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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor MERON, Presiding**
Judge Florence MUMBA
Judge Mehmet GÜNEY
Judge Wolfgang SCHOMBURG
Judge Inés Mónica WEINBERG DE ROCA

Registrar: **Mr. Adama Dieng**

Date: **13 December 2004**

ICTR Appeals Chamber
Date: 13 December 04
Action:
Copied To: All Judges, Parties, Judicial Archives, LOs, LSS

THE PROSECUTOR

v.

ELIZAPHAN NTAKIRUTIMANA AND GÉRARD NTAKIRUTIMANA

Cases Nos. ICTR-96-10-A and ICTR-96-17-A

JUDGEMENT

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal" respectively) is seised of appeals by Elizaphan Ntakirutimana and Gérard Ntakirutimana ("Appellant" individually or "Appellants" collectively, or "Accused") and by the Prosecution, against the Judgement rendered by Trial Chamber I in the case of *Prosecutor v. Elizaphan and Gérard Ntakirutimana* on 21 February 2003 ("Trial Judgement"). [1]

[1] For ease of reference, two annexes are appended to this Judgement: Annex A - Procedural Background and Annex B - Cited Materials/Defined Terms.

I. INTRODUCTION

A. The Appellants

2. Elizaphan Ntakirutimana was born in 1924 in Ngoma secteur, Gishyita commune, Kibuye prefecture, Rwanda. He is married and has eight children, including Gérard Ntakirutimana. In the period April to July 1994, he was pastor and president of the West Rwanda Association of the Seventh Day Adventist Church based in the Mugonero Complex, Gishyita commune, Kibuye prefecture, Rwanda.

3. Gérard Ntakirutimana was born in 1958 in Ngoma secteur, Gishyita commune, Kibuye prefecture, Rwanda. From April 1993, Gérard Ntakirutimana was a medical doctor at the Seventh Day Adventist's hospital at Mugonero Complex, Gishyita commune. He is married and has three children.[2]

B. The Judgement and Sentence

4. Elizaphan Ntakirutimana and Gérard Ntakirutimana were jointly tried on the basis of two indictments, Indictment no. ICTR-96-10-I, as amended on 27 March 2000 and on 20 October 2000, in the case of *Prosecutor v. Elizaphan Ntakirutimana, Gérard Ntakirutimana, and Charles Sikubwabo* ("Mugonero Indictment"); and Indictment no. ICTR-96-17-I, as amended on 7 July 1998, in the case of *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* ("Bisesero Indictment"). The charges against Charles Sikubwabo, who was at large at the time of the trial, were severed from the Mugonero Indictment.[3] The Appeals Chamber notes that the Indictments, which form the basis of the convictions, do not charge the Appellants for the 1994 genocide in Rwanda in its entirety, but for their individual criminal responsibility relating to selected incidents.

5. The Trial Chamber found Elizaphan Ntakirutimana guilty of genocide (Count 1A of the Mugonero Indictment and Count 1 of Bisesero Indictment) and sentenced him to ten years' imprisonment with credit for time spent in custody awaiting trial. Gérard Ntakirutimana was found guilty of genocide (Count 1A Mugonero Indictment and Count 1 Bisesero Indictment) and of murder as a crime against humanity (Count 3 of the Mugonero Indictment and Count 4 of the Bisesero Indictment). The Trial Chamber sentenced Gérard Ntakirutimana to 25 years' imprisonment with credit for time spent in custody awaiting trial.

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[2] *See* Trial Judgement, paras. 34-38.
[3] *See id.*, paras. 7-8.

C. The Appeals

6. The Appellants appeal from all of the factual findings against them and also allege a number of legal errors. They have indicated that they rely on each other's appeals. Accordingly, where appropriate, the Appeals Chamber has considered many of the Appellants' submissions as being relevant to the two of them.

7. Gérard Ntakirutimana submits that the Trial Chamber made errors of law invalidating the decision and errors of fact which occasioned a miscarriage of justice.[4] His Appeal Brief divides legal errors into six general categories: (a) errors relating to the Indictments; (b) errors relating to the burden of proof; (c) errors relating to the treatment of prior inconsistent statements; (d) indicia of witness coaching; (e) errors relating to the alibi; and (f) evidence relating to motive. In addition, Gérard Ntakirutimana asserts that none of the factual findings on which his convictions rest could have been made by a reasonable tribunal.

8. Elizaphan Ntakirutimana contends generally that the Trial Chamber committed a number of recurring legal and factual errors in relation to the Mugonero and Bisesero Indictments.[5] He has regrouped the errors into seven broad categories, relevant to (i) the burden of proof, (ii) the treatment of prior inconsistent statements, (iii) credibility evaluation, (iv) the Indictments, (v) procedure, (vi) the treatment of the alibi, and (vii) character evaluation. Each of these categories is then sub-divided into a number of legal errors.[6] In addition, Elizaphan Ntakirutimana presents the following grounds of appeal: (i) failure of the Prosecution to provide notice, (ii) that Defence testimony raised a reasonable doubt, (iii) that the Trial Chamber erred by failing to consider the Defence's motion to dismiss, (iv) that there was insufficient evidence to establish that Tutsi refugees at the Mugonero Complex were targeted solely on the basis of their ethnicity, and (v) that punishment cannot be imposed for aiding and abetting in genocide. Finally, the Appellants present a joint ground of appeal on the existence of a political campaign against them.

9. The Prosecution filed a consolidated response to the appeals of Elizaphan Ntakirutimana and Gérard Ntakirutimana.[7]

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[4] Gérard Ntakirutimana's "Defence Appeal Brief" filed 28 July 2003 ("Appeal Brief (G. Ntakirutimana)"), and Gérard Ntakirutimana's "Defence Reply Brief" filed 13 October 2003 ("Reply" or "Reply (G. Ntakirutimana)").
[5] "Pastor Elizaphan Ntakirutimana's Appeal Brief" filed 11 August 2003 ("Appeal Brief (E. Ntakirutimana)"), and "Pastor Elizaphan Ntakirutimana's Reply Brief" filed 13 October 2003 ("Reply" or "Reply (E. Ntakirutimana)").
[6] *See* Appeal Brief (E. Ntakirutimana), pp. 29-32.
[7] "Prosecution Response Brief", filed on 22 September 2003 ("Prosecution Response").

10. The Prosecution presents six grounds for appeal.[8] The Prosecution asserts that the Trial Chamber erred (i) by failing to apply the "joint criminal enterprise" doctrine to determine Elizaphan Ntakirutimana's and Gérard Ntakirutimana's respective responsibility for the crime of genocide, (ii) in restricting Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted on Tutsis at the Mugonero Complex and in Bisesero, and (iii) in its definition of the *mens rea* requirement for aiding and abetting genocide. The Prosecution's fourth and fifth grounds of appeal address issues relating to crimes against humanity (extermination) and crimes against humanity (murder). As a sixth ground of appeal, the Prosecution challenges the sentences imposed by the Trial Chamber. Elizaphan Ntakirutimana and Gérard Ntakirutimana filed responses to the Prosecution appeal.[9]

D. Standards for Appellate Review

11. The Appeals Chamber recalls the requisite standards for appellate review pursuant to Article 24 of the Statute. Article 24 addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice. 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.[10]

12. As regards errors of fact, as has been previously underscored by the Appeals Chamber of both this Tribunal and of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber. Where an erroneous finding of fact is alleged, the Appeals Chamber must give deference to the trial chamber that received the evidence at trial as it is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly

[8] "Prosecution Appeal Brief", filed on 23 June 2003, and "Prosecution Reply Brief" filed on 19 August 2003 ("Prosecution Reply").
[9] "Defence Response to the Prosecution Appeal Brief", filed by Gérard Ntakirutimana on 4 August 2003 ("Response (G. Ntakirutimana)"); "Reply (sic) to Prosecutor's Appeal Brief", filed by E. Ntakirutimana on 5 August 2003 ("Response (E. Ntakirutimana)").
[10] *Niyitegeka* Appeal Judgement, para. 7; *Vasiljević* Appeal Judgement, para. 6 (citations omitted). *See also, e.g., Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.

erroneous. If the finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice.[11]

13. The Appeals Chamber emphasises that on appeal, a party cannot merely repeat arguments that did not succeed at trial, in the hope that the Appeals Chamber will consider them afresh. The appeals process is not a trial *de novo* and the Appeals Chamber is not a second trier of fact. It is incumbent on the party alleging the error to demonstrate that the Trial Chamber's rejection of arguments constituted such an error as to warrant the intervention of the Appeals Chamber. Thus, arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[12]

14. Moreover, in its submissions, the appealing party must provide precise references to relevant transcript pages or paragraphs in the trial judgement to which the challenge is being made.[13] Failure to do so, or if the submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies, makes it difficult for the Appeals Chamber to assess fully the party's arguments on appeal.[14]

15. Finally, it is within the inherent jurisdiction of the Appeals Chamber to select those submissions which merit a reasoned opinion in writing. Arguments which are evidently unfounded may be dismissed without detailed reasoning.[15]

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[11] *Niyitegeka* Appeal Judgement, para. 8; *Krstić* Appeal Judgement, para. 40; *Krnojelac* Appeal Judgement, paras. 11-13, 39; *Tadić* Appeal Judgement, para. 64; *Čelebići* Appeal Judgement, para. 434; *Aleksovski* Appeal Judgement, para. 63; *Vasiljević* Appeal Judgement, para. 8.

[12] *See in particular Rutaganda* Appeal Judgement, para. 18.

[13] Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4(b). *See also Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137; *Vasiljević* Appeal Judgement, para. 11.

[14] *Niyitegeka* Appeal Judgement, paras. 9-10; *Vasiljević* Appeal Judgement, para. 12. *See also Kunarac et al.* Appeal Judgement, paras. 43, 48.

[15] *Niyitegeka* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, paras. 47-48; *Vasiljević* Appeal Judgement, para. 12.

II. APPEAL OF GÉRARD NTAKIRUTIMANA

A. Legal Errors

16. Gérard Ntakirutimana submits that the Trial Chamber made errors of law invalidating the decision. His Appeal Brief divides them into six general categories: (a) errors relating to the Indictments; (b) errors relating to the burden of proof; (c) errors relating to the treatment of prior inconsistent statements; (d) indicia of witness coaching; (e) errors relating to the alibi, and (f) evidence relating to motive.

1. The Indictments

17. As a general matter, the Prosecution responds that many of Gérard Ntakirutimana's arguments regarding perceived legal errors in the Indictments have been waived as they were not presented to the Trial Chamber.[16] The Appeals Chamber will address the issue of waiver in the context of each separate argument.

(a) Double Jeopardy

18. Gérard Ntakirutimana contends that the Appellants' genocide convictions violate principles of double jeopardy because the convictions under the Mugonero and Bisesero Indictments rely "on the same delicts."[17] The Prosecution argues that this argument was not included in the Notice of Appeal and does not respond to it in substance.[18] The Appeals Chamber notes that Gérard Ntakirutimana's Notice of Appeal does not contend that his convictions violate double jeopardy, nor is it clear that this issue was raised before the Trial Chamber. The Appeals Chamber is of the view that Gérard Ntakirutimana has waived the right to adduce this argument on appeal.[19]

19. Moreover, the Appeals Chamber considers that Gérard Ntakirutimana's argument, to the extent it is developed, lacks merit. The Appeal Brief asserts that "[c]onvicting the Accused of two counts based on the same conduct is contrary to principles of double jeopardy" and that his two genocide convictions rely "on the same delicts."[20] This is an inaccurate description of the Judgement. The *actus reus* supporting the genocide conviction under the Mugonero Indictment was the finding that Gérard Ntakirutimana was "individually criminally responsible for the death of Charles Ukobizaba,"[21] whereas the genocide conviction under the Bisesero Indictment was for other

[16] Prosecution Response, para. 2.2 & n. 6 (citing authorities).
[17] Appeal Brief (G. Ntakirutimana), para. 1.
[18] Prosecution Response, para. 2.1.
[19] *Kunarac et a.l* Appeal Judgement, para. 61.
[20] Appeal Brief (G. Ntakirutimana), para. 1.
[21] Trial Judgement, paras. 794-795.

acts enumerated in paragraph 832 of the Trial Judgement that do not include the killing of Ukobizaba. Counsel for Gérard Ntakirutimana acknowledged this when he argued that the Trial Chamber should refuse a Prosecution request to combine the allegations in a single indictment, a move he opposed because the Mugonero and Bisesero allegations "do not come out of the same act or ... same transaction."[22]

20. Gérard Ntakirutimana appears to take issue with the Trial Chamber's reliance on all of the genocidal acts he was found to have committed, both in Mugonero and Bisesero, as a basis for concluding that he had the requisite *mens rea* for the two genocide convictions, namely that he intended "to destroy, in whole, the Tutsi ethnic group."[23] However, the Appeals Chamber notes that his Appeal Brief does not elaborate any argument that double jeopardy principles are offended by two convictions with mental elements established by the same conduct but each with an *actus reus* distinguishable in time, location, and identity of victims. There is no need to decide whether such an argument could be successfully mounted; it suffices for present purposes that Gérard Ntakirutimana has failed to do so here.

(b) Failure to Plead Material Facts

21. Gérard Ntakirutimana's principal allegation of error regarding the Indictments concerns the alleged failure of the Indictments to plead various material facts underlying his convictions.[24] The Appellant submits that the Indictments did not "set[] out the material facts of the Prosecution case with enough detail to inform [him] clearly of the charges against him so that he may prepare his defence,"[25] such as "the identity of the victim, the time and place of the events and the means by which the acts were committed."[26] The Appellant has also challenged certain of the allegations concerning Elizaphan Ntakirutimana.

22. The Prosecution contends that Gérard Ntakirutimana waived this argument by failing to present it to the Trial Chamber.[27] It adds that, normally, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment in order to conduct further investigations in

[22] T. 2 November 2001, p. 4 (closed session).
[23] Trial Judgement, paras. 793, 834.
[24] Appeal Brief (G. Ntakirutimana), paras. 2-3.
[25] *Kupreškić et al.* Appeal Judgement, para. 88.
[26] *Id.*, para. 89.
[27] Prosecution Response, para. 2.2.

order to respond to the unpleaded allegation. The Prosecution submits that the Appellant took none of these steps during trial.[28]

23. In this case, however, the Trial Chamber's Judgement makes clear that the Appellants challenged the admission of evidence of unpleaded facts in a manner that the Trial Chamber considered adequate. The Judgement contains a detailed discussion entitled "Specificity of the Indictments"[29] and explicitly states that "the Chamber does not accept the Prosecution's submission that the Defence sat on its rights and did not challenge the lack of specificity in the Indictments."[30] In some situations, the Trial Chamber refused to make findings against the Appellants because it found that the Bisesero Indictment was defective due to its failure to plead the relevant allegation and that the defect was not subsequently cured.[31] Given that the Trial Chamber expressly found that the vagueness challenge was properly presented, the issue may also be properly raised on appeal.

24. The law governing challenges to the vagueness of an indictment is set out in detail in the ICTY Appeals Chamber's Judgement in *Kupreškić*. As in that case, because this issue is being raised after the Accused have been tried and a verdict rendered, the complaint will be considered only in relation to the counts under which the Accused were actually convicted,[32] namely the genocide counts for both Accused and the count of crimes against humanity (murder) for Gérard Ntakirutimana.

25. The *Kupreškić* Appeal Judgement stated that Article 18(4) of the ICTY Statute, read in conjunction with Articles 21(2), 4(a) and 4(b), "translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven."[33] Whether certain "facts" are "material" depends on the nature of the case. *Kupreškić* discussed several possible factors that could bear on the determination of materiality. For example, if the Prosecution charges personal physical commission of criminal acts, the indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed." [34] On the other hand, such detail need not be pleaded if the "sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters."[35] Even in cases where a high degree of specificity is "impractical," however, "since the identity of the victim is information that is valuable to the

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[28] *Id.*, paras. 2.2, 2.27.
[29] Trial Judgement, Chapter. II.2.
[30] *Id.*, para. 52.
[31] *Id.*, paras. 565 (allegation of an attack at Gitwe Primary School), 698 (allegation of killings at Murambi Church).
[32] *See Kupreškić et al.* Appeal Judgement, para. 79.
[33] *Id.*, para. 88.
[34] *Id.*, para. 89.
[35] *Id.*

preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."[36]

26. *Kupreškić* also envisioned the possibility in which the Prosecution was unable to plead with specificity because the material facts were not in the Prosecution's possession. As a general matter, "the Prosecution is expected to know its case before it goes to trial" and cannot expect to "mould[] the case against the accused in the course of the trial depending on how the evidence unfolds."[37] If the Defence is denied the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation for trial until then. A trial chamber must be mindful of whether proceeding to trial in such circumstances is fair to the accused. *Kupreškić* indicated that while there are "instances in criminal trials where the evidence turns out differently than expected," such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[38]

27. If an indictment is insufficiently specific, *Kupreškić* stated that such a defect "may, in certain circumstances cause the Appeals Chamber to reverse a conviction."[39] However, *Kupreškić* left open the possibility that a defective indictment could be cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[40] The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the *Kupreškić* Appeal Judgement put it, whether the trial was "rendered unfair" by the defect.[41] *Kupreškić* considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in the Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial.[42] In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant.[43] As has been previously noted, "mere service of witness statements by the [P]rosecution

[36] *Id.*, para. 90.
[37] *Id.*, para. 92.
[38] *Id.*
[39] *Id.*, para. 114.
[40] *Id.*
[41] *Id.*, para. 122.
[42] *Id.*, paras. 117-120.
[43] *Id.*, paras. 119-121.

pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[44]

28. In *Kupreškić*, the omitted facts were not clearly stated in the pre-trial brief or in the Prosecution's opening statement;[45] the underlying witness statement was not disclosed until "one to one-and-a-half weeks prior to trial and less than a month prior to [the witness's] testimony in court";[46] and the omitted fact was indicative of a "radical transformation" of the Prosecution's case from one alleging "wide-ranging criminal conduct ... during a seven-month period" to a targeted prosecution for persecution because of participation "in two individual attacks."[47] Moreover, the Appeals Chamber concluded that "whether the Trial Chamber would take into account [the unpleaded facts] as a possible basis for liability in respect of the persecution count was, until the very end of trial, not settled,"[48] and that this uncertainty "materially affected" the ability of the accused to prepare their defence.[49] These factors eliminated the possibility that the failure to plead material facts in the indictment had not prejudiced the accused in *Kupreškić*; rather, their "right to prepare their defence was seriously infringed" and their trial "rendered unfair."[50]

29. The allegations against Elizaphan and Gérard Ntakirutimana must be assessed in light of these standards. The Trial Chamber acknowledged that "some paragraphs of the Mugonero and Bisesero Indictments are rather generally formulated."[51] The question, then, is whether these general formulations meet the *Kupreškić* test for sufficient pleading of the material facts on which the Trial Chamber based the convictions and, if they do not, whether the Prosecution cured the defects through post-indictment communications.

(i) Did the Mugonero Indictment Fail to Plead Material Facts?

30. The principal allegations in the Mugonero Indictment are as follows:

> 4.7 On or about the morning of 16 April 1994, a convoy, consisting of several vehicles followed by a large number of individuals armed with weapons went to the Mugonero Complex. Individuals in the convoy included, among others, Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, members of the National Gendarmerie, communal police, militia and civilians.

[44] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.
[45] *Kupreškić et al.* Appeal Judgement, paras. 117-118.
[46] *Id.*, para. 120.
[47] *Id.*, para. 121.
[48] *Id.*, para. 110.
[49] *Id.*, para. 119.
[50] *Id.*, para. 122.
[51] Trial Judgement, para. 43.

> 4.8 The individuals in the convoy, including Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, participated in an attack on the men, women and children in the Mugonero Complex, which continued throughout the day.
>
> 4.9 The attack resulted in hundreds of deaths and a large number of wounded among the men, women and children who had sought refuge at the Complex.
>
> 4.10 During the months that followed the attack on the Complex, Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, searched for an [*sic*] attacked Tutsi survivors and others, killing and causing serious bodily or mental harm to them.[52]

31. Under this Indictment, the Prosecution alleged and the Trial Chamber found that Gérard Ntakirutimana "procured ammunition and gendarmes for the attack on the Complex" and "killed Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994."[53] These findings supported the Trial Chamber's conclusion that Gérard Ntakirutimana had the requisite intent for genocide and, in the case of the killing of Ukobizaba, the conclusion that Gérard Ntakirutimana was "individually criminally responsible" for his death and therefore was guilty of genocide.[54] The killing of Ukobizaba also grounded the conclusion that Gérard Ntakirutimana was guilty of murder as a crime against humanity.[55] Gérard Ntakirutimana was therefore found guilty of genocide at Mugonero because of acts committed by him personally, namely the killing of Ukobizaba and the procurement of ammunition and gendarmes. Similarly, Elizaphan Ntakirutimana was pronounced guilty of genocide because the Trial Chamber found that he "conveyed armed attackers to the Mugonero Complex in his vehicle on the morning of 16 April 1994."[56]

32. Under *Kupreškić*, 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."[57] The Appeals Chamber must therefore consider whether the material facts underlying the Mugonero convictions were sufficiently pled in the Indictment and, if not, whether that failure was cured by other means.

a. The Allegation That Gérard Ntakirutimana Murdered Charles Ukobizaba

33. The Mugonero Indictment does not state Ukobizaba's name or any of the circumstances surrounding his killing that were eventually found in the Judgement. Yet nothing suggests that it was "impracticable to require a high degree of specificity" in this matter.[58] On the contrary, as the

[52] Mugonero Indictment, paras. 4.7-4.10 (emphasis omitted).
[53] Trial Judgement, para. 791.
[54] *Id.*, paras. 793-795.
[55] *Id.*, paras. 806-810.
[56] *Id.*, paras. 788, 790.
[57] *Kupreškić et al.* Appeal Judgement, para. 89.
[58] *Id.*

Trial Chamber pointed out, the witness statements of several Prosecution witnesses and the Prosecution's Pre-Trial Brief mentioned Ukobizaba's name and alleged that Gérard Ntakirutimana personally killed him.[59] The Prosecution was therefore in a position to plead specific material facts regarding Ukobizaba's killing in the Mugonero Indictment, yet it failed to do so. This failure renders the counts of genocide and crimes against humanity (murder) against Gérard Ntakirutimana defective.

34. *Kupreškić* next requires consideration of whether the defect was cured by other Prosecution communications regarding the material facts underlying its case, and of whether such information was timely, clear and consistent enough to ensure that the Appellant suffered no undue prejudice from the Mugonero Indictment's failure to plead Ukobizaba's killing in detail. The Trial Chamber held that the Prosecution's Pre-Trial Brief and witness statements disclosed to the Accused cured the omission, and the Prosecution relies on this conclusion on appeal.[60]

35. The witness statements of Witnesses GG and HH, disclosed to the Appellant no later than 10 April 2000, aver that Gérard Ntakirutimana killed Ukobizaba at Mugonero on 16 April 1994, with Witness GG specifically stating that Ukobizaba was shot with a gun.[61] The Prosecution also refers to a statement of Witness AA, but AA explicitly stated that he could not say whether Gérard Ntakirutimana shot anyone.[62] Moreover, AA gave investigators a list of Mugonero victims that states that Ukobizaba "was killed with a machete," not with a gun.[63] The disagreement between the statements of Witnesses GG and HH, on the one hand, and the statement of Witness AA, on the other, demonstrates that disclosure of those statements alone did not offer "clear" or "consistent" information with respect to the role of Ukobizaba's killing in the Prosecution's case.

36. The Pre-Trial Brief, filed 16 July 2001, states: "Dr. Gerard Ntakirutimana personally killed several Tutsi individuals including the hospital accountant, Charles Ukobizaba and one Kajongi."[64] Annex B to the Pre-Trial Brief, which was filed 15 August 2001, summarized the planned testimony of Prosecution witnesses. Annex B gave notice of Witness GG's testimony that "[d]uring

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[59] Trial Judgement, para. 60; *see also* Prosecution Response, para. 2.9 & note 21.
[60] Trial Judgement, paras. 60, 62-63; Prosecution Response, paras. 2.2, 2.9.
[61] Statement of Witness GG dated 30 June 1996, p. 5 ("I saw Dr. Gerard NTAKIRUTIMANA walking in front of the attackers. He was armed with a gun. I saw that they were holding the accountant of the hospital. His name was Charles UKOBIZABA. I saw that they took the key of the office from UKOBIZABA by force. After that I saw that Dr. Gerard NTAKIRUTIMANA killed UKOBIZABA with a gun. It was a pistol."), disclosed 10 April 2000 (p. PN0190); Statement of Witness HH dated 2 April 1996, p. 3 ("I even saw Doctor Gerard NTAKIRUTIMANA kill the hospital accountant named UKOBIZABA Charles after having confiscated the key to his office."), disclosed 10 April 2000 (p. PN0171).
[62] Statement of Witness AA dated 11 April 1996, p. 3 ("You ask me if I saw that RUZINDANA or Dr. Gerard NTAKIRUTIMANA actually shooting [*sic*] anybody. I can not tell you that.").
[63] List Attached to Statement of Witness AA dated 28 November 1995 ("UKOBIZABA Charles, Comptable (Accountant) of the Hospital MUGONERO (he was killed with a machete)"); List Attached to Statement of Witness AA dated 30 November 1995 ("Ukobizaba Charles, Accountant at the Mugonero Hospital, he was macheted.").

the attack he saw *Dr. Gérard Ntakirutimana* kill Ukobizaba, the hospital accountant, and take the keys of his office,"[65] and of Witness HH's testimony that "[i]n the course of the attack the witness saw *Dr. Gérard Ntakirutimana* kill the hospital accountant Ukobizaba Charles after confiscating the key to his office."[66]

37. In contrast to the witness statements alone, the Pre-Trial Brief made it unequivocal that the Prosecution intended to prove that Gérard Ntakirutimana personally killed Ukobizaba. Annex B further indicated that the Prosecution planned to rely on the testimony of Witnesses GG and HH in this regard. Thus, the Prosecution had clearly and consistently informed the Defence by 16 July 2001 that it planned to assert that Gérard Ntakirutimana killed Ukobizaba at Mugonero on 16 April 1994. The Prosecution further informed the Defence on 15 August 2001 of the witnesses on whose testimony this charge was based.

38. In order to satisfy *Kupreškić*, however, the disclosure made in the Pre-Trial Brief and Annex B must also be found to be timely, such that the Defence suffered no prejudice from the failure of the Indictment to allege specifically that Gérard Ntakirutimana killed Ukobizaba. The Pre-Trial Brief was filed two months before the opening of trial, and Annex B was filed one month before trial, both pursuant to an oral order of the Trial Chamber on 2 April 2001 that was later reaffirmed in a written decision.[67] The proximity of these filings to trial, however, is not the only consideration. The Mugonero Indictment stated that Gérard Ntakirutimana was responsible for "the killings and causing of serious bodily or mental harm to members of the Tutsi population"[68] and "the murder of civilians."[69] In this context, allegations that Gérard Ntakirutimana personally killed a Tutsi individual, particularly allegations supported by two witnesses, would necessarily be of significant importance.

39. Unlike in *Kupreškić*, where the unpleaded facts represented a "drastic change in the Prosecution case" and were coupled with "ambiguity as to the pertinence" of the underlying evidence, which was only disclosed in the weeks before trial,[70] here the fact of Ukobizaba's killing fit directly into the Prosecution's case as pleaded in the Mugonero Indictment, was clearly supported by two previously-disclosed witness statements, and was made unambiguously known to the Appellants two months before trial.

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[64] Pre-Trial Brief, para. 15.
[65] Annex B to Pre-Trial Brief, p. 5.
[66] *Id.*, p. 6.
[67] *See* Decision on Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure Etc., 16 July 2001, para. 11 (citing T. 2 April 2001, pp. 29-34).
[68] Mugonero Indictment, Count 1A.
[69] *Id.*, Count 3.
[70] *Kupreškić et al.* Appeal Judgement, para. 121.

40. Gérard Ntakirutimana argues that the two witness statements cannot, on their own, remedy the Indictment alone because they were "inconsistent."[71] First of all, Gérard Ntakirutimana does not identify any inconsistencies between the two statements, but only purported inconsistencies between the trial testimony of Witnesses GG and HH,[72] which, though relevant to their credibility at trial, are irrelevant to the question of whether their statements aided in curing an error in the Indictment. More importantly, however, the *Kupreškić* test is not directed to the clarity and consistency of the Prosecution's *evidence* as disclosed to the accused, but rather to the clarity and consistency of the Prosecution's announcement of the *material facts* it intends to prove. Here, the Appellants were informed by the Pre-Trial Brief and Annex B that the Prosecution would argue that Gérard Ntakirutimana killed Ukobizaba and rely on the evidence of Witnesses GG and HH as support. Whether Witnesses GG and HH gave consistent testimony in their statements would affect the Prosecution's ability to prove the charge, but it has no bearing on Gérard Ntakirutimana's notice of that charge against him or his ability to prepare a defence against it.

41. Of course, if the only arguable notice to the Defence regarding the Prosecution's intent to prove a particular material fact is its inclusion in conflicting or ambiguous disclosure, the chamber will be unlikely to find that the accused had "timely, clear, and consistent information detailing the factual basis underpinning the charges against him or her."[73] In this regard, the mere fact of disclosure of witness statements on 10 April 2000 was insufficient to cure the indictment error, because of the contradiction between the statements of Witnesses GG and AA with regard to the method of Ukobizaba's murder. The Pre-Trial Brief and Annex B made plain that the Prosecution planned to rely on Witnesses GG's and HH's testimony, not AA's – a decision that is hardly surprising given the obvious importance of an allegation of direct commission of murder to the Prosecution's case. Thus, while Gérard Ntakirutimana is correct that the witness statements alone were not sufficient to overcome the defect in the Indictment, the explicit mention of Ukobizaba's murder in the Pre-Trial Brief and Annex B's identification of Witnesses GG and HH as the witnesses on which the Prosecution would rely, when combined with the previously-disclosed statements of those two witnesses, constitute the "timely, clear, and consistent information" required by *Kupreškić*.

42. Gérard Ntakirutimana lastly argues that the Pre-Trial Brief was not a reliable source of information for the Prosecution's charges, because it included an allegation that Gérard Ntakirutimana killed "one Kajongi,"[74] an allegation that was not presented at trial. The Prosecution

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[71] Appeal Brief (G. Ntakirutimana), para. 10.b.
[72] *See* Reply (G. Ntakirutimana), para. 6 (citing Appeal Brief (G. Ntakirutimana), para. 91).
[73] *Kupreškić et al.* Appeal Judgement, para. 114.
[74] Pre-Trial Brief, para. 15.

has the discretion to forgo presentation of material facts, even if they are specifically alleged in the indictment. In this situation, the Pre-Trial Brief put the Appellants on sufficient notice that the Prosecution would seek to prove that Gérard Ntakirutimana killed Ukobizaba. The fact that the Appellants were also on notice of another charge that was later dropped does not alter this conclusion.

43. Naturally, the Prosecution cannot intentionally seek to exhaust its opponent's resources by leaving the Defence to investigate charges that it has no intent to prosecute. The Prosecution should make every effort to ensure not only that the indictment specifically pleads the material facts that the Prosecution intends to prove but also that any facts that it does not intend to prove are removed. The same applies to other communications that give specific information regarding the Prosecution's intended case, such as the Pre-Trial Brief. It would be a serious breach of ethics for the Prosecution to draw the Defence into lengthy and expensive investigations of facts that the Prosecution does not intend to prove at trial. Gérard Ntakirutimana does not claim that the Prosecution did so in this case. For present purposes, then, it suffices to state that the Pre-Trial Brief's allegation regarding Kajongi does not affect the conclusion that the Pre-Trial Brief, Annex B, and the statements of Witness GG and HH cured the Mugonero Indictment's failure to allege that Gérard Ntakirutimana murdered Charles Ukobizaba.

