ICTR-97-20-A
20 May 2005
(5874/H-5730/H)

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UNITED
NATIONS

Tribunal Pénal International pour le Rwanda

International Criminal Tribunal for Rwanda

2005 MAY 20 A 8:43

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr Adama Dieng**

Judgement of: **20 May 2005**

ICTR Appeals Chamber
Date: 20 May 2005
Action:
Copied To: Concerned Judge
Parties, Judicial Archive
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LAURENT SEMANZA

v.

THE PROSECUTOR

Case No. ICTR-97-20-A

JUDGEMENT

The Office of the Prosecutor:

Mr James Stewart
Ms Amanda Reichman
Mr Neville Weston

Counsel for the Appellant

Mr Charles Achaleke Taku

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Rosette Muzigo-Morrison
SIGNATURE: DATE: 20/05/05

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal," respectively) is seised of appeals by Laurent Semanza ("Appellant") and by the Prosecution, against the Judgement rendered by Trial Chamber III in the case of *Prosecutor v. Laurent Semanza* on 15 May 2003 ("Trial Judgement").[1]

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

I. INTRODUCTION

2. The Appellant was born in 1944 in Musasa commune, Kigali Rural prefecture, Rwanda. He was bourgmestre of Bicumbi commune for more than twenty years, until being replaced by Juvénal Rugambarara in 1993. After he ceased to serve as bourgmestre, the Appellant remained a member of the *Mouvement Républicain National et Démocratique* ("MRND"), which, up to 1994, was the political party of the President of Rwanda, Juvénal Habyarimana. The Appellant was nominated as a MRND representative to the National Assembly which was to be established pursuant to the 1993 Arusha Accords.

A. The Trial Judgement

3. The Appellant was tried on the basis of Indictment no. ICTR-97-20-I, as amended on 23 June 1999, on 2 July 1999 and on 12 October 1999, in the case of *Prosecutor v. Laurent Semanza* ("Indictment" or "Third Amended Indictment"). The Appeals Chamber notes that the Indictment charged the Appellant with individual criminal responsibility in relation to selected incidents, but not for the entire genocide of 1994.

4. The Trial Chamber convicted the Appellant of one count of complicity in genocide (Count 3), one count of aiding and abetting extermination as a crime against humanity (Count 5), one count of rape as a crime against humanity (Count 10), one count of torture as a crime against humanity (Count 11), and two counts of murder as a crime against humanity (Counts 12 and 14). The Appellant was sentenced to twenty-four years and six months' imprisonment[2] with credit being given for time already served.[3]

B. The Appeals

5. The Appellant raises 22 grounds of appeal. His arguments relate principally to an apprehension of bias of the Trial Chamber, shortcomings in the Indictment and amendments to the Indictment, errors with respect to his alibi, problems in the taking of judicial notice by the Trial Chamber, evidentiary objections, expert testimony, cumulative charging and convictions, and flaws in his sentence.[4]

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[2] Twenty-five years less six months to compensate for violations of the Appellant's rights: Trial Judgement, para. 590.
[3] Trial Judgement, para. 591.
[4] Defence Appeal Brief, filed on 21 October 2003 ("Semanza Appeal Brief"); *see also* Prosecution Response to Defence Appeal Brief, filed on 01 December 2003 ("Prosecution Response"); Defence Reply to Prosecutor's Reply (sic) to Defence Appeal Brief, filed on 15 December 2003 ("Semanza Reply").

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6. The Prosecution presses three grounds of appeal. It avers that the Appellant should be held liable for ordering crimes at Musha church and for war crimes, and it raises objections to the Appellant's sentence.[5]

C. Standards for Appellate Review

7. The Appeals Chamber recalls the standards for appellate review pursuant to Article 24 of the Statute of the Tribunal ("Statute"), as summarised in the *Ntakirutimana* Appeal Judgement.[6] Article 24 addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice. A party alleging an error of law must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[7]

8. As regards errors of fact, as has been previously underscored by the Appeals Chamber of both this Tribunal and of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber. Where an erroneous finding of fact is alleged, the Appeals Chamber will give deference to the trial chamber that heard the evidence at trial as it is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. If the finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice.[8]

9. The Appeals Chamber emphasises that, on appeal, a party cannot merely repeat arguments that did not succeed at trial in the hope that the Appeals Chamber will consider them afresh. The appeals process is not a trial *de novo* and the Appeals Chamber is not a second trier of fact. The burden is on the moving party to demonstrate that the trial chamber's findings or decisions constituted such an error as to warrant the intervention of the Appeals Chamber. Thus, arguments of

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[5] Prosecution Appeal Brief filed on 01 September 2003 ("Prosecution Appeal Brief"); Defence Reply (sic) Brief filed on 10 October 2003 ("Semanza Response"); Prosecution Reply to the "Defence's Reply to Prosecutor's Brief", filed on 27 October 2003 ("Prosecution Reply").

[6] *Ntakirutimana* Appeal Judgement, paras 11-15.

[7] *Niyitegeka* Appeal Judgement, para. 7; *Vasiljević* Appeal Judgement, para. 6 (citations omitted). *See also, e.g., Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.

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

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.[9]

10. Moreover, in its submissions, the appealing party must provide precise references to relevant transcript pages or paragraphs in the trial judgement to which the challenge is being made.[10] Failure to do so, or obscure, contradictory, or vague submissions, or submissions that suffer from other formal and obvious insufficiencies, makes it difficult for the Appeals Chamber to assess fully the party's arguments on appeal.[11]

11. Finally, it is within the inherent jurisdiction of the Appeals Chamber to select those submissions which merit a reasoned opinion in writing. Arguments which are evidently unfounded may be dismissed without detailed reasoning.[12]

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

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II. APPEAL OF LAURENT SEMANZA

A. Apprehension of Bias (Grounds 1, 5, 6, 8 and 21)

12. The Appellant contends that the Trial Chamber exhibited bias against him throughout the trial, thereby violating Articles 19(1), 20(1), (2), (3) and 4(e) of the Tribunal's Statute and Rule 14 of the Rules of Procedure and Evidence ("Rules").[13] The Appellant submits that, as a result, the integrity of the proceedings was undermined, the entire Trial Judgement was unreasonable and ought to be quashed, and he should be acquitted.[14]

13. The applicable principles on the issue of impartiality and bias were recently summarized by the Appeals Chamber as follows:

> Following the Judgement of the ICTY Appeals Chamber in the case of *Prosecutor v. Furundžija*, 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." On appeal, it is for the appealing party to rebut this presumption of impartiality. As stated in *Furundžija* 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. In *Furundžija* 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'". The Appeals Chamber recently confirmed this position in the Judgement in the case of *Rutaganda v. Prosecutor*.[15]

14. The elements adduced by the Appellant in support of his contention that the Trial Chamber was biased will now be considered.

1. Statements Made by Judges during Trial

15. The Appellant submits that the Judges of the Trial Chamber made statements putting in doubt their impartiality.

16. The Appellant first refers to a statement made by Presiding Judge Ostrovsky during a Status Conference held on 23 September 1999, which the Appellant describes as "[o]ne of the most egregious displays of bias":[16]

> But I think that we can start and then if you have some problems we can deal with them. To plead guilty, well, it's unfortunate that your client did not follow your example.[17]

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[13] Semanza Appeal Brief, para. 10a).
[14] *Ibid.*, para. 18.
[15] *Niyitegeka* Appeal Judgement, para. 45 (references omitted).
[16] Semanza Appeal Brief, para. 11a).
[17] T. 23 September 1999 (closed session), p. 2, lines 1-4.

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17. The Appellant did not provide any explanations as to the context in which this statement was made, its significance, or its effect on the proceedings. Having read the transcript of 23 September 1999, the Appeals Chamber considers that Judge Ostrovsky's remark was intended as banter, in response to the following comments of Mr. Dumont, defence counsel at the time:

> Your Honours, I plead guilty, guilty in the sense that I am a little crazy, I forgot my badge in Brussels and I've been given another one indicating that I'm a visitor, but also I forgot my diary in Brussels...[18]

18. The Appeals Chamber does not consider that a reasonable observer would have apprehended bias because of Judge Ostrovsky's statement. Nevertheless, the Appeals Chamber advises that statements on potentially serious matters made in jest, and which risk being misinterpreted, should be avoided.

19. The Appellant next asserts that Judge Ostrovsky stated that, pursuant to the Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Fact Pursuant to Rules 94 and 54,[19] he was satisfied that the crimes for which the Appellant was charged had been committed and that the onus was now on him to prove his innocence by showing that he did not participate in committing them. In this connection, the Appellant refers to the transcript of 8 December 2000, but does not cite to any specific page.[20]

20. The transcript of 8 December 2000 does not show that such a statement was ever made by Judge Ostrovsky. While Judge Ostrovsky referred to the Decision on Judicial Notice, it was to remind the Parties to concentrate on the matters that were not the subject of that Decision so as to avoid wasting time on issues that were the subject of the Decision on Judicial Notice.[21]

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[18] T. 23 September 1999 (closed session), p.1, lines 8-13.
[19] 3 November 2000 ("Decision on Judicial Notice").
[20] Semanza Appeal Brief, para. 11e).
[21] T. 8 December 2000 (closed session), at pp. 23-24:

> The only thing I would like to say in this connection, I would like to remind you that the Chamber took judicial notice that there was, through Rwanda, widespread or systematic attacks, again, on the civilian population, based on Tutsi and ethnic identification. During the attacks some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there was a large number of deaths of persons of Tutsi ethnic identity.
>
> The Chamber also took judicial notice of the existence in the country during this period of time, the enumerated X comprising the crime of genocide as provided in Article 2 of the Statute. But my impression is, I am very sincere that the parties don't take into account that such a decision on the Chamber has been taken and that the Chamber took judicial notice. And the intention very often is concentrated, and the time is spent not on the alleged involvement of the Accused in the acts which occurred in this period of time in this country, but on the events which should not be even discussed, taking into account that the Chamber took judicial notice that there were widespread systematic attacks, many Tutsi have been killed, etc., etc. Therefore, I would like to ask the parties to take it into account and it could help us to save a lot of time.

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21. The Appellant also contends that Judge Williams "exhibited open bias and hostility against the Defence."[22] In this connection, the Appellant refers to the transcript of 28 February 2002 and asserts that Judge Williams 1) improperly questioned him about a member of the Defence team[23]; and 2) indicated to the Prosecution the areas in which it should bring its rebuttal evidence.[24]

22. As to the first of these elements, the transcript reveals that Judge Williams asked the following question to the Appellant: "Mr. Joseph Mushyandi is an assistant to your legal team; does he speak Kinyarwanda?"[25] The Appellant does not attempt to explain why this question was improper. The Appeals Chamber is not convinced that a reasonable observer would entertain an apprehension of bias as a result of the question.

23. As to the second element, Judge Williams was just stating what was obvious to every participant in the discussion: the Prosecution's rebuttal would deal with the alibi.[26] This cannot justify an apprehension of bias.

2. Pleading on the First Amended Indictment

24. The Appellant contends that the Trial Chamber, in consultation with the Prosecution, moved the date of his appearance to plead to the First Amended Indictment[27] and that this "opportunity was used by the Prosecution to ambush the accused in the Court Room and over his protest misdirected him to plead to seven new counts in the absence of his lawyer."[28]

25. Examination of the transcript suggests a very different understanding of the events of 24 June 1999. Indeed, it appears that it had been agreed between the Prosecution and the lead defence counsel at the time that the date of the Appellant's appearance would be changed to 24 June 1999, and that the Appellant would be represented by duty defence counsel on that occasion.[29] While the Appellant objected to being represented by duty defence counsel because he had not received written confirmation of this from lead defence counsel, he repeatedly stated that he was ready to plead on the First Amended Indictment, even in the absence of the person he regarded as his duly

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[22] Semanza Appeal Brief, para. 122.
[23] *Ibid.*
[24] *Ibid.*, paras 122-124.
[25] T. 28 February 2002, p. 115.
[26] *Ibid.*, p. 160 ("I imagine the main – Mr. Taku, the main issue here with regard to the rebuttal is the alibi. It's not a massive reopening of the case. That is the main issue, I would imagine."). *See also ibid.*, p. 165.
[27] On 31 May 1999, the Prosecution sought leave to amend the Indictment by adding seven new counts. The Trial Chamber orally granted the application on 18 June 1999. The First Amended Indictment was filed on 23 June 1999. The Second Amended Indictment was filed on 2 July 1999, and the Third Amended Indictment was filed on 12 October 1999. *See infra*, section II. B. 2.
[28] Semanza Appeal Brief, para. 11c). The appearance was first scheduled for 5 July 1999, but it was changed to 24 June 1999.
[29] T. 24 June 1999, p. 4.

appointed counsel.[30] Accordingly, the Appellant has not demonstrated any impropriety on the part of the Trial Chamber.

3. Unfair Treatment

26. The Appellant submits that the Trial Chamber rendered a series of decisions during the trial that unfairly disadvantaged him, and that this shows that the Trial Chamber was biased.

(a) Trial Chamber Decisions Concerning Witnesses

27. The Appellant first argues that the Trial Chamber allowed the Prosecution to call additional witnesses at the end of its case as well as rebuttal witnesses, but did not allow the Defence to call VZ to testify, to enter VZ's statement into evidence, or to enter other Prosecution witness statements into evidence.[31] Nor was the Defence allowed to call rejoinder witnesses.[32]

28. The Appeals Chamber is of the view that there was nothing improper about these decisions. The Trial Chamber allowed the Prosecution to call rebuttal witnesses because it found that the Defence had not notified the Prosecution of its intent to plead an alibi, contrary to the requirement of Rule 67.[33] The Trial Chamber's refusal to enter VZ's statement into evidence was based on that witness's refusal to testify and on the belief that, in and of itself, the statement of VZ would have very little probative value.[34] Yet, the Trial Chamber reminded the Defence that if it wished to obtain evidence from VZ, it could seek to bring him before the Tribunal to testify as part of its case.[35] Contrary to the Appellant's assertion, the Trial Chamber did not prevent the Defence from calling VZ. Finally, the Defence Motion for Leave to Call Rejoinder Witnesses was denied because, as found by the Trial Chamber, "in principle, rejoinder should only be permitted in relation to unanticipated issues newly raised in rebuttal"[36] and because the alibi was part of the Defence "case-in-chief and all testimony about Semanza's whereabouts in April 1994 as such should have been adduced at that time."[37]

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[30] *Ibid.*, pp. 8-12.
[31] Semanza Appeal Brief, para. 11b).
[32] *Ibid.*, paras 15-16.
[33] Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, 27 March 2002, paras 8-12; Trial Judgement, para. 77. *See also infra* section II. D. 2.
[34] Decision on the Defence Motion for Orders Calling Prosecution Witness VZ listed in Prosecution Witness List of November 2000; Prosecution Witness [sic] VL, VH and VK Listed in Supporting Material to the Third Amended Indictment to Testify; In the Alternative Admit the Statements of the Said Witnesses in Unredacted Form in Evidence in the Interest of Justice Pursuant to Rules 54, 68 and 98 of the Rules of Procedure and Evidence, 6 September 2001, paras 9-10.
[35] *Ibid.*, para. 9.
[36] Decision on Defence Motion for Leave to Call Rejoinder Witnesses, 30 April 2002, para. 8.
[37] *Ibid.*, para. 12.

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(b) Refusal to View Tapes during the Proceedings

29. The Appellant next asserts that "[t]he Trial Chamber surprisingly accepted audiocassettes [*sic*, videocassettes] of alleged massacre sites in evidence and despite Defence insistence refused to allow same to be viewed in the course of the proceedings."[38]

30. The Appellant did not provide any reference to the record in support of this assertion. In the circumstances, it is very difficult for the Appeals Chamber to assess it. Nevertheless, the Appeals Chamber is aware that, on 6 November 2000, the Defence requested to view some tapes but the Prosecution objected to the Appellant viewing the tapes in their entirety because of witness protection issues.[39] Yet the Prosecution offered a practical solution to address these concerns,[40] and this suggestion was adopted by the Trial Chamber.[41] To the extent that this is the instance to which the Appellant was referring, the Appeals Chamber is not convinced that the Trial Chamber demonstrated any unfairness.

(c) Decisions Relating to Cross-examination of Witnesses

31. The Appellant submits that the Trial Chamber unfairly "denied the Defence the right to cross-examine and challenge the credibility of prosecution witnesses and evidence with prosecution witness statements," while on the other hand ordering disclosure of Defence witness statements to the Prosecution and allowing the Prosecution to use these statements to cross-examine Defence witnesses.[42]

32. The Appellant did not attempt to explain how the transcript excerpts he refers to support his contention that he was unfairly disadvantaged by the Trial Chamber. The Appellant refers to the following:

- Judge Williams asking Defence Counsel about the relevance of a line of questioning[43];
- Defence Counsel receiving a warning pursuant to Rule 46 for objecting to a Trial Chamber finding that a question is irrelevant[44];
- Presiding Judge Ostrovsky reminding Defence Counsel that he has been warned before and that he ought to adhere to the Rules[45];

[38] Semanza Appeal Brief, para. 11b).
[39] T. 6 November 2000, pp. 195-213.
[40] *Ibid.*, pp. 204-207. The Prosecution suggested that Defence Counsel first view the original tapes outside the presence of the Appellant; the Prosecution would then provide the Defence with copies of the tapes expunged of any detail that could lead to the identification of witnesses, copies that could then be viewed by the Appellant. This was to guarantee to the Defence that the expunged tapes had not been modified except to the extent required for witness protection.
[41] *Ibid.*, pp. 208, 212-213.
[42] Semanza Appeal Brief, para. 11d).
[43] T. (French) 6 November 2000 (closed session), pp. 112-113.
[44] *Ibid.*, pp. 151-153.

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- Judge Williams's request to obtain an English translation of a cartoon[46];
- Judge Williams asking Defence Counsel whether he intends to call a particular witness.[47]

The Appeals Chamber finds that these instances do not demonstrate any unfairness or bias on the part of the Trial Chamber.

(d) Protective Measures

33. The Appellant submits that the Trial Chamber decided on 23 August 2000 that protective measures would extend prospectively to all future witnesses the Prosecution intended to call despite the fact that the Prosecution had not applied for this. The Appellant submits that the Trial Chamber thus deprived the Defence of reasonable notice to prepare itself.[48]

34. On 10 December 1998, former Trial Chamber II[49] (before which the case was pending at the time) granted measures to protect the identity of Prosecution witnesses.[50] On 23 August 2000, the Trial Chamber issued a decision in which it noted the Defence's contention that the Prosecution should have applied for protection of the witnesses added at the hearing, but rejected that contention and decided that "the scope of the witness protection provided in the Decision [of 10 December 1998] applies prospectively and covers newly added witness."[51] The Appeals Chamber can see no impropriety in this: Rule 75(A) of the Rules provides that a Trial Chamber has the power to order *proprio motu* appropriate measures for the privacy and protection of victims and witnesses.[52] Further, contrary to the argument of the Appellant, the Defence was not deprived of sufficient notice since the Prosecution was under the obligation to disclose the particulars of its witnesses sufficiently in advance to allow the Defence to prepare for cross-examination[53] and it did so.

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[45] *Ibid.*, p. 198.
[46] T. (French) 8 November 2000 (closed session), pp. 103-105.
[47] T. (French) 6 November 2001 (closed session), pp. 12-13.
[48] Semanza Appeal Brief, para. 11f). The Appellant refers to the Decision on Defence Motion for Disclosure, 23 August 2000, para. 15. However, the correct reference is to the Decision on the Defence Extremely Urgent Application Ex Parte for a Subpoena to compel Consistent Disclosure, Better and Further Particulars, 23 August 2000, para. 15.
[49] Judge William H. Sekule, Presiding, Judges Yakov A. Ostrovsky and Tafazzal H. Khan.
[50] Decision on the Prosecution Motion for the Protection of Witnesses, 10 December 1998.
[51] Decision on the Defence Extremely Urgent Application Ex Parte for a Subpoena to Compel Consistent Disclosure, Better and Further Particulars, 23 August 2000, para. 15.
[52] Rule 75(A) provides:

> A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

[53] Decision on the Prosecution Motion for the Protection of Witnesses, 10 December 1998, para. 7, reaffirmed in the Decision on the Defence Extremely Urgent Application Ex Parte for a Subpoena to Compel Consistent Disclosure, Better and Further Particulars, 23 August 2000, paras 17-18.

(e) The Scheduling Order of 2 May 2002 and the Parties' Closing Briefs

35. The Appellant asserts that the Scheduling Order of 2 May 2002 was unfair as both parties had to file their closing briefs on the same day, thereby depriving the Defence of the possibility of knowing the contents of the Prosecution's closing brief in order to prepare a reply.[54]

36. There is nothing in the Rules to suggest that different dates must be set for each party to file its closing brief. The Appellant misconstrues the purpose of a closing brief, which is not to respond to the other party's closing brief, but to express its own position regarding the charges set out in indictment and the evidence led in the case. The practice generally followed at the ICTR and the ICTY is for both parties to file their closing brief at the same time. Accordingly, the Appeals Chamber finds that there was no impropriety here.

(f) Withdrawal of Photographs Tendered by Prosecution Witness VP

37. The Appellant contends that the Trial Chamber exhibited bias against him when it ordered that certain exhibits be withdrawn and that corresponding parts of the record be expunged. In particular, the Appellant asserts that Judge Williams suggested to withdraw pictures tendered by Prosecution Witness VP because such pictures would tend to support the alibi of the Defence, therefore undermining the Prosecution's case.[55] The Appellant alleges that Judge Williams's suggestion came after the Prosecution purportedly acknowledged that OTP "took part in tampering with the evidence by reproducing the photos in Arusha."[56]

38. The Appeals Chamber finds that the transcript in relation to this instance shows that the Trial Chamber did not commit any impropriety.[57] The photographs were tendered to allow Witness VP to identify certain persons who, on her testimony, had died during the genocide. The fact that the people on the photographs might have been neighbours of the Appellant could not, without more, support his alibi. The photographs were excluded from the record for no other reason than that they had very little probative value and that they could have led to the identification of Witness VP.

(g) Attempts to Greet

39. The Appellant asserts that Judge Williams "in a lengthy, angry and spiteful rebuke" criticized him for attempting to wave at Prosecution witnesses when they were called to testify,

[54] Semanza Appeal Brief, para. 11g).
[55] *Ibid.*, para. 12d).
[56] *Ibid.*, para. 12d).

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while the Trial Chamber relied on Witness XXK's attempt to greet him as evidence of that witness' credibility.[58]

40. The relevant statement by Judge Williams is a s follows:

> The first matter is that we have noticed that when the witness going to the witness box and they are asked to identify the Accused Mr. Semanza. After they have identified them he's waving to them. We do not think that that is appropriate and we would suggest to Mr. Semanza that he discontinue that activity and we would ask you to urge him that he should not continue to do it. That's the first point.[59]

To this, Defence Counsel objected that it was the Prosecution's witness that had waved to the Appellant and that he had simply waved back. Judge Williams replied that he did not know whether the witness had waved to the Appellant, but said that "[w]hoever is waving it's inappropriate and improper and we want an end to be put to that."[60] The President also confirmed that the warning was being addressed to both the Prosecution and the Defence.[61] The Appeals Chamber finds that there was no "lengthy, angry and spiteful rebuke" by Judge Williams.

41. As to the Trial Chamber's reliance on Witness XXK's attempt to greet the Appellant as an indicium of credibility, the Appeals Chamber finds that this does not amount to rewarding the Prosecution for misconduct. First, the transcript for 23 April 2002 shows that Witness XXK was prevented from greeting the Appellant and that the Prosecution explained to Witness XXK that the judges did not allow witnesses to greet the defendant.[62] Second, the Trial Chamber was not countenancing the witness's conduct, but was simply making an observation as to the behaviour of the witness and her attitude towards the Appellant. In evaluating the credibility of witnesses, the Trial Chamber is entitled to make such judgements. Third, the Trial Chamber's evaluation of Witness XXK's credibility was not based only on her attempt to greet the Appellant. The Trial Chamber found that she "clearly held the Accused in high esteem as evidenced by her desire to greet him *and* by her respectful references to him while testifying."[63]

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[57] As noted by the Prosecution, the relevant transcript is that of 4 December 2000 (pages 84-90), not that of 15 December 2000 (as referred to by the Appellant).
[58] Semanza Appeal Brief, paras 94-95.
[59] T. 9 November 2000, p. 5.
[60] *Ibid.*, p. 6.
[61] *Ibid.*, p. 7.
[62] T. 23 April 2002 (closed session), p. 18.
[63] Trial Judgement, para. 111 (emphasis added).

4. Failure to Recuse

42. The Appellant contends that the Trial Chamber should have recused itself once the Appeals Chamber had ruled that the Trial Chamber's failure to hear his *habeas corpus* motion violated his rights.[64]

43. The Appeals Chamber finds that this argument is unpersuasive. The Appeals Chamber did not find that the violation of the Appellant's rights was attributable to the Trial Chamber; rather, it found that it was because the writ for *habeas corpus* was not placed on the cause list by the Registry that it had not been heard by the Trial Chamber.[65] Further, the Appeals Chamber found that Defence Counsel, having filed the writ on 29 September 1997, did not refer to it for a substantial period of time and "became interested in the fate of his writ of habeas corpus only after the Appeals Chamber's 3 November 1999 Decision in the *Barayagwiza* case."[66] The Appeals Chamber found that Defence Counsel should have made representations to either the Registry or the Prosecution in order to take the matter of the writ to conclusion, and found that Defence Counsel had failed in his duty of diligence.[67] Accordingly, there was no need for the Trial Chamber to recuse itself and the failure to do so certainly did not give rise to an apprehension of bias.

5. Alleged Discrepancies with *Bisengimana* Indictment

44. The Appellant contends that the Trial Chamber failed to take into account important discrepancies between the charges against him in his own Indictment and the facts attributed to him in the *Bisengimana* indictment, discrepancies that he says were identified in the Defence's Closing Brief. The Appellant asserts that an impartial panel would have stayed the proceedings and exercised its powers under Rule 89(A) to (D) and Rule 90 (G) of the Rules, Article 19(1) of the Statute, or would have taken judicial notice of the *Bisengimana* indictment under Rule 94(B) of the Rules.[68]

45. The Appeals Chamber does not consider this assertion sufficient to establish an apprehension of bias. The Defence only raised the issue of alleged discrepancies with the *Bisengimana* indictment in its Closing Brief. If the Defence believed that the *Bisengimana* indictment was beneficial and somehow exculpatory to the Appellant, it should have raised this during the trial, the *Bisengimana* indictment having been made public in July 2000, *i.e.*, before the start of the trial in the present case. In fact, the *Bisengimana* Indictment was never introduced in

[64] Semanza Appeal Brief, para. 11h).
[65] Decision, 31 May 2000 ("Semanza Appeal Decision"), para. 114.
[66] *Ibid.*, para. 118.
[67] *Ibid.*, paras 120-121.
[68] Semanza Appeal Brief, para. 13.

the record and the Trial Chamber was under no obligation to address an argument that was raised for the first time in the Defence's Closing Brief. Moreover, even if the Trial Chamber could have taken notice of the *Bisengimana* indictment on its own, it was required to concern itself with the Indictment and the evidence in the case before it.

6. Alleged Failure to Rule on Issues Submitted for Determination

(a) Audiocassettes of Intercepted Telephone Conversations

46. On 18 April 2001, the Prosecution tendered two audiocassettes that were received by the Trial Chamber as Exhibit P11 with no objection from the Defence.[69] These audiocassettes contained recordings of intercepted telephone conversations. The Appellant contends that he applied to the Trial Chamber to order the Prosecution to make available for cross-examination the persons who intercepted and recorded the telephone conversations; the Appellant maintains that the Trial Chamber never ruled on the matter.[70] This, the Appellant writes, "was a clear miscarriage of justice due to the bias and neglect on the part of the Chamber."[71]

47. The Appellant has not referred to any specific portion of the transcript of 18 April 2001 in support of his argument. In fact, the transcript of 18 April 2001 does not indicate that the Defence made a request to have the possibility to cross-examine the persons who intercepted and recorded the conversations. The Appeals Chamber finds that, in the circumstances, the Appellant has not demonstrated any apprehension of bias.

(b) Alleged Failure to Rule on All Issues Raised in Motion of 14 July 2000

48. On 14 July 2000, the Defence filed a motion alleging a series of violations of the Rules and Statute.[72] The Appellant asserts that "in a show of bias," the Trial Chamber minimized some of the Defence's concerns and failed to rule on most of the issues submitted for determination.[73]

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[69] T. 18 April 2001, pp. 24-25.

[70] Semanza Appeal Brief, para. 14d). In his Reply of 15 December 2003, the Appellant writes (para. 64):

> The Chamber did not make available for cross-examination [] the person in the RPF secretariat in Kigali who intercepted the telephone conversations, nor did it order the production of the original cassettes from which the copies were made even though it promised to look into the matter later.

The Appellant does not refer to any portion of the record in support of this contention.

[71] Semanza Appeal Brief, para. 14d).

[72] Defence Supplementary Motion for Dismissal of Entire Proceedings Due to Persistent and Continuing Violations of the Rules of Procedure and Evidence and the Statute of the Tribunal Brought Pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence (CF. Orders of the III [sic] Trial Chambers [sic] of 6 July 2000, Page 55, Lines 1-4), 14 July 2000.

[73] Semanza Appeal Brief, para. 14e).

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49. The Appellant first contends that the Trial Chamber minimized the Defence concerns about the successive amendments to the Indictment by stating at paragraph 24 of the Trial Judgement that these amendments only corrected translation errors and clarified facts, as well as by stating at paragraph 42 of the Trial Judgement that no pre-trial challenges to the Indictment were ever made. This is a mischaracterization of paragraphs 24 and 42 of the Trial Judgement. Paragraph 24 clearly distinguishes the amended Indictment filed on 23 June 1999 (in which seven new counts were added) and the second and third amended Indictments, which only corrected translation errors or clarified facts as requested by the Trial Chamber.[74] Reference could also be made to paragraphs 20-26 and 34 of the Decision of 11 September 2000, which explain the reasons for and extent of the successive amendments to the Indictment.[75] As to paragraph 42 of the Trial Judgement, the Trial Chamber wrote that "[t]he Defence has not offered any explanation for its delay in raising *many* of its specific challenges to the Indictment until its Closing Brief";[76] the Trial Chamber did not say that no pre-trial challenges to the Indictment were ever made.[77]

50. Second, the Appellant asserts that, in its Decision of 11 September 2000, the Trial Chamber failed to make findings on most of the Defence's submissions. However, the Appellant has not identified which issues raised in the motion filed on 14 July 2000 have not been decided by the Trial Chamber in its Decision of 11 September 2000. In fact, it seems that the Trial Chamber has ruled on all points raised by the Defence: Alleged Non-Disclosure of Supporting Materials,[78] Lack of Supporting Materials for Amended Indictments and Failure to Seek Leave to Amend the Indictment,[79] Disclosure of Witness Statements,[80] Non-Disclosure of Witnesses' Identities,[81] Prosecutor's Request to Admit Facts,[82] and Lack of Jurisdiction.[83]

51. Third, the Appellant argues that the Trial Chamber ignored the Defence's objections to certain facts being judicially noticed. However, the Decision on Judicial Notice recognizes that the Defence objected to some of the elements suggested to be taken judicial notice of,[84] but the Trial

[74] *See infra* sections II. B. 2. and II. B. 6.
[75] Decision on the Defence Motion for Dismissal of the Entire Proceedings Due to Persistent and Continuous Violations of the Rights of the Accused, Rules of Procedure and Evidence and the Statute of the Tribunal and Abuse of Process, 11 September 2000.
[76] Emphasis added.
[77] *See also infra* section II. B. 8.
[78] Decision on the Defence Motion for Dismissal of the Entire Proceedings Due to Persistent and Continuous Violations of the Rights of the Accused, Rules of Procedure and Evidence and the Statute of the Tribunal and Abuse of Process, 11 September 2000, paras 18-19.
[79] *Ibid.*, paras 20-26.
[80] *Ibid.*, para. 27.
[81] *Ibid.*, para. 28.
[82] *Ibid.*, para. 29.
[83] *Ibid.*, para. 30.
[84] Decision on Judicial Notice, paras 8-15.

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Chamber considered that these objections were unreasonable.[85] Consequently, the Appeals Chamber finds that these instances do not support the Appellant's contention of bias.

(c) The Amicus Curiae Brief Filed by Belgium

52. The Appellant asserts that the Trial Chamber's failure to make a finding on an *amicus* brief filed by the Government of the Kingdom of Belgium and the reply of the Defence deprived the Appellant of his right to a fair trial and violated Article 22(2) of the Statute.[86]

53. The Appeals Chamber finds that the Appellant has not demonstrated how such an alleged failure resulted in unfairness or led to an apprehension of bias.

7. Right to be Present at Status Conferences

54. The Appellant alleges that, "throughout most of the Proceedings," the Trial Chamber denied him the right to be present at status conferences.[87] The Appellant has not referred to any portion of the record that would indicate that he requested to be present at status conferences or that he was ever denied that right. The Appeals Chamber is not convinced that the Appellant has satisfied his burden in relation to this element.

8. Prosecuting Counsel Joining ICTR Chambers Before Judgement

55. The Appellant claims that a perception of bias attaches to the transfer of Mr. Chile Eboe-Osuji (who had been acting for the Prosecution in this case since 1999) to ICTR Chambers (a transfer which occurred sometime between the completion of the case in June 2002 and the delivery of the Trial Judgement on 15 May 2003).[88]

56. The Appeals Chamber is not convinced that this leads to an apprehension of bias since Mr. Eboe-Osuji became Senior Legal Officer of Trial Chamber II and, as such, he could not have played any role in the deliberations of Trial Chamber III in this case. As explained by the Prosecution:

> Deliberations for judgments of the Tribunal are strictly privileged and confined to the staff of each Trial Chamber; staff of different Trial Chambers are thus prohibited from discussing the substance of any Judgments with any other person, including the staff of the other Trial Chambers.[89]

[85] *Ibid.*, para. 31.
[86] Semanza Appeal Brief, para. 17.
[87] *Ibid.*, para. 18a).
[88] *Ibid.*, para. 18b).
[89] Prosecution Response, para. 44.

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9. Language in Which Trial Judgement was Delivered

57. Under the title "Inadequate guarantees to be tried in language Accused understood," the Appellant argues that the Trial Judgement was delivered only in English on 15 May 2003, despite paragraph 594 stating that the Trial Judgement was done in English and French.[90] The Appeals Chamber notes that the fact that the French translation of the Trial Judgement might not have been ready at the time the Trial Judgement was rendered does not establish unfairness, apprehension of bias or any impropriety on the part of the Tribunal. What is important is that, throughout the proceedings, the Appellant had access to simultaneous translation in French or Kinyarwanda, and that, on 15 May 2003, a summary of the Trial Judgement was read in English, French and Kinyarwanda. This was done and, therefore, there was no apprehension of bias in this regard.

10. Conclusion

58. The Appeals Chamber finds that, on the basis of the foregoing, the Appellant has not rebutted the presumption of impartiality of the Trial Chamber.

B. The Indictment (Ground 2)

1. Initial Appearance, Disclosure, and Confirmation

59. The Appellant contends that the Indictment and initial appearance were flawed in a variety of respects. He begins with the argument that his initial arrest in Cameroon was not consistent with Rule 53 because he was served with the Decision confirming the *Barayagwiza* indictment rather than with his own Indictment.[91] He further maintains that the initial Indictment did not comply with Article 17 of the Statute and Rule 47(B) & (C) of the Rules of Procedure and Evidence,[92] and that the Prosecution's initial disclosure did not comport with the requirements of Rule 66(A)(1), apparently because the disclosed Indictment included redactions and used a number of pseudonyms.[93]

60. The Appellant's arguments were largely addressed by the Appeals Chamber's earlier Decision in this case dated 31 May 2000, in which the Chamber found that "the Appellant had been informed of the nature of the crimes for which he was being prosecuted by the Prosecution on 3 May 1996, on which date the Yaoundé Court of Appeal deferred judgment on the extradition

[90] Semanza Appeal Brief, para. 18c).
[91] *Ibid.*, para. 25.
[92] *Ibid.*, para. 28. Article 17 relates to the investigation and preparation of the indictment. Rule 66(A)(1) provides that, within 30 days of the accused's initial appearance, the Prosecutor shall disclose to the Defence "copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused."

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request against the Appellant from Rwanda."[94] The Appeals Chamber concluded that there was "no doubt" that the Appellant's counsel "had received a copy of the submissions by the Office of the Public Prosecutor," and that "it is reasonable to infer that the Appellant had been informed in substance of the nature of the crimes for which he was being sought by the Prosecutor of the Tribunal."[95]

61. The Appellant makes other, more specific arguments regarding his initial arrest in Cameroon, and those arguments are addressed in later sections of the Judgement.[96] On the question of how that initial arrest failed to comport with Rule 53, however, and how it relates to his initial appearance and confirmation of the Indictment, the Appellant offers little explanation to support his allegations. Indeed, his contentions are conclusory. He contends that he was served with a redacted Indictment in violation of Rule 66, but he does not explain how much material was redacted or how those redactions prevented him from being fully apprised of the charges against him.[97] Notwithstanding, the Appeals Chamber is satisfied that his rights were fully respected. As noted in the Appeals Chamber Decision of 31 May 2000, "the Appellant was formally informed of the charges laid against him by the Tribunal when the Order issued under Rule 40 *bis* was served on him in Cameroon."[98] The Appeals Chamber accordingly concludes that the Appellant's arguments are without merit.

2. Amendments to the Indictment

62. The Appellant offers more specific arguments relating to the manner in which the Prosecution amended the Indictment against him.[99] In assessing these contentions, it is helpful at the outset to review the course of events preceding trial in this case.

63. The Prosecution filed its initial Indictment against the Appellant on 16 October 1997. That initial Indictment contained seven counts and was confirmed by Judge Lennart Aspegren on 23 October 1997.[100] Nearly two years later, on 31 May 1999, the Prosecution sought leave to amend the Indictment by adding seven new counts, and the Trial Chamber orally granted the application on

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[93] *Ibid.*, para. 25-26.
[94] Semanza Appeal Decision, 31 May 2000, para. 81.
[95] *Ibid.*, para. 85.
[96] *See infra* section II.L.4.
[97] Semanza Appeal Brief, para. 25. To the extent it is clear, the Appellant's argument with respect to Rule 66 appears to focus in part on the Prosecution's use of pseudonyms. Semanza Appeal Brief para. 26. That argument is addressed later in the Judgement. *See infra* section II.B.7.
[98] Semanza Appeal Decision, 31 May 2000, para. 88.
[99] The amendments to the indictment were the subject of considerable discussion at the appeals hearing. *See* T. 14 Dec. 2004, pp. 6-7, 15, 36, 39-42, 67-69.
[100] Trial Judgement, para. 5.

18 June 1999.[101] The Chamber also directed the Prosecution to provide further specificity regarding the facts relating to the new charges. On 23 June 1999, the Prosecution filed its First Amended Indictment, which contained fourteen counts.[102] The first seven counts of the First Amended Indictment were the same as the seven counts contained in the first Indictment. The seven additional counts were: rape as a crime against humanity (Counts 8 and 10); other gender-related crimes that constitute serious violations of Common Article 3 to the Geneva Conventions (Count 9); torture as a crime against humanity (Count 11); murder as a crime against humanity (Counts 12 and 14); and other serious violations of Common Article 3 to the Geneva Conventions (Count 13).[103]

64. The next day, the Appellant made an initial appearance in relation to the First Amended Indictment and pleaded not guilty on all new counts.[104] The Prosecution then orally sought leave to amend the First Amended Indictment in order to correct minor translation discrepancies between the English and French versions. Again, the Chamber orally granted the Prosecution's request, and, on 2 July 1999, the Prosecution filed its Second Amended Indictment. Finally, on 12 October 1999, the Prosecution filed the Third Amended Indictment, which was drafted in compliance with the Trial Chamber's order of 1 September 1999 calling for greater factual precision with respect to the new charges.[105] The Third Amended Indictment is the final version of the Prosecution's charges.

