



UNITED NATIONS
NATIONS UNIES

**Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda**

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrézia Vaz
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Judgement of: 28 September 2011

THE PROSECUTOR

v.

YUSSUF MUNYAKAZI

Case No. ICTR-97-36A-A

JUDGEMENT

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of appeals by Yussuf Munyakazi (“Munyakazi”) and the Prosecution against the Judgement pronounced on 30 June 2010 and filed in writing on 5 July 2010 by Trial Chamber I of the Tribunal (“Trial Chamber”) in the case of *The Prosecutor v. Yussuf Munyakazi* (“Trial Judgement”).¹

I. INTRODUCTION

A. Background

2. Munyakazi was born in 1936 in Rwamatamu Commune, Kibuye Prefecture, Rwanda.² At the time of the relevant events in 1994, he lived in Bugarama Commune, Cyangugu Prefecture, where he had become a wealthy landowner and farmer.³ The Trial Chamber concluded that he held *de facto* authority over the *Interahamwe* from Bugarama during attacks against Shangi and Mibilizi parishes on 29 and 30 April 1994, respectively.⁴ Based on Munyakazi’s role during these attacks, the Trial Chamber convicted him of committing genocide and extermination as a crime against humanity.⁵ The Trial Chamber sentenced Munyakazi to a single term of 25 years of imprisonment.⁶

B. The Appeals

3. Both Munyakazi and the Prosecution appealed.⁷ In his appeal, Munyakazi advances eight grounds of appeal challenging his convictions and sentence and requests the Appeals Chamber to enter a judgement of acquittal.⁸ The Prosecution responds that Munyakazi’s appeal should be dismissed in its entirety.⁹ The Prosecution presents three grounds of appeal against the Trial Judgement.¹⁰ It requests the Appeals Chamber to convict Munyakazi for committing genocide and extermination as a crime against humanity at Nyamasheke parish; to find him responsible for

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

² Trial Judgement, paras. 1, 29.

³ Trial Judgement, paras. 1, 30, 104.

⁴ Trial Judgement, paras. 5, 134.

⁵ Trial Judgement, paras. 24, 26, 501, 508.

⁶ Trial Judgement, paras. 27, 522.

⁷ Munyakazi Notice of Appeal; Prosecution Notice of Appeal.

⁸ Munyakazi Notice of Appeal, paras. 5-97; Munyakazi Appeal Brief, paras. 6-363.

⁹ Prosecution Response Brief, paras. 6, 207.

¹⁰ Prosecution Notice of Appeal, paras. 1-22; Prosecution Appeal Brief, para. 3.

genocide and extermination as a crime against humanity based on his participation in a joint criminal enterprise in connection with the massacres at Nyamasheke, Shangi, and Mibilizi parishes; and to increase his sentence to life imprisonment.¹¹ Munyakazi responds that the Prosecution's appeal should be dismissed.¹²

4. The Appeals Chamber heard oral submissions regarding these appeals on 28 March 2011.

¹¹ Prosecution Notice of Appeal, paras. 7, 18, 19, 22; Prosecution Appeal Brief, paras. 4, 83.

¹² Munyakazi Response Brief, para. 170.

II. STANDARDS OF APPELLATE REVIEW

5. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.¹³

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

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.¹⁴

7. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.¹⁵ In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.¹⁶

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

Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.¹⁷

9. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting

¹³ *Muvunyi II* Appeal Judgement, para. 7; *Renzaho* Appeal Judgement, para. 7. See also *Haradinaj et al.* Appeal Judgement, para. 9.

¹⁴ *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). See also *Muvunyi II* Appeal Judgement, para. 8; *Renzaho* Appeal Judgement, para. 8; *Haradinaj et al.* Appeal Judgement, para. 10.

¹⁵ *Muvunyi II* Appeal Judgement, para. 9; *Renzaho* Appeal Judgement, para. 9. See also *Haradinaj et al.* Appeal Judgement, para. 11.

¹⁶ *Muvunyi II* Appeal Judgement, para. 9; *Renzaho* Appeal Judgement, para. 9. See also *Haradinaj et al.* Appeal Judgement, para. 11.

¹⁷ *Krstić* Appeal Judgement, para. 40 (internal citations omitted). See also *Muvunyi II* Appeal Judgement, para. 10; *Renzaho* Appeal Judgement, para. 10; *Haradinaj et al.* Appeal Judgement, para. 12.

the intervention of the Appeals Chamber.¹⁸ Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.¹⁹

10. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.²⁰ Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.²¹ Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.²²

¹⁸ *Muvunyi II* Appeal Judgement, para. 11; *Renzaho* Appeal Judgement, para. 11. See also *Boškoski and Tarčulovski* Appeal Judgement, para. 16.

¹⁹ *Muvunyi II* Appeal Judgement, para. 11; *Renzaho* Appeal Judgement, para. 11. See also *Boškoski and Tarčulovski* Appeal Judgement, para. 16.

²⁰ Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). See also *Muvunyi II* Appeal Judgement, para. 12; *Renzaho* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 17.

²¹ *Muvunyi II* Appeal Judgement, para. 12; *Renzaho* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 17.

²² *Muvunyi II* Appeal Judgement, para. 12; *Renzaho* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 17.

III. APPEAL OF YUSSUF MUNYAKAZI

A. Alleged Errors in Assessing the Alibi (Ground 1)

11. The Trial Chamber convicted Munyakazi for committing genocide and extermination as a crime against humanity based on his participation in the attacks at Shangi parish in Gafunzo Commune on 29 April 1994 and at Mibilizi parish in Cyimbogo Commune on 30 April 1994.²³ Munyakazi presented an alibi that on both dates he remained in Bugarama Commune where he attended the funeral proceedings of Emedeyo Kabungo.²⁴ The Trial Chamber found that Munyakazi did not provide notice of his intent to rely on an alibi defence, that his alibi had “little evidentiary value”, and that it was “overcome by the compelling Prosecution evidence placing Munyakazi at Shangi and Mibilizi [p]arishes on 29 and 30 April 1994, respectively.”²⁵

12. Munyakazi submits that the Trial Chamber erred in rejecting his alibi.²⁶ In this section, the Appeals Chamber addresses two principal questions: (i) whether the Trial Chamber erred in its consideration of the notice provided by Munyakazi for his alibi; and (ii) whether the Trial Chamber erred in assessing the underlying alibi evidence.²⁷

1. Notice of Alibi

13. The Trial Chamber found that Munyakazi did not provide notice of his intent to rely on an alibi defence as prescribed by Rule 67(A)(ii)(a) of the Rules.²⁸ The Trial Chamber observed that the alibi was introduced only during the testimony of Munyakazi, who appeared as the final witness.²⁹ The Trial Chamber rejected as unpersuasive the explanation that Munyakazi’s counsel only discovered the existence of an alibi while preparing the accused for his testimony.³⁰ It observed that the failure to provide notice of the alibi was “not dispositive” but stated that it was relevant in assessing whether the alibi was credible.³¹ In accordance with Rule 67(B) of the Rules, the Trial

²³ Trial Judgement, paras. 501, 508.

²⁴ Trial Judgement, paras. 37, 42, 43, 54-57.

²⁵ Trial Judgement, paras. 44, 57, 58.

²⁶ Munyakazi Notice of Appeal, paras. 5, 20-26; Munyakazi Appeal Brief, paras. 8-38, 85-100. *See also* T. 28 March 2011 pp. 3-6, 20, 34-36.

²⁷ Munyakazi also advanced an alibi to defend against the allegation that he participated in the attack at Nyamasheke parish on 16 April 1994. *See* Trial Judgement, paras. 38-41, 48-53. On appeal, he challenges the Trial Chamber’s rejection of this alibi. *See* Munyakazi Notice of Appeal, paras. 6-18; Munyakazi Appeal Brief, paras. 39-84. However, he was not convicted for this massacre, and, as such, any error in the assessment of this portion of the alibi would not result in a miscarriage of justice. Therefore, the Appeals Chamber need not discuss this aspect of the appeal.

²⁸ Trial Judgement, paras. 44, 58.

²⁹ Trial Judgement, para. 45.

³⁰ Trial Judgement, paras. 47, 58.

³¹ Trial Judgement, para. 58. *See also* Trial Judgement, para. 44.

Chamber assessed the evidence supporting the alibi, found it to be inconsistent and contradictory, and concluded that the circumstances under which the alibi was raised undermined its credibility.³²

14. Munyakazi submits that the Trial Chamber erred in its assessment of the notice that he provided for his alibi.³³ According to Munyakazi, he provided notice of his alibi, in part, by pleading not guilty to the allegations in the Indictment placing him at various crime scenes.³⁴ Furthermore, he submits that, through his Defence Pre-Trial Brief, the Prosecution had notice of his intent to rely on an alibi from various paragraphs of the brief in which it was stated that “Munyakazi has never been implicated directly or indirectly in any of the allegations constituting the charges against him”, that “Munyakazi denies going [to] Nyamasheke, Mibilizi and Shangi”, and that “Munyakazi did not move from Bugarama.”³⁵ In this respect, Munyakazi contends that, since the Indictment does not specify the time of the alleged crimes, it was sufficient for him simply to identify the commune where he remained on the dates of the alleged crimes.³⁶

15. Munyakazi also challenges the Trial Chamber’s characterization of his explanation for the late notice as suspicious since, if accepted, it would deny him the possibility of recalling events during the course of the trial.³⁷ In any event, he argues that the late disclosure has no bearing on the reliability of his alibi since “[d]isclosure serves only as a practical arrangement available to the [P]rosecution to prepare its case.”³⁸

16. In addition, Munyakazi submits that the Trial Chamber erred in law by relying on both Rule 67(A)(ii) and Rule 67(B) of the Rules in assessing his alibi.³⁹ He argues that it was impermissible for the Trial Chamber to both discredit his alibi for failing to provide adequate notice in accordance with Rule 67(A)(ii) of the Rules and also take into account the underlying evidence.⁴⁰ Furthermore, he argues that the Trial Chamber ultimately failed to consider whether his alibi was credible.⁴¹

³² Trial Judgement, paras. 44, 54-59.

³³ Munyakazi Appeal Brief, paras. 8-19; Munyakazi Reply Brief, paras. 16-18.

³⁴ Munyakazi Appeal Brief, para. 16.

³⁵ Munyakazi Appeal Brief, para. 17, *referring to* Defence Pre-Trial Brief, paras. 9, 21-23.

³⁶ Munyakazi Appeal Brief, para. 18, *citing The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure, 21 September 2007, para. 20 (accused gave sufficient alibi notice by indicating the commune where he was on the day of the attack).

³⁷ Munyakazi Reply Brief, para. 18.

³⁸ Munyakazi Reply Brief, para. 17. However, during the hearing of the appeal, Munyakazi acknowledged the Trial Chamber’s discretion to find that his notice of alibi was late and that such late notice could have an impact on the assessment of the credibility of his alibi. *See* T. 28 March 2011 p. 3.

³⁹ Munyakazi Appeal Brief, paras. 8-13; Munyakazi Reply Brief, para. 16. *See* T. 28 March 2011 pp. 3, 4.

⁴⁰ Munyakazi Appeal Brief, paras. 8-13; Munyakazi Reply Brief, para. 16.

⁴¹ Munyakazi Appeal Brief, para. 12.

17. The Appeals Chamber recalls that Rule 67(A)(ii)(a) of the Rules requires the defence to notify the Prosecution before the commencement of trial of its intent to enter a defence of alibi. According to this provision, “the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.” Bearing this in mind, the Appeals Chamber can identify no error in the Trial Chamber’s finding that Munyakazi failed to provide notice of his alibi in accordance with Rule 67(A)(ii)(a) of the Rules. A plea of not guilty provides none of the information required by this provision. Moreover, the purported notice provided by the Defence Pre-Trial Brief fails to conform to the Rule since it was filed after the commencement of the trial, following the close of the Prosecution case, and because it lacks any description of the witnesses or evidence supporting the alibi.

18. The Appeals Chamber also considers that the Trial Chamber reasonably questioned the circumstances surrounding the belated discovery of the alibi. The Appeals Chamber has held that the manner in which an alibi is presented may impact its credibility.⁴² Therefore, it was within the Trial Chamber’s discretion to take into account Munyakazi’s failure to provide timely and adequate notice in assessing the alibi evidence.⁴³

19. In a similar vein, the Trial Chamber acted in accordance with the Rules in taking the manner in which an alibi was presented into account together with its assessment of the underlying evidence. Contrary to Munyakazi’s submission, Rules 67(A)(ii) and 67(B) of the Rules are not mutually exclusive. A Trial Chamber may reasonably consider the circumstances surrounding the notice provided by the accused for his alibi when assessing the alibi on the merits.⁴⁴

20. Finally, there is no merit in Munyakazi’s submission that the Trial Chamber failed to consider whether his alibi was credible. The Trial Chamber fully assessed the evidence offered in support of the alibi.⁴⁵ It described this evidence as having “little evidentiary value”,⁴⁶ as being “inconsistent and contradictory”,⁴⁷ and as “not credible”.⁴⁸ It also weighed his alibi in connection with the Prosecution evidence presented in support of his participation in the attacks at Shangi and

⁴² See *Kalimanzira* Appeal Judgement, para. 56.

⁴³ See *Kalimanzira* Appeal Judgement, para. 56.

⁴⁴ See, e.g., *Kalimanzira* Appeal Judgement, para. 70 (affirming assessment of alibi based on the notice provided as well as the credibility of testimony).

⁴⁵ Trial Judgement, paras. 44-57.

⁴⁶ Trial Judgement, para. 57.

⁴⁷ Trial Judgement, para. 59.

⁴⁸ Trial Judgement, para. 421.

Mibilizi parishes and determined that its “reasonableness [had] been overcome by the compelling Prosecution evidence”.⁴⁹

21. Accordingly, Munyakazi has not demonstrated any error in the Trial Chamber’s assessment of his alibi notice.

2. Alleged Errors in the Assessment of the Evidence

22. Munyakazi denied being present during the attacks at Shangi and Mibilizi parishes, which occurred on 29 and 30 April 1994, respectively.⁵⁰ The Trial Chamber determined that Munyakazi offered two differing accounts of his activities during this period.⁵¹ According to the Trial Chamber, on the first day of his testimony, Munyakazi stated that, on 29 April 1994, he attended prayer services at 3.30 and 6.00 p.m. and read the Koran in the interim.⁵² On the second day of his evidence, Munyakazi testified that, on 29 April 1994, he attended funeral proceedings at 2.00 p.m. for Kabungo and then subsequently participated in three days of mourning in accordance with Muslim tradition.⁵³ The Trial Chamber observed that Munyakazi did not clarify the inconsistencies, for example by explaining that, while he attended the funeral proceedings, he left to attend prayer services.⁵⁴ It further noted that Munyakazi provided no corroboration for his alibi for 29 and 30 April 1994, in particular concerning the death of Kabungo, his participation in funeral services, and the three-day mourning tradition.⁵⁵ Thus, the Trial Chamber determined that his alibi for this period had “little evidentiary value.”⁵⁶ The Trial Chamber further found that the reasonableness of the alibi “has been overcome by the compelling Prosecution evidence” placing him at the crime scenes.⁵⁷

23. Munyakazi submits that the Trial Chamber erred in assessing his alibi for 29 and 30 April 1994.⁵⁸ He argues that the Trial Chamber reversed the burden of proof when it faulted him for adducing no evidence, beyond his testimony, of Kabungo’s death or of the Muslim mourning tradition, in particular when neither the Prosecution nor the Trial Chamber challenged these aspects of his testimony during the proceedings.⁵⁹ Munyakazi also disputes that he provided an inconsistent account of his actions on 29 and 30 April 1994 since there is no contradiction in saying that he read

⁴⁹ Trial Judgement, para. 57. *See also* Trial Judgement, paras. 376, 421.

⁵⁰ Trial Judgement, para. 42.

⁵¹ Trial Judgement, para. 55.

⁵² Trial Judgement, paras. 42, 56.

⁵³ Trial Judgement, paras. 43, 56.

⁵⁴ Trial Judgement, para. 56.

⁵⁵ Trial Judgement, para. 57.

⁵⁶ Trial Judgement, para. 57.

⁵⁷ Trial Judgement, para. 57.

⁵⁸ Munyakazi Appeal Brief, paras. 20-38, 85-100; Munyakazi Reply Brief, paras. 20-24, 28.

the Koran and attended a funeral.⁶⁰ He submits that the additional detail provided on the second day of his testimony concerning the funeral and mourning simply completed, rather than changed, the explanation of his activities during this period.⁶¹

24. The Appeals Chamber recalls that an accused does not bear the burden of proving his alibi beyond reasonable doubt.⁶² When an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.⁶³ The Appeals Chamber observes that the Trial Chamber correctly recalled the law and burden of proof to be applied in the assessment of alibi.⁶⁴

25. Furthermore, the Appeals Chamber has held that “Trial Chambers are endowed with the discretion to require corroboration”.⁶⁵ In this respect, it was not unreasonable for the Trial Chamber to question the credibility of Munyakazi’s alibi in the absence of corroboration given the inherent self-interest of his testimony and the introduction of the alibi at the close of the case. Furthermore, the fact that the death of Kabungo and the mourning period were not specifically challenged during cross-examination does not prevent the Trial Chamber from doubting their veracity and taking the lack of corroboration into account when assessing the evidence. The Appeals Chamber has previously emphasized that a Trial Chamber is not required to accept as true statements unchallenged during cross-examination.⁶⁶ Therefore, the Trial Chamber has not shifted the burden of proof in assessing Munyakazi’s alibi; all that it has done, and this quite properly, is to note that there was no supporting evidence of the alibi.

26. The Appeals Chamber can also identify no error in the Trial Chamber’s decision to discredit Munyakazi’s alibi on the basis that he provided two different versions of his activities during the relevant time. It follows from Munyakazi’s first day of testimony that he mentioned only attending prayers at the mosque and reading the Koran on 29 April 1994.⁶⁷ On his second day of testimony, however, Munyakazi added that he had in fact participated in funeral proceedings that day at the home of Kabungo, a member of his congregation, and that he subsequently observed three days of

⁵⁹ Munyakazi Appeal Brief, paras. 29-38, 92-100; Munyakazi Reply Brief, paras. 21-24, 28. *See* T. 28 March 2011 pp. 3, 4.

⁶⁰ Munyakazi Appeal Brief, paras. 85-93; Munyakazi Reply Brief, para. 20.

⁶¹ Munyakazi Appeal Brief, para. 89.

⁶² *Zigiranyirazo* Appeal Judgement, para. 17.

⁶³ *Zigiranyirazo* Appeal Judgement, para. 18. *See also* *Renzaho* Appeal Judgement, para. 303.

⁶⁴ Trial Judgement, para. 35, *quoting* *Zigiranyirazo* Appeal Judgement, paras. 17, 18.

⁶⁵ *Nchamihigo* Appeal Judgement, para. 45.

⁶⁶ *Karera* Appeal Judgement, para. 29.

⁶⁷ T. 14 October 2009 pp. 50, 51 (“On that day, 29 April, I did not move out. [...] After the 3:30 prayer, we got down to reading the Koran. And at the end of it, we went for the 6 p.m. prayer. So after the prayer, we occupied ourselves with reading the Koran and other religious texts.”).

mourning there.⁶⁸ The Appeals Chamber notes that Munyakazi's account of his activities on the second day of his testimony is the core of his alibi for the attacks at Shangi and Mibilizi parishes. Therefore, it was not unreasonable for the Trial Chamber to question why this version of his alibi was not provided when first questioned about his actions on 29 April 1994, in particular given that Munyakazi only offered it following a leading question from his counsel.⁶⁹ In any case, a review of the Trial Judgement reveals that the "reasonableness" of Munyakazi's alibi was ultimately overcome only after it was weighed together with the "compelling Prosecution evidence placing [him] at Shangi and Mibilizi [p]arishes on 29 and 30 April 1994, respectively".⁷⁰

27. Accordingly, Munyakazi has not demonstrated that the Trial Chamber erred in the assessment of his alibi.

3. Conclusion

28. For the foregoing reasons, the Appeals Chamber dismisses Munyakazi's First Ground of Appeal.

⁶⁸ T. 15 October 2009 pp. 1-3, 32, 54, 55.

⁶⁹ T. 15 October 2009 pp. 1, 2 ("Q. I would therefore like to put the following question to you, Mr. Munyakazi: Was this a habit for you that after the 3:30 prayer session you read the Koran? A. That was not a habit, but during that period – but first of all, I believe that yesterday I was mistaken, because we gathered at a location after the prayer session. I don't think I pointed out that there was anything specific or peculiar on that date. Q. Since you remember that peculiar thing that happened on that date, Mr. Munyakazi, can you talk to the Court about it? A. On that day, we lost a person who was Muslim. His name was Kabungo, Emedeyo. [...] Q. *And that person who died, were you busy arranging his funeral on that day; is that what we should understand from your answer?* [...] [Presiding Judge]: That was leading.") (emphasis added). See also Trial Judgement, para. 56 ("It was only on the second day of his examination-in-chief that Munyakazi recalled, in response to a leading question from his counsel, that he had attended funeral proceedings for Kabungo on the afternoon of the 29th and that the proceedings had lasted three days").

⁷⁰ Trial Judgement, para. 57.

B. Alleged Errors Relating to Munyakazi's Authority (Ground 2)

29. The Trial Chamber convicted Munyakazi for committing genocide and extermination as a crime against humanity based on his role in the attacks at Shangi and Mibilizi parishes on 29 and 30 April 1994, respectively.⁷¹ In particular, the Trial Chamber found that Munyakazi was a leader of the attacks and exercised *de facto* authority over the Bugarama *Interahamwe* during their course.⁷²

30. Munyakazi submits that the Trial Chamber erred in assessing his authority over the Bugarama *Interahamwe*.⁷³ In this section, the Appeals Chamber considers (i) whether Munyakazi had notice of his role as the leader of the attacks at Shangi and Mibilizi parishes; and (ii) whether the Trial Chamber properly assessed the underlying evidence.

1. Alleged Defects in the Form of the Indictment

31. Paragraph 1 of the Indictment reads:

Yussuf MUNYAKAZI was born in 1935 in Rwamatamu *commune*, Kibuye *préfecture*, Rwanda. During the period covered by this indictment, Yussuf MUNYAKAZI was a wealthy businessman and commercial farmer in Bugarama *commune*, Cyangugu *préfecture* and a leader with *de facto* authority over the Bugarama MRND *Interahamwe* militia (hereinafter 'the Bugarama *interahamwe*').

32. Paragraph 13 of the Indictment reads:

On or about 29 April 1994, Yussuf MUNYAKAZI, with the Bugarama *interahamwe*, attacked and killed hundreds of Tutsi civilians who had sought refuge at Shangi Parish, Gafunzo *commune*, Cyangugu *préfecture*, using firearms and traditional weapons. Yussuf MUNYAKAZI transported the *interahamwe* to Shangi parish and personally shot and killed several Tutsi civilians during the attack.

