



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Carmel Agius
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. Bongani Majola

Summary of: 14 December 2015

THE PROSECUTOR

v.

**Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvain NSABIMANA
Alphonse NTEZIRYAYO
Joseph KANYABASHI
Élie NDAYAMBAJE**

Case No. ICTR-98-42-A

SUMMARY OF APPEAL JUDGEMENT

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1. The Appeals Chamber is sitting today in the case of *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje*. All parties, including the Prosecution, appealed against the Trial Judgement, pronounced on 24 June 2011 and issued in writing in English on 14 July 2011 by Trial Chamber II. In accordance with the Scheduling Order of 2 November 2015, the Appeals Chamber will presently deliver the judgement in this case.

2. Following the practice of the Tribunal, not every point addressed in the judgement will be mentioned in this summary, which focuses only on central issues. This oral summary does not constitute any part of the official and authoritative judgement of the Appeals Chamber, which will be distributed to the parties in writing at the close of this hearing.

I. BACKGROUND

3. Nyiramasuhuko was born in April 1946 in Butare Prefecture, and is the mother of Arsène Shalom Ntahobali. She was appointed Minister of Family and Women's Development in the government of Rwanda on 16 April 1992 and continued to serve in this post under the interim government headed by Prime Minister Jean Kambanda during the events of 1994. When she was appointed Minister, she was elected as a member of the *Mouvement révolutionnaire national pour la démocratie et le développement* National Committee, representing Butare Prefecture.

4. Ntahobali was born in 1970 in Israel. In April 1994, he was both a student and part-time manager of Hotel Ihuliro located in Butare Prefecture.

5. Nsabimana was born in 1951 in Butare Prefecture. He was a member of the *Parti social démocrate*, also known as the PSD, from the time of the party's founding and served as the head of the Mbazi section of the PSD in Butare Prefecture. He became the head of the PSD in Kigali-rural Prefecture following his relocation to Kigali. He served as prefect of Butare from 19 April until 17 June 1994.

6. Nteziryayo was born in 1947 in Butare Prefecture. A graduate of the *École des officiers* in Kigali in 1973, he occupied a series of senior military positions until September 1991, when he was appointed to the Ministry of Interior and Communal Development, where he served as Director of Communal Police Matters until 17 June 1994, when he was appointed prefect of Butare, replacing Nsabimana.

7. Kanyabashi was born in 1937 in Butare Prefecture. He was a member of the PSD and served as *bourgmestre* of Ngoma Commune in Butare Prefecture from April 1974 until he left Rwanda in July 1994.

8. Ndayambaje was born in 1958 in Butare Prefecture. He served as *bourgmestre* of Muganza Commune from 10 January 1983 until October 1992, and a second time from 18 June 1994 until he left Rwanda on 7 July 1994.

9. Kanyabashi and Ndayambaje were arrested in Belgium on 28 June 1995 and transferred to the custody of the Tribunal on 8 November 1996. Nyiramasuhuko and Nsabimana were arrested in Kenya and transferred to the custody of the Tribunal on 18 July 1997. Ntahobali was arrested in Kenya and transferred to the custody of the Tribunal on 24 July 1997. Nteziryayo was arrested in Burkina Faso on 26 March 1998 and transferred to the custody of the Tribunal on 21 May 1998.

10. The case of Nyiramasuhuko was initially joined to that of Ntahobali, the case of Nsabimana was joined to that of Nteziryayo, and the cases of Kanyabashi and Ndayambaje were pursued separately. On 5 October 1999, a bench of Trial Chamber II ordered the joint trial of the six accused.

11. The trial commenced on 12 June 2001, with the Prosecution closing its case on 18 October 2004. The co-Accused presented their cases from 31 January 2005 to 2 December 2008. Four Prosecution witnesses were recalled and gave further testimonies on 23 and 24 February 2009. The closing arguments were heard from 20 to 30 April 2009.

12. The events giving rise to this case concern crimes committed in Butare Prefecture. The Trial Chamber found Nyiramasuhuko guilty of: (i) conspiracy to commit genocide by entering into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture; (ii) genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for ordering killings of Tutsis who had sought refuge at the office of Butare Prefecture in Butare Town, Ngoma Commune, in May and June 1994; and (iii) rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior for failing to prevent and punish rapes perpetrated by *Interahamwe* at the Butare Prefecture Office in May and June 1994. The Trial Chamber determined that Nyiramasuhuko also bore responsibility as a superior for the killings that she ordered at the

prefectoral office and took this into account in sentencing. The Trial Chamber sentenced Nyiramasuhuko to life imprisonment.

13. The Trial Chamber found Ntahobali guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for: (i) killing numerous Tutsis in late April 1994 at a roadblock erected near Hotel Ihuliro in Butare Town, including a girl he had first raped; (ii) ordering the killing of Léopold Ruvurajabo at this roadblock in late April 1994, killings at the *Institut de recherche scientifique et technique*, otherwise known as the “IRST”, on 21 April 1994, and killings of Tutsis who had sought refuge at the Butare Prefecture Office in May 1994; and (iii) aiding and abetting the killing of an individual named Rwamukwaya and his family around 29 to 30 April 1994 as well as the killings of Tutsis abducted from the *École évangéliste du Rwanda*, also referred to as the EER, perpetrated between mid-May and early June 1994.

14. The Trial Chamber also found Ntahobali guilty of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for: (i) raping a young Tutsi girl near the Hotel Ihuliro roadblock in late April 1994 as well as Tutsi women who were taking refuge at the Butare Prefecture Office; (ii) ordering the rapes of Tutsi women at the prefectoral office; and (iii) aiding and abetting the rapes of a Tutsi woman by *Interahamwe* at the prefectoral office. Finally, the Trial Chamber determined that Ntahobali also bore responsibility as a superior for the killings and rapes committed by *Interahamwe* that he ordered at the prefectoral office, the killing of Ruvurajabo at the Hotel Ihuliro roadblock, and the killings committed by *Interahamwe* at or near the EER that he aided and abetted, and took this into account in sentencing. The Trial Chamber sentenced Ntahobali to life imprisonment.

15. The Trial Chamber found Nsabimana guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for aiding and abetting by omission the killing of Tutsis who had sought refuge at the Butare Prefecture Office by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence. The Trial Chamber sentenced Nsabimana to 25 years of imprisonment.

16. Turning to Nteziryayo, the Trial Chamber found him guilty of committing direct and public incitement to commit genocide by making speeches that constituted direct appeals to the population

to kill Tutsis at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994 and at Ndayambaje's swearing-in ceremony as the new *bourgmestre* of Muganza Commune that took place on 22 June 1994. The Trial Chamber sentenced Nteziryayo to 30 years of imprisonment.

17. The Trial Chamber found Kanyabashi guilty of committing direct and public incitement to commit genocide by making megaphone announcements on two occasions in late May and mid-June 1994, which directly called on the population to kill Tutsis. It also convicted him of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior for failing to prevent and punish the killings of Tutsis perpetrated by Ngoma commune policemen at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994. The Trial Chamber sentenced Kanyabashi to 35 years of imprisonment.

18. The Trial Chamber found Ndayambaje guilty of committing direct and public incitement to commit genocide by directly inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994 and by making a speech containing inciting statements to commit genocide at his swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994. The Trial Chamber also convicted him of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 22 to 24 April 1994. He was also convicted for the same crimes on the basis of instigating the killings of Tutsi women and girls abducted from Mugombwa Sector after his swearing-in ceremony on 22 June 1994. The Trial Chamber sentenced Ndayambaje to life imprisonment.

19. In addition to the voluminous written submissions of the parties, the Appeals Chamber heard oral arguments between 14 and 17 April 2015 as well as between 20 and 22 April 2015. Furthermore, it admitted additional evidence on appeal in relation to Ntahobali's and Ndayambaje's appeals.

II. COMMON GROUNDS OF APPEAL ON FAIRNESS OF THE PROCEEDINGS

A. Arrest and Initial Appearance

20. Nyiramasuhuko, Ntahobali, Nteziryayo, and Ndayambaje allege violations of their right to a fair trial in the context of their arrests and initial appearances. The Appeals Chamber rejects Nyiramasuhuko's contentions that the Trial Chamber erred in assessing violations of her right to be promptly informed of the charges against her and her right to an initial appearance without undue delay. It further finds that she has not demonstrated that the judicial recognition of these violations was not an effective remedy.

21. The Appeals Chamber also concludes that Ntahobali has not shown that the Trial Chamber erred in assessing the delay between his transfer to the custody of the Tribunal and the date of his initial appearance. Ntahobali has also not demonstrated that the Trial Chamber's recognition of this 41-day delay as a violation of his right to an initial appearance without delay was an insufficient remedy.

22. The Appeals Chamber, Judge Agius dissenting, rejects Nteziryayo's request to reconsider its prior determination that he has waived his right to argue on appeal that his rights were violated as a result of the delay between his arrest and his initial appearance. It also finds, Judge Agius dissenting, that Ndayambaje has waived his right to challenge on appeal allegations that his right to be promptly informed of the charges against him was violated and that he suffered prejudice due to the fact that he was deprived of counsel for several months after his initial indictment was confirmed and an arrest warrant was issued.

B. Joinder of Trials

23. Nyiramasuhuko and Ntahobali submit that the Trial Chamber erred in granting the Prosecution's motion for joinder of trials. Nyiramasuhuko also asserts that the Trial Chamber erred in rejecting her motion for severance and that her right to a fair trial was violated as a result of the Trial Chamber's order relevant to the cross-examination and presentation of the Defence cases. The Appeals Chamber concludes that neither Nyiramasuhuko nor Ntahobali has demonstrated any error with respect to the relevant decisions or the Trial Judgement.

C. Replacement of Judge Maqutu

24. Nyiramasuhuko, Ntahobali, and Ndayambaje raise challenges related to decisions allowing the continuation of the trial with Judge Solomy B. Bossa as a substitute judge for Winston C. M. Maqutu, whose term of office ended on 24 May 2003. For the reasons set forth in the Judgement, the Appeals Chamber dismisses a request that the Appeals Chamber reconsider its decision upholding the Trial Chamber's decision to continue the trial with a substitute judge. It further dismisses challenges to Trial Chamber decisions denying the recall of certain witnesses who had not testified before the substitute judge as well as challenges alleging errors in the Trial Judgement.

D. Addition of Witnesses to the Prosecution's Witness List

25. Nyiramasuhuko and Ntahobali allege that the Trial Chamber, in a decision of 30 March 2004, erred in allowing the Prosecution to add certain witnesses to its witness list. The Appeals Chamber finds that neither demonstrates an error in the decision or any subsequent prejudice as a result of it.

E. Presence of Prosecution Witnesses in the Courtroom During Objections

26. The Trial Chamber determined on 30 January 2004 that, for the remainder of the trial, witnesses would be excluded from the courtroom during objections and associated arguments raised during the course of their testimony. Ntahobali and Ndayambaje submit that the Trial Chamber erred in law and in fact in failing to exclude the witnesses from the courtroom during objections by the parties prior to this date. Having failed to demonstrate any prejudice, the Appeals Chamber dismisses Ntahobali's and Ndayambaje's contentions.

F. Cross-Examination of Witness TA

27. Nyiramasuhuko and Ntahobali appeal a 24 October 2001 decision by the Trial Chamber denying the request to postpone the cross-examination of Witness TA and Ntahobali appeals a 19 January 2004 decision denying his request to exclude or recall the witness for further cross-examination. For the reasons explained in the Judgement, the Appeals Chamber finds that neither Nyiramasuhuko nor Ntahobali demonstrates that any error of the Trial Chamber resulted in prejudice and dismisses their appeals in this respect.

G. Refusal to Recall Witnesses

28. Nyiramasuhuko and Ntahobali challenge decisions of the Trial Chamber denying various requests to recall a number of Prosecution witnesses for further cross-examination. Ntahobali also

challenges a Trial Chamber decision limiting the scope of the cross-examination of a Prosecution witness recalled for further cross-examination. For the reasons explained in the Judgement, the Appeals Chamber concludes that Nyiramasuhuko and Ntahobali have failed to demonstrate any discernible error in the exercise of the Trial Chamber's discretion with respect to the challenged decisions.

H. Nsabimana's Statements

29. In the course of the trial, the Trial Chamber admitted into evidence the transcript of a journalist's interview with Nsabimana dated 1 October 1994, a letter written by Nsabimana in 1996, and the transcript of a March 1996 phone interview between Prosecution Expert Witness Alison Des Forges and Nsabimana as Exhibits P114, P113, and P185, respectively. The Trial Chamber also heard Witness Des Forges's testimony concerning phone conversations she had with Nsabimana in March and April 1996. Nyiramasuhuko, Ntahobali, and Nsabimana submit that the Trial Chamber erred in law and in fact in relying on this evidence to establish their criminal responsibility.

30. The Appeals Chamber dismisses the challenges as they concern Exhibits P113 and P185 as well as those relating to Witness Des Forges's testimony concerning phone conversations she had with Nsabimana in March and April 1996. However, it finds that, in relation to Exhibit P114, the Trial Chamber erred in finding that this transcript of a journalist's interview with Nsabimana dated 1 October 1994 "reflected [Nsabimana's] own views" or "contained a faithful reflection of what he said during the interview" and acknowledged that the document was "authentic". The Appeals Chamber also finds that the Trial Chamber erred in relying on the exhibit as proof of Nsabimana's views, especially in finding that Nsabimana was aware of the plan to exterminate Tutsis when Nsabimana expressly testified to the contrary. The Appeals Chamber assesses the impact of this finding when examining Nsabimana's submissions on his responsibility for aiding and abetting by omission crimes committed at the Butare Prefecture Office.

