UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mohamed Shahabuddeen** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Wolfgang Schomburg**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**21 May 2007**

MIKAELI MUHIMANA

v.

THE PROSECUTOR

Case No. ICTR-95-1B-A

JUDGEMENT

Counsel for Mikaeli Muhimana:

Prof. Nyabirungu mwene Songa
Mr. Kazadi Kabimba
Mr. Mathias Sahinkuye

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Linda Bianchi
Mr. Abdoulaye Seye
Mr. François Xavier Nsanzuwera

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal by Mikaeli (also known as Mika) Muhimana ("Appellant") against the Judgement and Sentence rendered by Trial Chamber III of the Tribunal on 28 April 2005 in the case of *The Prosecutor v. Mikaeli Muhimana* ("Trial Judgement").[1]

I. INTRODUCTION

A. The Appellant

2. The Appellant was born on 24 October 1961 in Kagano Cellule, Gishyita Sector, Gishyita Commune, Kibuye Prefecture, Rwanda.[2] The Appellant was the *conseiller* of Gishyita Sector from 1990 through the relevant period covered by his Indictment in 1994.[3]

B. The Judgement and Sentence

3. The Trial Chamber convicted the Appellant pursuant to Article 6(1) of the Statute of the Tribunal ("Statute") for instigating, committing, and abetting crimes between April and June 1994 at various locations in Kibuye Prefecture, including Gishyita Town, Mubuga Church, Mugonero Complex, and the Bisesero area comprising, *inter alia*, Nyarutovu Cellule, Ngendombi Hill, Kanyinya Hill, and Muyira Hill.[4] Specifically, the Trial Chamber determined that the Appellant participated in various attacks by shooting and throwing a grenade at Tutsi refugees and raping numerous Tutsi women or women whom he believed to be Tutsi.[5] Additionally, the Trial Chamber found that the Appellant disembowelled a pregnant woman who died as a result of her injuries.[6] The Trial Chamber also found that the Appellant abetted others who raped women as well as instigated individuals to kill victims in his presence.[7] For these crimes, the Trial Chamber convicted the Appellant of genocide (Count 1), rape as a crime against humanity (Count 3), and murder as a crime

[1] For ease of reference, two annexes are appended to this Judgement: Annex A - Procedural Background; Annex B - Cited Materials and Defined Terms.
[2] Trial Judgement, para. 4.
[3] Trial Judgement, paras. 4, 132, 604.
[4] Trial Judgement, paras. 508-519, 552-563, 570-583.
[5] Trial Judgement, paras. 512, 513, 552, 570.
[6] Trial Judgement, paras. 557, 570-576.
[7] Trial Judgement, paras. 553, 570.

against humanity (Count 4).[8] The Trial Chamber sentenced the Appellant to imprisonment for the remainder of his life on each count.[9]

C. The Appeal

4. The Appellant appeals his convictions and challenges his sentences. He requests the Appeals Chamber to overturn his convictions and to release him.[10] In the alternative, he requests the Appeals Chamber to order a retrial or, as a further alternative, to quash his life sentences and substitute them with an appropriate fixed-term sentence.[11] The Appellant has divided his grounds of appeal into three categories: errors of law and fact relating to general issues, erroneous factual findings related to specific events, and sentencing errors. Within these categories, the Appeals Chamber has identified sixteen grounds of appeal. The Prosecution responds that all grounds of appeal should be dismissed.[12]

5. The Appeals Chamber heard oral submissions regarding this appeal on 15 January 2007. Having considered the written and oral submissions of the parties, the Appeals Chamber hereby renders its Judgement.

[8] Trial Judgement, paras. 519, 562, 563, 582, 583, 585. Having found the Appellant guilty of genocide, the Trial Chamber dismissed the charge of complicity in genocide (Count 2). Trial Judgement, paras. 520, 586.
[9] Trial Judgement, paras. 618, 619.
[10] Notice of Appeal, Ch. IV.
[11] Notice of Appeal, Ch. IV.
[12] *See* Respondent's Brief, para. 21.

II. STANDARDS OF APPELLATE REVIEW

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

7. As regards 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.[13]

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

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[14]

9. 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 intervention of the Appeals Chamber.[15] 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.[16]

10. 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.[17] Further, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal

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[13] *See Gacumbitsi* Appeal Judgement, para. 7, quoting *Ntakirutimana* Appeal Judgement, para. 11 (internal citations omitted). *See also Kajelijeli* Appeal Judgement, para. 5; *Staki}* Appeal Judgement, para. 8; *Vasiljević* Appeal Judgement, para. 6.

[14] *Gacumbitsi* Appeal Judgement, para. 8, quoting *Krsti}* Appeal Judgement, para. 40 (internal citations omitted). *See also Kajelijeli* Appeal Judgement, para. 5.

[15] *Ndindabahizi* Appeal Judgement, para. 11; *Gacumbitsi* Appeal Judgement, para. 9; *Niyitegeka* Appeal Judgement, para. 9. *See also Staki}* Appeal Judgement, para. 11; *Naletili} and Martinovi}* Appeal Judgement, para. 13.

[16] *Ndindabahizi* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 6; *Ntakirutimana* Appeal Judgement, para. 13. *See also Staki}* Appeal Judgement, para. 11; *Naletili} and Martinovi}* Appeal Judgement, para. 13.

[17] Practice Direction on Formal Requirements for Appeals from Judgement, para. 4(b). *See also Ndindabahizi* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 7; *Staki}* Appeal Judgement, para. 12; *Vasiljevi}* Appeal Judgement, para. 11.

and obvious insufficiencies.[18] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and will dismiss arguments which are evidently unfounded without providing detailed reasoning.[19]

[18] *Vasiljević* Appeal Judgement, para. 12. *See also Ndindabahizi* Appeal Judgement, para. 12; *Naletili} and Martinovi}* Appeal Judgement, para. 14; *Kajelijeli* Appeal Judgement, para. 7.
[19] *Gacumbitsi* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 8; *Niyitegeka* Appeal Judgement, para. 11. *See also Staki}* Appeal Judgement, para. 13; *Bla{ki}* Appeal Judgement, para. 13.

III. ALLEGED ERRORS RELATING TO THE DEFINITION OF *INTERAHAMWE*, ITS STRUCTURE, AND THE APPELLANT'S ROLE THEREIN (GROUND OF APPEAL 1)

11. The Appellant submits that the Trial Chamber erred in law and in fact by finding that he had authority over the *Interahamwe* and that he was in a position to order them to commit genocide and crimes against humanity, thereby incurring individual criminal responsibility pursuant to Article 6(1) of the Statute.[20] He further submits that the Trial Chamber erred in fact when it "linked" him to the *Interahamwe* without first defining the *Interahamwe* and his position in it.[21]

12. The essence of the Appellant's submission under this ground of appeal is that the Trial Chamber erred in finding that he had authority over the *Interahamwe* and that he was in a position to order them to commit crimes for which he was held responsible. The Appeals Chamber finds no merit in this submission. The Trial Chamber did not find that the Appellant had authority over the *Interahamwe* or that he ordered them to commit crimes for which he was then held responsible. Rather, the Trial Chamber held the Appellant responsible for personally committing genocide,[22] committing and abetting rape as a crime against humanity,[23] and committing and instigating murders as crimes against humanity.[24] None of these holdings is founded upon any finding that the Appellant had authority over the *Interahamwe* or that he ordered the *Interahamwe* to commit these crimes. Consequently, there was no need for the Trial Chamber to define the *Interahamwe*, its structure, or the Appellant's position in it.

13. Accordingly, this ground of appeal is dismissed.

[20] Appellant's Brief, para. 23.
[21] Notice of Appeal, p. 2, Ch. I, para. 1; Appellant's Brief, paras. 21, 22.
[22] Trial Judgement, paras. 513, 519.
[23] Trial Judgement, paras. 552, 553, 562.
[24] Trial Judgement, paras. 570, 571, 582.

IV. ALLEGED ERROR RELATING TO THE BURDEN OF PROOF (GROUND OF APPEAL 2)

14. The Appellant submits that the Trial Chamber erred in law by reversing the burden of proof and essentially requiring him to prove the impossibility of his presence at the scene of crimes or that the crimes could not have occurred, rather than simply requiring him to "induce a reasonable doubt as to whether his version might not be true".[25] The Appellant illustrates this alleged legal error under this ground of appeal by pointing to the Trial Chamber's findings on the rapes of Languida Kamukina and Goretti Mukashyaka.[26]

15. Based on the uncorroborated testimony of Prosecution Witness AP,[27] the Trial Chamber inferred that the Appellant raped these two women, reasoning as follows:

> Although Witness AP was not an eyewitness to the rape of Goretti and Languida, the Chamber infers that the Accused raped them on the basis of the following factors: the witness saw the Accused take the girls into his house; she heard the victims scream, mentioning the Accused's name and stating that they "did not expect him to do that" to them; finally the witness saw the Accused lead the victims out of his house, stark naked, and she noticed that they were walking "with their legs apart".[28]

16. In asserting that the Trial Chamber reversed the burden of proof, the Appellant points to the following passage from the Trial Judgement:

> The Chamber finds that the mere fact that several Defence witnesses did not hear of rapes committed by the Accused in his house on 7 April 1994 does not mean that they *could not have occurred*. The witnesses advanced no reason to support the implied assertion that, if the Accused had committed rapes, they would have heard of them. The Chamber does not find this argument persuasive. The Chamber does not accept the contention that under Rwandan culture it is impossible for a man to rape a woman in the matrimonial home. The Chamber accepts that in any society such behaviour would be considered unacceptable. However, this fact *does not preclude the possibility that it could occur*.[29]

17. The Appellant contends that his evidence considered under the proper legal standard at the very least raised doubt as to the commission of the rapes, especially as Witness AP was not an eye-witness to the actual crimes.[30] The Appeals Chamber considers here the Appellant's legal argument concerning the burden of proof, and it addresses the Trial Chamber's reliance on Witness AP in connection with these events in Ground of Appeal 8.

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[25] Appellant's Brief, para. 27, quoting *^elebi}i Case* Trial Judgement, para. 603. *See also* Notice of Appeal, p. 2, Ch. I, para. 2; Appellant's Brief, paras. 25-31.
[26] Appellant's Brief, para. 26.
[27] Trial Judgement, paras. 17-19, 22.
[28] Trial Judgement, para. 32.
[29] Appellant's Brief, paras. 26, 28, quoting Trial Judgement, para. 25 (emphasis added).
[30] Appellant's Brief, paras. 28-30.

18. The Appeals Chamber considers that some of the language used in paragraph 25 of the Trial Judgement, highlighted by the Appellant, could be perceived as a shift in the burden of proof to the Appellant, when viewed in isolation. An accused does not need to prove at trial that a crime "could not have occurred" or "preclude the possibility that it could occur". Nonetheless, it is apparent from the Trial Chamber's approach as a whole that it did not place the burden on the Appellant to establish that the rapes could not have occurred.

19. The Trial Chamber's statement that "the mere fact that several Defence witnesses did not hear of [the] rapes […] does not mean that they could not have occurred" reflects the appreciation that simply not hearing of something does not necessarily rebut the evidence that established that the rapes had been committed. Notably, the Trial Chamber observed that the Defence witnesses "advanced no reason to support the implied assertion that, if the [Appellant] had committed rapes, they would have heard of them."[31] This analysis does not demonstrate a shift of burden of proof to the Appellant. Rather, it reflects the Trial Chamber's assessment of the limited probative value of the evidence presented by the Appellant in the context of the totality of evidence presented by both parties.

20. In addition, the Trial Chamber's statement that: "[t]he Chamber accepts that in any society such behaviour would be considered unacceptable. However, this fact does not *preclude* the possibility that it could occur",[32] when considered in the context of the Trial Judgement, also does not evidence a shift in the burden of proof to the Appellant. The Appeals Chamber considers that the Trial Chamber's assessment of the Appellant's evidence relating to standards of behaviour in a particular society simply reflects the limited probative value of such evidence in raising reasonable doubt when weighed against Prosecution evidence that the rapes did occur, which the Trial Chamber considered to be credible.

21. Accordingly, this ground of appeal is dismissed.

[31] Trial Judgement, para. 25.
[32] Emphasis added.

V. ALLEGED ERRORS RELATING TO THE POWERS OF *CONSEILLER DE SECTEUR* (GROUND OF APPEAL 3)

22. The Appellant submits that the Trial Chamber erred in law and in fact by not defining the scope of his legal authority as a *conseiller* as well as his position, role and subordinates, in accordance with the Rwandan Law of 23 November 1963 on Territorial Administration and the *Bagilishema* Trial Judgement.[33] He argues that, as a result of this alleged error, his conviction for "ordering" has no legal basis.[34]

23. The Appeals Chamber observes that the Trial Chamber did not find the Appellant responsible for ordering any of the crimes of which it convicted him; rather, the Trial Chamber held him responsible for committing, abetting, and instigating.[35] The Appeals Chamber therefore finds that the Appellant has failed to show how the fact that the Trial Chamber did not address the powers of a *conseiller* amounted to an error.

24. Accordingly, this ground of appeal is dismissed.

[33] Notice of Appeal, p. 2, Ch. I, para. 3; Appellant's Brief, paras. 32-36, citing *Bagilishema* Trial Judgement, para. 198.
[34] Appellant's Brief, para. 35.
[35] Trial Judgement, paras. 513, 519, 552, 553, 562, 570, 576, 582.

VI. ALLEGED ERRORS RELATING TO THE ALIBI (GROUND OF APPEAL 4)

25. The Appellant submits that the Trial Chamber erred in law and in fact by unfairly considering his alibi based on the circumstances surrounding the death of his child on 8 April 1994 and the ensuing mourning period.[36] He argues that the Trial Chamber erred in discrediting his alibi based on the testimony of Defence Witness DC, who proved to be a "hostile witness".[37] The Appellant contends that the Trial Chamber could have admitted the alibi that he continuously remained at home at least until 12 April 1994, when Witness DC allegedly saw him at Mubuga Church.[38]

26. The Appellant does not make any reference to any part of the Trial Judgement in support of the present submission, nor does he explain the significance of the claim that Witness DC was a "hostile witness". The Appeals Chamber has reviewed the relevant paragraphs of the Trial Judgement and notes the following:

> At trial, the Accused raised an alibi to establish that he could not have committed the crimes, which occurred outside his home, for which he was indicted. The Accused called a number of witnesses to say that he remained at his home in Gishyita continuously mourning his dead son from 8 to 16 April 1994.[39]

27. The Appeals Chamber also notes that the Trial Chamber followed established jurisprudence when it considered the Appellant's alibi and correctly reasoned as follows:

> The Trial Chamber is satisfied that the evidence of the Defence witnesses does not raise a reasonable doubt as to whether the Accused was present at the various locations where he is alleged to have committed or participated in the commission of crimes. This finding in no way undermines the Accused's presumption of innocence, and the Trial Chamber has made its factual findings bearing in mind that the Prosecution alone bears the burden of proving beyond a reasonable doubt the allegations made against the Accused.[40]

28. A review of the Trial Judgement shows that the Trial Chamber considered the Appellant's alibi in the context of the allegations against him during the period of 8 to 16 April 1994.[41] The Appeals Chamber notes that, in this assessment, Witness DC was only one of many eyewitnesses to have placed the Appellant outside his home during this period.[42] Furthermore, the Trial Chamber

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[36] Notice of Appeal, p. 2, para. 4; Appellant's Brief, para. 37.
[37] Appellant's Brief, paras. 37, 38.
[38] Appellant's Brief, para. 37.
[39] Trial Judgement, para. 12.
[40] Trial Judgement, paras. 13-15, citing *Niyitegeka* Appeal Judgement, para. 60, *Musema* Appeal Judgement, para. 108.
[41] Trial Judgement, paras. 63, 160, 203. The Appellant has raised specific challenges against these findings in other grounds of his appeal. *See* Grounds of Appeal 10, 11.
[42] *See, e.g.,* Trial Judgement, paras. 63, 203.

noted that the evidence in support of the alibi was not convincing.[43] There is, therefore, no merit in the Appellant's contention that, even if the Trial Chamber relied on Witness DC, it should have accepted his alibi until 12 April 1994. Moreover, the Appellant's unsubstantiated submission that Witness DC was a "hostile witness" does not demonstrate that no reasonable trier of fact could have relied on his evidence.

29. Accordingly, this ground of appeal is dismissed.

[43] Trial Judgement, paras. 63, 160, 203.

VII. ALLEGED ERRORS RELATING TO THE INTENT TO COMMIT GENOCIDE (GROUND OF APPEAL 5)

30. The Appellant submits that the Trial Chamber erred in law and in fact by finding that he had the intent to commit genocide when it was established at trial that he had a Tutsi wife whom he protected to the end of the war; that he had saved Tutsi people in Gishyita; that he had saved Witness AQ, a Tutsi woman; and that he had married a Tutsi woman during his flight to Zaire.[44] The Appellant argues that "a person cannot have the intent to commit genocide […] and at the same time carry out protective and goodwill acts for members of the same group."[45]

31. The Appeals Chamber observes that the Trial Chamber took the following factors into account in determining that the Appellant had intent to commit genocide:

> 515. The Chamber finds that the attacks mentioned […] above were systematically directed against the *Tutsi* group. Before the attacks on Mubuga Church commenced, *Hutu* refugees, who were intermingled with the *Tutsi*, were instructed to come out of the church. Similarly, both Prosecution and Defence witnesses testified that the refugees who had gathered on Kanyinya and Muyira Hills were predominantly *Tutsi*.
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> 516. Factors such as the sheer scale of the massacres, during which a great number of *Tutsi* civilians died or were seriously injured, and the number of assailants who were involved in the attacks against *Tutsi* civilians, lead the Chamber to the irresistible conclusion that the massacres, in which the Accused participated, were intended to destroy the *Tutsi* group in whole or in part.
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> 517. The Accused targeted *Tutsi* civilians during these attacks by shooting and raping *Tutsi* victims. He also raped a young *Hutu* girl, Witness BJ, whom he believed to be *Tutsi*, but later apologised to her when he was informed that she was *Hutu*. During the course of some of the attacks and rapes, the Accused specifically referred to the *Tutsi* ethnic identity of his victims.
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> 518. Thus, the Chamber finds that the Accused's participation in the attacks, and his words and deeds demonstrate his intent to destroy, in whole or in part, the *Tutsi* group.[46]

32. The Appeals Chamber notes that the Trial Chamber's finding that the Appellant participated in killing and seriously injuring Tutsi victims with the intention to commit genocide, was based on evidence which the Appellant has failed to successfully impugn. The Appellant attempts to show error in the finding of his intent by pointing to his acts of protecting individual Tutsis, including his wives. This evidence was before the Trial Chamber. The Trial Chamber was free to consider that it did not suffice to impeach the evidence of the Appellant's individual acts of violence against the Tutsis which formed the basis of its finding that he had the requisite intent to commit genocide. In

[44] Notice of Appeal, p. 2, para. 5; p. 8, para. 6; Appellant's Brief, paras. 39-44.
[45] Appellant's Brief, para. 45.
[46] Trial Judgement, paras. 515-518.

general, evidence of limited and selective assistance towards a few individuals does not preclude a trier of fact from reasonably finding the requisite intent to commit genocide.[47]

33. Accordingly, this ground of appeal is dismissed.

[47] *See Rutaganda* Appeal Judgement, para. 537 ("[T]he Appeals Chamber holds the view that a reasonable trier of fact could very well not take account of some of the illustrations [of assisting Tutsi] provided by the Appellant, which appear immaterial within the context of the numerous atrocities systematically and deliberately perpetrated against members of the Tutsi group, owing to their being members of thereof."). *See also Kvo~ka et al.* Appeal Judgement, paras. 232, 233 (referring to persecution as a crime against humanity, which is also a specific intent crime).

VIII. ALLEGED ERRORS RELATING TO THE PLOT BY PASCAL NKUSI AND CERTAIN WITNESSES (GROUND OF APPEAL 6)

34. The Appellant submits that the Trial Chamber erred in law and in fact by failing to consider his arguments advanced at trial in relation to a plot by Pascal Nkusi against him, his family, and his property[48] and by failing to draw all necessary inferences from the contention that Prosecution Witness AP was biased in her testimony against him in light of her relationship with Pascal Nkusi.[49] The Appellant explains that Pascal Nkusi fraudulently obtained his property[50] and that Prosecution Witness AQ is also benefiting from it.[51] He further avers that Pascal Nkusi intimidated Defence Witness DQ.[52] The Appellant contends that Pascal Nkusi recruited witnesses for the Prosecution who were "attached" to him and who were enjoying the Appellant's property to appear before the Tribunal and lie.[53] He further submits that Pascal Nkusi provided the Prosecution with Witnesses AP, AX, AQ, BB, BU, BF, AW, BE, and BC, and that no reasonable trier of fact would have found their testimonies to be credible in light of this plot.[54]

35. The Trial Judgement reflects that the Trial Chamber explicitly considered many of the arguments relating to the alleged plot by Pascal Nkusi and his alleged relationship with certain witnesses. In relation to Witness AP, the Trial Chamber reasoned as follows:

> The Chamber has also noted the Defence challenge to Witness AP's credibility that she is related to the current *conseiller* of Gishyita *Secteur*, who replaced the Accused, and that her testimony is therefore biased, and part of a plot against the Accused by the *conseiller* to deprive the Accused of his property. The Chamber notes that the Defence never put this allegation of bias to the witness during cross-examination. Moreover, in assessing the credibility of Witness AP, the Chamber has taken note of this allegation of bias and is satisfied that it does not in any way discredit her testimony.[55]

36. The Appeals Chamber notes that the Trial Chamber assessed the challenges to Witness AP's testimony in the Trial Judgement and found her to be credible.[56] Having reviewed the Trial Chamber's assessment of Witness AP's evidence, the Appeals Chamber finds no error in the Trial Chamber's acceptance of and reliance on her testimony.

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[48] Notice of Appeal, p. 2, para. 6; Appellant's Brief, para. 46.
[49] Appellant's Brief, paras. 50, 82-86. According to the Appellant this follows from the testimonies of Witnesses DA, DT, and DJ. The Appellant advances these arguments primarily under Ground of Appeal 8 challenging the evidence of Witness AP in connection with the rapes of Languida Kamukina and Goretti Mukasyaka, but the Appeals Chamber finds it appropriate to consider them here in connection with his other arguments concerning Pascal Nkusi.
[50] Appellant's Brief, para. 46.
[51] Appellant's Brief, paras. 49, 84.
[52] Appellant's Brief, para. 48.
[53] Appellant's Brief, paras. 46, 48.
[54] Appellant's Brief, paras. 46, 47.
[55] Trial Judgement, para. 30.
[56] *See, e.g.,* Trial Judgement, paras. 23-31.

37. In relation to Witness AQ, the Trial Chamber took into consideration the Appellant's arguments concerning her alleged connection to Pascal Nkusi when assessing her testimony. The Trial Chamber reasoned as follows:

> The Chamber is mindful of the Defence submission regarding the partiality of Witness AQ and has, accordingly, considered her testimony with the necessary caution. Nevertheless, the Chamber finds her recollection of the events credible and reliable.[57]

38. The Appellant's argument that Witnesses AX, BB, BU, BF, AW, BE, and BC are biased given their relationship with Pascal Nkusi is not substantiated by any reference to evidence in the record.[58] Therefore, the Appeals Chamber declines to consider it further.

39. The Appeals Chamber concludes that there is no merit in the Appellant's contention that the Trial Chamber did not consider his arguments in relation to the alleged plot and finds that the Appellant has failed to demonstrate any error of law or fact on the part of the Trial Chamber in this regard.

40. Accordingly, this ground of appeal is dismissed.

[57] Trial Judgement, para. 106.
[58] Appellant's Brief, paras. 46, 48. The Appellant suggests that all individuals "invoke" Pascal Nkusi's name, but does not cite to a specific exhibit. *See* Appellant's Brief, para. 48 fn. 50. Additionally, the Appellant directs the Appeals Chamber to review paragraph 79 of the Defence Closing Brief, which indicates that these witnesses have "a particular relationship with Pascal Nkusi." *See* Appellant's Brief, para. 46, citing Defence Closing Brief, para. 79. The Appeals Chamber notes that while the Appellant generically references "identification sheets" in the Defence Closing Brief, he does not point to any specific exhibit.

IX. ALLEGED ERROR RELATING TO THE ATTACKS AT NYARUTOVU HILL AND THE NEIGHBOURING AREAS OF KIZIBA, NYARUTOVU, AND NGENDOMBI (GROUND OF APPEAL 7)

41. The Appellant submits that the Trial Chamber erred in fact when it found that the attacks at Nyarutovu Hill and the neighbouring areas of Kiziba, Nyarutovu, and Ngendombi between 8 and 11 April 1994 had been established,[59] whereas Prosecution Witnesses AT, BJ, and AV testified that "the poor climate had set in in Ngoma, Mubuga and Gishyita three or four days after the death of the President".[60] Relying on excerpts of evidence given by Witnesses AT and BJ,[61] the Appellant contends that, according to Witness AT, no massacres had taken place in the six days following President Habyarimana's death[62] and that, according to Witness BJ, war had only broken out on 16 April 1994.[63]

42. The Appeals Chamber notes that the Trial Chamber relied on the evidence given by two eyewitnesses, Witnesses AW and W, to find that between 8 and 11 April 1994, the Appellant took part in two attacks at Nyarutovu Hill and neighbouring areas.[64] The Appellant argues that three other Prosecution witnesses, namely Witnesses AT, BJ, and AV, contradicted the Trial Chamber's findings when they testified that on the relevant dates, between 8 and 11 April 1994, the hostilities had not yet started.

43. It is apparent from the Trial Judgement that Witnesses AT and BJ were among the Tutsi refugees at the Mugonero Complex in Ngoma in the days immediately following the assassination of President Juvenal Habyarimana.[65] Both witnesses focussed in their testimonies on the events at Mugonero Complex and, in particular, on the events of 16 April 1994.[66] The Appellant does not show how these testimonies would support the contention that attacks did not take place at other locations, namely Nyarutovu Hill and the neighbouring areas, on other dates. The Appellant cites an excerpt of Witness AT's testimony that "poor climate" set in in his area three to four days after President Habyarimana's death.[67] The Appeals Chamber notes that this excerpt, however, clearly

[59] Notice of Appeal, p. 2, Ch. II, para. 1; p. 9, para. 8; Appellant's Brief, paras. 51-55, citing Trial Judgement, paras. 64-67. The Appeals Chamber notes that the Appellant also challenges these factual findings under Ground of Appeal 9.
[60] Appellant's Brief, para. 56. *See also* Notice of Appeal, p. 9, para. 8.
[61] Appellant's Brief, paras. 57, 59, 60.
[62] Appellant's Brief, para. 58.
[63] Appellant's Brief, para. 61.
[64] Trial Judgement, paras. 63-68.
[65] Trial Judgement, paras. 227, 247.
[66] Trial Judgement, para. 227.
[67] Appellant's Brief, para. 57, citing T. 19 April 1994 pp. 4, 5.

refers to a specific location, namely the place of the witness's residence, which is irrelevant to the Trial Chamber's findings related to attacks at Nyarutovu Hill and the neighbouring areas.[68] Similarly, the testimony of Witness BJ referred to by the Appellant in this connection does not establish that the Trial Chamber erred in making the findings in question. Finally, the Appellant has not provided any argument or references in relation to Witness AV.[69]

44. For the foregoing reasons, the Appeals Chamber finds that the Appellant has not demonstrated in this ground of appeal that Witnesses AT, BJ, and AV contradicted the Trial Chamber's findings as to the attacks at Nyarutovu Hill and the neighbouring areas between 8 and 11 April 1994.