33. Paragraph 14 of the Indictment reads:

On or about 30 April 1994, Yussuf MUNYAKAZI, with the Bugarama *interahamwe*, attacked and killed about a hundred civilian Tutsis [*sic*] men who had sought refuge at Mibilizi Parish, Cyimbogo *commune*, Cyangugu *préfecture*, using firearms and traditional weapons. Yussuf MUNYAKAZI transported the *interahamwe* to Mibilizi parish and ordered them to kill only Tutsi males which they did.

34. Based on the evidence presented in support of these paragraphs, the Trial Chamber was unable to conclude that Munyakazi exercised *de facto* authority over the Bugarama *Interahamwe*

⁷¹ Trial Judgement, paras. 491, 501, 508.

⁷² Trial Judgement, paras. 125, 134, 376, 380, 422, 423, 491.

⁷³ Munyakazi Notice of Appeal, paras. 27-32; Munyakazi Appeal Brief, paras. 102-136. *See also* T. 28 March 2011 pp. 6, 7, 33, 34.

throughout the entire period covered by the Indictment.⁷⁴ Nonetheless, the Trial Chamber was convinced that Munyakazi led, and exercised *de facto* authority over, the Bugarama *Interahamwe* during the attacks at Shangi and Mibilizi parishes.⁷⁵ In so finding, the Trial Chamber noted Munyakazi's prominence within Bugarama and his wealth.⁷⁶ With respect to Shangi parish, the Trial Chamber relied primarily on Prosecution evidence that Munyakazi led a delegation to speak with parish authorities; deceived refugees as to the true intentions of his group; oversaw or ordered the destruction of the church door; fired a shot which commenced the massacre; and ordered assailants to distinguish themselves from the Tutsis.⁷⁷ In relation to Mibilizi parish, the Trial Chamber relied principally on evidence that Munyakazi told the refugees there that they had to "pay" for killing President Habyarimana and then directed the *Interahamwe* to remove a group of refugees, who were killed in a forest.⁷⁸

35. Munyakazi submits that the Indictment does not allege that he led the attacks at Shangi and Mibilizi parishes or exercised *de facto* authority over the Bugarama *Interahamwe* during them.⁷⁹ Rather, Munyakazi argues that it follows from the Indictment as well as from the Prosecution's case at trial that he was being prosecuted as the leader of the Bugarama *Interahamwe* throughout the entire period covered in the Indictment based on acts such as recruiting members, training, arming, and feeding them, and providing them with facilities and transportation.⁸⁰ Munyakazi emphasizes that this pleaded basis for his authority was rejected by the Trial Chamber.⁸¹

36. The Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.⁸² In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.⁸³ The Appeals Chamber has further held that criminal acts that were physically committed by the accused personally must be set forth specifically in the indictment, including, where feasible, "the identity of the victim, the time and place of the events

⁷⁴ Trial Judgement, paras. 111, 133.

⁷⁵ Trial Judgement, paras. 121, 125, 134, 376, 380, 422, 423.

⁷⁶ Trial Judgement, paras. 104, 491.

⁷⁷ Trial Judgement, paras. 365, 366.

⁷⁸ Trial Judgement, paras. 386, 387, 416.

⁷⁹ Munyakazi Appeal Brief, para. 106; Munyakazi Reply Brief, para. 34.

⁸⁰ Munyakazi Appeal Brief, paras. 102-114; Munyakazi Reply Brief, paras. 30-37. *See also* T. 28 March 2011 p. 6.

⁸¹ Munyakazi Reply Brief, para. 32.

⁸² *Muvunyi II* Appeal Judgement, para. 19; *Renzaho* Appeal Judgement, para. 53; *Kalimanzira* Appeal Judgement, para. 46; *Muvunyi I* Appeal Judgement, para. 18; *Seromba* Appeal Judgement, paras. 27, 100; *Simba* Appeal Judgement, para. 63; *Muhimana* Appeal Judgement, paras. 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49; *Ndindabahizi* Appeal Judgement, para. 16.

⁸³ *Muvunyi II* Appeal Judgement, para. 19; *Kalimanzira* Appeal Judgement, para. 46; *Muvunyi I* Appeal Judgement, para. 18; *Ntagerura et al.* Appeal Judgement, para. 28; *Kvo~ka et al.* Appeal Judgement, para. 33. *See also Nahimana et al.* Appeal Judgement, para. 326.

and the means by which the acts were committed.”⁸⁴ An indictment lacking sufficient precision in the pleading of material facts is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.⁸⁵

37. The Trial Chamber found that Munyakazi *committed* the crimes at Shangi and Mibilizi parishes “[o]n the basis of his leadership position at the crime sites”, which showed that “[he] was as much an integral part of the killings as those he enabled”.⁸⁶ As Munyakazi submits, the Indictment does not specifically state that he was the leader of the attacks at Shangi and Mibilizi parishes. However, the more general allegations in paragraphs 13 and 14 of the Indictment that “Yussuf MUNYAKAZI, with the Bugarama *interahamwe*, attacked and killed” Tutsis at the two parishes must be read in light of paragraph 1 of the Indictment, which alleges his role as “a leader” with “*de facto* authority” over that militia group.⁸⁷ Therefore, the Appeals Chamber is satisfied that the Indictment provided Munyakazi with notice that he had a leadership role and exercised *de facto* authority over the Bugarama *Interahamwe* during the attacks at Shangi and Mibilizi parishes. Contrary to Munyakazi’s submission, the fact that the Prosecution’s theory of the scope and basis of his leadership of the Bugarama *Interahamwe* was broader than that ultimately proven at trial does not mean that the notice of Munyakazi’s role in the crimes was deficient.

38. Accordingly, Munyakazi has not demonstrated that he lacked notice of his leadership role in the crimes committed at Shangi and Mibilizi parishes.

2. Alleged Errors in the Assessment of the Evidence

39. Munyakazi raises three main challenges to the Trial Chamber’s consideration of the evidence underlying its findings that he led the attacks at Shangi and Mibilizi parishes. He alleges errors in the assessment of the Prosecution witnesses with respect to both events and highlights purported inconsistencies in the findings regarding his authority.⁸⁸

⁸⁴ *Muhimana* Appeal Judgement, para. 76; *Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreškić et al.* Appeal Judgement, para. 89. See also *Ndindabahizi* Appeal Judgement, para. 16.

⁸⁵ *Renzaho* Appeal Judgement, para. 55; *Kalimanzira* Appeal Judgement, para. 46; *Nchamihigo* Appeal Judgement, para. 338; *Muvunyi I* Appeal Judgement, para. 20; *Seromba* Appeal Judgement, para. 100; *Simba* Appeal Judgement, para. 64; *Muhimana* Appeal Judgement, paras. 76, 195, 217; *Ntagerura et al.* Appeal Judgement, paras. 28, 65; *Gacumbitsi* Appeal Judgement, para. 49.

⁸⁶ Trial Judgement, para. 491.

⁸⁷ See *Rutaganda* Appeal Judgement, para. 304 (noting that indictment paragraphs cannot be read in isolation from the rest of the document). See also *Semanza* Appeal Judgement, para. 358 (reading various paragraphs of an indictment together in concluding that the appellant was charged with ordering crimes).

⁸⁸ Munyakazi Appeal Brief, paras. 115-136.

(a) Shangi Parish

40. The Trial Chamber found that Munyakazi led the attack at Shanghi parish.⁸⁹ It relied primarily on evidence from four Prosecution witnesses, including two survivors (Prosecution Witnesses BWR and BWQ) and two accomplices (Prosecution Witnesses BWW and BWU), who confirmed Munyakazi's leadership role.⁹⁰ In reaching this conclusion, the Trial Chamber relied on Witness BWQ's evidence to determine that Munyakazi led a delegation to speak with the mother superior and deceived the refugees by telling them that the *Interahamwe* would provide protection for them.⁹¹ The Trial Chamber also accepted that Munyakazi oversaw or ordered the destruction of the church door, noting that Witness BWU testified that Munyakazi ordered the attackers to break it down and that Witnesses BWR and BWQ saw Munyakazi standing with the attackers after its destruction.⁹² It further found credible Witness BWR's account of Munyakazi firing the first shot which commenced the attack within the church.⁹³

41. In addition, the Trial Chamber accepted Witness BWU's evidence that Munyakazi ordered the assailants to distinguish themselves from the Tutsis and that the assailants then formed two groups to attack from the front and back of the parish.⁹⁴ The Trial Chamber observed that this aspect of Witness BWU's account was corroborated by Witnesses BWR and BWQ who stated that the attackers wore tree branches and confirmed the manner of the attack.⁹⁵ Finally, the Trial Chamber considered that Munyakazi's leading role in the attack was corroborated by Prosecution Witnesses MM and MP, who heard from the same source that Munyakazi led the attack at Shanghi parish.⁹⁶

42. Munyakazi submits that the Trial Chamber erred in this assessment.⁹⁷ In particular, he argues that the Trial Chamber misconstrued Witness BWQ's evidence in finding that Munyakazi led a delegation to visit the mother superior.⁹⁸ Munyakazi further argues that no reasonable trier of fact could have relied on Witness BWQ's testimony about Munyakazi's purported deception of the

⁸⁹ Trial Judgement, paras. 376, 380.

⁹⁰ Trial Judgement, paras. 368, 376.

⁹¹ Trial Judgement, para. 365.

⁹² Trial Judgement, paras. 365, 366.

⁹³ Trial Judgement, para. 365.

⁹⁴ Trial Judgement, para. 366.

⁹⁵ Trial Judgement, para. 366.

⁹⁶ Trial Judgement, paras. 368, 376.

⁹⁷ Munyakazi Appeal Brief, paras. 115, 117-127.

⁹⁸ Munyakazi Appeal Brief, para. 117, *citing* T. 22 April 2009 pp. 14, 15.

refugees and his presence at the door of the church to conclude that he was the leader of the attack.⁹⁹

43. Moreover, Munyakazi submits that the Trial Chamber erred in relying on Witness BWR to conclude that Munyakazi fired the shot which commenced the attack.¹⁰⁰ In this respect, Munyakazi emphasizes the chaotic circumstances of the attack and the presence of other gunmen firing at the time which, in his view, raise questions about the reliability of the witness's ability to identify Munyakazi at the door of the church and as the initial shooter.¹⁰¹ Furthermore, Munyakazi highlights his own testimony, which he asserts was not disputed, that he had never had any form of weapons training.¹⁰²

44. Finally, Munyakazi challenges the Trial Chamber's reliance on Witness BWU's evidence to find that he ordered the assailants to break down the church door and distinguish themselves from the Tutsis.¹⁰³ Munyakazi argues that, given the chaotic circumstances of the attack, Witness BWU would not have been able to hear the order to break down the door.¹⁰⁴ In this respect, Munyakazi notes that, in another part of the Trial Judgement, the Trial Chamber observed that Witness BWU did not know Munyakazi well.¹⁰⁵ Furthermore, Munyakazi notes that, while there is other testimony that the assailants wore branches during the attack, this evidence fails to support that he issued the order for them to do so.¹⁰⁶

45. A review of Witness BWQ's evidence reveals that, upon arrival, Munyakazi addressed the witness, who was with two other refugees, and told him to tell the other refugees to gather at the church and that the *Interahamwe* were there to protect them.¹⁰⁷ It does not follow from the witness's evidence that this information was conveyed to any other refugee before the attack. Thus, the Trial Chamber's observation that Munyakazi "deceived the refugees" appears to be limited to only three individuals.¹⁰⁸ It also follows from Witness BWQ's account that Munyakazi asked to speak with the mother superior and that the witness led him and his two bodyguards to her residence.¹⁰⁹ The Trial

⁹⁹ Munyakazi Appeal Brief, para. 118.

¹⁰⁰ Munyakazi Appeal Brief, paras. 119-125.

¹⁰¹ Munyakazi Appeal Brief, paras. 119-121.

¹⁰² Munyakazi Appeal Brief, paras. 122-125.

¹⁰³ Munyakazi Appeal Brief, paras. 126, 127.

¹⁰⁴ Munyakazi Appeal Brief, para. 127.

¹⁰⁵ Munyakazi Appeal Brief, paras. 331, 332, *citing* Trial Judgement, para. 10.

¹⁰⁶ Munyakazi Appeal Brief, para. 126.

¹⁰⁷ T. 22 April 2009 p. 14 ("[Munyakazi] told me, 'Go and tell your fellow refugees to get into the church because the persons who have come in the car are armed and are here to provide security for them.'").

¹⁰⁸ Trial Judgement, para. 365.

¹⁰⁹ T. 22 April 2009 pp. 14, 15, 28.

Chamber's use of the term "delegation"¹¹⁰ does not appear entirely accurate in describing what in fact was only Munyakazi and two bodyguards.

46. The Appeals Chamber, however, is not convinced that these minor overstatements of Witness BWQ's testimony result in a miscarriage of justice. The witness's account illustrates Munyakazi's attempts to meet with parish authorities and to use deception to gather refugees at the church. The Appeals Chamber is satisfied that these actions, in particular when viewed together with other evidence of Munyakazi's role, such as overseeing or ordering the destruction of the church door, firing the shot which commenced the attack, and issuing instructions to assailants, reasonably support the Trial Chamber's conclusion that Munyakazi led the attack.

47. The Appeals Chamber is also not convinced that the chaotic circumstances of the attack prevented the Trial Chamber from relying on Witness BWR's testimony concerning Munyakazi's role in the attack. The Trial Chamber expressly considered these circumstances in assessing the witness's testimony.¹¹¹ It also follows from Witness BWR's evidence, which was considered credible, that he was familiar with Munyakazi prior to the event.¹¹² Significantly, Witness BWR was among the refugees trying to block the church door, saw Munyakazi at close range, and clearly recalled the type of weapon he used to start the attack.¹¹³ Witness BWR was therefore well placed to observe the events. Witness BWR's identification of Munyakazi at the door of the church was also corroborated by Witness BWQ.¹¹⁴ Based on this evidence, the Appeals Chamber considers that it was reasonable for the Trial Chamber to rely on Witness BWR's eye-witness account. Furthermore, Munyakazi's submission on appeal that he did not receive weapons training does not call into question the reasonableness of the Trial Chamber's reliance of Witness BWR's eye-witness testimony that he fired into the church.

48. The Appeals Chamber equally finds no merit in the argument that the chaotic circumstances surrounding the attack prevented the Trial Chamber from relying on Witness BWU's account of Munyakazi's order to break down the church door. Although the witness recalled attacking refugees as soon as the assailants entered the parish compound,¹¹⁵ it does not follow from his account that chaos prevailed at the moment Munyakazi gave the order. Rather, the record reflects that, when

¹¹⁰ Trial Judgement, para. 365.

¹¹¹ Trial Judgement, para. 368.

¹¹² Trial Judgement, paras. 330, 365.

¹¹³ T. 22 April 2009 p. 45 ("When they forced the door open, I was able to see Munyakazi through the opening of the main door. Subsequently, I saw Munyakazi carrying a pistol [...] I was in a group of persons who were close to that door and who were trying to block it and prevent it from being forced to open. [...] I clearly recall [the] weapon. It was a small calibre gun, a revolver type.")

¹¹⁴ Trial Judgement, para. 365.

¹¹⁵ T. 4 June 2009 p. 8.

Munyakazi spoke, a group of assailants, including the witness, had gathered near the locked church door, which was preventing an attack on the refugees.¹¹⁶ Therefore, Munyakazi has not shown that the Trial Chamber unreasonably accepted this aspect of Witness BWU's testimony.

49. Moreover, the Appeals Chamber is not convinced that the Trial Chamber erred in relying on Witness BWU's identification of Munyakazi even though, in an earlier part of the Trial Judgement, it observed that the witness "did not know Munyakazi very well" when discussing whether Munyakazi distributed weapons at Shangi parish.¹¹⁷ First, a review of the Trial Chamber's analysis reveals that Witness BWU's familiarity with Munyakazi was not the basis for its rejection of the witness's evidence of the distribution.¹¹⁸ Rather, the Trial Chamber reasoned that Witness BWU's testimony that Munyakazi transported weapons to Shangi parish did not support an inference that Munyakazi supplied them.¹¹⁹ Second, the Appeals Chamber notes that Witness BWU testified that he first saw Munyakazi from a distance of 20 meters during a meeting at Kamarampaka stadium in Cyangugu Prefecture in late 1993, when Munyakazi was introduced by the prefect as an *Interahamwe* leader from Bugarama.¹²⁰ Although his prior knowledge of Munyakazi was limited, the Appeals Chamber notes that all Prosecution witnesses consistently described Munyakazi's attire at the parish and that Witness BWU's account of Munyakazi's presence near the church door was corroborated by Witnesses BWQ and BWR.¹²¹ In this context, the Appeals Chamber is satisfied that it was reasonable to rely on Witness BWU's identification evidence.

50. Turning to Witness BWU's testimony that Munyakazi ordered the assailants to distinguish themselves from the refugees, the Appeals Chamber notes that the Trial Chamber viewed the testimony of this witness, an accomplice, with caution and stated that it would "generally rely on his testimony only when corroborated by other witnesses."¹²² As corroboration of this point, the Trial Chamber referred to Witnesses BWR's and BWQ's similar description of the assailants' attire.¹²³ The Appeals Chamber considers that this evidence offers only partial corroboration since it

¹¹⁶ T. 4 June 2009 p. 8 ("[W]hen we got to the parish, we gathered together; however, there was a problem because the refugees had locked themselves inside the church. So Munyakazi said, 'Go and get axes so as to break down the doors and finish off the refugees.' So we went to borrow two axes in houses which were near the church, and we returned there with the two axes.").

¹¹⁷ Trial Judgement, para. 10.

¹¹⁸ *Compare* Trial Judgement, para. 10, with Trial Judgement, para. 206.

¹¹⁹ Trial Judgement, para. 206 ("Witness BWU testified that Munyakazi arrived at Shangi Parish on 29 April 1994, with two Daihatsu vehicles loaded with weapons. He added that Munyakazi led the Bugarama *Interahamwe* during this attack. As noted above (see Chapter II.3), [Witness] BWU was an accomplice witness, and thus, the Trial Chamber views his testimony with caution. The Trial Chamber finds that it cannot infer that the weapons were supplied by Munyakazi merely on the basis that he transported them to Shangi Parish.").

¹²⁰ T. 4 June 2009 pp. 5, 6, 9, 11, 19-22. *See also* Trial Judgement, para. 335.

¹²¹ Trial Judgement, paras. 364-366.

¹²² Trial Judgement, para. 366.

¹²³ Trial Judgement, para. 366.

does not substantiate the material aspect of this facet of Witness BWU's testimony, namely, that Munyakazi issued the order for the assailants to distinguish themselves from the refugees.

51. A Trial Chamber has the discretion to evaluate whether evidence taken as a whole is reliable and credible and to accept or reject the fundamental features of the evidence.¹²⁴ It follows from Witness BWU's evidence as a whole that Munyakazi led the attack and issued various instructions to the assailants.¹²⁵ It was within the Trial Chamber's discretion to accept this fundamental feature of the witness's evidence, particularly considering that Witness BWU was a part of the attacking force. The Trial Chamber's careful approach is illustrated by its assessment that "the Prosecution introduced testimony from six witnesses, from a wide array of perspectives, all confirming Munyakazi's leadership role, and that four of these witnesses provided detailed first-hand evidence of how Munyakazi led the attack on Shangi [p]arish" and that their evidence was "credible and reliable" and corroborated each other on this main point.¹²⁶

52. In sum, the Appeals Chamber is satisfied that the evidence of Munyakazi's efforts on arrival to speak with parish authorities, his exchange with Witness BWQ, and his role in destroying the church door and in commencing the attack – when considered together with more general evidence of Munyakazi's leadership from all Prosecution witnesses related to this event – formed a reasonable basis for the Trial Chamber's finding that Munyakazi led the attack.

(b) Mibilizi Parish

53. The Trial Chamber determined that Munyakazi led and participated in the attack on Mibilizi parish based "in particular" on the "consistent and credible" account of Prosecution Witness LCQ, "a survivor and eye[-]witness" of the attack.¹²⁷ According to Witness LCQ's testimony, Munyakazi told the refugees: "You have killed the head of state, and you have come to hide here. [...] You are going to pay for what you have done."¹²⁸ Witness LCQ stated that Munyakazi then directed the *Interahamwe* to remove a group of refugees from the parish premises; they were ultimately stripped naked and killed in a forest.¹²⁹

¹²⁴ *Simba* Appeal Judgement, para. 103. *See also Renzaho* Appeal Judgement, para. 269; *Rukundo* Appeal Judgement, para. 207.

¹²⁵ Trial Judgement, paras. 335-342, 366, 368, 376.

¹²⁶ Trial Judgement, para. 376.

¹²⁷ Trial Judgement, para. 416. *See also* Trial Judgement, para. 423.

¹²⁸ T. 28 April 2009 p. 20. *See also* Trial Judgement, para. 386.

¹²⁹ T. 28 April 2009 pp. 21, 22, 35-37. *See also* Trial Judgement, para. 387.

54. The Trial Chamber also considered that Munyakazi's leadership role in the attack was confirmed by Prosecution Witnesses BWW, MM, and MP.¹³⁰ In particular, the Trial Chamber observed that Witness BWW, a participant in the attack, confirmed that Munyakazi was one of the leaders of the attack.¹³¹ The Trial Chamber also noted that Witnesses MM and MP, who were at the parish during the attack, also named Munyakazi as its leader.¹³² While the basis of their identification of Munyakazi was hearsay, the Trial Chamber considered it reliable since it was corroborated by Witnesses BWW and LCQ.¹³³

55. Munyakazi submits that the Trial Chamber erred in finding that he led the attack on Mibilizi parish based on the accounts of Witnesses MM and MP because they are inconsistent and hearsay.¹³⁴

56. As discussed in the Trial Judgement, there are various differences between the accounts of Witnesses MM and MP, and their basis for identifying Munyakazi was hearsay.¹³⁵ It follows from the Trial Judgement, however, that the Trial Chamber clearly expressed its preference for and "relie[d], *in particular*, on Witness LCQ to establish Munyakazi's role in the attack at Mibilizi."¹³⁶ In this ground of appeal, Munyakazi makes no arguments concerning the Trial Chamber's reliance on this witness and has not otherwise successfully challenged his credibility on appeal. Therefore, even if convincing, Munyakazi's arguments concerning Witnesses MM and MP could not demonstrate that the Trial Chamber erred in finding that he led and participated in the attack on Mibilizi parish.

(c) Inconsistency in Findings

57. In assessing the evidence of Munyakazi's overall role in the Bugarama *Interahamwe*, the Trial Chamber rejected a number of aspects of the Prosecution's case, in particular that he had authority over their acts throughout the Indictment period.¹³⁷ In reaching this conclusion, it noted that the fact that Munyakazi was seen in the company of *Interahamwe* was not a sufficient basis to infer that he had authority over them.¹³⁸ It also highlighted evidence that, on 7 April 1994, members of the Bugarama *Interahamwe* killed one of Munyakazi's adopted Tutsi sons and also tried to kill

¹³⁰ Trial Judgement, paras. 415-417, 422.

