



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

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge William H. Sekule  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Arlette Ramaroson

**Registrar:** Mr. Bongani Majola

**Judgement of:** 29 September 2014

**ILDÉPHONSE NIZEYIMANA**

**v.**

**THE PROSECUTOR**

*Case No. ICTR-00-55C-A*

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**JUDGEMENT**

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## CONTENTS

<b>I. INTRODUCTION</b> .....	<b>1</b>
A. BACKGROUND .....	1
B. THE APPEALS .....	2
<b>II. STANDARDS OF APPELLATE REVIEW</b> .....	<b>3</b>
<b>III. APPEAL OF ILDÉPHONSE NIZEYIMANA</b> .....	<b>6</b>
A. ALLEGATIONS OF COLLUSION (GROUND 1).....	6
B. ALIBI (GROUNDS 33-38, AND 42-44, IN PART).....	109
1. Notice of Alibi .....	114
2. Assessment of the Alibi Evidence .....	141
(a) Reversal of the Burden of Proof.....	141
(b) Failure to Make Findings on the Occurrence of the Reconnaissance Mission .....	181
(c) Assessment of the Credibility of the Alibi Evidence .....	191
(d) Nizeyimana’s Replacement at the ESO .....	262
(e) Reliance on Nizeyimana’s Involvement in Other Crimes.....	292
3. Conclusion .....	312
C. KILLING OF THE RUHUTINYANYA FAMILY (GROUNDS 4-7, AND 42-44, IN PART) .....	323
1. Assessment of Prosecution Evidence.....	331
(a) Prosecution Witnesses XAG and YAL .....	331
(b) Prosecution Witness ZAW .....	383
2. Assessment of Defence Witness ZML07.....	403
3. Assessment of Nizeyimana’s <i>Mens Rea</i> .....	434
4. Conclusion .....	484
D. KILLINGS AT CYAHINDA PARISH (GROUNDS 8-10, AND 42-44, IN PART).....	494
1. Assessment of the Evidence.....	494
2. Application of the Only Reasonable Inference Standard.....	585
3. Conclusion .....	636
E. KILLING OF THE FORMER QUEEN OF RWANDA, ROSALIE GICANDA, AND THE OTHERS TAKEN FROM HER HOME (GROUNDS 2, 3, AND 11-15, AND 42-44, IN PART).....	646
1. Notice .....	656
2. Assessment of the Evidence.....	666
3. Application of the Only Reasonable Inference Standard.....	747
4. Superior Responsibility.....	787
5. Date of the Killing of Gicanda.....	827
6. Conclusion .....	838
F. KILLING OF REMY RWEKAZA AND THE ATTACK ON WITNESS ZAV AT THE GIKONGORO/CYANGUGU AND KIGALI ROADS JUNCTION ROADBLOCK (GROUNDS 16-18 AND 20, AND 44, IN PART) .....	848
1. Cross-Examination of Prosecution Witness ZAV .....	858
(a) Prior Statements to United States Authorities.....	858
(b) “Interview Note” of 27-28 November 2009.....	898
2. Date of the Killing of Rwekaza and Attack on Witness ZAV .....	938
3. Conclusion .....	949
G. KILLING OF BEATA UWAMBAYE AT THE GIKONGORO/CYANGUGU AND KIGALI ROADS JUNCTION ROADBLOCK (GROUNDS 21-23, AND 43 AND 44, IN PART).....	959
1. Assessment of Prosecution Evidence.....	969
2. Assessment of Defence Evidence .....	989
3. Conclusion .....	1029
H. KILLING OF PIERRE CLAVER KARENZI AT THE HOTEL FAUCON ROADBLOCK (GROUNDS 25-28, AND 42 AND 43, IN PART) .....	1031

1. Notice.....	103100
2. Assessment of the Evidence.....	104101
3. Conclusion .....	107104
<b>I. KILLING OF MATABARO, NYIRINKWAYA, AND OTHERS (GROUNDS 29-32, AND 42-44, IN PART)</b>	<b>108105</b>
1. Failure to Recall Witnesses.....	109106
2. Inconsistencies in the Evidence of Witnesses BZC and BXF .....	114111
3. Violation of Presumption of Innocence and Reversal of Burden of Proof.....	116113
4. Date of the Killings.....	118114
5. Conclusion .....	118115
<b>J. JOINT CRIMINAL ENTERPRISE (GROUNDS 39 AND 40, AND 44, IN PART)</b> .....	<b>119116</b>
1. Notice of the Joint Criminal Enterprise .....	119116
2. Assessment of Nizeyimana’s Participation in the Joint Criminal Enterprise .....	124121
3. Conclusion .....	130126
<b>K. SUPERIOR RESPONSIBILITY (GROUND 41)</b> .....	<b>131127</b>
<b>IV. APPEAL OF THE PROSECUTION</b> .....	<b>138134</b>
A. NIZEYIMANA’S PRELIMINARY CHALLENGE.....	138134
B. KILLING OF TUTSI CIVILIANS AT BUTARE UNIVERSITY HOSPITAL (GROUND 1).....	138134
1. Identification of ESO Soldiers as Perpetrators of Crimes at Butare Hospital .....	143139
2. Nizeyimana’s Knowledge of Killings Committed by ESO Corporal Niyibizi.....	145141
3. Conclusion .....	147142
C. RAPES OF TUTSI CIVILIANS AT BUTARE UNIVERSITY HOSPITAL (GROUND 2).....	148144
1. General Identification of ESO Soldiers as Perpetrators of Rapes at Butare Hospital ...	150145
2. Witness MKA’s Identification of ESO Soldiers as Perpetrators of Rapes at Butare Hospital .....	152147
(a) Witness MKA’s Ability to Distinguish Different Soldiers .....	153148
(b) Circumstances in which the Sexual Violence Occurred .....	155151
(c) Age of the Soldier who Committed the Second Rape of Witness MKA .....	156152
(d) Presence of Presidential Guards.....	158153
3. Conclusion .....	158154
D. KILLINGS OF TUTSI CIVILIANS AT BUTARE UNIVERSITY (GROUND 3).....	160155
<b>V. SENTENCING</b> .....	<b>166161</b>
A. NIZEYIMANA’S SENTENCING APPEAL (GROUND 45) .....	166161
B. IMPACT OF THE APPEALS CHAMBER’S FINDINGS ON THE SENTENCE .....	167162
<b>VI. DISPOSITION</b> .....	<b>169164</b>
<b>VII. OPINION DISSIDENTE CONJOINTE DES JUGES GÜNEY ET RAMAROSON</b> .....	<b>1</b>
<b>VIII. ANNEX A – PROCEDURAL HISTORY</b> .....	<b>1</b>
A. NOTICES OF APPEAL AND BRIEFS .....	1
1. Nizeyimana’s Appeal.....	1
2. Prosecution’s Appeal .....	2
B. ASSIGNMENT OF JUDGES .....	2
C. MOTION RELATED TO THE ADMISSION OF ADDITIONAL EVIDENCE .....	3
D. HEARING OF THE APPEALS .....	3
<b>IX. ANNEX B – CITED MATERIALS AND DEFINED TERMS</b> .....	<b>1</b>
A. JURISPRUDENCE .....	1
1. Tribunal.....	1
2. International Criminal Tribunal for the Former Yugoslavia (ICTY).....	5
B. DEFINED TERMS AND ABBREVIATIONS.....	8

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of appeals by Ildéphonse Nizeyimana (“Nizeyimana”) and the Prosecution against the Judgement and Sentence pronounced by Trial Chamber III of the Tribunal (“Trial Chamber”) on 19 June 2012 in the case of *The Prosecutor v. Ildéphonse Nizeyimana* (“Trial Judgement”).<sup>1</sup>

## I. INTRODUCTION

### A. Background

2. Nizeyimana was born on 5 October 1963.<sup>2</sup> During the relevant period, Nizeyimana held the rank of captain at the military training school, the *École des Sous-Officiers* in Butare (“ESO”).<sup>3</sup> By 7 April 1994, he was the S2 officer, charged with military intelligence, as well as the S3 officer, responsible for training and operations at the ESO.<sup>4</sup>

3. The Trial Chamber found Nizeyimana responsible pursuant to Article 6(1) of the Statute of the Tribunal (“Statute”) through his participation in a joint criminal enterprise for the killing of the Ruhutinyanya family, the attack on Cyahinda Parish, the killing of the former Queen of Rwanda, Rosalie Gicanda, and the others taken from her home, the killing of Pierre Claver Karenzi, and the killing of those taken from the Matabaro and Nyirinkwaya households.<sup>5</sup> It also found him responsible pursuant to Article 6(1) of the Statute for ordering the killings of Remy Rwekaza and Beata Uwambaye and the serious bodily and mental harm caused to Prosecution Witness ZAV.<sup>6</sup> As a result of these findings, the Trial Chamber convicted Nizeyimana of genocide, extermination and murder as crimes against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>7</sup> The Trial Chamber acquitted Nizeyimana of

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<sup>1</sup> *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Judgement and Sentence, pronounced on 19 June 2012, filed on 22 June 2012. For ease of reference, two annexes are appended: Annex A – Procedural History; and Annex B – Cited Materials and Defined Terms.

<sup>2</sup> Trial Judgement, fn. 3935.

<sup>3</sup> Trial Judgement, paras. 1, 1482.

<sup>4</sup> Trial Judgement, para. 1482.

<sup>5</sup> Trial Judgement, paras. 1498, 1508, 1515, 1534, 1539, 1550, 1559, 1565, 1579.

<sup>6</sup> Trial Judgement, paras. 1524, 1565, 1579. In addition, the Trial Chamber found that Nizeyimana could be held liable pursuant to Article 6(3) of the Statute for the killing of the Ruhutinyanya family, the killing of Rosalie Gicanda and the others taken from her home, the killings of Remy Rwekaza and Beata Uwambaye, the serious bodily and mental harm caused to Witness ZAV, and the killing of those taken from the Matabaro and Nyirinkwaya households, and took this into account in sentencing. Trial Judgement, paras. 1499, 1516, 1525, 1540, 1567, 1580.

<sup>7</sup> Trial Judgement, paras. 1539, 1550, 1566, 1579, 1581.

rape as a crime against humanity, and rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II,<sup>8</sup> and found that he was not responsible for various crimes, including those pertaining to the rapes and killings of Tutsi civilians at Butare University Hospital and the killings of Tutsi civilians at the National University of Rwanda in Butare.<sup>9</sup> The Trial Chamber sentenced Nizeyimana to a single term of life imprisonment.<sup>10</sup>

## **B. The Appeals**

4. Nizeyimana advances forty-five grounds of appeal challenging his convictions and sentence and requests that the Appeals Chamber quash his convictions and acquit him or, alternatively, reduce his sentence.<sup>11</sup> The Prosecution responds that Nizeyimana's appeal should be dismissed in its entirety.<sup>12</sup>

5. The Prosecution presents three grounds of appeal challenging Nizeyimana's acquittals for the rapes and killings of Tutsi civilians at Butare University Hospital and the killings of Tutsi civilians at the National University of Rwanda in Butare and requests that the Appeals Chamber convict him pursuant to Article 6(3) of the Statute for these crimes.<sup>13</sup> Nizeyimana responds that the Prosecution's appeal should be summarily dismissed because it is vague and fails to conform to the Practice Direction on Formal Requirements<sup>14</sup> and the Statute.<sup>15</sup> Alternatively, he argues that it should be dismissed because it fails to identify any legal or factual error in the Trial Judgement.<sup>16</sup>

6. The Appeals Chamber heard oral submissions regarding these appeals on 28 April 2014.

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<sup>8</sup> Trial Judgement, para. 1581.

<sup>9</sup> Trial Judgement, paras. 399, 929, 937, 950, 987, 995, 997, 1002, 1005, 1027, 1038, 1050, 1051, 1480.

<sup>10</sup> Trial Judgement, para. 1599.

<sup>11</sup> Nizeyimana Notice of Appeal, paras. 10-121; Nizeyimana Appeal Brief, paras. 13-607. *See also* Nizeyimana Reply Brief, paras. 4-108. Nizeyimana abandoned Grounds of Appeal 19 and 24. *See* Nizeyimana Appeal Brief, paras. 281, 321.

<sup>12</sup> Prosecution Response Brief, paras. 2, 314.

<sup>13</sup> Prosecution Notice of Appeal, paras. 1-17; Prosecution Appeal Brief, paras. 25-118. *See also* Prosecution Reply Brief, paras. 4-14.

<sup>14</sup> Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007 ("Practice Direction on Formal Requirements").

<sup>15</sup> Nizeyimana Response Brief, paras. 9-14, 89.

<sup>16</sup> Nizeyimana Response Brief, paras. 9-10, 16, 90.

## II. STANDARDS OF APPELLATE REVIEW

7. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.<sup>17</sup>

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

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.<sup>18</sup>

9. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.<sup>19</sup> In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.<sup>20</sup>

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

Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.<sup>21</sup>

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<sup>17</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 8; *Ndindiliyimana et al.* Appeal Judgement, para. 8; *Ndahimana* Appeal Judgement, para. 7. See also *Dorđevi* Appeal Judgement, para. 13.

<sup>18</sup> *Ntakirutimana* Appeal Judgement, para. 11 (reference omitted). See also, e.g., *Bizimungu* Appeal Judgement, para. 9; *Ndindiliyimana et al.* Appeal Judgement, para. 9; *Dorđevi* Appeal Judgement, para. 14; *Ndahimana* Appeal Judgement, para. 8.

<sup>19</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 10; *Ndindiliyimana et al.* Appeal Judgement, para. 10; *Ndahimana* Appeal Judgement, para. 9. See also *Dorđevi* Appeal Judgement, para. 15.

<sup>20</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 10; *Ndindiliyimana et al.* Appeal Judgement, para. 10; *Ndahimana* Appeal Judgement, para. 9. See also *Dorđevi* Appeal Judgement, para. 15.

<sup>21</sup> *Krstić* Appeal Judgement, para. 40 (references omitted). See also, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Dorđevi* Appeal Judgement, paras. 16, 17; *Ndahimana* Appeal Judgement, para. 10.

The same standard of reasonableness and the same deference to factual findings of the trial chamber apply when the Prosecution appeals against an acquittal.<sup>22</sup> The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.<sup>23</sup> However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a Defence appeal against conviction.<sup>24</sup> A convicted person must show that the trial chamber's factual errors create a reasonable doubt as to his guilt.<sup>25</sup> The Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of the convicted person's guilt has been eliminated.<sup>26</sup>

11. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.<sup>27</sup> Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.<sup>28</sup>

12. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.<sup>29</sup> Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, or vague, or suffer from other formal and obvious insufficiencies.<sup>30</sup> Finally, the Appeals Chamber has inherent discretion in

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<sup>22</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Dorđevi* Appeal Judgement, para. 18.

<sup>23</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Dorđevi* Appeal Judgement, para. 18.

<sup>24</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Dorđevi* Appeal Judgement, para. 18.

<sup>25</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Dorđevi* Appeal Judgement, para. 18.

<sup>26</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Dorđevi* Appeal Judgement, para. 18.

<sup>27</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 12; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Ndahimana* Appeal Judgement, para. 11. See also *Dorđevi* Appeal Judgement, para. 20.

<sup>28</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 12; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Ndahimana* Appeal Judgement, para. 11. See also *Dorđevi* Appeal Judgement, para. 20.

<sup>29</sup> Practice Direction on Formal Requirements, para. 4(b). See also, e.g., *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Ndahimana* Appeal Judgement, para. 12.

<sup>30</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Ndahimana* Appeal Judgement, para. 12. See also *Dorđevi* Appeal Judgement, para. 20.



selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.<sup>31</sup>

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<sup>31</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Ndahimana* Appeal Judgement, para. 12. See also *Dorđevi* Appeal Judgement, para. 19.

### III. APPEAL OF ILDÉPHONSE NIZEYIMANA

#### A. Allegations of Collusion (Ground 1)

13. Nizeyimana advanced an alibi that he was away from Butare town from 26 April 1994 to 26 May 1994, when he was allegedly assigned to the Mata training centre at the tea factory in Gikongoro Prefecture, after which he was transferred to the front in Nyanza.<sup>32</sup> The Trial Chamber found that there was a reasonable possibility that Nizeyimana arrived at the Mata tea factory in late April 1994 and left for Nyanza towards the end of May 1994.<sup>33</sup> The Trial Chamber then concluded, however, that there was no reasonable possibility of Nizeyimana having maintained a continuous and uninterrupted presence at the Mata tea factory during this month, except for one day when he returned to the ESO to exchange a vehicle.<sup>34</sup> In finding that such a reasonable possibility was eliminated, the Trial Chamber considered, *inter alia*: (i) that Nizeyimana's significant position in the ESO's hierarchy made it unlikely that he would not have returned to the ESO camp; (ii) his involvement in the killing of Beata Uwambaye at a roadblock near Butare town on or about 5 May 1994; and (iii) that it was inconceivable that he would not have visited his pregnant wife who resided in Butare.<sup>35</sup> The Trial Chamber also found the alibi evidence to be insufficiently probative on this issue.<sup>36</sup>

14. In assessing the evidence, the Trial Chamber found the evidence of Prosecution Witnesses AZD, ZAW, ZY, BDE, and ZT too "general in nature", with regard to the date of Nizeyimana's assignment to the Mata training centre, to eliminate the reasonable possibility of the truthfulness of Nizeyimana's alibi from 26 April 1994 and onwards.<sup>37</sup> Nonetheless, the Trial Chamber found these witnesses generally credible.<sup>38</sup>

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<sup>32</sup> *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-PT, Ildéphonse Nizeyimana's Notice of Alibi, 12 January 2011 (confidential) ("Notice of Alibi"), paras. 9, 11. *See also* Trial Judgement, paras. 1205, 1409. Although the Notice of Alibi refers to Nizeyimana being transferred to the front in "Masange" rather than the front in "Nyanza", the Appeals Chamber observes that at trial Nizeyimana considered that these two terms described the same location. *See* Notice of Alibi, para. 11; Nizeyimana Closing Brief, para. 63 ("On about 26 May, Nizeyimana was sent to Masange/Nyanza.").

<sup>33</sup> Trial Judgement, paras. 1426-1428.

<sup>34</sup> Trial Judgement, paras. 1428, 1448, 1449.

<sup>35</sup> Trial Judgement, paras. 1443, 1447-1449.

<sup>36</sup> Trial Judgement, para. 1449.

<sup>37</sup> Trial Judgement, paras. 1424, 1425. *See* Trial Judgement, para. 1426.

<sup>38</sup> *See, e.g.*, Trial Judgement, paras. 1424, 1441. The Trial Chamber relied on the testimonies of Witnesses AZD, ZAW, ZY, BDE, and ZT in its findings in relation to the killings of the Ruhutinyanya family, Rosalie Gicanda and the others taken from her home, and Pierre Claver Karenzi. *See* Trial Judgement, paras. 160-220, 484-530, 596-623.

15. Nizeyimana submits that the Trial Chamber failed to address his arguments that Witnesses AZD, ZAW, ZY, BDE, and ZT colluded to undercut his alibi from 26 April 1994.<sup>39</sup> Nizeyimana contends that, in their evidence given approximately one week after the filing of his Notice of Alibi,<sup>40</sup> these witnesses uniformly pushed back the date of his departure from the ESO camp to the end of May 1994 and that the Trial Chamber unreasonably concluded that this was of no importance.<sup>41</sup> Nizeyimana underlines that it was impossible that all these Prosecution witnesses from the ESO made the same mistake about the date and that the Trial Chamber therefore erred in finding that the error was only “general in nature”.<sup>42</sup> Nizeyimana further points to the Trial Chamber’s rejection of Prosecution Witness YAA’s testimony which, according to him, demonstrated the fabrication of evidence.<sup>43</sup> Nizeyimana submits that the Trial Chamber should have viewed these witnesses’ evidence with caution but failed to do so, which undermines its findings in relation to the killings of the Ruhutinyanya family, Rosalie Gicanda and the others taken from her home, and Pierre Claver Karenzi.<sup>44</sup> As a consequence, Nizeyimana asks the Appeals Chamber to acquit him in relation to these killings.<sup>45</sup>

16. The Prosecution responds that Nizeyimana’s arguments must fail since they do not show any impact on the Trial Chamber’s findings and merely cross-reference other grounds of appeal.<sup>46</sup> In any event, the Prosecution contends that Nizeyimana demonstrated no collusion or fabrication of evidence among Prosecution witnesses from the ESO and that the Defence allegations were duly considered by the Trial Chamber.<sup>47</sup>

17. The Appeals Chamber recalls that trial chambers enjoy broad discretion in choosing which witness testimony to prefer, and in assessing the impact on witness credibility of inconsistencies within or between witnesses’ testimonies and prior statements.<sup>48</sup> The Appeals Chamber also recalls that a trial chamber does not need to set out in detail why it accepted or rejected a particular

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<sup>39</sup> Nizeyimana Notice of Appeal, para. 10; Nizeyimana Appeal Brief, paras. 14-25, *referring to, inter alia*, Nizeyimana Closing Brief, para. 119. *See also* AT. 28 April 2014 p. 15. The Appeals Chamber notes that, in his Notice of Appeal, Nizeyimana submits that the Trial Chamber failed to address his arguments in relation to the role of Prosecution Witness Justin Gahizi as the key organizer of the Prosecution witnesses. *See* Nizeyimana Notice of Appeal, para. 10. The Appeals Chamber considers that Nizeyimana abandoned this contention, since he does not expand on it in his Appeal Brief. The Appeals Chamber further notes Nizeyimana’s argument that the Trial Chamber impermissibly applied a double standard of assessment of the evidence with regard to the alibi. *See* Nizeyimana Appeal Brief, para. 22. This argument is addressed elsewhere in this Judgement. *See infra* Section III.B.2.(c).

<sup>40</sup> Nizeyimana Appeal Brief, paras. 15, 16, 24. *See also* AT. 28 April 2014 p. 15.

<sup>41</sup> Nizeyimana Appeal Brief, para. 19, *referring to* Trial Judgement, para. 1424. *See also* AT. 28 April 2014 p. 15.

<sup>42</sup> Nizeyimana Appeal Brief, para. 19, *referring to* Trial Judgement, para. 1424.

<sup>43</sup> Nizeyimana Appeal Brief, para. 20, *referring to* Trial Judgement, fn. 3735. *See also* AT. 28 April 2014 p. 15.

<sup>44</sup> Nizeyimana Appeal Brief, paras. 17, 24, 25. *See also* AT. 28 April 2014 p. 15.

<sup>45</sup> Nizeyimana Appeal Brief, para. 25, *referring to, inter alia*, Nizeyimana Appeal Brief, paras. 116, 225, 362.

<sup>46</sup> Prosecution Response Brief, para. 14. *See also* Prosecution Response Brief, para. 192; AT. 28 April 2014 p. 37.

<sup>47</sup> Prosecution Response Brief, paras. 190, 192. *See also* Prosecution Response Brief, para. 191.

testimony.<sup>49</sup> It is further well-established that trial chambers have the discretion to accept some but reject other parts of a witness's testimony.<sup>50</sup>

18. The Appeals Chamber notes that the Trial Chamber expressly considered the general challenges raised by the Defence to the credibility of Witnesses AZD, ZAW, ZY, BDE, and ZT, and that it found no reason to view their evidence with caution.<sup>51</sup> Furthermore, contrary to Nizeyimana's argument,<sup>52</sup> the Trial Chamber did not identify any "pushing back" of dates by Prosecution witnesses or discard it as of "no importance". Rather, the Trial Chamber found the Prosecution witnesses' evidence with respect to Nizeyimana's assignment to the Mata training centre "general in nature" in the sense that the bases for their knowledge of when Nizeyimana left the ESO for Mata were not demonstrated.<sup>53</sup> The Trial Chamber also specifically addressed Nizeyimana's argument that Witness BDE met "frequently" with others to discuss testifying against him and concluded that it was unfounded.<sup>54</sup> The Trial Chamber found, in particular, that "[n]othing in Witness BDE's evidence reflects questionable overlaps with that provided by Witnesses Gahizi and ZT".<sup>55</sup> In these circumstances, Nizeyimana's mere assertion that the Trial Chamber should have viewed the witnesses' testimonies with caution because they allegedly colluded in their testimonies to push back the date of Nizeyimana's departure from the ESO camp does not demonstrate any error in the Trial Chamber's approach.

19. The Appeals Chamber further finds no merit in Nizeyimana's claim that the Trial Chamber's rejection of Witness YAA's evidence, in relation to the alibi, demonstrates that there was fabrication of evidence.<sup>56</sup> Nizeyimana does not explain how an inconsistency with prior testimony in the *Muvunyi* case, which in the view of the Trial Chamber rendered this part of the witness's evidence of "limited probative value",<sup>57</sup> would establish that Witness YAA fabricated evidence against him. Furthermore, it does not demonstrate that there was collusion or fabrication of evidence by Witnesses AZD, ZAW, ZY, BDE, and ZT. His argument is therefore summarily

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<sup>48</sup> *Muvunyi* Appeal Judgement of 1 April 2011, para. 44; *Kalimanzira* Appeal Judgement, para. 105. See *Ndahimana* Appeal Judgement, para. 93.

<sup>49</sup> *Bizimungu* Appeal Judgement, paras. 217, 263, 296; *Gatete* Appeal Judgement, para. 136; *Ntabakuze* Appeal Judgement, para. 161.

<sup>50</sup> *Ndahimana* Appeal Judgement, para. 183; *Kanyarukiga* Appeal Judgement, para. 187; *Ntabakuze* Appeal Judgement, fn. 342; *Bagosora and Nsengiyumva* Appeal Judgement, paras. 243, 618.

<sup>51</sup> Trial Judgement, paras. 1424, 1441. See also, e.g., Trial Judgement, paras. 180-186, 492, 495, 610, 861, 944.

<sup>52</sup> *Nizeyimana* Appeal Brief, para. 19.

<sup>53</sup> See Trial Judgement, paras. 1424, 1425, fn. 3695.

<sup>54</sup> Trial Judgement, paras. 492, 944. See also Trial Judgement, fn. 1320.

<sup>55</sup> Trial Judgement, para. 492.

<sup>56</sup> See *Nizeyimana* Appeal Brief, para. 20.

<sup>57</sup> Trial Judgement, fn. 3735.

dismissed. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana's First Ground of Appeal.

## **B. Alibi (Grounds 33-38, and 42-44, in part)**

20. The Trial Chamber convicted Nizeyimana pursuant to Article 6(1) of the Statute of murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II based, in part, on the killings of Pierre Claver Karenzi at the Hotel Faucon roadblock around 21 April 1994, Remy Rwekaza on 21 April 1994, and the Matabaro and Nyirinkwaya family members around 22 April 1994.<sup>58</sup> The Trial Chamber also convicted Nizeyimana pursuant to Article 6(1) of the Statute of genocide based, in part, on the killings of Karenzi and Rwekaza, and the serious bodily and mental harm caused to Prosecution Witness ZAV on 21 April 1994.<sup>59</sup>

21. Nizeyimana filed a Notice of Alibi on 12 January 2011, advancing an alibi that he was away from Butare town on 21 and 22 April 1994 on a reconnaissance mission to the Mata tea factory in Gikongoro Prefecture.<sup>60</sup>

22. The Trial Chamber found that the evidence supporting Nizeyimana's alibi lacked credibility or was insufficiently probative to raise the reasonable possibility of his presence at the Mata tea factory on 21 and 22 April 1994.<sup>61</sup> In reaching this conclusion, the Trial Chamber considered the "evolutions" in the Notice of Alibi as it pertained to which ESO soldiers accompanied Nizeyimana on the mission,<sup>62</sup> the demeanour of the alibi witnesses,<sup>63</sup> the credibility of individual alibi witnesses and the consistencies and inconsistencies in and between their evidence,<sup>64</sup> and the highly convincing and credible evidence of Nizeyimana's participation in the crimes for which he was ultimately convicted on those days.<sup>65</sup>

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<sup>58</sup> Trial Judgement, paras. 1559, 1565, 1566, 1579, 1581. *See also* Trial Judgement, paras. 1519, 1529.

<sup>59</sup> Trial Judgement, paras. 1519, 1524, 1534, 1539, 1581.

<sup>60</sup> Notice of Alibi, paras. 9, 10. *See also* Trial Judgement, paras. 1205, 1272, 1278. Nizeyimana also raised an alibi from 26 April 1994 to 26 May 1994, when he was allegedly assigned to the Mata training centre at the tea factory, after which he was transferred to the front in Nyanza. Notice of Alibi, para. 11 (referring to his transfer to the front in "Masange"). The Trial Chamber found that there was a reasonable possibility that Nizeyimana arrived at the Mata tea factory in late April and left for Nyanza towards the end of May 1994. However, it did not consider that it raised the reasonable possibility of Nizeyimana's continued and uninterrupted absence from the ESO camp and Butare town from late April to late May 1994. Trial Judgement, paras. 1426-1428, 1449. To the extent that Nizeyimana challenges the Trial Chamber's assessment of the alibi from 26 April 1994 onwards, these arguments are addressed elsewhere. *See supra* Section III.A.

<sup>61</sup> Trial Judgement, paras. 1371, 1372.

<sup>62</sup> Trial Judgement, paras. 1280, 1281.

<sup>63</sup> Trial Judgement, paras. 1288, 1338, 1351, 1355.

<sup>64</sup> Trial Judgement, paras. 1289-1370.

<sup>65</sup> Trial Judgement, paras. 1371, 1372.

23. Nizeyimana challenges the Trial Chamber's findings in relation to his alibi for 21 and 22 April 1994.<sup>66</sup> Nizeyimana submits that the Trial Chamber erred in its: (i) evaluation of the timing of the filing of the Notice of Alibi; and (ii) assessment of the alibi evidence.

#### 1. Notice of Alibi

24. Nizeyimana filed his Notice of Alibi on 12 January 2011 and the trial started on 17 January 2011.<sup>67</sup> The Trial Chamber found that Nizeyimana's original Notice of Alibi was in line with the Defence's obligations pursuant to Rule 67(A)(ii)(a) of the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>68</sup> The Trial Chamber noted that, throughout the course of the Prosecution case, the number of alibi witnesses increased.<sup>69</sup> As a result of the piecemeal and delayed identification of the alibi witnesses the Defence intended to call, the Trial Chamber allowed the Prosecution to call rebuttal witnesses.<sup>70</sup> In the Trial Judgement, the Trial Chamber considered that the evolving alibi witness list may have resulted from ongoing investigations rather than evidence fabrication.<sup>71</sup> Nonetheless, it noted evolutions in the evidence of alibi witnesses from the Notice of Alibi with respect to which ESO soldiers accompanied Nizeyimana on the reconnaissance mission, most particularly Defence Witness Thomas Ruzindana.<sup>72</sup> The Trial Chamber considered this relevant to the assessment of the evidence.<sup>73</sup>

25. Nizeyimana contends that the Trial Chamber erred in finding that his Notice of Alibi was incomplete and that he provided piecemeal and delayed identification of alibi witnesses.<sup>74</sup> Nizeyimana submits that his Notice of Alibi was filed in a timely manner and never changed with respect to his whereabouts.<sup>75</sup> He claims that his Notice of Alibi was ready for filing in mid-December 2010 and that any delay in its filing was attributable to the Trial Chamber which took four weeks to rule on a motion for protective measures for his alibi witnesses that he filed on

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<sup>66</sup> Nizeyimana Notice of Appeal, paras. 89-101, 112-117; Nizeyimana Appeal Brief, paras. 415-488, 582-587, 589-602. *See also* AT. 28 April 2014 pp. 5-8.

<sup>67</sup> Notice of Alibi; T. 17 January 2011 p. 5. *See also* Trial Judgement, Annex A, para. 16.

<sup>68</sup> Trial Judgement, para. 1278, *referring to The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Prosecutor's Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi pursuant to Rules 54 and 67(A)(ii), 7 February 2011, paras. 6, 7.

<sup>69</sup> Trial Judgement, para. 1279.

<sup>70</sup> *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 7 June 2011 ("Trial Decision of 7 June 2011"), paras. 25, 26, p. 7; *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 15 June 2011 ("Trial Decision of 15 June 2011"), paras. 30, 34, p. 11. *See also* Trial Judgement, para. 1279.

<sup>71</sup> Trial Judgement, para. 1279.

<sup>72</sup> Trial Judgement, paras. 1280, 1281.

<sup>73</sup> Trial Judgement, para. 1281.

<sup>74</sup> Nizeyimana Notice of Appeal, paras. 99, 100; Nizeyimana Appeal Brief, paras. 477-484.

<sup>75</sup> Nizeyimana Appeal Brief, para. 478.

15 December 2010.<sup>76</sup> He also avers that the trial was rushed and that he did not have time to complete his investigations, thus explaining the late and evolving summaries of alibi evidence.<sup>77</sup> Nizeyimana further underlines the importance of the absence of any finding of collusion between the alibi witnesses.<sup>78</sup> Nizeyimana therefore submits that the Trial Chamber erred in allowing rebuttal evidence,<sup>79</sup> and in finding that the lateness of the notice raised concerns about the credibility of the alibi evidence.<sup>80</sup>

26. The Prosecution responds that the Trial Chamber properly allowed rebuttal evidence and reasonably considered the circumstances surrounding the Notice of Alibi when assessing the merits of the alibi.<sup>81</sup> It maintains that the record shows that Nizeyimana was not diligent, that he provided only piecemeal and delayed identification of prospective alibi witnesses, and that he filed his purported notice of alibi on 12 January 2011, only five days before the trial commenced.<sup>82</sup> The Prosecution further contends that Nizeyimana does not demonstrate how the filing of his Motion for Protective Measures of 15 December 2010 would excuse his repeated failure to provide timely notice of his alibi.<sup>83</sup> The Prosecution also points to the late disclosure on 20 April 2011, 55 days after the close of the Prosecution case, of the particulars of his alibi evidence, thereby defeating the purpose of such notice.<sup>84</sup> It further underlines that the number of alibi witnesses and the scope of their evidence increased during the presentation of the Defence case, raising further concerns that the alibi was tailored to rebut the Prosecution case.<sup>85</sup>

27. The Appeals Chamber recalls that Rule 67(A)(ii)(a) of the Rules requires the Defence to notify the Prosecution before the commencement of trial of its intent to enter a defence of alibi. The Appeals Chamber notes that the Trial Chamber considered the Notice of Alibi of 12 January 2011,

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<sup>76</sup> Nizeyimana Appeal Brief, para. 479, *referring to The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-PT, Defence Motion Requesting Protective Measures for Defence Witnesses RWV07, RWV08, OUV06, CKN10, OUV01, RWV02 and OUV03, 15 December 2010 (confidential) (“Motion for Protective Measures of 15 December 2010”); *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-PT, Decision on Defence Motion Requesting Protective Measures for Defence Witnesses RWV07, RWV08, OUV06, CKN10, OUV01, RWV02 and OUV03, 11 January 2011.

<sup>77</sup> Nizeyimana Appeal Brief, paras. 480, 481, 483, *referring to Status Conference*, T. 1 December 2010 p. 2.

<sup>78</sup> Nizeyimana Appeal Brief, para. 482.

<sup>79</sup> Nizeyimana Notice of Appeal, para. 99.

<sup>80</sup> Nizeyimana Notice of Appeal, para. 100; Nizeyimana Appeal Brief, para. 484.

<sup>81</sup> Prosecution Response Brief, paras. 223, 228.

<sup>82</sup> Prosecution Response Brief, para. 224.

<sup>83</sup> Prosecution Response Brief, paras. 224, 227.

<sup>84</sup> Prosecution Response Brief, para. 225, *referring to Trial Decision of 15 June 2011*, paras. 1, 15, 33.

<sup>85</sup> Prosecution Response Brief, paras. 225, 226, *referring to Trial Decision of 15 June 2011*, paras. 13-15. The Prosecution underlines that Nizeyimana added 11 alibi witnesses in his Pre-Defence Brief on 28 March 2011, two alibi witnesses in a Supplementary Notice of Alibi on 13 April 2011, alibi information concerning six witnesses in an Amended Pre-Defence Brief on 20 April 2011, and finally gave notice of Defence Witness RWV09’s alibi evidence on 5 June 2011.



filed prior to the commencement of trial, to be in line with the Defence's obligations.<sup>86</sup> The Appeals Chamber therefore summarily dismisses Nizeyimana's contentions regarding the timing of the filing of his Notice of Alibi of 12 January 2011, in particular regarding the alleged delay of the Trial Chamber in addressing his Motion for Protective Measures of 15 December 2010.

28. Turning to the Trial Chamber's finding that the identification of alibi witnesses was piecemeal and delayed throughout the Prosecution case, the Appeals Chamber observes that the Trial Chamber expressly acknowledged that this may have resulted from ongoing investigations.<sup>87</sup> The Appeals Chamber therefore finds that the Trial Chamber was seized of the difficulties encountered by the Defence, to which Nizeyimana refers on appeal. Nonetheless, the Trial Chamber considered that the late identification of alibi witnesses warranted, in the interests of justice, granting the Prosecution leave to call rebuttal evidence,<sup>88</sup> which it found "crucial in its search for the truth".<sup>89</sup> It further explicitly based its decision to allow rebuttal evidence upon the ability of the Prosecution to adequately investigate and respond to the Defence alibi witnesses, and not upon any late disclosure of the Notice of Alibi.<sup>90</sup> The Appeals Chamber finds that Nizeyimana does not demonstrate any error in the Trial Chamber's exercise of its discretion to allow the Prosecution to present rebuttal evidence.

29. With regard to the evolving alibi witness list, the Appeals Chamber has already found that the Trial Chamber did not ignore the fact that the Defence was conducting investigations throughout the Prosecution case.<sup>91</sup> The Appeals Chamber recalls, however, that it is well-established that the manner in which an alibi is presented may impact its credibility.<sup>92</sup> While the Trial Chamber found that ongoing investigations could explain the expansion of the witness list,<sup>93</sup> it considered that the evolution, with respect to which ESO soldiers accompanied Nizeyimana on the reconnaissance mission,<sup>94</sup> remained relevant to the assessment of the evidence.<sup>95</sup> The Appeals Chamber observes that the Trial Chamber further reasonably questioned the circumstances surrounding this evolution of the alibi evidence, including "the growing uniformity of evidence

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<sup>86</sup> Trial Judgement, para. 1278.

<sup>87</sup> Trial Judgement, para. 1279.

<sup>88</sup> Trial Decision of 7 June 2011, paras. 25, 26. *See also* Trial Judgement, para. 1279.

<sup>89</sup> Trial Decision of 15 June 2011, para. 30. *See also* Trial Judgement, para. 1279.

<sup>90</sup> Trial Decision of 15 June 2011, para. 34. *See also* Trial Decision of 15 June 2011, para. 33; Trial Judgement, para. 1279.

<sup>91</sup> *See* Trial Judgement, para. 1279.

<sup>92</sup> *See Ndahimana Appeal Judgement*, para. 113; *Munyakazi Appeal Judgement*, para. 18; *Kalimanzira Appeal Judgement*, para. 56.

<sup>93</sup> Trial Judgement, para. 1279.

<sup>94</sup> Trial Judgement, paras. 1280, 1281.

<sup>95</sup> Trial Judgement, para. 1281.

distinct from the notice”,<sup>96</sup> as well as the variances between Witness Ruzindana’s testimony and other Defence evidence.<sup>97</sup> In these circumstances, the Appeals Chamber finds that it was within the Trial Chamber’s discretion to take into account, among other factors, the evolving nature of the alibi in its assessment of the alibi evidence.

30. Nizeyimana’s arguments are therefore dismissed.

## 2. Assessment of the Alibi Evidence

31. In this section, the Appeals Chamber considers whether the Trial Chamber erred in its assessment of the alibi evidence by: (i) reversing the burden of proof; (ii) failing to make findings on the occurrence of the reconnaissance mission to Mata; (iii) incorrectly assessing the credibility of the alibi evidence; (iv) failing to address the evidence of Nizeyimana’s replacement at the ESO; and (v) relying on Nizeyimana’s involvement in other crimes.

### (a) Reversal of the Burden of Proof

32. Nizeyimana submits that the Trial Chamber erred in misapplying the burden of proof, effectively shifting it onto him.<sup>98</sup> Nizeyimana contends that the Trial Chamber unreasonably rejected the alibi evidence on the basis that it was contrary to the Prosecution evidence, thus displaying a circular reasoning and applying a presumption of guilt.<sup>99</sup> He particularly challenges the Trial Chamber’s finding that “the diversity of credible sources of Nizeyimana’s involvement in crimes, some of which are in direct conflict with the alibi evidence also eliminate[s] the reasonable possibility of its truthfulness”.<sup>100</sup> Nizeyimana also argues that the Trial Chamber impermissibly required him to disprove the probability that he was in Butare at that time, by finding “improbable” that he would be absent from Butare town in view of his considerable tenure and participation in similar conduct.<sup>101</sup>

33. Nizeyimana further challenges in detail the Trial Chamber’s approach which, he asserts, erroneously searched for doubt only in the Defence evidence instead of considering whether it

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<sup>96</sup> Trial Judgement, para. 1281. In this regard, the Appeals Chamber finds it irrelevant that the Trial Chamber made no express finding of collusion. See Nizeyimana Appeal Brief, para. 482.

<sup>97</sup> Trial Judgement, para. 1298.

<sup>98</sup> Nizeyimana Notice of Appeal, paras. 89-91, 116; Nizeyimana Appeal Brief, paras. 421-425, 597-601. See also Nizeyimana Reply Brief, paras. 77-79.

<sup>99</sup> Nizeyimana Notice of Appeal, para. 116, *referring to, inter alia*, Trial Judgement, paras. 1292, 1306, 1316, 1318, 1355, 1356, 1359, 1365, 1371, 1372; Nizeyimana Appeal Brief, paras. 424(vi) (*referring to* Trial Judgement, para. 1356), 424(xi).

<sup>100</sup> Nizeyimana Notice of Appeal, para. 116; Nizeyimana Appeal Brief, para. 424(xi), *referring to* Trial Judgement, para. 1371.

<sup>101</sup> Nizeyimana Notice of Appeal, para. 91, *referring to* Trial Judgement, para. 1372.

raised a doubt about the Prosecution case.<sup>102</sup> Nizeyimana points to a number of instances where the Trial Chamber allegedly applied the incorrect test by relying on baseless impressions in viewing the Defence witnesses' evidence with "suspicion" and finding it "doubtful",<sup>103</sup> and that it had the "strong impression" that testimonies were tailored.<sup>104</sup> He similarly submits that the finding that some witnesses' testimonies were "plausible" but not "credible" revealed that they indeed raised a doubt.<sup>105</sup> He further avers that the Trial Chamber erred in requiring the Defence evidence to be "dispositive", while it only needed to raise a doubt.<sup>106</sup>

34. The Prosecution responds that Nizeyimana's repeated claims that the Trial Chamber reversed the burden of proof should fail as they amount to general attempts to construe the Trial Chamber's consideration of the evidence out of context.<sup>107</sup> It further underlines that the Trial Chamber, which referred to the appropriate burden of proof and carefully assessed the alibi evidence, reasonably concluded that the alibi was ultimately not credible when weighed against the evidence of Nizeyimana's participation in crimes.<sup>108</sup>

35. The Appeals Chamber notes that the Trial Chamber correctly recalled that "[a]n accused does not bear the burden of proving his alibi beyond reasonable doubt" and that "the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true".<sup>109</sup> The Trial Chamber further recalled that "[w]here the alibi evidence does *prima facie* account for the accused's activities at the relevant time of the commission of the crime, the Prosecution must 'eliminate the reasonable possibility that the alibi is true,' for example, by demonstrating that the alibi evidence is not credible".<sup>110</sup>

36. Turning to the Trial Chamber's application of the burden of proof, the Appeals Chamber finds no merit in Nizeyimana's contention that the Trial Chamber applied circular reasoning or a

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<sup>102</sup> Nizeyimana Appeal Brief, paras. 422, 423, 425, *referring to* Trial Judgement, para. 1292, fn. 3304. *See also* Nizeyimana Reply Brief, paras. 77-79.

<sup>103</sup> Nizeyimana Appeal Brief, para. 424, *referring to* Trial Judgement, paras. 728 (Witness KEN06), 1293-1295 (Witness Jean Népomuscène Bunani), 1296-1298 (Witness Thomas Ruzindana), 1299-1301 (Witness ZML13), 1302-1307 (Witnesses RWV11 and CKN10), 1356, 1363, 1364 (Witness OUV03), 1367 (Witness Augustin Mushimiyimana).

<sup>104</sup> Nizeyimana Appeal Brief, paras. 424(iv), (vi), (ix).

<sup>105</sup> Nizeyimana Appeal Brief, para. 424, *referring to* Trial Judgement, paras. 1301 (Witness ZML13), 1307 (Witnesses RWV11 and CKN10).

<sup>106</sup> Nizeyimana Appeal Brief, para. 424, *referring to* Trial Judgement, paras. 1358, 1365. *See also* Nizeyimana Appeal Brief, para. 458; AT. 28 April 2014 pp. 6, 12.

<sup>107</sup> Prosecution Response Brief, paras. 193, 194, 305, 308, 309.

<sup>108</sup> Prosecution Response Brief, para. 194.

<sup>109</sup> Trial Judgement, para. 1206, *referring to* Zigiranyirazo Appeal Judgement, paras. 17, 18. *See* Ndahimana Appeal Judgement, para. 91.

<sup>110</sup> Trial Judgement, para. 1206, *referring to* Zigiranyirazo Appeal Judgement, para. 18.

presumption of guilt to its assessment of the alibi evidence.<sup>111</sup> Contrary to Nizeyimana’s suggestion, the Trial Chamber did not dismiss the alibi simply because it was contrary to the Prosecution evidence. The Trial Chamber carried out an in-depth assessment of the Defence alibi evidence and found that it was not credible based on a number of different factors, including the witnesses’ demeanour, their personal and professional links with Nizeyimana, their accounts of the timing of the mission, and the discrepancies and consistencies in and between their evidence.<sup>112</sup> In its conclusion, after “[h]aving assessed the credibility of the alibi evidence in isolation”, the Trial Chamber found it “either lacking credibility or insufficiently probative to even suggest the reasonable possibility of Nizeyimana’s presence on a 21 to 22 April 1994 reconnaissance mission to the Mata tea factory.”<sup>113</sup> Having found that there was no reasonable possibility of the alibi being true, it added that the Prosecution evidence was “highly convincing and credible”.<sup>114</sup> The Appeals Chamber understands that by so stating, the Trial Chamber merely considered that the alibi evidence failed to raise a doubt about Nizeyimana’s guilt.

37. The Appeals Chamber further finds that, by expressing “doubts”, “suspicions”, or otherwise “strong impression[s]”,<sup>115</sup> the Trial Chamber was merely explaining its reasons for finding that the alibi evidence was not credible. Similarly, by stating that the alibi evidence of Defence Witnesses RWV11 and CKN10 was “plausible” but “not credible”,<sup>116</sup> the Trial Chamber was indicating that their explanations for remembering the dates of the alibi were plausible “when viewed in isolation”,<sup>117</sup> but when considered in the context of their evidence as a whole, they were not credible.<sup>118</sup> The Appeals Chamber finds also that, by considering it “improbable” that Nizeyimana would be absent from Butare town at that time,<sup>119</sup> the Trial Chamber did not require him to disprove this probability but rather explained its reasons for finding that the alibi was not reasonably possibly true and therefore did not raise a doubt about Nizeyimana’s absence from Butare town.

38. With respect to the Trial Chamber’s findings that the alibi testimonies of Defence Witnesses Irénée Hitayezu, KEN096, RWV09, and Emmanuel Habyarimana were “not dispositive”,<sup>120</sup> the Appeals Chamber agrees that this specific language could indicate a misapplication of the burden of

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<sup>111</sup> Nizeyimana Notice of Appeal, para. 116; Nizeyimana Appeal Brief, para. 424(xi).

<sup>112</sup> Trial Judgement, paras. 1286-1370.

<sup>113</sup> Trial Judgement, para. 1371.

<sup>114</sup> Trial Judgement, para. 1371.

<sup>115</sup> Trial Judgement, paras. 728, 1293, 1295, 1296, 1298, 1301, 1304, 1306, 1359, 1363, 1367.

<sup>116</sup> Trial Judgement, para. 1307.

<sup>117</sup> Trial Judgement, para. 1302.

<sup>118</sup> Trial Judgement, para. 1307. *See also* Trial Judgement, para. 1304.

<sup>119</sup> Trial Judgement, para. 1372.

<sup>120</sup> Trial Judgement, paras. 1358 (“far from dispositive”), 1365, 1369.

proof.<sup>121</sup> In this regard, the Appeals Chamber recalls that alibi evidence is not required to establish the alibi beyond reasonable doubt, but only to show that the alibi is reasonably possibly true.<sup>122</sup> Nonetheless, use of such language does not automatically invalidate the Trial Chamber's entire alibi analysis, as the Appeals Chamber has stated:

When assessing whether a Trial Chamber, when using this type of language, has in fact shifted the burden of proof, the Appeals Chamber carries out an in-depth analysis of the specific findings related to a given incident. The Appeals Chamber has generally found that such language, while inappropriate, is not fatal when viewed in the broader context of a Trial Chamber's findings. This is especially the case where the Trial Chamber accurately refers elsewhere in the judgement to the appropriate burden of proof for the evaluation of alibi evidence, its overall approach evinces a careful assessment of the alibi evidence, and its conclusion that the alibi evidence is ultimately not credible is reasonable when weighed against the evidence of participation in a crime.<sup>123</sup>

39. Keeping these principles in mind, the Appeals Chamber will consider whether the Trial Chamber's findings regarding the alibi witnesses whose evidence was found "not dispositive"<sup>124</sup> indicate an improper assessment of their credibility or application of the burden of proof. The Appeals Chamber notes that with respect to Witnesses Hitayezu and KEN096, the Trial Chamber considered their evidence in detail and concluded that they lacked basic credibility<sup>125</sup> and it was on this basis that it found that their evidence was not "dispositive".<sup>126</sup> The Trial Chamber did not rely on Witness RWV09's evidence because his evidence was "brief", "failed to provide details" on the basis of his knowledge, and was, in any event, an estimate of the date in question.<sup>127</sup> As discussed further below, the Appeals Chamber also finds no error in the Trial Chamber's assessment of the low probative value of Witness RWV09's evidence.<sup>128</sup> In relation to Witness Habyarimana, the Trial Chamber noted that aspects of his testimony were credible, but that his testimony was also not inconsistent with evidence placing Nizeyimana in Butare town.<sup>129</sup> The Appeals Chamber, therefore, understands that by stating that his evidence was not "dispositive", the Trial Chamber was referring to the fact that this evidence was not sufficient to raise a reasonable doubt in the Prosecution case. Accordingly, the Appeals Chamber concludes that, although the Trial Chamber's use of the term "not dispositive" in relation to the evidence of these four witnesses is inconsistent with the burden

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<sup>121</sup> Cf. *Zigiranyirazo* Appeal Judgement, para. 19.

<sup>122</sup> *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.

<sup>123</sup> *Zigiranyirazo* Appeal Judgement, para. 20 (internal citations omitted).

<sup>124</sup> Trial Judgement, paras. 1358, 1365, 1369.

<sup>125</sup> Trial Judgement, paras. 658, 659, 665-668, 721-728, 1358, 1370.

<sup>126</sup> Trial Judgement, para. 1358.

<sup>127</sup> Trial Judgement, para. 1365.

<sup>128</sup> See *infra* Section III.B.2.(d).

<sup>129</sup> Trial Judgement, para. 1369.

of proof, the Trial Chamber did not in fact shift the burden of proof, when considered in the context of the Trial Chamber's overall careful assessment of the alibi evidence.<sup>130</sup>

40. The Appeals Chamber also finds reasonable, in view of the Trial Chamber's overall careful assessment of the evidence, the Trial Chamber's conclusion that the alibi evidence was ultimately not credible when weighed against the highly convincing evidence of Nizeyimana's involvement in crimes.<sup>131</sup> In the view of the Appeals Chamber, the language used by the Trial Chamber merely reflects the trier of fact's duty to determine, when faced with competing versions of events, which evidence it considers more probative.<sup>132</sup>

41. Nizeyimana's arguments are therefore dismissed.

(b) Failure to Make Findings on the Occurrence of the Reconnaissance Mission

42. Nizeyimana submits that the Trial Chamber failed to make a clear finding about the very occurrence of the reconnaissance mission to Mata, independently of the issue of his participation therein.<sup>133</sup> He contends that such a finding would have supported his alibi.<sup>134</sup>

43. The Prosecution responds that the alibi witnesses' evidence actually suggests that the reconnaissance mission to Mata did not take place because it was unwarranted as Mata was nearby and well-known to the army.<sup>135</sup> The Prosecution underlines that the fact that the alibi evidence was "obviously aimed" at lengthening the reconnaissance mission further affected its credibility as to the very existence of the mission.<sup>136</sup>

44. The Appeals Chamber recalls that the Trial Chamber is only required to make findings on those facts which are essential to the determination of guilt on a particular count.<sup>137</sup> Nizeyimana does not demonstrate how the failure to make a finding about the occurrence of the reconnaissance mission to Mata had any adverse impact on his convictions or on the Trial Chamber's analysis of his alibi. As reflected in the Trial Chamber's conclusion, the issue at stake with respect to the alibi

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<sup>130</sup> See *Zigiranyirazo* Appeal Judgement, para. 20.

<sup>131</sup> Trial Judgement, para. 1371.

<sup>132</sup> *Ndahimana* Appeal Judgement, para. 46; *Hategekimana* Appeal Judgement, para. 155; *Rukundo* Appeal Judgement, para. 217.

<sup>133</sup> Nizeyimana Appeal Brief, para. 474. The Appeals Chamber notes that Nizeyimana did not raise this argument in his Notice of Appeal. Nonetheless, the Appeals Chamber observes that the Prosecution did not object to this issue being raised for the first time in Nizeyimana's Appeal Brief and, in fact, responded to this argument. In light of this, the Appeals Chamber exercises its discretion to consider this issue in the interests of justice.

<sup>134</sup> Nizeyimana Appeal Brief, para. 474.

<sup>135</sup> Prosecution Response Brief, para. 222.

<sup>136</sup> Prosecution Response Brief, para. 222.

<sup>137</sup> *Karera* Appeal Judgement, para. 20, quoting *Kvočka* Appeal Judgement, para. 23.

was Nizeyimana's participation in a reconnaissance mission on 21 and 22 April 1994.<sup>138</sup> In any event, the Appeals Chamber observes that the Trial Chamber also did not find credible the alibi evidence in relation to the reconnaissance mission itself, including its dates<sup>139</sup> and general features.<sup>140</sup> Nizeyimana's argument is therefore dismissed.

(c) Assessment of the Credibility of the Alibi Evidence

45. In assessing the credibility of the alibi evidence, the Trial Chamber relied, *inter alia*, on the witnesses' demeanour,<sup>141</sup> their personal or professional links with Nizeyimana,<sup>142</sup> as well as on their recollection of the timing<sup>143</sup> and features of the mission.<sup>144</sup> The Trial Chamber also noted the "remarkable consistency" among the alibi witnesses' testimonies,<sup>145</sup> but nonetheless did not find their evidence credible in view of discrepancies which contrasted with their uniform recollection of the exculpatory aspects of their testimony.<sup>146</sup>

46. Nizeyimana argues that the Trial Chamber erred in setting aside one by one the Defence witnesses instead of evaluating whether, cumulatively, their evidence could reasonably possibly be true.<sup>147</sup> Nizeyimana submits that the Trial Chamber failed to find any corroboration between the 17 Defence alibi witnesses, despite the consistency of their evidence about Nizeyimana's presence during the reconnaissance mission in Mata on 21 and 22 April 1994.<sup>148</sup> Nizeyimana claims that, by contrast, the Trial Chamber ruled out corroboration by requiring several individual testimonies to be dispositive.<sup>149</sup>

47. Nizeyimana contends that the Trial Chamber failed to provide a reasoned opinion when rejecting in bulk the Defence witnesses' evidence in relation to his alibi on 21 and 22 April 1994 solely because of their demeanour.<sup>150</sup> He avers that the Trial Chamber's blanket statement that they showed a predisposition to lie, in the absence of an individualized evaluation of the witnesses'

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<sup>138</sup> Trial Judgement, paras. 1371, 1372.

<sup>139</sup> Trial Judgement, paras. 1292-1307.

<sup>140</sup> *See, e.g.*, Trial Judgement, paras. 1308-1325.

<sup>141</sup> Trial Judgement, paras. 1288, 1338, 1351, 1355.

<sup>142</sup> Trial Judgement, paras. 1289, 1353.

<sup>143</sup> Trial Judgement, paras. 1292-1307, 1330-1333, 1352-1355.

<sup>144</sup> Trial Judgement, paras. 1308-1325, 1339-1344.

<sup>145</sup> Trial Judgement, paras. 1286, 1309.

<sup>146</sup> Trial Judgement, paras. 1309-1316, 1339-1341.

<sup>147</sup> Nizeyimana Notice of Appeal, para. 92, *referring to* Trial Judgement, paras. 1286-1370; Nizeyimana Appeal Brief, paras. 436-442. *See also* Nizeyimana Appeal Brief, para. 422.

<sup>148</sup> Nizeyimana Appeal Brief, paras. 436-438, 440-442; AT. 28 April 2014 p. 5.

<sup>149</sup> Nizeyimana Appeal Brief, para. 439; AT. 28 April 2014 pp. 5, 6. *See also* AT. 28 April 2014 p. 12.

<sup>150</sup> Nizeyimana Notice of Appeal, para. 92; Nizeyimana Appeal Brief, paras. 426 (*referring to* Trial Judgement, para. 1288), 427, 429. *See also* Nizeyimana Notice of Appeal, para. 89; Nizeyimana Reply Brief, para. 80.

demeanour, precludes the Appeals Chamber from properly scrutinizing its findings.<sup>151</sup> Nizeyimana therefore requests that the Appeals Chamber review the Defence alibi witnesses' testimonies<sup>152</sup> and, in particular, review the video of Defence Witness CKN22's testimony.<sup>153</sup>

48. Nizeyimana also asserts that the Trial Chamber's finding that the alibi witnesses who had worked with him at the ESO were partial is unsupported.<sup>154</sup> He claims that this speculative approach ignores the very nature of alibi, which inherently relies upon the evidence of witnesses somehow linked to the accused.<sup>155</sup> Nizeyimana challenges the Trial Chamber's finding that the alibi witnesses who participated in the reconnaissance mission had a "strong personal interest of placing themselves outside Butare town", which, he alleges, amounts to a speculative suggestion that they were accomplices in crimes.<sup>156</sup>

49. Nizeyimana particularly challenges the Trial Chamber's rejection of Defence Witness RWV09's evidence.<sup>157</sup> He avers that the Trial Chamber erred in finding that he did not provide proper notice that Witness RWV09 would testify on the alibi<sup>158</sup> and underscores that the Prosecution did not object to this testimony.<sup>159</sup> Nizeyimana further submits that the Trial Chamber erred in finding that Witness RWV09's evidence was "not dispositive" regarding the date of the reconnaissance mission to Mata since his evidence was primarily meant to corroborate the very existence of this mission and Nizeyimana's participation therein.<sup>160</sup> Nizeyimana underlines that Witness RWV09 was never expressly discredited by the Trial Chamber.<sup>161</sup>

50. Nizeyimana further asserts that the Trial Chamber impermissibly applied a double standard in its assessment of the Prosecution and Defence witnesses.<sup>162</sup> Nizeyimana points to a number of instances where the Trial Chamber allegedly showed leniency towards Prosecution evidence, in

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<sup>151</sup> Nizeyimana Appeal Brief, para. 427.

<sup>152</sup> Nizeyimana Appeal Brief, para. 430.

<sup>153</sup> Nizeyimana Appeal Brief, para. 428.

<sup>154</sup> Nizeyimana Appeal Brief, para. 431, *referring to* Trial Judgement, paras. 1289-1291. Nizeyimana refers to Witnesses CKN10, Ruzindana, RWV11, ZML13, and Bunani.

<sup>155</sup> Nizeyimana Appeal Brief, paras. 432, 433.

<sup>156</sup> Nizeyimana Appeal Brief, para. 435, *referring to* Trial Judgement, para. 1328.

<sup>157</sup> Nizeyimana Notice of Appeal, para. 95, *referring to* Trial Judgement, para. 1365; Nizeyimana Appeal Brief, paras. 457-459, 461; AT. 28 April 2014 pp. 5, 6. *See also* Nizeyimana Reply Brief, paras. 83-95.

<sup>158</sup> Nizeyimana Appeal Brief, para. 460, *referring to* Trial Judgement, fn. 3454, *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-PT, Nizeyimana Pre Defense Brief, 28 March 2011 (confidential) ("Nizeyimana Pre-Defence Brief"), p. 50, and an email dated 5 June 2011, attached as Annex H to Nizeyimana Appeal Brief.

<sup>159</sup> Nizeyimana Appeal Brief, para. 460, *referring to* Witness RWV09, T. 8 June 2011 pp. 12, 13 (closed session).

<sup>160</sup> Nizeyimana Appeal Brief, paras. 457, 458, *referring to* Trial Judgement, paras. 1326, 1328, 1365, 1368, 1371, 1372; AT. 28 April 2014 pp. 5, 6, 38. *See also* Nizeyimana Appeal Brief, para. 424(x); Nizeyimana Reply Brief, para. 84. Nizeyimana further contends that it was obvious from the notice of Witness RWV09's alibi evidence that he would only provide an approximation as to the date of the reconnaissance mission. *See* Nizeyimana Reply Brief, para. 83.

<sup>161</sup> Nizeyimana Reply Brief, paras. 85-89.



contrast to the assessment of Defence evidence.<sup>163</sup> As a consequence, Nizeyimana claims that the burden on him was practically unattainable and that, had the Trial Chamber consistently applied the correct standard, it would not have reached the impugned findings.<sup>164</sup>

51. The Prosecution responds that the demeanour of the Defence alibi witnesses was only one among several factors considered by the Trial Chamber to reasonably discredit the alibi.<sup>165</sup> It submits that the Trial Chamber thoroughly discussed the merits of the alibi evidence and identified numerous internal concerns about the Defence alibi witnesses, taken both individually and in light of the totality of the evidence.<sup>166</sup> The Prosecution adds that Nizeyimana's arguments regarding the double standard of assessment of the evidence should fail since Nizeyimana merely seeks to substitute the Trial Chamber's evaluation of the evidence with his own.<sup>167</sup>

52. The Prosecution further maintains that the alibi evidence was not credible since Defence witnesses all repeated the same story which was not believable.<sup>168</sup> It underscores that the Trial Chamber correctly considered a number of issues which raised concerns about the credibility of the alibi evidence.<sup>169</sup>

53. The Prosecution underlines that Nizeyimana's challenges to the Trial Chamber's assessment of Witness RWV09's evidence should be dismissed since he was not part of the reconnaissance mission, he only provided a brief assertion with no basis for his alleged knowledge and recollection, and his evidence was suspicious and wavering.<sup>170</sup> The Prosecution also submits that the Trial Chamber correctly observed that Nizeyimana failed to provide notice of Witness RWV09's alibi evidence in his Notice of Alibi and Pre-Defence Brief.<sup>171</sup> It further underscores that, contrary to

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<sup>162</sup> Nizeyimana Notice of Appeal, paras. 92, 114; Nizeyimana Appeal Brief, paras. 591-595. *See also* Nizeyimana Appeal Brief, para. 434.

<sup>163</sup> Nizeyimana compares the assessment of the credibility of Defence Witness Bunani and of Prosecution Witness ZAK with regard to their recollection of the dates of formal events. Nizeyimana Appeal Brief, para. 424(i). He also compares the assessment of the demeanour of alibi witnesses and the assessment of the demeanour of Prosecution Witness AZD. Nizeyimana Appeal Brief, para. 430. Nizeyimana further underscores the Trial Chamber's repeated reliance on corroboration in assessing the Prosecution evidence, in contrast to the assessment of the Defence evidence. Nizeyimana Appeal Brief, paras. 443-445. *See also* Nizeyimana Appeal Brief, paras. 436-442. He finally compares the assessment of the credibility of Defence Witness RWV09 with Prosecution witnesses in relation to the specificity of the dates given. Nizeyimana Appeal Brief, para. 459.

<sup>164</sup> Nizeyimana Notice of Appeal, para. 114; Nizeyimana Appeal Brief, para. 595.

<sup>165</sup> Prosecution Response Brief, paras. 196, 197, 205.

<sup>166</sup> Prosecution Response Brief, para. 198.

<sup>167</sup> Prosecution Response Brief, paras. 305, 307.

<sup>168</sup> Prosecution Response Brief, para. 198.

<sup>169</sup> Prosecution Response Brief, paras. 199-204.

<sup>170</sup> Prosecution Response Brief, paras. 206, 208, 209. *See also* AT. 28 April 2014 p. 36.

<sup>171</sup> Prosecution Response Brief, paras. 210, 211.

Nizeyimana's assertion, Witness RWV09 was in fact expressly called to testify about the date of the reconnaissance mission to Mata.<sup>172</sup>

54. The Appeals Chamber recalls that a trial chamber is best placed to evaluate the probative value of evidence.<sup>173</sup> The Appeals Chamber notes that the Trial Chamber correctly observed that “the mere presentation of alibi evidence does not necessarily raise the reasonable possibility that it is true and that it is within the discretion of the [Trial] Chamber to assess it”.<sup>174</sup>

55. The Appeals Chamber observes that, contrary to Nizeyimana's claim, the Trial Chamber evaluated the testimonies of alibi witnesses regarding both their individual<sup>175</sup> and collective merits.<sup>176</sup> In particular, the Trial Chamber noted the “remarkable consistency” among the alibi evidence of ESO soldier witnesses as to the dates, duration, and purpose of the reconnaissance mission to Mata.<sup>177</sup> The Trial Chamber thus expressly considered the common features in the alibi evidence. Nonetheless, it concluded that the uniformity of the testimonies on exculpatory aspects and “inane details” contrasted with their discrepancies on other important aspects<sup>178</sup> and with the general context,<sup>179</sup> rendering the alibi evidence ultimately not credible.<sup>180</sup> That conclusion, in the view of the Appeals Chamber, was not unreasonable. In these circumstances, the Trial Chamber's findings that testimonies of five of the alibi witnesses were not individually “dispositive” do not undermine its collective evaluation of the evidence.<sup>181</sup> Nizeyimana does not demonstrate any error in this regard.

