UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Patrick Robinson** **Judge Liu Daqun** **Judge Andrésia Vaz** **Judge Bakhtiyar Tuzmukhamedov**
Registrar:	**Mr. Bongani Majola**
Judgement of:	**4 February 2013**

JUSTIN MUGENZI
PROSPER MUGIRANEZA

v.

THE PROSECUTOR

Case No. ICTR-99-50-A

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 the appeals of Justin Mugenzi ("Mugenzi") and Prosper Mugiraneza ("Mugiraneza") against the judgement pronounced by Trial Chamber II of the Tribunal ("Trial Chamber") on 30 September 2011 and issued in writing on 19 October 2011 in the case of *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza* ("Trial Judgement").[1]

I. INTRODUCTION

A. Background

2. Mugenzi was born in 1939 in Rukara Commune, Kibungo Prefecture, Rwanda.[2] Mugenzi founded the *Parti libéral* ("PL") in 1991 and served as its chairman.[3] In July 1993, he became Minister of Trade and Industry in the Broad-Based Transitional Government, and he retained that position as part of the Interim Government in April 1994.[4]

3. Mugiraneza was born in 1957 in Kigarama Commune, Kibungo Prefecture, Rwanda.[5] He was appointed Minister of Labour and Social Affairs in 1991 and subsequently served as Minister of Public Service and Professional Training in 1992 and 1993.[6] On 9 April 1994, he was appointed Minister of Civil Service in the Interim Government.[7]

4. The Trial Chamber found Mugenzi and Mugiraneza guilty of conspiracy to commit genocide based on their roles in the removal of Jean-Baptiste Habyalimana from his post as the prefect of Butare Prefecture on 17 April 1994.[8] The Trial Chamber also found Mugenzi and

[1] For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.
[2] Trial Judgement, para. 5.
[3] Trial Judgement, para. 7.
[4] Trial Judgement, paras. 7, 1882. The Appeals Chamber notes that paragraph 7 of the Trial Judgement refers to Mugenzi as the "Minister of Commerce", while paragraph 1882 of the Trial Judgement refers to Mugenzi as the "Minister of Trade and Industry". The Appeals Chamber finds that the title of "Minister of Trade and Industry" most aptly describes the position that Mugenzi occupied within the Interim Government. *See, e.g.*, Mugenzi Closing Brief, paras. 196, 241, 261, 272, 1028 (referring to Mugenzi as Minister of Trade); T. 9 November 2005 p. 73 (in which Mugenzi describes his duties as being connected with, *inter alia*, "trade and industry"). *See also* Indictment, para. 4.7 (referring to Mugenzi as Minister of Trade and Industry).
[5] Trial Judgement, para. 14.
[6] Trial Judgement, paras. 15, 16.
[7] Trial Judgement, paras. 16, 1882.
[8] Trial Judgement, paras. 1222-1250, 1959-1962, 1988.

Mugiraneza guilty of direct and public incitement to commit genocide based on their roles in the installation ceremony of Sylvain Nsabimana as the new prefect of Butare Prefecture on 19 April 1994, where, the Trial Chamber found, Interim President Théodore Sindikubwabo delivered an inflammatory speech calling for the killing of Tutsis.[9] The Trial Chamber sentenced Mugenzi and Mugiraneza each to a single sentence of 30 years of imprisonment.[10]

5. The Trial Chamber acquitted Mugenzi's and Mugiraneza's co-accused, Casimir Bizimungu and Jérôme-Clément Bicamumpaka.[11]

B. The Appeals

6. Mugenzi advances 18 grounds of appeal challenging his convictions and sentence.[12] He requests the Appeals Chamber to vacate his convictions and acquit him.[13] Alternatively, he requests a significant reduction of his sentence.[14]

7. Mugiraneza advances seven grounds of appeal challenging his convictions and sentence.[15] He requests the Appeals Chamber to acquit him or dismiss the Indictment against him with prejudice.[16] In the alternative, he requests a retrial or a substantial reduction of the sentence imposed by the Trial Chamber.[17]

8. The Prosecution responds that Mugenzi's and Mugiraneza's appeals should be dismissed in their entirety.[18]

9. The Appeals Chamber heard oral submissions regarding these appeals on 8 October 2012.

10. In addition, Mugiraneza filed two motions on the eve of the appeal hearing and Mugenzi filed one motion shortly thereafter, requesting that the Appeals Chamber admit additional evidence

[9] Trial Judgement, paras. 1322-1383, 1976-1988.
[10] Trial Judgement, paras. 2021, 2022.
[11] Trial Judgement, para. 1988.
[12] Mugenzi Notice of Appeal, paras. 4, 8-46; Mugenzi Appeal Brief, paras. 9-340.
[13] Mugenzi Notice of Appeal, paras. 8, 9, 12, 16, 19, 21, 26-28, 30, 34, 39, 41, 42, 45; Mugenzi Appeal Brief, paras. 27, 30, 52, 65, 82, 84, 102, 187, 196, 205, 208, 274, 284, 297, 298, 322.
[14] Mugenzi Appeal Brief, paras. 322, 326, 329, 340. *See also* Mugenzi Notice of Appeal, paras. 45, 46.
[15] Mugiraneza Notice of Appeal, paras. 4-45; Mugiraneza Appeal Brief, paras. 3-265. In his Notice of Appeal, Mugiraneza advanced 63 "issues", numbered 1 through 64 but omitting number 28. He proceeded to organize the majority of these "issues" into seven sections in his Appeal Brief: (i) issues related to trial without undue delay; (ii) evidentiary issues concerning the admission of evidence; (iii) notice issues; (iv) Rule 68 violations; (v) issues related to the sufficiency of the evidence; (vi) issues related to the weighing of the evidence; and (vii) sentencing issues. For clarity, the Appeals Chamber will refer to these seven sections as Grounds One to Seven of Mugiraneza's appeal. In addition, the Appeals Chamber notes that "issues" numbered 3, 5, 6, 18, 37 through 39, 42 through 45, 47 through 51, and 55 through 64 in Mugiraneza's Notice of Appeal are not included in his Appeal Brief. The Appeals Chamber therefore finds that he has abandoned these arguments and will not consider them.
[16] Mugiraneza Notice of Appeal, para. 47; Mugiraneza Appeal Brief, paras. 48, 49, 121, 123, 136, 172, 179, 191, 207, 268.
[17] Mugiraneza Notice of Appeal, para. 47; Mugiraneza Appeal Brief, paras. 136, 260, 265, 269.

and find that the Prosecution had violated its disclosure obligations under Rule 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules").[19] The Appeals Chamber considers these motions in this judgement.[20]

[18] Prosecution Response Brief, paras. 2, 430.
[19] Prosper Mugiraneza's Emergency Motion for Admission of Evidence Pursuant to Rule 115(A), 6 October 2012 ("Mugiraneza Motion of 6 October 2012"); Prosper Mugiraneza's Motion Pursuant to Rule 115(A) for Admission of Testimony of Augustin Ngirabatware, 8 October 2012 ("Mugiraneza Motion of 8 October 2012"); Justin Mugenzi's Motion for Relief for Violations of Rule 68 and for Admission of Additional Evidence, 15 October 2012 ("Mugenzi Motion").
[20] *See infra* Section III.B, nn. 223, 354.

II. STANDARDS OF APPELLATE REVIEW

11. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute of the Tribunal ("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.[21]

12. 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.[22]

13. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[23] 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.[24]

14. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[25]

15. 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 the

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[21] *See, e.g.*, *Gatete* Appeal Judgement, para. 7; *Hategekimana* Appeal Judgement, para. 6; *Kanyarukiga* Appeal Judgement, para. 7. *See also Gotovina and Markač* Appeal Judgement, para. 10.
[22] *Ntakirutimana* Appeal Judgement, para. 11 (reference omitted). *See also, e.g.*, *Gotovina and Markač* Appeal Judgement, para. 11; *Gatete* Appeal Judgement, para. 8; *Hategekimana* Appeal Judgement, para. 7; *Kanyarukiga* Appeal Judgement, para. 8.
[23] *See, e.g.*, *Gatete* Appeal Judgement, para. 9; *Hategekimana* Appeal Judgement, para. 8; *Kanyarukiga* Appeal Judgement, para. 9. *See also Gotovina and Markač* Appeal Judgement, para. 12.
[24] *See, e.g.*, *Gatete* Appeal Judgement, para. 9; *Hategekimana* Appeal Judgement, para. 8; *Kanyarukiga* Appeal Judgement, para. 9. *See also Gotovina and Markač* Appeal Judgement, para. 12.
[25] *Krstić* Appeal Judgement, para. 40 (references omitted). *See also, e.g.*, *Gotovina and Markač* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 10; *Hategekimana* Appeal Judgement, para. 9; *Kanyarukiga* Appeal Judgement, para. 10.

intervention of the Appeals Chamber.[26] 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.[27]

16. 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.[28] 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.[29] 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.[30]

[26] *See, e.g.*, *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11. *See also Gotovina and Markač* Appeal Judgement, para. 14.
[27] *See, e.g.*, *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11. *See also Gotovina and Markač* Appeal Judgement, para. 14.
[28] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). *See also, e.g.*, *Gotovina and Markač* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 12; *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12.
[29] *See, e.g.*, *Gatete* Appeal Judgement, para. 12; *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12. *See also Gotovina and Markač* Appeal Judgement, para. 15.
[30] *See, e.g.*, *Gatete* Appeal Judgement, para. 12; *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12. *See also Gotovina and Markač* Appeal Judgement, para. 15.

III. FAIRNESS OF THE PROCEEDINGS

17. Mugenzi and Mugiraneza submit that their right to a fair trial was violated.[31] In this section, the Appeals Chamber considers: (i) whether the Trial Chamber erred in its assessment of their right to trial without undue delay; and (ii) whether the Prosecution violated its disclosure obligations under Rule 68 of the Rules.

A. Alleged Undue Delay (Mugenzi Ground 15; Mugiraneza Ground 1)

18. Mugenzi and Mugiraneza were arrested in Cameroon on 6 April 1999.[32] An indictment confirmed on 12 May 1999 charged them jointly with two other accused.[33] Mugenzi and Mugiraneza were transferred to the Tribunal on 31 July 1999 and had their initial appearances on 17 August 1999.[34] The evidentiary phase of the trial opened on 6 November 2003 and closed on 12 June 2008.[35] In total, the Trial Chamber heard 171 witnesses over the course of 399 trial days.[36] The Trial Chamber heard closing arguments from 1 to 5 December 2008.[37] The Trial Judgement was pronounced on 30 September 2011 and was issued in writing on 19 October 2011.[38] The period from Mugenzi's and Mugiraneza's arrests to the pronouncement of the Trial Judgement was 12 years, 5 months, and 24 days.

19. Throughout the trial proceedings, Mugenzi and Mugiraneza claimed violations of their right to trial without undue delay. In particular, prior to issuing the Trial Judgement, the Trial Chamber denied two motions filed by Mugenzi[39] and four motions filed by Mugiraneza[40] alleging violations

[31] Mugenzi Notice of Appeal, paras. 43-45; Mugenzi Appeal Brief, paras. 299-322; Mugiraneza Notice of Appeal, paras. 4, 5, p. 5; Mugiraneza Appeal Brief, paras. 3-50, 124-136.
[32] Trial Judgement, paras. 8, 17.
[33] Trial Judgement, Annex A, para. 6.
[34] Trial Judgement, Annex A, para. 8.
[35] Trial Judgement, Annex A, paras. 29, 81.
[36] The trial was conducted in 14 trial sessions. The Prosecution called 57 witnesses over the course of five trial sessions: 6 November to 15 December 2003; 19 January to 25 March 2004; 7 June to 8 July 2004; 13 September to 28 October 2004; and 1 March to 23 June 2005. *See* Trial Judgement, Annex A, para. 29. The four Defence teams called a total of 114 witnesses over the course of nine trial sessions: 1 November to 14 December 2005; 20 March to 5 May 2006; 21 August to 12 October 2006; 16 January to 21 February 2007; 30 April to 12 June 2007; 13 and 14 August 2007; 17 September to 8 November 2007; 28 January to 19 March 2008; and 14 April to 12 June 2008. *See* Trial Judgement, Annex A, para. 81.
[37] *See generally* T. 1-5 December 2008.
[38] Trial Judgement, Annex A, para. 161.
[39] Trial Judgement, Annex A, paras. 22, 101, *referring to The Prosecutor v. Justin Mugenzi et al*., Case No. ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), [11] November 2002, *The Prosecutor v. Justin Mugenzi et al.*, Case No. ICTR-99-50-I, Corrigendum to the Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), 29 November 2002, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, 14 June 2007.

of this fair trial right. The Trial Chamber also considered the matter in the Trial Judgement, where it determined, Judge Short dissenting,[41] that, given the size and complexity of the case, there had been no undue delay in the proceedings.[42]

20. Mugenzi and Mugiraneza submit that the Trial Chamber erred in finding that their right to trial without undue delay had not been violated.[43] Specifically, Mugenzi argues that the "extraordinary duration of this case demands close scrutiny" and justification, in particular given that he spent more than 12 years in detention on the basis of an *ex parte*, *in camera* confirmation of an indictment by a single judge employing a *prima facie* standard of proof, during which time he had no realistic possibility for provisional release.[44] Mugenzi contends that the fact that he was convicted does not obviate the concerns over the length of delay in these proceedings given the

[40] On 2 October 2003, the Trial Chamber dismissed a motion by Mugiraneza to dismiss the Indictment for undue delay. The Trial Chamber, however, certified the decision for interlocutory appeal. On 27 February 2004, the Appeals Chamber vacated the decision and remitted the issue for reconsideration, reasoning that the Trial Chamber had impermissibly considered the fundamental purpose of the Tribunal as a factor and failed to inquire into the conduct of the parties. On 3 November 2004, the Trial Chamber reconsidered the matter and held that Mugiraneza's rights had not been violated. On 24 February 2005, the Trial Chamber denied a motion from Mugiraneza for leave to appeal this decision. *See* Trial Judgement, Annex A, para. 24, *referring to The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief, 2 October 2003, *The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's Request Pursuant to Rule 73 for Certification to Appeal Denial of his Motion to Dismiss for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and Appropriate Relief, [28] October 2003, *The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004 ("Decision of 27 February 2004"), *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to a Trial without Undue Delay, 3 November 2004, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Leave to Appeal from the Trial Chamber's Decision of 3 November 2004, 24 February 2005. On 29 May 2007, 10 February 2009, and 23 June 2010, the Trial Chamber denied three other motions by Mugiraneza alleging a violation of his right to trial without undue delay. *See* Trial Judgement, Annex A, paras. 99, 149, 156, *referring to The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, 29 May 2007, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay, 10 February 2009, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, 23 June 2010.

[41] In his partially dissenting opinion, Judge Short concluded that Mugenzi's and Mugiraneza's right to trial without undue delay had been violated because the Trial Chamber took an unreasonable amount of time in delivering the Trial Judgement following the close of the evidence in the case. *See* Trial Judgement (Partially Dissenting Opinion), paras. 3, 7. Judge Short indicated that numerous administrative and scheduling delays had "stalled" the delivery of the Trial Judgement, including the assignment of Judge Khan and Judge Muthoga to a multitude of other cases, increasing their and their legal staff's caseloads. *See* Trial Judgement (Partially Dissenting Opinion), para. 5. According to Judge Short, the appropriate remedy for the violation was a five-year reduction of Mugenzi's and Mugiraneza's sentences. *See* Trial Judgement (Partially Dissenting Opinion), para. 7.

[42] Trial Judgement, para. 79. *See also* Trial Judgement, paras. 66-78.

[43] Mugenzi Appeal Brief, paras. 299-322; Mugiraneza Appeal Brief, paras. 3-50. *See also* Mugenzi Reply Brief, paras. 100-106; Mugiraneza Reply Brief, paras. 17-22; AT. 8 October 2012 pp. 30-35, 66, 68, 69.

[44] Mugenzi Appeal Brief, para. 300. *See also* Mugenzi Appeal Brief, paras. 299, 301, 302.

impact of this delay on public confidence in the administration of justice and on the quality of the evidence.[45]

21. In addition, Mugenzi submits that the Trial Chamber erred in concluding that the extreme delay in his case could be attributed simply to the size and complexity of the proceedings and in rejecting his assertion that the delay must be attributed to organizational failures.[46] In support of this claim, Mugenzi provides an overview of the total days available for use in the Tribunal's various courtrooms and contends that the courtrooms were significantly under-utilized throughout the duration of his trial.[47] He argues that the Trial Chamber failed to adequately consider this issue.[48] Moreover, Mugenzi compares the speed at which his case progressed with the three-year trial period and nine-month judgement-drafting phase in the *Popovi} et al.* case at the ICTY, which, he asserts, has a more voluminous record.[49] He also refers to Judge Short's partially dissenting opinion in which Judge Short attributed the length of the judgement-drafting phase principally to Judge Khan's and Judge Muthoga's competing judicial work.[50] Mugenzi further highlights the efforts he made to facilitate the speed of his trial, such as cooperating with the Prosecution, offering to present his defence first when another accused was not prepared, and seeking severance on multiple occasions.[51]

22. Mugenzi also argues that the Trial Chamber erred in its consideration of his challenges to the delay in the pre-trial proceedings insofar as it treated these claims as attempts to reconsider previous determinations made at the beginning of the case.[52] Mugenzi submits that the challenges contained in his Closing Brief sought different relief based on the evolving circumstances in the case, and that his claims relating to the pre-trial phase of the proceedings, including his arguments concerning a failure to prioritize his case, were not comprehensively considered by the Trial Chamber.[53]

23. Furthermore, Mugenzi contends that the size and complexity of the case resulted from the Prosecution's negligence in advancing a "bloated indictment loaded with allegations, the majority

[45] Mugenzi Appeal Brief, paras. 303, 304.
[46] Mugenzi Appeal Brief, paras. 305-310, 315. *See also* Mugenzi Reply Brief, para. 102.
[47] Mugenzi Appeal Brief, para. 306; Mugenzi Reply Brief, paras. 100, 101.
[48] Mugenzi Appeal Brief, para. 306; Mugenzi Reply Brief, para. 100.
[49] Mugenzi Appeal Brief, para. 307, *referring to Popović et al.* Trial Judgement, para. 5. *See also* AT. 8 October 2012 p. 66.
[50] Mugenzi Appeal Brief, para. 315. *See also* Mugenzi Reply Brief, para. 102.
[51] Mugenzi Appeal Brief, paras. 308-310.
[52] Mugenzi Appeal Brief, paras. 311-314, *referring to* Trial Judgement, paras. 71, 72.
[53] Mugenzi Appeal Brief, paras. 311-314.

of which turned out to be unsubstantiated".[54] In this respect, Mugenzi contends that the Prosecution "fail[ed] to properly investigate exculpatory information and/or to assess the weakness of its evidence".[55]

24. Finally, Mugenzi asserts that it is plain that he suffered prejudice because he spent 12.5 years away from his family in detention "as a man presumed innocent […] kept uncertain as to his fate".[56] He further highlights the impact of the delay on the Trial Chamber's assessment of witness credibility, and argues that the length of the proceedings deprived him of the possibility to hear a witness whose transcripts were recently disclosed by the Prosecution and who died in the years following his 2002 testimony in another case.[57]

25. Mugiraneza submits that the Trial Chamber failed to address his complaints of violation of the right to trial without undue delay.[58] Mugiraneza emphasizes the importance of the right to trial without undue delay as a right under customary international law and points to the approach taken in various international and national jurisdictions to safeguard this right.[59] He submits that, in its decisions on his motions to dismiss, the Trial Chamber failed to comprehensively consider the harm caused by the delay in the progress of the trial and to recognize that the harm increased with the passage of time.[60]

26. In addition, Mugiraneza submits that the Trial Chamber failed to properly consider the length of time between the close of the case and the issuance of the Trial Judgement.[61] He argues that this delay is primarily attributable to the Tribunal and United Nations authorities giving Judge Khan and Judge Muthoga other judicial work and authorizing Judge Short's part-time status, a fact which was not acknowledged in the Trial Judgement.[62] Mugiraneza further highlights the Tribunal's completion strategy reports to the Security Council, which repeatedly referred to delays in the projected delivery of the Trial Judgement and cited problems such as staff retention.[63]

27. Mugiraneza also contends that, although the proceedings were described as complex, this complexity resulted from the volume of evidence, much of which was irrelevant to his individual

[54] Mugenzi Appeal Brief, para. 320. *See also* Mugenzi Appeal Brief, para. 308.
[55] Mugenzi Appeal Brief, para. 320.
[56] Mugenzi Appeal Brief, para. 317 (emphasis omitted).
[57] Mugenzi Appeal Brief, paras. 318, 319; Mugenzi Reply Brief, paras. 103-105; AT. 8 October 2012 p. 66.
[58] Mugiraneza Appeal Brief, para. 19.
[59] Mugiraneza Appeal Brief, paras. 25-37. *See also* Mugiraneza Reply Brief, para. 20.
[60] Mugiraneza Appeal Brief, paras. 21-24, 38.
[61] Mugiraneza Appeal Brief, paras. 39, 43; AT. 8 October 2012 pp. 30, 31.
[62] Mugiraneza Appeal Brief, paras. 39, 43; AT. 8 October 2012 pp. 30, 31, 34, 68.
[63] Mugiraneza Appeal Brief, para. 44. *See also* Mugiraneza Appeal Brief, para. 45; Mugiraneza Reply Brief, paras. 21, 22; AT. 8 October 2012 pp. 30, 34.

case, and not from the factual or legal issues raised therein.[64] He places blame for this complexity on the Prosecution's decision to conduct a single, multi-accused case, which he asserts unnecessarily prolonged his trial.[65] Mugiraneza also faults the Prosecution for delaying the case through its repeated violations of its disclosure obligations under Rule 68 of the Rules.[66]

28. Finally, Mugiraneza submits that his 12-year incarceration prior to the issuance of the Trial Judgement amounts to prejudice *per se* and a violation of his right to pre-trial release in accordance with Article 9 of the International Covenant on Civil and Political Rights ("ICCPR").[67]

29. The Prosecution responds that the Trial Chamber correctly considered the relevant factors under the appropriate legal standard and that Mugenzi and Mugiraneza have failed to demonstrate any error in this assessment.[68]

30. The right to be tried without undue delay is enshrined in Article 20(4)(c) of the Statute. This right only protects the accused against *undue* delay, which is determined on a case-by-case basis.[69] A number of considerations are relevant to this assessment, including: (i) the length of the delay; (ii) the complexity of the proceedings (the number of counts, the number of accused, the number of witnesses, the quantity of evidence, the complexity of the facts and of the law); (iii) the conduct of the parties; (iv) the conduct of the authorities involved; and (v) the prejudice to the accused, if any.[70]

31. In assessing whether there was undue delay in this case,[71] the Trial Chamber acknowledged that the more than 12-year period from arrest to the issuance of the Trial Judgement had been

[64] Mugiraneza Appeal Brief, paras. 40, 42. Mugiraneza notes that the trial averaged 79.8 trial days per year during the five-year length of the trial. *See* Mugiraneza Appeal Brief, para. 41.
[65] Mugiraneza Appeal Brief, paras. 40, 42. *See also* AT. 8 October 2012 p. 30.
[66] Mugiraneza Appeal Brief, para. 42.
[67] Mugiraneza Appeal Brief, paras. 46, 47. *See also* Mugiraneza Reply Brief, paras. 18, 19; AT. 8 October 2012 pp. 31, 32.
[68] Prosecution Response Brief, paras. 57-88. *See also* AT. 8 October 2012 pp. 60-63.
[69] *Gatete* Appeal Judgement, para. 18; *Renzaho* Appeal Judgement, para. 238; *Nahimana et al*. Appeal Judgement, para. 1074.
[70] *Gatete* Appeal Judgement, para. 18; *Renzaho* Appeal Judgement, para. 238; *Nahimana et al*. Appeal Judgement, para. 1074. *See also* Decision of 27 February 2004, p. 3.
[71] In the Trial Judgement, the Trial Chamber considered allegations of undue delay advanced by Mugenzi and two of his co-accused, Casimir Bizimungu and Jérôme-Clément Bicamumpaka. *See* Trial Judgement, para. 66. The Appeals Chamber sees no merit to Mugiraneza's submission that the Trial Chamber erred in failing to consider his own arguments in this regard in the Trial Judgement. A review of Mugiraneza's Closing Brief reveals only a cursory reference in a footnote to undue delay, where he described an inconsistency between two testimonies as "another example of how Mugiraneza's right to a trial without undue delay prejudiced his ability to present his defence". *See* Mugiraneza Closing Brief, n. 475. *See also* Mugiraneza Closing Brief, para. 356. Moreover, the Appeals Chamber notes that the Trial Chamber considered and rejected Mugiraneza's various challenges made during the course of the trial. *See supra* para. 19. In the absence of specific arguments, the Trial Chamber acted within the scope of its discretion in declining to reassess these matters in the Trial Judgement.

lengthy.[72] The Trial Chamber also recognized concerns that the increased workload of the judges contributed to the delay in the proceedings.[73] However, the Trial Chamber considered that the overall length of the proceedings was due to the size and complexity of the case, which it described as follows:

> The Indictment against these Accused charges several modes of liability and 10 counts. The proceedings involved four Accused, 171 witnesses, 399 trial days and 975 documentary exhibits totalling more than 8,000 pages. Transcripts in this proceeding amount to more than 27,000 pages. The Chamber rendered a multitude of oral decisions during trial and has issued 391 written decisions outside the Judgement.
>
> The Accused were four high-level government ministers, allegedly responsible for massacres throughout Rwanda from April to July 1994. The Prosecution has claimed both individual and superior responsibility for all four Accused. The Chamber has heard a multitude of witness testimonies and admitted vast amounts of documentary evidence concerning the workings of the Interim Government and each Accused's role and responsibility therein, as well as their purported involvement in more specific events at various locales across the country. The prominence of these Accused and its assessment required evidence covering nearly four years, from 1990 to 1994.[74]

32. The Appeals Chamber recalls that "because of the Tribunal's mandate and of the inherent complexity of the cases before the Tribunal, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts".[75] In the circumstances of this case, which is one of the largest ever heard by the Tribunal, the significant period of time which elapsed during these proceedings can be reasonably explained by its size and complexity. The pace of the trial was not dissimilar from that of other multi-accused trials, where no undue delay has been identified.[76] As a result, the fact that some multi-accused cases may have proceeded at a more accelerated pace does not, in and of itself, demonstrate that the duration of proceedings in this case amounted to undue delay.