I. Participation of a Former Prosecution Legal Officer in the Preparation of the Trial Judgement

31. Ntahobali and Ndayambaje submit that the participation of the Chief of the Chambers Support Section in the preparation of the Trial Judgement undoubtedly affected their right to a fair trial as he had previously participated in the present case as an employee of the Office of the Prosecutor in 1998 and 1999. The Appeals Chamber finds that they do not substantiate their claims, as the Chief of the Chambers Support Section had not participated in any deliberations relating to the guilt or innocence of any of the various accused and was excluded from the judgement drafting

process from July 2009 onwards. It further concludes that they do not provide support for the assertion that the impartiality or appearance of impartiality of the judicial-making process and, consequently, their fair trial rights, may have been affected by the limited involvement of the Chief of the Chambers Support Section in this case prior to July 2009.

J. Allegations of False Testimony and Contempt

32. Nyiramasuhuko, Ntahobali, and Kanyabashi submit that the Trial Chamber erred in relation to the allegations of false testimonies by Witnesses QA, QY, and SJ. In particular, they contend that the Trial Chamber erred in failing: (i) to communicate three *amici curiae* reports into the allegations of false testimonies by Witnesses QA, QY, and SJ before the delivery of the Trial Judgement; (ii) to consider the impact of *amici curiae* reports on the credibility of the Prosecution evidence; and (iii) to take into account that the acts of the Prosecution as revealed in the *amici curiae* reports affected the fairness of the proceedings. In addition, Nyiramasuhuko and Ntahobali also argue that the Trial Chamber erred in failing to exclude the evidence of Witnesses QY and SJ as a result of their lies or, in the alternative, to apply the requisite caution in assessing both their testimonies and the evidence of the witnesses who were also allegedly instructed to lie.

33. The Appeals Chamber finds that the Trial Chamber abused its discretion by not communicating the last two *amicus curiae* reports to the parties before the delivery of the Trial Judgement but that Nyiramasuhuko, Ntahobali, and Kanyabashi have failed to show that this error resulted in prejudice. The Appeals Chamber further finds that it has not been demonstrated that the Trial Chamber abused its discretion by not communicating the first *amicus curiae* report before the delivery of the Trial Judgement, erred in failing to consider and discuss in the Trial Judgement the contents of the *amici curiae* reports, or erred in deciding not to exclude from its consideration the evidence of Witnesses QY and SJ.

34. Furthermore, although the Appeals Chamber finds in the sections discussing Nyiramasuhuko's and Ntahobali's challenges to the Trial Chamber's findings related to the Butare Prefecture Office that the Trial Chamber erred in relying on Witnesses QY's and SJ's evidence in relation to the attacks at the prefectural office, it concludes that the Trial Chamber did not err in relying on Witnesses QY's and SJ's evidence for the events at the EER. The Appeals Chamber also finds no error in the Trial Chamber's assessment of the evidence of other Prosecution witnesses in relation to the allegations of false testimonies.

K. Right to be Tried Without Undue Delay

35. In the course of the proceedings, the Trial Chamber denied several motions filed by Nyiramasuhuko, Ntahobali, Kanyabashi, and Ndayambaje alleging violations of their right to be tried without undue delay. The Trial Chamber also considered the issue in the Trial Judgement and concluded that the co-Accused's right to be tried without undue delay had not been violated and that they had not demonstrated that they suffered any "legal prejudice".

36. Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje submit that the Trial Chamber erred in finding that their right to be tried without undue delay was not violated and that they did not suffer prejudice from the delays in the proceedings. Ntahobali and Nteziryayo add that it took an unreasonable time for the Tribunal to translate the Trial Judgement into French during the appellate phase of the proceedings.

37. For the reasons set forth in the Judgement, the Appeals Chamber rejects most of the contentions as they concern the Trial Chamber's determination that the trial of the co-Accused was not unduly delayed. The Appeals Chamber also dismisses the submission that the appeal proceedings were unduly delayed as a result of the unreasonable time taken to translate the Trial Judgement into French.

38. However, it transpires from the procedural history of this case that the Prosecution's failure to comply with its disclosure obligations and lack of readiness delayed the start of the trial by several months. The Prosecution does not provide any explanation as to why it was not in a position to disclose some of the relevant materials despite express orders from the Trial Chamber or why it repeatedly changed the date for its readiness to commence trial. The Appeals Chamber finds that the Prosecution's failure to fulfill its disclosure obligations and lack of readiness created unjustified delays in the start of the trial.

39. The Appeals Chamber further observes that, during the trial phase, the judges sitting in this case were also involved in several other proceedings before the Tribunal. It is unquestionable that the pace of the trial was affected by the judges' obligations in other cases. Whereas the proceedings in this case needed interruptions so as to allow the parties to prepare, the judges' obligations in other cases prevented them from sitting in this case for approximately 36 weeks. In light of the time required to dispose of the motions filed in these other cases, deliberate on their merits, and write the judgements, these additional obligations also necessarily significantly reduced the time the Trial Chamber judges could devote to the present case. The Appeals Chamber concludes that, in the particular circumstances of this case, where the co-Accused had already been in detention for nearly

4 to 6 years at the start of the trial and which had already suffered from significant delays, the additional delays resulting from the judges' simultaneous participation to other proceedings caused undue delay.

40. In light of the foregoing, the Appeals Chamber finds that Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje have demonstrated that the Trial Chamber erred in finding that their right to be tried without undue delay had not been violated, and that this violation caused them prejudice.

41. In the interests of justice, the Appeals Chamber finds *proprio motu* that the Trial Chamber also erred in finding that Nsabimana's right to be tried without undue delay had not been violated, and that this violation caused him prejudice.

42. The Appeals Chamber will rule on the appropriate remedy after examining the merits of the remaining challenges raised by the co-Appellants and the Prosecution and after reaching its final conclusions on the co-Appellants' guilt and individual circumstances.

III. APPEAL OF PAULINE NYIRAMASUHUKO

A. Fairness of the Proceedings

43. Nyiramasuhuko submits that the Trial Chamber demonstrated an appearance of bias through applying different standards when assessing Prosecution and Defence evidence. She also raises challenges related to Expert Witness André Guichaoua's report and testimony, the cross-examination of Prosecution witnesses, and the disclosure of potentially exculpatory material and information that could have assisted her in the preparation of her defence. For the reasons set forth in Judgement, the Appeals Chamber dismisses Nyiramasuhuko's appeal in respect of each of these challenges.

B. Indictment

44. Nyiramasuhuko submits that the Trial Chamber erred in authorising the Prosecution to amend her Indictment to add new charges against her and in rejecting her request for additional information raised in her preliminary motion alleging defects in the form of the Indictment. As detailed in the Judgement, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, rejects Nyiramasuhuko's allegations of error as they concern the Trial Chamber's decision to allow the

Prosecution leave to amend the Indictment. The Appeals Chamber further rejects Nyiramasuhuko's challenges to the dismissal of her requests for additional information.

45. Nyiramasuhuko also contends that she was not charged with the criminal conduct on the basis of which she was convicted or lacked notice thereof, and that she was materially prejudiced in the preparation of her defence.

46. Concerning Nyiramasuhuko's challenges to the pleading of her involvement in a conspiracy to commit genocide, the Appeals Chamber concludes that the Indictment was not defective regarding the pleading of Nyiramasuhuko's responsibility for conspiracy to commit genocide and that Nyiramasuhuko was put on adequate notice that she was alleged to have entered into an agreement to exterminate the Tutsi population with, among others, members of the Interim Government on or after 9 April 1994. The nature of the charge in this regard was further confirmed by the Prosecution in its opening statement and pre-trial brief, in which it specifically referred to a plan to commit genocide masterminded by the Interim Government and implemented by the co-Accused, including Nyiramasuhuko.

47. The Appeals Chamber turns to Nyiramasuhuko's submissions that the Trial Chamber erred in finding that she received sufficient notice with respect to her responsibility for crimes committed in relation to attacks at the Butare Prefecture Office.

48. As discussed in the Judgement, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in finding that her responsibility for the killing of Tutsis who had sought refuge at the Butare Prefecture Office was clearly pleaded in the Indictment. It also rejects Nyiramasuhuko's contention that the vagueness of the Indictment concerning her responsibility for rapes at the prefectural office was not curable and finds that Nyiramasuhuko has failed to demonstrate that she was not put on sufficient notice that she was charged on the basis of rapes perpetrated at the Butare Prefecture Office.

49. As it concerns her superior responsibility for crimes committed at the prefectural office, the Appeals Chamber concludes that, although the Trial Chamber erred in finding that the Indictment adequately identified Nyiramasuhuko's alleged subordinates, its error did not invalidate its decision to find Nyiramasuhuko responsible as a superior in connection with the killings and rapes perpetrated by *Interahamwe* that she ordered at the prefectural office. In this respect, the Appeals Chamber finds that the defect in the Indictment as regards the identification of these *Interahamwe* as her subordinates was subsequently cured by timely, clear, and consistent information.

50. Nyiramasuhuko also submits that the Trial Chamber erred in convicting her on the basis of the allegation concerning the distribution of condoms. However, the Appeals Chamber observes that she was not found guilty in relation to this event and considers that any error would not have any impact on Nyiramasuhuko's conviction or sentence. Furthermore, to the extent that this incident was relied upon as circumstantial evidence of Nyiramasuhuko's genocidal intent for different events, the Appeals Chamber finds that the evidentiary facts by which her *mens rea* was to be established did not need to be pleaded.

51. Finally, the Appeals Chamber dismisses Nyiramasuhuko's challenges pertaining to the cumulative effect of the defects in the Indictment, and in particular, her claim of prejudice resulting from the accumulation of defects in the Indictment.

C. Fabrication of Evidence and Genocide Survivors Groups

52. Nyiramasuhuko submits that the Trial Chamber erred in fact and in law in failing to assess the testimonies of Witnesses FAE, QBP, and SU with great caution given their membership in associations of genocide survivors. She further argues that the Trial Chamber erred in its consideration of or failed to consider Defence evidence that further reflected that these individuals or members of genocide survivors associations falsely accused persons. The Appeals Chamber considers that a witness's membership in an association of survivors alone does not imply a desire or motive to implicate the accused, nor does it render the witness's evidence tainted or his accounts unreliable or partial. It observes that the Trial Chamber explicitly addressed the Defence's allegations of evidence fabrication in the Trial Judgement and finds that Nyiramasuhuko does not demonstrate that the Trial Chamber's rejection thereof constituted an error.

D. Conspiracy to Commit Genocide

53. The Trial Chamber found that, from 9 April until 14 July 1994, and in particular between 9 April and 19 April 1994, Nyiramasuhuko agreed with other members of the Interim Government to issue directives to encourage the population to hunt down and kill Tutsis in Butare Prefecture. Specifically, it found that during a Cabinet meeting of the Interim Government held on 16 or 17 April 1994, Nyiramasuhuko agreed with other members of the Interim Government to remove as prefect of Butare Jean-Baptiste Habyalimana, who had posed an obstacle to the killing of Tutsis, and replace him with Nsabimana. The Trial Chamber further determined that, on 19 April 1994, Nyiramasuhuko attended Nsabimana's swearing-in ceremony as prefect of Butare, lending further support to the Interim Government's decision to replace Habyalimana. It considered that, by her presence and failure to dissociate herself from the content of Prime Minister Jean Kambanda's and

President Théodore Sindikubwabo's speeches during the ceremony, Nyiramasuhuko effectively endorsed their inflammatory statements. The Trial Chamber also held that the removal of Habyalimana, the appointment of Nsabimana as the new prefect, and Kambanda's and Sindikubwabo's speeches were "factors that coincided with the commencement of widespread killings" in Butare Prefecture. Furthermore, the Trial Chamber found that Nyiramasuhuko, as a member of the Interim Government, adopted and issued a directive of 27 April 1994 encouraging the population to mount and man roadblocks, the purpose of which was to encourage the killing of Tutsis.

54. On this basis, and considering Nyiramasuhuko's participation with the Interim Government in many of the Cabinet meetings at which the massacre of Tutsis was discussed and in decisions which triggered the onslaught of massacres in Butare Prefecture, the Trial Chamber concluded that the only reasonable conclusion was that Nyiramasuhuko entered into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture with the intent to destroy, in whole or in part, the Tutsi ethnic group. Consequently, the Trial Chamber convicted Nyiramasuhuko of conspiracy to commit genocide.

55. Nyiramasuhuko submits that the Trial Chamber erred in convicting her of conspiracy to commit genocide by: (i) exhibiting bias by adopting a differential treatment of the evidence between her and her co-accused; (ii) relying on her testimony to convict her; (iii) relying on expert evidence; (iv) its assessment of the 27 April Directive; (v) its assessment of Kambanda's and Sindikubwabo's Speeches; and (vi) making contradictory and inconsistent findings.

56. Having carefully considered each of the challenges in detail, and as set forth in the Judgement, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated any error with respect to each of the challenges that she presents on appeal. The Appeals Chamber concludes that she has not shown that the Trial Chamber erred in convicting her of conspiracy to commit genocide with members of the Interim Government.

E. Alibis

57. Nyiramasuhuko contends that, when evaluating her alibis, the Trial Chamber erred in finding that her notice of alibi was filed late and in its assessment of the alibi evidence relating to the periods of 14 to 16 May 1994 and early to mid-June 1994. The Appeals Chamber finds that Nyiramasuhuko fails to demonstrate any error that affects the conclusions of the Trial Chamber and dismisses her appeal in this respect.

