



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 Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Judgement of: 16 November 2009

PROTAIS ZIGIRANYIRAZO

v.

THE PROSECUTOR

Case No. ICTR-01-73-A

JUDGEMENT

Counsel for Protais Zigiranyirazo:

Mr. John Philpot
Mr. Peter Zaduk
Ms. Fiona Gray
Mr. Kyle Gervais

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Christine Graham
Ms. Linda Bianchi
Ms. Béatrice Chapaux
Mr. Alfred Orono Orono

I. INTRODUCTION	1
A. BACKGROUND	1
B. THE APPEALS	2
II. STANDARDS OF APPELLATE REVIEW	3
III. APPEAL OF PROTAIS ZIGIRANYIRAZO	5
A. ALLEGED ERRORS IN EVALUATING THE ALIBI (GROUNDS 6 AND 12).....	5
1. Burden of Proof in the Assessment of Alibi	5
2. Alleged Errors in Evaluating Exculpatory Evidence Related to Kesho Hill (Ground 6)	7
3. Alleged Errors in Evaluating Exculpatory Evidence Related to Kiyovu Roadblock (Ground 12).....	20
4. Conclusion	28
B. OTHER GROUNDS OF APPEAL (GROUNDS 13 TO 16)	29
IV. SENTENCING APPEALS (ZIGIRANYIRAZO’S GROUND 17 AND PROSECUTION APPEAL)	30
V. DISPOSITION	31
VI. ANNEX A – PROCEDURAL HISTORY	1
A. NOTICES OF APPEAL AND BRIEFS	1
1. Zigiranyirazo Appeal	1
2. Prosecution Appeal	1
B. ASSIGNMENT OF JUDGES	2
C. MOTIONS RELATED TO HEARING ADDITIONAL EVIDENCE ON APPEAL.....	2
D. HEARING OF THE APPEALS	3
VII. ANNEX B – CITED MATERIALS AND DEFINED TERMS	4
A. JURISPRUDENCE	4
1. ICTR	4
2. ICTY	6
B. DEFINED TERMS AND ABBREVIATIONS.....	7

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal,” respectively) is seized of appeals by Protais Zigiranyirazo (“Zigiranyirazo”) and the Prosecution against the Judgement rendered by Trial Chamber III of the Tribunal (“Trial Chamber”) on 18 December 2008 in the case of *The Prosecutor v. Protais Zigiranyirazo* (“Trial Judgement”).¹

I. INTRODUCTION

A. Background

2. Zigiranyirazo was born on 2 February 1938 in Giciye Commune, Gisenyi Prefecture, Rwanda.² He was the brother-in-law of the late former President of Rwanda, Juvenal Habyarimana.³ Zigiranyirazo became a Member of Parliament in 1969.⁴ In 1973, he was appointed Prefect of Kibuye and then served as Prefect of Ruhengeri from 1974 until 1989.⁵ After his resignation, he studied in Canada and returned to Rwanda in 1993 to work as a businessman.⁶

3. The Trial Chamber convicted Zigiranyirazo pursuant to Article 6(1) of the Statute of the Tribunal (“Statute”) for committing genocide (Count 2) and extermination as a crime against humanity (Count 4) by participating in a joint criminal enterprise to kill Tutsis at Kesho Hill in Gisenyi Prefecture on 8 April 1994, where assailants attacked and killed between 800 and 1,500 Tutsi refugees.⁷ In addition, it convicted Zigiranyirazo pursuant to Article 6(1) of the Statute for aiding and abetting genocide (Count 2) at the Kiyovu Roadblock in Kigali, where between 10 and 20 persons were killed.⁸

4. For his genocide conviction in relation to the events at Kesho Hill, the Trial Chamber sentenced Zigiranyirazo to 20 years of imprisonment.⁹ For his genocide conviction in relation to the

¹ For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.

² Trial Judgement, para. 4.

³ Trial Judgement, para. 4.

⁴ Trial Judgement, para. 5.

⁵ Trial Judgement, para. 5.

⁶ Trial Judgement, para. 5.

⁷ Trial Judgement, paras. 330, 410, 427, 436, 439, 447.

⁸ Trial Judgement, paras. 251, 426, 427, 447.

⁹ Trial Judgement, para. 468.

events at the Kiyovu Roadblock, it sentenced him to 15 years of imprisonment.¹⁰ For his conviction for extermination as a crime against humanity in relation to the events at Kesho Hill, Zigiranyirazo received a sentence of 20 years of imprisonment.¹¹ The Trial Chamber ordered that these sentences be served concurrently.¹²

B. The Appeals

5. Zigiranyirazo presents seventeen grounds of appeal challenging his convictions and his sentences. He requests that the Appeals Chamber overturn his convictions or, alternatively, reduce his sentences.¹³ The Prosecution responds that all grounds of Zigiranyirazo's appeal should be dismissed.¹⁴

6. The Prosecution presents a single ground of appeal challenging Zigiranyirazo's sentences,¹⁵ requesting the Appeals Chamber to impose a life sentence or, alternatively, a total effective sentence greater than 20 years of imprisonment.¹⁶ Zigiranyirazo responds that the Prosecution's appeal should be dismissed.¹⁷

7. The Appeals Chamber heard oral submissions regarding these appeals on 28 September 2009.

¹⁰ Trial Judgement, para. 469.

¹¹ Trial Judgement, para. 470.

¹² Trial Judgement, para. 471.

¹³ Zigiranyirazo Notice of Appeal, p. 10; Zigiranyirazo Appeal Brief, paras. 8, 467-469. In his Notice of Appeal, Zigiranyirazo also requested, in the alternative, a new trial. *See* Zigiranyirazo Notice of Appeal, p. 10. However, in his Appeal Brief, this form of relief is abandoned because, in his view, once the errors in law and fact have been corrected, the evidence is "overwhelmingly favourable to him." *See* Zigiranyirazo Appeal Brief, para. 467.

¹⁴ Prosecution Response Brief, paras. 1, 274.

¹⁵ Prosecution Notice of Appeal, paras. 1-5; Prosecution Appeal Brief, para. 4.

¹⁶ Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras. 5, 104. The Appeals Chamber notes that, in its Notice of Appeal, the Prosecution only requested the imposition of life imprisonment. *See* Prosecution Notice of Appeal, para. 5.

¹⁷ Zigiranyirazo Response Brief, para. 109.

II. STANDARDS OF APPELLATE REVIEW

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

9. 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.¹⁹

10. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal interpretation and review the relevant factual findings of the Trial Chamber accordingly.²⁰ 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 the finding may be confirmed on appeal.²¹

11. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by the 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.²²

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.²³ Arguments which do not have the potential to cause the

¹⁸ *Karera* Appeal Judgement, para. 7; *Muvunyi* Appeal Judgement, para. 8; *Seromba* Appeal Judgement, para. 9. See also *Mrkšić and Šljivančanin* Appeal Judgement, para. 10.

¹⁹ *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). See also *Karera* Appeal Judgement, para. 8; *Muvunyi* Appeal Judgement, para. 9; *Seromba* Appeal Judgement, para. 10; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11.

²⁰ *Karera* Appeal Judgement, para. 9. See also *Mrkšić and Šljivančanin* Appeal Judgement, para. 12.

²¹ *Karera* Appeal Judgement, para. 9. See also *Mrkšić and Šljivančanin* Appeal Judgement, para. 12.

²² *Krstić* Appeal Judgement, para. 40 (internal citations omitted). See also *Karera* Appeal Judgement, para. 10; *Muvunyi* Appeal Judgement, para. 10; *Seromba* Appeal Judgement, para. 11.

²³ *Karera* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement, para. 11; *Seromba* Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 9. See also *Mrkšić and Šljivančanin* Appeal Judgement, para. 16.

impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.²⁴

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.²⁵ 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.²⁶ 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.²⁷

²⁴ *Karera* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement, para. 11; *Seromba* Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 9. *See also* *Mrkšić and Šljivančanin* Appeal Judgement, para. 16.

²⁵ Practice Direction on Formal Requirements for Appeals from Judgement, para. 4(b). *See Karera* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement, para. 12; *Seromba* Appeal Judgement, para. 13; *Muhimana* Appeal Judgement, para. 10. *See also* *Mrkšić and Šljivančanin* Appeal Judgement, para. 17.

²⁶ *Karera* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement, para. 12; *Seromba* Appeal Judgement, para. 13; *Muhimana* Appeal Judgement, para. 10. *See also* *Mrkšić and Šljivančanin* Appeal Judgement, para. 17.

²⁷ *Karera* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement, para. 12; *Seromba* Appeal Judgement, para. 13; *Muhimana* Appeal Judgement, para. 10. *See also* *Mrkšić and Šljivančanin* Appeal Judgement, para. 18.

III. APPEAL OF PROTAIS ZIGIRANYIRAZO

A. Alleged Errors in Evaluating the Alibi (Grounds 6 and 12)

14. The Appeals Chamber first addresses Zigiranyirazo's Sixth and Twelfth Grounds of Appeal, which challenge the Trial Chamber's consideration of his alibi relating to both the Kesho Hill and Kiyovu Roadblock events.²⁸ The Trial Chamber found that Zigiranyirazo was present at Kesho Hill in Gisenyi Prefecture at some point on the morning of 8 April 1994 and that he addressed the assailants assembled there before they launched an attack on Tutsi refugees.²⁹ The Trial Chamber also determined that he was present at the Kiyovu Roadblock, near his residence in Kigali, on 12 and 17 April 1994, where he aided and abetted killings.³⁰

15. In respect of both events, Zigiranyirazo presented an alibi, which, for the most part, the Trial Chamber did not discount, placing him at the Presidential residence at Camp Kanombe just outside Kigali ("Kanombe") during the attack at Kesho Hill and at the Rubaya Tea Factory ("Rubaya") in Gisenyi Prefecture at the time when he was supposedly seen at the Kiyovu Roadblock.³¹ In addition, at trial, Zigiranyirazo argued with regard to both events that the distance between Gisenyi Prefecture and the Kigali area as well as the difficulty of travel between the two regions in April 1994 corroborated his alibi.³² The Trial Chamber did not expressly discuss this circumstantial evidence.

1. Burden of Proof in the Assessment of Alibi

16. On appeal, Zigiranyirazo submits that the Trial Chamber reversed the burden of proof and committed a number of other legal and factual errors in its assessment of his alibi for both Kesho Hill and the Kiyovu Roadblock events.³³ Accordingly, at the outset, the Appeals Chamber considers it appropriate to recall the basic principles with respect to the proper assessment of alibi evidence before considering Zigiranyirazo's specific contentions.

²⁸ Zigiranyirazo Notice of Appeal, paras. 6, 12.

²⁹ Trial Judgement, paras. 329, 330, 400, 401.

³⁰ Trial Judgement, paras. 251, 413, 427.

³¹ Trial Judgement, paras. 231, 245-250, 301, 323.

³² Zigiranyirazo Appeal Brief, para. 116, *citing* Defence Closing Brief, paras. 157-167, 229, 230, 237, 249, 350, 851-854.

³³ *See infra* Section III.A.2 (Ground 6: Alleged Errors in Evaluating Exculpatory Evidence Related to Kesho Hill); Section III.A.3 (Ground 12: Alleged Errors in Evaluating Exculpatory Evidence Related to Kiyovu Roadblock).

17. An alibi does not constitute a defence in its proper sense.³⁴ By raising an alibi, an accused is simply denying that he was in a position to commit the crime with which he was charged.³⁵ An accused does not bear the burden of proving his alibi beyond reasonable doubt.³⁶ Rather, “[h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime”³⁷ or, otherwise stated, present evidence “likely to raise a reasonable doubt in the Prosecution case.”³⁸ If the alibi is reasonably possibly true, it must be accepted.³⁹

18. Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.⁴⁰ The Prosecution may do so, for instance, by demonstrating that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence does *prima facie* account for the accused’s activities at the relevant time of the commission of the crime, the Prosecution must “eliminate the reasonable possibility that the alibi is true,”⁴¹ for example, by demonstrating that the alibi evidence is not credible.

19. The Appeals Chamber has considered on several occasions whether Trial Chambers have erroneously shifted the burden of proof to the accused with respect to their alibis. Appellants have frequently pointed to language in the assessment of alibi evidence intimating that they were required to disprove the Prosecution’s evidence through their alibis. The Appeals Chamber has recognized that language which suggests, *inter alia*, that an accused must “negate” the Prosecution’s evidence,⁴² “exonerate” himself,⁴³ or “refute the possibility” that he participated in a

³⁴ *Ndindabahizi* Appeal Judgement, para. 66; *Kajelijeli* Appeal Judgement, paras. 41, 42; *Kayishema and Ruzindana* Appeal Judgement, para. 106; *Delali* et al. Appeal Judgement, para. 581.

