International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ENGLISH
Original: French

APPEALS CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Fausto Pocar
Judge Theodor Meron

Registry: Adama Dieng

Judgement of: 3 July 2002

THE PROSECUTOR
(Appellant)
v.
Ignace BAGILISHEMA
(Respondent)

Case No. ICTR-95-1A-A

JUDGEMENT
(REASONS)

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Sonja Boelaert-Suominen
Mathias Marcussen

Counsel for the Defence:
François Roux
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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seized of an appeal filed by the Prosecution ("the Appellant") against the Judgement rendered by Trial Chamber I of the Tribunal ("the Trial Chamber") on 7 June 2001 in the case of *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T (the "Judgement").

2. On 3 July 2002, following the Appeal Hearing of 2 July 2002 in Arusha, the Appeals Chamber rendered its Judgement, unanimously dismissing the Appeal filed by the Prosecution. On that occasion, the Appeals Chamber indicated that the reasons for its Judgement would be made available to the parties as soon as possible.

3. Accordingly, the Appeals Chamber

SETS OUT HEREIN THE REASONS FOR ITS JUDGEMENT.

I. INTRODUCTION

A. Trial Proceedings

4. The amended Indictment of 17 September 1999, on the basis of which Ignace Bagilishema (the "Respondent", "Bagilishema" or the "Accused") was tried, charged the Respondent with involvement in criminal acts perpetrated in Mabanza *commune* between 1 April and 31 July 1994 (the "Indictment"). In his capacity as *bourgmestre* of the said *commune*, Bagilishema was charged under Articles 6(1) and 6(3) of the Statute (individual criminal responsibility) with seven distinct counts in respect of the following crimes: genocide, punishable under Article 2(3)(a) of the Statute (Count 1); complicity in genocide, punishable under Article 2(3)(e) of the Statute (Count 2); crimes against humanity, punishable under Articles 3(a), 3(b) and 3(i) of the Statute (Counts 3, 4 and 5); serious violations of common Article 3 of the Geneva Conventions and of Additional Protocol II, punishable under Articles 4(a) and 4(e) of the Statute (Counts 6 and 7).

5. On 18 September 1999, Bagilishema pleaded not guilty to all the counts in the Indictment. The trial commenced on 27 October 1999, and ended on 19 October 2000, when the case was adjourned for deliberation.

6. In its Judgement rendered on 7 June 2001, the Trial Chamber acquitted Bagilishema on all counts in the Indictment.[1] The Chamber also ordered the immediate release of the Accused pursuant to Rule 99(A) of the Tribunal's Rules of Procedure and Evidence (the "Rules").

B. Appeal Proceedings[2]

7. The Prosecution appealed the Judgement on 9 July 2001. It advanced three grounds of appeal. Two of these contained several submissions, which the Appeals Chamber summarized as follows at the appeal hearing:[3]

Ground 1: Allegations of errors relating to Article 6(3) of the Statute, which comprises three submissions:

First and second submission: The Trial Chamber erred in law and fact in its assessment of the mental element provided for in Article 6(3) of the Statute. The Trial Chamber is alleged to have committed an error of law as a result of having failed to ask whether Bagilishema had reason to know that crimes had been committed by his subordinates at the Trafipro roadblock. Assuming that the Appeals Chamber is of the opinion that the Trial Chamber has examined the test of whether the Respondent had reason to know, the Trial Chamber committed a factual error for having found that the Respondent had no "reason to know" that crimes had been committed at the Trafipro roadblock.

Third submission: The Trial Chamber made a wrong legal analysis of the superior-subordinate relationship under Article 6(3) of the Statute.

Ground 2: Allegation of errors relating to the admission of written confessions of Witnesses AA, Z and Y.

Ground 3: Allegation of errors relating to the assessment and evaluation of evidence relating to the Trafipro roadblock and the Gatwaro Stadium. With regard to this ground of appeal, the Prosecutor alleged three general errors and three "specific" errors.

(A) "General" errors:

(i) First error: Application of a wrong criteria with regard to the assessment of evidence relating to the presence of the Accused at the Gatwaro Stadium during the period when the refugees were locked up and subjected to maltreatment, as well as during the Gatwaro attack;

(ii) Second error: The Trial Chamber erred in its use of prior written statements;

(iii) Third error: Erroneous finding relating to Witness Z.

(B) "Specific" errors:

(i) First error: Error relating to the assessment made by the Trial Chamber regarding the evidence tendered with regard to Trafipro roadblock;

(ii) Second error: Error in the assessment of the evidence relating to the murder of Judith;

(iii) Third error: Error relating to the assessment of evidence relating to the presence of the Accused at the Gatwaro Stadium on 13, 14 and 18 April 1994.

C. Standard of review for an appeal against acquittal

8. The present appeal is filed by the Prosecution against acquittal by the Trial Chamber. This type of appeal is provided for under Article 24 of the Tribunal's Statute, which states that the two parties may lodge an appeal on grounds of an error of law or of fact.[4] On several occasions, the Appeals Chamber has reiterated the standards to be applied in considering errors on a question of law and errors of fact raised in an appeal against conviction.[5] However, the Appeals Chamber has never had the opportunity to define the standards to be applied in considering appeals by the Prosecution against acquittal, and deems it necessary to do so in the present matter, inasmuch as the greater part of the Prosecution's grounds of appeal relates to allegations of errors of fact.

9. With regard to allegations of errors on a question of law, the Appeals Chamber considers that the standards of review are the same for the two types of appeal: following the example of a party appealing against conviction, an appeal by the Prosecution against acquittal, which alleges that the Trial Chamber committed an error on a question of law, must establish that the error invalidates the decision.

10. With regard to errors of fact in appeals against conviction, the Appeals Chamber applies the standard of the "unreasonableness" of the impugned finding. The Appeals Chamber must determine whether the finding of guilt beyond reasonable doubt is one which no reasonable tribunal of fact *could have* reached, it being understood that the Appeals Chamber can only overturn a decision of the Trial Chamber where the alleged error of fact occasioned a miscarriage of justice. An appellant who alleges an error of fact must therefore show both the error that was committed and the miscarriage of justice resulting therefrom.[6]

11. As the Appeals Chambers of both the ICTR and the ICTY have repeatedly stressed, an appeal is not an opportunity for a *de novo* review of the case. The Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber."[7] Because "[t]he

task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber, […] [i]t is only when the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber."[8] Two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[9]

12. The Appeals Chamber has also repeatedly explained the reasons for this deference to the factual findings of the Trial Chambers. As the ICTY Appeals Chamber put it in the *Kupreškić* Appeal Judgement:

> The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.[10]

13. The same standard of unreasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, as when considering an appeal by the accused, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the challenged finding.

14. Under Article 24(1)(b) of the Statute, the Prosecution, like the accused, must demonstrate "an error of fact that occasioned a miscarriage of justice." For the error to be one that occasioned a miscarriage of justice, it must have been "critical to the verdict reached."[11] Because the Prosecution bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution faces a more difficult task. It must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.

II. INADMISSIBILITY OF THE PROSECUTION'S APPEAL

15. The Respondent argues that the Appellant's Brief is inadmissible because (1) the Prosecution did not comply with the Practice Direction on the Length of Briefs and Motions on Appeal right from the beginning of the appeal process, and (2) the decision rendered on 30 November 2001 by the Pre-hearing Judge was violated. Generally speaking, the Respondent requests the Appeals Chamber:

> […] to note (i) that the Prosecution has been granted several extensions of time to file its Brief in compliance with the Practice Direction of 13.8.01; (ii) that notwithstanding the various extensions, the Prosecutor has not respected the time-limits granted him; and (iii) that his Brief violates Article 20 (a) of the Statute, and, consequently, to find and rule that the third version of the Prosecutor's Appeal Brief of 19 December 2001 is inadmissible, and, accordingly to dismiss the notice of appeal.[12]

16. On 13 August 2001, the Presiding Judge of the Appeals Chamber signed the Practice Direction on the Length of Briefs and Motions on Appeal (the "Practice Direction"), which came into force on the day it was notified to the parties, namely 19 September 2001.[13] The Prosecution filed its Appeal Brief on 29 October 2001, in conformity with the guidelines laid down by the Pre-hearing Judge.[14] On 2 November 2001, the Prosecution filed a motion in which it acknowledged that its Appeal Brief exceeded the maximum number of pages set forth in the Practice Direction,[15] and requested the Appeals Chamber to admit its Brief as filed on 29 October 2001 and, in the alternative, to grant it an extension of seven (7) days to file a new Brief. On 30 November 2001, the Pre-hearing Judge ruled on the Motion as follows:

> Whereas, as a result, the Appellant's Brief is not in order, and whereas it is necessary for the Appellant to comply with the requirements of the Practice Direction; whereas the interests of justice require that the Appellant should file a new brief within a reasonable time-limit, and whereas the seven-day extension of time requested by the Appellant to file a new brief is reasonable;
>
> […] Grant the alternative request in the Prosecution's Motion and Order the Prosecution to file an Appellant's Brief that complies with the criteria set forth in the Practice Direction within seven (7) days from the date of this Decision.[16]

17. The Prosecution filed a second version of its appeal brief on 7 December 2001, in conformity with the aforementioned Decision of the Pre-hearing Judge. On 14 December 2001, the Deputy Registrar of the Tribunal informed the President and Judges of the Appeals Chamber that the Appellant's Brief, containing more than 40,000 words, did not conform to the Practice Direction nor to the Pre-hearing Judge's Decision of 30 November 2001.

18. On 19 December 2001, the Prosecution filed a motion requesting the Pre-hearing Judge to accept the observations of the Registry with respect to the number of words contained in the brief, and acknowledged that the said brief did not conform to the criteria set out in the Practice Direction. It further requested the Appeals Chamber to grant the Prosecution a further extension of time to enable it to file a brief in conformity with the Practice Direction, which was attached to the motion. In its motion, the Prosecution explained that it had concentrated on reducing the number of pages without paying attention to the number of words on each page, and that upon receiving the observations of the Registry, it had reduced its brief to 29,867 words.

19. On the same day, the Pre-hearing Judge rendered the following Decision:

> Considering that the Decision of 30 November 2001 directed the Prosecution to file an Appellant's Brief in compliance with the applicable Practice Direction;
>
> Whereas the arguments put forth by the Prosecution in support of its motion in themselves do not constitute sufficient justification for an extension of time;
>
> Whereas, however, to ensure that the proceedings are not unduly delayed, it is necessary to allow the Appellant to file the new Brief as attached to his Motion;

Whereas furthermore by failing to file an Appellant's Brief in compliance with the Decision of 30 November 2001, the Appellant failed to comply with the order of the Pre-hearing Judge in the said Decision and having ascertained Appellant's non-compliance with this order, the Appeals Chamber will *take appropriate disciplinary measures, if necessary and at the right moment*.

For the foregoing reasons, we

Allow the Appellant to file his new Brief attached to the motion for extension of time;

Request the Registry to translate the new Appellant's Brief into French and to serve the said document on the parties before 7 January 2002;

Affirm that, at this stage of appeal proceedings, time allotted for response by the Respondent will commence when the Registry serves the Respondent and his Counsel with the French version of the new Appellant's Brief.[17]

20. Before the Appeals Chamber, the Respondent submits that the appropriate disciplinary measure is a declaration of nullity of the Appellant's Brief, which, according to the Respondent, was filed out of time.[18] In support of his argument, the Respondent refers to the *Kayishema/Ruzindana* Appeal Judgement, which states:

[…] procedural time-limits are to be respected and […] are indispensable to the proper functioning of the Tribunal and to the fulfilment of its mission to do justice. Violation of these time-limits, unaccompanied by any showing of good cause, will not be tolerated.[19]

21. The Appeals Chamber rejects the Respondent's arguments. Considering the exceptional circumstances of this case, the Appeals Chamber holds that there is no reason for imposing any specific disciplinary measure on the Prosecution. The disciplinary measure consisting in declaring the Appellant's Brief irregular and the appeal inadmissible because of non-compliance with the requirements of the Practice Direction is inappropriate in the instant case and would be quite disproportionate. In the case of *The Prosecutor v. Kayishema and Ruzindana*, the decision of the Appeals Chamber setting the deadline for the filing of briefs was clear, but the Prosecution failed to comply with it. It did not seek an extension of time to file its brief prior to that deadline; its motion for clarification of the time-limits was filed late, and the Appeals Chamber considered, in the judgement, that it had failed to substantiate the basis upon which it was seeking relief. Its formal motion for extension of time was finally submitted over two months after the deadline had expired. The Prosecution also failed to comply with the new deadline set by the Pre-hearing Judge. There was therefore a repeated pattern of non-compliance and a lack of diligence on the part of the Prosecution in the *Kayishema*/*Ruzindana* case. In the present case, however, the failure to comply is of a markedly different nature; the Prosecution did file its brief in conformity with the guidelines set by the Pre-hearing Judge.

22. Furthermore, the Prosecution, after accepting the observations of the Registry regarding the number of words in the brief and acknowledging that the brief in question did not comply with the criteria set out in the Practice Direction, took the necessary steps to cure the non-compliance with the text referred to above. The Appeals Chamber considers that the Prosecution has thus shown proof of dispatch in filing a new brief in

compliance with the criteria in the Practice Direction on the same day that it filed the motion for extension of time. The Prosecution therefore took the necessary steps to correct its error as quickly as possible and immediately after the problem was brought to its notice. In any case, the Defence has failed to establish that he was prejudiced in any way.

23. For these reasons, the Appeals Chamber dismisses all of the Respondent's arguments on the inadmissibility of the appeal.

III. FIRST GROUND OF APPEAL: ALLEGATIONS OF ERRORS RELATING TO ARTICLE 6(3) OF THE ATATUTE

24. In its first ground of appeal, the Prosecution advances three submissions relating to the analysis made by the Trial Chamber of the Respondent's responsibility founded on Article 6(3) of the Statute and to the findings based thereon with regard to the crimes committed at the Trafipro roadblock in Mabanza *commune*:[20]

- First submission: the Trial Chamber committed an error in not ruling on the issue as to whether the Respondent "had reason to know" that crimes had been committed by his subordinates at the Trafipro roadblock;[21]

- Second submission: the Trial Chamber committed an error in finding that the Respondent did "not have reason to know" that crimes had been committed by his subordinates at the said roadblock;[22] and

- Third submission: the Trial Chamber committed an error of law in its legal analysis of the conditions required for a person to be considered as a superior within the meaning of Article 6(3) of the Statute.[23]

25. With regard to the first two submissions, the Prosecution requests the Appeals Chamber to quash the acquittal of the Respondent on Counts 1, 3 and 6 of the Indictment and to remit the case to a Trial Chamber. On the basis of the third submission, the Prosecution requests this Chamber to note the errors raised and to make the necessary corrections in the interests of justice.[24]

1. Whether the Trial Chamber considered the "had reason to know" test

26. The Appeals Chamber emphasizes, first of all, that the Prosecution does not contest the analysis which the Trial Chamber made of the applicable law,[25] but only contests the application by the said Chamber of the criteria set out in Article 6(3) of the Statute. The Prosecution submits that the Trial Chamber committed an error of law in not seeking to know whether the Accused "had reason to know" in terms of Article 6(3) of the Statute, or, in other words, whether he possessed information which put him on notice of the risk of crimes being committed or crimes which have been committed and requiring him to carry out an additional investigation or punish his subordinates guilty of such crimes.[26]

27. For a proper interpretation of the "had reason to know" standard, the Prosecution relies on the manner in which this issue was addressed in the *Čelebići* Appeal Judgement[27] and proposes an interpretation of the concept of "inquiry notice" (i.e., a superior's affirmative duty to inquire further when put on notice). The Prosecution dwells at length on the question of applying the above standard to civilian superiors in support of its argument that the said obligation applies to all superiors.[28] Referring to paragraphs 966 to 989 of the Trial Judgement, the Appellant submits that the Trial Chamber only tried to establish, on the basis of direct or circumstantial evidence, that the Respondent had actual knowledge of the facts.[29] According to the Prosecution, the Trial Chamber's findings in paragraphs 988 and 989 of the Judgement reveal that the "had reason to know" standard was not examined.[30] It further submits that insofar as the standard of criminal negligence as applied by the Trial Chamber[31] differs from that used in the *Čelebići* Appeal Judgement, it is necessary to determine whether the legal ingredients required for criminal negligence[32] could amount to the "had reason to know" standard,[33] in accordance with the *Čelebići* jurisprudence.[34]

28. After considering the Appellant's arguments, the Appeals Chamber holds, for the reasons set out below, that the Trial Chamber actually examined the "had reason to know" standard. However, the distinction between the "knowledge" and "had reason to know" standards could have been expressed more clearly by the Trial Chamber. The "had reason to know" standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused actually knew that crimes had been committed or were about to be committed. It merely requires that the Chamber be satisfied that the accused had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates."[35]

29. In paragraph 896 of the Judgement, the Trial Chamber set forth the standard for establishing the Accused's *mens rea* under Article 6(3) of the Statute:

> […] *the knowledge element of superior responsibility* will be fulfilled if the Accused actually knew of one or more crimes committed or about to be committed in connection with a roadblock, or alternatively was put on notice and failed to inquire further.[36]

The Trial Chamber further considered "'knowledge' [as] an indispensable element of […] the liability of a superior […]", by holding that "the mental element of knowledge [must be] demonstrated beyond reasonable doubt."[37] On the basis of this definition, the Trial Chamber found, after examining the direct evidence, that it was not in a position to establish that the Accused *had knowledge* of the murders of Judith and Bigirimana.[38] It therefore proceeded to examine the concept of "knowledge", or the Accused's *mens rea* under Article 6(3) of the Statute, on the basis of the available circumstantial evidence, guided by the indicia set down by the Commission of Experts in its Final Report.[39]

30. The Appeals Chamber recalls that the murders of Judith and Bigirimana are the only criminal acts acknowledged by the Trial Chamber as having been perpetrated by subordinates of the Respondent. With regard to the murder of Bigirimana, the Trial Chamber held in paragraph 974 of the Judgement that it was not convinced that the

Accused *had been notified* of the imminent offence by Bigirimana's wife.[40] It also underscored the fact that "it [was] not possible […] to look to other known facts in an effort to determine whether the Accused was at his office or at the *bureau communal*, or at any rate close by, when the offence was committed." The Trial Chamber further held that "[a]s the Accused's location is unknown for the date on which Bigirimana was killed, the corresponding indicium of knowledge does not enter into the Chamber's calculations."[41] With respect to the murder of Judith, the Trial Chamber, in considering the Accused's responsibility as superior,[42] took into account its earlier findings, and in particular, the fact that the Respondent denied *having had knowledge* of the murder of Judith.[43] Besides, it appears from paragraphs 986 *et seq*. of the Trial Judgement that the Trial Chamber considered the Prosecution's theory that the Accused "*would have found out about*" the murder of Judith later and "upon being informed of the crime should have initiated an investigation to identify and punish the perpetrators" of the crime. The Trial Chamber also held the view that "the claim that Judith's murder was *public knowledge* in Mabanza *commune* [lacked] *sufficient foundation*."[44] Following an examination of the indicia relating to the Accused's presence, the geographical location, the time, and *modus operandi*, the Trial Chamber came to the conclusion that there was no evidence to show that the killings of Judith and Bigirimana were not just isolated or exceptional incidents, rather than illustrations of a routine of which the Accused *could not plausibly have remained unaware*.[45] In other words, the Trial Chamber decided that the evidence put forward by the Prosecution did not prove beyond reasonable doubt that the Accused had reason to know that murders had been committed at the Trafipro roadblock.