F. Butare Prefecture Office

58. Nyiramasuhuko challenges the Trial Chamber's findings that she ordered the killings of Tutsis seeking refuge at the Butare Prefecture Office and that she could bear superior responsibility for such killings committed by *Interahamwe* as well as rapes committed by *Interahamwe* during attacks at the prefectural office from mid-May into the first half of June 1994. In particular, she contends that the Trial Chamber erred in: (i) making imprecise and improper findings; (ii) its assessment of the evidence; (iii) finding her responsible for ordering killings at the prefectural office; and (iv) finding her responsible as a superior for rapes committed by *Interahamwe* during attacks at the prefectural office.

59. Turning first to Nyiramasuhuko's contentions about imprecision in the Trial Judgement, the Appeals Chamber concludes that the Trial Judgement reflects that Nyiramasuhuko was convicted of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis taking refuge at the Butare Prefecture Office during an attack in mid-May 1994, also known as the Mid-May Attack, and during an attack around the end of May to the beginning of June 1994 when Ntahobali, Nyiramasuhuko, and *Interahamwe* came to the Butare Prefecture Office on three occasions in one night, also known as the Night of Three Attacks. The Trial Judgement also reflects that the Trial Chamber considered Nyiramasuhuko's superior responsibility for these killings as an aggravating factor in sentencing. The Appeals Chamber finds that Nyiramasuhuko was not convicted in relation to any of the killings committed during additional attacks in the first half of June 1994, also known as the First Half of June Attacks.

60. The Appeals Chamber also concludes that the Trial Judgement reflects that Nyiramasuhuko was convicted of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a

superior pursuant to Article 6(3) of the Statute for the rapes committed by *Interahamwe* following her orders during the Night of Three Attacks and one of the First Half of June Attacks.

61. The Appeals Chamber finds that the Trial Chamber erred in law in failing to provide a reasoned opinion with respect to Nyiramasuhuko's responsibility for ordering killings during the Mid-May Attack and the Night of Three Attacks and discusses whether the Trial Chamber's error invalidates the decision when assessing her responsibility for ordering killings below. The Appeals Chamber dismisses Nyiramasuhuko's remaining challenges concerning the imprecision or impropriety of the Trial Chamber's findings concerning her participation in crimes during attacks at the prefectural office.

62. The Appeals Chamber turns to Nyiramasuhuko's challenges to the Trial Chamber's assessment of the relevant evidence concerning the Mid-May Attack, the Night of Three Attacks, and the First Half of June Attacks. Nyiramasuhuko argues that the Trial Chamber committed errors such as relying on unpleaded and prejudicial evidence and failing to properly assess alleged collusion. She also contends that it erred in its assessment of identification evidence as well as the evidence specifically related to the aforementioned attacks.

63. The Appeals Chamber finds that the Trial Chamber committed certain errors in relation to its assessment of evidence concerning the Night of Three Attacks but concludes that these errors have not occasioned a miscarriage of justice. The Appeals Chamber dismisses the remainder of Nyiramasuhuko's appeal as it concerns the Trial Chamber's assessment of evidence in relation to these attacks.

64. Furthermore, and bearing in mind the Trial Chamber's failure to provide a reasoned opinion regarding Nyiramasuhuko's responsibility for ordering killings, the Appeals Chamber finds that the Trial Chamber's factual findings and the evidence it relied upon sustain the conclusion that Nyiramasuhuko bears responsibility under Article 6(1) of the Statute for ordering killings of Tutsis abducted from the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks. The Appeals Chamber also dismisses Nyiramasuhuko's contentions that the Trial Chamber erred in finding her responsible as a superior in relation to these attacks for failing to prevent the killing of refugees abducted from the Butare Prefecture Office perpetrated by *Interahamwe* following her orders and punish the *Interahamwe* who committed them. It further dismisses Nyiramasuhuko's allegations that the Trial Chamber erred in convicting her pursuant to Article 6(3) of the Statute in relation to the rapes committed by the *Interahamwe* following her orders at the Butare Prefecture Office.

65. Accordingly, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in convicting her for ordering the killing of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks pursuant to Article 6(1) of the Statute and as a superior pursuant to Article 6(3) of the Statute for the rapes committed by *Interahamwe* upon her orders during the Night of Three Attacks and one of the First Half of June Attacks. The Appeals Chamber further finds that Nyiramasuhuko has not shown that the Trial Chamber erred in finding that she bore superior responsibility for the killings perpetrated by *Interahamwe* upon her orders during the Mid-May Attack and the Night of Three Attacks and in considering her responsibility in this regard in sentencing.

G. Distribution of Condoms

66. Nyiramasuhuko challenges the Trial Chamber's findings, based on Witness FAE's evidence, that, at the beginning of June 1994, Nyiramasuhuko came to the Cyarwa-Sumo Sector, Ngoma Commune, and distributed condoms for the *Interahamwe* to be used in the raping and killing of Tutsi women in that sector.

67. The Appeals Chamber finds no merit in Nyiramasuhuko's apparent suggestion that she was convicted in relation to this incident, as the Trial Chamber only relied on this circumstantial evidence, among other evidence, to find that Nyiramasuhuko possessed the specific intent to commit genocide in relation to other events. Furthermore, the Appeals Chamber dismisses Nyiramasuhuko's contention that the Trial Chamber erred in its assessment of, and reliance on, Witness FAE's evidence. It also finds no error to the extent the Trial Chamber relied on this conduct as additional circumstantial evidence of Nyiramasuhuko's genocidal intent.

IV. APPEAL OF ARSÈNE SHALOM NTAHOBALI

A. Fairness of the Proceedings

68. Ntahobali raises challenges related to: (i) the amendment of Rule 90(G) of the Rules; (ii) the admissibility of documentary evidence; and (iii) the suspension of his lead investigator. The Appeals Chamber dismisses Ntahobali's appeal in these respects.

69. The Appeals Chamber further considers that, contrary to Ntahobali's submissions, there is no cumulative prejudice to assess as a result of Ntahobali's allegations of the violations of his fair trial rights and that no further remedy is warranted. It is also not persuaded that the cumulative

effect of the violations of his fair trial rights recognised by the Trial Chamber and the Appeals Chamber warrant further remedy in addition to those granted by the Trial Chamber and the Appeals Chamber.

B. Indictment

70. Ntahobali submits that the Trial Chamber erred in authorising the Prosecution to amend his Indictment to add charges of superior responsibility, that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof, and that he was materially prejudiced in the preparation of his defence.

71. The Appeals Chamber, Judge Pocar and Judge Liu dissenting, dismisses Ntahobali's contention related to the Trial Chamber's decision to grant leave to the Prosecution to amend the Indictment.

72. As it concerns Ntahobali's responsibility for the killings perpetrated at the IRST, the Appeals Chamber finds that the Trial Chamber erred in concluding that the defect in the Indictment concerning Ntahobali's responsibility for the killings perpetrated at the IRST on 21 April 1994 was cured. However, the Appeals Chamber concludes that, because he did not effectively show that his defence was materially impaired by the lack of adequate notice in this respect, Ntahobali has failed to demonstrate that the Trial Chamber's error invalidates its decision to convict him for ordering the killing of approximately 200 Tutsis at the IRST on 21 April 1994.

73. With respect to the pleading of Ntahobali's responsibility for committing killings at the Hotel Ihuliro roadblock, the Appeals Chamber finds that the Trial Chamber erred in considering that the date range "[b]etween April and July 1994" in the relevant paragraph of the Indictment gave "an adequate description of the time frame involved". However, the Appeals Chamber finds that the Trial Chamber's error in not considering that the Indictment was overly broad regarding the timeframe of the alleged abductions and killings committed at the Hotel Ihuliro roadblock did not invalidate its decision to convict Ntahobali on this basis as the defect was subsequently cured. The Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in any other respect regarding notice of the allegation that he committed killings at the roadblock.

74. Turning to Ntahobali's challenges that he received inadequate notice with respect to the Trial Chamber's findings that he ordered the killing of a man named Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, the Appeals Chamber concludes that the Trial Chamber did not err in finding that the vagueness of the Indictment concerning the killing of Ruvurajabo was cured

by the provision of timely, clear, and consistent information. As a result, his submissions pertaining to the prejudice he allegedly suffered from the lack of notice are without merit.

75. The Trial Chamber convicted Ntahobali for raping a Tutsi girl who arrived at the Hotel Ihuliro roadblock around the end of April 1994. It found that the relevant Indictment paragraphs were unduly vague and insufficient to put Ntahobali on notice of the Prosecution's intention to prove that he was responsible for abducting and then raping the girl but determined that the defect was cured. The Appeals Chamber concludes that Ntahobali has failed to demonstrate that the Trial Chamber erred in so finding.

76. As it concerns Ntahobali's responsibility for aiding and abetting the killing of the Rwamukwaya family, the Appeals Chamber finds that, although the Trial Chamber erred in concluding that the defects in the Indictment concerning Ntahobali's responsibility for this crime were cured, this error does not invalidate its decision to convict him on this basis as the Prosecution proved on appeal that Ntahobali's ability to prepare his defence in this respect was not materially impaired.

77. With respect to Ntahobali's responsibility for ordering killings in relation to attacks at the Butare Prefecture Office, the Appeals Chamber finds that the Trial Chamber erred in failing to conclude that the Indictment was vague as regards the pleading of the form of responsibility of ordering. However, the Appeals Chamber concludes that this error does not invalidate its decision to convict Ntahobali for ordering *Interahamwe* to kill Tutsis who were abducted from the prefectural office because the vagueness of the Indictment was remedied by the provision of timely, clear, and consistent information.

78. As it concerns Ntahobali's responsibility for rapes committed during attacks at the prefectural office, the Appeals Chamber notes that there is no dispute that the Indictment was defective regarding the pleading of Ntahobali's responsibility in this respect. However, it concludes that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that the defects in the Indictment concerning his responsibility for rapes at the prefectural office were curable and cured by timely, clear, and consistent information.

79. Turning to Ntahobali's challenges that he lacked sufficient notice of having aided and abetted crimes committed at or near the EER, the Appeals Chamber finds that the Trial Chamber erred in law by failing to address Ntahobali's contention regarding the pleading of his responsibility in this respect. However, the Appeals Chamber concludes that Ntahobali has not demonstrated that he lacked sufficient notice of the allegation that he aided and abetted by tacit approval and

encouragement the killing of Tutsi refugees at or near the EER between mid-May and the beginning of June 1994. Consequently, the Appeals Chamber finds that the Trial Chamber's error does not invalidate its decision to convict him on this basis.

80. The Appeals Chamber also finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding him responsible as a superior under Article 6(3) of the Statute for crimes perpetrated at the Hotel Ihuliro roadblock and against Tutsis who had sought refuge at the prefectural office and the EER based on lack of notice.

81. Finally, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in concluding that his trial had not been rendered unfair due to the number of defects in his Indictment.

C. Admission and Assessment of Co-Accused's Evidence

82. Ntahobali submits that the Trial Chamber erred in finding him guilty in relation to various crimes based in part on its reliance upon evidence by his co-accused. The Appeals Chamber finds that Ntahobali's submissions related to the admission and assessment of such evidence concerning the killing of the Rwamukwaya family are moot. It further finds that he does not otherwise demonstrate error in relation to the remainder of his appeal in this respect.

D. Alibis

83. Ntahobali submits that the Trial Chamber erred in its assessment of the alibi evidence relating to the periods between late April and early May 1994 and between 26 or 27 May and 5 June 1994, and requests that the Appeals Chamber overturn his convictions for the crimes committed during these periods of time. While the Appeals Chamber finds that the Trial Chamber erred in failing to consider aspects of a Defence witness's evidence, for the reasons explained in the Judgement, this error does not invalidate the Trial Chamber's conclusion that Ntahobali's alibis were not credible. He does not otherwise demonstrate that the Trial Chamber erred in rejecting his alibis.

E. Institut de Recherche Scientifique et Technique

84. The Trial Chamber relied exclusively on the evidence of Witness QCB to conclude that Ntahobali participated in the abduction of 40 Tutsis at the Rugira roadblock and that he subsequently ordered *Interahamwe* to kill these and other Tutsis at the *Institut de Recherche Scientifique et Technique*, also known as the IRST. Ntahobali submits that the Trial Chamber erred

in law and in fact in its assessment of the evidence. He further argues that the Trial Chamber's findings fail to support his liability for ordering the killings under Article 6(1) of the Statute.

85. The Appeals Chamber finds that Ntahobali has not demonstrated any error in the Trial Chamber's assessment of the evidence related to this event. Having considered the additional evidence admitted on appeal relating to Witness QCB's credibility as well as the trial record, the Appeals Chamber is itself convinced beyond reasonable doubt of Ntahobali's guilt concerning the killing of approximately 200 refugees at the IRST on 21 April 1994. It further finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding him responsible under Article 6(1) of the Statute on the basis of ordering the killings perpetrated at the IRST.

F. Hotel Ihuliro Roadblock

86. The Trial Chamber found that a roadblock was erected in Butare Town near Hotel Ihuliro in late April 1994. It also determined that Ntahobali manned the roadblock, which was used to abduct and kill members of the Tutsi population. In particular, the Trial Chamber found that Ntahobali ordered the killing of Ruvurajabo at this roadblock on 21 April 1994 and that he raped and murdered a Tutsi girl at the same roadblock around the end of April 1994. The Trial Judgement also reflects that Ntahobali was found responsible for having physically perpetrated the killing of multiple Tutsis at the roadblock, including but not limited to the killing of the Tutsi girl.