33. Although the size and complexity of the case resulted from the Prosecution's decision to jointly charge four senior government officials, Mugiraneza fails to demonstrate that this decision improperly prolonged his trial. The Appeals Chamber also considers speculative Mugenzi's

[72] Trial Judgement, para. 74.
[73] Trial Judgement, para. 74.
[74] Trial Judgement, paras. 76, 77.
[75] *Nahimana et al.* Appeal Judgement, para. 1076.
[76] In the *Bagosora et al.* case, involving the trial of four senior military officers, the trial chamber heard 242 witnesses over the course of 408 trial days in proceedings which lasted 11 years. *See Bagosora et al.* Trial Judgement, paras. 76, 78, 84. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 38 (dismissing Anatole Nsengiyumva's challenge to undue delay in the proceedings). In the *Nahimana et al.* case, the Appeals Chamber held that a period of seven years and eight months between the arrest of Jean-Bosco Barayagwiza and the issuance of the trial chamber's judgement did not constitute undue delay, with the exception of some initial delays which violated his fundamental rights. In particular, the Appeals Chamber reasoned that Barayagwiza's case was particularly complex due to the multiplicity of counts, the number of accused, witnesses, and exhibits, as well as the complexity of the facts and law. *See Nahimana et al.* Appeal Judgement, paras. 1072-1077. This case is nearly twice the size of the *Nahimana et al.* case. *Compare Nahimana et al.* Trial Judgement, paras. 50, 94 (93 witnesses over the course of 238 trial days) *with* Trial Judgement, para. 76 (171 witnesses over the course of 399 trial days).

contention that investigative failings resulted in the size and complexity of the case or that the Prosecution acted impermissibly simply because much of the Prosecution's case at trial was deemed unproven. The Appeals Chamber likewise dismisses Mugiraneza's unsubstantiated contention that the Prosecution's disclosure violations resulted in undue delay.

34. The Appeals Chamber is also not convinced that the Trial Chamber erred in rejecting the allegation that organizational failings resulted in undue delay in the context of the pre-trial and trial phases of the proceedings.[77] Specifically, the Appeals Chamber is not satisfied that Mugenzi's contention as to the utilization of the Tribunal's courtrooms during the relevant period demonstrates that it was, in fact, possible for the Trial Chamber to accelerate the pace of the proceedings in this case. In particular, his submissions fail to consider that trials before the Tribunal are conducted in segments, especially in cases of this magnitude, in order to allow the parties to prepare, to provide time for the translation of documents, and to secure witnesses and other evidence.[78] Mugenzi's submissions also do not account for other judicial or trial management activity, such as the preparation of decisions, that takes place outside the courtroom.

35. In addition, the Appeals Chamber, Judge Robinson dissenting, finds no merit in the contentions that the Trial Chamber failed to properly consider the delay in the pre-trial phase of the case, the three-year time period between final trial submissions and the issuance of the Trial Judgement, or the impact of the trial judges' work on other judicial matters.[79] The Trial Chamber expressly noted that the more than 12-year period from the arrest of the accused to the Trial Judgement, which encompasses all phases of the pre-trial and trial proceedings, including judgement drafting, was lengthy.[80] It also acknowledged concerns that the conduct of the Tribunal and the increased workload of the presiding judges contributed to the length of the proceedings.[81] In this respect, the Appeals Chamber observes that it is not unusual for judges of the Tribunal to

[77] *See* Trial Judgement, para. 79. In his Appeal Brief, Mugiraneza alludes generally to various systemic problems and administrative disputes described in detail in an earlier motion before the Trial Chamber, and suggests that these were additional reasons for the delay. *See* Mugiraneza Appeal Brief, para. 45. However, merely referring the Appeals Chamber to one's arguments set out at trial is insufficient as an argument on appeal. *See Nchamihigo* Appeal Judgement, para. 369; *Haraqija and Morina* Appeal Judgement, para. 26; *Brđanin* Appeal Judgement, para. 35.
[78] *See, e.g.*, *Bagosora et al.* Trial Judgement, para. 81.
[79] Mugenzi argues that the Trial Chamber failed to properly consider a number of his arguments related to delay during the pre-trial phase. Although Mugenzi highlights certain general differences among his various submissions both before and at the end of trial, the Appeals Chamber considers that he has not clearly articulated any specific arguments that the Trial Chamber failed to consider. *See* Mugenzi Appeal Brief, paras. 311-314. Accordingly, the Appeals Chamber finds that Mugenzi has not demonstrated any reversible error. The Appeals Chamber likewise considers that Mugiraneza's general claim that his pre-trial detention violates Article 9 of the ICCPR, without more, is not a sufficient argument on appeal. *See* Mugiraneza Appeal Brief, para. 47.
[80] Trial Judgement, para. 74.
[81] Trial Judgement, para. 74.

participate in multiple proceedings, impacting the pace of those respective proceedings.[82] In any event, Mugenzi and Mugiraneza have not shown the relative significance of the judges' workload distribution, overlapping duties, and outside activities, or the relative significance of any related staffing issues, for the conduct of this case.

36. Furthermore, the Appeals Chamber finds no merit in Mugenzi's contention that the passage of time as a result of the lengthy trial proceedings prejudiced him by impacting the Trial Chamber's analysis of the credibility of witnesses. To illustrate this claim, he highlights a single instance in which the Trial Chamber excused a contradiction between a Prosecution witness's testimony and other evidence on the basis of the witness's possible forgetfulness in light of the period of time that had elapsed since the events.[83] Notably, the incident at issue related to an event which does not underpin Mugenzi's conviction.[84] The Appeals Chamber has also considered Mugenzi's claim that the length of the proceedings deprived him of the possibility to hear a witness who died in the years following his 2002 testimony in another case but finds, for the reasons explained below, that this testimony is consistent with the Trial Chamber's conclusions regarding the degree of violence in Butare Prefecture and would have been cumulative of other evidence in the record.[85]

37. The Appeals Chamber is mindful that the right enshrined in Article 20(4)(c) of the Statute is fundamental. While the Appeals Chamber is concerned by the duration of the proceedings as a whole, given the size and complexity of this case, it is not convinced, Judge Robinson dissenting, that Mugenzi and Mugiraneza have demonstrated any error in the Trial Chamber's finding that the length of the proceedings did not amount to undue delay.

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[82] The Appeals Chamber has previously determined that an 18-month judgement-drafting phase in a complex single-accused case, while concerning, did not in itself amount to undue delay. *See Renzaho* Appeal Judgement, para. 241. Notably, the trial chamber in the *Renzaho* case explained that the delay resulted from other judicial activity. *See The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-T, T. 14 July 2009 p. 2 ("The delivery of the judgement has been delayed because this Chamber has been involved in three other cases involving a total of six accused, including the time-consuming *Bagosora et al.* judgement.").

[83] Mugenzi Appeal Brief, paras. 318, 319, *referring to* Trial Judgement, para. 1144. *See also* Mugenzi Reply Brief, paras. 103-105.

[84] *See* Trial Judgement, paras. 1144, 1188, 1193. Mugenzi argues in his Reply Brief that the Trial Chamber relied upon the evidence of this same Prosecution witness in relation to one of his convictions and that the Trial Chamber's failure to infer that the witness was unreliable based on the contradiction between his testimony and other evidence was therefore "crucial". *See* Mugenzi Reply Brief, para. 103, *referring to* Trial Judgement, para. 1234. *See also* Mugenzi Reply Brief, para. 105. The Appeals Chamber considers that Mugenzi's claim in this respect is speculative and ignores the other evidence on the record in relation to his conviction. Mugenzi's submission that the Trial Chamber failed to extend similar latitude to the testimony of a Defence witness as was given to the Prosecution witness is likewise without merit, as the Appeals Chamber observes that no specific contradiction was highlighted with respect to the Defence witness's evidence. *See* Trial Judgement, para. 1235; Mugenzi Appeal Brief, para. 319; Mugenzi Reply Brief, para. 104.

[85] *See infra* para. 44.

B. Alleged Violations of Rule 68 of the Rules (Mugenzi Motion; Mugiraneza Motion of 8 October 2012; Mugiraneza Ground 4)

38. Mugenzi and Mugiraneza submit that the Prosecution violated its obligations under Rule 68 of the Rules to disclose exculpatory material from the *Hategekimana*, *Nyiramasuhuko et al.*, *Ntagerura et al.*, and *Ngirabatware* cases as additional evidence.[86] Mugenzi and Mugiraneza also seek the admission of the disclosed material from the *Ntagerura et al.* and *Ngirabatware* cases.[87] The Appeals Chamber considers here only their arguments related to the alleged disclosure violations.[88]

39. Rule 68(A) of the Rules provides that the Prosecution "shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".[89] To establish that the Prosecution is in breach of its disclosure obligation, the applicant must: (i) identify specifically the material sought; (ii) present a *prima facie* showing of its probable exculpatory nature; and (iii) prove that the material requested is in the custody or under the control of the Prosecution.[90] If the Defence satisfies the relevant chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate.[91]

1. Mugenzi's Request for Relief for Alleged Rule 68 Violations

40. Mugenzi contends that the Prosecution violated Rule 68 of the Rules by failing to timely disclose material directly relevant to his conviction in relation to the removal of Jean-Baptiste

[86] Mugenzi Motion, paras. 23-40, 55, *referring to* material from the *Ntagerura et al.* case; Mugiraneza Appeal Brief, paras. 124-136, *referring to* material from the *Nyiramasuhuko et al.* case and from the *Hategekimana* case; Mugiraneza Motion of 8 October 2012, para. 15, *referring to* material from the *Ngirabatware* case. *See also* Justin Mugenzi's Reply to Prosecution Response to Motion for Relief for Violations of Rule 68 and for Admission of Additional Evidence, 12 November 2012 ("Mugenzi Reply"), paras. 1, 8-13; Prosper Mugiraneza's Reply to the Prosecution's Response to Prosper Mugiraneza's and [J]ustin Mugenzi's Motions Under Rule 68 and for the Admission of Evidence Pursuant to Rule 115 Emergency Motion for Admission of Evidence, 12 November 2012 ("Mugiraneza Reply"), paras. 2-4, 9, 11, 12, 25.

[87] Mugenzi Motion, paras. 41-54, 56, *referring to* material from the *Ntagerura et al.* case; Mugiraneza Motion of 6 October 2012, paras. 9-22, *referring to* material from the *Ntagerura et al.* case; Mugiraneza Motion of 8 October 2012, paras. 1-15, *referring to* material from the *Ngirabatware* case. *See also* Mugenzi Reply, paras. 14-18; Mugiraneza Reply, paras. 18-24.

[88] The Appeals Chamber discusses Mugenzi's and Mugiraneza's requests for admission of the disclosed material below. *See infra* nn. 223, 354.

[89] Rule 68(A) of the Rules.

[90] *See, e.g.*, *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Disclosure, 18 January 2011 ("*Bagosora et al.* Appeal Decision of 18 January 2011"), para. 7; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010 ("*Kamuhanda* Appeal Decision"), para. 14. *See also Kalimanzira* Appeal Judgement, para. 18.

[91] *See, e.g.*, *Kalimanzira* Appeal Judgement, para. 18.

Habyalimana from the latter's position as the prefect of Butare Prefecture on 17 April 1994, namely Witness CHC's testimony from the *Ntagerura et al.* case.[92] Mugenzi contends that Witness CHC's testimony is exculpatory because it contradicts the Prosecution's claim at trial that the decision to remove Habyalimana was taken in order to facilitate massacres of Tutsis in Butare Prefecture.[93] According to Mugenzi, Witness CHC's testimony demonstrates that killings had started in the Butare Prefecture prior to the 17 April 1994 decision, that this was known to the Cabinet, and that Habyalimana was removed for failing to perform his duties as prefect.[94]

41. Mugenzi asserts that he suffered prejudice as a result of the Prosecution's failure to timely disclose Witness CHC's testimony because, *inter alia*, this witness's testimony, if heard at trial, could have been favourably taken into account by the Trial Chamber in its assessment of the evidence concerning the decision to remove Habyalimana.[95] As relief, Mugenzi requests the Appeals Chamber to draw an inference from Witness CHC's evidence in his favour and to acquit him fully,[96] or, in the alternative, to quash his conviction for conspiracy to commit genocide or substantially reduce his sentence.[97]

42. The Prosecution concedes that it should have disclosed aspects of Witness CHC's testimony.[98] It claims, however, that its failure to disclose the testimony earlier was the result of a mistake in identifying relevant material rather than bad faith.[99] The Prosecution further argues that Witness CHC's testimony is not exculpatory as it supports the Prosecution case and the Trial Chamber's finding that Butare Prefecture was largely peaceful before the removal of Habyalimana from his post as prefect and that violence spread in that prefecture only after the prefect's removal.[100] The Prosecution finally argues that even assuming that Witness CHC's testimony is exculpatory, its evidence is of a low probative value and Mugenzi was not materially prejudiced by the non-disclosure of that material in light of other testimony before the Trial Chamber which put forward the same assertions.[101] Therefore, the Prosecution contends that the failure to disclose

[92] Mugenzi Motion, paras. 2, 10, 23-37.
[93] Mugenzi Motion, paras. 23, 27-29.
[94] Mugenzi Motion, paras. 25-29.
[95] Mugenzi Motion, paras. 34, 35. *See also* Mugenzi Reply, paras. 2, 8-13.
[96] Mugenzi Motion, para. 38.
[97] Mugenzi Motion, paras. 40, 55.
[98] Prosecution's Response to Prosper Mugiraneza's and Justin Mugenzi's Motions under Rule 68 and for the Admission of Evidence Pursuant to Rule 115, 5 November 2012 ("Prosecution Response"), paras. 3, 11.
[99] Prosecution Response, paras. 3-7, 11.
[100] Prosecution Response, paras. 23-25.
[101] Prosecution Response, paras. 25-34.

Witness CHC's testimony does not warrant granting the "disproportionate" relief requested by Mugenzi.[102]

43. The Appeals Chamber considers that Mugenzi has sufficiently identified the material in question. In addition, the Appeals Chamber observes that the Prosecution does not dispute that the material was in its custody and concedes that it should have disclosed Witness CHC's testimony.[103] The Prosecution further admits that the non-disclosure of Witness CHC's testimony denied Mugenzi the opportunity to rely upon this evidence at trial.[104] The Appeals Chamber is satisfied that Mugenzi has made a *prima facie* showing of the probable exculpatory nature of Witness CHC's testimony insofar as this witness's testimony addresses the reasons for the removal of the prefect of Butare Prefecture as well as the extent of violence in Butare Prefecture at or around the time of the prefect's removal, two of the Trial Chamber's considerations in relation to Mugenzi's conviction for conspiracy to commit genocide.[105] Accordingly, the Appeals Chamber finds that the Prosecution breached its disclosure obligations under Rule 68 of the Rules.

44. Turning to the question of prejudice, the Appeals Chamber notes that, as Mugenzi submits, Witness CHC's testimony reflects that killings occurred in Butare Prefecture before the dismissal of the prefect.[106] However, the Appeals Chamber observes that Witness CHC also testified that, on 16 April 1994, the Cabinet "noticed that in Butare at the time there were no massacres as in other préfectures, but, nevertheless, there was no peace either".[107] Therefore, Witness CHC's testimony is consistent with the Trial Chamber's conclusions that there were instances of violence, including killings, in Butare Prefecture prior to the removal of Habyalimana, but that the killings peaked from 19 through 26 April 1994.[108] In addition, Witness CHC's testimony is cumulative of other evidence on the record.

45. As to the reasons underpinning Habyalimana's dismissal, the Appeals Chamber observes that the Trial Chamber explicitly considered "undisputed evidence" that Habyalimana failed to attend a meeting of prefects in Kigali on 11 April 1994 as well as Defence evidence suggesting that his failure to attend the meeting raised doubts as to his ability to lead Butare Prefecture in a time of

[102] Prosecution Response, para. 35.
[103] *See* Prosecution Response, paras. 3, 11.
[104] *See* Prosecution Response, para. 26.
[105] Trial Judgement, paras. 1232-1241. *See also* Trial Judgement, paras. 1366, 1369, 1372, 1376.
[106] Mugenzi Motion, paras. 26, 28. *See also* Mugenzi Motion, Annex 4 (*The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, T. 29 May 2002 pp. 35, 36, 43-46).
[107] Mugenzi Motion, Annex 4 (*The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, T. 29 May 2002 p. 34).
[108] *See* Trial Judgement, paras. 1240, 1241.

war.[109] The Trial Chamber's rejection of this Defence evidence was not based on a lack of corroboration but rather on the Trial Chamber's conclusion that the "Defence explanations for Habyalimana's removal, when viewed in the context of all the evidence, [did not] raise doubt in the Prosecution evidence that his dismissal was part of a larger agenda aimed at furthering the killing of Tutsi civilians in Butare".[110] Witness CHC's testimony reflects that "what was said" during the 17 April 1994 meeting at which it was agreed to remove Habyalimana from his post as prefect of Butare Prefecture was that Habyalimana was dismissed because he failed to perform his duties as prefect.[111] Asked whether the true reason behind Habyalimana's removal was because he resisted the massacres of Tutsis, Witness CHC responded that this was "possible, but it was not said during the [17 April 1994 meeting]".[112] This evidence is consistent with the Trial Chamber's finding that, while some of the Defence's alternative explanations for Habyalimana's removal were discussed by the Cabinet ministers, "the Chamber has no doubt that all participants would have understood [these alternative explanations] as relying primarily on the fact that he was a Tutsi and political moderate".[113]

46. As highlighted by Mugenzi, unlike the Defence witnesses who testified about the event and who have also been accused or convicted by the Tribunal, Witness CHC is not an accused person before the Tribunal and the fact that he personally attended the 17 April 1994 meeting places him in a position to give direct evidence as to the reasons for Habyalimana's removal.[114] However, the Trial Chamber did not reject the Defence evidence concerning this event because it was self-interested or indirect; rather, it concluded that, in the context of all the evidence, Habyalimana's dismissal was part of a larger agenda aimed at furthering the killing of Tutsi civilians in Butare Prefecture.[115] Accordingly, the fact that Witness CHC was not an accused before the Tribunal would not have altered the Trial Chamber's view of the existing evidence on the record.

[109] Trial Judgement, para. 1233. *See also* Trial Judgement, paras. 1195, 1227.
[110] Trial Judgement, para. 1235. *See also* Trial Judgement, para. 1244.
[111] Mugenzi Motion, para. 26. *See also* Mugenzi Motion, Annex 4 (*The Prosecutor v. André Ntagerura et al*., Case No. ICTR-99-46-T, T. 29 May 2002 pp. 43, 44).
[112] Mugenzi Motion, para. 26. *See also* Mugenzi Motion, Annex 4 (*The Prosecutor v. André Ntagerura et al*., Case No. ICTR-99-46-T, T. 29 May 2002 p. 45).
[113] Trial Judgement, para. 1235. *See also* Trial Judgement, paras. 1233, 1234.
[114] Mugenzi Motion, paras. 34, 35.
[115] Trial Judgement, para. 1235. *See also* Trial Judgement, para. 1244.

2. Mugiraneza's Requests for Relief for Alleged Rule 68 Violations

(a) Mugiraneza's Fourth Ground of Appeal

47. Mugiraneza submits that the Prosecution violated its obligations under Rule 68 of the Rules to disclose exculpatory material from the *Nyiramasuhuko et al.* case related to the interpretation of the words "*Inkotanyi*" and "enemy", and from the *Hategekimana* case, concerning the existence of violence as early as 7 April 1994 in Butare Prefecture.[116] Mugiraneza argues that the material from the *Hategekimana* case is exculpatory as it conflicts with the Prosecution's theory that Butare Prefecture remained calm prior to the removal of the prefect and Interim President Théodore Sindikubwabo's subsequent speech in Butare Prefecture on 19 April 1994.[117] As a remedy, Mugiraneza requests the Appeals Chamber to impose "meaningful sanctions" against the Prosecution, order a retrial, or dismiss the relevant counts of the Indictment.[118]

48. The Prosecution responds that Mugiraneza has failed to establish that the relevant material is exculpatory.[119]

49. The Appeals Chamber notes that, as a general rule, a notice of appeal is not the proper vehicle for advancing in the first instance alleged disclosure violations identified only during the appeal proceeding. A notice of appeal is normally limited to challenges against a particular order, ruling, or decision taken by a trial chamber.[120] The Appeals Chamber recalls, however, that the Prosecution's disclosure of material under Rule 68 of the Rules is a continuing obligation.[121] If a party identifies a potential disclosure violation after the conclusion of the trial and while appellate proceedings are ongoing, it may seek relief by bringing a motion before the Appeals Chamber.[122] Given the importance of the Prosecution's disclosure obligation under Rule 68 of the Rules, the Appeals Chamber will nonetheless consider the arguments raised by Mugiraneza under his Fourth Ground of Appeal.

