



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

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge William H. Sekule
Judge Arlette Ramaroson
Judge Khalida Rachid Khan
Judge Koffi Kumelio A. Afande

Registrar: Mr. Bongani Majola

Judgement: 29 September 2014

CALLIXTE NZABONIMANA

v.

THE PROSECUTOR

Case No. ICTR-98-44D-A

JUDGEMENT

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

I. INTRODUCTION

A. Background

2. Nzabonimana was born in 1953 in Kavumu *secteur*, Nyabikenke *commune*, Gitarama *préfecture*.² From 8 April 1994 to mid-July 1994, he was the Rwandan Minister of Youth and Associative Movements and served as the Chairman of the *Mouvement républicain national pour la démocratie et le développement* (“MRND”) party in Gitarama *préfecture* during the events.³

3. The Trial Chamber convicted Nzabonimana pursuant to Article 6(1) of the Statute of the Tribunal (“Statute”) for instigating genocide (Count 1) and extermination as a crime against humanity (Count 4) at the Cyayi centre on 14 April 1994 resulting in the killings of Tutsis at the Nyabikenke *commune* office on 15 April 1994.⁴ The Trial Chamber convicted him for conspiracy to commit genocide (Count 2) based on two agreements to commit genocide in Gitarama *préfecture*.⁵ Further, the Trial Chamber convicted him for direct and public incitement to commit genocide (Count 3), based on his speeches at the Butare trading centre on 12 April 1994, at the Cyayi centre on 14 April 1994, and at the Murambi training centre on 18 April 1994.⁶ The charge of murder as a crime against humanity (Count 5) was dismissed.⁷ Nzabonimana was sentenced to a single term of life imprisonment.⁸

¹ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Judgement and Sentence, pronounced on 31 May 2012, filed on 25 June 2012. For ease of reference, two annexes are appended: Annex A – Procedural History; Annex B – Cited Materials and Defined Terms.

² Trial Judgement, para. 4.

³ Trial Judgement, para. 5. *See also ibid.*, para. 89.

⁴ Trial Judgement, paras. 1718, 1737, 1786, 1787, 1790, 1800.

⁵ Trial Judgement, paras. 1747, 1748, 1749, 1800.

⁶ Trial Judgement, paras. 1762, 1768, 1773, 1775, 1800.

⁷ Trial Judgement, paras. 1796, 1800.

⁸ Trial Judgement, paras. 1821, 1822.

B. The Appeals

4. Nzabonimana presents eight grounds of appeal challenging his convictions and sentence.⁹ He requests the Appeals Chamber to overturn the Trial Judgement, enter acquittals on all counts of the Indictment, and order his immediate release.¹⁰ In the alternative, Nzabonimana requests the Appeals Chamber to reduce his sentence.¹¹ The Prosecution responds that Nzabonimana's appeal should be dismissed.¹²

5. The Prosecution advances two grounds of appeal. It challenges the Trial Chamber's finding that Nzabonimana instigated a massacre at the Nyabikenke *commune* office on 15 April 1994, arguing that his conviction for this crime should be based on his committing or, in the alternative, ordering the massacre.¹³ The Prosecution also challenges the Trial Chamber's decision to not convict Nzabonimana of aiding and abetting genocide stemming from the killings of Tutsis in Rutobwe *commune*.¹⁴ Nzabonimana responds that the Prosecution's appeal should be dismissed.¹⁵

6. The Appeals Chamber heard oral arguments regarding these appeals on 29 April 2014.

⁹ Nzabonimana Notice of Appeal, pp. 7-60; Nzabonimana Appeal Brief, paras. 21-395.

¹⁰ Nzabonimana Notice of Appeal, p. 61; Nzabonimana Appeal Brief, para. 396.

¹¹ Nzabonimana Notice of Appeal, p. 61.

¹² Prosecution Response Brief, paras. 5, 315.

¹³ Prosecution Notice of Appeal, para. 2; Prosecution Appeal Brief, paras. 2-4, 23-57, 69.

¹⁴ Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 5, 58-69.

¹⁵ Nzabonimana Response Brief, para. 12, p. 32.

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.¹⁶

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.¹⁷

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.¹⁸ 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.¹⁹

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.²⁰

The same standard of reasonableness and the same deference to factual findings of the trial chamber apply when the Prosecution appeals against an acquittal.²¹ 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

¹⁶ See, e.g., *Bizimungu* Appeal Judgement, para. 8; *Ndindiliyimana et al.* Appeal Judgement, para. 8; *Ndahimana* Appeal Judgement, para. 7. See also *Đorđević* Appeal Judgement, para. 13.

¹⁷ *Ntakirutimana* Appeal Judgement, para. 11 (internal reference omitted). See also, e.g., *Bizimungu* Appeal Judgement, para. 9; *Ndindiliyimana et al.* Appeal Judgement, para. 9; *Ndahimana* Appeal Judgement, para. 8.

¹⁸ *Blaškić* Appeal Judgement, para. 15. See also, e.g., *Bizimungu* Appeal Judgement, para. 10; *Ndindiliyimana et al.* Appeal Judgement, para. 10.

¹⁹ *Blaškić* Appeal Judgement, para. 15. See also, e.g., *Bizimungu* Appeal Judgement, para. 10; *Ndindiliyimana et al.* Appeal Judgement, para. 10.

²⁰ *Krstić* Appeal Judgement, para. 40 (internal references omitted). See also, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10.

²¹ See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Đorđević* Appeal Judgement, para. 18.

the impugned finding.²² 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.²³ A convicted person must show that the trial chamber's factual errors create a reasonable doubt as to his guilt.²⁴ The Prosecution 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.²⁵

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.²⁶ 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.²⁷

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.²⁸ Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.²⁹ Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.³⁰

²² See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Đorđević* Appeal Judgement, para. 18.

²³ See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Đorđević* Appeal Judgement, para. 18.

²⁴ See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Đorđević* Appeal Judgement, para. 18.

²⁵ See, e.g., *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Ndahimana* Appeal Judgement, para. 10. See also *Đorđević* Appeal Judgement, para. 18.

²⁶ *Kupreškić et al.* Appeal Judgement, para. 27. See also, e.g., *Bizimungu* Appeal Judgement, para. 12; *Ndindiliyimana et al.* Appeal Judgement, para. 12.

²⁷ See, e.g., *Bizimungu* Appeal Judgement, para. 12; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Ndahimana* Appeal Judgement, para. 11. See also *Đorđević* Appeal Judgement, para. 20.

²⁸ Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). See also, e.g., *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Ndahimana* Appeal Judgement, para. 12.

²⁹ *Kunarac et al.* Appeal Judgement, para. 43. See also, e.g., *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Ndahimana* Appeal Judgement, para. 12.

³⁰ *Krnjelac* Appeal Judgement, para. 16. See also, e.g., *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Ndahimana* Appeal Judgement, para. 12.

III. APPEAL OF NZABONIMANA

A. Alleged Errors Relating to Nzabonimana's Right to a Fair Trial (Ground 1)

13. Nzabonimana submits that the Trial Chamber erred in fact and in law in its assessment of his right to a fair trial, in light of the Prosecution's conduct during its investigations and the trial proceedings.³¹ In particular, Nzabonimana argues that the Prosecution violated its disclosure obligations concerning material disclosed: (i) in relation to Prosecution Witnesses CNAA and CNAC;³² (ii) from various other trials before the Tribunal;³³ (iii) in relation to Prosecution Witness CNAL;³⁴ and (iv) in relation to Prosecution Rebuttal Witness CNR1.³⁵ Nzabonimana also lists other issues related to the Prosecution's conduct that the Trial Chamber allegedly failed to take into account.³⁶ He requests that all findings of the Trial Chamber delivered after a manifestly unfair trial be reversed, or that his sentence be significantly reduced as a result of repeated violations of his basic rights.³⁷

14. The Prosecution responds that Nzabonimana's submissions should be summarily dismissed.³⁸

15. The Appeals Chamber recalls that it has inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning.³⁹ In particular, the Appeals Chamber may summarily dismiss submissions that are either: (i) a mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber; or (ii) mere assertions unsupported by any evidence, undeveloped assertions, or assertions that fail to articulate any error.⁴⁰

16. With respect to the alleged disclosure violations, the Appeals Chamber considers that Nzabonimana merely raises issues on appeal that the Trial Chamber already addressed and ruled upon without attempting to demonstrate an error in the Trial Chamber's reasoning in the relevant

³¹ Nzabonimana Notice of Appeal, para. 1.1; Nzabonimana Appeal Brief, paras. 21-28.

³² Nzabonimana Appeal Brief, para. 25.

³³ Nzabonimana Appeal Brief, para. 26.

³⁴ Nzabonimana Appeal Brief, para. 27.

³⁵ Nzabonimana Appeal Brief, para. 28.

³⁶ Nzabonimana Notice of Appeal, para. 1.1(1)-(10); Nzabonimana Appeal Brief, paras. 21-24.

³⁷ Nzabonimana Appeal Brief, para. 29.

³⁸ Prosecution Response Brief, paras. 12-24.

³⁹ See *supra*, para. 12.

⁴⁰ See, e.g., *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Strugar* Appeal Judgement, para. 16.

findings⁴¹ or decisions.⁴² At no point does Nzabonimana substantiate any prejudice he could have incurred as a result of an alleged violation of his right to a fair trial. Consequently, his submissions related to the alleged violations of disclosure obligations are summarily dismissed. The Appeals Chamber also dismisses Nzabonimana's remaining submissions related to his right to a fair trial as he fails to provide any argument in support.⁴³

17. For the foregoing reasons, the Appeals Chamber dismisses Nzabonimana's First Ground of Appeal.

⁴¹ See Trial Judgement, paras. 45-48, 58-60, fn. 94.

⁴² The Appeals Chamber notes the following Trial Chamber's decisions for: (i) the documents from the *Ngirabatware* trial, in *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Appropriate Relief in Light of Exculpatory Material Disclosed by the Prosecution on 15 November 2011, 30 April 2012, p. 14; (ii) the statement of Witness CNAL, in *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion to Recall Witness CNAL, 17 December 2009; and (iii) the 22 February 2012 statements, in the *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Appropriate Relief in Light of Exculpatory Material Disclosed by the Prosecution on 23 February 2012 Relating to Witness T77, 30 April 2012, paras. 40, 49, 52 in which the Trial Chamber concluded that the Prosecution was not in violation of its Rule 68 of the Rules obligations. As to the disclosed documents on 18 July 2012, the Appeals Chamber notes that Nzabonimana refers to a motion that was already adjudicated by the Appeals Chamber. See Decision on Callixte Nzabonimana's New Motion for Remedies, 16 October 2013; Callixte Nzabonimana's New Motion for Appropriate Remedies on Account of Further Violations of Rules 66(A)(ii) and 68 of the Rules of Procedure and Evidence, 12 July 2013 (original French version filed on 25 June 2013) (public with confidential and public annexes).

⁴³ The Appeals Chamber notes that Nzabonimana merely enumerates issues related to the conduct of the Prosecution with reference in footnotes to paragraphs of the Trial Judgement or decisions from the Trial Chamber. See Nzabonimana Appeal Brief, paras. 21-24, fns. 34-40. The Appeals Chamber observes, however, that Nzabonimana's contentions regarding the Trial Chamber's erroneous assessment of evidence are considered in this Judgement where Nzabonimana provides the required specifications. See *infra*, paras. 69, 70, 74-78, 197, 203, 285, 287.

B. Alleged Errors Relating to the Assessment of the Alibi (Ground 2, in part)

18. Nzabonimana presented an alibi according to which he was in Kigali from 6 to 12 April 1994, and therefore could not have participated in meetings and distributed weapons in Nyabikenke *commune*, Gitarama *préfecture*, between 8 and 12 April 1994, as alleged in paragraphs 16, 17, 35, 37, and 52 of the Indictment.⁴⁴ The Trial Chamber did not reject the alibi in its entirety, but concluded that it was “not sufficiently credible to raise a reasonable doubt in the Prosecution’s case [and] not reasonably possibly true in relation to the relevant paragraphs of the Indictment”.⁴⁵

19. Nzabonimana submits that, although he was not convicted of any crime within the period covered by the alibi, the Trial Chamber applied the wrong standard of proof in assessing each alibi witness and the Prosecution evidence.⁴⁶ Nzabonimana argues that this shifting in the burden of proof and the failure to assess the Defence evidence in its entirety were prejudicial to him as it affected his right to a fair trial and impacted the Defence evidence as a whole.⁴⁷

20. The Prosecution responds that Nzabonimana’s submissions should be summarily dismissed, as he was not convicted for any crime falling within the alibi period.⁴⁸

21. The Appeals Chamber finds that Nzabonimana fails to sufficiently elaborate his submissions, as he merely refers to paragraphs of the Trial Judgement. Furthermore, his submission related to his right to a fair trial is broad and does not refer to any finding or decision.⁴⁹ Consequently, his challenges are summarily dismissed. In any event, the Appeals Chamber observes that the Trial Chamber correctly recalled the applicable law on the assessment of alibi evidence.⁵⁰ The Appeals Chamber also notes that the Trial Chamber considered the alibi evidence in conjunction with the Prosecution evidence when assessing paragraphs 16, 17, 35, 37, and 52 of the Indictment,⁵¹ and recalled its finding that the alibi was not reasonably possibly true in relation to each paragraph examined.⁵² The Trial Chamber held that “[d]espite this finding that Nzabonimana’s alibi cannot be reasonably possibly true, [...] the burden of proof remains on the Prosecution to establish the events alleged in the Indictment beyond reasonable doubt”.⁵³ The Trial Chamber acquitted Nzabonimana of the charges in question as it concluded that the Prosecution failed to

⁴⁴ Trial Judgement, paras. 293, 294.

⁴⁵ Trial Judgement, para. 458.

⁴⁶ Nzabonimana Notice of Appeal, para. 2.1; Nzabonimana Appeal Brief, para. 30.

⁴⁷ Nzabonimana Appeal Brief, para. 31.

⁴⁸ Prosecution Response Brief, para. 25.

⁴⁹ See Nzabonimana Appeal Brief, para. 31.

⁵⁰ See Trial Judgement, paras. 386-389, 392.

⁵¹ Trial Judgement, paras. 296, 462, 509, 553, 578, 639, and fns. 591, 645, 692, 726, 804.

⁵² Trial Judgement, paras. 462, 509, 553, 578, 639, and fns. 591, 645, 692, 726, 804.

⁵³ Trial Judgement, para. 459.

prove beyond reasonable doubt the relevant allegations of the Indictment.⁵⁴ The Appeals Chamber is therefore not persuaded that the Trial Chamber shifted the burden of proof or applied the wrong standard of proof to assess Nzabonimana's alibi evidence.

22. For the foregoing reasons, the Appeals Chamber dismisses in part Nzabonimana's Second Ground of Appeal.⁵⁵

⁵⁴ Trial Judgement, paras. 506, 550, 575, 635, 636, 662. *See* Indictment, paras. 16, 17, 35, 37, 52.

⁵⁵ Nzabonimana's allegations related to the Trial Chamber's assessment of his influence (*see* Nzabonimana Notice of Appeal, para. 2.2; Nzabonimana Appeal Brief, section 2.2) are examined below. *See infra*, paras. 136, 137, 141-144.

C. Alleged Errors Relating to the Cyayi Centre and the Nyabikenke Commune Office
(Ground 2, in part, and Ground 3)

23. The Trial Chamber convicted Nzabonimana of direct and public incitement to commit genocide by, *inter alia*, encouraging, on 14 April 1994, a crowd of persons at the Cyayi centre near the Nyabikenke *commune* office to kill Tutsis (Count 3).⁵⁶ Additionally, it convicted Nzabonimana of genocide (Count 1) and extermination as a crime against humanity (Count 4) for instigating, by his speech at the Cyayi centre, the killings of Tutsis at the Nyabikenke *commune* office on 15 April 1994.⁵⁷ In particular, the Trial Chamber determined that Nzabonimana held a meeting in the afternoon of 14 April 1994 at the Cyayi centre, located approximately 250 to 300 metres away from the Nyabikenke *commune* office.⁵⁸ It found that approximately 30 people were present at the centre and that Nzabonimana said to those gathered: “I know that Hutus do not heed instructions. Do not continue to eat the cows of Tutsi who have sought refugee at the *communal* office. What really matters is not the cows; it is rather, the owners of the cows that matter”.⁵⁹ The Trial Chamber also found that Nzabonimana threatened a Tutsi, Evariste Munyagatare, who was among those seeking refuge at the Nyabikenke *commune* office.⁶⁰ The Trial Chamber further determined that, following Nzabonimana’s address on 14 April 1994 at the Cyayi centre, the first successful attack against the Nyabikenke *commune* office occurred between 3.00 and 4.00 a.m. and resumed during the day on 15 April 1994.⁶¹ The Trial Chamber found that during these attacks on the *commune* office, between 15 and 60 Tutsi refugees were killed, including Munyagatare.⁶²

24. Nzabonimana submits that the Trial Chamber erred in fact and in law in convicting him in connection with the events at the Cyayi centre and the Nyabikenke *commune* office.⁶³ In this section, the Appeals Chamber considers Nzabonimana’s arguments in relation to: (i) notice; (ii) the assessment of evidence; (iii) direct and public incitement to commit genocide; and (iv) instigation of genocide and extermination as a crime against humanity.

⁵⁶ Trial Judgement, paras. 1763, 1768, 1775, 1800.

⁵⁷ Trial Judgement, paras. 1718, 1737, 1786, 1787, 1790, 1800. Based on its findings related to the Nyabikenke *commune* office attacks, the Trial Chamber also found Nzabonimana responsible for murder as a crime against humanity. However, recalling the law on cumulative convictions and the fact that Nzabonimana was convicted of extermination as a crime against humanity, the Trial Chamber dismissed the charge of murder as a crime against humanity. *See* Trial Judgement, paras. 1795, 1799, 1800.

⁵⁸ Trial Judgement, paras. 887, 938. *See also ibid.*, para. 1710.

⁵⁹ Trial Judgement, paras. 887, 938. *See also ibid.*, para. 1710.

⁶⁰ Trial Judgement, paras. 887, 938. *See also ibid.*, para. 1710.

⁶¹ Trial Judgement, paras. 913, 936, 939. *See also ibid.*, para. 1711.

⁶² Trial Judgement, paras. 936, 939. *See also ibid.*, para. 1711.

⁶³ Nzabonimana Notice of Appeal, paras. 3.1-3.5; Nzabonimana Appeal Brief, paras. 33-116.

1. Notice

25. Nzabonimana submits that he did not receive clear and sufficient notice in paragraphs 19 and 20 of the Indictment of allegations that he threatened Munyagatare and of Munyagatare's death.⁶⁴ He argues that while the Trial Chamber acknowledged that Munyagatare's death was not pleaded in the Indictment or in the Prosecution Pre-Trial Brief, it failed to determine whether he was put on notice.⁶⁵ Although the Trial Chamber decided not to convict him on the basis of Munyagatare's death, Nzabonimana claims that it considered the death as evidence of the contextual background and a material element of his conviction for genocide, extermination, and direct and public incitement to commit genocide.⁶⁶ Nzabonimana further avers that he was not notified of the alleged threat he made against Munyagatare, which was a material element for his convictions of genocide and direct and public incitement to commit genocide.⁶⁷ Nzabonimana argues that he suffered prejudice because he was unable to prepare for his cross-examination of Prosecution Witnesses CNAI or CNAX, did not research *Gacaca* judicial documents related to Munyagatare's death, and did not request to call eye-witnesses with respect to this event.⁶⁸

26. The Prosecution responds that Munyagatare's death and Nzabonimana's threat against him did not have to be pleaded because they are part of the evidence and, for the death, contextual background to the allegations in the Indictment.⁶⁹ Furthermore, the Prosecution argues that only Witness CNAX testified to Munyagatare's death and that Nzabonimana received, a year before his testimony, his prior statement detailing the death and the threat.⁷⁰ Regarding both Witnesses CNAI and CNAX, the Prosecution submits that Nzabonimana did not object to their testimonies because of lack of notice.⁷¹

27. Paragraph 19 of the Indictment reads:

On or about 14 April 1994, **Callixte NZABONIMANA** held a meeting at *Cyayi* cellule, *Kiyumba* secteur, *Nyabikenke* commune, *Gitarama* prefecture. He asked the population to prioritize the massacre of Tutsi before taking their properties. As a result of this meeting, Tutsi were killed at the *Nyabikenke* communal office by *Interahamwe*, Hutu civilians and communal policemen.

28. Paragraph 20 of the Indictment reads:

⁶⁴ Nzabonimana Notice of Appeal, para. 3.4; Nzabonimana Appeal Brief, paras. 113-115.

⁶⁵ Nzabonimana Appeal Brief, para. 113.

⁶⁶ Nzabonimana Appeal Brief, para. 113.

⁶⁷ Nzabonimana Appeal Brief, para. 115.

⁶⁸ Nzabonimana Appeal Brief, para. 114, *referring to, inter alia*, Callixte Nzabonimana's Motion to Present Additional Evidence on Appeal, 24 July 2013 (confidential) (original French version filed on 5 June 2013) ("Rule 115 Motion").

⁶⁹ Prosecution Response Brief, paras. 101, 103.

⁷⁰ Prosecution Response Brief, paras. 101, 103.

⁷¹ Prosecution Response Brief, paras. 101, 102.

On or about 15 April 1994, following the orders of **Callixte NZABONIMANA**, Tutsi refugees at *Nyabikenke* communal office were attacked by *Interahamwe*, Hutu civilians, soldiers and communal policemen. Many Tutsi were killed including Speciose KARUHONGO, Jeanne UJENEZA and Gabriel KANIMBA. On or about 15 April 1994, after the attack at the *Nyabikenke* communal office, **Callixte NZABONIMANA** served beer to the attackers at his home in *Kavumu* secteur, *Nyabikenke* commune.

29. The Appeals Chamber recalls that the Prosecution is required to state the charges and the material facts underpinning those charges in the indictment with sufficient precision, but not the evidence by which such facts are to be proven.⁷² In reaching its judgement, a trial chamber can only convict the accused of crimes that are charged in the indictment.⁷³ An indictment which fails to set forth material facts in sufficient detail is defective;⁷⁴ however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.⁷⁵

30. Objections based on lack of notice should be specific and timely.⁷⁶ When an appellant raises a defect in the indictment for the first time on appeal, he or she bears the burden of showing that his or her ability to prepare his or her defence was materially impaired.⁷⁷ When, however, an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare his or her defence was not materially impaired.⁷⁸

31. With respect to Munyagatare's death, the Appeals Chamber notes that neither paragraphs 19 or 20 of the Indictment identify Munyagatare as a victim of the *commune* office attacks on 15 April 1994. Contrary to Nzabonimana's submission,⁷⁹ the Trial Chamber determined that he did not receive sufficient notice of Munyagatare's death.⁸⁰ Consequently, the Trial Chamber stated that it would not consider his killing as a basis for conviction but could take "this evidence into account as contextual background to further corroborate properly pled allegations in the Indictment".⁸¹

⁷² *Šainović et al.* Appeal Judgement, para. 213; *Kanyarukiga* Appeal Judgement, para. 73; *Kupreškić et al.* Appeal Judgement, para. 88.

⁷³ *See, e.g., Bizimungu* Appeal Judgement, para. 363; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntawukulilyayo* Appeal Judgement, para. 189.

⁷⁴ *See, e.g., Bizimungu* Appeal Judgement, para. 46; *Kanyarukiga* Appeal Judgement, para. 73; *Kupreškić et al.* Appeal Judgement, para. 114.

⁷⁵ *See, e.g., Bizimungu* Appeal Judgement, para. 46; *Ndindiliyimana et al.* Appeal Judgement, para. 176; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117.

⁷⁶ *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 122; *Renzaho* Appeal Judgement, para. 56; *Muvunyi I* Appeal Judgement, para. 123.

⁷⁷ *See Ndindiliyimana et al.* Appeal Judgement, para. 176; *Renzaho* Appeal Judgement, para. 56; *Ntagerura et al.* Appeal Judgement, para. 31.

⁷⁸ *See Ndindiliyimana et al.* Appeal Judgement, para. 176; *Renzaho* Appeal Judgement, para. 56; *Ntagerura et al.* Appeal Judgement, para. 31.

⁷⁹ *See Nzabonimana* Appeal Brief, para. 113.

⁸⁰ Trial Judgement, para. 935.

⁸¹ Trial Judgement, para. 935.

32. According to paragraph 20 of the Indictment: “Many Tutsis were killed including Speciose KARUHONGO, Jeanne UJENEZA and Gabriel KANIMBA”. The Appeals Chamber observes that although the paragraph lists specific victims, this is only by way of example as shown through the use of the word “including”. The material fact for Nzabonimana’s conviction of instigation is that Tutsis were killed following his course of conduct.⁸² The Appeals Chamber considers that the names listed after “including” only serve as examples of the material fact that Tutsis were killed at the Nyabikenke *commune* office during the 15 April 1994 attacks. Indeed, the Trial Chamber found that “during these attacks on the *commune* office, between 15 and 60 Tutsi refugees were killed, including Evariste Munyagatare”.⁸³

33. The Appeals Chamber observes that the Trial Chamber did not convict Nzabonimana for Munyagatare’s killing but referred to his death in finding that Tutsi refugees were killed at the *commune* office during the 15 April 1994 attacks.⁸⁴ The Appeals Chamber therefore finds that Munyagatare’s killing is not a material fact that should have been pleaded in the Indictment. Accordingly, the Appeals Chamber dismisses Nzabonimana’s argument.

34. Turning to the threat, the Appeals Chamber notes that neither paragraph 19 nor 20 of the Indictment specifies that Nzabonimana threatened Munyagatare on 14 April 1994. The Trial Chamber found that Nzabonimana prompted others to act and to continue the genocidal attack upon the Nyabikenke *commune* office, and that he intended to do so “by threatening a Tutsi and saying that Tutsis should be massacred at Cyayi centre on 14 April 1994”.⁸⁵ Accordingly, in the Trial Chamber’s view, Nzabonimana’s criminal conduct consisted of his threat against Munyagatare and his statement at the Cyayi centre.⁸⁶ His threat thus amounted to a material fact, which along with his statement, underpinned Nzabonimana’s conviction for instigation. The Appeals Chamber recalls that when the accused is charged with instigation, the Prosecution is required to identify the “particular acts” or the “particular course of conduct” on the part of the accused which forms the basis for the charge in question.⁸⁷ On this basis, the Appeals Chamber finds that the threat should have been pleaded in the Indictment. In this respect, the Indictment was defective.

⁸² With respect to direct and public incitement to commit genocide, the Appeals Chamber notes the inchoate nature of this offence. As the material fact for this conviction cannot be based on the killings at the *commune* office but only on Nzabonimana’s conduct at the Cyayi centre on 14 April 1994, the Appeals Chamber therefore limits its analysis to his convictions for genocide and extermination as a crime against humanity.

⁸³ Trial Judgement, para. 939 (emphasis added).

⁸⁴ See Trial Judgement, paras. 935, 1711, fn. 2167.

⁸⁵ Trial Judgement, para. 1717. The Appeals Chamber observes that the Trial Chamber did not refer to Nzabonimana’s threat against Munyagatare in its findings on direct and public incitement. See Trial Judgement, paras. 1763-1768.

⁸⁶ Trial Judgement, para. 1717.

⁸⁷ See e.g., *Ndindiliyimana et al.*, para. 172; *Ntawukulilyayo* Appeal Judgement, para. 188; *Renzaho* Appeal Judgement, para. 53.

35. Having reviewed the trial record, the Appeals Chamber observes that at no point did Nzabonimana object to allegations of threatening Munyagatare prior to or during the testimonies of Witnesses CNAI and CNAX.⁸⁸ The Nzabonimana Pre-Defence Brief makes no reference to Munyagatare and does not argue lack of notice with respect to paragraphs 19 and 20 of the Indictment.⁸⁹ Furthermore, the Trial Chamber noted that “the Defence did not file any motion prior to its Closing Brief that alleged defects in the Indictment”.⁹⁰ The Appeals Chamber therefore considers that Nzabonimana raises the alleged lack of notice on his threat against Munyagatare for the first time on appeal. Accordingly, Nzabonimana bears the burden of showing that his ability to prepare his defence was materially impaired.

36. Nzabonimana has failed to meet this burden. The Appeals Chamber finds that, Nzabonimana was able to challenge the credibility of Witnesses CNAI and CNAX.⁹¹ Furthermore, the Appeals Chamber notes that the Defence cross-examined Witnesses CNAI and CNAX on the threat,⁹² and presented Defence witnesses to contradict the testimonies of Witnesses CNAI and CNAX on this issue.⁹³ In these circumstances, the Appeals Chamber finds that Nzabonimana has not shown that the failure to plead the threat against Munyagatare materially impaired his defence and therefore dismisses his argument

37. For the foregoing reasons, the Appeals Chamber dismisses Nzabonimana’s arguments in relation to notice under his Third Ground of Appeal.

2. Assessment of Evidence

38. On the basis of Prosecution and Defence evidence, the Trial Chamber determined that on 13 April 1994 there was an attempted attack on the Nyabikenke *commune* office which was repelled by Defence Witness T24 and *commune* policemen and during which Tutsi refugees were not

⁸⁸ Witness CNAI, T. 26 November 2009 pp. 61-65; Witness CNAI, T. 27 November 2009 pp. 22, 28-33, 37 (closed session); Witness CNAX, T. 23 November 2009 pp. 60, 61; Witness CNAX, T. 24 November 2009 pp. 32-37 (closed session). *See also* Closing Arguments, T. 20 October 2011, T. 21 October 2011; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana’s Abridged Final Brief, 13 July 2011 (confidential) (“Nzabonimana Closing Brief”), paras. 201-237, 251-287, 425, 426, 431, 555.

⁸⁹ *See The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Revised and Amended Pre-Defence Brief, 8 April 2010 (original French version filed on 12 March 2010) (“Nzabonimana Pre-Defence Brief”), paras. 37-41.

⁹⁰ Trial Judgement, para. 36.

⁹¹ *See* Trial Judgement, paras. 873, 876, 877.

⁹² Witness CNAI, T. 27 November 2009 pp. 28-32 (closed session); Witness CNAX, T. 24 November 2009 p. 33 (closed session).

⁹³ *See* Witness T24, T. 28 April 2010 p. 44, where the witness testified that he knew Munyagatare and never heard of an incident where Munyagatare challenged Nzabonimana (*see also* Trial Judgement, para. 784); *see* Witness T193, T. 9 March 2011 pp. 15, 22 (closed session), where the witness, who also knew Munyagatare, denied being present with Kamali, Witness CNAI, and Munyagatare during Nzabonimana’s remarks at the Cyayi centre (*see also* Trial Judgement, para. 816).

harmed.⁹⁴ Based on the evidence of Prosecution Witnesses CNAI and CNAX, the Trial Chamber found that, on the afternoon of 14 April 1994, Nzabonimana held a meeting at the Cyayi centre, located approximately 250 to 300 metres from the *commune* office, where approximately 30 people were present, including Isaac Kamali, Munyagatare, Witnesses CNAI, CNAX, and Defence Witness T193.⁹⁵ According to the Trial Chamber, Nzabonimana said to those gathered: “I know that Hutus do not heed instructions. Do not continue to eat the cows of Tutsi who have sought refuge at the *communal* office. What really matters is not the cows; it is, rather, the owners of the cows that matter”.⁹⁶ It also determined that after Nzabonimana spoke, Munyagatare, who was among those seeking refuge at the *commune* office, challenged him and that Nzabonimana then threatened Munyagatare.⁹⁷

39. Relying primarily on the evidence of Witnesses CNAI and CNAX, the Trial Chamber determined that on the night of 14 to 15 April 1994, between 3.00 and 4.00 a.m. (“Night Attack”), Hutu civilians and *commune* policemen, armed with firearms, grenades, and traditional weapons, attacked the *commune* office.⁹⁸ It further held that, starting at approximately 10.00 a.m. on 15 April 1994 (“Day Attack”) and lasting until the afternoon, *commune* policemen, the *Interahamwe*, and civilians armed with traditional weapons, firearms, and grenades attacked the *commune* office.⁹⁹ The Trial Chamber concluded that during the attacks, approximately 15 to 60 Tutsi refugees, including Munyagatare, were killed.¹⁰⁰

40. In its findings relating to the Cyayi centre and the Nyabikenke *commune* office, the Trial Chamber considered Defence evidence “in conjunction with the Defence claims that the Prosecution witnesses fabricated their evidence”, and concluded that the Defence did not raise a reasonable doubt in the Prosecution’s case.¹⁰¹

41. The Appeals Chamber will first consider Nzabonimana’s submissions on the assessment of Prosecution evidence,¹⁰² and then turn to the assessment of Defence evidence.¹⁰³ It does so bearing

⁹⁴ Trial Judgement, paras. 866, 938. The Trial Chamber made these findings on the basis of evidence from Witnesses CNAX, T24, T28, T193, and Ndayisaba.

⁹⁵ Trial Judgement, paras. 887, 938.

⁹⁶ Trial Judgement, paras. 887, 938.

⁹⁷ Trial Judgement, paras. 887, 938.

⁹⁸ Trial Judgement, paras. 910-913, 939. *See also ibid.*, paras. 888-898.

⁹⁹ Trial Judgement, paras. 927, 936, 939.

¹⁰⁰ Trial Judgement, paras. 936, 939.

¹⁰¹ Trial Judgement, para. 940. *See also ibid.*, para. 256.

¹⁰² Nzabonimana Notice of Appeal, paras. 3.1.1, 3.1.2; Nzabonimana Appeal Brief, paras. 33-60.

¹⁰³ Nzabonimana Notice of Appeal, para. 3.1.3; Nzabonimana Appeal Brief, paras. 61-79.

in mind that it will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned findings.¹⁰⁴

(a) Alleged Errors in Assessing Prosecution Evidence

42. The Trial Chamber relied on Witnesses CNAI and CNAX with respect to the events at the Cyayi centre on 14 April 1994 and it relied primarily on these witnesses in making its findings related to the Night and the Day Attacks at the Nyabikenke *commune* office.¹⁰⁵ Furthermore, the Trial Chamber's finding that Munyagatare was killed during the *commune* office attacks was based solely on Witness CNAX's testimony.¹⁰⁶

43. Nzabonimana submits that the Trial Chamber erred in assessing Witnesses CNAI's and CNAX's credibility and should not have relied upon them to make findings about the events at the Cyayi centre and the Nyabikenke *commune* office.¹⁰⁷

44. The Prosecution responds that the Trial Chamber correctly relied on the corroborating evidence of Witnesses CNAI and CNAX.¹⁰⁸

45. The Appeals Chamber recalls that trial chambers are best placed to assess the evidence, including the demeanour of witnesses.¹⁰⁹ Therefore, trial chambers have full discretionary power in assessing the credibility of a witness and in determining the weight to be accorded to his or her testimony.¹¹⁰ This assessment is based on a number of factors, including the witness's demeanour in court, his or her role in the events in question, the plausibility and clarity of the witness's testimony, whether there are contradictions or inconsistencies in his or her successive statements or between his or her testimony and other evidence, any prior examples of false testimony, any motivation to lie, and the witness's responses during cross-examination.¹¹¹ In addition, the Appeals Chamber has previously stated that it is within a trial chamber's discretion to accept or reject a witness's

¹⁰⁴ See *supra*, para. 10.

¹⁰⁵ Trial Judgement, paras. 867-878, 887-890, 892-895, 900-902, 910-913, 915, 923, 925-929, 936, 938-940. The Appeals Chamber will use the singular form of the word "attack" in relation to 15 April 1994, noting that the Trial Chamber uses the plural (*see* Trial Judgement, paras. 914, 921, and 924) and the singular (*see* Trial Judgement, paras. 924-927).

¹⁰⁶ Trial Judgement, paras. 932, 935, 939.

¹⁰⁷ Nzabonimana Notice of Appeal, paras. 3.1.1, 3.1.2; Nzabonimana Appeal Brief, para. 42.

¹⁰⁸ Prosecution Response Brief, para. 38.

¹⁰⁹ See, e.g., *Kanyarukiga* Appeal Judgement, para. 121; *Simba* Appeal Judgement, para. 9; *Ntagerura et al.* Appeal Judgement, paras. 12, 213.

¹¹⁰ See, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 331; *Ndahimana* Appeal Judgement, para. 43; *Kanyarukiga* Appeal Judgement, para. 121.