87. On these bases, the Trial Chamber convicted Ntahobali pursuant to Article 6(1) of the Statute of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Convention and of Additional Protocol II. It further found that he could bear superior responsibility pursuant to Article 6(3) of the Statute for the conduct of the *Interahamwe* who killed Ruvurajabo and considered this as an aggravating factor in sentencing.

88. For the reasons explained in the Judgement, the Appeals Chamber finds that no reasonable trier of fact could have found that Ntahobali physically perpetrated killings of Tutsis at the Hotel Ihuliro roadblock in addition to that of the Tutsi girl. Consequently, it reverses Ntahobali's convictions pursuant to Article 6(1) of the Statute for committing killings of Tutsis at the Hotel Ihuliro roadblock other than that of the Tutsi girl. However, the Appeals Chamber concludes that Ntahobali has failed to demonstrate any error in the Trial Chamber's conclusions on the date of the establishment of the Hotel Ihuliro roadblock, his responsibility for the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, and his responsibility for the rape and murder of a Tutsi girl at the same roadblock around the end of April 1994. With respect to the killing of Ruvurajabo specifically, the Appeals Chamber, having considered the additional evidence admitted on appeal as

well as the trial record, is itself convinced beyond reasonable doubt of Ntahobali's guilt in relation to this event.

G. Killing of the Rwamukwaya Family

89. The Trial Chamber found that an individual named Rwamukwaya and his family, who were of Tutsi ethnicity, were killed on or about 29 or 30 April 1994, after Ntahobali had threatened to kill them. The Trial Chamber held that “[g]iven the narrow time frames involved between Ntahobali’s threat pronounced against the Rwamukwaya family, the sighting of their bodies, and the first sightings of Ntahobali in a vehicle known to have belonged to Rwamukwaya, [...] the inference drawn as to Ntahobali’s responsibility in the killing of the Rwamukwaya family is the only reasonable conclusion based on the totality of the evidence.” The Trial Chamber further found that Ntahobali’s threat substantially contributed to the commission of the Rwamukwayas’ death and that he was aware of the principal perpetrators’ genocidal intent. The Trial Chamber convicted Ntahobali under Article 6(1) of the Statute for aiding and abetting these killings.

90. The Appeals Chamber finds that, even if Ntahobali’s threat against the family, their death, and his coming into possession of their vehicle were temporally proximate and occurred in that order, this is an insufficient basis to infer as the only reasonable conclusion that Ntahobali’s conduct had a substantial effect on the commission of the killing of the Rwamukwaya family. The Trial Chamber made no findings about the circumstances of the killing of the Rwamukwaya family, its principal perpetrators, including whether they acted pursuant to Ntahobali’s threat to kill the Rwamukwaya family, or the circumstances in which Ntahobali came into possession of Rwamukwaya’s vehicle. Nor did the Trial Chamber refer to any evidence in these respects. Likewise, while the Trial Chamber concluded that unidentified principal perpetrators committed the killing with the requisite genocidal intent and that Ntahobali was aware of this intent, it did not refer to any of its factual findings or evidence on the record to substantiate this conclusion. Consequently, the Appeals Chamber concludes that the Trial Chamber erred in finding that Ntahobali aided and abetted the killing of the Rwamukwaya family on or about 29 or 30 April 1994 and reverses his convictions entered on this basis.

H. Butare Prefecture Office

91. Ntahobali challenges the Trial Chamber’s findings that he could bear responsibility for ordering killings as well as its findings that he committed, ordered, and aided and abetted rapes in relation to various attacks at the Butare Prefecture Office. He further appeals the Trial Chamber’s findings that he could bear responsibility as a superior in relation to crimes committed during these

attacks. In particular, he contends that the Trial Chamber erred in: (i) making imprecise or unsupported findings; (ii) its assessment of the evidence; (iii) convicting him for ordering killings and rapes committed during attacks at the prefectoral office; and (iv) finding that he bore superior responsibility for the killings and rapes committed by *Interahamwe* during attacks at the prefectoral office.

92. Turning first to Ntahobali's contentions relating to imprecision in the Trial Judgement, the Appeals Chamber concludes that the Trial Judgement reflects that Ntahobali was convicted pursuant to Article 6(1) of the Statute in relation to the Butare Prefecture Office for: (i) ordering killings and committing the rape of Witness TA during the Mid-May Attack; (ii) ordering the rapes of six women and committing the rape of Witness TA during an attack seven days after the Mid-May Attack; (iii) ordering the rapes of Witness TA during an attack 11 days after the Mid-May Attack; and (iv) aiding and abetting Witness TA's rape during one of the First Half of June Attacks. For reasons explained in the Judgement, the Appeals Chamber reverses the Trial Chamber's finding that Ntahobali is responsible for committing the rape of any Tutsi woman other than Witness TA at the prefectoral office. In addition, the Appeals Chamber, Judge Khan dissenting, finds that the Trial Judgement does not reflect that Ntahobali was convicted for ordering killings during attacks other than the Mid-May Attack.

93. With respect to imprecision regarding Ntahobali's responsibility as a superior pursuant to Article 6(3) of the Statute, the Appeals Chamber finds that the Trial Judgement clearly reflects that the Trial Chamber held Ntahobali responsible as a superior in connection with only those crimes that he ordered and for which he was convicted under Article 6(1) of the Statute. Consequently, the Trial Judgement reflects that Ntahobali was found to bear superior responsibility over *Interahamwe* who killed "Tutsis forced to board the pickup" truck during the Mid-May Attack and who raped Witness TA and six other women during attacks seven and 11 days after the Mid-May Attack.

94. The Appeals Chamber turns to Ntahobali's challenges to the Trial Chamber's assessment of the relevant evidence concerning the Mid-May Attack, the attacks seven and 11 days after the Mid-May Attack, also known as the Last Half of May Attacks, the Night of Three Attacks, and the First Half of June Attacks.

95. Ntahobali submits that the Trial Chamber erred in: (i) reversing the burden of proof; (ii) admitting and making findings on unpleaded and prejudicial evidence; (iii) rejecting admissible evidence; (iv) inferring trauma to justify inconsistencies in the Prosecution evidence; (v) improperly assessing expert testimony; and (vi) failing to consider exculpatory evidence. He further argues that the Trial Chamber erred in its assessment of identification evidence as well as its assessment of the

evidence specifically pertaining to the Mid-May Attack, the Last Half of May Attacks, the Night of Three Attacks, the First Half of June Attacks, and the number of refugees abducted and killed from the prefectoral office.

96. The Appeals Chamber finds that the Trial Chamber committed certain errors in relation to its assessment of identification evidence concerning the Mid-May Attack as well as evidence related to the Night of Three Attacks. However, it concludes that these errors have not occasioned a miscarriage of justice. It further considers that, although it affirmed Ntahobali's criminal responsibility for the killings of Tutsi refugees abducted during the Mid-May Attack, the Trial Chamber's apparent attribution of responsibility to Ntahobali for the killings of hundreds of Tutsi refugees abducted from the Butare Prefectural Office is not sustained by the record or is based on findings for which Ntahobali was not convicted by the Trial Chamber. The Appeals Chamber dismisses the remainder of Ntahobali's challenges to the Trial Chamber's assessment of evidence concerning the events at the Butare Prefecture Office.

97. Turning to Ntahobali's challenges as they concern his responsibility pursuant to Articles 6(1) and 6(3) of the Statute, the Appeals Chamber first examines the Trial Chamber's findings in relation to ordering killings during the Mid-May Attack. The Appeals Chamber concludes that the Trial Chamber erred in its obligation to provide a reasoned opinion. However, the Appeals Chamber, Judge Liu dissenting, finds that this error does not invalidate the Trial Chamber's decision, as its findings and relevant evidence sustain its conclusion that Ntahobali is responsible under Article 6(1) of the Statute for ordering the killings of numerous Tutsi refugees who were forced on board the pickup truck during the Mid-May Attack at the Butare Prefecture Office. The Appeals Chamber, Judge Liu dissenting, further finds that the Trial Chamber did not err in concluding that Ntahobali could bear superior responsibility for killings committed by *Interahamwe* on the basis of his orders.

98. As it concerns Ntahobali's responsibility for ordering rapes in relation to attacks at the prefectoral office, the Appeals Chamber concludes that no reasonable trier of fact could have found Ntahobali responsible for ordering rapes during the attack seven days after the Mid-May Attack on the basis of Witness TA's evidence. The Appeals Chamber further concludes that the Trial Chamber erred in finding that Ntahobali could bear superior responsibility under Article 6(3) of the Statute for these rapes.

99. However, the Appeals Chamber concludes that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that he was liable for ordering *Interahamwe* to rape Witness TA during the attack 11 days after the Mid-May Attack. The Appeals Chamber, Judge Liu dissenting,

further finds no error by the Trial Chamber in finding that Ntahobali could also bear superior responsibility under Article 6(3) of the Statute on this basis.

100. The Appeals Chamber also affirms Ntahobali's responsibility for committing the rapes of Witness TA during the Mid-May Attack and during the attack seven days later as well as aiding and abetting the rapes of Witness TA during one of the First Half of June Attacks.

I. École Évangéliste du Rwanda

101. Ntahobali appeals the Trial Chamber's findings concerning his criminal responsibility for the killing of Tutsi refugees abducted from the *École Évangéliste du Rwanda*, also known as the EER, between mid-May and the beginning of June 1994. In particular, he argues that the Trial Chamber erred in: (i) making imprecise findings in relation to the crimes committed at the EER, violating his right to a reasoned opinion; (ii) its assessment of the evidence relating to these events; (iii) its assessment of his responsibility for aiding and abetting; and (iv) finding that he was responsible as a superior for these crimes.

102. The Appeals Chamber first considers Ntahobali's contentions concerning imprecision in the Trial Judgement. The Appeals Chamber finds that the Trial Judgement clearly shows that his aiding and abetting liability under Article 6(1) of the Statute is predicated on the criminal conduct of *Interahamwe* and soldiers that took place during attacks conducted in his presence and that he was not convicted of the crimes committed in his absence. As it concerns his responsibility under Article 6(3) of the Statute, the Appeals Chamber finds that the Trial Judgement indicates that Ntahobali was only held responsible as a superior on the basis of the killings perpetrated by the *Interahamwe* that he tacitly approved and encouraged by his presence alongside them and that he was not held responsible for all crimes committed by the *Interahamwe* at the EER. Consequently, the Appeals Chamber dismisses Ntahobali's contentions that the Trial Chamber erred by making imprecise findings.

103. With respect to his challenges to the Trial Chamber's assessment of the evidence, the Appeals Chamber finds that the Trial Chamber erred in relying on Witness QY's prior sightings of Ntahobali on two occasions in support of her identification of him at the EER. However, the Appeals Chamber concludes that this error has not occasioned a miscarriage of justice and that Ntahobali has not demonstrated that no reasonable trier of fact could have relied on Witness QY's identification of him at the EER. The Appeals Chamber dismisses the remainder of Ntahobali's challenges to the Trial Chamber's overall assessment of the evidence relating to the events at the EER.

104. As for Ntahobali's challenges concerning his responsibility under Article 6(1) of the Statute for aiding and abetting the killing of Tutsi refugees at or near the EER, the Appeals Chamber finds that the Trial Chamber erred in relying on Ntahobali's prior conduct at the Hotel Ihuliro roadblock and the Butare Prefecture Office to establish his criminal responsibility for aiding and abetting the killings perpetrated by *Interahamwe* and soldiers at or near the EER. However, the Appeals Chamber finds that this error does not invalidate the Trial Chamber's decision to convict Ntahobali for aiding and abetting these killings in light of the Trial Chamber's factual findings and the relevant evidence it relied upon concerning his authority over the *Interahamwe* and soldiers during the attacks on the EER. The Appeals Chamber concludes that Ntahobali has not demonstrated that the Trial Chamber erred in finding him responsible for aiding and abetting by tacit approval and encouragement of the killings of Tutsi refugees perpetrated by *Interahamwe* and soldiers at or near the EER during attacks conducted in his presence. The Appeals Chamber further finds no error in the Trial Chamber's conclusion that Ntahobali was also responsible as a superior pursuant to Article 6(3) of the Statute for the killings committed by the *Interahamwe* at or near the EER.

105. Consequently, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in convicting him pursuant to Article 6(1) of the Statute for aiding and abetting the killings of Tutsi refugees abducted from the EER between mid-May and the beginning of June 1994 and in concluding that he bore superior responsibility under Article 6(3) of the Statute for the above killings committed by the *Interahamwe*.

J. Crime of Extermination

106. Ntahobali challenges the Trial Chamber's finding that the killings perpetrated at the Hotel Ihuliro roadblock and the killing of the Rwamukwaya family, "considered individually or collectively", support the conclusion that they were committed on a large scale and that they reach the threshold for a conviction for extermination as a crime against humanity.