44. In light of all the circumstances, the Appeals Chamber is satisfied that the Prosecution has met its burden of showing that its failure to mention Ukobizaba's killing in the Indictment did not actually prejudice Gérard Ntakirutimana's ability to defend against this charge.

b. The Allegation That Gérard Ntakirutimana Procured Arms, Ammunition and Gendarmes

45. The allegation that Gérard Ntakirutimana procured weapons, ammunition and gendarmes for the attack at Mugonero Complex does not appear in the Indictment. Like the allegation relating to the murder of Charles Ukobizaba, the Prosecution was in a position to plead specific details regarding this matter, given that it possessed the statement of Witness OO dated 12 August 1998, which contains a lengthy description of Gérard Ntakirutimana's activities at the Kibuye gendarmerie camp and was the sole evidentiary basis for the Prosecution's allegation.[75] The Prosecution's failure to include a specific pleading of this fact therefore rendered the Indictment defective.

[75] Statement of Witness OO dated 12 August 1998.

46. The Trial Chamber found, however, that the defect was cured by the fact that the allegation of procurement of weapons, ammunition and gendarmes was included in the Pre-Trial Brief.[76] The Pre-Trial Brief asserts that "[b]etween 10 and 16 April 1994 Dr. Gerard Ntakirutimana frequently visited the Kibuye Gendarme camp headquarters from where he procured arms, ammunition and gendarmes, for purposes of launching an attack on Tutsi refugees gathered at the Mugonero complex."[77] Annex B announces that Witness OO would testify that "in April 94 he saw *Dr. Gerard Ntakirutimana* at the base on several occasions, sometimes with soldiers and gendarmes. On one or two such occasions the witness saw *Dr. Gerard Ntakirutimana* being supplied with arms, ammunition and gendarmes for purposes of 'mounting operations' at the Mugonero complex."[78] The statement of Witness OO, as noted above, contains a lengthy narrative description of events at the Kibuye gendarmerie camp, including of Gérard Ntakirutimana's arrival at the camp on the morning of the Mugonero attack, driving a white pick-up "filled with about 10 *Interahamwe* militiamen," who shot their guns in the air and said "we need weapons and ammunition because you have failed."[79] Although it is not clear from the record when OO's witness statement was first disclosed to the Defence, a confidential memorandum from the Prosecution filed with the Registry of the Tribunal states that it was disclosed on 29 August 2000.[80]

47. Gérard Ntakirutimana contends that the Pre-Trial Brief's statement that he visited the Kibuye camp "[b]etween 10 and 16 April 1994" did not give proper notice of what he submits is the Prosecution's "unequivocal trial allegation of 15 April" as the date of the procurement of weapons and gendarmes; he also argues that the 15 April date "falls outside the period specified for the Mugonero allegations."[81] The Trial Chamber found that Gérard Ntakirutimana took gendarmes and ammunition with him from the Kibuye camp on 16 April, not 15 April.[82] This finding was well within the time period specified in the Mugonero Indictment, which states that Gérard Ntakirutimana was part of a "convoy, consisting of several vehicles followed by a large number of individuals armed with weapons" that went to the Mugonero Complex "[o]n or about the morning of 16 April 1994."[83] The statement in the Pre-Trial Brief that Gérard Ntakirutimana visited the Kibuye camp "[b]etween 10 and 16 April 1994" is precise enough to enable the preparation of a defence to the charge of procurement, particularly when viewed in combination with Annex B and the statement of Witness OO. Annex B makes clear that the allegation of procurement rests on the testimony of Witness OO, whose statement in turn makes clear that Gérard Ntakirutimana

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[76] Trial Judgement, para. 172.
[77] Pre-Trial Brief, para. 11.
[78] Annex B to Pre-Trial Brief, p. 10.
[79] Statement of Witness OO dated 12 August 1998, p. 12.
[80] Confidential Memorandum from Renifa Madenga to Koffi Afandé, 2 April 2003, p. 6.
[81] Appeal Brief (G. Ntakirutimana), para. 10.a.
[82] Trial Judgement, para. 186.

physically obtained arms and personnel at the Kibuye camp on the morning of the day of the attack on the hospital and the church. Based on these three documents, the Appellants were clearly informed that the Prosecution intended to prove that Gérard Ntakirutimana visited the camp between 10 and 16 April and that he obtained arms and gendarmes there on the morning of 16 April.

48. Gérard Ntakirutimana submits that the allegation of procurement was "buried among 83 statements disclosed."[84] This argument would have great force if the allegation were insignificant in the context of the case pleaded in the Indictment and if it were never mentioned except in isolated references in a witness statement. In this situation, however, the assertion in Witness OO's statement that Gérard Ntakirutimana procured weapons and attackers on the morning of the attack on the Mugonero Complex is obviously one of direct relevance to the pleaded allegation that Gérard Ntakirutimana "participated in an attack on the men, women and children in the Mugonero Complex."[85] While the importance of the allegation might not have been enough to cure an Indictment defect on its own given that it was contained in a single witness statement, it must be viewed together with the unambiguous information in the Pre-Trial Brief and Annex B that the Prosecution intended to rely on Witness OO's evidence as proof that Gérard Ntakirutimana was "supplied with arms, ammunition and gendarmes" for the purpose of an attack on Mugonero.[86] As with the killing of Ukobizaba, this information sufficed to cure the vagueness in the Indictment. Gérard Ntakirutimana failed to identify any particular prejudice to his ability to defend against the charge of procurement at trial by the fact that the Prosecution failed to communicate it specifically until the Pre-Trial Brief was filed on 15 July 2001. These circumstances compel the conclusion that the Prosecution sufficiently cured the defect in the Indictment by subsequent clear, consistent, and timely information regarding the nature of its case.

c. The Allegation That Elizaphan Ntakirutimana Conveyed Armed Attackers[87]

49. The Trial Chamber also found that Elizaphan Ntakirutimana "conveyed armed attackers to the Mugonero Complex in his vehicle on the morning of 16 April 1994, and that these attackers proceeded to kill Tutsi refugees at the Complex."[88] Although the Mugonero Indictment alleges that Elizaphan Ntakirutimana was one of the "[i]ndividuals in the convoy" that went to Mugonero on 16

[83] Mugonero Indictment, paras. 4.7-4.8.
[84] Appeal Brief (G. Ntakirutimana), para. 10.a.
[85] Mugonero Indictment, para. 4.8.
[86] Annex B to Pre-Trial Brief, p. 10.
[87] Although the argument regarding this point was raised in the brief of Gérard Ntakirutimana, not Elizaphan Ntakirutimana, the Appeals Chamber will consider it in light of the Appellant's respective incorporation of the arguments in each other's brief. Appeal Brief (E. Ntakirutimana), p. 88.
[88] Trial Judgement, para. 788.

April[89] and that he "participated in an attack" on the Complex,[90] the allegation that he conveyed other attackers to the Complex is not alleged in the Indictment. In the view of the Appeals Chamber, the distinction is important because Elizaphan Ntakirutimana's genocide conviction under the Mugonero Indictment was based not on a finding of personal physical "participat[ion] in an attack,"[91] as alleged in the Indictment, but rather on the finding that "in conveying armed attackers to the Complex, Elizaphan Ntakirutimana is individually criminally responsible for aiding and abetting in the killing and causing of serious bodily or mental harm to the Tutsi refugees at the Complex."[92]

50. As a preliminary matter, the Prosecution submits that this argument has been waived as it was not presented to the Trial Chamber. This argument has some force because, although the Trial Chamber specifically discussed and disposed of the challenge to the Indictment in its discussion of the killing of Ukobizaba[93] and the procurement of arms and gendarmes by Gérard Ntakirutimana,[94] it did not do so in discussing Elizaphan Ntakirutimana's transport of armed attackers.

51. It is clear that the Prosecution could have pleaded its material allegation that Elizaphan Ntakirutimana conveyed attackers to the Mugonero attack. Witness MM, one of several witnesses upon whom the Prosecution relied to prove this fact, had previously attested to this allegation in a statement in 1996.[95] Accordingly, the Prosecution was in a position to plead this material fact in the Indictment, and its failure to do so rendered the Indictment defective.

52. The Appellants do not appear to have objected to this error at trial when the Prosecution presented evidence that Elizaphan Ntakirutimana conveyed attackers to Mugonero.[96] The Appellant's filings before the Appeals Chamber do not reference any specific objection, nor does it appear that they asked for more time to cross-examine the relevant witnesses or to conduct further investigations. Normally, the Defence's silence would constitute a waiver of the argument: "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party."[97] The Appeals Chamber recalls, however, that the Trial Chamber concluded that the challenges that the Appellants presented to the vagueness of the Indictments were properly presented and enabled

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[89] Mugonero Indictment, para. 4.7.
[90] *Id.*, para. 4.8.
[91] *Ibid.*
[92] Trial Judgement, para. 790.
[93] *Id.*, paras. 60-63.
[94] *Id.*, para. 172.
[95] Statement of Witness MM dated 11 April 1996, p. 4 ("J'ai vu le Pasteur NTAKIRUTIMANA venir vers l'hôpital avec sa camionnette contenant 4 ou 5 des militaires à l'arrière.").
[96] *See, e.g.*, T. 19 September 2001, p. 84 (Witness MM); T. 20 September 2001, p. 135 (Witness GG).
[97] *Kayishema and Ruzindana* Appeal Judgement, para. 91.

the Trial Chamber to evaluate the issue.[98] The Trial Chamber also cited certain portions of the Defence Closing Brief, which specifically challenges the allegation that Elizaphan Ntakirutimana transported attackers, although it does so in the context of challenging the credibility of the evidence underlying the allegation and it does not specifically address the Indictment's failure to plead this fact.[99] The Trial Chamber's unequivocal statement that it believed the challenges to the vagueness of the Indictment to have been properly presented and its specific citation of a page of the Defence Closing Brief that addresses the allegation that Elizaphan Ntakirutimana conveyed attackers to Mugonero indicate that the Appellants brought the point to the attention of the Trial Chamber in a manner that permitted the Trial Chamber to consider it to its satisfaction. The Appeals Chamber will therefore treat this argument as properly raised below.

53. In contrast to the killing of Ukobizaba and Gérard Ntakirutimana's procurement of arms and gendarmes, however, the allegation regarding Elizaphan Ntakirutimana transporting attackers to Mugonero is not clearly set out in the Pre-Trial Brief. Rather, the Pre-Trial Brief states only that "a convoy of military and civilian attackers arrived at Mugonero Complex in vehicles belonging to Pastor Elizaphan Ntakirutimana and others" and that "Pastor Elizaphan [Ntakirutimana] and Dr. Gerard Ntakirutimana were present during the attack at the complex."[100] As the Trial Chamber pointed out, the Pre-Trial Brief "does not specifically either allege that either Accused was in the convoy."[101] By contrast, the Pre-Trial Brief contains several passages specifically alleging that Elizaphan Ntakirutimana conveyed attackers to sites other than the Mugonero Complex. When making allegations about the Seventh Day Adventist Church at Murambi, the Pre-Trial Brief clearly states that "Dr. Gerard Ntakirutimana and Pastor Elizaphan Ntakirutimana conveyed attackers and personally pursued the refugees at this location."[102] Similarly, with regard to events in Bisesero, the Pre-Trial Brief states that "around May 1994, 'Interahamwe' who were taken there by Pastor Elizaphan Ntakirutimana, captured a witness,"[103] and that "[o]n many occasions between April, May and June 1994 Pastor Elizaphan Ntakirutimana took armed attackers in his vehicle to the Bisesero area and pointed out hiding Tutsi for the attackers to kill."[104] These allegations show that, when it chose to do so, the Prosecution was able to allege specifically in its Pre-Trial Brief that Elizaphan Ntakirutimana conveyed attackers to particular sites. A similar allegation with respect to conveying attackers to Mugonero is conspicuously absent.

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[98] Trial Judgement, para. 52.
[99] *Id.*, para. 48 & n. 53 (citing Defence Closing Brief, p. 78).
[100] Pre-Trial Brief, paras. 13, 15.
[101] Trial Judgement, para. 60.
[102] Pre-Trial Brief, para. 16.
[103] *Id.*, para. 20.
[104] *Id.*, para. 21.

54. The Trial Chamber concluded generally that the Appellants were "entitled to conclude that the allegations in [Annex B to the Pre-Trial Brief] were the allegations it would have to meet at trial."[105] The Prosecution also relies on the summaries in Annex B of the testimony of Witnesses FF, MM, and YY.[106] The Appeals Chamber must therefore consider whether Annex B, on its own, clearly, consistently and timely informed Elizaphan Ntakirutimana that he would be obliged to meet the allegation that he transported attackers to Mugonero.

55. With regard to Witness FF, Annex B states: "The witness will testify that around 9 a.m. on 16 April 94 armed soldiers were conveyed to the hospital in three cars belonging to *Pastor Ntakirutimana, Dr. Gerard Ntakirutimana* and the hospital administration."[107] Witness YY was to testify that "he saw thousands of armed civilians come to attack the refugees at the complex" and that "[t]he attackers included *Dr. Gerard Ntakirutimana, pastor Elizaphan Ntakirutimana*, [and others]."[108] Although Annex B later stated that Witness YY "will testify further, that he saw *pastor Elizaphan Ntakirutimana* transporting attackers in his vehicle, and that on one occasion he saw *him* supervising *Interahamwe* to take off the iron sheets of Murambi Adventist Church," this sentence immediately followed a sentence stating that "following the Mugonero attack he fled to Bisesero where he witnessed attacks on several occasion."[109] Like the Pre-Trial Brief, Annex B's summaries of the testimony of Witnesses FF and YY do not clearly state that Elizaphan Ntakirutimana transported attackers to Mugonero. The only witness summary cited by the Prosecution that does contain this allegation is that of Witness MM, which states that "*Pastor Elizaphan Ntakirutimana* took soldiers to the hospital in his Hilux pick-up truck."[110]

56. Other summaries of testimony in Annex B add to the uncertainty regarding Elizaphan Ntakirutimana's role in the Mugonero attack. The summary of Witness GG's testimony states only that Elizaphan Ntakirutimana was among the attackers at Mugonero.[111] This is consistent with GG's prior statements to investigators, none of which stated that Elizaphan Ntakirutimana conveyed attackers in his vehicle.[112] Annex B's summaries of the testimony of Witnesses KK and PP state that Elizaphan Ntakirutimana was "[a]mong the attackers" at Mugonero, but not that he conveyed attackers there.[113] Despite these summaries, these three witnesses, along with Witnesses MM and

[105] *Id.*, para. 62.
[106] Prosecution Response, para. 2.11 & n. 28.
[107] Annex B to Pre-Trial Brief, p. 4.
[108] *Id.*, p. 17.
[109] *Ibid.*
[110] *Id.*, p. 9.
[111] *Id.*, p. 5.
[112] Statement of Witness GG dated 20 June 1996, p. 4 (stating that Elizaphan Ntakirutimana and Obed Ruzindana arrived at about the same time and that "there were armed civilians in the pick up of RUZINDANA," but not stating that anyone rode with Elizaphan Ntakirutimana).
[113] Annex B to Pre-Trial Brief, pp. 7, 11.

YY, were five of the six principal witnesses on which the Trial Chamber relied in concluding that Elizaphan Ntakirutimana conveyed attackers to Mugonero.[114] As for the sixth, Witness HH, Annex B of the Pre-Trial Brief does not state that the witness even saw Elizaphan Ntakirutimana at Mugonero, let alone that he conveyed attackers there.[115]

57. In sum, there is only one sentence in Annex B to the Pre-Trial Brief alleging that Elizaphan Ntakirutimana conveyed attackers to Mugonero. When viewed together with the Pre-Trial Brief itself, which failed to state the allegation even though it contained similar facts regarding Bisesero, it cannot be said that the Prosecution clearly or consistently informed the Defence that it intended to rely on the transport of attackers as the basis for the Mugonero Indictment's count of genocide against Elizaphan Ntakirutimana. Even if Annex B is considered sufficient notice that Witness MM would testify that Elizaphan Ntakirutimana conveyed attackers, the Annex and the statements disclosed did not communicate the important role that the testimony of five other witnesses – GG, KK, PP, YY, and HH – would have in proving this allegation. In this context, the Pre-Trial Brief and Annex B thereto did not provide clear, consistent, or timely information regarding the Prosecution's case on this point.

58. The Prosecution contends that the Appellants have not shown any actual prejudice from the asserted vagueness in the Indictment because their defence was based on alibi, challenges to witness credibility, and internal inconsistencies in witness statements.[116] Article 20(4)(a) of the Statute of the Tribunal guarantees the accused the right to "be informed promptly and in detail ... of the nature and cause of the charge against him." As such, a vague indictment, not cured by timely and sufficient notice, leads to prejudice. The defect may only be deemed harmless "through demonstrating that [the accused's] ability to prepare their defence was not materially impaired."[117] *Kupreškić* places this burden of showing that the Defence was not materially impaired squarely on the Prosecution. The Prosecution's submission that the Appellants have not shown any actual prejudice rests on the speculative assumption that, had Elizaphan Ntakirutimana been given proper notice of the omitted allegation, he would have conducted his defence in an identical manner. The Prosecution cannot cure a vague indictment by presuming that the Appellants' defence would not have changed had proper notice of a material fact been given. A defence based on alibi and challenges to the credibility of Prosecution witnesses is still dependent on sufficient notice of the material facts the Prosecution intends to prove. The Defence's use of its investigative resources

[114] Annex B also stated that Witness AA would testify that attackers arrived at Mugonero in Elizaphan Ntakirutimana's vehicle, but it is equivocal on the question whether Elizaphan Ntakirutimana transported them himself. Annex B to Pre-Trial Brief, p. 1. Witness AA was not called at trial.
[115] Annex B to Pre-Trial Brief, p. 6.
[116] Prosecution Response, para. 2.11.
[117] *Kupreškić et al.* Appeal Judgement, para. 122.

necessarily revolves around the particular facts proven, as do its preparation for the cross-examination of Prosecution witnesses. In this case, based on the Indictment, the Pre-Trial Brief and Annex B, counsel for Elizaphan Ntakirutimana could reasonably have prepared to favour the allegation of Elizaphan Ntakirutimana's physical participation in the Mugonero attack and have given less attention to the allegation that he conveyed attackers there. Whether counsel could in fact have prepared a more effective cross-examination in this context is beside the point. Since the Prosecution had several opportunities to inform the Defence of this material fact and yet has not shown that it did so, and since the Defence adequately raised the issue, the Prosecution cannot rely on the mere assertion that the Appellant's counsel did not suffer by it.

59. The Prosecution has not shown that it cured the failure of the Mugonero Indictment to plead that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex. Accordingly, the Trial Chamber erred in concluding that a conviction could be based on this unpleaded material fact.

(ii) Did the Bisesero Indictment Fail to Plead Material Facts?

60. The relevant allegations in the Bisesero Indictment are as follows:

> 4.10. Many of those who survived the massacre at Mugonero Complex fled to the surrounding areas, one of which was the area known as Bisesero.
>
> 4.11. The area known as Bisesero spans the two communes of Gishyita and Gisovu in Kibuye Prefecture. From April through June 1994, hundreds of men, women and children sought refuge in various locations in Bisesero. These men, women and children were predominantly Tutsis and were seeking refuge from attacks on Tutsis which had occurred throughout the Prefecture of Kibuye. The majority of these men, women and children were unarmed.
>
> 4.12. From April through June 1994, convoys of a large number of individuals armed with various weapons went to the area of Bisesero. Individuals in the convoy included, among others, Elizaphan Ntakirutimana and Gerard Ntakirutimana, members of the National Gendarmerie, communal police, militia and civilians.
>
> 4.13. The individuals in the convoys, including Elizaphan Ntakirutimana and Gerard Ntakirutimana, participated in the attacks on the men, women and children in the area of Bisesero which continued almost on a daily basis for several months.
>
> 4.14. The attacks resulted in hundreds of deaths and a large number of wounded among the men, women and children who had sought a refuge in Bisesero.
>
> 4.15. During the months of these attacks, individuals, including Elizaphan Ntakirutimana and Gerard Ntakirutimana, searched for and attacked Tutsi survivors and others, killing or causing serious bodily and mental harm to them.
>
> 4.16. At one point during this time period, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero. Elizaphan Ntakirutimana went to a church located in Murambi where many Tutsis were seeking refuge from the ongoing massacres. Elizaphan Ntakirutimana ordered the

attackers to destroy the roof of this church so that it could no longer be used as a hiding place for the Tutsis.[118]

61. In convicting Gérard Ntakirutimana of genocide under the Bisesero Indictment, the Trial Chamber relied on several findings of fact regarding the Appellant's participation in attacks on Tutsi in the Bisesero region. The Trial Chamber found that Gérard Ntakirutimana participated in nine separate attacks on Tutsi refugees in Bisesero, which were identified by specific dates, locations, or acts that Gérard Ntakirutimana took,[119] and also found that he participated in additional acts at "unspecified locations in Bisesero."[120] These findings underlay the Trial Chamber's conclusions that Gérard Ntakirutimana had committed the *actus reus* and had the requisite *mens rea* for genocide.[121] The Trial Chamber also found that, in addition to ordering the removal of the roof of the church in Murambi as alleged in paragraph 4.16 of the Bisesero Indictment, Elizaphan Ntakirutimana transported attackers to five additional sites in the Bisesero region and assisted them in killing and causing of serious bodily harm to Tutsi refugees.[122] These findings supported the Trial Chamber's conclusions that Elizaphan Ntakirutimana aided and abetted others in the killing or causing of serious bodily or mental harm and had the requisite *mens rea* for genocide.[123]

62. In light of the preceding discussion regarding *Kupreškić*, it is clear that the facts enumerated by the Trial Chamber in support of its finding of genocidal acts and intent were material facts that should have been included in the Bisesero Indictment. Almost none of them were. The Appeals Chamber must therefore determine whether the Prosecution was in a position to include those facts in the Indictment and, if it was, whether the failure to do so was cured by clear, consistent, and timely information communicated to the Defence specifying that those allegations were part of the Prosecution's case.

a. The Allegations That Gérard Ntakirutimana Attacked Refugees at Murambi Hill On or About 18 April 1994 and That He Shot at Refugees at Gitwe Hill in Late April or May 1994

63. The Trial Chamber found that "on or about 18 April 1994 Gérard Ntakirutimana was with Interahamwe in Murambi Hill pursuing and attacking Tutsi refugees" and that "in the last part of

[118] Bisesero Indictment, paras. 4.10-4.16.
[119] Trial Judgement, para. 832(i)-(ix).
[120] *Id.*, paras. 704, 832(x).
[121] *Id.*, paras. 834-835.
[122] *Id.*, paras. 827-828(i)-(vi).
[123] *Id.*, paras. 830-831.

April or possibly in May, Gérard Ntakirutimana was with attackers in Gitwe Hill where he shot at refugees."[124] Both findings rested on the testimony of Witness FF.

64. The attack at Murambi Hill was mentioned in one of Witness FF's witness statements, which stated: "I also saw Dr. Gerard Ntakirutimana many times in May and June of 1994 ... On one occasion, I saw him in Murambi driving his car. He was wearing shorts and a long coat. He parked his car and spent the whole day with the killers running after the Tutsi and shooting him [sic]. He had a long gun, which he had on his shoulder."[125] Regarding the attack at Gitwe, Witness FF's statement states that the witness saw Gérard Ntakirutimana "[s]ometime in June ... at Gitwe Primary School. He was on foot with a group of attackers. I was hiding in the bush near the road near a spring or water. The Tutsi refugees were on the hill opposite. They called to him, 'How can you kill when you are the son of a pastor.'"[126] The Trial Chamber's findings, including Gérard Ntakirutimana's attire and the gun on his shoulder at Murambi, and the refugees' protest at Gérard Ntakirutimana's conduct at Gitwe, show that the statement refers to the same events as Witness FF's trial testimony.[127] The Prosecution was therefore aware of significant details regarding this allegation prior to trial, including the particular locations (Murambi and Gitwe) and the means with which Gérard Ntakirutimana allegedly committed one of the attacks (the gun over the shoulder at Murambi). The Prosecution should have included these facts in the Bisesero Indictment. Failure to do so rendered the Indictment defective.

65. The Trial Chamber held that the failure to allege these Murambi and Gitwe attacks in the Indictment was cured. First, the Trial Chamber noted that "the Indictment alleges that attacks were carried out in the area of Bisesero, wherein Murambi and Gitwe Hills are located, thereby putting the Defence on notice of these allegations."[128] The Trial Chamber also relied on the summary of Witness FF's testimony provided in Annex B to the Pre-Trial Brief.[129] The Prosecution relies on these same arguments on appeal.

66. In the view of the Appeals Chamber, the allegation in the Bisesero Indictment that the Appellants participated in attacks "in the area of Bisesero which continued almost on a daily basis for several months" does not adequately inform them that the Prosecution intended to charge participation in specific attacks at Murambi or at Gitwe. The Bisesero Indictment states that the area "spans the two communes of Gishyita and Gisovu in Kibuye Prefecture";[130] the Pre-Trial Brief calls

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[124] *Id.*, para. 543.
[125] Statement of Witness FF dated 15 November 1999, p. 7.
[126] *Ibid.*
[127] Trial Judgement, paras. 538-539.
[128] *Id.*, para. 540.
[129] *Ibid.*
[130] Bisesero Indictment, para. 4.11.

it a "vast region with undulating hills and plains."[131] Where the Prosecution has detailed information regarding the time and location of particular allegations, *Kupreškić* does not permit it to limit its allegations to a "vast region" that spans two communes. Rather, an Indictment must "delve into particulars" where possible.[132]

67. The Appeals Chamber notes that the summary of Witness FF's evidence in Annex B gives more specific information regarding the two allegations than the Bisesero Indictment. Regarding the Gitwe attack, the summary states that "[t]he witness will further testify that she saw Gérard Ntakirutimana in the company of Ngirinshuti Mathias, head of hospital staff shooting at Tutsi at Gitwe Hill. The witness will further testify that there were also soldiers, commune policemen and Hutu civilians among the attackers."[133] The summary also indicates that the witness will testify to "several attacks between April and June 94 in the hills of Bisesero, including Rwamakena, Muyira, Murambi and Gitwe Hills where she saw Dr. Gérard Ntakirutimana."[134] Although no specific details are given in the summary about the attack at Murambi, the summary clearly informed the Defence that the Prosecution intended to allege, supported by Witness FF's testimony, that Gérard Ntakirutimana participated in those attacks. The summary also permitted Gérard Ntakirutimana to prepare his defence by reference to Witness FF's witness statements, which contained further details regarding the allegations of attacks at Murambi and Gitwe.

68. For the Appeals Chamber, a problem arises, however, with regard to the timing of the attacks. The Annex B summary does not provide any time frame for the Gitwe attack and states only that the Murambi attack took place "between April and June 94," along with several others.[135] Witness FF's statement does not specify when the Murambi attack took place, although it immediately follows the allegation that Witness FF "saw Dr. Gerard NTAKIRUTIMANA many times in May and June 1994 while [FF] was hiding in the hills."[136] The statement avers that the Gitwe attack occurred "[s]ometime in June."[137] Moreover, the statement specifically states that Witness FF spent the day of 18 April 1994 at a colleague's home and did not leave until the evening, after which she went to her parents' home in Gisovu and then fled into the Bisesero hills where she witnessed the attacks at issue. Based on the information provided prior to trial, then, Gérard Ntakirutimana was justified in concluding that the Prosecution's case was that these two attacks occurred in May or June 1994, or at the very least after 18 April 1994.

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[131] Pre-Trial Brief, para. 19.
[132] *Kupreškić et al.* Appeal Judgement, para. 98.
[133] Annex B to Pre-Trial Brief, p. 4.
[134] *Id.*
[135] *Id.*
[136] Statement of Witness FF dated 15 November 1999, p. 7.
[137] *Id.*, p. 7.

69. At trial, however, Witness FF testified that the Murambi attack took place "before noon" on the "[e]ighteenth of April 1994"[138] and the Gitwe attack "the next day."[139] The Trial Chamber found that the Murambi attack occurred "around 18 April 1994" and the Gitwe attack "[t]he following day, on 19 April 1994."[140] When cross-examined with regard to the timing of the attacks, Witness FF specifically contradicted the mention in her statement that the Gitwe attack took place in June and reaffirmed that both attacks took place in April 1994.[141]

70. In *Rutaganda*, the Appeals Chamber confronted the situation in which an Indictment specifically pleaded that the accused distributed weapons "on or about 6 April 1994," but the Trial Chamber held that distribution occurred "on 8 and 15 April 1994, and on or around 24 April 1994."[142] The Appeals Chamber held that this discrepancy did not violate the rights of the accused, stating that "in general, minor differences between the indictment and the evidence presented at trial are not such as to prevent the Trial Chamber from considering the indictment in the light of the evidence presented at trial."[143] In that case, however, the Indictment "d[id] not show that the Prosecution necessarily envisaged only a single act of weapons distribution" and the accused had shown no prejudice due to the variation in the date of the distribution.[144] The posture in this case is different. The Bisesero Indictment did not mention the Murambi or Gitwe attacks at all, let alone indicate a general date for their occurrence. Moreover, the information that the Prosecution suggests remedied this defect in the Indictment – Annex B and Witness FF's witness statements – not only reflected that the attacks occurred in different months, but actually *excluded* the dates proffered at trial by stating that the witness was elsewhere on those dates. The Defence would have been quite justified in thinking, based on Witness FF's witness statements, that it did not need to present an alibi for a Murambi attack on 18 April 1994. Had the Appellants known of the dates that the Prosecution eventually advanced at trial, they might have challenged Witness FF's trial testimony by seeking out witnesses who would support the testimony given in Witness FF's statement, such as the "Hutu colleague" who welcomed Witness FF into her home for the day of 18 April, according to the statement.[145]

71. The above discussion shows that the Prosecution did not provide clear, consistent or timely information relating to the allegation of these attacks. The Appeals Chamber finds that the

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[138] T. 28 September 2001, pp. 53-54.
[139] *Id.*, pp. 55-56.
[140] Trial Judgement, paras. 538-539 (citing T. 28 September 2001, pp. 52-60, and T. 1 October 2001, pp. 29-30, 45-48).
[141] T. 1 October 2001, p. 38 ("The attack which was launched against Murambi took place in April. … As for the attack on Gitwe, it did not take place in June either. As far as I recall, it would have been closer to the month of April. It is possible that that attack took place in May, but not in June.").
[142] *Rutaganda* Appeal Judgement, para. 297.
[143] *Id.*, para. 302.
[144] *Id.*, paras. 304-305.
[145] Statement of Witness FF dated 15 November 1999, p. 7.

Prosecution has therefore not met its burden of showing that the defect in the Indictment was cured and that no prejudice resulted to the Appellant. Indeed, given that the information available to the Defence in Annex B and Witness FF's witness statements was inconsistent with the case that the Prosecution presented at trial, the Defence was, in fact, prejudiced by lack of notice. The Trial Chamber therefore erred in relying on these findings in convicting Gérard Ntakirutimana of genocide under the Bisesero Indictment.

b. The Allegation That Gérard Ntakirutimana Transported Attackers in Kidashya Hill and Chased and Shot Tutsi Refugees in the Hills

72. Also relying on trial testimony of Witness FF, the Trial Chamber found "that sometime between April and June 1994, Gérard Ntakirutimana was in Kidashya Hill transporting armed attackers, and that he participated in chasing and shooting at Tutsi refugees in the hills."[146] The Trial Chamber acknowledged, and the Prosecution does not contest, that this allegation did not appear in the Bisesero Indictment and was not mentioned in the Pre-Trial Brief, Annex B thereto, or any of Witness FF's witness statements.[147] Rather, "[t]he precise reference to Kidashya Hill appeared in Witness FF's testimony and was not available to the Prosecution before the trial started."[148]

73. The Trial Chamber held that the Defence "had sufficient notice of the allegation in view of the sheer scale of the killings in the hills of Bisesero."[149] The reference to "sheer scale" recalls the statement in *Kupreškić* that "there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of crimes.'"[150] The *Kupreškić* Appeal Judgement elaborated that, in situations in which the crimes charged involve hundreds of victims, such as where the accused is alleged to have participated "as a member of an execution squad" or "as a member of a military force," the nature of the case might excuse the Prosecution from "specify[ing] every single victim that has been killed or expelled."[151] This observation allows for the fact that, in many of the cases before the two International Tribunals, the number of individual victims is so high that identifying all of them and pleading their identities is effectively impossible. The inability to identify victims is reconcilable with the right of the accused to know the material facts of the

[146] Trial Judgement, para. 586; *see also id.* 832(vi).
[147] *Id.*, para. 583.
[148] *Ibid.*
[149] *Id.*
[150] *Kupreškić et al.* Appeal Judgement, para. 89 (quoting *Kvočka* Decision of 12 April 1999, para. 17).
[151] *Id.*, para. 90.

charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim.

74. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. Proof of a criminal act against a named or otherwise identified individual can be a significant boost to the Prosecution's case; in addition to showing that the accused committed one crime, it can support the inference that the accused was prepared to do likewise to other unidentifiable victims and had the requisite *mens rea* to support a conviction. As a consequence, the Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the "sheer scale" of the crime made it impossible to identify that individual in the indictment. Quite the contrary: the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual.[152]

75. *Kupreškić* did not expressly address the application of its "sheer scale" pronouncement to material facts regarding the location of crimes. There may well be situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations. In cases concerning physical acts of violence perpetrated by the accused personally, however, location can be very important. If nothing else, notice of the alleged location of the charged activity permits the Defence to focus its investigation on that area. When the Prosecution seeks to prove that the accused committed an act at a specified location, it cannot simultaneously claim that it is impracticable to specify that location in advance.

76. In this case, the Prosecution specifically sought to show, through the evidence of Witness FF, that Gérard Ntakirutimana participated in an attack at Kidashya Hill. Witness FF's identification of that location itself refutes the argument that identifying it was somehow "impracticable." The "sheer scale" discussion in *Kupreškić* therefore does not apply here.

77. Rather, the Appeals Chamber considers that the Kidashya finding falls into a different category of allegations mentioned in *Kupreškić*, namely those which were not pled in the indictment "because the necessary information [was] not in the Prosecution's possession."[153] Although the evidence at trial sometimes turns out to be different from the Prosecution's expectations, the accused are generally entitled to proceed on the basis that the material facts disclosed to them are "exhaustive in nature" unless and "until given sufficient notice that evidence will be led of

[152] *Id.*, para. 89.
[153] *Id.*, para. 92.

additional incidents."[154] Given that "the Prosecution is expected to know its case before it goes to trial," the question is whether it was fair to the Appellant to be tried and convicted based on an allegation as to which neither he nor the Prosecution had actual or specific notice.[155] On this question, as on the question of whether communications of information sufficed to cure an indictment defect, the Prosecution bears the burden of demonstrating that the new incidents that became known at trial caused no prejudice to the Appellant.

78. The Prosecution relies on three arguments: first, that the new allegation did not change the Prosecution's case fundamentally; second, that the Appellants did not complain of the novelty of the allegation during trial; and third, that the Appellants have failed to show any prejudice. The second and third arguments have already been dealt with: the Trial Chamber considered that the argument was properly raised and, where the error was not waived by the Appellants, the burden of showing that the error in the Indictment was harmless falls on the Prosecution. The first argument suggests that the Prosecution may obtain a conviction at trial based on evidence of acts that neither party was aware would be part of the case, as long as the acts are generally consistent with the overall theme of the Prosecution case and do not "fundamentally" change it. Such a rule would reward the pleading of broad generalities and encourage the Prosecution to avoid narrowing its case to conform to the evidence it knows it can prove, in order to leave open the possibility of benefiting from testimony of criminal acts disclosed for the first time on the stand. The Appeals Chamber holds that this procedure cannot be reconciled with an accused's right to be informed of the nature and cause of the charge against him. Moreover, the Appeals Chamber cannot accept the Prosecution's argument that it was not possible to particularise the exact site of each attack because they were so numerous and occurred almost daily.[156] In the present situation, Witness FF's witness statements mentioned alleged participation by Gérard Ntakirutimana in the attacks in Bisesero. The Prosecution thus had ample opportunity to obtain more specific information from the witness prior to trial.

79. The Prosecution has accordingly not shown that the witness-stand revelation of an attack at Kidashya Hill was fair to the Appellants. The Trial Chamber erred in basing a conviction on that material fact.

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[154] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 63.
[155] *Kupreškić et al.* Appeal Judgement, para. 92.
[156] Prosecution Response, para. 2.6.

c. The Allegation That Gérard Ntakirutimana Shot at Refugees at Mutiti Hill

80. Witness FF also testified, and the Trial Chamber found, that Gérard Ntakirutimana participated in an attack at Mutiti Hill, where he shot at refugees.[157] The Mutiti allegation is not mentioned in the Bisesero Indictment, thereby rendering the Indictment defective, and, like the allegation regarding Kidashya Hill, is not mentioned in the Pre-Trial Brief, Annex B thereto, or any statement of Witness FF.

81. The Trial Chamber found that there was "no issue of a lack of notice to the Defence" because the Bisesero Indictment generally alleged attacks in the area of Bisesero, where Mutiti Hill is located, and because Witness FF's statements indicated that she saw Gérard Ntakirutimana participate in attacks "in the hills of Bisesero, including Rwakamena, Muyira, Murambi and Gitwe hills."[158] As discussed above, the general allegation of attacks in Bisesero does not clearly inform the Appellant that the Prosecution will present evidence of an attack at a specific location such as Mutiti. The same is true of Witness FF's witness statements, which do not mention Mutiti. For the reasons discussed above, the Trial Chamber erred in basing a conviction on the Mutiti Hill attack.

d. The Allegation That Gérard Ntakirutimana Headed a Group of Armed Attackers at Muyira Hill and Shot at Tutsi Refugees in June 1994

82. Relying on testimony of Witness HH, the Trial Chamber found that "one day in June 1994, Gérard Ntakirutimana headed a group of armed attackers at Muyira Hill. He carried a gun and shot at Tutsi refugees."[159] The Prosecution was clearly in a position to specify this allegation in the Bisesero Indictment; it was mentioned in the Prosecution's opening statement, which argued that "[t]he evidence will prove that Elizaphan and Gérard Ntakirutimana caused the death of Tutsis at Mugonero Complex and at numerous places in Bisesero including Muyira, Murambi, Gisoro and Gitwe hills."[160] The Muyira allegation should have been pleaded in the Indictment, and failure to do so rendered the Indictment defective.

83. The Trial Chamber found, however, that Annex B to the Pre-Trial Brief, when viewed in conjunction with a witness statement of Witness HH, provided sufficient notice of this allegation. Annex B states that "[i]n May 1994 [HH] fled to Bisesero where he saw that *Dr. Gerard Ntakirutimana* ... formed part of the contingent of attackers who attacked them almost daily between then and June 94. He observed them from various hills and other locations in the Bisesero

[157] Trial Judgement, paras. 674, 832(ix).
[158] *Id.*, para. 674.
[159] *Id.*, para. 668; *see also id.*, para. 832(viii).
[160] T. 18 September 2001, p. 33, cited in Trial Judgement, para. 633.

area."[161] The Trial Chamber also observed that "Witness HH's reconfirmation statement of 25 July 2001, which was disclosed to the Defence on 14 September 2001, specifically refers to Witness HH's observation of Gérard Ntakirutimana 'attacking us with a rifle' at Muhira Hill, 'at some stage.'"[162]

84. Although the "reconfirmation statement" did provide clear and consistent information that Gérard Ntakirutimana would face allegations regarding an attack at Muyira Hill, it cannot be said that such information came in a timely fashion. The Trial Chamber's summary states that it was not disclosed to the Appellants until 14 September 2001, four days before the beginning of trial and eleven days before Witness HH began testifying. There is no explanation for the delay in disclosing this statement, particularly given that it was signed over seven weeks earlier on 25 July 2001. The Prosecution cannot wait until four days before trial to give clear notice that it will pursue an additional allegation of personal physical wrongdoing.

85. The Appeals Chamber therefore concludes that the error in the Bisesero Indictment regarding the attack at Muyira Hill in June 1994 was not cured by subsequent information. The Trial Chamber therefore erred in relying on this allegation to convict Gérard Ntakirutimana.

e. The Allegation That Gérard Ntakirutimana Took Part in an Attack on Refugees at Muyira Hill in Mid-May 1994

86. Relying on the testimony of Witness GG, the Trial Chamber found that "[s]ometime in mid-May 1994, at Muyira Hill, Gérard Ntakirutimana took part in an attack on Tutsi refugees."[163] There is no suggestion that the Prosecution could not have included this allegation in the Bisesero Indictment, and the Indictment is defective due to the omission. Moreover, the details of this attack are not specifically set out in the Pre-Trial Brief, in Annex B thereto, or in any of GG's witness statements.

87. The Trial Chamber found, however, that sufficient notice was given that the Prosecution would charge Gérard Ntakirutimana with an attack at Muyira Hill through the "reconfirmation statement" of Witness HH dated 25 July 2001. As stated above, however, that statement was disclosed to the Defence too late for it to be considered as "timely" information regarding the nature of the Prosecution's case. Since HH's statement did not provide adequate notice of the allegation for a Muyira Hill attack in June testified to by Witness HH, it no more provides adequate notice of an allegation of a separate Muyira Hill attack in mid-May testified to by Witness GG.

[161] Annex B to Pre-Trial Brief, p. 6.

88. The Appeals Chamber considers therefore that the failure of the Bisesero Indictment to plead an attack at Muyira Hill in mid-May was not cured. The Trial Chamber erred in placing weight on this allegation in convicting Gérard Ntakirutimana.

f. The Allegation That Gérard Ntakirutimana Participated in an Attack Against Tutsi Refugees at Muyira Hill on 13 May 1994 and Shot and Killed the Wife of Nzamwita

89. Based on the testimony of Witness YY, the Trial Chamber found that Gérard Ntakirutimana "participated in the attack against Tutsi refugees at Muyira Hill on 13 May 1994 and that he shot and killed the wife of one Nzamwita, a Tutsi civilian."[164] As stated above, attacks at Muyira Hill were not specifically mentioned in the Indictment, nor was the allegation that Gérard Ntakirutimana personally murdered an individual identifiable as "the wife of one Nzamwita." The Indictment is defective due to these omissions.

90. In determining that the failure to plead these allegations specifically had been cured, the Trial Chamber relied on its prior finding that "the Defence received sufficient notice that they would have to meet allegations relating to both Accused's participation in attacks against Tutsi refugees at Muyira Hill."[165] For the reasons given above, the Appeals Chamber finds that this conclusion was erroneous.

91. Consequently, the Appeals Chamber finds that the Trial Chamber erred in resting a conviction on the allegation of an attack at Muyira Hill on 13 May 1994 and on the allegation that Gérard Ntakirutimana shot and killed the wife of Nzamwita.

g. The Allegations That Gérard Ntakirutimana Participated in an Attack at Gitwe Hill at the End of April or Beginning of May 1994 and That He Shot and Killed One Esdras

92. The Trial Chamber held that Gérard Ntakirutimana participated in an attack at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994, and that he killed a person named "Esdras" during that attack.[166] This finding was based on evidence of Witness HH.[167]

93. Although the allegation of a Gitwe attack was not included in the Indictment, the Trial Chamber found that the Appellants were sufficiently informed that the Prosecution would allege an

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[162] Trial Judgement, para. 665; *see also id.*, para. 633.
[163] *Id.*, para. 832(v); *see also id.*, para. 635.
[164] *Id.*, para. 642; *see also id.*, para. 832(iv).
[165] *Id.*, para. 640.
[166] *Id.*, para. 832(iii).
[167] *Id.*, paras. 552-559.

attack at Gitwe Hill by Annex B to the Pre-Trial Brief, in combination with the witness statement of Witness HH. Annex B states that Witness HH would testify that Gérard Ntakirutimana "formed part of the contingent of attackers who attacked ... almost daily between [May 1994] and June 94" in the Bisesero area.[168] Witness HH's prior statement contains a detailed description of an attack at Gitwe, which specifies that Gérard Ntakirutimana "still with gun in hand" was one of the attackers who pursued refugees who had fled to "the *colline* [hill] of Gitwe."[169] The statement adds that "Doctor Gérard NTAKIRUTIMANA was among the persons who chased after us to kill us."[170] The Trial Chamber concluded that this statement, together with the specific indication in Annex B that Witness HH would testify to attacks in Bisesero, adequately informed the Defence that the Prosecution intended to prove that Gérard Ntakirutimana participated in the attack at Gitwe Hill.

94. In light of the principles discussed above, the Trial Chamber's conclusion was correct. Although the allegation of an attack at Gitwe Hill could and should have been specifically pleaded in the Indictment, the Defence was subsequently informed in a clear, consistent, and timely manner that it had to defend against this allegation.

95. In the view of the Appeals Chamber, the allegation regarding Esdras, however, is a different matter. Witness HH's statement does not name any particular murder victim. The Trial Chamber found that "[t]his information was not available to the Prosecution before the witness gave his testimony."[171] The Trial Chamber concluded that "this is an example of a situation where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of victims and the dates of the commission of the crime."[172]

96. As discussed above, however, the "sheer scale" discussion in *Kupreškić* does not apply to situations in which the Prosecution contends that the accused personally killed a specific, identifiable person. The "sheer scale" exception allows the pleading of charges without the names of victims in situations where it would be impracticable to identify them. In this situation, it was clearly practicable to identify Esdras a victim; he was so identified by a witness at trial. Rather, as with the allegation regarding Kidashya Hill, this is a situation in which the Prosecution did not possess the relevant information until Witness HH took the stand.

97. The question, then, is whether it was fair to require Gérard Ntakirutimana to defend against the charge of murdering Esdras without any prior notice. Gérard Ntakirutimana argues in this regard that the revelation of Esdras's name and identity at trial made it impossible for the Defence to

[168] Annex B to Pre-Trial Brief, p. 6.
[169] Statement of Witness HH dated 2 April 1996, p. 3.
[170] *Id.*
[171] Trial Judgement, para. 558.

determine who Esdras was and if he was in fact dead.[173] The Prosecution relies on the same arguments it submitted with relation to Kidashya Hill, and adds that the Defence "failed to demonstrate that they ever tried" to investigate Esdras's death.[174]

98. The suggestion that the Defence must show that it attempted to investigate Esdras's death in order to avoid criminal liability on an allegation that first appeared at trial misstates the law. As stated in connection with Kidashya Hill, the burden of showing that the Indictment's failure to plead a material fact was harmless, assuming the error is not waived, belongs to the Prosecution. The remaining Prosecution arguments have been addressed in connection with the discussion of Kidashya Hill.

99. The Appeals Chamber considers therefore that the Trial Chamber erred in concluding that convictions could be based on the uncharged killing of Esdras. However, it did not err in finding that the Appellants had sufficient notice that Gérard Ntakirutimana would be charged with participation in an attack at Gitwe Hill where he pursued and shot at Tutsi refugees.

h. The Allegation That Gérard Ntakirutimana Participated in an Attack at Mubuga Primary School in June 1994

100. Relying on testimony of Witness SS, the Trial Chamber found that "Gérard Ntakirutimana participated in an attack at Mubuga Primary School in June 1994 and shot at Tutsi refugees."[175] This allegation was not included in the Bisesero Indictment.

101. The Trial Chamber concluded that sufficient information was given regarding this allegation due to the summary of Witness SS's testimony in Annex B to the Pre-Trial Brief and one of SS's prior witness statements, which was disclosed on 7 February 2001. In the view of the Appeals Chamber, this conclusion was correct. Annex B informed the Appellants that Witness SS "will further testify that he saw *Dr. Gerard Ntakirutimana* again after the attack at Mugonero complex, attacking Tutsis hiding in Mubuga in Bisesero area."[176] The witness statement adds even more information, specifically stating that Gérard Ntakirutimana was "shooting at the people hiding in

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[172] *Id.*
[173] Appeal Brief (G. Ntakirutimana), para. 21.a.
[174] Prosecution Response, para. 2.29.
[175] Trial Judgement, para. 628; *see also id.*, 832(vii).
[176] Annex B to Pre-Trial Brief, p. 14.

the school."[177] Although the statement identifies the location as "Mu Mubuga," the reference to "Mubuga in Bisesero area" in Annex B makes clear the nature of the Prosecution's allegation.

102. The Appeals Chamber considers that the Trial Chamber therefore did not err in finding that the failure to plead this allegation in the Indictment was cured by subsequent information communicated to the Defence.

i. The Allegation That Elizaphan Ntakirutimana Transported Armed Attackers Chasing Tutsi Survivors at Murambi Hill

103. Also relying on Witness SS, the Trial Chamber found that "one day in May or June 1994, Elizaphan Ntakirutimana transported armed attackers who were chasing Tutsi survivors at Murambi Hill."[178] This allegation does not appear in the Bisesero Indictment.

104. As with the allegation of Gérard Ntakirutimana's participation in the attack at Mubuga School, the Trial Chamber held that the summary of Witness SS's testimony in Annex B to the Pre-Trial Brief and Witness SS's prior witness statement provided sufficient information regarding the Prosecution's intent to advance this allegation at trial.[179] The Appeals Chamber agrees. Annex B announced that Witness SS would testify "that he fled to Bisesero and then Gitwe where he saw *Pastor Elizaphan Ntakirutimana* between Gitwe and Ngoma, near Murambi. *The Pastor* was with about twenty-five people who were armed. They chased the witness and others, firing at them."[180] Witness SS's statement, in turn, contains the following information: "I saw Pastor Elizaphan Ntakirutimana between Gitwe and Ngoma, near to Murambi. I saw him in a Hilux single cabin vehicle. I saw him through window [sic] but after that I fled away and then I saw him from a distance. The vehicle stopped and the Pastor Elizaphan Ntakirutimana came out of the vehicle. He was with 25-30 people, some of whom came walking and few in his vehicle. Those people started chasing me. The people running behind us were chanting that Pastor Elizaphan Ntakirutimana told them that [sic] 'God told me that you should kill and finish all tutsis.' [sic]"[181] Annex B, together with the added detail regarding the attack in SS's witness statement, clearly informed the Accused that the Prosecution would present evidence of the Murambi attack.

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[177] Statement of Witness SS dated 18 December 2000, p. 5 ("I saw Dr. Gerard Ntakirutimana once again after the attack at Mugonero Complex, when he was attacking the hiding tutsis at Mu Mubuga in Bisesero area. At that time, I was hiding in that area and I saw him chasing the fleeing people with his gun. I was hiding around 40 m away from Mu Mubuga primary school where tutsi were hiding. From there, I saw him shooting at the people hiding in the school and when people started running here and there, he was running after them and shooting at them.").
[178] Trial Judgement, paras. 579, 828(v).
[179] *Id.*, para. 576.
[180] Annex B to Pre-Trial Brief, p. 14.
[181] Statement of Witness SS dated 18 December 2000, p. 5.

105. The Trial Chamber therefore committed no error in concluding that the Bisesero Indictment's failure to allege Elizaphan Ntakirutimana's transportation of attackers to the Murambi attack was cured by subsequent information communicated to the Accused.

j. The Allegation That Elizaphan Ntakirutimana Transported Attackers and Pointed Out Fleeing Refugees in Nyarutovu Cellule

106. Based on the evidence of Witness CC, the Trial Chamber held that "Elizaphan Ntakirutimana brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill one day in the middle of May 1994" and that "at this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees."[182] These allegations were omitted from the Bisesero Indictment.

107. The Trial Chamber concluded that Annex B of the Pre-Trial Brief and the prior statement of Witness CC, disclosed on 29 August 2000, sufficed to inform the Defence of this allegation.[183] This conclusion was correct. The Trial Chamber's findings make clear that the finding of an attack at Nyarutovu rests on evidence of an attack in that region near the road between Gishyita and Gisovu.[184] The summary of Witness CC's evidence in Annex B to the Pre-Trial Brief states that Witness CC would testify that "he saw the *Pastor* [Elizaphan Ntakirutimana] on the road between Gishyita and Gisovu in his white Toyota pick-up. In the car were armed civilians. When the car stopped *the Pastor* and the attackers disembarked. The *Pastor* pointed out groups of Tutsi refugees to the attackers. The attackers went to the said refugees and killed them."[185] Witness CC's statement expands on these allegations:

> "I saw [Elizaphan Ntakirutimana] on the road between Gishyita and Gisovu. I think it was somewhere in the middle of the events. I saw him in his car. It was a Toyota pick-up. The colour of the car was white. I saw that the Pastor drove the car by himself. There were armed civilians on the car of the Pastor. I saw that some of those civilians were armed with guns. Because the Pastor was in the car, I couldn't see, if he carried a gun. The civilians were dressed in civilian clothes. I saw that the Pastor stopped the car. At that time the distance between the car of the Pastor and me was about 100 – 150 meters. I was standing on the sleep [sic] of a mountain, so I could see the Pastor and his car with the armed civilians, very clear. As soon the Pastor stopped the car, I saw that the armed civilians got out of the car. Also the Pastor got out of the car. I saw him very clearly. I saw him pointing out groups of Tutsis to the attackers. As soon as he pointed them out, the attackers started to attack them. They killed the Tutsis with guns, machetes and clubs."[186]

108. The details in Annex B and the statement of Witness CC notified the Defence that the Prosecution would allege that Elizaphan Ntakirutimana transported attackers and pointed out Tutsi

[182] Trial Judgement, paras. 594; *see also id.*, para. 828(ii).
[183] *Id.*, para. 590.
[184] *Id.*, paras. 589, 591.
[185] Annex B to Pre-Trial Brief, p. 2.
[186] Statement of Witness CC dated 13 June 1996, p. 4.

refugees near the Gishyita-Gisovu road. The Trial Chamber therefore committed no error in concluding that the Bisesero Indictment's failure to allege these facts was cured.

k. The Allegations That Elizaphan Ntakirutimana Participated in a Convoy of Vehicles Carrying Attackers to Kabatwa Hill and That He Pointed Out Tutsi Refugees at Neighbouring Gitwa Hill

109. Relying on evidence of Witness KK, the Trial Chamber found that "Elizaphan Ntakirutimana participated in a convoy of vehicles carrying armed attackers to Kabatwa Hill at the end of May 1994, and that, later on that day, at neighbouring Gitwa Hill, he pointed out the whereabouts of Tutsi refugees to attackers who attacked the refugees causing injury to Witness KK."[187] These allegations do not appear in the Bisesero Indictment.

110. Annex B to the Pre-Trial Brief does not clearly mention these allegations, although it does state that Witness KK would testify that he "saw *pastor Ntakirutimana* ... at the hills, in the company of attackers, almost daily."[188] The Trial Chamber noted, albeit in a different part of the Judgement, that Witness KK's witness statement "contains an explicit reference to an event at Kabatwa Hill."[189] This reference, however, appears to refer to an attack "[t]owards the end of April" and does not mention that Elizaphan Ntakirutimana was present at that attack.[190] The statement does mention another attack that is very similar in its distinguishing characteristics to the attack that the Trial Chamber found occurred at Kabatwa Hill "at the end of May 1994":[191] it mentions that Elizaphan Ntakirutimana stood near his car while the attack progressed, that *Interahamwe* harvested peas and loaded them into Elizaphan Ntakirutimana's vehicle, and that Witness KK himself was seriously wounded by shrapnel from a grenade. However, the statement describes this event as occurring "around the 4th May 1994" at two unspecified hills in Bisesero.[192] Finally, although Witness KK testified, and the Trial Chamber found, that Elizaphan Ntakirutimana had directed the attackers to run after and attack the group of refugees of which Witness KK was a part, the statement attributes this to other attackers, not to Elizaphan Ntakirutimana.[193]

111. Annex B and the statement of Witness KK therefore provided sufficient notice that Elizaphan Ntakirutimana would be charged with liability for presence at an attack during which he

[187] Trial Judgement, para. 607.
[188] Annex B to Pre-Trial Brief, p. 8.
[189] Trial Judgement, para. 547.
[190] Statement of Witness KK dated 8 December 1999, p. 9.
[191] Trial Judgement, para. 607.
[192] Statement of Witness KK dated 8 December 1999, p. 10.
[193] *Id.*, ("On the hill opposite there was another group of attackers. They saw us and shouted, 'Catch them, catch them.' Then a group of Military came downhill after us.").

stood near his car while peas were loaded into it and during which Witness KK was wounded by grenade shrapnel. The information available to the Appellants before trial, however, provided no notice of the location of the event, contained a date that the Trial Chamber found was inaccurate, and did not allege that Elizaphan Ntakirutimana had pointed out refugees to attackers during the event. On the other hand, it appears that Witness KK's identification of the location and date of the attack and his allegation that Elizaphan Ntakirutimana directed the attackers were not available to the Prosecution before trial. The question, therefore, is whether it was fair to Elizaphan Ntakirutimana to convict him for this attack given that neither he nor the Prosecution had notice of the correct date or precise location of its occurrence or of a key element of Elizaphan Ntakirutimana's alleged participation.

112. As was discussed in relation to the Kidashya Hill allegation, in circumstances where the Prosecution relies on material facts that were revealed for the first time at trial, the Prosecution bears the burden of showing that there was no unfairness to the Accused. The Prosecution does not advance any arguments in this regard other than those already addressed in connection with Kidashya Hill. The Appeals Chamber therefore concludes that the Prosecution has not carried the burden of showing that no unfairness resulted from the conviction of Elizaphan Ntakirutimana on the basis of an attack the material facts of which were first revealed at trial. The Trial Chamber should not have based its conviction of Elizaphan Ntakirutimana on these allegations.

1. The Allegation That Elizaphan Ntakirutimana Transported Armed Attackers to and Was Present at an Attack at Mubuga Primary School in Mid-May

113. On the basis of evidence of Witness GG, the Trial Chamber found that Elizaphan Ntakirutimana "was present in the midst of the killing of Tutsi at Mubuga in mid-May, that he was in his vehicle transporting armed attackers as part of a convoy which included two buses, all carrying armed attackers."[194] The Trial Chamber noted that these allegations were not specifically mentioned in the Bisesero Indictment, the Pre-Trial Brief, Annex B thereto, or any of Witness GG's witness statements.[195] The best information provided to the Defence regarding this allegation was the statement in Annex B to the Pre-Trial Brief that Witness GG "often saw *Pastor Ntakirutimana*, *Dr. Gerard Ntakirutimana*, and the Prefet in Mumubuga [sic] between April and June 1994."[196]

114. The Appeals Chamber notes that the Trial Chamber Judgement does not clearly state why it considered that the Appellants had sufficient notice of this allegation. The Prosecution's only

[194] Trial Judgement, para. 614; *see also id.*, 828(iv).
[195] *Id.*, para. 613.
[196] Annex B to Pre-Trial Brief, p. 5.

argument in this regard is that the witness statement of a different witness, Witness CC, put Elizaphan Ntakirutimana on notice that he "would be charged with several incidents of transporting attackers."[197] Yet the Prosecution does not argue, and the Trial Chamber did not find, that the specific information that surfaced at trial regarding the date, location, and specific involvement of Elizaphan Ntakirutimana in the Mubuga attack was not available to the Prosecution beforehand. Indeed, the fact that the Prosecution was able to include in Annex B an allegation that Witness GG saw Elizaphan Ntakirutimana at "Mumubuga" suggests that it possessed more information than was included in Witnesses GG's or CC's witness statements, which do not mention Mubuga or "Mumubuga" at all. The lone statement in Annex B, unsupported by any witness statement, that Witness GG saw Elizaphan Ntakirutimana at "Mumubuga" is not the type of "clear" information regarding the Prosecution's case that *Kupreškić* holds is essential to cure an indictment's failure to plead material facts.

115. The Appeals Chamber finds that the Trial Chamber therefore erred in convicting Elizaphan Ntakirutimana based on his alleged presence at and transportation of attackers to an attack at Mubuga.

m. The Allegation That Elizaphan Ntakirutimana Was Part of a Convoy Including Attackers at Ku Cyapa

116. Relying on Witness SS, the Trial Chamber found that "one day in May or June [Elizaphan Ntakirutimana] was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers" and that he "was part of a convoy which included attackers," who that day "participated in the killing of a large number of Tutsi."[198] This allegation is lacking from the Bisesero Indictment and its omission renders the Indictment defective.

117. Annex B to the Pre-Trial Brief contains a brief description of this event in the summary of Witness SS's testimony: "A few days later [after the Murambi Hill attack] the witness saw *Pastor Elizaphan Ntakirutimana* again. The witness also saw the vehicle of Ruzindana in the area."[199] Witness SS's witness statement, however, contains more detail, notably the location: "After [the Murambi Hill attack] again after a few days, when I was crossing the road at Cyapa while I was going to Muyira, a small place in Bisesero area, I saw the Pastor Elizaphan Ntakirutimana going in his vehicle. There were many vehicles, even buses moving in Bisesero area but I could come across

[197] Prosecution Response, Annex A, Row 14.
[198] Trial Judgement, para. 661; *see also id.* para. 828(vi).
[199] Annex B to Pre-Trial Brief, p. 14.

the vehicle of Pastor Elizaphan Ntakirutimana while crossing the road and fleeing to hide myself. That moment, I also noticed the vehicle of Ruzindana in the area."[200]

118. The Appeals Chamber notes that neither Witness SS's statement nor Annex B specifically states that "there was a wide-scale attack at Ku Cyapa" or that the buses travelling with the Appellant were "a convoy which included attackers" who then killed "a large number of Tutsi."[201] However, from the context of both the witness statement, which describes several attacks in which Elizaphan Ntakirutimana allegedly participated, and Annex B, which summarizes evidence of attacks in Bisesero, the witness statement's reference to the vehicles of Elizaphan Ntakirutimana and Ruzindana in connection with an "incident at Cyapa,"[202] and Annex B's inclusion of it in its summary of facts to be proven at trial, makes clear that the Prosecution intended to present Witness SS as a witness to Elizaphan Ntakirutimana's presence at Ku Cyapa, with a number of other vehicles carrying attackers. The difference between "Cyapa" and "Ku Cyapa" does not appear to be material.

119. The Appeals Chamber therefore finds that the failure in the Bisesero Indictment to allege with specificity that Elizaphan Ntakirutimana was in a convoy which included attackers was cured by subsequent information communicated to the Defence.

