UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Liu Daqun** **Judge Carmel Agius** **Judge Khalida Rachid Khan** **Judge Bakhtiyar Tuzmukhamedov**
Registrar:	**Mr. Bongani Majola**
Judgement of:	**11 February 2014**

AUGUSTIN NDINDILIYIMANA
FRANÇOIS-XAVIER NZUWONEMEYE
INNOCENT SAGAHUTU

v.

THE PROSECUTOR

PUBLIC AND REDACTED

Case No. ICTR-00-56-A

JUDGEMENT

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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 Augustin Ndindiliyimana ("Ndindiliyimana"), François-Xavier Nzuwonemeye ("Nzuwonemeye"), Innocent Sagahutu ("Sagahutu"), and the Prosecution against the Judgement in the case of *The Prosecutor v. Augustin Ndindiliyimana et al.*, which was pronounced on 17 May 2011 by Trial Chamber II of the Tribunal ("Trial Chamber") and filed in writing on 17 June 2011 ("Trial Judgement").[1]

I. INTRODUCTION

A. Background

2. Ndindiliyimana was born in 1943 and raised in Nyaruhengeri Commune, Butare Prefecture, Rwanda.[2] In 1994 he held the rank of major general and, until 5 June 1994, was Chief of Staff of the Rwandan gendarmerie.[3] The Trial Chamber convicted Ndindiliyimana as a superior for genocide and extermination as a crime against humanity based on the participation of gendarmes in an attack on Kansi Parish.[4] It also found him guilty as a superior for genocide and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed by gendarmes at Saint André College.[5] The Trial Chamber also convicted Ndindiliyimana of murder as a crime against humanity.[6] The Trial Chamber sentenced Ndindiliyimana to a single sentence of time served and ordered his immediate release on 17 May 2011.[7]

3. Nzuwonemeye was born on 30 August 1955 in Musasa Commune, Kigali Prefecture, Rwanda.[8] During the relevant period, he held the rank of major and was the commander of the

[1] For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms. On 7 February 2014, the Appeals Chamber issued an order severing the case of Augustin Bizimungu ("Bizimungu"), who had been tried with Ndindiliyimana, Nzuwonemeye, and Sagahutu, and whose appeal was heard with theirs. *See* Order for Further Submissions and Severance, 7 February 2014, pp. 1, 2. *See also* Bizimungu Notice of Appeal; Bizimungu Appeal Brief; Prosecution Response Brief (Bizimungu); Bizimungu Reply Brief; Prosecution Notice of Appeal, paras. 1-31; Prosecution Appeal Brief, paras. 15-146, 214-216, 219-249; Bizimungu Response Brief.
[2] Trial Judgement, para. 81.
[3] Trial Judgement, paras. 84, 86, 1922, 1923.
[4] Trial Judgement, paras. 2077-2080, 2085, 2111, 2112, 2119.
[5] Trial Judgement, paras. 2081-2085, 2145, 2152.
[6] Trial Judgement, para. 2163.
[7] Trial Judgement, paras. 79, 80, 2267, 2272; T. 17 May 2011 p. 26.
[8] Trial Judgement, para. 92.

Reconnaissance Battalion.[9] Sagahutu was born in 1962 in Gisuma Commune, Cyangugu Prefecture, Rwanda.[10] During the relevant period, he was the commander of Squadron A within the Reconnaissance Battalion.[11]

4. The Trial Chamber convicted Nzuwonemeye and Sagahutu of ordering and aiding and abetting murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killing of Prime Minister Agathe Uwilingiyimana.[12] It further concluded that Nzuwonemeye was liable as a superior for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II with respect to the killing of Belgian peacekeepers who were part of the UNAMIR peacekeeping mission.[13] The Trial Chamber found Sagahutu liable as a superior for murder as a crime against humanity in relation to the killing of the Belgian peacekeepers and also convicted him of ordering and aiding and abetting murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[14] The Trial Chamber sentenced Nzuwonemeye and Sagahutu each to a single term of 20 years of imprisonment.[15]

B. The Appeals

5. Ndindiliyimana, Nzuwonemeye, Sagahutu, and the Prosecution have filed appeals against the Trial Judgement.[16] Ndindiliyimana advances 12 grounds of appeal and requests that his convictions be dismissed.[17] Nzuwonemeye presents seven grounds of appeal and requests that the Appeals Chamber set aside his convictions or, alternatively, order a re-trial or reduce his sentence to time served.[18] Sagahutu advances 15 grounds of appeal and requests that his convictions be overturned or, in the alternative, that his sentence be reduced.[19] The Prosecution responds that the appeals should be dismissed.[20]

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[9] Trial Judgement, paras. 93, 94, 2013, 2014. The Reconnaissance Battalion was also colloquially referred to as the RECCE Battalion throughout the Trial Judgement.
[10] Trial Judgement, para. 96.
[11] Trial Judgement, paras. 96, 2026.
[12] Trial Judgement, paras. 2093, 2107, 2108, 2146, 2154, 2156.
[13] Trial Judgement, paras. 2098, 2107, 2146, 2148, 2155, 2163.
[14] Trial Judgement, paras. 2099, 2108, 2146, 2148, 2150, 2151, 2157, 2163.
[15] Trial Judgement, paras. 79, 2268, 2269.
[16] *See generally* Ndindiliyimana Notice of Appeal *and* Ndindiliyimana Appeal Brief; Nzuwonemeye Notice of Appeal *and* Nzuwonemeye Appeal Brief; Sagahutu Notice of Appeal *and* Sagahutu Appeal Brief; Prosecution Notice of Appeal *and* Prosecution Appeal Brief.
[17] Ndindiliyimana Notice of Appeal, paras. 6-29; Ndindiliyimana Appeal Brief, paras. 44-308.
[18] Nzuwonemeye Notice of Appeal, paras. 5-199; Nzuwonemeye Appeal Brief, paras. 3-562.
[19] Sagahutu Notice of Appeal, paras. 9-99; Sagahutu Appeal Brief, paras. 7-279.
[20] Prosecution Response Brief (Ndindiliyimana), para. 273; Prosecution Response Brief (Nzuwonemeye), para. 295; Prosecution Response Brief (Sagahutu), para. 289.

6. The Prosecution presents four grounds of appeal and seeks the reversal of several acquittals in relation to crimes alleged against Ndindiliyimana.[21] It further requests that the sentences of Nzuwonemeye and Sagahutu be increased to life imprisonment[22] and that Ndindiliyimana's sentence be substantially increased.[23] Ndindiliyimana, Nzuwonemeye, and Sagahutu respond that the Prosecution's appeal should be dismissed.[24]

7. The Appeals Chamber heard oral submissions regarding these appeals from 7 to 10 May 2013.

[21] Prosecution Notice of Appeal, paras. 32-43; Prosecution Appeal Brief, paras. 147-213.
[22] Prosecution Notice of Appeal, paras. 27-31, 49-58; Prosecution Appeal Brief, paras. 214-249, 292-322.
[23] Prosecution Notice of Appeal, paras. 44-48; Prosecution Appeal Brief, paras. 250-291.
[24] Ndindiliyimana Response Brief, para. 152 (p. 57); Nzuwonemeye Response Brief, p. 17; Sagahutu Response Brief, para. 90.

II. STANDARDS OF APPELLATE REVIEW

8. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[25]

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

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[26]

10. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[27] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[28]

11. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[29]

The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could

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[25] *See*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 11; *Gatete* Appeal Judgement, para. 7; *Hategekimana* Appeal Judgement, para. 6. *See also Perišić* Appeal Judgement, para. 7.
[26] *Ntakirutimana* Appeal Judgement, para. 11 (reference omitted). *See also*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 12; *Gatete* Appeal Judgement, para. 8; *Hategekimana* Appeal Judgement, para. 7. *See also Perišić* Appeal Judgement, para. 8.
[27] *See*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 9; *Hategekimana* Appeal Judgement, para. 8. *See also Perišić* Appeal Judgement, para. 9.
[28] *See*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 9; *Hategekimana* Appeal Judgement, para. 8. *See also Perišić* Appeal Judgement, para. 9.
[29] *Krstić* Appeal Judgement, para. 40 (references omitted). *See also*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement para. 14; *Gatete* Appeal Judgement, para. 10; *Hategekimana* Appeal Judgement, para. 9. *See also Perišić* Appeal Judgement, para. 10.

have made the impugned finding. However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.[30]

12. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[31] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[32]

13. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[33] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[34] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[35]

[30] *Mrkšić and Šlivančanin* Appeal Judgement, para. 15; *Seromba* Appeal Judgement, para. 11; *Strugar* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 24.
[31] *See*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10. *See also Perišić* Appeal Judgement, para. 11.
[32] *See*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11; *Ntabakuze* Appeal Judgement, para. 14. *See also Perišić* Appeal Judgement, para. 11.
[33] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). *See also*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12; *Hategekimana* Appeal Judgement, para. 11. *See also Perišić* Appeal Judgement, para. 12.
[34] *See*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12; *Hategekimana* Appeal Judgement, para. 11. *See also Perišić* Appeal Judgement, para. 12.
[35] *See*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12; *Hategekimana* Appeal Judgement, para. 11. *See also Perišić* Appeal Judgement, para. 12.

III. APPEAL OF AUGUSTIN NDINDILIYIMANA

A. Alleged Violations of Fair Trial Rights (Grounds 11 and 12)

14. Ndindiliyimana submits that the Trial Chamber violated his right to a fair trial as guaranteed by Articles 19 and 20 of the Statute.[36] In this section the Appeals Chamber considers whether: (i) the Trial Chamber failed to provide sufficient remedies in light of the Prosecution's violation of its disclosure obligations pursuant to Rule 68 of the Rules; (ii) the Tribunal's decisions concerned with alleged prosecutorial misconduct prior to and during trial were in error; and (iii) the proceedings were unduly delayed.

1. Rule 68 of the Rules

15. Following submissions from Ndindiliyimana, on 4 February 2008, the Trial Chamber ordered the Prosecution to review documents in its possession and give to the Defence all exculpatory material subject to disclosure pursuant to Rule 68 of the Rules.[37] On 29 February 2008, the Prosecution disclosed to the Defence approximately 3,000 pages of un-redacted witness statements.[38]

16. In a decision of 22 September 2008, the Trial Chamber concluded that the Prosecution had persistently violated its disclosure obligations under Rule 68 of the Rules in relation to several exculpatory statements disclosed to Ndindiliyimana after its order of 4 February 2008.[39] The Trial Chamber found that the violations prevented Ndindiliyimana from using exculpatory material to test the credibility of Prosecution witnesses, and that, because Ndindiliyimana's Defence case had concluded prior to the disclosure, he was also prevented from considering the exculpatory material when determining which witnesses should testify on his behalf.[40] The Trial Chamber considered a range of possible remedies, including a request from Ndindiliyimana to either dismiss the charges against him or to reopen the case to present further evidence.[41] The Trial Chamber ordered Ndindiliyimana to file a motion specifying, on the basis of the belatedly disclosed exculpatory

[36] Ndindiliyimana Notice of Appeal, paras. 27, 28; Ndindiliyimana Appeal Brief, paras. 257-307; Ndindiliyimana Reply Brief, paras. 97-103.
[37] T. 4 February 2008 pp. 1-13. *See also The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008 ("Trial Decision of 22 September 2008"), para. 1.
[38] *See* Trial Decision of 22 September 2008, para. 2. Further disclosures were made by the Prosecution on 19 March and 23 April 2008. *See* Trial Decision of 22 September 2008, para. 4.
[39] Trial Decision of 22 September 2008, paras. 38-40, 42, 44, 49, 50, 52-55, 59.
[40] Trial Decision of 22 September 2008, para. 59.
[41] Trial Decision of 22 September 2008, paras. 60-62.

material, which Prosecution witnesses he sought to recall and which additional Defence witnesses he sought to call to testify.[42]

17. In a decision issued on 4 December 2008, the Trial Chamber granted, in part, a motion brought by Ndindiliyimana to recall certain Prosecution witnesses and to add new Defence witnesses to remedy the prejudice caused by the late disclosure of the exculpatory material.[43] The Trial Chamber denied, however, Ndindiliyimana's alternative request to admit as evidence the exculpatory statements and to dismiss the charges against him, noting that these remedies were inappropriate in light of the other remedies granted to him.[44]

18. However, on 12 April 2011, the Trial Chamber, *proprio motu*, admitted into evidence 12 witness statements because witnesses whom Ndindiliyimana was granted leave to recall or to call as new witnesses were unavailable to testify.[45] The Trial Chamber reasoned that the admission of the statements was the only suitable remedy to address the prejudice Ndindiliyimana had suffered as a result of the Prosecution's disclosure violations.[46]

19. Finally, in the Trial Judgement, the Trial Chamber concluded that the Prosecution's failure to disclose exculpatory materials in a timely manner throughout the trial and after its conclusion had resulted in violations of Ndindiliyimana's fair trial rights.[47] Consequently, the Trial Chamber considered these violations as a mitigating factor in Ndindiliyimana's sentencing.[48]

20. Ndindiliyimana argues that, while the Trial Chamber correctly found violations of the Prosecution's disclosure obligations pursuant to Rule 68 of the Rules,[49] the remedies granted during the trial proceedings and in the Trial Judgement were insufficient.[50] Specifically, he asserts that the Trial Chamber erred by not dismissing the charges against him.[51]

[42] Trial Decision of 22 September 2008, paras. 63, 64, p. 22.
[43] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Ndindiliyimana's Motion to Recall Identified Prosecution Witnesses and to Call Additional Defence Witnesses, 4 December 2008 ("Decision on Ndindiliyimana Motion to Recall Witnesses of 4 December 2008"), paras. 9, 12, 18, 23, pp. 9, 10.
[44] Decision on Ndindiliyimana Motion to Recall Witnesses of 4 December 2008, paras. 4, 28-30.
[45] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on the Admission of Written Statements Disclosed by the Prosecutor Pursuant to Rule 68(A) of the Rules of Procedure and Evidence (With Strictly Confidential Annex), 12 April 2011 ("Trial Decision of 12 April 2011"), paras. 5, 6.
[46] Trial Decision of 12 April 2011, para. 6.
[47] Trial Judgement, paras. 2192, 2193.
[48] Trial Judgement, para. 2194.
[49] Ndindiliyimana Appeal Brief, paras. 258-260, 264-271.
[50] Ndindiliyimana Appeal Brief, paras. 261, 265, 270; Ndindiliyimana Reply Brief, para. 99.
[51] Ndindiliyimana Appeal Brief, paras. 258, 261, 265, 271.

21. The Prosecution responds that Ndindiliyimana has not demonstrated any error in the remedies granted by the Trial Chamber and that he has failed to demonstrate that any new remedies are warranted on appeal.[52]

22. The Appeals Chamber recalls that, at trial, determining the appropriate remedy in light of a violation of Rule 68 of the Rules falls within the broad discretion of the trial chamber.[53] A trial chamber's exercise of discretion will be reversed only if the challenged decision was based on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[54]

23. In the view of the Appeals Chamber, Ndindiliyimana does not demonstrate that the Trial Chamber abused its discretion in fashioning the remedies for the Prosecution's disclosure violations. Recalling witnesses[55] and admitting new evidence[56] are appropriate remedies where disclosure violations have resulted in prejudice to an accused.[57] Where an accused's fair trial rights have been violated, a reduction of the sentence may be an appropriate remedy if the accused was convicted at trial.[58] However, the relief requested by Ndindiliyimana at trial and on appeal – dismissal of the charges against him – is not necessarily appropriate even where prejudice to the accused has been demonstrated.[59]

24. Accordingly, the Appeals Chamber finds that Ndindiliyimana has failed to demonstrate that the Trial Chamber erred in fashioning the remedies for the Prosecution's disclosure violations.

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[52] Prosecution Response Brief (Ndindiliyimana), paras. 232, 240-249.
[53] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 ("*Karemera et al.* Appeal Decision of 28 April 2006"), para. 7 ("If a Rule 68 disclosure is extensive, parties are entitled to request an adjournment in order to properly prepare themselves. The authority best placed to determine what time is sufficient for an accused to prepare his defence is the Trial Chamber conducting the case".)(internal citations omitted).
[54] *Kalimanzira* Appeal Judgement, para. 14; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 26 September 2006 ("*Bagosora et al.* Appeal Decision of 26 September 2006"), para. 6.
[55] *Karemera et al.* Appeal Decision of 28 April 2006, para. 8.
[56] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 31. *Cf. Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend his Notice of Appeal and Motion to Admit Evidence, filed confidentially on 23 March 2011, public redacted version filed on 9 November 2011 ("*Setako* Appeal Decision of 23 March 2011"), para. 16.
[57] Where a violation of Rule 68 of the Rules has occurred, a chamber must examine whether the Defence has been prejudiced by the violation before considering whether a remedy is appropriate. *Setako* Appeal Decision of 23 March 2011, para. 14; *Kalimanzira* Appeal Judgement, para. 18.
[58] *Kajelijeli* Appeal Judgement, para. 255. *Cf. Setako* Appeal Judgement, para. 297.
[59] *See Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012 ("*Mugenzi and Mugiraneza* Decision of 24 September 2012"), paras. 17, 22, 27, 28, 33, 38.

2. Tribunal's Decisions and Alleged Prosecutorial Misconduct

25. Ndindiliyimana submits that his fair trial rights were violated because the Tribunal failed to sufficiently protect him from prosecutorial misconduct.[60] Specifically, he contends that the original indictment of 23 January 2000 ("Original Indictment") was a "dummy indictment" which lacked sufficient evidentiary support to justify its confirmation and his arrest.[61] He asserts that the Prosecution had no evidence against him at the time and that his arrest was politically motivated and designed to secure his cooperation in the case against Théoneste Bagosora.[62] In his view, the Prosecution used his incarceration to fabricate a case against him.[63]

26. Ndindiliyimana further notes that he only received a heavily redacted version of the Original Indictment eight days after his arrest.[64] He asserts that, during his initial appearance, the Hearing Judge erred by not requiring the Prosecution to produce a "real" indictment and by holding that the issue of redactions was a matter of form of the indictment.[65] Ndindiliyimana also contends that the Pre-Trial Chamber erred in allowing the Prosecution to amend the Original Indictment nearly four years after his arrest and allowed him insufficient time to conduct investigations with respect to the new charges.[66] Moreover, he argues that the Pre-Trial Chamber erred in denying his repeated requests for disclosure and stay of proceedings.[67]

27. Ndindiliyimana additionally submits that, in order to harass him while he was in detention, the Prosecution interfered with his ability to receive visits from Colonel Hubert DeMaere and the colonel's wife and to appoint a key defence investigator.[68] In Ndindiliyimana's view, the Tribunal's decisions on these matters were erroneous.[69] Finally, Ndindiliyimana contends that the Prosecution acted unethically in allowing Alison Des Forges to testify and knowingly misinform the Trial Chamber even though her expert report, which was admitted into evidence, omitted exculpatory material relating to him.[70] Ndindiliyimana requests that the Appeals Chamber order an investigation and grant compensation for the alleged violations.[71]

[60] Ndindiliyimana Appeal Brief, paras. 278, 289-291, 293-295, 298, 300, 305. The Appeals Chamber observes that Ndindiliyimana's submissions on alleged prosecutorial misconduct are partly found in the section on undue delay. *See* Ndindiliyimana Appeal Brief, paras. 285-307. Clarity requires that these submissions be assessed separately.
[61] Ndindiliyimana Appeal Brief, paras. 257, 265, 273, 274, 287, 288, 295, 306.
[62] Ndindiliyimana Appeal Brief, paras. 257, 273, 287.
[63] Ndindiliyimana Appeal Brief, paras. 287, 297.
[64] Ndindiliyimana Appeal Brief, para. 274.
[65] Ndindiliyimana Appeal Brief, paras. 288, 289. *See also* Ndindiliyimana Appeal Brief, para. 287.
[66] Ndindiliyimana Appeal Brief, paras. 295, 297-305; Ndindiliyimana Reply Brief, paras. 102, 103.
[67] Ndindiliyimana Appeal Brief, paras. 290-294.
[68] Ndindiliyimana Appeal Brief, paras. 275-280.
[69] Ndindiliyimana Appeal Brief, paras. 276-280, 284.
[70] Ndindiliyimana Appeal Brief, paras. 281-283; Ndindiliyimana Reply Brief, para. 98.
[71] AT. 7 May 2013 pp. 56, 57.

28. The Prosecution responds that Ndindiliyimana fails to demonstrate any prosecutorial misconduct or errors on the Tribunal's part, including with respect to the amendment of the Original Indictment.[72] It submits that Ndindiliyimana's arguments that he was indicted without sufficient evidentiary support, that his arrest was politically motivated, and that his pre-trial detention was used solely as a means of securing his cooperation are baseless.[73] The Prosecution also rejects Ndindiliyimana's arguments that it knowingly allowed Witness Des Forges to mislead the Trial Chamber.[74]

29. The Appeals Chamber recalls that the burden of showing an abuse of process rests with the accused.[75] When a party alleges that the right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement.[76]

30. Turning first to Ndindiliyimana's assertion that the Prosecution indicted him for political reasons and without evidentiary support, the Appeals Chamber recalls that, pursuant to Article 15 of the Statute, the Prosecution has broad discretion in relation to the initiation of investigations and in the preparation of indictments.[77] Ndindiliyimana's arguments that insufficient information existed to support the confirmation of the Original Indictment fail to meet the threshold for appellate review. His submissions do not refer to the decision confirming the Original Indictment or allege any error therein.[78] Indeed, Ndindiliyimana's counsel later conceded that he had no objection to the confirmation process of the Original Indictment.[79] Ndindiliyimana merely repeats sweeping arguments that the Prosecution indicted him for political reasons, which were already adjudicated.[80] Ndindiliyimana fails to demonstrate that any of the relevant decisions was in error. Having failed to show any error in the indictment process, the Appeals Chamber similarly rejects Ndindiliyimana's contention that he was arrested for the purpose of securing his testimony against Théoneste

[72] Prosecution Response Brief (Ndindiliyimana), paras. 261-266.
[73] Prosecution Response Brief (Ndindiliyimana), paras. 234-238, 254, 255, 262.
[74] Prosecution Response Brief (Ndindiliyimana), para. 239.
[75] *Kanyarukiga* Appeal Judgement, para. 19, *citing Akayesu* Appeal Judgement, para. 340.
[76] *Gatete* Appeal Judgement, para. 18; *Bagosora and Nsengiyumva* Appeal Judgement, para. 62, fn. 137; *Renzaho* Appeal Judgement, para. 196.
[77] *See* Articles 15(1) *and* 15(2) of the Statute. *See also Akayesu* Appeal Judgement, para. 94, *quoting Delalić et al.* Appeal Judgement, para. 602.
[78] *See* Ndindiliyimana Appeal Brief, paras. 287, 295. *See also The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-I, Decision Confirming the Indictment, 28 January 2000 ("Trial Decision of 28 January 2000").
[79] T. 22 March 2002 pp. 12 ("This is not an attack on Judge Kama's confirmation of the indictment, not at all".), 13 ("They tried to characterise my motion as an attack on Judge Kama's decision to confirm the indictment. I have no problem with the confirmation of the indictment by Judge Kama. I can't – I know I cannot reopen that matter. I am not trying to reopen that matter".).
[80] *See*, *e.g.*, *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-I, Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 16 May 2003, paras. 9-45; T. 30 April 2004 pp. 30-34. *See also The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-I, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004 ("Decision on Stay of Indictment of 26 March 2004"), paras. 25-29.

Bagosora. That the Prosecution also sought to obtain Ndindiliyimana's cooperation once he was in the Tribunal's custody is not improper.[81]

31. Turning to Ndindiliyimana's challenges to redactions in the Original Indictment, the Appeals Chamber observes that, pursuant to Rule 53 of the Rules, a Judge or a Trial Chamber may order the non-disclosure of an indictment, or part thereof, under certain circumstances, including if it is in the interests of justice. The Judge who confirmed the Original Indictment found that the Prosecution had satisfied the requirements under Rule 53 of the Rules to prevent the disclosure to Ndindiliyimana of the names and identifying information of co-accused who remained at large.[82] Ndindiliyimana shows no error with respect to this decision.

32. Moreover, the Appeals Chamber observes that duty counsel for Ndindiliyimana raised the general issue of redactions and asked for guidance during Ndindiliyimana's initial appearance on 27 April 2000.[83] The Judge informed duty counsel for Ndindiliyimana that this challenge needed to be raised in a preliminary motion as it went to the form of the Original Indictment.[84] Duty counsel for Ndindiliyimana did not question this guidance.[85] While Ndindiliyimana takes issue with the Judge's characterization of the objection as one going to the "form" of the indictment rather than to its "substance", the Appeals Chamber cannot discern how Ndindiliyimana suffered any prejudice from the Judge's guidance. Furthermore, the Pre-Trial Chamber, once seised of a motion from Ndindiliyimana's Defence concerning the redactions, determined that the redactions could not be "equated with the failure to inform the Accused of the charges against him".[86] Ndindiliyimana has failed to show on appeal any specific redactions which caused him prejudice.

33. Ndindiliyimana further argues that the Pre-Trial Chamber's decision allowing amendments to the Original Indictment, which added 16 substantially new charges against him, was in error and is further evidence that the Prosecution used his pre-trial detention to "concoct" charges against

[81] *Cf.* Rule 101(B)(ii) of the Rules which expressly mentions cooperation with the Prosecution as a mitigating factor in sentencing. *See also Bralo* Judgement on Sentencing Appeal, para. 51.
[82] Trial Decision of 28 January 2000, p. 2.
[83] T. 27 April 2000 pp. 102, 103.
[84] T. 27 April 2000 p. 103.
[85] T. 27 April 2000 p. 103.
[86] *The Prosecutor v. Augustin Ndindiliyimana*, Case No. ICTR-00-56-I, Decision on Urgent Preliminary Motion to Stay the Indictment or in the Alternative to Cure Defects in the Indictment, 20 October 2000 ("Trial Decision of 20 October 2000"), paras. 18-20. Notwithstanding, the Pre-Trial Chamber also directed the Prosecution to comply with its concessions that it no longer needed to redact information pertaining to co-accused who had since been arrested. Trial Decision of 20 October 2000, para. 20. The Prosecution subsequently complied with this instruction. *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-I, Inter-Office Memorandum, 10 April 2001 (communicating an indictment without redactions related to Nzuwonemeye and Sagahutu in light of their arrests).

him.[87] He also asserts that the period of six months that the Pre-Trial Chamber allowed him to conduct investigations into the new charges was insufficient.[88]

34. The Appeals Chamber recalls that nothing in Rule 50 of the Rules prevents the Prosecution from seeking amendments to the indictment that are substantial.[89] In this regard, Ndindiliyimana's blanket assertion that it was improper to allow the amendments, which included new facts supporting the charges against him, is without merit. Furthermore, a review of the Pre-Trial Chamber's decision granting leave to amend the Original Indictment demonstrates that it considered Ndindiliyimana's contention that the proposed amendments substantially altered the Prosecution's case against him.[90] Indeed, the Pre-Trial Chamber found that several of the proposed amendments resulted in the addition of new material facts supporting charges against each of the accused, including Ndindiliyimana.[91] The Pre-Trial Chamber further considered the timing of the Prosecution's motion to amend the Original Indictment in light of when the Prosecution obtained information to support the motion to amend and the length of the pre-trial detention at that time.[92] However, the Pre-Trial Chamber found Ndindiliyimana's submissions that the Prosecution waited to amend the Original Indictment to gain a tactical advantage unsubstantiated and noted that allowing the amendments would not alter the existing date to commence the trial.[93] Ndindiliyimana fails to demonstrate any error in this reasoning.

35. While Ndindiliyimana contends that the Pre-Trial Chamber erred when considering the prejudice resulting from the amendments to the Original Indictment, he has not substantiated his argument.[94] The Appeals Chamber notes that the Pre-Trial Chamber expressly considered the potential prejudice caused by the new factual allegations in the proposed amendments but

[87] *See* Ndindiliyimana Appeal Brief, para. 297; Ndindiliyimana Reply Brief, paras. 102, 103.
[88] Ndindiliyimana Appeal Brief, paras. 295-298; Ndindiliyimana Reply Brief, paras. 102, 103.
[89] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 11. *See also The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 19 ("Although the Prosecution may seek leave to expand its theory of the Accused's liability after the confirmation of the original indictment, the risk of prejudice from such expansions is high and must be carefully weighed".).
[90] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-I, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000, 26 March 2004 ("Decision on Prosecutor's Motion to Amend Indictment of 26 March 2004"), para. 10.
[91] Decision on Prosecutor's Motion to Amend Indictment of 26 March 2004, paras. 45, 52, 53, 55.
[92] Decision on Prosecutor's Motion to Amend Indictment of 26 March 2004, paras. 50, 51. Ndindiliyimana argues that the Pre-Trial Chamber erred in relying on misrepresentations by the Prosecution that facts supporting the new charges in the proposed amendments emerged during hearings in the last quarter of 2002 or during 2003, whereas many of the relevant witness statements were obtained as early as 2000. *See* Ndindiliyimana Appeal Brief, paras. 300-302. However, the decision clearly reflects that the Pre-Trial Chamber did not rely on representations that the amendments resulted from investigations in 2002 and 2003. *See* Decision on Prosecutor's Motion to Amend Indictment of 26 March 2004, para. 35.
[93] Decision on Prosecutor's Motion to Amend Indictment of 26 March 2004, paras. 50, 51.
[94] Ndindiliyimana Appeal Brief, para. 305.

determined that the nearly six months remaining before the commencement of trial was sufficient time to investigate the new facts alleged in the Indictment and prepare for trial.[95] Ndindiliyimana's disagreement with this determination does not demonstrate that he suffered any prejudice or that the Pre-Trial Chamber abused its discretion.[96]

36. The Appeals Chamber is also not convinced that Ndindiliyimana has demonstrated any error through his references to several pre-trial decisions denying requests for disclosure and stay of proceedings.[97] His present submissions repeat those that he made during his pre-trial detention, and only reflect a summary of the proceedings and his stated disagreement with the respective decisions without identifying any error or prejudice suffered.[98]

37. The Appeals Chamber turns to Ndindiliyimana's assertion that the Prosecution, in order to harass him, objected to the visit of Colonel Hubert DeMaere and his wife at the United Nations Detention Facility in June 2002. The Appeals Chamber observes that Ndindiliyimana objected to the propriety of the Prosecution's conduct[99] and that the President of the Tribunal adjudicated this matter in his favour without finding prosecutorial misconduct.[100] Ndindiliyimana points to no error in the decision.[101] Furthermore, his undeveloped arguments that the visit did not subsequently take place do not demonstrate an error of law or any resulting prejudice.[102]

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[95] Decision on Prosecutor's Motion to Amend Indictment of 26 March 2004, paras. 53, 55.
[96] Ndindiliyimana appears to argue that he was not sufficiently able to prepare his defence in the intervening months between the Pre-Trial Chamber's decision to grant the proposed amendments and the start of trial because the operative indictment ("Indictment") was not filed until 23 August 2004. Ndindiliyimana Appeal Brief, para. 304. This argument is without merit. The Prosecution communicated an amended version of the Original Indictment to the Registry on 31 March 2004 and Ndindiliyimana confirmed that he had been served with it on 1 April 2004. *See The Prosecutor v. Augustin Ndindiliyimana et al*., Case No. ICTR-00-56-T, *Transmission de l'acte d'accusation modifié pour faire suite aux instructions de la Chambre de première instance II contenues dans sa décision du 26 mars 2004*, 31 March 2004, Registry pp. 7726-7770 *and* Proof of Service to Detainees, 31 March 2004. The Appeals Chamber dismisses this argument. Moreover, the Indictment filed on 23 August 2004 reflects minor alterations and the deletion of paragraphs related to Protais Mpiranya based on his severance from the case. *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-2000-56-I, *Décision sur la requête du Procureur aux fins de disjonction d'instance*, 20 August 2004, filed in English on 19 May 2005 ("Decision on Severance"), paras. 16-19. *See also The Prosecutor v. Augustin Bizimungu*, Case No. ICTR-00-56-I, Decision on Augustin Bizimungu's Preliminary Motion, 15 July 2004, para. 28.
[97] Ndindiliyimana Appeal Brief, paras. 290-294, 296.
[98] *See* Ndindiliyimana Appeal Brief, paras. 290-294, 296. *See also The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on the Defence Motion for Immediate Release and Stay of All Charges Against the Accused Ndindiliyimana Due to the Prosecutor's Non-Compliance with the Rules, 10 April 2002 ("Trial Decision of 10 April 2002"), paras. 1-4, 6.
[99] *See The Prosecutor v. Augustin Ndindiliyimana et al*., Case No. ICTR-00-56-I, Motion Requesting Reversal of the Prosecutor's Request for Prohibition of Contact, 19 June 2002 ("Motion of 19 June 2002"), paras. 13-17.
[100] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, The President's Decision on a Defence Motion to Reverse the Prosecutor's Request for Prohibition of Contact Pursuant to Rule 64, 25 November 2002, para. 14.
[101] The Appeals Chamber observes that nothing in the Statute or the Rules provides for a direct appeal of a decision by the President concerning an administrative matter that related exclusively to the trial and has no bearing on appellate proceedings. *See Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Decision on Request for Judicial Review of the Registrar's and President's Decisions Concerning Payment of Fees and Expenses, 13 April 2010, para. 14.
[102] *See supra* para. 29.

38. Likewise, the Appeals Chamber observes that, at trial, Ndindiliyimana raised objections to the Prosecution's alleged improper interference with the appointment of Pierre Claver Karangwa as a Defence investigator.[103] The Pre-Trial Chamber considered that Ndindiliyimana's request lacked merit and that it was filed before it improperly.[104] Ndindiliyimana fails to highlight any error in that decision or to show that he exhausted the administrative remedies available to him to secure Karangwa's appointment.[105]

39. Finally, Ndindiliyimana's submissions that the Prosecution knowingly allowed Witness Des Forges to mislead the Trial Chamber fail to demonstrate any abuse of process invalidating the Trial Judgement. Specifically, Ndindiliyimana merely repeats the concerns expressed by the Trial Chamber in its discussion of mitigating factors in the sentencing portion of the Trial Judgement,[106] without identifying any error or prejudice.

40. In light of the foregoing, the Appeals Chamber finds that Ndindiliyimana has failed to demonstrate any error with respect to the alleged prosecutorial misconduct or related decisions.

3. Undue Delay

41. Ndindiliyimana submits that the Prosecution's improper conduct, as set out above, resulted in the undue delay of the commencement of his trial as well as its undue extension.[107] He contends that the trial was delayed so that the Prosecution could build a case against him.[108] Ndindiliyimana argues that a reversal of his convictions is the only appropriate remedy.[109]

42. The Prosecution responds that any delay in Ndindiliyimana's trial was not undue, but resulted from the complexity of proceedings involving several accused[110] as well as the considerable pre-trial litigation.[111]

43. The Appeals Chamber recalls that the right to be tried without undue delay is enshrined in Article 20(4)(c) of the Statute and protects an accused against *undue* delay, which is determined on

[103] *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-I, Urgent Oral Motion for an Order that the Registrar Hold a Hearing on the Suspension of the Contract of his Investigator Pierre Claver Karangwa, 5 June 2002, paras. 21-24, 29, 33. *See also* Motion of 19 June 2002, paras. 19-23.
[104] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-I, Decision on Augustin Ndindiliyimana's Motion for an Order that the Registrar Hold a Hearing on the Suspension of the Contract of his Investigator Pierre-Claver Karangwa, 12 November 2002, para. 17.
[105] *Cf. Renzaho* Appeal Judgement, para. 196.
[106] *See* Trial Judgement, paras. 2209, 2210.
[107] Ndindiliyimana Appeal Brief, paras. 285-307.
[108] Ndindiliyimana Appeal Brief, para. 303; Ndindiliyimana Reply Brief, para. 102.
[109] Ndindiliyimana Appeal Brief, paras. 284, 307.
[110] Prosecution Response Brief (Ndindiliyimana), paras. 255, 257-260, 267, 270.
[111] Prosecution Response Brief (Ndindiliyimana), paras. 268, 269.

a case-by-case basis.[112] A number of factors are relevant to this assessment, including: the length of the delay; the complexity of the proceedings; the conduct of the parties; the conduct of the relevant authorities; and the prejudice to the accused, if any.[113] In this context, the Appeals Chamber also recalls that when a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the trial chamber violated a provision of the Statute and/or the Rules and that this violation caused prejudice which amounts to an error of law invalidating the trial judgement.[114]

44. The Appeals Chamber observes that Ndindiliyimana was incarcerated for four years prior to the commencement of his trial.[115] While this period is substantial, the Appeals Chamber also notes that Ndindiliyimana was one of five co-accused charged in the same indictment.[116] Of the four accused who were tried together, Ndindiliyimana was the first to be arrested,[117] with the last co-accused, Bizimungu, apprehended and transferred to the Tribunal over two years later.[118] Although Ndindiliyimana's individual case may have started earlier, joinder is provided for by the Rules[119] and was not challenged by Ndindiliyimana on appeal.

45. Furthermore, the record reveals that this case was subject to extensive and complex pre-trial litigation.[120] Of particular significance, Ndindiliyimana raised challenges regarding selective prosecution,[121] objected to his prosecution before the Tribunal on the basis of *res judicata*,[122] and sought to stay proceedings and have his case transferred to a national jurisdiction pursuant to Rule 11*bis* of the Rules.[123] The Appeals Chamber notes that accused before the Tribunal are free to raise procedural and substantive challenges and highlights this litigation only to underscore the complexity of Ndindiliyimana's pre-trial proceedings.[124]

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[112] *Mugenzi and Mugiraneza* Appeal Judgement, para. 30; *Gatete* Appeal Judgement, para. 18; *Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074.
[113] *Mugenzi and Mugiraneza* Appeal Judgement, para. 30; *Gatete* Appeal Judgement, para. 18; *Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074.
[114] *Gatete* Appeal Judgement, para. 18, *citing Haradinaj et al.* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 28. *See also Kanyarukiga* Appeal Judgement, para. 52; *Bagosora and Nsengiyumva* Appeal Judgement, fn. 137; *Renzaho* Appeal Judgement, para. 196.
[115] Ndindiliyimana was arrested in Belgium on 29 January 2000 and transferred to the Tribunal on 22 April 2000. *See* Trial Judgement, para. 87, Annex A, para. 7.
[116] Trial Judgement, Annex A, para. 5.
[117] Nzuwonemeye and Sagahutu were arrested on 15 February 2000 and transferred to the Tribunal in May and November 2000, respectively. Trial Judgement, paras. 95, 97, Annex A, paras. 11, 13.
[118] Bizimungu was arrested on 2 August 2002 and transferred to the Tribunal on 14 August 2002. Trial Judgement, para. 91, Annex A, para. 9.
[119] *See* Rule 82(A) of the Rules. *See also Bagosora and Nsengiyumva* Appeal Judgement, paras. 35, 37, 38.
[120] *See* Trial Judgement, Annex A, paras. 14-24.
[121] *See generally* Decision on Stay of Indictment of 26 March 2004.
[122] *See* Trial Decision of 20 October 2000, paras. 1, 15-17; Trial Decision of 10 April 2002, paras. 5, 16.
[123] *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial, Including Reasons in Support of the Chamber's Oral Ruling Delivered on Monday 20 September 2004, 24 September 2004, paras. 30-32.
[124] *Cf. Gatete* Appeal Judgement, para. 18. In addition, the Appeals Chamber observes that cases with the same number of accused and pre-trial proceedings of similar length have not been considered unduly delayed. *See Bizimungu et al.*

46. Finally, the Appeals Chamber recalls that it has already dismissed Ndindiliyimana's submissions regarding prosecutorial misconduct.[125] To the extent he argues that his trial was unduly delayed due to the Prosecution's failure to timely disclose exculpatory material,[126] the Appeals Chamber observes that in light of these violations two additional trial days were held for further questioning of Prosecution and Defence witnesses.[127] As explained above, the Appeals Chamber is satisfied that the remedies provided for the disclosure violations by the Trial Chamber sufficiently compensated Ndindiliyimana for any resulting undue delay.[128]

47. In light of the foregoing, the Appeals Chamber finds that Ndindiliyimana has failed to demonstrate undue delay.

4. Conclusion

48. Based on the foregoing, the Appeals Chamber dismisses Ndindiliyimana's Eleventh and Twelfth Grounds of Appeal.

Trial Judgement, paras. 68, 71, 72, 79, affirmed in *Mugenzi and Mugiraneza* Appeal Judgement, paras. 34, 35, 37; *Bagosora et al.* Trial Judgement, paras. 73, 76, 77, affirmed in *Bagosora and Nsengiyumva* Appeal Judgement, para. 38.

[125] *See supra* para. 40.

[126] *See* Ndindiliyimana Appeal Brief, paras. 291, 293, 297.

[127] *See generally* T. 16 February 2009; T. 18 February 2009.

[128] *See supra* paras. 23, 24.

B. Kansi Parish (Grounds 1 to 8, in part)

49. The Trial Chamber convicted Ndindiliyimana as a superior pursuant to Article 6(3) of the Statute for genocide and extermination as a crime against humanity for the killing of Tutsi refugees at Kansi Parish.[129] The Trial Chamber found that, on 21 April 1994, gendarmes assigned to guard Ndindiliyimana's residence in Nyaruhengeri provided weapons to and assisted *Interahamwe* in the attack at the nearby parish.[130] The Trial Chamber further held that the gendarmes stationed at Ndindiliyimana's residence were his subordinates acting under his control,[131] and that Ndindiliyimana knew or had reason to know that they had committed crimes at Kansi Parish,[132] but failed to punish them.[133]

50. Ndindiliyimana submits that the Trial Chamber erred in convicting him of these crimes.[134] In particular, Ndindiliyimana contends that the Trial Chamber erred in: (i) its assessment of evidence relating to the question of whether gendarmes guarding his residence in Nyaruhengeri participated in the commission of crimes at Kansi Parish;[135] (ii) its conclusion that a superior-subordinate relationship existed between him and these gendarmes;[136] (iii) finding that he possessed sufficient knowledge of events at Kansi Parish to satisfy the *mens rea* requirement under Article 6(3) of the Statute;[137] and (iv) finding that he failed to take the required punitive measures.[138] In addition, Ndindiliyimana contends that the Trial Chamber improperly applied the burden and standard of proof and violated the presumption of innocence.[139]

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[129] Trial Judgement, paras. 2085, 2119, 2163. *See also* Trial Judgement, paras. 19, 55. The Appeals Chamber observes that both the Trial Judgement and the submissions of the parties consistently use the term "refugee" to describe persons taking refuge. For the sake of clarity, the Appeals Chamber uses the same term throughout this Judgement, even though the term does not accurately reflect the status of these persons under international law.

[130] *See* Trial Judgement, para. 1292. The Appeals Chamber notes that the Trial Chamber stated in the legal findings section of the Trial Judgement that the gendarmes stationed at Ndindiliyimana's residence participated in the attack at Kansi Parish on 21 and 22 April 1994. *See* Trial Judgement, para. 1947. *See also* Trial Judgement, para. 2184. However, none of the Prosecution witnesses on whom the Trial Chamber relied in order to hold Ndindiliyimana responsible for this incident, gave evidence with respect to 22 April 1994. *See* Trial Judgement, paras. 1227-1238, 1242-1244, 1286-1291. The Appeals Chamber therefore considers the Trial Chamber's references to this day to be a clerical error and understands that Ndindiliyimana was only convicted for crimes committed at Kansi Parish on 21 April 1994.

[131] Trial Judgement, paras. 1947, 1949.

[132] Trial Judgement, paras. 1294, 1295, 1951.

[133] Trial Judgement, para. 1956.

[134] *See* Ndindiliyimana Notice of Appeal, paras. 6, 9, 11-25; Ndindiliyimana Appeal Brief, paras. 44-111, 159, 163-166 (p. 48), 167-169, 172-186, 197-206, 212-247; AT. 7 May 2013 pp. 8-24.

[135] Ndindiliyimana Notice of Appeal, paras. 7, 8; Ndindiliyimana Appeal Brief, paras. 47-111, 159, 163; Ndindiliyimana Reply Brief, paras. 17-22, 26-48.

[136] Ndindiliyimana Notice of Appeal, paras. 9-12; Ndindiliyimana Appeal Brief, paras. 164-166 (p. 48), 167-169, 172-186, 197; Ndindiliyimana Reply Brief, paras. 61-66.

[137] Ndindiliyimana Notice of Appeal, paras. 13, 25; Ndindiliyimana Appeal Brief, paras. 198-206, 212, 240-247; Ndindiliyimana Reply Brief, paras. 10, 11, 67-76, 86, 93, 94.

[138] Ndindiliyimana Notice of Appeal, paras. 17-21, 23, 24; Ndindiliyimana Appeal Brief, paras. 213-239; Ndindiliyimana Reply Brief, paras. 82-92.

[139] Ndindiliyimana Notice of Appeal, paras. 8, 22; Ndindiliyimana Appeal Brief, paras. 44-46, 159.

51. The Appeals Chamber notes that the Trial Chamber found that, after 7 April 1994, the operational command over the majority of gendarmerie units was transferred to the Rwandan army and that Ndindiliyimana therefore no longer exercised effective control over gendarmes who had been deployed to assist the army in combat against the RPF.[140] The Trial Chamber held, however, that Ndindiliyimana retained full *de jure* authority over gendarmes not deployed to assist the army in combat.[141] In this respect, it noted Ndindiliyimana's testimony that he had full command over approximately 200 gendarmes (100 in Kigali and 100 in the remainder of the country).[142] With respect to these gendarmes, the Trial Chamber acknowledged that: Ndindiliyimana suffered from a lack of resources and faced difficulties in communicating with gendarmerie units on the ground; his force was infiltrated by extremists and rogue elements; and his material ability to control the gendarmes under his operational command decreased as the war progressed.[143] For these reasons, the Trial Chamber considered that Ndindiliyimana did not exercise effective control over all gendarmes under his operational command and that his "material ability to prevent and/or punish crimes […] varied considerably between different *gendarmerie* units".[144]

52. At the time of the attack at Kansi Parish on 21 April 1994, Ndindiliyimana's residence in Nyaruhengeri was guarded by a number of gendarmes who had been deployed by the commander of the Butare gendarmerie unit, Cyriaq Habyarabatuma, based on a personal request for protection by Ndindiliyimana's wife, Defence Witness Marie Nakure.[145] The Trial Chamber concluded that Ndindiliyimana exercised "*de facto* authority" over these gendarmes because they had been "gathered" by his wife and Ndindiliyimana had "admitted" at trial that he would have known had they participated in the attack at Kansi Parish.[146] It also stated that the gendarmes belonged to units under the operational command of the gendarmerie and that their operation at Kansi Parish entailed a degree of organization and therefore found that: "[i]t follows from Ndindiliyimana's position as Chief of Staff of the *Gendarmerie* that the *gendarmes* in question were his subordinates under his effective control".[147]

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[140] Trial Judgement, paras. 1925-1929, 1936. Although the Trial Chamber found that Ndindiliyimana retained *de jure* disciplinary authority over gendarmes deployed to assist the army, his material ability to exercise "day-to-day and operational control" as well as to punish these gendarmes was limited. *See* Trial Judgement, paras. 1933, 1935. *See also* Trial Judgement, paras. 2196, 2197.
[141] Trial Judgement, paras. 1930, 1937.
[142] Trial Judgement, para. 1930, *referring to* Ndindiliyimana, T. 23 June 2008 pp. 11-13; Ndindiliyimana Closing Brief, para. 103.
[143] Trial Judgement, paras. 1937, 1946.
[144] Trial Judgement, para. 1946. *See also* Trial Judgement, paras. 2198, 2234, 2242.
[145] *See* Trial Judgement, paras. 1264, 1271. *See also* Witness Nakure, T. 2 June 2008 pp. 6, 7, 22.
[146] Trial Judgement, para. 1947.
[147] Trial Judgement, para. 1949.

53. Ndindiliyimana submits that the Trial Chamber erred in finding that he had a superior-subordinate relationship with the gendarmes stationed at his residence.[148] He asserts that the Trial Chamber failed to provide a reasoned opinion as to why he exercised authority over these gendarmes.[149] In his view, it was not proved that he had the requisite authority.[150]

54. The Prosecution responds that the Trial Chamber's impugned findings were reasonable.[151] It points out that the gendarmes who participated in the attack at Kansi Parish were assigned to guard Ndindiliyimana's private residence.[152] The Prosecution contends that "[i]t defies common sense to suggest that Witness Nakure obtained, by herself, some 6 *gendarmes* for her private use, without the intervention or the influence and position of her husband as the Chief of Staff of the *Gendarmerie*".[153] It further submits that Ndindiliyimana's command over the Butare gendarmerie unit was demonstrated by the fact that Ndindiliyimana paid a visit to Habyarabatuma on 15 April 1994,[154] sent elements from this unit to Kigali,[155] received daily situation reports from the Butare gendarmerie unit, and, in May 1994, instructed Colonel Muvunyi to arrange a meeting with local security officials, including the Butare gendarmerie unit.[156]

55. The Appeals Chamber recalls that the essential element of a superior-subordinate relationship within the meaning of Article 6(3) of the Statute is the possession of effective control on the part of the superior in the sense of a material ability to prevent or punish criminal conduct by his subordinates.[157]

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[148] Ndindiliyimana Notice of Appeal, paras. 9-12; Ndindiliyimana Appeal Brief, paras. 164-166 (p. 48), 168, 169, 172-186, 197; Ndindiliyimana Reply Brief, paras. 61-65.
[149] Ndindiliyimana Notice of Appeal, para. 12; Ndindiliyimana Appeal Brief, paras. 165-168. *See also* Ndindiliyimana Reply Brief, para. 56.
[150] Ndindiliyimana Notice of Appeal, paras. 9, 10, 12; Ndindiliyimana Appeal Brief, paras. 174, 186. In this context, Ndindiliyimana specifically contends that, according to Witness FAV, the attack at Kansi Parish was led by the Presidential Guard, who were effectively the superiors of the gendarmes involved. Ndindiliyimana Appeal Brief, paras. 175-178. *See also* Ndindiliyimana Appeal Brief, paras. 73, 82; Ndindiliyimana Reply Brief, para. 62. Alternatively, Ndindiliyimana asserts that the gendarmes stationed at his residence were under the command of Bourgmestre Charles Kabeza because the latter arranged for their deployment. Ndindiliyimana Appeal Brief, paras. 179-186. Ndindiliyimana submits that the Trial Chamber did not consider the implications of the role of the bourgmestre and, in particular, failed to take into account the evidence of Defence Witness Stanislas Haralimana on the matter. Ndindiliyimana Appeal Brief, paras. 181, 182, 185. *See also* Ndindiliyimana Reply Brief, paras. 61, 62, 64. He finally maintains that he could not have had effective control over the gendarmes stationed at his residence because he was in Gitarama when the attack at Kansi Parish occurred. Ndindiliyimana Appeal Brief, para. 64.
[151] Prosecution Response Brief (Ndindiliyimana), para. 126. *See also* AT. 7 May 2013 pp. 33, 41, 42, 48.
[152] Prosecution Response Brief (Ndindiliyimana), para. 140; AT. 7 May 2013 p. 42.
[153] Prosecution Response Brief (Ndindiliyimana), para. 141. The Prosecution advances this argument in response to Ndindiliyimana's submission that the gendarmes stationed at his residence fell under the command of Bourgmestre Charles Kabeza. In the same vein, the Prosecution submits that the Trial Chamber was not obliged to conclude from Witness FAV's testimony that the gendarmes acted under the authority of the Presidential Guard or the army during the attack at Kansi Parish. Prosecution Response Brief (Ndindiliyimana), paras. 65, 67, 68, 146, 147.
[154] Prosecution Response Brief (Ndindiliyimana), paras. 142, 143. *See also* AT. 7 May 2013 p. 45.
[155] AT. 7 May 2013 p. 42, *referring to* Ndindiliyimana, T. 18 June 2008 pp. 14, 37 (French version).
[156] AT. 7 May 2013 p. 43.
[157] *Halilović* Appeal Judgement, para. 59; *Kayishema and Ruzindana* Appeal Judgement, para. 294; *Delalić et al.* Appeal Judgement, paras. 192, 193, 256. *See also Nahimana et al.* Appeal Judgement, para. 484.

56. While the Trial Chamber held that the gendarmes stationed at Ndindiliyimana's residence belonged to a unit under his operational command,[158] it did not explain the basis for this finding. In this respect, the Trial Chamber failed to provide a reasoned opinion. The Trial Chamber's failure to provide a reasoned opinion amounts to an error of law which allows the Appeals Chamber to consider the relevant evidence and factual findings in order to determine whether a reasonable trier of fact could have found beyond reasonable doubt that the gendarmes stationed at Ndindiliyimana's residence were under his command.[159] The Appeals Chamber recalls that, according to the evidence set out in the Trial Judgement, nearly all gendarmerie units were subordinated to the army at the time.[160] The Prosecution appears to have produced no evidence at trial that the Butare gendarmerie unit, from which the gendarmes assigned to Ndindiliyimana's residence came, remained under Ndindiliyimana's operational command.[161] Moreover, the Trial Judgement does not refer to any evidence that Ndindiliyimana played a role in the assignment of the gendarmes to his residence, issued orders to them, or interacted with them in any way. In these circumstances, no reasonable trier of fact could have concluded that the gendarmes stationed at Ndindiliyimana's residence belonged to a unit under his operational command or that Ndindiliyimana had effective control over them.

57. Furthermore, the Appeals Chamber is not satisfied that a reasonable trier of fact could have based its finding concerning Ndindiliyimana's effective control over the gendarmes stationed at his residence on the fact that the gendarmes were obtained by his wife and that he testified that he would have known of their involvement in an attack at Kansi Parish. The evidence suggests that Ndindiliyimana was not in Nyaruhengeri at the time of the gendarmes' assignment, had no direct contact with his family there, and only learned of the assignment while visiting briefly on 15 April 1994.[162] Moreover, it follows from the testimony of Witness Nakure that it was her personal request for protection which led Habyarabatuma to assign some of the gendarmes from the Butare

[158] Trial Judgement, para. 1949.
[159] *Cf. Bagosora and Nsengiyumva* Appeal Judgement, para. 683; *Kalimanzira* Appeal Judgement, paras. 100, 200. *See also Perišić* Appeal Judgement, para. 92.
[160] *See* Trial Judgement, paras. 1930, 1936.
[161] In this respect, the Appeals Chamber is not convinced by the Prosecution's reference to Ndindiliyimana's testimony that he paid a visit to Habyarabatuma, the commander of the Butare gendarmerie unit on 15 April 1994 and instructed Colonel Muvunyi to organize a meeting with Habyarabatuma in May 1994. The Prosecution has not shown that Ndindiliyimana's visit to Habyaratuma in and of itself showed that the Butare gendarmerie unit remained under his command. Moreover, the Prosecution provides no reference to support the suggestion that Ndindiliyimana received daily situation reports specifically from the Butare gendarmerie unit. Furthermore, evidence that members of the Butare gendarmerie were dispatched to Kigali to combat an RPF attack on Camp Kacyiru is consistent with the Trial Chamber's conclusions elsewhere that Ndindiliyimana did not possess operational control over gendarmes redeployed to fight against the RPF.
[162] *See* Witness Nakure, T. 2 June 2008 p. 6; Ndindiliyimana, T. 17 June 2008 pp. 66, 67; T. 20 June 2008 p. 60. *See also* Trial Judgement, paras. 1245, 1263-1265.

gendarmerie unit to guard Ndindiliyimana's residence.[163] Even assuming that Ndindiliyimana's influence played a role in the assignment of gendarmes to his home based on Witness Nakure's request, this fact could not reasonably support the finding of Ndindiliyimana's effective control over the gendarmes in question.[164] Similarly, Ndindiliyimana's statement that he would have found out about possible criminal activities of the gendarmes at his home is insufficient to show that he had authority over them.