³⁵ *Nahimana et al.* Appeal Judgement, para. 414; *Ndindabahizi* Appeal Judgement, para. 66; *Kajelijeli* Appeal Judgement, paras. 41, 42; *Niyitegeka* Appeal Judgement, para. 60; *Musema* Appeal Judgement, paras. 205, 206; *Kayishema and Ruzindana* Appeal Judgement, para. 106; *Delali* et al. Appeal Judgement, para. 581.

³⁶ *Nahimana et al.* Appeal Judgement, para. 414; *Simba* Appeal Judgement, para. 184; *Karera* Appeal Judgement, para. 331; *Musema* Appeal Judgement, para. 202; *Kayishema and Ruzindana* Appeal Judgement, para. 107.

³⁷ *Musema* Appeal Judgement, para. 202.

³⁸ *Karera* Appeal Judgement, para. 331 (internal citation omitted); *Simba* Appeal Judgement, para. 184 (internal citation omitted); *Kajelijeli* Appeal Judgement, para. 42 (internal citation omitted); *Niyitegeka* Appeal Judgement, para. 60.

³⁹ *Nahimana et al.* Appeal Judgement, para. 414; *Kamuhanda* Appeal Judgement, para. 38; *Kajelijeli* Appeal Judgement, para. 41; *Musema* Appeal Judgement, paras. 205, 206.

⁴⁰ *Karera* Appeal Judgement, para. 330; *Nahimana et al.* Appeal Judgement, para. 414; *Simba* Appeal Judgement, para. 184; *Kajelijeli* Appeal Judgement, para. 42; *Niyitegeka* Appeal Judgement, para. 60; *Musema* Appeal Judgement, paras. 205, 206; *Kayishema and Ruzindana* Appeal Judgement, para. 107. See also *Limaj et al.* Appeal Judgement, para. 64, quoting *Limaj et al.* Trial Judgement, para. 11 (“[A] finding that an alibi is false does not in itself ‘establish the opposite to what it asserts’. The Prosecution must not only rebut the validity of the alibi but also establish beyond reasonable doubt the guilt of the Accused as alleged in the Indictment.”).

⁴¹ *Kajelijeli* Appeal Judgement, para. 41 (internal citation omitted); *Kayishema and Ruzindana* Appeal Judgement, para. 106 (internal citation omitted). See also *Limaj et al.* Appeal Judgement, paras. 64, 65 (internal citation omitted); *Delali* et al. Appeal Judgement, para. 581.

⁴² See *Limaj et al.* Appeal Judgement, para. 65 (“When evaluating Haradin Bala’s alibi evidence, the Trial Chamber observed that ‘the testimony of most of the witnesses for the Defence for Haradin Bala does not necessarily negate the evidence that Haradin Bala remained in Llapushnik/Lapu{nik after the end of May.’ The use of the phrase ‘to negate

crime⁴⁴ indicates that the Trial Chamber misapplied the burden of proof. Indeed, as stated in the *Musema* Appeal Judgement, “[i]n considering the manner in which the Trial Chamber applied the burden and standard of proof, the Appeals Chamber must start off by assuming that the words used in the Trial Judgement accurately describe the approach adopted by the Trial Chamber.”⁴⁵

20. In assessing whether a Trial Chamber, when using this type of language, has in fact shifted the burden of proof, the Appeals Chamber carries out an in-depth analysis of the specific findings related to a given incident.⁴⁶ The Appeals Chamber has generally found that such language, while inappropriate, is not fatal when viewed in the broader context of a Trial Chamber’s findings. This is especially the case where the Trial Chamber accurately refers elsewhere in the judgement to the appropriate burden of proof for the evaluation of alibi evidence, its overall approach evinces a careful assessment of the alibi evidence, and its conclusion that the alibi evidence is ultimately not credible is reasonable when weighed against the evidence of participation in a crime.⁴⁷

2. Alleged Errors in Evaluating Exculpatory Evidence Related to Kesho Hill (Ground 6)

(a) Introduction

21. The Trial Chamber convicted Zigiranyirazo of genocide and extermination as a crime against humanity based on his participation in a joint criminal enterprise to kill Tutsi civilians at Kesho Hill in Gisenyi Prefecture.⁴⁸ The Trial Chamber found that he was present at Kesho Hill at some point on the morning of 8 April 1994 and that he addressed the assembled assailants before they launched an attack on the Tutsi refugees there.⁴⁹ As part of his defence, Zigiranyirazo presented evidence that he was not observed at Kesho Hill during the attack.⁵⁰ The Trial Chamber did not find this evidence to be credible or to have probative value.⁵¹

the evidence’ could be read in the sense that the Trial Chamber required Haradin Bala to negate the Prosecution evidence”), quoting *Limaj et al.* Trial Judgement, para. 647.

⁴³ See *Kamuhanda* Appeal Judgement, para. 39 (“the Appeals Chamber notes that in some instances the Trial Chamber applied language which *prima facie* supports the Appellant’s arguments [that the Trial Chamber shifted the burden of proof], for example in paragraph 174 of the [*Kamuhanda*] Trial Judgement: ‘[...] the evidence of Witness ALB does not *exonerate* the Accused from being present at Gikomero.’”) (emphasis in original).

⁴⁴ See *Musema* Appeal Judgement, para. 295 (“The wording ‘*are by themselves, insufficient to refute the possibility*’ used by the Trial Chamber with respect to alibi evidence might be an error on a point of law, had *Musema*’s evidence been sufficient to sustain a potential alibi.”)(emphasis in original), quoting *Musema* Trial Judgement, para. 740.

⁴⁵ *Musema* Appeal Judgement, para. 209.

⁴⁶ See, e.g., *Musema* Appeal Judgement, paras. 210, 211.

⁴⁷ See, e.g., *Limaj et al.* Appeal Judgement, para. 65; *Kamuhanda* Appeal Judgement, paras. 38-44; *Musema* Appeal Judgement, paras. 317, 318.

⁴⁸ Trial Judgement, paras. 410, 436, 447.

⁴⁹ Trial Judgement, paras. 329, 330, 400, 401.

⁵⁰ Trial Judgement, paras. 288-300.

⁵¹ Trial Judgement, paras. 319-322.

22. In addition, Zigiranyirazo presented an alibi, supported by nine witnesses who testified that he remained at Kanombe on 8 April 1994.⁵² One witness placed him at Kanombe around 8.00 a.m., and two witnesses saw him there around 3.00 or 4.00 p.m.⁵³ Another witness stated that he saw Zigiranyirazo there around 1.00 p.m., but the Trial Chamber did not accept this testimony as it concluded that it conflicted with other Defence evidence.⁵⁴ Other witnesses recalled seeing Zigiranyirazo at Kanombe, but did not recall the specific times at which they saw him.⁵⁵ After assessing the nine alibi witnesses, the Trial Chamber concluded:

[A]lthough the Chamber does not discount the evidence of these Defence Witnesses, other than Gloria Mukampunga, for reasons explained above, the Chamber finds that their evidence is too vague and does not place [Zigiranyirazo] at Kanombe at the specific times he was seen at Kesho Hill.⁵⁶

23. At trial, Zigiranyirazo referred to evidence regarding the distance between Kanombe and Kesho Hill to demonstrate that, in light of the alibi evidence, it would have been impossible for him to have been at both places on the same day.⁵⁷ In particular, he referred to the Trial Chamber's site visit, conducted from 12 to 16 November 2007, which purportedly retraced the route taken by Zigiranyirazo and his family when they fled from Kanombe to Gisenyi Prefecture on 11 April 1994. The Trial Chamber did not expressly refer to or discuss the site visit or the specifics of travel between Kanombe and Kesho Hill on 8 April 1994.⁵⁸

24. Zigiranyirazo submits that, in convicting him of participating in the Kesho Hill massacre on 8 April 1994, the Trial Chamber erred in law and in fact in assessing his alibi as well as other evidence which raises doubt about his presence there.⁵⁹ In sub-grounds (a), (b), and (f) of this ground of appeal, Zigiranyirazo challenges the Trial Chamber's assessment of his alibi.⁶⁰ In sub-grounds (c), (d), and (e), he argues that the Trial Chamber improperly discounted evidence demonstrating that he was not at Kesho Hill on 8 April 1994.⁶¹

⁵² Trial Judgement, paras. 301, 323.

⁵³ Trial Judgement, paras. 324, 327.

⁵⁴ Trial Judgement, para. 325.

⁵⁵ Trial Judgement, para. 323.

⁵⁶ Trial Judgement, para. 328.

⁵⁷ See *supra* n. 32. Of the cited paragraphs in Zigiranyirazo's Defence Closing Brief, referred to above, paragraphs 163 to 166 and 851 to 854 do not address the events at Kesho Hill but rather those at the Kiyovu Roadblock.

⁵⁸ The Trial Judgement contains only one reference to the site visit in the procedural history. See Trial Judgement, Annex I: Procedural History, para. 34.

⁵⁹ Zigiranyirazo Notice of Appeal, para. 6; Zigiranyirazo Appeal Brief, paras. 89-231.

⁶⁰ Zigiranyirazo Notice of Appeal, para. 6(a, b, f); Zigiranyirazo Appeal Brief, paras. 94-175, 224-231.

⁶¹ Zigiranyirazo Notice of Appeal, para. 6(c, d, e); Zigiranyirazo Appeal Brief, paras. 176-223.

25. The Trial Chamber did not definitively establish the time when Zigiranyirazo was present at Kesho Hill on the morning of 8 April 1994.⁶² However, it follows from the evidence of Witnesses AKK and AKL, on which the Trial Chamber's findings principally rest,⁶³ that Zigiranyirazo was there briefly sometime between 9.30 and 11.00 a.m.⁶⁴

26. In making its findings on Zigiranyirazo's presence at Kesho Hill, the Trial Chamber considered the evidence of nine alibi witnesses who placed him at Kanombe at various points on 8 April 1994.⁶⁵ The Trial Chamber noted that Witnesses Agnès Kampundu, Jeanne Marie Habyarimana, Marie Chantel Kamushiga, Bernadette Niyonizeye, and Aimé Marie Ntuye recalled seeing Zigiranyirazo at Kanombe on 8 April 1994, but explained that they did not refer to specific times when they saw Zigiranyirazo at Kanombe or provide detailed evidence on his activities.⁶⁶

27. In addition, the Trial Chamber credited two alibi witness as placing Zigiranyirazo at Kanombe at specific times: Witness Séraphin Bararengana at around 3.30 or 4.00 p.m. and Witness Marguérite Mukobwajana at around 8.00 a.m. and again around 3.00 or 4.00 p.m.⁶⁷ The Trial Chamber also stated that Witness Jean Luc Habyarimana testified he saw Zigiranyirazo around 1.00 p.m., speaking with Witness Bararengana.⁶⁸ However, the Trial Chamber chose not to consider this latter testimony, on the basis that it contradicted Witness Bararengana, who testified that Zigiranyirazo only arrived at Kanombe around 3.00 or 3.30 p.m.⁶⁹ The Trial Chamber did not consider that the evidence of Witnesses Bararengana and Mukobwajana provided Zigiranyirazo with an alibi for the period on 8 April 1994 when he was seen at Kesho Hill.⁷⁰

28. Witness Gloria Mukampunga also testified that she saw Zigiranyirazo at Kanombe around lunchtime, but given her young age at the time and other credibility concerns, the Trial Chamber

⁶² Trial Judgement, para. 329 (“The Chamber finds beyond reasonable doubt that, following an unsuccessful attack on Tutsi at Kesho Hill, [Zigiranyirazo] arrived at hill *Fsicg*, on the morning of 8 April 1994, [...]”) (emphasis added).

⁶³ While the Trial Chamber gave varying degrees of credit to five different witnesses concerning the events, its findings rest principally on the testimony of only two of them, Witnesses AKK and AKL. *See* Trial Judgement, para. 316 (“Accordingly, with regard to the Prosecution Witnesses who witnessed events at Kesho Hill, the Chamber accepts the evidence of Witness AKK. It further accepts the testimony of Witness AKL, but does not accept his recollection of the words spoken by the Accused without credible corroboration. With regard to Witnesses AKP, AKR and AKO, in view of concerns regarding their testimonies, the Chamber accepts their evidence only to the extent that it is corroborated by Witnesses AKK and AKL.”), para. 329 (“Accordingly, the Chamber makes the following findings on the basis of the testimonies of Prosecution Witnesses AKK, AKL, and also of Witnesses AKP, AKR and AKO to the extent that the testimony of the latter three is corroborated by credible evidence.”).