120. In relation to the fact that these same attackers were subsequently involved in attacks against Tutsi at Ku Cyapa, the Appeals Chamber considers that the failure to plead this with specificity in the Bisesero Indictment was not cured by the information contained in the witness statement and Pre-Trial Brief. That being said, the Appeals Chamber notes that, although the Trial Chamber concluded that these attackers subsequently killed Tutsi at Ku Cyapa, it did not rely on these findings in convicting Elizaphan Ntakirutimana.[203] Thus no prejudice resulted from the error.

n. Challenges to Allegations That Did Not Support Convictions

121. The Appellants assert that the Bisesero Indictment failed to plead facts that did not constitute "criminal conduct for which [the Accused were] convicted,"[204] but rather were used only as evidence supporting convictions for other criminal acts in Bisesero area. This category includes the allegation that Gérard Ntakirutimana attended planning meetings in Kibuye[205] and the allegation that Elizaphan Ntakirutimana was present in the company of assailants during an attack at Gitwa

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[200] Statement of Witness SS dated 18 December 2000, p. 5.
[201] Trial Judgement, para. 661.
[202] Statement of Witness SS dated 18 December 2000, p. 5.
[203] Trial Judgement, para. 828(vi).
[204] *Kupreškić et al.* Appeal Judgement, para. 79.
[205] Trial Judgement, para. 720.

cellule in the second half of May 1994.[206] Because the Trial Chamber did not find the Appellants criminally responsible for these acts or base convictions thereon, they were not "material facts" the absence of which from the Bisesero Indictment would render the pleading defective. Accordingly, the Appellants' argument with respect to these facts need not be addressed because, even if successful, it would not state an error of law that would invalidate the decision of the Trial Chamber.[207]

o. Ambiguity Regarding Number of Attacks

122. Gérard Ntakirutimana finally argues that the allegations and testimony regarding attacks at Mubuga and at Muyira Hill were fatally defective because it was not clear whether the allegations related to a single attack or several separate attacks.[208] Gérard Ntakirutimana argues that the Prosecution did not make its case clear in this regard, even at trial, and that it was left to the Trial Chamber to decide whether there was only one attack at Mubuga witnessed by Witnesses GG, SS, and HH[209] or three separate attacks witnessed by one witness each. Likewise, it was not clear whether the Prosecution was alleging five attacks at Muyira Hill and nearby Ku Cyapa witnessed by Witnesses GG, YY, II,[210] SS, and HH, or one single attack witnessed by all five. Gérard Ntakirutimana argues that, as a result of this imprecision, the Defence "did not know the case it had to meet until the Judgement was received."[211]

123. The Prosecution does not appear to dispute Gérard Ntakirutimana's argument that the Prosecution's case was not clarified until the Trial Chamber decided to treat the witnesses as testifying to separate events. The Trial Judgement appears to bear out Gérard Ntakirutimana's argument that it was the Trial Chamber that finally decided, based on variations between the testimony of the witnesses, to treat each one as testifying about separate events.[212]

124. The Appeals Chamber recalls that it is, of course, incumbent on the Prosecution to be as clear as possible about the factual allegations it intends to prove at trial. However, in this case, it was clear from the beginning that the Prosecution's case regarding Bisesero was that convoys of attackers, including the two Appellants, went to Bisesero to attack Tutsi civilians "almost on a daily basis for several months."[213] The Prosecution at no point indicated that it planned to treat any two

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[206] *Id.*, paras. 595-598.
[207] *See* Statute, art. 24(1)(a).
[208] Appeal Brief (G. Ntakirutimana), paras. 19, 21.e.
[209] The Trial Chamber did not rely on the testimony of Witness HH regarding Mubuga in convicting either Appellant.
[210] The Trial Chamber did not rely on the testimony of Witness II regarding Muyira in convicting either Appellant.
[211] Appeal Brief (G. Ntakirutimana), para. 19.
[212] Trial Judgement, paras. 611, 635.
[213] Bisesero Indictment, para. 4.13.

witnesses as corroborating each other on a specific fact. Gérard Ntakirutimana does not point to any such indication by the Prosecution, nor does he show that he was misled into believing that the witnesses who testified to attacks at Mubuga or at Muyira were testifying to anything other than separate attacks. The Prosecution also points out that counsel for the Defence appear to have proceeded on the assumption that each witness testified to an independent occurrence, in that they challenged the credibility of each witness individually. The Appeals Chamber notes that Gérard Ntakirutimana does not indicate how the defence could have been altered had he been informed that the Mubuga and Muyira witnesses were testifying to separate attacks, as the Trial Chamber found. In these circumstances, the Appeals Chamber considers that the Prosecution has shown that any uncertainty regarding whether it was charging single or several attacks at Mubuga and Muyira did not result in any unfairness against the Accused.

p. Concluding Remark

125. It is evident from the foregoing analysis that the Indictments in this case failed to allege a number of the material facts for which the Appellants were tried and convicted. The Appeals Chamber, having accepted many of the Appellant's complaints of a lack of notice resulting in prejudice, stresses to the Prosecution that the practice of failing to allege known material facts in an indictment is unacceptable and that it is only in exceptional cases that such a failure can be remedied, for instance, "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[214] The Appeals Chamber emphasises that, when material facts are unknown at the time of the initial indictment, the Prosecution should make efforts to ascertain these important details through further investigation and seek to amend the indictment at the earliest opportunity.

2. The Burden of Proof

126. Gérard Ntakirutimana contends that the Trial Chamber made various errors in assessing the evidence that amounted to errors of law in the application of the burden of proof.

(a) Assessing the Detention of Witness OO

127. Gérard Ntakirutimana contends that the Trial Chamber erred in refusing to draw an adverse inference against a Prosecution witness, Witness OO, who was being detained in Rwanda at the time. Gérard Ntakirutimana claims that the Trial Chamber gave Witness OO "the benefit of the

[214] *Kupreškić et al.* Appeal Judgement, para. 114.

doubt",[215] contrary to the requirement that the Prosecution prove its case beyond a reasonable doubt, due to the following sentence in the Judgement: "Given the presumption of innocence enjoyed by a detained person awaiting trial, the Chamber will not draw any adverse inference against Witness OO on account of his status as a detainee."[216]

128. The Appeals Chamber notes that it is not clear from the Trial Judgement why the Trial Chamber invoked the presumption of innocence in this context. The most likely reading is that it was resolving a dispute between the parties as to whether Witness OO was detained because he had been sentenced to prison for committing a crime, as the Appellants argued, or whether he was "detained awaiting trial."[217] The Trial Chamber stated that the evidence showed that Witness OO was awaiting trial for "having kept people in [his] home who subsequently died" and for "giving a pistol to a young man who was a civilian."[218] In this context, the Trial Chamber's reference to the "presumption of innocence" may be understood as making clear that Witness OO was a suspect who had not been convicted or sentenced, contrary to the Appellant's position.

129. Even this explanation, however, does not fully account for the next step of refusing to draw an adverse inference. As Gérard Ntakirutimana points out, a witness who faces criminal charges that have not yet come to trial "may have real or perceived gains to be made by incriminating accused persons" and may be tempted or encouraged to do so falsely.[219] This risk, when properly raised and substantiated, should be considered by the Trial Chamber. In this case, it appears that the Trial Chamber failed to consider this risk because Witness OO was a suspect who had not yet been convicted, even though suspects who are detained awaiting trial may also have motives to fabricate testimony. This was an error of law.

130. The Appeals Chamber recalls that a party showing an error of law must also explain "in what way the error invalidates the decision."[220] In this situation, therefore, it is incumbent on Gérard Ntakirutimana to demonstrate that, had the Trial Chamber properly considered whether to draw an adverse inference on account of Witness OO's detention awaiting trial on criminal charges, it would have done so. Gérard Ntakirutimana does not make any argument in this regard in his Appeal Brief, other than the general suggestion that persons facing criminal charges "may have" motives to fabricate evidence.[221] Gérard Ntakirutimana does not assert any basis for concluding that Witness OO did have such a motive or in fact fabricated evidence against him. The bald assertion

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[215] Appeal Brief (G. Ntakirutimana), para. 27.
[216] Trial Judgement, para. 173.
[217] *Id.*
[218] *Id.* (quoting T. 1 November 2001, pp. 188-191).
[219] Appeal Brief (G. Ntakirutimana), para. 27.
[220] *Rutaganda* Appeal Judgement, para. 20.
[221] Appeal Brief (G. Ntakirutimana), para. 27.

that criminal suspects sometimes lie on the witness stand does not invalidate the Trial Chamber's decision that Witness OO's testimony in this case was credible.

(b) Assessing Uncorroborated Alibi Testimony

131. Gérard Ntakirutimana next argues that the Trial Chamber unfairly assessed the evidence by accepting uncorroborated testimony of Prosecution witnesses and rejecting Defence witness testimony because it lacked corroboration.[222] Gérard Ntakirutimana contends that the Trial Chamber required the Defence to corroborate its alibi, whereas no such requirement was applied to Prosecution evidence.

132. As Gérard Ntakirutimana acknowledges,[223] there is no requirement that convictions be made only on evidence of two or more witnesses. Corroboration is simply one of many potential factors in the Trial Chamber's assessment of a witness's credibility. If the Trial Chamber finds a witness credible, that witness's testimony may be accepted even if not corroborated. Similarly, even if a Trial Chamber finds that a witness's testimony is inconsistent or otherwise problematic enough to warrant its rejection, it might choose to accept the evidence nonetheless because it is corroborated by other evidence.

133. Of course, a Trial Chamber should not apply differing standards in its treatment of evidence of the Prosecution and the Defence. Yet, in the view of the Appeals Chamber, Gérard Ntakirutimana's argument that the Trial Chamber committed such an error is not borne out by the Trial Judgement. The three examples that Gérard Ntakirutimana cites in which the Trial Chamber rejected the evidence of alibi witnesses display not the imposition of a blanket requirement of corroboration on alibi witnesses, but rather evaluations of the totality of the evidence presented.

134. Gérard Ntakirutimana suggests that the Trial Chamber rejected his alibi solely because other witnesses did not corroborate his own testimony,[224] but the Judgement is clear that the Trial Chamber viewed other Defence witnesses as actually contradicting Gérard Ntakirutimana's testimony. While Gérard Ntakirutimana testified that he was at his father's house on 15 April and the morning of 16 April 1994, Defence Witnesses 16 and 9 specifically testified that they did not see him at Elizaphan Ntakirutimana's house. The Appeals Chamber considers that the Trial Chamber's analysis shows that it did not require that other witnesses corroborate Gérard Ntakirutimana's testimony; rather, it merely reacted to the fact that Witnesses 16 and 9 undermined Gérard Ntakirutimana's account of events.

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[222] *Id.*, paras. 28-30.
[223] Reply (G. Ntakirutimana), para. 17.
[224] Appeal Brief (G. Ntakirutimana), para. 29.a.

135. Gérard Ntakirutimana next contends that the Trial Chamber incorrectly rejected the Accused's alibi testimony for the period of the end of April 1994 to July 1994. The Accused testified that they spent that time at Mugonero, except for certain specific trips to other places, and therefore could not have participated in attacks at Bisesero.[225] Gérard Ntakirutimana fastens onto the Trial Chamber's statement that both Accused frequently left Mugonero for "destinations ... about which there is little direct evidence other than the words of the Accused."[226] Gérard Ntakirutimana contends that this phrase indicates that the Trial Chamber "relied on the absence of corroboration to reject defence evidence."[227]

136. The Trial Chamber's analysis reveals, however, that the alibi was rejected because the Defence witnesses presented an "implausibly sanitized account of the times, with life at Mugonero existing in a kind of vacuum" in which the Appellants and the people around them supposedly "resumed the normalcy of their pre-April lives ... despite the massive attack at the Complex on 16 April, the subsequent fighting in the neighbouring district of Bisesero, the overall breakdown of law and order and the fact that Rwanda was at war."[228] The Trial Chamber was therefore faced with two accounts of what the Appellants did when they left Mugonero on those occasions: the testimony of the Appellants, which the Trial Chamber had already found implausible, and the testimony of Prosecution witnesses, which the Trial Chamber had found credible. Even though the Appellants testified that they often travelled in the company of other named persons, nobody other than the Appellants gave evidence regarding where they went when they left Mugonero during this period. In this context, the statement that the Defence's account of the Appellant's destinations when they left Mugonero was supported by "little direct evidence other than the words of the Accused"[229] does not reflect a requirement of corroboration unevenly imposed on the Appellants. Rather, the Appeals Chamber finds that it simply summarizes the Trial Chamber's assessment that no witness testified credibly that the Appellants never travelled to Bisesero, whereas several Prosecution witnesses testified credibly that they did.

137. The Appeals Chamber considers that the same is true of the Trial Chamber's rejection of the claim that Elizaphan Ntakirutimana was ill during the latter half of April 1994. The Trial Chamber found the claim implausible because Elizaphan Ntakirutimana "did not name his ailment" and "whatever the condition he might have had, it did not seem to prevent him, according to his own account, from going to work six times per week, or traveling to places outside Mugonero."[230]

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[225] Trial Judgement, paras. 521-528.
[226] *Id.*, para. 530.
[227] Appeal Brief (G. Ntakirutimana), paras. 29 & 29.b.
[228] Trial Judgement, para. 529.
[229] *Id.*, para. 530.
[230] *Id.*, para. 522.

Although the claim of illness was supported by testimony of Elizaphan Ntakirutimana's wife, the Trial Chamber found that her testimony was not credible, in part because her testimony regarding the alibi of Gérard Ntakirutimana during the same time period was contradicted by two other Defence witnesses.[231] Having found that all testimonies regarding Elizaphan Ntakirutimana's illness during the latter half of April 1994 were not credible, it was quite proper for the Trial Chamber to add that such evidence was not supported by any other Defence witness who could be expected, due to his or her proximity to Elizaphan Ntakirutimana at the relevant time, to be in a position to corroborate the claim. Thus, the fact that Elizaphan Ntakirutimana's wife's claim that her husband was ill "was not corroborated by Witnesses 16, 7, 6, 12, or 5, who made day-trips to Gishyita"[232] simply reinforces the finding that all of the witnesses who were in a position to testify to Elizaphan Ntakirutimana's illness either did not do so or did so in a manner that lacked credibility.

138. Finally, in the view of the Appeals Chamber, it is worth noting that the Trial Chamber used a similar analysis in rejecting the evidence of certain Prosecution witnesses.[233] Accordingly, the Appeals Chamber finds Gérard Ntakirutimana's argument that the Trial Chamber took an uneven approach to corroboration is unfounded.

(c) Declining to Make Findings of Fact in Favour of the Accused

139. Gérard Ntakirutimana contends that the Trial Chamber was required to resolve certain factual disputes in the Appellants' favour and erred by simply holding that the evidence was insufficient to make findings against Gérard Ntakirutimana.[234] Specifically, Witnesses XX and FF testified to certain factual allegations that the Trial Chamber concluded were not proven beyond reasonable doubt: that Gérard Ntakirutimana withheld medication from Tutsis, locked up medicine cabinets, kept the only keys to certain rooms at Mugonero Hospital, and that Red Cross vehicles brought patients to the hospital.[235] Gérard Ntakirutimana contends that, had the Trial Chamber taken the additional step of making affirmative findings contrary to the testimony of Witnesses XX and FF, the credibility of the testimony of those witnesses on other points would have been seriously diminished.[236] Gérard Ntakirutimana contends that, by refraining from making affirmative findings in Gérard Ntakirutimana's favour, but rather holding only that the Prosecution had not proven them beyond a reasonable doubt, the Trial Chamber committed an error of law.

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[231] *Id.*, para. 480.
[232] *Id.*
[233] *See, e.g.*, Trial Judgement, para. 655 (rejecting testimony of Witness II in part because of lack of corroboration).
[234] Appeal Brief (G. Ntakirutimana), para. 31.
[235] *Id.*, paras. 31.a-c.
[236] *Id.*, para. 31.

140. Although Gérard Ntakirutimana frames this argument as one of "failing to rule" on the factual disputes regarding Gérard Ntakirutimana's behaviour at the hospital, the Appeals Chamber considers that it is really a challenge to the credibility of Witnesses XX and FF in their testimony to other factual allegations. Since the accused has no burden to prove anything at a criminal trial, a trial chamber need not resolve factual disputes further once it has concluded that the Prosecution has not proven a fact beyond a reasonable doubt. The Appeals Chamber recalls that the presumption of innocence does not require the trial chamber to determine whether the accused is "innocent" of the fact at issue; it simply forbids the trial chamber from convicting the accused based on any allegations that were not proven beyond a reasonable doubt. Gérard Ntakirutimana's only legal support for his contrary position is a citation to paragraph 233 of the *Kupreškić* Trial Judgement, which does not bear on this issue at all.[237]

141. This argument, therefore, fails to demonstrate that the Trial Chamber committed an error of law. The question whether the Trial Chamber was unreasonable in crediting the testimony of Witnesses XX and FF on other matters will be considered in the context of the Appellants' challenges to the factual findings underlying their convictions.[238]

(d) Relying on Credible Testimony as Background Evidence

142. Gérard Ntakirutimana next identifies passages in which the Trial Chamber treats testimony that it considered to be credible as relevant to or corroborative of evidence of other events, even though the fact that the Prosecution sought to prove by means of the testimony was not proven beyond a reasonable doubt.[239] Gérard Ntakirutimana contends that, unless the fact asserted in a witness's testimony is found beyond a reasonable doubt, that testimony must be entirely disregarded in the Trial Chamber's consideration of the evidence.

143. The Appeals Chamber notes that Gérard Ntakirutimana does not cite any authority in support of his argument. Rather, he asserts that "[o]nce a Trial Chamber has expressed doubts about whether a fact has been proven, it contravenes the presumption of innocence … to continue to rely on it."[240] This abstract statement is correct as far as it goes: the trial chamber may not rely on *facts* that have not been proven beyond a reasonable doubt. But Gérard Ntakirutimana does not show

[237] *Id.* The cited paragraph recites a factual finding by the *Kupreškić* Trial Chamber and identifies the evidence that the Trial Chamber relied upon in making the finding. *Kupreškić et al.* Trial Judgement, para. 233.
[238] *See infra* section II.B.2.(a), where the Appeals Chamber concludes that, because the convictions based only on the testimony of Witness FF were quashed and that the remaining findings based on Witness FF's testimony did not ground any conviction, it is not necessary to address Gérard Ntakirutimana's challenge to Witness FF's credibility. A similar reasoning is applicable in the case of Witness XX, since no conviction was based on that witness's testimony.
[239] Appeal Brief (G. Ntakirutimana), para. 32.
[240] *Id.*, para. 33.

why the Trial Chamber erred in relying on *testimony* that, while insufficient to prove the fact for which the Prosecution adduces it, is relevant to another fact in the case.

144. Moreover, even if the Appellant had identified an error of law in this context, he has not shown that it would invalidate any part of the decision. Gérard Ntakirutimana finds fault with the Trial Chamber's statement that it would consider testimony of Witnesses YY and KK "as part of the general context in the days preceding the attack on 16 April," but does not show how this "general context" was or could have been used to his disadvantage.[241] The same is true of the Trial Chamber's statement that it would place "limited reliance" on Witness MM's testimony that he saw Gérard Ntakirutimana taking stock of dead bodies in the basement of Mugonero Hospital.[242] If anything, in the view of the Appeals Chamber, the fact that the Trial Chamber concluded that there was insufficient evidence that Gérard Ntakirutimana did anything of the kind[243] indicates that whatever "reliance" was placed on Witness MM's evidence, it was so "limited" as to have no effect on the verdict. Finally, although it is clear that the Trial Chamber had doubts about the accuracy of the testimony of Witness KK, owing to inconsistencies with his prior statement,[244] it appears to have treated Witness KK's problematic testimony as cumulative of that of six other witnesses who testified that they saw Elizaphan Ntakirutimana driving his car in the Mugonero area on 16 April, five of whom saw him transporting attackers.[245] It is clear that the Trial Chamber would have reached the same conclusion had it not treated Witness KK's testimony as corroborative. Accordingly, the Appeals Chamber considers that Gérard Ntakirutimana has not shown that this potential error, if error it was, would result in invalidation of any finding in the Judgement.

(e) Reference to Prior Consistent Statements

145. Gérard Ntakirutimana next asserts that the Trial Chamber erred in allowing the introduction of prior consistent statements by Prosecution witnesses as proof of the matter asserted (hearsay) or to bolster the credibility of the witnesses' in-court statements.[246] Gérard Ntakirutimana submits that prior consistent statements are only rarely relevant or probative because it is always possible that both the prior statement and the in-court testimony are false or mistaken in a consistent way.[247] Gérard Ntakirutimana argues that Rule 89(C) of the Rules should incorporate the common law rule that holds prior consistent statements to be inadmissible when offered to bolster a witness's

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[241] Trial Judgement, para. 120.
[242] *Id.*, para. 426.
[243] *Id.*, para. 430.
[244] *Id.*, para. 267.
[245] *Id.*, para. 281.
[246] Appeal Brief (G. Ntakirutimana), paras. 34-36.
[247] *Id.*, para. 36.

credibility.[248] Gérard Ntakirutimana then points out several situations in which the Trial Chamber noted that a witness's statement was consistent with the witness's in-court testimony and contends that the Trial Chamber used that consistency "as a basis for crediting [his or her] evidence."[249]

146. The Prosecution does not appear to disagree with Gérard Ntakirutimana's statement of the common law rule regarding prior consistent statements, but asserts that his examples do not reflect an improper use of consistent statements or did not cause prejudice.[250]

147. Although the jurisprudence of the Tribunal contains several comments on the use of prior *inconsistent* statements to impeach witness testimony,[251] it has not commented significantly on the proper uses of prior *consistent* statements. The Rules of Procedure and Evidence of the Tribunal do not expressly forbid the use of prior consistent statements to bolster credibility. However, the Appeals Chamber is of the view that prior consistent statements cannot be used to bolster a witness's credibility, except to rebut a charge of recent fabrication of testimony.[252] The fact that a witness testifies in a manner consistent with an earlier statement does not establish that the witness was truthful on either occasion; after all, an unlikely or untrustworthy story is not made more likely or more trustworthy simply by rote repetition.[253] Another reason supporting this position is that, if admissible and taken as probative, parties would invariably adduce numerous such statements in a manner that would be unnecessarily unwieldy to the trial.[254]

148. However, there is a difference between using a prior consistent statement to bolster the indicia of credibility observed at trial and rejecting a Defence challenge to credibility based on alleged inconsistencies between testimony and earlier statements. The former is a legal error, while the latter is simply a conclusion that the Defence's arguments are not persuasive. As the following paragraphs indicate, the Appeals Chamber considers that the examples cited in Gérard Ntakirutimana's Appeal Brief are primarily examples of the latter phenomenon.

149. For example, Gérard Ntakirutimana objects to the Trial Chamber's statement that Witness FF's testimony "was generally in conformity with her previous statements to investigators (see below)."[255] The "(see below)" reference makes plain that the Trial Chamber is merely summarizing the following paragraph in the Judgement, which rejects various Defence arguments claiming that

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[248] *Id.*
[249] *Id.*, para. 37.
[250] Prosecution Response, paras. 4.26-4.27.
[251] *Akayesu* Appeal Judgement, para. 142; *Musema* Appeal Judgement, para. 99.
[252] *See, e.g.*, *Tome v. United States*, 513 U.S. 150, 157 (1995) ("Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited."); *R. v. Beland and Phillips*, 36 C.C.C. (3d) 481, 489 (Supreme Court of Canada 1987).
[253] *See* 4 J.H. Wigmore, Evidence in Trials at Common Law §1124 (J.H. Chadbourn rev. 1972).
[254] *See id.*

Witness FF's testimony was not credible because it contained allegations inconsistent with or omitted from her prior statements.[256] The Trial Chamber's comment about "conformity with her previous statements" is therefore not a bolstering of credibility, but rather a simplified dismissal of the Defence's arguments of lack of credibility.

150. The same is true of several other examples cited by Gérard Ntakirutimana. The Trial Chamber's comments that Witness XX testified in a manner consistent with her previous statements[257] were made in paragraphs that begin with a summary of the Appellants' challenge to Witness XX's credibility, citing directly to the Defence Closing Brief.[258] That Brief made reference to Witness XX's prior statements and sought to identify inconsistencies between the two statements and between the statements and XX's testimony, particularly with regard to events in Bisesero.[259] It therefore appears that the Trial Chamber's discussion of consistency in Witness XX's witness statements was a refutation of the Defence's assertion of inconsistency, not a bolstering of credibility beyond the indicia of credibility discernible at trial. Likewise, the Trial Chamber's finding that Witness MM's testimony regarding Elizaphan Ntakirutimana's conveying of attackers to Mugonero "was generally in conformity with his previous statements"[260] and, in a footnote immediately thereafter, "was also generally in conformity with his statement to African Rights,"[261] is clearly a prelude to the finding in the next sentence that some "minor discrepancies between his first and second statements" were immaterial.[262]

151. The Trial Chamber's discussion of consistency between the prior statements of Witness FF[263] also responds to the Defence's claim that Witness FF's testimony regarding attacks at Murambi and Gitwe Hills did not match her prior statements.[264] The same is true regarding FF's testimony regarding an attack at Kidashya Hill.[265] The analysis of the statement of HH[266] likewise answers the Defence argument that "[t]he witness' prior statement to investigators contradicts" the allegation regarding the killing of Esdras.[267] The Defence likewise argued that Witness CC "was not

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[255] Appeal Brief (G. Ntakirutimana), para. 37.b (quoting Trial Judgement, para. 127).
[256] Trial Judgement, para. 128.
[257] *Id.*, paras. 131-132.
[258] *Id.*, para. 131 & n. 162 (citing Defence Closing Brief, pp. 70-75).
[259] Defence Closing Brief, pp. 71-75.
[260] Trial Judgement, para. 228.
[261] *Id.*, n. 299.
[262] *Id.*, para. 228.
[263] *Id.*, para. 541.
[264] Trial Judgement, para. 537 (summarizing Defence arguments).
[265] Trial Judgement, para. 585 ("It is true, *as argued by the Defence*, that Witness FF did not mention Kidashya Hill specifically in any of her prior written statements. However, as mentioned above she told investigators in four of her statements that she saw Gérard Ntakirutimana on several occasions in Bisesero." (Emphasis added.)).
[266] Trial Judgement, para. 559.
[267] *Id.*, para. 551.

credible because of discrepancies between his testimony and his prior statements";[268] it was not an improper bolstering for the Trial Chamber to reject the Defence's argument by concluding that Witness CC's testimony was "consistent with the written statement."[269]

152. Similarly, the Appeals Chamber notes that the reference to Witness DD's prior witness statement responds to the Defence's claim that Witness DD testified to events "not mentioned in his two reconfirmations" and that his testimony "consistently contradicted" his written statements;[270] the Trial Chamber concluded that, while there are "some differences between the statement and the testimony," the testimony regarding the material facts at issue was not inconsistent.[271] Moreover, in its findings of fact, the Trial Chamber rejected Witness DD's evidence on this point because it was "not convinced beyond a reasonable doubt that Witness DD could recognize Gérard Ntakirutimana in semi-darkness or from his voice."[272] Because the Trial Chamber did not make any factual finding in reliance on Witness DD's purportedly bolstered evidence,[273] any error in the treatment of the prior consistent statement could not invalidate the decision.

153. Gérard Ntakirutimana also cites the Trial Chamber's treatment of Witness HH's testimony that Gérard Ntakirutimana asked refugees to leave Mugonero hospital and relocate to the Ngoma Adventist Church.[274] Witness HH testified that Gérard Ntakirutimana's reason for giving this request was that "the livestock of the refugees was soiling the hospital"; the Trial Chamber then stated that this reason "is in conformity with his written statement to investigators of 2 April 1996."[275] It is not clear whether the Trial Chamber mentioned this consistency as a factor bearing on Witness HH's credibility, or whether the Trial Chamber simply meant to draw a distinction between Witness HH and another witness, KK, who stated a different reason in his earlier statement and no reason at all in his trial testimony.[276] More importantly, however, the Trial Chamber did not make a finding as to the reason Gérard Ntakirutimana gave for asking the refugees to relocate. The Trial Chamber found only that "Gérard Ntakirutimana did request the refugees to leave for the Ngoma Church," a fact testified to by Witnesses HH, KK, and MM.[277] Accordingly, even if the Trial Chamber did improperly view Witness HH's testimony regarding Gérard Ntakirutimana's reason for his request as bolstered with his prior consistent witness statement, such an error, in the view of the Appeals Chamber, could not invalidate any finding of the Chamber. Similarly, Gérard

[268] *Id.*, para. 588.
[269] *Id.*, para. 594.
[270] Defence Closing Brief, p. 138.
[271] Trial Judgement, para. 427.
[272] *Id.*, para. 428.
[273] *Id.*, para. 430.
[274] Appeal Brief (G. Ntakirutimana), para. 37.a.
[275] Trial Judgement, para. 108.
[276] *Id.*
[277] *Id.*

Ntakirutimana's challenge to the evaluation of Witness II's testimony[278] is moot in light of the Trial Chamber's finding that it was "not in a position to conclude beyond a reasonable doubt that Elizaphan Ntakirutimana participated and behaved as alleged by the Prosecution" and as testified to by the witness.[279]

154. Gérard Ntakirutimana's final example cites to a portion of the Trial Judgement summarizing the Prosecution's argument to the Trial Chamber, not the analysis of the Chamber itself.[280]

155. Accordingly, although Gérard Ntakirutimana has correctly stated the law regarding the impermissibility of using prior consistent statements to bolster witness credibility, the Appeals Chamber finds that he has failed to show any instance of it by the Trial Chamber that could have invalidated the Judgement. This ground of appeal therefore fails.

(f) Application of the Presumption of Innocence

156. Gérard Ntakirutimana cites several passages in the Trial Judgement that he contends reveal the Trial Chamber's misapprehension of the legal principle that the accused is presumed innocent unless and until the Prosecution proves guilt beyond a reasonable doubt.[281] First, Gérard Ntakirutimana cites sentences in which the Trial Chamber rejects Defence arguments because it was not "convinced" or "persuaded" by the Defence argument.[282] Gérard Ntakirutimana contends that these formulations indicate that the Trial Chamber placed a burden on the Defence to persuade or convince it of its position, rather than leaving the burden on the Prosecution to show guilt beyond a reasonable doubt. Second, Gérard Ntakirutimana notes instances in which the Trial Chamber rejected Defence evidence because there was a "distinct possibility" that it was unfounded and accepted Prosecution arguments or evidence because they were "plausible," because they gave the Trial Chamber an "impression," or because the situation "may" or "could well" have unfolded as the Prosecution submitted.[283]

157. The Prosecution bears the burden of proving the Accused's criminal responsibility beyond a reasonable doubt. Gérard Ntakirutimana contends, however, that the Trial Chamber's phrasing in the sentences excerpted above shows that the Trial Chamber convicted the Accused because they failed to persuade the Chamber of their innocence.

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[278] Appeal Brief (G. Ntakirutimana), para. 37.k.
[279] Trial Judgement, para. 655.
[280] Appeal Brief (G. Ntakirutimana), para. 37.e (citing Trial Judgement, para. 362).
[281] Appeal Brief (G. Ntakirutimana), para. 39.
[282] *Id.*, paras. 39.a-b, f-g (citing Trial Judgement, paras. 129, 229, 370, 591).
[283] *Id.*, paras. 39.c-e, h-l (citing Trial Judgement, paras. 133, 153, 335, 480, 539, 584, 597, 643).

158. It is necessary to determine whether the word choices identified by Gérard Ntakirutimana indicate that the Trial Chamber made factual findings against the Accused even though the totality of the evidence on the point admitted of a reasonable doubt.[284]

159. A review of the passages in which the Trial Chamber states that it is not "convinced" or "persuaded" by Defence arguments shows that, rather than imposing a burden on the Appellants, the Trial Chamber merely rejected Defence challenges to witness credibility. The Appeals Chamber considers that nothing in the Trial Chamber Judgement suggests that the Trial Chamber held the witnesses to be credible even though a reasonable doubt remained as to the credibility of the witnesses at issue. Rather, the Trial Chamber found that the Appellants' arguments seeking to raise a reasonable doubt failed to do so. Thus, the Trial Chamber held that the Defence's claim that Witnesses FF and MM were part of a campaign to convict the Appellants did not undermine the evidence of Witness FF's credibility;[285] that the discrepancies identified by the Defence between Witness CC's trial testimony and his prior statement likewise did not affect his credibility;[286] and that Witness HH had credibly testified that he was able to see the shooting of Ukobizaba, contrary to the Defence's argument based on Witness HH's location at the time.[287] The Appeals Chamber considers that nothing in the Trial Judgement suggests that the use of the terms "convinced" or "persuaded" reflected an impermissible burden on the Appellants; rather, these words simply express the Trial Chamber's conclusion that the Prosecution proved that its witnesses were credible beyond a reasonable doubt despite the Defence's arguments to the contrary.

160. The Appeals Chamber considers that the same is true of the Trial Chamber's conclusion that, although Witness CC had not mentioned seeing Elizaphan Ntakirutimana at an attack at Gitwa Cellule, "the general formulation according to which the witness saw the Accused at least four times during the attacks in the Bisesero area *could well* include the incident at Gitwa."[288] The Appellants' had argued at trial that Witness CC's evidence was not credible because it was inconsistent with his prior statements.[289] The Trial Chamber found, however, that the witness was "generally consistent and credible" and that, because there was no necessary contradiction between trial testimony of a specific attack at Gitwa and a prior statement of seeing Elizaphan Ntakirutimana at four attacks in Bisesero generally, the Appellants' argument of inconsistency failed to raise a reasonable doubt as to Witness CC's credible testimony. The Appeals Chamber considers that

[284] *See Musema* Appeal Judgement, para. 210.
[285] Trial Judgement, paras. 129, 229.
[286] *Id.*, para. 591.
[287] *Id.*, para. 370.
[288] *Id.*, para. 597 (emphasis added).
[289] *Id.*, para. 588.

Gérard Ntakirutimana has accordingly not shown that the Trial Chamber impermissibly gave the Prosecution the benefit of the doubt.

161. Gérard Ntakirutimana's challenge to the statement regarding a "distinct possibility" rests on a misreading. The Trial Chamber identified contradictions in the alibi evidence that, in its view, gave rise "to the distinct possibility that [three alibi witnesses] were either not aware of all of Gérard Ntakirutimana's movements or were minimising his absences to assist his defence."[290] The Trial Chamber was not stating that there was only a "possibility" that the alibi evidence was inconsistent and therefore incredible. Rather, it clearly found that the witnesses did contradict each other; the "possibility" language refers to potential *reasons* for the inconsistency, which though useful in the interest of completeness are not material facts that must be found beyond a reasonable doubt. Once the Trial Chamber found, beyond a reasonable doubt, that the alibi witnesses were not credible, it was not required to make findings beyond a reasonable doubt regarding the reasons why witnesses might offer incredible and inconsistent accounts of events.