31. The Appeals Chamber considers that the Prosecution's submissions are based on a partial analysis of the Trial Judgement. The Appeals Chamber concedes that the Trial Chamber did not explicitly refer to the "had reason to know" standard. The Appeals Chamber believes, however, that simply because the Trial Chamber did not explicitly declare that the Accused did not "have reason to know" does not mean that the Chamber did not refer to the standard. An analysis of the Judgement shows that the Trial Chamber indeed sought to know whether the Accused had sufficient information enabling the Chamber to find beyond a reasonable doubt that the Accused "had reason to know."

32. Moreover, with regard to the concept of "criminal negligence" challenged by the Prosecution,[46] the Appeals Chamber observes that the Trial Chamber identified criminal negligence as a "third basis of liability."[47] This form was qualified as a liability by omission, which takes the form of "criminal dereliction of a public duty."[48]

33. The Appeals Chamber wishes to recall and to concur with the *Čelebići* jurisprudence,[49] whereby a superior's responsibility will be an issue only if the superior, whilst some general information was available to him which would put him on notice of possible unlawful acts by his subordinates, did not take the necessary and reasonable measures to prevent the acts or to punish the perpetrators thereof.

34. The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both

unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.

35. References to "negligence" in the context of superior responsibility are likely to lead to confusion of thought, as the Judgement of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them.[50]

36. Depending on the nature of the breach of duty (which must be a gross breach), and the gravity of the consequences thereof, breaches of duties imposed by the laws of war may entail a disciplinary rather than a criminal liability of a superior who is subject to military discipline. The line between those forms of responsibility which may engage the criminal responsibility of the superior under international law and those which may not can be drawn in the abstract only with difficulty, and the Appeals Chamber does not need to attempt to do so in the present Judgement. It is better, however, that Trial Chambers do not describe superior responsibility in terms of negligence at all.

37. The Trial Chamber must be satisfied that, pursuant to Article 6(3) of the Statute, the accused either "knew" or "had reason to know", whether such a state of knowledge is proved directly or circumstantially. The Appeals Chamber is of the opinion that the test for criminal negligence as advanced by the Trial Chamber cannot be the same as the "had reason to know" test in terms of Article 6(3) of the Statute. In the Appeals Chamber's view, the Trial Chamber should not have considered this third form of responsibility, and, in this sense, it committed an error of law. The Appeals Chamber considers, however, that the error does not invalidate the Judgement, since, as pointed out before, the Trial Chamber established that Bagilishema neither knew nor possessed information which would have enabled him to conclude, in the circumstances at that time, that the murders had been committed or were about to be committed by his subordinates.

38. Accordingly, the Appeals Chamber dismisses the Prosecution's first part of this ground of appeal.

2. Whether the Trial Chamber committed an error in finding that it was not established beyond a reasonable doubt that the Accused "had reason to know" in terms of Article 6(3) of the Statute

39. The Prosecution submits that, were the Appeals Chamber to consider that the Trial Chamber examined the "had reason to know" standard within the meaning of Article 6(3) of the Statute, the Trial Chamber committed an error of fact in finding that the Respondent "did not have reason to know" crimes had been committed at the Trafipro roadblock.[51] For the Prosecution, this error occasioned a miscarriage of justice within the meaning of Article 24 of the Statute.[52]

40. The Prosecution puts forward the following argument:

- The factual findings in the Trial Judgement allow for the conclusion that the Respondent possessed enough information to put him on notice of possible unlawful acts by his subordinates. The Trial Chamber did not take into consideration the context in which the two murders occurred, namely, the background of widespread attacks on Tutsi civilians throughout Rwanda in general, and in the Kibuye *préfecture* and the *commune* of Mabanza in particular;[53]

- The Respondent was thus aware, in other words "had reason to know", that his subordinates had committed serious crimes. By its very nature, this information triggered the duty for the Accused to inquire further[54] and, following the inquiries, to prevent crimes from being committed or to punish the perpetrators thereof.[55] The Prosecution also bases its argument on its earlier submissions relating to "a superior's affirmative duty to inquire further when put on notice"[56] to demonstrate that the same standard applied to the Respondent in this case.[57]

41. The Appeals Chamber notes that the Appellant relies on *certain* general findings by the Trial Chamber relating to the background against which the killings of Judith and Bigirimana took place in order to propose, on the basis of this selection, various findings of fact that the Trial Chamber could, according to the Prosecution, have reached. In the Appeals Chamber's view, these findings should be placed back in their proper context and the allegations relating thereto should be considered in the light of the overall findings of fact made by the Trial Chamber.

42. The *Čelebići* Appeal Judgement makes it clear that "a showing that a superior *had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates* would be sufficient to prove that he 'had reason to know'."[58] The Appeals Chamber endorses the finding of the ICTY Appeals Chamber in the *Čelebići* Appeal Judgement that the information does not need to provide specific details about unlawful acts committed or about to be committed by his subordinates.[59] With regard to the arguments advanced by the Prosecution, the Appeals Chamber, however, deems it necessary to make a distinction between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes. With this distinction in mind, the Appeals Chamber identifies below the main arguments advanced by the Appellant to support the contention that the Respondent "had reason to know" that crimes had been committed or were about to be committed at the Trafipro roadblock.

(1) The Accused knew of the dangerous nature of the Trafipro roadblock. According to the Prosecution, the roadblock operated like any other roadblock in Rwanda.[60] On the basis of the general factual findings by the Trial Chamber relating to roadblocks, the Prosecution asserts that the Trafipro roadblock was used to identify and kill Tutsis.[61]

(2) The Prosecution challenges the Trial Chamber's finding in paragraph 937 of the Judgement that Witness Y gave an account of the purpose and functioning of the roadblock that was different from the account of Witness Z. According to the Prosecution, "Witness Y never gave this apparently crucial explanation in his oral testimony in court." The Prosecution submits that the Trial Chamber's point of departure should have been the oral testimony given by Witness Y in court, and that the portion of the written statement relied upon by the Trial Chamber in paragraph 937 of the Judgement should have been put to the Witness in court.[62]

(3) The Respondent knew that Witness Z was an ex-soldier with a criminal record.[63] With particular reference to the Kahan Commission Report,[64] the Prosecution submits that this fact is most important. It argued that, "the undisputed evidence on record shows that the Respondent knew about Witness Z's past."[65] Leaving aside this evidence, the Trial Chamber used "euphemistic language" in concluding that the Accused had not given a complete picture of all those staffing the roadblock.[66]

43. With regard to the killings of Judith and Bigirimana, the Appeals Chamber recalls the need to place the Respondent's *mens rea* in relation to the "had reason to know" standard within the context of the evidence available to the Trial Chamber, and to make a general appraisal of the Chamber's factual findings in this regard in order to establish whether the alleged errors exist.

44. As regards the Prosecution's allegations relating to the erroneous assessment of the purpose of the Trafipro roadblock, the Appeals Chamber holds that the Prosecution has obviously not demonstrated that the Trial Chamber made an unreasonable finding about the legitimate purpose of the roadblock in question.[67] Indeed, the Prosecution merely refers to some of the Trial Chamber's findings with a view to asserting that the Chamber's assessment of the purpose of the roadblock was erroneous. With regard to the Prosecution's argument concerning Witness Y, the Appeals Chamber observes that the Trial Chamber correctly reproduced the transcript of Witness Y's written statement as well as his testimony during the trial.[68] The reference made to Witness Y's "statement" in paragraph 937 of the Trial Judgement[69] is also accurate since the Trial Chamber is implicitly alluding to Witness Y's written statement. As to the more specific allegation that the Trial Chamber erred in referring to and relying upon the prior statement of Witness Y, the Appeals Chamber indicates that this allegation is dealt with under the third ground of appeal, and refers therefore to its findings relating thereto.[70] Lastly, with regard to the Respondent's knowledge of Witness Z's criminal record, the Trial Chamber did not indeed take explicitly into consideration all of the relevant evidence. It must be recalled, however, that a Trial Chamber is not obliged to give a detailed answer to every argument raised during a trial,[71] and that it is for the Trial Chamber to assess, *in concreto*, whether a superior has in his possession sufficient information.

45. The Appeals Chamber observes that the Trial Chamber relied on certain facts which were not disputed by the Appellant, for example, that there were personal motives behind the killings,[72] and that there was no evidence as to whether the Accused was

present at the communal office, so as to determine whether it was established beyond reasonable doubt that the Respondent "had reason to know" within the meaning of Article 6(3) of the Statute. The Appeals Chamber is of the opinion that the Prosecution has not demonstrated the unreasonableness of the Trial Chamber's finding that the Respondent had no reason to know that his subordinates were committing or had committed crimes on the persons of Judith and Bigirimana, or the miscarriage of justice resulting therefrom. In the light of the foregoing, the Appeals Chamber finds that it is unnecessary to address the issue of whether customary international law imposes a duty on a civilian superior to inquire further.

46. In conformity with the above-mentioned case-law relating to the standard for examining errors of fact on appeal,[73] the Appeals Chamber dismisses this part of the first ground of appeal.

3. Whether the Trial Chamber committed errors of law in its analysis of the superior-subordinate relationship

47. The Prosecution submits that the Trial Chamber's analysis of the conditions under which a person can be considered to be a superior in terms of Article 6(3) of the Statute is flawed in two instances:

- The Trial Chamber erred in law in stating that civilians can only be found liable on condition that they exercise a military-style command authority over alleged subordinates;[74] and

- The Trial Chamber erred in law in construing superior responsibility exclusively by virtue of a person's *de jure* authority. According to the Prosecution, the Trial Chamber made little or no allowance for the possibility that a person can be considered a superior on the basis of a *de facto* exercise of powers of command and control.[75]

48. The Prosecution considers that the Trial Chamber misapprehended the overriding factor (namely the "effective control" standard), which is used to determine whether a person can be considered a superior under Article 6(3) of the Statute.[76] The Prosecution requests the Appeals Chamber, in the interests of justice, to take note of the errors committed by the Trial Chamber and to provide the appropriate remedy.

(a) Issue as to the nature of a civilian superior's authority

49. The Prosecution takes issue with the Trial Chamber for over-emphasizing the "military features" of the superior-subordinate relationship.[77] The Trial Chamber, according to the Prosecution, took the view that a civilian superior's responsibility requires proof that the powers exercised by such superior over his subordinates are similar to the "command" powers of a military superior.[78] It further submits that the Trial Chamber misconstrued the principle in the *Čelebići* Appeal Judgement by subjecting a superior's responsibility when exercising his authority to a military-style

chain of command.[79] The Prosecution submits that there is no indication that the Trial Chamber focused on the test of effective control.[80]

50. Under Article 6(3), a commander or superior is the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the commission of a crime by a subordinate after the crime is committed".[81] The power or authority to prevent or to punish does not arise solely from a *de jure* authority conferred through official appointment.[82] Hence, "as long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control." [83] The *effective control* test applies to all superiors, whether *de jure* or *de facto*, military or civilian.[84]

51. Indeed, it emerges from international case-law that the doctrine of superior responsibility is not limited to military superiors, but also extends to civilian superiors. In the *Čelebići* case, it was held that:

> […] the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise *a degree of control over their subordinates which is similar to that of military commanders*.[85]

In this respect, the Appeals Chamber notes that the *Musema* Trial Judgement, which took into consideration the Rwandan situation, pointed out that "it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration."[86]

52. Hence, the establishment of civilian superior responsibility requires proof beyond reasonable doubt that the accused exercised effective control over his subordinates, in the sense that he exercised a degree of control over them which is similar to the degree of control of military commanders. It is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander.

53. In the instant case, the Trial Chamber relied on the *Čelebići* Trial Judgement, which was affirmed by the ICTY Appeals Chamber, in holding that:

> […] for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective", and the superior must have the "material ability" to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of *de jure* authority". The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.[87]

54. The Trial Chamber also reiterated that a civilian superior will have exercised effective control over his or her subordinates in the concrete circumstances if both *de facto* control and the trappings of *de jure* authority are present and similar to those found in a military context.[88] The Trial Chamber went further to point out that its approach was to consider the character of the *de jure* or *de jure-like* relationships (in French, "quasi-*de jure*") between the Accused and his supposed subordinates, and then to determine if the Accused's authority (whether real or contrived) was comparable to that exercised in a military context.[89]

55. The Appeals Chamber holds the view that the Trial Chamber's approach to the notion of "effective control" in relation to civilian superior was erroneous in law, to the extent that it suggested that the control exercised by a civilian superior must be of the same nature as that exercised by a military commander.[90] As the Appeals Chamber has already stated, this is not the case. It is sufficient that, for one reason or another, the accused exercises the required "degree" of control over his subordinates, namely, that of effective control. However, as conceded by the Prosecution,[91] this error did not affect the verdict as the Appeals Chamber is satisfied that the Accused did not possess the required *mens rea*. The Appeals Chamber therefore concludes that this error does not render the decision invalid.

56. The Appeals Chamber notes the ambiguity of the expression *a contrived de jure-like authority* (in French, "*autorité quasi-de jure factice*")[92] and acknowledges that it is difficult to grasp the meaning thereof. In the context of paragraph 152 of the Judgement, the concept seems to form part of the reasoning used by the Trial Chamber in examining the *de jure* authority exercised by the Accused, but it can be interpreted in different ways. The Appeals Chamber reiterates that the case law of the International Tribunals makes it mandatory to use the effective control test for both *de jure* and *de facto* superiors. Creating intermediate levels of authority is unnecessary and it would impair the legal analysis of the criminal liability of a superior under Article 6(3) of the Statute, as well as heighten the confusion in identifying the various forms of authority and instituting effective control. Although this wording is inappropriate, the Appeals Chamber considers that it is of no consequence to the Judgement, given that it was not unreasonable to conclude from the evidence presented that the Accused was not liable under Article 6(3) of the Statute for the killings at the Trafipro roadblock.

57. With regard to the Prosecution's argument that the Trial Chamber misapprehended the *Čelebići* jurisprudence by requiring a civilian superior to exercise his control through a military-style command, the Appeals Chamber draws attention to its previous decisions[93] and to those of the ICTY Appeals Chamber.[94] It emphasizes that the line of reasoning adopted by the Trial Chamber with regard to *gendarmes*[95] and reservists[96] can actually lead one to think that the Chamber sought to determine the Accused's position as part of the "*gendarmerie* command" or the "strict hierarchical structure of military personnel." Considering that the Accused, as a civilian administrative officer would not have been able to operate in this structure, the Trial Chamber deduced that he could not have exercised any *de jure* authority whatsoever over *gendarmes*.[97] However, these findings do not in themselves constitute an error,

considering that the Trial Chamber merely sought to establish whether the Accused wielded *de jure* authority. It therefore tried to determine whether Rwandan law conferred powers on a *bourgmestre* that were comparable to those of military commanders in terms of control over subordinates, thus placing him in a position similar to that of a military commander, for the purpose of evaluating the *de jure* responsibility of the *bourgmestre*, a civilian administrative officer, over military personnel.