65. The Appellant argues that he pleaded to the First Amended Indictment on 24 June 1999, before the Prosecution complied with the Trial Chamber's 18 June 1999 oral instruction that the Prosecution provide greater factual specificity with respect to the new counts.[106] He adds that the Prosecution's later amendment, resulting in the Third Amended Indictment, was not sufficient to put the Appellant on proper notice of the case against him.[107]

66. The Prosecution responds that the First Amended Indictment filed on 23 June 1999 – the version to which the Appellant pleaded not guilty on 24 June 1999 – did in fact comply with the Trial Chamber's oral injunction to clarify the statement of facts.[108] Then, "immediately after the Accused's plea," the Prosecution wanted to make a minor change in wording in the English-language version of the Indictment to make it conform with the French-language version.[109] These

[101] *Ibid.*, para. 6. This determination was embodied in a written decision issued 1 September 1999.
[102] *Ibid.*
[103] First Amended Indictment, 5-7.
[104] T. 24 June 1999, 37-41.
[105] Trial Judgement, para. 6.
[106] Semanza Appeal Brief, para. 34.
[107] *Ibid.*, para. 35.
[108] T. 14 December 2004, p. 68.
[109] *Ibid.*

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corrections were made in the Second Amended Indictment on 2 July 1999.[110] "Because the Accused had pleaded to the French version of the indictment," the Prosecution submits, "the Chamber did not ask him to plead again."[111] Finally, on 12 October 1999, the Prosecution filed its Third Amendment Indictment in response to the Trial Chamber's decision dated 1 September 1999, which ordered the Prosecution to "provide greater specificity as to facts related to the new charges."[112]

67. Under the Tribunal's Statute, Rules, and case law, an accused has a right "[t]o be informed promptly and in detail . . . of the nature and cause of the charge against him."[113] The charge or charges are to be embodied in an indictment that "set[s] forth the name and particulars of the suspect"[114] and that "contain[s] a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute."[115] The ultimate concern in considering questions related to an indictment and its amendments is whether the Defence was informed sufficiently and clearly enough to be able to prepare its case.[116]

68. The Appeals Chamber concludes that the Appellant's rights were protected by the Indictment and amendments in this case. The First Amended Indictment, which contained the entirety of the Prosecution's legal charges, placed the Appellant on ample notice of the charges against him. The Prosecution filed the Second and Third Amended Indictments, as recounted above, only to correct translation errors and to add specific facts consistent with the Trial Chamber's order. The translation correction in the Second Amended Indictment changed only one small phrase in Count 9 of the English version to make it compatible with the French version,[117] and the Third Amended Indictment merely contained additional information concerning the counts arising out of Common Article 3 and Additional Protocol II. These minor changes neither affected the substance of the Indictment nor deprived the Appellant of meaningful notice of the case against him.

[110] *Ibid.*
[111] *Ibid.*
[112] Trial Chamber Decision on the "Motion by the Office of the Prosecutor for Leave to Amend the Indictment," 1 Sept. 1999, p. 2.
[113] Article 20(4)(a) of the Statute.
[114] Rule 47(C).
[115] Article 17(4).
[116] *Kupreškić et al.* Appeal Judgement, para. 88.
[117] The second amended indictment replaced the phrase "enforced prostitution" in Count 9 with "sexual abuse."

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3. Rights to be Represented by Counsel of Choice During Plea and to Plead to Subsequent Amended Indictments

69. The Appellant contends that his right to be represented by counsel of his choice was infringed when duty counsel was appointed to represent him without his or his assigned counsel's consent.[118] He also argues that the Trial Chamber erred by requiring him to communicate only through duty counsel rather than on his own behalf,[119] and that the Presiding Judge inadequately safeguarded his rights to be represented by counsel and to understand the nature of the charges against him. For these reasons, he submits, the hearing violated Articles 19 and 20 of the Tribunal's Statute and Rule 47 of the Rules.[120]

70. Mr. Bharat B. Chadha appeared as duty counsel to represent the Appellant "solely" to deal with the initial appearance at the hearing on 24 June 1999.[121] At the hearing, Mr. Chadha stated that the Appellant was "unhappy" with the appointment and wanted his principal counsel to "confirm in writing that he agreed" with the arrangement.[122] The Appellant accordingly instructed Mr. Chadha not to speak on his behalf.[123]

71. Speaking on his own behalf, the Appellant then stated at the hearing that his objection was to the assignment of duty counsel, not to the entry of a plea on the new counts.[124] "As far as I'm concerned," he explained, "with regard to today's proceedings, concerning whether I should plead guilty or not, I can do that, there's no problem with that."[125] Later, after reiterating that he was prepared to plead to the new charges[126] and that he understood the charges against him, he pleaded not guilty on each of the counts.[127]

72. From the 24 June 1999 hearing transcript, it is clear that the Appellant was on full notice of the charges against him, that he understood those charges, and that he did not object to entering a plea on his own behalf with respect to the new charges. The Appellant proceeded to plead not guilty to each count at the hearing.

73. On appeal, the Appellant offers no substantial argument that he was prejudiced by the conduct of the initial appearance. In what appears to be an argument concerning prejudice, the

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[118] Semanza Appeal Brief, para. 38.
[119] *Ibid.*, para. 39-40.
[120] *Ibid.*, para. 37; *see also supra* section II.A.2.
[121] Trial Chamber T. 24 June 1999, p. 4.
[122] *Ibid.*, p. 5.
[123] *Ibid.*
[124] *Ibid.*, p. 10.
[125] *Ibid.*
[126] T. 24 June 1999, p. 12.
[127] *Ibid.*, pp. 37-41.

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Appellant suggests that, had counsel been present and the Presiding Judge ensured that the Indictment was in a language the Appellant understood, "then the finding at para. 24 of the judgement would have been unnecessary."[128] That argument is a *non sequitur*. Paragraph 24 of the Trial Judgement is not really a "finding" at all: it simply recites the chronology of the Prosecution's amendments to the Indictment and the Appellant's initial appearance. Nothing contained in that paragraph would have changed if the Appellant had been represented by different counsel at the hearing. Accordingly, the Appeals Chamber concludes that the Appellant has shown no prejudice concerning his initial appearance.

4. Failure to Plead to the Amended Indictments

74. The Appellant next argues that the Trial Chamber erred when it failed to permit him to enter a new plea on the Second and Third Amended Indictments. He notes that the Trial Chamber explained that no plea was required because the amendments merely corrected transcription errors and clarified facts, but he contends that the Trial Chamber did not precisely identify these changes, and that the alterations were fundamental to the competency of the Indictment.[129]

75. Rule 50(B) of the Rules of Procedure and Evidence provides:

> If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

76. As explained above, the Second and Third Amended Indictments did not add any new charges.[130] Contrary to the Appellant's arguments, the Prosecution's amendments were minor and did not materially alter the nature of the Indictment, much less add new counts. Rule 50(B) was accordingly not triggered. The Appeals Chamber is satisfied that the Appellant was fully apprised of all of the charges against him, and that he understood those charges, when he decided to plead not guilty at the 24 June 1999 hearing.

5. Other Objections

77. By a similar token, the Appellant argues that he was deprived of the right to understand the charges against him because the amendments ought to have been completed prior to the 24 June 1999 hearing and in a language that the Appellant understood.[131] As noted previously, however, the Appellant insisted at the hearing that he understood the charges against him and wished to plead not guilty. Again, the Appeals Chamber concludes that the Appellant has failed to show that he was

[128] Semanza Appeal Brief, para. 42.
[129] *Ibid.*, paras 43-45.
[130] *See supra* para. 69.

prejudiced in any way. The amendments added no new counts; the Appellant thus understood all of the information relevant to his entering a plea.

6. Nature of the Amendments

78. The Appellant contends that he should have been permitted to enter a plea on the First Amended Indictment because the amendments "supplemented new core elements" with respect to the counts on genocide, crimes against humanity, and Common Article 3.[132] He explains that the new elements added in the First Amended Indictment were the elements of conflict relating to crimes against humanity and Common Article 3, emphasizing that the word "Tutsi" replaced "civilian population" in the First Amended Indictment's earlier version and that the amendments added a reference to the Rwandan Government policy based on Tutsi ethnic identification.[133] He also notes that his name appeared in the First Amended Indictment's specific allegations for the first time following the 24 June 1999 plea hearing.[134] He argues that the document he pleaded to was not the First Amended Indictment as such, but rather a copy of the draft that was annexed to the motion for the amendment.[135] Thus, he submits, "[t]he trial, conviction, and sentencing . . . were . . . conducted on an amended indictment to which no plea was taken. . . ."[136]

79. In making this argument, the Appellant has accurately represented neither the timing nor the content of the amendments to the Indictment. First, contrary to the Appellant's contention, the First Amended Indictment was filed on 23 July 1999 – the day before the Appellant entered his plea of not guilty. Thus, this First Amended Indictment, not the initial Indictment, is relevant for considering the Appellant's plea and for comparison with the Second and Third Amended Indictments. An examination of the First Amended Indictment reveals that it contains all of the terms that the Appellant claims were missing from the Indictment to which he pleaded not guilty. The First Amended Indictment repeatedly uses the Appellant's name in the statement of facts, and in the disputed paragraph 3.19 it uses the term "Tutsi," not, as the Appellant claims, the more general phrase "civilian population." Thus, even if the Appellant were correct that the terminology that he cites affected "core elements" of the allegations against him, the relevant changes to the Indictment were embodied in the First Amended Indictment, *before* the Appellant pleaded not guilty.

[131] *Ibid.*, paras 47-50.
[132] *Ibid.*, para. 51.
[133] *Ibid.*, paras 53-55.
[134] *Ibid.*, para. 54.
[135] *Ibid.*, para. 57.
[136] *Ibid.*, para. 53.

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80. The Appellant relies on a decision in the *Blaškić* case for the proposition that a confirming judge must grant leave to add a new count to an indictment.[137] As explained above, however, no new counts were added in this case following the First Amended Indictment, and thus no new plea hearing was required. The Appeals Chamber accordingly determines that the amendments were consistent with the Tribunal's Statute and Rules, and that the Appellant's rights were not infringed.

7. Protection of Witnesses

81. The Appellant challenges various efforts by the Prosecution and the Trial Chamber to protect the identity of witnesses during the course of the trial. The Appellant argues, for instance, that the Prosecution infringed his right to a public trial by using pseudonyms for various witnesses.[138] The Appellant contends that the Prosecution did not properly request protection of these witnesses under Article 21 of the Tribunal's Statute or Rules 53(c) and 75, and he suggests that the Trial Chamber improperly instituted these measures of its own volition.[139] As a result of these witness-protection measures, the Appellant maintains, the rules and statutory provisions protecting the Appellant's right to a public trial – including Articles 18 and 20, as well as Rules 52 and 78 – were violated.[140] He adds that the standards applied by the Trial Chamber in rejecting his requests for disclosure were not consistent with the *lex fori* – that is, the standards applied by the Rwandan courts – and that this deficiency unfairly disadvantaged him.[141] Finally, he contends that the Trial Chamber improperly extended the witness protection measures prospectively to cover all prosecution witnesses.[142] The Trial Chamber's approach, he argues, was not consistent with Rule 69 because it was not limited to exceptional circumstances.

82. The Appeals Chamber notes that the Appellant's challenge to the Prosecution's use of pseudonyms is highly imprecise. In a different section of his brief, the Appellant identifies a number of witnesses for whom the Prosecution used pseudonyms in the initial supporting material, but he acknowledges that the Prosecution served Rule 66(A)(1) material with respect to these witnesses and that none of the witnesses testified at trial.[143] Then, in the portion of his brief that challenges the use of pseudonyms, the Appellant does not specify which witnesses were improperly identified by pseudonyms, nor does he argue that the identity of any witness who testified at trial was not properly disclosed to him. Absent any contention that Personal Information Statement

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[137] Semanza Appeal Brief, para. 58, erroneously referring to a decision dated 23 May 1994.
[138] *Ibid.*, paras 59-60.
[139] *Ibid.*, paras 61-62.
[140] *Ibid.*, para. 63.
[141] *Ibid.*, para. 64.
[142] *Ibid.*, para. 66; *see also supra* section II.A.3.a.
[143] Semanza Appeal Brief., para. 26. The witnesses cited by the Appellant are AA, JJ, HH, NN, LL, EE, GG, CC, 38, BB, II, DD, FF, MM, and KK.

forms were not duly used during the course of the proceedings to identify the Prosecution witnesses, the Appeals Chamber finds that the Appellant's argument concerning pseudonyms fails.

83. Even if the Appellant had argued with greater clarity that pseudonyms should not have been used for specific trial witnesses, the Trial Chamber correctly addressed that argument. At paragraphs 57 and 58 of its Judgement, the Chamber explained the witness protection measures used during the proceedings. The Chamber specifically found that the Prosecution had reasonable grounds for using pseudonyms in the Indictment for Victims A, B, D through H and J, whose names, if identified, would have disclosed the identity of protected witnesses.[144] The Chamber further found that the Prosecution adequately disclosed to the Defence the particulars of the protected witnesses pursuant to the witness protection order.[145] The Trial Chamber did conclude that one pseudonym used by the Prosecution was inappropriate, finding that there was no apparent victim or witness protection concern that required the use of the pseudonym rather than the victim's name.[146] But the Chamber determined that the Appellant was not prejudiced by this error because the identity of the witness in question was made apparent in another witness's written statement.[147] The Appeals Chamber is satisfied that the Trial Chamber carefully and correctly addressed his arguments, and that the Prosecution's use of pseudonyms violated neither the Statute nor the Rules of the Tribunal.

84. The Appeals Chamber further notes that the Appellant's contention that the Indictment was inconsistent with the *lex fori* is without merit. The validity of the Indictment is governed by the Statute, Rules, and case law of the Tribunal – not, as the Appellant contends, by Rwandan law.

8. Vagueness and Lack of Specificity

85. The accused has the right to be informed of the nature and cause of the charges against him or her.[148] This translates into an obligation for 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."[149] As explained in the *Kupreškić et al.* Appeal Judgement, "the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defense."[150]

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[144] Trial Judgement, para. 57.
[145] *Ibid.*
[146] *Ibid.*, para. 58.
[147] *Ibid.*
[148] Article 20(4)(a) of the Statute; *see also* Article 17(4) of the Statute and Rules 47(C).
[149] *Ntakirutimana* Appeal Judgement, para. 25; *Kupreškić et al.* Appeal Judgement, para. 88.
[150] *Kupreškić et al.* Appeal Judgement, para. 88.

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86. Referring to these principles, the Appellant argues that the Indictment against him was vague and imprecise and failed to put him on adequate notice to allow him to prepare his defence.[151] He contends, for instance, that the Prosecution failed to divulge the location in Musha *secteur* of one of the alleged crimes or to disclose the identity of the victims.[152] He further notes that the Trial Chamber convicted him of the events detailed in the testimony of Prosecution Witness VV. According to the Appellant, the Trial Chamber found that the events about which VV testified occurred in Bicumbi, which is located in Nzige *secteur* – not, as the Indictment alleged, in Gikoro commune. Thus, the Appellant argues, the Trial Chamber convicted him for crimes that were not alleged in the Indictment.[153] Finally, he contends that the Trial Chamber erred in failing to hear his pre-trial challenges to the Indictment.[154]

87. The Appeals Chamber finds that the Prosecution was not imprecise in the manner the Appellant claims, and that the Appellant was not prevented from properly preparing his defence. Contrary to the Appellant's arguments, Witness VV did not refer to being in Nzige sector.[155] Rather, she testified that the events occurred in Gikoro commune near Musha church, which is consistent with the Trial Chamber's findings.[156]

88. Moreover, the Trial Chamber did not, as the Appellant claims, decline to review any of his vagueness challenges. Instead, the Chamber noted that "allegations of vagueness should normally be dealt with at the pre-trial stage," citing the Appeals Chamber's decision in *Kupreškić*, and it stated that the Appellant had not explained his delay in raising many of his specific challenges to the Indictment.[157] But the Chamber nonetheless explained that its "duty to ensure the integrity of the proceedings and safeguard the rights of the Accused" warranted "full consideration" of his arguments.[158] The Chamber then carefully considered the specificity of the Indictment and in fact found a number of paragraphs to be impermissibly vague.[159] Thus, to the extent the Appellant contends that the Trial Chamber did not consider any of his pre-trial challenges, the Appeals Chamber concludes that his argument fails.

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[151] Semanza Appeal Brief, para. 71.
[152] *Ibid.*, paras 71-72. *See also* T. 14 December 2004, p. 2.
[153] *Ibid.*, paras 72-74.
[154] *Ibid.*, paras 75-79.
[155] The Appeals Chamber notes that the Trial Chamber erred in stating that "Prosecution Witness VV" was "hiding in Nzige sector." Trial Judgement para. 180. The Witness had never referred to being in the sector. This misstatement, however, has no bearing on the Trial Chamber's findings.
[156] T. 29 March 2001, pp. 15, 21-22.
[157] Trial Judgement, para. 42.
[158] *Ibid.*
[159] *Ibid.*, paras 50-52.

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C. Amendments to the Indictment (Ground 3)

89. In Ground 3 of his appeal, the Appellant contends that "the modifications effected by the Judges on the indictment at the judgement stage profoundly altered the nature of the charges against the Accused."[160] He explains that the Trial Chamber substantially amended the Indictment by considering certain paragraphs of the Indictment – namely, paragraphs 3.18 and 3.11 – together, which, he maintains, altered the nature of the Indictment. Contending that the Trial Chamber lacked the authority to amend the Indictment, the Appellant argues that the Chamber violated Articles 18, 19, and 20 of the Tribunal's Statute, and that therefore the Appeals Chamber should vacate the entire Judgement.[161]

90. The Trial Chamber did not fundamentally alter or amend the Indictment as the Appellant contends. The Trial Chamber simply considered the factual allegations relevant to separate charges together on the basis of their overlapping and related circumstances. Far from effecting an amendment of the Indictment, this aggregation of facts is a valid, indeed common, method of legal analysis. The Appeals Chamber recalls that indictments must be read as a whole.[162] The Appeals Chamber is satisfied that the Trial Chamber committed no error in this respect.

D. Alibi and Rebuttal (Ground 4)

1. Introduction

91. At trial, the Appellant raised an alibi to establish that he could not have committed the crimes for which he was indicted. The Appellant maintained that he remained at his home in Gahengeri from 28 March 1994 until the 8 April 1994, in observation of the traditional period of mourning after an unknown assailant had killed his daughter.[163] On the evening of 8 April 1994, the Appellant and his family were forced to flee the region because their home had come under attack.[164] In their flight, the Appellant and his family were assisted by a neighbour called Etienne Mbaraga "Bizuru", a driver of the nearby APEGA school.[165] The Appellant and his family spent the first night in Nzige.[166] On the morning of 9 April 1994, the Appellant went to the Nzige commune office to make a few phone calls, including a phone call to Kanombe Camp in Kigali.[167] While the Appellant was there, he learned that Bizuru – who had just left Nzige to bring back his

[160] Semanza Appeal Brief, para. 80.
[161] *Ibid.*, paras 81-83.
[162] *See, e.g., Kordić* Appeal Judgement, para. 133.
[163] Trial Judgement, para. 83.
[164] *Ibid.*
[165] *Ibid.*, paras 94-96.
[166] *Ibid.*, para. 112.
[167] *Ibid.*, para. 113.

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family – had been killed and his vehicle burned.[168] Immediately after learning this, the Appellant (and his family) left Nzige and took the Bugesera road to a friend's home in Ruhango, Gitarama prefecture, arriving there around 11:00 p.m (9 April 1994).[169] The Appellant remained in Ruhango until 18 April 1994, travelling daily to Gitarama town, to check on his business.[170] The Appellant then relocated to Murambi Center in Gitarama town.[171] On 15 May 1994, the *Inkotanyi* advance forced the Appellant to flee to Gisenyi, where he remained until crossing into Goma, Zaire, on 17 July 1994.[172]

92. Submitting that the Defence had not provided notice of its intent to plead an alibi as required by Rule 67(A)(ii)(a) of the Rules, the Prosecution sought leave from the Trial Chamber to present evidence in rebuttal.[173] The Trial Chamber allowed this.[174] In rebuttal, the Prosecution called three witnesses.[175] In particular, Witness XXK testified that the Appellant fled the region not on 8-9 April 1994, but on 18 or 19 April 1994, together with other residents of Bicumbi.[176]

93. In the Trial Judgement, the Trial Chamber expressed strong doubts about the credibility of the alibi. It first recalled that the Defence had not provided the advance notice required by Rule 67(A) of the Rules, rejected the Defence's contentions to the contrary, and declared that it was not impressed with the Defence's explanations for its failure to provide proper notice.[177] Nonetheless, the Trial Chamber emphasized that it fully considered the alibi in light of Rule 67(B) of the Rules.[178] The Trial Chamber added, however, that "where, as in this case, the Defence fails to show good cause for its failure to act in accordance with Rule 67(A)(ii)(a), the Chamber may take into account this failure when weighing the credibility of the alibi [...]."[179] The Trial Chamber then reviewed the evidence presented by the Defence in support of the alibi, as well as the evidence in rebuttal adduced by the Prosecution.[180] The Trial Chamber concluded that a significant portion of the evidence in support of the alibi was incredible and unreliable, and that the alibi appeared to be an afterthought.[181] The Trial Chamber stressed that this in no way undermined the Appellant's presumption of innocence, that the Prosecution alone bore the burden of proving the Appellant's

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[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*, para. 121.
[171] *Ibid.*
[172] *Ibid.*
[173] Prosecutor's Motion for Leave to Call Rebuttal Evidence (Rules 54, 89(b), 89(c), 85(a)), 5 March 2002; Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence (Rules 54, 89(b), 89(c), 85(a)), 7 March 2002.
[174] Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, 27 March 2002.
[175] Witness DCH, Witness XXK and Expert Witness Guichaoua.
[176] T. 23 April 2002 (closed session), pp. 18, 113.
[177] Trial Judgement, paras 77-81.
[178] *Ibid.*, para. 82.
[179] *Ibid.*, para. 82.
[180] *Ibid.*, paras 83-146.

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guilt beyond a reasonable doubt, and that the alibi evidence would be fully considered in determining whether the Prosecution had proved beyond reasonable doubt the Appellant's involvement in the alleged crimes.[182]

94. In his appeal, the Appellant takes issue with the Trial Chamber's treatment of his alibi and of the evidence presented in support of it. In accordance with an Appeals Chamber decision rendered 12 December 2003,[183] the Appellant also adduces additional evidence to buttress his alibi.

2. The Trial Chamber's Finding that the Defence Had Failed to Give Proper Notice of the Alibi and the Decision to Allow Rebuttal Evidence

(a) Alibi Known by the Prosecution from the Beginning of the Case?

95. A contention that underlies many of the Appellant's arguments is that the Prosecution was on notice of the Defence's alibi from the beginning of the proceedings. However, the Trial Chamber found that the Defence did not provide the notice required pursuant to Rule 67(A)(ii)(a) of the Rules, that the Prosecution could not have foreseen the alibi and that the Prosecution ought to be allowed to present evidence in rebuttal.[184] These findings were reiterated in the Judgement itself, the Trial Chamber explicitly rejecting the Defence's contentions that the Prosecution had some notice of the alibi.[185] Thus, although he never states this contention clearly, the Appellant appears to challenge the Trial Chamber's finding that the Defence did not give notice of its intent to offer an alibi as required by Rule 67(A)(ii)(a) of the Rules.

96. The Appeals Chamber is of the view that the Appellant has not demonstrated that the Trial Chamber erred in reaching that conclusion. The Appellant merely states:

> With respect to the first reasons advanced by the learned Trial Judges to grant the Prosecutor's motion [*i.e.*, the Prosecutor's Motion for Leave to call Rebuttal Evidence], the Defence submits respectfully as follows:
>
> The evidence of the alibi was available to the Prosecution ab initio. The said evidence was Exhibits D.38, P.11, P.5-9a-d, D.1, D.40, D.41, declarations of PWS, VI, VAR, VAQ, VD, VAR (sic).[186]

[181] *Ibid.*, para. 147.
[182] *Ibid.*, para. 148.
[183] Decision on Defence Motion for Leave to Present Additional Evidence to Supplement Record on Appeal, 12 December 2003 ("Semanza Rule 115 Decision").
[184] Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, 27 March 2002, paras 9-10.
[185] Trial Judgement, paras 77-82.
[186] Semanza Appeal Brief, para. 128.

The Appellant simply refers back to elements that were already before the Trial Chamber. He fails to show that the Trial Chamber did not consider this evidence. Further, the Appellant does not even attempt to explain why consideration of this evidence should have led to a different conclusion.

97. To be sure, the Appellant does discuss some of the elements mentioned above in other parts of his appeal brief. However, the Appellant still does not establish that the Prosecution had "some notice" of the alibi, much less that the Defence notified the Prosecution of the "place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi" as required by Rule 67(A)(ii)(a) of the Rules.

98. In particular, the Appellant contends that the Prosecution had evidence of the attack on his house.[187] However, even if one were to consider that this evidence suffices to prove that the Appellant's house was attacked on the date alleged by the Appellant (and that is debatable[188]), this is far from an assertion that the Appellant could not have committed the crimes for which he was charged because he had fled the region at the time these crimes were committed.

99. The Appellant also refers to a *procès-verbal* taken in Cameroon after his arrest in which he allegedly indicated that he fled his residence on 8 April 1994.[189] However, according to the *procès-verbal*, the Appellant only indicated that he fled his residence in April 1994. Moreover, this "indication" is certainly not sufficient to meet the requirements of Rule 67(A)(ii)(a) of the Rules or even to provide "some" notice of the alibi to the Prosecution.[190]

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[187] *Ibid.*, para. 100, referring to Exhibits P.5-9a-d (photos of the "ruins" of the Appellant's house) and P.11 (transcript of intercepted telephone conversations), and to the testimony of some Prosecution witnesses. At the Appeals Hearing (T. 14 December 2004, p. 48), Counsel for the Appellant also contended that, when cross-examining Prosecution Witness Duclos, he mentioned that the Appellant's house had been attacked on 8-9 April 1994 and that, as a result, the Appellant had been forced to flee. However, no reference to the record has been provided to support this contention. In any case, even if mention of the attack and the flight had been made in cross-examination, the Appeals Chamber is of the view that this does not satisfy the notice requirement of Rule 67(A) of the Rules.

[188] *See infra* section II. D. 3. (b) (i) b. Photos of the ruins of the Appellant's house do not – without more – provide any indication as to the moment the house might have come under attack. As to the intercepted telephone conversation, the Trial Chamber aptly summarized the weaknesses of this evidence at para. 118 of the Trial Judgement:

> The Chamber notes that in contrast to the Accused's testimony, the transcript of the intercepted telephone call, which the Defence acknowledged is between the Accused and Camp Kanombe, does not indicate that the RPF had just attacked the Accused's home, that the Accused had to flee his home, or that someone from the camp urged the Accused to flee Nzige. Instead, the transcript reflects that the Accused "just met" the Bourgmestre of Giti who "fled to the Gikoro commune" because the *Inkotanyi* were in Rutare. The transcript is inconsistent with the Accused's testimony and therefore undermines the credibility and reliability of the Accused's testimony concerning the attack on his house and his flight. [Footnote omitted]

[189] Semanza Appeal Brief, para. 100 h), referring to Exhibit D.38.

[190] As noted, this is also the conclusion reached by the Trial Chamber at para. 80 of the Trial Judgement.

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100. The Appellant further asserts that "[t]he Prosecutor was not surprised by the alibi and suffered no prejudice by the introduction of the alibi" because "the issue on which rebuttal was allowed and on which the Trial Chamber relied to discredit the Defence alibi was pleaded in the indictment ab initio, namely the RPF advance."[191] This is not persuasive. First, the Trial Chamber authorized rebuttal to reply to the Defence's alibi; rebuttal was not limited to the issue of the date of the RPF advance. Second, the date of the RPF advance was not the only reason for expressing doubts about the alibi. Third, the references to the RPF in paragraphs 3.4, 3.4.1, 3.4.3 and 3.18 of the Indictment have nothing to do with the alibi and do not suggest that the Prosecution was on notice of the alibi.[192]

101. Finally, the Appellant contends that the Prosecution was put on notice of the alibi by a Defence Motion filed in April 2000.[193] In that motion, the Defence requested, amongst other requests, that depositions of certain witnesses be taken and stated that those witnesses "could provide powerful alibi's [sic] disproving the prosecution assertions."[194] However, no further indication of what that alibi might be was provided. This was insufficient to put the Prosecution on notice of the alibi.[195]

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[191] Semanza Appeal Brief, para. 144 (footnote omitted: the Appellant was referring to para. 3.18 of the Indictment). *See* also Semanza Reply, para. 26, referring to paras 3.4, 3.4.1, 3.4.3, 3.18 of the Indictment.

[192] These paragraphs are as follows:

> 3.4 After the Rwandan Patriotic Front (RPF) attack of October 1990, the Rwandan Government policy was characterized by the identification of the Tutsis as the enemies to be defeated.
>
> 3.4.1 This policy defined the main enemy as the Tutsis from inside or outside the country, who wanted power, who did not recognize the achievement of the revolution of 1959, and who was seeking armed confrontation. The secondary enemy was defined as those who provided any kind of assistance to the main enemy. This latter category was considered as accomplices of RPF.
>
> 3.4.3 Laurent SEMANZA intended the attacks on these victims to be part of the non-international armed conflict because he believed that Tutsi civilians were enemies of the Government and/or accomplices of the RPF and that destroying them would contribute to the implementation of the Government policy against the enemies and the defeat of the RPF.
>
> 3.18 On or about 13 April 1994, in Musha Secteur, Gikoro Commune, Laurent SEMANZA and Paul BISENGIMANA interrogated a Tutsi man, Victim C, in order to obtain information about the military operations of the *Inkotanyi*, or RPF. During the time the interrogation was taking place, the RPF was advancing toward Gikoro and Bicumbi communes. Laurent SEMANZA and Paul BISENGIMANA each cut off one of Victim C's arms while they were interrogating him. Victim C died as the result of these injuries. Laurent SEMANZA intended the acts described in this paragraph to be part of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2 and 3.4.3 *supra*.

[193] Semanza Appeal Brief, para. 153. The Appellant refers to his Corrected Copy of Application for Subpoena, Recording of Depositions and Such Other Orders as the Hon. Third Trial Chambers (sic) may Deem Pit (sic) and Proper to Make in the Circumstances Pursuant to Rule 54 of the Rules of Procedure and Evidence ("Application for Subpoena and Recording of Depositions"), filed 25 April 2000.

[194] Application for Subpoena and Recording of Depositions, para. 4.

[195] This was also the conclusion reached by the Trial Chamber: *see* Trial Judgement, para. 80.

102. Thus, contrary to the Appellant's contention,[196] the elements mentioned by the Defence, even when taken collectively, do not establish that the Prosecution had "some" notice of the alibi or that the Defence had provided the notice required by Rule 67(A)(ii)(a) of the Rules.

103. In his Reply, the Appellant nevertheless asserts that "[t]he Prosecutor does not dispute the fact that the defense of alibi was known to him ab initio" and that further proof of this is provided by paragraphs 2.51-2.65 of the Prosecution's Appeal Brief.[197] However, it is simply not true that the Prosecution does not dispute that the alibi was known to him from the beginning of the proceedings.[198] Paragraphs 2.51-2.65 of the Prosecution's Appeal Brief concern the contention that the Appellant had sufficient notice that joint criminal enterprise could be used to assess his criminal responsibility; they do not contain any implicit or explicit admission that the Prosecution was aware of the alibi from the beginning of its case.

(b) Related Contentions that Logically Fail

104. In light of the above, the Appeals Chamber finds that the Appellant's contention that the Prosecution should have investigated the alibi[199] fails. The Appellant's argument that the evidence that the Prosecution sought to bring in rebuttal was available to it from the beginning of the case,[200] even if true, misses the point: this is irrelevant since the alibi was only disclosed at the beginning of the Defence's case. Finally, the Appellant contends that the Trial Chamber erred in writing at paragraph 147 of the Judgement:

> Moreover, in the opinion of the Chamber, the claim by the Defence that it was aware of the alibi from the beginning of the case, but decided, without good cause, not to give notice of it, suggests that the Accused's alibi was an afterthought.

In the Appellant's view, this suggestion was based on a "wrong premise" (although this "wrong premise" is not identified by the Appellant, it is presumably the Trial Chamber's finding that the Defence had not given notice of the alibi).[201] This argument also fails: as explained above, it has not been shown that the Trial Chamber erred in concluding that the Defence had not given proper notice of the alibi.

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[196] Semanza Appeal Brief, paras 128 and 155.
[197] Semanza Reply, para. 25. The Appellant refers to paras 251 to 265 of the Prosecution's Appeal Brief, and allegedly quotes paragraph 285 of that brief, but these references are incorrect: the Appellant is in fact referring to paras 2.51-2.65 of the Prosecution's Appeal Brief and quoting para. 2.65.
[198] *See, e.g.*, Prosecution Response, para. 136, where the Prosecution contends that the Appellant's submission that the Prosecution was aware of the alibi from the beginning of the case is without merit. In fact, large portions of the Prosecution Response are devoted to showing that the Trial Chamber did not err in concluding that the Defence had not provided proper notice of its alibi and that the Prosecution could not have anticipated the alibi.
[199] Semanza Appeal Brief, paras 87c), 100, 129-130 and 132.
[200] *Ibid.*, paras 131 and 154.
[201] *Ibid.*, para. 157.

(c) The Trial Chamber's Decision to Allow Rebuttal Evidence

105. The Appellant takes issue with the Trial Chamber's Decision to allow the Prosecution to adduce rebuttal evidence on the issue of the alibi.[202] The Appellant submits that there was a variety of reasons for refusing to grant the Prosecution's application.[203] However, the Appellant simply reiterates the arguments he made before the Trial Chamber and fails to show that the Trial Chamber erred in rejecting these arguments.[204]

106. The Appellant also contends that the Trial Chamber's decision to allow rebuttal evidence was based on two erroneous premises, to wit:

> -That fairness required that [the] Prosecution be granted leave to attempt to refute the alibi, a key issue that arose for the first time during the Defence case.
>
> -That the Defence alibi goes directly to the issue of guilt or innocence of the Accused in this case and is therefore a central matter for determination.[205]

107. At paragraphs 128-133 of his appeal brief, the Appellant takes issue with the first of these premises and puts forward a series of arguments to show that the evidence of the Defence's alibi was available to the Prosecution *ab initio* or that the Prosecution should have conducted further investigations. Given the above, these contentions fail.[206] As to the second of these premises, the Appellant does not even attempt to refute it. In fact, it seems that to do so would not aid the Appellant, because if the alibi does not go the issue of guilt or innocence, it is not a very effective alibi.

108. At paragraph 134 of his appeal brief, the Appellant contends that he raised questions about the vagueness and lack of specificity in the redacted statements of the witnesses the Prosecution intended to call in rebuttal but that the Trial Chamber did not rule on this. However, the Appellant does not indicate which questions were raised and not ruled upon by the Trial Chamber (nor does he provide any reference to the record in support of this contention).

(i) The Decision to Allow Professor Guichaoua to Testify in Rebuttal

109. The Appellant asserts that the Trial Chamber erred by allowing Professor Guichaoua to be called as a rebuttal witness.[207] The Appellant recalls that Professor Guichaoua testified earlier in

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[202] *Ibid.*, paras 120 and foll. At paragraphs 122-124 of his appeal brief, the Appellant argues that this shows that the Trial Chamber was biased. That contention has already been rejected: *see supra* section II. A. 3. (a) .
[203] Semanza Appeal Brief, paras 125-126.
[204] *Ibid.*, paras 125-126.
[205] *Ibid.*, para. 127 [references omitted].
[206] *See supra* section II. D. 2. (b)
[207] Semanza Appeal Brief, paras 133, 136, 137 and 138.

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the case as an expert witness and contends that it was "preposterous, indeed prejudicial to recall him as an ordinary rebuttal witness to interpret his earlier testimony before the court."[208]

110. In the opinion of the Appeals Chamber, the Appellant has not demonstrated that the Trial Chamber erred in allowing Professor Guichaoua to testify in rebuttal. First, the Appellant does not provide any authority for the proposition that an expert witness cannot be called as a rebuttal witness. Second, the Appellant misconstrues the reason why Professor Guichaoua was recalled in rebuttal. It appears that, during his cross-examination, Professor Guichaoua responded affirmatively to suggestions of Defence Counsel to the following effect: 1) that Professor Guichaoua had indicated in his report that the Appellant had been seen in Murambi, Gitamara, in the company of members of the Interim Government; and 2) that the Interim Government moved from Kigali to Murambi on or about the 12 April 1994.[209] Defence Counsel did not ask further questions to the witness on the subject. The Prosecution's case was closed on 25 April 2001. The Defence then started its case, disclosing for the first time the alibi and arguing that the cross-examination of Professor Guichaoua confirmed that the Appellant had escaped to Gitamara on 9 April 1994. The Prosecution sought leave from the Trial Chamber to recall Professor Guichaoua as a rebuttal witness to explain: 1) that he did not mean to suggest that the Appellant went to Gitarama on any particular date; and 2) that he did not mean to suggest that the Appellant stayed put in Gitarama during any particular period of time, without returning to Bicumbi or the region of Kigali Rural Prefecture.[210] The Appeals Chamber does not consider that the Trial Chamber erred in allowing this.[211]

(ii) A New Set of Criteria to Decide When Rebuttal Evidence Should Be Allowed?

111. The Appellant also submits that, in a later case, Trial Chamber III departed from the principles that it set out in its "Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence" in this case and developed a new set of principles to decide when rebuttal evidence should be allowed.[212] The Appellant asserts that application of this new set of principles to his case would have led the Trial Chamber to dismiss the Prosecution's motion to call evidence in rebuttal. In this connection,

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[208] *Ibid.*, para. 133.
[209] T. 24 April 2001, pp. 81-82. *See* also Prosecution's Motion for Leave to Call Rebuttal Evidence (Rules 54, 89(b), 89(c), 85(a)), 7 March 2002, iii.(b).
[210] Prosecution's Motion for Leave to Call Rebuttal Evidence (Rules 54, 89(b), 89(c), 85(a)), 7 March 2002, Appendix A, 6. André Guichaoua.
[211] Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, 27 March 2002, para. 9.
[212] Semanza Appeal Brief, para. 150, referring to *The Prosecutor v. Ntagerura, et al.*, ICTR-99-46-T, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73 and 85(A)(iii) of the Rules of Procedure and Evidence, 21 May 2003 ("*Ntagerura et al.* Decision"), paras 31-34.

the Appellant contends that the evidence the Prosecution sought to adduce in rebuttal was known to it since the beginning of the case,[213] that Professor Guichaoua was only coming to clarify an issue in his report on which he had been cross-examined,[214] that Witness XXK was called to testify on a peripheral issue on which she had no precise knowledge,[215] and that none of the issues on which the witnesses testified were central to the innocence or guilt of the Appellant.[216]

112. The principles enunciated in the *Ntagerura et al.* Decision do not diverge from the principles applied in the present case; in fact, they are a synthesis of the principles underlying the Trial Chamber's Decision in the present case and Trial Chamber I's Decision in the *Nahimana et al.* case.[217] There is no contradiction between the principles applied in this case and those in the *Ntagerura et al.* case.