162. Gérard Ntakirutimana attacks the Trial Chamber's use of the word "plausible" in accepting the testimony of Witness FF.[291] The context in which the Trial Chamber used this word makes clear that the Trial Chamber simply viewed it as a synonym for "credible." There is no suggestion that the Trial Chamber acted on evidence that it believed could admit of reasonable doubt. The similar complaint regarding Witness II is misplaced, since the paragraph cited refers to a summary of the Prosecution's submission, not the analysis of the Trial Chamber.[292]

163. Gérard Ntakirutimana argues that the Trial Chamber improperly concluded that he "simply abandoned the Tutsi patients" at Mugonero Hospital not because it was proven beyond a reasonable doubt, but because "[t]he overall impression [left] the Chamber with th[at] impression."[293] The Trial Chamber did not rely upon this in making a finding of fact, but it did state that it "note[d] the element[] as part of the general context."[294] Its statement that "[t]his behaviour is not in conformity with the general picture painted by the Defence of the Accused as a medical doctor who cared for his patients" suggests that the Trial Chamber at least relied on the "impression" in forming an opinion of the character of the Appellant. It therefore cannot be excluded that the Trial Chamber acted on an "impression" of the Appellant's behaviour that was not proven beyond a reasonable doubt.

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[290] *Id.*, para. 480.
[291] Appeal Brief (G. Ntakirutimana), paras. 39.i-j (referring to Trial Judgement, paras. 542, 584).
[292] *Id.*, para. 39.k (citing Trial Judgement, para. 643).
[293] Trial Judgement, para. 153.
[294] *Id.*

164. In the view of the Appeals Chamber, the context of this error, however, reveals its harmlessness. The "impression" received by the Trial Chamber was based on testimony of Gérard Ntakirutimana himself, who "acknowledge[d] that he departed the hospital leaving the Tutsi patients behind" and "did not return to the hospital to inquire as to the condition of patients and staff."[295] The Appellant does not argue that the Trial Chamber could not have found, based on his own testimony and beyond a reasonable doubt, that he "simply abandoned the Tutsi patients."[296] Thus, although it appears that the Trial Chamber based a conclusion regarding the Appellant's behaviour on an improper standard of proof, it is indisputable that the evidence was sufficient to support the conclusion when the correct standard is applied. Accordingly, the Appeals Chamber considers that this error of law does not invalidate the Trial Chamber's decision.

165. Gérard Ntakirutimana likewise attacks the Trial Chamber's statement following its enumeration of several named individuals who were killed in the attack at Mugonero: "(The Chamber did not receive information about the ethnicity of each of these individuals, but it is left with the clear impression that most of them were Tutsi.)"[297] Again, the Appellant argues that the Trial Chamber should not have made a finding adverse to him based merely on a "clear impression." However, it does not appear to the Appeals Chamber that this parenthetical sentence supported a finding regarding the ethnicity of those individuals. Rather, the naming of the deceased opens a discussion of the number of people killed in the Mugonero attack.[298] This discussion culminates in the conclusion that "paragraph 4.9 of the Indictments has been made out," namely that the Mugonero attack resulted in "hundreds of deaths and a large number of wounded."[299] The ethnicity of the dead and wounded is not mentioned in paragraph 4.9 of the two Indictments. Accordingly, while the statement challenged by Gérard Ntakirutimana does not appear to rely on proof beyond a reasonable doubt, its context and the use of parentheses indicate that it was meant as a side comment only. The finding regarding the ethnicity of the persons killed at Mugonero takes place in subsequent paragraphs and does not rest on a mere "impression" of the Trial Chamber.[300]

166. Finally, Gérard Ntakirutimana challenges the Trial Chamber's observation, in response to arguments regarding an omission of a fact from Witness DD's prior statement, that the fact "*may have* been omitted during the recording of the interview."[301] This equivocal construction suggests, as Gérard Ntakirutimana points out, that the Trial Chamber was not entirely convinced that the omission was due to a recording error, rather than to Witness DD's failure to mention it during the

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[295] *Id.*
[296] *Id.*
[297] *Id.*, para. 335.
[298] *Id.*, paras. 335-337.
[299] *Id.*, para. 337 (quoting Mugonero and Bisesero Indictments, para. 4.9).
[300] *Id.*, paras. 338-340.

interview.[302] The remainder of the Trial Chamber's discussion does not remedy the uncertainty. The Chamber merely states that the witness cannot read and that there were obviously communication problems between Witness DD and the investigators. Therefore, the Appellant appears to be correct that the Trial Chamber was not entirely confident in Witness DD's testimony on this point. However, the Trial Chamber then noted that Witness DD's testimony was corroborated by other witnesses.[303] In the view of the Appeals Chamber, this is therefore a situation in which the Trial Chamber, though perhaps not convinced of a fact beyond a reasonable doubt based solely on the testimony of one witness, was convinced by the corroboration of that witness's testimony by other witnesses. Whether this conclusion was reasonable is a question of fact to be decided later. At this stage, the fact that the Trial Chamber relied on corroboration in making its finding shows that the Trial Chamber did not base a finding solely on evidence as to which it expressed doubt.

167. In conclusion, it is worth noting that the Trial Chamber's choice of words in these situations could have been more precise in certain situations. However, on review of the specific contexts of each of the phrases challenged by Gérard Ntakirutimana, it becomes evident that the Trial Chamber properly understood and applied the presumption of innocence. This ground of appeal is therefore dismissed.

(g) Consideration of the Alibi

168. Gérard Ntakirutimana next contends that the Trial Chamber erred by rejecting the alibi because it was not "reasonably possibly true."[304] The phrase "reasonably possibly true" comes from the Appeals Chamber's Judgement in *Musema*, which adopted the following statement of law:

> In raising the defence of alibi, the Accused not only denies that he committed the crimes for which he is charged but also asserts that he was elsewhere than at the scene of these crimes when they were committed. The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. *In establishing its case, when an alibi defence is introduced, the Prosecution must prove, beyond any reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful.*[305]

169. The Appellant contends, in effect, that the Trial Chamber seized on the words "reasonably possibly true" and ignored the rest, which imposed upon Gérard Ntakirutimana the burden of proving that his alibi was "reasonably possibly true," rather than requiring the Prosecution to disprove it beyond a reasonable doubt. He raises two arguments: first, that the "reasonably possibly

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[301] *Id.*, para. 133 (emphasis added).
[302] Appeal Brief (G. Ntakirutimana), para. 39.c.
[303] Trial Judgement, paras. 133-134.
[304] Appeal Brief (G. Ntakirutimana), para. 40.
[305] *Musema* Appeal Judgement, para. 205 (quoting *Musema* Trial Judgement, para. 108) (emphasis added by *Musema* Appeal Judgement).

true" formulation places an impermissible burden on the Defence, and second, that under that formulation, the Trial Chamber could reject an alibi if it were uncertain about whether the alibi evidence showed that the alibi was "reasonably possibly true," even though uncertainties should be resolved in favour of the alibi.

170. The context of the *Musema* discussion makes clear that the phrase "if the defence is reasonably possibly true" is equivalent to the phrase "if the defence raises a reasonable doubt." Shortly before it quoted the above language, the Appeals Chamber stated: "The sole purpose of an alibi, when raised by a defendant, is only to cast a reasonable doubt on the Prosecution case."[306] The Chamber then stated "[W]hen the alibi has been properly raised, the onus is on the Prosecution to disprove it beyond a reasonable doubt failing which the Prosecution case would raise a reasonable doubt as to the accused's responsibility."[307]

171. The Appellant does not appear to quarrel with this statement of the law, under which a trial chamber may reject an alibi only if the Prosecution establishes "beyond a reasonable doubt that, despite the alibi, the facts alleged are nevertheless true."[308] Rather, Gérard Ntakirutimana contends that the Trial Chamber's rejection of the alibi because it was not "reasonably possibly true" did not conform to this standard. However, the Trial Chamber articulated the standard in a clear and correct manner when it first considered alibi evidence: "It follows from case law that when the Defence relies on alibi, the Prosecution must prove, beyond a reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi. If the alibi is reasonably possibly true, it must be successful."[309] None of the paragraphs cited by the Appellant suggest that the Trial Chamber used the phrase "reasonable possibility" in any way other than as a synonym for "reasonable doubt." Indeed, the Appeals Chamber considers that the context makes clear that the Trial Chamber evaluated the totality of the evidence and concluded that the Prosecution witnesses had proven criminal responsibility beyond a reasonable doubt despite the alibi.[310]

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[306] *Id.*, para. 200.
[307] *Id.*, para. 201.
[308] *Id.*, para. 202.
[309] Trial Judgement, para. 294.
[310] *Id.*, paras. 309 ("The Chamber does not find that this evidence, considered together with the evidence of the Prosecution witnesses, raises a reasonable possibility that the two Accused were not present in the vicinity of the Mugonero Complex between 8.00 and 9.00 on 16 April"); 480 ("The evidence does not raise a reasonable possibility that they were not at those locations in Murambi and Bisesero where Prosecution witnesses testify to having seen them in April."); 530 ("[T]he Chamber need only consider whether the alibi evidence creates a reasonable possibility that the Accused were not at locations at Murambi and Bisesero at certain times alleged by Prosecution witnesses, as summarized at the beginning of this discussion. The Chamber finds that no such reasonable possibility has been established.").

172. The Appellant's second argument is that the "reasonably possibly true" formulation could result in the giving of the benefit of the doubt to the Prosecution in cases of uncertainty. This argument loses its force when, as here, the Trial Chamber correctly understands the "reasonably possibly true" standard as identical to the standard of "reasonable doubt." It is true that, in borderline cases in which the Trial Chamber is unable to conclude whether the totality of the evidence shows guilt beyond a reasonable doubt, the Trial Chamber must resolve the uncertainty in the Accused's favour. But there is no suggestion that the Trial Chamber in this case erred in law by doing the contrary.[311] Accordingly, this ground of appeal fails.

(h) Consideration of Allegation of a "Political Campaign"

173. The submissions in relation to the existence of a political campaign are discussed below under Section IV (Common Ground of Appeal on the Existence of a Political Campaign Against the Appellants) of the present judgement.

(i) Consideration of Testimony of Prosecution Witnesses

174. Gérard Ntakirutimana claims that the Trial Chamber erred in law by "crediting the testimony of Prosecution witnesses when, without rational bases, it compartmentalized their testimony so as to insulate those aspects relied upon, from those aspects that were not believed beyond a reasonable doubt."[312] Although the Appellant frames this ground of appeal as one of law, it is in reality a challenge to various findings of credibility made by the Trial Chamber. Gérard Ntakirutimana does not argue that the Trial Chamber is forbidden, as a matter of law, from concluding that a witness's testimony, though not credible on one point, is credible on others. Rather, Gérard Ntakirutimana takes issue from the Trial Chamber's findings that certain specific Prosecution witnesses were credible as to some portions of their testimony, even though their evidence was rejected on other points. An error in a finding of credibility is an error of fact. An appellant cannot turn an error of fact into an error of law simply by contending that the trial chamber made a similar error in assessing the credibility of several witnesses on several occasions. These arguments will therefore be assessed in the context of reviewing the reasonableness of the Trial Chamber's factual decisions regarding credibility.

[311] The Trial Chamber's assessment of the Appellants' alibi has been addressed more fully in section H of the Appeals Chamber's discussion of Elizaphan Ntakirutimana's grounds of appeal.
[312] Appeal Brief (G. Ntakirutimana), para. 44.

3. Other Errors of Law Asserted by Gérard Ntakirutimana

175. Gérard Ntakirutimana asserts four remaining grounds of appeal under the heading of "legal errors." First, he claims that the Trial Chamber committed legal errors in its dismissal of various Defence challenges to the credibility of Prosecution witnesses based on their witness statements.[313] The Appellant's argument is that the Trial Chamber "seized upon rationalizations not grounded in evidence to discount the significance of inconsistencies in the Prosecution evidence."[314] Second, he argues that, because four Prosecution witnesses within the same week asked the Trial Chamber to prefer their in-court testimony to their prior statements, the Trial Chamber should have inferred (even though Gérard Ntakirutimana did not raise the issue) that they had been improperly coached by someone familiar with the jurisprudence of the International Tribunal and should have discounted their testimony accordingly.[315] Third, the Appellant contends that the Trial Chamber had no cogent reasons for rejecting the alibi evidence other than an irrational preference for Prosecution witnesses,[316] erred in convicting him for attacks that were identified as occurring at a specific time without finding beyond a reasonable doubt that there was no alibi for that time,[317] erred in failing to reconcile the finding that the alibi left open the "intermittent chance" for the Appellants to travel to Bisesero with the testimony of certain Prosecution witnesses that they saw them in Bisesero on regular occasions;[318] and erred in failing to consider that the Prosecution's account that the Appellants repeatedly ventured into Bisesero to participate in attacks was "preposterous."[319] Fourth, Gérard Ntakirutimana asserts that the Trial Chamber improperly failed to take account of the Defence's evidence that the Accused lacked any motive to commit the crimes charged.

176. As discussed above in connection with the Trial Chamber's assessment of Prosecution witnesses, however, these challenges attack the Trial Chamber's conclusion regarding the credibility of various witnesses or the conclusion that the evidence as a whole proved criminal responsibility beyond a reasonable doubt. These are challenges of fact. These arguments will therefore be assessed in reviewing the reasonableness of the Trial Chamber's factual decisions, to which the Appeals Chamber now turns.

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[313] *Id.*, paras. 45-52.
[314] *Id.*, para. 45.
[315] *Id.*, para. 53; Reply (G. Ntakirutimana), para. 27.
[316] Appeal Brief (G. Ntakirutimana), para. 55.
[317] *Id.*, para. 56.
[318] *Id.*, para. 56.
[319] *Id.*, para. 57.

B. Factual Errors

177. Gérard Ntakirutimana asserts that none of the factual findings on which his convictions rests could have been made by a reasonable tribunal. As aforementioned, the Tribunal's jurisprudence firmly establishes that it is the Trial Chamber's role to make findings of fact, including assessments of the credibility of witnesses.[320] The Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber."[321] The Appeals Chamber will revise them only where the Appellant establishes that the finding of fact is one that no reasonable tribunal could have reached. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[322]

178. This deference to the finder of fact is particularly appropriate where the factual challenges concern the issues of witness credibility. These are the kinds of questions that the trier of fact is particularly well suited to assess, for "[t]he Trial Chamber directly observed the witness and had the opportunity to assess her evidence in the context of the entire trial record."[323]

1. Mugonero Indictment

(a) Procurement of Ammunition and Gendarmes (Witness OO)

179. The Trial Chamber relied on Witness OO's testimony to find that Gérard Ntakirutimana attended a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town on the afternoon of 15 April 1994, and that he procured gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994.[324]

(i) Witness OO's Status as a Detainee in a Rwandan Prison

180. The Appellant argues that the evidence supplied by Witness OO is suspect because he had been in custody in Rwanda for seven years awaiting trial and therefore was likely to provide false testimony to curry favour with the authorities. In Gérard Ntakirutimana's submission, the Trial Chamber misunderstood this objection, refusing to draw an adverse inference from the fact that Witness OO was detained on the basis that Witness OO was entitled to the presumption of innocence. The objection, Gérard Ntakirutimana argues, was not that Witness OO was a bad

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[320] *Musema* Appeal Judgement, para. 18.
[321] *Id.*; *see also Niyitegeka* Appeal Judgement, para. 8; *Krstić* Appeal Judgement, para. 40; *Krnojelac* Appeal Judgement, para. 11; *Kupreškić et al.* Appeal Judgement, para. 32; *Furundžija* Appeal Judgement, para. 37; *Tadić* Appeal Judgement, para. 35; *Aleskovski* Appeal Judgement, para. 63.
[322] *Krstić* Appeal Judgement, para. 40; *Niyitegeka* Appeal Judgement, para. 8.
[323] *Kupreškić et al.* Appeal Judgement, para. 130.
[324] Trial Judgement para. 186.

character but that he had a motive to lie even if he was innocent. In addition, Gérard Ntakirutimana submits that Witness OO had previously lied about his status as a detainee in *Niyitegeka*.[325]

181. The Trial Chamber considered Witness OO's detention but refused to draw an adverse inference as to the witness's credibility.[326] It must be acknowledged that the reason given by the Trial Chamber – that a detained person enjoys the presumption of innocence (a legal error that has been discussed above) – does not answer the Defence argument that Witness OO had a reason to give untruthful evidence to ingratiate himself with the Rwandese authorities. Nevertheless, the mere fact that an incarcerated suspect had a possible incentive to perjure himself on the stand in order to gain leniency from the prosecutorial authorities is not sufficient, by itself, to establish that the suspect did in fact lie. The authorities cited by the Appellant are not to the contrary: none shows that an in-custody informant must necessarily be treated as unreliable. The Appellant also fails to substantiate his claim with any direct evidence of collusion between Witness OO and the Rwandese prosecutorial or prison authorities, or even with evidence of how Witness OO's testimony could have helped the witness with national authorities in Rwanda. In fact, the available evidence tends toward the opposite conclusion: as the Appeals Chamber has already noted, the witness did acknowledge, when on the stand in *Niyitegeka*, that there may be some benefit in testifying before the Tribunal. The witness, however, denied being motivated by such a possibility.[327] As the Appeals Chamber indicated on that occasion, the Appellant made no showing that would cast the truthfulness of that explanation into doubt.[328]

182. Insofar as the *Niyitegeka* transcripts of Witness OO's testimony are concerned, the Appeals Chamber has already explained that these transcripts do not form part of the record in this case, and it has rejected the Appellants' request to admit them as additional evidence.[329] Therefore, it will not consider any references to the *Niyitegeka* transcripts in the determination of the appeals in this case.[330]

(ii) Witness OO's Statement on Gérard Ntakirutimana's Presence at the Kibuye Gendarmerie Camp at the End of April or Beginning of May 1994

183. The Appellant argues that Witness OO is not credible because Witness OO testified to seeing Gérard Ntakirutimana at the Kibuye gendarme camp at the end of April or beginning of May, and described the scene in great detail, including that Gérard Ntakirutimana had an ever-

[325] Appeal Brief (G. Ntakirutimana), paras. 63-64 (citing Trial Judgement, para. 173).
[326] Trial Judgement, para. 173.
[327] Decision on Request for Admission of Additional Evidence, 8 April 2004, para. 19.
[328] *Id.*
[329] *Id.*, paras. 24-25.
[330] *Id.*, para. 25.

present military companion. By contrast, the Appellant points out, no other witness testified to this fact. He adds that in *Musema*, Witness OO testified that this event occurred in May 1994; when confronted with this inconsistency, the witness claimed to be testifying about two different yet identically detailed events.[331]

184. The Appellant's arguments are unpersuasive. Witness OO did indeed state in his statement to investigators of 12 August 1998 that he had seen Gérard Ntakirutimana and others come to the Kibuye gendarmerie camp to collect fuel for a bulldozer and four gendarmes to bury the bodies of killed Tutsi at the end of May 1994, whereas at trial he stated that this happened at the end of April or beginning of May 1994. This discrepancy – even if otherwise left unexplained – does not mean, however, that the Trial Chamber could not have relied on Witness OO's testimony with respect to a different event, which supports the ground of the judgement below. As the settled jurisprudence of the Tribunal establishes, the Trial Chamber may find some parts of a witness's testimony credible, and rely on them, while rejecting other parts as not credible.[332] The event with respect to which the Trial Chamber relied on Witness OO's testimony was Gérard Ntakirutimana's presence at the Kibuye gendarmerie camp on 15 and 16 April 1994, to procure attackers for the assault on Mugonero Complex on 16 April 1994. The Trial Chamber made no finding with regard to the specific event that the Appellant discusses.

185. As mentioned above, the Appellant also points to the fact that Witness OO stated at trial that Gérard Ntakirutimana arrived at the Kibuye gendarmerie camp after the events of 16 April 1994 with the bulldozer "with a soldier, who accompanied him everywhere,"[333] even though no other witness ever testified about such an ever-present military companion. As explained above, the Trial Chamber did not base any findings on this part of Witness OO's testimony. Moreover, Witness OO referred to this military companion only once in one sentence at trial and was not further questioned on the matter. In the view of the Appeals Chamber, this statement is therefore not sufficient to find the witness unreliable.

(iii) Witness OO's Testimony on Kayishema's Presence at a Meeting at Charroi Naval Post

186. The Appellant next argues that Witness OO is not credible because he asserted in his witness statement, and later repeated in his testimony in *Musema*, that Kayishema was present at a meeting at Charroi Naval Post, but testified to the contrary at trial here.[334] The issue of Kayishema's

[331] Appeal Brief (G. Ntakirutimana), para. 65.a.
[332] *Musema* Appeal Judgement, para. 20; *Čelebići* Appeal Judgement, paras. 485 and 498.
[333] Citing T. 1 November 2001, p. 171.
[334] Appeal Brief (G. Ntakirutimana), para. 65.b.

presence at a meeting at Charroi was not used by the Trial Chamber to support any finding against the Appellant. Even if the Appellant could establish that there is a discrepancy in Witness OO's statement and testimony as to Kayishema's presence at a meeting at Charroi Naval Post, that fact is not sufficient to establish that no reasonable Trial Chamber would have found Witness OO credible with respect to other matters.

(iv) Witness OO's Statements on Gendarmes' Freedoms at the Kibuye Gendamerie Camp

187. In this contention, the Appellant argues that Witness OO is not credible and that he is self-contradictory because he testified that gendarmes at the Kibuye camp could do what they wanted, while also stating that they could never leave the camp.[335] The Appeals Chamber considers that, contrary to the Appellant's argument, no inconsistency arises from Witness OO's statements at trial that during the war gendarmes at the Kibuye gendarmerie camp would do whatever they wanted and that "no soldier had any right to leave camp." The statements instead suggest that no soldier had any right to leave the camp but that, when within the camp between April and July, they were not subjected to ordinary military discipline.

(v) Witness OO's Claim that Investigators Did Not Maintain the Chronology and that He Did Not Read Through His Statement

188. The Appellant argues that Witness OO was not credible on the basis that, when confronted with an inconsistency in his witness statement, he claimed that he had not read the statement even though he had signed it, believing that he could correct errors in the statement at trial. The Appellant further points out that Witness OO testified that investigators did not maintain a chronology, which is belied by the statement itself. Moreover, the Appellant contends, the Prosecution relied on the statement in its effort to cure indictment errors.[336]

189. The Appellant fails to show that no reasonable Trial Chamber would have accepted Witness OO's explanation that the investigators did not maintain the chronology of events. The witness explained that the investigators took notes when they were questioning him and then went to type out his statement, and that they did not maintain the chronology of events.[337] This explanation is entirely plausible, because, as the Appellant acknowledges,[338] the statement refers to specific dates only sporadically, normally employing linking phrases such as "the next morning" or "the following afternoon." This mode of reference makes it difficult if not impossible to confirm precise

[335] *Id.*, para. 65.c, citing T. 2 November 2001, pp. 98, 110.
[336] *Id.*, para. 65.c-d.
[337] T. 2 November 2001, p. 54.
[338] Reply Brief (G. Ntakirutimana), para. 32.

dates for many of the events discussed. As a result, paragraphs could easily have been put "upside down"[339] by the investigators, as the witness had claimed on the stand.

190. The Appellant also fails to show that no reasonable Trial Chamber would have concluded that Witness OO did not lie about the fact that he did not read through his statement. When questioned about this fact by the Trial Chamber, the witness stated that he "did not have the opportunity to read that [the statement] over with [the investigators] to be able to correct that error,"[340] and immediately clarified the reason why he signed the statement without reading it first: "I signed that statement all right, but I was told that I was going to come and confirm what I stated before the Trial Chamber. And I said to myself that even if there was a problem with the statement, I was going to solve it since I would be present, myself."[341] The Trial Chamber accepted this explanation, and the Appellant fails to show why it would have been unreasonable for a Trial Chamber to credit such an explanation.

(vi) Witness OO's Alleged Discrepancies About the Timing of Events on 15-16 April

191. Gérard Ntakirutimana argues that, even if Witness OO was credible, the Trial Chamber drew unreasonable conclusions from his testimony. From Witness OO's testimony that he saw Gérard Ntakirutimana sometime before 18 April, the Trial Chamber concluded that he was at the Kibuye gendarme camp on 15 and 16 April. Gérard Ntakirutimana argues further that Witness OO's testimony that there was one day between Gérard Ntakirutimana's visits to the camp contradicts the Trial Chamber's finding that he was there on consecutive days (15 and 16 April).[342]

192. The Appeals Chamber notes that even though the witness initially testified that "between when [Gérard Ntakirutimana] returned and his first visit, one day had elapsed,"[343] in the next sentence he clarifies that the return "was the following day." The context in which the witness's statements are placed shows that the witness was repeatedly and consistently referring to the time of the return as the morning after Gérard Ntakirutimana's first visit to the camp on 15 April, namely to the morning of 16 April.[344] The Trial Chamber's finding is therefore reasonable.

193. Gérard Ntakirutimana also claims that Witness OO changed his testimony about timing of events to suit his stories. The Appellant lists a number of examples: (a) Witness OO's pre-trial statement said that the Gatwaro stadium attack occurred after the camp commander (Major Jabo)

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[339] T. 2 November 2001, p. 52.
[340] *Id.*, p. 54.
[341] *Id.*, p. 55.
[342] Appeal Brief (G. Ntakirutimana), para. 66 (citing Trial Judgement, paras. 144, 175).
[343] T. 2 November 2001, p. 71.
[344] *See* T. 2 November 2001, pp. 62, 64, 65, 70 ,71.

was transferred to Kigali, yet at trial he testified that it happened before the transfer, and when confronted with the inconsistency, he said the attack happened on 14 April, never resolving whether it was before or after the transfer; (b) in *Musema*, Witness OO testified that the Gatwaro attack and an attack on Home St. Jean occurred on the same day, yet in his statement he alleged that the Home St. Jean attack occurred later; (c) in *Musema*, Witness OO claimed that he first saw Musema at the camp at the end of April, yet in his statement he claimed he saw Musema with Gérard Ntakirutimana at a meeting that the Trial Chamber concluded took place on April 15.[345]

194. The Trial Chamber has expressly considered the inconsistency between Witness OO's pre-trial statement and his trial testimony as to the date of Major Jabo's transfer. Accepting Witness OO's explanation for why he believed his pre-trial statement to have been inaccurate, the Trial Chamber credited the witness's trial testimony instead.[346] As already explained, the Trial Chamber's conclusion that the witness provided a creditable explanation for the differences between his pre-trial statement and trial testimony was reasonable, as was the Trial Chamber's decision to credit the chronology of events that the witness provided at trial.

195. As to the alleged inconsistencies in Witness OO's testimony concerning the chronology of the attacks on Gatwaro and on Home St. Jean, the witness, at trial, acknowledged that he was not sure about the exact chronology: "I think it was on the same day and I think it was on the 18th."[347] Given this admission, the fact that he gave a slightly divergent testimony on different occasions does not cast doubt upon his credibility or demonstrate that the Trial Chamber was unreasonable in relying upon Witness OO's evidence.

196. As to the alleged discrepancy between Witness OO's pre-trial statement and his testimony in *Musema* about the first time he saw Musema, it was – as the Appellant acknowledges – the Trial Chamber and not the witness who concluded that the date of 15 April 1994 was the date on which the meeting between Gérard Ntakirutimana and Musema took place. In his statement to investigators, the witness did not ascribe any precise date to that meeting. Rather, the meeting is one of the events that the witness linked to other events by words such as "the following day." Considering the context of the witness's statement, the meeting seems to have taken place between the middle and end of April 1994. The Appeals Chamber considers that the witness's statement in *Musema* that he had seen Musema for the first time at the camp at the end of April is therefore not inconsistent with his statement to investigators in this case.

[345] Appeal Brief (G. Ntakirutimana), para. 67.
[346] Trial Judgement, para. 180.
[347] T. 2 November 2001, p. 41.

197. Gérard Ntakirutimana next challenges the Trial Chamber's acceptance of Witness OO's chronology of events on the morning of 16 April. In particular, he points to Witness OO's statement that Gérard Ntakirutimana arrived at the Kibuye camp between 7:00 and 7:30 a.m. on 16 April, which would have made it impossible for him to procure gendarmes, return to Mugonero, and leave for Gishyita at 8:30, which was the Prosecution's theory. Therefore, the Appellant argues, Witness OO changed his testimony at trial to state that Gérard Ntakirutimana arrived earlier, between 6:30 and 7:00.[348] The Appellant further argues that even this chronology is still impossible because one could not travel the distance involved and accomplish the tasks alleged in 90 minutes.[349] Finally, the Appellant points out that Witnesses GG and SS contradicted Witness OO's chronology, since they claim to have observed the house where Gérard Ntakirutimana was staying that morning, yet did not testify that he left between 5:30 and 6:30 a.m., as alleged by the Prosecution.[350]

198. The inconsistencies in Witness's OO's estimation of time alleged by the Appellant are not of such magnitude that no reasonable Trial Chamber would have accepted Witness OO's trial testimony as truthful. The Appellant provided no evidence which would suggest that the witness was deliberately untruthful in his trial testimony, so as to accommodate the Prosecution's trial theory. In addition, as already explained above, the Trial Chamber carefully considered the witness's explanation for the disparities in chronology between his pre-trial statement and trial testimony, and found the explanation credible.

(vii) Witness OO's Evidence of Vehicles Carrying Attackers, the Identity, Clothing and Number of Attackers

199. Gérard Ntakirutimana challenges the connection made by the Trial Chamber between Witness OO's testimony that he conveyed gendarmes from Kibuye in the hospital vehicle and two other vehicles and the finding that these gendarmes then took part in the Mugonero attack. The Appellant contends that the Trial Chamber was left in doubt as to whether any of the vehicles Witness OO said he saw in Kibuye were ever at Mugonero. Gérard Ntakirutimana argues that no witness at Mugonero observed people matching the detailed description Witness OO gave of the gendarmes at Kibuye; contrary to the Trial Chamber's finding, Witness 25 described them very differently. In addition, the Appellant submits, no witness described as many as 15 or 30 gendarmes (which was Witness OO's figure) arriving at Mugonero.[351] Gérard Ntakirutimana adds that Witness OO's testimony that the gendarmes returned at 5 p.m. is also contradicted by the Prosecution's own

[348] Appeal Brief (G. Ntakirutimana), para. 68.
[349] *Id.*, paras. 68-69 (citing Trial Judgement, paras. 161, 195).
[350] Appeal Brief (G. Ntakirutimana), para. 70 (citing Trial Judgement, para. 224).
[351] *Id.*, paras. 71-72 (citing Trial Judgement, paras. 224, 292).

theory that the fighting continued beyond 5 p.m.[352] Finally, he states that Witness OO's testimony is also contradicted by evidence that there was initial fighting between refugees and attackers.[353]

200. The Trial Chamber expressly considered the arguments the Appellant now puts forward with respect to the lack of corroboration of Witness OO's evidence concerning the vehicles carrying the attackers. In the Trial Chamber's view, the fact that the vehicles described by Witness OO were not described by any other witness did not cast doubt upon his credibility. As the Trial Chamber explained,

> Witness OO did not claim to know from his own experience what happened to the convoy after its departure [from the Kibuye camp]. He relied rather on indirect evidence, provided by the gendarme Nizeyimana, as to what the gendarmes (or at least some of the gendarmes) did after they left the camp. This does not diminish the reliability of the observations made by this witness in relation to the afternoon of 15 April and the morning of 16 April.[354]

201. The Trial Chamber limited its inquiry to the events that transpired at the Kibuye camp during that time, and to the specific question whether, at that time, Gérard Ntakirutimana applied efforts to procure gendarmes. The Trial Chamber therefore did not assess the broader factual matrix of what happened to the convoy of gendarmes procured by the Appellant after it left the camp. The Trial Chamber acknowledged that the description of the vehicles that arrived at the Mugonero Complex, given by the witnesses to that event, did not conform to the description of the vehicles leaving the Kibuye camp given by Witness OO.[355] The Trial Chamber nevertheless dismissed this inconsistency as irrelevant to Witness OO's credibility on the rationale that the witness did not testify first-hand to the events that took place at the Mugonero Complex, and therefore provided no testimony directly inconsistent with the testimony of the other witnesses.