58. Even if the gendarmes stationed at Ndindiliyimana's residence could have been considered his subordinates, the Trial Chamber did not address any possible impact on this relationship flowing from the fact that, according to the relevant testimonies of Prosecution Witnesses GFS and FAV, a separate unit either of gendarmes or the Presidential Guard collected the group of gendarmes from Ndindiliyimana's home shortly before the attack at Kansi Parish on 21 April 1994.[165] This was a critical issue since the Trial Chamber could not have reasonably excluded the possibility that the gendarmes at the residence acted under the arriving group's command and orders at the time of the commission of crimes at the parish and that Ndindiliyimana therefore lacked the material ability to prevent or punish their conduct.[166]

59. Finally, the Appeals Chamber concludes that no reasonable trier of fact could have found that the gendarmes stationed at Ndindiliyimana's residence in fact participated in the attack at Kansi Parish. In support of this finding, the Trial Chamber relied on the testimonies of Witnesses GFS and FAV that they where present when the gendarmes left Ndindiliyimana's residence and departed in the direction of the parish shortly prior to the attack, as well as the testimony of Prosecution Witness GFM who gave evidence as to what he observed at the parish.[167] The Appeals Chamber notes that these witnesses differed significantly with respect to the numbers of gendarmes they saw: Witness GFM testified that six gendarmes participated in the attack at Kansi Parish,[168] whereas Witnesses GFS and FAV claimed that 20 or more gendarmes left Ndindiliyimana's residence.[169] In

[163] Witness Nakure, T. 2 June 2008 pp. 6, 7, 22. Witness Nakure testified that she was frightened after the death of President Habyarimana and therefore went to the bourgmestre of Nyaruhengeri, Charles Kabeza, on 7 April 1994. Together with Kabeza she then met with Habyarabatuma to ask for help. Habyarabatuma provided her with three gendarmes for protection so that she could go back and stay in Nyaruhengeri. *See also* Trial Judgement, para. 1264.
[164] *See Delalić et al.* Appeal Judgement, para. 266 ("[C]ustomary law has specified a standard of effective control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions.")(emphasis omitted).
[165] *See* Trial Judgement, paras. 1232, 1233, 1237, 1288, 1290.
[166] *Cf. Blagojević and Jokić* Appeal Judgement, para. 303.
[167] *See* Trial Judgement, paras. 1227-1238, 1286, 1288, 1290, 1291.
[168] Witness GFM, T. 19 September 2005 pp. 56, 58 (closed session).
[169] Witness FAV testified that 20 gendarmes were stationed at Ndindiliyimana's residence at the time and left together with *Interahamwe* and the Presidential Guard for Kansi Parish. *See* Witness FAV, T. 21 September 2004 pp. 25, 26, 29-32; Witness FAV, T. 23 September 2004 pp. 30, 42, 43. *See also* Trial Judgement, paras. 1234, 1237. Witness GFS maintained that Ndindiliyimana's residence was guarded by five or six gendarmes and that they drove to Kansi Parish

this context, the Appeals Chamber also notes that Witness Nakure and Ndindiliyimana testified that only three gendarmes were assigned to their residence.[170] The Trial Chamber did not discuss any of these discrepancies even though it relied on all of these witnesses – including Witness Nakure – and Ndindiliyimana to find that Ndindiliyimana was liable as a superior of the gendarmes who took part in the attack at Kansi Parish.

60. The Appeals Chamber further notes that Witnesses GFS and FAV acknowledged that they did not observe the attack at Kansi Parish,[171] and also indicated that they were at a considerable distance from this location at the time.[172] Thus, while these witnesses may have expressed their opinion that the gendarmes from Ndindiliyimana's residence went to Kansi Parish and participated in the attack, they provided only circumstantial evidence to this effect. Witness GFM on the other hand, did not give any details as to the identity of the gendarmes he observed at Kansi Parish participating in the attack.[173] The Trial Chamber did not articulate how the evidence of these witnesses led to the only reasonable conclusion that all three witnesses were referring to the same gendarmes. The Appeals Chamber concludes that no reasonable trier of fact could have found this to be the only reasonable inference.

61. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in concluding that Ndindiliyimana exercised effective control over the gendarmes guarding his residence in Nyaruhengeri at the time of the attack against Kansi Parish. Moreover, the Appeals Chamber concludes that no reasonable trier of fact could have inferred as the only reasonable conclusion that the gendarmes stationed at Ndindiliyimana's residence participated in the attack. These errors invalidate the Trial Chamber's finding that Ndindiliyimana could be held liable under

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with 20 other gendarmes and *Interahamwe*. *See* Witness GFS, T. 27 September 2004 pp. 18-23; T. 28 September 2004 pp. 22-27. *See also* Trial Judgement, paras. 1231, 1232.

[170] Witness Nakure, T. 2 June 2008 pp. 7, 22, 23, 29; Ndindiliyimana, T. 17 June 2008 p. 66; Ndindiliyimana, T. 20 June 2008 pp. 59, 60. *See also* Trial Judgement, paras. 1251, 1264, 1269.

[171] *See* Witness FAV, T. 21 September 2004 p. 29; T. 23 September 2004 p. 38; Witness GFS, T. 27 September 2004 p. 23; T. 28 September 2004 p. 26.

[172] Witness FAV testified that he heard gunshots coming from the direction of Kansi Parish 15 or 20 minutes after the convoy left Ndindiliyimana's residence. *See* Witness FAV, T. 21 September 2004 pp. 29, 30. *See also* Trial Judgement, para. 1238. Witness GFS stated that Kansi Parish was about 2.5 kilometres away from where she was located. *See* Witness GFS, T. 27 September 2004 p. 23. *See also* Trial Judgement, para. 1238.

[173] *See* Witness GFM, T. 19 September 2005 pp. 56-59 (closed session). *See also* Trial Judgement, paras. 1228, 1229. In this context, the Appeals Chamber notes the Trial Chamber's statement that Witness FAV's evidence was consistent with that of Witness GFM "to the extent that a vehicle carrying *gendarme*s was involved in the attack at Kansi Parish". Trial Judgement, para. 1291. However, Witness GFM testified that gendarmes came to the parish in a vehicle on 20 April 1994 and that the same individuals participated in the attack on the following day. He did not mention whether he saw them arrive in a vehicle then. *See* Witness GFM, T. 19 September 2005 pp. 56, 58 (closed session). Moreover, Witness GFM stated that the gendarmes' vehicle was red. Witness GFM, T. 19 September 2005 p. 56 (closed session). Witness FAV referred to a blue and a white car at Ndindiliyimana's residence as well as a red vehicle transporting the Presidential Guard that came to the house on 21 April 1994. *See* Witness FAV, T. 23 September 2004 pp. 4, 31-33, 37, 42. Witness GFS testified that the gendarmes stationed at Ndindiliyimana's residence went to Kansi Parish together with other gendarmes and *Interahamwe* in white vehicles. *See* Witness GFS, T. 27 September 2004 p. 23; Witness GFS, T. 28 September 2004 p. 24.

Article 6(3) of the Statute for crimes committed by gendarmes during the attack on Kansi Parish. Accordingly, the Appeals Chamber grants Ndindiliyimana's First, Second, and Fourth Grounds of Appeal, in part, and reverses Ndindiliyimana's conviction in relation to the killing of Tutsi refugees at Kansi Parish. As a consequence, the Appeals Chamber need not consider Ndindiliyimana's remaining arguments concerning this incident.

C. Saint André College (Grounds 1 to 8, in part)

62. The Trial Chamber convicted Ndindiliyimana as a superior pursuant to Article 6(3) of the Statute for genocide and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killing of Tutsi refugees in an attack at Saint André College, in Nyamirambo, Kigali, on 13 April 1994.[174] The Trial Chamber found that gendarmes from the Nyamirambo Brigade, acting in collaboration with *Interahamwe*, carried out this attack.[175] It further held that the gendarmes in question were Ndindiliyimana's subordinates acting under his control,[176] and that Ndindiliyimana knew or had reason to know that they had committed crimes,[177] but failed to punish them.[178]

63. Ndindiliyimana submits that the Trial Chamber erred in convicting him of these crimes.[179] In particular, he contends that the Trial Chamber erred in: (i) its assessment of evidence relating to whether there was an attack on Tutsi refugees at Saint André College on 13 April 1994 and the involvement of gendarmes from the Nyamirambo Brigade in such an attack;[180] (ii) its conclusion that a superior-subordinate relationship existed between him and the gendarmes from the Nyamirambo Brigade;[181] (iii) finding that he possessed the *mens rea* required under Article 6(3) of the Statute;[182] and (iv) finding that he failed to take punitive measures.[183] In addition, Ndindiliyimana contends that the Trial Chamber improperly applied the burden and standard of proof and violated the presumption of innocence.[184]

64. In this section, the Appeals Chamber considers whether the Trial Chamber erred in finding that a superior-subordinate relationship within the meaning of Article 6(3) of the Statute existed between Ndindiliyimana and the gendarmes from the Nyamirambo Brigade at the relevant time.

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[174] Trial Judgement, paras. 2085, 2152, 2163. *See also* Trial Judgement, paras. 22, 23, 65. The Appeals Chamber notes that while Ndindiliyimana was charged with genocide pursuant to Article 2(2)(a) of the Statute (killings) and Article 2(2)(b) of the Statute (causing serious bodily or mental harm), the Trial Judgement does not state on which of these provisions his conviction rests. *See* Trial Judgement, paras. 2081-2084. Since the Trial Chamber concluded that the gendarmes from the Nyamirambo Brigade killed Tutsis at Saint André College, the Appeals Chamber considers that Ndindiliyimana was convicted pursuant to Article 2(2)(a) of the Statute. *See* Trial Judgement, paras. 1365, 2081.
[175] Trial Judgement, para. 1365. *See also* Trial Judgement, para. 2081.
[176] Trial Judgement, paras. 1947-1949.
[177] Trial Judgement, paras. 1372, 1373, 1951.
[178] Trial Judgement, para. 1956.
[179] Ndindiliyimana Notice of Appeal, paras. 6, 9, 11-25; Ndindiliyimana Appeal Brief, paras. 44-46, 112-159, 163-169, 172-174, 187-203, 207-247; AT. 7 May 2013 pp. 26-29.
[180] Ndindiliyimana Notice of Appeal, paras. 7, 8; Ndindiliyimana Appeal Brief, paras. 112-158; Ndindiliyimana Reply Brief, paras. 17, 23, 49-54.
[181] Ndindiliyimana Notice of Appeal, paras. 9-12; Ndindiliyimana Appeal Brief, paras. 164-168, 172-174, 187-196; Ndindiliyimana Reply Brief, paras. 57-60, 66.
[182] Ndindiliyimana Notice of Appeal, paras. 13, 25; Ndindiliyimana Appeal Brief, paras. 198, 203, 207-211, 240-247; Ndindiliyimana Reply Brief, paras. 13, 67-70, 77-81, 86, 93, 94.
[183] Ndindiliyimana Notice of Appeal, paras. 17-21, 23, 24; Ndindiliyimana Appeal Brief, paras. 213-238; Ndindiliyimana Reply Brief, paras. 82-92.
[184] Ndindiliyimana Notice of Appeal, paras. 8, 22; Ndindiliyimana Appeal Brief, paras. 44-46, 112, 151, 159.

65. As discussed above in relation to the events at Kansi Parish, the Trial Chamber acknowledged that Ndindiliyimana did not have effective control over gendarmerie units which were subordinated to the Rwandan army after 7 April 1994.[185] Furthermore, it also considered that, while he exercised *de jure* authority over gendarmes who remained under his operational command, his effective control over these gendarmes varied considerably depending on the unit.[186]

66. The Trial Chamber concluded that Ndindiliyimana exercised "*de facto* authority" over the gendarmes who participated in the attack at Saint André College on 13 April 1994, reasoning that: (i) the killings took place in Kigali where Ndindiliyimana spent a large proportion of his time; (ii) Ndindiliyimana "admitted" at trial that he received reports from his General Staff regarding events at the college and issued orders to his subordinates operating at that location around the time of the attack; and (iii) Ndindiliyimana was aware that Prosecution Witness WG, an employee at Saint André College who implicated gendarmes from the Nyamirambo Brigade in the attack,[187] requested gendarmerie protection for the college on 14 April 1994.[188]

67. The Trial Chamber further held that "in light of the fact that Ndindiliyimana received information and issued orders to his subordinates regarding [Saint] André College, he maintained command and control over the gendarmes operating at that location".[189] It also stated that the gendarmes implicated in the attack at Saint André College belonged to units under the operational command of the gendarmerie and that their operation at the college entailed a degree of organization.[190] The Trial Chamber therefore found that: "[i]t follows from Ndindiliyimana's position as Chief of Staff of the *Gendarmerie* that the *gendarmes* in question were his subordinates under his effective control".[191]

68. Ndindiliyimana asserts that the Trial Chamber failed to provide a reasoned opinion as to his authority over the gendarmes from the Nyamirambo Brigade.[192] He argues that, in line with the Kigali city defence plan, these gendarmes fell under the control of the army and that this was clearly demonstrated by the fact that they were deployed to protect Saint André College by Colonel Marcel Gatsinzi (who was the Chief of Staff of the Rwandan army) after Witness WG contacted

[185] *See supra* para. 51. *See also* Trial Judgement, paras. 1925-1930, 1936.
[186] *See supra* para. 51. *See also* Trial Judgement, paras. 1937, 1946. Although the Trial Chamber found that Ndindiliyimana retained *de jure* disciplinary authority over gendarmes deployed to assist the army, his material ability to exercise "day-to-day and operational control" as well as to punish these gendarmes was limited. *See* Trial Judgement, paras. 1933, 1935.
[187] *See* Trial Judgement, paras. 1315-1323.
[188] Trial Judgement, para. 1948.
[189] Trial Judgement, para. 1948. *See also* Trial Judgement, para. 2083.
[190] Trial Judgement, para. 1949. *See also* Trial Judgement, para. 2083.
[191] Trial Judgement, para. 1949. *See also* Trial Judgement, para. 2083.
[192] Ndindiliyimana Appeal Brief, paras. 165, 167, 168, 172, 188; AT. 7 May 2013 pp. 10-13, 16, 26, 28.

Gatsinzi on 14 April 1994.[193] Ndindiliyimana further contends that he did not issue any orders to gendarmes at Saint André College and that his general influence and the fact that he received information about events at the college did not prove the existence of a superior-subordinate relationship between him and the gendarmes from the Nyamirambo Brigade.[194]

69. The Prosecution responds that the Trial Chamber reasonably found that the gendarmes from the Nyamirambo Brigade acted under Ndindiliyimana's control.[195] In support of this submission, the Prosecution reiterates the Trial Chamber's considerations set out above and adds that the gendarmes who attacked Saint André College on 13 April 1994 were dressed in official gendarmerie uniforms.[196] It points to evidence that Ndindiliyimana dispatched gendarmerie patrols and resources for an intervention group in Kigali,[197] which, on 7 April 1994, he put under the control of a commanding officer of the Muhima Camp to provide security in the Nyamirambo area where Saint André College was located.[198] It contends that this demonstrates Ndindiliyimana's effective control over gendarmes in the area.[199] It further asserts that Witness WG's request to Gatsinzi for protection on 14 April 1994 does not show that the army was in charge of the Nyamirambo Brigade.[200] The Prosecution contends that the witness did not call on Gatsinzi due to Gatsinzi's position within the army, but because Gatsinzi had studied at Saint André College.[201]

70. The Appeals Chamber recalls that the essential element of a superior-subordinate relationship within the meaning of Article 6(3) of the Statute is the possession of effective control on the part of the superior in the sense of a material ability to prevent or punish criminal conduct by his subordinates.[202]

71. While the Trial Chamber found that the gendarmes from the Nyamirambo Brigade who participated in the attack at Saint André College belonged to a unit under Ndindiliyimana's

[193] Ndindiliyimana Notice of Appeal, para. 12; Ndindiliyimana Appeal Brief, paras. 130, 187, 190, 191; Ndindiliyimana Reply Brief, paras. 57-59, 66; AT. 7 May 2013 pp. 28, 53. In this context, Ndindiliyimana also maintains that the evidence of Defence Witnesses JMV, Y1, TCB1, and AA-2 and Prosecution Witness Roméo Dallaire demonstrates that all gendarmerie units in Kigali were under army command and control at the time. *See* Ndindiliyimana Appeal Brief, paras. 191-196. However, the Appeals Chamber declines to address this submission because Ndindiliyimana expressly accepts elsewhere in his Appeal Brief the Trial Chamber's finding in paragraph 1930 of the Trial Judgement that approximately 100 gendarmes in Kigali remained under his operational command. *See* Ndindiliyimana Appeal Brief, para. 167. *See also* Ndindiliyimana Notice of Appeal, para. 10.
[194] *See* Ndindiliyimana Appeal Brief, paras. 166 (p. 49), 188, 189. *See also* Ndindiliyimana Reply Brief, para. 60.
[195] Prosecution Response Brief (Ndindiliyimana), paras. 5, 126, 135, 138; AT. 7 May 2013 pp. 33-38, 48.
[196] Prosecution Response Brief (Ndindiliyimana), para. 135.
[197] AT. 7 May 2013 p. 34, *referring to* Ndindiliyimana, T. 18 June 2008 p. 37.
[198] AT. 7 May 2013 p. 34, *referring to* Ndindiliyimana, T. 17 June 2008 p. 10.
[199] AT. 7 May 2013 p. 35.
[200] Prosecution Response Brief (Ndindiliyimana), para. 136.
[201] Prosecution Response Brief (Ndindiliyimana), para. 136. *See also* AT. 7 May 2013 p. 35.
[202] *Halilović* Appeal Judgement, para. 59; *Kayishema and Ruzindana* Appeal Judgement, para. 294; *Delalić et al.* Appeal Judgement, paras. 192, 193, 256. *See also Nahimana et al.* Appeal Judgement, para. 484.

operational command,[203] it did not explain the basis for this finding. Such explanation would have been particularly important in light of the Trial Chamber's finding that, after 7 April 1994, the majority of gendarmerie units were subordinated to the army.[204] Accordingly, the Appeals Chamber finds that the Trial Chamber failed to provide a reasoned opinion in this respect. The Trial Chamber's failure to provide a reasoned opinion amounts to an error of law which allows the Appeals Chamber to consider the relevant evidence and factual findings in order to determine whether a reasonable trier of fact could have found beyond reasonable doubt that the gendarmes from the Nyamirambo Brigade who participated in the attack at Saint André College were under Ndindiliyimana's command.[205] The Appeals Chamber observes that the Trial Chamber considered credible Witness WG's testimony that, on 14 April 1994, he requested the Chief of Staff of the Rwandan army, Gatsinzi, to provide protection at Saint André College and that in response Gatsinzi dispatched gendarmes from the Nyamirambo Brigade.[206] As Ndindiliyimana submits, Witness WG's testimony indicates that the army was exercising authority over the Nyamirambo Brigade and calls into question the reasonableness of the Trial Chamber's inference that members of the brigade acted under Ndindiliyimana's operational command and effective control at the time of the attack at Saint André College.[207]

72. Furthermore, the Appeals Chamber is not satisfied that, in the circumstances of this case, a reasonable trier of fact could have considered the facts that Ndindiliyimana spent a large proportion of his time in Kigali and that Saint André College was situated there to be relevant to establishing his effective control over the gendarmes involved in the commission of crimes at the college.[208]

73. In addition, the Appeals Chamber does not consider that the Trial Chamber's finding that Ndindiliyimana received information regarding events at Saint André College and "issued orders to his subordinates operating at that location around the time of the attack" could reasonably support the conclusion that he had effective control over the gendarmes involved in crimes there.[209] The evidence referred to by the Trial Chamber in support of this finding reflects that Ndindiliyimana testified that he was informed at a gendarmerie General Staff meeting on 14 April 1994 that the RPF had conducted a raid at Saint André College on the previous night and taken away "supporters

[203] Trial Judgement, para. 1949.
[204] *See* Trial Judgement, paras. 1930, 1936.
[205] *Cf. Bagosora and Nsengiyumva* Appeal Judgement, para. 683; *Kalimanzira* Appeal Judgement, paras. 100, 200. *See also Perišić* Appeal Judgement, para. 92.
[206] *See* Trial Judgement, para. 1361. *See also* Witness WG, T. 6 June 2005 p. 40; T. 7 June 2005 pp. 49, 50. Although the Trial Chamber stated in its conclusions on Ndindiliyimana's *de facto* authority over the gendarmes implicated in the attack at Saint André College that Witness WG addressed his protection request to the gendarmerie (*see* Trial Judgement, para. 1948), the Appeals Chamber notes that this interpretation was not supported by the evidence.
[207] The Appeals Chamber rejects as irrelevant in this context the Prosecution submission that Witness WG contacted Gatsinzi because he was a former student of Saint André College.
[208] Trial Judgement, para. 1948.
[209] Trial Judgement, para. 1948, *referring to* Ndindiliyimana, T. 18 June 2008 p. 38.

or well known members".[210] He stated that his staff asked what should be done about similar RPF operations in the future and that he advised them not to resist.[211] This testimony was thus unrelated to the attack against Tutsi refugees at the college on 13 April 1994. More importantly, it does not show that Ndindiliyimana issued any orders specifically in relation to the college or addressed to the Nyamirambo Brigade. Accordingly, the Trial Chamber misrepresented the record, and the Appeals Chamber concludes that no reasonable trier of fact could have relied on this evidence as a basis for its finding on Ndindiliyimana's effective control in connection with the attack at Saint André College.

74. Finally, while Ndindiliyimana acknowledged at trial that he was aware of Witness WG's request for protection to Gatsinzi, there is no evidence as to when he learned of it or if he had any role in Gatsinzi's response.[212] Thus, Ndindiliyimana's testimony on this point does not demonstrate that he had effective control over the Nyamirambo Brigade and no reasonable trier of fact could have considered that he did.

75. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in concluding that Ndindiliyimana exercised effective control over the gendarmes from the Nyamirambo Brigade who participated in the attack against Saint André College on 13 April 1994. This error invalidates the Trial Chamber's finding that Ndindiliyimana could be held liable under Article 6(3) of the Statute for crimes committed by gendarmes during the attack. Accordingly, the Appeals Chamber grants Ndindiliyimana's Second and Fourth Grounds of Appeal, in part, and reverses his convictions in relation to the killing of Tutsi refugees at Saint André College. As a consequence, the Appeals Chamber need not address Ndindiliyimana's remaining arguments concerning this incident.

[210] Ndindiliyimana, T. 18 June 2008 p. 38.
[211] Ndindiliyimana, T. 18 June 2008 p. 38 ("On the 13th of April, the RPF infiltrated from all angles into the city, with a view to embracing or taking its supporters or well known members. Then, the gendarmerie – and this is an issue – a problem which I had to deal with upon my return from Gitarama on the 14th – and the question was raised at the general staff: 'What are we to do when we see the RPF taking away people? Yesterday, they took some people from Saint André, and today, others left the stadium, the Saint André, and they went by, right before our own eyes, to the other side, joining the RPF.' Question: 'What should we do?' 'Well, we cannot shoot them down.' And my reaction was, let them go. Let them go. That was something we experienced. And the Prosecution witness was not asked to talk about the relationship with the gendarmerie".).
[212] Ndindiliyimana, T. 18 June 2008 p. 38.

D. Cumulative Convictions (Ground 9)

76. The Trial Chamber convicted Ndindiliyimana as a superior pursuant to Article 6(3) of the Statute for genocide and extermination as a crime against humanity in relation to the events at Kansi Parish on 21 April 1994.[213] In relation to the events at Saint André College on 13 April 1994, the Trial Chamber entered convictions against Ndindiliyimana pursuant to Article 6(3) of the Statute for genocide and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[214]

77. Ndindiliyimana submits that the Trial Chamber erred by entering cumulative convictions for extermination as a crime against humanity and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[215] The Appeals Chamber has reversed Ndindiliyimana's convictions in relation to the events at Kansi Parish and Saint André College upon which the error alleged in this ground of appeal was based.[216] Accordingly, the Appeals Chamber dismisses Ndindiliyimana's Ninth Ground of Appeal as moot.

[213] Trial Judgement, paras. 2085, 2119.
[214] Trial Judgement, paras. 2085, 2152.
[215] Ndindiliyimana Notice of Appeal, para. 26; Ndindiliyimana Appeal Brief, paras. 248, 252, 253.
[216] *See supra* paras. 61, 75.

E. Conviction under Count 4 of the Indictment (Ground 10)

78. In its verdict, the Trial Chamber convicted Ndindiliyimana for murder as a crime against humanity under Count 4 of the Indictment.[217]

79. Ndindiliyimana submits that the Trial Chamber erred in convicting him under Count 4 of the Indictment, when its other findings reflect that it had dismissed this charge.[218] He requests the Appeals Chamber to reverse his conviction for murder as a crime against humanity.[219]

80. The Prosecution responds that this ground of Ndindiliyimana's appeal should be granted and attributes the entry of a conviction against Ndindiliyimana under Count 4 of the Indictment to a typographical error.[220]

81. The Appeals Chamber notes that the Prosecution withdrew a number of allegations against Ndindiliyimana underlying Count 4 of the Indictment at the end of its case.[221] The remainder of the charges under this count was dismissed in the Trial Judgement.[222] Consequently, there was no basis upon which Ndindiliyimana could be convicted under Count 4 of the Indictment. The Appeals Chamber therefore finds that the Trial Chamber erred in law by convicting Ndindiliyimana under this count.

82. Accordingly, the Appeals Chamber grants Ndindiliyimana's Tenth Ground of Appeal and reverses his conviction under Count 4 of the Indictment for murder as a crime against humanity.

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[217] Trial Judgement, para. 2163.
[218] Ndindiliyimana Notice of Appeal, para. 29 (pp. 9, 10); Ndindiliyimana Appeal Brief, para. 255, fn. 2, *referring to* Trial Judgement, paras. 37-45, 1529-1622.
[219] Ndindiliyimana Notice of Appeal, para. 29 (pp. 9, 10); Ndindiliyimana Appeal Brief, para. 256.
[220] Prosecution Response Brief (Ndindiliyimana), paras. 229, 230.
[221] *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions Pursuant to Rule 98*bis*, 20 March 2007 ("Trial Decision of 20 March 2007"), para. 11 (withdrawing allegations in in paragraphs 92, 94, 95, 97, and 98 of the Indictment). *See also* Trial Judgement, paras. 3, 101.
[222] *See* Trial Judgement, paras. 1575, 1582, 1596, 1607, 1622 (dismissing paragraphs 93, 96, 99-102 of the Indictment).

IV. APPEALS OF FRANÇOIS-XAVIER NZUWONEMEYE AND INNOCENT SAGAHUTU

A. Alleged Violations of Fair Trial Rights (Nzuwonemeye Grounds 1 and 5, in part)

83. Nzuwonemeye asserts that the Trial Chamber committed several errors that resulted in violations of his right to a fair trial.[223] In this section, the Appeals Chamber considers whether: (i) Nzuwonemeye was denied the right to counsel and the right to cross-examination; (ii) the Trial Chamber erred in denying requests for certification to appeal decisions; (iii) the Trial Chamber erred in its assessment of the Prosecution's disclosure violations under Rule 68 of the Rules and granted ineffective remedies; (iv) the Trial Chamber erred in taking judicial notice of the existence of a widespread and systematic attack against a civilian population and a non-international armed conflict; and (v) the Trial Chamber violated the protections set forth in Rules 82(A) and 87(B) of the Rules.

1. Right to Counsel and Right to Cross-Examination

84. On 8 March 2005, Mr. André Ferran announced to the Trial Chamber his intention to request the Registrar to withdraw his commission as Nzuwonemeye's lead counsel under the Tribunal's legal aid system.[224] The Presiding Judge conferred with Nzuwonemeye who agreed with Mr. Ferran's intended withdrawal as his lead counsel.[225] Nzuwonemeye requested that his co-counsel, Ms. Danielle Girard, continue to represent him pending the formal withdrawal of Mr. Ferran and the assignment of a new lead counsel.[226] The Presiding Judge advised Nzuwonemeye to make a formal request to the Registrar for the assignment of a new lead counsel.[227] The Presiding Judge also confirmed that Ms. Girard would cover the duties of lead counsel in the interim.[228]

85. On 9 May 2005, prior to the examination-in-chief of Prosecution Witness HP, Ms. Girard announced to the Trial Chamber that Nzuwonemeye no longer wanted her to represent him and that, in accordance with her code of ethics, she could no longer continue as his counsel.[229] The Presiding Judge sought Nzuwonemeye's view on Ms. Girard's statement.[230] Nzuwonemeye explained that he

[223] *See* Nzuwonemeye Notice of Appeal, paras. 5, 37-48, 50-78; Nzuwonemeye Appeal Brief, paras. 3-7, 82-120, 122-155; Nzuwonemeye Reply Brief, paras. 2-17, 53-64, 66-95.
[224] T. 8 March 2005 pp. 2, 3.
[225] T. 8 March 2005 p. 5.
[226] T. 8 March 2005 p. 5.
[227] T. 8 March 2005 p. 5.
[228] T. 8 March 2005 p. 5.
[229] T. 9 May 2005 p. 3 (closed session).
[230] T. 9 May 2005 p. 3 (closed session).

had lost confidence in Ms. Girard because, in his view, she was not competent and did not adequately represent his interests.[231] Nzuwonemeye complained that he and Ms. Girard had had no contact concerning the defence strategy from 31 March to 4 May 2005.[232] According to Nzuwonemeye, their meeting on 4 May 2005 was brief and contentious.[233] Nzuwonemeye further stated that, when the two met on 7 May 2005, he explained to Ms. Girard the difficulties he was having with her and asked her to request to withdraw from the case.[234] Nzuwonemeye noted that he had not discussed with Ms. Girard the strategy of his case for the current trial session.[235] Nzuwonemeye emphasized that Ms. Girard "can no longer validly represent [him]" and that, "if she will address the Court, it will not be in [his] name".[236] Ms. Girard indicated her disagreement with the complaints raised and responded that she would make full representations to the Registry when Nzuwonemeye requested her withdrawal.[237]

86. The Presiding Judge acknowledged that there "appear[ed]" to be "differences" between Nzuwonemeye and Ms. Girard and directed Nzuwonemeye to make representations to the Registry.[238] The Presiding Judge noted that Ms. Girard's competency had been established when she was assigned at Nzuwonemeye's request.[239] Finally, the Presiding Judge explained that Ms. Girard had an obligation to continue representing Nzuwonemeye's interests until she was replaced.[240]

87. Following this exchange, the Trial Chamber heard Witness HP, a former member of the Reconnaissance Battalion, who provided testimony primarily concerning the conduct of Sagahutu and Reconnaissance Battalion soldiers in relation to the killing of Prime Minister Agathe Uwilingiyimana.[241] Ms. Girard briefly cross-examined the witness following more extensive questioning by counsel for Sagahutu and Ndindiliyimana.[242] After Ms. Girard's cross-examination, the Presiding Judge asked Nzuwonemeye if he wished to ask any further questions.[243]

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[231] T. 9 May 2005 p. 3 (closed session).
[232] T. 9 May 2005 p. 4 (closed session).
[233] T. 9 May 2005 p. 4 (closed session).
[234] T. 9 May 2005 p. 4 (closed session).
[235] T. 9 May 2005 p. 4 (closed session).
[236] T. 9 May 2005 pp. 3, 5 (closed session).
[237] T. 9 May 2005 p. 5 (closed session).
[238] T. 9 May 2005 p. 5 (closed session).
[239] T. 9 May 2005 p. 5 (closed session).
[240] *See* T. 9 May 2005 pp. 5, 6 (closed session). *See also* T. 9 May 2005 p. 7 ("I think we, too, can direct the Registrar to expedite and appoint a person as a co-counsel. And until such time, I think it is necessary for the continuation of this case – I think co-counsel should remain in the case until a decision has been reached by the Registry with regard to the appointment and with regard to her position, too".) (closed session).
[241] *See generally* Witness HP, T. 9 May 2005; T. 10 May 2005.
[242] T. 10 May 2005 p. 31.
[243] T. 10 May 2005 p. 31.

Nzuwonemeye posed several questions which were then put to the witness by the Presiding Judge.[244]

88. The Registrar later withdrew the assignment of Ms. Girard as co-counsel for Nzuwonemeye, citing a breakdown of communication between her and Nzuwonemeye.[245] On 6 October 2008, Nzuwonemeye sought to recall Witness HP for further cross-examination based on the subsequent disclosure of various materials by the Prosecution.[246] His motion made no reference to the nature of his representation during Witness HP's testimony. The Trial Chamber denied the request to recall Witness HP.[247] In his Closing Brief, Nzuwonemeye argued that the Trial Chamber could not rely on Witness HP based on his lack of representation during the witness's testimony.[248] In the Trial Judgement, the Trial Chamber relied on the testimony of Witness HP,[249] along with that of Prosecution Witnesses DA, AWC, ALN, DY, ANK/XAF, and DCK,[250] in finding Nzuwonemeye responsible for the killing of the Prime Minister.[251] The Trial Chamber did not address Nzuwonemeye's arguments concerning his purported lack of counsel at the time of Witness HP's cross-examination.

89. Nzuwonemeye submits that the Trial Chamber erred in hearing and relying on the evidence of Witness HP.[252] Nzuwonemeye contends that, given the breakdown in communication and conflict of interest between him and Ms. Girard, he lacked representation during the testimony of Witness HP and, as a corollary, was denied the right to cross-examine the witness.[253] Nzuwonemeye contends that the Trial Chamber "acted as if [Ms.] Girard were not present" since it asked him to pose questions following her cross-examination.[254] Nzuwonemeye notes that he did

[244] T. 10 May 2005 pp. 32-35.
[245] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision of Withdrawal of Ms. Danielle Girard as Co-Counsel for the Accused François-Xavier Nzuwonemeye, 13 October 2005, p. 3.
[246] *See generally The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Nzuwonemeye Confidential Defence Motion, in Compliance with the Trial Chamber's Order in its Decision, 22 September 2008 on Prosecutor's Violations of Rule 68 Disclosure Obligations, to Recall Prosecution Witnesses and Add Potential Defence Witnesses and Motion for Reconsideration of the Ruling on the "Belgian File", 6 October 2008, paras. 19, 45, 46.
[247] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's and Bizimungu's Motions to Recall Identified Prosecution Witnesses and to Call Additional Witnesses, 4 December 2008 ("Decision on Nzuwonemeye and Bizimungu Motions to Recall Witnesses of 4 December 2008"), paras. 25, 29. The Trial Chamber also denied a subsequent request for reconsideration. *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motion for Reconsideration, 16 February 2009 ("Trial Decision of 16 February 2009"), paras. 19, 22.
[248] Nzuwonemeye Closing Brief, paras. 56-62.
[249] *See* Trial Judgement, paras. 1632-1636, 1720-1745.
[250] *See* Trial Judgement, paras. 1624-1631, 1637-1644, 1647-1652, 1715-1745.
[251] Trial Judgement, paras. 2016, 2018, 2020, 2024, 2093-2095, 2146, 2163.
[252] Nzuwonemeye Notice of Appeal, para. 37; Nzuwonemeye Appeal Brief, paras. 82-99, 101. The Appeals Chamber addresses Nzuwonemeye's challenge to the Trial Chamber refusal to allow the recall of Witness HP below. *See infra* paras. 104, 111.
[253] Nzuwonemeye Appeal Brief, paras. 82-96.
[254] Nzuwonemeye Appeal Brief, para. 93.

not request to question the witness and felt pressured in the circumstances to do so.[255] Nzuwonemeye submits that he suffered prejudice as a result because the Trial Chamber relied heavily on Witness HP to convict him in relation to the death of the Prime Minister.[256]

90. Nzuwonemeye argues that the Trial Chamber erred by proceeding to hear the witness immediately after learning of the dispute between him and Ms. Girard. According to Nzuwonemeye, the Trial Chamber should have either: (i) adjourned the proceedings pending the assignment of a new counsel; (ii) appointed Ms. Girard as duty counsel; (iii) allowed Ms. Girard adequate time to prepare for cross-examination based on his instructions; or (iv) excluded Witness HP's testimony.[257]

91. The Prosecution responds that the Trial Chamber correctly allowed for Witness HP's evidence to proceed notwithstanding the issues raised by Nzuwonemeye prior to the witness's testimony.[258]

92. The Appeals Chamber finds no merit in Nzuwonemeye's contention that he was unrepresented during the testimony of Witness HP. Neither Nzuwonemeye's statement that Ms. Girard no longer represented him nor Ms. Girard's consideration that, in such circumstances, she could no longer continue to represent him in any way altered the existence of their attorney-client relationship and her attendant duties as counsel. The Appeals Chamber recalls that once counsel has been properly assigned, as was the case here, counsel has a professional obligation to continue representing the accused and may only be withdrawn or replaced if sufficient cause exists.[259] Furthermore, a counsel's obligation to represent an accused continues after withdrawal until new counsel is assigned.[260] The Trial Chamber clearly stated that it was both satisfied with Ms. Girard's competence and that she continued to represent Nzuwonemeye.[261] Indeed, the Appeals Chamber notes that Nzuwonemeye is not challenging Ms. Girard's competence on appeal.[262] Accordingly, Nzuwonemeye was represented at the time of Witness HP's testimony and there was no reason to adjourn the proceedings to await the assignment of a lead counsel or formally appoint Ms. Girard as duty counsel. Notably, the Presiding Judge's clarification that Ms. Girard continued

[255] Nzuwonemeye Appeal Brief, para. 93. *See also* Nzuwonemeye Reply Brief, para. 76.
[256] Nzuwonemeye Appeal Brief, paras. 97-99.
[257] Nzuwonemeye Appeal Brief, para. 92. *See also* Nzuwonemeye Reply Brief, para. 77.
[258] Prosecution Response Brief (Nzuwonemeye), paras. 68-86.
[259] *Blagojević and Jokić* Appeal Judgement, para. 17.
[260] *See* Directive on the Assignment of Defence Counsel, 15 June 2007, Article 20(A) ("Where the assignment of Counsel is withdrawn by the Registrar or where the services of assigned Counsel are discontinued, the Counsel assigned may not withdraw from acting until either a replacement Counsel has been provided by the Tribunal or by the suspect or accused, or the suspect or accused has declared his intention in writing to conduct his own defence".).
[261] T. 9 May 2005 pp. 5, 6 (closed session).
[262] Nzuwonemeye Reply Brief, para. 74 ("Co-Counsel's competency is not the issue on appeal […]".); AT. 8 May 2013 p. 31.

to represent Nzuwonemeye, as a practical matter, implemented one of the remedies that Nzuwonemeye now proposes that the Trial Chamber should have taken.

93. Moreover, the Appeals Chamber observes that, at the close of Witness HP's examination-in-chief on 9 May 2005, Ms. Girard indicated her intention to cross-examine the witness.[263] While, on the following day, Ms. Girard exhibited some hesitation as to whether she should cross-examine the witness, at no point did she indicate that she was unprepared to proceed and, indeed, she proceeded with the cross-examination.[264] While Nzuwonemeye points to the brevity of Ms. Girard's questioning,[265] he has identified no deficiencies in her performance. Likewise, he has not shown how further instruction from him would have altered the nature of the cross-examination and impacted the Trial Chamber's reliance on Witness HP's evidence. As a consequence, Nzuwonemeye has not shown that the Trial Chamber erred by not according additional time to Ms. Girard to prepare or receive further instruction.

94. The Appeals Chamber is satisfied that Nzuwonemeye was represented and that his counsel cross-examined Witness HP. Given that the Trial Chamber was satisfied with Ms. Girard's competence and that this has not been challenged on appeal, Nzuwonemeye has not identified any violation of his right to counsel or to cross-examine witnesses against him. Accordingly, Nzuwonemeye has failed to demonstrate that the Trial Chamber violated his fair trial rights in hearing and relying on Witness HP.

2. Failure to Certify Trial Decisions for Appellate Review

95. The Trial Chamber, in a decision of 20 March 2007, dismissed Nzuwonemeye's request for acquittal pursuant to Rule 98*bis* of the Rules.[266] Furthermore, on 24 April 2007, the Trial Chamber denied Nzuwonemeye's motion to certify this decision for appeal.[267] Additionally, on 29 February 2008, the Trial Chamber denied Nzuwonemeye's motions related to defects in the Indictment and

[263] T. 9 May 2005 p. 63
[264] T. 10 May 2005 pp. 21, 31.
[265] Nzuwonemeye Appeal Brief, para. 87.
[266] *See* Trial Decision of 20 March 2007, p. 17; *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Corrigendum to the Decision on Defence Motions Pursuant to Rule 98*bis*, 18 June 2007 ("Rule 98*bis* Corrigendum Decision"), p. 17. *See also The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motion for Clarification, 11 September 2007, para. 3 and Annex.
[267] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98*bis*, 24 April 2007, p. 4.

disclosure.[268] In a decision of 22 May 2008, the Trial Chamber dismissed Nzuwonemeye's motion to certify this decision for appeal.[269]

96. Nzuwonemeye submits that the Trial Chamber erred when denying his two motions for certification for appeal.[270] Nzuwonemeye argues that, as the "final arbiter of law", the Appeals Chamber should rule on his requests to certify for appeal on the basis of his trial submissions.[271] The Prosecution responds that Nzuwonemeye has not identified any error in the Trial Chamber's decisions and his arguments should be summarily dismissed.[272]

97. The Appeals Chamber observes that Nzuwonemeye does not point to any errors in the Trial Chamber's two decisions denying certification for appeal. In fact, on appeal Nzuwonemeye only references submissions he presented at trial. The Appeals Chamber recalls that "[m]erely referring the Appeals Chamber to one's arguments set out at trial is insufficient as an argument on appeal".[273] Accordingly, the Appeals Chamber summarily dismisses Nzuwonemeye's argument as he has failed to demonstrate that the Trial Chamber violated his fair trial rights when denying his two motions for certification for appeal.

3. Rule 68 of the Rules

98. On 4 February 2008, Nzuwonemeye joined an oral objection raised by Ndindiliyimana with respect to the Prosecution's alleged failure to disclose exculpatory material pursuant to Rule 68 of the Rules.[274] The same day, the Trial Chamber ordered the Prosecution to review documents in its possession and give to the Defence all exculpatory material subject to disclosure pursuant to Rule 68 of the Rules.[275] On 29 February 2008, the Prosecution disclosed to the Defence approximately 3,000 pages of un-redacted witness statements.[276]

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[268] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motions to Address Defects in the Form of the Indictment and to Order the Prosecution to Disclose All Exculpatory Material, 29 February 2008 ("Trial Decision Indictment and Disclosure of 29 February 2008"), p. 4.
[269] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008, 22 May 2008, p. 4.
[270] Nzuwonemeye Notice of Appeal, paras. 50, 78; Nzuwonemeye Appeal Brief, para. 155; Nzuwonemeye Reply Brief, paras. 66-68. In his notice of appeal, Nzuwonemeye also submits that the Trial Chamber's Trial Decision of 20 March 2007 was in error and that the Rule 98*bis* Corrigendum Decision constituted inappropriate appellate review. Nzuwonemeye Notice of Appeal, paras. 50, 51. He further argues that the Trial Chamber made findings in the Trial Decision of 20 March 2007 and that his convictions in the Trial Judgement departed from those findings. Nzuwonemeye Notice of Appeal, paras. 50, 51. These arguments have not been developed in the Nzuwonemeye Appeal Brief and the Appeals Chamber considers that Nzuwonemeye abandoned them.
[271] Nzuwonemeye Appeal Brief, para. 155; Nzuwonemeye Reply Brief, para. 67.
[272] Prosecution Response Brief (Nzuwonemeye), paras. 104, 105.
[273] *Haraqija and Morina* Appeal Judgement, para. 26, *quoting Brđanin* Appeal Judgement, para. 35.
[274] *See* T. 4 February 2008 pp. 4, 5, 8-10.
[275] T. 4 February 2008 pp. 12, 13.
[276] *See* Trial Decision of 22 September 2008, para. 2. Further disclosures were made by the Prosecution on 19 March and 23 April 2008. *See* Trial Decision of 22 September 2008, para. 4.

99. In the Trial Decision of 22 September 2008, the Trial Chamber concluded that the Prosecution had persistently violated its disclosure obligations under Rule 68 of the Rules.[277] In particular, the Trial Chamber held that the Prosecution had violated its obligations and caused prejudice to Nzuwonemeye based on its failure to disclose in a timely manner the 6 November 1997 and 2 March 1999 statements of Witness PCK,[278] the 4 March 1999 statement of Witness CR,[279] the 15 September 2000 statement of Witness CN ("Witness CN Statement"),[280] the 14 August 1998 statement of Witness JPF ("Witness JPF Statement"),[281] a statement from Witness AN1,[282] the 21 and 24 February 1997 statements of Witness NB,[283] as well as the 18 July 1996 and 1999 through 2000 statements of Witness Jean Marie Vianney Nzapfakumunsi.[284] By contrast, the Trial Chamber found that the Prosecution had not violated its disclosure obligations in relation to Witness CR's statements of 6 October 1995 and 27 March 1998 as well as a number of statements from Witnesses IB, MG, JDT, and JG.[285]

100. The Trial Chamber considered a range of remedies requested by Nzuwonemeye in light of the proven disclosure violations, including withdrawal of charges, exclusion of Prosecution evidence, and stay of proceedings for further investigation.[286] The Trial Chamber ordered Nzuwonemeye to file a motion specifying, on the basis of the belatedly disclosed exculpatory material, which Prosecution and Defence witnesses he sought to recall and which new Defence witnesses he sought to add.[287]

101. In a decision of 4 December 2008, the Trial Chamber granted Nzuwonemeye's request to recall Prosecution Witness ALN on the basis of the Witness CN Statement and Witness JPF Statement.[288] It further granted a request to recall Prosecution Witness DCK on the basis of the Witness JPF Statement.[289] The Trial Chamber also granted Nzuwonemeye's request to call Witnesses JPF, CN, and Nzapfakumunsi to testify on his behalf.[290] However, the Trial Chamber

[277] Trial Decision of 22 September 2008, para. 59.
[278] Trial Decision of 22 September 2008, para. 38.
[279] Trial Decision of 22 September 2008, para. 39.
[280] Trial Decision of 22 September 2008, paras. 41, 42.
[281] Trial Decision of 22 September 2008, para. 45.
[282] Trial Decision of 22 September 2008, para. 44.
[283] Trial Decision of 22 September 2008, para. 46.
[284] Trial Decision of 22 September 2008, para. 47. Witness Jean Marie Vianney Nzapfakumunsi was originally referred to as Witness JVN; however, he waived his protection and testified publicly and without pseudonym. *See* Witness Nzapfakumunsi, T. 18 February 2009 pp. 2, 3.
[285] Trial Decision of 22 September 2008, paras. 19, 20, 43. The Appeals Chamber notes that Witness CR is misspelled in para. 20 of the Trial Decision as "LR". However, the correct identification follows from Confidential Annex 1 to the Decision.
[286] Trial Decision of 22 September 2008, para. 60. *See also* Trial Decision of 22 September 2008, paras. 61, 62.
[287] Trial Decision of 22 September 2008, paras. 63, 64, p. 22.
[288] Decision on Nzuwonemeye and Bizimungu Motions to Recall Witnesses of 4 December 2008, paras. 19, 27, p. 13.
[289] Decision on Nzuwonemeye and Bizimungu Motions to Recall Witnesses of 4 December 2008, para. 26, p. 13.
[290] Decision on Nzuwonemeye and Bizimungu Motions to Recall Witnesses of 4 December 2008, paras. 34, 36, 38, p. 13.

found that Nzuwonemeye had not demonstrated good cause warranting the recall of Prosecution Witnesses DA, AWC, ANK/XAF, DY, and HP, as well as Expert Witness Alison Des Forges.[291]

102. In a decision of 16 February 2009, the Trial Chamber denied Nzuwonemeye's request to reconsider its 4 December 2008 decision not to allow the recall of Witnesses DA, AWC, ANK/XAF, DY, HP, and Des Forges.[292]

103. On 16 February 2009, immediately prior to the close of the evidentiary phase of the trial, Witness DCK appeared and was subject to further cross-examination by Nzuwonemeye.[293] Similarly, Nzuwonemeye elicited testimony from Defence Witness Nzapfakumunsi on 18 February 2009.[294] However, as it was not possible to locate Witness ALN or prospective Defence Witness CN, the Trial Chamber granted Nzuwonemeye's 26 February 2009 motion to admit as evidence the Witness CN Statement.[295] Prospective Defence Witness JPF also could not be located and did not testify.[296]

104. In this context, Nzuwonemeye argues that the Trial Chamber failed to provide sufficient remedies in relation to the Prosecution's disclosure violations.[297] First, he argues that the Trial Chamber erred by denying the admission of the exculpatory aspects of all the statements identified in his motion adjudicated by the Trial Chamber's decision of 22 September 2008.[298] Nzuwonemeye further submits that the Trial Chamber erred in its decision of 4 December 2008 by denying his request to recall Witnesses DA, AWC, DY, ANK/XAF, HP, and Des Forges, notwithstanding the Prosecution's proven violations of Rule 68 of the Rules.[299] He submits that his request for reconsideration of the 4 December 2008 decision was "denied or ignored".[300] Nzuwonemeye further argues that the Trial Chamber failed to provide a reasoned opinion in the Trial Judgement by not addressing his arguments regarding the Prosecution's disclosure violations in his Closing Brief.[301]

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[291] Decision on Nzuwonemeye and Bizimungu Motions to Recall Witnesses of 4 December 2008, paras. 16-18, 20, 22, 24, 25, 28.
[292] Trial Decision of 16 February 2009, paras. 3, 12, 15-17, 19, 21, 22, p. 9.
[293] *See* Witness DCK, T. 16 February 2009 pp. 64-77.
[294] *See* Witness Nzapfakumunsi, T. 18 February 2009 pp. 28-33.
[295] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Urgent Motion for Admission of CN's Statement into Evidence, 20 March 2009 ("Trial Decision of 20 March 2009"), paras. 3, 10-12. The Witness CN Statement was admitted as Chambers Exhibit X3.
[296] *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Proprio Motu Order for Transfer of a Detained Witness and for Certain Witnesses to Testify via Video-Link Pursuant to Rules 54, 90*bis*, and 75 of the Rules, 9 February 2009 ("Order of 9 February 2009"), para. 4. *See also* T. 16 February 2009 p. 78.
[297] Nzuwonemeye Notice of Appeal, para. 71; Nzuwonemeye Appeal Brief, paras. 134, 146. *See also* Nzuwonemeye Appeal Brief, para. 139.
[298] Nzuwonemeye Notice of Appeal, paras. 72, 76; Nzuwonemeye Appeal Brief, paras. 152, 153.
[299] Nzuwonemeye Notice of Appeal, para. 74; Nzuwonemeye Appeal Brief, paras. 100, 152.
[300] Nzuwonemeye Notice of Appeal, para. 73; Nzuwonemeye Appeal Brief, para. 134.
[301] Nzuwonemeye Notice of Appeal, para. 73; Nzuwonemeye Appeal Brief, paras. 134, 153.

105. In addition, Nzuwonemeye submits that the remedies the Trial Chamber did grant in light of the Prosecution's disclosure violations were insufficient.[302] He suggests that insufficient efforts were made to secure the recall of Witness ALN.[303] Furthermore, he argues that the Trial Chamber's decision to admit the Witness CN Statement in light of the inability to locate Witnesses ALN and CN was not an effective remedy as the Trial Chamber subsequently failed to consider this evidence in the Trial Judgement.[304] Similarly, Nzuwonemeye argues that allowing Defence Witness Nzapfakumunsi to testify in light of the Prosecution's disclosure violations did not amount to a remedy as the Trial Chamber did not consider relevant aspects of his evidence in the Trial Judgement.[305]

106. Finally, Nzuwonemeye challenges the alleged disparate treatment between the remedies granted to him and Ndindiliyimana.[306] He notes that the Trial Chamber admitted certain exculpatory evidence only in respect of Ndindiliyimana.[307]

107. The Prosecution responds that Nzuwonemeye fails to demonstrate any error in the Trial Chamber's decisions concerning the Prosecution's Rule 68 violations and appropriate remedies in light of them.[308] It also argues that Nzuwonemeye fails to demonstrate that the Trial Chamber did not consider the Witness CN Statement or Witness Nzapfakumunsi's testimony.[309]

108. The Appeals Chamber recalls that, at trial, determining the appropriate remedy in light of a violation of Rule 68 of the Rules falls within the broad discretion of the trial chamber.[310] A trial chamber's exercise of discretion will be reversed only if the challenged decision was based on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[311]

[302] Nzuwonemeye Appeal Brief, paras. 143-151.
[303] Nzuwonemeye Appeal Brief, paras. 143, 147-151; Nzuwonemeye Reply Brief, para. 81.
[304] Nzuwonemeye Notice of Appeal, paras. 67, 68, 76; Nzuwonemeye Appeal Brief, paras. 143, 148; Nzuwonemeye Reply Brief, paras. 82, 83.
[305] Nzuwonemeye Notice of Appeal, paras. 69, 70, 76; Nzuwonemeye Appeal Brief, paras. 143-145, 147-151; Nzuwonemeye Reply Brief, paras. 84, 87-90.
[306] Nzuwonemeye Appeal Brief, paras. 138, 154, 546-548,
[307] Nzuwonemeye Notice of Appeal, para. 72; Nzuwonemeye Appeal Brief, para. 154.
[308] Prosecution Response Brief (Nzuwonemeye), paras. 125-128, 292. *See also* AT. 8 May 2013 pp. 61, 62.
[309] Prosecution Response Brief (Nzuwonemeye), paras. 119-124.
[310] *See Karemera et al.* Appeal Decision of 28 April 2006, para. 7 ("If a Rule 68 disclosure is extensive, parties are entitled to request an adjournment in order to properly prepare themselves. The authority best placed to determine what time is sufficient for an accused to prepare his defence is the Trial Chamber conducting the case".).
[311] *Kalimanzira* Appeal Judgement, para. 14; *Bagosora et al.* Appeal Decision of 26 September 2006, para. 6.

(a) Failure to Grant Remedy

109. The Appeals Chamber first turns to Nzuwonemeye's argument that the Trial Chamber erred by failing to admit into evidence the exculpatory aspects of all the statements that he claims were disclosed to him only in 2008 and in violation of Rule 68 of the Rules.

110. The Appeals Chamber observes that, in his motion underlying the Trial Decision of 22 September 2008, Nzuwonemeye requested the admission into evidence of all the statements listed in an annex as an alternative measure to the requested dismissal of charges, exclusion of Prosecution evidence, or stay of proceedings.[312] As indicated above, the Trial Chamber concluded that the Prosecution had disclosed Witness CR's statements of 6 October 1995 and 27 March 1998, as well statements from Witnesses IB, MG, JDT, and JG in 2004, prior to the commencement of trial and thus had not committed any violation of Rule 68 of the Rules in this respect.[313] Regarding the statements in relation to which the Prosecution had violated its disclosure obligations, the Trial Chamber considered that "drawing necessary inferences from the evidence" and the other measures requested by the Defence were severe remedies which should only be invoked in exceptional circumstances.[314] The Trial Chamber concluded that these remedies were not warranted at that point given that it was still feasible to recall Prosecution witnesses and add additional Defence witnesses.[315] Nzuwonemeye's present submissions do not demonstrate any error in the Trial Chamber's conclusions.

111. The Appeals Chamber next considers Nzuwonemeye's submission that the Trial Chamber erred when it denied his request to recall Witnesses DA, AWC, ANK/XAF, DY, HP, and Des Forges in its decision of 4 December 2008 and subsequently erred in its decision of 16 February 2009 by rejecting his request for reconsideration. The Appeals Chamber observes that Nzuwonemeye identifies no particular error in the Trial Chamber's application of the law or evaluation of the circumstances in either decision and that he does not specify any prejudice suffered.[316] The Appeals Chamber recalls that a party cannot merely repeat arguments on appeal that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those

[312] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Nzuwonemeye Defence Motion, Based on Prosecution's Violations of Rule 68 (Rules of Procedure and Evidence) and for Relief, and Pursuant to Rules 5, 90(G)(ii) and 90(G)(iii) (Rules of Procedure and Evidence), 28 March 2008, para. 82.
[313] Trial Decision of 22 September 2008, paras. 19, 20, 43.
[314] Trial Decision of 22 September 2008, para. 62.
[315] Trial Decision of 22 September 2008, paras. 61, 62.
[316] Nzuwonemeye Appeal Brief, para. 134.

arguments constituted an error warranting the intervention of the Appeals Chamber.[317] Nzuwonemeye has failed to do so.

112. With respect to the Trial Chamber's purported failure to address his submissions on alleged Rule 68 violations advanced in his Closing Brief, Nzuwonemeye cites, in particular, to excerpts wherein he recounts the procedural history related to the Rule 68 litigation, outstanding requests made to the Prosecution in relation to possible exculpatory material, and requests that the Trial Chamber reconsider his motion to reconsider the decision of 4 December 2008.[318] These undeveloped submissions failed to substantiate violations of Rule 68 of the Rules at that time and provided no basis in law or fact supporting a second reconsideration of the decision of 4 December 2008. It was within the Trial Chamber's discretion to summarily dismiss these arguments without discussion.[319]

(b) Failure to Implement Remedy

113. The Appeals Chamber next turns to Nzuwonemeye's arguments that insufficient efforts were made to locate Witness ALN. The Trial Chamber indicated, on 9 February 2009, that it had been informed that the Witness and Victims Support Section ("WVSS") could not locate Witness ALN.[320] On 16 February 2009, counsel for Nzuwonemeye acknowledged that WVSS had indicated its inability to find the witness, but recalled that the witness had testified that he was a member of "the brigade of guards of the Rwandan government".[321] This acknowledgement by Nzuwonemeye is neither an express objection to the efforts made to locate Witness ALN nor a request to stay proceedings to allow further investigation into Witness ALN's whereabouts.[322] Nonetheless, Nzuwonemeye argues that this information was not acted upon.[323]

114. Nzuwonemeye's unsupported submissions fail to demonstrate insufficient diligence on the part of WVSS or the Trial Chamber in this regard. Indeed, in his application to admit the Witness CN Statement in light of the unavailability of Witnesses ALN and CN, Nzuwonemeye asserted that "the Nzuwonemeye Defence submits that all efforts were made in vein [*sic*] to find

[317] *Karera* Appeal Judgement, para. 11, *referring to Muvunyi I* Appeal Judgement, para. 11 *and Martić* Appeal Judgement, para. 14. *See also Renzaho* Appeal Judgement, para. 59.
[318] *See* Nzuwonemeye Notice of Appeal, para. 75; Nzuwonemeye Appeal Brief, para. 134, fn. 184, *citing* Nzuwonemeye Closing Brief, paras. 68-72.
[319] *See Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11*bis*.1, Decision on Appeal against Decision on Referral under Rule 11*bis*, 4 July 2006, para. 47.
[320] *See* Order of 9 February 2009, para. 4; Trial Decision of 20 March 2009, para. 3.
[321] T. 16 February 2009 p. 78.
[322] T. 16 February 2009 p. 78.
[323] *See* Nzuwonemeye Appeal Brief, para. 147; Nzuwonemeye Reply Brief, para. 81.

