UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mohamed Shahabuddeen** **Judge Liu Daqun** **Judge Theodor Meron** **Judge Wolfgang Schomburg**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**29 August 2008**

THARCISSE MUVUNYI

v.

THE PROSECUTOR

Case No. ICTR-2000-55A-A

JUDGEMENT

Counsel for Tharcisse Muvunyi:

Mr. William E. Taylor III
Ms. Abbe Jolles
Mr. Dorian Cotlar

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote Odora
Mr. Neville Weston
Ms. Linda Bianchi
Ms. Renifa Madenga
Mr. François Nsanzuwera
Ms. Evelyn Kamau

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals by Tharcisse Muvunyi ("Muvunyi") and the Prosecution against the Judgement and Sentence rendered by Trial Chamber II of the Tribunal ("Trial Chamber") on 12 September 2006 in the case of *The Prosecutor v. Tharcisse Muvunyi* ("Trial Judgement").[1]

I. INTRODUCTION

A. Background

2. Tharcisse Muvunyi was born on 19 August 1953 in Mukarange Commune, Byumba Prefecture.[2] From 1 March until mid-June 1994, Muvunyi served as Lieutenant-Colonel in the Rwandan Armed Forces, stationed at the *École des sous-officiers* ("ESO") in Butare Prefecture.[3] The Trial Chamber concluded that from 7 April 1994 Muvunyi assumed the position of ESO Commander after his superior officer, Marcel Gatsinzi, had been appointed the interim Chief of Staff of the Rwandan Army.[4] The Trial Chamber found that, as the interim Commander of ESO, Muvunyi had authority over the ESO Camp and its soldiers with responsibility for the security of the civilian population and the actions of ESO Camp soldiers within the central sector of Butare Prefecture.[5] This case concerns Muvunyi's responsibility for crimes committed at various locations in Butare Prefecture between April and June 1994.

3. The Trial Chamber convicted Muvunyi pursuant to Article 6(1) of the Statute of the Tribunal ("Statute") for direct and public incitement to commit genocide in connection with public meetings in Gikonko and in Gikore[6] and for aiding and abetting genocide in connection with an attack involving ESO Camp soldiers at the *Groupe scolaire* near the camp.[7] In addition, the Trial Chamber convicted Muvunyi of genocide pursuant to Article 6(3) of the Statute for failing to take necessary and reasonable measures to prevent the killings or to punish the perpetrators of attacks at the Butare University Hospital, University of Butare, Beneberika Convent, Mukura forest, and at

[1] For ease of reference, two annexes are appended: Annex A – Procedural Background; Annex B – Cited Materials and Defined Terms.
[2] Trial Judgement, para. 30.
[3] Trial Judgement, paras. 30, 57.
[4] Trial Judgement, para. 57.
[5] Trial Judgement, paras. 57, 90.
[6] Trial Judgement, paras. 507-510.

various roadblocks in Butare Prefecture.[8] The Trial Chamber further convicted Muvunyi pursuant to Article 6(3) of the Statute of other inhumane acts as a crime against humanity for mistreatment of Tutsis at the *Économat général,* Butare Cathedral, ESO Camp, Beneberika Convent, *Groupe scolaire*, and at various roadblocks in Butare Prefecture.[9]

4. For his convictions for the crimes of genocide (Count 1), direct and public incitement to commit genocide (Count 3), and other inhumane acts as a crime against humanity (Count 5), the Trial Chamber sentenced Muvunyi to a single sentence of twenty-five years' imprisonment.[10] The Trial Chamber dismissed the alternative charge of complicity in genocide (Count 2), in light of his conviction for genocide (Count 1), and acquitted Muvunyi of the charge of rape as a crime against humanity (Count 4).[11]

B. The Appeals

5. Muvunyi presents fourteen grounds of appeal challenging his convictions and his sentence.[12] He requests the Appeals Chamber to overturn his convictions or, in the alternative, to reduce his sentence.[13] The Prosecution responds that all grounds of his appeal should be dismissed.[14]

6. The Prosecution presents two grounds of appeal challenging Muvunyi's acquittal for rape as a crime against humanity and his sentence.[15] The Prosecution requests the Appeals Chamber to enter a conviction for rape as a crime against humanity (Count 4) and to increase Muvunyi's sentence to imprisonment for the remainder of his life.[16] Muvunyi responds that the Prosecution's grounds of appeal should be dismissed.[17]

7. The Appeals Chamber heard oral submissions regarding these appeals on 13 March 2008. Having considered the written and oral submissions of the parties, the Appeals Chamber hereby renders its Judgement.

---

[7] Trial Judgement, paras. 496, 498.
[8] Trial Judgement, paras. 497, 498.
[9] Trial Judgement, para. 530.
[10] Trial Judgement, paras. 531, 545.
[11] Trial Judgement, paras. 499, 526.
[12] Muvunyi Notice of Appeal, paras. 3-15; Muvunyi Appeal Brief, paras. 4-117. *See also Muvunyi,* Decision on Motion to Amend Grounds of Appeal, para. 6 (allowing Muvunyi to vary his Notice of Appeal to include Ground 13 as set out in his Appeal Brief). Muvunyi did not expressly number his alternative arguments challenging his sentence, and the Appeals Chamber has designated them as the fourteenth ground of appeal.
[13] Muvunyi Notice of Appeal, para. 15; Muvunyi Appeal Brief, paras. 110, 111.
[14] Prosecution Response Brief, paras. 16-18, 321.
[15] Prosecution Notice of Appeal, paras. 1-12.
[16] Prosecution Notice of Appeal, paras. 7, 12; Prosecution Appeal Brief, paras. 7, 174.
[17] Muvunyi Response Brief, paras. 99-101.

II. STANDARDS OF APPELLATE REVIEW

8. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.[18]

9. As regards errors of law, the Appeals Chamber has stated:

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

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

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[20]

The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding. However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.[21]

---

[18] *See Seromba* Appeal Judgement, para. 9; *Nahimana et al.* Appeal Judgement, para. 11; *Simba* Appeal Judgement, para. 8; *Blagojević and Jokić* Appeal Judgement, para. 6, fn. 14 (recalling jurisprudence under Article 25 of the ICTY Statute and under Article 24 of the Statute).

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

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

[21] *Seromba* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras. 13, 14.

11. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[22] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[23]

12. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[24] Further, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or if they suffer from other formal and obvious insufficiencies.[25] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and will dismiss arguments which are evidently unfounded without providing detailed reasoning.[26]

[22] *Muhimana* Appeal Judgement, para. 9; *Ndindabahizi* Appeal Judgement, para. 11; *Gacumbitsi* Appeal Judgement, para. 9; *Niyitegeka* Appeal Judgement, para. 9. *See also Staki}* Appeal Judgement, para. 11; *Naletili} and Martinovi}* Appeal Judgement, para. 13.
[23] *Muhimana* Appeal Judgement, para. 9; *Ndindabahizi* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 6; *Ntakirutimana* Appeal Judgement, para. 13. *See also Staki}* Appeal Judgement, para. 11; *Naletili} and Martinovi}* Appeal Judgement, para. 13.
[24] Practice Direction on Formal Requirements for Appeals from Judgement, para. 4(b). *See also Muhimana* Appeal Judgement, para. 10; *Ndindabahizi* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 7; *Staki}* Appeal Judgement, para. 12; *Vasiljevi}* Appeal Judgement, para. 11.
[25] *Vasiljević* Appeal Judgement, para. 12. *See also Muhimana* Appeal Judgement, para. 10; *Ndindabahizi* Appeal Judgement, para. 12; *Naletili} and Martinovi}* Appeal Judgement, para. 14; *Kajelijeli* Appeal Judgement, para. 7.
[26] *Muhimana* Appeal Judgement, para. 10; *Gacumbitsi* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 8; *Niyitegeka* Appeal Judgement, para. 11. *See also Staki}* Appeal Judgement, para. 13; *Bla{ki}* Appeal Judgement, para. 13.

III. APPEAL OF THARCISSE MUVUNYI

A. Alleged Errors relating to an Attack at the Butare University Hospital (Ground 1)

13. The Trial Chamber convicted Muvunyi pursuant to Article 6(3) of the Statute for genocide based, in part, on the role played by ESO Camp soldiers in the abduction and killing of twenty to thirty Tutsi refugees from the Butare University Hospital sometime after 20 April 1994.[27] Muvunyi submits that the Trial Chamber erred in law in convicting him for these abductions and killings.[28] In this section, the Appeals Chamber considers whether Muvunyi had adequate notice of this crime in order to prepare his defence.

14. Paragraph 3.29 of the Indictment alleges:

> On or about the 15th of April, Lieutenant Colonel MUVUNYI in the company of a section of soldiers participated in the attack on wounded refugees at the University Hospital in Butare separating the Tutsis from the Hutus and killing the Tutsi refugees.

Count 1 of the Indictment, charging the crime of genocide, states that the Prosecution is pursuing this allegation pursuant to Article 6(1) and Article 6(3) of the Statute.[29] In addition, the allegation in paragraph 3.29 of the Indictment is repeated verbatim in paragraph 11 of the Schedule of Particulars, which was filed by the Prosecution at the outset of trial.[30] The Schedule of Particulars also alleges that Muvunyi is responsible for the acts alleged in paragraph 3.29 of the Indictment pursuant to Article 6(1) and Article 6(3) of the Statute.[31]

15. The Trial Chamber heard testimony on Muvunyi's personal role in an attack at the Butare University Hospital, occurring sometime in May 1994, solely from Prosecution Witness XV.[32] The Trial Chamber found that this witness was not credible and, accordingly, held that the Prosecution did not prove Muvunyi's personal participation in this attack beyond reasonable doubt.[33] However, the Trial Chamber also heard other evidence implicating ESO Camp soldiers in abducting and

[27] Trial Judgement, paras. 261, 498.
[28] Muvunyi Notice of Appeal, para. 3; Muvunyi Appeal Brief, paras. 4-10, 13, 14; Muvunyi Reply Brief, paras. 11, 12. In addition, Muvunyi argues that the evidence is insufficient to establish the facts as found by the Trial Chamber. Muvunyi Notice of Appeal, para. 3; Muvunyi Appeal Brief, paras. 11, 12, 14.
[29] Indictment, p. 15.
[30] The Schedule of Particulars was filed on 28 February 2005; it is annexed to the Trial Judgement.
[31] Schedule of Particulars, para. 11.
[32] Trial Judgement, paras. 225-229, 251-253.
[33] Trial Judgement, paras. 253, 261.

killing twenty to thirty Tutsi refugees from the hospital sometime after 20 April 1994.[34] From this evidence, the Trial Chamber concluded:

> [T]he Chamber has heard evidence that sometime after 20 April 1994, ESO soldiers, in collaboration with *Interahamwe* and civilians abducted about 20 to 30 refugees from the University Hospital and killed them. The Chamber has considered the close proximity of ESO to the University Hospital, the presence of large numbers of Tutsi refugees at the hospital, and the presence of ESO soldiers at that location. Taking all relevant circumstances into account, the Chamber is satisfied beyond reasonable [*sic*] that the Accused had reason to know about the attack on Tutsi refugees at Butare University Hospital by ESO soldiers on or about 15 April 1994. Despite his superior military position over the said soldiers, and his material ability to intervene, he failed to do anything to prevent the attack or punish the soldiers' murderous conduct.[35]

16. Muvunyi submits that the Indictment and the Schedule of Particulars do not state the material facts required by the Tribunal's jurisprudence in order to convict him under Article 6(3) of the Statute for these crimes.[36] In particular, Muvunyi highlights the Prosecution's failure to properly identify the perpetrators and victims of the attack as well as its failure to plead that he had knowledge of the event.[37] Moreover, Muvunyi submits that neither the Indictment nor the Schedule of Particulars mentions the abductions or killings by ESO Camp soldiers after 20 April 1994, for which the Trial Chamber held him responsible.[38] Rather, he notes that these instruments charge him with personally participating in an attack at the hospital around 15 April 1994.[39] Muvunyi contends that holding him responsible for the abductions and killings after 20 April 1994 on the basis of Article 6(3) of the Statute amounted to convicting him of a new charge, which would have required the amendment of the Indictment.[40]

17. The Prosecution responds that Muvunyi received proper notice of its intent to hold him responsible as a superior for the role played by ESO Camp soldiers in the abductions and killings at the Butare University Hospital.[41] The Prosecution submits that both the Indictment and the Schedule of Particulars allege that Muvunyi is responsible for the attack at the hospital pursuant to Article 6(3) of the Statute.[42] Further, for the Prosecution, any variance between the language of the Indictment and evidence is minor and, in any event, is cured by the Pre-Trial Brief, its annexed witness summaries, and the Schedule of Particulars.[43] Concerning the discrepancy in dates, the

[34] Trial Judgement, para. 261. Several witnesses gave testimony related to this event with varying degrees of detail. *See* Trial Judgement, paras. 254-258. However, the Trial Chamber did not specify which witness or witnesses it relied on in making this finding. *See* Trial Judgement, para. 261.
[35] Trial Judgement, para. 261.
[36] Muvunyi Appeal Brief, paras. 4-10, 13, 14.
[37] Muvunyi Appeal Brief, paras. 4, 13.
[38] Muvunyi Appeal Brief, paras. 10, 13, 14.
[39] Muvunyi Appeal Brief, para. 5.
[40] Muvunyi Appeal Brief, paras. 13, 14; Muvunyi Reply Brief, para. 11.
[41] Prosecution Response Brief, paras. 19-59.
[42] Prosecution Response Brief, paras. 22-28.
[43] Prosecution Response Brief, paras. 29-58.

Prosecution argues that the date of "sometime after 20 April 1994" fits within the date range of "on or about 15 April 1994" and that paragraph 3.17 of the Indictment provided additional notice that the attack occurred later.[44] With respect to the nature of the attack, the Prosecution asserts that the term "attack" encompasses acts of abducting and murder.[45]

18. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[46] The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds.[47] Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings, or the exclusion of evidence outside the scope of the indictment.[48] In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.[49]

19. If the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6(3) of the Statute, the Indictment should plead the following: (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[50]

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

[44] Prosecution Response Brief, paras. 30-34. Paragraph 3.17 of the Indictment provides, in part, that "the massacres did not start until 19 April 1994".
[45] Prosecution Response Brief, para. 35.
[46] *Seromba* Appeal Judgement, paras. 27, 100; *Simba* Appeal Judgement para. 63; *Muhimana* Appeal Judgement, paras. 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49; *Ndindabahizi* Appeal Judgement, para. 16.
[47] *Ntagerura et al.* Appeal Judgement, para. 27. *See also Kvo~ka et al.* Appeal Judgement, para. 30; *Niyitegeka* Appeal Judgement, para. 194; *Kupre{ki} et al.* Appeal Judgement, para. 92.
[48] *Ntagerura et al.* Appeal Judgement, para. 27. *See also Kvo~ka et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 194; *Kupre{ki} et al.* Appeal Judgement, para. 92.
[49] *Nahimana et al.* Appeal Judgement, para. 326; *Ntagerura et al.* Appeal Judgement, para. 28; *Kvo~ka et al.* Appeal Judgement, para. 33.

basis underpinning the charge.[51] However, the principle that a defect in an indictment may be cured is not without limits. In this respect, the Appeals Chamber has previously emphasized:

> [T]he "new material facts" should not lead to a "radical transformation" of the Prosecution's case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.[52]

21. Bearing these principles in mind, the Appeals Chamber addresses whether Muvunyi had sufficient notice of the material facts underpinning his conviction as a superior for the crimes committed by ESO Camp soldiers at the Butare University Hospital. In this assessment, the Appeals Chamber takes into account both the Indictment as well as the Schedule of Particulars, which the Trial Chamber permitted the Prosecution to file "in order to arrange [its] current pleading in a clearer manner" and in particular to set out "the factual allegations which refer specifically to a type of responsibility under Article […] 6(3) of the Statute."[53]

22. Muvunyi's arguments focus primarily on the notice provided by the Indictment of the material facts related to his role in the crime as well as the criminal acts of the principal perpetrators. In this respect, the Appeals Chamber observes that paragraph 3.29 of the Indictment clearly alleges a specific attack on wounded refugees at the Butare University Hospital around 15 April 1994 where Muvunyi and a section of soldiers allegedly separated and killed Tutsi refugees. In contrast, the evidence which underpins Muvunyi's conviction in relation to paragraph 3.29 refers to an event sometime after 20 April 1994 wherein ESO Camp soldiers – in the absence of Muvunyi – participated in the abduction of Tutsis from the hospital and their subsequent killing elsewhere. The variances between the Indictment and the evidence with respect to the dates of the attack, the soldiers' conduct during the attack, and Muvunyi's presence and participation in the attack reflect that paragraph 3.29 of the Indictment alleges a different criminal event than the one for which he was convicted. As a result, the Appeals Chamber finds that Muvunyi did not have adequate notice of the material facts giving rise to superior responsibility for the abductions and killings at the Butare University Hospital after 20 April 1994. This conclusion is reinforced, as discussed below,

---

[50] *See Nahimana et al.* Appeal Judgement, para. 323; *Ntagerura et al.* Appeal Judgement, paras. 26, 152. *See also Naletili} and Martinovi}* Appeal Judgement, para. 67; *Blaški}* Appeal Judgement, para. 218.
[51] *Seromba* Appeal Judgement, para 100; *Simba* Appeal Judgement, para. 64; *Muhimana* Appeal Judgement, paras. 76, 195, 217; *Gacumbitsi* Appeal Judgement, para. 49. *See also Ntagerura et al.* Appeal Judgement, paras. 28, 65.
[52] *Bagosora et al.,* Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para. 30 (internal citations omitted).
[53] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, p. 17 (disposition).

by the Pre-Trial Brief and the Prosecution's attempts to amend paragraph 3.29 of the Indictment at the outset of trial.

23. As the Prosecution submits, the Pre-Trial Brief refers to several alleged attacks at the Butare University Hospital involving ESO Camp soldiers. The Pre-Trial Brief states in pertinent part:

> The University Hospital in Butare which was just a ten minute walk from the University campus was also *the scene of brutal attacks led by soldiers of the ESO*. Sometime in late April or early May 1994, the hospital was declared a military zone by the accused MUVUNYI. The hospital staffs were mandated to concentrate on treating of the Hutu soldiers who were wounded at the war front and to halt all treatment to Tutsi refugees. Indeed the wounded Tutsi refugees were ordered to evacuate the hospital with no provision for their treatment or care by any alternative medical organization.
>
> These Tutsi refugees were then attacked and killed by a combination of soldiers from the ESO as well as interahamwe led by prominent interahamwe persons in Butare town. These attacks were carried out with the full consent and knowledge of the accused persons [*sic*]. *MUVUNYI was present with soldiers in one of those attacks* on wounded refugees at the University Hospital in Butare in which the Tutsi refugees were separated from the Hutu refugees and killed.[54]

24. While the Pre-Trial Brief refers to several attacks perpetrated by ESO Camp soldiers, the final sentence of this passage expressly alleges that Muvunyi personally participated in one of these attacks. When this sentence is read in the context of the Indictment, it is clear that it refers to the attack specifically charged in paragraph 3.29 of the Indictment. It follows from the plain text of paragraph 3.29 of the Indictment, as from the Pre-Trial Brief, that Muvunyi was charged on the basis of his alleged personal participation in an attack at the hospital taking place around 15 April 1994.

25. Moreover, a review of the record reveals that, at the outset of trial, the Prosecution sought to amend paragraph 3.29 of the Indictment concerning the attack at the Butare University Hospital.[55] The Prosecution made this attempt to amend the Indictment at around the same time that it filed its Pre-Trial Brief.[56] Though the proposed amended paragraph sought to expand the date range from "on or about 15 April 1994" to "between April and May 1994", like paragraph 3.29 of the Indictment, it still referred only to a single attack involving Muvunyi's personal participation along

[54] Pre-Trial Brief, paras. 74, 75 (emphasis added).
[55] The Prosecution initially filed a proposed amended indictment on 19 January 2005, which repeats the language of paragraph 3.29 of the Indictment verbatim. *See* Proposed Amended Indictment (19 January 2005), para. 14. However, in response to several concerns raised by the Trial Chamber, the Prosecution filed a revised proposed amended indictment on 4 February 2005, which alters the language of paragraph 3.29 of the Indictment. *See* Proposed Amended Indictment (4 February 2005), para. 15. *See also Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, paras. 1-5, 11-15.
[56] The Prosecution filed its Pre-Trial Brief on 25 January 2005. The Prosecution filed proposed amended indictments on 19 January 2005 and 4 February 2005.

with ESO Camp soldiers in separating and then killing Tutsi refugees at the hospital.[57] Notably, in the Proposed Amended Indictment, the Prosecution sought to drop the allegation of superior responsibility under Article 6(3) of the Statute and to focus on Muvunyi's direct role in this attack.[58] The proposed amendment reinforces the proposition that Muvunyi was charged in paragraph 3.29 of the Indictment for a specific attack at the hospital in which he allegedly physically participated, not as a superior for failing to prevent or to punish his subordinates for an attack committed in his absence at some later point.

26. The Prosecution's contention that the variances between the Indictment and the evidence at trial are minor or that any resulting defect was cured fails to address the fundamental problem with paragraph 3.29 of the Indictment and the related conviction: the paragraph is not vague; it specifically alleges a different event and form of criminal conduct from the one for which Muvunyi was convicted by the Trial Chamber. The differences in the dates as well as the nature of the attack (abductions from the hospital and killings elsewhere versus separations and killings at the hospital), in addition to Muvunyi's alleged role, underscore this point. Paragraph 3.29 of the Indictment, therefore, did not properly inform Muvunyi of the material facts for the crime for which he was ultimately convicted.