56. The Appeals Chamber also finds no merit in Nizeyimana's claim that the Trial Chamber erred in rejecting the alibi witnesses' evidence solely because of their demeanour and made a “blanket statement” that they were predisposed to lying.<sup>182</sup> Although the Trial Chamber found that the ESO soldier witnesses' demeanour would have been sufficient in itself to discredit their evidence, it expressly acknowledged that such demeanour is “not always clearly depicted on paper” and remained “mindful of its obligation to provide a reasoned opinion on issues of central relevance”.<sup>183</sup> The Trial Chamber considered the witnesses' demeanour as a “starting point”<sup>184</sup> and

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<sup>172</sup> Prosecution Response Brief, para. 207.

<sup>173</sup> *Nchamihigo* Appeal Judgement, para. 42; *Rutaganda* Appeal Judgement, para. 29.

<sup>174</sup> Trial Judgement, para. 1287.

<sup>175</sup> Trial Judgement, paras. 1293-1307, 1331-1347, 1351-1367.

<sup>176</sup> Trial Judgement, paras. 1286, 1308-1329, 1332, 1335, 1339-1341.

<sup>177</sup> Trial Judgement, paras. 1286, 1308, 1309.

<sup>178</sup> Trial Judgement, paras. 1309-1316, 1335, 1339-1341.

<sup>179</sup> Trial Judgement, paras. 1317-1328, 1333, 1356.

<sup>180</sup> Trial Judgement, paras. 1329, 1348, 1368, 1370, 1371.

<sup>181</sup> Trial Judgement, paras. 1347, 1358, 1365, 1369.

<sup>182</sup> Nizeyimana Notice of Appeal, para. 92; Nizeyimana Appeal Brief, paras. 426, 427, 429.

<sup>183</sup> Trial Judgement, para. 1288.

assessed a number of other factors before rejecting their evidence.<sup>185</sup> The Appeals Chamber recalls that the assessment of the demeanour of witnesses in considering their credibility is one of the fundamental functions of a trial chamber, to which the Appeals Chamber must accord considerable deference.<sup>186</sup> Furthermore, the Appeals Chamber has previously noted that it “is loathe to disturb such credibility assessments on review”.<sup>187</sup> The Appeals Chamber, bearing in mind the broad discretion enjoyed by trial chambers in the matter, finds that Nizeyimana does not demonstrate any error in the Trial Chamber’s approach.

57. With regard to the links between Nizeyimana and the ESO soldier alibi witnesses, the Appeals Chamber recalls that a witness’s close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing his or her evidence.<sup>188</sup> The Appeals Chamber notes that the Trial Chamber correctly noted that such relationships “[did] not render the witnesses’ testimony *per se* unreliable or lacking [in] credibility”.<sup>189</sup> Moreover, the Appeals Chamber observes that, while the Trial Chamber found the intimate or professional links between Nizeyimana and ESO soldier alibi witnesses “relevant to a consideration of their credibility”,<sup>190</sup> it considered them only as “bolster[ing] other concerns when viewed in light of the [Trial] Chamber’s assessment of their demeanours and other factors”.<sup>191</sup> The Appeals Chamber finds no error in the Trial Chamber’s approach. The Trial Chamber also considered that these alibi witnesses had “a strong personal interest of placing themselves outside of Butare town [...] given the significant involvement of ESO soldiers in attacks on civilians in Butare around this period”.<sup>192</sup> Although speculative, the Appeals Chamber does not find that this statement amounts to finding that the alibi witnesses were accomplices of any specific crime.

58. Turning to Nizeyimana’s challenge to the Trial Chamber’s assessment of Witness RWV09’s evidence,<sup>193</sup> the Appeals Chamber finds no error in the Trial Chamber’s observation that Nizeyimana did not provide proper notice in his Notice of Alibi or Pre-Defence Brief that Witness RWV09 would provide alibi evidence.<sup>194</sup> The Appeals Chamber notes that Nizeyimana does not

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<sup>184</sup> Trial Judgement, para. 1288.

<sup>185</sup> Trial Judgement, paras. 1289-1329.

<sup>186</sup> *Muvunyi* Appeal Judgement of 1 April 2011, para. 26. See also *Nchamihigo* Appeal Judgement, para. 47.

<sup>187</sup> *Muvunyi* Appeal Judgement of 1 April 2011, para. 26, quoting *Ntakirutimana* Appeal Judgement, para. 244.

<sup>188</sup> *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 117.

<sup>189</sup> Trial Judgement, para. 1291.

<sup>190</sup> Trial Judgement, para. 1290.

<sup>191</sup> Trial Judgement, para. 1291.

<sup>192</sup> Trial Judgement, para. 1328.

<sup>193</sup> Nizeyimana Notice of Appeal, para. 95; Nizeyimana Appeal Brief, paras. 457-461; AT. 28 April 2014 pp. 5, 6, 38. See also Nizeyimana Reply Brief, paras. 83-95.

<sup>194</sup> Trial Judgement, fn. 3454.

challenge the absence of such notice in the Notice of Alibi.<sup>195</sup> Furthermore, the Nizeyimana Pre-Defence Brief provides no such notice, since unlike with respect to other witnesses, there is no indication that Witness RWV09 would provide alibi evidence.<sup>196</sup> With respect to the email sent by Nizeyimana to the Prosecution three days before the testimony of Witness RWV09,<sup>197</sup> the Appeals Chamber notes that the Trial Chamber was not required to consider a document which was not part of the trial record.<sup>198</sup> In any case, the Appeals Chamber does not find that a late email would amount to proper and timely notice. Nonetheless, the Appeals Chamber observes that the Prosecution did not object to the alibi evidence of Witness RWV09 and that the Trial Chamber exercised its discretion to assess it in the section on the alibi.<sup>199</sup> In these circumstances, Nizeyimana does not demonstrate that it was unreasonable for the Trial Chamber to take into account that Nizeyimana had not given notice of Witness RWV09's alibi evidence,<sup>200</sup> among other factors, in assessing his testimony.<sup>201</sup>

59. The Appeals Chamber also finds no merit in Nizeyimana's argument that Witness RWV09 was never expressly discredited by the Trial Chamber.<sup>202</sup> Nizeyimana fails to appreciate that the Trial Chamber did not rely on Witness RWV09's evidence not because it was discredited but rather because it provided too little detail to support the alibi.<sup>203</sup> Indeed, the Trial Chamber expressly found that Witness RWV09's "evidence about the reconnaissance mission was brief" and that "his evidence failed to provide details reflecting why he knew Nizeyimana also went on the reconnaissance mission".<sup>204</sup> Nizeyimana does not demonstrate that the Trial Chamber erred in its assessment of Witness RWV09's alibi evidence.

60. The Appeals Chamber, finally, turns to Nizeyimana's arguments in relation to the Trial Chamber's alleged double standard in its assessment of the Prosecution and Defence evidence. The Appeals Chamber will examine the specific instances of alleged application of a double standard raised by Nizeyimana in turn. At the outset, however, the Appeals Chamber notes that Nizeyimana points to no specific finding and provides no analysis in relation to the alleged leniency towards all

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<sup>195</sup> See Nizeyimana Appeal Brief, para. 460.

<sup>196</sup> The Appeals Chamber notes that the references provided by Nizeyimana do not point to the anticipated evidence of Witness RWV09. See Nizeyimana Appeal Brief, para. 460, *referring to* Nizeyimana Pre-Defence Brief, Witness 48 at p. 50.

<sup>197</sup> Nizeyimana Appeal Brief, Annex H. See also Nizeyimana Appeal Brief, para. 460.

<sup>198</sup> Cf. *Kanyarukiga* Appeal Judgement, para. 163.

<sup>199</sup> Trial Judgement, para. 1365.

<sup>200</sup> Trial Judgement, fn. 3454.

<sup>201</sup> Trial Judgement, para. 1365.

<sup>202</sup> Nizeyimana Reply Brief, paras. 85-89.

<sup>203</sup> Trial Judgement, para. 1365.

<sup>204</sup> Trial Judgement, para. 1365.

Prosecution witnesses who made mistakes as to dates.<sup>205</sup> Therefore, this contention is summarily dismissed.

61. Nizeyimana asserts that the Trial Chamber showed more leniency towards Prosecution Witness ZAK regarding the date of a formal event in his life than it showed to Defence Witness Jean Népomuscène Bunani's inability to recall the date of his own wedding.<sup>206</sup> In this respect, the Appeals Chamber considers that these situations were different and, therefore, do not show that the Trial Chamber applied different standards to the assessment of the evidence of these two witnesses. The Trial Chamber considered it unreasonable that Witness Bunani would not remember the date of his wedding, but would remember the date of the reconnaissance mission under Nizeyimana's leadership.<sup>207</sup> With respect to Witness ZAK, the date of the formal event in which he participated was not at issue, and indeed, the witness recalled the date of the relevant formal event in his life.<sup>208</sup> Rather, the Defence challenged the very existence of that event on the basis of the absence of any record of it in the registry for the relevant date; however, the Trial Chamber found the challenge unpersuasive given the passage of time and the change of administrative functions in Rwanda.<sup>209</sup>

62. Nizeyimana further alleges that the Trial Chamber failed to address the Defence's arguments in relation to the demeanour of Prosecution Witness AZD, whereas demeanour was a factor taken into account in the assessment of Defence witnesses.<sup>210</sup> In this regard, the Appeals Chamber observes that the Trial Chamber properly took into account the challenges raised to Witness AZD's evidence<sup>211</sup> and addressed issues relevant to his credibility in detail.<sup>212</sup> Bearing in mind the broad discretion enjoyed by trial chambers in assessing witnesses' evidence and the fact that they need not articulate every step of their reasoning,<sup>213</sup> the Appeals Chamber finds that Nizeyimana's mere reference to submissions made at trial concerning Witness AZD's demeanour does not demonstrate that the Trial Chamber impermissibly disregarded relevant factors in assessing Witness AZD's evidence or applied a different standard of assessment.<sup>214</sup>

63. The Appeals Chamber further finds no merit in Nizeyimana's comparison of the Trial Chamber's allegedly unequal reliance on "corroboration" in its assessment of the Prosecution and

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<sup>205</sup> Nizeyimana Appeal Brief, para. 459.

<sup>206</sup> Nizeyimana Appeal Brief, para. 424(i).

<sup>207</sup> Trial Judgement, paras. 1293-1295.

<sup>208</sup> Trial Judgement, para. 779, *referring to* Witness ZAK, T. 25 January 2011 pp. 13, 14 (closed session).

<sup>209</sup> Trial Judgement, paras. 779, 780.

<sup>210</sup> Nizeyimana Appeal Brief, para. 430.

<sup>211</sup> Trial Judgement, para. 182, *referring to* Nizeyimana Closing Brief, paras. 105, 109, 110. Paragraph 110 of Nizeyimana's Closing Brief challenged Witness AZD's demeanour.

<sup>212</sup> Trial Judgement, paras. 182-186. *See also* Trial Judgement, paras. 495, 524, 610, 861.

<sup>213</sup> *Ndindiliyimana et al.* Appeal Judgement, para. 340; *Karera* Appeal Judgement, para. 19.

Defence evidence.<sup>215</sup> The Appeals Chamber recalls that trial chambers have the discretion to decide in the circumstances of each case whether corroboration is necessary at all and as to which witnesses.<sup>216</sup> As a result, the fact that a trial chamber requires corroboration for the evidence of some witnesses and not for that of others does not necessarily indicate a misapplication of the standard of proof. In the present case, the Appeals Chamber has already found that the Trial Chamber reasonably addressed the collective merits of the alibi evidence and that it even noted its “remarkable consistency”.<sup>217</sup> The Appeals Chamber therefore cannot identify any impermissible application of a different standard of evidentiary assessment with regard to corroboration.

64. Nizeyimana’s arguments are therefore dismissed.

(d) Nizeyimana’s Replacement at the ESO

65. In finding that Nizeyimana’s alibi for 21 and 22 April 1994 could not reasonably possibly be true, the Trial Chamber considered, *inter alia*, his position as a “senior officer charged with intelligence and operations” at the ESO, which rendered it “inconceivable” that he would be absent from Butare given the events in Butare town during this period of time.<sup>218</sup>

66. Nizeyimana submits that the Trial Chamber failed to consider that he was replaced as S2/S3 officer at the ESO by Second Lieutenant Ezechiel Gakwerere from 18 April 1994 onwards, which contradicts the finding that it was improbable, because of his position, that he was absent from Butare during the relevant period.<sup>219</sup> In particular, Nizeyimana points to the evidence of Defence Witnesses OUV03 and RWV09 to this effect and that his sole duty thereafter was the setting up of the Mata training centre.<sup>220</sup> He argues that the Trial Chamber implicitly credited the evidence of Witnesses OUV03 and RWV09 with regards to the date of Nizeyimana’s replacement at the ESO.<sup>221</sup> Nizeyimana points to the Trial Chamber’s reliance on his replacement at the ESO to credit his alibi from 26 April 1994 onwards but maintains that the Trial Chamber overlooked this evidence in relation to the alibi for 21 and 22 April 1994 and therefore contradicted itself.<sup>222</sup>

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<sup>214</sup> Cf. *Karera* Appeal Judgement, para. 20.

<sup>215</sup> Nizeyimana Appeal Brief, paras. 443-445.

<sup>216</sup> *Gatete* Appeal Judgement, para. 138; *Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Ntawukulyayo* Appeal Judgement, para. 21.

<sup>217</sup> See *supra* para. 55.

<sup>218</sup> Trial Judgement, para. 1328. See also Trial Judgement, para. 1372.

<sup>219</sup> Nizeyimana Notice of Appeal, paras. 96-98; Nizeyimana Appeal Brief, paras. 462-476, referring to, *inter alia*, Nizeyimana Closing Brief, paras. 31, 32.

<sup>220</sup> Nizeyimana Appeal Brief, para. 463, referring to Witness RWV09, T. 8 June 2011 pp. 12, 13 (closed session); Witness RWV09, T. 8 June 2011 p. 41; Witness OUV03, T. 31 May 2011 pp. 14, 22-26; Witness OUV03, T. 1 June 2011 pp. 10, 11. See also Nizeyimana Appeal Brief, para. 471; Nizeyimana Reply Brief, paras. 90, 94.

<sup>221</sup> Nizeyimana Appeal Brief, paras. 466, 467. See also Nizeyimana Reply Brief, paras. 85-89.

<sup>222</sup> See Nizeyimana Appeal Brief, paras. 466, 468-471.

Nizeyimana further claims that the Trial Chamber erred in qualifying the reconnaissance mission as “uneventful”, “modest”, and “conducted at a snail’s pace”, in contradiction with its own finding regarding the importance of Nizeyimana’s presence in Mata, in late April 1994, for the setting up of a military training facility capable of accommodating thousands of recruits.<sup>223</sup>

67. The Prosecution responds that Nizeyimana’s argument should be summarily dismissed.<sup>224</sup> It avers that the Trial Chamber expressly considered the evidence of Nizeyimana’s replacement at the ESO, for all relevant periods, and found that it did not bolster Nizeyimana’s alibi.<sup>225</sup> The Prosecution underlines that the Trial Chamber did not credit Witnesses OUV03’s and RWV09’s evidence that Nizeyimana was replaced at the ESO on 18 April 1994 but rather found them insufficiently reliable to establish the reasonable possibility of the alibi’s truthfulness.<sup>226</sup>

68. The Prosecution adds that, in any event, neither Nizeyimana’s alleged replacement at the ESO nor the setting up of a training centre eliminated Nizeyimana’s considerable authority in the ESO’s command structure, in view of his long tenure as S2/S3 officer.<sup>227</sup> The Prosecution therefore contends that the Trial Chamber’s finding that it was improbable that he would have been absent as ESO resources were being deployed and actively used in Butare was reasonable.<sup>228</sup> It points to evidence that Nizeyimana was in Butare town and involved in crimes there even after his reassignment towards the end of April 1994.<sup>229</sup>

69. The Appeals Chamber dismisses Nizeyimana’s contention that the Trial Chamber failed to consider his replacement at the ESO with regard to his alibi for 21 and 22 April 1994. Although the Trial Chamber did not consider this evidence in the section on Nizeyimana’s alibi for 21 and 22 April 1994, a reading of the Trial Judgement as a whole reveals that the Trial Chamber took into consideration Witnesses OUV03’s and RWV09’s evidence of Nizeyimana’s replacement as S2/S3 officer at the ESO.<sup>230</sup>

70. Turning to the date of Nizeyimana’s reassignment to the Mata training centre, the Appeals Chamber finds that nowhere in the Trial Judgement did the Trial Chamber find that it occurred

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<sup>223</sup> Nizeyimana Appeal Brief, para. 472, *referring to* Trial Judgement, paras. 1294, 1328. Nizeyimana also points to an alleged contradiction with the Trial Chamber’s finding regarding his role in the Cyahinda Parish events. *See* Nizeyimana Appeal Brief, para. 473. The Appeals Chamber finds the relevance of this allegation unclear and therefore summarily dismisses it.

<sup>224</sup> Prosecution Response Brief, para. 217.

<sup>225</sup> Prosecution Response Brief, para. 217.

<sup>226</sup> Prosecution Response Brief, paras. 218, 219, *referring to, inter alia*, Trial Judgement, para. 1368, fn. 730.

<sup>227</sup> Prosecution Response Brief, para. 220.

<sup>228</sup> Prosecution Response Brief, para. 221.

<sup>229</sup> Prosecution Response Brief, para. 220.

<sup>230</sup> Trial Judgement, paras. 1392, 1394. *See also* Trial Judgement, para. 1375, fn. 730.

around 18 April 1994, before the reconnaissance mission to Mata, thereby “implicitly” crediting Witnesses OUV03’s and RWV09’s testimonies. Rather, the Trial Chamber explicitly concluded, based on corroborated evidence, that Nizeyimana was reassigned “towards the end of April 1994”.<sup>231</sup> The Trial Chamber further provided a reasoned opinion as to the probative weight of Witnesses OUV03’s and RWV09’s evidence.<sup>232</sup> It found these witnesses, respectively, “unreliable”<sup>233</sup> and “not dispositive”<sup>234</sup> or “of limited probative value”.<sup>235</sup> More significantly, the Trial Chamber found Witness OUV03 unreliable “particularly as it relates to the recollection of dates”<sup>236</sup> and noted Witness RWV09’s “admitted inability to accurately identify the dates”.<sup>237</sup> Therefore, even if the Trial Chamber did not explicitly discredit Witnesses OUV03’s and RWV09’s testimonies as to the date of Nizeyimana’s replacement, it acted within the bounds of its discretion in finding that, around 21 April 1994, Nizeyimana was still a “senior officer charged with intelligence and operations” at the ESO, rendering it “inconceivable” that he would be absent from Butare.<sup>238</sup>

71. In the view of the Appeals Chamber, the Trial Chamber also reasonably considered it “inconceivable” that a senior officer of Nizeyimana’s position would leave Butare “for the purposes of the modest reconnaissance mission conducted at a snail’s pace”.<sup>239</sup> This conclusion is not at odds with the Trial Chamber’s consideration that Nizeyimana was reassigned to Mata in late April 1994 for the purpose of setting up a military training facility.<sup>240</sup> That Nizeyimana was eventually put in charge of the training facility does not necessarily mean that he participated in the reconnaissance mission prior to the establishment of the facility, or indicate how the reconnaissance mission was conducted.

72. Nizeyimana’s arguments are therefore dismissed.

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<sup>231</sup> Trial Judgement, para. 1428. *See also* Trial Judgement, para. 1425.

<sup>232</sup> Trial Judgement, paras. 1354-1357, 1359-1365. *See also* Trial Judgement, paras. 517, 772, 1419, 1435, fn. 727. The Trial Chamber particularly expressed “fundamental reservations” about Witness OUV03’s credibility, as well as its impression that his evidence was tailored. Trial Judgement, paras. 1363, 1364.

<sup>233</sup> Trial Judgement, para. 1355.

<sup>234</sup> Trial Judgement, para. 1365.

<sup>235</sup> Trial Judgement, para. 1421.

<sup>236</sup> Trial Judgement, para. 1419.

<sup>237</sup> Trial Judgement, para. 1421.

<sup>238</sup> Trial Judgement, para. 1328. *See also* Trial Judgement, para. 1372.

<sup>239</sup> Trial Judgement, para. 1328.

<sup>240</sup> Trial Judgement, paras. 1409, 1410, 1426-1428.



(e) Reliance on Nizeyimana's Involvement in Other Crimes

73. In finding that Nizeyimana's alibi for 21 and 22 April 1994 could not reasonably possibly be true, the Trial Chamber considered, *inter alia*, the credible evidence of Nizeyimana's involvement in crimes which were in direct conflict with the alibi evidence.<sup>241</sup>

74. Nizeyimana contends that the Trial Chamber erred in rejecting his alibi for 21 and 22 April 1994 on the basis of his involvement in the killings of the Matabaro and Nyirinkwaya family members, the killing of Rwekaza, the attack on Witness ZAV, the killing of Gicanda and the others taken from her home, and the killing of Karenzi, "some of which" were in direct conflict with the alibi.<sup>242</sup> Nizeyimana submits that the decisive weight afforded to the conflicting Prosecution evidence was unreasonable.<sup>243</sup> More specifically, he points to the alleged ambiguity and "reluctance" of the Trial Chamber to make clear findings about the dates of these crimes,<sup>244</sup> although it considered them as conflicting with the alibi evidence.<sup>245</sup> Nizeyimana maintains that it was his position that all these crimes occurred on 21 April 1994 and that they were covered by his alibi.<sup>246</sup> In his view, there was enough evidence to determine their exact dates.<sup>247</sup> Even if a doubt remained, he claims that the dates should have been interpreted in his favour and not left undetermined, in order to apply the correct standard of proof and allow him to eliminate the possibility of his involvement.<sup>248</sup>

75. Nizeyimana further generally contends that the Trial Chamber erred in relying on his propensity for criminal conduct as a factor for rejecting the alibi evidence.<sup>249</sup> He refers to the *Kupreškić et al.* and *Nshogoza* cases to support his claim that "similar-fact evidence" should not be admissible as evidence of an accused's general propensity to commit a charged crime.<sup>250</sup>

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<sup>241</sup> Trial Judgement, paras. 1327, 1371.

<sup>242</sup> Nizeyimana Notice of Appeal, paras. 93, 94, *referring to* Trial Judgement, paras. 1327, 1371; Nizeyimana Appeal Brief, paras. 447-456.

<sup>243</sup> Nizeyimana Notice of Appeal, para. 94; Nizeyimana Appeal Brief, para. 456.

<sup>244</sup> Nizeyimana Appeal Brief, paras. 450-455. Nizeyimana underlines alleged discrepancies in the Trial Judgement about the dates of the killing of Rwekaza and attack on Witness ZAV (Nizeyimana Appeal Brief, para. 451, *referring to* Trial Judgement, paras. 759, 1327, 1371, 1519), the killing of Gicanda (Nizeyimana Appeal Brief, para. 452, *referring to* Trial Judgement, paras. 529, 530, 1327, 1371, 1510), and the killing of the Matabaro family members (Nizeyimana Appeal Brief, para. 453, *referring to* Nizeyimana Grounds 29-32). *See also* AT. 28 April 2014 pp. 7, 8.

<sup>245</sup> Nizeyimana Appeal Brief, para. 450.

<sup>246</sup> Nizeyimana Appeal Brief, para. 449; AT. 28 April 2014 pp. 7, 8.

<sup>247</sup> Nizeyimana Appeal Brief, para. 454. *See also* AT. 28 April 2014 pp. 7, 8.

<sup>248</sup> Nizeyimana Notice of Appeal, para. 94; Nizeyimana Appeal Brief, para. 456.

<sup>249</sup> Nizeyimana Notice of Appeal, para. 112, *referring to, inter alia*, Trial Judgement, paras. 1371, 1372; Nizeyimana Appeal Brief, paras. 582-587, 589; AT. 28 April 2014 p. 16. *See also* Nizeyimana Appeal Brief, para. 475.

<sup>250</sup> Nizeyimana Appeal Brief, paras. 583, 584, *referring to Kupreškić et al.* Appeal Judgement, para. 321; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct, 20 February 2009, para. 4.

76. The Prosecution responds that Nizeyimana's arguments should be summarily dismissed since the Trial Chamber did not reject his alibi solely because of evidence establishing his involvement in other crimes.<sup>251</sup> It submits that the Trial Chamber was required to assess the alibi evidence in light of the entirety of the evidence and that it only considered Nizeyimana's involvement in crimes as further support for its disbelief of the alibi evidence.<sup>252</sup> In this regard, the Prosecution adds that Nizeyimana's reliance on the *Kupreškić et al.* and *Nshogoza* cases regarding propensity evidence is inapposite since, in the instant case, all acts and conduct that the Trial Chamber took into account were properly charged.<sup>253</sup>

77. The Prosecution submits that Nizeyimana's assertion of the conflict between the dates of the crimes and his purported alibi does not demonstrate any error, since the alibi narrative in itself lacked credibility.<sup>254</sup> In any event, it asserts that the Trial Chamber expressly noted that the dates of some of the crimes overlapped with the period of the alibi for 21 and 22 April 1994.<sup>255</sup>

78. The Appeals Chamber finds no merit in Nizeyimana's claim that the decisive weight afforded to the conflicting Prosecution evidence was unreasonable.<sup>256</sup> The Appeals Chamber recalls that mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or that it should have interpreted evidence in a particular manner, are liable to be summarily dismissed.<sup>257</sup> The Appeals Chamber has already upheld the Trial Chamber's conclusion that the alibi evidence was ultimately not credible when weighed against the evidence of Nizeyimana's involvement in the crimes charged.<sup>258</sup> The Appeals Chamber further finds that the Trial Chamber did not impermissibly reject Nizeyimana's alibi on the basis of his propensity for criminal conduct, but rather on the basis of "the diversity of credible sources"<sup>259</sup> and "the highly convincing evidence"<sup>260</sup> of his involvement in the specific crimes, which it found proven beyond reasonable doubt elsewhere in the Trial Judgement. Nizeyimana demonstrates no error in this analysis.

79. Finally, the Appeals Chamber cannot identify any failure of the Trial Chamber to make clear findings about the dates of the crimes for which the alibi was provided. The Appeals Chamber notes that the Trial Chamber provided a reasoned opinion and ultimately found that: (i) the killings of

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<sup>251</sup> Prosecution Response Brief, para. 213.

<sup>252</sup> Prosecution Response Brief, paras. 213, 214, 216.

<sup>253</sup> Prosecution Response Brief, para. 306.

<sup>254</sup> Prosecution Response Brief, para. 215; AT. 28 April 2014 p. 37.

<sup>255</sup> Prosecution Response Brief, para. 215.

<sup>256</sup> Nizeyimana Notice of Appeal, para. 94; Nizeyimana Appeal Brief, para. 456.

<sup>257</sup> *Nchamihigo* Appeal Judgement, para. 157; *Krajišnik* Appeal Judgement, para. 27.

<sup>258</sup> See *supra* Section III.B.2.(a).

<sup>259</sup> Trial Judgement, para. 1371.

<sup>260</sup> Trial Judgement, para. 1372.

Rosalie Gicanda and the others taken from her home occurred on or around 20 April 1994;<sup>261</sup> (ii) the killing of Remy Rwekaza, as well as the attack on Prosecution Witness ZAV, occurred on 21 April 1994;<sup>262</sup> (iii) the killing of Pierre Claver Karenzi occurred around 21 April 1994;<sup>263</sup> and (iv) the killings of the Matabaro and Nyirinkwaya family members occurred on 22 April 1994.<sup>264</sup> The Appeals Chamber finds that Nizeyimana does not demonstrate how the alleged error would have impacted his conviction, since the Trial Chamber further expressly considered the timing of his alibi relevant and since it systematically assessed whether it raised doubt in the Prosecution evidence in relation to these crimes.<sup>265</sup> Nizeyimana's arguments are therefore dismissed.

### 3. Conclusion

80. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana's Thirty-Third through Thirty-Eighth Grounds of Appeal, and his Forty-Second through Forty-Fourth Grounds of Appeal, in part.

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<sup>261</sup> Trial Judgement, paras. 530, 734, 1327, 1371, 1510. *See also* Trial Judgement, paras. 519-529. The Appeals Chamber notes that the Trial Chamber used "on or around 20 April 1994" and "around 20 April" interchangeably.

<sup>262</sup> Trial Judgement, paras. 759, 1327, 1371, 1519. *See also* Trial Judgement, paras. 745, 757, 758. The Appeals Chamber notes that the Trial Chamber used "on or about 21 April 1994" and "on 21 April 1994" interchangeably.

<sup>263</sup> Trial Judgement, paras. 619, 1529, 1535.

<sup>264</sup> Trial Judgement, paras. 732, 1327, 1371. *See also* Trial Judgement, paras. 705-730. The Appeals Chamber notes that the Trial Chamber also referred to "around 22 April 1994". Trial Judgement, para. 1554.

<sup>265</sup> Trial Judgement, paras. 457, 529 (killings of Gicanda and the others taken from her home), 629, 732 (killings of the Matabaro and Nyirinkwaya family members), 740, 759 (killing of Rwekaza and attack on Witness ZAV). *See* Trial Judgement, paras. 581, 599, 623, 1532 (with respect to the killing of Karenzi, the Trial Chamber considered that Nizeyimana had raised an alibi, observed that there was no direct evidence of Nizeyimana having ordered or instigated this killing, and referred to Nizeyimana's presence and orders at a nearby roadblock "on the same day" that led to the attacks on Rwekaza and Witness ZAV).

### **C. Killing of the Ruhutinyanya Family (Grounds 4-7, and 42-44, in part)**

81. The Trial Chamber convicted Nizeyimana of committing genocide and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6(1) of the Statute, for participating in the basic form of a joint criminal enterprise based, in part, on his involvement in the killing of the Ruhutinyanya family.<sup>266</sup> Furthermore, the Trial Chamber found that Nizeyimana could bear superior responsibility, pursuant to Article 6(3) of the Statute, for this event and stated that it would take this into account in sentencing.<sup>267</sup>

82. The Trial Chamber determined that, around 17 April 1994, soldiers from the ESO camp freed members of the Ruhutinyanya family detained by hostile, armed civilians, including *Interahamwe*, at a roadblock at the Akanyaru border crossing near Burundi and brought them to the ESO camp.<sup>268</sup> The Trial Chamber observed that the ESO soldiers referred to the Tutsi family as *Inyenzi* or *Inkotanyi*.<sup>269</sup> The Trial Chamber further found that around 18 April 1994, Nizeyimana ordered the removal of the Ruhutinyanya family from the ESO camp and their return to the roadblock from where they had been retrieved, knowing that the implementation of this order would lead to their deaths.<sup>270</sup> According to the Trial Judgement, ESO soldiers subsequently returned the Ruhutinyanya family members to the same roadblock from which they had been removed the previous day.<sup>271</sup> The Trial Chamber concluded that the same ESO soldiers, and/or the armed civilians and *Interahamwe* manning the roadblock, directly participated in the killing of members of this family.<sup>272</sup> The Trial Chamber found that the only reasonable conclusion from the evidence was that Nizeyimana possessed genocidal intent and that he was aware of the genocidal intent of the principal perpetrators.<sup>273</sup>

83. Nizeyimana challenges his convictions based on the killing of the Ruhutinyanya family members, and more specifically the Trial Chamber's assessment of the evidence on the record.<sup>274</sup> In this section, the Appeals Chamber considers alleged errors in the Trial Chamber's assessment of:

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<sup>266</sup> Trial Judgement, paras. 1498, 1539, 1565, 1566, 1579, 1581. The Trial Chamber also found that Nizeyimana could have been convicted for aiding and abetting the killing of the Ruhutinyanya family, but considered that his liability was most appropriately characterized as participating in a joint criminal enterprise. *See* Trial Judgement, para. 1498.

<sup>267</sup> Trial Judgement, paras. 1499, 1502, 1540, 1567, 1580.

<sup>268</sup> Trial Judgement, paras. 160, 1495.

<sup>269</sup> Trial Judgement, paras. 165, 169, 199, 1495.

<sup>270</sup> Trial Judgement, paras. 213, 214, 1494.

<sup>271</sup> Trial Judgement, paras. 160, 1494. *See also* Trial Judgement, para. 213.

<sup>272</sup> Trial Judgement, paras. 215, 219, 1494.

<sup>273</sup> Trial Judgement, para. 1496. *See also* Trial Judgement, para. 1497.

<sup>274</sup> Nizeyimana Notice of Appeal, paras. 12-32, 112-117; Nizeyimana Appeal Brief, paras. 26-116, 582-587, 589-602. *See also* AT. 28 April 2014 pp. 4, 5, 9, 10, 13.

(i) the Prosecution evidence; (ii) Defence Witness ZML07's evidence; and (iii) the circumstantial evidence in relation to Nizeyimana's *mens rea*.

### 1. Assessment of Prosecution Evidence

84. Nizeyimana submits that the Trial Chamber erred in its evaluation of Prosecution Witnesses XAG, YAL, and ZAW by not adequately considering inconsistencies in their testimonies when assessing their credibility.<sup>275</sup>

#### (a) Prosecution Witnesses XAG and YAL

85. Witnesses XAG and YAL were gendarmes assigned to escort the Ruhutinyanya family to Burundi on 17 April 1994, and later that same day were brought to the ESO camp together with the Ruhutinyanya family.<sup>276</sup> The Trial Chamber considered their evidence about what happened at the Akanyaru border crossing and at the ESO camp to be consistent.<sup>277</sup> It observed the “[n]otable differences” in their testimonies but ultimately concluded that these disparities failed to raise doubt about their “fundamentally consistent evidence”.<sup>278</sup> In particular, the Trial Chamber noted their differing accounts in relation to their treatment and detention at the ESO camp, but concluded that these inconsistencies related to “peripheral events”.<sup>279</sup> The Trial Chamber further considered that their evidence was corroborated by Prosecution Witnesses ZAW, BDE, and ZY, as well as Defence Witnesses RWV11 and CKN10.<sup>280</sup>

86. Nizeyimana argues that the Trial Chamber erred in its assessment of the evidence of Witnesses XAG and YAL.<sup>281</sup> He asserts that the Trial Chamber erred in finding that the inconsistencies in their testimonies regarding what occurred once they arrived at the ESO camp on 17 April 1994 were “peripheral” whereas their evidence was incompatible.<sup>282</sup> In this regard,

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<sup>275</sup> Nizeyimana Notice of Appeal, paras. 15-21; Nizeyimana Appeal Brief, paras. 47-77; AT. 28 April 2014 pp. 4, 5. *See also* Nizeyimana Appeal Brief, paras. 591-595. The Appeals Chamber considers Nizeyimana's submissions in relation to Prosecution Witness AZD in the section on the killing of Queen Gicanda. Nizeyimana Notice of Appeal, paras. 12-14, 21; Nizeyimana Appeal Brief, paras. 26-46, 76, 77. *See infra* Section III.E.2.

<sup>276</sup> Trial Judgement, paras. 163, 179. *See also* Trial Judgement, paras. 124-131.

<sup>277</sup> Trial Judgement, para. 164, 165.

<sup>278</sup> Trial Judgement, paras. 166, 169. *See also* Trial Judgement, para. 164.

<sup>279</sup> Trial Judgement, paras. 166-169.

<sup>280</sup> Trial Judgement, para. 172. *See also* Trial Judgement, paras. 173-178.

<sup>281</sup> Nizeyimana Appeal Brief, paras. 49-66. *See also* AT. 28 April 2014 p. 4. In his Notice of Appeal, Nizeyimana points to Witness YAL's failure to identify Nizeyimana in court. Nizeyimana Notice of Appeal, para. 16. However, as this argument is not included in his Appeal Brief, the Appeals Chamber finds that Nizeyimana has abandoned this argument and will not consider it.

<sup>282</sup> Nizeyimana Appeal Brief, paras. 49-57, 60; AT. 28 April 2014 pp. 4, 5. Nizeyimana submits that Witness YAL testified that upon seeing Nizeyimana, they were disarmed, savagely assaulted for approximately two hours, and then released. Nizeyimana asserts that Witness XAG testified that Nizeyimana ordered that they be detained and given food

Nizeyimana underscores that the evidence of Witnesses XAG and YAL concerning their interaction with Nizeyimana at the ESO camp was relied upon to establish Nizeyimana's conduct and to infer his knowledge and genocidal intent and as such should not have been characterized as "peripheral" by the Trial Chamber.<sup>283</sup> Nizeyimana also submits that the Trial Chamber "improperly prohibited" the use of Witness XAG's testimony to cross-examine Witness YAL on their treatment at the ESO camp.<sup>284</sup> He contends that the contradictions in these witnesses' evidence should have impacted their credibility, especially given that the Trial Chamber rejected portions of Witness YAL's evidence as unproven.<sup>285</sup>

87. Nizeyimana submits that no reasonable trier of fact could have accepted the accounts of Witnesses XAG and YAL that they escaped from their detention at the ESO camp unnoticed given the evidence that the ESO camp was well-guarded that evening.<sup>286</sup> Furthermore, Nizeyimana avers that the Trial Chamber shifted the burden of proof by requiring him to provide an alternate explanation for the inconsistencies between the two witnesses, namely positive evidence that they colluded.<sup>287</sup>

88. Nizeyimana also asserts that the Trial Chamber erred in finding that there was corroboration for the evidence of Witnesses XAG and YAL.<sup>288</sup> Nizeyimana submits that only Witness ZY corroborated their evidence and argues that her evidence was hearsay and "far from compelling".<sup>289</sup> Nizeyimana maintains that the remaining Prosecution evidence does not confirm that Witnesses XAG and YAL were present at the ESO camp that evening or Nizeyimana's reaction to their presence.<sup>290</sup>

89. The Prosecution responds that Nizeyimana's challenges should be dismissed as he merely reiterates challenges he made at trial about the differences in the witnesses' testimony, which the Trial Chamber considered but reasonably found to be immaterial.<sup>291</sup>

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from the ESO kitchen and that they retained their weapons and escaped after one hour. *See* Nizeyimana Appeal Brief, para. 51.

<sup>283</sup> Nizeyimana Appeal Brief, paras. 52, 53, 61; Nizeyimana Reply Brief, para. 4. *See also* AT. 28 April 2014 p. 5.

<sup>284</sup> Nizeyimana Appeal Brief, para. 58, *referring to* Witness YAL, T. 25 January 2011 p. 65.

<sup>285</sup> Nizeyimana Appeal Brief, para. 55. *See also* Nizeyimana Appeal Brief, paras. 60, 65. Nizeyimana points to the Trial Chamber's finding that Witness YAL's evidence that Nizeyimana and others assaulted them was unproven. Nizeyimana Appeal Brief, para. 55, *referring to* Trial Judgement, fn. 360.

<sup>286</sup> Nizeyimana Appeal Brief, para. 59, *referring to* Trial Judgement, paras. 150, 151, 154, 165.

<sup>287</sup> Nizeyimana Appeal Brief, para. 62, *referring to* Trial Judgement, para. 163. *See also* Nizeyimana Appeal Brief, paras. 597-601.

<sup>288</sup> Nizeyimana Appeal Brief, para. 63.

<sup>289</sup> Nizeyimana Appeal Brief, para. 63.

<sup>290</sup> Nizeyimana Appeal Brief, para. 64, *referring to* Trial Judgement, paras. 173-176; Nizeyimana Reply Brief, para. 5.

<sup>291</sup> Prosecution Response Brief, paras. 2, 4, 5, 18-21.

90. The Prosecution argues that the Trial Chamber did not reverse the burden of proof by stating that the Defence had not challenged the circumstances in which Witnesses XAG and YAL provided evidence.<sup>292</sup> The Prosecution asserts that Nizeyimana does not demonstrate the implausibility that Witnesses XAG and YAL were able to escape as they described.<sup>293</sup> The Prosecution underscores that the Trial Chamber found the manner in which Nizeyimana cross-examined Witness YAL about Witness XAG's testimony to be improper and accordingly reasonably exercised its discretion in curtailing this line of cross-examination.<sup>294</sup> Finally, the Prosecution submits that the evidence of Witnesses XAG and YAL was corroborated by Witnesses ZAW, BDE, ZY, and AZM and that Nizeyimana's unsubstantiated assertions should be summarily dismissed.<sup>295</sup>

91. The Appeals Chamber considers that the Trial Chamber reasonably concluded that the inconsistencies between the testimonies of Witnesses XAG and YAL pertained to "peripheral events" and, consequently, did not undermine their credibility.<sup>296</sup> While Nizeyimana correctly submits that the Trial Chamber relied on the evidence of Witnesses XAG and YAL concerning their interaction with him at the ESO camp in support of its findings on Nizeyimana's conduct and intent, the Appeals Chamber notes that, in so doing, it relied on the mutually corroborating aspects of the witnesses' respective testimonies. Both witnesses stated that the first sergeant who brought them to Nizeyimana informed him that the witnesses had been assisting *Inyenzi* or *Inkotanyi*, that Nizeyimana responded angrily to this information, and that he confiscated their identification cards.<sup>297</sup> The inconsistent aspects of Witnesses XAG's and YAL's testimonies regarding their treatment and detention at the ESO camp did not relate specifically to Nizeyimana being informed of the Ruhutinyanya family's presence at the camp, but rather to the plight of the witnesses thereafter.<sup>298</sup> Therefore, it was not unreasonable for the Trial Chamber to characterize this evidence as peripheral. The Trial Chamber reasonably assessed the evidence, resolving the inconsistencies between the two witnesses' testimonies, and exercised its discretion in accepting the fundamental features of their evidence as established.<sup>299</sup> The Appeals Chamber further notes that Nizeyimana merely restates the variances between the testimonies, which he raised unsuccessfully at trial, and

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<sup>292</sup> Prosecution Response Brief, para. 22.

<sup>293</sup> Prosecution Response Brief, para. 23. *See also* AT. 28 April 2014 p. 20.

<sup>294</sup> Prosecution Response Brief, para. 24.

<sup>295</sup> Prosecution Response Brief, paras. 25, 26.

<sup>296</sup> *See* Trial Judgement, paras. 166-169.

<sup>297</sup> Trial Judgement, paras. 165, 179, 198, 199, 1496. *See also* Witness XAG, T. 25 January 2011 pp. 32, 41; Witness YAL, T. 25 January 2011 pp. 49, 50, 63, 64.

<sup>298</sup> Trial Judgement, paras. 127, 131, 166-168. *See also* Witness XAG, T. 25 January 2011 pp. 32, 41; Witness YAL, T. 25 January 2011 pp. 49, 50, 63, 64.

<sup>299</sup> *Cf.* *Kanyarukiga* Appeal Judgement, para. 136; *Munyakazi* Appeal Judgement, para. 51; *Setako* Appeal Judgement, para. 31; *Renzaho* Appeal Judgement, para. 269; *Rukundo* Appeal Judgement, paras. 201, 207.

consequently fails to demonstrate that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber.<sup>300</sup>

92. Turning to Nizeyimana's argument that the Trial Chamber improperly stopped him from cross-examining Witness YAL on the basis of Witness XAG's testimony, the Appeals Chamber recalls that decisions relating to the general conduct of trial proceedings are within the discretion of the Trial Chamber.<sup>301</sup> The Appeals Chamber further recalls that pursuant to Rule 90(F) of the Rules, trial chambers enjoy discretion in setting the parameters of cross-examination.<sup>302</sup> The Appeals Chamber has previously noted the particular usefulness of cross-examination as a tool for discerning whether a witness's testimony has been improperly influenced,<sup>303</sup> but has equally noted that it is the duty of the Trial Chamber to ensure that cross-examination is not impeded by useless and irrelevant questions.<sup>304</sup> While Nizeyimana was afforded the opportunity to cross-examine Witness YAL, the Trial Chamber prevented him from doing so on the basis of Witness XAG's testimony.<sup>305</sup> In this instance, the Trial Chamber should have explained why it did not consider it appropriate to allow Nizeyimana the opportunity to cross-examine Witness YAL on the basis of Witness XAG's testimony. Nonetheless, the Appeals Chamber notes that Nizeyimana did not challenge the Trial Chamber's ruling in this regard either at trial or in his Closing Brief.<sup>306</sup> Moreover, the Trial Chamber considered inconsistencies between the evidence of Witnesses XAG and YAL.<sup>307</sup> Consequently, the Appeals Chamber is not convinced that the Trial Chamber's error invalidates the Trial Judgement. This argument is therefore dismissed.

93. The Appeals Chamber also does not find that the Trial Chamber shifted the burden of proof in assessing the evidence of Witnesses XAG and YAL. In the section of the Trial Judgement referred to by Nizeyimana, the Trial Chamber merely noted that the Defence raised no challenges concerning the fact that the two witnesses testified on the same day, and that no evidence on the record suggested that they colluded.<sup>308</sup> Furthermore, the Appeals Chamber finds no error in the

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<sup>300</sup> See Nizeyimana Closing Brief, paras. 303-305. See also *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Ndahimana* Appeal Judgement, para. 11; *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11.

<sup>301</sup> *Kanyarukiga* Appeal Judgement, para. 26; *Setako* Appeal Judgement, para. 19. See also *Haradinaj et al.* Appeal Judgement, para. 39.

<sup>302</sup> *Kanyarukiga* Appeal Judgement, para. 42; *Rukundo* Appeal Judgement, para. 133; *Nahimana et al.* Appeal Judgement, para. 182.

<sup>303</sup> *Rukundo* Appeal Judgement, para. 134, referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para. 13.

<sup>304</sup> *Nahimana et al.* Appeal Judgement, para. 182, quoting *Rutaganda* Appeal Judgement, para. 45.

<sup>305</sup> Witness YAL, T. 25 January 2011 p. 65. The Appeals Chamber observes that trial chambers have allowed the use of witnesses' testimony in cross-examination. See, e.g., *Nyiramasuhuko et al.* Trial Judgement, paras. 4028, 4029.

<sup>306</sup> See Witness YAL, T. 25 January 2011 p. 65; Nizeyimana Closing Brief, paras. 293-319.

<sup>307</sup> Trial Judgement, paras. 166-169.

<sup>308</sup> Trial Judgement, para. 163.



Trial Chamber's acceptance of parts of Witness YAL's testimony despite rejecting one aspect of it, as it considered his evidence in detail and found peripheral his evidence that Nizeyimana and others assaulted Witness XAG and himself.<sup>309</sup> In this regard, it recalls that trial chambers have the discretion to accept some parts of a witness's testimony while rejecting other parts.<sup>310</sup>

94. The Appeals Chamber considers that Nizeyimana has not demonstrated that it was implausible that Witnesses XAG and YAL were able to escape because the ESO camp was "well guarded".<sup>311</sup> The Trial Chamber considered the evidence of Defence Witnesses RWV11 and CKN10 concerning their posts at the entrances of the ESO camp.<sup>312</sup> However, Witnesses RWV11 and CKN10 did not testify that the camp was so well-guarded that an escape would have been improbable.<sup>313</sup> In this regard, the Trial Chamber noted Witness XAG's testimony that the "soldiers were not paying attention to them" and so they managed to escape.<sup>314</sup> The Appeals Chamber considers that Nizeyimana's arguments in this regard are speculative and unsubstantiated, and that he repeats on appeal arguments that did not succeed at trial.<sup>315</sup>

95. The Appeals Chamber next turns to Nizeyimana's argument that the Trial Chamber erred in finding that the evidence of Witnesses XAG and YAL was corroborated. With respect to Nizeyimana's challenge to the Trial Chamber's reliance on Witness ZY's evidence as corroborative of the evidence of Witnesses XAG and YAL, the Appeals Chamber observes that the Trial Chamber considered the hearsay aspect of her testimony, but nonetheless found her evidence that Nizeyimana had assigned cadets to guard the vehicle and that he would decide the fate of the occupants to be compelling.<sup>316</sup> The Appeals Chamber further considers that the Trial Chamber had the discretion to cautiously consider and rely on hearsay evidence.<sup>317</sup> Accordingly, Nizeyimana has failed to show that the Trial Chamber erred in relying on Witness ZY's evidence in this regard.

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<sup>309</sup> Trial Judgement, paras. 166, 169, fn. 360.

<sup>310</sup> *Kanyarukiga* Appeal Judgement, para. 187; *Ntabakuze* Appeal Judgement, fn. 342; *Bagosora and Nsengiyumva* Appeal Judgement, paras. 243, 618; *Ntawukulilyayo* Appeal Judgement, para. 155.

<sup>311</sup> Nizeyimana Appeal Brief, para. 59.

<sup>312</sup> See Trial Judgement, paras. 150, 151 (Witness RWV11 testified that he was at the southern entrance of the ESO camp when the Ruhutinyanya family arrived and then moved to the northern entrance later that evening), 154 (Witness CKN10 testified that he was positioned at the main entrance of the ESO camp when the family arrived).

<sup>313</sup> See Witness RWV11, T. 2 June 2011 pp. 17, 18, 35, 36, 49-56; Witness CKN10, T. 26 May 2011 pp. 42, 43, 58; T. 30 May 2011 pp. 51, 52.

<sup>314</sup> Trial Judgement, para. 127.

<sup>315</sup> See Nizeyimana Closing Brief, paras. 303, 304. See also *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11.

<sup>316</sup> Trial Judgement, para. 178. See also Trial Judgement, paras. 162, 173-176.

<sup>317</sup> See *Gatete* Appeal Judgement, para. 99; *Ntabakuze* Appeal Judgement, fn. 319; *Hategekimana* Appeal Judgement, para. 121; *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, paras. 96, 199.

96. Finally, and contrary to Nizeyimana's submission, the accounts of Witnesses XAG and YAL were not solely corroborated by Witness ZY.<sup>318</sup> Indeed, while the Trial Chamber specifically considered that other Prosecution witnesses did not place Witnesses XAG and YAL at the ESO camp on the evening of 17 April 1994, it also noted that Prosecution Witnesses ZAW, BDE, and ZY, along with Defence Witnesses RWV11 and CKN10 provided general corroboration for the fact that the Ruhutinyanya family was brought to the ESO camp in a minibus that evening.<sup>319</sup> In this regard, the Appeals Chamber recalls that two *prima facie* credible testimonies corroborate one another when one testimony is compatible with the other regarding the same fact or a sequence of linked facts.<sup>320</sup> It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way.<sup>321</sup> Accordingly, Nizeyimana has failed to show that the Trial Chamber erred in finding that Witnesses XAG and YAL were circumstantially corroborated.

97. For the foregoing reasons, the Appeals Chamber finds that Nizeyimana has failed to demonstrate that the Trial Chamber erred in its assessment of the credibility of Witnesses XAG and YAL.

(b) Prosecution Witness ZAW

98. Witness ZAW, a cadet at the ESO camp in April 1994, observed that the Ruhutinyanya family was brought to the camp in mid-April 1994 and heard Nizeyimana instruct Sergeant Major Nyirimanzi to return the family members to where they had been found.<sup>322</sup> The Trial Chamber noted inconsistencies between his trial testimony and a prior statement given to Tribunal investigators in May 2010 and signed in June 2010, but found them immaterial in light of the fundamental consistencies between them.<sup>323</sup>

99. Nizeyimana submits that the Trial Chamber erred in dismissing as immaterial the inconsistencies between the testimony of Witness ZAW and his 2010 statement to Tribunal investigators.<sup>324</sup> Nizeyimana also asserts that in his prior statement, the witness did not state that Nizeyimana referred to the Ruhutinyanya family as *Inyenzi* but only so stated during his testimony

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<sup>318</sup> See Trial Judgement, paras. 169, 172, 173, 178, 190, 191, 193.

<sup>319</sup> See Trial Judgement, para. 172. See also Trial Judgement, paras. 173-176, 193.

<sup>320</sup> *Gatete* Appeal Judgement, para. 125; *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121, quoting *Bikindi* Appeal Judgement, para. 81; *Nahimana et al.* Appeal Judgement, para. 428.

<sup>321</sup> *Ndahimana* Appeal Judgement, para. 93; *Gatete* Appeal Judgement, paras. 125, 205; *Kanyarukiga* Appeal Judgement, para. 220; *Ntabakuze* Appeal Judgement, para. 150; *Ntawukulilyayo* Appeal Judgement, para. 24.

<sup>322</sup> Trial Judgement, paras. 132, 133. See also Trial Judgement, para. 162.

<sup>323</sup> Trial Judgement, paras. 180, 181. See also Trial Judgement, paras. 187-190.

<sup>324</sup> Nizeyimana Appeal Brief, paras. 67-70, 73; Nizeyimana Reply Brief, paras. 6-8. Nizeyimana argues that the major differences concern when, where, and how the witness learned of the presence of the Ruhutinyanya family members at

at trial.<sup>325</sup> Nizeyimana implies that Witness ZAW altered his account in order to align it with that of Prosecution Witness AZD.<sup>326</sup> Furthermore, Nizeyimana maintains that the Trial Chamber erred in finding the evidence of Witnesses ZAW and AZD to be “fundamentally consistent and compelling”.<sup>327</sup>

100. The Prosecution responds that Nizeyimana fails to demonstrate how the Trial Chamber erred in its assessment of Witness ZAW’s evidence based on the totality of the circumstances.<sup>328</sup>

101. The Appeals Chamber notes that the Trial Chamber considered in detail the inconsistencies between Witness ZAW’s prior statement and his trial testimony and dismissed them as immaterial.<sup>329</sup> The Trial Chamber concluded that Witness ZAW’s explanation regarding these inconsistencies was reasonable given the considerable passage of time and the fact that “[t]he variances are immaterial when viewed in light of the fundamental consistencies between his statement and testimony”.<sup>330</sup> The Appeals Chamber finds no error in this approach. Nizeyimana’s contention that Witness ZAW only mentioned Nizeyimana’s reference to the family as *Inyenzi* in his testimony and not in his prior statement also fails as the witness was not questioned regarding this inconsistency at trial.<sup>331</sup> In any event, that a fact is mentioned during a witness’s testimony but omitted from the same witness’s statement does not necessarily imply a material inconsistency,<sup>332</sup> as Nizeyimana claims. Nizeyimana’s attempts to re-litigate arguments that did not succeed at trial are consequently rejected.<sup>333</sup>

102. The Appeals Chamber also finds no merit in Nizeyimana’s unsubstantiated contentions that: (i) Witness ZAW altered his testimony in order to align it with that of Witness AZD; and (ii) the Trial Chamber erred in finding the evidence of Witnesses ZAW and AZD to be consistent. These arguments are summarily dismissed.

103. In light of the foregoing, the Appeals Chamber dismisses Nizeyimana’s arguments in relation to Witness ZAW.

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the ESO camp and when and how Nizeyimana ordered their removal. Nizeyimana Appeal Brief, paras. 68-73. *See also* Nizeyimana Appeal Brief, para. 74; AT. 28 April 2014 p. 4.

<sup>325</sup> Nizeyimana Reply Brief, para. 7.

<sup>326</sup> *See* Nizeyimana Appeal Brief, para. 70. *See also* Nizeyimana Appeal Brief, para. 75.

<sup>327</sup> Nizeyimana Appeal Brief, para. 75, *quoting* Trial Judgement, para. 188.

<sup>328</sup> Prosecution Response Brief, paras. 27-30. *See also* AT. 28 April 2014 pp. 20, 21.

<sup>329</sup> Trial Judgement, paras. 180, 181.

<sup>330</sup> Trial Judgement, para. 181.

<sup>331</sup> *See* Witness ZAW, T. 26 January 2011 pp. 37, 38.

<sup>332</sup> *See Kajelijeli* Appeal Judgement, para. 176.

<sup>333</sup> *See Ndindiliyimana et al.* Appeal Judgement, para. 12; *Ndahimana* Appeal Judgement, para. 11; *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11.

## 2. Assessment of Defence Witness ZML07

104. Witness ZML07 was among the ESO soldiers assigned to return the Ruhutinyanya family to the Burundian border on 18 April 1994.<sup>334</sup> The Trial Chamber considered the witness's evidence in detail and accepted portions of his first-hand account.<sup>335</sup> However, the Trial Chamber observed that the witness had an "ostensible personal interest" given his participation in the mission, noted the witness's demeanour during his testimony, and found his evidence regarding the events at the roadblock to be "patently unbelievable".<sup>336</sup>

105. Nizeyimana submits that the Trial Chamber erred in accepting parts of Witness ZML07's testimony for the purpose of corroboration, while rejecting other parts of it.<sup>337</sup> He asserts that the Trial Chamber speculated that Witness ZML07, who was in exile at the time of his testimony, testified to exonerate himself in relation to the killing of the Ruhutinyanya family.<sup>338</sup> Nizeyimana maintains that the Trial Chamber applied a double standard in assessing witnesses' credibility as Prosecution Witnesses ZBJ and BXF were also in exile and testified under pseudonyms but the Trial Chamber did not express similar concerns about their credibility.<sup>339</sup>

106. Nizeyimana further contends that the Trial Chamber erred in relying on the testimony of Defence Witness Désiré Ufitimana, concerning a different convoy to the border on 20 April 1994, to discredit the evidence of Witness ZML07.<sup>340</sup> Nizeyimana submits that the convoy on 20 April 1994 took place under different circumstances than the return of the Ruhutinyanya family to the border on 18 April 1994.<sup>341</sup> Furthermore, Nizeyimana notes that Witness Ufitimana corroborates Witness ZML07, insofar as he confirmed that ESO soldiers acted as escorts to secure safe passage to Burundi. This, according to Nizeyimana, undermines the Trial Chamber's finding that the only reasonable inference was that Nizeyimana sent the Ruhutinyanya family back to the border

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<sup>334</sup> Trial Judgement, para. 145. *See also* Trial Judgement, para. 195.

<sup>335</sup> Trial Judgement, paras. 196, 202, 203, 205-207, 209-212, 217.

<sup>336</sup> Trial Judgement, para. 205.

<sup>337</sup> Nizeyimana Notice of Appeal, para. 22. *See* Nizeyimana Appeal Brief, paras. 78-93. *See also* Nizeyimana Appeal Brief, paras. 597-601; AT. 28 April 2014 p. 13.

<sup>338</sup> Nizeyimana Appeal Brief, para. 79, *referring to* Trial Judgement, para. 205. *See also* Nizeyimana Reply Brief, para. 10; AT. 28 April 2014 p. 13. According to Nizeyimana, as a protected witness in exile Witness ZML07 had nothing to fear or to gain by testifying, which should bolster his credibility. Nizeyimana Appeal Brief, paras. 80-82.

<sup>339</sup> Nizeyimana Appeal Brief, para. 83. *See also* Nizeyimana Appeal Brief, paras. 591-595.

<sup>340</sup> Nizeyimana Appeal Brief, para. 85, *referring to* Trial Judgement, paras. 209-211.

<sup>341</sup> Nizeyimana Appeal Brief, paras. 86-89. In particular, Nizeyimana argues that: (i) these events occurred on different days, with potentially different crowds at the border; (ii) the presence of the Italian ambassador on Witness Ufitimana's convoy would have necessarily entailed a different context not just for the ESO soldiers with the convoy, but also the crowd at the border; (iii) the Trial Chamber ignored the fact that Witness ZML07's convoy had returned the same family that they extracted from the location on the previous day, which could have encountered a stronger reaction from the crowd; and (iv) the fundamental difference between the two convoys was that Witness ZML07's convoy was not overrun by the crowd but was fired upon by Burundian soldiers.

knowing that they would be killed.<sup>342</sup> Nizeyimana also asserts that it was conceivable that the *Interahamwe* at the roadblock acted aggressively since the family “had previously experienced considerable hostility” when they were at the roadblock.<sup>343</sup> He submits that the Trial Chamber misapplied the reasonable doubt standard.<sup>344</sup>

107. The Prosecution responds that the Trial Chamber’s finding that Witness ZML07 had an incentive to lie and its rejection of his testimony based on several considerations were reasonable.<sup>345</sup> The Prosecution further argues that the Trial Chamber correctly exercised its discretion in considering Witness Ufitimana’s evidence of a similar event in assessing the credibility of Witness ZML07.<sup>346</sup>

108. The Appeals Chamber notes that the Trial Chamber considered Witness ZML07’s evidence in detail, including the extent to which his evidence was corroborated by other evidence.<sup>347</sup> Recalling that it is not unreasonable for a trier of fact to accept some, but reject other, parts of a witness’s testimony,<sup>348</sup> the Appeals Chamber finds that the Trial Chamber did not act unreasonably in accepting parts of Witness ZML07’s account,<sup>349</sup> while rejecting other parts.<sup>350</sup>

109. The Appeals Chamber also finds no merit in Nizeyimana’s contention that the Trial Chamber speculated in its holding that Witness ZML07 testified so as to exonerate himself because he was in exile at the time of his testimony. The Trial Chamber noted his status in exile in the context of its consideration that he was among the ESO soldiers in the convoy that escorted the Ruhutinyanya family from the ESO camp to the Akanyaru border crossing and that it would be self-incriminatory if he had agreed that the purpose of the mission was to kill the Ruhutinyanya family.<sup>351</sup> By contrast, there was no indication that Witnesses ZBJ and BXF were accomplices, and in any event, the Trial Chamber also considered their immigration status in detail.<sup>352</sup> Moreover, Witness ZML07’s status in exile and his reasons for testifying were not a determinative factor in the Trial Chamber’s ultimate assessment of his credibility.<sup>353</sup> The Appeals Chamber, therefore, finds that Nizeyimana has failed to demonstrate that the Trial Chamber erred in considering Witness

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<sup>342</sup> Nizeyimana Appeal Brief, para. 90.

<sup>343</sup> Nizeyimana Appeal Brief, para. 91, *referring to* Trial Judgement, para. 207.

<sup>344</sup> Nizeyimana Appeal Brief, paras. 92, 93.

<sup>345</sup> Prosecution Response Brief, paras. 32-34, 37. *See also* AT. 28 April 2014 pp. 21, 22.

<sup>346</sup> Prosecution Response Brief, paras. 35, 36. *See also* AT. 28 April 2014 p. 22.

<sup>347</sup> *See* Trial Judgement, paras. 193, 195, 196, 202, 203, 205-207, 209-212, 217.

<sup>348</sup> *Kanyarukiga* Appeal Judgement, para. 187; *Ntabakuze* Appeal Judgement, fn. 342; *Bagosora and Nsengiyumva* Appeal Judgement, paras. 243, 618; *Ntawukulilyayo* Appeal Judgement, para. 155.

<sup>349</sup> Trial Judgement, paras. 193, 196, 207, 217.

<sup>350</sup> Trial Judgement, paras. 205, 206, 208, 209.

<sup>351</sup> Trial Judgement, para. 205.

<sup>352</sup> Trial Judgement, paras. 680-684.

ZML07's immigration status or that it treated Prosecution and Defence evidence differently in this regard.

110. Likewise, in the view of the Appeals Chamber, the Trial Chamber did not err in its assessment of Witness ZML07's account by considering Witness Ufitimana's testimony of having accompanied another convoy across the same border days after the Ruhutinyanya family incident.<sup>354</sup> The Trial Chamber observed the "strikingly similar circumstances" of the two missions,<sup>355</sup> but also noted the differences Nizeyimana points to, including that Witness Ufitimana's convoy was accompanied by a foreign ambassador.<sup>356</sup> Similarly, the Trial Chamber also considered the fact that the Ruhutinyanya family had "previously experienced considerable hostility" at the border.<sup>357</sup> Taking this evidence into consideration, the Trial Chamber concluded that "the fact that one group of ESO soldiers sought to safely escort Tutsis across the border while others contributed directly to another group's killing is not irreconcilable".<sup>358</sup> Nizeyimana fails to point to any aspect of this evidence that the Trial Chamber failed to take into account; he merely suggests a different interpretation of the evidence. The Appeals Chamber therefore dismisses these arguments.

111. Equally unconvincing is Nizeyimana's argument that Witness Ufitimana's evidence that ESO soldiers acted as escorts to secure safe passage to Burundi for the 20 April 1994 convoy undermines the Trial Chamber's finding that the only reasonable inference was that Nizeyimana sent the Ruhutinyanya family back to the roadblock knowing that they would be killed. As the Trial Chamber found, the fact that ESO soldiers were able to safely escort the 20 April 1994 convoy suggests that, had the soldiers intended to also safely escort the Ruhutinyanya family across the border, this could have been accomplished.<sup>359</sup> That another convoy was safely escorted under different circumstances, namely with the presence of a foreign ambassador in the 20 April 1994 convoy, could not reasonably give rise to the inference that the intent behind the convoy carrying the Ruhutinyanya family was also to provide safe passage. Given the differences between the two convoys, which the Trial Chamber considered in detail,<sup>360</sup> as discussed above, the Appeals Chamber finds that this evidence does not undermine the Trial Chamber's conclusion that the only reasonable inference was that Nizeyimana ordered the family's return to the roadblock, knowing

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<sup>353</sup> See Trial Judgement, paras. 205-209.

<sup>354</sup> See Trial Judgement, paras. 209-211.

<sup>355</sup> Trial Judgement, para. 209. The Trial Chamber considered that armed ESO soldiers accompanied both convoys which contained Tutsis driving in their own vehicles to the Burundian border, and that they faced difficulties at roadblocks which the ESO soldiers were able to negotiate their way through.

<sup>356</sup> Trial Judgement, paras. 209, 211.

<sup>357</sup> Trial Judgement, para. 207.

<sup>358</sup> Trial Judgement, para. 211.

<sup>359</sup> See Trial Judgement, paras. 209-211.

<sup>360</sup> Trial Judgement, paras. 209-211.

that they would be killed. In this regard, the Appeals Chamber finds that the Trial Chamber did not misapply the standard of proof as Nizeyimana submits.

### 3. Assessment of Nizeyimana's *Mens Rea*

112. In concluding that Nizeyimana had the requisite knowledge and intent regarding the killings of the Ruhutinyanya family members, the Trial Chamber considered a number of factors, including: (i) that the information about what occurred at the Akanyaru border crossing prior to the Ruhutinyanya family's arrival at the ESO camp was "circulated widely among ESO soldiers"; (ii) that Nizeyimana would have acquired this information during the several hours that the family was present at the ESO camp, given his position as the S2/S3 officer charged with intelligence and operations and as a captain issuing orders to lower ranking officers; (iii) Nizeyimana's anger at the family's presence at the ESO camp, highlighted by his reference to them as *Inyenzi/Inkotanyi* and his disgust at the resources being spent to protect this Tutsi family; and (iv) that Nizeyimana "around this same time, substantially and significantly" contributed to the "overwhelming" military assault on Tutsis at Cyahinda Parish.<sup>361</sup> The Trial Chamber concluded that the only reasonable inference was that Nizeyimana gave an order for the Ruhutinyanya family to be returned to the border knowing that the implementation of this order would lead to their deaths.<sup>362</sup>

113. Nizeyimana submits that the Trial Chamber erred in finding that the only reasonable inference to be drawn from his order that the family be returned to the roadblock was that he knew and intended that it would lead to their deaths.<sup>363</sup> Nizeyimana asserts that the Trial Chamber ignored the alternative reasonable inferences that the convoy was returned to the roadblock in order to successfully cross the border into Burundi and that it was organized by Tharcisse Muvunyi, as illustrated by the fact that the family had a military escort to secure their safe passage and were issued with *laissez-passeurs* by Muvunyi.<sup>364</sup> He argues that the Trial Chamber erred in speculating that the soldiers went to great lengths to effectuate this mission in order to allow them "plausible deniability of their involvement".<sup>365</sup> Additionally, Nizeyimana contends that his anger at the presence of the Ruhutinyanya family at the ESO camp could have been caused by the presence of a civilian group inside a military facility during a time of war.<sup>366</sup> Similarly, Nizeyimana submits that

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<sup>361</sup> Trial Judgement, paras. 198, 199, 201, 1496, 1497, 1499.