113. Even if one were to consider the elements raised by the Appellant at paragraph 151 of his appeal brief in light of the principles outlined in the *Ntagerura et al.* Decision, this would not suffice to show that the Trial Chamber erred in allowing the Prosecution's motion to present evidence in rebuttal. First, as noted above,[218] once it has been found that the Defence had not given proper notice of its alibi and that the alibi could not have been anticipated by the Prosecution, it is irrelevant that the rebuttal evidence was available to the Prosecution from the beginning. Second, it has not been shown that the Trial Chamber erred in allowing Professor Guichaoua to testify in rebuttal.[219] As to Witness XXK, she was called to testify mainly with respect to the date of the Appellant's departure, an issue that could hardly be described as a "peripheral" in light of the Appellant's alibi.[220] Finally, it is simply not true that the testimony of rebuttal witnesses dealt with peripheral issues.

(d) Trial Chamber's Decision Denying Leave to Call Rejoinder Witnesses

114. At paragraph 140 of his appeal brief, the Appellant submits that the Trial Chamber erred in denying the Defence Motion for Leave to Call Rejoinder Witnesses[221] on the issue of the RPF

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[213] Semanza Appeal Brief, para. 151a), b), d) and e).
[214] *Ibid.*, para. 151c).
[215] *Ibid.*, para. 151f).
[216] *Ibid.*, para. 151g).
[217] *Prosecutor v. Ferdinand Nahimana, et al.*, Case No. ICTR-99-52-T, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003, 13 May 2003, paras. 43 and foll.
[218] *See supra* section II. D. 2. (b)
[219] *See supra* section II. D. 2. (c) (i)
[220] Prosecutor's Motion for Leave to Call Rebuttal Evidence (Rules 54, 89(b), 89(c), 85(a)), 5 March 2002, Appendix A, Witness XXK.
[221] *Requête de la défense en vue d'appeler des témoins en duplique conformément aux dispositions de l'article 85 IV du Réglement de procédure et de preuve*, 24 April 2002 ("Defence Motion for Leave to Call Rejoinder Witnesses").

advance.[222] In the Appellant's view, the issue of the RPF advance was raised for the first time during Witness XXK's testimony in rebuttal, which should have warranted a rejoinder.

115. The Appeals Chamber considers that the Trial Chamber did not err in this regard. The Appellant writes at paragraph 146 of his appeal brief that Defence Witness CBN "testified about the attack on Semanza's house, about the RPF infiltration, about massacres in the commune and about the RPF advance and capture of the entire commune."[223] Moreover, the Appellant himself argues that the issue of the RPF advance was actually pleaded in the Indictment.[224] In the circumstances, the issue of the RPF advance can hardly be described by the Defence as an "issue that was being raised for the first time" in the testimony of Witness XXK.

116. At paragraphs 28 and 29 of his Reply, the Appellant raises new arguments in support of his contention that the Trial Chamber should have allowed rejoinder witnesses. The Appellant first contends that the Trial Chamber erred in denying him leave to call in rejoinder Witness KKN, who allegedly had firsthand knowledge of the facts on which Witness XXK testified and whose existence had purportedly become known to the Defence only during Witness XXK's testimony.[225] The Appellant also contends that he should have been allowed to call in rejoinder two witnesses who were supposed to testify in rebuttal, but who were not ultimately called.[226]

117. The Appeals Chamber is not convinced by these new arguments. First, it appears that it was Defence Counsel who first referred to Witness KKN in his cross-examination of Witness XXK[227]; it was also Defence Counsel who kept questioning Witness XXK about Witness KKN.[228] In the circumstances, it seems doubtful that the Defence was unaware of that witness's existence before the end of its case. If the Defence knew about Witness KKN before the end of its case and somehow believed that her testimony could support the alibi, then that witness should have been called as part of the Defence's case. However, even if the Defence only learned about Witness KKN after the close of its case, it is unclear whether that witness really had "firsthand knowledge" of the facts on which Witness XXK testified. Indeed, the Appellant asserts that Witness XXK testified that Witness KKN "had firsthand knowledge of the facts on which [Witness XXK] testified and would tell the truth"[229] but does not point to any portion of the record in support of this assertion. In fact, the record does not support this assertion: Witness XXK only said that Witness

[222] Decision on Defence Motion for Leave to Call Rejoinder Witnesses, 30 April 2002, paras 11-12.
[223] Emphasis added.
[224] Semanza Appeal Brief, para. 144; Semanza Reply, para. 26.
[225] Semanza Reply, para. 28.
[226] *Ibid.*, para. 29.
[227] T. 23 April 2002 (closed session), p. 32.
[228] *Ibid.*, pp. 33, 34, 50, 52, 64 and 67.
[229] Semanza Reply, para. 28.

KKN was not with Mbaraga Bizuru at the time of his death[230] and that Witness KKN was with her at the house when Mbaraga Bizuru left to accompany the family of the Appellant.[231] In its Motion for Leave to Call Rejoinder Witnesses, the Defence did not give a summary of the anticipated testimony of Witness KKN: it simply said that Witness KKN was closely related to Mbaraga Bizuru and that Witness XXK had said in her testimony that Witness KKN knew about Mbaraga Bizuru's death and the Appellant's alibi,[232] which as shown above is far from clear. Accordingly, the Appeals Chamber finds that the Appellant has not demonstrated the purpose for which Witness KKN would have testified in rejoinder and the Trial Chamber did not err in denying this part of the motion.

118. As to the second point (regarding the two witnesses that were not ultimately called in rebuttal), the Appellant has not shown that these witnesses's testimony was required to answer a point raised for the first time in rebuttal. Indeed, the question of the date of the Appellant's flight (on which the witnesses were allegedly going to testify) was central to the Defence's case and all testimony about the Appellant's whereabouts in April 1994 should have been adduced at that time. Further, the Appellant cannot argue that the existence of these witnesses became known to him only after the close of his case: these witnesses were present during his interrogation following his arrest in Cameroon in 1996, and the Prosecution had disclosed the *procès-verbal* of that interrogation to the Defence before the start of its case.

3. Appreciation of Evidence on the Alibi

(a) Credibility of Alibi Witnesses

119. The Appellant first contends that the Trial Chamber applied a discriminatory criterion in assessing the credibility of alibi witnesses.[233] In the Appellant's view, the Trial Chamber disbelieved the alibi witnesses simply because of their relationships with him.[234]

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[230] T. 23 April 2002 (closed session), p. 34.

[231] *Ibid.*, p. 50. However, at p. 52 of the transcript, Witness XXK says that Witness KKN was in her own house at the time Mbaraga Bizuru went to see Witness XXK to tell her that he was transporting the family of the Appellant, but that because the two houses are close together, Witness KKN "knew everything that was going on" (p. 52, line 13). It is not clear what Witness XXK meant by this, but it could be argued that Witness KKN knew that Mbaraga was going to transport the Appellant's family. However, it's a giant leap to assert, as the Appellant seems to be doing, that Witness KKN had firsthand knowledge of the Appellant's flight.

[232] *Requête de la défense en vue d'appeler des témoins en duplique conformément aux dispositions de l'article 85 IV du Réglement de procédure et de preuve*, 24 April 2002. This is the summary of the anticipated testimony given by the Defence for Witness KKN :

> *- Le témoin est proche parent de Mbaraga Etienne alias Bizuru et voisin de Semanza Laurent;*
>
> *- Le témoin habitait la même maison que le témoin XXK. Cette derniere a confirmé à la barre que le témoin KKN connaissait la vérité sur la mort de Mbaraga ainsi que sur l'alibi de Semanza.*

[233] Semanza Appeal Brief, para. 87.

120. The Appeals Chamber is not convinced of this. The Trial Chamber assessed each witness on an individual basis. It never concluded that some witnesses were not credible merely because they were related to or acquainted with the Appellant. While the Trial Chamber rightly considered the relationship between a witness and the Appellant as a relevant element in the assessment of the witness's credibility, that assessment was always done in light of all the circumstances, after consideration of the witness's testimony in its totality. For instance, the Trial Chamber found that the credibility of Witnesses PFM, KNU, MLZ and CYS was not called into question only by their close personal relationships to the Appellant, but also by their incredible, unreliable or exaggerated assertions.[235]

121. Accordingly, the Appellant's contentions that the Trial Chamber applied a "relationship criterion" without assessing the credibility on a case-by-case basis[236] or that it applied such a criterion in a discriminatory manner[237] must be rejected as without merit.

(b) Appreciation of Evidence in Support of the Alibi

122. The Appellant takes issue with the Trial Chamber's evaluation of the credibility of some witnesses and its evaluation of the evidence on the alibi in general. The Appellant also presents the additional evidence of Witness TDR to support his alibi. The Appeals Chamber will first consider the Trial Chamber's assessment of (i) the alibi and (ii) the rebuttal evidence before it. The Appeals Chamber will then assess (iii) the additional evidence and its impact (or absence thereof) on the Appellant's convictions.

(i) The Trial Chamber's Assessment of the Alibi Evidence

123. The Appellant takes issue with the Trial Chamber's assessment of the evidence before it. The elements raised by the Appellant will be considered following the narrative of the alibi in the Trial Judgement: a. The Appellant's whereabouts on 6-8 April 1994; b. The alleged attack on the Appellant's house in the evening of 8 April 1994; c. The Appellant's flight from the region on 8-9 April; and d. The Appellant's whereabouts on 10-18 April 1994.

a. The Appellant's Whereabouts on 6-8 April 1994

124. At trial, the Appellant maintained that he remained at home from the end of March until 8 April 1994, in observation of the traditional mourning period for the death of his daughter.[238] Three

[234] *Ibid.*, paras 84, 90-92.
[235] Trial Judgement, paras 91-92, 107, 131-132.
[236] Semanza Appeal Brief, para. 91.

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Defence witnesses testified in support of this: Witnesses PFM, KNU and MLZ.[239] The Trial Chamber expressed strong doubts about the credibility of these testimonies,[240] noting the close personal relationships between these witnesses and the Appellant as well as the witnesses's "exaggerated assertions that the Accused remained *consistently* at home, whereas the Accused was seen by these witnesses at his home on only a handful of brief occasions during the relevant period."[241] In this connection, the Trial Chamber added that the witnesses were hardly in a position to know the whereabouts of the Appellant for the rest of the relevant period since they themselves claimed to have spent most of their time outside his presence in the children's south residence, in one of the two chapels, or hiding under their beds.[242]

125. The Appellant asserts that the Trial Chamber discounted the ability of two Defence witnesses to account for his movements on 8 April 1994 because of these witnesses's location and position, but that, elsewhere, the Trial Chamber fully credited the testimony of Prosecution Witness VA, who was "similarly situated" and had memory lapses.[243] The issue of Witness VA's credibility will be addressed elsewhere[244] as it does not relate to the Defence's alibi. As regards the two Defence Witnesses that were allegedly discounted by the Trial Chamber, the Appellant identifies just one of them (Witness PFM) and fails to show how the Trial Chamber's appreciation of that witness's evidence was unreasonable. In fact, it was reasonable for the Trial Chamber to conclude that a witness who said that she spent most of her time in the chapel on 7 April 1994 and hiding under a bed on 8 April 1994 could not accurately account for all of the Appellant's movements for the period 6-8 April 1994.

b. Alleged Attack of RPF Infiltrators on 8 April 1994

126. The Appellant submits that there was ample evidence to show that he fled the region due to an attack on his house by RPF infiltrators in the night of 8 April 1994.[245]

127. The Appellant refers first to photos of the "ruins" of his house,[246] and to the fact that Prosecution investigators and a Prosecution expert witness saw these ruins.[247] However, while this might be sufficient to show that the Appellant's house was destroyed, the Appeals Chamber finds

[237] *Ibid.*, para. 92.
[238] *See* Trial Judgement, para. 83.
[239] *See ibid.*, paras 85-90.
[240] *Ibid.*, paras 91-92.
[241] *Ibid.*, para. 91 [Emphasis in original].
[242] *Ibid.*, para. 92.
[243] Semanza Appeal Brief, paras 102-104.
[244] *See infra* section II. G. 1. (f)
[245] Semanza Appeal Brief, paras 98 and foll.; Appellant Reply, paras 38-39.
[246] Semanza Appeal Brief, para. 100a), referring to Exhibit P.5-9a-d.

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that it does not prove that (a) the house was destroyed by an attack of RPF infiltrators; (b) the attack took place during the evening of 8 April 1994; and (c) the Appellant had to flee that very night as a result of the attack.

128. The Appellant also refers to the transcript of a telephone conversation intercepted on 9 April 1994 in support of his contention that he had just fled because of a RPF attack.[248] However, the Appeals Chamber finds that Exhibit P.11 does not support that contention. The relevant portion of the exhibit is as follows:

> SEMANZA: You can inform the bosses... that I have just met the *Bourgmestre* of Giti; he has fled to Gikoro *commune*. I'm talking about the *Bourgmestre* of Giti.
>
> SPEAKER F: The *Bourgmestre*?
>
> SEMANZA: Of Giti.
>
> SPEAKER F: Yes.
>
> SEMANZA: Of Rutare, Rutare. He has sought refuge in Gikoro.
>
> SPEAKER F: Rutare,
>
> SEMANZA: Yes.
>
> SPEAKER F: Gikoro?
>
> SEMANZA: Yes. He has sought refuge in Gikoro. He has just told me that the *Inkotanyi* are at the Rutare *commune* office. And they are now ... they are ... they are training. So ... [inaudible] people from Giti, Rutare, Gikoro and Gikomero who have fled, they are camping there; they are apparently all crowded there.[249]

Thus, contrary to the Appellant's contentions, this does not indicate that the RPF had just attacked his home, that he had to flee his home, or that he was urged to flee Nzige.

129. The Appellant also contends that he was prevented from mounting an effective defence on this point because the Trial Chamber rejected his requests to obtain information about (1) the activities of the RPF in the region in 1994 and (2) the occupation of his house and property since 9 April 1994.[250] However, the Decision to which the Appellant refers[251] does not contain any indication that the Defence ever asked for "information about the activities of the RPF in the region

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[247] *Ibid.*, para. 100a), d), e) and f).
[248] *Ibid.*, para. 100b) and c), referring to Exhibit P.11. At paragraph 101 of his Brief, the Appellant also refers to what it presents as excerpts of Exhibit P.11 to support his contention that his house had been attacked by Tutsi. However, the excerpts quoted by the Appellant do not seem to come from Exhibit P.11 (there are no "Paragraphs 4940 and 4939" in Exhibit P.11).
[249] Exhibit P.11 (English version), p. 16.
[250] Semanza Appeal Brief, para. 100g) and h).
[251] Decision on the Defence Extremely Urgent Application Ex Parte for A Subpoena to Compel Consistent Disclosure, Better and Further Particulars, 23 April 2000.

in 1994." Nor did the "Defence Extremely Urgent Application Ex Parte for A Subpoena to Compel Consistent Disclosure, Better and Further Particulars" of 13 April 2000 contain any such request. As to the second request, while the Appellant asked for "[a]ll information about the present occupants"[252] of his property, it did not ask for the "information about the occupation of his house and property since 9th [of] April 1994."[253] The Trial Chamber rejected this request because "[t]he Defence ha[d] not identified sufficiently the precise documents, the persons in possession of the documents, their exact whereabouts, nor their particular relevance."[254] The Appellant has failed to show that the Trial Chamber erred in denying this request.

130. At paragraphs 105-109 of his appeal brief, the Appellant asserts that the Trial Chamber failed to take into consideration evidence that supports his thesis that he had to flee his house on 8 April 1994. However, the Appellant fails to show that the Trial Chamber did not consider the evidence in question or that consideration of the evidence would have led a reasonable trier of fact to reach a different conclusion. As stated by the ICTY Appeals Chamber, "[a] Trial Chamber is not required to articulate in its judgment every step of its reasoning in reaching particular findings."[255] In any case, the Trial Chamber explicitly referred in the Trial Judgement to the evidence mentioned by the Appellant here (albeit not necessarily in the context of the Appellant's alibi):

> - The Appellant submits that the Trial Chamber failed to consider the testimonies of Witnesses VI, VAQ and VM.[256] However, the testimony of these witnesses is specifically referred to at Paragraph 568 of the Judgement. Further, the Appellant has not shown that these witnesses made the statements attributed to them.[257]
>
> - The Appellant contends that the Trial Chamber did not consider evidence to show that there existed a state of insurgency in the region prior to the RPF advance on 18 April 1994.[258] In this connection, the Appellant refers to the testimonies of Witnesses MV and VN.[259] However, the Trial Chamber did refer to the testimonies of these witnesses, albeit in a different context.[260] Further, the Appellant fails to

[252] Para. 7(5) of the Corrected Copy of Application for Subpoena, Recording of Depositions and For Such Other Orders the Hon. Third Trial Chambers [sic] May Deem Pit [sic] and Proper to Make in the Circumstances Pursuant to Rule 54 of the Rules of Procedure and Evidence, 25 April 2000.
[253] Semanza Appeal Brief, para. 100h).
[254] Decision on Semanza's Motion for Subpoena, Depositions, and Disclosure, 20 October 2000, para. 39.
[255] *Čelebići* Appeal Judgement, para. 481. *See* also *ibid.*, para. 498; *Kupreškić et al.* Appeal Judgement, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 382; *Kvočka et al.* Appeal Judgement, paras 23-25.
[256] Semanza Appeal Brief, paras 105-107.
[257] As to Witnesses VI and VAQ, the Appellant only refers to the transcripts for 15 November 2000, 14 and 15 March 2001, without specifying any pages. As to Witness VM, the Appellant does not provide any reference to the record.
[258] Semanza Appeal Brief, para. 108.
[259] *Ibid.*, footnote 69.
[260] Witness MV: paras 101, 108 (the Trial Chamber finds the testimony of this witness unreliable) and 157, as well as footnote 457.
Witness VN: paras 215, 217, 224-226, 249, 293, 296 and 306, as well as footnotes 507-509 and 794.

show that these testimonies support his contention that there existed a state of insurgency in the region prior to 18 April 1994.[261]

- The Appellant contends that the Trial Chamber did not consider "the report of Degni Segui, the evidence of VAM, Professor Ndengejeho, Antoine Nyetera, SDN about the state of insurgency in the country leading to political assassination."[262] However, this evidence was mentioned by the Trial Chamber in its Judgement.[263] Further, even if there was evidence of a state of insurgency in the country leading to political assassination (and, without specific references to the record, this is hard to ascertain) and even if that evidence was considered credible (again, the Trial Chamber found that some of these testimonies were unreliable), this is too general to constitute evidence in support of the Appellant's thesis that an attack on his house forced him to flee on 8 April 1994.

- The Appellant also refers to the "unchallenged evidence about the assassination of his daughter," to "the fact that people in his locality were afraid after the attack on his house and spent nights in the bush," to "the attack on his house by about 30 Tutsi" and to the "lies" of Witness XXK.[264] Aside from the fact that an assertion in a brief that a witness has lied does not constitute evidence, and from the fact that the evidence to which the Appellant refers in support of his contention that his house was attacked by 30 Tutsi does not appear to be in the record,[265] the Appellant fails to show that the Trial Chamber did not consider evidence suggesting that his daughter had been assassinated or that people had spent nights in the bush. In fact, that evidence was considered and referred to by the Trial Chamber.[266]

131. At paragraphs 111-112 of his appeal brief, the Appellant again seems to argue that the Trial Chamber did not consider evidence to suggest that the RPF advance occurred before 18 April 1994. However, the Appellant fails to demonstrate that the Trial Chamber disregarded that evidence. Further, it is hard to understand how some of the evidence referred to by the Appellant could support his contention that he left on 8 April 1994: the Appellant states that the administrative authorities of Bicumbi and Gikoro did not leave upon the RPF advance but remained and resisted that advance,[267] that the bourgmestres of Gikoro and Bicumbi made reports to the Prefect about the security situation in these communes,[268] and that the bourgmestre of Bicumbi was now training

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[261] As to Witness MV, the Appellant merely refers to the transcript for 22 October 2001 without specifying any page(s); as to Witness VN, the Appellant refers to the transcript for 14 November 2000, p. 12, lines 1-9, but that reference does not appear to be correct (p. 12, lines 1-9 of the English transcript refers to an exchange between the President of the Trial Chamber and Defence Co-Counsel; p. 12, lines 1-9 of the French transcript refers to a statement by the President).
[262] Semanza Appeal Brief, para. 108.
[263] Report of Degni-Ségui: Annex II Judicial Notice, Part B, iv.
Testimony of Witness VAM: paras 55, 57, 264-266, 268, 269, 271 and footnote 687.
Testimony of Professor Ndengejeho: paras 63, 139, 142, 193, 223, 224, 237, 242, 287, 291, 300-302, 306, 572.
Testimony of Witness Nyetera: paras 103, 108, 222, 224, 235, 241 and footnotes 507 and 522.
Testimony of Witness SDN: para. 128 and footnote 506.
[264] Semanza Appeal Brief, para. 109.
[265] As noted above (*supra* footnote 248), there does not seem to be any "Paragraph 4976" in Exhibit P.11.
[266] For instance, the death of the Appellant's daughter is referred to at paras 83-85, 90 and 575 of the Trial Judgement; the fact that some witnesses hid in the bushes close to the Appellant's house is mentioned at para. 150 of the Trial Judgement.
[267] Semanza Appeal Brief, para. 111.
[268] *Ibid.*

members of the public to defend the commune.[269] As to the other evidence mentioned by the Appellant at paragraph 112 of his appeal brief, the Appeals Chamber finds that:

> - The Trial Chamber explicitly found that the testimony of Witness CBN was questionable[270] and the Appellant fails to cast doubt on this finding;
>
> - There is no indication from Exhibit P.11 that Rugumbara informed Claver in a telephone conversation that the Appellant feared for his life and that he had left for Karenge.[271]

132. At paragraph 114 of his appeal brief, the Appellant refers to a declaration of VZ, in which VZ allegedly states that he met with Paul Bisengimana on 8 April 1994 and that Bisengimana reported to him that the *Inkotanyi* were attacking in Gahengeli. However, VZ was not a witness before the Trial Chamber and his statement was not admitted in evidence.[272] The Appellant has not demonstrated that the Trial Chamber erred in refusing to admit VZ's statement in evidence.[273] In any case, that statement would have had very little (if any) probative value to show that the Appellant's house in Gahengeri had come under attack in the evening of 8 April 1994.

133. In his Reply, the Appellant also submits that the Trial Chamber confused the attacks of RPF infiltrators (which allegedly led to his flight from the region on 8-9 April 1994) and the RPF advance that led to the capture of the region on 18-19 April 1994.[274] However, the Appellant simply refers to evidence that was before the Trial Chamber and fails to show that the Trial Chamber manifestly erred in its evaluation thereof.

134. The Appellant also refers to written statements introduced as Exhibits D1, D40 and D44,[275] statements which he submits "contained the attack on the Accused's house and his absence from the locality."[276] However, the Appellant does not show that the Trial Chamber failed to take these statements into account or that after consideration thereof, no reasonable trier of fact would have failed to conclude that his house was attacked on 8 April 1994, leading to his flight.[277] In the

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[269] *Ibid.*, para. 112.
[270] Trial Judgement, para. 119.
[271] Exhibit P.11, pp. 18-24, 35-43.
[272] See *supra* section II. A. 3. (a) and *infra* section II. G. 3. The Appellant also sought leave of the Appeals Chamber to adduce VZ's statement on appeal, but this was denied: Decision on Defence Motion for Leave to Present Additional Evidence and to Supplement Record on Appeal, 12 December 2003, pp. 3-4.
[273] See *supra* section II. A. 3. (a) and *infra* section II. G. 3.
[274] Semanza Reply, paras 38-39.
[275] *Ibid.*, para. 46.
[276] *Ibid.*
[277] In fact, the Appellant does not even refer to portions of the statements that would support his contention that his house was attacked on 8 April 1994. Further, it does not appear that the authors of the statements testified before the Trial Chamber (Exhibits D.1 and D.40 contains the deposition of Munanira Etienne; D.44 contains the deposition of Witness VAZ; the Trial Judgement does not refer to Munanira Etienne or to Witness VAZ). The Appellant has not shown that a reasonable trier of fact would have given more weight to this evidence.

circumstances, the Appellant has not demonstrated that the Trial Chamber manifestly erred in relation to Exhibits D1, D40 and D44.

135. The Appeals Chamber concludes that the evidence to which the Appellant refers was before the Trial Chamber and that the Appellant has failed to show that a reasonable trier of fact would have invariably concluded that his house had been attacked on 8 April 1994, thus precipitating his flight. The Appeals Chamber hastens to add that, in any case, the Trial Chamber did not decide (nor did it have to decide) whether the Appellant's house had been attacked on 8 April 1994. The Trial Chamber had to decide whether the alibi evidence raised a reasonable doubt as to the Appellant's involvement in the crimes for which he was indicted. It found that it did not. In finding so, it considered that, even if the Appellant had left his residence following an attack on 8 April 1994, he could still have returned to the region later.[278] Therefore, even if the Appellant could positively show that he left his residence on 8 April 1994, this would not suffice to raise a reasonable doubt as to his presence on the crimes scenes unless the Appellant could also demonstrate that no reasonable trier of fact could have found that he could have returned to the region after having left on 8-9 April 1994 or that the evidence placing him at Musha church, Mabare mosque and Mwulire hill would not have been accepted by a reasonable trier of fact.

c. The Appellant's Flight from the Region on 8-9 April 1994

136. The Appellant maintained that, after he fled his residence late on 8 April 1994, he spent the first night in Nzige, made a few phone calls at the Nzige communal office during the morning of 9 April 1994, and then left with his family for a friend's house in Ruhango, Gitarama commune, where they arrived around 11 p.m. on 9 April 1994.

137. At paragraph 113 of his appeal brief, the Appellant refers to the testimonies of Defence witnesses KNU and PFM concerning his alleged flight on 9 April 1994. However, the Trial Chamber referred explicitly to these testimonies in its discussion of the alibi.[279] The Appellant fails to show that the Trial Chamber manifestly erred in this regard.

138. At paragraphs 117-118 of his appeal brief, the Appellant refers to evidence which he says corroborates the timeline given by him and the date of his flight. However, the evidence as to the departure of the Belgian troops on 11 April 1994 does not help to show that the Appellant fled on 8-9 April 1994. The reference in telephone conversations,[280] allegedly intercepted the same day as the conversation between the Appellant and Camp Kanombe, to the imminent departure of the

[278] Trial Judgement, para. 204.
[279] *Ibid.*, paras 115-116.

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Belgian troops could support the fact that the intercepted telephone conversations occurred before 11 April 1994. However, it does not appear that the date of the Appellant's phone call from the Nzige communal office was ever in doubt. What is disputed is that this was a "desperate phone call made by the Accused to Camp Kanombe."[281] In fact, the Trial Chamber found that the transcript of the intercepted telephone conversation did not indicate that the RPF had just attacked the Appellant's home, that he had to flee his home or that someone from Camp Kanombe had urged him to flee Nzige.[282] As noted above, the Appellant has not demonstrated that this was an unreasonable finding.[283]

139. The Appellant also seems to submit that his alibi is reinforced by the fact that Witness XXK purportedly admitted that "she never saw the Accused in 1994 and that the Accused never drove the red vehicle of APEGA."[284] The Appeals Chamber notes that, while Witness XXK admits that she did not personally see the Appellant leave on the day of his flight, she did not say that she had not seen him at all in 1994.[285] As to whether the Appellant ever drove the red vehicle of APEGA, Witness XXK said that she had not seen him drive it in April 1994, but that it had happened before;[286] Witness XXK even said that she did not know which vehicle the Appellant was driving the day of his flight because the Appellant and Bizuru would sometimes change vehicles.[287] It is hard to see how these elements could be corroborative of the assertion that the Appellant had left on 8-9 April 1994. Further, the testimony of Witness XXK has been considered by the Trial Chamber and, as will be discussed below, the Appellant fails to show that the Trial Chamber was unreasonable in this regard.[288]

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[280] The Appellant was not even an interlocutor in these alleged conversations.
[281] Semanza Appeal Brief, para. 118.
[282] Trial Judgement, paras 114 and 118.
[283] *See supra* section II. D. 3. (b) (i) b.
[284] Semanza Appeal Brief, para. 119.
[285] T. 23 April 2002 (closed session), pp. 50-52.
[286] *Ibid.*, pp. 44-45.
[287] *Ibid.*, p. 49, lines 9-11. The issue of the APEGA vehicle is important because Witness VN testified that, using the APEGA vehicle, the Appellant brought *Interahamwe* and soldiers for the attack on Mwulire hill on 18 April 1994 (*see* Trial Judgement, para. 217). The Trial Chamber found that this testimony was credible: Trial Judgement, para. 226. It was also alleged by Witness VM that the Appellant used the red APEGA vehicle to run over survivors the day after the Musha church attack (*see* T. 7 March 2001, pp. 19, 34). However, the fact that Witness XXK did not see the Appellant use the APEGA vehicle in April 1994 does not imply that the Appellant did not use it in April 1994, much less that the Appellant had left the region on 9 April 1994 or that he never returned to the region after that date.
[288] *See infra* section II. D. 3. (b) (ii) b. In fact, while the Trial Chamber accepted Witness XXK's version of Bizuru's actions on 18-19 April 1994 as reliable and credible (Trial Judgement, paras 111, 120), it did not find that the Appellant had only left on 18 or 19 of April 1994. The Trial Chamber only found that, even if the Appellant had left the region on 8-9 April 1994, he could have returned later (*see* Trial Judgement, para. 204).

i. Witness CBN

140. In her written declaration, Witness CBN stated that she saw the Appellant at the commune office in Nzige on the morning of 9 April 1994, that he explained to her that he was fleeing with his family to Gitarama, and that he was not able to get in touch with Kigali in order to request soldiers to protect him.[289]

141. The Appellant objects to the fact that the Trial Chamber gave more credence to Witness XXK than to Witness CBN on the issue of the date of his flight.[290] The Appellant submits that Witness CBN was credible and objective, and that the "criteria of relationship" could not be invoked against her as she no longer worked for him.[291] The Appellant also submits that Witness CBN "was so credible that it was the Prosecution who proposed that as a humanitarian gesture her statement be admitted under oath and went on to renounce his right of cross-examination."[292] Finally, the Appellant asserts that, while the Trial Chamber referred to Exhibit D.21 (Witness CBN's written statement) in its Judgement, it made no finding about it.[293]

142. The Appeals Chamber considers that the Appellant has not demonstrated that the Trial Chamber manifestly erred in its appreciation of Witness CBN's evidence. First, as noted above, the Trial Chamber did not rely exclusively on any "relationship criteria"; rather, it evaluated each witness's credibility on its own.[294] Second, if the Prosecution suggested that Witness CBN's written statement be admitted in evidence based on exceptional circumstances, it was because she was seven months' pregnant and in ill health, not because she was particularly credible.[295] Indeed, when asked by Judge Williams if the Prosecution understood that the statement would be evidence unchallenged, Counsel for the Prosecution replied that it would be unchallenged on its own, but that it would be challenged by other evidence, particularly evidence in rebuttal.[296] Finally, the Trial Chamber not only referred to Exhibit D.21 in its Judgement but also noted that the credibility and reliability of Witness CBN's statement was rendered questionable by her lengthy working relationship with the Appellant.[297] It also referred to Exhibit D.21 in relation to the evidence on the

[289] Exhibit D.21, pp. 4-5.
[290] Semanza Appeal Brief, paras 146-149.
[291] *Ibid.*, paras 146-147.
[292] *Ibid.*, para. 148.
[293] *Ibid.*, para. 149.
[294] *See supra* section II. D. 3. (a)
[295] T. 31 October 2001, pp. 69-70.
[296] *Ibid.*, pp. 70-72.
[297] Trial Judgement, para. 119.

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massacre at Mabare mosque and found that Witness CBN's account in that regard was not reliable.[298] Thus, Exhibit D.21 was clearly considered by the Trial Chamber.

d. The Appellant's Whereabouts on 10-18 April 1994 and the Possibility that he Returned to the Region after his Alleged Flight on 9 April 1994

143. The Appellant affirms that he remained in Ruhango (Gitarama prefecture) until 18 April 1994, travelling daily to Gitarama town to check on his business.[299] The Appellant then relocated to Murambi Center in Gitarama town.[300]

144. At paragraphs 32-36 of his Reply, the Appellant contends that the Trial Chamber erred in concluding that

> even if the Accused had gone at some point to Gitarama, as his evidence indicates, the testimony of Defence Witness TDB, who travelled from Gikoro to Ruhango, Gitarama on 13 April 1994, confirms that the Accused could have travelled between the two places at that time. [301]

145. The Appellant asserts that TDB only indicated that he fled to Bicumbi.[302] However, the excerpt quoted by the Appellant at paragraph 33 of his Reply is from the testimony of Witness BP, not that of Witness TDB. In fact, Witness TDB testified that he fled from his house near Musha church on 13 April 1994, and that the next day he met the Appellant in Ruhango, Gitarama.[303]

146. The Appellant also contends that the inference drawn by the Trial Chamber (*i.e.*, that, even if he had gone at some point to Gitarama, he could have come back to the region of the crimes) was unreasonable because (1) Witness TDB had said that the Appellant was not one of the assailants at Musha church[304] and (2) the circumstances of Witness TDB's flight to Gitarama (in particular, the RPF advance) would have made it impossible for the Appellant to return to the region after the 8 April 1994.[305] With regard to the first contention, Witness TDB stated himself that he arrived at Musha church after the fighting had taken place,[306] so a reasonable trier of fact could have concluded that he simply did not see the Appellant because he was not there at the time of the attack. As to the second point, Witness TDB fled during the night of 13-14 April 1994. Thus, although his testimony could perhaps suggest that it would have been more difficult for the Appellant to come back to the region after 14 April 1994, it certainly does not show that the

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[298] *Ibid.*, paras 236 and 240.
[299] T. 18 February 2002, pp. 90-92; T. 27 February 2002, pp. 62-63.
[300] *Ibid.*
[301] Trial Judgement, para. 204.
[302] Semanza Reply, para. 33, quoting T. 4 October 2001, pp. 4-5.
[303] T. 4 October 2001, p. 65.
[304] Semanza Reply, para. 34, no reference to the record provided.
[305] *Ibid.*, paras 35-36.

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Appellant could not have come back to the region before the night of 13-14 April 1994. Accordingly, the Appellant has not demonstrated that the Trial Chamber manifestly erred in concluding that, even if the Appellant had gone to Ruhengo at some point, he could have come back to the region later.

147. The Appellant also submits that the Trial Chamber failed to take into consideration that, "if the Accused had a well founded fear for his safety in the region then it was improbable that he would have come back."[307] However, the Appeals Chamber notes that the Trial Chamber never concluded that the Appellant had a "well-founded fear for his safety in the region." Contrary to the Appellant's assertion that "the Chamber found that the Accused fled to Gitarama,"[308] the Trial Chamber simply noted "that Defence Witness TDB's identification of the Accused in Gitarama town on 14 April 1994 appears credible and reliable."[309] From that, it cannot be concluded that the Trial Chamber found that the Appellant had reasons to flee on 8-9 April 1994. In fact, such a conclusion goes against all of the Trial Chamber's discussion on the issue of the alibi.

148. The Appellant also refers to written statements introduced as Exhibits D1, D40 and D44, in support of his contention that he was not in the region when the crimes took place.[310] However, the Appellant does not even attempt to show that the Trial Chamber failed to take these statements into account and that after consideration thereof, it would have had to conclude that he never returned to the region after his flight on 8-9 April 1994.[311] In the circumstances, the Appeals Chamber is of the view that the Appellant has not demonstrated that the Trial Chamber manifestly erred in relation to Exhibits D1, D40 and D44.

(ii) Evidence in Rebuttal

a. Professor Guichaoua as a Rebuttal Witness

149. The Appellant asserts that the testimony of Professor Guichaoua might have been prejudicial to his case.[312] However, having found that the Appellant did not establish that the Trial Chamber erred in allowing the testimony of Professor Guichaoua in rebuttal, it follows that the Trial Chamber was entitled to consider this evidence.[313] In any case, as noted by the Appellant himself,[314] the Trial Chamber disregarded the statements that went beyond the purposes for which

[306] T. 4 October 2001, pp. 58-59.
[307] Semanza Reply, para. 45.
[308] *Ibid.*, para. 46.
[309] Trial Judgement, para. 133.
[310] Semanza Reply, para. 47.
[311] The Appellant does not refer to portions of the statements that would support his contention that he was never in the region after 9 April 1994.

Professor Guichaoua was called in rebuttal.[315] The fact that the Trial Chamber did not discuss part of Professor Guichaoua's testimony in rebuttal[316] is of no consequence. As previously noted by the ICTY Appeals Chamber, "[a] Trial Chamber is not required to articulate in its judgment every step of its reasoning in reaching particular findings."[317]

b. Witness XXK as a Rebuttal Witness

i. Credibility of Witness XXK

150. At paragraphs 93-97 of his Brief, the Appellant takes issue with the Trial Chamber's appreciation of the credibility of Witness XXK.

- Witness XXK's Desire to Greet the Appellant in Court

151. The Appellant first argues the Trial Chamber relied on Witness XXK's attempt to greet him when entering the courtroom as evidence of Witness XXK's reliability as a rebuttal witness.[318] As explained above,[319] there was nothing wrong in relying on the behaviour of the witness to evaluate her credibility. To the contrary, this is what any trier of fact must do. Further, the Trial Chamber did not rely only on this element in support of its finding that Witness XXK was a credible and reliable witness; it also noted that her testimony was detailed, that she had first-hand knowledge of the relevant events and that her present marital circumstances did not impugn her credibility as Witness XXK "clearly held the Accused in high esteem as evidenced by her desire to greet him in court and by her respectful references to him while testifying."[320] The Appellant has not demonstrated that this was unreasonable.