107. Because the Appeals Chamber has reversed Ntahobali's conviction for extermination as a crime against humanity based on the killing of the Rwamukwaya family and his convictions on the basis of committing killings of Tutsis at the Hotel Ihuliro roadblock beyond the killing of the Tutsi girl, his arguments in this respect are moot. As to his contentions concerning the remaining killings of Ruvurajabo and the Tutsi girl at the Hotel Ihuliro roadblock in late April 1994, there can be no dispute that, taken by themselves, the individual killings of these two individuals do not meet the large scale requirement for the crime of extermination as a crime against humanity. However, the Appeals Chamber observes that the two killings perpetrated at the Hotel Ihuliro roadblock were perpetrated in the same commune, in similar circumstances, by the same category of perpetrators,

and approximately at the same time as the numerous killings perpetrated at the locations near the IRST, at or near the EER, and the killings of Tutsis abducted from the Butare Prefecture Office. Consequently, the Appeals Chamber finds no error in the Trial Chamber's collective consideration of the events in relation of which Ntahobali was convicted to find him guilty of extermination as a crime against humanity for the killings perpetrated at the Hotel Ihuliro roadblock and all other killings for which he remains convicted.

K. Crime of Persecution

108. Ntahobali challenges his convictions for committing, ordering, and aiding and abetting persecution as a crime against humanity on the basis of killings of Tutsis between April and June 1994. In particular, he submits that the Trial Chamber erred in law in finding that he and the principal perpetrators acted with discriminatory intent and that discrimination on ethnic grounds could constitute persecution as a crime against humanity pursuant to Article 3(h) of the Statute. He contends that Article 3(h) of the Statute does not include ethnicity among the listed discriminatory grounds and that the Trial Chamber therefore violated the principle of legality and went beyond the intention of the drafters of the Statute, who limited the scope of persecution to political, racial, and religious grounds.

109. The Appeals Chamber notes that Article 3(h) of the Statute limits the jurisdiction of the Tribunal over persecution as a crime against humanity to three listed discriminatory grounds, namely political, racial, and religious grounds. According to a textual and contextual interpretation of Article 3(h) of the Statute, the Appeals Chamber, Judge Agius dissenting, also finds that "ethnicity" cannot be interpreted as being included in the list of discriminatory grounds enumerated therein. Moreover, and contrary to the holding of the Trial Chamber, the Appeals Chamber in the *Nahimana et al.* case did not extend the *mens rea* for this crime to include "ethnicity" as an additional discriminatory ground.

110. Consequently, the Appeals Chamber finds that the Trial Chamber applied an incorrect legal standard in convicting Ntahobali of persecution as a crime against humanity on the basis that he acted with discriminatory intent on ethnic grounds. It applied a similar incorrect legal standard in convicting Nyiramasuhuko, Nsabimana, Kanyabashi, and Ndayambaje of persecution as a crime against humanity on the basis that they acted with discriminatory intent on ethnic grounds.

111. In light of this error of law, the Appeals Chamber has reviewed the relevant factual findings of the Trial Chamber and concludes, Judge Agius dissenting, that they do not support the conclusion that Ntahobali as well as Nyiramasuhuko, Nsabimana, Kanyabashi, and Ndayambaje

committed persecution as a crime against humanity on one of the three discriminatory grounds enumerated in Article 3(h) of the Statute, namely on political, racial, or religious grounds. Consequently, the Appeals Chamber, Judge Agius dissenting, reverses Ntahobali's, Nyiramasuhuko's, Nsabimana's, Kanyabashi's, and Ndayambaje's convictions for persecution as a crime against humanity.

V. APPEAL OF SYLVAIN NSABIMANA

A. Indictment

112. Nsabimana submits that he was not fully informed of the charge against him in relation to his responsibility for crimes committed at the Butare Prefecture Office and could not adequately prepare his defence. For the reasons explained in the Judgement, the Appeals Chamber concludes that Nsabimana has failed to demonstrate that the Trial Chamber erred in finding that he was put on adequate notice of the charge on the basis of which he was convicted and dismisses his appeal in this respect.

B. Nsabimana's Swearing-In Ceremony

113. Nsabimana challenges the Trial Chamber's conclusion that, during his attendance at his swearing-in ceremony as prefect of Butare on 19 April 1994, he gave tacit approval to the inflammatory statements made by President Théodore Sindikubwabo and Prime Minister Jean Kambanda on that occasion, which encouraged the population to kill Tutsis and incited genocide.

114. The Appeals Chamber observes that the Trial Chamber did not convict Nsabimana on the basis of his conduct at the swearing-in ceremony. Furthermore, the conduct for which he was convicted is not based on the finding that he gave his tacit approval to Kambanda's and Sindikubwabo's speeches. Consequently, the Appeals Chamber dismisses this aspect of Nsabimana's appeal.

C. Admission and Reliance on Prejudicial Evidence

115. Nsabimana submits that the Trial Chamber erred in admitting and relying on the evidence of several Prosecution witnesses to find him responsible for aiding and abetting by omission the killings of Tutsi refugees abducted from the prefectural office because he received no notice that these witnesses would testify against him. He further submits that the Trial Chamber erred in

admitting and relying on a Prosecution witness's evidence concerning one Alphonse because this event was not pleaded in the Indictment.

116. The Appeals Chamber finds that the Trial Chamber infringed Nsabimana's right to a reasoned opinion by failing to fully address arguments in his closing brief that the evidence of certain Prosecution witnesses should be excluded. However, it concludes that this error does not invalidate the Trial Chamber's decision to rely on the impugned evidence because Nsabimana does not show how the Trial Chamber's reliance thereon violated his right to adequate time to prepare his defence or, if it did, caused him prejudice. The Appeals Chamber dismisses the remainder of Nsabimana's appeal in this respect.

D. Butare Prefecture Office

117. In finding Nsabimana responsible under Article 6(1) of the Statute for aiding and abetting by omission the killings of Tutsis who had sought refuge at the Butare Prefecture Office, the Trial Chamber made the following findings as it concerned the *actus reus* for this mode of responsibility. It concluded that, in his capacity as prefect, Nsabimana had the legal duty to provide assistance to people in danger, to ensure the tranquillity, public order, and security of people, and to protect civilians, including the wounded and sick, against acts or threats of violence. It further held that, by refusing to take action in the midst of the continuing attacks at the prefectural office, Nsabimana assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the perpetration of their attacks, that his failure to act had a substantial effect on the realisation of their crimes, and that he had the means available to him to "forestall these harms, but he did nothing".

118. Nsabimana contends that the Trial Chamber erred as individual responsibility by omission under Article 6(1) of the Statute can only be incurred where the alleged omission is punishable under a rule of criminal law and because the Trial Chamber failed to indicate the legal sanction provided under such texts. However, the Appeals Chamber observes that the Trial Chamber, in part, found that Nsabimana's duty to act stemmed notably from Rwandan criminal law. The Appeals Chamber concludes that Nsabimana fails to demonstrate that the Trial Chamber erred in relying on Article 256 of the Rwandan Penal Code or that it was under the obligation to specify the criminal sanction incurred from the violation of this provision. The Appeals Chamber dismisses his appeal in this respect.

119. As regards Nsabimana's contention that the Trial Chamber erred in concluding that his omission substantially assisted the perpetration of the crimes, the Appeals Chamber, for the reasons explained in the Judgement, finds that Nsabimana's contentions fail to identify any error that could

invalidate the verdict or could have occasioned a miscarriage of justice. Similarly, the Appeals Chamber dismisses Nsabimana's arguments regarding his ability to act. Consequently, Nsabimana has not demonstrated that the Trial Chamber erred in finding that the *actus reus* for aiding and abetting by omission had been satisfied.

120. In determining that Nsabimana possessed the requisite *mens rea* for aiding and abetting by omission the killings of Tutsis who had sought refuge at the Butare Prefecture Office, the Trial Chamber found that Nsabimana knew of the night-time attacks at the prefectural office before the end of May 1994 and that the Tutsis seeking refuge there were being abducted, raped, and killed. It further found that Nsabimana was aware of the perpetrators' genocidal intent and that he also knew that his failure to act assisted in the commission of the crimes. Nsabimana disputes each of these conclusions.

121. As it concerns the Trial Chamber's finding that Nsabimana knew of night-time attacks, the Appeals Chamber finds that the Trial Chamber erred in the assessment of, and reliance on, Exhibits P113 and P114 as well as parts of Nsabimana's testimony. However, in light of the evidence of several Prosecution witnesses and "the open and notorious nature of the attacks" at the prefectural office relied upon by the Trial Chamber in determining Nsabimana's knowledge of the attacks at the prefectural office prior to the end of May 1994, the Appeals Chamber finds that these errors have not occasioned a miscarriage of justice.

122. With respect to the Trial Chamber's finding that Nsabimana was aware of the perpetrators' genocidal intent, the Appeals Chamber finds that no reasonable trier of fact could have relied on Exhibit P114 to conclude that "Nsabimana admitted that he was aware of a plan to kill Tutsis, that Tutsis were being killed, and that the militia had been trained for this purpose." However, the Appeals Chamber concludes that this error has not occasioned a miscarriage of justice as Nsabimana does not demonstrate any error in the Trial Chamber's reliance on Exhibit P113 as supporting the conclusion that he was aware of the principal perpetrators' genocidal intent. Neither has Nsabimana demonstrated that the Trial Chamber erred in concluding that he was actually aware of night-time attacks which were specifically targeted against Tutsis at the prefectural office earlier than the end of May 1994 and which involved, *inter alia*, the abduction, rape, and killings of Tutsis.

123. Finally, as explained in the Judgement, Nsabimana has not demonstrated that the Trial Chamber erred in finding that he knew that his failure to act assisted in the commission of the crimes. Consequently, the Appeals Chamber finds that Nsabimana has failed to demonstrate that the Trial Chamber erred in finding that he possessed the requisite *mens rea* for the mode of liability of aiding and abetting by omission.

124. The Appeals Chamber therefore finds that Nsabimana has not demonstrated that the Trial Chamber erred in convicting him of genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killing of Tutsis who had sought refuge at the Butare Prefecture Office by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence.

VI. APPEAL OF ALPHONSE NTEZIRYAYO

A. Indictment

125. Nteziryayo submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof. He further contends that the cumulative effect of the defects in the Indictment “not only rendered the totality of the trial process unfair and caused [him] substantial prejudice, but also invalidate the substantive findings of the Trial Judgment.”

126. As it concerns Nteziryayo’s responsibility for the direct and public incitement to commit genocide based on his statements at Ndayambaje’s swearing-in ceremony as Muganza Commune *bourgmestre*, the Appeals Chamber concludes that Nteziryayo has not demonstrated that the Trial Chamber ultimately erred in finding that he was put on notice that he was charged with direct and public incitement to commit genocide based on his utterances at this event and that he did not suffer prejudice.

127. Turning to Nteziryayo’s challenges that the Trial Chamber erred in finding that he had sufficient notice of the Muyaga and Kibayi Communes meetings, the Appeals Chamber finds that the Indictment is manifestly defective in relation to the allegations concerning Nteziryayo’s speeches at these meetings. However, the Appeals Chamber finds that the allegations did not constitute new charges but fell within the broader allegation relating to Nteziryayo’s public incitement to exterminate the Tutsi population in Butare Prefecture between April and July 1994 expressly pleaded in the Indictment. Accordingly, the Appeals Chamber considers that the defects in the Indictment regarding Nteziryayo’s responsibility for direct and public incitement at meetings held in Muyaga and Kibayi Communes were curable.

128. As to whether the defects were cured, the Appeals Chamber concludes that Trial Chamber erred in finding that the defects in the Indictment were cured as they relate to the dates of the

Muyaga Commune and Kibayi Commune meetings at which Nteziryayo would have incited the commission of genocide. However, the Appeals Chamber finds that these errors do not invalidate the Trial Chamber's decision to convict Nteziryayo on the basis of these meetings as the Prosecution has proven on appeal that Nteziryayo's ability to prepare his defence was not materially impaired. The Appeals Chamber further finds that the Trial Chamber did not err in concluding that defects as to the location of the Kibayi Commune meeting were cured.

129. Finally, the Appeals Chamber dismisses Nteziryayo's claim of prejudice resulting from the accumulation of defects in the Indictment as he has not shown that their cumulative effect materially hampered the preparation of his defence.

B. Ndayambaje's Swearing-In Ceremony

130. The Trial Chamber found that, during Ndayambaje's public swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994 held in the woods near the Muganza commune office, Nteziryayo and Ndayambaje told the population to continue with their "work", urged them to "sweep the dirt outside", and instructed that those hiding Tutsis who refused to hand them over should be killed. The Trial Chamber convicted Nteziryayo of committing direct and public incitement to commit genocide on the basis of his statements.

131. Nteziryayo raises several challenges to the Trial Chamber's assessment of evidence related to this event. The Appeals Chamber finds that no reasonable trier of fact could have relied on the evidence of certain Prosecution witnesses alone to find that Ndayambaje's swearing-in ceremony occurred specifically "on or around 22 June 1994" considering the ambiguity in their evidence as to its precise date. However, the Appeals Chamber concludes that this error has not occasioned a miscarriage of justice given other features of the evidence that the Trial Chamber relied upon to find that these witnesses were discussing Ndayambaje's swearing-in ceremony. Furthermore, and for the reasons explained in the Judgement, the Appeals Chamber dismisses the remainder of Nteziryayo's submissions that the Trial Chamber erred in its assessment of the Prosecution and Defence evidence. The Appeals Chamber therefore finds that Nteziryayo has failed to demonstrate any error in relation to his conviction for direct and public incitement to commit genocide based on his statements at Ndayambaje's swearing-in ceremony.

C. Muyaga Commune Meeting

132. The Trial Chamber found that, around mid-June 1994, Nteziryayo, in his capacity as Butare Prefect, attended a public meeting in Mamba Sector, Muyaga Commune, at which he incited the population to kill Tutsis by urging the audience to "hunt down, flush out and kill Tutsis without any

distinction”. It convicted him of committing direct and public incitement to commit genocide on this basis.