¹³¹ Trial Judgement, paras. 400, 415.

¹³² Trial Judgement, paras. 392, 395, 415.

¹³³ Trial Judgement, para. 415.

¹³⁴ Munyakazi Appeal Brief, paras. 128-133; Munyakazi Reply Brief, paras. 38-40.

¹³⁵ Trial Judgement, paras. 413, 415.

¹³⁶ Trial Judgement, para. 416 (emphasis added).

¹³⁷ Trial Judgement, para. 111.

¹³⁸ Trial Judgement, para. 106.

an individual whom Munyakazi was trying to protect.¹³⁹ The Trial Chamber also noted the lack of conclusive evidence concerning whether the Bugarama *Interahamwe* met at Munyakazi's home at his behest and whether it was a "well-structured organisation with a well-defined chain of command."¹⁴⁰ Furthermore, the Trial Chamber had doubt as to whether Munyakazi recruited, trained, armed, or provided food to members of the *Interahamwe*.¹⁴¹

58. Munyakazi submits that the Trial Chamber's findings concerning his lack of overall authority or involvement in the Bugarama *Interahamwe* throughout the Indictment period contradict its conclusions that he led the attacks at Shangi and Mibilizi parishes.¹⁴²

59. The Appeals Chamber does not consider the conclusions regarding the scope of Munyakazi's overall authority over the Bugarama *Interahamwe* to be inconsistent with the findings that he led the attacks at Shangi and Mibilizi parishes. The Trial Chamber found that Munyakazi exercised authority over the assailants at Shangi and Mibilizi parishes after examining the specific evidence related to his conduct during the attacks. The fact that the Prosecution did not prove some aspects of its case concerning Munyakazi's overall authority or role in the Bugarama *Interahamwe* does not cast doubt on these specific findings.

3. Conclusion

60. For the foregoing reasons, the Appeals Chamber dismisses Munyakazi's Second Ground of Appeal.

¹³⁹ Trial Judgement, para. 111.

¹⁴⁰ Trial Judgement, para. 133.

¹⁴¹ Trial Judgement, paras. 164, 173, 208, 252, 259, 267.

¹⁴² Munyakazi Appeal Brief, paras. 134-136. *See also* T. 28 March 2011 p. 7.

C. Alleged Errors Relating to Shangi Parish (Ground 3)

61. The Trial Chamber convicted Munyakazi of committing genocide and extermination as a crime against humanity based on his role in the killing of 5,000 to 6,000 Tutsi civilians at Shangi parish on 29 April 1994.¹⁴³ On the basis of the evidence of six Prosecution witnesses, the Trial Chamber found that Munyakazi led the attack, transported *Interahamwe* to the parish, and instructed them to kill the Tutsi civilians there.¹⁴⁴ Munyakazi presented three witnesses, whose accounts suggested in varying degrees that neither he nor the Bugarama *Interahamwe* participated in the attack.¹⁴⁵ The Trial Chamber questioned the reliability of the Defence evidence and concluded that it did not raise reasonable doubt.¹⁴⁶

62. Munyakazi submits that the Trial Chamber erred in convicting him of these crimes.¹⁴⁷ In this section, the Appeals Chamber considers whether the Trial Chamber erred in its assessment of the evidence.

1. Alleged Errors in the Assessment of the Prosecution Evidence

63. In making its findings concerning the events at Shangi parish, the Trial Chamber relied primarily on four eye-witnesses to the attack:¹⁴⁸ Prosecution Witnesses BWQ and BWR, who survived the massacre, as well as Prosecution Witnesses BWU and BWW, who were assailants.¹⁴⁹ The Trial Chamber considered that these four witnesses “provided largely consistent first-hand accounts of the day’s events”.¹⁵⁰

64. The Trial Chamber also concluded that these four witnesses credibly confirmed Munyakazi’s leadership role and “provided detailed first-hand evidence of how [he] led the attack”.¹⁵¹ In particular, the Trial Chamber accepted the evidence of Witness BWQ that, on arrival at the parish, Munyakazi told the witness that the *Interahamwe* were there to protect the refugees

¹⁴³ Trial Judgement, paras. 496, 501, 508.

¹⁴⁴ Trial Judgement, paras. 376, 380.

¹⁴⁵ Trial Judgement, paras. 350-362. The Trial Chamber also rejected Munyakazi’s alibi that he attended the funeral of a friend in Bugarama commune. *See* Trial Judgement, paras. 57-59, 363, 376. Munyakazi challenges the assessment of his alibi in the First Ground of Appeal.

¹⁴⁶ Trial Judgement, paras. 371-376.

¹⁴⁷ Munyakazi Notice of Appeal, paras. 33-51; Munyakazi Appeal Brief, paras. 137-187. *See also* T. 28 March 2011 pp. 7, 8, 36, 37. The Appeals Chamber also considers in this section similar challenges raised by Munyakazi in his Seventh Ground of Appeal which also relate to the Trial Chamber’s assessment of the evidence. *See* Munyakazi Appeal Brief, paras. 315-319, 329-333.

¹⁴⁸ Trial Judgement, paras. 363-368.

¹⁴⁹ Trial Judgement, paras. 365-367.

¹⁵⁰ Trial Judgement, para. 364.

¹⁵¹ Trial Judgement, para. 376. *See also* Trial Judgement, para. 368.

and then proceeded to the residence of the mother superior.¹⁵² The Trial Chamber also accepted the evidence of Witnesses BWQ, BWR, and BWU, which, when considered together, indicated that Munyaikazi oversaw or ordered the destruction of the church door.¹⁵³ In addition, the Trial Chamber accepted Witness BWR's evidence that Munyaikazi fired the shot which commenced the killing of those inside the church.¹⁵⁴ Moreover, the Trial Chamber considered evidence from Witness BWU that just before the assault Munyaikazi issued orders to the attackers at a nearby cemetery to distinguish themselves from the refugees.¹⁵⁵ Finally, the Trial Chamber noted that the evidence of Prosecution Witnesses MM and MP, who heard that Munyaikazi led the attack, provided some additional support to the eye-witness accounts of Witnesses BWQ, BWR, BWU, and BWW.¹⁵⁶

65. As part of his defence, Munyaikazi requested the Trial Chamber to conduct a site visit at Shangi parish, among other places, to verify whether witnesses inside the parish could have seen and heard what transpired outside.¹⁵⁷ The Trial Chamber initially granted this motion,¹⁵⁸ noting that it had "paid special attention to the question of whether some of the disputed issues at trial are relative to physical attributes of various sites".¹⁵⁹ Upon reconsideration, the Trial Chamber *proprio motu* cancelled the visit,¹⁶⁰ considering that, after a more detailed review of the record, it was in a position to assess the evidence without the benefit of the visit.¹⁶¹

66. Munyaikazi argues that the Prosecution evidence is inconsistent and unreliable.¹⁶² He disputes Witnesses BWQ's and BWR's observations of how the attack unfolded, including the witnesses' ability to see the assailants through ventilation holes in the wall of the church and to identify Munyaikazi at the door of the church during the chaotic circumstances of the attack.¹⁶³ In addition, Munyaikazi points to discrepancies between the accounts of Witnesses BWU and BWW concerning the identity of the individuals purportedly killed by Munyaikazi and whether the Bugarama *Interahamwe* were assisted by local assailants, whether they stopped at a cemetery prior

¹⁵² Trial Judgement, para. 365.

¹⁵³ Trial Judgement, paras. 365, 366.

¹⁵⁴ Trial Judgement, para. 365.

¹⁵⁵ Trial Judgement, paras. 338, 366.

¹⁵⁶ Trial Judgement, para. 368.

¹⁵⁷ *The Prosecutor v. Yussuf Munyaikazi*, Case No. ICTR-97-36A-T, Yussuf Munyaikazi's Motion for Judicial View of the *Locus in Quo*, 20 October 2009, para. 8. See also *The Prosecutor v. Yussuf Munyaikazi*, ICTR-97-36A-T, Decision on Yussuf Munyaikazi's Motion for Judicial View of the *Locus in Quo*, 18 March 2010 ("Decision of 18 March 2010"), para. 6.

¹⁵⁸ Decision of 18 March 2010, p. 4, Annex I.

¹⁵⁹ Decision of 18 March 2010, para. 7 (internal citation omitted).

¹⁶⁰ *The Prosecutor v. Yussuf Munyaikazi*, Case No. ICTR-97-36A-T, Reconsideration of "Decision on Yussuf Munyaikazi's Motion for Judicial View of the *Locus in Quo*", 10 May 2010 ("Decision of 10 May 2010"), para. 6.

¹⁶¹ Decision of 10 May 2010, para. 6.

¹⁶² Munyaikazi Appeal Brief, paras. 140-153, 178-187, 315-319, 330-333.

¹⁶³ Munyaikazi Appeal Brief, paras. 141-144, 150, 315-319.

to the assault, and whether they attended a reception following the attack.¹⁶⁴ Munyakazi further submits that, had the Trial Chamber not cancelled the site visit, “it could not have minimized” these discrepancies.¹⁶⁵

67. Munyakazi also challenges the Trial Chamber’s reliance on the hearsay evidence provided by Witnesses MM and MP to corroborate the accounts of those witnesses who were present during the attack.¹⁶⁶ He contends that this evidence is unreliable, uncorroborated, and untested.¹⁶⁷

68. Finally, Munyakazi argues that the Prosecution evidence is exaggerated and that no reasonable trier of fact could have concluded that the Bugarama *Interahamwe*, who arrived in only two vehicles, killed 5,000 to 6,000 refugees in the span of a few hours even with the assistance of local assailants.¹⁶⁸ Munyakazi argues that this impossible scenario casts doubt on the Trial Chamber’s evaluation of the evidence of Prosecution Witnesses BWQ, BWR, BWU, and BWW.¹⁶⁹ Furthermore, Munyakazi submits that, given the chaos of such a situation, the Trial Chamber failed to apply the requisite caution in accepting the evidence of these witnesses identifying him at the scene and as the leader of the attack.¹⁷⁰

69. The Appeals Chamber recalls that the Trial Chamber accepted evidence from Witnesses BWQ and BWR, who saw assailants, including Munyakazi, outside the church through ventilation holes in its walls.¹⁷¹ Witness BWQ estimated that “[t]he ventilation holes were about 40 by 50 centimetres” and that “the empty spaces could have been filled [*sic*] up with about five or six blocks.”¹⁷² The witness further noted that one could “easily” see through them.¹⁷³ In the absence of any contradictory evidence, the Appeals Chamber is not convinced that it was unreasonable to accept this aspect of Witnesses BWQ’s and BWR’s accounts.

70. The Appeals Chamber further recalls that it has already dismissed the challenge to Witness BWR’s ability to identify Munyakazi during the attack.¹⁷⁴ Further, the Trial Chamber expressly considered the chaotic circumstances in assessing Witness BWQ’s testimony.¹⁷⁵ It follows from

¹⁶⁴ Munyakazi Appeal Brief, paras. 151, 153, 331, 332, 333.

¹⁶⁵ Munyakazi Appeal Brief, para. 140. *See also* Munyakazi Reply Brief, paras. 44-47.

¹⁶⁶ Munyakazi Appeal Brief, paras. 178-181.

¹⁶⁷ Munyakazi Appeal Brief, paras. 180, 181.

¹⁶⁸ Munyakazi Appeal Brief, paras. 167, 182-187. *See also* Munyakazi Reply Brief, para. 55.

¹⁶⁹ Munyakazi Appeal Brief, para. 187.

¹⁷⁰ Munyakazi Appeal Brief, paras. 187, 315-319, 331*bis*, 332.

¹⁷¹ Trial Judgement, paras. 326, 327, 333, 365, 366. *See also* Witness BWQ, T. 22 April 2009 pp. 15, 31; Witness BWR, T. 22 April 2009 pp. 45, 55.

¹⁷² T. 22 April 2009 p. 31. *See also* T. 22 April 2009 p. 36 (French).

¹⁷³ T. 22 April 2009 p. 31.

¹⁷⁴ *See supra* para. 47.

¹⁷⁵ Trial Judgement, para. 368.

Witness BWQ's evidence, which the Trial Chamber considered credible, that he was familiar with Munyakazi prior to the event.¹⁷⁶ Moreover, the witness personally interacted with Munyakazi after the assailants arrived at the parish,¹⁷⁷ and saw him two more times: once through a ventilation hole as the main door of the church was destroyed; and again as Munyakazi entered the church after the destruction of the door, but *before* the assailants began throwing grenades at the refugees.¹⁷⁸ Witness BWR also corroborated Witness BWQ's account of Munyakazi's presence at the church door.¹⁷⁹ In this context, Munyakazi has not shown that it was unreasonable for the Trial Chamber to rely on Witness BWQ's eye-witness account of Munyakazi's actions at the church.

71. The Appeals Chamber is also not convinced that Munyakazi has identified any inconsistency between the accounts of Witnesses BWU and BWW that would call into question the Trial Chamber's reliance on their evidence. The Appeals Chamber recalls that the Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within or among witnesses' testimonies.¹⁸⁰ It is within the discretion of the Trial Chamber to evaluate any such inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.¹⁸¹ The Appeals Chamber further recalls that "corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony."¹⁸²

72. The Trial Chamber viewed the evidence of Witnesses BWU and BWW with caution, given their participation in the attack as accomplices of Munyakazi, and therefore accepted it only where corroborated.¹⁸³ In this respect, the Trial Chamber considered that the testimonies of Witnesses BWU and BWW were consistent on a number of key details, including the date and timeframe of the attack, the participation of Munyakazi and the *Interahamwe*, his dress and possession of a weapon, and the general tenor of how the attack unfolded.¹⁸⁴ It also relied on Witness BWU, together with the evidence of Witnesses BWQ and BWR, concerning Munyakazi's role in the

¹⁷⁶ Trial Judgement, paras. 320, 365.

¹⁷⁷ Trial Judgement, paras. 325, 365.

¹⁷⁸ T. 22 April 2009 pp. 15, 30, 31; T. 22 April 2009 p. 33 ("A. [...] But I know that after [Munyakazi] broke down the door, he took a look inside the church. And later on I heard only the noises of the victims, and I knew nothing again of what happened subsequently. Q. You were able to see him after you'd moved to the centre area of the church; is that what you're saying? A. I've explained this already. When they had done breaking down the door, he threw a look inside. Then he moved back and started lobbing in grenades.").

¹⁷⁹ Trial Judgement, para. 365.

¹⁸⁰ *Renzaho* Appeal Judgement, para. 355; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

¹⁸¹ *Renzaho* Appeal Judgement, para. 355; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

¹⁸² *Nahimana et al.* Appeal Judgement, para. 428. *See also* *Rukundo* Appeal Judgement, para. 201; *Karera* Appeal Judgement, para. 173.

¹⁸³ Trial Judgement, paras. 366, 367. *See also* Trial Judgement, para. 119.

destruction of the door of the church.¹⁸⁵ More importantly, Witnesses BWU and BWW corroborated Witnesses BWQ's and BWR's conclusion that Munyakazi led the attack.¹⁸⁶

73. Many of the purported inconsistencies highlighted by Munyakazi do not relate to these main features of Witnesses BWU's and BWW's evidence. Indeed, the Trial Chamber did not accept their respective accounts of Munyakazi personally killing refugees.¹⁸⁷ It also did not accept the evidence of Witness BWU that the Bugarama *Interahamwe* were provided with money to hold a reception following the attack.¹⁸⁸ In any case, the Appeals Chamber is not convinced that these parts of their evidence are inconsistent. Indeed, Munyakazi's purported killings of refugees in the church were separate incidents which occurred at different times in a large scale attack.¹⁸⁹ In addition, contrary to Munyakazi's suggestion, Witness BWU did not testify that a reception occurred immediately after the attack. Instead, Witness BWU noted that money was provided to Munyakazi's group to hold a reception "when they returned to their homes."¹⁹⁰ Therefore, Witness BWU's evidence is not inconsistent with Witness BWW's account of leaving after the attack.¹⁹¹

74. It follows from Witness BWU's testimony that local assailants from the Shangi area joined the Bugarama *Interahamwe* in attacking the parish.¹⁹² The witness also referred to Munyakazi giving orders to the attackers at a nearby cemetery shortly before they arrived at the parish.¹⁹³ Witness BWW, however, did not testify about the presence of local assailants or the stop at the cemetery.¹⁹⁴ A review of his testimony reveals that he was never asked about these particular matters.¹⁹⁵ Therefore, the fact that Witness BWW did not mention certain details contained in Witness BWU's evidence does not demonstrate that their accounts are incompatible.

¹⁸⁴ Trial Judgement, para. 364.

¹⁸⁵ Trial Judgement, paras. 365, 366.

¹⁸⁶ Trial Judgement, paras. 368, 376.

¹⁸⁷ Trial Judgement, paras. 377-379.

¹⁸⁸ Trial Judgement, paras. 466, 487. More generally, the Trial Chamber also concluded that there was insufficient evidence proving that Munyakazi provided food to the *Interahamwe* between January and July 1994. See Trial Judgement, paras. 259, 267.

¹⁸⁹ See Trial Judgement, paras. 377, 378 ("Prosecution Witness BWU stated that *after the church doors at Shangi were forced open by the Interahamwe*, a woman named Petronilla Nyiramuteteri asked Munyakazi for mercy and that Munyakazi responded by shooting and killing her. [...] Prosecution Witness BWW testified that *towards the end of the massacre* Munyakazi personally selected nine refugees out of the crowd and shot them.") (emphasis added).

¹⁹⁰ See T. 4 June 2009 p. 9.

¹⁹¹ Notably, Witness BWW testified that, upon his return to Bugarama, the *Interahamwe* were provided with food. See T. 29 May 2009 p. 19 ("Yes, we boarded the vehicles, once again, and they took us to Bugarama, more specifically, to Yussuf Munyakazi's home. When we arrived there, we noticed that food had been ready for us and we took our meals, after which we went to our respective homes.").

¹⁹² T. 4 June 2009 pp. 25, 26. See also Trial Judgement, para. 337.

¹⁹³ T. 4 June 2009 pp. 7, 8. See also Trial Judgement, paras. 338, 366.

¹⁹⁴ T. 29 May 2009 pp. 14-19, 29-34.

¹⁹⁵ In this context, there is no merit in Munyakazi's submission that Witness YCI corroborated Witness BWW's evidence that the assailants did not stop at the cemetery. See Munyakazi Appeal Brief, para. 153.

75. Accordingly, the Appeals Chamber can identify no error in the Trial Chamber's reliance on Witnesses BWU and BWW to establish that Munyakazi led the attack.

76. Turning to the site visit, the Appeals Chamber recalls that the Trial Chamber has the primary discretion to decide whether or not a site visit is necessary or relevant in the assessment of evidence.¹⁹⁶ The only credibility issue argued by Munyakazi that reasonably relates to the physical features of the parish is Witnesses BWQ's and BWR's ability to see assailants through the ventilation holes. On this point, the Trial Chamber heard testimony concerning the placement and size of the holes, as well as the ease with which one could see through them.¹⁹⁷ Munyakazi points to no other evidence on the record that would cast doubt on the physical features of the ventilation holes. Moreover, Witnesses BWQ and BWR testified that they saw Munyakazi immediately after the door was destroyed.¹⁹⁸ Furthermore, Witness BWU, who was outside the church, also testified about Munyakazi's presence at the door and the manner of the attack.¹⁹⁹ In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber acted within its discretion in cancelling the site visit.

77. The Appeals Chamber also can identify no error in the Trial Chamber's reliance on Witnesses MM and MP. The Trial Chamber expressly noted that they "provided only hearsay evidence" which came "from the same source."²⁰⁰ The Appeals Chamber recalls that the Trial Chamber has the discretion to cautiously consider and rely on hearsay evidence.²⁰¹ The Appeals Chamber considers that, in making its findings, the Trial Chamber relied principally on the "detailed first-hand evidence" of Witnesses BWQ, BWR, BWU, and BWW.²⁰²

78. There is no merit in Munyakazi's submission that the Trial Chamber erred in relying on exaggerated evidence. The Trial Chamber was clearly aware of the potential for exaggeration in view of its observation that Witness BWW had "a marked tendency to exaggerate figures".²⁰³ The Trial Chamber, however, relied only on this witness's evidence when corroborated.²⁰⁴ The Trial Chamber's findings were based principally on four eye-witnesses "from a wide array of

¹⁹⁶ *Simba* Appeal Judgement, para. 16.

¹⁹⁷ *See supra* para. 69.

¹⁹⁸ Witness BWQ, T. 22 April 2009 pp. 15, 33; Witness BWR, T. 22 April 2009 p. 45. *See also* Trial Judgement, paras. 365, 366.

¹⁹⁹ Trial Judgement, para. 366.

²⁰⁰ Trial Judgement, para. 368.

²⁰¹ *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39; *Nahimana et al.* Appeal Judgement, para. 831. *See also* *Muvunyi I* Appeal Judgement, para. 70; *Ndindabahizi* Appeal Judgement, para. 115; *Gacumbitsi* Appeal Judgement, para. 115; *Rutaganda* Appeal Judgement, para. 34.

²⁰² Trial Judgement, para. 376. *See also* Trial Judgement, paras. 363-368.

²⁰³ Trial Judgement, para. 367.

²⁰⁴ Trial Judgement, para. 367.

perspectives”,²⁰⁵ whose accounts converged on a number of key points with respect to how the attack unfolded.²⁰⁶ Munyakazi’s unsubstantiated assertion that it would have been impossible for the attackers to kill thousands of refugees in the course of several hours does not call into question the reasonableness of the Trial Chamber’s findings. His argument also fails to appreciate the consistent evidence of the assailants’ use of guns, grenades, and bladed traditional weapons against the largely defenceless refugees.²⁰⁷

79. The Appeals Chamber has already determined that the circumstances of the attack did not prevent the Trial Chamber from relying on Witnesses BWQ’s, BWR’s, and BWU’s identification of Munyakazi during it.²⁰⁸ In addition, the Appeals Chamber recalls that Witness BWW was a member of the Bugarama *Interahamwe* and that his basis for identifying Munyakazi as the leader of the attack was primarily from accompanying Munyakazi to the parish and receiving instruction from him prior to the attack.²⁰⁹ Therefore, Munyakazi has not demonstrated that the chaotic circumstances of the attack undermine the reasonableness of the Trial Chamber’s acceptance of the evidence of the four eye-witnesses concerning his role in it.

80. Accordingly, Munyakazi has not demonstrated that the Trial Chamber erred in its assessment of the Prosecution evidence.

