UNTED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding Judge**
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Adama Dieng**

Judgement of: **9 July 2004**

ELIÉZER NIYITEGEKA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-96-14-A

JUDGEMENT

Counsel for the Appellant:

Ms. Sylvia Geraghty
Mr. Feargal Kavanagh SC

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Melanie Werrett
Mr. James Stewart
Mr. Kenneth C. Fleming
Ms. Linda Bianchi
Mr. Alex Obote Odora

CONTENTS

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal" respectively) is seised of an appeal by Eliézer Niyitegeka against the Judgement rendered by Trial Chamber I in the case of *Prosecutor v. Eliézer Niyitegeka* on 16 May 2003 ("Trial Judgement"). [1]

I. INTRODUCTION

A. The Appellant

2. The Appellant, Eliézer Niyitegeka, was born on 12 March 1952 in Gitabura Secteur, Gisovu Commune, Kibuye Prefecture in Rwanda. He is married and has five children. The Appellant is a former journalist at Radio Rwanda. In 1991, at the time when multi-party politics were inaugurated in Rwanda, he was among the founding members of the MDR opposition party (*Mouvement Démocratique Républicain*). He assumed the Chairmanship of the MDR for the Kibuye Prefecture from 1991 to 1994.

3. Following the death of the then President of Rwanda in a plane crash on 6 April 1994, an Interim Government was sworn in on 9 April 1994, including the Appellant as Minister of Information. The Appellant remained in that position until the second half of July 1994 when he fled Rwanda.[2] The Appeals Chamber notes that the indictment, which forms the basis of the convictions, does not charge the Appellant for the 1994 genocide in Rwanda in its entirety, but for his individual criminal responsibility relating to selected incidents.

B. The Judgement and Sentence

4. The Trial Chamber found the Appellant guilty of the following crimes: genocide (Count 1); conspiracy to commit genocide (Count 3); direct and public incitement to commit genocide (Count 4); and murder (Count 5), extermination (Count 6), and other inhumane acts (Count 8) as crimes against humanity. The Trial Chamber sentenced the Appellant to imprisonment for the remainder of his life.

[1] For ease of reference, two annexes are appended to this Judgement: Annex A - Procedural Background and Annex B - Cited Materials/Defined Terms.
[2] Trial Judgement, para. 493.

C. The Appeal

5. The Appellant is appealing against the convictions and the sentence. In his Appeal Brief ("Appellant's Brief"), the Appellant challenges all the findings and decisions of the Trial Chamber as findings or decisions that could not have been reached by a reasonable Tribunal and submits that "on every count, his trial was manifestly unfair in breach of his statutory right to a fair trial."[3] The Appellant seeks the reversal of the convictions and sentence, and the issuance of an order directing his immediate release.[4]

6. For the purposes of the present Judgement, the Appeals Chamber has divided the Appellant's grounds of appeal into eight categories which can be summarized as follows:

(i) that the integrity of the trial process was undermined by the participation in the trial of a staff member of the Office of the Prosecutor who, at the time, was suspended from practice in her home jurisdiction, the State of New York;

(ii) that the Trial Chamber erred in treating the first-made records of questions posed by Prosecution investigators to witnesses, and the witnesses' answers, as privileged under Rule 70 and that the Prosecution should not have been permitted to call witnesses without providing a reasonable explanation for the unavailability of their original witness statements;

(iii) that there existed the possibility of bias on the part of the Trial Chamber due to a statement made during trial by counsel for the Prosecution, and that the statement was so prejudicial that the Trial Chamber breached the Appellant's right to trial by impartial judges when it declined to recuse itself;

(iv) that the Trial Chamber erred in its interpretation of the specific intent requirement for the crime of genocide;

(v) that the Trial Chamber applied the wrong burden of proof in assessing the alibi; that the Trial Chamber applied a more demanding standard in assessing the credibility of alibi

[3] Appellant's Brief, para. 7. The Appellant raises fifty-three grounds of appeal, alleging errors of law and fact. Some of the errors alleged under the individually numbered, untitled headings of the Appellant's Brief, which this Chamber construes as individual grounds of appeal, are related. Where this is the case, they are considered jointly herein. Paragraphs 1 through 8 of the Appellant's Brief concern matters other than individual allegations of errors and, as such, they are not addressed here.
[4] Appellant's Brief, para. 7.

witnesses than it did with regard to Prosecution witnesses; and that the Trial Chamber erred in finding that the alibi did not raise a reasonable doubt as to guilt;

(vi) that the Trial Chamber made general errors of law in its approach to the evidence of several witnesses, such as relying on uncorroborated testimony, accepting in-court testimony despite inconsistent prior statements, accepting testimony of accomplices, and accepting evidence with regard to witnesses' identification or recognition of the Appellant;

(vii) that the indictment upon which the Appellant was tried did not give sufficient notice of several of the allegations against him; that this absence of notice was not cured by subsequent communication of information; and that the Trial Chamber erred in dismissing his motion to exclude the testimony of one Prosecution witness, Witness GK, due to alleged untimely disclosure of a witness statement; and

(viii) that the Trial Chamber erred in its consideration of the evidence he offered in mitigation and gave insufficient weight to the mitigating circumstances.

In addition to the above, a number of other individual grounds of appeal have been presented by the Appellant and are considered separately.

D. Standards for Appellate Review

7. The Appeals Chamber recalls the requisite standards for appellate review pursuant to Article 24 of the Statute. Article 24 addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice. The ICTY Appeals Chamber has stated that:

> A party alleging that there is an error of law must advance arguments in support of the contention and explain how the error invalidates the decision; but, if the 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.[5]

8. As regards errors of fact, '[i]t 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

[5] *Vasiljevic* Appeal Judgement, para. 6 (citations omitted). *See also, e.g., Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.

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."[6]

9. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber. Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[7]

10. In order for the Appeals Chamber to assess the appealing party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenge is being made.[8] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[9]

11. Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a reasoned opinion in writing.[10] Therefore, the Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning.[11]

[6] *Krstic* Appeal Judgement, para. 40 (citations omitted).
[7] *See in particular Rutaganda* Appeal Judgement, para. 18.
[8] Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4(b). *See also Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137; *Vasiljevic* Appeal Judgement, para. 11.
[9] *Vasiljevic* Appeal Judgement, para. 12. *See also Kunarac et al.* Appeal Judgement, paras. 43, 48.
[10] *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, para. 47.
[11] *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, para. 48; *Vasiljevic* Appeal Judgement, para. 12.

II. INTEGRITY OF THE TRIAL PROCESS (GROUNDS OF APPEAL 9, 10, 11, 12)

12. The Appellant submits that the Trial Chamber erred when it convicted and sentenced him "while under a delusion as to the integrity of its trial process."[12] The Appellant asserts that the integrity of the entire trial was undermined by the fact that he was not prosecuted by professional lawyers in good standing who are licensed to practise law and whose integrity and ethical standards are above reproach.[13] The Appellant further asserts that the integrity of the trial was undermined by the fact that Prosecution Counsel Melinda Pollard falsely represented herself as a person entitled to the presumptions normally accorded to Prosecution trial attorneys, leading the Trial Chamber to rely upon her representations and undertakings.[14] Because of these factors, the Appellant claims, he was denied the right to a fair trial.[15]

A. Suspension of Prosecution Counsel

13. The Appellant submits that Prosecution Counsel Pollard had been suspended from the practice of law in the State of New York on two occasions because of a serial pattern of professional wrongdoing, including fraud, dishonesty, and deliberately giving false and misleading testimony, and that she was under active suspension during the course of some of the Appellant's pre-trial proceedings and all of his trial.[16] The Appellant contends that because Counsel Pollard failed to notify the Tribunal of her disciplinary record and her active suspension, the Trial Chamber and the Appellant were "deluded" into believing that she met the minimum professional and ethical standards, qualifications, and experience required of Prosecution counsel appearing before the Tribunal.[17] Consequently, in the Appellant's view, he was denied "an essential pre-requisite for a fair trial, namely that he would be fairly tried before a court where he would be prosecuted by professional lawyers of good standing, licensed/permitted to practice law and whose integrity/bona-fides/professional/ethical standards were above reproach."[18] The Prosecution concedes that Counsel Pollard's licence to practise law in New York was suspended.[19]

---

[12] Appellant's Brief, para. 9.
[13] Appellant's Brief, para. 13.
[14] Appellant's Brief, para. 9.
[15] Appellant's Brief, paras. 13, 14. As the Appellant's Counsel put it during the hearing of the appeal, "[t]he issue primarily is, then, whether or not Mr. Niyitegeka was able to get a fair trial when prosecuted by a charlatan attorney, somebody who was holding herself out as being a prosecutor and who was committing a fraud on the very Trial Chamber that she was appearing before, My Lords." T. 21 April 2004 p. 7.
[16] Appellant's Brief, para. 10.
[17] *Ibid*.
[18] Appellant's Brief, para. 13. *See also* T. 21 April 2004 p. 7.
[19] T. 21 April 2004 pp. 5-6. *See also* Prosecution Response Brief, paras. 86, 92, 95, 98.

14. The Tribunal's instruments do not prescribe qualification requirements for members of the staff of the Office of the Prosecutor appearing before it. While Rule 44(A) of the Tribunal's Rules of Procedure and Evidence ("Rules") stipulates that a counsel engaged by a suspect or an accused "shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law," the Rules and other instruments of the Tribunal contain no corresponding qualification provision for Prosecution counsel. In consequence, the integrity of the trial process before the Tribunal cannot be undermined, *per se*, by the status a Prosecution counsel may or may not have as a member of the bar in any State.

15. Pursuant to Rule 37(B) of the Rules, the Prosecutor's powers in respect of individual cases may be exercised by staff members of his office authorized by him or acting under his direction. In exercising such powers, Prosecution counsel must adhere to standards of professional conduct set out in Prosecutor's Regulation No. 2.[20] In accordance with Regulation No. 2, during investigations and judicial proceedings, Prosecution counsel are required to adopt the highest standards of professional conduct and are expected to follow the prescribed standards in order to safeguard the interests of justice, including "the fundamental rights of suspects and accused."[21] Notably, the

[20] "The Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR) makes this Regulation articulating the standards of professional conduct to which counsel in the Office of the Prosecutor (OTP) for both Tribunals will adhere." Prosecutor's Regulation No. 2, Standards of Professional Conduct for Prosecution Counsel (1999), para. 1 ("Regulation No. 2").

[21] Regulation No. 2, para. 2, subparas. (a) - (o). The Regulation provides in relevant part as follows:

> In the conduct of investigations, and in the conduct of pre-trial, trial and appellate proceedings, prosecution counsel will adopt the highest standards of professional conduct. The Prosecutor expects them, consistent always with the letter and the spirit of the relevant Statute and Rules of Procedure and Evidence, and the independence of the Prosecutor:
>
> (a) to serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of suspects and accused;
>
> (b) to maintain the honour and dignity of their profession and conduct themselves accordingly with proper decorum;
>
> (c) to be, and to appear to be, consistent, objective and independent, and avoid all conflicts of interest that might undermine the independence of the Prosecutor – in particular prosecution counsel shall not allow themselves to be influenced by national, ethnic, racial, religious or political consideration;
>
> (d) to exercise the highest standards of integrity and care, including the obligation always to act expeditiously when required and in good faith;
>
> (e) to demonstrate respect and candour before the Tribunal, and not knowingly to make an incorrect statement of material fact to the Tribunal, or offer evidence which prosecution counsel become aware that a statement made to the Tribunal is incorrect, or that evidence presented to the Tribunal is false, he or she shall take all the necessary steps to inform the Tribunal as soon as possible;

Prosecutor has the right and duty to deal with any failure of Prosecution counsel to observe the standards established in Regulation No. 2.[22]

16. Consequently, irrespective of Counsel Pollard's standing to practise law in New York, under the Tribunal's regulatory regime she was entitled to exercise such powers of the Prosecutor as have been entrusted to her under Rule 37(B) of the Rules. In the exercise of such powers, Counsel Pollard was required to adhere to the standards of professional conduct set out in Regulation No. 2. In addition, as a staff member of the United Nations, she also had a duty to act in accordance with the Charter of the United Nations, its Staff Rules and its Staff Regulations, which include a duty to act with integrity and honesty.[23] Similar standards are imposed upon defence counsel appearing

---

(f) to respect, protect and uphold the universal concepts of human dignity and human rights, and in particular avoid political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(g) to take any available measures, as required, to protect the privacy and ensure the safety of victims, witnesses and their families, to treat victims with compassion, and to make reasonable efforts to minimise inconvenience to witnesses;

(h) to assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused;

(i) to preserve professional confidentiality, including not disclosing information which may jeopardise ongoing investigations or prosecutions, or which might jeopardise the safety of victims and witnesses;

(j) to avoid communicating with a Judge or Chamber of the Tribunal about the merits of a particular case, except within the proper context of the proceedings in the case;

(k) to avoid, outside the courtroom, making public comments or speaking to the media about the merits of particular cases or the guilt or innocence of specific accused while judgement in such matters is pending before a Chamber of the Tribunal;

(l) to make it clear, particularly when undertaking official speaking engagements, that he or she is representing the OTP and not the Tribunal as a whole;

(m) in order to ensure the fairness, consistency and effectiveness of prosecutions, to make reasonable efforts to consult regularly and co-ordinate with other OTP staff and co-operate with colleagues in other sections of the Tribunal;

(n) to know, understand and follow OTP policies, guidelines and procedures;

(o) to respect these standards of ethical conduct, and to the best of their ability, to prevent and actively oppose any departure therefrom, and when given reason to believe that a departure from these standards has occurred or is about to occur, report the matter to the Prosecutor.

[22] Regulation No. 2, para. 4.

[23] For example, article 101 of the Charter of the United Nations provides that "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity." The United Nations Staff Regulations (ST/SGB/2003/5) 7/2/03, regulation 1.2 provides that "staff members shall uphold the highest standards of efficiency, competence and

before the Tribunal who have a duty to "act honestly, fairly, skilfully, diligently and courageously".[24] However, the Appeals Chamber stresses that the integrity of the judicial process demands that these ethical standards be applicable to all counsel appearing before the Tribunal. All counsel have a duty to adhere, as a minimum, to these ethical standards. This is independent of formal provisions or counsel's membership of a national bar.

17. The Appeals Chamber also notes that Counsel Pollard was not the only Prosecution counsel on the case and that she operated under the supervision of a Senior Trial Attorney during the trial. It has not been argued, nor does it appear, that the suspension of Counsel Pollard's licence to practise law in New York was in any way related to her conduct in the Appellant's case. Additionally, beyond making mere allegations about Counsel Pollard's possible misconduct in the proceedings against him,[25] the Appellant has not shown how Counsel Pollard's past conduct in New York affected his trial or rendered it unfair.

18. In view of the foregoing, it has not been established that Counsel Pollard's past professional conduct in the State of New York, the status of her licence to practise law there, or her alleged untimely disclosure that her licence to practise law in New York had been suspended, has undermined the integrity of the Appellant's trial or deprived him of the right to a fair trial. This ground of appeal is accordingly dismissed. However, the present finding is strictly limited to the matter considered here. It is not for the Appeals Chamber to comment on Counsel Pollard's past conduct in her home jurisdiction or her employment in the Office of the Prosecutor.

---

integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status."

[24] ICTR Code of Professional Conduct for Defence Counsel, 8/6/98, Introduction, point 2.

[25] *See, e.g.*, T. 21 April 2004 p. 11:

> MR. KAVANAGH: …. If she had responsibility for the file and she pulls original documents from that and shreds them, My Lord, we're never going to see them, and you're never going to see them, and the Prosecutor is never going to see them. And that is the difficulty in this case, My Lord. And that's why attorneys have to have a degree of integrity and bona fides, which she didn't have. Sorry, My Lords. Also in relation to --
>
> JUDGE SCHOMBURG: Yes, sorry to interrupt. May I ask: Is it your submission that Ms. Pollard deliberately shredded some documents, or did I misunderstand you?
>
> MR. KAVANAGH:You didn't misunderstand me, My Lord. I know it's conjecture, My Lord. I'm not in a position to prove, even to the balance of probabilities, that she did, My Lord. It's not possible. I didn't have access to the file in the first place to know what was in it. And if something has been taken from it, I don't know.

B. The Trial Chamber's Reliance on Representations and Undertakings of Counsel Pollard

19. The Appellant further submits that the Trial Chamber erred in law when it accepted Counsel Pollard's representations and undertakings while under the "delusion" that Counsel Pollard could be relied upon as an officer of the court to carry out her professional duties with a minimum acceptable standard of professional ethical conduct, requiring the Appellant to do likewise.[26] This, in the Appellant's view, resulted in his being denied any opportunity whatsoever to challenge Counsel Pollard's representations and undertakings to the Trial Chamber in an effective manner.[27] More specifically, the Appellant argues, he was denied the opportunity to challenge the truthfulness of the Prosecution's representations relating to the non-existence of material which may have benefited his defence, as well as the opportunity to seek an independent inquiry into the existence of investigators' first-made records of interviews with witnesses.[28]

20. As noted in the foregoing section, Counsel Pollard, like all Prosecution counsel, was required to follow the standards of professional conduct expected of all counsel appearing before the Tribunal in addition to those prescribed in Regulation No. 2, which include the duty to demonstrate candour before the Tribunal and not knowingly to make incorrect statements of material facts to the Tribunal.[29] It is, of course, essential that the Chambers of the Tribunal be able to rely on the integrity of counsel on both sides and that counsel be able to rely on each other's statements.[30] Dereliction in the duty of honesty may, in appropriate cases, be cause for sanctions or for contempt proceedings. Such dereliction by Prosecution counsel may also be contrary to the Charter of the United Nations and a breach of the relevant Staff Regulations and Staff Rules. The Appeals Chamber, however, finds no concrete evidence of a violation of the duty of honesty in the present case. In the absence of any showing of Counsel Pollard's breach of the prescribed standards, the Trial Chamber was entitled to accept and rely upon her representations and undertakings.

21. With respect to the Prosecutor's duty to disclose to the Defence the existence of exculpatory evidence, pursuant to Rule 68 of the Rules, the Appellant has failed to identify any specific instance where the Trial Chamber erroneously relied on Counsel Pollard's representations concerning such evidence. In fact, the Appellant did not point to any instance where the Trial Chamber relied on

[26] Appellant's Brief, paras. 9, 14.
[27] Appellant's Brief, paras. 9, 14, 73.
[28] Appellant's Brief, paras. 14, 15, 16, 28, 34, 35.
[29] *See* Regulation No. 2, para. 2(e).
[30] See *R. v. Early*, [2002] EWCA Crim 1904, [2003] 1 Cr App R 288 at para. 10 ("Judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided. The integrity of our system of criminal trial depends on judges being able to rely on what they are told by counsel and on counsel being able to rely on what they are told by each other. This is particularly crucial in relation to disclosure ….").

Counsel Pollard's representation as to exculpatory evidence. In these circumstances, this Chamber is forced to disregard the present argument as unfounded.

22. Moreover, the Appellant's argument that the Trial Chamber was "deluded" into relying on Counsel Pollard's representations about the non-existence of first-made records and that he was therefore denied the opportunity to challenge such representations is without merit. It has not been shown that Counsel Pollard's representations were factually incorrect; indeed, the Senior Trial Attorney confirmed them during the appeal hearing.[31]

23. It has not been established that the Trial Chamber erred in law when it relied on Counsel Pollard's representations and undertakings. Therefore, the appeal on this point is dismissed.

[31] *See* T. 22 April 2004 p. 5:

> MR. FLEMING: … There are no first-taken notes, as our learned friend wants to call them that; that is, a note taken of what a witness said. They simply don't exist. We told the Court that. They don't exist because of the complexity of taking statements in the context of Rwanda, principally, using translators to achieve the taking of statements – it is a very complex and difficult process – and the final statement which is signed is the statement which has been verified, in each case, by the witness having had the statement translated back to him or her. And there is, on those final statements, a translator's certificate swearing to the accuracy of the translation and the interpretation to and from the witness. It is then that the witness signs a statement, and that is the statement. Sometimes that process was done by hand; most of the time, it was completed in a typewritten form or a computer-generated form.
>
> So, to put all of this in context, first, there are no first-made notes, as our learned friends called for constantly and referred to here.

III. DISCLOSURE OF STATEMENTS, MATTERS NOT SUBJECT TO DISCLOSURE, AND RETENTION OF INFORMATION (GROUNDS OF APPEAL 11, 13, 16, 17, 62)

A. Disclosure

24. The Appellant submits that the Trial Chamber erred in law when it permitted the Prosecutor to rely upon Rule 70 of the Rules to claim privilege over the first-made records of the questions that Prosecution investigators put to witnesses and of the answers given.[32] The Appellant pleads that in order to be able to challenge the testimony of witnesses against him fully, in accordance with the fair trial requirements of Articles 19 and 20 of the Statute, he should have had access to the investigators' notes.[33]

25. The Appellant also submits that the Trial Chamber erred in law in permitting the Prosecution to call witnesses in circumstances where no reasonable explanation was given for the unavailability of the original statements made by the witnesses to the Prosecution investigators. The Appellant claims that the unavailability of the original statements deprived him of the opportunity to cross-examine the witnesses effectively.[34]

26. Finally, the Appellant argues that the Trial Chamber erred in law in convicting and sentencing him when on 27 February 2001 it issued an order directing the Prosecution to make a full disclosure, which in the Appellant's view has not been made.[35]

27. The Appellant cites cases from the European Court of Human Rights ("ECourtHR") as well as the Trial Judgement in the case of *Prosecutor v. Kayishema and Ruzindana* in support of the contention that "documentary material created at the time of the interview of Prosecution witnesses is relevant material that the Prosecution has an obligation to obtain, secure and make available to the Defence."[36]

28. The Prosecution responds that the factual circumstances of those cases from the ECourtHR cited by the Appellant are not relevant to the present case.[37] The Prosecution submits that none of the cases cited by the Appellant support the contention that the principle of equality of arms and the

[32] Appellant's Brief, paras. 24, 28, 39, 74. *See also* T. 14 August 2002 p. 60; Trial Judgement, para. 41.
[33] Appellant's Brief, paras. 39, 40, 42, 43, 45, 54.
[34] Appellant's Brief, para. 83.
[35] Appellant's Brief, para. 218.
[36] Appellant's Brief, paras. 53-61.
[37] Prosecution Response, para. 121.

right to a fair trial are infringed by not disclosing handwritten notes taken by an investigator. The Prosecution further submits that, on the contrary, an accused's right to disclosure is not absolute and that in any criminal trial there will be competing interests at stake which must be weighed against the rights of the accused.[38]

29. A review of the cited jurisprudence reveals that the cases from the ECourtHR are not on point and that nothing in the *Kayishema and Ruzindana* Trial Judgement supports the Appellant's contention. Nowhere in the relevant passages in that case did the Trial Chamber state that the Prosecution has an obligation to obtain, secure or make available to the Defence its own internal material created at the time of the interview.[39]

30. Pursuant to Rule 66(A)(ii) of the Rules, the Prosecutor has a duty, *inter alia*, to make available to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial. The Appeals Chamber notes that neither the ICTR nor ICTY has provided a clear definition of the term "statement." In particular, the jurisprudence has not made a clear distinction between "statements" and "internal documents prepared by a party [which] are not subject to disclosure or notification"[40] under Rules 66 and 67 of the Rules.[41]

31. A record of a witness interview, ideally, is composed of all the questions that were put to a witness and of all the answers given by the witness. The time of the beginning and the end of an interview, specific events such as requests for breaks, offering and accepting of cigarettes, coffee and other events that could have an impact on the statement or its assessment should be recorded as well.

32. Such an interview must be recorded in a language the witness understands. As soon as possible after the interview has been given, the witness must have the chance to read the record or to have it read out to him or her and to make the corrections he or she deems necessary and then the witness must sign the record to attest to the truthfulness and correctness of its content to the best of his or her knowledge and belief. A co-signature by the investigator and interpreter, if any, concludes such a record.

33. Records of questions put to witnesses by the Prosecution and of the answers given constitute witness statements pursuant to Rule 66(A)(ii) of the Rules. It is necessary to disclose the questions

[38] Prosecution Response, para. 122.
[39] *Kayishema and Ruzindana* Trial Judgement, para. 76.
[40] *See* Rule 70(A) of the Rules.
[41] This does not of course affect the Prosecution's obligation to disclose exculpatory material under Rule 68 of the Rules.

put to the witness in order to make the statement intelligible. This obligation also follows from the fair trial guarantees stipulated in Articles 19 and 20 of the Statute. Furthermore, an accused must have access to the questions put to the witness in order to be able to prepare for cross-examination properly. At times, it may be impossible to assess the probative value of the witness's answer without juxtaposing it with the relevant question. This may also affect a Chamber's assessment of the credibility of the witness and the reliability of a testimony in its development. The record of the first interview with a witness is of the highest value because it is most likely to capture the witness's recollection accurately, being closest in time to the events and less vulnerable to any subsequent influence.

34. Questions that were put to a witness – thus being part of the witness statement – have to be distinguished from "internal documents prepared by a party",[42] which are not subject to disclosure under Rule 70(A) of the Rules, as an exception to the general disclosure obligation pursuant to Rule 66(A)(ii) of the Rules. A question once put to a witness is not an internal note any more; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules. If, however, counsel or another staff member of the Prosecution notes down a question prior to the interrogation, without putting this question to the witness, such a question is not subject to disclosure. Similarly, any note made by counsel or another staff member of the Prosecution in relation to the questioning of the witness is not subject to disclosure, unless it has been put to the witness.