¹¹¹ See, e.g., *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114; *Nchamihigo* Appeal Judgement, para. 47.

testimony, after seeing the witness, hearing the testimony, and observing him or her under cross-examination.¹¹²

(i) Witness CNAI's Credibility

46. Nzabonimana submits that no reasonable trier of fact could have rejected some parts of Witness CNAI's testimony, while accepting other parts with respect to the same event.¹¹³ Nzabonimana claims that the Trial Chamber's rejection of Witness CNAI's testimony in relation to Kamali's knowledge of his ethnicity as a Tutsi,¹¹⁴ and on Witness T193's participation in the attacks, undermined Witness's CNAI credibility as a whole.¹¹⁵ As to Kamali's knowledge of Witness CNAI's ethnicity, Nzabonimana argues that, by finding one crucial aspect of his testimony implausible, the Trial Chamber considered that the witness could lie under oath.¹¹⁶ On Witness T193's participation in the attacks, Nzabonimana contends that Witness CNAI's explanations of contradictions, going as far as questioning the authenticity of a Gitarama court judgement, adversely impacted his credibility.¹¹⁷ Nzabonimana submits that the Trial Chamber could not rely on Witness CNAI's old age to explain contradictions because: (i) the witness gave a different explanation for discrepancies between his testimony at trial and previous statements; and (ii) the Trial Chamber treated age differently between Witness CNAI and Defence Witness Straton Sibomana.¹¹⁸ Nzabonimana further claims that the Trial Chamber failed to assess the implausible fact that Witness CNAI, after hearing Nzabonimana's speech in the Cyayi centre, returned to buy cigarettes from Germain Karangwa, the leader of the *Interahamwe*.¹¹⁹

47. The Prosecution responds that Nzabonimana merely repeats unsuccessful trial arguments without showing how the Trial Chamber's assessment of Witness CNAI's credibility was unreasonable.¹²⁰

48. The Trial Chamber considered one aspect of Witness CNAI's testimony implausible – that Kamali did not know that he was a Tutsi.¹²¹ It recalled that the witness testified to being related to

¹¹² See, e.g., *Kanyarukiga* Appeal Judgement, para. 121; *Nchamihigo* Appeal Judgement, para. 210; *Seromba* Appeal Judgement, para. 116.

¹¹³ Nzabonimana Notice of Appeal, para. 3.1.2(8); Nzabonimana Appeal Brief, para. 51. See also AT. 29 April 2014 pp. 6-8.

¹¹⁴ Nzabonimana Appeal Brief, para. 51, referring to Trial Judgement, paras. 875, 904-908. See also *ibid.*, paras. 52, 53, 57. Nzabonimana further argues that the Trial Chamber's successive rejections of Witness CNAI's testimony can only undermine his credibility. See *ibid.*, para. 55.

¹¹⁵ Nzabonimana Appeal Brief, para. 54, referring to Trial Judgement, paras. 903-908. See also *ibid.*, para. 57.

¹¹⁶ Nzabonimana Appeal Brief, paras. 51, 53.

¹¹⁷ Nzabonimana Appeal Brief, para. 54.

¹¹⁸ Nzabonimana Appeal Brief, paras. 56-58, referring to Trial Judgement, para. 1290.

¹¹⁹ Nzabonimana Appeal Brief, para. 59, referring to Trial Judgement, paras. 757-759.

¹²⁰ Prosecution Response Brief, para. 46.

¹²¹ Trial Judgement, para. 875.

Kamali and that they knew each other well.¹²² The Trial Chamber did not believe Witness CNAI on this aspect, but considered that this did not undermine the witness's credibility as a whole because:

[t]he Chamber recalls that the evidence established the presence of other Tutsis at Cyayi, including Evariste Munyagatare and Witness CNAX. Even if Kamali knew Witness CNAI was a Tutsi, this does not lead to the conclusion that Witness CNAI was not present at Cyayi to witness Nzabonimana's speech and its aftermath.¹²³

49. The Appeals Chamber considers that it was reasonable for the Trial Chamber to accept Witness CNAI's testimony of his presence, as well as of Nzabonimana's speech and its aftermath. The Appeals Chamber notes that the Trial Chamber found that Witness CNAI, along with Witness CNAX, provided internally credible and consistent accounts of the "Cyayi meeting".¹²⁴ Recalling that the Trial Chamber has the discretion to accept some but reject other parts of a witness's testimony,¹²⁵ the Appeals Chamber rejects Nzabonimana's argument that by finding one aspect of Witness CNAI's testimony implausible and not credible, the Trial Chamber would necessarily have considered the witness to lie under oath. Accordingly, Nzabonimana fails to demonstrate that the Trial Chamber erred in its assessment of Witness CNAI's credibility.

50. In its deliberations on the perpetrators of the Night Attack, the Trial Chamber held that:

Given the contradictions in Witness CNAI's accounts as to the participation of Witness T193 in the attack, and the difficult conditions for identification, the Chamber does not find that the evidence proves that Witness T193 carried a machete and participated in the attack.¹²⁶

51. After recalling that Witness CNAI questioned the authenticity of the Gitarama court judgement and denied stating that Witness T193 threw grenades,¹²⁷ the Trial Chamber did not find Witness CNAI's explanation for the discrepancy sufficient and also noted that conditions at the time of the attack made identification of assailants difficult.¹²⁸ Therefore, the Appeals Chamber notes that the Trial Chamber did not accept Witness CNAI's explanation. The Appeals Chamber is not convinced that the rejection of his explanation prevented the Trial Chamber from reasonably relying on the witness's evidence.

52. With respect to Nzabonimana's argument on Witness CNAI's age, the Appeals Chamber observes that the Trial Chamber relied on his age, the minor nature of the discrepancies, and the passage of time between the 1994 events and the witness's testimony, to find that the discrepancies

¹²² Trial Judgement, para. 875.

¹²³ Trial Judgement, para. 875.

¹²⁴ Trial Judgement, para. 872.

¹²⁵ See *Ndahimana* Appeal Judgement, para. 183; *Kanyarukiga* Appeal Judgement, para. 187; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243.

¹²⁶ Trial Judgement, para. 908.

¹²⁷ Trial Judgement, para. 906.

¹²⁸ Trial Judgement, paras. 906, 907.

between Witness CNAI's testimony and previous statements did not undermine his credibility.¹²⁹ The Appeals Chamber finds no error in this approach. The fact that Witness CNAI justified the discrepancies as mistakes made by people who recorded his statements did not prevent the Trial Chamber from taking into account the witness's age among other factors.¹³⁰ The Appeals Chamber is also not persuaded that the Trial Chamber erred in treating the ages of Witness CNAI and Witness Sibomana differently since circumstances of the two witnesses are distinguishable. After noting that Witness Sibomana was serving a prison sentence for his involvement in the genocide and was 82 years of age and in failing health,¹³¹ the Trial Chamber explicitly stated that it treated Witness Sibomana's testimony with appropriate caution.¹³² In comparison, Witness CNAI was not convicted for participating in the genocide, and he provided eyewitness account of events at the Cyayi centre and the Nyabikenke *commune* office.¹³³ In view of the foregoing, Nzabonimana fails to demonstrate that the Trial Chamber could not rely on Witness CNAI's age, among other factors, to find that the discrepancies did not undermine his credibility.

53. Finally, in summarising Witness CNAI's testimony, the Trial Chamber noted Witness CNAI's evidence that he returned to Karangwa's bar at around 8.00 p.m. and asked Karangwa if he sold cigarettes.¹³⁴ The Trial Chamber was therefore aware of this aspect of the testimony. Nzabonimana fails to demonstrate that the Trial Chamber erred in not expressly addressing this aspect of the evidence in assessing Witness CNAI's credibility. Nzabonimana also fails to explain how this aspect of the evidence was implausible. Accordingly, the Appeals Chamber dismisses Nzabonimana's argument that the Trial Chamber failed to assess this "implausible" fact.

54. In light of the above, the Appeals Chamber finds that the Trial Chamber did not err in the assessment of Witness CNAI's credibility.

(ii) Witness CNAX's Credibility

55. Nzabonimana submits that Witness CNAX lacked credibility because: (i) he was convicted and imprisoned for embezzlement;¹³⁵ (ii) having witnessed events involving Nzabonimana in 1994, the witness knew crucial information that could have saved Tutsis but refrained from warning them or any authority;¹³⁶ (iii) he testified that he waited until 2008 to reveal his knowledge of events,

¹²⁹ See Trial Judgement, para. 874.

¹³⁰ See Trial Judgement, paras. 873, 874.

¹³¹ Trial Judgement, para. 1290.

¹³² Trial Judgement, para. 1290, *referring to* Trial Judgement, paras. 80-82.

¹³³ See Trial Judgement, paras. 751-756, 760, 761, 764.

¹³⁴ Trial Judgement, para. 759.

¹³⁵ Nzabonimana Appeal Brief, para. 43; Nzabonimana Reply Brief, para. 22. See also AT. 29 April 2014 p. 50.

¹³⁶ Nzabonimana Appeal Brief, paras. 43, 46; Nzabonimana Reply Brief, para. 22. See also AT. 29 April 2014 pp. 55, 56.

while his declaration to Rwandan police made in 1996, which does not mention Nzabonimana or Munyagatare, shows the contrary;¹³⁷ and (iv) the Trial Chamber should have treated his silence as it did with Prosecution Witness CNBA.¹³⁸ Nzabonimana adds that the Trial Chamber erred in assessing Witness CNAX's credibility since his alibi and the Prosecution evidence for the Kabimbura centre on 11 April 1994 should have cast doubt on his credibility.¹³⁹

56. Nzabonimana submits that no reasonable trier of fact could have accepted Witness CNAX's testimony that Munyagatare died during the attacks because: (i) Witness CNAX's testimony, that he was in charge of identifying the victims in the middle of the attack, is implausible; and (ii) the Trial Chamber erroneously rejected Witness T193's testimony as hearsay, did not take Defence Witness T28's evidence into account, despite citing it, and disregarded Witness CNAI's testimony who had doubts about the death.¹⁴⁰

57. The Prosecution responds that Nzabonimana's submissions fail to provide arguments,¹⁴¹ ignore evidence accepted by the Trial Chamber,¹⁴² and rely on evidence not on the record.¹⁴³ It adds that the Trial Chamber rejected Nzabonimana's alibi for 11 April 1994, and acquitted him in relation to the Kabimbura meeting.¹⁴⁴ The Prosecution also responds that the Trial Chamber reasonably found that Munyagatare was killed at the *commune* office,¹⁴⁵ and that Nzabonimana's alternative account of Munyagatare's death is based on material not on the record.¹⁴⁶

58. The Appeals Chamber dismisses Nzabonimana's argument relating to Witness CNAX's imprisonment for embezzlement as he merely raises the issue without elaboration.¹⁴⁷ With respect to Witness CNAX's failure to warn refugees, the Appeals Chamber notes that the Trial Chamber explicitly considered this issue and accepted the witness's explanation, of not wanting to cause

¹³⁷ Nzabonimana Appeal Brief, para. 44, *referring to* Rule 115 Motion.

¹³⁸ Nzabonimana Appeal Brief, para. 45, *referring to* Trial Judgement, para. 1038. According to Nzabonimana, the Trial Chamber should have found that Witness CNAX's credibility was undermined by his silence, as it did for two witnesses. *See also* Nzabonimana Reply Brief, para. 22, where Nzabonimana specifies that it is Witness CNBA.

¹³⁹ Nzabonimana Appeal Brief, paras. 47-50; Nzabonimana Reply Brief, para. 23. Nzabonimana also argues that the Trial Chamber erred in finding that he breached Rule 67(A)(ii) of the Rules on notice of alibi and in excluding alibi witnesses. *See* Nzabonimana Notice of Appeal, para. 3.1.2(5). Noting that this argument is not developed further in Nzabonimana Appeal Brief, the Appeals Chamber considers that it has been withdrawn. Nzabonimana further submits that, in light of his alibi and Prosecution Witness CNR1's testimony, he was not at the Kabimbura centre. *See* Nzabonimana Appeal Brief, para. 91. *See also* AT. 29 April 2014 pp. 8, 9.

¹⁴⁰ Nzabonimana Appeal Brief, para. 78.

¹⁴¹ Prosecution Response Brief, paras. 40, 42.

¹⁴² Prosecution Response Brief, para. 39.

¹⁴³ Prosecution Response Brief, para. 41.

¹⁴⁴ Prosecution Response Brief, paras. 44, 45. *See also* AT. 29 April 2014 pp. 34, 35.

¹⁴⁵ Prosecution Response Brief, para. 72.

¹⁴⁶ Prosecution Response Brief, para. 74.

¹⁴⁷ The Appeals Chamber observes that the Trial Chamber noted Witness CNAX's imprisonment when assessing the witness's credibility on allegations to which he testified. *See* Trial Judgement, paras. 286, 653, 877. The Trial Chamber noted that the crime was unrelated to the genocide and that a criminal conviction unrelated to the facts of the present case did not *per se* indicate that the witness lacked credibility. *See idem*.

further insecurity among frightened refugees.¹⁴⁸ Nzabonimana makes no attempt to demonstrate how the Trial Chamber erred in finding Witness CNAX's explanation plausible. As for Witness CNAX's failure to warn authorities at the time of the events,¹⁴⁹ Nzabonimana provides no references in support of his argument and fails to explain the alleged impact on the witness's credibility. The Appeals Chamber also dismisses Nzabonimana's argument on Witness CNAX's testimony that he waited until 2008 to reveal his knowledge of events, as he relies on a document which is not part of the record in this case.¹⁵⁰

59. Further, the Appeals Chamber is not convinced by Nzabonimana's contention that the Trial Chamber erred in treating the silences of Witnesses CNAX and CNBA differently.¹⁵¹ Nzabonimana fails to explain how the situations of these witnesses warrant similar treatment. The Trial Chamber found that Witness CNBA's silence undermined his credibility because he was a local official, had a role in the ongoing investigations into the genocide, and given his official position would have provided relevant information during *Gacaca* sessions.¹⁵² This is distinguishable from circumstances surrounding Witness CNAX, who had no role in genocide investigations.

60. The Appeals Chamber now turns to Nzabonimana's challenge against Witness CNAX's credibility based on events on 11 April 1994 at the Kabimbura centre.¹⁵³ As context, the Appeals Chamber notes that, according to Witness CNAX, Nzabonimana was seen attending a meeting at the Kabimbura centre in Nyabikenke *commune* on 11 April 1994, around 5.00 p.m.¹⁵⁴ However, the Trial Chamber noted Witness CNR1's evidence that around 3.00 p.m. the witness left Gitarama *préfecture* with Nzabonimana to return to Kigali.¹⁵⁵ The Trial Chamber examined this contradiction in relation to events at the Kabimbura centre and concluded that the allegations against Nzabonimana in this respect were not established as Witness CNAX's evidence was uncorroborated, hearsay, and contradicted by Prosecution evidence.¹⁵⁶ The Appeals Chamber observes, however, that the Trial Chamber accepted Witness CNAX's testimony that he went to the

¹⁴⁸ Trial Judgement, para. 878.

¹⁴⁹ See Nzabonimana Appeal Brief, para. 46.

¹⁵⁰ See Decision on Callixte Nzabonimana's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, 22 April 2014 ("Rule 115 Decision"), p. 5. The Appeals Chamber recalls that it did not admit as additional evidence Witness CNAX's statement made in 1996, based, *inter alia*, on the fact it could not have been a decisive factor in reaching the decision at trial as Witness CNAX's testimony was found to be corroborated by Witness CNAI's testimony. See *ibid.*, p. 4.

¹⁵¹ See Nzabonimana Appeal Brief, para. 45, referring to Trial Judgement, para. 1038; Nzabonimana Reply Brief, para. 22.

¹⁵² Trial Judgement, para. 1038.

¹⁵³ Nzabonimana points to testimonies of Prosecution Rebuttal Witness CNR1 as well as alibi Defence Witnesses T11 and Mechtild Mugiraneza to demonstrate that Witness CNAX's testimony on Nzabonimana's presence at the Kabimbura centre on 11 April 1994 was contradicted. See Nzabonimana Appeal Brief, paras. 47-50.

¹⁵⁴ Witness CNAX, T. 23 November 2009 pp. 57-59. See also Trial Judgement, para. 642.

¹⁵⁵ Trial Judgement, para. 453.

¹⁵⁶ Trial Judgement, para. 662.

Kabimbura centre on 11 April 1994 for food.¹⁵⁷ The Trial Chamber did not find that Witness CNR1's evidence rendered the whole of Witness CNAX's evidence not credible. The Trial Chamber considered that the evidence of Witnesses Mugiraneza and T11 only covered parts of 11 April 1994,¹⁵⁸ and did not raise a reasonable doubt in the Prosecution evidence placing him at the scene of the alleged crime on 11 April 1994.¹⁵⁹ The Appeals Chamber does not detect any error in the Trial Chamber's assessment of Witness CNAX's credibility in light of Nzabonimana's alibi and Witness CNR1's evidence.¹⁶⁰

61. The Appeals Chamber further finds that the Trial Chamber reasonably accepted Witness CNAX's testimony on Munyagatare's death at the *commune* office.¹⁶¹ Despite being the only witness who testified that Munyagatare was killed during the attacks, the Trial Chamber considered that Witness CNAX provided credible and reliable testimony on the death.¹⁶² Nzabonimana appears to suggest that Witness CNAX was in charge of *identifying* Tutsis killed at the *commune* office and argues that this was implausible during an attack.¹⁶³ The Appeals Chamber observes that, in cross-examination, the Defence suggested the same to Witness CNAX, who answered:

When I was getting ready to run away, I passed near dead bodies. I even had to jump over some of – one of them. So under those conditions, it was when I was fleeing that I was able to identify Munyagatare's body. Those people had been killed by grenade shrapnels. They could be identified. And since I was one of those in charge of refugees, I felt compelled to know the identity of some of the victims.¹⁶⁴

62. The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness CNAX's testimony on Munyagatare's death, "given his position in charge of the refugees", and given that Witness CNAX felt a responsibility to identify Munyagatare's body.¹⁶⁵

63. The Appeals Chamber is also not persuaded that the Trial Chamber's assessment of other evidence on Munyagatare's death undermines Witness CNAX's overall credibility. Specifically, beyond disagreeing with the Trial Chamber's assessment of Defence Witnesses T28's and T193's testimonies, Nzabonimana fails to demonstrate how the Trial Chamber erred. Indeed, the Trial

¹⁵⁷ Trial Judgement, para. 662.

¹⁵⁸ See Trial Judgement, paras. 455, 456.

¹⁵⁹ See Trial Judgement, para. 457.

¹⁶⁰ The Appeals Chamber is equally not persuaded by Nzabonimana's claim that, on the basis of his alibi evidence, and Witness CNR1's testimony, Nzabonimana was not present at the Kabimbura centre on 11 April 1994. See Nzabonimana Appeal Brief, para. 91. Indeed, the Appeals Chamber observes that the Trial Chamber did not find that Nzabonimana was absent at the Kabimbura centre on 11 April 1994. The Appeals Chamber finds no error since Witnesses CNAX and CNR1 placed Nzabonimana in Gitarama at some point in the afternoon of 11 April 1994. See, e.g., Trial Judgement, paras. 450, 453, 659.

¹⁶¹ Trial Judgement, paras. 935, 936.

¹⁶² Trial Judgement, paras. 932, 935.

¹⁶³ Nzabonimana Appeal Brief, para. 78.

¹⁶⁴ Witness CNAX, T. 24 November 2009 p. 36 (closed session).

¹⁶⁵ Trial Judgement, para. 932. The Trial Chamber also considered that Witness CNAX knew Munyagatare as he saw him the previous day at the Cyayi centre and therefore would have been able to reliably identify him. See *idem*.

Chamber had the discretion to reject Witness T193's hearsay evidence, which it found implausible.¹⁶⁶ The Appeals Chamber observes that the Trial Chamber considered Witness T28's testimony that Munyagatare died in the home of his parents-in-law, but provided no reason for not accepting this explanation.¹⁶⁷ Having reviewed the transcripts, the Appeals Chamber observes that Witness T28 did not explain how he knew that Munyagatare died at the home of his parents-in-law.¹⁶⁸ As to Witness CNAI, the Trial Chamber explicitly considered his testimony and at no point did Witness CNAI doubt Munyagatare's death.¹⁶⁹ It considered Witness CNAI's statement from 2002, indicating that Munyagatare and his family were killed during the genocide and thrown into the Nyabarongo River.¹⁷⁰ However, the Trial Chamber noted that the 2002 statement is unclear as to where Munyagatare was killed and that Witness CNAI was not present at the scene to confirm whether Munyagatare was thrown into the river.¹⁷¹

64. In light of the above, the Appeals Chamber finds that the Trial Chamber did not err in the assessment of Witness CNAX's credibility.

(iii) Witnesses CNAI's and CNAX's Credibility in Relation to Fabrication of Evidence

65. On 8 December 2010, the Trial Chamber granted Nzabonimana's motion in part requesting the appointment of an *amicus curiae* to investigate allegations that Witness CNAI, or a member of the Prosecution team, disclosed protected witness information in violation of Rule 77(A)(ii) and/or (iv) of the Rules.¹⁷² The *Amicus* Report concluded that "Witness CNAI did not at all disclose any protected information pertaining to Defence Witness T36" and "did not threaten and/or bribe and/or intimidate Witness T36 or at all".¹⁷³ It further recommended that "there are no grounds or basis or at all for instigating proceedings for contempt of the Tribunal against Prosecution Witness CNAI".¹⁷⁴ The *Amicus* Report reached the same conclusions regarding members of the Prosecution's office.¹⁷⁵ The report did recommend that "the Chamber consider ordering further investigations on the need for supplementary protective measures for defence witnesses especially

¹⁶⁶ Trial Judgement, para. 934.

¹⁶⁷ Trial Judgement, para. 934.

¹⁶⁸ Witness T28, T. 2 June 2010 p. 44 (closed session).

¹⁶⁹ See Nzabonimana Appeal Brief, para. 78.

¹⁷⁰ Trial Judgement, para. 933.

¹⁷¹ Trial Judgement, para. 933. As for Nzabonimana's reliance on a 1996 statement from Witness CNAX and a declaration from Munyagatare's wife (see Nzabonimana Appeal Brief, para. 79), the Appeals Chamber notes that these materials are not part of the record in this case. See Rule 115 Decision, p. 5.

¹⁷² See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Renewed and Confidential Motion for Appointment of *Amicus Curiae* to Investigate Allegations of Contempt of the Tribunal Against Prosecution Witness CNAI, 8 December 2010. See also Trial Judgement, para. 1902. The Appeals Chamber notes that on 1 April 2011, the "Report of the *Amicus Curiae* on Allegations of Contempt of Tribunal by Witness CNAI and/or a Member [of] the Prosecution Office Pertaining to Defence Witness T36" ("*Amicus* Report") was filed confidentially.

¹⁷³ *Amicus* Report, para. 77.

¹⁷⁴ *Amicus* Report, para. 78.

¹⁷⁵ *Amicus* Report, para. 79.

where their status as defence witnesses is known in the community in the interest of justice and fair trial”.¹⁷⁶

66. On 21 October 2011, the Trial Chamber accepted the *Amicus* Report and declined to initiate contempt proceedings against any persons in the matter, including Witness CNAI.¹⁷⁷ It noted that the Defence “generally agreed with the conclusions of the *amicus*, particularly in regard to the need for the Tribunal to strengthen protective measures for Defence witnesses”.¹⁷⁸ On 21 October 2011, the Trial Chamber also issued a decision admitting a statement by Witness CNAI dated 8 March 2011 (“Witness CNAI Statement of 8 March 2011”), which was annexed to the *Amicus* Report.¹⁷⁹ In the same decision, the Trial Chamber rejected the admission of other documents annexed to the *Amicus* Report, including a statement by Prosecution Investigator Djibo Moumouni dated 8 March 2011 (“Prosecution Investigator Moumouni Statement”), and three statements by Defence Witness T37 (“Defence Witness T37 Statements”).¹⁸⁰

67. In assessing Defence allegations that Prosecution witnesses fabricated evidence, the Trial Chamber considered whether Rwandan authorities and Witness CNAI recruited Prosecution witnesses.¹⁸¹ Specifically, the Trial Chamber examined if Witness CNAI recruited witnesses, including Witness CNAX, to testify falsely for the Prosecution.¹⁸² In doing so, the Trial Chamber considered Defence arguments pointing to the *Amicus* Report.¹⁸³ It also assessed whether Rwandan authorities and Prosecution witnesses obstructed Defence investigations and whether Defence witnesses were harassed.¹⁸⁴ The Trial Chamber determined that the Defence claim of alleged fabrication was based on mere speculation and that the Defence team, despite encountering “logistical problems, it was able to adequately defend the interest of Nzabonimana”.¹⁸⁵ Furthermore, in making its factual findings on events at the Cyayi centre and the Nyabikenke *commune* office, the Trial Chamber explicitly recalled its findings on fabrication of evidence.¹⁸⁶

¹⁷⁶ *Amicus* Report, para. 80.

¹⁷⁷ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision Following *Amicus Curiae* Report Pertaining to Allegations of Co[n]tempt of the Tribunal by Prosecution Witness CNAI and/or a Member of the Prosecution Office, 21 October 2011 (“21 October 2011 Decision Accepting *Amicus* Report”), p. 11.

¹⁷⁸ 21 October 2011 Decision Accepting *Amicus* Report, paras. 12, 25. After noting that the “Defence did not disagree with the *amicus curiae* conclusions that Defence Witness T36 was not intimidated, threatened or bribed by Prosecution witness CNAI” and that the “Defence accepted the *amicus curiae* conclusions that neither Witness CNAI nor any Prosecution official divulged protected information pertaining to Witness T36”, the Trial Chamber considered that the Defence did not challenge or object to the conclusions of the *Amicus* Report. *See ibid.*, para. 25.

¹⁷⁹ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Admission of Documents, 21 October 2011 (“21 October 2011 Decision on Admission of Documents”), para. 24, p. 9.

¹⁸⁰ 21 October 2011 Decision on Admission of Documents, paras. 25-27, p. 9.

¹⁸¹ Trial Judgement, paras. 94-156; 240-255.

¹⁸² Trial Judgement, paras. 149-156.

¹⁸³ Trial Judgement, paras. 152, 155.

¹⁸⁴ Trial Judgement, paras. 240-255.

¹⁸⁵ Trial Judgement, para. 255. *See also ibid.*, para. 156.

¹⁸⁶ Trial Judgement, paras. 743, 856, 940.

68. Nzabonimana submits that the Trial Chamber erred in assessing Prosecution Witnesses CNAI's and CNAX's testimonies because it examined collusion and intimidation globally without specifically considering these issues in relation to Witnesses CNAI and CNAX, who were lying.¹⁸⁷

69. Nzabonimana submits that the Trial Chamber ignored the impact of the *Amicus* Report and Witness CNAI Statement of 8 March 2011 on the credibility of Witnesses CNAI and CNAX.¹⁸⁸ With respect to Witness CNAI Statement of 8 March 2011, Nzabonimana notes that Witness CNAI explained that he assisted the Prosecution in finding witnesses and that he provided the names of Prosecution Witnesses CNAQ, CNBH, CNAK, CNAX, and CNAY.¹⁸⁹ According to Nzabonimana, this is contrary to the Trial Chamber's findings that Witness CNAI denied assisting the Prosecution to find witnesses and was solely the contact person because he was the only one with a phone.¹⁹⁰ He argues that, because Witness CNAI testified to the contrary, the witness lied before the Trial Chamber.¹⁹¹ Furthermore, in light of Witness CNAI Statement of 8 March 2011, Nzabonimana argues that the Trial Chamber ignored Witness CNAX's lies when finding that the witness denied that Witness CNAI proposed him as a witness to the Prosecution.¹⁹² Nzabonimana also contends that, unlike Prosecution Witnesses CNAQ, CNAY, and CNBU, Witness CNAX denied that Witness CNAI accompanied him on 4 October 2008 to meet with Prosecution investigators in Nyamabuye *commune*, Gitarama *préfecture*.¹⁹³ Nzabonimana also argues that the *Amicus* Report established that Witness CNAI approached Witness T36 to testify for the Prosecution.¹⁹⁴

70. Nzabonimana further submits that the Trial Chamber erred in refusing to admit Prosecution Investigator Moumouni Statement and Defence Witness T37 Statements, all annexed to the *Amicus* Report, because they also impact Witness CNAI's credibility.¹⁹⁵ Nzabonimana points to the fact that the declaration of the investigator described Witness CNAI's supervisory role over Prosecution witnesses and that the investigator gave the witness names of individuals in Nyabikenke *commune* for background verification.¹⁹⁶ Nzabonimana also submits that the Trial Chamber erred in refusing to recall Prosecution investigators and witnesses involved, including Witness CNAI, after

¹⁸⁷ Nzabonimana Notice of Appeal, para. 3.1.1; Nzabonimana Appeal Brief, para. 33.

¹⁸⁸ Nzabonimana Notice of Appeal, para. 3.1.1(2); Nzabonimana Appeal Brief, para. 36; Nzabonimana Reply Brief, para. 21. *See also* AT. 29 April 2014 pp. 4-6, 50.

¹⁸⁹ Nzabonimana Appeal Brief, para. 38; Nzabonimana Reply Brief, para. 21.

¹⁹⁰ Nzabonimana Appeal Brief, para. 38, *referring to* Trial Judgement, paras. 149, 151, 153.

¹⁹¹ Nzabonimana Appeal Brief, para. 38.

¹⁹² Nzabonimana Appeal Brief, para. 39, *referring to* Trial Judgement, para. 114.

¹⁹³ Nzabonimana Appeal Brief, para. 39, *referring to* Trial Judgement, fn. 220; Nzabonimana Reply Brief, para. 21.

¹⁹⁴ Nzabonimana Appeal Brief, para. 38.

¹⁹⁵ Nzabonimana Notice of Appeal, para. 3.1.1(3); Nzabonimana Appeal Brief, para. 37.

¹⁹⁶ Nzabonimana Appeal Brief, para. 40.

discovering that 245,000 Rwandan Francs were paid to Rwandan authorities for the “treatment of witnesses in Gitarama”.¹⁹⁷

71. Finally, Nzabonimana submits that the Defence did not simply encounter “logistical” problems but that Defence witnesses were intimidated in relation to the Nyabikenke events.¹⁹⁸ In this regard, Nzabonimana relies on the testimony of Defence Investigator Fernand Batard, the declaration of Defence Witness T160, and the *Amicus* Report.¹⁹⁹

72. The Prosecution responds that: (i) Nzabonimana’s argument on global assessment should be summarily dismissed;²⁰⁰ (ii) the *Amicus* Report found Nzabonimana’s allegations of intimidation to be unfounded, that Nzabonimana accepted this conclusion, and that he fails to demonstrate why Witness CNAX’s evidence is false;²⁰¹ (iii) Nzabonimana fails to substantiate how the Trial Chamber erred in refusing to admit documents attached to the *Amicus* Report or how the documents affected Witness CNAI’s credibility;²⁰² (iv) money transferred to Rwandan authorities was not for bribes but to cover witnesses’ expenses;²⁰³ and (v) despite “logistical problems”, Defence Witness Batard was able to collect large volumes of evidence and Nzabonimana fails to explain the prejudice, if any, he suffered.²⁰⁴

73. In its findings on the alleged fabrication of evidence, the Trial Chamber concluded that:

Taking into account the Chamber’s assessment of the credibility of the relevant Defence and Prosecution witnesses and the evidence as a whole, the Chamber finds that the evidence led by the Defence relating to the alleged fabrication of evidence does not undermine the credibility of the Prosecution witnesses’ testimony.²⁰⁵

The Appeals Chamber recalls that the Trial Chamber did not initiate contempt proceedings against Witness CNAI and dismissed allegations of fabrication against Witnesses CNAI and CNAX.²⁰⁶ The

¹⁹⁷ Nzabonimana Appeal Brief, para. 41. *See also ibid.*, para. 21. *See also* AT. 29 April 2014 p. 50.

¹⁹⁸ Nzabonimana Appeal Brief, paras. 34, 35; Nzabonimana Reply Brief, paras. 19, 20. *See also* AT. 29 April 2014 pp. 5, 6.

¹⁹⁹ Nzabonimana Appeal Brief, para. 34; Nzabonimana Reply Brief, para. 20. *See also* AT. 29 April 2014 pp. 5, 6. The Appeals Chamber notes that in his Notice of Appeal, Nzabonimana advances arguments relating to witness intimidation under the section on Defence witnesses, but fails to develop these arguments in his Appeal Brief. *See* Nzabonimana Notice of Appeal, para. 3.1.3(5)(6). The Appeals Chamber also finds unsubstantiated his argument that the Trial Chamber excluded all Defence evidence without justification and failed to consider difficulties encountered throughout trial, except where evidence is corroborated by Prosecution evidence. *See* Nzabonimana Notice of Appeal, para. 3.1.3(4).

²⁰⁰ Prosecution Response Brief, para. 28.

²⁰¹ Prosecution Response Brief, para. 31. *See also* AT. 29 April 2014 pp. 32-34.

²⁰² Prosecution Response Brief, para. 32.

²⁰³ Prosecution Response Brief, paras. 36, 37, *referring to* Prosecution Reply Brief, paras. 77, 78.

²⁰⁴ Prosecution Response Brief, paras. 29, 30. *See also* AT. 29 April 2014 p. 31.

²⁰⁵ Trial Judgement, para. 256.

²⁰⁶ Trial Judgement, paras. 136-156, 253-256. *See also* 21 October 2011 Decision Accepting *Amicus* Report. With respect to Witness CNAX specifically, the Trial Chamber considered and rejected Defence assertions that this witness, along with Witnesses CNAI, CNAQ, CNAY, CNAF, CNAP, and CNBU all fabricated their testimony. *See* Trial Judgement, paras. 154, 156.

Trial Chamber explicitly recalled its findings on fabrication in its assessment of events at the Cyayi centre and the Nyabikenke *commune* office.²⁰⁷ Thus, contrary to Nzabonimana's arguments, the Trial Chamber did not merely consider collusion and intimidation in a global manner, but also explicitly in assessing the credibility of Witnesses CNAI and CNAX.²⁰⁸

74. The Appeals Chamber is not convinced by Nzabonimana's submission that the Trial Chamber ignored the impact of the *Amicus* Report and Witness CNAI Statement of 8 March 2011 on the credibility of Witnesses CNAI and CNAX. The Appeals Chamber observes that the Trial Chamber explicitly considered the *Amicus* Report when it examined the Defence allegation that Witness CNAI recruited witnesses to testify falsely for the Prosecution.²⁰⁹ In particular, the Trial Chamber noted the Defence submission, made in Nzabonimana Closing Brief, which pointed to the *Amicus* Report as evidence of Witness CNAI's recruitment and intimidation of witnesses.²¹⁰ The Trial Chamber recalled that it accepted conclusions contained in the *Amicus* Report and that the parties did not appeal this ruling.²¹¹ Specifically, the Trial Chamber recalled the *Amicus* Report's conclusions that Witness T36's allegations of being threatened, intimidated, and bribed by Witness CNAI were unfounded.²¹²

75. The Appeals Chamber notes that the Trial Chamber referenced sections of the *Amicus* Report that cited Witness CNAI Statement of 8 March 2011, thus showing that the Trial Chamber did take the statement into account.²¹³ Also, in its 21 October 2011 Decision on Admission of Documents, the Trial Chamber admitted the statement "for the sole purpose of challenging and assessing the credibility of Prosecution Witness CNAI".²¹⁴ In Witness CNAI Statement of 8 March 2011, Witness CNAI stated that he "sometimes assisted the Prosecution to look for witnesses when they requested".²¹⁵ The Trial Chamber noted that Witness CNAI denied recruiting Prosecution witnesses.²¹⁶ Witness CNAI testified that Prosecution investigators contacted the witness to, in turn, contact other witnesses because he had a phone.²¹⁷ When asked by Counsel: "[i]f I were to put it to you that a witness said you were the one who went to find them to come and testify here, would you deny that?", Witness CNAI answered: "I would contest that because I do

²⁰⁷ Trial Judgement, paras. 743, 856, 940.

²⁰⁸ Trial Judgement, para. 856.

²⁰⁹ Trial Judgement, paras. 152, 155.

²¹⁰ Trial Judgement, para. 152.

²¹¹ Trial Judgement, para. 152. *See also* 21 October 2011 Decision Accepting *Amicus* Report, p. 11.

²¹² Trial Judgement, para. 152.

²¹³ *See* Trial Judgement, fn. 227, *referring to Amicus* Report, paras. 42-46.

²¹⁴ 21 October 2011 Decision on Admission of Documents, para. 24.

²¹⁵ *Amicus* Report, Annex A.