27. The Prosecution highlights that Muvunyi failed to object during the course of the evidence on which the Trial Chamber relied and that, in any event, the Schedule of Particulars and Pre-Trial Brief cured the defect.[59] The Appeals Chamber, however, does not find the Prosecution's arguments convincing in view of the procedural history of this case. As noted above, at the outset of trial, the Prosecution sought to amend paragraph 3.29 of the Indictment to broaden the date range for this attack.[60] Muvunyi objected to the Prosecution's motion asserting that it contained new allegations, which included, among other things, an expansion of his scope of liability for other possible attacks at the hospital after 15 April 1994.[61] Moreover, Muvunyi challenged both the Indictment and the Schedule of Particulars because they failed to adequately plead the material facts necessary to

[57] Proposed Amended Indictment (4 February 2005), para. 15 ("Between April and May 1994, Lieutenant Colonel THARCISSE MUVUNYI was seen in the company of soldiers at the University Hospital in Butare ordering or instigating the said soldiers to attack wounded Tutsi refugees at the said hospital. During the said attack, soldiers under Lieutenant Colonel THARCISSE MUVUNYI'S command separated Tutsi refugees from their Hutu counterparts. The Tutsi refugees were subsequently attacked and killed by soldiers from ESO and Hutu militiamen").
[58] Proposed Amended Indictment (19 January 2005), pp. 3, 4; Proposed Amended Indictment (4 February 2005), pp. 3, 5.
[59] Prosecution Response Brief, para. 20.
[60] *See Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, para. 41(i), referring to Proposed Amended Indictment (4 February 2005), para. 15.
[61] *See Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, paras. 6-9.

establish superior responsibility.[62] Thus, Muvunyi raised these issues at the commencement of his trial. It therefore falls to the Prosecution to prove that Muvunyi's defence was not materially impaired by these defects.[63]

28. While the Appeals Chamber has previously held that a pre-trial brief can, in certain circumstances, cure a defect in an indictment,[64] the circumstances presented in this instance are different. The Pre-Trial Brief and the annexed witness summaries do not simply add greater detail in a consistent manner with a more general allegation already pleaded in the Indictment. Rather, the Pre-Trial Brief and the annexed witness summaries expand the charges specifically pleaded in the Indictment by charging additional attacks involving ESO Camp soldiers, based on superior responsibility, other than the one specifically mentioned in paragraph 3.29 of the Indictment. This does not amount to clear and consistent notice adding specificity to a vague paragraph; rather it is a *de facto* amendment of the Indictment. The Appeals Chamber reached a similar conclusion in the *Muhimana* Appeal Judgement where it determined that a witness summary annexed to a pre-trial brief did not simply add greater detail in a consistent manner with a more general allegation, but materially altered key facets of it.[65] Moreover, as discussed above, the Prosecution's efforts to amend paragraph 3.29 of the Indictment, at the same time it filed its Pre-Trial Brief, reinforce the proposition that the charges against Muvunyi relating to the Butare University Hospital stemmed from an event at which he was allegedly physically present, undermining the claim that the Pre-Trial Brief somehow provided clear and consistent notice of the crime for which he was ultimately convicted.

29. The Appeals Chamber also recalls that the Trial Chamber denied the Prosecution's motion to expand its charges related to the Butare University Hospital, among others, reasoning that "the Accused would have expended time and resources preparing his defence on the basis of the indictments filed."[66] Moreover, the Trial Chamber added "that to amend the indictment on the eve of trial, and in doing so, introduce new material elements as the Prosecutor seeks to do, is likely to cause substantial prejudice […] to [Muvunyi's] right to prepare his defence".[67] Significantly, in relation to the proposed amendment to broaden the date range with respect to the attack on the

[62] *See Muvunyi*, Decision on the Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber, para. 8.
[63] *Niyitegeka* Appeal Judgement, para. 200. *See also Muhimana* Appeal Judgement, paras. 199, 219; *Gacumbitsi* Appeal Judgement, para. 51; *Ntagerura et al.* Appeal Judgement, paras. 31, 138.
[64] *Muhimana* Appeal Judgement, paras. 82, 201, 223, citing *Gacumbitsi* Appeal Judgement, paras. 57, 58; *Naletili} and Martinovi}* Appeal Judgement, para. 45; *Ntakirutimana* Appeal Judgement, para. 48.
[65] *See, e.g., Muhimana* Appeal Judgement, para. 224.
[66] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, para. 48 (referring to the Indictment as well as the initial indictment against Muvunyi filed on 17 November 2000).
[67] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, para. 48.

hospital from "on or about 15th of April 1994" to "[b]etween April and May 1994", the Trial Chamber held that the expanded date range alone might necessitate further investigations.[68] This same rationale applies with even greater force to changing the mode of Muvunyi's participation in the attack or charging other attacks at the hospital in addition to the one expressly alleged in the Indictment.

30. In dismissing the Prosecution's interlocutory appeal challenging the Trial Chamber's refusal to allow it to amend the Indictment on the eve of trial, the Appeals Chamber affirmed the Trial Chamber's conclusion that to allow the amendments would result in undue prejudice to Muvunyi.[69] The Appeals Chamber also added: "It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of charges, or expand the scope of existing charges."[70] Given the circumstances surrounding the Trial Chamber's rejection of even a modest expansion of the date range in this paragraph on grounds of prejudice, it would have been apparent to Muvunyi that his liability for any attack at the Butare University Hospital was limited to the language of the Indictment, alleging that he participated in a specific attack around 15 April 1994.[71]

31. The Appeals Chamber is also not satisfied that the Schedule of Particulars provides any additional notice of the material facts underpinning Muvunyi's conviction for this event. Paragraph 11 of the Schedule of Particulars simply mirrors paragraph 3.29 of the Indictment.[72]

32. In sum, the Appeals Chamber finds that paragraph 3.29 of the Indictment does not plead the material facts giving rise to superior responsibility for the abductions and killings at the Butare University Hospital after 20 April 1994. By convicting Muvunyi of genocide for these crimes, the Trial Chamber erred in law by expanding the charges against the accused to encompass unpleaded crimes. As a result, the Appeals Chamber need not address Muvunyi's arguments concerning the identity of the perpetrators and victims or those related to the sufficiency of the underlying

[68] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, para. 41(i).
[69] *Muvunyi*, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, paras. 43-45.
[70] *Muvunyi*, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, para. 22.
[71] *Cf. Blagoje Simi}* Appeal Judgement, paras. 40, 41 (finding that language in a particular amended indictment did not put the appellant on notice that he was being prosecuted for joint criminal enterprise because the pre-trial judge accepted the amended indictment after submissions that the effect of the amendment was to only remove certain charges).
[72] Schedule of Particulars, para. 11 ("In addition, for all of the acts described at paragraphs [*sic*] 3.29 of the indictment the Prosecutor alleges that the accused knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 2(3)(a) and (e) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6(3) of the Statute.").

evidence. Accordingly, the Appeals Chamber grants Muvunyi's First Ground of Appeal and reverses his conviction for genocide for this event.

B. Alleged Errors relating to an Attack at the Beneberika Convent (Ground 2)

33. The Trial Chamber convicted Muvunyi pursuant to Article 6(3) of the Statute for genocide and other inhumane acts as a crime against humanity based, in part, on the role played by ESO Camp soldiers in an attack against the Beneberika Convent around 30 April 1994.[73] Muvunyi principally submits that the Trial Chamber erred in law in convicting him of genocide based on this event.[74] In this section, the Appeals Chamber considers whether Muvunyi had adequate notice of the material facts underlying the crime of genocide in order to properly prepare his defence in connection with this event. The Appeals Chamber considers Muvunyi's arguments against his conviction for other inhumane acts as a crime against humanity related to the attack at the Beneberika Convent in section III.I.

34. Paragraph 3.27 of the Indictment, relating to the attack on the convent, alleges:

> On the 30th of April 1994, Lieutenant Colonel MUVUNYI in the exercise of his *de facto* and *de jure* authority, ordered the soldiers of the Ngoma camp to go to the Beneberika Convent and kidnap the refugees at the Convent including women and children. A certain Lieutenant led this attack, and he kidnapped 25 people including the children of Professor Karenzi, who were never seen again.

35. In addition, paragraph 3.47 of the Indictment, on which the Trial Chamber relied in making findings on the charge of other inhumane acts as a crime against humanity in connection with this event, alleges:

> During the events referred to in this indictment, soldiers of the ESO and Ngoma Camp participated in the meting out of cruel treatment to Tutsi civilians by beating them with sticks, tree saplings and or rifle butts.

36. Count 1 of the Indictment, charging the crime of genocide, states that the Prosecution is pursuing the allegations in paragraph 3.27 pursuant to Article 6(1) and Article 6(3) of the Statute.[75] In addition, the allegations in paragraphs 3.27 and 3.47 of the Indictment are repeated verbatim, respectively, in paragraphs 10 and 35 of the Schedule of Particulars, which was filed by the Prosecution at the outset of trial. The Schedule of Particulars also states that Muvunyi is responsible for the acts alleged in these paragraphs under Article 6(3) of the Statute.[76]

---

[73] Trial Judgement, paras. 498, 530.
[74] Muvunyi Notice of Appeal, para. 4; Muvunyi Appeal Brief, paras. 15-18; Muvunyi Reply Brief, paras. 13, 14. In addition, Muvunyi argues that the Prosecution provided him with defective notice with respect to the location of the crime because the Indictment states that the Beneberika Convent is located in Huye Commune instead of where the Trial Chamber placed it in Ngoma Commune. Muvunyi Appeal Brief, paras. 15, 16. Muvunyi also asserts that the convictions are not supported by credible evidence, but he does not develop this argument in any detail. Muvunyi Appeal Brief, para. 19.
[75] Indictment, p. 15.
[76] Schedule of Particulars, paras. 10, 35.

37. The Trial Chamber found that, on or about 30 April 1994, Lieutenant Hategekimana of the Ngoma Camp led a group of *Interahamwe* and soldiers from both the Ngoma Camp and ESO in the attack on the Beneberika Convent, in which the assailants mistreated, abducted, and then killed Tutsi refugees.[77] The Trial Chamber was not satisfied that the evidence proved beyond reasonable doubt that Muvunyi "ordered" the attack, as alleged in paragraph 3.27 of the Indictment.[78] However, the Trial Chamber found that he had effective control over the ESO Camp soldiers involved in the attack and convicted him under Article 6(3) of the Statute for failing to take necessary and reasonable measures to prevent the attack and to punish the perpetrators.[79]

38. Muvunyi submits that the Indictment and the Schedule of Particulars do not plead the material facts underlying a charge of superior responsibility for these crimes.[80] In particular, he notes that the Indictment does not allege that ESO soldiers participated in the attack or plead the material facts relating to his knowledge of the crimes and his failure to prevent them or to punish his subordinates.[81] The Prosecution responds that both the legal charge of superior responsibility as well as the material facts supporting this charge were adequately pleaded in the Indictment and the Schedule of Particulars.[82]

39. Bearing in mind the principles of notice previously articulated in this Judgement,[83] the Appeals Chamber considers whether Muvunyi had sufficient notice of the material facts underpinning his conviction as a superior for the crimes committed by ESO Camp soldiers at the Beneberika Convent. In this assessment, the Appeals Chamber takes into account both the Indictment and the Schedule of Particulars which the Trial Chamber permitted the Prosecution to file "in order to arrange [its] current pleading in a clearer manner" and, in particular, to set out "the factual allegations which refer specifically to a type of responsibility under Article […] 6(3) of the Statute."[84]

1. Alleged Error relating to the Identity of the Subordinates

40. Based on the Indictment alone, Muvunyi would not have known that the Prosecution intended to hold him responsible for the actions of ESO Camp soldiers in the attack at the Beneberika Convent. Paragraph 3.27 of the Indictment which concerns this attack identifies as

[77] Trial Judgement, paras. 289, 436, 437.
[78] Trial Judgement, para. 289.
[79] Trial Judgement, paras. 290, 291, 530.
[80] Muvunyi Appeal Brief, paras. 15, 17, 18, 107; Muvunyi Reply Brief, paras. 14, 80, 81.
[81] Muvunyi Appeal Brief, paras. 18, 107; Muvunyi Reply Brief, para. 14.
[82] Prosecution Response Brief, paras. 61-71.
[83] *See supra* Section III.A (Alleged Errors relating to an Attack at the Butare University Hospital).

perpetrators only Ngoma Camp soldiers. While paragraph 3.47 of the Indictment refers generally to soldiers from both the ESO and Ngoma Camps mistreating civilians "during the events referred to in this indictment", the Appeals Chamber is not convinced that this general paragraph was intended to expand the participants in the attack on the Beneberika Convent beyond those specifically identified in paragraph 3.27 of the Indictment. In this respect, the Appeals Chamber observes that the relevant sections of the Pre-Trial Brief and the Schedule of Particulars related to the events at the Beneberika Convent also mention as perpetrators only Ngoma Camp soldiers.[85] The Appeals Chamber therefore finds that the Indictment is defective because it does not identify ESO Camp soldiers among the perpetrators of the attack at the Beneberika Convent.

41. This defect is significant because the role played by ESO Camp soldiers in this attack is the sole basis of Muvunyi's convictions related to this attack. Moreover, this is not a case where the Indictment identified the alleged perpetrators in a general manner. Rather, the perpetrators of the attack are specifically identified in paragraph 3.27 of the Indictment as soldiers from the Ngoma Camp. A review of the record, including Prosecution Witness QCM's evidence whose testimony alone implicates ESO Camp soldiers in this attack, reveals that Muvunyi did not object to this allegation. However, the Appeals Chamber is not convinced that it can fault Muvunyi for not objecting given the manner in which the allegation surfaced, the limited attention given to it by the Prosecution, as well as the exceedingly vague nature of Witness QCM's testimony implicating ESO Camp soldiers in the attack.[86] Moreover, the evidence related to the apparent participation of ESO Camp soldiers in the attack is plainly outside the scope of the limited focus of paragraph 3.27 of the Indictment. In the present circumstances, and considering the fact that Muvunyi made a timely objection to other defective aspects of this allegation, as discussed below, it falls to the Prosecution to prove that Muvunyi's defence was not materially impaired by this defect.[87] Though the omission

[84] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, p. 17 (disposition).
[85] *See* Schedule of Particulars, para. 10 (repeating paragraph 3.27 of the Indictment verbatim); Pre-Trial Brief, para. 80 ("It is alleged that Tharcisse MUVUNYI was also responsible for ordering soldiers of the Ngoma Camp to go to Benebirika Convent [*sic*] at Buye where some young orphans had taken refuge with nuns in the order.").
[86] A review of the Prosecution's examination of Witness QCM underscores this point. The Prosecution posed no questions concerning ESO Camp soldiers during its direct examination of Witness QCM, and posed only one question about the identity of the soldiers taking part in the attack during its re-examination. *See* T. 11 July 2005 pp. 2-16, 27-28. The allegation that ESO Camp soldiers were present during the attack surfaced for the first time at the end of the cross-examination in response to a general question about the witness's ability to recognize the soldiers. *See generally* T. 11 July 2005 pp. 24-25 ("Those I knew by sight were more than 20. […] I could see them. I could meet them along the road. I know that they lived in the Ngoma camp and others lived at ESO. […] It was not easy to identify individuals in such circumstances. It wouldn't be easy to identify every single one of them in such a large group, so I can't really tell you that I was able to identify each one of those 20. I told you I saw them along the road. I recognised them. It was not easy in such circumstances to identify particular individuals. […]"). Witness QCM did not attribute any criminal conduct specifically to ESO Camp soldiers and provided no testimony that these soldiers, as opposed to other attackers, harmed or killed the refugees at the convent.
[87] *Niyitegeka* Appeal Judgement, para. 200. *See also Muhimana* Appeal Judgement, paras. 199, 219; *Gacumbitsi* Appeal Judgement, para. 51; *Ntagerura et al.* Appeal Judgement, paras. 31, 138.

of a material fact in certain cases can be cured by the provision of timely, clear, and consistent information,[88] as noted above, the relevant pre-trial disclosures in this case simply reaffirm that the charges related to the Beneberika Convent concern only Muvunyi's alleged responsibility for Ngoma Camp soldiers.[89] The Appeals Chamber therefore finds that the defect was not cured.

2. Alleged Error relating to the Criminal Conduct of Subordinates

42. In any event, even if the Appeals Chamber were satisfied that paragraph 3.47 of the Indictment gave sufficient notice that ESO Camp soldiers were present during the attack, this would not cure the failure of the Indictment to allege their role in the kidnapping and killing of refugees from the convent. Paragraph 3.47 of the Indictment implicates ESO Camp soldiers only in cruel treatment. Thus, in respect of the events at the Beneberika Convent, the Indictment is defective as to the charge of genocide because it implicates only Ngoma Camp soldiers in the abduction and killing of refugees, the facts which underpin the genocide charge. As noted above, no other communication implicates ESO Camp soldiers in the attack on the convent.

3. Alleged Error relating to Knowledge of Crimes and Failure to Prevent or to Punish

43. Turning to Muvunyi's complaints about the pleading of his knowledge of the crimes and his failure to prevent them or to punish his subordinates, the Prosecution contends that the following language in the Schedule of Particulars adequately pleads these material facts:

> […] [F]or all of the acts described at paragraphs [*sic*] 3.27 of the indictment the Prosecutor alleges that the accused knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 2(3)(a) and (e) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6(3) of the Statute.[90]

44. The Prosecution further argues that Muvunyi's assertion that this provides deficient notice goes to the evidence and not to the material facts.[91] The Appeals Chamber does not agree. The above-quoted language mainly repeats the legal elements of superior responsibility, but fails to set out the underlying material facts. The Indictment is therefore defective in this respect. For these elements, proper notice requires the Prosecution to plead: *the conduct of the accused* by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and *the conduct of the accused* by which he may be found

[88] *Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para. 29.
[89] *See* Schedule of Particulars, para. 10; Pre-Trial Brief, para. 80.
[90] Schedule of Particulars, para. 10. The Prosecution uses similar language in paragraph 35 of the Schedule of Particulars in connection with paragraph 3.47 of the Indictment.
[91] Prosecution Response Brief, paras. 68-70.

to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[92]

45. In the *Ntagerura et al.* case, the Appeals Chamber rejected a nearly identical formulation as satisfying the pleading requirements for these elements of superior responsibility and overturned a conviction for genocide, in part, on that basis.[93] Muvunyi objected to the Prosecution's pleading of the elements of superior responsibility in the Schedule of Particulars shortly after it was filed.[94] The Prosecution points to no further information that would have provided Muvunyi with timely, clear, and consistent notice of these material elements, and, consequently, this defect in the Indictment has not been cured. The Prosecution's point that the Trial Chamber inferred Muvunyi's knowledge of the crimes from the role played by ESO Camp soldiers in the attack only highlights the resulting prejudice to the preparation of Muvunyi's defence.[95] As discussed above, Muvunyi lacked adequate notice that ESO Camp soldiers took part in the crimes committed at the convent.

4. Conclusion

46. In sum, the Appeals Chamber has identified several uncured defects in the Indictment relating to the notice of the material facts underlying Muvunyi's conviction as a superior for the crimes committed by ESO Camp soldiers at the Beneberika Convent: the Indictment does not implicate ESO Camp soldiers in the attack; it fails to plead their role in the kidnapping and killing of refugees; and it does not plead the material facts related to Muvunyi's knowledge of the crimes or failure to prevent them or to punish the perpetrators. Accordingly, the Trial Chamber erred in law in convicting Muvunyi of genocide based on the role played by ESO Camp soldiers in this attack. The Appeals Chamber therefore does not need to address Muvunyi's remaining arguments under this ground of appeal.

47. For the foregoing reasons, the Appeals Chamber grants Muvunyi's Second Ground of Appeal and reverses his conviction for genocide for this event.

[92] *See Ntagerura et al.* Appeal Judgement, paras. 26, 152 (emphasis added).
[93] *See Ntagerura et al.* Appeal Judgement, paras. 154-158.
[94] *Muvunyi*, Decision on the Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber, p. 2, para. 8.
[95] Prosecution Response Brief, para. 71.

C. Alleged Errors relating to Attacks at the University of Butare (Ground 3)

48. The Trial Chamber convicted Muvunyi pursuant to Article 6(3) of the Statute for genocide based, in part, on the role played by ESO Camp soldiers in abducting and killing Tutsi lecturers and students from the University of Butare.[96] Muvunyi submits that the Trial Chamber erred in law and in fact in convicting him for genocide on the basis of this event.[97] In this section, the Appeals Chamber considers two principal questions: (1) whether Muvunyi had adequate notice of the material facts underlying these crimes in order to properly prepare his defence; and (2) whether the Trial Chamber's findings are supported by credible evidence.

1. Alleged Defects in the Form of the Indictment

49. Paragraph 3.34(i) of the Indictment alleges:

> Furthermore, during the events referred to in this indictment, soldiers from the ESO went to the University of Butare to kill the Tutsi lecturers and students as part of plans to exterminate the Tutsi intelligentsia. Lieutenant Colonel MUVUNYI by reason of his position of authority over the soldiers of the ESO and the widespread nature of these massacres, knew or had reason to know, that these acts were being committed and he failed to take measures to prevent, or to put an end to these acts, or punish the perpetrators.

50. Count 1 of the Indictment, charging the crime of genocide, states that the Prosecution is pursuing the allegations in paragraph 3.34(i) of the Indictment pursuant to Article 6(1) and Article 6(3) of the Statute.[98] In addition, the allegation in paragraph 3.34(i) of the Indictment is repeated in paragraph 16 of the Schedule of Particulars, which was filed by the Prosecution at the outset of trial. The Schedule of Particulars also alleges that Muvunyi is responsible for the acts alleged in paragraph 3.34(i) pursuant to Article 6(1) and Article 6(3) of the Statute.[99]

51. The Trial Chamber made the following factual findings relating to the allegations made in paragraph 3.34(i) of the Indictment:

> Based on the evidence before it, the Chamber concludes that ESO soldiers systematically sought and killed Tutsi lecturers and students from the University of Butare. Due to the widespread nature of these attacks, and the proximity of the ESO Camp to the University of Butare, the Chamber finds that the Accused had reason to know that the attacks were taking place. The Chamber further finds that the Accused, as the commanding officer of the ESO, failed to do anything to stop the killing by ESO soldiers or to punish them for their illegal behaviour even though he had the material ability to do so.[100]

[96] Trial Judgement, paras. 303, 498.
[97] Muvunyi Notice of Appeal, para. 5; Muvunyi Appeal Brief, paras. 19-52; Muvunyi Reply Brief, paras. 15-20.
[98] Indictment, p. 15.
[99] Schedule of Particulars, para. 16.
[100] Trial Judgement, para. 303 (internal citation omitted).