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[116] Mugiraneza Appeal Brief, paras. 124-136.
[117] Mugiraneza Appeal Brief, paras. 125, 128.
[118] Mugiraneza Appeal Brief, para. 136. *See also* Mugiraneza Appeal Brief, paras. 130-135.
[119] Prosecution Response Brief, paras. 402-410.
[120] *See* Rule 108 of the Rules ("A party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the judgement or the sentence was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify *the order, decision or ruling challenged* with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought.") (emphasis added).
[121] *See*, *e.g.*, *Bagosora et al.* Appeal Decision of 18 January 2011, para. 7; *Kamuhanda* Appeal Decision, para. 14.
[122] *See* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006 ("Practice Direction"), para. 12 ("Where an appeal has been filed from a judgement, a party wishing to move the Appeals Chamber for a specific ruling or relief […] shall file, in accordance with the Rules, a motion containing: (a) the precise ruling or relief sought; (b) the specific provision of the Rules under which the ruling or relief is sought; (c) the grounds on which the ruling or relief is sought.").

50. The Appeals Chamber recalls that Mugiraneza filed a motion before the Appeals Chamber which sought the disclosure of transcripts from the *Nyiramasuhuko et al.* and *Hategekimana* cases.[123] The Appeals Chamber denied the motion, ruling with respect to the transcripts from the *Nyiramasuhuko et al.* case that Mugiraneza had "not demonstrated that the evidence constitutes exculpatory material within the meaning of Rule 68 of the Rules".[124] Further, the Appeals Chamber determined that Mugiraneza had not identified the material sought from the *Hategekimana* case with sufficient precision, noting in particular that the witnesses referred to by Mugiraneza were not mentioned in the *Hategekimana* Trial Judgement.[125]

51. In his Appeal Brief, Mugiraneza raises claims of alleged disclosure violations with respect to the material from the *Nyiramasuhuko et al.* case which are identical to those that the Appeals Chamber already dismissed in ruling on the Mugiraneza Motion of 21 November 2011.[126] Accordingly, the Appeals Chamber need not consider these arguments further. With respect to the material from the *Hategekimana* case, however, Mugiraneza acknowledges that he erroneously identified the relevant transcripts in his Notice of Appeal and notes that he has rectified this mistake in his Appeal Brief.[127]

52. The Appeals Chamber observes that Mugiraneza attempted to follow the appropriate procedure and challenged purported violations by way of a motion filed during the appeal proceedings, which, *inter alia*, contained errors identifying the relevant material from the *Hategekimana* case.[128] Mugiraneza has corrected these errors in his Appeal Brief, and the Prosecution has fully responded in its Response Brief.[129] In these particular circumstances, the Appeals Chamber will consider the arguments raised in Mugiraneza's Appeal Brief with respect to the material from the *Hategekimana* case.

53. The Appeals Chamber considers that Mugiraneza has identified the material sought with sufficient precision and has demonstrated that it was in the custody or control of the Prosecution

[123] *See* Prosper Mugiraneza's Motion to Disclosure of Exculpatory Material and for Sanctions, 21 November 2011 ("Mugiraneza Motion of 21 November 2011"), paras. 6, 9, 11.
[124] Decision on Prosper Mugiraneza's Motion for Disclosure, 22 March 2012 ("Decision of 22 March 2012"), para. 7. *See also* Decision of 22 March 2012, para. 14.
[125] Decision of 22 March 2012, para. 11.
[126] *Compare* Mugiraneza Appeal Brief, paras. 124, 127 *with* Mugiraneza Motion of 21 November 2011, paras. 6, 7. *See also* Decision of 22 March 2012, paras. 5-7.
[127] Mugiraneza Appeal Brief, n. 71. Notably, the mistaken references in the Notice of Appeal are identical to the references made in the Mugiraneza Motion of 21 November 2011. *Compare* Mugiraneza Notice of Appeal, p. 5 *with* Mugiraneza Motion of 21 November 2011, para. 9.
[128] *See* Decision of 22 March 2012, para. 11. *See also* Decision of 22 March 2012, para. 14 (denying Mugiraneza's motion).
[129] *See supra* paras. 48, 51.

since 2009 when the relevant witnesses appeared.[130] In particular, he refers to transcripts of the testimonies of Witnesses QDC, QCN, Jérôme Masinzo, XR, QCL, and BYR, who testified about violence in Butare Prefecture as early as 7 April 1994.[131] In addition, Mugiraneza points to the testimony of Witness BUR who testified about a meeting at the *École des sous-officiers* in Butare Prefecture on the night of 7 April 1994 in which it was decided to rape and kill Tutsis.[132]

54. Mugiraneza has also made a *prima facie* showing as to the probable exculpatory nature of this evidence insofar as it addresses the extent of violence in Butare Prefecture at or around the time of the prefect's removal, an important issue in relation to Mugiraneza's convictions for conspiracy to commit genocide and direct and public incitement.[133] Given that this evidence was not disclosed to Mugiraneza and that the Prosecution has not suggested that it was unable to provide the evidence earlier, the Appeals Chamber considers that the Prosecution breached its obligations under Rule 68 of the Rules to disclose the material as soon as practicable.

55. However, the Appeals Chamber considers that any possible prejudice suffered by Mugiraneza as a result of this violation was minimal. In this regard, the Appeals Chamber notes that the Trial Chamber explicitly concluded on the basis of evidence already on the record in this case that there were instances of violence in Butare Prefecture prior to the removal of Habyalimana on 17 April 1994.[134] The material from the *Hategekimana* case which should have been disclosed to Mugiraneza is consistent with and cumulative of this evidence.[135]

(b) Mugiraneza Motion of 8 October 2012

56. Mugiraneza contends that the Prosecution violated Rule 68 of the Rules by failing to disclose a portion of Augustin Ngirabatware's testimony from the *Ngirabatware* case.[136] Mugiraneza submits that this evidence is directly relevant to his conviction in relation to the reasons underpinning his attendance at Sindikubwabo's speech on 19 April 1994.[137] In particular, Mugiraneza argues that Ngirabatware's testimony is consistent with his own testimony before the

[130] *See Hategekimana* Trial Judgement, nn. 175-182, 202-21, 350-430 (referring to the dates of the relevant testimonies).
[131] *See* Mugiraneza Appeal Brief, para. 125, *referring to Hategekimana* Trial Judgement, paras. 232-262.
[132] *See* Mugiraneza Appeal Brief, para. 125, *referring to Hategekimana* Trial Judgement, paras. 125-128.
[133] Trial Judgement, paras. 1240-1242, 1366, 1369, 1372, 1376.
[134] *See* Trial Judgement, paras. 1240, 1241.
[135] The Appeals Chamber notes that much of the evidence to which Mugiraneza refers describes alleged violence committed against one individual. *See Hategekimana* Trial Judgement, paras. 232-252. The remaining evidence refers either to a meeting in which it was allegedly decided to rape and kill Tutsis or to violence that is said to have occurred after 19 April 1994. *See Hategekimana* Trial Judgement, paras. 125-128, 140-147.
[136] Mugiraneza Motion of 8 October 2012, para. 15. *See also* Mugiraneza Motion of 8 October 2012, paras. 2, 5 and Appendix (*The Prosecution v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, T. 7 December 2010 pp. 63, 64 ("Ngirabatware's testimony")). *See also* Mugiraneza Reply, para. 25.

Trial Chamber that he attended the speech because he had the obligation to do so and that he did not know in advance what Sindikubwabo would say.[138]

57. Mugiraneza adds that the failure to disclose this testimony prejudiced him as it could have had an impact at trial.[139] He requests the Appeals Chamber to take any appropriate action against the Prosecution such as drawing factual inferences in favour of Mugiraneza on the basis of this material.[140]

58. At the outset, the Appeals Chamber notes that contrary to Mugiraneza's submission,[141] the Prosecution Response filed on 5 November 2012 is not outside the prescribed time limit of 30 days for responses to motions filed under Rule 115 of the Rules.[142] The Appeals Chamber observes, however, that the Prosecution does not make any submission in its Response concerning the alleged exculpatory nature of Ngirabatware's testimony under Rule 68 of the Rules, but focuses on whether Ngirabatware's testimony should be admitted under Rule 115 of the Rules.[143]

59. The Appeals Chamber considers that Mugiraneza has sufficiently identified the material in question and observes that the Prosecution does not dispute that the transcript of Ngirabatware's testimony was in its custody or control.

60. The Trial Chamber convicted Mugiraneza, finding that he possessed the same genocidal intent held by Sindikubwabo on 19 April 1994.[144] The material from the *Ngirabatware* case supports an alternative explanation for Mugiraneza's attendance at the ceremony other than to promote the killing of Tutsis in Butare Prefecture. Therefore, Mugiraneza has demonstrated the probable exculpatory nature of Ngirabatware's testimony in relation to Mugiraneza's conviction for direct and public incitement to commit genocide.

61. By failing to disclose this evidence as soon as practicable, the Prosecution therefore breached its obligations under Rule 68 of the Rules. In light of the Prosecution's disclosure failure, Mugiraneza was denied the opportunity to seek the admission of the evidence before the delivery of the Trial Judgement. The Appeals Chamber nonetheless considers that the resulting prejudice to Mugiraneza, if any, was minimal.

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[137] Mugiraneza Motion of 8 October 2012, paras. 2, 7, 8, 11-14.
[138] Mugiraneza Motion of 8 October 2012, paras. 7, 8, 13.
[139] Mugiraneza Motion of 8 October 2012, paras. 13, 14.
[140] Mugiraneza Motion of 8 October 2012, para. 15.
[141] *See* Mugiraneza Reply, paras. 5-8.
[142] Practice Direction, para. 13. *See also supra* para. 38.
[143] *See* Prosecution Response, paras. 61-70.
[144] Trial Judgement, para. 1984.

62. In this respect, the Trial Chamber noted Mugiraneza's testimony that the chief of protocol told him that Sindikubwabo would be present at the installation ceremony and asked that the ministers attend it with him.[145] Ngirabatware's testimony that ministers had no obligation to attend official meetings "unless when the protocol service of the president's office invited [them] to attend"[146] would have been cumulative of Mugiraneza's evidence on the record. The Trial Chamber did not discount this evidence and, in fact, took it into account in assessing whether Sindikubwabo's attendance at the ceremony was unexpected.[147]

3. Conclusion

63. Based on the foregoing, the Appeals Chamber finds that the Prosecution violated its disclosure obligations under Rule 68 of the Rules to disclose exculpatory material from the *Hategekimana*, *Ntagerura et al.*, and *Ngirabatware* cases as soon as practicable. However, having considered the exculpatory evidence against the evidence on the record, the Appeals Chamber is not persuaded that the disclosure violations materially impacted the cases of Mugenzi and Mugiraneza. In these circumstances, where any possible prejudice from the violation was minimal, no relief is warranted. However, both the Trial Chamber and the Appeals Chamber have found that the Prosecution violated its Rule 68 obligations in this case on previous occasions.[148] The Trial Chamber decided that the accused had been materially prejudiced by the Prosecution's violation of its Rule 68 obligations to disclose exculpatory material as soon as practicable and accordingly decided to draw a reasonable inference in favour of the accused from the exculpatory material as a remedy.[149] The Appeals Chamber further recalls that the Trial Chamber qualified as "inexcusable" the Prosecution's conduct *vis-à-vis* its Rule 68 disclosure obligations.[150] In light of those observations, it is clear that the Prosecution's repeated violations of its obligations under Rule 68 of the Rules in this case negatively impacted the conduct of the proceedings and prejudiced the interests of justice. The Appeals Chamber therefore firmly reminds the Prosecution of the fundamental importance of its positive and continuous obligation to disclose exculpatory material under Rule 68 of the Rules.

[145] Trial Judgement, para. 1297.
[146] Mugiraneza Motion of 8 October 2012, para. 5.
[147] Trial Judgement, n. 1977.
[148] *See, e.g.*, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012, paras. 39, 44; Trial Judgement, paras. 175, 176.
[149] Trial Judgement, paras. 169, 174.
[150] Trial Judgement, para. 175.

C. Conclusion

64. For the foregoing reasons, the Appeals Chamber, Judge Robinson dissenting, dismisses Mugenzi's Fifteenth Ground of Appeal and Mugiraneza's First Ground of Appeal. The Appeals Chamber dismisses Mugiraneza's Fourth Ground of Appeal and dismisses, in part, the Mugenzi Motion and the Mugiraneza Motion of 8 October 2012.

IV. REMOVAL OF JEAN-BAPTISTE HABYALIMANA AS THE PREFECT OF BUTARE PREFECTURE, 17 APRIL 1994

65. The Trial Chamber convicted Mugenzi and Mugiraneza of conspiracy to commit genocide based on their involvement in a decision taken on 17 April 1994 by the Interim Government during a Cabinet meeting to remove Jean-Baptiste Habyalimana from the post of prefect of Butare Prefecture.[151] According to the Trial Judgement, Habyalimana, a Tutsi and a moderate leader from the *Parti libéral* ("PL"), was perceived by Mugenzi, Mugiraneza, Prime Minister Jean Kambanda, and the other members of the Interim Government who removed him as opposing the targeted killings of Tutsi civilians.[152] The Trial Chamber further found that, while killings occurred in Butare Prefecture prior to Habyalimana's removal from his post, these crimes appeared to have been localized and the common perception was that Butare Prefecture, until 17 April 1994, had resisted the ethnic violence that gripped much of the country.[153] In these circumstances, the Trial Chamber concluded that Mugenzi, Mugiraneza, and the other ministers present at the Cabinet meeting on 17 April 1994 made the decision to remove Habyalimana "with the intention to undercut the real and symbolic resistance the Tutsi prefect posed to the targeted killing of Tutsi civilians inhabiting or seeking refuge in Butare".[154] The Trial Chamber thus found that Mugenzi and Mugiraneza possessed genocidal intent when taking this decision.[155]

66. Mugenzi and Mugiraneza challenge their convictions for conspiracy to commit genocide.[156] In this section, the Appeals Chamber considers whether the Trial Chamber erred: (i) in light of the notice provided to Mugiraneza concerning his participation in this crime and in construing the form of his liability; and (ii) in its consideration of Mugenzi's and Mugiraneza's *mens rea*.

A. Notice and Form of Responsibility (Mugiraneza Ground 5, in Part)

67. Paragraph 6.43 of the Indictment reads, in relevant part:

> The country civil and military leaders became aware of the exceptional situation in Butare. Thus, the Interim Government, of which Casimir Bizimungu, Prosper Mugiraneza, Jérôme

[151] Trial Judgement, paras. 1222-1250, 1959-1962, 1988.
[152] Trial Judgement, paras. 1243, 1246.
[153] Trial Judgement, paras. 1240-1242.
[154] Trial Judgement, para. 1246. *See also* Trial Judgement, paras. 1237-1239, 1245, 1250.
[155] Trial Judgement, para. 1962. *See also* Trial Judgement, para. 1961.
[156] Mugenzi Notice of Appeal, paras. 13-16, 22-30; Mugenzi Appeal Brief, paras. 66-82, 103-208; Mugiraneza Notice of Appeal, paras. 7, 13-21, 31, 34, 35, 37, p. 7; Mugiraneza Appeal Brief, paras. 51-65, 137-207, 230-251. Although Mugiraneza lists "issue" number 23 in his Appeal Brief, he does not advance any arguments in relation to this "issue". *See* Mugiraneza Appeal Brief, p. 41, paras. 137-207. The Appeals Chamber considers that he has therefore abandoned his claim in this respect, and will not address it.

> Bicamumpaka and Justin Mugenzi were members, removed *Préfet* Habyalimana from office and incited the people to get involved in the massacres.[157]

Count 1 of the Indictment individually charges both Mugenzi and Mugiraneza with conspiracy to commit genocide, citing, *inter alia*, paragraph 6.43 of the Indictment. On this basis, the Trial Chamber concluded that the Indictment provided sufficient notice that the accused were charged with conspiracy to commit genocide based on the agreement to remove Habyalimana from the post of prefect of Butare Prefecture.[158]

68. Mugiraneza argues that the crime for which he was convicted is different from the crime charged in the Indictment or, alternatively, that the Indictment fails to charge a crime against him.[159] In this respect, he maintains that paragraph 6.43 of the Indictment simply alleges that the government of which Mugiraneza was a member removed the prefect from office and fails to allege any specific acts undertaken by Mugiraneza himself.[160] He underscores that a conviction for acts not pleaded in the Indictment is improper and contends that allegations of group liability based solely on membership in a government cannot give rise to individual criminal liability under the Statute.[161]

69. Mugiraneza also contends that the Trial Chamber erred in law in convicting him of conspiracy to commit genocide under the theory of joint criminal enterprise.[162] In this context, he argues that a conviction for conspiracy to commit genocide cannot be based on a theory of joint criminal enterprise.[163] He adds that there was insufficient evidence to convict him under a theory of joint criminal enterprise for the removal of the prefect of Butare Prefecture.[164]

70. The Prosecution responds that Mugiraneza was properly charged with conspiracy to commit genocide based on his role in the decision to remove Habyalimana.[165] The Prosecution also maintains that the Trial Chamber did not improperly conflate joint criminal enterprise with conspiracy when it convicted Mugiraneza of conspiracy to commit genocide, and that Mugiraneza's

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[157] Emphasis omitted. *See also* Trial Judgement, para. 1951 (observing that the relevant paragraphs of the Indictment in relation to the removal of Habyalimana as Butare's prefect are paragraphs 5.1, 6.10, 6.18, 6.21, 6.42, and 6.43).
[158] *See* Trial Judgement, n. 2735, *referring to* Indictment, paras. 5.1, 6.10, 6.18, 6.21, 6.43, Count 1.
[159] Mugiraneza Appeal Brief, paras. 154, 185-191. *See also* Mugiraneza Reply Brief, paras. 31, 32, 69-72.
[160] Mugiraneza Appeal Brief, para. 154. *See also* Mugiraneza Reply Brief, para. 32.
[161] Mugiraneza Appeal Brief, paras. 154, 187-190. *See also* Mugiraneza Reply Brief, paras. 31, 32.
[162] Mugiraneza Appeal Brief, paras. 153, 173-179. *See also* Mugiraneza Reply Brief, paras. 69-72. Mugiraneza asserts that it was not clear from the Trial Judgement whether his conviction under Count 1 of the Indictment was a conviction under a theory of joint criminal enterprise or for having joined a conspiracy, and specifies that he therefore is raising this issue out of an "abundance of caution". *See* Mugiraneza Appeal Brief, para. 173. *See also* AT. 8 October 2012 p. 22.
[163] Mugiraneza Appeal Brief, paras. 177, 178.
[164] Mugiraneza Appeal Brief, paras. 180-183.
[165] Prosecution Response Brief, paras. 335-338.

remaining arguments regarding the purported overlap of joint criminal enterprise and conspiracy are irrelevant.[166]

71. 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".[167] Contrary to Mugiraneza's claim, paragraph 6.43 and Count 1 of the Indictment, considered together, unambiguously put him on notice that his participation in the act of removing Habyalimana from his post as prefect was one basis for the allegation that Mugiraneza conspired to commit genocide. The text of paragraph 6.43 of the Indictment links Habyalimana's removal to killings, and Count 1 of the Indictment makes plain that Mugiraneza was individually charged with conspiracy to commit genocide. The Appeals Chamber is accordingly satisfied that the Trial Chamber did not err in finding that the Indictment provided sufficient notice for the charge of conspiracy to commit genocide. The Appeals Chamber also considers that the Indictment properly charged Mugiraneza, as an individual, with conspiracy to commit genocide by agreeing to remove Habyalimana from his post as prefect of Butare Prefecture.

72. The Appeals Chamber is similarly satisfied that, in entering a conviction for conspiracy to commit genocide based on Habyalimana's removal, the Trial Chamber did not do so pursuant to joint criminal enterprise. Nothing in the Trial Chamber's consideration of Mugiraneza's responsibility for the crime of conspiracy indicates that it applied joint criminal enterprise.[168] Although the Trial Chamber recalled its findings on joint criminal enterprise, which included a consideration of the decision to remove Habyalimana from his post, in the context of its consideration of the crime of conspiracy to commit genocide, it did so only to note that much of the same reasoning applied to its findings on conspiracy.[169]

73. Accordingly, Mugiraneza has not demonstrated that the Trial Chamber erred by convicting him of a crime that was not pleaded in the Indictment.[170]

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[166] Prosecution Response Brief, paras. 330-334.
[167] *Ntabakuze* Appeal Judgement, para. 65. *See also Gacumbitsi* Appeal Judgement, para. 123.
[168] *See* Trial Judgement, paras. 1959-1963. Moreover, the Trial Chamber's discussion of the gravity of the crimes committed by Mugiraneza explicitly recalls that the theory of joint criminal enterprise only applies to the crime of direct and public incitement to commit genocide. *See* Trial Judgement, para. 2014.
[169] *See* Trial Judgement, paras. 1959, 1960. Notably, the Trial Chamber's deliberations on the crime of direct and public incitement to commit genocide contain clear findings on the elements of joint criminal enterprise, and the theory is expressly noted as the basis of responsibility. *See* Trial Judgement, paras. 1984-1987.
[170] Mugiraneza's remaining arguments as to the relationship between joint criminal enterprise and conspiracy and the sufficiency of the evidence under a theory of joint criminal enterprise in relation to his conviction for conspiracy to commit genocide are therefore moot, and will not be addressed.

B. Reasons for Habyalimana's Removal and *Mens Rea* (Mugenzi Ground 4, Ground 7, in Part, and Grounds 9 and 10; Mugiraneza Ground 5, in Part, and Ground 6, in Part)

74. In reviewing the evidence on the record concerning the reasons for Habyalimana's removal, the Trial Chamber observed that there was no dispute that Habyalimana, a Tutsi, was dismissed from the post of prefect of Butare Prefecture at a Cabinet meeting on 17 April 1994.[171] The Trial Chamber also considered evidence indicating that Habyalimana was considered to be an obstacle to carrying out the genocide in Butare Prefecture, that, prior to 17 April 1994, killings in Butare were perceived as being less extensive than elsewhere in Rwanda, and that, following Habyalimana's removal and the announcement of his successor as prefect during the installation ceremony on 19 April 1994, the killings in Butare Prefecture rapidly increased and became more widespread.[172]

75. More broadly, the Trial Chamber considered evidence about the historical context of Butare Prefecture's population structure, the significance of Habyalimana as a Tutsi prefect, and the historical precedent of attacks on Tutsi civilians as a means of defence against RPF incursions.[173] The Trial Chamber characterized this evidence as demonstrating concerted and coordinated action reflecting a decision to weaken opposition to genocide in Butare Prefecture and then "spark" killings there.[174] It explained that "Ftğhe immediate temporal proximity" of the 17 April 1994 agreement to remove Habyalimana from his post as prefect and Interim President Théodore Sindikubwabo's speech on 19 April 1994 as well as "their thematic consistency necessarily reflect coordination".[175]

76. The Trial Chamber rejected alternative explanations for Habyalimana's removal which relied on his failure to coordinate with the Interim Government, and fears concerning his loyalty and the potential for RPF infiltration in Butare.[176] The Trial Chamber further found "unbelievable" Defence evidence suggesting that the Interim Government did not consider the fact that Habyalimana was a Tutsi or the symbolic significance of removing him from his post.[177] Finally, the Trial Chamber, while finding that the decision to remove Habyalimana was presented as an agreement between the PL and the *Parti sociale démocrate* ("PSD") at the Cabinet meeting, expressed "considerable reservations" about the explanation offered by Mugiraneza and others that

[171] Trial Judgement, para. 1223.
[172] *See* Trial Judgement, paras. 1234, 1240-1242. *See also* Trial Judgement, paras. 1937-1940.
[173] *See* Trial Judgement, paras. 1238, 1239, 1243, 1244.
[174] Trial Judgement, para. 1941. *See also* Trial Judgement, paras. 1959, 1960.
[175] Trial Judgement, para. 1943.
[176] *See* Trial Judgement, paras. 1225-1231, 1233-1239.
[177] Trial Judgement, para. 1244. *See also* Trial Judgement, para. 1237.