45. Accordingly, this ground of appeal is dismissed.

[68] The Appeals Chamber has reviewed Prosecution Exhibit 17 (under seal) containing Witness AT's particulars, including a reference to his residence in April 1994.
[69] *See* Appellant's Brief, para. 56. The Appellant only provided a reference to T. 1 April 2004 p. 5 which, the Appeals Chamber notes, is not a transcript of Witness AV's testimony.

X. ALLEGED ERRORS RELATING TO THE RAPES OF LANGUIDA KAMUKINA AND GORETTI MUKASHYAKA (GROUND OF APPEAL 8)

46. The Trial Chamber found that, on 7 April 1994, the Appellant raped two Tutsi women, Languida Kamukina and Goretti Mukashyaka, in his home and, as a result, convicted him of rape as a crime against humanity.[70] In making this finding, the Trial Chamber relied on the evidence of Prosecution Witness AP, holding as follows:

> Although Witness AP was not an eyewitness to the rape of Goretti and Languida, the Chamber infers that the Accused raped them on the basis of the following factors: the witness saw the Accused take the girls into his house; she heard the victims scream, mentioning the Accused's name and stating that they "did not expect him to do that" to them; finally the witness saw the Accused lead the victims out of his house, stark naked, and she noticed that they were walking "with their legs apart".[71]

47. The Appellant submits that the Trial Chamber erred in law and in fact in relying on Witness AP's uncorroborated circumstantial evidence of the rapes, in assessing Witness AP's credibility, and in assessing Defence evidence.[72] Recalling the elements of rape as defined in the *Kunarac et al.* case at the ICTY,[73] the Appellant alleges that, because Witness AP was not an eyewitness, she was not in a position to establish the *actus reus* of rape.[74]

48. The Prosecution responds that any crime under the jurisdiction of the Tribunal may be established through circumstantial evidence and that there is no rule requiring direct evidence to prove the *actus reus* of rape.[75] Moreover, the Prosecution submits that Witness AP gave both direct and circumstantial evidence, which was "detailed, credible and 'internally consistent'".[76]

49. The Appeals Chamber recalls that it is permissible to base a conviction on circumstantial evidence[77] and that a Trial Chamber has the discretion to decide in the circumstances of each case whether corroboration of evidence is necessary.[78]

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[70] Trial Judgement, paras. 32, 552, 563.
[71] Trial Judgement, para. 32.
[72] Notice of Appeal, pp. 2, 3, Ch. II, paras. 2-7; pp. 9, 10, paras. 8-14; Appellant's Brief, paras. 30, 62-88. In addition, the Appellant also raises other arguments concerning this event in Ground of Appeal 2.
[73] Appellant's Brief, para. 65, quoting *Kunarac* Trial Judgement, para. 460, *Kunarac* Appeal Judgement, para. 127.
[74] Appellant's Brief, para. 66.
[75] Respondent's Brief, paras. 107, 108.
[76] Respondent's Brief, paras. 109, 110, quoting Trial Judgement, para. 23.
[77] *Gacumbitsi* Appeal Judgement, para. 115.
[78] *Kajelijeli* Appeal Judgement, para. 170, citing *Niyitegeka* Appeal Judgement, para. 92 ("The Appeals Chamber has consistently held that a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness's testimony for the proof of a material fact.").

50. The Trial Chamber's finding that the Appellant raped Languida Kamukina and Goretti Mukashyaka is based on the testimony of Witness AP who described their maltreatment.[79] In such circumstances, the Appeals Chamber can identify no factual error on the part of the Trial Chamber in concluding that these two women were raped in the Appellant's home. The above-quoted text, in particular coupled with the evidence of widespread rape committed in the course of the crimes perpetrated by the Appellant, provides a sufficient basis for this conclusion.

51. However, it is apparent from Witness AP's testimony that the Appellant was not alone with the young women in the house at the relevant time.[80] Witness AP testified that "[a]mongst the voices coming from inside the house, the witness also recognised the voice of *Bourgmestre* Sikubwabo, telling the girls to 'shut up'."[81] Consequently, the Appeals Chamber is not persuaded that the Trial Chamber acted reasonably in determining that it was the Appellant who raped the two women, rather than another person present in the house, such as Sikubwabo.

52. Accordingly, the Appeals Chamber finds, Judge Shahabuddeen and Judge Schomburg dissenting, that the Trial Chamber erred in fact in convicting the Appellant for committing rape based on this event and reverses this factual finding. Even if Witness AP's evidence, as accepted by the Trial Chamber, demonstrated that the Appellant could bear criminal responsibility for the rapes of these women as an aider and abettor, the Prosecution did not charge this form of criminal responsibility in connection with these rapes,[82] and, therefore, it would not be appropriate for the Appeals Chamber to uphold the conviction on this basis.

53. The Trial Chamber's error of fact, however, did not occasion a miscarriage of justice because no conviction on any count of the Indictment rested solely on these rapes. The Appellant's conviction for rape as a crime against humanity, for which he was sentenced to life imprisonment,

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[79] *See* Trial Judgement, para. 32 ("[T]he witness saw the Accused take the girls into his house; she heard the victims scream, mentioning the Accused's name and stating that they "did not expect him to do that" to them; finally the witness saw the Accused lead the victims out of his house, stark naked, and she noticed that they were walking "with their legs apart".).

[80] Trial Judgement, para. 14. *See also* T. 30 April 1994 pp. 24, 27 ("I could hear voices of many people, and amongst these voices, I could hear the voice of the *bourgmestre*. […] Q. Now, can you tell me when Mika arrived at the house with the two girls, was there anybody else present inside that house, at that time, apart from Mika and the girls? A. Listen, I didn't enter the house. I can only say that there were many people. The only person whose voice I recognised was the *bourgmestre*.").

[81] Trial Judgement, para. 18.

[82] Paragraph 6 of the Indictment alleges that the Appellant "committed rape". More specifically, with respect to this event, paragraph 6(a)(i) of the Indictment reads:

> On or about 7 April 1994 in Gishyita town Gishyita sector, Gishyita commune, Mikaeli Muhimana brought two civilian women Goretti Mukashyaka and Languida Kamukina into his house and raped them. Thereafter he drove them naked out of his house and invited *Interahamwe* and other civilians to come and see how naked Tutsi girls looked like. Mikaeli Muhimana then directed the *Interahamwe* to part the girls' legs to provide the onlookers with a clear view of the girls' vaginas.

rests on his commission of or complicity in the rapes of ten other individuals.[83] Accordingly, the Appeals Chamber is not satisfied that its finding of error on the part of the Trial Chamber with respect to the rape of Languida Kamukina and Goretti Mukashyaka is sufficient to impugn his conviction for rape as a crime against humanity. The Appeals Chamber is also not satisfied that this error affects the Appellant's sentence of imprisonment for the remainder of his life in view of the other crimes and the appropriateness of considering this event in aggravation. Accordingly, the Appeals Chamber finds no basis for disturbing the Appellant's conviction or sentence due to this error of fact.

[83] *See* Trial Judgement, paras. 552, 553.

XI. ALLEGED ERRORS RELATING TO THE ATTACKS AGAINST TUTSIS ON NYARUTOVU HILL AND NGENDOMBI HILL AND RELATING TO THE RAPE OF ESPERANCE MUKAGASANA (GROUND OF APPEAL 9)

54. The Trial Chamber found that, between 8 and 11 April 1994, the Appellant participated in two "large scale" attacks against Tutsi refugees at Nyarutovu Hill.[84] In addition, the Trial Chamber found that, between 9 and 11 April 1994, the Appellant participated in an attack on Ngendombi Hill.[85] The Trial Chamber's findings reflect that the second attack on Nyarutovu Hill occurred on the same day as the attack on Ngendombi Hill.[86] The Trial Chamber convicted the Appellant of genocide based in part on his participation in the attacks on these two hills.[87] In another event, which is not related to the attacks on Nyarutovu and Ngendombi Hills, the Trial Chamber found that in mid-April 1994, the Appellant raped Esperance Mukagasana at his residence.[88] The Trial Chamber convicted the Appellant of rape as a crime against humanity based in part on this crime.[89] The Appeals Chamber addresses in turn the Appellant's three sub-grounds of appeal challenging the factual and legal findings on the attacks at Nyarutovu Hill and Ngendombi Hill, as well as the rape of Esperance Mukagasana.

A. Alleged Errors relating to the Attacks on Nyarutovu Hill

55. The Trial Chamber found that, on 8 or 9 April 1994, the Appellant participated in the first attack on Nyarutovu Hill by supplying the assailants with ammunition and by shooting and wounding a Tutsi man named Emmanuel.[90] In making these findings, the Trial Chamber relied on the evidence of Prosecution Witnesses AW and W.[91] The Trial Chamber found that the Appellant participated in a second attack on Nyarutovu Hill, as well as other neighbouring areas, including

[84] Trial Judgement, paras. 64-68.
[85] Trial Judgement, paras. 67, 76-79.
[86] The Trial Judgement refers to the second attack on Nyarutovu Hill as occurring on 11 April 1994 based on the evidence of Witness W. The Trial Chamber further found based on this witness's account that, on the same day as the second attack on Nyarutovu Hill, the Appellant participated in attacks on neighbouring areas including Nyarutovu, Kiziba, and Ngendombi. *See* Trial Judgement, para. 67. However, the Trial Chamber also found that the attack on Ngendombi Hill occurred between 9 and 11 April 1994, relying in part on Prosecution Witness W's account as corroboration for Prosecution Witnesses BB and BC. Trial Judgement, para. 76. As discussed below in connection with the Appellant's sub-ground of appeal related to the attacks at Ngendombi Hill, the Appeals Chamber finds that the Trial Chamber intended the broader date range of 9 to 11 April 1994 to apply equally to the second attack at Nyarutovu Hill.
[87] Trial Judgement, paras. 513, 519.
[88] Trial Judgement, paras. 103, 108.
[89] Trial Judgement, paras. 552, 563.
[90] Trial Judgement, paras. 64-66, 513.
[91] Trial Judgement, paras. 63-66.

Ngendombi Hill, between 9 and 11 April 1994.[92] In making findings concerning the second attack at Nyarutovu Hill, the Trial Chamber relied solely on the evidence of Witness W.[93] Under this ground of appeal, the Appellant submits that the Trial Chamber erred in law and in fact in its assessment of Witnesses AW and W and in its failure to consider other Defence evidence.[94] The Appeals Chamber has already considered the Appellant's other challenges to the findings related to the two attacks on Nyarutovu Hill under Ground of Appeal 7.

1. Alleged Errors in the Assessment of Witness AW

56. The Appellant submits that the Trial Chamber erred in law and in fact in relying on the testimony of Witness AW in making findings in relation to the attack on Nyarutovu Hill, arguing that his testimony was uncorroborated, inconsistent, and implausible.[95] In this respect, the Appellant raises six principal arguments which are discussed below in turn.

57. The Appellant initially submits that the Trial Chamber erred in fact in relying on the testimony of Witness AW because he contradicted himself by first stating that the Appellant arrived on 8 April 1994 in the Bisesero area in a red minivan and subsequently noting that he arrived during the attack in a white Toyota.[96] In this regard, the Appellant also submits that it was established by other witnesses that the commune did not have a red-coloured van.[97]

58. A review of the transcripts reveals that Witness AW made reference to a red minivan at the beginning of his testimony[98] and, when specifically questioned by the Prosecution about the vehicle, identified it as a white Toyota.[99] In recounting Witness AW's testimony in the Trial Judgement, the Trial Chamber referred only to the Appellant arriving in a "red minivan" and did not explicitly address this contradiction.[100] The Appeals Chamber recalls that, while a Trial Chamber is

[92] Trial Judgement, paras. 67, 76. The Trial Chamber also found that, on the day of the second attack on Nyarutovu Hill, the Appellant also participated in attacks in neighbouring areas such as Nyarutovu, Kiziba, and Ngendombi. The Trial Chamber discussed in detail only the attacks on Nyarutovu Hill and Ngendombi Hill and its findings on genocide are based only on those two locations. Trial Judgement, paras. 63-79, 513. The parties also do not address these other attacks in detail, and the Appeals Chamber therefore sees no need to address them.
[93] Trial Judgement, paras. 46-50, 67.
[94] Notice of Appeal, p. 3, paras. 8-10, 13; pp. 10-11, paras. 15-21; Appellant's Brief, paras. 89-106, 111-116.
[95] Notice of Appeal, p. 3, paras. 8, 9; pp. 10-11, paras. 15-17, 19; Appellant's Brief, paras. 89-102, 111-114.
[96] Appellant's Brief, paras. 90, 91, 96, 97, 111-114. At paragraph 111 of the Appellant's Brief, the Appellant refers to alleged contradictions between the evidence given by Witness AW and Witness W relating to the "means" the Appellant used to arrive at Nyarutovu Hill. The Appellant however goes on to illustrate this with an alleged internal inconsistency in Witness AW's testimony. Appellant's Brief, paras. 112, 113.
[97] Notice of Appeal, p. 10, para. 16. The Appeals Chamber notes that this argument was not mentioned in the Appellant's Brief and that the Appellant does not provide citation to evidence on the record.
[98] T. 14 April 2004 p. 5.
[99] T. 14 April 2004 p. 7.
[100] Trial Judgement, para. 39.

required to consider inconsistencies and any explanations offered in respect of them when weighing the probative value of evidence,[101] it does not need to individually address them in the Trial Judgement.[102] Furthermore, the presence of inconsistencies within or amongst witnesses' testimonies does not *per se* require a reasonable Trial Chamber to reject the evidence as being unreasonable.[103] The Appeals Chamber notes that Witness AW's testimony was consistent as to the owner and occupants of the vehicle.[104] The Appeals Chamber is therefore not convinced that no reasonable trier of fact could have relied on his testimony, notwithstanding the discrepancy concerning the colour of the vehicle.

59. The Appellant also submits that the Trial Chamber erred in fact in relying on Witness AW's testimony given his account that from Nyarutovu Hill he could see vehicles parked close to the Appellant's house in Gishyita town.[105] The Appellant submits that this would have been impossible in light of the witness's testimony that it would take approximately thirty minutes to walk from one location to the other, which the Appellant surmised corresponded to a distance of about two-and-a-half kilometres.[106]

60. A review of the relevant transcript shows that the witness found it difficult to estimate the distance between Gishyita town and Nyarutovu Hill, given the "roundabout pathways that lead from one place to the other."[107] Yet, the witness considered that "the distance was not very large" and could be covered in a thirty minute walk.[108] In this context, the witness was also asked to explain the location of a place called Kiziba in relation to Nyarutovu Hill and Gishyita town.[109] The witness stated that Kiziba was located between the two places.[110] He also stated that the distance between Kiziba and Nyarutovu Hill measured between thirty and fifty metres and that, in relation to Nyarutovu Hill, Kiziba was located in the valley below.[111] In challenging Witness AW's testimony on this point, the Appellant advances his own view of the situation based on speculation and selective references to the witness's testimony, which fail to account for the witness's elevated

[101] *Niyitegeka* Appeal Judgement, para. 96.
[102] *Niyitegeka* Appeal Judgement, para. 124. *See also Musema* Appeal Judgement, para. 20.
[103] *Niyitegeka* Appeal Judgement, para. 95, quoting *Kupreški} et al.* Appeal Judgement, para. 31.
[104] T. 14 April 2004 pp. 5, 7, 41.
[105] Appellant's Brief, paras. 92, 96, 97.
[106] Notice of Appeal, p. 10, para. 15; Appellant's Brief, para. 92. In the Notice of Appeal, the Appellant also submits that the hills Kirunga, Rurebero, and Gitovu were located between the Appellant's house and Nyarutovu Hill and, therefore, obstructed the view from one location to the other. *See* Notice of Appeal, p. 10, para. 15. This argument has not been presented or developed in the Appellant's Brief and, therefore, will not be addressed.
[107] T. 14 April 2004 p. 6.
[108] T. 14 April 2004 p. 6.
[109] T. 14 April 2004 p. 6.
[110] T. 14 April 2004 p. 6.

location on a hill. Therefore, the Appeals Chamber is not convinced that the Appellant has demonstrated that no reasonable trier of fact could have relied on this aspect of Witness AW's testimony.

61. The Appellant further submits that the Trial Chamber erred in fact in relying on Witness AW's testimony because the witness's account of when the attack unfolded is not consistent with his testimony on the timeframe when he was on Nyarutovu Hill.[112] The Appellant submits that Witness AW testified that the attack started at 11 a.m., although he attested to arriving at Nyarutovu Hill at 1 p.m., and, consequently, could not have witnessed the attack.[113] In addition, the Appellant argues that, if the witness arrived after the attack had begun, then this is inconsistent with his evidence that he and the refugees left the hill when the attackers arrived.[114]

62. The record reveals that the witness did not state that he personally witnessed the beginning of the attack, but merely testified that the attack started at 11 a.m. and was already under way when he arrived at 1 p.m.[115] Moreover, although the witness stated that he left Nyarutovu Hill when the attackers arrived,[116] it is evident from his examination that he was not referring to leaving the hill at the exact moment when the attackers arrived. Rather, when viewed in context, the exchange relied on by the Appellant for this point is simply a broad statement of what the refugees did as a result of the attack. During cross-examination, the witness further stated: "I tried to flee. Everybody was just running away Ғ…ǧ if I wanted to die, I would have stayed there, but I didn't want to and I ran away".[117] The Appeals Chamber does not consider the fact that the witness fled at some point after the Appellant's arrival as the attack unfolded as contradicting evidence of what he saw before he left the hill. In particular, the witness's testimony reflects that he observed the Appellant and other assailants arrive and saw the killing of several Tutsis.[118] Therefore, the Appeals Chamber is not convinced that the Appellant has shown that the Trial Chamber erred in its assessment of this evidence.

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[111] T. 14 April 2004 pp. 41, 42. The witness explained that from Kiziba, the attackers had to climb up the hill to pursue the refugees. T. 14 April 2004 pp. 41, 42.
[112] Appellant's Brief, paras. 93-97.
[113] Appellant's Brief, para. 93.
[114] Appellant's Brief, para. 94.
[115] T. 14 April 2004 p. 6 ("Q. Now, let's talk about your going to seek refuge on Nyarutovu hill on the 8th of April. What time, do you recall, sir, that you went to that place? A. It is from 11 a.m. that an attack was launched on Nyarutovu, and this attack lasted until 4 p.m. Q. No. What time did you get there? A. As concerns the time at which I reached that locality, it was at about 1 p.m., and people were saying that we needed to fight back at the thieves. We thought they were thieves whereas it had to do with assailants that were attacking the hill.").
[116] T. 14 April 2004 p. 8 ("And when they came on the Nyarutovu hill, we continued to Bisesero, with the refugees, that is.").
[117] T. 14 April 2004 p. 46.
[118] T. 14 April 2004 pp. 5-8.

63. The Appellant submits that the Trial Chamber erred in fact in relying on Witness AW's testimony because the witness was not certain whether he met Kabanda on 7 April 1994 at Kabanda's shop or home.[119] The transcripts reflect that the witness was cross-examined by the Defence and questioned by the Trial Chamber on this particular point and that he explained that, although Kabanda lived in Bisesero, he owned houses in Gishyita "where he plied his trade".[120] The Appeals Chamber is therefore not convinced that the Appellant has demonstrated the existence of any contradiction in Witness AW's account on this point that would call into question the Trial Chamber's overall credibility assessment.

64. The Appellant also submits that the Trial Chamber erred in fact in relying on Witness AW because of an alleged discrepancy about when he met the Appellant.[121] The Appellant points to a prior witness statement of Witness AW noting that he knew the Appellant "precisely after secondary school" and Witness AW's trial testimony indicating that he did not know if the Appellant attended secondary school.[122] The Appellant further notes that the witness then denied saying "secondary school" to the investigators even though he acknowledged his pre-trial statement by signing it.[123]

65. A review of the record reveals that Witness AW testified that he first knew the Appellant "when [the Appellant] finished school, when [the Appellant] just started trading".[124] The witness's testimony reflects that he did not know when the Appellant finished school or whether he went to secondary school.[125] The witness did state, however, that the Appellant went to primary school and began his trade when he was still young.[126] When confronted with his pre-trial statement referring to "secondary school", the witness explained that at the time he referred only to "studies", not to "secondary school".[127] The witness further explained that he did not write the pre-trial statement because he cannot read or write.[128] Given this explanation, the Appeals Chamber is not convinced that no reasonable trier of fact could have relied on Witness AW's evidence despite this alleged discrepancy.

[119] Appellant's Brief, paras. 98, 99.
[120] T. 14 April 2004 pp. 32, 35, 36.
[121] Appellant's Brief, paras. 100, 101.
[122] Appellant's Brief, para. 100.
[123] Appellant's Brief, para. 100.
[124] T. 14 April 2004 p. 23.
[125] T. 14 April 2004 p. 23.
[126] T. 14 April 2004 p. 23.
[127] T. 14 April 2004 pp. 23-25.
[128] T. 14 April 2004 p. 25.

66. Finally, the Appellant submits that the Trial Chamber erred in law in relying on Witness AW's uncorroborated testimony as to the first attack at Nyarutovu Hill in light of the foregoing challenges to his credibility.[129] The Appellant's characterization of Witness AW's testimony as uncorroborated is unfounded. The Trial Chamber determined that the Appellant participated in the first attack on Nyarutovu Hill on 8 or 9 April 1994 based on the corroborated testimonies of Witnesses AW and W.[130] Moreover, it is clear from the Trial Judgement that, with respect to the details of the Appellant's involvement in the attack, the Trial Chamber relied primarily on the evidence of Witness W.[131]

67. Accordingly, the Appellant's arguments in respect of Witness AW are dismissed.

2. Alleged Errors in the Assessment of Witness W

68. The Appellant submits that the Trial Chamber erred in fact in finding that there were two attacks on Nyarutovu Hill on the basis of Witness W's testimony.[132] The Appellant contends that, according to Witness W, there were no victims and the attackers were either unarmed or fired into the air.[133] The Appellant further submits that Witness W's evidence in the *Kayishema and Ruzindana* case, where the witness testified to having taken refuge on Bisesero Hill on 9 April 1994, is irreconcilable with his testimony about attacks on Ngendombi Hill on 11 April 1994 in the present case.[134]

69. The Appeals Chamber notes that the Appellant misrepresents Witness W's testimony in respect of the victims during the two attacks. Contrary to the Appellant's assertions, the witness testified that firearms were used, that some people were injured, and that he saw the Appellant shoot a young Tutsi man named Emmanuel during the attack on Nyarutovu Hill.[135] Furthermore, the witness testified that the Appellant participated in several attacks on 11 April 1994, during which many people were shot at and killed.[136] In addition, the Appeals Chamber is not persuaded by the Appellant's arguments regarding the alleged discrepancies in Witness W's testimony. The Appellant was confronted with his testimony from the *Kayishema and Ruzindana* trial and explained that he moved among several hills during the period in question.[137] The Appellant has not

[129] Appellant's Brief, para. 102.
[130] Trial Judgement, paras. 64, 65.
[131] Trial Judgement, para. 66.
[132] Notice of Appeal, p. 3, paras. 10, 13; pp. 10, 11, paras. 17, 18; Appellant's Brief, paras. 103, 105, 110, 115, 135.
[133] Appellant's Brief, paras. 103, 105, 110, 115.
[134] Appellant's Brief, para. 136.
[135] Trial Judgement, paras. 43, 44.
[136] Trial Judgement, paras. 46-50.
[137] T. 27 April 2004 p. 35; T. 29 April 2004 p. 34.

demonstrated that the Trial Chamber erred in accepting this explanation. Therefore, the Appellant has failed to demonstrate that no reasonable trier of fact could have made the Trial Chamber's findings regarding the attacks at Nyarutovu Hill, based in part on Witness W's testimony.

3. Alleged Inconsistency between the Testimonies of Witnesses AW and W

70. The Appellant submits that the Trial Chamber erred in fact in finding that testimonies of Witnesses AW and W corroborated each other because they provided different dates for the initial attack at Nyarutovu Hill.[138] The Trial Chamber addressed this issue as follows:

> The Chamber notes the discrepancy between the testimonies of Witnesses AW and W in relation to the date of the first attack at Nyarutovu. Whereas Witness AW testified that the attack occurred on 8 April 1994, Witness W recalled the date of the attack as 9 April 1994. The Chamber is of the view that in situations where witnesses are called to testify on events which took place over a decade ago, discrepancies relating to the time and date of the event may occur.[139]

The Appellant has not shown that no reasonable trier of fact could have accepted this explanation for this discrepancy. Accordingly, the Appellant's argument on this point is dismissed.

4. Alleged Error in Failing to Consider the Testimony of Witnesses DI and DT

71. The Appellant submits that the Trial Chamber erred in law in failing to consider the testimony of Defence Witnesses DI and DT with regard to the attacks at Nyarutovu Hill.[140]

72. The Appeals Chamber observes that the Appellant has not explained how the evidence of Witnesses DI and DT would have been relevant to the Trial Chamber's findings on the events at Nyarutovu Hill. Moreover, the Trial Chamber expressly considered the evidence provided by Witness DI in connection with other findings,[141] although it made no reference to the testimony of Witness DT. This, however, does not mean that the Trial Chamber did not consider the testimony of Witness DT. A Trial Chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record.[142]

73. In view of the foregoing discussion, the Appeals Chamber finds that the Appellant has failed to demonstrate that no reasonable trier of fact could have made the Trial Chamber's findings as to the events at Nyarutovu Hill. This sub-ground of appeal is therefore dismissed.

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[138] Notice of Appeal, p. 11, para. 17; Appellant's Brief, para. 104.
[139] Trial Judgement, para. 65.
[140] Notice of Appeal, p. 3, para. 14; p. 11, para. 21; Appellant's Brief, para. 116.
[141] *See* Trial Judgement, paras. 20, 21, 26, 87, 100, 235, 236, 250, 251, 446, 449, 475.
[142] *Musema* Appeal Judgement, para. 20.