²¹⁶ *See* Trial Judgement, para. 151, *referring to* Witness CNAI, T. 27 November 2009 pp. 18, 20 (closed session). The Appeals Chamber notes that in cross-examination Witness CNAI explicitly denied knowing any witness that he went to find. *See* Witness CNAI, T. 27 November 2009 p. 20 (closed session).

²¹⁷ *See* Witness CNAI, T. 27 November 2009 p. 18 (closed session).

not know any witness that I went to find”.²¹⁸ The question posed by Counsel can be reasonably understood as referring to a recruiting role and not merely a contact role. The Appeals Chamber considers that a reasonable trier of fact could have found that Witness CNAI was consistent in his statement and his testimony on his role as contact person. The Appeals Chamber finds Nzabonimana’s contention that Witness CNAI lied before the Trial Chamber unfounded. In any event, even if Witness CNAI did recruit Prosecution witnesses, there is no evidence that he recruited them “to testify falsely”. The Trial Chamber considered that the mere fact that witnesses had contact, travelled together to interviews, or temporarily stayed together “does not lead to the conclusion that they colluded to fabricate their evidence”.²¹⁹ The Trial Chamber then found the Defence claim of fabrication to be “based upon mere speculation” and that the “evidence does not support the conclusion that Witness CNAI *recruited witnesses to testify falsely* against Nzabonimana”.²²⁰ Nzabonimana fails to demonstrate how the Trial Chamber erred in its assessment of Witness CNAI’s credibility in light of the *Amicus* Report and Witness CNAI Statement of 8 March 2011.

76. Turning to the impact of the *Amicus* Report and Witness CNAI Statement of 8 March 2011 on Witness CNAX’s credibility, the Appeals Chamber first notes that the Trial Chamber explicitly considered differences between Witness CNAX’s evidence and the testimonies of Witnesses CNAY, CNAQ, CNBU, and CNAI on the presence of Witness CNAI when travelling to meet Prosecution investigators on 4 October 2008.²²¹ Second, the Appeals Chamber considers that Witness CNAX’s testimony is not contradicted by Witness CNAI Statement of 8 March 2011. At trial, Witness CNAX testified that he knew Witness CNAI and denied that the latter put him in touch with Prosecution investigators.²²² According to Witness CNAX, “[i]t is simply because [Witness CNAI] had a telephone and the people who could contact me would call him and give the information for him to relay to me”.²²³ Consistent with this, the Appeals Chamber observes that Witness CNAI Statement of 8 March 2011 merely states that Witness CNAI knew Witness CNAX adduced evidence for the Prosecution and that they came from the same area.²²⁴ Furthermore, there is no evidence that Witness CNAX was recruited by Witness CNAI to testify falsely against Nzabonimana.²²⁵ Based on the foregoing, the Appeals Chamber finds no basis for Nzabonimana’s

²¹⁸ See Witness CNAI, T. 27 November 2009 p. 20 (closed session).

²¹⁹ Trial Judgement, para. 153.

²²⁰ Trial Judgement, para. 156 (emphasis added).

²²¹ Trial Judgement, para. 150, fn. 220.

²²² Witness CNAX, T. 24 November 2009 p. 39 (closed session). See also Trial Judgement, para. 114.

²²³ Witness CNAX, T. 24 November 2009 p. 39 (closed session).

²²⁴ See *Amicus* Report, Annex A.

²²⁵ See *Amicus* Report, Annex A. See also Trial Judgement, para. 156.

argument that the Trial Chamber ignored the impact of the *Amicus* Report or Witness CNAI Statement of 8 March 2011 on the credibility of Witnesses CNAI and CNAX.

77. The Appeals Chamber now turns to Nzabonimana's submission that the Trial Chamber erred in refusing to admit Prosecution Investigator Moumouni Statement and Defence Witness T37 Statements, both of which have an alleged impact on Witness CNAI's credibility.²²⁶ The Appeals Chamber finds that Nzabonimana did not demonstrate how Prosecution Investigator Moumouni Statement and Defence Witness T37 Statements undermine the credibility of Witness CNAI. On 21 October 2011, the Trial Chamber denied Nzabonimana's motion to admit Prosecution Investigator Moumouni Statement and Defence Witness T37 Statements on the basis that Nzabonimana failed to show their relevance and probative value.²²⁷ With respect to Defence Witness T37 Statements, the Appeals Chamber finds that Nzabonimana is repeating arguments from trial without demonstrating how the Trial Chamber erred in its original assessment.²²⁸ As for Prosecution Investigator Moumouni Statement, the Appeals Chamber recalls that the Trial Chamber found that mere contact does not lead to collusion or fabrication of evidence.²²⁹ The Appeals Chamber finds no error in this. Furthermore, Witness CNAI's alleged recruitment of other Prosecution witnesses was already considered in relation to Witness CNAI Statement of 8 March 2011.

78. With respect to Nzabonimana's allegation concerning money paid to Rwandan authorities for the treatment of witnesses, the Trial Chamber stated that the concerns on disbursement of Tribunal funds to Prosecution witnesses had been extensively litigated.²³⁰ It determined, on the basis of Defence Witness Jean-Marie Vianney Mporanzi's testimony and Exhibit D125, that the money was used to pay for witnesses' travel and related expenses.²³¹ The issue was thoroughly explored at trial.²³² The Appeals Chamber finds that Nzabonimana fails to substantiate his

²²⁶ Nzabonimana Appeal Brief, para. 37.

²²⁷ See 21 October 2011 Decision on Admission of Documents, paras. 25-27, p. 9.

²²⁸ Compare Nzabonimana Appeal Brief, para. 37 with *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Motion for Admission of Documents, 24 May 2011 (confidential), para. 43.

²²⁹ See Trial Judgement, para. 153.

²³⁰ Trial Judgement, para. 62.

²³¹ Trial Judgement, paras. 144-146. See Exhibit D125 ("Payments made to Defence Witness Mporanzi").

²³² Trial Judgement, paras. 144-146. See also *ibid.*, para. 62, fn. 103. The Appeals Chamber recalls that it has upheld the Trial Chamber's determination to not initiate contempt proceedings Against Prosecution investigators on this matter. See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-AR91, Decision on Callixte Nzabonimana's Appeal Against the Trial Chamber's Decision on Motion for Rule 91 Proceedings Against Prosecution Investigators, 27 April 2012, para. 16; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Proceedings Against OTP Investigators, 25 November 2011, para. 26. In a decision on 7 April 2011, the Trial Chamber denied Nzabonimana's request to summon Prosecution investigators in relation to the 245,000 Rwandan Francs. See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on "Callixte Nzabonimana's Motion for Summon of OTP Investigators Adamou Allagouma and Almahamoud Sidibe, sous-préfet Ms. Immaculée Mukamasabo", 7 April 2011.

allegation that the Trial Chamber erred in refusing to summon witnesses to testify on this matter. His argument is therefore dismissed.

79. As for Nzabonimana's argument that the Defence did not merely encounter "logistical" problems but faced intimidation,²³³ it is unclear to the Appeals Chamber how this affects the Trial Chamber's determination on the credibility of Witnesses CNAI and CNAX. Furthermore, Nzabonimana merely repeats his arguments from trial.²³⁴ The Appeals Chamber notes that the Trial Chamber explicitly considered difficulties encountered by Investigator Batard.²³⁵ It determined that, despite difficulties, Investigator Batard interviewed approximately 300 people, contacted approximately 500 people, took 2000 photographs of sites in Rwanda, gathered approximately 600 *Gacaca* documents, and shot videos without hindrance.²³⁶ The Trial Chamber concluded that Nzabonimana's Defence team "was able to adequately defend the interests of Nzabonimana" through "utilising the fruits of investigator Batard's labour".²³⁷ More significantly, the Trial Chamber considered that Witness Batard "was free to investigate in Rwanda" and that Nzabonimana's submissions of hindrance amounted to "mere speculation".²³⁸ The Appeals Chamber finds no error in the Trial Chamber's determination.

80. On the basis of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in its credibility assessment of Witnesses CNAI and CNAX in relation to the allegations of fabrication of evidence.²³⁹

(iv) Corroboration and Alleged Contradictions between Witnesses CNAI and CNAX

81. Nzabonimana submits that the Trial Chamber could not find that Witness CNAI was corroborated by Witness CNAX, who testified to having heard statements similar to those allegedly made by Nzabonimana at the Kabimbura centre on 11 April 1994.²⁴⁰ Nzabonimana further submits that the Trial Chamber ignored the Prosecution's withdrawal of paragraphs 18 and 43 of its Indictment five days before the filing of the Prosecution Final Trial Brief, which smoothed-out

²³³ Nzabonimana Appeal Brief, paras. 34, 35; Nzabonimana Reply Brief, paras. 19, 20.

²³⁴ See Nzabonimana Closing Brief, paras. 36-43; Trial Judgement, paras. 240, 241, 243-253.

²³⁵ Trial Judgement, paras. 243-250, 253-255.

²³⁶ Trial Judgement, para. 254.

²³⁷ Trial Judgement, para. 255.

²³⁸ Trial Judgement, paras. 254, 255.

²³⁹ The Appeals Chamber also dismisses Nzabonimana's undeveloped arguments made in his Notice of Appeal that the Trial Chamber's errors in relation to assessment of fabrication of evidence amounted to violations of his fair trial rights. See Notice of Appeal, paras. 3.1.1(3), 3.1.1(5), 3.1.1(6), 3.1.1(8). The Appeals Chamber observes further that these arguments were not developed in the Nzabonimana Appeal Brief.

²⁴⁰ Nzabonimana Appeal Brief, para. 91. See also Nzabonimana Notice of Appeal, para. 3.1.2(3). See also AT. 29 April 2014 p. 9.

contradictions between testimonies of Witnesses CNAI and CNAX, and impacted their credibility.²⁴¹

82. The Prosecution responds that Nzabonimana's argument regarding corroboration is difficult to understand and he fails to explain why the Trial Chamber would be forced to come to the same conclusion about two different events at the Kabimbura centre and the Cyayi centre.²⁴² The Prosecution further responds that it withdrew paragraphs 18 and 43 of the Indictment in accordance with the Trial Chamber's request and not to conceal alleged contradictions in the evidence of Witnesses CNAI and CNAX.²⁴³

83. With respect to Nzabonimana's argument on corroboration of Witnesses CNAI and CNAX,²⁴⁴ the Appeals Chamber first observes that the Trial Chamber accepted Witness CNAI's testimony that Nzabonimana told those gathered to stop eating cows of Tutsi refugees and to focus on the Tutsis instead.²⁴⁵ It then found that Witness CNAX corroborated this by "stating that Nzabonimana had told the people that Tutsis were to be killed before their property was taken".²⁴⁶ Having reviewed the transcripts, the Appeals Chamber notes that Witness CNAX stated:

[Nzabonimana] was in a vehicle and was saying *the same thing that he had said at the Kabimbura centre*; namely, that the Tutsis had to be killed first before their property was taken and that anybody who acted in a contrary manner was mistaken.²⁴⁷

84. Despite referencing Kabimbura, Witness CNAX's testimony reveals that he directly heard what Nzabonimana said at the Cyayi centre, unlike his hearsay testimony concerning Kabimbura centre.²⁴⁸ Therefore, the Appeals Chamber finds no error in the Trial Chamber's use of Witness CNAX's direct evidence to corroborate Witness CNAI's testimony on Nzabonimana's statement at the Cyayi centre.

85. The Appeals Chamber observes that the Trial Chamber specifically ordered the Prosecution to withdraw paragraphs of the Indictment that were unsubstantiated by evidence.²⁴⁹ In compliance with the Trial Chamber's order, on 30 June 2011, the Prosecution withdrew nine paragraphs from

²⁴¹ Nzabonimana Appeal Brief, para. 60.

²⁴² Prosecution Response Brief, para. 82.

²⁴³ Prosecution Response Brief, para. 52, *referring to The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Order for Prosecution to Review Indictment and to File Public Version, 8 April 2011 ("Order of 8 April 2011").

²⁴⁴ Nzabonimana Appeal Brief, para. 91.

²⁴⁵ Trial Judgement, paras. 870, 887.

²⁴⁶ Trial Judgement, para. 870.

²⁴⁷ Witness CNAX, T. 23 November 2009 p. 60 (emphasis added).

²⁴⁸ Witness CNAX, T. 23 November 2009 pp 58, 59. *See also* Trial Judgement, paras. 643, 769.

²⁴⁹ *See* Order of 8 April 2011, p. 2.

the Indictment, including paragraphs 18 and 43.²⁵⁰ Considering that the Prosecution's withdrawal was done in accordance with a Trial Chamber order, and that Nzabonimana provides no further justification for his claim, the Appeals Chamber dismisses Nzabonimana's arguments in this regard.

(v) Conclusion

86. Based on the foregoing, the Appeals Chamber finds that Nzabonimana fails to demonstrate that the Trial Chamber erred in assessing the credibility of Witnesses CNAI and CNAX and in relying on their testimonies in respect of the events at the Cyayi centre and the Nyabikenke *commune* office on 14 and 15 April 1994.

(b) Alleged Errors in Assessing Defence Evidence

87. In relation to the events at the Cyayi centre and the Nyabikenke *commune* office, the Trial Chamber assessed the testimonies of Defence Witnesses T24, T28, T31, T150, T193, and Bernard Ndayisaba as well as the evidence of Defence Witness BCB from the *Rukundo* trial.²⁵¹ Nzabonimana submits that the Trial Chamber excluded all the Defence evidence without justification.²⁵² In particular, Nzabonimana challenges the Trial Chamber's assessment of Defence evidence with respect to: (i) the Cyayi centre on 14 April 1994; (ii) the participation of *commune* policemen during the Night and the Day Attacks at the Nyabikenke *commune* office; and (iii) firearm use during the Night and the Day Attacks at the Nyabikenke *commune* office.

(i) The Cyayi Centre

88. In relation to the event at the Cyayi centre, the Trial Chamber noted that all Defence witnesses denied that a meeting occurred.²⁵³ The Trial Chamber found the testimonies of Witnesses

²⁵⁰ See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Notice to the Defence that He Will Not Be Requesting for Convictions under Paragraphs 18, 22, 27, 31, 32, 36, 43, 53 and 55 of the Indictment, 30 June 2011, para. 1. See also Prosecution Closing Brief, para. 2.

²⁵¹ See Trial Judgement, paras. 782-855, 879-886, 895-901, 909, 911, 912, 914, 916-926, 928, 930, 932, 934, 935, 938-940. The Appeals Chamber notes that the Trial Chamber also examined excerpts of Father Lerusse's testimony from the *Rukundo* trial that the Defence used to challenge the credibility of Witness CNAX. See *ibid.*, paras. 918-924; see also *infra*, para. 112.

²⁵² Nzabonimana Notice of Appeal, para. 3.1.3; Nzabonimana Appeal Brief, paras. 61-78. The Appeals Chamber notes that Nzabonimana submits that the Trial Chamber erred in law and in fact in its assessment of the credibility of Defence Witnesses T24, T28, T150, and T193 by applying erroneous criteria. See Nzabonimana Notice of Appeal, para. 3.1.3(2); Nzabonimana Appeal Brief, para. 61. As Nzabonimana fails to articulate which criteria was allegedly applied erroneously, the Appeals Chamber will only examine his factual challenges. Also, while the contention that the Trial Chamber erroneously excluded evidence of pressure that Defence Witnesses T24 and Mporanzi faced is raised in his Notice of Appeal, the Appeals Chamber observes that he fails to develop this in his Appeal Brief. See Nzabonimana Notice of Appeal, para. 3.1.3(7). However, under Grounds 4 and 5, Nzabonimana challenges the Trial Chamber's credibility assessment of Witnesses T24 and Mporanzi. Accordingly, his arguments will be examined below. See *infra*, paras. 196-204, 285-291.

²⁵³ Trial Judgement, para. 879.

T24, Ndayisaba, T28, and BCB of little or no probative value.²⁵⁴ When assessing the testimonies of Witnesses T193 and T150, the Trial Chamber held that:

The Chamber recalls that Witness CNAI testified that both Witnesses T150 and T193 were present at Cyayi centre during the meeting on 14 April 1994. Witness T193 was convicted by a Rwandan court for his role in the genocide and was sentenced to nine years' imprisonment. The Chamber considers that given that both witnesses are implicated as being affiliated with Nzabonimana at Cyayi centre, they may have reason to distance themselves from this allegation.

Witness T150 testified that he neither saw nor heard of a meeting held at Cyayi *cellule* by Nzabonimana, and that no one mentioned the Cyayi meeting or Nzabonimana's words during the Cyayi *Gacaca* sessions. Witness T193 testified that on 14 April 1994, he passed through Cyayi centre at 2.00 p.m. but never saw Nzabonimana. Neither witness provided first hand testimony regarding what occurred at Cyayi centre at approximately 4.00 p.m. on 14 April 1994. The Chamber thus considers that the testimony of Witnesses T150 and T193 are of limited probative value.²⁵⁵

89. Nzabonimana submits that the Trial Chamber erred in treating Witnesses T193's and T150's testimonies with caution.²⁵⁶ He argues that, since they had no involvement in criminal activities linked with Nzabonimana's alleged crimes, they had no objective reason to distance themselves.²⁵⁷ According to Nzabonimana, by stating that "both witnesses are implicated as being affiliated with Nzabonimana at Cyayi centre", the Trial Chamber considered their mere presence at the scene to be criminal and used this as the reason to reject their testimonies.²⁵⁸ However, he maintains that, as per Witness CNAI's testimony, Witness T193 was at the Cyayi centre and his association was to protect Munyagatare.²⁵⁹ Nzabonimana also challenges the Trial Chamber's consideration of Witness T193's conviction as he was acquitted in relation to the attack at the *commune* office.²⁶⁰ Furthermore, Witness T193's conviction was unrelated to events at the Cyayi centre or to Nzabonimana as it pertained to later events.²⁶¹ Nzabonimana further submits that the Trial Chamber contradicted itself by rejecting the evidence of Witnesses T193 and T150 on the basis that both witnesses may have had reason to distance themselves as they were implicated as being affiliated with the event at the Cyayi centre, while, at the same time, finding that their testimonies lacked probative value as they were not present.²⁶² Nzabonimana submits that, had the Trial Chamber correctly assessed the testimonies of Witnesses T193 and T150, it could only have found that their

²⁵⁴ Trial Judgement, paras. 881, 884-886. As to Witness T24, the Trial Chamber recalled its finding that the witness's credibility was seriously undermined by his admission of lying to Prosecution investigators. *See* Trial Judgement, para. 880.

²⁵⁵ Trial Judgement, paras. 882, 883 (internal references omitted).

²⁵⁶ Nzabonimana Appeal Brief, paras. 62-65. *See also* AT. 29 April 2014 p. 10.

²⁵⁷ Nzabonimana Appeal Brief, paras. 62, 63. *See also* AT. 29 April 2014 p. 10.

²⁵⁸ Nzabonimana Appeal Brief, paras. 62, 64. *See also* AT. 29 April 2014 p. 10.

²⁵⁹ Nzabonimana Appeal Brief, para. 63.

²⁶⁰ Nzabonimana Appeal Brief, para. 65.

²⁶¹ Nzabonimana Appeal Brief, para. 65.

²⁶² Nzabonimana Appeal Brief, para. 66, *referring to* Trial Judgement, para. 883. *See also* AT. 29 April 2014 pp. 10, 11.

testimonies rendered Witness CNAI's evidence implausible and, as a consequence, also undermined Witness CNAX's testimony, as it corroborated Witness CNAI.²⁶³

90. The Prosecution responds that the Trial Chamber correctly rejected the claims of Witnesses T193 and T150 that Nzabonimana was not at the Cyayi centre.²⁶⁴ The Prosecution submits that the Trial Chamber was entitled to assess the testimonies of Witnesses T193 and T150 against that of Witness CNAI.²⁶⁵ It further argues that Nzabonimana fails to address the Trial Chamber's reasons for finding their testimonies of limited probative value.²⁶⁶

91. Nzabonimana replies that the Trial Chamber should not have found Witness CNAI, who testified to Witnesses T193 and T150 being present at the Cyayi centre, credible because it had admitted as one alternative that both Witnesses T193 and T150 were not at the Cyayi centre.²⁶⁷ He also contends that the reasons provided by the Prosecution for the Trial Chamber to disbelieve Witnesses T150 and T193 are absent from the Trial Judgement.²⁶⁸

92. Witness CNAI testified that around 4.00 p.m. or 5.00 p.m. on 14 April 1994, after Nzabonimana's statement at the Cyayi centre, Witness T193 arrived in a car with Witness T150, he stopped behind Nzabonimana's vehicle, got out, and walked towards Witness CNAI.²⁶⁹ Witness CNAI further testified that after Munyagatare was threatened, Witnesses CNAI and T193 pushed Munyagatare down a slope away from the road.²⁷⁰ Subsequently, Nzabonimana called Witness T193 and told him that they must go to the Remera centre "to finish off what they had started", Witness T193 gave his vehicle to Witness T150, who had been in Witness T193's car, and Witness T193 left in a car with Kamali.²⁷¹ Since Witness CNAI placed both Witness T193 and Witness T150 at the scene in association with Nzabonimana, the Appeals Chamber finds it reasonable for the Trial Chamber to note that both Defence witnesses were implicated as being "affiliated" with Nzabonimana and "may have reason to distance themselves".²⁷² The Appeals Chamber also notes that at no point did the Trial Chamber consider their mere presence to be criminal.

²⁶³ Nzabonimana Appeal Brief, para. 67.

²⁶⁴ Prosecution Response Brief, para. 53. *See also* AT. 29 April 2014 p. 35.

²⁶⁵ Prosecution Response Brief, para. 56.

²⁶⁶ Prosecution Response Brief, para. 58, *referring to* Prosecution Response Brief, para. 54 where the Prosecution submits that the Trial Chamber had several reasons to disbelieve Witnesses T150 and T193.

²⁶⁷ Nzabonimana Reply Brief, para. 25.

²⁶⁸ Nzabonimana Reply Brief, para. 25.

²⁶⁹ Witness CNAI, T. 26 November 2009 pp. 61, 65; Witness CNAI, T. 27 November 2009 p. 28 (closed session). *See also* Trial Judgement, paras. 751-753.

²⁷⁰ Witness CNAI, T. 26 November 2009 p. 65; Witness CNAI, T. 27 November 2009 p. 33 (closed session). *See also* Trial Judgement, para. 755.

²⁷¹ Witness CNAI, T. 26 November 2009 p. 65; Witness CNAI, T. 27 November 2009 p. 37 (closed session). *See also* Trial Judgement, para. 756.

²⁷² Trial Judgement, para. 882.

93. The Appeals Chamber further observes that the Trial Chamber referred to Witness T193's conviction "by a Rwandan court for his role in the genocide"²⁷³ but was aware that the witness was acquitted of having a role in the *commune* office attack.²⁷⁴ The Appeals Chamber again recalls that a trial chamber has full discretion to assess witness credibility,²⁷⁵ and notes that a witness's criminal history may be a factor in assessing credibility.²⁷⁶ Nzabonimana fails to demonstrate how the Trial Chamber erred in noting Witness T193's conviction when it assessed his credibility.

94. The Appeals Chamber also dismisses Nzabonimana's allegation that the Trial Chamber contradicted itself. The Trial Chamber's finding that Witnesses T193's and T150's testimonies are of limited probative value is based on the fact that neither of them provided first-hand testimony regarding what occurred at the Cyayi centre at the relevant time.²⁷⁷ The Appeals Chamber understands that the Trial Chamber considered that, even if they were found credible, it could not have relied upon them. The Trial Chamber determined that they were unable to account for what occurred at the Cyayi centre at 4 p.m. when the meeting was found to have taken place.²⁷⁸ Indeed, before examining the probative value of their testimonies, the Trial Chamber already applied a cautious approach when it preferred Witness CNAI's testimony.²⁷⁹ Therefore, the Appeals Chamber finds no contradiction in the Trial Chamber's assessment. The Appeals Chamber dismisses Nzabonimana's arguments alleging errors in assessing Defence evidence with respect to events at the Cyayi centre.

(ii) Participation of *Commune* Policemen at the Nyabikenke *Commune* Office

95. Based on the evidence of Witnesses CNAI and CNAX, the Trial Chamber found that the perpetrators of the Night Attack were *commune* policemen and Hutu civilians.²⁸⁰ The Trial Chamber stated:

Defence Witness T28, also an eyewitness, denied that *commune* policemen were involved. However, the Chamber notes that Witnesses T28 and BCB corroborated the Prosecution witnesses' testimony that *commune* policemen were present at the scene of the attack. The Chamber notes that while Witness T28 was not personally implicated in the attack, he was

²⁷³ Trial Judgement, para. 882.

²⁷⁴ Trial Judgement, para. 904, referring to Exhibit D76B (Judgement of Gitarama Court of First Instance, 20 March 2003), paras. 45-46, 103-104.

²⁷⁵ See *supra*, para. 45.

²⁷⁶ Cf. *Bagosora and Nsengiyumva* Appeal Judgement, para. 264; *Kamuhanda* Appeal Judgement, para. 142.

²⁷⁷ Trial Judgement, para. 883.

²⁷⁸ The Trial Chamber noted that Witness T193 testified that he passed through Cyayi centre at 2.00 p.m. but never saw Nzabonimana and Witness T150 testified that he neither saw nor heard of a meeting held at Cyayi *cellule* by Nzabonimana. See Trial Judgement, para. 883.

²⁷⁹ Trial Judgement, para. 882.

²⁸⁰ Trial Judgement, paras. 902, 910, 939.

indirectly implicated. The Chamber considers that, consequently, Witness T28 may have had a motive to distance himself from the allegation.²⁸¹

96. The Trial Chamber found that perpetrators of the Day Attack were *commune* policemen, *Interahamwe*, and civilians.²⁸² The Trial Chamber relied on Witness CNAX to find that *commune* policemen participated in the Day Attack. The Trial Chamber considered Witness BCB's testimony that around 2.00 p.m. a policeman threw a grenade into a crowd of refugees, and determined that this corroborated Witness CNAX's testimony that *commune* policemen were involved in the attack as perpetrators.²⁸³

97. Concerning the Night Attack, Nzabonimana submits that the Trial Chamber rejected Witness T28's testimony on the basis that he was "indirectly implicated" without further consideration.²⁸⁴ Nzabonimana argues that the Trial Chamber could not reject Witness T28's testimony without explaining the meaning of "indirectly implicated" and by hypothetically finding that the witness could have something to hide, while at the same time, noting that he was not accused of anything.²⁸⁵ Nzabonimana avers that the lack of corroboration does not render Witness T28's testimony unreliable about the identity of assailants.²⁸⁶ Nzabonimana contends that the question of reliability about the identity of the assailants is distinguishable from the participation of other *commune* policemen.²⁸⁷ Nzabonimana also asserts that the Trial Chamber failed to consider Witness BCB's testimony that it was night time and that his colleagues fired into the air to repel the assailants.²⁸⁸ In light of the Defence evidence, Nzabonimana submits that the Trial Chamber should not have believed Witnesses CNAI and CNAX that *commune* policemen participated in the Night Attack.²⁸⁹

98. With respect to the Day Attack, Nzabonimana submits that the Trial Chamber failed to find that the testimony of Father Lerusse, who saw two policemen aiming their guns to prevent an attack, corroborated Witness BCB.²⁹⁰ He further submits that the Trial Chamber failed to consider Witness BCB's testimony that the policemen, save one, tried to protect the refugees from assailants.²⁹¹ He claims that Witness BCB's evidence, that Father Rukundo arrived with five

²⁸¹ Trial Judgement, para. 900 (internal reference omitted).

²⁸² Trial Judgement, paras. 927, 939.

²⁸³ Trial Judgement, para. 925.

²⁸⁴ Nzabonimana Appeal Brief, para. 68, *referring to* Trial Judgement, para. 900. *See also* AT. 29 April 2014 p. 51.

²⁸⁵ Nzabonimana Appeal Brief, para. 68, *referring to* Trial Judgement, para. 900. *See also* AT. 29 April 2014 p. 51.

²⁸⁶ Nzabonimana Appeal Brief, para. 69, *referring to* Trial Judgement, para. 901. Nzabonimana submits that the Trial Chamber found that only Witness T28 testified that it was raining during the Night Attack and that his evidence on this point was thus uncorroborated. *See idem.* *See also* AT. 29 April 2014 pp. 51, 52.

²⁸⁷ Nzabonimana Appeal Brief, para. 71. Nzabonimana avers that no reasonable trier of fact could have found that Witness T28, who was present at the scene, ignored the participation of *commune* policemen. *See idem.*

²⁸⁸ Nzabonimana Appeal Brief, para. 72.

²⁸⁹ Nzabonimana Appeal Brief, para. 72.

²⁹⁰ Nzabonimana Appeal Brief, para. 75.

²⁹¹ Nzabonimana Appeal Brief, para. 75.

soldiers or *gendarmes*, rendered Witness CNAX's testimony, that policemen were aiming their guns at Father Rukundo's approaching vehicle, not plausible.²⁹² Nzabonimana adds that the Trial Chamber should have questioned the veracity of Witnesses CNAI's and CNAX's allegations concerning the behaviour of the *commune* policemen, in light of Witness T28 warning the communal authority after the attack, and Witnesses T28 and BCB assisting the wounded.²⁹³

99. As to the Night Attack, the Prosecution responds that Witness T28's evidence was rightly rejected.²⁹⁴ It submits that Nzabonimana fails to demonstrate that the Trial Chamber should have believed the Defence evidence and that Witness T28 had strong motives to deny that policemen were involved.²⁹⁵ With respect to the Day Attack, the Prosecution responds that the Trial Chamber rejected Witness BCB's denial that the *commune* policemen also perpetrated attacks during the day.²⁹⁶ The Prosecution argues that Father Lerusse's testimony did not corroborate Witness BCB's evidence, and that Witness CNAX's evidence of police aiming firearms at Father Rukundo was not implausible.²⁹⁷ The Prosecution adds that evidence from Witnesses BCB, T24, and T28 about moving injured refugees to a hospital, does not undermine the testimonies of Witnesses CNAX and CNAI that *commune* policemen participated in the Day Attack.²⁹⁸

100. Nzabonimana replies that rejection of Witness T28's evidence is even less justifiable since the Trial Chamber admitted that conditions during the Night Attack rendered identification of assailants difficult.²⁹⁹ With respect to Witness BCB, Nzabonimana submits that the Prosecution inappropriately discussed his evidence, whose credibility was never examined by the Trial Chamber, and whose testimony was communicated after the end of the trial.³⁰⁰

101. Turning first to the Night Attack, the Appeals Chamber considers that, had the Trial Chamber explained what it meant by personal and indirect implication, it would have revealed protected information.³⁰¹ In these circumstances, it was reasonable for the Trial Chamber to consider that "Witness T28 may have had a motive to distance himself from the allegation".³⁰²

²⁹² Nzabonimana Appeal Brief, para. 75.

²⁹³ Nzabonimana Appeal Brief, para. 73.

²⁹⁴ Prosecution Response Brief, para. 60.

²⁹⁵ Prosecution Response Brief, paras. 61, 63.

²⁹⁶ Prosecution Response Brief, para. 65.

²⁹⁷ Prosecution Response Brief, para. 66.

²⁹⁸ Prosecution Response Brief, para. 67.

²⁹⁹ Nzabonimana Reply Brief, para. 26, *referring to* Trial Judgement, para. 907.

³⁰⁰ Nzabonimana Reply Brief, para. 27, *referring to* Prosecution Response Brief, paras. 59-67.

³⁰¹ See Exhibit D37 (Protected Information Sheet). The Appeals Chamber notes that the Trial Chamber was clearly aware of its duty to provide a reasoned opinion and to protect the identity of witnesses. See Trial Judgement, paras. 65, 66.

³⁰² Trial Judgement, para. 900.

102. As to identifying assailants, the Trial Chamber considered that the conditions at the time of the attack, even under bright moonlight as testified by Witness CNAI, would have rendered the identification of individual assailants difficult.³⁰³ The Trial Chamber noted Witness T28's testimony that, as a result of the rainy weather, he could not identify assailants during the Night Attack.³⁰⁴ The Appeals Chamber observes that, by finding identification of particular assailants difficult at the time, irrespective of weather conditions, the Trial Chamber did not rely on Witness CNAI's testimony as to the bright moonlight, or on Witness T28's testimony as to the heavy rain. In the Appeals Chamber's view, any error from the Trial Chamber's rejection of Witness T28's evidence about the identity of assailants would not affect its reliance on Witnesses CNAI and CNAX to find that the perpetrators of the Night Attack were comprised of *commune* policemen and Hutu civilians.³⁰⁵ Accordingly, Nzabonimana's arguments related to Witness T28 are dismissed.³⁰⁶

103. As for the Trial Chamber's alleged failure to consider the testimony of Witness BCB, that *commune* policemen fired into the air to repel the assailants, the Appeals Chamber recalls that the fact that certain evidence has not been referred to in the Trial Judgement does not mean that the Trial Chamber did not take it into account in its assessment.³⁰⁷ In any event, the Appeals Chamber considers that Witness BCB's testimony on this matter is not incompatible with the finding that *commune* policemen participated in attacking Tutsi refugees. The Appeals Chamber further notes that, beyond stating his argument,³⁰⁸ Nzabonimana fails to substantiate how the Trial Chamber erred in this regard. Based on the above, the Appeals Chamber is not persuaded that the Trial Chamber unreasonably relied on the testimonies of Witnesses CNAI and CNAX to find that *commune* policemen were involved in the Night Attack. The Appeals Chamber therefore considers that Nzabonimana has failed to demonstrate that no reasonable trier of fact could have relied on their testimonies to reach such finding.

³⁰³ Trial Judgement, para. 907.

³⁰⁴ Trial Judgement, para. 901. *See also* Witness T28, T. 2 June 2010 pp. 51, 52 (closed session).

³⁰⁵ Trial Judgement, paras. 902, 910, 939.

³⁰⁶ The Appeals Chamber rejects Nzabonimana's contention that no reasonable trier of fact could have found that Witness T28 ignored the participation of *commune* policemen. The Trial Chamber did not make such a finding and the Appeals Chamber recalls the reasonableness of the Trial Chamber's conclusion that Witness T28, might have had a motive to distance himself.

³⁰⁷ *See Kalimanzira Appeal Judgement*, para. 195; *Simba Appeal Judgement*, para. 152. Without providing references, Nzabonimana maintains that Witness BCB's testimony was corroborated by Witness T28's testimony. The Appeals Chamber notes that the transcripts of Witness BCB's testimony were admitted into evidence and considered *prima facie* exculpatory. *See The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Consolidated Decision on Defence Motion for Appropriate Relief in Light of Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, Defence Motion in Light of The Trial Chamber's *Proprio Motu* Order of 15 March 2012, and Defence Motion Pursuant to the Trial Chamber's Order of 4 April 2012, 30 April 2012 ("30 April 2012 Decision"), para. 128.

³⁰⁸ Nzabonimana Appeal Brief, para. 72. The Appeals Chamber notes that Nzabonimana simply refers to paragraph 844 of the Trial Judgement without further support for his argument.

104. Turning to the Day Attack, the Appeals Chamber first recalls that the Trial Chamber considered Father Lerusse's evidence, Exhibit D62, to be of "very little probative value".³⁰⁹ It noted that the exhibit was not introduced into evidence under Rule 92*bis* of the Rules, which would have afforded the Prosecution the opportunity to cross-examine Father Lerusse.³¹⁰ However, the Trial Chamber determined that, in the interests of justice, it would consider substantive aspects of Father Lerusse's testimony as contained in Exhibit D62 and insofar as it impacted the credibility of Witness CNAX.³¹¹ When assessing the Defence's challenge to the Prosecution evidence that *commune* policemen participated in the Day Attack, the Trial Chamber explicitly considered the substance of Father Lerusse's testimony from the *Rukundo* case that two *commune* policemen defended the *commune* office.³¹² In comparing the evidence of Witness CNAX and Father Lerusse, the Trial Chamber noted Father Lerusse's admission that he lost sight of the *commune* policemen and considered that he was unable to provide a reliable account of the *commune* policemen's activities that day.³¹³

105. The Appeals Chamber observes that the Trial Chamber did not explicitly consider that Witness BCB corroborated Father Lerusse's evidence on the role of *commune* policemen.³¹⁴ However, as recalled above, the fact that certain evidence has not been referred to does not mean that it was not taken into account in the Trial Chamber's assessment.³¹⁵ Furthermore, the Appeals Chamber notes that the Trial Chamber explicitly took into account Witness BCB's testimony that a policeman threw a grenade at refugees, thus corroborating Witness CNAX's evidence that *commune* policemen were involved in the Day Attack.³¹⁶ Finally, the Trial Chamber explicitly considered that police officers assisted wounded refugees.³¹⁷ In any event, the Appeals Chamber is unable to see how evidence of their assisting Tutsis undermines the reasonableness of the Trial Chamber's finding that *commune* policemen participated in the attack.