Habyalimana was removed because the PL and the PSD had decided to trade prefect posts in Kibungo and Butare Prefectures.[178]

77. Mugenzi and Mugiraneza submit that the Trial Chamber erred in its assessment of the evidence in relation to the reasons for Habyalimana's removal from the post of prefect and in finding that they had the requisite *mens rea* for a conviction for conspiracy to commit genocide.[179] In particular, Mugenzi submits that the Trial Chamber erroneously based its findings concerning the reason for Habyalimana's removal on its conclusion that members of the Interim Government who were present at Sindikubwabo's 19 April 1994 speech supported genocide in Butare Prefecture, and vice versa.[180] According to Mugenzi, such circular reasoning is improper, as the standard for proof by circumstantial evidence requires that "predicate inferences" are themselves the only possible inferences from the facts.[181]

78. In addition, Mugenzi asserts that the Trial Chamber erred in finding that the only reasonable explanation for Habyalimana's removal as prefect of Butare Prefecture was Habyalimana's opposition to genocide and in failing to credit the evidence of alternative explanations for the removal.[182] Specifically, Mugenzi argues that the Trial Chamber erred by describing the killing of civilians as a traditional "war resource" employed against RPF attacks and in its consideration of the levels of violence in Butare Prefecture prior to, during, and after Habyalimana's removal.[183] Mugenzi asserts that, contrary to the Trial Chamber's findings, massive violence had swept Butare Prefecture by 17 April 1994.[184]

79. Mugenzi also submits that the Trial Chamber erred in considering that the removal of Habyalimana undercut both real and symbolic resistance to the killing of Tutsis and in proceeding to conclude that a decision to replace Habyalimana amounted to an agreement clearly aimed at the

[178] Trial Judgement, para. 1232. *See also* Trial Judgement, paras. 1228, 1230.
[179] Mugenzi Appeal Brief, paras. 66-82, 103-106, 108-154, 161-175, 179-187, 197-208; Mugiraneza Appeal Brief, paras. 148-152, 155-172, 184, 204-207, 232, 233, 242-251. *See also* Mugenzi Reply Brief, paras. 23, 24, 28-48, 50, 52, 57-59; Mugiraneza Reply Brief, paras. 25-30, 33-50; AT. 8 October 2012 pp. 4-12, 22-28, 65, 66, 69-71.
[180] Mugenzi Appeal Brief, paras. 105, 111-122, 154. *See also* Mugenzi Reply Brief, paras. 36-38; AT. 8 October 2012 pp. 11, 12, 65.
[181] Mugenzi Appeal Brief, para. 113, *referring to Ntagerura et al.* Appeal Judgement, para. 399.
[182] Mugenzi Appeal Brief, paras. 123-154, 161-164, 186. *See also* Mugenzi Reply Brief, paras. 39, 40; AT. 8 October 2012 pp. 7-12.
[183] Mugenzi Appeal Brief, paras. 141-143. *See also* Mugenzi Appeal Brief, paras. 144-146; Mugenzi Reply Brief, paras. 28-31, 47, 57.
[184] Mugenzi Appeal Brief, paras. 144-146. Mugenzi also contends that the Trial Chamber erroneously relied on evidence of perceived violence when the evidence was unknown to the Interim Government, while failing to focus on what he considers to be the relevant issue: the Cabinet's own knowledge of "the intense violence that occurred on 14, 15 and 16 April" 1994. *See* Mugenzi Appeal Brief, para. 149. *See also* Mugenzi Appeal Brief, paras. 148, 150; AT. 8 October 2012 pp. 9, 10.

commission of genocide.[185] In particular, Mugenzi argues that the Trial Chamber erred in finding that Habyalimana had successfully prevented killings in Butare Prefecture, that he was perceived as opposing genocide by the Interim Government, and that there was a common perception around 17 April 1994 that Butare Prefecture had been subject to less violence than the rest of the country.[186] In Mugenzi's view, the Trial Chamber's reasoning in this respect erroneously implies that the removal of any Tutsi official from a post "should be deemed tantamount to the encouragement of genocidal acts".[187] He adds that, while in the context of an "ethnically divided war, biases could play a role in the appointment and removal of government officials", it would be an "egregious fallacy" to assert that such bias reflects genocidal intent.[188]

80. Moreover, Mugenzi argues that Habyalimana's removal could also be reasonably explained by evidence that Habyalimana did not attend a meeting of prefects held on 11 April 1994, failed to communicate with the Interim Government, was suspected of being an RPF sympathizer, and presided over a prefecture vulnerable to RPF infiltration.[189] Mugenzi avers that the Trial Chamber failed to fully consider evidence concerning Habyalimana's loyalty in the form of an Interior Ministry report and that it misconstrued evidence concerning perceptions as to RPF infiltration.[190]

81. According to Mugenzi, the Trial Chamber also erred by failing to properly consider other relevant circumstantial evidence that demonstrated the absence of genocidal purpose in Habyalimana's removal.[191] In this respect, he contends that the Trial Chamber did not sufficiently consider either his direct evidence or that of Mugiraneza and Defence Witnesses André Ntagerura and Emmanuel Ndindabahizi concerning the reasons for Habyalimana's removal and, in particular, that it failed to consider points on which their testimonies were consistent, including Habyalimana's failure to cooperate with the Interim Government, the role of political parties in Habyalimana's removal, and the potential for RPF infiltration in Butare Prefecture.[192] Mugenzi further challenges the Trial Chamber's treatment of evidence concerning the appointment of new prefects in other prefectures, as well as its failure to consider evidence of the government's instructions to prefects

[185] Mugenzi Appeal Brief, paras. 147-153, 164, 197-204. *See also* Mugenzi Reply Brief, paras. 32-35, 58.
[186] Mugenzi Appeal Brief, paras. 147-150, 197-201. *See also* Mugenzi Reply Brief, paras. 32-35.
[187] Mugenzi Appeal Brief, para. 203. *See also* Mugenzi Appeal Brief, paras. 197, 204; Mugenzi Reply Brief, para. 48.
[188] Mugenzi Appeal Brief, para. 152. *See also* Mugenzi Appeal Brief, paras. 151, 153.
[189] Mugenzi Appeal Brief, paras. 123-140. *See also* Mugenzi Reply Brief, paras. 42-46.
[190] Mugenzi Appeal Brief, paras. 126-140.
[191] Mugenzi Appeal Brief, paras. 165-175.
[192] Mugenzi Appeal Brief, paras. 170-175. *See also* Mugenzi Appeal Brief, para. 179. Mugenzi adds that the Trial Judgement misstates certain aspects of his and Witness Ndindabahizi's evidence. *See* Mugenzi Appeal Brief, paras. 174, 175.

and other prefecture officials to take measures against violence, claiming that this evidence undermines the Trial Chamber's finding of genocidal purpose.[193]

82. Finally, Mugenzi maintains that the Trial Chamber erred in concluding that he possessed the requisite specific genocidal intent and in failing to provide a reasoned opinion in this respect.[194] More particularly, he submits that the Trial Chamber failed to adequately address how his individual intent could be inferred from a collective decision that may have been the result of various motivations.[195] He claims that the Trial Chamber erred in inferring that he played a decisive role in the decision to remove Habyalimana.[196] He also argues that the Trial Chamber failed to consider all of the circumstantial evidence relevant to his intent, including his consistent and public advocacy for ethnic reconciliation.[197] Mugenzi adds that the Trial Chamber erred by finding that he had genocidal intent on 17 April 1994 based on his presence at Sindikubwabo's speech two days later, an event of which he had no knowledge on 17 April 1994.[198]

83. Mugiraneza argues that the Trial Chamber erred in finding that his guilt was the only reasonable inference that could be drawn from the circumstantial evidence on the record.[199] In particular, he appears to challenge the Trial Chamber's reliance on its conclusions regarding Sindikubwabo's speech on 19 April 1994 to support its findings concerning Habyalimana's removal, arguing that it is improper to base a conviction or even a factual finding on an inference that is itself based on an inference.[200]

84. Mugiraneza also contends that the Trial Chamber erred in finding that Habyalimana was removed on account of his successful efforts to check violence in Butare, asserting that the record shows that violence and killings in Butare Prefecture were, in fact, widespread even before Habyalimana's removal.[201] In this respect, Mugiraneza argues that the Trial Chamber's findings that the violence in Butare Prefecture was "localized" near the border of Gikongoro Commune and

[193] Mugenzi Appeal Brief, paras. 165-169. *See also* Mugenzi Reply Brief, para. 50.
[194] Mugenzi Appeal Brief, paras. 66-82, 180-185, 206-208. *See also* Mugenzi Reply Brief, paras. 23, 24, 52, 59.
[195] Mugenzi Appeal Brief, paras. 180-185, 208.
[196] Mugenzi Appeal Brief, paras. 180-185. In this respect, Mugenzi suggests that he had a very limited ability to oppose Habyalimana's removal due to suspicions regarding his political party's links to the RPF. *See* Mugenzi Appeal Brief, paras. 181,182. *See also* AT. 8 October 2012 p. 66.
[197] Mugenzi Appeal Brief, paras. 66-82, 185. *See also* AT. 8 October 2012 pp. 5, 6.
[198] Mugenzi Appeal Brief, paras. 206, 207.
[199] Mugiraneza Appeal Brief, paras. 150-152, 155-172. *See also* Mugiraneza Reply Brief, paras. 29, 30, 33-50.
[200] Mugiraneza Appeal Brief, paras. 158, 159.
[201] Mugiraneza Appeal Brief, paras. 232, 233, 242-251. *See also* Mugiraneza Reply Brief, paras. 25-28.

not widespread prior to Habyalimana's removal and Sindikubwabo's speech are clearly erroneous.[202]

85. Mugiraneza further asserts that the Trial Chamber erred in inferring that he assented to Habyalimana's removal given his silence during the Cabinet meeting on 17 April 1994, contending that his abstention was an equally reasonable inference.[203] Moreover, according to Mugiraneza, given that his presence at the installation ceremony for the new prefect on 19 April 1994 could be reasonably explained by state protocol requirements, the Trial Chamber erred in finding that he agreed to the removal of the prefect based on his presence at the installation ceremony.[204]

86. Finally, Mugiraneza submits that no evidence demonstrates that Cabinet members were informed that the removal of Habyalimana was meant to eliminate obstacles to genocide or that he knew of any reason for Habyalimana's removal other than the reason which was presented to the Cabinet and which involved an agreement between political parties.[205] Mugiraneza adds that the Trial Chamber failed to consider evidence of his efforts to stop or reduce violence after 19 April 1994 as well as evidence that he had only a general knowledge of the violence in Butare Prefecture around the time of Habyalimana's removal.[206]

87. The Prosecution maintains that the Trial Chamber's consideration of the evidence, including the evidence of Sindikubwabo's speech on 19 April 1994, and the findings it reached as a result were reasonable and that the alternative explanations for Habyalimana's dismissal advanced on appeal represent an impermissible attempt to relitigate issues raised at trial.[207] The Prosecution further submits that the Trial Chamber reasonably found, based on the totality of the evidence, that Mugenzi and Mugiraneza possessed the requisite *mens rea* for a conviction for conspiracy to commit genocide.[208] In particular, the Prosecution argues that the Trial Chamber was not required to refer to the testimony of every witness or every piece of evidence on the trial record and that it is

[202] Mugiraneza Appeal Brief, para. 244.
[203] Mugiraneza Appeal Brief, paras. 160-164, 184. *See also* Mugiraneza Appeal Brief, paras. 150-152, 167-172, 204-207; Mugiraneza Reply Brief, paras. 33, 36-50; AT. 8 October 2012 pp. 24, 25, 69. Mugiraneza underscores that the Trial Chamber rejected the evidence of Mugiraneza and others who were present in the Cabinet meeting on 17 April 1994, and that the only direct evidence of what occurred at the meeting is Prosecution Exhibit 108, which suggests that the decision to remove the prefect reflected an agreement between political parties or concerns about Habyalimana's loyalty. *See* Mugiraneza Appeal Brief, paras. 137, 150, 152, 160, 161, 169, 170; Mugiraneza Reply Brief, paras. 33, 37, 42-48; AT. 8 October 2012 pp. 27, 28.
[204] Mugiraneza Appeal Brief, para. 164.
[205] Mugiraneza Appeal Brief, paras. 148, 149, 162, 165, 166, 169. *See also* AT. 8 October 2012 pp. 22-25, 27, 28.
[206] Mugiraneza Appeal Brief, para. 148.
[207] Prosecution Response Brief, paras. 126-162, 169-174, 178, 179, 191-198, 317-329, 379, 382-401. *See also* AT. 8 October 2012 pp. 37-48.
[208] Prosecution Response Brief, paras. 107-110, 199-202, 339-342; AT. 8 October 2012 pp. 38-43.

to be presumed that the Trial Chamber evaluated all the evidence presented to it.[209] In that respect, the Prosecution contends that Mugenzi fails to explain why his conduct prior to April 1994 negates the Trial Chamber's finding that he possessed genocidal intent.[210] Furthermore, the Prosecution argues that Mugiraneza's submission that he did not know the reason for the prefect's removal must fail as "knowledge" is not the requisite *mens rea* for the crime of conspiracy to commit genocide.[211]

88. The Appeals Chamber recalls that the Trial Chamber expressly noted that the Prosecution presented no direct evidence about the decision on 17 April 1994 to remove Habyalimana as prefect of Butare Prefecture.[212] In convicting Mugenzi and Mugiraneza, the Trial Chamber based its findings on circumstantial evidence.[213] The Appeals Chamber recalls that a conviction for conspiracy to commit genocide may be based on circumstantial evidence but that, where an inference of guilt is drawn from circumstantial evidence, it must be the only reasonable inference available from the evidence.[214]

89. The Appeals Chamber notes that, in reaching its conclusion that Habyalimana's dismissal was part of a larger agenda aimed at furthering the killing of Tutsi civilians in Butare, the Trial Chamber considered, *inter alia*, evidence concerning Habyalimana's Tutsi ethnicity, his perceived opposition to killings in Butare Prefecture, the ongoing war with the RPF, the history of attacking Tutsis as a means of defence against RPF incursions, and the levels of violence in Butare Prefecture before and after Habyalimana's removal.[215]

90. The Appeals Chamber observes that the Trial Chamber was also presented with evidence that Habyalimana was removed from his post for administrative reasons, in particular, as result of a prior agreement between the PSD and PL to switch control over Kibungo and Butare Prefectures, for failing to attend a key meeting of prefects in Kigali on 11 April 1994 without explanation, and because of his perceived links with the RPF.[216] The Trial Chamber noted that the evidence concerning Habyalimana's failure to attend the meeting on 11 April 1994 was undisputed, and it did not exclude that the issue of Habyalimana's purported ties to the RPF was discussed at the meeting on 17 April 1994 as the basis for Habyalimana's removal.[217] It concluded, however, that when

[209] Prosecution Response Brief, para. 109.
[210] Prosecution Response Brief, para. 110.
[211] Prosecution Response Brief, paras. 339-342.
[212] Trial Judgement, para. 1223.
[213] *See, e.g.*, Trial Judgement, para. 1246.
[214] *Nahimana et al.* Appeal Judgement, para. 896.
[215] Trial Judgement, paras. 1235-1245.
[216] Trial Judgement, paras. 1226, 1227.
[217] Trial Judgement, paras. 1233, 1235.

viewed in the context of all the evidence, these reasons did not undermine the Prosecution evidence that Habyalimana's removal was aimed at furthering the killing of Tutsis in Butare.[218]

91. In rejecting these alternative explanations, the Trial Chamber considered evidence that the war-front was relatively far from Butare Prefecture, that there was no legitimate threat of invasion by the RPF from neighbouring Burundi, and that the evidence of RPF infiltration in the area was general or pre-dated 1994.[219] The Appeals Chamber is not convinced, Judge Liu dissenting, that the considerations identified by the Trial Chamber eliminate the reasonable possibility that Mugenzi and Mugiraneza agreed to remove Habyalimana for political or administrative reasons rather than for the purpose of furthering the killing of Tutsis in Butare Prefecture. Consequently, the Appeals Chamber finds, Judge Liu dissenting, that the Trial Chamber erred in concluding that the only reasonable inference that could be drawn from the circumstantial evidence is that Mugenzi and Mugiraneza possessed the requisite *mens rea* for a conviction for conspiracy to commit genocide.

92. Moreover, the Appeals Chamber notes that the Trial Chamber's conclusion that Mugenzi and Mugiraneza possessed the *mens rea* for conspiracy to commit genocide was bolstered by the Trial Chamber's findings concerning their subsequent participation in the installation ceremony of the new prefect of Butare Prefecture on 19 April 1994 and their role in supporting the inflammatory speech made at the ceremony by Sindikubwabo.[220] The Appeals Chamber notes, however, that, as set forth below, it has found that the Trial Chamber lacked a sufficient evidentiary basis to conclude that Mugenzi and Mugiraneza were aware of what the content of Sindikubwabo's speech at the ceremony would be or the aim behind it.[221] As a result, the Appeals Chamber has reversed the Trial Chamber's findings as to Mugenzi's and Mugiraneza's *mens rea* in relation to their convictions for direct and public incitement to commit genocide.[222] Mugenzi's and Mugiraneza's participation in the installation ceremony therefore could not reinforce the finding of their *mens rea* for conspiracy to commit genocide.

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[218] Trial Judgement, para. 1235.
[219] Trial Judgement, paras. 1234, 1236.
[220] *See* Trial Judgement, para. 1237 ("Rather, a broad view of the record reveals that Habyalimana's dismissal was intended to undermine the real and symbolic resistance he posed to the genocide in Butare. *In particular*, this event cannot be considered separately from the 19 April 1994 installation ceremony for Habyalimana's replacement, over which President Théodore Sindikubwabo presided.") (emphasis added). *See also* Trial Judgement, para. 1962 ("Furthermore, the Chamber is satisfied that both Mugenzi and Mugiraneza possessed genocidal intent when agreeing to remove Habyalimana. *This conclusion is undeniable* when viewed against their continued contribution to ensuring that this 'policy' decision was properly understood by forming part of a large delegation of Interim Government ministers who went to Butare and show[ed] support to Sindikubwabo while making his inflammatory speech.") (emphasis added and reference omitted).
[221] *See infra* paras. 138, 141.
[222] *See infra* paras. 141, 142.

93. Accordingly, the Appeals Chamber considers, Judge Liu dissenting, that Mugenzi and Mugiraneza have demonstrated that the Trial Chamber erred in its assessment of the evidence related to their *mens rea* underlying their respective convictions for conspiracy to commit genocide. The Appeals Chamber therefore dismisses their remaining arguments as moot.[223]

C. Conclusion

94. For the foregoing reasons, the Appeals Chamber dismisses Mugiraneza's Fifth Ground of Appeal, in part. The Appeals Chamber, Judge Liu dissenting, grants Mugenzi's Fourth Ground of Appeal, Seventh Ground of Appeal, in part, and Ninth and Tenth Grounds of Appeal as well as Mugiraneza's Fifth and Sixth Grounds of Appeal, in part. The Appeals Chamber reverses, Judge Liu dissenting, Mugenzi's and Mugiraneza's convictions for conspiracy to commit genocide and enters a verdict of acquittal under Count 1 of the Indictment. It is therefore unnecessary to address the remaining submissions related to these convictions.[224]

[223] In these circumstances, the Appeals Chamber also need not address Mugenzi's and Mugiraneza's requests for admission of material from the *Ntagerura et al.* case as additional evidence. *See* Mugenzi Motion, paras. 41-54, 56; Mugiraneza Motion of 6 October 2012, paras. 1, 9-22. *See also* Mugenzi Reply, paras. 14-18; Mugiraneza Reply, paras. 18-25. The Mugenzi Motion is therefore dismissed, in part, as moot. *See also supra* para. 64. The Mugiraneza Motion of 6 October 2012 is dismissed as moot in its entirety.

[224] Specifically, Mugenzi challenges his conviction based on his contention that the "degree of concertation" upon which the Trial Chamber relied in convicting him falls short of the concerted or coordinated action required for convictions for conspiracy to commit genocide (Mugenzi Ground 8). *See* Mugenzi Notice of Appeal, para. 27; Mugenzi Appeal Brief, paras. 188-196. *See also* Mugenzi Reply Brief, paras. 53-56. Mugenzi also contends that the Trial Chamber erred in law by reversing the burden of proof in making its findings relating to the decision to remove Habyalimana as the prefect of Butare Prefecture (Mugenzi Ground 7, in Part). *See* Mugenzi Notice of Appeal, para. 25; Mugenzi Appeal Brief, paras. 107, 176-178. *See also* Mugenzi Reply Brief, para. 51. Mugenzi and Mugiraneza challenge the Trial Chamber's assessment of certain aspects of Expert Witness Des Forges's evidence (Mugenzi Ground 7, in Part; Mugiraneza Ground 2 and Ground 6, in Part). *See* Mugenzi Notice of Appeal, para. 22 Mugenzi Appeal Brief, paras. 155-160; Mugiraneza Notice of Appeal, paras. 7, 31, 32; Mugiraneza Appeal Brief, paras. 51-65, 230, 231, 234-241. *See also* Mugenzi Reply Brief, para. 49; Mugiraneza Reply Brief, paras. 23, 24. Mugiraneza submits that the Trial Chamber erred by failing to consider his argument that duress was a full defence against his conviction for conspiracy to commit genocide (Mugiraneza Ground 5, in Part). *See* Mugiraneza Notice of Appeal, p. 7; Mugiraneza Appeal Brief, paras. 197-203. *See also* Mugiraneza Reply Brief, paras. 73-81.