58. Consequently, the Trial Chamber did not intend to require proof of the Accused's position in the military command structure to establish the existence of *effective control*, but sought to know whether, *in this case*, in light of the evidence provided by the Prosecutor, it was possible to conclude that the Accused exercised *de jure* powers.[98]

(b) Issue as to failure by the Trial Chamber to consider *de facto* authority

59. The Prosecution submits that the Trial Chamber erred in making little or no allowance for the possibility that a person can be considered a superior on the basis of a *de facto* exercise of powers of command and control.[99] For his part, the Respondent emphasizes that the Prosecution did not adduce any evidence at trial to demonstrate the *de facto* authority exercised by the Accused over certain groups of subordinates. According to him, the Trial Chamber clearly considered both *de jure* and *de facto* powers on the basis of evidence adduced by the Prosecution.[100]

60. The Trial Chamber set out in paragraphs 39, 43, 151 and 153 of the Judgement its approach in examining the issue of the existence of *de facto* authority as part of its overall analysis of superior responsibility; it indicated that "[t]he existence of the second element of subordination, namely *de facto* control, will be considered, *as necessary, on a case-by-case basis*, in the course of the Chamber's analysis of the Prosecution's factual allegations."[101] The Trial Chamber took the view that "Ƒağ civilian superior will have exercised effective control over his or her subordinates in the concrete circumstances if both *de facto* and the trappings of *de jure* authority are present and similar to those found in a military context".[102]

61. The Appeals Chamber is of the view that, when the Trial Chamber came to apply the test of "effective control" to the facts of the case, it made little allowance for the possibility that the Accused could be considered as a superior on the basis of a *de facto* power or authority over his or her subordinates.[103] Furthermore, in paragraph 151 of the Judgement, the Trial Chamber wrongly held that both *de facto* and *de jure* authority need to be established before a superior can be found to exercise effective control over his or her subordinates. The Appeals Chamber reiterates that the test in all cases is whether the accused exercised effective control over his or her subordinates; this is not limited to asking whether he or she had *de jure* authority.[104] The ICTY Appeals Chamber held in the *Čelebići* Appeal Judgement that "[a]s long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control".[105]

62. The Appeals Chamber is therefore of the view that the lack of proper consideration of the *de facto* character of the Accused's responsibility by the Trial Chamber was incorrect and upholds the Appellant's third submission. However, as the Appellant concedes,[106] this by itself does not invalidate the judgement. This is so because the Trial Chamber was correct in finding that the Accused neither knew nor possessed information which would have enabled him to conclude, in the circumstances at that time, that crimes had been committed or were about to be committed by his subordinates.

IV. SECOND GROUND OF APPEAL: ALLEGATIONS OF ERRORS RELATING TO THE ADMISSION OF WRITTEN CONFESSIONS OF WITNESSES AA, Z AND Y

63. During the trial, the Prosecution presented three witnesses detained in Rwanda to testify, namely Witnesses Y, Z and AA, who appeared before the Trial Chamber on 7 February 2000, 8-9 February 2000 and 10-11 February 2000 respectively. In the course of their testimony, they each stated that they had made written confessions to the Rwandan authorities in which they recognized having participated in the genocide. At the end of the Prosecution case, and some time before the opening of the Defence case, the Defence filed a Motion on 20 April 2000 requesting the Trial Chamber to order the Prosecution to disclose the written confessions pursuant to Rule 68 of the Rules.[107] The Defence prayed the Trial Chamber to order the Prosecution to disclose the confessions in question, considering that disclosure was necessary for the discovery of the truth and for evaluating the credibility of the Witnesses.[108] In its response to the motion, the Prosecution indicated that it was not in possession of the documents, pointing out that it was for the Defence to use the resources at its disposal to conduct its investigations and, in particular, to obtain the documents it deemed relevant for the trial.[109] On 8 June 2000, the Trial Chamber dismissed the motion filed by the Defence pursuant to Rule 68 of the Rules.[110] The Chamber also stated that:

> Under Rule 98 the Chamber may, *proprio motu*, order either party to produce additional evidence. Having considered the facts and circumstances of this case, the Chamber is of the view that, for a better determination of the matters before it, the Prosecution is ordered to produce the written confessions of Prosecution witnesses Y, Z and AA. The Chamber is of the view that the said written confessions could be material in evaluating the credibility of the said Prosecution witnesses.
>
> The Chamber hereby decides that the Prosecution should take the necessary steps to obtain the written confessions of witnesses Y, Z and AA. The Prosecution is directed to take such steps by 23 June 2000 and to forward the said written confessions to the Chamber.[111]

64. Before the Appeals Chamber, the Prosecution submits that the Trial Chamber committed several errors of law in admitting the written confessions of Witnesses AA, Z and Y into the trial record. The errors are set out as follows:[112]

> (1) The fact that statements by witnesses are admitted without having them acknowledge the contents of the written confessions or offering them an opportunity to explain alleged inconsistencies or contradictions between their testimony and their written confessions;

(2) The fact that the Defence is allowed to rely on out-of-court statements by witnesses to challenge the credibility of the witnesses without having offered the witnesses an opportunity to explain the statements during cross-examination;

(3) The fact that there was no order calling back witnesses for additional examination on their written confessions;

(4) The fact that the written confessions were subsequently used in assessing the credibility of Witnesses Y, Z and AA.

65. The Appeals Chamber understands the thrust of the Prosecution's argument to be a demonstration that the above-noted proceedings were unfair, considering that the Trial Chamber never gave Witnesses Y, Z and AA the opportunity to explain themselves on the contradictions between their oral testimony and their confessions before Rwandan authorities.[113] The Prosecution contends that the admission of the written confessions was instrumental in the assessment the Trial Chamber made of the testimony of Witnesses Y, Z and AA, who testified to the events which occurred at the Gatwaro stadium and at the Mabanza communal office.[114] The Prosecution submits that, if the Trial Chamber had heard the explanations of the Witnesses on the contradictions, it would probably have arrived at a different conclusion. It further submits that, since neither the Prosecution nor the Appeals Chamber is in a position to determine what that conclusion would have been, it is necessary to hold a fresh trial.[115]

66. The Appeals Chamber dismisses the foregoing arguments. Where, as in the present case, the Prosecution is directed by the Trial Chamber to obtain further material, the Prosecution cannot rely upon Rule 98, as that rule contemplates that the party to which the direction is given will itself tender the further material in evidence as part of its case. The Trial Chamber does, however, have a clear power – as part of its duty to ensure that the trial is properly conducted – to direct the Prosecution to obtain material which may be relevant to the case of the accused. In such a case, the further material should be produced, not only to the Trial Chamber, but also to the accused. If any use is to be made of that material during the trial, it must either be elicited in evidence from a witness or tendered in evidence itself.[116]

67. In the present case, counsel for the defence should have been stopped by the Trial Chamber from referring to that material during the course of his final address when it was not in evidence. The tender of the further material as a defence exhibit without having given the witnesses the opportunity to deal with it in cross-examination was a serious breach of the duty of fairness of the trial, and it led to the right of the Prosecution to have the three witnesses recalled to explain their previous inconsistent statements.

68. The Prosecution's complaint can be rejected for yet another reason. At the appeal hearing, the judges asked the Prosecution whether the arguments advanced on appeal had been presented before the Trial Chamber, and, in particular, whether the Prosecution had requested the Trial Chamber to call back Witnesses Y, Z and AA so that they could give an explanation for the contradictions. The Prosecution admitted not having done this and conceded that it should indeed have asked for the witnesses to be brought back.[117] As

to why, under these conditions, the Prosecution was raising the issue on appeal, the Prosecution Attorney had the following reply:

> The only reason I can give you is the one I stated, that we submit that there is a problem with the judgement, and maybe part of that problem has occurred because the Prosecution did not ask for the witnesses to be called back when the Defence didn't do it. So we submit that that is potential failure by the Prosecution, the trial should not prevent that these errors be rectified. That is the only thing I think I can concede to your submissions and I concede your legal points, as I have conceded.[118]

69. Thus, at no time did the Prosecution request the Trial Chamber to call back the Witnesses in question. At no time did the Prosecution raise the issue of unfair proceedings before the Trial Chamber, although it appealed on this ground.[119] The Appeals Chamber considers that if this did not happen in the present case, it is probably because the Prosecution was hoping to have the confessional statements of the witnesses removed from the record rather than admitting the confessions as evidence and, in the circumstances, requesting the Witnesses to be called back.

70. The Appeals Chamber therefore holds that the Prosecution's justification is unfounded.[120] The Appeals Chamber cannot accept the argument that the Trial Chamber in this case was under a duty to ensure that the Witnesses were called back, under the pretext that the Chamber itself had asked that the statements of the Witnesses be made available. It is the sole responsibility of the party that claims to have suffered prejudice, in this case, the Prosecution, to request the Trial Chamber to have the Witnesses called back and to justify such a request.

71. In conformity with the case-law of the International Tribunals, the fact that an appellant did not raise an objection before the Trial Chamber means, in the absence of exceptional circumstances, that he waived his right to raise the issue as a valid ground of appeal.[121] In the instant case, the Appeals Chamber holds that in the absence of exceptional circumstances, this ground of appeal must be dismissed.

V. THIRD GROUND OF APPEAL: ALLEGATIONS OF ERRORS IN THE ASSESSMENT OF EVIDENCE CONCERNING THE "TRAFIPRO" ROADBLOCK AND THE GATWARO STADIUM

72. As regards this ground of appeal, the Appeals Chamber understands that the Prosecution began by alleging that the Trial Chamber committed three general errors in its assessment of the evidence concerning the crimes committed at the Trafipro roadblock and Gatwaro stadium.[122] According to the Prosecution, these errors "affect the assessment of the evidence throughout."[123] The Prosecution then alleged that the Trial Chamber committed three "specific" errors, in the sense that they all relate to the assessment of three specific issues in the Trial Judgement, namely, the purpose of the Trafipro roadblock, the murder of Judith and the presence of the Accused at the Gatwaro Stadium. In light of the above-mentioned errors, the Prosecution prayed the Appeals Chamber to reverse the Judgement with respect to Counts 1 to 6 of the Indictment and to order a new trial.

A. General errors[124]

1. Whether the Trial Chamber applied an incorrect standard in assessing the evidence of the presence of the Accused at Gatwaro Stadium

73. As to whether the Accused was present at the Gatwaro Stadium, the Trial Chamber made the following general observations:

> The question whether the Accused was present at the Stadium is critical to all the charges covering the period 13 to 18 April 1994. It follows from case law that mere presence at the scene of criminal events is not in itself incriminating […]. One obvious reason for this is that presence may have the purpose of preventing the commission of crimes. Nonetheless, if the Prosecution can establish that the Accused was at the Stadium during the critical period in question, other elements of participation in the crime may be presumable or imputable. A person in authority, such as the Accused, runs the risk of being identified with the perpetrators of the crimes unless he is seen to be actively and demonstrably opposing the crimes. Therefore, the Prosecution must lead sufficient evidence to convince the Chamber beyond reasonable doubt that the Accused was present at the Stadium at some point during the relevant period.[125]

> In view of this, the Chamber will have to treat a bare allegation of presence with caution. Put differently, a lack of detail will raise doubts. The Chamber will then examine the testimonies of other witnesses, or look to prior statements to clarify or test a witness's allegations. If corroboration is not found through this process, doubts will remain and presence will not have been established. It is incumbent on the Prosecution to adduce sufficient evidence to convince the Chamber that the Accused was present and, if so, to demonstrate his role during the events.[126]

74. The Prosecution mainly submits that the Trial Chamber erred in law in its assessment of the evidence, in so far as it made corroboration of the testimony of witnesses a pre-condition to establish the guilt of the Accused of the crimes committed at the Gatwaro Stadium. In other words, whenever the Trial Chamber determined that there was a lack of detail in a testimony, it examined the testimonies of other witnesses and looked to prior statements in order to clarify or test the witness's allegation. Thus, according to the Prosecution, the Trial Chamber relied on this process of seeking corroboration of the alleged facts. In this connection, the Prosecution submits that different statements made by the same witness cannot be used to corroborate each other.[127]

75. The Appeals Chamber observes first of all that the Trial Chamber was right in proceeding with caution with respect to the question of the identification of the Accused at the Stadium. As the Appeals Chamber of the ICTY indicated in the *Kupreškić* Appeal Judgement, a Trial Chamber must proceed with extreme caution when assessing a witness' identification of an accused made under difficult circumstances:

> In cases before this Tribunal, a Trial Chamber must always, in the interests of justice, proceed with extreme caution when assessing a witness' identification of the accused made under difficult circumstances. While a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a "reasoned opinion". In particular, a reasoned opinion must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence.[128]

76. After stating, in paragraph 532 of the Trial Judgement, that "a bare allegation of the presence of the Accused" should be treated "with caution" and that "a lack of detail will raise doubts", the Trial Chamber set out its general approach to assessing evidence in view of the need to proceed with caution as indicated above: the Trial Chamber first indicated that it "will examine the testimonies of other witnesses" and that it may "look to prior statements", in order to "clarify or test a witness's allegations". The Trial Chamber then went on to say that if "corroboration is not found through this process, doubts will remain and presence will not have been established". Finally, it stated that, in any event, "it is incumbent on the Prosecution to adduce sufficient evidence to convince the Chamber that the Accused was present and, if so, to demonstrate his role during the events".[129]

77. While considering the evidence adduced before it, the Trial Chamber indeed adopted the approach described above, with respect to the presence of the Accused on 13 April 1994,[130] 14 April 1994[131] and 18 April 1994.[132]

78. Contrary to the Prosecution's contention, the Appeals Chamber is of the view that by adopting such an approach, the Trial Chamber was simply exercising the required caution. Mindful of the need to proceed with caution in the examination of each allegation regarding the identification and presence of the Accused at the Stadium, the Trial Chamber focussed on assessing the credibility and reliability of the witnesses appearing before it. With regard to each witness, it was within its discretion to assess any inconsistencies noted and determine whether, in light of the overall evidence, the witness was reliable and his evidence credible. To this end, it either resorted to corroboration of the oral testimony from other evidence,[133] including other testimonies,[134] or compared or confirmed the content of the oral testimony of the witness with his prior statement(s).[135] But the Trial Chamber did not suggest that corroboration was necessary in every case as a matter of law.

79. The Appeals Chamber fails to see in what way the approach adopted by the Trial Chamber for corroboration constitutes an error. Of course, as the Prosecution stated, it is well settled that "the testimony of a single witness on a material fact may be accepted as evidence without the need for corroboration."[136] However, the Appeals Chamber considers that this jurisprudence cannot be interpreted to mean that a Trial Chamber cannot resort to corroboration; the Trial Chamber can do so by virtue of its discretion. In the present case, the Trial Chamber was entitled to verify the facts and assess the credibility of witnesses by reference to the testimony of other witnesses.

80. Moreover, the Appeals Chamber dismisses the Prosecution's argument that the Trial Chamber sought mutual "corroboration" of different statements made by the same witness (namely, a confessional statement of a witness with his previous statement).[137] The Appeals Chamber is of the view that, in this case, the Trial Chamber was simply seeking to establish the consistency of the said evidence, and hence, the credibility of the testimony, which is part of the main responsibilities of a trier of fact. The Appeals Chamber therefore considers that the Trial Chamber's findings should be viewed within

the context of the Trial Chamber's overall assessment of the consistency and credibility of the evidence.

81. In view of the foregoing, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber committed the alleged errors. Consequently, the Appeals Chamber dismisses this part of the third ground of appeal.

2. Whether the Trial Chamber erred in its use of and reliance on prior written statements

82. The Prosecution essentially submits that the Trial Chamber erred in relying on inconsistencies between the statements made to Prosecution investigators, on the one hand, and confessional statements made to Rwandan authorities, on the other hand, without having afforded the said witnesses an opportunity to explain the inconsistencies. The Prosecution refers to its second ground of appeal[138] and notes that the Defence did not cross-examine certain Prosecution Witnesses with a view to testing their credibility on some aspects of their testimony that it considered contradictory, and also that the Trial Chamber did not use its discretion to put questions to witnesses.

83. With regard to the use made by the Trial Chamber of confessional statements, the Appeals Chamber reiterates its conclusions concerning the second ground of appeal. Thus, it is up to the party which considers itself aggrieved, in this case, the Prosecution, to request the Trial Chamber to call back the witnesses for further cross-examination and provide justification for such request.

84. With regard to the specific issue of the Trial Chamber's reliance on prior witness statements, a question raised several times by the Prosecution, the Appeals Chamber refers to its findings in paragraphs 94 *et seq.* of this Judgement and dismisses this ground of appeal.

3. Whether the Trial Chamber erred by finding Witness Z not credible

85. The Prosecution impugns paragraph 747 of the Trial Judgement, which reads:

> While the Chamber accepts that Pastor Muganga was taken from the communal office area to the communal football field and killed, the events leading up to his death are unclear. The only purported eye-witness to the killing was Witness Z, whose testimony the *Chamber has found to be unreliable in relation to the allegations tending to incriminate the Accused* (See, in particular, sub-sections V.5.5 and V.5.6, *infra*).[139]

86. Despite the fact that the Trial Chamber actually found inconsistencies and flaws in Witness Z's testimony, the Prosecution does not understand the "basis for the categorical conclusion that whenever the evidence of Witness Z tends to incriminate the Accused, such evidence is unreliable."[140] The Prosecution submits that a review of the Trial Chamber's assessment of Witness Z's evidence reveals that such a finding is not substantiated.

87. The Appeals Chamber notes that paragraph 747 constitutes a general conclusion drawn from the Trial Chamber's observations in paragraphs 748 *et seq*. of the Judgement. The Appeals Chamber is of the view that those paragraphs provide a clear view of the basis for the finding set forth in paragraph 747, and dismisses the Appellant's arguments in that regard. For example, the Appeals Chamber notes that "the witness [Z] gave two different versions as to how he found out about it [the order] [given by the Accused to Semanza to kill Muganga]."[141] The Trial Chamber further stated that "[t]his shift in accounts [given by Witness Z] between direct examination and cross-examination *gives the impression of an attempt by the witness to claim that his knowledge of the order allegedly issued by the Accused was more immediate than it in fact was. This effort could stem from a desire to incriminate the Accused more decisively* […] ".[142]

88. As the Appeals Chamber recalled earlier, the Trial Chamber is not required to articulate in its Judgement every step of its reasoning in reaching particular findings.[143] The Appeals Chamber recalls that in order to establish an error of fact, the Prosecution must prove that the Trial Chamber's reasoning was incorrect, and as such resulted in a miscarriage of justice. Simply criticising the reasoning adopted by the Trial Chamber is not an adequate demonstration that the Trial Chamber committed an error of fact. As the Prosecution failed to demonstrate that the Trial Chamber's findings were unreasonable, this ground of appeal must be dismissed.