⁶⁴ Witness AKL suggested that Zigiranyirazo arrived around 9.30 or 10.00 a.m., and Witness AKK placed his arrival between around 10:00 or 11:00 a.m. *See* Trial Judgement, paras. 254, 265, 267.

⁶⁵ Trial Judgement, paras. 301, 323-328.

⁶⁶ Trial Judgement, paras. 323, 328.

⁶⁷ Trial Judgement, paras. 324, 327.

⁶⁸ Trial Judgement, para. 325.

⁶⁹ Trial Judgement, paras. 324, 325.

⁷⁰ Trial Judgement, paras. 324, 325, 327, 328.

was not convinced that she saw Zigiranyirazo on 8 April 1994.⁷¹ Zigiranyirazo sought to present a tenth alibi witness, Witness BNZ60, but the Trial Chamber denied his application to hear her testimony by video-link from Belgium because it would have been “repetitive and cumulative” of the other alibi evidence.⁷²

(b) Submissions

29. Zigiranyirazo submits that the Trial Chamber erred in law and fact in evaluating the alibi evidence.⁷³ In particular, Zigiranyirazo argues that, in finding that he had no alibi between 8.00 a.m. and 3.30 p.m., the Trial Chamber misapplied the evidentiary burden for an alibi as well as the law governing corroboration by failing to assess the testimonies of all alibi witnesses in their totality, failing to consider whether the individual testimonies corroborate each other despite minor differences, and failing to weigh these testimonies against the Prosecution evidence.⁷⁴ According to Zigiranyirazo, he met the threshold burden necessary to establish his alibi for 8 April 1994 based on the consistent testimony of his nine alibi witnesses.⁷⁵ He argues that the Trial Chamber failed to consider the key question of whether his alibi, viewed in its totality, was reasonably possibly true.⁷⁶ Furthermore, he submits that the Trial Chamber misconstrued the testimony of two key witnesses, Jean Luc Habyarimana and Marguérite Mukobwajana.⁷⁷ He contends that a proper reading of their evidence shows that he was in fact at Kanombe around 1.00 p.m. on 8 April 1994.⁷⁸

30. In addition, Zigiranyirazo submits that the Trial Chamber erred in law in failing both to maintain a record of the site visit and to consider the exculpatory evidence it revealed, namely the impossibility of making a return trip between Kanombe and Kesho Hill during the relevant time period on 8 April 1994, for which it had determined that he had not established an alibi.⁷⁹ According to Zigiranyirazo, it took the Trial Chamber approximately 10 hours to travel the distance from Kanombe to Rubaya.⁸⁰ He also acknowledges a shorter “theoretical” alternative itinerary, which, based on the site visit, would have resulted in a one-way journey of approximately six

⁷¹ Trial Judgement, paras. 326, 328.

⁷² *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence Motion for a Hearing by Video-Link for Protected Witness BNZ60 and Mr. Gaspart Musabyimana, 9 November 2007, para. 8.

⁷³ Zigiranyirazo Notice of Appeal, para. 6(b); Zigiranyirazo Appeal Brief, paras. 130-174.

⁷⁴ Zigiranyirazo Appeal Brief, paras. 131-134; Zigiranyirazo Reply Brief, paras. 47-50.

⁷⁵ Zigiranyirazo Appeal Brief, paras. 135-137, 160-171.

⁷⁶ Zigiranyirazo Appeal Brief, paras. 154-158.

⁷⁷ Zigiranyirazo Appeal Brief, paras. 139-153.

⁷⁸ Zigiranyirazo Appeal Brief, paras. 141, 143, 152, 153.

⁷⁹ Zigiranyirazo Notice of Appeal, para. 6(a); Zigiranyirazo Appeal Brief, paras. 94-129.

⁸⁰ Zigiranyirazo Appeal Brief, paras. 98, 99; Zigiranyirazo Reply Brief, para. 30.

hours.⁸¹ However, given the evidence of the difficulty of travel between Kanombe and Kigali at the time, Zigiranyirazo suggests that the alternative shorter itinerary is unlikely to have been possible.⁸²

31. Zigiranyirazo notes that the Trial Chamber accepted evidence placing him at Kanombe around 8.00 a.m. and again around 3.30 or 4.00 p.m.⁸³ Accordingly, he emphasizes that the length of time needed to travel the distance between Kanombe and Kesho Hill was of crucial importance in determining whether he had an alibi for the morning of 8 April 1994.⁸⁴ He notes that he fully argued this issue at trial and that it was “at the heart of the alibi defence.”⁸⁵ Zigiranyirazo submits that the Trial Chamber’s failure to address this issue indicates that it did not consider this evidence and thus violated his right to a reasoned opinion.⁸⁶ He argues that, in view of the travel time between Kanombe and Kesho Hill, the Trial Chamber’s findings with respect to his presence during the attack on the hill on the morning of 8 April 1994 are impossible, and that these errors thus invalidate the verdict.⁸⁷

32. The Prosecution responds that the Trial Chamber did not err in its assessment of Zigiranyirazo’s alibi, the site visit, or the feasibility of travel to the extent that correction on appeal is required.⁸⁸ It contends that the Trial Chamber did not err in law in determining that Zigiranyirazo did not have an alibi between 8.00 a.m. and 3.30 p.m. on 8 April 1994.⁸⁹ The Prosecution submits that Zigiranyirazo’s evidence did not place him at Kanombe during the relevant time and that the strength of the Prosecution evidence eliminated the reasonable possibility that the alibi was true.⁹⁰ The Prosecution contends that the Trial Chamber duly noted and assessed Zigiranyirazo’s alibi evidence, bearing in mind its duty to assess the evidence in light of the totality of the record, as well as the Prosecution’s burden to prove guilt beyond a reasonable doubt.⁹¹ According to the

⁸¹ Zigiranyirazo Appeal Brief, para. 119; Zigiranyirazo Reply Brief, para. 30.

⁸² Zigiranyirazo Appeal Brief, para. 120; Zigiranyirazo Reply Brief, para. 31.

⁸³ Zigiranyirazo Appeal Brief, paras. 113, 114.

⁸⁴ Zigiranyirazo Appeal Brief, para. 115.

⁸⁵ Zigiranyirazo Appeal Brief, para. 116.

⁸⁶ Zigiranyirazo Appeal Brief, paras. 106-111, 127. To illustrate this point, he compares the Trial Chamber’s failure to address the impossibility of travel with the *Karera*, *Simba*, *Semanza*, and *Kamuhanda* cases where this argument was also raised by the defence and the issue was expressly discussed in the respective judgements. See Zigiranyirazo Appeal Brief, paras. 122-126, citing *Karera* Appeal Judgement, paras. 335-337, 341, 346, 349, *Karera* Trial Judgement, para. 510, *Simba* Appeal Judgement, para. 159, *Simba* Trial Judgement, para. 401, *Kamuhanda* Trial Judgement, paras. 177-222, *Semanza* Trial Judgement, paras. 138-148.

⁸⁷ Zigiranyirazo Appeal Brief, paras. 127-129.

⁸⁸ Prosecution Response Brief, paras. 70-111.

⁸⁹ Prosecution Response Brief, paras. 86, 90.

⁹⁰ Prosecution Response Brief, para. 88.

⁹¹ Prosecution Response Brief, paras. 91, 92.

Prosecution, in finding the alibi evidence vague and inconclusive, the Trial Chamber considered it in its entirety and determined that it did not raise any doubt against the Prosecution's case.⁹²

33. The Prosecution concedes that the Trial Chamber misstated Witness Jean Luc Habyarimana's testimony, but nonetheless considers its overall rejection of his evidence along with that of Witness Mukobwajana to be reasonable.⁹³ In particular, it contends that the two witnesses provided contradictory accounts, with Witness Mukobwajana placing the visit to the military hospital in the morning and Witness Jean Luc Habyarimana indicating that it was around 1.00 p.m.⁹⁴

34. Furthermore, the Prosecution disputes Zigiranyirazo's contention that the site visit was taken to retrace his journey from Kanombe to Rubaya, noting that this was not addressed in the relevant Trial Chamber decision.⁹⁵ The Prosecution submits that there was no connection between the site visit and the impact of the alibi evidence on the evidence placing Zigiranyirazo at Kesho Hill.⁹⁶ The Prosecution also notes that Zigiranyirazo did not object to the lack of a record of the site visit during trial and that he was able to make arguments based on the site visit in his Defence Closing Brief.⁹⁷ The Prosecution contends that the Trial Chamber expressly referred to the site visit in the procedural history of the Trial Judgement as well as implicitly in its discussion of the evidence, as when it took account of the configuration of certain hills.⁹⁸

35. The Prosecution submits that Zigiranyirazo has failed to demonstrate that it would have been impossible for him to travel between Kanombe and Kesho Hill during the seven and a half to eight hour period for which he did not have an alibi.⁹⁹ It further contends that his reliance on the Trial Chamber's travel during the site visit is misplaced as the alleged route taken by Zigiranyirazo and his family on 11 April 1994 was not necessarily identical to the one taken by him on 8 April 1994.¹⁰⁰ The Prosecution also points to the testimony of Zhudi Janbek, the Prosecution's investigator, who regularly travelled the 160 kilometre paved route between Kigali and Gisenyi via

⁹² Prosecution Response Brief, paras. 92, 104-111.

⁹³ Prosecution Response Brief, paras. 95-103.

⁹⁴ Prosecution Response Brief, paras. 99-101, 103.

⁹⁵ Prosecution Response Brief, paras. 71, 75.

⁹⁶ Prosecution Response Brief, para. 75.

⁹⁷ Prosecution Response Brief, para. 76.

⁹⁸ Prosecution Response Brief, para. 77, *citing* Trial Judgement, para. 312.

⁹⁹ Prosecution Response Brief, para. 79.

¹⁰⁰ Prosecution Response Brief, paras. 72, 81-85.

Ruhengeri in two and a half hours.¹⁰¹ The Prosecution further suggests that, by helicopter, the journey between Kanombe and Gisenyi Prefecture would only take 45 minutes.¹⁰²

(c) Discussion

36. As a preliminary matter, the Appeals Chamber has previously stated that a detailed record of a Trial Chamber's site visit should normally be maintained.¹⁰³ The Appeals Chamber observes, however, that Zigiranyirazo did not object at trial to the lack of record. In addition, there appears to be no dispute with respect to the itinerary and travel times taken by the Trial Chamber during its site visit. The absence of a record also did not prevent Zigiranyirazo from fully addressing issues arising from the site visit in his Defence Closing Brief. Consequently, the Appeals Chamber does not consider that the lack of a record of the site visit invalidated the verdict.

37. At the core of Zigiranyirazo's submissions is the contention that the Trial Chamber failed to consider properly his alibi evidence and, in particular, to consider fully the feasibility of his travel between Kanombe and Kesho Hill during the period for which it found that he did not have an alibi on 8 April 1994. A review of the Trial Judgement reveals that the Trial Chamber did not set out the applicable legal principles specifically related to assessing an alibi.

38. The Appeals Chamber observes that the Trial Chamber correctly stated that the Prosecution bears the burden of establishing the accused's guilt beyond reasonable doubt¹⁰⁴ and that it would consider each piece of evidence in light of the totality of the evidence admitted at trial.¹⁰⁵ Furthermore, the Trial Chamber addressed the evidence of all nine alibi witnesses in its analysis alongside its assessment of the Prosecution evidence relating to the events at Kesho Hill.¹⁰⁶

39. Nonetheless, the Appeals Chamber finds that the Trial Chamber's assessment of Zigiranyirazo's alibi involves three serious errors that, taken together, invalidate his convictions based on the events at Kesho Hill. Specifically, the Trial Chamber erred by misapprehending the burden of proof in the context of alibi, failing to consider or provide a reasoned opinion with

¹⁰¹ Prosecution Response Brief, para. 84, *citing* T. 4 October 2005 pp. 2-4; T. 28 September 2009 p. 47. The Prosecution's estimates are based on an assumed average rate of speed of around 65 kilometres an hour.

¹⁰² Prosecution Response Brief, para. 84.

¹⁰³ *Karera* Appeal Judgement, para. 50.