V. INSTALLATION CEREMONY OF SYLVAIN NSABIMANA AS PREFECT OF BUTARE PREFECTURE, 19 APRIL 1994

95. The Trial Chamber convicted Mugenzi and Mugiraneza of direct and public incitement to commit genocide based on their roles in the installation ceremony of Sylvain Nsabimana as the new prefect of Butare Prefecture on 19 April 1994, where, the Trial Chamber found, Interim President Théodore Sindikubwabo delivered an inflammatory speech calling for the killing of Tutsis.[225] Specifically, the Trial Chamber found that Mugenzi and Mugiraneza, along with certain members of the Interim Government, including Prime Minister Jean Kambanda, participated in a joint criminal enterprise from at least 17 to 19 April 1994 to kill Tutsis in Butare Prefecture and that Sindikubwabo joined the joint criminal enterprise at some point prior to his speech, which the Trial Chamber found was made in furtherance of this common plan.[226]

96. The Trial Chamber found that Mugenzi and Mugiraneza substantially and significantly contributed to the incitement at the installation ceremony by agreeing, on 17 April 1994, to remove the prefect of Butare Prefecture, Jean-Baptiste Habyalimana, a Tutsi who had taken a public stand against killings in the region.[227] In addition, the Trial Chamber found that Mugenzi and Mugiraneza made a substantial and significant contribution to the joint criminal enterprise by attending the ceremony, where their presence provided substantial moral encouragement to Sindikubwabo as he incited the killing of Tutsis and where it contributed significantly to the appearance of a unified Interim Government that supported the president's message.[228] By these actions, the Trial Chamber concluded, Mugenzi and Mugiraneza demonstrated that they shared Sindikubwabo's genocidal intent to eliminate Tutsis in Butare Prefecture.[229]

97. Mugenzi and Mugiraneza submit that the Trial Chamber erred in convicting them of direct and public incitement to commit genocide.[230] In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing: (i) the sufficiency of the notice provided to Mugenzi and Mugiraneza; and (ii) their *mens rea*.

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[225] Trial Judgement, paras. 1322-1383, 1976-1988.
[226] Trial Judgement, paras. 1947, 1984.
[227] Trial Judgement, paras. 1945, 1985.
[228] Trial Judgement, paras. 1946, 1986.
[229] Trial Judgement, para. 1984.
[230] Mugenzi Notice of Appeal, paras. 8-12, 17-21, 31-42; Mugenzi Appeal Brief, paras. 9-65, 83-102, 209-298; Mugiraneza Notice of Appeal, paras. 8-12, 22-26, pp. 8, 9; Mugiraneza Appeal Brief, paras. 66-123, 208-211, 217-229. Mugenzi also raises arguments in relation his conviction for direct and public incitement under Ground 4 of his appeal. *See* Mugenzi Notice of Appeal, paras. 13-16; Mugenzi Appeal Brief, paras. 66-82. As these arguments have been considered above, the Appeals Chamber will not address them further here. *See supra* Section IV.B.

A. Notice (Mugenzi Grounds 1 and 2; Mugiraneza Ground 3)

98. Mugenzi and Mugiraneza submit that the Trial Chamber erred in convicting them of direct and public incitement to commit genocide, as they did not have sufficient notice that they were charged with participating in this crime through a joint criminal enterprise.[231]

99. Paragraph 6.45 of the Indictment reads:

> Thus, on 19 April 1994, the swearing-in ceremony in Butare for the new *Préfet*, Sylvain Nsabimana, was the occasion of a large gathering which had been announced and organized by the Interim Government. On that occasion, President Théodore Sindikubwabo made an inflammatory speech, openly and explicitly calling on the people of Butare to follow the example of the other *préfectures* and begin the massacres. He violently denounced the *banyira ntibindeba*, meaning those who did not feel concerned. He asked them to *get out of the way* and *let us work*. Prime Minister Jean Kambanda, who subsequently took the floor, did not contradict the President of the Republic, nor did any of the Ministers present, including Justin Mugenzi. Shortly thereafter, the massacre of Tutsis began in the *préfecture*.[232]

100. Paragraph 6.68 of the Indictment reads:

> Casimir Bizimungu, Prosper Mugiraneza, Jérôme Bicamumpaka and Justin Mugenzi, Edouard Karemera, André Rwamakuba, Mathieu [*sic*] Ngirumpatse, Joseph Nzirorera and Juvénal Kajelijeli, in their position of authority, acting in concert with, notably André Ntagerura, Pauline Nyiramasuhuko, Éliezer Niyitegeka, Tharcisse Renzaho and Théoneste Bagosora, participated in the planning, preparation or execution of a common scheme, strategy or plan, to commit the atrocities set forth above. The crimes were committed by them personally, by persons they assisted or by their subordinates, and with their knowledge or consent.[233]

101. The Prosecution made these allegations, among others, in support of the counts in the Indictment charging Mugenzi and Mugiraneza with direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute.[234] In its Pre-Trial Brief, filed on 20 October 2003, the Prosecution stated that "[it] will establish the criminal culpability of the four accused persons through their participation in a joint or common criminal enterprise to eliminate Tutsis".[235] The Prosecution proceeded to elaborate its pleading of joint criminal enterprise in detail,[236] making specific mention of the role allegedly played by Mugenzi and Mugiraneza in relation to Sindikubwabo's speech in Butare Prefecture.[237] The Prosecution reiterated its intention to hold the accused responsible based on joint criminal enterprise in its opening statement delivered on

[231] Mugenzi Appeal Brief, paras. 9-52; Mugiraneza Appeal Brief, paras. 66-123. *See also* Mugenzi Reply Brief, paras. 4-15; Mugiraneza Reply Brief, paras. 2, 4-16; AT. 8 October 2012 pp. 12, 15-19, 28, 29.
[232] Emphasis omitted.
[233] Emphasis omitted.
[234] Indictment, Counts 4, 5.
[235] Prosecution Pre-Trial Brief, para. 107.
[236] Prosecution Pre-Trial Brief, paras. 107-144.
[237] Prosecution Pre-Trial Brief, paras. 124-126.

6 November 2003,[238] and it expressly noted that Mugenzi's and Mugiraneza's roles in relation to Sindikubwabo's speech were "in furtherance of [the] agreed policy [of the Interim Government] to kill Tutsis".[239]

102. In his motion for judgement of acquittal, filed more than a year and half after the Prosecution's opening statement, Mugenzi raised a number of challenges to the notice given in the Indictment but did not specifically object to the pleading of joint criminal enterprise or make any arguments against the count relating to direct and public incitement to commit genocide.[240] In a similar motion filed on 18 July 2005, Mugiraneza raised a general objection to the manner in which the Prosecution pleaded responsibility under Article 6(1) of the Statute in the Indictment, which included a brief mention of the pleading requirements for joint criminal enterprise.[241] On 22 November 2005, the Trial Chamber declined to examine any alleged defects in the Indictment in its decision on the motions for judgement of acquittal, stating that "[t]hese are matters for the Chamber to consider at the end of the proceedings, in light of all the evidence".[242]

103. By separate motions filed on 19 and 22 September 2005, respectively, Casimir Bizimungu and Jérôme-Clément Bicamumpaka, who were co-accused at trial, challenged the pleading of joint criminal enterprise in the Indictment outside the framework of their requests pursuant to Rule 98*bis* of the Rules for a judgement of acquittal.[243] Mugenzi and Mugiraneza did not join these motions.[244] On 23 March 2006, the Trial Chamber denied these motions on the ground, *inter alia*, that they

[238] T. 6 November 2003 pp. 6 ("The Prosecutor will show, without reasonable doubt, that each incurred individual criminal liability as well as joint criminal liability for their individual acts, as well as the acts of the entire government insofar as they acted in furtherance of a joint criminal enterprise to kill Tutsis."), 9 ("Your Honours, the Prosecutor reminds the Defence that he will urge the Court that participation not explicitly referred to in Article 6(1), such as common or joint criminal enterprise, are included within the meaning of that Article. We shall argue that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime, or otherwise aid and abet in the planning, perpetration or execution of that crime. The Statute does not stop there. It does not exclude those modes of participation in the commission of crimes which occur where several persons, having common enterprise, embark on criminal activity that is then carried out either jointly or by some member of the plurality of persons. The Prosecutor will establish criminal culpability for those of the Accused under 6(1) by demonstrating that, (a), the Accused participated in the commission of the crimes, and that their conduct contributed to the commission of the crimes; and, secondly that the Accused participated or contributed in the commission of the crimes with the requisite knowledge and intent.").
[239] T. 6 November 2003 p. 10.
[240] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Justin Mugenzi's Motion for Acquittal on Counts 1, 6, 8, 9 and 10 of the Indictment, 14 July 2005, paras. 2, 69-91.
[241] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Prosper Mugiraneza's Motion for Judgment of Acquittal Pursuant to Rule 98*bis*, 18 July 2005, paras. 28-37.
[242] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motions Pursuant to Rule 98*bis*, 22 November 2005 ("Trial Chamber Decision of 22 November 2005"), para. 14. *See also* Trial Chamber Decision of 22 November 2005, p. 32.
[243] *See The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jérôme Bicamumpaka's Request for a Declaration that the Indictment Does Not Allege that he is Liable for Any Form of Joint Criminal Enterprise, 23 March 2006 ("Trial Chamber Decision of 23 March 2006"), p. 2, para. 17.
[244] *See* Trial Chamber Decision of 23 March 2006, p. 2.

were untimely.[245] The Trial Chamber reiterated that "[t]he parties may raise this issue during their final submissions at the end of the case".[246]

104. In its Closing Brief and closing arguments, the Prosecution reaffirmed its pleading of joint criminal enterprise.[247] Mugenzi and Mugiraneza objected to the pleading of joint criminal enterprise in their Closing Briefs and closing statements.[248]

105. In the Trial Judgement, the Trial Chamber examined whether the Prosecution provided adequate notice of its intent to hold the accused responsible pursuant to a joint criminal enterprise.[249] In particular, the Trial Chamber reviewed the language of paragraph 6.68 of the Indictment, including phrases such as "acting in concert with" and "participated in […] a common scheme, strategy or plan",[250] and considered that this paragraph "reflects the Prosecution's desire to pursue each of the Accused through a form of joint criminality based on a concerted action in support of a common criminal purpose".[251] The Trial Chamber concluded, however, that the language of the Indictment was "insufficiently clear to provide each Accused notice of the Prosecution's intention to rely specifically on joint criminal enterprise liability", and thus found the Indictment defective with respect to the pleading of joint criminal enterprise liability.[252]

106. The Trial Chamber determined that the Prosecution cured this defect in the Indictment through the provision of timely, clear, and consistent information concerning its pleading of joint criminal enterprise in its Pre-Trial Brief and opening statement.[253] Furthermore, the Trial Chamber observed that no Defence team objected to the references to joint criminal enterprise in the Prosecution's opening statement.[254] The Trial Chamber also noted that the first objections were

[245] *See* Trial Chamber Decision of 23 March 2006, paras. 12-18, p. 6. The Trial Chamber held, *inter alia*, that challenges to defects in the form of an indictment should normally be brought under Rule 72 of the Rules within 60 days after the indictment is filed and before the commencement of opening statements. The Trial Chamber noted that Mugenzi's and Mugiraneza's co-accused had not provided any justification for challenging the Indictment well after opening statements. *See* Trial Chamber Decision of 23 March 2006, paras. 14-16, *referring to* Rule 72(A)(ii) of the Rules.
[246] Trial Chamber Decision of 23 March 2006, para. 18.
[247] Prosecution Closing Brief, paras. 2, 4, 29, 36, 37; T. 1 December 2008 pp. 18-24, 26-29; T. 5 December 2008 pp. 5-11.
[248] Mugenzi Closing Brief, paras. 10-18; Mugiraneza Closing Brief, paras. 11-38, 43-51; T. 2 December 2008 pp. 71, 72; T. 4 December 2008 pp. 16, 17.
[249] Trial Judgement, paras. 1910-1936.
[250] Trial Judgement, para. 1916. *See also* Trial Judgement, paras. 1917-1919.
[251] Trial Judgement, para. 1923.
[252] Trial Judgement, para. 1923.
[253] Trial Judgement, paras. 1924-1936.
[254] Trial Judgement, para. 1935.

raised only in September 2005, and were considered to have been filed out of time without a showing of good cause for the delay.[255]

107. Mugenzi and Mugiraneza submit that the Trial Chamber erred in concluding that the defect in the Indictment had been cured, in considering the extent of prejudice they suffered as a result of the defect, and, consequently, in convicting them of direct and public incitement to commit genocide on the basis of their participation in a joint criminal enterprise.[256]

108. In particular, Mugenzi argues that the failure to plead joint criminal enterprise in an indictment should not be cured lightly.[257] He contrasts the curing of the defect in his case with the actions taken by the ICTY Prosecution to cure a similar defect in the *Kvočka et al.* case.[258] Specifically, he notes that in the *Kvočka et al.* case there was an amended pre-trial brief explicitly pleading joint criminal enterprise, an opening statement expressly mentioning the underlying material facts, a further opening statement following an adjournment, and an amendment of the indictment during the course of the trial to add the pleading, as well as a showing that the defence understood the nature of the allegations.[259]

109. Moreover, Mugenzi contends that the Trial Chamber erred in finding that notice was timely, given that the Prosecution first included joint criminal enterprise in its Pre-Trial Brief, which was filed four years after the Indictment was confirmed and just 17 days before the commencement of trial.[260]

110. Mugenzi also argues that the notice provided by the Prosecution lacked clarity and consistency.[261] In particular, Mugenzi notes that, in opposing his motion for severance in 2002, the Prosecution made no mention of joint criminal enterprise when it argued that his case should remain joined with that of his co-accused.[262] He also contends that when the Prosecution requested leave to file an amended indictment on 26 August 2003, the proposed amendments, which the Trial Chamber did not accept, did not mention joint criminal enterprise.[263] In addition, although Mugenzi acknowledges that the Prosecution referred to joint criminal enterprise in its Pre-Trial Brief and

[255] Trial Judgement, para. 1935, *referring to* Trial Chamber Decision of 23 March 2006, paras. 16, 18.
[256] Mugenzi Appeal Brief, paras. 9-52; Mugiraneza Appeal Brief, paras. 66-123. *See also* Mugenzi Reply Brief, paras. 4-15; Mugiraneza Reply Brief, paras. 2, 4-16.
[257] Mugenzi Appeal Brief, para. 15. *See also* Mugenzi Appeal Brief, para. 16, *referring to Simi}* Appeal Judgement, paras. 56, 57, *Gacumbitsi* Appeal Judgement, paras. 177-179.
[258] Mugenzi Appeal Brief, paras. 17, 19, 21, 26. *See also* AT. 8 October 2012 pp. 18, 19.
[259] Mugenzi Appeal Brief, paras. 17, 18, *referring to Kvočka et al.* Appeal Judgement, paras. 43-49, 52-54. *See also* Mugenzi Reply Brief, para. 7.
[260] Mugenzi Appeal Brief, paras. 24-26. *See also* Mugenzi Reply Brief, paras. 6, 7.
[261] Mugenzi Appeal Brief, paras. 11-14, 21-23. *See also* Mugenzi Reply Brief, paras. 8-12.
[262] Mugenzi Appeal Brief, paras. 11, 12.

opening statement, he contends that the Prosecution did not explain with particularity the nature of the joint criminal enterprise alleged or the supporting material facts.[264] According to Mugenzi, while the Prosecution Pre-Trial Brief refers to Sindikubwabo's speech in the context of its discussion of participation in a joint criminal enterprise, the Prosecution did not refer to this speech in its Closing Brief as evidence in support of this mode of liability, thereby leaving the impression that the speech was not being relied upon to prove incitement through a joint criminal enterprise.[265] Furthermore, Mugenzi argues that the Trial Chamber's failure to rule on whether joint criminal enterprise was part of the case until the conclusion of the trial implicitly confirmed that the matter was uncertain.[266]

111. Finally, Mugenzi contends that the Trial Chamber failed to properly consider the prejudice which resulted from the defect in the Indictment.[267] He submits that it is clear that he suffered prejudice due to the "breath-taking" expansion of the case against him on the eve of trial which implicated him in numerous events that were previously not relevant to him.[268] In this regard, Mugenzi asserts that a period of 17 days was inadequate to formulate a new defence to the expanded charges against him and that the Trial Chamber's acceptance of the dramatic expansion of the Prosecution's case is inconsistent with earlier rulings by both the Trial Chamber and the Appeals Chamber.[269] Moreover, he submits that the scope of the alleged joint criminal enterprise and the material facts used to support the allegation shifted throughout the trial.[270] He argues that the prejudice he suffered was magnified by the fact that, due to the sequential filing of closing briefs, he was responding to a closing brief in which the Prosecution did not mention Sindikubwabo's speech as an underlying act of the joint criminal enterprise.[271]

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[263] Mugenzi Appeal Brief, para. 13.
[264] Mugenzi Appeal Brief, paras. 14, 21.
[265] Mugenzi Appeal Brief, para. 23. *See also* Mugenzi Reply Brief, paras. 11, 12.
[266] Mugenzi Appeal Brief, paras. 19, 20.
[267] Mugenzi Appeal Brief, paras. 31-52.
[268] Mugenzi Appeal Brief, para. 39. *See also* Mugenzi Appeal Brief, paras. 35-38; Mugenzi Reply Brief, paras. 13, 14.
[269] Mugenzi Appeal Brief, paras. 40-43, 45, *referring to The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.2, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence, 25 June 2004, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI, 4 February 2004, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 26 January 2004, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR 99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003. *See also* Mugenzi Appeal Brief, paras. 44, 46-48; Mugenzi Reply Brief, para. 15.
[270] Mugenzi Appeal Brief, para. 49.
[271] Mugenzi Appeal Brief, para. 49.

112. Mugiraneza submits that the Indictment fails to plead joint criminal enterprise, or any supporting factual allegation related to his role in it, and that the Prosecution Pre-Trial Brief cannot serve to add charges or modes of liability, thereby effectively amending the Indictment.[272] Mugiraneza invokes the *Rukundo* Appeal Judgement and a decision by the Appeals Chamber in the *Uwinkindi* case in support of his argument that a pre-trial brief cannot be used to cure the defective pleading of joint criminal enterprise.[273]

113. Mugiraneza also challenges the timeliness of the notice provided by the Prosecution, in particular given that the Prosecution had several years to amend the Indictment but only attempted to do so on the eve of trial.[274] In addition, he argues that the Prosecution Pre-Trial Brief, which was filed less than three weeks before trial, failed to provide the requisite specificity as to the Prosecution's allegation of joint criminal liability and added ambiguity by inviting the Trial Chamber to enter convictions based on any mode of criminal liability under Article 6(1) of the Statute.[275] He adds that the Trial Chamber itself relied upon the Prosecution Closing Brief to understand the forms of joint criminal enterprise being pursued by the Prosecution.[276] Mugiraneza further underscores that the Prosecution failed to mention that it was pursuing joint criminal enterprise in relation to Counts 1 and 4 of the Indictment in written submissions requested by the Trial Chamber following the filing of its Closing Brief, thus adding further ambiguity.[277]

114. Finally, Mugiraneza asserts that he suffered prejudice as a result of the inadequate notice provided by the Prosecution, including because "[he] relied upon the factual allegations in the

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[272] Mugiraneza Appeal Brief, paras. 76-80, 92-95, 102, 103, 109, 112, 114, 116-121. *See also* Mugiraneza Appeal Brief, paras. 81-91, 96, 97, 113; Mugiraneza Reply Brief, paras. 2, 4. Mugiraneza also asserts that the Indictment was confirmed before the Appeals Chamber had recognized the theory of joint criminal enterprise. *See* Mugiraneza Appeal Brief, paras. 79, 102.

[273] Mugiraneza Appeal Brief, paras. 100, 101, 117, *referring to Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011 ("*Uwinkindi* Appeal Decision"), para. 13, *Rukundo* Appeal Judgement, paras. 29, 35-37. *See also* Mugiraneza Reply Brief, paras. 15, 16. Mugiraneza further argues that paragraph 6.45 of the Indictment alleges only that he failed to act and that, in the absence of proof that he was part of a joint criminal enterprise together with Sindikubwabo, he could only have been convicted as an aider and abetter. *See* Mugiraneza Appeal Brief, paras. 224-226. He adds that the Trial Chamber held that the Prosecution failed to prove aider and abetter liability through omission. *See* Mugiraneza Appeal Brief, para. 225, *referring to* Trial Judgement, paras. 1901-1904. In his Reply Brief, however, he advances more general arguments concerning the allegations in paragraphs 6.45 and 6.46 of the Indictment, which he contrasts with his ultimate conviction in relation to the president's speech. *See* Mugiraneza Reply Brief, paras. 10, 53-63. By raising these arguments only in his Reply Brief, Mugiraneza has deprived the Prosecution of the opportunity to respond to them. Therefore, the Appeals Chamber will not consider these arguments further. *See, e.g.*, *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 8.

[274] Mugiraneza Appeal Brief, paras. 76, 105-108, 117.

[275] Mugiraneza Appeal Brief, paras. 77, 79, 98, 99, 109, 110, 117, 120. *See also* Mugiraneza Appeal Brief, para. 114; Mugiraneza Reply Brief, para. 7.

[276] Mugiraneza Appeal Brief, paras. 115, 122.

[277] Mugiraneza Appeal Brief, paras. 79, 122; Mugiraneza Reply Brief, paras. 8, 9.

[I]ndictment and, after determining they did not constitute a crime, chose not to call witnesses related to the [C]abinet meeting or the Butare ceremony".[278]

115. The Prosecution responds that the Trial Chamber correctly determined that any defect in the pleading of joint criminal enterprise in the Indictment had been cured through subsequent submissions and that Mugenzi and Mugiraneza have not demonstrated any resulting prejudice.[279]

116. The Appeals Chamber recalls that 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.[280] In cases where the Prosecution intends to rely on joint criminal enterprise, the Prosecution must plead the purpose of the enterprise, the identity of its participants, the nature of the accused's participation in the enterprise, and the period of the enterprise.[281] Failure to specifically plead joint criminal enterprise, including the supporting material facts and the category, constitutes a defect in the indictment.[282]

117. If an indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.[283] However, a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.[284] 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.[285] In reaching its judgement, a trial chamber can only convict the accused of crimes that are charged in the indictment.[286]

118. Bearing these principles in mind, the Appeals Chamber concurs with the Trial Chamber that the pleading of joint criminal enterprise in the Indictment was defective.[287] Indeed, as the Trial

[278] Mugiraneza Appeal Brief, para. 122. *See also* Mugiraneza Reply Brief, para. 11.
[279] Prosecution Response Brief, paras. 16-56.
[280] *Hategekimana* Appeal Judgement, para. 258; *Muvunyi II* Appeal Judgement, para. 19; *Renzaho* Appeal Judgement, para. 53; *Kalimanzira* Appeal Judgement, para. 46.
[281] *Hategekimana* Appeal Judgement, para. 258; *Munyakazi* Appeal Judgement, para. 161; *Simba* Appeal Judgement, para. 63.
[282] *Hategekimana* Appeal Judgement, para. 258; *Munyakazi* Appeal Judgement, para. 161; *Simba* Appeal Judgement, para. 63.
[283] *Ntabakuze* Appeal Judgement, para. 30; *Renzaho* Appeal Judgement, para. 55; *Simba* Appeal Judgement, para. 64.
[284] *Ntabakuze* Appeal Judgement, para. 30; *Ntawukulilyayo* Appeal Judgement, para. 189; *Renzaho* Appeal Judgement, para. 55; *Rukundo* Appeal Judgement, para. 29.
[285] *Ntabakuze* Appeal Judgement, para. 30; *Ntawukulilyayo* Appeal Judgement, para. 189; *Renzaho* Appeal Judgement, para. 55; *Rukundo* Appeal Judgement, para. 29.
[286] *Ntawukulilyayo* Appeal Judgement, para. 189; *Munyakazi* Appeal Judgement, para. 36; *Rukundo* Appeal Judgement, para. 29. *See also Kvo~ka et al.* Appeal Judgement, para. 33.
[287] Trial Judgement, para. 1923.