35. The fact that a particular witness statement does not correspond to the standard set out above does not free a party from its obligation to disclose it to the other party pursuant to Rule 66(A)(ii) of the Rules. Furthermore, a witness statement which does not correspond to the standard set out above does not necessarily render the proceedings unfair. The Prosecution is obliged to make the witness statement available to the Defence in the form in which it has been recorded. However, something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility).[43]

36. Also, a statement not fulfilling the ideal standard set out above is not inadmissible as such. Pursuant to Rule 89(C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. However, any inconsistency of a witness statement with the standard set out above may be taken into consideration when assessing the probative value of the statement, if necessary.

[42] Emphasis added.
[43] Black's Law Dictionary, 7th Edition (St. Paul, West Group, 1999), Legal Maxims, p. 1662.

37. In the present case, the Appellant has not sufficiently demonstrated that additional records exist that have not been disclosed to the Defence. Without a showing of the availability of such records it has not been established that the Prosecution did not fulfil its duty to disclose pursuant to Rule 66(A)(ii) of the Rules. On the contrary, as discussed above, the Senior Trial Attorney confirmed that the Prosecution has no such documents in its possession,[44] and the Appellant has shown no reason to doubt this representation.

38. Furthermore, the Defence has not *in concreto* demonstrated that the Appellant has suffered prejudice by the way statements have been disclosed to him. The Appeals Chamber notes in this context that neither during the trial nor during the appeals proceedings has the Appellant tried to call an investigator as a witness to testify to the full content of a first-made statement in order to try to show such prejudice.

39. The Trial Chamber also did not err in law when it permitted the Prosecution to call witnesses for whom first-made records were unavailable. Furthermore, the Appellant did not demonstrate that he has suffered prejudice.

40. The related grounds of appeal on this point are therefore dismissed.

B. Retention of Information

41. The Appellant submits that the Trial Chamber erred in law "by deciding that the Prosecutor had not failed in her duty to preserve all the evidence as obliged by virtue of Rule 41."[45] The Appellant posits that fair procedure requires the Prosecution to record what the witness first says to its investigators, that such a notation be transcribed and signed by the witness, and that it then be translated and made available to the Trial Chamber and to "legal-teams."[46] The Appellant argues that the Prosecution's failure to obtain and preserve evidence in this way has deprived him of his right to challenge the testimony of Prosecution witnesses fully.[47]

42. The Appellant did not identify the instance when the Trial Chamber decided that the Prosecutor "had not failed in her duty to preserve all the evidence as obliged by virtue of Rule 41." Additionally, it is not obvious that the Chamber in fact considered this matter or that it reached the decision asserted by the Appellant. Consequently, this ground of appeal is dismissed on grounds of vagueness.

---

[44] T. 22 April 2004 p. 5.
[45] Appellant's Brief, para. 84.
[46] Appellant's Brief, paras. 40, 48.
[47] *Ibid*.

IV. APPREHENSION OF BIAS (GROUNDS OF APPEAL 14, 33)

43. The Appellant submits that the Trial Chamber erred in law when it decided not to recuse itself after Counsel Pollard made reference to a "highly prejudicial matter" which, in his view, is impossible to expunge from the minds of the Judges, and when it failed to order Counsel Pollard to retract her statement.[48] Specifically, the Appellant notes that in cross-examining Defence Witness TEN-16, Counsel Pollard sought the witness's opinion on the Appellant's character, alleging that the Appellant had implicated himself in the commission of rapes.[49] The Defence objected to this assertion and moved the Trial Chamber to recuse itself. The Chamber refused the application.[50] The Appellant argues that Counsel Pollard's statements were so highly prejudicial as to be impossible to expunge from the minds of the Judges and that, as a result, his right to be tried by impartial judges was breached, rendering his convictions and sentence unsafe.[51]

44. In denying the Defence application that the trial Judges recuse themselves, the Trial Chamber stated: "It is also recalled that the judges are professional judges, and we will certainly

---

[48] Appellant's Brief, paras. 77, 188.

[49] Appellant's Brief, para. 78. The exact exchange was as follows:

> BY MS. POLLARD: Q. Madam Witness, in your statement to -- I'm sorry. We have just learned that there is more than one statement. In your October 18, 2002, statement, you give an opinion as to whether or not Eliezer Niyitegeka was involved in the commission of rapes. Do you recall making a statement to that effect?
>
> A. He did not commit this crime.
>
> Q. And that is your opinion. Is that correct?
>
> A. If that crime had been committed, I would have been aware of it.
>
> Q. I will take that to be a "yes", and so my next question is: If I were to tell you that at the time Eliezer Niyitegeka was arrested in February of 1999 he made a statement to ICTR investigators implicating himself in the rapes during the events of 1994, and the question is, knowing that, would that change your opinion?
>
> MR. KAVANAGH: I hope I didn't get the correct translation of that, My Lords.
>
> THE INTERPRETER: Madam President, the microphone is not on.
>
> THE WITNESS: If he owned up to it, I know nothing about it. But as far as I am concerned, I would like to assert that if he had committed that crime in my region I would have learned about it. Since I heard nothing of the sort, I will conclude that he didn't do it.

T. 24 October 2002 pp. 87-88.

[50] Appellant's Brief, para. 78.

[51] Appellant's Brief, paras. 79, 188.

disregard any element of information or any element adduced in the case which has not been proved in the courtroom."[52] The Trial Chamber returned to this matter in the Judgement where it stated that it had not been influenced by the impugned comments.[53]

45. Following the Judgement of the ICTY Appeals Chamber in the case of *Prosecutor v. Furund`ija*, the Appeals Chamber held in *Akayesu* that "there is a presumption of impartiality that attaches to a Judge or a Tribunal and, consequently, partiality must be established on the basis of adequate and reliable evidence."[54] On appeal, it is for the appealing party to rebut this presumption of impartiality. As stated in *Furund`ija* in respect of a reasonable apprehension of bias, the Appellant bears the burden of adducing sufficient evidence to satisfy the Appeals Chamber that the Judges were not impartial.[55] In *Furund`ija* the ICTY Appeals Chamber held that there is "a high threshold to reach in order to rebut the presumption of impartiality" and recalled that "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly established'".[56] The Appeals Chamber recently confirmed this position in the Judgement in the case of *Rutaganda v. Prosecutor*.[57]

46. In the present case, the Appellant has not shown evidence of bias on the part of the trial Judges. On the contrary, the fact that the Trial Chamber found the Appellant not guilty of rape as a crime against humanity suggests that the Chamber was not affected by Counsel Pollard's statement.[58] The Appellant has not rebutted the presumption of impartiality and, consequently, this ground of appeal is dismissed.

[52] T. 29 October 2002 p. 152.
[53] Trial Judgement, para. 47.
[54] *Akayesu* Appeal Judgement, para. 91, following *Furund`ija* Appeal Judgement, paras. 196, 197.
[55] *Furund`ija* Appeal Judgement, para. 197.
[56] *Furund`ija* Appeal Judgement, para. 197 (quoting Mason J. in *Re JRL; Ex parte CJL* (1986) CLR 343, p. 352).
[57] *See Rutaganda* Appeal Judgement, paras. 39-125.
[58] Trial Judgement, paras. 458, 480.

V. ON THE DEFINITION OF GENOCIDE: THE GROUP "AS SUCH" (GROUND OF APPEAL 15)

47. The Appellant submits that the Trial Chamber erred in law by expanding the definition of genocide and deciding that he had the specific intent necessary for a finding of responsibility for genocide.[59] Specifically, the Appellant contends that the Trial Chamber erred in failing to interpret the words "as such" contained in Article 2(2) of the Statute as meaning "solely."[60] The Appellant argues that the Trial Chamber's interpretation of the words "as such" to mean that "the act must be committed against an individual because the individual was a member of a specific group and specifically because he belonged to this group, so that the victim is the group itself, not merely the individual," fails to give the words their full and true meaning and effect.[61] In the Appellant's view, the words "as such" should be interpreted as referring to a situation "where the specific intent was to commit the specified acts against the group *solely because they were members of such a group*" rather than a situation where the specific intent "was to commit the specified acts against a gathering of persons because they were believed to be the enemy or supporters of the enemy."[62] The Appellant submits that in misinterpreting the words "as such," the Trial Chamber, acting *ultra vires*, expanded the definition of genocide to include acts which reasonably could not have been foreseen as falling within its ambit, and that this offends the principle of *nullum crimen, nulla poena sine lege*.[63]

48. Article 2(2) of the Statute states, in part: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, *as such*…."[64] This provision mirrors Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("Genocide Convention").

49. It may be recalled that during the drafting of the Genocide Convention, the delegates debated whether to include the element of motive in the definition of the crime of genocide.[65] After extensive discussion, the words "as such" were introduced into the draft document to replace an explicit reference to motives made in an earlier draft. Venezuela, the author of this amendment, stated that "an enumeration of motives was useless and even dangerous, as such a restrictive

[59] Appellant's Brief, para. 80.
[60] *Ibid*.
[61] Appellant's Brief, para. 82.
[62] *Ibid.* (emphasis in original). *See also* Appellant's Brief in Reply, pp. 18-20.
[63] Appellant's Brief, para. 81.
[64] ICTR Statute, art. 2(2) (emphasis added).
[65] *See generally* Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002), pp. 411-414.

enumeration would be a powerful weapon in the hands of the guilty parties and would help them to avoid being charged with genocide. Their defenders would maintain that the crimes had been committed for other reasons than those listed in article II."[66] The Venezuelan delegate continued that "it was sufficient to indicate that intent was a constituent factor of the crime."[67] He observed that replacing the statement of motives with the words "as such" should meet the views of those who wanted to retain the statement, noting that motives were implicitly included in the words "as such".[68]

50. The Trial Chamber in the *Akayesu* case interpreted the concerned provision in Article 2(2) of the Statute to mean that "the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group."[69] This interpretation was adopted by the Tribunal in subsequent cases, including by the Trial Chamber in the present case.[70]

51. The Appellant proposes that the correct interpretation of the words "as such" is "solely," so that a finding of the requisite specific intent would be predicated on proof that the perpetrator committed the proscribed acts against members of the protected group "*solely because they were members of such a group.*"[71] This proposal, if adopted, would introduce into the calculus of the crime of genocide the determination whether the perpetrator's acts were motivated solely by the intent to destroy the protected group, in whole or in part, or whether the perpetrator was motivated by that intent as well as other factors.

52. In *Kayishema and Ruzindana*, the Appeals Chamber cautioned that "criminal intent (*mens rea*) must not be confused with motive" and stated that "in respect of genocide, personal motive does not exclude criminal responsibility" provided that the genocidal acts were committed with the requisite intent.[72] This position was reinforced in *Prosecutor v. Jelisic*, where the ICTY Appeals Chamber observed that "the existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide."[73]

---

[66] UN GAOR 6th Committee, 76th Meeting (1948), p. 124.
[67] *Ibid*.
[68] UN GAOR 6th Committee, 76th Meeting (1948), pp. 124-125.
[69] *Akayesu* Trial Judgement, para. 521.
[70] Trial Judgement, para. 410. *See also Media Case* Trial Judgement, para. 948; *Semanza* Trial Judgement, para. 312; *Bagilishema* Trial Judgement, para. 61; *Rutaganda* Trial Judgement, para. 60; *Musema* Trial Judgement, paras. 153, 154, 165.
[71] Appellant's Brief, paras. 80, 82 (emphasis in original).
[72] *Kayishema and Ruzindana* Appeal Judgement, para. 161.
[73] *Jelisic* Appeal Judgement, para. 49. Note also that the ICTY Appeals Chamber in the case of *Prosecutor v. Tadic* stated that save for sentencing, motive is irrelevant in criminal law. *Tadic* Appeal Judgement, paras. 268, 269. *See also*

53. The words "as such," however, constitute an important element of genocide, the "crime of crimes."[74] It was deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. The term "as such" has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion.[75] In other words, the term "as such" clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting "as such" to mean that the proscribed acts were committed against the victims *because of* their membership in the protected group, but not *solely* because of such membership.

54. Finally, it has not been shown that the Trial Chamber erred in deciding that the Appellant had the requisite specific intent for a finding of responsibility for genocide. In determining whether the Appellant had the requisite specific intent, the Trial Chamber carefully considered his actions during attacks on Tutsi refugees.[76]

55. The present ground of appeal is dismissed.

M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), p. 528: "The actor's intent, or state of mind, at the time of performing the act is different than his motives. The latter are the ultimate purposes or goals sought to be accomplished by such conduct and they are irrelevant." (citations omitted).

[74] *Prosecutor v. Kambanda*, ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para. 16; *Prosecutor v. Jelisic*, IT-95-10-A, Judgement, 14 December 1999, Partial Dissenting Opinion of Judge Wald, para. 2.

[75] *See* William A. Schabas, Genozid im Völkerrecht (2003), pp. 340-341; William A. Schabas, Genocide in International Law (2000), pp. 254-255.

[76] Trial Judgement, paras. 411-419.

VI. ALIBI (GROUNDS OF APPEAL 18, 47, 50, 51)

56. Under these grounds of appeal, the Appellant challenges the legal approach adopted and the burden of proof applied by the Trial Chamber in its assessment of the alibi evidence. In sum, the Appellant presents three main arguments: first, that the Trial Chamber applied the wrong burden of proof in assessing the alibi; second, that the Trial Chamber failed to apply the same standards in assessing Defence and Prosecution evidence; and third, that the Trial Chamber erred in finding that the alibi evidence for 28 June 1994 did not raise a reasonable doubt.

A. Standard of Proof for an Alibi

57. As a first argument, the Appellant contends that the Trial Chamber erred in law by requiring the Appellant to prove his alibi beyond reasonable doubt, whereas his evidential burden was only to show that, on the balance of probabilities, he was where he says he was. The Appellant submits that once he has met this burden, there must necessarily be a reasonable doubt that he was not where the Prosecution alleged him to have been. He submits that no adverse inference can be raised from his failure to discharge his evidential burden, and that the Prosecution's case should be considered afresh. According to the Appellant, the Trial Chamber erred by failing to direct itself properly in these matters.[77]

58. With reference to the *Kayishema and Ruzindana*[78] and *Tadic*[79] Trial Judgements, the Appellant submits that it is nearly impossible for an accused to provide a twenty-four hour, day by day, week by week account of his whereabouts for an alibi defence covering several months. He argues that where the Prosecution was unable to prove with any degree of accuracy the precise date on which he is alleged to have committed an offence, the Trial Chamber should have given him the

[77] Appellant's Brief, paras. 79, 85-86, 88, 91, 201.

[78] *See Kayishema and Ruzindana* Trial Judgement, para. 83: "The Chamber is aware of the difficulties of raising a defence where all of the elements of the offence are not precisely detailed in the Indictment. The difficulties are compounded because the alibi defence advanced by both accused persons does not remove them from the Bisesero vicinity at the time in question. The accused in the *Tadic* case faced similar difficulties. In that instance the Trial Chamber observed the near impossibility of providing a 24-hour, day-by-day, and week-by-week account of the accused's whereabouts for an alibi defence which covers a duration of several months. The Trial Chamber is of the opinion that this is a substantive issue."

[79] *See Tadic* Trial Judgement, para. 533: "The difficulty of establishing an alibi defence for those paragraphs that cover long periods of time is appreciated. In regard to those paragraphs, a major cause of difficulty for the Defence lies, however, in the very special character of its alibi defence, which not only has to extend over many months but also does not involve anything like total absence from the region where the offences are alleged to have occurred. Instead, it only asserts that the accused, although present within the region, was not involved in any of the activities alleged in the Indictment, but was instead leading his own quite innocent life and living with his family. Such a defence does not readily afford a complete answer to charges in the Indictment, since it cannot be expected, even in the most favourable circumstances, to provide anything like a 24-hour, day-by-day and week-by-week account of the accused's whereabouts. Favourable circumstances did apply to an extent to the period during which the accused served as a traffic

benefit of doubt by opting for the date of occurrence of the incident alleged by the Prosecution as being the day on which the Appellant had an alibi. The Appellant submits that in failing to do so, the Chamber erred in law and deprived him of a fair trial.[80]

59. In response, the Prosecution submits that the Trial Chamber applied the appropriate legal standard when assessing the Appellant's alibi and correctly stated the law on alibi as set out in *Musema*. In the view of the Prosecution, the Appellant thus fails to identify an error of law invalidating the decision.[81]

60. The Appeals Chamber recalls that where a defendant raises an alibi "he is merely denying that he was in a position to commit the crime with which he was charged," specifically that he was elsewhere than at the scene of the crime at the time of its commission.[82] It is settled jurisprudence before the two *ad hoc* Tribunals that in putting forward an alibi, a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution's case.[83] The burden of proving beyond reasonable doubt the facts charged remains squarely on the shoulders of the Prosecution. Indeed, it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[84]

61. In the view of this Chamber, the Trial Chamber correctly stated that the Prosecution bears the burden of proof and that an alibi defence does not bear a separate burden. The Trial Chamber affirmed that the alibi would succeed if it is reasonably possibly true. It added that even where the alibi is rejected it remains the task of the Prosecution to establish the offences charged beyond reasonable doubt:

> In *Musema*, it was held that "[i]n raising the defence of alibi, the Accused not only denies that he committed the crimes for which he is charged but also asserts that he was elsewhere than at the scene of these crimes when they were committed. The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. In establishing its case, when an alibi defence is introduced, the Prosecution must prove, beyond any reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful."[85]
>
> The Accused does not bear the burden of proving his alibi - if the alibi raises a reasonable doubt, the Accused must be acquitted. Where the alibi is rejected, a finding of guilt does not

policeman at the Orlovci checkpoint since written records exist of that service. However, even in the case of this period, and despite these written records, the accused's alibi for that period is, as has already been shown, far from conclusive."

[80] Appellant's Brief, paras. 87-88.

[81] Prosecution Response Brief, paras. 164-170.

[82] *Kayishema and Ruzindana* Appeal Judgement, para. 106.

[83] *See Kayishema and Ruzindana* Appeal Judgement, para. 113.

[84] *Musema* Appeal Judgement, para. 202.

[85] Trial Judgement, paras. 51, citing *Musema* Trial Judgement, para. 108, confirmed in *Musema* Appeal Judgement, paras. 205-206.

> automatically follow; the evidence must be assessed and a conviction entered only if the allegation has been proved beyond reasonable doubt.[86]

62. There is therefore no merit in the Appellant's argument that the Trial Chamber failed to direct itself properly as to the applicable legal standards and evidential burden when considering the alibi. The approach articulated by the Trial Chamber conforms to that previously set forth by the Appeals Chamber.

63. Regarding the Appellant's general submission that where the Prosecution failed to establish the precise date on which an event occurred, the Trial Chamber should have granted him the benefit of doubt by opting for a day for which he had an alibi, the Appeals Chamber dismisses it to the extent that it is unsupported by any specific examples of when, according to the Appellant, the Trial Chamber should have so acted.

64. Finally, the Appeals Chamber notes that the Appellant also states generally that the Trial Chamber's finding that the alibi does not raise a reasonable doubt that he was in Bisesero (Muyira) committing crimes is against the weight of evidence. He advances no arguments in support, except for those reviewed above.[87] This argument will therefore not be considered.

B. Applying Different Standards in Assessment of Evidence

65. As a second argument, the Appellant submits that the Trial Chamber failed to apply the same standards in assessing Defence and Prosecution evidence. The Appellant contends that the Trial Chamber, in rejecting the evidence of Defence witnesses, noted that certain Defence witnesses were unable to provide "details" about the Appellant's activities during the relevant period, could not provide "the exact number of days" on which they saw the Appellant, progressively changed their evidence, and were unable to confirm the lengths of time during which they saw the Appellant at Muyira. The Appellant submits that, by contrast, the Trial Chamber excused Prosecution witnesses' forgetfulness due to lapse of time, allowed inconsistent evidence of Prosecution witnesses, and convicted him on the basis of vague and unspecified Prosecution evidence.

66. In support of this contention, the Appellant refers to the following findings:

- the Trial Chamber rejected the alibi evidence of Defence Witnesses TEN-10 and TEN-22 on the basis that neither witness was able to provide "details" about the Appellant's activities

[86] Trial Judgement, paras. 52.
[87] Appellant's Brief, para. 95.

during the relevant period, whereas the Trial Chamber excused Prosecution Witness HR's lack of memory as to details due to lapse of time;[88]

- the Trial Chamber noted that Witness TEN-22 could not provide "*the exact number of days he saw the Accused*", whereas Prosecution Witnesses GGH, HR, KJ, GGY, and GGV did not specify exact dates of their sightings of the Appellant, yet the Trial Chamber accepted and relied on their unspecified evidence;[89]

- the Trial Chamber noted that Defence Witness TEN-10 "*changed his evidence, as his testimony progressed, concerning the frequency…*[with which] *he saw the Accused*" and considered this a "*significant factor*" in assessing his alibi evidence, whereas the Trial Chamber found Prosecution Witness GGR to be reliable despite the fact that his evidence changed in relation to the frequency with which he saw the Appellant;[90] and

- the Trial Chamber rejected Witness TEN-9's testimony that he was certain he saw Bernard Kouchner, a former French Secretary of State, on 14 May 1994, whereas it accepted Prosecution Witness HR's identification evidence, on the basis that the witness was "*certain*" he saw the Appellant and maintained his position throughout his testimony, and relied on the sole testimony of Prosecution Witness GGY, although he only indicated seeing the Appellant on the "morning" of 14 May without providing any other details.[91]

67. The Prosecution submits that there is no support for the Appellant's argument that the Trial Chamber rejected his alibi because it applied a different standard when assessing the credibility of his alibi witnesses. The Prosecution recalls that the Trial Chamber rejected other aspects of the Appellant's alibi on a number of grounds. The Prosecution submits therefore that there is no showing that the Trial Chamber would have accepted the Appellant's alibi but for the alleged errors.[92]

68. In light of the issues raised, the Appeals Chamber will consider *seriatim* the Appellant's examples of instances where the Trial Chamber is said to have applied different standards in assessing the evidence of Prosecution witnesses and of his alibi witnesses.

Witness TEN-10

[88] Appellant's Brief, para. 93.
[89] Appellant's Brief, para. 94 (emphasis in original).
[90] *Ibid*. (emphasis in original).
[91] Appellant's Brief, para. 95 (emphasis in original).
[92] Prosecution Response Brief, paras. 171-174.

69. The Appeals Chamber is of the opinion that the Appellant's reference to the Trial Chamber's finding of "lack of details" in the evidence of Witness TEN-10 does not support his argument that the Trial Chamber applied a different evidential standard in evaluating the Prosecution and Defence evidence. It is clear from a review of the Judgement that the Trial Chamber reached the conclusion that Witness TEN-10's evidence was of limited value and lacked detail only after having given full consideration to Witness TEN-10's evidence.[93] The Appellant has not shown that the Trial Chamber erred in so doing.

Witness TEN-22

70. Witness TEN-22, who was in Murambi from about 12 or 13 April to 20 May 1994, testified that he saw the Appellant on either 12 or 13 April 1994 and in mid-May during the visit of Kouchner. The witness explained that thereafter he "would see him pass by" and that "sometimes [the Appellant] would drop by to greet us."[94] The witness provides no specific dates or details about these occasions. The Appellant conceded that he was not in a position to say that he was in the witness's company "on a specific date at a specific time."[95] The Trial Chamber took note of the fact that the witness could not provide the exact number of days on which he saw the Appellant, or the frequency of his sightings, and that he did not present any further details about the Appellant's activities during the relevant period.[96] This is consistent with the evidence.

71. However, the Appellant argues that the Trial Chamber applied a different standard by requiring Defence Witness TEN-22 to provide exact dates whereas it convicted him on the vague testimony of Witnesses GGH, HR, KJ, GGY, and GGV. In support, the Appellant refers to the findings of the Trial Chamber in paragraphs 155, 130, and 232 of the Judgement, which, it should be noted, concern only the evidence of Witnesses HR, KJ, and GGY.

72. On the basis of Witness HR's testimony, the Trial Chamber found that on a day "sometime between 17 and 30 April 1994", at between 9.30 a.m. and noon, the Appellant participated in attacks at Muyira Hill against Tutsi refugees. Based on the testimony of Witness GGY, the Chamber found that "sometime between the end of April and beginning of May 1994, from between 8.30 a.m. and 9.30 a.m. to 3.00 p.m.," the Appellant led a large-scale attack against Tutsi refugees at Kivumu in Bisesero.[97] Finally, on the basis of the evidence of Witness KJ, the Chamber found that "sometime in June," at approximately 5.00 p.m., the Appellant spoke at a meeting at

[93] Trial Judgement, paras. 81, 196-198, 214, 355, 356.
[94] T. 29 October 2002 pp. 91-92.
[95] T. 29 October 2002 p. 102.
[96] Trial Judgement, paras. 190-192.

Kibuye Prefectural Office during which he specifically encouraged the audience to combine their efforts in overcoming the enemy, that is, the Tutsi, "and promised they would get his contribution," including *Interahamwe*, in due course.[98]

73. The Prosecution witnesses were therefore unable to testify with precision as to the day on which they saw the Appellant participate in the alleged offences and were able to indicate only a range of dates, "between 17 and 30 April 1994," "sometime between the end of April and beginning of May 1994" and "sometime in June." However, those witnesses were able to provide specific details about the events, including the identity of the persons present and the number of refugees, and were able to describe the unfolding of the events. Witness TEN-22, by contrast, provided no such details.