¹⁰⁴ Trial Judgement, para. 89 ("Pursuant to Article 20(3) of the Statute, an accused shall be presumed innocent until proven guilty. This presumption places on the Prosecution the burden of establishing the guilt of the accused, a burden which remains on the Prosecution throughout the entire trial. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.") (internal citation omitted).

¹⁰⁵ Trial Judgement, paras. 87, 88.

¹⁰⁶ Trial Judgement, paras. 318-328.

respect to relevant circumstantial evidence, and misconstruing key evidence which, properly considered, bolstered Zigiranyirazo's alibi.

40. First, the Appeals Chamber notes that although the Trial Chamber correctly recalled that the Prosecution bore the burden of proof, the Trial Chamber's approach to the alibi evidence indicates that it placed a greater evidentiary burden on Zigiranyirazo to establish an alibi than required under the Tribunal's jurisprudence. Specifically, the Trial Chamber made several statements discounting the testimony of alibi witnesses, for example stating:

(1) "the Chamber notes that the evidence of these [alibi] witnesses is *inconclusive* as to [Zigiranyirazo's] presence in Kanombe for the *entire* day,"¹⁰⁷

(2) "[Witness Bararengana's] testimony [of seeing Zigiranyirazo at 3.30 or 4.00 p.m.] *does not contradict* the Prosecution evidence that [Zigiranyirazo] was at Kesho Hill on the morning of 8 April 1994,"¹⁰⁸

(3) "[t]he Chamber therefore considers that [Jean Luc Habyarimana's] testimony, along with his evidence that he saw [Zigiranyirazo] in the evening, *does not provide [Zigiranyirazo] with an alibi* for the morning of 8 April 1994,"¹⁰⁹ and

(4) "[Witness Mukobwajana's] evidence [of seeing Zigiranyirazo around 8.00 a.m. and again around 3.00 or 4.00 p.m.] *does not provide [Zigiranyirazo] with an alibi* between approximately 8.00 a.m. and 4.00 p.m."¹¹⁰

41. These comments confirm that the Trial Chamber did not fully appreciate that Zigiranyirazo only needed to establish reasonable doubt that he would have been able to travel to and from Kesho Hill on the *morning* of 8 April 1994, rather than establish his exact location throughout the day in Kanombe. The Appeals Chamber also observes that the Trial Chamber dismissed the evidence of several witnesses who recalled seeing Zigiranyirazo at Kanombe on 8 April 1994, but could not state an exact time when they saw him. These witnesses provided at least some support for the alibi, especially as the Trial Chamber did not discount their evidence.¹¹¹ Finally, the Trial Chamber's misconception of Zigiranyirazo's burden in respect of presenting an alibi is apparent from its discussion of the alibi in relation to the events at the Kiyovu Roadblock, where it expressly misapplied his burden by stating that:

Accordingly, although the Chamber does not discount the Defence evidence suggesting that [Zigiranyirazo] was at Rubaya for approximately one week from 11 April 1994, the Chamber finds that none of the Defence Witnesses' testimonies *exclude the possibility* that [Zigiranyirazo] left

¹⁰⁷ Trial Judgement, para. 323 (emphasis added).

¹⁰⁸ Trial Judgement, para. 324 (emphasis added).

¹⁰⁹ Trial Judgement, para. 325 (emphasis added).

¹¹⁰ Trial Judgement, para. 327 (emphasis added).

¹¹¹ Trial Judgement, paras. 323, 328.

Rubaya for periods between 12 and 17 April 1994. The Chamber, therefore, finds that [Zigiranyirazo] does not have an alibi for 12 to 17 April 1994.¹¹²

42. The Appeals Chamber emphasizes that a successful alibi does not require conclusive proof of an accused's whereabouts.¹¹³ Indeed, there is no requirement that an alibi "exclude the possibility" that the accused committed a crime.¹¹⁴ The alibi need only raise reasonable doubt that the accused was in a position to commit the crime.¹¹⁵

43. The Appeals Chamber therefore finds that the Trial Chamber reversed the burden of proof in its assessment of Zigiranyirazo's alibi. The Appeals Chamber's conclusion is reinforced by the Trial Chamber's failure, in contrast to other cases where similar language was used, to articulate correctly the applicable burden of proof specific to the assessment of an alibi as well as by the numerous other factual and legal errors identified below. In view of the clear legal error in the application of the burden of proof, the Appeals Chamber will proceed to consider the relevant evidence *de novo* under the correct legal standard.¹¹⁶

44. The second error of the Trial Chamber was its failure to provide a reasoned opinion in relation to the feasibility of travel between Kesho Hill and Kanombe. The Appeals Chamber observes that the fastest estimate of time for travelling between Kigali and Gisenyi Prefecture on the record is two and half hours under optimal conditions, which does not account for the additional distance between Kanombe and Kigali and the specific travel time to Kesho Hill.¹¹⁷ Taking these

¹¹² Trial Judgement, para. 250 (internal citation omitted) (emphasis added). The Prosecution argues that this passage is consistent with the approach of the Trial Chamber in the *Simba* case, which stated that "the numerous inconsistencies in the alibi eliminate the reasonable possibility that [the Appellant] was in Gitarama at the time of the attack[s]" (*Simba* Trial Judgement, paras. 121, 177) and which was subsequently adopted by the Appeals Chamber (*Simba* Appeal Judgement, para. 187). See generally T. 28 September 2009 pp. 34, 35. The two statements, however, are not comparable. A close examination of the *Simba* Trial Judgement reflects that it engaged in a detailed assessment of the alibi evidence, noting numerous contradictions and deficiencies in the evidence, particularly when weighed against corroborated and credible evidence. Its approach clearly indicates that the defence did not raise reasonable doubt about the Prosecution's case and that the Prosecution eliminated the reasonable possibility that that portion of *Simba*'s alibi was true. See *Simba* Trial Judgement, paras. 374-384. By contrast, the above-quoted language used in the Trial Judgement suggests that Zigiranyirazo had the burden to exclude that he travelled to Kiyovu.

¹¹³ See *Simba* Appeal Judgement, para. 185 ("The Appeals Chamber is further satisfied that the Trial Chamber correctly applied [the legal standard on alibi evidence] in its subsequent findings on alibi. The Trial Chamber first found that, although the alibi evidence for the period of 6-13 April 1994 '[did] not account for every moment of the Appellant's time, viewed as a whole and when weighed against the Prosecution evidence, it provided a reasonable and satisfactory explanation for the Appellant's activities for this period.' The Appeals Chamber notes that this wording reflects that in assessing the alibi evidence for this period the Trial Chamber did not require the Defence to prove its case beyond reasonable doubt."), quoting *Simba* Trial Judgement, para. 349. See also *Nahimana et al.* Appeal Judgement, paras. 428-431, 473, 474 (reversing a Trial Chamber finding that an alibi based on hearsay had not been established).

¹¹⁴ See *supra* Section III.A.1 (Burden of Proof in the Assessment of Alibi). See also *Muhimana* Appeal Judgement, para. 18 ("An accused does not need to prove at trial that a crime 'could not have occurred' or 'preclude the possibility that it could occur'.")

¹¹⁵ See *supra* Section III.A.1 (Burden of Proof in the Assessment of Alibi).

¹¹⁶ See *supra* para. 10.

¹¹⁷ T. 4 October 2005 pp. 2-4. See also Zigiranyirazo Reply Brief, paras. 30, 31.

factors into consideration, Zigiranyirazo submits that the journey under optimal conditions would have taken approximately three hours and 18 minutes, which the Appeals Chamber accepts as a reasonable estimate.¹¹⁸ In addition, other estimates following from the site visit suggest that the journey could have taken between four and 10 hours one way.¹¹⁹ There is no basis in the record for the Prosecution's theory that the journey would have taken Zigiranyirazo approximately 45 minutes by helicopter.¹²⁰

45. The Appeals Chamber notes that “[t]here is a presumption that a Trial Chamber has evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.”¹²¹ However, this presumption may be rebutted “when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber’s reasoning.”¹²² The Appeals Chamber is mindful of potential limitations to evidence taken after the passage of several years concerning specifics of travel; however all relevant evidence shows that Kesho Hill in Gisenyi Prefecture is not in close geographic proximity to Kanombe, which is southwest of Kigali. As a result, the distance, time, and feasibility of travel are highly relevant factors to consider in view of the considerable evidence placing Zigiranyirazo at Kanombe at various times on 8 April 1994. Despite the crucial importance of this issue, the Trial Chamber failed to address it.

46. In addition, Zigiranyirazo presented the evidence of Witnesses Bernadette Niyonzeye and Agnès Kampundu, who recalled that Zigiranyirazo returned to Kanombe on 8 April 1994 shortly

¹¹⁸ See T. 28 September 2009 p. 10. At the hearing, the Prosecution maintained that it would take around two and a half hours to travel from Kanombe to Kesho Hill. It further admitted that it would take no more than 20 minutes to travel from Kanombe to Kigali. See T. 28 September 2009 pp. 47, 48. Zigiranyirazo noted that the last seven or eight kilometres before reaching Kesho Hill was along a dirt road. See T. 28 September 2009 p. 10. In view of these factors, the Appeals Chamber considers Zigiranyirazo’s estimate of the journey taking more than three hours under optimal conditions as more reasonable.

¹¹⁹ The estimate of 10 hours is based on the longest route via Butare Prefecture. With respect to the route via Gitarama, the approximate times offered by the Prosecution and Zigiranyirazo are similar. See T. 28 September 2009 p. 49 (“[The Prosecution] would stipulate [that the route via Gitarama took] four to five hours. The Defence estimate is five to six, so we’re not really that far apart.”).

¹²⁰ The Prosecution cites its own counsel’s question during cross-examination of a defence witness for the proposition that it only took 45 minutes to travel from Kanombe to Gisenyi Prefecture. See Prosecution Response Brief, para. 84, citing T. 27 February 2007 p. 81. The relevant exchange reads: “Q. Would you agree or would you have no idea that to travel from Kanombe camp to the Rubaya tea factory area in a helicopter would take about 45 minutes? A. I wouldn’t know. I don’t know. I saw -- that a journey by car took a whole day.” During oral argument, the Appeals Chamber asked the Prosecution whether it had abandoned its theory of Zigiranyirazo’s possible use of a helicopter. See T. 28 September 2009 p. 45 (“MR. PRESIDENT: During the trial, the point was made that there was some kind of a possibility of helicopter travel. I take it that you are not maintaining this any longer. MS. BIANCHI: Your Honour, my colleague, Christine Graham, is going to deal with the issue of travel, including the questions on whether the helicopter theory is still in play.”). The Prosecution never returned to the matter.

¹²¹ *Halilovi*} Appeal Judgement, para. 121. See also *Kvoèka et al.* Appeal Judgement, para. 23.

¹²² *Kvoèka et al.* Appeal Judgement, para. 23.

after leaving, due to fighting in Kigali.¹²³ Again, bearing in mind that the Trial Chamber did not discount the evidence of these witnesses,¹²⁴ it is unacceptable that it did not address this evidence, which would significantly undermine the possibility of Zigiranyirazo travelling to Kesho Hill by any route on 8 April 1994. Accordingly, the Trial Chamber erred in law by failing to provide a reasoned opinion on the feasibility of Zigiranyirazo's travel between Kanombe and Kesho Hill.

47. The third error in the Trial Chamber's reasoning involved its misconstruing key alibi evidence. In particular, both Zigiranyirazo and the Prosecution agree that the Trial Chamber erred in its assessment of the evidence of Witness Jean Luc Habyarimana. Stating that Witness Jean Luc Habyarimana testified that he saw Zigiranyirazo at Kanombe around 1.00 p.m. with Witness Bararengana, the Trial Chamber discounted his evidence because Witness Bararengana stated that he only arrived in Kanombe around 3.00 or 3.30 p.m.¹²⁵ However, a review of the record shows that Witness Jean Luc Habyarimana testified that he and Zigiranyirazo went to the military hospital at Camp Kanombe around 1.00 p.m. on 8 April 1994 *before* Witness Bararengana arrived at Kanombe.¹²⁶ Therefore, contrary to the finding in the Trial Judgement, there is no clear inconsistency between the accounts of Witnesses Jean Luc Habyarimana and Bararengana.¹²⁷

48. In addition, a review of Witness Mukobwajana's evidence reflects that she corroborates Witness Jean Luc Habyarimana's testimony that he went with Zigiranyirazo to the military hospital before Witness Bararengana arrived at Kanombe.¹²⁸ Although Witness Mukobwajana did not specify a time for this visit, her testimony nonetheless corroborates Witness Jean Luc Habyarimana's account.¹²⁹ The Appeals Chamber finds no merit in the Prosecution contention that,

¹²³ See Zigiranyirazo Appeal Brief, paras. 160, 161.