[Witnesses ALN and CN] for their appearance before the court […]".[324] In the same application, Nzuwonemeye recalled that the Trial Chamber had informed the parties that WVSS had been unable to locate Witness ALN without arguing that available information had not been acted upon or insufficient diligence had been used to locate the witness.[325] Had Nzuwonemeye felt that insufficient efforts were made to locate Witness ALN, it was his obligation to raise an objection with the Trial Chamber and exhaust all available measures to seek the assistance of WVSS and the Trial Chamber in securing Witness ALN's attendance prior to the close of proceedings.[326] This lack of diligence is fatal to his appeal in this regard.[327]

115. The Appeals Chamber next considers Nzuwonemeye's submissions that the admission of the Witness CN Statement was not a sufficient remedy in light of the absence of Witnesses ALN and CN because the Trial Chamber failed to consider the Witness CN Statement in the Trial Judgement. The Appeals Chamber recalls that the Trial Chamber, in its decision of 4 December 2008, considered that the Witness CN Statement contradicted Witness ALN's testimony that he was Nzuwonemeye's driver on 6 and 7 April 1994, Witness ALN's description of Nzuwonemeye's activities "during that period", as well as Nzuwonemeye's alleged involvement in the killing of the Belgian peacekeepers.[328] When admitting the Witness CN Statement, the Trial Chamber found it necessary to admit it in its entirety for the limited purpose of assessing the credibility of Witness ALN's testimony.[329] As discussed elsewhere, the admission of evidence is a permissible remedy where a disclosure violation under Rule 68 of the Rules has caused prejudice to an accused.[330]

116. In the Trial Judgement, the Trial Chamber relied, in part, on the evidence of Witness ALN to establish Nzuwonemeye's criminal responsibility for the killing of Prime Minister Agathe Uwilingiyimana on the morning of 7 April 1994. Specifically, it accepted Witness ALN's evidence that Nzuwonemeye instructed Sagahutu to deploy two armoured vehicles to support Presidential Guards at the Prime Minister's home that morning.[331] Of material importance, the Trial Chamber relied on Witness ALN's testimony that he overheard this instruction in Camp Kigali early on the

[324] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Nzuwonemeye Defence Very Urgent Motion for Admission of Exculpatory Portion of CN Statement, in Light of ALN and CN Absence, as Rule 68 Remedy and Pursuant to Rule 92*bis*(A), (C) of the Rules of Procedure and Evidence, 27 February 2009 ("Nzuwonemeye Motion of 27 February 2009"), para. 8.
[325] Nzuwonemeye Motion of 27 February 2009, para. 14.
[326] *See Renzaho* Appeal Judgement, para. 216; *Simba* Appeal Judgement, para. 41; *Tadić* Appeal Judgement, para. 55.
[327] *See* T. 25 June 2009 p. 50. *See also* T. 25 June 2009 p. 71.
[328] Decision on Nzuwonemeye and Bizimungu Motions to Recall Witnesses of 4 December 2008, paras. 19, 36. *See also* Trial Decision of 22 September 2008, paras. 41, 42.
[329] Trial Decision of 20 March 2009, para. 12.
[330] *See supra* paras. 18, 24.
[331] *See generally* Trial Judgement, paras. 1715-1719. *See also* Trial Judgement, para. 1744.

morning of 7 April 1994.[332] Nzuwonemeye argues, however, that the Witness CN Statement raises doubt that Witness ALN overheard this order.[333]

117. The Trial Judgement does not expressly refer to the Witness CN Statement. However, when assessing the credibility of Witness ALN's testimony about Nzuwonemeye's order to deploy Reconnaissance Battalion soldiers to the Prime Minister's home on the morning of 7 April 1994, the Trial Chamber, without citation, generally referred to having "heard evidence […] of Defence Witnesses disputing Witness ALN's claim to have been present at Camp Kigali" but noted that none contravened his testimony that he was there around 6.30 a.m.[334] This conclusion is not inconsistent with the contents of the Witness CN Statement, which provides no detail as to Witness ALN's whereabouts at that time.[335] To the extent the Trial Chamber did not expressly consider the Witness CN Statement, the Appeals Chamber considers the implication of this omission below.

118. The Appeals Chamber observes that other Prosecution evidence, contrary to the Witness CN Statement, confirms Witness ALN's testimony that he drove for Nzuwonemeye.[336] **[REDACTED]**,[337] **[REDACTED]**[338] **[REDACTED]**.[339] Consequently, it was within the Trial Chamber's discretion to give little to no credit on the Witness CN Statement, which, in any event, did not refute Witness ALN's testimony that he was present at Camp Kigali and in a position to overhear Nzuwonemeye on the morning of 7 April 1994.[340]

119. The Appeals Chamber further observes that the Witness CN Statement does not contain any reference to Nzuwonemeye ordering the deployment of troops to the Prime Minister's home and indicates that Witness CN was unaware of Reconnaissance Battalion soldiers participating in the attack there on the morning of 7 April 1994.[341] The Appeals Chamber notes that the Trial Chamber did not expressly refer to the Witness CN Statement when assessing the involvement of Reconnaissance Battalion soldiers in the killing of the Prime Minister. Nonetheless, the Trial Chamber considered Defence evidence from witnesses who were Reconnaissance Battalion soldiers but were not present at the Prime Minister's home, who disputed that members of the

[332] Trial Judgement, para. 1719. *See also* Trial Judgement, paras. 1642, 1715, 1716.
[333] Nzuwonemeye Appeal Brief, paras. 148, 149.
[334] Trial Judgement, para. 1716.
[335] *See* Chambers Exhibit X3, pp. K0153605-K0153607. The Witness CN Statement reflects that Nzuwonemeye was at Camp Kigali between approximately after midnight and 9.00 a.m. on 7 April 1994 and that Witness CN drove Nzuwonemeye to his home around 9.00 a.m. Chambers Exhibit X3, p. K0153606.
[336] *See*, *e.g.*, Witness ANK/XAF, T. 2 September 2005 pp. 22, 24 (closed session).
[337] **[REDACTED].**
[338] **[REDACTED].**
[339] **[REDACTED].**
[340] The Appeals Chamber recalls that the existence of exculpatory material does not require a trial chamber to draw adverse inferences in light of it. *See Mugenzi and Mugiraneza* Decision of 24 September 2012, paras. 17, 22, 27, 28, 33, 38.

Reconnaissance Battalion participated in the attack there.[342] The Witness CN Statement is cumulative of this evidence. The Appeals Chamber recalls that a trial chamber is not required to refer to every piece of evidence on the record.[343] However, to the extent the Trial Chamber failed to consider the Witness CN Statement, Nzuwonemeye has not shown an error demonstrating a miscarriage of justice, as the Witness CN Statement is cumulative of witness testimony that the Trial Chamber considered and rejected.

120. The Appeals Chamber turns to Nzuwonemeye's additional argument that allowing Witness Nzapfakumunsi to testify was an insufficient remedy due to the Trial Chamber's failure to consider his evidence in the Trial Judgement. The Appeals Chamber recalls that the Trial Chamber, in its decision of 4 December 2008, granted Nzuwonemeye's request to recall Witness Nzapfakumunsi given the witness's close association with the top echelons of the Rwandan army, his first-hand knowledge of the meeting at the *École supérieure militaire* ("ESM") on 7 April 1994, and his ability to testify about other allegations in the Indictment.[344]

121. The Appeals Chamber observes that Nzuwonemeye argues that Witness Nzapfakumunsi provided credible information that Presidential Guards were responsible for both the murder of the Prime Minister and the Belgian peacekeepers, and that he and others did not learn of these killings until after a meeting at the ESM on 7 April 1994.[345] The Appeals Chamber observes that, while the Trial Chamber did not expressly refer to this evidence when assessing Nzuwonemeye's liability for the killings of the Prime Minister and the Belgian peacekeepers, it is mentioned elsewhere in the Trial Judgement.[346] The Appeals Chamber therefore considers that the Trial Chamber was aware of Witness Nzapfakumunsi's testimony and did not ignore it. Moreover, the Trial Chamber considered similar evidence that soldiers from units other than the Reconnaissance Battalion, including the Presidential Guard, participated in the attack on the Prime Minister.[347] In light of these facts, the Appeals Chamber is not convinced that the Trial Chamber provided an insufficient remedy to the Prosecution's disclosure violations because it did not rely on Witness Nzapfakumunsi's testimony.

[341] Chambers Exhibit X3, p. K0153606.
[342] Trial Judgement, para. 1738. *See also* Trial Judgement, paras. 1704-1706.
[343] *Rukundo* Appeal Judgement, para. 67; *Nchamihigo* Appeal Judgement, para. 121; *Kajelijeli* Appeal Judgement, paras. 59, 60.
[344] Decision on Nzuwonemeye and Bizimungu Motions to Recall Witnesses of 4 December 2008, paras. 29, 38. *See also* Trial Decision of 22 September 2008, para. 47.
[345] *See* Nzuwonemeye Appeal Brief, para. 144 *and* Nzuwonemeye Reply Brief, para. 87, *citing* T. 18 February 2009 pp. 30, 32, 33. *See also* Nzuwonemeye Appeal Brief, para. 145.
[346] *See* Trial Judgement, paras. 665, 666.
[347] Trial Judgement, paras. 1732-1734.

(c) Disparate Treatment

122. The Appeals Chamber turns to Nzuwonemeye's arguments regarding the alleged disparate treatment he received in light of the Prosecution's disclosure violations. He submits that the Trial Chamber erred by admitting into evidence, *proprio motu*, certain exculpatory statements for Ndindiliyimana but not for him.[348]

123. The Appeals Chamber has rejected Nzuwonemeye's claims that the Trial Chamber erred in not admitting exculpatory aspects of several statements in light of alleged or proven disclosure violations under Rule 68 of the Rules.[349] That the Trial Chamber admitted certain exculpatory statements at the close of proceedings relating to Ndindiliyimana did not automatically require the Trial Chamber to do the same in respect of evidence relating to Nzuwonemeye. Nzuwonemeye fails to substantiate how the Trial Chamber's omission prejudiced him. Accordingly, this argument is dismissed.

(d) Conclusion

124. Based on the foregoing, the Appeals Chamber finds that Nzuwonemeye has failed to demonstrate that the Trial Chamber erred in its assessment of disclosure violations under Rule 68 of the Rules and that it granted ineffective remedies.

4. Judicial Notice

125. Nzuwonemeye submits that the Trial Chamber erred in taking judicial notice of a widespread or systematic attack against the civilian population and of a non-international armed conflict because he disputed these facts at trial.[350] Nzuwonemeye further asserts that the Trial Chamber erred because it took judicial notice of a widespread or systematic attack against the civilian population late in the proceedings, without being requested to do so by the Prosecution or hearing the parties, and even though it did not "put facts on the record to support 'widespread or systematic attacks'".[351] He also contends that the Trial Chamber impermissibly relied on judicial notice in order to establish the required nexus of the killings of the Prime Minister and the Belgian peacekeepers with the non-international armed conflict.[352] In addition, he argues that the Trial Chamber failed to specify on which legal basis it took judicial notice of the existence of the non-

[348] Nzuwonemeye Notice of Appeal, para. 72; Nzuwonemeye Appeal Brief, para. 154. *See also* Nzuwonemeye Appeal Brief, para. 138; AT. 8 May 2013 p. 36. He emphasizes that he had previously sought to have exculpatory aspects of certain statements admitted in light of alleged disclosure violations. *See* Nzuwonemeye Notice of Appeal, para. 72; AT. 8 May 2013 p. 36.
[349] *See supra* para. 110.
[350] Nzuwonemeye Notice of Appeal, paras. 39, 44; Nzuwonemeye Appeal Brief, paras. 455, 458, 459.
[351] Nzuwonemeye Notice of Appeal, para. 42; Nzuwonemeye Appeal Brief, paras. 104-106, 108.

international armed conflict.[353] In Nzuwonemeye's view, the Trial Chamber thus caused him prejudice and violated his fair trial rights.[354]

126. The Prosecution responds that the Trial Chamber was required under Rule 94(A) of the Rules to take judicial notice.[355]

127. The Trial Chamber's reasoning clearly indicates that it considered the existence of widespread and systematic attacks against Tutsi and Hutu civilians and of a non-international armed conflict in Rwanda during the relevant time to be facts of common knowledge subject to judicial notice under Rule 94(A) of the Rules.[356] The Appeals Chamber finds no error in this respect. As previously held, the existence of widespread or systematic attacks against a civilian population based on Tutsi ethnic identification between April and July 1994, as well as the existence of a non-international armed conflict in Rwanda at the time, are notorious facts not subject to reasonable dispute.[357] Rule 94(A) of the Rules obliges trial chambers to take judicial notice of such facts regardless of a request or a hearing of the parties.[358] Consequently, the Appeals Chamber considers that there is no merit in Nzuwonemeye's claims that he disputed the existence of widespread and systematic attacks against civilians and of a non-international armed conflict, that these facts were not sufficiently proved by evidence on the record and that the Trial Chamber took judicial notice late in the proceedings, that it did so *proprio motu* and without hearing the parties.

128. Finally, contrary to Nzuwonemeye's submission, the Trial Chamber did not rely on judicial notice to establish a nexus between the armed conflict and the crimes for which he was convicted. As discussed elsewhere in this Judgement, the Trial Chamber made an independent finding of the nexus based on a number of factors.[359]

129. Accordingly, Nzuwonemeye has failed to demonstrate that the Trial Chamber violated his fair trial rights by taking judicial notice.

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[352] Nzuwonemeye Notice of Appeal, paras, 43, 45.
[353] Nzuwonemeye Appeal Brief, paras. 458, 464.
[354] Nzuwonemeye Notice of Appeal, paras. 41, 46; Nzuwonemeye Appeal Brief, para. 107.
[355] Prosecution Response Brief (Nzuwonemeye), paras. 29, 37, 257-259.
[356] *See* Trial Judgement, para. 105.
[357] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera et al.* Decision of 16 June 2006"), para. 29; *Semanza* Appeal Judgement, para. 192.
[358] *Bikindi* Appeal Judgement, para. 99; *Karemera et al.* Decision of 16 June 2006, paras. 22, 29, 41. *See*, in contrast, Rule 94(B) of the Rules.
[359] *See infra* paras. 265, 266.

5. Rules 82(A) and 87(B) of the Rules

130. Nzuwonemeye submits that the Trial Chamber violated his rights by failing to accord him the same rights as if he had been tried individually, as required by Rule 82(A) of the Rules, and by failing, contrary to Rule 87(B) of the Rules, to make separate findings against him.[360] To illustrate the alleged violations of Rule 82(A) of the Rules, Nzuwonemeye highlights various instances in the Trial Judgement where the Trial Chamber misattributed evidence or objections to the wrong party.[361] Nzuwonemeye also contends that the Trial Chamber failed to properly address his objections concerning the cross-examination by Ndindiliyimana of Nzuwonemeye Defence Witnesses Deo Munyaneza and Sylvestre Ntivuguruzwa and provide a reasoned opinion.[362] He also argues that the Trial Chamber mischaracterized and relied on evidence presented by the Sagahutu Defence to convict him.[363] Finally, Nzuwonemeye points to several paragraphs in the Trial Judgement to argue that the Trial Chamber failed to make separate findings as required by Rule 87(B) of the Rules.[364]

131. The Prosecution responds that Nzuwonemeye has failed to demonstrate any error warranting appellate intervention.[365]

132. The Appeals Chamber recalls that Rule 82(A) of the Rules provides that "[i]n joint trials, each accused shall be accorded the same rights as if he were being tried separately". The rights of an accused at trial are expressly detailed in Article 20 of the Statute. On appeal, when a party alleges that the right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement.[366]

133. Nzuwonemeye argues that the Trial Chamber on several occasions incorrectly attributed evidence and objections presented by him as having been presented by Sagahutu, and *vice versa*,[367]

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[360] Nzuwonemeye Notice of Appeal, paras. 54-64; Nzuwonemeye Appeal Brief, paras. 122-130; Nzuwonemeye Reply Brief, paras. 69-72. In addition, Nzuwonemeye challenges the violation of his rights in the context of the assessment of his sentence. *See* Nzuwonemeye Appeal Brief, para. 130. In light of the conclusions reached elsewhere in this Judgement, this argument is moot. *See infra* paras. 254, 312, 321, 322.
[361] Nzuwonemeye Notice of Appeal, paras. 56, 57, 61; Nzuwonemeye Appeal Brief, paras. 127, 128.
[362] Nzuwonemeye Notice of Appeal, para. 54; Nzuwonemeye Appeal Brief, para. 129.
[363] Nzuwonemeye Notice of Appeal, paras. 58-60, 63; Nzuwonemeye Appeal Brief, para. 124-127; Nzuwonemeye Reply Brief, para. 72.
[364] Nzuwonemeye Appeal Brief, paras. 131-133; Nzuwonemeye Reply Brief, paras. 69, 70. The Appeals Chamber observes that Nzuwonemeye's submissions concerning the Trial Chamber's purported violation of Rule 87 of the Rules were not raised in the Nzuwonemeye Notice of Appeal. Notwithstanding, the Prosecution has not objected to this argument on this basis and the Appeals Chamber shall consider its merits.
[365] Prosecution Response Brief (Nzuwonemeye), paras. 106-118.
[366] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 62, fn. 137. *See also Gatete* Appeal Judgement, para. 18; *Renzaho* Appeal Judgement, para. 196.
[367] *See* Nzuwonemeye Appeal Brief, paras. 126 (noting that Nzuwonemeye Defence Witness D3's evidence was summarized in a section of the Trial Judgement devoted to summaries of evidence from Sagahutu Defence witnesses), 128 (noting that Nzuwonemeye's notice objection was incorrectly attributed to him and Sagahutu; highlighting that the

in some cases failed to make any distinction between Sagahutu and Nzuwonemeye Defence witnesses,[368] and, in one instance, misidentified the pseudonym of a witness.[369]

134. The Appeals Chamber recalls that typographical errors or mistaken references can occur in judgements and decisions even after careful review and that their occurrence does not typically result in a miscarriage of justice, if the meaning of the relevant text can be reasonably ascertained from the surrounding context and where the factual propositions referred to by the Trial Chamber are in fact supported by the record.[370] Nzuwonemeye has not demonstrated that, other than the misattributions in the Trial Judgement, the Trial Chamber mischaracterized the evidence or the nature of his objections or erred in its assessment. Accordingly, the Appeals Chamber can identify no prejudice to Nzuwonemeye or any violation of his rights under Rule 82(A) of the Rules as a result of these mistaken references.

135. Turning to Nzuwonemeye's objections to the cross-examination of Witnesses Munyaneza and Ntivuguruzwa, the Appeals Chamber notes that Nzuwonemeye raises specific concerns about various lines of questioning by Ndindiliyimana intended to raise doubt that the witnesses were present during the Prime Minister's death, which thereby sought to undermine Nzuwonemeye's defence.[371] The Appeals Chamber observes that contemporaneous objections were raised during the witnesses' testimonies and were considered by the Trial Chamber.[372] Although the Trial Chamber did not expressly revisit Nzuwonemeye's objections in the Trial Judgement, a review of its analysis of the witnesses' evidence indicates that the Trial Chamber did not consider that the cross-examination of the witnesses by Ndindiliyimana raised doubts about their presence during the killing of the Prime Minister.[373] Rather, the Trial Chamber's analysis indicates that their evidence, even if accepted as true, failed to raise doubt in the Prosecution case.[374] In this context, Nzuwonemeye has failed to demonstrate a violation causing prejudice that amounts to an error of law invalidating the judgement.[375]

Trial Chamber incorrectly referred to Nzuwonemeye's Closing Brief when summarizing arguments identified as Sagahutu's; and noting that Sagahutu Defence Witness Luc Marchal's evidence was "prejudicially" summarized within a section of the Trial Judgement devoted to Nzuwonemeye Defence witnesses).

[368] Nzuwonemeye Appeal Brief, para. 128 (arguing that the Trial Chamber considered the evidence of Witnesses K4, CSS, and Habimana without distinguishing them as either Nzuwonemeye or Sagahutu Defence witnesses in Trial Judgement paragraphs 528-530).

[369] Nzuwonemeye Appeal Brief, para. 128 (highlighting that the Trial Chamber misidentified a witness in paragraph 179 of the Trial Judgement).

[370] *See*, *e.g.*, *Hategekimana* Appeal Judgement, para. 30.

[371] *See* Witness Munyaneza, T. 10 July 2008 pp. 18-30; Witness Ntivuguruzwa, T. 16 July 2008 pp. 29-31.

[372] *See* T. 10 July 2008 pp. 23-30; T. 16 July 2008 pp. 29-31.

[373] *See* Trial Judgement, paras. 1734, 1735.

[374] *See* Trial Judgement, paras. 1734, 1735.

[375] The Appeals Chamber observes that Rule 90(F)(i) of the Rules provides that a trial chamber "shall exercise control over the mode […] of interrogating witnesses […] so as to: Make the interrogation […] effective for the ascertainment of the truth; […]." Furthermore, in a joint trial, the possibility of antagonistic defences does not in itself constitute a

136. The Appeals Chamber observes that Nzuwonemeye makes several specific challenges that the Trial Chamber, in violation of Rule 82(A) of the Rules, relied on evidence presented by the Sagahutu Defence or evidence relevant only to Sagahutu to support Nzuwonemeye's convictions.[376] Specifically, Nzuwonemeye argues that the Trial Chamber relied on the evidence of Sagahutu Defence Witnesses CSS and UDS to make findings of his culpability.[377] However, contrary to Nzuwonemeye's submissions, in this paragraph of the Trial Judgement, the Trial Chamber found that the testimonies of Sagahutu Defence Witnesses CSS and UDS were insufficient to raise doubt about the Prosecution evidence pertaining to the participation of Reconnaissance Battalion soldiers in the killing of the Prime Minister.[378] Consequently, the Trial Chamber considered this evidence only as potentially exculpatory, and Nzuwonemeye's argument that the Trial Chamber relied on their testimonies to establish his guilt, in violation of Rule 82(A) of the Rules, is without merit.

137. Nzuwonemeye further argues that the Trial Chamber violated Rule 82(A) of the Rules by assessing the testimonies of Nzuwonemeye and Sagahutu together.[379] The Trial Chamber found that the testimonies of Nzuwonemeye and Sagahutu that Warrant Officer Boniface Bizimungu and other crew assigned to the Reconnaissance Battalion armoured vehicles could not have been present at the attack on the Prime Minister's residence because they were tasked with protecting other important sites in Kigali from 6 to 7 April 1994 did not raise doubt in the Prosecution evidence that Reconnaissance Battalion soldiers participated in the killing of the Prime Minister.[380] Nzuwonemeye fails to show that the Trial Chamber committed any error in assessing this common aspect of their testimonies together. This argument is therefore dismissed.

138. Nzuwonemeye suggests that the Trial Chamber incorrectly convicted him on the basis of Prosecution evidence adduced against Sagahutu.[381] In the relevant paragraph, the Trial Chamber relied on the testimonies of Prosecution Witnesses HP and DA to determine that Sagahutu had

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conflict of interests capable of causing serious prejudice. *Cf. Prosecutor v. Ante Gotovina and Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006 ("*Gotovina* Decision of 25 October 2006"), para. 37. This is because, in part, trials at the Tribunal are conducted by professional judges who are able to exclude prejudicial evidence from their minds when it comes to determining the guilt of a particular accused. *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of the Accused, 24 January 2006 ("*Pandurević and Trbić* Decision of 24 January 2006"), para. 25. *See also Gotovina* Decision of 25 October 2006, para. 37. The Trial Chamber's conduct, in this instance, underscores these principles.

[376] Regarding Nzuwonemeye's reference to Sagahutu's testimony on whether the Reconnaissance Battalion had multi-grenade launchers in its arsenal (*see* Nzuwonemeye Appeal Brief, paras. 124, 125), the Appeals Chamber has found elsewhere that the Trial Chamber erred in its interpretation of this evidence and its reliance on it to the disadvantage of Sagahutu. *See infra* para. 356.

[377] Nzuwonemeye Appeal Brief, para. 126 (incorrectly referring to Trial Judgement, para. 1730); Nzuwonemeye Notice of Appeal, para. 57 (correctly referring to Trial Judgement, para. 1738).

[378] Trial Judgement, para. 1738.

[379] Nzuwonemeye Appeal Brief, para. 126, *referring to* Trial Judgement, para. 1739.

[380] Trial Judgement, para. 1739.

[381] Nzuwonemeye Appeal Brief, para. 127, *referring to* Trial Judgement, para. 1730.

ordered these witnesses to transport the Prime Minister's corpse from her residence to the Kanombe hospital.[382] The Trial Chamber further stated that this evidence also supported the view that the accused were closely involved in the events that led to the killing of the Prime Minister.[383] Nzuwonemeye's argument fails to appreciate that he was charged with the Prime Minister's killing both pursuant to Articles 6(1) and 6(3) of the Statute,[384] and that Prosecution evidence pertaining to the nature and extent of the involvement of Sagahutu, his *de jure* subordinate, in the killing of the Prime Minister and the events that followed, as well as his subordinate's actual or constructive knowledge of the crime, are not only relevant to the prosecution of that subordinate, but to Nzuwonemeye's prosecution as well.

139. Finally, in support of his contention that the Trial Chamber violated Rule 87(B) of the Rules, Nzuwonemeye points to several paragraphs of the Trial Judgement, in which he claims that the Trial Chamber erred by making joint findings related to him and Sagahutu.[385]

140. The Appeals Chamber recalls that Rule 87(B) of the Rules provides in the pertinent part that "[i]f two or more accused are tried together under Rule 48, separate findings shall be made as to each accused". Notwithstanding this provision, the Appeals Chamber observes that the Rules anticipate that two or more accused may be tried together on the basis of the same crimes.[386] Indeed, jurisprudence regarding the advantages of joint trials reflects that they may be used to ensure that the same evidence is available and assessed with regard to each accused and thus result in a greater likelihood of consistent evaluation of the evidence, findings, and verdicts on the basis of the same facts.[387] In this context, a trial chamber may make findings of guilt for more than one co-accused on the basis of the same evidence so long as a majority of the trial chamber is satisfied that each accused's guilt is established beyond reasonable doubt.[388]

141. The Trial Chamber concluded that Nzuwonemeye's involvement in the killings of the Prime Minister and the Belgian peacekeepers had been proved in light of the evidence before it.[389] It made individualized findings regarding the applicable forms of responsibility and separately identified the

[382] Trial Judgement, para. 1730.
[383] Trial Judgement, para. 1730.
[384] *See* Indictment, paras. 78, 103, 104, 107, 118.
[385] Nzuwonemeye Appeal Brief, paras. 131, 132, *citing* Trial Judgement, paras. 47-50, 64-66, 1715-1719, 1730, 1733-1735, 1739, 1740, 1744, 1745, 1853-1889, 2090.
[386] *See* Rules 48, 48*bis*, 49, and 82 of the Rules.
[387] *See Pandurević and Trbić* Decision of 24 January 2006, para. 23.
[388] *See* Rule 87(A) of the Rules.
[389] *See* Trial Judgement, paras. 1715, 1719, 1740, 1744, 1745, 1888, 2093, 2094, 2098.

counts and crimes for which Nzuwonemeye was convicted.[390] Accordingly, the Appeals Chamber is not convinced that Nzuwonemeye has identified any violation of Rule 87(B) of the Rules.

142. Accordingly, Nzuwonemeye has failed to demonstrate that the Trial Chamber violated his fair trial rights by disregarding its obligations under Rules 82(A) and 87(B) of the Rules.

6. Conclusion

143. Based on the foregoing, the Appeals Chamber dismisses Nzuwonemeye's First and Fifth Grounds of Appeal, in part.

[390] *See* Trial Judgement, paras. 1745, 1888, 1889, 2013-2025, 2093-2095, 2098, 2107, 2146, 2149, 2154, 2155, 2163.

B. Notice (Nzuwonemeye Ground 1 in part; Sagahutu Grounds 1, and 3 and 8, in part)

144. The Trial Chamber convicted Nzuwonemeye and Sagahutu for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering and aiding and abetting the killing of the Prime Minister.[391] The Trial Chamber also found that Nzuwonemeye and Sagahutu could be held responsible for this killing as superiors under Article 6(3) of the Statute, which it considered in sentencing.[392] It further concluded that Nzuwonemeye was liable as a superior for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II with respect to the killing of the Belgian peacekeepers.[393] In relation to this incident, Sagahutu was found liable as a superior for murder as a crime against humanity and for ordering and aiding and abetting murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[394]

145. Nzuwonemeye and Sagahutu submit that the Trial Chamber erred in convicting them for these crimes because they lacked proper notice.[395] In this section, the Appeals Chamber considers Nzuwonemeye's and Sagahutu's arguments regarding: (i) the pleading of cumulative forms of responsibility in the Indictment; (ii) notice in relation to the killing of the Prime Minister; and (iii) notice in relation to the killing of the Belgian peacekeepers.[396]

1. Cumulative Pleading of Forms of Responsibility

146. Nzuwonemeye submits that the Indictment impermissibly charges him cumulatively with liability pursuant to Articles 6(1) and 6(3) of the Statute in relation to the same crimes without making a distinction as to the material facts underpinning each form of responsibility.[397] Sagahutu argues that the Indictment pleads his liability for ordering and aiding and abetting the killings of the

[391] Trial Judgement, paras. 1745, 1903, 2093, 2107, 2108, 2146, 2154, 2156, 2163. *See also* Trial Judgement, paras. 47, 65, 74-77, 508, 513, 2063, 2244, 2254.
[392] Trial Judgement, paras. 1745, 2094, 2095, 2107, 2108, 2146, 2244, 2254.
[393] Trial Judgement, paras. 2098, 2107, 2146, 2148, 2155, 2163.
[394] Trial Judgement, paras. 2099, 2108, 2146, 2148, 2150, 2151, 2157, 2163.
[395] Nzuwonemeye Notice of Appeal, paras. 6-36, 38, 41, 42, 46; Nzuwonemeye Appeal Brief, paras. 8-81, 110; AT. 8 May 2013 pp. 29-31; Sagahutu Notice of Appeal, paras. 10-14; Sagahutu Appeal Brief, paras. 7-9, 66-69, 103, 161, 165. *See also* Nzuwonemeye Notice of Appeal, paras. 83, 84, 118, 121, 137, 181, 182; Nzuwonemeye Appeal Brief, paras. 160, 166-169, 177, 178, 198, 214, 248, 302, 312, 321, 405, 507, 508, 514, 519; Sagahutu Appeal Brief, paras. 106, 108, 123, 213, 218, 253, 258.
[396] The Appeals Chamber dismisses Sagahutu's assertion that his rights under Rule 82(A) of the Rules were violated because the Indictment did not distinguish between him and Nzuwonemeye as it was only raised in his notice of appeal and not subsequently developed. *See* Sagahutu Notice of Appeal, para. 15. Similarly, the Appeals Chamber dismisses Nzuwonemeye's notice arguments in relation to joint criminal enterprise as he was not convicted on this basis and has failed to identify any impact on the verdict. *See* Nzuwonemeye Notice of Appeal, para. 34.
[397] Nzuwonemeye Notice of Appeal, para. 18; Nzuwonemeye Appeal Brief, paras. 30, 31, 34. *See also* AT. 8 May 2013 p. 83.

Prime Minister and the Belgian peacekeepers in the alternative rather than cumulatively.[398] He therefore contends that the Trial Chamber erred in convicting him under both forms of responsibility.[399]

147. The Prosecution responds to Sagahutu's submissions, arguing that, since both ordering and aiding and abetting are pleaded in the Indictment, the Trial Chamber was entitled to convict Sagahutu accordingly.[400] With respect to Nzuwonemeye's arguments, the Prosecution submits that the Trial Chamber found that paragraph 78 of the Indictment specifies which crimes are attributed to which mode of liability including those in reference to Article 6(1) of the Statute and that this information was reiterated in the Prosecution Pre-Trial Brief.[401]

148. The Appeals Chamber notes that the *chapeau* paragraph for murder as a crime against humanity (Count 4), paragraph 78 of the Indictment, states that all accused in the instant case, "by their individual acts […] planned, instigated, ordered, committed *or* otherwise aided and abetted" the crimes charged.[402] Similarly, the *chapeau* paragraph for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7), paragraph 118 of the Indictment, alleges that "by virtue of their acts, the Accused planned, incited to commit, ordered, *or* otherwise aided and abetted" crimes.[403]

149. The Appeals Chamber is not convinced that the formulation "or" in the context of paragraphs 78 and 118 of the Indictment meant that the Prosecution intended to charge one form of responsibility to the exclusion of the others or that Sagahutu could have reasonably understood the Indictment in that manner. The general formulations contained in these paragraphs of the Indictment are mere recitations of Article 6(1) of the Statute, which the Appeals Chamber has previously noted evinces an intent by the Prosecution to cumulatively charge all forms of responsibility.[404] Furthermore, the Appeals Chamber recalls that cumulative charging of several forms of responsibility in an indictment is allowed, provided that the Prosecution discharges its obligation to state all material facts underpinning each charge.[405]

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[398] Sagahutu Appeal Brief, paras. 66, 103, 106, 108, 123, 161, 165, 213, 218. *See also* Sagahutu Reply Brief, para. 23.
[399] Sagahutu Appeal Brief, paras. 68, 165.
[400] Prosecution Response Brief (Sagahutu), paras. 3, 30.
[401] AT. 8 May 2013 p. 57.
[402] Emphasis added.
[403] Emphasis added.
[404] *See, e.g.*, *Semanza* Appeal Judgement, para. 357.
[405] *Ntagerura et al.* Appeal Judgement, para. 158. *See also Simba* Appeal Judgement, para. 77. In this context, the Appeals Chamber further observes that the rationale behind alternative charging, which considers 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," similarly supports cumulative charging. *Naletilić and Martinović* Appeal Judgement, para. 103, *quoting Delalić et al.* Appeal Judgement, para. 400. *See also Kupreškić et al.* Appeal Judgement, paras. 385, 386.

150. The Appeals Chamber therefore dismisses Nzuwonemeye's and Sagahutu's arguments that there was an error regarding the cumulative or alternative charging of forms of responsibility. Whether the Prosecution properly pleaded the material facts in support of each form of responsibility for which Nzuwonemeye and Sagahutu were convicted will be addressed below.[406]

2. Killing of the Prime Minister

151. Nzuwonemeye and Sagahutu submit that the Trial Chamber erred in convicting them for the killing of the Prime Minister because the Indictment was defective.[407] In this section, the Appeals Chamber considers: (i) Nzuwonemeye's arguments regarding murder as a crime against humanity; (ii) Sagahutu's arguments regarding murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; (iii) Nzuwonemeye's arguments relating to conspiracy to commit genocide; (iv) Nzuwonemeye's and Sagahutu's arguments in respect of ordering and aiding and abetting; and (v) Nzuwonemeye's arguments regarding superior responsibility.

(a) Murder as a Crime Against Humanity

152. Nzuwonemeye submits that the Trial Chamber erred in convicting him for murder as a crime against humanity in relation to the Prime Minister's killing because the Indictment contains insufficient information as to: (i) the nexus between the murder and a widespread or systematic attack against a civilian population;[408] (ii) the conduct of the Reconnaissance Battalion;[409] (iii) the identity of the victims who were killed together with the Prime Minister;[410] and (iv) Nzuwonemeye's intent to kill or engage in acts which would cause serious bodily harm resulting in the death of the Prime Minister.[411]

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[406] *See infra* paras. 166-212.
[407] *See* Sagahutu Notice of Appeal, paras. 10, 14; Sagahutu Appeal Brief, paras. 69, 103; Nzuwonemeye Notice of Appeal, para. 6; Nzuwonemeye Appeal Brief, paras. 8, 9.
[408] Nzuwonemeye Notice of Appeal, para. 16; Nzuwonemeye Appeal Brief, para. 23. In this context, Nzuwonemeye further asserts that the Trial Chamber impermissibly took judicial notice of a widespread or systematic attack against a civilian population in order to cure the defect in the Indictment and held that the nexus element did not need to be pleaded in relation to specific crimes. Nzuwonemeye Notice of Appeal, paras. 38-42; Nzuwonemeye Appeal Brief, paras. 102, 103, *referring to* Trial Judgement, para. 140; AT. 8 May 2013 p. 31. *See also* Nzuwonemeye Reply Brief, paras. 21-23.
[409] Nzuwonemeye Appeal Brief, paras. 81, 166; AT. 8 May 2013 p. 37.
[410] Nzuwonemeye Notice of Appeal, paras. 14, 15; Nzuwonemeye Appeal Brief, paras. 41, 42; Nzuwonemeye Reply Brief, paras. 42-46.
[411] Nzuwonemeye Notice of Appeal, paras. 13, 24; Nzuwonemeye Appeal Brief, paras. 18, 19. *See also* AT. 8 May 2013 p. 31.

153. The Prosecution responds that the elements of murder as a crime against humanity are sufficiently pleaded in the Indictment.[412] In its view, Nzuwonemeye repeats unsuccessful trial arguments without showing any error on the Trial Chamber's part.[413]

154. With respect to Nzuwonemeye's first two contentions, the Appeals Chamber observes that the *chapeau* paragraph for murder as a crime against humanity, paragraph 78 of the Indictment, alleges that Nzuwonemeye and his co-accused "were responsible for several murders committed against Rwandan nationals, as part of widespread or systematic attacks against a civilian population, on national, political, ethnic, racial or religious grounds". The provision then refers to, *inter alia*, paragraphs 103, 106, and 107 of the Indictment, which set out specific allegations in relation to the killing of the Prime Minister. Specifically, paragraph 103 of the Indictment states that soldiers of the Reconnaissance Battalion, acting in concert with the Presidential Guard and *Interahamwe*, "hunted down, tortured and killed" the Prime Minister. Contrary to Nzuwonemeye's assertions, it was thus clear from the Indictment that this particular crime allegedly formed part of a widespread or systematic attack against a civilian population and specified conduct reflecting the Reconnaissance Battalion's involvement.[414]

155. With respect to Nzuwonemeye's claim that the Indictment fails to properly plead the identity of the victims killed alongside the Prime Minister, the Appeals Chamber notes that the Indictment alleges that the Prime Minister as well as three members of her entourage, including her husband were killed.[415] The Trial Chamber addressed Nzuwonemeye's challenge pertaining to the pleading of the identity of the victims.[416] Moreover, several Prosecution witnesses gave evidence at trial about the killing of other persons at the Prime Minister's residence.[417] However, the Trial Judgement does not contain any factual or legal findings as to whether the killing of these individuals had been proved beyond reasonable doubt or on Nzuwonemeye's criminal responsibility in this regard. Rather, throughout the Trial Judgement, the Trial Chamber consistently referred only to Nzuwonemeye's liability for the killing of the Prime Minister.[418] Consequently, Nzuwonemeye

[412] Prosecution Response Brief (Nzuwonemeye), paras. 17, 20-24, 28; AT. 8 May 2013 p. 55.
[413] Prosecution Response Brief (Nzuwonemeye), paras. 18, 27, 53-55.
[414] For these reasons, the Appeals Chamber declines to address Nzuwonemeye's submissions on alleged errors in the Trial Chamber's findings on the pleading of the nexus element for crimes against humanity in paragraph 140 of the Trial Judgement. *See* Nzuwonemeye Notice of Appeal, paras. 16, 38-42; Nzuwonemeye Appeal Brief, paras. 23, 102, 103; AT. 8 May 2013 p. 31. Moreover, similar claims in relation to the pleading of the killing of the Belgian peacekeepers and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II are also dismissed. *See* Nzuwonemeye Appeal Brief, paras. 45, 102-112.
[415] Indictment, para. 103.
[416] Trial Judgement, para. 141.
[417] *See* Trial Judgement, paras. 1627, 1635, 1640, 1653, 1657.
[418] Trial Judgement, paras. 46, 47, 64, 1713, 1714, 2093-2095, 2136, 2137, 2141, 2146, 2154.

was not convicted for the death of members of the Prime Minister's entourage. As a result, Nzuwonemeye's complaint is dismissed.[419]

156. As to Nzuwonemeye's submission that the Indictment fails to plead his intent to kill the Prime Minister, the Appeals Chamber recalls that he was convicted for ordering and aiding and abetting. The Appeals Chamber discusses below whether the Indictment sufficiently pleads conduct supporting the elements necessary to establish these modes of liability.[420]

157. Accordingly, Nzuwonemeye has failed to show that the Indictment was defective in its pleading of the Prime Minister's killing as murder as a crime against humanity.

(b) Murder as a Serious Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II

158. Sagahutu submits that the Trial Chamber erred in convicting him for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killing of the Prime Minister because the Indictment does not contain any reference to this crime under Count 7.[421]

159. The Prosecution responds that all the elements of the crime of murder of the Prime Minister as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II are pleaded in the Indictment.[422]

160. The Appeals Chamber finds no merit in Sagahutu's argument. Specifically, paragraph 118 of the Indictment - the *chapeau* paragraph for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II - refers to paragraphs 103 to 107 of the Indictment. Notably, paragraphs 103 to 107 of the Indictment contain specific allegations regarding the killing of the Prime Minister.

161. Accordingly, the Appeals Chamber finds that Sagahutu has failed to demonstrate that the killing of the Prime Minister was not pleaded in the Indictment in support of the charge of murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.

[419] *Cf. Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11.
[420] *See infra* paras. 173-180, 185-190.
[421] Sagahutu Appeal Brief, paras. 69, 103. *See also* Sagahutu Appeal Brief, paras. 106, 108, 123, 253, 258.
[422] Prosecution Response Brief (Sagahutu), para. 27.

(c) Conspiracy to Commit Genocide

162. Nzuwonemeye submits that the Trial Chamber erred by relying on allegations pleaded in Indictment paragraphs 34, 38, 40, and 48, which support the charge of conspiracy to commit genocide (Count 1), when convicting him for the killing of the Prime Minister as murder as a crime against humanity (Count 4) and for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7).[423]

163. The Prosecution responds that Nzuwonemeye's submissions neither demonstrate a defect in the Indictment nor any error on the part of the Trial Chamber.[424]

164. The Appeals Chamber finds no merit in Nzuwonemeye's submission. Nzuwonemeye was acquitted under Count 1 of the Indictment,[425] and the Trial Chamber expressly concluded that his involvement in the killing of the Prime Minister did not demonstrate his participation in a conspiracy to commit genocide.[426] Furthermore, the Trial Chamber's factual findings underpinning his convictions for the killing of the Prime Minister as murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II were not made pursuant to paragraphs 34, 38, 40, and 48 of the Indictment.[427]

165. Accordingly, Nzuwonemeye has not identified any error in this respect and his submission is dismissed.[428]

(d) Ordering and Aiding and Abetting

166. The *chapeau* paragraphs 78 and 118 of the Indictment charge Nzuwonemeye and Sagahutu for the murder of the Prime Minister (Counts 4 and 7, respectively) pursuant, *inter alia*, to Article 6(1) of the Statute.[429] In their relevant parts, they allege that, by virtue of their acts, Nzuwonemeye and Sagahutu "ordered […] or otherwise aided and abetted […] the crimes referred to in paragraphs […] 103 [and/to] 107 […]".

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[423] *See* Nzuwonemeye Notice of Appeal, paras. 7-12, 35, 36; Nzuwonemeye Appeal Brief, paras. 13-17, 39, 40, 80, 81. *See also* Nzuwonemeye Notice of Appeal, para. 121; Nzuwonemeye Appeal Brief, paras. 178, 507.
[424] Prosecution Response Brief (Nzuwonemeye), paras. 39-48.
[425] Trial Judgement, paras. 2070, 2163. *See also* Trial Judgement, paras. 74, 75.
[426] *See* Trial Judgement, paras. 513-518, 2063, 2064.
[427] *See* Trial Judgement, paras. 1623 (*referring to* Indictment, paras. 78, 103), 1903 (*referring to* Indictment, paras 103-108).
[428] In light of this conclusion, the Appeals Chamber dismisses Nzuwonemeye's additional contentions that the Trial Chamber erroneously dismissed deficient pleadings in paragraphs 34, 38, 40, and 48 of the Indictment. *See* Nzuwonemeye Notice of Appeal, paras. 7, 11, 35, 36; Nzuwonemeye Appeal Brief, paras. 15, 39, 80.
[429] Although paragraph 78 of the Indictment (Count 4) does not explicitly allege the killing of the Prime Minister, it specifically refers to paragraphs 103 and 107, which plead the killing of the Prime Minister. The same reasoning applies to paragraph 118 of the Indictment (Count 7).

167. The Trial Chamber held Nzuwonemeye responsible for ordering and aiding and abetting the killing of the Prime Minister on the basis that he ordered the deployment of soldiers of the Reconnaissance Battalion to the Prime Minister's residence in the morning of 7 April 1994, remained in contact with his subordinates at this location, sent supplies, and issued operational instructions.[430] In rejecting Nzuwonemeye's argument that the Indictment was defective in charging him pursuant to Article 6(1) and Article 6(3) of the Statute for the killing of the Prime Minister, the Trial Chamber ruled that "[p]aragraph 78 of the Indictment specifies which crimes are attributed to each mode of liability, including allegations in reference to Article 6(1), and this information is reiterated in the Pre-Trial Brief in paragraphs 114 to 116".[431]

168. In addition, the Trial Chamber found that, on the morning of 7 April 1994, Sagahutu carried out the order given by Nzuwonemeye to deploy Reconnaissance Battalion armoured vehicles and troops in order to reinforce the Presidential Guard soldiers present at the Prime Minister's residence.[432] The Trial Chamber also found that Sagahutu remained in contact with his subordinates, in particular Warrant Officer Bizimungu who led the armoured vehicles unit deployed at the Prime Minister's residence, and that Sagahutu sent supplies and issued operational instructions.[433] Accordingly, the Trial Chamber concluded that Sagahutu ordered and aided and abetted the direct perpetrators involved in the killing of the Prime Minister.[434]

169. Nzuwonemeye and Sagahutu both submit that the Trial Chamber erred in holding them responsible for ordering and aiding and abetting the killing of the Prime Minister because the material facts underpinning their convictions are not properly pleaded in the Indictment.[435] They further contend that the Trial Chamber erroneously considered that any defect in the Indictment was subsequently cured.[436] Nzuwonemeye additionally asserts that the Trial Chamber failed to properly address his challenges on the matter in the Trial Judgement.[437]

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[430] *See* Trial Judgement, para. 2093. *See also* Trial Judgement, paras. 47, 1719, 1740, 1743-1745, 2107, 2163.
[431] Trial Judgement, para. 142.
[432] Trial Judgement, paras. 1719, 1744, 2093. *See also* Trial Judgement, para. 2253.
[433] Trial Judgement, paras. 1743, 1744, 2093. *See also* Trial Judgement, paras. 47, 1740, 2253. The Trial Chamber noted that paragraphs 106 and 107 of the Indictment refer to "Sergeant Major Bizimungu", however, it indicated that throughout the trial all the parties were in agreement that this individual was the same as "Warrant Officer Bizimungu" to which several Prosecution and Defence witnesses referred. *See* Trial Judgement, fn. 2918.
[434] Trial Judgement, paras. 2029, 2033, 2093. *See also* Trial Judgement, paras. 65, 1719, 1740, 1743-1745, 1903, 2108, 2146, 2254.
[435] *See* Nzuwonemeye Notice of Appeal, paras. 9, 18, 19, 30, 32, 33, 84; Nzuwonemeye Appeal Brief, paras. 27, 32, 33, 52, 57, 58, 73-79; Sagahutu Notice of Appeal, paras. 12, 13; Sagahutu Appeal Brief, paras. 67, 103, 106, 108. *See also* Nzuwonemeye Notice of Appeal, paras. 118, 182; Nzuwonemeye Appeal Brief, paras. 167, 168, 177, 214, 232, 248; Sagahutu Reply Brief, paras. 1, 3, 4; AT. 8 May 2013 pp. 30, 37, 84; AT. 9 May 2013 p. 24.
[436] *See* Nzuwonemeye Notice of Appeal, para. 21; Nzuwonemeye Appeal Brief, paras. 25, 32, 36-38; Sagahutu Notice of Appeal, paras. 12, 16; Sagahutu Appeal Brief, para. 8; AT. 8 May 2013 p. 37.
[437] Nzuwonemeye Notice of Appeal, paras. 20, 25; Nzuwonemeye Appeal Brief, paras. 24, 38.

170. The Prosecution responds that the Indictment sufficiently specifies the basis of Nzuwonemeye's and Sagahutu's responsibility and that further clarification was provided in the Prosecution Pre-Trial Brief.[438]

171. The Appeals Chamber considers in turn Nzuwonemeye's and Sagahutu's challenges regarding the pleading of the material facts for ordering and aiding and abetting the crimes. Before doing so, the Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[439] Whether a fact is "material" depends on the nature of the Prosecution's case.[440] The practice of the Tribunal also requires the Prosecution to plead the specific forms of individual criminal responsibility for which the accused is being charged.[441]

172. Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the planning, preparation, or execution of the alleged crimes, the Prosecution is required to identify the particular acts or the particular course of conduct on the part of the accused which forms the basis for the charges in question.[442] Moreover, the Prosecution is expected to know its case before it goes to trial and cannot omit material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[443] Accordingly, the Prosecution has repeatedly been discouraged from simply restating the language of Article 6(1) of the Statute.[444] An indictment which fails to set forth material facts in sufficient detail is defective.[445] However, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[446]

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[438] Prosecution Response Brief (Nzuwonemeye), paras. 51, 64-66; Prosecution Response Brief (Sagahutu), paras. 3, 23-25, 29, 31. *See also* AT. 8 May 2013 pp. 55-58; AT. 9 May 2013 pp. 27, 28.
[439] *See*, *e.g.*, *Kanyarukiga* Appeal Judgement, para. 73; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 188.
[440] *Renzaho* Appeal Judgement, para. 53; *Nahimana et al.* Appeal Judgement, para. 322; *Ndindabahizi* Appeal Judgement, para. 16.
[441] *See*, *e.g.*, *Ntawukulilyayo* Appeal Judgement, para. 188; *Rukundo* Appeal Judgement, para. 30; *Simić* Appeal Judgement, para. 21.
[442] *See*, *e.g.*, *Ntawukulilyayo* Appeal Judgement, para. 188; *Renzaho* Appeal Judgement, para. 53; *Ntagerura et al.* Appeal Judgement, para. 25.
[443] *Ntawukulilyayo* Appeal Judgement, para. 202; *Kupreškić et al.* Appeal Judgement, para. 92. *See also Muvunyi I* Appeal Judgement, para. 18; *Ntagerura et al.* Appeal Judgement, para. 27.
[444] *See Ntawukulilyayo* Appeal Judgement, fn. 467; *Rukundo* Appeal Judgement, para. 30; *Semanza* Appeal Judgement, para. 357; *Ntakirutimana* Appeal Judgement, para. 473.
[445] *Kanyarukiga* Appeal Judgement, para. 73; *Ntawukulilyayo* Appeal Judgement, para. 189; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 5.
[446] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Munyakazi* Appeal Judgement, para. 36; *Kalimanzira* Appeal Judgement, para. 46.

(i) Ordering (Nzuwonemeye)

173. Paragraph 78 of the Indictment which, as indicated above, serves as an introduction to the charge of murder as a crime against humanity (Count 4), alleges that all accused in the present case were responsible for killings of Rwandan nationals under Article 6(1) of the Statute because, "by their individual acts, the Accused planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the crimes" in question. These crimes are then identified by reference to other provisions, including paragraphs 103 and 107 of the Indictment, which set out the allegations against Nzuwonemeye and Sagahutu in relation to the killing of the Prime Minister. Similarly, paragraph 118 of the Indictment, which charges Nzuwonemeye and his co-accused with murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, states that "by virtue of their acts, the Accused planned, incited to commit, ordered, or otherwise aided and abetted the planning or execution of the crimes referred to in paragraphs […] 103 to 107".

174. The Appeals Chamber observes that the *chapeau* paragraphs for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, paragraphs 78 and 118 of the Indictment, simply repeat the language of Article 6(1) of the Statute by stating that all accused were responsible for planning, instigating, committing, ordering, or aiding and abetting the crimes charged. Similarly, paragraphs 103, 106, and 107 of the Indictment, which set out the specific allegations in relation to the killing of the Prime Minister, do not identify any conduct on Nzuwonemeye's part or his *mens rea*. These provisions merely allege that soldiers under his command led by Sagahutu carried out the crime. In particular, no mention is made of any of the material facts upon which the Trial Chamber held Nzuwonemeye responsible for ordering the killing of the Prime Minister. Specifically, the Indictment fails to identify that he ordered the deployment of Reconnaissance Battalion soldiers to the Prime Minister's residence in the morning of 7 April 1994, remained in contact with his subordinates at this location, sent supplies, and issued operational instructions.[447]

175. Accordingly, the Appeals Chamber considers that the Indictment does not clearly indicate the conduct upon which the Trial Chamber held Nzuwonemeye responsible for having ordered and aided and abetted the killing of the Prime Minister. The Indictment is therefore vague and defective.[448]

[447] *See* Trial Judgement, para. 2093. *See also* Trial Judgement, para. 1744.
[448] In this context, the Appeals Chamber recalls that where an accused is alleged to have given orders for the killing of specific individuals, the obligation to provide precision as to the circumstances thereof is at its highest. *See Bagosora and Nsengiyumva* Appeal Judgement, para. 132.

176. The Appeals Chamber recalls that defects in an indictment may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[449] It is well established that, if an appellant raises a defect in the indictment for the first time on appeal, he bears the burden of showing that his ability to prepare his defence was materially impaired.[450] Where an accused had already raised the issue of lack of notice before the trial chamber, the burden rests on the Prosecution to demonstrate on appeal that the accused's ability to prepare a defence was not materially impaired.[451]

177. As early as 2001, Nzuwonemeye objected to the pleading of his conduct and responsibility,[452] but his submissions were rejected by the Trial Chamber.[453] He repeated his objections in 2007[454] and in 2008,[455] which were also dismissed by the Trial Chamber.[456] Finally, Nzuwonemeye reiterated his complaints in his Closing Brief, noting that the Indictment "simply tracks the language" of Article 6(1) of the Statute without providing the necessary material facts.[457]

178. As a result, the Appeals Chamber finds that Nzuwonemeye made a timely challenge concerning notice of his liability under Article 6(1) of the Statute. Accordingly, the Prosecution has to show that Nzuwonemeye's ability to prepare his defence was not materially impaired by the insufficient pleading of his responsibility for ordering.

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[449] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189.
[450] *Ntagerura et al.* Appeal Judgement, paras. 31, 138; *Kvočka et al.* Appeal Judgement, para. 35; *Niyitegeka* Appeal Judgement, para. 200.
[451] *Muvunyi I* Appeal Judgement, para. 41; *Ntagerura et al.* Appeal Judgement, paras. 31, 138; *Kvočka et al.* Appeal Judgement, para. 35.
[452] *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Preliminary Motions, filed in French on 23 April 2001 and in English on 19 December 2001 ("Nzuwonemeye Motion of 19 December 2001"), paras. 10, 18, 20.
[453] The Trial Chamber accepted the motion as filed in a timely manner and concluded that the charges against Nzuwonemeye were "sufficiently detailed as presented or that the factual details can be inferred from the general context, given that the Indictment must be read in its entirety". *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Preliminary Motions, 12 December 2002, paras. 18, 25.
[454] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Nzuwonemeye Defence Motion on Defects in the Form of the Indictment in Light of the Chamber's Decisions in Respect to the Defence 98*bis* Motions and Pursuant to Rule 72(F), 18 October 2007 ("Nzuwonemeye Motion of 18 October 2007"), para. 111 (objecting that paragraphs 103 to 107 of the Indictment "do not include any allegations to support the form of participation alleged.").
[455] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Nzuwonemeye Defence Motion to Exclude Evidence of Acts not Charged, Pursuant to Article 20, ICTR Statute, 3 March 2008 ("Nzuwonemeye Motion of 3 March 2008"), paras. 4, 49-53, p. 11.
[456] The Trial Chamber rejected the Nzuwonemeye Motion of 18 October 2007 on the basis that it had been filed outside the time limits stipulated in Rule 72(A) of the Rules. It held, however, that this did not preclude Nzuwonemeye from raising defects in the Indictment in his Closing Brief. Trial Decision Indictment and Disclosure of 29 February 2008, paras. 7, 10. Moreover, the Trial Chamber did not reject the Nzuwonemeye Motion of 3 March 2008 as untimely, but instead held that Nzuwonemeye's responsibility for the killing of the Prime Minister was adequately pleaded in the Indictment. *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motion to Exclude Acts not Pleaded in the Indictment, 4 July 2008, para. 31.
[457] Nzuwonemeye Closing Brief, paras. 166, 167, 188, 189.