202. The Appeals Chamber considers the Trial Chamber's logic to be puzzling. Implicit in the Trial Chamber's findings and reasoning is the assumption that the vehicles procured by Gérard Ntakirutimana on the morning of 16 April at Kibuye were the same vehicles that arrived afterwards at Mugonero. This sequence of events creates an expectation that the description of the vehicles arriving at Mugonero would be consistent with the description of the vehicles seen leaving Kibuye. There is no suggestion in the judgement or in the testimony of the witnesses that Gérard Ntakirutimana and the accompanying gendarmes switched the vehicles en route from Kibuye to Mugonero. While such a possibility cannot be excluded, it was incumbent upon the Trial Chamber to make appropriate factual inquiry in order to ascertain the complete sequence of events and to assess fully Witness OO's credibility. On the record as it exists, a reasonable trial chamber could

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[352] *Id.*, para. 73.
[353] *Id.*
[354] Trial Judgement, para. 183.
[355] *Id.*, para. 182.

not have reconciled the differences in the testimony of Witness OO and the Mugonero witnesses solely on the basis of the fact that Witness OO did not testify directly about the kind of vehicles that had arrived at Mugonero.

203. The question remains, however, whether a reasonable trier of fact could nevertheless have credited Witness OO's testimony about the events that took place at Kibuye on 15-16 April, despite the doubts whether his description of the vehicles was accurate. In finding that there was insufficient evidence that Gérard Ntakirutimana conveyed attackers to the Mugonero Complex, the Trial Chamber cast serious doubt upon the credibility of the testimony given by the witnesses who purported to have seen Gérard Ntakirutimana in the Complex on the morning of 16 April.[356] For instance, the Trial Chamber was unconvinced by the testimony of Witness HH, who claimed to have seen the Appellant arrive at the Complex in a white Peugeot pickup.[357] The Trial Chamber observed that this description of Gérard Ntakirutimana's vehicle was not consistent with the vehicle description given by any other witness. Similarly, the Trial Chamber expressed doubts about the testimony given by Witness KK, who claimed to have seen the Appellant arrive at the Complex in a hospital vehicle.[358] The Trial Chamber also expressed doubt about the evidence given by another witness, Witness PP, who claimed to have seen Gérard Ntakirutimana arrive at the Complex in his father's car.[359]

204. Given the doubts expressed by the Trial Chamber about the evidence of these three witnesses with respect to their observations of the convoy which arrived at Mugonero on 16 April, a reasonable trial chamber could have decided to credit instead the vehicle description given by Witness OO, whom the Trial Chamber found to be a credible witness.[360] As already explained, the Trial Chamber is in a unique position to evaluate the demeanour of the testifying witness, to question the witnesses directly about the gaps or inconsistencies in their testimonies, and to evaluate their credibility on the basis of the witnesses' reaction to the difficult questions put to them by the parties or by the judges. The Trial Chamber's decision to find Witness OO's testimony credible is therefore entitled to substantial deference.

205. Furthermore, even if the Trial Chamber had concluded that Witness OO's description of the vehicles was subject to doubt, that conclusion does not necessarily cast doubt upon the rest of his testimony with respect to the events of 15-16 April, which the Trial Chamber found to be detailed

[356] Trial Judgement, paras. 286-292.
[357] *Id.*, para. 286.
[358] *Id.*, para. 287.
[359] *Id.*, para. 288. Three other witnesses whose testimony was considered by the Trial Chamber "did not claim that Gérard Ntakirutimana conveyed the attackers," and the Trial Judgement therefore contains no discussion of the description of the arriving vehicles given by these witnesses. Trial Judgement, para. 289.
[360] *Id.*, para. 173.

and consistent.[361] Finally, even if the testimony of Witness OO were to be disbelieved entirely, and if the Trial Chamber's concomitant finding that Gérard Ntakirutimana procured the gendarmes were to be reversed, that reversal alone would not negate the Trial Chamber's finding that the Appellant had the requisite genocidal intent.[362] That finding relied, in addition, on the Trial Chamber's findings that the Appellant participated in the attacks at Mugonero on 16 April and shot at refugees, that he killed Charles Ukobizaba, and that he participated in the attack on Witness SS.[363] The Trial Chamber's acceptance of Witness OO's testimony with respect to whether the Appellant procured gendarmes at Kibuye on 15-16 April, even if erroneous, therefore did not result in a miscarriage of justice and need not be set aside.

206. As to the Appellant's arguments with respect to Witness OO's testimony about the identity and clothing of attackers, the Appeals Chamber finds those contentions to be unfounded. Several other witnesses testified to seeing *Interahamwe* take part in the attack on the Mugonero Complex, and these witnesses did not specify how they were dressed.[364] Their testimony, therefore, does not cast doubt upon the evidence given by Witness OO on this point. Furthermore, Witness 25, on whose testimony the Appellant relies, in fact stated that while some people were wearing civilian clothing others wore "branches of trees and leaves," which is consistent with Witness OO's description. The fact that Witness 25 did not specify whether these individuals were *Interahamwe* or someone else does not undermine the credibility of Witness OO's evidence. Witness 25 did not testify that these people were not *Interahamwe* or attackers, stating rather that "there were people of all kinds, dressed in all ways."[365] Therefore the Trial Chamber was not unreasonable in concluding that Witness 25's statement corroborated Witness OO's statement on the identity and clothing of attackers. In addition, Witness OO's testimony is corroborated, in part, by that of Witness HH, who testified that attackers were wearing military clothes, khaki-coloured clothes or uniforms.[366]

207. The Appellant's argument that Witness OO's numerical estimate of individuals leaving Kibuye with Gérard Ntakirutimana is higher than the estimate of attackers given by the Mugonero witnesses also fails. First, it is clear from the evidence given by the Mugonero witnesses that the attackers who arrived at the Mugonero Complex were substantial in number. The testimony of Witness HH is consistent with the estimate given by Witness OO, as Witness HH stated that about 15-20 people arrived at Mugonero in one car,[367] and that there were at least 100-120 attackers

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[361] *Id.*, paras. 180, 186.
[362] *Id.*, para. 793.
[363] *Id.*, para. 791.
[364] *See, e.g.*, Witness FF, T. 28 September 2001, pp. 28, 36; Witness KK, T. 4 October 2001, p. 16; Witness DD, T. 23 October 2001, pp. 83, 84; Witness MM, T. 19 September 2001, pp. 92, 93, 115, 150.
[365] T. 15 February 2002, pp. 30, 31.
[366] T. 25 September 2001, pp. 126-128.
[367] *Id.*, p. 125.

altogether.[368] Gérard Ntakirutimana's argument as to the timing of the gendarmes' return also fails, as there was evidence that the attackers left the Complex at various times throughout the day.

208. In any event, for reasons explained above, even if Witness OO's testimony had been inconsistent with the testimony of other witnesses on the issues of the attackers' identity, clothing and numbers, that does not necessarily invalidate the remainder of his testimony or lead to a miscarriage of justice.

(viii) Reliability of Witness OO's Hearsay Evidence that the Gendarmes Collected by the Appellant Participated in the Attack on the Mugonero Complex

209. The Appellant next argues that the Trial Chamber lacked any evidence establishing that the gendarmes, *Interahamwe* and ammunition he procured were ever in Mugonero.[369] The Appellant avers that only hearsay statements alleged by Witness OO suggest that the gendarmes from Kibuye arrived at Mugonero; the Appellant submits that these statements are not reliable. The Appellant first notes Witness OO's claim that Gérard Ntakirutimana told him of the need to "beat the Tutsis who were in the hospital, the church and even the store."[370] It is unlikely and unbelievable, so the Appellant argues, that Gérard Ntakirutimana would have made such a statement to a stranger. The Appellant next points out that Witness OO also testified that gendarme Nizeyimana told him that Gérard Ntakirutimana said that the gendarmes took part in the attack. The Appellant argues that this statement, even if made, is unreliable and undermined by the absence of evidence of the vehicles or the gendarmes being at Mugonero.[371]

210. Contrary to the Appellant's argument, the Appeals Chamber considers that the Trial Chamber was not unreasonable in relying on Witness OO's hearsay evidence. The first item of Witness OO's testimony that the Appellant attacks – Witness OO's report that Gérard Ntakirutimana told him of the need to "beat the Tutsis who were in the hospital, the church and even the store" – is a direct testimony by Witness OO as to the words the Appellant had spoken to him. While the Appellant argues that it was unlikely and unbelievable that he would have made a statement of that kind to a stranger, the Trial Chamber found that Witness OO "had known the Accused for about three of four months prior to seeing him at the gendarmerie camp [, and] had visited the hospital and had received treatment from the Accused."[372] A reasonable Trial Chamber therefore could conclude that the Appellant would have disclosed his intentions to a member of the gendarmerie from whom he sought to procure soldiers and ammunition, especially given that it was

[368] *Id.*, pp. 134, 135.
[369] Appeal Brief (G. Ntakirutimana), para. 72.
[370] *Id.*, para. 73.
[371] *Ibid.*

a gendarme whom the Appellant knew from prior interactions. There is no evidence that the Appellant intended to keep secret the goal with which he arrived at the Kibuye camp.

211. As to Witness OO's testimony about the information he obtained from gendarme Nizeyimana, that hearsay raises greater concerns of reliability, because the truthfulness of that information depends not only on the credibility of Witness OO and the accuracy of his observation, but also on the credibility and reliability of Nizeyimana. The Trial Chamber found that Nizeyimana "reported to the witness that he and Gérard Ntakirutimana had taken part in an attack again Tutsi persons at the Mugonero Complex."[373] This finding, if correct, could support an inference that the gendarmes procured by the Appellant, as well as the Appellant himself, participated in the attack on the Mugonero Complex and the atrocities carried out there. The Trial Chamber, however, rejected the Prosecution's contention that Gérard Ntakirutimana conveyed the attackers to the Mugonero Complex for insufficiency of evidence.[374] Nor did the Trial Chamber rely on Witness OO's hearsay evidence about his conversation with Nizeyimana in its finding that Gérard Ntakirutimana participated in attacks on 16 April at the Mugonero Complex and shot at refugees. That finding was based on testimony given by other witnesses. In these circumstances, the hearsay evidence reported by Witness OO, even if incorrect or unreliable, has not contributed to the Appellant's conviction and has not led to a miscarriage of justice. The Appeals Chamber finds therefore that the Trial Chamber's acceptance of the hearsay evidence need not be set aside.

(ix) Alibi Evidence

212. Finally, Gérard Ntakirutimana submits that the Trial Chamber was wrong to conclude that he adduced no evidence that he was at his father's house on 15 April and the early morning of 16 April. The Appellant points out that Witnesses XX and 16, Elizaphan Ntakirutimana's wife, and the two Appellants all testified in support of the alibi that the Appellants left Elizaphan Ntakirutimana's house in Mugonero for Gishyita at 6:15 a.m. in Elizaphan Ntakirutimana's vehicle, they left Gishyita between 7:10 and 7:30, arrived back in Mugonero at 8:00, were told by a gendarme to leave shortly thereafter, took five minutes to pack and left for Gishyita for the second time. They picked up others on the road and arrived in Gishyita between 8:30 and 9:30 a.m. In the Appellant's submission, the Trial Chamber unreasonably relied on Witness OO instead of these witnesses to conclude that Gérard Ntakirutimana was at the Kibuye camp procuring gendarmes.[375] The Appellant asserts that, contrary to the Trial Chamber's finding, there is a simple explanation why Witnesses 9, 16, and Elizaphan Ntakirutimana's wife did not see Gérard Ntakirutimana early

[372] Trial Judgement, para. 166.
[373] *Id.*, para. 186.
[374] *Id.*, para. 292.

on the morning of the April 16: Gérard Ntakirutimana's car was parked outside the compound overnight and left for Gishyita in the early morning hours.[376]

213. In the view of the Appeals Chamber, the Trial Chamber, which considered the issue of the alibi at length, did not act unreasonably when rejecting the Appellant's alibi evidence. As the Trial Chamber noted, only the Appellant himself and his father, Elizaphan Ntakirutimana, claimed that Gérard Ntakirutimana was at his parents' house on the afternoon of 15 April and the morning of 16 April. The Trial Chamber concluded that neither Defence Witness 16 nor Defence Witness 9, who both were at Elizaphan Ntakirutimana's house on that morning, had seen Gérard Ntakirutimana there, and even the wife of Elizaphan Ntakirutimana did not mention her son when describing her activities at the house early on 16 April.[377] Although she did see the hospital vehicle, usually driven by Gérard Ntakirutimana, parked on the road outside the compound of her house, she gave the time for that observation as being around 8 a.m., which is not the relevant time.[378] To the extent that the Trial Chamber did not credit parts of the testimonies of the Defence witnesses, it acted within the permissible bounds of its discretion in evaluating the credibility of witnesses testifying before the court. In so doing, the Appeals Chamber is satisfied that the Trial Chamber did not rely upon an absence of corroboration to reject defence evidence as alleged by the Appellant.[379]

(b) The Shooting of Charles Ukobizaba at Mugonero (Witnesses HH and GG)

(i) Witness HH

a. General Challenge to the Credibility

214. Gérard Ntakirutimana lists seven instances where Witness HH testified to certain facts yet the Trial Chamber did not believe him. The Appellant points out that the Trial Chamber noted inconsistencies between Witness HH's testimony and his earlier statement, found that his explanations were "not entirely satisfactory," yet it still credited his evidence. Gérard Ntakirutimana argues that the Trial Chamber should have had serious concerns about Witness HH's credibility and should have rejected his entire testimony.[380]

215. As already explained, it is settled jurisprudence of the Tribunal that a Trial Chamber may find some portions of a witness's testimony credible, and rely upon them in imposing a conviction,

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[375] Appeal Brief (G. Ntakirutimana), paras. 74-76.
[376] *Id.*, para. 77.
[377] Trial Judgement, paras. 184, 306.
[378] T. 10 April 2002, pp. 40, 52.
[379] Appeal Brief (G. Ntakirutimana), para. 29.
[380] *Id.*, paras. 81-83 (citing Trial Judgement, paras. 249, 251, 256, 258, 286, 419, 556, 619, 620, 669).

while rejecting other portions of the same witness's testimony as not credible. The Appeals Chamber considers that where the Trial Chamber declined to rely upon the evidence given by Witness HH, it did so because of its concerns about the accuracy of his observations.[381] In no instance where the Trial Chamber disbelieved Witness HH's testimony did it question his sincerity as a witness. The Trial Chamber considered the impact of the instances where it found Witness HH's evidence faulty on his overall credibility, yet reaffirmed that those instances "do[] not render the rest of his evidence unreliable."[382] The Appellant has not demonstrated the Trial Chamber was unreasonable in doing do. The Appellant's general challenge to Witness HH's credibility therefore fails.

b. Witness HH's Connection to Persons Interested in the Appellants' Conviction

216. Gérard Ntakirutimana argues that evidence shows that Witness HH was connected to persons and groups interested in the conviction of those charged before the ICTR. He asserts that Witness HH lied under oath and was evasive about his connection to Assiel Kabera, thereby raising serious questions about his credibility.[383]

217. The Appeals Chamber considered this argument in Section IV of the present Judgement.[384] For reasons given in that section, the Appellant's arguments fail.

c. Inconsistencies Between Pre-trial Statements and Trial Testimony

i. Omissions in Pre-trial Statements

218. Gérard Ntakirutimana submits that Witness HH's testimony included new allegations that were absent from his original statement and/or his "reconfirmation statement." The first point raised by the Appellant is that Witness HH never claimed to have seen Elizaphan Ntakirutimana at Mugonero in the original statement, yet this was a major feature of his trial testimony. This challenge is the same as the challenge brought by Elizaphan Ntakirutimana.[385]

219. Witness HH testified that he saw Elizaphan Ntakirutimana at the Mugonero Complex with attackers on the morning of 16 April 1994. In his previous witness statement and reconfirmation statement, however, Witness HH made no mention of Elizaphan Ntakirutimana conveying attackers

[381] *See* Trial Judgement, paras. 258, 292, 421, 556, 619, 620, 669.
[382] Trial Judgement, para. 258. To the same effect, *see* Trial Judgement, para. 373 ("other issues relating to the credibility of Witness HH do not reduce his credibility in the present context").
[383] Appeal Brief (G. Ntakirutimana), para. 84.
[384] "Common Ground of Appeal on the Existence of a Political Campaign Against the Appellants."

to Mugonero on 16 April 1994. During his testimony, the witness was asked about this failure to mention Elizaphan Ntakirutimana in his prior statements. The Trial Chamber reviewed the answers provided by the witness about the content of his statements and, although it found them not entirely satisfactory, the Chamber was of the view that they did not cast doubt on his testimony.[386]

220. The Appeals Chamber notes that, aside from repeating assertions previously made at trial, the Appellants do not attempt to substantiate their submission that the Trial Chamber erred; nor do they in any way address the treatment of the apparent inconsistencies between the witness's statements and his testimony. In particular it should be noted that the Trial Chamber observed generally that it gave "higher consideration to sworn witness testimony before it than prior statements" and concluded that the witness's previous statements were generally about massacres which occurred at the hospital in Mugonero and not specifically about the Appellants.[387] In addition, the Trial Chamber reasoned that although the witness's statements contained less information about the Appellant than his testimony, this did not reduce his overall credibility.[388] It also took into consideration that Witness HH's testimony regarding the actions of Elizaphan Ntakirutimana was consistent with that of other witnesses.[389] Accordingly, the Appeals Chamber finds that the Trial Chamber's conclusion was not unreasonable.

221. Gérard Ntakirutimana next argues that Witness HH never claimed in either statement to have seen Elizaphan Ntakirutimana at Bisesero, whereas at trial he testified to seeing Elizaphan Ntakirutimana there twice. At trial, the witness was asked why he had not mentioned Elizaphan Ntakirutimana's participation in events at Ku Cyapa and Mubuga. He explained that he had not been asked about these events. The Trial Chamber was satisfied with this answer and found the witness to be credible and consistent under cross-examination.[390] The Appellant does not advance any arguments to show that the Trial Chamber acted unreasonably. Consequently, this challenge fails.

222. Gérard Ntakirutimana also submits that Witness HH never claimed in either of his statements that he saw Gérard Ntakirutimana approach or enter the main building at Mugonero at sundown.[391] The Appeals Chamber notes that the entire discussion of the Mugonero attack in Witness HH's April 1996 statement was confined to a single paragraph, which contained no

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[385] Appeal Brief (E. Ntakirutimana), pp. 14-15.
[386] Trial Judgement, paras. 252-260.
[387] *Id.*, para. 260.
[388] The witness's statement of 1996 is in narrative form, and does not include any questions. Mention is made of Gérard Ntakirutimana and others taking part in the attack on Mugonero Complex on 16 April 1994. Elizaphan Ntakirutimana is mentioned only in relation to events at Gitwe Hill.
[389] Trial Judgement, para. 257.
[390] *Id.*, para. 703.
[391] Appeal Brief (G. Ntakirutimana), para. 85.

coverage of any specific events between Ukobizaba's shooting around noon on 16 April and 2 a.m. on 17 April. Nothing therefore indicates that Witness HH was questioned about specific matters during that time period. The fact of Gérard Ntakirutimana's entering the hospital building may not have been viewed as important at the interview stage, but it assumed importance only as a result of the evidence given by other witnesses.

223. The witness was questioned about omissions at trial, and he explained the absence of any mention in his prior statement of Gérard Ntakirutimana transporting attackers to the Complex in the following terms: "You should not think that three months of events could be recorded on a document of a few pages"; and "if at a certain point in time I spoke about the presence of Gérard without mentioning his vehicle, then it's because I was not asked how he got there."[392] Because "during the [pre-trial] interview Witness HH did not exhaustively list all attackers of vehicles conveying assailants," the Trial Chamber concluded that "it does not reduce the credibility of Witness HH that the statement provides less information about [] Gérard Ntakirutimana than his testimony."[393] The Trial Chamber did not find Witness HH's responses sufficient to cast doubt on his testimony, concluding that "the witness's statement was about 'the massacres which took place at the hospital in Mugonero' generally, and not specifically about the two Accused."[394] In the Appeal Chamber's view, the Trial Chamber's assessment was reasonable.

224. Moreover, the Trial Chamber noted that the witness had failed to mention in his statement seeing the Appellant enter the main building around nightfall on 16 April, and treated his evidence with caution.[395] The Appellant has not shown that the approach of the Trial Chamber was unreasonable.

225. The Appellant next argues that Witness HH did not claim in his statements that Gérard Ntakirutimana killed Esdras, yet he testified to that effect at trial.[396] In particular, the Appellant notes that, in his statement, Witness HH said that Gérard Ntakirutimana "was among the persons who chased after us to kill us. However, it was difficult to see who killed who." Yet, the Appellant avers, Witness HH was able to testify in detail that Gérard Ntakirutimana killed Esdras.

226. As explained in Section II.A.1.(b)(ii)g. of the present Judgement, due to the insufficient notice afforded in the Indictment, the Appellant's conviction cannot be premised on the killing of Esdras. Therefore, even if the Appellant were to succeed in showing that Witness HH's evidence

[392] T. 26 September 2001, p. 111.
[393] Trial Judgement, para. 257.
[394] Trial Judgement, para. 260.
[395] *Id.*, para. 421.
[396] Appeal Brief (G. Ntakirutimana), para. 85.

with respect to the killing of Esdras is not credible, this would have no effect on the verdict. Moreover, the Appeals Chamber does not consider that the Trial Chamber was unreasonable in finding Witness HH generally credible despite his failure to mention explicitly the killing of Esdras in his pre-trial statements. In this connection, the Appeals Chamber observes that the Trial Chamber noted the explanations provided by Witness HH[397] and seems to have considered that the statements were reconcilable with Witness HH's testimony at trial.[398]

ii. Observation of the shooting of Charles Ukobizaba

227. The Appellant next alleges that Witness HH testified at trial that he saw the killing of Charles Ukobizaba from a window, whereas he said in his pre-trial statement that he saw the killing from small holes in the wall while hiding in the ceiling. The Appellant submits that the Trial Chamber should have rejected Witness HH's evidence on this point due to his implausible explanations for the inconsistencies with his statement.[399]

228. The Trial Chamber considered the alleged inconsistency and Witness HH's assertion that the inconsistency was caused by a misunderstanding on the part of the investigators.[400] The Trial Chamber noted that the witness "was cross-examined extensively on this issue" and that he "explained that he hid in the building from around noon on 16 April to 2 a.m. on 17 April, that some of his observations were made through the perforated holes in the ceiling, whereas other observations, including the shooting of Ukobizaba, were made from the ground floor."[401] The Trial Chamber then concluded that "the declaration in the written statement did not reduce the credibility of this part of Witness HH's testimony."[402] The Appeals Chamber does not consider that the Trial Chamber was unreasonable. Having observed the witness in person, the Trial Chamber was entitled to accept his explanations and to credit the witness's testimony. Moreover, as the Trial Chamber noted, Witness HH's testimony that the Appellant shot Charles Ukobizaba was also corroborated by Witness GG's testimony.[403]

229. The Appellant also submits that Witness HH's testimony as to the moment he went to hide in the ceiling was inconsistent.[404] In this connection, the Appellant avers that the witness first

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[397] Trial Judgement, para. 555.
[398] *Id.*, para. 559.
[399] Appeal Brief (G. Ntakirutimana), para. 88.
[400] Trial Judgement, para. 370.
[401] *Id.*, para. 370.
[402] *Id.*
[403] *Id.*, paras. 371-373.
[404] Appeal Brief (G. Ntakirutimana), para. 89.

testified that he went into the ceiling "between 11:00 and 2:00"[405] and then, when he realized that the Defence was trying to pin him down to an early entry into the ceiling, he said he did not hide in the ceiling between 11 a.m. and 2 p.m., but rather that he went into the ceiling "at about 4 p.m."[406] This, says the Appellant, should have impelled the Trial Chamber to reject Witness HH's testimony.

230. The Appeals Chamber has considered the transcripts of 26 and 27 September 2001 and it is not convinced that the witness attempted to change his answer to avoid being "pinned down." Witness HH first testified that he went into the building sometime between 11 a.m. and 2 p.m. and that he hid into the ceiling about an hour later.[407] Witness HH's cross-examination continued the next day. When asked at what time he went into the ceiling, Witness HH replied: "You are asking me questions on time, but I've already told you that I didn't have a watch. And I think this question was put to me yesterday actually, and I gave you an estimate. I think that I left – that I went into the ceiling between 1100 and 1400 hours."[408] Moments later, the witness corrected himself, saying that he went into the building between 11 a.m. and 2 p.m., and that it was only an hour or two later that he went into the ceiling, concluding "[s]o I would say that I went into the ceiling at about 4 p.m."[409] This was in conformity with his testimony the previous day. Therefore, the Appeals Chamber is not persuaded that the above shows that Witness HH lacked credibility and that the Trial Chamber should have rejected his testimony.

231. Finally, the Appellant contends that certain elements of Witness HH's testimony on this subject are simply beyond belief and that, as a result, a reasonable trial chamber would have been compelled to reject his testimony.[410] In this connection, the Appellant submits that Witness HH testified that he did not concentrate on how many shots were fired at Ukobizaba, yet he could situate where all attackers were standing and state whether they had guns and in which direction they fired.

232. In the Appeals Chamber's view, the fact that the witness did not concentrate on the number of shots fired bears little relation to his ability (or inability) to observe the shooters. As the Trial Chamber found, the observational conditions for Witness HH were good,[411] and it was therefore reasonable for the Trial Chamber to conclude, given the overall evidence before it, that Witness HH could observe the events well enough to describe them in detail, even if he could not recall the number of shots fired at Ukobizaba.

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[405] T. 27 September 2001, p. 9.
[406] *Id.*, p. 12.
[407] T. 26 September 2001, pp. 115-116.
[408] T. 27 September 2001, p. 9.
[409] *Id.*, pp. 11-12.
[410] Appeal Brief (G. Ntakirutimana), para. 89.
[411] Trial Judgement, para. 371.

iii. General Challenges

233. The Appellant invokes a number of other alleged contradictions between Witness HH's pre-trial statements and his in-court testimony.[412] The Appellant also claims that the difficulties that Witness HH's statements posed had been drawn to his attention prior to testifying and that his responses were rehearsed.[413] The Appellant further submits that Witness HH's explanations for the inconsistencies between his statements and his testimony were implausible.[414] In addition, the Appellant argues that other parts of Witness HH's testimony were beyond belief and should have impelled the Trial Chamber to reject his testimony.[415]

234. The Appellant presents this list of alleged contradictions and inadequate explanations with the goal of attacking three findings made by the Trial Chamber: first, and mainly, the finding that the Appellant shot at Charles Ukobizaba;[416] second, the finding that the Appellant killed Esdras;[417] and, third, that the Appellant headed a group of attackers at Muyira Hill where he shot Tutsi refugees.[418] As explained in Section II.A.1.b.(ii) of the present Judgement, the last two findings cannot serve as predicates of the Appellant's convictions due to the insufficiency of notice. Therefore, the issue of whether the testimony of Witness HH with respect to those findings is credible is now moot insofar as those two findings are concerned.

235. As to the first finding – that the Appellant killed Charles Ukobizaba – the Appeals Chamber has considered above the inconsistencies alleged by the Appellant that relate directly to Witness HH's observation that the Appellant shot Charles Ukobizaba, and concluded that the Trial Chamber was not unreasonable in believing Witness HH's testimony on that issue. The other alleged inconsistencies, contradictions or exaggerations mentioned by the Appellant do not relate directly to Witness HH's observation of the shooting of Charles Ukobizaba and even if true, would not affect the finding that the Appellant killed Charles Ukobizaba.[419]

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[412] Appeal Brief (G. Ntakirutimana), para. 86.
[413] *Id.*, para. 87.
[414] *Id.*, para. 88.
[415] *Id.*, para. 89.
[416] *Id.*, para. 78.
[417] *Id.*, para. 90.
[418] *Id.*, para. 90.
[419] In fact, the Trial Chamber expressly considered how the Defence's various challenges to the credibility of Witness HH's testimony on other issues – the challenges which largely parallel those brought by the Appellant now – affect the credibility of Witness HH on the issue of the shooting of Charles Ukobizaba. The Trial Chamber noted that these challenges "d[id] not reduce [Witness HH's] credibility in the present context." Trial Judgement, para. 373.

(ii) Witness GG

a. General Attack on Credibility

236. Gérard Ntakirutimana submits that Witness GG was not credible because the Trial Chamber rejected many of his claims, including, notably, that the Appellant shot Ignace Rugwizangoga, that he was at Mubuga School, and that he was a leader at the Muyira Hill attack. Gérard Ntakirutimana contends that these claims were not mistakes or memory lapses on the part of the witness; rather, they show that Witness GG lied.[420]

237. An examination of the findings of the Trial Chamber in relation to the instances mentioned by Gérard Ntakirutimana shows that the Trial Chamber did not reject Witness GG's evidence due to credibility concerns,[421] but rather found that the evidence presented, whether derived from Witness GG's testimony or from elsewhere, was insufficient to prove a fact beyond reasonable doubt.[422] The fact that a witness's testimony may not provide sufficient detail to prove a particular fact beyond reasonable doubt does not mean that the witness's testimony should be discredited.

238. The Appellant next challenges the Trial Chamber's finding that Witness GG could not read and its use of this finding to forgive inconsistencies in Witness GG's testimony. In support of his contention, the Appellant asserts that, in *Kayishema and Ruzindana*, Witness GG confirmed his witness statement and signature and never claimed he could not read; yet, in this case, Witness GG indicated that he had not (and could not) read his statement, that he had not signed it, and that someone had probably forged his signature.[423] The Appellant also submits that Witness GG voluntarily spelled out complicated words for the Trial Chamber, even correcting Defence counsel on the spelling of "Nbarybukeye,"[424] yet on cross-examination he denied having spelled names during his testimony. Third, the Appellant points out that all four investigators who were involved in taking GG's statements noted that GG could write Kinyarwanda.[425]

239. The Appeals Chamber recalls that the Appellant presented this challenge in an earlier motion to this Chamber.[426] The Appellant contended, as he does in his brief here, that Witness GG had personally spelled names of people and places while testifying before the Trial Chamber,

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[420] Appeal Brief (G. Ntakirutimana), paras. 94-95.
[421] In fact, the Trial Chamber reiterated several times that Witness GG was credible (*see* Trial Judgement, paras 238, 373, 535, 634, 682).
[422] Trial Judgement, paras. 535 (shooting of Ignace Rugwizangoga), 615 (presence of Gérard Ntakirutimana at Mubuga School), 636 (as to whether Gérard Ntakirutimana was a leader at the Muyira Hill attack).
[423] Appeal Brief (G. Ntakirutimana), para. 96.
[424] *Id.*
[425] *Id.*

despite having claimed to be illiterate. In response, the Prosecution submitted that it was in fact the court interpreter, and not the witness, who had spelled out the names.[427] In support of this argument, the Prosecution presented a "Certification of audio transcripts by Mathias Ruzindana, Reviser; Language Services Section, 3 September 2003," and an internal Memorandum sent by a Prosecution Appeals Counsel to members of the trial team.[428] The Appeals Chamber noted in its Decision of 24 June 2004 that there were "legitimate doubts on the accuracy of the [trial] transcript as to whether it was Witness GG or the interpreter who had spelled names during the Witness' testimony before the Trial Chamber."[429] In order to ensure the accuracy and reliability of the transcript, the Appeals Chamber ordered the Registry to review the transcript of Witness GG's testimony and to submit to the Appeals Chamber and the parties a newly certified copy of the accurate transcript.[430] The Registry complied with these orders on 8 July 2004. The Appellant has not presented any new submission after the receipt of the material from the Registry.

240. Having examined the transcript, as corrected by the Registry, the Appeals Chamber now concludes that the evidence adduced by the Appellant does not establish that the witness has intentionally misled the Trial Chamber as to his literacy. The witness's credibility is therefore not affected.