106. On the basis of the foregoing, the Appeals Chamber dismisses Nzabonimana's arguments that the Trial Chamber erred in its assessment of the Defence evidence to find that *commune* policemen participated in the Night and Day Attacks.

³⁰⁹ Trial Judgement, para. 919.

³¹⁰ Trial Judgement, para. 919.

³¹¹ Trial Judgement, para. 919.

³¹² Trial Judgement, para. 923.

³¹³ Trial Judgement, para. 923.

³¹⁴ See Trial Judgement, para. 923.

³¹⁵ See *supra*, para. 103. The Appeals Chamber recalls that there is a presumption that a Trial Chamber has evaluated all the evidence presented to it, provided that there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. See, e.g., *Bizimungu* Appeal Judgement, fn. 766; *Ntabakuze* Appeal Judgement, fn. 357; *Bagosora and Nsengiyumva* Appeal Judgement, fn. 625.

³¹⁶ Trial Judgement, para. 925.

³¹⁷ Trial Judgement, para. 917.

(iii) Firearms Use at the Nyabikenke Commune Office

107. The Trial Chamber determined that Hutu civilians and *commune* policemen were armed with firearms, grenades, and traditional weapons during the Night Attack.³¹⁸ It also found that the assailants used traditional weapons, as well as firearms and grenades during the Day Attack.³¹⁹

108. Nzabonimana submits that the Trial Chamber failed to provide a reasoned opinion on the use of firearms during the Night Attack.³²⁰ He argues that after finding that Witnesses BCB and T28 corroborated Witnesses CNAX and CNAI on the use of grenades, the Trial Chamber also made conclusions on the use of firearms without factual analysis.³²¹ Nzabonimana further submits that the Trial Chamber distorted the testimony of Witnesses T24 and Ndayisaba when using their evidence to corroborate the use of firearms in the Day Attack.³²² He argues that Witness Ndayisaba testified to not having seen or heard firearms and Witness T24 to not having been told about firearms.³²³ According to Nzabonimana, the Trial Chamber did not consider Witness BCB's evidence that Father Rukundo arrived and confiscated the assailants' traditional weapons.³²⁴

109. The Prosecution responds that the Trial Chamber reasonably concluded that after Nzabonimana's intervention attacks escalated and attackers used firearms, as opposed to only traditional weapons.³²⁵ It submits that Defence witnesses corroborated the use of firearms and grenades.³²⁶

110. Turning first to the Night Attack, the Appeals Chamber rejects Nzabonimana's submission that the Trial Chamber failed to provide a reasoned opinion. Having considered that Witnesses T28 and BCB corroborated the testimony of Prosecution witnesses on the use of grenades, the Trial Chamber stated: "[t]herefore, the Chamber concludes that the assailants were armed with firearms, grenades and traditional weapons [...]".³²⁷ It is clear that this sentence was a summary of the Trial Chamber's findings. Notably, in the preceding paragraph the Trial Chamber found that Witnesses CNAI and CNAX "both agreed that the assailants were armed with grenades and firearms".³²⁸ Nzabonimana fails to demonstrate that the Trial Chamber erred in that regard.

³¹⁸ Trial Judgement, paras. 913, 939.

³¹⁹ Trial Judgement, paras. 927, 939.

³²⁰ Nzabonimana Appeal Brief, para. 74.

³²¹ Nzabonimana Appeal Brief, para. 74.

³²² Nzabonimana Appeal Brief, para. 76.

³²³ Nzabonimana Appeal Brief, para. 76. Nzabonimana argues that this is corroborated by Witness T28. *See idem*.

³²⁴ Nzabonimana Appeal Brief, para. 77, *referring to* Trial Judgement, para. 854.

³²⁵ Prosecution Response Brief, para. 68.

³²⁶ Prosecution Response Brief, paras. 68, 69. At the appeal hearing, the Prosecution submitted that Kamali distributed at least one grenade. *See* AT. 29 April 2014 p. 29.

³²⁷ Trial Judgement, para. 912.

³²⁸ *See* Trial Judgement, para. 911.

111. With respect to the Day Attack, Witness CNAX testified that the assailants used firearms.³²⁹ According to the Trial Chamber, Witnesses T24 and Ndayisaba corroborated Witness CNAX's testimony that assailants employed "firearms and grenades" during this attack.³³⁰ However, in coming to this conclusion, the Trial Chamber only noted that Witness Ndayisaba testified that he heard an explosion and that Witness T24 learned that Father Lerusse barely escaped a grenade attack.³³¹ As summarised in the Trial Judgement, Witness Ndayisaba denied that firearms were used and Witness T24 was not told that firearms were used.³³² Consequently, no reasonable trier of fact could find that the two Defence witnesses corroborated Witness CNAX on the use of firearms during the Day Attack and the Appeals Chamber finds that the Trial Chamber erred in this respect.

112. However, this error does not occasion a miscarriage of justice as it has no impact on the Trial Chamber's finding that firearms were used during the Day Attack. The Appeals Chamber recalls that it accepted the Trial Chamber's finding on the participation of *commune* police during the Night Attack.³³³ The Appeals Chamber also recalls evidence that policemen carried firearms during attacks at night³³⁴ and during the day.³³⁵ With respect to the Day Attack, the Trial Chamber explicitly considered Defence submissions that Father Lerusse's evidence refuted Witness CNAX's testimony that two *commune* policemen were aiming their guns at Father Rukundo's approaching vehicle.³³⁶ In responding to Defence arguments, the Trial Chamber did not consider that Father Lerusse was able to provide a reliable account of the *commune* policemen's activities, given his admission that he lost sight of the *commune* policemen.³³⁷ Nzabonimana fails to demonstrate how the Trial Chamber erred in relying on Witness CNAX's evidence to find that firearms were used during the Day Attack. Based on the above, the Appeals Chamber finds it reasonable for the Trial Chamber to conclude that firearms were used by assailants, which included *commune* policemen, in the Day Attack.³³⁸

113. Finally, in summarising Witness BCB's testimony, the Trial Chamber noted his evidence that Father Rukundo arrived and confiscated traditional weapons.³³⁹ The Appeals Chamber therefore considers that the Trial Chamber did not ignore this aspect of Witness BCB's evidence. In

³²⁹ Witness CNAX, T. 23 November 2009 pp. 59, 60. *See also* Trial Judgement, paras. 915, 923.

³³⁰ Trial Judgement, para. 924.

³³¹ Trial Judgement, para. 924.

³³² Witness T24, T. 26 April 2010 p. 55 (closed session); Witness Ndayisaba, T. 28 March 2011 pp. 11, 26. *See also* Trial Judgement, paras. 790 (Witness T24), 829 (Witness Ndayisaba).

³³³ *See supra*, paras. 102, 103.

³³⁴ *See* Witness CNAI, T. 26 November 2009 pp. 68, 69; Trial Judgement, paras. 761, 897.

³³⁵ Witness CNAX, T. 24 November 2009 p. 31 (closed session); Trial Judgement, para. 923.

³³⁶ Trial Judgement, para. 923.

³³⁷ Trial Judgement, para. 923.

³³⁸ Trial Judgement, paras. 927, 939.

³³⁹ Trial Judgement, para. 854.

any event, Nzabonimana fails to demonstrate how this evidence impacts the finding that firearms were used.

114. Accordingly, the Appeals Chamber dismisses Nzabonimana's arguments in relation to the use of firearms in the Night Attack at the *commune* office and finds that the Trial Chamber's error on the corroboration from Witnesses T24 and Ndayisaba on firearms use in the Day Attack does not occasion a miscarriage of justice.

(iv) Conclusion

115. Based on the foregoing, the Appeals Chamber finds that Nzabonimana has failed to demonstrate that the Trial Chamber committed any error in its assessment of Defence evidence in relation to the events at the Cyayi centre and the Nyabikenke *commune* office on 14 and 15 April 1994 that would occasion a miscarriage of justice.³⁴⁰

(c) Conclusion

116. The Appeals Chamber dismisses Nzabonimana's arguments in relation to the assessment of evidence under his Third Ground of Appeal.

3. Direct and Public Incitement to Commit Genocide

117. The Trial Chamber convicted Nzabonimana of direct and public incitement to commit genocide based, in part, on his conduct at the Cyayi centre on 14 April 1994.³⁴¹ In particular, it determined that Nzabonimana's speech, which consisted of an explicit call to kill Tutsis, constituted a direct call to commit genocide.³⁴² The Trial Chamber found that Nzabonimana's conduct satisfied the public element of the crime.³⁴³ The Trial Chamber further found that Nzabonimana had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group and to directly incite those present to commit genocide.³⁴⁴

118. Nzabonimana submits that the Trial Chamber erred in law and in fact by characterising the incitement as "public".³⁴⁵ Nzabonimana avers that the Trial Chamber erred in law by failing to take

³⁴⁰ The Appeals Chamber also dismisses Nzabonimana's general claim, raised in the Notice of Appeal but undeveloped in his Appeal Brief, that the Trial Chamber repeatedly violated his right to a fair trial in its assessment of Defence evidence. *See* Nzabonimana Notice of Appeal, para. 3.1.3(1).

³⁴¹ Trial Judgement, paras. 1768, 1775, 1800.

³⁴² Trial Judgement, para. 1765.

³⁴³ Trial Judgement, para. 1766.

³⁴⁴ Trial Judgement, para. 1767.

³⁴⁵ Nzabonimana Notice of Appeal, para. 3.2; Nzabonimana Appeal Brief, paras. 80-93. *See also* AT. 29 April 2014 p. 11. Nzabonimana's argument on the corroboration between Witnesses CNAI and CNAX (*see* Nzabonimana Appeal Brief, para. 91) has been examined in the previous section. *See supra*, paras. 81-84. The Appeals Chamber summarily

into account and properly apply the jurisprudence.³⁴⁶ In particular, he argues that the number of persons present, though not to be used strictly, is an essential factor that should be taken into account when assessing the public character of the incitement and that the *Nahimana et al.* and *Kalimanzira* Appeal Judgements characterised speeches from a vehicle as a “conversation”.³⁴⁷ Nzabonimana submits that the Trial Chamber circumvented the elements of the crime when relying on Nzabonimana’s intention to be heard by anyone in the area to determine that “he was not heard by an exclusive and limited group”.³⁴⁸ He considers that through this “*a contrario*” reasoning and the finding that “[t]he witnesses did not indicate the specific audience to whom the speech was addressed” the Trial Chamber admitted that the public element and the audience were not established.³⁴⁹ Nzabonimana asserts that the findings were vitiated from the start when the Trial Chamber considered it unreasonable to require Witnesses CNAI and CNAX to remember the exact number of people present and Nzabonimana’s exact words.³⁵⁰ Further, Nzabonimana claims that the Trial Chamber inferred his intention from the fact that he summoned Witness CNAI, while at the same time not believing this aspect of the witness’s evidence.³⁵¹

119. Nzabonimana submits that the facts correspond to private, rather than public, incitement as Witness CNAI described private discussions between Nzabonimana, seated in his car, and specific persons, including the witness.³⁵² Nzabonimana submits that the Trial Chamber should have found that only Witness CNAI was the direct recipient of his words, and that his deputy, Kamali, Witness T193, and Munyagatare were indirect listeners.³⁵³

120. The Prosecution responds that the Trial Chamber correctly convicted Nzabonimana of direct and public incitement to commit genocide for the event at the Cyayi centre.³⁵⁴ The Prosecution

dismisses Nzabonimana’s undeveloped submission that the Trial Chamber rejected all testimonies of the witnesses who were in the area but who testified to not being informed of similar words (*see* Nzabonimana Appeal Brief, para. 88). It recalls that Nzabonimana’s challenges to the assessment of Defence evidence have been examined in the previous section. *See supra*, paras. 88-94.

³⁴⁶ Nzabonimana Notice of Appeal, para. 3.2.1; Nzabonimana Appeal Brief, paras. 80-83.

³⁴⁷ *See* Nzabonimana Appeal Brief, paras. 81, 83.

³⁴⁸ Nzabonimana Appeal Brief, para. 86. *See also* Nzabonimana Reply Brief, para. 32.

³⁴⁹ Nzabonimana Appeal Brief, para. 86 (French version). *See also* Nzabonimana Reply Brief, para. 31.

³⁵⁰ Nzabonimana Appeal Brief, para. 85. Nzabonimana further submits that the Trial Chamber distorted the testimony of Witness CNAX, who stated there were “less than” 30 people, when it determined that there was a “crowd” of “approximately” 30 people. *See* Nzabonimana Appeal Brief, para. 92, *referring to* Trial Judgement, paras. 769, 869, 1763. *See also* AT. 29 April 2014 p. 11. At the appeal hearing, Nzabonimana also argued that Witnesses CNAI and CNAX did not corroborate each other on Kamali’s and Witnesses T193’s and T150’s presence at the Cyayi centre. *See* AT. 29 April 2014 p. 53.

³⁵¹ Nzabonimana Appeal Brief, para. 86. *See also* Nzabonimana Reply Brief, para. 32; AT. 29 April 2014 pp. 11, 12.

³⁵² Nzabonimana Notice of Appeal, para. 3.2.2; Nzabonimana Appeal Brief, paras. 89, 90, 93. *See also* AT. 29 April 2014 p. 11.

³⁵³ Nzabonimana Appeal Brief, para. 90. *See also* Nzabonimana Reply Brief, para. 32. Nzabonimana argues that no public has been called, except Witness CNAI allegedly, and from its factual findings there was no “speech” made during a “meeting”. *See* Nzabonimana Appeal Brief, para. 89.

³⁵⁴ Prosecution Response Brief, para. 76.

submits that Nzabonimana ignores the law and evidence.³⁵⁵ It contends that Nzabonimana's incitement meets the *Akayesu* definition³⁵⁶ from the International Law Commission, according to which incitement is public if it is made "to a number of individuals in a public place".³⁵⁷ The Prosecution submits that Nzabonimana's reliance on the *Nahimana et al.* and *Kalimanzira* Appeal Judgements is misplaced as in both cases the inciting remarks were given to restricted groups of *militia* members manning roadblocks.³⁵⁸ The Prosecution argues that Nzabonimana incorrectly claims that he summoned Witness CNAI whereas the evidence shows that Kamali called Witness CNAI to listen to Nzabonimana's address.³⁵⁹ The Prosecution submits that Nzabonimana's claim on the Trial Chamber's finding in relation to the exact number of persons at the Cyayi centre, or on his exact words should be dismissed as he provides no reason to support it.³⁶⁰

121. The Appeals Chamber recalls that a person may be found guilty of direct and public incitement to commit genocide, pursuant to Article 2(3)(c) of the Statute, if he or she directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).³⁶¹ Such intent in itself presupposes a genocidal intent.³⁶²

122. The Appeals Chamber observes that the Trial Chamber explicitly considered the Appeals Chamber's jurisprudence noting that all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area.³⁶³ It also recalled the holding in the *Kalimanzira* Appeal Judgement that the *travaux préparatoires* of the Genocide Convention confirmed that "public" incitement to genocide pertains to *mass communications*.³⁶⁴

³⁵⁵ Prosecution Response Brief, para. 77.

³⁵⁶ Prosecution Response Brief, para. 78.

³⁵⁷ Prosecution Response Brief, para. 77, *referring to* Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, Report of the International Law Commission on the deliberations of its forty eighth meeting, 51 U.N. ORGA Supp. (No. 10), reproduced in the Yearbook of International Law Commission, 1996, vol. II (Part Two) ("Draft Code of Crimes against the Peace and Security of Mankind"), p. 22; *Akayesu* Trial Judgement, paras. 556, 674. The Prosecution submits that the *Akayesu* Trial Chamber convicted Akayesu on the basis of this definition and the Appeals Chamber did not disturb its findings. *See idem*. The Prosecution also submits that whether Nzabonimana's words were a remark, not a speech, is irrelevant. *See ibid.*, para. 78.

³⁵⁸ Prosecution Response Brief, para. 83.

³⁵⁹ Prosecution Response Brief, para. 79. According to the Prosecution during the appeal hearing, Nzabonimana used the plural form in his statement and was "addressing a plurality of persons". *See* AT. 29 April 2014 p. 31.

³⁶⁰ Prosecution Response Brief, para. 81.

³⁶¹ *Kalimanzira* Appeal Judgement, para. 155; *Bikindi* Appeal Judgement, para. 135; *Nahimana et al.* Appeal Judgement, para. 677.

³⁶² *Nahimana et al.* Appeal Judgement, para. 677, *citing Akayesu* Trial Judgement, para. 560. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 135; *Bikindi* Appeal Judgement, para. 135.

³⁶³ *See* Trial Judgement, para. 1754, *referring to Kalimanzira* Appeal Judgement, paras. 155, 156.

³⁶⁴ *See* Trial Judgement, para. 1754. *See also Kalimanzira* Appeal Judgement, para. 158.

123. The Trial Chamber further considered that in its assessment of the public element of the incitement, it “may consider the surrounding circumstances, such as the place where the incitement occurred and whether the audience was selective or limited. Incitement is ‘public’ when conducted through speeches, shouting or threats uttered in public places or at public gatherings”.³⁶⁵

124. The Appeals Chamber turns to the *Kalimanzira* Appeal Judgement, which Nzabonimana relies on to argue that the number of persons is an indispensable factor to determine the public element.³⁶⁶ The Appeals Chamber observes that the *Kalimanzira* Appeals Chamber did not rule on the definition of the public element given by the *Kalimanzira* Trial Chamber, which recalled the definition from the *Akayesu* Trial Judgement, and did not specify whether the number of persons present is an essential factor. On the one hand, the *Kalimanzira* Appeals Chamber concluded that the Tribunal’s jurisprudence and other sources indicated mass communication to be a factor, implying that the public element of direct and public incitement corresponds to a large audience.³⁶⁷ On the other hand, the *Kalimanzira* Appeals Chamber reversed the convictions on the basis that recipients of the incriminating message were not intended to be the general public.³⁶⁸ It is thus unclear whether the *Kalimanzira* Appeals Chamber considered the size of the audience to be a requirement of public and direct incitement as opposed to whether the audience can also be selected or limited. In fact, in both the *Nahimana et al.* and *Kalimanzira* cases, the Appeals Chamber opined that the “general public” was not the recipient of the message or considered that the message was not intended to be for the general public.³⁶⁹

125. Considering that the jurisprudence of the Appeals Chamber does not specify whether a large audience is a requirement for direct and public incitement to commit genocide, the Appeals Chamber will turn to the definition given by trial chambers,³⁷⁰ which recalls the definition from the *Akayesu* Trial Judgement. Referring to various sources of international law, the *Akayesu* Trial Chamber elaborated on the definition of the public element of the crime of incitement to commit genocide. It noted a 1996 report of the International Law Commission that defined “public incitement” as “a call for criminal action to *a number of individuals in a public place* or to members

³⁶⁵ Trial Judgement, para. 1755, referring to *Muvunyi II* Appeal Judgement, para. 27. The Appeals Chamber notes that the Trial Chamber mistakenly refers to the Appeal Judgement in the *Muvunyi* case, while the quote comes from the Trial Judgement in the same case rendered on retrial. See *Muvunyi II* Trial Judgement, para. 27.

³⁶⁶ See Nzabonimana Appeal Brief, para. 81, referring to *Kalimanzira* Appeal Judgement, paras. 151-165.

³⁶⁷ *Kalimanzira* Appeal Judgement, paras. 156, 160, fn. 410.

³⁶⁸ *Kalimanzira* Appeal Judgement, paras. 161-165.

³⁶⁹ *Nahimana et al.* Appeal Judgement, para. 862; *Kalimanzira* Appeal Judgement, paras. 161, 164.

³⁷⁰ *Muvunyi II* Trial Judgement, para. 27. This Trial Judgement was rendered on retrial. The Appeals Chamber further notes that this passage of the *Muvunyi* Trial Judgement was in turn based on the *Kalimanzira* Trial Judgement. See *Muvunyi II* Trial Judgement, fn. 42, referring to *Kalimanzira* Trial Judgement, para. 515. The *Kalimanzira* Trial Judgement is in turn based on *Akayesu* Trial Judgement. See *Kalimanzira* Trial Judgement, para. 515, referring to *Akayesu* Trial Judgement, paras. 556, 559. See also *Niyitegeka* Trial Judgement, para. 431.

of the general public at large by such means as the mass media, for example, radio or television”.³⁷¹ It also considered that the Civil Law systems understood words as being public when “spoken aloud in a place that were [sic] public by definition”.³⁷²

126. Contrary to Nzabonimana’s submissions, the Appeals Chamber does not consider that the incitement must necessarily be communicated through mass communication in order to amount to “public” incitement within the meaning of Article 2(3)(c) of the Statute. The number of individuals in the audience is not an element of the crime of direct and public incitement to commit genocide. Though the *Kalimanzira* Appeal Judgement noted that the Tribunal’s jurisprudence includes convictions involving “speeches made to large, fully public assemblies”, in the Appeals Chamber’s view, it does not foreclose convictions based on communications to smaller audiences when the incriminating message is given in a public space to an unselected audience. The Appeals Chamber notes that the *travaux préparatoires* of the Genocide Convention do not contradict, but support this position by stating that public incitement was understood as “*public speeches* or in the press, through the radio, the cinema or other ways of reaching the public”, though it expressly excluded “private” incitement.³⁷³ The International Law Commission confirmed that the indispensable element of public incitement requires communicating “the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a *public place* or by technical means of mass communication, such as by radio or television”.³⁷⁴

127. Consequently, the Appeals Chamber detects no error in the Trial Chamber applying the definition of “public” as stated in the *Muvunyi*, *Niyitegeka*, *Kajelijeli*, and *Akayesu* Trial Judgements. Indeed, though most convictions for direct and public incitement involve mass communication, a smaller audience is also consistent with international law according to which:

[The Trial] Chamber may consider the surrounding circumstances, such as the place where the incitement occurred and whether the audience was selective [sic] or limited. Incitement is ‘public’

³⁷¹ *Akayesu* Trial Judgement, para. 556 (emphasis added), citing Draft Code of Crimes against the Peace and Security of Mankind.

³⁷² *Akayesu* Trial Judgement, para. 556. The Appeals Chamber also notes that a court in a common law jurisdiction interpreted “public incitement” as a message “delivered in a public place at a public meeting”. See *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, para. 94, where the Supreme Court of Canada stated that Mugesera’s “message was delivered in a public place at a public meeting and would have been clearly understood by the audience”.

³⁷³ Hiram Abtahi & Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden-Boston: Martinus Nijhoff Publishers, 2008), p. 986 (emphasis added). However, this exclusion does not result in the non-criminalisation of incitement on a smaller scale *per se*.

³⁷⁴ See Draft Code of Crimes Against the Peace and Security of Mankind, p. 22, commentary on Article 2(3)(f) (emphasis added). The International Law Commission also specifies that the “public appeal for criminal action increases the likelihood that at least one individual will respond to the appeal and, moreover, encourages the kind of ‘mob violence’ in which a number of individuals engage in criminal conduct”. See *idem*.

when conducted through speeches shouting or threats uttered in public places or at public gatherings³⁷⁵

128. It is clear from the legal findings in relation to the Cyayi centre that the Trial Chamber considered the place and the audience as factors to assess the public element.³⁷⁶ As stated above, the number of persons present is not an essential factor in this assessment. As to speeches made from a vehicle, the Appeals Chamber notes that the *Kalimanzira* Appeal Judgement did not qualify them as conversations.³⁷⁷ It was the nature of Kalimanzira's presence and exchanges with those at the roadblocks that were in line with a conversation rather than speaking from a vehicle.³⁷⁸

129. The Appeals Chamber now turns to Nzabonimana's argument that the Trial Chamber relied on his intention to establish that he was not heard by an exclusive and limited group.³⁷⁹ In assessing the public element, the Trial Chamber stated: "[t]he fact that Witness CNAI was summoned over, and that Evariste Munyagatare, a Tutsi, was also present, establishes beyond reasonable doubt that the words were intended to be heard by anyone in the area, rather than an exclusive and limited group".³⁸⁰ Recalling the definition of direct and public incitement to commit genocide, the Appeals Chamber notes that establishing the public element requires not only that the accused publicly incited (*actus reus*), but also that the accused had the intent to incite publicly (*mens rea*).³⁸¹ The Trial Chamber concluded that Nzabonimana's conduct satisfied the public element of the crime but failed to explicitly state whether it was making a finding on the *actus reus* or *mens rea* or both. However, the Appeals Chamber observes that in this specific instance, the facts used by the Trial Chamber to establish the public element – the public location, a crowd of approximately 30 people, and audience that was not selected or limited – showed that the incitement was public and that Nzabonimana intended it to be so. In this context, the Appeals Chamber considers that the Trial Chamber made an assessment of both the *actus reus* and *mens rea* of the public element based on the same facts. While the Trial Chamber could have been clearer, the Appeals Chamber does not consider that the Trial Chamber used the *mens rea* to prove the *actus reus*, or that the Trial Chamber indicated that the public character was not established.

130. The Appeals Chamber is also not persuaded that the Trial Chamber acknowledged that the audience was not established when stating that the "witnesses did not indicate the specific

³⁷⁵ Trial Judgement, para. 1755. See also *Muvunyi II* Trial Judgement, para. 27; *Kajelijeli* Trial Judgement, para. 851; *Niyitegeka* Trial Judgement, para. 431; *Ruggiu* Judgement and Sentence, para. 17; *Akayesu* Trial Judgement, para. 556.

³⁷⁶ See Trial Judgement, para. 1766.

³⁷⁷ *Kalimanzira* Appeal Judgement, para. 159.

³⁷⁸ *Kalimanzira* Appeal Judgement, para. 159. The Appeals Chamber observes that in the *Kalimanzira* case it concluded that the *Nahimana et al.* Appeal Judgement was directly applicable to Kalimanzira's convictions as the underlying facts were similar in both cases.

³⁷⁹ See Nzabonimana Appeal Brief, para. 86; Nzabonimana Reply Brief, para. 32.

³⁸⁰ Trial Judgement, para. 1766.

³⁸¹ See *supra*, para. 121.

audience”.³⁸² In finding that the audience was not limited or exclusive, the Trial Chamber recalled Witness CNAX’s description of a crowd of “approximately 30 people”, and the fact that Witness CNAI was summoned over, in the presence of Munyagatare, a Tutsi.³⁸³ Furthermore, the Trial Chamber was merely noting minor differences between accounts of Witnesses CNAI and CNAX when it found that “it would be unreasonable to expect the witnesses to provide matching verbatim accounts of such details as to the number of people present and the exact words spoken by Nzabonimana and Munyagatare”.³⁸⁴ The Appeals Chamber does not detect any error in the Trial Chamber’s analysis.

131. The Appeals Chamber now turns to Nzabonimana’s claim that the Trial Chamber inferred his intention from the fact that Witness CNAI was summoned over by Nzabonimana, while not believing this aspect of the witness’s testimony.³⁸⁵ The Appeals Chamber first observes that at no point does the Trial Chamber find that Nzabonimana summoned the witness.³⁸⁶ The Trial Chamber made no explicit factual finding as to who summoned Witness CNAI over to Nzabonimana and simply stated that “Witness CNAI was summoned over” in its legal findings.³⁸⁷ Based on the above, Nzabonimana fails to demonstrate that the Trial Chamber erred.

132. The Appeals Chamber recalls that the Trial Chamber relied on the public location, a crowd of approximately 30 people,³⁸⁸ and an audience that was not exclusive or limited to find that the incitement was public.³⁸⁹ Accordingly, whether Witness CNAI testified to Kamali calling him to listen to Nzabonimana’s speech or to hear what Nzabonimana was going to tell him personally would not convert the public character of the incitement, as reasonably found by the Trial Chamber, into private discussions between Nzabonimana and specific persons.³⁹⁰ Moreover, Witness CNAI

³⁸² See Nzabonimana Appeal Brief, para. 86; Nzabonimana Reply Brief, para. 31. See also Trial Judgement, para. 1766.

³⁸³ Trial Judgement, para. 1766.

³⁸⁴ Trial Judgement, para. 872. Furthermore, the Appeals Chamber recalls that the number of individuals in an audience is not an essential element of the crime of direct and public incitement to commit genocide. Accordingly, the Appeals Chamber summarily dismisses Nzabonimana’s argument that the Trial Chamber distorted Witness CNAX’s testimony that there were “less than” 30 persons compared to the finding that there were “approximately” 30 people as being an irrelevant consideration incapable of affecting the verdict. See Nzabonimana Appeal Brief, para. 92.

³⁸⁵ See Nzabonimana Appeal Brief, para. 86; Nzabonimana Reply Brief, para. 32.

³⁸⁶ Furthermore, the Trial Chamber assessed the Defence’s allegation that Kamali would have known Witness CNAI’s ethnicity as a Tutsi and would not have called him to listen to Nzabonimana’s speech. The Trial Chamber stated that it did not believe Witness CNAI’s testimony that Kamali did not know his ethnicity. See Trial Judgement, para. 875.

³⁸⁷ Trial Judgement, para. 1766.

³⁸⁸ The Appeals Chamber observes that, in its factual findings, the Trial Chamber determined that Nzabonimana “held a meeting” at the Cyayi centre. See Trial Judgement, paras. 887, 938. However, in its legal analysis on direct and public incitement to commit genocide, apart from titling the section “Cyayi Centre Meeting”, the Trial Chamber does not refer to the incident in terms of a “meeting”. See Trial Judgement, paras. 1763-1768, 1775.

³⁸⁹ See Trial Judgement, para. 1766.

³⁹⁰ Nzabonimana points to specific sections of the witness’s testimony and submits that the French version of the transcripts indicate that Nzabonimana addressed the witness “personally”. See Nzabonimana Appeal Brief, para. 90; Nzabonimana Reply Brief, para. 29. The Appeals Chamber notes that in the French transcript Witness CNAI uses pronouns referring to himself. See Witness CNAI, T. 26 November 2009 p. 70 (French) (emphasis added) (“*Isaac Kamali qui me connaissait m’a appelé, je me suis dirigé vers l’endroit où il se trouvait, il s’entretenait avec le Ministre*”).

testified that Nzabonimana repeated the same statement in Witness T193's presence and that Munyagatare also heard the statement.³⁹¹ The Appeals Chamber recalls that the words were spoken in a public space, were heard by several persons, including Tutsis,³⁹² and contained a message directed to anyone in the area rather than selected persons.³⁹³ The Appeals Chamber is not convinced that Witness CNAI's testimony described facts corresponding to private conversations. Accordingly, the Appeals Chamber finds that Nzabonimana has failed to demonstrate that the Trial Chamber erred in characterising the incitement as public.

133. Based on the foregoing, that the Appeals Chamber dismisses Nzabonimana's arguments in relation to his conviction for direct and public incitement to commit genocide under his Third Ground of Appeal.

4. Instigation of Genocide and Extermination as a Crime Against Humanity

134. The Trial Chamber convicted Nzabonimana of instigating genocide and extermination as a crime against humanity for the killings of Tutsis at the Nyabikenke *commune* office on 15 April 1994.³⁹⁴ The Trial Chamber considered that, "particularly when viewed in context, Nzabonimana's remarks substantially contributed to the successful attack upon the *commune* office".³⁹⁵ The Trial Chamber held that this was the only reasonable inference from the following circumstantial evidence: (i) Nzabonimana was an influential figure in Gitarama *préfecture* and originated from Nyabikenke *commune*;³⁹⁶ (ii) prior to Nzabonimana's exhortations at the Cyayi centre, the attempted attack on the *commune* office had been unsuccessful, *commune* policemen and members of the population helped repel the attacks; following Nzabonimana's address, however, *commune* policemen and members of the population successfully attacked the *commune* office with the only resistance coming from the refugees themselves;³⁹⁷ and (iii) after Nzabonimana's speech, the attacks escalated in their intensity and character, and assailants used firearms and grenades as

Callixte ; et il m'a dit d'écouter bien ce que le Ministre allait me dire. J'ai effectivement prêté attention à ce que le Ministre disait. Callixte m'a dit ce qui suit :[...]). In comparison, the English transcript does not show the use of these pronouns. See Witness CNAI, T. 26 November 2009 p. 61 ("Isaac Kamali knew me and he called for me. I went towards them to the location where he was having a discussion with Minister Callixte. He then told me to listen attentively to what the minister was going to say. So I paid attention to what the minister said. This is what Callixte said[...]").

³⁹¹ See Witness CNAI, T. 26 November 2009 p. 61. See also Witness CNAI, T. 26 November 2009 p. 70 (French).

³⁹² Witnesses CNAI, CNAX, and Munyagatare. See Trial Judgement, paras. 887, 938.

³⁹³ See Trial Judgement, para. 1766.

³⁹⁴ Trial Judgement, paras. 1718, 1737, 1786, 1787, 1790, 1800.

³⁹⁵ Trial Judgement, paras. 1712, 1715.

³⁹⁶ Trial Judgement, para. 1712.

³⁹⁷ Trial Judgement, para. 1713.

opposed to only traditional weapons, which were used during the attack at the *commune* office on 13 April 1994.³⁹⁸

135. Nzabonimana submits that the Trial Chamber erred in finding a causal link between his statements at the Cyayi centre and the attack at the Nyabikenke *commune* office, and that even if a link was established from the circumstantial evidence, this inference was not the only reasonable conclusion.³⁹⁹ Nzabonimana further argues that the Trial Chamber erred in its findings on his *mens rea*.⁴⁰⁰ The Prosecution responds that the Trial Chamber's findings support Nzabonimana's conviction for this mode of liability.⁴⁰¹

(a) Substantial Contribution

136. Nzabonimana submits that the Trial Chamber erroneously inferred that he substantially contributed to the attacks solely on the basis of: (i) his influence in Gitarama *préfecture*; (ii) the success of the Night and Day Attacks, including the behavioural change of the population and *commune* policemen; and (iii) the use of firearms.⁴⁰²

137. Nzabonimana submits that the Trial Chamber erred in finding that he was influential and argues that it was required to find that he had specific influence in Nyabikenke on the day of the events.⁴⁰³ Nzabonimana also maintains that the Trial Chamber used acts for which he was convicted under direct and public incitement to commit genocide to assess his influence,⁴⁰⁴ and that no evidence was adduced on his influence over the *Interahamwe* in Gitarama *préfecture*.⁴⁰⁵

138. Further, Nzabonimana submits that the Trial Chamber's implicit inference that the attack was successful because the prior attack was unsuccessful does not explain how his utterances led to the successful attacks on 15 April 1994.⁴⁰⁶ As for the population's change of behaviour, Nzabonimana argues that the population had been targeting Tutsis since 8 April 1994 in large scale attacks throughout the *commune*, without indication that he played any role therein.⁴⁰⁷ He adds that there is no evidence that members of the population, who protected Tutsis on 13 April 1994, had

³⁹⁸ Trial Judgement, para. 1714.

³⁹⁹ Nzabonimana Notice of Appeal, paras. 3.3.1, 3.3.2; Nzabonimana Appeal Brief, paras. 94-98, 100-112. *See also* AT. 29 April 2014 pp. 13, 14.

⁴⁰⁰ Nzabonimana Notice of Appeal, para. 3.3.2.1(7), (8); Nzabonimana Appeal Brief, para. 99.

⁴⁰¹ Prosecution Response Brief, paras. 88-90. *See also* AT. 29 April 2014 p. 29. According to the Prosecution, Nzabonimana's remarks go beyond mere instigation. *See ibid.*, para. 88, *referring to* Prosecution Appeal Brief, paras. 49, 50.

⁴⁰² Nzabonimana Notice of Appeal, para. 3.3.2.1(5); Nzabonimana Appeal Brief, paras. 97, 100-112.

⁴⁰³ Nzabonimana Appeal Brief, paras. 101-103, 106. *See also* Nzabonimana Reply Brief, para. 36, *referring to* Kamuhanda Appeal Judgement, paras. 65, 66. *See also* Nzabonimana Appeal Brief, section 2.2.

⁴⁰⁴ Nzabonimana Appeal Brief, para. 105.

⁴⁰⁵ Nzabonimana Appeal Brief, para. 98, *referring to* Trial Judgement, fn. 153.

⁴⁰⁶ Nzabonimana Appeal Brief, para. 107.