74. The Trial Chamber noted that even were it to have accepted Witness TEN-22's evidence, as it contained so few details, it would not have been inconsistent with the possibility that the Appellant could have been elsewhere during the relevant period.[99] Although the Appellant need only raise a doubt in the Prosecution case, the Appeals Chamber is of the view that it was within the discretion of the Trial Chamber to accept the evidence of Witnesses HR, KJ, and GGY, despite their failure to specify dates, and not that of Witness TEN-22, whose alibi evidence was very limited. The Appeals Chamber finds that the submissions of the Appellant do not show that the Trial Chamber failed to apply the same legal standard when assessing the evidence of Witness TEN-22 and the evidence of Prosecution witnesses.

Witness TEN-9

75. Witness TEN-9 testified that Kouchner visited the Interim Government at Murambi in Gitarama Prefecture on 14 May 1994. He indicated that Kouchner met with the Appellant and with journalists who were to interview Kouchner at Radio Rwanda's mobile studio in the centre of Murambi. The witness testified that he saw the Appellant on that occasion, although this appears to have been a short sighting, and explained that he was told that Kouchner's convoy had been shot at by the Rwandan Patriotic Front ("RPF") in Kigali.[100] In cross-examination, the witness maintained that Kouchner had visited Murambi and met with the Appellant on 14 May 1994, and not on 15 May 1994, as suggested by the Prosecution.[101] The Prosecution referred to a press article by

[97] Trial Judgement, para. 130.
[98] Trial Judgement, para. 232.
[99] Trial Judgement, para. 192.
[100] T. 29 October 2002 pp. 136-137.
[101] T. 30 October 2002 pp. 35-38.

journalist Mark Huband of the Guardian Newspaper in London, who travelled with Kouchner, to show that Kouchner was in Murambi on 15 May, not 14 May.[102]

76. The Trial Chamber concluded that the evidence of Witness TEN-9 did not raise a reasonable doubt as to whether the Appellant was present at Muyira Hill on 14 May 1994. It found that there was no evidence in Witness TEN-9's testimony as to whether Kouchner's visit occurred in the morning of 14 May at the time of the attack or as to the length of time for which the witness observed the Appellant. The Chamber noted that the witness's evidence was not "inconsistent with the possibility that the [Appellant] could have left Murambi for Bisesero, and returned the same day, unobserved by the witness."[103]

77. The Appellant argues that the Trial Chamber erred in so concluding by not taking into consideration the "distance/difficulty of movement prevailing at that time" and because it was not even-handed in assessing Defence evidence. The Appeals Chamber notes that although the first aspect of the Appellant's argument is not articulated or explained, he does provide two apparent examples to show how the Trial Chamber is said to have applied differing standards in assessing the evidence of Witness TEN-9 and Prosecution evidence.

78. First, the Appellant notes that the Trial Chamber rejected Witness TEN-9's evidence even though he was certain that he saw the Appellant on 14 May 1994, yet it accepted the evidence of Prosecution Witness HR on the basis that he was certain that he saw the Appellant on an occasion between 17 and 30 April 1994. The Appeals Chamber considers that this reference adds little to the Appellant's argument. Indeed, unlike Witness TEN-9, the certainty expressed by Witness HR related to his actual sighting of the Appellant, not so much to the exact date, whereas Witness TEN-9's certainty relates to the day on which he saw the Appellant. In addition, the Appellant fails to address the fact that the Trial Chamber's findings took into account the press article which suggests that Kouchner's visit occurred on 15 May 1994 and not on 14 May 1994. Moreover, the Trial Chamber did not effectively reject Witness TEN-9's evidence; rather, having considered it, it found it insufficient to create a reasonable doubt as to whether the Appellant was present at Muyira Hill on 14 May 1994.

79. Secondly, the Appellant notes that the Trial Chamber accepted the evidence of Witness GGY that he saw the Appellant on the morning of 14 May 1994, despite not specifying at what time and for how long he saw him. Although the Appellant suggests that in the absence of such details he

[102] Trial Judgement, para. 194; T. 30 October 2002 pp. 35-38.
[103] Trial Judgement, para. 195.

should be afforded the benefit of the doubt, he does not develop his argument to show error on the part of the Trial Chamber in relying on the evidence of Witness GGY.[104]

80. The Appeals Chamber finds therefore that the Appellant has not shown that the Trial Chamber failed to apply the same standards in assessing Defence and Prosecution evidence.

C. Alibi Evidence for 28 June 1994

81. The Appellant refers to Defence Exhibit D-17 which states that on 26 June 1994 the French Special Operation Forces were engaged as far as Kibuye and had put an end to the massacres in the built up areas. According to the Appellant, this evidence, along with the alibi evidence provided by Defence Witness TEN-6 establishes that the French forces were in Kibuye by 22 June and had put an end to the massacres by 26 June. He submits that this evidence raises a reasonable doubt that the Appellant was in the Kibuye area on 28 June giving orders to commit offences, as testified to by Prosecution Witness KJ.[105]

82. The Appellant also argues that the Trial Chamber erred in law and in fact in finding that the evidence of Defence Witnesses TEN-22 and TEN-10 did not raise a reasonable doubt as to the presence of the Appellant in Kibuye on 28 June 1994 and that this resulted in a breach of the Appellant's right to fair procedures and a fair trial.[106]

83. For events on 28 June 1994 the Trial Chamber concluded:

> Based on the totality of the evidence, the Chamber notes that the witness did not see who fired the gun, or the direction the gunshot came from. His evidence is that at the time he heard the gunshot, he was 15 metres away from the vehicle in which the two people were. He did not see who killed these two people. Consequently, the Chamber finds that there is insufficient evidence in support of the allegation that the Accused killed the man and woman. The Chamber's findings with respect to the alleged sexual violence committed on the body of the dead woman will be set out in II.7.2.4 below.[107]
>
> …
>
> Although the witness did not see the act of inserting the piece of wood into the woman's genitalia, he heard the order being issued by the Accused and later saw the woman lying on the road with wood sticking out of her genitalia. Based on the totality of the evidence, the Chamber finds that on 28 June 1994, near the Technical Training College, on a public road, the Accused ordered Interahamwe to undress the body of a woman who had just been shot dead, to fetch and sharpen a piece of wood, which he then instructed them to insert into her genitalia. This act was then carried out by the Interahamwe, in accordance with his instructions. The body of the woman, with the

[104] Trial Judgement, para. 179.
[105] Appellant's Brief, paras. 96, 206.
[106] Appellant's Brief, para. 207.
[107] Trial Judgement, para. 287.

> piece of wood protruding from it, was left on the road for some three days thereafter. The Accused referred to the woman as "Inyenzi" which the Chamber is satisfied was meant to refer to Tutsi.[108]

84. In making its findings, the Trial Chamber considered the evidence of Witnesses TEN-6 and KJ and the proposition that it was unbelievable that such acts occurred despite the presence of French troops in Kibuye on 28 June. The Trial Chamber found the evidence of Witness TEN-6 to be of "questionable veracity" and chose not to rely upon it. The Appellant has not addressed this finding to show that it was one that no reasonable trier of fact could have reached.

85. The Trial Chamber made no specific reference to Defence Exhibit D-17 in its findings, as cited by the Appellant in this ground of appeal. The exhibit, a "Rapport d'information" before the French *Assemblée Nationale* on French military operations with the United Nations between 1990 and 1994, explains only that as of 26 June 1994 French troops had secured the Kibuye agglomeration and ended all massacres in the area. In the mind of the Appellant this report creates a reasonable doubt that the events of 28 June 1994 occurred as testified to by Witness KJ.

86. The Appeals Chamber recalls that pursuant to Rule 89(C) it is within the Trial Chamber's discretion to admit any relevant evidence which it deems to have probative value, and that the Trial Chamber, as trier of fact, is in the best position to evaluate the probative value of evidence and to determine which evidence it will rely upon in making its findings. Defence Exhibit D-17 was placed on record during the cross-examination of Witness KJ on the events of 28 June 1994 in Kibuye. The witness was extensively cross-examined on the killing of the man and woman, and on the subsequent insertion of a stick in the dead woman's genitalia. He was also questioned about the feasibility of the Appellant ordering *Interahamwe* to commit criminal acts given the French presence in Kibuye at the time. The Appeals Chamber notes that the witness affirmed that the French did not put an end to the genocide and were unable to prevent the *Interahamwe* from killing. He testified that all the French "could do was to pick up survivors here and there during the massacres."[109]

87. In his submissions, the Appellant argues only that Defence Exhibit D-17 and the evidence of Witness TEN-6 establish that there were no more massacres in Kibuye on 28 June 1994. He does not address the findings of the Trial Chamber or attempt to show why the Trial Chamber should have attached more weight to Defence Exhibit D-17 and less to the evidence of Witness KJ. In the view of the Appeals Chamber, it was within the Trial Chamber's discretion as trier of fact to accept the evidence of Witness KJ for 28 June 1994, evidence which had been tested during his

[108] Trial Judgement, para. 316.
[109] T. 16 October 2002 pp. 49-62 (Closed Session).

examination before the Trial Chamber. The contents of the exhibit were before the Trial Chamber and Witness KJ was questioned about the presence of French troops in Kibuye. The Appellant has not shown how the Trial Chamber's finding was one that no reasonable trier of fact could have reached in relying on the evidence of Witness KJ, and not on that of Witness TEN-6 or on Defence Exhibit D-17.

88. In relation to Defence Witnesses TEN-22 and TEN-10, the Appellant argues that the Trial Chamber erred generally in finding that the evidence of Defence Witnesses TEN-22 and TEN-10 did not raise a reasonable doubt as to his presence in Kibuye on 28 June 1994. Aside from the submissions addressed in section VI.B above, the Appellant advances no specific arguments in relation to the alibi evidence presented by the Witnesses TEN-22 and TEN-10. These submissions are therefore unsubstantiated.

89. The Appeals Chamber therefore dismisses the appeal related to the alibi on all grounds.

VII. CREDIBILITY OF PROSECUTION WITNESSES AND RELIABILITY OF THEIR EVIDENCE (GROUNDS OF APPEAL 19, 20, 21, 22, 23, 24, 25, 40, 41, 42, 43, 45, 48, 49, 53, 54)

90. The Appellant raises numerous issues under multiple grounds of appeal concerning the Trial Chamber's assessment of the credibility of Prosecution witnesses and the reliability of their evidence. These issues relate to the Trial Chamber's approach to assessing uncorroborated evidence, inconsistencies in evidence, and accomplice and identification evidence. In the interest of clarity, the Appeals Chamber considers these submissions first according to the legal issues that they raise and then on a witness by witness basis.

A. Uncorroborated Testimony (Ground of Appeal 19)

91. The Appellant submits that the Trial Chamber erred in law in accepting and relying upon uncorroborated evidence of Witnesses GK,[110] GGH,[111] KJ,[112] HR,[113] GGY,[114] GGV,[115] GGM,[116] DAF,[117] and GGO.[118]

92. Rule 89(C) of the Rules allows a Trial Chamber to "admit *any* relevant evidence which it deems to have probative value."[119] The Appeals Chamber has consistently held that a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness's testimony for the proof of a material fact.[120] Accordingly, acceptance of and reliance upon uncorroborated evidence, *per se*, does not constitute an error in law.

[110] Appellant's Brief, para. 98.
[111] Appellant's Brief, para. 99.
[112] Appellant's Brief, para. 100.
[113] Appellant's Brief, para. 101.
[114] Appellant's Brief, para. 102.
[115] Appellant's Brief, para. 103.
[116] Appellant's Brief, para. 104.
[117] Appellant's Brief, para. 106.
[118] Appellant's Brief, para. 107.
[119] Emphasis added.
[120] *See Rutaganda* Appeal Judgment, para. 29 ("It is possible for one Trial Chamber to prefer that a witness statement be corroborated, but neither the jurisprudence of the International Tribunal nor of the ICTY makes this an obligation."); *Musema* Appeal Judgment, paras. 36-38; *Kayishema and Ruzindana* Appeal Judgement, paras. 154, 187, 320, 322; *Celebici Case* Appeal Judgment, para. 506; *Aleksovski* Appeal Judgment, paras. 62-63; *Tadic* Appeal Judgment, para. 65; *Kupreškic et al.* Appeal Judgement, para. 33. The Appellant concedes that in the Tribunal's jurisprudence corroboration is not required. T. 21 April 2004 p. 19.

B. Inconsistencies Between Prior Statements and Testimony (Ground of Appeal 20)

93. The Appellant submits that the Trial Chamber erred in law "in deciding that the explanations given to it for the discrepancies existing between the stated facts recorded in prior statements/testimonies and the testimony before it, were sufficient to justify giving it a probative value sufficient to prove beyond a reasonable doubt, the guilt of the Appellant."[121] In this regard, the Appellant particularly refers to testimonies of Witnesses GGH,[122] KJ,[123] and HR.[124]

94. Additionally, the Appellant argues that the Trial Chamber erred in law in giving insufficient weight to Defence Exhibit D-15 in which the Appellant is not named as having been involved in attacks in Kibuye Prefecture.[125] Furthermore, the Appellant submits, without pointing to any specific error, that Witnesses DAF, GGM, and GGR testified along with others in the *Kayishema and Ruzindana* trial about an attack on Tutsi refugees at Muyira Hill and that, while the Judgement in that case mentions the names of assailants and responsible officials, it does not name the Appellant among them.[126]

95. The jurisprudence of both the ICTR and the ICTY shows that Trial Chambers have the primary responsibility for assessing and weighing evidence, determining whether a witness is credible and the evidence reliable, and according the tendered evidence its proper weight.[127] The following statement of the ICTY Appeals Chamber in *Kupreškic* is on point:

> As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence. The presence of inconsistencies does not, *per se*, require a reasonable Trial Chamber to reject it as being unreasonable.[128]

96. It is not a legal error *per se* to accept and rely on evidence that varies from prior statements or other evidence. However, a Trial Chamber is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence.[129] The Trial Chamber in the present case noted that it considered all discrepancies and corresponding

---

[121] Appellant's Brief, para. 108.
[122] Appellant's Brief, paras. 109-111.
[123] Appellant's Brief, paras. 112-114.
[124] Appellant's Brief, para. 115.
[125] Appellant's Brief, para. 116.
[126] Appellant's Brief, para. 117.
[127] *See, e.g., Rutaganda* Appeal Judgement, para. 188; *Musema* Appeal Judgement, para. 18; *Kayishema and Ruzindana* Appeal Judgement, paras. 319, 323, 324; *Akayesu* Appeal Judgement, para. 132; *Aleksovski* Appeal Judgement, para. 63; *Tadic* Appeal Judgement, para. 64; *Kupreškic et al.* Appeal Judgement, paras. 31, 32, 156; *Celebici Case* Appeal Judgement, para. 491.
[128] *Kupreškic et al.* Appeal Judgement, para. 31 (internal citations omitted).

explanations. The Appellant has not shown that the Trial Chamber committed any error in doing so.[130]

C. Accomplice Testimony (Grounds of Appeal 21, 22)

97. The Appellant submits that the Trial Chamber erred in law when it decided not to categorize certain witnesses as accomplices and when it failed to give itself "the necessary warnings" with regard to accepting and weighing their evidence.[131] The Appellant submits that Witnesses GK, KJ, and GGV fall into the category of accomplices and that the Trial Chamber was required to treat their evidence with circumspection.[132]

98. The ordinary meaning of the term "accomplice" is "an associate in guilt, a partner in crime."[133] Nothing in the Statute or the Rules of the Tribunal prohibits a Trial Chamber from relying upon testimony of those who were partners in crime of persons being tried before it. As stated above, a Chamber may admit any relevant evidence which it deems to have probative value.[134] Accomplice testimony is not *per se* unreliable, especially where an accomplice may be thoroughly cross-examined.[135] However, 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 the circumstances in which it was tendered.[136] In the view of the Appeals Chamber, reliance upon evidence of accomplice witnesses *per se* does not constitute a legal error.

D. Identification/Recognition Evidence (Grounds of Appeal 23, 24, 25)

99. The Appellant submits that the Trial Chamber erred in law in accepting and assessing identification/recognition evidence because the investigators failed to obtain and record from witnesses a description of the person they saw and believed to be the Appellant, or explanations of how they could recognize and identify him, their prior knowledge of him, and the circumstances of their observation.[137] The Appellant further submits that the Trial Chamber erred in law in deciding that in-dock identification was sufficient to prove beyond reasonable doubt that the person the

---

[129] *See Kupreškic et al*. Appeal Judgement, para. 31.
[130] Trial Judgement, para. 40.
[131] Appellant's Brief, paras. 128, 130.
[132] Appellant's Brief, paras. 131, 134, 135, 136, 137; Appellant's Brief in Reply, p. 22.
[133] *Oxford English Dictionary* (2nd ed.).
[134] *See* Rule 89(C) of the Rules.
[135] *See Media Case.*, Case No. ICTR-99-52-I, Decision on the Defence Motion Opposing the Hearing of the Ruggiu Testimony against Jean Bosco Barayagwiza, 31 January 2002, pp. 2-3.
[136] *See Kordic and Cerkez* Trial Judgement, para. 629. *See also Media Case* Trial Judgement, para. 824.
[137] Appellant's Brief, para. 138.

witness saw was the Appellant.[138] According to the Appellant, the Trial Chamber further erred in law by failing to take into account the totality of the circumstances surrounding such evidence.[139] Finally, the Appellant submits that the Trial Chamber erred in law in failing to give itself a warning before considering the identification/recognition evidence.[140] The Appellant points to the assessment of identification or recognition evidence of Witnesses GGH,[141] KJ,[142] HR,[143] GGY,[144] GGR,[145] GGV,[146] GGM,[147] DAF,[148] and GGO,[149] as instances in which the Trial Chamber erred.

100. The Appellant argues that the Trial Chamber erred in assessing identification/recognition evidence. In relation to the Defence assertion that identification evidence triggers a warning that the Judges must give to themselves, the Trial Chamber stated in its Judgement:

> The Chamber accepts that identification evidence has inherent difficulties due to the vagaries of human perception and recollection. Therefore, the Chamber has carefully assessed and weighed the identification evidence adduced, taking into account the following factors: prior knowledge of the Accused, existence of adequate opportunity in which to observe the Accused, reliability of witness testimonies, conditions of observation of the Accused, discrepancies in the evidence or the identification, the possible influence of third parties, the existence of stressful conditions at the time the events took place, the passage of time between the events and the witness's testimony, and the general credibility of the witness.[150]

101. This methodology reveals no error of law; indeed, it conforms to the cautious approach endorsed by the Appeals Chamber in other cases.[151]

E. Credibility of Individual Witnesses and Reliability of Their Evidence

102. Having reviewed the submissions and applicable law related to uncorroborated evidence, inconsistencies in evidence, and accomplice and identification evidence, the Appeals Chamber shall now proceed to examine the credibility and reliability issues raised by the Appellant on a witness by witness basis. Trial Chambers are accorded a high degree of deference in respect of factual findings. The Appeals Chamber is only entitled to substitute its assessment for that of the Trial Chamber if no

[138] *Ibid*.
[139] *Ibid.*
[140] Appellant's Brief, paras. 151, 152.
[141] Appellant's Brief, para. 160.
[142] Appellant's Brief, para. 161.
[143] Appellant's Brief, para. 162.
[144] Appellant's Brief, para. 163.
[145] Appellant's Brief, paras. 164-166.
[146] Appellant's Brief, paras. 167, 168.
[147] Appellant's Brief, para. 169.
[148] Appellant's Brief, para. 170.
[149] Appellant's Brief, para. 171.
[150] Trial Judgement, para. 49 (internal citation omitted).
[151] *See Kupreškic et al*. Appeal Judgement, paras. 31-40; *Kayishema and Ruzindana* Trial Judgement, paras. 71, 456-461, upheld in the Appeal Judgement, para. 327.

reasonable trier of fact could have arrived at the Trial Chamber's conclusion and only if the error has occasioned a miscarriage of justice.[152]

1. Witness GK (Grounds of Appeal 19, 21, 22, 48, 49)

103. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence of Witness GK, given that he was the sole witness to testify to what happened at a certain meeting on 3 May 1994 and considering that his testimony was otherwise flawed.[153] Additionally, the Appellant submits that the Trial Chamber erred in law and in fact in relying upon Witness GK's uncorroborated, non-expert opinion evidence as to the meaning of words spoken at the 3 May 1994 meeting in Kibuye.[154] Finally, the Appellant submits without elaboration that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness GK and that, had it done so, Witness GK's testimony would have been held incapable of providing proof beyond reasonable doubt as to the facts to which he testified.[155]

104. The Appellant further submits that the Trial Chamber erred in law in failing to categorize Witness GK as an accomplice, in failing to exercise extreme caution in considering his evidence and in failing to give itself the necessary warnings with regard to accepting and weighing his evidence.[156] The Appellant posits that Witness GK has been detained in Rwanda on suspicion of having committed genocide and argues that the Trial Chamber erred in law and in fact in failing to take into account Defence and Prosecution submissions that the witness was charged with genocide and with being an accomplice of a person who had been convicted of genocide.[157]

105. The Appeals Chamber shall now consider these submissions. The Trial Chamber addressed the Appellant's arguments in respect of the evidence of Witness GK in the Judgement.[158] Upon a Defence submission, the Trial Chamber considered whether Witness GK was an accomplice whose evidence should be viewed with caution.[159] According the term "accomplice" its ordinary meaning and considering the record, the Trial Chamber found that the witness was not an accomplice whose uncorroborated evidence was subject to special caution.[160] On appeal, the Appellant has failed to show this to be an erroneous finding. Despite finding that Witness GK was not an accomplice of the

[152] *See, e.g., Rutaganda* Appeal Judgement, paras. 21-23.
[153] Appellant's Brief, para. 98.
[154] Appellant's Brief, paras. 203-205.
[155] Appellant's Brief, para. 202.
[156] Appellant's Brief, paras. 128, 130.
[157] Appellant's Brief, paras. 134, 135.
[158] Trial Judgement, paras. 245-248.
[159] Trial Judgement, para. 245.
[160] *Ibid*.

Appellant, the Trial Chamber expressly noted in the Judgement that it exercised caution when deliberating on and evaluating the witness's evidence.[161] Consequently, even if the Trial Chamber had erred in finding that Witness GK was not an accomplice, the Appellant has not shown that he suffered any prejudice, as the Trial Chamber explicitly stated that it exercised caution when evaluating the witness's evidence.

106. The Appellant objects to the Trial Chamber's reliance upon Witness GK's evidence as to the meaning of the words spoken at a meeting on 3 May 1994 in Kibuye. The Trial Chamber considered this issue and stated its view that the witness "was testifying to *his personal understanding* of the words used in their context and *his impression* as a member of the audience how that audience would have understood those words."[162] It is therefore clear that the Trial Chamber was well aware of the limitations of this evidence. The Appellant has failed to demonstrate that the Trial Chamber gave "undue weight" to the witness's evidence on this point.

107. In the view of the Appeals Chamber, the Trial Chamber's assessment of the credibility of Witness GK shows that the Trial Chamber treated that evidence with great caution. Nothing has been shown on appeal to indicate that the Trial Chamber erred in finding the witness credible and relying on his testimony. The appeal on these grounds in respect of Witness GK is therefore dismissed.

2. Witness GGH (Grounds of Appeal 19, 20, 23, 24, 25, 45, 48)[163]

108. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence of Witness GGH concerning the events of 10 and 13 April 1994, given that this evidence was not corroborated and was otherwise deficient.[164] The Appellant also submits that the Trial Chamber erred in law by disregarding material discrepancies between the witness's prior statements and his testimony.[165]

109. The Appellant notes that in his testimony concerning the events of 10 April 1994, Witness GGH did not indicate the distance from which he saw the Appellant, how long he observed him, and how far he was from the vehicle in question when he observed guns.[166] The Appellant points out that the witness testified that he had been drinking at that time and argues that given the

[161] Trial Judgement, paras. 48, 245.
[162] Trial Judgement, para. 247 (emphasis added).
[163] Pursuant to Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004, reference to Witness GGH in ground of appeal 40 was struck from the Appellant's Brief.
[164] Appellant's Brief, para. 99.
[165] Appellant's Brief, paras. 99, 109, 110, 111.
[166] Appellant's Brief, para. 160.

circumstances, there was reasonable doubt that Witness GGH had been in a position to see what was inside the vehicle.[167] The Appellant further argues that the witness's identification of the Appellant on 13 April 1994 is not reliable because he made the identification during nightfall from a hiding position in the bushes some one hundred meters away when there was a crowd of people and the person he identified as the Appellant was wearing a hat.[168] Finally, the Appellant submits that the witness's identification of the Appellant on 13 May 1994 cannot be relied upon, given that it was made at a distance of one hundred meters, on hilly territory, while the witness was trying to hide.[169] The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence in such circumstances.[170]

110. The Appellant further submits, without elaboration, that the Trial Chamber erred in law and in fact in deciding that Witness GGH was a credible witness and that he had not mistakenly identified the Appellant as being present at Gisovu on 10 April 1994, and at Bisesero on 13 April 1994 and at the end of May 1994.[171]

111. Finally, the Appellant submits, again without elaboration, that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness GGH and that, had it done so, Witness GGH's testimony would have been held incapable of providing proof beyond reasonable doubt as to the facts to which he testified.[172]

112. The Appeals Chamber shall now consider these submissions. The Appellant highlights several discrepancies between Witness GGH's testimony and his prior written statements as well as his evidence tendered in the *Musema* case. As noted above, the Trial Chamber, as the trier of fact, has discretion in evaluating and resolving evidential inconsistencies. The Trial Chamber assessed the inconsistencies alleged here in the Judgement.[173] On appeal, the Appellant has failed to demonstrate how the Trial Chamber erred in this assessment. Similarly, the Appellant has failed to demonstrate that the Trial Chamber's acceptance of the witness's explanation regarding the commencement of massacres and the date on which the witness went into hiding was a finding that no reasonable trier of fact could have reached.[174] Finally, in response to the Appellant's claim of tampering with Witness GGH's 13 October 1995 statement, the Trial Chamber noted that, upon

[167] *Ibid*.
[168] *Ibid*.
[169] *Ibid*.
[170] Appellant's Brief, paras. 99, 138.
[171] Appellant's Brief, paras. 199.
[172] Appellant's Brief, para. 202.
[173] Trial Judgement, paras. 56-66.
[174] Trial Judgement, para. 61.

examination, the alleged insertion matched the rest of the text and did not appear to have been improperly added.[175] Again, the Appellant has failed to show how the Trial Chamber erred in reaching this conclusion.