133. In reaching its findings, the Trial Chamber observed that Prosecution and Defence evidence consistently reflected that Nteziryayo spoke at a meeting in Muyaga Commune. However, the Trial Chamber determined that the evidence from the Defence did not concern the event discussed by the Prosecution witnesses and that it had “no bearing upon” the Trial Chamber’s assessment of the meeting testified to by the relevant Prosecution witnesses. The Trial Chamber convicted Nteziryayo of committing direct and public incitement to commit genocide on the basis of this event.

134. Nteziryayo raises several allegations as it concerns the Trial Chamber’s assessment of the Prosecution and Defence evidence. He further emphasises that the Trial Chamber erred in determining that the Prosecution witnesses testified about a meeting other than the meeting described by the Defence witnesses and, consequently, in concluding that the Defence evidence was irrelevant to the assessment of the Prosecution case.

135. The Appeals Chamber finds that the Trial Chamber failed in its obligation to provide a reasoned opinion when finding that the Defence evidence had no bearing on the Prosecution case. However, for the reasons developed in the Judgment, the Appeals Chamber finds that this error does not invalidate the Trial Chamber’s conclusion that Prosecution and Defence witnesses were talking about two different meetings. The Appeals Chamber dismisses the remainder of Nteziryayo’s challenges to the Trial Chamber’s assessment of evidence and finds that Nteziryayo has failed to demonstrate that the Trial Chamber erred in finding that he incited the commission of genocide during a meeting held in Muyaga Commune around mid-June 1994 and, on this basis, convicting him of direct and public incitement to commit genocide.

D. Kibayi Commune Meeting

136. The Trial Chamber convicted Nteziryayo of committing direct and public incitement to commit genocide based on its findings that, around mid to late June 1994, Nteziryayo, in his capacity as Butare Prefect, attended a public meeting on a football pitch next to the Kibayi commune office in Nyabisigara *Cellule*, Mukindo Sector, at which he incited the population to “flush out and kill the remaining Tutsis survivors in the *commune*”.

137. The Trial Chamber observed that Prosecution and Defence witnesses all testified to attending public meetings on a football pitch next to the Kibayi commune office. However, it concluded that the evidence led by the parties concerned two different meetings, and that the evidence led by the Defence regarding a meeting that took place on 24 May 1994 was therefore

“not relevant” and did not rebut the Prosecution evidence with respect to the subsequent meeting at the Kibayi commune office when Nteziryayo was prefect.

138. Nteziryayo raises several allegations of error concerning the Trial Chamber’s assessment of the Prosecution and Defence evidence. He further argues that the Trial Chamber erred in determining that the Prosecution witnesses testified about a meeting other than that described by the Defence witnesses and in dismissing the Defence evidence as irrelevant.

139. The Appeals Chamber finds that the Trial Chamber erred in considering that a certain aspect of a Prosecution witness’s evidence that several meetings occurred in Kibayi Commune was inconsistent with Defence evidence that only one public meeting was held. However, the Appeals Chamber finds that this error has not occasioned a miscarriage of justice. The Appeals Chamber further rejects the remainder of Nteziryayo’s challenges to the Trial Chamber’s assessment of the evidence concerning this event. The Appeals Chamber therefore finds that Nteziryayo has failed to demonstrate that the Trial Chamber erred in finding that he incited the commission of genocide during a meeting held in Kibayi Commune around mid to late June 1994 and, on this basis, in convicting him of direct and public incitement to commit genocide.

E. Prejudicial Assessment of Evidence

140. Nteziryayo submits that the Trial Chamber erred in applying different standards in assessing Prosecution and Defence evidence, which, in his view, invalidates all of his convictions. For the reasons set forth in the Judgement, the Appeals Chamber dismisses Nteziryayo’s appeal in this respect.

VII. APPEAL OF JOSEPH KANYABSHI

A. Variation of Witness List and Reopening of Case

141. Kanyabashi submits that the Trial Chamber erred in three decisions by not allowing him to vary his witness list as requested or to reopen his case to hear the proposed witnesses concerning the Kabakobwa Hill killings and the megaphone announcements. For the reasons explained in the Judgement, the Appeals Chamber finds that Kanyabashi has failed to demonstrate any discernible error in the exercise of the Trial Chamber’s discretion with respect to these decisions and dismisses his appeal in this respect.

B. Indictment

142. Kanyabashi submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof, and that he was materially prejudiced in the preparation of his defence. He also contends that the Trial Chamber erred in failing to assess the cumulative effect of the numerous defects of the Indictment on his fair trial rights.

143. With respect to Kanyabashi's convictions as a superior pursuant to Article 6(3) of the Statute in relation to the killings perpetrated by communal policemen at Kabakobwa Hill on 22 April 1994, the Appeals Chamber finds that the Indictment is not defective in pleading Kanyabashi's responsibility as a superior. The relevant Indictment paragraphs plead with precision all relevant material facts supporting the charge against Kanyabashi regarding the Kabakobwa Hill massacre. In particular, the source of Kanyabashi's criminal responsibility is based on the orders that he gave to the members of the Ngoma commune police to eliminate the Tutsi refugees at Kabakobwa Hill. The Indictment sets out that Kanyabashi knew that massacres of the civilian population were being committed and took no measures to stop them. The Prosecution, through its pre-trial brief, the evidence it presented at trial, and through its closing submissions, presented a case that Kanyabashi was an active participant in, ordered, and supervised the killings at Kabakobwa Hill.

144. However, the Appeals Chamber observes that the Trial Chamber concluded that it was not proven that Kanyabashi either ordered or was present during the attack at Kabakobwa and found him responsible as a superior on the basis of the following material facts: (i) his awareness of the Tutsi refugees' presence at Kabakobwa; (ii) the fact that, on 22 April 1994, *Interahamwe* went to report to him upon seeing the number of refugees at Kabakobwa Hill, before returning to commence the attack; (iii) the fact that he should have been able to hear the gunshots from the Ngoma commune office during the attack; (iv) the relatively small number of Ngoma commune policemen, his control over them as well as the fact that he was in regular contact with these policemen and that several of them were stationed at his house on the weekend of the attack at Kabakobwa Hill; (v) the systematic and large-scale nature of the attack; (vi) his public condemnation of the killings during a meeting at Huye Stadium; and (vii) the fact that he took no steps to prevent the attack or punish any policeman involved in the attack.

145. The Appeals Chamber considers that the Trial Chamber's findings were based upon a set of material facts different from those that were specifically pleaded in the Indictment, set forth in the Prosecution Pre-Trial Brief, and pursued throughout the trial. Consequently, the Appeals Chamber finds that the Trial Chamber erred in convicting Kanyabashi based on material facts that were not

pleaded, and reverses his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II based on these killings. The Appeals Chamber finds that the remainder of Kanyabashi's appeal as it concerns alleged errors committed by the Trial Chamber in relation to this event are moot and dismisses them.

146. The Appeals Chamber turns to Kanyabashi's contentions that the Trial Chamber erred in convicting him as a superior in relation to the killings perpetrated by soldiers at Matyazo Clinic in late April 1994 due to insufficient notice. At the outset, the Appeals Chamber dismisses Kanyabashi's contention that the Trial Chamber convicted him for a different attack against Matyazo Clinic than the one pleaded in the Indictment. However, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to Kanyabashi's superior responsibility for the killings perpetrated at Matyazo Clinic by soldiers insofar as it failed to provide adequate notice to Kanyabashi that the soldiers involved in these killings were alleged to be his subordinates. Nonetheless, the Appeals Chamber finds that this error does not invalidate the Trial Chamber's decision to convict Kanyabashi on this basis as the ambiguity of the Indictment was remedied by the additional information provided in the Prosecution Pre-Trial Brief and because the vagueness of the Indictment in this respect did not impair his ability to prepare his defence.

147. Turning to Kanyabashi's contentions that he lacked sufficient notice of his alleged responsibility for committing direct and public incitement to commit genocide through two megaphone announcements in late May and mid-June 1994, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds no error in the Trial Chamber's conclusion that the allegation of the second megaphone announcement by Kanyabashi in mid-June 1994 fell under the scope of the relevant Indictment paragraph. The Appeals Chamber is also of the view, Judge Pocar and Judge Agius dissenting, that the timeframe of the allegation of megaphone announcements by Kanyabashi pleaded in this paragraph was sufficient to provide him adequate notice.

148. However, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to the number of incidents of incitement by megaphone of which Kanyabashi was alleged to be responsible. Nonetheless, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that Kanyabashi was ultimately put on adequate notice of the relevant material facts with respect to the number of alleged incidents of incitement by megaphone and that the vagueness of the Indictment did not impair his ability to prepare his defence.

The Appeals Chamber, Judge Pocar and Judge Agius dissenting, therefore concludes that the Trial Chamber's error concerning the form of the Indictment regarding the number of incidents of incitement by megaphone did not invalidate its decision to convict Kanyabashi on the basis of the May and June 1994 megaphone announcements. Consequently, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, dismisses Kanyabashi's appeal in this respect.

149. Finally, for the reasons set forth in the Judgement, the Appeals Chamber dismisses Kanyabashi's allegation of error regarding the assessment of the cumulative effect of the defects of the Indictment on his fair trial rights.

C. Matyazo Clinic

150. The Trial Chamber, Judge Ramaroson dissenting, found that, in late April 1994, following an initial attack by soldiers, Kanyabashi went to Matyazo Clinic, addressed the Tutsis sheltering there, and thereafter ordered soldiers to open fire on the Tutsis, resulting in many deaths. Noting that the Prosecution only charged Kanyabashi under Article 6(3) of the Statute in relation to this event, the Trial Chamber found that it was not proven that Kanyabashi exercised *de jure* authority over the soldiers. However, recalling that Kanyabashi ordered the soldiers to shoot at the Tutsis and that they obeyed this order, the Trial Chamber concluded that "Kanyabashi exercised effective control over these soldiers on an *ad hoc* or temporary basis, and that he was in a superior-subordinate relationship over them." The Trial Chamber convicted Kanyabashi pursuant to Article 6(3) of the Statute on this basis.

151. Kanyabashi submits that no reasonable trier of fact could have convicted him for the killings at Matyazo Clinic based on the evidence on the record. In particular, he argues that the relevant evidence does not demonstrate that he was in a superior-subordinate relationship with the soldiers who allegedly followed his orders or that he had effective control over them.

152. The Appeals Chamber recalls that the imposition of superior responsibility necessitates a pre-existing superior-subordinate relationship between the accused and the perpetrators. It considers that the Trial Chamber's findings that Kanyabashi ordered soldiers to shoot at Tutsis and that the soldiers obeyed this order may be demonstrative of the fact that Kanyabashi was in a position of authority or influence that could compel the commission of a crime through the execution of his orders. Such findings also could be indicative of the fact that Kanyabashi exercised effective control over the soldiers. However, the Appeals Chamber finds that no reasonable trier of fact could have found that a single order from a civilian authority which was followed by soldiers demonstrated a pre-existing superior-subordinate relationship, which, in turn, imposed a duty on that civilian

authority to prevent the soldiers from committing crimes or to punish them for the crimes committed. The Prosecution's references to aspects of the record which were not relied upon by the Trial Chamber do not prove otherwise.

153. Accordingly, the Appeals Chamber reverses Kanyabashi's convictions pursuant to Article 6(3) of the Statute for genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Matyazo Clinic.

D. Incitement by Megaphone

154. The Trial Chamber, relying principally on the evidence of Witness QJ found that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them. The Trial Chamber found that the direct evidence of Witness QJ was corroborated by various details of Witness TK's evidence. It also considered that Prosecution and Defence evidence established that megaphone announcements from a moving vehicle were part of the *modus operandi* by which messages from the *bourgmestre* were disseminated to the population of Ngoma Commune from April through June 1994.

155. The Trial Chamber, relying primarily on the evidence of Witness QI, further found that, around mid-June 1994, Kanyabashi again used a megaphone to tell the population to clear bushes along the road in order to remove potential hiding places for the *Inkotanyi*, to flush out people who were hiding in the bushes, and to kill those found there, including children, old men, and women. The Trial Chamber also considered the *modus operandi* evidence when evaluating Witness QI's testimony with respect to this incident.

156. Based on these findings, as well as its determination that Kanyabashi's use of the terms "enemy" and "*Inkotanyi*" referred to and were understood to refer to Tutsis in general, the Trial Chamber concluded that Kanyabashi's May and June 1994 megaphone announcements constituted direct and public incitement to commit genocide and, accordingly, convicted him of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute.

157. Kanyabashi raises several general challenges to the Trial Chamber's assessment of the evidence as well as its conclusions that the evidence and findings establish that he committed direct and public incitement to commit genocide.

158. For the reasons explained in the Judgement, the Appeals Chamber finds that the Trial Chamber erred in concluding that certain Prosecution and Defence evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma Commune from April through June 1994. However, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, has not found that this error has occasioned a miscarriage of justice. Furthermore the Appeals Chamber, Judge Pocar and Judge Agius dissenting with respect to the finding that Kanyabashi has not demonstrated that the Trial Chamber erred in concluding that Witness TK's evidence partly corroborated Witness QJ's testimony concerning the May 1994 megaphone announcement, has dismissed the remainder of Kanyabashi's challenges as to the Trial Chamber's assessment of evidence concerning the May and June 1994 megaphone announcements.