<sup>362</sup> Trial Judgement, para. 201.

<sup>363</sup> Nizeyimana Notice of Appeal, paras. 26, 29; Nizeyimana Appeal Brief, paras. 94-98, 103, 110. *See also* AT. 28 April 2014 p. 10.

<sup>364</sup> Nizeyimana Appeal Brief, paras. 99, 100. *See also* Nizeyimana Reply Brief, para. 12.

<sup>365</sup> Nizeyimana Appeal Brief, para. 112, *referring to* Trial Judgement, para. 213.

<sup>366</sup> Nizeyimana Appeal Brief, paras. 102, 109.

the Trial Chamber's finding that he was disgusted by the resources spent to protect the Tutsi family fails to take into account the resources necessary to escort them back to the border.<sup>367</sup>

114. Nizeyimana further argues that the Trial Chamber erred in drawing a negative inference as to the purpose of the removal of the family based on the involvement of Second Lieutenant Jean Pierre Bizimana.<sup>368</sup> In this regard, he asserts that the Trial Chamber relied largely on Witness ZML07's testimony that Bizimana led the mission and that Nyirimanzi did not participate, despite the fact that this was contradicted by the testimonies of Witnesses ZAW and AZD that Nizeyimana gave the orders to Nyirimanzi.<sup>369</sup> He avers that the rest of Witness ZML07's testimony was completely discredited.<sup>370</sup> Nizeyimana claims that, in any event, Bizimana's involvement further proves that it was Muvunyi who ordered the mission since Bizimana was under the direct command of Muvunyi.<sup>371</sup> Nizeyimana also asserts that the Trial Chamber erred in relying on findings about Cyahinda Parish and Bizimana's involvement in Rosalie Gicanda's murder to infer Nizeyimana's and the perpetrators' *mens rea*.<sup>372</sup>

115. The Prosecution responds that Nizeyimana must have known that his orders would place the Ruhutinyanya family in grave danger, since they were almost killed at the border on the previous day and reports of what had happened circulated widely among ESO soldiers, and also in light of his position as the S2/S3 officer.<sup>373</sup> The Prosecution asserts that the Trial Chamber considered the evidence of the issuance of *laissez-passeurs* but found the evidence to be of limited probative value.<sup>374</sup> The Prosecution submits that the Trial Chamber was entitled to consider evidence of other crimes committed within the same area and time frame, including the events at Cyahinda Parish and the murder of Rosalie Gicanda.<sup>375</sup>

116. The Prosecution further asserts that it is irrelevant if Nizeyimana did not give instructions directly to Bizimana, but through Nyirimanzi.<sup>376</sup> It argues that Nizeyimana's assertions that he was angry because of the presence of a group of civilians in a military camp are inconsistent with his

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<sup>367</sup> Nizeyimana Appeal Brief, para. 113, *referring to* Trial Judgement, para. 199.

<sup>368</sup> Nizeyimana Appeal Brief, para. 104, *referring to* Trial Judgement, paras. 208, 219, 1495.

<sup>369</sup> Nizeyimana Appeal Brief, paras. 105, 106.

<sup>370</sup> Nizeyimana Appeal Brief, para. 105.

<sup>371</sup> Nizeyimana Appeal Brief, para. 107.

<sup>372</sup> Nizeyimana Appeal Brief, paras. 101-103, 108. *See also* Nizeyimana Appeal Brief, paras. 582-589; Nizeyimana Reply Brief, para. 13; AT. 28 April 2014 pp. 16, 39.

<sup>373</sup> Prosecution Response Brief, paras. 39, 40; AT. 28 April 2014 p. 21.

<sup>374</sup> Prosecution Response Brief, para. 41.

<sup>375</sup> Prosecution Response Brief, paras. 42, 43. *See also* AT. 28 April 2014 pp. 19, 20, 23.

<sup>376</sup> Prosecution Response Brief, para. 43. *See also* AT. 28 April 2014 p. 21.



own utterances that he was angry at the presence of the *Inyenzi/Inkotanyi* at the ESO camp and that they were protected by Witnesses XAG and YAL, whom he called accomplices.<sup>377</sup>

117. The Appeals Chamber recalls that a conviction may be based on circumstantial evidence but that, where a finding of guilt is based on an inference drawn from such evidence, it must be the only reasonable conclusion that could be drawn from it.<sup>378</sup> In order to successfully challenge a trial chamber's assessment of circumstantial evidence on appeal, an appellant must show that no reasonable trier of fact could have found that the conclusion reached by the trial chamber was the only reasonable inference.<sup>379</sup>

118. Nizeyimana contests the Trial Chamber's finding that the only reasonable inference is that Nizeyimana gave the order that the Ruhutinyanya family be returned to the roadblock with the knowledge and intent that by so ordering they would be killed. In this respect, the Trial Chamber expressly noted that the Prosecution witnesses gave no evidence that Nizeyimana ordered the murders of the family members, and that there was no direct evidence that he was informed of the dangers to them at the roadblock.<sup>380</sup> Although the Trial Chamber referred to the assessment of Defence evidence against "conflicting Prosecution testimonies" regarding the purpose of the mission transporting the Ruhutinyanya family back to the roadblock,<sup>381</sup> the Appeals Chamber notes that the only Prosecution witness who testified about the purpose of the mission was Witness XAG. That witness testified that he was told the day after the killing that "on the orders of Nizeyimana, the Ruhutinyanya family was returned to the roadblock so that those manning it would kill them."<sup>382</sup>

119. The Trial Chamber also considered the evidence of Witnesses RWV11, CKN10, and ZML07 that the reason for the mission to return the Ruhutinyanya family to the roadblock was to ensure their safe passage to Burundi and that it was Muvunyi who organized the mission.<sup>383</sup> However, the Trial Chamber dismissed these alternative explanations given its fundamental

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<sup>377</sup> Prosecution Response Brief, paras. 44, 45.

<sup>378</sup> *Ndahimana* Appeal Judgement, para. 65; *Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al.* Appeal Judgement, para. 306.

<sup>379</sup> *Luki} and Luki}* Appeal Judgement, para. 149.

<sup>380</sup> Trial Judgement, para. 197.

<sup>381</sup> Trial Judgement, para. 204.

<sup>382</sup> Trial Judgement, para. 128, *referring to* Witness XAG, T. 25 January 2011 p. 33 ("With regard to the family which we had left at the ESO camp, a lieutenant who lived in [the] ESO camp and who I had known in Ruhengeri informed me the following day that the members of that family were allegedly taken back to the roadblock we had left the preceding day so that the members of the public who were manning that roadblock would kill the members of that family. And the lieutenant said that that had happened under the orders of Captain Nizeyimana.").

<sup>383</sup> Trial Judgement, paras. 152, 156, 195, 196, 202-206, fn. 410.

concerns about the credibility of the evidence of Witnesses RWV11, CKN10, and ZML07.<sup>384</sup> It further considered that, even if credited, the second-hand evidence of Witnesses RWV11 and CKN10 was of “little probative value” when compared to the first-hand accounts of the Prosecution witnesses and the “compelling circumstantial evidence suggesting otherwise”.<sup>385</sup> The Appeals Chamber finds no error in these determinations.

120. The circumstantial evidence relied upon by the Trial Chamber in support of the inference that Nizeyimana ordered the return of the Ruhutinyanya family to the roadblock knowing and intending that they would be killed was evidence of Nizeyimana’s anger at the presence of the Ruhutinyanya family at the ESO camp and that he characterized them as *Inyenzi/Inkotanyi* and those accompanying them as “accomplices”.<sup>386</sup> The Trial Chamber further noted that the information about what had happened to the family at the roadblock when they initially arrived there was widely circulated among ESO soldiers, and that given Nizeyimana’s position within the ESO hierarchy, as well as the overnight presence of the family at the camp, it was “inconceivable” that Nizeyimana would not have been informed thereof.<sup>387</sup> The Appeals Chamber is not satisfied that Nizeyimana has established that no reasonable trier of fact could have found that the only reasonable inference from the record was that Nizeyimana ordered the Ruhutinyanya family to be returned to the roadblock knowing that they would be killed.

121. The Appeals Chamber turns to Nizeyimana’s submissions that the Trial Chamber erred in stating that the ESO soldiers made efforts in the execution of this mission to give them “plausible deniability” and that this demonstrated their, as well as Nizeyimana’s, intent.<sup>388</sup> The Trial Chamber expressly stated that Nizeyimana ordered the family to be removed from the ESO camp knowing that they would be killed at a “geographically distinct location”, which would allow the ESO soldiers to plausibly deny their involvement in the killing.<sup>389</sup> The Appeals Chamber considers that the Trial Chamber’s finding in this regard was speculative. However, the Trial Chamber’s finding has no impact on the conclusion that the only reasonable inference was that the purpose of the mission was the murder of the Ruhutinyanya family.<sup>390</sup> Therefore, the Appeals Chamber does not consider that this error invalidates the Trial Judgement and dismisses Nizeyimana’s submissions in this regard.

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<sup>384</sup> Trial Judgement, paras. 196, 204-207, 209-213. *See also* Trial Judgement, paras. 1289, 1290, 1292, 1304-1307, 1313, 1315, 1317, 1321, 1329, 1416, 1431, 1432. The Appeals Chamber has already dismissed Nizeyimana’s challenges to the Trial Chamber’s assessment of Witness ZML07’s credibility elsewhere. *See supra* Section III.C.2.

<sup>385</sup> Trial Judgement, para. 204.

<sup>386</sup> Trial Judgement, para. 199, fn. 415. *See also* Trial Judgement, paras. 127, 131, 139, 165, 179, 187, 191, 1495, 1497.

<sup>387</sup> Trial Judgement, para. 198.

<sup>388</sup> Nizeyimana Appeal Brief, para. 112.

122. The Appeals Chamber also rejects Nizeyimana's contentions regarding the reasons for his anger at the presence of the Ruhutinyanya family in the ESO camp and his disgust at the resources spent on protecting the Tutsi family. In light of the Trial Chamber's acceptance of the evidence that Nizeyimana characterized the Ruhutinyanya family as *Inyenzi/Inkotanyi*, and the gendarmes accompanying them as accomplices,<sup>391</sup> the Appeals Chamber considers that the Trial Chamber reasonably concluded that Nizeyimana's response to the presence of the family and the resources expended upon them was motivated by genocidal intent.

123. With regard to the Trial Chamber's reference to Nizeyimana's role in the Cyahinda Parish attack,<sup>392</sup> the Appeals Chamber notes its conclusion, by Majority, below that the Trial Chamber erred in finding that Nizeyimana was actively involved in authorizing and planning this attack.<sup>393</sup> Nevertheless, the Appeals Chamber does not consider that this calls into question the Trial Chamber's overall assessment of Nizeyimana's *mens rea* with regard to the killing of the Ruhutinyanya family, particularly as the Trial Chamber's observation of its conclusions on the Cyahinda Parish attack – which were based on separate findings – was made only after it had already concluded that Nizeyimana acted with the requisite knowledge and intent.<sup>394</sup> Likewise, in its legal findings concerning the killing of the Ruhutinyanya family, the Trial Chamber independently concluded that Nizeyimana possessed genocidal intent and was aware of the genocidal intent held by the principal perpetrators,<sup>395</sup> before considering that these findings were further bolstered by evidence of Nizeyimana's disgust towards the Ruhutinyanya family, and before finally comparing this attitude with that purportedly exhibited in relation to the Cyahinda Parish attack.<sup>396</sup> The Appeals Chamber therefore finds that the Trial Chamber's reference to Nizeyimana's role in the Cyahinda Parish attack was an additional consideration reinforcing its conclusion on Nizeyimana's *mens rea*. In light of this, the Appeals Chamber does not consider that the Trial Chamber's reference to this attack is capable of invalidating its independent finding that Nizeyimana had the requisite knowledge and intent regarding the killing of the Ruhutinyanya family.

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<sup>389</sup> Trial Judgement, para. 213.

<sup>390</sup> See Trial Judgement, paras. 201, 213-215.

<sup>391</sup> See Trial Judgement, paras. 127, 131, 139, 165, 179, 191, 198, 199, 1495, fn. 415.

<sup>392</sup> Trial Judgement, para. 199.

<sup>393</sup> See *infra* para. 158.

<sup>394</sup> Trial Judgement, para. 198 (“The only reasonable inference is that the very danger the Ruhutinyanya family had faced at the roadblock was the reason why Nizeyimana ordered ESO soldiers to return the family to that very location.”). See also Trial Judgement, para. 199 (discussing Nizeyimana's “anger” and “disgust” towards the Ruhutinyanya family's presence, before comparing such “disgust” with that exhibited in relation to the Cyahinda Parish attack).

<sup>395</sup> Trial Judgement, para. 1496.

<sup>396</sup> Trial Judgement, para. 1497.

124. The Appeals Chamber also dismisses Nizeyimana's arguments that the Trial Chamber erred in finding that Bizimana led the mission back to the Akanyaru border crossing roadblock. Contrary to Nizeyimana's submissions, Witness ZML07's evidence that Bizimana led the mission was corroborated by other evidence.<sup>397</sup> The Trial Chamber noted that, contrary to the evidence of Witnesses ZAW and AZD, Witness ZML07 testified that Nyirimanzi was not involved.<sup>398</sup> However, the fact that Nizeyimana ordered Nyirimanzi to return the family to the border does not undermine the finding that it was Bizimana who led the mission. Moreover, as discussed above, the Trial Chamber considered and reasonably rejected the evidence that Muvunyi arranged the removal of the family.<sup>399</sup> The Appeals Chamber further finds that the Trial Chamber was entitled to rely on evidence of Bizimana's role in Rosalie Gicanda's murder to infer intent, by demonstrating a pattern of targeted violence, including the perpetration of other culpable acts systematically directed against the same protected group, *i.e.*, Tutsis. This also reinforced the Trial Chamber's finding of the genocidal intent of the ESO soldiers and *Interahamwe* at the roadblock,<sup>400</sup> as well as Nizeyimana's *mens rea* for the killing of the Ruhutinyanya family members.<sup>401</sup>

125. Accordingly, the Appeals Chamber does not consider that Nizeyimana has demonstrated that the Trial Chamber erred in its assessment of the *mens rea* underlying his conviction for the killing of the Ruhutinyanya family.

#### 4. Conclusion

126. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana's Fourth through Seventh Grounds of Appeal, and Forty-Second through Forty-Fourth Grounds of Appeal, in part.

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<sup>397</sup> Trial Judgement, paras. 152, 156. *See also* Trial Judgement, para. 160.

<sup>398</sup> Trial Judgement, para. 196. Furthermore, the Trial Chamber considered in detail the evidence of Witnesses ZAW and AZD regarding Nizeyimana's order to Nyirimanzi to return the family to the border. *See* Trial Judgement, paras. 162, 179, 187-190.

<sup>399</sup> *See supra* para. 119. *See also* Trial Judgement, paras. 195, 196.

<sup>400</sup> Trial Judgement, para. 1495.

<sup>401</sup> Trial Judgement, para. 208. *Cf. Gatete* Appeal Judgement, para. 247; *Ntabakuze* Appeal Judgement, paras. 237, 248; *Hategekimana* Appeal Judgement, paras. 133, 134; *Renzaho* Appeal Judgement, para. 499.

#### **D. Killings at Cyahinda Parish (Grounds 8-10, and 42-44, in part)**

127. The Trial Chamber convicted Nizeyimana of committing genocide, extermination as a crime against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6(1) of the Statute, for his participation in the basic form of a joint criminal enterprise, based, in part, on his role in the killings committed at Cyahinda Parish around 18 April 1994.<sup>402</sup> The Trial Chamber found that, around 18 April 1994, soldiers including approximately 11 ESO soldiers and ESO's Chief Warrant Officer Paul Kanyashyamba, participated in an attack against the primarily Tutsi civilians who had sought refuge at Cyahinda Parish.<sup>403</sup> The attack resulted in the killings of thousands of the displaced persons at the parish.<sup>404</sup> The Trial Chamber concluded that Nizeyimana contributed to the planning of the attack and authorized the participation of ESO soldiers therein.<sup>405</sup>

128. Nizeyimana challenges his convictions for the killings at Cyahinda Parish and requests the Appeals Chamber to reverse them.<sup>406</sup> The Appeals Chamber will consider Nizeyimana's submissions that the Trial Chamber erred in: (i) its assessment of the evidence relevant to this incident; and (ii) finding that the only reasonable inference was that Nizeyimana contributed to the planning of the attack and authorized the participation of ESO soldiers therein.

##### 1. Assessment of the Evidence

129. Nizeyimana submits that the Trial Chamber's assessment of the credibility of Prosecution and Defence witnesses was "flawed and unfair".<sup>407</sup> Nizeyimana claims that the Trial Chamber applied a double standard in its evaluation of the evidence.<sup>408</sup> Specifically, Nizeyimana asserts that the Trial Chamber systematically excused as "immaterial" major deficiencies and inconsistencies in the testimonies of Prosecution Witnesses ZBK, ZCC, GEN, and Anaclet Dufitumukiza.<sup>409</sup> With

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<sup>402</sup> Trial Judgement, paras. 1503, 1508, 1539, 1547, 1550, 1578, 1579, 1581. The Trial Chamber also found that Nizeyimana could have been convicted for aiding and abetting the attack on Cyahinda Parish, but considered that his liability was most appropriately characterized as participating in a joint criminal enterprise. *See* Trial Judgement, para. 1508.

<sup>403</sup> Trial Judgement, paras. 311, 1503. *See also* Trial Judgement, paras. 18, 266, 267.

<sup>404</sup> Trial Judgement, paras. 267, 311, 1503.

<sup>405</sup> Trial Judgement, paras. 316, 1504.

<sup>406</sup> Nizeyimana Notice of Appeal, paras. 33-42, 112-117; Nizeyimana Appeal Brief, paras. 117-171, 582-587, 589-602. *See also* AT. 28 April 2014 pp. 4, 6, 9, 10, 39.

<sup>407</sup> Nizeyimana Notice of Appeal, paras. 33-36; Nizeyimana Appeal Brief, paras. 122, 145, 146.

<sup>408</sup> Nizeyimana Notice of Appeal, para. 33; Nizeyimana Appeal Brief, paras. 141, 144. *See also* Nizeyimana Appeal Brief, paras. 591-595.

<sup>409</sup> Nizeyimana Notice of Appeal, para. 33; Nizeyimana Appeal Brief, paras. 122, 124-130, 133, 135. *See also* AT. 28 April 2014 pp. 4, 5. Nizeyimana further asserts that the Trial Chamber acknowledged inconsistencies in the Prosecution evidence regarding the date of the attack on Cyahinda Parish but unreasonably concluded that they were immaterial. Nizeyimana Appeal Brief, para. 124; Nizeyimana Reply Brief, para. 14. However, as Nizeyimana does not expand upon this argument in any way or demonstrate why the Trial Chamber's conclusion was unreasonable, the

respect to Witness ZBK, Nizeyimana submits that the Trial Chamber incorrectly found that the discrepancy between her testimony and previous statement as to the vantage point from which she witnessed the events was immaterial.<sup>410</sup>

130. Nizeyimana asserts that the sole finding which links ESO soldiers to the events at Cyahinda Parish, the finding that 11 ESO soldiers, including Kanyashyamba, were at Cyahinda, is based on the uncorroborated testimony of Witness Dufitumukiza.<sup>411</sup> He also argues that the Trial Chamber erred in finding that there was no dispute that Kanyashyamba was stationed at the ESO in April 1994 because Defence Witness Irénée Hitayezu testified that Kanyashyamba had been posted as a special commander at the Akanyaru border crossing with Burundi prior to the attack at Cyahinda Parish.<sup>412</sup> Nizeyimana therefore contends that if any ESO soldiers were present at Cyahinda Parish, which is near Akanyaru, it was not as a result of his instructions and that they were not sent there from the ESO.<sup>413</sup> Nizeyimana further submits that the Trial Chamber acknowledged that Witness Dufitumukiza's testimony regarding the use of heavy weapons in the attack was inconsistent with his prior statement but excused this discrepancy as immaterial and ignored that the witness contradicted himself regarding whether ESO soldiers were the only ones with heavy weapons.<sup>414</sup> Along the same lines, Nizeyimana asserts that the Trial Chamber was also contradictory in its assessment of the range of fire of the heavy weapons used in the attack.<sup>415</sup> Nizeyimana contends that on the issue of whether ESO soldiers participated in the attack on Cyahinda Parish, the Trial Chamber effectively reversed the burden of proof, requiring him to produce exculpatory evidence and depriving him of the presumption of innocence.<sup>416</sup>

131. In contrast to its assessment of the Prosecution evidence, Nizeyimana claims that the Trial Chamber applied a less forgiving and “drastically” different standard to its assessment of Defence evidence.<sup>417</sup> In particular, Nizeyimana challenges the Trial Chamber's assessment of the evidence of Defence Witnesses CKN10, ZML10, and RWV09 and asserts that it erroneously discredited their

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Appeals Chamber summarily dismisses this argument. Likewise, Nizeyimana notes both that the Trial Chamber acknowledged Witness ZCC's confusion and lack of precision but still relied upon his testimony to establish the presence of soldiers among the attackers, and that the Trial Chamber acknowledged Witness GEN's “implausible” claims about what she was able to observe from her vantage point but nonetheless relied upon her evidence. Nizeyimana Appeal Brief, paras. 128, 129. However, as Nizeyimana does not allege any specific error in the assessment of the evidence of these witnesses, the Appeals Chamber summarily dismisses these arguments.

<sup>410</sup> Nizeyimana Appeal Brief, paras. 126, 127, *referring to* Trial Judgement, para. 276, fns. 641, 642.

<sup>411</sup> Nizeyimana Appeal Brief, para. 130. *See also* Nizeyimana Reply Brief, para. 19; AT. 28 April 2014 p. 39.

<sup>412</sup> Nizeyimana Appeal Brief, para. 131. *See also* AT. 28 April 2014 pp. 9, 10, 39.

<sup>413</sup> Nizeyimana Appeal Brief, para. 131. *See also* Nizeyimana Appeal Brief, para. 165; Nizeyimana Reply Brief, paras. 20-22, 25.

<sup>414</sup> Nizeyimana Appeal Brief, para. 133. *See also* Nizeyimana Reply Brief, para. 17; AT. 28 April 2014 p. 39.

<sup>415</sup> Nizeyimana Appeal Brief, para. 134. *See also* Nizeyimana Appeal Brief, para. 135.

<sup>416</sup> Nizeyimana Notice of Appeal, paras. 37-39; Nizeyimana Appeal Brief, paras. 147-149. *See also* Nizeyimana Appeal Brief, paras. 597-601.

evidence on the basis of minor discrepancies in their testimonies or their demeanour.<sup>418</sup> Nizeyimana specifically submits that the Trial Chamber misconstrued Witness CKN10's testimony that he did not see any soldiers in trucks leaving the ESO for Cyahinda.<sup>419</sup> Nizeyimana argues that the Trial Chamber erred in finding that Witness ZML10's evidence was corroborative of Prosecution evidence that military lorries brought large numbers of soldiers to Cyahinda Parish prior to the attack since Witness ZML10's evidence was incompatible with this Prosecution evidence.<sup>420</sup> Nizeyimana asserts that the Trial Chamber erroneously disbelieved Witness ZML10's testimony that he did not see ESO soldiers at the attack, which, in his view, was reasonable given that only 11 ESO soldiers were found to have participated in the attack.<sup>421</sup> According to Nizeyimana, Witness RWV09 was also discredited for no valid reason as his position at the ESO allowed him to know and reliably attest that no ESO soldiers went to Cyahinda Parish that day.<sup>422</sup>

132. The Prosecution responds that Nizeyimana's challenges to the Trial Chamber's assessment of the evidence are without merit.<sup>423</sup> According to the Prosecution, the Trial Chamber did not apply a double standard in its assessment of Prosecution and Defence evidence and provided specific reasons why discrepancies in the testimonies of Prosecution witnesses were deemed immaterial, while Defence witnesses were not considered credible enough to raise a reasonable doubt about Nizeyimana's involvement and guilt.<sup>424</sup> The Prosecution denies that the Trial Chamber reversed the burden of proof.<sup>425</sup>

133. The Appeals Chamber recalls that a trial chamber enjoys broad discretion in assessing the evidence on the record and the credibility of witnesses, and in determining the weight to be accorded to each piece of evidence for purposes of establishing the material facts of a case.<sup>426</sup> The Appeals Chamber further recalls that mere assertions that the trial chamber failed to give sufficient

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<sup>417</sup> Nizeyimana Appeal Brief, para. 137. *See also* Nizeyimana Appeal Brief, paras. 123, 168.

<sup>418</sup> Nizeyimana Notice of Appeal, paras. 33, 34, 37, 38; Nizeyimana Appeal Brief, paras. 123, 137-145. Nizeyimana also asserts that the Trial Chamber discredited Defence Witness Jean Marie Vianney Mushi on the basis of his demeanour, but does not elaborate upon this alleged error or why it would have invalidated the decision or occasioned a miscarriage of justice. *See* Nizeyimana Appeal Brief, para. 137. The Appeals Chamber will therefore not consider this submission.

<sup>419</sup> Nizeyimana Appeal Brief, para. 138. *See also* Nizeyimana Reply Brief, paras. 23, 24; AT. 28 April 2014 p. 6.

<sup>420</sup> Nizeyimana Appeal Brief, para. 139.

<sup>421</sup> Nizeyimana Appeal Brief, para. 140.

<sup>422</sup> Nizeyimana Notice of Appeal, para. 34; Nizeyimana Appeal Brief, paras. 141, 142. *See also* AT. 28 April 2014 p. 6.

<sup>423</sup> Prosecution Response Brief, paras. 48-70. *See also* AT. 28 April 2014 p. 23.

<sup>424</sup> Prosecution Response Brief, paras. 49-67. *See also* AT. 28 April 2014 pp. 23, 25, 26.

<sup>425</sup> Prosecution Response Brief, paras. 69, 70.

<sup>426</sup> *See, e.g.,* *Ndindiliyimana et al.* Appeal Judgement, para. 331; *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114; *Nchamihigo* Appeal Judgement, para. 47.

weight to certain evidence, or that it should have interpreted evidence in a particular manner, may be summarily dismissed.<sup>427</sup>

134. Applying these principles, the Appeals Chamber is not convinced that the Trial Chamber was unreasonable in finding that the discrepancy between Witness ZBK's testimony and her prior statement regarding her vantage point was immaterial. The Trial Chamber noted that in Witness ZBK's prior statement she had stated that, on 15 April 1994, the *bourgmestre* retrieved his wife from the commune office but asked Witness ZBK to stay and that she "was put behind his office in a Red Cross tent" whereas at trial the witness testified that she remained in the commune office and did not go to the nearby Red Cross facility until 19 April 1994.<sup>428</sup> However, the Trial Chamber considered that Witness ZBK testified that this aspect of her previous statement was incorrect and that it was an error in the recording of her statement.<sup>429</sup> Furthermore, the Trial Chamber noted evidence that the Red Cross camp was only metres from the commune office and therefore essentially at the same location.<sup>430</sup> It therefore concluded that, in any event, the discrepancy was immaterial as the witness's vantage point would not have been significantly different.<sup>431</sup> Nizeyimana does not demonstrate that the Trial Chamber unreasonably considered these factors in finding that this discrepancy was immaterial and therefore fails to show that the Trial Chamber was unreasonable in so concluding.

135. With respect to Nizeyimana's challenge to the Trial Chamber's reliance on Witness Dufitumukiza's uncorroborated evidence to conclude that 11 ESO soldiers and Kanyashyamba participated in the Cyahinda Parish attack,<sup>432</sup> the Appeals Chamber recalls that a trial chamber may make findings based on a single witness's testimony for proof of a material fact if that testimony is deemed credible.<sup>433</sup> The Trial Chamber found Witness Dufitumukiza's testimony credible and compelling on this issue.<sup>434</sup> It was, thus, within the Trial Chamber's discretion to rely solely on the testimony of Witness Dufitumukiza that ESO soldiers and Kanyashyamba participated in the attack at the parish, without requiring corroboration.

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<sup>427</sup> *Šainović et al.* Appeal Judgement, para. 27; *Nchamihigo* Appeal Judgement, para. 157; *Krajišnik* Appeal Judgement, para. 27.

<sup>428</sup> Trial Judgement, paras. 275, 276, referring to Witness ZBK, T. 19 January 2011 pp. 54, 57, 60.

<sup>429</sup> Trial Judgement, para. 276, referring to Witness ZBK, T. 19 January 2011 pp. 57, 60.

<sup>430</sup> Trial Judgement, fn. 641, referring to Witness ZCC, T. 18 January 2011 p. 48 ("Q. Can you describe where the Red Cross tent was in relation to the communal office? A. The tent nearest to the commune was about 3 metres from the communal office. Two people stayed in each tent. My tent was in the middle of other tents, and my tent was about 5 metres from the communal office."). See also Trial Judgement, para. 283.

<sup>431</sup> Trial Judgement, para. 276, fn. 641.

<sup>432</sup> Trial Judgement, paras. 310, 311. See also Trial Judgement, para. 271.

<sup>433</sup> See, e.g., *Gatete* Appeal Judgement, para. 138; *Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Renzaho* Appeal Judgement, para. 518; *Karera* Appeal Judgement, para. 45; *Seromba* Appeal Judgement, para. 79.

<sup>434</sup> See Trial Judgement, paras. 273, 274, 278-281, 293, 298, 299, 306, 310, 311.



136. In crediting Witness Dufitumukiza's evidence with respect to the issue of ESO soldiers' participation in the attack, the Trial Chamber did not reverse the burden of proof, as Nizeyimana contends, merely because it weighed the credibility of the evidence adduced by the Defence against the Prosecution evidence.<sup>435</sup> Contrary to Nizeyimana's argument, at no point did the Trial Chamber require the Defence to present "exhaustive exculpatory evidence".<sup>436</sup> Appraising the credibility of testimonies and, in particular, assessing the probative value of Defence witnesses' testimonies in relation to the testimonies of Prosecution witnesses does not amount to a reversal of the burden of proof, but falls squarely within a trial chamber's discretion.<sup>437</sup> The Trial Chamber acted within its discretion in determining the weight to be accorded to each piece of evidence for the purposes of establishing the material facts of the case.<sup>438</sup> There is no indication that while engaging in this task, the Trial Chamber ever deviated from the principle that the Prosecution must prove its case beyond reasonable doubt.<sup>439</sup>

137. Nizeyimana correctly notes that the Trial Chamber referred to Witness Hitayezu's testimony when finding that Kanyashyamba was stationed at the ESO in April 1994,<sup>440</sup> whereas Witness Hitayezu testified that by the time he arrived at the ESO camp on 8 April 1994, Kanyashyamba had been deployed to the border with Burundi as the commander of a group of soldiers posted there.<sup>441</sup> However, the Trial Chamber's erroneous reference to Witness Hitayezu's testimony, in the view of the Appeals Chamber, was harmless. In this regard, the Appeals Chamber observes that the Trial Chamber had "considerable suspicion" about Witness Hitayezu's evidence, finding that he "lack[ed] basic credibility", he exhibited "extremism before the Chamber" and his demeanour "left F...g the impression that his testimony was tailored in order to exculpate FNizeyimanağ".<sup>442</sup> The Appeals Chamber therefore finds that his evidence could not reasonably have undermined the other evidence upon which the Trial Chamber relied which indicated that Kanyashyamba was stationed at the ESO in April 1994.<sup>443</sup>

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<sup>435</sup> See Nizeyimana Notice of Appeal, paras. 37, 39; Nizeyimana Appeal Brief, paras. 147-149, 597-601.

<sup>436</sup> Nizeyimana Appeal Brief, para. 149.

<sup>437</sup> See *Kanyarukiga* Appeal Judgement, para. 121; *Muvunyi* Appeal Judgement of 29 August 2008, para. 144; *Bagilishema* Appeal Judgement, para. 78.

<sup>438</sup> Cf. *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114; *Nchamihigo* Appeal Judgement, para. 47.

<sup>439</sup> See, e.g., Trial Judgement, paras. 18, 20, 311, 316 (confirming that findings supporting Nizeyimana's involvement and guilt were established "beyond reasonable doubt" and concluding that there was "no doubt" that these findings reflect Nizeyimana's contributions to the attack).

<sup>440</sup> Trial Judgement, fn. 682.

<sup>441</sup> Witness Hitayezu, T. 9 June 2011 p. 61.

<sup>442</sup> Trial Judgement, paras. 568, 722, 1358. See also Trial Judgement, para. 1370.

<sup>443</sup> See Trial Judgement, fn. 682, referring to Witness BDE, T. 31 January 2011 p. 42 (referring to Kanyashyamba's origin from the border area south of Butare, a native of Kigembe); Witness YAA, T. 2 February 2011 p. 37 (referring to Kanyashyamba requisitioning Butare petrol filling stations for ESO use "as from the 7th of April"); Witness Gahizi, T.

138. Equally reasonable was the Trial Chamber's evaluation of Witness Dufitumukiza's evidence on the use of heavy weaponry during the attack on the parish. The Trial Chamber found Witness Dufitumukiza's testimony on the use of a heavy machine gun and a 60-millimetre mortar credible and convincing.<sup>444</sup> It so found despite having expressed reservations about whether a heavy machine gun which, according to evidence considered by the Trial Chamber, had a range of fire of 400 to 600 metres, could be used by soldiers stationed at the Nyakizu commune office to fire at Cyahinda Parish, nearly a kilometre away.<sup>445</sup> The Trial Chamber overcame its reservations in light of evidence showing that the distance between the soldiers using the gun and their targets was likely less than a kilometre, since: (i) soldiers launched their attacks not from the commune office itself, but its vicinity, and then kept moving towards the Cyahinda Parish area as the attack progressed; and (ii) the targeted civilians were located throughout the parish facilities.<sup>446</sup> Nizeyimana does not demonstrate any contradiction or error in the Trial Chamber's analysis on this point.<sup>447</sup>

139. Nizeyimana also fails to show an error in the Trial Chamber's finding that the discrepancy between Witness Dufitumukiza's testimony and his prior testimony in a Rwandan proceeding about the weapons used by the gendarmes was immaterial.<sup>448</sup> Witness Dufitumukiza testified at trial that the gendarmes only used a heavy machine gun and their firearms,<sup>449</sup> while his prior statement

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8 February 2011 p. 28 (referring to Kanyashyamba being involved in looting); Witness OUV03, T. 31 May 2011 pp. 12, 16-19, 24, 25, 39, T. 1 June 2011 p. 9 (referring to Kanyashyamba's position at the ESO and relationship with superior officers); Witness Bunani, T. 13 June 2011 p. 19 (generally describing the chain of command at the ESO and stating that Kanyashyamba reported to Tharcisse Muvunyi); Witness RWV09, T. 8 June 2011 pp. 10, 11 (closed session) (referring to the fact that Kanyashyamba worked in the S2/S3 office); Witness ZML07, T. 18 May 2011 p. 49 (stating that the witness recognized the name of Chief "Kanyeshyamba" from the ESO, but he did not remember his face); Witness BUV02, T. 10 May 2011 p. 80 ("Q. Did you also know, Mr. Witness, Chief Warrant Officer Kanyashyamba? A. Yes, I knew Warrant Officer Kanyashyamba. But for some time now I don't know the camp in which he is. I got to know him during the killings."). *See also* Trial Judgement, para. 314 ("Prosecution and Defence evidence also reflects that Kanyashyamba worked with Nizeyimana and that Nizeyimana had power over or gave orders to Kanyashyamba.").

<sup>444</sup> Trial Judgement, paras. 298, 299.

<sup>445</sup> Trial Judgement, para. 297.

<sup>446</sup> Trial Judgement, para. 298, and references cited therein, particularly Witness ZCC's testimony. *See also* Trial Judgement, para. 243.

<sup>447</sup> Nizeyimana further argues that the Trial Chamber's appraisal of Witness Dufitumukiza's testimony contradicts its earlier finding, in paragraph 206 of the Trial Judgement, that Burundian soldiers could not have fired on a roadblock located 500 metres to one kilometre inside Rwanda because of the limited shooting range of their firearms. *See* Nizeyimana Appeal Brief, para. 134, *referring to* Trial Judgement, para. 206. The Appeals Chamber does not see any contradiction in this regard. Nizeyimana's argument is based on a misreading of paragraphs 297 and 298 of the Trial Judgement. In those paragraphs, the Trial Chamber did not find that soldiers were shooting at Cyahinda Parish from one kilometre away, *i.e.*, a distance longer than the shooting range of their heavy weapons; the Trial Chamber instead cited evidence that the distance between the soldiers using the heavy weapons and Cyahinda Parish was likely smaller. *See* Trial Judgement, paras. 297, 298. Additionally, the evidence in relation to the weapons used by the Burundian soldiers only related to a gas machine gun and "other automatic weapons", whereas the evidence in relation to the weapons used in the Cyahinda Parish attack also included a 60 millimetre mortar. No evidence was adduced about the range of a 60 millimetre mortar. *See* Trial Judgement, paras. 147, 206, 297. There is, thus, no inconsistency between the Trial Chamber's findings concerning the Burundian soldiers and the findings concerning the soldiers' use of heavy weapons in the Cyahinda Parish attack.

<sup>448</sup> Trial Judgement, para. 280. *See also* Nizeyimana Appeal Brief, para. 133.

<sup>449</sup> Witness Dufitumukiza, T. 20 January 2011 p. 38 ("When gendarmes went to Cyahinda, they passed via the armoury, weapons store, that is, and they were given heavy weapons including a machine-gun. Otherwise, they also had their

indicated that the gendarmes used “rifles as well as light and heavy weapons”.<sup>450</sup> However, the Trial Chamber concluded that even if the different wording of the two statements constituted an inconsistency, it was technical in nature and immaterial.<sup>451</sup> The Appeals Chamber considers that it was reasonable for the Trial Chamber to make this finding, particularly given that the witness was not questioned further on the nature of the “light and heavy weapons” referred to in his prior statement.<sup>452</sup> In any event, the Appeals Chamber does not see how an inconsistency between Witness Dufitumukiza’s various statements on the weapons used by the gendarmes could impact the Trial Chamber’s finding that the witness provided credible testimony on the use of heavy weapons by soldiers located near the Nyakizu commune office.<sup>453</sup> Nizeyimana’s arguments in this regard are, therefore, rejected.

140. Turning to the Trial Chamber’s assessment of the Defence evidence, the Appeals Chamber considers that Nizeyimana fails to demonstrate an error in the Trial Chamber’s finding that Witness CKN10’s testimony – that he did not see any trucks carrying soldiers leaving the ESO camp on 18 April 1994 – failed to raise doubt about the Prosecution evidence.<sup>454</sup> The Trial Chamber found that this specific aspect of Witness CKN10’s evidence appeared to contradict another portion of his testimony, namely, that the Ruhutinyanya family left the ESO camp the same morning accompanied by soldiers.<sup>455</sup> The Appeals Chamber finds that, while the Trial Chamber correctly noted Witness CKN10’s evidence in this regard, it misconstrued it in finding that the witness contradicted himself. In response to a question about trucks going to Cyahinda, Witness CKN10 testified that he did not see any trucks carrying soldiers,<sup>456</sup> whereas when answering questions about the Ruhutinyanya family, he confirmed that he saw their minibus.<sup>457</sup> Accordingly, the Appeals Chamber considers that the Trial Chamber erred in finding that Witness CKN10 contradicted himself. Nonetheless, the Appeals Chamber does not consider that this error undermines the Trial Chamber’s decision not to credit his evidence in this regard. The Trial Chamber had considerable reservations about Witness CKN10’s credibility and also considered that other evidence regarding which ESO entrance

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individual or personal weapons. I would also like to add that at the gendarmerie camp there were no mortars. In terms of weapons – the heaviest weapon at the gendarmerie camp was that machine-gun.”).

<sup>450</sup> Trial Judgement, para. 280, *referring to* Witness Dufitumukiza, T. 20 January 2011 p. 51.

<sup>451</sup> Trial Judgement, para. 280.

<sup>452</sup> Trial Judgement, para. 280; Witness Dufitumukiza, T. 20 January 2011 p. 51.

<sup>453</sup> Trial Judgement, paras. 297-299.

<sup>454</sup> *See* Trial Judgement, para. 309.

<sup>455</sup> Trial Judgement, para. 309.

<sup>456</sup> Witness CKN10, T. 26 May 2011 p. 43.

<sup>457</sup> Witness CKN10, T. 26 May 2011 pp. 43, 44.

Witness CKN10 was guarding called into question the witness's ability to have seen the trucks carrying soldiers.<sup>458</sup>

141. Similarly, Nizeyimana fails to show that the Trial Chamber erred in finding that Witness ZML10's testimony that he saw a military "pickup" near the commune office<sup>459</sup> provided circumstantial support for the "compelling and first-hand accounts" of Witnesses ZBK and ZCC that lorries carried soldiers to Cyahinda Parish.<sup>460</sup> Witness ZML10 indeed testified that he saw a military pickup at the commune office.<sup>461</sup> Furthermore, the Trial Chamber merely observed, in passing, that Witness ZML10's account offered some support to the Prosecution evidence that lorries were used to carry soldiers to Cyahinda Parish.<sup>462</sup> However, that observation was not a necessary component of the Trial Chamber's finding that lorries were used to carry soldiers; the Trial Chamber reasonably premised its finding on the testimonies of Witnesses ZBK and ZCC, without requiring further corroboration, as it had the discretion to do.<sup>463</sup> Nizeyimana fails to demonstrate an error in this regard.

142. Furthermore, contrary to Nizeyimana's submission,<sup>464</sup> the Trial Chamber did not find that Witness ZML10's evidence that he did not see soldiers at Cyahinda Parish could not be believed. Rather, the Trial Chamber observed that, given "the scale of the attack and the area in which it was conducted",<sup>465</sup> as well as his own active participation in the attack, the witness would not have been able to see and identify all the attackers.<sup>466</sup> In light of this observation, the Trial Chamber's determination that Witness ZML10's testimony failed to raise a reasonable doubt about the validity of Prosecution evidence concerning the participation of 11 ESO soldiers in the attack was not erroneous or unreasonable.<sup>467</sup> Nizeyimana's arguments in this respect are also rejected.

143. According to Nizeyimana, Witness RWV09's evidence that ESO soldiers did not go to Cyahinda on 18 April 1994 was also discredited for no reason since his position at the ESO put him in a privileged position to attest that no ESO trucks left the camp that day.<sup>468</sup> The Trial Chamber acknowledged that Witness RWV09's evidence was probative in relation to "the allocation of ESO

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<sup>458</sup> Trial Judgement, para. 309.

<sup>459</sup> See Trial Judgement, para. 303.

<sup>460</sup> Trial Judgement, paras. 303, 310. The Trial Chamber referred to Witness ZCC, however, the Appeals Chamber understands that it intended to refer to Witness ZCC. See Trial Judgement, para. 310.

<sup>461</sup> Witness ZML10, T. 16 May 2011 p. 8.

<sup>462</sup> See Trial Judgement, para. 303.

<sup>463</sup> Trial Judgement, para. 310.

<sup>464</sup> Nizeyimana Appeal Brief, para. 140.

<sup>465</sup> Trial Judgement, para. 304.

<sup>466</sup> Trial Judgement, para. 305.

<sup>467</sup> See Trial Judgement, para. 306.

<sup>468</sup> Nizeyimana Notice of Appeal, para. 34; Nizeyimana Appeal Brief, paras. 141, 142.

vehicles in the second half of April 1994”.<sup>469</sup> Nonetheless, it concluded that the witness’s “denial that trucks were F...ğ allocated for the purposes of transporting soldiers from the ESO” was of “low probative value”.<sup>470</sup> The Trial Chamber did not explain this finding. However, in a footnote, the Trial Chamber noted that, at trial, Witness RWV09 had been confronted with his prior testimony in another case before the Tribunal that “just before the ‘19th’ ESO soldiers and gendarmes from Tumba were requested to go to communes in Butare where insecurity was prevailing”, including Nyakizu Commune, where, as the witness acknowledged, Cyahinda Parish is located.<sup>471</sup> When questioned at trial about his prior statement concerning ESO soldiers being sent to Nyakizu Commune, Witness RWV09 stated that only gendarmes and not ESO soldiers were sent there.<sup>472</sup> In the Appeals Chamber’s view, this inconsistency in Witness RWV09’s evidence, coupled with his inability at trial to give specific dates on which military vehicles left the ESO camp in April 1994, despite his certainty that the trucks did not go to Cyahinda Parish on 18 April 1994,<sup>473</sup> reasonably explains the Trial Chamber’s conclusion that the witness’s evidence on this point was of “low probative value”.<sup>474</sup>

144. Finally, the Appeals Chamber notes that, although Defence witnesses denied that trucks carrying soldiers left the ESO camp on the day of the attack, the Trial Chamber did not make a conclusive finding about the provenance of the lorries with ESO soldiers seen at Cyahinda Parish on that day.<sup>475</sup> The Trial Chamber only found that, based on the “compelling and first-hand accounts of Witnesses ZBK and [ZCC] F...ğ lorries carrying soldiers *arrived* at Cyahinda Parish on the same day”.<sup>476</sup> Moreover, the departure of lorries from the ESO camp on the same day of the attack did not form a basis for the Trial Chamber’s factual conclusions concerning the participation of ESO soldiers in the parish attack or about the “highly coordinated and heavily armed” nature of the attack.<sup>477</sup> As a result, Nizeyimana has failed to show that the Trial Chamber erred in

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<sup>469</sup> Trial Judgement, para. 308.

<sup>470</sup> Trial Judgement, para. 308. The Trial Chamber stated that “Fhğis denial that trucks were not allocated for the purposes of transporting soldiers from the ESO is of low probative value”. However, the Appeals Chamber understands that the Trial Chamber intended to state that “his denial that trucks were allocated for the purposes of transporting soldiers from the ESO is of low probative value” since this correlates with the witness’s testimony. *See* Witness RWV09, T. 8 June 2011 p. 49 (closed session).

<sup>471</sup> Trial Judgement, fn. 720, *referring to* Witness RWV09, T. 8 June 2011 pp. 50, 51 (closed session).

<sup>472</sup> Trial Judgement, fn. 720, *referring to* Witness RWV09, T. 8 June 2011 p. 51 (closed session).

<sup>473</sup> Witness RWV09, T. 8 June 2011 pp. 49, 50 (closed session).

<sup>474</sup> Trial Judgement, para. 308.

<sup>475</sup> *See* Trial Judgement, paras. 310, 311.

<sup>476</sup> Trial Judgement, para. 310 (emphasis added).

<sup>477</sup> Trial Judgement, para. 313. *See also* Trial Judgement, paras. 310, 311.

determining that Defence evidence did not raise a reasonable doubt about the Prosecution evidence concerning the presence of ESO soldiers at Cyahinda Parish.<sup>478</sup>

145. For the foregoing reasons, the Appeals Chamber concludes that Nizeyimana has failed to demonstrate that the Trial Chamber erred in its assessment of the Prosecution and Defence evidence in relation to the killings at Cyahinda Parish on 18 April 1994.

## 2. Application of the Only Reasonable Inference Standard

146. The Trial Chamber concluded that Nizeyimana contributed to the planning of the attack on the parish and authorized the participation of ESO soldiers in it.<sup>479</sup> According to the Trial Chamber, although “there [was] no direct evidence of FNizeyimanağ ordering, instigating or authorising the assault”,<sup>480</sup> this was the only reasonable conclusion to be inferred from the circumstantial evidence on the record.<sup>481</sup> The circumstantial evidence upon which this conclusion was based included evidence that: (i) Nizeyimana visited the Cyahinda Parish facilities on 17 April 1994, the day before the attack, as a member of a team charged with evaluating the security situation in the area;<sup>482</sup> (ii) Nizeyimana served as the officer in charge of intelligence, training, and operations at the ESO, which was the operational command centre for Butare and Gikongoro Prefectures;<sup>483</sup> and (iii) around 11 ESO soldiers, led by Chief Warrant Officer Kanyashyamba, Nizeyimana’s subordinate, participated in the attack against the parish on 18 April 1994, using specialized heavy arms which could weaken the structural safe havens of the refugees.<sup>484</sup>

147. Nizeyimana challenges the Trial Chamber’s conclusion that he contributed to the planning of the attack against the parish and authorized the participation of ESO soldiers therein.<sup>485</sup> In his view, this conclusion was speculative and not the only reasonable inference from the evidentiary record and should be reversed.<sup>486</sup> Nizeyimana also calls into question the factual findings upon which the Trial Chamber relied in support of its conclusion, *i.e.*, the findings that: (i) the attack against the parish was “highly coordinated and heavily armed”, as evidenced by the participation of

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<sup>478</sup> See Trial Judgement, paras. 308-310.

<sup>479</sup> Trial Judgement, paras. 316, 1504.

<sup>480</sup> Trial Judgement, para. 312.

<sup>481</sup> Trial Judgement, paras. 316, 1504.

<sup>482</sup> Trial Judgement, paras. 290, 313, 316, 1504, 1507.

<sup>483</sup> Trial Judgement, paras. 314, 1504.

<sup>484</sup> Trial Judgement, paras. 314-316, 1503, 1504, 1507. The Appeals Chamber observes that both the Trial Judgement and the submissions of the parties consistently use the term “refugee” to describe persons taking refuge. For the sake of clarity, the Appeals Chamber uses the same term throughout the Judgement, noting that the use of this term does not purport to reflect or determine the status of these persons under international law. *Cf. Ndahimana* Appeal Judgement, fn. 79.

<sup>485</sup> Nizeyimana Notice of Appeal, para. 40; Nizeyimana Appeal Brief, para. 150.

11 ESO soldiers who used heavy weapons;<sup>487</sup> (ii) Nizeyimana's participation in the security mission to Cyahinda Parish the day before the attack was intended to appraise the strength of the fortifications at the parish and plan the assault;<sup>488</sup> (iii) Nizeyimana was the ESO's officer in charge of intelligence, training, and operations before the attack;<sup>489</sup> and (iv) the ESO was the regional operational command centre for Butare and Gikongoro Prefectures at the time of the attack.<sup>490</sup> In Nizeyimana's view, these findings are contradicted or not adequately supported by the evidence on the record.<sup>491</sup>

148. The Prosecution responds that Nizeyimana impermissibly seeks to substitute his own reading of the evidence for the reasonable findings of the Trial Chamber.<sup>492</sup> The Prosecution defends as reasonable the Trial Chamber's findings that the ESO was the regional command centre at the time of the attack and that Nizeyimana was the ESO's S2/S3 officer, as well as the findings that the attack against the parish was highly coordinated and that Nizeyimana's visit to the parish the previous day allowed him to plan the attack.<sup>493</sup> In the Prosecution's view, the Trial Chamber's conclusion that Nizeyimana planned and authorized the participation of ESO soldiers in the attack is the only reasonable inference to be drawn from the record.<sup>494</sup>

149. The Appeals Chamber recalls that factual findings underpinning a finding of guilt of the accused based on circumstantial evidence must be the only reasonable inference that can be drawn from the record.<sup>495</sup>

150. The Appeals Chamber has already dismissed Nizeyimana's challenges to the Trial Chamber's findings that 11 ESO soldiers, led by Kanyashyamba, participated in the assault against

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<sup>486</sup> Nizeyimana Notice of Appeal, paras. 40-42; Nizeyimana Appeal Brief, paras. 150, 163-165, 167-171, 587. *See also* Nizeyimana Appeal Brief, paras. 582, 586, 589, 590; AT. 28 April 2014 pp. 10, 39.

<sup>487</sup> Nizeyimana Appeal Brief, para. 153, *referring to* Trial Judgement, para. 313. *See also* Nizeyimana Appeal Brief, para. 154.

<sup>488</sup> Nizeyimana Appeal Brief, paras. 151, 155, 169.

<sup>489</sup> Nizeyimana Appeal Brief, paras. 156, 157, 165, 166.

<sup>490</sup> Nizeyimana Appeal Brief, paras. 156, 158-162, *referring to, inter alia*, Witness CKN10, T. 26 May 2011 p. 35, Witness Habyarimana, T. 25 May 2011 p. 36. *See also* Nizeyimana Reply Brief, para. 30; AT. 28 April 2014 pp. 4, 9, 10. Nizeyimana also challenges the Trial Chamber's reliance on the fact that one of his subordinates, Kanyashyamba, led the ESO contingent that participated in the attack against the parish. Nizeyimana Notice of Appeal, para. 35; Nizeyimana Appeal Brief, paras. 165-167. The Appeals Chamber has already addressed and dismissed Nizeyimana's arguments in this regard in its section on Nizeyimana's challenges to the assessment of the evidence and accordingly will not address them here. *See supra* Section III.D.1.

<sup>491</sup> Nizeyimana Appeal Brief, para. 152. *See also* AT. 28 April 2014 pp. 10, 39.

<sup>492</sup> Prosecution Response Brief, paras. 68, 71-77; AT. 28 April 2014 p. 23.

<sup>493</sup> Prosecution Response Brief, paras. 73-77; AT. 28 April 2014 pp. 24-26.

<sup>494</sup> Prosecution Response Brief, para. 71; AT. 28 April 2014 pp. 24-26.

<sup>495</sup> *See Ndindiliyimana et al.* Appeal Judgement, para. 291; *Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515.

Cyahinda Parish and used heavy weapons.<sup>496</sup> Given the reasonableness of the findings about the participation of ESO soldiers, and soldiers in general, in the attack, as well as the use of heavy weaponry by the assailants, the Appeals Chamber does not find any error in the Trial Chamber's characterizations of the assault as "highly coordinated" and "heavily armed".<sup>497</sup> These descriptions referred to the entire attack against the parish, which, apart from the contingent of ESO soldiers, also involved "civilian militia and security forces", including other soldiers.<sup>498</sup> In that sense, the Trial Chamber's characterizations were sufficiently supported by the evidence, including the "compelling and first-hand accounts" of Witnesses ZBK and ZCC that "lorries carrying soldiers arrived at Cyahinda Parish" on the day of the attack.<sup>499</sup> Accordingly, it was reasonable for the Trial Chamber to find that it was "inconceivable that such a tactical assault, which involved ESO soldiers utilising specialised arms, would have occurred in Nyakizu commune, Butare prefecture, without the approval of the ESO command".<sup>500</sup>

151. The Appeals Chamber, nevertheless, does not find that the Trial Chamber's other inferences could be the only reasonable inferences available from the evidence on the record. Regarding Nizeyimana's visit to Cyahinda Parish on the eve of the attack, the Trial Chamber correctly stated that both Prosecution and Defence evidence established the fact of the visit.<sup>501</sup> The Trial Chamber found that Nizeyimana visited Cyahinda Parish as a member of a security delegation that included a priest and Butare's Tutsi Prefect, and that the purpose of the mission was "Foğstensibly F...ğ to ease the tensions between the refugees and the gendarmes".<sup>502</sup>

152. However, the Appeals Chamber, Judge Güney and Judge Ramaroson dissenting, is not convinced that the only reasonable inference from these facts is that Nizeyimana used the visit as an opportunity to inspect the parish facilities and examine the strengths and weaknesses of the defences employed by the refugees, as the Trial Chamber extrapolated from the "immediacy" of the attack the following day.<sup>503</sup> No reasonable trier of fact could have imputed to Nizeyimana, as the only reasonable inference, the intention of planning the attack while visiting the parish area, without further evidence of his individual actions or intentions during the visit. The facts that Nizeyimana visited the parish along with the Tutsi Prefect of Butare and that the alleged purpose of the mission

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<sup>496</sup> See *supra* Section III.D.1.

<sup>497</sup> Trial Judgement, para. 313.

<sup>498</sup> Trial Judgement, para. 267. See Trial Judgement, paras. 306, 313, 1503.

<sup>499</sup> Trial Judgement, para. 310.

<sup>500</sup> Trial Judgement, para. 315.

<sup>501</sup> See Trial Judgement, para. 267. See also Trial Judgement, para. 313.

<sup>502</sup> Trial Judgement, para. 313.

<sup>503</sup> Trial Judgement, paras. 313, 315, 316.



was to “evaluate the security situation” in the area<sup>504</sup> do not necessarily indicate that Nizeyimana used the visit to plan an attack against the refugees. No reasonable trier of fact could have eliminated the alternative reasonable inference that Nizeyimana’s presence at Cyahinda Parish was indeed to participate in a security delegation that would evaluate the security situation and assist with easing tensions between the refugees and the gendarmes.

153. With respect to the Trial Chamber’s reliance on Nizeyimana’s “experience within the offices of the S2 and S3” at the ESO as circumstantial evidence of his involvement in the parish attack,<sup>505</sup> Nizeyimana alleges that he was not the S2/S3 officer at the time of the attack on the parish.<sup>506</sup> In this regard, he points to the fact that the Trial Chamber referred to unspecified Defence evidence that Nizeyimana was replaced as the ESO’s S2/S3 officer by Second Lieutenant Ezechiel Gakwerere on 17 or 18 April 1994.<sup>507</sup> However, the Trial Chamber concluded that “even if credited”, such evidence did not raise “doubts about Nizeyimana’s participation at least in the planning and authorisation phases of this attack”.<sup>508</sup>

154. Nonetheless, while Nizeyimana fails to demonstrate that the Trial Chamber erred in not finding that he was replaced as the S2/S3 officer on 17 or 18 April 1994,<sup>509</sup> the Appeals Chamber considers, Judge Güney and Judge Ramarosan dissenting, that the mere fact that Nizeyimana had experience within the S2 and S3 offices does not compel as the only reasonable inference that he was involved in the planning and authorization of the attack on Cyahinda Parish. In this regard, the Appeals Chamber notes that the Trial Chamber did not examine other inferences, such as the possibility that Lieutenant Colonel Muvunyi, who was Nizeyimana’s superior, could have authorized the attack, particularly in the light of Defence evidence that Kanyashyamba, who was

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<sup>504</sup> Trial Judgement, para. 313.

<sup>505</sup> Trial Judgement, para. 314.

<sup>506</sup> See Nizeyimana Appeal Brief, paras. 157, 166.

<sup>507</sup> Nizeyimana Appeal Brief, para. 157, *referring to* Trial Judgement, fn. 730. The additional evidence that Nizeyimana points to in support of his assertion that he was not the S2/S3 officer at the time of the attack does not support his position. See Nizeyimana Appeal Brief, fn. 229.

<sup>508</sup> Trial Judgement, fn. 730.

<sup>509</sup> Witness OUV03, who testified that Nizeyimana was replaced, in fact stated that although the message about his replacement came on 17 April 1994, Nizeyimana was only replaced on 18 April 1994, the day of the Cyahinda Parish attack. See Witness OUV03, T. 31 May 2011 p. 25. Furthermore, the Trial Chamber explicitly considered and rejected Witness OUV03’s evidence that the message replacing Nizeyimana was received on 17 April 1994 given that it contradicted Witness RWV09’s evidence that it was received on 18 April 1994. Trial Judgement, para. 1364. The Trial Chamber also expressed “fundamental reservations” about Witness OUV03’s credibility. Trial Judgement, para. 1364. See also Trial Judgement, paras. 517, 772, 1355, 1359-1363, 1419, 1435, 1436, 1442. The other witnesses that Nizeyimana refers to in support of his argument that he was replaced on 17 or 18 April 1994 do not support this proposition. See Nizeyimana Appeal Brief, para. 166, fn. 229, *referring to* Witness CKN10, T. 26 May 2011 p. 38, Witness ZT, T. 10 February 2011 p. 83, Witness Habyarimana, T. 25 May 2011 pp. 43, 44, Witness AZD, T. 1 February 2011 pp. 25, 26.

found to have participated in the attack, reported directly to Muvunyi.<sup>510</sup> The evidence that Nizeyimana could also issue orders to Kanyashyamba does not undermine this possibility.

155. Finally, Nizeyimana argues that the Trial Chamber erred in finding that the ESO was Butare and Gikongoro Prefectures' operational command centre, and in relying on that finding in support of its conclusion that Nizeyimana was involved in the attack.<sup>511</sup> In support of this, Nizeyimana points to the testimony of Witness CKN10 that the operational area only existed on paper and became functional in June 1994.<sup>512</sup> However, while the Trial Chamber did not explicitly consider this aspect of Witness CKN10's evidence,<sup>513</sup> the Appeals Chamber notes that the Trial Chamber had considerable reservations about the credibility of this witness.<sup>514</sup> Nizeyimana also invokes the testimony of Witness Habyarimana, who testified that the ESO commander was not automatically the commander of an operational sector and that only if it were decided to create an operational sector would the commander be appointed.<sup>515</sup> Yet, while no specific evidence may have been adduced of the supreme commander appointing a commander for Butare and Gikongoro, the Trial Chamber noted considerable evidence on the record that: (i) in April 1994 the operational command in the area covered both Butare and Gikongoro; and (ii) Muvunyi was the operational commander of this area by virtue of being in command of the ESO.<sup>516</sup> Nizeyimana fails to demonstrate that no reasonable trier of fact could have found that the ESO was the Butare and Gikongoro Prefectures' operational command centre at the time in light of the evidence of Witnesses CKN10 and Habyarimana.

156. Regardless of Nizeyimana's failure to show an error in this respect, the Appeals Chamber, Judge Güney and Judge Ramaroson dissenting, is not satisfied that the fact that the ESO was the operational command centre for Butare and Gikongoro Prefectures supports, as the only reasonable inference, that Nizeyimana was involved in planning and authorizing the Cyahinda Parish attack. In

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<sup>510</sup> Trial Judgement, paras. 314, 1481.

<sup>511</sup> See Nizeyimana Appeal Brief, paras. 160-162; Nizeyimana Reply Brief, para. 30. See also AT. 28 April 2014 pp. 4, 9, 10.

<sup>512</sup> See Nizeyimana Appeal Brief, paras. 160, 161; Nizeyimana Reply Brief, para. 30; AT. 28 April 2014 pp. 4, 9, 10. The Appeals Chamber notes that while Nizeyimana cites the trial transcript of 26 May 2011 in support of his contentions, the correct reference is to the transcript of 30 May 2011.

<sup>513</sup> See Trial Judgement, fn. 3817; Witness CKN10, T. 30 May 2011 p. 35.

<sup>514</sup> See Trial Judgement, paras. 308, 309. See also Trial Judgement, paras. 1288, 1292, 1304, 1307.

<sup>515</sup> See Nizeyimana Appeal Brief, para. 162, referring to Witness Habyarimana, T. 25 May 2011 p. 36.

<sup>516</sup> Trial Judgement, para. 1481, fn. 3817, referring to, *inter alia*, Witness AZD, T. 31 January 2011 pp. 65, 66, T. 1 February 2011 pp. 24, 25 (see Witness AZD, T. 1 February 2011 p. 31 (French) which contains the correct transcription of T. 1 February 2011 p. 25 (English): "Q. F...ğ N'est-il pas vrai que le commandement de l'ESO assurait la gestion de l'ESO et en même temps assurait les fonctions de commandant de place? A. Cela est vrai. Q. N'est-il pas vrai qu'après l'affectation de Monsieur Gatsinzi, Tharcisse Muvunyi était devenu le commandant de l'ESO? A. C'est vrai, c'était lui le commandant en second, c'est lui qui a pris la relève."), Witness BDE, T. 28 January 2011 p. 11, Witness OUV03, T. 30 May 2011 p. 70 (the Trial Judgement incorrectly refers to T. 30 May 2011 p. 20), Witness CKN20, T. 15 June 2011 pp. 5, 6, Defence Exhibit 71.

this regard, the Appeals Chamber recalls that Nizeyimana was not the most senior officer at the ESO, and further that there is a reasonable possibility that it was Muvunyi, and not Nizeyimana, who authorized the participation of ESO soldiers in the attack.

157. For the foregoing reasons, the Appeals Chamber, Judge Güney and Judge Ramaroson dissenting, is not convinced that the only reasonable inference to be drawn from the record was that Nizeyimana planned the attack on Cyahinda Parish and authorized the participation of ESO soldiers therein. The Trial Chamber ought to have considered that Nizeyimana's visit to Cyahinda Parish a day before the attack was not necessarily for the purpose of planning the attack. Similarly, Nizeyimana's position at the ESO did not indicate that he was the only officer who could have authorized the attack. In light of this, the Appeals Chamber, Judge Güney and Judge Ramaroson dissenting, is not convinced that, even when taken together, the only reasonable inference was that it was Nizeyimana who planned and authorized the attack based on the facts that: (i) he was a member of the security delegation to the parish the day before, and was or had been the S2/S3 officer in charge of intelligence, training and operations; (ii) 11 ESO soldiers were among the perpetrators of the attack; (iii) the ESO was the operational command centre of the Butare and Gikongoro Prefectures; and (iv) the attack was highly coordinated and heavy arms were used. The evidence on the record allowed for other reasonable inferences, including that another ESO officer, such as Lieutenant Colonel Muvunyi, who was Nizeyimana's superior, authorized the participation of ESO soldiers in the attack.

158. Thus, in the view of the Appeals Chamber, Judge Güney and Judge Ramaroson dissenting, no reasonable finder of fact could have concluded, as the only reasonable inference from the record, that Nizeyimana was actively involved in authorizing and planning the assault against the refugees at Cyahinda Parish on 18 April 1994.

### 3. Conclusion

159. Accordingly, the Appeals Chamber dismisses Nizeyimana's Eighth and Ninth Grounds of Appeal, and Forty-Second through Forty-Fourth Grounds of Appeal, in part, and grants, Judge Güney and Judge Ramaroson dissenting, Nizeyimana's Tenth Ground of Appeal, and reverses Nizeyimana's convictions for genocide, extermination as a crime against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings committed at Cyahinda Parish. The impact of these reversals, if any, on sentencing will be considered in the relevant section below.