⁴⁰⁷ Nzabonimana Appeal Brief, para. 108. *See also* Nzabonimana Appeal Brief, para. 110.

heard him at the Cyayi centre and then turned around to attack refugees.⁴⁰⁸ Nzabonimana avers that the causal link between the event at the Cyayi centre and the attack on the *commune* office is not proven because the Trial Chamber did not find that individuals involved in the attack heard what was said at the Cyayi centre.⁴⁰⁹

139. Finally, Nzabonimana submits that the Trial Chamber's reasoning, that attacks escalated as a result of firearm and grenade use, seemed to imply his involvement in firearms and grenades distribution when he was found not guilty of such acts from 8 April to 14 April 1994.⁴¹⁰ Nzabonimana avers that the Trial Chamber, in doing so, changed the theory of the case against him without notice.⁴¹¹

140. The Prosecution responds that the Trial Chamber made correct findings on Nzabonimana's influence,⁴¹² and that there was evidence of his influence over the *Interahamwe*.⁴¹³ The Prosecution further responds that reference to prior attacks does not alter the fact that Tutsis were successfully protected until Nzabonimana's appearance on 14 April 1994.⁴¹⁴ The Prosecution further submits that, in relation to perpetrators of attacks being present at the Cyayi centre, it does not matter who precisely carried out Nzabonimana's genocidal order or how the order reached the assailants since evidence established that his order had the desired effect of killing Tutsis.⁴¹⁵ Finally, the Prosecution responds that it was after Nzabonimana's intervention that attackers were given access to grenades and firearms.⁴¹⁶ It argues that the Trial Chamber was entitled to determine that Nzabonimana's intervention affected civilians' ability to obtain weapons, even when he was not convicted for distribution of weapons.⁴¹⁷

⁴⁰⁸ Nzabonimana Appeal Brief, para. 109.

⁴⁰⁹ Nzabonimana Appeal Brief, paras. 98, 109; Nzabonimana Reply Brief, para. 36. *See also* Nzabonimana Notice of Appeal, para. 3.3.2.1(10). Nzabonimana argues that the Trial Chamber did not establish the specific audience at the Cyayi centre and did not find that the *Interahamwe*, members of the population, or *communal* policemen were present during his speech. *See* Nzabonimana Appeal Brief, paras. 98, 109; Nzabonimana Reply Brief, para. 34, *referring to* Trial Judgement, para. 1766 where Nzabonimana points to the Trial Chamber's finding that the witnesses "did not indicate the specific audience to whom the speech was addressed" to argue that there is no information on the persons who were instigated. Nzabonimana submits that Defence Witness T193, who was identified to be at the Cyayi centre, was exonerated for the attack on the *commune* office. *See* Nzabonimana Appeal Brief, para. 98, fn. 166.

⁴¹⁰ Nzabonimana Appeal Brief, paras. 97, 110, 111. *See also* AT. 29 April 2014 pp. 53, 54.

⁴¹¹ Nzabonimana Appeal Brief, para. 96. *See also* AT. 29 April 2014 pp. 53, 54. The Appeals Chamber also notes that Nzabonimana raises in his Notice of Appeal arguments related to the Prosecution's dropping of charges against him but fails to develop these arguments in his Appeal Brief. *See* Nzabonimana Notice of Appeal, para. 3.3.2.1(1)-(3),(5); Nzabonimana Appeal Brief, para. 96 (where he generally submits that "[t]he consequence of the Prosecution's dropping of charges [...] is that the Chamber rewrote the Prosecution case entirely on [his role] [...]"). The Appeals Chamber therefore considers that Nzabonimana has abandoned these allegations.

⁴¹² Prosecution Response Brief, para. 84.

⁴¹³ Prosecution Response Brief, para. 97, *referring to* Trial Judgement, paras. 1160, 1161.

⁴¹⁴ Prosecution Response Brief, para. 92.

⁴¹⁵ Prosecution Response Brief, para. 96.

⁴¹⁶ Prosecution Response Brief, para. 93. *See also* AT. 29 April 2014 p. 29.

⁴¹⁷ Prosecution Response Brief, para. 95.

141. To demonstrate his lack of influence, Nzabonimana points to: (i) public insults and sabotage against him and his projects in Nyabikenke;⁴¹⁸ (ii) the power of the *Mouvement démocratique républicain* (“MDR”) political party;⁴¹⁹ and (iii) evidence of planned attacks against his house, which, he argues, the Trial Chamber failed to consider.⁴²⁰ The Appeals Chamber observes that the Trial Chamber found overwhelming Prosecution and Defence evidence that Nzabonimana was an influential political personality in Gitarama *préfecture* during the events from April to July 1994.⁴²¹ This is based on Nzabonimana’s position as a Minister in the Interim Government, his previous tenure as Minister of Planning, his Chairmanship of the MRND party in Gitarama *préfecture*, his association with and roots in the region, and the settlement of the Interim Government in Gitarama *préfecture*.⁴²² In its assessment, the Trial Chamber considered that he was publicly insulted by his family and the population and that his development projects were sabotaged with the advent of multiparty politics.⁴²³ The Trial Chamber also considered party dynamics between the MDR and the MRND and, specifically, Nzabonimana’s arguments on the MDR’s power in Gitarama *préfecture*.⁴²⁴ While there is no explicit mention in the Trial Judgement of evidence of planned attacks against Nzabonimana’s house,⁴²⁵ the Appeals Chamber recalls that the fact that certain evidence has not been referred to does not mean it was not taken into account in the Trial Chamber’s assessment.⁴²⁶

142. The Appeals Chamber is also not persuaded that the Trial Chamber used Nzabonimana’s convictions of direct and public incitement to commit genocide to assess his influence.⁴²⁷ The Appeals Chamber notes that the Trial Chamber referenced its factual, rather than legal, findings in relation to Nzabonimana’s participation and speeches at, *inter alia*, the Butare trading centre, the Cyayi centre, and the Murambi meeting.⁴²⁸ According to the Trial Chamber, these events

⁴¹⁸ Nzabonimana Appeal Brief, para. 102.

⁴¹⁹ Nzabonimana Appeal Brief, para. 103.

⁴²⁰ Nzabonimana Appeal Brief, para. 106.

⁴²¹ Trial Judgement, para. 92.

⁴²² Trial Judgement, para. 92.

⁴²³ Trial Judgement, para. 88.

⁴²⁴ Trial Judgement, paras. 87, 88, 90. *See also* Trial Judgement, para. 85, *referring to* Nzabonimana Closing Brief, paras. 2-5. The Appeals Chamber summarily dismisses Nzabonimana’s undeveloped submission that the Indictment fails to plead the relationship between the MDR and MRND parties (*see* Nzabonimana Appeal Brief, para. 103). It further notes Nzabonimana’s submission that the Trial Chamber failed to consider a declaration of Defence Witness T46 and a report of Rwandan authorities (*see* Nzabonimana Appeal Brief, para. 103, *referring to* Exhibits D134 and D124, p. 8). The Appeals Chamber observes that Nzabonimana Closing Brief refers to both exhibits (*see* Nzabonimana Closing Brief, paras. 2, 5).

⁴²⁵ *See* Witness T24, T. 28 April 2010 pp. 49, 50 (closed session); Witness T31, T. 3 May 2010 p. 65 (closed session); Witness T33, 22 April 2010 p. 64 (closed session).

⁴²⁶ The Appeals Chamber recalls that there is a presumption that a Trial Chamber has evaluated all the evidence presented to it, provided that there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. *See, e.g., Bizimungu Appeal Judgement*, fn. 766; *Ntabakuze Appeal Judgement*, fn. 357; *Bagosora and Nsengiyumva Appeal Judgement*, fn. 625.

⁴²⁷ Nzabonimana Appeal Brief, para. 105.

⁴²⁸ Trial Judgement, para. 91.

constituted evidence that Nzabonimana had the power to exert his influence in his native region of Gitarama *préfecture*.⁴²⁹ Nzabonimana does not demonstrate that no reasonable trier of fact could have made the same finding.

143. With respect to Nzabonimana's influence over the *Interahamwe*, the Trial Chamber explicitly noted that the Prosecution has not proven beyond a reasonable doubt that he trained and armed the *Interahamwe*.⁴³⁰ The Trial Chamber further determined that "Nzabonimana's purported role *vis-à-vis* the *Interahamwe*" had no impact on the credible and consistent testimony that he was an influential individual within Gitarama *préfecture*.⁴³¹ Nzabonimana fails to demonstrate any error in this finding.⁴³²

144. In light of the foregoing, Nzabonimana fails to demonstrate that the Trial Chamber erred in finding that he was influential. He also fails to explain why instigation would require a determination that Nzabonimana had specific influence in Nyabikenke *commune* on the day of the events.⁴³³ The Appeals Chamber recalls that the Trial Chamber did not solely rely on Nzabonimana's influence to establish his substantial contribution to the attacks; but rather, his influence was one of several factors that the Trial Chamber took into account.⁴³⁴

145. The Appeals Chamber will now examine alleged errors in relation to the other factors which the Trial Chamber relied upon to infer that Nzabonimana substantially contributed to the killings at the Nyabikenke *commune* office. Regarding the Trial Chamber's reference to the prior unsuccessful attack,⁴³⁵ the Appeals Chamber observes that the Trial Chamber was considering the temporal proximity between the unsuccessful attack on 13 April 1994, Nzabonimana's speech at the Cyayi centre on 14 April 1994, and the subsequent successful attack the night right after his speech.⁴³⁶ The Appeals Chamber finds it reasonable for the Trial Chamber to consider this sequence of events, among other factors, to infer Nzabonimana's substantial contribution to the attacks. Nzabonimana fails to demonstrate how the Trial Chamber erred in this regard.

⁴²⁹ Trial Judgement, para. 91.

⁴³⁰ Trial Judgement, fn. 153, *referring to ibid.*, Section 3.3.1.2.

⁴³¹ Trial Judgement, fn. 153.

⁴³² The Appeals Chamber dismisses Nzabonimana's submission that the Trial Chamber relied *a posteriori* on witness testimonies that it pieced together, and that it cited transcripts from Defence witnesses that do not support findings on influence (*see* Nzabonimana Appeal Brief, para. 104, *referring to* Trial Judgement, fn. 147). The Appeals Chamber observes that the Trial Chamber did not reference Defence witnesses to support its findings on influence, and further, that Defence witness testimonies cited in footnote 147 correspond to evidence that the MRND placed importance on recruiting members of the population (*see* Trial Judgement, para. 87, fn. 147).

⁴³³ *See* Nzabonimana Appeal Brief, paras. 101-103, 106. As Nzabonimana has failed to demonstrate that the Trial Chamber was required to determine that he had specific influence in Nyabikenke *commune* on the day of the events, his argument that paragraph 90 of the Trial Judgement is "silent on the effect of these events on [his specific influence] exercised in Nyabikenke" is accordingly dismissed (*see* Nzabonimana Appeal Brief, para. 103).

⁴³⁴ Trial Judgement, para. 1712. For other factors, *see* Trial Judgement, paras. 1713, 1714.

⁴³⁵ *See* Nzabonimana Appeal Brief, para. 107.

⁴³⁶ *See* Trial Judgement, para. 1713. *See also* Trial Judgement, paras. 1709-1711.

146. The Appeals Chamber now turns to Nzabonimana's arguments on the population's behavioural change after his speech.⁴³⁷ The Appeals Chamber recalls the Trial Chamber's determination that prior to Nzabonimana's exhortations at the Cyayi centre, *commune* policemen and members of the population assisted in repelling attacks on the *commune* office.⁴³⁸ It then found that, following Nzabonimana's address at the Cyayi centre, *commune* police and members of the population successfully attacked the *commune* office with the only resistance coming from the refugees themselves.⁴³⁹ The Appeals Chamber detects no error in this regard. The Appeals Chamber is not persuaded how Nzabonimana's submission, that the population had been attacking Tutsis since 8 April 1994,⁴⁴⁰ undermines the Trial Chamber's findings on behavioural change before and after Nzabonimana's address.⁴⁴¹ The Appeals Chamber is also not convinced that the Trial Chamber was specifically required to determine that assailants of the Night and Day Attacks heard what he said at the Cyayi centre. The Appeals Chamber recalls that the *actus reus* of "instigating" is to prompt another person to commit an offence.⁴⁴² It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.⁴⁴³ Similarly, it is not required that the individuals who were instigated be the same as those who committed the crimes.⁴⁴⁴

147. As for firearm and grenade use, the Appeals Chamber recalls that the Trial Chamber considered, among other factors, that after Nzabonimana's speech attacks escalated in intensity and character.⁴⁴⁵ In reaching this conclusion, the Trial Chamber noted the use of firearms and grenades compared to prior attacks where assailants only used traditional weapons.⁴⁴⁶ The Appeals Chamber observes that the Trial Chamber did not find how or why assailants obtained firearms; rather, it considered that *after* Nzabonimana's statement assailants used modern weapons to successfully attack the *commune* office.⁴⁴⁷ On this basis, the Appeals Chamber is not persuaded that the Trial

⁴³⁷ Nzabonimana Appeal Brief, paras. 98, 108, 109.

⁴³⁸ Trial Judgement, para. 1713.

⁴³⁹ Trial Judgement, para. 1713.

⁴⁴⁰ Nzabonimana Appeal Brief, para. 108. *See also ibid.*, para. 110.

⁴⁴¹ *See* Trial Judgement, para. 1713.

⁴⁴² *See, e.g., Nchamihigo* Appeal Judgement, para. 188; *Karera* Appeal Judgement, para. 317; *Kordić and Čerkez* Appeal Judgement, para. 27.

⁴⁴³ *See, e.g., Karera* Appeal Judgement, para. 317; *Nahimana et al.* Appeal Judgement, para. 480; *Kordić and Čerkez* Appeal Judgement, para. 27.

⁴⁴⁴ The Appeals Chamber observes that, while previous cases have examined whether individuals who were instigated were the same as those who committed the crimes (*see Karera* Appeal Judgement, para. 318; *Nahimana et al.* Appeal Judgement, para. 513; *Ndindabahizi* Appeal Judgement, para. 116. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 75), the Appeals Chamber has not explicitly made it a requirement under instigation.

⁴⁴⁵ *See* Trial Judgement, para. 1714.

⁴⁴⁶ *See* Trial Judgement, para. 1714.

⁴⁴⁷ Trial Judgement, paras. 939, 1714. The Appeals Chamber recalls that it found no errors in the Trial Chamber's evidentiary assessment of firearm use. *See supra*, paras. 107-114.

Chamber implied that Nzabonimana was involved in firearms distribution.⁴⁴⁸ The Appeals Chamber also cannot see how the Trial Chamber changed the theory of the case against Nzabonimana in light of its reasoning on the escalation of intensity and character as well as his acquittals in relation to distribution of weapons.⁴⁴⁹

148. In light of the foregoing, the Appeals Chamber finds that Nzabonimana fails to demonstrate that the Trial Chamber erroneously inferred that he substantially contributed to the killings on the basis of his influence, the success of attacks the night following his speech, the “mere 250 to 300 metres” between the Cyayi centre and the *commune* office, and the escalation of intensity and character of the attacks through the use of firearms and grenades in the Day and Night Attacks.⁴⁵⁰ The Appeals Chamber therefore finds that the Trial Chamber reasonably concluded that the only reasonable inference from the circumstantial evidence was that Nzabonimana substantially contributed to the attacks.

149. Based on the foregoing, that the Appeals Chamber dismisses Nzabonimana’s arguments in relation to the *actus reus* of instigation.⁴⁵¹

(b) Mens Rea

150. In its legal findings, the Trial Chamber held that “[t]here is no doubt that, at the time of Nzabonimana’s prompting, he knew of the genocidal intent of his audience, particularly given the meeting’s temporal and physical proximity to the recent attack on the *commune* office”.⁴⁵² The Chamber also noted “the extensive circumstantial evidence of Nzabonimana’s genocidal intent, set out below”.⁴⁵³

151. Nzabonimana submits that, since the Trial Chamber did not define the specific audience he addressed at the Cyayi centre, it could not conclude that he knew the genocidal intent of his audience.⁴⁵⁴ He argues that the Trial Chamber was only assuming that he knew of the attack on 13 April 1994.⁴⁵⁵ Nzabonimana adds that the Trial Chamber erred in its determination of his

⁴⁴⁸ See Nzabonimana Appeal Brief, paras. 97, 111.

⁴⁴⁹ See Nzabonimana Appeal Brief, para. 96. See also Nzabonimana Notice of Appeal, para. 3.3.2.1(1).

⁴⁵⁰ See Trial Judgement, paras. 1709-1715.

⁴⁵¹ The Appeals Chamber also dismisses Nzabonimana’s general claim, raised in the Notice of Appeal but undeveloped in his Appeal Brief, that the Trial Chamber violated his right to a fair trial in, *inter alia*, refusing to postpone the start of the trial and restricting the number of Defence witnesses. See Nzabonimana Notice of Appeal, para. 3.3.2.1(11)-(13).

⁴⁵² Trial Judgement, para. 1717.

⁴⁵³ Trial Judgement, para. 1717.

⁴⁵⁴ Nzabonimana Appeal Brief, para. 99; Nzabonimana Reply Brief, para. 35.

⁴⁵⁵ Nzabonimana Appeal Brief, para. 99.

genocidal intent by noting circumstantial evidence of events occurring after his statement at the Cyayi centre.⁴⁵⁶

152. The Prosecution responds that Nzabonimana's argument is irrelevant because the required *mens rea* was sufficiently established.⁴⁵⁷ The Prosecution also submits that the Trial Chamber correctly established the second form of *mens rea* for instigation – Nzabonimana's awareness that genocide would be committed.⁴⁵⁸

153. The Appeals Chamber recalls that the *mens rea* for instigating is established where the perpetrator acts with either direct intent to prompt another to commit a crime, or with awareness of the substantial likelihood that a crime will be committed in execution of that instigation.⁴⁵⁹

154. The Appeals Chamber notes the Trial Chamber's determination that, by "threatening a Tutsi and saying that Tutsis should be massacred at Cyayi centre on 14 April 1994", Nzabonimana prompted others to act and to continue the genocidal attack upon the *commune* office, and that he intended to do so.⁴⁶⁰ Since the Trial Chamber explicitly found that Nzabonimana had the direct intent to prompt others to commit a crime,⁴⁶¹ any error in relation to the Trial Chamber's finding on Nzabonimana's knowledge of the genocidal intent of his audience is inconsequential to Nzabonimana's *mens rea* for instigation.⁴⁶²

155. In the same vein, any error on the part of the Trial Chamber in using subsequent events to establish Nzabonimana's genocidal intent is inconsequential to its finding on his intent.⁴⁶³ The Appeals Chamber observes that the Trial Chamber found that Nzabonimana indeed possessed the requisite intent to destroy, in whole or in part, the Tutsi ethnic group on the basis of his unambiguous words at the Cyayi centre.⁴⁶⁴

156. Based on the foregoing, Nzabonimana's arguments on the *mens rea* of instigation are dismissed.

⁴⁵⁶ Nzabonimana Appeal Brief, para. 99.

⁴⁵⁷ Prosecution Response Brief, paras. 98, 100.

⁴⁵⁸ Prosecution Response Brief, para. 99.

⁴⁵⁹ See, e.g., *Nchamihigo* Appeal Judgement, para. 61; *Nahimana et al.* Appeal Judgement, para. 480; *Kordić and Čerkez* Appeal Judgement, paras. 29, 32.

⁴⁶⁰ Trial Judgement, para. 1717.

⁴⁶¹ Trial Judgement, para. 1717.

⁴⁶² It is unclear whether the Trial Chamber, in stating that Nzabonimana "knew of the genocidal intent of his audience", sought to establish the alternate form of *mens rea* for instigation – an awareness of the substantial likelihood that a crime will be committed in execution of his instigation. See Trial Judgement, para. 1717.

⁴⁶³ Trial Judgement, para. 1717 ("The Chamber also notes the extensive circumstantial evidence of Nzabonimana's genocidal intent, set out below").

⁴⁶⁴ Trial Judgement, para. 1767. See also *ibid.*, para. 1737.

(c) Conclusion

157. For the foregoing reasons, the Appeals Chamber dismisses Nzabonimana's arguments in relation to instigation of genocide and extermination as a crime against humanity under his Third Ground of Appeal.

5. Conclusion

158. Accordingly, the Appeals Chamber dismisses Nzabonimana's Second Ground of Appeal, in part, and Third Ground of Appeal.

D. Alleged Errors Relating to the Butare Trading Centre (Ground 4 and Ground 5, in part)

159. The Trial Chamber convicted Nzabonimana for committing direct and public incitement to commit genocide (Count 3), based, in part, on his conduct at the Butare trading centre in Rutobwe *commune*.⁴⁶⁵ In particular, the Trial Chamber found that, on or about 12 April 1994, in the afternoon, Nzabonimana addressed a gathering at the Butare trading centre and told those gathered to kill Tutsis and take their belongings.⁴⁶⁶ The Trial Chamber further found that Nzabonimana asked if there were any Tutsis in the crowd.⁴⁶⁷ The Trial Chamber also held that Prosecution Witness CNAZ and another Tutsi fled and that Nzabonimana told *gendarmes* and the population to pursue them.⁴⁶⁸

160. Nzabonimana submits that the Trial Chamber erred in fact and in law in convicting him of direct and public incitement to commit genocide in connection with the event at the Butare trading centre and in considering this event as circumstantial evidence of his genocidal intent.⁴⁶⁹ In this section, the Appeals Chamber considers Nzabonimana's arguments in relation to: (i) notice; (ii) assessment of evidence; and (iii) direct and public incitement.

1. Notice

161. Nzabonimana submits that the Trial Chamber erred in fact and in law in finding that he received proper notice of the allegations relating to the Butare trading centre.⁴⁷⁰ He argues that the Trial Chamber failed to consider that evidence adduced at trial did not correspond to pleadings in paragraph 40 of the Indictment.⁴⁷¹ According to Nzabonimana, the Trial Chamber ought to have considered the following discrepancies between the Indictment and the evidence relating to the event: (i) the Indictment indicating "Hutu population", whereas the Trial Chamber mentioned a "gathering" and concluded that Nzabonimana did not use the term "*Inyenzi*";⁴⁷² (ii) the Indictment alleging that Nzabonimana himself indicated there were Tutsis in the crowd, whereas Prosecution Witnesses CNAZ and CNBH testified that Nzabonimana "asked" whether there were any Tutsis present;⁴⁷³ and (iii) the Indictment indicating "soldiers", whereas Witnesses CNAZ and CNBH testified to "*gendarmes*".⁴⁷⁴ On this last point, Nzabonimana argues that the Trial Chamber

⁴⁶⁵ Trial Judgement, paras. 1762, 1775, 1800.

⁴⁶⁶ Trial Judgement, para. 734. *See also ibid.*, para. 1757.

⁴⁶⁷ Trial Judgement, para. 734. *See also ibid.*, para. 1757.

⁴⁶⁸ Trial Judgement, para. 734. *See also ibid.*, para. 1757.

⁴⁶⁹ Nzabonimana Notice of Appeal, paras. 4.1-4.4; Nzabonimana Appeal Brief, paras. 117-169.

⁴⁷⁰ Nzabonimana Notice of Appeal, para. 4.3.1; Nzabonimana Appeal Brief, paras. 163-168.

⁴⁷¹ Nzabonimana Appeal Brief, para. 163, *referring to* Rwamakuba Trial Judgement, paras. 61, 64, 92, 93, 126, 127, 144, 153, 166-168.

⁴⁷² Nzabonimana Appeal Brief, para. 165, *referring to* Trial Judgement, paras. 734, 735.

⁴⁷³ Nzabonimana Appeal Brief, para. 166.

⁴⁷⁴ Nzabonimana Appeal Brief, para. 167.

acknowledged this discrepancy but erroneously excused it because Witnesses CNAZ and CNBH were farmers, while elsewhere in the Trial Judgement the Trial Chamber held the same discrepancy against Prosecution Witness CNAF.⁴⁷⁵ Finally, Nzabonimana asserts that the Trial Chamber should have drawn a negative inference from the fact that the nexus pleaded between Nzabonimana's conduct and the killings in Rutobwe *commune* was not proven and that no evidence was adduced on his instructions to take Tutsis' jobs.⁴⁷⁶

162. The Prosecution responds that the three differences are insignificant and did not prevent Nzabonimana from identifying the criminal conduct alleged against him.⁴⁷⁷ The Prosecution also submits that notice provided by an indictment is not rendered defective because some allegations were not established beyond a reasonable doubt.⁴⁷⁸

163. Paragraph 40 of the Indictment reads:

On or about 15 April 1994, at *Butare* trading centre, *Rutongo* secteur, *Rutobwe* commune, *Gitarama* prefecture, **Callixte NZABONIMANA** addressed a gathering and told the Hutu population to kill all *Inyenzi* and their accomplices, the Tutsi, and take their jobs and belongings. He stated that even among the gathering, there were Tutsi who must not be spared. **CNAZ** and other Tutsi tried to flee and the Accused told soldiers and the population to pursue them. Many Tutsi were killed following this meeting by persons including *Interahamwe*, Hutu civilians and soldiers.

164. The Appeals Chamber recalls that, while the Prosecution is required to state the charges and the material facts underpinning those charges in the indictment,⁴⁷⁹ in general, minor differences between the indictment and the evidence presented at trial are not such as to prevent the Trial Chamber from considering the indictment in light of the evidence presented at trial.⁴⁸⁰

165. The Appeals Chamber turns to the alleged discrepancy that, in the Indictment, Nzabonimana "told the Hutu population to kill all the *Inyenzi* and their accomplices, the Tutsis", whereas the Trial Chamber mentioned a "gathering" and found that he did not use the term "*Inyenzi*" during his address.⁴⁸¹ The Appeals Chamber observes that in the same sentence of paragraph 40 of the

⁴⁷⁵ Nzabonimana Appeal Brief, para. 167, *referring to* Trial Judgement, paras. 541, 734 and fn. 947.

⁴⁷⁶ Nzabonimana Appeal Brief, para. 168, *referring to* Trial Judgement, paras. 735, 738. Nzabonimana also maintains that discrepancies between Prosecution evidence and allegations in the Indictment resulted in the dismissal of allegations in *Bizimungu et al.* Trial Judgement. *See ibid.*, para. 164, *referring to* *Bizimungu et al.* Trial Judgement, paras. 1067-1081.

⁴⁷⁷ Prosecution Response Brief, paras. 147-149.

⁴⁷⁸ Prosecution Response Brief, para. 152. The Prosecution further argues that the trial judgements Nzabonimana cites are not comparable since the indictment in the *Bizimungu et al.* case failed to plead the relevant event and the *Rwamakuba* Trial Chamber did not reject evidence for not matching the indictment. *See ibid.*, paras. 151, 260, *referring to* *Rwamakuba* Trial Judgement, para. 84.

⁴⁷⁹ *See, e.g.,* *Bizimungu* Appeal Judgement, para. 94; *Kanyarukiga* Appeal Judgement, para. 73; *Ntagerura et al.* Appeal Judgement, para. 21.

⁴⁸⁰ *See* *Semanza* Appeal Judgement, fn. 492; *Rutaganda* Appeal Judgement, para. 302. *See also* *Muvunyi II* Appeal Judgement, para. 29.

⁴⁸¹ Nzabonimana Appeal Brief, para. 165, *referring to* Trial Judgement, paras. 734, 735.

Indictment Nzabonimana is alleged to have addressed a “gathering”. Moreover, paragraph 40 of the Indictment mentions both *Inyenzi* and Tutsi as the intended targets. Nzabonimana’s selective reference to parts of paragraph 40 of the Indictment fails to demonstrate that the Indictment did not provide him with the requisite notice in this respect.

166. As to the second alleged discrepancy, the Appeals Chamber observes that Nzabonimana points to whether he “stated” or “asked” about Tutsis at the gathering.⁴⁸² The Appeals Chamber considers this difference to be minor and observes that Nzabonimana does not demonstrate how the Indictment failed to provide him with the requisite notice in this respect.⁴⁸³

167. The Appeals Chamber is also not persuaded that the Trial Chamber erred in assessing the discrepancy between “soldiers” and “*gendarmes*” in the Indictment and the evidence.⁴⁸⁴ In finding that “any divergence in the classification of the individuals as *gendarmes* or soldiers was minor”, the Trial Chamber considered that: (i) Prosecution and Defence witnesses agreed that Nzabonimana had “uniformed escort”, whether identified as *gendarmes* or soldiers; (ii) Prosecution witnesses were “local residents, farmers and small business owners who would not necessarily be able to identify the difference between a *gendarme* and a soldier”; and (iii) summaries of Prosecution witness testimonies in the Prosecution Pre-Trial Brief indicated that Nzabonimana was accompanied by *gendarmes*.⁴⁸⁵ The Appeals Chamber detects no error in the Trial Chamber’s finding that the divergence was minor. Nzabonimana’s argument that the Trial Chamber erroneously treated Witnesses CNAZ and CNBH differently from Witness CNAF is also not convincing.⁴⁸⁶ With Witness CNAF, the Trial Chamber considered the discrepancy between *gendarme* and soldier to be an inconsistency between the witness’s testimony and his prior statement.⁴⁸⁷

168. In any event, Nzabonimana fails to demonstrate why this discrepancy is significant. Regardless of whether Nzabonimana told “soldiers” or “*gendarmes*”, in addition to the population, to pursue the Tutsis, what is relevant is the fact that Nzabonimana instructed that the Tutsis be pursued, which was properly pleaded in the Indictment.⁴⁸⁸

⁴⁸² See Nzabonimana Appeal Brief, para. 166.

⁴⁸³ See *supra* para. 164.

⁴⁸⁴ See Nzabonimana Appeal Brief, para. 167.

⁴⁸⁵ Trial Judgement, para. 734, fn. 947.

⁴⁸⁶ See Nzabonimana Appeal Brief, para. 167, *referring to* Trial Judgement, para. 541.

⁴⁸⁷ Trial Judgement, para. 541. The Appeals Chamber observes that the Trial Chamber found Witness CNAF’s explanation, that he was a peasant, insufficient to justify the inconsistency between his testimony and prior statement.

⁴⁸⁸ See Indictment, para. 40.

169. The Appeals Chamber is finally not persuaded that the Prosecution's failure to prove the nexus between Nzabonimana's conduct at the Butare trading centre and the Rutobwe killings⁴⁸⁹ as well as his instructions to take Tutsis' jobs⁴⁹⁰ showed any defect in the Indictment. The fact that some allegations are ultimately not proven does not necessarily mean that the Indictment is defective.⁴⁹¹

170. For the foregoing reasons, the Appeals Chamber dismisses Nzabonimana's arguments in relation to notice under his Fourth Ground of Appeal.

2. Assessment of Evidence

171. On the basis of Prosecution and Defence evidence, the Trial Chamber determined that Nzabonimana went to the Butare trading centre in Rutobwe *commune* on or about 12 April 1994, bought banana beer, and spoke to an audience of approximately 20 people.⁴⁹² The Trial Chamber found that Nzabonimana told those gathered to kill Tutsis and to take their belongings, and asked whether any Tutsis were in the crowd.⁴⁹³ It further determined that Prosecution Witness CNAZ and another Tutsi fled, and that Nzabonimana told *gendarmes* and the population to pursue them.⁴⁹⁴

172. Nzabonimana challenges the assessment of Prosecution and Defence evidence,⁴⁹⁵ and alleges unequal treatment of witnesses.⁴⁹⁶ The Appeals Chamber will address these challenges in turn.

(a) Alleged Errors in Assessing Prosecution Evidence

173. The Trial Chamber assessed the testimonies of Prosecution Witnesses CNAY, CNAZ, and CNBH.⁴⁹⁷ It did not find Witness CNAY credible as to the events at the Butare trading centre, accepted Witness CNAZ's evidence when corroborated by other credible evidence, and found Witness CNBH credible.⁴⁹⁸ The Trial Chamber further found that Witnesses CNAZ and CNBH provided consistent evidence that Nzabonimana made inflammatory comments about Tutsis after he

⁴⁸⁹ See Nzabonimana Appeal Brief, para. 168. The Appeals Chamber recalls the Trial Chamber's determination that there was no evidentiary link between the killings in Rutobwe and Nzabonimana's speech at the Butare trading centre (see Trial Judgement, para. 738), and that Nzabonimana was found not guilty of genocide with respect to the event at the Butare trading centre (see Trial Judgement, para. 1707).

⁴⁹⁰ See Nzabonimana Appeal Brief, para. 168.

⁴⁹¹ Cf. *Bagosora and Nsengiyumva* Appeal Judgement, para. 121, referring to *Munyakazi* Appeal Judgement, para. 37.

⁴⁹² Trial Judgement, paras. 703-707. See also *ibid.*, para. 734.

⁴⁹³ Trial Judgement, para. 734. See also *ibid.*, para. 708.

⁴⁹⁴ Trial Judgement, para. 734.

⁴⁹⁵ See Nzabonimana Notice of Appeal, paras. 4.1.1-4.1.4; Nzabonimana Appeal Brief, paras. 117-143, 149, 151.

⁴⁹⁶ See Nzabonimana Notice of Appeal, para. 4.1.5(1),(2),(7); Nzabonimana Appeal Brief, paras. 144-148, 150, 152.

⁴⁹⁷ See Trial Judgement, paras. 666-682, 703-718, 734.

⁴⁹⁸ Trial Judgement, paras. 713, 715, 718.

stopped at the trading centre, and that the overall consistency in their testimonies outweighed any differences.⁴⁹⁹ Nzabonimana challenges the Trial Chamber's assessment of their evidence.

(i) Alleged Contradictions

174. Nzabonimana submits that the Trial Chamber failed to consider contradictions between the testimonies of Witnesses CNAZ and CNBH in relation to:⁵⁰⁰ (i) his identification;⁵⁰¹ (ii) the manner in which the crowd assembled and the venue where the gathering took place;⁵⁰² (iii) the audience's conduct after Nzabonimana's utterances;⁵⁰³ (iv) whether Nzabonimana asked about Tutsis before or after Witness CNAZ's flight;⁵⁰⁴ and (v) the distribution of weapons.⁵⁰⁵ He argues that, taken together, the contradictions cast doubt on their testimonies.⁵⁰⁶

175. The Prosecution responds that the Trial Chamber did not fail to consider any significant contradictions between the Prosecution witnesses.⁵⁰⁷

176. Regarding his identification, Nzabonimana submits that, according to Witness CNBH, Nzabonimana did not need to introduce himself to his audience, while Witness CNAZ stated that he recognised Nzabonimana because he introduced himself to the crowd.⁵⁰⁸ The Appeals Chamber recalls the Trial Chamber's finding that, based on testimonies of Witnesses CNAZ and CNBH as well as Defence Witnesses T109 and T110, the evidence reliably identified Nzabonimana as being present at the Butare trading centre.⁵⁰⁹ The Appeals Chamber considers that whether or not Nzabonimana introduced himself does not undermine the fact that he was indeed identified. Nzabonimana also does not demonstrate how this minor variation casts doubt on the credibility of Witnesses CNAZ's and CNBH's testimonies.

177. Regarding the venue and the manner in which the crowd assembled, Nzabonimana submits that, according to Witness CNBH, Nzabonimana called the people and asked Joseph Ruhunga to gather those on the veranda of a drinking place with *gendarmes*, while, according to Witness CNAZ, the people at the centre rushed towards the vehicles that stopped and the meeting was held

⁴⁹⁹ See Trial Judgement, paras. 708, 712.

⁵⁰⁰ Nzabonimana Notice of Appeal, para. 4.1.3; Nzabonimana Appeal Brief, paras. 129-135.

⁵⁰¹ Nzabonimana Appeal Brief, para. 130.

⁵⁰² Nzabonimana Appeal Brief, para. 131.

⁵⁰³ Nzabonimana Appeal Brief, para. 132. See also *ibid.*, paras. 123, 124; AT. 29 April 2014 pp. 21, 49.

⁵⁰⁴ Nzabonimana Appeal Brief, para. 133. Nzabonimana argues that Witness CNAZ testified that the question was asked when Karegeya pointed to the witness, while Witness CNBH stated that it was after Witness CNAZ fled. See *idem*.

⁵⁰⁵ Nzabonimana Appeal Brief, para. 134. See also AT. 29 April 2014 p. 21.

⁵⁰⁶ Nzabonimana Appeal Brief, para. 135. See also Nzabonimana Reply Brief, para. 48.

⁵⁰⁷ Prosecution Response Brief, paras. 107, 111. See *ibid.*, paras. 113-118. See also AT. 29 April 2014 pp. 41, 42.

⁵⁰⁸ Nzabonimana Appeal Brief, para. 130.

⁵⁰⁹ Trial Judgement, para. 707.

outside.⁵¹⁰ The Appeals Chamber observes that the Trial Chamber relied, *inter alia*, on Witnesses CNAZ and CNBH when it noted that people present at the trading centre assembled around Nzabonimana upon his arrival.⁵¹¹ Further, a review of their testimonies reveals that neither witness described the venue of the meeting as being inside a building.⁵¹² Nzabonimana thus fails to demonstrate any contradiction that required the Trial Chamber to provide explicit reasoning.