B. "Specific" errors concerning the Trial Chamber's assessment of the evidence in relation to the purpose of the Trafipro roadblock, the murder of Judith and the presence of the Accused at the Gatwaro Stadium[144]

89. The Appeals Chamber holds that the questions raised by the Prosecution with respect to the "specific" errors relate to three main, distinct issues:[145] the Trial Chamber's assessment of the relevant evidence relating to the purpose of the Trafipro roadblock; the Trial Chamber's reliance on previous statements, namely, the statements made to Prosecution investigators and the confessional statements made to Rwandan authorities (on this point, the Appeals Chamber will address the Prosecution's arguments as a whole, insofar as this issue arises in relation to virtually all the questions raised); and finally the Trial Chamber's assessment of the evidence relating to the alleged presence of the Accused at the Gatwaro Stadium.

1. The Trial Chamber's assessment of the relevant evidence relating to the purpose of the Trafipro roadblock

90. The Prosecution refers to the Trial Chamber's findings in Chapter V of the Trial Judgement as regards the purpose of the Trafipro roadblock .[146] It argues that the Trial Chamber erred by not considering the testimonies of Witnesses KC, AB, RA, ZJ and that of the Accused.[147] The Appellant submits that the evidence referred to shows that the Accused was aware that identify cards were being checked at roadblocks, which had been erected for the purpose of identifying Tutsis. As early as the beginning of April 1994, the Accused knew that Tutsis were actively sought out in Mabanza and other *communes*

within Kibuye *préfecture*. According to the Prosecution, the above-mentioned Witnesses revealed the real purpose of the roadblock, namely, to find and kill Tutsis.[148]

91. The Prosecution submits that the aforementioned testimonies show in essence that:

- The Accused provided the *bourgmestre* of Tambwe and two other Tutsi women with *laissez-passers* indicating that they were Hutu;[149]

- The main purpose of the six roadblocks mounted in Mabanza was to identify Tutsis;[150]

- The Accused dissuaded five Tutsi nuns from going to Kibuye town because of the roadblocks they would encounter on their way;[151]

- The Accused helped the brother-in-law of Defence Witness ZJ by providing him with an identity card, which had the word "Hutu" written on it, to enable his wife and other Tutsis to cross the roadblocks that had been erected on the Kigali-Kibuye road, without experiencing problems;[152]

- The Accused issued over 100 *laissez-passers* and *feuilles de route* to persons from outside Mabanza *commune* and gave a witness several blank identify cards which had the word "Hutu" written on them so as to help citizens of Mabanza who were living in Kigali.[153]

92. The Appeals Chamber observes that the Trial Chamber considered the testimonies of all witnesses called by the Appellant in other parts of the Trial Judgement, either in Chapter IV entitled "General Issues"[154] or in the section entitled "Roadblocks sighted in Mabanza *Commune*". The Trial Chamber considered their testimonies for the purpose of "establishing whether the Accused was generally supportive of the massacres."[155] It is the view of the Appeals Chamber that the factual findings contained in Chapter V of the Judgement must therefore be read in the light of the "General Issues" dealt with earlier. In any event, as the Judgement must be viewed as a whole, it would be incorrect to assert that in Chapter V of the Judgement the Trial Chamber failed to take into account the submissions relating to the testimonies of Witnesses KC, AB, RA, ZJ, and the testimony of the Accused in Chapter IV of the Judgement.

93. Moreover, in Chapter V of the Trial Judgement, with regard in particular to the issue as to the purpose of the Trafipro roadblock, the Trial Chamber analysed the evidence before it in order to address the specific question as to whether the roadblocks had originally been set up by the Accused for criminal purposes. Thus, it began by analysing the documentary evidence presented by the Prosecution,[156] and then scrutinized the testimonies of the two Prosecution's witnesses who regularly attended the Trafipro roadblock.[157] On the basis of the relevant evidence, the Trial Chamber considered that it was unable to conclude beyond reasonable doubt that the aim of the Accused, when he set up the Trafipro roadblock, was to screen out and kill Tutsi

civilians.[158] In the light of the above, the Appeals Chamber finds nothing unreasonable in the Trial Chamber's reasoning and findings with regard to this specific point. It therefore dismisses the Appellant's submission on this point.

2. The Trial Chamber's reliance upon prior statements (statements made to Prosecution investigators and confessional statements to Rwandan authorities)

94. Firstly, the Prosecution refers to the Trial Chamber's findings as regards the inconsistencies between the testimonies of Witnesses Y and Z in the Section of the Judgement dealing with the purpose of the Trafipro roadblock. Referring to paragraph 937 of the Judgement,[159] the Prosecution submits that:

- The Trial Chamber erred insofar as it relied upon the written statement of Witness Y for the truth of its content, attributing more weight to this statement than to his testimony before the court and doing so without even putting the statement to the Witness to determine whether he accepted it as true;[160]

- Though there may be circumstances where a statement may be admitted for the truth of its contents, notably pursuant to Rule 92*bis* of the Rules,[161] no such consideration was given by the Trial Chamber in admitting the statement for this purpose. It appears that the Trial Chamber may simply have been mistaken in its appreciation of the difference between testimony and prior statement.[162] Moreover, its reliance on the statement means that it placed greater weight on the out-of-court statement than the live testimony of a witness.[163]

95. Secondly, the Prosecution challenges the Trial Chamber's findings as regards the murder of Judith. Referring mainly to paragraphs 959 to 961 of the Trial Judgement,[164] it raised the following main arguments:

- The inconsistency relied upon by the Trial Chamber to find Witness Z unreliable arises from a difference between Witness Z's confession to Rwandan authorities, his written statement and his testimony. However, neither the Defence nor the Trial Chamber put this single inconsistency to the Witness. On this point, the Prosecution refers the Appeals Chamber to the second ground of appeal;[165]

- The inconsistency does not undermine the evidence that the Accused came out of his office when Judith was escorted past his premises, and had a conversation with Witness Z. Further, Witness Y's testimony is not inconsistent with Witness Z's and cannot be used to discredit Witness Z's testimony due to the fact that "the supposed conversation between Witness Z and the Accused is not corroborated."[166] In that connection, the Prosecution contends that Witness Z's testimony is corroborated substantially by the testimony of WitnessY.[167] According to the Prosecution, the Trial Chamber should have asked Witnesses Y and Z to explain themselves on these minor inconsistencies.[168]

96. In the light of the above, the Appeals Chamber understands that the Prosecution takes issue with the Trial Chamber on two main points. In respect of these points, the Appeals Chamber considers as follows:[169]

(1) The Trial Chamber not only relied upon prior statements in order to assess the credibility of the witnesses but it also used them for the truth of their content.

97. According to the Prosecution, only evidence admitted as hearsay may be relied upon for the truth of its content (on this point, the Prosecution is referring to Rule 92*bis* of the Rules of ICTY), not prior witness statements. The Prosecution submits that such evidence should be relied upon only for the assessment of the credibility of witnesses.

98. The Appeals Chamber notes that, in the paragraphs of the Judgement mentioned by the Prosecution,[170] the Trial Chamber indeed relied on previous statements of witnesses for the truth of their content.However, the Appeals Chamber is of the view that such reliance does not constitute an error in this instance.

99. The Appeals Chamber recalls that, at the time of the trial, the only legal authority with regard to admission of evidence was Rule 89(C) of the Rules, which provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value."[171] The Trial Chamber therefore assessed the admissibility of the prior statements solely on the basis of Rule 89 of the Rules, by properly weighing their relevance and probative value. At paragraphs 24 and 25 of the Trial Judgement, it set out its approach in the assessment of the evidence, in the following terms:

> 24. Regarding in particular the assessment of testimony, the Chamber observes that, during the present trial, previous written statements of most witnesses appearing in this case were tendered in their textual entirety as exhibits. On occasions, the parties and, where appropriate, the Chamber, have raised inconsistencies between the content of an earlier statement and the testimony during the trial. The Chamber's point of departure when assessing the account given by a witness is his or her testimony in court. Of course, differences between earlier written statements and later testimony in court may be explained by many factors, such as the lapse of time, the language used, the questions put to the witness and the accuracy of interpretation and transcription, and the impact of trauma on the witnesses. However, where the inconsistencies cannot be so explained to the satisfaction of the Chamber, the reliability of witness' testimony may be questioned.
>
> 25. Finally, the Chamber notes that hearsay evidence is not inadmissible per se, even when it is not corroborated by direct evidence. Rather, the Chamber has considered such hearsay evidence with caution, in accordance with Rule 89. When relied upon, such evidence has, as all other evidence, been subject to the tests of relevance, probative value and reliability.

100. The Appeals Chamber considers that, in this case, the Trial Chamber relied on prior statements of witnesses for two purposes: on the one hand, to assess the credibility of the witnesses, and on the other hand for the truth of their content. In the latter case, the Trial Chamber had good grounds to proceed in the way it did, insofar as the prior statements were regarded as hearsay evidence. As "previous written statements of most witnesses appearing in this case were tendered in their textual entirety as exhibits,"[172] it was the responsibility of the Trial Chamber, pursuant to Rule 89 of the Rules, to determine, by virtue of its discretion, the weight to attach to such statements. The

Appeals Chamber holds that, at the time, nothing prevented the Trial Chamber from admitting prior statements as hearsay evidence; and this was the case even in instances where the witnesses concerned had testified at trial.[173]

(2) In the instances where the Trial Chamber relied upon differences between the witnesses' prior statements and their testimony in court, it failed to ask the witnesses to explain themselves on the said differences.

101. The Appeals Chamber holds the view that the Prosecution cannot allege on appeal that the Trial Chamber committed an error in this regard. It was incumbent upon the Prosecution, when necessary, to request the Trial Chamber to order further cross-examination in order to dispel any doubt regarding any inconsistencies that could affect the credibility of witnesses. The Prosecution cannot raise such an argument for the first time on appeal whereas the problem was not brought to the attention of the Trial Chamber at trial (see the findings of the Trial Chamber regarding the second ground of appeal).

3. Assessment of the evidence relating to the presence of the Accused at the Gatwaro Stadium on 13, 14 and 18 April 1994

(a) Presence of the Accused at the Gatwaro Stadium on 13 April 1994

102. The Prosecution argues that a number of inconsistencies noted by the Trial Chamber between Witness AC's prior statement and his testimony in court are immaterial, and that, moreover, the inconsistencies were not put to the Witness during her testimony.[174] The Prosecution refers in particular to the discrepancy relied upon by the Trial Chamber in relation to where the Accused was standing and what she heard the Accused say.

103. Concerning the reproach made to the Trial Chamber for having taken into account the discrepancy as to the time when the Accused arrived at the Stadium,[175] the Appeals Chamber dismisses the Prosecution's arguments. Firstly, as submitted by the Respondent,[176] it is clear that the Trial Chamber recognized that the discrepancy regarding the time was immaterial. Secondly, the discrepancy regarding the time when the witnesses saw the Accused at the Stadium appears to have been less crucial for the Trial Chamber than that regarding the moment when the Accused is alleged to have arrived at the Stadium. The Trial Chamber's use of the terms "before" and "after" in italics in the Judgement affirms this interpretation. In the view of the Appeals Chamber, nothing in the Trial Chamber's course of action indicates that it was unreasonable in this instance.

104. With respect to the argument that the discrepancy as to the wording of what the Accused said was a minor one, the Appeals Chamber sees nothing unreasonable in the Trial Chamber's findings at paragraph 541 of the Judgement. In any event, the Prosecution has failed to demonstrate the alleged error. As stated by the Respondent, it was the combination of inconsistencies as to when the Respondent arrived, where he

stood and what he said that was considered crucial by the Trial Chamber.[177] Indeed, the Trial Chamber explained that "[i]t has not been proved beyond reasonable doubt that the Accused was present at the Stadium in Kibuye on 13 April 1994. Even assuming that he was there, the testimonies of the witnesses provided little information about the purpose of the visit. Witness AC's testimony seems to indicate that he simply came to verify whether the refugees had arrived at the Stadium. There is insufficient evidence of criminal intent. No crimes under the Statute had been committed at the Stadium by that stage. Therefore, there can be no question of liability."[178]

(b) Presence of the Accused at the Gatwaro Stadium on 14 April 1994

105. The Prosecution submits that in its assessment of the evidence related to 14 April 1994, the Trial Chamber applied an incorrect test, namely that "in the absence of details" in the oral testimony of Witness A the Trial Chamber considered the prior statements of this witness and compared its content to his oral testimony.[179]

106. According to the Prosecution, the oral testimonies of Witnesses A and AC contain ample evidence upon which a reasonable trier of fact would have concluded the presence of the Accused at the Stadium.[180] It further submitted that there was no basis for resorting to the previous statements of the witness for "corroboration". Therefore, the Trial Chamber erred in failing to put such inconsistencies to Witness A at trial to afford him an opportunity to provide explanations for the said inconsistencies.[181]

107. The Appeals Chamber dismisses the Prosecution's arguments relating to the Trial Chamber's alleged application of an incorrect test in its assessment of the evidence. By virtue of its discretionary power, the Trial Chamber could consider the written statements "in the absence of other details" in order to assess the reliability and credibility of a given witness. In this instance, it is only after the Trial Chamber noted that the information provided by Witness A was "very limited"[182] that it decided to proceed, "in the absence of details",[183] to look into the witness' prior statements. The Appeals Chamber does not find the Trial Chamber's approach unreasonable.

108. With respect to the argument that the oral testimonies of Witnesses A and AC combined provide sufficient evidence upon which a reasonable Trial Chamber would have found that the Accused was present at the Stadium, the Appeals Chamber does not consider the Trial Chamber's reasoning to be unreasonable, in light of the evidence adduced, and considering the contradictory nature of the evidence. The Trial Chamber assessed and weighed the evidence adduced, in view of the specific circumstances of the case, in determining whether, on the whole, the accounts of both witnesses were relevant and credible.[184]

(c) Presence of the Accused at the Gatwaro Stadium on 18 April 1994

109. The Prosecution submits that the assessment of the oral testimonies of Witnesses G and A,[185] and the inferences drawn therefrom were erroneous. The Prosecution contends that the Trial Chamber took into consideration facts which were not evident on

the record, and which caused it to speculate that there were other factors which affected the ability of Witness G to see the Accused.[186] According to the Prosecution, if the Trial Chamber assessed the evidence correctly, in light of the fact that Witness G knew the Accused, the verdict of the Chamber would have been affected.[187]

110. The Appeals Chamber rejects the Prosecution's allegations. It recalls that the Trial Chamber expressly visited Rwanda in order to "better appreciate the evidence to be adduced during the trial."[188] The visit no doubt enabled the trial judges to form a concrete and realistic opinion of the situation. The information gathered during the visit cannot be considered speculative, especially given that the visit was aimed at assessing the evidence relating mainly to the question of the witnesses' conditions of observation at the stadium.

111. It appears to the Appeals Chamber that the main issue for the Trial Chamber was to determine whether Witness G could clearly identify the Accused at the Stadium on that day. The Prosecution submits that the Trial Chamber should have taken into consideration the fact that Witness G knew the Accused. This argument must be rejected as the Trial Chamber did recognize that the Witness "knew the Accused well."[189] Furthermore, it appears that this issue was not crucial for the Trial Chamber; as indicated in the Respondent's Brief,[190] it was rather the issue of visibility which appears to have been crucial for the Trial Chamber. The question before the Trial Chamber was how Witness G was able, given the distance between him and the stadium, to specifically identify the Accused among the attackers.[191] Upon reading the Judgement, it appears that the Trial Chamber had a very precise idea of the configuration of the place. It also appears that the Prosecution clearly did not provide sufficient information to the Chamber and that the testimonies of the witnesses who appeared before it could not support a finding by the Trial Chamber that the Accused was present at the Stadium on 18 April 1994. Once again, the Appeals Chamber is of the view that the Prosecution failed to show that the findings of the Trial Chamber on this issue were unreasonable.

112. In view of the foregoing, the Appeals Chamber dismisses all the submissions made under the third ground of appeal.

113. The Appeals Chamber therefore dismisses all the grounds of appeal raised by the Prosecution, as the Prosecution has failed to establish that the Trial Chamber committed any error of fact leading to a miscarriage of justice or any error of law invalidating the Judgement.

VI. DISPOSITION

For the foregoing reasons, the **Appeals Chamber**, on 3 July 2002, at Arusha, ruled as follows:

"The **Appeals Chamber**,

Pursuant to Article 24 of the Statute of the Tribunal and Rule 118 of the Rules of Procedure and Evidence,

Considering the written submissions of the Parties and their oral arguments at the hearing of 2 July 2002,

Sitting in open court,

Unanimously **Dismisses** the arguments of Ignace Bagilishema regarding the inadmissibility of the Prosecution's Appeal,

Unanimously **Dismisses** the appeal lodged by the Prosecution against the Judgement delivered on 7 June 2001, and will give the Reasons for the Judgement in due course,

Affirms the acquittal by the Trial Chamber on all the counts in the Indictment,

Rules that it is not necessary therefore to consider all the motions filed by Ignace Bagilishema pursuant to Rule 115 of the Rules of Procedure and Evidence, and the Motion for Protective Measures for Defence Witnesses,

Orders the immediate release of Ignace Bagilishema,

Rules that it is therefore not necessary to consider the *"Requête urgente de l'Intimé en demande de main levée de contrôle judiciaire"* [Respondent's Urgent Motion for the Lifting of Judicial Control Measures] filed on 2 July 2002,

Rules that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules of Procedure and Evidence.

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

Claude Jorda	Mohamed Shahabuddeen	David Hunt
Presiding Judge	Judge	Judge

Fausto Pocar	Theodor Meron
Judge	Judge

Dated this third day of July 2002
At Arusha, Tanzania."

The reasons for Judgement are now set out in the foregoing text.