**E. Killing of the Former Queen of Rwanda, Rosalie Gicanda, and the Others Taken from her Home (Grounds 2, 3, and 11-15, and 42-44, in part)**

160. The Trial Chamber convicted Nizeyimana of committing genocide, and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6(1) of the Statute for participating in the basic form of a joint criminal enterprise based, in part, on his involvement in the killing of the former Queen of Rwanda, Rosalie Gicanda, and the other individuals taken from her home.<sup>517</sup> The Trial Chamber found that, on or around 20 April 1994, a group of ESO soldiers led by Second Lieutenant Jean Pierre Bizimana abducted and killed Gicanda, who was a Tutsi, along with others whom they found at her residence.<sup>518</sup> Relying primarily on the evidence of Prosecution Witnesses AZD and Justin Gahizi, the Trial Chamber also found that Bizimana reported the murder of Gicanda to Nizeyimana.<sup>519</sup> The Trial Chamber concluded that Nizeyimana authorized Gicanda's killing.<sup>520</sup> The Trial Chamber considered that Nizeyimana's role in the killing of Gicanda and others could be characterized as aiding and abetting, but that participation in a joint criminal enterprise most appropriately encapsulated his liability.<sup>521</sup> The Trial Chamber also found that Nizeyimana could bear superior responsibility, pursuant to Article 6(3) of the Statute, for the killing of Gicanda and the others taken from her home and indicated that it would take this into account in sentencing.<sup>522</sup>

161. Nizeyimana submits that the Trial Chamber erred in convicting him for the killing of Gicanda and the others taken from her residence, and requests that he be acquitted of these killings.<sup>523</sup> The Appeals Chamber will consider in turn Nizeyimana's arguments that: (i) he was not on notice that it was alleged in the Indictment that he aided and abetted the killing of Gicanda and others; (ii) the Trial Chamber erred in its assessment of the evidence; (iii) the Trial Chamber failed to apply the proper standard of proof in making the relevant factual findings; (iv) the Trial Chamber erred in its assessment of his superior responsibility; and (v) the Trial Chamber failed to make a finding on the exact date of these killings and thereby failed to consider his alibi.

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<sup>517</sup> Trial Judgement, paras. 1515, 1539, 1565, 1566, 1579, 1581.

<sup>518</sup> Trial Judgement, paras. 530, 1510. *See also* Trial Judgement, paras. 484, 486-488.

<sup>519</sup> Trial Judgement, paras. 506, 514, 530, 1510, 1513.

<sup>520</sup> Trial Judgement, paras. 530, 1510, 1513.

<sup>521</sup> Trial Judgement, para. 1515.

<sup>522</sup> Trial Judgement, paras. 1516, 1518, 1540, 1567, 1580.

<sup>523</sup> Nizeyimana Notice of Appeal, paras. 12-14, 43-57; Nizeyimana Appeal Brief, paras. 26-46, 172-225. *See also* AT. 28 April 2014 pp. 9, 14-16, 41, 42.

## 1. Notice

162. Nizeyimana submits that the Trial Chamber erred in finding that he received sufficient notice that he was charged with aiding and abetting this crime and, therefore, also in finding him liable under this mode of liability.<sup>524</sup> He contends that paragraph 23 of the Indictment, relating to Gicanda's killing, is ambiguous and does not allege aiding and abetting.<sup>525</sup> Nizeyimana also argues that the Trial Chamber's reliance on the Prosecution Pre-Trial Brief ignores the specific language contained therein by which the Prosecution only alleged that he "ordered" the killing of Gicanda.<sup>526</sup> He adds that, contrary to the Trial Chamber's finding, the fact that he did not object at trial does not support the finding that he was on notice.<sup>527</sup>

163. The Prosecution responds that Nizeyimana was not convicted for aiding and abetting Gicanda's killing but for joint criminal enterprise liability.<sup>528</sup> It claims that aiding and abetting was pleaded,<sup>529</sup> and, in any case, that timely, clear, and consistent notice in this regard was provided to him.<sup>530</sup>

164. While the Trial Chamber considered that Nizeyimana's role in the killing of Gicanda and others could be characterized as aiding and abetting, it found that participation in a joint criminal enterprise most appropriately characterized his role and convicted him on this basis.<sup>531</sup> Accordingly, the Appeals Chamber need not address Nizeyimana's argument that he did not receive sufficient notice that he was charged with aiding and abetting this crime, as he was not convicted pursuant to this form of responsibility and therefore any error in this regard would not invalidate his convictions.

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<sup>524</sup> Nizeyimana Notice of Appeal, para. 56; Nizeyimana Appeal Brief, paras. 214-224, *referring to* Trial Judgement, paras. 1470-1474. Nizeyimana submits, however, that it is not clear whether the Trial Chamber found that he aided and abetted the relevant crime. *See* Nizeyimana Appeal Brief, para. 214.

<sup>525</sup> Nizeyimana Appeal Brief, para. 217. *See also* Nizeyimana Appeal Brief, paras. 220 (*referring to* Rukundo Appeal Judgement, paras. 33-38), 221; Nizeyimana Reply Brief, paras. 53, 54.

<sup>526</sup> Nizeyimana Appeal Brief, para. 222, *referring to* Trial Judgement, para. 1474, Prosecution Pre-Trial Brief, paras. 30, 171, 172. Nizeyimana also asserts that the Trial Chamber did not find the Indictment defective and yet proceeded to consider the Prosecution Pre-Trial Brief and opening statement, notwithstanding that this is not the practice if the Indictment is not defective. *See* Nizeyimana Appeal Brief, paras. 218, 223.

<sup>527</sup> Nizeyimana Appeal Brief, para. 219.

<sup>528</sup> Prosecution Response Brief, para. 114. *See also* AT. 28 April 2014 p. 23.

<sup>529</sup> Prosecution Response Brief, paras. 115-117. *See also* Prosecution Response Brief, para. 119, *referring to* Trial Judgement, para. 1473.

<sup>530</sup> Prosecution Response Brief, para. 115.

<sup>531</sup> Trial Judgement, para. 1515.

## 2. Assessment of the Evidence

165. Nizeyimana submits that the Trial Chamber erred in finding Witnesses AZD and Gahizi credible and in relying on their evidence.<sup>532</sup> With regard to Witness AZD, Nizeyimana contends that the Trial Chamber ignored two challenges he had raised in relation to this witness's credibility: (i) the inconsistency between Witness AZD's evidence that Marcel Gatsinzi announced his appointment as interim Chief of Staff of the Rwandan Armed Forces at a meeting on 6 April 1994 at 9.40 p.m. and Gatsinzi's own testimony in the *Bagosora and Nsengiyumva* case, which was admitted as evidence in this case, that he was appointed interim Chief of Staff of the Rwandan army on 7 April 1994 at 2.00 a.m.;<sup>533</sup> and (ii) Witness AZD's demeanour.<sup>534</sup> Nizeyimana requests that the Appeals Chamber review Witness AZD's testimony by video recording to assess his demeanour.<sup>535</sup> Nizeyimana further claims that the Trial Chamber failed to assess Witness Gahizi's evidence with appropriate caution.<sup>536</sup>

166. Furthermore, Nizeyimana argues that the Trial Chamber erred in finding immaterial the inconsistencies between the testimony of Witness AZD, his prior statement, and the testimonies of Witnesses YAA and Gahizi concerning, respectively, the presence of Witness YAA<sup>537</sup> and Second Lieutenant Ezechiel Gakwerere when Bizimana reported the murder of Gicanda to Nizeyimana.<sup>538</sup> In particular, Nizeyimana points out that, while, in a prior statement, Witness AZD had stated that Witness YAA was present when Bizimana reported the killing of Gicanda to Nizeyimana, Witness AZD did not testify to this effect in his examination-in-chief before the Trial Chamber, and Witness YAA testified that he was not present at that time.<sup>539</sup> Nizeyimana also underlines that Witness AZD testified that Gakwerere was also present when the killing was reported, while Witness Gahizi did not say whether Gakwerere was there.<sup>540</sup>

167. Nizeyimana asserts that the Trial Chamber erred in excusing these inconsistencies between the evidence of Witnesses AZD, YAA, and Gahizi based on the Prosecution's failure to put certain

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<sup>532</sup> Nizeyimana Notice of Appeal, paras. 12, 46; Nizeyimana Appeal Brief, paras. 27, 40, 178, 185, 190, 191. *See also* AT. 28 April 2014 pp. 9, 14.

<sup>533</sup> Nizeyimana Appeal Brief, paras. 31-34, *referring to* Nizeyimana Closing Brief, para. 104 and Defence Exhibit 22 (*Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Marcel Gatsinzi, T. 30 March 2011 pp. 5, 19, 20). *See also* Nizeyimana Appeal Brief, paras. 352-354; Nizeyimana Reply Brief, paras. 33-37; AT. 28 April 2014 p. 9.

<sup>534</sup> Nizeyimana Appeal Brief, paras. 31, 36-39, *referring to* Nizeyimana Closing Brief, para. 110. *See also* Nizeyimana Reply Brief, para. 38.

<sup>535</sup> Nizeyimana Appeal Brief, para. 38.

<sup>536</sup> Nizeyimana Appeal Brief, para. 190.

<sup>537</sup> Nizeyimana Appeal Brief, paras. 43-45, 179-182. *See also* AT. 28 April 2014 pp. 4, 5.

<sup>538</sup> Nizeyimana Notice of Appeal, paras. 43, 44; Nizeyimana Appeal Brief, paras. 179, 180, 183, 184, *referring to* Trial Judgement, paras. 497, 498, 508, 509. *See also* AT. 28 April 2014 pp. 4, 5.

<sup>539</sup> *See* Nizeyimana Appeal Brief, paras. 43, 181, *referring to* Trial Judgement, paras. 495-498.

questions to these witnesses.<sup>541</sup> In particular, Nizeyimana points to the fact that Witness AZD was not asked about Witness YAA's presence when Bizimana reported the killing to Nizeyimana or about Nizeyimana's reaction to the news, and that Witness Gahizi was not asked about who was present when Bizimana reported the killing to Nizeyimana.<sup>542</sup> Nizeyimana claims that, by "excusing the lack of corroboration",<sup>543</sup> the Trial Chamber misapplied the burden of proof by requiring the Defence to disprove Witnesses AZD's and Gahizi's evidence.<sup>544</sup>

168. Nizeyimana also claims that the Trial Chamber erred in concluding that Witnesses AZD and Gahizi corroborated each other.<sup>545</sup> He argues that the Trial Chamber failed to consider material differences between Witnesses AZD's and Gahizi's testimonies, in particular, that neither of them testified that the other was present when Bizimana reported the killing to Nizeyimana, and that Witness Gahizi did not mention that Witness YAA was present.<sup>546</sup> Nizeyimana also submits that Witness Gahizi's testimony cannot be considered "independent" evidence corroborating Witness AZD's testimony, as the Trial Chamber found Witness Gahizi to be "possibly partial" and essentially discredited him.<sup>547</sup>

169. Nizeyimana further submits that the Trial Chamber adopted a double standard in assessing the credibility of Prosecution and Defence evidence.<sup>548</sup> According to Nizeyimana, this is evidenced by the contrast between the Trial Chamber's "leniency" towards Prosecution Witnesses AZD, Gahizi, and AJP<sup>549</sup> on one hand, and its assessment of Defence Witness OUV03's evidence on the other.<sup>550</sup> In particular, Nizeyimana challenges the Trial Chamber's rejection of Witness OUV03's evidence that Bizimana was arrested for Gicanda's killing on the ground that this witness did not establish a basis for his knowledge of the event, despite the fact that the witness was corroborated by Witness Emmanuel Habyarimana.<sup>551</sup> In this regard, Nizeyimana also submits that the Trial Chamber erred in dismissing Witness Habyarimana's testimony on this point by speculating that Tharcisse Muvunyi had a motivation to mislead Habyarimana about the investigation into

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<sup>540</sup> See Nizeyimana Appeal Brief, para. 183; Nizeyimana Reply Brief, para. 43.

<sup>541</sup> Nizeyimana Appeal Brief, paras. 182, 188-190.

<sup>542</sup> Nizeyimana Appeal Brief, paras. 182, 188, 189.

<sup>543</sup> Nizeyimana Appeal Brief, paras. 182, 188. See also AT. 28 April 2014 p. 5.

<sup>544</sup> Nizeyimana Appeal Brief, paras. 182, 188, 189, 599, 600. See also AT. 28 April 2014 p. 5.

<sup>545</sup> Nizeyimana Appeal Brief, para. 187.

<sup>546</sup> Nizeyimana Appeal Brief, para. 186.

<sup>547</sup> Nizeyimana Reply Brief, para. 41, referring to Trial Judgement, paras. 499-503. See also Nizeyimana Reply Brief, para. 42.

<sup>548</sup> Nizeyimana Notice of Appeal, paras. 47, 114; Nizeyimana Appeal Brief, para. 196. See also Nizeyimana Appeal Brief, paras. 36, 192-195, 591-595.

<sup>549</sup> Nizeyimana Appeal Brief, paras. 45, 191, 192, 194, 195.

<sup>550</sup> Nizeyimana Appeal Brief, paras. 192, 193.

<sup>551</sup> Nizeyimana Appeal Brief, paras. 192, 193, 207.

Gicanda's killing.<sup>552</sup> By contrast, Nizeyimana claims that the Trial Chamber erroneously relied on Witness AJP's testimony that Nizeyimana told him that Bizimana had killed Gicanda, despite the fact that Witness AJP did not provide a date or a location for this conversation.<sup>553</sup>

170. The Prosecution responds that the Trial Chamber reasonably relied on Witness AZD's evidence after having fully considered Nizeyimana's challenges to his credibility, including those regarding the witness's demeanour.<sup>554</sup> With regard to the alleged contradiction as to the time of Gatsinzi's appointment as interim Chief of Staff, the Prosecution underscores that this concerns a peripheral matter which could not have affected Witness AZD's credibility.<sup>555</sup>

171. According to the Prosecution, Nizeyimana also fails to demonstrate any error in the Trial Chamber's conclusion that the inconsistencies in and between the testimonies of Witnesses AZD, YAA, and Gahizi were immaterial.<sup>556</sup> The Prosecution also recalls that Nizeyimana did not question Witness Gahizi about Gakwerere's presence, or Witness AZD about Nizeyimana's reaction to Bizimana's report.<sup>557</sup> It argues that there was no reversal of the burden of proof.<sup>558</sup>

172. In response to Nizeyimana's contention that the Trial Chamber applied a double standard to the assessment of the evidence of Witnesses AJP and OUV03, the Prosecution underlines, *inter alia*, that the close relationship between Nizeyimana and Witness AJP strengthened the reliability of the latter's evidence, while the Trial Chamber had expressed "fundamental reservations" about Witness OUV03's credibility.<sup>559</sup>

173. Nizeyimana replies that the Prosecution's repetition of the Trial Chamber's finding that Witness AZD was not specifically asked about Witness YAA's presence when Bizimana reported Gicanda's killing is false given that, during cross-examination, Witness AZD was asked to confirm the contents of his prior statement, which referred specifically to Witness YAA's presence, and he did so.<sup>560</sup>

174. The Appeals Chamber recalls that it is within the discretion of a trial chamber to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and

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<sup>552</sup> Nizeyimana Appeal Brief, para. 193.

<sup>553</sup> Nizeyimana Appeal Brief, para. 194.

<sup>554</sup> Prosecution Response Brief, paras. 82, 83, 87, *referring to* Trial Judgement, paras. 180, 182-198, 495, 610.

<sup>555</sup> Prosecution Response Brief, paras. 85, 86. *See* Prosecution Response Brief, para. 84.

<sup>556</sup> Prosecution Response Brief, paras. 88-92, 96.

<sup>557</sup> Prosecution Response Brief, paras. 91, 92.

<sup>558</sup> Prosecution Response Brief, para. 92. *See also* Prosecution Response Brief, para. 93.

<sup>559</sup> Prosecution Response Brief, para. 95, *referring to* Trial Judgement, paras. 1355-1364, fns. 670, 727. *See also* Prosecution Response Brief, para. 113.

<sup>560</sup> Nizeyimana Reply Brief, paras. 39, 40, *referring to* Trial Judgement, para. 496.



credible, and to accept or reject the fundamental features of the evidence.<sup>561</sup> The Appeals Chamber will defer to a trial chamber's judgement on issues of credibility, including its resolution of disparities among different witnesses' accounts, and will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned finding.<sup>562</sup>

175. Bearing these principles in mind, the Appeals Chamber notes that the Trial Chamber considered a number of Nizeyimana's general challenges to Witness AZD's credibility, as well as specific challenges to his evidence concerning Gicanda's killing.<sup>563</sup> It found that Nizeyimana did not show that Witness AZD's testimony was partial or unreliable or that he had any motivation or incentive to lie,<sup>564</sup> and concluded that his evidence was credible.<sup>565</sup>

176. The Trial Chamber admitted into evidence Gatsinzi's testimony from the *Bagosora and Nsenyumva* case as relevant and probative to the timing of Gatsinzi's appointment and Witness AZD's credibility, but noted that it would determine the evidentiary weight and impact, if any, on Witness AZD's credibility at the conclusion of the case.<sup>566</sup> However, in the Trial Judgement, the Trial Chamber did not explicitly consider the alleged inconsistency between Witness AZD's evidence and Gatsinzi's testimony in the *Bagosora and Nsenyumva* case about the time of Gatsinzi's appointment as interim Chief of Staff of the Rwandan Armed Forces.<sup>567</sup> The Appeals Chamber recalls that a trial chamber need not refer to every piece of evidence, provided there is no indication that it completely disregarded any particular piece of evidence; such disregard is shown where evidence that is clearly relevant to the findings is not addressed by the trial chamber's reasoning.<sup>568</sup> Contrary to Nizeyimana's contention,<sup>569</sup> the discrepancy in the evidence of Witness AZD and Gatsinzi about the timing of Gatsinzi's appointment as interim Chief of Staff of the Rwandan Armed Forces was not "clearly relevant" to this case.<sup>569</sup> Furthermore, Nizeyimana fails to

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<sup>561</sup> *Ndahimana* Appeal Judgement, para. 43; *Setako* Appeal Judgement, para. 31, referring to *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

<sup>562</sup> *Ndindiliyimana et al.* Appeal Judgement, para. 331; *Ndahimana* Appeal Judgement, para. 46; *Setako* Appeal Judgement, para. 31, referring to *Renzaho* Appeal Judgement, para. 355; *Gacumbitsi* Appeal Judgement, para. 70.

<sup>563</sup> Trial Judgement, paras. 180, 182-187, 495-498, 505, 508, 509.

<sup>564</sup> Trial Judgement, paras. 184, 186.

<sup>565</sup> Trial Judgement, paras. 495, 498, 508.

<sup>566</sup> *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Defence Motion pursuant to Rule 92bis (A) and (D) for Witness Marcel Gatsinzi, 6 May 2011, para. 8. The Appeals Chamber notes that Witness AZD was cross-examined on the issue of the timing of Gatsinzi's appointment as interim Chief of Staff of the Rwandan Armed Forces. The Defence put to him that Gatsinzi "received his appointment" from Colonel Théoneste Bagosora around 2.00 a.m. on 7 April 1994, and that he was inventing a story. The witness confirmed that he received the information of Gatsinzi's appointment as interim Chief of Staff during the night of 6 April 1994 and that Gatsinzi was already aware of it during that meeting. See Witness AZD, T. 1 February 2011 pp. 31, 32 (closed session).

<sup>567</sup> See generally Trial Judgement, paras. 484-530. See also Nizeyimana Closing Brief, para. 104.

<sup>568</sup> *Bizimungu* Appeal Judgement, fn. 766; *Kanyarukiga* Appeal Judgement, para. 127; *Kalimanzira* Appeal Judgement, para. 195; *Nchamihigo* Appeal Judgement, para. 166.

<sup>569</sup> The Appeals Chamber finds unpersuasive Nizeyimana's argument that the materiality of this issue derives from the fact that Witness AZD's testimony on this point was used to discredit Witness OUV03 in the alibi section. See

show how any inconsistency concerning such a peripheral matter could have affected the Trial Chamber's conclusions on Witness AZD's general credibility or on the credibility of his evidence in relation to Gicanda's killing in particular.<sup>570</sup>

177. The Appeals Chamber also finds unmeritorious Nizeyimana's argument that the Trial Chamber ignored his challenges concerning Witness AZD's demeanour and therefore also dismisses his request for the Appeals Chamber to review the video recording of his testimony. By merely referring to his unsubstantiated submissions at trial that Witness AZD "was very hesitant when questioned by the Defence" and was a "rather verbose man who first appeared to know everything but really knew very little",<sup>571</sup> Nizeyimana fails to show any error in the Trial Chamber's assessment. The Appeals Chamber recalls that the assessment of the weight and credibility of witness testimony is based on a number of factors, including the witness's demeanour in court.<sup>572</sup> A trial chamber's assessment of the witness's demeanour may be implicit in the Trial Chamber's assessment of the witness's credibility.<sup>573</sup>

178. The Appeals Chamber is further not persuaded by Nizeyimana's contention that the Trial Chamber failed to assess Witness Gahizi's evidence with caution. The Trial Chamber considered the possibly partial nature of Witness Gahizi's testimony, in view of his fractious past with Nizeyimana, and his demeanour.<sup>574</sup> It also found that the witness's explanations of discrepancies between his trial testimony and his testimony in the *Muvunyi* case were not convincing.<sup>575</sup> Based on these concerns, the Trial Chamber stated that it would assess his evidence with appropriate caution.<sup>576</sup> Nevertheless, the Trial Chamber concluded that Witness Gahizi's evidence concerning Gicanda's killing was strikingly consistent with Witness AZD's evidence and credible.<sup>577</sup> Nizeyimana fails to demonstrate that the Trial Chamber did not use appropriate caution in assessing the evidence of Witness Gahizi in relation to Gicanda's killing.

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Nizeyimana Reply Brief, para. 37. The Appeals Chamber notes that the Trial Chamber expressed several reservations about Witness OUV03's credibility, one of which related to the contradictions between his evidence that Nizeyimana was absent from the ESO on the night of 6 April 1994 and the testimony of Prosecution and Defence witnesses to the contrary. *See* Trial Judgement, paras. 1355, 1356, 1359-1364. Witness AZD was just one of the witnesses who testified that Nizeyimana was present at the meeting chaired by Gatsinzi that night. *See* Trial Judgement, fn. 3434.

<sup>570</sup> *See* Trial Judgement, paras. 498, 506, 514.

<sup>571</sup> Nizeyimana Appeal Brief, para. 31, *referring to* Nizeyimana Closing Brief, para. 110.

<sup>572</sup> *See Kanyarukiga Appeal Judgement*, para. 121; *Nahimana et al. Appeal Judgement*, para. 194.

<sup>573</sup> *Cf. Nahimana et al. Appeal Judgement*, para. 195. The Appeals Chamber notes that the Trial Chamber recalled, in several instances, its central role in assessing witnesses' demeanour and credibility. *See, e.g., Trial Judgement*, paras. 731, 1287. It also noted that it is not always possible to capture its reasons for its findings on a witness's demeanour on paper. *See* Trial Judgement, para. 1288.

<sup>574</sup> Trial Judgement, para. 499. *See also* Trial Judgement, paras. 1169, 1171, 1172.

<sup>575</sup> Trial Judgement, paras. 501, 502.

<sup>576</sup> Trial Judgement, para. 503. *See also* Trial Judgement, para. 1169, fn. 729.

<sup>577</sup> Trial Judgement, paras. 506, 508.

179. With regard to Nizeyimana's contention related to inconsistencies between the testimony of Witness AZD, his prior statement to Tribunal investigators, and the testimonies of Witnesses YAA and Gahizi, the Appeals Chamber notes that the Trial Chamber carefully addressed these points.<sup>578</sup> In relation to the alleged discrepancy concerning Witness YAA's presence when Bizimana reported Gicanda's killing to Nizeyimana, the Trial Chamber noted that Witness AZD's prior statement indicated that Witness YAA was present when Bizimana reported the killing to Nizeyimana, while Witness YAA testified that he was not in Butare at that time.<sup>579</sup> The Trial Chamber further noted that during his examination-in-chief, Witness AZD did not refer to Witness YAA's presence and that he was not specifically asked about Witness YAA's presence, but that he confirmed the contents of his prior statement during cross-examination.<sup>580</sup> In any event, the Trial Chamber concluded that the issue of whether Witness YAA was present when Bizimana reported Gicanda's killing to Nizeyimana was not material to Witness AZD's testimony, which the Trial Chamber found otherwise compelling.<sup>581</sup> In reaching this conclusion, the Trial Chamber considered that the material aspects of Witness AZD's statement and testimony, which it found to be consistent, were that Bizimana and Gakwerere killed Gicanda and that Witness AZD was in the officers' mess when Bizimana and Gakwerere reported to Nizeyimana that they had carried out his instructions in relation to this killing.<sup>582</sup> Nizeyimana does not show that the Trial Chamber was unreasonable in so finding.

180. Likewise, the Appeals Chamber is not persuaded by Nizeyimana's argument that the Trial Chamber erred in finding immaterial the inconsistencies between the testimonies of Witnesses AZD and Gahizi. The Trial Chamber found that the core elements of the evidence of Witnesses AZD and Gahizi were fundamentally consistent, namely that Nizeyimana had been informed that Gicanda had been killed.<sup>583</sup> It considered that both witnesses testified to having overheard Bizimana reporting the killing of Gicanda to Nizeyimana in the evening in the officers' mess.<sup>584</sup> The Trial Chamber also noted differences in their testimonies, but ultimately concluded, acting within its

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<sup>578</sup> Trial Judgement, paras. 495-498, 508, 509.

<sup>579</sup> Trial Judgement, paras. 495-497. The Appeals Chamber notes that the Trial Chamber did not explicitly discuss Witness YAA's credibility, but relied on general aspects of his evidence in other parts of the Trial Judgement. *See* Trial Judgement, paras. 90, 798, 829, 833. The Trial Chamber did, however, find that Witness YAA's explanations for the inconsistencies between his testimonies in this case and the *Muvunyi* case were not convincing. Trial Judgement, fn. 3735.

<sup>580</sup> Trial Judgement, para. 496, *referring to* Witness AZD, T. 1 February 2011 p. 49. The Trial Chamber noted that portions of Witness AZD's prior statement were read out to him at trial, including the relevant section, which he confirmed.

<sup>581</sup> Trial Judgement, paras. 497, 498.

<sup>582</sup> Trial Judgement, para. 498.

<sup>583</sup> Trial Judgement, para. 508.

<sup>584</sup> Trial Judgement, paras. 506, 507.

discretion, that these differences did not raise doubts about Witnesses Gahizi's or AZD's otherwise consistent and credible testimonies.<sup>585</sup> The Appeals Chamber finds no error in this approach.

181. The Appeals Chamber also dismisses Nizeyimana's claim that the Trial Chamber erred in concluding that Witnesses AZD and Gahizi corroborated each other because neither testified that the other was present when Bizimana reported the killing to Nizeyimana.<sup>586</sup> The Appeals Chamber recalls that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.<sup>587</sup> In this case, the Trial Chamber found, based on the evidence on the record, that the core elements of Witnesses AZD's and Gahizi's evidence were fundamentally consistent.<sup>588</sup> The fact that neither Witness AZD nor Witness Gahizi mentioned the presence of the other in the officers' mess at the relevant time does not render their descriptions of the relevant facts incompatible. In particular, the Trial Chamber noted that, according to Witness Gahizi, several other people were in the officers' mess when he overheard the conversation between Nizeyimana and Bizimana.<sup>589</sup> It also noted that Witness Gahizi was not asked to indicate who else was present.<sup>590</sup>

182. Contrary to Nizeyimana's contention, the facts that neither witness was questioned about the differences between their testimonies about who was present, and that the Trial Chamber noted this in assessing their credibility, do not reflect a misapplication or reversal of the burden of proof. By noting that the witnesses were not questioned about the discrepancies between their testimonies, the Trial Chamber did not place on the Defence the burden to prove Nizeyimana's innocence by challenging the credibility of these witnesses, as Nizeyimana asserts. The Trial Chamber was merely noting that the witnesses had not had the opportunity to elaborate upon them. In this regard, had the Defence wished to confront the witnesses with differences it considered material to their credibility, it could have done so in cross-examination, but chose not to. The Appeals Chamber, therefore, rejects Nizeyimana's assertions in this regard.

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<sup>585</sup> Trial Judgement, para. 508. The Trial Chamber specifically considered that Witness AZD also described Gakwerere reporting the event alongside Bizimana while Witness Gahizi made no reference to Gakwerere's presence, but reasonably considered that this did not raise doubts about their testimonies as Witness Gahizi was not questioned about whether Bizimana was accompanied by anyone. Trial Judgement, para. 508.

<sup>586</sup> Nizeyimana Appeal Brief, paras. 186, 187, 191.

<sup>587</sup> *Bizimungu* Appeal Judgement, para. 327; *Gatete* Appeal Judgement, para. 205; *Hategekimana* Appeal Judgement, para. 82; *Ntawukuliyayo* Appeal Judgement, para. 24. See *Ndahimana* Appeal Judgement, para. 93.

<sup>588</sup> Trial Judgement, para. 508.

<sup>589</sup> Trial Judgement, para. 468.

<sup>590</sup> See Trial Judgement, para. 508.

183. Nizeyimana also challenges the Trial Chamber's rejection of Witness OUV03's testimony on the ground that this witness did not establish a basis for his knowledge of Bizimana's arrest.<sup>591</sup> According to Nizeyimana, the Trial Chamber should have accepted Witness OUV03's testimony because it was corroborated by Witness Habyarimana.<sup>592</sup> However, a review of the Trial Judgement reveals that the Trial Chamber expressed serious reservations about Witness OUV03's credibility and did not find his evidence credible.<sup>593</sup> In particular, the Trial Chamber found elsewhere in the Trial Judgement that Witness OUV03 tailored his evidence in order to distance Nizeyimana from the ESO camp or Butare on critical dates, notwithstanding evidence to the contrary.<sup>594</sup> The Trial Chamber only accepted Witness OUV03's evidence on limited points when corroborated.<sup>595</sup>

184. In any event, and contrary to Nizeyimana's contention, the Appeals Chamber notes that Witness Habyarimana did not corroborate Witness OUV03's testimony that Bizimana had been arrested.<sup>596</sup> Witness Habyarimana simply testified that Muvunyi had told him that an investigation would be conducted.<sup>597</sup> While the Trial Chamber's finding that Muvunyi would have felt compelled to assure Witness Habyarimana that Gicanda's killing would be investigated was speculative,<sup>598</sup> this does not undermine the Trial Chamber's finding that Witness OUV03 was not reliable and credible on this point, to which the Appeals Chamber owes deference.

185. The Appeals Chamber also rejects Nizeyimana's assertion that the Trial Chamber erroneously relied on Witness AJP's evidence that Nizeyimana had informed him and others about Bizimana having killed Gicanda, even though the Trial Chamber acknowledged that the witness did not provide a date or a location for this conversation.<sup>599</sup> The Appeals Chamber notes that the Trial Chamber found this aspect of his evidence reliable given the undisputed close relationship between the witness and Nizeyimana, as well as the witness's continuous presence at Nizeyimana's home around the time Gicanda was killed, which was corroborated by Defence evidence.<sup>600</sup> Nizeyimana fails to show an error in the Trial Chamber's reasonable assessment in this regard; he simply seeks to substitute his own interpretation of the evidence for the Trial Chamber's conclusion.

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<sup>591</sup> Nizeyimana Appeal Brief, para. 192.

<sup>592</sup> Nizeyimana Appeal Brief, para. 193.

<sup>593</sup> Trial Judgement, paras. 517, 772, 1355-1364, 1435, 1442.

<sup>594</sup> Trial Judgement, paras. 1355, 1359, 1363.

<sup>595</sup> *See, e.g.*, Trial Judgement, fn. 670, 727, para. 1442.

<sup>596</sup> *See* Trial Judgement, paras. 515, 516.

<sup>597</sup> *See* Trial Judgement, paras. 480, 515, *referring to* Witness Habyarimana, T. 25 May 2011 p. 44. Additionally, the Trial Chamber found that Witness OUV03's evidence that Bizimana was arrested was inconsistent with the evidence of Witness RWV11 that Bizimana was not punished and with Prosecution evidence establishing that Nizeyimana authorized the killing. *See* Trial Judgement, para. 517.

<sup>598</sup> *See* Trial Judgement, para. 516.

<sup>599</sup> Nizeyimana Appeal Brief, para. 194.

<sup>600</sup> Trial Judgement, para. 510. *See also* Trial Judgement, para. 450.

Furthermore, Witness AJP's testimony was found to be consistent with the testimonies of Witnesses AZD and Gahizi and was used as circumstantial support for their evidence.<sup>601</sup> The Appeals Chamber finds that the Trial Chamber committed no error in taking this circumstantial evidence into account.

186. In light of the foregoing, the Appeals Chamber is not persuaded by Nizeyimana's contention that the Trial Chamber assessed the Prosecution evidence of Witnesses AZD, Gahizi, and AJP in a more lenient way than that of Defence Witness OUV03. As the Appeals Chamber has considered and rejected Nizeyimana's challenges to the Trial Chamber's assessment of Prosecution and Defence witnesses, his submission that there was a double standard in the assessment of this evidence is likewise rejected.

187. The Appeals Chamber dismisses Nizeyimana's arguments on the Trial Chamber's assessment of the evidence.

### 3. Application of the Only Reasonable Inference Standard

188. The Trial Chamber concluded that Nizeyimana authorized the killing of Gicanda,<sup>602</sup> despite acknowledging that "there is no direct evidence of Nizeyimana issuing orders or authorizing the killing of Gicanda in advance".<sup>603</sup> In reaching this conclusion, the Trial Chamber relied primarily on the first-hand evidence of Witnesses AZD and Gahizi that Bizimana reported the killing of Gicanda to Nizeyimana,<sup>604</sup> which, according to the Trial Chamber, was circumstantially supported by Witness AJP's testimony that Nizeyimana informed him and others that Bizimana had killed Gicanda.<sup>605</sup> The Trial Chamber also considered in this regard: (i) the second-hand evidence of Prosecution Witness BDE, a cadet at the ESO, that Nizeyimana ordered Bizimana and Gakwerere "to bring Rosalie Gicanda" and that upon those instructions, they went immediately to get Gicanda and killed her;<sup>606</sup> (ii) the evidence of Prosecution Witness ZAP, one of the persons the soldiers abducted and shot with Gicanda, that soldiers communicated via radio during the operation saying "Jaguar, Jaguar" and stopped at the ESO after the abduction before continuing on to the location where the soldiers shot them;<sup>607</sup> (iii) the evidence of Defence Witness BUV02, who testified to hearing Bizimana boasting in a bar about having killed Gicanda only a few hours after the killing,

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<sup>601</sup> Trial Judgement, para. 510.

<sup>602</sup> Trial Judgement, para. 530.

<sup>603</sup> Trial Judgement, para. 491.

<sup>604</sup> Trial Judgement, paras. 506-510, 514, 530.

<sup>605</sup> Trial Judgement, paras. 510, 514.

<sup>606</sup> Trial Judgement, paras. 470, 491-493, 510, 514.

<sup>607</sup> Trial Judgement, paras. 458-463, 512, *referring to* Prosecution Exhibit 40D(E) (Rule 92*bis* Statement of Witness ZAP).

as additional circumstantial support for Bizimana's participation in the killing and for the inference that the mission was condoned by Bizimana's superiors, including Nizeyimana,<sup>608</sup> and (iv) the position and role of Nizeyimana at the ESO, his relationship with Bizimana, and its findings on their coordinated action in relation to the killing of the Ruhutinyanya family, which occurred a few days earlier.<sup>609</sup> Finally, the Trial Chamber noted the absence of any evidence that Nizeyimana reported this incident, despite the fact that he was informed about the crime and had a legal obligation to report it to his superiors.<sup>610</sup>

189. According to Nizeyimana, the Trial Chamber's conclusions on his involvement in Gicanda's killing rely on speculation and do not meet the standard for findings based on circumstantial evidence.<sup>611</sup> Nizeyimana submits that the Trial Chamber failed to explain how its conclusion that he authorized the killing of Gicanda was the only reasonable inference to be drawn from the evidence that Bizimana reported the killing to him.<sup>612</sup> Nizeyimana also argues that the Trial Chamber speculated that: (i) he condoned the mission because Bizimana openly boasted about the killing; (ii) he and Bizimana were close; and (iii) as the attackers used a radio during the operation, they were acting under orders or in a coordinated manner.<sup>613</sup> Nizeyimana further claims that the Trial Chamber erroneously relied upon its findings regarding the killing of the Ruhutinyanya family to infer that Bizimana was acting in concert with him or under his instructions.<sup>614</sup> According to Nizeyimana, by doing so, the Trial Chamber impermissibly inferred from its findings relating to another crime his "propensity" to commit this crime.<sup>615</sup>

190. The Prosecution responds that Nizeyimana's cursory arguments that the Trial Chamber speculated and used propensity evidence in concluding that Gicanda's killing was the result of a coordinated operation sanctioned by the ESO's command must fail.<sup>616</sup>

191. The Appeals Chamber recalls its settled jurisprudence that a conclusion of guilt can be inferred from circumstantial evidence only if it is the only reasonable conclusion available on the

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<sup>608</sup> Trial Judgement, para. 513.

<sup>609</sup> Trial Judgement, para. 511.

<sup>610</sup> Trial Judgement, para. 515. *See also* Trial Judgement, para. 1484.

<sup>611</sup> Nizeyimana Notice of Appeal, paras. 49-52; Nizeyimana Appeal Brief, paras. 197, 202.

<sup>612</sup> Nizeyimana Appeal Brief, paras. 195, 202; Nizeyimana Reply Brief, paras. 46, 47, *referring to* Trial Judgement, paras. 514, 530. Nizeyimana also argues that the Trial Chamber's failure to articulate the proper standard for findings based on circumstantial evidence is a strong indication that it did not apply it. *See* Nizeyimana Reply Brief, para. 47.

<sup>613</sup> Nizeyimana Appeal Brief, paras. 200, 201.

<sup>614</sup> Nizeyimana Notice of Appeal, para. 49; Nizeyimana Appeal Brief, paras. 197, 199. *See also* AT. 28 April 2014 p. 16.

<sup>615</sup> Nizeyimana Appeal Brief, paras. 197-199, 582, 585, 587. *See also* AT. 28 April 2014 p. 16.

<sup>616</sup> Prosecution Response Brief, paras. 97-102. *See also* AT. 28 April 2014 pp. 19, 20, 22, 23, 35.

evidence.<sup>617</sup> The Trial Chamber articulated elsewhere in the Trial Judgement the standard for findings based on circumstantial evidence.<sup>618</sup>

192. Both Witness AZD, who the Trial Chamber found credible and compelling,<sup>619</sup> and Witness Gahizi testified that Bizimana reported to Nizeyimana that Gicanda had been killed.<sup>620</sup> In particular, Witness Gahizi testified that, upon being questioned by Nizeyimana, Bizimana answered: “Mission accomplished. We killed Rose Gicanda”.<sup>621</sup> Similarly, the Trial Chamber noted Witness AZD’s evidence that he was in the officers’ mess when Bizimana and Gakwerere reported to Nizeyimana that they had carried out his instructions in relation to this killing.<sup>622</sup> While this evidence, taken on its own, may have been insufficient to establish that Nizeyimana authorized the killing, it was not unreasonable for the Trial Chamber to consider the report by Bizimana to Nizeyimana on the accomplishment of the mission, along with the other evidence it relied upon, in finding that the only reasonable inference was that the killing had been authorized by Nizeyimana. In this regard, Nizeyimana fails to appreciate that the Trial Chamber did not rely on this evidence alone, but on a number of factors, including the hearsay evidence of Witness BDE that Nizeyimana had ordered Bizimana to take action with respect to Gicanda and that, as a result, she was killed.<sup>623</sup>

193. Nizeyimana has also failed to show that it was unreasonable for the Trial Chamber to conclude that the evidence that soldiers communicated by radio during the abduction of Gicanda suggested that this was a coordinated mission.<sup>624</sup> Relying on this evidence, the Trial Chamber noted that Witness ZAP did not directly link the radio communication to Nizeyimana but indicated that the soldiers had stopped at the ESO camp before continuing to the location where Gicanda and the

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<sup>617</sup> *Bizimungu* Appeal Judgement, para. 246; *Ndindiliyimana et al.* Appeal Judgement, para. 291; *Ndahimana* Appeal Judgement, para. 65; *Mugenzi and Mugiraneza* Appeal Judgement, para. 136.

<sup>618</sup> Trial Judgement, para. 216, *referring to Renzaho* Appeal Judgement, para. 318; *Ntagerura et al.* Appeal Judgement, para. 306.

<sup>619</sup> Trial Judgement, paras. 495, 498. *See also* Trial Judgement, paras. 198, 610, 861, 1326, 1424, 1443.

<sup>620</sup> Trial Judgement, paras. 494, 506, 507.

<sup>621</sup> Trial Judgement, para. 507, *referring to* Witness Gahizi, T. 7 February 2011 p. 30.

<sup>622</sup> Trial Judgement, para. 498, *referring to* Witness AZD, T. 1 February 2011 p. 49 (an excerpt from Witness AZD’s statement was read to Witness AZD: “When they returned from killing her, I heard *sous-lieutenants* Bizimana and Gakwerere talking to Captain Nizeyimana, Ildephonse, and telling him how they had carried out his instructions. They were making a report of the mission assigned to them by Nizeyimana. I presume that Ildephonse Nizeyimana is the one who sent the two officers to kill the queen, because when they returned from their mission they came to him to give their report. [...] I was present, for this took place in the officers’ mess. These two officers often came to Nizeyimana, Ildephonse, to give him an update of their daily activities.” Witness AZD confirmed this portion of his statement.). *See also* Trial Judgement, para. 506; Witness AZD, T. 31 January 2011 p. 78 (“I knew about this because when they had just killed that old lady they met us at the mess, they had come there to talk about it, to report it, and somehow to Captain Ildephonse Nizeyimana. I was present when they informed him that they had killed that old woman. They said it in national language.”).

<sup>623</sup> Trial Judgement, paras. 491, 510, 514.

<sup>624</sup> *See* Trial Judgement, para. 512.



others were shot.<sup>625</sup> The Trial Chamber noted, in particular, Witness ZAP's evidence that, when the vehicle carrying Gicanda and the others stopped at the ESO camp, the leader of the soldiers, along with a few others, got out of the vehicle, entered the ESO, and upon returning, took the detainees to the woods, where they shot them.<sup>626</sup> These aspects of Witness ZAP's evidence support the Trial Chamber's reasonable conclusion that Gicanda's murder was a coordinated mission. Similarly, Nizeyimana fails to show that the Trial Chamber erred in relying upon Witness BUV02's testimony that Bizimana boasted about having killed Gicanda in further support of the inference that the mission was condoned by Bizimana's superiors, including Nizeyimana. While these factors would have been insufficient on their own to establish Nizeyimana's involvement in the killing of Gicanda and others, Nizeyimana has failed to demonstrate that the Trial Chamber erred in taking them into consideration.

194. Furthermore, contrary to Nizeyimana's claim, the Trial Chamber did not infer his "propensity" to commit this crime from its findings on the Ruhutinyanya killings. Rather, the Trial Chamber considered the fact that Bizimana carried out Nizeyimana's orders concerning the Ruhutinyanya family, along with Nizeyimana's position as a senior ESO officer in charge of intelligence and operations, as circumstances bolstering Witnesses AZD's and Gahizi's accounts that Bizimana reported Gicanda's killing to Nizeyimana.<sup>627</sup> In the view of the Appeals Chamber, the evidence of Nizeyimana's role in the killing of the Ruhutinyanya family reasonably supported the Trial Chamber's conclusions that Bizimana and Nizeyimana acted in coordination,<sup>628</sup> and, ultimately, that Nizeyimana authorized Bizimana to kill Gicanda.<sup>629</sup> Nizeyimana fails to show that it was unreasonable for the Trial Chamber to rely on this incident, along with the other evidence, in support of the inference that he authorized the killing of Gicanda and the others taken from her home.

195. The Appeals Chamber considers that Nizeyimana has failed to demonstrate that no reasonable trier of fact could have concluded that Nizeyimana authorized the killing when considering the evidence that: (i) Nizeyimana ordered Bizimana and Gakwerere to take action with respect to Gicanda;<sup>630</sup> (ii) following the abduction of Gicanda, the soldiers communicated by radio and stopped at the ESO before continuing on to kill Gicanda;<sup>631</sup> (iii) Bizimana subsequently reported to Nizeyimana that Gicanda had been killed and stated "Mission accomplished. We killed

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<sup>625</sup> Trial Judgement, para. 512.

<sup>626</sup> Trial Judgement, paras. 461-463.

<sup>627</sup> Trial Judgement, para. 511.

<sup>628</sup> Trial Judgement, para. 511.

<sup>629</sup> Trial Judgement, paras. 530. *See also* Trial Judgement, paras. 1510, 1513.

<sup>630</sup> Trial Judgement, paras. 470, 491, 514.

Rose Gicanda”,<sup>632</sup> and (iv) Bizimana did not try to hide the killing from his superiors but rather boasted about it openly at a bar.<sup>633</sup> Further, the Trial Chamber reasonably considered that its conclusion was bolstered by Nizeyimana’s position, his closeness with Bizimana, the fact that Bizimana had committed crimes upon his orders days earlier, and that there was no evidence that Nizeyimana reported the crime despite knowing of it.<sup>634</sup>

196. In light of the foregoing, the Appeals Chamber finds that Nizeyimana has failed to demonstrate that there was another reasonable conclusion available from the evidence which favoured him and therefore dismisses his arguments.

#### 4. Superior Responsibility

197. The Trial Chamber found that Nizeyimana could bear superior responsibility for the killing of Gicanda and the others taken from her home and took this finding into account in sentencing Nizeyimana, although it did not enter a conviction under this mode of liability.<sup>635</sup> In so finding, the Trial Chamber considered that Nizeyimana had authorized the killings and that Bizimana, who was close to Nizeyimana, had reported the killings to him afterwards.<sup>636</sup> It further found that given Nizeyimana’s position within the ESO hierarchy and his considerable authority, he was in a position to prevent the crime or punish its perpetrators, and that Bizimana was not punished for this crime.<sup>637</sup>

198. Nizeyimana submits that the Trial Chamber erred in finding that he could bear superior responsibility for the killing of Gicanda and the others taken from her home.<sup>638</sup> He underlines that the Trial Chamber acknowledged credible evidence that Muvunyi knew of the crime on the night of 21 April 1994 and stated that an investigation would be conducted.<sup>639</sup> According to Nizeyimana, the Trial Chamber erred by failing to conclude, on this basis, that the attack was not an ESO operation and that it was Muvunyi, and not him, who had the power to prevent the crime or punish the culpable ESO soldiers.<sup>640</sup> In this regard, Nizeyimana argues that the Trial Chamber assumed, without evidentiary support, that Bizimana was his subordinate and disregarded evidence that

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<sup>631</sup> Trial Judgement, paras. 460-463, 512.

<sup>632</sup> Trial Judgement, para. 507. *See also* Trial Judgement, paras. 506, 508.

<sup>633</sup> Trial Judgement, para. 513.

<sup>634</sup> Trial Judgement, paras. 511, 515.

<sup>635</sup> Trial Judgement, paras. 1516, 1518, 1540, 1567, 1580, 1594.

<sup>636</sup> Trial Judgement, paras. 530, 1516, 1517.

<sup>637</sup> Trial Judgement, para. 1517, fn. 3862.

<sup>638</sup> Nizeyimana Appeal Brief, paras. 203-208. *See also* Nizeyimana Notice of Appeal, paras. 53, 54; AT. 28 April 2014 pp. 14, 41, 42.

<sup>639</sup> Nizeyimana Appeal Brief, para. 207.

<sup>640</sup> Nizeyimana Appeal Brief, paras. 207, 208. *See also* AT. 28 April 2014 pp. 41, 42.

Bizimana reported directly to Muvunyi.<sup>641</sup> Nizeyimana also asserts that the Trial Chamber reversed the burden of proof by finding that “there is no evidence that Nizeyimana reported this incident, despite his legal obligation to do so”.<sup>642</sup>

199. The Prosecution responds that Muvunyi’s position as the highest ranking officer at the ESO did not relieve Nizeyimana of his legal obligation to prevent or punish the crimes of his subordinates.<sup>643</sup> The Prosecution further contends that Nizeyimana’s reference to evidence that Muvunyi knew of the crimes and stated that an investigation would be conducted fails to show an error in the Trial Chamber’s finding that Defence evidence that this killing was unsanctioned was not dispositive.<sup>644</sup> The Prosecution underlines that Nizeyimana does not claim that he took steps to report Gicanda’s murder and does not demonstrate that evidence on the record shows that he did so.<sup>645</sup> The Prosecution submits that the Trial Chamber did not shift the burden of proof by finding that Nizeyimana took no steps to punish his subordinates, including by reporting Gicanda’s killing.<sup>646</sup>

200. The Appeals Chamber recalls that for liability of an accused to be established under Article 6(3) of the Statute, the Prosecution must prove that: (i) a crime over which the Tribunal has jurisdiction was committed; (ii) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, the accused had the material ability to prevent or punish commission of the crime by his subordinate); (iii) the accused knew or had reason to know that the crime was going to be committed or had been committed; and (iv) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by the subordinate.<sup>647</sup>

201. With regard to Nizeyimana’s contention that it was Muvunyi, and not him, who had the power to prevent the crimes or punish the culpable ESO soldiers, the Appeals Chamber notes that

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<sup>641</sup> Nizeyimana Appeal Brief, para. 206, *referring to* Witness OUV03, T. 31 May 2011 pp. 20, 21. Nizeyimana also points to the fact that the Trial Chamber acknowledged that his superior responsibility was limited. *See* Nizeyimana Appeal Brief, para. 206, *referring to* Trial Judgement, para. 1489. This reference is incorrect and the Appeals Chamber understands that Nizeyimana intended to refer to Trial Judgement, para. 1488. This argument is addressed in the section on Superior Responsibility. *See infra* Section III.K. *See also* AT. 28 April 2014 p. 42.

<sup>642</sup> Nizeyimana Appeal Brief, para. 204, *quoting* Trial Judgement, para. 515. *See* Nizeyimana Appeal Brief, para. 205.

<sup>643</sup> Prosecution Response Brief, para. 112. *See also* AT. 28 April 2014 pp. 33-35.

<sup>644</sup> Prosecution Response Brief, para. 112.

<sup>645</sup> Prosecution Response Brief, para. 110.

<sup>646</sup> Prosecution Response Brief, para. 111. According to the Prosecution, this finding simply reflects the absence of evidence to rebut the fact that Nizeyimana ordered his ESO subordinates to kill Gicanda, and, as a result, he did not take any steps to report the crime. *See* Prosecution Response Brief, para. 111.

<sup>647</sup> *See, e.g.,* *Ndahimana* Appeal Judgement, para. 38; *Setako* Appeal Judgement, para. 269, *referring to, inter alia, Nahimana et al.* Appeal Judgement, para. 484.

the Trial Chamber considered that Muvunyi was the Camp Commander<sup>648</sup> and may have possessed the same effective control in relation to the killing of Gicanda and the others taken from her home.<sup>649</sup> However, the Trial Chamber reasoned that, in the absence of credible evidence of Muvunyi's involvement in Gicanda's killing, this parallel authority did not reasonably eliminate Nizeyimana's effective control over the perpetrators of the crime.<sup>650</sup> The Trial Chamber also noted that more than one person may be held responsible for the same crime committed by a subordinate,<sup>651</sup> and that Nizeyimana was required to report the criminal conduct of any subordinate officer.<sup>652</sup> The Appeals Chamber finds no error in this approach. To the extent that more than one person is found to have effective control over the subordinates who have committed a crime, they may all incur criminal responsibility under Article 6(3) of the Statute for their failure to prevent the crimes of their subordinates or to punish them.<sup>653</sup> Furthermore, contrary to Nizeyimana's submission, the Trial Chamber did not accept the Defence evidence that the killing was not an ESO operation, and that Muvunyi knew of the crime and had stated that an investigation would be undertaken.<sup>654</sup>

202. In concluding that Nizeyimana had effective control over Bizimana, the Trial Chamber considered the fact that Nizeyimana authorized the killing of Gicanda, and that Bizimana reported the crime to him afterwards.<sup>655</sup> While a superior need not have ordered or authorized a crime to be convicted pursuant to Article 6(3) of the Statute,<sup>656</sup> proof that an accused is able to issue orders and that his orders are actually followed, are indicators of effective control.<sup>657</sup> The Trial Chamber further noted the close relationship between Nizeyimana and Bizimana, as well as his positive relationships with several lower ranking officers, which it found highly relevant to Nizeyimana's ability to exercise effective control over ESO soldiers and cadets.<sup>658</sup> In addition, the Trial Chamber considered Nizeyimana's position within the ESO hierarchy and the authority he possessed.<sup>659</sup> In light of all these factors pointing to Nizeyimana's effective control over Bizimana, the Appeals Chamber finds that it was reasonable for the Trial Chamber to have found the effective control element satisfied here. Nizeyimana fails to demonstrate an error in the Trial Chamber's finding.

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<sup>648</sup> Trial Judgement, para. 1481.

<sup>649</sup> Trial Judgement, para. 1518.

<sup>650</sup> Trial Judgement, para. 1518.

<sup>651</sup> Trial Judgement, para. 1488, *referring to Strugar* Trial Judgement, para. 365.

<sup>652</sup> Trial Judgement, para. 1484.

<sup>653</sup> *Cf. Bagosora and Nsengiyumva* Appeal Judgement, paras. 491, 494, 495.

<sup>654</sup> *See* Trial Judgement, paras. 515-517.

<sup>655</sup> Trial Judgement, paras. 1516, 1517.

<sup>656</sup> *Bagosora and Nsengiyumva* Appeal Judgement, para. 581.

<sup>657</sup> *See Halilović* Appeal Judgement, para. 207.

<sup>658</sup> Trial Judgement, paras. 1487, 1500, 1516.

<sup>659</sup> Trial Judgement, para. 1517. *See also* Trial Judgement, paras. 1482, 1486.

203. With regard to his contention that Bizimana reported directly to Muvunyi, Nizeyimana points to Witness OUV03's evidence that, after being appointed as interim commander, Muvunyi set up two sections, one of which, the anti-looting section, was headed by Bizimana.<sup>660</sup> However, Witness OUV03 did not testify that as a result of this, Bizimana reported directly to Muvunyi, as Nizeyimana claims.<sup>661</sup> Accordingly, this portion of Witness OUV03's evidence, in the view of the Appeals Chamber, is not clearly relevant to the issue of Nizeyimana's effective control over Bizimana.

204. The Appeals Chamber is also not convinced by Nizeyimana's argument that the Trial Chamber reversed the burden of proof by stating that "[t]here is no evidence that Nizeyimana reported this incident".<sup>662</sup> By so stating, the Trial Chamber was merely noting that Nizeyimana had adduced no evidence in this regard, which could have been relied upon to raise a reasonable doubt about his failure to prevent or punish the crimes of his subordinates. In this respect, the Trial Chamber properly recalled that, for an accused to incur responsibility under Article 6(3) of the Statute, one of the elements to be established beyond reasonable doubt is that the superior failed to take the necessary and reasonable measures to prevent or punish the commission of the crime by his subordinate.<sup>663</sup>

205. The Appeals Chamber further notes that, in support of its conclusions on Nizeyimana's superior responsibility, the Trial Chamber relied on its findings that Nizeyimana both authorized Gicanda's killing and was subsequently informed about the successful completion of the operation.<sup>664</sup> It clearly follows from this analysis that the Trial Chamber considered that Prosecution evidence pointing to the fact that Nizeyimana authorized the crime was circumstantial evidence that Nizeyimana would not have prevented or punished the culpable subordinates. Furthermore, the Trial Chamber took into account Defence evidence that Bizimana was never punished for this crime.<sup>665</sup> The Appeals Chamber does not see an error in the Trial Chamber's conclusion that the only reasonable inference from the record was that Nizeyimana had failed to prevent, or punish his subordinates for the killing of Gicanda and the others taken from her home. The Appeals Chamber thus dismisses Nizeyimana's arguments on his superior responsibility.

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<sup>660</sup> Nizeyimana Appeal Brief, para. 206, *referring to* Witness OUV03, T. 31 May 2011 pp. 20, 21.

<sup>661</sup> Witness OUV03, T. 31 May 2011 pp. 20, 21.

<sup>662</sup> Trial Judgement, para. 515.

<sup>663</sup> *See* Trial Judgement, para. 1475.

<sup>664</sup> Trial Judgement, paras. 1516, 1517.

<sup>665</sup> Trial Judgement, para. 517, *referring to* Witness RWV11, T. 2 June 2011 pp. 34, 35. *See* Trial Judgement, fn. 3862.

## 5. Date of the Killing of Gicanda

206. The Trial Chamber found that on or around 20 April 1994 Bizimana led a group of ESO soldiers in the killing of Gicanda and the others taken from her home.<sup>666</sup>

207. Nizeyimana claims that the Trial Chamber's failure to make a finding on the date of Gicanda's killing deprived him of the opportunity to challenge his involvement in the event through his alibi for 21 and 22 April 1994.<sup>667</sup> He submits that the Trial Chamber's conclusion that, even if it accepted Nizeyimana's alibi for 21 or 22 April 1994 as reasonably possibly true, it would not have raised doubt about his involvement in this crime was a manifest error of law.<sup>668</sup> Nizeyimana claims that overwhelming evidence demonstrates that the murder occurred on 21 April 1994.<sup>669</sup> He also argues that the Trial Chamber's reference to Gicanda's killing as being in direct conflict with the alibi demonstrates that it actually found that this event occurred on 21 April 1994.<sup>670</sup>

208. The Prosecution asserts that Nizeyimana's claims in this regard are incorrect and should be summarily dismissed.<sup>671</sup> It submits that Nizeyimana fails to show how the Trial Chamber's finding that the killing occurred on or around 20 April 1994 was unreasonable;<sup>672</sup> and how any error in this regard would have impacted his conviction, given that the Trial Chamber assessed and rejected his alibi for 21 and 22 April 1994.<sup>673</sup>

209. The Appeals Chamber has already upheld the Trial Chamber's rejection of Nizeyimana's alibi for 21 and 22 April 1994.<sup>674</sup> Therefore, even if the Trial Chamber had found, as Nizeyimana contends it should have, that Gicanda was killed on 21 April 1994, rather than on or about 20 April 1994, such a finding would not have undermined the Trial Chamber's conclusions on Nizeyimana's responsibility for this incident. Accordingly, the Appeals Chamber summarily dismisses this argument.

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<sup>666</sup> Trial Judgement, paras. 530, 1510.

<sup>667</sup> Nizeyimana Notice of Appeal, para. 55; Nizeyimana Appeal Brief, para. 209. *See also* AT. 28 April 2014 pp. 7, 8, 14, 15. In his reply, Nizeyimana acknowledges the Trial Chamber's finding that Gicanda's killing occurred on or around 20 April 1994, but claims that evidence on the record allowed the Trial Chamber to indicate the exact date, which was 21 April 1994. Nizeyimana Reply Brief, para. 50.

<sup>668</sup> Nizeyimana Appeal Brief, para. 212.

<sup>669</sup> Nizeyimana Appeal Brief, para. 210. *See also* Nizeyimana Appeal Brief, para. 211; Nizeyimana Reply Brief, para. 50. *See also* AT. 28 April 2014 pp. 7, 8, 14, 15.

<sup>670</sup> Nizeyimana Appeal Brief, para. 211, *referring to* Trial Judgement, paras. 1327, 1371. *See also* Nizeyimana Reply Brief, para. 51.

<sup>671</sup> Prosecution Response Brief, para. 103.

<sup>672</sup> Prosecution Response Brief, paras. 103, 106, 108.

<sup>673</sup> Prosecution Response Brief, paras. 105, 108. *See also* Prosecution Response Brief, para. 103; AT. 28 April 2014 p. 37.

<sup>674</sup> Trial Judgement, para. 1371; *supra* Section III.B.

## 6. Conclusion

210. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana's Second, Third, and Eleventh to Fifteenth Grounds of Appeal, and his Forty-Second through Forty-Fourth Grounds of Appeal, in part.

**F. Killing of Remy Rwekaza and the Attack on Witness ZAV at the Gikongoro/Cyangugu and Kigali Roads Junction Roadblock (Grounds 16-18 and 20, and 44, in part)**

211. The Trial Chamber convicted Nizeyimana of genocide, pursuant to Article 6(1) of the Statute, for ordering the killing of Remy Rwekaza and Prosecution Witness ZAV, which resulted in the death of Rwekaza and serious bodily and mental harm to Witness ZAV.<sup>675</sup> It also convicted Nizeyimana of murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute, for ordering the killing of Rwekaza.<sup>676</sup> Furthermore, the Trial Chamber found that Nizeyimana could bear superior responsibility, pursuant to Article 6(3) of the Statute, for this incident and indicated that it would take this into account in sentencing.<sup>677</sup>

212. The Trial Chamber found that Nizeyimana ordered ESO soldiers to kill Rwekaza and Witness ZAV, both Tutsis, at the Gikongoro/Cyangugu and Kigali roads junction roadblock on or about 21 April 1994.<sup>678</sup> The Trial Chamber found that the ESO soldiers shot and killed Rwekaza and that Witness ZAV suffered serious bodily and mental harm as a result of being shot.<sup>679</sup> The Trial Chamber concluded that through his presence and orders at the roadblock, Nizeyimana substantially and significantly contributed to the killing of Rwekaza and the shooting of Witness ZAV.<sup>680</sup> Furthermore, the Trial Chamber found that Nizeyimana's contribution was a necessary condition to the ensuing murder and assault.<sup>681</sup> The Trial Chamber concluded that the perpetrators acted with the intent to destroy at least a substantial part of the Tutsi group and that Nizeyimana shared this genocidal intent.<sup>682</sup>

213. Nizeyimana challenges his conviction based on the killing of Rwekaza and the serious bodily and mental harm suffered by Witness ZAV.<sup>683</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (i) preventing the Defence from fully cross-

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<sup>675</sup> Trial Judgement, paras. 1524, 1539, 1581. The Trial Chamber stated that although the facts supported Nizeyimana's conviction for his participation in a joint criminal enterprise to kill Tutsis at the Gikongoro/Cyangugu and Kigali roads junction roadblock, his participation in this specific event would most appropriately be characterized as "ordering". Trial Judgement, para. 1524.

<sup>676</sup> Trial Judgement, paras. 1565, 1566, 1578, 1579, 1581.

<sup>677</sup> Trial Judgement, paras. 1525, 1528, 1540, 1567, 1580.

<sup>678</sup> Trial Judgement, paras. 31, 759, 1519.

<sup>679</sup> Trial Judgement, paras. 31, 745, 759, 1519, 1524.

<sup>680</sup> Trial Judgement, para. 1520.

<sup>681</sup> Trial Judgement, para. 1520.

<sup>682</sup> Trial Judgement, paras. 1521, 1523.

<sup>683</sup> Nizeyimana Notice of Appeal, paras. 58-64; Nizeyimana Appeal Brief, paras. 226-291. *See also* Nizeyimana Notice of Appeal, para. 116; Nizeyimana Appeal Brief, paras. 597-601; AT. 28 April 2014 pp. 3, 4, 7, 8, 11, 39, 40. The Appeals Chamber notes that Nizeyimana has abandoned his submissions as contained in Ground 19 and therefore will not consider them. *See* Nizeyimana Notice of Appeal, para. 61; Nizeyimana Appeal Brief, para. 281.



examining Witness ZAV and consequently erred in its assessment of the witness's testimony; and (ii) relying on the evidence of Witness ZAV despite Nizeyimana's alibi.

### 1. Cross-Examination of Prosecution Witness ZAV

214. Witness ZAV was the sole Prosecution witness to testify that Nizeyimana ordered ESO soldiers to kill Rwekaza and him on 21 April 1994 at the Gikongoro/Cyangugu and Kigali roads junction roadblock.<sup>684</sup> The Trial Chamber considered and dismissed Nizeyimana's challenges to the witness's credibility, including his reluctance to answer questions about his immigration status in the United States of America, and his refusal to comment on interview notes compiled by the Prosecution.<sup>685</sup> The Trial Chamber concluded that it had "no reason to doubt" his testimony which it found compelling.<sup>686</sup>

215. Nizeyimana submits that the Trial Chamber erred in unfairly preventing him from cross-examining Witness ZAV on his United States immigration records and his prior oral statement to members of the Prosecution, whom he was not allowed to call as witnesses.<sup>687</sup>

#### (a) Prior Statements to United States Authorities

216. Nizeyimana requested documents relating to Witness ZAV's immigration to the United States of America from the United States Department of State, which in turn required a copy of the relevant portions of the trial transcripts as a pre-condition to assisting the Tribunal.<sup>688</sup> The Trial Chamber considered that such a disclosure would reveal the identity of Witness ZAV and therefore required the variation of the protective measures in place.<sup>689</sup> It noted that Nizeyimana did not demonstrate that the witness had consented to this variance.<sup>690</sup> The Trial Chamber reasoned that the disclosure required might place Witness ZAV "in a highly precarious position with respect to his immigration status", which "may only serve to further exacerbate the situation".<sup>691</sup> It noted that Nizeyimana had cross-examined the witness "at length" on the immigration process, including on the fact that he did not mention Nizeyimana's name during the immigration process.<sup>692</sup> The Trial

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<sup>684</sup> Trial Judgement, paras. 741-745, 756.

<sup>685</sup> Trial Judgement, paras. 746-751.

<sup>686</sup> Trial Judgement, paras. 752, 756, 757.

<sup>687</sup> Nizeyimana Notice of Appeal, paras. 58, 59; Nizeyimana Appeal Brief, paras. 227-271; Nizeyimana Reply Brief, paras. 55, 56. *See also* AT, 28 April 2014 pp. 3, 4, 7, 39, 40.

<sup>688</sup> *See The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Defence Motion for Variance of Protective Measures of Witness ZAV (confidential), 28 October 2011 ("Trial Decision of 28 October 2011"), para. 17.

<sup>689</sup> Trial Decision of 28 October 2011, para. 17.

<sup>690</sup> Trial Decision of 28 October 2011, para. 19.

<sup>691</sup> Trial Decision of 28 October 2011, para. 19.

<sup>692</sup> Trial Decision of 28 October 2011, para. 20; Trial Judgement, para. 747.