B. Alleged Errors relating to the Attack on Ngendombi Hill

74. The Trial Chamber found that, between 9 and 11 April 1994, the Appellant participated in the search for and attack on Tutsi civilians at Ngendombi Hill and that many Tutsis died or were seriously injured in the attack.[143] The Trial Chamber determined that the Appellant was armed with a gun and grenades and that he threw a grenade into a crowd of Tutsi refugees, causing many deaths.[144] In addition, the Trial Chamber found that, after the attack, the Appellant attacked Witness BC with a machete, cutting off her left hand, and that he killed her three children.[145] In finding that the Appellant participated in the attack on Ngendombi Hill, the Trial Chamber relied on the evidence of Prosecution Witnesses BC, BB, and W, which it considered "consistent and corroborative".[146] The Trial Chamber convicted the Appellant of genocide based in part on his role in this attack.[147] On appeal, the Appellant submits that the Trial Chamber erred in law and in fact in considering the notice provided by paragraph 5(d)(iv) of the Indictment and in assessing the evidence of Witnesses BC, BB, and W.[148]

1. Alleged Defect in the Form of the Indictment

75. The Appellant submits that the Trial Chamber erred in law in failing to address at trial his arguments pertaining to the vagueness of the Indictment.[149] He argues that paragraph 5(d)(iv) of the Indictment lacks precision and fails to plead any physical act of genocide.[150]

76. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused.[151] The Appeals Chamber has held that criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed."[152]

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[143] Trial Judgement, paras. 76, 78, 79.
[144] Trial Judgement, para. 76.
[145] Trial Judgement, para. 77.
[146] Trial Judgement, paras. 69, 74, 76.
[147] Trial Judgement, paras. 513, 519.
[148] Notice of Appeal, pp. 11, 12, paras. 21-25; Appellant's Brief, paras. 106-109, 117-147.
[149] Notice of Appeal, p. 12, para. 23; Appellant's Brief, paras. 127-133. In addition, the Appellant submits that the Trial Chamber erred in law in making findings on the attack at Ngendombi Hill, as alleged in paragraph 5(d)(iv) of the Indictment, because in the concluding paragraph of its findings on this attack it referred to paragraph 5(d)(ii) of the Indictment, which relates to Nyarutovu Hill. *See* Notice of Appeal, p. 12, para. 25; Appellant's Brief, paras. 141, 146, 147. A review of the Trial Judgement reveals that this is simply a typographical error and occasions no miscarriage of justice.
[150] Appellant's Brief, paras. 127-133.
[151] *Gacumbitsi* Appeal Judgement, para. 49. *See also Ndindabahizi* Appeal Judgement, para. 16.
[152] *Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreški} et al*. Appeal Judgement, para. 89. *See also Ndindabahizi* Appeal Judgement, para. 16.

An indictment lacking this precision is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[153]

77. Paragraph 5(d)(iv) of the Indictment reads: "In April 1994 Mikaeli Muhimana, along with Clement Kayishema, Obed Ruzindana and *Interahamwe* participated in [the] search for and attacks on Tutsi civilians taking refuge in Mutiti and Ngendombi hills in Bisesero." In connection with this paragraph, the Trial Chamber found that in April 1994, the Appellant participated in the "search for and attack" on Tutsi civilians at Ngendombi Hill.[154] The Trial Chamber found, more specifically, that the Appellant threw a grenade into a crowd of Tutsi refugees, causing many deaths.[155] The Trial Chamber further found that the Appellant killed Witness BC's three children and cut her on her hands, shoulder and head with a machete, cutting off her left hand.[156] The Appeals Chamber notes that, in its legal findings on genocide, the Trial Chamber only highlighted the wounding of Emmanuel with respect to the attacks on Nyarutovu Hill and Ngendombi Hill.[157] However, it appears that the Trial Chamber also convicted the Appellant of the grenade attack and crimes committed against Witness BC and her children since it made specific factual findings as to these events,[158] referred to Witness BC's anticipated evidence as alleging the Appellant's *actus reus* of genocide,[159] and cross-referenced in the legal findings the entire section encompassing these factual findings.[160]

78. The Trial Chamber considered that the allegation in Paragraph 5(d)(iv) of the Indictment that the Appellant "participated in [the] search for and attacks on *Tutsi* civilians" provided adequate notice of his role in the crime.[161] The Appeals Chamber disagrees. In the *Ntakirutimana* Appeal Judgement, the Appeals Chamber determined that the phrase "participated in an attack on […] Mugonero Complex" did not provide sufficient notice that the accused was being charged with the murder of a specific individual.[162] The Appeals Chamber reached a similar conclusion in the *Gacumbitsi* Appeal Judgement, where the indictment alleged that the accused "killed persons by his own hands" but failed to mention with respect to a massacre at a church a specific killing or the

[153] *Gacumbitsi* Appeal Judgement, para. 49. *See also Ntagerura et al.* Appeal Judgement, paras. 28, 65.
[154] Trial Judgement, para. 78.
[155] Trial Judgement, para. 76.
[156] Trial Judgement, para. 77.
[157] Trial Judgement, para. 513.
[158] Trial Judgement, paras. 76, 77.
[159] Trial Judgement, para. 73.
[160] Trial Judgement, para. 513 fn. 473, citing to Chapter II, Section E.
[161] Trial Judgement, para. 73.
[162] *Ntakirutimana* Appeal Judgement, paras. 30, 33.

accused's personal participation in the killings there.[163] The Appeals Chamber considers that the Indictment in this case does not contain any greater specificity than the cited portions of the indictments in the *Ntakirutimana* and *Gacumbitsi* cases. The Appellant could not have known, on the basis of the Indictment alone, that he was being charged as part of this attack with personally killing Tutsis with a grenade, seriously wounding Witness BC, and killing her children.

79. While in certain circumstances, "the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes",[164] this is not the case with respect to these events. The Prosecution should have expressly pleaded the grenade attack, the wounding of Witness BC, as well as the killing of her three children, particularly since it had this information in its possession before the amended Indictment was filed.[165] The Indictment was thus defective in this respect.

80. A review of the trial record, including the evidence of Witnesses BB and BC, reveals that the Appellant did not object to the form of this paragraph of the Indictment before trial or to the evidence led pursuant to it during the relevant testimonies. However, the Trial Chamber considered the Appellant's allegations of vagueness raised in the Defence Closing Brief in the Trial Judgement.[166] The Appeals Chamber has held that, where a Trial Chamber has treated a challenge to an indictment as being adequately raised, the Appeals Chamber should not invoke the waiver doctrine.[167] The Appeals Chamber will therefore treat the Appellant's objection as having been timely raised. It therefore falls to the Prosecution to prove that the Appellant's defence was not materially impaired by this defect.[168]

81. The Prosecution points to the Trial Chamber's finding that paragraph 5(d)(iv) of the Indictment was sufficiently specific, its observation that paragraphs 54 to 58 of the Pre-Trial Brief provided additional details, and the summary of Witness BC's anticipated evidence in an annex to the Pre-Trial Brief in an effort to show that the defect in the Indictment was cured by subsequent timely, clear, and consistent information provided to the Appellant.[169] Paragraphs 54 to 58 of the Pre-Trial Brief speak only generally about Tutsi refugees fleeing to the Bisesero region and provide no greater specificity as to the nature of the Appellant's conduct during the attack on Ngendombi

[163] *Gacumbitsi* Appeal Judgement, para. 50.
[164] *Gacumbitsi* Appeal Judgement, para. 50, citing *Kupreški} et al.* Appeal Judgement, para. 89 (internal citations omitted).
[165] Indeed, the Prosecution had the information in its possession since Witness BC provided her statement on 29 November 1999.
[166] Trial Judgement, para. 73.
[167] *Gacumbitsi* Appeal Judgement, para. 54. *See also Ntakirutimana* Appeal Judgement, para. 23.
[168] *Gacumbitsi* Appeal Judgement, para. 51.

Hill. However, a review of the summary of Witness BC's anticipated testimony in an annex to the Pre-Trial Brief contains an allegation that the Appellant cut off the witness's arm with a machete and killed her three children on Ngendombi Hill.[170] It further mentions that the Appellant shot at refugees and threw grenades resulting in death.[171]

82. In the *Gacumbitsi* Appeal Judgement, the Appeals Chamber held that a summary of an anticipated testimony in an annex to the Prosecution's pre-trial brief could, in certain circumstances, cure a defect in an indictment.[172] The circumstance at hand is similar to that in the *Gacumbitsi* case in that the summary of the anticipated testimony provides greater detail that is consistent with a general allegation pleaded in the Indictment.[173] The Pre-Trial Brief therefore provided the Appellant with timely, clear, and consistent information sufficient to put him on notice that he was being charged with committing genocide by throwing a grenade at Tutsis, wounding Witness BC, and killing her three children at Ngendombi Hill. Therefore, the Appellant has failed to demonstrate that the Trial Chamber erred in its consideration of his arguments pertaining to the vagueness of paragraph 5(d)(iv) of the Indictment.

2. Alleged Errors in the Assessment of Witness BC

83. The Appellant submits that the Trial Chamber erred in law and in fact in relying on Witness BC in light of inconsistencies in her account as to the death of her children and as to when she was at Ngendombi Hill.[174] The Appellant contends that Witness BC initially testified that her children were killed by a grenade and later testified that they were dismembered with a machete.[175]

84. The Trial Chamber addressed the Appellant's arguments regarding Witness BC's evidence and concluded that there was no "contradiction in the witness' [*sic*] account of how her children were killed".[176] On appeal, the Appellant has failed to show that no reasonable trier of fact could have made this finding. A review of the transcripts reveals that Witness BC did not suggest that her

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[169] Respondent's Brief, paras. 148, 149, referring to Trial Judgement, para. 73.
[170] Pre-Trial Brief, Annex A, p. 8. The summary further connects this allegation with paragraph 5(d) of the Indictment. The Appeals Chamber further notes that the Prosecution in the body of its Pre-Trial Brief specifically states that Witness BC will testify to the Appellant's acts of genocide in the various attacks in the Bisesero area. Pre-Trial Brief, para. 58.
[171] Pre-Trial Brief, Annex A, p. 8.
[172] *Gacumbitsi* Appeal Judgement, paras. 57, 58. *See also Ntakirutimana* Appeal Judgement, para. 48 (holding that a witness statement, when taken together with "unambiguous information" contained in a pre-trial brief and its annexes may be sufficient to cure a defect in an indictment). This approach is consistent with ICTY jurisprudence. *See Naletili} and Martinovi}* Appeal Judgement, para. 45.
[173] *Gacumbitsi* Appeal Judgement, para. 58.
[174] Notice of Appeal, p. 3, paras. 11, 15; p. 11, paras. 21, 22; Appellant's Brief, paras. 107-109, 120-124, 126, 137, 138, 140.
[175] Appellant's Brief, paras. 107-109.

children were killed by a grenade. Rather, the witness stated that people died as a result of a grenade that the Appellant had placed on the road and that only subsequently, when "[t]hose who did not die were finished off", the Appellant killed her children with a machete.[177]

85. The Appellant also asserts that Witness BC was not in a position to testify about the events at Ngendombi Hill on 10 April 1994 because on 9 April 1994 she had already taken refuge in Kigarama in the Bisesero area, and no evidence was adduced to show that she subsequently returned to Ngendombi Hill.[178]

86. The Appeals Chamber has reviewed the relevant transcripts which show that, according to Witness BC's testimony, she fled on Saturday, 9 April 1994, from Kigarama to the Bisesero region.[179] She specified that the first hill she reached was Kigarama Hill in the Bisesero region.[180] The witness then testified that Kigarama was not safe and that they "spent the day running".[181] She testified that on Sunday she witnessed the Appellant launch an attack at Ngendombi Hill in the Bisesero region.[182] The witness testified that, after the attack, during which she was wounded by the Appellant, her husband took her to Kigarama, a "*secteur* or *colline* of Bisesero,"[183] where she stayed for a few months.[184] The Appellant's submissions therefore fail to demonstrate that no reasonable trier of fact could have accepted Witness BC's testimony concerning the attack on Ngendombi Hill.

3. Alleged Errors in the Assessment of Witness BB

87. The Appellant submits that the Trial Chamber erred in law by failing to address the contradictions within Witness BB's testimony, which the Appellant had raised at trial.[185] To substantiate this submission, the Appellant merely refers to a paragraph of the Defence Closing Brief, without providing further reasoning and without attempting to demonstrate any error on the part of the Trial Chamber. Consequently, the Appeals Chamber will not consider this submission further.

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[176] Trial Judgement, para. 75.
[177] T. 20 April 2004 pp. 40, 41.
[178] Appellant's Brief, paras. 120-124, 126, 137, 138.
[179] T. 20 April 2004 p. 57.
[180] T. 20 April 2004 pp. 40, 57.
[181] T. 20 April 2004 p. 40.
[182] T. 20 April 2004 pp. 40-42, 57.
[183] T. 20 April 2004 p. 43.
[184] T. 20 April 2004 pp. 42-44.
[185] Appellant's Brief, para. 140.

4. Alleged Errors in Finding that Witnesses BB, BC, and W Corroborate Each Other

88. The Appellant submits that the Trial Chamber erred in fact in finding that the testimonies of Witnesses BB, BC, and W were coherent and corroborative.[186] The Appellant points to discrepancies in the accounts of these three witnesses concerning when the attack on Ngendombi Hill unfolded, as well as in the evidence of Witnesses BB and BC with respect to the manner in which the Appellant killed his victims. The Appeals Chamber addresses each argument in turn.

89. The Appellant notes that Witness BB testified that the attack occurred on 9 April 1994, while Witness BC stated that the attack took place on 10 April 1994, and Witness W testified that it occurred on 11 April 1994 and was "categorical that on Sunday 10 April there was no attack."[187]

90. The Appeals Chamber considers that the alleged inconsistencies relating to the dates of the attack do not affect the Trial Chamber's finding that "the attack on Tutsi refugees on Ngendombi Hill took place between 9 and 11 April 1994".[188] As the Trial Chamber stated in reconciling the discrepancy in the dates between the testimonies of Witnesses AW and W in connection with the date of the first attack on Nyarutovu Hill: "The Chamber is of the view that in situations where witnesses are called to testify on events which took place over a decade ago, discrepancies relating to the time and date of the event may occur."[189] It appears that the Trial Chamber applied this same approach to reconciling the different dates provided by Witnesses BB, BC, and W for the attack on Ngendombi Hill and that it focused instead on the consistency of the testimonies regarding specific features of the attack.[190] This is illustrated by the following passage:

> Based on the testimonies of Witnesses BB, BC, and W, the Chamber finds that the attack on Tutsi refugees on Ngendombi Hill took place between 9 and 11 April 1994, and that the Accused, with two *commune* policemen, including Ruzindana, led a group of *Interahamwe* in carrying out the attack. Based on the consistent and corroborative testimonies of all three witnesses, the Chamber finds that the Accused was armed with a gun and grenade and that he threw a grenade into a crowd of *Tutsi* refugees, causing many deaths.[191]

[186] Notice of Appeal, p. 3, para. 17; pp. 11, 12, paras. 21, 22, 24; Appellant's Brief, paras. 106, 117-120, 126, 135, 137-139, 140.
[187] Appellant's Brief, paras. 125, 135-137.
[188] Trial Judgement, para. 76.
[189] Trial Judgement, para. 65.
[190] The Appeals Chamber notes that the Trial Chamber referred to the specific date of 11 April 1994 in connection with Witness W and the specific date of 10 April 1994 in connection with Witness BC. *See* Trial Judgement, paras. 67, 77. Given the Trial Chamber's statements in paragraphs 64 and 76 of the Trial Judgement reconciling discrepancies in dates, the Appeals Chamber considers that these specific references simply reflect the estimates given by the witnesses and are not in and of themselves factual findings. Indeed, the Appeals Chamber notes that Witness BC, when questioned on a specific date, noted: "We were like mad people, traumatised people. Don't ask me about the time. I cannot tell you." *See* T. 20 April 2004 p. 57. Indeed, in light of such testimony, it would have been unreasonable to rely on Witness BC alone in order to assign any particular date to the attack.
[191] Trial Judgement, para. 76.

91. Beyond disputing the discrepancy in dates, the Appellant makes no submissions challenging the other common features of the accounts of these three witnesses, such as the identity of the assailants accompanying him and the grenade attack. In addition, the Appellant has also not advanced any argument suggesting that the passage of time in the circumstances of this case is not a reasonable explanation for justifying the discrepancy as to the precise date of the attack. Therefore, the Appeals Chamber is not convinced that the Trial Chamber erred in considering and in relying on the evidence of Witnesses BB, BC, and W as "consistent and corroborative" in making its findings concerning the events at Ngendombi Hill.

92. The Appellant additionally points to an alleged inconsistency between the testimonies of Witnesses BC and BB concerning how Witness BC's children were killed.[192] The Appellant submits that Witness BC testified that her children were dismembered, while Witness BB testified that the Appellant "didn't have a machete" and that, as a leader, he would "not soak himself in blood".[193]

93. Contrary to the Appellant's submission, there appears to be no contradiction between the testimony of Witness BC and Witness BB on this matter. The fact that Witness BB saw the Appellant armed with a gun and grenades around 1 p.m.[194] does not preclude a reasonable Trial Chamber from relying on Witness BC's testimony that she saw the Appellant close to sundown, killing her children with a machete.[195] This sub-ground of appeal is therefore dismissed.

C. Alleged Errors relating to the Rape of Esperance Mukagasana

94. The Trial Chamber found that, "during the first week after the eruption of hostilities", the Appellant raped Esperance Mukagasana in his home on several occasions.[196] In making this finding, the Trial Chamber relied solely on the eyewitness testimony of Prosecution Witness AQ, who lived in the Appellant's house at that time.[197] The Trial Chamber convicted the Appellant of rape as a crime against humanity in part based on this event.[198] The Appellant submits that the Trial Chamber erred in law and in fact in its assessment of Witness AQ.[199] His submission is supported by

[192] Appellant's Brief, para. 139.
[193] Appellant's Brief, para. 139, quoting T. 16 April 2004 p. 6.
[194] Trial Judgement, para. 53.
[195] Trial Judgement, paras. 58, 77.
[196] Trial Judgement, paras. 103, 108, 552.
[197] Trial Judgement, paras. 90-94, 102-108.
[198] Trial Judgement, paras. 552, 563.
[199] Notice of Appeal, pp. 3, 4, paras. 19-21; Appellant's Brief, paras. 151-174. In addition, the Appellant submits a related error of law and fact arguing that the Trial Chamber relied on, but failed to assess the credibility of Defence Witnesses TQ13, TQ14, DJ, NT1, DS, DR, and DI. Notice of Appeal, p. 12, para. 26; Appellant's Brief, paras. 148-150.

arguments related to a credibility finding on Witness AQ in relation to another event, allegations of bias, internal inconsistencies in the witness's account, lack of corroboration, and implausibility in light of Defence evidence.[200] The Appeals Chamber addresses each argument in turn.

1. Alleged Failure to Consider a Previous Finding on Witness AQ

95. The Appellant submits that the Trial Chamber erred in law and in fact in finding Witness AQ credible, even though it dismissed her uncorroborated testimony on the unlawfulness of a meeting held in Gishyita in mid-April 1994.[201]

96. The Appeals Chamber observes that, contrary to the Appellant's contention, the Trial Chamber did not decline to rely upon the evidence given by Witness AQ concerning a meeting held in Gishyita nor did it question the reliability of her testimony. The Trial Chamber considered her evidence that "some time before the meeting, she overheard the Accused state that he was going to hold a meeting to encourage the *Hutu* population to go out and kill *Tutsi*"[202] and found that this evidence was insufficient "to prove the allegations contained in Paragraph 6 (a) of the Indictment and Paragraph 40 of the Pre-Trial Brief that the Accused and others held meetings at which plans to attack *Tutsi* civilians were made."[203] Accordingly, the Appellant's argument on this point is dismissed.

2. Alleged Failure to Consider Bias

97. The Appellant also argues that the Trial Chamber erred in law and in fact because it failed to take into account his allegation of bias in respect of Witness AQ.[204] The Appeals Chamber observes that the Trial Chamber noted that it was "mindful of the Defence submission regarding the partiality of Witness AQ and [that it] has, accordingly, considered her testimony with the necessary caution."[205] Notwithstanding, the Trial Chamber found Witness AQ's "recollection of the events credible and reliable."[206] The Appeals Chamber considers that the Appellant has failed to

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In this respect, the Appellant points to paragraphs 82 to 87 of the Trial Judgement relating to another event involving Witness AQ. In respect to that other event, the Trial Chamber was not satisfied that the Prosecution had proved the allegations charged in paragraph 6(a) of the Indictment related to this event, namely that "the Accused and others held meetings at which plans to attack *Tutsi* civilians were made". *See* Trial Judgement, para. 88. The Appellant's cursory submissions on this point fail to relate this challenge in any detail to other relevant aspects of this ground of appeal. The Appeals Chamber therefore will not consider this argument further.

[200] Notice of Appeal, pp. 3, 4, paras. 19-21; Appellant's Brief, paras. 151-174.
[201] Appellant's Brief, paras. 152-156.
[202] Trial Judgement, para. 81.
[203] Trial Judgement, para. 88.
[204] Appellant's Brief, paras. 158, 169-174.
[205] Trial Judgement, para. 106.
[206] Trial Judgement, para. 106.

demonstrate an error in the Trial Chamber's approach or that no reasonable trier of fact could have reached the Trial Chamber's conclusion.

3. Alleged Failure to Consider Inconsistencies in Witness AQ's Testimony and Statements

98. The Appellant submits that the Trial Chamber erred in law and in fact in failing to consider a number of inconsistencies in the witness's testimony and prior statements.[207] The Appellant highlights a number of inconsistencies mentioned in the Defence Closing Brief and his closing arguments, which the Trial Chamber allegedly failed to address.[208]

99. The Appeals Chamber observes that a review of the transcripts shows that the witness was cross-examined on the alleged contradictions and that her explanations are on record. The Appellant again highlighted the alleged contradictions in his Defence Closing Brief. The Appeals Chamber reiterates that a Trial Chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony.[209] The Trial Chamber, when considering Witness AQ's credibility, stated the following:

> The Chamber finds the testimony of Prosecution Witness AQ credible. The Chamber is satisfied that Witness AQ, who lived in the Accused's house, was an eyewitness to the rape of Esperance. She gave a detailed description of how the Accused raped Esperance several times. The Witness did not exaggerate her evidence and was prepared to admit that she was not able to see the alleged rape of Esperance by Gisambo, because he closed the door.[210]

100. In addition, the Trial Chamber explicitly stated that it considered Witness AQ's evidence with caution.[211] The Appeals Chamber is not satisfied that the Appellant has demonstrated that the Trial Chamber erred in its assessment of any alleged inconsistency in Witness AQ's evidence.

4. Alleged Error relating to Lack of Corroboration

101. The Appellant submits that the Trial Chamber erred in law in relying on the evidence of Witness AQ concerning the rape of Esperance Mukagasana, given that her evidence was uncorroborated.[212] The Appeals Chamber recalls that a Trial Chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[213] The Appellant has not demonstrated an error by the Trial Chamber in this regard.

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[207] Appellant's Brief, paras. 157-160.
[208] Appellant's Brief, paras. 157-159.
[209] *Niyitegeka* Appeal Judgement, para. 124. *See also Musema* Appeal Judgement, para. 20.
[210] Trial Judgement, para. 102.
[211] Trial Judgement, para. 106.
[212] Appellant's Brief, para. 151.
[213] *Gacumbitsi* Appeal Judgement, para. 72; *Niyitegeka* Appeal Judgement, para. 92.

5. Alleged Error relating to Inconsistencies with other Evidence

102. The Appellant submits that the Trial Chamber erred in fact when it convicted him of the rape of Esperance Mukagasana when the evidence given by Defence Witnesses DQ, TQ1, NT1, DR, DI, DJ, and Prosecution Witness BF shows that it would have been "not only impossible, but also implausible" that he committed this act.[214]

103. A review of the Trial Judgement demonstrates that the Trial Chamber evaluated the evidence given by Defence witnesses on this point.[215] Additionally, the Trial Chamber explained why it did not to rely on the evidence the Appellant now highlights:

> The Chamber has already found that, even though some Defence witnesses testified that they did not hear of rapes committed by the Accused in his house on 7 April 1994, it does not follow that such rapes did not occur. The Chamber rejects the testimony of Defence witnesses who testified that it was not possible for the Accused to rape women in his own house, where his wife lived. These witnesses did not advance any convincing reason for this assertion.[216]

The Appeals Chamber cannot find any error in the Trial Chamber's finding. The Appellant merely points the Appeals Chamber to evidence that had been considered at trial without, however, demonstrating any error. Additionally, the Appellant's arguments regarding Witness BF are also unpersuasive. His assertion that the witness "must have been well informed" but had never witnessed the rape or death of Esperance Mukagasana is not supported by a direct reference to the record and fails to demonstrate that no reasonable trier of fact could have made the Trial Chamber's findings. The Appeals Chamber recalls that when faced with competing versions of events, it is the duty of the Trial Chamber which heard the witnesses to determine which evidence it considers more probative.[217] In the case at hand, the Appellant has not shown that the Trial Chamber erred in making this determination.

104. Accordingly, this sub-ground of appeal is dismissed.

D. Conclusion

105. For the foregoing reasons, this ground of appeal is dismissed in its entirety.

[214] Appellant's Brief, paras. 161-168.
[215] Trial Judgement, paras. 95-101, 104.
[216] Trial Judgement, para. 104.
[217] *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.

XII. ALLEGED ERRORS RELATING TO THE EVENTS AT MUBUGA CHURCH FROM 11 TO 15 APRIL 1994 (GROUND OF APPEAL 10)

106. The Trial Chamber found that, between 8 and 13 April 1994, many Tutsis sought refuge at Mubuga Church in Gishyita Commune[218] and that, on 14 April 1994, the Appellant was in the church presbytery where "looters" took the refugees' food supplies.[219] The Trial Chamber further found that, on the morning of 15 April 1994, the Appellant, along with others, launched an attack on the Tutsis at the church resulting in the deaths of hundreds of people[220] and concluded that the Appellant threw a grenade into the church, killing a Tutsi man named Kaihura.[221] The Trial Chamber convicted the Appellant of genocide and murder as a crime against humanity based, in part, on his participation in this attack.[222] The Appellant raises three challenges with respect to these findings relating to the assessment of Defence Witness DC, his alibi, and the burden of proof.[223]

A. Alleged Error in the Assessment of Witness DC

107. The Appellant submits that the Trial Chamber erred in fact in finding, based on the evidence of Defence Witness DC, that he was at Mubuga Church on 12 *and* 13 April 1994 during the looting of the food supplies.[224] In this respect, the Appellant submits that Witness DC's testimony referred to the looting taking place only on one day, 12 *or* 13 April 1994.[225]

108. A review of the Trial Judgement reveals that the Trial Chamber did not find, as the Appellant suggests, that the Appellant was present at Mubuga Church during the looting of food supplies on 12 *and* 13 April 1994. Rather, the Trial Chamber found that the Appellant was present at Mubuga Church during the looting of food supplies on 14 April 1994, based primarily on the eyewitness testimony of Prosecution Witness AF.[226] The Appellant's reference to the passage in the Trial Judgement that Witness DC testified that the looting occurred on 12 *and* 13 April 1994 merely highlights a typographical error in the Trial Chamber's description of Witness DC's testimony.[227] Elsewhere in the Trial Judgement, the Trial Chamber correctly referred to the date provided by

[218] Trial Judgement, para. 127.
[219] Trial Judgement, paras. 130-132.
[220] Trial Judgement, paras. 164, 167.
[221] Trial Judgement, paras. 164-167.
[222] Trial Judgement, paras. 513, 519, 570, 583.
[223] Notice of Appeal, pp. 13, 14, paras. 32-35; Appellant's Brief, paras. 175-185.
[224] Appellant's Brief, para. 175.
[225] Appellant's Brief, para. 176.
[226] Trial Judgement, paras. 123, 130-132.
[227] Trial Judgement, para. 131 ("although [Witness DC] testified that the looting occurred on 12 and 13 April 1994").