- Death of Mbaraga Bizuru

152. In an attempt to show that Witness XXK's testimony as to the date of the Appellant's flight was not reliable (Witness XXK had testified that the Appellant had fled the 18th or the 19th of April 1994, the day she last saw Mbaraga Bizuru alive), the Appellant argues that neither Witness XXK

[312] Semanza Appeal Brief, para. 137.
[313] *See supra* section II. D. 2. (c) (i) .
[314] Semanza Appeal Brief, para. 137.
[315] *See* Trial Judgement, para. 110.
[316] This part can be found at pp. 8-12 of the Transcript, 22 April 2002)
[317] *Čelebići* Appeal Judgement, para. 481. *See* also *ibid.*, para. 498; *Kupreškić et al.* Appeal Judgement, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 382; *Kvočka et al.* Appeal Judgement, paras 23-25.
[318] Semanza Appeal Brief, paras 94-95.
[319] *Supra* section II. A. 3. (g) .

nor the Appellant could testify authoritatively about the death of Mbaraga Bizuru as both accounts were derived from secondary sources. However, says the Appellant, his assertion that Bizuru had been killed on the 9th of April 1994 (and not on the 18th or 19th April 1994 as asserted by Witness XXK) was corroborated by the allegedly unchallenged testimony of Witness CBN.[321]

153. There are serious lacunae in this argument. First, it is irrelevant that Witness XXK did not have firsthand knowledge of the death of Bizuru: her testimony was that she last saw Bizuru on the 18th or 19th of April 1994[322] and that the Appellant and his family fled on that date.[323] Witness XXK's testimony appeared credible to the Trial Chamber.[324] Second, it is irrelevant that her testimony on this was uncorroborated while that of the Appellant was corroborated by Witness CBN. There is no corroboration requirement before this Tribunal and it is not the number of witnesses that matters.[325] Further, the evidence of Witness CBN was far from unchallenged: it was directly contradicted by Witness XXK's testimony and the Trial Chamber found that Witness CBN's credibility and reliability were rendered questionable by her lengthy working relationship with the Appellant.[326]

- Witness DCN

154. At paragraph 93 of his appeal brief, the Appellant writes:

> The Trial Chamber did not state why DCM (sic: DCN) could be biased due to the criteria of relationship with the Accused when he testified in his favour and yet corroborates XXK when that specific piece of evidence about the date of the advance of the RPF was against him.[327]

155. The Appellant thus accuses the Trial Chamber of "cherry picking" the testimony of Witness DCN. However, the Appeals Chamber considers that the Appellant misconstrues the findings of the Trial Chamber. The Trial Chamber actually found that:

> The Chamber also finds that testimonies of Defence Witnesses DCN, MV, BGN2, and Nyetera are not reliable because they consist solely of vague assertions gleaned from other people, lacking even the slightest indicia that their unidentified sources had any first hand knowledge. The Chamber also notes that Defence Witness DCN's friendship with the Accused's children and his past collaboration with the Accused in MRND youth recruitment undermine his credibility. The

[320] Trial Judgement, para. 111.
[321] Semanza Appeal Brief, para. 97.
[322] T. 23 April 2002 (closed session), p. 15.
[323] *Ibid.*, p. 18.
[324] Trial Judgement, paras 111, 120.
[325] *Kayishema and Ruzindana* Appeal Judgement, para. 154; *Musema* Appeal Judgement, para. 36; *Rutaganda* Appeal Judgement, para. 29; *Niyitigeka* Appeal Judgement, para. 92; *Ntakirutimana* Appeal Judgement, para. 132. *See* also *Tadić* Appeal Judgement, para. 65, *Aleksovski* Appeal Judgement, para. 62; *Čelebići* Appeal Judgement, paras 492 and 506; *Kupreškić et al.* Appeal Judgement, para. 33; *Kunarac et al.* Appeal Judgement, para. 268; *Kordić and Čerkez* Appeal Judgement, para 274-275; *Kvočka et al.* Appeal Judgement, para. 576
[326] Trial Judgement, para. 119.
[327] *See* also Semanza Reply, para. 41.

> Chamber, nonetheless, finds that Defence Witness DCN's detailed first-hand account of his flight from the RPF advance in Bicumbi around 19 April 1994 is credible and reliable. The Chamber also notes the consistency of his account with that of Prosecution Rebuttal Witness XXK.[328]

156. In the view of the Appeals Chamber, the Appellant has not shown that the Trial Chamber erred in its findings in relation to Witness DCN.

157. At paragraph 110 of his appeal brief, the Appellant comes back to the issue of the corroboration between the testimonies of Witnesses DCN and XXK. In the Appellant's view, the Trial Chamber erred in considering that Witness DCN corroborated Witness XXK about the RPF advance in Bicumbi. The Appellant contends that Witness XXK testified that the cause of her escape as well as that of the entire population was the gunshots that were heard from Gikoro.[329]

158. The Appellant is right when he states that Witness XXK did not refer to the RPF advance as the cause of her flight.[330] However, the critical corroboration between the testimonies of Witnesses XXK and DCN does not concern the RPF advance, but the date of the flight: both witnesses put it between 18 and 20 April 1994. Therefore, it was not unreasonable for the Trial Chamber to conclude as it did in paragraph 108 of the Trial Judgement.

ii. Treatment of Witness XXK's Testimony

159. At paragraphs 139-142 of his appeal brief, the Appellant takes issue with the Trial Chamber's treatment of the testimony of Witness XXK. First, the Appellant complains that Witness XXK did not provide direct or cogent circumstantial evidence on the issues about which she was called to testify, that the only source of her testimony was Mbaraga Bizuru, and that this source was clearly hearsay.[331] However, the Appellant does not show that the Trial Chamber manifestly erred in its appreciation of Witness XXK's evidence. Even if part of Witness XXK's testimony was hearsay evidence (in particular, it seems that she did not see the Appellant leave: it was Mbaraga Bizuru who told her that he was leaving with the Appellant and his family[332]), the Rules do not exclude hearsay evidence. Indeed, it is settled jurisprudence that such hearsay evidence is admissible as long as it is of probative value.[333] In this case, the Appellant has not

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[328] Trial Judgement, para. 108.
[329] *See* T. 23 April 2002 (closed session), p. 68.
[330] Witness XXK did not refer to the RPF during her testimony. It was Defence Counsel, who in responding to an objection of the Prosecution mentioned the RPF, seemingly because he believed that Witness XXK had testified that everyone had fled because of the RPF advance: *see* T. 23 April 2002 (closed session), p. 101.
[331] Semanza Appeal Brief, para. 139.
[332] T. 23 April 2002 (closed session), pp. 49-52.
[333] On the issue of hearsay evidence that takes the form of direct, live, in-court testimony by witnesses in relation to events that they had not witnessed personally, see *Akayesu* Appeal Judgement, paras 284-287; *Rutaganda* Appeal Judgement, para. 150.

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demonstrated that the Trial Chamber erred by considering the hearsay evidence adduced by Witness XXK.

160. Second, the Appellant argues that Witness XXK's testimony "lacked the specificity required in a criminal tribunal to amount to a rebuttal of the Defence alibi."[334] The Appellant does not refer to any authority in support of this assertion. The question whether the testimony was specific enough is a question relating to the appreciation of the evidence, and the Appellant has not demonstrated that the Trial Chamber manifestly erred in its appreciation of Witness XXK's evidence. In any case, the Prosecution need not "rebut" the alibi specifically but must instead prove that, notwithstanding the alibi evidence, the totality of the evidence demonstrates beyond a reasonable doubt that the accused committed the alleged offences.[335]

161. Third, the Appellant submits that there was nothing in the Prosecution's summary of the witness's anticipated evidence about the RPF advance, that Witness XXK testified on this, and that the Trial Chamber relied upon this to "invalidate" the alibi.[336] Thus, argues the Appellant, Witness XXK "testified out of the scope of the issue on which the decision for rebuttal was based," this was an issue that was being raised for the first time, and the Trial Chamber therefore erred in denying the Defence's motion for leave to call rejoinder witnesses.[337] The Appellant also contends that, because the issue of the RPF advance was outside the scope of the Prosecution's summary, Witness XXK's testimony should have been "stricken by the court."[338]

162. The Appeals Chamber finds that these arguments are unconvincing. First, as noted above, the issue of the RPF advance can hardly be described by the Defence as an "issue that was being raised for the first time" in the testimony of Witness XXK, and the Trial Chamber did not err in denying the Defence's motion for rejoinder on this issue.[339] Second, Witness XXK did not testify "out of the scope of her advance witness statement." Pursuant to the summary of her anticipated evidence in rebuttal, Witness XXK was going to testify on her relationship to Mbaraga Bizuru, on the fact that Witness XXK and Bizuru were neighbours of the Appellant, on the Appellant's flight from Gahengeri on 18 or 19 April 1994, and on Mbaraga Bizuru's death on 20 or 21 April 1994.

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[334] Semanza Appeal Brief, para. 139.
[335] *Čelebići* Appeal Judgement, para. 581.
[336] Semanza Appeal Brief, para. 140.
[337] *Ibid. See also* Semanza Reply, para. 27.
[338] Semanza Appeal Brief, para. 141. In the same paragraph, the Appellant also asserts that Witness XXK's identification data was never communicated to the Defence prior to her testimony. However, in the Prosecution's Motion for Leave to Call Rebuttal Evidence, 5 March 2002, Appendix A, the anticipated testimony of Witness XXK is summarized as follows: Witness XXK will testify that she was a "very very close relative of Mbaraga Etienne, alias 'Bizuru'" and that she and Bizuru were neighbours of the Defendant in Gahengeri. Thus, the Defence had sufficient information on the witness and cannot complain of any prejudice.
[339] *See supra* section II. D. 2. (d) .

Except for one point,[340] this is exactly the way she testified during her examination-in-chief.[341] It was Defence Counsel himself who raised the question of the RPF in cross-examination.[342] In any case, the issue of RPF attacks, infiltration or advance was at the heart of the alibi and the Appellant had no reasonable expectation that Witness XXK would not deal with this issue in her testimony.[343]

(iii) Additional Evidence of Witness TDR

163. The Appellant presents the additional evidence of Witness TDR, a RPF soldier in 1994, to support his alibi.[344]

a. The Evidence of Witness TDR

164. Witness TDR and the group of soldiers to which he was attached arrived on 8 April 1994 around 15:00 at Musha church.[345] They stayed in the woods next to the church. Around 20:00, the witness and other soldiers went to see priests at Musha parish to enquire about a stock of guns and radio communication equipment.[346] They then relocated to a forest at Rugende, close to the Kigali – Rwamagana road.[347]

165. The witness explained that they then moved to Gahengeri to place mortars and that, as part of their mission, they sought out the Appellant, who was deemed to be an influential person in the region.[348] He added that they were interested in eliminating "all obstacles", including "any influential person who was in that area."[349]

166. On the night of 9 April 1994, the witness and other soldiers went to the Appellant's house. They did not find him. They were informed by "someone looking after his cattle" that the Appellant "had gone to Kigali to attend a government meeting because he was to be appointed a member of parliament", and that he had not yet returned. He added under cross-examination that he heard from the "cow herdsman" that "Semanza had fled to (sic) massacre" and that the Appellant had gone

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[340] Instead of testifying that Mbaraga Bizuru died on 20 or 21 April 1994, she said that she last saw him alive on 18 or 19 April 1994: *see* T. 23 April 2002 (closed session), p. 15.
[341] T. 23 April 2002 (closed session), pp. 12-20.
[342] The RPF is mentioned only once in the Transcript of 23 April 2002, at p. 101, by Defence Counsel, who was responding to an objection raised by the Prosecution.
[343] Moreover, an advance witness statement is merely a summary of the anticipated testimony; the actual testimony often expands or provide more detail on the announced subjects.
[344] Heard by the Appeals Chamber on 13 December 2004, pursuant to its Decision on Defence Motion for Leave to present additional evidence and to supplement record on appeal, dated 12 December 2003.
[345] T. 13 December 2004, p. 5.
[346] *Ibid.*, pp. 5, 6.
[347] *Ibid.*, pp. 6, 7.
[348] *Ibid.*, p. 7.
[349] *Ibid.*

"well before". Witness TDR explained that the person keeping the Appellant's cows was one of the RPF's infiltrated elements.[350]

167. According to the witness, from 9 April 1994, soldiers went to the Appellant's compound every night to check whether he had returned. The soldiers would take positions outside the house and would patrol around the house to see if the Appellant was present. The Appellant was never seen.[351]

168. Witness TDR did not personally witness the killings at Musha church and at Mwulire hill. He received information from "infiltrators" and an "ambassador".[352]

169. On the night of 11 April 1994, Witness TDR's group of soldiers captured enemy soldiers after an attack at Rugende. They were informed that the Appellant "had not yet returned and that he had gone to Kigali."[353] According to Witness TDR, the Appellant's house was blown up with dynamite on 13 or 14 April 1994.[354]

170. It is unclear from his testimony when Witness TDR left the region, although he remained in the area of the Appellant's house for approximately one week.[355]

b. Credibility Evaluation

171. At the hearing, the Prosecution sought to show that the testimony of Witness TDR was not credible for a variety of reasons.[356] The Appeals Chamber considers that, even if deemed credible, the evidence of Witness TDR would not suffice to raise a reasonable doubt as to the guilt of the Appellant.[357] In light of this conclusion, it is not necessary to discuss the points raised by the Prosecution.

[350] *Ibid.*, pp. 7, 8, 13, 14.
[351] *Ibid.*, p. 8
[352] *Ibid.*, pp. 15, 20.
[353] *Ibid.*, pp. 8, 9.
[354] *Ibid.*, p. 9.
[355] *Ibid.*, p. 8.
[356] *Ibid.*, pp. 10-20.
[357] *See infra* sections II. D. 3. (b) (iii) c. and II. D. 3. (b) (iii) d.

c. Consideration of Witness TDR's Evidence

i. Presence of the Appellant and RPF control of the region

172. Witness TDR testified that the Appellant did not return to his house in Gahengeri after 9 April 1994. In his statement, Witness TDR indicated that the Appellant never returned to the region and added that he "was in charge of the region and [he] had to kill him. [The Appellant] could not escape our forces."[358] He also testified that they had sufficiently infiltrated the region and had sufficient information.[359]

173. However, the Appeals Chamber notes that it appears from Witness TDR's testimony that the RPF forces did not have full control of Bicumbi and Gikoro communes during the time Witness TDR was stationed there. Indeed, the witness himself explained that in the Musha locality there were ambushes and people continued to be killed, and that the RPF soldiers fought against *Interahamwe*, members of the communal force, and 'enemy soldiers'.[360] Despite the RPF presence, massacres still occurred at Mwulire and Musha. This would be in line with the evidence of Defence Witness DCN that the RPF took control of Bicumbi commune only between 18 and 20 April 1994.[361]

174. Also, aside from the evidence regarding the absence of the Appellant from his home in Gahengeri between 9 and 13 April 1994, there is no direct evidence as to the Appellant's whereabouts during this period. Witness TDR's various sources of information were from the "cattle boy", captured enemy soldiers and unidentified "infiltrators" and "ambassadors". Without RPF control of the region, Witness TDR's evidence at most confirms that the Appellant was not staying at his home in Gahengeri during the events, and suggests that the Appellant may have gone to Kigali with the government, although the veracity of this information is questionable in light of the Appellant's own evidence that he was in Gitarama for other reasons.

[358] Witness TDR's statement, p. 3.
[359] T. 13 December 2004, p. 8.
[360] *Ibid.*, pp. 8, 9.
[361] Trial Judgement, para. 100.

ii. Musha Church

- 8 or 9 April 1994

175. The Trial Chamber, on the basis of the evidence of Witnesses VA and VM, found that the Appellant and others went to Musha church around mid-day on 8 or 9 April 1994 in order to assess the situation shortly after refugees had begun arriving at the church.[362]

176. The Trial Chamber assessed the Appellant's alibi evidence that he never left home on 8 April 1994, and that he was at Nzige commune office until noon on 9 April 1994. It found that this did not preclude his presence at Musha church on 8 or 9 April.[363]

177. Witness TDR testified that he arrived with other soldiers at Musha church on 8 April 1994 around 15:00. It would seem from his testimony that on the night of 8 April they left Musha church, went to see priests in the parish and then relocated to a forest in Rugende. The next day, they moved to Gahengeri to place mortars and sought out the Appellant, arriving at his house in the evening of 9 April 1994.[364]

178. On the basis of his evidence, the Appeals Chamber finds that Witness TDR would not have been at or around Musha church at approximately mid-day on 8 or 9 April 1994, the time when Witnesses VA and VM saw the Appellant. Witness TDR's evidence is not capable of affecting the findings of the Trial Chamber for 8 or 9 April 1994.

- 13 April 1994

179. The Trial Chamber found that the Appellant and others returned to Musha church on 13 April 1994 and took part in an attack against the refugees.[365] It considered the alibi of the Appellant that he was at Gitarama on 13 April 1994, and concluded, on the evidence of Defence Witness TDB, that the Appellant could have travelled to Musha from Gitarama.[366]

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[362] *Ibid.*, para. 196.
[363] *Ibid.*, para. 205.
[364] T. 13 December 2004, p. 7.
[365] Trial Judgement, paras 196, 205.
[366] *Ibid.*, para. 204:

> The Chamber has also carefully considered the Accused's alibi, discussed above in Chapter III, in the context of all the evidence submitted concerning the events at Musha church. In particular, the Chamber recalls that the Accused claimed to be in Gitarama town on 13 April 1994 when the massacre occurred, which was confirmed only by the testimony of Defence Witness PFM, whose testimony, in the opinion of the Chamber, is biased by her close personal relationship with the Accused. The Chamber further emphasises that even if the Accused had gone at some point to Gitarama, as his evidence indicates, the testimony of Defence Witness TDB, who travelled from Gikoro to Ruhango, Gitarama on 13 April 1994, confirms that the Accused could have travelled between the two places at that time.

180. The Appeals Chamber notes that Witness TDR did not personally witness the massacres of 13 April at Musha church. He testified that "he heard people talk about them since there were infiltrators in the Musha region who gave us information regarding the massacres that were going on there".[367] There is no indication in Witness TDR's evidence that the infiltrators were direct witnesses to the massacres. Given that Witness TDR's evidence is at best hearsay and that the Trial Chamber found that the Appellant's alibi did not cast doubt on the evidence that he was present at the attack at Musha church, the Appeals Chamber finds that Witness TDR's additional evidence does not affect the findings of the Trial Chamber for 13 April 1994.

iii. Mwulire Hill

181. On the basis of the evidence of Witnesses VN and VP, the Trial Chamber found that the Appellant participated in attacks at Mwulire hill on 18 April 1994. The Appellant's alibi that he was in Gitarama on this day was dismissed.[368]

182. Witness TDR did not witness the attack at Mwulire. He was informed by someone working "as an ambassador" for them in the Mwulire region who provided information. Again, it is unclear whether the "ambassador" was a direct witness to the events at Mwulire.[369] This evidence is at best hearsay and does not cast doubt on the Trial Chamber's finding regarding Mwulire hill.

iv. Mabare Mosque

183. The Trial Chamber found that, on 12 April 1994, the Appellant was present and armed during an attack on Mabare mosque. It considered and dismissed the Appellant's alibi that he was in Gitarama on 12 April. Witness TDR does not mention the mosque. As discussed above, as the RPF did not have overall control of the region by 12 April 1994, it is unlikely that Witness TDR's evidence would have affected the Trial Chamber's findings.

d. Conclusion

184. In conclusion, the Appeals Chamber finds that, even if deemed credible, the testimony of alibi Witness TDR, considered together with the evidence on the Trial record, does not cast any doubt on the findings of the Trial Chamber as to the Appellant's guilt with respect to the events that occurred at Musha church and Mwulire hill, or as to his presence at the events of Mabare mosque.

[367] T. 13 December 2004, p. 15.
[368] Trial Judgement, paras 227, 228.
[369] T. 13 December 2004, p. 20.

(c) Conclusion on the Alibi Evidence

185. The Appeals Chamber is not convinced by the arguments of the Appellant that the Trial Chamber erred in finding that he was at Musha church, Mwulire hill and Mabare mosque. The Appeals Chamber also notes that the Trial Chamber did not decide whether the Appellant left the region on 8-9 April 1994 and returned to the crime scenes later, or whether he left the region only on 18-19 April 1994. The Trial Chamber simply found that the Appellant's presence at Musha church, Mwulire hill and Mabare mosque had been established beyond reasonable doubt. At the Appeals Hearing, the Appellant submitted that the Trial Chamber should have decided whether the Appellant left the region on 8-9 April 1994 and returned later or whether he only left the region after 18 or 19 April 1994.[370] The Appeals Chamber disagrees: the Trial Chamber only had to find that the alibi evidence did not succeed in raising a reasonable doubt as to his guilt for the events that occurred at Musha church and Mwulire hill, or as to his presence at the events of Mabare mosque. It did not have to make findings as to the Appellant's whereabouts at other times.

E. Judicial Notice (Grounds 9 and 17)

186. In delivering its Judgement, the Trial Chamber relied on a number of facts of common knowledge of which it had taken judicial notice. Most of these facts were set forth in the Trial Chamber's "Decision on the Prosecution's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54 dated 3 November 2000" ("Decision on Judicial Notice"). The Appellant challenges this aspect of the Trial Chamber's Judgement in a variety of respects.[371]

1. Rules Under Which the Motion was Brought and the Decision Rendered

187. The Appellant contends as a preliminary matter that the Trial Chamber should have dismissed the Prosecution Motion for Judicial Notice because it was brought under Rules 54 and 73, which do not apply to judicial notice, instead of Rule 94, which does.[372] The Appellant further argues that the Trial Chamber erred by stating that it would consider "the matter solely on the basis of the briefs pursuant to Rule 73(A)" but then turning around and basing its ruling on Rules 94 and 89.[373] He adds that Rule 89 did not apply because Rule 94 specified the circumstances in which a Trial Chamber could take judicial notice.

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[370] T. 14 December 2004, p. 51.
[371] A general discussion of the Defence's arguments regarding judicial notice can also be found in the hearing transcript. T. 14 Dec. 2004, 7-10.
[372] Semanza Appeal Brief, paras 161-172.
[373] *Ibid.*, para. 171 (quoting Decision on the Prosecution's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54 (TC) 3 November 2000 ("Decision on Judicial Notice")).

188. The Appellant does not accurately represent the Trial Chamber's Decision. The Chamber cited Rule 73(A) not as a source of its authority to take judicial notice, but rather as a ground for deciding the matter based solely on the briefing, without an oral hearing.[374] The Chamber plainly did not intend to exclude the relevance of Rule 94 to its decision.[375] On the contrary, it cited Rule 94 with emphasis and proceeded to evaluate the meaning of the phrase "common knowledge."[376]

189. The Appellant also errs in arguing that the Prosecution's Motion for Judicial Notice was not brought under Rule 94. As the Trial Chamber explained, "the Motion and the Revised Memorial correctly invoke[d] Rule 94 and Rule 89," and the Chamber accordingly "decline[d] the Defence's invitation to restrict consideration of the Motion to Rules 54 and 73."[377] Moreover, it was proper for the Chamber to apply Rule 89 of the Rules, which is the general provision that governs the admission of evidence at trial, providing at paragraph (C) that "a Chamber may admit any relevant evidence which it deems to have probative value."[378] The Appeals Chamber affirms that Rule 94 of the Rules is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted.[379] Therefore, the Appeals Chamber concludes that the Trial Chamber did not err in applying Rule 89 in addition to Rule 94 of the Rules.

190. The Appeals Chamber accordingly is satisfied that the motion for judicial notice was brought, and the subsequent decision rendered, under the proper rules.

2. Presumption of Innocence and Burden of Proof

191. Moving beyond the manner in which the motion for judicial notice was raised and considered, the Appellant argues that, in taking judicial notice of certain facts, the Trial Chamber violated the presumption of innocence and the right to a fair trial by shifting the burden of proof from the Prosecution to the Defence.[380] He argues that he specifically challenged a critical fact that went to the jurisdiction of the Tribunal – namely, that the 1994 conflict in Rwanda was an internal

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[374] Rule 73(A) provides that the "Trial Chamber ... may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court."
[375] Rule 94(A) provides that a "Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."
[376] Decision on Judicial Notice, para. 22.
[377] *Ibid.*, para. 19. The Notice of Motion that the Prosecution filed on 19 January 1999 was entitled "Prosecutor's Notice of Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54 of the Rules of Procedure and Evidence."
[378] Rule 89(C).
[379] *Momir Nikolic v. Prosecutor*, IT-002-60/1-A, Decision on Appellant's Motion for Judicial Notice, 5 April 2005, para. 17.
[380] Semanza Appeal Brief, paras 174-175.

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armed conflict.[381] The Appellant states that he also contested the character of the conflict and the systematic nature of the attacks.[382]

192. The Statute of the Tribunal provides that "[t]he accused shall be presumed innocent until proven guilty according to the provisions of the . . . Statute."[383] The Trial Chamber in this case was careful to note that it could take judicial notice of facts of common knowledge under Rule 94 of the Rules, but that it could not "take judicial notice of inferences to be drawn from the judicially noticed facts."[384] The Chamber emphasized that the "burden of proving the Accused's guilt, therefore, continue[d] to rest squarely upon the shoulders of the Prosecutor for the duration of the trial proceeding," and it stated that "the critical issue [was] what part, if any, . . . the Accused play[ed] in the events that took place."[385] As these passages suggest, the Trial Chamber struck an appropriate balance between the Appellant's rights under Article 20(3) and the doctrine of judicial notice by ensuring that the facts judicially noticed were not the basis for proving the Appellant's criminal responsibility. Instead, the Chamber took notice only of general notorious facts not subject to reasonable dispute, including, *inter alia*: that Rwandan citizens were classified by ethnic group between April and July 1994; that widespread or systematic attacks against a civilian population based on Tutsi ethnic identification occurred during that time; that there was an armed conflict not of an international character in Rwanda between 1 January 1994 and 17 July 1994; that Rwanda became a state party to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) on 16 April 1975; and that, at the time at issue, Rwanda was a state party to the Geneva Conventions of 12 August 1949 and their additional Additional Protocol II of 8 June 1977.[386] The Appeals Chamber finds that these judicially noted facts did not relieve the Prosecution of its burden of proof; they went only to the manner in which the Prosecution could discharge that burden in respect of the production of certain evidence which did not concern the acts done by the Appellant. When determining the Appellant's personal responsibility, the Trial Chamber relied on the facts it found on the basis of the evidence adduced at trial.

3. Grounds for the Decision

193. In addition to arguing that the Trial Chamber inverted the burden of proof, the Appellant challenges the grounds on which the Chamber based its Decision on Judicial Notice. According to the Appellant, the facts of which the Chamber took judicial notice were neither matters of common

[381] *Ibid.*, paras 176-179.
[382] *Ibid.*, paras 179.
[383] Article 20(3).
[384] Decision on Judicial Notice, para. 42.
[385] *Ibid.*, para. 43.
[386] *Ibid.*, Annex A, paras 1-6.

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knowledge nor reasonably indisputable, but rather were subject to factual dispute.[387] As the Trial Chamber noted in its Decision on Judicial Notice, however, the Appellant did not dispute some of the matters the Prosecution sought to have judicially noticed.[388] The Chamber observed that the Appellant disputed his personal involvement in the events recited by the Prosecution, but "palpably absent" from his submissions was "any argument or authority negating the existence of either the 'widespread or systematic attacks' or the elemental components of the crime of genocide against Tutsis."[389] The Chamber accordingly found "no impediment to taking judicial notice of those matters which are of common knowledge and reasonably indisputable."[390] It therefore appears that the Appellant failed either to raise some of his present objections or to substantiate them before the Trial Chamber.

194. At the time of the Decision on Judicial Notice, Rule 94 provided that "[a] Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."[391] The Rule was later amended[392] to provide, in addition, for the taking of judicial notice of adjudicated facts or documentary evidence.[393] The provision relating to facts of common knowledge, provided under paragraph (A) of Rule 94, remained the same.[394] As the ICTY Appeals Chamber explained in *Prosecution v. Milošević*, Rule 94(A) "commands the taking of judicial notice" of material that is "notorious."[395] The term "common knowledge" encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature.[396] Such facts are not only widely known but also beyond reasonable dispute.[397] As stated above, the fact that the Appellant did dispute some of the facts judicially noticed before the Trial Chamber did not prevent the Trial Chamber from qualifying the facts as facts of common knowledge since, as explained by the Trial Chamber, "[h]aving entered a plea of not guilty to all the counts in the indictment, the Accused has placed even the most patent of facts in dispute. However, this alone cannot rob the Chamber of its discretion to take judicial notice of those facts not subject to dispute among reasonable persons."[398] Having regard to the arguments submitted by the Appellant before the Trial Chamber to challenge the nature of the

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[387] Semanza Appeal Brief, paras 186-202.
[388] Decision on Judicial Notice, para. 32.
[389] *Ibid.*
[390] *Ibid.*
[391] Rule 94(A).
[392] *See* amendments adopted at the ninth session, 3 November 2000.
[393] Rule 94(B).
[394] Rule 94(A).
[395] "Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicative Facts," 28 October 2003, p. 3.
[396] Decision on Judicial Notice, para. 23. *See* M. Cherif Bassiouni & P. Manikas, The Law of the International Tribunal for the Former Yugoslavia (United States of America, 1996), p. 952.
[397] Decision on Judicial Notice, para. 24.
[398] *Ibid.*, para. 31.

facts adduced by the Prosecution and to the facts themselves, the Appeals Chamber considers that the said facts were not the subject of a "reasonable" dispute. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in considering that the facts enumerated in the Decision on Judicial Notice were "facts of common knowledge" within the meaning of Rule 94 of the Rules.

4. Motion to Dismiss

195. The Appellant also argues that the Trial Chamber took judicial notice despite his pending motion to dismiss for want of subject matter jurisdiction.[399] Because he was contesting the internal nature of the crisis, he maintains that it was not appropriate for the Trial Chamber to take judicial notice of the internal nature of the conflict.[400]

196. The Prosecution argues that the Appellant's argument is misplaced, because the Trial Chamber had dismissed his jurisdictional motion as filed out of time.[401] According to the Prosecution, the Trial Chamber noted that the Appellant had previously withdrawn its motion to dismiss, and the Chamber accordingly found that his renewal of that motion was frivolous and an abuse of process.[402]

197. The arguments of both parties are beside the point. Trial Chambers are not limited to taking judicial notice of facts that are conceded by both parties or, put differently, facts that are entirely *un*disputed. Trial Chambers may take judicial notice of facts that are *not reasonably subject* to dispute. The Trial Chamber in this case observed in its Decision on Judicial Notice that the Defence had opposed the Prosecution's motion in various respects. That is to be expected in an adversarial setting. But the mere fact that a jurisdictional motion might have been pending that raised questions about the nature of the crisis in Rwanda did not prevent the Trial Chamber from taking judicial notice of the state of affairs that existed in Rwanda in 1994.

198. It is worth underscoring what did not occur in this case. The Trial Chamber expressly declined to take judicial notice of the "fundamental question" of "whether 'genocide' took place in Rwanda," explaining that, "[n]otwithstanding the over-abundance of official reports, including United Nations reports confirming the occurrence of genocide, this Chamber believes that the question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional elemental crime."[403] Thus, the Appellant's jurisdictional objection relates only to the Trial Chamber's taking judicial notice of the fact that "an armed conflict not of an international

[399] Semanza Appeal Brief, paras 176-177.
[400] *Ibid.*, paras 178-179.
[401] Prosecution Appeal Brief, para. 174.
[402] *Ibid.*
[403] Decision on Judicial Notice, para. 36.

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character" occurred in Rwanda "[b]etween 1 January 1994 and 17 July 1994."[404] The Appeals Chamber is satisfied that the Trial Chamber appropriately concluded that the internal nature of the conflict in Rwanda is a fact of common knowledge that is beyond reasonable dispute.

5. Cumulative Conviction

199. The Appellant argues further that he was convicted "cumulatively" on the basis of the judicially noticed facts regarding widespread and systematic attacks.[405] The argument appears to relate to paragraphs 3.7 to 3.16 of the Indictment. Those paragraphs, however, discuss the Appellant's personal involvement in the events in the Bikumbi and Gikoro communes. They do not contain general statements regarding the widespread attacks against Tutsi, nor were they the subject of the Decision on Judicial Notice.[406] Rather, the general statements in the indictment concerning the widespread and systematic attacks on Tutsi are contained in paragraphs 3.2 to 3.4.2. The Appellant accordingly errs in contending that the facts alleged in paragraphs 3.7 to 3.16 were judicially noticed, much less that the judicially noticed facts formed the basis of his conviction.

6. Oral Motion for Reconsideration

200. The Appellant also contends that he "appropriately applied to the [Trial] Chamber to reconsider its Decision on Judicial Notice," but he says that the Trial Chamber failed to render a reasoned decision on that application.[407] In support of this argument, the Appellant cites the hearing transcript of 18 February 2002, the day on which he contends his counsel orally requested reconsideration of the judicial notice decision. An examination of the transcript, however, reveals that the Appellant did not request reconsideration at the hearing. The topic of the discussion on the transcript pages to which the Appellant refers was a document that was cited in the Decision on Judicial Notice.[408] Counsel for the Appellant argued at the hearing that the whole of the document, rather than merely a portion, should be made available to the Registrar for use at trial. Counsel expressly stated that he was "not debating the whole issue of judicial notice again."[409] Thus, the oral request to which the Appellant points related only to pages of a document; it was not, as the Appellant now contends, a request for wholesale reconsideration of the Decision on Judicial Notice. Contrary to the Appellant's arguments, then, the Trial Chamber did not fail to issue a reasoned decision upon his request.

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[404] *Ibid.*, Annex A.
[405] Semanza Appeal Brief, para. 184.
[406] Third Amended Indictment, paras 3.7-3.16.
[407] Semanza Appeal Brief, para. 208(a) & (b).
[408] T. 18 February 2002, p. 22.
[409] *Ibid.*, pp. 14-15.

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201. The Appeals Chamber concludes that the Trial Chamber committed no error in taking judicial notice of the facts contained in its Decision on Judicial Notice. These grounds of the appeal are accordingly dismissed.

F. Evaluation of Evidence on Identification (Grounds 10, 11 and 15)

202. The Appellant contends that the Trial Chamber unreasonably ignored or minimised contradictions or insufficiencies in the evidence which placed him at Musha church at the time of the massacre.[410] More specifically, the Appellant complains that Witnesses VA, VM and VD, while able to identify him in court, did not provide any detail to suggest that they were sufficiently acquainted with him to identify him at the time of the events of April 1994.[411] As to Witness VV, the Appellant asserts that she did not identify him at all.[412] The Appellant also contends that the identification by the witnesses was unreliable because of their contradictory evidence as to the vehicle(s) allegedly used by him[413] and as to his attire.[414]

1. Witness VA

203. The Appellant contends that Witness VA merely identified him at the hearing and that she did not provide credible and detailed information to suggest that she was sufficiently acquainted with him to identify him at Musha church.[415]

204. The Trial Chamber accepted Witness VA's testimony concerning the involvement of the Appellant in the events at Musha church.[416] In doing so, the Trial Chamber implicitly accepted that Witness VA could credibly identify the Appellant because she "vividly recalled seeing the Accused in 1992 leading an MRND rally where the participants arrested Tutsis and dragged them through the mud."[417] The Appellant objects that this is not sufficient to conclude that Witness VA could identify him at Musha church.[418] However, the Appellant does not provide any supporting

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[410] Semanza Appeal Brief, paras 211-213.
[411] *Ibid.*, paras 214-220. In this connection, the Appellant submits that the identifying witness should provide as much information about the accused as what is required in information sheets to identify protected witnesses: *see* Semanza Appeal Brief, para. 216 and Semanza Reply, para. 78. The Appellant does not refer to any authorities in support of this assertion and does not suggest cogent reasons for such a "standard." In the view of the Appeals Chamber, it is for the trial chamber, on a case-by-case basis, to decide whether a witness could credibly identify an accused at a crime scene. It should be emphasized that the issue here is merely that of identification. A witness is not expected to know all details about the accused or to know him personally; a witness must simply show that he or she was able to recognize the accused.
[412] Semanza Appeal Brief, para. 215.
[413] *Ibid.*, para. 221.
[414] *Ibid.*, para. 222.
[415] *Ibid.*, para. 214; Semanza Reply, para. 78.
[416] Trial Judgement, para. 195.
[417] *Ibid.*, para. 166, referring to T. 7 March 2001, pp. 97-98.
[418] At para. 78 of his Reply, the Appellant writes: "General statements about a cursory sighting of Semanza during a violent demonstration in 1992 (Witness VA) [...] were clearly insufficient identification." It should be noted that the

argument. The Appeals Chamber does not consider that the Trial Chamber was unreasonable in concluding that Witness VA's sighting of the Appellant leading a MRND manifestation in 1992 was sufficient for her to be able to identify him at Musha church. Contrary to what the Appellant seems to imply, it is not necessary for the witness to be personally or intimately acquainted with the person to be identified.

205. Second, the Appellant submits that Witness VA's identification was not reliable because she said that the person she perceived to be him was still bourgmestre in 1994.[419]

206. Witness VA believed that the Appellant remained the bourgmestre of Bicumbi until he became Member of Parliament in April 1994, and that he was succeeded by Rugambarara.[420] This is incorrect since the Appellant ceased to be bourgmestre in 1993 (after having been bourgmestre for 20 years) and it appears that Rugambarara was already bourgmestre at the time of the events in 1994. However, this error does not entail that this witness' identification of the Appellant was unreliable: for Witness VA to provide a reliable identification, it was not necessary to show that she knew the precise dates of the changes in the political career of the Appellant.

207. Third, the Appellant contends that Witness VA's identification was unreliable because of alleged contradictions in her testimony as to the vehicles used by him.[421] In this connection, the Appellant asserts that Witness VA testified that he came in "a Toyota vehicle which belonged to Bicumbi commune",[422] that he came in a "black car"[423] and that he "never drove".[424]

208. Contrary to the assertions of the Appellant, there are no internal contradictions in Witness VA's testimony on this subject. She testified that, on 9 April 1994, the Appellant came to Musha church in a black car and that he was not the driver of the car,[425] while on 13 April 1994, the Appellant came in a Toyota vehicle belonging to Bicumbi commune,[426] which he was not driving himself.[427] Accordingly, the Appellant has not demonstrated that the Trial Chamber was unreasonable in considering that Witness VA had credibly identified the Appellant during the events at Musha church.

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adjective "cursory" was added by the Appellant: there is no indication from Witness VA's testimony that she only saw him briefly: *see* T. 7 March 2001, pp. 97-98.
[419] Semanza Appeal Brief, para. 214; Semanza Reply, paras 78-79.
[420] T. 7 March 2001, pp. 95-96.
[421] Semanza Appeal Brief, para. 221.
[422] *Ibid.*, referring to T. 8 March 2001, p. 19.
[423] *Ibid.*, referring to T. 7 March 2001, p. 124.
[424] *Ibid.*, referring to T. 8 March 2001, pp. 26-27.
[425] T. 7 March 2001, p. 124.
[426] *Ibid.*, p. 124; T. 8 March 2001, p. 19.
[427] T. 8 March 2001, pp. 26-27.

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2. Witness VM

209. The Appellant asserts that Witness VM merely identified him in the courtroom.[428] Presumably, the Appellant is arguing that this is insufficient to show that Witness VM knew him and could have identified him at Musha church.

210. The Trial Chamber accepted Witness VM's testimony concerning the involvement of the Appellant in the events at Musha church.[429] In doing so, the Trial Chamber implicitly accepted that Witness VM could credibly identify the Appellant because he had been introduced to the school children in the commune as the bourgmestre of Bicumbi.[430] The Appellant's assertion that this was insufficient to show that the witness was sufficiently acquainted with him[431] is unpersuasive. So is his argument based on the fact that he was no longer the bourgmestre in 1994.[432] As stated above, it is irrelevant that the witness wrongly believed that the Appellant was still the bourgmestre in 1994; the important point is that the witness knew and could identify the Appellant.[433] Accordingly, the Trial Chamber was not unreasonable in implicitly accepting that the witness was able to identify the Appellant.