Chamber was therefore of the view that it had sufficient evidence before it to properly assess Witness ZAV's credibility without seeing the immigration file or any impeachment material that might result from its disclosure, and denied Nizeyimana's motion.<sup>693</sup> As a consequence, the immigration files were not disclosed to Nizeyimana.<sup>694</sup>

217. Nizeyimana submits that the Trial Chamber erred in rejecting his motion requesting the variation of protective measures for Witness ZAV, in order to obtain sworn statements he made in the immigration proceedings which contradicted his testimony at trial.<sup>695</sup> Nizeyimana argues that the Trial Chamber erred in favouring Witness ZAV's interests over his own right to access contradictory statements for the purposes of cross-examination.<sup>696</sup> According to Nizeyimana, Rule 75 of the Rules provides that, for matters related to protective measures, the rights of an accused come before those of a witness.<sup>697</sup> Nizeyimana further submits that the Trial Chamber erred in stating that he had exercised his full right to cross-examine Witness ZAV on his immigration file,<sup>698</sup> given the absence of the actual prior statement.<sup>699</sup>

218. Nizeyimana argues that the Trial Chamber refused to vary the witness protective measures finding that it might place Witness ZAV in a "highly precarious position" if the testimony were disclosed to the United States Government,<sup>700</sup> but erred by not interpreting that this demonstrated that Witness ZAV was lying during his testimony at trial, given that the two accounts were contradictory.<sup>701</sup>

219. Additionally, Nizeyimana contends that while the Trial Chamber recognized Witness ZAV's reluctance to answer questions relating to his immigration status, it erred in concluding that the witness's ongoing fear of Nizeyimana affected his demeanour and candour during cross-

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<sup>693</sup> Trial Decision of 28 October 2011, para. 20, p. 7.

<sup>694</sup> See Nizeyimana Appeal Brief, paras. 230-232.

<sup>695</sup> Nizeyimana Appeal Brief, paras. 228-232, referring to Trial Decision of 28 October 2011. See also Nizeyimana Appeal Brief, para. 245.

<sup>696</sup> Nizeyimana Appeal Brief, paras. 230-232, 245. See also AT. 28 April 2014 pp. 7, 39.

<sup>697</sup> Nizeyimana Appeal Brief, paras. 237-242, referring to *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements with Confidential Annex, 22 November 2006 ("*Haradinaj et al.* Pre-Trial Decision of 22 November 2006"), para. 3; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution's Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532, and Variation of Protective Measures for KDZ489, 5 June 2009 ("*Karadžić* Trial Decision of 5 June 2009"), para. 12. See also Nizeyimana Reply Brief, para. 55; AT. 28 April 2014 pp. 7, 39.

<sup>698</sup> Nizeyimana Appeal Brief, para. 233. See also Nizeyimana Appeal Brief, para. 245; AT. 28 April 2014 pp. 7, 39, 40.

<sup>699</sup> Nizeyimana Appeal Brief, para. 236. See also AT. 28 April 2014 pp. 7, 39, 40.

<sup>700</sup> Nizeyimana Appeal Brief, para. 230.

<sup>701</sup> Nizeyimana Appeal Brief, para. 244. See also Nizeyimana Appeal Brief, para. 243; AT. 28 April 2014 pp. 7, 39, 40. During cross-examination, Witness ZAV admitted that he did not mention Nizeyimana in his immigration application to the United States authorities. See Nizeyimana Appeal Brief, para. 228, referring to Witness ZAV, T. 23 February 2011 pp. 59, 60 (closed session).

examination.<sup>702</sup> Accordingly, Nizeyimana submits that the Trial Chamber violated the presumption of innocence and reversed the burden of proof in pre-determining his guilt by stating that the witness was justified in fearing him.<sup>703</sup>

220. The Prosecution responds that Nizeyimana's submissions lack merit and should be dismissed.<sup>704</sup> It argues that Nizeyimana fully cross-examined Witness ZAV, including on his United States immigration file.<sup>705</sup> It asserts that the Trial Chamber denied Nizeyimana's motion to vary the witness's protective measures after having fully considered Nizeyimana's rights and noting that he had "sufficient opportunity" to cross-examine the witness.<sup>706</sup> The Prosecution further argues that Nizeyimana does not demonstrate that the Trial Chamber's acceptance of Witness ZAV's account was so unreasonable that no reasonable trier of fact could have accepted it in the circumstances.<sup>707</sup> The Prosecution maintains that as Nizeyimana did not appeal the Trial Decision of 28 October 2011 and merely repeats arguments he unsuccessfully raised at trial, his sixteenth ground of appeal should be summarily dismissed.<sup>708</sup>

221. The Appeals Chamber is not convinced that Nizeyimana's right to cross-examine Witness ZAV was materially curtailed by the unavailability of the statements the witness had made in the immigration proceedings.<sup>709</sup> The Trial Chamber considered that Nizeyimana had cross-examined Witness ZAV "at length" on the immigration process.<sup>710</sup> In this regard, it noted that the witness "was reluctant to provide details, refusing in large part to answer any questions posed by the Defence in this regard, without his attorney present".<sup>711</sup> The Trial Chamber observed that Witness ZAV did not mention Nizeyimana's name in his immigration files and found that "it [had]

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<sup>702</sup> Nizeyimana Appeal Brief, para. 272, *referring to* Trial Judgement, para. 748; Nizeyimana Reply Brief, para. 57; AT. 28 April 2014 p. 11. *See also* Nizeyimana Appeal Brief, paras. 597-601.

<sup>703</sup> Nizeyimana Appeal Brief, paras. 273-279; AT. 28 April 2014 p. 11. *See also* Nizeyimana Appeal Brief, paras. 597-601.

<sup>704</sup> Prosecution Response Brief, paras. 124-127. The Prosecution responds that Nizeyimana's references to the *Haradinaj et al.* Pre-Trial Decision of 22 November 2006 and the *Karadžić* Trial Decision of 5 June 2009 are irrelevant and do not apply to the circumstances. Prosecution Response Brief, para. 125.

<sup>705</sup> Prosecution Response Brief, paras. 126, 127; AT. 28 April 2014 p. 27.

<sup>706</sup> Prosecution Response Brief, paras. 124, 125. *See also* AT. 28 April 2014 p. 27. The Prosecution asserts that Nizeyimana cross-examined Witness ZAV on: (i) the reasons for seeking refugee status in the United States of America; (ii) the immigration process; (iii) whether he provided information on the events at the roadblock; and (iv) the fact that he did not mention Nizeyimana. The Prosecution notes that Witness ZAV confirmed that he informed the authorities about this incident, but did not mention Nizeyimana's name in relation thereto. Prosecution Response Brief, para. 126.

<sup>707</sup> Prosecution Response Brief, paras. 132-134.

<sup>708</sup> Prosecution Response Brief, para. 124, *citing* Nizeyimana Closing Brief, paras. 251-253.

<sup>709</sup> The Appeals Chamber recalls in this regard that the right to cross-examination is not absolute. *See, e.g., Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 12.

<sup>710</sup> Trial Decision of 28 October 2011, para. 20; Trial Judgement, para. 747, *referring to* Witness ZAV, T. 23 February 2011 pp. 38-40; Witness ZAV, T. 23 February 2011 pp. 38, 39, 41-61 (closed session).

<sup>711</sup> Trial Judgement, para. 747.

before it sufficient evidence to enable it to properly assess Witness ZAV's credibility, without having to see his immigration file [...]".<sup>712</sup>

222. In the circumstances, Nizeyimana does not demonstrate how the disclosure of Witness ZAV's immigration file could have impacted the cross-examination of the witness. Furthermore, a review of Witness ZAV's testimony reveals that once he admitted that he did not mention Nizeyimana in his immigration records in relation to this event, Nizeyimana did not pursue the issue in his cross-examination.<sup>713</sup> In this regard, the Appeals Chamber also notes Nizeyimana's own contention that he "questioned the witness extensively about his prior statements to the United States immigration authorities".<sup>714</sup> Accordingly, the Appeals Chamber is not convinced that the Trial Chamber's exercise of its discretion to deny Nizeyimana's request to vary Witness ZAV's protective measures in order to secure his immigration documents was unreasonable or that it prejudiced Nizeyimana. Furthermore, the Appeals Chamber notes that, although Nizeyimana argued that the non-disclosure of immigration files violated his fair trial rights in his Closing Brief,<sup>715</sup> he did not seek leave to appeal the Decision of 28 October 2011.

223. Turning to Nizeyimana's argument that the Trial Chamber's acknowledgement that the disclosure of Witness ZAV's testimony might have put him in a precarious position should have impacted its assessment of his credibility, the Appeals Chamber considers that the Trial Chamber extensively addressed Witness ZAV's immigration issues in the Trial Judgement.<sup>716</sup> In particular, it noted that Witness ZAV was reluctant to provide details on the content of his immigration file and that he did not mention Nizeyimana in his application.<sup>717</sup> Having considered and addressed Nizeyimana's challenges on this point, the Trial Chamber concluded that the explanation provided by the witness was reasonable and compelling.<sup>718</sup> The Appeals Chamber recalls that it was within the discretion of the Trial Chamber to evaluate such inconsistencies and to consider whether the evidence as a whole is credible, without explaining its decision in detail.<sup>719</sup> Nizeyimana merely advances his own view, speculating that the fact that this would place Witness ZAV in a "precarious position" demonstrated the possibility that the witness was lying during his testimony at trial.

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<sup>712</sup> Trial Decision of 28 October 2011, para. 20.

<sup>713</sup> Witness ZAV, T. 23 February 2011 p. 60 (closed session).

<sup>714</sup> Nizeyimana Appeal Brief, para. 272.

<sup>715</sup> Nizeyimana Closing Brief, para. 253.

<sup>716</sup> Trial Judgement, paras. 747-749.

<sup>717</sup> Trial Judgement, paras. 747, 749.

<sup>718</sup> Trial Judgement, para. 749. *See also* Trial Judgement, paras. 747, 748.

<sup>719</sup> *See Rukundo* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 174.

224. The Appeals Chamber is also not convinced by Nizeyimana's argument that the Trial Chamber reversed the burden of proof in finding that Witness ZAV's ongoing fear of Nizeyimana affected his demeanour and candour during his cross-examination. The Appeals Chamber observes that throughout the Trial Judgement, the Trial Chamber correctly recalled the standard of proof.<sup>720</sup> With respect to the present issue, the Trial Chamber based its conclusions on a reasonable assessment of all the evidence before it, including, in particular, Witness ZAV's evidence that his refugee application was initiated for security purposes, since people "like Nizeyimana" continued to threaten him in Rwanda in 1997.<sup>721</sup> The Trial Chamber's consideration that Witness ZAV was fearful does not imply that Nizeyimana was guilty. It only reflects the Trial Chamber's assessment of Witness ZAV's mental state. The Trial Chamber also considered the severity of the incident reported by the witness before finding his "reluctance to implicate such a high ranking military officer during his immigration proceedings a reasonable and compelling explanation".<sup>722</sup> The Appeals Chamber finds no error in the formulation of the Trial Chamber's conclusion. Nizeyimana's mere suggestion that the Trial Chamber pre-determined Nizeyimana's guilt is consequently without merit.

(b) "Interview Note" of 27-28 November 2009

225. The Prosecution disclosed to Nizeyimana a document entitled "Interview Note" taken following a meeting that the Prosecution had with Witness ZAV in November 2009 ("Interview Note").<sup>723</sup> During Nizeyimana's cross-examination of Witness ZAV on 23 February 2011, the Trial Chamber afforded him the opportunity to question the witness about the Interview Note.<sup>724</sup> However, the Trial Chamber did not allow Nizeyimana to show the witness the document as it found that it was "not properly a statement" given that it was not acknowledged by the witness.<sup>725</sup>

226. Nizeyimana included two members of the Prosecution trial team, who were present during the November 2009 meeting with Witness ZAV, in his witness list attached to his Pre-Defence Brief with the view of questioning them about alleged discrepancies between the Interview Note and Witness ZAV's testimony at trial.<sup>726</sup> The Trial Chamber ordered Nizeyimana to remove the members of the Prosecution team from his witness list because the Defence had made no *prima*

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<sup>720</sup> See, e.g., Trial Judgement, paras. 204, 978, 980, 1005, 1184.

<sup>721</sup> Trial Judgement, para. 749, referring to Witness ZAV, T. 23 February 2011 pp. 52, 53 (closed session).

<sup>722</sup> Trial Judgement, para. 749.

<sup>723</sup> Witness ZAV, T. 23 February 2011 pp. 62, 63 (closed session). See also Nizeyimana Appeal Brief, para. 250, fn. 311, Annex E; Prosecution Response Brief, paras. 128, 130. During the testimony of Witness ZAV it emerged that, subsequently, the Prosecution disclosed a written statement signed by the witness emanating from two meetings held in November 2009 and July 2010. Witness ZAV, T. 23 February 2011 pp. 63, 66 (closed session).

<sup>724</sup> Witness ZAV, T. 23 February 2011 p. 64 (closed session).

<sup>725</sup> Witness ZAV, T. 23 February 2011 pp. 64-70 (closed session). See also Nizeyimana Appeal Brief, para. 252.

*facie* showing of misfeasance on the part of the Prosecution, as was required to justify the calling of the person who has recorded a statement, and because any discrepancy between Witness ZAV's prior statement and his testimony would go to the determination of his credibility as a witness, which would be assessed at the end of the case.<sup>727</sup>

227. Nizeyimana submits that the Trial Chamber erred in stating that the Interview Note was not a statement, and in refusing him the right to show the statement to Witness ZAV and to cross-examine the witness thereon.<sup>728</sup> He argues that the Prosecution disclosed the statement containing "detailed interview notes on Prosecution letterhead", which differed "substantially" from Witness ZAV's testimony "on material issues".<sup>729</sup> He asserts that the fact that the statement was not signed does not limit his right to cross-examine on it.<sup>730</sup> He further points to the fact that interview notes constitute statements within the meaning of Rule 66(A) of the Rules and must be disclosed.<sup>731</sup>

228. Nizeyimana further argues that the Trial Chamber erred in its Trial Decision of 12 April 2011 ordering him to remove two members of the Prosecution team, who were present at the meeting with Witness ZAV, from his witness list.<sup>732</sup> Nizeyimana asserts that because Witness ZAV denied the contents of the statement while admitting to meeting with Prosecution investigators, he was entitled to call the Prosecution investigators to "prove the existence of the statement".<sup>733</sup>

229. Nizeyimana claims that the refusal to allow him to cross-examine Witness ZAV on the Interview Note and the refusal to allow him to call the members of the Prosecution team prevented

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<sup>726</sup> Nizeyimana Pre-Defence Brief (confidential), p. 50 (Witnesses 45 and 46).

<sup>727</sup> *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Prosecutor's Urgent Motion Concerning Deficiencies of the Pre-Trial Defence Brief, 12 April 2011 ("Trial Decision of 12 April 2011"), paras. 20, 21.

<sup>728</sup> Nizeyimana Appeal Brief, paras. 246, 247, 252-254. *See also* AT. 28 April 2014 pp. 3, 4, 40.

<sup>729</sup> Nizeyimana Appeal Brief, paras. 250, 251, 254, Annex E. *See also* AT. 28 April 2014 pp. 3, 4. Nizeyimana submits that in his testimony, Witness ZAV "unequivocally" stated that Nizeyimana did not get out of his car, whereas in the interview he stated that Nizeyimana was standing on the side of the road "to make sure soldiers killed us. I could see him standing there, it was a short distance." Nizeyimana Appeal Brief, para. 251, *citing* Witness ZAV, T. 23 February 2011 pp. 61, 62, 65 (closed session).

<sup>730</sup> Nizeyimana Appeal Brief, para. 253. *See also* AT. 28 April 2014 p. 40.

<sup>731</sup> Nizeyimana Appeal Brief, para. 253.

<sup>732</sup> Nizeyimana Appeal Brief, paras. 246, 268. *See also* Nizeyimana Appeal Brief, paras. 255-258.

<sup>733</sup> Nizeyimana Appeal Brief, paras. 247, 248, 251, 255-268. *See also* AT. 28 April 2014 p. 4. Nizeyimana contends that the Trial Chamber erred in finding no *prima facie* demonstration of "misfeasance" by the Prosecution, based on the *Zigiranyirazo* case. Nizeyimana Appeal Brief, paras. 256-268. He argues that the *Zigiranyirazo* case is inapplicable because he was not seeking to call the members of the Prosecution team to prove the contents of the Interview Note but only its existence and that he therefore did not have to prove misfeasance in order to be able to call the members of the Prosecution team. *See* Nizeyimana Appeal Brief, paras. 259-263. Nizeyimana further submits that there is *prima facie* proof of misfeasance because the Prosecution's refusal to admit the statement is "an error, mistake or carelessness by the Prosecution in his public duty", arguing that there is "likely" a violation of either Rules 66 or 68 of the Rules. Nizeyimana Appeal Brief, paras. 264-267.

him from impeaching Witness ZAV, and that these errors invalidate the findings concerning this event.<sup>734</sup>

230. The Prosecution responds that prior to trial, it disclosed internal Prosecution notes pursuant to Rule 47 of the Rules concerning Witness ZAV, who never saw or signed the notes.<sup>735</sup> It argues that it was reasonable for the Trial Chamber to rule the document inadmissible since Witness ZAV subsequently signed a “proper” statement, which included these notes.<sup>736</sup> The Prosecution further contends that Nizeyimana questioned the witness with regard to the Interview Note<sup>737</sup> and that his submissions should be dismissed as repetitive.<sup>738</sup>

231. With regard to the Trial Chamber’s decision not to allow Nizeyimana to show the document to the witness,<sup>739</sup> the Appeals Chamber recalls that decisions relating to the general conduct of trial proceedings and, more specifically, the parameters of cross-examination, fall within the discretion of the Trial Chamber.<sup>740</sup> The Appeals Chamber can discern no error in the Trial Chamber’s exercise of its discretion, especially considering that the Interview Note was not signed or acknowledged by the witness and that a signed statement emanating from this meeting with the witness was subsequently disclosed.<sup>741</sup> Furthermore, the Appeals Chamber recalls that Nizeyimana opted not to file the Interview Note as an exhibit or to pursue the matter in the face of a Prosecution objection.<sup>742</sup> Therefore, the Interview Note is not part of the record in this case. The Appeals Chamber recalls that it can summarily dismiss arguments and allegations when materials at issue are not part of the

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<sup>734</sup> Nizeyimana Appeal Brief, paras. 269-271.

<sup>735</sup> Prosecution Response Brief, paras. 128, 131. *See also* AT. 28 April 2014 p. 27.

<sup>736</sup> *See* Prosecution Response Brief, paras. 123, 128. *See also* AT. 28 April 2014 p. 27. The Prosecution maintains that the email correspondence transmitting the notes to the Trial Chamber prior to trial clearly stated that they were a “draft of an anticipated statement that the witness has neither seen nor approved”. Prosecution Response Brief, para. 130, *citing* Witness ZAV, T. 23 February 2011 p. 63 (closed session). The Prosecution further asserts that the notes were akin to “work product” subject to Rule 70 of the Rules and that given the “contemporaneous signed statement” from the same interview, which was disclosed in a timely manner to Nizeyimana, Nizeyimana’s claimed disclosure violation is “wholly baseless”. Prosecution Response Brief, para. 131. Nizeyimana replies that oral communications with witnesses in preparation for trial do not fall within the scope of Rule 70(A) of the Rules. Nizeyimana Reply Brief, para. 56. The Prosecution also submits that Nizeyimana does not identify any issue on which he was not able to cross-examine Witness ZAV and fails to explain any prejudice or unfairness he suffered. AT. 28 April 2014 p. 27.

<sup>737</sup> Prosecution Response Brief, para. 128. The Prosecution avers that Witness ZAV refused to comment on the statement and maintained his live testimony, confirming that Nizeyimana did not exit his vehicle, that he did not know the woman who sat next to Nizeyimana in the vehicle, and that Nizeyimana discussed going to Nyanza with a Hutu driver. Prosecution Response Brief, para. 130, *referring to* Trial Judgement, para. 750.

<sup>738</sup> Prosecution Response Brief, para. 129, *referring to* Nizeyimana Closing Brief, paras. 255-257.

<sup>739</sup> *See* Witness ZAV, T. 23 February 2011 pp. 64, 70 (closed session); Nizeyimana Appeal Brief, para. 252.

<sup>740</sup> *Kanyarukiga* Appeal Judgement, paras. 26, 42; *Setako* Appeal Judgement, para. 19; *Rukundo* Appeal Judgement, para. 133; *Haradinaj et al.* Appeal Judgement, para. 39; *Nahimana et al.* Appeal Judgement, para. 182.

<sup>741</sup> Witness ZAV, T. 23 February 2011 pp. 63, 65, 70 (closed session).

<sup>742</sup> Witness ZAV, T. 23 February 2011 pp. 64, 70, 71 (closed session) (“Mr. Philpot: In this circumstance we will file neither at this stage.”).

trial record and have not been admitted on appeal pursuant to Rule 115 of the Rules.<sup>743</sup> Furthermore, contrary to Nizeyimana's assertion, the Trial Chamber did allow him to question Witness ZAV on the Interview Note, which he did.<sup>744</sup>

232. Additionally, the Appeals Chamber considers Nizeyimana's argument that the Interview Note is a statement in accordance with Rule 66 of the Rules to be irrelevant. Rule 66 of the Rules pertains only to the disclosure of documents. In this instance, the Appeals Chamber recalls that the Prosecution disclosed the Interview Note.<sup>745</sup> However, that a document is disclosed to the Defence does not make it *per se* admissible into evidence.<sup>746</sup> Therefore his argument is summarily dismissed.

233. Nizeyimana's argument regarding the Trial Chamber's refusal to allow him to call the Prosecution team members to prove the existence of the Interview Note must also fail. In this regard, the Appeals Chamber observes that the Interview Note was disclosed to the parties, that Nizeyimana questioned Witness ZAV on the Interview Note, and that consequently the discrepancies alleged are reflected in the transcripts, including the witness's reluctance to respond to this line of questioning.<sup>747</sup> In light of this, it is clear that the existence of the Interview Note was not at issue, and that its contents were discussed at trial. Accordingly, Nizeyimana fails to show why it was necessary to call the members of the Prosecution team to establish the existence of the Interview Note.

234. In light of the foregoing, the Appeals Chamber dismisses Nizeyimana's contentions in this regard.

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<sup>743</sup> *Krajišnik* Appeal Judgement, para. 25; *Galić* Appeal Judgement, paras. 311-313. Nizeyimana sought the admission of the Interview Note pursuant to Rule 115 of the Rules on appeal; however, this request was denied. *See* Decision on Appellant's *Confidential* Motion for Fresh Evidence and Corollary Relief, 23 April 2014, paras. 11, 35.

<sup>744</sup> *See* Witness ZAV, T. 23 February 2011 pp. 64, 65, 68-70 (closed session).

<sup>745</sup> *See* Nizeyimana Appeal Brief, para. 250, fn. 311; Prosecution Response Brief, para. 128; Witness ZAV, T. 23 February 2011 pp. 62, 63 (closed session).

<sup>746</sup> Rule 66(B) of the Rules provides for the disclosure of all information in the custody or control of the Prosecution which is material to the preparation of the defence, or is intended for use by the Prosecution as evidence at trial, or was obtained from, or belonged to the accused. *See also* Rule 68 of the Rules. Meanwhile, it is established jurisprudence that a trial chamber has the discretion on the admissibility of relevant evidence that it deems to have probative value, pursuant to Rule 89(C) of the Rules. *See, e.g.,* *Simba* Appeal Judgement, para. 103; *Niyitegeka* Appeal Judgement, para. 36.

<sup>747</sup> Witness ZAV, T. 23 February 2011 pp. 64, 66, 68-70 (closed session). *See also* Nizeyimana Appeal Brief, para. 250, fn. 311, Annex E; Prosecution Response Brief, paras. 128, 130.



## 2. Date of the Killing of Rwekaza and Attack on Witness ZAV

235. The Trial Chamber observed that: (i) Witness ZAV's evidence conflicted with Nizeyimana's alibi evidence for 21 April 1994;<sup>748</sup> (ii) the Defence did not expressly challenge Witness ZAV as to the date of the killing of Rwekaza and the serious bodily and mental harm caused to Witness ZAV;<sup>749</sup> (iii) Witness ZAV expressly referred to 21 April 1994 as the date on which the incident occurred and Rwekaza died;<sup>750</sup> and (iv) Pierre Claver Karenzi was killed on the same day.<sup>751</sup> The Trial Chamber concluded that this incident occurred "on or about 21 April 1994".<sup>752</sup> The Trial Chamber found that Nizeyimana's alibi for 21 April 1994 was not credible and that the Prosecution evidence "eliminated the reasonable possibility of its truthfulness".<sup>753</sup>

236. Nizeyimana submits that his alibi for 21 to 22 April 1994 contradicts Witness ZAV's evidence that Nizeyimana ordered ESO soldiers to kill Rwekaza and him on 21 April 1994 at the Gikongoro/Cyangugu and Kigali roads junction roadblock.<sup>754</sup> He argues that the Trial Chamber erred in determining that this event occurred "on or about 21 April", given that it acknowledged that Witness ZAV testified that it occurred on 21 April 1994.<sup>755</sup> He states that the Trial Chamber merely "opined" that the Prosecution did not question Witness ZAV as to how he was sure of the date, subsequently recognized that it was in "direct conflict" with the alibi, and dismissed his alibi.<sup>756</sup> Nizeyimana asserts that the Prosecution was well aware of the alibi and could have pursued the issue of the date but chose not to do so, so as not to give the witness the opportunity to confirm his prior statement.<sup>757</sup> Nizeyimana submits that the Trial Chamber erred in concluding that the event "did not necessarily occur on 21 April 1994" and therefore unreasonably dismissed the alibi, despite its finding that Karenzi was killed on 21 April 1994, and that Rwekaza was killed on the same day as Karenzi.<sup>758</sup>

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<sup>748</sup> Trial Judgement, para. 759.

<sup>749</sup> Trial Judgement, para. 758.

<sup>750</sup> Trial Judgement, paras. 745, 753, 758. *See also* Trial Judgement, paras. 741, 759; Witness ZAV, T. 23 February 2011 p. 26; T. 23 February 2011 p. 60 (closed session).

<sup>751</sup> Trial Judgement, paras. 1520, 1521.

<sup>752</sup> Trial Judgement, paras. 759, 1519. *See also* Trial Judgement, paras. 30, 31.

<sup>753</sup> Trial Judgement, para. 759. *See also* Trial Judgement, paras. 1327-1329, 1348, 1349, 1371, 1372.

<sup>754</sup> Nizeyimana Appeal Brief, paras. 282-289. *See also* AT. 28 April 2014 pp. 7, 8. *See generally supra* Section III.B (for Nizeyimana's submissions concerning his alibi).

<sup>755</sup> Nizeyimana Appeal Brief, paras. 283, 284. *See also* AT. 28 April 2014 pp. 7, 8.

<sup>756</sup> Nizeyimana Appeal Brief, para. 284.

<sup>757</sup> Nizeyimana Appeal Brief, para. 285.

<sup>758</sup> Nizeyimana Appeal Brief, paras. 286-288. *See also* AT. 28 April 2014 pp. 7, 8. Nizeyimana underscores that the Trial Chamber repeatedly asserted that the attack occurred "on 21 April" elsewhere in the Trial Judgement. Nizeyimana Reply Brief, para. 58, *referring to* Trial Judgement, paras. 1327, 1371.

237. The Prosecution responds that Nizeyimana’s arguments are based on “wrong premises” and should be summarily dismissed.<sup>759</sup> It maintains that Witness ZAV’s “credible and compelling evidence” directly contradicted Nizeyimana’s alibi for 21 April 1994.<sup>760</sup>

238. The Appeals Chamber recalls that the Trial Chamber did not find that Nizeyimana’s alibi for 21 April 1994 could reasonably possibly be true and that the Appeals Chamber has upheld this finding on appeal.<sup>761</sup> Therefore, even if the Trial Chamber had found, as Nizeyimana contends it should have, that the attack on Rwekaza and Witness ZAV occurred on 21 April 1994, it would not have undermined the Trial Chamber’s findings on Nizeyimana’s responsibility for this incident. Accordingly, the Appeals Chamber summarily dismisses this argument.

### 3. Conclusion

239. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana’s Sixteenth through Eighteenth and Twentieth Grounds of Appeal, and Forty-Fourth Ground of Appeal, in part.

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<sup>759</sup> Prosecution Response Brief, para. 135.

<sup>760</sup> Prosecution Response Brief, para. 135. *See also* AT. 28 April 2014 p. 37.

<sup>761</sup> *See supra* Section III.B.

**G. Killing of Beata Uwambaye at the Gikongoro/Cyangugu and Kigali Roads Junction Roadblock (Grounds 21-23, and 43 and 44, in part)**

240. The Trial Chamber convicted Nizeyimana of genocide, murder as a crime against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6(1) of the Statute, for ordering the killing of Beata Uwambaye at the Gikongoro/Cyangugu and Kigali roads junction roadblock near Butare town.<sup>762</sup> Furthermore, the Trial Chamber found that Nizeyimana could bear superior responsibility, pursuant to Article 6(3) of the Statute, for this incident and indicated that it would take this into account in sentencing.<sup>763</sup>

241. Relying on the testimony of Prosecution Witness ZAK, the Trial Chamber found that Nizeyimana ordered ESO soldiers to kill Uwambaye, a Tutsi civilian who was accompanying the witness, a Hutu soldier, at the roadblock on or about 5 May 1994.<sup>764</sup> The Trial Chamber specifically found that, in compliance with Nizeyimana's order, ESO soldiers led Uwambaye to a wooded area away from the roadblock.<sup>765</sup> The Trial Chamber acknowledged that Witness ZAK could not see what was happening, but heard three gunshots and Uwambaye's yell, and then saw the soldiers return, wiping blood off their bayonets.<sup>766</sup> In light of these findings, the Trial Chamber concluded that the only reasonable conclusion was that Uwambaye was killed by the soldiers and that through his presence and order at the roadblock, Nizeyimana contributed substantially to her killing.<sup>767</sup> The Trial Chamber also found that the perpetrators of Uwambaye's killing acted with the genocidal intent to destroy at least a substantial part of the Tutsi group and that Nizeyimana shared their genocidal intent.<sup>768</sup>

242. Nizeyimana challenges his conviction for the killing of Uwambaye.<sup>769</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (i) assessing Prosecution evidence and by relying solely on the testimony of Witness ZAK; and (ii) its assessment of the Defence arguments and evidence pertaining to Uwambaye's killing.

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<sup>762</sup> Trial Judgement, paras. 1524, 1539, 1565, 1566, 1579, 1581. The Trial Chamber found that Nizeyimana could have been convicted for his participation in a basic joint criminal enterprise to kill Tutsis at this roadblock, but decided that Nizeyimana's participation in this specific event would be most appropriately characterized as "ordering". Trial Judgement, para. 1524.

<sup>763</sup> Trial Judgement, paras. 1525, 1527, 1528, 1540, 1567, 1580.

<sup>764</sup> Trial Judgement, paras. 785, 786, 790. *See also* Trial Judgement, paras. 762-764, 769.

<sup>765</sup> Trial Judgement, paras. 788, 790.

<sup>766</sup> Trial Judgement, para. 788. *See also* Trial Judgement, paras. 762-764, 769.

<sup>767</sup> Trial Judgement, paras. 790, 1519, 1520. *See also* Trial Judgement, para. 789.

<sup>768</sup> Trial Judgement, paras. 1521, 1523.

## 1. Assessment of Prosecution Evidence

243. Nizeyimana contends that the Trial Chamber erroneously relied on circumstantial evidence not implicating him in order to draw inferences as to his presence at the roadblock and involvement in Uwambaye's killing.<sup>770</sup> In particular, he submits that the Trial Chamber erroneously relied on findings contained in other sections of the Trial Judgement as to the existence of the roadblock, the presence of ESO soldiers there, and the commission of crimes against Tutsi civilians at the roadblock in support of its conclusions regarding Nizeyimana's liability for Uwambaye's killing.<sup>771</sup> He argues that the Trial Chamber's "improper" use of this circumstantial evidence invalidates the finding of guilt against him.<sup>772</sup>

244. In challenging the Trial Chamber's findings on Witness ZAK's credibility, Nizeyimana asserts that it was erroneous and improper for the Trial Chamber to rely on the "single, uncorroborated and highly questionable" testimony of Witness ZAK.<sup>773</sup> Nizeyimana points to the Trial Chamber's finding that "Witness ZAK was able to provide considerable details about Uwambaye that would corroborate his testimony about his relationship with her"<sup>774</sup> and submits that the Trial Chamber erred in allowing Witness ZAK to corroborate himself on the issue of his alleged relationship to Uwambaye.<sup>775</sup> In Nizeyimana's view, this "illegal self-corroboration" constitutes an error of law which invalidates the Trial Chamber's finding on Uwambaye's murder.<sup>776</sup>

245. The Prosecution responds that Nizeyimana's arguments should be dismissed.<sup>777</sup> It argues that the Trial Chamber was entitled to rely on relevant circumstantial evidence to bolster Witness ZAK's otherwise compelling testimony.<sup>778</sup> It further asserts that the neutral use of the word

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<sup>769</sup> Nizeyimana Notice of Appeal, paras. 65-76; Nizeyimana Appeal Brief, paras. 292-320. *See also* AT. 28 April 2014 pp. 7, 12, 13, 41. The Appeals Chamber observes that Nizeyimana has abandoned Ground 24. *See* Nizeyimana Appeal Brief, para. 321.

<sup>770</sup> Nizeyimana Appeal Brief, paras. 293-296, *referring to* Trial Judgement, paras. 785, 786.

<sup>771</sup> Nizeyimana Appeal Brief, paras. 293-296. *See also* Nizeyimana Reply Brief, para. 63.

<sup>772</sup> Nizeyimana Appeal Brief, para. 296.

<sup>773</sup> Nizeyimana Notice of Appeal, para. 65; AT. 28 April 2014 pp. 7, 12, 13. *See also* Nizeyimana Appeal Brief, para. 292; AT. 28 April 2014 p. 41. In his Notice of Appeal, Nizeyimana mistakenly refers to Witness ZAV. *See* Nizeyimana Notice of Appeal, paras. 65, 66.

<sup>774</sup> Nizeyimana Appeal Brief, para. 307, *referring to* Trial Judgement, para. 780.

<sup>775</sup> Nizeyimana Appeal Brief, paras. 292, 306-312; AT. 28 April 2014 pp. 7, 12, 13. *See also* Nizeyimana Reply Brief, para. 64.

<sup>776</sup> Nizeyimana Appeal Brief, para. 312. *See also* AT. 28 April 2014 pp. 7, 12, 13.

<sup>777</sup> Prosecution Response Brief, paras. 140, 151. *See also* AT. 28 April 2014 pp. 31, 32.

<sup>778</sup> Prosecution Response Brief, paras. 142-144. *See also* AT. 28 April 2014 pp. 31, 32.

“corroborate” does not constitute an error of law and that the Trial Chamber expressly considered the evidence on the nature of Witness ZAK’s relationship with Uwambaye.<sup>779</sup>

246. The Appeals Chamber recalls that a trial chamber may rely on the uncorroborated evidence of a single credible witness when making factual findings even with respect to material facts.<sup>780</sup> A trial chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary.<sup>781</sup> Therefore, the Trial Chamber’s decision to rely on the testimony of a single Prosecution witness to establish the facts relating to Uwambaye’s killing without requiring corroboration of his testimony does not, as such, constitute an error.

247. Concerning the Trial Chamber’s alleged reliance on circumstantial evidence to corroborate Witness ZAK’s testimony, the Appeals Chamber is not convinced that the Trial Chamber committed an error. The Trial Chamber found that evidence showing the existence of the roadblock at the Gikongoro/Cyangugu and Kigali roads junction, the presence of ESO soldiers manning that roadblock, and the commission of crimes against Tutsi civilians there, as well as at other roadblocks, provided circumstantial support for Witness ZAK’s testimony.<sup>782</sup> Contrary to Nizeyimana’s assertion, however, the Trial Chamber did not rely upon this evidence to draw inferences against Nizeyimana, but rather to describe a broader general pattern of criminal conduct, which supported Witness ZAK’s testimony as to the involvement of ESO soldiers in the commission of crimes at the Gikongoro/Cyangugu and Kigali roads junction roadblock near Butare town.<sup>783</sup> While the fact that this evidence does not indicate that Nizeyimana was present at the roadblock around 5 May 1994 limits its probative value, it does not render it irrelevant. Nizeyimana thus fails to show that the Trial Chamber erred in relying on other evidence on the record as a background to, and in additional support of, Witness ZAK’s testimony.<sup>784</sup>

248. In addition, a review of the Trial Judgement reveals that this circumstantial corroboration was not decisive for the Trial Chamber, which was in any event convinced by the credibility of

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<sup>779</sup> Prosecution Response Brief, para. 147; AT. 28 April 2014 pp. 32, 33.

<sup>780</sup> See *Renzaho* Appeal Judgement, para. 518 (stating that a trial chamber “may rely on a single witness’s testimony for proof of a material fact if, in its opinion, that testimony is relevant and credible”); *Karera* Appeal Judgement, para. 45; *Seromba* Appeal Judgement, para. 79; *Kajelijeli* Appeal Judgement, para. 170; *Rutaganda* Appeal Judgement, para. 449. See also *Luki} and Luki}* Appeal Judgement, para. 375.

<sup>781</sup> See, e.g., *Bizimungu* Appeal Judgement, para. 241; *Gatete* Appeal Judgement, para. 138; *Bagosora and Nsengiyumva* Appeal Judgement, para. 251.

<sup>782</sup> Trial Judgement, paras. 785, 786.

<sup>783</sup> Trial Judgement, paras. 785, 786. The Appeals Chamber notes that the Trial Chamber refers to Sections II.7.1 and II.7.3 of the Trial Judgement related, respectively, to the killing of Remy Rwekaza and the attack on Witness ZAV, as well as crimes perpetrated at roadblocks throughout Butare Prefecture against Tutsis.

<sup>784</sup> The Appeals Chamber recalls that in other cases it has affirmed the use of background evidence as circumstantial corroboration of an otherwise credible witness’s testimony. See, e.g., *Bagosora and Nsengiyumva* Appeal Judgement, paras. 255, 257.

Witness ZAK's testimony concerning the involvement of Nizeyimana in Uwambaye's killing.<sup>785</sup> The Trial Chamber expressly acknowledged that Witness ZAK was the only person to testify about this particular event.<sup>786</sup> It observed that Witness ZAK provided the only first-hand evidence that Nizeyimana ordered ESO soldiers to kill Uwambaye, identified by him as an *Inyenzi*, around 5 May 1994.<sup>787</sup> The Trial Chamber further found the witness credible,<sup>788</sup> and decided to rely on his testimony to support its finding as to Nizeyimana's guilt for this particular event.<sup>789</sup> Given that the Trial Chamber considered that Witness ZAK's evidence was "compelling"<sup>790</sup> and "entirely credible",<sup>791</sup> the Trial Chamber had the discretion to base its findings concerning Uwambaye's killing and Nizeyimana's guilt on that testimony alone, without the need for additional corroborative evidence.<sup>792</sup> The Appeals Chamber, therefore, rejects Nizeyimana's challenges to the Trial Chamber's use of circumstantial evidence to reinforce its findings about this incident.

249. The Appeals Chamber next turns to Nizeyimana's assertion that the Trial Chamber erred in allowing Witness ZAK to corroborate himself. In this regard, the Trial Judgement states that "Witness ZAK was able to provide considerable details about Uwambaye that would corroborate his testimony about his relationship with her and explain why the two were travelling through Butare around 5 May 1994".<sup>793</sup> The Appeals Chamber finds that a plain reading of the sentence makes it clear that the verb "corroborate" in that sentence is used colloquially, as a synonym of "confirm" or "reinforce", and not in the legal sense of the term "corroboration" has acquired in the jurisprudence of the Tribunal. Although a different choice of words may have been preferable, the Appeals Chamber sees no legal error in the Trial Chamber's formulation.

250. Accordingly, the Appeals Chamber finds that Nizeyimana did not demonstrate that the Trial Chamber erred in its assessment of the Prosecution evidence concerning the killing of Uwambaye.

## 2. Assessment of Defence Evidence

251. Nizeyimana also challenges the Trial Chamber's assessment of the Defence evidence.<sup>794</sup> In particular, he argues that the Trial Chamber erred in dismissing the challenges to Witness ZAK's

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<sup>785</sup> Trial Judgement, paras. 781-788.

<sup>786</sup> Trial Judgement, para. 785.

<sup>787</sup> Trial Judgement, para. 769. *See also* Trial Judgement, para. 763.

<sup>788</sup> Trial Judgement, para. 781. *See also* Trial Judgement, paras. 787, 788.

<sup>789</sup> Trial Judgement, paras. 781-790.

<sup>790</sup> Trial Judgement, paras. 787, 788.

<sup>791</sup> Trial Judgement, para. 781.

<sup>792</sup> *See, e.g., Renzaho Appeal Judgement*, para. 518; *Karera Appeal Judgement*, para. 45; *Seromba Appeal Judgement*, para. 79.

<sup>793</sup> Trial Judgement, para. 780.

<sup>794</sup> Nizeyimana Appeal Brief, paras. 292, 297-305, 313-320. *See also* Nizeyimana Reply Brief, paras. 59, 60.

credibility as collateral and immaterial to the assessment of Witness ZAK's testimony, whereas the Defence's purpose was not to challenge the witness's credibility in general, but rather to show that his entire testimony was fabricated, that Uwambaye never existed, that Witness ZAK had not trained at the ESO as he claimed, and that the event he described never occurred.<sup>795</sup> Nizeyimana argues that, in ignoring his substantive defence, the Trial Chamber "based its decision almost uniformly on the demeanour of sole uncorroborated [Witness] ZAK"<sup>796</sup> which constitutes an error of law in light of the Appeals Chamber's jurisprudence that reliance on demeanour should be treated with caution.<sup>797</sup>

252. Nizeyimana further argues that the Trial Chamber reversed the burden of proof by requiring the Defence to adduce exhaustive evidence of his innocence.<sup>798</sup> In support of his assertion, Nizeyimana specifically contends that the Trial Chamber's assessment of Defence Witnesses OUV03 and RWV11 was erroneous.<sup>799</sup> In Nizeyimana's view, the Trial Chamber did not try to ascertain whether their testimonies raised a doubt about Witness ZAK's studies at the ESO, but rather suggested that the two witnesses "would have to prove they did not know [Witness] ZAK or the probative value of their testimony would be diminished".<sup>800</sup> Nizeyimana adds that the Trial Chamber also erred in law in speculating that Defence Witness Aloys Ntabakuze's evidence, challenging that Witness ZAK held a post in the Para Commando Battalion, might be incomplete despite the fact that this testimony corroborated other evidence.<sup>801</sup> Nizeyimana, moreover, asserts that Defence Witness Valens Hahirwa's testimony on the absence of any record of the relationship between Witness ZAK and Uwambaye was sufficient to raise a reasonable doubt on the nature of their relationship.<sup>802</sup>

253. The Prosecution responds that the Trial Chamber correctly found Nizeyimana guilty based on its assessment of Witness ZAK's testimony and that Nizeyimana's arguments should be dismissed as he merely repeats allegations that failed at trial or seeks to substitute his own position for that of the Trial Chamber.<sup>803</sup> According to the Prosecution, the Trial Chamber properly and reasonably relied on Witness ZAK's demeanour, as well as other circumstantial evidence on the

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<sup>795</sup> Nizeyimana Appeal Brief, paras. 297-302, 304. *See also* Nizeyimana Reply Brief, paras. 59, 60; AT. 28 April 2014 pp. 13, 41.

<sup>796</sup> Nizeyimana Appeal Brief, para. 302, *referring to* Trial Judgement, para. 781.

<sup>797</sup> Nizeyimana Appeal Brief, paras. 303-305.

<sup>798</sup> Nizeyimana Appeal Brief, paras. 313, 315-318, 320.

<sup>799</sup> Nizeyimana Appeal Brief, para. 316.

<sup>800</sup> Nizeyimana Appeal Brief, para. 316. *See also* AT. 28 April 2014 p. 41.

<sup>801</sup> Nizeyimana Appeal Brief, para. 317. *See also* AT. 28 April 2014 p. 41.

<sup>802</sup> Nizeyimana Appeal Brief, para. 318. *See also* AT. 28 April 2014 p. 41.

<sup>803</sup> Prosecution Response Brief, paras. 140, 141, 145, 146, 148-151. *See also* AT. 28 April 2014 pp. 31, 32.

record, to find his account of this incident credible and reliable.<sup>804</sup> The Prosecution further submits that, given the convincing and reliable first-hand testimony of Witness ZAK, the Trial Chamber properly found the Defence evidence to be of limited probative value.<sup>805</sup>

254. The Appeals Chamber recalls that trial chambers enjoy broad discretion, when faced with competing versions of the same event, in choosing which version they consider more credible and which witness testimony to prefer,<sup>806</sup> as well as in assessing the impact on witness credibility of inconsistencies within or between witnesses' testimonies and prior statements.<sup>807</sup> The Appeals Chamber further recalls that mere assertions that the trial chamber failed to give sufficient weight to certain evidence, or that it should have interpreted evidence in a particular manner, may be summarily dismissed.<sup>808</sup>

255. Contrary to Nizeyimana's assertions, the Trial Chamber expressly considered the Defence theory that Witness ZAK fabricated his account of Uwambaye's killing.<sup>809</sup> The Trial Chamber acknowledged that the Defence challenged the reliability of Witness ZAK's testimony and that Witnesses OUV03, RVW11, Ntabakuze, Hahirwa provided relevant evidence,<sup>810</sup> and carefully addressed each of the challenges raised by the Defence, including the arguments that Witness ZAK: (i) did not train at the ESO in the early 1990s;<sup>811</sup> (ii) was never part of the Para Commando Battalion;<sup>812</sup> and (iii) did not participate in a formal ceremony with Uwambaye in October 1993.<sup>813</sup>

256. In particular, the Trial Chamber extensively analysed and assessed the evidence provided by Witnesses OUV03 and RWV11, which was intended to raise a doubt about Witness ZAK's testimony that he trained at the ESO from late 1990 to early 1991 (when Nizeyimana was the ESO's S2/S3 officer), and to undermine the reliability of the witness's identification of Nizeyimana in 1994.<sup>814</sup> The Trial Chamber found that Witness OUV03 was equivocal when testifying about the date of his service at the ESO, that neither Witness OUV03 nor Witness RWV11 was a member of

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<sup>804</sup> Prosecution Response Brief, paras. 140, 141, 146, 148. *See also* AT. 28 April 2014 pp. 31, 32.

<sup>805</sup> Prosecution Response Brief, paras. 149, 150. *See also* AT. 28 April 2014 pp. 31, 32.

<sup>806</sup> *See Ndahimana* Appeal Judgement, paras. 46, 93; *Ntabakuze* Appeal Judgement, fn. 523; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29 ("Where testimonies are divergent, it is the duty of the Trial Chamber, which heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit.") (internal reference omitted).

<sup>807</sup> *Kalimanzira* Appeal Judgement, para. 105.

<sup>808</sup> *Nchamihigo* Appeal Judgement, para. 157; *Krajišnik* Appeal Judgement, para. 27.

<sup>809</sup> *See* Trial Judgement, para. 770.

<sup>810</sup> Trial Judgement, para. 761.

<sup>811</sup> Trial Judgement, paras. 771-773.

<sup>812</sup> Trial Judgement, paras. 774-778.

<sup>813</sup> Trial Judgement, paras. 779, 780.

<sup>814</sup> Trial Judgement, paras. 771, 772. The Trial Judgement refers to Witness ZAK's testimony that he recognised Nizeyimana because Nizeyimana had been the ESO's S2/S3 officer when the witness was a cadet there from late 1990 to early 1991. *See* Trial Judgement, paras. 762, 771.



the same intake into the ESO of which Witness ZAK claimed to be part, making the timing of it less significant than it would have been to Witness ZAK, and that it had concerns about the credibility of Witnesses OUV03 and RWV11.<sup>815</sup> The Trial Chamber determined that Witnesses OUV03 and RWV11 failed to raise a reasonable doubt in Witness ZAK's compelling account that he was an ESO student in the early 1990s and that he could identify Nizeyimana.<sup>816</sup> The Appeals Chamber finds no error in the Trial Chamber's analysis or in how it exercised its discretion.

257. The Appeals Chamber finds equally unmeritorious Nizeyimana's contention that the Trial Chamber reversed the burden of proof by considering that Witnesses OUV03 and RWV11 could not be found credible unless they affirmatively established that they did not know Witness ZAK. In the view of the Appeals Chamber, Nizeyimana's contention is based on an erroneous interpretation of the Trial Chamber's observation that "Witnesses OUV03 and RWV11 were not questioned as to whether they knew Witness ZAK as an ESO cadet".<sup>817</sup> The Appeals Chamber does not consider that observation as requiring the Defence to produce affirmative evidence of Nizeyimana's innocence, as Nizeyimana implies. Nizeyimana fails to substantiate his claim that the Trial Chamber's observation amounted to a reversal of the burden of proof or that it served as the basis for drawing inferences against him. The Appeals Chamber dismisses Nizeyimana's arguments in this regard.

258. The Appeals Chamber further rejects Nizeyimana's challenges to the Trial Chamber's assessment of Witness Ntabakuze's testimony. The Trial Chamber addressed the testimony of Witness Ntabakuze, through which, *inter alia*, Nizeyimana attempted to contest Witness ZAK's testimony that Nizeyimana held a post in the Para Commando Battalion.<sup>818</sup> In particular, the Defence had presented Witness Ntabakuze, who was the Commander of the Para Commando Battalion during the relevant period, with a social security fund sheet, which, according to Ntabakuze, listed all soldiers for the second company of the Para Commando Battalion for the second quarter of 1993.<sup>819</sup> The Trial Chamber noted that Witness ZAK was not listed on this document,<sup>820</sup> but, upon due consideration, found that Witness Ntabakuze's testimony did not demonstrate that it would necessarily list every soldier who worked in the second company during the second quarter of 1993.<sup>821</sup> Nizeyimana challenges this finding as speculative and erroneous, but he fails to demonstrate that no reasonable trier of fact could have reached the same conclusion as

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<sup>815</sup> Trial Judgement, para. 772. Elsewhere in the Trial Judgement, the Trial Chamber observed that the witnesses had considerable professional links with Nizeyimana and expressed concerns as to their credibility. *See, e.g.*, Trial Judgement, paras. 1289, 1290, 1355, 1360-1364.

<sup>816</sup> Trial Judgement, para. 772.

<sup>817</sup> Trial Judgement, para. 772.

<sup>818</sup> Trial Judgement, paras. 774-778.

<sup>819</sup> Trial Judgement, para. 775.

<sup>820</sup> Trial Judgement, para. 775.

the Trial Chamber. Nizeyimana, in essence, argues that the Trial Chamber should have preferred the Defence's theory about the probative value of Witness Ntabakuze's testimony and the social security fund sheet, without offering any reasons why the Trial Chamber's assessment was erroneous. The Appeals Chamber, therefore, dismisses Nizeyimana's challenges.

259. For the same reasons, the Appeals Chamber rejects Nizeyimana's argument that Witness Hahirwa's testimony was sufficient to raise a reasonable doubt about the nature of the relationship between Witness ZAK and Uwambaye. Nizeyimana's argument amounts to a mere assertion that does not demonstrate how the Trial Chamber erred in its evaluation of the relevant Defence evidence.<sup>822</sup> As such, his argument is summarily dismissed.<sup>823</sup>

260. Equally meritless is Nizeyimana's assertion that the Trial Chamber erred in relying heavily on Witness ZAK's in-court demeanour in finding his testimony more credible than the Defence witnesses. On this matter, the Appeals Chamber recalls that a trial chamber may take into account a witness's demeanour in court as one of multiple factors in its assessment of the witness's credibility.<sup>824</sup> As the Appeals Chamber has stated before, "The assessment of the demeanour of witnesses in considering their credibility is one of the fundamental functions of a Trial Chamber to which the Appeals Chamber must accord considerable deference".<sup>825</sup>

261. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's assessment of the Defence evidence relating to the killing of Uwambaye.

### 3. Conclusion

262. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana's Twenty-First through Twenty-Third Grounds of Appeal, and his Forty-Third and Forty-Fourth Grounds of Appeal, in part.

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<sup>821</sup> Trial Judgement, paras. 777, 778.

<sup>822</sup> See Trial Judgement, para. 780.

<sup>823</sup> See *Nchamihigo* Appeal Judgement, para. 157.

<sup>824</sup> *Kanyarukiga* Appeal Judgement, para. 121; *Nchamihigo* Appeal Judgement, para. 47; *Nahimana et al.* Appeal Judgement, para. 194.

<sup>825</sup> *Muvunyi* Appeal Judgement of 1 April 2011, para. 26, and authorities cited therein.

**H. Killing of Pierre Claver Karenzi at the Hotel Faucon Roadblock (Grounds 25-28, and 42 and 43, in part)**

263. The Trial Chamber convicted Nizeyimana of committing genocide, murder as a crime against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6(1) of the Statute, for participating in the basic form of a joint criminal enterprise based, in part, on his involvement in the killing of Pierre Claver Karenzi at the Hotel Faucon roadblock around 21 April 1994.<sup>826</sup>

264. The Trial Chamber found that Karenzi, a Tutsi lecturer at Butare University and a prominent figure in Butare town, was shot by an ESO soldier at the Hotel Faucon roadblock after he had been taken from his home.<sup>827</sup> The Trial Chamber observed that there was no direct evidence demonstrating that Nizeyimana ordered or authorized this killing.<sup>828</sup> However, it concluded that the only reasonable inference was that the instructions Nizeyimana issued to ESO soldiers to kill Tutsis at a nearby roadblock were transmitted and issued to the Hotel Faucon roadblock.<sup>829</sup> On this basis, the Trial Chamber found that Nizeyimana approved of and authorized the killings at the Hotel Faucon roadblock which significantly and substantially contributed to Karenzi's killing.<sup>830</sup>

265. Nizeyimana challenges his conviction in relation to the killing of Karenzi.<sup>831</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing: (i) the notice of Nizeyimana's mode of liability; and (ii) the evidence of his role in the killing.

1. Notice

266. Nizeyimana submits that the Trial Chamber erred in finding him responsible in relation to the killing of Karenzi as an aider and abettor.<sup>832</sup>

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<sup>826</sup> Trial Judgement, paras. 1534, 1539, 1565, 1566, 1579, 1581. The Trial Chamber also found that Nizeyimana could have been convicted for aiding and abetting the killing of Karenzi, but considered that his liability was most appropriately characterized as participating in a joint criminal enterprise. *See* Trial Judgement, para. 1534.

<sup>827</sup> Trial Judgement, para. 1529. *See also* Trial Judgement, paras. 605, 615, 622.

<sup>828</sup> Trial Judgement, para. 1532. *See also* Trial Judgement, para. 599.

<sup>829</sup> Trial Judgement, para. 1533.

<sup>830</sup> Trial Judgement, paras. 1532, 1533.

<sup>831</sup> Nizeyimana Notice of Appeal, paras. 77-82; Nizeyimana Appeal Brief, paras. 323-362. *See also* AT. 28 April 2014 pp. 3, 7, 8, 10, 11, 16, 40.

<sup>832</sup> Nizeyimana Notice of Appeal, para. 77; Nizeyimana Appeal Brief, paras. 324-339. *See also* Nizeyimana Reply Brief, paras. 65, 66; AT. 28 April 2014 p. 3. The Appeals Chamber notes that Nizeyimana also challenges his responsibility under the basic form of joint criminal enterprise and the notice of this mode of liability. *See* Nizeyimana Notice of Appeal, para. 77; Nizeyimana Appeal Brief, para. 326 (*referring to* Nizeyimana Ground 39). These arguments are addressed elsewhere in this Judgement. *See infra* Section III.J.

267. The Prosecution responds that Nizeyimana was not convicted under the mode of liability of aiding and abetting but on the basis of his participation in a joint criminal enterprise alone.<sup>833</sup>

268. A review of the Trial Judgement reflects that, while the Trial Chamber considered that Nizeyimana's role in the killing of Karenzi could be characterized as aiding and abetting, he was only convicted for his participation in the basic form of a joint criminal enterprise.<sup>834</sup> Furthermore, the characterization of Nizeyimana's role as an aider and abettor with regard to this killing was not considered by the Trial Chamber in sentencing.<sup>835</sup> Accordingly, the Appeals Chamber need not address Nizeyimana's argument that he did not receive sufficient notice that he was charged with aiding and abetting this crime, as he was not convicted pursuant to this form of responsibility.

## 2. Assessment of the Evidence

269. The Trial Chamber noted the absence of direct evidence of Karenzi's murder<sup>836</sup> and of Nizeyimana's involvement therein.<sup>837</sup> It however found that the only reasonable conclusion available from the circumstantial and the "particularly strong" hearsay evidence of Prosecution Witnesses AZD and AZM was that Karenzi was shot and killed by an ESO soldier in charge of security at the Hotel Faucon roadblock.<sup>838</sup> The Trial Chamber further found that the only reasonable inference that could be drawn from the evidence that on the same day Nizeyimana issued instructions to kill two Tutsis to ESO soldiers at a nearby roadblock, at the junction of the Gikongoro/Cyangugu and Kigali roads, was that Nizeyimana's instructions were necessarily transmitted and that he similarly approved of and authorized the killing of Tutsis at the Hotel Faucon roadblock.<sup>839</sup>

270. Nizeyimana submits that the Trial Chamber erred in finding him responsible for the killing of Karenzi despite the absence of any evidence that he ordered it.<sup>840</sup> Nizeyimana contends that the Trial Chamber failed to provide clear reasoning as to how the factors considered necessarily led to a finding of guilt.<sup>841</sup> Nizeyimana further avers that the inference that he must have ordered or

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<sup>833</sup> Prosecution Response Brief, paras. 154, 155; AT. 28 April 2014 pp. 27, 28.

<sup>834</sup> Trial Judgement, paras. 1534, 1539, 1565, 1566, 1579.

<sup>835</sup> See Trial Judgement, paras. 1592-1598.

<sup>836</sup> Trial Judgement, paras. 612, 620.

<sup>837</sup> Trial Judgement, paras. 599, 1532.

<sup>838</sup> Trial Judgement, para. 622.

<sup>839</sup> Trial Judgement, para. 1533.

<sup>840</sup> Nizeyimana Notice of Appeal, para. 77, referring to Trial Judgement, para. 1534; Nizeyimana Appeal Brief, paras. 340-351. See also Nizeyimana Reply Brief, para. 69.

<sup>841</sup> Nizeyimana Appeal Brief, para. 346. The Appeals Chamber also notes Nizeyimana's argument that the Trial Chamber failed to make findings on his *mens rea* and that there was no evidence that he had knowledge that the killing of Karenzi could or would have occurred. See Nizeyimana Appeal Brief, para. 350. The Appeals Chamber notes that this argument exceeds the scope of Nizeyimana's Notice of Appeal. It further observes that the Prosecution did not

authorized the killing of Karenzi was not the only reasonable inference available from the evidence.<sup>842</sup> Nizeyimana underlines that, considering the scope of the violence at the time, it could not be presumed that, if an ESO soldier killed someone, it had to have been ordered or approved by Nizeyimana.<sup>843</sup>

271. Nizeyimana also contends that the Trial Chamber impermissibly used propensity arguments when concluding that his conduct at a geographically proximate roadblock was sufficient to establish that he similarly approved of and authorized the killings of Tutsis at the Hotel Faucon roadblock.<sup>844</sup> Nizeyimana further submits that the Trial Chamber speculated about the existence of a network of roadblocks and the fact that instructions were transmitted from one roadblock to another, especially since there was no evidence that the killing of Rwekaza and the attack on Witness ZAV at the nearby roadblock occurred before the killing of Karenzi at the Hotel Faucon roadblock.<sup>845</sup>

272. Nizeyimana further argues that the Trial Chamber erred in failing to consider his alibi in relation to the killing of Karenzi.<sup>846</sup> He contends that the Trial Chamber failed to make explicit findings as to the date of this killing when it stated that it occurred “around 21 April 1994”.<sup>847</sup> He submits that the Trial Chamber impermissibly avoided direct contradiction with the alibi while, at the same time, it found that the killing of Karenzi occurred on the same day as the killing of Rwekaza and the attack on Witness ZAV at the nearby roadblock, to support the inference of guilt.<sup>848</sup>

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respond to this allegation and that, in any case, the Trial Chamber made express findings that Nizeyimana approved of or authorized the killings of Tutsis at the Hotel Faucon roadblock, which included Karenzi, and that Nizeyimana had genocidal intent, in the legal findings on the killing of Karenzi. *See* Trial Judgement, paras. 1533, 1534. The Appeals Chamber will therefore not address this argument.

<sup>842</sup> Nizeyimana Notice of Appeal, para. 78, *referring to* Trial Judgement, paras. 1532, 1533; Nizeyimana Appeal Brief, paras. 341-344. *See also* AT. 28 April 2014 pp. 10, 11, 40.

<sup>843</sup> Nizeyimana Appeal Brief, para. 343.

<sup>844</sup> Nizeyimana Appeal Brief, para. 349. *See also* Nizeyimana Notice of Appeal, para. 112; Nizeyimana Appeal Brief, paras. 582-590; AT. 28 April 2014 pp. 16, 40.

<sup>845</sup> Nizeyimana Appeal Brief, paras. 345, 347, 348. *See also* Nizeyimana Reply Brief, paras. 68, 69; AT. 28 April 2014 pp. 10, 11, 40.

<sup>846</sup> Nizeyimana Notice of Appeal, paras. 80, 81; Nizeyimana Appeal Brief, paras. 355-361. *See also* AT. 28 April 2014 pp. 7, 8.

<sup>847</sup> Nizeyimana Appeal Brief, para. 356, *referring to* Trial Judgement, paras. 605, 619, 621, 1529. *See also* AT. 28 April 2014 pp. 7, 8.

<sup>848</sup> Nizeyimana Appeal Brief, paras. 355, 357. *See also* AT. 28 April 2014 pp. 7, 8. Nizeyimana also submits that the Trial Chamber erred in relying on the evidence of Witness AZD who was not credible, without viewing it with the appropriate caution. Nizeyimana Notice of Appeal, para. 79; Nizeyimana Appeal Brief, paras. 352-354, *referring to* Nizeyimana Appeal Brief, Chapter 1.2. The Appeals Chamber recalls that it has already dismissed Nizeyimana’s specific challenges to the assessment of Witness AZD’s evidence elsewhere in this Judgement. *See supra* Sections III.A, III.B.2.(c), III.E.2. Nizeyimana generally asserts that the Trial Chamber incorrectly applied a double standard of assessment of the evidence. Nizeyimana Notice of Appeal, para. 114; Nizeyimana Appeal Brief, paras. 591-596, *referring to, inter alia*, Nizeyimana Appeal Brief, paras. 349, 357. The Appeals Chamber summarily dismisses this

273. The Prosecution responds that the Trial Chamber reasonably accepted the evidence of Witnesses AZD and AZM in relation to the killing of Karenzi.<sup>849</sup> The Prosecution contends that Nizeyimana's superior position, considerable authority, presence, direct order, and approval or authorization of the targeted killings of Tutsis made it possible for perpetrators to carry out criminal acts.<sup>850</sup> It highlights that Nizeyimana gave direct orders to kill Tutsis at other roadblocks around the same time, and in the same area.<sup>851</sup> The Prosecution avers that Nizeyimana's alternative inferences are baseless and unreasonable.<sup>852</sup>

274. The Appeals Chamber observes that the Trial Chamber expressly noted that there was no direct evidence demonstrating that Nizeyimana ordered or authorized the killing of Karenzi.<sup>853</sup> In determining Nizeyimana's significant contribution to the joint criminal enterprise to kill Karenzi, the Trial Chamber relied on circumstantial evidence.<sup>854</sup> The factors relied upon by the Trial Chamber included that: (i) the Hotel Faucon roadblock was among a network of geographically proximate roadblocks manned by ESO soldiers; (ii) Tutsis were targeted in an open and notorious manner at these roadblocks; and (iii) Nizeyimana issued instructions, the exact same day, at the nearby roadblock at the Gikongoro/Cyangugu and Kigali roads junction.<sup>855</sup> The Trial Chamber found that the only reasonable inference was that the instructions which Nizeyimana issued at the Gikongoro/Cyangugu and Kigali roads junction roadblock "were necessarily transmitted and consistent with those issued to the Hotel Faucon roadblock" and that this established that he approved of and authorized the killings of Tutsis at that roadblock as well, and therefore, by implication, the killing of Karenzi.<sup>856</sup>

275. While the factors relied upon by the Trial Chamber could reasonably have given rise to the inference that Nizeyimana approved of or authorized the killing of Tutsis at the Hotel Faucon roadblock, and therefore Karenzi's killing, the Appeals Chamber is not convinced that it was the only reasonable inference available from the evidence. Unlike the killing of Remy Rwekaza and Beata Uwambaye and the attack on Witness ZAV, where the Trial Chamber found that Nizeyimana was present and ordered the killings,<sup>857</sup> there is no direct evidence of Nizeyimana's presence or

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argument as Nizeyimana fails to develop it, and mere assertions that a trial chamber failed to give sufficient weight to certain evidence, or that it should have interpreted evidence in a particular manner, are liable to be summarily dismissed. *See, e.g., Nchamihigo Appeal Judgement, para. 157.*

<sup>849</sup> Prosecution Response Brief, paras. 158, 159, 162. *See also* AT. 28 April 2014 p. 28.

<sup>850</sup> Prosecution Response Brief, para. 158.

<sup>851</sup> Prosecution Response Brief, para. 158.

<sup>852</sup> Prosecution Response Brief, paras. 159-161. *See also* AT. 28 April 2014 p. 29.

<sup>853</sup> Trial Judgement, para. 1532. *See also* Trial Judgement, para. 599.

<sup>854</sup> Trial Judgement, paras. 1532-1534.

<sup>855</sup> Trial Judgement, paras. 1532, 1533.

<sup>856</sup> Trial Judgement, para. 1533.

<sup>857</sup> *See* Trial Judgement, paras. 1519, 1520.

involvement at the Hotel Faucon roadblock<sup>858</sup> or the killing of Karenzi specifically. While the Trial Chamber was entitled to rely on circumstantial evidence, the mere facts that these roadblocks were located close to one another and a similar pattern of killings was occurring at those roadblocks are insufficient to establish, as the only reasonable inference, that Nizeyimana's orders to kill two Tutsis at the Gikongoro/Cyangugu and Kigali roads junction roadblock "were necessarily transmitted and consistent with those issued at the Hotel Faucon roadblock".<sup>859</sup> There is no evidence, direct or circumstantial, of such a transmission from one roadblock to another. The Appeals Chamber finds that other reasonable inferences can be drawn from the evidence, including that the ESO soldier who killed Karenzi acted under the direct instructions of a superior present at the Hotel Faucon roadblock, or that he did so on his own initiative. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in concluding that Nizeyimana contributed to the killing of Karenzi. It therefore need not consider the remainder of Nizeyimana's arguments in relation to this event.