Witness DC as "12 *or* 13 April" 1994.[228] The Appellant makes no submissions on the possible impact that this error might have had on the Trial Chamber's assessment of Witness AF's evidence. In addition, he points to no deficiencies in the Trial Chamber's approach in reconciling the accounts of Witness AF and Witness DC, or in its assessment of Witness AF's evidence. The Appellant, therefore, has failed to demonstrate that no reasonable trier of fact could have made the Trial Chamber's finding on his presence at Mubuga Church during the looting of the food supplies. Moreover, the Appellant has not articulated how this error invalidated any part of the Trial Judgement. The Appeals Chamber observes that, although this event was charged in the Indictment, the Trial Chamber did not rely on it to establish the Appellant's responsibility for genocide.[229]

B. Alleged Error relating to the Alibi

109. The Appellant submits that the Trial Chamber erred in fact and in law in finding that he participated in the attack on the Mubuga Church on 15 April 1994.[230] He points to an alleged factual error in the Trial Chamber's assessment of his alibi and disputes that the evidence of Defence Witness TQ28, who saw him at the CCDFP building in Gishyita centre,[231] contradicts that he remained constantly at home.[232] In this respect, the Appellant asserts that CCDFP and his home "are basically in the same location […] not even 70 metres apart."[233]

110. The Appeals Chamber observes that the Appellant has failed to substantiate his claim about the proximity of the CCDFP building to his home with any reference to the record. Putting this aside, however, the Appeals Chamber notes that this was only one of several factors which the Trial Chamber considered in rejecting the Appellant's alibi for this event. In particular, the Trial Chamber noted that the alibi evidence presented by other Defence witnesses was internally inconsistent and lacked credibility.[234] Moreover, the Trial Chamber pointed to the evidence of Witness DC, who also placed the Appellant at the church, further undermining the Appellant's claim that he remained continuously at home during the period covered by the alibi.[235] The Appellant does not address these other reasons for rejecting his alibi and thus has not demonstrated any error in the Trial Chamber's findings with respect to it.

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[228] Trial Judgement, paras. 121, 160 (emphasis added).
[229] Trial Judgement, paras. 487, 513.
[230] Appellant's Brief, paras. 177-185.
[231] The Trial Chamber did not define "CCDFP".
[232] Appellant's Brief, para. 177.
[233] Appellant's Brief, para. 177.
[234] Trial Judgement, para. 160.
[235] Trial Judgement, para. 160.

C. Alleged Error relating to the Burden of Proof

111. The Appellant argues that the Trial Chamber erred in law in its application of the burden of proof.[236] The Appellant suggests that the Trial Chamber required him to prove that he was not at Mubuga Church rather than cast reasonable doubt on the Prosecution's evidence.[237] Moreover, the Appellant argues that the Trial Chamber applied a standard of proof below beyond reasonable doubt in finding that he participated in the attacks on Mubuga Church.[238] In this respect, the Appellant points to the evidence of Defence Witnesses DZ and DAA, who were patrolling the church, and who testified that they did not see the Appellant during the attack.[239] The Appellant further alleges that the Trial Chamber made a related factual error in discrediting Witness DZ because he was not at the church.[240] According to the Appellant, Witness DZ was only a short distance away, approximately the length of the courtroom.[241]

112. In support of his contention that the Trial Chamber erred in law by requiring him to prove his absence from the church and that his participation in the attack was not proven beyond reasonable doubt, the Appellant points primarily to the following passage from the Trial Judgement pertaining to Witnesses DZ and DAA: "While it is quite possible that these witnesses would have recognized the Accused if they had seen him during the attack, it is also quite possible that they would have missed seeing him."[242] The Appeals Chamber is not persuaded that this language demonstrates that the Trial Chamber shifted the burden of proof onto the Appellant, or that in making its findings, the Trial Chamber did not apply the beyond reasonable doubt standard in assessing the Prosecution's evidence.

113. In discussing its assessment of alibi evidence, the Trial Chamber specifically recalled that "it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true."[243] A review of the Trial Judgement reveals that, in finding that the Appellant participated in the attack on Mubuga Church and that he killed Kaihura, the Trial Chamber relied on the eyewitness accounts of Prosecution Witnesses AF and AV, which it found to be credible.[244] The Appellant does not address this evidence, which underlies the factual findings on his role in the attack. Moreover, the Appeals Chamber finds no deviation from the principles related

[236] Appellant's Brief, paras. 178-184.
[237] Appellant's Brief, paras. 178, 180, 183, 184.
[238] Appellant's Brief, paras. 178, 180-184.
[239] Appellant's Brief, para. 179.
[240] Appellant's Brief, para. 185.
[241] Appellant's Brief, para. 185.
[242] Appellant's Brief, para. 181, quoting Trial Judgement, para. 161.
[243] Trial Judgement, paras. 13-15, quoting *Niyitegeka* Appeal Judgement, para. 60.

to the assessment of alibi evidence in the Trial Chamber's assessment of the testimonies of Witnesses DZ and DAA. In making the impugned statement, the Trial Chamber simply considered the limited probative value that evidence of this nature has in the context of a large scale assault involving hundreds of attackers.[245]

114. In addition, the Appeals Chamber finds no error of fact in the Trial Chamber's statement, in assessing Witness DZ's evidence, that the witness "admitted that he was not stationed at the church itself, but rather on the road close to the church".[246] In the Appellant's view, the Trial Chamber failed to appreciate how close Witness DZ's position was to the church.[247] A review of the Trial Judgement reveals, however, that the Trial Chamber was mindful of the witness's proximity to the events since it expressly noted that he was "on the road close to the church".[248]

D. Conclusion

115. Accordingly, this ground of appeal is dismissed.

[244] Trial Judgement, paras. 156, 165.
[245] In this respect, the Trial Chamber was not satisfied that the Prosecution proved that the Appellant played a leadership role. *See* Trial Judgement, para. 157. Moreover, Witnesses DZ and DAA referred to a large number of attackers. *See* Trial Judgement, paras. 147, 151 (Witness DZ spoke of "eight hundred Hutu men" and Witness DAA referred to "about 2,000 gendarmes and about 1,500 civilians").
[246] Trial Judgement, para. 161.
[247] Appellant's Brief, para. 185.
[248] Trial Judgement, para. 161.

XIII. ALLEGED ERRORS RELATING TO THE RAPE OF AGNES MUKAGATARE AT MUBUGA CEMETERY ON 15 APRIL 1994 (GROUND OF APPEAL 11)

116. The Trial Chamber found that, on 15 April 1994 after the attack on Mubuga Church, the Appellant and a group of *Interahamwe* brought six young Tutsi women to a cemetery near the church where the Appellant raped one of them, Agnes Mukagatare.[249] The Trial Chamber based its findings on the eyewitness account of Prosecution Witness AV.[250] The rape of Agnes Mukagatare forms part of the Appellant's conviction for rape as a crime against humanity.[251]

117. The Appellant submits that the Trial Chamber erred in fact[252] in finding that he raped Agnes Mukagatare on the basis of Witness AV's testimony because her evidence was internally inconsistent, lacked corroboration, and was inconsistent with the testimonies of other Prosecution and Defence witnesses, in particular with respect to when the event occurred.[253] The Appellant further contends that the Trial Chamber erred in fact in rejecting his alibi for this period based on the evidence of Witness DC.[254]

A. Alleged Errors in the Assessment of Witness AV

118. The Appellant points to a number of alleged inconsistencies in the evidence of Witness AV, which he claims undermine her credibility and the possibility of her observing the rape. Witness AV's evidence reflects that, at the time she saw the Appellant, she was walking from the church to the nearby dispensary to find the bodies of her parents after learning of their death from her sister.[255] The Appellant contends that the ability of Witness AV and her sister to walk to and from Mubuga Church is contradicted by her evidence and that of Witness AF about the attack and the fact that *Interahamwe* were posted around the perimeter of the church at the time.[256] A review of the Trial Judgement and the record, however, reveals that these submissions lack merit. The Trial Chamber noted that Witness AV learned of the death of her parents and left the church on 15 April

[249] Trial Judgement, paras. 198, 204.
[250] Trial Judgement, paras. 170, 171, 191, 198, 199.
[251] Trial Judgement, para. 552.
[252] The Appellant initially describes the errors related to the assessment of Witness AV's evidence in the Appellant's Brief as an error of law. *See* Appellant's Brief, para. 186. However, it is clear from the nature of his submissions and the language used elsewhere in this ground of appeal and the Notice of Appeal that he is alleging errors of fact. *See, e.g.,* Appellant's Brief, paras. 192, 195, 198-200; Notice of Appeal, p. 14, paras. 36-38.
[253] Notice of Appeal, p. 14, paras. 36-38; Appellant's Brief, paras. 186-199.
[254] Notice of Appeal, p. 15, para. 40; Appellant's Brief, paras. 200-203.
[255] Trial Judgement, paras. 170, 171.
[256] Appellant's Brief, paras. 187-189, 191.

1994 after "the attack had subsided".[257] However, the Appellant cites testimony from Witness AF referring to *Interahamwe* surrounding the church preventing people from leaving on 14 April 1994, a day before the witness walked toward the dispensary.[258] The Appellant also claims that Witness AV gave contradictory testimony about whether her sister was at the church or the nearby dispensary where their parents were killed.[259] The Appeals Chamber, however, is not convinced that the portion of Witness AV's evidence referred to by the Appellant reflects a discrepancy in her account about whether her sister was at the church or the dispensary.[260] Therefore, these arguments do not demonstrate any error in the Trial Chamber's findings on Witness AV's credibility and her ability to be in a position to observe the Appellant's crime.

119. The Appellant argues that Witness AV's lack of knowledge concerning Agnes Mukagatare's age, home, and family background undermines the Trial Chamber's findings on her credibility.[261] Although the Trial Chamber did not expressly discuss in the Trial Judgement the basis of Witness AV's identification of the victim, a review of her evidence reflects that the witness knew Agnes Mukagatare as a nurse in the dispensary.[262] The Appellant has not shown this to be an unreasonable basis for identifying the victim.

120. The Appellant contends that Witness AV's evidence of the rape on the afternoon of 15 April 1994 is uncorroborated and conflicts with the evidence of Witness AF and Defence Witnesses DF and DG, who refer to a number of women being taken from the Mubuga Church and killed in the nearby cemetery on the night of 14 April 1994.[263] While Witness AV's testimony was not corroborated, the Appeals Chamber has consistently held that a Trial Chamber has the discretion to

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[257] Trial Judgement, para. 170.

[258] Appellant's Brief, para. 191, quoting T. 28 April 2004 p. 27. The Appellant in his submissions attempts to characterize this passage of Witness AF's testimony as indicating the conditions at the church "*from* 14 April 1994" (emphasis added). However, a review of the transcript reveals that the witness referred only to the conditions *on* 14 April 1994. *See* T. 28 April 2004 p. 27 ("Q. Now, what was the situation inside the Mubuga church *on the 14th* of April? […] A. *On the 14th* the situation was not a good one for the refugees because they could not get out of the church for one. […]") (emphasis added).

[259] Appellant's Brief, para. 189.

[260] It is clear from the exchange that the questions posed during cross-examination were very general and did not specify a time-frame and that Witness AV's sister ultimately came to the church. *See* T. 1 April 2004 pp. 54-55 ("Q. While you were in the church […] were you there with any other member of your family? A. Yes, I was with some. […] Q. All your brothers and all your sisters? A. Yes. Q. And how did you learn of your parents' death at the dispensary? A. My younger sister told me so. She was with them at the dispensary. Q. So all your sisters were not at the Catholic Church? A. Yes, that sister was not at the Catholic Church. Q. When did your junior sister join you? A. I do not recall the hour, but it was before midday, around midday.").

[261] Appellant's Brief, para. 190.

[262] T. 1 April 2004 p. 55 ("Q. Regarding the six girls, you could fully identify one of them and you could only identify the first names of two of them and the three others you can't remember their names. Can you talk to us about Mutagatare, whom you knew the best? A. She was a nurse at the dispensary, and that is why I knew her.").

[263] Appellant's Brief, paras. 186, 192-199.

rely on uncorroborated, but otherwise credible, witness testimony.[264] The Trial Chamber found Witness AV's account to be credible and explained that she "clearly recognized the Appellant" and had a "clear and unobstructed view" of his crime.[265] A review of the Trial Judgement reveals that the Trial Chamber considered the evidence of the killings on the night of 14 April 1994 in making its factual findings based on Witness AV's testimony.[266] The Trial Chamber was not satisfied that Witness AV and Witnesses DF and DG were referring to the same events.[267] The Trial Chamber's rejection of the Appellant's position at trial that the rape described by Witness AV and the crimes referred to by Witnesses DF and DG were the same appears reasonable, particularly given Witness AV's eyewitness account and the marked differences in the time of the events and the names and numbers of the victims.[268]

121. The Trial Chamber did not expressly consider whether Witness AV's account of the rape of Agnes Mukagatare on 15 April 1994 conflicted with Witness AF's evidence of women from the church being raped on the night of 14 April 1994. Nonetheless, it follows from the Trial Judgement that Witness AV's testimony was considered in the context of Witness AF's account.[269] The Appeals Chamber is not convinced that the evidence of Witness AF renders erroneous the Trial Chamber's findings based on Witness AV's testimony in light of the explanation provided by the Trial Chamber in connection with the alleged discrepancy of testimony of Witnesses DF and DG.

B. Alleged Errors related to the Alibi

122. In challenging the rejection of his alibi of remaining continuously at home on 15 April 1994, the Appellant notes that the Trial Chamber misstated the date when Witness DC placed him at Mubuga Church.[270] In particular, he notes that Witness DC testified that the Appellant was at the church on 12 or 13 April 1994, but the Trial Chamber, in rejecting his alibi for 15 April 1994, reflected that the witness saw him at the church on the day of the attack of 15 April 1994.[271] The

[264] *Gacumbitsi* Appeal Judgement, para. 72.
[265] Trial Judgement, para. 197.
[266] Trial Judgement, paras. 172, 179-186, 202. The Appeals Chamber notes that Witness AF heard that the women were raped, though Witnesses DF and DG stated that they were killed, but not that they were raped.
[267] Trial Judgement, para. 202.
[268] *Cf.* Trial Judgement, paras. 170, 171 *with* Trial Judgement, paras. 180-185. The Appeals Chamber also notes the Appellant's submission that the Trial Chamber erred in law and unfairly treated differently the discrepancies with respect to the timing of events when considering Prosecution and Defence evidence. Notice of Appeal, para. 39; Appellant's Brief, para. 197. The Appeals Chamber, in this instance, is not persuaded by this argument. For the Trial Chamber, the discrepancies reflected that Witness AV and Witnesses AF, DF, and DG were referring to different events, not that the Defence evidence lacked credibility. Trial Judgement, para. 202.
[269] The Trial Chamber summarized Witness AF's account immediately after the evidence of Witness AV. Trial Judgement, paras. 170, 172.
[270] Appellant's Brief, paras. 200-203.
[271] Appellant's Brief, paras. 200, 201.

Appeals Chamber agrees with the Appellant that the Trial Chamber misstated Witness DC's testimony in this portion of the Trial Judgement.[272] Nonetheless, the Appeals Chamber is not satisfied that the Appellant has demonstrated an error occasioning a miscarriage of justice. Elsewhere in the Trial Judgement, including a section assessing the alibi, the Trial Chamber correctly reflected the date on which Witness DC saw the Appellant as "12 *or* 13 April" 1994.[273] The Appeals Chamber observes that the purpose of the Trial Chamber's inclusion of Witness DC's evidence in the assessment of the alibi was to reflect that the Appellant's proposition that he remained *continuously* at home from 8 to 16 April 1994 was exaggerated, not to demonstrate that the Appellant was at the church on 15 April 1994.[274]

123. Moreover, Witness DC's evidence that he saw the Appellant at the church on 12 or 13 April 1994 was only one of several factors the Trial Chamber took into account in finding that the alibi evidence for 15 April 1994 lacked credibility.[275] In particular, in rejecting the alibi for 15 April 1994, the Trial Chamber relied on the corroborated eyewitness accounts of Witnesses AV and AF who placed the Appellant at the church on 15 April 1994.[276] In addition, the Trial Chamber observed that the alibi evidence lacked credibility.[277] The Appellant's submissions fail to demonstrate the unreasonableness of these other, independent grounds for rejecting his alibi, and thus he has not demonstrated that the Trial Chamber's findings with respect to it are erroneous.

124. Accordingly, this ground of appeal is dismissed.

[272] *See* Trial Judgement, para. 203.
[273] Trial Judgement, paras. 121, 160.
[274] Trial Judgement, paras. 12, 15, 160.
[275] Trial Judgement, paras. 160, 203.
[276] Trial Judgement, paras. 156, 203.
[277] Trial Judgement, para. 160.

XIV. ALLEGED ERRORS RELATING TO THE ATTACK AGAINST TUTSI REFUGEES AT MUGONERO COMPLEX ON 16 APRIL 1994 (GROUND OF APPEAL 12)

125. The Trial Chamber found that the Appellant participated in an attack against Tutsi civilians at Mugonero Complex on 16 April 1994.[278] The Trial Chamber further found that the Appellant was present when the attacks were launched and that he used a gun to kill and inflict injuries on Tutsi civilians targeted by the attackers.[279] Additionally, the Trial Chamber determined that the Appellant committed and abetted rapes during this attack.[280] The Trial Chamber relied, in part, on its findings relating to the attack on the Mugonero Complex in convicting the Appellant of genocide,[281] rape as a crime against humanity,[282] and murder as a crime against humanity.[283] The Appellant raises several challenges to the Trial Chamber's assessment of the evidence and the credibility of Prosecution witnesses which the Trial Chamber relied upon in making findings relating to his participation in this attack. The Appeals Chamber discusses each of these challenges in turn below.

A. Alleged Error relating to Witness DI

126. The Appellant submits that the Trial Chamber erred in fact by attributing statements to Witness DI that he had not made, thereby distorting the witness's evidence to suggest that the Appellant killed with guns and grenades.[284] The Appellant contends that Witness DI's evidence instead establishes that the Appellant was not present during the attack against Tutsi refugees at Mugonero Complex on 16 April 1994.[285]

127. In summarizing Witness DI's testimony, the Trial Chamber stated that "Witness DI testified that the Accused never clubbed anyone to death, as only the assailants without guns or grenades killed victims in this manner."[286] The transcript reflects that the witness had testified that the *witness* himself, rather than the Appellant, had never clubbed anyone to death at the Mugonero Complex,

[278] Trial Judgement, para. 246. Relying on the same witnesses, the Trial Chamber considered the specific crimes committed by the Appellant during the attack in a separate section of the Trial Judgement. *See* Trial Judgement, paras. 261-306. These crimes are discussed under Ground of Appeal 13.
[279] Trial Judgement, para. 259.
[280] Trial Judgement, paras. 273-275, 302-304, 552, 553.
[281] Trial Judgement, paras. 513, 519.
[282] Trial Judgement, paras. 552, 553, 562, 563.
[283] Trial Judgement, paras. 570, 582, 583.
[284] Notice of Appeal, p. 15, para. 41; Appellant's Brief, paras. 204, 205 (emphasis added).
[285] Appellant's Brief, para. 204.
[286] Trial Judgement, para. 236.

stating that "guns and grenades" were used in the attack.[287] This error in the summary was made only after the Trial Chamber had correctly recounted Witness DI's testimony, which indicated that "[a]ccording to Witness DI, 'Mika wasn't present' during the attack".[288] In determining whether the Appellant participated in the attacks at Mugonero Complex on 16 April 1994, the Trial Chamber recalled Witness DI's testimony that the Appellant "could not have been present during the attacks,"[289] but concluded, nonetheless, that it did not consider Witness DI's evidence to be credible.[290] Moreover, the Trial Chamber did not rely on Witness DI's testimony to establish that the Appellant "used his gun to kill and inflict injuries on Tutsi civilians targeted by the attackers" at Mugonero Complex.[291] Thus, the Appeals Chamber considers that the Trial Chamber's error in summarizing Witness DI's testimony does not demonstrate that the Trial Chamber's assessment of the evidence was unreasonable or resulted in a miscarriage of justice.

128. Accordingly, this sub-ground of appeal is dismissed.

B. Alleged Errors relating to Witness BG

129. The Appellant submits that the Trial Chamber erred in law and in fact in the assessment of Witness BG's credibility.[292] In this respect, the Appellant argues that portions of her account were scientifically inaccurate and points to inconsistencies between her pre-trial statements and her trial testimony.

1. Alleged Error in Relying on Witness BG's Testimony Given the Scientific Impossibility of Aspects of her Evidence

130. The Appellant submits that the Trial Chamber erred in law and in fact in finding Witness BG to be credible given her testimony "that 'a fire set by assailants at Mugonero Church with petrol was put out because of the blood everywhere'".[293] The Appellant argues that the witness's account is scientifically inaccurate.[294] Consequently, the Appellant suggests that Witness BG's testimony

[287] T. 1 September 2004 p. 56 ("Q. Now, how many Tutsi refugees did you club to death at the complex? A. No one. We used guns and grenades. Guns and grenades were used. They could not have been hit with clubs, whereas there were guns and grenades that could be used.").
[288] *Cf.* Trial Judgement, para. 236 *with* T. 1 September 2004 pp. 40, 57.
[289] Trial Judgement, para. 250.
[290] Trial Judgement, paras. 250, 251.
[291] Trial Judgement, paras. 246, 259.
[292] Notice of Appeal, p. 15, paras. 42, 43; Appellant's Brief, paras. 206-221.
[293] Notice of Appeal, p. 15, para. 42; Appellant's Brief, paras. 206-208.
[294] Appellant's Brief, para. 208.

could "only be a mistake or a lie," and that the Trial Chamber erred in law in disregarding "scientific truth".[295]

131. In assessing Witness BG's evidence, the Trial Chamber highlighted the Appellant's submissions challenging the scientific accuracy of Witness BG's testimony.[296] The Trial Chamber considered that the account, "even if scientifically inaccurate," did not "tarnish" the credibility of the witness.[297] Consequently, the Trial Chamber relied partially on Witness BG's testimony in finding that the Appellant participated in the attack on Mugonero Complex.[298]

132. The Appeals Chamber notes that the Trial Chamber made no findings as to whether blood put out the fire at Mugonero Church. This notwithstanding, a reasonable trier of fact may disregard certain parts of a witness's testimony while relying on other parts of the testimony which it considers credible and reliable.[299] In the present case, the Trial Chamber assessed Witness BG's credibility in light of the same challenge that the Appellant has brought on appeal.[300] Moreover, in finding that the Appellant participated in the 16 April 1994 attack on Mugonero Complex, the Trial Chamber also relied on corroborating evidence provided by several other witnesses.[301] Accordingly, the Appellant has failed to demonstrate that the Trial Chamber erred in relying, in part, on Witness BG's evidence in its findings related to the events at Mugonero Complex.

2. Alleged Failure to Address Discrepancies between Witness BG's Witness Statement and her Subsequent Evidence

133. The Appellant argues that the Trial Chamber erred in law and in fact in failing to address all of his objections relating to discrepancies between Witness BG's pre-trial statement of 14 November 1995 and a subsequent statement of 24 October 1999, as well as her trial testimony.[302] First, the Appellant argues that Witness BG provided inconsistent accounts regarding where she hid after leaving Mugonero Hospital.[303] The Appellant argues that Witness BG's 14 November 1995 statement indicates that she spent a week in Gishyita and then stayed in Kibuye town for two weeks

[295] Appellant's Brief, paras. 206, 208.
[296] Trial Judgement, para. 248.
[297] Trial Judgement, para. 248.
[298] Trial Judgement, para. 259.
[299] *See, e.g.*, *Ntagerura et al.* Appeal Judgement, para. 214; *Semanza* Appeal Judgement, paras. 155, 156; *Kajelijeli* Appeal Judgement, para. 167; *Kamuhanda* Appeal Judgement, para. 248.
[300] Trial Judgement, para. 248.
[301] Trial Judgement, paras. 246, 259.
[302] Notice of Appeal, p. 15, para. 43; Appellant's Brief, para. 209.
[303] Appellant's Brief, para. 209.

before moving to Zaire.[304] The Appellant notes that the witness's 24 October 1999 statement and her trial testimony indicated that upon leaving the hospital she climbed the hills towards Gitwa on her way to the Bisesero area.[305] The Appellant argues that this discrepancy is relevant to whether the witness observed the events in the Bisesero area and to whether she could have been captured on 22 April 1994 and subsequently raped.[306]

134. Second, the Appellant emphasizes that Witness BG never mentioned rape and sexual violence in her 14 November 1995 statement, even though this statement was taken much closer to the events.[307] The Appellant suggests that Witness BG's explanations concerning this discrepancy at trial were so confusing that a reasonable trier of fact would have rejected her testimony.[308] Third, the Appellant argues that the Trial Chamber acted unreasonably in relying on the witness's later statement without providing any reason for disregarding the earlier statement.[309] Finally, the Appellant contends that the Trial Chamber erred in law in accepting the testimony of Witness BG,[310] as she ought to have been disqualified as a witness due to her incapacity to testify because she had suffered from "mental dementia and trauma".[311]

135. The Appeals Chamber recalls that the primary responsibility for assessing the credibility of witnesses and the probative value of evidence lies with the Trial Chambers.[312] In fulfilling this responsibility, a Trial Chamber has the duty to evaluate inconsistencies that may arise in the evidence.[313] Where a Trial Chamber has based its findings on testimony that is inconsistent with prior out-of-court statements or other evidence, this does not necessarily constitute an error.[314] However, the Trial Chamber is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence.[315]

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[304] Appellant's Brief, para. 210.
[305] Appellant's Brief, paras. 209-211.
[306] Appellant's Brief, paras. 212, 216. The Appellant has also been convicted of abetting the rape of Witness BG when on 22 April 1994 he "permitted" an *Interahamwe* named Mugonero to abduct Witness BG knowing that Mugonero wanted to rape her. Trial Judgement, paras. 318, 319, 323, 553, 563. The Appellant challenges this conviction under Ground of Appeal 13.
[307] Appellant's Brief, para. 213.
[308] Appellant's Brief, para. 214.
[309] Appellant's Brief, para. 217.
[310] Appellant's Brief, para. 221.
[311] Appellant's Brief, para. 221.
[312] *See, e.g., Niyitegeka* Appeal Judgement, para. 95; *Rutaganda* Appeal Judgement, para. 188; *Musema* Appeal Judgement, para. 18; *Kayishema and Ruzindana* Appeal Judgement, paras. 319, 323, 324; *Akayesu* Appeal Judgement, para. 132; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64; *Kupreškić et al.* Appeal Judgement, paras. 31, 32, 156; *Čelebići Case* Appeal Judgement, para. 491.
[313] *Kupreškić et al.* Appeal Judgement, para. 31 (internal citations omitted).
[314] *Niyitegeka* Appeal Judgement, para. 96.
[315] *See Kupreškić et al.* Appeal Judgement, para. 31. *See also Niyitegeka* Appeal Judgement, para. 96.