211. The Appellant also contends that Witness VM's identification was unreliable because there were contradictions in his testimony as to the vehicles he allegedly used.[434] In this connection, the Appellant asserts that Witness VM testified he arrived in the "red Toyota vehicle belonging to APEGA",[435] that he came in "his vehicle,"[436] that he came in a "brownish car"[437] and that he came "with the Interahamwe in a truck, he was not driving".[438]

212. The Appeals Chamber is not convinced by this argument. As to the sighting of the Appellant in the red Toyota vehicle belonging to APEGA, Witness VM testified that, on the day

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[428] Semanza Appeal Brief, para. 215 and footnote 162, referring to T. 6 March 2001, pp. 101-102.
[429] Trial Judgement, para. 195.
[430] *Ibid.*, para. 174, referring to T. 7 March 2001, pp. 46-47 ("He often came to visit the school and we used to see him. He was shown to us. We were told that he was our bourgmestre. Furthermore, he used to hold meetings with teachers. Therefore, it was impossible not to know him.")
[431] Semanza Appeal Brief, para. 218; Appellant Reply, para. 78
[432] Semanza Appeal Brief, para. 219.
[433] *See supra* section II. F. 1. It should also be noted that the transcript provides other indications that Witness VM was sufficiently acquainted with the Appellant to identify him at Musha church. For instance, Witness VM was asked in cross-examination: "Prior to that date [*i.e.*, date of the massacre at Musha church] had you had an opportunity of seeing Semanza in that car or that was the first time you were seeing him in that car?" To this, Witness VM replied: "It was his car, I used to see him in that car." (T. 6 March 2001, p. 117)
[434] Semanza Appeal Brief, para. 221.
[435] *Ibid.*, referring to T. 7 March 2001, pp. 32 and 34.
[436] *Ibid.* The Appellant refers to T. 6 March 2001, p. 134, but the Transcript (in English) stops at p. 128 and p. 134 of the Transcript (in French) is not on point. The correct reference is probably T. 6 March 2001, p. 116.
[437] *Ibid.* The Appellant does not provide any reference to the record, but it is probably T. 6 March 2001, p. 117.
[438] *Ibid.* The Appellant refers to T. 6 March 2001, p. 137, but the Transcript (in English) stops at p. 128 and p. 137 of the Transcript (in French) is not on point. The correct reference is probably T. 6 March 2001, p. 119.

after the attack at Musha church,[439] he saw the Appellant run over people on a road with the red Toyota vehicle belonging to APEGA.[440] Witness VM testified that, on the day of the attack at Musha church, he saw the Appellant arrive in his vehicle (the Appellant was not driving), a vehicle he described as of a brownish colour in which he used to see the Appellant; this vehicle was followed by a truck and other vehicles of average size ("Toyota vehicles for example") with *Interahamwe*.[441] Therefore, there is no contradiction as to the vehicles used by the Appellant in the testimony of Witness VM.

3. Witness VD

213. The Appellant asserts that Witness VD merely identified him in the courtroom.[442] Presumably, the Appellant is arguing that this is insufficient to show that Witness VD knew him and could have identified him at various places in April 1994. However, no further argument is offered in support of this. In fact, the record shows that Witness VD testified to seeing the Appellant several times on 11, 12, 13 and between 16 and 20 April 1994 (see paragraph below); Defence Counsel never questioned the witness's ability to recognize the Appellant. In the circumstances, there did not seem to be any dispute that Witness VD knew the Appellant and could properly identify him in 1994.

214. In his Reply, the Appellant argues that "[t]he alleged sighting of the accused by VD in Musha on the 11-16 and 20 April 1994 was discredited by other prosecution evidence".[443] However, the Appellant distorts the evidence provided by this witness. Witness VD testified to seeing the Appellant at the Gikoro commune office (together with Bisengimana) on 11 April 1994,[444] to seeing him distributing weapons to youths on 12 April 1994,[445] to seeing him together with Bisengimana at the commune office on 12 April 1994,[446] to seeing him in a vehicle with Bisengimana early on 13 April 1994,[447] and to seeing him at Saint Kizito Orphanage some time between 16 and 20 April 1994[448] (in Witness VD's own words "the people who were at the Musha

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[439] T. 7 March 2001, p. 19.
[440] *Ibid.*, p. 34. This was in conformity with Witness VM's prior statement: T. 7 March 2001, p. 32.
[441] T. 6 March 2001, pp. 117-119. In his prior statement, Witness VM had said that "Semanza brought in a truckload of Interahamwe who attacked Musha church." ("Semanza a amené en camion des interahamwes qui ont attaqués (sic) l'église de Musha.") When confronted in cross-examination with this apparent contradiction, Witness VM explained that the *Interahamwe* came on trucks, that he did not say that the Appellant was driving a truck, but that he was in front of them (presumably in his own car) and that he was not the one driving: T. 6 March 2001, p. 119.
[442] Semanza Appeal Brief, para. 215 and footnote 162, referring to T. 6 March 2001, pp. 101-102.
[443] Semanza Reply, para. 83.
[444] T. 14 March 2001, pp. 56-57.
[445] *Ibid.*, p. 55.
[446] *Ibid.*, pp. 63-64.
[447] *Ibid.*, pp. 85-86.
[448] *Ibid.*, pp. 45-46, 88-92.

parish had already been killed"[449]). Thus, Witness VD did not testify that he saw the Appellant at Musha church on the dates mentioned above; the sightings were made at different places. Therefore, there is no contradiction with the evidence provided by Witnesses VA and VM (who did not see the Appellant at Musha church on 11 April 1994). There is no contradiction either with the evidence of Professor Guichaoua: contrary to the assertions of the Appellant, Professor Guichaoua never said that the Appellant was with the interim Government in Gitarama on 11 April 1994.[450] The Appellant also contends that VD's evidence is contradicted by DCH's testimony, but he does not refer to any specific part of the record in support;[451] in any case, the Trial Chamber did not find Witness DCH's testimony concerning the Appellant's activities during the relevant events reliable or credible[452] and the Appellant has not demonstrated that this conclusion was unreasonable. The Appellant also submits that Witness VD's evidence was contradicted by evidence provided by Witnesses VAK, VV, VA, VM and XXK but does not provide any specific reference.[453] At any rate, even if there were contradictions with these witnesses – and, when one takes into account the various times and places of the sightings, it is not clear that there were any contradictions[454] – the Appellant fails to show that the Trial Chamber was unreasonable in its treatment thereof.

215. Accordingly, it has not been shown that the Trial Chamber was unreasonable in accepting Witness VD's identification of the Appellant at various times and places on 11, 12, 13 and between 16 and 20 April 1994.

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[449] *Ibid.*, p. 46.
[450] *See supra* section II. D. 2. (c) (i) and T. 22 April 2002, p. 9.
[451] The Appellant refers to T. 15 and 18 April 2002, without specifying any pages.
[452] Trial Judgement, para. 137.
[453] Semanza Reply, para. 83.
[454] As to the alleged contradiction with Witness **VAK (12 April)**: Witness VAK did say that the Appellant arrived at the mosque at **approximately** 10 a.m. on the morning of 12 April 1994 (T. 15 March 2001, pp. 91-92, 103-104), while Witness VD allegedly saw him at the Gikoro commune office distributing weapons to youths at 10 a.m. (T. 14 March 2001, pp. 85-85). In light of the approximate time given by Witness VAK, it is possible that the Appellant was first seen by Witness VD at the commune office and that he then departed for the mosque, arriving there shortly after (no indication of the distance between these sites was provided).
As to the alleged contradiction with Witness **VAK (13 April)**: The Appellant has not referred to any part of the record to show that Witness VAK said that he was at the mosque on the morning of 13 April. The Trial Chamber's summary of Witness VAK's testimony (Trial Judgement, para. 230), does not indicate that Witness VAK testified to seeing the Appellant at the mosque on the morning of 13 April 1994.
As to the alleged contradiction with Witnesses **VV, VA and VM** (13 April): Witness VV allegedly saw the Appellant (with Bisengimana and Rugambage) in Nzige around 10 a.m. on 13 April 1994 (T. 29 March 2001, pp. 7, 14, 19, 53-54); they then went to Musha church from where the witness could see smoke and hear the sound of explosions (T. 29 March 2001, p. 9). As noted above, Witnesses VA and VM saw the Appellant arrive at Musha church around 10 a.m. on 13 April 1994. However, Witness VD testified to seeing the Appellant and Bisengimana together in a vehicle around 7:30 or 8 a.m. (T. 14 March 2001, pp. 85-86). Thus, there is no contradiction here.
As to the alleged contradiction with Witness **XXK**: Witness XXK testified that the Appellant fled the region either 18 or 19 of April 1994 (T. 23 April 2002 (closed session), pp. 18, 113); Witness VD placed the attack on the orphanage some time between 16 and 20 April 1994 (T. 14 March 2001, pp. 45-46, 88-92). Again, there is no necessary contradiction here.

4. Witness VV

216. The Appellant contends that "VV did not identify the Accused at all."[455] By this, the Appellant probably refers to the fact that there was no in-court identification. However, the Appellant fails to mention why: there was no in-court identification because Witness VV's deposition was taken from her hospital bed and the Appellant elected to be absent from the deposition proceedings.[456] Accordingly, the Appellant's contention that "VV did not identify the Accused at all" is devoid of any merit.

217. The Appellant also contends that there is no evidence to show that Witness VV was sufficiently acquainted with him to be able to identify him in April 1994.[457] The Appellant contends that Witness VV testified that "she knew the accused as the Bourgmestre who used to come to Gikoro to meet the Bourgmestre during official function[s]. The Accused, the Defence submits, was never the Bourgmestre of Gikoro nor was he Bourgmestre of any locality in 1994."[458] The Appellant is distorting Witness VV's testimony: she testified that she knew the Appellant "because he was the bourgmestre of the Bicumbi commune. And he used to come to commune – to Gikoro commune to meet the bourgmestre of Gikoro, which is our commune, especially when there were events such as meetings."[459] Witness VV never stated that the Appellant was the bourgmestre of Gikoro. As to the fact that Witness VV still referred to the Appellant as the bourgmestre, for the reasons given above, this cannot cast doubt on the capacity of the witness to identify the Appellant in April 1994.[460]

218. Accordingly, the Appellant has not shown that the Trial Chamber was unreasonable in considering that Witness VV was able to identify the Appellant in April 1994.

5. Alleged Contradictions between the Witnesses as to Vehicle or Vehicles Used by the Appellant

219. As noted, the Appellant contends that the evidence as to the vehicle in which he arrived at Musha church was contradictory.[461] It has been shown above that each testimony was internally consistent on this question.[462] The question that remains is whether the witnesses contradicted each other as to the vehicle with which the Appellant arrived at Musha church on 13 April 1994, and, if

[455] Semanza Appeal Brief, para. 215.
[456] T. 29 March 2001, pp. 1 (referring to Order of Trial Chamber III pursuant to Rule 71) and 3.
[457] Semanza Appeal Brief, para. 215.
[458] *Ibid.*, para. 215.
[459] T. 29 March 2001, pp. 6-7.
[460] *See supra* section II. F. 1.
[461] Semanza Appeal Brief, para. 221.
[462] *See supra* sections II. F. 1. and II. F. 2.

so, whether the Trial Chamber was unreasonable in finding that the Appellant was at Musha church on 13 April 1994.[463]

220. Witness VA testified that the Appellant arrived at Musha church on 13 April 1994 in a Toyota vehicle belonging to Bicumbi commune.[464] Witness VM testified that the Appellant arrived in his "brownish" car.[465] Witness VD testified that, around 7:30 or 8:00 a.m. on 13 April 1994, he saw the Appellant and Bisengimana drive around Musha sector in a white Hilux looking for the people to whom they had given weapons in order to go to Musha church.[466] Finally, Witness VV testified that the car in which she saw the Appellant on the morning of 13 April 1994 was a "sedan"[467] though it appears that she said "grey sedan" in her prior statement.[468]

221. Witness VD's testimony on this subject cannot shed any light as to the question of the car in which the Appellant arrived at Musha church: that testimony was limited to a sighting that occurred a few hours before the attack at Musha church and there is no indication that the Appellant and Bisengimana remained in the same vehicle until the attack. Accordingly, the Appeals Chamber will compare the testimonies of Witnesses VA, VM and VV. It appears that these testimonies are not entirely consistent on the subject.[469] Nevertheless, even if there were some contradictory evidence on this subject, the Appellant has failed to demonstrate that the Trial Chamber was unreasonable in convicting the Appellant without being absolutely sure about the vehicle in which he arrived at the crime scene. In the view of the Appeals Chamber, even if there was uncertainty about the vehicle in which the Appellant arrived at Musha church (and the Trial Chamber did not decide this question), this matter was secondary, as the Trial Chamber had sufficient and credible evidence going to the Appellant's presence at and participation in the massacre at Musha church.

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[463] The Trial Chamber did not make a finding as to the car in which the Appellant arrived at Musha church on the morning of 13 April 1994.
[464] *See supra* section II. F. 1.
[465] *See supra* section II. F. 2.
[466] T. 14 March 2001, p. 87. The Appellant contends (Appellant Brief, para. 221, footnote 176, referring to T. 14 March 2001, p. 7, l.16 (as noted above, there seems to be a problem with the numbering for the transcript on that date: the transcript provided to the Appeals Chamber starts at p. 39 instead of p. 1. In terms of that numbering, the relevant page is thus p. 45, l. 16)), that Witness VD described the vehicle as a "white pickup without a number plate." However, when Witness VD provided that answer, he was referring to the vehicle he had seen in relation to the events at the orphanage, some time between 16 and 20 April 1994: *see* T. 14 March 2001, pp. 44-46.
[467] T. 29 March 2001, p. 16.
[468] *Ibid.*, p. 21.
[469] The Appeals Chamber has no indication that the "Toyota vehicle belonging to the Bicumbi commune" (Witness VA) was the same as the "brownish car usually used by Semanza" (Witness VM) or the "sedan" (Witness VD).

6. Alleged Contradictions between the Witnesses as to the Appellant's Attire

222. The Appellant contends that the evidence as to his attire on the day of the attack at Musha church was contradictory and that this shows that the identification by the witnesses was not reliable.[470] In this connection, the Appellant submits that

> - Witness VM stated that the Appellant was wearing a black pair of trousers, but that he could not remember the colour of his shirt.[471]
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> - Witness VA testified that the Appellant "was wearing a pair of trousers in *kitenge* cloth and a gown, which was the uniform of the *Interahamwe*. And on the gown he was wearing or shirt, we could see drawing of hoes, a small hoe and machetes."[472]
>
> - Witness VV stated that "Semanza was wearing a shirt and a pair of trousers of the same colour, and this suit is normally known as *Kaunda* suit. It was of a grey colour."[473]

223. The Appellant distorts the testimony of Witness VA: this is the answer Witness VA gave when asked to describe what the Appellant was wearing on his first visit to Musha church (which she put on 9 April 1994), not on 13 April 1994.[474] As to the evidence provided by Witnesses VM and VV, their testimonies are not necessarily incompatible as a dark grey colour could appear black, or vice versa.[475] In any case, even if there was some inconsistency between the testimonies of Witnesses VM and VD on this subject, this would be a minor inconsistency. Therefore, the Appeals Chamber considers that the Appellant has not shown that no reasonable trier of fact would have accepted the identification of the Appellant at Musha church because of inconsistencies in the description of his attire.

7. Conclusion

224. The Appellant has failed to show that the Trial Chamber unreasonably ignored insufficiencies or contradictions in the evidence pertaining to identification for the events at Musha church. There was sufficient and credible evidence to show that the four witnesses the Appellant now seeks to impugn knew him prior to the attack and could properly identify him at the time. Moreover, the alleged contradictions as to the vehicle(s) used by the Appellant and as to his attire do not cast doubt on the identification made by the witnesses. Contrary to the Appellant's

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[470] Semanza Appeal Brief, para. 222.
[471] T. 7 March 2001, p. 16.
[472] *Ibid.*, pp. 123-124.
[473] No reference provided by the Appellant (the correct reference is T. 29 March 2001, p. 15).
[474] T. 7 March 2001, pp. 123-124.
[475] Prosecution Response, para. 209.

contentions, the Trial Chamber properly found that the identification evidence was reliable, coherent and corroborated.[476]

G. Evidence Supporting the Convictions (Grounds 12, 14 and 16)

225. Relying on the testimony of Witnesses VA and VM (and on the corroboration provided by Witnesses VD and VV), the Trial Chamber found that the Appellant participated in the attack on Musha church "by gathering *Interahamwe* to take part in the attack and by directing the assailants to kill Tutsi refugees, as alleged in paragraph 3.11 of the Indictment."[477] Based on this finding, the Trial Chamber convicted the Appellant for complicity in genocide[478] and for aiding and abetting the commission of crimes against humanity (extermination).[479]

226. The Appellant submits that the findings of the Trial Chamber at paragraphs 195, 196, 425, 429, 430 and 434 of the Trial Judgement are not supported by the evidence on record.[480] The Appellant further submits that the Trial Chamber ignored the evidence that pointed to his innocence or was favourable to him. In the Appellant's view, if the evidence had been properly analyzed, the Trial Chamber would have come to the conclusion that he was innocent.[481]

1. Witness VA

227. The Appellant contends that Witness VA's testimony was full of contradictions and incredible.[482]

(a) Identification of the Church Building(s)

228. The Appellant first avers that the witness was unable to recognize Musha church in photographs, even though she allegedly sought refuge there in April 1994. The Appellant also

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[476] *See* Trial Judgement, paras 195-197.
[477] *Ibid.*, para. 206.
[478] *Ibid.*, paras 430, 433, 435-436.
[479] *Ibid.*, paras 465. The Trial Chamber also found the Appellant criminally responsible for murder as a crime against humanity (Trial Judgement, para. 450) but did not enter a conviction on this ground because it considered that it was included in the extermination conviction (Trial Judgement, paras 504-505). The Trial Chamber also found that the Appellant was criminally responsible for aiding and abetting war crimes (Trial Judgement, para. 535) but a majority of the judges was against entering a conviction on this count (Trial Judgement, paras 535, 536).
[480] These findings all relate to the events at Musha church, except those at para. 434. At paragraph 434, the Trial Chamber found that the Appellant was armed and present during the killings of Tutsi refugees at Mabare mosque on 12 April 1994. It added, however, that "[t]he Accused's presence alone at the time of the killings at Mabare mosque does not give rise to criminal liability." Presumably, the Appellant is challenging the Trial Chamber's finding that he was present and armed at the time of the killings at Mabare mosque. However, even if this were found erroneous, it is unclear what effect this would have on the verdict since the Trial Chamber did not impose criminal liability on the Appellant for his presence at Mabare mosque during the killings.
[481] Semanza Appeal Brief, para. 223.
[482] *Ibid.*, para. 224.

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submits that Witness VA wrongly believed that there were six buildings on the church premises and that there were refugees in all six buildings.[483]

229. During her examination-in-chief, Witness VA was presented with photographs[484] and asked a series of questions relating to those exhibits.[485] It appears that she had some difficulty in recognizing Musha church, where she had allegedly taken refuge. Nevertheless, the Appeals Chamber is not convinced that this shows that no reasonable trier of fact would have relied on Witness VA's testimony concerning the events at Musha church. In any case, Witness VA's testimony on the events of Musha church was corroborated in large parts by Witness VM's testimony.

(b) Discrepancies with the Indictment

230. The Appellant argues that "the indictment at paragraph 3.11 does not state that Semanza and Rugambarara came to the church and worked in cooperation, this witness [*i.e.*, Witness VA] stated that on the 9th April 1994 both came to the church."[486] It is hard to understand the Appellant's complaint in this regard, but to the extent that he is suggesting that the testimony of a witness can have no more detail than what is alleged in the indictment, or that if a witness provides more detail than what is alleged in the indictment this affects his or her credibility, the Appeals Chamber rejects his argument.

(c) Witness VA's Assertion that the Appellant Was the Leader at Musha Church

231. The Appellant takes issue with Witness VA's assertion that he was the leader on his first visit to Musha church. The Appellant argues that Witness VA gave no reason or basis for this assertion and that she probably said that because she thought he was still bourgmestre, which was erroneous.[487] The Appellant insists that he did not have any *de jure* power at the time of the events at Musha church.[488]

232. The Appellant's insistence on his lack of *de jure* power ignores the possibility that he could have had *de facto* power. In any case, since the Trial Chamber did not find that the Appellant acted as a superior during the events at Musha church or that he ordered the massacres,[489] it is not

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[483] *Ibid.*, paras 224-226.
[484] Exh. P.5, photos numbers 19b-19h.
[485] T. 7 March 2001, pp. 53-56, 59.
[486] Semanza Appeal Brief, para. 227.
[487] *Ibid.*, para. 227.
[488] *Ibid.*, paras 228-229.
[489] Trial Judgement, paras 415-419. The Trial Chamber considered that, even if the Appellant had influence, there was not sufficient proof that he had effective control over the perpetrators. Accordingly, it found that the Appellant could

necessary to examine this argument further. The Appellant has not demonstrated that the Trial Chamber committed an error that would affect the verdict.

(d) Witness VA and the Trial Chamber's Finding that the Appellant and Others Went to Musha Church on 8 or 9 April 1994

233. The Appellant challenges the Trial Chamber's finding (based on the testimonies of Witnesses VA and VM) that, along with Paul Bisengimana and others, he went to Musha church on 8 or 9 April 1994.[490] In this connection, the Appellant asserts that: (1) the Indictment states that the events at Musha church took place between 9 and 13 April 1994; and (2) the finding that he went together with Paul Bisengimana and others to Musha church on 8 or 9 April 19994 is wrong because, "[a]part from Bisengimana, Rwabukumba the Brigadier of Gikoro, Rugambarara and Rwakayigamba, this witness [*i.e.*, Witness VA] did not testify that Semanza came along with others as stated in this finding."[491] As to the first argument, while the Indictment states that the events at Musha church took place between 9 and 13 April, this is not "evidence" to contradict the Trial Chamber's finding (if contradiction there is: the Trial Chamber found that the visit occurred at midday on 8 or 9 April 1994).[492] As to the second argument, the Appellant himself recognizes that Witness VA said that he went to Musha church with Bisengimana and others (the Appellant mentions Rwabukumba, Rugambarara and Rwakayigamba) on 9 April 1994. Further, both Witness VA and Witness VM testified that they saw the Appellant and Bisengimana with others.[493]

234. The Appellant next attempts to discredit Witness VA's account of his first visit to Musha church by arguing that no other witness referred to a meeting between him, the priest and the refugees who had been to school, or to the cutting of a child's feet.[494] The only other witness who testified to the Appellant's first visit to Musha church was Witness VM.[495] The fact that Witness VM did not testify to the events mentioned above does not necessarily imply that one of the two witnesses was untruthful. Indeed, the witnesses might not have been asked the same questions and, even though they claimed to have been both in the church, they might not have witnessed all the same events. In any case, the Trial Chamber did not make any finding on the events mentioned

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not be considered a "superior" for the purposes of Art. 6(3) of the Statute and that he could not be found responsible for "ordering" under Art. 6(1) of the Statute.

[490] Semanza Appeal Brief, para. 230.

[491] *Ibid.*

[492] Moreover, even if the visit occurred on 8 April, "minor differences between the indictment and the evidence presented at trial are not such as to prevent the Trial Chamber from considering the indictment in the light of the evidence presented at trial." *Rutaganda* Appeal Judgement, para. 297.

[493] Witness VA mentioned that he saw the Appellant, Bisengimana, Rugumbarara, Rwabukumba, Rwakayigamba, *Interahamwe* and communal policemen. T. 7 March 2001, pp. 57, 105, 106. Witness VM mentioned that he saw the Appellant, Bisengimana, Rugumbarara and policemen. T. 6 March 2001, pp. 88-89.

[494] Semanza Appeal Brief, para. 231.

above and it has not been demonstrated that the Trial Chamber was unreasonable in relying on any part of Witness VA's testimony.

235. The Appellant recalls that Witness VA testified that he told Bisengimana that the church had to be burned down so that the refugees would die inside.[496] The Appellant then writes:

> The Trial Chamber found at paragraph 208 [*sic*, para. 207] that insufficient evidence was led by the Prosecutor to prove the co-operation of Bisengimana and yet proceeded to convict the Accused, drawing inferences of specific intent as well as *mens rea* from this incident.[497]

236. This misunderstands the findings of the Trial Chamber: the Trial Chamber did not find that the Appellant had never stated that the church had to be burned. On the contrary, it found that, on his first visit to Musha Church on 8 or 9 April 1994, the Appellant expressed an intention to kill the refugees there.[498] It only found that insufficient evidence had been adduced to show that the Appellant and Bisengimana had worked together to organize the massacres.[499]

237. At paragraph 234 of his appeal brief, the Appellant notes that the indictment in the case of Rugambarara states that, upon arrival at Musha church, the Appellant allegedly said, "I do not want anybody from the Church to escape. Even if it is necessary destroy the Church." The Appellant seems to have two contentions in this regard: (i) his own Indictment did not refer to this expressly; (ii) Witness VA did not testify to the exact words uttered by the Appellant.[500]

238. This is unpersuasive. First, the *Rugambarara* Indictment states that the Appellant made the above utterance on his arrival at Musha church on 13 April 1994, not 8 or 9 April 1994.[501] This is not necessarily the same incident as that referred to by Witness VA. Second, the "exact words" of an accused need not be recounted for a trial chamber to determine the probative value of a statement and to make a finding.

239. The Appellant also seems to contend that, on 8 or 9 April 1994, the refugees in Musha church comprised both Hutu and Tutsi and that, therefore, the Trial Chamber could not draw from his statement ("the church should be burned") that he had the specific intent for genocide.[502]

240. The Appeals Chamber is not convinced by this argument. First, even if there were still some Hutu in the church at the time the Appellant made the statement (on 8 or 9 April 1994), the

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[495] The Appellant also refers to the "declaration of VZ", but that declaration was not admitted in evidence (see *supra* section II. A. 3. (a) and *infra* section II. G. 3.
[496] Semanza Appeal Brief, para. 233.
[497] *Ibid.*
[498] Trial Judgement, para. 196.
[499] *Ibid.*, para. 207.
[500] Semanza Appeal Brief, para. 235.
[501] *The Prosecutor* v. *Juvénal Rugambarara*, Case No. ICTR-00-59-1, Indictment, 10 July 2000, para. 3.28(i).

Trial Chamber found that the great majority of refugees was Tutsi.[503] Second, in finding that the Appellant had the specific intent to commit genocide, the Trial Chamber did not rely only on the utterance he made on 8 or 9 April, but also on very probative elements such as his actions before, during and after the attack on Musha church.[504]

241. The Appellant recalls that, contrary to Witness VA, Witness VM did not testify to hearing the Appellant say that the church had to be burned, even if Witness VM was inside Musha church at the moment the statement was allegedly made.[505] This is not sufficient to show that the Trial Chamber was unreasonable in relying on Witness VA's testimony on this point. As explained above, two witnesses in the same general area do not necessarily have identical observations and recollections about who was present and what was said. In the case at hand, there were many refugees inside the church, and it is possible that not everyone heard the Appellant's statement.

242. The Appellant argues that VZ would have been the best witness to testify to these events, but that the Trial Chamber "refused to admit his declaration in evidence or to take a deposition from him."[506] As found above, the Trial Chamber did not err in refusing to admit VZ's statement.[507] Accordingly, there is no need to examine further this argument, or any argument based on VZ, since VZ's evidence is not on record.

243. The Appellant alleges that the Prosecution stated in its Closing Brief that the statement attributed to the Appellant was made not at Musha church but at the commune office.[508] However, even if the Prosecution made an error in its Closing Brief, this has no evidentiary value: the Trial Chamber must rely on the evidence adduced to make its findings, not on the Closing Brief.

(e) Witness VA's Testimony that the Appellant Tortured and Killed one Rusanganwa

244. Witness VA testified that, on 13 April 1994 (the day of the attack on Musha church), the Appellant tortured and killed a refugee called Rusanganwa.[509] The Trial Chamber relied on this part of Witness VA's testimony to find that the Appellant "intentionally inflicted serious injuries on Rusanganwa after questioning him at Musha church and that Rusanganwa died as a result of those

[502] Semanza Appeal Brief, paras 236-238.
[503] *See* Trial Judgement, para. 429. At paragraphs 238 and 240 of his appeal brief, the Appellant makes the assertion that this finding "is not born by the evidence" and argues that, contrary to Witness VA's testimony, there were also Hutu among the refugees in the church. This is insufficient to show an error on the part of the Trial Chamber. First, Witness VA did not testify that there were only Tutsi in the church; rather, she said that the refugees she knew were Tutsi. Second, there is little doubt that there were also some Hutu, but the majority of refugees were Tutsi. The arguments of the Appellant do not cast doubt on this finding.
[504] Trial Judgement, paras 178, 196, 206, 425-430.
[505] Semanza Appeal Brief, para. 238.
[506] *Ibid.*, para. 241.
[507] *See supra* section II. A. 3. (a)
[508] Semanza Appeal Brief, para. 242, referring to the Prosecution's Closing Brief, p. 31.

injuries."[510] The Appellant attacks the credibility of this part of Witness VA's testimony.[511] In this connection, the Appellant notes that there was some confusion as to the name of the victim (Rusanganwa or Lusanganwa) and asserts that there was a contradiction between Witness VA's prior statement and her testimony as to whether only the arms or the arms and legs of the refugee were cut off.

245. The Appellant's arguments on this point fail. The Appellant does not dispute that "Victim C" (as identified in the Indictment) was tortured and murdered, but argues over the precise name of this victim (Rusanganwa or Lusanganwa). In this connection, the Trial Chamber wrote:

> The English transcripts refer to Rusanganwa in this colloquy as Lusanganwa. After reviewing the Kinyarwanda to French translation, the witness's original statement in French, and unchallenged references to this individual as Rusanganwa by other witnesses, the Chamber notes that the spelling of this individual's name as Lusanganwa in this portion of the English transcript is a non-material translation or transcription error.[512]

The Appellant has not demonstrated that the Trial Chamber erred in this regard. As to the alleged discrepancy between Witness VA's prior statement and her in-court testimony, the Trial Chamber did consider this and stated:

> The Chamber is satisfied that the apparent confusion or contradiction in Witness VA's account is not material and is explained by the trauma of the event, the manner in which her testimony was elicited, and an apparent misunderstanding between the witness and the investigators. Her testimony concerning this event was otherwise detailed and vivid, and the Chamber accepts that the witness heard the Accused question Rusanganwa about the RPF advance and then saw the Accused strike him with a machete.[513]

The Appellant has not demonstrated that this was unreasonable.

246. The Appellant also argues that the Trial Chamber contradicted itself in finding first that "insufficient evidence was presented to show that the Accused co-operated with Bisengimana in the commission of any offence in Musha church as alleged" and then in finding that the Appellant and Bisengimana tortured and killed Rusanganwa.[514] However, the Appellant distorts the finding of the Trial Chamber at paragraph 207 of the Trial Judgement: the Trial Chamber only found that there was not sufficient evidence that the Appellant and Bisengimana worked together to organize the massacre at Musha church, not that they never committed any crimes together.

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[509] T. 7 March 2001, pp. 77-78.
[510] Trial Judgement, para. 213.
[511] Semanza Appeal Brief, paras 243-251.
[512] Trial Judgement, n. 277.
[513] *Ibid.*, para. 212.
[514] Semanza Appeal Brief, para. 250.

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247. The Appellant also submits that the Trial Chamber erred in finding that he committed torture against Rusanganwa.[515] In this connection, the Appellant refers to the *Furundžija* Trial Judgement – in which the Trial Chamber found that "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a state or any other authority-wielding entity"[516] – and contends that he cannot be found guilty of torture because he was not a public official and, in his view, there was no evidence that Bisengimana (who was bourgmestre) was at Musha church on 13 April 1994.

248. In the *Kunarac et al.* Appeal Judgement, the ICTY Appeals Chamber explained that the public official requirement is not a requirement outside the framework of the Torture Convention:

> Furthermore, in the *Furundžija* Trial Judgement, the Trial Chamber noted that the definition provided in the Torture Convention related to "the purposes of [the] Convention". The accused in that case had not acted in a private capacity, but as a member of armed forces during an armed conflict, and he did not question that the definition of torture in the Torture Convention reflected customary international law. In this context, and with the objectives of the Torture Convention in mind, the Appeals Chamber in the *Furundžija* case was in a legitimate position to assert that "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity". This assertion, which is tantamount to a statement that the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally.
>
> The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.[517]

This was recently reaffirmed in the *Kvočka et al.* Appeal Judgement.[518] Accordingly, the argument that the Appellant cannot be convicted of torture because he was not a public official or because Bisengimana was allegedly not present at Musha church on 13 April 1994 fails.

(f) Witness VA's Testimony as to the Attack on Musha Church on 13 April 1994

249. The Appellant recalls some parts of Witness VA's testimony concerning the attack on Musha church on 13 April 1994[519] and concludes:

> The above testimony raises serious questions as to whether on the basis of the above, the Trial Chamber was right to find that genocide was committed in Musha Church and there after [sic] proceeded to find that murder and crimes against humanity were committed there.[520]

[515] *Ibid.*, paras 252-256.
[516] *Furundžija* Trial Judgement, para. 162.
[517] *Kunarac et al.* Appeal Judgement, paras 147-148.
[518] *Kvočka et al.* Appeal Judgement, para. 284.
[519] Semanza Appeal Brief, paras 257-259.
[520] *Ibid.*, para. 260.

250. This bald assertion is insufficient to show that the relevant findings of the Trial Chamber were unreasonable. To be sure, the Appellant also avers that the Trial Chamber should not have relied upon Witness VA's testimony as to the attack on Musha church because she testified that she saw everything while "covered with dead bodies"[521] or because "she was hit by a hammer and buried in a mass grave filled with corpses."[522] However, these arguments also fail: Witness VA testified that it was during the attack (*i.e.*, after the torture of Victim C and the separation of Hutu children from Tutsi children) that she was injured.[523] She was then placed under a pile of dead bodies and, when the assailants came to take the dead bodies and load them in the vehicles, they realized that she was not dead, and they hit her on the head with a hammer, undressed her and buried her in a pit full of dead bodies.[524] Thus, even assuming that the Appellant is right that a witness covered with dead bodies and hit with a hammer might not have seen "everything", the Appellant has not cast any doubt on Witness VA's ability to testify on the events before she was injured. There were no problems with Witness VA's assertion that the Appellant arrived at Musha church with *Interahamwe*, that he and Bisengimana tortured Victim C, that they separated the Hutu children from the Tutsi ones, and that the assailants opened fire and threw grenades inside the church.

2. Witness VM

251. The Appellant attacks the credibility of Witness VM. In this connection, the Appellant submits that: (1) Witness VM testified that he saw him with Bisengimana and Rugambarara at Musha church on 8 April 1994 (the day after his arrival at the church), while Witness VA testified that his first visit to the church was on 9 April 1994[525]; (2) Witness VM contradicted himself as to the moment the *Interahamwe* arrived at Musha church[526]; (3) Witness VM had problems identifying the church on photos and could only do so after a leading question of the Prosecution[527]; (4) on the first visit of the Appellant to Musha church (which the witness said occurred on 8 April 1994), Witness VM did not hear him tell Bisengimana that the church would have to be burned down; Witness VM only saw the Appellant and Bisengimana take notes[528]; (5) Witness VM's version of the events at the church and the role played by the Appellant differs from Witness VA's version, particularly as to the moment the attack commenced, the identity of the attackers and the age of the

[521] *Ibid.*, paras 104 and 337.
[522] Semanza Reply, para. 75.
[523] T. 7 March 2001, p. 84.
[524] *Ibid.*, p. 85
[525] Semanza Appeal Brief, paras 261 and 263 (referring to T. 6 March 2001, p. 89).
[526] *Ibid.*, para. 262 (no reference to the record provided).
[527] *Ibid.*, para. 262 (referring to T. 6 March 2001, pp. 84-85).
[528] *Ibid.*, paras 263 (referring to T. 6 March 2001, p. 90) and 270 (referring erroneously to T. 13-14 November 2000, pp. 128-129 – this is a reference to the testimony of Witness VN).

victims[529]; (6) there were some differences between Witness VM's testimony and Witness VA's testimony as to some of the persons killed at Musha church; in particular, Witness VM did not testify to the torture and killing of Lusanganwa[530]; (7) Witness VM wrongly believed that the Appellant was in charge of the attack and this belief was based on erroneous assumptions, namely that the Appellant was still bourgmestre, that he was giving instructions and that the *Interahamwe* had been training at his house[531]; (8) Witness VM's identification of the Appellant was unsafe under the circumstances described by the witness[532]; and (9) Witness VM discredited himself when he testified that he saw the Appellant in Kabuga using the red pickup truck of APEGA to run over survivors.[533]

252. The Appeals Chamber is not persuaded by these submissions. In many cases, the Appellant distorts the evidence given by Witness VM.[534] More importantly, the Appellant does not address the findings of the Trial Chamber: he simply lists a number of complaints against Witness VM's testimony. However, all of these elements – to the extent that there is any truth in what the Appellant alleges – were before the Trial Chamber. The Appellant fails to show that the Trial Chamber ignored those elements or that its treatment thereof was unreasonable.

3. VZ's Version of the Events at Musha Church

253. The Appellant asserts:

> A comprehensive, first hand account of what transpired at the Musha Church in April 1994 is vividly narrated by VZ in his witness declaration dated 27 February 2001. While corroborating Defence witnesses BZ, MTP and BP in every material particular, it exculpates the Accused totally in the events. Like Defence witnesses, it placed responsibility for the events totally on soldiers who deserted the battlefront. It was therefore not in the interest of Justice that the Chamber ignored this **dispassionate, neutral, firsthand credible** account.[535]

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[529] *Ibid.*, para. 264 (referring only to testimony of Witness VA, T. 7 March 2001, pp. 82-84).
[530] *Ibid.*, para. 265 (referring erroneously to T. 7 March 2001, pp. 96-97 – the correct reference is T. 6 March 2001, pp. 96-97).
[531] *Ibid.*, paras 266-267 (no reference to Witness VM's testimony provided).
[532] *Ibid.*, para. 268 (referring erroneously to T. 20 March 2001, p. 99 – this is a reference to Witness VAO's testimony – and to *Kupreškić et al.* Appeal Judgement, without providing any more specific reference).
[533] *Ibid.* (referring erroneously to T. 20 March 2001, p. 100 – this is a reference to Witness VAO's testimony). In this connection, the Appellant asserts that Witness VA testified that he never drove and that Witness XXK said that he never drove the red APEGA vehicle in April 1994 (no references provided).
[534] For instance, there was no contradiction in Witness VM's testimony as to the date the *Interahamwe* arrived at the church: Witness VM said that they arrived 4 to 6 days after he took refuge in the church (Trial Judgement, para. 175; T. 6 March 2001, pp. 92, 137-138), he did not say that they arrived the following day (and the Appellant does not refer to any part of the record in support of this assertion). Further, the Appellant himself contradicts his argument when he writes, at para. 270 of appeal brief: "VM ... nor did he see any Interahamwe or Presidential Guard at the site on the above material point [*i.e.*, on the 8th of April 1994]." There are other examples of such distortions but because the Appellant does not show that the findings of the Trial Chamber in relation to Witness VM were unreasonable, it is unnecessary to identify all these distortions.
[535] Semanza Appeal Brief, para. 274.

The Appellant contends that, shortly after having refused to admit VZ's written declaration in evidence, the Trial Chamber allowed over objections of the Defence the Prosecution to read "an account of the events by VZ in the Belgian Newspaper Het Volk cited by the Washington Post of 15th April 1994."[536] The Appellant submits that this shows that the Trial Chamber was biased.[537] The Appellant also avers that VZ's account of the events at Musha church contradicts many of the Trial Chamber's findings.[538]

254. The issue of the Trial Chamber's refusal to accept VZ's written declaration in evidence has already been discussed above.[539] For the reasons given there, the Appellant has not demonstrated that the Trial Chamber erred in refusing VZ's written declaration or that the Trial Chamber was biased. In this connection, it should be recalled that the Trial Chamber explicitly reminded the Defence that, if it wished to obtain evidence from VZ, it could seek to call him to testify as part of its case.[540] There is no evidence that the Defence ever tried to call VZ to testify. As to the fact that the Trial Chamber allowed the Prosecution to read an account of the events by VZ as reported by the newspapers, this was only done for the purpose of cross-examining a Defence witness: the Prosecution was allowed to test the credibility of a Defence witness by presenting her with someone's else account as reported by a newspaper.[541]

255. Given that neither VZ's written declaration nor the newspaper articles referred to above were entered into evidence before the Trial Chamber and that the Appeals Chamber found that VZ's statement could not be admitted on appeal pursuant to Rule 115 of the Rules,[542] it is unnecessary to examine further the Appellant's arguments on VZ's statement or the newspaper articles allegedly reporting his version of the events.