¹²⁴ Trial Judgement, para. 328.

¹²⁵ Trial Judgement, para. 325.

¹²⁶ T. 26 February 2007 pp. 30, 31 ("FWitness Jean Luc Habyarimana:ğ A. I also went to the Camp Kanombe military hospital. FMr. Zaduk:ğ Q. Who did you go with? A. I was with several people, particularly all members of the affected families, who happened to be there, as well as with my uncle, Mr. Protais Zigiranyirazo, and soldiers who accompanied us. [...] Q. What time would you have gone to that military hospital on the 8th? A. I'd rather say that it was in the middle of the day, let's say, at around 1 p.m. Q. All right. So you can confirm that your uncle was with you at the military hospital at that time on that day; is that right? A. That is right. [...] Q. Do you know whether that was before or after Dr. Bararengana arrived? A. It was prior to Dr. Bararengana's arrival. Q. And after the doctor arrived, did you go anywhere with him? A. Yes. After the arrival of the doctor, in the evening – around evening, I took him to see the brother – the body of his brother, the president, as well as the body of the other president, that is, President Ntaryamira.").

¹²⁷ See Trial Judgement, para. 325.

¹²⁸ T. 19 November 2007 p. 53.

¹²⁹ See *Nahimana et al.* Appeal Judgement, para. 428 ("[T]he Appeals Chamber is of the view that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible

notwithstanding the Trial Chamber's error, it would have been reasonable to reject the evidence of Witness Jean Luc Habyarimana because Witness Mukobwajana's testimony, when read in the French original, placed Zigiranyirazo's trip to the hospital in the morning rather than around 1.00 p.m.¹³⁰ Contrary to the Prosecution's submission, the French version of Witness Mukobwajana's testimony in fact suggests only that Zigiranyirazo's visit to the morgue occurred at some point on 8 April, not that it specifically took place in the morning of that day.¹³¹ In any event, the Appeals Chamber views any difference between the witnesses' accounts as to the exact time when the trip to the military hospital occurred as minor.¹³² Therefore, the Trial Chamber also erred in evaluating Witness Mukobwajana's testimony when it suggested that she did not place Zigiranyirazo at Kanombe between 8.00 a.m. and 3.00 p.m.¹³³

49. The Appeals Chamber finds that the Trial Chamber's reversal of the burden of proof, failure to provide a reasoned opinion, and its factual errors in relation to key evidence invalidate Zigiranyirazo's convictions. The properly considered evidence of undiscounted alibi witnesses places Zigiranyirazo in the Kanombe area at both around 8.00 a.m. and around 1.00 p.m. – making travel to and from Kesho Hill in time to address the assailants there, even using the travel times for the shortest route via Ruhengeri, around three hours and 18 minutes one way, impossible.¹³⁴ Just as circumstantial evidence may properly serve as a basis of conviction,¹³⁵ an accused may also rely on such evidence and any reasonable inferences capable of being drawn from it in his defence.¹³⁶ It is reasonable to infer from this evidence that Zigiranyirazo was present in the Kanombe area during the morning of 8 April 1994 based on multiple sightings by several witnesses over the course of the day, in particular when coupled with the evidence of the distance and feasibility of travel between

testimony.”). *See also* Trial Judgement, para. 91 (“[A] significant period of time has elapsed between the events alleged in the Indictment and the testimonies given in court. Therefore, lack of precision or minor discrepancies between the evidence of different witnesses, or between the testimony of a particular witness and a prior statement, while calling for cautious consideration, was not regarded in general as necessarily discrediting the evidence.”).

¹³⁰ *See* Prosecution Response Brief, paras. 99-101, 103; T. 28 September 2009 pp. 43, 44.

¹³¹ *See* T. 19 November 2007 p. 53 (French version) (“*Le 8, le fait marquant, c’est... parce que les corps venaient de... de rester là, on les a déposés dans un endroit parce que ça commençait à sentir dans le salon, et mon oncle Protais, avec Jean-Luc, avec quelques personnes, ils sont allés voir où...où les corps étaient déposés. Dans la matinée, le 8 aussi, on attendait l’arrivée du... du petit frère du Président...*”). The Appeals Chamber observes that, when Witness Mukobwajana says “*le 8 aussi*,” the transcript marks this out in commas, strongly suggesting that the “*aussi*” referred to the date only.

¹³² The Appeals Chamber notes that this difference is likely no more significant in time than that between Witnesses AKK's and AKL's sighting of Zigiranyirazo at Kesho Hill. *See* Trial Judgement, paras. 254, 265. In the case of Witnesses AKK and AKL, the Trial Chamber simply described Zigiranyirazo's presence at Kesho Hill as being “on the morning of 8 April 1994.” *See* Trial Judgement, para. 329.

¹³³ Trial Judgement, para. 327.

¹³⁴ As a consequence, the Appeals Chamber does not need to assess the contested issues as to the viability of this route.

¹³⁵ *Muhimana* Appeal Judgement, para. 49. *See also* *Gacumbitsi* Appeal Judgement, para. 115.

¹³⁶ However, given that an accused does not bear a burden of proof, by contrast to the burden of the Prosecution in establishing a conviction, an inference based on circumstantial evidence need not be the only reasonable one in order to support a successful defence.

Kanombe and Kesho Hill. Thus the Appeals Chamber finds that the alibi evidence casts doubt on the Prosecution evidence placing Zigiranyirazo at Kesho Hill on the morning of 8 April 1994.

50. The Trial Chamber found the evidence from Witnesses AKK and AKL of Zigiranyirazo's presence at Kesho Hill to be consistent, detailed, credible, and corroborated.¹³⁷ In some circumstances, this might be enough to eliminate the reasonable possibility that Zigiranyirazo's alibi was true. However, in this case, the Trial Chamber did not reach its conclusions on the credibility of Witnesses AKK and AKL after assessing their accounts in light of all the alibi evidence, since it found that Zigiranyirazo had no alibi for the morning of 8 April 1994.¹³⁸ This casts serious doubt upon the reasonableness of the Trial Chamber's findings on the credibility of Witnesses AKK and AKL. The Appeals Chamber considers that, given the distance between Kesho Hill and Kanombe, a reasonable trier of fact could not be convinced that Witnesses AKK and AKL credibly placed Zigiranyirazo at Kesho Hill and at the same time not expressly explain how the evidence of Zigiranyirazo's alibi, which was largely not discounted, failed to raise reasonable doubt, an explanation which the Trial Chamber did not attempt.

51. In sum, the Appeals Chamber concludes that the Trial Chamber erred in law and in fact in its assessment of the alibi evidence, by misapprehending the applicable legal principles, failing to consider or provide a reasoned opinion with respect to relevant evidence, and misconstruing key evidence which further bolstered Zigiranyirazo's alibi. The Appeals Chamber considers that these errors constituted a miscarriage of justice and invalidated the verdict, and thus that the Trial Chamber's findings on Zigiranyirazo's participation in the attack at Kesho Hill on 8 April 1994 must be overturned.

52. Accordingly, the Appeals Chamber grants the Sixth Ground of Appeal and reverses Zigiranyirazo's convictions for genocide and extermination as a crime against humanity based on his participation in the massacre at Kesho Hill. Consequently, there is no need to assess Zigiranyirazo's remaining arguments concerning the events at Kesho Hill under this or any other ground of appeal.¹³⁹

¹³⁷ Trial Judgement, paras. 309, 310, 316, 327, 329.

¹³⁸ Trial Judgement, paras. 324, 325, 327.

¹³⁹ More specifically, Zigiranyirazo's additional grounds of appeal concerning Kesho Hill are the following. In the First Ground of Appeal, Zigiranyirazo challenges his conviction based on the Trial Chamber's evaluation of five Prosecution witnesses who testified about the attack on Kesho Hill. *See* Zigiranyirazo Notice of Appeal, para. 1; Zigiranyirazo Appeal Brief, paras. 14-40. In the Second Ground of Appeal, Zigiranyirazo challenges his conviction, based on the Trial Chamber's error in not drawing an adverse inference from the Prosecution's failure to call Witness BIU. *See* Zigiranyirazo Notice of Appeal, para. 2; Zigiranyirazo Appeal Brief, paras. 41-54. In the Third Ground of Appeal, he challenges his conviction, based on the alleged use of non-credible testimony to corroborate other witnesses. *See*

3. Alleged Errors in Evaluating Exculpatory Evidence Related to Kiyovu Roadblock (Ground 12)

(a) Introduction

53. The Trial Chamber convicted Zigiranyirazo of genocide for aiding and abetting the killing of Tutsi civilians at the Kiyovu Roadblock,¹⁴⁰ which was erected in close proximity to his residence in the Kiyovu neighbourhood of Kigali.¹⁴¹ The Trial Chamber found that he was present at the roadblock on 12 and 17 April 1994 on the basis of the testimony of Prosecution Witness BCW.¹⁴² Witness BCW also testified that he saw Zigiranyirazo and his children pass through the roadblock in a military jeep on 19 April 1994.¹⁴³

54. In making these findings, the Trial Chamber considered the evidence of nine alibi witnesses who placed Zigiranyirazo at Rubaya in Gisenyi Prefecture during a period of approximately one week, starting on 11 April 1994.¹⁴⁴ In particular, the Trial Chamber noted that Witnesses Agnès Kampundu, Marie Chantel Kamugisha, Witness BNZ120, Gloria Mukampunga, Aimé Marie Ntuye, and Bernadette Niyonizeye stated that Zigiranyirazo was at Rubaya, but gave vague testimony.¹⁴⁵ It noted that Witnesses Domitilla Zigiranyirazo, Marguérite Mukobwajana, and Séraphin Bararengana provided greater detail, but could not account for his presence for the entire week.¹⁴⁶ The Trial Chamber concluded:

Accordingly, although the Chamber does not discount the Defence evidence suggesting that [Zigiranyirazo] was at Rubaya for approximately one week from 11 April 1994, the Chamber finds that none of the Defence Witnesses' testimonies exclude the possibility that [Zigiranyirazo] left Rubaya for periods between 12 and 17 April 1994. The Chamber, therefore, finds that [Zigiranyirazo] does not have an alibi for 12 to 17 April 1994.¹⁴⁷

In dismissing the alibi, the Trial Chamber also did not expressly refer to or discuss its site visit or the possibility of travel between Rubaya and the Kiyovu Roadblock on 12 and 17 April 1994.¹⁴⁸

Zigiranyirazo Notice of Appeal, para. 3; Zigiranyirazo Appeal Brief, paras. 55-70. In the Fourth Ground of Appeal, he challenges his conviction based on the Trial Chamber's acceptance of the testimony of Witnesses AKL and AKR in relation to the presence of Major Aloys Ntabakuze at Kesho Hill. *See* Zigiranyirazo Notice of Appeal, para. 4; Zigiranyirazo Appeal Brief, para. 71. In the Fifth Ground of Appeal, he challenges his conviction based on the Trial Chamber's finding that he participated in a joint criminal enterprise. *See* Zigiranyirazo Notice of Appeal, para. 5; Zigiranyirazo Appeal Brief, paras. 72-88.

¹⁴⁰ Trial Judgement, paras. 427, 447.

¹⁴¹ Trial Judgement, paras. 243, 251.

¹⁴² Trial Judgement, paras. 251, 413.

¹⁴³ Trial Judgement, para. 224.

¹⁴⁴ Trial Judgement, paras. 231, 245-250.

¹⁴⁵ Trial Judgement, paras. 245-248.

¹⁴⁶ Trial Judgement, para. 249.

¹⁴⁷ Trial Judgement, para. 250 (internal citation omitted).

¹⁴⁸ The Trial Judgement contains only one reference to the site visit in the procedural history. *See* Trial Judgement, Annex I: Procedural History, para. 34.