2. Alleged Errors in the Assessment of the Defence Evidence

81. Munyakazi called three witnesses to refute the Prosecution’s case relating to the attack at Shangi parish.²¹⁰ Defence Witness Faustin Ntakirutimana was not at Shangi parish during the attack, but he heard assailants boasting about it and received other information from survivors and *Gacaca* proceedings after the events.²¹¹ From this, the witness deduced that the massacre was led by

²⁰⁵ Trial Judgement, para. 376. *See also* Trial Judgement, paras. 363-368.

²⁰⁶ Trial Judgement, paras. 364-368, 376.

²⁰⁷ Trial Judgement, paras. 327, 328, 334, 339, 341, 345, 365. *See also* Witness BWQ, T. 22 April 2009 p. 33 (“Well, when we had to deal with small-scale attacks launched by the members of the population, we defended ourselves with stones or with bricks that we removed from walls of buildings or from the fence of the parish. So we were able to put up resistance because we were dealing with members of the population who had only spears or other traditional weapons. But, subsequently, they called upon [Munyakazi’s] *Interahamwe* who came armed with guns.”); Witness BWW, T. 29 May 2009 p. 32 (“A. In 1994 it wasn’t complicated to kill a Tutsi. All you had to do was to strike him with a club, and when he fell, you would cut him up with a machete. It was as if we were cutting down a banana tree. Furthermore, some of the victims asked us to kill them quickly, and that is what we did. [...] It took us hours, I would say two and a half to three hours to kill all the Tutsi who were at the parish. There were very many. But since they had not been eating, they were weak.”).

²⁰⁸ *See supra* paras. 47-49, 70.

²⁰⁹ Trial Judgement, paras. 343, 344. *See also* T. 29 May 2009 pp. 16, 17, 30, 31.

²¹⁰ Trial Judgement, paras. 350-362.

²¹¹ T. 2 September 2009 pp. 40-44, 46, 47, 49. *See also* Trial Judgement, paras. 351-353.

a former soldier named Pima who forced local residents to attack the parish.²¹² Witness Ntakirutimana never heard about Munyakazi's participation in the massacre.²¹³ Defence Witness YCI, who followed the attackers as they headed to the parish, did not see Munyakazi or hear about his presence at the parish; the witness described Pima as the leader and local assailants as the perpetrators.²¹⁴ Defence Witness ELB, a member of the Bugarama *Interahamwe*, testified that he did not participate in the attack at Shangi parish and was not aware of it.²¹⁵

82. The Trial Chamber identified various concerns as to the reliability of this evidence and concluded that it did not raise reasonable doubt that Munyakazi led the attack.²¹⁶ Munyakazi submits that the Trial Chamber erred in its assessment of the Defence evidence.²¹⁷

(a) Witness Ntakirutimana

83. The Trial Chamber found the evidence of Witness Ntakirutimana to be consistent and credible but noted that his testimony was entirely hearsay.²¹⁸ The Trial Chamber concluded that “[t]he fact that he did not hear Munyakazi's name mentioned after the conflict by colleagues who were present at Shangi or during Gacaca proceedings does not confirm Munyakazi's absence.”²¹⁹

84. According to Munyakazi, “[i]t is unconceivable and beyond imagination that a leader of an attack in broad day goes unnoticed.”²²⁰ Therefore, Munyakazi contends that the Trial Chamber unreasonably rejected Witness Ntakirutimana's evidence – which was based on various sources present at the site and corroborated by Prosecution Witness BWU's guilty plea – demonstrating that Munyakazi did not participate in the attack.²²¹ Munyakazi also argues that the Trial Chamber unfairly rejected this exculpatory evidence while at the same time relying on hearsay evidence provided by Prosecution Witnesses MM and MP.²²²

85. The Appeals Chamber can identify no error in the Trial Chamber's approach to Witness Ntakirutimana's evidence. The fact that Ntakirutimana's unidentified and untested sources did not mention Munyakazi's involvement, in particular in separate proceedings involving different

²¹² T. 2 September 2009 pp. 40-43*bis*, 46, 47, 49. *See also* Trial Judgement, paras. 351, 353.

²¹³ T. 2 September 2009 pp. 43, 44, 47. *See also* Trial Judgement, para. 353.

²¹⁴ T. 7 September 2009 pp. 8-13, 19-21. *See also* Trial Judgement, paras. 358, 359, 361.

²¹⁵ T. 17 September 2009 pp. 2, 11, 12, 20, 25. *See also* Trial Judgement, para. 362.

²¹⁶ Trial Judgement, paras. 371-376.

²¹⁷ Munyakazi Appeal Brief, paras. 154-177.

²¹⁸ Trial Judgement, para. 372.

²¹⁹ Trial Judgement, para. 372.

²²⁰ Munyakazi Appeal Brief, para. 154.

²²¹ Munyakazi Appeal Brief, paras. 154-156. *See also* Munyakazi Reply Brief, paras. 50-52.

²²² Munyakazi Appeal Brief, paras. 157, 180, 181. *See also* Munyakazi Reply Brief, para. 53; T. 28 March 2011 pp. 7, 8.

accused, carries limited probative value when weighed against corroborated and credible eye-witness testimony. Witness BWU's guilty plea before a Rwandan court does not lend additional weight to Witness Ntakirutimana's account. The Trial Chamber took into account Witness BWU's failure to mention Munyakazi in his plea when assessing his credibility.²²³ As the Appeals Chamber has previously stated, "to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility."²²⁴

86. Furthermore, while the Trial Chamber relied on hearsay provided by Witnesses MM and MP, their evidence was used simply as an additional element of corroboration of the "detailed first-hand evidence" given by four other witnesses.²²⁵ The Trial Chamber was therefore reasonable in its treatment of the evidence of these witnesses.

(b) Witness YCI

87. The Trial Chamber concluded that Witness YCI gave only a partial eye-witness account of the attack and that his description of what he observed was unclear.²²⁶ It also questioned his basis for identifying Pima as the leader of the attack and noted that, even if true, "Pima's presence and possible leadership role [...] is not inconsistent with the Prosecution's allegations."²²⁷ The Trial Chamber also doubted Witness YCI's credibility on the basis that he was unaware of the existence of the *Interahamwe* in April 1994, even though he was an MRND member.²²⁸

88. Munyakazi submits that the Trial Chamber unreasonably rejected the evidence of Witness YCI.²²⁹ Munyakazi maintains that the witness knew him, was in a unique position to follow events in the area, and could therefore reasonably attest to his absence from the site and Pima's leadership of the attack.²³⁰ According to Munyakazi, Witness YCI provided a coherent and credible account of what he observed, which was corroborated by the other Defence witnesses and the alibi.²³¹ Moreover, Munyakazi contends that the Trial Chamber unreasonably discounted Witness YCI's testimony because the witness said that he was not familiar with the *Interahamwe*.²³²

²²³ Trial Judgement, para. 366, n. 759.

²²⁴ *Kajelijeli* Appeal Judgement, para. 176.

²²⁵ Trial Judgement, para. 376. *See also* Trial Judgement, paras. 363-368.

²²⁶ Trial Judgement, paras. 373, 374.

²²⁷ Trial Judgement, para. 374.

²²⁸ Trial Judgement, para. 375.

²²⁹ Munyakazi Appeal Brief, paras. 158-167.

²³⁰ Munyakazi Appeal Brief, paras. 159, 160, 166.

²³¹ Munyakazi Appeal Brief, paras. 159, 162, 163, 166, 167. *See also* Munyakazi Reply Brief, paras. 52, 54.

²³² Munyakazi Appeal Brief, para. 165.

89. The Trial Chamber questioned Witness YCI's purported lack of knowledge concerning the *Interahamwe*; however, this was not its main basis for discounting his testimony. Instead, the Trial Chamber was "not persuaded that the witness was in a position to know whether Munyakazi was at Shangi [p]arish on 29 April 1994."²³³ Notably, the witness was neither an assailant nor a refugee, and he only briefly observed very limited parts of the attack from a distance.²³⁴ In contrast, the Trial Chamber heard four eye-witnesses, both victims and assailants, who credibly described Munyakazi's role in leading the attack at the parish.²³⁵ In such circumstances, the fact that Witness YCI did not see Munyakazi during the attack carries limited probative value when weighed against credible eye-witness testimony placing him at the scene. The Appeals Chamber recalls that, when faced with competing versions of events, it is the duty of the Trial Chamber that heard the witnesses to determine which evidence it considers more probative.²³⁶ The Appeals Chamber can identify no error in the Trial Chamber's preference for the Prosecution evidence on this point.

(c) Witness ELB

90. The Trial Chamber found that Witness ELB was an accomplice witness based on his conviction for genocide by a *Gacaca* court in Rwanda and considered his testimony with caution.²³⁷ It noted that Witness ELB denied participating in the attack, which was disputed by Witness BWU who placed him there.²³⁸ The Trial Chamber accorded little weight to Witness ELB's testimony on the basis that the witness "may have tailored his testimony in order to minimise his own role in the events of April 1994."²³⁹

²³³ Trial Judgement, para. 375. *See also* Trial Judgement, paras. 373, 374.

²³⁴ Trial Judgement, para. 360 ("The witness went into hiding when he first heard whistles and drums. However, when he heard gunshots and explosions, he approached the attackers to see what was taking place but then retreated again."); T. 7 September 2009 pp. 9, 11 ("And we were careful not to get close to them, because they were dangerous. [...] We also heard a number of loud explosions, which frightened us. Then we would fall to the ground and then also get up to see what was actually happening. So you can understand that this was not an ordinary event because we were not used to gunshots and explosions. We were, therefore, accordingly frightened. The attackers began to order people to come closer, but we were frightened and we ran away. But we saw the attackers leave the parish after looting sewing machines and other property. [...] Like I was saying, we heard grenade explosions and gunshots. Then we were ordered to come closer to the parish, at which point we decided to go into hiding in the bushes around the parish. It was not our desire to die in that manner, because we thought that they were ultimately going to kill us. When we got to a lower level, we each went back to their own home and we continued to hear the whistles and the drums being beaten. Then we noticed that they were carrying sewing machines and bags, and came to the conclusion that, after killing the members of our various families, the attackers had gone on to loot their property."). *See also* Trial Judgement, para. 373.

²³⁵ Trial Judgement, paras. 363-368, 376.

²³⁶ *Muvunyi II* Appeal Judgement, para. 57; *Muhimana* Appeal Judgement, para. 103; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.

²³⁷ Trial Judgement, paras. 131, 371.

²³⁸ Trial Judgement, paras. 131, 371.

²³⁹ Trial Judgement, para. 371.

91. Munyakazi disputes that Witness ELB was an accomplice and submits that the Trial Chamber unreasonably discounted his testimony on this basis.²⁴⁰ Munyakazi argues that the Trial Chamber erred in saying that Witness ELB was convicted in *Gacaca* proceedings whereas the witness was tried and sentenced to death before the *Tribunal d'instance* in Cyangugu prefecture.²⁴¹ Munyakazi contends that, in view of the witness's death sentence, it was unreasonable for the Trial Chamber to determine that he testified in a manner to minimize his involvement.²⁴² Munyakazi also highlights a contradiction between the Trial Chamber's findings that the witness was an accomplice and its conclusion that there was insufficient evidence to demonstrate that he participated in the attack.²⁴³ Munyakazi submits that Witness ELB offered reliable and credible testimony, which is corroborated by the alibi and the evidence of Witnesses YCI and Ntakirutimana.²⁴⁴

92. The Appeals Chamber acknowledges that the Trial Chamber erred in stating that “[Witness ELB] was tried and convicted by a *Gacaca* court in Rwanda”,²⁴⁵ based upon the fact that Witness ELB testified that he was convicted by the *Tribunal d'instance* in Cyangugu Prefecture.²⁴⁶ This misstatement, however, would not result in a miscarriage of justice since the Trial Chamber otherwise correctly described the proceedings and the charges.²⁴⁷

93. The Appeals Chamber has stated that the ordinary meaning of the term “accomplice” is “an association in guilt, a partner in crime”.²⁴⁸ The caution associated with accomplice testimony is most appropriate where a witness “is charged with the same criminal acts as the accused.”²⁴⁹ Like Munyakazi, Witness ELB was charged and convicted based on his participation in several attacks, including at Shangi parish.²⁵⁰ Therefore, the Appeals Chamber is satisfied that the Trial Chamber correctly described Witness ELB as an accomplice.

94. In addition, the Appeals Chamber can identify no error in the Trial Chamber's conclusion that Witness ELB was an accomplice²⁵¹ while also refusing to rely on Witness BWU's

²⁴⁰ Munyakazi Appeal Brief, paras. 168-177.

²⁴¹ Munyakazi Appeal Brief, para. 169.

²⁴² Munyakazi Appeal Brief, para. 170.

²⁴³ Munyakazi Appeal Brief, paras. 171-176.

²⁴⁴ Munyakazi Appeal Brief, para. 177. *See also* Munyakazi Reply Brief, paras. 52, 54.

²⁴⁵ Trial Judgement, para. 131.

²⁴⁶ T. 17 September 2009 pp. 24, 25.

²⁴⁷ Trial Judgement, para. 131 (“The witness, along with Tarek Aziz and 28 others, was charged with killing Tutsis, *inter alia*, at CIMERWA, in Mibilizi, in Shangi, and in Bisesero. He denied having participated in the events at Mibilizi, Bisesero and Shangi but confessed to having participated in the attack at CIMERWA.”). *See also* T. 17 September 2009 pp. 24, 25.

²⁴⁸ *Ntagerura et al.* Appeal Judgement, para. 203, *quoting Niyitegeka* Appeal Judgement, para. 98.

²⁴⁹ *Ntagerura et al.* Appeal Judgement, para. 234.

²⁵⁰ Trial Judgement, para. 131. *See also* T. 17 September 2009 pp. 24, 25.

²⁵¹ Trial Judgement, paras. 131, 371.

uncorroborated evidence placing Witness ELB at Shangi parish.²⁵² This finding is not contradictory. Rather, it reflects the Trial Chamber's cautious approach to the accomplice evidence of Witness BWU and its decision not to rely on his testimony in the absence of corroboration.

95. The Trial Chamber also acted within its discretion in considering Witness ELB's evidence with caution and according it "little weight".²⁵³ Witness ELB was convicted and sentenced to death based on his participation in the massacres at Shangi and Mibilizi parishes, in Bisesero, and at CIMERWA.²⁵⁴ He admitted participating in the attack at CIMERWA, but maintained his innocence in relation to the other massacres, including at Shangi parish.²⁵⁵ Notwithstanding the completion of his proceedings, he acknowledged that "things might change – because some people are testifying in the Gacaca proceedings in my favour".²⁵⁶ In this context, the Trial Chamber reasonably concluded that he may have had an interest in minimizing his own role in the events.

96. Accordingly, Munyakazi has not demonstrated that the Trial Chamber erred in its assessment of Witness ELB.

3. Conclusion

97. For the foregoing reasons, the Appeals Chamber dismisses Munyakazi's Third Ground of Appeal.

²⁵² Trial Judgement, para. 487.

²⁵³ Trial Judgement, para. 371.

²⁵⁴ Trial Judgement, para. 131. *See also* T. 17 September 2009 pp. 24, 25.

²⁵⁵ Trial Judgement, para. 131. *See also* T. 17 September 2009 pp. 24, 25.

²⁵⁶ T. 17 September 2009 p. 25.

D. Alleged Errors Relating to Mibilizi Parish (Ground 4)

98. The Trial Chamber convicted Munyakazi of committing genocide and extermination as a crime against humanity based on his role in the killing of 60 to 100 Tutsi civilians at Mibilizi parish on 30 April 1994.²⁵⁷ On the basis of the evidence of four Prosecution witnesses, the Trial Chamber found that Munyakazi both led and participated in the attack at the parish.²⁵⁸ Munyakazi presented three witnesses, whose accounts suggested that no attack occurred at the parish on 30 April 1994 and that neither he nor the Bugarama *Interahamwe* participated in any other killings there.²⁵⁹ The Trial Chamber did not consider the Defence evidence to be reliable or credible.²⁶⁰

99. Munyakazi submits that the Trial Chamber erred in convicting him of these crimes.²⁶¹ In this section, the Appeals Chamber considers whether the Trial Chamber erred in its assessment of the evidence.

1. Alleged Errors in the Assessment of the Prosecution Evidence

100. The Trial Chamber relied on four witnesses who were at Mibilizi parish during the attack: Prosecution Witnesses MM and MP, who were part of a committee responsible for the security of the refugees; Prosecution Witness LCQ, who survived the attack; and Prosecution Witness BWW, who was an assailant.²⁶² The Trial Chamber observed that Witnesses MM, MP, and LCQ testified that the attack took place on 30 April 1994.²⁶³ It noted that all four Prosecution witnesses indicated that the attack started in the afternoon between 3.00 and 5.00 p.m.²⁶⁴ The Trial Chamber considered that Witnesses MM, LCQ, and BWW provided similar accounts of the refugees being gathered and killed outside the parish premises.²⁶⁵

101. Munyakazi submits that no reasonable trier of fact could have relied on the Prosecution's contradictory evidence to find that an attack occurred at Mibilizi parish on 30 April 1994.²⁶⁶ In

²⁵⁷ Trial Judgement, paras. 423, 496, 501, 508.

²⁵⁸ Trial Judgement, paras. 412-417, 422, 423.

²⁵⁹ Trial Judgement, paras. 402-412.

²⁶⁰ Trial Judgement, paras. 418-422. The Trial Chamber also rejected Munyakazi's alibi that he was mourning the death of a friend in Bugarama Commune. *See* Trial Judgement, paras. 57-59, 363, 376, 401, 421. Munyakazi challenges the assessment of his alibi in the First Ground of Appeal.

²⁶¹ Munyakazi Notice of Appeal, paras. 52-61; Munyakazi Appeal Brief, paras. 188-234. *See also* T. 28 March 2011 pp. 8, 9, 37. Munyakazi's submission that the evidence adduced at trial is insufficient to establish his leadership role (Munyakazi Appeal Brief, para. 189) is addressed in connection with his Second Ground of Appeal.

²⁶² Trial Judgement, paras. 390, 393, 412-417, 422.

²⁶³ Trial Judgement, para. 415. The Trial Chamber noted that Witness BWW did not know the exact date of the attack. *See* Trial Judgement, para. 415.

²⁶⁴ Trial Judgement, para. 415.

²⁶⁵ Trial Judgement, paras. 413, 416, 417.

²⁶⁶ Munyakazi Appeal Brief, paras. 203-232.

particular, he highlights inconsistencies between the accounts of Witnesses MM and MP with respect to the number of gendarmes who addressed the assailants, their ability to see Munyakazi or vehicles within the parish premises, where the refugees were killed, how the attack started, and whether there was a victim selection process.²⁶⁷ Munyakazi argues that these discrepancies cannot be reasonably explained by the passage of time or confusion given Witnesses MM's and MP's similar vantage points during the attack and their shared role in ensuring the welfare of the refugees.²⁶⁸ Munyakazi also highlights the discrepancy between Witnesses MM's and MP's contention that the gendarmes tried to prevent the attack and Witness BWW's assertion that the gendarmes welcomed the attackers.²⁶⁹

102. Munyakazi argues that the Trial Chamber failed to appreciate the differences in Witnesses MM's, LCQ's, and BWW's respective accounts concerning the location and manner of the killings.²⁷⁰ Munyakazi further contends that Witnesses MM and LCQ could not corroborate each other given their different vantage points during the attack.²⁷¹ Furthermore, Munyakazi submits that the evidence of Witness BWW is exaggerated and lacking in key details.²⁷² Munyakazi also points to differences among the witnesses' descriptions of the assailants' attire, the gender of the refugees at the parish, and the involvement of certain attackers.²⁷³ Finally, Munyakazi submits that, had the Trial Chamber not cancelled the site visit, it would have determined that the discrepancies between the testimonies of Witnesses MM, MP, LCQ, and BWW were significant.²⁷⁴

103. A review of the Trial Judgement and record reflects that there are certain differences between the accounts of the Prosecution witnesses, which are partly reflected in the summary of their evidence in the Trial Judgement. Contrary to Munyakazi's submissions, however, these differences are generally minor and do not call into question the reasonableness of the Trial Chamber's reliance on the accounts of the witnesses. The Appeals Chamber recalls that the Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within or among witnesses' testimonies.²⁷⁵ It is within the discretion of the Trial Chamber to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and credible, and to

²⁶⁷ Munyakazi Appeal Brief, paras. 204, 205, 207, 214-217, 223, 224.

²⁶⁸ Munyakazi Appeal Brief, paras. 207, 216, 217, 232.

²⁶⁹ Munyakazi Appeal Brief, paras. 223-225, 230.

²⁷⁰ Munyakazi Appeal Brief, paras. 211, 212, 218-220, 229.

²⁷¹ Munyakazi Appeal Brief, para. 213.

²⁷² Munyakazi Appeal Brief, paras. 226, 228, 232.

²⁷³ Munyakazi Appeal Brief, paras. 206-210, 221, 222, 229, 231.

²⁷⁴ Munyakazi Appeal Brief, paras. 233, 234; Munyakazi Reply Brief, para. 57.

²⁷⁵ *Renzaho* Appeal Judgement, para. 269; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

accept some but reject other parts of a witness's testimony.²⁷⁶ Furthermore, corroboration does not require witnesses' accounts to be identical in all aspects since "[e]very witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others."²⁷⁷ Rather, the main question is whether two or more credible accounts are incompatible.²⁷⁸

104. Witness MP's account of how the attack unfolded is mostly incompatible with those of Witnesses MM, LCQ, and BWW.²⁷⁹ Specifically, according to the Trial Judgement, Witness MP described an attack involving killings which occurred in the classrooms on the premises of the parish.²⁸⁰ In contrast, Witnesses MM, LCQ, and BWW indicated that the victims were first gathered at the parish, removed from its premises, stripped naked, and killed elsewhere.²⁸¹ The Trial Chamber considered that this discrepancy could be explained by the passage of time and confusion due to the frequency of attacks on the parish during that period.²⁸² The Appeals Chamber is satisfied that these circumstances reasonably explain why Witness MP may have been mistaken about some of the specific details of the attack on 30 April 1994. Accordingly, the Appeals Chamber finds that the Trial Chamber acted within its discretion in rejecting many of the inconsistent details of the attack given by Witness MP and in preferring the corroborated version of events provided by Witnesses MM, LCQ, and BWW.²⁸³

105. The other discrepancies between Witnesses MM and MP, which were not expressly addressed in the Trial Judgement, are minor and could also be explained by confusion and the passage of time. It was within the discretion of the Trial Chamber to nonetheless rely on other aspects of Witness MP's evidence on points where his evidence was consistent with that of other witnesses, such as the time and date of the attack, the number of victims, and the leader of the attack.²⁸⁴ Accordingly, Munyakazi has not demonstrated that the discrepancies between Witness MP's testimony about the attack and the other evidence call into question the reasonableness of the Trial Chamber's findings.

²⁷⁶ *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103. See also *Muvunyi II* Appeal Judgement, para. 26; *Muvunyi I* Appeal Judgement, para. 128.

²⁷⁷ *Nahimana et al.* Appeal Judgement, para. 428.