4. Individual Criminal Responsibility for the Musha church massacre

256. The Appellant maintains that the evidence does not show that he was present at the Musha church or that he ordered the massacre.[543] He acknowledges that the Trial Chamber found that his influence over other physical perpetrators of the crimes mentioned in the Indictment was not sufficient to conclude that he was a superior in some formal or informal hierarchy with effective

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[536] *Ibid.*, para. 275.
[537] *Ibid.*, para. 276.
[538] *Ibid.*, paras 277-296.
[539] *See supra* sections II. A. 3. (a) and II. G. 3.
[540] Decision on the Defence Motion for Orders Calling Prosecution Witness VZ listed in Prosecution Witness List of November 2000; Prosecution Witness VL, VH and VK Listed in Supporting Material to the Third Amended Indictment to Testify; In the Alternative Admit the Statements of the Said Witnesses in Unredacted Form in Evidence in the Interest of Justice Pursuant to Rules 54, 68 and 98 of the Rules of Procedure and Evidence, 6 September 2001, para. 9.
[541] T. 25 October 2001, pp. 28-37.
[542] Decision on Defence Motion for Leave to Present Additional Evidence and to Supplement Record on Appeal, 12 December 2003, pp. 3-4.

control over these perpetrators,[544] but he submits that this is in contradiction with paragraph 478 of the Trial Judgement, where the Trial Chamber found:

> Having regard, *inter alia*, to the influence of the Accused and to the fact that the rape of Victim A occurred directly after the Accused instructed the group to rape, the Chamber finds that the Accused's encouragement constituted instigation because it was causally connected and substantially contributed to the actions of the principal perpetrator. The assailant's statement that he had been given permission to rape Victim A is evidence of a clear link between the Accused's statement and the crime. The Chamber also finds that the Accused made his statement intentionally with the awareness that he was influencing the perpetrator to commit the crime.

257. The Appeals Chamber considers that there is no contradiction. First, the finding at paragraph 478 of the Trial Judgement does not relate to the Musha church massacre, but to separate events, namely the rape of Victim A in Nzige. Second, the Appellant was convicted for having instigated the rape of Victim A.[545] For an accused to be convicted of instigating, it is not necessary to demonstrate that the accused had "effective control" over the perpetrator.[546] The requirement of "effective control" applies in the case of responsibility as a superior under Article 6(3) of the Statute.[547] In the case at hand, even though the Trial Chamber found that it had not been proven that the Appellant had effective control over others (and thus refused to convict him on the basis of his superior responsibility), this does not mean that the Appellant could not be convicted for instigating. On the evidence presented, the Appeals Chamber is not convinced that the Trial Chamber erred in convicting the Appellant for instigating the rape of Victim A.

258. The Appellant also seems to submit that the kind of participation under Article 6(1) of the Statute should have been particularized in the Indictment. In his appeal brief, the Appellant writes:

> The Chamber found that the Accused did not organize the commission of the crimes nor did he lead same in Musha Church or at Mwulire. Nevertheless, rather [than] acquit the Accused, the Chamber acknowledged that since the count did not "specify a particular form of criminal participation under article 6(1), the Chamber may consider the charge under the appropriate form within the indictment and fair notice. [Footnote omitted]"[548]

259. The Appeals Chamber notes that it has long been the practice of the Prosecution to merely quote the provisions of Article 6(1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under Article 6(1) of the Statute. The Appeals Chamber reiterates that, to avoid any possible ambiguity, it would be advisable to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged.[549] Nevertheless, even if an individual count of the indictment does not indicate precisely

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[543] Semanza Appeal Brief, para. 281.
[544] *Ibid.*, paras 282-283, referring to the Trial Judgement, paras 402, 417.
[545] Trial Judgement, para. 479.
[546] *See Kordić and Čerkez* Appeal Judgement, para. 27.
[547] *Cf. supra* Part III.
[548] Semanza Appeal Brief, para. 285.
[549] *Ntakirutimana* Appeal Judgement, para. 473; *Aleksovski* Appeal Judgement, n. 319.

the form of responsibility pleaded, an accused might have received clear and timely notice of the form of responsibility pleaded, for instance in other paragraphs of the indictment. In the case at hand, the Appeals Chamber is satisfied that the Appellant had clear and timely notice that he was being charged with, *inter alia*, complicity in genocide and aiding and abetting extermination.[550]

5. Genocide, Complicity to Commit Genocide and Crimes Against Humanity

(a) Genocide

260. The Appellant contends that he could not be convicted for genocide on the basis of the evidence adduced at trial.[551] The Appellant submits that the Trial Chamber should not have convicted him as a perpetrator or co-perpetrator of genocide because he did not fulfil a "key coordinating role" or because there was no evidence of a "high level genocidal plan."[552] Since the Appellant was not convicted by the Trial Chamber as a principal perpetrator or co-perpetrator of genocide but as an accomplice of genocide, these arguments do not provide any reason to alter the Trial Judgement. Further, for an accused to be convicted as perpetrator or co-perpetrator of genocide, it is not necessary that he or she fulfils a "key coordinating role" or that a "high level genocidal plan" be established (even if the existence of a plan to commit genocide can be useful to prove the specific intent required for genocide).[553]

261. The Appellant also contends that there is no evidence on record that the *Interahamwe* attacked Musha church on 13 April 1994 with the intention to destroy in whole or in part the Tutsi ethnic group.[554]

262. The ICTY Appeals Chamber has held that:

> As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.[555]

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[550] As to complicity in genocide, Count 3 of the Indictment is directly on point; as to aiding and abetting extermination, *see* paras 3.7 to 3.16 of the Indictment. The Appeals Chamber also considers that the Appellant had clear and timely notice that he was being charged with ordering the Musha church massacre (*see* para. 3.11 of the Indictment).
[551] Semanza Appeal Brief, para. 299. The Appellant also argues that conspiracy to commit genocide has not been proved. However, the Appellant was convicted for complicity in genocide (*see* Trial Judgement, paras 435, 436 and 553), not for conspiracy to commit genocide. In fact, he was not even charged with conspiracy to commit genocide.
[552] Semanza Appeal Brief, paras 300-301.
[553] *Kayishema and Ruzindana* Appeal Judgement, para. 138; *Rutaganda* Appeal Judgement, para. 525. *See also Jelisić* Appeal Judgement, para. 48.
[554] Semanza Appeal Brief, paras 301-304.
[555] *Jelisić* Appeal Judgement, para. 47.

In the present case, the Trial Chamber found that "there were massive, frequent, large scale attacks against civilian Tutsi in Bicumbi and Gikoro communes"[556] and that the Appellant took part in these attacks.[557] The Appellant has not demonstrated that the Trial Chamber's conclusions that the principal perpetrators had the requisite intent to commit genocide[558] and that he had knowledge of this and even shared the same intent[559] were unreasonable.

(b) Crimes Against Humanity

263. The Appellant asserts that, in light of the findings that the Prosecution did not introduce sufficient evidence to prove that he worked in close cooperation with Bisengimana to organize the massacre at Musha church[560] and that there was no evidence on record that he organized, executed or directed the attack on Tutsi refugees at Mwulire hill on 18 April 1994,[561] the Trial Chamber should have acquitted him of crimes against humanity for these attacks.[562]

264. The Appeals Chamber is not convinced by these submissions. As to the Musha church attack, even if the Trial Chamber was not satisfied that there was sufficient evidence to prove that the Appellant and Bisengimana worked in close cooperation to organize the massacre at Musha church, it was convinced beyond a reasonable doubt that the Appellant participated in the attack by gathering *Interahamwe* and by directing the assailants to kill Tutsi refugees.[563] The Trial Chamber subsequently found that the Appellant had aided and abetted the principal perpetrators of the Musha church massacre and was therefore guilty of crimes against humanity.[564] The Appellant fails to cast doubt on this. As to the Mwulire hill attack, while the Trial Chamber was not convinced that the Appellant had organized, executed or directed the attack, it was convinced beyond a reasonable doubt that "the Accused participated in the killing of Tutsi refugees on Mwulire Hill on 18 April 1994."[565] The Trial Chamber subsequently found that the Appellant had aided and abetted the principal perpetrators of the Mwulire attack and was therefore responsible for crimes against humanity.[566] Again, the Appellant fails to cast doubt on this.

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[556] Trial Judgement, para. 442.
[557] *Ibid.*, paras 206, 228, 244, 426, 430, 433.
[558] *Ibid.*, para. 424.
[559] *Ibid.*, paras 427-429.
[560] *Ibid.*, para. 207.
[561] *Ibid.*, para. 228.
[562] Semanza Appeal Brief, para. 298.
[563] Trial Judgement, para. 206.
[564] *Ibid.*, paras 448-450 (murder as a crime against humanity), 463-465 (extermination as a crime against humanity).
[565] *Ibid.*, para. 228.
[566] *Ibid.*, paras 453-454 (murder as a crime against humanity), 463-465 (extermination as a crime against humanity).

265. The Appellant next submits that the Prosecution did not establish all the elements which, in his view, must be proved before a conviction for crimes against humanity can be entered.[567] In this connection, the Appellant asserts that four elements must be shown to establish a systematic attack:

> (a) the existence of a political objective, (b) a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is to destroy, persecute or weaken a community; (c) the perpetration of a criminal action on a very large scale against a group of civilians or the continuous commission of inhumane acts linked to another the preparation and use of significant public or private resources whether military of other; (d) the implication of high level political and/or military authorities in the definition and establishment of the methodical plan.[568]

The Appellant also suggests that:

> In Prosecutor v. Kupreskic et al. it was held that the essence of a crime against humanity is the systematic policy of a certain scale and gravity directed against a civilian population; the crimes must be directed at the civilian population, specifically identified as a group by the perpetrators of those acts. The crimes must, to some extent be organised and systematic although they need not be related to a policy established at state level, in the conventional sense they cannot be the work of isolated individuals alone. The crimes must be of a certain scale and gravity. The Chamber determined therefore that the three essential elements are the requirement of an armed conflict, directed against a civilian population.[569]

266. Examining whether these elements were established in the case at hand, the Appellant submits: (1) the Prosecution did not prove the existence of a high-level policy against the Tutsi as alleged in paragraphs 3.4 and 3.4.1 of the Indictment; (2) the Prosecution did not adduce evidence of an armed conflict or of any attack by a party to an armed conflict; (3) the Prosecution did not adduce any evidence of the systematic nature of the attacks; and (4) the Trial Chamber relied only on its Decision on Judicial Notice to find that the elements mentioned above had been met.[570]

267. Article 3 of the Statute of the Tribunal provides:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> (a) Murder;
>
> (b) Extermination;
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> (c) Enslavement;
>
> (d) Deportation;
>
> (e) Imprisonment;
>
> (f) Torture;
>
> (g) Rape;
>
> (h) Persecutions on political, racial and religious grounds;
>
> (i) Other inhumane acts.

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[567] Semanza Appeal Brief, paras 298, 305-308.
[568] *Ibid.*, para. 305 (referring to *Blaškić* Trial Judgement, para. 203).
[569] *Ibid.*, para. 306 (referring erroneously to *Kupreškić et al.* Trial Judgement, para. 546 – the correct reference being para. 544).
[570] *Ibid.*, paras 298 and 307.

268. The Trial Chamber in *Akayesu* interpreted Article 3 of the Statute as requiring that the following elements be established before entering a conviction for crimes against humanity:

> (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
>
> (ii) the act must be committed as part of a widespread or systematic attack;
>
> (iii) the act must be committed against members of the civilian population [...][571]

The *Akayesu* Trial Chamber considered that a fourth element had to be proved, namely that "the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds",[572] but the Appeals Chamber disagreed and explained:

> The meaning to be collected from Article 3 of the Statute is that even if the accused did not have a discriminatory intent when he committed the act charged against a particular victim, he nevertheless knew that his act could further a discriminatory attack against a civilian population; the attack could even be perpetrated by other persons and the accused could even object to it. As a result, where it is shown that the accused had knowledge of such objective nexus, the Prosecutor is under no obligation to go forward with a showing that the crime charged was committed against a particular victim with a discriminatory intent. In this connection, the only known exception in customary international law relates to cases of persecutions.[573]

269. The Appeals Chamber considers that the above is a correct statement of the law. Contrary to the submissions of the Appellant, the Prosecution did not have to prove the existence of a high-level policy against the Tutsi: although the existence of a policy or plan may be useful to establish that the attack was directed against a civilian population and that it was widespread and systematic, it is not an independent legal element.[574] Similarly, the Prosecution did not have to prove the existence of an armed conflict: contrary to Article 5 of the ICTY Statute, Article 3 of the ICTR Statute does not require that the crimes be committed in the context of an armed conflict.[575] This is an important distinction.

270. The Appeals Chamber is also not convinced that the Trial Chamber concluded that the widespread or systematic attack element had been established in the absence of any evidence from the Prosecution or by relying only on its Decision on Judicial Notice. Indeed, the Trial Chamber found that, "[i]n light of the judicially noticed facts, the factual findings made in relation to the internal armed conflict in Rwanda and the evidence of massacres of civilians between 6 April 1994 and 31 July 1994 ... there were massive, frequent, large scale attacks against civilian Tutsi in

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[571] *Akayesu* Trial Judgement, para. 578.
[572] *Ibid.*
[573] *Akayesu* Appeal Judgement, para. 467.
[574] *Kunarac et al.* Appeal Judgement, para. 98; *Blaškić* Appeal Judgement, para. 120.
[575] *Cf. Tadić* Appeal Judgement, para. 251; *Kunarac et al.* Appeal Judgement, para. 86.

Bicumbi and Gikoro communes."[576] The Appellant has not demonstrated that this finding was unreasonable.

271. The Appellant also argues that the Trial Chamber erred in convicting him of extermination because there was no proof of preparation and organization of the murders.[577] In this connection, the Appellant avers that the Trial Chamber ignored evidence that he never drove the red APEGA vehicle that allegedly brought the equipment, *Interahamwe* and soldiers to Musha and Mwulire, and that the Trial Chamber itself found that he did not plan, order or execute the massacres at the Musha and Mwulire sites. However, an accused need not have planned, ordered or executed the massacres to be convicted of extermination. Indeed, Article 6(1) refers also to other modes of participation. The Appeals Chamber does not consider that the Trial Chamber erred in convicting the Appellant for aiding and abetting extermination.[578]

6. Mwulire Hill

272. Relying on the testimony of Witnesses VN and VP, the Trial Chamber found that the Appellant participated in the killing of Tutsi refugees on Mwulire hill on 18 April 1994; it held, however, that there was no evidence that he organized, executed or directed the attacks.[579] On the basis of these findings, the Trial Chamber found the Appellant criminally responsible for (i) complicity in genocide for aiding and abetting the principal perpetrators who killed members of the Tutsi ethnic group at Mwulire hill;[580] (ii) murder (a crime against humanity) for aiding and abetting the murder of Tutsi civilians at Mwulire hill on 18 April 1994,[581] though the Trial Chamber vacated this conviction because it found that was included in the extermination conviction;[582] (iii) extermination (a crime against humanity) for aiding and abetting the principals to commit extermination at Mwulire hill;[583] (iv) violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute) for aiding and abetting the intentional murders committed at Mwulire hill,[584] although a majority of the Trial Chamber was against entering a conviction on this count.[585]

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[576] Trial Judgement, para. 442 (references omitted).
[577] Semanza Appeal Brief, para. 308. The Appellant refers to the *Stakić* Trial Judgement (para. 638) for his proposition that extermination requires a degree of preparation and organization.
[578] The Prosecution disagrees with this and submits that the Appellant should have been convicted as a perpetrator or co-perpetrator of extermination. The Prosecution's arguments in this connection are examined *supra* Part III.
[579] Trial Judgement, para. 228.
[580] *Ibid.*, paras 431-433.
[581] *Ibid.*, paras 451-455.
[582] *Ibid.*, para. 505.
[583] *Ibid.*, paras 463-464.
[584] *Ibid.*, para. 535.
[585] *Ibid.*, paras 535-536.

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273. The Appellant takes issue with the Trial Chamber's assessment of the evidence on his participation in the massacres at Mwulire hill.[586] In particular, the Appellant submits that the Trial Chamber only considered and relied upon "unspecified and uncorroborated aspects of the evidence of VN and VP" and that it ignored relevant testimony and exhibits.[587] Many of the arguments raised by the Appellant in this respect merely repeat arguments made on the issue of the alibi. The Appeals Chamber has already concluded that the Appellant had not shown that the Trial Chamber erred in its treatment of the alibi.[588]

274. As to the other evidence that the Trial Chamber allegedly ignored, the Appellant first submits that Rugambarara made a "confession" which supposedly "absolved the Accused of this and other crimes in the region."[589] However, the reference provided by the Appellant does not seem to be the correct one.[590] The Appeals Chamber has considered the transcripts of the intercepted telephone conversations involving Rugambarara, but it has not found any confession "completely absolving the Accused."[591]

275. The Appellant contends that the Trial Chamber ignored Witness XXK's testimony that "she never saw Semanza drive that vehicle [*i.e.*, the red APEGA vehicle] in April 1994 and that she did not see Semanza in April 1994."[592] However, this is a distortion of Witness XXK's testimony, who only said that she did not see the Appellant drive the red APEGA vehicle in April 1994.[593] The fact that Witness XXK did not see the Appellant drive that vehicle does not necessarily imply that he did not drive it at all in April 1994.

276. The Appellant avers that the Trial Chamber ignored the statement of Munirana Etienne (named by Witness VP as one of the *Interahamwe* brought to Mwulire hill by the Appellant), who affirmed that he did not see the Appellant at all in April 1994.[594] This witness did not testify at trial and it seems that the Prosecution did not have the opportunity to cross-examine him.[595] Moreover, his evidence was contradicted by Witness VP's evidence that the Appellant was at Mwulire hill,

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[586] Semanza Appeal Brief, paras 310-326.
[587] *Ibid.*, para. 310. The "evidence" allegedly ignored by the Trial Chamber includes (in the words used by the Appellant): the testimony of Witnesses VAR, Ruzindana, Kaiser, XXK, CBN; the telephone conversations by Rugambarara in Exh. P.11; Exhibits D.27A, D.28, D.1, D.40, D.42, D.44; Court Document No. 5; and the Prosecution's motion to call additional evidence at the close of its case.
[588] *See supra* section II. D.
[589] Semanza Appeal Brief, para. 311, referring to the transcript of intercepted telephone conversations (Exh. P11).
[590] The Appellant refers to "paragraphs 4931, 4920, 4906, 4993, 4982, 4980, 4979 and 5006" of the transcript of intercepted telephone conversations (Exh. P11), but as noted there are no such numbered paragraphs in Exh. P11 (*supra* footnote 2488).
[591] *See* Exh. P.11.
[592] Semanza Appeal Brief, para. 313.
[593] T. 23 April 2002, p. 45.
[594] Semanza Appeal Brief, para. 314, referring to Exh. D.1, D.40, and D.41.
[595] Prosecution Response, para. 274.

which evidence the Trial Chamber found credible. The Appellant has not shown that the Trial Chamber was unreasonable in preferring Witness VP's evidence to that of Munanira Etienne.

277. The Appellant also refers to "Court Document No. 5", which he alleges shows that the Prosecution exaggerated the scale of the attacks at Mwulire[596] and calls into question the Trial Chamber's finding in its Decision on Judicial Notice that there were widespread or systematic attacks in the region.[597] However, the witnesses who testified before the Trial Chamber gave strong testimony about the events at Mwulire, including the number of people who were killed there.[598] The Appellant has not demonstrated that the Trial Chamber was unreasonable in relying on their evidence for its finding as to the numbers killed.[599] Similarly, the Appellant has not shown that the Trial Chamber was unreasonable in concluding that the attack at Mwulire hill was part of widespread or systematic attacks against the Tutsi.[600]

278. Finally, the Appellant refers to Witness XXK's evidence that the Appellant fled the region on 18 or 19 April 1994, which would allegedly have prevented him from taking part in the attack on Mwulire hill on 18 April 1994.[601] However, the Trial Chamber considered this evidence and yet it found that the Appellant participated in the attack at Mwulire hill. The Appellant has not shown that the Trial Chamber erred in doing so.

279. Therefore, the Appeals Chamber is not convinced that the Trial Chamber was unreasonable in finding that the Appellant participated in the attack at Mwulire hill.

H. Rape of Victim A, Murder of Victim B, Torture and Murder of Victim C (Ground 13)[602]

280. The Trial Chamber found that Victim A (a.k.a. Witness VV) was raped,[603] that Victim B was murdered[604] and that Victim C (a.k.a. Rusanganwa) was tortured and murdered.[605] The Appellant was found criminally responsible for rape as a crime against humanity (Count 10: the

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[596] Semanza Appeal Brief, para. 315. The Appellant also contends that Witness VN's testimony on the events at Mwulire hill differed from his account of the same events in "Court Document No. 5", but the Appellant does not provide any reference in support of this assertion.
[597] Semanza Appeal Brief, para. 316.
[598] In this connection, *see* Trial Judgement, paras 224 to 228.
[599] In particular, the Trial Chamber was entitled to prefer the testimony of the witnesses that appeared before it to the assertions in "Court Document No. 5".
[600] Trial Judgement, para. 442.
[601] Semanza Appeal Brief, para. 322.
[602] The Appellant describes this ground as "Counts 11 and 12 (Torture and murder of Victims B and C, and Rape of Victim A)", but the findings of the Trial Chamber were that Victim A (a.k.a. Witness VV) was raped (Trial Judgement, para. 261), that Victim B was murdered (Trial Judgement, paras 261-262) and that Victim C (a.k.a. Rusanganwa) was tortured and murdered (Trial Judgement, paras 209-213).
[603] Trial Judgement, para. 261.
[604] *Ibid.*, paras 261-262.
[605] *Ibid.*, paras 209-213.

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Appellant was held liable as an instigator for the rape of Victim A),[606] for torture as a crime against humanity (Count 11: the Appellant was found responsible as a principal perpetrator in relation to Victim C and as an instigator in relation to Victim A)[607] and for murder as a crime against humanity (Count 12: the Appellant was found responsible as a principal perpetrator in relation to Victim C and as an instigator in relation to Victim B).[608]

281. The Appellant first submits that no reasonable Trial Chamber would have found as the Trial Chamber did in paragraphs 46 to 61 of the Trial Judgement[609] and yet convict him on Counts 11 and 12.[610] However, Counts 11 and 12 are based upon paragraphs 3.17 and 3.18 of the Indictment, which, unlike paragraphs 3.7, 3.8, 3.9, 3.15 and 3.16 of the Indictment, were not found to be too imprecise to maintain a conviction.

282. Second, the Appellant contends that "[t]he alleged victim A was tortured and murdered in Musha Church whereas the alleged victims B and C were raped and C murdered at another location found to be Nzige."[611] In the Appellant's view:

> it was not appropriate to have lumped these events together especially as the co-perpetrators were different and no evidence was established that the two events were related in any manner whatsoever. There was no evidence on record to prove that the said isolated acts were part of [] widespread and or systematic violations by the same perpetrators against a civilian population on the grounds of ethnic, political or racial grounds. The Accused allegedly arrived at each site after unidentified perpetrators had already consummated the crimes. No evidence, from which the intention of the perpetrator could be inferred, was ever adduced.[612]

283. Contrary to what is asserted by the Appellant, the relevant events were not "lumped together" by the Indictment or the Trial Judgement. According to paragraph 3.17 of the Indictment:

> Laurent SEMANZA spoke to a small group of men in Gikoro Commune. He told them that they had killed Tutsi women but that they must also rape them before killing them. In response to Semanza's words the same men immediately went to where two Tutsi women, Victim A and Victim B, had taken refuge. One of the men raped Victim A and two men raped and murdered Victim B.

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[606] *Ibid.*, para. 479.
[607] *Ibid.*, para. 488.
[608] *Ibid.*, para. 494.
[609] In that section of the Trial Judgement, the Trial Chamber found that several allegations in the Indictment were defective in that they failed to specify precise dates or criminal acts. (*See* Trial Judgement, paras 50-52 and 61, where the Trial Chamber finds that the broad allegations in paras 3.7, 3.8, 3.9, 3.15 and 3.16 are impermissibly vague.)
[610] Semanza Appeal Brief, para. 327. In the same paragraph, the Appellant also contends that the "indictment as retained or comprehended by the Trial Chamber at paragraphs 10 and 162 to 164 of the Judgement is substantially different from the indictment as laid," that "[t]his was done to circumvent the insufficiency of the indictment in respect of counts 11 and 12, which relied on paragraphs 3.17 and 3.18" and that he "did not plead to the 3rd amended indictment as laid or the indictment as modified by Judgement in paragraphs 3.11 and 3.18 contrary to the indictment." These arguments have been dismissed above. *See* sections II. B. and II. C.
[611] Semanza Appeal Brief, para. 328, allegedly referring to the Trial Judgement, para. 180 (in this paragraph, the Trial Chamber summarizes the testimony of Prosecution Witness VV as to the events leading to the attack on Musha church). The Appellant again confuses the findings of the Trial Chamber: Victim A was raped and Victim B was killed in Nzige, while Victim C was tortured and killed at Musha church. *See* Trial Judgement, paras 209-213, 261-262.
[612] Semanza Appeal Brief, para. 328 (no references to the record provided).

According to paragraph 3.18 of the Indictment:

> On or about 13 April 1994, in Musha Secteur, Gikoro Commune, Laurent SEMANZA and Paul BISENGIMANA interrogated a Tutsi man, Victim C, in order to obtain information about the military operations of the *Inkotanyi*, or RPF. During the time the interrogation was taking place, the RPF was advancing toward Gikoro and Bicumbi communes. Laurent SEMANZA and Paul BISENGIMANA each cut off one of Victim C's arms while they were interrogating him. Victim C died as the result of these injuries.

The Trial Chamber found that these events occurred on the same day,[613] but nevertheless dealt with these events separately.[614] The Appeals Chamber sees no error in this.

284. The Appellant next contends that a reasonable Trial Chamber would have acquitted him on all these counts upon proper consideration of Exhibits D.27, D.28, P.35 and D.42, of the testimony of Witness VV, and of "the preponderance of evidence that the victims in all cases were both Hutu and Tutsi."[615] In the view of the Appeals Chamber, this is too vague and unsubstantiated to demonstrate any error of the Trial Chamber that would justify intervening.

285. The Appellant avers that he has been convicted as the instigator of crimes (killing and raping) that were already underway prior to his arrival.[616] This is unpersuasive: while there might have been violence in the region before the Appellant made his "speech" on 13 April 1994, the Appellant was convicted not for instigating this violence in general, but for instigating the rape of Victim A and the murder of Victim B, events which occurred immediately after his "speech."

286. The Appellant also alleges that the Prosecution has not made out the elements of co-perpetration or all the elements of torture listed by the *Furundžija* Trial Judgement; in particular, the Prosecution has not proved that he acted in any official or semi-official capacity.[617] However, as noted above,[618] the public official requirement is not a requirement outside the framework of the Torture Convention. Accordingly, it was not necessary to show that the Appellant acted in an official or semi-official capacity when he tortured Victim C (or that bourgmestre Bisengimana was a co-perpetrator).

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[613] Trial Judgement paras 209-213 and 258. As to the instigation, Witness VV testified that the Appellant made his speech just prior to departing for the attack on Musha church (*see* Trial Judgement, paras 253-254). It is unclear whether the assailants first raped Witness VV and killed Victim B before going to attack Musha church or whether they were not part of the assailants at Musha church (the Trial Chamber did not make a finding on this), but this is irrelevant to the Appellant's responsibility: even if he was no longer in Nzige at the time Witness VV was raped and Victim B killed, his responsibility is for instigating the rape and murder, not committing.

[614] *See* Trial Judgement, paras 209-213 and 257-262. In its discussion of the criminal responsibility of the Appellant, the Trial Chamber also considered these events separately: Trial Judgement, paras 480-494. Even if the convictions themselves were based on the two series of events (which was permitted by Counts 11 and 12 of the Indictment), this does not mean that the Trial Chamber "lumped together" the events.

[615] Semanza Appeal Brief, para. 329. As to Witness VV's testimony, the Appellant is referring to T. 29 March 2001, pp. 9 and 43.

[616] Semanza Appeal Brief, para. 330.

[617] *Ibid.*, para. 331.

[618] *See supra* section II. G. 1. (e)

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287. The Appellant submits that the testimony of Witness VV concerning the death of her cousin is not credible because she said that she "recognized the remains of her cousin by watching her toes in an area in front of the house in which she was buried."[619] This is a misstatement of the evidence. Witness VV testified that three of the men who had listened to the Appellant's exhortations came to the house where she and Victim B (her cousin) were hiding, that they took Victim B outside, that Victim B screamed that she preferred to be killed and that, after she was raped, Witness VV left the house and saw that her cousin had been killed and buried with the toes still sticking out.[620] Accordingly, the Appellant has not demonstrated that the Trial Chamber was unreasonable in relying on Witness VV's testimony and in finding that Victim B had been killed by the men who had heard his exhortations.

288. The Appellant makes the argument that the Trial Chamber unreasonably erred since he was convicted for crimes which occurred at the same time, but in different places (Nzige and Musha church).[621] The Appeals Chamber is not persuaded. Although the Trial Chamber noted that Witness VV had "testified that the event was contemporaneous with the attack at Musha Church" and therefore found that the attack on Witness VV occurred on or about 13 April 1994,[622] the use of the word "contemporaneous" was simply intended to mean that the rape of Witness VV and the attack on Musha church had both taken place on the same day. This becomes clear when taking into consideration the last two sentences at paragraph 258 of the Trial Judgement.[623] Moreover, the Trial Chamber accepted Witness VV's testimony that, after his "speech," the Appellant went to Musha church.[624] The Trial Chamber considered that the Appellant first told a group of men to rape Tutsi women before killing them and then went to Musha church. The Appellant does not show that this was unreasonable.

289. The Appellant asserts that he was wrongly convicted on Counts 10-12 and 14 and that the language in which he allegedly told the *Interahamwe* to commit the crimes detailed in those counts was not made out at trial or even set out in the Indictment.[625] However, it is not necessary to charge and prove the "exact" language used by an accused. Here, paragraph 3.17 of the Indictment

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[619] Semanza Appeal Brief, para. 333 (no reference to the record provided).
[620] T. 29 March 2001, p. 11.
[621] Semanza Appeal Brief, paras 335, 341.
[622] Trial Judgement, para. 258.
[623] *Ibid.*:

> Although the witness did not specify a certain date in April 1994, the Chamber notes that she testified that the event was contemporaneous with the attack at Musha church. Therefore, the Chamber finds that the attack on Witness VV occurred on or about 13 April 1994.

[624] *See* Trial Judgement, paras 180 (referring to T. 29 March 2001, p. 9) and 197.
[625] Semanza Appeal Brief, para. 338.

described in sufficient detail the contents of the statements of the Appellant[626] and there was evidence to make out this allegation.[627] The Appellant has not demonstrated that the Trial Chamber erred in this regard.

290. Finally, the Appellant – purportedly drawing on the *Akayesu* Trial Judgement – seems to suggest that, even if his statements were made out, they would still only establish that he incited the crimes rather than instigating them.[628] However, the Trial Chamber's holding that the Appellant instigated the rape of Victim A and the murder of Victim B was based on its finding that the Appellant's words had been immediately acted upon.[629] The Appellant has not shown that this finding was in error.

I. Murder of Victims D, E, F, G, H, and J (Ground 15)

291. Paragraph 3.19 of the Indictment provides:

> On or about 8 April 1994, Laurent SEMANZA met Juvenal RUGAMBARARA and a group of *Interahamwe* in front of a particular house in Bicumbi Commune. Laurent SEMANZA told the *Interahamwe* to search for and kill the members of a particular Tutsi family. Immediately thereafter, in Laurent SEMANZA's presence, Juvenal RUGAMBARARA also told the *Interahamwe* to locate and kill the same Tutsi family. A short time later the *Interahamwe* searched a field near the house and found and killed four members of the family; Victim D, Victim E, Victim F and Victim G, and also a neighbor, Victim H, and her baby, Victim J.

292. Relying on the testimony of Witness VAM, the Trial Chamber found that these allegations had been made out.[630] Armed with this conclusion, the Trial Chamber held that the Appellant was criminally responsible for murder (a crime against humanity) for instigating the murders of Victims D, E, F, G, H and J.[631]

293. The Appellant recalls his arguments in relation to Grounds 2 (Indictment) and 4 (Alibi) of his appeal to show that the Trial Chamber erred in finding that the allegations in paragraph 3.19 of the Indictment had been made out.[632] The Appellant contends that the Trial Chamber erred in its evaluation of Exhibits P.11 and D.2 and that it ignored contradictory evidence as to where he was at the relevant time.[633] The Appellant also contends that it was unreasonable to hold that he had

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[626] Paragraph 3.17 of the Indictment states: "Laurent SEMANZA spoke to a small group of men in Gikoro Commune. He told them that they had killed Tutsi women but that they must also rape them before killing them. In response to Semanza's words the same men immediately went to where two Tutsi women, Victim A and Victim B, had taken refuge. One of the men raped Victim A and two men raped and murdered Victim B."
[627] Trial Judgement, paras 253 (referring to T. 29 March 2001, pp. 9, 33-35) and 261.
[628] Semanza Appeal Brief, para. 340.
[629] Trial Judgement, para. 261.
[630] *Ibid.*, paras 271-272.
[631] *Ibid.*, paras 495-499.
[632] Semanza Appeal Brief, para. 342.
[633] *Ibid.*, para. 343.

control over the *Interahamwe* since he had no official position.[634] For the reasons given earlier, these arguments are rejected.[635]

294. The Appellant also contends that there is a lack of evidence that he was a co-perpetrator with Juvenal Rugambarara.[636] In this connection, the Appellant argues that it is unclear why the Indictment charged both him and Rugambarara with telling the *Interahamwe* to search for and kill members of a particular family; the Appellant further contends that the Prosecution did not prove that his alleged orders directly resulted in the killings.[637]

295. Similar arguments have been addressed above. It suffices here to reiterate that, for the Appellant to be found guilty of instigating murder as a crime against humanity, it is irrelevant whether he acted in cooperation with authorities (Rugambarara). As to the question of whether there was sufficient evidence to show that the Appellant substantially contributed to the killings, the Trial Chamber found that this was the case.[638] The Appellant fails to cast doubt on this finding.

296. The Appellant argues that the Prosecution failed to plead and prove the precise instigating language he allegedly used.[639] As noted above, it is not necessary to charge and prove the "exact" instigating language used by an accused.[640] Here, paragraph 3.19 of the Indictment gave sufficient information about the tenor of the statement and there was evidence to make out the allegations in the Indictment.[641] The Appellant has not demonstrated that the Trial Chamber was unreasonable.

297. The Appellant also submits that Witness VAM held a grievance against him, rendering her testimony unsafe.[642] However, the animosity between the Appellant and members of Witness VAM's family was part of the case against the Appellant: arguably, it was because of that animosity that he told *Interahamwe* to search for and kill Witness VAM's husband and family.[643] Further, the Appellant has not demonstrated that VAM testified untruthfully. Accordingly, the Appellant has not shown that the Trial Chamber was unreasonable in relying on Witness VAM's testimony on this.

298. The Appellant further contends that the Trial Chamber ignored Witness VAR's testimony that he saw the Appellant on 8 April 1994, in that "it undermines the Prosecution case in respect of

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[634] *Ibid.*, para. 343.
[635] *See supra* sections II. B. II. D. II. G. 1. (c)
[636] Semanza Appeal Brief, paras 344-345.
[637] *Ibid.*, para. 345.
[638] Trial Judgement, paras 497 and 498.
[639] Semanza Appeal Brief, paras 346-347.
[640] *See supra* section II. G. 1. (d) and II. H. .
[641] *See* Trial Judgement, paras 264-272.
[642] Semanza Appeal Brief, paras 348-349.
[643] Prosecution Response, paras 300-301.

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the alleged instigation to kill victims D, E, F, G, H a neighbour and her child J on the 8th [of] April 1994 and the alleged instructions to Bisengimana on the 8th or the 9th to burn down the church as relied on by the Chamber with the words allegedly uttered in Mabare, and judicial notice to find specific intent to commit genocide."[644] However, although the evidence of Witness VAR is not discussed in the Trial Judgement, this does not necessarily imply that the Trial Chamber ignored it completely. The Appellant must demonstrate that no reasonable trial chamber could have reached the conclusion reached by the Trial Chamber had it considered the evidence of Witness VAR. The Appeals Chamber is not convinced that this demonstration has been made.

J. Expert Evidence (Ground 19)

299. The Appellant advances several arguments related to the testimony of Professor André Guichaoua, who gave evidence for the Prosecution as an expert witness. The Appellant contends that Professor Guichaoua did not qualify as an expert concerning the Appellant's alleged influence and reputation because the witness had neither known the Appellant nor written about him prior to submitting his expert report.[645] He notes that portions of Professor Guichaoua's testimony related to the Appellant's house in Gahengeli, but that the witness visited the house only after it had been destroyed and was in ruins.[646] Thus, he avers, Professor Guichaoua was incompetent to testify about this matter.

300. The Appellant argues further that Professor Guichaoua refused to reveal the sources of his information, and that his report and testimony constituted character and reputation evidence that was inappropriate given that the Appellant had not placed his character in issue.[647] He asserts that his alleged character and influence were matters about which only factual witnesses, not an expert, could testify.[648] Thus, the Appellant maintains, the Trial Chamber violated Rule 93 of the Rules of Procedure and Evidence and Articles 19(1) and 20 of the Statute by admitting Professor Guichaoua's report and testimony.[649]

301. The Appellant's assertion that Professor Guichaoua was not qualified as an expert witness is belied by his counsel's concession at trial that, "Yes . . . he is an expert."[650] The Trial Chamber also noted at trial that the Appellant's counsel had told the Chamber "that he has no doubt about the competence of Professor Guichaoua and he doesn't oppose Professor Guichaoua as an expert

[644] Semanza Appeal Brief, para. 312, no reference to the transcript for the testimony of Witness VAR provided.
[645] *Ibid.*, para. 350.
[646] *Ibid.*, para. 352.
[647] *Ibid.*, para. 350.
[648] *Ibid.*, para. 353.
[649] *Ibid.*, para. 350.
[650] T. 24 April 2001, p. 24.

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witness"[651] – a characterization with which counsel registered no disagreement. Having conceded that Professor Guichaoua was qualified, counsel subsequently waived the opportunity, when it was presented, to cross-examine Professor Guichaoua on the matters of his competence and qualifications.[652]

302. Even setting aside the Appellant's failure to challenge Professor Guichaoua's expertise at trial, his arguments fail on the merits. The Appellant's contentions are internally contradictory. The Appellant argues on the one hand that Professor Guichaoua did not know enough facts: that he was unqualified because he lacked personal knowledge of the Appellant's influence and reputation before beginning to prepare his report, and that he was incompetent to testify about the Appellant's home because he never saw it before its destruction. On the other hand, he avers that Professor Guichaoua's testimony constituted factual testimony that was inappropriate as a substantive matter for an expert witness. In either event, the Appellant misconceives the role of expert witnesses generally and the content of Professor Guichaoua's testimony in particular.