Chamber noted, the Appeals Chamber has previously considered formulations similar to those in the Indictment to be insufficient to provide proper notice of joint criminal enterprise.[288]

119. Contrary to Mugiraneza's contention, the Appeals Chamber is not convinced, however, that a pleading of joint criminal enterprise was entirely omitted from the Indictment and that the defect in the Indictment was therefore incapable of being cured. The Appeals Chamber notes that paragraph 6.68 of the Indictment alleges that the accused "act[ed] in concert with" other individuals and "participated in […] a common scheme, strategy or plan, to commit the atrocities set forth above", and that "[t]he crimes were committed by them personally, by persons they assisted or by their subordinates, and with their knowledge or consent". In the *Gacumbitsi* Appeal Judgement, the Appeals Chamber held that a nearly identical formulation could be interpreted either as incorporating joint criminal enterprise or referring to committing genocide through direct participation, aiding and abetting, or superior responsibility pursuant to Article 6(3) of the Statue.[289] As in *Gacumbitsi*, the language of paragraph 6.68 of the Indictment is open to multiple interpretations concerning the mode of liability and is therefore vague as to whether joint criminal enterprise was charged.[290]

120. The situation in the *Rukundo* case to which Mugiraneza points was different in that it did not concern a defect in the indictment due to vagueness. There, the relevant paragraphs of the indictment mentioned three specific modes of liability, whereas the trial chamber entered convictions on the basis of another mode that was not pleaded.[291] The Appeals Chamber held that the trial chamber erred by convicting Emmanuel Rukundo on the basis of a mode of liability that was not charged.[292] Mugiraneza's reliance on the *Uwinkindi* Appeal Decision is similarly unpersuasive, as the Appeals Chamber held in that case that a pre-trial brief could not cure defects in an indictment when challenges to the indictment were raised at the pre-trial stage.[293] In this case,

[288] Trial Judgement, para. 1917, 1918, *referring to Gacumbitsi* Appeal Judgement, paras. 172-174.
[289] *Gacumbitsi* Appeal Judgement, para. 172. The Trial Chamber notably compared the text of paragraph 6.68 of the Indictment to the relevant language in the indictment considered by the Appeals Chamber in the *Gacumbitsi* case. *See* Trial Judgement, paras. 1916-1921.
[290] As Mugiraneza suggests, the Indictment was confirmed before the ICTY Appeals Chamber had recognized the theory of joint criminal enterprise. *Compare* Trial Judgement, Annex A, para. 6 (noting that the Indictment was confirmed on 12 May 1999) *with Tadić* Appeal Judgement, para. 220 (concluding, in a judgement issued on 15 July 1999, that the notion of joint criminal enterprise is firmly established in customary international law). *See also* Trial Judgement, para. 1920. However, he fails to show how this fact demonstrates that the elements of the theory of joint criminal enterprise were omitted from the Indictment or that the Trial Chamber erred in finding that the Indictment reflected the Prosecution's intent to pursue such a theory.
[291] *Rukundo* Appeal Judgement, paras. 20, 34-36.
[292] *Rukundo* Appeal Judgement, para. 37.
[293] *Uwinkindi* Appeal Decision, para. 13 ("Consequently, in a case such as the present, *where defects in the indictment surface at the pre-trial stage*, the Prosecution cannot refrain from amending the indictment by arguing that it will correct existing defects through its Pre-Trial Brief.") (emphasis added).

however, Mugiraneza first challenged the pleading of joint criminal enterprise only after the close of the Prosecution's case, a year and a half after the opening of the trial.[294]

121. In view of the foregoing, the Appeals Chamber is satisfied that, in the present case, it was appropriate for the Trial Chamber to consider whether the Indictment was cured by timely, clear, and consistent information.[295]

122. As the Trial Chamber recalled in the Trial Judgement, none of the accused made a contemporaneous objection to the Prosecution's submissions concerning joint criminal enterprise in the Prosecution Pre-Trial Brief and opening statement.[296] Mugenzi and Mugiraneza both appear to suggest that, because they objected at trial, the Prosecution bears the burden of showing that they were not prejudiced by the defect in the Indictment.[297] They fail to appreciate, however, that the Trial Chamber deemed the objections made after the close of the Prosecution's case untimely and noted that good cause had not been shown for the delay.[298] The Appeals Chamber has previously held that "objections based on lack of notice should be specific and timely".[299] Furthermore, when an objection based on lack of notice is raised at trial, a trial chamber may consider whether it was so untimely as to shift the burden of proof to the Defence to demonstrate that the accused's ability to defend himself has been materially impaired.[300] In the absence of any explanation for Mugenzi's and Mugiraneza's failure to make a contemporaneous objection, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to consider the delay in bringing challenges to the Indictment and conclude that such challenges were untimely. Therefore, Mugenzi and Mugiraneza bear the burden of demonstrating that their ability to prepare a defence was materially impaired.

123. In this context, Mugenzi and Mugiraneza have not demonstrated any error in the Trial Chamber's conclusion that the Prosecution Pre-Trial Brief and opening statement provided

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[294] *See supra* para. 102.
[295] Notably, in the *Gacumbitsi* case, the Appeals Chamber considered whether the Prosecution had cured the defect related to the pleading of joint criminal enterprise in the indictment by examining information provided in the pre-trial brief and opening statement. *See Gacumbitsi* Appeal Judgement, paras. 175-177.
[296] Trial Judgement, para. 1935.
[297] Mugenzi Appeal Brief, paras. 33, 34; Mugiraneza Appeal Brief, para. 91.
[298] Trial Judgement, para. 1935. The Appeals Chamber observes that the Trial Chamber's ruling in this regard was related to motions filed by Mugenzi's and Mugiraneza's co-accused in September 2005. *See* Trial Judgement, para. 1935; *supra* para. 103. Although Mugenzi and Mugiraneza filed challenges in relation to the Indictment two months earlier, they did not specifically address the sufficiency of the Prosecution's pleading of joint criminal enterprise at that time and instead only raised the issue in their Closing Briefs. *See supra* para. 102. In these circumstances, the Appeals Chamber considers that the Trial Chamber's ruling as to the untimely nature of the September 2005 challenges of Mugenzi's and Mugiraneza's co-accused extends to Mugenzi's and Mugiraneza's challenges as well.
[299] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 ("*Bagosora et al.* Appeal Decision of 18 September 2006"), para. 46.
[300] *Bagosora et al.* Appeal Decision of 18 September 2006, paras. 45, 46.

sufficient information to inform Mugenzi and Mugiraneza that they were facing allegations that they participated in a joint criminal enterprise to kill the Tutsis in Butare Prefecture through the commission of the crime of direct and public incitement in relation to Sindikubwabo's 19 April 1994 speech.[301] As the Trial Chamber found, the Prosecution Pre-Trial Brief set forth the Prosecution's allegations as to: (i) the category of joint criminal enterprise (first and third);[302] (ii) the purpose of the enterprise (the elimination of Tutsis as well as the specific crimes pleaded in the Indictment including, *inter alia*, the crime of direct and public incitement to commit genocide);[303] (iii) the identity of its participants (including, *inter alios*, the four accused, other government ministers, and Sindikubwabo);[304] (iv) the nature of the accused's participation in the enterprise (including, *inter alia*, their involvement in the removal of the Butare prefect and presence during the president's speech);[305] and (v) the period of the enterprise (9 April 1994 to 31 July 1994).[306] The intent to rely on joint criminal enterprise was also consistently reiterated during the Prosecution's opening statement.[307]

124. The Appeals Chamber is not convinced that the absence of any explicit discussion of joint criminal enterprise in two Prosecution submissions filed prior to the Prosecution Pre-Trial Brief[308] demonstrates that the Trial Chamber erred in finding that the Prosecution Pre-Trial Brief and opening statement provided clear and consistent notice.[309] Furthermore, while the Prosecution's final written submissions are somewhat equivocal as to whether it was pursuing allegations in relation to Sindikubwabo's 19 April 1994 speech on the basis of joint criminal enterprise,[310] the

[301] Trial Judgement, paras. 1926-1935. As Mugenzi suggests, in the *Kvočka et al.* case the ICTY Appeals Chamber considered more than a pre-trial brief and an opening statement in determining whether a defect in the indictment was cured. *See Kvočka et al.* Appeal Judgement, paras. 43-49, 52-54. However, Mugenzi fails to demonstrate that a pre-trial brief and an opening statement are insufficient, on their own, to cure a defect in an indictment. *See generally Simba* Appeal Judgement, para. 64 (noting that in determining whether a defective indictment was cured, the Appeals Chamber has previously looked at information provided in the Prosecution's pre-trial brief and opening statement). *See also, e.g.*, *Ntabakuze* Appeal Judgement, paras. 48, 49; *Renzaho* Appeal Judgement, paras. 122-124.
[302] Trial Judgement, para. 1926. *See also* Prosecution Pre-Trial Brief, para. 94.
[303] Trial Judgement, para. 1927. *See also* Prosecution Pre-Trial Brief, paras. 45-47, 107-110, 115-117.
[304] Trial Judgement, para. 1928. *See also* Prosecution Pre-Trial Brief, paras. 45, 107-109, 112.
[305] Trial Judgement, paras. 1929-1931. *See also* Prosecution Pre-Trial Brief, paras. 121, 123-127.
[306] Trial Judgement, para. 1928. *See also* Prosecution Pre-Trial Brief, paras. 45, 47, 108, 115.
[307] T. 6 November 2003 pp. 8-10, 12.
[308] *See The Prosecutor v. Justin Mugenzi*, Case No. ICTR-99-50-I, Prosecutor's Reply to the Defence Motion for Stay of Proceedings or in the Alternative Provisional Release and in Addition Severance under Rule 82B, 16 September 2002 (confidential); *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Prosecutor's Request for Leave to File an Amended Indictment, 26 August 2003.
[309] Trial Judgement, paras. 1934-1936.
[310] Prosecution Closing Brief, paras. 213, 295, 296. *See also The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Prosecutor's Written Submissions on the Request of the Trial Chamber dated 14th November 2008, 21 November 2008 (confidential), p. 21 (implicating Mugiraneza in direct and public incitement based on Sindikubwabo's speech without expressly mentioning the theory of liability).

Appeals Chamber recalls that closing submissions cannot constitute proper notice.[311] Accordingly, the Appeals Chamber is not persuaded that any minor ambiguity at that stage demonstrates that the notice provided by the Prosecution Pre-Trial Brief and opening statement lacked clarity or consistency. The Appeals Chamber likewise finds no merit in the contention that the Trial Chamber's decision not to consider challenges to notice until the end of the case, a decision based in part on the untimely nature of the challenges, created further ambiguity. This is particularly true for Mugenzi, who did not challenge the pleading of joint criminal enterprise until his Closing Brief.

125. Turning to whether the information given to Mugenzi and Mugiraneza was timely, the Appeals Chamber observes that notice was provided to Mugenzi and Mugiraneza before the commencement of trial. Mugenzi and Mugiraneza fail to demonstrate that either the Prosecution's delay in requesting to amend the Indictment or the fact that the Prosecution Pre-Trial Brief was filed less than three weeks before the trial began is sufficient, in and of itself, to render untimely the notice provided.

126. The Appeals Chamber is also not convinced by Mugenzi's contention that he suffered prejudice as a result of the expansion of the case on the eve of trial or that the Trial Chamber failed to sufficiently consider this prejudice. Notably, Mugenzi was not convicted on the basis of any of the expanded allegations as to specific factual events which he contends that he was forced to defend against.[312] Moreover, he makes no submissions detailing any efforts that he, in fact, devoted to defending against these expanded allegations. He likewise does not explain how the expanded allegations may have impacted his defence against allegations concerning his role in relation to Sindikubwabo's 19 April 1994 speech, an event in which paragraph 6.45 of the Indictment clearly implicates him. He likewise fails to demonstrate how the Trial Chamber's acceptance of the clarifications in the Prosecution Pre-Trial Brief as to joint criminal enterprise is inconsistent with the Trial Chamber's denial of the Prosecution's request to amend the Indictment or with other evidentiary rulings by the Trial Chamber and the Appeals Chamber.

127. Finally, the Appeals Chamber observes that both Mugenzi and Mugiraneza defended against allegations concerning their role in relation to Sindikubwabo's 19 April 1994 speech, arguing, *inter alia*, that the speech was ambiguous, that it did not amount to direct and public incitement to commit genocide, and that they lacked advance knowledge of its content and purpose.[313] Even if

[311] *See Ntabakuze* Appeal Judgement, para. 80; *Ntawukulilyayo* Appeal Judgement, para. 202; *Gacumbitsi* Appeal Judgement, para. 178.
[312] *See* Mugenzi Appeal Brief, para. 38.
[313] Mugenzi Closing Brief, paras. 740-802, 1376-1388; Mugiraneza Closing Brief, paras. 504-515. *See generally Simba* Appeal Judgement, para. 64 (noting that an accused's submissions at trial, including a final trial brief or closing

there was any latent ambiguity concerning joint criminal enterprise in the Prosecution's closing submissions, Mugenzi and Mugiraneza have not demonstrated on appeal how their defence would have differed had they known that the cases against them were pursued under this theory.

128. In sum, the Appeals Chamber is satisfied that the Trial Chamber did not err in finding that the defect in the pleading of joint criminal enterprise in the Indictment was cured. Furthermore, Mugenzi and Mugiraneza have not demonstrated that they suffered any material prejudice in their ability to prepare their defence.

B. *Mens Rea* (Mugenzi Ground 3, in Part, and Ground 11, in Part; Mugiraneza Ground 5, in Part)

129. The Trial Chamber found that Mugenzi, Mugiraneza, and certain other members of the Interim Government, including Kambanda and Sindikubwabo, participated in a joint criminal enterprise with the common criminal purpose of killing Tutsis in Butare Prefecture.[314] The Trial Chamber held that Sindikubwabo's speech on 19 April 1994, which incited the killing of Tutsis, was made in furtherance of this common criminal purpose.[315] The Trial Chamber concluded that Mugenzi and Mugiraneza "possessed the same genocidal intent held by Sindikubwabo" by virtue of their participation in the decision to remove Habyalimana and their attendance at the installation ceremony on 19 April 1994.[316]

130. Mugenzi and Mugiraneza submit that the Trial Chamber erred in finding that they possessed the *mens rea* necessary to sustain their conviction for direct and public incitement.[317] In particular, Mugenzi submits that the Trial Chamber failed to find that he possessed the requisite intent to directly and publicly incite others to commit genocide.[318] Mugenzi argues that the Trial Chamber's finding that Mugenzi possessed the "same" genocidal intent as Sindikubwabo cannot remedy this error, as intent to kill Tutsis is not equivalent to intent to incite.[319] Mugenzi similarly points to the

arguments, "may assist in some instances in determining to what extent the accused was put on notice of the Prosecution's case").
[314] Trial Judgement, para. 1947. *See also* Trial Judgement, para. 1984.
[315] Trial Judgement, para. 1947. *See also* Trial Judgement, para. 1984.
[316] Trial Judgement, para. 1984.
[317] Mugenzi Appeal Brief, paras. 55, 59-65, 285-291; Mugiraneza Appeal Brief, paras. 210, 211, 220-223. *See also* Mugenzi Reply Brief, paras. 20-22, 91-94; Mugiraneza Reply Brief, paras. 67, 68; AT. 8 October 2012 pp. 4-6, 12, 28, 29, 67.
[318] Mugenzi Appeal Brief, paras. 59-62, 64, 285-291. *See also* Mugenzi Reply Brief, paras. 20-22, 91-94.
[319] Mugenzi Appeal Brief, para. 61, *referring to* Trial Judgement, para. 1984. *See also* Mugenzi Reply Brief, para. 20. Mugenzi also underscores that it is "unsatisfactory" to find an accused's intent simply by reference to the intent of another individual. *See* Mugenzi Appeal Brief, para. 61.

fact that the Trial Chamber only found that he had knowledge of the general content of the president's remarks and avers that knowledge is not equivalent to intent to incite.[320]

131. Furthermore, Mugenzi argues that there is no evidence demonstrating that those who removed Habyalimana could have foreseen that Sindikubwabo would subsequently deliver inflammatory remarks at the installation ceremony of the new prefect.[321] In addition, Mugenzi submits that government ministers frequently attended installation ceremonies for prefects and thus there was nothing unusual or unprecedented about their presence at the ceremony in Butare Prefecture on 19 April 1994.[322] Accordingly, Mugenzi contends that there is no merit in the Trial Chamber's reliance on the presence of such officials at the installation ceremony as implying their support for Sindikubwabo's message.[323] Mugenzi also argues that the Trial Chamber erred in its reliance on his and Kambanda's failure to contradict Sindikubwabo's speech given that they spoke at the ceremony before Sindikubwabo.[324]

132. Mugiraneza submits that the speech was improvised and that there is no evidence that he, or anyone else, knew in advance what the president would say.[325] Mugiraneza contends that in the absence of such evidence his conviction for direct and public incitement cannot stand.[326] He adds that he attended the installation ceremony because he was asked to do so by the government protocol officer.[327]

133. The Prosecution responds that a holistic reading of the Trial Judgement demonstrates that the Trial Chamber made sufficient findings to conclude that Mugenzi possessed both genocidal intent and the intent to directly and publicly incite genocide.[328] The Prosecution adds that the Trial Chamber found, based on a totality of the evidence, that Mugiraneza must have known that Sindikubwabo's speech would incite killings in Butare.[329]

134. Although the Trial Chamber did not expressly identify the form of joint criminal responsibility on which it relied, a review of its legal findings reveals that it held Mugenzi and Mugiraneza responsible for direct and public incitement to commit genocide under the first or basic category of joint criminal enterprise. In this respect, the Trial Chamber found that Mugenzi and

[320] Mugenzi Appeal Brief, para. 286.
[321] Mugenzi Appeal Brief, para. 289.
[322] Mugenzi Appeal Brief, para. 290.
[323] Mugenzi Appeal Brief, para. 290.
[324] Mugenzi Appeal Brief, para. 291. *See also* Mugenzi Appeal Brief, para. 288; Mugenzi Reply Brief, para. 94.
[325] Mugiraneza Appeal Brief, paras. 210, 220-223. *See also* Mugiraneza Reply Brief, para. 67.
[326] Mugiraneza Appeal Brief, para. 223. *See also* Mugiraneza Appeal Brief, para. 222.
[327] Mugiraneza Appeal Brief, para. 211. *See also* Mugiraneza Reply Brief, para. 68.
[328] Prosecution Response Brief, paras. 98-103, 257-261. *See also* AT. 8 October 2012 p. 43.

Mugiraneza possessed the same genocidal intent held by Sindikubwabo and that they were all members of a joint criminal enterprise.[330] These findings are consistent with convictions under the first category of joint criminal enterprise.[331]

135. The Appeals Chamber further recalls that the *mens rea* for the crime of direct and public incitement to commit genocide is the intent to directly and publicly incite others to commit genocide.[332] Such intent in itself presupposes that the perpetrator possesses the specific intent for genocide.[333] The Trial Chamber found that Sindikubwabo possessed both genocidal intent and the intent to directly and publicly incite genocide.[334] While the Trial Chamber did not expressly conclude that Mugenzi and Mugiraneza had the requisite intent to directly and publicly incite others to commit genocide, it found that they possessed the "same genocidal intent held by Sindikubwabo".[335] The Appeals Chamber is satisfied that, when read in context, this finding shows that the Trial Chamber considered that Mugenzi and Mugiraneza possessed both genocidal intent and the intent to incite.[336] The Trial Chamber's findings in this respect as well as its reference to the definition of the crime of direct and public incitement[337] indicate that it was aware of the legal requirement set out above.

136. The Appeals Chamber observes that the Trial Chamber inferred that Mugenzi and Mugiraneza had the requisite intent based on their participation in the decision to remove Habyalimana as prefect of Butare Prefecture on 17 April 1994 and their subsequent presence at the installation ceremony of the new prefect on 19 April 1994 where Sindikubwabo incited the killing of Tutsis.[338] The Appeals Chamber recalls that a conviction may be based on circumstantial evidence but that, where a finding of guilt is based on an inference drawn from such evidence, it must be the only reasonable conclusion that could be drawn from it.[339] If there is another conclusion that could be reasonably reached from the evidence, the conclusion of guilt beyond reasonable doubt cannot be drawn.[340]

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[329] Prosecution Response Brief, paras. 361-363. *See also* AT. 8 October 2012 p. 46.
[330] Trial Judgement, paras. 1947, 1984.
[331] *See Simba* Appeal Judgement, para. 246.
[332] *Nahimana et al.* Appeal Judgement, para. 677. *See also Kalimanzira* Appeal Judgement, para. 155.
[333] *Nahimana et al.* Appeal Judgement, para. 677.
[334] Trial Judgement, para. 1982.
[335] Trial Judgement, para. 1984.
[336] *See* Trial Judgement, paras. 1982-1984.
[337] Trial Judgement, para. 1973.
[338] Trial Judgement, paras. 1983, 1984.
[339] *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al.* Appeal Judgement, para. 306.
[340] *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al.* Appeal Judgement, para. 306.

137. The Appeals Chamber recalls that the Trial Chamber expressly considered Defence evidence that Mugenzi and Mugiraneza did not know what Sindikubwabo would say during the installation ceremony.[341] However, it concluded that, "to the extent that the ministers in Butare, including Mugenzi and Mugiraneza, did not know the precise words the President would utter during the installation ceremony, the only reasonable conclusion is that they knew the message would be aimed at sparking killings of Tutsi civilians there".[342] In reaching this conclusion the Trial Chamber observed that Sindikubwabo's speech was the culmination of the decision by the ministers of the Interim Government, including Mugenzi and Mugiraneza, to remove Habyalimana as prefect of Butare Prefecture.[343] The Trial Chamber also considered that the evidence reflected that the presence of so many high level officials at the installation ceremony was unusual and was intended to make a point.[344] The Trial Chamber further considered that the ceremony was "clearly a coordinated and concerted effort, accumulating an array of national and local officials as well as the resources to have the messages transmitted nationally", and that the ministerial delegation, by including members of a variety of political parties, presented a united Interim Government front in support of Sindikubwabo's speech.[345]

138. The Appeals Chamber finds that the Trial Chamber erred in concluding that the only reasonable inference that could be drawn from the evidence on the record is that Mugenzi and Mugiraneza knew that Sindikubwabo's speech at the ceremony would be aimed at sparking the killing of Tutsis and that, therefore, their presence at the ceremony demonstrates their shared genocidal intent. In this respect, the Appeals Chamber notes the Trial Chamber's acknowledgment that there was no direct evidence that Mugenzi and Mugiraneza met with Sindikubwabo immediately prior to the ceremony or any other direct evidence of "pre-planning".[346] Furthermore, the Appeals Chamber considers that, given that Mugenzi spoke at the ceremony before Sindikubwabo, it was unreasonable for the Trial Chamber to rely on the fact that Mugenzi did not contradict Sindikubwabo in support of its finding that Mugenzi must have known the intended message of the president's speech.[347]

139. The Appeals Chamber also considers that, based on the record, no reasonable trier of fact could have excluded the reasonable possibility that Mugenzi and Mugiraneza attended the

[341] Trial Judgement, para. 1368.
[342] Trial Judgement, para. 1369. *See also* Trial Judgement, para. 1941. Elsewhere in the Trial Judgement the Trial Chamber specifically rejected the Defence evidence that the Interim Government ministers did not know what Sindikubwabo would say as "unbelievable". Trial Judgement, para. 1944.
[343] Trial Judgement, para. 1369.
[344] Trial Judgement, para. 1369. *See also* Trial Judgement, para. 1944.
[345] Trial Judgement, para. 1369. *See also* Trial Judgement, para. 1943.
[346] Trial Judgement, para. 1943. *See also* Trial Judgement, para. 1942.

installation ceremony for reasons other than because they shared a common criminal purpose of killing Tutsis in Butare Prefecture. Notably, Mugenzi and Mugiraneza submit that they attended the ceremony as a result of obligations arising from their positions as ministers.[348] Indeed, the Trial Chamber recounted evidence from Mugiraneza and Defence Witness André Ntagerura, a former minister, that their attendance at the installation ceremony resulted from obligations of protocol and custom.[349] The Trial Chamber did not discount this evidence and, in fact, took it into account in rejecting Mugenzi's claim that Sindikubwabo's attendance at the ceremony was unexpected.[350] Moreover, a review of the Trial Judgement reflects that Mugenzi also attended the installation ceremony of the new prefect of Gisenyi Prefecture on 20 April 1994 and that there is evidence that Kambanda and other ministers attended the installation ceremony of the prefect of Ruhengeri Prefecture in the second half of April 1994.[351]

140. Furthermore, the Trial Chamber relied on its finding that Mugenzi and Mugiraneza acted with genocidal intent in agreeing on 17 April 1994 to remove Habyalimana as the prefect of Butare Prefecture to reinforce its conclusion that they would have thus known that Sindikubwabo's message would be aimed at sparking the killings in Butare Prefecture in view of the coordinated nature of the events.[352] The Appeals Chamber recalls that it has reversed, Judge Liu dissenting, the Trial Chamber's finding that Mugenzi and Mugiraneza possessed genocidal intent in taking the decision to replace Habyalimana.[353] The Appeals Chamber thus considers that Mugenzi's and Mugiraneza's participation in the decision could not support the finding of their *mens rea* for direct and public incitement to commit genocide.