²⁷⁸ *Nahimana et al.* Appeal Judgement, para. 428.

²⁷⁹ Trial Judgement, para. 413.

²⁸⁰ Trial Judgement, para. 413.

²⁸¹ Trial Judgement, para. 413. See also Witness MM, T. 27 April 2009 p. 63; Witness LCQ, T. 28 April 2009 p. 21; Witness BWW, T. 29 May 2009 p. 21. The Trial Chamber noted, however, that Witness BWW testified that the *Interahamwe* killed some of the refugees inside the parish itself as night time approached. See Trial Judgement, para. 400.

²⁸² Trial Judgement, para. 413.

²⁸³ Trial Judgement, para. 413.

²⁸⁴ Trial Judgement, paras. 390, 397, 414, 415, 422, 496.

106. Munyakazi's contention that Witnesses MM, LCQ, and BWW provided inconsistent accounts of the killings lacks merit. There are some minor differences in the details of the killings recounted by Witnesses MM, LCQ, and BWW. For example, Witness MM only referred to the refugees being killed outside the parish premises "in the courtyard" and "further down the road",²⁸⁵ whereas Witnesses LCQ and BWW described the specific location as a forest.²⁸⁶ In addition, unlike Witness LCQ, Witness BWW did not mention that the refugees were split into smaller groups after being taken into the forest.²⁸⁷ Witness BWW's account of the assailants slitting the throats of their victims with machetes differs slightly from Witness LCQ's account of the assailants hitting their victims with clubs before hacking them with machetes.²⁸⁸ Although some of the details offered by these witnesses vary, this does not undermine the Trial Chamber's reliance on their testimonies. Such minor variances are not unexpected in the context of an attack of this nature, in particular where the witnesses have differing vantage points. Munyakazi has not demonstrated that their accounts are incompatible. Accordingly, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to consider Witnesses LCQ's and BWW's evidence as corroborative and to rely on it.

107. In a similar vein, the Appeals Chamber is also not convinced that the varying descriptions of the militiamen's attire, the involvement of particular assailants, and the gender of those at the parish renders the witnesses' accounts incompatible. These differences too can be reasonably explained by the witnesses' varying vantage points during the attack, their respective knowledge of the involvement of particular attackers, and the passage of time.

108. The differences in the evidence of Witnesses MM and MP that the gendarmes attempted to dissuade the attackers and the evidence of Witness BWW that the gendarmes welcomed the assailants are reasonably explained by the witnesses' varying vantage points.²⁸⁹ Witnesses MM and MP did not participate in the conversation between the gendarmes and the assailants and thus were

²⁸⁵ See T. 27 April 2009 p. 63. See also Trial Judgement, paras. 397, 413.

²⁸⁶ See Witness LCQ, T. 28 April 2009 p. 21; Witness BWW, T. 29 May 2009 p. 21. See also Trial Judgement, paras. 387, 400, 413, 417.

²⁸⁷ See Witness LCQ, T. 28 April 2009 pp. 21, 22; Witness BWW, T. 29 May 2009 pp. 21, 22. See also Trial Judgement, paras. 387, 400.

²⁸⁸ See Witness LCQ, T. 28 April 2009 p. 22; Witness BWW, T. 29 May 2009 p. 22. See also Trial Judgement, para. 387.

²⁸⁹ See Witness MP, T. 27 April 2009 pp. 47, 48; Witness MM, T. 27 April 2009 p. 62; Witness BWW, T. 29 May 2009 p. 35.

not in a position to reliably report the gendarmes' initial reaction to the attackers' arrival at the parish.²⁹⁰

109. Furthermore, the Appeals Chamber is not convinced that the Trial Chamber erred in relying on the testimony of Witness BWW. The Trial Chamber was well aware of Witness BWW's propensity to exaggerate certain details, including the number of victims, which it noted in other parts of the Trial Judgement.²⁹¹ In addition, it also noted that he could not recall the date of the attack.²⁹² Given that Witness BWW was an accomplice, the Trial Chamber relied on his evidence only where corroborated.²⁹³ Therefore, it was not unreasonable for the Trial Chamber to accept certain details of his account which were consistent with other evidence and to rely on the testimony of other witnesses where Witness BWW's evidence differed.

110. Finally, the Appeals Chamber recalls that the Trial Chamber has the primary discretion to decide whether or not a site visit is necessary or relevant for the assessment of evidence.²⁹⁴ The Appeals Chamber is not convinced that any of the discrepancies discussed above reasonably relate to the physical features of Mibilizi parish or its surroundings. Therefore, Munyakazi has not demonstrated that it was unreasonable for the Trial Chamber to cancel the site visit.

111. Accordingly, Munyakazi has not demonstrated that the Trial Chamber's assessment of the Prosecution evidence is unreasonable.

2. Alleged Errors in the Assessment of the Defence Evidence

112. Munyakazi called three witnesses to refute the Prosecution's case relating to Mibilizi parish.²⁹⁵ As summarized in the Trial Judgement, Defence Witness Thomas Nahimana testified that he visited Mibilizi parish on 20, 24, and 30 April 1994.²⁹⁶ During his visit on 20 April 1994, Witness Nahimana heard about an attack on the parish two days earlier.²⁹⁷ Later, the witness

²⁹⁰ See Witness MP, T. 27 April 2009 p. 47 ("Q. Did the gendarmes tell you about their – the conversation they had, rather, with the assailants? A. Yes. The gendarmes reported to us what they had told the assailants."); Witness MM, T. 27 April 2009 p. 62 ("Besides, when the assailants reached our workplace, one of the gendarmes responsible for our protection came out in order to go and negotiate with Munyakazi and the *Interahamwe*. When that gendarme came back, he told us that those responsible for the centre were going to be spared on that day because Munyakazi had agreed to spare them."). The Appeals Chamber notes that Witness MP did overhear a subsequent conversation between the gendarmes and the assailants. See Witness MP, T. 27 April 2009 p. 48.

²⁹¹ Trial Judgement, para. 367.

²⁹² Trial Judgement, para. 415.

²⁹³ Trial Judgement, paras. 367, 417.

²⁹⁴ *Simba* Appeal Judgement, para. 16.

²⁹⁵ Trial Judgement, paras. 402-412.

²⁹⁶ Trial Judgement, para. 404.

²⁹⁷ Trial Judgement, para. 405.

learned that the attack was led by Édouard Bandetse, leader of the Mibilizi *Interahamwe*.²⁹⁸ The witness did not mention an attack on 20 April 1994 and asserted that there was no attack at the parish on 30 April 1994.²⁹⁹ The Trial Chamber noted that Defence Witness MPCC heard while he was in prison and during *Gacaca* sessions that Édouard Bandetse led the killings at Mibilizi; the witness, however, did not hear about Munyakazi's involvement.³⁰⁰ As summarized in the Trial Judgement, Defence Witness ELB, a member of the Bugarama *Interahamwe*, testified that the Bugarama *Interahamwe* never attacked Mibilizi parish and that the attacks there were led by *Interahamwe* from Mibilizi and Gitarama.³⁰¹ The Trial Chamber had various concerns as to the reliability and credibility of the Defence evidence and concluded that it did not raise reasonable doubt that Munyakazi led and participated in the attack at Mibilizi parish on 30 April 1994.³⁰²

113. Munyakazi submits that the Trial Chamber erred in its assessment of the Defence evidence.³⁰³ In particular, he challenges the Trial Chamber's decision not to rely on Witness Nahimana because he did not recall an earlier attack on the parish on 20 April 1994 and because of the chaotic circumstances at the parish.³⁰⁴ Munyakazi argues that he was not charged with an attack on 20 April 1994 and thus what transpired on that date was not central to the examination of Witness Nahimana.³⁰⁵ Munyakazi further alleges bias in the Trial Chamber's assessment of Witness Nahimana by pointing to a question by the Presiding Judge who asked why his account of the events of 30 April 1994 differed from those of Witnesses MM and MP.³⁰⁶

114. In addition, Munyakazi submits that the Trial Chamber's overall approach in evaluating the evidence related to the attack on the parish demonstrates that it did not apply the same criteria to the Prosecution and Defence evidence.³⁰⁷ He contends that the Trial Chamber was forgiving of various discrepancies in the Prosecution evidence in light of the passage of time and possible confusion, in particular noting that the Prosecution witnesses did not consistently mention attacks at the parish on 11 and 13 April 1994.³⁰⁸ However, according to Munyakazi, the Trial Chamber did not consider this possibility in relation to Witness Nahimana's failure to mention the attack on 20 April 1994.³⁰⁹ Munyakazi further argues that the Trial Chamber relied on accomplice and hearsay evidence from

²⁹⁸ Trial Judgement, para. 405.

²⁹⁹ Trial Judgement, paras. 405-407, 419.

³⁰⁰ Trial Judgement, paras. 410, 418.

³⁰¹ Trial Judgement, paras. 411, 420.

³⁰² Trial Judgement, paras. 418-423.

³⁰³ Munyakazi Appeal Brief, paras. 190-202.

³⁰⁴ Munyakazi Appeal Brief, paras. 190, 192, 193.

³⁰⁵ Munyakazi Appeal Brief, para. 193. *See also* T. 28 March 2011 p. 9.

³⁰⁶ Munyakazi Appeal Brief, para. 194, *citing* T. 2 September 2009 p. 20; Munyakazi Reply Brief, para. 60.

³⁰⁷ Munyakazi Appeal Brief, paras. 190, 191, 195-202; Munyakazi Reply Brief, para. 58.

³⁰⁸ Munyakazi Appeal Brief, paras. 195, 197; Munyakazi Reply Brief, para. 59. *See also* T. 28 March 2011 pp. 8, 9.

³⁰⁹ Munyakazi Appeal Brief, paras. 190, 199; Munyakazi Reply Brief, para. 59. *See also* T. 28 March 2011 p. 9.

the Prosecution, but did not give equal weight to this type of evidence from the Defence.³¹⁰ In this respect, Munyakazi contends that, unlike its evaluation of the Prosecution evidence, the Trial Chamber dismissed the Defence evidence without first considering whether it was corroborated by other witnesses.³¹¹ Munyakazi submits that, had the Trial Chamber properly evaluated the Defence evidence, it would have concluded that Witness Nahimana demonstrated that no attack occurred at Mibilizi parish on 30 April 1994 and that his account was corroborated by Witnesses MPCC and ELB.³¹²

115. The Appeals Chamber is not convinced that the Trial Chamber's assessment of the evidence is unreasonable or shows bias. A presumption of impartiality attaches to any Judge of the Tribunal.³¹³ The Presiding Judge's question to Witness Nahimana reveals nothing more than her attempt to understand why the witness was better placed to know what transpired at the parish on 30 April 1994 than the two individuals whom he was visiting.³¹⁴

116. Munyakazi has also not demonstrated that the Trial Chamber accorded a different margin of appreciation to similar credibility issues impacting the Prosecution and Defence evidence. The Trial Chamber noted key inconsistencies among the Prosecution and Defence evidence alike.³¹⁵ Where the evidence varied, the Trial Chamber expressed a preference for the version supported by corroborated first-hand evidence.³¹⁶ It also explained, where necessary, how confusion at the time of the relevant events may have impacted the witnesses' recollections of what may have otherwise been credible evidence.³¹⁷ Notably, it did this in rejecting Witness Nahimana's account of what transpired at the parish on 30 April 1994 and portions of Prosecution Witness MP's account of the event.³¹⁸

³¹⁰ Munyakazi Appeal Brief, paras. 190, 196, 200, 201.

³¹¹ Munyakazi Appeal Brief, paras. 190, 201, 202.

³¹² Munyakazi Appeal Brief, paras. 200, 202.

³¹³ See, e.g., *Renzaho* Appeal Judgement, para. 21; *Nahimana et al.* Appeal Judgement, para. 48; *Rutaganda* Appeal Judgement, para. 42.

³¹⁴ See T. 2 September 2009 p. 20 ("MADAM PRESIDENT: Can you tell the Court why you think number 2, who is now a priest like yourself, and number 3, another priest – he has been a priest for all these years – would come to these Chambers and tell us that Munyakazi was present on that day and led the attack, since they were living there at the time? Why would they come and tell us that that is what happened, since you are saying that it did not happen because you were a visitor there? THE WITNESS: I do not know if I'm able to answer that question and I wouldn't know what it is they told you. They probably told you things the way they saw it. And I'm telling you things the way I saw it. I wouldn't know the reasons for which they told you what they told you. But I was present on the 30th, and I'm telling you things the way I saw them. MADAM PRESIDENT: You were a mere visitor, who left and went back, and they were living there at the time.").

³¹⁵ Trial Judgement, paras. 413, 415, 419.

³¹⁶ Trial Judgement, paras. 413, 415, 419.

³¹⁷ Trial Judgement, paras. 413, 419.

³¹⁸ Trial Judgement, paras. 413, 419.

117. The Trial Chamber did not discuss the differences in the evidence of Prosecution Witnesses MM, MP, and LCQ concerning the initial attacks at the parish on 11 or 13 April 1994. Witness MM indicated that the attacks began on 11 April 1994.³¹⁹ Witness LCQ believed that the first attack occurred on 13 April 1994.³²⁰ Witness MP acknowledged that there were other attacks, but did not specify any dates and was not questioned about when they occurred.³²¹ The Appeals Chamber considers that, despite these minor variances in detail, the accounts of these witnesses remain compatible. Notably, Witnesses MM, MP, and LCQ consistently recalled the three most significant attacks at the parish on 18, 20, and 30 April 1994 and mentioned other assaults by local inhabitants.³²²

118. Witness Nahimana's omission of a significant attack at the parish on 20 April 1994, which was confirmed by three eye-witnesses, is more significant than the possible omission by the Prosecution witnesses of earlier, smaller incidents.³²³ However, the events at the parish on that date were not necessarily a central feature of his testimony, and neither party questioned him extensively on this issue. Even if it were an error to discount his evidence on this basis, the Appeals Chamber can identify no miscarriage of justice. The fact remains that Witness Nahimana asserted that no attack occurred on 30 April 1994 and that he never heard about one from Witnesses MM and MP or other sources.³²⁴ In contrast, the Trial Chamber heard evidence from four Prosecution witnesses, including Witnesses MM and MP; in the view of the Trial Chamber, this evidence credibly confirmed that Munyakazi participated in an attack at the parish on 30 April 1994.³²⁵ The Appeals Chamber recalls that, when faced with competing versions of events, it is the duty of the Trial Chamber that heard the witnesses to determine which evidence it considers more probative.³²⁶ Based on the foregoing, the Appeals Chamber finds that it was reasonable for the Trial Chamber to accept the Prosecution evidence over Witness Nahimana's account.

³¹⁹ Witness MM, T. 27 April 2009 p. 61 (“The attacks began on the 11th of April, and they were carried out by the local inhabitants of the area, and we had to defend ourselves and repel the attacks by throwing stones, but the attacks continued.”).

³²⁰ Witness LCQ, T. 28 April 2009 p. 17 (“The first attack, *to my recollection*, was launched on the 13th [...] of April”)(emphasis added).

³²¹ Witness MP, T. 27 April 2009 p. 45 (“Many attacks were waged against the parish and they varied in magnitude. However, I’m going to mention the attacks that took place on [18, 20, and 30 April 1994]”).

³²² Witness MP, T. 27 April 2009 p. 45; Witness MM, T. 27 April 2009 p. 61; T. 28 April 2009 p. 6; Witness LCQ, T. 28 April 1994 pp. 17, 28.

³²³ Trial Judgement, para. 419.

³²⁴ Trial Judgement, paras. 406-408.

³²⁵ Trial Judgement, paras. 412-417, 422, 423.

³²⁶ *Muvunyi II* Appeal Judgement, para. 57; *Muhimana* Appeal Judgement, para. 103; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.

119. The remainder of Munyakazi's claim of bias is his contention that the Trial Chamber approached hearsay and accomplice evidence differently depending on whether it was presented by the Prosecution or the Defence.

120. The Appeals Chamber observes that both the Prosecution and Defence presented hearsay evidence. However, only a portion of Witnesses MM's and MP's evidence concerning the attack was based on hearsay, namely their basis for identifying Munyakazi as the leader of the attack.³²⁷ In accepting this aspect of their evidence, the Trial Chamber discussed their sources of information, which included gendarmes at the scene who personally interacted with Munyakazi.³²⁸ Moreover, the Trial Chamber relied on this identification evidence only in connection with other eye-witness testimony, which it deemed credible.³²⁹

121. In contrast, Witness MPCC's entire account of the attack was based on hearsay acquired well after the events.³³⁰ The witness was not at the parish and only later learned about what transpired while in prison and during *Gacaca* proceedings.³³¹ Moreover, the fact that his unidentified and untested sources did not mention the attack on 30 April 1994 or Munyakazi's involvement in it, in particular in separate proceedings involving different accused, carries limited probative value when weighed against corroborated and credible eye-witness testimony.

122. The Prosecution and Defence also relied on the evidence of former members of the Bugarama *Interahamwe*. Prosecution Witness BWW acknowledged participating in the attack.³³² The Trial Chamber viewed his evidence with caution and accepted it only where corroborated.³³³ In each instance where the Trial Chamber relied on his evidence, it was supported to some degree by at least two other witnesses who were considered credible by the Trial Chamber.³³⁴ Defence Witness ELB denied that the Bugarama *Interahamwe* or Munyakazi participated in the attack.³³⁵ The Trial Chamber noted, however, that Witness ELB was convicted in Rwanda for participating in the attack and was also identified at the scene by Witness LCQ.³³⁶ Therefore, notwithstanding Witness ELB's continued professions of innocence,³³⁷ it was reasonable for the Trial Chamber to

³²⁷ Trial Judgement, para. 415.

³²⁸ Trial Judgement, para. 415.

³²⁹ Trial Judgement, paras. 415-417, 422.

³³⁰ Trial Judgement, paras. 410, 418.

³³¹ Trial Judgement, paras. 410, 418.

³³² Trial Judgement, paras. 398-400, 412, 417.

³³³ Trial Judgement, para. 367.

³³⁴ Trial Judgement, paras. 413, 415, 417, 422.

³³⁵ Trial Judgement, para. 411.

³³⁶ Trial Judgement, para. 420.

³³⁷ T. 17 September 2009 pp. 24, 25.

view Witness ELB's evidence with greater suspicion than the corroborated first-hand evidence of Witness BWW.

123. Furthermore, contrary to Munyakazi's submission, the Trial Chamber did not dismiss the Defence evidence without considering whether it was corroborated. The Trial Chamber expressly noted that it had considered the totality of the Defence evidence together.³³⁸ The Appeals Chamber considers that Munyakazi has not demonstrated that the Trial Chamber did not have a reasonable basis for rejecting the Defence's version of events in light of the limited probative value of the Defence evidence and the other significant concerns about its credibility noted above.

124. In sum, the Trial Chamber's overall approach does not reveal bias. The Appeals Chamber is satisfied that there was a reasonable basis for according different weight to the Prosecution and Defence evidence.

125. Accordingly, Munyakazi has not demonstrated that the Trial Chamber's assessment of the Defence evidence is unreasonable.

3. Conclusion

126. For the foregoing reasons, the Appeals Chamber dismisses Munyakazi's Fourth Ground of Appeal.

³³⁸ Trial Judgement, para. 421 ("*Taken together*, the Trial Chamber does not consider [...] the Defence evidence to be reliable or credible.")(emphasis added).

E. Alleged Errors Relating to Transportation (Ground 5)

127. The Trial Chamber found that Munyakazi and the Bugarama *Interahamwe* arrived at Shangi and Mibilizi parishes aboard two vehicles, respectively, on 29 and 30 April 1994.³³⁹ The Trial Chamber considered that it was immaterial whether Munyakazi owned these vehicles.³⁴⁰ Rather, the Trial Chamber inferred that Munyakazi facilitated the transportation of the *Interahamwe* based on its findings that he was the leader of the two attacks.³⁴¹

128. Munyakazi submits that the Trial Chamber erred in finding that he facilitated transportation of the *Interahamwe*.³⁴² He argues that it was essential for the Trial Chamber to identify the origin of the vehicles and his specific role in providing transport.³⁴³ Munyakazi also highlights various inconsistencies in the evidence concerning the origin, colour, and presence of the vehicles at the attack sites.³⁴⁴

129. A review of the Trial Judgement reflects that Munyakazi's convictions rest solely on his leadership role in the attacks.³⁴⁵ The findings related to transportation do not underpin his convictions.³⁴⁶ Accordingly, Munyakazi has not demonstrated under this ground of appeal that any alleged error on the part of the Trial Chamber resulted in a miscarriage of justice or invalidated the verdict.

130. For the foregoing reasons, the Appeals Chamber dismisses Munyakazi's Fifth Ground of Appeal, which is manifestly without merit.

³³⁹ Trial Judgement, para. 266.

³⁴⁰ Trial Judgement, paras. 261, 266.

³⁴¹ Trial Judgement, paras. 266, 267.

³⁴² Munyakazi Notice of Appeal, paras. 62-69; Munyakazi Appeal Brief, paras. 235-268. *See also* T. 28 March 2011 pp. 9-11, 18-22.

³⁴³ Munyakazi Appeal Brief, paras. 236-241, 244, 268. *See also* T. 28 March 2011 pp. 10, 11, 18-22.

³⁴⁴ Munyakazi Appeal Brief, paras. 245-267.

³⁴⁵ Trial Judgement, para. 491.

³⁴⁶ *See generally* Trial Judgement, paras. 491, 496-501, 507, 508.

F. Alleged Errors Relating to the Legal Elements of the Crimes (Grounds 6 and 7)

131. The Trial Chamber convicted Munyakazi for committing genocide and extermination as a crime against humanity based on his role in the attacks at Shangi and Mibilizi parishes.³⁴⁷ Munyakazi submits that the Trial Chamber erred in convicting him of these crimes.³⁴⁸ In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing (i) Munyakazi's form of criminal responsibility under Article 6(1) of the Statute; and (ii) the legal elements of genocide and extermination as a crime against humanity.

1. Alleged Errors in Assessing the Form of Responsibility

132. In convicting Munyakazi of committing crimes at Shangi and Mibilizi parishes, the Trial Chamber emphasized his position of authority at the crime sites and its findings related to his leading role in the attacks.³⁴⁹ The Trial Chamber held that, "[o]n the basis of his leadership position at the crime sites, [...] Munyakazi was as much an integral part of the [...] killings as those he enabled, and that he approved and embraced the decision to commit the crimes as his own."³⁵⁰ In assessing Munyakazi's position of authority, the Trial Chamber also considered his wealth and prominence in the Bugarama community, based on his property holdings and earlier chairmanship of a rice cooperative and a local bank.³⁵¹

133. Munyakazi submits that the Trial Chamber erred in identifying him as a leader of the two attacks and in relying on this purported role to hold him responsible for committing the crimes.³⁵² In particular, Munyakazi reiterates his arguments that the Trial Chamber erred in assessing the evidence placing him at the attacks as well as his alibi.³⁵³ Munyakazi further contends that the Trial Chamber erred in finding that he had authority over the assailants during the attacks by pointing to the lack of notice in the Indictment, the lack of evidence of his effective control, and the purported inconsistencies in the findings concerning his overall role in the *Interahamwe* as an organization, and his specific leadership of the attacks.³⁵⁴ In addition, Munyakazi submits that his purported influence cannot serve as a basis for finding that he had authority over the perpetrators.³⁵⁵

³⁴⁷ Trial Judgement, paras. 491, 501, 508.