52. Muvunyi submits that the Indictment and the Schedule of Particulars do not adequately plead the material facts underlying an allegation of superior responsibility for these crimes.[101] In particular, he contends that he did not have sufficient notice of the identity of his subordinates, the approximate time of the attacks on the University of Butare, and the identity of the victims.[102] Moreover, he challenges the pleading of his knowledge of the crimes and his failure to prevent them or to punish his subordinates.[103]

53. The Prosecution responds that it was not necessary to plead the names of the victims and perpetrators.[104] The Prosecution further argues that the language "during the events referred to in this indictment" adequately particularized the approximate time of the attacks in view of the on-going nature of the violations as well as other paragraphs in the Indictment reflecting that the crimes which were attributed to Muvunyi were committed between mid-April and July 1994.[105] Finally, the Prosecution submits that, with respect to the "knowledge and punishment component", the Indictment refers to Muvunyi's "position of authority" and the "widespread" nature of the crimes and thus puts him on notice of these material elements.[106]

54. Bearing in mind the principles of notice previously articulated in this Judgement,[107] the Appeals Chamber considers whether Muvunyi had sufficient notice of the material facts underpinning his convictions as a superior for the crimes committed by ESO Camp soldiers at the University of Butare. In this assessment, the Appeals Chamber takes into account both the Indictment as well as the Schedule of Particulars, which the Trial Chamber permitted the Prosecution to file "in order to arrange [its] current pleading in a clearer manner" and in particular to set out "the factual allegations which refer specifically to a type of responsibility under Article […] 6(3) of the Statute."[108]

(a) Alleged Error relating to the Identity of Subordinates

55. The Appeals Chamber is not satisfied that Muvunyi has shown that paragraph 3.34(i) of the Indictment fails to sufficiently identify his subordinates. A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under

[101] Muvunyi Appeal Brief, paras. 19, 20, 22, 52.
[102] Muvunyi Appeal Brief, paras. 20, 52.
[103] Muvunyi Appeal Brief, paras. 19, 22.
[104] Prosecution Response Brief, paras. 125, 130.
[105] Prosecution Response Brief, paras. 127-129.
[106] Prosecution Response Brief, para. 126.
[107] *See supra* Section III.A (Alleged Errors relating to an Attack at the Butare University Hospital).
[108] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, p. 17 (disposition).

Article 6(3) of the Statute.[109] Paragraph 3.34(i) refers to "soldiers from the ESO" and Count 1 states that the allegation in this paragraph would be pursued under Article 6(3) of the Statute. In addition, paragraph 2.3 of the Indictment specifies that ESO soldiers were under Muvunyi's command.[110] On the basis of the Indictment, therefore, Muvunyi would have known that he was being charged as a superior for the criminal acts of ESO Camp soldiers at the University of Butare.

56. In the *Ntagerura et al.* case, the Appeals Chamber held that Samuel Imanishimwe was sufficiently informed of the identity of his subordinates in relation to an attack by information reflecting that the soldiers came from the camp under his command.[111] The Appeals Chamber notes that Muvunyi had a similar degree of notice as to the identity of his subordinates. Beyond the assertion that the Indictment does not identify the perpetrators, Muvunyi has not advanced any argument as to why further specificity was required in this particular case. Accordingly, Muvunyi has failed to demonstrate that the Indictment is defective with respect to pleading the identity of his subordinates.

(b) Alleged Error relating to the Criminal Conduct of Subordinates

57. Turning to the question of whether the Indictment properly described the criminal conduct of his subordinates, Muvunyi takes issue with the pleading of the approximate time of the attacks and challenges the pleading of the identity of the victims and the manner and means of the killings.[112]

58. The Appeals Chamber notes that paragraph 3.34(i) of the Indictment specifies the dates of the attack only as "during the events referred to in this indictment", thereby providing a date range from mid-April through June 1994.[113] This date range appears broad; however, a broad date range, in and of itself, does not invalidate a paragraph of an indictment. In this respect, the Appeals Chamber has previously stated that "the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts themselves are often not very much in

[109] *Blagojevi} and Joki}* Appeal Judgement, para. 287.
[110] Paragraph 2.3 of the Indictment states: "In his capacity as Commander of the ESO, the accused had under his command the officers and soldiers of the school. He exercised authority and control over the gendarmerie, Ngoma Camp, as well as all military operations in Butare *préfecture*."
[111] *See Ntagerura et al.* Appeal Judgement, paras. 140, 141, 153.
[112] Muvunyi Appeal Brief, paras. 20, 52.
[113] *See, e.g.,* Indictment, paras. 3.24, 3.27-3.29, 3.44, 3.45, 3.48 (referring to the commission of specific crimes between April and June 1994).

issue."[114] Moreover, in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes.[115]

59. Paragraph 3.34(i) of the Indictment also describes the attacks against Tutsis at the University of Butare as "widespread". Therefore, the Prosecution appears to have intended to prove the existence of a series of killings reflecting a pattern of conduct. The Trial Chamber's findings, which also do not fix any set of dates for the attacks or identify the specific victims, further reflect that the Prosecution was not necessarily in a position to provide greater specificity in the Indictment.

60. In addition, with respect to the pleading of the identity of the victims and the manner and means of the killings, paragraph 3.34(i) of the Indictment identifies the victims as "Tutsi lecturers and students from the University of Butare" and states that ESO Camp soldiers went to the university "to kill" them. The Appeals Chamber considers that, in the circumstances noted above, this adequately identifies the victims and pleads the manner and means of the attack. Beyond making cursory objections on these points, Muvunyi advances no argument as to why greater specificity would be required.

61. Accordingly, Muvunyi has failed to demonstrate that the Indictment is defective with respect to the timing of the attacks, the identification of the victims, and the manner and means of the attacks.

(c) Alleged Error relating to Knowledge of Crimes and Failure to Prevent or to Punish

62. Finally, the Appeals Chamber is not persuaded by Muvunyi's complaints about the pleading of his knowledge of the crimes and his failure to prevent them or to punish his subordinates.[116] A review of the Trial Judgement reflects that the Trial Chamber inferred his knowledge of these attacks from their "widespread" nature and the proximity of the University of Butare to the ESO Camp.[117] In addition, it appears that the Trial Chamber implicitly inferred Muvunyi's failure to prevent the crimes or to punish the subordinates in question from the continuing nature of the violations.[118] Both of these elements therefore follow from the assertion in paragraph 3.34(i) of the

[114] *Ntagerura et al.* Appeal Judgement, para. 26 fn. 82, quoting *Blaški}* Appeal Judgement, para. 218.
[115] *Muhimana* Appeal Judgement, para. 79; *Gacumbitsi* Appeal Judgement, para. 50; *Kupreški}* Appeal Judgement, para. 89.
[116] Muvunyi Appeal Brief, paras. 19, 22.
[117] Trial Judgement, para. 303.
[118] Trial Judgement, para. 303.

Indictment that the attacks on Tutsis at the University of Butare were "widespread". In any event, beyond making a cursory objection to these aspects of the Indictment, Muvunyi advances no argument as to why greater specificity would be required. Accordingly, Muvunyi has failed to demonstrate that the Indictment is defective with respect to the pleading of these material facts.

(d) Conclusion

63. For the foregoing reason, this sub-ground of appeal is dismissed.

2. Alleged Errors in the Assessment of the Evidence

64. The Trial Chamber based its finding that ESO Camp soldiers "systematically sought and killed Tutsi lecturers and students from the University of Butare" on the evidence of Prosecution Witnesses KAL and NN.[119] From the testimony of Witness NN, the Trial Chamber recounted that on 20 April 1994 Muvunyi established an "anti-looting squad" which included, amongst others, two ESO Camp soldiers named Sibomana and Ntamuhanga.[120] The Trial Chamber noted that, according to Witness NN, this unit effectively operated as a "death squad", abducting and killing Tutsis from the University of Butare.[121] The Trial Chamber found that Witness KAL, who testified that Sibomana abducted and killed Tutsi students from the university,[122] "largely corroborated" the account of Witness NN.[123] Moreover, the Trial Chamber based its finding that Muvunyi had reason to know of these attacks on their "widespread nature" and the proximity of the university to the ESO Camp.[124] Finally, the Trial Chamber concluded that Muvunyi had the material ability to prevent these crimes or to punish the ESO soldiers who perpetrated them because he was the "commanding officer of ESO".[125]

65. Muvunyi contests the Trial Chamber's finding that he had effective control over ESO Camp soldiers and, in particular, the perpetrators of the killings related to the University of Butare.[126] He further contends that Witnesses KAL and NN gave no credible evidence concerning his knowledge of the crimes.[127] In this respect, he submits that the Trial Chamber's reliance on the proximity of the

[119] Trial Judgement, paras. 302, 303.
[120] Trial Judgement, para. 302. The underlying evidence does not state that Muvunyi established the squad, but rather that an ESO officer named Bizimana established the squad after a meeting held by Muvunyi on 20 April 1994. T. 18 July 2005 p. 49 ("Furthermore, on the 20th, following the meeting chaired by Muvunyi, Bizimana appointed Ntamuhanga as the leader of the team assigned to prevent soldiers from looting.").
[121] Trial Judgement, para. 302.
[122] Trial Judgement, paras. 293, 294.
[123] Trial Judgement, para. 302.
[124] Trial Judgement, para. 303.
[125] Trial Judgement, para. 303.
[126] Muvunyi Appeal Brief, paras. 25-34, 45-51.
[127] Muvunyi Appeal Brief, paras. 39-44.

university to the ESO Camp to infer his knowledge is misplaced as the evidence does not show that the killings occurred at the university.[128] Finally, he emphasizes that the underlying evidence is based exclusively on hearsay testimony which lacks even the most basic details about the crimes.[129]

66. The Prosecution responds that there is sufficient evidence to demonstrate that Muvunyi had effective control over ESO Camp soldiers.[130] The Prosecution further contends that the "widespread" nature of the crimes provided ample support for the Trial Chamber's inference that Muvunyi knew or had reason to know about them.[131]

67. A review of the Trial Judgement reflects that the Trial Chamber did not make specific findings on Muvunyi's effective control over the ESO Camp soldiers who were involved in the events at the University of Butare.[132] Instead, in another part of the Trial Judgement, the Trial Chamber extensively discussed the evidence and made findings on his authority over ESO Camp soldiers in general, concluding that, from 7 April until mid-June 1994, Muvunyi was the "Commander of ESO" and had effective control over its soldiers.[133] Muvunyi challenges this finding in his Twelfth Ground of Appeal. He does not raise any argument specific to the attacks on the University of Butare or the ESO Camp soldiers involved therein warranting a separate consideration of this issue here.[134]

68. As to Muvunyi's knowledge of the crimes, the Appeals Chamber observes that the Trial Chamber relied on the "widespread" nature of the attacks as well as the proximity of the ESO Camp to the university.[135] It is evident from the Trial Judgement and the record that the Trial Chamber's findings on the abductions and killings underlying Muvunyi's conviction for the events at the university are based entirely on circumstantial and hearsay evidence. The Prosecution notably does not address this point.

69. Witness NN, who attested to these crimes, only heard about them from a student hiding at the Faculty of Medicine.[136] That student in turn learned of the attacks second-hand from the

[128] Muvunyi Appeal Brief, para. 38.
[129] Muvunyi Appeal Brief, paras. 27, 28, 44, 52.
[130] Prosecution Response Brief, paras. 103-112, 120-123.
[131] Prosecution Response Brief, paras. 113-119.
[132] Trial Judgement, para. 303.
[133] Trial Judgement, paras. 31-57.
[134] Muvunyi does assert that Witness KAL's testimony that Muvunyi ordered the attacks on the university is hearsay. Muvunyi Appeal Brief, paras. 29-34. The Trial Chamber reached the same conclusion and did not accept this aspect of Witness KAL's evidence. *See* Trial Judgement, para. 301.
[135] Trial Judgement, para. 303.
[136] Trial Judgement, para. 298. *See also* T. 18 July 2005 p. 50 ("I do not very well remember the date [of the attacks]. Furthermore, maybe I should make some other clarifications on the massacres at the university. A student at the university, whose family members had sought refuge in Butare, had asked me to try to save that girl who was studying

assailants who boasted of them.[137] The account of Witness NN contains no detail on any specific incident or the frequency of the attacks. The Trial Chamber relied primarily on Witness NN, but considered that Witness KAL provided corroboration.[138] However, Witness KAL also did not personally observe the events, but stated that ESO Camp soldiers brought university students to the camp and then took them out, surmising that they were then killed.[139] His evidence is similarly devoid of detail.

70. It is well established that, as a matter of law, it is permissible to base a conviction on circumstantial or hearsay evidence.[140] However, caution is warranted in such circumstances.[141] In this respect, the Trial Chamber explained in the Trial Judgement that "there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt."[142] Here, there was good reason to consider whether the hearsay evidence was otherwise supported, as neither witness provided any detail on the abductions and killings themselves. Consequently, the Appeals Chamber is not persuaded that the Trial Chamber acted reasonably and with the requisite degree of caution in relying on the evidence of Witnesses NN and KAL about these events. No reasonable trier of fact could have concluded that ESO camp soldiers "systematically sought and killed Tutsi lecturers and students"[143] in circumstances where it heard no evidence about even a single incident.

71. Accordingly, this sub-ground of appeal is granted.

---

at the university. […] I took her out of the faculty of medicine. As a matter of fact, when I asked her what the situation was on the university campus, she told me that people were being killed. […] Those were the circumstances under which I learned of the massacres at the university. […] Secondly, as I have just stated to you, I heard about the massacres at the university when I went to the university campus to free that girl, and she related everything to me.").

[137] Trial Judgement, para. 298. *See also* T. 18 July 2005 p. 50 ("She told me that children who had committed the massacres at the university were members of Ntamuhanga's military police group. They came boasting, giving us details on the manner in which the students had been killed.").

[138] Trial Judgement, para. 302.

[139] Trial Judgement, paras. 294-296. *See also* T. 8 March 2005 pp. 6-10 ("Sergeant Major Sibomana was a student in the school, but he had the rank of sergeant. When he finished, he went to university because he had been granted leave to do so. […] And at one point he asked to leave the army and he was authorised to do so, but since the university was not far from the ESO camp, he would come to the camp, and he would go and abduct students from the university but come back to the ESO camp. So he worked with the soldiers as if he had come back into the army. […] Sergeant Major Sibomana as a student at the university was under a duty to identify students who were called *Inkotanyi*. Those students were put on board vans that had been commandeered, and they scoured the town looking for those students who were brought to ESO camp, and then they took them out of the ESO camp. […] All those who had been taken to ESO camp, not only the students, anyone who was taken out of that camp, was killed. It was not only those students, it was everyone.").

[140] *Muhimana* Appeal Judgement, para. 49; *Gacumbitsi* Appeal Judgement, para. 115.

[141] *Ndindabahizi* Appeal Judgement, para. 115. *See also Rutaganda* Appeal Judgement, paras. 34, 156.

[142] Trial Judgement, para. 12.

[143] Trial Judgement, para. 303.

3. Conclusion

72. For the foregoing reasons, the Appeals Chamber grants Muvunyi's Third Ground of Appeal and reverses his conviction for genocide to the extent that it is based on the attacks on Tutsi students and lecturers at the University of Butare.

D. Alleged Errors relating to an Attack at the *Groupe Scolaire* (Ground 4)

73. The Trial Chamber convicted Muvunyi pursuant to Article 6(1) of the Statute for genocide and pursuant to Article 6(3) of the Statute for other inhumane acts as a crime against humanity, based, in part, on the role played by ESO Camp soldiers in the killing and beating of Tutsi refugees at the *Groupe scolaire*.[144] In particular, the Trial Chamber found that on 29 April 1994, Lieutenant Modeste Gatsinzi of the ESO Camp led a group of assailants including ESO and Ngoma Camp soldiers and *Interahamwe* in an attack against Tutsi civilians at the *Groupe scolaire*.[145]

74. During the attack on the *Groupe scolaire*, the assailants separated Tutsis from the other refugees and beat them.[146] The Trial Chamber did not make any explicit or detailed factual findings on the killing of these refugees,[147] but it follows from the evidence, which Muvunyi does not dispute on appeal, that the assailants loaded a number of Tutsi refugees onto trucks and killed them elsewhere.[148] The Trial Chamber found that Muvunyi had knowledge of the attack and refused to come to the assistance of the refugees as a whole.[149] The Trial Chamber found that he instead gave instructions that the Bicunda family should not be harmed.[150] From Muvunyi's inaction and selective assistance, the Trial Chamber found that he tacitly approved of the unlawful conduct of the ESO Camp soldiers who took part in the attack and thereby aided and abetted the killing of the Tutsi refugees.[151]

75. Muvunyi submits that the Trial Chamber erred in law and in fact in entering his conviction for aiding and abetting genocide which was based solely on this event.[152]

---

[144] Trial Judgement, paras. 496, 498, 530.
[145] Trial Judgement, para. 360.
[146] Trial Judgement, para. 447.
[147] In particular, in setting out the "salient issues" which were "corroborated and established beyond reasonable doubt" the Trial Chamber does not refer to the killing of the refugees other than one member of the Bicunda family who was killed due to a mistaken identity. Trial Judgement, para. 360 ("In fact the salient issues that an attack was perpetrated on *Groupe scolaire* on 29 April 1994 by soldiers and *Interahamwe*, that Bicunda's family was saved by the Accused, that one of the Bicunda children was killed during the attack due to a mistaken identity, and that an ESO soldier called Lieutenant Modeste Gatsinzi led the group of military and civilian attackers, have all been corroborated and established beyond reasonable doubt."). However, the Trial Chamber's legal findings simply state that Muvunyi "assisted and encouraged the killing of Tutsi civilians at the *Groupe scolaire*". *See* Trial Judgement, para. 496.
[148] This follows from the evidence of Witnesses QBE and TQ. *See* Trial Judgement, paras. 336, 340. In another part of the Trial Judgement, the Trial Chamber reflects that it based its findings with respect to the attack on these two Prosecution witnesses. *See* Trial Judgement, para. 447.
[149] Trial Judgement, paras. 358, 363, 364, 496.
[150] Trial Judgement, paras. 360, 364, 496.
[151] Trial Judgement, para. 496.
[152] Muvunyi Notice of Appeal, para. 6; Muvunyi Appeal Brief, paras. 53-67; Muvunyi Reply Brief, paras. 21-24. The Appeals Chamber considers Muvunyi's arguments against his conviction for other inhumane acts as a crime against humanity based on this event in connection with his Tenth Ground of Appeal. *See infra* Section III.I (Alleged Errors relating to the Conviction for Other Inhumane Acts as a Crime against Humanity).

76. The Trial Chamber found that Muvunyi's "tacit approval" of the unlawful conduct of ESO Camp soldiers during the attack at the *Groupe scolaire* on 29 April 1994 "assisted and encouraged" the killings of Tutsis who sought refuge there.[153] The Trial Chamber described Muvunyi's conduct as follows:

> […] [W]hen soldiers from the ESO were in the process of attacking unarmed civilian Tutsi refugees at the *Groupe scolaire*, the Accused refused to come to the refugees' assistance. Instead, he gave instructions that members of a certain family should be separated from the other Tutsi refugees and should not be harmed. Indeed, even when one child from this family was mistakenly taken away together with the other Tutsi refugees, the Accused sent a vehicle to try to rescue the child. The overall conduct of the Accused during this event, including the fact that he implicitly allowed a large contingent of soldiers under his command to leave their Camp fully equipped with arms and ammunition to attack unarmed refugees, his instruction to these soldiers not to kill or otherwise harm members of the Bicunda family, while leaving the vast majority of unarmed Tutsi refugees at the mercy of the genocidal killers, amounted to tacit approval of the unlawful conduct of the ESO soldiers. This approval assisted and encouraged the killing of the Tutsi civilians at the *Groupe scolaire*.[154]

The Trial Chamber found that Muvunyi had knowledge of the attack based, in particular, on his position as the interim Commander of the ESO Camp, the nature and scale of the attacks at the *Groupe scolaire*, and his apparent order to spare the Bicunda family.[155] In finding that Muvunyi ordered the assailants not to harm the Bicunda family, the Trial Chamber relied on Prosecution Witness TQ, who heard a soldier say during the attack: "Those members of Muvunyi's family should come closer".[156]

77. Muvunyi submits that no reasonable trier of fact could have found that he aided and abetted the attack on Tutsis at the *Groupe scolaire* based on the evidence presented at trial.[157] He argues that the evidence does not show that he had knowledge of the attack or that he played any affirmative role in it.[158] In Muvunyi's view, the Trial Chamber based his conviction primarily on his apparent order to spare the Bicunda family.[159] Muvunyi submits that the evidence of Witness TQ, however, is "unattributed hearsay" which, even if believed, is open to other reasonable interpretations.[160] Furthermore, he notes that Witness TQ's evidence is contradicted by Defence Witness MO38, who testified that the orders of Colonel Marcel Gatsinzi saved the Bicunda family.[161] In this respect, Muvunyi submits that the Trial Chamber erred in dismissing without

[153] Trial Judgement, para. 496.
[154] Trial Judgement, para. 496.
[155] Trial Judgement, paras. 358, 363, 364.
[156] Trial Judgement, para. 341. The Trial Chamber stated that the evidence of Witness QBE corroborated its finding that Muvunyi ordered that the Bicunda family be spared. Trial Judgement, para. 359. However, as discussed below, this is not the case.
[157] Muvunyi Appeal Brief, paras. 54, 60-67.
[158] Muvunyi Appeal Brief, paras. 53, 65.
[159] Muvunyi Appeal Brief, paras. 61, 67.
[160] Muvunyi Appeal Brief, paras. 61, 62.
[161] Muvunyi Appeal Brief, para. 63.

analysis the evidence of Witness MO38 in favour of Witness TQ who had been accused of genocide.[162]

78. The Prosecution responds that the Trial Chamber correctly inferred that Muvunyi tacitly approved of the participation of ESO Camp soldiers in the attack at the *Groupe scolaire* from the order given to save the Bicunda family, his attempts to save a child of this family who was mistakenly taken, his refusal to come to the assistance of the other refugees, and his overall conduct in allowing a contingent of armed soldiers to leave the camp to participate in the attack.[163] The Prosecution contends that Muvunyi has not demonstrated that it was unreasonable to rely on the evidence of Witness TQ.[164] The Prosecution also notes that the Trial Chamber's conclusion that Muvunyi knew about the attack is reasonable in light of the proximity of the camp to the *Groupe scolaire* and the repeated nature of the attacks.[165]

79. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.[166] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[167]

80. An accused may be convicted of aiding and abetting when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[168] In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence at or very near the crime scene, especially if considered together with his prior conduct, which allows the conclusion that the accused's conduct amounted to official sanction of the crime and thus substantially contributed to it.[169] The question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry.[170]

81. The Trial Chamber refers only to limited circumstantial evidence suggesting that Muvunyi tacitly approved the criminal conduct of the principal perpetrators. It is well established that, as a

[162] Muvunyi Appeal Brief, para. 63.
[163] Prosecution Response Brief, para. 142.
[164] Prosecution Response Brief, paras. 143, 144.
[165] Prosecution Response Brief, para. 149.
[166] *Blagojevi} and Joki}* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370.
[167] *Blagojevi} and Joki}* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370.
[168] *Brđanin* Appeal Judgement, paras. 273, 277.
[169] *Brđanin* Appeal Judgement, para. 277
[170] *Blagojevi} and Joki}* Appeal Judgement, para. 134.

matter of law, it is permissible to base a conviction on circumstantial or hearsay evidence.[171] However, caution is warranted in such circumstances.[172] A close review of the evidence underpinning the Trial Chamber's factual findings reveals that it is equivocal at best and does not support the conclusion that Muvunyi had knowledge of or tacitly approved of the attack on Tutsis at the *Groupe scolaire*.