(b) Submissions

55. Zigiranyirazo submits that the Trial Chamber erred in law and in fact in rejecting his alibi for 12 and 17 April 1994.¹⁴⁹ He contends that the Trial Chamber erred in its application of the law of alibi by failing to assess it in its totality and then weigh it against the evidence of Witness BCW.¹⁵⁰ He points to the Trial Chamber's finding that "none of the Defence Witnesses' testimonies exclude the possibility that [he] left Rubaya" as an indication that the Trial Chamber shifted the burden of proof.¹⁵¹

56. In addition, Zigiranyirazo submits that the Trial Chamber erred in law in failing to maintain a record of the site visit and to consider the exculpatory evidence it revealed as well as from his alibi witnesses, relating to the impossibility of his travelling from Rubaya to Kiyovu on 12 and 17 April 1994.¹⁵² According to Zigiranyirazo, the site visit revealed that it took the Trial Chamber around 10 hours to travel from Rubaya in Gisenyi Prefecture to Kiyovu in Kigali following the same itinerary that he and his family took after leaving Kanombe, which is just outside Kigali.¹⁵³ He also refers to a shorter alternative route via Gitarama Prefecture, which, based on the site visit, would have taken approximately four to five hours.¹⁵⁴ However, to demonstrate that the Gitarama route took even longer during the relevant events, Zigiranyirazo points to the evidence of Witnesses BBL and RDP167 whose respective journeys along this route on 11 April and in late-May 1994 lasted the entire day.¹⁵⁵

57. Zigiranyirazo notes that Witness BCW placed him at the Kiyovu Roadblock between 11.00 a.m. and 12.00 p.m. on 12 April 1994.¹⁵⁶ Zigiranyirazo submits that, given the travel time between Rubaya and Kiyovu, it would have been impossible for him to have been in Kiyovu between 11:00 a.m. and 12:00 p.m. in view of the alibi evidence, especially Witness Bararengana's testimony that the two men shared a room in Rubaya each night during that period.¹⁵⁷ He

¹⁴⁹ Zigiranyirazo Notice of Appeal, para. 12(b, e); Zigiranyirazo Appeal Brief, paras. 314-327, 346-362, 367-376, 381-400.

¹⁵⁰ Zigiranyirazo Appeal Brief, paras. 381, 382, 387-396.

¹⁵¹ Zigiranyirazo Appeal Brief, paras. 383-386, *quoting* Trial Judgement, para. 250; Zigiranyirazo Reply Brief, para. 103.

¹⁵² Zigiranyirazo Notice of Appeal, para. 12(a); Zigiranyirazo Appeal Brief, paras. 328-345; Zigiranyirazo Reply Brief, paras. 83, 87, 89.

¹⁵³ Zigiranyirazo Appeal Brief, paras. 98, 99; Zigiranyirazo Reply Brief, para. 86.

¹⁵⁴ Zigiranyirazo Appeal Brief, paras. 119, 339-345. This is also the Prosecution's position. *See* T. 28 September 2009 p. 49.

¹⁵⁵ Zigiranyirazo Appeal Brief, para. 341.

¹⁵⁶ Zigiranyirazo Appeal Brief, para. 333.

¹⁵⁷ Zigiranyirazo Appeal Brief, paras. 333-335, 339, 342.

emphasizes that the alibi evidence shows that his absences from Rubaya were only of a short duration.¹⁵⁸

58. Moreover, Zigiranyirazo contends that the Trial Chamber erred in fact in finding that he did not have an alibi for 12 April 1994, particularly because Witness Domitilla Zigiranyirazo stated that she was with him on that day.¹⁵⁹ Furthermore, he challenges the Trial Chamber's interpretation of Domitilla Zigiranyirazo's testimony that he left Rubaya between 12 and 17 April 1994, since she stated that she went with him to a nearby location, in fact reinforcing the alibi.¹⁶⁰ According to Zigiranyirazo, the Trial Chamber also unreasonably discounted the evidence of Witnesses Mukobwajana and Bararengana based on a non-existent inconsistency as to the number of times Zigiranyirazo left Rubaya alone.¹⁶¹ Moreover, Zigiranyirazo notes that the Trial Chamber erroneously used a trip mentioned by Witness Kampundu, which occurred after 18 April 1994, to reinforce its conclusion that he left Rubaya between 12 and 17 April 1994.¹⁶²

59. Zigiranyirazo argues that the absences cited by the Trial Chamber confirm the alibi since they were all brief and during them he was at nearby locations and that, therefore, it was unreasonable to use them to reject his evidence.¹⁶³ He further questions the reasonableness of the Trial Chamber's complaint that his evidence lacked detail given that "[l]ittle of significance happened in those days."¹⁶⁴ Zigiranyirazo further emphasizes that no reason was ever advanced for his return to Kigali on 12 April 1994, one day after a lengthy and difficult journey to reach Rubaya.¹⁶⁵

60. The Prosecution responds that the Trial Chamber neither misconstrued the alibi evidence nor erred in its application of the relevant law.¹⁶⁶ It submits that Zigiranyirazo has not identified any evidence material to the Trial Chamber's findings that it failed to consider or that any such failure would have impacted the verdict.¹⁶⁷ It recalls that a Trial Chamber is presumed to have considered all of the evidence and, in this respect, notes that the Trial Judgement specifically mentions the convoy from Kanombe to Rubaya.¹⁶⁸ Furthermore, the Prosecution submits that Zigiranyirazo's

¹⁵⁸ Zigiranyirazo Reply Brief, paras. 84, 85, 88, 89.

¹⁵⁹ Zigiranyirazo Appeal Brief, paras. 347-349; Zigiranyirazo Reply Brief, para. 92.

¹⁶⁰ Zigiranyirazo Appeal Brief, paras. 350-352; Zigiranyirazo Reply Brief, paras. 93, 94.

¹⁶¹ Zigiranyirazo Appeal Brief, paras. 353-358.

¹⁶² Zigiranyirazo Appeal Brief, paras. 359-362.

¹⁶³ Zigiranyirazo Appeal Brief, paras. 367-370.

¹⁶⁴ Zigiranyirazo Appeal Brief, para. 371.

¹⁶⁵ Zigiranyirazo Appeal Brief, paras. 372-376.

¹⁶⁶ Prosecution Response Brief, paras. 199-210, 214-220, 225-233.

¹⁶⁷ Prosecution Response Brief, paras. 190-198.

¹⁶⁸ Prosecution Response Brief, para. 191.

argument confuses the issue of “impossibility” with that of the “likelihood of such a trip.”¹⁶⁹ It notes that the Defence evidence in fact demonstrated that Zigiranyirazo left Rubaya on several occasions and that it was found to be inconsistent, thereby undermining the general evidence that he remained consistently there.¹⁷⁰ The Prosecution also questions the reliability of Zigiranyirazo’s estimates with respect to the travel conditions and times on 12 and 17 April 1994.¹⁷¹

61. The Prosecution submits that the Trial Chamber properly assessed the evidence of Domitilla Zigiranyirazo, which was inconsistent about the date on which Zigiranyirazo left Rubaya without her.¹⁷² It further contends that Zigiranyirazo has failed to demonstrate how the Trial Chamber’s conclusions with respect to Witness Kampundu as well as the alleged contradictions between the evidence of Witnesses Mukobwajana and Bararengana are errors which impacted the verdict.¹⁷³

62. Finally, the Prosecution disputes that Zigiranyirazo’s absences from Rubaya were minimal and describes his argument on this point as “guesswork.”¹⁷⁴ It further argues that it was reasonable for the Trial Chamber to require Zigiranyirazo’s witnesses to provide details of his activities at Rubaya.¹⁷⁵ The Prosecution submits that the Trial Chamber correctly applied the law on alibi in its assessment of the alibi evidence.¹⁷⁶

(c) Discussion

63. The Appeals Chamber recalls its conclusions in connection with the Sixth Ground of Appeal that the Trial Chamber’s failure to maintain a record of the site visit did not invalidate the verdict.¹⁷⁷ Nevertheless, a review of the Trial Chamber’s discussion of the alibi in relation to the Kiyovu Roadblock reveals that it committed three significant errors: not applying the correct legal standard to the assessment of the alibi; misconstruing key evidence to discount the alibi; and failing to consider or provide a reasoned opinion with respect to relevant evidence.

64. First, the Appeals Chamber recalls its conclusion in connection with Zigiranyirazo’s Sixth Ground of Appeal that the Trial Chamber erred in law in its assessment of the alibi evidence by misapprehending the applicable legal principles on the burden of proof.¹⁷⁸ The Appeals Chamber

¹⁶⁹ Prosecution Response Brief, para. 192. *See also* Prosecution Response Brief, para. 193.

¹⁷⁰ Prosecution Response Brief, paras. 194, 195, 197, 198.

¹⁷¹ Prosecution Response Brief, para. 196.

¹⁷² Prosecution Response Brief, paras. 200-206, 218-220.

¹⁷³ Prosecution Response Brief, paras. 207-210.

¹⁷⁴ Prosecution Response Brief, para. 215.

¹⁷⁵ Prosecution Response Brief, para. 216.

¹⁷⁶ Prosecution Response Brief, paras. 225, 232, 233.

¹⁷⁷ *See supra* Section III.A.2 (Ground 6: Alleged Errors in Evaluating Exculpatory Evidence Related to Kesho Hill).

¹⁷⁸ *See supra* Section III.A.2 (Ground 6: Alleged Errors in Evaluating Exculpatory Evidence Related to Kesho Hill).

considers that this finding applies with equal force to the Trial Chamber's assessment of Zigiranyirazo's alibi for his purported presence at the Kiyovu Roadblock on 12 and 17 April 1994. In particular, the Appeals Chamber emphasizes that, contrary to the conclusion of the Trial Chamber,¹⁷⁹ there is no requirement that an alibi "exclude the possibility" that an accused committed a crime.¹⁸⁰ Instead, Zigiranyirazo's alibi need only raise reasonable doubt in the Prosecution's case.¹⁸¹ As such, the Appeals Chamber will proceed to consider the relevant evidence *de novo* under the correct standard.¹⁸²

65. Second, as Zigiranyirazo submits, the Trial Chamber unreasonably relied on the evidence of brief local trips in the area surrounding Rubaya to question his alibi evidence. In particular, while Witness Domitilla Zigiranyirazo acknowledged that Zigiranyirazo left Rubaya, she stated that he accompanied her on a visit to see her mother-in-law.¹⁸³ The Appeals Chamber further finds no merit in the Prosecution's argument that Witness Domitilla Zigiranyirazo's suggestion at trial that Zigiranyirazo left Rubaya on 12 April 1994 to assist his Tutsi wife cross the border into Goma, Zaire, is a further basis for discrediting the alibi.¹⁸⁴ There are several fatal flaws to this submission, in particular that the witness subsequently corrected her testimony, noting that this event occurred on 20 April 1994.¹⁸⁵ Moreover, the Trial Chamber did not use this correction to discredit the witness. Finally, even if Witness Domitilla Zigiranyirazo's initial testimony were accepted, it would reasonably suggest that Zigiranyirazo in fact travelled to Goma on 12 April 1994 rather than to Kiyovu in Kigali, further undermining the Trial Chamber's factual findings.

66. In addition, the Trial Chamber's reliance on Witness Kampundu for the proposition that Zigiranyirazo left Rubaya is misplaced since she was referring to trips made by Zigiranyirazo during a later period when he was staying in Gasiza.¹⁸⁶ Finally, contrary to the Trial Chamber's conclusion, the evidence of Witness Bararengana that Zigiranyirazo left Rubaya only once without

¹⁷⁹ Trial Judgement, para. 250.

¹⁸⁰ See *Muhimana* Appeal Judgement, para. 18 ("An accused does not need to prove at trial that a crime 'could not have occurred' or 'preclude the possibility that it could occur'."). See also *supra* Section III.A.2 (Ground 6: Alleged Errors in Evaluating Exculpatory Evidence Related to Kesho Hill).

¹⁸¹ See *supra* Section III.A.1 (Burden of Proof in the Assessment of Alibi).

¹⁸² See *supra* para. 10.

¹⁸³ T. 27 February 2007 p. 61 ("Q. Did you leave Rubaya to go anywhere during your period in Rubaya? A. I went to see my mother-in-law because she was sick. [...] Q. Could you describe where her house is located? A. We were neighbours. Our home and my mother-in-law's home were near each other. Q. Now, who went with you that day when you went to see your mother-in-law? Do you recall? A. I was with my husband."). The Appeals Chamber observes that Witness Domitilla Zigiranyirazo further stated that "[o]n that visit, my husband went to see Sagatwa's mother and I stayed at my mother-in-law's home." See T. 27 February 2009 p. 61. However, there is nothing in the record to suggest that this absence was significant or that the home of Sagatwa's mother was located a great distance away.

¹⁸⁴ See Prosecution Response Brief, paras. 195, 198; T. 28 September 2007 pp. 38, 39.