³⁴⁸ Munyakazi Notice of Appeal, paras. 70-89; Munyakazi Appeal Brief, paras. 269-351; Munyakazi Reply Brief, paras. 70-99. *See also* T. 28 March 2011 pp. 12-17, 33, 34.

³⁴⁹ Trial Judgement, para. 491.

³⁵⁰ Trial Judgement, para. 491.

³⁵¹ Trial Judgement, paras. 104, 491.

³⁵² Munyakazi Appeal Brief, paras. 275-282, 285-323, 326-338, 349; Munyakazi Reply Brief, paras. 70-79, 86-98.

³⁵³ Munyakazi Appeal Brief, paras. 276, 277, 294, 318, 319, 327-338.

³⁵⁴ Munyakazi Appeal Brief, paras. 279-281, 285, 286, 297, 298, 312, 342; Munyakazi Reply Brief, paras. 70-73, 78, 79, 86-95. *See also* T. 28 March 2011 pp. 12, 14, 15.

³⁵⁵ Munyakazi Appeal Brief, paras. 287, 288, 290-293, 295-302, 311. *See also* T. 28 March 2011 pp. 14, 17, 33, 34.

Munyakazi submits that Tarek Aziz was the acknowledged leader of the Bugarama *Interahamwe*.³⁵⁶ He also argues that the Trial Chamber never identified any member of the Bugarama *Interahamwe* at the crime sites.³⁵⁷

134. Munyakazi argues that he did not physically perpetrate any of the crimes or engage in a culpable omission as required by Article 6(1) of the Statute.³⁵⁸ He concedes that the definition of committing under this provision may include other acts beyond physical perpetration.³⁵⁹ Nonetheless, Munyakazi denies playing an integral part in the crimes and argues that, in other cases where authority was relevant to criminal liability, the Tribunal has found that the accused played a pivotal role, including such acts as leading, directing, ordering, instructing, rewarding, transporting, supervising, procuring weapons, and convening meetings.³⁶⁰ He recalls that the Trial Chamber did not find that he recruited, trained, armed, fed, or acted in concert with certain named perpetrators in the Indictment.³⁶¹ He further submits that “the Trial Chamber neither acknowledged any order or instruction given by Munyakazi to the alleged assailants of [the attacks on] Shangi and Mibilizi [parishes], nor did it indicate concretely how [he] enabled these attacks”.³⁶²

135. In relation to genocide and extermination as a crime against humanity, the Appeals Chamber has held that “committing” under Article 6(1) of the Statute, which envisions physical perpetration of a crime, need not only mean physical killing and that other acts can constitute direct participation in the *actus reus* of the crimes.³⁶³ The question is whether an accused’s conduct “was as much an integral part of the [crimes] as were the killings which it enabled.”³⁶⁴ In this case, the Trial Chamber found that Munyakazi’s leadership role constituted an integral part of the crimes.³⁶⁵ This approach is in line with the jurisprudence of the Appeals Chamber.³⁶⁶

³⁵⁶ Munyakazi Appeal Brief, para. 286.

³⁵⁷ Munyakazi Appeal Brief, para. 303.

³⁵⁸ Munyakazi Appeal Brief, paras. 270, 271, 275.

³⁵⁹ Munyakazi Reply Brief, para. 74.

³⁶⁰ Munyakazi Appeal Brief, paras. 305-309, 323; Munyakazi Reply Brief, paras. 74-79. *See also* T. 28 March 2011 pp. 14, 15.

³⁶¹ Munyakazi Reply Brief, para. 78.

³⁶² Munyakazi Appeal Brief, para. 310.

³⁶³ *Gacumbitsi* Appeal Judgement, para. 60. *See also* *Kalimanzira* Appeal Judgement, para. 219; *Seromba* Appeal Judgement, para. 161.

³⁶⁴ *Kalimanzira* Appeal Judgement, para. 219, *quoting* *Gacumbitsi* Appeal Judgement, para. 60. *See also* *Seromba* Appeal Judgement, para. 161.

³⁶⁵ Trial Judgement, para. 491.

³⁶⁶ *Seromba* Appeal Judgement, paras. 164-172, 190; *Gacumbitsi* Appeal Judgement, para. 60.

136. Contrary to Munyakazi's submissions, his role in the crimes is entirely consistent with the facts of the *Seromba* and *Gacumbitsi* cases.³⁶⁷ Munyakazi fails to appreciate that the Trial Chamber found that he personally participated in the attacks, led the assailants, issued instructions, and, in particular, oversaw key aspects of the crimes, such as the destruction of the door at Shangi parish and the removal of refugees from Mibilizi parish.³⁶⁸ The Appeals Chamber recalls that it has already rejected Munyakazi's challenges to the assessment of his alibi, the Prosecution evidence, and his authority.³⁶⁹ His liability was not based on his prominence or influence alone, but rather on his active involvement in the crimes committed at Shangi and Mibilizi parishes on 29 and 30 April 1994, respectively.

137. Furthermore, even if it were correct that Tarek Aziz was the leader of the Bugarama *Interahamwe*, this proposition would not undermine the reasonableness of the Trial Chamber's finding that Munyakazi led the two attacks, which was based principally on Munyakazi's actions on the ground during the events. There is also no merit in Munyakazi's assertion that the Trial Chamber had no basis to find that the Bugarama *Interahamwe* participated in the attacks. All Prosecution witnesses, including a member of the group, attested to its presence at and participation in the attacks.³⁷⁰ That there were other assailants as well does not undermine the conclusion that Munyakazi led the attacks.

138. Accordingly, Munyakazi has not demonstrated any error in the Trial Chamber's assessment of his form of responsibility and commission of the crimes of genocide and extermination as a crime against humanity.

2. Alleged Errors in Assessing Genocide and Extermination as a Crime Against Humanity

139. The Trial Chamber found that the vast majority of persons at Shangi and Mibilizi parishes were Tutsi civilians, who had been repeatedly attacked in April 1994.³⁷¹ It concluded that Munyakazi led the attacks on these two parishes on 29 and 30 April 1994, respectively, to complete

³⁶⁷ *Seromba* Appeal Judgement, para. 171 ("It is irrelevant that Athanase Seromba did not personally drive the bulldozer that destroyed the church. What is important is that Athanase Seromba fully exercised his influence over the bulldozer driver who, as the Trial Chamber's findings demonstrate, accepted Athanase Seromba as the only authority, and whose directions he followed."); *Gacumbitsi* Appeal Judgement, para. 60 ("Here, the accused was physically present at the scene of the Nyarubuye Parish massacre, which he 'directed' and 'played a leading role in conducting and, especially, supervising'.") (internal citations omitted).

³⁶⁸ Trial Judgement, paras. 134, 365, 366, 376, 380, 386, 387, 416, 417, 422, 423, 491.

³⁶⁹ See *supra* Sections III.A (Alleged Errors in Assessing the Alibi); III.B.1 (Alleged Defects in the Form of the Indictment); III.B.2 (Alleged Errors in the Assessment of the Evidence); III.C (Alleged Errors Relating to Shangi Parish); III.D (Alleged Errors Relating to Mibilizi Parish).

³⁷⁰ Trial Judgement, paras. 72, 73, 76, 77, 79, 320, 323-327, 332-335, 337-342, 344-346, 363-368, 376, 386-388, 390-392, 398-400, 415, 416, 422, 423.

³⁷¹ Trial Judgement, paras. 496, 499.

the killings.³⁷² It found that the assailants killed approximately 5,000 to 6,000 refugees at Shangi parish and 60 to 100 Tutsis at Mibilizi parish.³⁷³ The Trial Chamber observed that it had very little direct evidence of Munyakazi's intent and no evidence of his personal views regarding Tutsis.³⁷⁴ However, it noted Munyakazi's statement to the Tutsi refugees at Mibilizi that they "were going to pay" for killing the head of state.³⁷⁵ In view of the nature and scope of the crimes, the Trial Chamber inferred that the attackers, including Munyakazi, acted with genocidal intent.³⁷⁶ The Trial Chamber also inferred that, in leading attacks on places of refuge, Munyakazi was aware that these attacks formed part of a widespread and systematic attack on Tutsi civilians.³⁷⁷ Accordingly, the Trial Chamber convicted Munyakazi of committing genocide and extermination as a crime against humanity based on his role in the attacks.³⁷⁸

140. In challenging the findings on his *mens rea*, Munyakazi submits that the Trial Chamber failed to find that he intended to commit the crimes.³⁷⁹ He argues that there was no factual or legal basis to conclude that he had the specific intent to commit genocide or the necessary intent for extermination as a crime against humanity.³⁸⁰ Furthermore, Munyakazi contends that it was necessary for the Trial Chamber to find that his intent to commit genocide was formed "prior [to] the commission of the offences"³⁸¹ and emphasizes the Trial Chamber's observation that "the evidence about his personal views on Rwanda's Tutsi Minority [was] non-existent."³⁸² Munyakazi also argues that the Trial Chamber shifted the burden of proof, when it stated that "the Defence has not suggested that there was any other motive or purpose or intent underlying these attacks."³⁸³

141. The Appeals Chamber notes that the Trial Chamber correctly set forth the requisite elements of the *mens rea* for genocide and extermination as a crime against humanity.³⁸⁴ In particular, the Trial Chamber observed that for genocide an accused must act "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such".³⁸⁵ With respect to extermination as a

³⁷² Trial Judgement, paras. 496, 499.

³⁷³ Trial Judgement, para. 496.

³⁷⁴ Trial Judgement, paras. 105, 498.

³⁷⁵ Trial Judgement, para. 498.

³⁷⁶ Trial Judgement, paras. 496, 499, 500.

³⁷⁷ Trial Judgement, paras. 500, 505.

³⁷⁸ Trial Judgement, paras. 501, 508.

³⁷⁹ Munyakazi Appeal Brief, paras. 283, 284; Munyakazi Reply Brief, paras. 80-85. Munyakazi also submits that the Trial Chamber did not establish his role in the crimes, which is discussed above. *See* Section III.F.1 (Alleged Errors in Assessing the Form of Responsibility).

³⁸⁰ Munyakazi Appeal Brief, paras. 339-345, 348, 349; Munyakazi Reply Brief, paras. 84, 85.

³⁸¹ Munyakazi Reply Brief, para. 84.

³⁸² Munyakazi Appeal Brief, para. 284, *quoting* Trial Judgement, para. 105.

³⁸³ Munyakazi Appeal Brief, para. 340, *quoting* Trial Judgement, para. 496. *See also* Munyakazi Appeal Brief, para. 341.

³⁸⁴ Trial Judgement, paras. 493, 504, 506.

³⁸⁵ Trial Judgement, para. 493.

crime against humanity, the Trial Chamber recalled that an accused must “intend to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their death in a widespread or systematic manner.”³⁸⁶ The Trial Chamber further observed that the perpetrator must have acted with knowledge that his acts formed part of a widespread or systematic attack against the civilian population on national, political, ethnic, racial, or religious grounds.³⁸⁷

142. The Trial Chamber established Munyakazi’s intent to participate in the crimes based on his personal participation and leadership role in attacks, which resulted in the death of thousands of mostly Tutsi civilians.³⁸⁸ The Appeals Chamber can identify no error in this approach. The Appeals Chamber has held that an accused’s intent to participate in a crime may be inferred from circumstantial evidence,³⁸⁹ including his active participation in an attack.³⁹⁰ Indeed, contrary to Munyakazi’s suggestion, “[t]he inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent.”³⁹¹ The lack of evidence concerning Munyakazi’s personal views about Tutsis does not undermine the reasonableness of the Trial Chamber’s findings. Furthermore, the evidence of his active participation in the killing of thousands of Tutsi civilians at two parishes reasonably demonstrates that he possessed both genocidal intent and the requisite intent for extermination as a crime against humanity, that is, the intent to kill on a large scale with awareness that the crimes formed part of a widespread and systematic attack against Tutsi civilians.³⁹²

143. Moreover, the Appeals Chamber is not convinced that the Trial Chamber shifted the burden of proof in assessing Munyakazi’s intent to commit the crimes. The Appeals Chamber observes that the Trial Chamber correctly stated that the Prosecution bears the burden of proof.³⁹³ While the Trial Chamber’s findings on intent were based primarily on circumstantial evidence, it considered that they were the only reasonable inference to be drawn from the evidence.³⁹⁴ In this context, the Trial Chamber’s suggestion that the Defence did not offer “any other motive or purpose or intent

³⁸⁶ Trial Judgement, para. 506.

³⁸⁷ Trial Judgement, paras. 503, 504.

³⁸⁸ Trial Judgement, paras. 380, 423, 491, 496, 500, 507.

³⁸⁹ See, e.g., *Rukundo* Appeal Judgement, para. 61; *Nahimana et al.* Appeal Judgement, para. 524; *Seromba* Appeal Judgement, paras. 176, 177.

³⁹⁰ *Simba* Appeal Judgement, paras. 262, 266.

³⁹¹ *Simba* Appeal Judgement, para. 266.

³⁹² See Trial Judgement, paras. 499, 500.

³⁹³ Trial Judgement, para. 34.

³⁹⁴ Trial Judgement, paras. 499, 500.

underlying these attacks”³⁹⁵ simply underscores the absence of evidence which might provide another reasonable explanation for the commission of the crimes.

144. Accordingly, Munyakazi has not demonstrated any errors in the Trial Chamber’s assessment of his intent to commit the crimes of genocide and extermination as a crime against humanity.

3. Conclusion

145. For the foregoing reasons, the Appeals Chamber dismisses Munyakazi’s Sixth and Seventh Grounds of Appeal.

³⁹⁵ Trial Judgement, para. 496.

IV. APPEAL OF THE PROSECUTION

A. Alleged Errors Relating to Nyamasheke Parish (Ground 1)

146. The Prosecution sought to hold Munyakazi responsible for the killing of hundreds of Tutsi civilians on 16 April 1994 at Nyamasheke parish in Kagano Commune, Cyangugu Prefecture.³⁹⁶ It presented two eye-witnesses, Prosecution Witnesses LAY and BWP, both survivors of the attack, who placed Munyakazi at the parish during the attack.³⁹⁷ As part of his defence, Munyakazi presented evidence from Defence Witnesses MBRE, YCH, and YCC.³⁹⁸ As summarized in the Trial Judgement, these witnesses testified that an attack led by Pima occurred at the parish on 15 April 1994 and that no attack took place there on 16 April 1994.³⁹⁹ Munyakazi also relied on the testimony of Defence Witness Thomas Nahimana, who did not hear Munyakazi's name mentioned in connection with the attack.⁴⁰⁰

147. In addition, the Trial Chamber considered evidence from three witnesses that members of the Bugarama *Interahamwe* participated in an attack on 16 April 1994 at the CIMERWA cement factory near Bugarama Centre.⁴⁰¹ Although neither party referred to this evidence as part of its case, the Trial Chamber considered that the evidence of the CIMERWA attack raised questions about the participation of Munyakazi and the Bugarama *Interahamwe* in any attack at Nyamasheke parish, allegedly occurring more than 85 kilometres away on the same day.⁴⁰² After assessing the totality of the evidence, the Trial Chamber concluded that it had reasonable doubt about Munyakazi's participation in an attack at Nyamasheke parish on 16 April 1994.⁴⁰³

148. The Prosecution submits that the Trial Chamber erred in failing to find that Munyakazi participated in the attack at Nyamasheke parish and thus to enter a conviction for committing genocide and extermination as a crime against humanity on that basis.⁴⁰⁴ The Prosecution notes that the Trial Chamber found that the evidence of Witnesses LAY and BWP was credible, reliable,

³⁹⁶ Indictment, para. 12.

³⁹⁷ Trial Judgement, paras. 269, 271-282, 301-303.

³⁹⁸ Trial Judgement, paras. 270, 285-295, 301, 304. Munyakazi also presented an alibi, which the Trial Chamber rejected. *See* Trial Judgement, paras. 38-41, 48-53, 59, 283, 306.

³⁹⁹ Trial Judgement, paras. 301, 304, 305.

⁴⁰⁰ Trial Judgement, paras. 270, 284, 305.

⁴⁰¹ Trial Judgement, paras. 296-300, 307-314, 316.

⁴⁰² Trial Judgement, paras. 307-314, 316.

⁴⁰³ Trial Judgement, para. 316.

⁴⁰⁴ Prosecution Notice of Appeal, paras. 1-7; Prosecution Appeal Brief, paras. 15-43. *See also* T. 28 March 2011 pp. 39-41. In its Notice of Appeal the Prosecution submits that the Trial Chamber erred in not considering the findings in the *Ntagerura et al.* Trial Judgement that Munyakazi participated in an attack at Nyamasheke parish on 16 April 1994. *See* Prosecution Notice of Appeal, para. 4. The Prosecution, however, has not developed this argument in its appeal brief.

consistent, and corroborative.⁴⁰⁵ The Prosecution further notes that Witnesses MBRE, YCC, and YCH were not present at the parish during the attack and simply claimed that there was no attack at the parish on 16 April 1994.⁴⁰⁶ It further notes that they confirmed that attacks occurred at the parish around that date.⁴⁰⁷

149. In addition, the Prosecution argues that the questions raised by the Trial Chamber about Munyakazi's participation in the attack at the parish by the limited evidence of the attack at CIMERWA were speculative and unreasonable, in particular since neither party pointed to this evidence as part of its case.⁴⁰⁸ The Prosecution emphasizes that there was no evidence that Munyakazi participated in the attack at CIMERWA; instead, it shows that Tarek Aziz was the leader of that attack.⁴⁰⁹ The Prosecution submits that, since the attack at CIMERWA was not a part of its case, it was unreasonable for the Trial Chamber to state that "the Prosecution evidence does not suggest that Munyakazi participated in the attack on Nyamasheke [p]arish, and then went on to attack CIMERWA".⁴¹⁰ The Prosecution further contends that the Trial Chamber was unreasonable in stating that the Prosecution had not adduced evidence that there were more than two factions of the Bugarama *Interahamwe*.⁴¹¹ In this respect, it highlights Witness ELB's testimony that "he was *part of the group* that went to CIMERWA", which, in its view, indicates that not all members went to the factory.⁴¹²

150. Finally, the Prosecution submits that the Trial Chamber had no evidentiary basis to conclude that the circumstances at Nyamasheke were chaotic and that the Prosecution witnesses therefore could have been mistaken about details.⁴¹³ The Prosecution recalls that the witnesses attested to a "sequence of events, providing the dates and details of the successive attacks they personally witnessed at Nyamasheke [p]arish."⁴¹⁴

151. Munyakazi responds that the evidence of Witnesses LAY and BWP was not credible, reliable, consistent, or corroborative.⁴¹⁵ In this respect, he submits that, had the Trial Chamber

⁴⁰⁵ Prosecution Appeal Brief, paras. 16, 19-23, 25, 41. *See also* T. 28 March 2011 p. 39.

⁴⁰⁶ Prosecution Appeal Brief, para. 24.

⁴⁰⁷ Prosecution Appeal Brief, para. 24.

⁴⁰⁸ Prosecution Appeal Brief, paras. 16, 26-32. *See also* T. 28 March 2011 pp. 39-41.

⁴⁰⁹ Prosecution Appeal Brief, paras. 26, 28, 29. *See also* T. 28 March 2011 p. 40.

⁴¹⁰ Prosecution Appeal Brief, para. 30, *quoting* Trial Judgement, para. 312. *See also* T. 28 March 2011 p. 40.

⁴¹¹ Prosecution Appeal Brief, para. 31, *quoting* Trial Judgement, para. 312. *See also* T. 28 March 2011 p. 40.

⁴¹² Prosecution Appeal Brief, para. 31, *citing* T. 27 September 2009 p. 11. *See also* T. 28 March 2011 p. 40.

⁴¹³ Prosecution Appeal Brief, paras. 16, 33-37. During the hearing, the Prosecution emphasized that Witness LAY could not have been mistaken about the dates and details of the attack at Nyamasheke parish since it occurred the day after the death of his entire family. *See* T. 28 March 2011 pp. 40, 41.

⁴¹⁴ Prosecution Appeal Brief, para. 34.

⁴¹⁵ Munyakazi Response Brief, paras. 27-55, 57-62, 77-87.

conducted a site visit, there would have been additional reasons to discount their testimony.⁴¹⁶ Munyakazi also highlights his alibi, which, in his view, was unreasonably discounted and further emphasizes that Witnesses MBRE, YCC, and YCH confirmed that there was no attack at the parish on 16 April 1994.⁴¹⁷ Finally, Munyakazi contends that the Trial Chamber correctly questioned his participation in the massacre at the parish based on the attack at CIMERWA.⁴¹⁸

152. The Appeals Chamber underscores that Trial Chambers enjoy broad discretion in assessing evidence, to which deference is owed.⁴¹⁹ Although the Trial Chamber found Witnesses LAY and BWP to be “generally credible and reliable”,⁴²⁰ the Prosecution does not fully appreciate that the Trial Chamber heard competing evidence, which was not discounted, from Witnesses MBRE, YCC, and YCH that no attack occurred at the parish on 16 April 1994.⁴²¹ Although these Defence witnesses were not at the parish, as the Prosecution notes, the Trial Chamber observed that, based on their respective vantage points in and around Kabeza Centre, from where the entrance of the parish was visible, they were in a position to know whether an attack occurred at the parish on that date.⁴²² The Prosecution does not dispute this or raise any other challenge to the Trial Chamber’s assessment of this Defence evidence. Consequently, the accounts of Witnesses LAY and BWP that Munyakazi participated in an attack at the parish on 16 April 1994 cannot be easily reconciled with Witnesses MBRE’s, YCC’s, and YCH’s testimony.

153. The evidence concerning the involvement of the Bugarama *Interahamwe* in the attack at CIMERWA on 16 April 1994 may reasonably be described as circumstantial support for the proposition that Munyakazi did not participate in another massacre on that same day at Nyamasheke parish with members of that same group. As the Prosecution observes, there is no indication that Munyakazi participated in the attack at CIMERWA.⁴²³ However, it cannot be said that the involvement of members of the Bugarama *Interahamwe* in the CIMERWA attack is incapable of raising some concern about evidence that, on the same day, the group was involved in another attack at a distant location.

154. The Appeals Chamber recalls that the Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within or among witnesses’ testimonies.⁴²⁴ Although it would

⁴¹⁶ Munyakazi Response Brief, para. 63.

⁴¹⁷ Munyakazi Response Brief, paras. 56, 64-76, 86.