113. The Appellant challenges the Trial Chamber's reliance on identification/recognition evidence of Witness GGH. It should be recalled that the Trial Chamber expressly stated in the Judgement that it had carefully assessed and weighed the identification evidence adduced, taking into account a host of factors derived from the jurisprudence of the Tribunal.[176] As the Trial Chamber recalled, when evaluating identification evidence, the Trial Chamber should consider factors such as prior knowledge of the accused, the conditions under which the observations were made, possible discrepancies, influence, and extenuating circumstances.[177]

114. The Trial Chamber noted in the Judgement that Witness GGH had known the Appellant as a member of Parliament and as a radio journalist and that he used to see him often before 1994 because of their mutual involvement in politics.[178] The Trial Chamber therefore took account of facts demonstrating the witness's prior knowledge of the Appellant. Furthermore, a review of the Judgement shows that the Trial Chamber was careful in assessing and weighing the identification evidence given by Witness GGH. Thus, for example, the Trial Chamber decided not to rely on Witness GGH's testimony that he heard the Appellant from 250 meters away, although the witness explained how this was possible.[179]

115. The Appellant argues that the witness did not provide details of his observation of the Appellant on 10 April 1994.[180] This submission lacks merit. The record shows that the witness testified that the Appellant "parked his vehicle *at the location where we were*" and provided other details of the situation.[181] In respect of the witness's identification of the Appellant at Rugarama on 13 April 1994, the Appellant contends that the Trial Chamber failed to take into account that it was nightfall when the witness saw him and that he was wearing a hat.[182] A review of the record shows that it was around 4 p.m. when the witness saw the Appellant.[183] It cannot be said on the basis of

[175] Trial Judgement, para. 57.
[176] Trial Judgement, para. 49.
[177] *See Kupreškic et al.* Appeal Judgement, paras. 31-40; *Kayishema and Ruzindana* Trial Judgement, paras. 71, 456-461, upheld in the Appeal Judgement, para. 327.
[178] Trial Judgement, para. 55.
[179] Trial Judgement, para. 207.
[180] Appellant's Brief, para. 160. *See also* Defence Final Trial Brief, pp. 102-103.
[181] T. 15 August 2002 pp. 87-88 (emphasis added).
[182] Appellant's Brief, para. 160.
[183] T. 16 August 2002 p. 93.

this that the Trial Chamber did not correctly assess the identification evidence. A Trial Chamber is not obliged to expand upon every factor that goes into making its decision.[184] The Trial Chamber did note the distance between the witness and the Appellant and the fact that the Appellant was hiding at the time of the recognition.[185] Finally, the Appellant contests the Trial Chamber's reliance upon the witness's identification of the Appellant at Rwirambo Hill on 13 May 1994 because the identification was made at a distance of one hundred meters on hilly territory while the witness was hiding.[186] The Trial Chamber noted the detailed circumstances of this identification in the Judgement, clearly showing that the Chamber was aware of its circumstances.[187]

116. In addition to the foregoing factors, when weighing the identification evidence, the Trial Chamber also considered that it found Witness GGH to be credible and took into account his demeanour and conduct during the part of his testimony related to the identifications made on 13 April and 13 May 1994.[188] On the basis of the foregoing review, the Appeals Chamber finds that the Appellant failed to demonstrate that the Trial Chamber erred in relying on the identification evidence of Witness GGH.

117. The Trial Chamber's assessment of the credibility of Witness GGH was detailed and careful. The Appellant has not shown that the Trial Chamber committed a legal error or acted unreasonably in finding the witness credible and in relying on his testimony. The appeal on these grounds in respect of Witness GGH is therefore dismissed.

3. Witness KJ (Grounds of Appeal 19, 20, 21, 22, 23, 24, 25, 42, 48, 53)[189]

118. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence of Witness KJ relating to meetings held on 16 April 1994 and in June 1994 and to an unspecified "incident" on 28 June 1994, given that this evidence was not corroborated and was otherwise deficient.[190]

119. The Appellant also submits that the Trial Chamber erred in law by misapplying the burden of proof in finding the witness credible on the basis that the inconsistencies in his evidence were

[184] *See Musema* Appeal Judgement, para. 18; *Celebici Case* Appeal Judgement, para. 481.
[185] Trial Judgement, para. 235.
[186] Appellant's Brief, para. 160.
[187] Trial Judgement, paras. 145-146.
[188] Trial Judgement, para. 66.
[189] Pursuant to Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004, reference to Witness KJ in ground of appeal 53 was struck from the Appellant's Brief.
[190] Appellant's Brief, para. 100.

minor and were adequately explained by him and by disregarding certain material inconsistencies.[191] Further, the Appellant submits, the Trial Chamber erred in law in failing to give "any/sufficient" weight to the material discrepancies between Witness KJ's statement and his testimony in other cases before the Tribunal and his testimony in the present case regarding the presence of Kayishema at a certain meeting.[192] The Appellant also points out that Witness KJ ought not have been deemed credible and reliable, particularly given that he is detained, that he believes that testifying before the Tribunal is a mitigating circumstance, and that he admits to having been "controlled" by "outside forces" in Rwanda.[193]

120. The Appellant also submits that the Trial Chamber erred in law in deciding not to categorize Witness KJ as an accomplice, in failing to exercise extreme caution in considering his evidence and in failing to give itself the necessary warnings with regard to accepting and weighing his evidence.[194] The Appellant notes that although the Trial Chamber stated that the witness has not been charged with any crime and that he is being held in a military camp among witnesses, in his written statement the witness described himself as a "detainee," a fact to which he admitted during trial where he also stated that he knew that testifying before the Tribunal amounted to a mitigating circumstance.[195] The Appellant also recalls the witness's evidence that he was in a military camp and that he had been told what information he cannot provide for security reasons.[196]

121. The Appellant argues that Witness KJ's identification of the Appellant on 16 April and 28 June 1994 was unreliable and that the Trial Chamber erred in law in relying on it.[197] The Appellant observes that, in respect of 16 April 1994, there was no evidence of how far away the witness was when he heard the Appellant speak and how he recognized his voice.[198] As to an unidentified meeting in June, the Appellant argues that Witness KJ's evidence was unreliable given the stressful conditions, distance, the large crowd, obstruction due to a large number of buses, and the time of night.[199] Similarly, the Appellant points out in respect of an event of 28 June 1994 that the witness did not testify to his distance from the Appellant when he observed him, the duration of his observation of the Appellant, the location from which he observed the Appellant, and whether he had an unobstructed view of the Appellant.[200] The Appellant also submits, without elaboration, that

[191] Appellant's Brief, paras. 112, 129.
[192] Appellant's Brief, para. 113.
[193] Appellant's Brief, paras. 114, 129.
[194] Appellant's Brief, paras. 130, 136.
[195] Appellant's Brief, para. 136.
[196] *Ibid*.
[197] Appellant's Brief, paras. 100, 161.
[198] Appellant's Brief, para. 161.
[199] *Ibid*.
[200] *Ibid*.

the Trial Chamber erred in law and in fact in deciding that Witness KJ was a credible witness and that he had not mistakenly identified the Appellant as being present in Kibuye town on 28 June 1994.[201]

122. Finally, without elaboration, the Appellant submits that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness KJ and that, had it done so, Witness KJ's testimony would have been held incapable of providing proof beyond reasonable doubt.[202]

123. The Appeals Chamber shall now consider these submissions. The Appellant submits that the Trial Chamber erred in finding that discrepancies between the testimony of Witness KJ and his prior statements and his testimony in the *Musema* and *Ntakirutimana* trials, were "minor" and "adequately explained."[203] As previously noted, the Trial Chamber has the discretion to evaluate and resolve evidential inconsistencies. In the instant case, the Appellant raised the issue of inconsistencies in his Final Trial Brief and the Trial Chamber specifically addressed the inconsistencies in the Judgement.[204] In the view of the Appeals Chamber, the Appellant has not demonstrated either a factual or legal error in the Trial Chamber's findings concerning the inconsistencies.

124. However, while the Trial Chamber expressly addressed in the Judgement a number of alleged inconsistencies, it did not discuss the Appellant's contention, raised in the Final Trial Brief and again on appeal, that Witness KJ testified in the present case and in *Musema* that Kayishema was present at a certain public gathering in June 1994, whereas in the *Ntakirutimana* trial he testified that Kayishema was not there.[205] It should be recalled that a Trial Chamber need not articulate in its Judgement every factor it considered in reaching a particular finding and the fact that the Chamber did not discuss this matter in the Judgement does not constitute an error.[206] A review of the transcripts from the cases in question shows that the record is not clear as to whether Kayishema was present at the meeting in question. This lack of clarity stems, to a large extent, from the fact that the date of the meeting is not specified and it is therefore not possible to ascertain whether the evidence highlighted by the Appellant relates to the same meeting. In the present case,

---

[201] Appellant's Brief, para. 197.
[202] Appellant's Brief, para. 202.
[203] Trial Judgement, para. 78.
[204] Trial Judgement, paras. 73-78, 277-280.
[205] Defence Final Trial Brief, pp. 115-116; Appellant's Brief, para. 113. On appeal, the Appellant did not provide any reference to the *Niyitegeka* trial transcript in connection with this matter. The present discussion is based on the references provided in the Defence Final Trial Brief.
[206] *See Musema* Appeal Judgement, para. 18; *Celebici Case* Appeal Judgement, para. 481.

the witness testified about a meeting which took place at the prefecture office in June 1994 without specifying the date further.[207] In *Musema*, the witness testified about a meeting which took place at the same location at the end of May or the beginning of June.[208] In *Ntakirutimana*, the witness testified about a meeting which took place at that location "towards the end of June."[209]

125. On the other hand, the enumeration of the participants in the meeting mentioned in the three cases reveals a significant overlap, and the purpose and context of the meeting referred to in the three cases is similar. As to Prefect Kayishema's presence at the meeting, the witness's testimony from the three cases may be summarized as follows. In the present case, Witness KJ stated that the Appellant spoke to those gathered and that "the préfet came subsequently", which indicates that Kayishema was not present during the Appellant's speech but was present at some later point during the gathering.[210] Additionally, the witness testified that he left the meeting after the Appellant's speech.[211] In *Ntakirutimana*, the witness testified that he stayed at the meeting until the Appellant spoke and congratulated the authorities, noting that Kayishema was "not present *at the time*" and that the speaker said when he started to speak that Kayishema was on a mission.[212] Provided that it is the same meeting being described in both instances, the evidence is not contradictory as to Kayishema's presence or absence. The testimonies indicate that Kayishema was not present during the Appellant's speech and that the witness left the meeting at some point after the Appellant's speech. Kayishema may have arrived after the Appellant's speech or after the witness left. While the witness's evidence in the present case is not inconsistent with his evidence in *Ntakirutimana*, it is difficult to reconcile it with his testimony in *Musema* where the witness stated, albeit without much clarity, that Kayishema introduced the authorities when they arrived in the prefecture office for the meeting.[213] Assuming that this is the same meeting as that described in the other two cases, the witness's testimony in *Musema* indicates that Kayishema was present at the beginning of the gathering.

126. However, due to the lack of clarity as to whether the witness's testimony in the three cases concerned one and the same meeting, it is difficult to reach any conclusion about the possibility of a discrepancy in the witness's evidence on this issue. In finding Witness KJ credible, the Trial Chamber carefully considered a host of factors, both positive and negative.[214] In the view of the

[207] T. 15 October 2002 pp. 30, 31, 33.
[208] T. 6 May 1999 pp. 53, 66.
[209] T. 1 November 2001 pp. 183, 184 (Closed Session).
[210] T. 15 October 2002 p. 36 (emphasis added).
[211] *Ibid*.
[212] T. 1 November 2001 pp. 182-183 (emphasis added).
[213] T. 5 May 1999 p. 76.
[214] Trial Judgement, paras. 72-78.

Appeals Chamber, the Trial Chamber's finding cannot be disturbed on the uncertain ground that the witness's testimony concerning a peripheral issue may have varied. The finding of credibility is based on an assessment of the totality of the evidence and circumstances, and in the present case it has not been shown to have been made erroneously in respect of Witness KJ. The Trial Chamber's assessment of discrepancies reveals careful consideration and caution and is not a finding that no reasonable trier of fact could have reached.

127. The Appellant submits that the Trial Chamber erred in law in deciding that Witness KJ was not an accomplice or by not exercising extreme caution in considering his evidence. The Trial Chamber addressed this point in detail in the Judgement.[215] On appeal, the Appellant has failed to show the Trial Chamber's finding that the witness was not an accomplice to be legally erroneous or one that no reasonable trier of fact could have reached. Moreover, despite finding that the witness was not an accomplice, the Trial Chamber decided to exercise caution in evaluating his testimony.[216] Consequently, the Appellant could not have suffered prejudice from the Trial Chamber's decision that the witness was not an accomplice.

128. The Appellant argues that the Trial Chamber erred in accepting and relying on Witness KJ's identification evidence. As already noted, the Trial Chamber recognized that identification evidence must be assessed and weighed carefully.[217] The Appellant bases this challenge, in part, on the fact that the witness did not know the Appellant prior to "the events of 1994."[218] This argument is irrelevant. The question is not necessarily whether Witness KJ knew the Appellant prior to the events, but rather whether and how the witness could recognize and identify him during the events. The witness explained how he was able to recognize the Appellant: in April 1994 the Appellant came to the witness's workplace and presented his identification to him.[219] After that, the witness saw the Appellant several times.[220] The Trial Chamber noted this evidence in the Judgement.[221]

129. The Appellant argues that the witness did not provide details of how he came to hear the Appellant speak about a certain attack on 16 April 1994. This argument is wholly without merit. As the Trial Chamber noted in the Judgement, much of Witness KJ's testimony was given in closed session in order to protect his identity.[222] For this reason the Chamber omitted certain details from

[215] Trial Judgement, paras. 72-75.
[216] Trial Judgement, paras. 48, 73.
[217] Trial Judgement, para. 49.
[218] Appellant's Brief, para. 100.
[219] T. 15 October 2002 pp. 7-8.
[220] T. 15 October 2002 pp. 8-9.
[221] Trial Judgement, para. 71.
[222] Trial Judgement, para. 69.

the Judgement, as is explained therein.[223] This cannot be taken to mean that the Chamber did not consider the evidence led in closed session. The closed session transcript clearly sets out the circumstances in which the witness heard the Appellant speak about the given attack.[224] In light of this evidence, the Trial Chamber's acceptance of the witness's identification of the Appellant on 16 April 1994 is not unreasonable.

130. In regard to the witness's June 1994 identification of the Appellant at the Kibuye Prefectural Office, the Appellant contends that the Chamber failed to consider the stressful conditions, obstructions, and time of night.[225] However, a review of the record from the closed session shows that the witness placed the event at around 5:00 p.m., that he was present at the gathering, that he saw the Appellant arrive, and that he listened to the Appellant's speech.[226] In the view of the Appeals Chamber, on the basis of this evidence, the Trial Chamber's acceptance of the witness's identification evidence relating to this event does not constitute either a legal error or a factual error.

131. The Appellant also submits that Witness KJ did not give certain details relating to his identification of the Appellant on 28 June 1994.[227] This submission is not borne out by the record. The identification in question here was made in connection with the alleged killing of a man and a killing and subsequent mutilation of a woman that, according to the witness, occurred near the *Ecole Normale Technique*. The witness described the situation, including his identification of the Appellant. For example, contrary to the Appellant's submission, the witness did specify how far he was from the Appellant when the Appellant ordered mutilation of the woman's corpse: five meters.[228] The Trial Chamber outlined the evidence relating to this event in the Judgement and considered it at some length.[229] The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber's acceptance of the witness's identification was a finding that no reasonable trier of fact could have reached.

132. The Trial Chamber's assessment of the credibility of Witness KJ shows an abundance of caution. Nothing has been shown on appeal to indicate that the Trial Chamber erred in finding the witness credible and in relying on his testimony. Accordingly, the appeal in respect of Witness KJ on these grounds is dismissed.

---

[223] *Ibid*.
[224] T. 15 October 2002 p. 23 (Closed Session).
[225] Appellant's Brief, para. 161.
[226] T. 15 October 2002 pp. 34-38 (Closed Session).
[227] Appellant's Brief, para. 161.
[228] T. 15 October 2002 p. 47.
[229] Trial Judgement, paras. 273-287, 316.

4. Witness HR (Grounds of Appeal 19, 20, 23, 24, 25, 40, 41, 48)

133. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence of Witness HR concerning an incident at Muyira Hill between 17 and 30 April 1994, given that the evidence was not corroborated and was otherwise deficient.[230] The Appellant also submits that the Trial Chamber erred in law when it found Witness HR credible, given the discrepancies between his testimony in the present case and his testimony in other cases before the Tribunal, as well as his prior statement in which he did not mention the Appellant as a leader of the 13 May 1994 attacks at Muyira Hill.[231]

134. The Appellant further submits that the Trial Chamber erred in law in relying on Witness HR's uncorroborated identification of the Appellant during attacks between 17 and 30 April 1994 and on 13 May 1994 in circumstances in which there were large numbers of people and given that the observations were made under chaotic and stressful conditions.[232] The Appellant further submits, without elaboration, that the Trial Chamber erred in law and in fact in deciding that Witness HR was a credible witness and/or that he had accurately identified the Appellant as being present during attacks at Muyira Hill between 17 and 30 April 1994 or on 13 May 1994.[233]

135. Finally, the Appellant submits, again without elaboration, that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness HR and that, had it done so, Witness HR's testimony would have been held incapable of providing proof beyond reasonable doubt.[234]

136. The Appeals Chamber shall now consider these submissions. The Appellant contends that the Trial Chamber erred in law in accepting and relying on the evidence of Witness HR given the discrepancies between his testimony and his prior statements and between his testimony and his evidence in other cases before the Tribunal. The Trial Chamber considered this matter in the Judgement.[235] On appeal, the Appellant fails to identify any specific error in the Trial Chamber's evaluation of his submissions on this matter. The Appellant merely contests the conclusions reached by the Trial Chamber in respect of the effect of the discrepancies on the weight of the witness's evidence. In the view of the Appeals Chamber, a review of the Trial Chamber's approach to assessing the alleged discrepancies does not reveal any error.

---

[230] Appellant's Brief, para. 101.
[231] Appellant's Brief, para. 115.
[232] Appellant's Brief, para. 162.
[233] Appellant's Brief, paras. 195, 196.
[234] Appellant's Brief, para. 202.
[235] Trial Judgement, paras. 98-108, 154.

137. The Appellant challenges the witness's identification evidence relating to the attacks at Muyira Hill between 17 and 30 April 1994 and on 13 May 1994, again relying on the same arguments presented in his Final Trial Brief and failing to identify any error on the part of the Trial Chamber.[236] In assessing the identification evidence, the Trial Chamber noted the basis of the witness's prior knowledge of the Appellant as well as the conditions under which the identification was made, following the factors that the Trial Chamber set out as relevant when considering and weighing identification evidence.[237] The Trial Chamber also took into account its finding, based on the totality of the Witness HR's evidence, that he was a credible witness.[238] Considering the foregoing and the evidence that the witness identified the Appellant on three occasions during the attacks at Muyira Hill from distances of fifteen, twenty, and about twenty-two meters, and that these identifications occurred during daytime, the Trial Chamber's acceptance of the identifications has not been shown to be one that no reasonable trier of fact could have reached.[239]

138. The Trial Chamber's assessment of the credibility of Witness HR was detailed and careful. The Appellant has not demonstrated on appeal that the Trial Chamber erred in finding the witness credible and relying on his testimony. Accordingly, the appeal in respect of Witness HR on these grounds is dismissed.

5. Witness GGY (Grounds of Appeal 19, 20, 23, 24, 25, 40, 48)

139. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the testimony of Witness GGY that the Appellant participated in an attack at Kivumu between the end of April and the beginning of May 1994 and that he was present at a 14 May 1994 attack at Muyira Hill because this evidence was not corroborated and was otherwise deficient.[240] The Appellant argues that Witness GGY's testimony that he saw the Appellant shooting at refugees on 14 May 1994 at Muyira Hill is contradicted by testimonies of Witnesses GGH and HR who did not see the Appellant at that time (HR) and who did not see him "do anything" on that date (GGH) and submits that the Trial Chamber erred in law when, despite these discrepancies and the other deficiencies, it accorded probative value to Witness GGY's evidence.[241]

140. The Appellant also submits that the Trial Chamber erred in law in accepting Witness GGY's identification in circumstances in which the witness, while running and engaging in an attack at

[236] Defence Final Trial Brief, pp. 122-125. *See also* Appellant's Brief, para. 162.
[237] Trial Judgement, paras. 49, 94, 95, 97, 134, 135.
[238] Trial Judgement, paras. 108, 155.
[239] Trial Judgement, paras. 94, 95, 134, 135.
[240] Appellant's Brief, para. 102.
[241] Appellant's Brief, paras. 102, 108, 118.

Kivumu, saw the Appellant from a distance of up to one hundred meters in a crowd of 300 attackers and in which he observed the Appellant for a minute or less from a distance of ninety to one hundred meters at Muyira Hill on 13 and 14 May 1994.[242] The Appellant further submits, without elaboration, that the Trial Chamber erred in law and in fact in deciding that Witness GGY was a credible witness "and/or" that he had accurately identified the Appellant as being present during an attack at Muyira Hill on 13 May 1994.[243]

141. Finally, the Appellant submits without elaboration that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness GGY and that, had it done so, Witness GGY's testimony would have been held incapable of providing proof beyond reasonable doubt.[244]

142. The Appeals Chamber shall now consider these submissions. The Appellant avers that the evidence of Witness GGY that he saw the Appellant shooting at refugees on 14 May 1994 at Muyira Hill is contradicted by testimonies of Witnesses GGH and HR.[245] Indeed, the Trial Chamber was aware of Witness GGH's testimony that he did not see the Appellant do anything on the day in question as well as that of Witness HR that he did not then see the Appellant.[246] Nevertheless, the Chamber found that the Appellant shot at refugees.[247] In the view of the Appeals Chamber, the Trial Chamber's finding was not shown to be one that no reasonable trier of fact could have reached. Clearly, three witnesses making non-simultaneous observations from differing vantage points may observe three different situations. To say that Witness GGH did not see the Appellant "do anything" on a particular day at a particular place and that Witness HR did not see the Appellant at all does not exclude the possibility of Witness GGY observing the Appellant shoot refugees.

143. The Appellant also argues that the Trial Chamber erred in assessing the identification evidence of Witness GGY. As already noted above, the Trial Chamber recognized that identification evidence must be assessed and weighed carefully.[248] The Appellant asserts that during the attack at Kivumu, the witness, while running and engaging in an attack, sighted the Appellant only once and then only briefly at a distance of up to one hundred meters, making his identification of the Appellant doubtful.[249] The Trial Chamber considered this matter in the Judgement[250] and, on

[242] Appellant's Brief, para. 163.
[243] Appellant's Brief, para. 195.
[244] Appellant's Brief, para. 202.
[245] Appellant's Brief, para. 118.
[246] Trial Judgement, paras. 180, 181. *See also* Defence Final Trial Brief, p. 180.
[247] Trial Judgement, para. 205.
[248] Trial Judgement, para. 49.
[249] Appellant's Brief, para. 163.
[250] Trial Judgement, paras. 121-122. *See also* Defence Final Trial Brief, p. 181.

appeal, the Appellant has not identified any specific error in the Trial Chamber's holding. Moreover, the Appeals Chamber notes that the Appellant's argument on this point is partly founded upon a misrepresentation of the evidence. As the Trial Chamber noted in the Judgement, Witness GGY observed the Appellant during the attack not once, but on several occasions at distances ranging from eighty to less than a hundred meters.[251]

144. The Appellant further argues that no trier of fact could have found that Witness GGY made a positive identification of the Appellant at Muyira Hill in circumstances in which the witness saw him at a distance of ninety to one hundred meters for a minute or less, adding that the witness could not identify Muyira in a photograph.[252] The Trial Chamber considered these arguments, as reflected in the Judgement.[253] The Appeals Chamber notes that the witness saw the Appellant during the attacks of 13 and 14 May 1994 in the Muyira area on three different occasions, rather than only for "a minute or less."[254] A review of the Judgement shows that, in assessing the witness's identifications of the Appellant discussed above, the Trial Chamber took into account the circumstances of the identifications as well as the witness's basis for recognizing the Appellant.[255] The Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber erred in assessing the identification evidence.

145. The Trial Chamber's assessment of the credibility of Witness GGY was detailed and careful. The Appellant has not demonstrated on appeal that the Chamber erred in finding the witness credible and in relying on his testimony. Accordingly, the appeal in respect of Witness GGY on these grounds is dismissed.