### 3. Conclusion

276. For the foregoing reasons, the Appeals Chamber grants Nizeyimana's Twenty-Sixth Ground of Appeal and reverses his convictions for genocide, murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killing of Pierre Claver Karenzi at the Hotel Faucon roadblock around 21 April 1994. The impact of these reversals, if any, on sentencing will be considered in the relevant section below. The Appeals Chamber dismisses Nizeyimana's Twenty-Fifth, Twenty-Seventh, and Twenty-Eighth Grounds of Appeal, and Forty-Second and Forty-Third Grounds of Appeal, in part.

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<sup>858</sup> The Trial Chamber found that Witness ZBH's evidence that Nizeyimana issued orders at the Hotel Faucon roadblock was "far from dispositive", particularly as it lacked sufficient details concerning when this might have taken place, and is at odds with the witness's prior confession in 2003. Trial Judgement, para. 838.

<sup>859</sup> See Trial Judgement, para. 1533.

## **I. Killing of Matabaro, Nyirinkwaya, and Others (Grounds 29-32, and 42-44, in part)**

277. The Trial Chamber convicted Nizeyimana of committing murder as a crime against humanity, and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6(1) of the Statute, for participating in the basic form of a joint criminal enterprise based, in part, on his involvement in the killings of persons taken from the Matabaro and Nyirinkwaya households.<sup>860</sup> Furthermore, the Trial Chamber found that Nizeyimana could bear superior responsibility, pursuant to Article 6(3) of the Statute, for this event and indicated that it would take this into account in sentencing.<sup>861</sup>

278. The Trial Chamber found that, around 22 April 1994, persons taken from the Matabaro and Nyirinkwaya households were killed by ESO soldiers, in Nizeyimana's presence, based on his instructions, and with his express approval.<sup>862</sup> The Trial Chamber observed that Nizeyimana accompanied a number of ESO soldiers who forcibly removed members of Deputy Prosecutor Jean Baptiste Matabaro's family and persons staying at his home, as well as those civilians who fled to and were staying at the nearby home of Sub-Prefect Zéphanie Nyirinkwaya.<sup>863</sup> The soldiers separated the male heads of households, including Matabaro and Nyirinkwaya, from the group and shot and killed them.<sup>864</sup> The soldiers subsequently opened fire on the others in the group, killing a number of them.<sup>865</sup> The Trial Chamber found that Nizeyimana's presence at the incident, and the instructions he issued, amounted to a significant and substantial contribution to the killings.<sup>866</sup>

279. Nizeyimana challenges his conviction based on these killings.<sup>867</sup> In this section, the Appeals Chamber considers Nizeyimana's arguments that the Trial Chamber erred in: (i) failing to recall Prosecution Witnesses BZC, BXF, and ZBJ for cross-examination based on prior inconsistent statements obtained from Canadian immigration authorities after their testimony in this case; (ii) unreasonably excusing major inconsistencies in the testimonies of Witnesses BZC and BXF;

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<sup>860</sup> Trial Judgement, paras. 1559, 1565, 1566, 1578, 1581. The Trial Chamber found that Nizeyimana could have been convicted for aiding and abetting pursuant to Article 6(1) of the Statute for the killings of those taken from the Matabaro and Nyirinkwaya households, but considered that his liability was most appropriately characterized as participating in a basic joint criminal enterprise. *See* Trial Judgement, para. 1559.

<sup>861</sup> Trial Judgement, paras. 1560, 1561, 1567, 1580.

<sup>862</sup> Trial Judgement, paras. 704, 730, 736, 737, 1538, 1554, 1558.

<sup>863</sup> Trial Judgement, paras. 669, 670, 1554.

<sup>864</sup> Trial Judgement, para. 1555. *See also* Trial Judgement, para. 735.

<sup>865</sup> Trial Judgement, paras. 671, 737, 1555.

<sup>866</sup> Trial Judgement, paras. 736, 1558.

<sup>867</sup> Nizeyimana Notice of Appeal, paras. 83-88; Nizeyimana Appeal Brief, paras. 363-414. *See also* AT. 28 April 2014 pp. 7, 8, 11, 12, 16, 17, 38, 40, 41.



(iii) violating the presumption of innocence and shifting the burden of proof in its assessment of the credibility of the evidence; and (iv) assessing the date of the murders in the context of his alibi.<sup>868</sup>

### 1. Failure to Recall Witnesses

280. Witnesses BZC, BXF, and ZBJ were among those taken from the Matabaro compound during this incident.<sup>869</sup> They each identified Nizeyimana as being present at the Matabaro compound with ESO soldiers who guarded his neighbouring home, and, with the exception of Witness ZBJ, were present when soldiers fired upon the group.<sup>870</sup> The Trial Chamber considered that all three witnesses knowingly obtained and used false immigration documents in order to travel, which it held warranted “cautious and careful scrutiny of their evidence”, but concluded that they had no incentive to lie to the Trial Chamber or implicate Nizeyimana,<sup>871</sup> or had anything to gain, and that they testified despite security concerns.<sup>872</sup> The Trial Chamber concluded that their evidence was “individually and collectively, compelling”.<sup>873</sup>

281. Following the close of trial, the Canadian immigration authorities disclosed to Nizeyimana immigration documents relating to Witnesses BZC, BXF, and ZBJ.<sup>874</sup> Nizeyimana filed a motion seeking to recall these witnesses on the basis of inconsistencies between their respective immigration files and their testimonies at trial.<sup>875</sup> The Trial Chamber dismissed Nizeyimana’s motion, reasoning that the Defence had not demonstrated circumstances that warranted the recall of these witnesses to avoid prejudice.<sup>876</sup>

282. Nizeyimana submits that the Trial Chamber abused its discretion in denying his motion.<sup>877</sup> He asserts that the witnesses provided different accounts of this event involving Nizeyimana to the Canadian Immigration and Refugee Board (“Canadian Immigration Board”), which would have

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<sup>868</sup> Nizeyimana also submits that the Trial Chamber erred in relying on other crimes to infer his guilt in relation to this event. Nizeyimana Appeal Brief, para. 588, *referring to* Trial Judgement, paras. 734, 735. Since he does not expand on it, the Appeals Chamber summarily dismisses this argument.

<sup>869</sup> *See* Trial Judgement, paras. 630-633, 637, 638, 642-644, 672, 687.

<sup>870</sup> *See* Trial Judgement, paras. 630-633, 635-638, 642-644, 672, 687.

<sup>871</sup> Trial Judgement, paras. 680-683, *referring to, inter alia*, Witness BXF, T. 22 February 2011 pp. 29-31, 36 (closed session); Witness BZC, T. 22 February 2011 pp. 66, 67 (closed session); Witness ZBJ, T. 25 February 2011 pp. 19-21 (closed session).

<sup>872</sup> Trial Judgement, paras. 682-684, fn. 1769.

<sup>873</sup> Trial Judgement, paras. 686, 687.

<sup>874</sup> *See The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Confidential Decision on Nizeyimana Defence Motion to Recall Witnesses BXF, BZC and ZBJ, 7 May 2012 (“Trial Decision of 7 May 2012”), para. 7.

<sup>875</sup> *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-PT, Confidential Nizeyimana Defence Motion to Recall Witnesses BXF, BZC and ZBJ, 17 February 2012 (“Recall Motion of 17 February 2012”), paras. 1-3, 8, 32, 33, 35-52, 63. *See* Trial Decision of 7 May 2012, para. 8.

<sup>876</sup> Trial Decision of 7 May 2012, paras. 9-38. *See also* Trial Judgement, para. 695.

<sup>877</sup> Nizeyimana Notice of Appeal, para. 83; Nizeyimana Appeal Brief, paras. 364-368, 380; AT. 28 April 2014 p. 7. *See also* Nizeyimana Appeal Brief, paras. 375, 406.

necessarily impacted their credibility,<sup>878</sup> and that he was consequently deprived of his fair trial rights.<sup>879</sup>

283. Nizeyimana further argues that the Trial Chamber pre-determined that Witness ZBJ was credible, rendering a recall unnecessary,<sup>880</sup> and failed to consider the contradictory version of events and other evidence presented by Nizeyimana, stating instead that he failed to introduce these documents “for any other purpose”.<sup>881</sup> Nizeyimana claims that the Trial Chamber misconstrued his motion in considering that he wanted to file the Canadian Immigration Board’s decisions to bind the Trial Chamber to its findings on the credibility of these witnesses, whereas he was in fact seeking the admission of these materials to use in cross-examining the witnesses on prior inconsistencies.<sup>882</sup> Furthermore, Nizeyimana asserts that the Trial Chamber unreasonably refused to transcribe the refugee hearings, which deprived the Trial Chamber and him of the opportunity to consider the full scope of the contradictions between Witnesses ZBJ and BXF.<sup>883</sup>

284. The Prosecution responds that Nizeyimana’s challenges should be dismissed in their entirety, as he attempts to re-litigate arguments which were unsuccessful at trial, based on vague assertions, and to substitute the Trial Chamber’s reasonable findings with his own self-serving conclusions.<sup>884</sup> It argues that the Trial Chamber fully justified its decision not to recall the witnesses, and that Nizeyimana’s “scant arguments” do not demonstrate an error warranting appellate intervention.<sup>885</sup> The Prosecution submits that Nizeyimana makes no argument demonstrating any prejudice suffered, and that he does not explain why he did not seek the admission of the documents as exhibits at trial, or refer to the fact that the witnesses were examined on these contradictions and that the Trial Chamber considered and rejected them.<sup>886</sup> Furthermore, the Prosecution underscores that Nizeyimana did not challenge the Trial Decision of 7 May 2012,

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<sup>878</sup> Nizeyimana Appeal Brief, paras. 368, 380, 382; AT. 28 April 2014 p. 7.

<sup>879</sup> Nizeyimana Appeal Brief, paras. 368-370, 381; AT. 28 April 2014 p. 7. *See also* Nizeyimana Appeal Brief, paras. 371, 372, *referring to* Recall Motion of 17 February 2012, paras. 32-59; Nizeyimana Reply Brief, paras. 70, 71.

<sup>880</sup> Nizeyimana Appeal Brief, para. 376, *referring to* Trial Decision of 7 May 2012, para. 31.

<sup>881</sup> Nizeyimana Appeal Brief, para. 376, *referring to* Trial Judgement, para. 695. Nizeyimana contends that Witness ZBJ testified in court that she hid under a bed and heard gunshots, whereas her Canadian immigration documents stated that she was an eyewitness to the entire scene, and did not mention Nizeyimana. Nizeyimana Appeal Brief, paras. 373, 374. Nizeyimana reiterates that the appropriate remedy in such circumstances is the recall of witnesses and not the introduction of material into evidence. Nizeyimana Appeal Brief, paras. 376, 378; Nizeyimana Reply Brief, para. 72. Nizeyimana further contends that the Trial Chamber’s reliance on a decision rendered in the *Setako* trial, in the Trial Decision of 7 May 2012, was erroneous since the issues are different. Nizeyimana Reply Brief, para. 73, *referring to The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Decision on Defence Request to Admit a Document, 15 October 2009, paras. 4-7. Because Nizeyimana raised this contention for the first time in his Reply Brief, and thereby deprived the Prosecution of an opportunity to respond, the Appeals Chamber will not address it.

<sup>882</sup> Nizeyimana Appeal Brief, para. 377.

<sup>883</sup> Nizeyimana Appeal Brief, paras. 379, 380, *referring to* Trial Decision of 7 May 2012, para. 39.

<sup>884</sup> Prosecution Response Brief, paras. 2, 3, 5, 167, 170, 172. *See also* AT. 28 April 2014 p. 30.

<sup>885</sup> Prosecution Response Brief, paras. 168, 169, 171. *See also* AT. 28 April 2014 p. 30.

<sup>886</sup> Prosecution Response Brief, para. 172. *See also* AT. 28 April 2014 pp. 29, 30.

thereby waiving his right to do so and that, therefore, his arguments should be summarily dismissed.<sup>887</sup>

285. The Appeals Chamber notes that Nizeyimana did not seek reconsideration or certification to appeal the Trial Decision of 7 May 2012. A party cannot remain silent on a matter and forego direct review of an interlocutory decision only to return to this matter in the appeal from final judgement and seek a remedy, as Nizeyimana attempts to do in this case.<sup>888</sup> Nonetheless, in the interests of justice and given the importance of safeguarding fair trial rights, the Appeals Chamber will consider Nizeyimana's arguments under this ground of appeal.

286. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in the conduct of proceedings before them,<sup>889</sup> including in their determination of the necessity to recall witnesses.<sup>890</sup> This discretion must be exercised consistently with Articles 19 and 20 of the Statute, which require trial chambers to ensure that trials are fair and expeditious.<sup>891</sup> In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.<sup>892</sup> The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.<sup>893</sup>

287. In the Trial Decision of 7 May 2012, the Trial Chamber noted that the Defence exercised due diligence in retrieving the immigration records of the three witnesses,<sup>894</sup> and conscientiously analysed the Defence submissions,<sup>895</sup> reasonably concluding that a recall in each instance was

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<sup>887</sup> Prosecution Response Brief, para. 173. Nizeyimana replies that he raised an issue with regard to the Trial Decision of 7 May 2012 for the first time in his Closing Brief. Nizeyimana Reply Brief, para. 74, *referring to* Nizeyimana Closing Brief, para. 226. The Appeals Chamber dismisses this argument as illogical, since the Trial Decision of 7 May 2012 was rendered after Nizeyimana's Closing Brief was filed on 8 November 2011.

<sup>888</sup> *See Tadić* Appeal Judgement, para. 55. *See also André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007, para. 6.

<sup>889</sup> *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19. *See also Rukundo* Appeal Judgement, para. 147; *Nchamihigo* Appeal Judgement, para. 18.

<sup>890</sup> *See, e.g., Ndindiliyimana et al.* Appeal Judgement, para. 23, *referring to The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 8.

<sup>891</sup> *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19. *See also Nchamihigo* Appeal Judgement, para. 18; *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 22.

<sup>892</sup> *See, e.g., Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19; *Renzaho* Appeal Judgement, paras. 143, 175; *Nchamihigo* Appeal Judgement, para. 18.

<sup>893</sup> *See, e.g., Ndahimana* Appeal Judgement, para. 14; *Renzaho* Appeal Judgement, para. 143; *Kalimanzira* Appeal Judgement, para. 14; *Nchamihigo* Appeal Judgement, para. 18. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 6.

<sup>894</sup> Trial Decision of 7 May 2012, para. 7.

<sup>895</sup> Trial Decision of 7 May 2012, paras. 9-38. *See also* Recall Motion of 17 February 2012, paras. 32-47.

unnecessary because either the issues were ancillary to the evidence at hand, and therefore peripheral to the credibility assessment of each witness, or that they were cumulative in nature and therefore of limited probative value.<sup>896</sup> The Trial Chamber further found that questioning these witnesses on conclusions reached by another entity, namely the Canadian Immigration Board, would be superfluous given that the witnesses would not be in a position to clarify the credibility analyses conducted by the Canadian Immigration Board.<sup>897</sup>

288. The Appeals Chamber finds that this analysis and ultimate conclusion, including the Trial Chamber's consideration of the cumulative and peripheral nature of the evidence, are consistent with the exercise of the Trial Chamber's discretionary power. The Trial Chamber reasonably assessed each Defence submission, within the context of the cross-examination of the respective witnesses, in reaching its conclusion. In this regard, the Appeals Chamber also recalls that Article 20(4)(e) of the Statute provides for the right to cross-examine witnesses, and that trial chambers "exercise control over the mode and order of interrogating witnesses",<sup>898</sup> enjoying considerable discretion in setting the parameters of cross-examination.<sup>899</sup>

289. The Appeals Chamber notes that Nizeyimana only makes specific submissions on how the Trial Chamber erred in the Trial Decision of 7 May 2012 with regard to Witness ZBJ and provides no support for his more general arguments *vis-à-vis* Witnesses BZC and BXF.<sup>900</sup> The Appeals Chamber is not convinced by Nizeyimana's argument that the Trial Chamber pre-determined Witness ZBJ's credibility rendering a recall of the witness unnecessary. The Trial Chamber expressly considered the discrepancy highlighted by Nizeyimana, with regard to whether she actually witnessed the events first-hand.<sup>901</sup> The Trial Chamber found that the other information contained in her personal information sheet was "generally consistent" with her testimony and that further cross-examination on her whereabouts during the shooting would be unnecessary, as it would not affect her testimony that Nizeyimana was present at the Matabaro house and that members of that family and others were killed.<sup>902</sup>

290. The Appeals Chamber finds that the Trial Chamber reasonably concluded that Witness ZBJ's explanation that it was not until her hearing in Canada that she understood that she

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<sup>896</sup> Trial Decision of 7 May 2012, paras. 19, 23, 38.

<sup>897</sup> Trial Decision of 7 May 2012, paras. 18, 19, 37, 38.

<sup>898</sup> Rule 90(F) of the Rules. *See Rukundo Appeal Judgement*, para. 133.

<sup>899</sup> *Rukundo Appeal Judgement*, para. 133; *Nahimana et al. Appeal Judgement*, para. 182.

<sup>900</sup> Nizeyimana Appeal Brief, paras. 371-383. The Appeals Chamber will consider Nizeyimana's specific arguments with regard to Witnesses BZC and BXF below. *See infra* Section III.I.2.

<sup>901</sup> Trial Decision of 7 May 2012, paras. 28, 30; Recall Motion of 17 February 2012, paras. 35, 36. *See also* Witness ZBJ, T. 25 February 2011 pp. 8, 9, 11.

<sup>902</sup> Trial Decision of 7 May 2012, paras. 30, 31.

would have to “narrate everything” about that event, and therefore she did not mention Nizeyimana’s role in her initial statement upon arriving in Canada, was “reasonable and compelling”.<sup>903</sup> Furthermore, in assessing her credibility, the Trial Chamber considered her immigration status in detail,<sup>904</sup> as well as issues of security surrounding her testimony<sup>905</sup> and suggestions of collusion between Witnesses BZC, BXF, and ZBJ.<sup>906</sup> Nizeyimana does not point to any aspect of this evidence that the Trial Chamber failed to take into account and merely suggests a different interpretation thereof. The Trial Chamber reasonably assessed the evidence, resolving the inconsistencies between the witness’s testimony and prior statement, and exercised its discretion in accepting the fundamental features of her evidence as established.<sup>907</sup> The Appeals Chamber further notes that Nizeyimana merely restates the variances between the testimony and prior statement, which he raised unsuccessfully at trial, and consequently fails to demonstrate that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber.<sup>908</sup> As Nizeyimana has failed to demonstrate that he was prejudiced by not being able to cross-examine the witnesses regarding their immigration statements, the Appeals Chamber finds that his arguments regarding the admission of these documents are likewise unsuccessful.

291. Regarding the Trial Chamber’s decision not to recall the witnesses on the basis of the decisions of the Canadian Immigration Board, the Appeals Chamber finds that the Trial Chamber did not misconstrue Nizeyimana’s submission. Contrary to his argument, it did not deny the recall solely on the basis that it is not bound by the decisions of other entities, but also because it considered that questioning these witnesses on conclusions reached by the Canadian Immigration Board would be superfluous given that the witnesses would not be in a position to clarify the credibility analyses conducted by the Canadian Immigration Board.<sup>909</sup>

292. Furthermore, Nizeyimana provides no support for his argument that the Trial Chamber was unreasonable in its refusal to order a transcription of the Canadian immigration hearings. The Trial Chamber reasonably considered that such transcripts would merely confirm information already

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<sup>903</sup> Trial Judgement, paras. 691, 692.

<sup>904</sup> Trial Judgement, paras. 680-683.

<sup>905</sup> Trial Judgement, para. 684.

<sup>906</sup> Trial Judgement, paras. 685, 686.

<sup>907</sup> Cf. *Kanyarukiga* Appeal Judgement, para. 136; *Munyakazi* Appeal Judgement, para. 51; *Setako* Appeal Judgement, para. 31; *Renzaho* Appeal Judgement, para. 269; *Rukundo* Appeal Judgement, paras. 201, 207.

<sup>908</sup> See Nizeyimana Closing Brief, paras. 223-226. See also *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11.

<sup>909</sup> Trial Decision of 7 May 2012, paras. 18, 19, 37, 38.

contained in the personal information sheets and therefore would not add anything new to the assessment.<sup>910</sup>

293. Recalling that decisions relating to the general conduct of trial proceedings are within the discretion of the Trial Chamber,<sup>911</sup> the Appeals Chamber finds that Nizeyimana has failed to demonstrate that the Trial Chamber committed a discernible error or abused its discretion in refusing to recall Witnesses BZC, BXF, and ZBJ. Therefore, the Appeals Chamber dismisses his attempts to re-litigate arguments that did not succeed at trial.<sup>912</sup>

## 2. Inconsistencies in the Evidence of Witnesses BZC and BXF

294. The Trial Chamber considered Nizeyimana's challenges in relation to the inconsistencies between the prior statements of the Prosecution witnesses and their testimonies at trial, including, *inter alia*, the inconsistencies between Witnesses BZC's and ZBJ's statements to the Canadian Immigration Board and their respective testimonies.<sup>913</sup> The Trial Chamber concluded that the discrepancies were immaterial and accepted the witnesses' explanations for their omissions, including that the Canadian Immigration Board appeared "disinterested" in genocide-related activities, which was circumstantially corroborated by Witness BXF.<sup>914</sup>

295. Nizeyimana submits that the Trial Chamber erred in its findings that the discrepancies between the testimonies and prior statements of Witnesses BZC and BXF were immaterial.<sup>915</sup> He argues that the discrepancies relate to the narration of the events at hand and therefore undermine the witnesses' credibility.<sup>916</sup> In relation to Witness BZC, Nizeyimana asserts that his account before the Canadian Immigration Board "bore no resemblance" to his testimony at trial, demonstrating that he is "untrustworthy".<sup>917</sup> In particular, Nizeyimana argues that Witness BZC did not mention in his statement the presence of Nizeyimana.<sup>918</sup> Nizeyimana avers that Witness BXF made no reference to

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<sup>910</sup> Trial Decision of 7 May 2012, para. 39.

<sup>911</sup> *Kanyarukiga* Appeal Judgement, para. 26; *Setako* Appeal Judgement, para. 19. See also *Haradinaj et al.* Appeal Judgement, para. 39.

<sup>912</sup> Nizeyimana Closing Brief, paras. 223-226; Recall Motion of 17 February 2012, paras. 35-52. See *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11.

<sup>913</sup> Trial Judgement, paras. 688-695. The Trial Chamber noted that Witness BZC did not mention Nizeyimana, who was in civilian attire, in relation to this event in his application, but only "people in military uniforms". Witness ZBJ did not identify Nizeyimana in relation to this event in her initial statement to the Canadian immigration authorities. Trial Judgement, paras. 690, 691. With regard to Witness BXF, the Trial Chamber considered the inconsistencies between his prior statement to Tribunal representatives and his testimony at trial only. Trial Judgement, paras. 688, 689.

<sup>914</sup> Trial Judgement, paras. 689-694.

<sup>915</sup> Nizeyimana Notice of Appeal, para. 87; Nizeyimana Appeal Brief, paras. 407, 408, referring to Trial Judgement, paras. 689, 694. See also Nizeyimana Appeal Brief, paras. 409-411; AT. 28 April 2014 p. 5.

<sup>916</sup> Nizeyimana Appeal Brief, paras. 410, 411.

<sup>917</sup> Nizeyimana Appeal Brief, para. 409.

<sup>918</sup> Nizeyimana Appeal Brief, para. 409.

him in his Canadian immigration statements.<sup>919</sup> He maintains that the Trial Chamber should have also considered these contradictions in the context of the witnesses' refusal to disclose their immigration statements.<sup>920</sup>

296. The Prosecution responds that Nizeyimana's submissions in this regard must fail, as Nizeyimana does not demonstrate any error in the Trial Chamber's reasoning and conclusions.<sup>921</sup> The Prosecution argues that Nizeyimana extensively cross-examined the witnesses about the inconsistencies and that the Trial Chamber accepted their explanations.<sup>922</sup>

297. The Appeals Chamber finds that the Trial Chamber reasonably concluded that the discrepancies between the prior statements of Witnesses BZC and BXF and their testimonies at trial were "immaterial" and, consequently, did not undermine their credibility.<sup>923</sup> The inconsistent aspects of Witness BZC's testimony did not relate specifically to the actual fact of the killings, or Nizeyimana's presence during this event and the involvement of ESO soldiers, but rather to the aftermath of the killings.<sup>924</sup> Furthermore, the Appeals Chamber notes that Witness BZC was extensively cross-examined on these inconsistencies, as well as his failure to mention before the Canadian Immigration Board Nizeyimana's involvement, clarifying that the Canadian Immigration Board was disinterested in events related to the genocide,<sup>925</sup> which was corroborated by Witness BXF.<sup>926</sup>

298. The Appeals Chamber observes that Nizeyimana raises specific challenges to paragraph 689 of the Trial Judgement and notes that, there, the Trial Chamber considered inconsistencies between Witness BXF's prior statement to Tribunal representatives and not his statement to the Canadian Immigration Board.<sup>927</sup> Nevertheless, in later paragraphs in the Trial Judgement, the Trial Chamber considered and accepted Witness BXF's explanation for why he was not forthcoming with details before the Canadian Immigration Board.<sup>928</sup>

299. The Appeals Chamber notes that the Trial Chamber did not classify these witnesses' alleged failures to implicate Nizeyimana in this incident as "immaterial", but rather found immaterial other

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<sup>919</sup> Nizeyimana Appeal Brief, para. 411.

<sup>920</sup> Nizeyimana Appeal Brief, para. 412.

<sup>921</sup> Prosecution Response Brief, paras. 177, 178.

<sup>922</sup> Prosecution Response Brief, paras. 178, 179. *See also* AT. 28 April 2014 pp. 29, 30.

<sup>923</sup> *See* Trial Judgement, paras. 688, 689, 692-694. *See also* Trial Decision of 7 May 2012, paras. 11-23.

<sup>924</sup> *See* Trial Judgement, para. 694, fn. 1789; Trial Decision of 7 May 2012, paras. 21-23; Witness BZC, T. 22 February 2011 pp. 80-82 (closed session).

<sup>925</sup> Witness BZC, T. 22 February 2011 pp. 80-82 (closed session).

<sup>926</sup> *See* Trial Judgement, para. 693; Witness BXF, T. 22 February 2011 p. 36 (closed session).

<sup>927</sup> Trial Judgement, para. 689. *See also* Trial Judgement, para. 688.

inconsistencies between the various accounts which did not refer to the actual killings or Nizeyimana's presence at and role therein.<sup>929</sup> The Trial Chamber found reasonable the witnesses' explanations that their failure to mention Nizeyimana in their statements to the Canadian Immigration Board was because the authorities seemed disinterested in the events related to the genocide and the witnesses did not realize that they had to provide all details relating to the events in their initial statements.<sup>930</sup> The Trial Chamber reasonably assessed the evidence, resolving the discrepancies between the various accounts, and appropriately exercised its discretion in accepting the fundamental features of their evidence as established.<sup>931</sup> The Appeals Chamber further notes that Nizeyimana merely restates the discrepancies between the testimonies, which he raised unsuccessfully at trial, and consequently fails to demonstrate that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber.<sup>932</sup>

### 3. Violation of Presumption of Innocence and Reversal of Burden of Proof

300. Nizeyimana submits that the Trial Chamber erred in finding the Prosecution witnesses credible, in part, because they had nothing to gain from participating in the trial, including bolstering any immigration applications in Canada.<sup>933</sup> He asserts that this necessarily presumed that the Prosecution witnesses were telling the truth unless Nizeyimana could prove that they testified for personal advantage which, he argues, shifted the burden of proof onto the Defence.<sup>934</sup>

301. Nizeyimana argues that the Trial Chamber erred by stating that it preferred, as more credible, the version of events as described by the three Prosecution witnesses rather than the Defence witnesses, to establish the date of the incident as proven beyond reasonable doubt.<sup>935</sup> He

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<sup>928</sup> See Trial Judgement, paras. 692, 693, fn. 1788. See also Trial Decision of 7 May 2012, fn. 41, paras. 16, 17; Witness BXF, T. 22 February 2011 p. 36 (closed session).

<sup>929</sup> See Trial Judgement, paras. 689, 694; Trial Decision of 7 May 2012, paras. 11, 12, 19.

<sup>930</sup> See Trial Judgement, paras. 690-693.

<sup>931</sup> Cf. *Kanyarukiga* Appeal Judgement, para. 136; *Munyakazi* Appeal Judgement, para. 51; *Setako* Appeal Judgement, para. 31; *Renzaho* Appeal Judgement, para. 269; *Rukundo* Appeal Judgement, paras. 201, 207. For the same reasons, the Appeals Chamber dismisses Nizeyimana's argument that the Trial Chamber failed to consider these inconsistencies in the context of the witnesses' refusal to disclose their full immigration statements, for which he provides no support.

<sup>932</sup> See Recall Motion of 17 February 2012, paras. 43, 46; Trial Decision of 7 May 2012, paras. 9, 20; Nizeyimana Closing Brief, paras. 223-226. See also *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11.

<sup>933</sup> Nizeyimana Appeal Brief, para. 395.

<sup>934</sup> Nizeyimana Notice of Appeal, para. 85; Nizeyimana Appeal Brief, paras. 394-399, referring to Trial Judgement, paras. 682, 683. See also Nizeyimana Appeal Brief, paras. 597-602.

<sup>935</sup> Nizeyimana Notice of Appeal, para. 86; Nizeyimana Appeal Brief, paras. 400-405, referring to Trial Judgement, paras. 731-738, 1559, 1560. See also Nizeyimana Appeal Brief, paras. 591-596; AT. 28 April 2014 pp. 7, 8.



asserts that consequently the burden employed by the Trial Chamber was that of the “balance of probabilities” or “burden of preponderance”, which is not the correct burden in a criminal trial.<sup>936</sup>

302. The Prosecution responds that Nizeyimana’s submissions are incorrect.<sup>937</sup> It asserts that the Trial Chamber noted that the witnesses knowingly obtained false passports and cautiously assessed their evidence, but found them credible as they had nothing to gain by testifying against Nizeyimana.<sup>938</sup> The Prosecution maintains that Nizeyimana simply disagrees with the Trial Chamber’s findings without indicating what it may have failed to consider.<sup>939</sup>

303. The Appeals Chamber does not find that the Trial Chamber shifted the burden of proof in assessing the evidence of Witnesses BZC, BXF, and ZBJ. In the sections referred to by Nizeyimana, the Trial Chamber considered that these witnesses knowingly obtained false passports to travel internationally,<sup>940</sup> recognizing that “this prior bad conduct [was] relevant to the evaluation of their testimonies”.<sup>941</sup> However, in finding them credible, the Trial Chamber determined that they had nothing to gain by participating in Nizeyimana’s trial and found no subjectively held motivations to implicate Nizeyimana in the attack.<sup>942</sup> Furthermore, recalling that trial chambers enjoy broad discretion in choosing which witness testimony to prefer, and in assessing the impact on witness credibility of inconsistencies within or between witnesses’ testimonies,<sup>943</sup> the Appeals Chamber notes that the Trial Chamber considered in detail both Prosecution and Defence evidence, including the credibility concerns inherent in both,<sup>944</sup> before concluding that the first-hand, eye-witness testimonies of Witnesses BZC, BXF, and ZBJ was “compelling beyond reasonable doubt”.<sup>945</sup> The Appeals Chamber therefore finds that Nizeyimana has failed to demonstrate that the Trial Chamber erred in considering the immigration status of Witnesses BZC, BXF, and ZBJ or that it unreasonably favoured Prosecution evidence over Defence evidence in this regard.

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<sup>936</sup> Nizeyimana Appeal Brief, paras. 402-405; Nizeyimana Reply Brief, para. 76. *See also* AT. 28 April 2014 pp. 11, 12, 16, 17, 40, 41.

<sup>937</sup> Prosecution Response Brief, paras. 177, 180. *See also* AT. 28 April 2014 pp. 30, 31.

<sup>938</sup> Prosecution Response Brief, para. 180.

<sup>939</sup> Prosecution Response Brief, para. 182.

<sup>940</sup> Trial Judgement, paras. 680-682.

<sup>941</sup> Trial Judgement, para. 682.

<sup>942</sup> Trial Judgement, paras. 682, 683.

<sup>943</sup> *See Muvunyi* Appeal Judgement of 1 April 2011, para. 44. *See also Nchamihigo* Appeal Judgement, para. 201; *Muvunyi* Appeal Judgement of 29 August 2008, para. 144.

<sup>944</sup> Trial Judgement, paras. 696-729.

<sup>945</sup> Trial Judgement, para. 730. *See also* Trial Judgement, para. 731.

#### 4. Date of the Killings

304. The Trial Chamber concluded that the killing of persons taken from the Matabaro and Nyirinkwaya households occurred on 22 April 1994.<sup>946</sup> The Trial Chamber found that Nizeyimana's alibi for 21 and 22 April 1994 lacked credibility and that it failed to raise the reasonable possibility that Nizeyimana was absent from Butare town during this period.<sup>947</sup>

305. Nizeyimana submits that the Trial Chamber erred in finding that the killings occurred on 22 April 1994, since Prosecution and Defence evidence indicated that they occurred on 21 April 1994.<sup>948</sup> Given this error and the fact that the correct date was 21 April 1994, Nizeyimana argues that he could not have been present at the killings as his alibi indicates that he was in Mata on a reconnaissance mission from the morning of 21 April 1994 until late on 22 April 1994.<sup>949</sup>

306. The Prosecution responds that Nizeyimana's "sweeping assertion" and "unsubstantiated claim" should be summarily dismissed.<sup>950</sup> It argues that the alibi was rejected because it lacked credibility.<sup>951</sup>

307. The Appeals Chamber has already upheld the Trial Chamber's rejection of Nizeyimana's alibi for 21 and 22 April 1994.<sup>952</sup> Therefore, even if the Trial Chamber had found, as Nizeyimana contends it should have, that the killing of persons taken from the Matabaro and Nyirinkwaya households occurred on 21 April 1994, rather than on or about 22 April 1994, it would not have undermined the Trial Chamber's findings on Nizeyimana's responsibility. Accordingly, the Appeals Chamber summarily dismisses this argument.

#### 5. Conclusion

308. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana's Twenty-Ninth through Thirty-Second Grounds of Appeal, and Forty-Second through Forty-Fourth Grounds of Appeal, in part.

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<sup>946</sup> Trial Judgement, para. 730. The Appeals Chamber notes that in its legal findings the Trial Chamber referred to the killings occurring "around 22 April 1994". Trial Judgement, para. 1554. However, in light of the Trial Chamber's findings on alibi, this discrepancy is not material.

<sup>947</sup> Trial Judgement, para. 732. *See also* Trial Judgement, paras. 1371, 1372.

<sup>948</sup> Nizeyimana Notice of Appeal, para. 84; Nizeyimana Appeal Brief, paras. 384-393. *See also* AT. 28 April 2014 pp. 7, 8, 38.

<sup>949</sup> Nizeyimana Notice of Appeal, para. 84; Nizeyimana Appeal Brief, paras. 384, 393. *See also* AT. 28 April 2014 pp. 7, 8. *See also supra* Section III.B.

<sup>950</sup> Prosecution Response Brief, para. 174. *See also* AT. 28 April 2014 p. 30.

<sup>951</sup> Prosecution Response Brief, para. 174. *See also* AT. 28 April 2014 pp. 30, 36, 37.

<sup>952</sup> *Supra* Section III.B. *See also* Trial Judgement, para. 1371.

## **J. Joint Criminal Enterprise (Grounds 39 and 40, and 44, in part)**

309. The Trial Chamber found Nizeyimana responsible pursuant to Article 6(1) of the Statute as a participant in basic joint criminal enterprises in relation to the killings of the Ruhutinyanya family, Tutsi civilians at Cyahinda Parish, Rosalie Gicanda and the others taken from her home, Pierre Claver Karenzi, and those taken from the Matabaro and Nyirinkwaya households.<sup>953</sup>

310. Nizeyimana challenges the Trial Chamber's findings that he was responsible for these crimes as a participant in a basic joint criminal enterprise and requests the Appeals Chamber to acquit him of all crimes for which he was found guilty pursuant to joint criminal enterprise.<sup>954</sup> The Appeals Chamber recalls that it has reversed Nizeyimana's convictions in relation to the crimes committed at Cyahinda Parish, Judge Güney and Judge Ramaroson dissenting, and for the killing of Pierre Claver Karenzi.<sup>955</sup> Accordingly, the Appeals Chamber will not consider Nizeyimana's submissions as they relate to these two events. In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing: (i) the notice of the joint criminal enterprise; and (ii) Nizeyimana's participation therein.

### **1. Notice of the Joint Criminal Enterprise**

311. Nizeyimana's convictions for committing through joint criminal enterprises the killings of the Ruhutinyanya family, Gicanda and the others taken from her home, and those taken from the Matabaro and Nyirinkwaya households, were based on *chapeau* paragraph 5 and on paragraphs 19, 22, and 23 of the Indictment,<sup>956</sup> which read:

[...] [T]he Accused committed genocide by wilfully and knowingly participating in a joint criminal enterprise whose object, purpose and foreseeable outcome was the commission of genocide against the Tutsi ethnic group and persons identified as Tutsi or presumed to support the Tutsi in Butare *préfecture*. To fulfil this criminal purpose, the Accused acted with leaders and members of the FAR, including Colonel Tharcisse Muvunyi, Lieutenant Ildephonse Hategekimana, Lieutenant Cyriaque Habyarabatura of the Butare *Gendarmerie*, Sous-Lieutenants Jean Pierre Bizimana, Modeste Gatsinzi, Ezechiel Gakwerere, Alphonse Ndayambaje, and Tharcisse Ngendahimana, Chief Warrant Officers Francois Ntibiramira, Damien Ntamuhanga, and Paul Kanyeshyamba, Sergeant Ezechier Rwaza, Sergeant Major Innocent Sibomana, Corporal Fulgence Niyibizi, and a number of other officers, soldiers and recruits from ESO; the *Interahamwe*, including Jean Marie Vianney Ngabonziza; the "Civil Defense Forces"; militias

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<sup>953</sup> Trial Judgement, paras. 1498, 1508, 1515, 1534, 1539 (genocide), 1550 (extermination as a crime against humanity), 1559, 1565, 1566 (murder as a crime against humanity), 1579 (murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II).

<sup>954</sup> Nizeyimana Notice of Appeal, paras. 102-106; Nizeyimana Appeal Brief, paras. 489-530. *See* AT. 28 April 2014 pp. 13-15. The Appeals Chamber notes that Nizeyimana also challenges the Trial Chamber's findings in relation to the killings of Remy Rwekaza and Beata Uwambaye and the attack on Prosecution Witness ZAV. *See* Nizeyimana Appeal Brief, paras. 524, 525, 527. The Appeals Chamber will not address these arguments since Nizeyimana was not convicted in relation to these crimes under the joint criminal enterprise mode of responsibility. *See* Sections III.F, III.G.

<sup>955</sup> *See supra* Sections III.D.3, III.H.3.

<sup>956</sup> *See* Trial Judgement, paras. 122, 456, 628, 1460-1462.

acting as a group in loose organisation, namely militias affiliated with the MRND, MDR, PL, CDR and PSD parties and armed civilians acting as individuals in a common purpose; communal police and local administrative officials from communes in Butare *préfecture*, including Ngoma, Huye, Gishamvu, Nyaruhengeri, Ndora, Shyanda, Mbazi, Nyakizu, Kigembe, Ntyazo, Ruhashya, Mugusa and Kibayi, among others; other known participants, such as Vincent Ntezimana, Innocent Nkuyubwatsi; and other unknown participants, all such actions being taken either directly or through subordinates, for at least the period of 6 April 1994 through 17 July 1994 inclusive. Each of the above-named members of the joint criminal enterprise acted in concert with various other members, often acting on Ildephonse NIZEYIMANA's orders, authorization or instigation. [...] <sup>957</sup>

Between 16 April and 19 April 1994, members of the Ruhutinyanya family were forcibly apprehended by ESO soldiers including First Sergeant Nyirimanzi, who were members of the joint criminal enterprise referred to in paragraph 5 herein. The apprehension took place at a roadblock manned by *Interahamwe* on the way to Burundi, from where the Ruhutinyanya family was forced to return to the ESO and then killed on the orders or at the instigation of Ildephonse NIZEYIMANA. In particular, following the instructions of the Accused, Sous-Lieutenant Bizimana engaged a number of subordinate FAR soldiers from his platoon and others, including Chief Warrant Officers Paul Kanyeshyamba and Francois Ntibiramira and first Sergeant Nyirimanzi, and exercised their command to target the civilian victims. <sup>958</sup>

On or about 20 April 1994, Ildephonse NIZEYIMANA led ESO soldiers who were members of the joint criminal enterprise referred to in paragraph 5 herein to the homes of Jean-Baptiste Matabaro and Zephania Nyirinkwaya where the Accused forcibly removed and killed Jean-Baptiste Matabaro and Zephania Nyirinkwaya. [...] <sup>959</sup>

On or about 21 April 1994, Ildephonse NIZEYIMANA ordered or authorized soldiers from the ESO, Ngoma Camp and Butare *Gendarmerie* Camp, and armed civilians who were members of the joint criminal enterprise referred to in paragraph 5 herein to kill Rosalie Gicanda. In particular, following the instructions of the Accused, Sous-Lieutenant Jean Pierre Bizimana took a number of subordinate FAR soldiers with him including Corporal Aloys Mazimpaka and others, and armed civilians including Dr. Kageruka, to the home of the victim under the auspices of conducting a search. As a result, soldiers acting under the orders or authorization of Ildephonse NIZEYIMANA forcibly removed and killed Rosalie Gicanda and other persons who were residing at her home. <sup>960</sup>

312. The Trial Chamber found that the Prosecution had provided timely, clear, and consistent notice with respect to its reliance on basic joint criminal enterprise liability. <sup>961</sup> The Trial Chamber identified, in paragraph 5 of the Indictment, the common purpose of this joint criminal enterprise, its timeframe, the list of participants, as well as Nizeyimana's contribution through his "orders, authorization or instigation". <sup>962</sup> The Trial Chamber also found that paragraphs 19, 22, and 23 of the Indictment, setting forth the material facts, provided further specificity <sup>963</sup> and, for each alleged crime, it identified distinct common purposes, participants, contributions, and time periods. <sup>964</sup>

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<sup>957</sup> Indictment, para. 5 (genocide). *See also* Indictment, paras. 37 (extermination as a crime against humanity), 43 (murder as a crime against humanity), and 51 (murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II).

<sup>958</sup> Indictment, para. 19. *See also* Indictment, paras. 38, 44, 52.

<sup>959</sup> Indictment, para. 22. *See also* Indictment, paras. 38, 40, 44, 52.

<sup>960</sup> Indictment, para. 23. *See also* Indictment, paras. 38, 44, 52.

<sup>961</sup> Trial Judgement, para. 1463.

<sup>962</sup> Trial Judgement, para. 1460.

<sup>963</sup> Trial Judgement, para. 1462.

<sup>964</sup> Trial Judgement, fns. 3772-3775.

313. Nizeyimana submits that the Trial Chamber erred in finding that he received proper notice of the alleged joint criminal enterprise.<sup>965</sup> Nizeyimana argues that the scope of the joint criminal enterprise was insufficiently defined.<sup>966</sup> He particularly takes issue with paragraph 5 of the Indictment and its “endless list” of members of the alleged joint criminal enterprise, which he alleges included every person living in Butare.<sup>967</sup> Notably, he challenges the Trial Chamber’s finding that paragraph 5 of the Indictment should be read in conjunction with the paragraphs setting forth the material facts which, according to him, impermissibly rendered every perpetrator a potential participant in the joint criminal enterprise.<sup>968</sup> Nizeyimana also challenges the Trial Decisions of 9 June 2010 and 16 December 2010, as well as the resulting two amendments of the Indictment, which in his view did not cure the vague formulation of the list of participants in the joint criminal enterprise.<sup>969</sup> Nizeyimana contends that it was impossible to investigate or defend against such allegations.<sup>970</sup> He finally argues that the Trial Chamber failed to consider his Closing Brief submissions on the issue.<sup>971</sup>

314. The Prosecution responds that Nizeyimana’s arguments should fail.<sup>972</sup> It submits that paragraph 5 of the Indictment specifically pleaded the material facts of the basic joint criminal enterprise for which Nizeyimana was convicted.<sup>973</sup> In particular, the Prosecution contends that the names and categories of alleged participants in the joint criminal enterprise were adequately pleaded, in accordance with the relevant jurisprudence, and that they could not be artificially limited.<sup>974</sup> The Prosecution further underscores that the purposes, participants, contributions, and periods specified in the paragraphs setting forth the material facts “all fit within the scope of the [joint criminal enterprise] as pleaded under paragraph 5 of the Indictment”.<sup>975</sup>

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<sup>965</sup> Nizeyimana Notice of Appeal, para. 102, *referring to* Trial Judgement, paras. 1457-1463; Nizeyimana Appeal Brief, paras. 491, 499. *See also* AT. 28 April 2014 pp. 13-15.

<sup>966</sup> Nizeyimana Appeal Brief, paras. 500, 502.

<sup>967</sup> Nizeyimana Appeal Brief, paras. 494-498, 500-502. *See also* Nizeyimana Reply Brief, para. 97; AT. 28 April 2014 pp. 13, 14.

<sup>968</sup> Nizeyimana Appeal Brief, para. 500.

<sup>969</sup> Nizeyimana Notice of Appeal, para. 102; Nizeyimana Appeal Brief, paras. 492-498, *referring to, inter alia, The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-2000-55C-PT, Decision on Nizeyimana’s Preliminary Motion on Defects in the Amended Indictment, 9 June 2010 (“Trial Decision of 9 June 2010”), *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-2000-55C-PT, Decision on Defence Preliminary Motion on Defects in the Indictment, 16 December 2010 (“Trial Decision of 16 December 2010”).

<sup>970</sup> Nizeyimana Notice of Appeal, para. 102; Nizeyimana Appeal Brief, paras. 494, 501, 503.

<sup>971</sup> Nizeyimana Appeal Brief, para. 502, *referring to* Nizeyimana Closing Brief, paras. 586-593.

<sup>972</sup> Prosecution Response Brief, paras. 231, 233-238, 268; AT. 28 April 2014 pp. 18, 19.

<sup>973</sup> Prosecution Response Brief, paras. 233, 235; AT. 28 April 2014 pp. 18, 19, 27, 28.

<sup>974</sup> Prosecution Response Brief, paras. 234, 236, 237; AT. 28 April 2014 pp. 18, 19.

<sup>975</sup> Prosecution Response Brief, para. 238, *referring to* Trial Judgement, para. 1461, fns. 3772-3775. *See also* AT. 28 April 2014 pp. 18, 19.

315. The Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.<sup>976</sup> In cases where the Prosecution intends to rely on joint criminal enterprise, the Prosecution must plead the purpose of the enterprise, the identity of its participants, the nature of the accused's participation in the enterprise, and the period of the enterprise.<sup>977</sup> Failure to specifically plead joint criminal enterprise, including the supporting material facts and the category, constitutes a defect in the indictment.<sup>978</sup>

316. The Appeals Chamber is not convinced that Nizeyimana has identified any error in the pleading of joint criminal enterprise in the Indictment. As noted by the Trial Chamber, the *chapeau* paragraph 5 of the Indictment correctly sets forth the Prosecution's allegations as to: (i) the category of joint criminal enterprise, basic and extended, through reference to the relevant *mens rea* of each; (ii) the purpose of the enterprise (the "commission of genocide against the Tutsi ethnic group [and those] presumed to support the Tutsi in Butare [Prefecture]"); (iii) the identity of its participants, listed by name as well as category (including, *inter alia*, Nizeyimana, other leaders and members of the FAR, soldiers from the ESO, *Interahamwe*, armed civilians, and other known and unknown participants); (iv) the nature of the accused's participation in the enterprise (including through his "orders, authorization or instigation"); and (v) the period of the enterprise ("6 April 1994 through 17 July 1994").<sup>979</sup>

317. The Appeals Chamber also notes the plural form used by the Trial Chamber in its findings that Nizeyimana bears responsibility for his participation in "basic joint criminal enterprises".<sup>980</sup> The Appeals Chamber understands that the Trial Chamber found Nizeyimana responsible as a participant in multiple joint criminal enterprises, the common purposes of which were to kill the Ruhutinyanya family, Gicanda and the others taken from her home, and those taken from the Matabaro and Nyirinkwaya households.<sup>981</sup> Nizeyimana does not raise any error in this respect. In any event, the Appeals Chamber notes that the Trial Chamber concluded that the material facts pleaded in relation to these specific joint criminal enterprises were "within the broader period for which the joint criminal enterprise is alleged to have existed" and that they provided "further

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<sup>976</sup> See, e.g., *Mugenzi and Mugiraneza* Appeal Judgement, para. 116; *Hategekimana* Appeal Judgement, para. 258; *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96.

<sup>977</sup> See, e.g., *Mugenzi and Mugiraneza* Appeal Judgement, para. 116; *Hategekimana* Appeal Judgement, para. 258; *Munyakazi* Appeal Judgement, para. 161; *Simba* Appeal Judgement, para. 63.

<sup>978</sup> See, e.g., *Mugenzi and Mugiraneza* Appeal Judgement, para. 116; *Hategekimana* Appeal Judgement, para. 258; *Munyakazi* Appeal Judgement, para. 161; *Simba* Appeal Judgement, para. 63.

<sup>979</sup> Trial Judgement, para. 1460. See also Indictment, para. 5.

<sup>980</sup> Trial Judgement, paras. 1539, 1565, 1579.

<sup>981</sup> See Trial Judgement, paras. 1498, 1515, 1539, 1559, 1565, 1566, 1579. See also Trial Judgement, fn. 3772.

specificity”, including as to “Nizeyimana’s specific contribution”.<sup>982</sup> The Appeals Chamber further observes the Trial Chamber’s finding that the killing of the Ruhutinyanya family “fell squarely within the common purpose to kill the Tutsis of Butare”.<sup>983</sup> It was also clear from the concise statement of facts in paragraphs 19, 22, and 23 of the Indictment that the alleged common purpose of the main joint criminal enterprise comprised these killings.<sup>984</sup> The Appeals Chamber therefore considers that, while the Trial Chamber’s reference to multiple joint criminal enterprises is somewhat confusing, it convicted Nizeyimana under a mode of responsibility which was adequately pleaded in the Indictment.

318. Turning to the pleading of the list of participants, the Appeals Chamber observes that the Trial Chamber correctly recalled, in its Trial Decision of 16 December 2010, that participants in a joint criminal enterprise may be identified by category and need not be named individually.<sup>985</sup> The Trial Chamber further properly found that the *chapeau* paragraph 5 of the Indictment, listing participants by name or category,<sup>986</sup> had to be read in conjunction with the paragraphs setting forth the material facts, which provided specificity as to the identity of participants for each incident.<sup>987</sup> In particular, paragraphs 19, 22, and 23 of the Indictment further identified the categories of “members of the FAR” and “armed civilians” with names and geographic and temporal details related to each incident.<sup>988</sup> The Trial Chamber’s approach is therefore in line with the Tribunal’s jurisprudence.<sup>989</sup> The Appeals Chamber further dismisses Nizeyimana’s claim that he was faced with “limitless charges” because of the “endless list of possible [joint criminal enterprise] participants”.<sup>990</sup> Nizeyimana had to respond to a limited number of charges specifically pleaded in the paragraphs setting forth the material facts. Nizeyimana thus fails to demonstrate any vagueness with regard to the notice of joint criminal enterprise.

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<sup>982</sup> Trial Judgement, para. 1462.

<sup>983</sup> Trial Judgement, fn. 3851.

<sup>984</sup> Indictment, para. 5, referring to Indictment, paras. 6-35. See, in particular, Indictment, paras. 19, 22, 23.

<sup>985</sup> Trial Decision of 16 December 2010, para. 26, referring to *Krajišnik* Appeal Judgement, para. 156, *Simba* Appeal Judgement, paras. 72, 73.

<sup>986</sup> Trial Judgement, para. 1460. See also Indictment, para. 5.

<sup>987</sup> Trial Judgement, paras. 1461, 1462. See also Trial Decision of 16 December 2010, para. 27.

<sup>988</sup> Trial Judgement, fn. 3773. See also Indictment, paras. 19 (identifying the FAR members as ESO soldiers, including First Sergeant Nyirimanzi, as well as Sous-Lieutenant Bizimana and subordinate FAR soldiers, including Chief Warrant Officers Paul Kanyashyamba and François Ntibiramira, and first Sergeant Nyirimanzi), 22 (identifying the FAR members as ESO soldiers), 23 (identifying the FAR members as soldiers from the ESO, Ngoma Camp, and Butare Gendarmerie Camp, including Sous-Lieutenant Jean Pierre Bizimana and Corporal Aloys Mazimpaka, and the armed civilians as including one called Dr. Kageruka).

<sup>989</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 162; *Simba* Appeal Judgement, paras. 71, 72.

<sup>990</sup> Nizeyimana Appeal Brief, para. 500.

319. The Appeals Chamber also finds no merit in Nizeyimana's contention that the Trial Chamber failed to consider his submissions as to the scope of the joint criminal enterprise.<sup>991</sup> The Trial Chamber expressly referred to Nizeyimana's arguments and dismissed them, in the absence of any justification supporting reconsideration of its Trial Decisions of 9 June 2010 and 16 December 2010.<sup>992</sup> The Appeals Chamber considers that Nizeyimana merely repeats arguments that did not succeed at trial,<sup>993</sup> and that he does not demonstrate any error warranting appellate intervention.

320. Nizeyimana's arguments are therefore dismissed.

## 2. Assessment of Nizeyimana's Participation in the Joint Criminal Enterprise

321. The Appeals Chamber recalls that the Trial Chamber found Nizeyimana responsible as a participant in multiple joint criminal enterprises which all fell within the common purpose of the main joint criminal enterprise to kill the Tutsis of the Butare Prefecture.<sup>994</sup> The Trial Chamber found that the killings of the Ruhutinyanya family, Gicanda and the others taken from her home, and those taken from the Matabaro and Nyirinkwaya households involved a plurality of persons, sharing a common purpose and acting in concert to commit a crime provided for in the Statute.<sup>995</sup> The Trial Chamber found that Nizeyimana contributed significantly and substantially to each crime for which he was convicted under this mode of responsibility.<sup>996</sup> The Trial Chamber further found that he agreed to the common purpose and possessed the requisite *mens rea*.<sup>997</sup>

322. Nizeyimana submits that the Trial Chamber erred in finding the existence of a joint criminal enterprise and that he participated therein.<sup>998</sup> Nizeyimana contends that the Trial Chamber failed to provide a reasoned opinion with regard to the alleged joint criminal enterprise<sup>999</sup> and that its findings that he agreed to a common purpose or had genocidal intent were baseless.<sup>1000</sup> Nizeyimana argues that the joint criminal enterprise and his *mens rea* were improperly found proven through circular reasoning, since the Trial Chamber relied on the very commission of crimes and his

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<sup>991</sup> Nizeyimana Appeal Brief, para. 502.

<sup>992</sup> Trial Judgement, para. 1458, *referring to* Nizeyimana Closing Brief, paras. 587-593.

<sup>993</sup> *See, e.g., Hategekimana Appeal Judgement*, para. 10; *Kanyarukiga Appeal Judgement*, para. 11; *Ntabakuze Appeal Judgement*, para. 14.

<sup>994</sup> *See supra* para. 317.

<sup>995</sup> Trial Judgement, paras. 1498, 1515, 1559.

<sup>996</sup> Trial Judgement, paras. 1496, 1498, 1514, 1515, 1558, 1559.

<sup>997</sup> Trial Judgement, paras. 1496-1498, 1513, 1515, 1556-1559, 1563, 1578.

<sup>998</sup> Nizeyimana Notice of Appeal, para. 104; Nizeyimana Appeal Brief, paras. 505-530. *See also* AT. 28 April 2014 p. 15.

<sup>999</sup> Nizeyimana Appeal Brief, paras. 511, 512, 514, 529.

<sup>1000</sup> Nizeyimana Appeal Brief, paras. 513, 514, 517, *referring to* Trial Judgement, paras. 1496, 1498, 1508, 1515, 1534, 1559. Nizeyimana underlines, in particular, the absence of footnotes. *See* Nizeyimana Appeal Brief, paras. 514, 517.



participation in the common purpose to establish the common purpose.<sup>1001</sup> In his view, the joint criminal enterprise should have been proven independently of his participation or contribution.<sup>1002</sup> Nizeyimana underscores that none of the meetings through which the Prosecution sought to show the existence of a common purpose was found proven beyond a reasonable doubt.<sup>1003</sup>

323. Nizeyimana further avers that the Trial Chamber systematically ignored the Defence alternative theories, while there were other reasonable inferences available from the evidence than his participation in a joint criminal enterprise.<sup>1004</sup> In particular, Nizeyimana disputes the Trial Chamber's finding that evidence of his selective assistance to Tutsis did not raise doubt as to his genocidal intent.<sup>1005</sup> He further challenges the Trial Chamber's reliance on the ESO soldiers' role in attacks at Butare University and Butare University Hospital to infer genocidal intent.<sup>1006</sup>

324. The Prosecution responds that Nizeyimana's arguments should be rejected.<sup>1007</sup> The Prosecution maintains that the common purpose, the involvement of a plurality of persons, Nizeyimana's significant participation, and the fact that Nizeyimana and other participants shared the same criminal intent were proven beyond reasonable doubt.<sup>1008</sup> In particular, the Prosecution asserts that the Trial Chamber provided a reasoned opinion regarding the common purpose.<sup>1009</sup> It underlines that Nizeyimana misleadingly isolates sentences in the factual findings, while the Trial Chamber undertook an in-depth analysis of the facts establishing the common purpose.<sup>1010</sup> The Prosecution further underscores that the Trial Chamber properly inferred the *mens rea* from the entire body of circumstantial evidence, including from Nizeyimana's own acts and conduct.<sup>1011</sup> The Prosecution also contends that the Trial Chamber committed no error in relying on events at Butare University and Butare University Hospital to infer the genocidal intent of ESO soldiers who killed Gicanda and Karenzi, since they formed part of the same criminal transaction.<sup>1012</sup>

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<sup>1001</sup> Nizeyimana Appeal Brief, paras. 509, 516, 523, 529; AT. 28 April 2014 p. 15. *See also* Nizeyimana Appeal Brief, para. 600.

<sup>1002</sup> Nizeyimana Appeal Brief, para. 507. *See also* AT. 28 April 2014 p. 15.

<sup>1003</sup> Nizeyimana Appeal Brief, para. 508.

<sup>1004</sup> Nizeyimana Appeal Brief, paras. 510, 516-529. The Appeals Chamber notes that Nizeyimana mostly repeats arguments related to the assessment of circumstantial evidence that were already raised under his Ground 7. *See* Nizeyimana Appeal Brief, paras. 516-519, 521 (killing of the Ruhutinyanya family). The Appeals Chamber has addressed and dismissed these arguments elsewhere in the Judgement. *See supra* Section III.C.3.

<sup>1005</sup> Nizeyimana Appeal Brief, para. 520, *referring to* Trial Judgement, fn. 3849.

<sup>1006</sup> Nizeyimana Appeal Brief, para. 524.

<sup>1007</sup> Prosecution Response Brief, paras. 232, 239-268.

<sup>1008</sup> Prosecution Response Brief, para. 239. *See also* Prosecution Response Brief, paras. 246-267.

<sup>1009</sup> Prosecution Response Brief, para. 245.

<sup>1010</sup> Prosecution Response Brief, paras. 245, 246.

<sup>1011</sup> Prosecution Response Brief, para. 248. *See also* Prosecution Response Brief, paras. 249-253, 260, 261, 265, 266.

<sup>1012</sup> Prosecution Response Brief, para. 266.

325. The Appeals Chamber recalls that in order to find an individual liable for the commission of a crime through a basic joint criminal enterprise:

Fağ trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime [...] did in fact take place. Where the principal perpetrator is not shown to belong to the [joint criminal enterprise], the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the [joint criminal enterprise] (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.<sup>1013</sup>

326. The Appeals Chamber notes that, contrary to Nizeyimana’s assertion, the Trial Chamber provided a detailed reasoned opinion with regard to the joint criminal enterprise and to his participation therein.<sup>1014</sup> The Trial Chamber expressly identified in its legal findings the plurality of persons belonging to the joint criminal enterprise<sup>1015</sup> and the common criminal purpose.<sup>1016</sup> It also identified Nizeyimana’s significant contribution<sup>1017</sup> and requisite *mens rea*.<sup>1018</sup> The Appeals Chamber finds no error in the Trial Chamber’s approach.

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<sup>1013</sup> *Gotovina and Markač* Appeal Judgement, para. 89, quoting *Brđanin* Appeal Judgement, para. 430 (references omitted). See also *Krajičnik* Appeal Judgement, para. 662.

<sup>1014</sup> Trial Judgement, paras. 1494-1498, 1503-1508, 1510-1515, 1529-1534, 1554-1559.

<sup>1015</sup> Trial Judgement, paras. 1494, 1495, 1498 (the “plurality of persons” involved in the killing of the Ruhutinyanya family included Nizeyimana, ESO soldiers, Second Lieutenant Bizimana, and/or the armed civilian and *Interahamwe* manning the roadblock near the Akanyaru border crossing), 1510, 1515 (the “plurality of persons” involved in the killing of Gicanda and the others taken from her home included Nizeyimana, ESO soldiers, and Second Lieutenant Bizimana), 1554, 1559 (the “plurality of persons involved in the killing of those taken from the Matabaro and Nyirinkwaya households included Nizeyimana and ESO soldiers).

<sup>1016</sup> Trial Judgement, paras. 1498, 1515, 1559 (“[The killings] involved a plurality of persons, sharing a common purpose and acting in concert to commit a crime provided for in the Statute.”). See also Trial Judgement, paras. 1460 (“[The Indictment] identifies that [the] joint criminal enterprise’s purpose is ‘the commission of genocide against the Tutsi ethnic group’ as well as those ‘presumed to support the Tutsi in Butare prefecture’.”), 1462, fns. 3772 (“FTghe purposed listed in Indictment paragraph 19, was to target Tutsi[] civilians, who were members of the [Ruhutinyanya] family; the purpose identified in Indictment paragraph 22, was to forcibly remove and kill members of the Matabaro and Nyirinkwaya families; the purposed listed in Indictment paragraph 23 was to forcibly remove and kill Rosalie Gicanda and other persons who were residing at her home; [...]”), 3851 (“[T]he common purpose to kill the Tutsis of Butare, including [the Ruhutinyanya] family [...]”).

<sup>1017</sup> Trial Judgement, paras. 1496 (“[...] Nizeyimana’s orders to return the [Ruhutinyanya] family to the location from which they were first retrieved amounted to significant and substantial contributions to their deaths”), 1498, 1514 (“[G]iven Nizeyimana’s high rank and considerable authority within the ESO, as well as his relationship with Second Lieutenant Bizimana, Nizeyimana’s authorisation of the killing [of Gicanda] before the attack, and his continued authorisation after, amounted to significant and substantial contributions to the crime in the form of moral support and approval.”), 1515, 1558 (“[T]he killings [of those taken from the Matabaro and Nyirinkwaya households] occurred based on Nizeyimana’s instructions and were committed with his express approval. [...] [H]is presence, in addition to

327. The Appeals Chamber also finds no merit in Nizeyimana's arguments regarding the Trial Chamber's reliance on the circumstances of the commission of the crimes to establish the joint criminal enterprise and the participants' agreement to the common purpose. As noted by the Trial Chamber, the common purpose need not be previously arranged or formulated; it may materialise extemporaneously.<sup>1019</sup> The Appeals Chamber further recalls that the common purpose may be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.<sup>1020</sup>

328. The Appeals Chamber notes that the Trial Chamber's factual and legal findings, based on the evidence, clearly demonstrate that the killing of Tutsi civilians occurred on a massive scale in Butare,<sup>1021</sup> with soldiers and civilians acting together in targeted killings after 19 April 1994.<sup>1022</sup> The Trial Chamber also expressly found that the participants in the joint criminal enterprise "act[ed] in concert" to kill the Ruhutinyanya family, Gicanda and the others taken from her home, and those taken from the Matabaro and Nyirinkwaya households.<sup>1023</sup> Moreover, the Trial Chamber detailed the coordination between Nizeyimana, ESO soldiers, and armed civilians when ordering the removal and escorting of the Ruhutinyanya family to a roadblock where they were ultimately killed.<sup>1024</sup> In the same vein, the Trial Chamber noted the "relationship and repeated collaboration" between Nizeyimana and Bizimana in relation to the removal and reporting of the killing of Gicanda.<sup>1025</sup> It also assessed the "methodical and organised approach" reflected by the killings of those taken from the Matabaro and Nyirinkwaya households, for which Nizeyimana accompanied and supervised ESO soldiers who removed, separated, shot, and killed a number of persons.<sup>1026</sup> Furthermore, in finding the *mens rea* of the participants in the joint criminal enterprise, the Trial Chamber detected numerous links between those specific killings as well as other killings, including those following President Théodore Sindikubwabo's speech on 19 April 1994, and those at the *Groupe Scolaire*, Butare University, and Butare University Hospital,<sup>1027</sup> thereby bolstering the finding that a common purpose existed to kill the Tutsis of Butare Prefecture.

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the instructions he issued, amounted to significant and substantial tacit approval [of] the removal and subsequent murder operation."), 1559.

<sup>1018</sup> Trial Judgement, paras. 1496, 1498, 1513, 1515, 1558, 1559.

<sup>1019</sup> Trial Judgement, para. 1454. *See also* *Gatete* Appeal Judgement, para. 241; *Krajišnik* Appeal Judgement, fn. 418; *Brđanin* Appeal Judgement, para. 418.

<sup>1020</sup> *Krajišnik* Appeal Judgement, fn. 418; *Vasiljević* Appeal Judgement, para. 109.

<sup>1021</sup> *See, e.g.*, Trial Judgement, paras. 267, 311, 563, 793, 933, 1100, 1101, 1503, 1505, 1547, 1550, 1572, 1573.

<sup>1022</sup> *See, e.g.*, Trial Judgement, para. 832, *referring to* Sections II.5.1 and II.8.1 of the Trial Judgement.

<sup>1023</sup> Trial Judgement, paras. 1498, 1515, 1559.

<sup>1024</sup> Trial Judgement, paras. 1494, 1495.