141. Accordingly, Mugenzi and Mugiraneza have demonstrated that the Trial Chamber erred in its assessment of the evidence related to their *mens rea* for convictions for direct and public

[347] *See* Trial Judgement, para. 1369.
[348] *See, e.g.*, Mugenzi Appeal Brief, para. 290 (recalling that Mugenzi attended the installation ceremony of the prefect of Gisenyi Prefecture on 20 April 1994 and that Kambanda and other members of the Interim Government attended the 22 April 1994 installation ceremony for the prefect of Ruhengeri Prefecture); Mugiraneza Appeal Brief, paras. 164, 211 (contending that Mugiraneza's attendance at the 19 April 1994 installation ceremony could reasonably be explained as a matter of state protocol).
[349] Trial Judgement, paras. 1297, 1301.
[350] Trial Judgement, n. 1977.
[351] Trial Judgement, paras. 1391, 1400, 1428, 1430. The Trial Chamber did not discount the evidence of Defence Witness Basile Nsabumugisha concerning the ministerial presence at his swearing-in ceremony as the new prefect of Ruhengeri Prefecture. *See* Trial Judgement, paras. 1430, 1439.
[352] Trial Judgement, para. 1984.
[353] *See supra* paras. 93, 94.

incitement to commit genocide. The Appeals Chamber therefore dismisses their remaining arguments as moot.[354]

C. Conclusion

142. For the foregoing reasons, the Appeals Chamber dismisses Mugenzi's First and Second Grounds of Appeal and Mugiraneza's Fifth Ground of Appeal, in part. The Appeals Chamber grants Mugenzi's Third and Eleventh Grounds of Appeal, in part, and Mugiraneza's Fifth Ground of Appeal, in part. Accordingly, the Appeals Chamber reverses Mugenzi's and Mugiraneza's convictions for direct and public incitement to commit genocide and enters a verdict of acquittal under Counts 4 and 5 of the Indictment. It is therefore unnecessary to address the remaining submissions related to these convictions.[355]

VI. SENTENCE

143. The Trial Chamber sentenced Mugenzi and Mugiraneza each to a single sentence of 30 years of imprisonment for their convictions for conspiracy to commit genocide and direct and public incitement to commit genocide.[356] Mugenzi and Mugiraneza have appealed their sentences.[357] The Appeals Chamber has reversed, Judge Liu dissenting in part, all of Mugenzi's and

[354] In these circumstances, the Appeals Chamber also need not address Mugiraneza's request for the admission of material from the *Ngirabatware* case as additional evidence on appeal. *See generally* Mugiraneza Motion of 8 October 2012, *referring to* material from the *Ngirabatware* case. *See also* Mugiraneza Reply, paras. 18-24. This motion is therefore dismissed, in part, as moot. *See also supra* para. 64.

[355] More specifically, Mugenzi and Mugiraneza challenge the Trial Chamber's conclusions that Sindikubwabo's speech amounted to a *direct* call to incitement and that the president's remarks were intended to be *public* (Mugenzi Grounds 12, 13, and 14; Mugiraneza Ground 5, in Part). *See* Mugenzi Notice of Appeal, paras. 35-42; Mugenzi Appeal Brief, paras. 209-284, 298; Mugiraneza Notice of Appeal, paras. 23, 24; Mugiraneza Appeal Brief, paras. 209, 210, 217-219. *See also* Mugenzi Reply Brief, paras. 60-90. Mugenzi and Mugiraneza submit that the Trial Chamber erred in assessing the elements of joint criminal enterprise with regard to the scope of the joint criminal enterprise, Mugenzi's and Mugiraneza's significant contribution to the joint criminal enterprise, and Sindikubwabo's membership in the joint criminal enterprise (Mugenzi Grounds 3, in Part, 5 and 6, and 11, in Part; Mugiraneza Ground 5, in Part). *See* Mugenzi Notice of Appeal, paras. 10, 17-21, 32; Mugenzi Appeal Brief, paras. 53-58, 63-65, 83-102, 292-297; Mugiraneza Notice of Appeal, para. 26; Mugiraneza Appeal Brief, paras. 224-226. *See also* Mugenzi Reply Brief, paras. 16-19, 25-27, 95-99; Mugiraneza Reply Brief, paras. 51, 52, 64-68. Finally, Mugiraneza argues that the Trial Chamber failed to consider that duress was a full defence against his conviction for direct and public incitement (Ground 5, in Part). *See* Mugiraneza Notice of Appeal, pp. 8, 9; Mugiraneza Appeal Brief, paras. 227-229. *See also* Mugiraneza Reply Brief, paras. 73-81.

[356] Trial Judgement, paras. 1988, 2021, 2022.

[357] Mugenzi Notice of Appeal, para. 46; Mugenzi Appeal Brief, paras. 323-340; Mugiraneza Notice of Appeal, paras. 42-44; Mugiraneza Appeal Brief, paras. 252-265, 269.

Mugiraneza's convictions.[358] Accordingly, the Appeals Chamber need not address any alleged errors relating to their sentences.

[358] *See supra* paras. 93, 94, 141, 142.

VII. DISPOSITION

144. For the foregoing reasons, **THE APPEALS CHAMBER**,

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

SITTING in open session;

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 8 October 2012;

GRANTS, Judge Liu dissenting, Mugenzi's Fourth Ground of Appeal, Seventh Ground of Appeal, in part, and Ninth and Tenth Grounds of Appeal and Mugiraneza's Fifth and Sixth Grounds of Appeal, in part, **REVERSES** their convictions for conspiracy to commit genocide, and **ENTERS**, in respect of them, Judge Liu dissenting, a verdict of acquittal under Count 1 of the Indictment;

GRANTS Mugenzi's Third and Eleventh Grounds of Appeal, in part, and Mugiraneza's Fifth Ground of Appeal, in part, **REVERSES** their convictions for direct and public incitement to commit genocide, and **ENTERS**, in respect of them, a verdict of acquittal under Counts 4 and 5 of the Indictment;

DISMISSES, Judge Robinson dissenting in part, Mugenzi's and Mugiraneza's remaining grounds of appeal in all other respects as well as all pending motions; and

ORDERS, in accordance with Rules 99(A) and 107 of the Rules, the immediate release of Mugenzi and Mugiraneza and **DIRECTS** the Registrar to make the necessary arrangements.

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

Theodor Meron	Patrick Robinson	Liu Daqun
Presiding Judge	Judge	Judge

Andrésia Vaz	Bakhtiyar Tuzmukhamedov
Judge	Judge

Judge Robinson appends a partially dissenting opinion.

Judge Liu appends a dissenting opinion.

Done this 4th day of February 2013 at Arusha, Tanzania.

[Seal of the Tribunal]

VIII. PARTIALLY DISSENTING OPINION OF JUDGE PATRICK ROBINSON

A. Undue Delay

1. I have joined the Majority in overturning the convictions of Mugenzi and Mugiraneza for conspiracy to commit genocide and direct and public incitement to commit genocide.[1] However, I differ from the Majority on the question of undue delay, in that, I consider the period of two years and ten months for the preparation of the Trial Judgement to be inordinately long and as such a breach of the Appellants' right to trial without undue delay.[2]

2. While the Trial Chamber sought to explain the overall length of the proceedings, it did not focus specifically on the length of the judgement drafting phase.[3] In my view, in determining the question of undue delay the length of the judgement drafting phase required special attention. In noting that the overall proceedings were lengthy, the Trial Chamber acknowledged that the conduct of the Tribunal and increased workload of the presiding judges contributed to this delay in proceedings.[4] It is observed that the Majority have commented that "it is not unusual for judges of the Tribunal to participate in multiple proceedings, impacting the pace of those respective proceedings";[5] however, even if the assignment of Judges to multiple cases is a factor that operated to lengthen the judgement drafting phase, - and I very much doubt that that fact alone could ever be sufficient to justify the lengthy delay in the judgement drafting phase of any case – it cannot properly be invoked in response to a claim of undue delay. When delay results from the manner in which the Tribunal has organized and managed its resources, it is no answer to a claim of undue delay that the exigencies of the Tribunal's work dictated that course, if the claim for undue delay is otherwise well-grounded.

3. I note Mugiraneza's submission that the "length of the delay between submissions and judgment should be given great weight",[6] and concur with Judge Short's conclusion that the Majority in the Trial Chamber's judgement did not sufficiently consider the reasonableness of the time taken to deliver the Trial Judgement; more specifically he found that the period of three years

[1] Judgement, paras. 101, 149, 151.
[2] Judgement, paras. 35, 37.
[3] Trial Judgement, para. 74.
[4] Trial Judgement, paras. 74, 75. *See also* Trial Judgement, Partially Dissenting Opinion of Judge Emile Francis Short ("Judge Short's Partial Dissent"), para. 5.
[5] Judgement, para. 35.
[6] Mugiraneza Appeal Brief, para. 39.

between the close of evidence and the rendering of the Trial Judgement was "sufficient to constitute a violation of the Accused's right to trial without undue delay";[7] this failure to give due weight to a relevant consideration amounts to an error by the Trial Chamber.

4. In other large and complex trials, the judgement phase was considerably shorter.[8] For example, the *Bagosora et al.* case, which the Trial Chamber considered in assessing the length of its own proceedings,[9] also related to four co-accused but involved more extensive evidence in terms of the number of witnesses heard and exhibits received.[10] However, the judgement drafting phase in that case lasted approximately one year and eight months,[11] Another example is the ICTY case of *Popović et al.*, in which there were seven accused; although it was more complex than the instant case, the preparation of the trial judgement was completed in nine months.[12]

5. In sum, I find that the Trial Chamber failed to give sufficient weight to the length of the judgement drafting phase in determining whether there was a breach of the Appellants' right to trial without undue delay.

B. Financial Compensation as an Effective Remedy

6. The next issue to consider is the appropriate remedy for the breach of the Appellants' right to trial without undue delay. In that regard, I have considered whether formal recognition would constitute a sufficient remedy and concluded that it would not. In my view, Mugenzi and Mugiraneza are entitled to financial compensation.

7. In *Kajelijeli* the Appeals Chamber held that "[w]here a suspect or an accused's rights have been violated during the period of his unlawful detention pending transfer and trial, Article 2(3)(a) of the ICCPR stipulates that "[a]ny person whose rights or freedoms as herein recognized are

[7] Judge Short's Partial Dissent, paras. 3, 5.
[8] *Bagosora et al.* Trial Judgement, paras. 2367, 2368 (noting that closing statements were completed on 1 June 2007 and the written judgement was filed on 9 February 2009); *Ntagerura et al.* Trial Judgement, para. 24 (noting, in a judgement filed on 25 February 2004, that closing statements were concluded on 15 August 2003); *Nahimana et al.* Trial Judgement, paras. 94, (stating that closing arguments were completed on 22 August 2003 in a judgement issued in writing on 5 December 2003).
[9] Trial Judgement, para. 78.
[10] *See Bagosora et al.* Trial Judgement, para. 78 ("The three Indictments against the four Accused each charged direct and superior responsibility and between 10 and 12 counts, including conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (murder, extermination, rape, persecution and other inhumane acts) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (violence to life and outrages upon personal dignity). Over the course of 408 trial days, the Chamber heard 242 witnesses, received nearly 1,600 exhibits and issued around 300 written decisions.") (references omitted).
[11] *See Bagosora et al.* Trial Judgement, paras. 2367, 2368 (noting that closing statements were completed on 1 June 2007 and the written judgement was filed on 9 February 2009).

violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".”[13] An effective remedy is one that is sufficient to compensate for the right breached, taking into account all the relevant circumstances including the subject matter, the nature of the right breached, and the stage of the proceedings when that right was breached.[14]

8. I consider that two years and ten months is an inordinately long period of time to prepare the Trial Judgement in the circumstances of this case, and that the drafting phase was unduly delayed. Although it is difficult to specify with precision what portion of the two years and ten months amounts to undue delay, in my view a substantial portion of that period constitutes undue delay, and it is clear that the Appellants were prejudiced by the protracted delay in the rendering of the verdict and the resulting prolonged detention during a portion of the judgement drafting phase.

9. The cases establish that the remedy of formal recognition of a breach is most usually applicable to breaches that are not considered substantial or do not prejudice the accused/appellant.[15] In *Bagosora et al.*, the Trial Chamber properly distinguished the more substantial breaches in the *Rwamakuba* and *Kajelijeli* cases, warranting financial compensation or reduction of sentence, from the *Bagosora et al.* case where the breaches were minimal, in respect of which formal recognition that they occurred was an appropriate remedy;[16] that is not the situation here: the breach is substantial and prejudices the Appellants. I would estimate the period of undue delay to be as long as one year – a substantial period. Moreover, Mugenzi and Mugiraneza suffered psychological non-pecuniary damage which cannot be sufficiently compensated by the mere finding of a violation; cases show that in such circumstances financial compensation is warranted.[17]

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[12] *Popović et al.* Trial Judgement, Annex 2, para. 36 (observing, in a judgement issued in writing on 10 June 2010, that closing arguments concluded on 14 September 2009). This case is still on appeal.
[13] *Kajelijeli* Appeal Judgement, para. 322.
[14] See *Attorney-General's Reference No. 2 of 2001* [2003] UKHL 68, para. 24, in particular Lord Bingham's reference to the stage of proceedings.
[15] *Jean Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 ("*Barayagwiza* Decision"), paras. 53-70, 75; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000 ("*Semanza* Decision"), paras. 87, 90, 114, 127, 128, Disposition; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007 ("*Rwamakuba* Trial Chamber Decision"), paras. 1-4, 68-70, 73, p. 23; *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision Appropriate Remedy, 13 September 2007 ("*Rwamakuba* Appeals Chamber Decision"), paras. 23, 25, 27, 30; *Bagosora et al.* Trial Judgement, para. 97.
[16] *Bagosora et al.* Trial Judgement, para. 97.
[17] *Beggs v. The United Kingdom* [2012] ECHR 1868, para. 282, where the ECHR considered that the applicant suffered some frustration resulting from delays attributable to the authorities, which cannot sufficiently be compensated by the finding of a violation; *Mitchell and Holloway v. The United Kingdom* [2002] ECHR 818, para. 69, where the ECHR considered that the applicants "must have certainly suffered some non-pecuniary damage, such as distress and frustration resulting from the protracted length of the proceedings, which cannot sufficiently be compensated by the finding of a violation".

10. There is precedent in the Tribunal for the award of financial compensation.[18] Significantly, the Appeals Chamber's dictum in *Rwamakuba* that "in practice, the effective remedy accorded by a Chamber for violations of an accused's fair trial rights will almost always take the form of equitable or declaratory relief"[19] does not rule out financial compensation. Each case must be examined on its own merits. Nor should the holding "in the past, the Appeals Chamber has envisioned financial compensation as a form of effective remedy only in situations where, amongst other violations, an accused was impermissibly detained without being informed of the charges against him"[20] be misconstrued. This is nothing more than a reference to the requirement under Article 9(5) of the ICCPR for "an enforceable right to compensation". That provision in the ICCPR reflects a rule of customary international law which would be binding on the Tribunal. But it obviously does not mean that compensation for a breach of fair trial rights is confined to unlawful detention or arrest. In the *Rwamakuba* case itself, the Appeals Chamber confirmed the Trial Chamber's award of US$2,000.00 for the delay in assigning counsel to the accused, and the Appeals Chamber outlined what, in my view, is the proper basis for determining the form of relief that should be granted for a breach of a fair trial right when it said "the jurisprudence of the Appeals Chamber reflects that the nature and form of the effective remedy should be proportional to the gravity of harm that is suffered".[21] Again, the proportionality requirement means that each case has to be determined on the basis of its own facts.

11. An important factor in determining the nature and form of the effective remedy in this case is the stage of the proceedings at which the breach occurred.[22] In this case the breach occurred during the period between the end of the case and the delivery of the Trial Judgement – a period of suspense, frustration, and waiting for the judgement that was prolonged for a substantial period of time by reason of the breach. This is a period during which the Appellants could have been in the company of their families. In the Judgement there is a reference to the assertion by Mugenzi that he "suffered prejudice because he spent 12.5 years away from his family in detention "as a man presumed innocent Ŧ…ğ kept uncertain as to his fate"."[23] The trauma and anxiety that come from the feeling of uncertainty of his fate would have been aggravated in this penultimate phase before the delivery of the Trial Judgement. Likewise, I note that during the Appeals Hearing, counsel for Mugiraneza referred to his client spending "13 years sitting in the UNDF [United Nations Detention

[18] *Barayagwiza* Decision, para. 75; *Semanza* Decision, Disposition; *Rwamakuba* Trial Chamber Decision, p. 23; *Rwamakuba* Appeals Chamber Decision, paras. 31, 32; *Bagosora et al.* Trial Judgement, para. 87.
[19] *Rwamakuba* Appeals Chamber Decision, para. 27.
[20] *Ibid*.
[21] *Ibid*.
[22] *See supra* n. 14.
[23] Judgement, para. 24.

Facilities] while his family's some place else" while being uncertain about his future.[24] Mugiraneza had also submitted that the "anxiety he bore while waiting a dozen years to know his fate and the outcome of the trial can never be undone".[25] I take this to be good evidence of the impact of the prolonged detention on the psychological state of Mugenzi and Mugiraneza. This prolonged detention included the critically suspenseful period that was of such length as to constitute undue delay. There is nothing in the record from the Prosecution contradicting these assertions by Mugenzi and Mugiraneza. In sum, Mugenzi and Mugiraneza suffered non-pecuniary damages that cannot be sufficiently compensated by the mere finding of a violation, which is what a formal recognition of the violation amounts to.

12. The factors most relevant to, and determinative of, the quantum of compensation are the extent of moral damage and the loss of income for the period of one year. As to the former, there is evidence of the impact of the prolonged detention on the psychological state of Mugenzi and Mugiraneza, but none in relation to the latter. Ideally, the Chamber should have had information from Mugenzi and Mugiraneza on this question. In the absence of any information or evidence on loss of income, I would fix compensation for moral damages at US$5,000.00 for each Appellant.[26]

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

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Judge Patrick Robinson

Done this 4th day of February 2013 at Arusha, Tanzania.

[Seal of the Tribunal]

[24] T. 8 October 2012 p. 31.
[25] Mugiraneza Appeal Brief, para. 49.
[26] Offering guidance is the *Rwamakuba* case, where the appellant was awarded US$2,000.00 for a delay of 125 days, *Rwamakuba* Trial Chamber Decision, paras. 28, 31, 32, p. 23; *Rwamakuba* Appeals Chamber Decision, paras. 31, 32. Notably, also in the *Rwamakuba* case, on the reasonableness of the amount, the Appeals Chamber rejected the Registrar's submission that US$2,000.00 had no basis in fact, *i.e.* Rwamakuba should have shown proof of specific harm. *See Rwamakuba* Appeals Chamber Decision, para. 29.

IX. DISSENTING OPINION OF JUDGE LIU

1. In this Judgement, the Majority reverses Justin Mugenzi's and Prosper Mugiraneza's convictions for conspiracy to commit genocide for the removal of Jean-Baptiste Habyalimana as the Prefect of Butare Prefecture, and enters a verdict of acquittal.[1] The Majority finds that the Trial Chamber erred in concluding that the only reasonable inference that could be drawn from the evidence is that Mugenzi and Mugiraneza possessed the requisite *mens rea* for conspiracy to commit genocide.[2] For the reasons expressed below, I am unable to agree with the Majority's reasoning and the consequent reversal of the Trial Chamber's verdict in this regard.

2. The Trial Chamber found that the decision to dismiss Habyalimana from his post as the Prefect of Buture Prefecture was taken during a meeting of Interim Government ministers on 17 April 1994, which Mugenzi and Mugiraneza attended.[3] The Trial Chamber considered that the evidence compellingly established that Mugenzi and Mugiraneza agreed with the decision to dismiss Habyalimana.[4] It concluded that the decision to remove Habyalimana, a Tutsi and a moderate PL opposition party leader,[5] was "part of a larger agenda aimed at furthering the killing of Tutsi civilians in Butare"[6] in order to extend the genocide.[7] In reaching this conclusion, the Trial Chamber observed that, under Habyalimana's administration, most of Butare Prefecture had avoided the scale of ethnic violence occurring elsewhere in Rwanda[8] and noted that "Habyalimana and his prefecture had achieved relative success in keeping killings in abeyance while he retained the post as prefect."[9]

3. More specifically, the Trial Chamber considered evidence that Butare, and Butare town in particular, had remained relatively peaceful prior to Habyalimana's removal.[10] It noted that Jean Kambanda, Prime Minister of the Interim Government, issued a public statement on 11 April 1994, which indicated that the Interim Government was receiving reports that the situation was calm in Butare.[11] The Trial Chamber further observed that Kambanda had criticised Habyalimana for being

[1] Appeal Judgement, para. 94.
[2] Appeal Judgement, para. 91.
[3] Trial Judgement, para. 1223.
[4] Trial Judgement, paras. 1228-1231.
[5] Trial Judgement, para. 1243.
[6] Trial Judgement, para. 1235.
[7] Trial Judgement, para. 1961.
[8] Trial Judgement, para. 1240.
[9] Trial Judgement, para. 1241.
[10] Trial Judgement, para. 1240. *See also* Trial Judgement, para. 1242.
[11] Trial Judgement, para. 1242.