179. In line with the reasoning in the Trial Judgement,[458] the Prosecution points to paragraph 114 of the Prosecution Pre-Trial Brief to support its claim that any defect in the Indictment regarding Nzuwonemeye's liability pursuant to Article 6(1) of the Statute was subsequently cured.[459] This provision states that Nzuwonemeye was responsible under the charge of murder as a crime against humanity for the killing of the Prime Minister "by soldiers of the Reconnaissance Battalion and the Presidential Guard *acting on his instructions*".[460]

180. In addition, the Appeals Chamber observes that the summary of Prosecution Witness ALN's anticipated testimony annexed to the Prosecution Pre-Trial Brief indicates that this witness would give evidence that Nzuwonemeye ordered Sagahutu on the morning of 7 April 1994 to reinforce the Presidential Guards at the Prime Minister's residence and to search for and kill the Prime Minister, and that Nzuwonemeye maintained constant contact with his soldiers at this location.[461] The Appeals Chamber considers that this information, when read in conjunction with paragraphs 78, 103, and 118 of the Indictment, informed Nzuwonemeye with sufficient precision of the material facts supporting ordering liability with respect to the Prime Minister's killing.[462] Accordingly, the Appeals Chamber finds that the defect in the Indictment was cured by timely, clear, and consistent information. Nzuwonemeye's claim that he lacked notice that he could be held responsible for ordering the Prime Minister's killing is therefore dismissed.

(ii) Ordering (Sagahutu)

181. With respect to the killing of the Prime Minister, the Appeals Chamber considers that from the Indictment alone Sagahutu was informed of the material facts for ordering this crime. Paragraphs 103 and 107 of the Indictment plead acts that could be characterized as issuing orders. Paragraph 103 alleges that Sagahutu "led" elements of the Reconnaissance Battalion, who, in conjunction with others, "killed [the] Prime Minister". Paragraph 107 pleads that Sagahutu questioned his subordinate Warrant Officer Bizimungu as to why he would want to bring the Prime

[458] Trial Judgement, para. 142.
[459] Prosecution Response Brief (Nzuwonemeye), para. 51; AT. 8 May 2013 p. 57.
[460] Prosecution Pre-Trial Brief, para. 114 (emphasis added). *See also* Prosecution Pre-Trial Brief, para. 119.
[461] Prosecution Pre-Trial Brief, Annexure IV, pp. 97, 124.
[462] The Appeals Chamber notes that the Prosecution Pre-Trial Brief is based on the amended indictment of 29 March 2004 ("Indictment of 29 March 2004") rather than the subsequent Indictment, filed on 23 August 2004. *See* Prosecution Pre-Trial Brief, para. 1. As the relevant paragraphs in the Indictment of 29 March 2004 pertaining to Nzuwonemeye are identical to those in the Indictment, the Appeals Chamber considers that the Indictment can be read in conjunction with the Prosecution Pre-Trial Brief. *See, e.g. Renzaho* Appeal Judgement, paras. 121, 122. The only difference between the Indictment of 29 March 2004 and the Indictment is that the charges regarding the accused Protais Mpiranya in the Indictment of 29 March 2004 were removed from the Indictment on 20 August 2004 when the Trial Chamber ordered the severance of the case of accused Protais Mpiranya from the impending trial of the other four co-accused. Paragraphs 7 to 9, 78 to 80 and 105 to 113 of the Indictment of 29 March 2004 which concerned only Protais Mpiranya were deleted and no longer appear in the Indictment. *See* Decision on Severance, paras. 17-20, p. 6. The Prosecution was not ordered to file a new pre-trial brief. *See generally* Decision on Severance.

Minister to Camp Kigali, and that the Prime Minister was killed thereafter.[463] Moreover, paragraph 106 of the Indictment states that at all times during that morning, Sagahutu remained in radio contact with Warrant Officer Bizimungu.[464] The Appeals Chamber considers therefore that paragraph 78 of the Indictment read together with paragraphs 103, 106, and 107 of the Indictment sufficiently plead Sagahutu's conduct for ordering the killing of the Prime Minister.

182. Moreover, the Appeals Chamber considers that the information in the Indictment was supplemented by timely, clear, and consistent information contained in the Prosecution Pre-Trial Brief.[465] Specifically, the allegation was reinforced in paragraph 130 of the Prosecution Pre-Trial Brief, which states that the killing of the Prime Minister was carried out "by soldiers of the Reconnaissance Battalion and Presidential Guard, *acting on* [*Sagahutu's*] *instructions*".[466] In addition, the summaries of Prosecution Witnesses DAK's and HP's anticipated testimony appended to the Prosecution Pre-Trial Brief indicated that these witnesses would give evidence that Sagahutu ordered the killing of the Prime Minister.[467] Accordingly, Sagahutu's contention that he lacked notice of his responsibility for ordering is dismissed.

183. Finally, the Appeals Chamber dismisses Sagahutu's argument that the Trial Chamber erred in finding that Prosecution witness statements annexed to the Prosecution Pre-Trial Brief provided him with notice of orders he issued on his own initiative or from Nzuwonemeye.[468] Sagahutu's criminal liability is based on orders he issued for the killing of the Prime Minister, irrespective of who initiated the orders. Also, the Trial Chamber's findings referred to by Sagahutu were made in the context of the challenges made at trial to the pleading of Sagahutu's participation in a conspiracy to commit genocide and, as such, are irrelevant to the pleading of him having ordered other crimes to be committed.[469]

184. Accordingly, the Appeals Chamber finds that Sagahutu was sufficiently informed of his course of conduct pertaining to the allegation of ordering the killing of the Prime Minister.

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[463] *See* Indictment, para. 107.
[464] *See* Indictment, para. 106.
[465] The Appeals Chamber notes that the Prosecution Pre-Trial Brief is based on the Indictment of 29 March 2004 rather than the operative Indictment, which was filed on 23 August 2004. *See* Prosecution Pre-Trial Brief, para. 1. Like Nzuwonemeye, the relevant paragraphs in the Indictment of 29 March 2004 pertaining to Sagahutu are identical to those in the Indictment. For the reasons expressed above, the Appeals Chamber considers that the Indictment can be read in conjunction with the Prosecution Pre-Trial Brief. *See supra* fn. 462.
[466] Prosecution Pre-Trial Brief, para. 130 (emphasis added). *See also* Prosecution Pre-Trial Brief, para. 135.
[467] *See* Prosecution Pre-Trial Brief, Annexure IV, pp. 103, 120.
[468] *See* Sagahutu Notice of Appeal, para. 12, *referring to* Trial Judgement, para. 147.
[469] The Appeals Chamber observes that the Trial Chamber made findings regarding Count 4 in the context of its analysis of Sagahutu's challenge of the charge of conspiracy to commit genocide under Count 1 (*see* Trial Judgement, paras. 143-147). In that regard, the Trial Chamber considered that the allegations listed under Count 1 were also listed under Count 4, and in particular found that paragraphs 104 and 107 of the Indictment were not defective (Trial Judgement, para. 144).

(iii) Aiding and Abetting (Nzuwonemeye)

185. The Trial Chamber found that Nzuwonemeye aided and abetted the killing of the Prime Minister by ordering the deployment of soldiers of the Reconnaissance Battalion to the Prime Minister's residence in the morning of 7 April 1994, remaining in contact with soldiers at this location, sending supplies, and issuing operational instructions to them.[470] Accordingly, the Appeals Chamber finds that the aforementioned acts amounted to material facts underpinning Nzuwonemeye's responsibility for aiding and abetting which should have been pleaded in the Indictment.

186. However, none of these facts is mentioned in the Indictment. As indicated above, the *chapeau* paragraphs for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II charge Nzuwonemeye with all forms of liability pursuant to Article 6(1) of the Statute and merely repeat the statutory language.[471] Paragraphs 103, 106, and 107 of the Indictment, which relate specifically to Nzuwonemeye's and Sagahutu's responsibility for the killing of the Prime Minister, do not identify any particular conduct on Nzuwonemeye's part or the *mens rea* necessary to establish the elements for aiding and abetting. Nzuwonemeye could therefore not have known from the Indictment that, and on which basis, the Prosecution sought to hold him responsible for aiding and abetting the killing of the Prime Minister. The Indictment was thus defective.

187. Furthermore, the defect was not subsequently cured by timely, clear, and consistent information. Paragraph 114 of the Prosecution Pre-Trial Brief states that the perpetrators of the Prime Minister's killing acted on Nzuwonemeye's instructions. This allegation neither informed Nzuwonemeye by which conduct he aided and abetted the crime nor that the Prosecution did in fact intend to hold him responsible under this mode of liability. While the summaries for Witnesses ALN and DA appended to the Prosecution Pre-Trial Brief indicated that Nzuwonemeye ordered Sagahutu to reinforce the Presidential Guards at the Prime Minister's residence and maintained radio contact with his subordinates at this location,[472] this information did not provide Nzuwonemeye with adequate notice that the Prosecution was pursuing a case of aiding and abetting against him. In this context, the Appeals Chamber further recalls that, in its opening statement, the

[470] *See* Trial Judgement, paras. 1744, 2093.
[471] *See* Indictment, paras. 78, 118.
[472] Prosecution Pre-Trial Brief, Annexure IV, pp. 97, 124.

Prosecution maintained that Nzuwonemeye incurred criminal liability for the crimes charged in the Indictment for other reasons.[473]

188. In addition, the Appeals Chamber observes that not even in its Closing Brief did the Prosecution submit that any evidence adduced at trial demonstrated that Nzuwonemeye assisted the killing of the Prime Minister.[474] The Prosecution Closing Brief merely set out the legal definition of aiding and abetting[475] but, on the facts, exclusively argued for Nzuwonemeye's superior responsibility pursuant to Article 6(3) of the Statute.[476] In its closing submissions, the Prosecution mentioned only in passing that Nzuwonemeye ordered his soldiers "to dispatch armoured vehicles to the vicinity of the residence of the [P]rime [M]inister to lend assistance to […] the Presidential Guard, to hunt down and assassinate the [P]rime [M]inister".[477] However, it did not ask the Trial Chamber to enter a conviction for aiding and abetting. Finally, it is noteworthy that the Prosecution does not appear to have argued at any point during trial that Nzuwonemeye incurred criminal responsibility – as an aider and abettor or otherwise – because he sent supplies to the Reconnaissance Battalion deployed to the vicinity of the Prime Minister's residence and issued operational instructions.[478]

189. Thus, up until the end of the proceedings, the Prosecution did not unequivocally indicate that its theory of the case against Nzuwonemeye was that he aided and abetted the killing of the Prime Minister. It therefore comes as no surprise that Nzuwonemeye made no attempt at trial to refute such an allegation.

190. In light of the above, the Appeals Chamber finds that the Trial Chamber erred in convicting Nzuwonemeye for aiding and abetting the Prime Minister's killing because he lacked proper notice of this form of responsibility. Accordingly, the Appeals Chamber grants Nzuwonemeye's First Ground of Appeal, in part, and reverses his conviction for aiding and abetting murder as a crime

[473] Prosecution Opening Statement, T. 20 September 2004 pp. 58, 59. The Appeals Chamber notes that, at the end of its opening statement, the Prosecution further submitted that Nzuwonemeye and his co-accused "by their words and actions" encouraged their subordinates to participate in the atrocities charged. Prosecution Opening Statement, T. 20 September 2004 p. 63. However, the Appeals Chamber considers that this allegation was not specific enough to put Nzuwonemeye on notice that he was alleged to have aided and abetted the Prime Minister's killing.
[474] Prosecution Closing Brief, paras. 574-587, 968-1067, 1235-1260.
[475] Prosecution Closing Brief, para. 1448.
[476] Prosecution Closing Brief, paras. 1623-1634.
[477] Prosecution Closing Arguments, T. 24 June 2009 p. 43.
[478] It appears that the Trial Chamber's finding that supplies in the form of ammunition, a radio set, and food were sent to the Reconnaissance Battalion deployed to the Prime Minister's residence was based on the testimonies of Witnesses DA and HP. *See* Trial Judgement, paras. 1628, 1635, 1636. *See also* Prosecution Closing Brief, para. 974; Prosecution Closing Arguments, T. 24 June 2009 p. 44. However, Witnesses DA and HP only implicated Sagahutu in issuing orders regarding the provision of supplies. *See* Witness DA, T. 11 January 2005 pp. 56-58; Witness HP, T. 9 May 2005 pp. 21, 22, 24.

against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.

(iv) Aiding and Abetting (Sagahutu)

191. With regard to the material facts for aiding and abetting the killing of the Prime Minister, the Appeals Chamber recalls that the Trial Chamber found that upon Nzuwonemeye's order Sagahutu sent an armoured unit from the Reconnaissance Battalion to the Prime Minister's residence to reinforce the Presidential Guards present at that location.[479] It held that "[t]hroughout the attack, Nzuwonemeye and Sagahutu remained in contact with the troops on the ground, sending them supplies and issuing operational instructions".[480] Although the Trial Chamber did not make an explicit finding on the conduct satisfying the elements of aiding and abetting, it is clear that it considered that Sagahutu aided and abetted the killing of the Prime Minister by sending an armoured unit from the Reconnaissance Battalion and supplies to his subordinates on the ground, as well as issuing operational instructions.[481] Thus, Sagahutu's acts of sending an armoured unit and supplies and issuing operational instructions were material facts that had to be pleaded in the Indictment. Therefore, the question before the Appeals Chamber is whether the material facts in support of the charge of aiding and abetting the murder of the Prime Minister were properly pleaded in the Indictment.

192. While the Trial Chamber did not explicitly elaborate on the content of Sagahutu's operational instructions in its findings relating to Sagahutu's responsibility under Article 6(1) of the Statute, the Appeals Chamber observes that the Trial Chamber provided further details in that respect in its legal findings on Sagahutu's superior responsibility under Article 6(3) of the Statute. It relied on evidence that Sagahutu gave two operational instructions to Warrant Officer Bizimungu concerning: whether Belgian soldiers should have access to the Prime Minister's residence; and following the Prime Minister's arrest, whether she should be taken to Camp Kigali.[482] With regard to the first instruction, the Trial Chamber also recalled in its sentencing section that "Sagahutu instructed [Warrant Officer] Bizimungu that the Belgians should be allowed to enter the Prime Minister's residence but that they should not leave the residence with anything, and that [Reconnaissance] Battalion soldiers should shoot back at the Belgians if attacked".[483]

[479] Trial Judgement, paras. 1719, 1744, 2093. *See also* Trial Judgement, para. 2253.
[480] Trial Judgement, para. 2093. *See also* Trial Judgement, paras. 47, 1744.
[481] *See* Trial Judgement, para. 2093.
[482] Trial Judgement, para. 2029.
[483] Trial Judgement, para. 2253.

193. The Appeals Chamber notes that the Trial Chamber's finding concerning the second operational instruction about the Prime Minister being taken to Camp Kigali is consistent with an allegation pleaded in the Indictment.[484] With regard to the Trial Chamber's conclusion that Sagahutu issued an instruction relating to the Belgian peacekeepers' access to the Prime Minister's residence, the Appeals Chamber considers that this instruction is not clearly alleged in the Indictment.[485] The Appeals Chamber further notes that the Indictment does not contain any information with respect to Sagahutu's acts of sending an armoured unit to the Prime Minister's residence and providing supplies to Reconnaissance Battalion soldiers deployed there.[486] Accordingly, the Appeals Chamber considers that the Indictment is defective in failing to plead these material facts that formed part of the basis for the charge of aiding and abetting the crimes.

194. The Appeals Chamber further observes that paragraph 130 of the Prosecution Pre-Trial Brief and the appended summaries for Witnesses DAK and HP fail to provide notice of the material facts relied on by the Trial Chamber in finding Sagahutu liable for aiding and abetting the killing of the Prime Minister.[487] Similarly, in its opening statement, the Prosecution did not mention any specific conduct of Sagahutu by which he aided and abetted the killing of the Prime Minister.[488] The Appeals Chamber therefore finds that the defect in the Indictment was not subsequently cured.

195. The Appeals Chamber recalls that where the Indictment is found to be defective, an appellant who raises a defect in the indictment for the first time on appeal bears the burden of showing that his ability to prepare his defence was materially impaired.[489] Where, however, an accused had already raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to demonstrate on appeal that the accused's ability to prepare a defence was not materially impaired.[490]

196. With regard to the Trial Chamber's finding that Sagahutu issued an operational instruction in relation to the Belgian peacekeepers' access to the Prime Minister's residence and sent an armoured unit and supplies to his subordinates on the ground, the Trial Chamber relied on the

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[484] *See* Indictment, para. 107 ("Later that same day when Sergeant Major Bizimungu asked Innocent Sagahutu if Prime Minister Agathe Uwilingiyimana should be taken to Kigali Camp he answered scathingly '*pour quoi faire?*' [what for?]. Thereupon Prime Minister Agathe Uwilingiyimana was killed".).
[485] The Indictment pleads a request by the non-commissioned officer to Sagahutu regarding how to proceed if the Belgian peacekeepers were to resist the arrest of the Prime Minister, and Sagahutu's order to use his armoured vehicles if that were to be the case. *See* Indictment, para. 107.
[486] *See* Indictment, paras. 78, 103-108, 118.
[487] Prosecution Pre-Trial Brief, para. 130, Annexure IV, pp. 103, 120.
[488] Prosecution Opening Statement, T. 20 September 2004 pp. 59, 60.
[489] *Ntagerura et al.* Appeal Judgement, paras. 31, 138; *Kvočka et al.* Appeal Judgement, para. 35; *Niyitegeka* Appeal Judgement, para. 200.
[490] *Muvunyi I* Appeal Judgement, para. 41; *Ntagerura et al.* Appeal Judgement, paras. 31, 138; *Kvočka et al.* Appeal Judgement, para. 35; *Niyitegeka* Appeal Judgement, para. 200.

evidence of Prosecution Witnesses AWC, ALN, DA, and HP.[491] The Appeals Chamber notes that, in his closing arguments, Sagahutu made a general objection in relation to the pleading in the Indictment of the charge regarding the killing of the Prime Minister.[492] Nonetheless, Sagahutu did not take specific issue with the introduction of particular material facts during the testimony of Witnesses AWC, ALN, DA, and HP.[493] Therefore, the Appeals Chamber considers that Sagahutu did not make a specific and timely objection at trial to the lack of pleading in the Indictment of these material facts. In such circumstances, it falls on Sagahutu to demonstrate that the preparation of his defence was materially impaired by these omissions in the Indictment.[494]

197. Sagahutu has failed to make such a demonstration. Sagahutu does not present any argument in his Appeal Brief regarding the prejudicial effect of the leading of evidence regarding these material facts on the preparation of his defence.[495] In fact, Sagahutu cross-examined the witnesses on the allegation of sending an armoured unit and the supplies and to some extent on the operational instruction relating to the Belgian peacekeepers' access to the Prime Minister's residence without

[491] *See* Trial Judgement, paras. 1715-1720, 1740, 1744. *See also* Trial Judgement, paras. 1625-1628, 1632-1635, 1638, 1642, 1643.

[492] Sagahutu Closing Arguments, T. 25 June 2009 p. 83 ("Concerning the murder of [the] Prime Minister […] [i]n the *Ntagerura* [*et al.*] case, it was held that the Accused was charged [with] having planned, incited, committed, ordered or aided and abetted, and executed the alleged crimes. The Prosecutor should spell out the actions and the line of conduct of the Accused which give rise to the charges that are brought against him. This was not proven by the Prosecutor insofar as Captain Innocent Sagahutu is concerned".). In his Closing Brief, Sagahutu generally objected to the Prosecution's failure to plead in the Indictment his "role" in the killing of the Prime Minister. *See* Sagahutu Closing Brief, para. 55 ("[*a*]*ux paragraphes 78, 103 à 107, le Procureur ne montre pas le rôle que le Capitaine Sagahutu aurait joué en tant que commandant de l'Escadron A ou comme supérieur hiérarchique*".).

[493] On the issue of the armoured unit: Witness ALN, T. 29 September 2004 pp. 45, 47; Witness DA, T. 11 January 2005 pp. 40-44, 53; Witness AWC, T. 18 January 2006 pp. 29-31. On the issue of supplies: Witness DA, T. 11 January 2005 pp. 56-58, 65, 71; T. 12 January 2005 p. 7; T. 13 January 2005 p. 10; Witness HP, T. 9 May 2005 pp. 21, 22, 24. Sagahutu did not challenge the pleading of these material facts in the Indictment at trial. *See* Sagahutu Closing Brief, paras. 54-57, 71-74, 76-79, 225-230, 234, 236, 240, 509, 516, 663. The Appeals Chamber notes further that Sagahutu challenged the credibility of the testimonies of Witnesses DA, HP, and AWC relating to the allegation of sending supplies and an armoured unit. *See* Sagahutu Closing Brief, paras. 240, 242, 243, 246, 287, 289-292, 509, 516, fn. 241; Sagahutu Closing Arguments, T. 25 June 2009 pp. 83, 84. The Appeals Chamber notes that during examination-in-chief, Witness DA attributed the instruction regarding the access of the Belgian peacekeepers to the Prime Minister's residence to Nzuwonemeye. *See* Witness DA, T. 11 January 2005 pp. 48 ("There was a message from Bizimungu and addressed to Sagahutu stating that Belgian soldiers wanted to get in where he was, and he was asking him to say whether he should allow those Belgian soldiers to get in".), 49 ("Warrant Officer Bizimungu said that the vehicles on board which were -- where he was, wanted to get in where he was, that is, in the [P]rime [M]inister's residence, and he was asking whether he should be allowed to let those vehicles get in where he was. That was the content of that message. […] That message was meant for Sagahutu, and the person who responded to it was the commander of the battalion, who said that they should let them in but that they shouldn't be let out with anything whatsoever".). However, during cross-examination, Witness DA attributed this instruction to Sagahutu. *See* Witness DA, T. 24 January 2005 p. 38 ("Q. Are you able then to say who was in charge of the radio during the day of 7th April 1994? […] Q. […] Are you able to tell the Court – let me rephrase my question. You heard Bizimungu call Major Nzuwonemeye? A. No, he was speaking, rather, to Sagahutu and not to Nzuwonemeye."). It should be noted that the Trial Chamber in its summary of Witness DA's evidence only referred to his evidence given during examination-in-chief. *See* Trial Judgement, paras. 1624-1631.

[494] *See Ntagerura et al.* Appeal Judgement, paras. 31, 138; *Kvočka et al.* Appeal Judgement, para. 35; *Niyitegeka* Appeal Judgement, para. 200.

[495] *See* Sagahutu Appeal Brief, paras. 67, 108, 165, 218. Sagahutu's submissions during the Appeal Hearing also do not particularize or demonstrate prejudice suffered. *See* AT. 9 May 2013 p. 24.

ever raising an objection of error in the pleading of these material facts in the Indictment.[496] Consequently, the Appeals Chamber finds that Sagahutu has not discharged his burden to demonstrate that his defence was materially impaired by the defects in the Indictment. Accordingly, his arguments are dismissed.[497]

(e) Superior Responsibility (Nzuwonemeye)

198. The Trial Chamber found that, in addition to his responsibility for ordering and aiding and abetting, Nzuwonemeye could be held responsible for the killing of the Prime Minister as a superior pursuant to Article 6(3) of the Statute and considered this to be an aggravating factor in sentencing.[498]

199. Nzuwonemeye contends that the Trial Chamber erred in relying on the unpleaded allegation that he attended a meeting at army headquarters on the night of 6 to 7 April 1994 in order to find that he was a "senior officer" and "acted as a person of authority".[499] He further asserts that the Indictment fails to set out the facts supporting his knowledge and failure to take necessary and reasonable measures to prevent or to punish the perpetrators of the Prime Minister's killing.[500] He maintains that the Trial Chamber failed to properly address his challenges on these matters[501] and

[496] On the issue of supplies: Witness DA, T. 24 January 2005 pp. 51, 52, 54-56, 63; T. 25 January 2005 pp. 4-6; T. 25 January 2005 pp. 22, 23 (closed session). On the issue of supplies and/or armoured vehicles: Witness ALN, T. 4 October 2004 pp. 29, 30; Witness HP, T. 9 May 2005 pp. 36, 42. On the issue of the armoured unit: Witness AWC, T. 19 January 2006 pp. 44, 45, 47-49, 53, 55-57. The Appeal Chamber notes that Sagahutu cross-examined Witness HP on the allegation pleaded in paragraph 107 of the Indictment and on radio communication between Sagahutu and Warrant Officer Bizimungu in general and on the morning of 7 April 1994. *See* Witness HP, T. 9 May 2005 pp. 30 ("Q. […] Now, Witness, you did say that you listened to a radio conversation between W. O. Boniface Bizimungu and Captain Sagahutu. Do you confirm that? A. Yes, I do".), 31-33, 35, 36 ("Q. Witness, you referred to the death of Agathe, and you said that W.O. Boniface Bizimungu sent the first message. Can you recall the first message sent by W.O. Boniface Bizimungu with regard to Agathe and at what time you got this message? A. With regard to this message, I got it in the morning, around 6:00. It was early in the morning. Q. And do you recall the very words used during that message? A. I told you that that morning I heard the following. He asked the question – he put the question as follows: 'UNAMIR troops are already in great number at Agathe's residence. They are going to shoot at us.' And he replied that they also had weapons, and that they should shoot back in case they were attacked".), 37 ("Q. Witness, that was the first message. And you also received the second message. And, once again can you tell the Court the very words which were used?"), 39, 42 ("When WO Bizimungu called Captain Sagahutu to say that the UNAMIR troops were firing at them, […] Captain Sagahutu asked him to shoot back".). Sagahutu did not specifically cross-examine Witness DA on the issue relating to the access of the Belgian peacekeepers' to the Prime Minister's residence but rather on general issues regarding verbal and radio communications at the relevant time. *See* Witness DA, T. 24 January 2005 p. 38 ("Q. Are you able then to say who was in charge of the radio during the day of 7th April 1994? […] Q. […] Are you able to tell the Court -- let me rephrase my question. You heard Bizimungu call Major Nzuwonemeye? A. No, he was speaking, rather, to Sagahutu and not to Nzuwonemeye".). Moreover, Sagahutu called Defence witnesses to testify on the allegations of sending the armoured unit and supplies. *See* Witness CSS, T. 23 October 2008 pp. 24-28, 41; Witness UDS, T. 27 October 2008 pp. 40, 41 (closed session); Witness Habimana, T. 13 November 2008 p. 9.

[497] For previous examples where the burden of showing prejudice was on the Appellant who did not make submissions as to how he was prejudiced, *see*, *e.g.*, *Muvunyi I* Appeal Judgement, para. 124; *Niyitegeka* Appeal Judgement, paras. 207, 211.

[498] Trial Judgement, paras. 1745, 2094, 2095, 2107, 2146, 2244, 2246.

[499] Nzuwonemeye Notice of Appeal, para. 9; Nzuwonemeye Appeal Brief, paras. 57, 59-72.

[500] Nzuwonemeye Notice of Appeal, paras. 18-21, 27; Nzuwonemeye Appeal Brief, paras. 28, 29. *See also* Nzuwonemeye Notice of Appeal, para. 137; Nzuwonemeye Appeal Brief, paras. 302, 312, 321, 405.

[501] Nzuwonemeye Notice of Appeal, paras. 20, 21, 27; Nzuwonemeye Appeal Brief, paras. 24, 70.

erroneously concluded that any defect in the Indictment had been cured through the Prosecution Pre-Trial Brief.[502]

200. The Prosecution responds that paragraph 78 of the Indictment and paragraph 116 of the Prosecution Pre-Trial Brief, in particular, put Nzuwonemeye on sufficient notice of his responsibility as a superior pursuant to Article 6(3) of the Statute for the killing of the Prime Minister.[503] It further contends that Nzuwonemeye's participation in the meeting on the night of 6 to 7 April 1994 was not a material fact underpinning his superior responsibility, but merely evidence which, among other factors, demonstrated that he exercised a position of authority over the perpetrators of the crime.[504]

201. The Appeals Chamber addresses Nzuwonemeye's challenges bearing in mind that, for a charge of superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead, *inter alia*, the criminal conduct of those for whom the accused is alleged to be responsible, the conduct by which the accused may be found to have known or had reason to know that crimes were about to be committed or had been committed by his subordinates as well as the conduct by which the accused may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.[505]

(i) Superior-Subordinate Relationship

202. The *chapeau* paragraphs of the Indictment for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II charge Nzuwonemeye with superior responsibility pursuant to Article 6(3) of the Statute for the killing of the Prime Minister.[506] Paragraphs 8 and 9 of the Indictment state that, during the relevant period, Nzuwonemeye was the commander of the Reconnaissance Battalion and, in this capacity, exercised authority over all the units of that battalion. Paragraph 103 of the Indictment further alleges that soldiers from the Reconnaissance Battalion under Nzuwonemeye's command participated in hunting down, torturing, and killing the Prime Minister.

203. As previously held, the description of an accused as the commander of a specified military unit is a sufficient basis for asserting the material fact that he was in a position of superior authority over the unit for the purposes of an allegation under Article 6(3) of the Statute.[507] Consequently, the

[502] Nzuwonemeye Notice of Appeal, para. 21.
[503] *See* Prosecution Response Brief (Nzuwonemeye), paras. 21, 52, 59, 60. *See also* AT. 8 May 2013 pp. 55, 57, 58.
[504] Prosecution Response Brief (Nzuwonemeye), paras. 58-63.
[505] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 100; *Bagosora and Nsengiyumva* Appeal Judgement, para. 191; *Muvunyi I* Appeal Judgement, para. 19.
[506] Indictment, paras. 78, 118.
[507] *See Ntabakuze* Appeal Judgement, para. 107; *Blaškić* Appeal Judgement, para. 227.

Appeals Chamber considers that the above-described information in the Indictment put Nzuwonemeye on notice that the Prosecution alleged that a superior-subordinate relationship existed between him and the soldiers of the Reconnaissance Battalion involved in the killing of the Prime Minister.

204. Nzuwonemeye takes issue with the fact that, when assessing whether this superior-subordinate relationship was proved, the Trial Chamber relied on his participation in a meeting of senior military officials at army headquarters on the night of 6 to 7 April 1994 which was not pleaded in the Indictment.[508] However, this fact, along with others, merely formed the basis from which the Trial Chamber inferred that Nzuwonemeye exercised *de facto* authority and effective control over the soldiers of the Reconnaissance Battalion, in particular, those implicated in the Prime Minister's killing.[509] In this respect, Nzuwonemeye's participation in the impugned meeting did not amount to a material fact underpinning his superior responsibility, but merely constituted evidence of his superior-subordinate relationship with the perpetrators. Nzuwonemeye's submission is therefore dismissed.

(ii) Knowledge

205. The Trial Chamber found that Nzuwonemeye had "actual knowledge that his subordinates were about to commit or had committed a crime with respect to the death of [the] Prime Minister" because of the organized nature of the deployment of Reconnaissance Battalion troops to the vicinity of the Prime Minister's residence on Nzuwonemeye's instructions, the regular communication between Warrant Officer Bizimungu and senior Reconnaissance Battalion officers, including Sagahutu, throughout the attack, and the supply of food and materials from Reconnaissance Headquarters to Warrant Officer Bizimungu.[510] These facts led the Trial Chamber to conclude that "the involvement of [Reconnaissance] Battalion soldiers in such an organized operation required authorisation from the highest levels of the battalion".[511]

206. The Appeals Chamber notes that none of these facts is pleaded in the Indictment.[512] The only express reference to the allegation that Nzuwonemeye knew or had reason to know that soldiers under his command were involved in the Prime Minister's killing is contained in the *chapeau* paragraphs for murder as a crime against humanity and as a serious violation of Article 3

[508] Nzuwonemeye Notice of Appeal, para. 9; Nzuwonemeye Appeal Brief, paras. 57, 59-72.
[509] *See* Trial Judgement, paras. 2015-2018.
[510] Trial Judgement, para. 2020.
[511] Trial Judgement, para. 2020.
[512] *See also supra* paras. 185, 186.

common to the Geneva Conventions and of Additional Protocol II.[513] However, these provisions merely repeat the language of Article 6(3) of the Statute. Since, as stated above, paragraphs 103, 106, and 107 of the Indictment also do not mention any conduct on the part of Nzuwonemeye from which to deduce that he was aware of the Reconnaissance Battalion's involvement in the crime, the Appeals Chamber finds that the Indictment was defective in this respect.[514]

207. Nzuwonemeye objected to the pleading of the elements of superior responsibility at trial,[515] and the Trial Chamber accepted his objections as timely by dismissing them on the merits in the Trial Judgement.[516] It therefore falls to the Prosecution to demonstrate that Nzuwonemeye's ability to prepare his defence was not materially impaired. Paragraph 116 of the Prosecution Pre-Trial Brief simply repeats the language of Article 6(3) of the Statute by stating that Nzuwonemeye knew or had reason to know of all crimes with which he was charged under the count of murder as a crime against humanity. This provision is therefore insufficient to cure the aforementioned defect.

208. Nonetheless, the Appeals Chamber finds that the defect was cured. Specifically, paragraph 114 of the Prosecution Pre-Trial Brief alleges that Nzuwonemeye incurred criminal responsibility pursuant to Article 6(1) for the Prime Minister's killing because the perpetrators acted on his instructions. Moreover, the summaries for Witnesses ALN and DA appended to the Prosecution Pre-Trial Brief indicate that these witnesses would testify about Nzuwonemeye's orders and radio communications relating to the deployment of the Reconnaissance Battalion to the Prime Minister's residence and her murder.[517] These allegations implied that Nzuwonemeye was aware of his subordinates' involvement in the crime.[518] While the Prosecution did not expressly link this information to Nzuwonemeye's superior responsibility under Article 6(3) of the Statute,[519] a careful reading of the Prosecution Pre-Trial Brief would have allowed Nzuwonemeye to understand on which basis the Prosecution intended to establish that he knew or had reason to know that the

[513] Indictment, paras. 78, 118.
[514] *Cf. Muvunyi I* Appeal Judgement, paras. 44, 45; *Ntagerura et al.* Appeal Judgement, paras. 154, 155, 158.
[515] Nzuwonemeye Motion of 18 October 2007, paras. 103-112; Nzuwonemeye Closing Brief, paras. 139, 140, 175-183.
[516] While the Trial Chamber rejected the Nzuwonemeye Motion of 18 October 2007 for having been filed outside the time limits stipulated in Rule 72(A) of the Rules, it held that this did not preclude him from raising defects in the Indictment in his Closing Brief. *See* Trial Decision Indictment and Disclosure of 29 February 2008, paras. 7, 10. In the Trial Judgement, the Trial Chamber dismissed Nzuwonemeye's challenges to the pleading of his superior responsibility by reference to paragraph 78 of the Indictment and paragraphs 114 to 116 of the Prosecution Pre-Trial Brief. *See* Trial Judgement, para. 142. As indicated above, the Appeals Chamber interprets these findings to mean that the Trial Chamber treated Nzuwonemeye's challenges as timely. *See supra* paras. 177, 178.
[517] *See* Prosecution Pre-Trial Brief, Annexure IV, pp. 97, 124.
[518] *Cf. Ntabakuze* Appeal Judgement, para. 119.
[519] *See* Prosecution Pre-Trial Brief, paras. 114-116. *See also* Prosecution Opening Statement, T. 20 September 2004 pp. 58, 59.

Reconnaissance Battalion was implicated in the Prime Minister's killing and failed to prevent or punish this crime.[520]

209. Accordingly, the Appeals Chamber finds that the defect in the Indictment regarding Nzuwonemeye's knowledge was subsequently cured by clear, consistent, and timely notice. Nzuwonemeye's submission in this regard is therefore dismissed.

(iii) Failure to Prevent or Punish

210. The Trial Chamber found that, as commander of the Reconnaissance Battalion, Nzuwonemeye failed to prevent his subordinates from killing the Prime Minister or punish them afterwards, reasoning that the attack on the Prime Minister was a highly organized military operation and that the participation of the Reconnaissance Battalion in this operation required authorization from the highest levels of the battalion.[521] In this context, the Trial Chamber further concluded that, in light of the material and human resources at his disposal, the disciplinary reputation of Reconnaissance Battalion soldiers, and the fact that all his orders were dutifully obeyed by Sagahutu and other Reconnaissance Battalion soldiers, Nzuwonemeye had the material ability to prevent or punish this crime but failed to do so.[522]

211. The Appeals Chamber notes that these facts are neither pleaded in the Indictment nor mentioned in the Prosecution Pre-Trial Brief or opening statement. Rather, paragraphs 78 and 118 of the Indictment as well as paragraph 116 of the Prosecution Pre-Trial Brief repeat the statutory language of Article 6(3) of the Statute in stating that Nzuwonemeye failed to prevent or punish all crimes with which he was charged under the count of murder as a crime against humanity. However, it is well accepted that, in many cases, it will be sufficient to plead that the accused did not take any necessary and reasonable measures to prevent or punish the commission of criminal acts.[523] Moreover, as discussed above, paragraph 114 of the Prosecution Pre-Trial Brief alleges that Nzuwonemeye incurred criminal responsibility pursuant to Article 6(1) for the Prime Minister's killing because the perpetrators acted on his instructions. The summaries for Witnesses ALN and DA appended to the Prosecution Pre-Trial Brief indicated that these witnesses would testify about Nzuwonemeye's orders and radio communications relating to the deployment of the

[520] In this context, the Appeals Chamber additionally recalls that in many cases it will be sufficient to plead that the accused did not take any necessary and reasonable measures to prevent or punish the commission of criminal acts. *See Ntabakuze* Appeal Judgement, para. 123; *Renzaho* Appeal Judgement, para. 54; *Nahimana et al.* Appeal Judgement, para. 323.
[521] Trial Judgement, para. 2024.
[522] Trial Judgement, para. 2024.
[523] *See Ntabakuze* Appeal Judgement, para. 123; *Renzaho* Appeal Judgement, para. 54; *Nahimana et al.* Appeal Judgement, para. 323.

Reconnaissance Battalion to the Prime Minister's residence and her murder.[524] While the Prosecution did not expressly link this information to Nzuwonemeye's superior responsibility under Article 6(3) of the Statute,[525] the Appeals Chamber considers that a careful reading of the Prosecution Pre-Trial Brief would have allowed Nzuwonemeye to understand that he was alleged to have failed to take the necessary measures to prevent or punish the crime.[526]

212. Accordingly, the Appeals Chamber rejects Nzuwonemeye's submission that he lacked notice of his failure to prevent or punish his subordinates for the killing of the Prime Minister.

3. Killing of the Belgian Peacekeepers

213. Sagahutu and Nzuwonemeye submit that the Trial Chamber erred in convicting them for the killing of the Belgian peacekeepers because the Indictment was defective.[527] In this section, the Appeals Chamber considers: (i) Nzuwonemeye's arguments regarding murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; (ii) Sagahutu's arguments in respect of ordering and aiding and abetting; (iii) Nzuwonemeye's arguments regarding superior responsibility; and (iv) Sagahutu's arguments regarding superior responsibility.

(a) Murder as a Crime Against Humanity and as a Serious Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Nzuwonemeye)

214. Nzuwonemeye submits that the Indictment fails to plead: (i) the nexus of the killing of the Belgian peacekeepers with a widespread or systematic attack against the civilian population and an armed conflict;[528] (ii) the civilian status of the peacekeepers;[529] and (iii) Nzuwonemeye's intent for murder and his awareness of the civilian status of the peacekeepers.[530] Nzuwonemeye asserts that the Trial Chamber failed to provide a reasoned opinion on these issues.[531] He also appears to suggest that the Indictment is defective because it pleads a motivation behind the Belgian

[524] *See* Prosecution Pre-Trial Brief, Annexure IV, pp. 97, 124.
[525] *See* Prosecution Pre-Trial Brief, paras. 114-116. *See also* Prosecution Opening Statement, T. 20 September 2004 pp. 58, 59.
[526] *Cf. Ntabakuze* Appeal Judgement, para. 125.
[527] Sagahutu Notice of Appeal, paras. 10-12, 14; Sagahutu Appeal Brief, paras. 7-9; Sagahutu Reply Brief, paras. 1-5; Nzuwonemeye Notice of Appeal, paras. 6, 13, 18-21, 24, 27, 29; Nzuwonemeye Appeal Brief, paras. 8-12, 18-24, 34-38, 43-45; Nzuwonemeye Reply Brief, paras. 14-20, 41. *See also* Sagahutu Appeal Brief, paras. 165, 213; Nzuwonemeye Notice of Appeal, para. 83; Nzuwonemeye Appeal Brief, paras. 321, 405, 514-517.
[528] Nzuwonemeye Appeal Brief, paras. 23, 47-50.
[529] Nzuwonemeye Appeal Brief, paras. 43, 44, 50.
[530] Nzuwonemeye Notice of Appeal, paras. 13, 24; Nzuwonemeye Appeal Brief, paras. 18-21, 51.
[531] Nzuwonemeye Notice of Appeal, paras. 17, 24, 29, 30; Nzuwonemeye Appeal Brief, paras. 9, 12, 23, 46; AT. 8 May 2013 p. 29.

peacekeepers' murder which was "unconnected to any intent" on his part and different from the reason for the killings as ultimately accepted by the Trial Chamber.[532]

215. The Prosecution responds that the elements of murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II are sufficiently pleaded in the Indictment.[533]

216. The Appeals Chamber notes that the *chapeau* paragraph for murder as a crime against humanity, paragraph 78 of the Indictment, states that the Belgian peacekeepers were killed during widespread or systematic attacks against a civilian population. Similarly, the *chapeau* paragraph for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, paragraph 118 of the Indictment, alleges that soldiers or civilians under the authority of Nzuwonemeye and his co-accused killed members of the Rwandan civilian population "in the context of" and "in direct relation to" a non-international armed conflict with the RPF and that, "at the same place and time", soldiers under Nzuwonemeye's and Sagahutu's command killed the Belgian peacekeepers. This provision also states that the Belgian peacekeepers' mandate "did not include combat (see Chapter 6 of the United Nations Charter)" and indicates that they were disarmed before they were killed.

217. In light of these facts, the Appeals Chamber considers that paragraphs 78 and 118 of the Indictment put Nzuwonemeye on notice of the allegation that the killing of the Belgian peacekeepers was connected to a widespread or systematic attack against the civilian population as well as a non-international armed conflict. Furthermore, the information in the Indictment reflects that the Belgian peacekeepers were protected persons. Moreover, the Appeals Chamber considers that the Trial Chamber was not required to address these alleged defects in the Indictment in the Trial Judgement given that Nzuwonemeye did not clearly raise them in his Closing Brief.[534]

218. As to Nzuwonemeye's assertion that the Indictment failed to plead his intent to kill the Belgian peacekeepers and awareness of their civilian status, the Appeals Chamber recalls that Nzuwonemeye was convicted as a superior pursuant to Article 6(3) of the Statute for this crime, not as a direct perpetrator. Neither his intent to kill the peacekeepers nor his awareness of their civilian

[532] Nzuwonemeye Notice of Appeal, para. 181; Nzuwonemeye Appeal Brief, paras. 21, 514-517. *See also* AT. 8 May 2013 p. 30.
[533] Prosecution Response Brief (Nzuwonemeye), paras. 17, 20-22, 25, 28, 32-35; AT. 8 May 2013 pp. 55, 56.
[534] Regarding the pleading of the nexus of the killing of the Belgian peacekeepers with a widespread or systematic attack against the civilian population, the Appeals Chamber notes that Nzuwonemeye simply referred to all objections on defects in the Indictment, which he had raised in previous motions at trial. *See* Nzuwonemeye Closing Brief, paras. 45 (fn. 25), 487, 488, 599. With respect to the civilian status of the peacekeepers, Nzuwonemeye focused not on pleading issues, but on what he perceived to be a lack of evidentiary proof. *See* Nzuwonemeye Closing Brief, paras. 796-804.

status needs to be proven to establish Nzuwonemeye's liability under Article 6(3) of the Statute. His argument thus has no bearing on the pleading of the killings as a crime against humanity as such.

219. Finally, the Appeals Chamber rejects Nzuwonemeye's claims regarding the reason why the Belgian peacekeepers were killed and his knowledge thereof. This matter essentially concerns motive which, in contrast to *mens rea*, is not an element of any crime.[535] It thus does not need to be pleaded.

220. In light of the above, the Appeals Chamber finds that Nzuwonemeye has failed to show that the Indictment was defective in pleading the killing of the Belgian peacekeepers as murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.

(b) Ordering and Aiding and Abetting (Sagahutu)

221. The *chapeau* paragraph 118 of the Indictment charges Sagahutu with the killing of the Belgian peacekeepers pursuant to, *inter alia*, Article 6(1) of the Statute. In its relevant part, this paragraph alleges that, by virtue of his acts, Sagahutu "ordered […] or otherwise aided and abetted […] the crimes referred to in paragraphs […] 103 to 107 […]".

222. The Trial Chamber found that, during the morning of 7 April 1994, Reconnaissance Battalion soldiers under Sagahutu's command were involved in an attack that killed Belgian peacekeepers at Camp Kigali.[536] It held that, while at the Reconnaissance Battalion's headquarters at Camp Kigali, Corporals Nzeyimana[537] and Masonga, both soldiers in the battalion, informed Sagahutu of the ongoing attack against the Belgian peacekeepers at Camp Kigali and that these peacekeepers were resisting the attack.[538] Thereupon, Sagahutu instructed Corporals Nzeyimana and Masonga[539] to put down the resistance and, in his presence, they took a multiple grenade launcher ("MGL") from his office and went to participate in the attack, killing the remaining

[535] *Cf. Kanyarukiga* Appeal Judgement, para. 262; *Limaj et al.* Appeal Judgement, para. 109.
[536] Trial Judgement, paras. 1906, 2096, 2149. *See also* Trial Judgement, paras. 49, 2255.
[537] The Appeals Chamber notes that the spelling of the name "Nzeyimana" appears in paragraphs 1749, 1750, 1756, 1861, 1862, 1870, 1877, 1879-1881, 1885, 2019, 2030, 2032, 2034, 2099 of the Trial Judgement whereas this name is spelled "Nizeyimana" in paragraphs 1907 and 2150 of the Trial Judgement. The Appeals Chamber considers the latter spelling to be a typographical error.
[538] Trial Judgement, paras. 1880, 1907, 2150. *See also* Trial Judgement, para. 2255.
[539] Trial Judgement, paras. 2034, 2150. *See also* Trial Judgement, para. 2032. The Appeals Chamber notes that the Trial Chamber concluded in the factual findings section of the Trial Judgement that only Corporal Nzeyimana received the order from Sagahutu. *See* Trial Judgement, para. 1885.

Belgian peacekeepers.[540] On this basis, the Trial Chamber concluded that Sagahutu ordered and aided and abetted the attack on the Belgian peacekeepers.[541]

223. Sagahutu submits that the Trial Chamber erred in convicting him for ordering and aiding and abetting the killing of the Belgian peacekeepers since these modes of liability were not pleaded in the Indictment with the required specificity.[542] Sagahutu adds that the Indictment fails to plead any order that he personally issued to kill the Belgian peacekeepers.[543] He contends further that the Trial Chamber erred in finding that Prosecution witness statements put him on notice of orders he issued on his own initiative or orders he gave that originated from Nzuwonemeye.[544]

224. The Prosecution responds that Sagahutu's contentions should be summarily dismissed as he fails to show any error warranting relief on appeal.[545] It submits that Sagahutu received sufficient notice of the crimes charged and was convicted only for conduct sufficiently pleaded in the Indictment.[546] The Prosecution contends further that the Prosecution Pre-Trial Brief provided him with relevant additional information.[547]

225. The Appeals Chamber notes that paragraph 105 of the Indictment alleges that on the morning of 7 April 1994, Reconnaissance Battalion soldiers "led" by Sagahutu arrested ten Belgian peacekeepers present at the residence of the Prime Minister, and that after being disarmed, the Belgian peacekeepers were transported to Camp Kigali where they were killed by several perpetrators, including soldiers from the Reconnaissance Battalion. Paragraph 106 of the Indictment states that at all times during that morning, Sagahutu remained in radio contact with Warrant Officer Bizimungu who participated in the arrest of the Belgian peacekeepers. Further, paragraph 107 of the Indictment alleges that Sagahutu ordered a non-commissioned officer to use his armoured vehicles against the Belgian peacekeepers in the event they resisted the arrest of the Prime Minister.

226. As indicated above, Sagahutu's conviction for ordering does not rest on his conduct in relation to the arrest of or attack on the Belgian peacekeepers at the Prime Minister's residence.[548] Rather, his responsibility is based on the fact that he instructed his subordinates at the Reconnaissance Battalion's headquarters at Camp Kigali to put down the resistance by the captured

[540] Trial Judgement, paras. 1907, 2150. *See also* Trial Judgement, para. 2255.
[541] Trial Judgement, paras. 1907, 2150. *See also* Trial Judgement, paras. 65, 2256.
[542] Sagahutu Notice of Appeal, para. 14; Sagahutu Appeal Brief, paras. 165, 213. *See also* Sagahutu Reply Brief, paras. 1, 3, 4.
[543] Sagahutu Notice of Appeal, para. 12.
[544] Sagahutu Notice of Appeal, para. 12.
[545] Prosecution Response Brief (Sagahutu), paras. 3, 23, 24, 31.
[546] Prosecution Response Brief (Sagahutu), paras. 3, 24, 26, 29, 31.
[547] Prosecution Response Brief (Sagahutu), para. 29.

peacekeepers and for this purpose provided or approved the use of an MGL from his office.[549] Likewise the Trial Chamber considered that Sagahutu's conduct with respect to the MGL amounted to aiding and abetting the killing of the Belgian peacekeepers.[550] Consequently, these circumstances amounted to material facts underpinning Sagahutu's responsibility for ordering and aiding and abetting.

227. The Appeals Chamber observes that the Indictment does not contain the allegations that Sagahutu ordered his subordinates to put down the resistance of the Belgian peacekeepers at Camp Kigali, and that he provided or approved of the use of an MGL in the attack against them.[551] Consequently, the material facts underpinning Sagahutu's responsibility for ordering and aiding and abetting are absent from the Indictment, and the Indictment is thus defective.

228. The Appeals Chamber further observes that the Prosecution Pre-Trial Brief and the opening statement do not refer to Sagahutu issuing instructions or providing a weapon to Corporals Nzeyimana and Masonga.[552] However, the Appeals Chamber notes that this information was communicated on 28 December 2004 in a witness statement annexed to the Prosecution's motion to add Prosecution Witness AWC to its witness list.[553] The Trial Chamber granted the Prosecution's request to add Witness AWC to its list of witnesses on 11 February 2005.[554] On 2 December 2005, the Prosecution also communicated to the Trial Chamber and the parties a will-say statement from Witness AWC stating that he would testify about "an [MGL] rifle that Corporal Nzeyimana took from Captain Sagahutu's office during the morning of 7 April 1994 to finish killing the Belgian

[548] *See supra* para. 222.
[549] Trial Judgement, paras. 1907, 2019, 2150. *See also* Trial Judgement, para. 2255.
[550] Trial Judgement, paras. 1907, 2019, 2150. *See also* Trial Judgement, para. 2255.
[551] *See* Indictment, paras. 103-107.
[552] *See* Prosecution Pre-Trial Brief, paras. 130-132, 135, 136; Prosecution Opening statement, T. 20 September 2004 pp. 59, 60.
[553] *The Prosecutor v. Augustin Ndindiliyimana et al*., Case No. ICTR-00-56-T, *Requête additionnelle du Procureur en variation de sa liste de témoins : article 73 bis E) du Règlement de procédure et de Preuve*, 28 December 2004 ("Prosecution Motion to Vary Witness List"), paras. 4, 6, p. 3. Witness AWC's written statement, annexed to the Prosecution Motion to Vary Witness List, reads in part: "At about 1100 hours, some soldiers came to the office of the Reconnaissance Battalion and informed Captain SAGAHUTU that the Belgian soldiers were putting on some resistance. I heard Captain SAGAHUTU telling the soldiers that if the Belgians put up any resistance they should killed [*sic*] them all. I cannot recall the names of the soldiers who came to the office, but they were many. One of the soldiers was Captain SAGAHUTU's driver who was a marksman named C[o]rporal NZEHIMANA. […] When SAGAHUTU gave them this directive, they returned and went and killed the Belgians". Prosecution Motion to Vary Witness List, annex, p. 4.
[554] *The Prosecutor v. Augustin Ndindiliyimana et al*., Case No. ICTR-00-56-T, Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 *bis* (E) of the Rules, 11 February 2005 ("Trial Decision to Vary Witness List of 11 February 2005"), p. 6.

soldiers that were continuing to mount resistance".[555] Witness AWC testified over the course of four days in January 2006.

229. The Appeals Chamber recalls that, in certain circumstances, it has found that a Prosecution motion to vary its witness list, as well as witness statements supporting the motion, may be considered as providing timely, clear, and consistent information capable of curing a defective indictment.[556] In this regard, Sagahutu was put on notice of the contents of Witness AWC's testimony a little more than three months after the commencement of trial proceedings and over a year before Witness AWC testified.[557] Moreover, the Prosecution Motion to Vary Witness List expressly linked Witness AWC's anticipated evidence with charges setting forth Sagahutu's liability for the killing of the Belgian peacekeepers.[558]

230. Furthermore, and bearing in mind the principles on timely objection to defects in the indictment previously articulated in this Judgement,[559] the Appeals Chamber observes that at no point did Sagahutu object to the introduction of these material facts for lack of notice prior to[560] or during Witness AWC's testimony.[561] In these circumstances, the Appeals Chamber finds that Sagahutu did not make a timely objection to the lack of pleading of these material facts in the Indictment. Therefore, it falls on him to demonstrate that his ability to prepare his defence was materially impaired by the omission of the allegation in the Indictment that he instructed Corporals Nzeyimana and Masonga to take an MGL from his office in order to kill Belgian peacekeepers.

231. Sagahutu has failed to make such a demonstration. He contends generally that the lack of clarity in the Indictment and Prosecution Pre-Trial Brief on this issue, given the size of this case, was prejudicial to his ability to prepare an effective defence.[562] However, he does not present any

[555] *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Interoffice Memorandum, Subject: Points of the Indictment to which Witnesses AWC, KSB, DBB and GFA Will Testify, 2 December 2005. The summary was also provided in French.
[556] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 169.
[557] The Appeals Chamber observes that counsel for Sagahutu objected that he could not read the English version of the witness statement when he received it in December 2004. *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, *Réponse à la requête du Procureur en variation de sa liste de témoins: article 73*bis(E) *du Règlement de Procédure et de Preuve*, 5 January 2005 ("Response to Prosecution Motion to Vary Witness List"), para. 3. Notably, the Trial Chamber observed that the Prosecution indicated that a translated copy would be disclosed to the Defence as soon as possible (Trial Decision to Vary Witness List of 11 February 2005, para. 17) and the Appeals Chamber notes that counsel for Sagahutu cross-examined Witness AWC on the basis of a French translation of the statement. *See, e.g.*, Witness AWC, T. 19 January 2006 pp. 23, 34, 35, 44, 47.
[558] *See* Prosecution Motion to Vary Witness List, para. 6 (indicating that Witness AWC would testify on paragraphs 22, 103-107 and 118 of the Indictment). *See also* Trial Decision to Vary Witness List of 11 February 2005, para. 18.
[559] *See supra* para. 176.
[560] Sagahutu objected to the proposed testimony of Witness AWC as duplicative of evidence but did not object on the basis that his proposed evidence contained material facts not pleaded in the Indictment. Response to Prosecution Motion to Vary Witness List, paras. 9-12.
[561] *See* Witness AWC, T. 18 January 2006 pp. 32-34; T. 19 January 2006 pp. 34, 35. *See also* Sagahutu Closing Brief, paras. 313-356, 664; Sagahutu Closing Arguments, T. 25 June 2009 pp. 75-93; T. 26 June 2009 pp. 1-10.
[562] AT. 9 May 2013 p. 24.

argument demonstrating the prejudicial effect of the leading of Witness AWC's evidence on the preparation of his defence.[563] The Appeals Chamber observes further that he cross-examined Witness AWC at length on these material facts[564] and challenged Witness AWC's testimony in his Closing Brief without raising an error with respect to the pleading of these material facts in the Indictment.[565] Consequently, Sagahutu has not discharged his burden to show that he lacked notice of the allegations and that his defence was materially impaired.

232. Accordingly, the Appeals Chamber dismisses Sagahutu's arguments concerning the defective pleading of his ordering and aiding and abetting liability with respect to the killing of the Belgian peacekeepers.