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

Claude Jorda	Mohamed Shahabuddeen	David Hunt
Presiding Judge	Judge	Judge

Fausto Pocar	Theodor Meron

Judge Judge

Dated this thirteenth day of December 2002

[Seal of the Tribunal]

ANNEX A: APPEALS PROCEEDINGS

1. Summary of facts relating to filings on appeal

1. On 9 July 2001, the Prosecution appealed the Judgement rendered on 7 June 2001 by the Trial Chamber.[192] By decision dated 26 September 2001, the Presiding Judge of the Appeals Chamber designated himself Pre-Hearing Judge in the present case ("PHJ").[193] On 19 October 2001, the PHJ issued an order setting 24 September 2001 as the beginning date for the parties to agree on the contents of the record on appeal.[194] By decision rendered on 30 November 2001,[195] Judges Claude Jorda, Mohamed Shahabuddeen, David Hunt, Fausto Pocar and Theodor Meron were assigned to the present case.

2. In accordance with the decision of the PHJ dated 1 October 2001,[196] the Prosecution filed its Appeal Brief on 29 October 2001.[197] On 2 November 2001, the Prosecution filed an urgent motion for authorization to exceed the page limit allowed for the Appellant's Brief and alternative request for extension of time.[198] Upon realizing that its appeal brief exceeded the number of pages allowed by the Practice Direction on the Length of Briefs and Motions on Appeal, the Prosecution requested the Appeals Chamber to allow its brief as filed on 29 October 2001 and, alternatively, to grant it an extension of seven (7) days within which to file a new brief. By decision dated 30 November 2001, the PHJ ordered the Prosecution to file an Appellant's Brief in accordance with the requirements set forth in the Practice Direction within seven (7) days of the said decision.[199] The said brief was filed on 7 December 2001.[200] The Judges of the Appeals Chamber were informed by the Deputy Registrar of the Tribunal, on 14 December 2001, that the Appellant's Brief did not comply with the Practice Direction with regard to the number of words. In its Urgent Motion filed on 19 December 2001,[201] the Prosecution explained that it dwelt on reducing the number of pages in its brief without paying attention to the word count, and requested the Appeals Chamber to grant the Prosecution an extension of time to file a brief in compliance with the Practice Direction, which was attached to the Motion.[202] The same day, the PHJ noted the Prosecution's failure to comply with the decision of 30 November 2001 and stated that the Appeals Chamber would take appropriate disciplinary measures, if necessary and at the right moment. He, however, stated that in order to avoid undue delay in the proceedings, there was cause to allow the Prosecution to file the new brief attached to the Motion for an Extension of Time Limits.[203]

3. On 7 February 2002, Bagilishema filed his Respondent's Brief in Response[204] to which the Prosecution replied on 25 February 2002.[205] Bagilishema then filed a Motion on 13 March 2002 requesting leave to file a rejoinder to the Prosecution's Reply Brief.[206] By decision dated 20 March 2002, the PHJ dismissed the said Motion.[207] Recalling that the Rules do not provide for the filing of a rejoinder in respect of appeals against judgement, the PHJ pointed out that the Appeals Chamber may, at its discretion, allow the filing of a written submission not provided for by the Rules, where such filing is warranted for a proper determination of the appeal. In the instant case, as the Reply was still being translated, the Respondent had had no opportunity to apprise himself of the Motion and had not shown that the filing of the Rejoinder was justified. Once the Brief in Reply was translated into French,[208] Bagilishema filed another motion seeking leave to file a rejoinder to the Prosecution's Reply Brief on 23 April 2002,[209] to which the Prosecution responded on 1 May 2002.[210] In its Decision of 23 May 2002,[211] the PHJ noted that in order to ensure a fair trial, every party has the right to challenge the arguments put forward by the Prosecution. In the instant case, however, he held, on the one hand, that Bagilishema had had *"tout le loisir de discuter les arguments soulevés par le Procureur dans son Mémoire en réponse"* [all the time to address the arguments raised by the Prosecution in its Reply Brief] and, on the other hand, that the Prosecution's Reply did not contain any new arguments relating to the main grounds of appeal. After emphasizing that Bagilishema had failed to show that filing the rejoinder was justified for a proper determination of the appeal, and, after examining the document, considering that it was not necessary for the proper conclusion of the appeal, the PHJ dismissed the second motion.

2. Motions filed as part of the appeals proceedings

4. The motions filed as part of the appeals proceedings raise several questions, which the Appeals Chamber combined for consideration under the following headings:

(a) Inadmissibility of the Prosecution's Appeal Brief

5. On 12 September 2001, Bagilishema filed a motion challenging the admissibility of the Prosecution's appeal, arguing notably on the ground, *inter alia* that it was too vague and imprecise for him to understand the Prosecutor's grounds of appeal and hence, to adequately prepare his defence.[212] Bagilishema submitted that such lack of specificity of the grounds of appeal was tantamount to a lack of grounds and that therefore, the Prosecution's Notice of Appeal did not "set forth the grounds" within the meaning of Rule 108(A) of the Rules. On 24 September 2001, the Prosecution filed its Response in English and an alternative request seeking a suspension of the Briefing schedule and an extension of time.[213] Subsequently, Bagilishema wrote a letter to the Presiding Judge of the Appeals Chamber, stating that he was unable to understand the Prosecution's Response, as it was in English.[214] By Decision dated 1 October 2001, the PHJ granted Bagilishema's request and ordered him to file his reply within seven (7) days after receiving the translation of the Prosecution's Response, which was expected by 8 October 2001 at the latest.[215] The PHJ also fixed 29 October 2001 as the deadline for

filing the Prosecution's Appeal Brief, without prejudice to the Appeals Chamber's decision as to the admissibility of the Prosecution's Notice of Appeal.

6. On 26 October 2001, the Appeals Chamber rendered its Decision.[216] Considering Rules 111 and 108 of the Rules, the Appeals Chamber took the view that the only formal requirement under the Rules regarding the content of the notice of appeal is an enumeration of the grounds of appeal and that in no case does the notice of appeal have to give details of the arguments the parties intend to raise in support of the grounds of appeal. The Appeals Chamber also held that it is the Appellant's Brief that contains details of the grounds of appeal. The Appeals Chamber therefore dismissed Bagilishema's motion challenging the admissibility of the Prosecution's Appeal Brief.

(b) Translation and extension of deadlines

7. Bagilishema filed a motion for translation and additional time on 31 October2001,[217] to which the Prosecution responded on 14 November 2001.[218] On 30 November 2001, the PHJ ordered the Prosecution to file an Appellant's Brief in compliance with the criteria set forth in the Practice Direction within seven days from the date of the decision, and also granted Bagilishema's motion to the effect that the thirty-day time-limit for the filing of the Respondent's Brief, as provided for in Rule 112 of the Rules, should only start to run from the time the Registry served him and his Counsel with the French translation of the new Appellant's Brief, which was to be served on the Parties by 4 January 2002 at the latest.[219]

8. On 22 January 2002, Bagilishema filed a motion for extension of time,[220] which the PHJ dismissed on 25 January 2002 on the grounds that it constituted an abuse of process within the meaning of Rule 73(E) of the Rules,[221] insofar as Bagilishema had already brought the issues raised in his motion before the PHJ and the Appeals Chamber, which issues were still under consideration by the Appeals Chamber.

9. On 12 February 2002, the Prosecution filed an urgent motion for extension of time and for leave of court to exceed the page limit allowed for the Prosecution's Reply Brief,[222] to which Bagilishema responded on 20 February 2002.[223] The PHJ dismissed this motion on 21 February 2002 on the grounds that the Prosecution had failed to show good cause for an extension of time and did not establish such exceptional circumstances as would justify its exceeding the page limit set forth in the Practice Direction.[224]

(c) Motions for review

10. On 12 December 2001, Bagilishema filed a motion for review of the Order rendered by the PHJ on 30 November 2001.[225] He submitted that the parties' filings should be translated into both languages and that the deadlines allowed him should start to run only from the time he was served with the French version of all documents intended for him. On 20 December 2001, the Prosecution responded to Bagilishema's motion for review.[226] Bagilishema filed a second Motion for review on 21 December

2001,[227] challenging the PHJ's Decision of 19 December 2001, whereby the Prosecution was allowed to file its new Appellant's Brief attached to the Motion for Extension of Time (filed on 19 December 2001).[228] The Prosecution responded to Bagilishema's second Motion for review on 4 January 2002.[229]

11. By Decision dated 6 February 2002,[230] the Appeals Chamber reiterated that only a decision that puts an end to proceedings may be reviewed, and that in this instance, "neither of the two decisions impugned by the Respondent in his 'motions for review'" put an end to proceedings. The Appeals Chamber held that the motions for review should be viewed as motions for reconsideration, and that such a motion for reconsideration should be brought before the PHJ who had rendered the decision, given that the Rules do not provide for appeals to the Appeals Chamber against decisions rendered by the PHJ. The Appeals Chamber thus held that it was necessary to refer the motions to the PHJ for consideration. On 6 February 2002, the PHJ dismissed the motions for review on the grounds that, in the first motion, there were no exceptional circumstances to justify a reconsideration by the PHJ of his decision, and, moreover, Bagilishema had not demonstrated in his second motion the existence of exceptional circumstances that would warrant a reconsideration by the PHJ of his decision. With regard to the argument relating to the inadmissibility of the Prosecution's Brief, the PHJ emphasized that it was possible for Bagilishema to advance, if necessary his arguments in this connection in an *addendum* to his response to the Appellant's Brief.[231]

(d) Motions for disclosure of evidence and for witness protection measures

12. On 12 December 2001, Bagilishema filed a motion requesting the Appeals Chamber to order the Prosecution to disclose recordings of Broadcasts on Radio Muhabura to the Defence.[232] The Prosecution filed its Brief in Response on 20 December 2001 and 28 January 2002.[233] Recalling that under the provisions of Rule 68 of the Rules "it is the Prosecutor who determines *ab initio* whether an item of evidence is exculpatory or not," the PHJ emphasized that the Appeals Chamber would intervene if Bagilishema could show that the Prosecution had not fulfilled its obligations. The PHJ dismissed this motion on 6 February 2002 on the ground that it was unfounded and, in particular, because the Prosecution stated that it did not have the evidence requested and that, in any event, the said evidence showed no item of information that could be disclosed under Rule 68 of the Rules.[234]

13. On 8 March 2002, Bagilishema sought an order from the Appeals Chamber for protective measures for potential Defence witnesses.[235] The Prosecution filed its Response on 22 March 2002,[236] and the Respondent filed a Reply thereto on 11 April 2002.[237] By Decision of 30 May 2002, the Appeals Chamber decided to defer consideration of the motion for protection of Defence witnesses until the Prosecution's appeal against acquittal had been heard, given that Bagilishema had requested the Appeals Chamber to have the said witnesses called to testify pursuant to Rule 115 of the Rules.[238]

(e) Motions brought under Rule 115 of the Rules

14. On 8 March 2002, Bagilishema filed a Confidential Motion for Leave to file new Evidence.[239] The Prosecution responded to it on 22 March 2002.[240] On 25 April 2002,[241] Bagilishema filed his Reply, to which the Prosecution filed an objection on 1 May 2002.[242] Bagilishema filed a Supplementary Motion on 29 April 2002[243] for leave to file new evidence in which he sought to adduce as additional evidence certain factual findings made in the Trial Judgement of 21 May 1999 and the Appeal Judgement of 1 June 2001 in *The Prosecutor v. Kayishema and Ruzindana*. The Prosecution filed a Response to this Motion on 9 May 2002.[244] The Appeals Chamber decided on 30 May 2002 to defer consideration of the motions brought under Rule 115 until after the hearing of the Prosecution's appeal against the acquittal of Bagilishema.[245] The Appeals Chamber considered that the issues raised by Bagilishema in the above-mentioned motions brought under Rule 115 would be relevant to the Prosecution's appeal only if the Prosecution's appeal against Bagilishema's acquittal could succeed in the Appeals Chamber. The Appeals Chamber held that it was therefore appropriate to first hear the parties' arguments relating to the Prosecution's appeal.

3. The Appeal Judgement

On 3 July 2002 at the end of the appeal hearing held at the seat of the Tribunal in Arusha on 2 July 2002, the Appeals Chamber rendered its Judgement.[246] In substance, the Appeals Chamber unanimously dismissed the Prosecutor's appeal, as well as Bagilishema's arguments relating to the inadmissibility of the Prosecutor's appeal and affirmed the acquittal on all counts in the Indictment's.

ANNEX B: GLOSSARY

A. Filings of the Parties

Notice of Appeal	Notice of Appeal, filed in English by the Prosecution on 9 July 2002.
Appellant's Brief	"Prosecution's Appeal Brief (Further reduced version)", filed on 19 December 2001.
Respondent's Response	"Respondent's Brief in Response", filed on 7 February 2002.
Prosecution's Reply	"Prosecution's Reply Brief", filed on 25 February 2002.

B. References relating to the instant case

Indictment	Amended Indictment in *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, 17 September 1999.
Hearings on Appeal	Hearings on the arguments of the parties on appeal, held on 2 and 3 July 2002.
Bagilishema or Respondent	Ignace Bagilishema.
Appeals Chamber	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.
T	Transcripts of trial proceedings in *The Prosecutor v. Ignace Bagilishema,* Case No. ICTR-95-1A-T. All page numbers referred to in this Judgement are those of the unofficial and uncorrected English version.
T(A)	Transcripts of the hearings on appeal held in Arusha on 2 and 3 July 2002. All page numbers of the transcripts of the hearings referred to in this Judgement are those of Document BL20702E.APPEAL.doc.
Trial Judgement	The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001.
Judge Güney's Opinion	Separate and Dissenting Opinion of Judge Mehmet Güney in *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001.
Prosecution or Appellant	Office of the Prosecutor.
Rules	Rules of Procedure and Evidence of the Tribunal.
Statute	Statute of the Tribunal.
International Tribunal or Tribunal	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
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.

C. Cited Cases

Akayesu Appeal Judgement	*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (Appeals Chamber).
Aleksovski Appeal Judgement	*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 (ICTY Appeals Chamber).
Čelebići Appeal Judgement	*Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (ICTY Appeals Chamber).
Furundžija Appeal Judgement	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (ICTY Appeals Chamber).
Kambanda Appeal Judgement	*Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000 (Appeals Chamber).

Kayishema/Ruzindana Appeal Judgement	*Clément Kayishema and Obed Ruzindana v. The Prosecutor*, Case No. ICTR-95-1-A, Judgement, 1 June 2001 (Appeals Chamber).
Kupreškić Appeal Judgement	*Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001 (ICTY Appeals Chamber).
Musema Appeal Judgement	*Alfred Musema v. The Prosecutor,* Case No. ICTR-96-13-A, Judgement, 16 November 2001 (Appeals Chamber).
Tadić Appeal Judgement	*Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, Judgement, 15 July 1999 (ICTY Appeals Chamber).
Tadić Decision (additional evidence)	Decision on Appellant's Motion for the extension of the time-limit and admission of additional evidence, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, 15 October 1998 (ICTY Appeals Chamber).
Blaškić Trial Judgement	*The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (ICTY Trial Chamber).
Čelebići Trial Judgement	*Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998 (ICTY Trial Chamber).
Kayishema/Ruzindana Trial Judgement	*The Prosecutor v. Clément Kayishema et Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 (Trial Chamber).
Musema Trial Judgement	*The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000 (Trial Chamber).

D. Other References

ICC	International Criminal Court established by the Rome Statute, adopted on 17 July 1998, Doc. ONU A/CONF/1 83/9.
Practice Direction	Practice Direction on the Length of Briefs and Motions on Appeal.
Report of the Commission of Experts	Report of the United Nations Commission of Experts S/1994/674.

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[1] It should be noted that the Accused was unanimously found not guilty of Counts 1, 6 and 7 of the Indictment, and, not guilty of Counts 2, 3, 4 and 5 of the Indictment by a majority (Judge Güney appended a Separate and Dissenting Opinion). Judge Asoka de Z. Gunawardana appended a Separate Opinion to the Judgement.

[2] Details of the proceedings are found in Annex A.

[3] T(A), 2 July 2002, p. 4 *et seq*.

[4] Article 24 of the Statute provides as follows:

"1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers *or from the Prosecution* on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers." (Emphasis added).

Article 24 of the Tribunal's Statute is similar to Article 25 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). It should be noted that in his Report S/25704 (devoted to ICTY), the Secretary-General of the United Nations indicated that "[t]he right of appeal should be exercisable on two grounds: an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice. *The Prosecutor should also be entitled to initiate appeal proceedings on the same grounds"*, para. 117 (emphasis added).

[5] *Musema* Appeal Judgement, paras. 15 to 21; *Kayishema/Ruzindana* Appeal Judgement, para. 320; *Akayesu* Appeal Judgement, paras. 174 to 179.

[6] *Musema* Appeal Judgement, para. 17; *Akayesu* Appeal Judgement, para. 178.

[7] *Musema* Appeal Judgement, para. 18 (quoting *Furundžija* Appeal Judgement, para. 37); see also *Tadić* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63.

[8] *Akayesu* Appeal Judgement, para. 232 (quoting *Tadić* Appeal Judgement, para. 64); see also *Kunarac* Appeal Judgement, paras. 39 and 40; *Kupreškić* Appeal Judgement, paras. 30 and 32; *Čelebići* Appeal Judgement, para. 435.

[9] See, *e.g.*, *Tadić* Appeal Judgement, para. 64.

[10] *Kupreškić* Appeal Judgement, para. 32; see *Kunarac* Appeal Judgement, para. 40.

[11] *Kupreškić* Appeal Judgement, para. 29.

[12] Respondent's Brief, para. 54.

[13] The Practice Direction was indeed served by the Registry on the various Offices of the Prosecutor (at The Hague and in Arusha) on 18 September 2001 and on all Defence Counsel on 18 and 19 September 2001.

[14] "Decision "Motion for extension of time", *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, rendered on 1 October 2001.