241. Gérard Ntakirutimana also asserts that Witness GG's "fabricated" statement regarding his literacy prevented him from testing Witness GG's evidence. In this connection, the Appellant submits first that, when asked to identify a location on a sketch, Witness GG replied that he could not read, and that the Presiding Judge thus suggested not using the sketch.[431] Second, the Appellant contends that, when questioned about material inconsistencies between a prior statement and his testimony, Witness GG replied that he could not read his statement and that he had not signed it or countersigned each page, yet the next day Witness GG admitted that he had signed the statement.[432] The Appellant concludes that the Trial Chamber accepted this "ludicrous" claim rather than finding that Witness GG lied to avoid cross-examination.[433]

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[426] "Defence Motion to Strike Annex B from the Prosecution Response Brief, and for Re-Certification of the Record," filed on 2 March 2004.
[427] "Prosecution Response to Defence Motion to Strike Annex B from the Prosecution Response Brief, and for Re-Certification of the Record," filed on 11 March 2004.
[428] This procedural history, as well as both supporting documents submitted by the Prosecution, are described in the Appeals Chamber's Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, rendered on 24 June 2004.
[429] Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, 24 June 2004.
[430] *See Ibid.* and Decision on Registrar's Submission Under Rule 33B, 7 July 2004.
[431] Appeal Brief (G. Ntakirutimana), para. 97(i).
[432] *Id.*, para. 97(ii).
[433] *Id.*, para. 97. In this connection, the Appellant refers to para. 231 of the Trial Judgement, but it does not seem that this paragraph is relevant to the issue at hand.

242. The Appeals Chamber is not convinced that these instances show that the Appellant was prevented from testing Witness GG's evidence under a false pretext. First, as found above, the Appellant has not established that the witness intentionally misled the Trial Chamber as to his literacy. As to the issue of Witness GG's ability to use sketches, the Appeals Chamber is of the view that this is a collateral matter and that the Appellant could test Witness GG's evidence otherwise.[434] As to questions relating to Witness GG's answers on the subject of his prior statements, the Appeals Chamber notes that Witness GG initially denied having signed a statement,[435] but he subsequently corrected this and recognized his signature.[436] It was thus left to the Trial Chamber to determine how this affected Witness GG's credibility. In the Appeals Chamber's opinion, the Appellant has not shown that the Trial Chamber was unreasonable in its treatment of GG's testimony on this subject, despite bald assertions to this effect. Accordingly, this argument fails.

243. Finally, Gérard Ntakirutimana points to alleged inconsistencies between Witness GG's testimony in this case and his testimony in *Kayishema and Ruzindana*.[437] The Appellant argues that when he was challenged with these inconsistencies before the Trial Chamber, the witness attempted to explain them by claiming that his testimony in *Kayishema and Ruzindana* was not recorded correctly by the court reporters. The Appellant contends that the Trial Chamber erroneously credited his explanations, because it understood these as errors made by investigators, not by court reporters.[438] This shows, the Appellant argues, that the Trial Chamber unreasonably ignored the Defence argument and the contradictions in Witness GG's testimonies.

244. While the Appellant is correct that the Trial Chamber erred in treating the omission in question as one made by an investigator rather than a court reporter, that rationale was not the only reason the Trial Chamber credited Witness GG's testimony. The Trial Chamber stated that it accepted his testimony "[a]fter having observed the witness giving evidence."[439] Thus, the Chamber credited Witness GG's testimony not only because of the recording error (about which it was mistaken), but also because it was in a position to observe his demeanour and assess his credibility for itself. The Appeals Chamber is loathe to disturb such credibility assessments on review, and the Appellant has not supplied sufficient reasons to doubt that the Trial Chamber's credibility assessment was in error.

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[434] *See* T. 24 September 2001, pp. 127 and foll.
[435] T. 24 September 2001, pp. 111-114.
[436] T. 25 September 2001, p. 68.
[437] Appeal Brief (G. Ntakirutimana), para. 99.
[438] *Id.*, para. 99 (quoting Trial Judgement, para. 634).
[439] Trial Judgement, para. 369.

b. Shooting of Charles Ukobizaba

245. The Appellant asserts that Witness GG's testimony regarding the shooting of Charles Ukobizaba was confusing and contradicted by his pre-trial statements.[440]

246. The Appeals Chamber notes that the Trial Chamber considered these alleged contradictions and concluded that Witness GG's testimony concerning the killing of Ukobizaba appeared credible.[441] The Trial Chamber accepted the witness's explanations for the variations.[442] The Appellant has not submitted any argument to show that the Trial Chamber acted unreasonably in crediting the witness's explanations, and in accepting as credible the evidence he gave in open court. The Appeals Chamber considers that the Trial Chamber's conclusion that those parts of the witness's testimony were credible is not unreasonable.

247. The Appellant also alleges that Witness GG testified in *Kayishema and Ruzindana* that he first saw a gun on 14 May 1994. However, GG testified in this case that he saw Gérard Ntakirutimana with a gun on 16 April 1994.[443] In the view of the Appeals Chamber, if the Trial Chamber was effectively presented with this contradiction, it gave more credence to the testimony of GG in this case. The Appellant has not demonstrated that it was unreasonable of the Trial Chamber to do so.

248. As to the Appellant's arguments that Witness GG was more precise about the times of the attack in his *Kayishema and Ruzindana* testimony than in his testimony in this case, the Appeals Chamber is not convinced that this suffices to show that the Trial Chamber should not have relied on Witness GG's testimony. Indeed, it is possible that the witness remembered the events more clearly at the time of his earlier testimony in *Kayishema and Ruzindana*, and he might have been more hesitant to give precise times when testifying four years later.

249. Lastly, the Appellant points to Witness GG's testimony that he went to hide on the first floor of the hospital after the shooting and "found people cutting others up." This, the Appellant argues, is contradicted by Baghel, Witness MM and Witness FF, who said the first floor was locked throughout; no witness testified to violence occurring there.[444]

250. The Appeals Chamber considers that the evidence on which the Appellant seeks to rely does not support his contention. While Witness MM did testify that, in the days prior to the attack, the

[440] Appeal Brief (G. Ntakirutimana), para. 101.
[441] Trial Judgement, paras. 369, 373.
[442] *Id.*, para. 369.
[443] Appeal Brief (G. Ntakirutimana), para 101(viii).
[444] Appeal Brief (G. Ntakirutimana), para. 101.

Appellant closed the first floor of the hospital to the refugees staying at the Mugonero Complex,[445] this does not necessarily mean that the floor remained inaccessible the day of the attack. As to the Appellant's reliance on the testimony of Witness FF, the citation of the record he provides does not contain any reference to the closure of the hospital's first floor, and therefore cannot help his argument. Finally, the testimony of Witness Baghel was too qualified and imprecise to support an inference that Witness GG was lying when he testified that he hid on the first floor of the hospital.[446]

c. Attack Sometime in Mid-May at Muyira Hill

251. Gérard Ntakirutimana claims that Witness GG's testimony on this subject was confused, and contradicted and inconsistent with his testimony in *Kayishema and Ruzindana.*[447]

252. As discussed in Section II.A.1.(b)(ii)e., the conviction based on these particular allegations has been set aside due to insufficient notice in the indictment. Moreover, the Appeals Chamber considers that the alleged inconsistencies are not of such magnitude that, even if proven true, they could discredit Witness GG's overall credibility to such an extent that no reasonable Trial Chamber would have relied on parts of his testimony to sustain convictions.

d. Witness GG's Testimony that Elizaphan Ntakirutimana Participated in an Attack at Mubuga in mid-May, and that He Ordered the Removal of the Murambi Church Roof

253. The Appellant submits that Witness GG's statements regarding the attack at Mubuga further demonstrate his lack of credibility. In this connection, the Appellant points to a number of apparent inconsistencies, including GG's failure to mention the Appellants' involvement at any time prior to trial, the moment of the event, the identity of the victims, and the assertion that Elizaphan Ntakirutimana killed a certain Habayo.[448] The Appellant also argues that Witness GG's extensive testimony in *Kayishema and Ruzindana* and his statement to African Rights about the removal of the Murambi church roof contradict many parts of his evidence in this case.[449] Finally, the Appellant asserts that Witness GG first testified that he did not hear Elizaphan Ntakirutimana give

[445] T. 19 September 2001, p. 56.
[446] *See* T. 18 September 2001, pp. 127-128.
[447] Appeal Brief (G. Ntakirutimana), paras. 102-106.
[448] Appeal Brief (G. Ntakirutimana), paras. 107-108.
[449] *Id.*, paras. 109-110.

reasons for ordering the removal of the church roof but later testified that Elizaphan Ntakirutimana said it was to deny shelter to Tutsis.[450]

254. As the Appellant acknowledges, the Trial Chamber made no finding against him regarding a Bisesero-area event based on this evidence.[451] The Appellant relies on the alleged inconsistencies described above only in support of his general challenge to Witness GG's credibility. As already explained, a Trial Chamber is free to accept a portion of a witness's testimony as credible even if it rejects other portions of his testimony. Therefore, even if the Appellant were to succeed in showing that Witness GG could not be believed with respect to the question of whether Elizaphan Ntakirutimana was present during the killings at Mubuga and transported the attackers, it does not follow that the Trial Chamber was unreasonable in relying on Witness GG's evidence with respect to other factual findings underlying Gérard Ntakirutimana convictions. An appellant who wishes a court to draw the inference that a particular witness cannot be credited at all on the grounds that a particular portion of that witness's testimony is wrought with irredeemable inconsistencies has a high evidentiary burden: he or she must explain why the alleged inconsistencies are so fatal to the witness's overall credibility that they permeate his entire testimony and render all of it incredible.

255. The Appeals Chamber considers that the Appellant here fails to meet this high evidentiary burden. He fails to argue any connection between the alleged inconsistencies and the supposed untruthfulness of Witness GG in the rest of his testimony. The contradictions on which the Appellant relies are, in any event, not significant enough to cast doubt on the overall truthfulness of the witness. Witness GG's pre-trial statements were very brief, particularly with respect to the Bisesero events, and therefore may not have reflected all of the witness's observations to which he later testified at trial. As for the alleged inconsistency with Witness GG's evidence in *Kayishema and Ruzindana*, that testimony is ambiguous enough to support an inference that it referred to a different Mubuga event. Even if the event was the same, as the Appellants were not at trial in that case, the witness's failure to mention their presence during his testimony is not, by itself, sufficient to cast doubt upon his testimony in this case that the Appellants were present during the same events. The same reasoning applies to the events in Murambi: while the witness did testify in *Kayishema and Ruzindana* about attacks in Murambi generally, he was not asked about events at the church, and so may not have mentioned the Appellants' presence there. The additional discrepancies alleged by the Appellant are also insufficient to show that they infect the entire testimony of Witness GG so that no reasonable Trial Chamber could credit even a portion of it.

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[450] *Id.*, para. 111.
[451] *See* Trial Judgement, para. 615 ("In relation to Gérard Ntakirutimana the Chamber notes the paucity of evidence and finds that the Prosecution has not proved beyond a reasonable doubt that he participated in the same attack at Mubuga Primary School.").

e. Witness GG's Political Motivation

256. The Appellant contends that GG was politically motivated to convict the Appellants and that all factual findings based on his testimony are erroneous and produced a miscarriage of justice. For reasons given in Section IV.B.1. below (Common Ground of Appeal on the Existence of a Political Campaign against the Appellants), the Appeals Chamber rejects the claim that Witness GG's testimony was unreliable and not credible because it was politically motivated.

f. Alleged Inconsistencies Between the Evidence of Witness HH and Witness GG

257. The Appellant contends that, apart from credibility concerns as to Witness HH and GG, their accounts contradict rather than corroborate each other on the killing of Ukobizaba. In particular, the Appellant submits the following: (a) While both witnesses said the shooting occurred in a courtyard, each indicated a different courtyard; (b) HH said that Gérard Ntakirutimana was facing Ukobizaba as though having a conversation, that he was holding a gun close to his victim, and that the two men stood with nobody moving for some time, whereas GG said that Gérard Ntakirutimana called out to Ukobizaba and shot him when he turned, which would suggest some distance between them; (c) HH said that Ukobizaba gave a set of keys to Gérard Ntakirutimana after some conversation, whereas GG said that Gérard Ntakirutimana took the keys after Ukobizaba was shot and fell; and (d) although the Trial Chamber found that both witnesses agreed that the shooting occurred "around noon," Witness GG was inconsistent as to the time of the shooting, while Witness HH was not prepared to commit to a time.[452]

258. The Trial Chamber concluded that the variations between the accounts given by both witnesses were minor and could not outweigh the "overwhelming and convincing similarities" between the two accounts.[453] This conclusion was not unreasonable. On the whole, the two witnesses' testimonies corroborated one another: both testified that the Appellant faced Ukobizaba alone in a courtyard, shot him with a pistol, and took an object from him.[454] The Appellant correctly notes that there are differences between the witnesses' testimonies, but those differences are more atmospheric than substantive. Witness GG observed the shooting of Ukobizaba as he was trying to find a hiding place in the wake of the attack on Mugonero – as he was, in the Prosecution's formulation, "running for his life."[455] Witness HH, by contrast, witnessed the shooting through a window from inside a building where he was hiding. Both witnesses were under tremendous stress, and although their recollections of minor details may not have been perfectly precise, their memory

[452] Appeal Brief (G. Ntakirutimana), para. 91.
[453] Trial Judgement, para. 371.
[454] *Id.*, paras. 365-371.
[455] Prosecution Response 62, para. 5.82 (citing T. 20 September 2001, pp.143-146).

of important points was clear, and they corroborated one another on these major points. Having considered these factors, the Trial Chamber not unreasonably concluded that the variations in their accounts did not undermine the core of their testimonies or the credibility of their statements.

g. Allegation that Witness HH and Witness GG Colluded

259. The Appellant asserts that, in their statements, both Witnesses HH and GG declare that Gérard Ntakirutimana went to Ukobizaba's office after shooting him. Yet both witnesses disavowed this at trial, HH claiming that he only assumed it, GG denying that he ever said it. Gérard Ntakirutimana contends that these supposed errors raise serious concerns about the integrity of the investigation, suggesting that they were collaborators, albeit inefficient ones.[456]

260. The Appellant has not adduced enough evidence to substantiate an inference that the two witnesses collaborated in the preparation of their trial testimony. The aforementioned inconsistencies between the pre-trial statements and the evidence the witnesses gave in court are not sufficient to establish collusion between the witnesses.

(iii) The Absence of Proof of Death of Ukobizaba and Esdras

261. The Appellant contends that the Trial Chamber unreasonably assumed that Ukobizaba and Esdras were killed. He asserts that the evidence of Witness HH only showed that they were shot and fell; however, many people who were shot survived. Absent proof of death, the Appellant argues, the Trial Chamber should not have assumed it. The Appellant adds that the Trial Chamber's finding that MM testified that Gérard Ntakirutimana mentioned "Ukobizaba" as being among the dead[457] is simply wrong; MM did not testify to that.[458]

262. The Appeals Chamber does not consider that the Trial Chamber was unreasonable in drawing the inference that Charles Ukobizaba was killed from the testimonies of the witnesses, such as the testimony of Witness HH and Witness GG that the Appellant shot at Ukobizaba. It was reasonable to infer from the circumstances that Ukobizaba did not survive: he was shot at close proximity; he fell to the ground; and Witness MM testified that Mika and Ruzindana mentioned the name Ukobizaba while "taking an inventory of the cadavers."[459]

[456] Appeal Brief (G. Ntakirutimana), para. 92.
[457] Trial Judgement, n. 542.
[458] Appeal Brief (G. Ntakirutimana), para. 93.
[459] T. 20 September 2001, p. 67.

263. As to the argument that there was insufficient proof of the death of Esdras, the Appeals Chamber has disallowed the conviction relying on that factual finding due to insufficient notice, and therefore the Appellant's present contention is moot.

(c) Attack on Refugees at the Mugonero Complex (Witness SS)

(i) General Challenge to the Credibility of Witness SS

264. Gérard Ntakirutimana incorporates the arguments of Elizaphan Ntakirutimana's Appeal Brief regarding Witness SS and adds further arguments, notably that Witness SS's awareness of Philip Gourevitch's book *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda* (1998) influenced his testimony and undermined his impartiality, and that his association with the son of Charles Ukobizaba, who has an obvious interest in securing Gérard Ntakirutimana's conviction, casts a further doubt over Witness SS's credibility.[460]

265. These arguments are addressed in IV.B.5. of this Judgement.[461] For reasons given there, the Appellant's general challenge to the credibility of Witness SS fails.

(ii) Witness SS's Mugonero Evidence

266. Gérard Ntakirutimana claims that Witness SS gave two different accounts of meeting Gérard Ntakirutimana as Witness SS was fleeing Mugonero. Witness SS testified that he was running through the forest when he encountered Gérard Ntakirutimana and other attackers, whereas according to his statement he saw Gérard Ntakirutimana and the attackers when he was "trying to get into the bush."[462] The Appellant notes that Witness SS refused to estimate the distance between himself and his attackers because there were no bushes in the courtroom, even though he was able to estimate distances when investigators recorded his statement.[463] The Appellant adds that the testimony of Witness SS is unbelievable and cites further aspects of Witness SS's testimony, including his identification of Gérard Ntakirutimana when firing a shot, his description of the smoking gun, and the general unfolding of the events.[464] The Appellant contends that the Trial Chamber was clearly troubled by Witness SS's testimony and rejected many of his claims, including his observation of the smoking gun and even the claim that Gérard Ntakirutimana shot at him, yet still found the witness's identification of the Appellant to be reliable. The Appellant

[460] Appeal Brief (G. Ntakirutimana), paras. 117-120.
[461] "Common Ground of Appeal on the Existence of a Political Campaign Against the Appellants."
[462] Appeal Brief (G. Ntakirutimana), para. 121.
[463] *Id.*, para. 122.
[464] Appeal Brief (G. Ntakirutimana), para. 123.

submits that the Trial Chamber failed to grasp that Witness SS was inventing facts in an effort to convince the Chamber of Gérard Ntakirutimana's guilt.[465]

267. Although, as the Appellant argues, Witness SS used different language in describing his encounter with Gérard Ntakirutimana in the witness statement and at trial, the Appeals Chamber considers that this difference does not give rise to an inference of inconsistency. Describing his flight from the Mugonero Complex in his witness statement, Witness SS stated that he "passed by the girls dormitory trying to get to the bush. There, however, I met another group of attackers,"[466] among whom he claimed to have seen Gérard Ntakirutimana. At trial the witness stated that he met Gérard Ntakirutimana in the forest.[467] The difference between these two statements is not significant. Furthermore, when confronted with this discrepancy, the witness credibly explained that when talking about "the bush," he meant a place where there was vegetation, and that when giving his prior statement, he was very close to the forest to which he referred.[468]

268. The Appeals Chamber is not persuaded that the witness's difficulty in estimating distances undermines his credibility. The witness consistently refused to estimate distances in his pre-trial statement as well as at trial, explaining that it was difficult for him to estimate distances indoors when the relevant situation had occurred outside. Other passages of his testimony consistently show that he had difficulty in estimating distances.[469] The distances were estimated by the investigators or by counsel and members of the Trial Chamber. The witness explained that estimating the relevant distance in his pre-trial statement was easier, as he could show the investigators outside, but still stressed that he himself had not estimated the distance, but rather that the investigators had done so.

269. The Trial Chamber was not convinced beyond reasonable doubt that Gérard Ntakirutimana shot at Witness SS, because Witness SS did not actually see Gérard Ntakirutimana aim or fire at him and, under the circumstances, it was not very likely that the witness could have seen the smoke come out of the Appellant's gun. In the opinion of the Appeals Chamber, this conclusion does not necessarily imply that the witness was untruthful. Although the witness mentioned the detail of the gun smoke for the first time only at trial and, in the Trial Chamber's considered assessment, was mistaken about having seen the gun fired, the witness's error with respect to this important detail does not suffice to impugn his testimony as a whole. The Trial Chamber, as the assessor of the witness's demeanour, was best placed to ascertain where the witness was embellishing his testimony and to separate these parts from the core of the witness's evidence.

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[465] *Id.*, para. 124.
[466] Witness statement of 18 December 2001, p. 4.
[467] T. 31 October 2001, pp. 59 *et seq.*
[468] *Id.*, pp. 60, 61.
[469] *See, e.g.*, T. 30 October 2001, pp. 99, 110, 111, 115-117,124, 135; T. 31 October 2001, pp. 81, 105, 106, 108.

270. The Trial Chamber repeatedly stated that SS was a credible witness,[470] even though it was not convinced beyond reasonable doubt that the evidence presented showed that Gérard Ntakirutimana shot at him.[471] Witness SS said that he had recognized Gérard Ntakirutimana, among others, even if he had just given a quick look to the group of attackers. This statement appears credible, as he had known Gérard Ntakirutimana by sight for several years. Furthermore, the witness explained that, as stated in his witness statement, he believed that the attackers were carrying guns in addition to traditional weapons because he saw Gérard Ntakirutimana carry a gun. An examination of his witness statement discloses that Witness SS first spoke to what kinds of weapons the attackers were carrying before turning to speak more directly about the weapon that Gérard Ntakirutimana was allegedly carrying. As a result, the Trial Chamber could reasonably rely on Witness SS's recognition of Gérard Ntakirutimana as member of the group of attackers even if it rejected Witness SS's submission that Gérard Ntakirutimana shot at him in the forest.

(iii) Witness SS's Sighting of Elizaphan Ntakirutimana at Mugonero

271. Gérard Ntakirutimana submits that Witness SS recounted seeing Elizaphan Ntakirutimana at Mugonero three times before the attack, including seeing him receive a letter from refugees seeking protection. However, the Trial Chamber found, and according to Gérard Ntakirutimana the Prosecution accepted, that Elizaphan Ntakirutimana was not at Mugonero at that time, but rather was delivering the letter to the *bourgmestre*. The Appellant submits that the Trial Chamber erred when it determined that Witness SS was credible yet failed to explain its reasons for disregarding Witness SS's incorrect testimony on this point when determining that he was generally credible.[472]

272. In the Appeals Chamber's view, even if Witness SS testified that he saw Elizaphan Ntakirutimana on 16 April 1994, before the beginning of the attacks at the Mugonero Complex, this does not necessarily undermine his credibility. Acknowledging once again the deference that is ordinarily accorded to credibility findings of the Trial Chamber, the Appeals Chamber in this instance is not convinced that the Trial Chamber was unreasonable in crediting Witness SS's testimony on this point.

(iv) Witness SS's Evidence Regarding Elizaphan Ntakirutimana at a Murambi Attack Between May and June 1994

273. Gérard Ntakirutimana asserts that Witness SS's testimony regarding an attack at Murambi is not credible. Gérard Ntakirutimana recalls that Witness SS testified that he encountered Elizaphan

[470] Trial Judgement, para. 577 (citing paras. 277-285, 388-393, 577-579, 623-628, 658-661, 685-686).
[471] *Id.*, para. 392.
[472] Appeal Brief (G. Ntakirutimana), para. 125.

Ntakirutimana in a vehicle filled with attackers at Murambi and that he did not notice it until the vehicle was very close. Witness SS gave two explanations of why he did not hear the vehicle approach until it was very close: that he was "out of his head" because he was on his way to commit suicide, and that he was walking on banana leaves that drowned out the noise. According to Gérard Ntakirutimana, the Trial Chamber unreasonably accepted the explanations of Witness SS.[473]

274. Gérard Ntakirutimana also takes issue with Witness SS's claim that "later on" he was hiding and heard attackers say that Elizaphan Ntakirutimana had told them that God ordered that the Tutsi be killed. Gérard Ntakirutimana submits that it is highly unlikely that attackers would have explained to each other why they had engaged in a chase that was already over. While the Trial Chamber rejected this as hearsay, the Appellant argues that it should have gone further and recognized this as evidence of Witness SS's bias and willingness to lie.[474]

275. In his testimony, Witness SS described in detail his sighting of Elizaphan Ntakirutimana at the Murambi attack. His testimony was consistent with his witness statement. He explained that he saw Elizaphan Ntakirutimana driving his car carrying attackers when he crossed a road. He could recognize Elizaphan Ntakirutimana because he knew him since long before the attack, because it was daytime, and because he was a short distance away. Witness SS explained that shortly after he started running away from the attackers, he turned around to see what was happening behind him and could see Elizaphan Ntakirutimana standing right next to his car and watching the attackers chasing him.[475] The witness explained that he had not heard the vehicle approaching because he was walking on dry banana leaves in a plantation, which made a loud noise, and because he was about to commit suicide and therefore had "kind of lost [his] head."[476] The Appeals Chamber does not consider that the Trial Chamber was unreasonable in accepting Witness SS's testimony on this.

276. As to Witness SS's assertion that he heard attackers say that Pastor Ntakirutimana had said that God had ordered that the Tutsi should be killed and exterminated,[477] the Trial Chamber did not rely on this account because Witness SS had not personally heard Elizaphan Ntakirutimana make such a remark.[478] Therefore, this part of Witness SS's testimony formed no basis for the Trial Chamber's verdict. Moreover, even if Witness SS was untruthful in this part of his testimony, the Trial Chamber could still have found him credible with respect to other parts, on which it did rely in reaching its verdict. The Appeals Chamber does not consider that the Trial Chamber was unreasonable in its treatment of this part of Witness SS's evidence. The arguments raised by

[473] Appeal Brief (G. Ntakirutimana), paras. 126-127.
[474] *Id.*, para. 127.
[475] T. 31 October 2001, p. 120.
[476] T. 31 October 2001, pp. 121,123.
[477] T. 30 October 2001, pp. 131.

Elizaphan Ntakirutimana in relation to Witness SS's evidence have been addressed in Section III.C. of the present Judgement.

(v) Witness SS's Evidence of Gérard Ntakirutimana's Presence at a Mubuga School Incident

277. The Appellant alleges that Witness SS claimed for the first time in his testimony that he personally saw Gérard Ntakirutimana kill Tutsi at Mubuga Primary School, whereas his pre-trial statement merely alleged that he saw Gérard Ntakirutimana shooting at people hiding in the school. Gérard Ntakirutimana asserts that Witness SS invented a tale of Gérard Ntakirutimana's going to the door and shooting inside the school. He submits that the Trial Chamber properly ignored this part of Witness SS's testimony but adds that the Trial Chamber should have used this to question Witness SS's credibility. Gérard Ntakirutimana also contends that Witness SS was coached on how to respond to allegations of inconsistencies with his pre-trial statement.[479]

278. In his witness statement and his testimony, Witness SS described that he saw Gérard Ntakirutimana shoot at refugees in and outside of the school. At trial, Witness SS also stated that Gérard Ntakirutimana had in fact killed people and that he later saw dead bodies in and outside of the school. The Appeals Chamber is not convinced that there is a contradiction between Witness SS's pre-trial statement and his testimony. The Appeals Chamber notes that Witness SS's pre-trial statement was very short. Even if, in his statement, Witness SS did not say expressly that the actions of Gérard Ntakirutimana had resulted in the death of people, this could reasonably be inferred in the circumstances. This alleged discrepancy between Witness SS's trial testimony and his prior statement is therefore not sufficient to show that Witness SS had a "demonstrated willingness to lie and embellish,"[480] and that the Trial Chamber could not reasonably rely on Witness SS's testimony.

(d) Attacks on Refugees at the Mugonero Complex (Witnesses YY, GG, HH, SS)

(i) Witness YY: General Credibility Challenge

279. The Appellant asserts that the Trial Chamber should not have accepted any part of Witness YY's evidence because he evidently invented at trial that Gérard Ntakirutimana killed Kagemana and Macantaraga. The Appellant argues that the evidence clearly showed that Kagemana was killed later by unknown persons, and the Trial Chamber itself concluded that Witness YY had not provided sufficient information to warrant a conclusion that Gérard Ntakirutimana killed

[478] Trial Judgement, para. 578.
[479] Appeal Brief (G. Ntakirutimana), paras. 128-131.

Macantaraga. The Appellant contends that even the Trial Chamber was "not entirely satisfied" with Witness YY's explanations of inconsistencies between his statement and his testimony, finding them to be "somewhat remarkable."[481]

280. As already explained, the settled jurisprudence of the Tribunal permits a Trial Chamber to accept a witness's testimony on one issue while rejecting it with respect to another. The Trial Chamber's decision not to accept Witness YY's evidence that Gérard Ntakirutimana killed Kagemana or Macantaraga[482] does not necessarily mean that the witness's evidence could not be accepted on other factual matters. The Trial Chamber concluded that the evidence was insufficient to show that Gérard Ntakirutimana killed Kagemana and Macantaraga. The Trial Chamber's decision not to accept Witness YY's evidence on this point, however, does not cast doubt upon the credibility of the witness's overall testimony.

(ii) Witness YY: Credibility Challenge with Respect to the Events in Murambi Church and the Killing of Nzamwita's Wife at Muyira Hill

281. The Appellant submits that Witness YY's credibility was damaged by his allegation, made for the first time at trial, that Gérard Ntakirutimana was involved in removing the roof from the Murambi Church and that both Appellants were involved in killings at Murambi Church. The Appellant argues that the Trial Chamber should have concluded, because these allegations had not been made in the witness's pre-trial statement, that Witness YY was not a trustworthy witness.[483] The Appellant adds that this supported by other examples of what he believes was inconsistent or evasive testimony.[484] The Appellant also submits that other witnesses contradicted Witness YY's evidence, which further undermines his testimony and his credibility.[485] Finally, the Appellant avers that Witness YY's testimony that Gérard Ntakirutimana shot Nzamwita's wife at Muyira Hill was not plausible.[486]

282. The inconsistencies alleged by the Appellant relate to two issues considered in the Trial Judgement: (a) the attack at Murambi Church and (b) the killing of Nzamwita's wife in the course of an attack at Muyira Hill. With respect to the first issue, the Appeals Chamber, in Section III.C.4.(a) of this Judgement, analyses an analogous argument of Elizaphan Ntakirutimana to the credibility of Witness YY. The Appeals Chamber concludes that Witness YY's account of the

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[480] *Id.*
[481] Appeal Brief (G. Ntakirutimana), paras. 134-137 (quoting Trial Judgement, paras. 274, 357).
[482] Trial Judgement, para. 404.
[483] Appeal Brief (G. Ntakirutimana), para. 138.
[484] *Id.*, para. 139.
[485] *Id.*, para. 140.
[486] *Id.*, para. 141.

shooting that took place at the Murambi Church was not credible and that no reasonable Trial Chamber would have accepted his testimony on that point. With respect to the second issue, the Appeals Chamber concluded, in Section II.A.1(b)(ii)f. of the Judgement, that the Appellant lacked sufficient notice about the allegation that he shot and killed Nzamwita's wife, and that the Trial Chamber erred in basing his conviction on that finding. Thus, the inconsistencies now alleged by the Appellant, even if true, would only further support the Appeals Chamber's conclusion in Section III.C.4.(a) and would have no effect with respect to the Trial Chamber's conviction invalidated by the Appeals Chamber in Section II.A.1.(b)(ii)f. To be relevant to the remaining findings in the Trial Judgement that are based on the testimony of Witness YY, the Appellant must show how the inconsistencies alleged above cast the overall credibility of the witness into such doubt that no reasonable Trial Chamber would have accepted his testimony on any other matter. The Appellant fails to make that high showing. Moreover, with the exception of the disallowed conviction for the attack on Muyira Hill, any other conviction-relevant factual finding where the Trial Chamber relied on the testimony given by Witness YY was corroborated by the testimony of other witnesses.[487] Therefore, even if the testimony of Witness YY were altogether excluded as not credible, the Trial Chamber's factual findings would be unaffected.

(iii) Contradictory Evidence as to the Sightings of Gérard Ntakirutimana at Mugonero

283. Gérard Ntakirutimana argues that, even if credible, the evidence of Witnesses GG, HH, SS, KK, PP and YY is so confused and contradictory regarding Gérard Ntakirutimana's presence at Mugonero that it cannot prove beyond a reasonable doubt that he was there.[488]

284. The alleged contradictions at paragraphs 144 and 145 of the Appellant's Brief relate to the arrival of vehicles carrying attackers at Mugonero on 16 April 1994 and to whether Gérard Ntakirutimana accompanied these vehicles. In this connection, the Trial Chamber has concluded that the evidence on these issues "d[id] not provide a sufficiently detailed or coherent picture to conclude beyond a reasonable doubt that Gérard Ntakirutimana conveyed attackers to the Complex on the morning of 16 April 1994."[489] The contradictions which the Appellant adduces here have no bearing on the Trial Chamber's conclusion that the Appellant was present during and participated in the attack on refugees at Mugonero.