<sup>1025</sup> Trial Judgement, paras. 1510, 1513.

<sup>1026</sup> Trial Judgement, paras. 1554-1556, 1558.

<sup>1027</sup> Trial Judgement, paras. 1497, 1511-1513, 1531.

329. The Appeals Chamber, bearing in mind that the common purpose need not be previously arranged, further considers that the fact that the meetings pleaded in paragraphs 9, 10, and 11 of the Indictment were not proven beyond reasonable doubt had no bearing on the finding that a common purpose materialized through the cohesive action of the participants in the joint criminal enterprise. The Appeals Chamber therefore dismisses Nizeyimana's assertion that the common purpose should have been proven independently or that the Trial Chamber erred in applying circular reasoning.

330. The Appeals Chamber is also not satisfied that Nizeyimana has identified any error in the Trial Chamber's inference that he and the other members of the joint criminal enterprise acted with the requisite *mens rea*. The Appeals Chamber recalls that a conviction may be based on circumstantial evidence but that, where a finding of guilt is based on an inference drawn from such evidence, it must be the only reasonable conclusion that could be drawn from it.<sup>1028</sup> If there is another conclusion that could be reasonably reached from the evidence, the conclusion of guilt beyond reasonable doubt cannot be drawn.<sup>1029</sup>

331. Bearing in mind these principles, the Appeals Chamber finds that the Trial Chamber properly relied on circumstantial evidence, including Nizeyimana's acts and conduct which it found proven beyond reasonable doubt,<sup>1030</sup> to infer Nizeyimana's *mens rea* with regard to each killing for which he was convicted under the joint criminal enterprise mode of responsibility. In particular, the Trial Chamber expressly relied on evidence of Nizeyimana's order to remove the Ruhutinyanya family and on his awareness that such order would lead to their slaughter to find that the only reasonable conclusion was that he possessed genocidal intent.<sup>1031</sup> With regard to the killing of Gicanda and the others taken from her home, the Trial Chamber properly relied on evidence of Nizeyimana's authorization, combined with his prior proven criminal conduct, to find that the only reasonable conclusion was that he possessed the requisite genocidal intent.<sup>1032</sup> Furthermore, the Trial Chamber expressly relied, with respect to the killings of those taken from the Matabaro and Nyirinkwya households, on evidence of Nizeyimana's presence, instructions, position within the

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<sup>1028</sup> *Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al.* Appeal Judgement, para. 306.

<sup>1029</sup> *Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al.* Appeal Judgement, para. 306.

<sup>1030</sup> See Trial Judgement, Sections II.4.1, II.6.2, II.6.6.

<sup>1031</sup> Trial Judgement, paras. 1496, 1498. The Appeals Chamber notes that the finding of Nizeyimana's awareness of the principal perpetrators' intent, challenged by Nizeyimana as lacking a reasoned opinion, was also inferred from the above-cited circumstantial evidence. See Trial Judgement, para. 1496. See also Nizeyimana Appeal Brief, para. 517. On the same basis, the Trial Chamber found that Nizeyimana possessed the requisite *mens rea* for the crimes of murder as a crime against humanity and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. See Trial Judgement, paras. 1563, 1564, 1566, 1578.

military, and participation in other attacks, to conclude that he necessarily had knowledge of the broader context of the widespread and systematic attack against the civilian population and that he had the requisite intent for murder as a crime against humanity.<sup>1033</sup> In light of the above, the Appeals Chamber finds that it was reasonable for the Trial Chamber to infer as the only reasonable conclusion that Nizeyimana possessed the requisite *mens rea* for each crime.

332. The Appeals Chamber further finds that Nizeyimana does not demonstrate that the Trial Chamber impermissibly disregarded other reasonable inferences available from the evidence with regard to his *mens rea* and participation in the joint criminal enterprise. The Appeals Chamber recalls that it has dismissed similar arguments elsewhere in the Judgement.<sup>1034</sup> In addition, the Appeals Chamber notes that the Trial Chamber explicitly addressed evidence that Nizeyimana lodged one Tutsi at his home, but nonetheless found that this did not raise doubt in the fact that he possessed genocidal intent.<sup>1035</sup> The Appeals Chamber considers that, in light of all the evidence provided, such finding of selective and limited assistance did not preclude a reasonable trier of fact from concluding that the only reasonable inference was that Nizeyimana possessed the requisite intent and shared the common criminal purpose.<sup>1036</sup>

333. In the same vein, the Appeals Chamber finds no error in the Trial Chamber's exercise of its discretion to rely on the totality of the circumstantial evidence before it in reaching the conclusion that other participants in the joint criminal enterprise possessed the requisite intent. In particular, the Appeals Chamber considers that the Trial Chamber reasonably relied, in addition to the circumstances of the commission of the crimes, on the proven criminal conduct of ESO soldiers in attacks at Butare University and Butare University Hospital.<sup>1037</sup> Nizeyimana does not demonstrate any error in this approach.

334. Accordingly, Nizeyimana's arguments are dismissed.

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<sup>1032</sup> Trial Judgement, paras. 1513, 1515. On the same basis, the Trial Chamber found that Nizeyimana possessed the requisite *mens rea* for the crimes of murder as a crime against humanity and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. See Trial Judgement, paras. 1563, 1564, 1566, 1578.

<sup>1033</sup> Trial Judgement, paras. 1558, 1559. On the same basis, the Trial Chamber found that Nizeyimana possessed the requisite *mens rea* for the crime of murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. See Trial Judgement, para. 1578.

<sup>1034</sup> See *supra* Section III.C.3.

<sup>1035</sup> Trial Judgement, fn. 3849.

<sup>1036</sup> See Trial Judgement, fn. 3849. Cf. *Ntawukulyayo* Appeal Judgement, para. 227; *Muvunyi* Appeal Judgement of 1 April 2011, para. 58; *Kvočka et al.* Appeal Judgement, para. 233.

<sup>1037</sup> Trial Judgement, para. 1512.

### 3. Conclusion

335. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana's Thirty-Ninth and Fortieth Grounds of Appeal, and Forty-Fourth Ground of Appeal, in part.

### **K. Superior Responsibility (Ground 41)**

336. In addition to finding Nizeyimana guilty under Article 6(1) of the Statute, the Trial Chamber found him responsible for genocide, murder as a crime against humanity, and 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 role of ESO soldiers, including Second Lieutenant Jean Pierre Bizimana, in the killings of members of the Ruhutinyanya family,<sup>1038</sup> the killings of Rosalie Gicanda and those removed from her home,<sup>1039</sup> the killings of Remy Rwekaza and Beata Uwambaye, and the serious bodily harm caused to Prosecution Witness ZAV.<sup>1040</sup> Similarly, it found that he could bear responsibility under Article 6(3) of the Statute for murder as a crime against humanity, and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, for the killings of those removed from the Matabaro and Nyirinkwaya households.<sup>1041</sup> The Trial Chamber indicated that it would take its findings on Nizeyimana's superior responsibility into account in sentencing.<sup>1042</sup>

337. Nizeyimana challenges the Trial Chamber's findings in relation to his superior responsibility under Article 6(3) of the Statute.<sup>1043</sup> The Appeals Chamber recalls that none of Nizeyimana's convictions rests on his responsibility pursuant to Article 6(3) of the Statute. However, it will consider his arguments specific to Article 6(3) of the Statute insofar as they may impact his sentence.

338. Nizeyimana submits that the Trial Chamber erred in finding it proven beyond reasonable doubt that he had *de jure* authority and that he exercised effective control with the material ability to prevent and punish criminal conduct,<sup>1044</sup> especially where there were other reasonable inferences to be drawn.<sup>1045</sup> In particular, Nizeyimana contends that the Trial Chamber's finding that he "might" have had *de jure* authority and the ability to prevent and punish his subordinates fails to meet the burden of proof beyond reasonable doubt.<sup>1046</sup> He argues that the evidence established that Commander Tharcisse Muvunyi, Nizeyimana's *de jure* superior, was the senior officer at the ESO

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<sup>1038</sup> Trial Judgement, paras. 1499-1502, 1540, 1565, 1567, 1579, 1580. *See also* Trial Judgement, paras. 1481-1489.

<sup>1039</sup> Trial Judgement, paras. 1516-1518, 1540, 1565, 1567, 1579, 1580. *See also* Trial Judgement, paras. 1481-1489.

<sup>1040</sup> Trial Judgement, paras. 1525-1528, 1540, 1565, 1567, 1579, 1580. *See also* Trial Judgement, paras. 1481-1489. The Trial Chamber found Nizeyimana responsible as a superior for the serious bodily harm suffered by Witness ZAV only in relation to the count of genocide. *See* Trial Judgement, para. 1540.

<sup>1041</sup> Trial Judgement, paras. 1560, 1561, 1565, 1567. *See also* Trial Judgement, paras. 1481-1489.

<sup>1042</sup> *See, e.g.*, Trial Judgement, paras. 1502, 1518, 1528, 1561, 1567, 1594.

<sup>1043</sup> Nizeyimana Notice of Appeal, paras. 107-110; Nizeyimana Appeal Brief, paras. 531-565. *See also* AT. 28 April 2014 pp. 14, 41, 42.

<sup>1044</sup> Nizeyimana Notice of Appeal, para. 107; Nizeyimana Appeal Brief, paras. 537-543. *See also* AT. 28 April 2014 pp. 14, 41, 42.

<sup>1045</sup> Nizeyimana Appeal Brief, para. 536.

at that time, and that Muvunyi was therefore responsible for punishing ESO soldiers and Nizeyimana had no direct authority over them.<sup>1047</sup>

339. Nizeyimana submits that the Trial Chamber correctly found that his *de facto* authority had to be determined on a case-by-case basis but argues that it erred in its findings in this regard.<sup>1048</sup> Specifically, with respect to the Ruhutinyanya family killings, Nizeyimana asserts that the Trial Chamber failed to identify the perpetrators and found that the killings were either perpetrated by ESO soldiers or *Interahamwe*, such that his effective control over the perpetrators could not have been established.<sup>1049</sup> Nizeyimana argues, in relation to the killings of Rwekaza and Uwambaye, and the attack on Witness ZAV, that the “relative inexperience of ESO soldiers” does not support the finding that he had *de facto* or *de jure* authority over them.<sup>1050</sup> Nizeyimana contends that his actual presence during the attack at the Matabaro and Nyirinkwaya households and his civilian attire failed to establish his effective control, especially given that there was no direct evidence that he ordered, instigated, or authorized these killings.<sup>1051</sup> In all instances, Nizeyimana argues that the Trial Chamber failed to give appropriate weight to the role Muvunyi played, and states that he did not have *de jure* authority at the ESO camp as a consequence.<sup>1052</sup>

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<sup>1046</sup> Nizeyimana Appeal Brief, para. 537, *referring to* Trial Judgement, para. 1487. *See also* AT. 28 April 2014 p. 14.

<sup>1047</sup> Nizeyimana Appeal Brief, para. 538, *referring to* Trial Judgement, paras. 795, 1481-1483, 1485, 1528. *See also* AT. 28 April 2014 p. 42. *See also* Nizeyimana Appeal Brief, paras. 539-543, 552.

<sup>1048</sup> Nizeyimana Appeal Brief, para. 539. Nizeyimana disputes the findings that he was present in Butare when these events occurred, but addresses the errors in relation to the application of Article 6(3) of the Statute in this Ground of Appeal. Nizeyimana Appeal Brief, paras. 535, 556, 560. However, as the Appeals Chamber has already considered and rejected Nizeyimana’s arguments in relation to his alibi, it will not revisit his arguments here. *See supra* Section III.B. With regard to the killings of Gicanda and the others taken from her home, Nizeyimana submits that the Trial Chamber erred in its consideration that he was in a position to prevent the killings, as the evidence did not demonstrate that he knew or should have known about the killings since there was no evidence that he ordered or authorized them. Nizeyimana Appeal Brief, paras. 550, 551, *referring to* Trial Judgement, para. 493. He also argues that an investigation into the killing of Gicanda was to be conducted by Muvunyi, which, he submits, demonstrates that it was not him who had superior responsibility. Nizeyimana Appeal Brief, paras. 553, 554. The Appeals Chamber has already addressed these arguments elsewhere in this Judgement. *See supra* Section III.E.

<sup>1049</sup> Nizeyimana Appeal Brief, paras. 545, 546, *referring to* Trial Judgement, paras. 201, 215. Nizeyimana repeats his submissions made in Ground 7 in terms of inferences as to his genocidal intent and alternative inferences as to Muvunyi’s role in the incident. *See* Nizeyimana Appeal Brief, paras. 544, 547, 549. The Appeals Chamber has already dismissed these assertions elsewhere in this Judgement. *See supra* Section III.C.3. Nizeyimana also asserts that Defence Witness OUV03 established that Muvunyi arrested Bizimana for his participation in the crime, which raised a doubt in the Prosecution’s case because Bizimana fell under Muvunyi’s authority. Nizeyimana Appeal Brief, paras. 548, 549. The Appeals Chamber has already addressed and rejected the argument that Muvunyi had Bizimana arrested and that Bizimana fell under Muvunyi’s sole authority. *See supra* Section III.E.

<sup>1050</sup> Nizeyimana Appeal Brief, paras. 557, 558, *referring to* Trial Judgement, para. 1525. Nizeyimana also argues that he was not in Butare at the time of these attacks. Nizeyimana Appeal Brief, para. 556. However, the Appeals Chamber has already considered Nizeyimana’s challenges that the Trial Chamber erred in finding that he was present at the Gikongoro/Cyangugu and Kigali roads junction roadblock and ordered the killings, and rejected them. *See supra* Sections III.F, III.G.

<sup>1051</sup> Nizeyimana Appeal Brief, paras. 562-564, *referring to* Trial Judgement, paras. 690, 733, 736. Nizeyimana repeats his submissions made in Grounds 30, 31, and 33-38. Nizeyimana Appeal Brief, paras. 559-561. The Appeals Chamber has already dismissed these assertions elsewhere in this Judgement. *See supra* Sections III.B, III.I.

<sup>1052</sup> Nizeyimana Appeal Brief, paras. 548, 549, 553, 558. *See also* AT. 28 April 2014 p. 42.



340. Nizeyimana notes that the findings pursuant to Article 6(3) of the Statute were used for sentencing purposes and requests that the sentence be reduced accordingly.<sup>1053</sup>

341. The Prosecution responds that none of Nizeyimana's convictions rests solely on his superior responsibility pursuant to Article 6(3) of the Statute and that therefore this ground must fail.<sup>1054</sup> It further asserts that Nizeyimana's challenges are unmeritorious,<sup>1055</sup> as the Trial Chamber established several relevant factors in determining Nizeyimana's effective control,<sup>1056</sup> and demonstrated that he had a duty to take necessary and reasonable measures to prevent his ESO subordinates from committing the crimes, or to punish them after their commission.<sup>1057</sup>

342. The Appeals Chamber recalls that the threshold for a superior-subordinate relationship within the meaning of Article 6(3) of the Statute is the possession of effective control on the part of the superior, in the sense of a material ability to prevent or punish criminal conduct by his subordinate(s).<sup>1058</sup> It is settled jurisprudence that the test for effective control is the material ability to prevent or punish the proven offences.<sup>1059</sup>

343. The Appeals Chamber finds that the Trial Chamber reasonably relied on a plurality of factors to demonstrate Nizeyimana's *de jure* authority and effective control, specifically: (i) his undisputed leadership position and rank of Captain and S2/S3 officer within the ESO camp;<sup>1060</sup> (ii) his duration of service at the ESO camp, including by comparison to Muvunyi's limited tenure, and his authority to issue orders to ESO soldiers;<sup>1061</sup> (iii) his positive relationships with lower ranking, yet influential officers, including Bizimana; (iv) the relative inexperience and youth of ESO cadets; as well as (v) the context surrounding each individual incident.<sup>1062</sup>

344. In considering these factors, the Trial Chamber specifically took into account Defence submissions regarding the limited responsibilities of an S2/S3 officer, that he had no direct

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<sup>1053</sup> Nizeyimana Notice of Appeal, paras. 108-110; Nizeyimana Appeal Brief, paras. 531, 532, *referring to* Trial Judgement, paras. 1502, 1518, 1528, 1540, 1561, 1567.

<sup>1054</sup> Prosecution Response Brief, paras. 269, 304.

<sup>1055</sup> Prosecution Response Brief, para. 270.

<sup>1056</sup> Prosecution Response Brief, para. 272, *referring to* Trial Judgement, paras. 198, 511, 736, 1481-1489. *See also* AT. 28 April 2014 pp. 33-36.

<sup>1057</sup> Prosecution Response Brief, para. 274. *See also* Prosecution Response Brief, paras. 277, 280, 285-292, 294-297, 301, 302; AT. 28 April 2014 pp. 33-36. Nizeyimana replies that the Prosecution seeks to expand superior responsibility by imparting on Nizeyimana a higher duty than the law requires. Nizeyimana Reply Brief, para. 108.

<sup>1058</sup> *Nahimana et al.* Appeal Judgement, para. 484; *Halilović* Appeal Judgement, para. 59. *See also, e.g., Ntabakuze* Appeal Judgement, para. 100; *Bagosora and Nsengiyumva* Appeal Judgement, para. 191.

<sup>1059</sup> *See Nahimana et al.* Appeal Judgement, para. 625. *See also Ntabakuze* Appeal Judgement, para. 169; *Orić* Appeal Judgement, para. 91.

<sup>1060</sup> Trial Judgement, para. 1482.

<sup>1061</sup> Trial Judgement, paras. 1486, 1487.

<sup>1062</sup> Trial Judgement, paras. 1487, 1499-1502, 1516-1518, 1525-1528, 1560, 1561.

authority over subordinates and retained limited ability to impose punishment,<sup>1063</sup> and that Nizeyimana was outranked at the relevant time by Muvunyi – the Camp Commander, and as such – Nizeyimana’s *de jure* superior.<sup>1064</sup> Nevertheless, the Trial Chamber concluded that the evidence indicated that Nizeyimana had obligations to maintain discipline of lower ranking soldiers and was required to report criminal conduct of subordinates, and that it was undisputed that he was a “formidable figure within the ESO’s hierarchy, notwithstanding any *de jure* limitations to his authority”,<sup>1065</sup> based on his rank, position, and tenure within the ESO command structure, and the manner in which he was perceived by ESO soldiers in general.<sup>1066</sup> Furthermore, the Trial Chamber determined that Nizeyimana did not have the material ability “at *all* times to prevent or punish *all* crimes committed by *all* subordinate military personnel at the ESO”,<sup>1067</sup> but that he exercised this power under certain circumstances “notwithstanding the possibility that Muvunyi did as well”,<sup>1068</sup> and that this would be determined on a case-by-case basis.<sup>1069</sup>

345. The Appeals Chamber finds this analysis, in conjunction with the subsequent case-by-case assessments, to be reasonable in establishing Nizeyimana’s effective control and material ability to prevent or punish crimes in each instance. The Appeals Chamber therefore dismisses Nizeyimana’s general contentions that he had no *de jure* authority or effective control, based on the Trial Chamber’s finding that he “might” have had the ability to prevent and punish the perpetrators of the crimes because of his authority to issue orders and his substantial influence.<sup>1070</sup> In this regard, the Trial Chamber’s finding that “the relative inexperience and youth of ESO cadets is another factor that, in some cases, might have given Nizeyimana the material ability to prevent and punish criminal conduct of subordinate ESO soldiers” does not indicate that the Trial Chamber applied the incorrect standard, as it considered that this was simply an additional factor which could have demonstrated his effective control in some cases.<sup>1071</sup>

346. Furthermore, to the extent that Nizeyimana seeks to show that it was not he, but rather Muvunyi, who had the authority and material ability to prevent crimes or punish perpetrators, the Appeals Chamber considers that proof of Muvunyi’s authority does not cast doubt on that of Nizeyimana, as such power is not necessarily exclusive.<sup>1072</sup> In this regard, the Trial Chamber

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<sup>1063</sup> Trial Judgement, para. 1483.

<sup>1064</sup> Trial Judgement, para. 1481. *See also, e.g.*, Trial Judgement, paras. 1528, 1561.

<sup>1065</sup> Trial Judgement, para. 1484. *See also* Trial Judgement, paras. 1486-1488.

<sup>1066</sup> Trial Judgement, paras. 1486, 1487.

<sup>1067</sup> Trial Judgement, para. 1488 (emphasis in original).

<sup>1068</sup> Trial Judgement, para. 1488.

<sup>1069</sup> Trial Judgement, para. 1489.

<sup>1070</sup> Trial Judgement, para. 1487.

<sup>1071</sup> Trial Judgement, para. 1487.

<sup>1072</sup> *Cf. Bagosora and Nsengiyumva* Appeal Judgement, paras. 491, 494, 495.

explicitly noted Muvunyi's authority,<sup>1073</sup> and considered Nizeyimana's arguments in relation to Muvunyi's relationship with specific ESO soldiers, and his involvement in the relevant events.<sup>1074</sup> The Appeals Chamber has considered and dismissed Nizeyimana's specific arguments in relation to Muvunyi's role elsewhere in this Judgement.<sup>1075</sup> Therefore his submissions concerning Muvunyi's parallel authority fail in all respects.

347. With respect to Nizeyimana's assertion that the Trial Chamber did not determine whether the perpetrators of the killings of the Ruhutinyanya family were ESO soldiers or *Interahamwe*, the Appeals Chamber notes that the Trial Chamber unequivocally found that the ESO soldiers who transported the Ruhutinyanya family to the roadblock significantly and substantially contributed to and intended their deaths.<sup>1076</sup> The Appeals Chamber recalls that an accused may be held responsible as a superior under Article 6(3) of the Statute where a subordinate "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute", provided, of course, that all the other elements of such responsibility have been established.<sup>1077</sup> In this regard, the Appeals Chamber recalls its finding above that the Trial Chamber reasonably established Nizeyimana's effective control over the ESO soldiers and his material ability to prevent or punish them.<sup>1078</sup> Furthermore, the Trial Chamber reasonably exercised its discretion in cautiously considering the circumstantial and hearsay evidence and in concluding that the family was killed in the vicinity of the roadblock near the Akanyaru border, and that the ESO soldiers who transported the family to this location participated in killing them.<sup>1079</sup> Nizeyimana's mere disagreement with the Trial Chamber's findings without more support is insufficient to call into question the Trial Chamber's findings on his effective control in respect of this event.

348. The Appeals Chamber finds that the Trial Chamber reasonably relied on the "relative inexperience of ESO soldiers" as an indication of Nizeyimana's effective control over those ESO soldiers involved in the Rwekaza and Uwambaye killings, and the serious bodily harm suffered by Witness ZAV.<sup>1080</sup> While on its own this could not have supported a finding that he had the authority

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<sup>1073</sup> Trial Judgement, paras. 1481, 1482.

<sup>1074</sup> See, e.g., Trial Judgement, paras. 152, 156, 195, 515, 516, 1502, 1518, 1528, 1561, fn. 410.

<sup>1075</sup> See *supra* Sections III.C, III.E.

<sup>1076</sup> Trial Judgement, paras. 215, 219. See also Trial Judgement, paras. 1495, 1496.

<sup>1077</sup> *Nahimana et al.* Appeal Judgement, para. 486. See also *Nahimana et al.* Appeal Judgement, para. 485, quoting *Blagojević and Jokić* Appeal Judgement, paras. 280-282.

<sup>1078</sup> See *supra* para. 345.

<sup>1079</sup> Trial Judgement, paras. 216-220. See *Gatete* Appeal Judgement, para. 99; *Ntabakuze* Appeal Judgement, fn. 319; *Hategekimana* Appeal Judgement, para. 121; *Munyakazi* Appeal Judgement, para. 77; *Kalimanziira* Appeal Judgement, paras. 96, 199.

<sup>1080</sup> Trial Judgement, para. 1525.

and effective control over these ESO soldiers, the Appeals Chamber observes that the Trial Judgement reflects that this was only one of a number of indicators taken into account by the Trial Chamber.<sup>1081</sup> The Appeals Chamber observes that the Trial Chamber based its findings on Nizeyimana's ability to prevent or punish these crimes on its conclusions regarding his active participation in the events, namely that the soldiers acted on his orders.<sup>1082</sup> The Trial Chamber further considered the contextual circumstances surrounding the events, namely: (i) that Rwekaza and Witness ZAV were returned to the roadblock by Nizeyimana after they had already been allowed to pass through; and (ii) the soldiers' fear of the consequences if they failed to comply with Nizeyimana's orders.<sup>1083</sup> It is clear from a reading of the Trial Judgement as a whole that the Trial Chamber's analysis in the legal findings concerning Nizeyimana's superior responsibility are to be viewed in conjunction with the separate analyses relating to each underlying crime.<sup>1084</sup> The Appeals Chamber therefore dismisses this submission.

349. Likewise, Nizeyimana fails to demonstrate that the Trial Chamber erred in its determination that he incurred superior liability in relation to the killings at the Matabaro and Nyirinkwaya households. Nizeyimana fails to consider that the Trial Chamber relied on multiple factors in inferring his effective control with regard to this event, including: (i) the context in which the attack occurred, and that given this context Nizeyimana's presence substantially and significantly contributed to the killings; (ii) Nizeyimana's position as a high ranking officer within the ESO hierarchy and as the S2/S3 officer charged with intelligence and training/operations; and (iii) his intimate knowledge of the neighborhood showing that he had a supervisory role and presence to ensure successful completion of the attack.<sup>1085</sup> The Trial Chamber further considered his direct involvement in the attack and the Prosecution evidence identifying the ESO soldiers present.<sup>1086</sup> Furthermore, contrary to Nizeyimana's assertion, the evidence that he was in civilian attire at the roadblock<sup>1087</sup> was not one of the factors the Trial Chamber considered in establishing his effective control.<sup>1088</sup> The Appeals Chamber can identify no error in this approach and therefore dismisses Nizeyimana's contentions in this regard.

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<sup>1081</sup> Trial Judgement, paras. 1525-1527.

<sup>1082</sup> Trial Judgement, paras. 1525-1527. *See also* Trial Judgement, paras. 1519, 1524.

<sup>1083</sup> Trial Judgement, paras. 1526, 1527.

<sup>1084</sup> Trial Judgement, paras. 1481-1489, 1499-1502, 1516-1518, 1525-1528, 1560, 1561.

<sup>1085</sup> Trial Judgement, paras. 734-736, 1558, 1560.

<sup>1086</sup> Trial Judgement, para. 1560.

<sup>1087</sup> *See* Trial Judgement, para. 690.

<sup>1088</sup> Trial Judgement, paras. 1560, 1561.

350. Accordingly, Nizeyimana has failed to demonstrate that the Trial Chamber erred in concluding that he exercised effective control over the ESO soldiers who perpetrated each of the incidents for which it found Nizeyimana responsible as a superior.

351. For the foregoing reasons, the Appeals Chamber dismisses Nizeyimana's Forty-First Ground of Appeal.

## IV. APPEAL OF THE PROSECUTION

### A. Nizeyimana's Preliminary Challenge

352. Nizeyimana argues that the Prosecution's appeal should be summarily dismissed, in its entirety, for failing to comply with the Practice Direction on Formal Requirements and the Statute.<sup>1089</sup> In particular, Nizeyimana contends that the Prosecution does not identify which findings are the subject of its appeal and whether the alleged errors are legal or factual in nature, rendering it "impossible" for him to respond.<sup>1090</sup>

353. The Prosecution submits that it has specifically identified the areas of the Trial Judgement that it challenges, and that there is no basis for summary dismissal of its appeal.<sup>1091</sup>

354. The Appeals Chamber does not observe any irregularity in relation to the Prosecution's appeal. Despite Nizeyimana's contention that the purported shortcomings in the Prosecution's appeal made responding "an impossible task",<sup>1092</sup> the Appeals Chamber notes that he in fact responded to the Prosecution's challenges.<sup>1093</sup> Nizeyimana's request for summary dismissal is without merit, and it is consequently dismissed.

### B. Killing of Tutsi Civilians at Butare University Hospital (Ground 1)

355. The Prosecution alleged that Nizeyimana was responsible for authorizing, ordering, or instigating soldiers from the Rwandan Armed Forces, ESO, Ngoma Camp, and Butare Gendarmerie Camp, as well as *Interahamwe* on or around 20 April 1994 to kill Tutsi civilians at Butare University Hospital ("Butare Hospital").<sup>1094</sup> The Indictment alleges that a number of specific killings took place at Butare Hospital on 22, 23, and 24 April 1994.<sup>1095</sup> The Prosecution also alleged that Nizeyimana was responsible as a superior pursuant to Article 6(3) of the Statute for these crimes.<sup>1096</sup>

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<sup>1089</sup> Nizeyimana Response Brief, paras. 10-14, 89, *referring to* Practice Direction on Formal Requirements, para. 4, Statute, Article 24; AT. 28 April 2014 pp. 53, 58.

<sup>1090</sup> Nizeyimana Response Brief, paras. 13, 14. *See also* Nizeyimana Response Brief, paras. 11, 15; AT. 28 April 2014 p. 53.

<sup>1091</sup> AT. 28 April 2014 pp. 58, 59.

<sup>1092</sup> Nizeyimana Response Brief, paras. 13, 14.

<sup>1093</sup> *See* Nizeyimana Response Brief, paras. 10, 15-88, 90. *See also* AT. 28 April 2014 pp. 53-58.

<sup>1094</sup> Indictment, paras. 15, 38, 44.

<sup>1095</sup> Indictment, para. 15.

<sup>1096</sup> Indictment, paras. 36, 42, 46.

356. The Trial Chamber found that Nizeyimana could not be held responsible for the killings at Butare Hospital.<sup>1097</sup> In making the relevant findings, the Trial Chamber considered in turn a number of specific incidents of killings at Butare Hospital, as well as general evidence of killings at the hospital by ESO soldiers.<sup>1098</sup> It found that Nizeyimana's responsibility for each incident was not established for various reasons, which included that: (i) there was no direct evidence of Nizeyimana's involvement in the killings; (ii) the evidence presented tended to implicate Presidential Guards rather than ESO soldiers; (iii) the record failed to reflect that Nizeyimana exercised effective control over the perpetrators of the killings; and (iv) it was not established that Nizeyimana knew or should have known about the killings.<sup>1099</sup>

357. The Prosecution submits that the Trial Chamber erred in failing to convict Nizeyimana as a superior under Article 6(3) of the Statute for the crimes committed by his ESO subordinates at Butare Hospital, and requests that the Appeals Chamber enter convictions for genocide and extermination as a crime against humanity.<sup>1100</sup>

358. The Prosecution submits that the Trial Chamber erred in its assessment of the evidence of the involvement of ESO soldiers in the killings due to its fragmented, rather than holistic, approach.<sup>1101</sup> Specifically, it argues that the "Trial Chamber ignored the interconnection between the crimes targeting the Tutsi[s] in Butare *préfecture* and Nizeyimana's ESO soldiers' participation in a joint criminal enterprise to commit genocide",<sup>1102</sup> and that the evidence established that Tutsi civilians and patients were repeatedly subjected to various forms of violence, including murder, in April and May 1994 at Butare Hospital.<sup>1103</sup> The Prosecution further argues that the participation of ESO soldiers in the targeted killings and violence against Tutsis at Butare Hospital was established.<sup>1104</sup> The Prosecution refers to the corroborative testimonies of Prosecution Witnesses ZAL, YAP, and BDE who identified ESO soldiers as being among those who occupied Butare Hospital and participated in the killings.<sup>1105</sup>

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<sup>1097</sup> Trial Judgement, paras. 929, 937, 950, 987, 995, 997, 1002, 1005, 1480.

<sup>1098</sup> Trial Judgement, paras. 889-1005.

<sup>1099</sup> Trial Judgement, paras. 926-929, 934-937, 947-950, 987, 993-995, 1002.

<sup>1100</sup> Prosecution Notice of Appeal, paras. 1-3, 5, 6; Prosecution Appeal Brief, paras. 2, 8, 25, 50; Prosecution Reply Brief, paras. 1, 2, 13. *See also* AT. 28 April 2014 pp. 42, 45-47, 59-61. The Prosecution also requests that the Appeals Chamber enter a conviction for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to these crimes; however, as this event was not pleaded under this count of the Indictment, the Appeals Chamber will not consider it. *See* Indictment, paras. 52, 54.

<sup>1101</sup> Prosecution Notice of Appeal, paras. 3, 5; Prosecution Appeal Brief, para. 27. *See also* Prosecution Appeal Brief, para. 2; Prosecution Reply Brief, para. 1.

<sup>1102</sup> Prosecution Appeal Brief, para. 27. *See also* AT. 28 April 2014 pp. 47, 60.

<sup>1103</sup> Prosecution Appeal Brief, para. 28. *See also* AT. 28 April 2014 p. 45.

<sup>1104</sup> Prosecution Appeal Brief, paras. 29, 32; AT. 28 April 2014 pp. 45, 60. *See also* AT. 28 April 2014 p. 46.

<sup>1105</sup> Prosecution Appeal Brief, paras. 29-32. *See also* AT. 28 April 2014 p. 46.

359. According to the Prosecution, the ESO soldiers who committed the killings at Butare Hospital were Nizeyimana's subordinates as he was their hierarchical superior with *de jure* and *de facto* control, and, moreover, he had a close relationship with several of the ESO soldiers who perpetrated the crimes.<sup>1106</sup> It contends that the Trial Chamber erred in finding that Nizeyimana temporarily "lost his power and authority over soldiers belonging to the same group of subordinates from ESO, with whom he committed crimes throughout Butare during the same period".<sup>1107</sup> In particular, the Prosecution argues that Nizeyimana did not lose effective control over his ESO subordinates merely because Presidential Guards also committed the crimes at Butare Hospital as the Presidential Guards and ESO soldiers belonged to two separate organs and functional chains of command in the Rwandan Armed Forces.<sup>1108</sup> Additionally, the Prosecution contends that Nizeyimana's superior position was not affected by the fact that Tharcisse Muvunyi, his immediate superior, had overall *de jure* command over the ESO soldiers as effective control need not be exclusive to one person.<sup>1109</sup>

360. The Prosecution further asserts that the Trial Chamber erred by failing to find that Nizeyimana had the requisite knowledge to incur superior liability based on the information he personally received as well as information available to him which would have obliged him to conduct further inquiry.<sup>1110</sup> Specifically, it argues that Nizeyimana acquired actual knowledge of the crimes being committed by soldiers at Butare Hospital, which was located next door to the ESO, from Prosecution Witness Rony Zachariah, a Médecins Sans Frontières doctor.<sup>1111</sup> The Prosecution submits that Nizeyimana's knowledge of the ongoing killings and the involvement of the Presidential Guards, although not under his command, also constituted sufficiently alarming information.<sup>1112</sup> The Prosecution also argues that Nizeyimana had other reasons to know of the involvement of ESO soldiers under his command in crimes against Tutsis at the hospital,<sup>1113</sup> including his position as S2/S3 officer and his direct participation in the campaign to kill Tutsis in Butare Prefecture during the same time period.<sup>1114</sup> The Prosecution asserts that Nizeyimana need not have been specifically informed of details of the killings or that ESO soldiers were the

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<sup>1106</sup> Prosecution Appeal Brief, para. 33; AT. 28 April 2014 p. 46. *See also* Prosecution Appeal Brief, paras. 11-13; AT. 28 April 2014 pp. 59, 60.

<sup>1107</sup> Prosecution Appeal Brief, paras. 34, 37. *See also* AT. 28 April 2014 p. 59.

<sup>1108</sup> Prosecution Appeal Brief, paras. 3, 5, 35.

<sup>1109</sup> Prosecution Appeal Brief, paras. 5, 36.

<sup>1110</sup> Prosecution Appeal Brief, paras. 7, 38, 47. *See also* AT. 28 April 2014 pp. 46, 47, 59, 61.

<sup>1111</sup> Prosecution Appeal Brief, paras. 39, 40; AT. 28 April 2014 pp. 46, 61.

<sup>1112</sup> Prosecution Appeal Brief, para. 41. *See also* AT. 28 April 2014 pp. 47, 61.

<sup>1113</sup> Prosecution Appeal Brief, para. 42. *See also* AT. 28 April 2014 p. 47.

<sup>1114</sup> Prosecution Appeal Brief, paras. 7, 42-45. *See also* Prosecution Appeal Brief, para. 10; AT. 28 April 2014 pp. 47, 60.



perpetrators, and that the Trial Chamber failed to consider the evidence as a whole.<sup>1115</sup> With regard to the latter submission, it argues that the Trial Chamber erroneously limited its assessment to Nizeyimana's knowledge of separate incidents or specific Tutsi victims.<sup>1116</sup>

361. The Prosecution also submits that Nizeyimana did nothing to prevent his subordinates from participating in the crimes or to punish them,<sup>1117</sup> and "in fact provided a 'continued authorization', and 'moral support and approval' to his ESO subordinates' criminal conduct" based on his involvement in the crimes with the same group of ESO subordinates before, during, and after the killings at Butare Hospital.<sup>1118</sup>

362. Nizeyimana responds that the Prosecution only alleges errors of fact but fails to show that the Trial Chamber's findings are unreasonable or wholly erroneous and as such fails to meet the legal standard of review on appeal.<sup>1119</sup> Nizeyimana also contends that the Prosecution failed to state which killings it submits were proven beyond reasonable doubt and therefore subject to appeal.<sup>1120</sup>

363. In response to the Prosecution's argument that the Trial Chamber took a piecemeal approach, Nizeyimana avers that the Trial Chamber considered each allegation pleaded in the Indictment as well as general allegations of violence at Butare Hospital, and as a result considered the allegations and evidence as a whole.<sup>1121</sup> Nizeyimana contends that the Prosecution misstates the Trial Chamber's findings by arguing that it was held that he "temporarily lost his authority", as the Trial Chamber in fact found that his alibi created doubt as to whether he had the requisite knowledge of the actions of ESO soldiers when he was no longer assigned to the ESO.<sup>1122</sup> Nizeyimana also argues that the Prosecution's submission that there was no basis to find that he lost effective control is "patently incorrect" as it presupposes that he had effective control while the Trial Chamber found "that his effective control was limited and fact-specific".<sup>1123</sup> As to the Prosecution's arguments on his failure to prevent or punish the crimes of his subordinates, Nizeyimana responds that, in light of the Trial Chamber's findings on his lack of knowledge and

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<sup>1115</sup> Prosecution Appeal Brief, paras. 6, 41, 46. *See also* AT. 28 April 2014 p. 47.

<sup>1116</sup> Prosecution Appeal Brief, paras. 6, 46, 47.

<sup>1117</sup> Prosecution Appeal Brief, para. 48. *See also* Prosecution Appeal Brief, para. 24; AT. 28 April 2014 pp. 47, 61.

<sup>1118</sup> Prosecution Appeal Brief, para. 49.

<sup>1119</sup> Nizeyimana Response Brief, paras. 16-23, 34-36. *See also* Nizeyimana Response Brief, para. 26; AT. 28 April 2014 pp. 53, 55.

<sup>1120</sup> Nizeyimana Response Brief, paras. 31-33; AT. 28 April 2014 p. 53.

<sup>1121</sup> Nizeyimana Response Brief, paras. 37-40. *See also* Nizeyimana Response Brief, paras. 41, 44, 45, 47, 52, 53; AT. 28 April 2014 p. 56.

<sup>1122</sup> Nizeyimana Response Brief, para. 48. *See also* AT. 28 April 2014 pp. 56, 57.

<sup>1123</sup> Nizeyimana Response Brief, para. 49. *See also* AT. 28 April 2014 pp. 53, 54.

that the perpetrators were not ESO soldiers, the Prosecution “does not raise a valid ground of appeal”.<sup>1124</sup>

364. In reply, the Prosecution asserts that Nizeyimana misstates the Trial Chamber’s reasoning and finding on his purported alibi.<sup>1125</sup> The Prosecution argues that the Trial Chamber “did not make the wholesale finding Nizeyimana suggests, that [his] purported alibi cast doubt on his knowledge of all crimes at issue and [...] of the participation of ESO soldiers in the sustained targeting and killing” of Tutsis at Butare Hospital,<sup>1126</sup> and that Nizeyimana’s contention is unfounded.<sup>1127</sup>

365. The Appeals Chamber recalls that where the Prosecution appeals an acquittal, it must show that when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused’s guilt has been eliminated.<sup>1128</sup>

366. With regard to the various incidents of killings at Butare Hospital, the Trial Chamber found that: (i) the evidence tended to implicate the Presidential Guards in the killing of 40 bed-ridden patients on 22 April 1994, and failed to demonstrate that ESO soldiers committed the killings;<sup>1129</sup> (ii) “the evidence clearly does not implicate ESO soldiers” in the killing of Médecins Sans Frontières staff;<sup>1130</sup> (iii) around or after 25 April 1994, ESO Corporal Fulgence Niyibizi killed an elderly man but the evidence failed to show that Nizeyimana ordered or instigated the killing, or that he knew or should have known about this isolated incident;<sup>1131</sup> (iv) Niyibizi and a soldier, Hagenimana, killed a hospital attendant, Venancie, but that there was no direct evidence of Nizeyimana’s contribution to the killing or that he knew or should have known about the killing;<sup>1132</sup> and (v) the evidence did not establish the participation of Niyibizi or other ESO soldiers in the killings of Épiphanie and Vénérande Mukanama, or in the killings observed by Prosecution Witness ZT.<sup>1133</sup> The Trial Chamber further found that general evidence of participation of ESO soldiers in the events at Butare Hospital failed to demonstrate that Nizeyimana significantly or substantially

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<sup>1124</sup> Nizeyimana Response Brief, para. 55.

<sup>1125</sup> Prosecution Reply Brief, paras. 3-12. *See also* AT. 28 April 2014 p. 60.

<sup>1126</sup> Prosecution Reply Brief, para. 5.

<sup>1127</sup> Prosecution Reply Brief, para. 11.

<sup>1128</sup> *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10; *Boškoski and Tar-uloovski* Appeal Judgement, para. 272; *Mrk{i}* and *Šljivan-anin* Appeal Judgement, para. 15; *Strugar* Appeal Judgement, para. 14; *Seromba* Appeal Judgement, para. 11.

<sup>1129</sup> Trial Judgement, para. 926.

<sup>1130</sup> Trial Judgement, paras. 934, 935.

<sup>1131</sup> Trial Judgement, paras. 947-949.

<sup>1132</sup> Trial Judgement, paras. 989-995.

<sup>1133</sup> Trial Judgement, paras. 988, 996-1001, 1003-1005.

contributed to any proven criminal conduct or that he exercised effective control over the perpetrators.<sup>1134</sup>

367. The Appeals Chamber will first address the Prosecution's arguments regarding the Trial Chamber's findings that it was not established that Nizeyimana's subordinates were involved in the killing of 40 bed-ridden patients on 22 April 1994, Médecins Sans Frontières staff, Épiphanie, Vénéranda Mukanama, or in the killings observed by Witness ZT before turning to consider its arguments regarding Nizeyimana's knowledge of the killings committed at Butare Hospital.

#### 1. Identification of ESO Soldiers as Perpetrators of Crimes at Butare Hospital

368. The Appeals Chamber finds the Prosecution's argument that the Trial Chamber employed a fragmented approach to assessing the evidence on the involvement of ESO soldiers in the killings to be without merit. The Trial Chamber devoted a section of its deliberations on the evidence of ESO soldiers' participation in the events at Butare Hospital,<sup>1135</sup> and noted that this evidence "remains highly relevant to particularised events that are expressly pleaded in the Indictment".<sup>1136</sup> The Trial Chamber also considered the general evidence of crimes purportedly committed by ESO soldiers at Butare Hospital in its discussion of the soldiers' involvement in the particular killings pleaded in the Indictment.<sup>1137</sup> Notably, the Trial Chamber explicitly found that the "Prosecution's reliance on general evidence of ESO soldiers participating in violence at the hospital" was insufficient to exclude the reasonable possibility that the particular crimes were committed by perpetrators other than ESO soldiers.<sup>1138</sup> The Trial Chamber then concluded that the general evidence of the participation of ESO soldiers in crimes lacked the "details necessary to sustain [the Prosecution's] exacting burden of proof".<sup>1139</sup> The Appeals Chamber therefore finds that the Trial Chamber considered evidence of ESO soldiers' general participation in crimes. Despite not explicitly referring to ESO soldiers' participation in the crimes committed in Butare Prefecture, the Appeals Chamber is unconvinced that the Trial Chamber erred in its approach to assessing the evidence and dismisses the Prosecution's argument.

369. The Prosecution disputes the Trial Chamber's finding on the general nature of the evidence on the participation of ESO soldiers in crimes by referring to the evidence of Witnesses ZAL, YAP,

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<sup>1134</sup> Trial Judgement, paras. 976-987.

<sup>1135</sup> Trial Judgement, paras. 976-987.

<sup>1136</sup> Trial Judgement, para. 976.

<sup>1137</sup> Trial Judgement, paras. 926, 927, 933, 935. *See also* Trial Judgement, paras. 976-978.

<sup>1138</sup> Trial Judgement, paras. 927, 935.

<sup>1139</sup> Trial Judgement, para. 978. *See also* Trial Judgement, para. 983 ("In other instances, the Prosecution led evidence about rather particular crimes, but the identification of the soldiers as ESO soldiers remains highly questionable.").

and BDE. However, the Appeals Chamber notes that the Trial Chamber acknowledged that evidence was led “that implicated particular ESO soldiers in crimes” but found that it lacked sufficient detail to meet the Prosecution’s burden of proof.<sup>1140</sup> The Trial Chamber then considered the evidence of Witnesses ZAL and YAP, referred to by the Prosecution on appeal, and concluded that it was “quite vague” and insufficient to support findings beyond a reasonable doubt.<sup>1141</sup> The Prosecution fails to identify an error by the Trial Chamber in its assessment of the evidence of these witnesses. The Appeals Chamber also notes that the Trial Chamber accepted the evidence of Witness BDE identifying one ESO soldier, Corporal Niyibizi, as being involved in the killing of an elderly man around or after 25 April 1994.<sup>1142</sup> The Prosecution has failed to show how the general evidence of Witnesses ZAL and YAP, or Witness BDE’s identification of one ESO soldier in an isolated incident, demonstrates that the Trial Chamber erred in finding that it was not established that ESO soldiers were involved in the killing of 40 bed-ridden patients on 22 April 1994, Médecins Sans Frontières staff, Épiphanie, Vénéranda Mukanama, or in the killings observed by Witness ZT. In light of the foregoing, the Appeals Chamber need not consider the Prosecution’s arguments regarding Nizeyimana’s effective control over the perpetrators of these incidents.

370. With respect to the general evidence of ESO soldiers’ involvement in killings at Butare Hospital, the Trial Chamber found that the ambiguity as to the identities of the perpetrators raised doubts that Nizeyimana exercised effective control over them.<sup>1143</sup> The Prosecution merely asserts that Nizeyimana had effective control over the ESO soldiers who participated in the crimes at Butare Hospital and that his effective control was not temporarily lost or eliminated.<sup>1144</sup> However, it fails to point to any error in the Trial Chamber’s finding that Nizeyimana’s effective control had to be established on a case-by-case basis and that there was insufficient evidence that he had effective control over the perpetrators of the killings at Butare Hospital.<sup>1145</sup> The Prosecution merely points to factors which the Trial Chamber itself considered in making its finding that Nizeyimana had effective control over ESO soldiers in some circumstances.<sup>1146</sup> Moreover, the Prosecution’s argument that the Trial Chamber erred in finding that he lost effective control over the ESO soldiers because of the involvement of Presidential Guards is misplaced as the Trial Chamber did not make such a finding. Rather, the Trial Chamber concluded that the evidence failed to establish that ESO

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<sup>1140</sup> Trial Judgement, para. 978.

<sup>1141</sup> Trial Judgement, paras. 979, 980.

<sup>1142</sup> Trial Judgement, paras. 945-947.

<sup>1143</sup> Trial Judgement, para. 987.

<sup>1144</sup> See Prosecution Appeal Brief, paras. 33-37.

<sup>1145</sup> See, e.g., Trial Judgement, paras. 929, 937, 987, 1002, 1488, 1489.

<sup>1146</sup> See Prosecution Appeal Brief, para. 35. See also Trial Judgement, paras. 1482-1487.

soldiers committed the killing of the 40 bed-ridden patients and Médecins Sans Frontières staff, and that it could not be reasonably excluded that Presidential Guards had committed the killings.<sup>1147</sup>

371. The Appeals Chamber therefore finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that it was not established that the perpetrators of the killings of the 40 bed-ridden patients, the Médecins Sans Frontières staff, Épiphanie, Vénérande Mukanama, or the killings observed by Witness ZT were perpetrated by Nizeyimana's subordinates. Accordingly, the Prosecution has not demonstrated that the Trial Chamber erred in acquitting Nizeyimana of these incidents. The Prosecution's arguments regarding Nizeyimana's knowledge of these killings are also rejected as moot. The Appeals Chamber will only consider the Prosecution's arguments on knowledge in relation to the killings of an elderly man around or after 25 April 1994 and of a hospital attendant, Venancie, which the Trial Chamber found were committed by ESO Corporal Niyibizi.

## 2. Nizeyimana's Knowledge of Killings Committed by ESO Corporal Niyibizi

372. The Trial Chamber found that Niyibizi killed an elderly man on or after 25 April 1994 but concluded "that the evidence fail[ed] to demonstrate that Nizeyimana knew or should have known about this isolated incident".<sup>1148</sup> In so finding, the Trial Chamber reasoned that the evidence tended to reflect that Niyibizi operated on his own,<sup>1149</sup> and that Nizeyimana presented alibi evidence that raised the reasonable possibility that he was not based in Butare Prefecture when this crime occurred.<sup>1150</sup> The Trial Chamber gave similar reasoning for its finding that the evidence failed to reflect that Nizeyimana knew or should have known about Niyibizi's killing of the hospital attendant, Venancie.<sup>1151</sup>

373. The Prosecution raises no argument challenging the Trial Chamber's finding that Niyibizi operated on his own and spent little time at the ESO camp such that Nizeyimana may not have known of these isolated incidents. Further, the Prosecution's arguments on Nizeyimana's alibi evidence are limited to asserting that his alibi did "not preclude him from knowing or having reason to know of his ESO subordinates' participation in the crimes committed at the Hospital".<sup>1152</sup> Beyond stating its own interpretation of the evidence, the Prosecution does not articulate how the

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<sup>1147</sup> Trial Judgement, paras. 926, 934, 935.

<sup>1148</sup> Trial Judgement, paras. 947, 949.

<sup>1149</sup> Trial Judgement, para. 949.

<sup>1150</sup> Trial Judgement, para. 950. The Trial Chamber considered that alibi evidence presented raised the reasonable possibility that Nizeyimana was reassigned to lead a military training camp at the Mata tea factory in Gikongoro Prefecture around 26 April 1994.

<sup>1151</sup> Trial Judgement, paras. 989, 993-995.

<sup>1152</sup> Prosecution Reply Brief, para. 12.

Trial Chamber erred in its finding. The Appeals Chamber finds that the Prosecution's contentions are insufficient to show an error on the part of the Trial Chamber in concluding that the alibi evidence raised doubt as to whether Nizeyimana knew or had reason to know of the isolated crimes committed by Niyibizi.

374. With respect to the Prosecution's arguments that the Trial Chamber failed to consider evidence that a Médecins Sans Frontières doctor informed Nizeyimana of killings at Butare Hospital and evidence that Presidential Guards were involved in killings there, the Appeals Chamber notes that the Trial Chamber considered this evidence.<sup>1153</sup> However, it considered that the evidence of Prosecution witnesses, including Witness Zachariah – who had informed Nizeyimana of the crimes – tended to reflect that they believed that the perpetrators of the crimes were Presidential Guards, who were not Nizeyimana's subordinates.<sup>1154</sup> The Trial Chamber further noted that this evidence failed to indicate that Nizeyimana was informed that ESO soldiers were involved in the crimes.<sup>1155</sup> In this regard, although the Trial Chamber did not explicitly consider Nizeyimana's position as S2/S3 officer in the context of his knowledge of the two killings by Niyibizi, the Appeals Chamber recalls that "although certain evidence may not have been referred to by a Trial Chamber, in the particular circumstances of a given case it may nevertheless be reasonable to assume that the Trial Chamber took it into account".<sup>1156</sup> Further, the Appeals Chamber notes that the Trial Chamber was aware of Nizeyimana's position as S2/S3 officer,<sup>1157</sup> and is therefore not convinced that given the other evidence discussed above,<sup>1158</sup> this factor would have been sufficient to show that he knew or had reason to know that Niyibizi was involved in killings at Butare Hospital.

375. Notably, the Prosecution's argument that Nizeyimana need not have been specifically informed that ESO soldiers were the perpetrators is unpersuasive. The Appeals Chamber recalls that the "reason to know" standard is met when the accused has "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates".<sup>1159</sup> In the context of Niyibizi's crimes, to find that Nizeyimana had the requisite knowledge, the Prosecution would have to show that he had information that would put him on notice that Niyibizi, the only

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<sup>1153</sup> Trial Judgement, paras. 897, 994.

<sup>1154</sup> Trial Judgement, para. 994.

<sup>1155</sup> Trial Judgement, para. 994.

<sup>1156</sup> *Nchamihigo* Appeal Judgement, para. 166; *Musema* Appeal Judgement, para. 19.

<sup>1157</sup> Trial Judgement, para. 1482. *See also, e.g.*, Trial Judgement, paras. 189, 198, 314, 736.

<sup>1158</sup> *See supra* para. 372.

<sup>1159</sup> *Nahimana et al.* Appeal Judgement, para. 791. *See also Bagilishema* Appeal Judgement, paras. 28, 42.

identified culpable subordinate, was about to or had engaged in criminal activity.<sup>1160</sup> The Prosecution fails to identify such evidence and therefore does not demonstrate an error in the Trial Chamber's finding that it was not shown that Nizeyimana knew or had reason to know of Niyibizi's crimes.

### 3. Conclusion

376. In sum, the Prosecution has failed to show that the Trial Chamber erred in finding that the perpetrators of the killings at Butare Hospital – other than the killings of the elderly man and Venancie, which were committed by Niyibizi – were not sufficiently identified as ESO soldiers and, therefore, that Nizeyimana could not be held responsible for these crimes, as it was not proven that he possessed effective control over the perpetrators. Further, with regard to the killings committed by Niyibizi, the Prosecution has failed to demonstrate any error on the part of the Trial Chamber in concluding that Nizeyimana was not proven to have the requisite knowledge of these crimes. The Appeals Chamber, therefore, affirms Nizeyimana's acquittals for the killings at Butare Hospital and dismisses the Prosecution's remaining arguments.

377. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's First Ground of Appeal.

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<sup>1160</sup> Cf. *Orić* Appeal Judgement, para. 60. The other identified perpetrator involved in the killing of the hospital attendant, Venancie, a soldier named Hagenimana, was clearly identified by Prosecution Witness ZW as a non-ESO soldier. See Trial Judgement, paras. 957, 959.

### **C. Rapes of Tutsi Civilians at Butare University Hospital (Ground 2)**

378. The Prosecution alleged that Nizeyimana was responsible for ordering, authorizing, or instigating soldiers from the FAR, ESO, Ngoma Camp, and Butare Gendarmerie Camp, as well as *Interahamwe*, and other militias and armed civilians to rape Tutsi women at the Butare Hospital and other locations between 6 April 1994 and 17 July 1994.<sup>1161</sup> The Indictment specifically identifies a number of rapes committed at Butare Hospital between late April 1994 and early July 1994.<sup>1162</sup> The Prosecution also alleged that Nizeyimana was responsible as a superior pursuant to Article 6(3) of the Statute for these crimes.<sup>1163</sup>

379. The Trial Chamber found that although Tutsi women, including Prosecution Witnesses MKA, ZBL, and DCO, were raped at Butare Hospital, the evidence presented was ambiguous regarding the identity of the perpetrators.<sup>1164</sup> The Trial Chamber therefore could not determine whether: (i) the rapes were committed by ESO soldiers; (ii) Nizeyimana exercised effective control over the perpetrators; (iii) Nizeyimana made any significant or substantial contributions to the crimes; and (iv) he knew or should have known about these crimes.<sup>1165</sup>

380. The Prosecution submits that the Trial Chamber erred in failing to convict Nizeyimana as a superior under Article 6(3) of the Statute for the rapes committed by his ESO subordinates at Butare Hospital, and requests that the Appeals Chamber enter convictions for rape as an act of genocide, as a crime against humanity, and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>1166</sup>

381. The Prosecution submits that the only reasonable conclusion available from the entirety of the evidence is that ESO soldiers participated in the rapes of Tutsi women at Butare Hospital.<sup>1167</sup> In support of this, the Prosecution contends that the Trial Chamber erred in: (i) conducting a piecemeal

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<sup>1161</sup> Indictment, paras. 8, 30-35. *See* Trial Judgement, paras. 5, 1010, 1028.

<sup>1162</sup> Indictment, paras. 31(iii), 31(iv), 35. *See* Trial Judgement, paras. 1010, 1028, 1039.

<sup>1163</sup> Indictment, paras. 36, 49, 50, 57, 58.

<sup>1164</sup> Trial Judgement, paras. 1025, 1026, 1036, 1037, 1049.

<sup>1165</sup> Trial Judgement, paras. 1027, 1038, 1050, 1051. With regard to the specific rapes of Witnesses ZBL and DCO, the Trial Chamber also noted that the alibi evidence presented by Nizeyimana on his reassignment to the Mata tea factory towards the end of April 1994 raised doubts that he substantially or significantly contributed to these rapes. *See* Trial Judgement, paras. 1038, 1051. Furthermore, elsewhere in the Trial Judgement, the Trial Chamber concluded that it “[was] not satisfied that Nizeyimana, in general, had the material ability at *all* times to prevent or punish *all* crimes committed by *all* subordinate military personnel at the ESO”. Trial Judgement, para. 1488 (emphasis in original).

<sup>1166</sup> Prosecution Notice of Appeal, paras. 7-12; Prosecution Appeal Brief, paras. 2, 8, 52, 84.

<sup>1167</sup> Prosecution Appeal Brief, paras. 51, 53, 56.



assessment of the evidence;<sup>1168</sup> and (ii) failing to credit Witness MKA's identification of ESO soldiers as being involved in the rapes of Tutsi women at Butare Hospital.<sup>1169</sup>

382. Additionally, according to the Prosecution, Nizeyimana had effective control over the ESO soldiers involved in the crimes at Butare Hospital.<sup>1170</sup> It also contends that there was sufficient evidence on the record to establish that Nizeyimana knew or had reason to know that his ESO subordinates were involved in rapes at Butare Hospital.<sup>1171</sup> The Prosecution further submits that Nizeyimana failed to initiate any inquiry into the role of his ESO subordinates in the crimes at Butare Hospital,<sup>1172</sup> and that he failed to prevent or punish these crimes.<sup>1173</sup>

383. In response, Nizeyimana argues that the Prosecution fails to demonstrate that the alleged errors of fact eliminate all reasonable doubt as to his guilt.<sup>1174</sup> According to Nizeyimana, the Trial Chamber assessed the testimony of Witness MKA and reasonably concluded that it was not established that the perpetrators of her rapes were ESO soldiers.<sup>1175</sup> Nizeyimana further argues that, as the identity of the perpetrators was not proven, he could not have had the requisite knowledge and, therefore, the Prosecution's arguments should be dismissed.<sup>1176</sup>

384. The Appeals Chamber recalls that where the Prosecution appeals an acquittal, it must show that when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.<sup>1177</sup>

385. In this section, the Appeals Chamber will address whether the Trial Chamber erred in its: (i) conclusions based on the general evidence of ESO soldiers being involved in violence and crimes; and (ii) assessment of Witness MKA's evidence.

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<sup>1168</sup> Prosecution Appeal Brief, para. 52.

<sup>1169</sup> Prosecution Appeal Brief, paras. 57, 78. *See also* AT. 28 April 2014 pp. 47-51.

<sup>1170</sup> Prosecution Appeal Brief, paras. 5, 11-13, 80.

<sup>1171</sup> Prosecution Appeal Brief, paras. 79, 81. *See also* AT. 28 April 2014 p. 60. The Prosecution argues that Nizeyimana knew that his ESO subordinates were involved in crimes and rapes throughout Butare; that he was informed of killings involving his ESO subordinates, and rapes were committed at the same time as those killings; and that he received alarming and specific information about the ongoing violence at the hospital.

<sup>1172</sup> Prosecution Appeal Brief, para. 82. *See also* AT. 28 April 2014 p. 52.

<sup>1173</sup> Prosecution Appeal Brief, para. 83. *See also* AT. 28 April 2014 p. 52.

<sup>1174</sup> Nizeyimana Response Brief, paras. 58, 59, 64, 65.

<sup>1175</sup> Nizeyimana Response Brief, paras. 61-63, 67, 68, 70, 71. *See also* AT. 28 April 2014 p. 58. Regarding the rapes of Witnesses ZBL and DCO, Nizeyimana also notes the Trial Chamber's finding that his alibi evidence cast reasonable doubt on his knowledge of these crimes. Nizeyimana Response Brief, paras. 68, 72. The Prosecution replies that Nizeyimana's contention that his alibi created doubts about his knowledge of the crimes committed by ESO soldiers at Butare Hospital is unfounded. Prosecution Reply Brief, para. 11. *See also* Prosecution Reply Brief, paras. 3-10, 12. Nizeyimana also argues that the same logic regarding his alibi in relation to the rapes of Witnesses ZBL and DCO should apply to the rapes of Witness MKA. AT. 28 April 2014 p. 58.

<sup>1176</sup> Nizeyimana Response Brief, para. 73. *See also* AT. 28 April 2014 p. 58.

## 1. General Identification of ESO Soldiers as Perpetrators of Rapes at Butare Hospital

386. The Prosecution contends that the Trial Chamber erred in conducting a piecemeal assessment of the evidence.<sup>1178</sup> In support of its argument, the Prosecution refers to evidence of Tutsi women being raped in hotels, places of refuge, and killing sites such as Butare Hospital.<sup>1179</sup> It also refers to evidence that ESO soldiers raped Tutsi women at other locations in Butare town “and even bragged about their crimes”.<sup>1180</sup> Noting the Trial Chamber’s findings that soldiers scoured the hospital asking for identification and raping women who were perceived to be Tutsis and that ESO soldiers participated in violence targeting Tutsis at Butare Hospital, the Prosecution argues that a reasonable trier of fact would have necessarily concluded that ESO soldiers did not limit themselves to checking identification cards and killing Tutsis at Butare Hospital.<sup>1181</sup>

387. Nizeyimana responds that the Prosecution fails to appreciate that the Trial Chamber addressed each particular allegation made in the Indictment and concluded that none was proven beyond reasonable doubt.<sup>1182</sup> He also argues that the Trial Chamber reasonably concluded that the involvement of ESO soldiers in the rapes was not established, therefore he could not have been held responsible.<sup>1183</sup>

388. The Appeals Chamber finds the Prosecution’s argument that the Trial Chamber failed to take a holistic approach to assessing the evidence to be without merit. The Trial Chamber expressly referred to “other evidence” and “other accounts” as circumstantial support to Witness MKA’s evidence of soldiers scouring the hospital and raping Tutsi women at Butare Hospital during the relevant time.<sup>1184</sup> It also considered evidence from ESO soldiers that their colleagues had committed rapes elsewhere in Butare town, but found this to be insufficient to establish that the soldiers who committed the rapes at Butare Hospital were from the ESO.<sup>1185</sup> The Trial Chamber specifically concluded that although the evidence of rapes by soldiers at Butare Hospital and of ESO soldiers committing rapes generally in Butare town “raises the reasonable possibility that ESO

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<sup>1177</sup> *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10; *Bo{koski and Tar~ulovski* Appeal Judgement, para. 272; *Mrk{i} and Šljivan~anin* Appeal Judgement, para. 15; *Strugar* Appeal Judgement, para. 14; *Seromba* Appeal Judgement, para. 11.

<sup>1178</sup> Prosecution Appeal Brief, para. 52.

<sup>1179</sup> Prosecution Appeal Brief, paras. 53, 56. *See also* AT. 28 April 2014 p. 51.

<sup>1180</sup> Prosecution Appeal Brief, para. 54. *See* Prosecution Appeal Brief, para. 10; AT. 28 April 2014 p. 51.

<sup>1181</sup> Prosecution Appeal Brief, paras. 55, 56. *See* Prosecution Appeal Brief, para. 18; AT. 28 April 2014 p. 51.

<sup>1182</sup> Nizeyimana Response Brief, para. 57.

<sup>1183</sup> Nizeyimana Response Brief, paras. 61, 63, 68, 71. *See* Nizeyimana Response Brief, paras. 62, 64, 65, 67, 70. *See also* AT. 28 April 2014 p. 58.

<sup>1184</sup> Trial Judgement, paras. 1021, 1026, 1034, 1047.

<sup>1185</sup> Trial Judgement, paras. 1026, 1037.

soldiers raped Tutsis at the Butare University Hospital, it is not the only reasonable conclusion”.<sup>1186</sup> In support of its finding, the Trial Chamber observed that none of the evidence presented could establish Nizeyimana’s involvement in the attacks.<sup>1187</sup> In addition, the Trial Chamber expressed reservations regarding the witnesses’ ability to identify their assailants as being from the ESO.<sup>1188</sup> The Trial Chamber also considered evidence that other soldiers such as Presidential Guards were present at Butare Hospital and, therefore, it could not conclude that ESO soldiers were the ones who committed the rapes.<sup>1189</sup>

389. The Prosecution recalls the evidence on the record as well as the Trial Chamber’s observations,<sup>1190</sup> but does not dispute the Trial Chamber’s assessment of the evidence as such. Instead, it argues that, on the basis of these findings, the Trial Chamber erred in failing to find that the only reasonable conclusion is that ESO soldiers committed rapes at Butare Hospital during the genocide.<sup>1191</sup> The Appeals Chamber recalls that a conviction may be based on circumstantial evidence but that, where a finding of guilt is based on an inference drawn from such evidence, it must be the only reasonable conclusion to be drawn from it.<sup>1192</sup> If the evidence supports other reasonable, non-culpable inferences, then the accused cannot be found guilty beyond reasonable doubt.<sup>1193</sup> In the present case, other than simply asserting its own interpretation of the evidence, the Prosecution fails to provide cogent arguments on how the pattern of identifying Tutsi civilians and the violence following such identification would support only one reasonable conclusion, namely that ESO soldiers were involved in the rapes at Butare Hospital. This is particularly so in the circumstances which the Trial Chamber noted, where other soldiers, notably Presidential Guards, were also present, playing a similar role in the violence against the Tutsis.<sup>1194</sup>

390. Although failing to show an error by the Trial Chamber in assessing the general evidence of violence and rapes, the Prosecution relies particularly on the evidence of Witness MKA in its contention that Nizeyimana should be held responsible as a superior for the rapes it alleges were

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<sup>1186</sup> Trial Judgement, para. 1037. *See* Trial Judgement, para. 1027.