303. The purpose of expert testimony is to supply specialized knowledge that might assist the trier of fact in understanding the evidence before it. Expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise; their views need not be based upon firsthand knowledge or experience. Indeed, in the ordinary case the expert witness lacks personal familiarity with the particular case, but instead offers a view based on his or her specialized knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside the layperson's ken.

304. In this case, the Prosecution tendered Professor Guichaoua's testimony as a sociologist who was in Rwanda for part of April 1994 and who is an expert in questions of genocide.[653] His testimony was based on research conducted within the scope of his expertise; it was not founded on personal experience. The Trial Chamber appropriately credited his general testimony concerning the behaviour of officials during the events of 1994, but not his specific testimony speculating on the Appellant's behaviour.[654] The Trial Chamber acted well within its discretion in concluding that the expert witness was qualified. The Appeals Chamber is satisfied that the expert's testimony was appropriately admitted into evidence.

305. The Appellant's more specific argument concerning the basis for Professor Guichaoua's testimony is similarly of no avail. In response to questions posed by Defence Counsel regarding his

[651] *Ibid.*, p. 39.
[652] *Ibid.*, pp. 48-53.
[653] *Ibid.*, pp. 57-62.
[654] *See* Trial Judgement, para. 144.

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sources, Professor Guichaoua stated that he had been studying the issue of genocide, and the area of Rwanda in particular, for many years and had accumulated a number of resources.[655] He explained that his methodology when undertaking analysis of a case is first to consult those resources, including administrative reports. He then verifies the information in the notes he has taken and talks to some of his usual contacts.[656] And although Professor Guichaoua declined to expose his entire address book to public view, he indicated his willingness to disclose particular resources and contacts if asked about specific matters.[657] Thus, the witness candidly disclosed both his methodology and his sources.

306. The Appeals Chamber concludes that the Trial Chamber appropriately admitted and considered the expert evidence, and it accordingly dismisses this ground of the appeal.

K. Cumulative Charging (Ground 20)

307. The Appellant argues that he was improperly charged on cumulative grounds.[658] Specifically, he contends that it was impermissible for him to be charged with genocide, complicity to commit genocide, and crimes against humanity for the same conduct.[659] Citing the *Blockburger* test from the jurisprudence of the United States,[660] the Appellant submits that the charges against him were so overlapping in their elements and their proofs that the indictment was defective.[661]

308. The ICTY Appeals Chamber stated in *Čelebići* that "[c]umulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven."[662] The Appeals Chamber explained that "[t]he Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence."[663] For that reason, the Appeals Chamber noted in *Čelebići*, "cumulative charging constitutes the usual practice of both this Tribunal and the ICTR."[664] This Appeals Chamber confirmed in *Musema*, an ICTR case, that "the above holding on cumulative charges reflects a general principle and is equally applicable" to ICTR cases.[665]

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[655] T. 24 April 2001, p. 93.
[656] *Ibid.*, pp. 93-94.
[657] *Ibid.*, p. 95.
[658] Semanza Appeal Brief, paras 354-367.
[659] *Ibid.*, para. 354.
[660] *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).
[661] Semanza Appeal Brief, paras 360-361.
[662] *Čelebići* Appeal Judgement, para. 400.
[663] *Ibid.*
[664] *Ibid.*
[665] *Musema* Appeal Judgement, para. 369.

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309. The Appellant's arguments in this case are plainly meritless in light of the *Čelebići-Musema* principle. Regardless of whether the charges were cumulative or not, the Prosecution was entitled to bring overlapping charges. It is up to the Trial Chamber at a later stage to winnow the charges and to prevent impermissibly cumulative convictions. The Appeals Chamber therefore rejects ground 20 of the appeal.[666]

L. Sentencing (Ground 22)

1. The Sentence

310. To recapitulate matters relating to the verdict and sentence, the Trial Chamber convicted the Appellant of one count of complicity in genocide (Count 3), one count of aiding and abetting extermination as a crime against humanity (Count 5), one count of rape as a crime against humanity (Count 10), one count of torture as a crime against humanity (Count 11), and two counts of murder as a crime against humanity (Counts 12 and 14).[667] The Trial Chamber sentenced the Appellant to two terms of 15 years' imprisonment for complicity in genocide (Count 3) and aiding and abetting extermination as a crime against humanity (Count 5).[668] Because these convictions were based on identical facts – the massacres at Musha church and Mwulire hill – the Trial Chamber ordered these sentences to run concurrently.[669]

311. The Trial Chamber also concluded that the convictions on Counts 10, 11, 12, and 14 were based on related factual events, and that the sentences for those crimes accordingly should run concurrently.[670] It entered the following sentences: seven years' imprisonment for instigating rape as a crime against humanity (Count 10); ten years' imprisonment for instigating torture by rape and personally committing torture as a crime against humanity (Count 11); ten years' imprisonment for instigating one murder and personally committing one murder (Count 12); and eight years' imprisonment for instigating the murder of six persons (Count 14).[671] The Chamber ordered that the sentences for Counts 10, 11, 12, and 14 shall be served consecutively to the concurrent sentences for Counts 3 and 5, making a total sentence of 25 years' imprisonment.[672] Pursuant to the

[666] The Appellant also claims that the Trial Chamber's judgement is invalid because it contains cumulative convictions. This argument is considered in the next section.
[667] Trial Judgement para. 553.
[668] *Ibid.*, para. 585.
[669] *Ibid.*
[670] *Ibid.*, paras 586-587.
[671] *Ibid.*, para. 588.
[672] *Ibid.*, paras 589-590.

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Appeals Chamber decision of 31 May 2000,[673] the Trial Chamber reduced the sentence by six months for violations of the Appellant's rights during his pre-trial detention in Cameroon.

2. Standard of Review

312. The Appellant raises a number of challenges to the sentence. Before reviewing those challenges, the Appeals Chamber first recalls the standard of review. The Appeals Chamber's review of an appeal of the sentencing portion of a judgement is not *de novo*. Trial Chambers are vested with broad discretion to tailor the penalties to fit the individual circumstances of the accused and the gravity of the crime.[674] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion.[675] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence.[676] A Trial Chamber's sentencing decision may therefore only be disturbed on appeal if the Appellant shows that the Trial Chamber erred in the weighing process either by taking into account what it ought not to have considered or by failing to take into account what it ought to have considered.[677]

3. Cumulative Convictions

313. The Appellant first contends that the Trial Chamber failed to apply the principles laid out in *Čelebići* and erred in entering cumulative convictions.[678] Because of this failure, he contends, his cumulative convictions and sentence violate the principle of double jeopardy.[679] He submits that the Trial Chamber considered as aggravating factors the "effect of crimes charged cumulatively, the number of deaths, [and] the influence of the Accused."[680]

314. The Appellant advances this argument in a conclusory way. He does not identify the respects in which he believes his convictions were cumulative, and he offers little in the way of supporting arguments. Nonetheless, the Appeals Chamber will consider his contention to ensure that the proscription on cumulative convictions was not abridged.

315. The general test for cumulative convictions was recently reaffirmed in the *Krstić* Appeal Judgement:

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[673] Semanza Appeal Decision.
[674] *Čelebići* Appeal Judgement, para. 717.
[675] *Tadić* Judgement in Sentencing Appeals, para. 22; *see also Blaskić* Appeal Judgement, para. 680; *Dragan Nikolić* Appeal Judgement, para. 9.
[676] *Čelebići* Appeal Judgement, para. 725; *Dragan Nikolić* Appeal Judgement, para. 9.
[677] *Čelebići* Appeal Judgement, para. 780; *Dragan Nikolić* Appeal Judgement, para. 9.
[678] Semanza Appeal Brief, paras 370-372.
[679] *Ibid.*, para. 370.
[680] *Ibid.*, para. 371.

> The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other. An element is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter.[681]

316. The Appellant was convicted under Count 3 of complicity in genocide, which is proscribed by Article 2(3)(e) of the Statute.[682] The Trial Chamber held that "there is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1)."[683] The Trial Chamber further noted that "the *mens rea* requirement for complicity to commit genocide in Article 2(3)(e) mirrors that for aiding and abetting and the other forms of accomplice liability in Article 6(1)."[684] However, the ICTY Appeals Chamber held in *Krstić* that "the terms 'complicity' and 'accomplice' may encompass conduct broader than that of aiding and abetting."[685] "[A]n individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime",[686] while "there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group."[687] This was reaffirmed in *Ntakirutimana*, where this Appeals Chamber said: "[i]n reaching this conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of liability from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same *mens rea*, while other forms of complicity may require proof of specific intent."[688]

317. The Trial Chamber also convicted the Appellant of crimes against humanity under five separate counts: rape of Victim A (Count 10); torture of Victims A and C (Count 11); murder of Victims B and C (Count 12); murder of Victims D, E, F, G, H, and J (Count 14); and extermination (Count 5).

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[681] *Krstić* Appeal Judgement, para. 218 (footnotes omitted); *see also Čelebići* Appeal Judgement, para. 412-413; *Ntakirutimana* Appeal Judgement, para. 542; *Kordić and Čerkez* Appeal Judgement, paras 1032-1033.
[682] However, the majority of the Appeals Chamber considers that the Appellant should be convicted of genocide for his role in the massacre at Musha church and of complicity in genocide for his part in the Mwulire hill attack: *see infra* section III. A.
[683] Trial Judgement, para. 394.
[684] Trial Judgement, para. 394.
[685] *Krstić* Appeal Judgement, para. 139. *See also Ntakirutimana* Appeal Judgement, para. 371.
[686] *Krstić* Appeal Judgement, para. 140.
[687] *Ibid.*, para. 142.
[688] *Ntakirutimana* Appeal Judgement, para. 500.

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318. A conviction for genocide or complicity in genocide is not impermissibly cumulative with the convictions for crimes against humanity. A conviction for genocide under Article 2 of the Statute requires proof of an "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."[689] That is a wholly different legal and factual showing from the finding of a "widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" that must support a conviction for crimes against humanity.[690] Upon this basis, the Appeals Chamber has held that convictions for genocide and convictions for crimes against humanity, based on the same facts, are permissible.[691]

319. The Appeals Chamber accordingly turns now to the crimes against humanity convictions. The Appellant's convictions for murder are not cumulative because the two murder convictions were for the killing of different victims. As recounted above, Count 12 was for the murders of Victims B and C; Count 14 was for the murder of Victims D, E, F, G, H, and J. The convictions for instigating the rape of Victim A (Count 10) and the torture of Victim A (Count 11) present no problems of cumulativeness, because they contain different legal elements.

320. So, too, the conviction on Count 12, for the murders of Victims B and C, does not overlap impermissibly with the conviction for the torture of Victim C. Murder and torture are composed of different legal elements; that is, each crime contains an element that the other does not. Torture requires a specific, enumerated purpose: in this case, to obtain information or a confession. Murder, on the other hand, requires no such purpose; it requires only the intent to kill or inflict grievous bodily injury. Thus, an accused may be convicted of both offences.

321. Finally, the extermination count does not impermissibly overlap with the murder convictions, because the convictions were for different crimes involving different factual scenarios.

322. Accordingly, the Appeals Chamber is satisfied that the Appellant's convictions were not improperly cumulative.

4. Reduction of Sentence and Related Issues Concerning the Appellant's Pre-Trial Detention

323. The Appellant's arguments with respect to sentencing focus heavily on his pre-trial detention. This matter was the subject of a prior decision by the Appeals Chamber.[692] The Appellant filed a motion in 1999 to set aside his arrest and detention as unlawful. The Trial

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[689] Article 2(2) of the Statute.
[690] Article 3 of the Statute.
[691] *Musema* Appeal Judgement, para. 370; *Krstić* Appeal Judgement, paras 219-227; *Ntakirutimana* Appeal Judgement, para. 542.
[692] Semanza Appeal Decision.

Chamber dismissed the motion, and the Appeals Chamber issued its decision on 31 May 2000. The Appeals Chamber noted that the Appellant had been detained for two periods of time in Cameroon, and that he was transferred to the Tribunal's custody in Arusha after the second period of detention.[693] The issues on appeal were whether, during those periods of pre-trial detention, he had been promptly informed of the charges against him and had been detained in accordance with international human rights law.

324. The Appeals Chamber concluded that the Appellant's right to be promptly informed of the charges against him was violated during his first period of detention because of the 18-day lapse between his arrest and his being informed of the charges against him.[694] With respect to the second period of detention, the Appeals Chamber found that Appellant was already made aware of the charges against him during his first detention.[695] Thus, if any violation of the Appellant's rights occurred, it was "less serious" than the violation during the initial detention.[696] The Appeals Chamber also considered the Appellant's claim that he was not afforded an opportunity to challenge the lawfulness of his detention, because the Trial Chamber did not hear his habeas corpus petition.[697] The Appeals Chamber concluded that "the Appellant's right to challenge the lawfulness of his detention was violated."[698]

325. Having found these violations, the Appeals Chamber then considered the question of remedy. It observed that the question of prejudice "must be assessed . . . in the light of the circumstances of the case."[699] The Chamber determined that "the remedy sought by the Appellant, namely his release, [was] disproportionate" to the rights violation.[700] Instead, it decided "that for the violation of his rights, the Appellant [was] entitled to a remedy which shall be given when judgement is rendered by the Trial Chamber."[701] Specifically, the Appeals Chamber instructed the Trial Chamber that, if it found the Appellant guilty, it should reduce his sentence to account for the violation of his rights.[702] Pursuant to that instruction, the Trial Chamber in its Judgement considered the nature of the violations and concluded, in light of "the importance of these

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[693] *Ibid.*, para. 87. For a fuller procedural narrative regarding the Appellant's detentions in Cameroon and related legal developments, see *ibid.*, paras 4-20.
[694] *Ibid.*, para. 87.
[695] *Ibid.*, para. 89.
[696] *Ibid.*, para. 90.
[697] *Ibid.*, paras 112-114. The Appeals Chamber noted that the Trial Chamber did not hear the motion because the Registry did not place it on the cause list. *Ibid. See also supra* section II.A.4.
[698] *Ibid.*, para. 114.
[699] *Ibid.*, para. 123.
[700] *Ibid.*, para. 129.
[701] *Ibid.*, Disposition para. 6.
[702] *Ibid.*, Disposition para. 6(b).

fundamental rights," that it was "appropriate to reduce the Accused's sentence by a period of six months."[703]

326. To the extent that the Appellant argues that the Trial Chamber failed to follow the Appeals Chamber's directive, that argument is misplaced. The Trial Chamber clearly considered the Appeals Chamber's decision and, after determining that the rights violations were "importan[t]," reduced the Appellant's sentence accordingly. Thus, the Appellant can only contend that the amount of this reduction was insufficient. But the Appellant has not provided a coherent argument, much less cited any authority, regarding what would constitute a more appropriate adjustment in his sentence. Given that the Appeals Chamber can only act on discernible sentencing errors on review, the Appeals Chamber concludes that the Appellant's arguments concerning his pre-trial detention fail.

327. The Appellant also argues that the Trial Chamber did not treat the issue of the pre-trial detention violations with sufficient seriousness because it considered the violations only as a mitigating factor and "ignored" the "denial of justice."[704] But the Appeals Chamber decision did not specify the format in which the Trial Chamber was required to consider the rights violations; it merely instructed the Trial Chamber to take the violations into account. It was reasonable for the Trial Chamber to do so in the context of mitigating circumstances, since it is the finding of a mitigating factor that results in the reduction of a sentence. And as previously explained, the Trial Chamber did not "ignore" the denial of justice; on the contrary, it noted that the rights violations were important. This argument is of no avail.

328. Finally, it is worth noting that the Appellant appears to conflate two separate issues: (1) the reduction in his sentence for the pre-trial violation of his rights, and (2) credit for time served. The Trial Chamber appropriately dealt with these issues in separate portions of its judgement. As just explained, the Chamber granted a six-month reduction in the sentence for the rights violations. Separately, it afforded credit for time served of seven years, one month, and nineteen days.[705]

329. The Appeals Chamber accordingly determines that the Trial Chamber properly complied with the Appeals Chamber's earlier decision in granting a reduction in the Appellant's sentence for the violations of his rights that occurred before trial.

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[703] Trial Judgement, para. 580.
[704] Semanza Appeal Brief, para. 375.
[705] Trial Judgement, para. 584.

5. Other Indictments

330. The Appellant also argues that indictments filed against other defendants while the case against him was pending contained information that the Prosecution withheld from him, and that the allegations in those indictments were at variance with the charges against him.[706] He submits that the withholding of this information was so prejudicial to his defence that the Appeals Chamber should quash the entire proceedings and order a new trial.[707]

331. This claim is difficult to assess because the Appellant does not identify the information that was allegedly withheld from him, nor does he specify how the indictments were different from his own. In any event, the indictments at issue – against Juvenal Rugambarara and Paul Bisengimana – were signed on 1 July 2000. At that time, the Defence had not yet begun its case and would not do so until 1 October 2001. Thus, there was ample opportunity to raise objections regarding the different indictments with the Trial Chamber.[708]

332. The Appeals Chamber rejects the Appellant's request that, in light of the information contained in the other indictments, it quash the proceedings and order a new trial.

6. Mitigating Factors

333. The Appellant further contends that the Trial Chamber failed to recognize certain mitigating circumstances.[709] Specifically, he argues that the Trial Chamber should have considered that the Appellant himself was a victim of the insurgency in 1994, insofar as his daughter was assassinated and his property destroyed.[710] Moreover, he submits that the Trial Chamber did not consider his advanced age and poor health,[711] his activities in aiding and assisting refugees in 1990,[712] his general record of generous and favourable treatment of Tutsi,[713] his efforts "to bring peaceful cohesion and social justice to the commune,"[714] or his attempts to bridge the ethnic gap and heal "the wounds of division due to war and poverty."[715]

334. Contrary to the Appellant's arguments, the Trial Chamber considered all of the mitigating factors cited by the Appellant. The Trial Chamber specifically noted that the Appellant argued that

[706] Semanza Appeal Brief, paras 382-384.
[707] *Ibid.*, para. 385.
[708] *See also supra* section II.A.5.
[709] Semanza Appeal Brief, paras 378-379, 391-392.
[710] *Ibid.*, para. 378.
[711] *Ibid.*
[712] *Ibid.*, para. 379.
[713] *Ibid.*
[714] *Ibid.*, para. 391.
[715] *Ibid.*; *see also ibid.*, para. 392.

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he was himself a victim of the events of 1994 and that he suffered ill health.[716] The Trial Chamber concluded that these factors were not relevant mitigating considerations in the Appellant's sentencing.[717] The Trial Chamber also noted the Appellant's contention that his "twenty years of development efforts . . . should be considered in deciding on the appropriate sentence," and it "considered the prior character and accomplishments of the Accused in mitigation of his sentence."[718] Thus, the Appellant cannot argue that the Trial Chamber failed altogether to consider the mitigating factors he cites. Rather, he can only aver that the Trial Chamber did not conclude that these factors weighed as heavily in the balance as the Appellant would have liked. As noted previously, however, a Trial Chamber's sentencing decision may only be disturbed on appeal if the Trial Chamber committed a discernible error, or if the Appellant shows that the Trial Chamber erred in the weighing process either by taking into account what it ought not to have considered or by failing to take into account what it ought to have considered.[719] Given that the Trial Chamber took into account all of the factors upon which the Appellant now relies, and given that the Appellant has shown no discernible error in affording insufficient weight to a particular factor, the Appellant's arguments assailing the judgement in this respect are of no avail.

7. Aggravating Factors

335. The Appellant also argues that the Trial Chamber erred in its assessment of the aggravating factors. First, he asserts that the Trial Chamber contradicted itself in concluding that the Appellant's prominence in the community constituted an aggravating factor.[720] He notes that the Trial Chamber did not find sufficient evidence to convict the Appellant for criminal responsibility as a superior, and he contends that this finding does not comport with the Trial Chamber's later treatment of his influence as an aggravating factor.[721]

336. It is true that the Trial Chamber found "that the evidence of the Accused's influence in this case [did] not sufficiently demonstrate that he was a superior in some formal or informal hierarchy with effective control over the known perpetrators."[722] But that finding is not inconsistent with the finding that his "prominence and influence made it more likely that others would follow his negative example."[723] As the Trial Chamber itself explained, the Appellant "no longer held the post of bourgmestre," but he "had been appointed to serve in the parliament that was to be established

[716] Trial Judgement, paras 575-576.
[717] *Ibid.*
[718] *Ibid.*, para. 577.
[719] *Čelebići* Appeal Judgement, para. 780.
[720] Semanza Appeal Brief, paras 387-388.
[721] *Ibid.*
[722] Trial Judgement, para. 417.
[723] *Ibid.*, para. 573.

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pursuant to the Arusha Accords, and he was still widely regarded in his locality as an influential person."[724] The question of criminal responsibility as a superior is analytically distinct from the question of whether an accused's prominent status should affect his or her sentence. It was within the Trial Chamber's competence and reasonable for it to conclude that the Appellant did not hold a hierarchical position sufficient to render him liable for criminal responsibility as a superior while also finding that his influence was substantial enough to constitute an aggravating factor.

337. The Appellant further contends that the Trial Chamber's finding regarding the number of persons who died, and its use of that finding as an aggravating factor, was based on insufficient and exaggerated evidence.[725] The Appellant offers only a conclusory statement in this regard and does not explain why the evidence was insufficient.

338. With respect to the number of deaths, the Trial Chamber observed that it had already considered this factor in assessing the gravity of the offence of extermination and that it therefore could not also consider the same factor as an aggravating factor in the sentence for extermination.[726] The Chamber did, however, consider the number of victims to be an aggravating circumstance in determining the appropriate sentence for complicity in genocide.[727] The Appellant has not demonstrated that this conclusion contained any discernible error.

8. Sanctionable Conduct

339. The Appellant argues that a range of sanctionable conduct occurred during the proceedings, and that this conduct should result in a "reasonable reduction" or *vacatur* of his sentence.[728] The Appellant specifically refers to the following conduct:

- the Prosecution's introduction of Exhibit P.38 that contained a judgement from the court of first instance in Cameroon, which the Appellant asserts was forged;[729]
- the seriousness of the Appellant's illegal detention in Cameroon;[730]
- the Prosecution's introduction of Exhibit P.11, which consisted of transcripts of intercepted telephone conversations that the Appellant contends were deliberately manipulated;[731]

[724] *Ibid.*
[725] Semanza Appeal Brief, para. 389.
[726] Trial Judgement, para. 571.
[727] *Ibid.*
[728] Semanza Appeal Brief, para. 408.
[729] *Ibid.*, para. 409.
[730] *Ibid.*, para. 416.
[731] *Ibid.*, para. 413.

- the admission into evidence of photographs that the Appellant asserted were forged and that the Presiding Judge ordered withdrawn;[732]

- the information in the other indictments that was at variance with the indictment against the Appellant.[733]

The Appellant urges the Appeals Chamber "to consider all the above factors in quashing the sentences or substantially reducing" them.[734]

340. The first two issues raised by the Appellant – the forged document from Cameroon and the seriousness of his pre-trial rights violations – are largely addressed by the foregoing discussion regarding the reduction in the Appellant's sentence. As discussed, the Trial Chamber sufficiently accounted for the violation of the Appellant's pre-trial detention rights in its six-month reduction in his sentence. As for Exhibit P.38, the Trial Chamber examined the evidence and concluded that the validity of Judge Mballe's attestation was a peripheral matter that was bound up in the larger issue of the Appellant's pre-trial detention.[735] Because those matters had already been addressed by the Appeals Chamber in its decision of 31 May 2000, the Trial Chamber reasonably declined to permit the Defence to reopen the issue.

341. With respect to the disputed transcripts of the telephone conversations, the Appellant does not specify a decision by the Trial Chamber that he is appealing, nor does he explain when, if ever, he objected to the admission of the evidence before the Trial Chamber.[736] Indeed, as explained above, the Defence made no objection to Exhibit P.11.[737] The Appeals Chamber has already rejected the Appellant's arguments with respect to the Trial Chamber's evaluation of Exhibit P.11.[738]

342. As for the photographic evidence, the Appellant himself notes that the Trial Chamber ordered the evidence withdrawn. Further, as noted above, the photographic evidence was withdrawn not because the photographs had been forged, but because the evidence had little probative value and could have resulted in the identification of a protected witness.[739] The Appellant therefore has identified no sanctionable conduct.

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[732] *Ibid.*, para. 414.
[733] *Ibid.*, para. 415.
[734] *Ibid.*, para. 417.
[735] Trial Judgement, para. 40.
[736] For a discussion of the disputed transcripts, see also T. 14 December 2004, pp. 48-49.
[737] *See supra* sections II.A.6 and II.D.3.b.i.
[738] *Ibid.*
[739] *See supra* section II.A.3.f.

343. Finally, the Appellant's contention that the information in other indictments was allegedly at odds with the information in the Appellant's indictment has been addressed previously and need not be reiterated here.[740]

9. Rwandan Sentencing Laws

344. Finally, the Appellant submits that the Trial Chamber failed to consider particular provisions of the Rwandan Penal Code.[741] First, he cites Articles 82 and 83 of the Code, which, he asserts, confer discretion on the judge to consider mitigating factors and to alter the sentence accordingly.[742] Second, he points to Articles 94 and 95, which, he states, prohibit the imposition of cumulative and consecutive sentences for convictions on the same charge.[743]

345. It is worth noting that the Trial Chamber made explicit reference to "the sentencing practice in the Rwandan courts."[744] That is all the Tribunal's Statute requires – "recourse to the general practice regarding prison sentences in the courts of Rwanda."[745] Moreover, the Trial Chamber did not act in a manner contrary to Rwandan law. Although the Chamber did not specifically cite the provisions to which the Appellant refers, it did, as previously explained, consider a range of mitigating circumstances. Thus, the Appellant's citation of Articles 82 and 83 of the Rwandan Penal Code are of no avail, because the Trial Chamber already did what he now asks.

346. As for Articles 94 and 95, as previously explained, the Trial Chamber did not enter any impermissible cumulative convictions, nor did it impose consecutive sentences for the same charge. The Appellant's consecutive sentences are for different convictions involving different factual proof and different elements. Hence, the Appellant's arguments fail.

347. The Appeals Chamber concludes that the Trial Chamber did not err in fixing the Appellant's sentence. The Chamber accordingly dismisses Ground 22 of his appeal.

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[740] *See supra* section II.A.5.
[741] Semanza Appeal Brief, para. 421.
[742] *Ibid.*
[743] *Ibid.*
[744] Trial Judgement, para. 560.
[745] Article 23(1) of the Statute.

III. APPEAL OF THE PROSECUTION

348. During the appeal hearings, the Prosecution abandoned Ground 1 (Commission of genocide, extermination and murder) and Ground 3 (Elements of aiding and abetting genocide and complicity in genocide) of its appeal.[746] The Appeals Chamber now considers the remaining three grounds of appeal of the Prosecution, namely, Ground 2 on the Appellant's liability for ordering crimes at Musha church, Ground 4 on 'war crimes' and Ground 5 on the Sentence.

A. Liability for Ordering Crimes at Musha Church (Ground 2)

1. Arguments of the Parties

349. The Prosecution's second ground of appeal concerns the Trial Chamber's findings on the events at Musha church and its legal qualification of the Appellant's participation in the events.[747] The Prosecution contends that the Appellant should have at least been found guilty for ordering the killings of Tutsi in the genocide at Musha church.[748] In support of its argument, it points to relevant findings of the Trial Chamber and evidence.[749]

350. The Prosecution argues that the Trial Chamber erred in its assessment of the relationship between "ordering" under Article 6(1) of the Statute and superior responsibility under Article 6(3) of the Statute. The Prosecution submits that the Trial Chamber erred in positing that for "ordering" to be established, it is necessary to have proof of a superior-subordinate relationship. The Prosecution contends that it need only be shown that the Appellant had authority to order, and that "others felt compelled to and did follow his orders."[750]

351. In support of its position the Prosecution cites ICTY and ICTR jurisprudence, and argues that although there is a divergence of views between respective Trial Chambers, most ICTY Trial Chambers do not require proof of a superior-subordinate relationship for "ordering" under Article

[746] T. 13 December 2004, p. 47.
[747] Counts 1, 4, and 5 of the Indictment, and factual findings in paras 194-213 (general overview), 425-430 (Count 1), 446-450 (Count 4) and 462 (Count 5) of the Trial Judgement.
[748] Prosecution Appeal Brief, para. 3.3. The relevant factual findings are summarised by the Prosecution as follows: The Trial Chamber found in paragraphs 425 to 430 that Semanza provided substantial assistance to the principal perpetrators of the genocide. For the reasons set out in paragraphs 435 and 436, it entered a conviction for "aiding and abetting" or complicity in genocide under Count 1. Further, the Trial Chamber found in paragraphs 446 to 450 that Semanza encouraged and supported, and hence "aided and abetted", the murder of refugees at Musha church, concluding in paragraph 450 that he was criminally responsible for murder as a crime against humanity (Count 4). Similarly, the Trial Chamber found in paragraphs 461 to 465 that Semanza intentionally aided and abetted the principal perpetrators at Musha church, concluding in paragraph 465 that he was criminally responsible for aiding and abetting extermination (Count 5).
[749] Prosecution Appeal Brief, paras 3.5-3.9.

7(1) of the ICTY Statute (Article 6(1) of the ICTR Statute).[751] In the alternative, the Prosecution submits that if a superior - subordinate relationship is required for a finding of ordering under Article 6(1) of the Statute, the evidence against the Appellant demonstrates that the individuals who followed the Appellant's orders at Musha church were acting as his subordinates, and that at that time he was *de facto* their superior.

352. Finally, the Prosecution submits that "ordering" results in responsibility as a principal perpetrator.[752]

353. If its ground of appeal were allowed, the Prosecution requests the Appeals Chamber to find the Appellant guilty of genocide under Count 1 for ordering the killing of Tutsi at Musha church, to reverse the conviction for complicity in genocide under Count 3 for the killings at Musha and to enter a conviction for genocide under Count 1. The Prosecution also requests that the conviction for extermination under Count 5 be maintained but that the conviction be revised to reflect the Appellant's culpability for ordering the extermination of civilians. The Prosecution submits that a conviction for ordering the commission of genocide and extermination of Tutsi at Musha church warrants a higher sentence than that imposed for aiding and abetting.[753]

354. During the hearings, the Appellant argued that the Prosecution had not put him on sufficient notice that it would pursue ordering as mode of liability.[754] The Appellant submits that the Prosecution's allegation that the orders were given without proof of authority or capacity attributable to the Appellant is unacceptable, that there is no evidence to establish that he had any influence in the region, and that the Prosecution's ground of appeal should be dismissed.[755]

2. Discussion

355. In relation to the events at Musha church, the Trial Chamber found that the Appellant provided substantial assistance to the principal perpetrators of the killings at Musha church by gathering *Interahamwe* for the attack and by directing the attackers to kill the Tutsi refugees at the church.[756] However, the Trial Chamber did not find that there was sufficient evidence to find that the Appellant ordered the perpetrators to commit the killings. Under this ground of appeal, the Appeals Chamber is being asked whether the Trial Chamber erred on the basis of the established facts in not finding the Appellant guilty of ordering. Before considering the Prosecution's

[750] *Ibid.*, paras 3.18-3.19.
[751] *Ibid.*, paras 3.20-3.51.
[752] *Ibid.*, paras 3.69-3.53.
[753] *Ibid.*, paras 3.70-3.76.
[754] T. 13 December 2004, pp. 62-66.
[755] Semanza Response, paras 252-269.
[756] Trial Judgement, paras 206, 426.

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submissions, the Appeals Chamber addresses the Appellant's argument that he was not put on notice that he would be pursued for ordering as a mode of liability.

356. The Appeals Chamber has previously held that the Prosecution has a responsibility to set out the material facts underpinning the charges in the Indictment with sufficient particularity so as to inform the defendant clearly of the charges against him or her so that he or she may prepare a defence. Where the Prosecution fails to do so, the Indictment is rendered defective, although it can be cured in limited circumstances if the Prosecution provides the accused with clear, timely and consistent information detailing the factual basis underpinning the charges.[757]

357. The practice of both the ICTY and the ICTR requires that the Prosecution plead the specific mode or modes of liability for which the accused is being charged. The Prosecution has repeatedly been discouraged from the practice of simply restating Article 6(1) of the Statute unless it intends to rely on all of the modes of liability contained therein, because of the ambiguity that this causes.[758] The Appeals Chamber in *Ntakirutimana* stated:

> While the Appeals Chamber accepts that it has been the practice of the Prosecution to merely quote the provisions of Article 6(1), and in the ICTY Article 7(1), the Prosecution has also long been advised by the Appeals Chamber that it is preferable for it not to do so. For example, the ICTY Appeals Chamber in the *Aleksovski* case stated that "the practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged." The Appeals Chamber endorses this statement.[759]

358. The Indictment in this case was not specific as to the form of participation of the Appellant. Instead, the Prosecution charged the Appellant generally for having either "planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation and execution of said acts," a *verbatim* reproduction of Article 6(1) of the Statute.[760] However, a review of the allegations against the Appellant in the Indictment clearly shows that the Appellant was accused of having played a prominent role during the events, organising, leading and directing attacks, and that he was in an alleged position of authority *vis-à-vis* various categories of attackers. The Indictment spells out that the Appellant organized and executed the massacres at Musha church, Mwulire hill and Mabare mosque, and that in addition to his personal participation in the killings, he "led the attack on the refugees at Musha church"[761] and "directed the attacks on the refugees" at Mwulire hill and

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[757] *Kupreškić et al.* Appeal Judgement, para. 88.
[758] *See e.g.*, *Prosecutor v. Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 60; *Aleksovski* Appeal Judgement, para. 171, fn. 319; *Čelibići* Appeal Judgement, para. 351; *Prosecutor v. Brdanin & Talić*, Decision on Objections by Momir Talić to the form of the Amended Indictment, 20 February 2001, para. 10.
[759] *Ntakirutimana* Appeal Judgement, para. 473 (internal references omitted).
[760] Indictment, section "CHARGES".
[761] *Ibid.*, para. 3.11.

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at Mabare mosque.[762] The Indictment adds that the Appellant had "*de facto* and/or *de jure* authority and control over militiamen, in particular *Interahamwe*, and other persons, including members of the Rwandan Armed Forces (FAR), communal police and other government agents."[763] The contents of the Indictment thus put the Appellant on notice that the case against the Appellant included criminal responsibility for ordering massacres.

359. The Appeals Chamber now turns to the Prosecution's argument that the Trial Chamber committed a legal error by making the Appellant's liability for ordering dependent upon proof of a superior-subordinate relationship.

360. In its Judgement, the Trial Chamber considered the correct definition for ordering under Article 6(1) of the Statute to be as follows:

> "Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime. Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it. [764]

361. Thus, in its definition, the Trial Chamber did not require proof of a formal superior-subordinate relationship for the Appellant to be found responsible for ordering. All that it required was the implied existence of a superior-subordinate relationship. The Trial Chamber's approach in this case is consistent with recent jurisprudence of the Appeals Chamber. As recently clarified by the ICTY Appeals Chamber in *Kordić and Čerkez*, the *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required.[765] It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[766] The Trial Chamber thus committed no legal error in its enunciation of the elements of ordering.

362. Bearing in mind that the Trial Chamber correctly defined the elements of ordering, the Appeals Chamber does not consider that the Trial Chamber thereafter required the Prosecution to furnish proof of a formal superior-subordinate relationship for the Appellant to be convicted of ordering. That being said, in the view of the Appeals Chamber, the evidence before the Trial Chamber in relation to Musha church does not support the Trial Chamber's finding that the Appellant did not possess any form of authority over the attackers.

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[762] *Ibid.*, paras 3.12 and 3.13.
[763] *Ibid.*, para. 3.16.
[764] Trial Judgement, para. 382.
[765] *Kordić and Čerkez* Appeal Judgement, para. 28.
[766] *Ibid.*

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363. It should be recalled that authority creating the kind of superior-subordinate relationship envisaged under Article 6(1) of the Statute for ordering may be informal or of a purely temporary nature. Whether such authority exists is a question of fact. In the present case, the evidence is that the Appellant directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees at Musha church. According to the Trial Chamber, the refugees "were then executed on the directions" of the Appellant.[767] On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute.

364. Consequently, the Appeals Chamber rejects the Prosecution submission that the Trial Chamber committed a legal error by making the legal qualification of ordering under Article 6(1) of the Statute dependent upon proof of a formal superior-subordinate relationship. The Trial Chamber presented the correct definition for ordering under Article 6(1) of the Statute. However, the Appeals Chamber finds that the Trial Chamber erred in its application of this correct legal standard to the facts. It is clear from the evidence that the Appellant had the necessary authority to render him liable for ordering the attacks and killings at Musha church. The Appeals Chamber, Judge Pocar dissenting, therefore enters a conviction for ordering genocide and for ordering extermination in relation to the massacre at Musha church.

B. War Crimes (Ground 4)

365. The Prosecution's fourth ground of appeal concerns the Trial Chamber's acquittal of the Appellant for serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II under Article 4(a) of the Statute (Counts 7 and 13 of the Indictment). Although the Trial Chamber found that a number of the acts of the Appellant constituted serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute), the Trial Chamber declined to enter convictions for these acts due to the application of the law on cumulative convictions. The Prosecution argues that the Trial Chamber's failure to do so is against settled jurisprudence and constitutes a legal error.[768] The Prosecution submits that had the Trial Chamber applied the law correctly in relation to cumulative convictions, a conviction would have been entered against the Appellant under Count 7 for murders at Musha church and Mwulire hill and under Count 13 for instigating the rape and torture of Victim A and the murder of Victim B and for committing torture and murder of Rusanganwa constitutive of serious violations of Common

[767] Trial Judgement, paras 178, 196.

Article 3 to the Geneva Conventions and of Additional Protocol II. The Prosecution requests that the Appeals Chamber reverse the acquittal of Semanza under Counts 7 and 13 and enter convictions for both these counts.[769] The Prosecution does not seek in this ground of appeal to increase the sentence imposed against the Appellant.