178. As for the audience's conduct after Nzabonimana's speech, he submits that, according to Witness CNAZ, after being denounced by Karegeya, those in the crowd pursued the witness in order to kill him.⁵¹³ He argues that, on the other hand, Witness CNBH testified that the population protected the Tutsis and did not denounce them, and those who pursued Witness CNAZ did not intend to kill him.⁵¹⁴ The Appeals Chamber notes that the Trial Chamber explicitly considered differences between the testimonies of Witnesses CNAZ and CNBH on this point. The Trial Chamber considered that Witness CNAZ "exaggerated" details of the incident, including how Karegeya denounced him as a Tutsi, but it found that this did not undermine Witness CNAZ's entire testimony.⁵¹⁵ Nzabonimana further submits that Witness CNAZ did not mention the pursuit of Jérôme Musabyimana by *gendarmes* in a vehicle, as described by Witness CNBH.⁵¹⁶ The Appeals Chamber observes that the Trial Chamber explicitly noted Witness CNBH's description that the *gendarmes* chased Musabyimana and not Witness CNAZ.⁵¹⁷ The Trial Chamber assessed this inconsistency, found it to be minor, and considered that it may be attributed to the significant passage of time.⁵¹⁸ The Trial Chamber also considered that Witness CNAZ was chased by *gendarmes*,⁵¹⁹ and that Witness CNBH corroborated Witness CNAZ's testimony that *gendarmes* chased one of the men who fled.⁵²⁰ The Appeals Chamber detects no error in the Trial Chamber's assessment, especially given that Witness CNAZ was pursued, and that, according to Witness CNBH, Witness CNAZ and Musabyimana ran in opposite directions.⁵²¹ Nzabonimana's argument that the Trial Chamber failed to consider this alleged contradiction is dismissed.

⁵¹⁰ Nzabonimana Appeal Brief, para. 131.

⁵¹¹ See Trial Judgement, para. 704, *referring to* Witness CNAZ, T. 12 November 2009 p. 41 (closed session); Witness CNBH, T. 3 December 2009 pp. 22, 32 (closed session). The Appeals Chamber notes that in the French version of the transcripts, Witness CNAZ does not mention in his answer to Defence Counsel that people "rushed" (*see* Witness CNAZ, T. 12 November 2009 pp. 47, 48 (French) (closed session)).

⁵¹² See Witness CNAZ, T. 12 November 2009 p. 41 (closed session), where Witness CNAZ mentions "open air"; Witness CNBH, T. 3 December 2009 pp. 22, 32 (closed session).

⁵¹³ Nzabonimana Appeal Brief, para. 132.

⁵¹⁴ Nzabonimana Appeal Brief, para. 132.

⁵¹⁵ Trial Judgement, paras. 711, 712.

⁵¹⁶ Nzabonimana Appeal Brief, para. 132. *See also* AT. 29 April 2014 p. 21.

⁵¹⁷ Trial Judgement, para. 710.

⁵¹⁸ Trial Judgement, para. 710.

⁵¹⁹ Trial Judgement, para. 708.

⁵²⁰ Trial Judgement, para. 708.

⁵²¹ See Witness CNBH, T. 3 December 2009 pp. 36, 37 (closed session).

179. Regarding the moment when Nzabonimana asked about Tutsis in the crowd, the Appeals Chamber observes that the Trial Chamber noted the differences between the testimonies of Witnesses CNAZ and CNBH when summarising their evidence. Specifically, it noted that, according to Witness CNAZ, Nzabonimana asked the question before the witness fled,⁵²² and according to Witness CNBH, it was after Witness CNAZ and Musabyimana fled.⁵²³ The Appeals Chamber is not convinced that the Trial Chamber failed to consider this discrepancy.⁵²⁴ In any event, the Appeals Chamber finds that this discrepancy does not undermine the Trial Chamber's finding that both witnesses corroborated each other on key points that: (i) Nzabonimana asked whether there were Tutsis in the crowd, (ii) Witness CNAZ fled the scene as a result of Nzabonimana's speech, and (iii) Nzabonimana instructed others to pursue him.⁵²⁵

180. As for the weapons distribution, the Trial Chamber noted that, according to Witness CNAZ, Nzabonimana told the population that if anyone needed weapons, he had a cargo that could be distributed.⁵²⁶ The Trial Chamber also noted that, according to Witness CNBH, Nzabonimana told the crowd that they should use their traditional weapons to kill Tutsis.⁵²⁷ Accordingly, the Appeals Chamber observes that the Trial Chamber considered the varied accounts of Witnesses CNAZ and CNBH regarding weapons. Further, the Appeals Chamber considers that this alleged discrepancy does not undermine the overall credibility of Witnesses CNAZ and CNBH, or undermine the Trial Chamber's finding that both witnesses corroborated each other on key facts related to the events at the Butare trading centre.⁵²⁸

181. In light of the above, the Appeals Chamber finds that Nzabonimana has failed to demonstrate that the Trial Chamber erred in its assessment of the differences between Witnesses CNAZ's and CNBH's accounts.

(ii) Corroboration

182. Nzabonimana submits that, despite numerous inconsistencies between the testimonies of Witnesses CNAZ and CNBH, the Trial Chamber nevertheless found that the two witnesses corroborated each other.⁵²⁹ He argues that the Trial Chamber erred in finding corroboration on the

⁵²² See Trial Judgement, para. 679.

⁵²³ See Trial Judgement, para. 670.

⁵²⁴ The Appeals Chamber recalls that there is a presumption that a trial chamber has evaluated all the evidence presented to it, provided that there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. See *supra*, para. 105, fn. 315.

⁵²⁵ Trial Judgement, paras. 708, 712, 734.

⁵²⁶ Trial Judgement, para. 678.

⁵²⁷ Trial Judgement, para. 669.

⁵²⁸ See Trial Judgement, paras. 708, 734.

⁵²⁹ Nzabonimana Notice of Appeal, para. 4.1.2; Nzabonimana Appeal Brief, para. 128. See also Nzabonimana Reply Brief, paras. 15, 49.

fact that Witness CNAZ fled the trading centre as a result of Nzabonimana's speech and that Nzabonimana gave instructions to pursue Tutsis.⁵³⁰ Nzabonimana maintains that both witnesses described two different scenes of what occurred after Nzabonimana spoke at the Butare trading centre.⁵³¹ According to Nzabonimana, while noting Witness CNAZ's testimony that he was pursued by *gendarmes* and noting Witness CNBH's testimony that the *gendarmes* pursued Musabyimana and not Witness CNAZ, the Trial Chamber still found corroboration between Witnesses CNBH and CNAZ on the fact that the *gendarmes* chased one of the men who fled.⁵³² Nzabonimana further submits that any corroboration between Witnesses CNAZ and CNBH that they met in Kabgayi is not relevant.⁵³³ Nzabonimana also contests the finding that Defence Witness T110 corroborated Witness CNAZ to the effect that the latter was one of the first to leave the gathering.⁵³⁴

183. The Prosecution responds that the Trial Chamber reasonably found corroboration between Witnesses CNAZ and CNBH.⁵³⁵

184. With respect to the corroboration between Witnesses CNAZ and CNBH, the Appeals Chamber recalls that two *prima facie* credible testimonies need not be identical in all aspects in order to be corroborative and that corroboration may exist even when some details differ.⁵³⁶ The Appeals Chamber further recalls the Trial Chamber's determination that the overall consistency in the testimonies of Witnesses CNAZ and CNBH outweighed the differences.⁵³⁷ In coming to this conclusion, the Trial Chamber considered that both witnesses placed Nzabonimana at the Butare trading centre on 12 April 1994.⁵³⁸ The Trial Chamber found the corroborated facts to be: (i) Nzabonimana was present at the Butare trading centre; (ii) approximately 20 people gathered; (iii) both Prosecution witnesses were present; (iv) after stopping at the trading centre, Nzabonimana made inflammatory comments about Tutsis to those present; (v) Nzabonimana asked whether there were any Tutsi in the crowd; (vi) Witness CNAZ fled the trading centre as a result of Nzabonimana's speech and Nzabonimana instructed others to pursue him; and (vii) *gendarmes* pursued one of the men who fled.⁵³⁹

⁵³⁰ Nzabonimana Appeal Brief, para. 123, *referring to* Trial Judgement, para. 708.

⁵³¹ Nzabonimana Appeal Brief, paras. 123, 128, *referring to* Trial Judgement, paras. 670, 680.

⁵³² Nzabonimana Appeal Brief, para. 124, *referring to* Trial Judgement, paras. 708, 710.

⁵³³ Nzabonimana Appeal Brief, para. 126, *referring to* Trial Judgement, para. 709.

⁵³⁴ Nzabonimana Appeal Brief, para. 125, *referring to* Trial Judgement, para. 708. Nzabonimana argues that, contrary to Witness CNAZ's testimony, Witness T110 stated that Witness CNAZ left quietly without being bothered and did not flee as a result of the threats. *See ibid.*, *referring to* Trial Judgement, para. 725. *See also ibid.*, para. 12.

⁵³⁵ Prosecution Response Brief, paras. 108-110.

⁵³⁶ *See, e.g.,* Ndahimana Appeal Judgement, para. 93; Ntabakuze Appeal Judgement, para. 150; Ntawukulilyayo Appeal Judgement, para. 24. *See also* Bizimungu Appeal Judgement, para. 327.

⁵³⁷ Trial Judgement, para. 712.

⁵³⁸ Trial Judgement, paras. 703, 704, 707.

⁵³⁹ *See* Trial Judgement, paras. 703, 705-708.

185. The Trial Chamber further noted that Witness CNAZ exaggerated details, including the fact that Karegeya denounced the witness as a Tutsi, which caused him to flee.⁵⁴⁰ The Appeals Chamber recalls that, while the Trial Chamber did not find Witness CNAZ credible on the exaggerated details, it nevertheless concluded that these details did not lead it to discount the witness's entire testimony.⁵⁴¹ Furthermore, while there is a discrepancy as to whom the *gendarmes* pursued, the Trial Chamber reasonably found that both witnesses corroborated the fact that the *gendarmes* chased a fleeing Tutsi.⁵⁴² The Appeals Chamber is not convinced by Nzabonimana's submission that both witnesses described two different scenes of what occurred after his utterances at the Butare trading centre. As discussed above, the Appeals Chamber did not detect any error in the Trial Chamber's assessment of the discrepancies between Witnesses CNAZ's and CNBH's accounts.⁵⁴³ Given the above, Nzabonimana has not demonstrated that it was unreasonable for the Trial Chamber to conclude that the overall consistency in their testimonies outweighed the differences. Accordingly, the Appeals Chamber finds that the Trial Chamber reasonably found corroboration between Witnesses CNAZ and CNBH.

186. Contrary to Nzabonimana's argument,⁵⁴⁴ at no point did the Trial Chamber determine that Witnesses CNAZ and CNBH met in Kabgayi. The Trial Chamber found that both witnesses testified to seeking refuge at Kabgayi, and that Witness CNBH corroborated Witness CNAZ's presence there.⁵⁴⁵ The Appeals Chamber also notes that the Trial Chamber made this finding when it examined consistent aspects of their testimonies. In any event, Nzabonimana fails to demonstrate how the Trial Chamber erred or how such an error would undermine findings that the two Prosecution witnesses corroborated each other on key facts.

187. Finally, the Trial Chamber found that Witness T110 corroborated Witness CNAZ's testimony that the latter was one of the first to leave the gathering.⁵⁴⁶ The Appeals Chamber notes that Witness T110 testified to Witness CNAZ being "the first to leave the place" when estimating Witness CNAZ's departure in relation to Nzabonimana's departure.⁵⁴⁷ The Appeals Chamber is not convinced that this was incompatible with Witness CNAZ describing himself leaving as a result of the speech, while others were still present.⁵⁴⁸ Given the circumstances, the Appeals Chamber finds

⁵⁴⁰ Trial Judgement, paras. 711, 712.

⁵⁴¹ Trial Judgement, para. 712.

⁵⁴² Trial Judgement, paras. 708, 734.

⁵⁴³ *See supra*, paras. 174-181.

⁵⁴⁴ Nzabonimana Appeal Brief, para. 126.

⁵⁴⁵ Trial Judgement, para. 709.

⁵⁴⁶ Trial Judgement, para. 708. The Appeals Chamber notes the Trial Chamber's finding that Witness T110 corroborated not only Witness CNAZ but also Witness CNBH, as it indicated the Prosecution witnesses. *See idem*.

⁵⁴⁷ Witness T110, T. 13 October 2010 p. 11 (closed session).

⁵⁴⁸ Witness CNAZ, T. 12 November 2009 pp. 4, 5; Witness CNAZ, T. 12 November 2009 p. 43 (closed session).

that the Trial Chamber reasonably found corroboration between Witnesses CNAZ and T110 on this aspect of the evidence.

188. Based on the foregoing, the Appeals Chamber finds that Nzabonimana has failed to demonstrate any error in the Trial Chamber's assessment of corroborating evidence.

(iii) Overall Assessment of Prosecution Witnesses

189. Nzabonimana submits that the testimonies of Witnesses CNAY, CNAZ, and CNBH were irreconcilable and that the Trial Chamber should have considered all the evidence and contradictions before deciding whether the allegations concerning the Butare trading centre were established.⁵⁴⁹ Nzabonimana maintains that the Trial Chamber, while rejecting Witness CNAY's testimony because it differed too widely from the evidence of the other Prosecution witnesses, failed to draw conclusions on the inconsistencies between the three witnesses.⁵⁵⁰ He claims that the Trial Chamber limited itself to the testimonies of Witnesses CNAZ and CNBH, and further erred by stating that the overall consistency in their testimonies outweighed the differences.⁵⁵¹

190. The Prosecution responds that the Trial Chamber reasonably did not accept Witness CNAY's testimony, only accepted parts of Witness CNAZ's testimony when consistent with other evidence, and reasonably disregarded other parts of Witness CNAZ's testimony because of significant passage of time.⁵⁵²

191. Nzabonimana replies that the Trial Chamber did not fully take into account Witness CNAY's testimony, and also that the Prosecution evades addressing the Trial Chamber's failure to consider the witness's contradictory version of events.⁵⁵³

192. The Appeals Chamber is not convinced that the Trial Chamber erred in its overall assessment of the Prosecution evidence. The Trial Chamber considered the testimonies of all three Prosecution witnesses and it weighed Witness CNAY's account against the other evidence.⁵⁵⁴ Specifically, it noted that Witness CNAY's account "varie[d] widely from the other witnesses who testified, both in the time of the meeting, the words spoken by Nzabonimana and the actions of the crowd after the speech".⁵⁵⁵ The Trial Chamber concluded that Witness CNAY's testimony was not

⁵⁴⁹ Nzabonimana Notice of Appeal, para. 4.1.1; Nzabonimana Appeal Brief, paras. 117-121.

⁵⁵⁰ Nzabonimana Appeal Brief, paras. 117, 120, 121. *See also* Nzabonimana Reply Brief, paras. 39, 41, 42; AT. 29 April 2014 pp. 21, 22.

⁵⁵¹ Nzabonimana Appeal Brief, paras. 117-122, *referring to* Trial Judgement, para. 712. *See also* Nzabonimana Reply Brief, para. 44; AT. 29 April 2014 p. 22.

⁵⁵² Prosecution Response Brief, para. 107.

⁵⁵³ Nzabonimana Reply Brief, paras. 39, 40.

⁵⁵⁴ Trial Judgement, para. 718.

⁵⁵⁵ Trial Judgement, para. 718.

credible in relation to the Butare trading centre and noted that the Prosecution did not cite this witness in its submissions.⁵⁵⁶ The Appeals Chamber considers that, in rejecting Witness CNAY's evidence, the Trial Chamber was drawing conclusions on inconsistencies between Prosecution witnesses. Recalling the Trial Chamber's discretion to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence,⁵⁵⁷ the Appeals Chamber detects no error in the Trial Chamber's assessment of the three Prosecution witnesses.

193. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in the overall assessment of Witnesses CNAY, CNAZ, and CNBH.

(iv) Conclusion

194. Based on the foregoing, the Appeals Chamber considers that Nzabonimana has failed to demonstrate any error in the Trial Chamber's reliance on Witnesses CNAZ and CNBH in respect of the events at the Butare trading centre on 12 April 1994.

(b) Alleged Errors in Assessing Defence Evidence

195. The Trial Chamber assessed the testimonies of Defence Witnesses T109, T110, and Jean-Marie Vianney Mporanzi.⁵⁵⁸ In relation to Witness Mporanzi, the Trial Chamber considered his testimony on whether the meeting occurred to be of limited probative value.⁵⁵⁹ The Trial Chamber recalled contradictions between his testimony and previous statements,⁵⁶⁰ and found his vague claim that Rwandan authorities pressured him to make his previous statements insufficient to substantiate his assertion that his prior statements were fabricated.⁵⁶¹ Furthermore, it determined that, even if fabricated, Witness Mporanzi's admission to providing false statements undermined his credibility.⁵⁶² The Trial Chamber noted that Witnesses T109 and T110 acknowledged that Nzabonimana came to the Butare trading centre, but denied that he made inflammatory remarks about Tutsis or that any Tutsis fled the trading centre during his address.⁵⁶³ Nzabonimana

⁵⁵⁶ Trial Judgement, para. 718.

⁵⁵⁷ See, e.g., *Ndahimana* Appeal Judgement, para. 93; *Hategekimana* Appeal Judgement, para. 82; *Munyakazi* Appeal Judgement, para. 71.

⁵⁵⁸ Trial Judgement, paras. 683-708, 719-734.

⁵⁵⁹ Trial Judgement, para. 731.

⁵⁶⁰ Trial Judgement, para. 732.

⁵⁶¹ Trial Judgement, para. 733.

⁵⁶² Trial Judgement, para. 733.

⁵⁶³ Trial Judgement, para. 719.

challenges the Trial Chamber's assessment of Witness Mporanzi's credibility,⁵⁶⁴ and of contradictions between Witnesses T109 and T110.⁵⁶⁵

(i) Witness Mporanzi's Credibility

196. Nzabonimana submits that the Trial Chamber erroneously determined that Witness Mporanzi's credibility was undermined because he admitted to lying to the Prosecution.⁵⁶⁶ Nzabonimana submits that the Trial Chamber erroneously stated that nothing suggested *Bourgmestre* Charles Gahunde encouraged Witness Mporanzi to testify falsely.⁵⁶⁷ He argues that no trier of fact would have failed to note that the duress Witness Mporanzi faced "vitiated his liberty" on whether to accuse Nzabonimana or not.⁵⁶⁸ Nzabonimana adds that the Trial Chamber erred in finding that the witness failed to adduce evidence of duress.⁵⁶⁹ He also maintains that the Trial Chamber found that Witness Mporanzi was not arrested and suffered no undue consequences as a result of his decision to testify for the Defence, whereas Witness Mporanzi fled Rwanda in 2008 to avoid suffering any undue consequences.⁵⁷⁰ Nzabonimana further submits that, by only considering Witness Mporanzi's admission to lying, the Trial Chamber failed to address evidence corroborating the witness's testimony on a system of recruitment, and thus failed to provide a reasoned opinion.⁵⁷¹

197. Nzabonimana also submits that the Trial Chamber simply examined contradictions between Witness Mporanzi's testimony and the prior statements he refuted about events at the Butare trading centre, and failed to make findings based on the witness's freely stated facts during his trial

⁵⁶⁴ Nzabonimana Notice of Appeal, paras. 4.1.4(3), 4.1.5(6), 5.1.2(2); Nzabonimana Appeal Brief, paras. 136-143, 181, 184, 186, 187, 189, 190. Nzabonimana challenges the Trial Chamber's assessment of Witness Mporanzi's credibility in relation to fabrication of evidence and the Butare trading centre under his Fourth and Fifth Grounds of Appeal. The Appeals Chamber considers all contentions related to Witness Mporanzi together in this section.

⁵⁶⁵ Nzabonimana Notice of Appeal, paras. 4.1.5(2); Nzabonimana Appeal Brief, para. 149.

⁵⁶⁶ Nzabonimana Notice of Appeal, paras. 4.1.4(3), 4.1.5(6), 5.1.2(2); Nzabonimana Appeal Brief, paras. 137, 181 (French original). *See also* AT. 29 April 2014 pp. 12, 13. Noting that none of Nzabonimana's allegations in relation to his right to a fair trial, including the ones related to the assessment of fabrication of evidence, is developed in his Appeal Brief, the Appeals Chamber considers that these have been withdrawn (*see* Nzabonimana Notice of Appeal, paras. 4.1.4(5)-(8)). The Appeals Chamber also observes that several arguments relating to fabrication of evidence are repetitive of those raised under Ground 3 (*see* Nzabonimana Notice of Appeal, paras. 4.1.4(1), 4.1.4(5), 4.1.5(3)) and have been already assessed under Ground 3 of Nzabonimana's appeal (*see supra*, paras. 70, 71, 72, 78, 79).

⁵⁶⁷ Nzabonimana Appeal Brief, para. 186.

⁵⁶⁸ Nzabonimana Appeal Brief, para. 186. Nzabonimana submits that Witness Mporanzi felt no "freedom" to refuse *Bourgmestre* Charles Gahunde's request to testify against Nzabonimana, based on a prepared list of allegations, as a refusal would be considered an act against the RPF. *See ibid.*, para. 185.

⁵⁶⁹ Nzabonimana Appeal Brief, para. 184, *referring to* Trial Judgement, paras. 119-135, 140.

⁵⁷⁰ Nzabonimana Appeal Brief, para. 187.

⁵⁷¹ Nzabonimana Appeal Brief, paras. 136-143. In particular, Nzabonimana submits that: (i) like Witness Mporanzi, Witness CNBH confirmed that it was *Bourgmestre* Gahunde who put them in touch with ICTR investigators, and that refusing to make a statement against Nzabonimana was not possible; (ii) Prosecution Witness CNBA testified that it was Witness CNBH who put him in touch with investigators from the Prosecution, thus confirming that Witness CNBH participated in the recruitment of Prosecution witnesses and corroborating Witness Mporanzi's testimony regarding the system of recruitment; and (iii) Witness T109 corroborated Witness Mporanzi in testifying that Witness CNBH attempted to recruit him to give false testimony against Nzabonimana. *See ibid.*, paras. 140-142.

testimony.⁵⁷² Nzabonimana further submits that he was prejudiced by the Trial Chamber's errors and the Prosecution's obstruction as he was unable to use Witness Mporanzi's testimony to confront Witness CNAZ.⁵⁷³

198. The Prosecution responds that Nzabonimana provides no argument as to why the Trial Chamber was not entitled to disbelieve "a confessed liar".⁵⁷⁴ It submits that Nzabonimana re-argues the evidence and misstates Witness Mporanzi's testimony in relation to *Bourgmestre Gahunde*.⁵⁷⁵ While acknowledging Witness Mporanzi's flight from Rwanda, the Prosecution argues that Nzabonimana ignores that several detained witnesses did not suffer consequences by testifying for the Defence.⁵⁷⁶ The Prosecution further responds that Nzabonimana's undeveloped claim, that it prevented him from confronting Witness CNAZ, should be summarily dismissed as he fails to address the Trial Chamber's central decision on this matter.⁵⁷⁷

199. Turning first to the Trial Chamber's assessment of Witness Mporanzi's credibility in relation to fabrication of evidence, the Appeals Chamber observes that the Trial Chamber examined his testimony in detail when it considered allegations that Rwandan authorities were involved in evidence fabrication.⁵⁷⁸ The Trial Chamber determined that Witness Mporanzi's vague claims did not support the conclusion that Rwandan Government officials coerced him to make his 1998 and 2003 statements to Prosecution investigators.⁵⁷⁹ The Trial Chamber based its determination on the following considerations: (i) nothing in Witness Mporanzi's account of his interaction with Gahunde suggested that Gahunde encouraged him to testify falsely;⁵⁸⁰ (ii) Witness Mporanzi's testimony that he could freely add and omit allegations against Nzabonimana undermined his supposed belief that he was under threat to testify falsely;⁵⁸¹ and (iii) the witness ultimately decided not to testify for the Prosecution and instead testified for the Defence and, by his own admission, he was not arrested and suffered no undue consequences as the result of his testimony.⁵⁸² Given the Trial Chamber's explicit consideration of the alleged duress and circumstances surrounding

⁵⁷² Nzabonimana Appeal Brief, para. 190.

⁵⁷³ Nzabonimana Appeal Brief, para. 138. *See also ibid.*, paras. 24, 189.

⁵⁷⁴ Prosecution Response Brief, para. 119.

⁵⁷⁵ Prosecution Response Brief, para. 167.

⁵⁷⁶ Prosecution Response Brief, para. 168, *referring to* Trial Judgement, paras. 189, 196, 212, 223.

⁵⁷⁷ Prosecution Response Brief, paras. 120-124.

⁵⁷⁸ Trial Judgement, paras. 136-148.

⁵⁷⁹ Trial Judgement, para. 143.

⁵⁸⁰ Trial Judgement, para. 140. In this regard, the Trial Chamber considered Witness Mporanzi's testimony that he had no choice but to testify against Nzabonimana, and yet admitted that Gahunde spoke to him gently. It considered that the witness provided no evidence other than vague perceptions and fears that he would be imprisoned if he did not testify. *See idem.*

⁵⁸¹ Trial Judgement, para. 141.

⁵⁸² Trial Judgement, para. 142.

Witness Mporanzi's false prior statements,⁵⁸³ the Appeals Chamber observes that beyond disagreeing with the Trial Chamber's assessment, Nzabonimana fails to demonstrate how the Trial Chamber erred. The Appeals Chamber thus dismisses Nzabonimana's arguments in this regard.

200. The Appeals Chamber is also not convinced that the Trial Chamber erred in stating that Witness Mporanzi "provided no evidence" other than vague perceptions and fears that he would be imprisoned if he did not testify.⁵⁸⁴ Read in context, the Trial Chamber was assessing Witness Mporanzi's testimony on his fear of imprisonment should he not testify against Nzabonimana. As for the witness's flight from Rwanda in 2008, the Appeals Chamber is unable to see how this argument undermines, or renders unreasonable, the Trial Chamber's finding that Witness Mporanzi, by his own admission, was not arrested and suffered no undue consequences as a result of his testimony for Nzabonimana.⁵⁸⁵ The Appeals Chamber therefore finds no error in the Trial Chamber considering Witness Mporanzi's admission to providing false statements in its assessment of his credibility.

201. Considering the above, specifically the Trial Chamber's determination that the allegations of coercion were unfounded, the Appeals Chamber finds that the Trial Chamber had no reason to address whether other witnesses corroborated Witness Mporanzi's testimony on the system of recruitment.⁵⁸⁶ Nzabonimana's arguments on the alleged failure to address evidence are accordingly dismissed.

⁵⁸³ Specifically, the Appeals Chamber observes that the Trial Chamber explicitly considered, *inter alia*: (i) the list of allegations against Nzabonimana; (ii) Gahunde questioning whether Witness Mporanzi supported the RPF, and the witness's fear of answering "no"; (iii) Witness Mporanzi's fear of being imprisoned for not fabricating evidence against Nzabonimana; (iv) Witness Mporanzi's interactions with Gahunde; (v) Witness Mporanzi's acknowledgement that in 2003 he freely made additional allegations against Nzabonimana beyond those Gahunde told him (*see* Witness Mporanzi, T. 26 May 2010 pp. 35, 36); (vi) Witness Mporanzi received money for food and travel expenses, which did not expect and received after his testimony; (vii) Witness Mporanzi made false accusations against Nzabonimana because he thought it would be difficult for authorities to arrest Nzabonimana, who was hiding in the Congo (*see* Witness Mporanzi, T. 26 May 2010 p. 40); and (viii) Witness Mporanzi left Rwanda because his conscience troubled him for imperilling Nzabonimana and wanted to make reparations for what he did (*see* Witness Mporanzi, T. 26 May 2010 pp. 40, 41). *See* Trial Judgement, paras. 120-135, 137-143, 146.

⁵⁸⁴ Trial Judgement, para. 140.

⁵⁸⁵ Trial Judgement, para. 142.

⁵⁸⁶ In any event, the Appeals Chamber observes that the Trial Chamber considered Witness CNBH's testimony that *Bourgmestre* Gahunde also contacted the Prosecution witness (Trial Judgement, paras. 108, 109, 136, fn. 209). The Trial Chamber determined that evidence of a witness's mere contact with Rwandan authorities does not lead to a conclusion that the witness fabricated testimony against Nzabonimana (Trial Judgement, para. 136). The Appeals Chamber detects no error in this determination. Additionally, the Appeals Chamber does not accept Nzabonimana's argument that Witness CNBA's testimony that investigators sent Witness CNBH as a messenger (Witness CNBA, T. 14 December 2009 pp. 49, 50 (closed session)) confirmed that Witness CNBH participated in recruitment or corroborated Witness Mporanzi's testimony "regarding the system of recruitment" (Nzabonimana Appeal Brief, para. 141). Furthermore, the Appeals Chamber is unable to identify which specific aspect of Witness Mporanzi's testimony is corroborated as Nzabonimana fails to provide any relevant transcript reference from Witness Mporanzi's testimony on the recruitment system or on Witness CNBH's recruitment activities to falsely accuse Nzabonimana. Accordingly, the Appeals Chamber dismisses Nzabonimana's argument that Witnesses CNBA and T109 corroborated Witness Mporanzi in this regard.

202. Turning to the assessment of Witness Mporanzi's credibility in relation to the events at the Butare trading centre, the Appeals Chamber recalls that the Trial Chamber found that his testimony in this respect was of limited probative value.⁵⁸⁷ The Trial Chamber considered that an impromptu meeting could have occurred at the Butare trading centre without Witness Mporanzi's knowledge.⁵⁸⁸ To reach this conclusion, the Trial Chamber noted Witness Mporanzi's testimony that after 9 April 1994 he was concerned with refugees and other security matters.⁵⁸⁹ Therefore, the Appeals Chamber finds that the Trial Chamber did not simply consider his admission to lying, or merely examined contradictions between prior statements he refuted and his testimony. The Appeals Chamber therefore dismisses Nzabonimana's contention that the Trial Chamber did not enter findings on Witness Mporanzi's trial testimony.

203. As for the allegations of prejudice resulting from his inability to cross-examine Witness CNAZ with Witness Mporanzi's evidence, Nzabonimana merely mentions a Defence objection prior to Witness CNAZ's cross-examination.⁵⁹⁰ However, he fails to indicate any error in the Trial Chamber rejecting the objection.⁵⁹¹ Finally, Nzabonimana does not identify any error in the decision nor does he indicate the Prosecution obstruction he is challenging. Also, it is entirely unclear on what matter Nzabonimana wanted to confront Prosecution witnesses with Witness Mporanzi's testimony. Given his unsubstantiated and vague claims, the Appeals Chamber dismisses his argument.

204. In light of the above, the Appeals Chamber rejects Nzabonimana's submission that the Trial Chamber erred by failing to provide a reasoned opinion or in assessing Witness Mporanzi's credibility in relation to fabrication of evidence and his testimony on the Butare trading centre.

(ii) Witnesses T109's and T110's Contradictions

205. Nzabonimana submits that, contrary to the Trial Chamber's finding, Witnesses T109 and T110 did not contradict each other on why Nzabonimana's vehicle stopped at the Butare trading

⁵⁸⁷ Trial Judgement, para. 731.

⁵⁸⁸ Trial Judgement, para. 731.

⁵⁸⁹ Trial Judgement, para. 731.

⁵⁹⁰ See Nzabonimana Appeal Brief, para. 138, *referring to* Witness CNAZ, T. 12 November 2009 pp. 8-13.

⁵⁹¹ The Appeals Chamber notes that on 12 November 2009, during Witness CNAZ's testimony, the Defence brought an oral motion seeking to postpone the cross-examination of this witness until it met with Witness Mporanzi. The Defence argued that the Prosecution obstructed the meeting by failing to cooperate with the Defence and by maintaining the witness on its list despite Witness Mporanzi's desire to not testify for the Prosecution. During these oral arguments, it surfaced that the Defence, rather than the Prosecution, had knowledge of Witness Mporanzi's whereabouts. Having heard the arguments, the Trial Chamber orally denied the Defence motion to postpone Witness CNAZ's testimony. See Witness CNAZ, T. 12 November 2009 pp. 8-13. The Appeals Chamber detects no error in the Trial Chamber's decision as it considered that the Defence had sufficient information to cross-examine Witness CNAZ, and it left the option open for Nzabonimana to recall Witness CNAZ. See Witness CNAZ, T. 12 November 2009 p. 13.

centre.⁵⁹² According to Nzabonimana, the fact that Witness T110 did not see Nzabonimana relieving himself casts no doubt on the witness's testimony, and the Trial Chamber could not infer that his testimony was contradictory.⁵⁹³ Nzabonimana further claims that the Trial Chamber erroneously found Witnesses T109's and T110's version of events suspect because of their discrepancies and their attempt to present the meeting as an impromptu event.⁵⁹⁴ Nzabonimana argues that the Trial Chamber and the Prosecution agreed the meeting was impromptu and that Witnesses T109 and T110 should not have been "reproached".⁵⁹⁵

206. The Prosecution responds that Nzabonimana ignores contradictions the Trial Chamber identified in the evidence of Witnesses T109 and T110.⁵⁹⁶ Regarding the "impromptu" nature of the meeting, the Prosecution submits that Nzabonimana ignores the real issue – namely that these witnesses gave contradictory reasons why Nzabonimana stopped at the Butare trading centre in order to avoid the conclusion that he stopped to give an inciting speech.⁵⁹⁷

207. In a statement of 13 January 2010, Witness T109 indicated that Nzabonimana exited and stood beside his vehicle, and that his driver exited the vehicle to go to the toilet.⁵⁹⁸ Witness T109 made no modifications to these facts in his statement of 23 May 2010.⁵⁹⁹ During his testimony, Witness T109 stated that Nzabonimana exited the vehicle to relieve himself in a banana plantation, and that his driver went "to the gents".⁶⁰⁰ As for Witness T110, in a statement of 12 January 2010, the witness said that Nzabonimana stopped at the Butare trading centre because Ruhunga had called for him, "if not, he would perhaps have merely greeted us from his car and would have continued on his way".⁶⁰¹ During his testimony, Witness T110 testified that Ruhunga went towards Nzabonimana and spoke with him, and that Nzabonimana was always standing near his car.⁶⁰²

208. The Trial Chamber considered that both witnesses provided contradictory accounts as to why Nzabonimana's vehicle stopped at the trading centre.⁶⁰³ The Appeals Chamber observes that

⁵⁹² Nzabonimana Appeal Brief, para. 149, *referring to* Trial Judgement, paras. 727, 728.

⁵⁹³ Nzabonimana Appeal Brief, para. 149.

⁵⁹⁴ Nzabonimana Appeal Brief, para. 151, *referring to* Trial Judgement, para. 729.

⁵⁹⁵ Nzabonimana Appeal Brief, para. 151, *referring to* Trial Judgement, para. 664. *See also* AT. 29 April 2014 p. 20.

⁵⁹⁶ Prosecution Response Brief, para. 138.

⁵⁹⁷ Prosecution Response Brief, para. 140, *referring to* Trial Judgement, para. 729.

⁵⁹⁸ Exhibit P58 (Witness T109's Statement of 13 January 2010), para. 12.

⁵⁹⁹ Exhibit P59 (Witness T109's Statement of 23 May 2010).

⁶⁰⁰ Witness T109, T. 2 June 2010 p. 65 (closed session); Witness T109, T. 3 June 2010 pp. 26, 27 (closed session).

⁶⁰¹ Exhibit P69 (Witness T110's Statement of 12 January 2010), para. 14. *See also* AT. 29 April 2014 p. 19.

⁶⁰² Witness T110, 12 October 2010 p. 21 (closed session).