159. Consequently, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that Kanyabashi has failed to demonstrate any error in the Trial Chamber's assessment of the evidence concerning the late May and mid-June 1994 megaphone announcements that has occasioned a miscarriage of justice and warrants the intervention of the Appeals Chamber. Furthermore, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that Kanyabashi has failed to demonstrate that the Trial Chamber erred in finding him responsible for directly and publicly inciting the commission of genocide by making megaphone announcements in Butare Town in late May and mid-June 1994.

VIII. APPEAL OF ÉLIE NDAYAMBAJE

A. Indictment

160. Ndayambaje submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof, and that he was materially prejudiced in the preparation of his defence. He also contends that the "immeasurable accumulation of events not pleaded in the Indictment has caused [him] irreparable prejudice."

161. The Appeals Chamber dismisses Ndayambaje's contentions that he was not charged with or lacked sufficient notice of his alleged responsibility for: (i) aiding and abetting the killings at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 22 to 24 April 1994; (ii) committing direct and public incitement to commit genocide at his swearing-in ceremony on

22 June 1994; and (iii) instigating the killings of Tutsi women and girls abducted from Mugombwa Sector after his swearing-in ceremony.

162. However, the Appeals Chamber observes that the Trial Chamber failed to address Ndayambaje's contention at trial that he received insufficient notice that he was charged with direct and public incitement to commit genocide based on his addresses at Mugombwa Church on 20 and 21 April 1994. Given the importance of this issue, the Appeals Chamber considers that the Trial Chamber should have addressed Ndayambaje's claim and that the failure to do so infringed Ndayambaje's right to a reasoned opinion.

163. The Appeals Chamber further finds that, although the relevant Indictment paragraphs put Ndayambaje on notice that he was charged with direct and public incitement to commit genocide through inciting the massacres of the Tutsi population in Muganza Commune, it did not provide him notice of his statements in relation to Mugombwa Church. Consequently, the Appeals Chamber finds that the Indictment is defective in this respect. The Appeals Chamber also finds that this defect was not cured through post-indictment disclosures and that the Prosecution has failed to prove on appeal that Ndayambaje's ability to prepare his defence was not materially impaired by the defect in the Indictment. The Appeals Chamber, accordingly, concludes that the Trial Chamber erred in convicting Ndayambaje of committing direct and public incitement to commit genocide based on his statements at Mugombwa Church on 20 and 21 April 1994. The Appeals Chamber dismisses as moot Ndayambaje's remaining challenges that concern his responsibility on this basis.

164. Finally, the Appeals Chamber also dismisses Ndayambaje's claim of prejudice resulting from the accumulation of events not pleaded in the Indictment, as he has not demonstrated that the defects in the Indictment materially hampered the preparation of his defence.

B. Bias

165. Ndayambaje submits that the Trial Chamber demonstrated bias in applying different standards when assessing Prosecution and Defence evidence. The Appeals Chamber finds that Ndayambaje has failed to show that the Trial Chamber applied a double standard in its assessment of Prosecution and Defence evidence. He has also failed to rebut the presumption of impartiality attached to the judges of the Trial Chamber. The Appeals Chamber dismisses Ndayambaje's appeal in this respect.

C. Alibi

166. Ndayambaje argues that the Trial Chamber erred in its assessment of his late notice of alibi, reversed the burden of proof relevant to alibi evidence, and erred in its assessment of his alibi evidence for the period of 20 through 24 April 1994. The Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in considering the manner in which Ndayambaje raised his alibi in evaluating its credibility, or that it misconstrued the relevant standard of proof applicable to alibi evidence. It further concludes that Ndayambaje has failed to demonstrate any error in the Trial Chamber's assessment of alibi evidence that would warrant the intervention of the Appeals Chamber. The Appeals Chamber dismisses Ndayambaje's appeal in this respect.

D. Denial of Site Visits

167. Ndayambaje raises several challenges related to the Trial Chamber's decision denying the Prosecution's request to conduct a site-visit and its later dismissal of his request to reconsider this decision in the Trial Judgement. For the reasons explained in the Judgement, Ndayambaje has not demonstrated any error and the Appeals Chamber dismisses this aspect of his appeal.

E. Mugombwa Church

168. Relying primarily on the evidence of Witness QAR, the Trial Chamber found that Ndayambaje aided and abetted attacks on Tutsis taking refuge inside Mugombwa Church on 20 and 21 April 1994, resulting in the deaths of hundreds, if not thousands.

169. Ndayambaje raises several challenges to the Trial Chamber's assessment of evidence supporting his convictions for aiding and abetting the killings at the church. The Appeals Chamber finds that the Trial Chamber committed errors with respect to its assessment of certain Prosecution and Defence evidence. However, the Appeals Chamber finds that Ndayambaje has failed to demonstrate any error in the Trial Chamber's assessment of the evidence relating to his involvement in crimes perpetrated at Mugombwa Church on 20 and 21 April 1994 that occasioned a miscarriage of justice and warrants the intervention of the Appeals Chamber.

170. Consequently, the Appeals Chamber concludes that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for aiding and abetting the killings committed at Mugombwa Church on 20 and 21 April 1994 and, accordingly, dismisses his appeal in this respect.

F. Kabuye Hill

171. Ndayambaje challenges the Trial Chamber's findings that he was present at Kabuye Hill on 22 April 1994 when soldiers, policemen, and armed civilians attacked Tutsis gathered on the hill, resulting in the death of thousands of Tutsis. He further challenges the Trial Chamber's findings that he: (i) transported soldiers, civilians, and communal policemen to Kabuye Hill, where they participated in attacks against Tutsis on 23 and 24 April 1994; (ii) distributed weapons at Kabuye Hill and the Muganza commune office on 23 April 1994, which were later used in the massacres of Tutsis at Kabuye Hill; and (iii) was present during the attacks at Kabuye Hill on 23 and 24 April 1994 that resulted in thousands of deaths.

172. As it concerns Ndayambaje's presence at Kabuye Hill on 22 April 1994, the Appeals Chamber, having carefully reviewed the record, finds that the Trial Chamber erred in finding that Witness EV testified to seeing Ndayambaje during the attack on refugees at Kabuye Hill on 22 April 1994. Considering that the Trial Chamber found that Witness EV was the only witness testifying to Ndayambaje's presence at Kabuye Hill on 22 April 1994 and that no other witnesses relied upon by the Prosecution testified to Ndayambaje's presence at Kabuye Hill on that date, the Appeals Chamber finds that no reasonable trier of fact could have concluded as proven beyond reasonable doubt that Ndayambaje was present at Kabuye Hill on 22 April 1994.

173. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in holding Ndayambaje responsible for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994 on the basis of his presence during the attack and reverses his convictions for aiding and abetting the killings perpetrated at Kabuye Hill on that day.

174. With respect to the Trial Chamber's findings supporting Ndayambaje's convictions for the attacks at Kabuye Hill on 23 and 24 April 1994, the Appeals Chamber finds that, although the Trial Chamber committed limited errors relating to its assessment of Prosecution and Defence evidence, these errors have not occasioned a miscarriage of justice or invalidated the relevant findings.

175. Finally, the Appeals Chamber recalls that it admitted additional evidence on appeal as it concerned the credibility of Prosecution Witnesses EV and RT. For the reasons set forth in the Judgement, the Appeals Chamber finds it unnecessary to examine the trial record and additional evidence relating to Witness EV. As it concerns Witness RT, the Appeals Chamber, having considered the trial evidence and the additional evidence admitted on appeal, is itself convinced beyond reasonable doubt of Ndayambaje's guilt concerning the killing of Tutsis perpetrated at Kabuye Hill following the distribution of grenades on 23 April 1994.

176. Consequently, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for aiding and abetting the killings perpetrated during attacks on Kabuye Hill on 23 and 24 April 1994 by transporting attackers to Kabuye Hill, distributing weapons that were later used in the massacres, and being present during the attacks.

G. Ndayambaje's Swearing-In Ceremony

177. The Trial Chamber convicted Ndayambaje pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide on the basis of the statements he made at his swearing-in ceremony as the *bourgmestre* of Muganza Commune on 22 June 1994.

178. Ndayambaje raises several challenges regarding the Trial Chamber's assessment of evidence and contends that it made imprecise and unsupported findings. The Appeals Chamber finds that the Trial Chamber erred in failing to consider relevant aspects of a Defence witness's evidence concerning a killing that allegedly followed the swearing-in ceremony but that this error does not invalidate any of the findings pertaining to the swearing-in ceremony. The Appeals Chamber also concludes that the Trial Chamber erred in concluding that a discrepancy existed in another Defence witness's evidence, which was used, in part, to cast doubt on the witness's testimony about the content of the speeches at the swearing-in ceremony. However, for the reasons explained in the Judgement, the Appeals Chamber concludes that this error has not occasioned a miscarriage of justice. The Appeals Chamber further determines that the Trial Chamber erred in interpreting that the evidence of certain Prosecution witnesses supported the conclusion that the swearing-in ceremony occurred specifically on or around 22 June 1994. However, the Appeals Chamber finds that this error does not demonstrate that the Trial Chamber erred in concluding that all the Prosecution witnesses it relied upon were testifying about Ndayambaje's swearing-in ceremony in Muganza Commune, which the parties do not dispute occurred on 22 June 1994.

179. The Appeals Chamber dismisses the remainder of Ndayambaje's challenges as to the Trial Chamber's assessment of evidence and finds that he has not demonstrated that the Trial Chamber erred in making imprecise and unsupported findings concerning who made inciting speeches during his swearing-in ceremony.

180. For the foregoing reasons, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for committing direct and public incitement to commit genocide through his utterances at his swearing-in ceremony on 22 June 1994 and, accordingly, dismisses Ndayambaje's appeal in this respect.

H. Abduction of Tutsi Women and Girls in Mugombwa

181. Based primarily on the evidence of Witness QAR, as corroborated by Witnesses FAU and QAF, the Trial Chamber found that, after Ndayambaje's swearing-in ceremony as *bourgmestre* of Muganza Commune on 22 June 1994, a group of Tutsi women and girls from Mugombwa Sector, Muganza Commune, including one named Nambaje, were abducted by assailants from Saga. The Trial Chamber further found that, during the abduction, Ndayambaje came to the Virgin Mary Statue in Mugombwa Sector and made it clear to the abductors that they "were free to do what they wanted with the girls". The Trial Chamber found that the abducted women and girls were subsequently taken to a brick factory at Gasenyi, a valley between Mugombwa and Kibayi, where they were killed. The Trial Chamber convicted Ndayambaje of, among other crimes, genocide and extermination as crimes against humanity for instigating the killing of the Tutsi women and girls, including Nambaje, based on his words at the Virgin Mary Statue.

182. Ndayambaje raises several challenges to the Trial Chamber's assessment of Prosecution and Defence evidence as well as its findings that all elements of the crimes of genocide and extermination as a crime against humanity were met in relation to this event.

183. The Appeals Chamber notes that the evidence provided by Witness FAU concerning the abduction and killing of Nambaje reveals that it was a separate incident that did not concern the women from Mugombwa Sector. Consequently, the Appeals Chamber finds that the Trial Chamber erred in considering that Nambaje was part of the group of victims abducted from Mugombwa Sector and killed at Gasenyi following Ndayambaje's words at the Virgin Mary Statue and, consequently, in convicting Ndayambaje for instigating her killing on this basis.

184. The Appeals Chamber further finds that, because Witness FAU's testimony concerning the abduction and killing of Nambaje concerned an event unrelated to the killing of Tutsi girls from Mugombwa Sector about which Witness QAR testified, the Trial Chamber erred in relying on Witness FAU's evidence as corroborating aspects of Witness QAR's evidence. However, for the reasons explained in the Judgement, the Appeals Chamber finds that this error does not invalidate the Trial Chamber's findings based on Witness QAR's evidence and has not occasioned a miscarriage of justice. The Appeals Chamber dismisses the remainder of Ndayambaje's challenges to the Trial Chamber's assessment of Prosecution and Defence evidence.

185. With respect to Ndayambaje's challenge to the Trial Chamber's findings regarding genocidal intent, the Appeals Chamber finds that the Trial Chamber could not reasonably rely on the circumstances of the abduction of Nambaje to infer the *mens rea* of those who abducted and

killed the Tutsi women and girls from Mugombwa Sector. However, Ndayambaje does not demonstrate that no reasonable trier of fact could have concluded that the assailants possessed genocidal intent based on “the widespread killing of Tutsis throughout Rwanda” at the relevant time and the fact that the abducted women and girls were targeted because they were Tutsis. Consequently, Ndayambaje’s additional argument that he could not know of their genocidal intent because they had no such intent is similarly rejected.

186. The Appeals Chamber turns to Ndayambaje’s claim that the Trial Chamber erred in convicting him of extermination as a crime against humanity because the abduction of eight identifiable women and girls in Mugombwa does not satisfy the large scale requirement that characterises the crime of extermination as a crime against humanity. The Appeals Chamber finds that the Trial Chamber did not err in finding that, taken collectively with the killings perpetrated at Mugombwa Church and Kabuye Hill for which Ndayambaje was also convicted, the killing of the group of abducted women and girls “occurred on a large scale”.

187. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in considering that Ndayambaje was part of the same group of abducted women and girls abducted from Mugombwa Sector and killed at a brick factory at Gasenyi and, consequently, in convicting Ndayambaje for instigating her killing through his words at the Virgin Mary Statue. However, the Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in finding him responsible for genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls from Mugombwa Sector based on his utterances at the Virgin Mary Statue.