82. Initially, as to Muvunyi's knowledge of the attack, the Trial Chamber relied in part on his position as the Interim Commander of the ESO Camp as well as the repeated nature and scale of the attacks.[173] The Trial Chamber made no express finding about any other attacks before 29 April 1994, in particular attacks involving ESO soldiers. The evidence simply refers to an earlier incident where a group of people led by an *Interahamwe* separated the Tutsis from the other refugees, but left them unharmed after receiving money from Bicunda.[174] The Trial Chamber refers to no specific evidence indicating that Muvunyi was informed of this earlier incident, nor does it necessarily follow that, if he were informed, it would have put him on notice that ESO soldiers would participate in a later attack. The Trial Chamber also did not point to any specific evidence of communications within the chain of command that would have carried the news of either the first or second attack to Muvunyi.[175] Finally, there is no direct evidence that Muvunyi knew that armed soldiers left the camp to take part in the *Groupe scolaire* attack.[176] Instead, this appears to follow from the Trial Chamber's inference, discussed below, that Muvunyi ordered that the Bicunda family be spared.

83. Apparently the strongest evidence indicating that Muvunyi had knowledge of the attack comes from Witness TQ, who heard a soldier ask that "members of Muvunyi's family should come closer",[177] whereupon he observed that "Bicunda and other members of his family moved out and

---

[171] *Muhimana* Appeal Judgement, para. 49; *Gacumbitsi* Appeal Judgement, para. 115.
[172] *Ndindabahizi* Appeal Judgement, para. 115. *See also Rutaganda* Appeal Judgement, paras. 34, 156.
[173] Trial Judgement, paras. 358, 363, 364.
[174] This follows from the evidence of Witness QBE. *See* Trial Judgement, paras. 328-330 ("According to QBE's testimony, the first attack was by a group of people apparently led by an *Interahamwe* dressed in *Kitenge* cloth. […] Witness QBE testified that on this occasion, the refugees were not killed because a certain Bicunda paid the attackers about 200,000 Rwandan francs to save their lives.").
[175] The Trial Chamber heard evidence that Witness QBE called the ESO Camp and asked Muvunyi to provide assistance. It, however, was not convinced that the witness in fact spoke with Muvunyi. *See* Trial Judgement, para. 358.
[176] In particular, the Appeals Chamber observes that the only evidence that ESO Camp soldiers participated in the attack comes from Witnesses QBE and TQ, who heard from other sources after the attack, that soldiers from the ESO Camp participated and that the leader of the attack was Lieutenant Gatsinzi, a soldier from the ESO Camp. *See* Trial Judgement, paras. 331, 339. In addition, Witness NN testified that Lieutenant Gatsinzi participated in the attack, but he gave no basis for this assertion. *See* Trial Judgement, para. 352.
[177] Trial Judgement, para. 341. At a later point in his testimony, Witness TQ stated simply that the soldier asked to see Bicunda's family. *See* T. 20 June 2005 p. 23 ("When a soldier asked to see Bicyunda's [*sic*] family, Bicyunda [*sic*] went towards his wife […]").

stood aside, and nobody touched them".[178] The Trial Chamber relied on this evidence both to establish Muvunyi's knowledge of the attack and to construe his assistance to the Bicunda family as indifference to and thus tacit approval of the killing of the remaining refugees.[179] The Appeals Chamber finds, however, that no reasonable trier of fact could conclude on the basis of this vague statement from an unidentified soldier that Muvunyi gave any instructions to the assailants in connection with the Bicunda family.

84. Additionally, the Trial Chamber cited no testimony in finding that Muvunyi ordered an ambulance to save a child of the Bicunda family who was abducted from the *Groupe scolaire*. Although some evidence in this regard was provided by Witness TQ, the witness only speculated without elaboration that Muvunyi was responsible for dispatching the ambulance.[180] As a consequence, no reasonable trier of fact could find from this evidence that it was Muvunyi who ordered an ambulance to save the child.

85. The Trial Chamber stated that the evidence of Witness QBE supported its finding that Muvunyi ordered that the Bicunda family be spared.[181] However, a review of Witness QBE's evidence reveals that the witness did not mention the incident described by Witness TQ or even the sparing of the Bicunda family during the second attack. Rather, it follows from Witness QBE's testimony that, during the first attack, Bicunda paid the assailants not to harm the refugees.[182]

86. Finally, the Appeals Chamber observes that the Trial Chamber heard no direct evidence on the specific role, if any, that the ESO Camp soldiers played in the actual killing of the refugees after they were taken from the *Groupe scolaire.*[183] This is significant because Muvunyi was convicted of genocide for tacitly approving the "unlawful conduct of the ESO soldiers".[184]

87. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in inferring from the evidence presented that Muvunyi had knowledge of or tacitly approved of the killing of Tutsis at

[178] Trial Judgement, para. 341.
[179] Trial Judgement, paras. 361, 364, 496.
[180] Trial Judgement, para. 341 ("However, a child from Bicunda's family, nicknamed Kibwa, stayed away from other members of Bicunda's family and was taken away and killed. TQ learnt that an ambulance was sent for the child but it was already too late."), citing T. 30 June 2005 p. 23. The relevant portion of the transcript reads: "In the meantime an ambulance took him to the university hospital, but it was realised that the child was already dead and we subsequently buried him. (…) And I believe that your client was aware of that death and he sent somebody." *See* T. 30 June 2005 p. 23.
[181] Trial Judgement, para. 359.
[182] Trial Judgement, para. 330. *See also* T. 15 June 2005 p. 21.
[183] *See* Trial Judgement, paras. 336, 340. As noted above, the Trial Chamber made no express findings about the killings.
[184] Trial Judgement, para. 496.

the *Groupe scolaire*. As a result, the Appeals Chamber need not address Muvunyi's remaining arguments in support of this ground of appeal.[185]

88. For the foregoing reasons, the Appeals Chamber grants Muvunyi's Fourth Ground of Appeal and reverses his conviction for genocide on the basis of the attack against Tutsis at the *Groupe scolaire*.

[185] Muvunyi also submits that he did not have adequate notice of the material facts underlying his conviction for aiding and abetting genocide in order to properly prepare his defence. Muvunyi Notice of Appeal para. 6; Muvunyi Appeal Brief, paras. 53-56, 60.

E. Alleged Errors relating to an Attack at the Mukura Forest (Ground 5)

89. The Trial Chamber convicted Muvunyi pursuant to Article 6(3) of the Statute for genocide based, in part, on the role played by ESO Camp soldiers in killing Tutsi refugees at the Mukura forest.[186] Muvunyi submits that the Trial Chamber erred in law in convicting him of this crime because he lacked adequate notice of the material facts underlying this crime in order to properly prepare his defence.[187]

90. Paragraph 3.40 of the Indictment alleges:

> During the events referred to in this indictment, thousands of civilians, mostly Tutsi, in Butare *prefecture*, were massacred, including at the following locations:
>
> - Ngoma parish, Ngoma *Commune*
> - Matyazo Dispensary, Matyazo
> - Kibeho parish, Mugusa *Commune*
> - Beneberika Convent, Sovu, Huye *Commune*
> - *Groupe scolaire*, Ngoma
> - *Économat Generale*, Ngoma *Commune*
> - Nyumba parish, Gatare *Commune*
> - Muslim Quarters, Ngoma *Commune*.

91. In connection with this paragraph, the Trial Chamber heard evidence from Prosecution Witnesses XV and YAK of an attack at the Mukura forest against Tutsi refugees by *Interahamwe* and ESO and Ngoma Camp soldiers.[188] The Trial Chamber accepted this evidence and found that ESO Camp soldiers under Muvunyi's command and authority collaborated with *Interahamwe* and Ngoma Camp soldiers to attack and kill Tutsi refugees at the Mukura forest.[189] The Trial Chamber also concluded that Muvunyi had reason to know of this attack but failed to prevent it or to punish the perpetrators.[190]

92. In assessing the notice provided to Muvunyi of the attack at the Mukura forest, the Trial Chamber noted that this location was not mentioned in paragraph 3.40 of the Indictment.[191] However, it concluded that paragraph 3.40 was not intended to be exhaustive.[192] The Trial Chamber was satisfied that Muvunyi received notice in a timely, clear, and consistent manner of the Prosecution's intent to lead evidence on the attack through the summary of the anticipated evidence

[186] Trial Judgement, paras. 372, 498.
[187] Muvunyi Notice of Appeal, para. 7; Muvunyi Appeal Brief, paras. 69, 70; Muvunyi Reply Brief, paras. 25-29.
[188] Trial Judgement, paras. 365-372.
[189] Trial Judgement, para. 372.
[190] Trial Judgement, para. 372.
[191] Trial Judgement, para. 26.
[192] Trial Judgement, para. 26.

of Witnesses XV and YAK annexed to the Pre-Trial Brief as well as their unredacted statements which were disclosed to him at least twenty-one days prior to their respective testimony.[193]

93. Muvunyi submits that the Indictment does not mention the attack on Tutsi refugees at the Mukura forest and that he thus lacked notice of this material fact.[194] The Prosecution responds that Muvunyi had notice of this allegation through the summary of the anticipated testimonies of Witnesses XV and YAK annexed to the Pre-Trial Brief as well as the disclosure of their respective unredacted statements forty days before the commencement of trial, and thus suffered no prejudice.[195]

94. Bearing in mind the principles of notice previously articulated in this Judgement,[196] the Appeals Chamber considers that Muvunyi could not have known, on the basis of the Indictment alone, that he was being charged in connection with the attack at the Mukura forest because this attack is not mentioned in the Indictment. While in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes,[197] this is not the case with respect to this attack. If the Prosecution had intended to establish Muvunyi's liability for the Mukura forest attack, both the occurrence of this attack and the details of his liability should have been pleaded in the Indictment. Mukura forest was a major massacre site[198] and the Prosecution had in its possession information about this attack several months before filing the initial indictment against Muvunyi in November 2000.[199] Indeed, during the hearing of the appeal, the Prosecution acknowledged that the Indictment was defective in this respect.[200] The Appeals Chamber finds that paragraph 3.40 of the Indictment is defective because it fails to enumerate the Mukura forest among the massacre sites, thus omitting a material fact which, in part, formed the basis of Muvunyi's conviction for genocide.

---

[193] Trial Judgement, para. 26.
[194] Muvunyi Appeal Brief, paras. 68-70.
[195] Prosecution Response Brief, paras. 151-168. The Prosecution notes that the exact date of the disclosure of the unredacted statements was 19 January 2005. Prosecution Response Brief, para. 159.
[196] *See supra* Section III.A (Alleged Errors relating to an Attack at the Butare University Hospital).
[197] *Muhimana* Appeal Judgement, para. 79; *Gacumbitsi* Appeal Judgement, para. 50; *Kupreški}* Appeal Judgement, para. 89.
[198] *See* AT. 13 March 2008 pp. 29, 32, 34. The Prosecution states that Mukura "is comparatively in the same line of other massacre sites". With respect to the number of refugees who were attacked, the Prosecution added that "Mukura forest is relatively viewed as one of the big massacre sites because of the evidence of Witness XV and YAK, which actually characterised it as a big massacre site." AT. 13 March 2008 p. 34.
[199] The Prosecution indicates that statements of Witnesses XV and YAK mentioning the attack were given on 7 December and 17 June 2000, respectively. *See* Prosecution Response Brief, para. 159.
[200] AT. 13 March 2008 pp. 29, 38. Further, the Prosecution stated that "with a substantial massacre site it would have been proper for a charging instrument to specify it" and that "[t]his was not done". AT. 13 March 2008 p. 34.

95. Recalling that defects in an indictment can be cured, the Prosecution submits that Muvunyi failed to object at trial to the testimony regarding the Mukura forest.[201] Muvunyi argues that throughout the trial he objected to evidence relating to uncharged conduct, and that the Presiding Judge repeatedly indicated to him that the Trial Chamber would not consider any evidence supporting unpleaded allegations. He submits that he relied on the Presiding Judge's guidance.[202]

96. A review of the trial record reveals that during the appearance of Witness XV, Muvunyi objected to evidence being led in relation to uncharged conduct.[203] The Presiding Judge overruled this objection, generally stating that any evidence led during the trial which proved facts not charged in the Indictment would not be taken into account by the Trial Chamber.[204] In these circumstances, it would be unreasonable to expect counsel for Muvunyi to object again, on the same basis, to the evidence regarding the attack at the Mukura forest that was led shortly thereafter. Similarly, in light of the particular circumstances surrounding Witness XV's testimony relating, *inter alia*, to the attack at the Mukura forest, the Appeals Chamber is not satisfied that it would have been reasonable to expect counsel for Muvunyi to object to evidence given subsequently by Witness YAK in relation to the same event.[205] The Appeals Chamber therefore finds that it falls to the Prosecution to demonstrate that the preparation of Muvunyi's defence was not prejudiced by the omission from the Indictment of the attack at the Mukura forest.

97. The Appeals Chamber now turns to the question of whether the defect in the Indictment was cured by subsequent timely, clear, and consistent information provided to Muvunyi. The Appeals Chamber has previously held that a summary of an anticipated testimony in an annex to the Prosecution's pre-trial brief can, in certain circumstances, cure a defect in an indictment.[206]

---

[201] AT. 13 March 2008 pp. 29-30.
[202] AT. 13 March 2008 p. 15. In support of this submission, Muvunyi specifies two particular instances where the Presiding Judge said that the Trial Chamber would not consider evidence in relation to uncharged conduct. *See* AT. 13 March 2008 p. 73, referring to T. 16 May 2005 pp. 10-12 and T. 1 March 2005 pp. 13-14.
[203] T. 16 May 2005 p. 10.
[204] T. 16 May 2005 pp. 10-12. The Presiding Judge stated: "[W]hatever is not in the indictment, Mr. Counsel, will not be convicted or acquitted. So when the witness narrates something, we can't say that you must (*unintelligible*) say only this. But if he's going outside the realm of evidence, I think you may. In the final decision, these are not relevant to the charges. But we can't confine the witness and say that he must say only this. […] So why are you worried about it? We [*sic*] are not charged with that. That will be dismissed just like that." Mr. Taylor noted in response: "I understand the Court's finding in that regard, that if it is not supported by the pleadings, […] it can't stand as a basis for conviction." Similarly, when, at the outset of the trial, Muvunyi objected to evidence being led in relation to uncharged conduct, the Presiding Judge stated: "[I]f there is nothing in the indictment, why are you worried? They have to prove the indictment. […] [I]f it is not in the indictment, how are we going to attribute it? […] So if there is nothing in the indictment, I don't think there's any objection on your part." T. 1 March 2005 pp. 13-14.
[205] T. 29 June 2005; T. 30 June 2005.
[206] *Gacumbitsi* Appeal Judgement, paras. 57, 58. *See also Ntakirutimana* Appeal Judgement, para. 48 (holding that a witness statement, when taken together with "unambiguous information" contained in a pre-trial brief and its annexes

98. The circumstances presented in this instance, however, are different. The Pre-Trial Brief and the annexed witness summaries do not simply add greater detail in a consistent manner to a more general allegation already pleaded in the Indictment. As far as Muvunyi could have known, the allegation of an attack at the Mukura forest surfaced for the first time in the annex to the Pre-Trial Brief, filed on 25 January 2005,[207] summarizing the anticipated testimony of Witnesses XV and YAK, whose unredacted statements were disclosed only a few days earlier, on 19 January 2005.[208] The summaries of the anticipated evidence of Witnesses XV and YAK annexed to the Pre-Trial Brief also do not reference paragraph 3.40 of the Indictment.[209] As explained below, such notice, when viewed against the record as a whole, neither clearly nor consistently reflected the Prosecution's intent to hold Muvunyi responsible for the attack.

99. The Appeals Chamber must also consider the notice provided by the Pre-Trial Brief in the context of the procedural history of this case. The Prosecution was in possession of the information related to this massacre from 17 June 2000, yet this specific allegation, unlike the other attacks listed in paragraph 3.40 of the Indictment, did not feature in the initial indictment filed on 17 November 2000, the current Indictment filed on 23 December 2003, or in the proposed amendments to the Indictment that the Prosecution sought to introduce on 17 January and 4 February 2005. Moreover, it is axiomatic that, if the Prosecution had intended to hold Muvunyi responsible for the attack at the Mukura forest, it would have mentioned this in the Schedule of Particulars filed on 28 February 2005,[210] in particular since the Trial Chamber granted the Prosecution leave to file it "in order to arrange [its] current pleading in a clearer manner".[211] The Prosecution also made no reference to the Mukura forest in its opening statement given on the same day.[212] Finally, at the close of the case, the Prosecution did not ask the Trial Chamber to convict Muvunyi on the basis of this attack in its Closing Brief.[213] In such circumstances, the Appeals Chamber finds it difficult to construe the sole reference to this attack in an annex to the Pre-Trial Brief as sufficient notice capable of curing the defect in the Indictment.

---

may be sufficient to cure a defect in an indictment). This approach is consistent with ICTY jurisprudence. *See Naletili} and Martinovi}* Appeal Judgement, para. 45.

[207] Pre-Trial Brief, Annex, R. PP. 1190-1192.

[208] Prosecution Response Brief, para. 159.

[209] *See* Pre-Trial Brief, Annex, R. PP. 1190-1192. The summary of Witness XV's anticipated evidence refers to paragraph 3.29 of the Indictment related to the attack on the Butare University Hospital. The summary of Witness YAK's evidence refers to paragraphs 3.24, 3.25, 3.29, 3.34(i), and 3.35 of the Indictment, related specifically to the attacks on the hospital and University of Butare as well as to several meetings. However, paragraph 3.35 of the Indictment is a general allegation referring to attacks by *Interahamwe* "with the help of soldiers". Moreover, the summary of Witness YAK's evidence refers only to responsibility under Article 6(1) of the Statute.

[210] Schedule of Particulars, para. 21.

[211] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, p. 17 (disposition).

[212] T. 28 February 2005 pp. 2-7.

[213] Prosecution Closing Brief, paras. 308-949.

100. In any event, the Appeals Chamber must also view the notice provided by the Pre-Trial Brief against the backdrop of the Prosecution's unsuccessful attempt to amend the indictment before the start of trial. In rejecting the Prosecution's motion, the Trial Chamber reasoned "that to amend the indictment on the eve of trial, and in doing so, introduce new material elements as the Prosecutor seeks to do, is likely to cause substantial prejudice […] to [Muvunyi's] right to prepare his defence".[214] This rationale applies with equal force to the introduction of a new massacre site to the charges against Muvunyi by way of summaries of anticipated evidence in the Pre-Trial Brief. In affirming the Trial Chamber's decision that, allowing the expansion of the charges might lead to prejudice, the Appeals Chamber stated: "[i]t is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges."[215] In view of this and of the circumstances described above, it would have been apparent to Muvunyi that his liability for any attacks was limited to those listed in the Indictment. Accordingly, the Trial Chamber erred in law in the particular circumstances of this case in finding that the summaries of anticipated evidence of Witnesses XV and YAK annexed to the Pre-Trial Brief cured the defect in the Indictment.[216]

101. For the foregoing reasons, the Appeals Chamber grants Muvunyi's Fifth Ground of Appeal and reverses his conviction for genocide based on the attack at the Mukura forest.

[214] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, para. 48.
[215] *Muvunyi*, Decision on the Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, para. 22.
[216] While it was not permissible to convict Muvunyi on the basis of this evidence, this does not mean that the Trial Chamber erred in admitting the evidence in connection with other specifically pleaded events. *See Ntahobali and Nyiramasuhuko*, Decision on the Appeal by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", paras. 13-15.