136. The Appeals Chamber notes that Witness BG's statement of 24 October 1999 was not tendered into evidence. Nonetheless, the relevant transcripts indicate that Witness BG was confronted with this statement during her cross-examination.[316] The Trial Judgement reflects that the Trial Chamber considered the Appellant's arguments related to this document when making its findings.[317] Specifically, the Trial Chamber noted:

> The Defence submits that because of Witness BG's conflicting prior written statements, dated 14 November 1995 and 24 October 1999, as well as inconsistencies in her testimony, the evidence of this witness should be rejected.[318]

The Trial Chamber relied on Witness BG's evidence and that of several other witnesses in finding that the Appellant participated in attacks on Mugonero Complex on 16 April 1994.[319] However, the Trial Judgement does not explicitly address where she went upon leaving Mugonero Hospital or her failure to mention being raped in her 14 November 1995 statement.

137. A review of the trial record reveals that Witness BG was cross-examined regarding her failure to mention rape in her 14 November 1995 statement:

> A. I wasn't asked questions relating thereto, but I think, given the situation in which I found myself, even if questions were asked [of] me on that subject, I don't think I could have talked about it. For a Rwandan it is difficult to talk about such events. It is subsequently, after having gotten some training, some counsel from a number of people that have talked about it; otherwise I wouldn't have been able to talk about those events at that particular time.
>
> Q. Can we know what kind of training you received?
>
> A. On several occasions we were told that for those who were traumatised we needed to meet doctors and that these doctors told us that we should talk about those various events, which were difficult for us, and they told us that by talking about them it will be better for us to put them in perspective and to be aware of our state of health. And it is under those conditions that we, therefore, that had the courage of talking about them.[320]

The Trial Chamber sought clarification from the witness regarding her 14 November 1995 statement on this point.[321] Moreover, Witness BG was cross-examined on her failure to describe the attacks in Bisesero in her 14 November 1995 statement.[322] Subsequent to these questions and responses, Witness BG was also cross-examined regarding discrepancies in her 14 November 1995 statement concerning where she went after leaving Mugonero Hospital:

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[316] *See* T. 6 April 2004 pp. 13, 17, 22, 25-27.
[317] *See* Trial Judgement, paras. 248, 249.
[318] Trial Judgement, para. 248.
[319] Trial Judgement, paras. 246, 247, 259. Additionally, the Trial Chamber relied on Witness BG's evidence alone in finding that the Appellant abetted Mugonero in raping her. *See* Trial Judgement, paras. 318-323, 553. This event is discussed under Ground of Appeal 13.
[320] T. 6 April 2004 pp. 7-8.
[321] T. 6 April 2004 pp. 8-9.
[322] T. 6 April 2004 p. 8.

> Q. And when you left the basement, madam, where did you go?
>
> A. I went up through the Gitwe hill going towards the Bisesero region.
>
> Q. Since this has to do with the statement of the 14th November 1995 I will simply recall what we read, that is: 'I spent one week at Gishyita and then I was housed there for a week in Kibuye town and then I moved on to Zaire.' You state, in your statement of 24 October, that you went to Bisesero; is that correct?
>
> A. Yes, that is true. I went to Bisesero.[323]

138. The Appellant has not demonstrated that the witness's explanations concerning the discrepancies among her accounts based on the trauma she suffered after being raped were unreasonable or that no reasonable trier of fact could have relied on Witness BG's evidence in light of the arguments advanced under this ground of appeal. In addition, the Appeals Chamber is satisfied that the Trial Chamber considered the discrepancies arising between Witness BG's 14 November 1995 statement and her subsequent statement and trial testimony. The Appeals Chamber recalls that the Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial.[324] A Trial Chamber has the discretion to accept a witness's evidence, notwithstanding inconsistencies between trial testimony and his or her previous statements.[325] Accordingly, the Appeals Chamber is not convinced that the Trial Chamber erred in not explaining why it preferred certain aspects of Witness BG's evidence over others.

139. Finally, the Appellant argues that, as a matter of law, the Trial Chamber should have rejected Witness BG's evidence because she admitted that in 1995 she was "suffering from mental dementia and trauma"[326] and that no subsequent evidence was led to establish that she regained mental health. However, a review of the trial record reveals that at no point did Witness BG suggest that she suffered from "dementia". Moreover, the witness indicated that she had received counselling for the trauma she suffered.[327] Additionally, the Appellant fails to cite any evidence on the record revealing that Witness BG was incapable of understanding her obligations while testifying as a witness before the Tribunal. Therefore, the Appeals Chamber is not convinced that the Trial Chamber erred in relying on her testimony.

140. Accordingly, this sub-ground of appeal is dismissed.

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[323] T. 6 April 2004 p. 13.
[324] *^elebi}i Case* Appeal Judgement, para. 498.
[325] *Kajelijeli* Appeal Judgement, para. 96.
[326] Appellant's Brief, para. 221.
[327] T. 6 April 2004 pp. 7-8.

C. Alleged Errors relating to Witnesses DS and DK

141. The Appellant submits that the Trial Chamber erred in law in rejecting the testimonies of Defence Witnesses DS and DK, who testified that, in Gishyita Prison and during *gacaca* sessions, his name was not mentioned in relation to the attack at Mugonero Complex.[328] He argues that the Trial Chamber did not provide any reason for rejecting this exculpatory evidence and that this failure amounts to an error of law, which invalidates the Trial Chamber's decision.[329]

142. The Appeals Chamber notes that, in assessing the evidence of Witnesses DS and DK, the Trial Chamber did not find these witnesses persuasive because they were not eyewitnesses to the crimes committed at Mugonero Complex and their testimonies related to what they had heard years later in Gishyita Prison and during *gacaca* sessions.[330] The Appellant has not shown that the Trial Chamber's assessment of this evidence was unreasonable, particularly in light of the other evidence the Trial Chamber considered in relation to the crimes committed at Mugonero Complex.

143. Accordingly, this sub-ground of appeal is dismissed.

D. Alleged Error relating to Witness AV

144. The Appellant submits that the Trial Chamber erred in law by relying on the testimony of Witness AV as one of the Prosecution witnesses who testified about the attack at Mugonero Complex.[331] He contends that the entire testimony of Witness AV related exclusively to the "Mubuga site" and cannot be relied upon to support the allegations relating to the "Mugonero events".[332]

145. The Appeals Chamber notes that the Trial Chamber mentioned Witness AV once in its findings on the attacks at Mugonero Complex.[333] However, it is clear that this is a mere typographical error as the Trial Chamber did not summarize Witness AV's evidence alongside other Prosecution evidence on this event and because it did not discuss this witness's testimony in its analysis of the relevant evidence. Rather, the Trial Chamber relied on the evidence of Prosecution

[328] Notice of Appeal, p. 16, para. 44; Appellant's Brief, paras. 222-225.
[329] Appellant's Brief, para. 225.
[330] Trial Judgement, para. 254.
[331] Notice of Appeal, p. 16, para. 45; Appellant's Brief, paras. 226-228.
[332] Appellant's Brief, para. 227.
[333] Trial Judgement, para. 259.

Witnesses BG, BI, BJ, AT, and AU.[334] Consequently, the Appeals Chamber finds that this error did not cause prejudice to the Appellant and did not invalidate the decision.

146. Accordingly, this sub-ground of appeal is dismissed.

E. Conclusion

147. For the foregoing reasons, this ground of appeal is dismissed in its entirety.

[334] Trial Judgement, para. 247.

XV. ALLEGED ERRORS RELATING TO THE RAPES AND MURDERS COMMITTED AT MUGONERO COMPLEX AND THE RAPE OF WITNESS BG (GROUND OF APPEAL 13)

148. The Trial Chamber found that, during the attack on Mugonero Complex on 16 April 1994, the Appellant played a role in the rape and murder of several women in three separate incidents which occurred in the basement of Mugonero Hospital.[335] Based on these findings, the Trial Chamber convicted the Appellant of genocide,[336] rape as a crime against humanity,[337] and murder as a crime against humanity.[338] In another event on 22 April 1994, which is not related to the attack on the complex, the Trial Chamber also found that the Appellant "permitted" an *Interahamwe* named Mugonero to "take away" Prosecution Witness BG with knowledge that Mugonero wanted to rape her.[339] Based on this event, the Trial Chamber convicted the Appellant for rape as a crime against humanity for abetting the rape of Witness BG.[340] The Appeals Chamber addresses in turn the Appellant's four sub-grounds of appeal challenging the factual and legal findings on the three incidents occurring at the Mugonero Hospital, as well as the events surrounding the rape of Witness BG.

A. Alleged Errors relating to the Rape and Murder of Mukasine Kajongi and Amos Karera's Two Daughters

149. The Trial Chamber found that, on 16 April 1994, the Appellant raped Mukasine Kajongi and abetted two other assailants accompanying him to rape the two daughters of Amos Karera in the basement of Mugonero Hospital.[341] The Trial Chamber further found that, after those rapes, the Appellant instigated the two other assailants to murder these three women.[342] The Trial Chamber relied on the evidence of a single witness, Prosecution Witness AT, who observed the events while under a pile of dead bodies.[343] The Trial Chamber convicted the Appellant for these rapes and

[335] Trial Judgement, paras. 273, 274, 276, 291, 302, 552, 553, 570.
[336] Trial Judgement, paras. 513, 519.
[337] Trial Judgement, paras. 552, 553, 563.
[338] Trial Judgement, paras. 570, 583.
[339] Trial Judgement, paras. 318, 323, 553.
[340] Trial Judgement, paras. 553, 563.
[341] Trial Judgement, paras. 273, 274, 552, 553.
[342] Trial Judgement, paras. 276, 570. The Trial Chamber's factual findings refer to the murder of only one of Amos Karera's daughters while its legal findings refer to the killing of both daughters. Neither party raises this discrepancy on appeal. A review of the transcripts of Witness AT's testimony, in particular the French version, reveals that the witness indicated that both daughters were killed. *See* T. 19 April 2004 p. 16; T. 19 April 2004 p. 17 (French version).
[343] Trial Judgement, para. 272.

murders for genocide,[344] rape as a crime against humanity,[345] and murder as a crime against humanity.[346]

150. The Appellant submits that the Trial Chamber erred in law and in fact in convicting him for these crimes on the basis of the evidence of Witness AT. In particular, the Appellant alleges a number of inconsistencies between Witness AT's evidence and his previous statements, the lack of clarity in his evidence concerning the location of the crime, and the lack of corroboration.[347] In addition, the Appellant submits that the Trial Chamber erred in fact in relying on the evidence of Prosecution Witness AU in convicting him for this event.[348] The Appeals Chamber addresses each of the Appellant's arguments in turn.

1. Alleged Errors relating to Inconsistencies between Witness AT's Testimony and Pre-Trial Statements

151. With respect to alleged discrepancies between Witness AT's testimony and his prior statements, the Appellant submits that the Trial Chamber erred in fact in relying on Witness AT's account based on his written statement of 12 November 1999, instead of his earlier account provided in his statement of 20 June 1996.[349] He argues that the Trial Chamber ought to have relied upon the earlier statement, which makes no reference to rape, as this was taken closer in time to the events.[350] He also argues that a reasonable trier of fact would have found the later statement to be unreliable "in the absence of any plausible explanation" as to why the witness did not mention rape in the earlier statement.[351]

152. The Appeals Chamber considers that the Appellant's present line of argument, suggesting that Witness AT did not see the Appellant's crimes because they were not mentioned in his first pre-trial statement, is not convincing. As the Appeals Chamber has previously held, "to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility."[352] Moreover, the Appellant presented these arguments to the

[344] Trial Judgement, paras. 513, 519.
[345] Trial Judgement, paras. 552, 553, 563.
[346] Trial Judgement, paras. 570, 583.
[347] Notice of Appeal, pp. 16-18, paras. 46-54, 56-58; Appellant's Brief, paras. 229-248, 250-257.
[348] Notice of Appeal, p. 18, para. 55; Appellant's Brief, para. 249.
[349] Appellant's Brief, paras. 230-234.
[350] Appellant's Brief, para. 230.
[351] Appellant's Brief, para. 233.
[352] *Kajelijeli* Appeal Judgement, para. 176.

Trial Chamber.[353] The Trial Chamber undertook "a careful review of the written statements and the oral testimony of Witness AT," in particular with respect to the omission of rape in the first statement.[354] The Trial Chamber considered any discrepancies between them to be minor and was not satisfied that the omission of rape in the first statement affected the witness's credibility.[355] The Appellant has failed to show how the Trial Chamber erred in considering his arguments and, accordingly, has failed to show any error of law or fact in the Trial Chamber's assessment of Witness AT's credibility with respect to the alleged inconsistencies in his statements.

2. Alleged Error relating to the Location of the Crime

153. The Appellant submits that the Trial Chamber erred in fact in relying on Witness AT's unreliable and uncorroborated evidence to establish that these crimes were committed and that the basement of Mugonero Hospital was the crime scene.[356] The Appellant points to several discrepancies in Witness AT's testimony and prior statements with respect to the details of this location.[357] He argues that the Trial Chamber minimized these discrepancies in its assessment of his testimony and, therefore, failed to clarify the exact location of the crime.[358] He submits that this alleged error of fact resulted in a further error of law because the location of a crime is a material fact which is necessary to prove the existence of the crime itself.[359]

154. The Trial Chamber concluded that the rape and murder of Mukasine Kajongi and Amos Karera's two daughters occurred in the basement of Mugonero Hospital.[360] In making this finding, the Trial Chamber considered the various alleged inconsistencies in Witness AT's account, in particular related to the location of the crime, and concluded, notwithstanding, that the witness gave credible evidence.[361]

155. Beyond general complaints that the Trial Chamber minimized the specific discrepancies to which he alludes, the Appellant alleges only one specific error in the Trial Chamber's assessment of

[353] Trial Judgement, paras. 269, 270.
[354] Trial Judgement, paras. 269, 270.
[355] Trial Judgement, paras. 269, 270. The Trial Chamber noted, *inter alia,* that "the witness' explanation, during cross-examination, that the 1996 statement focused on the attack itself, not on particular incidents which occurred during the course of the attack", and that "the witness was consistent in his description of the rape of Mukasine Kajongi." *Id.,* para. 270.
[356] Appellant's Brief, paras. 235, 236, 242-245.
[357] Appellant's Brief, paras. 237-244.
[358] Appellant's Brief, paras. 236, 242.
[359] Appellant's Brief, paras. 245, 247.
[360] Trial Judgement, paras. 274, 276.
[361] Trial Judgement, paras. 269, 271.

Witness AT's account of the location of the crime.[362] The Appellant claims that the Trial Chamber misstated Witness AT's testimony in justifying an alleged discrepancy about the number of rooms in the surgical area.[363] The Trial Chamber stated: "Witness AT did not assert that the surgical theatre consisted of many rooms. Rather, the witness testified only that there were more than two rooms in the surgical area, located in the basement of the hospital."[364] The Appellant contends that the Trial Chamber erred in stating that Witness AT never testified that there were several rooms in the "surgical area".[365]

156. The Appeals Chamber considers that the Appellant has failed to appreciate the Trial Chamber's distinction in this passage between the terms "surgical theatre" and "surgical area" and finds no contradiction between this statement and the witness's testimony. The Appellant has therefore not pointed to any factual error in the Trial Chamber's assessment of the various discrepancies advanced by him at trial. The Trial Chamber reasoned that any inconsistency in Witness AT's account related to "minor details" and, with respect to discrepancies as to the location of the crime, simply resulted from trauma, the passage of time, and the witness's lack of familiarity with the surgical theatre.[366] The Appellant has not demonstrated that, in these circumstances, this was an unreasonable basis for assessing any discrepancy or vagueness in the witness's evidence related to the location of the crime. A review of Witness AT's testimony reveals that he consistently stated that he sought refuge in a room with around thirty dead bodies in the basement of Mugonero Hospital, where he witnessed the rape and murder of three women.[367]

157. The Appeals Chamber is not satisfied that the Appellant has shown that no reasonable trier of fact could have made the Trial Chamber's findings with respect to the location of the crime. Therefore, the Appellant's further argument that the Trial Chamber erred in law by failing to establish the location of the crime need not be addressed.

3. Alleged Error relating to Lack of Corroboration

158. The Appellant submits that the Trial Chamber erred in law in relying on the uncorroborated evidence of Witness AT.[368] In this respect, in addition to the arguments raised above, he argues that

[362] Appellant's Brief, para. 244.
[363] Appellant's Brief, para. 244.
[364] Trial Judgement, para. 271.
[365] Appellant's Brief, para. 244.
[366] Trial Judgement, paras. 269, 271.
[367] T. 19 April 2004 pp. 11-13, 37-38.
[368] Appellant's Brief, paras. 246, 254, 257.

Witness AT engaged in collusion, lied about his relationship with Witness BJ, and was involved in a murder.[369]

159. It is well established that a Trial Chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[370] The Trial Chamber assessed Witness AT, an eyewitness to this event, and found him to be credible.[371] As discussed above, the Appeals Chamber is not satisfied that the Appellant has pointed to any factual or legal error in this assessment with respect to the alleged inconsistencies in the witness's account.

160. In asserting that Witness AT colluded with other witnesses, the Appellant points to the following passage from his testimony:

> Q. You told the Prosecution investigator the following: "Regarding rape and other sexually related crimes, which is the purpose of your investigations, I knew about some cases, in particular three cases of rape and one case of sexual mutilation." Can you confirm that statement?
>
> A. I made that statement, but then haven't you heard women who came to testify here? I'm sure you must have listened to their testimonies.[372]

The Appeals Chamber considers that this passage simply reflects Witness AT's awareness that women had been raped and does not evidence collusion with other witnesses.

161. The Appeals Chamber is also not satisfied that the Appellant has demonstrated any error on the part of the Trial Chamber with respect to his allegation that Witness AT lied about his relationship with Witness BJ, who also attested to an incident of rape at the Mugonero Complex.[373] A review of the record reveals that, although Witness AT stated during cross-examination that he did not have a "relationship" with Witness BJ,[374] he provided additional clarification on this matter during his re-examination.[375] Therefore, the Appellant has not demonstrated that the witness misrepresented his relationship with Witness BJ. Moreover, this issue was fully explored during the witness's testimony and raised during closing arguments,[376] and it was thus before the Trial Chamber when assessing the witness's credibility. Finally, beyond referring to allegations advanced during closing arguments, the Appellant has not substantiated his claim that Witness AT was involved in a murder.

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[369] Appellant's Brief, paras. 251-257.
[370] *Gacumbitsi* Appeal Judgement, para. 72, citing *Semanza* Appeal Judgement, para. 153.
[371] Trial Judgement, paras. 269, 272, 273.
[372] T. 19 April 2004 p. 25.
[373] *See* Trial Judgement, paras. 284-286, 288.
[374] T. 19 April 2004 pp. 28, 30.
[375] T. 20 April 2004 pp. 25-26.
[376] T. 19 April 2004 pp. 26-34; T. 20 April 2004 pp. 24-26; T. 20 January 2005 p. 35.

162. Accordingly, the Appellant has not demonstrated any error of fact or law on the part of the Trial Chamber in relying on the uncorroborated testimony of Witness AT.

4. Alleged Error relating to Witness AU

163. The Appellant submits that the Trial Chamber erred in fact in relying on Witness AU's testimony to establish the murder of Mukasine Kajongi and Amos Karera's two daughters.[377] He argues that this witness never testified about this event.[378] The Appeals Chamber observes that in its factual findings on these murders, the Trial Chamber referred to Witness AU hearing the assailants' gunfire.[379] However, a review of the Trial Judgement and record reveals that this is simply a typographical error. The evidence misattributed to Witness AU is clearly set out in the summary of the evidence in connection with Witness AT.[380] Therefore, the Appeals Chamber is not satisfied that this typographical error resulted in a miscarriage of justice.

164. Accordingly, this sub-ground of appeal is dismissed.

B. Alleged Errors relating to the Rape of Witness BJ, Mukasine, and Murekatete

165. The Trial Chamber found that, on 16 April 1994 in the basement of Mugonero Hospital at the Mugonero Complex, the Appellant raped Prosecution Witness BJ, a young Hutu woman whom he mistook for a Tutsi.[381] The Trial Chamber further found that at the same time two assailants, who accompanied the Appellant, raped Mukasine and Murekatete, whose ethnicity was not established at trial.[382] The Trial Chamber found that the Appellant abetted these rapes.[383] In part, on the basis of these events, the Trial Chamber convicted the Appellant of rape as a crime against humanity.[384] On appeal, the Appellant raises three principal legal and factual challenges related to an alleged defect in the form of the Indictment, the ethnicity of the victims, and the credibility of Witness BJ.[385]

[377] Appellant's Brief, para. 249.
[378] Appellant's Brief, para. 249.
[379] Trial Judgement, para. 276.
[380] *See* Trial Judgement, para. 265.
[381] Trial Judgement, paras. 291, 552.
[382] Trial Judgement, paras. 291, 553.
[383] Trial Judgement, para. 553.
[384] Trial Judgement, paras. 552, 553, 563.
[385] Notice of Appeal, pp. 18-19, paras. 59-62; Appellant's Brief, paras. 258-267.

1. Alleged Defect in the Form of the Indictment

166. The Appellant submits that the Trial Chamber erred in law[386] in convicting him on the basis of the rapes of Witness BJ, Mukasine, and Murekatete because the Indictment failed to provide him with sufficient notice of the place of these crimes.[387] He submits that the Indictment alleges that the rapes were committed at Mugonero Complex, which is "huge and comprises several buildings, including a hospital, a church, and a school".[388]

167. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the indictment so as to provide notice to the accused.[389] The Appeals Chamber has held that criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed."[390]

168. Paragraph 6(c)(ii) of the Indictment reads:

> On 16 April 1994, at the Mugonero complex, Mikaeli Muhimana and *Interahamwe* collectively raped civilian *Tutsi* women Mukasine and Murekatete staff maids at Mugonero hospital, and a civilian *Hutu* lady BJ-K. Mikaeli Muhimana subsequently apologised to BJ-K for the 'mistake' of raping her as he initially thought she was *Tutsi*.

On the basis of this paragraph, the Trial Chamber concluded, *inter alia*, that the Appellant raped Witness BJ and abetted the rapes of Mukasine and Murekatete in the basement of Mugonero Hospital at the Mugonero Complex.[391] From the Indictment alone, the Appellant would have known that he was being charged in connection with these rapes at Mugonero Complex. The Indictment, however, does not indicate that these crimes specifically occurred in the basement of the Mugonero Hospital.

169. The question remains whether the failure to further specify the location of these crimes within the Mugonero Complex as the basement of the Mugonero Hospital renders this paragraph defective with respect to the location of these crimes. The Appeals Chamber notes that the Prosecution was in a position to provide the exact location of these rapes as early as 15 November

[386] The Appellant refers to this as an error of fact. However, the Appeals Chamber treats claims of lack of notice as errors of law. *See, e.g., Gacumbitsi* Appeal Judgement, para. 46; *Niyitegeka* Appeal Judgement, para. 191.
[387] Notice of Appeal, p. 18, para. 59; Appellant's Brief, paras. 258-262.
[388] Appellant's Brief, para. 259.
[389] *See supra* para. 76. *See also Gacumbitsi* Appeal Judgement, para. 49; *Ndindabahizi* Appeal Judgement, para. 16.
[390] *Gacumbitsi* Appeal Judgement, para. 49, quoting *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreški} et al*. Appeal Judgement, para. 89. *See also Ndindabahizi* Appeal Judgement, para. 16.
[391] Trial Judgement, paras. 291, 552.

1999.[392] Nonetheless, the Appeals Chamber is not satisfied that the failure to plead the exact location of these crimes within the complex resulted in a defect in the Indictment.

170. In the *Ntakirutimana* Appeal Judgement, the Appeals Chamber concluded that Gérard Ntakirutimana had adequate notice that he murdered Charles Ukobizaba at the Mugonero Hospital during this same attack on Mugonero Complex.[393] In that case, Gérard Ntakirutimana challenged his indictment, alleging that it did not, *inter alia*, set forth the place of this crime in sufficient detail.[394] The Appeals Chamber notes that, as with the events in this case, the murder occurred at the Mugonero Hospital and the indictment referred to the location of the crime only as "Mugonero Complex".[395] Beyond the assertion that Mugonero Complex is "huge",[396] the Appellant has not advanced any argument indicating why further specificity was required in this particular case.

171. Accordingly, the Appellant has failed to demonstrate that the Indictment was defective with respect to the location of these crimes.

2. Alleged Errors relating to the Ethnic Identity of the Victims

172. In addition, the Appellant submits that the Trial Chamber erred in fact in finding in paragraph 288 of the Trial Judgement that Mukasine and Murekatete were Tutsi when it referred to them as "two *Tutsi* staff maids".[397] He notes that Witness BJ testified that she did not know the ethnicity of Mukasine and Murekatete.[398] Moreover, the Appellant submits that, in failing to establish the ethnic identity of these women, the Trial Chamber erred in law in convicting him for genocide on the basis of this event.[399]

173. Paragraph 288 of the Trial Judgement, which the Appellant challenges, is not a factual finding, but simply a summary of allegations contained in paragraph 6(c)(ii) of the Indictment. Contrary to the Appellant's assertion, the Trial Chamber observed in its factual findings on this

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[392] *See* Respondent's Brief, para. 209 ("In her statement of 15 November 1999, Witness BJ stated that, 'I did not identify those spearheading the attack because I was scared; my only concern then was to arrive at the hospital as swiftly as possible and hide. At about 9 am, a man named MIKA came into the room with two other men.'").
[393] *Ntakirutimana* Appeal Judgement, paras. 30-44.
[394] *Ntakirutimana* Appeal Judgement, para. 21.
[395] *Ntakirutimana* Appeal Judgement, paras. 30, 33-44. The Appeals Chamber concluded in the *Ntakirutimana* Appeal Judgement that the indictment was defective because it failed to plead the specific murder. The Pre-Trial Brief along with the witness statements, which the Appeals Chamber concluded cured this defect, also did not further specify the location of the crime beyond referring to Mugonero Complex.
[396] Appellant's Brief, para. 259.
[397] Appellant's Brief, para. 264.
[398] Appellant's Brief, para. 263.
[399] Appellant's Brief, paras. 263, 264. The Appellant makes reference to the failure to establish that the women belonged to a "protected group" within the meaning of the Genocide Convention and the Statute. Appellant's Brief, para. 263. Thus, the Appeals Chamber understands his submissions as challenging his conviction for genocide.

incident that the ethnicity of Mukasine and Murekatete was unknown.[400] Moreover, the Appellant's contention that the Trial Chamber erred in law in entering a conviction against him for genocide based on this event is without merit. The Trial Chamber stated in its legal findings that the Appellant's conviction for genocide, insofar as it related to acts of rape at Mugonero Complex, encompassed only the rapes of Tutsi women.[401]

174. Rather, the Appellant was convicted of the rapes of Mukasine and Murekatete as a crime against humanity,[402] and he does not dispute that these crimes were part of the "discriminatory, widespread, and systematic attacks […] directed against groups of *Tutsi* civilians in Gishyita *Commune* and in the Bisesero area, between April and June 1994."[403] Accordingly, the Appellant has not demonstrated any error related to the Trial Chamber's findings related to the ethnicity of the victims which might result in a miscarriage of justice.