<sup>1187</sup> Trial Judgement, paras. 1022, 1038, 1048.

<sup>1188</sup> Trial Judgement, paras. 1025, 1027, 1035-1037, 1048.

<sup>1189</sup> Trial Judgement, paras. 1026, 1037, 1048.

<sup>1190</sup> The Prosecution supports its arguments that ESO soldiers were the perpetrators of the rapes at Butare Hospital with specific references to evidence of soldiers “singing” of their rape of Tutsi women and that women were kept in hotels and raped by soldiers. *See* Prosecution Appeal Brief, paras. 54-56; AT. 28 April 2014 p. 51. However, the Appeals Chamber notes that this exact evidence was considered by the Trial Chamber before it concluded that “this evidence is second-hand and fails to implicate ESO soldiers in the rapes at Butare University Hospital”. Trial Judgement, paras. 1026, 1037, fn. 2522.

<sup>1191</sup> Prosecution Appeal Brief, paras. 53-57.

<sup>1192</sup> *Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515. *See Ndindiliyimana et al.* Appeal Judgement, para. 291.

<sup>1193</sup> *Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515.

<sup>1194</sup> Trial Judgement, paras. 1026, 1037, 1048.

committed by ESO soldiers at Butare Hospital. The Appeals Chamber will now address the Prosecution's arguments on Witness MKA's evidence.

## 2. Witness MKA's Identification of ESO Soldiers as Perpetrators of Rapes at Butare Hospital

391. The Trial Chamber found that "Witness MKA's evidence reflects ambiguity regarding the identity of the perpetrators of the rapes",<sup>1195</sup> and that "[w]ithout reliable identification evidence, more than one reasonable conclusion can be reached with respect to the identity of the perpetrators who raped Witness MKA".<sup>1196</sup> Based on these conclusions, the Trial Chamber found that the "[a]mbiguity as to the identity of the soldiers created doubt as to whether Nizeyimana exercised effective control over them".<sup>1197</sup>

392. The Prosecution submits that the Trial Chamber erred in failing to credit Witness MKA's identification of ESO soldiers as being involved in the rapes of Tutsi women at Butare Hospital.<sup>1198</sup> Specifically, the Prosecution contends that Witness MKA testified that she was raped three times by two ESO soldiers, and that she properly identified the ESO soldiers as she: (i) found ESO soldiers at Butare Hospital upon her arrival on 18 April 1994, which was before the Presidential Guards were present; and (ii) saw soldiers coming directly from the ESO camp and while they were checking identification and committing crimes.<sup>1199</sup>

393. The Prosecution argues that the Trial Chamber unreasonably rejected Witness MKA's identification essentially on grounds which were unsupported or irrelevant.<sup>1200</sup> The Prosecution specifically challenges the Trial Chamber's consideration of: (i) the ability of Witness MKA to distinguish among different soldiers;<sup>1201</sup> (ii) Witness MKA's ability to identify ESO soldiers in light of the circumstances in which sexual violence occurred;<sup>1202</sup> (iii) the age of the soldier who perpetrated the second rape;<sup>1203</sup> and (iv) the presence of Presidential Guards at Butare Hospital who also targeted Tutsi civilians.<sup>1204</sup>

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<sup>1195</sup> Trial Judgement, para. 1025.

<sup>1196</sup> Trial Judgement, para. 1027.

<sup>1197</sup> Trial Judgement, para. 1027.

<sup>1198</sup> Prosecution Appeal Brief, paras. 57, 78. *See also* AT. 28 April 2014 pp. 47-51.

<sup>1199</sup> Prosecution Appeal Brief, para. 58. *See also* AT. 28 April 2014 pp. 49, 50.

<sup>1200</sup> Prosecution Appeal Brief, paras. 58-78.

<sup>1201</sup> Prosecution Appeal Brief, paras. 59-67. *See also* AT. 28 April 2014 p. 50.

<sup>1202</sup> Prosecution Appeal Brief, paras. 68-72. *See also* AT. 28 April 2014 p. 51.

<sup>1203</sup> Prosecution Appeal Brief, paras. 73-75. *See also* AT. 28 April 2014 pp. 50, 51.

<sup>1204</sup> Prosecution Appeal Brief, paras. 76, 77. *See also* AT. 28 April 2014 pp. 49, 50.

394. Nizeyimana responds that the Trial Chamber carefully considered Witness MKA's evidence and did not err in its assessment of her identification testimony.<sup>1205</sup> He also responds that the Prosecution seeks to substitute its position on the evidence for the findings of the Trial Chamber.<sup>1206</sup>

(a) Witness MKA's Ability to Distinguish Different Soldiers

395. In finding that there was ambiguity as to the identity of the perpetrators,<sup>1207</sup> the Trial Chamber considered that Witness MKA did not have a military background, was not from the area, and that "she expressed reservations about her ability to distinguish among different soldiers, including those that raped her and others".<sup>1208</sup>

396. The Prosecution submits that the Trial Chamber's reasoning that Witness MKA had reservations about the identity of the soldiers was unsupported and unreasonable.<sup>1209</sup> It claims that Witness MKA "did not express reservation, confusion or uncertainty", and that her evidence was consistent that the soldiers who raped her belonged to the same group of soldiers she found at the hospital and saw coming from the ESO camp, and who wore camouflage uniforms.<sup>1210</sup> The Prosecution argues that Witness MKA had several opportunities to observe the soldiers at Butare Hospital, and that the soldiers she found on her arrival at the hospital on 18 April 1994 could only have been ESO soldiers, as the Presidential Guards had not yet arrived.<sup>1211</sup> In this regard, the Prosecution argues that the witness identified the perpetrators as ESO soldiers "primarily based on her direct observations of the soldiers who came to and left the hospital compound from the adjacent ESO camp".<sup>1212</sup>

397. The Prosecution also argues that Witness MKA's admission that she was unable to distinguish the various military uniforms did not affect the reliability of her identification of ESO soldiers.<sup>1213</sup> It contends that the descriptions of the uniforms of ESO soldiers given by other

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<sup>1205</sup> Nizeyimana Response Brief, paras. 61, 63. *See also* AT. 28 April 2014 p. 58.

<sup>1206</sup> Nizeyimana Response Brief, para. 65.

<sup>1207</sup> Trial Judgement, paras. 1022, 1025.

<sup>1208</sup> Trial Judgement, paras. 1022, 1025.

<sup>1209</sup> Prosecution Appeal Brief, para. 64. *See also* Prosecution Appeal Brief, paras. 59, 67.

<sup>1210</sup> Prosecution Appeal Brief, paras. 59, 61. *See also* Prosecution Appeal Brief, paras. 64, 65; AT. 28 April 2014 p. 49.

<sup>1211</sup> Prosecution Appeal Brief, para. 60. *See also* AT. 28 April 2014 pp. 49, 50.

<sup>1212</sup> Prosecution Appeal Brief, para. 65. *See also* Prosecution Appeal Brief, para. 66. To support this submission, the Prosecution refers to Witness MKA's evidence that on her arrival at Butare Hospital, she saw soldiers from the ESO camp, and that when asked later where the soldier who committed her first rape was from, she said "[d]uring the day we could see those soldiers going about among us". *See* Prosecution Appeal Brief, paras. 59, 61; Witness MKA, T. 21 February 2011 pp. 3, 4, 7. The Prosecution also submits that "one important factor in determining the reliability of identification evidence is the prior opportunity of a witness to observe their perpetrators". AT. 28 April 2014 p. 49, *referring to Musema Appeal Judgement*, paras. 113, 138, 160.

<sup>1213</sup> Prosecution Appeal Brief, para. 65.

witnesses are not inconsistent with Witness MKA's evidence.<sup>1214</sup> The Prosecution further disputes the Trial Chamber's consideration of Witness MKA's lack of a military background and unfamiliarity with the Butare area as raising legitimate questions about her ability to identify ESO soldiers.<sup>1215</sup> It adds that the Trial Chamber's finding of Witness MKA's unfamiliarity with the Butare area is not supported by the evidence.<sup>1216</sup>

398. Nizeyimana responds that Witness MKA testified that she was unable to distinguish between different soldiers and that the Trial Chamber's finding in this regard was reasonable.<sup>1217</sup>

399. In concluding that Witness MKA had reservations about her ability to distinguish between different soldiers, the Trial Chamber observed that she implicated ESO soldiers in the removal of Tutsi refugees from Butare Hospital.<sup>1218</sup> However, specifically in relation to her first rape, she stated she was unable to distinguish the various military uniforms and testified that "as far as I was concerned, all soldiers wore the same type of uniform".<sup>1219</sup> Regarding her second rape, Witness MKA described the soldier by approximate age, uniform, and accoutrements but stated she had never seen this soldier before.<sup>1220</sup> With respect to her third rape, the Trial Chamber considered the variance in Witness MKA's evidence between her 2010 statement, in which she stated that she could not see the persons who raped her and other women in order "to confirm that they were soldiers", and her trial testimony in which she suggested that this had been a misstatement and that the perpetrators were soldiers.<sup>1221</sup> However, even in her testimony confirming that the perpetrator of her third rape was a soldier, she did not identify him as being from the ESO.<sup>1222</sup> The Appeals Chamber considers that the Trial Chamber reasonably assessed the evidence in finding that Witness MKA had reservations about her ability to distinguish between different soldiers.

400. Furthermore, while Witness MKA may have had the opportunity to observe the soldiers coming and going from Butare Hospital, this does not undermine the Trial Chamber's assessment in light of Witness MKA's inability to identify the soldiers who committed the rapes as ESO soldiers.

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<sup>1214</sup> Prosecution Appeal Brief, para. 66. In particular, the Prosecution points to the testimony of Prosecution Witness BUQ who testified that an ESO soldier named Rubaga, who raped her, also wore camouflage.

<sup>1215</sup> Prosecution Appeal Brief, para. 67, *referring to* Trial Judgement, para. 1025. *See also* AT. 28 April 2014 p. 50.

<sup>1216</sup> Prosecution Appeal Brief, para. 67.

<sup>1217</sup> Nizeyimana Response Brief, paras. 62, 63. *See also* AT. 28 April 2014 p. 58.

<sup>1218</sup> Trial Judgement, para. 1022.

<sup>1219</sup> Witness MKA, T. 21 February 2011 p. 7. *See* Trial Judgement, para. 1022, fn. 2516.

<sup>1220</sup> Witness MKA, T. 21 February 2011 pp. 8, 9. *See* Trial Judgement, para. 1022, fn. 2516.

<sup>1221</sup> Trial Judgement, para. 1024. *See* Witness MKA, T. 21 February 2011 pp. 32, 33.

<sup>1222</sup> Trial Judgement, para. 1024. Witness MKA testified that the soldier who raped her the third time was the same soldier who raped her on the first occasion. Trial Judgement, para. 1024, *referring to* Witness MKA, T. 21 February 2011 p. 11.

401. The Appeals Chamber agrees with the Prosecution that Witness MKA's inability to distinguish military uniforms is not necessarily contrary to the assertion that the soldiers she observed at Butare Hospital were from the ESO and is not necessarily inconsistent with the evidence of other witnesses providing "different descriptions of uniforms ESO soldiers wore at the time".<sup>1223</sup> However, this does not compel as the only reasonable inference that the soldiers who committed rapes at Butare Hospital were from the ESO.

402. Further, while there is no evidence to support the Trial Chamber's conclusion that Witness MKA "was not from the area",<sup>1224</sup> the Appeals Chamber is not convinced that this misstatement of the record by the Trial Chamber vitiates its detailed analysis of Witness MKA's testimony and its conclusion as to the witness's ability to identify her assailants.

403. Accordingly, the Appeals Chamber finds that the Prosecution has failed to show that the Trial Chamber erred in finding that Witness MKA's evidence was ambiguous as to whether the perpetrators of her rapes were soldiers from the ESO and that she expressed reservations about her ability to distinguish between different soldiers, including those who raped her.

(b) Circumstances in which the Sexual Violence Occurred

404. After concluding that Witness MKA's evidence reflected ambiguity regarding the identity of the perpetrators of the rapes about which she testified,<sup>1225</sup> the Trial Chamber noted that "the circumstances in which the sexual violence occurred – lights being turned off (in two instances) and the women being covered by blankets (in another) – understandably haFveĝ resulted in difficulties in obtaining reliable identifications".<sup>1226</sup>

405. The Prosecution argues that this conclusion was unreasonable in light of the totality of Witness MKA's evidence.<sup>1227</sup> It contends that Witness MKA did not express any difficulty in seeing or identifying the soldiers,<sup>1228</sup> and, in fact, she did see the specific soldiers who raped her on the first two occasions.<sup>1229</sup> In relation to the first and third rapes, the Prosecution also points out that

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<sup>1223</sup> Prosecution Appeal Brief, para. 66.

<sup>1224</sup> Trial Judgement, para. 1025. *See also* Prosecution Exhibit 31.

<sup>1225</sup> Trial Judgement, para. 1025.

<sup>1226</sup> Trial Judgement, para. 1025.

<sup>1227</sup> Prosecution Appeal Brief, para. 68. *See* Prosecution Appeal Brief, para. 72.

<sup>1228</sup> Prosecution Appeal Brief, para. 68.

<sup>1229</sup> Prosecution Appeal Brief, paras. 68-70. *See also* AT. 28 April 2014 p. 51.

torch lights were used by the soldiers and, specifically with regard to the third rape, Witness MKA could see the soldiers when they first entered the room before the lights were turned off.<sup>1230</sup>

406. Nizeyimana did not specifically respond to this argument.

407. A review of the Trial Judgement reveals that the Trial Chamber's reliance on the circumstances in which the rapes took place was an additional consideration in determining the witness's inability to identify the perpetrators of the rapes.<sup>1231</sup> Therefore, the Trial Chamber's observation that the circumstances "understandably [had] resulted in difficulties in obtaining reliable identifications"<sup>1232</sup> was not decisive for the Trial Chamber's findings.

408. Consequently, the Appeals Chamber is not persuaded by the Prosecution's submission that the Trial Chamber erred in considering this factor in its overall assessment of whether the perpetrators of the rapes were identified as ESO soldiers.

(c) Age of the Soldier who Committed the Second Rape of Witness MKA

409. Another factor the Trial Chamber considered as contributing to the ambiguity of the identity of the perpetrators of the rapes is the age of the soldier who raped Witness MKA on the second occasion, which the witness estimated to be around 26 or 27 years old.<sup>1233</sup> The Trial Chamber considered that the relative youth of ESO soldiers was a credible basis on which to distinguish them from other military personnel, and concluded that "youth" in the context of the trial record meant "shortly after the completion [of] primary education".<sup>1234</sup> From this understanding of "youth", the Trial Chamber considered that "[a] soldier in his late 20s is not necessarily consistent with this description".<sup>1235</sup>

410. The Prosecution argues that the Trial Chamber erred by finding that the estimated age of this soldier precluded the involvement of ESO soldiers in the three rapes of Witness MKA.<sup>1236</sup> In support of this argument, it first refers to witnesses who were ESO soldiers and aged 26 and 30 in April 1994, and to Witness MKA having withdrawn the estimated age she gave.<sup>1237</sup> The

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<sup>1230</sup> Prosecution Appeal Brief, paras. 69, 71. *See also* AT. 28 April 2014 p. 51.

<sup>1231</sup> Trial Judgement, para. 1025.

<sup>1232</sup> Trial Judgement, para. 1025.

<sup>1233</sup> Trial Judgement, para. 1023.

<sup>1234</sup> Trial Judgement, para. 1023.

<sup>1235</sup> Trial Judgement, para. 1023.

<sup>1236</sup> Prosecution Appeal Brief, para. 73. *See* Prosecution Appeal Brief, para. 74; AT. 28 April 2014 pp. 50, 51.

<sup>1237</sup> Prosecution Appeal Brief, para. 74. *See also* AT. 28 April 2014 pp. 50, 51.



Prosecution also argues that the estimated age of the soldier who committed the second rape has no bearing on the identification of the ESO soldier who committed the first and third rapes.<sup>1238</sup>

411. Nizeyimana did not specifically respond to this argument.

412. The Appeals Chamber notes that Witness MKA testified that the soldier who raped her the second time “must have been around 26 or 27. But forgive me, because I did not know his date of birth. But I can say he was more or less young”.<sup>1239</sup> The Appeals Chamber does not consider, as the Prosecution argues, that this amounted to Witness MKA withdrawing her estimation of the age of her attacker.

413. The Appeals Chamber notes that the Trial Chamber referenced various pieces of evidence in support of its conclusion that the “youth” of ESO soldiers in the context of the trial record meant “shortly after the completion [of] primary education”.<sup>1240</sup> However, as noted by the Prosecution, some evidence on the record shows that witnesses who were ESO soldiers were in their late 20s in April 1994.<sup>1241</sup> Therefore, the Appeals Chamber finds that, while there is evidence that cadets were allowed to enter the ESO at a very early age, age alone is an insufficient basis for excluding the possibility that the soldier was from the ESO. The Appeals Chamber finds that no reasonable trier of fact could have concluded that “[a] soldier in his late 20s is not necessarily consistent” with the description of a “youth”,<sup>1242</sup> and therefore finds that the Trial Chamber erred in considering the age of the soldier as a factor precluding a finding that he was from the ESO.

414. Nonetheless, in light of the other factors considered by the Trial Chamber and the totality of the evidence, the Appeals Chamber is not convinced that taking into account this error, the only reasonable inference would have been that the perpetrators of the rapes were ESO soldiers. Therefore, the Prosecution has not met its burden on appeal and fails to show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of Nizeyimana’s guilt has been eliminated.<sup>1243</sup>

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<sup>1238</sup> Prosecution Appeal Brief, para. 75.

<sup>1239</sup> Witness MKA, T. 21 February 2011 p. 8.

<sup>1240</sup> Trial Judgement, para. 1023, fn. 2518.

<sup>1241</sup> See Prosecution Appeal Brief, para. 74, referring to Prosecution Exhibit 20, Defence Exhibits 58, 64, 75.

<sup>1242</sup> Trial Judgement, para. 1023.

<sup>1243</sup> *Dorđević* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 24; *Ndahimana* Appeal Judgement, para. 10; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Seromba* Appeal Judgement, para. 11.

(d) Presence of Presidential Guards

415. The Trial Chamber also addressed general evidence of violence against Tutsi civilians being perpetrated by ESO soldiers at Butare Hospital, but concluded that “the evidence also reflects that Presidential Guards, who arrived around the last third of April 1994 had an equal hand in targeting Tutsis at the hospital”.<sup>1244</sup>

416. The Prosecution submits that the Trial Chamber erred in considering the involvement of the Presidential Guards in attacks at Butare Hospital which did not undermine Witness MKA’s identification of ESO soldiers as the perpetrators of the rapes.<sup>1245</sup> It contends that there was no evidence on the uniforms of the Presidential Guards which contradicts Witness MKA’s evidence and points out that the witness was not aware of the arrival of the Presidential Guards at Butare Hospital.<sup>1246</sup>

417. Nizeyimana did not specifically respond to this argument.

418. The Appeals Chamber finds that the Prosecution misinterprets the Trial Chamber’s reference to the presence of the Presidential Guards. In noting that the Presidential Guards were present and participating in crimes against Tutsi civilians at Butare Hospital,<sup>1247</sup> the Trial Chamber reasoned that this provided further support for its conclusion that “more than one reasonable conclusion can be reached with respect to the identity of the perpetrators who raped Witness MKA”.<sup>1248</sup> Furthermore, the lack of evidence on what the Presidential Guards wore does not show that the Trial Chamber was unreasonable in concluding that the descriptions of what the soldiers who raped Witness MKA were wearing did not necessarily demonstrate that they came from the ESO camp.<sup>1249</sup> Similarly, whether Witness MKA was aware of the arrival of the Presidential Guards is irrelevant to her ability to identify her attackers. Therefore, the Prosecution fails to demonstrate that the Trial Chamber erred in taking into consideration that Presidential Guards were present at Butare Hospital and participated in the violence against Tutsis.

### 3. Conclusion

419. The Appeals Chamber finds that the Prosecution has failed to show that the Trial Chamber erred in finding that the perpetrators of the rapes at Butare Hospital were not sufficiently identified

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<sup>1244</sup> Trial Judgement, para. 1026.

<sup>1245</sup> Prosecution Appeal Brief, paras. 76, 77. *See also* AT. 28 April 2014 pp. 48, 49.

<sup>1246</sup> Prosecution Appeal Brief, para. 77.

<sup>1247</sup> Trial Judgement, para. 1026.

<sup>1248</sup> Trial Judgement, para. 1027.

<sup>1249</sup> Trial Judgement, para. 1022.

as ESO soldiers and, therefore, that it could not hold Nizeyimana liable as a superior on this basis. For these reasons, the Appeals Chamber need not consider the Prosecution's arguments on whether Nizeyimana failed to prevent or punish his subordinates for the rapes committed at Butare Hospital.

420. Based on the foregoing, the Appeals Chamber dismisses the Prosecution's Second Ground of Appeal.

#### **D. Killings of Tutsi Civilians at Butare University (Ground 3)**

421. The Prosecution alleged that Nizeyimana was responsible for ordering and instigating soldiers from the Rwandan Armed Forces, ESO, Ngoma Camp, and Butare Gendarmerie Camp, as well as *Interahamwe* to kill Tutsi civilians at the National University of Rwanda in Butare (“Butare University”).<sup>1250</sup> It also alleged that Nizeyimana was responsible as a superior pursuant to Article 6(3) of the Statute for these crimes.<sup>1251</sup>

422. The Trial Chamber found that around 21 April 1994, armed and uniformed soldiers entered the Butare University campus, searched its premises, and separated Tutsi students from other students.<sup>1252</sup> Tutsi students were subsequently gathered at the basketball court and killed outside the campus.<sup>1253</sup> The Trial Chamber found that ESO soldiers were present and substantially and significantly contributed to the killing of Tutsi students at the university on or about 21 April 1994.<sup>1254</sup>

423. However, the Trial Chamber concluded that “there is no evidence directly implicating Nizeyimana in this attack, and the record fails to demonstrate that he provided substantial or significant assistance to the crimes committed during it”.<sup>1255</sup> Furthermore, it found that the “record may be interpreted to reasonably reflect that ESO units were re-subordinated within a command structure of [the Presidential Guard]”.<sup>1256</sup> In these circumstances, the Trial Chamber was not satisfied that Nizeyimana exercised effective control over the ESO soldiers contributing to this operation.<sup>1257</sup> The Trial Chamber therefore did not convict Nizeyimana pursuant to either Article 6(1) or 6(3) of the Statute for the killings of Tutsi civilians at Butare University.<sup>1258</sup>

424. The Prosecution submits that the Trial Chamber erred in failing to convict Nizeyimana as a superior under Article 6(3) of the Statute for the crimes committed by his ESO subordinates at Butare University<sup>1259</sup> and requests that the Appeals Chamber enter convictions for genocide and extermination as a crime against humanity.<sup>1260</sup>

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<sup>1250</sup> Indictment, paras. 14, 38, 44.

<sup>1251</sup> Indictment, paras. 36, 42, 46.

<sup>1252</sup> Trial Judgement, para. 373.

<sup>1253</sup> Trial Judgement, para. 373.

<sup>1254</sup> Trial Judgement, para. 398.

<sup>1255</sup> Trial Judgement, para. 399.

<sup>1256</sup> Trial Judgement, para. 399.

<sup>1257</sup> Trial Judgement, para. 399.

<sup>1258</sup> Trial Judgement, para. 399.

<sup>1259</sup> Prosecution Notice of Appeal, paras. 13, 16, 17; Prosecution Appeal Brief, paras. 2, 24, 86.

<sup>1260</sup> Prosecution Appeal Brief, paras. 87, 117. The Prosecution also requests that the Appeals Chamber enter a conviction for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol

425. The Prosecution alleges that Nizeyimana was a *de jure* and *de facto* superior of, and exercised effective control over, the ESO soldiers who participated in the crimes.<sup>1261</sup> The Prosecution claims that the Trial Chamber's finding that Nizeyimana lacked a material ability to prevent or punish his ESO subordinates was "incorrect, unreasonable, and inconsistent with the proven facts of this case".<sup>1262</sup> It asserts that Nizeyimana's effective control over the ESO soldiers was established on the basis of several factors, including his position as S2/S3 officer and his power within the ESO command structure, his capacity to issue orders that were obeyed, and his personal relationship with influential subordinates active on the ground.<sup>1263</sup> The Prosecution argues that no reasonable trier of fact could have found that Nizeyimana's effective control over the same group of ESO subordinates "fluctuated and changed in nature and degree in the course of the same organized criminal transaction to kill Tutsis throughout Butare *préfecture*, over such a short period of time".<sup>1264</sup> It also points to the facts that ESO soldiers were sent in "subsequent waves" and that ESO soldier Innocent Sibomana commanded other ESO soldiers during the attack at the university which, it asserts, show that the ESO soldiers were sent by their own command structure.<sup>1265</sup>

426. The Prosecution contends that the participation of the Presidential Guard did not detract from Nizeyimana's authority and effective control, nor did it lessen the ESO soldiers' role in the attack.<sup>1266</sup> According to the Prosecution, the Trial Chamber unreasonably considered the ESO soldiers' participation to be secondary to that of the Presidential Guard.<sup>1267</sup> The Prosecution argues that the Trial Chamber's finding that the ESO soldiers "may" have been re-subordinated to the Presidential Guard was speculative.<sup>1268</sup>

427. The Prosecution claims that the Trial Chamber erred in referring to the *Blagojević and Jokić* Appeal Judgement as an example of a case where the presence of a parallel authority raised doubt about the defendant's effective control over subordinates.<sup>1269</sup> The Prosecution asserts that in that case Vidoje Blagojević only had *de jure* authority whereas in this case the Trial Chamber found Nizeyimana had *de facto* and *de jure* authority.<sup>1270</sup> Furthermore, it argues that, unlike in the

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II in relation to these crimes; however, as this event was not pleaded under this count, the Appeals Chamber will not consider it. *See* Indictment, paras. 52, 54.

<sup>1261</sup> Prosecution Appeal Brief, paras. 11-13, 22, 86, 90, 105. *See also* AT. 28 April 2014 pp. 44, 45, 59, 60.

<sup>1262</sup> Prosecution Appeal Brief, para. 90.

<sup>1263</sup> Prosecution Appeal Brief, para. 89. *See also* AT. 28 April 2014 pp. 59, 60.

<sup>1264</sup> Prosecution Appeal Brief, paras. 5, 88, 99-104.

<sup>1265</sup> Prosecution Appeal Brief, paras. 92, 97. *See also* Prosecution Appeal Brief, para. 101; AT. 28 April 2014 p. 43.

<sup>1266</sup> Prosecution Appeal Brief, paras. 91-99. *See also* AT. 28 April 2014 pp. 43-45.

<sup>1267</sup> Prosecution Appeal Brief, paras. 85, 93. *See also* AT. 28 April 2014 p. 43.

<sup>1268</sup> Prosecution Appeal Brief, para. 91. *See also* Prosecution Appeal Brief, para. 94; AT. 28 April 2014 pp. 43, 44.

<sup>1269</sup> Prosecution Appeal Brief, paras. 93, 95, *referring to Blagojević and Jokić* Appeal Judgement, paras. 301-304. *See also* AT. 28 April 2014 pp. 44, 45.

<sup>1270</sup> Prosecution Appeal Brief, paras. 93, 94. *See also* AT. 28 April 2014 pp. 44, 45.

*Blagojević and Jokić* case, there existed no chain of command between the ESO soldiers and the Presidential Guard, but rather that they were separate organs of the Rwandan army.<sup>1271</sup> The Prosecution claims that parallel authority by one superior does not reasonably eliminate effective control of a second superior.<sup>1272</sup>

428. The Prosecution also alleges that Nizeyimana possessed the necessary *mens rea* for superior responsibility because he knew or had reason to know that crimes were about to be committed or had been committed at Butare University.<sup>1273</sup> The Prosecution submits that, despite his duty to prevent and punish the crimes of his ESO subordinates, Nizeyimana did not take any necessary and reasonable measures to prevent or punish these crimes.<sup>1274</sup> It asserts that to the contrary, he encouraged the killings.<sup>1275</sup>

429. Nizeyimana responds that the Prosecution's submissions should be dismissed in their entirety.<sup>1276</sup> Nizeyimana submits that the Prosecution misrepresents the Trial Judgement by asserting that he was found to have both *de jure* and *de facto* authority over ESO soldiers.<sup>1277</sup> Nizeyimana submits that the Trial Chamber reasonably concluded that the ESO soldiers who committed the crimes at Butare University were not under his effective control as they were re-subordinated to the Presidential Guard.<sup>1278</sup>

430. Furthermore, according to Nizeyimana, the Prosecution erroneously distinguishes the *Blagojević and Jokić* Appeal Judgement from the instant case, whereas both cases are based on similar findings.<sup>1279</sup> Nizeyimana claims that the Prosecution confuses the Trial Chamber's considerations concerning *de jure* authority and effective control when discussing the issue of "re-subordination".<sup>1280</sup> According to Nizeyimana, the concept of "re-subordination" only played a role for the Trial Chamber when considering his *de jure* authority, not his effective control.<sup>1281</sup>

431. Lastly, Nizeyimana submits that the Trial Chamber reasonably concluded that while more than one person could have *de jure* authority and superior liability for crimes committed by a

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<sup>1271</sup> Prosecution Appeal Brief, paras. 95, 96. *See also* AT. 28 April 2014 pp. 44, 45.

<sup>1272</sup> Prosecution Appeal Brief, paras. 5, 92, 101-104. *See also* AT. 28 April 2014 pp. 44, 45.

<sup>1273</sup> Prosecution Appeal Brief, paras. 7, 23, 86, 106-111.

<sup>1274</sup> Prosecution Appeal Brief, paras. 12, 86, 105, 112-115. *See also* AT. 28 April 2014 pp. 45, 59.

<sup>1275</sup> Prosecution Appeal Brief, para. 115.

<sup>1276</sup> *See* Nizeyimana Response Brief, paras. 9, 90.

<sup>1277</sup> Nizeyimana Response Brief, paras. 24, 75, 76, 78. *See also* AT. 28 April 2014 pp. 54, 55.

<sup>1278</sup> Nizeyimana Response Brief, paras. 77, 86.

<sup>1279</sup> Nizeyimana Response Brief, paras. 79-83. *See also* AT. 28 April 2014 p. 54.

<sup>1280</sup> Nizeyimana Response Brief, paras. 81, 82.

<sup>1281</sup> Nizeyimana Response Brief, paras. 84-86.

subordinate, in this instance, ESO soldiers were not under his effective control.<sup>1282</sup> Consequently, Nizeyimana contends that due to his lack of effective control, the Prosecution cannot argue that he failed to prevent or punish the crimes.<sup>1283</sup>

432. The Appeals Chamber recalls that where the Prosecution appeals an acquittal, it must show that when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.<sup>1284</sup>

433. The Appeals Chamber observes that, in determining the general scope of Nizeyimana's authority, the Trial Chamber concluded that "Nizeyimana possessed some, although not absolute, *de jure* authority over soldiers of lower rank at the ESO".<sup>1285</sup> The Trial Chamber particularly considered that Nizeyimana did not hold the highest military rank at the ESO camp during the relevant time.<sup>1286</sup> Nevertheless, it found that Nizeyimana held a leadership position within the ESO camp.<sup>1287</sup> In this position, he had obligations to maintain discipline of lower ranking soldiers and report criminal conduct.<sup>1288</sup> The Trial Chamber further considered that Nizeyimana "was a figure of considerable actual authority within the ESO's command structure".<sup>1289</sup>

434. The Trial Chamber concluded that "[g]iven the record, [it] is not satisfied that Nizeyimana, in general, had the material ability at *all* times to prevent or punish *all* crimes committed by *all* subordinate military personnel at the ESO".<sup>1290</sup> The Trial Chamber therefore found that it had to assess Nizeyimana's responsibility under Article 6(3) of the Statute on a case-by-case basis.<sup>1291</sup> Notably, with respect to the crimes committed at Butare University, the Trial Chamber concluded that it "is not satisfied that the record reflects that Nizeyimana exercised effective control over the ESO soldiers contributing to this operation".<sup>1292</sup>

435. The Prosecution merely asserts that Nizeyimana had effective control over the ESO soldiers who participated in the crimes at Butare University and that his effective control over ESO soldiers

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<sup>1282</sup> Nizeyimana Response Brief, para. 87. *See also* AT. 28 April 2014 pp. 54, 55.

<sup>1283</sup> Nizeyimana Response Brief, para. 88.

<sup>1284</sup> *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10; *Boškoski and Tar-uloški* Appeal Judgement, para. 272; *Mrk{i}* and *Šljivan-anin* Appeal Judgement, para. 15.

<sup>1285</sup> Trial Judgement, para. 1485.

<sup>1286</sup> Trial Judgement, para. 1481.

<sup>1287</sup> Trial Judgement, para. 1482.

<sup>1288</sup> Trial Judgement, para. 1484.

<sup>1289</sup> Trial Judgement, para. 1486. *See also* Trial Judgement, para. 1487.

<sup>1290</sup> Trial Judgement, para. 1488 (emphasis in original).

<sup>1291</sup> Trial Judgement, para. 1489.

<sup>1292</sup> Trial Judgement, para. 399.

could not have fluctuated throughout Butare over the relevant period of time.<sup>1293</sup> However, it fails to point to any error in the Trial Chamber's finding that Nizeyimana's effective control had to be established on a case-by-case basis and that there was insufficient evidence that he had effective control over the ESO soldiers who participated in the killings at Butare University.<sup>1294</sup> The Prosecution merely points to factors which the Trial Chamber itself considered in making its finding that Nizeyimana had effective control over ESO soldiers in some circumstances.<sup>1295</sup> Furthermore, the Trial Chamber also considered the evidence referred to by the Prosecution that ESO soldiers were sent to Butare University in waves and that Sibomana, an ESO soldier and student at Butare University, was commanding other soldiers.<sup>1296</sup> The Prosecution fails to establish that the only reasonable inference from this evidence is that the ESO soldiers at Butare University were under Nizeyimana's authority, particularly in light of the Trial Chamber's finding that Nizeyimana did not have effective control over all ESO soldiers at all times.<sup>1297</sup> The Prosecution does not point to any evidence that the Trial Chamber failed to consider that would establish Nizeyimana's authority and effective control over the soldiers involved in the killings at Butare University or that would implicate Nizeyimana in the attack.

436. The Appeals Chamber turns to the Prosecution's challenge to the Trial Chamber's finding that the ESO soldiers involved in the killings at Butare University played a secondary role to the Presidential Guard. In so finding, the Trial Chamber considered evidence that ESO soldiers brought students to a "sorting centre" which had been prepared by the "professional soldiers" who decided what would become of the victims.<sup>1298</sup> The Trial Chamber further noted that the Presidential Guard appeared to be leading the operation, as well as the difference in age and experience between the ESO soldiers and the Presidential Guards, as further support for its finding.<sup>1299</sup> The Prosecution does not challenge these factors or show that no reasonable trier of fact could have relied on them to find that the ESO soldiers played a secondary role in the attacks.

437. Furthermore, the Trial Chamber did not rely on direct evidence that the ESO soldiers had been re-subordinated to the Presidential Guard but considered that the record *may* be interpreted to reasonably reflect that this was the case. Accordingly, the Trial Chamber found that reasonable doubt existed as to Nizeyimana's effective control over the ESO soldiers involved in the Butare University attack. The Prosecution fails to show that no reasonable trier of fact could have

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<sup>1293</sup> See Prosecution Appeal Brief, paras. 11-13, 22, 86, 88, 90, 99, 101-105.

<sup>1294</sup> See Trial Judgement, paras. 399, 1489.

<sup>1295</sup> See Prosecution Appeal Brief, para. 89. See also Trial Judgement, paras. 1482-1487.

<sup>1296</sup> Trial Judgement, paras. 390, 391.

<sup>1297</sup> Trial Judgement, para. 1488.

<sup>1298</sup> Trial Judgement, para. 394.



entertained this doubt, given the involvement of the Presidential Guard in the attack and the lack of evidence on the trial record linking this assault to Nizeyimana.

438. Likewise, the Prosecution's assertion that the ESO soldiers and Presidential Guard were independent of each other as two distinct organs of the Rwandan army does not show that the Trial Chamber erred in finding that evidence on the record may be interpreted to reflect that the ESO soldiers were re-subordinated to the Presidential Guard's authority.

439. Finally, with regard to the Trial Chamber's reference to the *Blagojević and Jokić* Appeal Judgement in connection with the proposition that the presence of a parallel authority at the crime-scene may raise reasonable doubt that the accused exercised effective control over the subordinates,<sup>1300</sup> the Appeals Chamber considers that, although the facts of that case were not identical to the present case, it was not unreasonable for the Trial Chamber to have considered the presence of the Presidential Guard at Butare University as a relevant factor in its determination of Nizeyimana's effective control over the ESO soldiers.

440. In light of the foregoing, the Appeals Chamber dismisses the Prosecution's Third Ground of Appeal.

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<sup>1299</sup> Trial Judgement, paras. 395, 396.

<sup>1300</sup> Trial Judgement, fn. 1035.

## V. SENTENCING

441. The Trial Chamber sentenced Nizeyimana to a single sentence of life imprisonment for his convictions for genocide, extermination and murder as crimes against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>1301</sup> Nizeyimana has appealed his sentence.<sup>1302</sup>

442. The Appeals Chamber recalls, in this regard, that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crimes.<sup>1303</sup> As a rule, the Appeals Chamber will revise a sentence only if the appealing party demonstrates that the trial chamber committed a discernible error in exercising its sentencing discretion or that it failed to follow the applicable law.<sup>1304</sup>

### A. Nizeyimana's Sentencing Appeal (Ground 45)

443. Nizeyimana submits that the Trial Chamber erred in imposing an excessive sentence of life imprisonment and requests the Appeals Chamber to substantially reduce his sentence.<sup>1305</sup> He claims that the Trial Chamber erred in failing to consider the mitigating circumstances in determining his sentence.<sup>1306</sup> Nizeyimana also argues that life imprisonment without parole violates international and regional human rights instruments.<sup>1307</sup>

444. The Prosecution responds that Nizeyimana's sentencing appeal should be dismissed in its entirety, as Nizeyimana fails to demonstrate that the Trial Chamber erred in exercising its sentencing discretion.<sup>1308</sup>

445. The Appeals Chamber recalls that while a trial chamber has the obligation to consider any mitigating circumstances when determining the appropriate sentence, it enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if

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<sup>1301</sup> Trial Judgement, paras. 1581, 1598, 1599.

<sup>1302</sup> Nizeyimana Notice of Appeal, paras. 118-120; Nizeyimana Appeal Brief, paras. 603-607.

<sup>1303</sup> *Ndindiliyimana et al.* Appeal Judgement, para. 418; *Ndahimana* Appeal Judgement, para. 218; *Gatete* Appeal Judgement, para. 268; *Hategekimana* Appeal Judgement, para. 288; *Kanyarukiga* Appeal Judgement, para. 270.

<sup>1304</sup> *Ndindiliyimana et al.* Appeal Judgement, para. 418; *Ndahimana* Appeal Judgement, para. 218; *Gatete* Appeal Judgement, para. 268; *Hategekimana* Appeal Judgement, para. 288; *Kanyarukiga* Appeal Judgement, para. 270.

<sup>1305</sup> Nizeyimana Notice of Appeal, paras. 118, 120; Nizeyimana Appeal Brief, paras. 603-605, 607.

<sup>1306</sup> Nizeyimana Notice of Appeal, paras. 118, 120; Nizeyimana Appeal Brief, paras. 603, 604, 607.

<sup>1307</sup> Nizeyimana Notice of Appeal, para. 119; Nizeyimana Appeal Brief, para. 606.

<sup>1308</sup> Prosecution Response Brief, paras. 310-313.

any, to be accorded to that factor.<sup>1309</sup> Accordingly, the existence of mitigating circumstances does not automatically imply a reduction of sentence<sup>1310</sup> or preclude the imposition of a sentence of life imprisonment where the gravity of the offence so requires.<sup>1311</sup>

446. The Appeals Chamber notes that the Trial Chamber considered various factors raised in mitigation including, *inter alia*, Nizeyimana's age, his marital and family status, his lengthy public service to his country, his harbouring of at least one Tutsi during the genocide, and his conduct in detention, and accorded them some limited weight.<sup>1312</sup> Nizeyimana points to no specific mitigating factors raised at trial which the Trial Chamber failed to consider.

447. The Appeals Chamber also summarily dismisses Nizeyimana's unsubstantiated assertion that a life sentence without parole amounts to a violation of the fundamental right to be protected from cruel, inhuman, or degrading punishment.

448. For the foregoing reasons, the Appeals Chamber finds that Nizeyimana has failed to demonstrate that the Trial Chamber imposed a manifestly excessive sentence or erred in its consideration of mitigating factors. Accordingly, the Appeals Chamber dismisses Nizeyimana's Forty-Fifth Ground of Appeal.

#### **B. Impact of the Appeals Chamber's Findings on the Sentence**

449. The Appeals Chamber has affirmed Nizeyimana's convictions pursuant to Article 6(1) of the Statute for his participation in a joint criminal enterprise which resulted in the killing of the Ruhutinyanya family, the killing of the former Queen of Rwanda, Rosalie Gicanda, and the others taken from her home, and the killing of those taken from the Matabaro and Nyirinkwaya households. It has also affirmed his conviction pursuant to Article 6(1) of the Statute for ordering the killings of Remy Rwekaza and Beata Uwambaye and ordering the attack on Witness ZAV which resulted in serious bodily and mental harm to him. It has therefore affirmed Nizeyimana's convictions for genocide and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.

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<sup>1309</sup> *Ndahimana* Appeal Judgement, para. 223; *Ntabakuze* Appeal Judgement, para. 280; *Bagosora and Nsengiyumva* Appeal Judgement, para. 424.

<sup>1310</sup> *Ntabakuze* Appeal Judgement, para. 280; *Nahimana et al.* Appeal Judgement, para. 1038; *Kajelijeli* Appeal Judgement, para. 299.

<sup>1311</sup> *Ntabakuze* Appeal Judgement, para. 280; *Ntawukulilyayo* Appeal Judgement, fn. 581; *Renzaho* Appeal Judgement, para. 612.

<sup>1312</sup> Trial Judgement, para. 1595.

450. The Appeals Chamber recalls, however, that it has reversed Nizeyimana's convictions for the killings at Cyahinda Parish as well as the killing of Pierre Claver Karenzi.

451. The Appeals Chamber considers that Nizeyimana remains convicted of very serious crimes. Nonetheless, in view of the reversal of his convictions for two incidents of killings, one of which involved the killing of thousands of displaced persons who had sought refuge at Cyahinda Parish, the Appeals Chamber considers that a reduction in Nizeyimana's sentence is warranted.

452. In the circumstances of this case, the Appeals Chamber reduces Nizeyimana's sentence from life imprisonment to a term of 35 years of imprisonment.

## VI. DISPOSITION

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

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

**NOTING** the written submissions of the parties and their oral arguments presented at the appeal hearing on 28 April 2014;

**SITTING** in open session;

**GRANTS**, Judge Güney and Judge Ramaroson dissenting, Nizeyimana's Tenth Ground of Appeal and **REVERSES** Nizeyimana's convictions for genocide, extermination as a crime against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Cyahinda Parish around 18 April 1994;

**GRANTS** Nizeyimana's Twenty-Sixth Ground of Appeal and **REVERSES** Nizeyimana's convictions for genocide and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killing of Pierre Claver Karenzi at the Hotel Faucon roadblock around 21 April 1994;

**DISMISSES** Nizeyimana's appeal in all other respects;

**AFFIRMS** Nizeyimana's convictions for:

- genocide and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killing of the Ruhutinyanya family around 18 April 1994;
- genocide and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killing of the former Queen of Rwanda, Rosalie Gicanda, and the others taken from her home on or around 20 April 1994;
- genocide for the killing of Remy Rwekaza and serious bodily and mental harm caused to Witness ZAV at the Gikongoro/Cyangugu and Kigali roads junction roadblock on or about 21 April 1994 and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killing of Remy Rwekaza;

- genocide and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killing of Beata Uwambaye at the Gikongoro/Cyangugu and Kigali roads junction roadblock on or about 5 May 1994; and
- murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killing of persons taken from the Matabaro and Nyirinkwaya households around 22 April 1994;

**DISMISSES** the Prosecution's appeal in all respects;

**SETS ASIDE** the sentence of life imprisonment imposed on Nizeyimana by the Trial Chamber, and **IMPOSES** a sentence of 35 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 5 October 2009;

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

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

Judge Güney and Judge Ramaroson append a joint partially dissenting opinion.

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

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Judge Theodor Meron, Presiding

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Judge William H. Sekule

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Judge Mehmet Güney

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Judge Liu Daqun

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Judge Arlette Ramaroson

Done this twenty-ninth day of September 2014 at Arusha, Tanzania.

**FSeal of the Tribunal**

## VII. OPINION DISSIDENTE CONJOINTE DES JUGES GÜNEY ET RAMAROSON

1. La Chambre de première instance a conclu que Nizeyimana a participé dans une entreprise criminelle commune relative aux événements de la paroisse de Cyahinda du 18 avril 1994 et a ainsi commis les crimes de génocide, d'extermination constitutive de crime contre l'humanité, ainsi que de meurtre constitutif de violation de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II.<sup>1</sup> Dans le présent arrêt, la Chambre d'appel annule les condamnations de Nizeyimana pour ces crimes en raison d'une erreur de la Chambre de première instance qui aurait omis d'examiner d'autres déductions possibles se dégageant de la preuve circonstancielle.<sup>2</sup>

2. Nous ne pouvons souscrire à l'acquittement de Nizeyimana en ce qui concerne son rôle dans les tueries de la paroisse de Cyahinda pour les raisons ci-dessous énoncées.

### (a) Statut et rôle de Nizeyimana

3. Nous ne partageons pas l'avis de la majorité que la Chambre de première instance a commis une erreur en omettant d'évaluer la possibilité pour le Colonel Muvunyi, étant alors le supérieur de Nizeyimana, d'avoir autorisé l'attaque.<sup>3</sup> Selon cette majorité, les fonctions de Nizeyimana en tant qu'officier S2/S3 en charge des opérations et des renseignements ne pouvaient mener à la seule conclusion raisonnable que Nizeyimana a autorisé la participation des soldats de l'ESO, dont celle de l'adjudant-chef Kanyashyamba, à l'attaque de la paroisse de Cyahinda.<sup>4</sup>

4. En premier lieu, et contrairement au raisonnement exprimé par la Chambre d'appel, la Chambre de première instance a fait une analyse minutieuse de la déposition des témoins en ce qui concerne le statut de Nizeyimana et son rôle dans les événements.<sup>5</sup>

5. De plus, nous notons que les fonctions d'officier S2/S3 de Nizeyimana ne constituent qu'un des éléments de preuve circonstancielle servant d'assise à la conclusion de la Chambre de première instance.<sup>6</sup> En effet, la Chambre de première instance a également considéré que l'ESO était le centre de commandement opérationnel des préfectures de Butare et Gikongoro au moment de l'attaque.<sup>7</sup> Aussi, Nizeyimana avait le pouvoir d'émettre des ordres à l'adjudant-chef

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<sup>1</sup> Jugement, paras. 312-316, 1503-1508, 1547, 1581.

<sup>2</sup> Arrêt, paras. 155, 160, 454.

<sup>3</sup> Arrêt, para. 155.

<sup>4</sup> Arrêt, para. 155.

<sup>5</sup> Jugement, para. 314. *Voir également* Jugement, paras. 1481-1488, 1503-1509.

<sup>6</sup> Jugement, paras. 312-316.

<sup>7</sup> Jugement, para. 314.



Kanyashyamba.<sup>8</sup> Il était l'officier S2/S3 en charge des renseignements, de la formation et des opérations. Outre les dépositions des témoins à charge, ce sont les témoins à décharge eux-mêmes tel que le témoin RWV09 qui a précisé que Nizeyimana était l'officier S2/S3 au moment des faits et que les adjudants-chefs Kanyeshyamba et Nzampanima travaillaient dans ce service.<sup>9</sup> En outre, le témoin OUV03 a spécifié que Nizeyimana était chargé de la réception et de la communication des renseignements et que l'adjudant Kanyashyamba travaillait sous ses ordres.<sup>10</sup>

6. Nous notons aussi que la Chambre de première instance a considéré la position du Colonel Muvunyi au sein de la hiérarchie en place à l'ESO moment des faits.<sup>11</sup> La Chambre a évalué la preuve à décharge à l'effet que le Colonel Muvunyi était habilité à émettre des ordres à Kanyashyamba, l'officier ayant participé aux attaques.<sup>12</sup> Elle a par ailleurs pris en compte la preuve à charge et décharge qui soutenait la conclusion que Nizeyimana pouvait également émettre des ordres à Kanyashyamba.<sup>13</sup> De plus, l'assignation du Colonel Muvunyi au camp de l'ESO ne datait que d'environ une dizaine de jours.<sup>14</sup> À notre humble avis, il est évident que la Chambre de première instance a jugé que le pouvoir de Muvunyi d'émettre des ordres, à la lumière de l'ensemble des éléments de preuve, n'affecte pas la conclusion selon laquelle Nizeyimana a donné des ordres à Kanyashyamba et autorisé la participation des militaires de l'ESO dans l'attaque contre les réfugiés installés sur les lieux de la paroisse de Cyahinda.

(b) Sur la visite de Nizeyimana à la paroisse de Cyahinda

7. Il est manifeste que la présence de Nizeyimana au sein de la délégation du comité préfectoral de la sécurité démontre qu'il était une des autorités responsables de la situation sécuritaire des réfugiés.<sup>15</sup> Sa présence sur les lieux la veille de l'attaque n'est pas contestée. A notre humble avis, cette présence, prise dans le contexte du déroulement des événements et des autres éléments de preuve circonstancielle au dossier, nous mène à la seule déduction raisonnable que Nizeyimana a *contribué* à la planification de l'opération militaire.<sup>16</sup>

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<sup>8</sup> Jugement, paras. 314, 1504.

<sup>9</sup> Jugement, n.b.p. 729.

<sup>10</sup> Jugement, para. 314, n.b.p. 729.

<sup>11</sup> Jugement, para. 314. *Voir également* Jugement, paras. 1481-1488, 1503-1509.

<sup>12</sup> *Voir supra* para. 5.

<sup>13</sup> Jugement, para. 314, n.b.p. 728.

<sup>14</sup> Jugement, para. 1481.

<sup>15</sup> Jugement, para. 131.

<sup>16</sup> Jugement, paras. 316, 1504, 1506.

(c) Sur l'attaque de la paroisse de Cyahinda

8. L'attaque a eu lieu immédiatement le lendemain après la visite de la délégation préfectorale.<sup>17</sup> La participation des militaires de l'ESO et notamment de l'adjudant-chef Kanyashyamba a été prouvée.<sup>18</sup>

9. Les témoins à charge ZBK, ZCC et Dufitumukiza ont livré des récits concordants sur l'attaque lancée par les militaires alors qu'ils se trouvaient dans les environs immédiats du bureau communal de Nyakizu.<sup>19</sup> Dufitumukiza a notamment observé quelque 11 militaires de l'ESO conduits par l'adjudant-chef Kanyashyamba en train d'attaquer la paroisse.<sup>20</sup>

(d) Conclusion

10. A notre avis, une chambre raisonnable pouvait en venir à la conclusion que la seule déduction raisonnable est qu'en tant que responsable des opérations et de renseignements, et compte tenu de sa présence à la paroisse Cyahinda la veille, Nizeyimana a contribué à la planification de l'attaque de la paroisse le lendemain. Les autres éléments de preuve circonstancielle, soulevés à juste titre par la Chambre de première instance, incluent (i) qu'en tant que responsable des opérations à l'ESO qui est le centre opérationnel de commandement des préfecture de Butare et Gikongoro, Nizeyimana a autorisé la participation des soldats de l'ESO dans l'attaque de la paroisse; (ii) la participation de 11 soldats de l'ESO dont l'adjudant-chef Kanyashyamba à qui il était habilité d'émettre des ordres; et que (iii) les 11 soldats de l'ESO ont utilisé des armes lourdes et l'attaque était hautement coordonnée, ce qui implique l'autorisation du commandement de l'ESO.<sup>21</sup> A la lumière de l'ensemble de ces éléments de preuve, nous sommes d'avis que le fait que le Colonel Muvunyi ait autorisé la participation des soldats de l'ESO dans l'attaque sans impliquer Nizeyimana n'est pas une déduction raisonnable.

11. Il résulte de tout ce qui précède que la Chambre d'appel aurait dû confirmer la déclaration de culpabilité de Nizeyimana pour génocide, extermination constitutive de crime contre l'humanité et meurtre constitutif de violation de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II en ce qui concerne les tueries commises à la paroisse de Cyahinda.

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<sup>17</sup> Jugement, paras. 313, 316, 1504, 1506.

<sup>18</sup> Jugement, para. 311.

<sup>19</sup> Jugement, paras. 226-229, 234-244, 271.

<sup>20</sup> Jugement, para. 228.

<sup>21</sup> Jugement, paras. 312-316, 1503-1508.



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

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Juge Mehmet Güney

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Juge Arlette Ramaroson

Fait le 29<sup>ième</sup> jour de septembre 2014, à Arusha, en Tanzanie.

**[Seal of the Tribunal]**

## VIII. ANNEX A – PROCEDURAL HISTORY

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

### A. Notices of Appeal and Briefs

2. The Trial Chamber rendered the judgement in this case on 19 June 2012 and issued the written Trial Judgement on 22 June 2012.<sup>1</sup> Nizeyimana and the Prosecution both appealed.

#### 1. Nizeyimana’s Appeal

3. On 26 June 2012, the Pre-Appeal Judge dismissed Nizeyimana’s request for an extension of time to file his notice of appeal until 23 July 2012, as he already had until that date to file his notice of appeal.<sup>2</sup> On 19 July 2012, the Pre-Appeal Judge granted, in part, Nizeyimana’s motion for an extension of time to file his appeal brief, and ordered him to file it no later than 40 days after receiving the French translation of the Trial Judgement.<sup>3</sup>

4. Nizeyimana filed his initial notice of appeal on 23 July 2012.<sup>4</sup> On 16 April 2013, the Pre-Appeal Judge granted, in part, Nizeyimana’s request for an extension of the word limit for his appeal brief to 40,000 words.<sup>5</sup> On 18 June 2013, the Appeals Chamber found that good cause existed to grant Nizeyimana’s motion to amend his notice of appeal, and accepted the amended notice of appeal annexed to his motion as the operative Notice of Appeal.<sup>6</sup> On 5 August 2013, Nizeyimana filed his Appeal Brief.<sup>7</sup>

5. On 22 August 2013, the Pre-Appeal Judge dismissed a Prosecution motion to strike the Nizeyimana Appeal Brief, or for an extension of the word limit and of the deadline for the filing of its Respondent’s brief, and instructed the Prosecution to file its Respondent’s brief in compliance

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<sup>1</sup> The French translation of the Trial Judgement was filed on 24 June 2013, and distributed to the Parties on 25 June 2013.

<sup>2</sup> Decision on Ildéphonse Nizeyimana’s Request for Extension of Time to File Notice of Appeal, 26 June 2012, pp. 1, 2.

<sup>3</sup> Decision on Ildéphonse Nizeyimana’s Motion for Extension of Time for the Filing of the Appellant’s Brief, 19 July 2012, p. 3.

<sup>4</sup> Ildéphonse Nizeyimana’s Notice of Appeal, 23 July 2012.

<sup>5</sup> Decision on Ildéphonse Nizeyimana’s Motion Requesting an Extension of the Word Limit for his Brief on Appeal, 16 April 2013, para. 9.

<sup>6</sup> Decision on Motion by Ildéphonse Nizeyimana to Amend his Notice of Appeal, 18 June 2013, paras. 4, 9, 10.

<sup>7</sup> Ildéphonse Nizeyimana’s *Confidential* Brief on Appeal, 5 August 2013.

with the Appeals Chamber's decision of 16 April 2013.<sup>8</sup> The Prosecution filed its Response Brief on 16 September 2013.<sup>9</sup> Nizeyimana filed his Reply Brief on 1 October 2013.<sup>10</sup>

## 2. Prosecution's Appeal

6. On 29 June 2012, the Prosecution filed its Notice of Appeal.<sup>11</sup> On 12 September 2012, the Prosecution filed its Appeal Brief.<sup>12</sup> On 17 September 2012, the Pre-Appeal Judge granted, in part, Nizeyimana's motion for an extension of time for filing his Respondent's brief, and ordered Nizeyimana to file his Respondent's brief no later than 20 days from the date on which he was served the French translation of the Trial Judgement and the Prosecution Appeal Brief, whichever was later.<sup>13</sup>

7. The translations of the Prosecution Notice of Appeal and Prosecution Appeal Brief were filed respectively on 28 January 2013<sup>14</sup> and 18 April 2013.<sup>15</sup> Nizeyimana filed his Response Brief on 12 July 2013.<sup>16</sup> The Prosecution filed its Reply Brief on 29 July 2013.<sup>17</sup>

## B. Assignment of Judges

8. On 26 June 2012, the Presiding Judge of the Appeals Chamber assigned the following judges to hear the appeal: Judge Theodor Meron (Presiding), Judge Patrick Robinson, Judge Mehmet Güney, Judge Arlette Ramaroson, and Judge Andréia Vaz,<sup>18</sup> and assigned himself as the Pre-Appeal Judge.<sup>19</sup> On 19 March 2013, the Presiding Judge replaced Judge Andréia Vaz with Judge William H. Sekule.<sup>20</sup> On 2 July 2013, the Presiding Judge of the Appeals Chamber denied Nizeyimana's motion to disqualify Judge William H. Sekule and Judge Arlette Ramaroson, finding

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<sup>8</sup> Decision on Prosecution's Motion to Strike "Ildéphonse Nizeyimana's *Confidential* Brief on Appeal" or for Alternative Relief, 22 August 2013, para. 21.

<sup>9</sup> Prosecutor's Respondent's Brief, 16 September 2013.

<sup>10</sup> Ildéphonse Nizeyimana's *Confidential* Brief in Reply, 1 October 2013.

<sup>11</sup> Prosecutor's Notice of Appeal, 29 June 2012.

<sup>12</sup> Prosecutor's Appellant's Brief, 12 September 2012.

<sup>13</sup> Decision on Ildéphonse Nizeyimana's Motion for Extension of Time for the Filing of the Response to Prosecutor's Appellant's Brief, 17 September 2012, p. 3.

<sup>14</sup> *Acte d'appel du Procureur*, 28 January 2013.

<sup>15</sup> *Mémoire d'appel du Procureur*, 18 April 2013.

<sup>16</sup> Ildéphonse Nizeyimana's Brief in Response to the Prosecutor's Appeal, 12 July 2013.

<sup>17</sup> Prosecutor's Brief in Reply to "Ildéphonse Nizeyimana's Brief in Response to the Prosecutor's Appeal", 29 July 2013.

<sup>18</sup> Order Assigning Judges to a Case Before the Appeals Chamber, 26 June 2012, p. 1.

<sup>19</sup> Order Assigning a Pre-Appeal Judge, 26 June 2012, p. 1.

<sup>20</sup> Order Replacing a Judge in a Case Before the Appeals Chamber, 19 March 2013, p. 1.

that it was without merit.<sup>21</sup> On 10 March 2014, the Presiding Judge replaced Judge Patrick Robinson with Judge Liu Daqun.<sup>22</sup>

**C. Motion Related to the Admission of Additional Evidence**

9. On 23 April 2014, the Appeals Chamber denied Nizeyimana's motion for the admission of additional evidence and corollary relief.<sup>23</sup>

**D. Hearing of the Appeals**

10. On 28 April 2014, the parties presented their oral arguments at a hearing held in Arusha, Tanzania in accordance with the Scheduling Order of 1 April 2014.<sup>24</sup>

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<sup>21</sup> Decision on Ildéphonse Nizeyimana's Motion to Disqualify Judge William H. Sekule and Judge Arlette Ramarason, 2 July 2013, paras. 22, 23.

<sup>22</sup> Order Replacing a Judge in a Case Before the Appeals Chamber, 10 March 2014, p. 1.

<sup>23</sup> Decision on Appellant's *Confidential* Motion for Fresh Evidence and Corollary Relief, 23 April 2014, para. 35.

<sup>24</sup> Scheduling Order, 1 April 2014.

## IX. ANNEX B – CITED MATERIALS AND DEFINED TERMS

### A. Jurisprudence

#### 1. Tribunal

##### **BAGILISHEMA, Ignace**

*The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002 (“*Bagilishema* Appeal Judgement”).

##### **BAGOSORA, Théoneste and NSENGIYUMVA, Anatole**

*Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011 (“*Bagosora and Nsengiyumva* Appeal Judgement”).

*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence, 25 September 2006.

##### **BIKINDI, Simon**

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

##### **BIZIMUNGU, Augustin**

*Augustin Bizimungu v. The Prosecutor*, Case No. ICTR-00-56B-A, Judgement, 30 June 2014 (“*Bizimungu* Appeal Judgement”).

##### **GACUMBITSI, Sylvestre**

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



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*Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-A, Judgement, 8 May 2012 (“*Kanyarukiga Appeal Judgement*”).

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*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera’s Interlocutory Appeal, 28 April 2006.

**KARERA, François**

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

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*Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Judgement, 4 February 2013 (“*Mugenzi and Mugiraneza Appeal Judgement*”).

**MUNYAKAZI, Yussuf**

*The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-A, Judgement, 28 September 2011 (“*Munyakazi Appeal Judgement*”).

**MUSEMA, Alfred**

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

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

**ORIĆ, Naser**

*Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008 (“*Orić* Appeal Judgement”).

**ŠAINOVIĆ, Nikola et al.**

*Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014 (“*Šainović et al.* Appeal Judgement”).

**STRUGAR, Pavle**

*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 (“*Strugar* Appeal Judgement”).

*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005 (“*Strugar* Trial Judgement”).

**TADIĆ, Duško**

*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”).

**VASILJEVIĆ, Mitar**

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 (“*Vasiljević* Appeal Judgement”).

## **B. Defined Terms and Abbreviations**

<b>AT.</b>	Transcript from hearings on appeal in the present case. All references are to the official English transcript, unless otherwise indicated.
<b>ESO</b>	<i>École des sous-officiers</i> (Butare)
<b>FAR</b>	<i>Forces armées rwandaises</i> (Rwandan Armed Forces)
<b>fn(s).</b>	Footnote(s)
<b>Indictment</b>	Second Amended Indictment, 17 December 2010
<b>MDR</b>	<i>Mouvement démocratique républicain</i>
<b>MRND</b>	<i>Mouvement révolutionnaire national pour la démocratie et le développement</i> Fbefore 5 July 1991g
	<i>Mouvement républicain national pour la démocratie et le développement</i> Fafter 5 July 1991g
<b>Nizeyimana Amended Pre-Defence Brief</b>	<i>The Prosecutor v. Ildéphonse Nizeyimana</i> , Case No. ICTR-00-55C-PT, Nizeyimana Amended Pre Defense Brief, 20 April 2011 (confidential)
<b>Nizeyimana Appeal Brief</b>	Ildéphonse Nizeyimana’s <i>Confidential</i> Brief on Appeal, 5 August 2013. Public redacted version filed on 18 November 2013.
<b>Nizeyimana Closing Brief</b>	<i>The Prosecutor v. Ildéphonse Nizeyimana</i> , Case No. ICTR-00-55C-T, Nizeyimana Defence Closing Brief, 8 November 2011 (confidential)
<b>Nizeyimana Notice of Appeal</b>	Ildéphonse Nizeyimana’s Amended Notice of Appeal, 14 May 2013
<b>Nizeyimana Pre-Defence Brief</b>	<i>The Prosecutor v. Ildéphonse Nizeyimana</i> , Case No. ICTR-00-55C-PT, Nizeyimana Pre Defense Brief, 28 March 2011 (confidential)
<b>Nizeyimana Reply Brief</b>	Ildéphonse Nizeyimana’s <i>Confidential</i> Brief in Reply, 1 October 2013
<b>Nizeyimana Response Brief</b>	Ildéphonse Nizeyimana’s Brief in Response to the Prosecutor’s Appeal, 12 July 2013
<b>Notice of Alibi</b>	<i>The Prosecutor v. Ildéphonse Nizeyimana</i> , Case No. ICTR-00-55C-PT, Ildéphonse Nizeyimana’s Notice of Alibi, 12 January 2011 (confidential)
<b>p. or pp.</b>	Page(s)
<b>para(s).</b>	Paragraph(s)
<b>Practice Direction on Formal Requirements</b>	Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007

<b>Prosecution</b>	Office of the Prosecutor
<b>Prosecution Appeal Brief</b>	Prosecutor's Appellant's Brief, 12 September 2012. Filed in French on 18 April 2013.
<b>Prosecution Notice of Appeal</b>	Prosecutor's Notice of Appeal, 29 June 2012. Filed in French on 28 January 2013.
<b>Prosecution Pre-Trial Brief</b>	<i>The Prosecutor v. Ildéphonse Nizeyimana</i> , Case No. ICTR-00-55C-PT, Prosecutor's Pre-Trial Brief, 15 July 2010
<b>Prosecution Reply Brief</b>	Prosecutor's Brief in Reply to "Ildéphonse Nizeyimana's Brief in Response to the Prosecutor's Appeal", 29 July 2013
<b>Prosecution Response Brief</b>	Prosecutor's Respondent's Brief, 16 September 2013
<b>PSD</b>	<i>Parti sociale pour la démocratie</i>
<b>Rules</b>	Rules of Procedure and Evidence of the Tribunal
<b>Statute</b>	Statute of the Tribunal established by Security Council Resolution 955 (1994)
<b>Supplementary Notice of Alibi</b>	<i>The Prosecutor v. Ildéphonse Nizeyimana</i> , Case No. ICTR-00-55C-PT, Nizeyimana Defence Supplementary Notice of Alibi, 13 April 2011 (confidential)
<b>T.</b>	Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated.
<b>Trial Chamber</b>	Trial Chamber III of the Tribunal
<b>Trial Judgement</b>	<i>The Prosecutor v. Ildéphonse Nizeyimana</i> , Case No. ICTR-00-55C-T, Judgement and Sentence, pronounced on 19 June 2012, filed on 22 June 2012
<b>Tribunal or ICTR</b>	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994