366. The Appeals Chamber notes that in response the Appellant does not specifically address the submissions of the Prosecution under this ground of appeal. Instead, he seems to be challenging the fact-finding process of the Trial Chamber under Counts 7 and 13 of the Indictment, and to be presenting new arguments which are not relevant to determining this ground of appeal.[770]

367. In its Judgement, the Trial Chamber, by majority (Judges Williams and Dolenc), found that the Appellant (i) aided and abetted the intentional murders at Musha church and Mwulire hill,[771] and (ii) instigated the rape and torture of Victim A and the murder of Victim B, and that he committed torture and the intentional murder of Rusanganwa.[772] It ruled by the same majority that these acts constituted serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II.[773] No conviction was entered for these acts, as one of the two Judges forming the majority (Judge Dolenc), was of the opinion that it would be impermissible to convict due to the "apparent ideal concurrence of the crimes" with complicity of genocide as charged in Count 3 of the Indictment, and crimes against humanity as charged in Counts 10, 11 and 12 of the Indictment.[774]

368. The jurisprudence on cumulation of convictions is settled. Cumulative convictions "under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other."[775] In *Rutaganda*, the Appeals Chamber considered the question of whether cumulative convictions could be entered on the basis of the same set of facts for serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute), genocide (Article 2 of

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[768] Prosecution Appeal Brief, paras 5.1-5.12.
[769] The Prosecution notes that if it is successful in relation to its second ground of appeal, then the conviction to be entered under Count 7 against the Appellant should reflect the finding that he directly perpetrated the crimes for which he has been found to have committed, as serious violations of Common Article 3 and Additional Protocol II. It adds that even if the Prosecution is not successful in relation to its second ground of appeal, a conviction should be entered under Count 7 on the basis of the Trial Chamber's findings that the Appellant was guilty of aiding and abetting the murders committed at Musha church and Mwulire hill.
[770] Semanza Response, paras 272-300; T. 14 December 2004, pp. 13-16, 18.
[771] Count 7 of the Indictment.
[772] Count 13 of the Indictment.
[773] Trial Judgement, paras 535, 551.
[774] Trial Judgement, paras 536, 551-552.
[775] *Musema* Appeal Judgement, paras 361, 363 (quoting *Čelebići* Appeal Judgement, paras 412-413). *See also* *Ntakirutimana* Appeal Judgement, para. 542.

the Statute) and crimes against humanity (Article 3 of the Statute). The Appeals Chamber stated that convictions under Article 4 of the Statute for 'war crimes' had a materially distinct element not required for the convictions on genocide and crimes against humanity, "namely the existence of a nexus between the alleged crimes and the armed conflict satisfying the requirements of common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II."[776] It added that a conviction for genocide and crimes against humanity each required proof of materially distinct elements not required under Article 4, namely proof of specific intent (*dolus specialis*) for genocide, and proof of a widespread or systematic attack against a civilian population for crimes against humanity.[777]

369. In the present case, convictions were not entered under Article 4 of the Statute due to apparent ideal concurrence with complicity to commit genocide (Count 3) and crimes against humanity (Counts 10, 11 and 12). In the opinion of the Appeals Chamber this constitutes an error. Simultaneous convictions are permissible for war crimes, crimes against humanity and complicity to commit genocide as each has a materially distinct element. The Appellant's conviction for complicity to commit genocide was based on his aiding and abetting principal perpetrators who killed Tutsi because of their ethnicity.[778] As noted earlier, the *mens rea* for complicity in genocide, for those forms of complicity amounting to aiding and abetting, is knowledge of the specific intent of the perpetrator(s).[779] The Appellant's convictions for crimes against humanity necessitated proof of a widespread or systematic attack against a civilian population, whereas convictions for war crimes require that the offences charged be closely related to the armed conflict. In the Trial Chamber's opinion, this nexus was clearly established.[780]

370. In the view of the Appeals Chamber, the Trial Chamber erred when it failed to enter convictions for serious violations of Common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II thereto under Count 7 (for having aided and abetted the intentional murders committed at Musha church and Mwulire hill), and under Count 13 (for having instigated the rape and torture of Victim A and murder of Victim B, and for having committed torture and intentional murder of Rusanganwa).

371. For these reasons, and pursuant to Article 24 of the Statute, the Appeals Chamber allows the Prosecution's fourth ground of appeal and, pursuant to Articles 6(1) and 4(a) of the Statute, holds that it has been established beyond reasonable doubt that the Appellant is individually responsible

[776] *Rutaganda* Appeal Judgement, para. 583.
[777] *Ibid. See also Kunarac et al.* Appeal Judgement, para. 176.
[778] Trial Judgement, paras 435-436.
[779] *See supra* para. 316.
[780] Trial Judgement, paras 516-522.

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for serious violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II. Accordingly, the Appeals Chamber, Judge Pocar dissenting, finds that the correction of the error requires entry of convictions under Counts 7 and 13 of the Indictment. However, in light of the Appeals Chamber's findings on the Prosecution's second ground of appeal,[781] the conviction under Count 7 is for ordering the murders at Musha church and for aiding and abetting the murders at Mwulire hill.

C. Sentence (Ground 5)

372. In its fifth ground of appeal, the Prosecution submits that the Trial Chamber committed a number of errors in its determination of the sentence and that these errors led to the imposition of an inadequate sentence. The Prosecution contends that the Trial Chamber committed four distinct errors:

> (i) the Trial Chamber erred by not having due regard to the sentencing practice of Rwanda;
>
> (ii) the Appellant's sentence for complicity in genocide and aiding and abetting extermination does not comport with the Tribunal's sentencing practice and is manifestly disproportionate to the gravity of these crimes and his role in them;
>
> (iii) the Trial Chamber erred by imposing sentences for the Appellant's instigation of rape and instigation of the murder of several individuals which were manifestly disproportionate to the gravity of these crimes; and
>
> (iv) the Trial Chamber erred in treating the Appellant's accomplishments as bourgmestre as a mitigating factor while at the same time finding that his position in the community was an aggravating factor.[782]

373. The Prosecution requests that the Appeals Chamber increase the total sentence for the Appellant from 25 years to life imprisonment. In the alternative, in line with the approach of the Trial Chamber, the Prosecution submits:

> (i) that the Appellant's sentences for complicity in genocide and extermination should be increased from 15 years to concurrent sentences of 25 years each, to be served consecutively to his other sentences;

[781] *See supra* section III. A.
[782] Prosecution Appeal Brief, pp. 50-68.

(ii) the Appellant's sentence of 7 years for instigating rape, and his sentence of 8 years for instigating the murder of six individuals, should be increased significantly, both individually and collectively, to terms of imprisonment of at least 10 years and 15 years respectively, to be imposed concurrently; and

(iii) that these sentences should be imposed consecutively with the total term of imprisonment being as a consequence a term of imprisonment of 40 years.[783]

374. As the Appeals Chamber has stressed above, as a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion.[784] It is incumbent upon the moving party to show that the Trial Chamber went beyond the limits of its discretionary powers in imposing the sentence.[785] The Appeals Chamber will intervene in the sentence only if the moving party demonstrates that the Trial Chamber erred by taking into account what it ought not to have considered or by failing to take into account what it ought to have considered.[786]

1. Due Regard for General Sentencing Practice of Rwanda

375. The Prosecution submits that in imposing the sentence, the Trial Chamber did not have proper regard to the general sentencing practice of Rwanda, as provided in Article 23 of the Statute and Rule 101 of the Rules. Although the Prosecution concedes that the Trial Chamber is not bound by national law, it contends that the Trial Chamber did not sufficiently consider the sentencing practice of Rwanda in relation to the crimes for which the Appellant was convicted. The Prosecution adds that had the Trial Chamber properly considered the nature of the Appellant's conduct and crimes within the Rwandan framework, it would have imposed a much higher sentence.[787]

376. Article 23(1) of the Statute provides that, in determining the terms of imprisonment, "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of

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[783] Prosecution Appeal Brief, para. 6.5. *See* Trial Judgement, paras 585-591. The sentences imposed by the Trial Chamber are as follows: for Count 3, complicity in genocide, and Count 5, aiding and abetting extermination as a crime against humanity, two terms of 15 years imprisonment to run concurrently. The sentences for Counts 3 and 5 are to be served consecutively with the concurrent sentences for Count 10, instigating rape as a crime against humanity - 7 years imprisonment; Count 11, instigating torture by rape and personally committing torture as a crime against humanity - 10 years imprisonment; Count 12, instigating one murder and personally committing one murder - 10 years imprisonment; Count 14, instigating murder of six persons - 8 years imprisonment. The total sentence of twenty-five years imprisonment was reduced by six months to compensate the Appellant for the violations of his rights; the final sentence was twenty-four years and six months imprisonment.

[784] *See supra* section II.L; *see also Tadić* Judgement in Sentencing Appeals, para. 22; *see also Blaškić* Appeal Judgement, para. 680, *Dragan Nikolić* Appeal Judgement, para. 9.

[785] *Čelebići* Appeal Judgement, para. 717; *Dragan Nikolić* Appeal Judgement, para. 9.

[786] *Čelebići* Appeal Judgement, para. 780; *Dragan Nikolić* Appeal Judgement, para. 9.

[787] Prosecution Appeal Brief, paras 6.6-6.13.

Rwanda." Similarly, Rule 101(B)(iii) of the Rules indicates that the Trial Chamber "shall take into account ... such factors as ... the general practice regarding prison sentences in the courts of Rwanda." The question therefore, as raised in the Prosecution's appeal, is the extent to which the Trial Chamber is bound by the general practices in Rwanda.

377. Guidance on this issue is to be found in cases from both this Tribunal and the ICTY, where the trial chambers are likewise required to have recourse to the practices of the courts of the former Yugoslavia when determining a sentence. The Appeals Chamber clarified in *Serushago* that the command for Trial Chambers to "'have recourse to the general practice regarding prison sentences in the courts of Rwanda' does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice."[788] The ICTY Appeals Chamber in *Dragan Nikolić*, citing notably the *Krstić* Appeal Judgement and the *Kunarac et al.* Trial Judgement, held that "although a Trial Chamber should have 'recourse to' and should 'take into account' the general practice regarding prison sentences in the courts of the former Yugoslavia, this 'does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.'"[789] It further held that "Trial Chambers have to take into account the sentencing practices in the former Yugoslavia and, should they depart from the sentencing limits set in those practices, must give reasons for such departure."[790] Therefore, a Trial Chamber, whilst not bound by the sentencing practices of the former Yugoslavia or of Rwanda is obliged to explain the sentence imposed and any divergence from the sentencing limits of either the former Yugoslavia or of Rwanda.[791] Following the *Krstić* Appeal Judgement, the Trial Chamber in this case was therefore entitled to impose a greater or lesser sentence than that which would have been imposed by the Rwandan courts.[792]

378. The Trial Chamber, in its discussion on applicable sentencing ranges, reviewed the Rwandan Penal Code with respect to the recommended sentences for the crimes of murder and rape, the penalties to be imposed for accomplices, and aggravating factors in rape cases. It also noted that, for genocide and crimes against humanity, the Rwandan Organic Law[793] stipulated that sentences prescribed in the ordinary Penal Code shall apply "with certain modifications, including heightened penalties of death and life imprisonment, respectively, for Categories 1 and 2

[788] *Serushago* Appeal Judgement, para. 30.
[789] *Dragan Nikolić* Appeal Judgement, para. 69.
[790] *Ibid.*
[791] *Ibid.*, paras 68, 69.
[792] *Krstić* Appeal Judgement, paras 262, 270.
[793] Loi Organique n° 08/96 du 30/08/96 sur l'organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises a partir du 1er Octobre 1990, Journal Officiel n° 17 du 1/9/1996 (Rwanda).

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perpetrators."[794] The Prosecution submits that despite these references the Trial Chamber did not appear to have properly considered the Appellant's sentence in the context of the Rwandan Organic Law, and that under Rwandan law the Appellant would have received at least life imprisonment.

379. The Trial Chamber also considered sentences imposed in other cases before the International Tribunal[795] and reviewed any mitigating and aggravating factors.[796]

380. The Trial Chamber thus carefully considered the relevant factors, general as well as individualised, in determining the appropriate sentence the Appellant should receive. Although his sentence may have been more severe in Rwandan courts, the Trial Chamber acted within its discretion when it imposed a lesser sentence. The Appeals Chamber is unable to find a discernible error in the reasoning of the Trial Chamber.

2. Disparity with the Tribunal's Sentencing Practice and Applying a Sentence which is Disproportionate to the Gravity of these Crimes

381. The Prosecution next argues that the Appellant's sentences for complicity in genocide and aiding and abetting extermination are in disparity with the Tribunal's sentencing practice. It contends that the Trial Chamber committed a discernible error in its sentencing discretion by imposing concurrent 15-year sentences for the massacres at Mwulire and Musha. The Prosecution submits that the sentences were manifestly insufficient given the gravity of the crimes, the level of participation of the Appellant, and his genocidal intent at the time of both massacres.

382. It adds that, by trying to determine the Appellant's sentence through a comparative analysis of the range of sentences imposed by the Tribunal, the Trial Chamber gave insufficient weight to the Appellant's conduct and placed too much importance on labeling as a principal or indirect perpetrator. According to the Prosecution, to attempt to ensure that each sentence is comparative or relative to those received by other convicted persons may result in an inappropriate sentence.

383. The Prosecution argues that it is clear from the Tribunal's jurisprudence that in cases of genocide, where the mitigating circumstances are outweighed by the aggravating circumstances, the sentence generally imposed is life imprisonment. Finally, the Prosecution notes that there is nothing in the Tribunal's jurisprudence to suggest a lesser sentence is to be imposed on those who are convicted of complicity in genocide alone, rather than genocide itself.[797]

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[794] Trial Judgement, paras 560-561.
[795] *Ibid*, paras 560-564.
[796] *Ibid*, paras 565-578.
[797] Prosecution Appeal Brief, paras 6.14-6.41.

384. The Appeals Chamber notes that many of the arguments of the Prosecution relate to the appropriate sentence to be imposed upon an accused convicted for genocide, presumably as a principal perpetrator, rather than an accomplice or aider and abettor. As explained above, the Appeals Chamber has concluded that the Trial Chamber erred in its application of the correct legal standard to the facts of this case, and that the Appellant had the necessary authority to render him liable for ordering the attacks and killings at Musha church.[798] The pertinent question is whether this error affects the sentence.

385. In the main, the Trial Chamber's approach to determining the appropriate sentence was conscientious. Its approach was premised on the need to individualise the sentence in light of the particular circumstances of the case. It indicated that it should "go beyond the abstract gravity of the crime to take into account the particular circumstances of the case, as well as the form of and degree of the participation of the accused."[799] The Trial Chamber rejected the Prosecution's request that a life sentence be imposed.[800]

386. The Trial Chamber noted that the crimes of the Appellant were of the most serious gravity, and that the Appellant, through his participation in the crimes, contributed to the harming and killing of many civilian Tutsi.[801] In the view of the Appeals Chamber, by listing the various offences for which he was found guilty, although the Trial Chamber did not make express reference to his genocidal intent and substantial assistance, the Trial Chamber implicitly took these into account when it considered sentencing.

387. The Trial Chamber also looked at the sentencing practices of the Tribunal and of the ICTY. It indicated that although the practice of awarding single sentences for the totality of an accused's conduct made it difficult to determine a range of sentences for each specific crime, it was possible to ascertain a general range of sentences, "which may provide useful guidance as to the appropriate sentence."[802] The Trial Chamber then noted in summary form various sentences which had been previously imposed by the Tribunals.

388. Despite the Trial Chamber's conscientious treatment of the Appellant's sentence, the Appeals Chamber is not satisfied that the 15-year sentences for complicity in genocide and aiding and abetting extermination that the Trial Chamber imposed are commensurate with the gravity of the Appellant's offences, as determined by the Appeals Chamber. The Appeals Chamber has concluded above that the Appellant's actions at Musha church amounted to perpetration in the form

[798] *See supra* para. 364.
[799] Trial Judgement, para. 556.
[800] *Ibid.*, para. 559.
[801] *Ibid*, para. 557.

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of ordering rather than mere complicity in genocide and aiding and abetting extermination.[803] This form of direct perpetration entails a higher level of culpability than complicity in genocide and aiding and abetting extermination convictions entered by the Trial Chamber. The Appeals Chamber recently held in *Krstić* that "aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator."[804] The Appeals Chamber endorses this reasoning to the extent that a higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than merely aids and abets extermination.

389. As the Prosecution notes, at the Tribunal, convictions for perpetrating genocide, at least those not reached after a guilty plea, have generally resulted in life sentences. The Trial Chamber's 15-year sentences (for aiding and abetting) are therefore inadequate in light of the Appellant's level of culpability. On the other hand, the Appeals Chamber in this case earlier determined that the length of the Appellant's sentence should be mitigated by violations of his pre-trial rights.[805] On balance, the Appeals Chamber concludes, Judge Pocar dissenting, that the 15-year sentences for complicity in genocide and for aiding and abetting extermination should be increased by 10 years to reflect the Appellant's responsibility for ordering genocide and extermination at Musha church. Thus, the Appeals Chamber determines that the Appellant's sentence for these offences should be 25 years' imprisonment.

3. Inadequate Sentences for Instigating Rape and Murder

390. As a third error, the Prosecution submits that the Trial Chamber erred in imposing a 7-year sentence for instigating rape and an 8-year sentence for instigating the murder of 6 people. It argues that the sentences are manifestly disproportionate to the gravity of these crimes, do not accord with sentences imposed for similar crimes by the Tribunal, and that the Trial Chamber did not reasonably consider the appropriate penalty which would have been imposed under Rwandan law.

391. The Prosecution submits that, given the circumstances of this case, the sentences are manifestly inadequate and fall outside the acceptable range of sentences imposed by the Tribunal for serious sexual offences such as rape. It adds that the Trial Chamber appears to have been influenced in sentencing the Appellant for these crimes by the fact that instigation is a form of

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[802] *Ibid*, paras 562-564.
[803] *See supra* para. 364.
[804] *Krstić* Appeal Judgement, para. 268.
[805] *See supra* section II. L. 4.

indirect participation, thereby warranting a lesser sentence than he would have received as a principal perpetrator.[806]

392. The Appeals Chamber recalls that it will not substitute its sentence for that of a Trial Chamber unless the Trial Chamber has committed a discernible error in exercising its discretion, or has failed to follow applicable law. The burden is on the moving party to demonstrate that the Trial Chamber acted outside its discretion in imposing a sentence.

393. As the Appeals Chamber stated above, while the Trial Chamber is obliged to consider the Rwandan sentencing practices, it is not bound by them, and it is entitled to impose a greater or lesser sentence than that which would have been imposed by the Rwandan courts.[807] The Trial Chamber considered the relevant factors, general as well as individualised, in determining the appropriate sentence the Appellant should receive. Although his sentence may have been more severe in Rwandan courts, the Trial Chamber acted within its discretion. Consequently, this element of the Prosecution's ground of appeal fails.

394. In relation to the submission that the sentences imposed by the Trial Chamber are disproportionate to those imposed in other cases before the International Tribunals and do not reflect the gravity of the crimes, the Appeals Chamber recalls that, as a general principle, comparison to other cases in support of a move to have the sentence increased may indeed provide guidance if it relates to the same offence, in particular if the crimes were committed in substantially similar circumstances. However, such comparison may be of limited value given that each case has its own particular circumstances and that the aggravating and mitigating factors may dictate different results.[808] Ultimately, the decision as to the length of sentence is a discretionary one, turning on the circumstances of the case.[809]

395. In support of its argument, the Prosecution refers to the *Kunarac et al.* and *Čelibići* Trial Judgements, which note the gravity of the crime of rape as a crime against humanity. The Prosecution also cites the Trial Chamber's own acknowledgment that, in other cases before the International Tribunals, persons convicted of rape received sentences ranging from 12 to 15 years. However, apart from these references, the Prosecution does not advance any convincing arguments demonstrating that the Trial Chamber committed a discernible error. The Prosecution's suggestion that the Trial Chamber "appears to have been influenced" in imposing a sentence by the fact that the Appellant was not a principal perpetrator carries no weight. Although the Trial Chamber may have

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[806] Prosecution Appeal Brief, paras 6.42-6.56.
[807] *See Krstić* Appeal Judgement, para. 262
[808] *Čelibići* Appeal Judgement, para 717.
[809] *Krstić* Appeal Judgement, para. 248.

imposed lesser sentences than in other cases, it has not been shown that in so doing it acted outside its discretion.

4. Consideration of the Appellant's Prior Character and Accomplishments in Mitigation

396. As a fourth sentencing error, the Prosecution submits that the Trial Chamber erred by considering as mitigating factors the Appellant's prior character and accomplishments as bourgmestre. The Prosecution contends that, while the Trial Chamber properly characterised the Appellant's influence and relative importance in the community as aggravating factors, it was contradictory then to note in mitigation that the Appellant was a successful bourgmestre in Bicumbi for over twenty years. The Prosecution also submits that the Appellant's efforts and accomplishments in bringing prosperity to the community do not amount to "good character." Finally, the Prosecution argues that even if the Appellant's role as a successful bourgmestre in Bicumbi who brought prosperity and development to his region may be considered evidence of his "good character," the Trial Chamber erred in the exercise of its discretion by giving such evidence any weight in mitigation of his sentence. The Prosecution notes, however, that because the Trial Chamber did not expressly indicate the weight given to this factor in deciding on the appropriate sentence, it is unable to evaluate the specific effect of this error.[810]

397. Trial Chambers of both International Tribunals have to a greater or lesser extent taken into account an accused's previous good character in mitigation, as well as accomplishments in functions previously held. For instance, in *Niyitegeka* the Trial Chamber considered in mitigation that the accused was a person of good character prior to the events "and that as a public figure and a member of the MDR, he advocated democracy and opposed ethnic discrimination."[811] Similarly, in *Ntakirutimana*, the Trial Chamber found as a mitigating factor that Elizaphan Ntakirutimana was a "highly respected personality within the Seventh-Day Adventist Church of the West-Rwanda Field and beyond" and that he led an "exemplary life as a church leader."[812] The Trial Chamber also noted Gérard Ntakirutimana's good character, and that he had testified that his return to Rwanda in 1993 was prompted by "his hope to contribute to development and to promote peace within his country."[813] In the *Obrenović* Sentencing Judgement, the ICTY Trial Chamber held that "prior to the war Dragan Obrenović was a highly respected member of his community who did not discriminate against anybody."[814]

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[810] Prosecution Appeal Brief, paras 6.57-6.65.
[811] *Niyitegeka* Trial Judgement, para. 496.
[812] *Ntakirutimana* Trial Judgement, para. 895.
[813] *Ibid.*, para. 908.
[814] *Obrenović* Sentencing Judgement para 134. *See also Stakić* Trial Judgement, para. 926; *Furundžija* Trial Judgement, para. 284; and *Blaškić* Trial Judgement, para. 782.

398. The Appeals Chamber is of the view that it was within the Trial Chamber's discretion to take into account as mitigation in sentencing the Appellant's previous good character and accomplishments as bourgmestre. Precedent does not support the Prosecution's position that "being a successful academic, politician or administrator is irrelevant" as a mitigating factor in crimes of genocide and crimes against humanity. Notwithstanding, the Appeals Chamber notes that in most cases the accused's previous good character is accorded little weight in the final determination of determining the sentence.[815] However, in this case, the Trial Chamber does not indicate how much weight, if any, it attaches to the Appellant's previous character and accomplishments. Thus, it is not clear that these mitigating factors unduly affected the sentence, given the nature of the offences. Consequently the Appeals Chamber finds no discernible error on the part of the Trial Chamber.

399. Finally, the Appeals Chamber finds no merit in the Prosecution's argument that there exists a contradiction in the Trial Chamber's reasoning that the Appellant's position of influence was an aggravating factor, whereas his previous accomplishments as bourgmestre were considered in mitigation.

[815] *Niyitegeka* Appeal Judgement, paras 264-266; *Kupreškić et al.* Appeal Judgement, paras 428-430.

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IV. DISPOSITION

For the foregoing reasons,

THE APPEALS CHAMBER

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

NOTING the written submission of the parties and their oral arguments presented at the hearings on 13 and 14 December 2004;

SITTING in an open session;

AFFIRMS the conviction for complicity in genocide under Count 3 of the Indictment with respect to the events at Mwulire hill;

REVERSES the conviction for complicity in genocide under Count 3 of the Indictment with respect to the events at Musha church;

REVERSES the acquittal for genocide under Count 1;

ENTERS, Judge Pocar dissenting, a conviction for genocide under Count 1 of the Indictment with respect to the events at Musha church;

AFFIRMS the conviction for aiding and abetting extermination as a crime against humanity under Count 5 of the Indictment with respect to the events at Mwulire hill;

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REVERSES the conviction for aiding and abetting extermination as a crime against humanity under Count 5 of the Indictment with respect to the events at Musha church;

ENTERS, Judge Pocar dissenting, a conviction for ordering extermination as a crime against humanity under Count 5 of the Indictment with respect to the events at Musha church;

REVERSES the acquittals for serious violations of Common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II thereto under Counts 7 and 13;

ENTERS, Judge Pocar dissenting, convictions for serious violations of Common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II thereto under Count 7 (for ordering the murders at Musha church and aiding and abetting the murders at Mwulire hill) and Count 13 (for instigating the rape and torture of Victim A and the murder of Victim B, and for committing torture and intentional murder of Rusanganwa);

AFFIRMS the conviction for rape as a crime against humanity under Count 10;

AFFIRMS the conviction for torture as a crime against humanity under Count 11,

AFFIRMS the convictions for murder as a crime against humanity under Counts 12 and 14;

DISMISSES the Defence and Prosecution appeals in all other respects;

QUASHES the sentence of 25 years' imprisonment handed down by the Trial Chamber;

ENTERS, Judge Pocar dissenting, a sentence of 35 years' imprisonment, subject to credit being given under Rule 101(D) of the Rules for the period already spent in detention, and subject to a further six-month reduction as ordered by the Trial Chamber for violations of fundamental pre-trial rights;

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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 of Procedure and Evidence, that Laurent Semanza remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

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

Theodor Meron
Presiding Judge

Mohamed Shahabuddeen
Judge

Mehmet Güney
Judge

Fausto Pocar
Judge

Inés Mónica Weinberg de Roca
Judge

Judge Mohamed Shahabuddeen and Judge Mehmet Güney append a separate opinion.

Judge Fausto Pocar appends a dissenting opinion.

Signed on the 12th day of May 2005
at The Hague, The Netherlands,
and issued on the 20th day of May 2005
at Arusha, Tanzania.

[SEAL OF THE TRIBUNAL]

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V. SEPARATE OPINION OF JUDGE SHAHABUDDEEN AND JUDGE GÜNEY

1. We agree with the outcome of today's judgement but feel obliged to say something on the question of sentence and on the competence of the Appeals Chamber to substitute a conviction for an acquittal.

A. Sentencing

2. Mr Semanza ("Appellant"), having been found guilty by the Appeals Chamber of ordering genocide, is a perpetrator of genocide. That is the gravest crime known to the international criminal justice system. In this case, it involved a multitude of horrible deaths inflicted by a mob gathered and directed for the purpose by the Appellant, who was a man of influence in the community. The victims had gone to Musha Church to take refuge: there they were done to death unmercifully.

3. We agree with the granting of compensation for the unlawful detention of the Appellant, in the shape of a six months' reduction of imprisonment. But for that reduction, the crime of genocide that he has committed would justifiably have attracted a sentence of imprisonment for the remainder of his life – the maximum sentence permitted to the Tribunal. By contrast, according to paragraph 389 of the judgement of the Appeals Chamber, "the Appellant's sentence for these offences should be 25 years' imprisonment" – our understanding being that "these offences" include ordering genocide at Musha Church.

4. Normally, we would not opine separately on matters of sentencing. But what we believe is the leniency shown in this case suggests that a matter of perspective is involved. In the case of genocide, this is a new sentence for a new conviction; both are made by the Appeals Chamber. The doctrine that the Appeals Chamber would not interfere in the Trial Chamber's exercise of a sentencing discretion unless there is a discernible error by the Trial Chamber does not inhibit the Appeals Chamber in passing sentence for a new conviction.

B. The competence of the Appeals Chamber to substitute a conviction for an acquittal

5. It is said that recognised international human rights instruments enjoin that there must be a right of appeal from a conviction and that, as there is no right of appeal from the Appeals Chamber, the Appeals Chamber is without power to substitute a conviction for an acquittal. The judgement of the Appeals Chamber is to the opposite effect, and we respectfully agree with it. For the sake of

brevity, we incorporate the arguments set out in the second separate opinion appended to the judgement of this Appeals Chamber in *Rutaganda*.[1] We would only emphasise certain matters.

6. It being our view that the Appeals Chamber has competence under Article 24(2) of the Statute to substitute a conviction for an acquittal, a reversal of that position would amount to an amendment of the Statute by the Appeals Chamber. Needless to say, the Appeals Chamber is powerless to do that.

7. The case law establishes that the principles of recognised international human rights instruments are intended to secure fairness to the accused. We are not convinced by arguments of unfairness where the conviction by the Appeals Chamber was on a charge duly preferred,[2] where the merits of the case relating to this charge were litigated in the Trial Chamber, where the judgement of the Trial Chamber was in favour of the accused in the sense that he was convicted of a lesser offence than that charged and acquitted of the latter,[3] and where the Prosecution then exercised its statutory right to appeal to the Appeals Chamber from that judgement.

8. In such a situation, the Appellant would have had a full opportunity to argue both at trial and on appeal about the correctness of a submission that he be convicted for the offence as charged. In the *Čelebići* case, in remitting sentencing to a Trial Chamber, the ICTY Appeals Chamber did say that "there may be matters of important principle involved", but it also noted that "the Appeals Chamber has had no submissions from the parties on these issues".[4] In other words, if the matter had been fully discussed before the Appeals Chamber it would not necessarily have remitted the matter.

9. Like *Čelebići*, *Krstić* concerned the subject of cumulative convictions. In such cases, there could be good reason (which we do not propose to elaborate) for not entering a conviction. Even so, we note that Krstić was, by the Appeals Chamber, found "guilty of aiding and abetting genocide" and "guilty of aiding and abetting murder as a violation of the laws or customs of war".[5] True, these convictions were in lieu of convictions for more serious crimes, but that does not touch the alleged principle that the Appeals Chamber cannot enter a first conviction. Other cases can be cited that are consistent with the right of the Appeals Chamber to make a first conviction.[6] *Rutaganda* was one; it

[1] ICTR-96-3-A, of 26 May 2003.
[2] Count 1 of the Third Amended Indictment.
[3] See Judgement of the Trial Chamber, para. 553.
[4] IT-96-21-A, of 20 February 2001, para. 711.
[5] IT-98-33-A, of 19 April 2004, p. 87.
[6] *See Tadić* Appeal Judgement, IT-94-1-A, of 15 July 1999, para. 327; *Kupreskić et al.* Appeal Judgement, IT-95-16-A, of 23 October 2001, p. 172; and *Krnojelac* Appeal Judgement, IT-97-25-A, of 17 September 2003, pp. 113-114.

was a decision of this Appeals Chamber which, by majority, reversed the acquittal of Georges Rutaganda and found him "guilty on Counts 4 and 6 ...".[7]

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

Mohamed Shahabuddeen
Judge

Mehmet Güney
Judge

Signed on the 12th day of May 2005
at The Hague, The Netherlands,
and issued on the 20th day of May 2005
at Arusha, Tanzania.

[SEAL OF THE TRIBUNAL]

[7] ICTR-96-3-A, of 26 May 2003, p. 168.

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VI. DISSENTING OPINION OF JUDGE POCAR

1. In this judgement, the Appeals Chamber 1) reverses the acquittals entered by the Trial Chamber with regard to Counts 1, 7 and 13 and enters new convictions under each; and 2) reverses the conviction entered by the Trial Chamber under Count 5 and enters a more serious conviction under that count. I agree with the majority's reasoning and conclusion that the Trial Chamber erred in its acquittals and conviction of the Appellant under these counts. However, I do not agree that we, as the Appeals Chamber, have competence to remedy these errors by subsequently entering new or more serious convictions on appeal. For the reasons provided in my Dissenting Opinion in the *Rutaganda* case,[1] I believe that such an approach is in violation of an accused's fundamental right to an appeal as enshrined in Article 14(5) of the International Covenant on Civil and Political Rights ("ICCPR"), given that the Appeals Chamber is the court of last resort in this Tribunal. It must be emphasized that Article 24 of the Tribunal's Statute, which governs appeals, must be interpreted in conformity with Article 14(5) of the ICCPR.[2] Indeed, the whole *raison d'être* of the Appeals Chamber as established by the Security Council under Article 24 is to ensure protection of the right to an appeal.[3]

2. In my view, the Appeals Chamber in this case had two possible avenues before it under Article 24. The first was recognized in the *Čelebići* Appeal Judgement. In that case, the Appeals Chamber identified the error committed by the Trial Chamber under the law on cumulative convictions, quashed certain convictions entered at trial, and remitted the case to a Trial Chamber for further proceedings to determine an appropriate sentence consistent with the Appeals Chamber's decision. The Appeals Chamber expressly reasoned that some issues are of *such significance* that they should be determined by a Chamber from which it is possible to lodge an appeal in order to preserve the right to an appeal.[4] Indeed, such an approach is provided for under Rule 118(C) of the Tribunal's Rules of Procedure and Evidence ("Rules").[5] Arguably, the issues in this case

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[1] *See Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgement, 26 May 2003, Dissenting Opinion of Judge Pocar.

[2] The ICCPR was adopted unanimously by General Assembly resolution and thus, it may be assumed that the Security Council, as a UN body, is to act in compliance with that declaration of principles by the General Assembly. Furthermore, in relation to Article 25 of the ICTY Statute, the corresponding article to Article 24 of the ICTR Statute, the Security Council expressly indicated its intention to fully comply with the ICCPR through its adoption of the Report of the Secretary General (S/25704) via Security Council Resolution 827 (1993). Paragraph 116 of this Report provides that:

> [t]he Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.

[3] *Id.*

[4] *Čelibići* Appeal Judgement, para. 711 (emphasis added).

[5] Rule 118(C) of the Rules provides that "[i]n appropriate circumstances the Appeals Chamber may order that the accused be retried before the Trial Chamber."

surrounding entry of three new convictions for genocide and for serious violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II as well as entry of a more serious conviction for ordering extermination, fall within the category of those of "such significance" that they should be determined by a Trial Chamber, whose decision may then be appealed.

3. The second avenue that was available to the Appeals Chamber was the one taken in the *Krstić* Appeal Judgement. In that case, the Appeals Chamber found that the Trial Chamber had erred as a matter of law in disallowing the Appellant's conviction for extermination on grounds that it was impermissibly cumulative with his conviction for genocide on the basis of the same facts. Likewise, the Appeals Chamber found that the Trial Chamber erred in disallowing the Appellant's conviction for persecution as a crime against humanity on grounds that it was impermissibly cumulative with his conviction for genocide. However, rather than enter two new convictions against the Appellant, the Appeals Chamber was satisfied to pronounce the Trial Chamber's findings to be erroneous and, in the Disposition, simply noted that the Trial Chamber incorrectly disallowed the convictions.[6] The Appeals Chamber corrected an error of law by the Trial Chamber without entry of a new conviction or sentence and thus, the Appellant's right to an appeal was not violated.

4. In this case, the Appeals Chamber has taken neither the *Čelebići* nor the *Krstić* approach in correcting the Trial Chamber's errors under Counts 1, 5, 7 and 13.[7] As stated previously, I agree that the Trial Chamber erred. However, I cannot agree to correct those errors using an approach which, I believe, is also in error. In my view, reversal of acquittals and entry of new convictions or reversal of convictions and entry of more serious convictions on appeal cannot be in conformity with the fundamental right to an appeal under Article 14(5) of the ICCPR and therefore, I dissent.

[6] *See Krstić* Appeal Judgement, paras. 219-229 and p. 87.
[7] I note that each Appeals Chamber possesses a margin of discretion in its choice of an appropriate remedy on a case by case basis, whether it be remittance of the case back to a Trial Chamber for a re-determination of an appropriate conviction and sentence or pronouncement of the Trial Chamber's error without entry of a new or more serious conviction and sentence, so long as that remedy is in conformance with the Appellant's right to an appeal.

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

Fausto Pocar
Judge

Signed on the 12th day of May 2005
at The Hague, The Netherlands,
and issued on the 20th day of May 2005
at Arusha, Tanzania.

[SEAL OF THE TRIBUNAL]

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ANNEX A: PROCEDURAL BACKGROUND

1. On 16 June 2003, the Appellant[1] and the Prosecution[2] filed their Notices of Appeal from Trial Chamber I's Judgement of 15 May 2003.[3] On 26 June 2003, the Appellant filed a motion under Rule 115 of the Rules for leave to present additional evidence and to supplement the record on appeal.[4] The motion sought the admission *inter alia* of fourteen additional witnesses as well as an excerpt of a publication by African Rights entitled "Rwanda: Death, Despair and Defiance." By Decision dated 12 December 2003,[5] the Appeals Chamber granted the motion to the extent that it granted the Appellant leave to present the evidence of Witness TDR and dismissed the motion in all other respects.

2. The Prosecution filed its Appeal Brief on 1 September 2003,[6] and the Appellant submitted his Reply Brief on 10 October 2003.[7] The Appellant filed his Appeal Brief on 21 October 2003,[8] and on 29 October 2003 the Appellant submitted the Defence's Book of Exhibits and Authorities.[9] The Prosecution then filed its Reply to the "Defence's Reply to Prosecutor's Brief" on 27 October 2003,[10] and its Response to the Defence Appeal Brief on 1 December 2003.[11] The Appellant's Reply to the Prosecutor's Reply to his Appeal Brief was submitted on 15 December 2003.[12]

3. On 30 March 2004, the Appeals Chamber dismissed an urgent motion by Paul Bisengimana for leave to appear as *amicus curiae* in the Appellant's case.[13] A request for reconsideration of the *amicus curiae* application of Paul Bisengimana was registered on 29 April 2004.[14] The Applicant requested the reconsideration of the Decision because he discovered subsequently that the Prosecution was arguing in the *Semanza* appeal that Laurent Semanza was a participant in a joint

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[1] Notice and Grounds of Appeal against the Judgement of Trial Chamber three in ICTR-97-20-T Prosecutor v. Laurent Semanza date 15 May 2003 (Article 24 of the Statute and Rule 108 of the Rules of procedure and Evidence), 16 June 2003.
[2] Prosecution's Notice of Appeal, 16 June 2003.
[3] Trial Judgement, 15 May 2003.
[4] Defence Motion for leave to present additional evidence and to supplement record on appeal, 26 June 2003.
[5] Decision on Defence Motion for Leave to present additional evidence and to supplement record on appeal, 12 December 2003.
[6] Prosecution Appeal Brief, 1 September 2003.
[7] Defence Reply Brief, 10 October 2003.
[8] Defence Appeal Brief, 22 October 2003.
[9] Defence's Book of Exhibits and Authorities submitted with the Defence Reply Brief, 29 October 2003.
[10] Prosecution Reply to the "Defence's Reply to Prosecution's Brief", 27 October 2003.
[11] Prosecution Response to Defence Appeals Brief, 1 December 2003.
[12] Defence Reply to Prosecutor's Reply to Defence Appeal Brief, 15 December 2003.
[13] Decision on Amicus Curiae Application of Paul Bisengimana, 30 March 2004.
[14] Requête Urgente de Paul Bisengimana en révision de la décision de la Chambre d'Appel du 30 mars 2004 suite à la découverte d'un élément nouveau et aux fins d'obtenir l'autorisation d'intervenir en qualité *d'amicus curiae* dans la cause en appel de Laurent Semanza, 29 April 2004.

criminal enterprise, which may have implicated the Applicant. The Appeals Chamber dismissed the application on 19 May 2004.[15]

4. On 13 December 2004, the Appeals Chamber conducted a hearing under Rule 115, during which it heard testimony from Witness TDR. The Appeals Chamber also heard arguments from the Appellant and the Prosecution on 13 and 14 December 2004 concerning the merits of their appeals.

5. The Appellant filed a subsequent motion for the admission of additional evidence, requesting the admission under Rule 115 of pages 6 to 28 of the testimony of FPK2, a protected witness in the *Simba* case.[16] On 5 April 2005, the Appeals Chamber denied the Appellant's motion, finding that the evidence, which was vague, would not have affected the Trial Chamber's verdict.[17]

[15] Decision on Application for Reconsideration of Amicus Curiae Application of Paul Bisengimana, 19 May 2004.
[16] Extremely Urgent Motion for Admission of pages 6-28 of the Transcripts of the Testimony on Oath of Protected Defence Witness FPK2 in Case No. ICTR-01-76-T, Prosecutor Vs. Simba dated 16 December 2004, pursuant to Rule 89 and Rule 115 (B); 118(A) of the Rule of Evidence and Procedure of the ICTR For Consideration During Deliberation in ICTR-097-20-A reserved for Judgement on 14 December 2004, 14 January 2005.
[17] Decision on Laurent Semanza's Motion for Admission of Additional Evidence, 5 April 2005.

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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-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")

KAJELIJELI

Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement, 1 December 2003 ("*Kajelijeli* Trial Judgement")

KAMUHANDA

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