3. Alleged Error in the Assessment of Witness BJ

175. The Appellant submits that the Trial Chamber erred in fact and in law in failing to address all but one of the nineteen arguments raised in the Defence Closing Brief relating to the reliability of Witness BJ's testimony.[404] He argues that this failure deprived him of a fair trial, which includes the right to be guaranteed that the evidence and arguments presented by the Defence have been heard and carefully considered.[405]

176. The Appeals Chamber notes that the fact that the Trial Chamber did not refer to every one of the Appellant's arguments in relation to Witness BJ's testimony in its reasoning, does not mean that those arguments had not been considered. A Trial Chamber is not required to set out in detail why it accepted or rejected a witness's testimony, or justify its evaluation of testimony in cases where there are discrepancies in the evidence.[406] It is also not obliged in its judgement to recount and justify its findings in relation to every submission made at trial.[407] Moreover, the Appeals Chamber declines to consider the Appellant's remaining eighteen arguments allegedly impugning the

[400] Trial Judgement, para. 291.
[401] Trial Judgement, para. 513 ("The Chamber finds that, through personal commission, the Accused killed and caused serious bodily or mental harm to members of the *Tutsi* group: […] (c) By taking part in attacks at Mugonero Complex, where he raped *Tutsi* women and shot at *Tutsi* refugees. Many *Tutsi* refugees died or were injured in the attack.").
[402] Trial Judgement, paras. 553, 563.
[403] Trial Judgement, para. 533.
[404] Appellant's Brief, paras. 265, 266.
[405] Appellant's Brief, para. 266.
[406] *Musema* Appeal Judgement, para. 20.
[407] *Čelebići Case* Appeal Judgement, para. 498.

credibility of Witness BJ in particular as they are incorporated merely by reference from the Defence Closing Brief, without any additional argument justifying their consideration on appeal.

177. Accordingly, this sub-ground of appeal is dismissed.

C. Alleged Errors relating to the Rape of Witness AU

178. The Trial Chamber found that, on 16 April 1994 during the attack on Mugonero Complex, the Appellant raped Witness AU twice in the basement of Mugonero Hospital.[408] The Trial Chamber convicted him, in part, based on this event for genocide[409] and rape as a crime against humanity.[410] The Appellant submits errors of fact and of law in the notice given to him in the Indictment for this event and in the assessment of Witness AU's testimony.[411]

1. Alleged Defect in the Form of the Indictment

179. The Appellant contends that the Indictment alleges that the rape took place at "Mugonero School of Medicine", which does not exist, and that it therefore does not give notice that the event occurred in the basement of Mugonero Hospital.[412]

180. Paragraph 6(c)(iv) of the Indictment reads:

> On 16 April 1994, at the Mugonero complex, Mikaeli Muhimana, acting in concert with *Interahamwe* went to one of the operating rooms in the medical school building in the Mugonero complex and collectively raped Tutsi women AU-K, Immaculate Mukabarore, Josephine Mukankwaro. In particular Mikaeli Muhimana raped AU-K.

181. On the basis of the Indictment alone, the Appellant would have known that he was being charged with the rape of Witness AU at the Mugonero Complex. As the Appeals Chamber noted above in this ground of appeal, this is sufficient notice of the location of this crime in the context of these events. In light of the reference to "operating room" and "medical school building", the Appeals Chamber is satisfied that it would have been apparent that this was a reference to the Mugonero Hospital. Accordingly, the Appellant has failed to demonstrate that the Indictment was defective with respect to the location of this crime.

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[408] Trial Judgement, paras. 302, 552.
[409] Trial Judgement, paras. 513, 519.
[410] Trial Judgement, paras. 552, 563.
[411] Notice of Appeal, p. 19, para. 63; Appellant's Brief, paras. 268-274. The Appellant also raises an argument in his Notice of Appeal concerning the credibility of her account concerning the number of attackers, which he does not develop in his brief. Notice of Appeal, p. 19, para. 63.
[412] Appellant's Brief, paras. 270, 274.

2. Alleged Errors in the Assessment of Witness AU

182. The Appellant submits that the Trial Chamber erred in fact in finding that Witness AU was raped in the basement of Mugonero Hospital because the witness gave conflicting testimony about the location of the crime and could not clearly indicate where it occurred.[413] The Appellant points to passages in the witness's testimony where she refers both to "the church" and "the hospital surgery" and to a contradiction in the witness's testimony and her pre-trial statement concerning whether she was alone in the room before the Appellant raped her.[414]

183. As the Appellant submits, Witness AU apparently stated that she observed other women "lying down on the ground in the church", referring to the same location where she was raped.[415] The Appeals Chamber notes that immediately after this reference the interpreters asked the witness to move closer to the microphone because they were having difficulty hearing her.[416] The witness then indicated that, when the attackers arrived, she and other refugees were on the ground of the church, and subsequently went to the surgical room.[417] A review of the transcripts reveals that, other than this one instance, Witness AU consistently attested to fleeing the church to the hospital where she was raped in the hospital basement.[418] In addition, her testimony also reflects that at some points she used the term "church" to refer to the entire Mugonero Complex.[419] Therefore, the Appeals Chamber is not convinced that no reasonable trier of fact could have relied on her account despite this discrepancy.

184. A certain degree of ambiguity is apparent in Witness AU's account of whether she was in the room alone or with others when the Appellant raped her.[420] The Trial Chamber, however, was aware of this, as it sought clarification from her on this point during her testimony.[421] The Appeals Chamber considers that the Trial Chamber appears to have exercised an appropriate degree of

[413] Appellant's Brief, paras. 268-274.
[414] Appellant's Brief, paras. 271-273.
[415] T. 7 April 2004 p. 5 ("Q. […] You said the *Interahamwes* were maltreating these girls and raping them. A. That is correct. Q. It was – and you also indicated this is the same room where Mika Muhimana had sexual intercourse with you. A. Yes, these other people were lying down on the ground in the church. I was able to identify some of these people.").
[416] T. 7 April 2004 p. 5.
[417] T. 7 April 2004 p. 5 ("Q. Thank you, Madam Witness. We were talking about the *Interahamwes* who were raping the girls, and as a follow-up to that, I want to ask a question whether Mika Muhimana was present when these *Interahamwes* were raping the girls. A. He was present, and when he came in he was accompanied by a large crowd of *Interahamwe*. We were on the floor in the church, and afterwards we went to the surgical room.").
[418] T. 7 April 2004 pp. 4-5, 7, 18, 21-23, 29.
[419] *See, e.g.,* T. 7 April 2004 p. 3 ("We were at the hospital in Ngoma, in a church [...]. We saw people running away. We went towards the church. When we arrived at the church, the president was dead. We learnt of this when we reached the hospital.").
[420] T. 7 April 2004 pp. 25-30.
[421] T. 7 April 2004 p. 30.

caution in assessing her testimony as reflected in its rejection of certain portions of her account relating to other rapes she claimed to have witnessed.[422] Accordingly, the Appeals Chamber is not satisfied that these apparent contradictions show that no reasonable trier of fact could have made the Trial Chamber's finding that this crime occurred in the basement of the Mugonero Hospital.

D. Alleged Errors relating to the Rape of Witness BG

185. The Trial Chamber found that the Appellant "permitted" an *Interahamwe* called Mugonero to "take away" Witness BG with the knowledge that Mugonero intended to rape her.[423] The Trial Chamber found that, based on this, the Appellant encouraged Mugonero to rape Witness BG and that this encouragement contributed substantially to the subsequent rape.[424] The Trial Chamber, therefore, found the Appellant responsible for abetting the rape of Witness BG and convicted him for rape as a crime against humanity, in part based on this event.[425]

186. The Appellant alleges that the Trial Chamber erred in law in convicting him of a crime that is not provided for in the Statute.[426] The Appellant argues that he was convicted for "authorising" Mugonero to abduct and rape Witness BG, which is not a mode of participation under Article 6(1) of the Statute.[427] Moreover, the Appellant further argues that, to the extent that "authorising" means "ordering", Mugonero allegedly asked for a "favour" and thus was not compelled to commit the crime.[428]

187. The Trial Chamber convicted the Appellant for abetting the rape of Witness BG.[429] Abetting is one of the modes of participation under Article 6(1) of the Statute. Therefore, the Appellant's argument that he was convicted of a crime or for a mode of participation that is not in the Statute is without merit.

188. In addition, the Appellant argues that the Trial Chamber erred in fact in failing to establish the structure of the *Interahamwe* in Gishyita Commune, his role in the *Interahamwe*, and a superior-

[422] Trial Judgement, para. 303.
[423] Trial Judgement, paras. 318, 323, 553.
[424] Trial Judgement, para. 553.
[425] Trial Judgement, paras. 553, 563.
[426] Notice of Appeal, p. 20, para. 69; Appellant's Brief, paras. 276-284. In addition, in his Notice of Appeal, the Appellant raised a number of challenges to the credibility of Witness BG, but he did not develop them in his Appellant's Brief under this ground. Notice of Appeal, pp. 19-20, paras. 65-68. The Appeals Chamber, however, discusses these issues in connection with the Appellant's challenge to Witness BG's credibility under Ground of Appeal 12.
[427] Appellant's Brief, paras. 276-284.
[428] Appellant's Brief, paras. 282, 283.
[429] Trial Judgement, para. 553.

subordinate relationship between him and Mugonero.[430] He submits that the Trial Chamber was required to establish his position of authority in order to show that he used his authority to "persuade or force another person to commit a crime."[431]

189. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime, and that this support has a substantial effect on the perpetration of the crime.[432] The requisite mental element of aiding and abetting is knowledge that the acts assist the commission of the specific crime of the principal perpetrator.[433] For an accused to be convicted of abetting an offence, it is not necessary to prove that he had authority over the principal perpetrator.[434]

190. The Appeals Chamber is not convinced that the Trial Chamber erred in convicting the Appellant for abetting the rape of Witness BG when he gave permission to Mugonero to "take away" Witness BG. The Trial Chamber concluded that the Appellant was a well-known and influential person in his community.[435] The Trial Chamber further found that the Appellant knew that Mugonero wanted to rape the witness.[436] The Appeals Chamber considers that a reasonable trier of fact could find that the Appellant's actions in such circumstances amounted to encouragement which had a substantial affect on Mugonero's subsequent rape of Witness BG. In the *Semanza* Appeal Judgement, the Appeals Chamber reached a similar conclusion in respect of an "influential" accused who encouraged the rape of Tutsi women by giving "permission" to rape them.[437]

191. Accordingly, this sub-ground of appeal is dismissed.

E. Conclusion

192. In view of the foregoing, this ground of appeal is dismissed in its entirety.

[430] Appellant's Brief, paras. 275, 285-290.
[431] Appellant's Brief, paras. 285, 290.
[432] *Ntakirutimana* Appeal Judgement, para. 530; *Vasiljević* Appeal Judgement, para. 102.
[433] *Ntakirutimana* Appeal Judgement, para. 530; *Vasiljević* Appeal Judgement, para. 102.
[434] *Cf. Semanza* Appeal Judgement, para. 257 (referring to instigation).
[435] Trial Judgement, para. 604.
[436] Trial Judgement, para. 323.
[437] *Semanza* Appeal Judgement, paras. 256, 257, quoting *Semanza* Trial Judgement, para. 478.

XVI. ALLEGED ERRORS RELATING TO THE ATTACK AT KANYINYA HILL IN MAY 1994 (GROUND OF APPEAL 14)

193. The Trial Chamber found that, "on a morning during May 1994", the Appellant called the Tutsi refugees on Kanyinya Hill together for a meeting and, when one of them stepped forward to speak to him, he told the individual that he would return the next day with "white people who would bring food and medicine".[438] The Trial Chamber concluded that on the next day the Appellant returned to the hill with busloads of armed assailants and unleashed a devastating attack.[439] The Trial Chamber found that the Appellant actively participated in this attack by shooting and wounding a Tutsi man named Nyagihigi.[440] In making these findings, the Trial Chamber relied primarily on the evidence of Prosecution Witness AP, which it found was corroborated by Prosecution Witness AW.[441] The Trial Chamber convicted the Appellant of genocide in part based on his role in this attack.[442] On appeal, the Appellant raises three principal factual and legal challenges with respect to the Trial Chamber's assessment of the notice provided by the Indictment, the Prosecution evidence, and the standard applied in assessing Defence evidence.[443] The Appeals Chamber addresses these arguments in turn.

A. Alleged Defect in the Form of the Indictment

194. The Appellant submits that the Trial Chamber erred in law in failing to address his arguments pertaining to the vagueness of the Indictment.[444] He argues that paragraph 5(d)(v) of the Indictment lacks precision and fails to plead any physical act of genocide.[445]

195. As noted above, the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused.[446] Applying the standard of notice articulated previously in this Judgement, where an accused is alleged to have personally committed a crime, the indictment must specify the criminal acts physically committed by the accused.[447] An indictment lacking this precision is defective;

[438] Trial Judgement, para. 339.
[439] Trial Judgement, para. 340.
[440] Trial Judgement, para. 513.
[441] Trial Judgement, paras. 338-340.
[442] Trial Judgement, para. 513.
[443] Notice of Appeal, p. 20, paras. 70-73; Appellant's Brief, paras. 291-314.
[444] Notice of Appeal, p. 20, para. 73; Appellant's Brief, para. 314.
[445] Appellant's Brief, para. 314.
[446] *See supra* paras. 76, 167. *See also Gacumbitsi* Appeal Judgement, para. 49, *Ndindabahizi* Appeal Judgement, para. 16.
[447] *Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreški} et al*. Appeal Judgement, para. 89. *See also Ndindabahizi* Appeal Judgement, para. 16.

however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[448]

196. Paragraph 5(d)(v) of the Indictment reads: "In May 1994, Mikaeli Muhimana along with Clement Kayishema, Obed Ruzindana, *Interahamwe* and *gendarmes*, searched for and attacked *Tutsi* civilians taking refuge in Kabakobwa, Gitwa, Kanyinya and Ngendombi hills in Bisesero area." In connection with this allegation, the Trial Chamber found that the Appellant participated in an attack on Kanyinya Hill in May 1994 and participated in this massacre of Tutsis, *inter alia*, by shooting and wounding a Tutsi man named Nyagihigi.[449]

197. On the basis of the Indictment alone, the Appellant could not have known that he was being charged with personally shooting and wounding Nyagihigi during this attack. While in certain circumstances, "the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes",[450] this is not the case with respect to the shooting of Nyagihigi.[451] The Prosecution should have expressly pleaded this shooting and wounding as it had the information in its possession before the amended Indictment was filed.[452] The Indictment was thus defective in this respect.

198. A review of the trial record, including the evidence of Witness AP, reveals that the Appellant did not object to the form of this paragraph before trial or during the witness's testimony. The Prosecution, however, argues only that the Appellant failed to raise this argument in the Defence Closing Brief.[453] The Appeals Chamber notes that the Appellant did challenge the evidence that he shot and wounded Nyagihigi after the close of the Defence case before closing arguments in a motion to strike Witness AP's testimony, along with other Prosecution evidence, on grounds of lack of notice.[454] In deciding on the Appellant's motion to strike, the Trial Chamber held that it would consider these issues in reaching final judgement and invited the parties to present

[448] *Gacumbitsi* Appeal Judgement, para. 49. *See also Ntagerura et al.* Appeal Judgement, paras. 28, 65.
[449] Trial Judgement, paras. 340, 513.
[450] *Gacumbitsi* Appeal Judgement, para. 50, citing *Kupreški} et al.* Appeal Judgement, para. 89 (internal citations omitted).
[451] The Trial Chamber did not refer to the Appellant's initial visit to assess the situation and to call on the refugees to gather together on the date of the massacre as part of his participation in the attack. Trial Judgement, para. 513.
[452] Indeed, the Prosecution had this information in its possession since Witness AP provided statements between 1999 and 2000.
[453] Respondent's Brief, para. 250.
[454] *See The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, *Requête en irrecevabilité des témoignages relatifs à des charges ne figurant pas dans l'acte d'accusation modifié ou n'ayant pas été soutenues devant la Chambre ou ayant été rétractées par le Procureur*, 6 September 2004, para. 6 (requesting exclusion of Witness AP's testimony in part on the basis that the shooting of Nyagihigi is not pleaded in the Indictment).

their submissions on this point in their closing briefs.[455] A review of the Defence Closing Brief also reveals that the Appellant raised an objection in it based on the inadequacy of the notice provided by paragraph 5(d)(v) of the Indictment.[456]

199. The Appeals Chamber has held that, where a Trial Chamber has treated a challenge to an indictment as being adequately raised, the Appeals Chamber should not invoke the waiver doctrine.[457] In this case, the Trial Chamber did not consider the Appellant's objection based on lack of notice in its motion to strike as untimely, but rather invited the parties to present arguments on this point in their final submissions.[458] In addition, although it did not specifically address the Appellant's claims of lack of notice in respect to this paragraph of the Indictment in the Trial Judgement, the Trial Chamber considered other similar challenges made in the Defence Closing Brief as timely.[459] The Appeals Chamber will therefore treat the Appellant's objection as having been timely raised. It therefore falls to the Prosecution to prove that the Appellant's defence was not materially impaired by this defect.[460]

200. The question remains whether the defect in the Indictment was cured by subsequent timely, clear, and consistent information provided to the Appellant. The Prosecution makes no submissions in this regard, simply referring to the sheer scale of the massacre.[461] Nonetheless, the Appeals Chamber observes that the Appellant conceded in his motion to strike that he received more detailed notice of this incident in the Pre-Trial Brief.[462] A review of the summary of Witness AP's anticipated testimony in an annex to the Pre-Trial Brief contains an allegation that the Appellant was among the leaders attacking the refugees at Kanyinya Hill and that sometime in mid-May 1994 she saw the Appellant shoot and kill Nyagihigi.[463]

201. In the *Gacumbitsi* Appeal Judgement, the Appeals Chamber held that a summary of an anticipated testimony in an annex to the Prosecution's pre-trial brief could, in certain circumstances,

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[455] *Muhimana*, Order in Relation to Defence Motion on Inadmissibility of Witness Testimony.
[456] Defence Closing Brief, paras. 177, 194.
[457] *Gacumbitsi* Appeal Judgement, para. 54. *See also Ntakirutimana* Appeal Judgement, para. 23.
[458] *Muhimana*, Order in Relation to Defence Motion on Inadmissibility of Witness Testimony.
[459] *See, e.g.*, Trial Judgement, paras. 403, 404, 571-575.
[460] *Gacumbitsi* Appeal Judgement, para. 51.
[461] Respondent's Brief, paras. 249-252.
[462] *See The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, *Requête en irrecevabilité des témoignages relatifs à des charges ne figurant pas dans l'acte d'accusation modifié ou n'ayant pas été soutenues devant la Chambre ou ayant été rétractées par le Procureur*, 6 September 2004, para. 6.
[463] Pre-Trial Brief, Annex A, p. 2. The summary, however, does not refer the Appellant to paragraph 5(d)(v) of the Indictment.

cure a defect in an indictment.[464] The present circumstance is similar to that in *Gacumbitsi* where the summary of the anticipated testimony provides greater detail in a consistent manner with a general allegation pleaded in the Indictment.[465] The Pre-Trial Brief therefore provided the Appellant with timely, clear, and consistent information sufficient to put him on notice that he was being charged with committing genocide by shooting Nyagihigi at Kanyinya Hill. Therefore, the Appellant has failed to demonstrate that the Trial Chamber erred in failing to consider his arguments pertaining to the vagueness of paragraph 5(d)(v) of the Indictment.

B. Alleged Errors in the Assessment of Witnesses AP and AW

202. The Appellant submits that the Trial Chamber erred in fact in assessing the evidence of Witnesses AP and AW and in making factual findings on the basis of it.[466]

203. The Appellant submits that Witness AW's evidence reflects that no attack occurred at Kanyinya Hill because, contrary to his direction, the refugees did not assemble in order to receive the promised humanitarian assistance.[467] The Appeals Chamber, however, is not satisfied that the Appellant has demonstrated any contradiction between Witness AW's account on this point and the Trial Chamber's findings that an attack occurred.

204. The Appellant further submits that Witness AW's account of the Appellant's conversation with Witness AW during his initial visit to Kanyinya Hill is implausible and that no reasonable trier of fact could have relied on this evidence to establish the Appellant's role in the attack.[468] The Appellant argues that the conversation could not have taken place because, if, as the Prosecution contended, the Appellant was armed and a "genocide hangman […] whose job was to exterminate Tutsi", he would have simply killed Witness AW, a Tutsi, at this meeting.[469] The Appeals Chamber is not convinced that this submission, which is mere speculation, calls into question the

[464] *Gacumbitsi* Appeal Judgement, paras. 57, 58. *See also Ntakirutimana* Appeal Judgement, para. 48 (holding that a witness statement, when taken together with "unambiguous information" contained in a pre-trial brief and its annexes may be sufficient to cure a defect in an indictment). This approach is consistent with ICTY jurisprudence. *See Naletili} and Martinovi}* Appeal Judgement, para. 45.
[465] *Gacumbitsi* Appeal Judgement, para. 58.
[466] Notice of Appeal, p. 20, paras. 70, 71; Appellant's Brief, paras. 291-304. The Appellant also points to an apparent contradiction between the evidence of Witnesses AP and AW and Witness BI as to the location where the Appellant told the refugees to assemble after his initial visit. Appellant's Brief, para. 295. However, as the Appellant acknowledges, the Trial Chamber did not rely on Witness BI's testimony in making findings on this event. *See* Trial Judgement, para. 338.
[467] Appellant's Brief, paras. 291, 292.
[468] Appellant's Brief, paras. 293, 294.
[469] Appellant's Brief, para. 294.

reasonableness of the Trial Chamber's reliance on Witness AW's testimony. This is especially so because this conversation took place not on the day of the attack, but earlier.[470]

205. Next, the Appellant submits that the Trial Chamber erred in fact in finding that Witness AW corroborated Witness AP's evidence in light of several alleged discrepancies between their accounts related to the timing of the events and what transpired during the Appellant's initial meeting with the refugees.[471] In particular, the Appellant notes that Witness AW described the Appellant arriving for the initial visit with Obed Ruzindana and two soldiers and stated that the attack occurred two days later.[472] The Appellant submits that, in contrast, Witness AP described the Appellant arriving with communal police and stated that the attack occurred one day later.[473] The Appellant observes that neither witness placed this event in mid-May 1994, noting that Witness AP stated that it occurred at the beginning of May 1994.[474] Finally, the Appellant's submissions suggest that Witness AW's description of a group of refugees interacting with the Appellant is inconsistent with the Trial Chamber's finding that one individual stepped forward to speak with him.[475]

206. The Trial Chamber did not explicitly assess these discrepancies between the accounts of Witnesses AP and AW, which, the Appeals Chamber notes, are for the most part readily apparent in the summary of their evidence presented in the Trial Judgement.[476] Rather, in assessing their evidence, the Trial Chamber focused on the similarities in the accounts of Witnesses AW and AP, noting that both testified that the Appellant arrived in a red vehicle accompanied by others and promised to return with assistance for the refugees.[477] The Appeals Chamber observes that these witnesses provided a broadly consistent description and chronology of the events in question and notes that Witness AP attested to giving estimates with respect to dates and times.[478] The Appeals Chamber also finds no error in the finding that the event occurred in mid-May 1994, a broad time frame, which is not inconsistent with the general description provided by the witnesses.[479]

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[470] Trial Judgement, paras. 329, 338.
[471] Appellant's Brief, paras. 296-304.
[472] Appellant's Brief, paras. 300, 303.
[473] Appellant's Brief, paras. 300, 301
[474] Appellant's Brief, paras. 298, 299.
[475] Appellant's Brief, paras. 291-294.
[476] Trial Judgement, paras. 326-329.
[477] Trial Judgement, para. 338.
[478] Trial Judgement, para. 326 ("Witness AP told the Chamber that she could not recall the specific dates of events that occurred when she was in the Bisesero Hills.").
[479] Prosecution Witness AW placed this event between 10 and 14 May 1994. T. 14 April 2004 p. 54 ("This happened in the month of May, I would say between the 10th and the 14th, before the attacks that were launched on Muyira hill."). Prosecution Witness AP estimated that this event occurred sometime after 8 May 1994. Her testimony reflects that she arrived in the Bisesero area on 8 April 1994 and saw the Appellant there about a month after her arrival. *See* Trial Judgement, para. 326; T. 30 March 2004 pp. 32, 33 ("I only got to Bisesero on the 8th [of April] […]. Well, we could

207. Moreover, a review of the Trial Judgement reveals that the Trial Chamber relied primarily on the evidence of Witness AP in making findings on the details of this event.[480] While not every aspect or detail of Witness AP's account was corroborated by Witness AW, the Appeals Chamber has consistently held that a Trial Chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[481] The Trial Chamber determined that Witness AP was credible,[482] and the Appellant has not shown this finding to be erroneous.

208. Accordingly, the Appellant has not demonstrated that no reasonable trier of fact could have considered the testimony of Witness AW as corroborating the testimony of Witness AP and made findings on the basis of their evidence.

C. Alleged Error in the Assessment of Defence Evidence

209. The Appellant submits that the Trial Chamber erred in law by applying a stricter standard in assessing the credibility of Defence witnesses in respect of this event than in assessing the Prosecution evidence and by reversing the burden of proof, leading it to reject the Defence evidence.[483] The Appellant argues that the Trial Chamber accepted a certain degree of vagueness in assessing descriptions of the events provided by Prosecution witnesses, noting that it was understandable given the passage of time.[484] However, the Appellant asserts that, in assessing the credibility of Defence witnesses, the Trial Chamber used similar vagueness in their accounts to reject their evidence.[485] In addition, the Appellant submits that the Trial Chamber's rejection of testimonies of Defence witnesses who stated that they did not see him during the attack essentially required him to prove that he did not participate in the crimes.[486]

210. In assessing the credibility of Defence Witnesses DY, DK, DL, and DF, who admitted to participating in various attacks in the Bisesero area, the Trial Chamber observed that they gave "vague descriptions of the time and place of the attacks in which they participated and sketchy details about their own roles in the killing."[487] However, the vagueness in their accounts was not the principal reason for rejecting their evidence. Rather, as the Trial Chamber noted, "[t]he thrust of the

not recall dates. We do not even know the day of the week. Night followed day. We didn't know which day it was. It was in the month of May. We had just spent a month in Bisesero.").
[480] Trial Judgement, paras. 326-328, 339, 340.
[481] *Gacumbitsi* Appeal Judgement, para. 72.
[482] Trial Judgement, para. 338.
[483] Notice of Appeal, p. 20, para. 72; Appellant's Brief, paras. 305-313.
[484] Appellant's Brief, paras. 306, 308.
[485] Appellant's Brief, paras. 307, 309, 310, 313.
[486] Appellant's Brief, paras. 312, 313.
[487] Trial Judgement, para. 342.

Defence evidence was that these witnesses neither saw the Accused during the attacks nor heard, during *gacaca* sessions held in prison in Rwanda, that the Accused participated in the attacks."[488] The Appellant has thus not established that the Trial Chamber erred by applying a more stringent standard to its assessment of the Defence evidence than in its assessment of the Prosecution evidence.