(c) Superior Responsibility (Nzuwonemeye)

233. Nzuwonemeye submits that the Trial Chamber erred in convicting him as a superior pursuant to Article 6(3) of the Statute for the killing of the Belgian peacekeepers because this allegation is not properly pleaded in the Indictment.[566]

234. The Prosecution responds that the Indictment pleads Nzuwonemeye's superior responsibility without ambiguity.[567]

235. The Appeals Chamber recalls that, for a charge of superior responsibility, the indictment must plead, *inter alia*, the criminal conduct of those for whom the accused is alleged to be responsible, the conduct by which the accused may be found to have known or had reason to know that crimes were about to be committed or had been committed by his subordinates as well as the conduct by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.[568]

236. The *chapeau* paragraphs for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II charge Nzuwonemeye, *inter alia*, with superior responsibility for the killing of the Belgian peacekeepers but merely repeat the language of Article 6(3) of the Statute.[569] Particulars of the crime are described in paragraph 105 of the Indictment which alleges that soldiers from the Reconnaissance

[563] *See* Sagahutu Appeal Brief, paras. 67, 108, 165, 213.
[564] *See*, *in particular*, Witness AWC, T. 19 January 2006 pp. 34-38; T. 20 January 2006 pp. 3-6.
[565] Sagahutu Closing Brief, paras. 319-321, 323, 332-335, 340-356, 664.
[566] Nzuwonemeye Notice of Appeal, paras. 18, 20, 21, 27; Nzuwonemeye Appeal Brief, paras. 28, 29, 35. *See also* Nzuwonemeye Appeal Brief, paras. 321, 405; AT. 8 May 2013 p. 84.
[567] Prosecution Response Brief (Nzuwonemeye), para. 52. *See also* AT. 8 May 2013 pp. 55-58.
[568] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 100; *Bagosora and Nsengiyumva* Appeal Judgement, para. 191; *Muvunyi I* Appeal Judgement, para. 19.
[569] Indictment, paras. 78, 118.

Battalion under Nzuwonemeye's command and led by Sagahutu, with assistance from the Presidential Guard, arrested the Belgian peacekeepers at the Prime Minister's residence on the morning of 7 April 1994, disarmed them, and transported them to Camp Kigali where they were killed by members of the Reconnaissance Battalion, the Presidential Guard, and the Music Company.

237. The Appeals Chamber observes that Nzuwonemeye was convicted for the killing of the Belgian peacekeepers because his immediate subordinate, Sagahutu, instructed Corporals Nzeyimana and Masonga to put down the resistance by the captured peacekeepers at Camp Kigali and for this purpose provided or approved the use of an MGL from his office.[570] The Indictment does not plead any specific conduct by which Nzuwonemeye could have been found to have known of the involvement of his soldiers in the attack against the Belgian peacekeepers and failed to take punitive measures.[571] In the Appeals Chamber's view, the allegation in paragraph 105 of the Indictment that the attack occurred at Camp Kigali, and thus in close proximity to Nzuwonemeye's command post, did not provide clear notice to Nzuwonemeye that the Prosecution intended to establish on this basis that he had reason to know of his subordinates' criminal conduct and that he failed to punish them. Similarly, as previously held, general reference to Article 6(3) of the Statute and to the fact that people under the command of the accused participated in crimes is not sufficient to inform the accused of the case he has to meet.[572] Under these circumstances, the Appeals Chamber finds that the Indictment was defective.

238. Nzuwonemeye objected to the pleading of the elements of superior responsibility at trial,[573] and the Trial Chamber accepted his objections as timely by dismissing them on the merits in the Trial Judgement.[574] It therefore falls to the Prosecution to demonstrate that Nzuwonemeye's ability to prepare his defence was not materially impaired. The Prosecution only points to paragraph 116 of the Prosecution Pre-Trial Brief.[575] This provision simply restates the language of Article 6(3) of the Statute in relation to all crimes with which Nzuwonemeye was charged under the count of murder

[570] Trial Judgement, paras. 1885, 1889, 2019, 2023, 2025.
[571] In particular, with the exception of the location of the attack and some of the perpetrators, the Indictment does not mention any of the factors on which the Trial Chamber ultimately relied in order to establish Nzuwonemeye's knowledge. *See* Trial Judgement, para. 2023.
[572] *Ntagerura et al.* Appeal Judgement, para. 157.
[573] *See* Nzuwonemeye Motion of 19 December 2001, paras. 10, 18, 20; Nzuwonemeye Motion of 18 October 2007, paras. 103-112; Nzuwonemeye Closing Brief, paras. 139, 140, 175-183.
[574] While the Trial Chamber rejected the Nzuwonemeye Motion of 18 October 2007 for having been filed outside the time limits stipulated in Rule 72(A) of the Rules, it held that this did not preclude him from raising defects in the Indictment in his Closing Brief. *See* Trial Decision Indictment and Disclosure of 29 February 2008, paras. 7, 10. In the Trial Judgement, the Trial Chamber dismissed Nzuwonemeye's challenges to the pleading of his superior responsibility by reference to paragraph 78 of the Indictment and paragraphs 114 to 116 of the Prosecution Pre-Trial Brief. *See* Trial Judgement, para. 142. As indicated above, the Appeals Chamber interprets these findings to mean that the Trial Chamber treated Nzuwonemeye's challenges as timely. *See also supra* paras. 177, 178.
[575] Prosecution Response Brief (Nzuwonemeye), para. 52.

as a crime against humanity. It does not set out material facts underpinning the relevant criminal conduct of his subordinates, his knowledge, and failure to punish specifically with regard to the killing of the Belgian peacekeepers. This provision is therefore insufficient to cure the aforementioned defect in the Indictment.

239. Moreover, the Appeals Chamber notes that, in its opening statement, the Prosecution made no mention of Nzuwonemeye's responsibility as a superior or, in fact, under any other mode of liability, for the killing of the Belgian peacekeepers.[576] While it claimed in broad terms that all accused in the present case, "by their speech, […] instructions, [and] overt acts", failed to punish their subordinates who were guilty of mass atrocities,[577] this statement was too general and vague for Nzuwonemeye to deduce on which basis the Prosecution intended to establish his liability for specific crimes. Accordingly, the Appeals Chamber finds that the aforementioned defect was not cured by timely, clear, and consistent information.

240. In addition, the Appeals Chamber considers it noteworthy that, when the Prosecution finally did elaborate on Nzuwonemeye's superior responsibility at the end of trial, it argued a different case than that which was ultimately accepted by the Trial Chamber. Instead of pursuing a conviction for failure to punish on the basis that, due to the location of the attack and the hierarchical structures within the Reconnaissance Battalion, Nzuwonemeye had reason to know of his subordinates' involvement in the killing of the Belgian peacekeepers,[578] the Prosecution emphasized Nzuwonemeye's failure to stop, *i.e.* prevent the further attack while it was ongoing and alleged that he actually knew of it because he was present at the scene and even ordered Sagahutu to use armoured vehicles to shoot at the peacekeepers.[579] All these claims were rejected by the Trial Chamber.[580] This lends further support to the conclusion that Nzuwonemeye was not adequately informed of the allegations against him and that it was not open to the Trial Chamber to convict him pursuant to Article 6(3) of the Statute in relation to the killing of the Belgian peacekeepers.

241. In light of the above, the Appeals Chamber grants Nzuwonemeye's First Ground of Appeal, in part, and finds that the Trial Chamber erred in holding Nzuwonemeye responsible as a superior pursuant to Article 6(3) of the Statute in relation to the killing of the Belgian peacekeepers. Nzuwonemeye's convictions in relation to this event must therefore be reversed.

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[576] *See* Prosecution Opening Statement, T. 20 September 2004 p. 59 (where the Prosecution simply stated that the Belgian peacekeepers were killed by soldiers of the Reconnaissance Battalion under Nzuwonemeye's command).
[577] Prosecution Opening Statement, T. 20 September 2004 p. 63.
[578] *See* Trial Judgement, paras. 1889, 2023, 2025. *See also supra* para. 237.
[579] Prosecution Closing Brief, paras. 1644, 1647-1649.
[580] *See* Trial Judgement, paras. 1875, 1876, 1888.

(d) Superior Responsibility (Sagahutu)

242. On 25 June 2001, Sagahutu filed a motion alleging errors in the form of the indictment filed on 23 January 2000.[581] On 25 September 2002, the Trial Chamber granted in part Sagahutu's Preliminary Motion and instructed the Prosecution "to verify the official position occupied by Sagahutu in the Rwandan Army Reconnaissance Battalion at the time of the events and to amend the information provided in Paragraphs 1.16 and 1.17 of the [Original] Indictment, if necessary".[582] The Trial Chamber further ordered the Prosecution to specify the alleged role Sagahutu played in the events regarding, *inter alia*, the killings of the Prime Minister and the Belgian peacekeepers.[583] Sagahutu's alleged position in the "Rwandan Army Reconnaissance Battalion" was amended in the Indictment to read that he was "Second-in-Command" or "Acting Commander of the Reconnaissance Battalion".[584]

243. At trial, Sagahutu challenged his alleged hierarchical positions pleaded in the Indictment.[585] In the Trial Judgement, the Trial Chamber found that the allegation regarding Sagahutu's position as second-in-command or as acting commander of the Reconnaissance Battalion had not been established beyond reasonable doubt.[586] It noted, however, that Sagahutu conceded that he was the commander of Squadron A of the Reconnaissance Battalion at the time of the events relevant to the Indictment.[587] Accordingly, the Trial Chamber was satisfied that Sagahutu exercised *de jure* authority over members of Squadron A of the Reconnaissance Battalion.[588] The Trial Chamber further concluded that Sagahutu was responsible as a superior for the killing of the Belgian peacekeepers.[589]

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[581] *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-2000-56-I, *Exceptions préjudicielles*, 25 June 2001 ("Preliminary Motion") (the English translation of the Preliminary Motion was filed on 14 March 2002). *See also The Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-2000-56-I, Indictment, 23 January 2000 ("Original Indictment").

[582] *The Prosecutor v. Innocent Sagahutu et al.*, Case No. ICTR-00-56-T, Decision on Sagahutu's Preliminary, Provisional Release and Severance Motions, 25 September 2002 ("Decision on Preliminary Motion of 25 September 2002"), p. 12. *See also* Decision on Preliminary Motion of 25 September 2002, para. 30; Original Indictment, paras. 1.16 ("During the events referred to in this indictment, Innocent Sagahutu exercised the functions of the second-in-command of the Reconnaissance Battalion […] within the Rwandan Army and the A company commander of the said Battallion [*sic*]. He had the rank of Captain".), 1.17 ("In his capacity as second-in-command of the Reconnaissance Battalion of the Rwandan Army, Innocent Sagahutu exercised authority over all the units of this Battalion".).

[583] The Trial Chamber held that the said clarifications regarding Sagahutu's role concerned paragraphs 5.7, 5.14, 5.15, and 5.20 of the Original Indictment. *See* Decision on Preliminary Motion of 25 September 2002, para. 33, p. 13.

[584] Indictment, para. 12 ("In his capacity as Second-in-Command or Acting Commander of the Reconnaissance Battalion of the Rwandan Army, Innocent Sagahutu exercised authority over all units of that Battalion".).

[585] *See* Sagahutu Closing Brief, para. 54, *referring to* Decision on Preliminary Motion of 25 September 2002, para. 30. *See also* Sagahutu Closing Brief, para. 55. Sagahutu also claimed in his Closing Brief that the Prosecution failed to clarify the role he played as a superior in the attack against the Belgian peacekeepers. *See* Sagahutu Closing Brief, paras. 54, 55.

[586] Trial Judgement, para. 2027.

[587] *See* Trial Judgement, para. 2026. *See also* Sagahutu Closing Brief, paras. 99-101.

[588] Trial Judgement, para. 2028. *See also* Trial Judgement, paras. 1, 96, 2253.

[589] Trial Judgement, para. 2099. *See also* Trial Judgement, paras. 50, 2256.

244. Sagahutu submits that the Prosecution disregarded the Trial Chamber's order to provide particulars, to correct information in the Indictment regarding his official position in the Reconnaissance Battalion, and to clarify the role he played as a superior in the attack against the Belgian peacekeepers.[590] Sagahutu asserts that the specific "facts" on which his conviction was based were not pleaded and the defects not cured.[591] Consequently, Sagahutu argues, the defects in the Indictment invalidate his convictions and the Appeals Chamber should either set aside his convictions or review his sentence in light of the prejudice he suffered.[592]

245. The Prosecution responds that Sagahutu's contentions are not developed and should therefore be dismissed.[593] It adds that the Indictment properly charges Sagahutu with superior responsibility for the killing of the Belgian peacekeepers.[594]

246. With respect to Sagahutu's contention concerning the Prosecution's alleged failure to clarify his official function in the Indictment, the Appeals Chamber notes that Sagahutu merely repeats arguments on appeal that were considered by the Trial Chamber without raising any alleged error on the part of the Trial Chamber. In any event, the Appeals Chamber observes that the Trial Chamber did not rely on the contested positions alleged in the Indictment when making its findings on Sagahutu's criminal responsibility. The Trial Chamber found that the allegation regarding Sagahutu's position as second-in-command or as acting commander of the Reconnaissance Battalion had not been established beyond reasonable doubt.[595] It held nonetheless that Sagahutu exercised *de jure* authority over members of Squadron A of the Reconnaissance Battalion.[596] Sagahutu does not challenge the Trial Chamber's conclusion.[597] Accordingly, his argument is dismissed.

247. The Appeals Chamber now turns to Sagahutu's argument that the Prosecution failed to comply with the Trial Chamber's order to clarify his role as a superior in the attack against the Belgian peacekeepers and that the specific facts on which his conviction was based were not pleaded or the defects cured.

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[590] Sagahutu Appeal Brief, paras. 7, 8.
[591] Sagahutu Appeal Brief, para. 8, *referring to* Trial Judgement, paras. 2032, 2157.
[592] Sagahutu Appeal Brief, para. 9.
[593] Prosecution Response Brief (Sagahutu), paras. 21, 22.
[594] Prosecution Response Brief (Sagahutu), para. 28, *referring to* Indictment, paras. 78, 103, 105.
[595] Trial Judgement, para. 2027.
[596] Trial Judgement, para. 2028. *See also* Trial Chamber, paras. 1, 96, 2253. The Trial Chamber observed further that "although the Indictment refers to Sagahutu as head of 'Company A', it is common ground among Prosecution and Defence witnesses that Sagahutu was head of Squadron A". *See* Trial Judgement, fn. 3749. Sagahutu does not challenge this statement.
[597] *See* Sagahutu Appeal Brief, paras. 219-241, where Sagahutu does not challenge this specific finding under his Tenth Ground of Appeal. Sagahutu's challenges of his liability as a superior of the killing of the Belgian peacekeepers (*see* Sagahutu Appeal Brief, paras. 219-241) are addressed below. *See infra* paras. 375-387.

248. The Appeals Chamber observes that, besides reiterating the Prosecution's failure to clarify his role as a superior in the attack against the Belgian peacekeepers, Sagahutu fails to appreciate that the Original Indictment was significantly amended following the Trial Chamber's order to the Prosecution.[598] The Appeals Chamber notes that the *chapeau* paragraph of the Indictment for murder as a crime against humanity charges Sagahutu, *inter alia*, with superior responsibility for the killing of the Belgian peacekeepers and pleads that he led soldiers from the Reconnaissance Battalion involved in the arrest of the Belgian peacekeepers at the Prime Minister's residence and in their killing at Camp Kigali.[599] Indeed, in respect of this allegation, the Trial Chamber found that Sagahutu instructed Corporals Nzeyimana and Masonga to put down the resistance by the captured peacekeepers at Camp Kigali and for this purpose provided or approved the use of an MGL from his office.[600] This finding is consistent with the allegation that Sagahutu played a leading role in the killing of the Belgian peacekeepers.

249. With regard to his challenge to the pleading of specific facts underpinning his conviction, Sagahutu merely refers to paragraph 2032 of the Trial Judgement, which concerns the Trial Chamber's finding on his superior-subordinate relationship with Corporals Masonga and Nzeyimana in relation to the killing of the Belgian peacekeepers. In that respect, the Trial Chamber found that, during the morning of 7 April 1994, Reconnaissance Battalion soldiers under Sagahutu's command were involved in an attack that killed Belgian peacekeepers at Camp Kigali, in particular Corporals Nzeyimana and Masonga, who were found to be Sagahutu's subordinates.[601]

250. Bearing in mind the pleading of the material facts in the Indictment for a charge of superior responsibility previously articulated in this Judgement,[602] the Appeals Chamber considers only whether Sagahutu was on notice regarding the material facts relating to the identification of subordinates over whom Sagahutu had effective control and for whose acts he is alleged to be responsible.

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[598] The Trial Chamber highlighted that "Paragraph 5.7 refers *inter alia* to the 'Reconnaissance Battalion under the command of Major Francois-Xavier [*sic*] Nzuwonemeye' but no mention is made of Sagahutu despite the fact that he is charged pursuant to Article 6(3) for all 12 counts on the basis of this paragraph. Paragraph 5.14 refers to 'FAR personnel, including elements from the Presidential Guard, the Para-Commando Battalion and the Reconnaissance Battalion' and Paragraph 5.15 describes the killing of the Belgian soldiers by them. These paragraphs support the charges against Sagahutu for his command responsibility (Article 6(3) for Counts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 of the [Original Indictment]). Paragraph 5.20 refers to 'elements of the Presidential Guard' and to 'groups of soldiers' without any further precision despite the fact that this paragraph forms the basis of the factual allegations in support of the charges under Article 6(3) for Counts 1, 2, 3, 4, 6, 8, 9, and 10 of the [Original Indictment]. The alleged role that Sagahutu played as a commander or a superior during the events described in these paragraphs must be specified by the Prosecution". Decision of Preliminary Motion of 25 September 2002, para. 33.
[599] Indictment, paras. 78, 105.
[600] Trial Judgement, paras. 1885, 1889, 2019, 2023, 2025.
[601] Trial Judgement, paras. 2032, 2096, 2099. *See also* Trial Judgement, paras. 50, 2255.
[602] *See supra* para. 201.

251. The Appeals Chamber observes that the Indictment sufficiently identified Sagahutu's subordinates for whose acts he was alleged to be responsible. The Appeals Chamber recalls that "[a] superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute".[603] Paragraphs 11 and 12 of the Indictment plead Sagahutu's authority over all units of the Reconnaissance Battalion, including Squadron A. Moreover, paragraph 105 of the Indictment alleges that soldiers from the Reconnaissance Battalion led by Sagahutu, assisted by the Presidential Guard, arrested the Belgian peacekeepers at the Prime Minister's residence on the morning of 7 April 1994, disarmed them, and transported them to Camp Kigali where they were killed by, *inter alia*, members of the Reconnaissance Battalion. Sagahutu has not advanced any argument as to why further specificity was required in this particular case. Accordingly, Sagahutu has failed to demonstrate that the Indictment is defective with respect to pleading the identity of his subordinates.

252. Accordingly, the Appeals Chamber dismisses Sagahutu's arguments that he lacked notice regarding his superior responsibility for the killing of the Belgian peacekeepers.

4. Conclusion

253. In light of the foregoing, the Appeals Chamber finds that Sagahutu has failed to demonstrate that he lacked notice of his role in ordering, aiding and abetting, and as a superior for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings of the Prime Minister and the Belgian peacekeepers. Consequently, the Appeals Chamber dismisses Sagahutu's First, and in part, Third, and Eighth Grounds of Appeal.

254. The Appeals Chamber grants Nzuwonemeye's First Ground of Appeal in part, and finds that the Trial Chamber erred in finding him responsible under Article 6(1) of the Statute for aiding and abetting the killing of the Prime Minister and under Article 6(3) of the Statute as a superior for the killing of the Belgian peacekeepers because the Indictment was defective in both respects and was not subsequently cured. Accordingly, Nzuwonemeye's convictions for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on these bases must be reversed. The remainder of Nzuwonemeye's submissions on notice is dismissed.

[603] *Hategekimana* Appeal Judgement, para. 166; *Muvunyi I* Appeal Judgement, para. 55. *See also Blagojević and Jokić* Appeal Judgement, para. 287.

C. Elements of the Crimes (Nzuwonemeye Ground 5, in part; Sagahutu Grounds 11 and 12)

255. Nzuwonemeye and Sagahutu submit that the Trial Chamber erred in its assessment of the *chapeau* elements for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[604] Since the Appeals Chamber has already found that the Trial Chamber erred in convicting Nzuwonemeye for the killing of the Belgian peacekeepers because he lacked notice,[605] Nzuwonemeye's submissions are only discussed to the extent that they concern the killing of the Prime Minister.

1. Murder as a Crime Against Humanity (Sagahutu)

256. The Trial Chamber concluded that widespread and systematic attacks were launched against members of the civilian population in Rwanda on ethnic and political grounds during the period covered by the Indictment and that, as a high-ranking military officer, Sagahutu would have been familiar with the situation "both nationally and in areas under [his] control".[606] The Trial Chamber further found that the killing of the Prime Minister was an "organised military operation" authorized by senior military officers, including Sagahutu.[607] It also stated that the arrest and disarming of the Belgian peacekeepers occurred "during the course of an attack on the Prime Minister, which was clearly part of the broader attack against the civilian population on political grounds" and that it was therefore "clear that the killing of the peacekeepers formed part of the widespread and systematic attack on political and ethnic grounds".[608] Moreover, the Trial Chamber was satisfied that the direct perpetrators and Sagahutu were aware that the killings of the Prime Minister and the Belgian peacekeepers formed part of a systematic attack against the civilian population on political and ethnic grounds.[609]

257. Sagahutu submits that the Trial Chamber erred in finding that the killings of the Prime Minister and the Belgian peacekeepers took place during a widespread and systematic attack against civilians.[610] Sagahutu also asserts that these crimes could not have been considered part of such an attack because the Trial Chamber found that they were committed in chaotic circumstances and thus amounted to isolated incidents.[611] In this context, Sagahutu also argues that the Trial Chamber

[604] Nzuwonemeye Notice of Appeal, paras. 176-179; Nzuwonemeye Appeal Brief, paras. 462, 463, 465-493; Sagahutu Notice of Appeal, paras. 87-91; Sagahutu Appeal Brief, paras. 242-251, 253-257, 259.
[605] *See supra* para. 254.
[606] Trial Judgement, para. 2090. *See also* Trial Judgement, para. 105.
[607] Trial Judgement, para. 2093.
[608] Trial Judgement, para. 2097.
[609] Trial Judgement, paras. 2094, 2098, 2099. *See also* Trial Judgement, para. 2090. Since the Trial Chamber's findings in paragraph 2099 of the Trial Judgement pertain only to Sagahutu, the Appeals Chamber considers the Trial Chamber's reference to Bizimungu in this paragraph to be a typographical error.
[610] Sagahutu Notice of Appeal, para. 87; Sagahutu Appeal Brief, paras. 242-244, 251.
[611] Sagahutu Notice of Appeal, paras. 87, 88; Sagahutu Appeal Brief, paras. 242, 245, 247, 249, 251.

contradicted itself when it acquitted him of conspiracy to commit genocide because there was no pre-conceived plan to kill the Prime Minister and the Belgian peacekeepers.[612]

258. In addition, Sagahutu submits that there was no basis for the Trial Chamber to conclude that he was aware of a widespread attack against the civilian population and that his acts were part of this attack.[613] He adds that the Trial Chamber failed to make a finding on his awareness of an attack "at the particular time when it commenced".[614] Moreover, Sagahutu contends that he provided protection to the Belgian School on 7 April 1994 and assisted Belgian peacekeepers at a roadblock which contradicts "the idea that [he] had the intention of participating in a widespread and systematic attack against civilians".[615]

259. The Prosecution responds that Sagahutu's arguments are unfounded and do not warrant any relief on appeal because the Trial Chamber reasonably found that the killings of the Prime Minister and the Belgian peacekeepers were committed as part of a widespread or systematic attack against the civilian population and that Sagahutu was aware of this fact.[616]

260. The Appeals Chamber recalls that an enumerated crime under Article 3 of the Statute constitutes a crime against humanity if it is proven to have been committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds.[617] The term "widespread" refers to the large scale nature of the attack and the number of victims, whereas the term "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence".[618] With respect to the *mens rea*, the perpetrator must have acted with knowledge of the broader context of the attack, and with knowledge that his acts (or omissions) formed part of the widespread or systematic attack against the civilian population.[619]

261. The Appeals Chamber notes that, in support of his argument that a widespread attack against the civilian population had not yet started when the Prime Minister and the Belgian peacekeepers were killed, Sagahutu relies on the Trial Chamber's finding that open hostilities between the Rwandan armed forces and the RPF began when the RPF troops moved out of the *Conseil national*

[612] Sagahutu Appeal Brief, para. 246, *referring to* Trial Judgement, paras. 511-518, 536.
[613] Sagahutu Appeal Brief, para. 248.
[614] Sagahutu Appeal Brief, para. 249.
[615] Sagahutu Appeal Brief, para. 250. *See also* AT. 9 May 2013 p. 2.
[616] Prosecution Response Brief (Sagahutu), paras. 7, 218-222, 226, 227, 234-249, 252.
[617] Article 3 of the Statute. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 389; *Semanza* Appeal Judgement, paras. 268, 269; *Ntakirutimana* Appeal Judgement, para. 516.
[618] *Bagosora and Nsengiyumva* Appeal Judgement, para. 389. *See also Nahimana et al.* Appeal Judgement, para. 920, *quoting Kordić and Čerkez* Appeal Judgement, para. 94; *Gacumbitsi* Appeal Judgement, para. 101.
[619] *Bagosora and Nsengiyumva* Appeal Judgement, para. 389. *See also Gacumbitsi* Appeal Judgement, para. 86; *Kordić and Čerkez* Appeal Judgement, para. 99.

pour le développement ("CND") barracks in Kigali on 7 April 1994.[620] This finding was part of the Trial Chamber's assessment on the nexus of the killing of the Prime Minister and the Belgian peacekeepers with an armed conflict.[621] As previously held, the concepts of "attack" and "armed conflict" are not identical and Article 3 of the Statute does not require that crimes against humanity be committed in the context of an armed conflict.[622] Contrary to Sagahutu's assertion, the Trial Chamber did not find that the widespread and systematic attack against the civilian population only started when the RPF moved out of the CND barracks. This submission is therefore dismissed.

262. In addition, while the Trial Chamber observed that the circumstances at the Prime Minister's residence in the morning of 7 April 1994 were "chaotic"[623] and that the attack against the Belgian peacekeepers appeared to have been spontaneous, unplanned, and disorganised,[624] the Appeals Chamber is not convinced that this made it unreasonable for the Trial Chamber to conclude that the crimes formed part of a widespread or systematic attack against the civilian population. In this context, the Appeals Chamber recalls that the Trial Chamber was satisfied that the killing of the Prime Minister was a well organized operation involving Reconnaissance Battalion soldiers who could not have acted "outside the orders and knowledge" of Sagahutu as a commander within this battalion.[625] The Appeals Chamber recalls further that, while the existence of a plan may support a finding that an attack was directed at a civilian population and that it was widespread or systematic, it is not a legal element of crimes against humanity.[626] Hence, the Trial Chamber's conclusion that the killings of the Prime Minister and the Belgian peacekeepers were not part of a pre-conceived plan for the purposes of conspiracy to commit genocide[627] was not inconsistent with its finding that these killings were related to a broader attack against the civilian population.

263. Finally, the Appeals Chamber is not convinced by Sagahutu's assertion that the Trial Chamber erred in finding that he was aware of the widespread attack against the civilian population and that his acts were part of this attack. The Trial Chamber made clear that the basis of its conclusion was that the attacks on civilians were highly organized and broad-based and that, in his position as a high-ranking officer, Sagahutu would have been familiar with the situation both nationally and in areas under his control.[628] While the Trial Chamber did not expressly state that

[620] *See* Sagahutu Notice of Appeal, para. 87, *referring to* Trial Judgement, para. 2134; Sagahutu Appeal Brief, para. 243.
[621] *See* Trial Judgement, Section 5.10.2.1.2.
[622] *See Nahimana et al.* Appeal Judgement, para. 916, *quoting Kunarac et al.* Appeal Judgement, para. 86; *Semanza* Appeal Judgement, para. 269. *See also Tadić* Appeal Judgement, para. 251.
[623] Trial Judgement, para. 1722.
[624] Trial Judgement, para. 511
[625] Trial Judgement, paras. 1744, 2035, 2093.
[626] *Nahimana et al.* Appeal Judgement, para. 922; *Gacumbitsi* Appeal Judgement, para. 84; *Semanza* Appeal Judgement, para. 269; *Blaškić* Appeal Judgement, para. 120.
[627] *See* Trial Judgement, paras. 511, 512, 518.
[628] Trial Judgement, para. 2090.

Sagahutu had such knowledge in the morning of 7 April 1994 when the Prime Minister and the Belgian peacekeepers were killed, the Appeals Chamber understands that this conclusion was implied. Sagahutu does not advance any substantive argument to show that it was unreasonable for the Trial Chamber to draw such a conclusion. His assertion that he provided protection to the Belgian School and assisted Belgian soldiers at a roadblock are insufficient to show an error in the Trial Chamber's reasoning.

264. Accordingly, Sagahutu has failed to demonstrate an error in the Trial Chamber's assessment of the legal elements of crimes against humanity.

2. Murder as a Serious Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II

265. The Trial Chamber was satisfied that the legal elements for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II had been proven because: (i) a non-international armed conflict existed between the Rwandan army and the RPF;[629] (ii) the killings of the Prime Minister and the Belgian peacekeepers were closely related to the armed conflict;[630] and (iii) the victims of these crimes did not take an active part in the hostilities.[631]

266. Regarding the nexus element, the Trial Chamber considered that the downing of the President's plane in the evening of 6 April 1994 prompted the escalation of hostilities between the Rwandan armed forces and the RPF on the following day and that the killings of the Prime Minister and the Belgian peacekeepers were committed within a few hours the President's death.[632] In this context, the Trial Chamber also noted that "the RPF was identified with the Tutsi minority and with many members of the political opposition in Rwanda" and that the armed conflict "created the environment and provided a pretext for the extensive killings and other abuses of the civilian population, particularly Tutsi".[633] It further observed that: (i) the attack on the Prime Minister was organized; (ii) at the time of the attack, the Prime Minister had intended to go to Radio Rwanda for an address to the population which could have substantially calmed the situation in the country; (iii) there was evidence that "Rwandan government soldiers taunted the Prime Minister after her arrest on 7 April and told her that she would be taken to the CND in order to take an oath", and that this was a "veiled reference to […] the Kigali base of the RPF forces"; (iv) the Belgian peacekeepers were sent to the Prime Minister's residence to escort her to the radio station; (v) the

[629] Trial Judgement, paras. 105, 2132.
[630] Trial Judgement, paras. 2133-2139.
[631] Trial Judgement, paras. 2141, 2142.
[632] *See* Trial Judgement, paras. 2134, 2136, 2138.
[633] Trial Judgement, para. 2134. *See also* Trial Judgement, para. 2137.

Belgian peacekeepers were killed at Camp Kigali after being disarmed at the Prime Minister's residence; and (vi) there were widespread rumours at the time among the assailants at Camp Kigali that the "Belgians" were responsible for shooting down the President's plane.[634]

267. Nzuwonemeye and Sagahutu submit that the Trial Chamber erred in finding that there was a nexus between the armed conflict and the killings of the Prime Minister and the Belgian peacekeepers.[635] In their view, the Trial Chamber erroneously found that an armed conflict existed at the time of the commission of these crimes.[636] Sagahutu adds that the Trial Chamber made contradictory findings regarding the date on which a non-international armed conflict in Rwanda began.[637]

268. In addition, Nzuwonemeye asserts that the Trial Chamber erred in finding that the Prime Minister's intended speech at Radio Rwanda could have substantially calmed the situation in the country, that her killing was an organized military operation, and that the Belgian peacekeepers were sent to escort the Prime Minister to make her radio address.[638] He also contends that the Trial Chamber reversed the burden of proof when finding based on the testimony of Defence Witness Deo Munyaneza that the Prime Minister was taunted after her arrest since this was "an element which must be proved by the Prosecution".[639]

269. Finally, Nzuwonemeye submits that the Prosecution withdrew the indictment against Bernard Ntuyahaga and had his case transferred to Belgium because it considered that the killing of the Prime Minister amounted to an isolated act of violence.[640] In Nzuwonemeye's view, this established a "legal precedent" for treating the incident as "ordinary" murder, rather than an international crime.[641]

[634] Trial Judgement, paras. 2137, 2138.
[635] Nzuwonemeye Notice of Appeal, paras. 176, 177; Nzuwonemeye Appeal Brief, paras. 463, 482-485; Sagahutu Notice of Appeal, paras. 89, 91.
[636] Nzuwonemeye Appeal Brief, paras. 462, 467, 468, 472, 473, 478, 484-486; Sagahutu Notice of Appeal, para. 90; Sagahutu Appeal Brief, para. 255. *See also* Nzuwonemeye Reply Brief, para. 155; AT. 8 May 2013 pp. 45, 50. Nzuwonemeye also asserts that there was no evidence to support the Trial Chamber's findings on the nexus. *See* Nzuwonemeye Appeal Brief, paras. 486, 490. In light of the summary of the Trial Chamber's findings in the text above, this submission is summarily dismissed as unsubstantiated.
[637] Sagahutu Appeal Brief, para. 254.
[638] Nzuwonemeye Appeal Brief, paras. 487, 491. *See also* AT. 8 May 2013 p. 48.
[639] Nzuwonemeye Appeal Brief, para. 492. *See also* AT. 8 May 2013 p. 50.
[640] Nzuwonemeye Appeal Brief, paras. 479, 480.
[641] *See* Nzuwonemeye Appeal Brief, paras. 479, 480. *See also* AT. 8 May 2013 p. 51.

270. The Prosecution responds that Nzuwonemeye and Sagahutu fail to show that the Trial Chamber erred in finding that the crimes for which they were convicted amounted to serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[642]

271. The Appeals Chamber recalls that the nexus required for a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II need not be a causal link, but that the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed.[643] The Appeals Chamber has thus held that "if it can be established […] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict".[644] To find a nexus, it is sufficient that the alleged crimes be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[645]

272. The Appeals Chamber notes that, in support of their argument that an armed conflict started only after the Prime Minister and the Belgian peacekeepers had been killed, Nzuwonemeye and Sagahutu rely on the Trial Chamber's finding that open hostilities between the Rwandan armed forces and the RPF began on 7 April 1994 with the RPF leaving their barracks at the CND.[646] Sagahutu additionally refers to paragraph 63 of the Trial Judgement where the Trial Chamber stated that it took judicial notice of the existence of an armed conflict in Rwanda between 7 April and 17 July 1994.[647]

273. The Appeals Chamber observes that Paragraph 63 of the Trial Judgement is located in the overview section which contains a non-dispositive summary of the Trial Chamber's findings in the case.[648] Elsewhere, the Trial Chamber took judicial notice of the existence of a non-international armed conflict in Rwanda between 1 January 1994 and 17 July 1994.[649] The Appeals Chamber recalls that it has found no error in this regard.[650] Accordingly, the Appeals Chamber considers the reference to 7 April 1994 at paragraph 63 of the Trial Judgement to be an oversight. Moreover, the

[642] Prosecution Response Brief (Nzuwonemeye), paras. 256-261. Prosecution Response Brief (Sagahutu), paras. 7, 253-261, 264-266.
[643] *Setako* Appeal Judgement, para. 249; *Rutaganda* Appeal Judgement, para. 569, *citing Kunarac et al.* Appeal Judgement, para. 58.
[644] *Setako* Appeal Judgement, para. 249; *Rutaganda* Appeal Judgement, para. 569, *citing Kunarac et al.* Appeal Judgement, para. 58.
[645] *Setako* Appeal Judgement, para. 249; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.
[646] *See*, *e.g.*, Nzuwonemeye Appeal Brief, para. 468, *referring to* Trial Judgement, para. 2134; Sagahutu Appeal Brief, para. 255.
[647] *See* Sagahutu Appeal Brief, para. 254.
[648] *See* Trial Judgement, para. 2.
[649] *See* Trial Judgement, paras. 105, 2132.
[650] *See supra* para. 127.

Trial Chamber held that the downing of the President's plane in the evening of 6 April 1994 was a *catalyst* for the escalation of hostilities between the Rwandan armed forces and the RPF and that these hostilities *resumed* later on 7 April 1994.[651] Thus, a comprehensive interpretation of the Trial Judgement shows that the Trial Chamber concluded that an armed conflict was ongoing when the Prime Minister and the Belgian peacekeepers were killed.[652]

274. Furthermore, the Appeals Chamber does not consider it necessary to further address Nzuwonemeye's arguments regarding the Trial Chamber's assessment of evidence that the Prime Minister's radio address could have substantially calmed the situation in the country, that the Belgian peacekeepers were sent to escort the Prime Minister to make the radio address, that the Prime Minister was taunted by soldiers of the Rwandan army, and that there were rumors that "Belgians" were implicated in shooting down the President's plane. While the Trial Chamber made such observations,[653] the Appeals Chamber considers that these matters were not central to the conclusion that the killing of the Prime Minister was linked to the armed conflict. Rather the above mentioned factors merely served to throw light on the circumstances of the Prime Minister's death and reinforce the Trial Chamber's finding that the armed conflict created a pretext for extensive killings of members of the civilian population, including that of the Prime Minister.[654] Nzuwonemeye does not advance any argument showing an impact of his challenges on the reasonableness of this conclusion.

275. In addition, the Appeals Chamber dismisses Nzuwonemeye's unsubstantiated assertion that there was no evidence that the killing of the Prime Minister was an organized military operation since the Trial Chamber discussed this issue elsewhere in the Trial Judgement.[655]

276. Finally, with respect to the *Ntuyahaga* case, the Appeals Chamber notes that the Trial Chamber assessed and denied Nzuwonemeye's arguments on this matter at trial and that Nzuwonemeye merely repeats his submissions without showing an error in the Trial Chamber's decision.[656] In any event, the Prosecution's decision to withdraw an indictment in one case has no bearing on other cases. Moreover, nothing in the *Ntuyahaga* case shows that the killing of the Prime Minister should be considered as "ordinary" murder, rather than an international crime.[657]

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[651] *See* Trial Judgement, paras. 2134, 2136-2138. *See also* Trial Judgement, paras. 1926, 1933, 2196.
[652] *See* Trial Judgement, paras. 2134, 2136, 2138.
[653] *See* Trial Judgement, para. 2137.
[654] *See* Trial Judgement, paras. 2134, 2137.
[655] Trial Judgement, para. 1744.
[656] *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Supplemental Motions on Alleged Defects in the Form of the Indictment, 15 July 2008, p. 4.
[657] Nzuwonemeye points to the Prosecution's submissions in its 1999 request for withdrawal of the indictment against Bernard Ntuyahaga, noting that the indictment had previously been reduced to a single count in relation to the killings

277. In light of the foregoing, the Appeals Chamber finds that Nzuwonemeye and Sagahutu have failed to demonstrate that the Trial Chamber erred in its assessment of the legal elements of murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.

3. Conclusion

278. Accordingly, the Appeals Chamber dismisses Nzuwonemeye's Fifth Ground of Appeal in part, and Sagahutu's Eleventh and Twelfth Grounds of Appeal.

of the Prime Minister and the Belgian peacekeepers. *See* Nzuwonemeye Appeal Brief, para. 479. In the part referred to by Nzuwonemeye, the Prosecution merely stated that "[t]he prosecution of isolated criminal acts which can no longer be placed within the context of conspiracy to commit genocide is not in line with the desired prosecutorial objective of – shedding light on the tragic events that occurred in Rwanda in 1994, and highlighting the complete criminal landscape of the wide spread [*sic*] and systematic massacres committed". *See The Prosecutor v. Bernard Ntuyahaga*, Case No. ICTR-98-40-I, Prosecutor's Motion under Rules 51 and 73 to Withdraw the Indictment against the Accused, 25 February 1999, paras. 13, 14.

D. Killing of Prime Minister Agathe Uwilingiyimana (Nzuwonemeye Grounds 3 and 6, in part; Sagahutu Grounds 2 to 5)

279. The Trial Chamber convicted Nzuwonemeye and Sagahutu of murder as a crime against humanity and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killing of the Prime Minister Agathe Uwilingiyimana.[658] In this respect, the Trial Chamber found that, on 7 April 1994, various units of the Rwandan army, including soldiers of the Reconnaissance Battalion, attacked the Prime Minister's residence and killed her in what the Trial Chamber described as an organized military operation conducted with the authorization of senior military officers.[659]

280. Specifically, the Trial Chamber concluded that Nzuwonemeye ordered Sagahutu to deploy an armoured unit from the Reconnaissance Battalion to reinforce elements of the Presidential Guard at the Prime Minister's residence.[660] The Trial Chamber found that Sagahutu complied with this order and that an armoured vehicle was stationed between 150 and 200 metres from the residence.[661] The Trial Chamber also credited evidence from several witnesses who heard Corporal Fiacre Afrika, a member of the Squadron A of the Reconnaissance Battalion, boast about his role in the killing of the Prime Minister.[662] The Trial Chamber also found, in light of the well-coordinated nature of the operation, that evidence suggesting that a soldier from the *École supérieure militaire* ("ESM") killed the Prime Minister, would not absolve Nzuwonemeye or Sagahutu of their subordinates' involvement in the operation that led to her death.[663] The Trial Chamber further found that, during the course of the operation, Nzuwonemeye and Sagahutu remained in contact with the troops on the ground, sent them supplies, and issued operational instructions.[664] The Trial Chamber found that the Reconnaissance Battalion soldiers who participated in the killing acted on the orders

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[658] Trial Judgement, paras. 2093, 2107, 2108, 2146, 2147, 2154, 2156, 2163. *See also* Trial Judgement, paras. 508, 513, 1903.
[659] *See* Trial Judgement, paras. 1734, 1744, 2024, 2035, 2093.
[660] *See* Trial Judgement, paras. 1715, 1719, 2016, 2093.
[661] *See* Trial Judgement, paras. 1715, 1719, 1735, 2093.
[662] *See* Trial Judgement, paras. 1649, 1650, 1652, 1729. *See also* Trial Judgement, paras. 1733 ("In light of the firsthand and credible evidence elicited from other Prosecution witnesses *implicating* [*Reconnaissance*] *Battalion soldiers in the killing of the Prime Minister* […]. Furthermore, the evidence of Des Forges and Dallaire is not necessarily inconsistent with the Prosecution case *that the Prime Minister was killed by soldiers of various units of the Rwandan* [*a*]*rmy including those of the* [*Reconnaissance*] *Battalion*."), 1744 ("The evidence precludes any suggestion that the [*Reconnaissance*] *Battalion soldiers who participated in the killing of the Prime Minister* were acting outside the orders and knowledge of the two Accused in their capacity as commanders of this battalion."), 2029 ("The Chamber therefore finds that Sagahutu had *de facto* authority *over* [*Reconnaissance*] *Battalion soldiers from Squadron A who participated in the killing of the Prime Minister*."), 2035 ("Members of [Squadron A of the Reconnaissance Battalion] *could not have participated in the killing of such a senior political figure* without the permission of their superiors."), 2093 ("[Reconnaissance] Battalion soldiers […] participated in the attack on *and killing of* Prime Minister Agathe Uwilingiyimana".) (emphasis added).
[663] Trial Judgement, para. 1734. *See also* Trial Judgement, para. 1733.
[664] Trial Judgement, para. 2093. *See also* Trial Judgement, para. 1744.

and with the knowledge of Nzuwonemeye and Sagahutu given the organized nature of the attack, their role as commanders, and the fact that they remained abreast of the situation.[665]

281. The Trial Chamber concluded that, "[b]ased on the evidence before it, […] Nzuwonemeye and Sagahutu are responsible under Article 6(1) of the Statute for ordering the killing of the Prime Minister and also aiding and abetting the direct perpetrators".[666] The Trial Chamber further found that they were also responsible for the killing as superiors under Article 6(3) of the Statute, which it considered in relation to sentencing.[667] The Appeals Chamber recalls that it has already reversed the Trial Chamber's finding that Nzuwonemeye aided and abetted this killing for lack of sufficient notice.[668]

282. Nzuwonemeye and Sagahutu submit that the Trial Chamber erred in convicting them of these crimes.[669] In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing: (i) Nzuwonemeye's and Sagahutu's liability for ordering; (ii) Sagahutu's liability for aiding and abetting the crimes under Article 6(1) of the Statute; and (iii) Nzuwonemeye's and Sagahutu's superior responsibility under Article 6(3) of the Statute.

1. Article 6(1) of the Statute

(a) Ordering

283. Sagahutu submits that the Trial Chamber did not provide a reasoned opinion as it failed to make findings that he possessed the *mens rea* and committed the *actus reus* necessary to convict him for ordering the killing of the Prime Minister.[670] He notes that the Trial Judgement contains no express conclusion that he ordered the killing of the Prime Minister.[671] Furthermore, in his view, the Trial Chamber's findings about (i) his orders to deploy Reconnaissance Battalion soldiers to the vicinity of the Prime Minister's residence on the morning of 7 April 1994;[672] (ii) his communications with the deployed Reconnaissance Battalion soldiers;[673] and (iii) Reconnaissance

[665] Trial Judgement, para. 1744.
[666] Trial Judgement, para. 2093.
[667] Trial Judgement, paras. 2094, 2095, 2107, 2108, 2146, 2244, 2246, 2254, 2257. *See also* Trial Judgement, para. 1745.
[668] *See supra* para. 190.
[669] *See* Nzuwonemeye Notice of Appeal, paras. 83-137; Nzuwonemeye Appeal Brief, paras. 166-320, 520-525; Nzuwonemeye Reply Brief, paras. 99-134; AT. 8 May 2013 pp. 42-53, 77-81. *See* Sagahutu Notice of Appeal, paras. 17-49; Sagahutu Appeal Brief, paras. 10-145; Sagahutu Reply Brief, paras. 6-36; AT. 9 May 2013 pp. 4-16, 45-48.
[670] Sagahutu Notice of Appeal, paras. 24, 25; Sagahutu Appeal Brief, paras. 77-79, 87, 92, 103; Sagahutu Reply Brief, para. 20; AT. 9 May 2013 pp. 4, 5. *See also* Sagahutu Appeal Brief, paras. 70-72 (arguing that the Trial Chamber erred by failing to provide a reasoned opinion on each of the elements necessary to find that Sagahutu ordered the killing of the Prime Minister).
[671] Sagahutu Appeal Brief, paras. 73, 87.
[672] Sagahutu Appeal Brief, paras. 39, 40, 87-89, 100; Sagahutu Reply Brief, para. 29; AT. 9 May 2013 pp. 5, 10.
[673] Sagahutu Appeal Brief, paras. 44-55, 101; AT. 9 May 2013 pp. 6-10.

Battalion soldiers transporting the Prime Minister's corpse to Camp Kanombe[674] cannot support as the only reasonable inference that he ordered the killing of the Prime Minister.[675]

284. Sagahutu emphasizes the absence of any evidence demonstrating that he or anyone else in the Reconnaissance Battalion was in prior contact with members of the Presidential Guard, who the Trial Chamber found had participated in the killing of the Prime Minister.[676] He further points to the Trial Chamber's finding that the decision to kill the Prime Minister was not made at the meeting at Army Headquarters on the evening of 6 to 7 April 1994.[677] He argues that, given the record and the Trial Chamber's findings, it would be unreasonable to conclude that he was aware of any plan to kill the Prime Minister and that any instruction he gave was criminal in nature.[678]

285. Sagahutu also argues that the Trial Chamber's findings fail to demonstrate any causal link between his conduct and the killing of the Prime Minister.[679] Specifically, he contends that the Trial Chamber failed to identify that Reconnaissance Battalion soldiers, including Warrant Officer Boniface Bizimungu and Corporal Fiacre Afrika, participated in the killing of the Prime Minister or in any crime in relation to this event.[680] He contends that the Trial Chamber did not identify the killer of the Prime Minister, thereby failing to demonstrate that he possessed the requisite authority over the unknown perpetrator to order the killing.[681] He argues that his conviction for ordering should be dismissed, as to uphold it would be to engage in speculation as to what the Trial Chamber found in support of this form of liability.[682]

286. Nzuwonemeye submits that the Trial Chamber's findings fail to establish the elements required for ordering the killing of the Prime Minister.[683] In particular, he notes the absence of direct evidence that he ordered the commission of this crime.[684] He argues that the Trial Chamber failed to identify the actual perpetrator of the Prime Minister's killing, including whether it was a Reconnaissance Battalion soldier.[685] He claims that the Trial Chamber failed to make any specific

[674] Sagahutu Appeal Brief, para. 56.
[675] Sagahutu Appeal Brief, paras. 55, 74.
[676] Sagahutu Appeal Brief, paras. 35, 40, 94, 95; Sagahutu Reply Brief, paras. 11, 21.
[677] Sagahutu Appeal Brief, paras. 94, 95; AT. 9 May 2013 p. 5.
[678] Sagahutu Notice of Appeal, para. 40; Sagahutu Appeal Brief, paras. 39, 89, 94, 95; Sagahutu Reply Brief, para. 11.
[679] Sagahutu Notice of Appeal, para. 25; Sagahutu Appeal Brief, paras. 50-52, 76; Sagahutu Reply Brief, paras. 7, 9, 31; AT. 9 May 2013 p. 9.
[680] Sagahutu Appeal Brief, paras. 10, 20-30, 41-43, 50-53, 56-61, 75, 85, 87, 99; Sagahutu Reply Brief, paras. 8, 9, 35; AT. 9 May 2013 p. 9.
[681] Sagahutu Appeal Brief, paras. 10, 20-24, 61, 75; Sagahutu Reply Brief, paras. 7, 35; AT. 9 May 2013 pp. 2, 3.
[682] Sagahutu Appeal Brief, para. 80, *referring to Krajišnik* Appeal Judgement, para. 176. *See also* Sagahutu Appeal Brief, paras. 26 (*referring to Orić* Appeal Judgement, para. 47), 27 (*referring to Seromba* Appeal Judgement, paras. 47, 48).
[683] Nzuwonemeye Notice of Appeal, para. 110; Nzuwonemeye Appeal Brief, paras. 170, 172, 174, 175, 197, 199, 311, 524; Nzuwonemeye Reply Brief, paras. 99-102, 125; AT. 8 May 2013 pp. 44, 46.
[684] Nzuwonemeye Appeal Brief, paras. 176, 308, 311, 520. *See also* AT. 8 May 2013 pp. 43, 44, 46, 51, 78.
[685] Nzuwonemeye Appeal Brief, paras. 174, 189-196, 199, 201, 268; AT. 8 May 2013 pp. 46, 47.

findings regarding the conduct of Reconnaissance Battalion soldiers in connection with this event, and that, consequently, the Trial Chamber did not establish a causal link between their actions and the Prime Minister's death.[686] Furthermore, Nzuwonemeye argues that, contrary to the Trial Chamber's conclusions, the record fails to demonstrate that at the relevant time he had contact with Sagahutu or Warrant Officer Boniface Bizimungu or that he supplied the warrant officer with food and ammunition.[687]

287. Nzuwonemeye also points to the Trial Chamber's findings, which he claims demonstrate that the Prime Minister's killing had not been planned and was not the result of a "military order".[688] He argues that the Trial Chamber failed to provide a reasoned opinion ruling out the reasonable possibility that those who killed the Prime Minister were part of a "rogue" operation.[689] In this context, he contends that evidence of him deploying Reconnaissance Battalion soldiers is consistent with a non-criminal military operation and fails to provide a basis for concluding that he ordered or intended the Prime Minister's killing.[690]

288. The Prosecution responds that the Trial Chamber's factual conclusions sufficiently establish the *actus reus* and the *mens rea* to hold Sagahutu liable for ordering under Article 6(1) of the Statute.[691] With respect to *actus reus*, the Prosecution points to the Trial Chamber's findings that Sagahutu ordered the deployment of Reconnaissance Battalion armoured vehicles to the Prime Minister's residence to reinforce the Presidential Guard.[692] It argues that the Reconnaissance Battalion's acts of blockading and controlling access to the residence,[693] including with respect to Belgian peacekeepers, pointing a canon at the Prime Minister's residence and firing upon it,[694] shooting at the Belgian peacekeepers,[695] as well as the "personal participation" of Reconnaissance Battalion soldiers in the operation to kill the Prime Minister[696] substantially contributed to her death.[697]

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[686] Nzuwonemeye Appeal Brief, paras. 193-198, 262, 263, 268, 522; AT. 8 May 2013 pp. 78, 79.
[687] Nzuwonemeye Appeal Brief, paras. 248, 304; AT. 8 May 2013 pp. 49, 50, 78, 79.
[688] Nzuwonemeye Appeal Brief, paras. 175-177, 270-276, 508-513; Nzuwonemeye Reply Brief, para. 125; AT. 8 May 2013 p. 51.
[689] Nzuwonemeye Appeal Brief, paras. 308-311.
[690] Nzuwonemeye Appeal Brief, paras. 175-177, 179, 511; Nzuwonemeye Reply Brief, paras. 99-102, 125; AT. 8 May 2013 p. 48.
[691] Prosecution Response Brief (Sagahutu), paras. 90, 91, 98, 99.
[692] Prosecution Response Brief (Sagahutu), para. 96.
[693] Prosecution Response Brief (Sagahutu), para. 96. *See also* Prosecution Response Brief (Sagahutu), paras. 48, 82, 104.
[694] Prosecution Response Brief (Sagahutu), paras. 96, 97. *See also* Prosecution Response Brief (Sagahutu), paras. 45, 64.
[695] Prosecution Response Brief (Sagahutu), para. 97; AT. 8 May 2013 p. 68. *See also* Prosecution Response Brief (Sagahutu), paras. 44, 82.
[696] Prosecution Response Brief (Sagahutu), para. 97. *See also* Prosecution Response Brief (Sagahutu), paras. 35, 40, 41, 55, 62, 68-75, 77, 104. *Cf.* Prosecution Response Brief (Nzuwonemeye), paras. 172, 173.
[697] Prosecution Response Brief (Sagahutu), paras. 96, 97. *See also* Prosecution Response Brief (Sagahutu), para. 66.

289. Turning to Sagahutu's *mens rea*, the Prosecution contends that his order to deploy Reconnaissance Battalion soldiers to the Prime Minister's residence to reinforce the Presidential Guard,[698] his utterances and his operational instructions[699] demonstrate that he ordered that the Prime Minister be killed, or, at a minimum, that he acted with the awareness of the substantial likelihood that she would be murdered.[700] The Prosecution emphasizes that Sagahutu's acts and statements were made as Hutu moderates and members of the political opposition were being systematically killed,[701] and that the existence of any prior plan to kill her was not necessary to establish his *mens rea*.[702] The Prosecution also points to Sagahutu's direct involvement after the Prime Minister's killing in the removal of her corpse as further evidence of his knowing participation in the murder operation.[703]

290. The Prosecution further argues that the Trial Chamber inferred as the only reasonable conclusion that Nzuwonemeye ordered the Prime Minister's murder.[704] The Prosecution contends that this conclusion was reasonably supported by evidence that Nzuwonemeye ordered the deployment of Reconnaissance Battalions soldiers to the Prime Minister's residence,[705] that he kept abreast of events, issued operational instructions to the Reconnaissance Battalion before and after the Prime Minister's death,[706] as well as evidence implicating the Reconnaissance Battalion in the operation that led to the Prime Minister's death.[707]

291. The Appeals Chamber recalls that a person in a position of authority may incur responsibility under Article 6(1) of the Statute for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[708] Ordering, like any other form of responsibility, can be inferred from circumstantial evidence, provided it is the only reasonable inference available from the evidence.[709]

292. The Appeals Chamber observes that the Trial Chamber did not make express findings on the *mens rea* and *actus reus* related to Nzuwonemeye's and Sagahutu's liability for ordering under

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[698] Prosecution Response Brief (Sagahutu), paras. 99, 100, 104; AT. 9 May 2013 pp. 29-31, 36.
[699] Prosecution Response Brief (Sagahutu), para. 101. *See also* Prosecution Response Brief (Sagahutu), paras. 45-47. *Cf.* Prosecution Response Brief (Nzuwonemeye), para. 153.
[700] Prosecution Response Brief (Sagahutu), para. 99. *See also* Prosecution Response Brief (Sagahutu), paras. 80, 84, 85.
[701] Prosecution Response Brief (Sagahutu), paras. 100, 101, *referring to* Trial Judgement, paras. 706, 715, 717, 728.
[702] Prosecution Response Brief (Sagahutu), para. 102.
[703] Prosecution Response Brief (Sagahutu), paras. 48, 66; AT. 9 May 2013 p. 34.
[704] Prosecution Response Brief (Nzuwonemeye), paras. 144, 157. *See also* Prosecution Response Brief (Nzuwonemeye), para. 152.
[705] Prosecution Response Brief (Nzuwonemeye), paras. 153, 157; AT. 8 May 2013 pp. 62, 63, 65.
[706] Prosecution Response Brief (Nzuwonemeye), paras. 156, 157.
[707] Prosecution Response Brief (Nzuwonemeye), paras. 154, 170-174.
[708] *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, paras. 75, 76.
[709] *Renzaho* Appeal Judgement, para. 318. *See also Milošević* Appeal Judgement, para. 265; *Galić* Appeal Judgement, para. 178.