F. Alleged Errors relating to Events at Various Roadblocks (Ground 6)

102. The Trial Chamber convicted Muvunyi as a superior pursuant to Article 6(3) of the Statute for genocide and other inhumane acts as a crime against humanity based, in part, on the role played by ESO Camp soldiers in the mistreatment and killing of Tutsi civilians at various roadblocks in Butare prefecture.[217] Muvunyi submits that the Trial Chamber erred in law in convicting him of these crimes because the Indictment does not charge him with any crimes based on events occurring at roadblocks, nor does it adequately plead the material facts underpinning the related convictions.[218] Muvunyi's arguments concerning his conviction for other inhumane acts as a crime against humanity overlap to some extent with those raised under his Eleventh Ground of Appeal and are thus addressed there.[219] In this section, the Appeals Chamber considers whether Muvunyi had adequate notice of the material facts underlying the crime of genocide in order to properly prepare his defence in connection with events at roadblocks.

103. Paragraphs 3.33 and 3.34 of the Indictment allege:

> 3.33. On 27th April 1994, the Interim Government ordered roadblocks to be set up, knowing that the roadblocks were being used to identify the Tutsi and their "accomplices" for the purpose of eliminating them. These orders were followed and had already been put in place in Butare.
>
> 3.34 These checkpoints were ostensibly to check for weapons and to prevent any infiltration by the enemy. The roadblocks were located at Rwasave, Rwabuye, the front of Hotel Faucon, in front of Ngoma Camp, in front of the Ibis Hotel, at the junction leading to the University hospital, beside Chez Bihira and in front of the ESO. These checkpoints served as points where searches were conducted on civilians for purposes of identity control and to check against the infiltration of the enemy.

104. Count 1 of the Indictment charges Muvunyi with genocide as a superior based on paragraph 3.34 of the Indictment pursuant to Article 6(3) of the Statute.[220] In addition, the allegations at paragraphs 3.33 and 3.34 of the Indictment are repeated verbatim in paragraphs 12 and 13 of the Schedule of Particulars. In addition, paragraphs 14 and 15 of the Schedule of Particulars add the following allegations:

> 14. Lieutenant Colonel THARCISSE MUVUNYI was seen at a roadblock in front of Chez Bihira giving instructions to his soldiers.
>
> 15. On or about 20 April 1994, soldiers from ESO who were stationed at the roadblock in front of Chez Bihira killed 3 Tutsi civilians following which, the said soldiers threw their bodies into a gutter located beside the University Health Centre. […].

[217] Trial Judgement, paras. 157, 456, 497, 498, 530.
[218] Muvunyi Notice of Appeal, para. 8; Muvunyi Appeal Brief, paras. 71-74; Muvunyi Reply Brief, paras. 30-44.
[219] *See infra* Section III.I (Alleged Errors relating to the Conviction for Other Inhumane Acts as a Crime against Humanity).
[220] Indictment, p. 15.

The Schedule of Particulars also states that Muvunyi is responsible for the acts alleged in paragraphs 3.33 and 3.34 of the Indictment as well as paragraphs 14 and 15 of the Schedule of Particulars, quoted above, as a superior under Article 6(3) of the Statute.

105. In connection with the allegations in paragraphs 3.33 and 3.34 of the Indictment, the Trial Chamber found that, between 7 April and 15 June 1994, ESO Camp soldiers manned roadblocks in various parts of Butare town in order to identify Tutsi civilians for elimination.[221] The Trial Chamber found that Muvunyi would have known about these roadblocks "[d]ue to the large number of roadblocks set up in Butare, the widespread nature of the killings at these roadblocks, the proximity of some of the roadblocks to the ESO Camp, and the fact that ESO soldiers were routinely deployed to man the roadblocks".[222] The Trial Chamber found that "Muvunyi failed to take necessary and reasonable measures to stop the unlawful killing of Tutsi civilians at these roadblocks by ESO soldiers."[223]

106. Muvunyi principally submits that paragraphs 3.33 and 3.34 of the Indictment fail to allege any act of misconduct constituting the crime of genocide which is attributable to him or anyone else for whose acts he could be held responsible.[224] In his view, therefore, the Indictment does not charge him with the crime of genocide based on any event occurring at a roadblock.[225] Muvunyi acknowledges that the Prosecution attempted to cure this defect through the Schedule of Particulars.[226] However, he recalls that the Trial Chamber had previously refused to grant leave to the Prosecution to amend the Indictment by adding the allegations found in paragraphs 14 and 15 of the Schedule of Particulars.[227]

107. The Prosecution responds that the Indictment, when read in its entirety, clearly sets out an offence implicating Muvunyi and ESO Camp soldiers in crimes committed at roadblocks.[228] In particular, in describing the offence pleaded in the Indictment, the Prosecution notes that "roadblocks were set up in several areas in Butare and that Tutsi civilians were targeted and beaten up at the various roadblocks."[229] With respect to the role of Muvunyi and ESO Camp soldiers at roadblocks, the Prosecution refers to paragraphs 3.21 and 3.22 of the Indictment, which describe

[221] Trial Judgement, para. 157.
[222] Trial Judgement, para. 157.
[223] Trial Judgement, para. 157.
[224] Muvunyi Appeal Brief, paras. 72, 73; Muvunyi Reply Brief, paras. 33-44.
[225] Muvunyi Appeal Brief, paras. 72, 73; Muvunyi Reply Brief, paras. 33-44.
[226] Muvunyi Appeal Brief, para. 73.
[227] Muvunyi Appeal Brief, para. 73.
[228] Prosecution Response Brief, paras. 173-182.
[229] Prosecution Response Brief, para. 174.

generally Muvunyi's military role in the prefecture in ensuring security.[230] Moreover, the Prosecution points to paragraph 3.47 of the Indictment which alleges generally that ESO Camp soldiers beat Tutsi civilians during the events alleged in the Indictment.[231] Finally, the Prosecution also highlights the proximity of the roadblocks to the ESO Camp, as reflected in paragraph 3.34 of the Indictment.[232]

108. Bearing in mind the principles of notice previously articulated in this Judgement,[233] the Appeals Chamber considers that the Indictment is defective in relation to Muvunyi's conviction for genocide based on the crimes committed by ESO Camp soldiers at various roadblocks. While the Trial Chamber did not make any specific findings or point to any particular evidence in concluding that ESO Camp soldiers participated in "widespread" killings at roadblocks,[234] a review of the Trial Judgement and the record reflects that such a conclusion may follow from the evidence of Prosecution Witness KAL who heard soldiers boasting about killings, though he never personally saw any.[235] Also, the Trial Chamber's findings on the "widespread" killings may be based on the testimony of Prosecution Witness CCQ who around 20 April 1994 saw three dead bodies near the *Chez Bihira* roadblock manned by ESO Camp soldiers.[236] However, on the basis of the Indictment alone, Muvunyi would not have known that he was being prosecuted for "widespread" killings at various roadblocks, as alluded to by Witness KAL, or for the three specific killings mentioned by Witness CCQ at the *Chez Bihira* roadblock. Paragraphs 3.33 and 3.34 of the Indictment neither mention these crimes nor connect either Muvunyi or ESO Camp soldiers to the roadblocks.

109. Even accepting the Prosecution's argument that the Indictment, when read as a whole, connects Muvunyi and ESO Camp soldiers to the events at roadblocks, there remains a fundamental problem with the Indictment in this respect: it does not allege that ESO Camp soldiers engaged in killings at roadblocks. Indeed, paragraph 3.47 of the Indictment, cited in the Prosecution Response Brief in support of this argument, refers only to beatings.[237] This is significant because, although the Trial Chamber made factual findings on beatings and other mistreatment in connection with Muvunyi's conviction for other inhumane acts as a crime against humanity, his conviction for

[230] Prosecution Response Brief, paras. 179-181.
[231] Prosecution Response Brief, para. 177.
[232] Prosecution Response Brief, para. 182.
[233] *See supra* Section III.A (Alleged Errors relating to an Attack at the Butare University Hospital).
[234] Trial Judgement, paras. 157, 497.
[235] Trial Judgement, para. 113. The Appeals Chamber considered similar evidence given by Witness KAL in connection with the attacks on the University of Butare and found that no reasonable trier of fact could have relied on this hearsay evidence alone to find that there had been widespread killings. *See supra* Section III.C (Alleged Errors relating to Attacks at the University of Butare).
[236] Trial Judgement, para. 124.
[237] *See, e.g,* Prosecution Response Brief, paras. 174, 177.

genocide rests on the role of ESO Camp soldiers in killing Tutsi civilians at roadblocks, not beating them.[238]

110. The Appeals Chamber notes that the Schedule of Particulars alleges that Muvunyi was seen giving instructions to his soldiers at the *Chez Bihira* roadblock and that ESO Camp soldiers killed three Tutsis at this roadblock around 20 April 1994.[239] Elsewhere in this Judgement,[240] the Appeals Chamber has read the Indictment together with the Schedule of Particulars since the Trial Chamber permitted the Prosecution to file it "in order to arrange [its] current pleading in a clearer manner" and, in particular, to set out "the factual allegations which refer specifically to a type of responsibility under Article […] 6(3) of the Statute."[241] However, as explained below, it would not be fair to read the Indictment in connection with the Schedule of Particulars in this specific instance.

111. At the outset of trial, the Prosecution sought to amend the Indictment, in part, by adding the specific allegations found in paragraphs 14 and 15 of the Schedule of Particulars.[242] The Trial Chamber rejected these amendments noting the "substantial prejudice" that it might cause Muvunyi.[243] On interlocutory appeal, the Appeals Chamber affirmed the reasonableness of the Trial Chamber's conclusion that to allow the amendments would result in undue prejudice to Muvunyi.[244] Therefore, in this context, it was not proper for the Prosecution to include these allegations in the Schedule of Particulars or for the Trial Chamber to enter a conviction on the basis thereof.

112. In any event, Muvunyi interposed a specific objection during the Prosecutor's opening statement at the mention of widespread killings at roadblocks, asserting that this allegation was not properly pleaded in the Indictment.[245] It therefore falls to the Prosecution to prove that Muvunyi's

---

[238] Trial Judgment, para. 497 ("Furthermore, the Chamber concludes that the Accused is individually responsible as a superior for *the killing* of Tutsi civilians by ESO soldiers […] at various roadblocks in Butare.") (emphasis added).
[239] Schedule of Particulars, paras. 14, 15.
[240] *See, e.g.,* Section III.A (Alleged Errors relating to an Attack at the Butare University Hospital); Section III.B (Alleged Errors relating to an Attack at the Beneberika Convent); Section III.C (Alleged Errors relating to Attacks at the University of Butare).
[241] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, p. 17 (disposition).
[242] Proposed Amended Indictment (4 February 2005), paras. 20, 21.
[243] *Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, paras. 41(iv), 48-50.
[244] *Muvunyi*, Decision on the Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, paras. 43-45.
[245] T. 28 February 2005 p. 6 ("MR. TAYLOR: I object. May it please the Court; I object that the Prosecutor is bringing in in [*sic*] his opening statement, matters that this Court has said could not be amended into the indictment. And, therefore, if they are not properly amended into the indictment, are not proper for consideration in his opening statement. MR. PRESIDENT: Well, Counsel, I think he is only giving the background, so this will -- whatever comes out in his opening has to be proofed later. So, if he -- if there is no evidence forthcoming from the Prosecution, I think this will be disregarded. Yes, Counsel, you may continue. MR. JALLOW: Your Honours, I thank you, Your Lordships, very much for that clarification.").

defence was not materially impaired by the defect.[246] The Prosecution points to no timely, clear, and consistent information which put Muvunyi on notice that he would be held responsible for killings perpetrated by ESO Camp soldiers at roadblocks. Rather, as noted above, the Prosecution's submissions focus exclusively on the nature of the notice that Muvunyi received in connection with the beatings of civilians. Therefore, the Prosecution has not rebutted the presumption of material impairment to Muvunyi's defence stemming from this defect in the Indictment.

113. Accordingly, the Appeals Chamber grants Muvunyi's Sixth Ground of Appeal and reverses his conviction for genocide based on killings at roadblocks.

[246] *Niyitegeka* Appeal Judgement, para. 200. *See also Muhimana* Appeal Judgement, paras. 199, 219; *Gacumbitsi* Appeal Judgement, para. 51; *Ntagerura et al.* Appeal Judgement, paras. 31, 138.

G. Alleged Errors relating to a Meeting in Gikonko, Mugusa Commune (Ground 7)

114. The Trial Chamber convicted Muvunyi pursuant to Article 6(1) of the Statute for direct and public incitement to commit genocide based, in part, on a speech he gave in Gikonko in Mugusa Commune.[247] Muvunyi submits that the Trial Chamber erred in law and in fact in convicting him of this crime.[248] In this section, the Appeals Chamber considers two principal questions: (1) whether Muvunyi had adequate notice of this crime in order to prepare his defence; and (2) whether the Trial Chamber properly assessed the evidence.

1. Alleged Defect in the Form of the Indictment

115. Paragraph 3.24 of the Indictment reads:

> During the events referred to in this indictment, Lieutenant Colonel MUVUNYI, in the company of the chairman of the civil défense program for Butare who later became the *Prefet* of Butare *préfecture*, and other local authority figures, went to various communes all over Butare *prefecture* purportedly to sensitize the local population to defend the country, but actually to incite them to perpetrate massacres against the Tutsis. These sensitization meetings took place in diverse locations throughout Butare *préfecture*, such as:
>
> - *in Mugusa commune sometime in late April 1994;*
> - *at the Gikore Center sometime in early May 1994;*
> - *in Muyaga bureau communal between the 3rd and 5th of June 1994;*
> - *in Nyabitare secteur, Muganza commune sometime in early June 1994.*

116. Further, paragraph 3.25 of the Indictment reads:

> At the meetings referred to in paragraph 3.24 above, which were attended almost exclusively by Hutus, Lieutenant Colonel MUVUNYI, in conjunction with these local authority figures, publicly expressed virulent anti-Tutsi sentiments, which they communicated to the local population and militiamen in traditional proverbs. The people understood these proverbs to mean exterminating the Tutsis and the meetings nearly always resulted in the massacre of Tutsis who were living in the commune or who had taken refuge in the commune.

117. In connection with these allegations, the Trial Chamber found that Muvunyi addressed a crowd of Hutu members of the population in April or May 1994 in Gikonko.[249] The Trial Chamber found that, during his speech at this meeting, Muvunyi chastised the local *bourgmestre* for hiding a Tutsi named Vincent Nkurikiyinka and asked the bourgmestre to deliver this man to "the killers".[250] The Trial Chamber found that Muvunyi then used the Rwandan proverb "when a snake is near a calabash, it is necessary to break that calabash in order to get the snake".[251] The Trial Chamber found that this was understood by the population as a call to kill Tutsis.[252] The Trial Chamber noted

[247] Trial Judgement, paras. 507, 510, 531.
[248] Notice of Appeal, para. 9; Muvunyi Appeal Brief, paras. 75-81; Muvunyi Reply Brief, paras. 45, 46.
[249] Trial Judgement, paras. 190, 507.
[250] Trial Judgement, paras. 190, 507.
[251] Trial Judgement, para. 190.
[252] Trial Judgement, paras. 190, 507.

that, as a result of Muvunyi's remarks, *Conseiller* Gasana led a group of attackers to the commune office in order to kill Vincent Nkurikiyinka.[253]

118. Muvunyi submits that he did not have notice of the particular charge that the Prosecution intended to pursue related to the Gikonko incident because the Indictment fails to give an approximate date or place where the meeting occurred.[254] Muvunyi acknowledges that paragraph 3.24 of the Indictment refers to a meeting at the end of April 1994 in Mugusa Commune, among other possible sites.[255] However, he considers that this description refers to a different event than the one for which he was convicted, namely an incident at a roadblock occurring in April 1994, about which Witness YAQ testified, and whose testimony about this incident the Trial Chamber found lacked credibility.[256] According to Muvunyi, the evidence of Witness YAQ instead places the speech for which he was convicted at a later point in May or June 1994.[257] Therefore, Muvunyi contends that he was convicted of a crime that was not pleaded in the Indictment.[258]

119. The Prosecution responds that the Indictment provided Muvunyi with sufficient notice of the approximate time and location of this crime, pointing to the reference in paragraph 3.24 of the Indictment to a speech "in Mugusa commune sometime in late April".[259] The Prosecution submits that, in any event, Muvunyi received additional notice of these material facts from the Pre-Trial Brief coupled with Witness YAQ's statement of 4 February 2000 which was disclosed to him in a redacted form on 20 July 2001 and in an unredacted form on 19 January 2005.[260]

120. Bearing in mind the principles of notice previously articulated in this Judgement,[261] the Appeals Chamber considers whether Muvunyi had sufficient notice of the material facts underlying his conviction for direct and public incitement to commit genocide based on the speech he gave at Gikonko, Mugusa Commune. The Appeals Chamber has held that criminal acts that were physically committed by the accused 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."[262] An indictment lacking this precision is defective; however, the defect may be cured

[253] Trial Judgement, paras. 190, 507.
[254] Muvunyi Appeal Brief, para. 80; Muvunyi Reply Brief, para. 46.
[255] Muvunyi Appeal Brief, para. 80; Muvunyi Reply Brief, para. 46.
[256] Muvunyi Reply Brief, para. 46.
[257] Muvunyi Reply Brief, para. 46.
[258] Muvunyi Appeal Brief, paras. 80, 81; Muvunyi Reply Brief, para. 46.
[259] Prosecution Response Brief, para. 206.
[260] Prosecution Response Brief, paras. 208-210.
[261] *See supra* Section III.A (Alleged Errors relating to an Attack at the Butare University Hospital).
[262] *Seromba* Appeal Judgement, para. 27; *Muhimana* Appeal Judgement, para. 76; *Ndindabahizi* Appeal Judgement, para. 16; *Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreški} et al*. Appeal Judgement, para. 89.

if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[263]

121. The Appeals Chamber is not convinced by the Prosecution's contention that paragraph 3.24 of the Indictment adequately identifies the place and approximate time of the event for which Muvunyi was convicted. The reference in paragraph 3.24 of the Indictment to Mugusa Commune is exceedingly broad. In addition, the approximate time given for the speech in the Indictment as "late April" is inconsistent with the evidence given at trial. In this respect, a review of the transcripts reveals that Witness YAQ initially testified that Muvunyi's speech in Gikonko in Mugusa Commune occurred "between the months of April or May".[264] However, as Muvunyi notes, a closer examination of Witness YAQ's testimony, bearing in mind the chronology of the events he describes as well as the clarifications provided during cross-examination, reflects that his evidence clearly places this event towards the end of May or in June 1994.[265] The later date range is also consistent with the Trial Chamber's reliance on the evidence of Witness MO80 whose testimony indicated that Vincent Nkurikiyinka was killed around mid-May 1994.[266] Therefore, the Appeals Chamber agrees with Muvunyi that the reference in paragraph 3.24 of the Indictment to a meeting "in Mugusa Commune sometime in late April 1994" did not provide him with adequate notice that he would be held responsible for the specific meeting in Gikonko at the end of May or in June 1994.

122. However, paragraph 3.24 of the Indictment indicates that the list of meetings therein is not exhaustive, thus potentially incriminating Muvunyi in other events in Butare prefecture. While in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission

[263] *Seromba* Appeal Judgement, para. 100; *Simba* Appeal Judgement, para 64; *Muhimana* Appeal Judgement, paras. 76, 167, 195, 217; *Gacumbitsi* Appeal Judgement, para. 49; *Ntagerura et al.* Appeal Judgement, paras. 28, 65.

[264] T. 31 May 2005 p. 7 ("I met him at another place between the months of April and May. This is simply an approximation. At that time people were killing, and they did not pay any attention to the months. The days just went by, but I can say it was between the months of April and May.").

[265] After recounting the chronology of each of the three times the witness saw Muvunyi during the relevant events, Witness YAQ clarified that the speech underpinning Muvunyi's conviction occurred in May or June. *See* T. 31 May 2005 p. 35 ("The meeting at Gikonko was held after the massacres. It was towards June […] I have told you that it was in May or June."). This clarification followed an extensive colloquy between the Defence, the Presiding Judge, and the witness intended to clarify the approximate dates of each time the witness saw Muvunyi. *See generally* T. 31 May 2005 pp. 34-35. Moreover, even when speculating that this might have happened between April or May, the witness tied it to a specific event, noting that the meeting took place when "[t]he *Inkotanyis* had already arrived in Ntyazo *commune*." T. 31 May 2005 p. 7. Witness MO80 stated that the killing of Vincent Nkurikiyinka occurred in mid-May 1994 in the context of the RPF advance in Ntyazo commune. *See* T. 14 February 2006 p. 8 ("[Vincent Nkurikiyinka] died when those manning the roadblocks went to fight the *Inkotanyi* at Ntyazo and youths had to be gathered to go and fight the *Inkotanyi*.").

[266] Trial Judgement, para. 188.

of the crimes,[267] this is not the case with respect to Muvunyi's address in Gikonko at the end of May or June 1994.[268] The Indictment was thus defective because it did not adequately plead the material facts related to the approximate time or place of this crime.

123. A review of the trial record, including the evidence of Witness YAQ, reveals that Muvunyi did not object to the form of this paragraph before trial or during the witness's testimony. Nonetheless, he challenged the form of paragraph 3.24 of the Indictment at the trial stage in his motion for judgement of acquittal, although his submissions did not take specific issue with the evidence of Witness YAQ.[269] In this respect, the Appeals Chamber has held:

> [O]bjections based on lack of notice should be specific and timely. The Appeals Chamber agrees with the Prosecution that blanket objections that "the entire indictment is defective" are insufficiently specific. As to timeliness, the objection should be raised at the pre-trial stage (for instance in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced. However, an objection raised later at trial will not automatically lead to a shift in the burden of proof: the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objection earlier in the trial.[270]

The Trial Chamber did not consider Muvunyi's objection to the form of paragraph 3.24 of the Indictment to be timely.[271] Muvunyi has not advanced any reason suggesting that this conclusion was erroneous. It therefore falls to him to demonstrate that the preparation of his defence was prejudiced by the omission from the Indictment of the approximate time and place of the Gikonko meeting.[272]

124. Muvunyi has failed to make such a demonstration. Indeed, the Appellant's Brief does not address the question of prejudice suffered from the leading of evidence about the Gikonko meeting.[273] In these circumstances, the Appeals Chamber finds that Muvunyi has not discharged his burden to demonstrate prejudice. Consequently, this sub-ground of appeal is dismissed.