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[487] *See* Trial Judgement, paras. 365-373 (relying on the evidence of Witnesses HH and GG that the Appellant shot Charles Ukobizaba, and therefore was present during the attack on the Mugonero Complex); paras. 388-393 (finding, on the basis of the testimony of Witness SS, that the Appellant shot at him on the day in question in the vicinity of the Mugonero Complex, a finding further supporting a conclusion that the Appellant was present in the complex on that day); paras. 702-704 (relying on the testimony of Witness HH to find that the Appellant participated in attacks in unspecified locations in Bisesero).
[488] *Id.*, paras. 143-147.
[489] Trial Judgement, para. 292.

285. The Appellant also contends that the evidence was contradictory on the question of where Gérard Ntakirutimana might have been at the start of the attack on the Complex.[490] However, the Trial Chamber made no finding on this issue[491] and the Appeals Chamber considers that, even if the evidence were found inconclusive, this would not affect the finding that Gérard Ntakirutimana killed Ukobizaba around midday. Accordingly, this argument fails.

286. The Appellant also notes that Witnesses GG and HH testified that, around midday, Gérard Ntakirutimana was in the hospital courtyard shooting Ukobizaba; however, this seems to contradict the evidence of Witnesses YY and SS who both placed the Appellant elsewhere around that time.[492] The Appeals Chamber finds that the evidence presented by the witnesses in question is not so conflicting regarding Gérard Ntakirutimana's presence that the Trial Chamber was unreasonable in finding, beyond a reasonable doubt, that he was at Mugonero. The fact that several witnesses were in the same general area does not necessarily mean that their observations about the identity and the location of those present have to be identical for the witnesses to be considered credible. The differences in their respective statements can be explained by the place from where these witnesses made their observations, as well as by the fact that the witnesses did not give exact times for their observations. The Appeals Chamber has already rejected the Appellant's argument that the evidence given by Witnesses HH and GG was so contradictory as to make unreasonable the Trial Chamber's finding that he shot Charles Ukobizaba in the Mugonero hospital courtyard on 16 April 1994. This is also sufficient to support a conclusion that the Appellant was present during the attack on the Mugonero Complex on 16 April 1994. The Trial Chamber acted reasonably in concluding that "[t]he fact that the Accused was observed in other locations by Witness YY . . . and [Witness] SS . . . does not exclude his presence during the shooting of Ukobizaba."[493] The distances within the Complex made it possible for Gérard Ntakirutimana to move from one location to another within a short time.

287. Finally, the Appellant contends that, despite the obvious contradictions between the testimonies of the Prosecution witnesses, the Trial Chamber unreasonably disbelieved the evidence of Defence Witness 25 which corroborated the Appellant's alibi.[494] Witness 25 testified that he saw the Appellants in Gishyita around 1.00-1.30 p.m. from about 80-100 metres, but that he did not approach them because he had been drinking, and he did not want the Pastor to know that since drinking is prohibited for Adventists. The Trial Chamber explained that it was not convinced by this

[490] Appeal Brief (G. Ntakirutimana), paras. 146-147.
[491] In relation to the events of 16 April 1994 at Mugonero, the Trial Chamber found that i) Gérard Ntakirutimana killed Ukobizaba around midday (para. 384); ii) Gérard Ntakirutimana participated in the attack on that day (paras. 393 and 404).
[492] Appeal Brief (G. Ntakirutimana), para. 146.
[493] Trial Judgement, para. 384.

testimony.[495] In the view of the Appeals Chamber, the Appellant has not demonstrated that this was unreasonable.

2. Bisesero Indictment

(a) The Bisesero Findings Based Solely on Testimony of Witness FF

288. Gérard Ntakirutimana argues that no reasonable tribunal could have found Witness FF credible. The Trial Chamber relied upon Witness FF's testimony alone to find that the Appellant (1) pursued and attacked Tutsi with *Interahamwe* at Murambi Hill on or about 18 April 1994; (2) was with attackers and shot at refugees at Gitwe Hill in late April or May; (3) transported attackers and chased and shot Tutsi at Kidashya Hill between April and June 1994; and (4) was with *Interahamwe* and shot at refugees in a forest by a church at Mutiti Hill in June 1994.[496] The Trial Chamber did not rely on Witness FF's testimony with respect to any other factual findings related to the Bisesero Indictment.

289. For reasons explained in Section II.A.1.(b)(ii) of the present Judgement, the Appeals Chamber has quashed the convictions of Gérard Ntakirutimana based on the four findings listed above due to the insufficiency of notice. This conclusion makes the Appellant's challenge to Witness FF's credibility, insofar as it seeks to invalidate the Trial Chamber's findings with respect to the Bisesero Indictment, moot.

290. The Trial Chamber also discussed the evidence given by Witness FF with respect to some events charged in the Mugonero indictment. The Trial Chamber relied on the testimony of Witness FF in three instances. First, the Trial Chamber used the witness's evidence in finding that Gérard Ntakirutimana said, in the week prior to the attack on the Mugonero Complex, that the Hutu patients should leave the hospital.[497] Second, the Trial Chamber used the evidence provided by Witness FF to find that, prior to the attack, the Appellant "simply abandoned the Tutsi patients."[498] The Trial Chamber then observed, "as part of the general context," that "[t]his behaviour [wa]s not in conformity with the general picture painted by the Defence of the Accused as a medical doctor who cared for his patients."[499] Third, the Trial Chamber relied on Witness FF's testimony that she "saw 'soldiers' on board vehicles and *Interahamwe* on foot arrive at the [Mugonero] Complex at

[494] Appeal Brief (G. Ntakirutimana), para. 148.
[495] Trial Judgement, para. 382.
[496] Appeal Brief (G. Ntakirutimana), para. 151.
[497] Trial Judgement, para. 134.
[498] *Id.*, para. 153.
[499] *Id.*, para. 324.

9.00 a.m." on 16 April, and commenced killings, "progress[ing] from the open areas to the ESI Chapel, and thence to the hospital."[500]

291. The first two findings based on the evidence given by Witness FF – that the Appellant told the Hutu patients to leave the hospital and that he abandoned his Tutsi patients – were not used by the Trial Chamber, either on their own or as elements of a broader context, to support any of the convictions it imposed, nor to determine the appropriate sentence for Gérard Ntakirutimana after the conviction. With respect to the last observation given by Witness FF – that attackers arrived at the Mugonero Complex on the morning of 16 April and proceeded to kill the refugees congregating there – the Trial Chamber did not use that observation to make any particular finding. Moreover, the evidence as to the beginning of the attack was also given by other Prosecution witnesses, such as Witnesses GG, HH, YY, SS, MM and PP,[501] as well as by a number of Defence witnesses, such as Witnesses 8, 5, 7, 6, 32 and 9.[502] Any conclusion the Trial Chamber had drawn from these testimonies would have remained the same even if it had disbelieved Witness FF. The credibility of Witness FF is also immaterial with respect to the convictions or the sentence imposed by the Trial Chamber under the Mugonero Indictment. There is consequently no need to address the Appellant's challenge to Witness FF's credibility.

(b) The Bisesero Findings Based Solely on Testimony of Witness HH

292. Witness HH provided uncorroborated evidence of two Bisesero incidents: (1) that around the end of April or the beginning of May, Gérard Ntakirutimana shot and killed Esdras during an attack at Gitwe Primary School; and (2) that Gérard Ntakirutimana headed a group of attackers at Muyira Hill where he shot at Tutsi refugees in June 1994. The Appeals Chamber has already determined that, for lack of sufficient notice, Gérard Ntakirutimana could not be convicted on the basis of the killing of Esdras or the attack at Muyira Hill in June 1994.[503] Therefore, the only remaining finding is that Gérard Ntakirutimana took part in the attack near Gitwe Primary School at the end of April or the beginning of May 1994. For the reasons set out in Section II.B.1.(b) of this Judgement, the Appeals Chamber concludes that the Trial Chamber could reasonably rely on the evidence provided by Witness HH to find Gérard Ntakirutimana guilty of genocide under the Bisesero Indictment.

[500] *Id.*, para. 324.
[501] *Id.*, paras. 322-325.
[502] *Id.*, paras. 326-331.
[503] *See supra* section II.A.1.(b)(ii)

(c) The Bisesero Findings Based Solely on Testimony of Witness YY

293. Gérard Ntakirutimana claims the Trial Chamber unreasonably relied on Witness YY's evidence to find that he had participated in an attack at Muyira Hill and shot and killed the wife of Nzamwita on 13 May 1994. Gérard Ntakirutimana refers to his challenges to Witness YY's credibility in the discussion of the Mugonero events.[504] For reasons given in Sections II.A.1.(b)(ii) and II.B.1.(d) of this Judgement, the Appellant's challenge to this finding of the Trial Chamber is now moot.

(d) The Bisesero Findings Based Solely on Testimony of Witness GG

294. Gérard Ntakirutimana claims the Trial Chamber unreasonably relied on Witness GG's evidence to find that he took part in an attack on Tutsi refugees at Muyira Hill in mid-May 1994.[505] For the reasons set out in Section II.A.1.(b)(ii) of this Judgement, the Appellant's challenge to this finding of the Trial Chamber is now moot.

(e) The Bisesero Findings Based Solely on Testimony of Witness SS

295. Gérard Ntakirutimana claims the Trial Chamber unreasonably relied on Witness SS to find that he participated in an attack at Mubuga Primary School and shot at Tutsi refugees sometime in June 1994. This finding was based solely on Witness SS's testimony. Gérard Ntakirutimana refers to his challenges to Witness SS's credibility in the discussion of the Mugonero events.[506] For the reasons set out in Section II.B.1.(c) of this Judgement, the Appeals Chamber concludes that the Trial Chamber could reasonably rely on the evidence provided by Witness SS to find Gérard Ntakirutimana guilty of genocide under the Bisesero Indictment.

(f) Attending Planning Meetings (Witness UU)

296. Gérard Ntakirutimana also argues that the Trial Chamber erred in relying on the evidence given by Witness UU to find that he attended meetings in Kibuye during which the attacks against the Tutsis were planned.[507] In support, the Appellant asserts a number of challenges to Witness

[504] *Id.*, para. 164.
[505] Appeal Brief (G. Ntakirutimana), para. 165.
[506] *Id.*, para. 166.
[507] The Prosecution objects to the inclusion of this material in the re-filed Appeal Brief because it was not included in Gérard Ntakirutimana's original Appeal Brief, and argues that this action contravened the Order of 21 July 2003 issued by the Pre-Appeal Judge, which required Gérard Ntakirutimana to file a new brief, conforming with the 16 September 2002 Practice Direction on the Length of Briefs and Motions on Appeal. That order, the Prosecution notes, did not authorize the Appellant to include a new substantive section. The Appellant acknowledges that the newly included section contained material not present in his original brief, and does not claim that the order permitted him to do so. The Appellant, however, argues that the Prosecution suffered no prejudice because it was able to respond to the issues raised, and in fact did so. While the Appellant's action is in contravention of the Order of 21 July 2003, and the

UU's credibility.[508] As Gérard Ntakirutimana acknowledges, however, the Trial Chamber has not relied directly on this finding to support any of the convictions.[509] While the Appellant summarily asserts that this finding "affected the outcome of the case,"[510] he fails to present any argument as to how this finding has influenced the verdict and what impact, if any, the setting-aside of this finding would have on the Trial Chamber's verdict. Where the Appellant "fails to make submissions as to how the alleged error led to a miscarriage of justice," the Appeals Chamber need not consider the Appellant's arguments.[511] Accordingly, because the Appellant has presented no argument as to how the reversal of the Trial Chamber's finding that he had attended planning meetings in Kibuye will impact upon the Trial Chamber's verdict, the Appeals Chamber will not consider his arguments.[512]

Appellant is reprimanded for non-compliance, the Appeals Chamber nevertheless agrees that the Prosecution suffered no prejudice and therefore will not disregard the Appellant's arguments on the grounds of non-compliance.

[508] Appeal Brief (G. Ntakirutimana), para. 167.

[509] *Id.*

[510] *Id.*

[511] *Vasiljević* Appeal Judgement, para. 20.

[512] Many of the Appellant's challenges to the credibility of Witness UU were, in any event, considered at length by the Trial Chamber. *See* Trial Judgement, paras. 707-708, 715-716. The Trial Chamber concluded that the witness was credible, and that decision remains reasonable even in light of the Defence's submissions on Appeal.

III. APPEAL OF ELIZAPHAN NTAKIRUTIMANA

297. The Appeals Chamber now considers the issues raised on appeal by Elizaphan Ntakirutimana.

298. In his Appeal Brief, Elizaphan Ntakirutimana contends generally that the Trial Chamber committed a number of recurring legal and factual errors in relation to the Mugonero and Bisesero Indictments which violated his right to a fair trial, thereby occasioning a miscarriage of justice and invalidating the Trial Judgement. The Appeals Chamber notes that the submissions of the Appellant are at times unclear, with alleged legal errors being in reality complaints about the Trial Chamber's factual findings. Nevertheless, the Appeals Chamber has endeavoured to consider all of the submissions presented by the Appellant.

A. The Mugonero Indictment

299. Elizaphan Ntakirutimana challenges the findings of the Trial Chamber made in paragraphs 281 to 283 of the Trial Judgement, and submits that the Trial Chamber erred in its finding that he "conveyed attackers to the Mugonero complex on the morning of 16 April 1994".[513]

300. As the Appeals Chamber found above in relation to the appeal of Gérard Ntakirutimana on the question of the sufficiency of notice, the allegation that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex on 16 April 1994 was a material fact which the Prosecution failed to plead in the Indictment. In addition, as the Prosecution did not cure the resulting defect in the Indictment, the Appeals Chamber found the Trial Chamber to have erred in concluding that a conviction could be based on these un-pleaded facts.[514]

301. In light of these findings, it is not necessary for the Appeals Chamber to consider the merits of Elizaphan Ntakirutimana's submissions on the Trial Chamber's assessment of the evidence of Prosecution Witnesses MM, FF, PP, QQ and UU for the Mugonero Indictment. Even were the Appellant's arguments meritorious, they would have no impact on the findings against him in the Mugonero Indictment. However, the submissions of the Appellant against the Trial Chamber's fact finding process for the Mugonero Indictment are considered, where relevant, in the context of the Appellant's challenges for the Bisesero findings and to the extent that they concern Gérard Ntakirutimana's appeal against his convictions for events in Mugonero and Bisesero.

[513] Appeal Brief (E. Ntakirutimana), pp. 4-28.
[514] Section II.A.1.(b)(i)(c) of the Judgement.

B. Insufficiency of Evidence to Establish That Tutsi Refugees at Mugonero Complex Were Targeted Solely on the Basis of their Ethnicity

302. Elizaphan Ntakirutimana submits that the Trial Chamber erred in fact and law in finding that Tutsi refugees who were attacked at the Mugonero Complex on 16 April 2004 "were targeted solely on the basis of their ethnic group."[515] Although the Appeals Chamber found that the Trial Chamber erred in concluding that a conviction could be based on the unpleaded fact that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex, the Appeals Chamber shall nevertheless consider this ground of appeal as the issues raised also concern Gérard Ntakirutimana.

303. The Appellant argues that "[a] finding that the overwhelming majority of the refugees killed and wounded at Mugonero were Tutsis cannot support a finding that Tutsi refugees were targeted solely on the basis of their ethnic group."[516] In the view of the Appeals Chamber, the finding that the Tutsi seeking refuge at Mugonero were targeted on the basis of their ethnicity has not been shown to be unreasonable. The evidence included testimonies of Witnesses MM, HH, YY, and several others indicating that most of the refugees assembled at the Mugonero Complex were of Tutsi ethnicity.[517] The Trial Chamber was entitled to find from the evidence that these refugees were targeted on grounds of their ethnicity.[518]

304. The Appeals Chamber need not consider whether the Trial Chamber erred in finding that the refugees were targeted "solely" for their Tutsi ethnicity because the definition of the crime of genocide does not contain such a requirement.[519] It is immaterial, as a matter of law, whether the refugees were targeted solely on the basis of their ethnicity or whether they were targeted for their ethnicity in addition to other reasons.

305. Accordingly, this ground of appeal is dismissed.

C. Bisesero Indictment

306. In relation to the Bisesero Indictment, Elizaphan Ntakirutimana submits that the Trial Chamber erred in its findings that he was present or that he committed acts on six separate occasions in Bisesero during April through June 1994. The Appellant notes that five of the six

[515] *Id.*, pp. 32-34 (referring to Trial Judgement, para. 340).
[516] *Id.*, p. 33.
[517] *See* Trial Judgement, paras. 338-339.
[518] *See id.*, paras. 334-340.
[519] *See Niyitegeka* Appeal Judgement, paras. 48-53.

findings are based on the uncorroborated testimony of single witnesses.[520] The Appeals Chamber will review the submissions of the Appellant on an event by event basis.

307. As discussed above in the assessment of Gérard Ntakirutimana's submissions on sufficiency of notice, the Appeals Chamber has found that the Trial Chamber erred in convicting Elizaphan Ntakirutimana for (i) his alleged participation in a convoy of vehicles carrying armed attackers to Kabatwa Hill at the end of May 1994, and his pointing out to attackers of the whereabouts of refugees on Kabatwa and Gitwa Hills, and (ii) his alleged participation in events at Mubuga primary school in the middle of May 1994.[521]

308. It remains for the Appeals Chamber to consider the Appellant's submissions on four events for which he was convicted, namely for his participation in events at (i) Nyarutovu cellule and Gitwa Hill, in the middle and second half of May 1994; (ii) Murambi Hill, in May or June 1994; (iii) Muyira Hill - Ku Cyapa, in May or June 1994; and (iv) Murambi Church, in the end of April 1994.

1. Nyarutovu Cellule and Gitwa Hill (Witness CC)

309. Elizaphan Ntakirutimana argues that the Trial Chamber erred by relying on the uncorroborated evidence of Witness CC to find that he participated in events at Nyarutovu cellule and Gitwa Hill in the middle and second half of May 1994.[522]

310. In respect of Nyarutovu, the Trial Chamber found:

> ...that Elizaphan Ntakirutimana brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill one day in the middle of May 1994, and that the group was searching for Tutsi refugees and chasing them. Furthermore, the Chamber finds that, at this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests".[523]

311. Regarding Gitwa Hill, the Trial Chamber was satisfied beyond reasonable doubt that:

> ... Elizaphan Ntakirutimana was present among armed attackers at the occasion of an attack against Tutsi refugees at Gitwa cellule, and that his car was parked nearby. Although this evidence is limited in respect of the Accused's exact role or conduct in connection with the attack, it corroborates other sightings of the Accused in Bisesero, in the company of attackers, during the time-period relevant to the Bisesero Indictment.[524]

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[520] Appeal Brief (E. Ntakirutimana), p. 36.
[521] Section II.A.1.(b).
[522] Appeal Brief (E. Ntakirutimana), pp. 37-42.
[523] Trial Judgement, para. 594.
[524] Trial Judgement, para. 598.

(a) Sufficiency of Notice

312. In relation to the events at Nyarutovu, Elizaphan Ntakirutimana argues that the Trial Chamber erred when it concluded that although this incident is not specifically mentioned in the Indictment it is summarized as part of Witness CC's anticipated evidence in Annex B of the Prosecution's Pre-trial Brief and is also described in Witness CC's written statement of 12 June 1996.[525]

313. These submissions have been discussed above in relation to the notice arguments presented by Gérard Ntakirutimana. The Appeals Chamber has concluded that the details in Annex B and the statement of Witness CC notified the Defence that the Prosecution would allege that Elizaphan Ntakirutimana transported attackers and pointed out Tutsi refugees near the Gishyita-Gisovu road. The Trial Chamber therefore committed no error in concluding that the Bisesero Indictment's failure to allege these facts was cured.[526]

(b) Discrepancies in the Evidence

314. Elizaphan Ntakirutimana submits that the Trial Chamber erred by disregarding inconsistencies between the witness's written statement and his in-court testimony, by accepting the witness's explanations for these, and by relying on the witness's evidence despite the lack of details and despite the witness's serious allegations against ICTR investigators.[527] These arguments, in the view of the Appeals Chamber, seem also to go to the credibility of the witness.

315. In his submissions, the Appellant refers extensively to apparent discrepancies between the witness's written statement and his in-court testimony in an attempt to demonstrate error in the fact-finding process. Most of these alleged inconsistencies were put to the witness during his testimony, raised in the Defence Closing Brief and considered by the Trial Chamber in its Judgement.

316. The Appeals Chamber recalls that it will not lightly disturb findings of fact by a trial chamber, and will substitute the assessment of the trial chamber only if no reasonable trier of fact could have arrived at the same conclusion. The trial chamber has the advantage of observing witnesses in person and is, as such, better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. The Appeals Chamber emphasises that it is not a legal error *per se* to accept and rely on evidence that varies from prior statements or other evidence. However, a trial chamber is bound to take into account inconsistencies and any explanations offered

[525] *Id.*, para. 590.
[526] Section II.A.1.(b).
[527] Appeal Brief (E. Ntakirutimana), pp. 38-42.

in respect of them when weighing the probative value of the evidence.[528] Also, as previously noted, a trial chamber may find parts of a witness's testimony credible and rely on them, whilst rejecting other parts as not credible.

317. The Appellant argues that the Trial Chamber erred in stating that the list in Witness CC's statement of 10 attackers whom the witness recognised during the events was not exhaustive.[529] He contends that, had the witness really seen him, his name would have been included in the list, and not at the end of the statement. According to the Appellant, this suggests that the witness "was prompted by the investigator to make allegations against him."[530]

318. The Appeals Chamber has reviewed the witness's evidence, including his statement of 12 June 1996, and the witness's explanations during cross-examination on the omission of Elizaphan Ntakirutimana from the list, and considers that the Trial Chamber was not unreasonable in concluding that the list was not exhaustive. The Trial Chamber's conclusion finds additional support from the fact that the witness also mentioned in his statement seeing Clément Kayishema during the events yet does not include him in the list of 10 attackers at the beginning of the statement. The Appeals Chamber finds the Appellant's allegation that the witness was improperly prompted by an investigator to make accusations to be wholly speculative and without foundation.

319. Next, the Appellant submits that the Trial Chamber should have impeached the witness as he changed his evidence at trial to fit the Prosecution's case. He adds that the Trial Chamber erred by disregarding discrepancies and by attempting to sanitize the evidence. In support, Elizaphan Ntakirutimana refers to the witness's written statement, in which the witness mentioned seeing only armed civilians with him during the attack at Nyarutovu, whereas at trial the witness testified that there were also *Interahamwe* and soldiers in military uniforms.[531]

320. The Appeals Chamber notes that during cross-examination the witness was asked by the Appellant and the Trial Chamber about the attackers he saw with the Appellant. Questioned as to the differences between his statement and his testimony, the witness explained that at his interview with the investigators he had clearly mentioned the presence of soldiers, as well as civilians, and that the statement was therefore incorrect.[532] The Trial Chamber observed the demeanour of the witness and itself questioned the witness on the differences between his testimony and his earlier statement. The Trial Chamber addressed this apparent discrepancy in its findings, concluding that it did not affect the witness's credibility. It also noted that the witness statement included a general

[528] *See Kupreškić et al.* Appeal Judgement, paras. 31-32; *Niyitegeka* Appeal Judgement, paras. 95-96.
[529] Trial Judgement, para. 591.
[530] Appeal Brief (E. Ntakirutimana), p. 38.
[531] *Id.*, pp. 38-39.

description of attackers in Bisesero, which included soldiers, civilians and *Interahamwe*.[533] Apart from reiterating that there exists an inconsistency in the witness's evidence, the Appellant does not advance any argument of merit which would justify the Appeals Chamber disturbing the Trial Chamber's findings.

321. The same conclusion applies to the Appellant's submissions regarding the witness's estimates about the time at which the Bisesero attacks began during the events from April to June 1994 and on the distance between the witness's home, Ngoma Church and Muyira Hill.[534] The Trial Chamber considered the differences between the witness's testimony, statement and earlier testimony not to be material and of little importance.[535] A mere assertion of the Appellant that the Trial Chamber should have accorded more weight to these discrepancies is insufficient to meet his burden on appeal to show error on the part of the Trial Chamber.

322. In addition the Appellant argues that the Trial Chamber erred when it reasoned that "the witness described the Accused's car in a way which corresponded to the description by other witnesses".[536] The Appellant suggests that the witness did not know from observation but that someone else had told him of the make and colour of the Appellant's vehicle.[537] In the view of the Appeals Chamber, this argument is without foundation and misconstrues the evidence. The Appeals Chamber notes that the witness was consistent in his evidence that the Appellant's vehicle was "whitish", white or near-white.[538] Although during cross-examination there appeared to be some discussion about dates, in the view of the Appeals Chamber, placed in proper context, this cannot be interpreted to mean that the witness had been told by another person about the Appellant's car.[539]

323. The Appellant argues that the Trial Chamber erred in assessing Witness CC's identification evidence for Nyarutovu.[540] The Appeals Chamber recalls that where a finding of guilt is made on the basis of identification evidence given by a witness under apparently difficult circumstances, the Trial Chamber should provide a "reasoned opinion". As the Appeals Chamber noted in *Kupreškić*, a Trial Chamber should take into account a number of factors such as the duration of the observation, the presence of obstructions, light quality, whether the observation was made in daytime or at night, inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event, misidentification or denial of the ability to identify followed by later identification of the

[532] T. 9 October 2001, pp. 49-51.
[533] Trial Judgement para. 591.
[534] Appeal Brief (E. Ntakirutimana), pp. 40-41.
[535] Trial Judgement, para. 593.
[536] *Id.*, para. 592.
[537] Appeal Brief (E. Ntakirutimana), p. 40.
[538] For instance, T. 9 October 2001, pp. 13, 54.
[539] T. 9 October 2001, pp. 54-55.
[540] Appeal Brief (E. Ntakirutimana), pp. 39-41.

defendant by a witness and the "clear possibility" that the witness may have been influenced by suggestions from others.[541]

324. Here, the Trial Chamber considered that the observation was made in broad daylight, that it lasted for about 2 minutes from a distance of about 100 meters, that there was no evidence of persons or vegetation obstructing the witness's view, that the witness knew the Appellant since 1977, having seen him during religious gatherings, and that his testimony was coherent and consistent with his written statement.[542] In the view of the Appeals Chamber, it cannot be said that the Trial Chamber unreasonably assessed the identification evidence.

325. Consequently, the Appeals Chamber finds that the Trial Chamber was careful in its assessment of the evidence, and that all of the inconsistencies raised by the Appellant were reasonably treated by the Trial Chamber. Accordingly, the Appeals Chamber dismisses the Appellants' submissions that the witness's difficulty in remembering when and how his witness statement was taken, and the lack of details in his evidence raise a reasonable doubt about all his testimony.

2. Murambi Hill (Witness SS)

326. In relation to events at Murambi Hill, the Trial Chamber found:

> The testimony of Witness SS is uncorroborated. However, he appeared consistent throughout his testimony about this event, which was in conformity with his statement to investigators of 18 December 2000. The fact that this statement was given more than six years after the events does not reduce his credibility. Consequently, the Chamber finds that one day in May or June 1994, Elizaphan Ntakirutimana transported armed attackers who were chasing Tutsi survivors at Murambi Hill.[543]

327. Elizaphan Ntakirutimana contends that the Trial Chamber misapplied the burden of proof on the basis that the record shows that the evidence of Witness SS was contradictory and insufficient to support the finding that the Appellant "transported armed attackers who were chasing Tutsi survivors at Murambi Hill" at some point in May or June 1994.

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[541] *See Kupreškić et al.* Appeal Judgement, paras. 34-40.
[542] Trial Judgement, para. 594.
[543] *Id.*, para. 579.

(a) Lack of Notice

328. Elizaphan Ntakirutimana submits that no mention was made of the events at Murambi Hill in the indictment, the Pre-Trial Brief or the Prosecution's closing arguments, and accordingly seems to argue that the Trial Chamber erred in finding that he was put on sufficient notice of the event.[544]

329. This ground of appeal has been addressed in the discussion of the legal arguments presented by Gérard Ntakirutimana. It has been found that the Trial Chamber committed no error in concluding that the Bisesero Indictment's failure to allege that the Appellant transported attackers to the Murambi attack was cured by subsequent information communicated to the Accused.[545]

(b) Insufficiency of Evidence

330. Elizaphan Ntakirutimana questions the evidence of Witness SS that he saw him in his car during the event, and submits that it is insufficient to support the finding that he "transported armed attackers who were chasing Tutsi survivors at Murambi hill". He indicates that Witness SS never mentioned whether he saw him driving the vehicle or whether there was someone else in the vehicle with him. Elizaphan Ntakirutimana adds that the witness gave few details about where he stopped the vehicle, and about whether he had direct sight of him. The Appellant also submits that it would have been doubtful that the witness could have identified him at a distance of 200 meters when he turned around whilst running away from the attackers. Finally the Appellant notes that in a report by *African Rights*, Witness SS did not mention seeing a car or attackers with the Appellant, or that he was chased by the attackers.[546]

331. In making its findings, the Trial Chamber took into consideration observational conditions, the position of the witness in relation to Elizaphan Ntakirutimana when he first observed him, and the fact that he saw attackers alight from the Appellant's vehicle.[547] The Trial Chamber's assessment of the evidence is in conformity with the witness's testimony.[548] Moreover, in cross-examination, Elizaphan Ntakirutimana questioned the witness about his sighting of the Appellant's vehicle, the distance from which he saw him, whether he was crossing the road, and the presence of the attackers.[549]

332. In the view of the Appeals Chamber, the Appellant has not shown that the Trial Chamber erred in assessing the evidence of Witness SS. The Appellant does not directly address the findings

[544] Appeal Brief (E. Ntakirutimana), pp. 48-49.
[545] Section II.A.1.(b).
[546] Appeal Brief (E. Ntakirutimana), pp. 48-49.
[547] Trial Judgement, paras. 575-576.
[548] T. 30 October 2001, pp. 127-133

of the Trial Chamber to show their unreasonableness, and merely repeats aspects of the evidence which he deems undermine the witness's credibility. The issue as to the distance from which the witness observed the Appellant was developed by the Appellant during cross-examination and fully considered by the Trial Chamber. It is clear from the evidence that the witness initially saw the Appellant at a distance of approximately 8 meters, and observed him again as he was running to escape the attackers who had alighted from the Appellant's car.[550] The questions as to Elizaphan Ntakirutimana driving his vehicle, and the presence of anyone else in the cabin of the vehicle, were not specifically put to the witness.[551] The fact that the witness's evidence may have been limited on the event and not greatly detailed has not been shown to undermine its reliability.

(c) Delivery of the Letter

333. Elizaphan Ntakirutimana seems to submit that Witness SS's credibility is undermined as his evidence on the delivery of the 16 April letter from the pastors to the Appellant contradicts the evidence of Witnesses GG, HH, YY and MM.[552]

334. The Appeals Chamber notes that the Appellant's submissions here are vague and unclear. He does not develop this argument. It is accordingly dismissed.

(d) Sighting of Gérard Ntakirutimana

335. Elizaphan Ntakirutimana submits that Witness SS's credibility was undermined when he testified that he saw Gérard Ntakirutimana in Mugonero in 1992 and 1993 when, according to the Appellant, Gérard Ntakirutimana was in the United States from January 1991 until March 1993. He adds that the evidence suggests that the witness did not know either the Appellant or Gérard Ntakirutimana, having referred to the Appellant as a "minister" in the *African Rights* report and that he did not live in Mugonero prior to 1994.[553]

336. During the examination and cross-examination, the witness was extensively questioned on the dates of his studies at the ESI Mugonero and on when he saw Gérard Ntakirutimana. The witness indicated that he observed Gérard Ntakirutimana on a number of occasions prior to April 1994, but that he was not sure of the exact date. Although there appears to have been some confusion during the examination, Elizaphan Ntakirutimana has not shown that this in any way

[549] T. 31 October 2001, pp. 117-124.
[550] *Id.*, pp. 128-133.
[551] Although the witness did testify that, "I was about to cross the road. He saw me, he stopped his vehicle, he came out, and the people who were with him started running after me in an attempt to catch me", which suggests that the Appellant may have been driving his vehicle. T. 30 October 2001, p. 128.
[552] Appeal Brief (E. Ntakirutimana), pp. 48-51.
[553] *Id.*, p. 51.