⁶⁰³ Trial Judgement, paras. 727, 728. According to the Trial Judgement, Witness T109 stated that Nzabonimana went to a banana plantation to relieve himself, while Witness T110 testified that Nzabonimana stood by his car the whole time he was at the trading centre. *See ibid.*, para. 727. The Trial Chamber further noted that in previous statements, Witness T109 stated that Nzabonimana stood by his vehicle without mentioning the banana plantation, and the witness explained that he informed Defence investigators of this fact but it was not recorded. *See ibid.*, para. 728. As for Witness T110, the Trial Chamber noted that in a prior statement, he stated that Nzabonimana's vehicle stopped because Ruhunga called for him. *See ibid.*, para. 728.

the Trial Chamber found the discrepancies significant because the Prosecution presented evidence that Nzabonimana deliberately drove to population centres, stopped his vehicle, and encouraged Hutus to kill Tutsis.⁶⁰⁴ According to the Trial Chamber, “the Defence witnesses attempted to portray Nzabonimana’s stop at the Butare trading centre as impromptu and attempted to establish that Nzabonimana stopped his vehicle at the trading centre for reasons other than to give an inflammatory address”.⁶⁰⁵ The Trial Chamber noted, however, that these witnesses provided contradictory reasons for why he stopped, and considered that these contradictory accounts “undermine the credibility of their counter-narrative regarding the reason Nzabonimana stopped at the Butare trading centre”.⁶⁰⁶

209. The Appeals Chamber finds it inconsequential whether the Trial Chamber erred in finding that these witnesses provided contradictory reasons for *why* Nzabonimana stopped. What matters is whether Nzabonimana made inflammatory statements about Tutsis. The Appeals Chamber further recalls that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.⁶⁰⁷ On this basis, the Trial Chamber had reasonable basis to reject the Defence’s version of events, which denied Nzabonimana making inflammatory remarks about Tutsis, and accept the evidence of Prosecution Witnesses CNAZ and CNBH, which it found consistent.

210. Finally, the Appeals Chamber is not convinced that the Trial Chamber “agreed” that the meeting at the Butare trading centre was “impromptu”.⁶⁰⁸ The Appeals Chamber observes that, in summarising the Prosecution’s arguments, the Trial Chamber noted that “Nzabonimana held an impromptu meeting”.⁶⁰⁹ However, in the Trial Chamber’s assessment, it considered that the Prosecution presented evidence during trial that “Nzabonimana deliberately drove to population centres in Gitarama *préfecture*, stopped his vehicle and encouraged Hutus to kill Tutsis”.⁶¹⁰

⁶⁰⁴ Trial Judgement, para. 729

⁶⁰⁵ Trial Judgement, para. 729.

⁶⁰⁶ Trial Judgement, para. 729.

⁶⁰⁷ See e.g., *Ndahimana* Appeal Judgement, para. 46; *Ntabakuze* Appeal Judgement, fn. 523; *Rutaganda* Appeal Judgement, para. 29 (“Where testimonies are divergent, it is the duty of the [t]rial [c]hamber, 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).

⁶⁰⁸ See *Nzabonimana* Appeal Brief, para. 151, *referring to* Trial Judgement, para. 664.

⁶⁰⁹ Trial Judgement, para. 664.

⁶¹⁰ Trial Judgement, para. 729. The Appeals Chamber also considers it inaccurate for Nzabonimana to say that the Prosecution “agreed” the meeting was impromptu. See *Nzabonimana* Appeal Brief, para. 151. The Appeals Chamber considers that the Prosecution’s use of “impromptu” in its Closing Brief was about how the meeting was held. See Prosecution Closing Brief, para. 212. However, the Trial Chamber’s analysis at paragraph 729 of the Trial Judgement relates to Prosecution evidence on the reasons for driving and stopping at different population centres in Gitarama to encourage the killing of Tutsis.

211. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber's assessment of contradictions between Witnesses T109 and T110 does not warrant the Appeals Chamber's intervention.

(iii) Conclusion

212. Based on the foregoing, the Appeals Chamber considers that Nzabonimana fails to demonstrate that the Trial Chamber committed any error in its assessment of Defence evidence that would occasion a miscarriage of justice.

(c) Alleged Unequal Treatment of Testimonies

(i) Prosecution and Defence Witnesses

213. Nzabonimana submits that the Trial Chamber treated Prosecution and Defence witnesses unequally by assessing contradictions, judicial records, the opinion of witnesses, and the plausibility of testimonies in a radically different manner.⁶¹¹ Given the number and importance of contradictions between Witnesses CNAZ and CNBH, Nzabonimana argues that the Trial Chamber should not have considered Witness T109 not credible because of a mistake in one aspect of his testimony.⁶¹² According to Nzabonimana, the Trial Chamber also should not have found Witness T110's testimony (stating that Witness CNAZ left at the same time or a little before Nzabonimana made his statement) contradictory to his prior statement from January 2010 (indicating that Witness CNAZ left some minutes before Nzabonimana).⁶¹³ Nzabonimana also avers that the Trial Chamber incorrectly reproached Witness T110 for his opinion on Witness CNAZ allegedly falling into a ditch,⁶¹⁴ while it assessed differently the opinion of Prosecution witnesses.⁶¹⁵

214. Nzabonimana further submits that the Trial Chamber treated the issue of judicial records differently between Defence Witnesses T109 and T110 and Prosecution Witnesses CNAA and CNAC.⁶¹⁶ Nzabonimana submits that nothing in the judicial records of Witnesses T109 and T110 gave reasons to doubt their sincerity.⁶¹⁷ He argues that the Trial Chamber erred by holding against

⁶¹¹ Nzabonimana Notice of Appeal, para. 4.1.5; Nzabonimana Appeal Brief, paras. 145-148, 150, 152. *See also* AT. 29 April 2014 pp. 19-21.

⁶¹² Nzabonimana Appeal Brief, para. 148, *referring to* Trial Judgement, para. 724.

⁶¹³ Nzabonimana Appeal Brief, para. 146, *referring to* Trial Judgement, para. 725. Nzabonimana notes the Trial Chamber's finding that Witness T110's hesitation, in responding to why Witness CNAZ left the scene, "may" indicate that he was not credible in respect of events to which he testified. *See idem*.

⁶¹⁴ Nzabonimana Appeal Brief, para. 147 (French original), *referring to* Trial Judgement, para. 726. *See also* AT. 29 April 2014 pp. 18, 19.

⁶¹⁵ Nzabonimana Appeal Brief, para. 147 (French original), *referring to* Nzabonimana Appeal Brief, paras. 220, 221.

⁶¹⁶ Nzabonimana Appeal Brief, para. 145.

⁶¹⁷ Nzabonimana Appeal Brief, para. 145.

Witness T109 his false guilty plea,⁶¹⁸ and against Witness T110 his admission to making a false confession.⁶¹⁹ Nzabonimana argues that there is overwhelming evidence of pressure on prisoners to plead guilty.⁶²⁰

215. Nzabonimana also submits that the Trial Chamber found the evidence of Witnesses T109 and T110 not plausible on the fact that Nzabonimana's escorts remained in the vehicle and left him in the middle of the crowd.⁶²¹ However, he argues that it accepted the testimony of Witnesses CNAZ and CNBH that Nzabonimana ordered the same escorts to pursue Tutsis, leaving him amidst people he threatened to kill.⁶²² According to Nzabonimana, this Prosecution evidence, coupled with the *gendarmes*' unlikely pursuit of Musabyimana in a vehicle, should have raised doubt or mistrust in relation to accounts of Prosecution witnesses.⁶²³ He claims that the Trial Chamber described discrepancies in Prosecution evidence as minor divergences and additional details,⁶²⁴ while it held that differences between the testimonies of Witnesses T109 and T110 undermined their credibility.⁶²⁵

216. The Prosecution responds that the Trial Chamber reasonably disbelieved Witnesses T109 and T110 for a "host of thoroughly explained reasons".⁶²⁶ The Prosecution submits that: (i) Nzabonimana fails to acknowledge the Trial Chamber's concern that Witnesses T109 and T110 changed their accounts to favour Nzabonimana;⁶²⁷ (ii) the Trial Chamber correctly considered that Witness T110 asserted, without basis, that Witness CNAZ did not fall into a ditch;⁶²⁸ (iii) Nzabonimana ignores findings that Witnesses T109 and T110 did not suffer adverse consequences for refusing to give certain testimony;⁶²⁹ and (iv) the Trial Chamber regarded Witnesses CNAZ's and CNAC's testimonies with caution.⁶³⁰ Furthermore, the Prosecution responds that, given Nzabonimana's position as a government minister, the Trial Chamber reasonably found that the *gendarmes* would not have stayed in the car when Nzabonimana alighted

⁶¹⁸ Nzabonimana Appeal Brief, para. 145, *referring to* Trial Judgement, para. 720.

⁶¹⁹ Nzabonimana Appeal Brief, para. 145, *referring to* Trial Judgement, para. 721. Nzabonimana notes that the Trial Chamber acknowledged the absence of a nexus between the allegations related to Witness T110's confession and the charges against Nzabonimana. *See idem*, *referring to* Trial Judgement, para. 722.

⁶²⁰ Nzabonimana Appeal Brief, para. 145.

⁶²¹ Nzabonimana Appeal Brief, para. 150, *referring to* Trial Judgement, para. 730. *See also* AT. 29 April 2014 p. 47.

⁶²² Nzabonimana Appeal Brief, para. 150, *referring to* Trial Judgement, para. 708. *See also* AT. 29 April 2014 p. 47.

⁶²³ Nzabonimana Appeal Brief, para. 150, *referring to* Trial Judgement, para. 671.

⁶²⁴ Nzabonimana Appeal Brief, para. 152, *referring to* Trial Judgement, paras. 710, 711.

⁶²⁵ Nzabonimana Appeal Brief, para. 152, *referring to* Trial Judgement, paras. 724-729.

⁶²⁶ Prosecution Response Brief, para. 129, *referring to* Trial Judgement, paras. 719-730. *See also* AT. 29 April 2014 pp. 42, 43.

⁶²⁷ Prosecution Response Brief, para. 135, *referring to* Trial Judgement paras. 724, 725. *See also* AT. 29 April 2014 p. 42.

⁶²⁸ Prosecution Response Brief, para. 137, *referring to* Trial Judgement, para. 726.

⁶²⁹ Prosecution Response Brief, para. 133.

⁶³⁰ Prosecution Response Brief, para. 134, *referring to* Trial Judgement, paras. 1142, 1210.

and that they would have followed his orders to pursue fleeing Tutsis.⁶³¹ The Prosecution adds that the Trial Chamber treated Prosecution and Defence witnesses alike as it found certain contradictions between Witnesses T109 and T110 to be minor.⁶³²

217. With respect to the alleged unequal assessment of discrepancies, the Appeals Chamber notes that, contrary to what Nzabonimana appears to submit,⁶³³ the Trial Chamber did not use a “mistake” in one aspect of Witness T109’s testimony to find his evidence incredible as a whole.⁶³⁴ The Trial Chamber noted a “significant discrepancy” between Witness T109’s testimony and prior statements regarding Witness CNAZ,⁶³⁵ and considered this discrepancy to undermine Witness T109’s credibility “as to what happened to Witness CNAZ on the date of Nzabonimana’s address at the Butare trading centre”.⁶³⁶ The Appeals Chamber detects no error in the Trial Chamber’s assessment of the discrepancy and observes that the Trial Chamber reached its conclusion on the credibility of Witness T109’s testimony based on several factors.⁶³⁷

218. As for Witness T110, the Trial Chamber observed that he provided contradictory accounts of Witness CNAZ’s actions after Nzabonimana’s speech.⁶³⁸ The Trial Chamber noted that, according to Witness T110’s 12 January 2010 statement, Witness CNAZ left a few minutes before Nzabonimana and was not pursued; however, in his testimony at trial, the witness stated that Witness CNAZ left at the same time or very shortly before Nzabonimana.⁶³⁹ In the Appeals Chamber’s view, there is no contradiction between “a few minutes before” and “very shortly before”. Also, a review of his testimony at trial reveals that Witness T110 did not provide any information that would contradict his prior statement that Witness CNAZ was not pursued as Witness T110 stated that “when he left, he had no problem”.⁶⁴⁰ The Appeals Chamber thus finds that no reasonable trier of fact could conclude that a contradiction existed between Witness T110’s prior statement and testimony on when Witness CNAZ left the Butare trading centre. The Trial

⁶³¹ Prosecution Response Brief, para. 139.

⁶³² Prosecution Response Brief, para. 141, *referring to* Trial Judgement, para. 723. *See also* AT. 29 April 2014 p. 42.

⁶³³ Nzabonimana Appeal Brief, para. 148.

⁶³⁴ *See* Trial Judgement, para. 724.

⁶³⁵ Trial Judgement, para. 724.

⁶³⁶ Trial Judgement, para. 724. Specifically, the Trial Chamber observed that: (i) in Witness T109’s testimony, Witness CNAZ and other Tutsis remained at the centre throughout Nzabonimana’s speech; (ii) in his 13 January 2010 statement, Witness CNAZ left the trading centre without explanation and that the departure did not provoke a reaction or response from anyone; and (iii) in his 23 May 2010 statement, Witness CNAZ did not leave the trading centre before Nzabonimana. *See idem, referring to* Witness T109, T. 2 June 2010 p. 70-72 (closed session); Exhibit P58 (Witness T109’s Statement of 13 January 2010), para. 17; Exhibit P59 (Witness T109’s Statement of 23 May 2010).

⁶³⁷ *See* Trial Judgement, paras. 720, 724, 730.

⁶³⁸ Trial Judgement, para. 725.

⁶³⁹ Trial Judgement, para. 725, *referring to* Exhibit P69 (Witness T110’s Statement of 12 January 2010), para. 16; Witness T110, T. 13 October 2010 pp. 11, 14 (closed session). The Appeals Chamber notes that Nzabonimana inaccurately states the finding of the Trial Chamber recalling Witness T110’s testimony that Witness CNAZ left at the same time or very shortly before Nzabonimana left, as opposed to at the same time or little before Nzabonimana made his statement. *See* Nzabonimana Appeal Brief, para. 146.

⁶⁴⁰ Witness T110, T. 13 October 2010 pp. 11, 14 (closed session).

Chamber accordingly erred in finding a contradiction. However, the Appeals Chamber is not convinced that this error occasioned a miscarriage of justice. The Appeals Chamber recalls that the Trial Chamber rejected Witness T110's evidence on several bases, including his criminal history and the retraction of his sworn confession.⁶⁴¹

219. Nzabonimana fails to demonstrate how the Trial Chamber's assessment of Witness T110, regarding what happened to Witness CNAZ after he left the meeting, warranted similar treatment to Prosecution witnesses on other events.⁶⁴² According to the Trial Chamber, Witness T110 admitted that he did not know what happened to Witness CNAZ after the latter left the meeting, yet he later denied that Witness CNAZ fell into a ditch.⁶⁴³ On this basis, the Trial Chamber doubted Witness T110's testimony regarding what happened to Witness CNAZ after he fled the meeting.⁶⁴⁴ Contrary to what Nzabonimana claims, the Trial Chamber did not reproach the witness for having expressed an *opinion* but considered that his "willingness to deny material facts of which he admittedly had no knowledge" undermined his credibility.⁶⁴⁵ Keeping in mind that trial chambers are best placed to assess the evidence, including the demeanour of witnesses,⁶⁴⁶ the Appeals Chamber finds that Nzabonimana has not demonstrated that the Trial Chamber erred in its assessment of Witness T110's testimony compared to Prosecution witnesses.

220. As to the Trial Chamber's treatment of the judicial records, the Appeals Chamber is not convinced that the Trial Chamber erred in applying caution to the testimonies of Witnesses T109 and T110 as a result of their convictions and Witness T110's retraction of his sworn confession.⁶⁴⁷ Furthermore, independent of the Trial Chamber's assessment of Witnesses CNAA and CNAC, to which the Trial Chamber applied caution,⁶⁴⁸ the Trial Chamber had enough information in the

⁶⁴¹ Trial Judgement, paras. 721, 722.

⁶⁴² Nzabonimana Appeal Brief, para. 147 (French original), *referring to* Trial Judgement, para. 726. The Appeals Chamber also dismisses Nzabonimana's submission on Witness T110's hesitation as he does not substantiate any error nor demonstrate why the Trial Chamber was not allowed to make an additional observation on Witness T110's demeanor. *See ibid.*, para. 146; Trial Judgement, para. 725.

⁶⁴³ Trial Judgement, para. 726.

⁶⁴⁴ Trial Judgement, para. 726.

⁶⁴⁵ Trial Judgement, para. 726.

⁶⁴⁶ *See, e.g., Kanyarukiga Appeal Judgement*, para. 121; *Simba Appeal Judgement*, para. 9; *Ntagerura et al. Appeal Judgement*, paras. 12, 213.

⁶⁴⁷ Trial Judgement, paras. 720-722. In assessing the credibility of Witness T109 the Trial Chamber noted that the witness was not directly implicated in any criminal activity with regard to the event at the Butare trading centre. However, it treated his testimony with appropriate caution for his participation in crimes committed in Gitarama *préfecture* for which he was convicted *in absentia*. *See ibid.*, para. 720. The Trial Chamber considered Witness T110's admission to fabricating confession to secure release from prison, and observed that his retraction of a sworn confession was a serious matter that raised questions regarding credibility. It also noted the witness's 11-year prison sentence in Rwanda. According to the Trial Chamber, Witness T110 was not directly implicated in any criminal activity with regard to the present allegation; however, due to his conviction and sentence, it treated his testimony with appropriate caution. *See ibid.*, paras. 721, 722.

⁶⁴⁸ *See* Trial Judgement, paras. 1064, 1142, 1210, 1480.

judicial records of Witnesses T109 and T110 to apply caution to their testimonies. Accordingly, Nzabonimana's argument of unequal treatment fails.

221. Concerning the conduct of *gendarmes*, the Trial Chamber did not find it plausible, according to the evidence of Witnesses T109 and T110, that Nzabonimana's escorts remained in the car while he left the vehicle.⁶⁴⁹ The Trial Chamber reasoned that, given the President's death less than a week prior to the meeting, it did not believe that Nzabonimana's security would allow a government minister to walk unescorted in a crowd.⁶⁵⁰ Nzabonimana fails to demonstrate that this was an assessment that no reasonable trier of fact could make. Furthermore, based on the evidence of Witnesses CNAZ and CNBH, the Trial Chamber found that Nzabonimana told *gendarmes* and the population to pursue Witness CNAZ and another Tutsi.⁶⁵¹ The Appeals Chamber considers that Nzabonimana merely disagrees with the Trial Chamber's assessment and fails to demonstrate how the Trial Chamber erred. The Appeals Chamber thus dismisses Nzabonimana's arguments.

222. Finally, the Appeals Chamber is not convinced that the Trial Chamber treated Defence and Prosecution witnesses unequally in its assessment of contradictions. The Appeals Chamber recalls that an error, if any, made in the assessment of Defence evidence is distinguishable from the issue of unequal assessment of Prosecution and Defence evidence. In this regard, the Appeals Chamber notes that the Trial Chamber considered the evidence of Prosecution Witness CNAZ incredible on several details that he exaggerated,⁶⁵² and it rejected Prosecution Witness CNAY's evidence on the entire allegation since his account varied widely from other testimonies.⁶⁵³ Nzabonimana fails to acknowledge that the Trial Chamber also found some inconsistencies in the accounts of Witnesses T109 and T110 to be minor.⁶⁵⁴ Based on the foregoing, the Appeals Chamber finds that the Trial Chamber did not treat Defence witnesses unequally compared to Prosecution witnesses.

(ii) Prosecution Witnesses

223. Nzabonimana submits that the Trial Chamber applied a different standard when it found the silence of Prosecution Witnesses CNBA, CNBT, CNAK, and CNAQ during *Gacaca* proceedings to undermine their credibility, while it was satisfied with Witness CNAZ's explanation of why he did not testify against Nzabonimana in *Gacaca* proceedings.⁶⁵⁵

⁶⁴⁹ Trial Judgement, para. 730. *See also* Trial Judgement, paras. 686, 693.

⁶⁵⁰ Trial Judgement, para. 730.

⁶⁵¹ Trial Judgement, paras. 708, 734.

⁶⁵² Trial Judgement, paras. 711, 712.

⁶⁵³ Trial Judgement, para. 718.

⁶⁵⁴ Trial Judgement, para. 723.

⁶⁵⁵ Nzabonimana Appeal Brief, para. 144, *referring to* Trial Judgement, paras. 713, 1038, 1421, 1686.

224. The Prosecution responds that the Trial Chamber evaluated the totality of evidence, considered many factors, and weighed individual reasons why witnesses did not mention Nzabonimana.⁶⁵⁶ According to the Prosecution, Nzabonimana ignores that, in contrast to all other witnesses he mentions, Witness CNAZ did not testify in *Gacaca* proceedings.⁶⁵⁷

225. The Trial Chamber found that the fact that Witness CNAZ did not accuse Nzabonimana prior to giving his statement in 2008 did not impact his credibility.⁶⁵⁸ The Trial Chamber accepted the witness's explanation that he first spoke to Prosecution investigators in 2008 and that he was never prosecuted for not appearing before a *Gacaca* court.⁶⁵⁹ In contrast, the Trial Chamber considered that Witnesses CNBA, CNBT, CNAK, and CNAQ, who previously testified before *Gacaca* proceedings, omitted to raise allegations related to Nzabonimana and that this undermined their credibility.⁶⁶⁰ The Appeals Chamber therefore notes that the Trial Chamber had no information before it that Witness CNAZ testified before *Gacaca* proceedings, while it had such information for the other witnesses. Given the different circumstances between Witness CNAZ and Witnesses CNBA, CNBT, CNAK, and CNAQ, Nzabonimana fails to demonstrate that the Trial Chamber erred in reaching different conclusions on their credibility.

(d) Conclusion

226. Based on the foregoing, the Appeals Chamber finds that Nzabonimana has failed to demonstrate that the Trial Chamber committed any error in its assessment of evidence under his Fourth and Fifth, in part, Grounds of Appeal that would occasion a miscarriage of justice.

3. Direct and Public Incitement to Commit Genocide

227. In relation to the Butare trading centre, the Trial Chamber found that Nzabonimana gave a speech: (i) with explicit instructions to kill Tutsis, and thus constituted a direct call on those assembled to commit genocide; (ii) in a public location to 20 members of the general population; and (iii) with the requisite intent.⁶⁶¹

228. Nzabonimana submits that the Trial Chamber erred in law and in fact in characterising the incitement as direct and public.⁶⁶² Nzabonimana submits that the facts as found by the Trial Chamber do not constitute direct and public incitement, as defined by the Appeals Chamber's

⁶⁵⁶ Prosecution Response Brief, para. 128.

⁶⁵⁷ Prosecution Response Brief, para. 128, *referring to* Trial Judgement, para. 713.

⁶⁵⁸ Trial Judgement, para. 713.

⁶⁵⁹ Trial Judgement, para. 713. *See also* Witness CNAZ, T. 12 November 2009 pp. 19-21 (closed session).

⁶⁶⁰ Trial Judgement, paras. 1038, 1421, 1686.

⁶⁶¹ Trial Judgement, paras. 1759-1761.

⁶⁶² Nzabonimana Notice of Appeal, para. 4.2; Nzabonimana Appeal Brief, paras. 153-162.

jurisprudence.⁶⁶³ Rather, the facts constituted an improvised meeting with a very limited number of persons.⁶⁶⁴ In particular, Nzabonimana submits that the Trial Chamber erred in characterising the incitement as public because he was found to address a limited group of about 20 people, who were gathered to share a drink, and therefore tantamount to a private conversation.⁶⁶⁵ Nzabonimana argues that the persons were gathered in an “ambiguous manner” and that the veranda of a drinking place necessarily limited the number of individuals who could meet there.⁶⁶⁶ Nzabonimana further argues that the Trial Chamber fails to specify the nature and the size of the audience, and that the number of persons present is an indispensable factor that should be considered when assessing the public character of the incitement.⁶⁶⁷

229. Nzabonimana also submits that the Trial Chamber erroneously found the incitement to be direct because it failed to specify whether it relied on Witness CNAZ’s or Witness CNBH’s account of Nzabonimana’s words, rendering the evaluation of the direct effect of the words impossible.⁶⁶⁸ In addition, Nzabonimana concedes that incitement does not require proof of a causal relationship between the acts of the accused and the genocide.⁶⁶⁹ However, pointing to the *Nahimana et al.* Trial Judgement, he argues that it must be established that the accused’s actions “were *likely* to cause the commission of the crime of genocide” and that this was not done in the present case.⁶⁷⁰

230. The Prosecution responds that the incitement was public because it happened at the Butare trading centre, a public space with drinking establishments and shops.⁶⁷¹ It submits that, while the size of the audience can be relevant to determine the public character of the incitement, the public nature of Nzabonimana’s incitement was already proven by the public space where he spoke.⁶⁷² The Prosecution further responds that the incitement was direct because, as the Trial Chamber found, evidence demonstrated that Nzabonimana told the audience to kill Tutsis and two Tutsis fled as a

⁶⁶³ Nzabonimana Appeal Brief, para. 153, *referring to Kalimanzira* Appeal Judgement, paras. 151-165.

⁶⁶⁴ Nzabonimana Appeal Brief, para. 162. Nzabonimana submits that the Trial Chamber erred in law by assessing the public and direct nature of the incitement on the basis of unreliable evidence. *See ibid.*, para. 155. Nzabonimana’s challenges to the assessment of evidence have been examined in the previous section.

⁶⁶⁵ Nzabonimana Appeal Brief, para. 157.

⁶⁶⁶ Nzabonimana Appeal Brief, para. 157. Nzabonimana also points to the fact that he was able to offer alcohol to the whole crowd and to the absence of strangers during his speech. *See idem.*

⁶⁶⁷ Nzabonimana Appeal Brief, paras. 155, 156.

⁶⁶⁸ Nzabonimana Appeal Brief, paras. 158, 159. Nzabonimana recalls that, according to the jurisprudence, it has to be more than “a mere vague or indirect suggestion”, and that the culture and context need to be taken into account. *See ibid.*, paras. 84, 159, fn. 272, *referring to Nahimana et al.* Appeal Judgement, paras. 686, 692, 694-702.

⁶⁶⁹ Nzabonimana Appeal Brief, para. 160.

⁶⁷⁰ Nzabonimana Appeal Brief, para. 160, *referring to Nahimana et al.* Trial Judgement, para. 1015. Nzabonimana points to several facts, namely that he shared drinks with all the Tutsis who were present, that they came from the same locality, that no one in the audience denounced any Tutsi, that the audience did not agree with what Nzabonimana was saying and that the persons who were allegedly pursuing Witness CNAZ had no intention of killing him, and that there were no attacks following Nzabonimana’s visit. *See ibid.*, para. 161.

⁶⁷¹ Prosecution Response Brief, para. 143. The Prosecution submits that Nzabonimana made his speech “to a number of individuals in a public space”, as required under the law. *See ibid.*, para. 77, *referring to Akayesu* Trial Judgement, paras. 556, 674 and *Akayesu* Appeal Judgement, p. 143.

⁶⁷² Prosecution Response Brief, para. 143.

result.⁶⁷³ Finally, the Prosecution argues that the *Nahimana et al.* Trial Chamber explained that direct incitement had the potential to result in genocide but did not stipulate this as an additional element of this crime.⁶⁷⁴

231. The Appeals Chamber recalls that a person may be found guilty of direct and public incitement to commit genocide, pursuant to Article 2(3)(c) of the Statute, if he or she directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).⁶⁷⁵ The Appeals Chamber recalls that when assessing the “public” element of the incitement, factors such as the place where the incitement occurred and whether the attendance was selected or limited can be taken into account.⁶⁷⁶ It also recalls that the number of persons present is not an essential factor in this assessment.⁶⁷⁷ The Appeals Chamber considers that, though not required, the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public.⁶⁷⁸

232. The Appeals Chamber observes the Trial Chamber’s consideration that: (i) the audience consisted of approximately 20 members of the general population, including Tutsis, who happened to be present in the area at the time; and (ii) the incitement occurred in an undeniably public location.⁶⁷⁹ Therefore, the Appeals Chamber is satisfied that the Trial Chamber, in assessing the public character of the incitement, properly considered the public location of the utterances and whether the audience was selected or limited. The Appeals Chamber rejects Nzabonimana’s argument that the Trial Chamber erred in failing to specify the size of the audience. While not determining the exact number of the persons present in the crowd, the Trial Chamber nevertheless determined the approximate number.⁶⁸⁰ In this regard, the Appeals Chamber considers that it is not required for a trial chamber to determine the exact number of people present. Given the foregoing, the Appeals Chamber finds that Nzabonimana has failed to demonstrate an error in the Trial Chamber’s finding of the public element of the incitement and therefore dismisses his argument that the incriminating message was tantamount to a private conversation.

⁶⁷³ Prosecution Response Brief, para. 144.

⁶⁷⁴ Prosecution Response Brief, para. 145.

⁶⁷⁵ *See supra*, para. 121.

⁶⁷⁶ *See supra*, para. 127.

⁶⁷⁷ *See supra*, para. 126.

⁶⁷⁸ *Cf. Muvunyi I* Trial Judgement, para. 503; *Akayesu* Trial Judgement, para. 556.

⁶⁷⁹ Trial Judgement, para. 1760. *See also* Trial Judgement, paras. 703, 705. With respect to Nzabonimana’s argument that the veranda of a drinking place would necessarily limit the number of individuals who could meet there, the Appeals Chamber is of the view that he does not demonstrate that the Trial Chamber erred in its assessment of the public element.

⁶⁸⁰ Trial Judgement, paras. 703, 705, 1760.

233. Turning to Nzabonimana's argument that the Trial Chamber erred in finding the incitement to be direct, the Appeals Chamber recalls that direct and public incitement implies that the speech is a direct appeal to commit any act referred to in Article 2(2) of the Statute and requires more than a vague or indirect suggestion.⁶⁸¹ The Appeals Chamber notes the Trial Chamber's finding that Nzabonimana's speech "included explicit instructions to kill Tutsis" and thus constituted "an incontestably direct call on those assembled to commit genocide".⁶⁸² In coming to this conclusion, the Trial Chamber noted that Witnesses CNAZ and CNBH provided different versions of Nzabonimana's words.⁶⁸³ It considered the differences to be minor and attributed them to the passage of time.⁶⁸⁴ The Appeals Chamber finds this assessment reasonable. The Appeals Chamber is also not persuaded that these minor inconsistencies impact the Trial Chamber's finding that, according to both witnesses, Nzabonimana made inflammatory statements about the Tutsis and asked whether there were any Tutsis in the crowd.⁶⁸⁵ Accordingly, the Appeals Chamber is not persuaded that the Trial Chamber erred in finding the incitement to be direct.

234. As for Nzabonimana's contention regarding the likelihood of his actions causing the crime of genocide,⁶⁸⁶ the Appeals Chamber recalls that direct and public incitement is an inchoate crime and that it is punishable even if no act of genocide has resulted therefrom.⁶⁸⁷ In light of this, the *actus reus* of direct and public incitement is satisfied when a person directly and publicly incites the commission of genocide, irrespective of whether his or her acts were likely to cause the crime of genocide.⁶⁸⁸ Accordingly, the Appeals Chamber rejects Nzabonimana's contention that, to establish direct and public incitement to commit genocide, it must be proven that the accused's actions were likely to cause the commission of the crime of genocide.

235. Based on the foregoing, the Appeals Chamber finds that Nzabonimana has failed to demonstrate that the Trial Chamber erred in characterising the incitement as "direct and public" and

⁶⁸¹ See *Nahimana et al.* Appeal Judgement, para. 692, referring to, *inter alia*, *Kajelijeli* Trial Judgement, para. 852; *Akayesu* Trial Judgement, para. 557.

⁶⁸² Trial Judgement, para. 1759.

⁶⁸³ Trial Judgement, para. 710, fn. 910. Witness CNBH, T. 3 December 2009 p. 22 (closed session) ("[Nzabonimana] told us that the fighting was intense at the front [...] that the way to bring an end to the war with the Tutsis was by eliminating all the Tutsis [...]"). Witness CNAZ, T. 12 November 2009 p. 4 ("[Nzabonimana] told us at the time that he had just launched the killings, the work in Nyabikenke *commune*, [...] since, the killings have already begun in Nyabikenke, they should also begin in Rutobwe *commune*" [...]). See also Trial Judgement, fn. 910.

⁶⁸⁴ Trial Judgement, para. 710.

⁶⁸⁵ Trial Judgement, para. 708. The Trial Chamber found that "Witnesses CNBH and CNAZ provided consistent evidence that Nzabonimana made inflammatory comments about Tutsis after he stopped at the trading centre", "Nzabonimana asked whether there were any Tutsis in the crowd", they "corroborated each other's testimony that Witness CNAZ fled the trading centre as a result of Nzabonimana's speech and that Nzabonimana instructed others to pursue him". See *idem*.

⁶⁸⁶ Nzabonimana Appeal Brief, para. 160, referring to *Nahimana et al.* Trial Judgement, para. 1015.

⁶⁸⁷ *Nahimana* Appeal Judgement, para. 678.

⁶⁸⁸ See *Nahimana* Appeal Judgement, para. 678.

accordingly dismisses his arguments in relation to direct and public incitement to commit genocide under his Fourth Ground of Appeal.

4. Conclusion

236. Accordingly, the Appeals Chamber dismisses Nzabonimana's Fourth and Fifth, in part, Grounds of Appeal.

E. Alleged Errors Relating to Murambi (Ground 5, in part)

237. The Trial Chamber convicted Nzabonimana of direct and public incitement to commit genocide based, in part, on his speech at the Murambi training centre on 18 April 1994 (Count 3).⁶⁸⁹ The Trial Chamber found that, on 18 April 1994, the Prime Minister of Rwanda Jean Kambanda and other members of the Interim Government, including Nzabonimana held a meeting for the *bourgmestres* of Gitarama *préfecture*.⁶⁹⁰ It found that during the meeting Nzabonimana ordered the killings of *bourgmestres* and other local officials opposed to the massacre of Tutsis.⁶⁹¹

238. The Trial Chamber also convicted Nzabonimana of conspiracy to commit genocide in relation to, *inter alia*, an agreement with the Prime Minister and other Ministers of the Interim Government to encourage the destruction of the Tutsi population, as such, in Gitarama *préfecture* (Count 2).⁶⁹² It found that the agreement materialised on 18 April 1994 at the Murambi meeting.⁶⁹³

239. The Trial Chamber did not find Nzabonimana guilty of genocide with respect to his conduct at the meeting but found that it provided circumstantial evidence of his intent to destroy, in whole or in substantial part, the Tutsi ethnic group, as such.⁶⁹⁴

240. Nzabonimana submits that the Trial Chamber erred in fact and in law in convicting him of direct and public incitement and of conspiracy to commit genocide in connection with the event at Murambi on 18 April 1994 and in considering this event as circumstantial evidence of his genocidal intent.⁶⁹⁵ In this section, the Appeals Chamber considers Nzabonimana's arguments in relation to: (i) notice; (ii) the assessment of evidence; (iii) direct and public incitement; and (iv) conspiracy.

1. Notice

241. Nzabonimana submits that he lacked notice of the crime of conspiracy to commit genocide and that he was convicted beyond the scope of the Indictment for the crime of direct and public incitement to commit genocide.⁶⁹⁶

⁶⁸⁹ Trial Judgement, paras. 1773, 1775, 1800.

⁶⁹⁰ Trial Judgement, para. 1158. *See also ibid.*, para. 1769.

⁶⁹¹ Trial Judgement, para. 1179. *See also ibid.*, para. 1769.

⁶⁹² Trial Judgement, paras. 1747, 1749, 1800. The Trial Chamber also entered a conviction for conspiracy to commit genocide in relation to an agreement with Jean-Damascene Ukirikyeyezu in May 1994 to encourage the killing of members of the Tutsi population in Tambwe *commune*. *See ibid.*, paras. 1748, 1749.

⁶⁹³ Trial Judgement, para. 1747.

⁶⁹⁴ Trial Judgement, para. 1726.

⁶⁹⁵ Nzabonimana Notice of Appeal, paras. 5.1-5.6; Nzabonimana Appeal Brief, paras. 170-180, 182, 183, 185, 188, 191-301.