¹⁸⁵ See T. 28 February 2007 p. 31.

¹⁸⁶ T. 5 March 2007 pp. 69-71.

him¹⁸⁷ is not incompatible with the evidence of Witness Mukobwajana who stated that Zigiranyirazo periodically ran errands.¹⁸⁸ In this respect, a review of Witness Bararengana's testimony indicates that he was not categorical about the number of Zigiranyirazo's departures.¹⁸⁹ Furthermore, Witness Bararengana was referring to Zigiranyirazo's trips *without him*, whereas the testimony of Witness Mukobwajana suggests that Witness Bararengana accompanied Zigiranyirazo on the trips.¹⁹⁰ In any event, the minor inconsistencies, if any, between the testimonies of Witnesses Mukobwajana and Bararengana as to the number of such trips taken by Zigiranyirazo is an unreasonable basis for discounting their evidence. Indeed, this appears to run contrary to the Trial Chamber's express recognition that "a significant period of time has elapsed between the events" and that "minor discrepancies between the evidence of different witnesses [were] not regarded in general as necessarily discrediting the evidence."¹⁹¹

67. In concluding that Zigiranyirazo did not have an alibi between 12 and 17 April 1994, the Trial Chamber did not consider the evidence as a whole as well as the relevant circumstantial evidence of his presence at Rubaya or in its vicinity. It is reasonable to infer that Zigiranyirazo was present at Rubaya in Gisenyi Prefecture, or in its vicinity, between 12 and 17 April 1994 based on multiple sightings by several witnesses over the course of several days, especially when the evidence of these witnesses is considered together with evidence regarding the time and difficulties involved in travelling between Rubaya and Kiyovu. The Appeals Chamber therefore finds that the Trial Chamber erred in fact by misconstruing key alibi evidence.

68. Third, the Appeals Chamber finds that the Trial Chamber failed to consider or provide a reasoned opinion with respect to the distance and feasibility of travel between Rubaya and Kigali on the relevant dates. The Appeals Chamber recalls that the estimates for travelling between Gisenyi Prefecture and Kigali, based on the testimony of the Prosecution investigator and the Trial

¹⁸⁷ Trial Judgement, para. 249, *citing* T. 7 March 2007 p. 25.

¹⁸⁸ Trial Judgement, para. 249, *citing* T. 20 November 2007 p. 32.

¹⁸⁹ T. 7 March 2007 p. 25 ("A. We were in the same premises, maybe not 24 hours each day because he moved out, I believe, once. And I had stayed back at the time. Q. So, we agree that you do recall at least one occasion you and Zigiranyirazo, at Rubaya, parted company. I'm going to suggest, perhaps, that was an occasion that he went to Rugunga hill. And you wouldn't know where he went, would you, you weren't with him? A. No, I think he once went with my sister to shop or to make some purchases.").

¹⁹⁰ T. 20 November 2007 p. 32 ("Witness Mukobwajana: A. Yes, [Zigiranyirazo] could go to make errands, go to the market, and then come back. We were together all the time throughout the seven days. [...] Q. Didn't you also say that Mr. Zigiranyirazo went to visit his sick mother? A. When he went to fetch things for us to be able to sleep, blankets, mattresses and also to bring the small children, the little boy, Aimé, I mentioned, in order to go and see the grandmother, otherwise during the day, during meals, during the prayer, in the evening and at bedtime, everyone was there because we would have our meal together. Q. But when you say that you were always together, that is not true. Isn't that so? A. "Always together", what does it mean? What I mean is that Mr. Bararengana and the other gentlemen would run errands. The women would prepare the meals, but at dinner time and for prayers, everyone was there and we would take our meals together. I don't know whether I was clear.").

¹⁹¹ Trial Judgement, para. 91.

Chamber's site visit, vary, and range from approximately three hours (via Ruhengeri), to four to six hours (via Gitarama), and up to 10 hours (via Butare).¹⁹²

69. The Appeals Chamber is mindful that evidence concerning specific travel details taken after several years can only be of limited assistance in establishing the time and exact itinerary purportedly taken by Zigiranyirazo on 12 and 17 April 1994. Nevertheless, the various estimates reflect that Rubaya in Gisenyi Prefecture is not in close geographic proximity with the Kiyovu area of Kigali. As a result, the distance, time, and feasibility of travel are highly relevant factors in view of the evidence placing Zigiranyirazo at Rubaya on 12 April 1994 and 17 April 1994, as each trip would have resulted in a significant period of absence from Rubaya.¹⁹³ This is especially true given the evidence of Witnesses BBL and RDP167 which suggests that the relevant circumstances at the time made travel along the route via Gitarama significantly more time consuming than was the case during the Trial Chamber's site visit.¹⁹⁴

70. The Appeals Chamber notes that the Trial Chamber did refer generally to the lengthy journey from Kanombe, which is near Kigali, to Rubaya in recounting the alibi evidence.¹⁹⁵ Therefore, it follows that it was aware of the significant distance in assessing the allegations related to the Kiyovu Roadblock. In such circumstances, the Trial Chamber should have provided clear reasons as to why the alibi did not account for the time when Zigiranyirazo was seen at the Kiyovu Roadblock. This is especially so given the alibi evidence that Witness Bararengana saw Zigiranyirazo on 12 April 1994,¹⁹⁶ evidence which is not easily reconciled with Zigiranyirazo's presence, according to Witness BCW, at the Kiyovu Roadblock around 11.00 a.m. or 12.00 p.m. on 12 April 1994. As noted above, the brief absences in the area surrounding Rubaya did not provide a reasonable basis for discounting the alibi. While the Trial Chamber might have reasonably rejected Witness Bararengana's testimony for a number of other reasons when weighed against that of Witness BCW, it did not do so. Rather, it expressly stated that it did not discount Witness Bararengana's evidence.¹⁹⁷

¹⁹² See *supra* Section III.A.2 (Ground 6: Alleged Errors in Evaluating Exculpatory Evidence Related to Kesho Hill). The Appeals Chamber notes that the three hour estimate does not include the additional twenty to thirty minute distance from Kanombe to Kigali, which was relevant to the discussion of the Kesho Hill convictions, but not to the events at the Kiyovu Roadblock.

¹⁹³ In view of this conclusion, the Appeals Chamber does not find it necessary to discuss the additional evidence related to the viability of the Ruhengeri route.

¹⁹⁴ See *supra* para. 56.

¹⁹⁵ Trial Judgement, paras. 246-248. See also Trial Judgement, para. 87, n. 88.

¹⁹⁶ See T. 6 March 2007 p. 45.

¹⁹⁷ Trial Judgement, para. 250.

71. When viewed as a whole under the correct standard, the evidence in support of Zigiranyirazo's alibi, which was not discounted by the Trial Chamber, provides a reasonable basis to conclude that he remained in Rubaya and its surrounding area on 12 and 17 April 1994. Accordingly, the Appeals Chamber finds that the alibi evidence casts doubt on the Prosecution evidence placing him at the Kiyovu Roadblock on 12 and 17 April 1994.

72. The Trial Chamber found Witness BCW, who testified to Zigiranyirazo's presence at the Kiyovu Roadblock, to be a "clear and forthright witness."¹⁹⁸ In certain contexts, this might be enough to eliminate the reasonable possibility that Zigiranyirazo's alibi was true. However, in this case, the Trial Chamber did not reach its conclusions on the credibility of Witness BCW after assessing his account in light of the properly considered alibi evidence. This raises serious questions about the reasonableness of the Trial Chamber's findings on Witness BCW's credibility. The Appeals Chamber considers that, given the distance between Rubaya and Kiyovu, a reasonable trier of fact could not be convinced that Witness BCW credibly placed Zigiranyirazo there on 12 and 17 April 1994 and at the same time not discount the evidence of his alibi.

73. In sum, the Appeals Chamber concludes that the Trial Chamber erred in law and in fact in its assessment of the alibi evidence for the period from 11 to 17 April 1994, by misapprehending the applicable legal principles, failing to consider or provide a reasoned opinion with respect to relevant evidence, and misconstruing key evidence related to the alibi. The Appeals Chamber considers that these errors constituted a miscarriage of justice and invalidated the verdict, and thus that the Trial Chamber's findings on Zigiranyirazo's participation in the crimes committed at the Kiyovu Roadblock must be overturned.

74. Accordingly, the Appeals Chamber grants the Twelfth Ground of Appeal and reverses the Trial Chamber's conviction for aiding and abetting genocide based on Zigiranyirazo's participation in the killings at the Kiyovu Roadblock. Consequently, there is no need to assess Zigiranyirazo's remaining arguments concerning the events at the Kiyovu Roadblock under this or other grounds of appeal.¹⁹⁹

¹⁹⁸ Trial Judgement, para. 236. *See also* Trial Judgement, paras. 243, 244 (further describing Witness BCW's testimony as "detailed" and "consistent").

¹⁹⁹ More specifically, Zigiranyirazo's additional grounds of appeal concerning the Kiyovu Roadblock are the following: In the Seventh Ground of Appeal, Zigiranyirazo challenges his conviction based on the Trial Chamber's finding that his actions amounted to the standard of aiding and abetting. *See* Zigiranyirazo Notice of Appeal, para. 7; Zigiranyirazo Appeal Brief, paras. 232-247. In the Eighth Ground of Appeal, he challenges the Trial Chamber's findings that he had the requisite *mens rea* for aiding and abetting genocide. *See* Zigiranyirazo Notice of Appeal, para. 8; Zigiranyirazo Appeal Brief, paras. 248-268. In the Ninth Ground of Appeal, he challenges his conviction based on the existence of the roadblock at Kiyovu. *See* Zigiranyirazo Notice of Appeal, para. 9; Zigiranyirazo Appeal Brief, paras. 269-289. In the

4. Conclusion

75. In reversing Zigiranyirazo's convictions for genocide and extermination as a crime against humanity, the Appeals Chamber again underscores the seriousness of the Trial Chamber's errors. The crimes Zigiranyirazo was accused of were very grave, meriting the most careful of analyses. Instead, the Trial Judgement misstated the principles of law governing the distribution of the burden of proof with regards to alibi and seriously erred in its handling of the evidence. Zigiranyirazo's resulting convictions relating to Kesho Hill and the Kiyovu Roadblock violated the most basic and fundamental principles of justice. In these circumstances, the Appeals Chamber had no choice but to reverse Zigiranyirazo's convictions.

Tenth Ground of Appeal, he challenges his conviction based on the Trial Chamber's failure to address prior inconsistent statements of Witness BCW. *See* Zigiranyirazo Notice of Appeal, para. 10; Zigiranyirazo Appeal Brief, paras. 290-310. In the Eleventh Ground of Appeal, he challenges his conviction based on the Trial Chamber's acceptance of Witness ATO's testimony regarding the presence of General Gratién Kabiligi at the roadblock. *See* Zigiranyirazo Notice of Appeal, para. 11; Zigiranyirazo Appeal Brief, para. 311.

B. Other Grounds of Appeal (Grounds 13 to 16)

76. In his Thirteenth through Sixteenth Grounds of Appeal, Zigiranyirazo raises more general arguments against his convictions with respect to the events at both Kesho Hill and the Kiyovu Roadblock.²⁰⁰ As discussed under Zigiranyirazo's Sixth and Twelfth Grounds of Appeal, the Appeals Chamber has reversed Zigiranyirazo's convictions for genocide and extermination as a crime against humanity. Accordingly, the Appeals Chamber need not address any of the other alleged errors advanced by Zigiranyirazo relating to his convictions.

²⁰⁰ More specifically, in the Thirteenth Ground of Appeal, Zigiranyirazo challenges his conviction based on the Trial Chamber's failure to consider that evidence against him was discovered only after his arrest. *See* Zigiranyirazo Notice of Appeal, para. 13; Zigiranyirazo Appeal Brief, paras. 401-408. In the Fourteenth Ground of Appeal, he challenges his conviction based on the Trial Chamber's limited consideration of evidence relating to his good relations with Tutsis. *See* Zigiranyirazo Amended Notice of Appeal, para. 14; Zigiranyirazo Appeal Brief, paras. 409-419. In the Fifteenth Ground of Appeal, he challenges his conviction based on the Trial Chamber's reliance on unsigned will-say statements in assessing the credibility of witnesses. *See* Zigiranyirazo Notice of Appeal, para. 15; Zigiranyirazo Appeal Brief, paras. 420-428. In the Sixteenth Ground of Appeal, he challenges his conviction based on the Trial Chamber's reliance on a revised Kinyarwanda translation of testimony not made available to him. *See* Zigiranyirazo Notice of Appeal, para. 16; Zigiranyirazo Appeal Brief, paras. 429-435.