6. Witness GGV (Grounds of Appeal 19, 20, 21, 22, 23, 24, 25, 43, 48)[256]

146. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence of Witness GGV concerning three meetings as well as incidents in Kiziba, given that the evidence was not corroborated and was otherwise deficient.[257]

147. The Appellant also submits that the Trial Chamber erred in finding Witness GGV credible, considering, *inter alia*, that there were indications that he was an RPF soldier or accomplice.[258] The

[251] T. 15 August 2002 pp. 73-75. *See also* Trial Judgement, paras. 118, 122.
[252] Appellant's Brief, para. 163.
[253] Defence Final Trial Brief, pp. 178-179. *See also* Trial Judgement, paras. 151-152, 185.
[254] Trial Judgement, paras. 152, 185.
[255] Trial Judgement, paras. 119, 122, 151, 152, 185.
[256] Pursuant to Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004, reference to Witness GGV in grounds of appeal 53 and 54 was struck from the Appellant's Brief.
[257] Appellant's Brief, para. 103.

Appellant further submits that the Trial Chamber erred in law in deciding not to categorize Witness GGV as an accomplice, in failing to exercise extreme caution while considering his evidence, and in failing to give itself the necessary warnings with regard to accepting and weighing his evidence.[259]

148. The Appellant additionally submits that the Trial Chamber erred in law in its acceptance of Witness GGV's evidence that during an attack at Kiziba on 18 June 1994 he saw the Appellant from far away through binoculars whereas, during cross-examination, the witness was unable to describe how binoculars functioned nor describe Kiziba or the surrounding area.[260] Moreover, the Appellant appears to allege an error on the part of the Trial Chamber in accepting the witness's testimony that after the attack at Kiziba he overheard a particular discussion taking place inside a canteen, whereas the Appellant argues that if sensitive matters were discussed they would not have been audible outside the canteen.[261]

149. Without elaboration, the Appellant also submits that the Trial Chamber erred in law and in fact in deciding that Witness GGV was a credible witness and that he had accurately identified the Appellant as being present in Kibuye on 10 and 17 June 1994 and at Kiziba on 18 June 1994.[262]

150. Similarly without elaboration, the Appellant submits that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness GGV and that, had it done so, Witness GGV's testimony would have been held incapable of providing proof beyond reasonable doubt.[263]

151. The Appeals Chamber shall now consider these submissions. The Appellant claims that the Trial Chamber erred in law in finding Witness GGV credible and in relying on his testimony, which, the Appellant alleges, is deficient in a number of respects. It should be emphasized that the primary responsibility for evaluating and weighing evidence rests with the Trial Chamber.

152. The Appellant asserts that the Trial Chamber erred by failing to categorize Witness GGV as an accomplice or to consider his testimony with caution.[264] The Appellant states that Witness GGV's presence during the attack at Kiziba and his interaction with *Interahamwe* militia show that

[258] Appellant's Brief, paras. 103, 120.
[259] Appellant's Brief, paras. 130, 137.
[260] Appellant's Brief, paras. 138, 168.
[261] Appellant's Brief, para. 167.
[262] Appellant's Brief, para. 198.
[263] Appellant's Brief, para. 202.
[264] Appellant's Brief, paras. 130, 131.

he participated in criminal activity.[265] The Appellant then goes on to argue that the witness's presence during the attacks and at meetings shows that he was an RPF soldier or accomplice.[266] On the basis of these seemingly inconsistent allegations, the Appellant submits that the witness has "an obvious and powerful inducement to implicate the Appellant, so as to advance his own position or to curry favour with the Rwandan authorities, so as to exculpate himself from any allegation of wrongdoing."[267] The Appellant made this submission at the trial level[268] and the Trial Chamber stated in the Judgement that the Appellant had failed to present any evidence to support his claim.[269] The Appellant adduced no additional evidence in this respect on appeal. During trial the witness explained that he was among the attackers at Kiziba in order to save himself.[270] However, he testified that during the attack he stayed behind to watch over the buses used to transport the attackers.[271] Further, he denied participating in killings while being disguised as an *Interahamwe* at a roadblock in Kibuye and insisted that his testimony was not motivated by a desire to avoid prosecution.[272] Indeed, the Defence conceded that he has not been charged with any offence.[273] Finally, the witness disclaimed any connection with the RPF and the Appellant did not produce any evidence to the contrary.[274] Upon considering the record, the Appeals Chamber finds that the Trial Chamber's conclusion that Witness GGV was not an accomplice was one that a reasonable Chamber could have reached.

153. The Appellant challenges the witness's identification of him at the Kiziba attack on 18 June 1994.[275] The Appellant states that the witness saw him "by using binoculars" while during cross-examination the witness was unable to describe how binoculars functioned.[276] This argument is founded upon a misrepresentation of the evidence and is wholly without merit. The record shows that Witness GGV saw and identified the Appellant at Kiziba at the place where the witness was watching over the attackers' buses and where the Appellant arrived and parked his vehicle.[277] The witness described that he was close to the Appellant when the Appellant alighted from his car and loaded his weapon.[278] It was only when the Appellant left the parking area and went toward the

[265] Appellant's Brief, para. 137.
[266] *Ibid*.
[267] *Ibid*.
[268] Defence Final Trial Brief, p. 191.
[269] Trial Judgement, para. 213.
[270] T. 27 August 2002 pp. 116, 118, 119; T. 28 August 2002 p. 26.
[271] T. 27 August 2002 p. 30; T. 28 August 2002 pp. 30-31.
[272] T. 27 August 2002 pp. 112-113; T. 28 August 2002 p. 27.
[273] Defence Final Trial Brief, p. 191.
[274] T. 27 August 2002 p. 132.
[275] Appellant's Brief, paras. 103, 168.
[276] *Ibid*.
[277] T. 27 August 2002 pp. 30-31.
[278] T. 27 August 2002 p. 35.

attack that the witness watched him through binoculars.[279] The witness then saw the Appellant again when the Appellant returned to the place where the vehicles were parked and where the witness had remained.[280] The witness's identification of the Appellant therefore did not depend on his familiarity with using binoculars. Even so, during cross-examination the witness stated that although he had never used binoculars before, it was not difficult to use them.[281] Moreover, the witness described how to use the focussing mechanism on binoculars and noted that he was using the binoculars with another person who focussed them and handed them to him from time to time.[282] In view of this evidence, it cannot be held that the Trial Chamber erred in accepting the witness's identification of the Appellant on the ground that the witness could not describe how binoculars work.

154. In questioning this identification, the Appellant also highlights that the witness could not describe Kiziba or the surrounding countryside or name the nearby hills.[283] The Appellant presented this argument to the Trial Chamber[284] and advances nothing new on appeal to counter the Trial Chamber's acceptance of the witness's testimony. A review of the record shows that, contrary to the Appellant's submission, the witness did describe where the buses were parked as well as the surrounding area.[285]

155. The Appellant also questions how Witness GGV, standing outside, could have overheard a discussion that took place in a canteen following the attack at Kiziba on 18 June 1994.[286] Considering that the discussion was about the attacks on Tutsis in Bisesero, the Appellant submits that "if such discrete [sic] matters were discussed, it is unlikely [the speakers] would have been speaking loud enough for GGV to have heard the discussion while outside the canteen."[287] There is no evidence that the meeting and its subject were meant to be secret. Quite the contrary, the evidence is that people were coming and going.[288] In describing this evidence, the Trial Chamber noted that the witness was outside the canteen close to an open window through which he could hear what was taking place inside the canteen, despite the fact that there was "quite a lot of noise."[289] It is apparent that in accepting this evidence the Trial Chamber considered the totality of

[279] T. 27 August 2002 pp. 35-36.
[280] T. 27 August 2002 p. 37.
[281] T. 27 August 2002 p. 73.
[282] T. 27 August 2002 pp. 73, 74.
[283] Appellant's Brief, para. 168.
[284] Defence Final Trial Brief, pp. 188-189.
[285] T. 27 August 2002 pp. 31, 75-80.
[286] Appellant's Brief, para. 167.
[287] *Ibid*.
[288] Trial Judgement, para. 209.
[289] *Ibid*.

the circumstances in which the witness heard the Appellant speak inside the canteen, including negative factors such as noise. In the view of the Appeals Chamber, the Appellant failed to demonstrate error on the part of the Trial Chamber in accepting this evidence.

156. The Appellant also submits that the Trial Chamber erred in law and fact in deciding that Witness GGV was a credible witness and that he had accurately identified the Appellant as being present in Kibuye and at Kiziba.[290] This is another instance in which the Appellant fails to specify the nature of the alleged error. As noted above, the Trial Chamber assessed the credibility of Witness GGV taking into account the totality of the evidence.[291] The Trial Chamber found the witness's testimony to be clear and consistent and noted the factors which enabled the witness to identify the Appellant.[292] The Trial Chamber also noted the circumstances in which each identification occurred.[293] In the view of the Appeals Chamber, the Appellant has failed to show the Trial Chamber's error in finding Witness GGV to be credible and in accepting and relying on his evidence.

157. Accordingly, the appeal in respect of Witness GGV on these grounds is dismissed.

7. Witness GGM (Grounds of Appeal 19, 20, 23, 24, 25, 48)

158. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence of Witness GGM concerning the Appellant's presence at a meeting at Kucyapa on 13 May 1994, given that the evidence was not corroborated and was otherwise deficient.[294] The Appellant also submits that the Trial Chamber erred in law when it found Witness GGM credible, because a person who was with him on 13 May 1994 did not corroborate his account of the meeting at Kucyapa.[295]

159. The Appellant further submits that the Trial Chamber erred in law in accepting Witness GGM's testimony that the Appellant was present at the meeting at Kucyapa because the Chamber failed to consider that it was becoming dark when the witness observed the Appellant, the witness was hiding in a mature sorghum field, the situation was chaotic, there was a large number of people at the meeting, and the witness agreed that he did not see very well.[296]

---

[290] Appellant's Brief, para. 198.
[291] Trial Judgement, para. 213.
[292] Trial Judgement, paras. 210, 213.
[293] Trial Judgement, paras. 208-210, 216-217.
[294] Appellant's Brief, para. 104.
[295] Appellant's Brief, para. 121.
[296] Appellant's Brief, paras. 138, 169.

160. Finally, the Appellant submits without elaboration that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness GGM and that, had that been done, his testimony would have been held incapable of providing proof beyond reasonable doubt.[297]

161. The Appeals Chamber shall now consider these submissions. The Appellant argues that the Trial Chamber erred in law in finding Witness GGM credible because a person who was with him on 13 May 1994 did not corroborate his account of a certain meeting which took place on that day. On appeal, the Appellant merely repeats the argument presented to the Trial Chamber[298] without identifying any error in the Trial Chamber's decision.[299] Upon a review of the Judgement and the underlying record, the Appeals Chamber finds no error on the part of the Trial Chamber with respect to this matter.

162. The Appellant also challenges the Trial Chamber's acceptance of Witness GGM's identification evidence related to the Appellant's presence at the 13 May 1994 meeting in Kucyapa. Contrary to the Appellant's submission, nothing indicates that the Trial Chamber, having decided to assess and weigh identification evidence carefully, failed to consider the circumstances of the impugned identification.[300] Indeed, the Trial Chamber considered the Appellant's challenge[301] and carefully described the circumstances of the identification and the basis provided by the witness for being able to identify the Appellant.[302] In the view of the Appeals Chamber, the Trial Chamber's acceptance of the witness's identification of the Appellant at the meeting was made after a proper consideration of the matter and cannot be said to be erroneous.

163. The appeal in respect of Witness GGM on these grounds is therefore dismissed.

8. Witness DAF (Grounds of Appeal 19, 20, 23, 24, 25, 40, 48, 53, 54)

164. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence of Witness DAF concerning a murder which took place on 20 May 1994, in circumstances in which the evidence was not corroborated and was otherwise deficient.[303] The Appellant further submits that the Trial Chamber erred in law when it found Witness DAF credible and disregarded discrepancies between his prior statements and testimony and between his testimony in another case

[297] Appellant's Brief, para. 202.
[298] Trial Judgement, para. 173. *See also* Defence Final Trial Brief, p. 162.
[299] Appellant's Brief, para. 121.
[300] Trial Judgement, para. 49.
[301] Trial Judgement, para. 254.
[302] Trial Judgement, paras. 141, 142, 144, 254, 255.
[303] Appellant's Brief, para. 106.

before the Tribunal and his testimony in the present case.[304] The Appellant also submits without elaboration that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness DAF and that, had appropriate caution been exercised, his testimony would have been held incapable of providing proof beyond reasonable doubt.[305]

165. The Appellant additionally submits that the Trial Chamber erred in law by relying on Witness DAF's identification of the Appellant on 20 May 1994 at the scene of a murder.[306] The Appellant argues that the witness's testimony was lacking in detail and unreliable, pointing out that the witness observed the Appellant from an "unspecified" location on a hill at a distance of about thirty-seven meters and that he could not say on which side of a vehicle the Appellant was sitting.[307] The Appellant further submits, without elaboration, that the Trial Chamber erred in law and in fact in deciding that Witness DAF was a credible witness "and/or" that he had accurately identified the Appellant as being present during an attack at Muyira Hill on 13 May 1994.[308]

166. Without classifying the alleged error and without clearly identifying the circumstances underlying ground of appeal 53, the Appellant also submits that the Trial Chamber violated his right to be presumed innocent by making findings of fact based on the uncorroborated testimony of Witness DAF.[309] Finally, without identifying the circumstances or making reference to the record, the Appellant submits that the Trial Chamber erred in law and in fact in finding that Witness DAF had correctly identified the Appellant as the person who shot certain people.[310]

167. The Appeals Chamber shall now consider these submissions. The Appellant argues that the Trial Chamber erred in finding Witness DAF credible and in relying on his testimony. The Appeals Chamber recalls that the Trial Chamber assessed and weighed the credibility of the witness and the reliability of his evidence after considering his testimony as a whole.[311] The Trial Chamber expressly observed that it has "examined the testimony and observed the witness's demeanour … carefully…."[312] Part of the Appellant's challenge to the finding of credibility is founded upon alleged discrepancies between Witness DAF's testimony in this case and his testimony in the *Musema* case as well as the decision of the Trial Chamber in *Musema* to reject his testimony

[304] Appellant's Brief, paras. 106, 108, 122.
[305] Appellant's Brief, para. 202.
[306] Appellant's Brief, para. 170.
[307] *Ibid*.
[308] Appellant's Brief, para. 195.
[309] Appellant's Brief, para. 209.
[310] Appellant's Brief, para. 210.
[311] Trial Judgement, paras. 162-168, 293.
[312] Trial Judgement, para. 164.

regarding the events of 13 May 1994.[313] The Trial Chamber addressed this argument in the Judgement.[314] During trial the witness explained that he was not asked in *Musema* whether he saw the Appellant at a particular place and that the fact that the witness did not mention the Appellant did not imply that he was not there.[315] The Trial Chamber in the present case noted this in its assessment of the witness's credibility.[316] This explanation is supported by a review of the witness's testimony in the *Musema* case.[317] Additionally, as the Trial Chamber noted, the witness had mentioned the Appellant as one of the leaders in his testimony in the *Kayishema and Ruzindana* case.[318]

168. The Trial Chamber also took note of the fact that the Chamber in *Musema* decided not to rely on the witness's testimony relating to 13 May 1994.[319] The Trial Chamber in this case explained, however, that the *Musema* Trial Chamber took this decision on the witness's evidence relating to Musema's actions on that day and it concluded on that basis that the finding in *Musema* did not relate to the present case.[320] A review of the relevant portion of the *Musema* Trial Judgement does not show this to be a necessarily erroneous conclusion.[321] The Trial Chamber in the present case was fully entitled to make its own finding as to the credibility of the witness and the reliability and weight of his evidence based upon its own observation of the witness and its own evaluation of his evidence in the context of the present case.

169. In his challenge to the finding of Witness DAF's credibility, the Appellant also points to the "uncanny parallel" between his 15 June 1996 statement that on 13 May 1994 he saw Alfred Musema kill a certain Goretti Mukangoga in a red car and his testimony that on 20 May 1994 he saw the Appellant kill an unidentified girl in the same circumstances.[322] The Trial Chamber observed that the witness mentioned the Appellant killing the girl in his statement dated 6 February 1997 and that he confirmed the event during cross-examination.[323] Indeed, a review of the statements shows that the witness's description of the circumstances of Musema's killing of Goretti Mukangoga is not the same as his description of the Appellant's killing of the girl on 20 May 1994,

[313] Appellant's Brief, para. 122.
[314] Trial Judgement, paras. 164, 166.
[315] T. 26 August 2002 pp. 117-119.
[316] Trial Judgement, para. 166.
[317] T. 4 May 1999 pp. 18-23 (the witness was not specifically asked whether he saw the Appellant among the attackers. When he identified those he saw, he stated that these were "some of the leaders" and noted that "there were a lot of people").
[318] Trial Judgement, para. 166; T. 3 March 1998 p. 38 (naming the Appellant as one of the leaders of the attacks on 13 May 1994).
[319] Trial Judgement, para. 164.
[320] *Ibid*.
[321] *See Musema* Trial Judgement, para. 698.
[322] Appellant's Brief, para. 122. *See also* Defence Final Trial Brief, pp. 155-156.

despite the fact that both refer to a man killing a female as well as to a red vehicle. In view of the foregoing, the Appeals Chamber holds that it has not been demonstrated that the Trial Chamber erred in finding Witness DAF to be credible.

170. The Appellant also contends that the Trial Chamber erred in accepting Witness DAF's identification evidence of the Appellant relating to 13 and 20 May 1994. The Trial Chamber has considered the Appellant's arguments concerning this evidence.[324] The Appeals Chamber recalls that the Trial Chamber has expressed its cautious approach to identification evidence.[325] In reviewing the evidence of Witness DAF relating to 13 and 20 May 1994, the Trial Chamber considered the circumstances of the witness's observation of the Appellant as well as the basis of his ability to recognize the Appellant.[326] Coupled with the Chamber's finding that the witness is credible, the Chamber's acceptance of his identification evidence has not been shown to be erroneous.

171. The Appellant also submits as follows: "In relying upon the uncorroborated allegation of a single witness in circumstances where there was no independent evidence of the existence of any of the deceased or their deaths/mutilation, … of the Appellant having shot them dead/ordered mutilation, the Trial Chamber made presumptions of fact that it was not entitled in law to make in adversarial criminal proceedings, resulting in the violation of the Appellants [sic] right to be presumed innocent."[327] In making this submission, the Appellant fails to refer the Appeals Chamber to the record or to specify the evidence and parts of the Judgement to which he is referring. It is apparent that this argument lacks merit. As noted above, a Trial Chamber may, in its discretion, rely on the testimony of a single witness as proof of a material fact. In circumstances in which the Trial Chamber finds the witness to be credible, it does not constitute an error for the Chamber to accept and rely on his testimony, even in the absence of corroborating evidence. This is not a question of "presuming" facts, as the Appellant would have it; it is a matter of according probative value to the testimony of a credible witness.

172. Finally, without identifying the circumstances or making reference to the record, the Appellant asserts that the Trial Chamber erred in fact and law in finding that Witness DAF had correctly identified the Appellant as the person who shot certain people.[328] It may be recalled that the appealing party is required to provide the Appeals Chamber with precise references to any

[323] Trial Judgement, para. 293. *See also* T. 26 August 2002 p. 119.
[324] Trial Judgement, paras. 162, 163, 165, 168, 293.
[325] Trial Judgement, para. 49.
[326] Trial Judgement, paras. 139, 140, 163, 165, 292, 293.
[327] Appellant's Brief, para. 209.

relevant transcript page or paragraph number in the Judgement to which reference is made.[329] Further, as the Appeals Chamber recently stated: "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[330] The failure to identify impugned evidence or alleged errors constitutes an "obvious insufficiency." In the present instance, the Appellant said nothing more than: "The Learned Trial Chamber erred in law and in fact in finding that Witnesses DAF and GGV had correctly identified the Appellant as the person who shot the unidentified girl, old man and young boy."[331] This submission is entirely devoid of any reference to the record or to features that might help identify what evidence is being challenged, such as date or place. Moreover, aside from making the blanket allegation of legal and factual errors, this submission fails to identify what those errors are. In such circumstances the Appeals Chamber cannot be expected to entertain the Appellant's submission.

173. The appeal in respect of Witness DAF on these grounds is dismissed.

9. Witness GGO (Grounds of Appeal 19, 20, 23, 24, 25, 48)

174. The Appellant submits that the Trial Chamber erred in law in accepting and relying on the evidence of Witness GGO concerning a certain incident which took place on 22 June 1994 at Kazirandimwe Hill, given that the evidence was not corroborated and was otherwise deficient.[332] The Appellant additionally submits without elaboration that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness GGO and that, had it done so, Witness GGO's testimony would have been held incapable of providing proof beyond reasonable doubt.[333]

175. The Appellant further submits that the Trial Chamber erred in law when it found Witness GGO credible, concluding that there were "minor" discrepancies in his evidence, given that the Chamber acknowledged that he did not always have the presence of mind to provide details.[334] In support of this ground of appeal, the Appellant points to discrepancies between Witness GGO's prior statements and his testimony before the Tribunal, as well as discrepancies between the

[328] Appellant's Brief, para. 210.
[329] Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4(b). *See also Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137; *Vasiljevic* Appeal Judgement, para. 11.
[330] *Vasiljevic* Appeal Judgement, para. 12. *See also Kunarac et al.* Appeal Judgement, paras. 43, 48.
[331] Appellant's Brief, para. 210. Reference to Witness GGV in ground 54 was struck from the Appellant's Brief by Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004.
[332] Appellant's Brief, para. 107.
[333] Appellant's Brief, para. 202.

evidence of Witness GGO in the present case and testimonies of other witnesses about the same event in another case before the Tribunal.[335] The Appellant further notes that since in his statement of 13 January 1999 Witness GGO told investigators that he was shot on 22 June 1994, which rendered him immobile until he was rescued by French soldiers on 28 June 1994, he could not have seen the Appellant on 22 June 1994 on Kazirandimwe Hill, as he claimed in his testimony.[336] The Appellant also submits that the Trial Chamber erred in law in accepting the witness's explanation for the discrepancy between the dates he gave for leaving Bisesero.[337]

176. The Appellant further submits that the Trial Chamber erred in law by relying on Witness GGO's identification of the Appellant while he was hiding at a distance that was "too great," from which no one could have recognized anybody, and taking into account that, as the Trial Chamber noted, the witness was fleeing, had been without food for three months, and did not have the presence of mind to provide details.[338]

177. The Appeals Chamber shall now consider these submissions. The Appeals Chamber recalls that upon considering Witness GGO's evidence, the Trial Chamber found him to be credible and not prone to exaggeration.[339] The Appellant claims that the Chamber erred in this finding. The Appellant contests the witness's credibility, *inter alia*, on the basis of the fact that he met with Prosecution investigators at least seven and possibly eight times, yet mentioned the Appellant only once.[340] A review of the record shows that the witness gave recorded statements to investigators on only four occasions.[341] Further, the witness explained having mentioned the Appellant to the investigators on only one occasion by testifying that he answered the questions asked of him and did not discuss other matters.[342]

178. The Appellant additionally contends that the Trial Chamber erred in accepting the witness's explanation of a discrepancy as to when he fled to Bisesero, stating that the witness had failed to give such an explanation in prior statements. The Appeals Chamber recalls that the Trial Chamber noted this matter in its overall assessment of the witness's credibility.[343]

---

[334] Appellant's Brief, para. 123.
[335] Appellant's Brief, paras. 124, 125, 126.
[336] Appellant's Brief, para. 125.
[337] Appellant's Brief, para. 124.
[338] Appellant's Brief, para. 171.
[339] Trial Judgement, para. 310.
[340] Appellant's Brief, para. 123. *See also* Defence Final Trial Brief, p. 170.
[341] T. 28 August 2002 pp. 137-139.
[342] T. 29 August 2002 pp. 54-55.
[343] Trial Judgement, para. 306.

179. Furthermore, the Appellant, focusing on the witness's use of the word "immobile," contends that the witness did not see the murder of a certain Kabanda since he could not have moved three or four kilometres from where he was shot to the site of the murder.[344] The Appeals Chamber notes that during his testimony Witness GGO explained that by "immobile" he meant that he could no longer continue running through the hills as before, not that he was incapable of movement.[345] Moreover, the witness detailed how he moved to Kazirandimwe where he saw Kabanda's murder.[346]

180. Finally, in respect of alleged inconsistencies, the Appellant questions the witness's evidence that the Appellant was present at Kabanda's murder, arguing that Witness DAF had not mentioned the Appellant's presence during this event in his testimony in the *Kayishema and Ruzindana* case.[347] Additionally, the Appellant notes that Witness GGM, a close relative of Kabanda, never placed the Appellant at the site of the murder, and contests the Trial Chamber's statement that Witness GGM had not been specifically asked about Kabanda's death.[348] In the view of the Appeals Chamber, a review of the *Kayishema and Ruzindana* trial Judgement shows that while Witness DAF did not mention the Appellant in connection with Kabanda's murder, his testimony did not identify those present during the event, except for the perpetrator, and thus did not preclude the possibility that the Appellant was present.[349] Similarly, Witness GGM's testimony relating to Kabanda's murder is very brief, lacking in detail, and can in no way be understood to preclude the possibility of the Appellant's presence during the event.[350]

181. Considering the foregoing, the Appeals Chamber finds that it has not been demonstrated that the Trial Chamber erred in finding Witness GGO to be credible despite the alleged inconsistencies in his evidence.