"inactive" and not having started killings in his prefecture.[12] In addition, the Trial Chamber noted evidence that Habyalimana was regarded "among the prefects who took action to stop killings and lootings."[13] In this context, the Trial Chamber also took into account the joint *communiqué* issued on 16 April 1994 by Habyalimana and the Prefect of Gikongoro in direct response to violence in the border regions of the two prefectures, condemning the violence.[14] Indeed, the Trial Chamber was clear and unequivocal; it had no doubt that Habyalimana "would have been perceived by those who removed him as opposing the targeted killings of Tutsi civilians."[15]

4. Moreover, the Trial Chamber considered that, while killings had occurred in Butare prior to Habyalimana's removal, these were ostensibly localised in the Prefecture's outer communes near Gikongoro.[16] By contrast, it observed that the killings in Butare Prefecture spread dramatically and peaked from 19-26 April 1994, after Habyalimana had been removed from office.[17] In view of the evidence as a whole, the Trial Chamber determined that the only reasonable conclusion is that Mugenzi, Mugiraneza, and the other members of the Interim Government who agreed to remove Habyalimana made this decision with the requisite genocidal intent to undercut the real and symbolic resistance the Tutsi Prefect posed to the targeted killing of Tutsi civilians inhabiting or seeking refuge in Butare.[18]

5. In its assessment of the evidence, the Trial Chamber carefully considered and reasonably rejected the alternative explanations advanced by the Defence for the reasons behind the decision to dismiss Habyalimana from his post. The Trial Chamber concluded that the Defence explanations for Habyalimana's removal, when viewed in the context of all the evidence, did not raise doubt in the Prosecution evidence that his dismissal was part of a larger agenda aimed at furthering the killing of Tutsi civilians in Butare.[19] In this regard, the Trial Chamber considered, *inter alia*, evidence that the war-front was relatively far from Butare Prefecture, that there was no legitimate threat of invasion by the RPF from neighbouring Burundi, and that the evidence of RPF infiltration in the area was general or pre-dated 1994.[20] Notwithstanding this detailed and considered evaluation of the evidence, and without identifying any specific error, the Majority maintains that

[12] Trial Judgement, para. 1234.
[13] Trial Judgement, para. 1243.
[14] Trial Judgement, para. 1243.
[15] Trial Judgement, para. 1243.
[16] Trial Judgement, para. 1241.
[17] Trial Judgement, para. 1241. In this regard, I note that the Trial Chamber observed that the killings increased after the inflammatory speech by Théodore Sindikubwabo on 19 April 1994. While the Trial Chamber considered the impact of this speech in the context of its evaluation of Habyalimana's dismissal, it did not primarily rely on this factor in finding Mugenzi and Mugiraneza guilty of conspiracy to commit genocide.
[18] Trial Judgement, paras. 1246, 1250, 1961.
[19] Trial Judgement, para. 1235.
[20] Trial Judgement, paras. 1234, 1236. *See also* Trial Judgement, paras. 1244, 1247-1249.

the Trial Chamber failed to "eliminate the reasonable possibility that Mugenzi and Mugiraneza agreed to remove Habyalimana for political or administrative reasons rather than for the purpose of furthering the killing of Tutsis in Butare Prefecture."[21] In my view, this conclusion is without foundation and exceeds the purview of the Appeals Chamber.

6. Mugenzi and Mugiraneza have failed to demonstrate that the Trial Chamber erred by not giving sufficient credence to the evidence on the record suggesting that Habyalimana's dismissal was motivated by concerns other than furthering the killings of Tutsi civilians in Butare. Mugenzi and Mugiraneza have likewise failed to show that the Trial Chamber exceeded the scope of its discretion in weighing the evidence and in rejecting alternative explanations for Habyalimana's removal.[22] Moreover, having considered the totality of the arguments advanced by Mugenzi and Mugiraneza, I would dismiss all their submissions concerning their convictions for conspiracy to commit genocide and uphold these convictions.[23]

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

Done this 4th day of February 2013,
at Arusha,
Tanzania.

Judge Liu Daqun

Seal of the Tribunal

[21] Appeal Judgement, para. 91.
[22] In particular, and limiting this analysis to the challenges of the Trial Chamber's rejection of alternative explanations, I consider that Mugenzi has failed to demonstrate that the Trial Chamber erred by not giving sufficient credence to the evidence on the record suggesting that Habyalimana's dismissal was motivated by concerns about his job performance, suspicions concerning his links to the RPF based, *inter alia*, on report from the Interior Ministry, and the possibility of RPF infiltration of Butare. I note that the Trial Chamber specifically acknowledged the possibility that Cabinet ministers received evidence that Habyalimana might have links with the RPF at the meeting on 17 April 1994, but concluded that, to the extent such allegations were discussed, there was no doubt that "all participants would have understood them as relying primarily on the fact that he was a Tutsi and political moderate rather than any genuine threat he posed to safety in his prefecture through RPF infiltration". *See* Trial Judgement, para. 1235. *See also* Trial Judgement, para. 1233. Mugenzi has also failed to show why evidence concerning the report of the Interior Ministry related to his possible links to the RPF, even if not sufficiently considered by the Trial Chamber, would demonstrate any error in this conclusion. Similarly, although Mugenzi contests the Trial Chamber's assessment of the evidence concerning Habyalimana's ability to lead Butare Prefecture and possible RPF infiltration of the prefecture, he has failed to demonstrate that the Trial Chamber exceeded the scope of its discretion in weighing this evidence and in rejecting it as an alternative explanation for Habyalimana's removal. *See* Trial Judgement, para. 1235. In this respect, I note that, even as framed by Mugenzi, Witness Des Forges's testimony suggests that RPF infiltration of Butare was relatively

unlikely, and Mugenzi's own testimony indicated that he did not consider infiltration to be widespread. *See* Mugenzi Appeal Brief, para. 127; Trial Judgement, para. 1236. *See also* T. 9 November 2005 p. 72.

[23] *See* Appeal Judgement, para. 94.

X. ANNEX A – PROCEDURAL HISTORY

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

A. Notices of Appeal and Briefs

2. The Trial Chamber rendered the judgement in this case on 30 September 2011 and issued the written Trial Judgement on 19 October 2011. Only Mugenzi and Mugiraneza appealed.

3. Mugenzi and Mugiraneza filed their respective notices of appeal on 21 November 2011.[1] On 30 November 2011, the Pre-Appeal Judge granted in part Mugiraneza's motion for an extension of time to file his notice of appeal and considered Mugenzi's and Mugiraneza's notices of appeal to be validly filed.[2]

4. On 26 January 2012, the Pre-Appeal Judge dismissed Mugiraneza's motion for an extension of time to file his Appellant's brief but found, *proprio motu,* that good cause existed to grant a 14-day extension of time to both Mugenzi and Mugiraneza.[3] Mugenzi and Mugiraneza filed their respective appeal briefs on 20 February 2012.[4]

5. On 2 April 2012, the Prosecution filed its initial Respondent's briefs in relation to Mugenzi's and Mugiraneza's respective appeals.[5] On 16 April 2012, the Pre-Appeal Judge granted Mugenzi's and Mugiraneza's requests that the Prosecution be ordered to re-file its Respondent's briefs and ordered the Prosecution to re-file them in compliance with the word limit provided for in the Practice Direction on the Length of Briefs and Motions on Appeal dated 8 December 2006 or, in the alternative, to file a motion requesting authorization to exceed this word limit.[6] On 25 April 2012, the Pre-Appeal Judge denied the Prosecution's motion requesting such authorization and

[1] Justin Mugenzi's Notice of Appeal, 21 November 2011; Prosper Mugiraneza's Notice of Appeal, 21 November 2011. *See also* Prosper Mugiraneza's Corrected Notice of Appeal, 22 November 2011.
[2] Decision on Prosper Mugiraneza's Motion for an Extension of Time to File Notice of Appeal, 30 November 2011, pp. 1, 2.
[3] Decision on Prosper Mugiraneza's Motion for Extension of Time to File his Appellant's Brief, 26 January 2012, paras. 1, 10, 11.
[4] Justin Mugenzi's Appeal Brief, 20 February 2012; Prosper Mugiraneza's Appellate Brief, 20 February 2012.
[5] Prosecutor's Brief in Response to Justin Mugenzi's Appeal, 2 April 2012; Prosecutor's Brief in Response to Prosper Mugiraneza's Appeal, 2 April 2012.
[6] Decision on Motions for an Order Requiring the Prosecution to Re-file its Response Briefs, 16 April 2012, pp. 1, 2, 4.

ordered the Prosecution to file its Respondent's brief(s) in compliance with the word limit.[7] The Prosecution filed its consolidated response brief on 30 April 2012.[8]

6. On 10 May 2012, the Pre-Appeal Judge denied Mugiraneza's motion seeking, *inter alia*, an extension of time for the filing of his brief in reply.[9] Mugenzi and Mugiraneza filed their respective reply briefs on 15 May 2012.[10] On 18 June 2012, the Pre-Appeal Judge granted the Prosecution's motion requesting that Annexes D and E to the Mugiraneza Reply Brief be expunged from the record and directed the Registry to replace them with amended versions of Annexes D and E.[11]

B. Assignment of Judges

7. On 14 October 2011, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Liu Daqun, Judge Andrésia Vaz, Judge Theodor Meron, Judge Carmel Agius, and Judge Arlette Ramaroson.[12] On 4 November 2011, the Presiding Judge of the Appeals Chamber, Judge Patrick Robinson, replaced Judge Arlette Ramaroson with himself.[13] On 17 November 2011, Judge Theodor Meron became the Presiding Judge of the Appeals Chamber and on 30 November 2011, Judge Theodor Meron designated himself as Pre-Appeal Judge.[14] On 5 July 2012, he replaced Judge Carmel Agius with Judge Bakhtiyar Tuzmukhamedov.[15]

C. Motions Related to Alleged Disclosure Violations and to Admission of Additional Evidence on Appeal

8. On 21 November 2011, Mugiraneza filed a motion requesting the Appeals Chamber to order the Prosecution to disclose certain exculpatory material and sanction the Prosecution for its disclosure violations.[16] The Prosecution responded on 1 December 2011.[17] Mugiraneza replied on 5 December 2011.[18] On 22 March 2012, the Appeals Chamber denied the motion.[19]

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[7] Decision on the Prosecution's Motion for an Extension of the Word Limit for its Respondent's Briefs, 25 April 2012, p. 3.
[8] Prosecutor's Brief in Response to Justin Mugenzi and Prosper Mugiraneza's Appeals, 30 April 2012.
[9] Decision on Prosper Mugiraneza's Requests for a Writ of Mandamus and an Extension of Time, 10 May 2012, pp. 2, 3.
[10] Justin Mugenzi's Reply Brief, 15 May 2012; Prosper Mugiraneza's Reply to the Prosecutor's Appellate Brief, 15 May 2012.
[11] Decision on Prosecutor's Motion to Expunge from the Record Annexes D and E to Mugiraneza's Reply Brief, 18 June 2012, pp. 2, 3.
[12] Order Assigning Judges to a Case Before the Appeals Chamber, 14 October 2011, p. 1.
[13] Order Replacing a Judge in a Case Before the Appeals Chamber, 4 November 2011, p. 1.
[14] Order Assigning a Pre-Appeal Judge, 30 November 2011, p. 1.
[15] Order Replacing a Judge in a Case Before the Appeals Chamber, 5 July 2012, p. 1.
[16] Prosper Mugiraneza's Motion to Disclosure of Exculpatory Material and for Sanctions, 21 November 2011, paras. 11, 12.

9. On 15 March 2012, Mugenzi filed a motion requesting that his convictions be quashed in light of the Prosecution's alleged failure to timely disclose certain exculpatory evidence.[20] On 20 March 2012, Mugiraneza joined Mugenzi's motion and made additional submissions.[21] The Prosecution responded to Mugenzi on 26 March 2012 and to Mugiraneza on 29 March 2012.[22] Mugenzi replied on 29 March 2012.[23] Mugiraneza did not file a reply. On 24 September 2012, the Appeals Chamber denied the motions.[24]

10. On 6 October 2012 and 8 October 2012, Mugiraneza filed motions requesting, *inter alia*, the Appeals Chamber to admit certain transcripts from other cases before the Tribunal as additional evidence under Rule 115 of the Rules.[25] In his motion filed on 8 October 2012, Mugiraneza also argued that the Prosecution violated its disclosure obligations under Rule 68 of the Rules.[26] On 15 October 2012, Mugenzi filed a motion seeking the admission of additional evidence on appeal and further submitted that the Prosecution violated Rule 68 of the Rules.[27] The Prosecution responded to the three motions on 5 November 2012.[28] Mugenzi and Mugiraneza replied on 12 November 2012.[29] The Appeals Chamber addressed the parties' submissions in relation to the Prosecution's obligations under Rule 68 of the Rules in its judgement.[30] Considering the merits of the appeals, the Appeals Chamber did not find it necessary to address the requests to admit additional evidence and dismissed the requests as moot.[31]

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[17] Prosecutor's Response to "Prosper Mugiraneza's Motion to Disclosure (sic!) Exculpatory Materials and for Sanctions", 1 December 2011.
[18] Prosper Mugiraneza's Reply to the Prosecutor's Response to his Motion to Disclosure of Exculpatory Material and for Sanctions, 5 December 2011.
[19] Decision on Prosper Mugiraneza's Motion for Disclosure, 22 March 2012, para. 14.
[20] Justin Mugenzi's Motion for Relief for Violations of Rule 68, 15 March 2012, para. 59.
[21] Prosper Mugiraneza's Motion Joining Justin Mugenzi's Motion for Relief for Violations of Rule 68, 20 March 2012, para. 1.
[22] Prosecutor's Response to: "Justin Mugenzi's Motion for Relief for Violations of Rule 68", 26 March 2012; Prosecutor's Response to Prosper Mugiraneza's Motion Joining Justin Mugenzi's Motion for Relief for Violations of Rule 68, 29 March 2012.
[23] Justin Mugenzi's Reply to Prosecutor's Response to Motion for Relief for Violations of Rule 68, 29 March 2012.
[24] Decision on Motions for Relief for Rule 68 Violations, 24 September 2012, para. 45.
[25] Prosper Mugiraneza's Emergency Motion for Admission of Evidence Pursuant to Rule 115(A), 6 October 2012, para. 1; Prosper Mugiraneza's Motion Pursuant to Rule 115(A) for Admission of Testimony of Augustin Ngirabatware, 8 October 2012, paras. 1, 15.
[26] Prosper Mugiraneza's Motion Pursuant to Rule 115(A) for Admission of Testimony of Augustin Ngirabatware, 8 October 2012, para. 15.
[27] Justin Mugenzi's Motion for Relief for Violations of Rule 68 and for Admission of Additional Evidence, 15 October 2012, paras. 30, 36, 41, 55, 56.
[28] Prosecution's Response to Prosper Mugiraneza's and Justin Mugenzi's Motions under Rule 68 and for the Admission of Evidence Pursuant to Rule 115, 5 November 2012.
[29] Justin Mugenzi's Reply to Prosecution Response to Motion for Relief for Violations of Rule 68 and for Admission of Additional Evidence, 12 November 2012; Prosper Mugiraneza's Reply to the Prosecution's Response to Prosper Mugiraneza's and [J]ustin Mugenzi's Motions Under Rule 68 and for the Admission of Evidence Pursuant to Rule 115 Emergency Motion for Admission of Evidence, 12 November 2012.
[30] *See supra* para. 38.
[31] *See supra* nn. 223, 354.

D. Other Issues

11. On 26 April 2012, Mugiraneza filed an application for a writ of mandamus, seeking, *inter alia*, an order establishing a means by which he could exchange documents and communicate with his legal team in connection with the preparation of his brief in reply.[32] On 4 May 2012, the Registrar filed submissions in compliance with the Pre-Appeal Judge's order dated 1 May 2012.[33] Mugiraneza responded on 7 May 2012.[34] On 10 May 2012, the Pre-Appeal Judge denied Mugiraneza's motion.[35]

12. On 27 November 2012, Mugiraneza filed a motion seeking authorization to file a post-submission brief.[36] The Prosecution responded on 4 December 2012.[37] On 15 January 2013, the Appeals Chamber denied Mugiraneza's motion.[38]

E. Hearing of the Appeals

13. On 8 October 2012, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 10 September 2012.[39]

[32] Prosper Mugiraneza's Application for Writ of Mandamus, 26 April 2012, para. 10.
[33] Order Requesting Submissions Pursuant to Rule 33(B) of the Rules, 1 May 2012, p. 1; Registrar's Submissions in Response to the Order of 1 May 2012, 4 May 2012.
[34] Prosper Mugiraneza's Response to the Registrar's Submissions in Response to the Order of 1 May 2012, 7 May 2012.
[35] Decision on Prosper Mugiraneza's Requests for a Writ of Mandamus and an Extension of Time, 10 May 2012, p. 3.
[36] Prosper Mugiraneza's Motion for Leave to File Post-Submission Brief Limited to the Effects of the Appeals Chamber's Decisions in *Gotovina* and *Gatete* and Proposed Post-Submission Brief, 27 November 2012.
[37] Prosecution's Response to: "Prosper Mugiraneza's Motion for Leave to File Post-Submission Brief Limited to the Effect of the Appeals Chamber's Decisions in *Gotovina* and *Gatete* and Proposed Post-Submission Brief", 4 December 2012.
[38] Decision on Prosper Mugiraneza's Motion for Leave to File Post-Hearing Submissions, 15 January 2013, p. 3.
[39] AT. 8 October 2012 pp. 4-71; Scheduling Order, 10 September 2012.

XI. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

BAGOSORA and NSENGIYUMVA

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008 ("*Bagosora et al*. Trial Judgement").

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-01-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

GATETE

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement").

HATEGEKIMANA

Ildephonse Hategekimana v. The Prosecutor, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 ("*Hategekimana* Appeal Judgement").

The Prosecutor v. Ildephonse Hategekimana, Case No. ICTR-00-55B-T, Judgement and Sentence, 6 December 2010 ("*Hategekimana* Trial Judgement").

KALIMANZIRA

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement").

KANYARUKIGA

Gaspard Kanyarukiga v. The Prosecutor, Case No. ICTR-02-78-A, Judgement, 8 May 2012 ("*Kanyarukiga* Appeal Judgement").

MUNYAKAZI

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-A, Judgement, 28 September 2011 ("*Munyakazi* Appeal Judgement").

MUVUNYI

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 1 April 2011 ("*Muvunyi II* Appeal Judgement").

NAHIMANA et al.

Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (the English translation of the French original was filed on 16 May 2008) ("*Nahimana et al.* Appeal Judgement").

The Prosecutor v. Ferdinand Nahimana et al., Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("*Nahimana et al.* Trial Judgement").

NCHAMIHIGO

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-01-63-A, Judgement, 18 March 2010 ("*Nchamihigo* Appeal Judgement").

NTAGERURA et al.

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-A, Judgement, 7 July 2006 (the English translation of the French original was filed on 29 March 2007) ("*Ntagerura et al.* Appeal Judgement").

NTABAKUZE

Aloys Ntabakuze v. The Prosecutor, Case No. ICTR-98-41A-A, Judgement, 8 May 2012 ("*Ntabakuze* Appeal Judgement").

NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement").

NTAWUKULILYAYO

Dominique Ntawukulilyayo v. The Prosecutor, Case No. ICTR-05-82-A, Judgement, 14 December 2011 ("*Ntawukulilyayo* Appeal Judgement").

RENZAHO

Tharcisse Renzaho v. The Prosecutor, Case No. ICTR-97-31-A, Judgement, 1 April 2011 ("*Renzaho* Appeal Judgement").

RUKUNDO

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-01-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement").

SIMBA

Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-A, Judgement, 27 November 2007 ("*Simba* Appeal Judgement").

2. ICTY

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").

GOTOVINA and MARKAČ

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 ("*Gotovina and Markač* Appeal Judgement").

HARAQIJA and MORINA

Prosecutor v. Astrit Haraqija and Bajrush Morina, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009 ("*Haraqija and Morina* Appeal Judgement").

KRSTI]

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

KVOČKA et al.

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

POPOVIĆ et al.

Prosecutor v. Vujadin Popović et al., Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) ("*Popović et al.* Trial Judgement").

SIMI]

Prosecutor v. Blagoje Simi}, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simi}* Appeal Judgement").

TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

B. Defined Terms and Abbreviations

AT.

Transcript from the appeal hearing in the present case

ICCPR

International Covenant on Civil and Political Rights

ICTR or **Tribunal**

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

ICTY

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

Indictment

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-I, 12 May 1999

Mugenzi Appeal Brief

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Justin Mugenzi's Appeal Brief, 20 February 2012

Mugenzi Closing Brief

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T, Justin Mugenzi's Closing Brief, 10 November 2008 (confidential)

Mugenzi Motion

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Justin Mugenzi's Motion for Relief for Violations of Rule 68 and for Admission of Additional Evidence, 15 October 2012

Mugenzi Notice of Appeal

Casimir Bizimungu et al. v. The Prosecutor, Case No. ICTR-99-50-A, Justin Mugenzi's Notice of Appeal, 21 November 2011

Mugenzi Reply

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Justin Mugenzi's Reply to Prosecution Response to Motion for Relief for Violations of Rule 68 and for Admission of Additional Evidence, 12 November 2012

Mugenzi Reply Brief

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Justin Mugenzi's Reply Brief, 15 May 2012

Mugiraneza Appeal Brief

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Prosper Mugiraneza's Appellate Brief, 20 February 2012

Mugiraneza Closing Brief

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T, Prosper Mugiraneza's Corrected Closing Brief, 24 November 2008 (confidential), *as amended by The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Addendum to Prosper Mugiraneza's Corrected Closing Brief, 2 December 2008 (confidential)

Mugiraneza Motion of 6 October 2012

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Prosper Mugiraneza's Emergency Motion for Admission of Evidence Pursuant to Rule 115(A), 6 October 2012

Mugiraneza Motion of 8 October 2012

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Prosper Mugiraneza's Motion Pursuant to Rule 115(A) for Admission of Testimony of Augustin Ngirabatware, 8 October 2012

Mugiraneza Motion of 21 November 2011

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-A, Prosper Mugiraneza's Motion to Disclosure of Exculpatory Material and for Sanctions, 21 November 2011

Mugiraneza Notice of Appeal

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-A, Prosper Mugiraneza's Corrected Notice of Appeal, 22 November 2011

Mugiraneza Reply

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Prosper Mugiraneza's Reply to the Prosecution's Response to Prosper Mugiraneza's and [J]ustin Mugenzi's Motions Under Rule 68 and for the Admission of Evidence Pursuant to Rule 115 Emergency Motion for Admission of Evidence, 12 November 2012

Mugiraneza Reply Brief

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Prosper Mugiraneza's Reply to the Prosecutor's Appellate Brief, 15 May 2012

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PL

Parti libéral

Prosecution

Office of the Prosecutor

Prosecution Closing Brief

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T, Prosecutor's Closing Brief with Applied Corrigendum, 10 November 2008 (confidential)

Prosecution Pre-Trial Brief

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-I, Prosecution's Pre-Trial Brief Pursuant to Rule 73*bis*(B)(i), 20 October 2003

Prosecution Response

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Prosecution's Response to Prosper Mugiraneza's and Justin Mugenzi's Motions under Rule 68 and for the Admission of Evidence Pursuant to Rule 115, 5 November 2012

Prosecution Response Brief

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Prosecutor's Brief in Response to Justin Mugenzi and Prosper Mugiraneza's Appeals, 30 April 2012

PSD

Parti sociale démocrate

RPF

Rwandan (also Rwandese) Patriotic Front

Rules

Rules of Procedure and Evidence of the Tribunal

Statute

Statute of the International Criminal Tribunal for Rwanda established by Security Council Resolution 955 (1994)

T.

Transcript

Trial Judgement

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T, Judgement and Sentence, 30 September 2011