Article 6(1) of the Statute.[710] The Trial Chamber's reasoning fails to specify when, where, how, and to whom Nzuwonemeye and Sagahutu issued instructions to commit an offence upon which their ordering liability for the killing of the Prime Minister could be founded.[711] Similarly, the Trial Chamber failed to identify in the Trial Judgement what conduct on the part of Nzuwonemeye and Sagahutu had a "direct and substantial effect" on the killing of the Prime Minister.[712]

293. The Appeals Chamber recalls that, as part of fair trial guarantees, a trial chamber is required to provide a reasoned opinion under Article 22(2) of the Statute and Rule 88(C) of the Rules.[713] Consequently, a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis on which it reached the decision to convict or acquit an accused.[714] In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[715] The Appeals Chamber finds that the Trial Chamber's failure to make *mens rea* and *actus reus* findings in relation to Nzuwonemeye's and Sagahutu's liability for ordering amounts to a failure to provide a reasoned opinion. The Trial Chamber's failure to provide a reasoned opinion amounts to an error of law which allows the Appeals Chamber to consider the relevant evidence and factual findings in order to determine whether a reasonable trier of fact could have found beyond reasonable doubt that the requisite *actus reus* and *mens rea* were established in relation to Nzuwonemeye's and Sagahutu's liability for ordering under Article 6(1) of the Statute.[716]

294. The Appeals Chamber turns first to the Trial Chamber's conclusion that Nzuwonemeye and Sagahutu deployed Reconnaissance Battalion soldiers to the vicinity of the Prime Minister's residence to support the Presidential Guard soldiers there, a conclusion which the Trial Chamber reached and relied on, in part, to find Nzuwonemeye and Sagahutu liable for ordering.[717] A review of the Trial Judgement reflects that the Trial Chamber relied upon the evidence of Prosecution Witnesses ALN and AWC to make this finding.[718]

[710] Trial Judgement, paras. 2093, 2146.
[711] Trial Judgement, paras. 2093, 2146.
[712] Trial Judgement, paras. 2093, 2146.
[713] *See*, *e.g.*, *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Muvunyi I* Appeal Judgement, para. 144.
[714] *See Hadžihasanović and Kubura* Appeal Judgement, para. 13.
[715] *Renzaho* Appeal Judgement, para. 320; *Kajelijeli* Appeal Judgement, para. 60; *Kordić and Čerkez* Appeal Judgement, para. 383. *Cf. Orić* Appeal Judgement, para. 56.
[716] *Cf. Bagosora and Nsengiyumva* Appeal Judgement, para. 683; *Kalimanzira* Appeal Judgement, paras. 100, 200. *See also Perišić* Appeal Judgement, para. 92.
[717] Trial Judgement, para. 2093.
[718] *See* Trial Judgement, paras. 1715-1719.

295. The Trial Chamber summarized Witness ALN's testimony as indicating that the purpose of the deployment was "to ensure that the Prime Minister did not flee, and if necessary to kill her".[719] However, Witness AWC, who also overheard the deployment orders, did not corroborate this aspect of Witness ALN's account.[720] On this basis, the Trial Chamber only concluded that Nzuwonemeye and Sagahutu sent Reconnaissance Battalion soldiers to the vicinity of the Prime Minister's residence to reinforce the Presidential Guard, without concluding that the purpose of this deployment at the time it was made was to kill the Prime Minister.[721]

296. The Prosecution argues that Nzuwonemeye's and Sagahutu's conduct must be assessed in light of the ongoing assassinations of Hutu moderates and political opposition leaders around the time of the Prime Minister's killing and that they possessed the intent to have the Prime Minister killed.[722] However, the Prosecution's references to the Trial Judgement fail to demonstrate any conclusion by the Trial Chamber that Nzuwonemeye, Sagahutu, or Reconnaissance Battalion soldiers participated in any of these attacks or that Nzuwonemeye and Sagahutu were aware of them at the time of deploying Reconnaissance Battalion soldiers to the vicinity of the Prime Minister's residence.[723]

297. The Trial Judgement refers to no evidence suggesting that, at the time of the deployment of Reconnaissance Battalion soldiers to the vicinity of the Prime Minister's residence, Nzuwonemeye and Sagahutu were aware of an operation to kill the Prime Minister.[724] To the contrary, the Trial Chamber considered as a "reasonable inference" that "Nzuwonemeye may have ordered Sagahutu to reinforce the Presidential Guard soldiers at the residence of the Prime Minister in order to prevent her from reaching the radio station where she was expected to deliver a radio speech calling

[719] *See* Trial Judgement, para. 1642, *referring to* Witness ALN, T. 29 September 2004 p. 45; T. 30 September 2004 p. 35; T. 5 October 2004 pp. 20-22.
[720] *See* Trial Judgement, para. 1638. *See also* Witness AWC, T. 18 January 2006 pp. 29-31.
[721] Trial Judgement, para. 1719 ("Based on the evidence set out above, the Chamber is satisfied that early in the morning of 7 April 1994, Nzuwonemeye and Sagahutu ordered [Reconnaissance] Battalion armoured vehicles to deploy to the Prime Minister's residence in order to reinforce the Presidential Guard soldiers present at that location".). *See also* Trial Judgement, paras. 1715-1717. The Appeals Chamber observes that when discussing Sagahutu's knowledge relevant to his liability under Article 6(3) of the Statute, the Trial Chamber recalled, without citation, that "Sagahutu gave the order for [Warrant Officer] Bizimungu's unit to redeploy from Radio Rwanda to a position near the Prime Minister's residence on Paul VI Avenue, and to collaborate with the Presidential Guard *in attacking the Prime Minister*". *See* Trial Judgement, para. 2033 (emphasis added). Notably, when discussing Nzuwonemeye's knowledge, the Trial Chamber, consistent with its factual findings and legal conclusions under Article 6(1) of the Statute, refers to an order to "reinforce Presidential Guard troops at the residence of the Prime Minister" without referring to an instruction to "attack" her. *See* Trial Judgement, para. 2016. *See also* Trial Judgement, paras. 1719, 2093. In this regard, the summary in paragraph 2033 of the Trial Judgement is incompatible with the Trial Chamber's other findings.
[722] *See, e.g.*, Prosecution Response Brief (Sagahutu), paras. 100, 101; AT. 8 May 2013 pp. 66-68.
[723] *See* Prosecution Response Brief (Sagahutu), para. 101, *referring to* Trial Judgement, paras. 706, 715, 717, 728. *See also* AT. 8 May 2013 p. 67 (referring to the testimony of Defence Witness Luc Marchal and Prosecution Witness LMC concerning their awareness of Presidential Guards attacking political moderates).
[724] The Appeals Chamber also notes that the Trial Chamber found no evidence that a decision to kill the Prime Minister was made at a meeting attended by Nzuwonemeye at Rwandan army headquarters on the evening of 6 to 7 April 1994 prior to the deployment. *See* Trial Judgement, para. 517.

for calm in the country".[725] This conclusion does not necessarily indicate that in deploying Reconnaissance Battalion soldiers to reinforce the Presidential Guard at the Prime Minister's residence Nzuwonemeye and Sagahutu intended that the Prime Minister be killed or were aware of the substantial likelihood that this might occur in the execution of the order.[726] In view of the foregoing, the Appeals Chamber finds that no reasonable trial chamber could have considered Nzuwonemeye's and Sagahutu's deployment of Reconnaissance Battalion soldiers to the vicinity of the Prime Minister's residence to reinforce the Presidential Guard as proof of the requisite elements of ordering liability under Article 6(1) of the Statute.

298. The Appeals Chamber next turns to the Trial Chamber's conclusions that following the deployment, before and after the attack on the Prime Minister's residence, Nzuwonemeye and Sagahutu remained in contact with the "troops on the ground, sending them supplies, and issuing operational instructions".[727] As noted above, the Trial Chamber referred to these findings when determining that Nzuwonemeye and Sagahutu were responsible for ordering under Article 6(1) of the Statute.[728]

299. When assessing Sagahutu's *de facto* authority over Reconnaissance Battalion soldiers in its findings under Article 6(3) of the Statute, the Trial Chamber recalled:

> [O]n [Sagahutu's] instructions, Witnesses DA and HP took ammunition, food and other supplies to [Warrant Officer Boniface] Bizimungu during the latter's deployment on Paul VI Avenue; Sagahutu gave operational instructions to Bizimungu regarding, *inter alia*, whether to allow Belgian soldiers access to the Prime Minister's residence; and significantly, following the Prime Minister's arrest, Bizimungu asked Sagahutu whether she should be taken to Camp Kigali. Finally, it was on the basis of Sagahutu's orders that [Reconnaissance] Battalion soldiers removed the Prime Minister's body from her residence to Kanombe Hospital on 7 April 1994. The Chamber therefore finds that Sagahutu had *de facto* authority over [Reconnaissance] Battalion soldiers from Squadron A[,] who participated in killing the Prime Minister. The Chamber has clear evidence of multiple operational orders issued by him that were dutifully obeyed by his subordinates.[729]

Furthermore, when discussing Sagahutu's knowledge in relation to liability under Article 6(3) of the Statute for this crime, the Trial Chamber stated:

> Subsequently, when Belgian [Peacekeepers] were on their way to the Prime Minister's residence, Sagahutu was informed about their arrival by [Warrant Officer Boniface] Bizimungu who sought

[725] Trial Judgement, para. 1718. The Appeals Chamber recalls that it denied Nzuwonemeye's request, pursuant to Rule 115 of the Rules, to admit additional evidence concerning his knowledge of whether the Prime Minister intended to give a radio address, in part, because such evidence was inconsequential to the Trial Chamber's findings underpinning his convictions under Articles 6(1) and 6(3) of the Statute for the Prime Minister's killing and because Nzuwonemeye failed to demonstrate how the exclusion of such evidence would lead to the miscarriage of justice. *See* Decision on François-Xavier Nzuwonemeye's Motion for the Admission of Additional Evidence (Confidential), 3 May 2013, para. 31.
[726] *See Renzaho* Appeal Judgement, para. 315; *Nahimana et al.* Appeal Judgement, para. 481; *Blaškić* Appeal Judgement, para. 42.
[727] Trial Judgement, para. 2093.
[728] Trial Judgement, para. 2093.
[729] Trial Judgement, para. 2029.

> his instructions on whether to allow the Belgians through. Most importantly, after the Prime Minister was arrested, Sagahutu was informed by [Warrant Officer Boniface] Bizimungu who again requested his permission to bring the Prime Minister to Camp Kigali. To this question, Sagahutu gave the rhetorical answer, "[T]o do what?" Shortly thereafter, the Prime Minister was killed. Finally, Sagahutu saw the Prime Minister's dead body at her residence on 7 April and arranged for its removal from there to Kanombe hospital.[730]

From these statements, as well as a reading of the Trial Judgement as a whole, the Appeals Chamber considers that the Trial Chamber accepted various aspects of the evidence of Witnesses DA and HP concerning Sagahutu's contact with Reconnaissance Battalion soldiers at the Prime Minister's residence, his issuance of operational instructions, and provision of supplies.[731]

300. At the outset, the Appeals Chamber observes that none of the evidence cited by the Trial Chamber reflects that Nzuwonemeye and Sagahutu issued an order to Reconnaissance Battalion soldiers to kill the Prime Minister. Notably, Witnesses DA and HP testified that they were not aware of such an order.[732] The Appeals Chamber therefore finds that the Trial Chamber's conclusions set out above, which are the only specific findings on Nzuwonemeye's and Sagahutu's support or instructions to the deployed Reconnaissance Battalion soldiers,[733] fail to provide a reasonable basis to infer that Nzuwonemeye or Sagahutu ordered the killing of the Prime Minister or issued an order with the awareness of the substantial likelihood that she would be killed in the execution thereof.[734] Indeed, the Trial Chamber's findings and the evidence it relied upon in making them are consistent with the Trial Chamber's own consideration that Reconnaissance Battalion soldiers may have been deployed for the purpose of preventing the Prime Minister from giving a radio address.[735]

301. The Trial Chamber also failed to identify what conduct by the Reconnaissance Battalion members had a "direct and substantial effect" on the killing of the Prime Minister. In this regard, the Trial Chamber stated that Reconnaissance Battalion soldiers under Nzuwonemeye's and Sagahutu's command "participated in the attack on and killing of" the Prime Minister.[736] The Trial Chamber, however, did not specify the nature of the soldiers' participation. A review of the Trial

[730] Trial Judgement, para. 2033.
[731] Trial Judgement, paras. 1740, 1743, 1744. *See also* Trial Judgement, paras. 2020, 2033, 2093.
[732] *See* Witness DA, T. 19 January 2005 p. 10; T. 24 January 2005 p. 39; Witness HP, T. 9 May 2005 pp. 41, 42.
[733] The Appeals Chamber observes that there is no evidence referred to in the Trial Judgement that Nzuwonemeye sent supplies to Reconnaissance Battalion soldiers stationed at the Prime Minister's home. Furthermore, in light of the Trial Chamber's rejection of the evidence of Witness ALN, only Witness DA testified that Nzuwonemeye communicated with Reconnaissance Battalion soldiers at the Prime Minister's residence. *See* Trial Judgement, paras. 1625, 1626, 1631, 1644, 1741. However, the Trial Chamber stated it would only accept Witness DA's evidence where corroborated. *See* Trial Judgement, para. 1724. Consequently, no reasonable trier of fact could have found, as the Trial Chamber did in paragraph 2093 of the Trial Judgement, that Nzuwonemeye "remained in contact with the troops on the ground" and sent them "supplies".
[734] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 277; *Renzaho* Appeal Judgement, para. 315; *Nahimana et al.* Appeal Judgement, para. 481.
[735] Trial Judgement, para. 1718.
[736] Trial Judgement, para. 2093.

Chamber's factual findings reveals that it relied on the evidence of Prosecution Witnesses DA, HP, DY, ANK/XAF, and DCK to reach such a conclusion.[737]

302. The Appeals Chamber observes that the only evidence that a Reconnaissance Battalion soldier physically participated in the killing of the Prime Minister is indirect. Specifically, Witnesses DY, ANK/XAF, and DCK testified to having heard Corporal Fiacre Afrika of Squadron A of the Reconnaissance Battalion state that he shot the Prime Minister.[738] On the other hand, Defence Witness Déo Munyaneza provided direct evidence that soldiers of the Presidential Guard searched for the Prime Minister, disarmed UNAMIR soldiers, and that a soldier from the ESM shot the Prime Minister behind her house.[739] When assessing Witness Munyaneza's testimony, the Trial Chamber did not discredit his evidence that an ESM soldier shot the Prime Minister, but concluded that it did not raise doubt with respect to Prosecution evidence concerning the role of Nzuwonemeye's and Sagahutu's subordinates "in the operation" that led to the Prime Minister's death.[740]

303. Furthermore, the Trial Chamber recalled evidence of Witness DA, who testified to seeing the Prime Minister's dead body, that she was "riddled with bullet wounds".[741] However, the Appeals Chamber recalls that the Trial Chamber stated that it would only rely on Witness DA's evidence where corroborated by other reliable evidence.[742] The Trial Chamber appears to have relied upon the testimony of Witness HP as corroborative of this particular aspect of Witness DA's evidence.[743] However, Witness HP's testimony does not support the conclusion that the Prime Minister was shot more than once.[744] The Trial Chamber did not note any other evidence that would corroborate that the Prime Minister suffered multiple shots. Rather, the only other evidence on this

[737] Trial Judgement, paras. 1720, 1724, 1729, 1734, 1735, 1744. *See also* Trial Judgement, paras. 2018, 2029, 2031, 2035, 2093.
[738] *See* Trial Judgement, paras. 1649, 1650, 1652. *See also* Trial Judgement, para. 1729. The Trial Chamber did not make any express findings beyond reasonable doubt that Corporal Fiacre Afrika shot the Prime Minister.
[739] *See* Trial Judgement, paras. 1680-1683.
[740] Trial Judgement, paras. 1734. Indeed, that the Trial Chamber found Witness Munyaneza's evidence about the shooting of the Prime Minister credible is further supported by the Trial Chamber's later reliance on his testimony that Rwandan soldiers taunted the Prime Minister in establishing that her killing was closely related to the armed conflict between the Rwandan government and the RPF. *See* Trial Judgement, para. 2137. *See also* Trial Judgement, para. 1683.
[741] Trial Judgement, para. 1630.
[742] Trial Judgement, para. 1724.
[743] Trial Judgement, para. 1737.
[744] Without citation, the Trial Chamber recalled that "Witnesses DA and HP testified that they saw the Prime Minister's dead body with bullet wounds". *See* Trial Judgement, para. 1737. This statement is not reasonably supported by Witness HP's testimony. *See* Trial Judgement, para. 1635. *See also* Witness HP, T. 9 May 2005 pp. 22 ("Q. Having seen all these bodies, Witness, take the [P]rime [M]inister's body, what did you notice about these bodies or on these bodies? A. I noticed that all these bodies were naked and that they had been shot. Q. These shots, where were they on their body? A. Around the mouth area, the abdomen, and on one leg".), 48 ("Q. Witness, when you came into the – or entered the [P]rime [M]inister's residence you saw the [P]rime [M]inister's body, as well as the bodies of others. As far as you recall, did you notice any marks on the body other than the bullets that had been shot at them? A. All I saw was the bullet that had gone into the body".).

point mentioned in the Trial Judgement is a statement of Prosecution Witness DP, who viewed the Prime Minister's corpse at Camp Kanombe, that he saw one bullet wound.[745]

304. Presented with direct evidence that a soldier from ESM shot the Prime Minister and the indirect evidence that Corporal Afrika claimed that he had done so, and considering the absence of any reliable evidence that the Prime Minister was shot more than once, no reasonable trier of fact could have concluded that Corporal Afrika shot the Prime Minister.[746] This aspect of the evidence therefore could not be considered to substantiate the Trial Chamber's finding that Reconnaissance Battalion soldiers "participated in the attack on and killing of" the Prime Minister.[747]

305. The Trial Chamber also stated that Witnesses DA and HP provided "eyewitness" testimony that Reconnaissance Battalion soldiers were "involved" in the attack that led to the killing of the Prime Minister,[748] and that they gave evidence that a Reconnaissance Battalion unit led by Warrant Officer Boniface Bizimungu and including Corporal Fiacre Afrika "collaborated" with other Rwandan army soldiers "in attacking the Prime Minister".[749] Later statements in the Trial Judgement's factual findings emphasize that the Trial Chamber relied, in part, on the direct nature of the evidence of Witnesses DA and HP when assessing other evidence concerning the involvement of Reconnaissance Battalion soldiers in the Prime Minister's murder.[750]

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[745] *See* Trial Judgement, para. 1653. *See also* Witness DP, T. 22 September 2005 p. 73 ("Q. Describe the body, as you saw it. A. Before carrying the body to the morgue – after taking the body to the morgue, I was curious and asked the warrant officer with me if I could go and see Agathe Uwilingiyimana since I did not know her. I went to the morgue, got to the door of the morgue, and we entered the room where they had been offloaded, and we started by observing the body of Prime Minister Agathe, and we noticed that she had a bullet in her forehead. I was not interested in looking at the other two bodies. I did not seek to examine how they had been shot".); T. 27 September 2005 p. 36 ("Q. You say you saw Agathe's body, and I think you said you noticed that this body was – you said the body was covered, but you saw a single bullet wound to the forehead; is that what you say, and that you could recognise her? A. Yes, I said so. Q. Well, my information from the people who were there and saw her body says that her face was almost destroyed by a shot to the face and she was unrecognisable; so you could not have been there, sir. A. You have information from other people, but I am giving you my version of the fact as an eye witness".).

[746] Notably, in submissions during the appeal proceeding, the Prosecution has also questioned the probative value of the indirect evidence that Corporal Fiacre Afrika shot the Prime Minister. *See* Confidential Prosecution's Response to "Nzuwonemeye's Confidential Motion for Leave to Admit into Evidence Exculpatory Materials, Pursuant to Rule 115 of the Rules of Procedure and Evidence and to Supplement Record on Appeal", 21 May 2012 (confidential), para. 41 ("Prosecution evidence […] was limited to the fact that Corporal Africa [*sic*] was heard boasting that he killed the Prime Minister. […] None of the Prosecution Witnesses (DY, ANK/XAF, and DCK) who heard Afrika boasting about his participation and that of [Reconnaissance Battalion] soldiers in the attack against the Prime Minister attested to the truthfulness of Afrika's claim".).

[747] Trial Judgement, para. 2093. The Appeals Chamber observes that the Trial Chamber relied on evidence of Witness HP concerning a radio conversation where Warrant Officer Boniface Bizimungu informed Sagahutu that the Prime Minister had been arrested and requested permission to bring her to the Camp Kigali, to which Sagahutu responded "[T]o do what?". *See* Trial Judgement, paras. 1634, 2033. Within its findings on Sagahutu's knowledge under Article 6(3) of the Statute, the Trial Chamber further found that the Prime Minister was killed shortly after this conversation. Trial Judgement, para. 2033. The Appeals Chamber considers that this finding does not demonstrate that Reconnaissance Battalion soldiers had a direct and substantial impact on the Prime Minister's killing.

[748] Trial Judgement, para. 1720.

[749] Trial Judgement, para. 1720.

[750] *See* Trial Judgement, paras. 1733 ("In light of the *firsthand* and credible *evidence elicited from other Prosecution witnesses* implicating [Reconnaissance] Battalion soldiers in the killing of the Prime Minister, the Chamber is unwilling

306. The Appeals Chamber finds, however, that the Trial Chamber's statement in paragraph 1720 of the Trial Judgement that Witnesses HP and DA "provided eyewitness testimony that [Reconnaissance] Battalion soldiers were involved in the attack that led to the killing of the Prime Minister" is not reasonably supported by their testimonies. Specifically, the Trial Chamber's summaries of the testimonies of Witnesses HP and DA do not reflect that either witnessed the killing of the Prime Minister,[751] and the Prosecution concedes that their evidence does not reflect that they did.[752] Moreover, the Appeals Chamber observes that the Prime Minister was dead by the time of Witness HP's arrival at the scene[753] and that he testified that he did not know who killed the Prime Minister.[754] Furthermore, while Witness DA saw the apprehension and removal of the Belgian peacekeepers from the Prime Minister's compound while soldiers continued to search for the Prime Minister,[755] and described soldiers firing on the residence,[756] he did not, however, identify Reconnaissance Battalion soldiers as participating in either activity.[757]

307. Even accepting the Prosecution evidence from Witnesses DA and HP that Reconnaissance Battalion soldiers were posted in the vicinity of the Prime Minister's residence,[758] the record shows that not all Rwandan army soldiers who were in the vicinity of the Prime Minister's residence were

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to absolve [Reconnaissance] Battalion soldiers of any responsibility for the killing based on the indirect evidence of Des Forges and Dallaire".), 1738 ("The Chamber is therefore unwilling to discard the *firsthand* and corroborated *evidence of Prosecution witnesses* implicating [Reconnaissance] Battalion soldiers in the death of the Prime Minister in favour of the hearsay evidence of Witnesses UDS and CSS".), 1739 ("In the view of the Chamber, the fact that [Reconnaissance] Battalion soldiers had been tasked with defending important sites near the Prime Minister's residence does not in itself preclude their involvement in the death of the Prime minister at her residence on 7 April, *as established by the firsthand* and credible *evidence elicited from a number of Prosecution witnesses*. In the absence of cogent evidence to the contrary, the Chamber is unwilling to cast aside the credible and *firsthand evidence of Prosecution witnesses based on this submission advanced by the Accused*".) (emphasis added).

[751] *See* Trial Judgement, paras. 1628-1630, 1635.

[752] Prosecution Response Brief (Sagahutu), para. 41; Prosecution Response Brief (Nzuwonemeye), paras. 170, 171.

[753] *See* Trial Judgement, para. 1635. *See also* Witness HP, T. 9 May 2005 pp. 21-24, 42, 43, 46 (closed session), 48; T. 10 May 2005 pp. 11, 15.

[754] Witness HP, T. 9 May 2005 p. 42.

[755] *See* Trial Judgement, para. 1628. *See also* Witness DA, T. 11 January 2005 pp. 58-63, 65; T. 13 January 2005 pp. 64-66, 71, 72; T. 17 January 2005 pp. 16, 25, 28, 30, 31; T. 19 January 2005 pp. 18-21; T. 20 January 2005 pp. 2, 10, 13, 14, 23; T. 24 January 2005 pp. 63-65; T. 25 January 2005 p. 9.

[756] Witness DA, T. 19 January 2005 pp. 18, 30. *See also* Witness DA, T. 11 January 2005 p. 62 ("Q. Do you know their mission? Do you know their mission at the prime minister's house? A. Most of them were waiting for the prime minister to get out of the residence, for them to be able to assassinate her, *because they continue firing on the residence, but the prime minister was not coming out*. They were therefore waiting for the prime minister to come out for them to be able to kill her".) (emphasis added); T. 19 January 2005 p. 21 (affirming this testimony). *But see* Witness DA, T. 19 January 2005 pp. 17, 18 ("Q. While you were delivering those munitions, was the gunfire continuing? A. No".).

[757] The Appeals Chamber observes that Witness DA testified that armoured vehicles commanded by Warrant Officer Boniface Bizimungu fired upon the Prime Minister's residence. *See* Witness DA, T. 11 January 2005 p. 58; T. 18 January 2005 p. 73; T. 19 January 2005 p. 31. However, Witness DA's testimony does not reflect that he saw this. Indeed, when asked what he observed Bizimungu doing when he drove up to his armoured vehicle, the witness responded: "[Bizimungu] was standing up in front of his armoured vehicle and he came to receive the ammunitions that I brought to him". *See* Witness DA, T. 11 January 2005 p. 58.

[758] The Appeals Chamber observes that Nzuwonemeye and Sagahutu challenge the Trial Chamber's assessment of evidence concerning the deployment of Reconnaissance Battalion soldiers to the Prime Minister's residence and the evidence of Witnesses HP and DA who testified concerning the presence of Reconnaissance Battalion soldiers at the residence. *See, e.g.*, Nzuwonemeye Appeal Brief, paras. 252-266, 277-286; Sagahutu Appeal Brief, paras. 12-19, 33-43.

searching for her or contributed to her killing.[759] Moreover, the Appeals Chamber observes that the Trial Chamber concluded that the Reconnaissance Battalion armoured unit was positioned 150 to 200 metres from the Prime Minister's residence and that it could not be seen from its entrance gate.[760] This evidence raises questions as to how, in the absence of evidence reflecting positive contributions to the attack, the Reconnaissance Battalion soldiers situated at this location collaborated with or encouraged the principal perpetrators who killed the Prime Minister.

308. The Appeals Chamber concludes that no reasonable trier of fact could have found that the evidence of Witnesses DA and HP reflects that they were "eyewitnesses" to the "involvement" of Reconnaissance Battalion soldiers in the attack that resulted in the Prime Minister's death. Moreover, no reasonable trier of fact could have relied on the direct evidence of Witnesses DA and HP to conclude, as the Trial Chamber did when making its legal findings under Article 6(1) of the Statue, that Reconnaissance Battalion soldiers "participated in the attack on and killing of" the Prime Minister.[761]

309. Finally, the Appeals Chamber observes that Witnesses DA and HP both provided hearsay and circumstantial evidence that reflected their opinion that Reconnaissance Battalion soldiers "participated in the attack on" the Prime Minister. Specifically, Witness DA testified to having heard a radio communication in which Warrant Officer Boniface Bizimungu from the Reconnaissance Battalion told Sagahutu that he had started shooting at the Prime Minister's residence.[762] Witness DA also provided evidence that he re-supplied Warrant Officer Boniface Bizimungu with ammunition in the vicinity of the Prime Minister's residence, believing that Bizimungu had exhausted his supply shooting at the Prime Minister's residence.[763] Likewise, Witness DA testified that while visiting the residence with Sagahutu after the Prime Minister had been killed, Warrant Officer Boniface Bizimungu gave Sagahutu a piece of paper which the witness believed to be a speech the Prime Minister was expected to deliver.[764]

310. Furthermore, Witness HP overheard Warrant Officer Boniface Bizimungu radio to Sagahutu that UNAMIR peacekeepers had arrived at the Prime Minister's residence and were shooting, to

[759] *See* Trial Judgement, paras. 1680-1683.
[760] Trial Judgement, para. 1735.
[761] Trial Judgement, para. 2093.
[762] Trial Judgement, para. 1626, *referring to* Witness DA, T. 11 January 2005 pp. 51-53. The Appeals Chamber also observes that Witness AWC testified to having heard gunfire while at the Reconnaissance Battalion's headquarters and later learned that the sound was Reconnaissance Battalion soldiers using their armoured vehicles to fire at Belgian peacekeepers. *See* Trial Judgement, para. 1639, *referring to* Witness AWC, T. 18 January 2006 p. 32.
[763] Trial Judgement, para. 1628; Witness DA, T. 11 January 2005 p. 56. *See also* Witness DA, T. 11 January 2005 pp. 57, 58, 71; T. 17 January 2005 p. 25; T. 19 January 2005 pp. 17, 18; T. 24 January 2005 p. 63; T. 25 January 2005 pp. 5, 6.
[764] Trial Judgement, para. 1629, *referring to* Witness DA, T. 12 January 2005 p. 8.

which Sagahutu responded that Bizimungu should fire back if attacked.[765] Similarly, although Witness HP arrived in the vicinity of the Prime Minister's residence after she had been killed, he remarked that Warrant Officer Bizimungu spoke to him in a manner reflecting that Bizimungu was part of the search for the Prime Minister.[766] While neither Witness DA nor Witness HP knew of an order issued to Reconnaissance Battalion soldiers to kill the Prime Minister,[767] they expressed their opinion that the Reconnaissance Battalion soldiers in the vicinity of the Prime Minister's residence were there to support the operation that led to her death.[768]

311. The Appeals Chamber observes that the Trial Chamber made no express findings on this hearsay and circumstantial evidence[769] and failed to identify if the conduct had a direct and substantial impact on the killing of the Prime Minister.[770] Indeed, the Trial Chamber did not assess the reliability of this evidence in light of its own conclusion that it would rely on Witness DA's evidence only when corroborated by other reliable evidence[771] or in light of Defence evidence to the contrary.[772]

312. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber failed to make sufficient findings to establish the elements necessary to establish Nzuwonemeye's and Sagahutu's liability for ordering the killing of the Prime Minister. Moreover, no reasonable trier of fact could have found that Reconnaissance Battalion soldiers "participated in the attack on and killing of" the Prime Minister on the basis of the trial record. The legal and factual errors identified above have resulted in a miscarriage of justice, and the Appeals Chamber, therefore, reverses Nzuwonemeye's and Sagahutu's convictions for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of ordering the killing of the Prime Minister under Article 6(1) of the Statute.

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[765] Trial Judgement, para. 1633, *referring to* Witness HP, T. 9 May 2005 pp. 20, 36, 42, T. 10 May 2005 p. 9.
[766] *See* Trial Judgement, para. 1635. *See also* Witness HP, T. 9 May 2005 p. 22.
[767] *See*, *e.g.*, Witness DA, T. 19 January 2005 p. 10; T. 24 January 2005 p. 39; Witness HP, T. 9 May 2005 pp. 41, 42.
[768] *See*, *e.g.*, Witness DA, T. 11 January 2005 pp. 56-58, 61-65; Witness HP, T. 9 May 2005 pp. 41, 42.
[769] *See* Trial Judgement, paras. 1720, 1740.
[770] The Appeals Chamber observes that the Trial Chamber stated that "[t]he evidence suggests that members of the [Reconnaissance] Battalion attempted to prevent the Belgian [peacekeepers] from reaching the residence of the Prime Minister". Trial Judgement, para. 1718. However, no reasonable trier of fact could have relied on this conclusion to find that this conduct had a direct and substantial effect on the Prime Minister's killing in light of the Trial Chamber's further observation that the "Belgian [peacekeepers] eventually arrived at the residence where they were later disarmed by Rwandan [a]rmy soldiers […]". *See* Trial Judgement, para. 1718. Indeed, the Trial Chamber did not repeat this apparent finding when assessing Nzuwonemeye's and Sagahutu's liability under Article 6(1) of the Statute. *See* Trial Judgement, para. 2093.
[771] Trial Judgement, para. 1724.
[772] *Compare, for example,* Trial Judgement, para. 1626 (Witness DA overhearing that Reconnaissance Battalion soldiers fired at the Prime Minister's residence), *with* Trial Judgement, paras. 1697, 1698 (Defence Expert Witness Thomas Kubic testified that his investigations showed no physical evidence that the Prime Minister's residence was struck by gunfire, and that an armoured vehicle located near the junction where Reconnaissance Battalion soldiers were deployed would not have had a clear line of fire at the residence). The Trial Chamber did not discount Witness Kubic's evidence,

(b) Aiding and Abetting

313. As noted above, the Trial Chamber found that Nzuwonemeye and Sagahutu were liable under Article 6(1) of the Statute for aiding and abetting the killing of the Prime Minister, relying on the same factors used to support their ordering liability.[773] The Appeals Chamber recalls that it has already reversed the Trial Chamber's finding that Nzuwonemeye aided and abetted this killing for lack of sufficient notice.[774] Consequently, the Appeals Chamber shall only assess the merits of Sagahutu's appeal on this point.

314. Sagahutu submits that the Trial Chamber erred because it failed to make the requisite *actus reus* and *mens rea* findings on his liability for aiding and abetting the killing of the Prime Minister under Article 6(1) of the Statute.[775] Sagahutu submits that the Trial Chamber's findings, even if accepted, also fail to establish these elements.[776]

315. The Prosecution responds that the Trial Chamber correctly recalled the elements that need to be established to hold a person responsible for aiding and abetting.[777] It argues that the Trial Chamber's findings demonstrate that Sagahutu could be held liable for aiding and abetting the Prime Minister's killing.[778]

316. The Appeals Chamber observes that the Trial Chamber did not make *mens rea* and *actus reus* findings with respect to Sagahutu's liability for aiding and abetting under Article 6(1) of the Statute.[779] As recalled above, fair trial guarantees require that a trial chamber provide a reasoned opinion under Article 22(2) of the Statute and Rule 88(C) of the Rules.[780] In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[781] The Appeal Chamber finds that the Trial Chamber's failure to make *mens rea* and *actus reus* findings in relation to Sagahutu's liability for aiding and abetting under Article 6(1) of Statute amounts to a failure to provide a reasoned opinion. The Trial Chamber's failure to provide a reasoned opinion constitutes an error of law which allows the Appeals Chamber to consider the relevant evidence and factual findings in order to determine whether a reasonable trier of fact could

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but instead concluded that it did not cast doubt on Prosecution evidence that the Prime Minister was shot to death by soldiers of the Rwandan army, including members of the Reconnaissance Battalion. Trial Judgement, para. 1737.
[773] *See supra* paras. 280, 281.
[774] *See supra* para. 190.
[775] Sagahutu Notice of Appeal, paras. 30-32; Sagahutu Appeal Brief, paras. 106, 110-115, 123; Sagahutu Reply Brief, para. 20; AT. 9 May 2013 pp. 11, 15, 16.
[776] Sagahutu Notice of Appeal, para. 29; Sagahutu Appeal Brief, paras. 116-123; Sagahutu Reply Brief, paras. 7, 9; AT. 9 May 2013 p. 12. *See also* Sagahutu Appeal Brief, paras. 23-30, 38, 43.
[777] Prosecution Response Brief (Sagahutu), para. 108.
[778] Prosecution Response Brief (Sagahutu), paras. 109-121.
[779] Trial Judgement, paras. 2093, 2146.
[780] *See supra* para. 293.
[781] *See supra* para. 293.

have found beyond reasonable doubt that the requisite *actus reus* and *mens rea* were established in relation to Sagahutu's liability for aiding and abetting under Article 6(1) of the Statute.[782]

317. Specifically, as to the *mens rea*, the Appeals Chamber concludes, in light of the analysis above, that neither evidence that Sagahutu deployed Reconnaissance Battalion soldiers to reinforce the Presidential Guard at the Prime Minister's residence nor evidence of Sagahutu's communication with and provision of supplies to Reconnaissance Battalion soldiers deployed to the vicinity of the Prime Minister's residence provide a reasonable basis to infer that Sagahutu knew of his subordinates' involvement in the killing of the Prime Minister, as required for aiding and abetting liability.[783]

318. Likewise, while the Trial Chamber concluded when assessing Sagahutu's aiding and abetting liability that Reconnaissance Battalion soldiers "participated in the attack on and killing of" the Prime Minister, the Appeals Chamber has concluded above that no reasonable trier of fact could have reached such a conclusion.[784]

319. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber failed to make sufficient findings to establish all the elements necessary to find Sagahutu liable for aiding and abetting. The legal and factual errors identified above have resulted in a miscarriage of justice and the Appeals Chamber therefore reverses Sagahutu's convictions for aiding and abetting the killing of the Prime Minister under Article 6(1) of the Statute.

2. Article 6(3) of the Statute

320. As discussed above, the Appeals Chamber has found that the Trial Chamber erred in finding Nzuwonemeye and Sagahutu liable under Article 6(1) of the Statute for ordering the killing of the Prime Minister, and Sagahutu liable for aiding and abetting this crime. Of particular significance, the Appeals Chamber has emphasized the Trial Chamber's failure to make necessary findings as to the elements supporting each mode of liability. As the Appeals Chamber emphasized above, the Trial Chamber erred in finding that Reconnaissance Battalion soldiers "participated in the attack on and killing of" the Prime Minister.[785] Because a superior may only be held liable for the crimes of his subordinates if the latter are proved to have actually participated in crimes, Nzuwonemeye and Sagahutu cannot be held liable.

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[782] *Cf. Bagosora and Nsengiyumva* Appeal Judgement, para. 683; *Kalimanzira* Appeal Judgement, paras. 100, 200. *See also Perišić* Appeal Judgement, para. 92.
[783] *See supra* paras. 294-300, 312.
[784] *See supra* paras. 301-312.
[785] *See supra* paras. 301-312.

321. Accordingly, the Appeals Chamber reverses the Trial Chamber's finding that Nzuwonemeye and Sagahutu are responsible as superiors under Article 6(3) of the Statute for the killing of the Prime Minister.

3. Conclusion

322. Based on the foregoing, the Appeals Chamber grants Nzuwonemeye's Third and Sixth Grounds of Appeal, in part, and Sagahutu's Second to Fifth Grounds of Appeal, in part, and reverses their convictions related to the killing of the Prime Minister for murder as a crime against humanity and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Appeals Chamber also reverses the Trial Chamber's finding that Nzuwonemeye and Sagahutu can be held responsible as superiors for the killing of the Prime Minister. The Appeals Chamber dismisses the remainder of the challenges raised by Nzuwonemeye and Sagahutu in relation to this event.[786]

[786] In particular, in addition to the remaining evidentiary challenges raised by Nzuwonemeye and Sagahutu, the Appeals Chamber dismisses as moot Nzuwonemeye's challenges in Ground 1 concerning the site visit, and his challenges in Ground 2 concerning the errors relating to the reversing of the burden of proof. Likewise, the Appeals Chamber dismisses the remainder of Sagahutu's challenges in Ground 2 concerning the misapplication of the burden of proof.

E. Killing of the Belgian Peacekeepers (Nzuwonemeye Ground 4; Sagahutu Grounds 6 to 10)

323. The Trial Chamber convicted Nzuwonemeye as a superior pursuant to Article 6(3) of the Statute for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II with respect to the killing of Belgian peacekeepers at Camp Kigali on 7 April 1994.[787] The Appeals Chamber recalls that it has reversed these convictions for lack of notice.[788] Accordingly, it need not consider Nzuwonemeye's remaining arguments concerning this event.[789] The Trial Chamber convicted Sagahutu in relation to this event as a superior pursuant to Article 6(3) of the Statute for murder as a crime against humanity and for ordering and aiding and abetting pursuant to Article 6(1) of the Statute for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[790]

324. In entering these convictions, the Trial Chamber concluded that Sagahutu issued an order to Corporal Nzeyimana or to Corporals Nzeyimana and Masonga from the Reconnaissance Battalion to put down the Belgian peacekeepers' resistance and for this purpose either provided a multi-grenade launcher ("MGL") from his office or consented to the use of this weapon.[791] The Trial Chamber further found that Corporals Nzeyimana and Masonga actively participated in the second and concluding phase of the attack against the Belgian peacekeepers and that they used the MGL to fire at the peacekeepers.[792]

325. Sagahutu submits that the Trial Chamber erred in convicting him for this event.[793] In this section, the Appeals Chamber considers whether the Trial Chamber erred in its: (i) assessment of the evidence; and (ii) conclusion that Sagahutu incurred liability for ordering, aiding and abetting, and as a superior.

[787] Trial Judgement, paras. 2098, 2107, 2146, 2148, 2155, 2163.
[788] *See supra* para. 241.
[789] *See* Nzuwonemeye Notice of Appeal, paras. 138-173; Nzuwonemeye Appeal Brief, paras. 321-451.
[790] Trial Judgement, paras. 2099, 2108, 2146, 2148, 2150, 2151, 2157, 2163. *See also* Trial Judgement, para. 2256.
[791] Trial Judgement, paras. 1885, 1887. *See also* Trial Judgement, paras. 1872, 2034, 2099, 2150. The Appeals Chamber notes that the Trial Chamber made inconsistent findings as to whether Sagahutu issued orders to both Corporals Nzeyimana and Masonga or only to Corporal Nzeyimana. *Compare* Trial Judgement, para. 1885 *with* Trial Judgement, paras. 2034, 2099, 2150. The Appeals Chamber further notes that, while the Trial Chamber consistently referred to Sagahutu's order to put down the Belgian peacekeepers' resistance, it also stated that Sagahutu issued orders to Corporal Nzeyimana "to counter any Belgian resistance and to kill those putting up such resistance". *See* Trial Judgement, para. 1885. *See also* Trial Judgement, para. 1877.
[792] Trial Judgement, paras. 1862, 1863, 1866, 1885, 1887. *See also* Trial Judgement, paras. 2030, 2032, 2034, 2099.
[793] Sagahutu Notice of Appeal, paras. 50-86; Sagahutu Appeal Brief, paras. 146-241.

1. Assessment of Evidence

326. The Trial Chamber's findings that Corporals Nzeyimana and Masonga were instructed by Sagahutu to put down the Belgian peacekeepers' resistance and that they obtained an MGL from Sagahutu's office were based on the testimony of Prosecution Witness AWC.[794] Regarding the role of Corporals Nzeyimana and Masonga in the attack against the peacekeepers, the Trial Chamber relied on the evidence of Witness AWC and Prosecution Witness DCK.[795] It found that, while Witness AWC's account differed slightly from that of Witness DCK, "both witnesses are consistent that [Corporals Nzeyimana and Masonga] used the MGL to fire at the Belgians and that Nzeyimana then climbed over a wall either to inflict the final deadly blow (according to Witness AWC) or to confirm that the last Belgian [peacekeeper] had been killed (according to Witness DCK)".[796]

327. Sagahutu submits that the Trial Chamber erred in assessing the relevant evidence.[797] In this section, the Appeals Chamber addresses whether the Trial Chamber erred in: (i) relying on Witness AWC's evidence; (ii) its assessment of Witnesses AWC's and DCK's evidence; (iii) its assessment of exculpatory evidence; and (iv) its conclusions regarding the number of Belgian peacekeepers for which Sagahutu could be held liable.

(a) Alleged Error in Relying on Witness AWC's Evidence

328. Sagahutu submits that the Trial Chamber was required to assess Witness AWC's testimony with appropriate caution because, among all the witnesses who testified about the killing of the Belgian peacekeepers, this witness was the only one who implicated him.[798] **[REDACTED]**[799] **[REDACTED]**.[800] **[REDACTED]**.[801]

329. In addition, Sagahutu maintains that the Trial Chamber committed a number of errors with respect to the factors on which it did rely in favouring Witness AWC's evidence over that of Witness ANK/XAF.[802] He also contends that the Trial Chamber ignored and failed to provide a

[794] Trial Judgement, paras. 1862, 1877, 1878, 1885.
[795] Trial Judgement, paras. 1861, 1862, 1880, 1881, 1885.
[796] Trial Judgement, para. 1862.
[797] *See* Sagahutu Notice of Appeal, paras. 50-67; Sagahutu Appeal Brief, paras. 146-218; Sagahutu Reply Brief, paras. 37-59.
[798] Sagahutu Appeal Brief, paras. 172, 176, 177; AT. 9 May 2013 p. 20.
[799] Sagahutu Appeal Brief, paras. 169-178, 214; Sagahutu Reply Brief, paras. 53-57; AT. 9 May 2013 pp. 22, 23 (closed session). Sagahutu adds that Witness ANK/XAF also appeared in the *Bagosora et al.* case and the Bernard Ntuyahaga trial in Belgium and **[REDACTED]** in the attack against the Belgian peacekeepers. *See* Sagahutu Appeal Brief, para. 174.
[800] Sagahutu Appeal Brief, paras. 169-175; AT. 9 May 2013 pp. 20-24.
[801] AT. 9 May 2013 p. 23.
[802] *See* Sagahutu Appeal Brief, paras. 184-193.

reasoned opinion on his evidence, as well as that of Defence Witness K4 and Nzuwonemeye that Witness AWC was not at Camp Kigali on 6 and 7 April 1994.[803]

330. The Prosecution responds that the Trial Chamber was aware of the identity of Witness ANK/XAF and reasonably considered Witness AWC to be credible based on the totality of the evidence.[804] In addition, the Prosecution maintains that the main features of Witness AWC's testimony were compatible with the evidence of Witness DCK.[805]

331. The Appeals Chamber recalls that trial chambers enjoy full discretionary power in assessing the credibility of a witness and determining the weight to be accorded to his testimony.[806] The Appeals Chamber will defer to a trial chamber's judgement on issues of credibility, including its resolution of disparities among different witnesses' accounts, and will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned finding.[807]

332. The Appeals Chamber recalls that the Trial Chamber found Witness AWC to have testified that the MGL used in the attack against the Belgian peacekeepers was provided by Sagahutu to Corporals Nzeyimana and Masonga.[808] **[REDACTED]**,[809] testified that he observed two soldiers from Squadron C of the Reconnaissance Battalion come to the battalion headquarters armed with an MGL and drive away together with Major Ntuyahaga in the direction of the scene of the attack.[810]

333. The Trial Chamber noted the difference between these testimonies and considered that Witnesses AWC and ANK/XAF were consistent that the MGL came "from the highest echelons" of the Reconnaissance Battalion.[811] However, it ultimately dismissed the evidence of Witness ANK/XAF on the source of the MGL in favour of Witness AWC's testimony, reasoning that: (i) the timing of events suggested by Witness AWC was more consistent with the totality of the evidence on the attack against the Belgian peacekeepers; (ii) Witness AWC identified Sagahutu, Corporal Nzeyimana, and Corporal Masonga as the suppliers of the MGL, whereas Witness ANK/XAF was unable to name the soldiers from Squadron C who brought the weapon;

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[803] Sagahutu Appeal Brief, paras. 149, 150. *See also* AT. 9 May 2013 p. 3.
[804] Prosecution Response Brief (Sagahutu), paras. 156, 185, 187, 191. *See also* AT. 9 May 2013 p. 38.
[805] Prosecution Response Brief (Sagahutu), para. 187.
[806] *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114; *Nchamihigo* Appeal Judgement, para. 47; *Nahimana et al.* Appeal Judgement, para. 194.
[807] *Setako* Appeal Judgement, para. 31.
[808] Trial Judgement, paras. 1862, 1870, 1877, 1885. *See also* Trial Judgement, paras. 2030, 2034, 2099, 2150.
[809] **[REDACTED]**.
[810] Witness ANK/XAF, T. 1 September 2005 pp. 10-12, 68, 69; T. 5 September 2005 p. 4. *See also* Trial Judgement, para. 1763.
[811] Trial Judgement, para. 1870. *See also* Trial Judgement, para. 1877. The Appeals Chamber notes that, contrary to the Trial Chamber's statements in Trial Judgement paragraphs 1870 and 1877 (*citing* Witness ANK/XAF, T. 1 September 2005 pp. 10, 11), Witness ANK/XAF did not testify that the MGL was taken from Nzuwonemeye's office. *See*, *in particular*, Witness ANK/XAF, T. 1 September 2005 pp. 10-12; T. 5 September 2005 p. 4. *See also* Witness ANK/XAF, T. 1 September 2005 pp. 68, 69.

(iii) Witness AWC's position within the Reconnaissance Battalion enabled him to interact closely with the senior commanders of the battalion and he knew Corporal Masonga well; (iv) due to the proximity of Witness AWC to Sagahutu's office, the witness was in a good position to see and hear the events taking place there, whereas Witness ANK/XAF observed events from the transport depot and thus from a greater distance; and (v) Witness DCK corroborated the evidence of Witness AWC with respect to Corporal Nzeyimana's presence and active participation during the attack against the Belgian peacekeepers.[812] **[REDACTED]**.

334. The Appeals Chamber considers that this assessment suffers from significant shortcomings. The Appeals Chamber finds that no reasonable trier of fact could have dismissed the evidence of Witness ANK/XAF on the basis that the timing of the events to which he testified was less consistent with other evidence in the record than the evidence of Witness AWC. In this respect, the Trial Chamber relied on the fact that Witness AWC placed the retrieval of the MGL from Sagahutu's office at around 11.00 a.m. on 7 April 1994 and stated that this timing comported with its own finding that the attack against the Belgian peacekeepers took place between 9.00 a.m. and 12.30 p.m., whereas Witness ANK/XAF "place[d] the incident at around 4.00 p.m.".[813] However, the Trial Chamber failed to explain in this context what evidence supported the conclusion that the attack occurred between approximately 9.00 a.m. and 12.30 p.m. In addition, it later departed from this finding in order to infer Nzuwonemeye's knowledge of the events by stating that the attack lasted until about 2.30 or 3.00 p.m.[814] Moreover, a review of the trial record indicates that Witnesses AWC and ANK/XAF did not provide significantly different accounts with respect to the timing of the events they described.[815]

335. **[REDACTED]**.[816] **[REDACTED]**.

[812] Trial Judgement, paras. 1879-1881.
[813] Trial Judgement, para. 1879.
[814] *See* Trial Judgement, paras. 2021, 2023.
[815] Witness AWC estimated that he first saw the captured Belgian peacekeepers at Camp Kigali at around 9.00 a.m. on 7 April 1994 when the attack commenced. While he stated that Corporal Nzeyimana took the MGL from Sagahutu's office at around 11.00 a.m., he indicated that the "bombings" started after 2.00 p.m. He further estimated that the last peacekeepers may have been killed around 2.30 or 3.00 p.m. and mentioned that Corporal Masonga returned to the Reconnaissance Battalion offices between 3.00 and 4.00 p.m. *See* Witness AWC, T. 18 January 2006 pp. 31-34; T. 19 January 2006 pp. 11-14; T. 20 January 2006 pp. 3-6. Witness ANK/XAF testified that he heard around 10.00 a.m. on 7 April 1994 that Belgian peacekeepers were under attack at Camp Kigali. When he arrived at the scene, two peacekeepers had already been killed. After following the attack for about 10 to 30 minutes, he returned to the transport depot of the Reconnaissance Battalion where, in the afternoon, he watched Major Ntuyahaga and two soldiers from Squadron C armed with an MGL leave into the direction of the UNAMIR building. Shortly afterwards, the witness heard an unusual gun sound and immediately ran there to find that the MGL had just been used. He estimated that this happened at around 4.00 p.m. *See* Witness ANK/XAF, T. 1 September 2005 pp. 7-12, 70; T. 2 September 2005 pp. 5-7, 34.
[816] **[REDACTED]**.

336. However, the Appeals Chamber emphasizes that it will reverse a trial chamber's discretionary decision on the credibility of a witness only if no reasonable trier of fact could have made the impugned finding.[817] For the following reasons, the Appeals Chamber considers that this is not the case here. As discussed in detail below, the Trial Chamber's conclusion that Corporal Masonga was involved in retrieving the MGL from Sagahutu's office and participated in the attack against the Belgian peacekeepers was based on a misinterpretation of Witness AWC's testimony.[818] A review of the record demonstrates that Witness AWC did not testify that Corporal Masonga was present when Sagahutu issued instructions to Corporal Nzeyimana for the killing of the Belgian peacekeepers or participated in the retrieval of the MGL from Sagahutu's office.[819] Accordingly, a reasonable trial chamber could have assessed the accounts of Witnesses AWC and ANK/XAF on the basis of which of the two was better situated to make observations concerning the origins of the MGL.

337. While Sagahutu submits that Witness ANK/XAF was equally well positioned to know the soldiers belonging to the Reconnaissance Battalion because he and Witness AWC worked in the same office,[820] the Appeals Chamber is not persuaded by this argument. The essential issue is not whether Witness ANK/XAF knew Reconnaissance Battalion soldiers in general, but whether the Trial Chamber could have reasonably taken into account that he was unable to name the two soldiers from Squadron C whom he saw bring the MGL, whereas Witness AWC positively identified Sagahutu and Corporal Nzeyimana.[821] Sagahutu shows no error in this respect.

338. Sagahutu further asserts that the Trial Chamber erred in relying on the greater distance between Witness ANK/XAF and the soldiers from Squadron C, claiming that the witness observed events at the parking lot from his location at the transport depot and that he was thus not further away than **[REDACTED]**.[822] However, Sagahutu's references to the Trial Judgement and evidence do not substantiate this contention and the Appeals Chamber is therefore not convinced that he has shown an error. Finally, although Sagahutu correctly points out that the Trial Chamber erred in finding that Corporal Nzeyimana was actively involved in the attack against the Belgian peacekeepers,[823] Witness DCK confirmed the corporal's presence at the scene of the attack when

[817] *Setako* Appeal Judgement, para. 31.
[818] *See infra* paras. 344-346.
[819] *See* Witness AWC, T. 18 January 2006 pp. 32-34; T. 19 January 2006 pp. 14-16, 36, 37; T. 20 January 2006 pp. 3-6. *See also* Trial Judgement, para. 1749.
[820] Sagahutu Appeal Brief, para. 187.
[821] In this regard, the Appeals Chamber rejects as irrelevant Sagahutu's argument that the Trial Chamber ignored Witness ANK/XAF's explanation that he was unable to name the soldiers because they were new. Sagahutu Appeal Brief, para. 187.
[822] Sagahutu Appeal Brief, para. 188.
[823] *See infra* paras. 349-351.

the MGL was fired.[824] The Appeals Chamber considers that, in this regard, Witnesses AWC and DCK corroborated each other and that it was not unreasonable for the Trial Chamber to take this circumstance into account when assessing whether to prefer the evidence of Witness AWC or Witness ANK/XAF.

339. In light of the above, the Appeals Chamber finds that, while the Trial Chamber committed errors in its resolution of the disparities between Witness AWC's and Witness ANK/XAF's testimonies, Sagahutu has not shown that no reasonable trier of fact could have preferred Witness AWC's evidence over that of Witness ANK/XAF.

340. **[REDACTED]**.[825] Sagahutu also testified that Witness AWC was on leave at the time.[826] While this evidence is not addressed in the Trial Judgement, the Appeals Chamber is not convinced that Sagahutu has shown that this omission has resulted in a miscarriage of justice. As a general rule, trial chambers are not obliged to explain every step of their reasoning or discuss every piece of evidence.[827] Since other witnesses, including Witness ANK/XAF and Prosecution Witness DY, indicated that they saw Witness AWC at Camp Kigali on 6 and 7 April 1994,[828] it was not unreasonable for the Trial Chamber to accept his evidence despite evidence to the contrary from Witness K4, Nzuwonemeye, and Sagahutu.

341. Accordingly, the Appeals Chamber finds that Sagahutu has failed to demonstrate that it was unreasonable for the Trial Chamber to rely on Witness AWC instead of Witness ANK/XAF and to conclude on this basis that Sagahutu instructed Corporal Nzeyimana to put down the Belgian peacekeepers' resistance and for this purpose either provided an MGL or consented to the use of this weapon, which was taken from his office.

(b) Alleged Errors in the Assessment of Witnesses AWC's and DCK's Evidence

342. Sagahutu submits that Witness AWC did not implicate Corporal Masonga in any criminal conduct during the attack against the Belgian peacekeepers and that the Trial Chamber therefore misrepresented the evidence.[829] Similarly, Sagahutu contends that the Trial Chamber erred in its conclusions on Corporal Nzeyimana because there was no evidence that he fired the MGL, Witness AWC did not unequivocally state that the corporal killed the last peacekeeper, and Witness

[824] *See* Witness DCK, T. 9 March 2005 pp. 7, 9, 10. *See also* Trial Judgement, paras. 1756, 1860, 1861.
[825] **[REDACTED]**.
[826] Sagahutu, T. 2 December 2008 pp. 17, 18.
[827] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269.
[828] **[REDACTED]**.
[829] *See* Sagahutu Appeal Brief, paras. 195-203, 208, 228, 230; Sagahutu Reply Brief, para. 45; AT. 9 May 2013 p. 50.