182. The Appellant also claims that the Trial Chamber erred by relying on Witness GGO's identification of the Appellant, claiming that the witness was too far away to recognize him.[351] As noted by the Trial Chamber, the witness testified to having been only fifty to seventy meters from the Appellant.[352] Additionally, the Trial Chamber noted the circumstances of the witness's

---

[344] Appellant's Brief, para. 125. *See also* Defence Final Trial Brief, p. 173.
[345] T. 29 August 2002 pp. 57-62.
[346] T. 29 August 2002 p. 62.
[347] Appellant's Brief, para. 126.
[348] Trial Judgement, para. 309. *See also* Defence Final Trial Brief, p. 172.
[349] *See Kayishema and Ruzindana* Trial Judgement, para. 429; T. 3 March 1998 pp. 48-54, 58-60; T. 4 March 1998 pp. 6-20.
[350] T. 23 August 2000 p. 40; T. 26 August 2002 p. 74.
[351] Appellant's Brief, para. 171.
[352] Trial Judgement, para. 303; T. 28 August 2002 p. 115; T. 29 August 2002 p. 41.

observation of the Appellant as well as the basis for the witness's ability to recognize him.[353] In such a situation, and recalling that the Trial Chamber found the witness to be credible, it cannot be held that the Trial Chamber erred in relying on Witness GGO's identification of the Appellant.

183. The appeal in respect of Witness GGO on these grounds is dismissed.

10. Witness GGR (Grounds of Appeal 20, 23, 24, 25, 40, 48)

184. The Appellant submits that the Trial Chamber erred in law in finding Witness GGR credible, given, *inter alia*, discrepancies in the witness's testimony in this case, as well as discrepancies between his testimony and testimonies of other witnesses.[354] Additionally, the Appellant submits, the Trial Chamber erred in law by considering the discrepancies to be "minor" and relying on this evidence to convict the Appellant.[355]

185. The Appellant further submits that the Trial Chamber erred in law in accepting Witness GGR's evidence that he saw the Appellant twice on 13 May 1994.[356] In support of this argument the Appellant notes that the witness was never closer than 120 meters to the Appellant and that the observations took place in chaotic and stressful conditions.[357] Additionally, during the first sighting the witness observed the Appellant for less than ten minutes and only saw his profile.[358] In respect of the second sighting, the Appellant submits that it occurred at nightfall while the witness was hiding in a bush.[359] The Appellant submits that the circumstances of the sightings were such that no trier of fact could have found that Witness GGR accurately identified the Appellant.[360] The Appellant additionally submits without elaboration that the Trial Chamber erred in law and in fact in deciding that Witness GGR was a credible witness and/or that he accurately identified the Appellant as being present during an attack at Muyira Hill on 13 May 1994.[361]

186. Finally, the Appellant submits, without elaboration, that the Trial Chamber erred in law in failing to exercise a sufficient degree of caution when considering the evidence of Witness GGR

[353] Trial Judgement, paras. 303-304.
[354] Appellant's Brief, para. 119.
[355] *Ibid*.
[356] Appellant's Brief, paras. 138, 164.
[357] Appellant's Brief, paras. 164, 165.
[358] Appellant's Brief, para. 164.
[359] Appellant's Brief, para. 165.
[360] *Ibid*.
[361] Appellant's Brief, para. 195.

and that, had sufficient caution been exercised, his testimony would have been held incapable of providing proof beyond reasonable doubt.[362]

187. The Appeals Chamber shall now consider these submissions. The Appellant argues that the Trial Chamber erred in finding Witness GGR credible despite inconsistencies in his testimony and discrepancies between his testimony and evidence of other witnesses. The Appellant alleges that the witness's testimony was not consistent as to how many times he saw the Appellant on 13 May 1994. He testified, in the Appellant's view, that he saw the Appellant more than once on that day and then stated that he saw him only once.[363] A review of the record reveals that the witness's testimony on this point was not inconsistent. The witness was clear in testifying that he saw the Appellant on more than one occasion on 13 May 1994; when he said that he saw the Appellant once, he explained that he meant that he saw him only on one day during the killings, rather than indicating that he saw him only once on 13 May.[364] The witness did state that he saw the Appellant several times on 13 May 1994, immediately specifying that in fact he saw him twice.[365] In the view of the Appeals Chamber this does not appear to be an inconsistency in the evidence; rather it is a clarification in the testimony initiated by the witness himself.

188. The Appellant also notes discrepancies between the testimony of Witness GGR and testimonies of Witnesses HR and DAF as to when the attacks on 13 May 1994 began.[366] Witness GGR testified that the attacks began at around 8 and 8.30 a.m., Witness DAF testified that they began between 7 and 8 a.m., and Witness HR stated that Tutsi refugees were attacked at the top of Muyira Hill at around 10 a.m.[367] The Trial Chamber noted these testimonies and concluded that the attacks began between 7 and 10 a.m.[368] The fact that the three witnesses did not give precisely the same time for the beginning of the attacks may be due to their different locations as well as to the fact that they may have had no means of ascertaining the exact time. In any event, the Trial Chamber was aware of all the evidence in its deliberations. The Appeals Chamber finds that the Appellant did not demonstrate any error in the Trial Chamber's factual finding on this point.

189. Finally, the Appellant claims that the Trial Chamber erred in accepting Witness GGR's identification of the Appellant on 13 May 1994 near Muyira Hill.[369] As previously noted, the Trial

[362] Appellant's Brief, para. 202.
[363] Appellant's Brief, para. 119.
[364] T. 20 August 2002 pp. 67, 132.
[365] *Ibid*.
[366] Appellant's Brief, para. 119.
[367] Trial Judgement, paras. 134, 137, 139; T. 19 August 2002 p. 25; T. 20 August 2002 p. 66; T. 26 August 2002 p. 87.
[368] Trial Judgement, para. 178.
[369] Appellant's Brief, para. 195.

Chamber stated that it must consider a host of factors when evaluating identification evidence.[370] The Appeals Chamber recalls that in the instant case, the Trial Chamber explicitly considered the witness's identification of the Appellant on 13 May 1994, finding his testimony clear, consistent and reliable.[371] The Trial Chamber noted that the witness had known the Appellant for a long time, having seen him during political campaigns and during recruitment of members for the MDR Party prior to April 1994.[372] The Trial Chamber further noted and extensively considered the conditions surrounding Witness GGR's observations of the Appellant on 13 May 1994.[373] In this respect it should be noted that the Appellant alleges that the witness never saw the Appellant from closer than 120 meters.[374] However, during the examination-in-chief, the witness testified that when he observed the Appellant, he was forty to fifty meters from him.[375] The distance of 120 meters to which the Appellant refers was given during cross-examination as the distance to a place where *Interahamwe* were meeting, not to the place where the witness saw the Appellant.[376] However, the witness's answers about the distance between him and the Appellant became confused during the cross-examination and he stated that he did not want to make estimates.[377] Upon review of the record, the Appeals Chamber finds that the Trial Chamber's conclusion that the witness was about forty to fifty meters from the Appellant was one that a reasonable trier of fact could have reached. The Appeals Chamber considers that the Appellant's remaining arguments concerning this identification, relating to the time of day and the length of observations, do not demonstrate that the Trial Chamber erred in accepting the evidence.

190. The Appeals Chamber holds that the Trial Chamber's finding that Witness GGR was credible has not been shown to be erroneous or one that no reasonable trier of fact could have reached. The appeal in respect of Witness GGR on these grounds is accordingly dismissed.

[370] Trial Judgement, para. 49.
[371] Trial Judgement, paras. 157, 161.
[372] Trial Judgement, para. 138; T. 20 August 2002 pp. 54-57.
[373] Trial Judgement, para. 157; T. 20 August 2002 pp. 129-135. During Witness GGR's testimony, all three Judges questioned the witness concerning his identification evidence. They considered the witness's location and physical condition, time of day, and viewing opportunities.
[374] Appellant's Brief, para. 164.
[375] T. 20 August 2002 p. 66.
[376] T. 20 August 2002 pp. 111-114.
[377] T. 20 August 2002 pp. 124, 125.

VIII. NOTICE (GROUNDS OF APPEAL 32, 35, 39, 52)

191. The Appellant contends that the Trial Chamber erred in law in finding that he committed acts that were not pleaded in the indictment and by relying on those findings to convict him. The Appellant cites nine witnesses who, he asserts, testified to unpleaded material facts.[378]

192. The Prosecution responds to these arguments in a cursory manner. Other than suggesting that the Appellant's argument with respect to three of the nine witnesses should be rejected for failure to "indicate a decision made by the Trial Chamber with respect to notice,"[379] the Prosecution merely invokes general statements of law and baldly asserts that the Appellant failed to meet his burden on appeal.[380] This style of argumentation does not provide the Appeals Chamber with meaningful assistance. Nor is the suggestion in the Prosecutor's response that defects in the indictment were corrected by "provision to the Defence of timely, clear and consistent information"[381] useful, given that the response does not specify when such information was provided to the Defence and does not identify any such communication in the record.

193. The law governing challenges to the failure of an indictment to provide notice of material facts is set out in detail in the ICTY Appeals Chamber's Judgement in *Kupreškic*. The *Kupreškic* Judgement stated that Article 18(4) of the ICTY Statute, read in conjunction with Articles 21(2), 4(a) and 4(b), "translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven."[382] *Kupreškic* discussed several factors that may bear on the determination of materiality, although whether certain facts are "material" ultimately depends on the nature of the case. If the Prosecution charges personal physical commission of criminal acts, the indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed."[383] On the other hand, such detail need not be pleaded if the "sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.'"[384] Even in cases in which a high degree of specificity is "impracticable," however, "since the identity of the victim is

[378] Appellant's Brief, paras. 178-187.
[379] Prosecution Response Brief, para. 195.
[380] Prosecution Response Brief, paras. 194-197.
[381] Prosecution Response Brief, para. 196 (quoting *Ntakirutimana* Trial Judgement, para. 59).
[382] *Kupreškic et al.* Appeal Judgement, para. 88.
[383] *Kupreškic et al.* Appeal Judgement, para. 89.
[384] *Kupreškic et al.* Appeal Judgement, para. 89 (quoting *Prosecutor v. Kvocka, et al.*, Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17).

information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."[385]

194. *Kupreškic* also addressed the possibility that the Prosecution might be unable to plead a material fact with specificity because it was not in the Prosecution's possession prior to trial. As a general matter, "the Prosecution is expected to know its case before it goes to trial" and cannot expect to "mould? g the case against the accused in the course of the trial depending on how the evidence unfolds."[386] If the Defence is denied the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of the trial. The Trial Chamber must consider whether proceeding to trial in such circumstances is fair to the accused. *Kupreškic* indicated that there are "instances in criminal trials where the evidence turns out differently than expected," and such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[387]

195. Failure to set forth the specific material facts of a crime constitutes a "material defect" in the indictment.[388] Such a defect does not mean, however, that trial on that indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreškic* stated that a defective indictment "*may*, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic.[389] *Kupreškic* left open the possibility that the Appeals Chamber could deem a defective indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[390]

196. A Trial Chamber faced with a situation in which "the evidence turns out differently than expected" may not simply find that the error has been cured, but rather should take one or more of the steps envisioned by *Kupreškic*, including excluding the evidence or ordering the Prosecution to move to amend the indictment.[391] In considering a motion to amend the indictment, a Trial Chamber should naturally consider whether the Prosecution has previously provided clear and timely notice of the allegation such that the Defence has had a fair opportunity to conduct investigations and prepare its response. On appeal, however, amendment of the indictment is no

[385] *Kupreškic et al.* Appeal Judgement, para. 90.
[386] *Kupreškic et al*. Appeal Judgement, para. 92.
[387] *Ibid*.
[388] *Kupreškic et al*. Appeal Judgement, para. 114.
[389] *Ibid*. (emphasis added).
[390] *Ibid*.
[391] *Kupreškic et al.* Appeal Judgement, para. 92.

longer possible. Rather, the question is whether the error of trying the accused on a defective indictment "invalidat?ed the decision" and warrants the Appeals Chamber's intervention.[392]

197. Whether the Prosecution cured a defect in the indictment depends, of course, on the nature of the information that the Prosecution provides to the Defence and on whether the information compensates for the indictment's failure to give notice of the charges asserted against the accused. *Kupreškic* considered that adequate notice of material facts might be communicated to the Defence in the Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial.[393] The timing of such communications, the importance of the information to the ability of the accused to prepare his defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant in determining whether subsequent communications make up for the defect in the indictment.[394] As has been previously noted, "mere service of witness statements by the ?Pgrosecution pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[395]

198. In considering whether a defect in the indictment has been cured by subsequent disclosure, the question arises as to which party has the burden of proof on the matter. Although the Judgement in *Kupreškic* did not address this issue expressly, the Appeals Chamber's discussion indicates that the burden in that case rested with the Prosecution. *Kupreškic* stated that, in the circumstances of that case, a breach of "the substantial safeguards that an indictment is intended to furnish to the accused" raised the presumption "that such a fundamental defect in the … Indictment did indeed cause injustice."[396] The defect could only have been deemed harmless through a demonstration "that ?the Accused'sg ability to prepare their defence was not materially impaired."[397] *Kupreškic* clearly imposed the duty to make that showing on the Prosecution, since the absence of such a showing led the Appeals Chamber to "uph?ogld the objections" of the accused.[398]

199. It is noteworthy, however, that *Kupreškic* specifically mentioned the fact that the accused in that case had made a timely objection before the Trial Chamber to the admission of evidence of the material fact in question.[399] In general, "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the

[392] Statute, art. 24(1)(a).
[393] *Kupreškic et al*. Appeal Judgement, paras. 117-120.
[394] *Kupreškic et al*. Appeal Judgement, paras. 119-121.
[395] *Prosecutor v. Brðanin and Talic*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.
[396] *Kupreškic et al*. Appeal Judgement, para. 122.
[397] *Ibid*.
[398] *Kupreškic et al*. Appeal Judgement, paras. 124-125.
[399] *Kupreškic et al*. Appeal Judgement, para. 123.

event of an adverse finding against that party."[400] Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.

200. The importance of the accused's right to be informed of the charges against him under Article 20(4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[401]

A. Claims of Lack of Notice

201. The Appeals Chamber will now analyze the Appellant's claims of lack of notice of material facts in light of *Kupreškic* and the foregoing discussion.

1. The Allegation that the Appellant Transported Weapons on 10 April 1994 (Witness GGH)

202. The Trial Chamber found, based on the evidence of Prosecution Witness GGH, that "on 10 April 1994, the Accused was transporting guns in Gisovu with three soldiers aboard a white Hilux."[402] The Appellant contends that the transportation of weapons on 10 April was a "material fact not pleaded in the Indictment" that should not have supported any conviction.[403]

---

[400] *Kayishema and Ruzindana* Appeal Judgement, para. 91.
[401] *See Kupreškic et al.* Appeal Judgement, para. 122 as well as *United States v. Cotton*, 535 U.S. 625, 631-634 (2002), *Rippingdale v. The Queen*, 109 A Crim R 304 (1999), at paras. 51-55 and *R. v. Nisbet*, (1971) 55 Cr. App. R. 490, 499-500.
[402] Trial Judgement, para. 68.
[403] Appellant's Brief, para. 180 (emphasis omitted). The Appellant repeats this argument in ground of appeal 35. Appellant's Brief, para. 190.

203. The Prosecution argues that this ground of appeal should be dismissed because the Trial Chamber did not address the question of notice with respect to Witness GGH.[404] The implication appears to be that the Appellant waived this argument by failing to present it to the Trial Chamber.

204. At the outset, it is not clear whether the allegation of transportation of weapons is indeed a material fact that should have been pleaded in the indictment. It is true that the Trial Chamber included this allegation in its recapitulation of factual findings bearing on the Appellant's acts of genocide,[405] but the Trial Chamber's ultimate finding of individual criminal responsibility for genocide referred only to "leading and participating in attacks against Tutsi" and "shooting at Tutsi refugees."[406] Although the Trial Chamber did consider the transportation of weapons in concluding that the Appellant had the requisite intent to commit genocide and crimes against humanity,[407] that does not automatically mean that the transportation of weapons was a "material fact" that should have been pleaded in the indictment.

205. The question whether the transportation of guns was a "material fact" need not be answered. Even if the Appeals Chamber were to consider that the transportation of guns amounts to a "material fact," the objection was not raised before the Trial Chamber. The transcript reflects no objection during trial to Witness GGH's evidence of the transportation of guns on 10 April 1994.[408] In fact, the Appellant's counsel later cross-examined Witness GGH on this allegation specifically without mentioning the absence of the allegation from the indictment.[409] The Appellant's Final Trial Brief also discusses this allegation in detail without raising any objection of lack of notice,[410] even though the Final Trial Brief does contain such objections with respect to allegations made by other witnesses.[411] Finally, although the Trial Chamber's Judgement mentions the Appellant's notice arguments with respect to several witnesses,[412] it does not mention or dispose of any notice objection in connection with Witness GGH. The Appeals Chamber accordingly concludes that this objection was not raised before the Trial Chamber.

206. Because the Appellant waived this objection in the Trial Chamber, it falls to him to prove that the failure to plead in the indictment the allegation that the Appellant transported weapons on 10 April 1994 materially impaired his defence.

---

[404] Prosecution Response Brief, para. 195 and n.160.
[405] Trial Chamber Judgement, para. 411.
[406] Trial Chamber Judgement, para. 420.
[407] Trial Chamber Judgement, paras. 419, 427, 436, 446, 453, 466.
[408] T. 15 August 2002 pp. 87-89.
[409] T. 16 August 2002 p. 61.
[410] Defence Final Trial Brief, pp. 98, 102-104.
[411] *See, e.g.*, Defence Final Trial Brief, pp. 149 (Witness DAF), 159-160 (Witness GGM), 176 (Witness GGY).
[412] *See, e.g.*, Trial Judgement, paras. 147-150 (Witnesses GGY, GGR, DAF and GGM), 182-184 (Witness GGY).

207. The Appellant makes no effort to show impairment of the defence. Indeed, the Appellant's Brief does not point out how he suffered any prejudice at all from the leading of evidence on the transportation of weapons on 10 April 1994. On the contrary, his counsel was able to cross-examine Witness GGH on the point and at no time suggested that the Defence was surprised to its detriment by the witness's testimony. In these circumstances, the Appellant has not shown that the failure to plead the transportation of weapons on 10 April 1994 in the indictment impaired his defence materially. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in relying on this fact to convict the Appellant and the related appeal is dismissed.

2. The Allegation that the Appellant Procured Gendarmes on 16 April 1994 for an Attack on Mubuga Church (Witness KJ)

208. The Trial Chamber found, based on the evidence of Witness KJ, that "approximately ten days after 6 April 1994" the Appellant "procured gendarmes … for an attack on Mubuga Church against Tutsi."[413] The Appellant contends that this was a material fact that should have been pleaded in the indictment.[414] The Prosecution again appears to contend that the Appellant waived this objection below.[415]

209. As with respect to Witness GGH, it is not clear whether the procurement of gendarmes constitutes a "material fact" in the circumstances of this case. It was mentioned in the Trial Chamber's recapitulation of facts relevant to the count of genocide but was not included in the ultimate finding of individual criminal responsibility.[416] The Trial Chamber otherwise referred to this finding only as a basis for inferring that the Appellant possessed the requisite *mens rea* for genocide and other crimes.[417]

210. As with the allegation regarding the transportation of weapons, however, there is no need to decide whether the procurement of gendarmes constituted a "material fact" in the case that should have been pleaded in the indictment. Even if the Appeals Chamber were to consider that the procurement of gendarmes amounts to a "material fact," the objection was not raised before the Trial Chamber. The Judgement does not address such a complaint, nor does the discussion of Witness KJ's testimony in the Defence Final Trial Brief mention it.[418]

---

[413] Trial Judgement, para. 83.
[414] Appellant's Brief, para. 181.
[415] Prosecution Response Brief, para. 195 and n. 160.
[416] Trial Chamber Judgement, paras. 411, 420.
[417] Trial Judgement, paras. 419, 427, 436, 446, 453, 466.
[418] Defence Final Trial Brief, pp. 111-119.

211. The Appellant makes no effort to specify how Witness KJ's testimony regarding the procurement of gendarmes materially impaired his defence. The Appellant asserts only that the witness's testimony regarding the Appellant's procurement of gendarmes was not fully anticipated by his witness statement, which specifies only that another person, Ndagijimana, assembled gendarmes for the attack on Mubuga Church.[419] The statement does note, however, that "Minister Eliezer" arrived at the camp the same morning and left with Ndagijimana and the gendarmes.[420] Moreover, the fact that the witness statement did not explicitly set forth the allegation at issue merely confirms that the Appellant lacked notice of the allegation; it does not meet the Appellant's additional burden to show, in light of his failure to object in the Trial Chamber, that the lack of notice materially impaired his defence. Since the Appellant has failed to meet that obligation, his argument with regard to Witness KJ's testimony fails. The Trial Chamber was therefore permitted to rely on Witness KJ's testimony that the Appellant procured gendarmes. This ground of appeal is dismissed.

3. The Allegation that the Appellant was Armed During an Attack at Kivumu at the End of April or Beginning of May 1994 (Witness GGY)

212. Witness GGY indicated in a prior written statement that he saw the Appellant take part in an attack at an unspecified location. During trial, Witness GGY testified that the Appellant carried a gun that was "between 80 centimetres and one metre long" during this attack and that he "was shooting at people."[421] The witness also testified that the attack occurred at a location called "Kivumu," which is on "the border of Gisovu and Gishyita communes."[422] The Trial Chamber accepted this testimony, finding that the Appellant was among the leaders of a large-scale attack at Kivumu "sometime between the end of April and beginning of May 1994" and that he "was armed with a gun and personally shot at Tutsi refugees."[423] The Trial Chamber relied on this finding in convicting the Appellant.[424] The Appellant contends that the Trial Chamber erred in making this finding against him because the indictment contained no allegation of an attack at Kivumu and did not allege that he was armed during this attack or that he personally shot at refugees. The Prosecution's response does not specifically address this argument.

213. During trial, the Appellant's counsel objected on the basis of lack of notice to the introduction of evidence that the Appellant was armed and that he shot at people during the Kivumu

[419] Appellant's Brief, para. 181.
[420] Statement of Witness KJ dated 6-11 August 1998 and signed 12 August 1998, p. 16.
[421] T. 14 August 2002 p. 28.
[422] T. 14 August 2002 p. 21.
[423] Trial Judgement, para. 130.

attack.[425] The transcript is also clear that the Trial Chamber overruled the Appellant's objection and admonished his counsel not to continue pressing it after the Trial Chamber's ruling.[426] It appears, therefore, that this objection was properly raised below.

214. The Trial Chamber nonetheless stated in the Judgement that "?tghe Defence does not complain of lack of notice with respect to the attack at Kivumu."[427] This statement cites a paragraph in the Defence Final Trial Brief and appears to rest on the fact that that brief only raises notice arguments with regard to Witness GGY's testimony concerning two other attacks.[428] The Trial Chamber was correct that the Defence Final Trial Brief did not raise a notice argument with respect to Kivumu, although it did raise a challenge to Witness GGY's credibility based on the fact that, in contrast to the witness's trial testimony, "?tghere is no mention of the Accused having any weapon in ?GGY'sg statement."[429] Nonetheless, it is clear that the Appellant did raise his complaint with regard to the Kivumu attack during the trial and received an unfavourable ruling. This suffices to preserve the point on appeal.

215. Under *Kupreškic*, criminal acts that were physically committed by the accused personally must be set forth specifically in the indictment, including, where feasible, "the identity of the victim, the time and place of the events and the means by which the acts were committed."[430] The location of the Kivumu attack and the means by which the Appellant allegedly participated in it are "material" facts that should have been pleaded in the indictment.

216. The indictment in this case does not allege that a specific attack occurred at the end of April or the beginning of May 1994, let alone that it occurred at Kivumu, that the Appellant was armed, or that the Appellant shot at Tutsi refugees. The closest the indictment comes to pleading these material facts is the allegation that "Éliezer ?sicg Niyitegeka personally led civilian militia in assaults on the Tutsi that had taken refuge in the hills of Bisesero"[431] and the allegations in paragraphs 6.57 and 6.58 of the Indictment, which counsel for the Prosecution referenced at the appeal hearing[432] and which state as follows:

---

[424] Trial Judgement, paras. 412, 419, 427, 436, 446, 453, 466.
[425] T. 14 August 2002 pp. 25-27.
[426] T. 14 August 2002 pp. 27-28.
[427] Trial Judgement, para. 120.
[428] Trial Judgement, para. 120 (citing Defence Final Trial Brief, p. 176, para. 2).
[429] Defence Final Trial Brief, p. 177.
[430] *Kupreškic et al.* Appeal Judgement, para. 89.
[431] Indictment, para. 6.68 (emphasis omitted). The genocide count of the indictment does not expand on this allegation, since it states only that the Appellant "facilitat?edg, aid?edg or abett?edg" massacres in Bisesero. Indictment, p. 60, para. (b).
[432] T. 22 April 2004 p. 78.