---

[267] *See Muhimana* Appeal Judgement, para. 79; *Gacumbitsi* Appeal Judgement, para. 50, citing *Kupreški} et al.* Appeal Judgement, para. 89.
[268] As discussed below, the Prosecution had this information in its possession from at least 4 February 2000.
[269] Motion for Judgement of Acquittal, para. 59 ("With respect to the sensitization meetings, the Prosecutor offered the testimony of Witnesses CCP, YAI, CCR, YAP. These sensitizing meetings as alleged in the indictment are not sufficiently plead as to victims of the crimes of genocide in each instance or what specific acts of genocide occurred in order to give the Accused notice of what Count 1 or Count 2 acts he must specifically defend against.").
[270] *Bagosora et al.,* Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para. 46 (internal citation omitted).
[271] *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98*bis*, para. 41.
[272] *Gacumbitsi* Appeal Judgement, para. 51, quoting *Niyitegeka* Appeal Judgement, paras. 199, 200. *See also Bagosora et al.,* Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, paras. 45-47.
[273] Muvunyi Appeal Brief, paras. 80-81 (where he simply objects to the lack of notice). A similar situation occurred in *Niyitegeka*. In that case, the Appeals Chamber found that the Indictment was defective, that Niyitegeka had not objected to this during trial, and that the burden of showing prejudice was therefore on him. Since he had made no submissions

2. Alleged Error in the Assessment of the Evidence of Witness YAQ

125. In making findings on Muvunyi's speech at Gikonko, the Trial Chamber relied chiefly on Witness YAQ.[274] To counter Witness YAQ's evidence on this point at trial, Muvunyi presented the evidence of Defence Witness MO80 who testified that he had not heard about the meeting.[275] The Trial Chamber, however, found that certain aspects of Witness YAQ's evidence not related to the speech were supported by Witness MO80, in particular those aspects relating to the attack against Vincent Nkurikiyinka.[276]

126. Muvunyi submits that the Trial Chamber erred in relying on the uncorroborated testimony of Witness YAQ since it acknowledged that he was an accomplice to the genocidal killings and that it viewed his evidence with caution.[277] In this respect, Muvunyi points to the Trial Chamber's rejection of Witness YAQ's account of an incident at a roadblock in Rumba cellule.[278] Muvunyi contends that Witness YAQ's account of the Gikonko meeting bears no greater indicia of reliability than the event in Rumba, which the Trial Chamber found lacked credibility.[279] Muvunyi further contends that the Trial Chamber erred in finding that Witness MO80 corroborated Witness YAQ.[280] According to Muvunyi, Witness MO80 was present when Vincent Nkurikiyinka was killed and at the "meeting" leading to the death and his description of the events contradicts Witness YAQ's evidence.[281] In addition, Muvunyi points to the evidence of Defence Witness MO48 who lived in clear sight of the alleged site of the meeting in Gikonko and who did not see Muvunyi attend a public meeting there.[282]

127. The Prosecution responds that the Trial Chamber properly assessed the evidence of Witness YAQ, noting that it was within its discretion to rely on the evidence of a single witness, even an accomplice, in convicting Muvunyi on the basis of the meeting in Gikonko.[283] The Prosecution asserts that Muvunyi did not demonstrate that Witness YAQ had a motive to lie.[284] Furthermore, the Prosecution submits that the Trial Chamber also acted properly in accepting Witness MO80's evidence to corroborate Witness YAQ's evidence concerning the killing of Vincent Nkurikiyinka

---

as to how he was prejudiced, the Appeals Chamber held that the Trial Chamber did not err in convicting him. *Niyitegeka* Appeal Judgement, paras. 200, 207, 211.
[274] Trial Judgement, paras. 182-186, 189, 190.
[275] Trial Judgement, paras. 187, 188.
[276] *See* Trial Judgement, para. 189.
[277] Muvunyi Appeal Brief, paras. 76, 79.
[278] Muvunyi Appeal Brief, para. 76, referring to Trial Judgement, para. 181.
[279] Muvunyi Appeal Brief, para. 76.
[280] Muvunyi Appeal Brief, paras. 76, 77.
[281] Muvunyi Appeal Brief, paras. 76, 77; Muvunyi Reply Brief, para. 45; AT. 13 March 2008 pp. 51-52.
[282] Muvunyi Appeal Brief, para. 78.
[283] Prosecution Response Brief, paras. 196-199.

even though it did not find credible his evidence that no meeting occurred.[285] The Prosecution highlights that a Trial Chamber has the discretion to accept some parts of a witness's testimony and to reject others.[286]

128. The Appeals Chamber has previously held that reliance upon evidence of accomplice witnesses *per se* does not constitute a legal error.[287] The Appeals Chamber noted, however, that "considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of circumstances in which it was tendered."[288] In addition, the Appeals Chamber recalls that a Trial Chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony and that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[289]

129. Nevertheless, the Appeals Chamber is not convinced that a reasonable trier of fact could have accepted Witness YAQ's evidence concerning Muvunyi's speech in Gikonko in May or June 1994, given its rationale for rejecting the witness's evidence in relation to a similar event in Rumba cellule. In assessing Witness YAQ's evidence implicating Muvunyi in inciting genocide at the Rumba cellule roadblock, the Trial Chamber expressly noted that he was an accomplice and that it viewed his evidence with caution.[290] In particular, the Trial Chamber stated that "[Witness] YAQ was an *Interahamwe* militiaman and had reason to enhance Muvunyi's participation in the genocidal campaign and in that way attempt to diminish his own role therein."[291] The Trial Chamber ultimately rejected his testimony concerning Rumba cellule because "in the circumstances of the present case, the evidence of Witness YAQ is not sufficiently reliable or credible to ground a finding of fact beyond reasonable doubt that a meeting took place at the roadblock in Rumba *cellule* on 24 April 1994 at which the Accused incited the population to kill Tutsis."[292]

130. While the Prosecution contends that Muvunyi failed to show that Witness YAQ had a reason to lie, such a motive plainly follows from the Trial Chamber's own assessment of the witness's account in other parts of the Trial Judgement. The Trial Chamber's reasons for rejecting

[284] Prosecution Response Brief, para. 197.
[285] Prosecution Response Brief, paras. 200-203.
[286] Prosecution Response Brief, para. 203.
[287] *Niyitegeka* Appeal Judgement, para. 98. *See also Ntagerura et al.* Appeal Judgement, para. 204.
[288] *Niyitegeka* Appeal Judgement, para. 98. *See also Ntagerura et al.* Appeal Judgement, paras. 204, 206.
[289] *Muhimana* Appeal Judgement, para. 101; *Gacumbitsi* Appeal Judgement, para. 72; *Niyitegeka* Appeal Judgement, para. 92; *Ntagerura et al.* Appeal Judgement, para. 214.
[290] Trial Judgement, paras. 156, 180.
[291] Trial Judgement, para. 156.
[292] Trial Judgement, para. 181.

Witness YAQ's evidence concerning the Rumba cellule roadblock are not based on any specific feature of that part of his testimony, but rather on his general motive to enhance Muvunyi's role in the crimes and to diminish his own. In other words, the Trial Chamber found that in general Witness YAQ was not a credible and reliable witness on matters incriminating Muvunyi. As such, the Appeals Chamber fails to see how the testimony of Witness MO80 about the killing of Vincent Nkurikiyinka would eliminate any doubt that the Trial Chamber had as to Witness YAQ's underlying motives for testifying. If anything, the evidence of Witness MO80 should have increased the Trial Chamber's concerns about Witness YAQ's credibility since Witness MO80 implicated him in the killing of Vincent Nkurikiyinka.[293]

131. Given that the Trial Chamber explicitly found Witness YAQ's testimony to be suspect due to his status as an accomplice and thus was required to treat his evidence with caution, it was necessary for the Trial Chamber to consider whether his testimony was corroborated. While Witness MO80 testified that he was not aware of nor took part in any public meeting that occurred in his commune between April and June 1994,[294] he did testify that shortly prior to the killing of Vincent Nkurikiyinka, policemen addressed an assembled crowd outside the communal offices, which included Witness YAQ, and encouraged them to kill Nkurikiyinka.[295] Witness MO80 testified that he was present at this gathering, but that Muvunyi was not.[296] As the Trial Chamber indicated, both witnesses also stated that *conseiller* Gasana was the leader of the armed attackers, that Vincent Nkurikiyinka was abducted from the Mugusa communal office and that he was killed sometime in April or May 1994.[297] Witness MO80's testimony therefore seems to be consistent with Witness YAQ's testimony about the killing of Vincent Nkurikiyinka and regarding a meeting (albeit of a different nature than the one described by Witness YAQ) that took place shortly before the killing. Significantly, though, Witness MO80's evidence contradicts Witness YAQ's evidence that Muvunyi was present at this meeting. The Appeals Chamber therefore finds that Witness MO80's testimony does not corroborate the most salient part of Witness YAQ's testimony – namely, that Muvunyi attended the meeting. Witness YAQ's testimony about this fact is therefore uncorroborated and, as such, it cannot form the basis of a conviction in the present circumstances.

[293] *See* T. 14 February 2006 p. 8.
[294] T. 14 February 2006 p. 10.
[295] T. 14 February 2006 p. 8 ("[Vincent Nkurikiyinka] died when those manning the roadblocks went to fight the *Inkotanyi* at Ntyazo and youths had to be gathered to go and fight the *Inkotanyi*. Once at the *communal* office policemen came to tell them that they could not fight and repulse the *Inkotanyi*, so there was a need to go and flush out Vincent and take him to kill him.").
[296] T. 14 February 2006 pp. 8-9; T. 15 February 2006 p. 23.
[297] Trial Judgement, para. 189

132. In sum, the Appeals Chamber is not satisfied that a reasonable trier of fact could have relied on Witness YAQ's evidence alone in finding that Muvunyi addressed a crowd of attackers in Gikonko in May or June 1994.

3. Conclusion

133. For the foregoing reasons, the Appeals Chamber grants Muvunyi's Seventh Ground of Appeal and reverses his conviction for direct and public incitement to commit genocide on this basis.

H. Alleged Errors relating to a Meeting at the Gikore Trade Center (Ground 8)

134. The Trial Chamber convicted Muvunyi pursuant to Article 6(1) of the Statute for direct and public incitement to commit genocide based, in part, on a speech he gave in May 1994 at the Gikore Trade Center.[298] Muvunyi submits that the Trial Chamber erred in law and in fact in convicting him of this crime.[299] In this section, the Appeals Chamber considers two principal questions: (1) whether Muvunyi had adequate notice of this crime in order to prepare his defence; and (2) whether the Trial Chamber properly assessed the evidence.

1. Alleged Defect in the Form of the Indictment

135. Paragraph 3.24 of the Indictment reads:

> During the events referred to in this indictment, Lieutenant Colonel MUVUNYI, in the company of the chairman of the civil défense program for Butare who later became the *Prefet* of Butare *préfecture*, and other local authority figures, went to various communes all over Butare *prefecture* purportedly to sensitize the local population to defend the country, but actually to incite them to perpetrate massacres against the Tutsis. These sensitization meetings took place in diverse locations throughout Butare *préfecture*, such as:
> - *in Mugusa commune sometime in late April 1994;*
> - *at the Gikore Center sometime in early May 1994;*
> - *in Muyaga bureau communal between the 3rd and 5th of June 1994;*
> - *in Nyabitare secteur, Muganza commune sometime in early June 1994.*

136. Further, paragraph 3.25 of the Indictment reads:

> At the meetings referred to in paragraph 3.24 above, which were attended almost exclusively by Hutus, Lieutenant Colonel MUVUNYI, in conjunction with these local authority figures, publicly expressed virulent anti-Tutsi sentiments, which they communicated to the local population and militiamen in traditional proverbs. The people understood these proverbs to mean exterminating the Tutsis and the meetings nearly always resulted in the massacre of Tutsis who were living in the commune or who had taken refuge in the commune.

137. Based on these allegations, the Trial Chamber found that, at a meeting held at the Gikore Trade Center in May 1994, Muvunyi made a speech in which he "called for the killing of Tutsis, the destruction of Tutsi property, associated Tutsis with the enemy at a time of war, and denigrated Tutsi people by associating them with snakes and poisonous agents."[300]

138. Muvunyi submits that the Indictment does not properly plead the material facts underpinning the charge of direct and public incitement with respect to the meeting at the Gikore

[298] Trial Judgement, paras. 211, 509, 510, 531.
[299] Notice of Appeal, para. 10; Muvunyi Appeal Brief, paras. 82-88; Muvunyi Reply Brief, paras. 47-50.
[300] Trial Judgement, para. 509.

Trade Center.[301] In this respect, he contends that paragraph 3.24 of the Indictment does not adequately plead the location and the date of the event.[302]

139. The Prosecution responds that the Indictment provided Muvunyi with sufficient notice of the approximate time and location of this crime, pointing to the reference in paragraph 3.24 of the Indictment to a speech "at Gikore Center sometime in early May".[303] The Prosecution submits that, in any event, Muvunyi received additional notice of the material facts through the summary of Witness YAI's anticipated evidence annexed to the Pre-Trial Brief as well as his pre-trial statement of 12 May 2000, disclosed to him in an unredacted form on 19 January 2005.[304]

140. From the Indictment alone, Muvunyi would have known that he was being charged with inciting genocide at the Gikore Center in "early May 1994". In addition, in terms of the venue, the Indictment specifically lists the Gikore Center as a location for this crime. The fact that paragraph 3.24 of the Indictment also lists other places where Muvunyi allegedly incited genocide does not render the paragraph vague with respect to the events occurring at the Gikore Center. Accordingly, Muvunyi has failed to demonstrate that the Indictment is defective with respect to the location and approximate date of the crime.

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

2. Alleged Errors in the Assessment of Evidence

142. In finding that Muvunyi incited the killing of Tutsis in his speech at the Gikore Trade Center, the Trial Chamber relied primarily on the evidence of Prosecution Witnesses YAI and CCP,[305] which it found "clear and coherent".[306] Muvunyi submits that the Trial Chamber erred in law and in fact in convicting him on the basis of their evidence. In particular, he alleges that the Trial Chamber failed to appreciate their status as accomplices, the numerous discrepancies in their respective accounts, as well as the conflicting evidence provided by Defence witnesses.[307]

---

[301] Muvunyi Appeal Brief, paras. 87, 88; Muvunyi Reply Brief, paras. 49, 50.
[302] Muvunyi Appeal Brief, paras. 87, 88.
[303] Prosecution Response Brief, para. 224.
[304] Prosecution Response Brief, para. 225.
[305] The Appeals Chamber notes that Muvunyi erroneously refers to Witness CCR instead to Witness CCP throughout this ground of appeal. In light of the context of this ground of appeal, the Appeals Chamber is satisfied that the reference to Witness CCR is a clerical error.
[306] Trial Judgement, paras. 191-201, 206-210. The Trial Chamber also considered that "the evidence of Prosecution Witnesses YAI and CCP is corroborated by that of Defence Witness MO78 who confirmed that he saw Muvunyi at a public meeting in Gikore on 23 or 24 May 1994, and that Nteziryayo and Nsabimana were also in attendance." *See* Trial Judgement, para. 210.
[307] Muvunyi Appeal Brief, paras. 83-86.

143. Muvunyi submits that Witnesses YAI and CCP gave varying accounts of the meeting at the Gikore Trade Center, which suggests that they did not attend the same meeting or that they did not attend the meeting at all.[308] In particular, he points to the discrepancy in the date-ranges provided by the witnesses for the meetings, the identity of the participants, and the nature of Muvunyi's speech. For example, Muvunyi states that the witnesses "said, variously that the meeting was held in Gikore sometime between mid May 1994, and late June 1994."[309] In addition, he points out that Witness YAI testified that the meeting was not attended by Alphonse Nteziryayo, yet Witness CCP stated that Nteziryayo was present.[310] He further argues that Witness YAI testified that Muvunyi spoke at the meeting, informing the population of the approach of the *Inkotanyi*, but never used the word "kill", while Witness CCP said that Muvunyi told the audience "that Tutsis were Serpants [*sic*] and should be killed".[311] The Prosecution responds that Muvunyi has not demonstrated that the Trial Chamber's finding was unreasonable.[312]

144. It is within a Trial Chamber's discretion to assess any inconsistencies in the testimony of witnesses, and to determine whether, in the light of the overall evidence, the witnesses were nonetheless reliable and credible.[313] However, the Trial Chamber also has an obligation to provide a reasoned opinion.[314] From the discussion of the evidence in the Trial Judgement, the Appeals Chamber cannot conclude whether a reasonable trier of fact could have relied on the testimony of Witnesses YAI and CCP to convict Muvunyi for this event. The Appeals Chamber is particularly troubled by the numerous inconsistencies in their testimonies as to the core details relating to Muvunyi's alleged speech[315] and by the utter lack of any discussion of these inconsistencies in the Trial Judgement.[316] In view of this, the Appeals Chamber finds it impossible to assess the finding that the testimony of Witnesses YAI and CCP about the meeting was "strikingly similar" or consistent with respect to the material facts relating to this charge.

145. Muvunyi further submits that the Trial Chamber erred in rejecting without discussion the evidence of Witness MO78 who had no criminal record and whose family members were both Hutu and Tutsi. According to Muvunyi, Witness MO78's description of the meeting was more credible

[308] Muvunyi Appeal Brief, paras. 83-85; Muvunyi Reply Brief, para. 47.
[309] Muvunyi Appeal Brief, para. 83.
[310] Muvunyi Appeal Brief, para. 84.
[311] Muvunyi Appeal Brief, para. 85.
[312] Prosecution Response Brief, para. 221.
[313] *See e.g., Bagilishema* Appeal Judgement, para. 78.
[314] *Simba* Appeal Judgement, para. 152; *Kamuhanda* Appeal Judgement, para. 32; *Kajelijeli* Appeal Judgement, para. 59; *Semanza* Appeal Judgement, paras. 130, 149; *Niyitegeka* Appeal Judgement, para. 124; *Rutaganda* Appeal Judgement, para. 536; *Musema* Appeal Judgement, paras. 18, 277; *^elebići Case* Appeal Judgement, para. 481; *Kupreškić et al.* Appeal Judgement, para. 224.
[315] *Compare* T. 25 May 2005 pp. 4-16 (Witness YAI) *with* T. 9 June 2005 pp. 1-14 (Witness CCP).

than that of Witnesses YAI and CCP. In particular, Muvunyi notes that Witness MO78 explained that the meeting concerned only security issues and did not involve denigrating Tutsis.[317] The Prosecution responds that the Trial Chamber properly assessed the evidence.[318]

146. A review of the relevant portion of the Trial Judgement reveals that the Trial Chamber considered the evidence of Witness MO78 that Muvunyi spoke to the audience on security issues and that he did not utter any ethnically denigrating words at the meeting. The Trial Chamber concluded, however, that it "disbeliev[ed] Witness MO78's evidence to the extent he said that in their speeches, Muvunyi and the other officials promoted peace, security and friendly relations among members of the population. This evidence is rejected in light of the clear and coherent evidence to the contrary given by Witnesses YAI and CCP."[319]

147. The Appeals Chamber recalls again that a Trial Chamber has an obligation to provide a reasoned opinion. In this instance, the Appeals Chamber considers that the Trial Chamber did not provide sufficient reasons for preferring the testimony of Witnesses YAI and CCP over that of Witness MO78. The Trial Chamber did not point to any inconsistencies in the evidence of Witness MO78 nor did it identify any reasons for doubting his credibility. The Trial Chamber appears to have deemed Witness MO78 unreliable solely on the basis that his evidence differed from that of Witnesses YAI and CCP. Such an approach is of particular concern given the Trial Chamber's express recognition[320] of the need to treat the evidence of Witnesses YAI and CCP, unlike the evidence of Witness MO78, with caution.[321] The Appeals Chamber therefore finds that the Trial Chamber failed to provide a reasoned opinion on this point.

148. These aggregate errors in addressing the apparently inconsistent testimony of Witnesses YAI, CCP, and MO78 prevent the Appeals Chamber from determining whether the Trial Chamber assessed the entire evidence on this point exhaustively and properly. In such circumstances, the Appeals Chamber is forced to conclude that Muvunyi's conviction for direct and public incitement to commit genocide on the basis of his alleged speech at the Gikore Trade Center is not safe and, accordingly, quashes it. The Appeals Chamber further finds that the present situation gives rise to appropriate circumstances for retrial pursuant to Rule 118(C) of the Rules, limited to the allegations considered under this ground of appeal. The Appeals Chamber stresses that an order for retrial is an exceptional measure to which resort must necessarily be limited. In the present situation, the

[316] *See* Trial Judgement, para. 209.
[317] Muvunyi Appeal Brief, para. 86.
[318] Prosecution Response Brief, para. 222.
[319] Trial Judgement, para. 210.
[320] *See* Trial Judgement, paras. 206, 208.

Appeals Chamber is well aware that Muvunyi has already spent over eight years in the Tribunal's custody. At the same time, the alleged offence is of the utmost gravity and interests of justice would not be well served if retrial were not ordered to allow the trier of fact the opportunity to fully assess the entirety of the relevant evidence and provide a reasoned opinion.

[321] *Cf. Simba* Appeal Judgement, para. 143.