⁴¹⁸ Munyakazi Response Brief, paras. 76, 88-106.

⁴¹⁹ *Kalimanzira* Appeal Judgement, para. 186.

⁴²⁰ Trial Judgement, para. 302.

⁴²¹ Trial Judgement, para. 304.

⁴²² Trial Judgement, para. 304.

⁴²³ Trial Judgement, paras. 296-300.

⁴²⁴ *Renzaho* Appeal Judgement, para. 269; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

have been reasonable for the Trial Chamber to prefer the credible and reliable first-hand evidence of Witnesses LAY and BWP, the Appeals Chamber cannot conclude that no reasonable trier of fact could have reasonable doubt as to Munyakazi's participation in an attack on Nyamasheke parish on 16 April 1994, in light of the competing Defence evidence.

155. Accordingly, the Prosecution has not demonstrated that the Trial Chamber's assessment of the totality of the evidence was unreasonable. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's First Ground of Appeal.

B. Alleged Errors Relating to Joint Criminal Enterprise (Ground 2)

156. The Indictment charges Munyakazi with participating in a joint criminal enterprise with a number of named individuals, such as Tarek Aziz and Thomas Mugunda, and, more generally, “the Bugarama *Interahamwe* militia and others.”⁴²⁵ According to the Indictment, “[t]he object and purpose of the joint criminal enterprise was to commit genocide and crimes against humanity targeting the Tutsi racial or ethnical group.”⁴²⁶ The Indictment further specified that “[t]he crimes enumerated within this Indictment were within the object of the joint criminal enterprise.”⁴²⁷

157. The Trial Chamber considered the allegation that Munyakazi participated in a joint criminal enterprise with the Bugarama *Interahamwe* “to be too vague to support a conviction.”⁴²⁸ As to the allegation that he participated in a joint criminal enterprise with the named individuals, such as Tarek Aziz and Thomas Mugunda, the Trial Chamber concluded that it was not supported by sufficient evidence.⁴²⁹ The Trial Chamber, however, convicted Munyakazi on the basis of Article 6(1) of the Statute of committing genocide and extermination as a crime against humanity in relation to the killings at Shangi and Mibilizi parishes.⁴³⁰

158. The Prosecution submits that the Trial Chamber erred in not convicting Munyakazi for the crimes at Shangi and Mibilizi parishes based on his participation in a joint criminal enterprise.⁴³¹ Specifically, the Prosecution challenges the Trial Chamber’s finding that the reference to the “Bugarama *Interahamwe*” was too vague, limiting its consideration of the evidence to named participants, including Tarek Aziz and Thomas Mugunda.⁴³² The Prosecution submits that the “Bugarama *Interahamwe*” is sufficiently specific and that the evidence related to Munyakazi’s role in the Shangi and Mibilizi parishes supports convictions on that basis.⁴³³ It requests the Appeals

⁴²⁵ Indictment, para. 4.

⁴²⁶ Indictment, para. 4.

⁴²⁷ Indictment, para. 5.

⁴²⁸ Trial Judgement, para. 489.

⁴²⁹ Trial Judgement, para. 490.

⁴³⁰ Trial Judgement, paras. 491, 501, 508.

⁴³¹ Prosecution Notice of Appeal, paras. 8-19; Prosecution Appeal Brief, paras. 44-67; Prosecution Reply Brief, paras. 12, 13. *See also* T. 28 March 2011 pp. 42-44, 50, 51, 55, 56. The Prosecution also argues that the Trial Chamber should have entered a conviction for joint criminal enterprise based on Munyakazi’s role in the attack at Nyamasheke parish. Prosecution Notice of Appeal, para. 18; Prosecution Appeal Brief, paras. 3, 4, 50, 52, 59, 66. The Appeals Chamber, however, has dismissed the Prosecution’s First Ground of Appeal, which argued that the Trial Chamber erred in not finding that Munyakazi participated in that attack. *See supra* Section IV.A (Alleged Errors Relating to Nyamasheke Parish). Therefore, the Appeals Chamber limits its consideration of this ground of appeal to the attacks at Shangi and Mibilizi parishes.

⁴³² Prosecution Appeal Brief, paras. 45-50.

⁴³³ Prosecution Appeal Brief, paras. 47, 48; Prosecution Reply Brief, para. 13.

Chamber therefore to enter such convictions and to increase Munyakazi's sentence to life imprisonment.⁴³⁴

159. Munyakazi responds that the Indictment fails to properly plead, and the evidence does not reasonably establish, that he participated in a joint criminal enterprise.⁴³⁵ In particular, he argues that neither the Indictment nor the Prosecution Pre-Trial Brief provided proper notice that he was charged with joint criminal enterprise, pleaded the form of joint criminal enterprise, or indicated his role in it.⁴³⁶ In this respect, Munyakazi submits that the Prosecution did not clearly indicate that it was solely relying on the basic form of joint criminal enterprise.⁴³⁷ Munyakazi further contends that the evidence does not establish that he participated in the crimes or that he had any connection with the Bugarama *Interahamwe*.⁴³⁸ Munyakazi also questions the propriety of entering a conviction for joint criminal enterprise when he is already convicted of committing crimes under Article 6(1) of the Statute.⁴³⁹

160. The Appeals Chamber recalls that the *actus reus* for participation in a joint criminal enterprise requires: (i) a plurality of persons; (ii) the existence of a common purpose (or plan) which amounts to or involves the commission of a crime encompassed by the Statute; and (iii) the participation of the accused in this common purpose.⁴⁴⁰ The basic form of joint criminal enterprise, which is at issue in this case, requires that the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission.⁴⁴¹

161. In cases where the Prosecution intends to rely on a theory of joint criminal enterprise, it must plead the purpose of the enterprise, the identity of its participants, the nature of the accused's participation in the enterprise, and the period of the enterprise.⁴⁴² The indictment should also clearly indicate which form of joint criminal enterprise is being alleged.⁴⁴³ Failure to specifically plead joint criminal enterprise, including the supporting material facts and the category, constitutes a defect in the indictment.⁴⁴⁴

⁴³⁴ Prosecution Appeal Brief, paras. 51-67.

⁴³⁵ Munyakazi Response Brief, paras. 109-145.

⁴³⁶ Munyakazi Response Brief, paras. 111, 114-123, 144.

⁴³⁷ Munyakazi Response Brief, para. 123.

⁴³⁸ Munyakazi Response Brief, paras. 112, 130-144.

⁴³⁹ Munyakazi Response Brief, para. 124.

⁴⁴⁰ See *Br|anin* Appeal Judgement, para. 364. See also *Ntakirutimana* Appeal Judgement, paras. 463, 466.

⁴⁴¹ See *Br|anin* Appeal Judgement, para. 365. See also *Ntakirutimana* Appeal Judgement, para. 467.

⁴⁴² *Simba* Appeal Judgement, para. 63.

⁴⁴³ *Simba* Appeal Judgement, para. 63.

⁴⁴⁴ *Simba* Appeal Judgement, para. 63.

162. In the *Simba* Appeal Judgement, the Appeals Chamber determined that an indictment properly pleaded the identity of the participants by identifying the physical perpetrators by general category, such as *Interahamwe*, and then further identifying them with geographic and temporal details related to each massacre site.⁴⁴⁵ The Indictment in the present case provides the same degree of specificity when the reference to the Bugarama *Interahamwe* in paragraph 4 of the Indictment is read together with paragraphs 13 and 14, alleging that Munyakazi and the Bugarama *Interahamwe* attacked and killed Tutsi civilians at Shangi and Mibilizi parishes, respectively, on 29 and 30 April 1994. Accordingly, the Trial Chamber erred in law in concluding that the reference to the Bugarama *Interahamwe* was too vague and in limiting its consideration of the evidence to only the named participants.

163. Nonetheless, this error is not capable of invalidating the Trial Chamber's verdict. The Trial Chamber concluded that "Munyakazi was as much an integral part of [the] killings as those he enabled" and thus convicted him based on his role in the attacks at Shangi and Mibilizi parishes under Article 6(1) of the Statute for *committing* genocide and extermination as a crime against humanity.⁴⁴⁶ Participation in a joint criminal enterprise is a form of committing under Article 6(1) of the Statute.⁴⁴⁷ Therefore, a finding that Munyakazi participated in a joint criminal enterprise in connection with the crimes for which he was convicted would have no bearing on the verdict. Munyakazi's conviction is based on his committing the crimes, which fully encapsulates his criminal conduct.

164. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's Second Ground of Appeal.

⁴⁴⁵ *Simba* Appeal Judgement, paras. 71, 72, quoting *Simba* Trial Judgement, paras. 392, 393.

⁴⁴⁶ Trial Judgement, para. 491. See also Trial Judgement, paras. 501, 508.

⁴⁴⁷ *Nahimana et al.* Appeal Judgement, para. 478; *Ntagerura et al.* Appeal Judgement, para. 24; *Ntakirutimana* Appeal Judgement, para. 452. See also *Krnojelac* Appeal Judgement, para. 29, quoting *Prosecutor v. Milan Milutinovi} et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdani's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 20.

V. SENTENCING APPEALS

165. The Trial Chamber sentenced Munyakazi to a single sentence of 25 years of imprisonment for his convictions for genocide (Count 1) and extermination as a crime against humanity (Count 3).⁴⁴⁸

166. Munyakazi and the Prosecution have both appealed this sentence.⁴⁴⁹ The Appeals Chamber addresses their appeals in turn, bearing in mind that Trial Chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crime.⁴⁵⁰ As a rule, the Appeals Chamber will revise a sentence only if the appealing party demonstrates that the Trial Chamber committed a discernible error in exercising its sentencing discretion or that it failed to follow the applicable law.⁴⁵¹

A. Munyakazi's Sentencing Appeal (Ground 8)

167. Munyakazi submits that the Trial Chamber erred in assessing his sentence and requests the Appeals Chamber to reduce it.⁴⁵² In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing the aggravating and the mitigating factors in Munyakazi's sentencing.

1. Aggravating Factors

168. The Trial Chamber determined that Munyakazi was an influential man in the Bugarama community based on his relative wealth and local prominence, which included serving as chairman of a rice cooperative and a local bank.⁴⁵³ The Trial Chamber concluded that Munyakazi's abuse of this influence constituted an aggravating factor since "[h]e leveraged [it] to reinforce and enhance the criminal activities of the Bugarama *Interahamwe* at Shangi and Mibilizi [p]arishes."⁴⁵⁴

⁴⁴⁸ Trial Judgement, paras. 521, 522.

⁴⁴⁹ Munyakazi Notice of Appeal, paras. 90-95; Prosecution Notice of Appeal, paras. 20-22.

⁴⁵⁰ See *Muvunyi II* Appeal Judgement, para. 63; *Renzaho* Appeal Judgement, para. 606; *Rukundo* Appeal Judgement, para. 240; *Kalimanzira* Appeal Judgement, para. 224; *Nchamihigo* Appeal Judgement, para. 384; *Bikindi* Appeal Judgement, para. 141; *Karera* Appeal Judgement, para. 385.

⁴⁵¹ See *Muvunyi II* Appeal Judgement, para. 63; *Renzaho* Appeal Judgement, para. 606; *Rukundo* Appeal Judgement, para. 240; *Kalimanzira* Appeal Judgement, para. 224; *Nchamihigo* Appeal Judgement, para. 384; *Bikindi* Appeal Judgement, para. 141; *Karera* Appeal Judgement, para. 385.

⁴⁵² Munyakazi Notice of Appeal, paras. 90-95; Munyakazi Appeal Brief, paras. 352-363; Munyakazi Reply Brief, paras. 100-104. See also T. 28 March 2011 p. 16.

⁴⁵³ Trial Judgement, paras. 104, 491.

⁴⁵⁴ Trial Judgement, para. 519.

169. Munyakazi submits that the Trial Chamber's conclusion that he was influential is contradicted by its findings that he lacked any position within the MRND party or that he held overall authority over the Bugarama *Interahamwe* throughout the Indictment period.⁴⁵⁵

170. The Appeals Chamber recalls that it is settled jurisprudence of the Tribunal that the abuse of a position of influence and authority in society can be taken into account as an aggravating factor in sentencing.⁴⁵⁶ Munyakazi fails to appreciate that the Trial Chamber's findings on his influence were based primarily on his relative wealth and prior prominent positions within his community.⁴⁵⁷ Munyakazi has not shown that this is an unreasonable basis for finding that he had influence. The Appeals Chamber, therefore, can identify no contradiction between the Trial Chamber's findings on Munyakazi's influence and his lack of involvement in the MRND party and overall authority over the Bugarama *Interahamwe* throughout the Indictment period.

171. Accordingly, the Appeals Chamber finds that Munyakazi has failed to demonstrate that the Trial Chamber committed a discernible error in assessing the aggravating factors in determining his sentence.

2. Mitigating Factors

172. The Trial Chamber acknowledged the assistance that Munyakazi provided to "a number of Tutsi friends during the genocide."⁴⁵⁸ It, however, disregarded this "selective assistance" in assessing Munyakazi's mitigating circumstances.⁴⁵⁹ Likewise, the Trial Chamber considered his "relative 'piety'" to be irrelevant to sentencing since it "did not prevent him from committing crimes or seeking absolution at Trial."⁴⁶⁰

173. Munyakazi submits that the Trial Chamber erred in assessing his mitigating circumstances and failed to take into account the totality of evidence presented in this respect.⁴⁶¹ In particular, Munyakazi contends that the Prosecution did not present any evidence of his criminal intent and that the Trial Chamber "observed that [he] did not harbor any hostility against Tutsis; he did not

⁴⁵⁵ Munyakazi Appeal Brief, paras. 354-356; Munyakazi Reply Brief, paras. 101-103.

⁴⁵⁶ *Renzaho* Appeal Judgement, para. 615; *Rukundo* Appeal Judgement, para. 250; *Seromba* Appeal Judgement, para. 230; *Ndindabahizi* Appeal Judgement, para. 136. See also *Dragomir Milošević* Appeal Judgement, para. 302; *Simba* Appeal Judgement, para. 284.

⁴⁵⁷ Trial Judgement, paras. 104, 491.

⁴⁵⁸ Trial Judgement, para. 520.

⁴⁵⁹ Trial Judgement, para. 520.

⁴⁶⁰ Trial Judgement, para. 520.

⁴⁶¹ Munyakazi Notice of Appeal, paras. 92-95; Munyakazi Appeal Brief, paras. 359-363; Munyakazi Reply Brief, para. 104.

either kill any Tutsi.”⁴⁶² Furthermore, Munyakazi disputes that his assistance was selective by highlighting his testimony and evidence from Prosecution Witness Esidras Musengayire and Defence Witnesses Albert Lavie and MDB.⁴⁶³ Munyakazi argues that the Trial Chamber ignored this evidence and further prevented him from reading a letter from a Tutsi person who benefited from his assistance.⁴⁶⁴ Moreover, Munyakazi contends that the Trial Chamber ignored the evidence of Witness MDB with respect to Munyakazi’s commitment to the Muslim faith.⁴⁶⁵

174. Pursuant to Rule 101(B)(ii) of the Rules, a Trial Chamber is required to take into account any mitigating circumstances in determining a sentence.⁴⁶⁶ However, it has broad discretion in determining the weight, if any, to be accorded to them.⁴⁶⁷ The Trial Chamber did not expressly discuss the specific evidence of Munyakazi’s assistance to Tutsis in the sentencing section of the Trial Judgement. This does not mean that the Trial Chamber did not consider this evidence in the context of assessing Munyakazi’s mitigating factors. A Trial Chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record.⁴⁶⁸

175. In addition, the Trial Chamber referred to Munyakazi’s arguments concerning mitigation⁴⁶⁹ and, in other parts of the Trial Judgement, it recounted the relevant evidence.⁴⁷⁰ Although the Trial Chamber did not mention Witness MDB’s testimony in the Trial Judgement, in recounting Munyakazi’s sentencing submissions, it cited the portion of his closing argument where he discussed the testimony of Witness MDB.⁴⁷¹ Therefore, the Appeals Chamber is not convinced that the Trial Chamber failed to take this evidence into account. The Appeals Chamber can also identify no error in describing Munyakazi’s assistance as “selective” when viewing it in the context of his participation in the killing of thousands of Tutsi refugees.

176. There is also no merit in Munyakazi’s submission that the Trial Chamber prevented Witness MDB from reading a letter from another Tutsi who was protected by Munyakazi. A review of the record reveals that, when the witness was asked to read the letter, the Prosecution objected;

⁴⁶² Munyakazi Notice of Appeal, para. 92.

⁴⁶³ Munyakazi Notice of Appeal, paras. 93-95; Munyakazi Appeal Brief, paras. 359, 360, 362, 363; Munyakazi Reply Brief, para. 104.

⁴⁶⁴ Munyakazi Notice of Appeal, para. 94; Munyakazi Appeal Brief, paras. 361, 362; Munyakazi Reply Brief, para. 104.

⁴⁶⁵ Munyakazi Appeal Brief, paras. 359, 360.

⁴⁶⁶ *Muvunyi II* Appeal Judgement, para. 70; *Rukundo* Appeal Judgement, para. 255; *Nchamihigo* Appeal Judgement, para. 387; *Muhimana* Appeal Judgement, para. 231.

⁴⁶⁷ See, e.g., *Nchamihigo* Appeal Judgement, para. 387; *Simba* Appeal Judgement, para. 306.

⁴⁶⁸ *Muhimana* Appeal Judgement, para. 72.

⁴⁶⁹ Trial Judgement, paras. 513, 520.

⁴⁷⁰ Trial Judgement, paras. 39, 40, 69, 107, 111, 184, 232.

⁴⁷¹ Trial Judgement, n. 1009, citing T. 28 January 2010 pp. 47, 48.

Munyakazi's counsel then proceeded onto a different matter without awaiting a ruling on the objection from the Trial Chamber.⁴⁷²

177. In addition, the Appeals Chamber is satisfied that the Trial Chamber acted within its discretion in determining that evidence of Munyakazi's commitment to his religious faith was irrelevant to sentencing as it did not prevent him from committing crimes. Similarly, Munyakazi's suggestion that there was insufficient evidence to demonstrate his criminal intent or that he killed Tutsis fails to appreciate that both of these points are amply demonstrated by his direct and leading role in the killing of thousands of refugees.

178. Accordingly, the Appeals Chamber finds that Munyakazi has failed to demonstrate that the Trial Chamber committed a discernible error in assessing the mitigating factors in determining his sentence.

3. Conclusion

179. For the foregoing reasons, the Appeals Chamber dismisses Munyakazi's Eighth Ground of Appeal.

⁴⁷² T. 1 September 2009 pp. 30, 31 (“Q. Have you read the letter, Witness? Have you read what the letter says? A. This letter refers or talks about the way in which Yussuf Munyakazi received us. And with your leave, I could read the letter or give it to you so that you read it, because I only read through it diagonally. MR. KAREGYESA: Your Honours, we have strong objection to this procedure, this underhand method of trying to get in witness testimony other than viva voce. We would oppose any reading of that letter. Much obliged. BY MR. MWAIKUSA: Q. Generally, would you agree with what she says in that letter, or do you think it contradicts your – MR. KAREGYESA: Objection, Your Honours, to that question. That letter is not in evidence and – MADAM PRESIDENT: Yes, Counsel. BY MR. MWAIKUSA: Q. You just said, Witness, that she was afraid to come and testify. What about you, yourself? A. I was very frightened, and I am still very afraid. But I made an effort because I had undertaken to come and testify. It is true that I had done so previously. And, you see, Yussuf Munyakazi helped us enormously; whereas, there were others at whose homes we went to fetch – or, to seek refuge and they turned us away. But Mr. Munyakazi helped me and he helped my children. MR. MWAIKUSA: That's all, Your Honours.”).

B. Prosecution's Sentencing Appeal (Ground 3)

180. The Prosecution submits that the Trial Chamber erred in law in its assessment of Munyakazi's sentence and requests the Appeals Chamber to increase the sentence to life imprisonment or, alternatively, to a term of imprisonment longer than 25 years.⁴⁷³

181. The Prosecution submits that Munyakazi's sentence of 25 years of imprisonment is disproportionately low and does not reflect the gravity of the crimes of genocide and extermination as a crime against humanity, considering that these are crimes of the most serious gravity, involving massive attacks and many victims.⁴⁷⁴

182. The Prosecution further submits that the Trial Chamber did not properly consider Munyakazi's pre-eminent role as well as the degree and form of his participation in the crimes.⁴⁷⁵ In this respect, the Prosecution recalls Munyakazi's role as a leader of the Bugarama *Interahamwe* in the attacks on and killing of Tutsi civilians in Shangi and Mibilizi parishes and that this amounted to the direct commission of the crimes.⁴⁷⁶ The Prosecution recalls Munyakazi's abuse of his influential position in Bugarama which amounts to an aggravating factor⁴⁷⁷ and that the specific aspects of Munyakazi's crimes suggest his demonstrated hatred against the Tutsis and his determination to exterminate them.⁴⁷⁸

183. The Prosecution also submits that the Trial Chamber failed to consider the massive scale of Munyakazi's crimes which resulted in "a substantial number of deaths and human suffering", namely the deaths of approximately 5,000 to 6,000 Tutsi refugees at Shangi parish and 60 to 100 refugees at Mibilizi parish.⁴⁷⁹ The Prosecution emphasized that Munyakazi demonstrated a clear intention to kill on a massive scale, considering the existence of a high concentration of Tutsi civilians in these locations.⁴⁸⁰

184. The Prosecution argues that the Trial Chamber should have relied on the *Gacumbitsi* Appeal Judgement where the Appeals Chamber held that the Trial Chamber "exceeded its scope of discretion by imposing a sentence of only thirty years imprisonment" considering that Munyakazi, like *Sylvestre Gacumbitsi*, was also "a primary player, a leader" and in light of "the massive nature

⁴⁷³ Prosecution Notice of Appeal, paras. 20-22; Prosecution Appeal Brief, paras. 68-83. *See also* T. 28 March 2011 pp. 44-49.

⁴⁷⁴ Prosecution Appeal Brief, paras. 69-74.

⁴⁷⁵ Prosecution Appeal Brief, paras. 69, 70, 74, 75-78.

⁴⁷⁶ Prosecution Appeal Brief, paras. 76, 77.

⁴⁷⁷ Prosecution Appeal Brief, para. 77, *quoting* Trial Judgement, para. 519.

⁴⁷⁸ Prosecution Appeal Brief, para. 78.