DCK did not implicate the corporal in any criminal conduct.[830] Sagahutu also argues that Witness AWC's testimony regarding Corporal Nzeyimana was hearsay, which should have been considered with caution, and, ultimately, rejected because it lacked detail and was contradicted by Witness DCK's version of the events.[831]

343. The Prosecution responds that the evidence as a whole demonstrates that Corporals Masonga and Nzeyimana participated in the attack against the Belgian peacekeepers and that Witness DA provided corroborating evidence in this regard.[832] It also maintains that Sagahutu's arguments about the hearsay testimony of Witness AWC are unpersuasive.[833]

(i) Corporal Masonga

344. The Appeals Chamber notes that, contrary to the Trial Chamber's statements in the Trial Judgement,[834] Witness AWC did not testify that Corporal Masonga participated in retrieving the MGL from Sagahutu's office. Rather, the witness only maintained that Corporal Nzeyimana took the MGL after having been instructed by Sagahutu to kill the last Belgian peacekeeper.[835]

345. With respect to the subsequent events, the Trial Judgement summarizes Witness AWC's evidence as follows:

> The witness left his office for the mess at around 12.00 noon and returned at 1.30 p.m. Between 3.00 and 4.00 p.m., Corporal Nzeyimana and Corporal Masonga returned to the witness's office where Masonga reported that they had killed all the Belgians and had therefore "completed their mission". Masonga further told Witness AWC that he had opened fire on the building but had not achieved his objective. As a result, Nzeyimana and another unknown soldier used a ladder to climb into the building and kill the remaining Belgian soldier.[836]

346. Having reviewed the record, the Appeals Chamber concludes that this summary does not accurately depict Witness AWC's testimony. The witness testified that Corporal Masonga returned to the Reconnaissance Battalion offices from the scene of the attack against the Belgian peacekeepers before Corporal Nzeyimana.[837] Significantly, the witness did not claim that Corporal Masonga participated in the attack. While his testimony-in-chief was not entirely clear,[838] he

[830] Sagahutu Appeal Brief, paras. 191, 192, 204-207. Sagahutu Reply Brief, para. 45. *See also* AT. 9 May 2013 p. 23.
[831] Sagahutu Appeal Brief, paras. 179-182, 208.
[832] Prosecution Response Brief (Sagahutu), para. 151; AT. 9 May 2013 pp. 41, 42.
[833] *See* Prosecution Response Brief (Sagahutu), paras. 185-187; AT. 9 May 2013 pp. 41, 42.
[834] Trial Judgement, paras. 1862, 1870, 1877. *See also* Trial Judgement, paras. 2030, 2032, 2034, 2099, 2150.
[835] Witness AWC, T. 18 January 2006 pp. 32, 33; T. 19 January 2006 pp. 14, 16, 36, 37; T. 20 January 2006 pp. 3-5. *See also* Trial Judgement, paras. 1749, 1885.
[836] Trial Judgement, para. 1750, *referring to* Witness AWC, T. 18 January 2006 p. 35, T. 19 January 2006 p. 14, T. 20 January 2006 pp. 3, 6.
[837] Witness AWC, T. 18 January 2006 p. 34; T. 20 January 2006 pp. 5, 6.
[838] *See* Witness AWC, T. 18 January 2006 p. 34 ("According to the information I received, what I was told by people who witnessed the incident, they were killed. In particular, Corporal Masonga and Corporal Nzeyimana who went off with the rifle told me that, 'the Belgian soldiers who were trying to resist, we have just killed them.' In brief, all the soldiers in the camp were killed. […] Masonga came to tell me that, 'we have just finished them all off'".). The Appeals

specified during cross-examination that Corporal Masonga went briefly to the scene of the attack once he heard explosions and, upon his return, spoke about his observations.[839] Although the English transcripts quote Witness AWC as stating that Corporal Masonga claimed that *he* had opened fire on the UNAMIR building,[840] this appears to be a translation error because, according to the French transcript, Witness AWC in fact testified that Corporal Masonga told him that "someone" had fired.[841]

347. Witness DCK did not implicate Corporal Masonga in the attack against the Belgian peacekeepers. He testified about having seen a soldier from the Reconnaissance Battalion fire grenades from an MGL into the UNAMIR building and acknowledged that he was unable to name this person.[842] Moreover, the Trial Chamber found that Witness DCK's identification of the shooter as belonging to the Reconnaissance Battalion was hearsay from an unidentified source and should be treated with caution.[843] Accordingly, the Appeals Chamber considers that this testimony was insufficient for any reasonable trier of fact to find that Corporal Masonga was involved in the attack against the Belgian peacekeepers. Finally, the Appeals Chamber rejects as irrelevant the

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Chamber notes that, according to the French transcript, Witness AWC did not clearly state that Masonga claimed involvement in the killing of the peacekeepers. *See* Witness AWC, T. 18 January 2006 pp. 39 (French) ("*Des informations qui m'ont été données par des gens qui ont assisté à cette scène m'ont dit qu'ils ont été tués, en… particulièrement, il y a le caporal Masonga, il y a le caporal Nzeyimana qui était parti avec le fusil, m'a dit 'le sous-lieutenant belge qui avait tenté de résister, nous allons donc le tuer.' Donc, en peu de mots, c'est-à-dire que tous les militaires belges qui se trouvaient à cet endroit ont été tués.*), 40 (*Masonga est venu le premier, il m'a dit: 'On vient de les achever tous.'*").

[839] Witness AWC, T. 20 January 2006 p. 5. *See also* Witness AWC, T. 19 January 2006 p. 14 ("A soldier came accompanied by another soldier, they found me in my office and they told me that the Belgians had put up a resistance, that was when Captain Sagahutu stood up in his office. The information that was relayed to me and I deemed it accurate was the information given to me by the corporal who said that the Belgians had put up a resistance. And I asked him, what type of resistance? He said that a lieutenant retreated into the house and had not yet been killed. I would like to assert to you that Captain Sagahutu ordered that that lieutenant be killed. The lieutenant in question went into Sagahutu's office and took a gun and immediately went towards the camp. I went to the restaurant, that is the non-commissioned officers' mess and I went to my office at about 1 p.m. I cannot be any more specific. The soldier who went to the camp returned to report that they had killed all the Belgians. He was with Corporal Masonga who said that those Belgians have been killed. That corporal said we have completed our mission".). In the Appeals Chamber's view, it transpires from the context of this statement that the corporal referred to by Witness AWC in the last sentence was not Masonga, but Nzeyimana.

[840] Witness AWC, T. 20 January 2006 p. 6 ("When Masonga arrived, he told me that the Belgian officer had just died. I asked him to relate everything to me and he told me that *he* opened fire on the building and *he* did not succeed in doing what he wanted to do, and then the assailants used a ladder to climb over the wall and look for some entrance into the building. That is how they killed the Belgian soldier. That is what Masonga told me because I reproached him for his conduct, that is, leaving his office without having informed me".) (emphasis added).

[841] Witness AWC, T. 20 January 2006 p. 8 (French) ("*Lorsque Masonga est venu, il m'a dit que l'officier belge venait de mourir. Je lui ai demandé de me faire le récit. Il m'a dit que l'<u>on</u> a tiré sur le bâtiment et que cela n'a pas produit d'effets et que les assaillants ont utilisé une échelle pour escalader le mur et se chercher une brèche. Et c'est ainsi qu'ils ont tué ce militaire belge. Voilà donc le récit que m'a fait Masonga, car je le blâmais pour le comportement qu'il avait adopté, à savoir sortir de son bureau sans m'en informer*".) (emphasis added).

[842] Trial Judgement, paras. 1756, 1860. *See also* Witness DCK, T. 9 March 2005 p. 9; T. 16 February 2009 p. 70.

[843] Trial Judgement, para. 1860.

Prosecution's reference to Witness DA as this witness only observed a member of the Huye Battalion carry an MGL.[844]

348. In light of the above, the Appeals Chamber finds that it was unreasonable for the Trial Chamber to conclude that Corporal Masonga participated in the attack against the Belgian peacekeepers.

(ii) Corporal Nzeyimana

349. Having reviewed the record, the Appeals Chamber concludes that, contrary to the Trial Chamber's statement,[845] Witness AWC neither testified that Corporal Nzeyimana shot the last Belgian peacekeeper nor did he or Witness DCK testify that the corporal fired an MGL during the attack. As discussed above, Witness AWC testified that Corporal Nzeyimana took an MGL from Sagahutu's office after Sagahutu had instructed him to kill the last Belgian peacekeeper.[846] The witness further claimed to have heard Corporal Nzeyimana boast after the attack that "they" had killed the peacekeepers and thus completed their mission, giving the impression of his involvement.[847] He also stated that Corporal Masonga informed him that Corporal Nzeyimana and another soldier had used a ladder to climb through the roof of the UNAMIR building but did not ascribe any particular role to Nzeyimana in attacking the Belgian peacekeepers in the building.[848] Witness DCK testified that he observed an unidentified Reconnaissance Battalion soldier launch grenades from an MGL into the UNAMIR building.[849] Witness DCK's testimony reflects that this person could not have been Corporal Nzeyimana because he asserted that he knew the corporal well and distinguished him from the shooter.[850]

350. The Appeals Chamber further notes that, while Witness AWC testified about Corporal Nzeyimana's boast after the attack against the Belgian peacekeepers, he did not observe the relevant part of the attack.[851] His evidence therefore amounted to hearsay which, in addition, lacked details as to what exactly Corporal Nzeyimana did at the UNAMIR building. More importantly, this evidence was called into question by the eye-witness testimony of Witness DCK who only described Corporal Nzeyimana approaching the UNAMIR building and confirming that the last

[844] Trial Judgement, para. 1753.*See also* Witness DA, T. 11 January 2005 pp. 70-72.
[845] Trial Judgement, para. 1862 ("While Witness AWC's account regarding the role of *Nzeyimana and Masonga* in the death of the remaining Belgian soldiers differs slightly from Witness DCK's explanation, both witnesses are consistent that *these two* [*Reconnaissance*] *Battalion soldiers used the MGL to fire at the Belgians*".) (emphasis added).
[846] Witness AWC, T. 18 January 2006 pp. 32, 33; T. 19 January 2006 pp. 14, 16, 36, 37; T. 20 January 2006 pp. 3-5.
[847] Witness AWC, T. 18 January 2006 p. 34; T. 19 January 2006 p. 14; T. 20 January 2006 p. 5.
[848] Witness AWC, T. 20 January 2006 p. 6.
[849] *See* Trial Judgement, paras. 1756, 1860, 1861. *See also* Witness DCK, T. 9 March 2005 pp. 7, 9, 10; T. 16 February 2009 pp. 69, 70.
[850] *See* Trial Judgement, paras. 1756, 1861. *See also* Witness DCK, T. 9 March 2005 pp. 9, 10, 13; T. 16 February 2009 pp. 69, 70.

Belgian peacekeepers were dead.[852] Thus, Witness DCK did not confirm that Corporal Nzeyimana took part in the commission of crimes.

351. The Appeals Chamber observes that the Trial Chamber did not address these discrepancies in the testimonies of Witnesses AWC and DCK, and, instead, treated their evidence as corroborative and supporting its conclusion that Corporal Nzeyimana actively participated in the attack against the Belgian peacekeepers.[853] The Appeals Chamber finds that no reasonable trier of fact could have assessed the evidence in this manner and therefore finds that the Trial Chamber erred.

352. However, the Appeals Chamber recalls its finding that the Trial Chamber did not err in relying on Witness AWC's testimony that Corporal Nzeyimana took the MGL used during the attack against the Belgian peacekeepers from Sagahutu's office after Sagahutu had instructed him to kill the remaining peacekeepers.[854]

(c) Alleged Error in the Assessment of Exculpatory Evidence

353. Sagahutu submits that the Trial Chamber erroneously rejected Defence evidence that the Reconnaissance Battalion did not have MGLs in its arsenal and failed to provide a reasoned opinion in this respect.[855] He further contends that the Trial Chamber distorted his testimony on the matter.[856] Moreover, Sagahutu argues that the Trial Chamber erred by not finding that evidence demonstrating the involvement of other elements in the attack against the Belgian peacekeepers raised reasonable doubt as to the participation of Reconnaissance Battalion soldiers.[857]

354. The Prosecution responds that it was reasonable for the Trial Chamber to dismiss the Defence evidence that the Reconnaissance Battalion did not possess MGLs in light of the corroborative evidence of Witnesses AWC, ANK/XAF, and DCK.[858]

355. The Trial Chamber summarized Defence evidence that the Reconnaissance Battalion had no MGLs in its arsenal.[859] Moreover, it noted this line of argument when deliberating on the question whether it had been proved that members of the Reconnaissance Battalion participated in the killing

[851] *See* Witness AWC, T. 18 January 2006 pp. 33, 34; T. 19 January 2006 p. 14; T. 20 January 2006 pp. 3-5.
[852] Witness DCK, T. 9 March 2005 pp. 9, 10, 13.
[853] *See* Trial Judgement, paras. 1862, 1863, 1885.
[854] *See supra* para. 341. *See also infra* paras. 366, 367, 372.
[855] Sagahutu Appeal Brief, paras. 151, 153; AT. 9 May 2013 pp. 19, 50.
[856] Sagahutu Notice of Appeal, para. 51; Sagahutu Appeal Brief, para. 152; AT. 9 May 2013 pp. 2, 19, 20, 50.
[857] Sagahutu Notice of Appeal, paras. 70, 78.
[858] Prosecution Response Brief (Sagahutu), paras. 159, 161. *See also* Prosecution Response Brief (Sagahutu), paras. 162, 163; AT. 9 May 2013 p. 41.
[859] Trial Judgement, paras. 1796, 1797, 1822, 1825, 1826, 1829.

of the Belgian peacekeepers and dismissed it.[860] The Appeals Chamber is therefore satisfied that the Trial Chamber was properly seized of the matter. A trial chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record.[861] In any case, Sagahutu has not demonstrated how this evidence calls into question the credible evidence relied on by the Trial Chamber that the MGL used during the attack was obtained from the Reconnaissance Battalion office.

356. The Appeals Chamber further notes that, in concluding that the Reconnaissance Battalion had MGLs in its arsenal, the Trial Chamber relied on the testimonies of Witness AWC and Sagahutu, stating that Sagahutu "also testified that the [Reconnaissance] Battalion did have MGLs in its arsenal".[862] In this respect, the Trial Chamber misrepresented Sagahutu's evidence, as he did not acknowledge that the Reconnaissance Battalion possessed such weapons.[863] However, this error did not occasion a miscarriage of justice. The relevant findings in the Trial Judgement reflect that Sagahutu was not convicted based on the assumption that the Reconnaissance Battalion had MGLs in its regular arsenal, but because one such weapon was found in his office and used during the attack against the Belgian peacekeepers.[864] For this purpose, whether the Reconnaissance Battalion had MGLs in its regular arsenal was not dispositive to determining whether Sagahutu was in fact in possession of such a weapon at that time.

357. Finally, the Appeals Chamber rejects Sagahutu's submission regarding the involvement of other elements in the attack. In support of this argument, Sagahutu refers to "credible witnesses, such as [Prosecution Witnesses Roméo Dallaire and Alison Des Forges]" that the Belgian peacekeepers were killed by "mutineers".[865] However, he neither provides references to the record nor advances any argument as to why this evidence made it unreasonable for the Trial Chamber to conclude that he and Corporal Nzeyimana were involved in the attack.

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[860] Trial Judgement, paras. 1864, 1871.
[861] *Rukundo* Appeal Judgement, para. 217; *Munyakazi* Appeal Judgement, para. 174; *Muhimana* Appeal Judgement, para. 72.
[862] Trial Judgement, para. 1871.
[863] *See* Sagahutu, T. 2 December 2008 pp. 19, 20 ("Now, to answer your question, if, to my knowledge, such armament existed in my battalion, as far as my squadron is concerned, my answer is that it did not exist. The reason, thereof, is simple. The grenade launcher is the weapon of a foot soldier. And, in the makeup of that kind of infantry unit, a foot soldier unit, when these things are numbered from 1 to 11, number [*sic*] 8 and 9 are grenade launchers. And those are the ones who use that kind of weapon. And their capacity is inferior to that of the mortar that I presented this morning, because, at the very most, the grenades had a range of one grenade being launched at a time – or being hand-thrown. Whereas, the 60 military mortars could be launched with a range and an impact that is double or even triple to the grenade. So there were none in my squadron, and the corporal – or the major testified here that none of them was found in the other units that were different from mine. And even people came from the infantry unit and testified before this Chamber that we did not have that kind of weapon. So it can be easily understood that that weapon did not exist in our unit".).
[864] *See* Trial Judgement, paras. 1862, 1872, 1877, 1885, 1887, 2030, 2099, 2150.
[865] *See* Sagahutu Notice of Appeal, para. 78.

(d) Alleged Error Regarding the Number of Casualties Attributable to Sagahutu

358. Sagahutu submits that the Trial Chamber erred in finding him responsible for the death of all ten Belgian peacekeepers who were killed at Camp Kigali on 7 April 1994.[866] He asserts that, based on the evidence of Witness AWC, he could not have been convicted for more than one murder.[867]

359. The Prosecution argues that Sagahutu was convicted for the death of all ten Belgian peacekeepers and that it was reasonable for the Trial Chamber to reach this conclusion since the killing of the peacekeepers was a continuation of an attack which commenced at the Prime Minister's residence and the Reconnaissance Battalion participated "in various phases of the chain of events".[868] The Prosecution further contends that "no specific unit of the Rwandan Army was singled out in the analysis of the first phase of the attack, nor was there any specific unit totally absolved from responsibility".[869] It therefore argues that it "is neither correct nor material" that only one peacekeeper was alive when Sagahutu ordered Corporal Nzeyimana to put down the resistance.[870]

360. The Appeals Chamber is not persuaded that Sagahutu was held responsible for the death of all ten Belgian peacekeepers who died at Camp Kigali on 7 April 1994. While the Trial Chamber made statements to that effect,[871] a comprehensive reading of the Trial Judgement shows that it convicted Sagahutu only in relation to peacekeepers that were killed during the second and concluding phase of the attack when he instructed Corporal Nzeyimana to put down the resistance and provided or consented to the use of the MGL.[872] In this context, the Trial Chamber concluded that the Prosecution had proved beyond reasonable doubt that soldiers from the Reconnaissance Battalion participated in the attack and killing of "at least two Belgian peacekeepers".[873] It appears that this conclusion was based on the Trial Chamber's observation that the first phase of the attack

[866] Sagahutu Notice of Appeal, paras. 54-57; Sagahutu Appeal Brief, paras. 147, 156-160. *See also* Sagahutu Reply Brief, paras. 46, 48-52; AT. 9 May 2013 pp. 16, 17.
[867] Sagahutu Appeal Brief, paras. 147, 148, 154; Sagahutu Reply Brief, paras. 37-41; AT. 9 May 2013 pp. 16, 17.
[868] Prosecution Response Brief (Sagahutu), paras. 168-170; AT. 9 May 2013 p. 37. *See also* Prosecution Response Brief (Sagahutu), paras. 150, 172, 173; AT. 9 May 2013 p. 38.
[869] Prosecution Response Brief (Sagahutu), para. 171.
[870] Prosecution Response Brief (Sagahutu), para. 150.
[871] *See*, *in particular*, Trial Judgement, paras. 49, 2063.
[872] *See* Trial Judgement, paras. 1862, 1865, 1885, 1887, 1907. In this regard, the Appeals Chamber notes in particular that the Trial Chamber concluded in the factual findings section of the Trial Judgement that between six and eight Belgian peacekeepers died in the first phase of the attack. *See* Trial Judgement, para. 1865. While the Trial Chamber observed that members of the Reconnaissance Battalion were present during these events, it expressly found when assessing Sagahutu's sentence that this did not demonstrate the battalion's participation in crimes. *See* Trial Judgement, para. 2255. *See also* Trial Judgement, para. 1859.
[873] Trial Judgement, para. 1887. *See also* Trial Judgement, paras. 65, 1856, 1857, 1863, 2030, 2032, 2034, 2035, 2099, 2108, 2136, 2138, 2146, 2148-2151, 2157, 2256, 2259 (referring to killed peacekeepers in plural or the attack against the peacekeepers in general).

led to the killing of between six and eight peacekeepers, whereas the remaining two to four peacekeepers died during the second phase of the attack.[874]

361. The Appeals Chamber observes that the evidence on the involvement of the Reconnaissance Battalion in the second phase of the attack came from Witnesses AWC and DCK.[875] Witness AWC testified in a manner that reflected that he overheard that only one Belgian peacekeeper was alive when the MGL was retrieved from Sagahutu's office to be used in the ensuing attack.[876] Notwithstanding, his evidence also indicates that he heard that more than one Belgian peacekeeper was alive at this time.[877] Moreover, Witness DCK testified that he believed that possibly four Belgian peacekeepers had retreated inside the UNAMIR building[878] and that he observed two bodies inside the UNAMIR building after the attack ended.[879] Sagahutu's arguments, which focus on the evidence of Witness AWC,[880] fail to demonstrate that it was unreasonable for the Trial Chamber to rely principally on Witness DCK's direct evidence to establish that the MGL used in the attack contributed to the death of at least two Belgian peacekeepers who had sought refuge in the UNAMIR building.[881]

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[874] *See* Trial Judgement, paras. 1855-1857, 1865, 1866.
[875] *See* Trial Judgement, paras. 1860-1863, 1881, 1885.
[876] *See* Witness AWC, T. 19 January 2006 p. 14; T. 20 January 2006 p. 6.
[877] *See* Witness AWC, T. 18 January 2006 p. 32 ("A. Yes, I saw him again. When I returned to my office around 11 a.m, I saw soldiers running and there was a member of his squadron, *a marksman and driver who said as he came that there were some Belgian soldiers who had just been killed and some who had put up resistance, and Captain Sagahutu immediately ordered that they should all be killed because they had put up resistance*. Corporal Nzeyimana who was a marksman of Sagahutu, went into the Squadron A office and took a gun, and then GL, and he went with that group of people and they returned to that place.") (emphasis added).
[878] Witness DCK, T. 9 March 2005 p. 9; T. 10 March 2005 pp. 7-9; T. 15 March 2005 p. 22.
[879] *See* Witness DCK, T. 9 March 2005 p. 10 ("Q. Were they dead or alive when you saw them? A. Are you referring to the soldiers who were inside the building? Q. Precisely, Witness, the ones inside the building. A. Yes. The soldiers inside the building were dead. Q. Were you able to count them? A. I was not able to enter the building proper. I got to the door, and I saw a body in the room just next to the entrance. Actually, that building had two rooms, and there was another dead body in the room behind. *Perhaps there were other bodies or there were just the two that I saw*."); T. 10 March 2005 pp. 7 ("Q. But in your statement, you make it very specific. You saw four soldiers, four other Belgian soldiers, inside the building. And you were quite specific, sir. That's how many you saw, correct? A. Talking about my statements, those who wrote them down may be mistaken. But when I gave rough estimates, I said there were four. I did not enter the building. I stayed at the door. *And what I said was that I saw one soldier in a room near the entrance and another soldier in a room.* Since there was gunfire from the windows, perhaps there were others. Now, if you tell me that in my statement I was specific with regard to the numbers, then that may be a slight mistake found in my statement.") (emphasis added), 8 ("Q. Yes, you did, sir. You said you saw one in one room and one other body in another room. That makes two. That's what you said. Why did you change it? A. Mr. President, I am talking about the dead bodies I saw with my own eyes. But I equally said that, to the best of my knowledge, since there were shots coming out of the building, I believed there were other soldiers and that afterwards there were four dead bodies. Now, if the person who wrote my statements said I gave the specific figure of four, then there is an error. But I said that I thought there were four dead bodies, *but I personally saw two of them*.") (emphasis added).
[880] *See* Sagahutu Appeal Brief, paras. 147, 148, 154, 158; AT. 9 May 2013 p. 17.
[881] The Trial Chamber interpreted Witness DCK's evidence to reflect that more than one Belgian peacekeeper died in the UNAMIR office. Trial Judgement, para. 1756 ("However, he observed from the door that the Belgian *soldiers* were dead") (emphasis added), *referring to* Witness DCK, T. 9 March 2005 p. 10.

2. Forms of Responsibility

362. In light of its findings in the previous section, the Appeals Chamber recalls that the Trial Chamber reasonably found that Sagahutu issued an order to Corporal Nzeyimana from the Reconnaissance Battalion to put down the Belgian peacekeepers' resistance and for this purpose either provided an MGL from his office or consented to the use of this weapon. On this basis, the Appeals Chamber considers in this section Sagahutu's challenges to the Trial Chamber's findings that he ordered and aided and abetted the killing of the Belgian peacekeepers and that he could be held responsible as a superior for this crime.[882]

(a) Ordering

363. Sagahutu submits that the Trial Chamber did not provide a reasoned opinion as it failed to address the legal elements of ordering, and, in particular, did not determine whether his alleged order had a direct and substantial effect on the killing of the Belgian peacekeepers and whether the person who received this order – Corporal Nzeyimana – carried out the crime.[883] In this regard, Sagahutu points out that it was not proved that any peacekeeper died from injuries inflicted by an MGL.[884] He also contends that the Trial Chamber did not resolve what Corporal Nzeyimana did during the attack and maintains that, since the identity of the perpetrators of the killings was not established, it could not have been reasonably inferred that the crimes were committed by soldiers over whom he possessed the requisite authority.[885] In addition, Sagahutu maintains that the conclusion that he ordered the killing of the Belgian peacekeepers was "not the sole reasonable inference from the fact that he may have asked [Corporal Nzeyimana] to 'put down the resistance'".[886]

364. The Prosecution responds that a reading of the Trial Judgement as a whole demonstrates that the Trial Chamber correctly applied the law on ordering and made reasonable findings as to Sagahutu's responsibility under this mode of liability.[887]

365. The Appeals Chamber recalls that a person in a position of authority may incur responsibility under Article 6(1) of the Statute for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[888]

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[882] Sagahutu Notice of Appeal, paras. 58-86; Sagahutu Appeal Brief, paras. 166, 212, 218-241.
[883] Sagahutu Notice of Appeal, paras. 60, 61; Sagahutu Appeal Brief, para. 166; AT. 9 May 2013 pp. 17, 19.
[884] Sagahutu Appeal Brief, para. 209; AT. 9 May 2013 p. 3.
[885] Sagahutu Notice of Appeal, para. 52; AT. 9 May 2013 pp. 18, 19.
[886] Sagahutu Notice of Appeal, para. 59.
[887] Prosecution Response Brief (Sagahutu), paras. 179, 183; AT. 9 May 2013 p. 42.

366. The Appeals Chamber is not persuaded that the Trial Chamber failed to provide a reasoned opinion in respect of its conclusion that Sagahutu incurred liability for ordering as it stated in the legal findings section of the Trial Judgement that Sagahutu *instructed* Corporals Nzeyimana and Masonga to put down the Belgian peacekeepers' resistance and that these two soldiers then went to participate in the killing.[889] While the Trial Chamber did not expressly find that Sagahutu's instructions had a direct and substantial effect on the crime and that he intended this outcome, the Appeals Chamber understands that these conclusions were implied in the Trial Chamber's findings.

367. The Appeals Chamber also rejects Sagahutu's submission that his instruction to "put down the resistance" could not have been reasonably understood as an order to kill the Belgian peacekeepers. While the Trial Chamber consistently referred to such instructions, the Appeals Chamber notes that Witness AWC expressly stated that Sagahutu ordered Corporal Nzeyimana to *kill* the last Belgian peacekeeper.[890]

368. However, as discussed in detail above, the Trial Chamber erred in finding that Corporals Masonga and Nzeyimana participated in the attack against the Belgian peacekeepers.[891] Thus, there is no evidence that the person who received the order from Sagahutu to kill – Corporal Nzeyimana – personally carried out the crime.[892] Furthermore, while Sagahutu and Corporal Nzeyimana provided the MGL that was used during the attack, there is no evidence that any Belgian peacekeeper died from wounds inflicted by this weapon.[893] Finally, the Trial Chamber neither found, nor is there evidence on the record to suggest that Sagahutu was in a position of authority *vis-à-vis* the person who fired the MGL against the UNAMIR building or the individuals who killed the last peacekeepers.[894] Under these circumstances, the Appeals Chamber considers that no reasonable trier of fact could have concluded that Sagahutu's order to Corporal Nzeyimana had a direct and substantial effect on the killing of the Belgian peacekeepers.

369. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in holding Sagahutu responsible for ordering.

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[888] *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, paras. 75, 76.
[889] Trial Judgement, para. 2150.
[890] *See* Witness AWC, T. 18 January 2006 pp. 32, 33; T. 19 January 2006 p. 14.
[891] *See supra* paras. 344-351.
[892] *Cf. Renzaho* Appeal Judgement, para. 315.
[893] While the Trial Chamber stated that the autopsy report for the Belgian peacekeepers found that "six of the Belgian soldiers appeared to have succumbed to injuries as a result of beatings while the remaining four soldiers died as a result of probable grenade explosions" (*see* Trial Judgement, para. 1867), the Appeals Chamber observes that the report in question merely states that some victims died from a "firearm projectile", without indicating whether this meant that they were killed by shrapnel from grenades. *See* Defence Exhibit 517 (Autopsy Report), p. 51.
[894] The Appeals Chamber recalls that, such a position of authority requires the ability of the accused to compel another person to commit a crime. *See Boškoski and Tarčulovski* Appeal Judgement, para. 164; *Semanza* Appeal Judgement, para. 361.

(b) Aiding and Abetting

370. Sagahutu submits that the Trial Chamber did not provide a reasoned opinion as it failed to address the legal elements of aiding and abetting, in particular whether his alleged supply of the MGL to Corporal Nzeyimana had a substantial effect on the killing of the Belgian peacekeepers.[895] In this context, Sagahutu points out that it was not proved that any peacekeeper died from injuries inflicted by an MGL.[896] Moreover, Sagahutu asserts that it was not established that he acted with the requisite intent.[897]

371. The Prosecution responds that the Trial Chamber's findings on Sagahutu's responsibility for aiding and abetting were reasonable.[898]

372. The Appeals Chamber is not persuaded that the Trial Chamber failed to provide a reasoned opinion in respect of its conclusion that Sagahutu incurred liability for aiding and abetting. In the legal findings section of the Trial Judgement, the Trial Chamber found that Sagahutu instructed Corporals Nzeyimana and Masonga to put down the Belgian peacekeepers' resistance and allowed them to take an MGL from his office in order to participate in the attack.[899] These findings were sufficient to establish the *actus reus* and *mens rea* for aiding and abetting. As discussed in detail above, the evidence shows that the Trial Chamber reasonably interpreted Sagahutu's instruction to Corporal Nzeyimana as an order to kill the last of the Belgian peacekeepers and for this purpose allowed the corporal to take an MGL from his office.[900] For this reason, Sagahutu's assertion that his *mens rea* was not established has no merit.

373. The Appeals Chamber is also not persuaded that the substantial effect of Sagahutu's contribution was called into question by the fact that there is no evidence that any peacekeeper died from injuries inflicted by the MGL that Sagahutu provided. As previously held, the assistance of an aider and abettor need not serve as a condition precedent for the crime.[901] Moreover, the overall reasoning in the Trial Judgement indicates that Sagahutu was held responsible because he assisted the *attack* against the Belgian peacekeepers by providing one of the weapons used and not because

[895] AT. 9 May 2013 p. 17.
[896] Sagahutu Appeal Brief, para. 209; AT. 9 May 2013 pp. 18, 49. *See also* Sagahutu Notice of Appeal, para. 70.
[897] Sagahutu Notice of Appeal, para. 65.
[898] Prosecution Response Brief (Sagahutu), paras. 195, 197. *See also* AT. 9 May 2013 pp. 36, 37.
[899] Trial Judgement, para. 2150.
[900] *See supra* paras. 352, 366, 367.
[901] *Blagojević and Jokić* Appeal Judgement, para. 127; *Blaškić* Appeal Judgement, para. 48. *See also Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 372.

someone was killed with this particular weapon.[902] To this end, it was irrelevant whether any Belgian peacekeeper died by means of the MGL.

374. Accordingly, the Appeals Chamber finds that Sagahutu has failed to demonstrate that the Trial Chamber erred in convicting him for aiding and abetting.

(c) Superior Responsibility

375. The Trial Chamber found that, in his capacity as the commander of Squadron A of the Reconnaissance Battalion, Sagahutu exercised *de jure* authority over members of this unit.[903] The Trial Chamber further found that Sagahutu had *de facto* authority over Corporal Nzeyimana and that there existed a direct superior-subordinate relationship since Corporal Nzeyimana was a "marksman within Squadron A" and often acted as Sagahutu's driver.[904] The Trial Chamber also found that Sagahutu had "direct knowledge of the involvement of Squadron A soldiers" in the killing of the Belgian peacekeepers and failed to prevent the killing of the Belgian peacekeepers or to punish his subordinates who participated in that crime.[905]

(i) Superior-Subordinate Relationship

376. Sagahutu submits that the Trial Chamber erred in finding that a superior-subordinate relationship existed between him and Corporal Nzeyimana.[906] In particular, he contends that the Trial Chamber erroneously found that he exercised *de facto* authority over Corporal Nzeyimana without establishing his effective control in this regard.[907] Sagahutu further asserts that the Appeals Chamber's finding in the *Setako* case that a superior's authority to issue orders does not automatically establish effective control should have led the Trial Chamber to conclude that he had no effective control over Corporal Nzeyimana.[908]

377. The Prosecution responds that the Trial Chamber reasonably concluded that Sagahutu was Corporal Nzeyimana's superior and had effective control over him.[909]

378. The Appeals Chamber recalls that the essential element of a superior-subordinate relationship within the meaning of Article 6(3) of the Statute is the possession of effective control on the part of the superior in the sense of a material ability to prevent or punish criminal conduct by

[902] *See* Trial Judgement, paras. 1869, 1872, 1885, 2099, 2150.
[903] Trial Judgement, para. 2028. *See also* Trial Judgement, paras. 2026, 2027.
[904] Trial Judgement, paras. 2030, 2032.
[905] Trial Judgement, paras. 2034, 2035.
[906] Sagahutu Notice of Appeal, paras. 69, 70; Sagahutu Appeal Brief, para. 240.
[907] Sagahutu Notice of Appeal, paras. 71, 73, 80, 83; Sagahutu Appeal Brief, paras. 220, 227, 231.
[908] Sagahutu Appeal Brief, para. 231, *referring to Setako* Appeal Judgement, para. 272.
[909] Prosecution Response Brief (Sagahutu), paras. 202-204.

his subordinate(s).[910] The Trial Chamber did not expressly find that Sagahutu exercised effective control over Corporal Nzeyimana. However, the Appeals Chamber considers that such a finding was implicit in the Trial Chamber's conclusions that Corporal Nzeyimana was a member of Squadron A and Sagahutu had *de jure* and *de facto* authority over him.

379. The Appeals Chamber is also not convinced by Sagahutu's reliance on the finding in the *Setako* Appeal Judgement that a superior's authority to issue orders is an indicator of effective control, but does not automatically establish such control.[911] Setako was convicted pursuant to Article 6(1) of the Statute for crimes committed by individuals who were not in a pre-existing superior-subordinate relationship with him.[912] The Appeals Chamber in that case therefore held that the mere fact that these individuals followed Setako's orders to commit the crimes in question was insufficient to establish his responsibility pursuant to Article 6(3) of the Statute.[913] By contrast, Corporal Nzeyimana was found to have been Sagahutu's subordinate in Squadron A of the Reconnaissance Battalion and to have acted as his driver. The Trial Chamber took these circumstances into account in addition to the fact that Corporal Nzeyimana acted on Sagahutu's order when participating in the attack against the Belgian peacekeepers.

380. In light of the above, the Appeals Chamber concludes that Sagahutu has failed to demonstrate that the Trial Chamber erred in finding that a superior-subordinate relationship existed between him and Corporal Nzeyimana within the meaning of Article 6(3) of the Statute.

(ii) Failure to Prevent or Punish

381. Sagahutu submits that the Trial Chamber erred in finding that he failed to prevent and punish Corporal Nzeyimana's criminal conduct.[914] He contends that the Trial Chamber did not provide a reasoned opinion for this finding.[915] He further asserts that the Trial Chamber erred in concluding that he could have prevented the killing of the Belgian peacekeepers given that, when acquitting him of conspiracy to commit genocide, it acknowledged that the attack was unplanned

[910] *Halilović* Appeal Judgement, para. 59; *Nahimana et al.* Appeal Judgement, para. 484; *Delalić et al.* Appeal Judgement, paras. 192, 193. *See also Kayishema and Ruzindana* Appeal Judgement, para. 294.
[911] *See Setako* Appeal Judgement, para. 272.
[912] *See Setako* Appeal Judgement, paras. 271, 273.
[913] *See Setako* Appeal Judgement, paras. 272-274.
[914] Sagahutu Notice of Appeal, para. 69; Sagahutu Appeal Brief, paras. 220, 232.
[915] Sagahutu Notice of Appeal, paras. 79, 82, *referring to* Trial Judgement, para. 2035; Sagahutu Appeal Brief, paras. 233, 234, 236. *See also* Sagahutu Appeal Brief, para. 240.

and disorganized.[916] Sagahutu adds that he did not have the material ability to prevent the actions of his subordinates in light of the chaotic circumstances prevailing at Camp Kigali at the time.[917]

382. Moreover, Sagahutu submits that the Trial Chamber did not make the requisite findings on whether he had the material ability to punish the perpetrators of the attack against the Belgian peacekeepers or on the necessary and reasonable measures that he should have taken in this regard.[918] He claims that the Trial Chamber's conclusion that he failed in his duty to punish was not supported by evidence.[919] Sagahutu further maintains that his situation is similar to the one in the *Bagosora et al.* case, where the Trial Chamber held that "there is absolutely no evidence that the perpetrators [of the crimes] were punished afterwards", and the Appeals Chamber found that this statement was not, in itself, sufficient to establish that Bagosora failed to fulfill his duty to punish.[920] In addition, Sagahutu maintains that any potential duty he had to punish ceased to exist when the Chief of Staff of the Rwandan army initiated investigations to identify the perpetrators of the attack against the Belgian peacekeepers and was unable to complete these investigations because of the ensuing war.[921] Sagahutu finally submits that a UNAMIR commission of inquiry did not implicate Reconnaissance Battalion soldiers or soldiers of Squadron A under his command in the killing of the peacekeepers.[922]

383. The Prosecution responds that the Trial Chamber made proper findings that Sagahutu failed to prevent and punish the crimes by his subordinates.[923] It underlines that investigations carried out by others cannot exonerate Sagahutu.[924] The Prosecution adds that Sagahutu did nothing to prevent his subordinates from retrieving the MGL from his office or to punish them.[925]

384. The Appeals Chamber notes that the Trial Chamber provided no express explanation as to how Sagahutu failed in his duty to prevent Corporal Nzeyimana from participating in the attack against the Belgian peacekeepers. However, the Appeals Chamber finds that this conclusion was based on the Trial Chamber's finding that Sagahutu instructed Corporal Nzeyimana to put down the peacekeepers' resistance and for this purpose provided the MGL, which logically showed that Sagahutu made no attempt to prevent his subordinate from engaging in the killing of the

[916] Sagahutu Notice of Appeal, para. 77; Sagahutu Appeal Brief, para. 232, *referring to* Trial Judgement, paras. 507, 511, 513, 514, 518, 668, 729.
[917] Sagahutu Notice of Appeal, para. 81.
[918] Sagahutu Notice of Appeal, para. 84.
[919] Sagahutu Appeal Brief, paras. 236, 237, 240.
[920] Sagahutu Appeal Brief, para. 235, *referring to Bagosora and Nsengiyumva* Appeal Judgement, para. 683.
[921] Sagahutu Notice of Appeal, para. 86; Sagahutu Appeal Brief, para. 238, *referring to* Trial Judgement, paras. 1844-1847.
[922] Sagahutu Notice of Appeal, para. 85; Sagahutu Appeal Brief, para. 239, *referring to* a report of a board of inquiry presided over by Lieutenant Colonel Dounkov signed on 10 May 1994 (Defence Exhibit 323).
[923] Prosecution Response Brief (Sagahutu), para. 212; AT. 9 May 2013 p. 43.
[924] Prosecution Response Brief (Sagahutu), para. 213.

peacekeepers. In this respect, the Appeals Chamber recalls that the duty to prevent arises for a superior from the moment he knows or has reason to know that his subordinate is about to commit a crime.[926] Sagahutu's assertion that the Trial Chamber did not provide a reasoned opinion for its conclusion that he failed to prevent Corporal Nzeyimana from participating in the killing of the Belgian peacekeepers is therefore dismissed.

385. Similarly, the Appeals Chamber is not persuaded by Sagahutu's assertions that the Trial Chamber acknowledged that the attack against the Belgian peacekeepers was unplanned and disorganized and that the chaotic circumstances precluded him from preventing his subordinates from participating in the attack. Sagahutu was not convicted of having failed to prevent the attack as such, but for not taking measures to prevent his subordinate Corporal Nzeyimana from participating in it. In this regard, it was irrelevant whether Sagahutu was in a position to stop the attack in general. The only thing required of him was to prevent his subordinate from taking part. Sagahutu not only did not do so, but actively encouraged Corporal Nzeyimana to contribute to the attack. The Appeals Chamber therefore discerns no error in the Trial Chamber's conclusion that Sagahutu failed to prevent Corporal Nzeyimana from becoming involved in the attack against the Belgian peacekeepers.

386. In addition, the Appeals Chamber is satisfied that the requisite finding on the measures available to Sagahutu to punish Corporal Nzeyimana are implicit in the Trial Chamber's conclusions on Sagahutu's senior position within the Reconnaissance Battalion and his role as Corporal Nzeyimana's commanding officer.[927] The Appeals Chamber further recalls that Sagahutu's instruction to Corporal Nzeyimana "to put down the resistance" was an order to kill the remaining Belgian peacekeepers and that for this purpose he allowed the corporal to take an MGL from his office.[928] Sagahutu fails to appreciate that the proof of his failure to punish Corporal Nzeyimana follows from this direct involvement in his subordinate's crime. Accordingly, Sagahutu has not demonstrated that the Trial Chamber failed to make necessary findings with respect to the measures available to punish his subordinates and his failure to do so.

387. Finally, the Appeals Chamber is not convinced by Sagahutu's reliance on the *Bagosora and Nsengiyumva* Appeal Judgement. In that case, the trial chamber found that there was no evidence that perpetrators of certain crimes were punished without considering what measures, if any, Bagosora had taken to punish the crimes and without making an explicit finding that he failed to

[925] Prosecution Response Brief (Sagahutu), paras. 210, 214, 215.
[926] *Bagosora and Nsengiyumva* Appeal Judgement, para. 642; *Hadžihasanović and Kubura* Appeal Judgement, para. 260.
[927] Trial Judgement, paras. 2026, 2032. *Cf. Bagosora and Nsengiyumva* Appeal Judgement, para. 510.
[928] *See supra* paras. 352, 366, 367, 372.

punish the crimes.[929] On appeal, the Appeals Chamber held that the finding that the perpetrators of the crimes were not punished was, on its own, insufficient to establish as a fact that Bagosora personally had failed in his duty to punish culpable subordinates.[930] This situation is different from the present case where the Trial Chamber explicitly found that Sagahutu failed to punish his subordinates for their participation in the attack against the Belgian peacekeepers.[931] Moreover, the Appeals Chamber had also concluded that the trial chamber in that case had erred in finding that Bagosora ordered or authorized the crimes and thus his failure to punish his subordinates could not be based on his direct involvement in the killings.[932] As noted above, the Trial Chamber reasonably concluded that Sagahutu was directly involved in his subordinate's crime.

3. Conclusion

388. In light of the above, the Appeals Chamber grants Sagahutu's Eighth to Tenth Grounds of Appeal, in part, and finds that the Trial Chamber erred in its finding on the involvement of Corporal Masonga in the attack. Moreover, the Appeals Chamber grants, in part, Sagahutu's Eighth Ground of Appeal and reverses his conviction for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva conventions and of Additional Protocol II on the basis of ordering the killing of the Belgian peacekeepers. Sagahutu's remaining convictions for these crimes based on aiding and abetting, and as a superior remain undisturbed. The impact, if any, on Sagahutu's sentence is addressed below.[933] In all other aspects, the Appeals Chamber dismisses Sagahutu's Sixth to Tenth Grounds of Appeal.

[929] *Bagosora et al.* Trial Judgement, para. 2040.
[930] *Bagosora and Nsengiyumva* Appeal Judgement, paras. 681, 683. In this regard, the Appeals Chamber in *Bagosora and Nsengiyumva* recalled that "[i]n certain circumstances, although the necessary and reasonable measures have been taken, the result may fall short of punishment of the perpetrators". *Bagosora and Nsengiyumva* Appeal Judgement, para. 683.
[931] Trial Judgement, para. 2035.
[932] *Bagosora and Nsengiyumva* Appeal Judgement, para. 686.
[933] *See infra* para. 446.

V. APPEAL OF THE PROSECUTION

A. Kansi Parish and Saint André College (Ground 6)

389. The Indictment charges Ndindiliyimana as a superior pursuant to Article 6(3) of the Statute for having failed to prevent or punish crimes committed by gendarmes at Kansi Parish and Saint André College.[934] The Trial Chamber convicted Ndindiliyimana for not having punished these offences.[935] The Trial Chamber concluded, however, that there was no evidence that Ndindiliyimana knew or had reason to know in advance of the crimes, and therefore did not enter a conviction for failing to prevent them.[936]

390. The Prosecution submits that the Trial Chamber erred by not holding Ndindiliyimana responsible for failing to prevent the crimes committed at Kansi Parish and Saint André College and requests that the Appeals Chamber enter a conviction on this basis and increase Ndindiliyimana's sentence.[937] The Appeals Chamber has reversed Ndindiliyimana's convictions in relation to the events at Kansi Parish and Saint André College because the Trial Chamber erred in finding that Ndindiliyimana had effective control over the perpetrators.[938] Accordingly, the Appeals Chamber dismisses the Prosecution's Sixth Ground of Appeal as moot.

[934] Indictment, paras. 61, 73, 76.
[935] Trial Judgement, paras. 19, 22, 23, 1295, 1312, 1365, 1373, 2085, 2119, 2152.
[936] Trial Judgement, paras. 1952, 2186.
[937] Prosecution Notice of Appeal, paras. 32-38; Prosecution Appeal Brief, paras. 147-187. *See also* Prosecution Reply Brief (Ndindiliyimana), para. 37; AT. 9 May 2013 p. 62.
[938] *See supra* paras. 61, 75.

B. *Centre d'étude des langues africaines* (CELA) (Ground 7)

391. At trial, the Prosecution sought to hold Ndindiliyimana responsible as a superior pursuant to Article 6(3) of the Statute for the actions of gendarmes in relation to the killing of approximately 60 Tutsi refugees removed from *Centre d'étude des langues africaines* ("CELA") on or about 22 April 1994.[939] The Trial Chamber found that 40 civilians, the majority of whom were Tutsi, were taken from CELA to the gendarmerie's Muhima Brigade ostensibly for questioning.[940] There, the civilians were briefly detained before being turned over to the *Interahamwe*, who took them towards Rugege where at least 10 of the civilians were killed by the *Interahamwe* at a roadblock.[941]

392. The Trial Chamber concluded that the gendarmes at the Muhima Brigade must have been aware that the civilians brought there were suspected of being RPF accomplices and of the role of *Interahamwe* in killing Tutsi civilians on the pretext that they were RPF accomplices.[942] The Trial Chamber also found that the gendarmes at the Muhima Brigade must have been aware of the strong likelihood that the *Interahamwe* would kill the refugees handed over to them.[943] Consequently, the Trial Chamber concluded that the gendarmes at the Muhima Brigade were complicit in the crimes against the civilians removed from CELA.[944] However, the Trial Chamber, Judge Park dissenting, was not satisfied that Ndindiliyimana knew or had reason to know of the complicity of the gendarmes at the Muhima Brigade in the crimes against the refugees abducted from CELA and dismissed this charge.[945]

393. The Prosecution submits that the Trial Chamber erred in failing to convict Ndindiliyimana for the crimes against the civilians removed from CELA.[946] In this section, the Appeals Chamber considers whether the Trial Chamber erred by: (i) using an incorrect standard in assessing Ndindiliyimana's *mens rea* for superior responsibility; (ii) applying an incorrect standard of proof; and (iii) incorrectly assessing the evidence.

1. *Mens Rea*

394. The Prosecution submits that the Trial Chamber applied an incorrect standard when assessing Ndindiliyimana's *mens rea* as it related to the crimes against civilians removed from

[939] Indictment, paras. 61, 77, 118. *See also* Trial Judgement, paras. 24, 1374.
[940] Trial Judgement, para. 1395.
[941] Trial Judgement, para. 1398.
[942] Trial Judgement, para. 1399.
[943] Trial Judgement, para. 1399.
[944] Trial Judgement, paras. 1399, 1400.
[945] Trial Judgement, paras. 1404, 1406.
[946] Prosecution Notice of Appeal, paras. 39-43; Prosecution Appeal Brief, paras. 188-213; AT. 9 May 2013 pp. 62-65.

CELA.[947] Specifically, it contends that the Trial Chamber required proof that Ndindiliyimana knew the exact nature and details of the role the gendarmes played in the events preceding the killing of civilians taken from CELA.[948] Instead, the Prosecution argues that it only needed to prove that Ndindiliyimana had reason to know that the gendarmes were about to commit or had committed a crime, and that general knowledge putting Ndindiliyimana on notice of possible unlawful acts by his subordinates satisfied this requirement.[949]

395. Ndindiliyimana responds that the test for his *mens rea* is not whether he had knowledge of generalised violence, but whether he had knowledge of prior crimes committed by his subordinates which would have led him to appreciate that further crimes were about to be committed by the particular subordinates involved at a given location.[950]

396. For the purposes of liability under Article 6(3) of the Statute, the Appeals Chamber recalls that "showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know'".[951] However, it is necessary to make a distinction between the fact that an accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes.[952]

397. In this case, the Appeals Chamber finds that the Trial Chamber applied the correct standard in assessing Ndindiliyimana's *mens rea*. At the outset, the Trial Chamber correctly articulated the law as it relates to the *mens rea* requirements for superior responsibility under Article 6(3) of the Statute.[953] Its statement of factors that satisfy the "reason to know" standard was also correct.[954] Of greater significance, the Trial Chamber repeatedly considered whether the evidence established that Ndindiliyimana "knew *or had reason to know*" of the acts of gendarmes at the Muhima Brigade.[955] At no point did the Trial Chamber's evaluation indicate that the Prosecution was required to prove that Ndindiliyimana knew the exact nature and details of the role that gendarmes played in the crimes against the civilians taken from CELA.

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[947] Prosecution Appeal Brief, para. 190; AT. 9 May 2013 p. 63.
[948] Prosecution Appeal Brief, paras. 194, 196, 197.
[949] Prosecution Appeal Brief, paras. 195, 196. *See also* Prosecution Reply Brief, paras. 29, 30, 33; AT. 9 May 2013 p. 64. *See also* AT. 10 May 2013 p. 24.
[950] Ndindiliyimana Response Brief, para. 84 (p. 30).
[951] *Delalić et al.* Appeal Judgement, paras. 238, 241. *See also Nahimana et al.* Appeal Judgement, para. 791; *Krnojelac* Appeal Judgement, para. 154; *Bagilishema* Appeal Judgement, para. 42.
[952] *Bagilishema* Appeal Judgement, para. 42.
[953] *See* Trial Judgement, paras. 1919-1921.
[954] *See* Trial Judgement, para. 1921.
[955] *See* Trial Judgement, paras. 1401, 1404-1406 (emphasis added).

398. Accordingly, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber erred in its application of the standard for assessing Ndindiliyimana's *mens rea* in relation to the crimes committed against the civilians removed from CELA.

2. Standard of Proof

399. The Prosecution submits that the Trial Chamber misapplied the standard of proof when assessing Ndindiliyimana's knowledge about the role of the Muhima Brigade gendarmes in the crimes against the civilians taken from CELA.[956] Specifically, it argues that the Trial Chamber required a "definitive finding" of Ndindiliyimana's knowledge, which, the Prosecution suggests, is a standard more stringent than proof beyond reasonable doubt.[957] Ndindiliyimana submits that the record fails to demonstrate that he had the requisite *mens rea* for this event.[958]

400. The Appeals Chamber recalls that accused before the Tribunal are presumed innocent, and that each fact upon which an accused's conviction is based must be established beyond reasonable doubt.[959] As highlighted by the Prosecution, this standard requires that the "proof must be such to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence".[960]

401. In assessing the evidence, the Trial Chamber commented that it was "not satisfied",[961] or that it could not "assume",[962] or that it had "considerable reservations"[963] that the record could support the finding that Ndindiliyimana knew or had reason to know about the role of the Muhima Brigade gendarmes in the crimes committed against the civilians taken from CELA. The Trial Chamber also found that, although Ndindiliyimana admitted in general terms to having received situation reports from his units around the country, this evidence alone was insufficient to ground a "definitive finding" that Ndindiliyimana knew or had reason to know of the events at the Muhima Brigade.[964] Finally, the Trial Chamber concluded that the Prosecution did not "prove" that Ndindiliyimana knew or reason to know about the role of gendarmes at the Muhima Brigade in the crimes.[965]

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[956] Prosecution Appeal Brief, paras. 190, 192, 193.
[957] Prosecution Appeal Brief, paras. 190, 192, 193.
[958] Ndindiliyimana Response Brief, paras. 84 (p. 30), 85 (p. 30), 77, 78, 82-86, 99-104, 110.
[959] *Ntawukulilyayo* Appeal Judgement, para. 103; *Ntagerura et al.* Appeal Judgement, para. 175; *Martić* Appeal Judgement, para. 55; *Halilović* Appeal Judgement, para. 109; *Milošević* Appeal Judgement, paras. 20, 231.
[960] *See Tadić* Appeal Judgement, para. 174. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 220; *Martić* Appeal Judgement, para. 61.
[961] Trial Judgement, para. 1404.
[962] Trial Judgement, para. 1405.
[963] Trial Judgement, para. 1405.
[964] Trial Judgement, para. 1405.
[965] Trial Judgement, para. 1406.

402. The Appeals Chamber is not persuaded that the Trial Chamber's use of the phrase "definitive finding" or its description that the Prosecution did not "prove" Ndindiliyimana's knowledge reflects a misapplication of the standard of the proof. In the preliminary matters section of the Trial Judgement, the Trial Chamber noted that the Prosecution was required to prove its case beyond reasonable doubt.[966] Moreover, the Trial Chamber repeatedly used the "beyond reasonable doubt" formulation when making findings as well as dismissing evidence,[967] demonstrating its awareness of the standard of proof required.

403. In this context, the Trial Chamber's analysis of the evidence related to Ndindiliyimana's knowledge, as cited above, reflects extensive consideration of the record. It reveals the Trial Chamber's reservations that the evidence was sufficient to establish beyond reasonable doubt that Ndindiliyimana possessed knowledge necessary for superior responsibility pursuant to Article 6(3) of the Statute. That the Trial Chamber did not expressly use the "beyond reasonable doubt" formulation in this particular context is insufficient to demonstrate its misapplication of the standard.[968]

404. Accordingly, the Appeals Chamber finds that the Prosecution has not demonstrated any error in the Trial Chamber's application of the standard of proof.