[15] In support of its motion, the Prosecution explained that "In the evening of Wednesday 31 October 2001, the Prosecution was informed by the Registry that the Prosecution's Appeal Brief did not conform with Section 1(a) of the Practice Direction, in that it exceeded 100 pages or 30,000 words. The Appeals Section in The Hague did not receive a copy of the Practice Direction before […] 1 November 2001, at which date the Appeals Section received a copy from the Office of the Prosecutor in Arusha." *Cf.* "Prosecution's Urgent Motion for Authorisation to Exceed the page limit to the Prosecution's Appeal Brief and Alternative Request for Extension of Time", *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, 2 November 2001, paras. 6 and 7.

[16] "Decision ("Respondent's Motion for translation and request for extension of time"; "Prosecution's Urgent Motion for Authorisation to exceed the page limit to the Prosecution's Appeal Brief and alternative Request for extension of time"), *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, rendered on 30 November 2001, p. 4.

[17] "Decision ("Prosecution's Urgent Motion for extension of time to file its appeal brief in compliance with the Practice Direction on the length of Briefs and Motions on Appeal"), *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, rendered on 19 December 2001, p. 3 (emphasis added).

[18] T(A), 2 July 2002, p. 179.

[19] *Kayishema/Ruzindana* Appeal Judgement, para. 46 (footnotes omitted).

[20] Appellant's Brief, para. 2.4.

[21] *Ibid*., paras. 2.5 and 2.39 to 2.44.

[22] *Ibid*., paras. 2.45 to 2.69.

[23] *Ibid*., para. 2.70

[24]Appellant's Brief, paras. 2.68, 2.69 and 2.75; T(A), 2 July 2002, p. 65 *et seq.*

[25] Trial Judgement, paras. 44 to 46 included.

[26]Appellant's Brief, para. 2.40.

[27] T(A), 2 July 2002, p. 22; Appellant's Brief, paras. 2.6 to 2.14.

[28] The Prosecution considers that "this is an important question on which it would be appropriate for this Appeals Chamber to pronounce, not only in view of this case on appeal, but also in view of the guidance that needs to be given to the Trial Chambers and the parties in other cases." The Prosecution is referring here to paragraph 240 of the *Čelebići* Appeal Judgement. *Cf*. Appellant's Brief, paras. 2.14 to 2.38. See also T(A), 2 July 2002, p. 30: "The Prosecution's submission is that, the concept of inquiry notice, as developed by the *Čelebići* Appeals Chamber applies to all superiors under the Statute regardless of their formal or legal status, regardless of whether they are civilian or *militia*."

[29]Appellant's Brief, para. 2.40; T(A), 2 July 2002, p. 41.

[30]Appellant's Brief, para. 2.40; T(A), 2 July 2002, pp. 41-42.

[31] It should be noted that the English version of the Judgement uses the two expressions "gross negligence" and "criminal negligence" (*Cf*. Trial Judgement, for example paras. 897 and 1005).

[32] Appellant's Brief, para. 2.42. The Prosecution is referring to the elements applied by the Trial Chamber in paras. 1011 and 1012 of the Judgement.

[33] Appellant's Brief, paras. 2.42 and 2.43.

[34] According to the Respondent, the Appellant misinterpreted the *Čelebići* Appeal Judgement (Respondent's Brief, para. 122). The Respondent submits that the ICTY Appeals Chamber clearly held that whereas it is not required that the superior actually acquaint himself with the information (whether it was

provided or made available to him), the relevant information only needs to be in the possession of the superior. (See also T(A), 2 July 2002, pp. 208-214). Furthermore, the Respondent considers that the Prosecution is "attempting to use the *Bagilishema* case to solve the legal issue of liability of military or civilian superiors" and submits that the standard set out in the *Čelebići* Appeal Judgement ought not to apply to civilian superiors (Respondent's Brief, paras. 124 and 141; T(A), 2 July 2002, p. 210). With respect to the Prosecution's main contention, he believes that the Trial Chamber "explicitly and implicitly" applied the "had reason to know" standard (Respondent's Brief, paras. 142 and 151). The Respondent points out that the fact that the Trial Chamber concluded that there were two possible groups of subordinates (the communal police and persons staffing the roadblocks) necessarily limits the obligation to assess the Respondent's *mens rea* in respect of the unlawful acts which may have been committed by these groups (or individuals in the group) (*Ibid*., para. 145), and that the test for criminal negligence encompasses the "had reason to know" concept. (*Ibid*., para. 156).

[35] *Čelebići* Appeals Judgement, par. 238.

[36] Emphasis added.

[37] Trial Judgement, para. 967. It follows from this paragraph that a superior's "knowledge" covers the two standards, namely (1) the Respondent "knew" or (2) the Respondent "had reason to know".

[38] Trial Judgement, para. 975.

[39] Trial Judgement, para. 968. The Trial Chamber is referring to paragraph 386 of the *Čelebići* Appeal Judgement, which in turn refers to the following indicia featuring in the said Report (United Nations Commission of Experts Report S/1994/674): the number of illegal acts, the type of illegal acts, the scope of illegal acts, the time during which the illegal acts occurred, the number and type of troops involved, the logistics involved, if any, the geographical location of the acts, the widespread occurrence of the acts, the tactical tempo of operations, the *modus operandi* of similar illegal acts, the officers and staff involved, and the location of the commander at the time.

[40] The Trial Chamber indeed considered that "[W]itness Z testified to the effect that the Accused was put on notice about the impending murders, and may even have encouraged their commission. In the case of Bigirimana, and for the reasons given earlier, the Chamber cannot accept Witness Z's testimony about the presence of the Accused at the Trafipro roadblock shortly before Bigirimana was taken away and killed; nor is the Chamber convinced that the Accused was notified of the imminent offence by Bigirimana's wife. In the case of Judith, Witness Z claimed to have conversed with the Accused moments after Witness Y and Rushimba led Judith past the window of the Accused's office. However, for the reasons given above, the Chamber has decided to disregard his evidence." *Cf.* Trial Judgement, para. 974.

[41] Trial Judgement, para. 977.

[42] *Ibid*., para. 966.

[43] The Trial Chamber in fact considered in para. 962 of the Judgement that "[i]t is arguable that if the Accused had seen the group pass before his window *he would have appreciated* the likelihood of an imminent offence. […]. However, *in the absence of any evidence that the Accused noticed the procession*, this line of argumentation leads nowhere." (emphasis added). Furthermore, the Trial Chamber emphasized that Witness Z, "the Prosecution's own witness, *effectively invited to allude to a tolerance for criminal conduc*t in the proximity of the *bureau communal*, spoke instead of his own and others' unreasoned conduct at the time." The unreasoned conduct in question in this para. refers to the fact that Witnesses Y, Z and Rushimba passed in front of the communal office, giving the impression that the Accused was informed about the crime that was about to be committed on the person of Judith. *Cf.* Trial Judgement, para. 963.

[44] Trial Judgement, para. 986 (emphasis added).

[45] Trial Judgement, para. 980 *in fine* (emphasis added). In the original version of the Trial Judgement, namely the English version, para. 980 reads: "[…] If the murders of Judith and Bigirimana were instances of a larger number of victims of the Trafipro roadblock, the inference that the Accused knew about the offences might have been plausible. But *there is no evidence to show that the two killings were not just isolated or exceptional incidents, rather than illustrations of a routine of which the Accused could not plausibly have remained unaware*".

[46] The Prosecution submits indeed that "it is important to examine whether the legal elements of the standard which the Trial Chamber articulated for criminal negligence could amount to the "had reason to know" standard in accordance with the *Čelebići* jurisprudence." (Appellant's Brief, para. 2.41 *et seq*.)

[47] The Trial Chamber stated that it would "address these three roadblocks below on the basis of all available evidence concerning their establishment and operation and decide whether the Accused is liable under one or more of the three forms of liability." (*cf.* Trial Judgement, paragraph 891). It continued in para. 897 that "a third basis of liability in this context is gross negligence." Lastly, the Trial Chamber stated in para. 1014 *in fine* that it had given its reasons for being unable to find the Accused guilty under Article 6(1) and 6(3). Nevertheless, according to the Chamber, "the question that remains is whether the Accused is nonetheless liable in negligence for the two deaths [of Judith and Bigirimana]."*Cf.* Trial Judgement, para. 1015.

[48] Trial Judgement, para. 897. It was thus held that, "[h]ad [he], as *bourgmestre*, an obligation to maintain order and security in Mabanza *commune*, it would have been a *gross breach of this duty* for him to have established roadblocks *and then failed properly to supervise their operations* at a time when there was a high risk that Tutsi civilians would be murdered in connection with them." (emphasis added).Consequently, in testing for negligence, according to the Trial Chamber, ordinary principles of the law of negligence apply to determine whether an accused person was in breach of a duty of care towards his or her victim. The next question is whether the breach caused the death of the victim and, if so, whether it should be characterized as so serious as to constitute a crime. (Trial Judgement, para. 1010). The Trial Chamber set forth the standard for examining this "form of liability" in para. 1011 of the Judgement.

[49] *Čelebići* Appeal Judgement, paras. 230 to 239. The *Čelebići* Appeal Judgement points out that Article 7(3) of the ICTY Statute, which is identical to Article 6(3) of the ICTR Statute, "is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence. A superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish." (*Čelebići* Appeal Judgement, para. 226).

[50] See, e.g., Summing-up of the Judge Advocate in *Babao Masao* case (Rabaul, 1947), reported in Law Reports of Trials of War Criminals, UNWCC, Vol. XI, at pp. 56 to 60.

[51] According to the Prosecution, the factual findings of the Trial Chamber and the undisputed evidence on record clearly show that "the majority's conclusion that the Prosecution did not adduce sufficient evidence to support the 'had reason to know' standard is so unreasonable that no reasonable trier of fact could have come to a similar conclusion." *Cf.* Appellant's Brief, para. 2.67.

[52] Appellant's Brief, para. 2.67.

[53] In support of its contention, the Prosecution advances the following main arguments:

- Para. 1019 only allows for the conclusion that the precise date of the killings of Judith and Bigirimana has not been established (Appellant's Brief, para. 2.47);

- These killings must be placed in the context of other events, which the Trial Chamber found were established beyond reasonable doubt: the events which took place in Mabanza (*Ibid*., para. 2.48), in Kibuye (*Ibid*., para. 2.49) and in Rwanda in general (*Ibid*., paras. 2.52 and 2.53); the purpose and functioning of the Trafipro roadblock (*Ibid*., paras. 2.54 to 2.58); knowledge by the Accused of Witness Z's past (*Ibid*., paras. 2.59 and 2.60); the close proximity of the Communal Office to the Trafipro roadblock where the murders were committed (*Ibid*., para. 2.61).

[54] The Prosecution posits that "if the superior fails to remain apprised of his subordinates' unlawful conduct and the superior had the means to obtain the knowledge, but deliberately refrained from investigating further, it may be presumed that he had the required mental element during his failure to prevent, report or punish." *Cf*. Appellant's Brief, para. 2.12.

[55] The Prosecution submits that the Respondent had the duty to investigate or inquire further because the evidence on the record demonstrated that the Respondent knew: (1) about the widespread killing of Tutsi civilians that took place all over Rwanda, in the town of Kibuye and in Mabanza; (2) about the fact that the perpetrators of these massacres were /…/ also *gendarmes*, policemen, ordinary Hutu civilians and inhabitants of his *commune*; (3) that Tutsis were targeted; (4) about the fact that roadblocks were inherently dangerous for Tutsi civilians; (5) that the Trafipro roadblock was at a strategic location; (6) that at least one of the persons staffing the Trafipro roadblock was an ex-soldier. *Cf*. Appellant's Brief, paras. 2.62 and 2.63.

The Prosecution submits that the Respondent failed in his duty to investigate further (*Ibid*., para. 2.64), and offers some suggestions on how the Respondent could have met his duty to inquire (*Ibid*., para. 2.65), following which "it would have been clear that several courses of action were open to him in order to comply with his duty as a superior to prevent the commission of crimes or to punish the perpetrators thereof." (*Ibid*., para. 2.66).

[56]Appellant's Brief, paras. 2.14 to 2.38. The Prosecution submits that the precise formal or technical status of a superior is not relevant and, hence, all superiors should be judged according to the same legal standard in relation to the "had reason to know" standard. For the Prosecution, "there is no indication that the drafters of the Statute intended to lay down different standards for different categories of superiors." (Appellant's Brief, para. 2.17). It submits that this position can be confirmed by international jurisprudence on the subject. The Prosecution, however, analyses the distinction between civilian and military superiors in Article 28 of the Statute of the International Criminal Court ("ICC"), which it qualifies as being innovative and deviating from customary law in force when the offences alleged in the Indictment were committed. (*Ibid*., para. 2.29 *et seq*.)

[57]Appellant's Brief, paras. 2.62 to 2.67.

[58] *Čelebići* Appeal Judgement, para. 238 (emphasis added).

[59] *Čelebići* Appeal Judgement, para. 238.

[60] The Prosecution submits in particular that the Respondent admitted that he had given no specific instruction regarding the operation of the Trafipro roadblock. *Cf*. Appellant's Brief, para. 2.54.

[61]Appellant's Brief, para. 2.58.

[62]Appellant's Brief, para. 2.55. The Prosecution refers to para. 930 of the Trial Judgement, the Statement of 17 September 2000, as well as Prosecution exhibit 77b. The Appeals Chamber points out that para. 930 of the Judgement refers to the Statement of 17 September 1999 in footnote 1101 of the Judgement, which mentions Defence exhibit 64. The Prosecution submits that this portion of the written statement of Witness Y was not specifically put to the witness in court, and that the Chamber's point of departure should have been the oral testimony given by this Witness in court.

[63] Appellant's Brief, paras. 2.59 and 2.60; T(A), 2 July 2002, pp. 49-50.

[64] See in particular Appellant's Brief, para. 2.25; T(A), 2 July 2002, p. 45.

[65]Appellant's Brief, para. 2.60. The Prosecution refers to the T, 7 June 2000, pp. 152 to 154, and to Defence exhibit No. 100. The Prosecution also refers to the T, 8 June 2000, pp. 230 to 245 and p. 42 and 9 February 2000, pp. 29 and 30.

[66] Appellant's Brief, para. 2.60. The Prosecution refers to paras. 924-925 and 754 of the Trial Judgement.

[67] Trial Judgement, paras. 936 and 938.

[68] Trial Judgement, paras. 930 and 929, the latter reproduces Witness Y's testimony at the hearing of 7 February 2000 (T, 7 February 2000, pp. 34-36).

[69] The Judgement reads: "Witness, Y, on the other hand, said that anyone with proper identification, whether Tutsi, Hutu or Twa, could pass through the roadblock without experiencing problems."

[70] See para. 94 *et seq*. of the present Judgement.

[71] *Kayishema/Ruzindana* Appeal Judgement, para. 165; *Furundžija* Appeal Judgement, para. 69; *Čelebići* Appeal Judgement, para. 481.

[72] See, for example, Trial Judgement, paras. 944, 952 and 1020.

[73] *Cf*. *supra*, para. 10 *et seq* of the present Judgement.

[74]Appellant's Brief, para. 2.70.

[75] *Ibid*., paras. 2.70 and 2.74.

[76] *Ibid*., para. 2.75.

[77] *Ibid*., para. 2.72. The Prosecution cites as an example the fact that the Trial Chamber uses the expression "trappings of military power" and subjects proof of a superior to the presence of military style authority. To illustrate the Trial Chamber's legal approach, the Prosecution cites paras. 43, 150, 151, 152, 160, 163 to 165, 171, 180, 183 and 664 of the Trial Judgement.

[78] At the appeal hearing the Prosecution stated that "[t]he Trial Chamber is firmly convinced that a person could only be considered a *de jure* superior on condition that that person was acting as a quasi military commander."*Cf*. T(A), 2 July 2002, p. 52.

[79]Appellant's Brief, para. 2.73. The Prosecution refers to paras. 252, 254 and 304 of the *Čelebići* Appeal Judgement.

[80]Appellant's Brief, para. 2.73. The Respondent, for his part, considers that the argument raised by the Prosecution before the Appeals Chamber is a display of citations from the Judgement made out of context and a misinterpretation of the Trial Chamber's analysis. According to him, the Chamber "correctly identified the characteristics that underpin the relationship between the Respondent and his supposed subordinates, which would make it possible to find whether or not there was sufficient control to establish command responsibility." The Defence submits further that "contrary to the Prosecutor's contention […],

the Trial Chamber did not refer to the 'trappings' of military command but to the 'trappings' of *de jure* command." *Cf*. Respondent's Brief, in particular, paras. 174 and 176.

[81]*Čelebići* Appeal Judgement, para. 192: "[u]nder article 7(3), a commander or superior is thus the one who possesses the power or the authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed."

[82]*Ibid*., para. 193.

[83] *Ibid*., para. 198.

[84] *Aleksovski* Appeal Judgement, para. 76 *in fine*. The ICTY Appeals Chamber took the view "that it does not matter whether [the Accused] was a civilian or military superior, if it can be proved that […] he had the powers to prevent or to punish in terms of Article 7(3)."

[85] Emphasis not in the original. *Čelebići* Trial Judgement, para. 378, affirmed on appeal in the *Čelebići* Appeal Judgement, para. 197 *in fine*. The ICTY Appeals Chamber considered in para. 197 of the *Čelebići* Appeal Judgement that "[i]n determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles. This would equally apply in the context of criminal responsibility. In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced. The Appeals Chamber considers that the ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility and thus agrees with the Trial Chamber that the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met. Muči}'s argument that *de facto* status must be equivalent to *de jure* status for the purposes of superior responsibility is misplaced. Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts. The Appeals Chamber therefore agrees with the Trial Chamber's conclusion […]" (footnotes omitted).

[86] *Musema* Trial Judgement, para. 135. The Trial Chamber based its finding on earlier case-law established in the *Akayesu* Trial Judgement (para. 491).

[87] Trial Judgement, para. 43 (footnotes omitted).

[88] Trial Judgement, para. 151, which reads as follows: "[…] a civilian superior will have exercised effective control over his or her subordinates in the concrete circumstances if both *de facto* control and the trappings of *de jure* authority are *present and similar to those found in a military context*." (emphasis added).