> 6.57 In May 1994, ?the Appellantg personally participated in the massacres which took place in Kibuye, by shooting at Tutsis.
>
> 6.58 At various locations and times throughout April, May and June 1994, ?the Appellantg brought armed individuals to the area of Bisesero and directed them to attack the people seeking refuge there. In addition, at various locations and times, and often in concert with others, ?the Appellantg personally attacked and killed persons seeking refuge in Bisesero.[433]

217. One Prosecution witness described Bisesero as "a large area";[434] a Prosecution filing in another case refers to it as a "vast region with undulating hills and plains."[435] A general allegation that the Appellant led others in several attacks in a "large area" at "various locations and times throughout April, May and June 1994" does not adequately inform the Defence that the Prosecution intends to charge participation in a specific attack at Kivumu at the end of April or beginning of May 1994 during which the Appellant personally shot at refugees. The indictment must "delve into particulars" where possible;[436] generalized allegations of attacks in Bisesero do not suffice.

218. The Appeals Chamber must therefore determine whether the Prosecution was in a position to include the material facts of the Kivumu attack in the indictment and, if it was, whether the failure to do so was cured by clear, consistent, and timely information communicated to the Defence specifying that those allegations were part of the Prosecution's case.

219. The record does not clearly disclose whether the Prosecution was aware that Witness GGY would testify to an attack at Kivumu at the end of April or beginning of May 1994 during which the Appellant carried a gun and shot at refugees. This attack is not mentioned in the summary of Witness GGY's testimony in the Prosecution's Pre-Trial Brief.[437] However, counsel for the Prosecution clearly intended to present such evidence, since she specifically directed the witness's attention to "the period of time at the end of April, at the very beginning of May of 1994" and asked whether "something unusual" happened during that period.[438] It is worth recalling that "the Prosecution is expected to know its case before it goes to trial."[439] Given that counsel for the Prosecution knew that the witness would testify to an attack in some detail, and considering that the Prosecution has not argued on appeal that it was not in a position to plead the material facts of the Kivumu attack with particularity, such as the timeframe of its occurrence, its location, and the manner in which the Appellant allegedly participated, the only reasonable conclusion is that the

---

[433] Indictment, paras. 6.57-6.58.
[434] Prosecutor's Final Trial Brief, p. 13, n. 63 (quoting T. 26 August 2002 p. 108 (Witness DAF)).
[435] *Prosecutor v. Ntakirutimana*, Nos. ICTR-96-10-T, ICTR-96-17-T, Pre-Trial Brief, para. 19.
[436] *Kupreškic et al*. Appeal Judgement, para. 98.
[437] Pre-Trial Brief, Annexure A, p. 20.
[438] T. 14 August 2002 pp. 19-20.
[439] *Kupreškic et al*. Appeal Judgement, para. 92.

Prosecution could have included specific particulars regarding the Kivumu attack in the indictment but failed to do so. This failure to plead material facts rendered the indictment defective.

220. The next question is whether the Prosecution has shown that the defect was cured by other "timely, clear and consistent information detailing the factual basis underpinning the charges" against the Appellant.[440] In this regard, the Trial Chamber stated that sufficient notice of the Kivumu attack was given through Witness GGY's statement taken on 25 October 1999.[441] The statement, which the witness signed on 7 December 1999, stated in the relevant part: "Next day they came with many Interahamwe. In that group I managed to identify the minister of information ?the Appellant g. They killed many people. I survived because I was running from one place to another and hiding in bushes around."[442] Although the statement mentioned that the Appellant participated in an attack, it did not specify its timeframe, that the Appellant was armed, or that he shot at refugees. The statement is also unclear as to the location of the attack. The statement indicates that it occurred the day after an attack at Kanyinya Hill, one of the Bisesero Hills, but does not say whether it occurred at the same location as that previous attack.[443] Notably, the statement says that the witness was "running from one place to another" during this attack, further muddying the statement's ability to give notice of the location where Witness GGY allegedly saw the Appellant. Most importantly, the statement does not mention Kivumu, which was the location mentioned in Witness GGY's trial testimony and the location found by the Trial Chamber.

221. As a general matter, "mere service of witness statements by the ?Pgrosecution pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[444] More importantly, however, the Trial Chamber's conclusion that the witness statement gave notice of the Kivumu attack conflicts with the Prosecution's submission at trial, which was that the statement referred not to the Kivumu attack, but rather to a later attack on 13 May 1994 at Muyira Hill.[445] Furthermore, no attack at Kivumu at the end of April or beginning of May is included in the summary of Witness GGY's evidence in the

[440] *Kupreškic et al*. Appeal Judgement, para. 114.
[441] Trial Judgement, para. 120.
[442] Statement of Witness GGY dated 25 October 1999 and signed 7 December 1999, p. 5.
[443] The relevant sentence appears to have been cut off from the English version of the statement, but the French statement is clear: "Un jour, j'ai vu RUZINDANA, Mika MUHIMANA et Charles SIKUBWABO venir avec les assaillants sur la colline de Kanyinya. C'est l'une des collines de Bisesero. Ils ont encerclé la colline. ... Le lendemain, ils sont venus avec de nombreux Interahamwe. Dans ce groupe, j'ai réussi à identifier le Ministre de l'information, Eliezer NIYITEGEKA. Ils ont tué de nombreuses personnes. J'ai survécu parce que je courais d'un endroit à l'autre et me cachais dans les buissons." Statement of Witness GGY dated 25 October 1999 and signed 7 December 1999 (French version), p. 5.
[444] *Prosecutor v. Brđanin and Talic*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.
[445] T. 14 August 2002 pp. 32-33.

Prosecution's Pre-Trial Brief.[446] Regardless of whether the witness statement referred to the Kivumu attack or not, the Appellant could well have concluded from the failure to mention Kivumu in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe.

222. The Prosecution has not pointed to any communication that it believes informed the Appellant in a "timely, clear and consistent" way that the Prosecution would include the Kivumu attack in its case. In response to a question from the Appeals Chamber asking for a reference to any information that would show that notice was given to the Defence of the Kivumu attack,[447] the Prosecution referred only to paragraphs 6.57 and 6.58 of the indictment and to the discussion in the Trial Chamber's Judgement.[448] As stated above, the indictment was insufficient to the task, and the Trial Chamber's analysis on this point was thrown off course by the misapprehension that the Defence did not raise a notice objection to the Kivumu allegation and the belief that Witness GGY's prior statement referred to the Kivumu attack.

223. The Appeals Chamber concludes that the Prosecution has not shown that the failure to plead the Kivumu attack in the indictment was cured by subsequent communication of information. The Trial Chamber therefore committed an error of law by convicting the Appellant in reliance on evidence of his participation in an attack at Kivumu at the end of April or the beginning of May 1994.

4. The Allegation that the Appellant Participated in an Attack on 13 May 1994 at Muyira Hill (Witnesses GGY and GGR)

224. Six witnesses testified that the Appellant was present at an attack at Muyira Hill on 13 May 1994. Four of those witnesses testified that the Appellant was armed;[449] two affirmed that he was not.[450] The Trial Chamber concluded that the Appellant was one of the leaders of the Muyira Hill attack on 13 April, that he was armed, and that he shot at Tutsi refugees.[451] This finding underlies all of the Appellant's convictions.[452]

225. Although the Muyira Hill attack of 13 May 1994 was not specifically alleged in the indictment, it was clear from the Prosecution's Pre-Trial Brief that the Prosecution intended to

[446] Pre-Trial Brief, Annexure A, p. 20.
[447] T. 22 April 2004 p. 57.
[448] T. 22 April 2004 p. 78.
[449] Trial Judgement, paras. 132 (Witness GGY); 134 (Witness HR); 137 (Witness GGR); 139 (Witness DAF).
[450] Trial Judgement, paras. 142 (Witness GGM); 145 (Witness GGH).
[451] Trial Judgement, para. 178.
[452] Trial Judgement, paras. 413, 419, 427, 436, 446, 453, 466.

charge the Appellant with participation in an attack on that date and at that location, and that testimony would be adduced stating that the Appellant was armed and shot at Tutsi refugees.[453] Indeed, the Appellant does not contend that he lacked notice that this attack would be presented in evidence against him. The Appellant instead argues that the indictment did not give notice of several facts mentioned during Witness GGY's testimony, such as the facts that other attackers carried "firearms and traditional weapons", that the attack lasted "the entire day", that the attackers left "just before nightfall", that the Appellant carried a "rifle", and that a "large number" of refugees died during the attack.[454] These facts, many of which do not relate to the Appellant's own conduct and which do not appear to be "material" to his convictions, are clearly set out in the Pre-Trial Brief.[455] Accordingly, the Prosecution gave the Appellant clear, consistent and timely information that the Prosecution would offer evidence of the Appellant's role in the 13 May 1994 attack at Muyira Hill and would do so through Witness GGY. Thus, any defect in the indictment in this regard was cured.

226. The Appellant's argument seems to have less to do with defects in the indictment than with the Appellant's suspicion that the Prosecution withheld exculpatory witness statements of Witness GGY.[456] The Appellant offers no support for his theory of undisclosed witness statements, which rests on nothing more than speculation.

227. The Appellant's argument regarding the evidence of Witness GGR is equally unavailing. As the Trial Chamber correctly noted, the Appellant "does not complain that [he] had no notice of this attack,"[457] but rather that he lacked notice of information concerning how Witness GGR was able to recognize him as a participant in the attack. The Appellant contends that details relating to identification must also be pleaded in the indictment or be subject to prior notice, but he cites no authority for this position. *Kupreškic* noted that the Prosecution must "state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven."[458] The circumstances that led the Trial Chamber to conclude that Witness GGR could reliably identify the Appellant[459] are not facts material to the charges in the indictment, but simply factors bearing on the credibility of the witness's testimony that the Appellant committed criminal acts on 13 May 1994. Factors relating to witness credibility need not be pleaded in the indictment.

---

[453] Pre-Trial Brief, Annexure A, pp. 17 (summary of evidence of Witness DAF); 20 (summary of evidence of Witness GGY); 21 (summary of evidence of Witnesses GGR and HR).
[454] Appellant's Brief, para. 182.
[455] Pre-Trial Brief, Annexure A, p. 20.
[456] Appellant's Brief, para. 182.
[457] Trial Judgement, para. 148.
[458] *Kupreškic et al*. Appeal Judgement, para. 88.
[459] Trial Judgement, para. 138.

228. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in finding that the Appellant had sufficient notice of the material facts of the attack at Muyira Hill on 13 May 1994 and the related appeal is dismissed.

5. The Allegation that the Appellant Participated in an Attack on 14 May 1994 at Muyira Hill (Witness GGY)

229. Again relying on the testimony of Witness GGY, the Trial Chamber found that the Appellant participated in an attack at Muyira Hill on 14 May 1994, during which he "was armed with a gun and shot at Tutsi refugees."[460] The Trial Chamber relied on this statement in convicting the Appellant of genocide and of extermination.[461] The Appellant's participation in that attack is therefore a "material fact" that should have been pleaded in the indictment. The failure to include it rendered the indictment defective.

230. The Appellant raised this issue before the Trial Chamber. The Trial Chamber noted that the 14 May attack was not alleged in the indictment and was not mentioned in the Prosecution's Pre-Trial Brief or in any witness statement. The Trial Chamber concluded, however, that the defect in the indictment was cured by the fact that Witness GGY had asserted in a prior statement "that attackers used to come everyday ?sicg to the Bisesero hills" and by the fact that "Prosecution witnesses have testified to large-scale attacks almost daily in various areas in the Bisesero Hills."[462] As was discussed in relation to the Kivumu attack, a general allegation of attacks in the Bisesero region does not cure the indictment's failure to plead the specific date and location of the Muyira Hill attack on 14 May 1994 or the manner of the Appellant's participation in it. The Prosecution has not argued that it was not in a position to plead this information in the indictment.

231. The Trial Chamber also stated that the Appellant's notice objection was addressed by the fact that the 14 May attack was a "continuation of the 13 May attack, of which the Defence had notice, through the Prosecutor's Pre-trial Brief."[463] The description of the 14 May attack as a "continuation" of the 13 May attack is not without doubt, given that several witnesses testified that the attack ended in the evening of 13 May[464] and that the summary of Witness GGY's evidence in

[460] Trial Judgement, para. 205. This finding was corroborated in a limited manner by two other witnesses, GGH and HR, who provided support for the Appellant's presence in the area but who did not see him do anything. Trial Judgement, paras. 180-181.
[461] Trial Judgement, paras. 414, 451.
[462] Trial Judgement, para. 182.
[463] Trial Judgement, para. 184.
[464] Trial Judgement, paras. 133 (Witness GGY testified that the 13 May attack "lasted until 5:30 p.m."); 135 (Witness HR testified that the Appellant participated in a meeting at Kucyapa on 13 May "?agfter this attack"); 137 (Witness

the Prosecution's Pre-Trial Brief does not state that the attack continued into the next day, but rather that it "lasted the entire day until attackers left just before nightfall."[465]

232. However, even accepting the Trial Chamber's statement that the 14 May attack was a "continuation" of the 13 May attack, this finding does not answer the question whether the Appellant was given adequate notice that he would be charged with committing criminal acts on 14 May 1994 at Muyira Hill. The notice requirements of *Kupreškic* apply to the material facts of all criminal acts, including criminal activity that arises as a consequence of earlier criminal activity. As the Trial Chamber acknowledged, the Prosecution did not communicate any information suggesting that the Appellant would be charged with an attack on 14 May 1994 until Witness GGY testified at trial.

233. In response to a question from the Appeals Chamber regarding the notice that was given to the Defence of the 14 May 1994 attack,[466] the Prosecution referred to the discussion in the Trial Chamber's Judgement and to paragraphs 6.57 and 6.58 of the indictment.[467] For the reasons stated above, the Trial Chamber's discussion does not justify its conclusion that the Defence had sufficient notice of the material facts of the 14 May 1994 attack. Likewise, paragraphs 6.57 and 6.58 of the indictment allege the Appellant's participation in "massacres which took place in Kibuye"[468] and attacks in "Bisesero,"[469] which does not give notice of a specific attack at a named location (Muyira Hill) on a specific date (14 May 1994).

234. The Prosecution has therefore not rebutted the presumption of material impairment of the defence that arises from this omission, nor has it suggested that it was not in possession of the information prior to trial. The failure to plead the 14 May 1994 attack in the indictment was therefore not cured.

235. The Appeals Chamber finds that the Trial Chamber erred in relying on evidence of the Appellant's participation in an attack at Muyira Hill on 14 May 1994 and in finding him guilty under several counts of the indictment for having participated in an attack at Muyira Hill on 14 May 1994.

GGR testified that the attacks "began around 8:00 a.m. and 8:30 a.m., and ended in the evening"); 141 (Witness GGM testified that he saw the Appellant "in the evening of 13 May 1994 at a meeting held after the attack").

[465] Pre-Trial Brief, Annexure A, p. 20.

[466] T. 22 April 2004 p. 57.

[467] T. 22 April 2004 p. 78.

[468] Indictment, para. 6.57.

[469] Indictment, para. 6.58.

6. The Allegation that the Appellant Committed Two Murders at Kiziba on 18 June 1994 (Witness GGV)

236. The Trial Chamber found that the Appellant killed an old man and a young boy at Kiziba on 18 June 1994.[470] The Appellant asserts that these murders were not alleged in the indictment.[471] The Prosecution suggests that this argument was not raised in the Trial Chamber.[472]

237. Review of the trial transcript reveals that the Appellant did not object to this evidence when it was introduced.[473] There is a likely reason why: the Prosecution's Pre-Trial Brief gave notice that Witness GGV would testify that, after two Tutsi refugees were found hiding in the bush, the Appellant "shot and killed the two Tutsi."[474] The Appellant was therefore aware that the Prosecution intended to present evidence of these acts through Witness GGV. The Appellant notably does not argue that he did not know that he would be charged with the killings; he merely says that the killings were not pleaded in the indictment.[475] In light of the information given in the Pre-Trial Brief, the Appellant cannot show, and does not attempt to show, that his defence was materially impaired by the failure to plead the two killings in the indictment. Rather, the failure was cured by information in the Pre-Trial Brief. The Trial Chamber therefore committed no error in relying on this evidence and, consequently, this ground of appeal is dismissed.

7. Testimony Regarding Familiarity with the Appellant (Witnesses GGV, GGM, DAF and GGO)

238. The Appellant notes that Prosecution Witnesses GGV, GGM, DAF and GGO testified that they knew, recognized, or were otherwise familiar with the Appellant due to prior encounters or sightings.[476] The Appellant contends that the details of these previous sightings should have been pleaded in the indictment or subject to clear notice before the witnesses testified at trial. As was stated above in connection with Witness GGR, the details of a witness's sighting of the Appellant are not material facts, but rather go the credibility of the witness's testimony that the Appellant was in fact seen committing a criminal act. Facts bearing on credibility need not be pleaded in the indictment. These grounds of appeal therefore fail.

[470] Trial Judgement, para. 272.
[471] Appellant's Brief, para. 184.
[472] Prosecution Response Brief, para. 195 and n. 160.
[473] T. 27 August 2002 p. 38; T. 28 August 2002 p. 61.
[474] Pre-Trial Brief, Annexure A, p. 19.
[475] Appellant's Brief, para. 184.
[476] Appellant's Brief, paras. 184-187. The Appellant repeats this argument in grounds of appeal 39 and 52. Appellant's Brief, paras. 194, 208.

8. The Identity of a Victim Murdered on 20 May 1994 (Witness DAF)

239. The Trial Chamber found that the Appellant shot and killed "a girl of 13-15 years of age."[477] The Appellant does not contend that he lacked notice that he would be charged with this murder; rather, he contends that the Prosecution should have pleaded the victim's "identity" in the indictment or else disclosed it.[478]

240. The Appellant is correct that "the identity of the victim," if known to the Prosecution, should be pleaded in the indictment. *Kupreškic* stated: "?Sgince the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."[479] But this statement necessarily recognizes that there will be some situations where the Prosecution is not in a position to name a victim. This appears to be such a situation. Witness DAF, the only witness to testify to the murder, stated that he did not know the victim.[480] The Prosecution is not obliged to forgo a charge relating to a murder simply because the victim cannot be identified. Rather, in the instant case, the victim's identity could not and need not have been pleaded in the indictment.

241. Other than the mere assertion that not knowing the victim's name "caus?edg serious prejudice,"[481] the Appellant does not explain how he suffered such prejudice, particularly in light of the fact that no witness testified to the victim's name and the Trial Chamber did not make a finding in that regard.

242. The Appellant's argument with respect to the failure to plead in the indictment or otherwise disclose the name of the victim killed on 20 May 1994 accordingly fails.

9. Motion to Exclude Testimony of Witness GK Due to Alleged Nondisclosure

243. The Appellant also asserts that he had "no/insufficient notice" of Witness GK's statement dated 15 and 16 May 1996.[482] This does not appear to be an argument regarding a defect in the indictment, but rather an argument that the Trial Chamber erred in dismissing his motion to exclude Witness GK's evidence because of untimely disclosure of a witness statement. The Appellant's principal contention of error is that the Trial Chamber was misled by an assertion by the

[477] Trial Judgement, para. 302.
[478] Appellant's Brief, para. 186.
[479] *Kupreškic et al.* Appeal Judgement, para. 90.
[480] T. 26 August 2002 p. 90.
[481] Appellant's Brief, para. 186.
[482] Appellant's Brief, para. 179. The Appellant's Brief reads "15th/16th May 1999," but the record indicates that the statement was in fact dated 1996. T. 17 June 2002 p. 101 (Closed Session).

Prosecution during the hearing on the motion to the effect that the witness statement "had been disclosed in November."[483]

244. In ruling on the Appellant's motion, the Trial Chamber found that the witness statement was filed with the Registry, along with other statements, on 17 May 2002.[484] Although the Chamber stated that several redacted statements had been in the Appellant's possession "for some considerable time," it is not clear whether the Chamber was relying on a representation by the Prosecution that the statement had been previously disclosed on 7 November 2000.[485]

245. The record is not transparent as to the exact moment when Witness GK's statement of 15 and 16 May 1996 was first disclosed. The Prosecution's assertion that the statement was disclosed in redacted form on 7 November 2000 is belied by a review of the disclosure made on that date, which includes a statement from GK dated 11 October 1995, but no statement dated 15 and 16 May 1996.[486] Correspondence from the Office of the Prosecutor on 10 May 2001 also indicates that only one statement of Witness GK, the one dated 11 October 1995, had been disclosed in any form as of 10 May 2001.[487]

246. However, even assuming that the Appellant's submission is correct – that is, that the Prosecution was wrong to state that a redacted version was disclosed in November 2000 and that this erroneous statement was material to the Trial Chamber's ruling – the Appellant does not make clear what harm has resulted. The decision whether to permit Witness GK to testify was, as with most decisions relating to the conduct of proceedings, within the discretion of the Trial Chamber.[488] The Appellant has not shown that, even assuming the statement of 15 and 16 May 1996 was not disclosed before 17 May 2002, the Trial Chamber failed to exercise its discretion properly when it permitted Witness GK to testify. The Appellant has therefore failed to establish that the Trial Chamber committed an error of law that invalidated its decision or an error of fact that occasioned a miscarriage of justice. This ground of appeal is therefore dismissed.

---

[483] Appellant's Brief, para. 179.
[484] T. 17 June 2002 p. 152.
[485] T. 17 June 2002 p. 153.
[486] Memorandum from Faria Rekkas (Office of the Prosecutor) to Antoine Mindua (Court Management), 7 November 2000, pp. 1370-1377, nos. K0125072-K0125079 (Document Disclosure No. GK1).
[487] Letter from Melinda Y. Pollard (Office of the Prosecutor) to Sylvia Geraghty (Counsel for Appellant), 10 May 2001, p. 2204 (Disclosure List).
[488] *See, e.g., Prosecutor v. Bagosora et al.*, Case Nos. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 16.

B. Remedy

247. The Appellant had insufficient notice of two of the material facts underpinning the charges against him, namely the allegations that he had participated in an attack at Kivumu at the end of April or the beginning of May 1994 and that he had participated in an attack at Muyira Hill on 14 May 1994. The Trial Chamber therefore committed an error of law in making findings with regard to these allegations and in finding the Appellant guilty under various counts of the indictment for having participated in these two attacks.

248. These errors of law do not invalidate the decision, however, because no conviction on any count of the indictment rested solely on the attack at Kivumu or the 14 May attack at Muyira Hill. Accordingly, there is no basis for disturbing the Appellant's convictions due to these errors of law.

IX. OTHER GROUNDS OF APPEAL (26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38, 46, 56, 60, 61)

249. The Appellant raises numerous grounds of appeal which fail to meet the requisite standards for consideration by the Appeals Chamber pursuant to Article 24 of the Statute or which do not merit a reasoned opinion in writing.[489] Such grounds are set out in this section.

A. Reversing the Burden of Proof (Ground of Appeal 26)

250. The Appellant submits that the Trial Chamber erred in law in reversing the burden of proof by requiring him to prove beyond reasonable doubt that members of the RPF were present in the areas under consideration when, in his view, it should have been sufficient to establish this as a matter of probability.[490] In submitting this argument, the Appellant fails to identify any decision of the Trial Chamber that was incorrect as a matter of law or to make any reference to the record. As such, this ground of appeal is dismissed for vagueness. Further, the Appellant submits that the Trial Chamber reversed the burden of proof in respect of alibi evidence.[491] This matter has already been addressed above in relation to ground of appeal number 18.

B. "Oath Help" (Ground of Appeal 27)

251. The Appellant submits that the Trial Chamber erred in law in deciding to permit the Prosecutor to "oath help" by submitting into evidence prior statements of witnesses to bolster their testimony. The Appellant submits that the witnesses' previous statements are not evidence as to the truth of their contents but are, at most, evidence of the fact that they were made, and that any inconsistency between the witnesses' in-court testimony and an earlier statement goes to credibility.[492] Moreover, the Appellant contends, the Trial Chamber failed to warn itself not to allow such statements to support testimony given in court.[493] Under this ground of appeal the Appellant also argues that the Trial Chamber failed to deal properly with testimonies of witnesses who testified in other cases before the Tribunal and were found to be unreliable. In such cases, the Appellant submits, their evidence in the present case cannot be relied upon to prove "anything" beyond reasonable doubt.[494] The Appellant fails to ground these submissions in the record or support them with references to the Judgement. The Appeals Chamber therefore considers this

[489] For a discussion of the applicable standards, *see supra* paras. 8 - 12.
[490] Appellant's Brief, para. 172.
[491] *Ibid*.
[492] Appellant's Brief, para. 173.
[493] *Ibid*.
[494] *Ibid*.

ground of appeal to be unfounded and dismisses it for vagueness. It may also be recalled that the Trial Chamber is entitled to admit any relevant evidence it deems to have probative value and that the Chamber expressly noted in the Judgement that it considered sworn testimony presented before it to have "considerably more probative value" than declarations in prior written statements.[495]

C. Conspiracy to Fabricate Evidence/Tainted Evidence (Grounds of Appeal 28, 29, 61)

252. The Appellant submits that the Trial Chamber erred in law and in fact when it failed to take into account evidence that there was a conspiracy to fabricate evidence or that Prosecution witnesses could have been influenced or pressured to give testimony that incriminated the Appellant.[496] The Appellant also submits that the Trial Chamber erred in law when it failed to consider that the evidence of Prosecution witnesses was tainted due to the Prosecutor's failure to adopt fair procedural safeguards for obtaining and preserving evidence.[497] In submitting these arguments, the Appellant fails to identify any decision of the Trial Chamber that was incorrect as a matter of law or fact or to make any reference to the record. Consequently, this ground of appeal is dismissed for vagueness.