3. Assessment of Evidence

405. As noted above, the Trial Chamber concluded that gendarmes at the Muhima Brigade were complicit in the crimes committed against the civilians who were taken from CELA.[969] The Trial Chamber noted, however, the absence of any direct evidence of Ndindiliyimana's knowledge of the role of the gendarmes in these events.[970] Nonetheless, the Trial Chamber expressly considered whether Ndindiliyimana's knowledge could be inferred based on information he received about the events at CELA[971] as well as evidence concerning his overall command of the gendarmerie and his admission that he received situation reports from gendarmerie units around the country.[972] The Trial Chamber concluded that the Prosecution had not proven that Ndindiliyimana knew or had reason to

[966] *See* Trial Judgement, paras. 107-109.
[967] For instances where the Trial Chamber found facts proven and expressly stated the "beyond reasonable doubt" formulation, *see*, *e.g.*, Trial Judgement, paras. 1147, 1196, 1197, 1209, 1295, 1312, 1365, 1743, 1745, 1887, 1899, 1950, 2111, 2113, 2116. For instances where the Trial Chamber expressly used the "beyond reasonable doubt" formulation in dismissing evidence, *see*, *e.g.*, Trial Judgement, paras. 244, 358, 411, 443, 474, 506, 518, 536, 566, 591, 650, 681, 731, 754, 769, 799, 805, 858, 861, 931, 981, 1002, 1011, 1034, 1093, 1307, 1308, 1311, 1409, 1434, 1477, 1575, 1582, 1596, 1607, 1622, 2070.
[968] *Cf. Martić* Appeal Judgement, paras. 57-60.
[969] Trial Judgement, paras. 1399, 1400.
[970] Trial Judgement, para. 1402.
[971] Trial Judgement, paras. 1403, 1404.
[972] Trial Judgement, para. 1405.

know of the role of his subordinates at the Muhima Brigade in the events that led to the killings of the Tutsi refugees abducted from CELA.[973]

406. The Prosecution argues that the Trial Chamber erred in its assessment of the evidence, pointing to general and specific evidence that, in its view, establishes the requisite knowledge for superior responsibility pursuant to Article 6(3) of the Statute.[974] With respect to general evidence, the Prosecution highlights Ndindiliyimana's position as the Chief of Staff of the Rwandan gendarmerie and general leadership position in the Rwandan military structure at the time.[975] It also points to Ndindiliyimana's receipt of situation reports and argues that gendarmes at the Muhima Brigade must have reported this incident to him.[976] To this end, it also notes Ndindiliyimana's evidence that, in April 1994, he had established a team to investigate massacres, killings, and all acts of violence.[977]

407. With respect to specific evidence, the Prosecution also points to Ndindiliyimana's admitted knowledge that refugees at CELA were suspected of being RPF accomplices,[978] and highlights Ndindiliyimana's awareness of details of the events at CELA as they were unfolding.[979] It further points to evidence pertaining to the involvement of gendarmes in every stage of the operation, including the removal of persons from CELA to the Muhima Brigade.[980]

408. In light of these circumstances, as well as Ndindiliyimana's admitted general knowledge that those identified as RPF accomplices and Tutsis were in danger of being killed,[981] the Prosecution argues that, at a minimum, Ndindiliyimana possessed sufficiently alarming information to impose on him an affirmative obligation to inquire into what happened at CELA and the Muhima Brigade.[982] It submits that this is sufficient to establish the *mens rea* for superior responsibility pursuant to Article 6(3) of the Statute.[983] Specifically, the Prosecution submits that the only reasonable conclusion was that Ndindiliyimana, at a minimum, had reason to know that crimes were about to be committed and were committed by his subordinates.[984] The Prosecution adds that, if the Appeals Chamber finds that the Trial Chamber erred with respect to Ndindiliyimana's

[973] Trial Judgement, para. 1406.
[974] Prosecution Appeal Brief, paras. 198-211.
[975] Prosecution Appeal Brief, paras. 198, 199.
[976] Prosecution Appeal Brief, paras. 198, 199; AT. 9 May 2013 p. 65. *See also* AT. 10 May 2013 pp. 23, 24.
[977] Prosecution Appeal Brief, para. 205.
[978] Prosecution Appeal Brief, paras. 200, 202; AT. 9 May 2013 p. 64.
[979] Prosecution Appeal Brief, paras. 198, 202, 204. *See also* AT. 9 May 2013 p. 64.
[980] Prosecution Appeal Brief, paras. 202, 203.
[981] Prosecution Appeal Brief, para. 200.
[982] Prosecution Appeal Brief, paras. 201, 206.
[983] Prosecution Appeal Brief, para. 210.
[984] Prosecution Appeal Brief, paras. 205, 209, 210.

knowledge, the record also demonstrates Ndindiliyimana's effective control over the gendarmes who committed these crimes.[985]

409. Ndindiliyimana responds that the Trial Chamber's conclusion that he did not have sufficient knowledge of the crimes committed at CELA is correct.[986]

410. The Appeals Chamber turns first to the Prosecution's arguments that Ndindiliyimana's leadership position within the Rwandan gendarmerie and military structure, his receipt of situation reports, and the existence of a unit investigating violence were sufficient to establish his *mens rea* for superior responsibility. The Appeals Chamber observes that the Trial Chamber expressly considered much of this evidence.[987] The Prosecution fails to demonstrate how it was unreasonable for the Trial Chamber to conclude that, notwithstanding Ndindiliyimana's position, it could not find as the only reasonable inference that Ndindiliyimana would have been aware of the "myriad actions of lower echelon *gendarmes*" and that the receipt of situation reports from gendarmerie units from around Rwanda was insufficient to establish that he knew or had reason to know of the events at the Muhima Brigade.[988]

411. Indeed, the Prosecution's position with respect to the general circumstances that *could have* brought this incident to Ndindiliyimana's attention fails to appreciate the Trial Chamber's other conclusions about communication difficulties Ndindiliyimana experienced, even with gendarmes based in Kigali and not involved in combat.[989] It also ignores the Trial Chamber's findings of Ndindiliyimana's deteriorating command over gendarmes.[990] Finally, the Appeals Chamber observes that even where the Trial Chamber found Ndindiliyimana's knowledge sufficient to establish his superior responsibility, the Trial Chamber still concluded that Ndindiliyimana's receipt of situation reports did not provide a sound basis for ascribing him notice of the involvement of gendarmes in that particular crime.[991] In light of the above, the Appeals Chamber finds no error in the Trial Chamber's conclusion that Ndindiliyimana's position and receipt of situation reports were

[985] Prosecution Appeal Brief, para. 199; Prosecution Reply Brief, paras. 34, 35; AT. 9 May 2013 pp. 65, 66.
[986] Ndindiliyimana Response Brief, paras. 95-98, 105. *See also* AT. 9 May 2013 pp. 74-76.
[987] Trial Judgement, paras. 1404, 1405.
[988] Trial Judgement, para. 1405. The Appeals Chamber recalls that while an individual's hierarchical position may be a significant *indicium* that he or she knew or had reason to know about subordinates' criminal acts, knowledge will not be presumed from status alone. *Blaškić* Appeal Judgement, paras. 56, 57; *Semanza* Trial Judgement, para. 404.
[989] Trial Judgement, paras. 1937-1941, 1946.
[990] Trial Judgement, paras. 1944-1946.
[991] *See*, *e.g.*, Trial Judgement, para. 1368 (assessing Ndindiliyimana's knowledge with respect to crimes committed by gendarmes at Saint André College).

insufficient to establish the knowledge necessary for liability pursuant to Article 6(3) of the Statute.[992]

412. The Appeals Chamber also finds no merit in the Prosecution's assertion that the Trial Chamber failed to sufficiently consider evidence that, in April 1994, Ndindiliyimana had established a team to investigate massacres, killings, and all acts of violence. While this evidence is not expressly referred to in the deliberations on the CELA event, the Trial Chamber considered this evidence when assessing Ndindiliyimana's general authority over gendarmes, and, in particular, in relation to his knowledge of crimes committed by gendarmes.[993]

413. Furthermore, the Appeals Chamber fails to see how general evidence pertaining to the contemporaneous existence of an investigative unit, when considered with the record in its entirety, requires the finding that Ndindiliyimana knew or had reason to know about the involvement of gendarmes in the brief detention of civilians at the Muhima Brigade. Indeed, the Appeals Chamber observes that Ndindiliyimana's evidence about what he learned from the investigative unit was that, with the exception of three gendarmes, there was no evidence indicating the involvement of gendarmes in the killings in Rwanda generally.[994]

414. Turning to the Prosecution's arguments about Ndindiliyimana's knowledge of the events at CELA, the Appeals Chamber recalls that the Trial Chamber stated:

> […] Ndindiliyimana testified to having been aware of the fact that a large number of assailants had gathered at CELA intending to attack the refugees there on suspicion that they were armed accomplices of the RPF. Ndindiliyimana also admitted that he knew of *Préfet* Renzaho's intervention at CELA during the events, as well as admitting that he knew that a search was conducted at CELA during the events and that some of the refugees were found to be armed. Their weapons were confiscated and the refugees were transferred to St. Paul Centre where they were protected by the *gendarmes*.[995]

The Prosecution suggests that this evidence, along with Ndindiliyimana's admitted awareness of what "happens to people who are described as [RPF] accomplices" and knowledge that Tutsis were seeking refuge and were in danger of being killed, constituted sufficiently alarming information to establish the *mens rea* requirement for liability under Article 6(3) of the Statute.[996] However, the Prosecution has not shown how this evidence establishes that Ndindiliyimana was in possession of sufficiently alarming information that *his subordinates – i.e.* the gendarmes – had committed or

[992] Even if the Trial Chamber had accepted the Prosecution's unsupported argument that the Muhima Brigade must have also submitted reports to Ndindiliyimana, it fails to show that such reporting necessarily would have included sufficiently alarming information about the role of gendarmes in the crimes committed against the civilians taken from CELA to warrant further inquiry by Ndindiliyimana.
[993] Trial Judgement, para. 1943. *Cf. Rukundo* Appeal Judgement, para. 217 ("A Trial Chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record".).
[994] *See* Trial Judgement, para. 2239, *citing* Ndindiliyimana, T. 23 June 2008 p. 21.
[995] Trial Judgement, para. 1403. *See also* Ndindiliyimana, T. 18 June 2008 pp. 42, 43.

were likely to commit crimes in relation to civilians removed from CELA.[997] For example, the Appeals Chamber observes that evidence referred to by the Prosecution does not reflect Ndindiliyimana's awareness that the gendarmes were threatening civilians or that they were involved in criminal activity at CELA, that civilians were removed from CELA and brought to the Muhima Brigade, or that the gendarmes at the Muhima Brigade turned the civilians over to the *Interahamwe*.[998] Consequently, the Appeals Chamber finds no error in the Trial Chamber's conclusion that it was "not satisfied that the fact that Ndindiliyimana had information, albeit limited, on the events that transpired at CELA is sufficient to conclude that he knew or had reason to know of the complicity of the *gendarmes* at the Muhima Brigade in the eventual killing of refugees that were abducted from CELA".[999]

415. Likewise, the Prosecution fails to show how evidence reflecting that one gendarme drove the civilians from CELA to the Muhima Brigade and that the gendarmes turned the civilians over to the *Interahamwe* requires the conclusion, in light of the preceding analysis, that Ndindiliyimana knew or had reason to know about the role of the gendarmes in the killing that ensued. The fact that the gendarmes played a role in the crimes committed against the civilians taken from CELA is not sufficient to establish that Ndindiliyimana possessed any awareness of this event.

416. Accordingly, the Prosecution has failed to demonstrate any error in the Trial Chamber's assessment of the evidence pertaining to Ndindiliyimana's *mens rea* for these crimes. Consequently, it is unnecessary to address Ndindiliyimana's effective control over the gendarmes found to be complicit in the crimes committed against the civilians removed from CELA.

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[996] Prosecution Appeal Brief, para. 200, *quoting* Trial Judgement, para. 2228.

[997] The Prosecution appears to argue that Ndindiliyimana had a positive obligation to conduct a further inquiry once in possession of sufficiently alarming information that *anyone* had or was about to commit a crime against Tutsi refugees. *See* Prosecution Appeal Brief, para. 206. This of course, is not the test when assessing an accused's knowledge with respect to superior responsibility. *See*, *e.g.*, *Blaškić* Appeal Judgement, para. 83 ("[T]he failure to punish concerns past crimes committed by *subordinates*, whereas the failure to prevent concerns future crimes of *subordinates*") (emphasis added); *Delalić et al.* Appeal Judgement, para. 241 ("The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard 'had reason to know', that is, a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by *subordinates*".) (emphasis added). Consequently, the Prosecution's reference to evidence of Ndindiliyimana preventing "officers" from driving refugees out of the *Hôtel des Mille Collines* at paragraph 207 of its appeal brief is inapposite as it ignores the absence of any indication that the gendarmes had or were likely to commit crimes against Tutsis who were at or removed from CELA.

[998] The Prosecution argues that Ndindiliyimana's evidence concerning what he knew was occurring at CELA was untruthful. In particular, the Prosecution notes that the Trial Chamber reasonably preferred Witness ATW's evidence over Ndindiliyimana's. Prosecution Appeal Brief, para. 208. The Appeals Chamber observes, however, that the Trial Chamber preferred Witness ATW's first-hand evidence over Ndindiliyimana's second-hand evidence about what in fact occurred at CELA, not with respect to Ndindiliyimana's knowledge. *See* Trial Judgement, paras. 1391-1394. This reflects the Trial Chamber's assessment of the probative value of the relevant evidence and does not, as suggested by the Prosecution, lead to the conclusion that Ndindiliyimana's account was untruthful.

[999] Trial Judgement, para. 1404.

4. Conclusion

417. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's Seventh Ground of Appeal.

VI. SENTENCING APPEALS

418. The Appeals Chamber has reversed all of Ndindiliyimana's and Nzuwonemeye's convictions and dismissed the Prosecution's request to enter new convictions against Ndindiliyimana in relation to the events at Kansi Parish, Saint André College, and CELA.[1000] Consequently, all submissions with respect to Ndindiliyimana's and Nzuwonemeye's sentences are dismissed as moot. In this section, the Appeals Chamber considers the sentencing appeal of Sagahutu as well as the Prosecution's appeal of his sentence. The Appeals Chamber recalls that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the accused and the gravity of the crime.[1001] As a rule, the Appeals Chamber will revise a sentence only if the appealing party demonstrates that the Trial Chamber committed a discernible error in exercising its sentencing discretion or that it failed to follow the applicable law.[1002]

419. The Trial Chamber sentenced Sagahutu to a single sentence of 20 years of imprisonment[1003] for his convictions for murder as a crime against humanity and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[1004] Sagahutu and the Prosecution have appealed this sentence.

A. Sagahutu's Sentencing Appeal (Grounds 13 to 15)

420. Sagahutu argues that the Trial Chamber erred in sentencing him to 20 years of imprisonment and requests that the Appeals Chamber reduce his sentence.[1005] The Appeals Chamber recalls that it has reversed Sagahutu's convictions in relation to the killing of the Prime Minister and for ordering the killing of the Belgian peacekeepers.[1006] In this section, the Appeals Chamber therefore considers whether the Trial Chamber erred in its assessment of the gravity of Sagahutu's offences related to the killing of the Belgian peacekeepers and the aggravating circumstances, and whether the sentence imposed was excessive in light of the circumstances.

[1000] *See supra* paras. 61, 75, 82, 190, 241, 254, 312, 321, 322, 390, 417.
[1001] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 268; *Ntabakuze* Appeal Judgement, para. 264; *Kanyarukiga* Appeal Judgement, para. 270; *Hategekimana* Appeal Judgement, para. 288.
[1002] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 268; *Ntabakuze* Appeal Judgement, para. 264; *Kanyarukiga* Appeal Judgement, para. 270; *Hategekimana* Appeal Judgement, para. 288.
[1003] Trial Judgement, paras. 79, 2268, 2269.
[1004] Trial Judgement, paras. 75, 77, 2093-2099, 2146-2151, 2154-2157.
[1005] Sagahutu Notice of Appeal, paras. 92-99; Sagahutu Appeal Brief, paras. 261-277; Sagahutu Reply Brief, paras. 64-69.
[1006] *See supra* paras. 322, 388.

1. Gravity of the Offences

421. In assessing the gravity of Sagahutu's offences, the Trial Chamber recalled at length the circumstances surrounding the killing of the Belgian peacekeepers on 7 April 1994.[1007] It further recalled that it had convicted Sagahutu under Article 6(1) of the Statute for ordering and aiding and abetting this crime as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II and as a superior for murder as a crime against humanity.[1008]

422. Sagahutu argues that, when assessing the gravity of the crimes, the Trial Chamber erred in relying upon facts which were not proven beyond reasonable doubt.[1009] Specifically, he contends that the Trial Chamber erred when considering the first phase of the attack against the Belgian peacekeepers despite there being no evidence of his involvement or that of his subordinates.[1010] Sagahutu also submits that the Trial Chamber erred by finding that he directly participated in the crimes when none of the evidence reflects his physical presence.[1011]

423. The Prosecution responds that the Trial Chamber's findings support a conclusion that all circumstances related to the killing of the Belgian peacekeepers were proven beyond reasonable doubt and could be considered in the gravity of Sagahutu's offences.[1012] Furthermore, it argues that the Trial Chamber's conclusions that Sagahutu was "directly responsible" under Article 6(1) of the Statute for the killing of the Belgian peacekeepers was correct and that such a finding does not require direct physical participation.[1013]

424. In support of his first contention, Sagahutu argues that the Trial Chamber erred in paragraph 2255 of the Trial Judgement when stating that "on 7 April 1994, [Reconnaissance] Battalion soldiers under Sagahutu's command participated in arresting, disarming, killing and mutilating Belgian UNAMIR soldiers".[1014] The Appeals Chamber observes that, in the relevant factual findings, the Trial Chamber concluded that 15 UNAMIR peacekeepers at the Prime Minister's residence were "disarmed, arrested, and conveyed" to Camp Kigali in a vehicle driven by Major Ntuyahaga.[1015] It further concluded that an initial attack against the UNAMIR peacekeepers, referred to as the "first phase", resulted in the death of about six to eight Belgian peacekeepers.[1016]

[1007] Trial Judgement, paras. 2253, 2255.
[1008] Trial Judgement, para. 2256. *See also* Trial Judgement, paras. 2108, 2151.
[1009] Sagahutu Appeal Brief, paras. 261, 262, 275.
[1010] Sagahutu Appeal Brief, paras. 261, 263-265; Sagahutu Reply Brief, paras. 64, 65.
[1011] Sagahutu Appeal Brief, para. 276.
[1012] Prosecution Response Brief (Sagahutu), paras. 272-276.
[1013] Prosecution Response Brief (Sagahutu), paras. 285, 286, *quoting* Trial Judgement para. 2263.
[1014] Sagahutu Appeal Brief, para. 263.
[1015] Trial Judgement, para. 1854.
[1016] Trial Judgement, paras. 1855, 1865.

However, the Trial Chamber concluded that the mere presence of Reconnaissance Battalion soldiers was not enough to indicate their "participation in the attack".[1017]

425. The Trial Chamber also determined that Reconnaissance Battalion soldiers participated in the "second phase" of the attack on the Belgian peacekeepers, which involved the use of a multiple grenade launcher and led to the killing of at least two Belgian peacekeepers who had survived the first phase.[1018] Sagahutu's criminal liability hinges on his participation as well as that of Reconnaissance Battalion soldiers in the second phase of the attack.[1019]

426. In this context, the Trial Chamber's statement that "[Reconnaissance] Battalion soldiers under Sagahutu's command participated in arresting, disarming, killing and mutilating"[1020] Belgian peacekeepers appears to be a reference to the "first phase" of the attack. Such a conclusion rests on the chronology of events listed by the Trial Chamber and in light of the Trial Chamber's conclusions that this phase was carried out with a "variety of crude instruments including canes, rifle butts and rocks".[1021] This, however, would contradict the Trial Chamber's findings discussed above that the record failed to demonstrate that Reconnaissance Battalion soldiers participated in the "first phase" of the attack.[1022] Furthermore, it would be an error for the Trial Chamber to have relied on circumstances pertaining to the "first phase" of the attack when considering the gravity of Sagahutu's offences, as the Trial Chamber expressly concluded that his liability for this part of the attack could not be established.[1023]

427. Notwithstanding, the Appeals Chamber further observes that the Trial Chamber, also in the gravity of the offences section, expressly recalled that the evidence failed to support the involvement of Reconnaissance Battalion soldiers in the "first phase" of the attack.[1024] In this regard, the Appeals Chamber considers that, while the Trial Chamber could have been clearer, it did not consider the circumstances pertaining to the "first phase" of the attack when assessing the gravity of Sagahutu's offences. This aspect of Sagahutu's appeal is therefore dismissed.

428. The Appeals Chamber turns to Sagahutu's argument that the Trial Chamber erred by considering that he bore "direct responsibility" for the crimes for which he was convicted in light of

[1017] Trial Judgement, para. 1859.
[1018] Trial Judgement, paras. 1857, 1866, 1867, 1872, 1887.
[1019] Trial Judgement, paras. 1885-1887, 2030, 2099, 2150.
[1020] Trial Judgement, para. 2255.
[1021] Trial Judgement, paras. 1855, 1865. *See also* Trial Judgement, para. 1867 (remarking that six of the Belgian peacekeepers died from injuries that resulted from "beatings").
[1022] *See* Trial Judgement, para. 2255. *See also* Trial Judgement, paras. 1859, 1865-1867, 1872, 1887, 2150.
[1023] *Cf. Simba* Appeal Judgement, para. 84, fn. 178, *quoting Kunarac et al.* Trial Judgement, para. 850.
[1024] Trial Judgement, para. 2255.

the fact that he was not present at the crime scene.[1025] The Appeals Chamber has concluded elsewhere that the Trial Chamber reasonably convicted Sagahutu for aiding and abetting the killing of Belgian peacekeepers.[1026] Physical presence at the crime scene is not required under this mode of liability. This argument is therefore dismissed.

2. Aggravating Circumstances

429. With regard to aggravating circumstances, the Trial Chamber considered Sagahutu's role as a superior and a leader of Squadron A of the Reconnaissance Battalion, and that he gave orders regarding the killing of the Belgian peacekeepers.[1027] It also found that "the identities of the victims enhance the penalty that should be applied".[1028] It further considered the "calculated and premeditated" nature of the killings[1029] and Sagahutu's lack of remorse.[1030]

430. Sagahutu argues that the Trial Chamber erred in finding aggravating circumstances that were not established beyond reasonable doubt.[1031] He further contends that the Trial Chamber's consideration of the "calculated and premeditated nature" of the killings of the Belgian peacekeepers was in contradiction to its conspiracy conclusions, which failed to demonstrate that these murders were in furtherance of a preconceived plan.[1032] Likewise, Sagahutu contends that the findings regarding the symbolic weight of these killings and that they removed impediments to the genocide and other crimes were not established beyond reasonable doubt.[1033]

431. The Prosecution responds that Sagahutu's submissions fail to demonstrate an error.[1034] It argues that the Trial Chamber's conclusions demonstrate the calculated and premeditated nature of the killings, their symbolic weight, and the fact that they removed impediments to the genocide.[1035]

432. The Appeals Chamber turns to Sagahutu's argument that the Trial Chamber's finding that the "calculated and premeditated nature" of the killings of the Belgian peacekeepers was an

[1025] Sagahutu's argument initially emphasized that the Trial Chamber erred in finding his "direct participation" in the killing of the Prime Minister and the Belgian peacekeepers. *See* Sagahutu Notice of Appeal, para. 95, *referring to* Trial Judgement, para. 2263. In his appeal brief, Sagahutu re-emphasized this point, but added that this error led to the rejection of the mitigating circumstances. *See* Sagahutu Appeal Brief, para. 276. He alleges no independent error as it relates to the Trial Chamber's assessment of mitigating circumstances. Consequently, this argument is addressed here.
[1026] *See supra* para. 374.
[1027] Trial Judgement, para. 2257.
[1028] Trial Judgement, para. 2258.
[1029] Trial Judgement, para. 2259.
[1030] Trial Judgement, para. 2260.
[1031] Sagahutu Appeal Brief, paras. 261, 262, 275.
[1032] Sagahutu Appeal Brief, paras. 261, 268, 269, 274; Sagahutu Reply Brief, paras. 68, 69.
[1033] Sagahutu Appeal Brief, paras. 267, 270, 271; Sagahutu Reply Brief, paras. 68, 69; AT. 10 May 2013 pp. 16, 17.
[1034] Prosecution Response Brief (Sagahutu), para. 277-283.
[1035] Prosecution Response Brief (Sagahutu), paras. 279-283.

aggravating factor contradicts its findings on conspiracy to commit genocide that it was not proven that these murders were committed in furtherance of a preconceived plan.

433. The Appeals Chamber observes that the Trial Chamber concluded that Sagahutu's participation in the killing of the Belgian peacekeepers failed to demonstrate that he was part of a conspiracy to commit genocide.[1036] Notwithstanding, the Trial Chamber concluded that the attack against the peacekeepers became "more organized as it progressed".[1037] It also found that Sagahutu instructed Corporal Nzeyimana to put down the peacekeepers' resistance and for this purpose provided an MGL or consented to the use of this weapon.[1038]

434. The Appeals Chamber considers that all of these findings support the Trial Chamber's conclusions that the attack possessed a "calculated and premeditated nature".[1039] The fact that it was insufficient to support Sagahutu's participation in a conspiracy to commit genocide does not undermine that conclusion.

435. Finally, the Appeals Chamber considers Sagahutu's arguments that the evidence fails to demonstrate beyond reasonable doubt that the killing of the Belgian peacekeepers carried particular symbolic weight and removed opposition to the ensuing genocide.[1040] The Appeals Chamber notes that there is no dispute as to the Trial Chamber's finding that the peacekeeper's mission was to assist UNAMIR to facilitate the peaceful implementation of the Arusha Accords and that they were specifically assigned to guard the Prime Minister at the time of their attack.[1041] Given their specific role as members of an international peace-keeping force aimed at assisting the peaceful implementation of the Arusha Accords, the Appeals Chamber is not satisfied that Sagahutu demonstrated an error on the part of the Trial Chamber in finding that the killings of the Belgian peacekeepers had symbolic value in removing opposition to the ensuing genocide.

3. Reasonableness of the Sentence

436. Sagahutu submits that the Trial Chamber abused its discretion in sentencing him to 20 years of imprisonment.[1042] He emphasizes that he was convicted of the killing of two persons, and notes,

[1036] *See* Trial Judgement, paras. 511, 512, 514, 518.
[1037] Trial Judgement, para. 511.
[1038] Trial Judgement, paras. 1885, 1887, 1887.
[1039] *See* Trial Judgement, paras. 2247, 2259.
[1040] Trial Judgement, para. 2247.
[1041] Trial Judgement, para. 2258.
[1042] Sagahutu Appeal Brief, para. 277.

in particular, the chaotic circumstances surrounding the killing of the Belgian peacekeepers.[1043] He also argues that the sentence is too severe in light of his subordinate position.[1044]

437. In light of the Trial Chamber's conclusions that have been affirmed, Sagahutu's submissions fail to demonstrate a discernible error in the sentence imposed. His emphasis on the limited number of deaths that support his convictions fails to appreciate their significance in the context of the genocide, which the Trial Chamber reasonably concluded was an aggravating factor.[1045]

438. With respect to Sagahutu's argument that the sentence imposed fails to reflect his subordinate position, the Appeals Chamber observes that Sagahutu points to no submissions made before the Trial Chamber arguing that he raised his subordinate position as a mitigating circumstance to be considered in sentencing.[1046] Consequently, the Appeals Chamber is not convinced that Sagahutu has demonstrated that the Trial Chamber committed a discernible error in determining his sentence.

4. Conclusion

439. Accordingly, the Appeals Chamber dismisses Sagahutu's Thirteenth through Fifteenth Grounds of Appeal.

B. Prosecution's Sentencing Appeal (Ground 9)

440. The Prosecution argues that the Trial Chamber abused its discretion in sentencing Sagahutu to 20 years of imprisonment.[1047] The Prosecution submits that the Trial Chamber failed to sufficiently consider its own findings related to Sagahutu's participation in the killing of the Belgian peacekeepers in its assessment of the gravity,[1048] as well as the brutality with which this crime was committed.[1049] Likewise, the Prosecution argues that the Trial Chamber failed to consider the impact of this crime in the ensuing genocide.[1050] It emphasizes, in particular, that the killing of the Belgian peacekeepers on 7 April 1994 led to the withdrawal of UNAMIR, which

[1043] Sagahutu Notice of Appeal, para. 96 (referring to the killing of three persons); Sagahutu Appeal Brief, para. 277 (referring to the killing of two persons).
[1044] Sagahutu Appeal Brief, para. 277.
[1045] Trial Judgement, para. 2258.
[1046] Sagahutu Appeal Brief, para. 277. *See also* Sagahutu Closing Brief; Closing Arguments, T. 25 June 2009 pp. 91-93.
[1047] Prosecution Notice of Appeal, paras. 56, 57. Prosecution Appeal Brief, paras. 301, 320; AT. 9 May 2013 p. 69.
[1048] Prosecution Notice of Appeal, paras. 50-54; Prosecution Appeal Brief, paras. 294, 296, 297, 299, 304-306, 308-311, 320; AT. 9 May 2013 p. 69.
[1049] Prosecution Appeal Brief, para. 278.
[1050] Prosecution Notice of Appeal, para. 55; Prosecution Appeal Brief, paras. 299, 300, 307, 312, 315-317, 321.

directly contributed to the subsequent killings at ETO-Nyanza.[1051] The Prosecution submits that Sagahutu should be sentenced to life imprisonment.[1052]

441. Sagahutu responds that the Prosecution fails to substantiate its argument that the Trial Chamber erred in exercising its sentencing discretion by not imposing a higher sentence.[1053] He also submits that the Trial Chamber erred in its conclusions regarding the impact of the killings of the Belgian peacekeepers, which were not proven beyond reasonable doubt.[1054]

442. The Appeals Chamber recalls that the determination of the gravity of the crime requires consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crimes.[1055] With respect to Sagahutu, the Trial Chamber described the nature and mode of his individual participation in the killing of the Belgian peacekeepers.[1056] The Appeals Chamber is not convinced that the Trial Chamber erred in its consideration of these factors. The Prosecution's argument merely repeats findings made by the Trial Chamber earlier in the Trial Judgement without demonstrating that they were not considered.

443. With respect to the Prosecution's arguments the Trial Chamber should have considered the brutal manner in which the killing of the first six Belgian peacekeepers occurred during the "first phase" of the attack,[1057] the Appeals Chamber recalls that the Trial Chamber did not find that any Reconnaissance Battalion soldiers participated in these killings and expressly noted that this could not be considered within the gravity of Sagahutu's offence.[1058] This argument is therefore dismissed.

444. Likewise, the Prosecution did not address the symbolic impact of the killing of the Belgian peacekeepers, when making sentencing submissions in its Closing Brief or oral closing submissions.[1059] In particular, it drew no link in its sentencing submissions between the killing of the Belgian peacekeepers and the ensuing attack on ETO-Nyanza. The Appeals Chamber recalls that Rule 86(C) of the Rules clearly indicates that sentencing submissions shall be addressed during closing arguments. It was therefore the Prosecution's responsibility to identify these factors if it wished to have them considered by the Trial Chamber. The Prosecution failed to do so. This aspect

[1051] Prosecution Appeal Brief, paras. 312-314, 318.
[1052] Prosecution Notice of Appeal, para. 58; Prosecution Appeal Brief, paras. 319, 322.
[1053] Sagahutu Response Brief, paras. 24-26, 28-33, 35-54, 68-81, 84, 85.
[1054] Sagahutu Response Brief, paras. 55-57, 61-67; AT. 10 May 2013 pp. 16, 17.
[1055] *Rukundo* Appeal Judgement, para. 243; *Kordić and Čerkez* Appeal Judgement, para. 1061. *See also Nahimana et al.* Appeal Judgement, para. 1038.
[1056] *See* Trial Judgement, paras. 2244, 2245, 2253-2256.
[1057] Prosecution Appeal Brief, paras. 298, 310.
[1058] *See* Trial Judgement, para. 2255. *See also* Trial Judgement, paras. 510, 511, 1860-1869, 1885, 1887, 2019, 2099.
[1059] Prosecution Closing Brief, paras. 1663-1704; Closing Arguments, T. 24 June 2009 pp. 49-54; T. 26 June 2009 pp. 19-21.

of the Prosecution appeal is therefore dismissed. In any event, the Appeals Chamber notes that the Trial Chamber found that the symbolic impact of the killing of the Belgian peacekeepers was an aggravating factor and took it into account in determining Sagahutu's sentence.[1060]

445. Based on the foregoing, the Appeals Chamber dismisses the Prosecution's Ninth Ground of Appeal.

C. Impact of the Appeals Chamber's Findings on Sagahutu's Sentence

446. The Appeals Chamber recalls that it has reversed Sagahutu's convictions for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of ordering and aiding and abetting the killing of the Prime Minister. It has also reversed his conviction for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of ordering the killing of the Belgian peacekeepers and on the basis Corporal Masonga's participation in the attack. The Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that this represents a reduction in Sagahutu's culpability and calls for a revision of his sentence.

447. The Appeals Chamber notes, however, that it has affirmed Sagahutu's convictions for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of aiding and abetting the killing of the Belgian peacekeepers and as a superior for murder as a crime against humanity in relation to the killing of the Belgian peacekeepers. Thus, he remains convicted of very serious crimes.

448. In the circumstances of this case, the Appeals Chamber, Judge Tuzmukhamedov dissenting, reduces Sagahutu's sentence from 20 years of imprisonment to 15 years of imprisonment.

[1060] Trial Judgement, para. 2258. The Trial Chamber also found "additionally aggravating that the UNAMIR peacekeepers were sent to Rwanda by the UN Security Council under its Chapter VI peacekeeping authority and were engaged in protecting the Prime Minister under that authority at the time of their capture". Trial Judgement, para. 2258.

VII. DISPOSITION

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

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

NOTING the written submissions of the parties and their oral arguments presented at the appeal hearing on 7 to 10 May 2013;

SITTING in open session;

WITH RESPECT TO AUGUSTIN NDINDILIYIMANA'S APPEAL

GRANTS Ndindiliyimana's First, Second, and Fourth Grounds of Appeal, in part, **REVERSES** his convictions for genocide and extermination as a crime against humanity in relation to the attack on Kansi Parish on 21 April 1994, as well as his convictions for genocide and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the attack at Saint André College on 13 April 1994, and **ENTERS** a verdict of acquittal under Counts 2, 5, and 7 of the Indictment;

GRANTS Ndindiliyimana's Tenth Ground of Appeal, **REVERSES** his conviction for murder as a crime against humanity, and **ENTERS** a verdict of acquittal under Count 4 of the Indictment;

DISMISSES Ndindiliyimana's appeal in all other respects;

WITH RESPECT TO FRANÇOIS-XAVIER NZUWONEMEYE'S APPEAL

GRANTS Nzuwonemeye's First, Third, and Sixth Grounds of Appeal, in part, **REVERSES** his convictions for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of ordering and aiding and abetting the killing of the Prime Minister and as a superior in relation to the killing of the Belgian peacekeepers, and **ENTERS** a verdict of acquittal under Counts 4 and 7 of the Indictment;

DISMISSES Nzuwonemeye's appeal in all other respects;

WITH RESPECT TO INNOCENT SAGAHUTU'S APPEAL

GRANTS Sagahutu's Second to Fifth Grounds of Appeal, in part, and **REVERSES** his convictions for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of ordering and aiding and abetting the killing of the Prime Minister;

GRANTS Sagahutu's Eighth to Tenth Grounds of Appeal, in part, and **REVERSES** his conviction for murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of ordering the killing of the Belgian peacekeepers and on the basis of Corporal Masonga's participation in the attack;

DISMISSES Sagahutu's appeal in all other respects;

AFFIRMS Sagahutu's convictions for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of aiding and abetting the killing of the Belgian peacekeepers and as a superior for murder as a crime against humanity in relation to the killing of the Belgian peacekeepers;

REDUCES, Judge Tuzmukhamedov dissenting, the sentence of 20 years of imprisonment imposed on Sagahutu by the Trial Chamber to 15 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 15 February 2000;

WITH RESPECT TO THE PROSECUTION'S APPEAL

DISMISSES the Prosecution's appeal as it relates to Ndindiliyimana, Nzuwonemeye, and Sagahutu;

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

ORDERS, in accordance with Rules 99(A) and 107 of the Rules, the immediate release of Nzuwonemeye, and **DIRECTS** the Registrar to make the necessary arrangements; and

ORDERS that, in accordance with Rule 103(C) and Rule 107 of the Rules, Sagahutu is to remain in the custody of the Tribunal pending the finalization 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	Liu Daqun	Carmel Agius
Presiding Judge	Judge	Judge

Khalida Rachid Khan	Bakhtiyar Tuzmukhamedov
Judge	Judge

Judge Tuzmukhamedov appends a partly dissenting opinion.

Done this 11th day of February 2014 at Arusha, Tanzania.

[Seal of the Tribunal]

VIII. PARTLY DISSENTING OPINION OF JUDGE TUZMUKHAMEDOV

1. In this Judgement, the Appeals Chamber has identified various and ultimately fatal errors in the Trial Chamber's assessment of Nzuwonemeye's and Sagahutu's individual criminal responsibility for the killing of the Prime Minister. In particular, it has been established that the Trial Chamber failed to provide a reasoned opinion since it did not make the necessary *actus reus* and *mens rea* findings in relation to Nzuwonemeye's and Sagahutu's liability for ordering this crime,[1] and also failed to make the necessary *actus reus* and *mens rea* findings in relation to Sagahutu's liability for aiding and abetting.[2] In this context, the Appeals Chamber has unanimously concluded, *inter alia*, that: (i) the Trial Judgement refers to no evidence suggesting that, at the time of the deployment of Reconnaissance Battalion soldiers to the vicinity of the Prime Minister's residence, Nzuwonemeye and Sagahutu were aware of an operation to kill the Prime Minister;[3] (ii) none of the evidence cited by the Trial Chamber reflected that Nzuwonemeye and Sagahutu issued an order to Reconnaissance soldiers to kill the Prime Minister or made it the only reasonable inference that they issued an order with the awareness of the substantial likelihood that the Prime Minister would be killed in the execution thereof;[4] (iii) the evidence relied upon by the Trial Chamber did not provide a reasonable basis to infer that Sagahutu knew of any involvement of his subordinates in the killing of the Prime Minister;[5] and (iv) the Trial Chamber failed to specify the nature of the involvement of Reconnaissance soldiers in the Prime Minister's killing, and no reasonable trier of fact could have found on the basis of the trial record that soldiers of this battalion participated in the attack on and killing of the Prime Minister.[6]

2. Furthermore, while the Appeals Chamber has affirmed Sagahutu's convictions in relation to the killing of the Belgian servicemembers of UNAMIR on the basis of aiding and abetting and superior responsibility pursuant to Article 6(1) and 6(3) of the Statute, it has found that the Trial Chamber erred in finding him responsible for ordering this crime,[7] and with respect to Corporal Masonga's participation in the attack against the Belgian peacekeepers.[8] In this context, the Appeals Chamber has observed that the Trial Judgement clearly misrepresents the evidence pertaining to

[1] *See* Appeal Judgement, paras. 292, 293, 312.
[2] *See* Appeal Judgement, paras. 316, 319.
[3] *See* Appeal Judgement, para. 297.
[4] *See* Appeal Judgement, para. 300.
[5] *See* Appeal Judgement, para. 317.
[6] *See* Appeal Judgement, paras. 301-312, 318. The Trial Chamber's error in this respect has also led the Appeals Chamber to conclude that the Trial Chamber erred in finding that Nzuwonemeye and Sagahutu were responsible as superiors pursuant to Article 6(3) of the Statute for the killing of the Prime Minister. *See* Appeal Judgement, paras. 320, 321.
[7] *See* Appeal Judgement, paras. 368, 369, 388, 449.
[8] *See* Appeal Judgement, paras. 348, 388, 449.

Corporal Masonga's role in the attack against the peacekeepers,[9] and that the Trial Chamber partly erred in assessing the available evidence on Corporal Nzeyimana's participation in the immediate killing of the Belgian peacekeepers.[10] Moreover, the Appeals Chamber has acknowledged significant shortcomings in the Trial Chamber's resolution of apparent contradictions in the testimonies of Prosecution Witnesses ANK/XAF and AWC with respect to the source of the multiple grenade launcher used during the attack against the peacekeepers as well as Sagahutu's conduct and responsibility for supplying this weapon.[11]

3. I fully support the Appeals Chamber's identification of the Trial Chamber's errors in relation to Nzuwonemeye's and Sagahutu's responsibility for the killing of the Prime Minister and the Belgian peacekeepers. Yet, while I acquiesce to the outcome of this Judgement, *i.e.* Nzuwonemeye's acquittal and the significant reversal of Sagahutu's convictions, I consider that the Trial Chamber's errors as described above are of extraordinary magnitude and gravity and pervade the entire reasoning in the Trial Judgement.

4. I am reminded of the view expressed by my distinguished colleague Judge Meron in an earlier case before the Appeals Chamber that "[t]he sheer number of errors in the Trial Judgement indicate[d] that remanding the case, rather than undertaking piecemeal remedies, would have been the best course. Although any one legal or factual error may not be enough to invalidate the Judgement, a series of such errors, viewed in the aggregate, may no longer be harmless, thus favoring a remand".[12] I cannot describe more eloquently my view of the problem with which the Appeals Chamber has been similarly confronted in the present case.

5. Moreover, it may be argued that the Appeals Chamber has taken on the predominant task of a trial chamber in evaluating, for example, evidence referenced in the Trial Judgement pertaining to the involvement of Reconnaissance Battalion soldiers in the attack on the Prime Minister,[13] and finding that, despite the Trial Chamber's errors in the resolution of contradictions between the testimonies of Witnesses ANK/XAF and AWC, a reasonable trier of fact could still have preferred the evidence of Witness AWC over that of Witness ANK/XAF.[14] However, I should note that it is well accepted in the jurisprudence of the Tribunal that trial chambers are best placed to assess the available evidence, including the credibility of witnesses, the weight to be attached to their

[9] *See* Appeal Judgement, paras. 344-348.
[10] *See* Appeal Judgement, paras. 349-351.
[11] *See* Appeal Judgement, paras. 332-335.
[12] *Nahimana et al.* Appeal Judgement, Partly Dissenting Opinion of Judge Meron, para. 1.
[13] *See* Appeal Judgement, paras. 301-311.
[14] *See* Appeal Judgement, paras. 336-341.

testimonies, and contradictions existing within such testimonies and/or in comparison with other evidence adduced at trial.[15]

6. For these reasons, I believe that the preferable course of action for the Appeals Chamber would have been to order a retrial or to at least remit, in part, the case against Nzuwonemeye and Sagahutu to be newly evaluated by a trier of fact at first instance in light of the available trial record.[16] I observe that, pursuant to Art. 1(4) of the Transitional Arrangements for the International Residual Mechanism for Criminal Tribunals, that judicial body would be the proper venue for a retrial.[17]

7. Regardless of these matters, I respectfully but strongly disagree with the Majority's decision to reduce Sagahutu's sentence. Irrespective of whether the Trial Chamber's decision to impose a sentence of 20 years of imprisonment against Sagahutu was influenced by its flawed conclusions that he was also responsible for the killing of the Prime Minister and ordered the attack against the Belgian peacekeepers, I believe that it was within the Appeals Chamber's discretion to affirm Sagahutu's sentence. In my opinion, the Majority should have made use of this discretion in light of the fact that Sagahutu was personally involved in a mortal attack against members of an international UN peacekeeping force. This attack constituted a grave crime which undoubtedly had a most devastating effect on the ensuing events in Rwanda at the relevant time. I therefore dissent from the Majority's finding on Sagahutu's sentence.

[15] *See, e.g.*, *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114; *Nchamihigo* Appeal Judgement, para. 47; *Nahimana et al.* Appeal Judgement, para. 194.
[16] The Tribunal has indicated that the Appeals Chamber also has the power to remit specific issues to a trier of fact to be assessed only based on the already available trial record. *See The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR75, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009, para. 13. I wish to emphasize that my suggestions regarding a retrial or limited remittance do not concern the Appeals Chamber's decision to reverse Nzuwonemeye's convictions for aiding and abetting the killing of the Prime Minister and in relation to the killing of the Belgian peacekeepers due to lack of notice. In this regard, *see* Appeal Judgement, paras. 185-190, 233-241. Such errors could not be remedied by way of a retrial.
[17] *See* UN Res. S/RES/1966 (2010), Annex 2 (Transitional Arrangements), Art. 1(4).

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

Done this 11th day of February 2014,
At Arusha, Tanzania.

_____
Judge Bakhtiyar Tuzmukhamedov

[Seal of the Tribunal]

IX. ANNEX A – PROCEDURAL HISTORY

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

A. Notices of Appeal and Briefs

2. Trial Chamber II of the Tribunal rendered the judgement in this case on 17 May 2011 and issued its written Trial Judgement in English on 17 June 2011. The French translation of the Trial Judgement was filed on 14 December 2011.[1]

1. Ndindiliyimana's Appeal

3. On 11 July 2011, the Pre-Appeal Judge denied Ndindiliyimana's request for an extension of time to file his notice of appeal.[2] On 15 July 2011, the Pre-Appeal Judge ordered Ndindiliyimana to file his notice of appeal no later than 20 July 2011.[3] Ndindiliyimana filed his notice of appeal on 20 July 2011.[4] On 5 August 2011, the Pre-Appeal Judge granted Ndindiliyimana's request to file his appeal brief within 40 days of the filing of the French translation of the Trial Judgement.[5] On 23 January 2012, Ndindiliyimana filed his appeal brief.[6] The Prosecution filed its response to Ndindiliyimana's appeal on 5 March 2012.[7] Ndindiliyimana filed his brief in reply on 20 March 2012.[8]

2. Nzuwonemeye's Appeal

4. On 11 July 2011, the Pre-Appeal Judge denied Nzuwonemeye's request for an extension of time to file his notice of appeal.[9] On 15 July 2011, the Pre-Appeal Judge ordered that Nzuwonemeye file his notice of appeal no later than 20 July 2011.[10] On 18 July 2011 the Appeals Chamber granted Nzuwonemeye's urgent motion for an extension of time to file his appeal brief and ordered Nzuwonemeye to file his appeal brief no later than 40 days after the filing of the French translation of the Trial Judgement.[11] Nzuwonemeye filed his notice of appeal confidentially

[1] *Jugement portant condamnation*, 14 December 2011.
[2] Decision on Motions for Extension of Time for the Filing of Appeal Submissions, 11 July 2011 ("Decision on Motions for Extension of Time").
[3] Decision on Request to Reconsider Decision on Motions for Extension of Time for the Filing of Appeal Submissions, 15 July 2011 ("Decision on Request for Reconsideration of Motions for Extension of Time").
[4] Notice of Appeal on Behalf of Augustin Ndindiliyimana, Pursuant to Rule 108, 20 July 2011.
[5] Decision on Ndindiliyimana's Request for Extension of Time to File his Appellant's Brief, 5 August 2011.
[6] Appellant's Brief, Augustin Ndindiliyimana, 23 January 2012.
[7] Prosecution's Respondent's Brief in Response to Augustin Ndindiliyimana's Appellant's Brief, 5 March 2012.
[8] Brief in Reply, Augustin Ndindiliyimana, 20 March 2012.
[9] Decision on Motions for Extension of Time.
[10] Decision on Request for Reconsideration of Motions for Extension of Time.
[11] Decision on Nzuwonemeye's Request for Extension of Time to File his Appeal Brief, 18 July 2011.

on 20 July 2011.[12] On 22 July 2011, the Pre-Appeal Judge ordered Nzuwonemeye to file a public redacted version of his notice of appeal.[13] Nzuwonemeye filed the public redacted version of his notice of appeal on 9 August 2011.[14]

5. On 20 January 2012, the Pre-Appeal Judge granted Nzuwonemeye's request to file an appellant's brief not exceeding 40,000 words.[15] Nzuwonemeye filed his appeal brief confidentially on 23 January 2012,[16] and a *corrigendum* to his appellant's brief on 1 February 2012.[17] The Prosecution filed its respondent's brief on 5 March 2012.[18] Nzuwonemeye field his reply brief on 20 March 2012.[19]

3. Sagahutu's Appeal

6. On 11 July 2011, the Pre-Appeal Judge granted, in part, Sagahutu's motion for an extension of time to file his notice of appeal and his appeal brief.[20] Sagahutu filed his notice of appeal on 13 January 2012,[21] and his appeal brief on 27 March 2012.[22] The Prosecution filed its respondent's brief on 7 May 2012.[23] On 17 May 2012, the Pre-Appeal Judge found that the length of the Prosecution's respondent's briefs to the appeals of Ndindiliyimana, Bizimungu, Nzuwonemeye, and Sagahutu exceeded its cumulative word limit but nonetheless dismissed Sagahutu's motion to dismiss the Prosecution's respondent's brief to his appeal.[24] Sagahutu filed his reply brief confidentially on 22 May 2012.[25]

[12] Notice of Appeal, pursuant to Article 24 of the ICTR Statute and Rule 108 of the Rules of Procedure and Evidence (confidential), 20 July 2011.
[13] Order on the Status of François-Xavier Nzuwonemeye's Notice of Appeal, 22 July 2011.
[14] Notice of Appeal, pursuant to Article 24 of the ICTR Statute and Rule 108 of the Rules of Procedure and Evidence (public redacted version), 9 August 2011.
[15] Decision on Bizimungu's and Nzuwonemeye's Motions for Extension of Word Limits. The Pre-Appeal Judge further granted the Prosecution a 10,000-word extension to respond to Nzuwonemeye's appeal.
[16] Nzuwonemeye Appellant's Brief, 23 January 2012 (confidential).
[17] Corrigendum to Nzuwonemeye Appellant's Brief, 1 February 2012 (confidential).
[18] Prosecution's Respondent's Brief in Response to François-Xavier Nzuwonemeye Appellant's Brief, 5 March 2012.
[19] Nzuwonemeye Appellant's Reply Brief to Prosecution's Respondent's Brief (confidential), with confidential Annex A, 20 March 2012.
[20] Decision on Motions for Extension of Time.
[21] *Acte d'appel d'Innocent Sagahutu*, 13 January 2012. The English translation of the French original was filed on 7 March 2012.
[22] *Mémoire d'appel d'Innocent Sagahutu,* 27 March 2012 (confidential, public redacted version filed on 30 March 2012). The English translation of the French original was filed on 7 August 2012.
[23] Prosecution's Respondent's Brief in Response to Innocent Sagahutu's Appellant's Brief, Rule 112 of the Rules of Procedure and Evidence, 7 May 2012.
[24] Decision on Innocent Sagahutu's Motion for Dismissal of the Prosecution's Response Brief to Sagahutu's Appeal, 17 May 2012.
[25] Sagahutu Defence Reply Brief, 22 May 2012 (confidential).

4. Prosecution's Appeal

7. On 11 July 2011, the Pre-Appeal Judge denied the Prosecution's request for an extension of time to file its notice of appeal.[26] The Prosecution filed its initial notice of appeal on 20 July 2011[27] and its appeal brief on 3 October 2011.[28] On 21 September 2011, the Pre-Appeal Judge granted Nzuwonemeye's motion for leave to file his respondent's brief no later than 15 days after the filing of the French translation of the Trial Judgement and the Prosecution's appellant's brief.[29] On 26 October 2011, the Pre-Appeal Judge granted, in part, Sagahutu's motion for an extension of time to file his respondent's brief and ordered him to file it no later than 30 days after the filing of the French translation of the Trial Judgement and the Prosecution's appeal brief, whichever was later.[30] The Pre-Appeal Judge dismissed Nzuwonemeye's motion to dismiss or strike out the Prosecution's Appeal Brief on 30 November 2011.[31]

8. Ndindiliyimana filed his respondent's brief on 11 November 2011.[32] Nzuwonemeye filed his respondent's brief on 16 April 2012.[33] Sagahutu filed his respondent's brief on 30 April 2012.[34] The Prosecution filed its reply to Ndindiliyimana's respondent's brief on 28 November 2011.[35] The Prosecution did not file a reply to the respondent's briefs of Nzuwonemeye or Sagahutu.

B. Assignment of Judges

9. On 16 June 2011, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeals in this case: Judge Patrick Robinson (Presiding), Judge Liu Daqun, Judge Andrésia Vaz, Judge Theodor Meron, and Judge Carmel Agius.[36] On 8 July 2011, the Presiding Judge assigned himself as Pre-Appeal Judge.[37] On 17 November 2011, Judge Theodor Meron became the Presiding Judge of the Appeals Chamber and accordingly replaced Judge Patrick Robinson as Presiding Judge in this case. On 30 November 2011, Judge Theodor Meron assigned himself as Pre-Appeal Judge.[38] On 7 March 2012, he replaced Judge Carmel Agius with Judge

[26] Decision on Motions for Extension of Time.
[27] Prosecutor's Notice of Appeal, 20 July 2011.
[28] Prosecution's Consolidated Appellant's Brief, 3 October 2011.
[29] Decision on Bizimungu's and Nzuwonemeye's Motions for Extension of Time to File their Respondent's Briefs, 21 September 2011.
[30] Decision on Sagahutu's Motion for Extension of Time to File his Respondent's Brief, 26 October 2011.
[31] Decision on Nzuwonemeye's Motion to Dismiss the Prosecution's Sentencing Appeal, 30 November 2011.
[32] Respondent's Brief, Augustin Ndindiliyimana, 11 November 2011.
[33] Nzuwonemeye Respondent's Brief, 16 April 2012.
[34] *Mémoire de l'intime Innocent Sagahutu en réponse au mémoire d'appel global du Procureur,* 30 April 2012. The English translation of the French original was filed on 5 September 2012.
[35] Prosecution's Brief in Reply to Augustin Ndindiliyimana's Respondent's Brief, 28 November 2011.
[36] Order Assigning Judges to a Case before the Appeals Chamber, 16 June 2011.
[37] Order Assigning a Pre-Appeal Judge, 8 July 2011.
[38] Order Assigning a Pre-Appeal Judge, 30 November 2011.

Khalida Rachid Khan on the Bench in this case.[39] On 28 February 2013, he replaced Judge Patrick Robinson with Judge Bakhtiyar Tuzmukhamedov on the Bench in this case.[40] On 19 March 2013, Judge Theodor Meron replaced Judge Andrésia Vaz with Judge Carmel Agius on the Bench in this case.[41]

C. Motion for the Admission of Additional Evidence on Appeal

10. On 3 May 2013, The Appeals Chamber denied Nzuwonemeye's motion for the admission of additional evidence.[42]

D. Other Issues

11. On 20 March 2012, the Appeals Chamber denied the request by IBUKA and Survivors Fund (SURF) for leave to make submissions as *amici curiae* in connection with the Prosecution's sentencing appeals.[43]

12. On 4 July 2012, the Appeals Chamber granted Sagahutu's request for the right of audience for a legal consultant.[44]

E. Appeal Hearing

13. The Appeals Chamber issued a Scheduling Order for the hearing of the appeals in this case on 2 April 2013.[45] The parties' oral arguments were heard at the appeal hearing held from 7 to 10 May 2013 in Arusha, Tanzania.

F. Severance

14. On 7 February 2014, the Appeals Chamber severed the appeal of Augustin Bizimungu and the Prosecution appeal related to his case from those of Ndindiliyimana, Nzuwonemeye, and Sagahutu and ordered further submissions from the Prosecution and Bizimungu.[46]

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[39] Order Replacing a Judge in a Case before the Appeals Chamber, 7 March 2012.
[40] Order Replacing a Judge in a Case before the Appeals Chamber, 28 February 2013.
[41] Order Replacing a Judge in a Case before the Appeals Chamber, 19 March 2013.
[42] Decision on François-Xavier Nzuwonemeye's Motion for the Admission of Additional Evidence, 3 May 2013 (confidential). *See also* Nzuwonemeye's Confidential Motion for Leave to Admit into Evidence Exculpatory Materials, Pursuant to Rule 115 of the Rules of Procedure and Evidence and to Supplement Record on Appeal, 19 April 2012.
[43] Decision on Request by IBUKA and Survivor's Fund (SURF) for Leave to File *Amici Curiae* Submissions Regarding the Prosecution's Sentencing Appeals, 20 March 2012.
[44] Decision on Innocent Sagahutu's Request for Right of Audience for a Legal Consultant, 4 July 2012.
[45] Scheduling Order, 2 April 2013.
[46] *See* Order for Further Submissions and Severance, 7 February 2014, pp. 1, 2. *See also* Bizimungu Notice of Appeal; Bizimungu Appeal Brief; Prosecution Response Brief (Bizimungu); Bizimungu Reply Brief; Prosecution Notice of Appeal, paras. 1-31; Prosecution Appeal Brief, paras. 15-146, 214-216, 219-249; Bizimungu Response Brief.

G. Delivery of Judgement

15. On 11 February 2014, the Appeals Chamber pronounced its Judgement in relation to Ndindiliyimana, Nzuwonemeye, and Sagahutu as well as the Prosecution appeal in relation to their cases. The Judgement was filed in writing on 27 February 2014.

X. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

AKAYESU, Jean-Paul

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

BAGILISHEMA, Ignace

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

BAGOSORA, Théoneste and NSENGIYUMVA, Anatole ("MILITARY I")

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

The Prosecutor v. Théoneste Bagosora, *Gratien Kabiligi*, *Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T Judgement and Sentence, 18 December 2008 ("*Bagosora et al.* Trial Judgement").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 26 September 2006 ("*Bagosora et al.* Appeal Decision of 26 September 2006").

BIKINDI, Simon

Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement, 18 March 2010 ("*Bikindi* Appeal Judgement").

MUGENZI, Justin and MUGIRANEZA, Prosper ("GOVERNMENT II")

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Judgement, 4 February 2013 ("*Mugenzi and Mugiraneza* Appeal Judgement").

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012 ("*Mugenzi and Mugiraneza* Decision of 24 September 2012").

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B. Defined Terms and Abbreviations

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CELA

Centre d'étude des langues africaines

CND

Conseil national pour le développement

ESM

École supérieure militaire (Kigali)

fn. (fns.)

footnote (footnotes)

FAR

Forces armées rwandaises (Rwandan Armed Forces)

Indictment

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MGL

Multiple grenade launcher

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Prosecution Response Brief (Sagahutu)

Prosecution's Respondent's Brief in Response to Innocent Sagahutu's Appellant's Brief, Rule 112 of the Rules of Procedure and Evidence, 7 May 2012

RPF

Rwandan (also Rwandese) Patriotic Front

Rules

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

Sagahutu Appeal Brief

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Acte d'appel d'Innocent Sagahutu, 13 January 2012 (English translation filed on 7 March 2012)

Sagahutu Reply Brief

Sagahutu Defence Reply Brief, 22 May 2012

Sagahutu Response Brief

Mémoire de l'intimé Innocent Sagahutu en réponse au mémoire d'appel global du Procureur, 30 April 2012 (English translation filed on 5 September 2012)

Statute

Statute of the International Criminal Tribunal for Rwanda established by Security Council Resolution 955 (1994)

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Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated

Trial Chamber

Trial Chamber II of the Tribunal

Trial Judgement

The Prosecutor v. Augustin Ndindiliyimana, Case No. ICTR-00-56-T, Judgement and Sentence, pronounced on 17 May 2011, filed in writing on 17 June 2011

Tribunal *or* ICTR

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

UN

United Nations

UN Safety Convention

Convention on the Safety of United Nations and Associated Personnel adopted by Resolution 49/59 of the UN General Assembly on 9 December 1994, and entered into force on 15 January 1999

UNAMIR

United Nations Assistance Mission for Rwanda

WVSS

Witness and Victims Support Section