[89] Trial Judgement para. 152, which reads as follows: "[…] for the character of a civilian's *de jure* authority (whether real or contrived) must be comparable to that exercised in a military context."

[90] *Čelebići* Appeal Judgement, paras. 196, 197 and 256. The ICTY Appeals Chamber considered that "'Command', a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term 'control', which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control. Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility […]" (footnotes omitted) (para. 196). It further held that "The concept of effective *control* over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control

is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute" (footnotes omitted) (para. 256).

[91] Prosecution Appellant's Brief, para. 2.75.

[92] Trial Judgement, para. 183.

[93] According to which "references […] to concepts of subordination, hierarchy and chains of command /…/need not be established in the sense of formal organisational structures so long as the fundamental requirement of an effective power to control the subordination, in the sense of preventing or punishing criminal conduct, is satisfied." *Cf. Kayishema/Ruzindana* Appeal Judgement, para. 298 (footnote 520). The Appeals Chamber referred to the *Čelebići* Appeal Judgement (para. 254) wherein the ICTY Appeals Chamber underscored this principle. The Appeals Chamber thus considered that: "[t]he Trial Chamber's references to concepts of subordination, hierarchy and chains of command must be read in this context, which makes it apparent that they need not be established in the sense of formal organisational structures so long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct, is satisfied."

[94] It was thus held that the relationship between a superior and his supposed subordinates may be both "direct and indirect", with the proviso that effective control must always be established. Furthermore, "the law relating to command responsibility recognises not only civilian superiors, who may not be in any such formal chain of command, and *de facto* authority, for which no formal appointment is required." *Cf. Čelebići* Appeal Judgement, paras. 252 and 304. The Appeals Chamber stated that it "[…] regards the Trial Chamber as having recognised the possibility of both indirect as well as direct relationships subordination and agrees that this may be the case, with the proviso that effective control must always be established […]" (*Čelebići* Appeal Judgement, para. 252). It further considered that it was "[…] satisfied that the Trial Chamber was *not* in fact imposing the requirement of such a formalised position in a formal chain of command, as opposed to requiring that there be proof that Deli} was a superior in the sense of having the material ability to prevent or punish the acts of persons subordinate to him." (para. 304).

[95] Trial Judgement, para. 180.

[96] Trial Judgement, paras. 184 and 185.

[97] Trial Judgement, para. 180. The Chamber considered, for example, that the *de jure* relationship between *gendarmes* and the *bourgmestre* was limited. See also Trial Judgement, para. 186 where the Trial Chamber held that "the Accused, as *bourgmestre*, did not have *de jure* authority over reservists in Mabanza *commune.*"

[98] In this regard, the Trial Chamber pointed out, with reference to *gendarmes*, that the *bourgmestre* had to approach other officials if he needed military assistance (Trial Judgement, para. 181) and that he would have had to refer any problems that emerged to the commander of the *gendarmerie* in Kibuye town (Trial Judgement, para. 182).

[99]Appellant's Brief, para. 2.74.

[100] See Respondent's Brief, para. 179, the Defence refers to paras. 164, 200, 223, 304 and 322 of the Trial Judgement.

[101]Judgement, para. 153 (emphasis added). In this regard, the Trial Chamber refers to its finding in chapter V of the Judgement.

[102] Judgement, para.151.

[103] See in particular paras. 163, 165, 183, 186 and 199 of the Trial Judgement.

[104] The Appeals Chamber held in para. 192 of its *Čelebići* Appeal Judgement that "under Article 7(3), a commander or a superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed".

[105] *Čelebići* Appeal Judgement, para.198.

[106] See para. 2.75 of the Appellant's Brief.

[107] "Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA", *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, filed on 20 April 2000. The Prosecution responded on 10 May 2000 and the Motion was heard orally on 25 May 2000.

[108] At the hearing of 25 May 2000, the Defence clarified its position as follows: "Our request is intended to have the Court order the Prosecutor to disclose these confessional statements. And let me add that we fail to understand why the Prosecutor did not take this initiative. How can witnesses called to testify before you rely on the fact that they confess their guilt, and yet hide from you these confessional statements? This is why we believe that either the Prosecutor has this statement in her possession, or she has the means to get them. In any case, whatever the case, it is up to her to bring this document before this Court. And let me add that during our last trip to Rwanda, the Defence team contacted the Procureur of Kibuye to request disclosure of the files on these witnesses and this was rejected. It is, therefore, only the Office of the Prosecutor which, pursuant to the powers conferred on them, can procure these documents. These documents are indispensable for the determination of the truth. The documents are indispensable in determining the credibility of these witnesses. Therefore, under Rule 68, Defence is of the view that it is the responsibility of the Office of the Prosecutor to produce these documents, failing which the Office of the Prosecutor cannot rely on the evidence of these witnesses, evidence which is tainted with suspicion." *Cf*. T, 25 May 2000, pp. 80 and 81.

[109] The Prosecution submits that, "[t]he Defence has informed the Prosecution that they had requested for the said evidence from the Third Party but that access was denied. Any attempt to impose a duty on the Prosecutor to exercise her statutory powers to obtain for the Defence evidence in the hands of a third party would be contrary to the provisions of Article 15 of the Statute of the Tribunal and also to existing case law." *Cf*. "The Prosecutor's Response to the Defence Motion under Rule 68 for the Disclosure of the Admission of Guilt by Witnesses Y, Z and AA," *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, 10 May 2000, para. 5.

[110] The Trial Chamber indeed pointed out that "[t]he disclosure obligation under Rule 68 relates to "the existence of evidence known" to the Prosecutor. A literal interpretation might suggest that mere knowledge of exculpatory evidence in the hands of a third party would suffice to engage the responsibility of the Prosecutor under that provision. However, to adopt such a meaning, would, in the extreme, allow for countless motions to be filed with the sole intention of engaging the Prosecutor into investigations and disclosure of issues which the moving party considered were 'known' to the Prosecutor. This would not be in conformity with Article 15 of the Statute. Under that provision, the Prosecutor is responsible for investigations. She shall act independently and not receive instructions from any source. 7. The Chamber is inclined to equate 'known' to 'custody and control' or 'possession'. This wording is used in Rules 66 (B) and 67 (C) of the Rules, which pertain to the inspection by one party of documents, books, photographs and tangible objects of the other party. Thus the obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of the said evidence. The Prosecutor cannot disclose that which she does not have. […]9. In the present case, the Prosecutor has stated categorically that she is not in possession of the written confessions of witnesses Y, Z and AA, and the Defence has brought no evidence to the contrary. Thus the Chamber must dismiss the Rule 68 motion of the Defence". *Cf*. "Decision on the Request of the Defence for an order for Disclosure

by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA," *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, rendered on 8 June 2000, paras. 6, 7 and 9.

[111] *Ibid.*, paras. 10 and 11.

[112] Appellant's Brief, para. 3.39.

[113] T(A), 2 July 2002, p. 114. To demonstrate its point, the Prosecution advances a number of principles that apply before the Tribunal with respect to the use and evaluation of prior witness statements. The Prosecution advances the principle that "If a witness was not cross-examined on an inconsistency, the cross-examining Party—or the Trial Chamber—must request that the witness be recalled for additional cross-examination." *Cf*. Appellant's Brief, para. 3.31. The Prosecution grounds its argument specifically on a decision rendered by Trial Chamber II on 2 November 2001 in the *Kajelijeli* case. See T(A), 2 July 2002, pp. 87 to 95.

[114] The Prosecution states that its appeal on this point concerns the events at the Trafipro roadblock, the killing of Judith and the events at the Gatwaro stadium. The Prosecution cites paras. 617, 635, 747, 748, 916, 920 to 922, 952 to 954 and 961 of the Trial Judgement. *Cf*. T(A), 2 July 2002, pp. 102 and 103.

[115] T(A), 2 July 2002, p. 112.

[116]*Prosecutor v Slobodan Milošević*, IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 24: "It would of course be quite wrong for the Trial Chamber, in determining the issues in the trial, to refer to material which may be available to it but which is not in evidence […]."

[117] T(A), 2 July 2002, pp. 116 and 117.

[118] *Ibid.*, p. 120.

[119] See the questions put by the judges at the appeal hearing, particularly T(A), 2 July 2002, pp. 132 to 137. The Respondent submits that the Office of the Prosecutor not only did not object to those documents being admitted, but made use of the said documents, for example in the closing arguments. T(A), 2 July 2002, pp. 222 and 223.

[120] The Appeals Chamber tried to understand the actual basis of this ground of appeal, presented by the Prosecution during the hearing on appeal as follows: "It is not solely an issue of fairness to the prosecution, but that is not the basis only of the admission of the statements, and it can't be solely as an issue of fairness or prejudice to the Prosecution's case, because the ultimate determination has to be one of the truthfulness of the testimony of the witnesses, and that is exactly what the Trial Chamber looked at these statements for. They didn't look at them for an issue in relation to the…I mean, they did look at them to see whether they supported the prosecution's case, but what they looked at them for was veracity or truthfulness or accuracy, and if they are going to rely on it for that purpose, in my respectful submission, it's not only an issue of fairness, it's also an issue of ensuring the accuracy by the trier of fact that is making that factual determination. That is the position in a nutshell. The trier has the discretion even where a party has, for example, waived a right, the trier has the discretion to admit additional evidence even where the evidence was available at trial if they think it goes to miscarriage of justice. I am not saying that is the standard here, Your Honour, but the point being if you can imagine the Prosecution failing, clearly in this case, to ask for a re-hearing or reply case, but subsequently it finds out that the witness confessional statements were completely coerced and there is no doubt that they are absolutely not true." T(A), 2 July 2002, pp. 137 to 139.

[121] *Kambanda* Appeal Judgement, para. 25. See also *Akayesu* Appeal Judgement, para. 113. The principle of waiver was also affirmed by ICTY Appeals Chamber in the *Čelebići* Appeal Judgement (para. 640), *Furundžija* Appeal Judgement (para. 174) and *Tadić* Appeal Judgement (para. 55).

[122] See Introduction to the present Judgement (para. 7).

[123] Appellant's Brief, para. 4.2.

[124] The alleged errors, as set out by the Appeals Chamber in the Introduction to this Judgement, are as follows: (i) First error: Application of a wrong criteria with regard to the assessment of evidence relating to the presence of the Accused at the Gatwaro Stadium during the period when the refugees were locked up and subjected to maltreatment, as well as during the Gatwaro attack; (ii) Second error: The Trial Chamber erred in its use of prior written statements;(iii) Third error: Erroneous finding relating to Witness Z.

[125] Trial Judgement, para. 531.

[126] *Ibid.*, para. 532.

[127] Appellant's Brief, para. 4.3 to 4.9, notably para. 4.7.

[128] *Kupreškić* Appeal Judgement, para. 39.

[129] Judgement, para. 532.

[130] Indeed, the Trial Chamber considered the testimonies of two witnesses, namely Witnesses A and AC, who claimed to have seen the Accused at the stadium, first by assessing the detail and logic therein, then, whenever it deemed it necessary, by comparing the testimonies to prior statements of the witnesses, and pointing out any inherent inconsistencies. See Trial Judgement, paras. 533 to 543.

[131] Indeed, the Trial Chamber stated, with regard to Witness A, that "[t]he circumstances of Witness A's sighting of the Accused on this day are not clear." (Trial Judgement, para. 547) and that "[a]s for the Accused's conduct and other details concerning the course of his visit, the information supplied by Witness A was very limited." (Trial Judgement, para. 548). It is only in "the absence of other details" that the Trial Chamber looked into prior statements of Witness A and stated that the "[t]he chronology of visits by the Accused as found in Witness A's testimony does not coincide with that of his statement of 29 June 1999." (Trial Judgement, para. 549). With respect to Witness AC, the Trial Chamber concluded that his testimony "does not convincingly corroborate that of Witness A." (Trial Judgement, para. 551) and added that "[t]he doubt in the Chamber's mind is not dispelled by consideration of the witness's statement of 21 June 1999." (Trial Judgement, para. 552). Finally, the Chamber concluded that "[t]he paucity of the evidence as to the Accused's presence (including the conditions of observation in a crowded Stadium) adduced by the Prosecution from Witnesses A and AC, when considered together with the lack of mutual corroboration, the signs of uncertainty in the accounts of both witnesses as to the date of the sighting, and the suggestion by the two other Prosecution witnesses that the Accused was in Mabanza *commune* at 9 a .m. on the day in question, means that the Prosecution's evidence of the Accused's presence at the Stadium on 14 April 1994 falls short of the applicable standard thereof. " (Trial Judgement, para. 553).

[132] The Trial Chamber considered the evidence of the three witnesses, namely Witnesses AA, A et G, who testified to having seen the Accused at the stadium on that date. Trial Judgement, para. 606. As concerns Witness AA, the Chamber stated that it would assess "his testimony and any credibility issues that may arise as a whole in chronological order." (Trial Judgement, para. 607). After analysing the witness' testimony and prior statements (Trial Judgement, para. 608 to 618), and mindful of the fact that the said testimony was to be treated "with caution" and that "other sources" were to be looked into "for corroboration" (Trial Judgement, para. 619), the Trial Chamber concluded that "[i]n view of the

considerable number of difficulties presented by Witness AA's testimony, the Chamber is unable to accept any of its elements unless they are strongly corroborated by other sources […]" (Trial Judgement, para. 636). As concerns Witness A, the Trial Chamber noted that his testimony was "very brief", regarding the Accused's alleged presence before the attack (Trial Judgement, para. 639). The Chamber noted that the information provided by Witness A in his prior statement was "difficult to interpret" (Trial Judgement, para. 640). Finally, the Trial Chamber found that "the evidence provided by Witness A was unclear." (Trial Judgement, para. 641). Lastly, with respect to Witness G, the Chamber began by considering "certain points that go to the credibility of Witness G's testimony" (Trial Judgement, para. 644), then, after analysing his testimony in detail, it found that the Prosecution's evidence was insufficient (Trial Judgement, paras. 652 and 653).

[133] See for instance Trial Judgement, paras. 551, 608, 619, 621, 628, 629, 636 and 653.

[134] For example, at para. 636, the Trial Chamber stated that "In view of the considerable number and variety of difficulties presented by Witness AA's testimony the Chamber is unable to accept any of its elements unless they are strongly corroborated by other sources."

[135] See, for instance, Trial Judgement, paras. 536, 538, 540, 549, 550, 552, 610, 612, 615, 618, 622, 623 and 634.

[136]*Kayishema/Ruzindana* Appeal Judgement, para. 154, citing the *Tadić* Appeal Judgement, para. 65, the *Aleksovski* Appeal Judgement, para. 62 and the *Čelebići* Appeal Judgement, paras. 492 and 506.

[137] The Prosecution takes issue with this type of corroboration. Indeed, at the Appeal hearing, the Prosecution stated: "With respect, this raises a number of problematic areas in that *at least in the jurisdiction of which I am aware, a previous statement can't corroborate a subsequent statement*." (Emphasis added). See T(A), 2 July 2002, p. 152. The Prosecution thus referred to para. 635 of the Judgement where the Trial Chamber held that "Witness AA's confessional statement of 11 November 1999 to the Rwandan authorities *corroborates* the statement of 22 and 23 September 1999." (Emphasis added).

[138] Appellant's Brief, paras. 4.10 and 4.12.

[139] Emphasis added.

[140] Appellant's Brief, para. 4.17. The Appeals Chamber sums up as follows the Prosecution's allegations that the Trial Chamber committed an error of fact: (1) at para. 947, the Trial Chamber did not substantiate its finding that Witness Z was not credible and merely made reference to other parts of the Judgement (namely, Sections V.5.5 and V.5.6); the Trial Chamber proceeded in a similar manner at para. 948 of the Judgement; (2) the Prosecution fails to see how reference to Section V.5.6 of the Judgement may serve as a basis for the Trial Chamber's general conclusion at para. 747 of the Judgement; similarly, according to the Prosecution, Section V.5.5, which refers to Section V.5.4.1 of the Judgement, does not substantiate such a finding; (3) moreover, the finding impugned by the Prosecution appears to be at variance with other findings in the Judgement. The evidence adduced by the Prosecution against the Accused in respect of the crimes committed in Bisesero comes indeed partly from Witness Z.

[141] Trial Judgement, para. 749.

[142] *Idem*, para. 749 (Emphasis added).

[143] *Kayishema/Ruzindana* Appeal Judgement, para. 165; *Furundžija* Appeal Judgement, para. 69; *Čelebići* Appeal Judgement, para. 481.

[144] As recalled by the Appeals Chamber in the introduction to the present Judgement: (i) First error: Error relating to the assessment made by Trial Chamber regarding the evidence tendered with regard to Trafipro roadblock; (ii) Second error: Error in the assessment of the evidence relating to the murder of Judith; (iii) Third error: Error relating to the assessment of evidence relating to the presence of the Accused at the Gatwaro Stadium on 13, 14 and 18 April 1994.

[145] Indeed, the Appeals Chamber notes that the arguments advanced by the Appellant in the various grounds of appeal are very similar and can be grouped and analysed under three main headings, as set out below.

[146] Trial Judgement, paras. 935 to 938.

[147] Appellant's Brief, paras. 4.32 to 4.34.

[148] Appellant's Brief, paras. 4.35 and 4.36. In essence, the Prosecution's argument presented before the Appeals Chamber repeats the one presented before the Trial Chamber. Para. 4.14 of the Indictment reads: "In particular, Ignace Bagilishema permitted and encouraged Interahamwe militiamen to set up roadblocks at strategic locations in and around Mabanza *commune*. The primary purpose of the said roadblocks was to screen individuals in order to identify and single out Tutsis." In its opening arguments before the Trial Chamber, the Prosecution alleged that "In order to ensure that no Tutsi remained alive, be it those from within or outside the *commune*, the Accused set up road blocks within Mabanza to help screen those fleeing from as far away as Gitarama and Kigali." (See on this point, Trial Judgement, para. 926). According to the Prosecution, Bagilishema was aware that Tutsis were in danger while crossing the roadblock, considering that he issued false identity cards and that the purpose of the roadblock was to identify and kill Tutsis.