211. Moreover, the Appeals Chamber is also not satisfied that the Appellant has shown that, in rejecting this Defence evidence, the Trial Chamber reversed the burden of proof. Noting that "these attacks involved thousands of assailants spread over a large area", the Trial Chamber simply reflected the limited probative value that evidence of this nature has in the context of a large-scale assault.[489] Accordingly, the Appeals Chamber dismisses these arguments.

D. Conclusion

212. In view of the foregoing, this ground of appeal is dismissed in its entirety.

[488] Trial Judgement, para. 342. For the same reasons, the Trial Chamber rejected the evidence of Defence Witness DD who was a refugee on Kanyinya Hill at the time. *See* Trial Judgement, para. 343.
[489] Trial Judgement, paras. 342, 343.

XVII. ALLEGED ERRORS RELATING TO THE MURDER OF PASCASIE MUKAREMERA (GROUND OF APPEAL 15)

213. The Trial Chamber found that, in mid-May 1994 on Rugona Hill, the Appellant cut a pregnant woman, Pascasie Mukaremera, with a machete and removed her child, who cried before dying.[490] The victim died as a result of the injuries.[491] The Trial Chamber convicted the Appellant of murder as a crime against humanity, in part based on this event.[492]

214. The Trial Chamber found that the relevant paragraph of the Indictment was defective with respect to the timing of this event, its location, and the form of the Appellant's participation in the crime.[493] Paragraph 7(d)(i) of the Indictment reads: "Towards the end of May 1994, at Nyakiyabo hill in the Bisesero area an *Interahamwe* named Gisambo killed Pascasie Mukarema, on instructions of Mikaeli Muhimana." The Trial Chamber observed that the Appellant disputed this allegation based on lack of notice with respect to the time and place of the event, but not as to the nature of his role in the murder.[494] The Trial Chamber considered that a summary of the testimonies of Prosecution Witnesses BI and AW, contained in an annex to the Prosecution's Pre-Trial Brief, as well as the disclosure of Witness AW's written statement cured these defects.[495]

215. On appeal, the Appellant submits that the Trial Chamber erred in law[496] in convicting him of the murder of Pascasie Mukaremera because the Indictment failed to give him proper notice of the time and place of the crime and his role in it.[497] In addition, he disputes the Trial Chamber's conclusion that he failed to contest the variance between the description of him in the Indictment as instructing Gisambo to kill Pascasie Mukaremera and the finding that he personally committed the crime.[498] He argues that this variance was not simply a defect in the legal qualification of the crime, but instead indicated that the Indictment pleaded a different act.[499]

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[490] Trial Judgement, paras. 402, 570, 576.
[491] Trial Judgement, para. 576.
[492] Trial Judgement, paras. 570, 576, 582, 583.
[493] Trial Judgement, paras. 404, 574.
[494] Trial Judgement, paras. 403, 404, 575. The Trial Chamber refers only to "the Defence submission" without referring to a particular document. The Trial Chamber appears to be referring to the Defence's Closing Brief.
[495] Trial Judgement, paras. 403, 404, 574.
[496] The Appellant refers to this as an error of fact. *See* Appellant's Brief, para. 315. However, the Appeals Chamber treats claims of lack of notice as errors of law. *See, e.g., Gacumbitsi* Appeal Judgement, para. 46; *Niyitegeka* Appeal Judgement, para. 191.
[497] Notice of Appeal, paras. 74, 75; Appellant's Brief, paras. 315-340.
[498] Appellant's Brief, paras. 331-334.
[499] Appellant's Brief, paras. 325-328, 340.

216. The Prosecution responds that the Appellant had sufficient notice of the time and location of the murder of Pascasie Mukaremera and his role in it through the Pre-Trial Brief and through the disclosure of the statement of Witness AW.[500] The Prosecution acknowledges that the Indictment was defective as to the legal qualification of the Appellant's role in the crime, but that it was within the Trial Chamber's discretion to reclassify the Appellant's mode of participation and enter a finding of guilt for personal commission, rather than ordering the murder.[501] The Prosecution further adds that the Appellant failed to object to the legal qualification of the crime at trial and has failed to demonstrate prejudice on appeal.[502] In this respect, the Prosecution observes that ordering and personal commission are both direct forms of participation in a crime.[503]

217. Applying the standard of notice articulated previously in this Judgement, where an accused is alleged to have personally committed a crime, the indictment must specify the criminal acts physically committed by the accused.[504] An indictment lacking this precision is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[505]

218. As the Trial Chamber observed, the Indictment is defective because it fails to allege the correct time and location of the murder and that the Appellant physically committed it.[506] The Appellant, therefore, could not have known, on the basis of the Indictment alone, that he was being charged with personally killing Pascasie Mukaremera in mid-May 1994 on Rugona Hill. A review of the transcripts of Prosecution Witness AW, whose uncorroborated testimony supports this conviction, reveals that the Appellant did not make a specific objection at the time the evidence was presented. However, he did raise an objection based on lack of notice in his Defence Closing Brief.[507] Although the Prosecution submits that the Appellant failed to make a contemporaneous objection to the evidence of Witness AW at trial,[508] the Trial Chamber did not describe the Appellant's objection based on lack of notice in its closing brief as untimely. The Appeals Chamber

[500] Respondent's Brief, paras. 254-264.
[501] Respondent's Brief, para. 261.
[502] Respondent's Brief, para. 263.
[503] Respondent's Brief, para. 264.
[504] *See supra* paras. 76, 167, 195. *See also Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreški} et al*. Appeal Judgement, para. 89, *Ndindabahizi* Appeal Judgement, para. 16.
[505] *Gacumbitsi* Appeal Judgement, para. 49. *See also Ntagerura et al.* Appeal Judgement, paras. 28, 65.
[506] Trial Judgement, paras. 403, 404, 574.
[507] Defence Closing Brief, paras. 318, 321.
[508] Respondent's Brief, para. 259.

has held that, where a Trial Chamber has treated a challenge to an indictment as being adequately raised, the Appeals Chamber should not invoke the waiver doctrine.[509]

219. The question arises whether the Appellant's objection pertained solely to the time and place of the murder or whether he also objected to the description of his alleged role in the killing. Both the Trial Chamber in its Judgement, and the Prosecution on appeal, consider that the Appellant failed to dispute the defect in the description in the Indictment of his role in the crime and, in this respect, only challenged evidence related to it on its merits.[510] However, a review of the Defence Closing Brief reveals that the Appellant also challenged the Indictment based on its failure to plead his physical perpetration of this crime.[511] Accordingly, the Appeals Chamber considers that the Appellant raised a timely objection to all defective aspects of this paragraph of the Indictment at trial. It therefore falls to the Prosecution to prove that the Appellant's defence was not materially impaired by these defects.[512]

220. The question remains whether the defect in the Indictment was cured by the disclosure of Witness AW's written statement and the summary of the evidence of Prosecution Witnesses BI and AW in an annex to the Prosecution's Pre-Trial Brief. On appeal, the Prosecution does not point to any additional filings or oral submissions beyond those mentioned by the Trial Chamber when considering whether the Indictment defects were cured.[513]

221. The Appeals Chamber observes that the summary of Witness BI's testimony in the annex refers to a different, although strikingly similar event allegedly occurring on Nyakiyabo Hill, rather than to the one presented at trial, occurring on Rugona Hill.[514] The summary provides:

> In Bisesero the witness was hiding in one of the hills, Nyakiyabo [*sic*] saw Muhimana shoot dead a child Mukasine was carrying and proceed to rape Mukasine. After raping the girl, Gisambo raped the same girl before shooting her.

The summary does not indicate that this anticipated testimony goes to Paragraph 7(d)(i) of the Indictment, which is at issue.[515] Moreover, the summary clarifies in a column entitled

[509] *Gacumbitsi* Appeal Judgement, para. 54. *See also Ntakirutimana* Appeal Judgement, para. 23.
[510] Trial Judgement, para. 575; Respondent's Brief, para. 263.
[511] Defence Closing Brief, paras. 318, 321.
[512] *Gacumbitsi* Appeal Judgement, para. 51. *See also Ntagerura et al.* Appeal Judgement, paras. 31, 138.
[513] *See* Respondent's Brief, para. 256.
[514] *See* Pre-Trial Brief, Annex A, p. 4.
[515] *See* Pre-Trial Brief, Annex A, p. 4. Instead, it refers to Paragraphs 5(c) and 6(c) of the Indictment which relate to the events at the Mugonero Complex. *Id.*

"Reconfirmations/Notice on New Evidence/Discrepancies" that Gisambo, not Muhimana, killed Mukasine's child, who was seven years old, not an infant.[516]

222. The summary of Witness AW's anticipated testimony in the annex to the Pre-Trial Brief, based on Witness AW's pre-trial statement dated 12 December 1999,[517] states in pertinent part: "[…] Witness fled to Rugona hill. In mid-May 1994, witness saw Muhimana opening the stomach of a pregnant Tutsi woman called Pascasie Mukaremera."[518] This summary further indicates that this information is relevant to paragraph 7(d)(i) of the Indictment, which is quoted above.[519]

223. In the *Gacumbitsi* Appeal Judgement, the Appeals Chamber held that a summary of an anticipated testimony in an annex to the Prosecution's pre-trial brief could, in certain circumstances, cure a defect in an indictment.[520] In that case, the indictment alleged generally that "Gacumbitsi killed persons by his own hands".[521] The Appeals Chamber found this allegation to be vague, in particular as it referred to the physical commission of murder of a particular person.[522] However, a summary of anticipated testimony contained in an annex to the pre-trial brief referred to a specific killing and connected it to the crime of genocide.[523] The Appeals Chamber also observed that the summary did not conflict with any other information that was provided to the accused and was provided in advance of trial.[524] The information in the annex to the pre-trial brief was thus found to be timely, clear, and consistent and to provide sufficient notice of the allegation of the specific murder mentioned in the summary.[525]

224. The circumstances presented in this instance, however, are different. The summary of Witness AW's anticipated testimony does not simply add greater detail in a consistent manner with a more general allegation already pleaded in the Indictment. Rather, the summary modifies the time, location, and physical perpetrator, matters that were already specifically pleaded in the Indictment, albeit in a materially different manner. In such circumstances, the summary of Witness AW's anticipated testimony in the annex of the Pre-Trial Brief and the disclosure of his witness statement

[516] *See* Pre-Trial Brief, Annex A, pp. 1, 4.
[517] *See* Ex. D 16(f).
[518] Pre-Trial Brief, Annex A, p. 6.
[519] Pre-Trial Brief, Annex A, p. 6.
[520] *Gacumbitsi* Appeal Judgement, paras. 57, 58. *See also Ntakirutimana* Appeal Judgement, para. 48 (holding that witness statements, when taken together with "unambiguous information" contained in a pre-trial brief and its annexes may be sufficient to cure a defect in an indictment). This is consistent with ICTY jurisprudence. *See Naletili} and Martinovi}* Appeal Judgement, para. 45.
[521] *Gacumbitsi* Appeal Judgement, para. 58.
[522] *Gacumbitsi* Appeal Judgement, para. 50.
[523] *Gacumbitsi* Appeal Judgement, paras. 57, 58.
[524] *Gacumbitsi* Appeal Judgement, para. 58.
[525] *Gacumbitsi* Appeal Judgement, para. 58.

do not provide clear and consistent information sufficient to put the Appellant on notice that he was being charged with physically committing the murder of Pascasie Mukaremera on Rugona Hill in mid-May 1994. The summary of Witness AW's testimony does not supplement or provide greater detail, but materially alters key facets of this paragraph. This discrepancy should have been immediately apparent to the Prosecution as it prepared its Pre-Trial Brief and listed the anticipated testimony of Witness AW in support of a paragraph of the Indictment that materially conflicted with it, in particular given that the Prosecution had shortly prior to that added this allegation to the Indictment for the purpose of providing specificity to the Accused.[526] The Prosecution however did not seek to clarify this discrepancy with a clear, timely, and consistent communication.

225. In addition, contrary to the observation in the Trial Judgement, the summary of Witness BI's testimony did not provide any notice that the location of the crime for which the Appellant was convicted is Rugona Hill because the summary appears to refer to a different event on Nyakiyabo Hill.[527] Rather, the summary of Witness BI's testimony simply adds greater confusion given its mention of Nyakiyabo Hill, which is in fact the location of the crime pleaded in paragraph 7(d)(i).

226. Moreover, the Appeals Chamber is not persuaded that these defects were not prejudicial, as indicated by the Trial Chamber, because the witness's testimony with respect to the date of the incident was consistent with his statement; because Rugona Hill, like Nyakiyabo Hill, is in the Bisesero area; and because the Indictment is merely defective in its legal qualification of the Appellant's act.[528] First, the question of proper notice is not whether the witness's testimony is consistent with his or her prior statement, but rather whether the notice provided is clear, consistent, and timely.[529] Second, as to the fact that Rugona Hill, like Nyakiyabo Hill, is in the Bisesero area, in the *Niyitegeka* Appeal Judgement, the Appeals Chamber concluded that the Trial Chamber erred in convicting the Appellant based on his participation in a massacre where the Indictment referred only generally to the Bisesero area, which did not give notice of a specific attack at a named

[526] *Muhimana*, Decision on Motion to Amend Indictment, paras. 7, 9 ("A comparison of the general allegations and facts described in the current Indictment with the detailed account in the proposed Indictment shows that the fairness of the trial will be very substantially enhanced. […] The new Indictment provides more precise particulars as to the location of killings and other criminal acts. […] Rather than changing or extending geographical scope, the effect of the proposed Indictment is to specify more precise locations within the broad area defined in the current Indictment. In that sense, the Defence cannot reasonably argue that it has had no notice that events at these locations are part of the Prosecution's case.").
[527] *See* Pre-Trial Brief, Annex A, p. 4.
[528] Trial Judgement, paras. 403, 404, 571-574.
[529] *Gacumbitsi* Appeal Judgement, para. 49. *See also Ntagerura et al.* Appeal Judgement, paras. 28, 65.

location on a specific date.[530] Finally, the defect is not simply a mischaracterization of the legal qualification of the crime, but an error in the description of the material facts of the crime itself.

227. In sum, the failure to properly plead Pascasie Mukaremera's murder in the Indictment was not cured and the Prosecution has failed to rebut the presumption of material impairment of the defence. Accordingly, the Appeals Chamber finds, Judge Schomburg dissenting, that the Trial Chamber erred in law in relying on this evidence in convicting the Appellant for this murder. His conviction for murder as a crime against humanity for this event on this count is therefore invalidated. As a consequence, the Appeals Chamber need not address the Appellant's remaining arguments under this ground of appeal.[531]

228. This error of law, however, does not invalidate the conviction of the Appellant for murder because this conviction did not rest solely on this murder. In addition, though the Trial Chamber described this particular attack as a "highly aggravating factor",[532] the Appeals Chamber is not satisfied that this error invalidates the Appellant's sentence of imprisonment for the remainder of his life in view of the other crimes[533] as well as the other aggravating factors considered by the Trial Chamber.[534] Accordingly, the Appeals Chamber finds no basis for disturbing the Appellant's conviction for murder as a crime against humanity despite its finding that the Trial Chamber erred in finding this incident established.

[530] *Niyitegeka* Appeal Judgement, paras. 229-235.
[531] *See* Notice of Appeal, paras. 76-78; Appellant's Brief, paras. 342-346.
[532] Trial Judgement, para. 612.
[533] In addition to the Appellant's convictions for genocide and rape as a crime against humanity, for which he was sentenced respectively to two concurrent terms of life imprisonment, the conviction and life sentence for murder also rests on the Appellant's commission of or complicity in the killing of five other individuals. *See* Trial Judgement, para. 570.
[534] *See generally* Trial Judgement, paras. 604-616 (discussing the Appellant's individual circumstances).

XVIII. ALLEGED ERROR RELATING TO THE SENTENCE (GROUND OF APPEAL 16)

229. The Trial Chamber, having found the Appellant guilty of genocide (Count 1), rape as a crime against humanity (Count 3), and murder as a crime against humanity (Count 4), sentenced him to imprisonment for the remainder of his life on each of the three counts.[535] The Trial Chamber found no mitigating circumstances.[536] In so doing, the Trial Chamber noted that the Appellant did not "extensively address the issue of mitigating circumstances".[537] The Trial Chamber quoted the Appellant's closing arguments, stating that he would rely on the Trial Chamber's "knowledge of the case file" and its "high sense of justice" to impose a "proportionate" sentence that reflected the "precise role that [he] might have played".[538]

230. The Appellant submits that the Trial Chamber erred in law by failing to consider any mitigating circumstances and in imposing on him an excessive and disproportionate sentence.[539] Referring to Article 23 of the Statute, Rule 101 of the Rules, and the jurisprudence of the ICTR and ICTY, the Appellant asserts that the Trial Chamber was obliged to consider mitigating circumstances.[540] He argues that the following factors should have mitigated his sentence. First, he had no prior criminal convictions and had a good reputation in Gishyita Commune.[541] Second, he was only thirty-three years old during the relevant period and is the father of nine young children.[542] Third, during the events in 1994, he protected several Tutsis.[543] Finally, he submits that, given his relatively low position in the Rwandan administrative structure and existing case law, his three life sentences are unreasonable.[544]

231. Pursuant to Rule 101(B)(ii) of the Rules, a Trial Chamber is required to take into account any mitigating circumstances in determining a sentence.[545] The accused, however, bears the burden of establishing mitigating factors by a preponderance of the evidence.[546] The Appeals Chamber notes that the Appellant made no sentencing submissions at trial.[547] In such circumstances, the Trial

[535] Trial Judgement, paras. 618, 619.
[536] Trial Judgement, para. 616.
[537] Trial Judgement, para. 602.
[538] Trial Judgement, para. 602.
[539] Notice of Appeal, pp. 21-22, paras. 79-85; Appellant's Brief, paras. 347-372.
[540] Appellant's Brief, paras. 352, 354.
[541] Appellant's Brief, paras. 356-359.
[542] Appellant's Brief, paras. 360-365.
[543] Appellant's Brief, para. 366.
[544] Appellant's Brief, para. 367-374.
[545] *Kamuhanda* Appeal Judgement, para. 354; *Kajelijeli* Appeal Judgement, para. 294.
[546] *Kajelijeli* Appeal Judgement, para. 294.
[547] Trial Judgement, para. 602.

Chamber's determination that there were no mitigating circumstances was within its discretion and does not constitute a legal error. If an accused fails to put forward relevant information, the Appeals Chamber considers that, as a general rule, a Trial Chamber is not under an obligation to seek out information that counsel did not see fit to put before it at the appropriate time.[548] Rule 86(C) of the Rules clearly indicates that sentencing submissions shall be addressed during closing arguments, and it was therefore the Appellant's prerogative to identify any mitigating circumstances instead of directing the Trial Chamber's attention to the record in general. The Appellant is simply advancing arguments on appeal that he failed to put forward at the trial stage, and the Appeals Chamber "does not consider itself to be the appropriate forum at which such material should first be raised".[549]

232. In any event, the Appellant's submissions fail to demonstrate that the Trial Chamber's finding of "no mitigating circumstances" is unreasonable.[550] The Appellant cites several cases, which, in his view, suggest that his age, status as a father, lack of prior criminal history, and his assistance to Tutsis should have mitigated the sentence.[551] Notwithstanding the fact that the Appellant's submissions do not identify evidence in the record substantiating his claim regarding his prior criminal record,[552] the Appellant points to no authority suggesting that the circumstances he now identifies require, as a matter of law, the mitigation of his sentence. The Appeals Chamber notes that comparing sentences with other cases that have been subject to final determination is of limited assistance in challenging one's sentence.[553]

233. Additionally, the Appellant's arguments, citing the *Tadi}* Sentencing Appeal Judgement discussing the principle of gradation, are equally unpersuasive. The principle suggests that sentences should be graduated, that is, that the most senior levels of the command structure should attract the severest sentences, with less severe sentences for those lower down the structure.[554] While the Trial Judgement makes no explicit reference to the role played by the Appellant in the larger Rwandan political or administrative structure, it did consider the Appellant's position, and,

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[548] *Kupre{ki} et al.* Appeal Judgement, para. 414.
[549] *Kamuhanda* Appeal Judgement, para. 354, quoting *Kvo~ka et al*. Appeal Judgement, para. 674.
[550] Trial Judgement, para. 616.
[551] Appellant's Brief, paras. 356-365, citing *Bla{ki}* Trial Judgement, paras. 778-780, 782; *Jelisi}* Trial Judgement, para. 124; *Jelisi}* Appeal Judgement, paras. 128-132; *Furund`ija* Trial Judgement, para. 284; *^elebi}i Case* Trial Judgement, paras. 1278, 1283; *Erdemovi} I* Sentencing Judgement, paras. 108, 111; *Erdemovi} II* Sentencing Judgement, para. 16; *Serushago* Sentencing Judgement, para. 39; *Kayishema and Ruzindana* Sentencing Order, 21 May 1999, para. 12. The Appeals Chamber notes that the Appellant makes no specific reference to cases supporting his contention that his assistance to Tutsis warrants mitigation. *See* Appellant's Brief, para. 366.
[552] Appellant's Brief, para. 357. The Appeals Chamber notes that elsewhere in the Appellant's Brief, the Appellant cites evidence in the record supporting his contention that he assisted Tutsis. *See* Appellant's Brief, paras. 39-44.
[553] *See Babić* Sentencing Appeal Judgement, para. 32; *Čelebići Case* Appeal Judgement, paras. 717, 720, 821.
[554] *Musema* Appeal Judgement, paras. 382, 383. *See also Tadi}* Sentencing Appeal Judgement, paras. 55, 56; *Čelebići Case* Appeal Judgement, para. 849; *Aleksovski* Appeal Judgement, para. 184.

contrary to his assertions, determined that he exercised influence.[555] Moreover, the principle is subject to the proviso that the gravity of the offences committed is the primary consideration when imposing a sentence.[556] The ICTY Appeals Chamber has held that "[i]n certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called command structure, a very severe penalty is nevertheless justified."[557]

234. Finally, the Appeals Chamber considers that the Trial Chamber correctly noted that the sentence should be commensurate with the gravity of the offences and the degree of liability of the convicted person.[558] In addition, the Trial Chamber also noted its obligation to consider the individual circumstances of the Appellant and his role in the crimes, including any mitigating circumstances, but found it appropriate to impose the maximum sentence.[559] In imposing life sentences on all counts, the Trial Chamber recounted the vast impact, as well as the violent and cruel nature of the Appellant's conduct.[560] The Appellant makes no submission suggesting that the crimes for which he was convicted, many of which involved his direct participation, are not grave. The Appeals Chamber recalls that even where mitigating circumstances exist, a Trial Chamber "is not precluded from imposing a sentence of life imprisonment, where the gravity of the offence requires the imposition of the maximum sentence provided for."[561] Mindful of the gravity of the Appellant's crimes, the Appeals Chamber does not find, even if it accepted the Appellant's submissions as to mitigating factors, any discernible error in sentencing that has resulted in a miscarriage of justice.

235. Accordingly, this ground of appeal is dismissed.

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[555] Trial Judgement, para. 604.
[556] *Musema* Appeal Judgement, para. 382; *^elebi}i Case* Appeal Judgement, paras. 847-849; *Aleksovski* Appeal Judgement, para. 182.
[557] *^elebi}i Case* Appeal Judgement, para. 847.
[558] Trial Judgement, paras. 591, 617.
[559] Trial Judgement, paras. 591, 594, 604-617. The Appeals Chamber considered the impact of its decision to reverse the Trial Chamber's findings on the Appellant's role in the rapes of Languida Kamukina and Goretti Mukashyaka under Ground of Appeal 8 as well as in killing Pascasie Mukaremera, which the Trial Chamber considered as a "highly aggravating factor", under Ground of Appeal 15.
[560] *See* Trial Judgement, paras. 604-615.
[561] *Niyitegeka* Appeal Judgement, para. 267, quoting *Musema* Appeal Judgement, para. 396.

XIX. DISPOSITION

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

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

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 15 January 2007;

SITTING in open session;

AFFIRMS unanimously the Appellant's conviction for genocide (Count 1); and **AFFIRMS** unanimously his sentence of imprisonment for the remainder of his life entered for that conviction;

ALLOWS, in part, Judge Shahabuddeen and Judge Schomburg dissenting, the Appellant's eighth ground of appeal; **REVERSES**, Judge Shahabuddeen and Judge Schomburg dissenting, the Trial Chamber's finding that he bears criminal responsibility for the rapes of Goretti Mukashyaka and Languida Kamukina; **AFFIRMS** unanimously his conviction for rape as a crime against humanity (Count 3) in all other respects; and **AFFIRMS** unanimously his sentence of imprisonment for the remainder of his life entered for that conviction;

ALLOWS, in part, Judge Schomburg dissenting, the Appellant's fifteenth ground of appeal; **REVERSES**, Judge Schomburg dissenting, the Trial Chamber's finding that he bears criminal responsibility for the murder of Pascasie Mukaremera; **AFFIRMS** unanimously his conviction for murder as a crime against humanity (Count 4) in all other respects; and **AFFIRMS** unanimously his sentence of imprisonment for the remainder of his life entered for that conviction;

DISMISSES unanimously the Appellant's appeal of his convictions and sentences in all other respects;

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

ORDERS, in accordance with Rule 103(B) and Rule 107 of the Rules, that Mikaeli (also known as Mika) Muhimana is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

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

Fausto Pocar	Mohamed Shahabuddeen	Mehmet Güney
Presiding Judge	Judge	Judge

Liu Daqun	Wolfgang Schomburg
Judge	Judge

Judge Mohamed Shahabuddeen and Judge Wolfgang Schomburg append a Joint Partly Dissenting Opinion.

Judge Wolfgang Schomburg appends a Partly Dissenting Opinion on the Interpretation of the Right to be Informed.

Dated this 21st day of May 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

XX. JOINT PARTLY DISSENTING OPINION OF JUDGE SHAHABUDDEEN AND JUDGE SCHOMBURG

1. We are in general agreement with the outcome of the judgement. However, in relation to Ground of Appeal 8 we cannot agree with the finding of the majority. The Trial Chamber found:

> [T]he witness saw the Accused take the girls into his house; she heard the victims scream, mentioning the Accused's name and stating that they "did not expect him to do that" to them; finally the witness saw the Accused lead the victims out of his house, stark naked, and she noticed that they were walking "with their legs apart".[1]

This was based on the evidence of Witness AP. The credibility of Witness AP was not at stake. The appellate exercise was confined to determining the reasonableness of the Trial Chamber's finding that the accused had raped the girls in accordance with the applicable standard of proof.

2. It was open to the Trial Chamber to determine that rape had been committed. Indeed, we do not find that the Appeals Chamber holds otherwise. Its difficulty was whether it was the appellant who raped the girls. On this, we consider that it was open to the Trial Chamber to find that it was the appellant who raped the girls: it was he who led them into his house, who led them out of it, and whose name they called out saying that they "did not expect him to do that" to them. Furthermore, when he led them out of the house they were "stark naked" and were walking "with their legs apart".