D. False Testimony (Ground of Appeal 30)

253. The Appellant submits that the Trial Chamber erred in law when, in weighing evidence of Prosecution witnesses, it took into consideration the fact that the Defence did not initiate any proceedings against witnesses who, the Defence maintained, were giving false testimony.[498] The Appellant points to paragraph 42 of the Trial Judgement in support of this submission.[499] This submission is devoid of merit. In paragraph 42 of the Judgement, the Trial Chamber noted that the Defence asserted that some Prosecution witnesses fabricated their testimony and noted that the Defence did not file any application under Rule 91 dealing with false testimony. The Trial Chamber expressed its view that "a distinction is to be made between credibility issues and false testimony" and correctly noted that the party moving an application under Rule 91 has the onus to prove the alleged falsehood.[500] Nothing in this, or indeed in the Trial Chamber's assessment of the credibility of individual witnesses, supports the Appellant's submission that when weighing Prosecution evidence the Trial Chamber took into account the fact that the Defence did not make an application under Rule 91. Accordingly, this ground of appeal is dismissed.

---

[495] Trial Judgement, para. 40.
[496] Appellant's Brief, paras. 174, 217.
[497] Appellant's Brief, para. 175.
[498] Appellant's Brief, para. 176.
[499] *Ibid*.
[500] Trial Judgement, para. 42.

E. Partially Doubtful Evidence (Ground of Appeal 31)

254. The Appellant submits that the Trial Chamber erred in law in relying on evidence given by Prosecution witnesses whose testimony the Chamber found to be doubtful in part.[501] The Appellant does not refer to any particular instance or witness, or any decision of the Trial Chamber, and fails to cite to the Trial Judgement. The Appellant merely refers this Chamber to grounds of appeal 19, 22, 23, and 30 which do not elucidate this submission. Consequently, this ground of appeal is dismissed for vagueness.

F. Standards Relating to Factual Findings (Ground of Appeal 34)

255. The Appellant submits that the Trial Chamber erred in law in employing "erroneous, discriminatory and inconsistent standards" when making its findings of fact.[502] The Appellant does not refer to any particular instance or witness, or any decision of the Trial Chamber, and fails to cite to the Trial Judgement. This ground of appeal is dismissed for vagueness.

G. Transportation of Weapons (Ground of Appeal 35)

256. Without citing the Judgement or the record, the Appellant submits that the Trial Chamber erred in law and in fact in finding that the Appellant knowingly transported guns on 10 April 1994 and/or that he knew that the guns would be ultimately used in an unlawful fashion.[503] The Appellant also argues that the Trial Chamber erred in relying on the finding of transportation of weapons to establish genocidal intent, given that the Appellant did not have sufficient notice of the charges against him.[504] This latter argument was addressed above in the discussion of the Appellant's claims of lack of notice. In respect of the first submission, the Appellant failed to identify the legal or factual error committed by the Trial Chamber in its finding in respect of the transportation of weapons. It appears that the Appellant is merely seeking an alternative interpretation of the evidence. Consequently, this ground of appeal is dismissed.

H. Submissions of Counsel as Evidence (Ground of Appeal 36)

257. The Appellant submits that the Trial Chamber erred in law when it accepted submissions of Prosecution counsel as evidence in a particular instance.[505] A review of the Judgement and of the relevant portion of the transcript shows that the Trial Chamber did not accept the Prosecution

[501] Appellant's Brief, para. 177.
[502] Appellant's Brief, para. 189.
[503] Appellant's Brief, para. 190.
[504] *Ibid*.

counsel's submissions as evidence, but rather that it relied on a witness's testimony.[506] The submission supporting this ground of appeal is therefore unfounded and, accordingly, the appeal is dismissed.

I. Weight of Evidence of Alibi Witnesses (Ground of Appeal 37)

258. The Appellant submits that the Trial Chamber erred in law in not considering what weight to attach to the general testimony of the evidence of Defence Witnesses TEN-8 and TEN-16 despite rejecting their evidence in relation to the alibi.[507] In this ground of appeal, the Appellant fails to identify the error of the Trial Chamber, does not provide any references to specific findings he is challenging, and does not attempt to demonstrate how the Trial Chamber committed the error. The Appellant merely refers the Appeals Chamber to his appeal in respect of alibi (specifically ground 18), without explaining the relevance of that ground of appeal to this submission. The Appeals Chamber cannot entertain this undeveloped submission and, therefore, dismisses this ground of appeal.

J. Weight of Propositions Put to a Witness (Ground of Appeal 38)

259. The Appellant submits that the Trial Chamber erred in law in deciding not to give proper weight to the propositions put to Witness GGY and in ruling them out completely on the basis that the Defence had not proved them to a sufficient degree.[508] In presenting this ground of appeal, the Appellant does not refer to any particular part of the Judgement or the record. Accordingly, this ground of appeal is dismissed for vagueness.

K. Bolstering of Testimony (Ground of Appeal 46)

260. Under this ground of appeal, the Appellant's entire submission is as follows: "In an effort to bolster GGM's testimony in the instant case, the Trial Chamber improperly utilises the contents of GGM's testimony in *Kayishema*."[509] As presented, this ground of appeal is unfounded. The Appellant fails to allege and specify the nature of the error, and this ground is therefore dismissed.

[505] Appellant's Brief, para. 191.
[506] Trial Judgement, para. 76; T. 16 October 2002 pp. 82-87 (Closed Session).
[507] Appellant's Brief, para. 192.
[508] Appellant's Brief, para. 193.
[509] Appellant's Brief, para. 200.

L. Benefit of Doubt (Ground of Appeal 56)

261. The Appellant's entire submission in respect of this ground of appeal is as follows: "The Learned Trial Chamber erred in law in failing to give the Appellant the benefit of all reasonable doubt in circumstances where there was a conflict in the evidence and where both versions might reasonably be true, as set out elsewhere."[510] The Appellant does not refer to any particular instance, witness, or decision of the Trial Chamber and fails to cite to the Trial Judgement. This ground of appeal is therefore dismissed for vagueness.

M. Absence of Sufficient Evidence to Convict (Ground of Appeal 60)

262. The Appellant submits that the Trial Chamber erred in law and in fact in convicting him "in the absence of any or any sufficient admissible evidence proving his guilt beyond all reasonable doubt, in the course of a fair trial."[511] In this ground of appeal the Appellant apparently seeks to cast doubt on his conviction for reasons of insufficiency of evidence and unfairness of the trial. In the way it is presented, this submission may be understood as encompassing the entire appeal in one sentence without any reference to the Judgement, the record, or any applicable law. As such, this is not a ground of appeal which identifies an error of law or fact in a suitable manner for consideration by this Chamber, and this ground is therefore dismissed.

[510] Appellant's Brief, para. 212.
[511] Appellant's Brief, para. 216.

X. SENTENCING (GROUNDS OF APPEAL 55, 57, 58, 59)

263. The Appellant raises arguments with respect to the Trial Chamber's decision to sentence him to imprisonment for the rest of his life. None of these arguments is well developed and, as such, could be dismissed for failure to be presented sufficiently on appeal. Nonetheless, the Appeals Chamber has decided to exercise its discretion to address these grounds on the merits.[512]

264. The Appellant first contends that the Trial Chamber erroneously concluded that his case "was not one of the exceptional cases where due consideration and weight ought to be given to the evidence of the good character and previous behaviour and utterances of the Appellant, in particular his public speeches."[513] The Appellant also asserts that the Trial Chamber failed "to give any/sufficient consideration or weight to the accepted facts established in evidence, namely that the Appellant was a man who had saved the lives of civilians, including members of the Tutsi ethnic group, that he was of good character, that he advocated democracy, that he opposed ethnic discrimination."[514]

265. The Appellant's assertion that the Trial Chamber failed to consider these factors is incorrect. The Trial Chamber stated that it "considered in mitigation the fact that the Accused was a person of good character prior to the events. As a public figure and a member of the MDR, he advocated democracy and opposed ethnic discrimination. As such, he proved courageous, despite threats to his life and property."[515] The Trial Chamber also considered, "?ign mitigation of the Accused's sentence," the evidence that he "intervened and saved a group of refugees from Interahamwe who accused them of being Inkotanyi" and from this inferred that "the Accused thus saved these refugees' lives."[516]

266. The Appellant's next argument is that the Trial Chamber erred in finding that these mitigating circumstances carried only "limited weight" in light of the gravity of the crimes that he was found to have committed.[517] In a case involving mitigating circumstances, the jurisprudence of the Tribunal is clear that "a decision as to the weight to be accorded thereto lies within the discretion of the Trial Chamber."[518] Here, the Trial Chamber decided that the mitigating factors

[512] *See Akayesu* Appeal Judgement, paras. 404-405.
[513] Appellant's Brief, para. 211.
[514] Appellant's Brief, para. 213.
[515] Trial Judgement, para. 496.
[516] Trial Judgement, para. 494.
[517] Trial Judgement, paras. 495, 497.
[518] *Musema* Appeal Judgement, para. 396. *See also Kayishema and Ruzindana* Appeal Judgement, para. 366 ("?Wgeighing and assessing aggravating and mitigating factors in sentencing lies primarily within the discretion of the

deserved "little weight" because the Chamber found that "when faced with the choice between participating in massacres of civilians or holding fast to his principles, ?the Appellant g chose the path of ethnic bias and participated in the massacres committed in Rwanda at the time."[519] Although the Appellant was found to have saved the lives of certain refugees on one occasion, he also "took the lives of others, and deliberately committed crimes of a heinous nature against civilians prior to and after this episode."[520] The Appellant has not shown that the Trial Chamber's decision exceeded the discretion conferred upon it in matters of sentencing.

267. The Appellant also argues that the imposition of a life sentence indicated that the Trial Chamber "failed to give the Appellant any credit whatsoever for the mitigating circumstances in the case and/or to provide for any element of rehabilitation and/or the public policy considerations of providing incentive to other accused charged before the Tribunal to deal with their cases in a way similar to that adopted by the Appellant."[521] However, nothing prevents a Trial Chamber from imposing a life sentence in light of the gravity of the crimes committed, even if the evidence in the case reveals the existence of mitigating circumstances. As the Appeals Chamber stated in *Musema*, "?igf a Trial Chamber finds that mitigating circumstances exist, it is not precluded from imposing a sentence of life imprisonment, where the gravity of the offence requires the imposition of the maximum sentence provided for."[522] Proof of mitigating circumstances does not automatically entitle the Appellant to a "credit" in the determination of the sentence; rather, it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination. The Appellant has not shown that the Trial Chamber neglected that duty in this case.

268. The Appellant argues that the Trial Chamber erred in law by balancing the aggravating and mitigating factors against each other, rather than first deciding "upon the appropriate sentence, having given due consideration to the aggravating factors" and then "tak?ingg into account the mitigating factors and reduc?ingg the penalty accordingly."[523] The Appellant does not cite any authority for his position that a sentencing Chamber is barred from balancing aggravating and mitigating factors. Indeed, the jurisprudence of the Tribunal clearly permits a Trial Chamber to balance aggravating factors against mitigating factors in determining the sentence. The Trial Chamber in *Kayishema and Ruzindana* balanced the relevant factors in a similar manner, and the Appeals Chamber did not suggest that such an approach was inadmissible, but rather affirmed that

Trial Chamber, and … the Appellant bears the burden of demonstrating that the Trial Chamber abused its discretion….").

[519] Trial Judgement, para. 497.

[520] Trial Judgement, para. 495.

[521] Appellant's Brief, para. 215.

[522] *Musema* Appeal Judgement, para. 396.

approach as within the discretion of the Trial Chamber.[524] The same was true in *Akayesu*, where the Trial Chamber concluded that "the aggravating factors overwhelm the mitigating factors," an approach that was upheld on appeal.[525] This ground of appeal is therefore without merit.

269. Finally, the Appeals Chamber has considered whether the Prosecution's failure to give proper notice of the Kivumu attack and the Muyira Hill attack on 14 May 1994 affects the sentence imposed in this case. The fact that the Prosecution was derelict in its duty to provide adequate notice of two individual attacks does not mitigate the seriousness of the Appellant's remaining crimes that were properly tried under fair procedures. Accordingly, the Appeals Chamber concludes that these errors of law do not invalidate the decision and do not warrant re-sentencing.

[523] Appellant's Brief, para. 214.
[524] *See Kayishema and Ruzindana* Appeal Judgement, para. 366.
[525] *Akayesu* Appeal Judgement, paras. 416-417 (quoting *Akayesu* Sentence, para. 37).

XI. DISPOSITION

270. 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 hearings on 21 and 22 April 2004;

SITTING in an open session;

DISMISSES the Appellant's appeal in its entirety;

AFFIRMS the sentence of imprisonment for the remainder of his life;

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

ORDERS, in accordance with Rules 103(B) and 107 of the Rules, that Eliézer Niyitegeka is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

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

Theodor Meron	Mohamed Shahabuddeen	Florence Ndepele Mwachande Mumba
Presiding Judge	Judge	Judge

Wolfgang Schomburg	Inés Mónica Weinberg de Roca
Judge	Judge

Signed on the fifth day of July 2004 at The Hague, The Netherlands, and issued this ninth day of July 2004

At Arusha, Tanzania.

[**SEAL OF THE TRIBUNAL**]

ANNEX A – PROCEDURAL BACKGROUND

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

A. Notice of Appeal

2. The Trial Judgement was delivered in English on 16 May 2003. On 21 May 2003, the Appellant filed a motion seeking an extension of time for filing his Notice of Appeal on the basis that the French text of the Trial Judgement was not available.[526] On 13 June 2003, the requested extension was granted and the Appellant was ordered to file his Notice of Appeal no later than on 20 June 2003.[527] The Appellant filed his Notice of Appeal on 20 June 2003.

3. On 25 July 2003, the Prosecution filed a motion concerning defects in the Appellant's Notice of Appeal, requesting that the Appellant be ordered to re-file the Notice of Appeal in conformity with the relevant Practice Directions.[528] By a Decision of 26 September 2003, the Appellant was ordered to re-file his Notice of Appeal, in conformity with the Practice Directions, within fifteen days.[529] The Appellant re-filed his Notice of Appeal on 17 October 2003.[530]

B. Appeal Briefs

4. The Appellant filed his Appeal Brief on 2 December 2003.[531] On 5 December 2003, the Appellant was ordered to re-file his Appeal Brief on the ground that it did not conform to the relevant Practice Direction.[532] The Appellant filed the Appeal Brief: Re-Filed on 23 December 2003.[533]

---

[526] Motion of Eliézer Niyitegeka Pursuant to Rule 116 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda Seeking an Extension of Time, 21 May 2003.
[527] Decision on Eliézer Niyitegeka's Motion for an Extension of Time or for the Filing of his Notice of Appeal, 13 June 2003. *See also* Decision on the Registrar's Submissions, 15 July 2003; Decision on the Registrar's Request, 25 July 2003.
[528] Prosecution Motion Concerning Defects in the Appellant Eliézer Niyitegeka's Notice of Appeal, 25 July 2003.
[529] Decision on Prosecution Motion Concerning Defects in the Appellant's Notice of Appeal, 26 September 2003. *See also* Decision on Eliézer Niyitegeka's Extremely Urgent Motion for an Extension of Time, 6 October 2003; Decision on Eliézer Niyitegeka's Urgent Motion Filed on 4 September 2003, 16 October 2003.
[530] *See also* Decision on Prosecution's Urgent Motion Concerning Defects in the Appellant's Notice of Appeal, 27 November 2003.
[531] Decision on Defence Motion for an Extension of Time and Scheduling Order, 17 November 2003; Decision on Eliézer Niyitegeka's Urgent Motion Filed on 22 October 2003, 3 December 2003; Decision on Eliézer Niyitegeka's Urgent Motion for Reconsideration of Appeals Chamber Decision Dated 3 December 2003, 4 February 2004.
[532] Decision on the Length of the Appellant's Brief, 4 December 2003. *See also* Decision on Defence Motion on the Length of the Appellant's Brief, 16 December 2003; Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003, 19 December 2003.
[533] *See also* Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004 (ordering that references to Witness GGH in ground 40 of the Appellant's Brief, to Witnesses GGV and KJ in ground 53 of the Appellant's Brief, and to Witness GGV in ground 54 of the Appellant's brief be struck from the brief).

5. The Prosecution filed its Response Brief on 30 January 2004.[534] The Appellant filed his Brief in Reply on 16 February 2004.

C. Assignment of Judges

6. On 4 June 2003, the following Judges were assigned to hear the appeal: Judge Theodor Meron, Presiding Judge; Judge Fausto Pocar; Judge Claude Jorda; Judge Mohamed Shahabuddeen; and Judge David Hunt.[535] Judge Shahabuddeen was designated as the Pre-Appeal Judge.[536] Subsequently, Judge Inés Mónica Weinberg de Roca was assigned to replace Judge Hunt,[537] Judge Wolfgang Schomburg was assigned to replace Judge Jorda,[538] and Judge Florence Ndepele Mwachande Mumba was assigned to replace Judge Pocar.[539]

D. Motion Concerning Additional Evidence and Judicial Notice

7. On 13 April 2004, the Appellant filed a motion seeking leave to present additional evidence in the form of five documents relating to the standing of Prosecution Counsel Melinda Pollard at the Bar of the State of New York and moving the Appeals Chamber to take judicial notice of an excerpt from a transcript from another case before the Tribunal as well as of two United Nations documents.[540] The Appeals Chamber dismissed this motion by an oral decision rendered on 21 April 2004,[541] with the written reasons for the dismissal issued on 17 May 2004.[542] However, since the Prosecution conceded the fact of Counsel Pollard's suspension from the practice of law in New York as well as the reasons therefor, as set out in the five documents which were the subject of the Appellant's motion concerning additional evidence, the Appellant was allowed to make submissions on the basis of the contents of those documents without their admission into evidence.[543]

---

[534] *See also* Decision on the Appellant's Urgent Motion Concerning Defects in the Respondent's Brief, 25 February 2004.
[535] Order of the Presiding Judge to Assign Judges, 4 June 2003.
[536] Order of the Presiding Judge Designating the Pre-Appeal Judge, 4 June 2003.
[537] Order of the Presiding Judge Replacing a Judge in a Case Before the Appeals Chamber, 6 August 2003.
[538] Order of the Presiding Judge Replacing a Judge in a Case Before the Appeals Chamber, 14 October 2003.
[539] Order of the Presiding Judge Replacing a Judge in a Case Before the Appeals Chamber, 16 January 2004.
[540] Extremely Urgent Defence Motion Pursuant to Rule 115/Rule 54 and Rule 94(A), (B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Seeking Leave to Present Additional Evidence and Requesting Judicial Notice, filed 13 April 2004.
[541] T. 21 April 2004 p. 6.
[542] Reasons for Oral Decision Rendered 21 April 2004 on Appellant's Motion for Admission of Additional Evidence and for Judicial Notice, 17 May 2004.
[543] T. 21 April 2004 p. 6. *See also* Reasons for Oral Decision Rendered 21 April 2004 on Appellant's Motion for Admission of Additional Evidence and for Judicial Notice, 17 May 2004, para. 11.

E. Hearing of the Appeal

8. Pursuant to a Scheduling Order of 2 April 2004, the Appeals Chamber heard the parties' submissions on the appeal on 21 and 22 April 2004 in Arusha, Tanzania.[544] In its Scheduling Order of 23 June 2004, in conformity with Rule 15*bis*(A), the Appeals Chamber was satisfied that it was in the interests of justice to have the hearing for the delivery of the Judgement in the absence of one of its Judges, who was unavailable due to official Tribunal business.

F. Motion for an Adjournment of Delivery of the Judgement

9. On 2 July 2004, the Appellant filed a motion seeking an adjournment of delivery of the Judgement and admission of additional evidence in the form of excerpts of certain documents from a United States Immigration Court purportedly relating to the credibility of Witnesses GGV and GGY.[545] The Appeals Chamber dismissed this motion by a decision rendered on 5 July 2004.[546]

[544] The Appellant's motion for adjournment was denied. Decision on Appellant's Motion for Adjournment, 1 April 2004. *See also* Order for Additional Information, 22 March 2004.
[545] Extremely Urgent Defence Motion for an Adjournment of Delivery of Judgement in Appeal, Pursuant to Rule 54 and Rule 116(A) and for the Admission and Full Consideration of Additional Evidence Pursuant to Rule 115, and Rule 89(C) and for Order/s Pursuant to Rule 54 of the Rules of Procedure and Evidence of ICTR, filed 2 July 2004.
[546] Decision on Appellant's Extremely Urgent Motion for Adjournment of Delivery of Judgement and for the Admission of Additional Evidence, 5 July 2004.

ANNEX B – CITED MATERIALS/DEFINED TERMS

A. Jurisprudence

1. ICTR

AKAYESU

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement")

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Sentence, 2 October 1998 ("*Akayesu* Sentence")

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

BAGILISHEMA

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

BAGOSORA ET AL.

Prosecutor v. Théoneste Bagosora et al., Case Nos. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003

KAYISHEMA AND RUZINDANA

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement")

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

"MEDIA CASE"/ NAHIMANA ET AL.

Prosecutor v. Ferdinand Nahimana et al., Case No. ICTR-99-52-I, Decision on the Defence Motion Opposing the Hearing of the Ruggiu Testimony against Jean Bosco Barayagwiza, 31 January 2002

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

MUSEMA

Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement")

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

NIYITEGEKA

Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Decision on Two Defence Motions Pursuant to, *Inter Alia*, Rule 5 of the Rules and the Prosecutor's Motion for Extension of Time to File the Modified Amended Indictment Pursuant to the Trial Chamber II Order of 20 November 2000; Warning to the Prosecutor's Counsel Pursuant to Rule 46(A), 27 February 2001

Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("Trial Judgement")

Eliézer Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004

NTAKIRUTIMANA

Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement")

RUTAGANDA

Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement")

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

SEMANZA

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

2. ICTY

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BLA[KI]

Prosecutor v. Tihomir Blaškic, Case No. IT-95-14-T, Decision on the Production of Discovery Materials, 27 January 1997

BR\ANIN AND TALI]

Prosecutor v. Radoslav Brđanin and Momir Talic, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001

"CELEBICI CASE"/DELALI] ET AL.

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

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

JELISIC

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

KORDIC AND CERKEZ

Prosecutor v. Dario Kordic and Mario Cerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordic and Cerkez* Trial Judgement")

KRSTIC

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

KUNARAC ET AL.

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

KUPREŠKIC ET AL.

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

KVO^KA ET AL.

Prosecutor v. Miroslav Kvocka, et al., Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999

NALETILI] AND MARTINOVI]

Prosecutor v. Mladen Naletilic and Vinko Martinovic, Case No. IT-98-34-T, Decision on the Defence Motion for Disclosure of any Defence Witness Statements in Possession of the Office of the Prosecutor, 18 April 2002

TADIC

Prosecutor v. Duško Tadic a/k/a "Dule", Case No. IT-94-1-T, Judgement, 7 May 1997 ("*Tadic* Trial Judgement")

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

VASILJEVIC

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

3. Other Jurisdictions

R. v. John Early and others, [2002] EWCA Crim 1904, [2003] 1 Cr. App. R. 288

R. v. Robert McPheat Nisbet, (1971) 55 Cr. App. R. 490

Rippingdale v. The Queen, 109 A. Crim. R. 304 (1999)

United States v. Vonn, 122 S. Ct. 1043 (2002)

B. Other Materials

4. Books/Chapters in Books

Bassiouni, M. Cherif, with the collaboration of Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (Irvington-on-Hudson, New York, Transnational Publishers Inc., 1996)

Boot, Machteld, Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and Subject Matter Jurisdiction of the International Criminal Court (Antwerpen, Oxford, New York, Intersentia, 2002)

Robinson, Nehemiah, The Genocide Convention: A Commentary (New York, Institute of Jewish Affairs, 1960)

Schabas, William A., Article 6: Genocide, in *Otto Triffterer*, ed., Commentary on the Rome Statute (Baden-Baden, Nomos, 1999)

Schabas, William A., Genozid im Völkerrecht (2003)

Schabas, William A., Genocide in International Law (2000)

5. Dictionaries

Oxford English Dictionary, 2nd Edition (Oxford, Clarendon Press, 1998)

C. Defined Terms

Appellant's Brief

Eliézer Niyitegeka v. Prosecutor, Case No. 96-14-A, Appeal Brief: Re-Filed, filed 23 December 2003

Appellant's Brief in Reply

Eliézer Niyitegeka v. Prosecutor, Case No. 96-14-A, Appellant's Brief in Reply, filed 16 February 2004

Defence Final Trial Brief

Prosecutor v. Eliézer Niyitegeka, Case No. 96-14-T, Defence Final Trial Brief, filed 20 February 2003

ECourtHR

European Court of Human Rights

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

ICTR Statute

Statute of the Tribunal

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

Prosecutor v. Eliézer Niyitegeka, Case No. 96-14-I, Amended Indictment, filed 25 November 2002

Pre-Trial Brief

Prosecutor v. Eliézer Niyitegeka, Case No. 96-14-T, Prosecutor's Pre-Trial Brief Pursuant to Rule 73*bis*(B)(i), filed 11 March 2002

Prosecutor's Final Trial Brief

Prosecutor v. Eliézer Niyitegeka, Case No. 96-14-T, Prosecutor's Final Trial Brief, filed 16 December 2002

Prosecution Response Brief

Eliézer Niyitegeka v. Prosecutor, Case No. 96-14-A, Prosecution Response Brief, filed 30 January 2004

Regulation No. 2

Prosecutor's Regulation No. 2, Standards of Professional Conduct for Prosecution Counsel (1999)

Rules

Rules of Procedure and Evidence of the Tribunal

T.

Transcript. All references to the transcript are to the official, English transcript, unless otherwise indicated.

Trial Judgement

Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003

Tribunal

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