I. Alleged Errors relating to the Conviction for Other Inhumane Acts as a Crime against Humanity (Grounds 9, 10, 11, 13)

149. The Trial Chamber convicted Muvunyi as a superior pursuant to Article 6(3) of the Statute for other inhumane acts as a crime against humanity under Count 5 of the Indictment based on the role played by ESO Camp soldiers in the mistreatment of Prosecution Witnesses YAN and YAO at the *Économat général*, Butare Cathedral, and at the ESO Camp;[322] the humiliation of Prosecution Witnesses QY and AFV at various roadblocks;[323] as well as the mistreatment of other Tutsi civilians during attacks at the Beneberika Convent[324] and *Groupe scolaire*.[325] The Trial Chamber made the factual findings underlying this conviction pursuant to allegations contained in paragraph 3.47 of the Indictment,[326] which states: "During the events referred to in this indictment, soldiers of the ESO and Ngoma Camp participated in the meting out of cruel treatment to Tutsi civilians by beating them with sticks, tree saplings and or rifle butts." Muvunyi submits that the Trial Chamber erred in law in convicting him of this crime principally because the Indictment did not charge him with crimes against humanity based on these events.[327]

150. Count 5 of the Indictment, charging other inhumane acts as a crime against humanity, states that "[b]y the acts and omissions described *specifically* in the paragraphs to which reference is made here in [*sic*] below: Tharcisse MUVUNYI pursuant to Article 6(3) paragraphs *3.44 and 3.49* is responsible for other inhumane acts […] and thereby committed a Crime Against Humanity […]".[328] Paragraph 3.44 of the Indictment refers to soldiers preventing wounded survivors of an attack from receiving medical attention at the Butare University Hospital.[329] Paragraph 3.49 of the

[322] Trial Judgement, paras. 426, 427, 530. Witness YAN was arrested at *Économat général*, which is near the Butare Cathedral. Trial Judgement, paras. 414-416. Witness YAO was arrested at the Butare Cathedral. Trial Judgement, para. 411.
[323] Trial Judgement, paras. 456, 530. The Trial Chamber also convicted Muvunyi as a superior under Article 6(3) of the Statute of genocide based on the conduct of ESO soldiers at various roadblocks. Trial Judgement, para. 498. The Appeals Chamber addresses Muvunyi's appeal against his conviction for genocide on this basis in section III.F of the Judgement.
[324] Trial Judgement, paras. 437, 530. The Trial Chamber also convicted Muvunyi as a superior under Article 6(3) of the Statute of genocide for this attack. Trial Judgement, para. 498. The Appeals Chamber addresses Muvunyi's appeal against his conviction for genocide on the basis of this attack in section III.B of this Judgement.
[325] Trial Judgement, paras. 447, 448, 530. The Trial Chamber also convicted Muvunyi as a superior under Article 6(1) of the Statute for genocide in connection with this attack. Trial Judgement, para. 498. The Appeals Chamber addresses Muvunyi's appeal against his conviction for genocide on the basis of this attack in section III.D of the Judgement.
[326] Trial Judgement, para. 410.
[327] Muvunyi Notice of Appeal, paras. 11-13; Muvunyi Appeal Brief, paras. 89, 91-96, 106, 109; Muvunyi Reply Brief, paras. 54-76, 79-81. Muvunyi raised similar arguments in his Sixth Ground of Appeal. *See supra* Section III.F (Alleged Errors relating to Events at Various Roadblocks); Muvunyi Appeal Brief, paras. 73, 74.
[328] Emphasis added.
[329] Paragraph 3.44 of the Indictment reads: "On or about the 21st of April 1994, some survivors of the Matyazo attack, sought refuge at the Ngoma Parish. Amongst the refugees were 62 wounded children ranging from 16 months to 5 years who were taken to the Parish by the *Counseiller* [*sic*] of the secteur, because he was prevented by the soldiers at the roadblock in front of the ESO, from taking the children for medical attention at the University Hospital."

Indictment alleges Muvunyi's intent for the attacks described in the Indictment to form part of the non-international armed conflict.[330] The Trial Chamber dismissed the allegations made in paragraphs 3.44 and 3.49 of the Indictment because the Prosecution conceded that it did not lead evidence in respect of them.[331]

151. Muvunyi argues that the Trial Chamber's decision to dismiss paragraphs 3.44 and 3.49 of the Indictment effectively dismissed the charge of other inhumane acts as a crime against humanity, as Count 5 was based exclusively on these two paragraphs.[332] He notes that the Indictment does not charge paragraph 3.47 under any count.[333] In this respect, Muvunyi acknowledges that the Schedule of Particulars states that paragraph 3.47 of the Indictment also supports Count 5, but argues that the Schedule of Particulars was not supposed to be a vehicle to amend the Indictment.[334] In any event, he adds that paragraph 3.47 of the Indictment is a general allegation which is devoid of detail on the material facts of the underlying crimes and the theory of superior responsibility.[335] Muvunyi further argues that, to the extent he had notice of some of the underlying acts, the Prosecution indicated that the supporting evidence related only to the charge of genocide, complicity to commit genocide, or rape.[336]

152. The Prosecution responds that the Indictment provided Muvunyi with notice of the material facts underpinning the charge of other inhumane acts and that any defects were cured through the communication of timely, consistent, and clear information.[337] In this respect, the Prosecution points to the Schedule of Particulars which states that paragraph 3.47 of the Indictment supports Count 5.[338] The Prosecution further notes that paragraph 3.47 of the Indictment in turn generally alleges that ESO Camp soldiers beat Tutsi civilians during the events referred to in the Indictment.[339] In addition, in the Prosecution's view, the summaries of the anticipated evidence annexed to the Pre-Trial Brief and the Prosecution's motion to add witnesses in support of Counts 4

[330] Paragraph 3.49 of the Indictment reads: "THARCISSE MUVUNYI intended the attacks described in this indictment on these victims to be part of the non-international armed conflict because the Tutsi civilians were considered enemies of the Government and/or accomplices of the RPF."
[331] Trial Judgement, para. 18.
[332] Muvunyi Appeal Brief, paras. 91, 93, 96, 109; Muvunyi Reply Brief, para. 70.
[333] Muvunyi Reply Brief, para. 66.
[334] Muvunyi Appeal Brief, para. 91.
[335] Muvunyi Appeal Brief, paras. 91, 92, 107; Muvunyi Reply Brief, paras. 66, 79.
[336] Muvunyi Appeal Brief, paras. 93, 96, 109.
[337] Prosecution Response Brief, paras. 183-194, 236-242, 248-257, 259-268, 287-296.
[338] Prosecution Response Brief, paras. 188, 189, 250, 286.
[339] Prosecution Response Brief, paras. 186, 260, 287.

and 5 during the trial provide additional detail on the material facts of the crime of other inhumane acts as a crime against humanity.[340]

153. Bearing in mind the principles of notice previously articulated in this Judgement,[341] Count 5 of the Indictment, charging other inhumane acts as a crime against humanity, is plainly defective in relation to the conviction entered by the Trial Chamber pursuant to it. From the Indictment alone, Muvunyi would not have known that he would be held responsible for the crime of other inhumane acts based on the criminal acts of ESO Camp soldiers, other than those alleged in paragraph 3.44 of the Indictment. Indeed, Count 5 of the Indictment expressly restricts Muvunyi's liability to the "acts or omissions described specifically" in paragraph 3.44 of the Indictment.[342] The Trial Chamber therefore exceeded the narrow focus of Count 5 by convicting Muvunyi based on the allegations flowing from paragraph 3.47, which the Indictment notably does not list in support of any of the charges.[343]

154. As the Prosecution notes, paragraph 35 of the Schedule of Particulars links paragraph 3.47 of the Indictment, which makes general allegations of cruel treatment of Tutsi civilians by ESO and Ngoma Camp soldiers, to Count 5. Muvunyi objected to the filing of the Schedule of Particulars because it did not set out in detail the material facts underlying the forms of responsibility advanced by the Prosecution under Articles 6(1) and 6(3) of the Statute, as directed by the Trial Chamber; however, his objection did not specifically address the expansion of Count 5 in paragraph 35 of the Schedule of Particulars to include paragraph 3.47 of the Indictment.[344] Muvunyi raised this objection in his Closing Brief, however, and the Trial Chamber did not consider it as untimely.[345] It

[340] Prosecution Response Brief, paras. 191-193, 236-242, 248-257, 259-268, 289-296.
[341] *See supra* Section III.A (Alleged Errors relating to an Attack at the Butare University Hospital).
[342] Count 5 also refers to paragraph 3.49 of the Indictment, but this paragraph refers to Muvunyi's intent and not the underlying criminal acts.
[343] *See generally* Indictment, pp. 15-17.
[344] *Muvunyi*, Decision on the Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber, paras. 7, 8.
[345] *See* Trial Judgement, para. 29. Muvunyi's objection in his Closing Brief with respect to the notice he received in connection with Count 5 concerns only Witnesses YAO and YAN. The fact that Muvunyi did not raise this same objection with respect to the mistreatment of Witnesses QY and AFV and the refugees at the Beneberika Convent and the *Groupe Scolaire* is explained by the Prosecution's submissions and the Trial Chamber's decision in connection with his motion for judgement of acquittal. In particular, the Trial Chamber and the Prosecution referred only to Witnesses YAN and YAO in support of Count 5. *See Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98*bis*, para. 73 ("The Prosecution offers the testimonies of Witnesses YAO and YAN in support of this count. Their testimonies support paragraph 3.47 of the Indictment. The Chamber has considered their testimonies and finds that, if believed, they could sustain a conviction of the Accused for other inhumane acts pursuant to Article 6(3).")(internal citations omitted).

therefore falls to the Prosecution to prove that Muvunyi's defence was not materially impaired by the defect.[346]

155. The Prosecution's contention that any defect in the Indictment was cured by the Schedule of Particulars and the summaries of anticipated testimony annexed to its Pre-Trial Brief fails to address the fundamental problem with Count 5 of the Indictment: the count is not vague; it is narrowly tailored and charges the crime of other inhumane acts as a crime against humanity based on one specific event which is described in paragraph 3.44 of the Indictment. By adding paragraph 3.47 of the Indictment as support for Count 5 in the Schedule of Particulars, the Prosecution essentially amended the Indictment and expanded the charge of other inhumane acts as a crime against humanity from a single event alleged in paragraph 3.44 where ESO Camp soldiers allegedly prevented wounded refugees from going to the Butare University Hospital to acts of cruel treatment by ESO and Ngoma Camp soldiers during every event alleged in the Indictment as pleaded in paragraph 3.47.

156. As noted above, the Indictment does not list paragraph 3.47 in support of any count. The Appeals Chamber has previously observed in this case that the Prosecution's failure to expressly state that a paragraph in the Indictment supports a particular count in the Indictment is indicative that the allegation is not charged as a crime.[347] The Appeals Chamber therefore considers that the mistreatment underlying Muvunyi's conviction for other inhumane acts as a crime against humanity was not charged in his Indictment. The omission of a count or charge from an indictment cannot be cured by the provision of timely, clear, and consistent information.[348]

157. In sum, the Appeals Chamber finds that Count 5 of the Indictment does not charge Muvunyi with other inhumane acts as a crime against humanity based on the mistreatment of Prosecution Witnesses YAN, YAO, QY, and AFV, as well as other Tutsi civilians during the attacks at the Beneberika Convent and the *Groupe scolaire* for which the Trial Chamber convicted him.

---

[346] *Niyitegeka* Appeal Judgement, para. 200. *See also Muhimana* Appeal Judgement, paras. 199, 219; *Gacumbitsi* Appeal Judgement, para. 51; *Ntagerura et al.* Appeal Judgement, paras. 31, 138.

[347] *Muvunyi*, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, para. 33 ("The Appeals Chamber is satisfied that the allegation of the Accused's involvement in the detention and disappearance of Habyalimana could constitute a new charge against the Accused. In the current indictment, the relevant paragraph is contained in the section titled "Concise Statement of Facts" and not in the section of specific allegations against the Accused. *Further, the Prosecution does not reference this paragraph of the current indictment as a material fact underpinning any of the charges made in the indictment.* If the proposed amendment is allowed, it is presumed that the Prosecution would include this allegation under Counts 1 and 2 of the indictment, in support of the charges of genocide, or alternatively complicity to genocide. But this does not change the fact that this fresh allegation could support a separate charge against the Accused.")(emphasis added).

[348] *Ntagerura et al.* Appeal Judgement, para. 32; *Bagosora et al.,* Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para. 29.

Consequently, the Appeals Chamber does not need to address Muvunyi's remaining arguments under these grounds of appeal pertaining to the pleading of superior responsibility and the sufficiency of the underlying evidence.

158. Accordingly, the Appeals Chamber grants Muvunyi's Ninth, Tenth, Eleventh, and Thirteenth Grounds of Appeal and reverses his conviction for other inhumane acts as a crime against humanity.

J. Alleged Errors relating to Muvunyi's Authority (Ground 12)

159. The Trial Chamber convicted Muvunyi of genocide and other inhumane acts as a crime against humanity principally as a superior pursuant to Article 6(3) of the Statute for the role played by ESO Camp soldiers in the killing and mistreatment of Tutsi civilians in Butare prefecture.[349] Muvunyi alleges several errors with respect to the Trial Chamber's finding that he assumed the position of Commander of the ESO Camp and that he had effective control over its soldiers.[350] Because the Appeals Chamber has granted Muvunyi's First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and Thirteenth Grounds of Appeal, and has thus reversed all convictions based on Muvunyi's role as a superior pursuant to Article 6(3) of the Statute, the Appeals Chamber need not address any alleged errors relating to his authority.

[349] Trial Judgement, paras. 497, 498, 530. The Trial Chamber convicted Muvunyi of genocide pursuant to Article 6(1) of the Statute for aiding and abetting the crimes committed at the *Groupe scolaire* by ESO Camp soldiers. His authority as ESO Commander was, nonetheless, relevant in determining that he "tacitly approved" of the crimes of his soldiers. *See* Trial Judgement para. 496.
[350] Muvunyi Notice of Appeal, para. 14; Muvunyi Appeal Brief, paras. 97-105; Muvunyi Reply Brief, paras. 77, 78.

IV. APPEAL OF THE PROSECUTION

A. Alleged Error relating to the Pleading of Rape as a Crime against Humanity (Ground 2)

160. Paragraph 3.41 of the Indictment alleges that *Interahamwe* and soldiers from the Ngoma Camp raped and sexually violated women during the course of several attacks in Butare Prefecture and places responsibility on Muvunyi for failing to prevent or to punish these crimes. At trial, in support of this allegation, the Prosecution presented evidence from Prosecution Witnesses AFV, QY, and TM that ESO Camp soldiers committed rapes, but did not present any evidence of rapes committed by Ngoma Camp soldiers.[351] The Trial Chamber held that the evidence did not support the charge of rape as pleaded, as it related to rapes committed by different perpetrators.[352] The Trial Chamber further concluded that because of this Muvunyi did not have an adequate opportunity to defend himself against the charge and that, therefore, it would be prejudicial to hold this evidence against him.[353] Consequently, the Trial Chamber found that the charge of rape against Muvunyi was not proven beyond reasonable doubt.[354]

161. The Prosecution submits that the Trial Chamber erred in law in failing to enter a conviction against Muvunyi for rape as a crime against humanity.[355] In this respect, the Prosecution argues that the Trial Chamber erred in finding that its attempts to cure the defect in the Indictment by giving subsequent notice of its intent to hold Muvunyi responsible for rapes committed by ESO soldiers amounted to introducing a new legal charge, which would have required a formal amendment of the Indictment.[356] The Prosecution submits that its failure to plead the rapes by ESO Camp soldiers constituted a defect in pleading a material fact which was subsequently cured by the Pre-Trial Brief, Opening Statement, and the Schedule of Particulars; that Muvunyi suffered no prejudice; and that, consequently, a conviction should be entered against him for these rapes.[357]

162. Muvunyi responds that the allegation that ESO Camp soldiers committed rapes was a "material transformation" of the Prosecution's case that constituted a new charge and, as such,

[351] Trial Judgement, paras. 379-395, 403, 408. In addition, the Prosecution presented the evidence of Witnesses YAI, CCP, and YAK in an effort "to show that the Accused knew or should have known that the widespread rape of Tutsi women was taking place in Butare." Trial Judgement, para. 408.
[352] Trial Judgement, paras. 409, 524-526. The Trial Chamber observed that "[w]hen the evidence was presented in Court during the trial, however, it turned out that it was not the soldiers from Ngoma Camp but those from the ESO Camp who had committed these acts." Trial Judgement, para. 403.
[353] Trial Judgement, paras. 404, 526.
[354] Trial Judgement, paras. 409, 526.
[355] Prosecution Notice of Appeal, paras. 8-12; Prosecution Appeal Brief, paras. 76-174.
[356] Prosecution Appeal Brief, paras. 76-112; AT. 13 March 2008 pp. 60-62.
[357] Prosecution Notice of Appeal, para. 12; Prosecution Appeal Brief, paras. 113-173: Prosecution Reply Brief, paras. 66-71.

should have been pleaded in the Indictment.[358] He adds that, throughout the case, the Prosecution's position was that he had authority over Ngoma Camp soldiers and *Interahamwe* and that he based his defence strategy on this.[359]

163. A review of the Trial Judgement reveals that the Trial Chamber considered the allegation implicating ESO Camp soldiers under Muvunyi's authority in rape as a material fact which should have been pleaded in the Indictment,[360] which the Prosecution concedes.[361] After noting that a defective indictment could be cured with subsequent timely, clear, and consistent notice, the Trial Chamber explained that this approach would not be appropriate with respect to this new allegation.[362] Bearing in mind the specific nature of the charge of rape in the Indictment – attributing responsibility to Muvunyi for rapes committed by *Interahamwe* and Ngoma Camp soldiers – the Trial Chamber viewed the allegation pertaining to rapes committed by ESO Camp soldiers as a "radical transformation" of the Prosecution case.[363]

164. The Trial Chamber concluded that Muvunyi did not have an opportunity to defend himself against this "fundamentally different case" and considered that it would be prejudicial to hold against him the evidence of the rapes allegedly committed by ESO Camp soldiers.[364] The Trial Chamber then observed that the proper method of bringing this allegation would have been to request an amendment of the Indictment, intimating that the addition of this material fact amounted to a new charge.[365] Finally, the Trial Chamber noted that, when the Prosecution sought to amend the Indictment at the outset of the trial, it requested the removal of the rape count as opposed to adding this further allegation.[366]

165. The Appeals Chamber cannot identify any legal error in the approach taken by the Trial Chamber that would invalidate its decision not to hold the allegation or evidence of rapes committed by ESO Camp soldiers against Muvunyi. The Appeals Chamber has held that an accused cannot be convicted of a crime on the basis of material facts omitted from an indictment or pleaded with insufficient specificity, unless the Prosecution has cured the defect by providing timely, clear, and consistent information detailing the factual basis underpinning the charges against him or

[358] Muvunyi Response Brief, paras. 90-98.
[359] Muvunyi Response Brief, para. 96.
[360] Trial Judgement, para. 401.
[361] Prosecution Appeal Brief, para. 77.
[362] Trial Judgement, paras. 402-404.
[363] Trial Judgement, para. 404.
[364] Trial Judgement, para. 404.
[365] Trial Judgement, paras. 405, 406.
[366] Trial Judgement, para. 407.

her.[367] However, the principle that a defect in an indictment may be cured is not without limits. In this respect, the Appeals Chamber has previously emphasized:

> [T]he "new material facts" should not lead to a "radical transformation" of the Prosecution's case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.[368]

166. The Appeals Chamber agrees with the Trial Chamber that the addition of the rape allegation implicating ESO Camp soldiers amounted to a radical transformation of the Prosecution's case on this count. This is not a case where the Indictment pleaded the alleged perpetrators in a general or vague manner, which the Prosecution then sought to cure through timely, clear, and consistent information.[369] Indeed, the perpetrators of the rapes set out in paragraph 3.41 of the Indictment are specifically identified as *Interahamwe* and soldiers from the Ngoma Camp. Paragraph 3.41 makes no mention of soldiers from the ESO Camp. The scope of the transformation of the Prosecution's case in respect of the rape charge is particularly illustrated by the fact that the Prosecution did not present evidence of acts of rape committed by *Interahamwe* and soldiers from the Ngoma Camp, but instead presented evidence of rapes allegedly committed by ESO Camp soldiers.[370] As the Appeals Chamber previously observed in this case, "[i]t is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges."[371] Consequently, the Trial Chamber did not err in law by finding that it would be prejudicial to consider the evidence of rape by ESO Camp soldiers in light of the rape allegation in the Indictment.

167. In any event, even if this defect in the Indictment could have been remedied, the Appeals Chamber is not satisfied that the Prosecution provided timely, clear, and consistent information of this new material fact to Muvunyi. In this respect, the Appeals Chamber is not convinced that the

---

[367] *Bagosora et al.,* Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para. 17, citing *Kupreški} et al.* Appeal Judgement, para. 114; *Kvočka et al.* Appeal Judgement, para. 33; *Naletilić and Martinović* Appeal Judgement, para. 26; *Ntagerura et al.* Appeal Judgement, paras. 28, 30.

[368] *Bagosora et al.,* Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para. 30 (internal citations omitted).

[369] *See, e.g., Muhimana* Appeal Judgement, paras. 200, 201 (general allegation was cured with more specific allegations in the pre-trial brief); *Gacumbitsi* Appeal Judgement, paras. 57, 58 (same). *See supra* Section III.E (Alleged Errors relating to an Attack at the Mukura Forest).

[370] Trial Judgement, paras. 378-399, 401, 403.

[371] *Muvunyi*, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, para. 22.