3. There might have been other possibilities. But it is common to crime situations that there might have been alternative possibilities. It is the function of the trial court (if it can) to sort out these possibilities. The Trial Chamber found that it could sort out the situation. In our view, it cannot be said that the inference which it drew did not accord with the standard of proof in that no reasonable trier of fact could have come to this conclusion beyond reasonable doubt.

4. We consider that no intervention by the Appeals Chamber is warranted. In consequence, we respectfully dissent.

[1] Trial Judgement, para. 32.

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

Mohamed Shahabuddeen	Wolfgang Schomburg
Judge	Judge

Dated this 21st day of May 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

XXI. PARTLY DISSENTING OPINION OF JUDGE SCHOMBURG ON THE INTERPRETATION OF THE RIGHT TO BE INFORMED

1. I am in general agreement with the outcome of the Judgement. However, I am concerned about the finding by the majority of the Appeals Chamber in relation to Ground of Appeal 15 that the Trial Chamber erred in law when relying on the evidence presented by the Prosecution in the attachments of the Pre-Trial Brief in relation to the murder of Pascasie Mukaremera. Therefore, I wish to offer some remarks on the right of the accused to be informed promptly and in detail about the nature and cause of the charge against him.

2. The right of the accused to be informed about the charges is a fundamental guarantee of the fairness of proceedings. Reflecting this - repeating *verbatim* the wording of Art. 14(3)(a) and (b) International Covenant on Civil and Political Rights of 16 December 1966[1], to which *inter alia* Article 7(a) of the African Charter on Human and Peoples Rights' of 26 June 1981[2] makes reference - the Statute of the Tribunal includes the following provisions:

> Article 21: Rights of the accused
>
> […] 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause o the charge against him;
>
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; […].

3. This provision also corresponds to the rights guaranteed in many other human rights conventions. For example, Article 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 reads:

> Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b) to have adequate time and facilities for the preparation of his defence; […].

[1] Article 14(3) of which reads: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing; […]."

[2] OAU Doc. CAB/LEG/67/3/Rev.5. The *African Charter of Human and Peoples' Rights* was adopted on 27 June 1981 at the 18th Ordinary Session of the Assembly of Heads of State and Government in Banjul, Gambia. It entered into force on 21 October 1986.

4. In the case at hand the Indictment alleged the accused to have instructed another person to commit murder. It informed the accused of the legal nature of the charge brought against him (committing murder), but did not inform the accused in detail about the underlying factual allegations. It has to be noted, however, that the summary of Witness AW's anticipated testimony, as appended to the Pre-Trial Brief[3], gives sufficiently clear and consistent information to notify the Appellant unequivocally that he was charged with physically committing the murder of Pascasie Mukaremera on Rugona Hill in mid-May 1994. It indicated the time, place and manner in which the crime was committed. The relevant part of the annex reads as follows:

> Witness fled to Rugona hill. In mid-May 1994, witness saw Muhimana opening the stomach of a pregnant Tutsi woman called **Pascasie Mukaremera.**[4]

This summary refers to paragraph 7(d)(i) of the Indictment, thus linking these detailed factual allegations unambiguously to the charge on this unique conduct. The reference to Witness AW's statement makes it abundantly clear that the Appellant was alleged to have committed the murder himself and not to have instructed another person to do it. Moreover, the different alleged crime scenes are in the same region and the difference between the end of May and mid-May is not substantial as there is no doubt about the concrete alleged crime.

5. The Indictment is the first guiding instrument for the criminal proceedings. According to the jurisprudence of the Tribunals, however, the Indictment is not to be seen in isolation. Other sources of information have to be taken into consideration as well, such as the Pre-Trial Brief including appended witness statements.

In *Gacumbitsi* the Appeals Chamber held:

> The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused. The Appeals Chamber has held that "criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible 'the identity of the victim, the time and place of the events and the means by which the acts were committed.'"[Footnote 117: *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreškić et al.* Appeal Judgement, para. 89] An indictment lacking this precision may, however, be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge. [Footnote 118: *Ntakirutimana* Appeal Judgement, para. 27, referring to *Kupreškić et al.* Appeal Judgement, para. 114] When an appellant raises a defect in the indictment for the first time on appeal, then he bears the burden of showing that his ability to prepare his defence was materially impaired. [Footnote 119: *Niyitegeka* Appeal Judgement, para. 200; *Kvočka et al.* Appeal Judgement, para. 35] In cases where an accused has raised the issue of lack of notice before the Trial Chamber, in contrast, the burden rests on the Prosecution to demonstrate that the accused's

[3] Pre-Trial Brief, Appendix A, page 6.
[4] *Ibid.*

> ability to prepare a defence was not materially impaired. [Footnote 120: *Niyitegeka* Appeal Judgement, para. 200; *Kvočka et al.* Appeal Judgement, para. 35][5]

In *Naletilić and Martinović* the Appeals Chamber even more precisely held:

> As to whether the defects were cured, the information in the Prosecution Pre-Trial Brief, filed on 11 October 2000, as well as in its Chart of Witnesses and List of Facts, filed on 18 July 2000, was provided to Naletili} and Martinovi} in a timely manner, as these documents were filed eleven and fourteen months prior to the commencement of trial, respectively. With regard to unlawful labour in locations other than the frontline, the Prosecution Pre-Trial Brief states that "prisoners were forced to work at the premises of Martinovi}" and that "detainees were forced by Martinovi} to loot the homes of Bosnian Muslims who had been evicted across the front-line into East Mostar". The Prosecution Chart of Witnesses and List of Facts provides that Martinovi} forced Muslim detainees to perform "work such as construction, maintenance, repairs on the front line or at other locations either in support of the military effort of the Croatian forces or for their personal gain".[6]

6. The European Court of Human Rights has dealt with the possible violation of Article 6(3)(a) and (b) of the Convention. In this context it held:

> The Court reiterates that in criminal matters the provision of full, detailed information to the defendant concerning the charges against him – and consequently the legal characterisation the court might adopt in the matter – is an essential prerequisite for ensuring that the proceedings are fair. Additionally, as regards the complaints under Article 6 § 3 (b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of a defendant's right to prepare his defence.[7]

In another case, the European Court of Human Rights stated:

> The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt the matter, is an essential prerequisite for ensuring that the proceedings are fair.
>
> **Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him.**
>
> Lastly, as regards the complaint under Article 6 § 3 (b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.[8]

7. Consequently, according to the above cited cases, the Indictment is not the only way to inform the appellant about the charges against him. In many cases, the Prosecution will not be in a position to know all the evidence at the early stage of proceedings in which the Indictment is filed.

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[5] *Gacumbitsi* Appeal Judgement, para. 49 (original footnotes in square brackets).
[6] *Naletilić, a.k.a. "Tuta", and Martinović, a.k.a. "Štela"*, Appeal Judgement, para. 33 (footnotes omitted).
[7] ECtHR, Case of *Borisova v. Bulgaria*, Appl. No. 56891/00, Judgment, 21 December 2006, para. 41 (further references omitted).
[8] ECtHR, Case of *Pélissier and Sassi v. France*, Appl. No. 25444/94, Judgement 25 March 1999, paras 52-54 (further references omitted, emphasis added).

It is unrealistic to believe that the Prosecution is not confronted with changing evidence throughout the whole course of the proceedings. It would be incredible or, at the very least, surprising, if the factual basis of an Indictment remained unchanged after the finalization of investigations. Even in cases where trial proceedings are already ongoing, it has to be and is possible to add fresh information to the case.

8. As it is at the same time still important to keep the accused informed about the charges against him, it is a generally accepted principle in criminal law, both in Anglo-Saxon and Romano-Germanic influenced jurisdictions, that such additional information can also be given by an indication that the factual basis and/or the legal assessment might be varied.

9. Before continuing, I would like to apologize for restricting my following comments to German law and jurisprudence. Unfortunately, the workload does not allow for in-depth comparative research. However, the quoted regulations and case law may serve as an example for many similar systems. Moreover, up until today nobody has successfully claimed that this approach violates the fundamental rights to be informed and to be heard.

10. The German Code of Criminal Procedure allows explicitly for legal indications by the court. The respective provision reads:

> Section 265. [Change in Legal Reference]
>
> (1) The defendant may not be sentenced on the basis of a penal norm other than the one referred to in the charges admitted by the court without first having his attention specifically drawn to the change in the legal reference and without having been afforded an opportunity to defend himself.
>
> (2) The same procedure shall be followed if special circumstances appear only at the hearing which in accordance with the penal norm increase criminal liability […].
>
> (3) The main hearing shall be suspended upon the defendant's application if, alleging insufficient preparation for defense, he contests newly discovered circumstances which admit the application of a more severe penal norm against the defendant than the one referred to in the charges admitted by the court, or which forms part of the circumstances indicated in subsection (2).
>
> (4) The court shall, in other cases as well, suspend the main hearing upon an application or proprio motu, if in consequence of the change in circumstances it appears reasonable for adequate preparation of the charges or of the defense.[9]

11. In order to avoid injustice by the barring principle of *ne bis in idem*, a regulation like this is necessary in the well understood interest of justice. It is inherent to any criminal proceedings that the underlying facts might be discovered only during the trial. To hold otherwise would make a

public hearing with its inherent dynamics superfluous. In such a hearing, for example, a witness might testify spontaneously or confronted in cross-examination in a totally different way. As a consequence the bench might reach different conclusions.

12. The above cited provisions show that there are ways to introduce new facts into the proceedings while at the same time safe-guarding the fundamental rights of the accused. In this context, it has to be noted that according to settled German jurisprudence a hearing can even be re-opened in order to hear new evidence when the court is handing down the reasons for the judgement – at a point in German criminal proceedings when the disposition has already been read out.[10] Not to allow a party to continue to bring new facts until the very end of the proceedings and to seek, if necessary, legal requalification would render the proceedings unfair, provided of course that these new facts or the new evidence were not previously known or available. However, the question of untimely disclosure is not at stake in this case.

13. From the outset, according to settled German jurisprudence, any legal indication, which enables the accused and his defence counsel to align the defence strategy accordingly is necessary and at the same time sufficient.[11] Certain inaccuracies in relation to the factual allegations are considered to be inherent to any indictment. A legal indication has to be given as soon as a more accurate description of the underlying facts is possible.[12] In cases, where in the course of the trial certain aspects of the factual allegations are simply specified further, however, a legal indication is only considered to be obligatory where the rights of the accused to be heard and to be protected against unexpected decisions so demand.[13]

14. In predominantly party-driven proceedings, like those before this Tribunal, such an indication has to be given by the Prosecution or, to avoid unfairness, by the bench (*iura novit curia*). As it is unrealistic to believe that the facts as described in the Indictment will always be proven in exactly that way at trial, it is important that such an indication can be given at any time during the proceedings. Just as in other criminal proceedings, our main concern should be to strive to find the truth. The possibility to introduce new facts in the course of the proceedings is therefore essential. In particular in light of our specific mandate under Chapter VII of the Charter of the

[9] Courtesy translation provided by the German Ministry of Justice. Emphasis added.
[10] Lutz Meyer-Goßner, Strafprozessordnung, 50th ed., C.H. Beck (2007), Section 268, marginal number 14 (with further references).
[11] German Federal Supreme Court (*Bundesgerichtshof*), Judgement of 16 October 1962, BGHSt 18, 56, guiding principles.
[12] German Federal Supreme Court (*Bundesgerichtshof*), Judgement of 29 July 1998, BGHSt 44, 153, guiding principles.
[13] German Federal Supreme Court (*Bundesgerichtshof*), Judgement of 20 February 2003, BGHst 44, 153, guiding principles.

United Nations[14], it is irresponsible to acquit an accused who was informed about the charges against him and had the possibility (and made indeed use of it) to defend himself against a slightly varied charge, however concrete and known in detail to him. In the case before us, the accused was in no doubt about the alleged concrete criminal conduct against which he had to defend himself. This is all that matters.

15. Ultimately, and in accordance with the rights guaranteed not only in the Statute[15], it is decisive that an accused is informed well in advance before a judgement is rendered. The question of delayed disclosure is irrelevant as long as the accused is able to defend himself against all the allegations. As the right to be informed cannot be viewed in isolation and must be seen in the context of the right to prepare a defence, the decisive factor in determining whether the accused's rights were in fact impaired has to be whether he was able to frame his defence accordingly. In the case at hand, the modification was presented even before the trial started. The Defence was clearly informed about the material facts underlying the alleged crime. Defence Counsel referred to the crime as described by Witness AW in cross-examination, thus showing that the Defence was completely aware of the time, place and manner of the alleged crime[16], and in particular that the Appellant was alleged to have committed the crime himself. Consequently, the defects of the Indictment were cured and the defence was in no way prejudiced.

16. By not taking into consideration at least the allegation as presented by the Prosecution in the Pre-Trial Brief and its appendices, the jurisprudence of the Tribunal ultimately runs the risk of hitting a dead-end, leading at the end of the day to injustice. Therefore, it would have been preferable to use this opportunity to clarify the jurisprudence of this Tribunal in the case before us. It is for these reasons that, with all due respect, I have to dissent in relation to Ground of Appeal 15.

[14] United Nations Security Council Resolution of 8 November 1994, S/Res/955 (1994) reads: "[…] Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, […]." In this context, please also note the famous words of former UN Secretary-General *Kofi Annan*: "There is no peace without justice; there is no justice without truth.", referring *inter alia* to *Prophet Mohammed,* Hadith: "If you see a wrong you must right it; with your hand if you can, or, with your words, or, with your stare, or in your heart, and that is the weakest of faith"; *Pope Paul VI*: "If you want peace, work for justice"; *Rabban Simeon Ben Gamaliel*: "The world rests on three pillars: on truth, on justice, and on peace"; a Talmudic commentary adds to this: "The three are really one. If justice is realized, truth is vindicated and peace results."
[15] *See supra* paras 2 and 3.
[16] T. 14 April 2004 p. 49-51.

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

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Wolfgang Schomburg

Judge

Dated this 21st day of May 2007 in Arusha, Tanzania.

[Seal of the Tribunal]

XXII. ANNEX A – PROCEDURAL BACKGROUND

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

A. Notice of Appeal

2. The Trial Chamber rendered its judgement at a hearing on 28 April 2005 and issued the written judgement in English on 26 May 2005. On 20 May 2005, the Appellant filed a motion seeking an extension of time for the filing of his Notice of Appeal on the basis that the French and Kinyarwanda texts of the Trial Judgement were not available.[1] On 2 June 2005, the Appeals Chamber ordered the Appellant to file his Notice of Appeal no later than thirty days from the date of the filing of the French translation of the Trial Judgement.[2] The French translation of the Trial Judgement was filed on 19 December 2005.[3]

3. The Appellant filed his Notice of Appeal on 26 January 2006.[4] On 22 February 2006, the Appeals Chamber accepted the Notice of Appeal as validly filed, requested the Registry to designate the Notice of Appeal as a confidential document, and ordered the Appellant to file a public and redacted version within sixty days of the filing of the order.[5] The Appellant filed a public and redacted version of the Notice of Appeal on 24 April 2006.[6]

B. Appellant's Brief

4. The Appellant filed a confidential brief in support of his appeal on 12 April 2006,[7] and a public, redacted version on 30 August 2006.[8] On 22 May 2006, the Prosecution filed its Respondent's Brief, partly in English and partly in French.[9] On 14 June 2006, the Appellant filed a motion requesting that the prescribed time limit for the filing of the Brief in Reply start to run from 10 July 2006, in case the French version of the Respondent's Brief was made available between 14 June 2006 and 10 July 2006.[10] On 21 June 2006, the Pre-Appeal Judge rendered a decision

[1] *Requête de la Défense aux fins du Report du Délai de Dépôt de l'Acte d'Appel*, 20 May 2005.
[2] Decision on Motion for Extension of Time for Filing of Notice of Appeal, 2 June 2005.
[3] *See* Order Concerning the Filing of the Notice of Appeal, 22 February 2006 (noting the date of filing of the French translation of the Trial Judgement).
[4] *Acte d'Appel*, 26 January 2006.
[5] Order Concerning the Filing of the Notice of Appeal, 22 February 2006.
[6] An English translation of the public and redacted Notice of Appeal was filed on 23 May 2006.
[7] An English translation of the confidential Appellant's Brief was filed on 27 June 2006.
[8] *Mémoire d'Appel public et caviardé*, 30 August 2006.
[9] An English translation of the Respondent's Brief was filed on 4 September 2006.
[10] *Requête de l'Appelant aux fins de réaménagement du calendrier judiciaire*, 14 June 2006. The Prosecution filed a response in French on 16 June 2006 (*Réponse du Procureur à la "Requête de l'Appelant aux fins de réaménagement du calendrier judiciaire"*).

disallowing the Appellant's request for an extension of time and reminded the Appellant to file his Brief in Reply within fifteen days of service of the French translation of the Respondent's Brief.[11] The French text of the Respondent's Brief was filed on 13 October 2006 and was served on the Appellant on 16 October 2006.[12]

5. On 14 November 2006, the Appeals Chamber noted in its Scheduling Order that the Appellant had not filed a Brief in Reply in accordance with Rule 113 of the Rules and that the time for the filing had lapsed.[13] The Appellant filed his Brief in Reply on 14 November 2006.[14] On 16 November 2006, the Prosecution filed a motion to expunge the Brief in Reply from the record.[15] On 17 November 2006, the Appellant filed a motion requesting the Appeals Chamber to declare his Brief in Reply validly filed.[16] On 11 January 2007, the Appeals Chamber dismissed the Appellant's motion, having found that the Appellant had failed to show good cause for the late filing within the ambit of Rule 116 of the Rules and granted the Prosecution's motion of 16 November 2006.[17] Consequently, the Appeals Chamber did not consider the Appellant's Brief in Reply.

C. Assignment of Judges

6. On 31 May 2005, the following Judges were assigned to hear the appeal: Judge Theodor Meron, Presiding; Judge Mohamed Shahabuddeen; Judge Mehmet Güney; Judge Fausto Pocar; and Judge Wolfgang Schomburg.[18] Judge Fausto Pocar was designated as Pre-Appeal Judge.[19] By Order of 1 February 2006, the following Judges were reassigned to hear the appeal: Judge Fausto Pocar, Presiding; Judge Mohamed Shahabuddeen; Judge Mehmet Güney; Judge Liu Daqun; and Judge Wolfgang Schomburg.[20] Judge Liu Daqun was assigned to replace Judge Fausto Pocar as Pre-Appeal Judge.[21]

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[11] Decision on Appellant's Motion for Extension of Time to File a Brief in Reply and Postponement of a Status Conference, 21 June 2006. On 27 June 2006, the Appellant filed a reply (*Réplique de l'Appelant à la réponse du Procureur à la requête du 16 juin 2006, relative au réaménagement du calendrier judiciaire*).
[12] Registrar's Submission under Rule 33(B) of the Rules on Decision on Appellant's Motion to Note the Failure to File the Respondent's Brief within the Prescribed Time Limit of 11 September 2006, 18 October 2006.
[13] Scheduling Order, 14 November 2006.
[14] *Réplique de l'Appelant au mémoire de l'Intimé,* 14 November 2006.
[15] Prosecutor's Motion to Expunge from the Record the Late and Over-Sized Reply Brief filed by the Appellant on 14 November 2006, 16 November 2006.
[16] *Requête de l'Appelant aux fins de la recevabilité de la Réplique au mémoire de l'intimé*, 17 November 2006.
[17] Decision on the Admissibility of the Appellant's Brief in Reply, 11 January 2007.
[18] Order of the Presiding Judge Assigning Judges to an Appeal before the Appeals Chamber, 31 May 2005.
[19] Order of the Presiding Judge Assigning Judges to an Appeal before the Appeals Chamber, 31 May 2005.
[20] Order Re-Assigning Judges to a Case before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006.
[21] Order Re-Assigning Judges to a Case before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006.

D. Motions related to the Admission of Additional Evidence

7. On 13 March 2006, the Appellant filed a motion for extension of time to file a motion to present additional evidence.[22] The Prosecution filed a response on 17 March 2006 opposing the extension of time,[23] and the Appellant filed a reply on 29 March 2006.[24] On 25 April 2006, the Appellant filed a motion to present additional evidence.[25] On 26 April 2006, the Pre-Appeal Judge denied the Appellant's 13 March 2006 motion for extension of time to file a motion to present additional evidence.[26] On 5 May 2006, the Prosecution filed a response to the Appellant's 25 April 2006 motion to present additional evidence.[27] On 26 September 2006, the Appeals Chamber denied the Appellant's 25 April 2006 motion for admission of additional evidence.[28] On 14 December 2006, the Appellant filed a second motion to admit additional evidence.[29] The Prosecution filed its response opposing this motion on 19 December 2006,[30] and the Appellant replied on 29 December 2006.[31] On 12 January 2007, the Appeals Chamber denied this second motion.[32] Hearing of the Appeal

8. On 15 January 2007, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 14 November 2006.[33] At the close of the hearing, the Appellant addressed the Appeals Chamber.

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[22] *Requête de l'Appelant aux fins de prorogation de délai pour la présentation des moyens de preuve supplémentaires,* 13 March 2006.
[23] *Réponse du Procureur à la requête de l'Appelant aux fins de prorogation de délai pour la présentation des moyens de preuve supplémentaires*, 17 March 2006.
[24] *Réplique de l'Appelant à la réponse du Procureur à la requête aux fins de prorogation de délai pour la présentation des moyens de preuve*, 29 March 2006.
[25] *Requête de l'Appelant aux fins de la présentation des moyens de preuve supplémentaires*, 25 April 2006.
[26] Decision on Appellant's Request for Extension of Time to File Additional Evidence Motion, 26 April 2006.
[27] Prosecutor's Response to "*Requête de l'Appelant aux fins de la présentation des moyens de preuve supplémentaires*", 5 May 2006.
[28] Decision on Appellant's Motion to Present Additional Evidence, 26 September 2006.
[29] *Requête de l'Appellant aux fins de présentation d'un moyen de preuve supplémentaire nouveau sur base de l'article 115 du Règlement de preuve et de procédure*, 14 December 2006.
[30] *Réponse du Procureur à la "Requête de l'Appelant aux fins de présentation d'un moyen de preuve supplémentaire nouveau sur base de l'article 115 du Règlement de preuve et de procédure"*, 19 December 2006.
[31] *Réplique de l'Appellant à la Réponse du Procureur relative à la présentation d'un moyen de preuve supplémentaire nouveau sur bas de l'article 115 du R.P.P.*, 29 December 2006.
[32] Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 12 January 2007.
[33] Scheduling Order, 14 November 2006.

XXIII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

Akayesu

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

Bagilishema

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement")

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

Gacumbitsi

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement")

Kajelijeli

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement")

Kamuhanda

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-95-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

Kayishema and Ruzindana

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Sentence, 29 May 2001 ("*Kayishema and Ruzindana* Sentencing Order")

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

Muhimana

The Prosecutor v. Mikaeli Muhimana, Case No. ICTR-95-IB-I, Decision on Motion to Amend Indictment, 21 January 2004 ("*Muhimana*, Decision on Motion to Amend Indictment")

The Prosecutor v. Mika Muhimana, Case No. ICTR-95-IB-T, Order in Relation to Defence Motion on Inadmissibility of Witness Testimony, 13 September 2004 ("*Muhimana*, Order in Relation to Defence Motion on Inadmissibility of Witness Testimony")

Musema

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

Ndindabahizi

Emmanuel Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement")

Niyitegeka

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

Ntagerura et al.

Le Procureur c/ André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Affaire n° ICTR-99-46-A, Arrêt, 7 juillet 2006 ("*Ntagerura et al.* Appeal Judgement")

Ntakirutimana

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

Rutaganda

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

Semanza

The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement")

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

Serushago

The Prosecutor v. Omar Serushago, Case No. ICTR-98-39-S, Sentence, 5 February 1999, ("*Serushago* Sentencing Judgement")

2. ICTY

Aleksovski

The Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 30 May 2001 ("*Aleksovski* Appeal Judgement")

Babi}

The Prosecutor v. Milan Babi}, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July

2005 ("*Babić* Sentencing Appeal Judgement")

Blaški}

The Prosecutor v. Tihomir Bla{ki}, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Bla{ki}* Trial Judgement")

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

Čelebići Case

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

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

Erdemovi}

The Prosecutor v. Drazen Erdemovi}, Sentencing Judgement, IT-96-22-T, 29 November 1996 ("*Erdemovi} I* Sentencing Judgement")

The Prosecutor v. Drazen Erdemovi}, Sentencing Judgement, IT-96-22, 5 March 1998 ("*Erdemovi} II* Sentencing Judgement")

Furund`ija

The Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furund`ija Trial Judgement")

Jelisić

The Prosecutor v. Goran Jelisi}, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisi}* Trial Judgement")

The Prosecutor v. Goran Jelisi}, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisi*ć Appeal Judgement")

Krstić

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

Kunarac et al.

The Prosecutor v. Dragoljub Kunarac et al., Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement")

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

Kupreškić et al.

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

Kvo~ka et al.

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

Naletili} and Martinovi}

The Prosecutor v. Mladen Naletili} and Vinko Martinovi}, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletili} and Martinovi}* Appeal Judgement")

Staki}

The Prosecutor v. Milomir Staki}, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Staki}* Appeal Judgement")

Tadić

The Prosecutor v. Duško Tadi} a/k/a "Dule", Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadi}* Appeal Judgement")

The Prosecutor v. Duško Tadi} a/k/a "Dule", Case No. IT-94-1-A and IT-94-1- *Abis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadi}* Sentencing Appeal Judgement")

Vasiljević

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

B. Defined Terms and Abbreviations

Appellant

Mikaeli (aka "Mika") Muhimana and the Counsel for the Defence of Mikaeli Muhimana

Appellant's Brief

The Defence of Mikaeli Muhimana Appeal Brief, filed in French (*Mémoire d'Appel*) on 12 April 2006

Defence Closing Brief

The Final Trial Brief of the Defence of Mikaeli Muhimana, English translation filed on 29 November 2004

Ex. D

Defence Exhibit

Ex. P

Prosecution Exhibit

Genocide Convention

Article II of the Convention on the Prevention and Punishment of Crime of Genocide, 9 December 1948

ICTR

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

ICTY

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

Notice of Appeal

The Defence of Mikaeli Muhimana Notice of Appeal, filed in French (*Acte d'Appel*) on 26 January 2006

p. (pp.)

page (pages)

para. (paras.)

paragraph (paragraphs)

Practice Direction on Formal Requirements for Appeals from Judgement

Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005

Pre-Trial Brief

Pre-Trial Brief of the Office of the Prosecutor of the International Criminal Tribunal for Rwanda (Filed Pursuant to Rule 73(B)(i)*bis* of the Rules of Procedure and Evidence), filed in English on 27 February 2004

Respondent

The Office of the Prosecutor of the International Criminal Tribunal for Rwanda

Respondent's Brief

Prosecution Response to Appeal Brief of the Defence of Mikaeli Muhimana, filed partly in French and partly in English (*Mémoire de l'intimé*) on 22 May 2006

Rules

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Statute

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

T.

Transcript

Trial Judgement

The Prosecutor v. Mikaeli Muhimana, Case No. ICTR-95-1B-T, rendered orally on 28 April 2005, written judgement released in English on 26 May 2005