⁴⁷⁹ Prosecution Appeal Brief, para. 79, *quoting* Trial Judgement, para. 516.

of the crimes”, his “leading role”, and the “relative insignificance of the purported mitigating factors”.⁴⁸¹

185. The Appeals Chamber recalls that the determination of the gravity of the crime requires consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crimes.⁴⁸² Contrary to the Prosecution’s submissions, the Trial Chamber expressly noted the very serious nature of the crimes committed, their scale, and Munyakazi’s role in their commission.⁴⁸³ In this regard, the Trial Chamber recalled that Munyakazi had committed crimes which are grave, “resulted in a substantial number of deaths and human suffering”, and constitute “serious violations of international humanitarian law”.⁴⁸⁴ Furthermore, the Trial Chamber considered “Munyakazi’s abuse of [his] influential position within Bugarama society” as an aggravating factor and rejected Munyakazi’s background and individual circumstances as mitigating factors.⁴⁸⁵ Therefore, the Trial Chamber was fully aware of all the factual and legal circumstances surrounding the offences referred to by the Prosecution in its submissions.

186. The Appeals Chamber recalls that each case is examined on its own facts.⁴⁸⁶ Furthermore, “[j]ust as there is no category of cases within the jurisdiction of the Tribunal where the imposition of life imprisonment is *per se* barred, there is also no category of cases where it is *per se* mandated.”⁴⁸⁷ The Appeals Chamber notes that, in deciding Munyakazi’s sentence, the Trial Chamber correctly sought guidance from comparable cases which did not result in life sentences.⁴⁸⁸ The Prosecution has not demonstrated that the Trial Chamber committed a discernible error in doing so.

187. Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber committed a discernible error in determining Munyakazi’s sentence. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution’s Third Ground of Appeal.

⁴⁸⁰ Prosecution Appeal Brief, para. 79, *citing* Trial Judgement, para. 506.

⁴⁸¹ Prosecution Appeal Brief, paras. 76, 80, *quoting* *Gacumbitsi* Appeal Judgement, paras. 204, 205.

⁴⁸² *Rukundo* Appeal Judgement, para. 243; *Kordi* and *Čerkez* Appeal Judgement, para. 1061. *See also* *Nahimana et al.* Appeal Judgement, para. 1038.

⁴⁸³ Trial Judgement, paras. 514, 516, 519, 520.

⁴⁸⁴ Trial Judgement, paras. 514, 516.

⁴⁸⁵ Trial Judgement, paras. 519, 520.

⁴⁸⁶ *Rukundo* Appeal Judgement, para. 260.

⁴⁸⁷ *Rukundo* Appeal Judgement, para. 260.

⁴⁸⁸ Trial Judgement, para. 517, *citing* *Simba* Appeal Judgement, paras. 279-288, *Semanza* Appeal Judgement, paras. 388, 389, *Kayishema and Ruzindana* Appeal Judgement, paras. 191, 194, 352.

VI. DISPOSITION

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

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

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 28 March 2011;

SITTING in open session;

DISMISSES Munyakazi's Appeal in all respects;

DISMISSES the Prosecution's Appeal in all respects;

AFFIRMS Munyakazi's convictions for genocide and extermination as a crime against humanity;

AFFIRMS the sentence of 25 years of imprisonment imposed on Munyakazi by the Trial Chamber to run as of this day, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 5 May 2004;

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

ORDERS that, in accordance with Rule 103(B) and Rule 107 of the Rules, Munyakazi is to remain in the custody of the Tribunal pending the finalization of arrangements for his transfer to the State where his sentence will be served.

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

Patrick Robinson
Presiding Judge

Mehmet Güney
Judge

Liu Daqun
Judge

Andrésia Vaz
Judge

Carmel Agius
Judge

Done this 28th day of September 2011 at Arusha, Tanzania.

Judge Güney appends a separate opinion.

Judge Liu appends a separate opinion.

Judge Vaz appends a separate opinion.

[Seal of the Tribunal]

VII. OPINION SÉPARÉE DU JUGE MEHMET GÜNEY

1. Je réitère ma position élaborée précédemment dans les arrêts *Gacumbitsi* et *Ndindabahizi*. En effet, je suis toujours opposé à l'application de cette forme élargie du mode de responsabilité de commission qui, selon moi, englobe, à toute fin pratique, les autres modes de responsabilité énumérés à l'article 6(1) du Statut, et vide ainsi de sa substance la raison d'être de cette énumération. De plus, la majorité ne motive pas cette création jurisprudentielle, ni ne dégage de la coutume internationale une assise juridique valable afin de légitimer ce nouveau mode de responsabilité plutôt ambigu.¹ Cependant, force est de constater que cette forme de participation criminelle fait désormais partie de la jurisprudence de ce tribunal.² Pour l'instant, la règle de prédictibilité et certitude du droit ne nous permet d'en départir.

2. Toutefois, je suis pour le moins inquiet de la généralisation de ce mode de responsabilité aux crimes autres que celui de génocide prévus au Statut. Dans l'arrêt *Seromba*, j'observe que la Chambre d'appel a malheureusement élevé l'*obiter dictum* de l'arrêt *Gacumbitsi*, spécifique à une trame factuelle sous-jacente au crime de génocide, à celui de *ratio decidendi* applicable aux autres crimes prévus au statut.³ Dans la mesure où ce nouveau principe de « commission au sens élargi », sans participation physique directe, est devenu jurisprudence, je joins ma voix à celles du Juge Vaz et du Juge Liu afin de restreindre l'application de ce mode de responsabilité aux crimes de génocide et d'extermination.⁴

3. Bien que la Chambre d'appel n'ait pas spécifiquement encadré l'application de ce nouveau principe de droit, il est à mon sens évident qu'il doit répondre aux exigences procédurales imposées à tous les autres modes de responsabilité.⁵ Ainsi, les particularités d'un mode de responsabilité donné, en l'espèce, que les actes reprochés fassent « partie intégrante » des crimes en question, doivent être spécifiquement plaidés dans l'acte d'accusation, faute de quoi l'acte d'accusation peut être considéré comme défectueux. Or, dans la présente affaire, après avoir écarté l'application de l'entreprise criminelle commune aux crimes de génocide et extermination, la Chambre de première instance s'est rabattue sur la notion de « commission » au sens large, très similaire à celui de l'entreprise criminel commune, sans pour autant que ce mode de responsabilité distinctif ait été

¹ Voir l'arrêt *Gacumbitsi*, para. 60; l'arrêt *Seromba*, para. 171; l'arrêt *Ndindabahizi*, para. 123.

² *Ibid.*

³ Tel qu'observé dans mon opinion dissente dans l'arrêt *Gacumbitsi*, il n'était pas nécessaire pour la majorité de la Chambre d'appel d'émettre cette opinion relativement à cette nouvelle définition de « commettre » au sens élargi pour maintenir la condamnation de génocide en appel, ce qui le qualifie donc d'*obiter dictum*, voir l'arrêt *Gacumbitsi*, para. 59.

⁴ Voir les décisions séparées des juges Liu et Vaz joints à cet arrêt.

⁵ L'arrêt *Rukundo*, para. 30, et les autres références qui y sont citées.

inclus dans l'acte d'accusation. Ainsi, elle contourne les exigences procédurales requises pour l'entreprise criminelle commune, et maintient la condamnation pour « avoir commis » les infractions. Selon moi, cette démarche était inacceptable.

4. Malheureusement, Munyakazi n'a pas interjeté appel sur ce point de droit.⁶ Il a ainsi accepté son application à son cas d'espèce. Il m'est par conséquent difficile de conclure que le défaut de l'acte d'accusation est fatal et a résulté en une injustice. Malgré ma divergence d'opinion quant à l'existence même de ce mode de responsabilité créé par la jurisprudence et son application, je suis contraint d'accepter les conclusions du jugement en appel sur ce point.

Fait en français et en anglais, la version en français faisant foi.

Fait à Arusha, Tanzanie, le 28 septembre 2011

Mehmet Güney
Juge

[Sceau du Tribunal international]

⁶ Mémoire de l'appelant, paras. 305-308; Mémoire en réplique, paras. 74.

VIII. SEPARATE OPINION OF JUDGE LIU

1. In this Judgement, the Appeals Chamber affirms Munyakazi's convictions for committing genocide and extermination as a crime against humanity.¹ His criminal responsibility is not based on a finding that he *physically* perpetrated a crime,² engaged in a culpable omission, or participated in a joint criminal enterprise.³ Rather, his criminal liability is predicated on the more expansive definition of "committing" under Article 6(1) of the Statute established in the *Gacumbitsi* Appeal Judgement.⁴ While I recognize that Munyakazi does not challenge this definition,⁵ I take this opportunity to clarify my previously expressed concerns⁶ with this developing mode of liability.⁷

2. The expanded form of commission introduced in the *Gacumbitsi* Appeal Judgement was designed to encompass "other acts" that may constitute direct participation in the *actus reus* of the crime of genocide.⁸ In determining whether such acts amount to "commission" in the context of genocide or extermination as a crime against humanity, the dispositive question is whether the accused's conduct was as much "an integral part" of the crime as were the killings which it enabled.⁹ Acts such as leading, supervising, directing an attack, and directing the separation and segregation of victims before a massacre have all been held to qualify under this broader definition of commission.¹⁰ However, these acts may equally be characterized as instances of ordering, instigating, or aiding and abetting the commission of these crimes.¹¹

¹ Appeal Judgement, paras. 136-138.

² Although the various modes of liability listed under Article 6(1) of the Statute have been commonly described as acts of "physical perpetration", I believe that this is something of a misnomer. Indeed, the Tribunal's jurisprudence distinguishes between the acts of committing by "primary offenders" and the conduct of "secondary offenders" responsible for facilitating a crime by planning, ordering, instigating, or aiding and abetting. The problem with such a distinction is that so-called "secondary offenders" are often arguably more culpable than those who perpetrate the crimes. In such cases, it may be apposite to charge the accused with participation in a joint criminal enterprise in order to properly reflect culpability. See W. A. Schabas, *The UN International Criminal Tribunals the former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006), p. 297.

³ See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 188; *Kayishema and Ruzindana* Appeal Judgement, para. 187; *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 31; *Ntakirutimana* Appeal Judgement, para. 468.

⁴ Appeal Judgement, paras. 135, 136. See *Gacumbitsi* Appeal Judgement, para. 60. See also *Seromba* Appeal Judgement, paras. 171, 172.

⁵ See Munyakazi Appeal Brief, paras. 308, 309; Munyakazi Reply Brief, para. 74.

⁶ See *Seromba* Appeal Judgement, Dissenting Opinion of Judge Liu.

⁷ Notwithstanding the concerns expressed herein, I would not disturb the findings of the Trial Chamber with respect to Munyakazi's criminal liability. Moreover, I note that even absent this expanded notion of commission, Munyakazi's criminal conduct could be characterized as ordering, instigating, or aiding and abetting, all of which were properly charged in the Indictment under Article 6(1) of the Statute. See Indictment, paras. 5, 6, 13, 14.

⁸ *Gacumbitsi* Appeal Judgement, para. 60.

⁹ See *Gacumbitsi* Appeal Judgement, para. 60; *Seromba* Appeal Judgement, para. 171. See also *Kalimanzira* Appeal Judgement, para. 219.

¹⁰ See *Gacumbitsi* Appeal Judgement, para. 60; *Seromba* Appeal Judgement, paras. 171, 172. See *Kalimanzira* Appeal Judgement, para. 219.

¹¹ See *Seromba* Appeal Judgement, Dissenting Opinion of Judge Liu, para. 14.

3. In effect, the newly expanded form of commission has subsumed various modes of individual criminal responsibility enumerated in the Statute. Specifically, ordering, instigating, and aiding and abetting appear to have been amalgamated into this mode of liability, to a large extent rendering redundant the distinctions envisaged by Article 6(1) of the Statute.¹² Whether instances of ordering, instigating, and aiding and abetting may be classified as “committing” is ostensibly a question of nature and degree, requiring judicial scrutiny to determine whether the overall conduct of the accused should be “elevated” to commission.¹³ Inevitably, the conflation of these various forms of liability creates considerable ambiguity as to the scope of a convicted person’s criminal responsibility. Such uncertainty may run contrary to basic principles of fairness.

4. Moreover, this expanded notion of commission not only embraces acts that technically amount to secondary forms of participation,¹⁴ but also extends to conduct that contributes to the commission of crimes of others. In this regard, this novel form of commission uncannily resembles joint criminal enterprise,¹⁵ without requiring the satisfaction of its more stringent pleading criteria.¹⁶ Indeed, it is questionable how an accused may receive adequate notice of a charge comprising this new and nebulous form of liability, which is perhaps best described as “individual criminal enterprise”.

5. Furthermore, the scope for applying this mode of liability is unclear. The extended definition of “commission” was initially introduced in a case of genocide,¹⁷ but has been subsequently considered with respect to extermination as a crime against humanity.¹⁸ This development anticipates the application of the extended form of commission in the context of war crimes or other crimes against humanity, such as rape and torture.¹⁹ In light of the concerns canvassed above, such an expansion of this mode of criminal liability would be undesirable.

¹² As has been observed, this runs contrary to the principle of *ut res magis valeat quam pereat*, according to which all provisions in the Statute should be given effect. See *Ndindabahizi* Appeal Judgement, Partially Dissenting Opinion of Judge Güney, para. 4.

¹³ See *Seromba* Appeal Judgement, para. 182; *Kalimanzira* Appeal Judgement, para. 220.

¹⁴ See *supra*, n. 2.

¹⁵ In the *Gacumbitsi* Appeal Judgement, the Appeals Chamber considered, Judge Güney dissenting, that Gacumbitsi’s action of directing the Hutu and Tutsi refugees to separate was not “adequately described by any other mode of Article 6(1) liability”. See *Gacumbitsi* Appeal Judgement, para. 60. Arguably, this act amounted to participation in a joint criminal enterprise, a charge for which Gacumbitsi had inadequate notice.

¹⁶ *Seromba* Appeal Judgement, Dissenting Opinion of Judge Liu, para. 7.

¹⁷ *Gacumbitsi* Appeal Judgement, para. 60.

¹⁸ *Seromba* Appeal Judgement, paras. 189, 190. See also *Ndindabahizi* Appeal Judgement, para. 123.

¹⁹ I note with concern that this form of liability has been applied at trial in the context of contempt. See *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008, paras. 20, 101, 102.

6. Notwithstanding the misgivings expressed herein, I accept that this broader form of commission has been established in the Tribunal's jurisprudence and should not be lightly disturbed. Future recourse to such liability should, however, be restricted where possible.

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

Liu Daqun
Judge

Done this 28th day of September 2011,
At Arusha, Tanzania.

[Seal of the Tribunal]

IX. OPINION SÉPARÉE DE LA JUGE ANDRÉSIA VAZ

1. Bien que je sois d'accord avec la conclusion de la Chambre d'appel de confirmer les déclarations de culpabilité prononcées à l'encontre de Munyaiakazi pour avoir commis les crimes de génocide et d'extermination constitutive de crime contre l'humanité en vertu de l'article 6(1) du Statut¹, les inquiétudes exprimées par le Juge Liu dans son opinion séparée concernant la définition (« *expanded* ») du mode de responsabilité de commission m'interpellent.

2. En effet, la Chambre de première instance a correctement rappelé les Arrêts *Gacumbitsi* et *Seromba* relativement à cette définition du mode de commission dans le cadre des crimes de génocide et d'extermination en tant que crime contre l'humanité et les a appliqués convenablement aux faits de la présente affaire². Cependant, comme le Juge Liu le relève avec justesse, l'application de ce mode de responsabilité, telle que développée par la jurisprudence de la Chambre d'appel, dans des affaires ultérieures appelle à la prudence. À mon sens, une telle approche démontre l'importance de repenser les contours de cette définition de mode de responsabilité et de son étendue. Ceci permettrait de prévenir qu'une telle application de la définition de la commission, aux dépens d'autres modes de responsabilité, n'ait pour effet d'instaurer une certaine incertitude dans la jurisprudence du Tribunal, en l'absence de balises clairement définies quant à ladite application.

Fait en français et en anglais, la version en français faisant foi.

Fait à Arusha, Tanzanie, le 28 septembre 2011.

Andrésia Vaz
Juge

[Sceau du Tribunal international]

¹ Voir Arrêt, par. 188. Voir également Arrêt, par. 136 à 138.

² Voir Jugement, par. 429, 430, se référant, *inter alia*, à l'Arrêt *Seromba*, par. 161, et à l'Arrêt *Gacumbitsi*, par. 60. Voir également Jugement, par. 380, 423, 491, 501 et 508.

X. ANNEX A – PROCEDURAL HISTORY

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

A. Notices of Appeal and Briefs

2. Trial Chamber I of the Tribunal rendered the judgement in this case orally on 30 June 2010 and filed the written Trial Judgement on 5 July 2010. Both parties appealed.

1. Munyakazi's Appeal

3. On 22 July 2010, the Pre-Appeal Judge granted a motion by Munyakazi for an extension of time to file his notice of appeal in light of the death of his lead counsel and ordered Munyakazi to file it no later than 23 August 2010.¹ Munyakazi's request to file his notice of appeal following the translation of the Trial Judgement into Kinyarwanda was denied.² Munyakazi filed his Notice of Appeal on 23 August 2010³ and his Appellant's brief on 8 November 2010.⁴ The Prosecution filed its Respondent's brief on 20 December 2010.⁵ Munyakazi filed his Reply brief on 4 January 2011.⁶

2. Prosecution's Appeal

4. The Prosecution filed its Notice of Appeal on 3 August 2010⁷ and its Appellant's brief on 18 October 2010.⁸ On 29 November 2010, Munyakazi filed his Respondent's brief.⁹ The Prosecution filed its Reply brief on 13 December 2010.¹⁰

B. Assignment of Judges

5. On 21 July 2010, the Presiding Judge of the Appeals Chamber assigned the following Judges to the appeal: Judge Patrick Robinson, presiding, Judge Mehmet Güney, Judge Liu Daqun,

¹ Decision on Yussuf [Munyakazi's] Motion for an Extension of Time for the Filing of the Notice of Appeal, 22 July 2010, paras. 7, 8 ("Decision of 22 July 2010").

² Decision of 22 July 2010, para. 6.

³ Yussuf Munyakazi's Notice of Appeal, 23 August 2010.

⁴ Yussuf Munyakazi's Appeal Brief, 8 November 2010.

⁵ Prosecutor's Respondent Brief, 20 December 2010.

⁶ Yussuf Munyakazi's Brief in Reply, 4 January 2011.

⁷ Prosecutor's Notice of Appeal, 3 August 2010.

⁸ Prosecutor's Appellant's Brief, 18 October 2010.

⁹ Yussuf Munyakazi's Respondent Brief, 29 November 2010.

¹⁰ Appellant's Brief in Reply, 13 December 2010.

Judge Andrézia Vaz, and Judge Carmel Agius.¹¹ On 22 July 2010, the Presiding Judge assigned himself as the Pre-Appeal Judge in this case.¹²

C. Hearing of the Appeals

6. On 28 March 2011, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 9 March 2011.¹³

¹¹ Order Assigning Judges to a Case Before the Appeals Chamber, 21 July 2010.

¹² Order Assigning a Pre-Appeal Judge, 22 July 2010.

¹³ Scheduling Order, 9 March 2011.

XI. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

BIKINDI

Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement, 18 March 2010 (“*Bikindi Appeal Judgement*”).

GACUMBITSI

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

KAJELIJELI

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

KALIMANZIRA

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2010 (“*Kalimanzira Appeal Judgement*”).

KARERA

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

KAYISHEMA and RUZINDANA

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

MUHIMANA

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

MUVUNYI

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 29 August 2008 (“*Muvunyi I Appeal Judgement*”).

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 1 April 2011 (“*Muvunyi II Appeal Judgement*”).

NAHIMANA et al.

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

NCHAMIHIGO

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-01-63-A, Judgement, 18 March 2010 (“*Nchamihigo* Appeal Judgement”).

NDINDABAHIZI

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

NIYITEGEKA

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

NTAGERURA et al.

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 (“*Ntagerura et al.* Appeal Judgement”).

NTAKIRUTIMANA

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

RENZAHO

Tharcisse Renzaho v. The Prosecutor, Case No. ICTR-97-31-A, Judgement, 1 April 2011 (“*Renzaho* Appeal Judgement”).

RUKUNDO

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 (“*Rukundo* Appeal Judgement”).

RUTAGANDA

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

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 (“*Semanza* Appeal Judgement”).

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-01-66-A, Judgement, 12 March 2008 (“*Seromba Appeal Judgement*”).

SIMBA

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

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

ZIGIRANYIRAZO

Protais Zigiranyirazo v. The Prosecutor, Case No. ICTR-01-73-A, Judgement, 16 November 2009 (“*Zigiranyirazo Appeal Judgement*”).

2. ICTY

BOŠKOSKI and TARČULOVSKI

Prosecutor v. Ljube Bošković and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 (“*Bošković and Tarčulovski Appeal Judgement*”).

BRANIN

Prosecutor v. Radoslav Br|anin, Case No. IT-99-36-A, Judgement, 3 April 2007 (“*Br|anin Appeal Judgement*”).

HARADINAJ et al.

Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj, Case No. IT-04-82-A, Judgement, 19 July 2010 (“*Haradinaj et al. Appeal Judgement*”).

KORDIĆ and ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez Appeal Judgement*”).

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 (“*Krnojelac Appeal Judgement*”).

KRSTIĆ

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

KUPREŠKIĆ et al.

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić et al. Appeal Judgement*”).

KVOČKA et al.

Prosecutor v. Miroslav Kvočka, Mlajo Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al. Appeal Judgement*”).

DRAGOMIR MILOŠEVIĆ

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009, (“*Dragomir Milošević Appeal Judgement*”).

B. Defined Terms and Abbreviations

CIMERWA

Ciment du Rwanda – A cement factory in Bugarama Commune, Cyangugu Prefecture

Defence Pre-Trial Brief

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-T, Yussuf Munyakazi's Pre-Defence Brief, 31 July 2009

ICTR

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

Indictment

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-I, Second Amended Indictment, 3 November 2008

MRND

Mouvement Révolutionnaire National pour la Démocratie et le Développement (prior to 1991) and *Mouvement Républicain National pour la Démocratie et le Développement* (from 1991)

Munyakazi Appeal Brief

Yussuf Munyakazi's Appeal Brief, 8 November 2010

Munyakazi Notice of Appeal

Yussuf Munyakazi's Notice of Appeal, 23 August 2010

Munyakazi Reply Brief

Yussuf Munyakazi's Brief in Reply, 4 January 2011

Munyakazi Response Brief

Yussuf Munyakazi's Respondent Brief, 29 November 2010

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footnote

p. (pp.)

page (pages)

para. (paras.)

paragraph (paragraphs)

Prosecution Appeal Brief

Prosecutor's Appellant's Brief, 18 October 2010

Prosecution Notice of Appeal

Prosecutor's Notice of Appeal, 3 August 2010

Prosecution Pre-Trial Brief

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-I, Prosecutor's Pre-Trial Brief, 30 March 2009

Prosecution Reply Brief

Appellant's Brief in Reply, 13 December 2010

Prosecution Response Brief

Prosecutor's Respondent Brief, 20 December 2010

Rules

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

Statute

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

T.

Transcript

Trial Judgement

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-T, Judgement and Sentence,
5 July 2010