Pre-Trial Brief, Opening Statement, and the Schedule of Particulars cured the defect in the Indictment, as the Prosecution suggests.[372] Though the Pre-Trial Brief[373] and Opening Statement[374] appear to implicate ESO Camp soldiers in acts of rape, the purported notice provided in these passing references does not signal the Prosecution's intention to hold Muvunyi responsible for these acts in a clear and consistent manner. In particular, around the same time the Prosecution filed its Pre-Trial Brief on 25 January 2005 and made its Opening Statement on 28 February 2005, it sought leave to amend the Indictment on 19 January 2005, including a specific prayer to remove the charge of rape in its entirety, and, on 28 February 2005, appealed against the Trial Chamber's decision denying its request to amend the indictment.[375]

168. In addition, contrary to the Prosecution's submissions, the Schedule of Particulars does not provide additional notice, but rather leads to further confusion. The paragraph in the Schedule of Particulars referred to by the Prosecution mentions Muvunyi's position as a superior of ESO Camp soldiers only as a basis for his knowledge of the acts of rape alleged in paragraph 3.41 of the Indictment.[376] However, the operative paragraph in the Schedule of Particulars, outlining which perpetrators actually committed the rapes, mirrors the Indictment and implicates only *Interahamwe* and soldiers from the Ngoma Camp.[377] This is telling as the sole purpose of the Schedule of Particulars was to remedy the deficiencies in the Prosecution's pleading of the material facts in the Indictment.[378]

---

[372] Prosecution Appeal Brief, paras. 123, 125, 129.

[373] Prosecution Appeal Brief, para. 123, quoting Pre-Trial Brief, para. 82 ("During the course of this and many other attacks led by soldiers from the ESO camp as well as soldiers from Ngoma camp and the gendarmeries, many women and girls were raped by militiamen and soldiers.").

[374] Prosecution Appeal Brief, para. 125, quoting T. 28 February 2005 p. 7 ("Furthermore, we will lead evidence to show, to establish, that the soldiers under the command of the Accused as well as militiamen committed acts of rape and sexual assault on women and young girls. […] The victims were taken by force or coerced to locations where they were raped and subjected to acts of sexual violence by militiamen and by soldiers from the Ngoma camp, as well as the ESO, which were both under the command of the Accused person.").

[375] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Prosecutor's Request for Leave to Amend an Indictment pursuant to Rules 73 and 50 of the Rules of Procedure and Evidence, 19 January 2005, para. 1.2(i)(a); *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Prosecution's Motion pursuant to Rule 73(B) for Certification to Appeal Trial Chamber Decision Denying Leave to File an Amended Indictment and for Stay of Proceedings, 28 February 2005. *See also* Trial Judgement, para. 407.

[376] Prosecution Appeal Brief, para. 129, quoting Schedule of Particulars, para. 33 ("In addition, for all of the acts described at paragraphs 3.41 to 3.41(i) the Prosecutor alleges that by reason of his position of authority over the soldiers of the ESO and the widespread nature of these massacres, Lieutenant Colonel THARCISSE MUVUNYI knew or had reason to know, that these acts were being committed and he failed to take measures to prevent, or to put an end to these acts, or punish the perpetrators pursuant to Article 6(3) of the Statute.").

[377] *See* Schedule of Particulars, para. 31 ("At paragraph 3.41 of the indictment the Prosecutor alleges that during the course of the acts referred to in Paragraphs 3.40 of the indictment, many women and girls were raped and sexually violated in these locations or were taken by force and coerced to other locations, where they were raped and subjected to acts of sexual violence *by Interahamwe and soldiers from the Ngoma camp*.")(emphasis added).

[378] *Muvunyi*, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, p. 17 (disposition) ("PERMITS the Prosecutor, if he chooses, to file a Schedule of Particulars in order to arrange his current pleading in a clearer manner--provided that no new allegation, as found by the Chamber, is added in this exercise.").

169. Accordingly, the Prosecution's Second Ground of Appeal is dismissed.

V. APPEALS CONCERNING THE SENTENCE (MUVUNYI'S GROUND 14, PROSECUTION'S GROUND 1)

170. The Trial Chamber sentenced Muvunyi to a single sentence of twenty-five years' imprisonment.[379] Muvunyi submits that the Trial Chamber erred in (i) imposing a sentence not commensurate with similar cases, (ii) assessing his aggravating circumstances, and (iii) in failing to give a reasoned analysis.[380] The Prosecution submits that the Trial Chamber erred with respect to its consideration of the gravity of the offences and its assessment of the aggravating and mitigating circumstances.[381] The Appeals Chamber dismissed the Prosecution's Second Ground of Appeal and granted Muvunyi's appeal, reversing his convictions for genocide under Count 1 of the Indictment, for other inhumane acts as a crime against humanity under Count 5 of the Indictment, and for direct and public incitement to commit genocide under Count 3 of the Indictment based on a speech he gave at Gikonko in Mugusa Commune. Moreover, the Appeals Chamber quashed Muvunyi's conviction for direct and public incitement to commit genocide under Count 3 of the Indictment based on a speech he gave at the Gikore Trade Center and ordered a retrial with respect to this charge. Accordingly, the Appeals Chamber need not address any alleged errors relating to his sentence. However, given that the order for retrial originated in the appeal by Muvunyi, the Appeals Chamber considers that the principle of fairness[382] demands that in the event that a new Trial Chamber was to enter a conviction for the respective charge, any sentence could not exceed the twenty-five years of imprisonment imposed by the first Trial Chamber.

[379] Trial Judgement, paras. 531, 545.
[380] Muvunyi Notice of Appeal, para. 15; Muvunyi Appeal Brief, paras. 111-117; Muvunyi Response Brief, paras. 24, 87. The Notice of Appeal does not address these arguments, and simply requests that the sentence should be reduced in light of any findings that might be reversed by the Appeals Chamber.
[381] Prosecution Notice of Appeal, paras. 1-7; Prosecution Appeal Brief, paras. 28-75.
[382] In some jurisdictions also specifically referred to as prohibition of *reformatio in peius*, meaning that a court solely seized of an appeal lodged by the accused cannot increase the sentence. *See* for instance for the United Kingdom: Criminal Appeal Act of 1968, Schedule 2, Section 2(1); Germany: Strafprozeßordnung (Code of Criminal Procedure), Sections 331 and 358(2); Austria: Strafprozeßordnung (Code of Criminal Procedure), Sections 290(2) and 293(3); Denmark: Retsplejeloven, Fjerde bog, Strafferetsplejen (Administration of Justice Act, Fourth Chapter, Criminal Proceedings), Sections 960(3)(2) and 965a(2).

VI. DISPOSITION

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

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

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 13 March 2008;

SITTING in open session;

GRANTS Muvunyi's Grounds of Appeal 1, 2, 3, 4, 5, and 6, and **REVERSES** Muvunyi's conviction for genocide under Count 1 of the Indictment;

GRANTS Muvunyi's Ground of Appeal 7, and **REVERSES** Muvunyi's conviction for direct and public incitement to commit genocide under Count 3 of the Indictment based on a speech he gave at Gikonko in Mugusa Commune;

GRANTS, in part, Muvunyi's Ground of Appeal 8, **QUASHES** Muvunyi's conviction for direct and public incitement to commit genocide under Count 3 of the Indictment based on a speech he gave at the Gikore Trade Center, and **ORDERS** a retrial pursuant to Rule 118(C) of the Rules, limited to the allegations considered under this ground of appeal;

GRANTS Muvunyi's Grounds of Appeal 9, 10, 11, and 13, and **REVERSES** Muvunyi's conviction for other inhumane acts as a crime against humanity under Count 5 of the Indictment;

DISMISSES Muvunyi's appeal in all other respects;

DISMISSES the Prosecution's appeal in all respects;

QUASHES the sentence of twenty-five years' imprisonment;

ORDERS that Muvunyi is to remain in the custody of the Tribunal pending his retrial;

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

_____	_____	_____
Fausto Pocar	Mohamed Shahabuddeen	Liu Daqun
Presiding Judge	Judge	Judge
_____	_____	
Theodor Meron	Wolfgang Schomburg	
Judge	Judge	

Done this 29th day of August 2008 at Arusha, Tanzania.

[Seal of the Tribunal]

VII. ANNEX A – PROCEDURAL BACKGROUND

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

A. Notices of Appeal and Briefs

2. The Trial Chamber pronounced judgement in this case on 12 September 2006 and rendered it in writing on 18 September 2006. Both parties appealed.

1. Muvunyi's Appeal

3. Muvunyi submitted his Notice of Appeal on 12 October 2006.[1] On 12 December 2006, Muvunyi requested leave to amend his grounds of appeal and to extend the time limit to file his Appeal Brief.[2] On 17 January 2007, Muvunyi filed his Amended Grounds for Appeal.[3] On 29 January 2007, the Prosecution objected to this filing since it was done without leave of the Appeals Chamber.[4] Muvunyi filed his Appeal Brief on 13 March 2007.[5] On 19 March 2007, the Appeals Chamber denied Muvunyi's request to amend his grounds of appeal and accepted the late-filing of his Appeal Brief.[6] On 27 March 2007, with leave of the Appeals Chamber, Muvunyi renewed his motion to amend his grounds of appeal.[7] The Appeals Chamber granted the motion on 18 April 2007.[8] The Prosecution filed its Response Brief on 23 April 2007,[9] and Muvunyi filed his Reply Brief on 9 May 2007.[10]

2. The Prosecution's Appeal

4. The Prosecution filed its Notice of Appeal on 17 October 2006, at the same time seeking leave to file its Notice of Appeal out of time.[11] On 22 November 2006, the Appeals Chamber

[1] Accused Tharcisse Muvunyi's Notice of Appeal, 12 October 2006. Muvunyi filed an earlier version of this Notice of Appeal addressed to the Trial Chamber on 11 October 2006, which is essentially the same as the version filed on 12 October 2006. The earlier version however failed to cite the relevant findings of the Trial Chamber. *See* Accused Tharcisse Muvunyi's Notice of Appeal, 12 October 2006. The operative Notice of Appeal is the one filed on 12 October 2006.
[2] Accused Tharcisse Muvunyi's Motion for Leave to Amend his Grounds for Appeal and Motion to Extend Time to File his Brief on Appeal, 12 December 2006.
[3] Accused Tharcisse Muvunyi's Amended Grounds for Appeal, 17 January 2007.
[4] Prosecutor's Motion Objecting to 'Accused Tharcisse Muvunyi's Amended Grounds for Appeal', 29 January 2007.
[5] Accused Tharcisse Muvunyi's Brief on Appeal, 13 March 2007.
[6] Decision on "Accused Tharcisse Muvunyi's Motion for Leave to Amend his Grounds for Appeal and Motion to Extend Time to File his Brief on Appeal" and "Prosecutor's Motion Objecting to 'Accused Tharcisse Muvunyi's Amended Grounds of Appeal'", 19 March 2007.
[7] Accused Tharcisse Muvunyi's Motion to Amend His Grounds for Appeal, 27 March 2007.
[8] Decision on Motion to Amend Grounds of Appeal, 18 April 2007.
[9] Prosecutor's Respondent's Brief, 23 April 2007.
[10] Accused Tharcisse Muvunyi's Reply to Prosecutor's Respondent's Brief, 9 May 2007.
[11] Prosecutor's Notice of Appeal and Motion for an Extension of Time Within Which to File Notice of Appeal, 17 October 2006.

granted the Prosecution's motion.[12] The Prosecution filed its Appeal Brief on 15 December 2006.[13] On 11 January 2007, Muvunyi requested an extension of time to file his Response Brief.[14] The Pre-Appeal Judge granted Muvunyi's request and ordered him to file his Response Brief no later than 12 March 2007.[15] Muvunyi filed his Response Brief[16] along with a motion to file the brief out of time on 28 March 2007.[17] The Pre-Appeal Judge granted Muvunyi's motion and accepted the filing.[18] The Prosecution filed its Reply Brief on 11 April 2007.[19]

B. Assignment of Judges

5. On 18 October 2006, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judges Mohamed Shahabuddeen, Mehmet Güney, Liu Daqun, Theodor Meron, and Wolfgang Schomburg.[20] Judge Liu was elected Presiding Judge and on 15 February 2007 designated himself as Pre-Appeal Judge.[21] On 5 March 2007, Judge Fausto Pocar issued an order assigning himself to replace Judge Güney and assumed the position of Presiding Judge in the case.[22] Judge Liu remained Pre-Appeal Judge.

C. Motions related to the Admission of Additional Evidence

6. On 29 March 2007, Muvunyi requested the Appeals Chamber to order the Prosecution to disclose the transcripts of testimonies of Witnesses AND72 and AND14 given in the *Nyiramasuhuko et al.* case, and to hear testimonies of these witnesses as additional evidence on appeal.[23] On 27 April 2007, the Appeals Chamber dismissed the request for disclosure of the transcripts as moot and denied the request to admit additional evidence.[24] On 28 May 2007, with leave of the Appeals Chamber, Muvunyi filed confidentially a renewed request to call Witnesses

[12] Decision on the Prosecution Motion for Extension of Time for Filing the Notice of Appeal, 22 November 2006.
[13] Prosecutor's Appellant's Brief, 15 December 2006.
[14] Accused Tharcisse Muvunyi's Motion to Extend Time to File his Brief in Reply to the Prosecutor's Appellant's Brief, 11 January 2007.
[15] Decision on "Accused Tharcisse Muvunyi's Motion to Extend Time to File His Brief in Reply to the Prosecutor's Appellant's Brief", 15 February 2007.
[16] Accused Tharcisse Muvunyi's Response to Prosecutor's Appellant's Brief, 28 March 2007.
[17] Accused Tharcisse Muvunyi's Motion to File His Response to Prosecutor's Appellant's Brief Out of Time, 28 March 2007.
[18] Decision on Motion to Allow Filing of Response Brief Out of Time, 4 April 2007.
[19] Prosecutor's Brief in Reply, 11 April 2007.
[20] Order Assigning Judges to a Case before the Appeals Chamber, 18 October 2006.
[21] Order Designating a Pre-Appeal Judge, 15 February 2007.
[22] Order Replacing a Judge in a Case before the Appeals Chamber, 5 March 2007.
[23] Accused Tharcisse Muvunyi's Motion to Take Testimony on Appeal Pursuant to Rule 115, 29 March 2007.
[24] Decision on a Request to Admit Additional Evidence, 27 April 2007.

AND72 and AND14 to give additional evidence on appeal.[25] On 27 August 2007, the Appeals Chamber denied the motion.[26]

7. On 7 June 2007, Muvunyi requested the disclosure of the closed session transcripts of the testimony of Prosecution Witness QY given during a national criminal proceeding in Canada as well as any information relating to attempts by the Prosecution to solicit false testimony from the witness or others appearing in his case and asked for sanctions.[27] The Appeals Chamber dismissed the request for disclosure of transcripts as moot and denied the request in all other respects, noting that Muvunyi had not shown a violation of the Prosecution's disclosure obligations.[28]

D. Hearing of the Appeals

8. On 13 March 2008, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 29 January 2008.[29]

E. Motions related to Post-Hearing Submissions

9. On 25 March 2008, Muvunyi filed submissions in clarification of issues raised during the Appeals Hearing.[30] The Prosecution objected to the filing of these submissions.[31] The Appeals Chamber granted the Prosecution's motion and dismissed the submissions.[32] On 5 May 2008, Muvunyi requested that the Appeals Chamber consider submissions on the Appeal Judgement in *Prosecutor v. Hadžihasanović* and acquit Muvunyi.[33] The Appeals Chamber dismissed this motion on 18 June 2008.[34]

---

[25] Accused Tharcisse Muvunyi's Motion to Take Testimony on Appeal Pursuant to Rule 115, 28 May 2007.
[26] Decision on Request to Admit Additional Evidence, 27 August 2007.
[27] Accused Tharcisse Muvunyi's Motion to Produce Testimony of Witness QY Pursuant to Rule 68 and for Sanctions, 7 June 2007.
[28] Decision on Motion for Disclosure, 20 July 2007.
[29] The hearing of the appeals was initially scheduled for 27 November 2007. *See* Scheduling Order, 19 September 2007. Upon emergency application, however, the hearing was postponed due to unavailability of lead counsel because of sudden illness. *See* Accused Tharcisse Muvunyi's Emergency Application to Reschedule Oral Argument Due to Unavailability of Lead Counsel William Taylor Because of Sudden Serious Illness While in Transit to ICTR, 26 November 2007; AT. 27 November 2007 pp. 2-5.
[30] Accused Tharcisse Muvunyi's Submission in Clarification to Issues Raised by the Appeal Chamber during Oral Arguments, 25 March 2008.
[31] Prosecutor's Motion to Expunge from the Record 'Accused Tharcisse Muvunyi's Submission in Clarification to Issues Raised by the Appeal Chamber during Oral Arguments', 3 April 2008.
[32] Decision on the Prosecutor's Motion to Expunge a Submission from the Record, 25 April 2008.
[33] Accused Tharcisse Muvunyi's Request for Permission to File and Allow Response to Post Oral Argument Request that the Appeals Chamber Consider the Case of Prosecutor v. Enver Hasanovic Ғ*sic*ğ IT-01-47-A and Acquit Tharcisse Muvunyi, 5 May 2008.
[34] Decision on Muvunyi's Request for Consideration of Post-Hearing Submissions, 18 June 2008.

VIII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

Bagilishema

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

Bagosora et al.

The Prosecutor v. Théoneste Bagosora et al., Case No ICTR 98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 ("*Bagosora et al.,* Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence")

Gacumbitsi

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

Kajelijeli

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

Kamuhanda

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

Muhimana

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement")

Musema

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

Muvunyi

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005 ("*Muvunyi,* Decision on the Prosecutor's Motion for Leave to File an Amended Indictment")

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, 12 May 2005 ("*Muvunyi*, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005")

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, Decision on the Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber, 24 June 2005 ("*Muvunyi*, Decision on Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber")

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98*bis*, 13 October 2005 ("*Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98*bis*")

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Decision on Motion to Amend Grounds of Appeal, 18 April 2007 ("*Muvunyi,* Decision on Motion to Amend Grounds of Appeal")

Nahimana et al.

Ferdinand Nahimana et al v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement")

Ndindabahizi

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

Niyitegeka

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004

("*Niyitegeka* Appeal Judgement")

Ntahobali and Nyiramasuhuko

Arsène Shalom Ntahobali and Pauline Nyiramasuhuko v. The Prosecutor, Case No. ICTR-97-21-AR73, Decision on the Appeal by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004 ("*Ntahobali and Nyiramasuhuko*, Decision on the Appeal by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible'")

Ntagerura et al.

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement")

Ntakirutimana

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

Rutaganda

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

Semanza

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

Seromba

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement")

Simba

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

2. ICTY

Blagojevi} and Joki}

Prosecutor v. Vidoje Blagojevi} and Dragan Joki}, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojevi} and Joki}* Appeal Judgement")

Blaški}

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

Brđanin

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

Čelebići Case

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

Krstić

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

Kupreškić et al.

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

Kvo~ka et al.

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

Limaj et al.

The Prosecutor v. Limaj et al., Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.*

Appeal Judgement")

Naletili} and Martinovi}

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

Blagoje Simi}

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

Staki}

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

Vasiljević

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

B. Defined Terms and Abbreviations

AT.

Appeals Hearing Transcript (English)

Defence Closing Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-2000-55A-T, Tharcisse Muvunyi's Final Trial Brief, 15 June 2006

ESO Camp

École des sous-officiers in Butare Prefecture, Rwanda

Ex. D

Defence Exhibit

fn.

footnote

ICTR

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

ICTY

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

Indictment

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-I, Indictment, 23 December 2003. The Indictment is annexed to the Trial Judgement (Annex III).

Motion for Judgement of Acquittal

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, Tharcisse Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98*bis*, 15 August 2005

Motion to Add Witnesses

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, Prosecutor's Very Urgent Motion pursuant to Rule 73*bis* for Leave to Vary the Prosecutor's List of Witnesses Filed on 19 January 2005, 28 February 2005

Muvunyi

Tharcisse Muvunyi

Muvunyi Appeal Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Accused Tharcisse Muvunyi's Brief on Appeal, 13 March 2007

Muvunyi Notice of Appeal

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Accused Tharcisse Muvunyi's Notice of Appeal, 12 October 2006

Muvunyi Response Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Accused Tharcisse Muvunyi's Response to Prosecutor's Appellant's Brief, 28 March 2007

Muvunyi Reply Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Accused Tharcisse Muvunyi's Reply to Prosecutor's Respondent's Brief, 9 May 2007

p. (pp.)

page (pages)

para. (paras.)

paragraph (paragraphs)

Practice Direction on Formal Requirements for Appeals from Judgement

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

Pre-Trial Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-I, Prosecutor's Pre-Trial Brief and Other Submissions in Compliance with Rule 73*bis* of the ICTR Rules, 25 January 2005

Proposed Amended Indictment (19 January 2005)

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-I, Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 73 and 50 of the Rules of Procedure and Evidence, 19 January 2005, Annex, Proposed Amended Indictment (19 January 2005)

Proposed Amended Indictment (4 February 2005)

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-I, The Prosecutor's Response to the Trial Chamber's Directive of 1 February 2005 in relation to the Scheduling Order Pursuant to Rule 47(f)(i) and 50 [*sic*] of the Rules, 4 February 2005, Annex, Proposed Amended Indictment (4

February 2005)

Prosecution Appeal Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Prosecutor's Appellant's Brief, 15 December 2006

Prosecution Closing Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, The Prosecutor's Closing Brief, 15 June 2006

Prosecution Notice of Appeal

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Prosecutor's Notice of Appeal and Motion for an Extension of Time within Which to File Notice of Appeal, 17 October 2006

Prosecution Reply Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Prosecutor's Brief in Reply, 11 April 2007

Prosecution Response Brief

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Prosecutor's Respondent's Brief, 23 April 2007

R. P. (R. PP.)

Registry Page(s) (reference to page number in the case file maintained by the Registry)

RPF

Rwandan Patriotic Front

Rules

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

Schedule of Particulars

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-PT, The Prosecutor's Notice of the Filing of the Schedule of Particulars to the Indictment pursuant to the Directive of the Trial Chamber, 28 February 2005. The Schedule of Particulars is annexed to the Trial Judgement (Annex III).

Statute

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

T.

Transcript

Trial Judgement

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-2000-55A-T, Judgement and Sentence, rendered orally on 12 September 2006, written judgement filed in English on 18 September 2006