[149] Testimony of Defence Witness KC. See Appellant's Brief, para. 4.31 citing the Trial Judgement, para. 243.

[150] Testimony of Witness AB. See Appellant's Brief, para. 4.32, citing T, 15 November 1999, p. 109.

[151] Testimony of Defence Witness RA. See Appellant's Brief, para. 4.33, citing the Trial Judgement, para. 249.

[152] Testimony of Defence Witness ZJ. See Appellant's Brief, para. 4.33 citing the Trial Judgement, para. 253.

[153] Testimony of the Accused. See Appellant's Brief, para. 4.34 citing T, 6 June 2000, pp. 49 to 67.

[154] See Trial Judgement, para. 243 for Witness KC; Judgement, para. 249, for Witness RA; Trial Judgement, para. 253 for Witness ZJ and Judgement, para. 255 *et seq*. for the Accused. The relevant testimony of Witness AB appears to have been analysed under the section of the Judgement entitled "Roadblocks Sighted in Mabanza *Commune*" in the factual findings of the Trial Chamber (See Judgement, para. 887 *et seq*.).

[155] Trial Judgement, para. 110.

[156] *Ibid.*, para. 935.

[157] Trial Judgement, para. 937.

[158] At para. 938 of the Trial Judgement, the Trial Chamber stated that "the true purpose of Trafipro or any other roadblock in Mabanza *commune* is best sought not in documentation or recalled oral instructions pertaining to its operations but rather in the operations themselves." And the Trial Chamber thus concluded

that: “All that can be said at this point is that the Prosecution has not shown beyond reasonable doubt that the aim of the Accused, when he set up the Trafipro roadblock, was to screen out and kill Tutsi civilians.”

[159] This paragraph reads: “The two prosecution witnesses who regularly attended the Trafipro roadblock gave differing accounts of its purpose. Witness Z testified that the Accused asked him to erect a roadblock “because the enemies are escaping”. The witness understood the Accused to be referring to Tutsi in general, as well as to members of the RPF and RPF-sympathisers. Witness Y, on the other hand, said that anyone with proper identification, whether Tutsi, Hutu or Twa, could pass through the roadblock without experiencing problems. He explained that Rushimba and Rukanos had given him relevant instructions, which they said had come from the Accused. Witness AA, who was not a staff member at the Trafipro roadblock, testified that the Accused had set up roadblocks to control the movements of *Inkotanyi* attempting to infiltrate the *commune*.” (Footnotes omitted).

[160] Appellant’s Brief, para. 4.40. The Appellant refers to its arguments regarding the first ground of appeal.

[161] Appellant’s Brief, para. 4.44. In this instance, the Prosecution is referring to Rule 92*bis* of the Rules of ICTY and the case law relating thereto.

[162] Appellant’s Brief, para. 4.44.

[163] *Ibid.*, para. 4.44.

[164] Para. 959 of the Trial Judgement reads: “Once again, the only evidence of the Accused’s direct involvement in the killing of Judith is the testimony of Witness Z. He claimed to have had a conversation with the Accused in front of the *bureau communal*, just after Judith was escorted past. ” Para. 960 of the Judgement reads: The Chamber accepts that Witness Z was involved in the killing of Judith. (According to Witness Y’s statement of 17 September 1999, Witness Z, Rushimba and he led Judith to her house, where she was killed by Rushimba). However, the Chamber cannot rely on other aspects of Witness Z’s account of the incident.” And the Trial Chamber added: “In his confession of 22 June 1998, Witness Z admitted his involvement in the murder of Judith but said nothing about an encounter with the Accused, in spite of mentioning him in relation to the killing of Pastor Muganga. He first referred to meeting the Accused in his statement of 18 September 1999, where he declared: “He asked us where we had found Judith, and *before we could answer*, he went on to say: 'That’s okay.’ This is in contradiction with his testimony (as excerpted above), according to which the witness had the opportunity to reply to the Accused’s question before being told, “That’s fine”. Other inconsistencies are apparent but need not be entered into here. The point is that the supposed conversation between Witness Z and the Accused is not corroborated. Witness Y who, according to Witness Z, was only some meters ahead did not refer to any conversation between Witness Z and the Accused. It is possible, of course, that the Accused who was, according to Witness Y, in his office when Judith was taken past, took notice and came out to the entrance where he met Witness Z. However, this mere possibility cannot fortify the account of a witness whose unreliability is questionable (V.5.4.1 and 5.5).” See Trial Judgement, para. 961 (Footnotes omitted).

[165] Appellant’s Brief, para. 4.51.

[166] *Ibid.*, para. 4.55.

[167] The Prosecution indeed considers that corroboration exists “as both witnesses testify in essence: "that Judith was apprehended near the roadblock; that she was Tutsi; that Rushimba brought her back to the roadblock; that she was taken to her house to be killed there; that she was taken past the window of the office of the Accused; and that Rushimba and Witness Y killed her, not Z”. See Appellant’s Brief, para. 4.57.

[168] The Prosecution submits that "[w]itness Y was not asked about the role of Witness Z, nor was he questioned about whether Witness Z was following him and meet with the Accused" (Appellant's Brief, para. 4.55). It also contends that "[a]s Witness Z was 5 to 10 metres behind Witness Y, and continued on to Judith's house, it is reasonable that Y may not have heard a conversation between Z and the Accused. This possibility is accepted by the Trial Chamber. Once again, it is noteworthy that Witness Y was not questioned in this regard" (Appellant's Brief, para. 4.58).

[169] T(A), 2 July 2002, pp. 144 to 145.

[170] In its Appellant's Brief, the Prosecution gives the example of the third paragraph of the Trial Chamber's findings regarding the purpose of the Trafipro roadblock, namely para. 937 of the Trial Judgement (See Appellant's Brief, para. 4.38 *et seq.*). At the Appeal hearing, the Prosecution also cited para. 920 in support of its argument (See T(A), 2 July 2002, pp. 150-151).

[171] Rule 92*bis* did not exist at the time of the trial. The Prosecution's arguments with regard to Rule 92*bis* of the Rules of ICTY are therefore not relevant in this case. The Appeals Chamber notes that Rule 92*bis* has since been included in ICTY Rules. See T(A), 2 July 2002, p. 159.

[172] Trial Judgement, para. 24.

[173] During the hearing on appeal, the Prosecution indeed argued that it was somewhat illogical for the Trial Chamber to admit evidence as hearsay evidence in so far as the concerned witness was sitting in the witness box. See T(A), 2 July 2002, pp. 160 and 161.

[174] Appellant's Brief, para. 4.66.

[175] The Prosecution refers, on this point, to para. 539 of the Trial Judgement which reads: "Also, Witness AC testified to seeing the Accused on 13 April 1994 at the Stadium, but at around 3 p.m. The Chamber does not attach significance to the fact that Witness A made his observation at 2 p.m., whereas Witness AC apparently saw him at 3 p.m. Witness A testified that he was giving only an estimate, as he had no watch. Moreover, it is quite understandable if both witnesses had difficulties in recalling the exact time of their observation almost six years after the event. However, Witness A testified that the Accused joined the refugees ("*nous a retrouvé*") at around 2 p.m. *before* the gates of the Stadium were opened, whereas Witness AC observed him arrive at around 3 p.m. *after* the refugees were already inside. Moreover, if the Accused was present when the refugees from Mabanza were about to enter the Stadium, it seems unlikely that he would return at a later stage to ask whether the refugees he had sent had arrived, as suggested by Witness AC. " See Appellant's Brief, para. 4.64.

[176] Respondent's Brief, para. 402.

[177] Respondent's Brief, para. 408.

[178] Trial Judgement, para. 543.

[179] Appellant's Brief, para. 4.73.

[180] Appellant's Brief, para. 4.74. With respect to Witness A, the Prosecution argues that Witness A provided detailed information relating to the presence of Bagilishema at the Stadium and considers that the discrepancy observed by the Trial Chamber between the testimony of Witness A and his prior statements ought to have been put to the Witness for clarification (See Appellant's Brief, paras. 4.75 and 4.76). Regarding Witness AC, the Prosecution submits that there was ample evidence upon which to conclude that the Witness AC was able to see the Respondent through the Stadium gates, and see the Accused's car, which was parked on the other side of the Stadium wall (See Appellant's Brief, para. 4.77).

[181] Appellant's Brief, para. 4.79.

[182] Trial Judgement, para. 548.

[183] *Ibid.*, para. 549.

[184] "The paucity of the evidence as to the Accused's presence (including the conditions of observation in a crowded Stadium) adduced by the Prosecution from Witnesses A and AC, when considered together with the lack of mutual corroboration, the signs of uncertainty in the accounts of both witnesses as to the date of the sighting, and the suggestion by two other Prosecution witnesses that the Accused was in Mabanza *commune* at 9 a.m. on the day in question, means that the Prosecution's evidence of the Accused's presence at the Stadium on 14 April 1994 falls short of the applicable standard of proof. " See Trial Judgement, para. 553.

[185] Here the Prosecution is making reference to paras. 649 and 651 of the Trial Judgement. See Appellant's Brief, paras. 4.87 and 4.88.

[186] Appellant's Brief, para. 4.87

[187] Appellant's Brief, para. 4.90. The Prosecution also argued that the fact that the witness may not have known Kayishema sufficiently to be able to clearly identify him does not necessarily affect the witness' ability to recognise the Accused. See Appellant's Brief, para. 4.89.

[188] Trial Judgement, para. 10.

[189] *Ibid.*, para. 650.

[190] Respondent's Brief, para. 455.

[191] Indeed, the Trial Chamber explained that "[a]lthough under favourable conditions of observation, a familiar face may be easily recognisable, albeit not necessarily distinctive, the Chamber is concerned as to how the witness was able to specifically identify the Accused and Kayishema amongst the attackers over this distance." See Trial Judgement, para. 649.

[192] "Notice of Appeal", filed in English on 9 July 2001.

[193] *"Ordonnance (Désignation d'un juge de la mise en état en appel)"*, 26 September 2001.

[194] "Order", 19 October 2001.

[195] "Decision on the Composition of the Appeals Chamber in Case No. ICTR-95-1A-A, 30 November 2001.

[196] *"Décision (demande de reports de délais)"*, 1 October 2001.

[197] "*Prosecution's Appeal Brief* ", filed on 29 October 2001 and "Corrigendum relating to the Prosecution's Appeal Brief, filed on 29 October 2001", filed in English on 30 October 2001.

[198] "Prosecution's Urgent Motion for Authorisation to exceed the page limit to the Prosecution's Appeal Brief and alternative Request for extension of time", filed in English on 2 November 2001.

[199] "Decision (Respondent's Motion for Translation and for Additional Time; Prosecution's Urgent Motion for Authorisation to Exceed the Page Limit to the Prosecution's Appeal Brief and Alternative Request for Extension of Time)", 30 November 2001.

[200] "Prosecution's Appeal Brief (reduced version)", filed on 7 December 2001.

[201] "Prosecution's Urgent Motion for Extension of Time to File its Appeals Brief in Compliance with the Practice Direction on the Length of Briefs and Motions on Appeal", filed in English on 19 December 2001.

[202] "Prosecution's Appeal Brief (further reduced version)", filed in English on 19 December 2001.

[203] "Decision (Prosecution's urgent motion for extension of time to file its appeals brief in compliance with the practice direction on the length of briefs and motions on appeal)", 19 December 2001.

[204] "Respondent's Brief in Response", filed on 7 February 2002. See also *"Erratum au Mémoire en réponse de l'Intimé"*, filed on 8 February 2002 and the two "*Corrigenda*", filed on 13 and 14 March 2002.

[205] "Prosecution's Reply Brief", filed in English on 25 February 2002.

[206] "Motion for leave to produce a Rejoinder to the Prosecution's Reply Brief", filed on 13 March 2002.

[207] "Decision on the Motion for Leave to produce a Rejoinder to the Prosecution's Reply Brief", 20 March 2002.

[208] "Prosecution's Reply Brief", filed in French on 11 April 2002.

[209] *"Requête de l'Intimé en demande d'autorisation de produire une duplique au mémoire en réplique du Procureur)"*, filed on 23 April 2002.

[210]"Prosecution Response to the Respondent's Second Motion for leave to file a Rejoinder", filed in English on 1 May 2002.

[211] *"Décision (Requête en demande d'autorisation de produire une duplique au Mémoire en Réplique du Procureur)*, 23 May 2002.

[212] "Respondent's Motion to have the Prosecutor's Notice of Appeal declared Inadmissible", filed on 12 September 2001.

[213] "Prosecution Response to the Respondent's Motion to have the Prosecution's Notice of Appeal declared Inadmissible and Prosecution's Alternative Request for a Suspension of the Briefing Schedule and for an Extension of Time", filed in English on 24 September 2001.

[214] Mr. Roux's letter to the President of ICTR Appeals Chamber, 26 September 2001.

[215] "*Décision (demande de reports de délais)"*, 1 October 2001.

[216] "Decision (Motion to have the Prosecution's Notice of Appeal Declared Inadmissible)", 26 October 2001.

[217] "Respondent's Motion for Translation and for Additional Time", filed on 31 October 2001.

[218] “Prosecution Response to the Respondent’s Motion for Translation of Documents and for Extensions of Time”, filed in English on 14 November 2001.

[219] “Decision (Respondent’s Motion for Translation and for Additional Time; Prosecution’s Urgent Motion for Authorisation to Exceed the Page Limit to the Prosecution’s Appeal Brief and Alternative Request for Extension of Time)”, 30 November 2001.

[220] “Respondent’s Motion for Supplementary Time-Limit”, filed on 22 January 2002.

[221] “Decision on the Respondent’s Motion for Extension of Deadlines”, 25 January 2002.

[222] “Prosecution’s Urgent Motion for an Extension of Time and for Permission to Exceed the Page Limits in its Reply Brief”, filed in English on 12 February 2002.

[223] *“Mémoire en réponse à la requête en urgence du Procureur”*, filed on 20 February 2002.

[224] “Decision on the Prosecution’s Urgent Motion for an Extension of Time and for Permission to Exceed the Page Limits in its Reply Brief”, 21 February 2002.

[225] “Motion for a Review of the Decision by the President of the Appeals Chamber”, filed on 12 December 2001.

[226] “Prosecution Response to the Respondent’s Motion for a Review of the Pre-Hearing Judge’s Decision of 30 November 2001”, filed in English on 20 December 2001.

[227] *“Requête en demande de révision de l’ordonnance du Président de la Chambre d’appel”*, filed on 21 December 2001.

[228] “Decision (Prosecution’s Urgent Motion for Extension of Time to File its Appeals Brief in Compliance with the Practice Direction on the Length of Briefs and Motions on Appeal)”, 19 December 2001. See *infra* “Summary of facts relating to filings on appeal”.

[229] “Prosecution’s Response to Respondent’s *'Requête en demande de révision de l’ordonnance du Président de la Chambre d’appel de l’Intimé’”*, filed in English on 4 January 2002.

[230] “Decision (Motions for Review of the Pre-Hearing Judge’s Decisions of 30 November and 19 December 2001)”, 6 February 2002.

[231] “Decision on the Motion for a Review of the Decision by the President of the Appeals Chamber; On the Motion Pursuant to Rule 73 of the Rules of Procedure and Evidence praying the Chamber to order the Prosecutor to Disclose to the Defence the Tapes containing the Recordings of Radio Muhabura; On the Motion for a Review of the Decision by the President of the Appeals Chamber”, 6 February 2002.

[232] *“Requête article 73 du RPP afin que la Chambre ordonne au Procureur de communiquer à la Défense les cassettes d’enregistrements de la radio Muhabura”*, filed on 12 December 2001.

[233] “Response to Respondent’s Motion under Rule 73 for an order for Disclosure of Recordings of Broadcasts on Radio Muhabura”, filed in English on 20 December 2001 and “Prosecution’s Supplemental Respondent’s Motion under Rule 73 for an order for Disclosure of Recordings of Broadcasts on Radio Muhabura”, filed in English on 28 January 2002.

[234] "Decision on the Motion for a Review of the Decision by the President of the Appeals Chamber; On the Motion Pursuant to Article 73 of the Rules of Procedure and Evidence praying the Chamber to order the Prosecutor to Disclose to the Defence the Tapes containing the Recordings of Radio Muhabura; On the Motion for a Review of the Decision by the President of the Appeals Chamber", 6 February 2002.

[235] "Motion for Protection of Defence Witnesses", filed on 8 March 2002.

[236] "Prosecution Response to Appellant's (sic) Witness Protection Motion", filed in English on 22 March 2002.

[237] "*Réplique de l'intimé à la réponse du Procureur à la requête en protection des témoins à décharge*", filed on 11 April 2002.

[238] "Decision on Motions raised under Rule 115", 30 May 2002.

[239] "Confidential Motion for leave to File New Evidence", filed on 8 March 2002 and "Supplement to the Confidential Motion for Submission of New Evidence", filed on 14 March 2002.

[240] "Prosecution's Response to Appellant's (*sic*) Motion for Admission of Additional Evidence", filed in English on 22 March 2002.

[241] "*Réplique confidentielle de l'intimé à la réponse du Procureur à la requête en présentation d'éléments nouveaux*", filed on 25 April 2002.

[242] "Prosecution's Objection to the Respondent's Reply on his Motion for Additional Evidence", filed in English on 1 May 2002.

[243] "Supplementary Motion for Leave to File New Evidence", filed on 29 April 2002.

[244] "Prosecution's Response to the Respondent's Additional Motion for Admission of New Evidence", filed in English on 9 May 2002.

[245] "Decision on Motions raised under Rule 115", 30 May 2002.

[246] Judgement, *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, 3 July 2002.