IX. APPEAL OF THE PROSECUTION

188. The Prosecution argues that the Trial Chamber erred in acquitting Kanyabashi of committing, or alternatively, instigating or aiding and abetting the crime of genocide by delivering a speech on 19 April 1994 during the swearing-in ceremony of Nsabimana as prefect of Butare. It further argues that the Trial Chamber erred in not finding Kanyabashi responsible for committing or aiding and abetting direct and public incitement to commit genocide through his speech.

189. The Appeals Chamber observes that the Trial Chamber held that, during the swearing-in ceremony of Nsabimana as prefect of Butare, President Théodore Sindikubwabo and Prime Minister Jean Kambanda gave speeches that were inflammatory and contained coded language that was understood by the attendees and the public as a call to identify and kill Tutsis and their accomplices. The Trial Chamber determined that Kambanda's and Sindikubwabo's speeches contributed to triggering the subsequent widespread killings and large-scale massacres in Butare Prefecture that constituted genocide, thereby advocating and inciting genocide and contributing to these genocidal killings.

190. The Trial Chamber also found that Kanyabashi gave his own speech following those of Kambanda and Sindikubwabo, which supported their message and contained a commitment to execute the directives and instructions they announced. The Trial Chamber, however, did not find that Kanyabashi's Speech was inflammatory or that it substantially contributed to the genocide that followed and acquitted Kanyabashi of genocide and of direct and public incitement to commit genocide in relation to the speech he made during Nsabimana's swearing-in ceremony. For the reasons set forth in the Judgement, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber erred in law or in fact in acquitting Kanyabashi of genocide and direct and public incitement to commit genocide in relation to the speech he gave at Nsabimana's swearing-in ceremony.

X. SENTENCING APPEALS

191. The Trial Chamber sentenced Nyiramasuhuko, Ntahobali, and Ndayambaje to life imprisonment and imposed sentences of 25, 30, and 35 years of imprisonment on Nsabimana, Nteziryayo, and Kanyabashi, respectively. Each convicted person challenges the Trial Chamber's sentencing determinations.

192. Nyiramasuhuko submits that the Trial Chamber erred in: (i) its consideration of the aggravating circumstances; (ii) failing to consider certain mitigating circumstances; and (iii) sentencing her to life imprisonment. For the reasons set forth in the Judgement, the Appeals Chamber, Judge Liu dissenting with respect to Nyiramasuhuko's abuse of her authority as an aggravating factor, finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred and dismisses the appeal of her sentence.

193. The Appeals Chamber, Judge Agius and Judge Liu dissenting with respect to the gravity of the offences, further finds that Ntahobali has not demonstrated that the Trial Chamber erred in: (i) assessing the gravity of the offences; (ii) its consideration of certain aggravating circumstances; (iii) failing to consider or accord sufficient weight to certain mitigating circumstances; (iv) imposing a higher sentence than that imposed in similar cases; and (v) sentencing him to life imprisonment in violation of his fundamental human rights.

194. As it concerns Nsabimana's sentencing appeal, the Appeals Chamber finds that the Trial Chamber impermissibly double-counted the vulnerability of the victims in assessing the gravity of the offences and as a separate aggravating factor. The Appeals Chamber further finds that, in light of the form and degree of participation of Nsabimana in the crimes committed, the sentence imposed by the Trial Chamber is excessive and that the Trial Chamber committed a discernible error in exercising its discretion in this regard. The Appeals Chamber dismisses the remainder of Nsabimana's appeal against his sentence.

195. Turning to Nteziryayo, the Appeals Chamber finds that the Trial Chamber erred in considering Nteziryayo's role in the civil defence programme as the Trial Chamber had previously found that Nteziryayo could not be held responsible for his role in the civil defence programme and acquitted him for the crimes committed by its members. It further finds that the Trial Chamber's unreferenced statement that "soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates" is insufficiently linked to the crime of direct and public incitement to commit genocide for which Nteziryayo was convicted and, consequently, irrelevant to the consideration of its gravity. The Appeals Chamber finds that Nteziryayo has failed to demonstrate any other error in the Trial Chamber's findings that may impact the determination of his sentence and dismisses the remainder of his appeal in this respect.

196. As regards Kanyabashi, the Appeals Chamber finds that the Trial Chamber impermissibly double-counted the number of casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic both in assessing the gravity of the offences and as a separate aggravating circumstance. The Appeals Chamber further concludes that the Trial Chamber erred in failing to consider Kanyabashi's age and good conduct in detention when determining his mitigating circumstances relevant to sentencing.

197. In addition, the Appeals Chamber notes that, in light of the fact that Kanyabashi's convictions for the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994 have been

overturned on appeal, the Trial Chamber's conclusion in its sentencing deliberations that his crimes were "of an obvious gravity resulting in a significant number of casualties in terms of death and injuries" and its reliance on the number of victims resulting from the killings at Kabakobwa Hill and Matyazo Clinic as an aggravating circumstance are no longer supported. Likewise, the Trial Chamber's conclusion that Kanyabashi abused his authority in relation to the crimes that occurred at Matyazo Clinic also lacks support. The Appeals Chamber also concludes that, in light of the fact that a majority of Kanyabashi's convictions have been overturned on appeal, it will consider Kanyabashi's contentions as to whether his sentence is manifestly excessive when assessing the impact of its own findings on his sentence. The Appeals Chamber dismisses Kanyabashi's remaining appeals related to his sentence.

198. Turning to Ndayambaje, the Appeals Chamber finds that he has failed to demonstrate any error in the Trial Chamber's determination of his sentence, having dismissed his specific contentions that Trial Chamber erred in: (i) assessing certain aggravating factors; (ii) failing to consider or accord sufficient weight to certain mitigating factors; (iii) imposing a sentence disproportionate to the degree of his participation in the crimes; (iv) failing to impose a sentence similar to those imposed in comparable cases; and (v) imposing a single sentence of life imprisonment.

XI. DISPOSITION

199. 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 appeals hearing between 14 and 17 April 2015 as well as between 20 and 22 April 2015;

SITTING in open session;

WITH RESPECT TO PAULINE NYIRAMASUHUKO'S APPEAL

GRANTS Ground 1 of Nyiramasuhuko's appeal in part, **FINDS** that the Trial Chamber erred in concluding that her right to be tried without undue delay had not been violated, and **FINDS** that this violation caused her prejudice;

DISMISSES Nyiramasuhuko's appeal in all other respects;

FINDS, *proprio motu*, Judge Agius dissenting, that the Trial Chamber erred in convicting Nyiramasuhuko for persecution as a crime against humanity, **REVERSES** Nyiramasuhuko's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 8 of the Nyiramasuhuko and Ntahobali Indictment;

AFFIRMS Nyiramasuhuko's convictions for:

- conspiracy to commit genocide pursuant to Article 6(1) of the Statute by entering into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture;
- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks; and
- rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish rapes perpetrated by *Interahamwe* at the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks;

REDUCES Nyiramasuhuko's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, subject to credit being given under Rules 101(C) and 107 of the Rules for the period she has already spent in detention since her arrest on 18 July 1997;

WITH RESPECT TO ARSÈNE SHALOM NTAHOBALI'S APPEAL

GRANTS Ground 1.1 of Ntahobali's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS, Judge Agius dissenting, Ground 4.6 of Ntahobali's appeal, **REVERSES** Ntahobali's conviction for persecution as a crime against humanity, and **ENTERS** a verdict of acquittal under Count 8 of the Nyiramasuhuko and Ntahobali Indictment;

GRANTS Ground 4.2 of Ntahobali's appeal in part and **REVERSES** his convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental

well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for killing numerous Tutsis, other than a Tutsi girl, at the Hotel Ihuliro roadblock in late April 1994;

GRANTS Grounds 3.4, in part, and 4.7 of Ntahobali's appeal and **REVERSES** his convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting the killing of Rwamukwaya and his family around 29-30 April 1994;

GRANTS, in part, Grounds 3.6, and 4.2 through 4.4, of Ntahobali's appeal and **REVERSES** his convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- raping Tutsi women, other than Witness TA, at the Butare Prefecture Office; and
- ordering the rapes of six Tutsi women, other than Witness TA, at the Butare Prefecture Office during the First Attack of the Last Half of May Attacks;

DISMISSES Ntahobali's appeal in all other respects;

AFFIRMS, Judge Liu dissenting with respect to Ntahobali's responsibility for ordering killings during the Mid-May Attack at the Butare Prefecture Office, Ntahobali's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- killing a Tutsi girl he had first raped at the Hotel Ihuliro roadblock in late April 1994;
- ordering the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, the killing of Tutsis at the IRST on 21 April 1994, and the killing of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack; and
- aiding and abetting the killings of Tutsis abducted from the EER between mid-May and early June 1994;

AFFIRMS Ntahobali's convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- raping a Tutsi girl near the Hotel Ihuliro roadblock in late April 1994 as well as Witness TA during the Mid-May Attack and the First Attack of the Last Half of May Attacks at the prefectoral office;
- ordering the rape of Witness TA at the prefectoral office during the Second Attack of the Last Half of May Attacks; and
- aiding and abetting the rapes of Witness TA at the prefectoral office during the First Half of June Attacks;

REDUCES Ntahobali's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, 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 24 July 1997;

WITH RESPECT TO SYLVAIN NSABIMANA'S APPEAL

DISMISSES Nsabimana's appeal in all respects;

FINDS, *proprio motu*, that the Trial Chamber erred in concluding that Nsabimana's right to be tried without undue delay had not been violated and **FINDS** that this violation caused him prejudice;

FINDS, *proprio motu*, Judge Agius dissenting, that the Trial Chamber erred in convicting Nsabimana for persecution as a crime against humanity, **REVERSES** Nsabimana's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 7 of the Nsabimana and Nteziryayo Indictment;

AFFIRMS Nsabimana's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killing of Tutsis who had sought refuge at the Butare Prefecture Office by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence;

REDUCES Nsabimana's sentence of 25 years of imprisonment imposed by the Trial Chamber to 18 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 18 July 1997;

WITH RESPECT TO ALPHONSE NTEZIRYAYO'S APPEAL

GRANTS Ground 9 of Nteziryayo's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

DISMISSES Nteziryayo's appeal in all other respects;

AFFIRMS Nteziryayo's convictions for direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making speeches that constituted direct appeals to the population to kill Tutsis at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994 and at Ndayambaje's Swearing-In Ceremony as the new *bourgmestre* of Muganza Commune that took place on 22 June 1994;

REDUCES Nteziryayo's sentence of 30 years of imprisonment imposed by the Trial Chamber to 25 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 26 March 1998;

WITH RESPECT TO JOSEPH KANYABASHI'S APPEAL

GRANTS Ground 6 of Kanyabashi's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS Grounds 1.1 and 2.2 of Kanyabashi's appeal, **REVERSES** his convictions for genocide extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings of Tutsis perpetrated by Ngoma commune policemen at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994, and **ENTERS** a verdict of acquittal under Counts 2, 6, 7, and 9 of the Kanyabashi Indictment;

DISMISSES, Judge Pocar and Judge Agius dissenting with respect to the incitement by megaphone, Kanyabashi's appeal in all other respects;

AFFIRMS, Judge Pocar and Judge Agius dissenting, Kanyabashi's convictions for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making megaphone announcements on two occasions in late May and mid-June 1994 calling on the population to kill Tutsis;

REDUCES Kanyabashi's sentence of 35 years of imprisonment imposed by the Trial Chamber to 20 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 28 June 1995;

WITH RESPECT TO ÉLIE NDAYAMBAJE'S APPEAL

GRANTS Ground 15 of Ndayambaje's appeal in part, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS Ground 2 of Ndayambaje's appeal and **REVERSES** his conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by directly inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994;

GRANTS Ground 18 of Ndayambaje's appeal in part and **REVERSES** his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol pursuant to Article 6(1) of the Statute for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994;

GRANTS Ground 20 of Ndayambaje's appeal in part and **REVERSES** his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol pursuant to Article 6(1) of the Statute for instigating the killing of a Tutsi girl named Nambaje abducted from Mugombwa Sector after his swearing-in ceremony on 22 June 1994;

DISMISSES Ndayambaje's appeal in all other respects;

FINDS, *proprio motu*, that the Trial Chamber erred in convicting Ndayambaje for persecution as a crime against humanity, **REVERSES** Ndayambaje's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 7 of the Ndayambaje Indictment;

AFFIRMS Ndayambaje's convictions for:

- committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making a speech containing inciting statements to commit genocide at his swearing in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994;

- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 23 to 24 April 1994; and
- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killings of Tutsi women and girls, other than one named Nambaje, abducted from Mugombwa Sector based on his utterances at the Virgin Mary Statute after his swearing-in ceremony on 22 June 1994;

REDUCES Ndayambaje's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, 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 28 June 1995;

WITH RESPECT TO THE APPEAL OF THE PROSECUTION

DISMISSES the Prosecution's appeal in its entirety;

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

ORDERS, in light of time served, Nsabimana's and Kanyabashi's immediate release; and

ORDERS that, in accordance with Rules 103(B) and 107 of the Rules, Nyiramasuhuko, Ntahobali, Nteziryayo, and Ndayambaje are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where their sentence will be served.

Judge Fausto Pocar appends a partially dissenting opinion.

Judge Fausto Pocar and Judge Carmel Agius append a joint dissenting opinion.

Judge Carmel Agius appends dissenting and separate opinions.

Judge Liu Daqun appends partially dissenting and dissenting opinions.

Judge Khalida Rachid Khan appends a dissenting opinion and a declaration.