IV. SENTENCING APPEALS (ZIGIRANYIRAZO'S GROUND 17 AND PROSECUTION APPEAL)

77. The Trial Chamber sentenced Zigiranyirazo to 20 years of imprisonment for genocide on the basis of his criminal acts at Kesho Hill (Count 2); 15 years of imprisonment for aiding and abetting genocide on the basis of his criminal acts at the Kiyovu Roadblock (Count 2); and 20 years of imprisonment for extermination as a crime against humanity for the events at Kesho Hill (Count 4).²⁰¹ It directed that these sentences be served concurrently.²⁰²

78. Zigiranyirazo and the Prosecution have both appealed these sentences.²⁰³ The Appeals Chamber has reversed all of Zigiranyirazo's convictions under his Sixth and Twelfth Grounds of Appeal. Accordingly, the Appeals Chamber need not address any alleged errors relating to his sentences.

²⁰¹ Trial Judgement, paras. 427, 436, 447, 468-470.

²⁰² Trial Judgement, para. 471.

²⁰³ Zigiranyirazo Notice of Appeal, para. 17; Zigiranyirazo Appeal Brief, paras. 436-466; Prosecution Appeal Brief, paras. 4, 18-104; Prosecution Notice of Appeal, paras. 1-3, 5. In its Appeal Brief, the Prosecution abandons a sub-ground of appeal, raised in its Notice of Appeal, concerning the Trial Chamber's alleged failure to give sufficient consideration to Rwanda's sentencing framework. *See* Prosecution Notice of Appeal, para. 4; Prosecution Appeal Brief, para. 4, n. 6.

V. DISPOSITION

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

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

SITTING in open session;

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 28 September 2009;

GRANTS Protais Zigiranyirazo's Sixth and Twelfth Grounds of Appeal, **REVERSES** his convictions for genocide and extermination as a crime against humanity for participating in the massacre on 8 April 1994 at Kesho Hill in Gisenyi Prefecture and for aiding and abetting genocide on 12 and 17 April 1994 in connection with the killings at the Kiyovu Roadblock in Kigali, and **ENTERS** a verdict of acquittal under Counts 2 and 4 of the Indictment;

DISMISSES as moot Protais Zigiranyirazo's remaining grounds of appeal, the Prosecution's Appeal, as well as all pending motions for the admission of additional evidence;

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

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

Theodor Meron
Presiding Judge

Mehmet Güney
Judge

Fausto Pocar
Judge

Liu Daqun
Judge

Carmel Agius
Judge

Done this 16th day of November 2009 at Arusha, Tanzania.

VI. ANNEX A – PROCEDURAL HISTORY

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

A. Notices of Appeal and Briefs

2. Trial Chamber III rendered the judgement in this case on 18 December 2008. Both parties appealed.

1. Zigiranyirazo Appeal

3. Zigiranyirazo submitted his Notice of Appeal on 19 January 2009.¹ On 28 January 2009, the Pre-Appeal Judge granted his request for an extension of time to file his Appellant's brief within 40 days of the filing of the French translation of the Trial Judgement.² On 10 February 2009, Zigiranyirazo requested leave to amend his grounds of appeal and annexed the Amended Notice of Appeal to his motion.³ On 18 March 2009, the Appeals Chamber granted the request and accepted as filed the Amended Notice of Appeal.⁴

4. On 14 May 2009, the Pre-Appeal Judge denied Zigiranyirazo's request for an extension of the word limit in his Appellant's brief.⁵ On 19 May 2009, Zigiranyirazo filed his Appellant's brief.⁶ The Prosecution filed its Respondent's brief on 29 June 2009.⁷ On 3 July 2009, the Pre-Appeal Judge denied Zigiranyirazo's request for an extension of time to file his Reply brief following the translation of the Prosecution's Respondent's brief into French.⁸ Zigiranyirazo filed his Reply brief on 10 July 2009.⁹

2. Prosecution Appeal

5. The Prosecution submitted its Notice of Appeal on 15 January 2009.¹⁰ It filed its Appellant's brief on 16 February 2009.¹¹ On 10 March 2009, the Appeals Chamber granted Zigiranyirazo a 15-day extension of time to file his Respondent's brief following the filing of the French version of the

¹ Notice of Appeal, 19 January 2009.

² Decision on Protais Zigiranyirazo's Motion for an Extension of Time, 28 January 2009.

³ Zigiranyirazo Motion for Leave to Amend Notice of Appeal, 10 February 2009 (Annex A: Amended Notice of Appeal, 9 February 2009).

⁴ Decision on Protais Zigiranyirazo's Motion for Leave to Amend Notice of Appeal, 18 March 2009.

⁵ Decision on Protais Zigiranyirazo's Motion for Variation of the Word Limits, 14 May 2009.

⁶ Appellant's Brief, 19 May 2009.

⁷ Prosecutor's Respondent's Brief, 29 June 2009.

⁸ Decision on Protais Zigiranyirazo's Motion for an Extension of Time for the Filing of the Reply Brief, 3 July 2009.

⁹ Appellant's Reply Brief, 10 July 2009.

¹⁰ Prosecutor's Notice of Appeal, 15 January 2009.

¹¹ Prosecutor's Appellant's Brief, 16 February 2009.

Trial Judgement and the Prosecution's Appellant's brief.¹² On 1 May 2009, Zigiranyirazo submitted his Respondent's brief.¹³ The Prosecution filed its Reply brief on 11 May 2009.¹⁴ On 14 May 2009, the Pre-Appeal Judge denied the Prosecution's motion to strike portions of Zigiranyirazo's Respondent's brief.¹⁵

B. Assignment of Judges

6. On 13 January 2009, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun, and Judge Theodor Meron.¹⁶ Judge Theodor Meron was elected Presiding Judge in the case, and he acted as Pre-Appeal Judge. On 5 May 2009, the Presiding Judge of the Appeals Chamber designated Judge Carmel Agius to replace Judge Mohamed Shahabuddeen in this case.¹⁷

C. Motions Related to Hearing Additional Evidence on Appeal

7. On 16 September 2009, the Appeals Chamber denied Mr. Zigiranyirazo's first motion to admit several categories of additional evidence.¹⁸ However, on 24 September 2009, the Appeals Chamber granted Mr. Zigiranyirazo's second motion and admitted two exhibits related to feasibility of travel between Kigali and Gisenyi Prefecture via Ruhengeri Prefecture during the relevant period.¹⁹

8. On 9 October 2009, the Prosecution filed a motion to admit rebuttal evidence, namely the transcripts and other relevant exhibits tendered during the evidence of Defence Witnesses BMP and YNZ, whose testimonies underlie the relevant findings of the excerpt of the *Karera* Trial Judgement, which was admitted by the Appeals Chamber on 24 September 2009.²⁰ On 12 October 2009, Zigiranyirazo filed a consolidated response and third motion for the admission of additional evidence related to the feasibility of travel between the Kigali area and Gisenyi

¹² Decision on Protais Zigiranyirazo's Motion for an Extension of Time for the Filing of the Respondent's Brief, 10 March 2009.

¹³ Defence Response to Prosecutor's Appellant's Brief (Appeal Against Sentence), 1 May 2009.

¹⁴ Prosecutor's Brief in Reply, 11 May 2009.

¹⁵ Decision on Prosecutor's Motion to Strike Portions of Protais Zigiranyirazo's Respondent's Brief, 14 May 2009.

¹⁶ Order Assigning Judges to a Case Before the Appeals Chamber, 13 January 2009.

¹⁷ Order Replacing a Judge in a Case Before the Appeals Chamber, 5 May 2009.

¹⁸ Decision on Zigiranyirazo's Motion for Admission of Additional Evidence on Appeal, 16 September 2009.

¹⁹ Decision on Zigiranyirazo's Second Motion for Admission of Additional Evidence on Appeal, 24 September 2009.

²⁰ Prosecutor's Motion to Present Rebuttal Evidence Pursuant to Rule 115, 9 October 2009.

Prefecture via Ruhengeri Prefecture during the period.²¹ After considering the merits of the appeal, the Appeals Chamber did not find it necessary to address the contested issue of the viability of the Ruhengeri route,²² and as such these motions were dismissed as moot.²³

D. Hearing of the Appeals

9. On 27 August 2009, the Appeals Chamber invited the parties: (i) to develop their submissions on the Trial Chamber's assessment of the alibi, specifically in comparison to other cases where the Appeals Chamber has considered the issue of alibi; and (ii) to discuss, with references to the record, the feasibility of travel along the route between Kigali and Gisenyi Prefecture via Ruhengeri Prefecture during the relevant period.²⁴ On 18 September 2009, the Appeals Chamber invited the parties to focus their submissions on Zigiranyirazo's Fifth, Sixth, Seventh, and Twelfth Grounds of Appeal.²⁵ On 28 September 2009, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 20 July 2009.²⁶

²¹ Response to Prosecutor's Motion to Present Rebuttal Evidence Pursuant to Rule 115 RPE and Motion to Allow Appeals Chamber to Take Cognizance of Additional Evidence under Rule 115 and for a Disclosure Order, 12 October 2009.

²² *See supra* nn. 134, 193.

²³ *See supra* para. 79.

²⁴ Order for the Preparation of the Appeal Hearing, 27 August 2009.

²⁵ Second Order for the Preparation of the Appeal Hearing, 18 September 2009.

²⁶ Scheduling Order, 20 July 2009.

VII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

Gacumbitsi

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

Kajelijeli

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

Kamuhanda

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Judgment and Sentence, 22 January 2004 (“*Kamuhanda Trial Judgement*”)

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 (“*Kamuhanda Appeal Judgement*”)

Karera

The Prosecutor v. François Karera, Case No. ICTR-01-74-T, Judgement and Sentence, 7 December 2007 (“*Karera Trial Judgement*”)

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 (“*Karera Appeal Judgement*”)

Kayishema and Ruzindana

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

Muhimana

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

Musema

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

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

Muvunyi

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 (“*Muvunyi Appeal Judgement*”)

Nahimana et al.

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

Ndindabahizi

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

Niyitegeka

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka Appeal Judgement*”)

Ntakirutimana

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

Semanza

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

Seromba

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

Simba

The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-T, Judgement and Sentence, 13 December 2005 (“*Simba Trial Judgement*”)

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

2. ICTY

Delalić et al.

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

Halilović

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 (“*Halilović Appeal Judgement*”)

Krstić

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

Kvočka et al.

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al. Appeal Judgement*”)

Limaj et al.

Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66-T, Judgement, 30 November 2005 (“*Limaj et al. Trial Judgement*”)

Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66-A, Judgement, 27 September 2007 (“*Limaj et al.* Appeal Judgement”)

Mrkšić and Šljivančanin

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 (“*Mrkšić and Šljivančanin* Appeal Judgement”)

B. Defined Terms and Abbreviations

Defence Closing Brief

The Prosecutor v. Protais Zigiranyirazo, Case No. ICTR-01-73-T, Defence Closing Brief: (Rule 86(a)), 30 April 2008

ICTR

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

ICTY

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

Indictment

The Prosecutor v. Protais Zigiranyirazo, Case No. ICTR-2001-73-I, Amended Indictment, 8 March 2005

n. (nn.)

footnote (footnotes)

p. (pp.)

page (pages)

para. (paras.)

paragraph (paragraphs)

Practice Direction on Formal Requirements for Appeals from Judgement

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

Prosecution Appeal Brief

Prosecutor's Appellant's Brief, 16 February 2009

Prosecution Notice of Appeal

Prosecutor's Notice of Appeal, 15 January 2009

Prosecution Reply Brief

Prosecutor's Brief in Reply, 11 May 2009

Prosecution Response Brief

Prosecutor's Respondent's Brief, 29 June 2009

Rules

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

Statute

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

T.

Transcript

Trial Judgement

The Prosecutor v. Protais Zigiranyirazo, Case No. ICTR-01-73-T, Judgement, 18 December 2008

Zigiranyirazo Appeal Brief

Appellant's Brief, 19 May 2009

Zigiranyirazo Notice of Appeal

Amended Notice of Appeal (Rule 108 R.P.E.), 9 February 2009

Zigiranyirazo Reply Brief

Appellant's Reply Brief, 10 July 2009

Zigiranyirazo Response Brief

Defence Response to Prosecutor's Appellant's Brief (Appeal Against Sentence), 1 May 2009