⁶⁹⁶ Nzabonimana Notice of Appeal, paras. 5.3.1, 5.5.1; Nzabonimana Appeal Brief, paras. 242-252, 258-272. *See also* Nzabonimana Reply Brief, paras. 57-64; AT, 29 April 2014 pp. 14-17. Nzabonimana also argues that the Prosecution dropped six out of 18 paragraphs on the charge of conspiracy a few days before filing its Closing Brief and that the

(a) Crime of Conspiracy to Commit Genocide

242. Nzabonimana submits that the Trial Chamber erred in finding him guilty of entering into an agreement with the Ministers of the Interim Government to destroy Rwanda's Tutsi population because he had not been given notice of this allegation, he did not present a related defence, and the defect was not cured.⁶⁹⁷ In particular, Nzabonimana submits that paragraph 59 of the Indictment is vague and imprecise as it did not inform him of the charges of participating in a conspiracy.⁶⁹⁸ He claims that paragraph 59 of the Indictment fails to state specifically the circumstances under which the conspiracy materialised, refers to an extremely broad time period, and contains not less than nine categories of people or entities with whom he allegedly entered into an agreement.⁶⁹⁹ Nzabonimana maintains that the Trial Chamber could not have satisfied itself that paragraphs pleaded in support of paragraph 59 of the Indictment contained the names of individuals with whom he allegedly conspired, and it could not find that he was provided with specific, comprehensive, and detailed information on the conspiracy described in paragraph 59 of the Indictment.⁷⁰⁰ Nzabonimana further contends that the circumstances of the conspiracy were only pleaded in the Prosecution Closing Brief and that the Trial Chamber reconstructed *a posteriori* the material circumstances of a conspiracy that began with the Murambi meeting, and continued with the Musambira and Nyakabanda events.⁷⁰¹

243. Nzabonimana submits that paragraph 26 of the Indictment, concerning the Murambi meeting, provided him with neither clear and consistent notice of the *actus reus* of conspiracy nor the circumstantial evidence from which the conspiracy was to be inferred.⁷⁰² He argues that notice of a meeting is insufficient to give notice of the charge of the crime of conspiracy if the material fact underpinning the crime is not pleaded.⁷⁰³ Furthermore, he submits that paragraph 26 of the Indictment, considered separately or together with paragraphs 48, 54, 59, and 60 of the Indictment, describes individual conduct of issuing an order, not a concerted agreement between several

Trial Chamber erred in failing to acknowledge the prejudice from the inflation of the Indictment. *See* Notice of Appeal, para. 5.5.1(10),(11). Since the arguments are not developed in his Appeal Brief, the Appeals Chamber considers that Nzabonimana has withdrawn them.

⁶⁹⁷ Nzabonimana Notice of Appeal, para. 5.5.1(4); Nzabonimana Appeal Brief, paras. 258-267.

⁶⁹⁸ Nzabonimana Appeal Brief, para. 259. *See also* Nzabonimana Reply Brief, paras. 62, 63.

⁶⁹⁹ Nzabonimana Appeal Brief, para. 259.

⁷⁰⁰ Nzabonimana Appeal Brief, para. 260.

⁷⁰¹ Nzabonimana Appeal Brief, paras. 262-264. Nzabonimana notes that the only submissions to which the Trial Judgement refers in this regard are the Prosecution Closing Brief and "three lines of rhetoric from the Prosecution Opening Statement". *See ibid.*, para. 261. Nzabonimana also submits that the Trial Chamber "did not hesitate to revive conspiracies alleged under paragraph 59 to make up for the Prosecution's inarticulate and non-existent case". *See ibid.*, para. 260 where Nzabonimana refers in a footnote to the "conspiracy with government ministers in Murambi" and the "conspiracy with Ukirikyeyezu in Tambwe".

⁷⁰² Nzabonimana Appeal Brief, para. 265. *See also* Nzabonimana Reply Brief, para. 64.

⁷⁰³ Nzabonimana Appeal Brief, para. 265.

persons to commit genocide.⁷⁰⁴ Nzabonimana contends that the Trial Chamber “rewrote” the Prosecution’s case when it found that he issued threats with the ministers present.⁷⁰⁵ He submits that, even if the Appeals Chamber were to find that the conduct alleged under paragraph 26 of the Indictment could include threats, he was nevertheless not provided with specific notice that such threats were part of the *actus reus* of paragraph 59 of the Indictment.⁷⁰⁶

244. Nzabonimana further submits that he was not provided notice of the Musambira and Nyakabanda “meetings”.⁷⁰⁷ He argues that the Trial Chamber erred in finding that paragraph 48 of the Indictment had provided clear and consistent notice of the allegations concerning Musambira.⁷⁰⁸ Regarding Nyakabanda, Nzabonimana submits that paragraph 54 of the Indictment did not provide notice as to the nature of his alleged conduct in respect of the crime of conspiracy to commit genocide.⁷⁰⁹

245. Nzabonimana also submits that he suffered prejudice, which the Trial Chamber did not mention in its assessment of paragraph 59 of the Indictment.⁷¹⁰ He further argues that the Trial Chamber convicted him of conspiracy to commit genocide, which it inferred from “piecing together” circumstantial evidence that was not pleaded by the Prosecution, and that he was not able to defend himself.⁷¹¹ He concludes that the identified errors, combined with the multitude of charges brought under the count of conspiracy, impaired his reading of the Indictment with respect to the count of conspiracy and his ability to effectively prepare his defence.⁷¹²

246. The Prosecution responds that the Trial Chamber found exactly what the Prosecution pleaded.⁷¹³ It submits that: (i) paragraph 59 of the Indictment pleaded that Nzabonimana and others conspired to kill Tutsis and that members of the conspiracy included Interim Government Ministers and others;⁷¹⁴ (ii) paragraphs 60 and 26 of the Indictment pleaded that the conspiracy occurred at Murambi on or about 18 April 1994;⁷¹⁵ and (iii) the Trial Chamber found that an agreement with the intent to destroy Rwanda’s Tutsi population in whole or in part materialised on 18 April 1994

⁷⁰⁴ Nzabonimana Appeal Brief, paras. 244, 245, 266. *See also* Nzabonimana Reply Brief, paras. 57, 64.

⁷⁰⁵ Nzabonimana Appeal Brief, para. 267.

⁷⁰⁶ Nzabonimana Appeal Brief, para. 267.

⁷⁰⁷ Nzabonimana Appeal Brief, para. 268. *See also* Nzabonimana Reply Brief, para. 64.

⁷⁰⁸ Nzabonimana Appeal Brief, paras. 269, 270. Nzabonimana submits that paragraph 48 of the Indictment fails to plead any *actus reus* for conspiracy and that, in any event, the Trial Chamber should have set aside this paragraph with respect to the count of conspiracy in view of its vagueness. *See idem*.

⁷⁰⁹ Nzabonimana Appeal Brief, para. 271. *See also* Nzabonimana Reply Brief, para. 64.

⁷¹⁰ Nzabonimana Appeal Brief, para. 264.

⁷¹¹ Nzabonimana Appeal Brief, para. 264.

⁷¹² Nzabonimana Appeal Brief, para. 272.

⁷¹³ Prosecution Response Brief, para. 156. *See also* AT. 29 April 2014 p. 41.

⁷¹⁴ Prosecution Response Brief, para. 155.

⁷¹⁵ Prosecution Response Brief, para. 155.

between Nzabonimana, the Prime Minister, and other Interim Government Ministers.⁷¹⁶ The Prosecution also submits that Nzabonimana's words in Musambira, pleaded in paragraphs 60 and 48 of the Indictment, and his presence at Kambanda's weapons distribution in Nyakabanda, pleaded in paragraphs 60 and 54 of the Indictment, further proved the agreement and Nzabonimana's adherence to it.⁷¹⁷

247. The Prosecution further responds that, regarding the date pleaded in paragraph 48 of the Indictment, Nzabonimana merely repeats arguments rejected at trial.⁷¹⁸ Finally, the Prosecution submits that it is irrelevant whether the removal of certain local authorities was sufficiently pleaded because Nzabonimana was not convicted on this basis.⁷¹⁹

248. Nzabonimana replies that if the concise statement of facts does not specify the agreement on which the conspiracy is based, the Prosecutor cannot invoke the general allegations of the "chapeau" paragraph on the count of conspiracy to submit that the said agreement was pleaded.⁷²⁰ He argues that paragraphs 26, 48, or 54 of the Indictment, regarding Murambi, Musambira, or Nyakabanda, respectively, did not provide notice of any agreement.⁷²¹ Given that paragraph 59 of the Indictment, even in conjunction with paragraphs 26, 48, and 54 of the Indictment, was insufficient to notify him of material facts of the conspiracy, Nzabonimana submits that he was not provided notice of the *actus reus* of the crime alleged.⁷²²

249. Paragraphs 59 and 60 of the Indictment read:

CONSPIRACY TO COMMIT GENOCIDE as set out in articles 2(3)(b) and 2(2)(a) and (b) of the Statute of the Tribunal in that during the period between 1 January 1994 and 31 July 1994, **Callixte NZABONIMANA** with other persons, including but not limited to Ministers, including those of the Interim Government of 9 April 1994, the leadership of Rwandan Armed Forces (FAR), Gendarmerie, Presidential Guard, the political leaders of the MRND, the MRD-Hutu Power faction, the PL-Hutu Power faction, other Hutu-Power factions of opposition parties, and various local administration officials, conspired to kill or cause serious bodily and mental harm to members of the Tutsi population, with the intent to destroy in whole or in part, a racial or ethnical group.

The Prosecutor hereby reiterates and incorporates by reference to **PARAGRAPHS 17, 21, 25, 26, 29, 43-45, 48, 49, 51-58** as concise statements of facts to support the charges under this specific count.

250. Paragraph 26 of the Indictment reads:

⁷¹⁶ Prosecution Response Brief, para. 156.

⁷¹⁷ Prosecution Response Brief, para. 156.

⁷¹⁸ Prosecution Response Brief, para. 157.

⁷¹⁹ Prosecution Response Brief, para. 157.

⁷²⁰ Nzabonimana Reply Brief, para. 63.

⁷²¹ Nzabonimana Reply Brief, para. 64.

⁷²² Nzabonimana Reply Brief, para. 64.

On or about 18 April 1994, at *Murambi Trading Centre*, **Callixte NZABONIMANA** together with the Prime Minister, and other members of the Interim Government, including Prosper MUGIRANEZA, **T82**, **T83**, held a meeting with the *Bourgmestres* of the communes in *Gitarama* prefecture. **Callixte NZABONIMANA** ordered the killing of *Bourgmestres* and other local officials opposed to the killings. Soon after the meeting, the *Bourgmestre* of *Mugina* commune, Callixte NDAGIJIMANA, and two *conseillers* from *Nyamabuye* commune namely Bernard TWAGIRAMUKIZA, *conseiller* of *Ruli* and Martin GASIGWA, *conseiller* of *Musiba*, were killed by persons including Hutu civilians and *Interahamwe*.

251. Paragraph 48 of the Indictment reads:

In May 1994, **Callixte NZABONIMANA** was present at the reinstatement ceremony of the *Bourgmestre* [sic] of *Musambira* in *Musambira* Commune, *Gitarama* prefecture. During the ceremony, **Callixte NZABONIMANA** accused the *Bourgmestres* [sic] of not being supportive of the killings of Tutsi, and warned them that they could be replaced by *Interahamwe*. The Accused refused to denounce the killings of Tutsi. Soon afterwards, the *bourgmestre* of *Masango*, the *prefet* and other local authorities were removed.

252. Paragraph 54 of the Indictment reads:

In May 1994, **Callixte NZABONIMANA** and Prime Minister Jean KAMBANDA launched the *Ndiza* battalion at *Kibangu secteur*, *Nyakabanda* Commune, where they distributed weapons and told the gathering that the purpose of the weapons were [sic] to fight the enemy who was the Tutsi.

253. The Trial Chamber found Nzabonimana guilty of conspiracy to commit genocide in relation to an agreement that materialised on 18 April 1994.⁷²³ The Trial Chamber also considered that the conduct of Nzabonimana and Kambanda, after the 18 April 1994 meeting, reinforced the conclusion that Nzabonimana, other ministers, and the Prime Minister entered into an agreement to encourage the destruction of the Tutsi population.⁷²⁴ This conduct consisted of Nzabonimana's presence when Kambanda distributed weapons in *Nyakabanda commune* and Nzabonimana's words at a reinstatement ceremony in *Musambira commune*.⁷²⁵

254. The Appeals Chamber recalls that the Prosecution is required to state the charges and the material facts underpinning those charges in the indictment with sufficient precision, but not the evidence by which such facts are to be proven.⁷²⁶ An indictment which fails to set forth material facts in sufficient detail is defective.⁷²⁷ In determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.⁷²⁸ The Appeals Chamber recalls that a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.⁷²⁹ While it is possible to

⁷²³ Trial Judgement, paras. 1747, 1749, 1800.

⁷²⁴ Trial Judgement, para. 1747.

⁷²⁵ Trial Judgement, para. 1746.

⁷²⁶ See *supra*, para. 29.

⁷²⁷ See *supra*, para. 29.

⁷²⁸ *Bizimungu* Appeal Judgement, para. 99; *Mugenzi and Mugiraneza* Appeal Judgement, para. 71, quoting *Ntabakuze* Appeal Judgement, para. 65. See also *Gacumbitsi* Appeal Judgement, para. 123.

⁷²⁹ See, e.g., *Bizimungu* Appeal Judgement, para. 46; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntabakuze* Appeal Judgement, para. 30.

remedy the vagueness of an indictment, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.⁷³⁰

255. Conspiracy to commit genocide under Article 2(3)(b) of the Statute has been defined as “an agreement between two or more persons to commit the crime of genocide”.⁷³¹ This agreement constitutes the *actus reus*.⁷³² The *actus reus* can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on other evidence.⁷³³ For instance, the concerted or coordinated action of a group of individuals can constitute evidence of an agreement.⁷³⁴ The Appeals Chamber recalls that when an accused is charged with conspiracy to commit genocide pursuant to Article 2(3)(b) of the Statute, the indictment must plead the following material facts: (i) an agreement between individuals aimed at the commission of genocide; and (ii) the fact that the individuals taking part in the agreement possessed the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such.⁷³⁵

256. The Appeals Chamber notes that paragraph 59 of the Indictment pleads that Nzabonimana conspired with other persons to kill or cause serious bodily and mental harm to members of the Tutsi population, with the intent to destroy in whole or in part, a racial or ethnic group. Therefore, both *actus reus* and *mens rea* of the crime were pleaded in paragraph 59 of the Indictment. The Appeals Chamber dismisses Nzabonimana’s allegation that he was not provided notice of the crime charged. Considering that the Indictment alleges that Nzabonimana conspired with others, including Ministers of the Interim Government,⁷³⁶ and that paragraph 60 of the Indictment referred to the Murambi meeting to support the charge of conspiracy to commit genocide,⁷³⁷ the Appeals Chamber finds that Nzabonimana was advised that the Murambi meeting would form part of the Prosecution’s allegation of conspiracy.

257. Turning to the material facts underpinning Nzabonimana’s conviction for conspiracy to commit genocide, the Appeals Chamber dismisses Nzabonimana’s argument that the Trial Chamber could not have satisfied itself that the paragraphs pleaded in support of the count of conspiracy to commit genocide contained the names of his alleged co-conspirators. The Appeals Chamber observes that the Trial Chamber noted, as a preliminary matter, that paragraph 59 of the Indictment

⁷³⁰ See, e.g., *Bizimungu* Appeal Judgement, para. 46; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntabakuze* Appeal Judgement, para. 30.

⁷³¹ *Seromba* Appeal Judgement, para. 218; *Nahimana et al.* Appeal Judgement, para. 894, citing *Ntagerura et al.* Appeal Judgement, para. 92.

⁷³² *Seromba* Appeal Judgement, para. 218; *Nahimana et al.* Appeal Judgement, para. 894.

⁷³³ *Seromba* Appeal Judgement, para. 221; *Nahimana et al.* Appeal Judgement, para. 896.

⁷³⁴ *Nahimana et al.* Appeal Judgement, para. 897.

⁷³⁵ *Nahimana et al.* Appeal Judgement, para. 344. See also *Ntagerura et al.* Appeal Judgement, para. 92.

⁷³⁶ See Indictment, para. 59.

⁷³⁷ See Indictment, para. 60.

sets out the basic elements of conspiracy, but does not in and of itself specify the individuals with whom Nzabonimana allegedly conspired.⁷³⁸ The Trial Chamber concluded, however, that the Indictment read as a whole adequately informs the Defence of the identity of his alleged co-conspirators.⁷³⁹ The Appeals Chamber agrees that, reading paragraph 59 of the Indictment in conjunction with other paragraphs pleaded in support of the count of conspiracy, Nzabonimana received adequate notice as to the identity of his alleged co-conspirators.

258. Similarly, the time frame for the agreement indicated in paragraph 59 of the Indictment – between 1 January 1994 and 31 July 1994 – is very broad. However, the Appeals Chamber finds that when reading paragraph 59 of the Indictment in conjunction with paragraphs 60 and 26 of the Indictment, specifying the date of 18 April 1994, Nzabonimana was provided with sufficiently precise notice of the date of the facts underpinning the charge of conspiracy.

259. With respect to Nzabonimana's argument on the circumstances of the conspiracy, the Appeals Chamber recalls that the agreement to commit genocide can be inferred from a concerted or coordinated action. The Appeals Chamber recalls that the Trial Chamber considered the concerted and coordinated actions of Nzabonimana and the Ministers of the Interim Government to infer that an agreement with the specific intent to destroy Rwanda's Tutsi population in whole or in part materialised on 18 April 1994.⁷⁴⁰ The Appeals Chamber will examine whether paragraph 59 of the Indictment, read in conjunction with paragraph 26 of the Indictment, clearly allege concerted or coordinated action as a basis for inferring conspiracy between Nzabonimana and his co-conspirators.

260. Paragraph 26 of the Indictment alleges that Nzabonimana and the other conspirators held a meeting at Murambi, where Nzabonimana ordered the killing of *bourgmestres* and other local officials opposed to the killings of Tutsis. However, the Indictment fails to plead a concerted or coordinated action of Nzabonimana and his co-conspirators. While paragraph 26 of the Indictment clearly states Nzabonimana's conduct, it merely alleges the presence of his co-conspirators without setting out their conduct. The fact that paragraph 59 of the Indictment pleads a general agreement and that paragraph 60 of the Indictment refers to paragraph 26 of the Indictment to underpin the charge does not resolve this lack of precision in pleading the conduct of his co-conspirators. The

⁷³⁸ Trial Judgement, para. 1743.

⁷³⁹ Trial Judgement, para. 1743.

⁷⁴⁰ Trial Judgement, para. 1747.

Appeals Chamber therefore concludes that the Indictment is defective as it fails to plead a material fact underpinning the charge of conspiracy with the required precision.⁷⁴¹

261. The Appeals Chamber recalls that defects may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.⁷⁴² In determining whether a defective indictment was cured, the Appeals Chamber has previously looked at information provided in the Prosecution Pre-Trial Brief, its opening statement, as well as the witness charts annexed to the Prosecution Pre-Trial Brief.⁷⁴³

262. The Appeals Chamber finds that the Prosecution Pre-Trial Brief provided Nzabonimana with further information on his alleged conduct at the Murambi meeting and the alleged conduct of his co-conspirators. Under the subheading “Activities of the Accused in the Context of the Prevailing Situation in Rwanda”, the Prosecution referred specifically to the Murambi meeting.⁷⁴⁴ The Prosecution alleged that “between 9 April and 17 July 1994, the Accused was a member of the Interim Government sworn in on 9 April 1994. This Government constituted, planned, orchestrated, pursued and/or implemented a scheme or strategy of killing Tutsi”, and that “[t]he Accused voluntarily joined the Interim Government and knowingly participated in and directly and substantially contributed to the realization of the conspiracy to eliminate Tutsi”.⁷⁴⁵ The Prosecution also declared that it:

[...] will adduce evidence to show that not only did the Accused remain a member of the Interim Government but he participated in various meetings with other members of the Interim Government in Gitarama prefecture and whose main purpose was to encourage the killing of Tutsi thereby showing his support of the Interim Government’s complicity in the massacres.⁷⁴⁶

It then went on to describe the course of events chronologically and argued that “on or about the 18 April 1994, during a meeting of the Interim Government at Murambi, Gitarama, with local authorities, Ministers including the Accused Mr. Callixte Nzabonimana, incited the killings of Tutsis” and “[t]hey issued threats to all local authorities who were not cooperating with the Interahamwe”.⁷⁴⁷ The Prosecution also announced that:

⁷⁴¹ However, the Appeals Chamber considers that this failure to plead a material fact with the required precision neither led to a radical transformation of the Prosecution’s case against Nzabonimana nor did it support, on its own, a separate charge, as Nzabonimana seems to suggest with his mention of “reviving conspiracies” (see Nzabonimana Appeal Brief, para. 260. See also Nzabonimana Notice of Appeal, para. 5.5.1(3)).

⁷⁴² See, e.g., *Bizimungu* Appeal Judgement, para. 46; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntabakuze* Appeal Judgement, para. 30.

⁷⁴³ *Simba* Appeal Judgement, para. 64. See also *Simić* Appeal Judgement, para. 24; *Muhimana* Appeal Judgement, paras. 82, 201.

⁷⁴⁴ Prosecution Pre-Trial Brief, paras. 31, 32.

⁷⁴⁵ Prosecution Pre-Trial Brief, para. 27.

⁷⁴⁶ Prosecution Pre-Trial Brief, para. 30.

⁷⁴⁷ Prosecution Pre-Trial Brief, para. 31.

Specifically, the Prosecutor will adduce evidence to prove that during a meeting at Murambi, Gitarama, which took place on 18 April 1994 the Accused supported the massacres committed by *Interahamwe* in Gitarama and demanded that *pr[é]fets* and *bou[r]gmestres* opposed to the killing of Tutsi be sacked. He publicly denounced those who were opposed to the massacres and threatened them with unspecified action.⁷⁴⁸

The Appeals Chamber finds that this information specified concerted and coordinated action between Nzabonimana and his alleged co-conspirators, namely that he and other ministers jointly incited the killings of Tutsis and threatened local authorities opposed to the killings.⁷⁴⁹

263. The chart of witnesses annexed to the Prosecution Pre-Trial Brief also provide clear and consistent information of Nzabonimana's conduct and the conduct of other ministers at the Murambi meeting.⁷⁵⁰ In particular, the summaries of Witnesses CNAA's and CNAO's expected testimonies, both linked to "Conspiracy" for the "offence charged" and paragraph 26 of the Indictment, clearly set forth a concerted action of threatening the *bourgmestres*.⁷⁵¹ Witness CNAA was expected to testify about "a security meeting of 18 April 1994 which took place at Murambi centre, chaired by Prime Minister Jean Kambanda and attended by members of the [Interim Government], Bourgmestres" and other authorities.⁷⁵² The summary further specifies: "Among the speakers were the [Prime Minister], Justin Mugenzi and [the] Accused. The latter two made some threats to the local authorities who were accused of supporting the RPF".⁷⁵³ The summary of Witness CNAO's expected testimony specifies that there were two meetings at Murambi on 18 April 1994, "[t]he first meeting was attended by the [Prime Minister], [the] Accused, J. Mugenzi, Pauline (Nyiramasuhuko), other ministers" and others.⁷⁵⁴ It then explicitly provides: "[The] Accused, Pauline and other speakers criticized the bourgmestres who were not assisting killers. They said that they should assist the killers and if they are unable to do so they should not obstruct the killers".⁷⁵⁵

264. Furthermore, in its Opening Statement, the Prosecution set out the allegation of an agreement in general terms,⁷⁵⁶ and specifically alleged that "Nzabonimana conducted many public

⁷⁴⁸ Prosecution Pre-Trial Brief, para. 32 (internal references omitted).

⁷⁴⁹ The Appeals Chamber notes that all those specifications were contained in the first version of the Prosecution's Pre-Trial Brief dated 12 February 2009, nine months before the beginning of the Trial. See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-I, Prosecutor's Pre-Trial Brief, 12 February 2009 (confidential), paras. 26, 30, 33, 34, 54, 62. The Prosecution made its opening statement on 9 November 2009. The Appeals Chamber therefore considers that the relevant information detailing the factual basis underpinning the charges was provided timely.

⁷⁵⁰ Prosecution Pre-Trial Brief, Annexure A (Summary of the Facts on which Witness Will Testify), pp. 1, 8, 9, 13, 14.

⁷⁵¹ Prosecution Pre-Trial Brief, Annexure A, Witness CNAA, p. 1, Witness CNAO, pp. 8, 9.

⁷⁵² Prosecution Pre-Trial Brief, Annexure A, Witness CNAA, p. 1.

⁷⁵³ Prosecution Pre-Trial Brief, Annexure A, Witness CNAA, p. 1.

⁷⁵⁴ Prosecution Pre-Trial Brief, Annexure A, Witness CNAO, pp. 8, 9.

⁷⁵⁵ Prosecution Pre-Trial Brief, Annexure A, Witness CNAO, p. 9.

⁷⁵⁶ Opening Statement, T. 9 November 2009 p. 11: "The interim government, which was comprised of ethnic Hutus, passionately joined in the conspiracy to kill Tutsis and moderate Hutus"; Opening Statement, T. 9 November 2009

meetings in which he instructed official *bourgmestres*, gendarmes, Hutu civilians, *Interahamwe*, *communal* policemen to kill Tutsi civilians seeking places of refuge”⁷⁵⁷ and that “on 18th of April 1994 at Murambi trading centre, Callixte Nzabonimana, *together with other members of the interim government*, ordered the killing of *bourgmestres* and other local officials opposed to the killings”.⁷⁵⁸ The latter statement clearly alleged a concerted action with other members of the Interim Government to order the killing of officials opposed to the killings of Tutsi population.

265. Although the Indictment was defective by not pleading with sufficient precision the conduct of the alleged co-conspirators at the Murambi meeting, its defect was subsequently cured by the provision of timely, clear, and consistent information.

266. In view of the Trial Chamber’s finding that the conspiracy “materialised on 18 April 1994” and that the conduct of Nzabonimana and Kambanda after the 18 April 1994 meeting reinforced this conclusion,⁷⁵⁹ the Appeals Chamber considers that any defect in paragraphs 48 and 54 of the Indictment would not invalidate the Trial Chamber’s decision to convict Nzabonimana for the crime of conspiracy to commit genocide in relation to the Murambi meeting and therefore does not consider it necessary to address the arguments in relation to those paragraphs.

267. The Appeals Chamber finds that Nzabonimana was made aware that he could be held liable for conspiracy to commit genocide in relation to the Murambi meeting, and that he was afforded the opportunity to defend himself in this respect. Accordingly, the Appeals Chamber rejects Nzabonimana’s argument that he lacked notice of the crime of conspiracy to commit genocide.

(b) Crime of Direct and Public Incitement to Commit Genocide

268. Nzabonimana submits that the Trial Chamber erred in fact and in law in convicting him beyond the scope of the Indictment when it found simultaneously that he issued an order at the Murambi meeting and a threat, jointly with the ministers present.⁷⁶⁰ Nzabonimana argues that, while it is clear from paragraph 26 of the Indictment that he was charged with issuing an order, the Trial Chamber ruled *ultra petita* in finding that he issued threats jointly with the ministers.⁷⁶¹

269. The Prosecution responds that there is no discrepancy between the conduct charged and conduct found, pointing that the Trial Chamber found exactly what was pleaded: “Nzabonimana

p. 14: “Instead of preventing genocide, the Accused conspired with others to kill Tutsis”, “Now let’s turn to the conspiracy to commit genocide. In this trial, Your Honours, you will hear evidence of a conspiracy to kill Tutsis in which the Accused agreed with his supporters to destroy Tutsi population [...]”.

⁷⁵⁷ Opening Statement, T. 9 November 2009 pp. 14, 15.

⁷⁵⁸ Opening Statement, T. 9 November 2009 pp. 15, 16 (emphasis added).

⁷⁵⁹ Trial Judgement, para. 1747.

⁷⁶⁰ Nzabonimana Appeal Brief, paras. 244-252. *See also* Nzabonimana Reply Brief, paras. 57-61.

ordered the killing of *bourgmestres* and other local officials opposed to the massacres of Tutsis”.⁷⁶² The Prosecution further considers that since the order was meant to threaten *bourgmestres*, the Trial Chamber also referred to the order as a threat.⁷⁶³

270. Paragraph 26 of the Indictment alleges that during a meeting with the *bourgmestres* of the communes in Gitarama *préfecture* Nzabonimana “ordered the killing of *Bourgmestres* and other local officials opposed to the killings”. The Appeals Chamber notes that paragraph 26 of the Indictment does not contain the word “threat”. However, Nzabonimana’s alleged criminal conduct underpinning his conviction of direct and public incitement was clearly set out. Whether his conduct constituted merely an order or also a threat is a question of evidence and the Trial Chamber’s findings in this regard do not render the Indictment defective.⁷⁶⁴ Nzabonimana was notified of his criminal conduct comprised of his utterances.

271. The Appeals Chamber therefore rejects Nzabonimana’s argument that the Trial Chamber convicted him beyond the scope of the Indictment when it found simultaneously that he issued an order and a threat at the Murambi meeting.

(c) Conclusion

272. For the foregoing reasons, the Appeals Chamber dismisses Nzabonimana’s arguments in relation to notice under his Fifth Ground of Appeal.

2. Assessment of Evidence

273. Under his Fifth Ground of Appeal, Nzabonimana makes various challenges to the Trial Chamber’s assessment of the Prosecution evidence with respect to fabrication of evidence, and to events at Rutobwe, Murambi, and Musambira.⁷⁶⁵ In particular, Nzabonimana submits that the Trial Chamber erred in assessing the credibility of Prosecution Witnesses CNAA and CNAC and in

⁷⁶¹ Nzabonimana Appeal Brief, paras. 244, 245.

⁷⁶² Prosecution Response Brief, para. 154. *See also* AT. 29 April 2014 p. 40.

⁷⁶³ Prosecution Response Brief, para. 154.

⁷⁶⁴ In its factual findings, the Trial Chamber concludes that during the meeting held at Murambi on 18 April 1994, Nzabonimana “ordered the killing of *bourgmestres* and other local officials opposed to the massacres of Tutsis” (*see* Trial Judgement, para. 1179). It further found that “it has been proven that the Ministers present at the meeting, including Nzabonimana, used this meeting to threaten the *bourgmestres*” (*see* Trial Judgement, para. 1179). In its legal findings on the crime of direct and public incitement to commit genocide, the Trial Chamber holds that “Nzabonimana ordered the killings of *bourgmestres* and other local officials opposed to the massacres of Tutsis during the meeting” (*see* Trial Judgement, para. 1769) and concludes that “Nzabonimana’s speech, which consisted of an explicit threat to kill persons opposing the massacre of Tutsis, constituted a direct call to commit genocide” (*see* Trial Judgement, para. 1771). Nzabonimana’s argument on the alleged error of the Trial Chamber in finding that he ordered the killings (*see* Nzabonimana Appeal Brief, para. 247) will be examined in another section. *See infra*, paras. 339, 345.

⁷⁶⁵ Nzabonimana Notice of Appeal, paras. 5.1.1, 5.2.1.1, 5.2.1.2, 5.2.2; Nzabonimana Appeal Brief, paras. 170-180, 196-241, 247.

finding corroboration between them.⁷⁶⁶ Nzabonimana further challenges the assessment of the Defence evidence with respect to fabrication of evidence and to events at Rutobwe and Murambi.⁷⁶⁷

274. The Appeals Chamber will examine in turn Nzabonimana's arguments on: (i) fabrication of evidence; (ii) the Trial Chamber's alleged piecemeal approach to the assessment of evidence; and (iii) the Trial Chamber's assessment of specific events.⁷⁶⁸

(a) Fabrication of Evidence

(i) Alleged Errors in Assessing Prosecution Evidence

275. The Trial Chamber observed that Witnesses CNAA and CNAC were imprisoned at the time of their testimonies, that both held positions of authority in the prison system, and that both acknowledged their influence within the prison structure and over fellow inmates.⁷⁶⁹ The Trial Chamber found that "the Defence claim that Witnesses CNAA and CNAC received their leadership positions in exchange for their testimony to be mere speculation",⁷⁷⁰ and found that the evidence did not "substantiate the claim that Witnesses CNAA and CNAC fabricated their testimony against Nzabonimana".⁷⁷¹

276. Nzabonimana submits that the Trial Chamber failed to exercise the extreme caution required to assess Witnesses CNAA and CNAC as both were detained accomplice witnesses with interests to lie because of direct benefits they gained from their testimonies.⁷⁷² He contends that no reasonable trier of fact could have failed to question whether there was a link between the circumstances of Witnesses CNAA and CNAC and the content of their testimonies against Nzabonimana.⁷⁷³ In this regard, Nzabonimana argues that the Trial Chamber dismissed the impact of their circumstances on their testimonies solely because the Defence presented no direct evidence that Witness CNAA, in

⁷⁶⁶ Nzabonimana Appeal Brief, paras. 170-180, 196-241, 247. *See also* Nzabonimana Reply Brief, para. 14.

⁷⁶⁷ Nzabonimana Notice of Appeal, paras. 5.1.2, 5.2.1.1, 5.2.1.2; Nzabonimana Appeal Brief, paras. 181-195, 202, 205, 206, 225-230. Under this section, the Appeals Chamber will only address Nzabonimana's challenges related to Defence Witness T24's credibility and the alleged corroborative evidence of duress as it has already examined all challenges made to the credibility assessment of Defence Witness Mporanzi. *See supra*, paras. 196-204.

⁷⁶⁸ The Appeals Chamber dismisses Nzabonimana's argument from the preliminary issue section of his Appeal Brief, in relation to the Trial Chamber's alleged inconsistent admission of the testimonies of Prosecution witnesses (*see* Nzabonimana Appeal Brief, paras. 17, 19). Nzabonimana fails to develop his argument and fails to explain how the situations warranted similar treatment by the Trial Chamber.

⁷⁶⁹ Trial Judgement, paras. 224, 225, 228. The Trial Chamber noted that Witness CNAA testified that at different times of his incarceration he was *capita général*, coordinator of the prisoners, and executive secretary of the prison. It further observed that Witness CNAC affirmed that he was in charge of equipment in Gitarama prison. *See ibid.*, para. 228.

⁷⁷⁰ Trial Judgement, para. 229.

⁷⁷¹ Trial Judgement, para. 231.

⁷⁷² Nzabonimana Notice of Appeal, para. 5.1.1; Nzabonimana Appeal Brief, paras. 170-180. *See also* Nzabonimana Notice of Appeal, para. 6.1(3).

⁷⁷³ Nzabonimana Appeal Brief, paras. 173, 175, 179.

particular, became *capita général* in exchange for his testimony before the Tribunal.⁷⁷⁴ In Nzabonimana's view, the Trial Chamber possessed evidence from the Defence and from Witness CNAA that this witness and Witness CNAC received exorbitant and abnormal powers from the Rwandan judicial authorities.⁷⁷⁵

277. Nzabonimana further submits that the Trial Chamber made a fundamental factual error when stating that Witness CNAA became *capita général* in 2003, before his 2005 testimony, while he testified in 1997 in the *Akayesu* trial.⁷⁷⁶ He also submits that the Trial Chamber failed to note that Witness CNAA lied when stating that he was *capita général* for less than a year, while evidence shows he held the post for a longer period.⁷⁷⁷

278. The Prosecution responds that there is no contention that Witnesses CNAA and CNAC held positions of authority in the prison system and that the Trial Chamber reasonably found the claim, that they received their positions in exchange for testimony, to be mere speculation.⁷⁷⁸ The Prosecution submits that Nzabonimana simply repeats his unsuccessful trial arguments and ignores the Trial Chamber's findings.⁷⁷⁹ In any event, the Prosecution submits that encouraging someone to testify is entirely different from bribing or forcing someone to make false accusations.⁷⁸⁰

279. The Prosecution further responds that nothing indicates that the positions of Witnesses CNAA and CNAC were abnormal, or that these witnesses abused their authority.⁷⁸¹ According to the Prosecution, there is also no indication that Witness CNAA provided incorrect information about the duration of his position as *capita général* and that any confusion between Witnesses CNAA's and CNAC's testimonies could be explained by the fact that the title, *capita général*, was changed to "executive secretary".⁷⁸²

280. The Appeals Chamber notes that the Trial Chamber examined at length each allegation on fabrication of evidence that the Defence had raised.⁷⁸³ Recalling that detained or accomplice witnesses may be motivated to testify falsely for a number reasons, the Trial Chamber considered that, as detained witnesses, Witnesses CNAA's and CNAC's testimonies would be treated with

⁷⁷⁴ Nzabonimana Appeal Brief, para. 171, *referring to* Trial Judgement, para. 229.

⁷⁷⁵ Nzabonimana Appeal Brief, para. 172.

⁷⁷⁶ Nzabonimana Appeal Brief, para. 174.

⁷⁷⁷ Nzabonimana Appeal Brief, para. 176.

⁷⁷⁸ Prosecution Response Brief, para. 159.

⁷⁷⁹ Prosecution Response Brief, paras. 158, 159.

⁷⁸⁰ Prosecution Response Brief, paras. 158, 159. The Prosecution refers to the availability of incentives to provide evidence such as in Rule 101(B)(ii) of the Rules. *See idem*.

⁷⁸¹ Prosecution Response Brief, para. 159.

⁷⁸² Prosecution Response Brief, para. 163, *referring to* Trial Judgement, para. 228.

⁷⁸³ In its section on fabrication of evidence, the Trial Chamber examined allegations that: (i) Rwandan Authorities and Witness CNAI recruited witnesses to testify falsely against Nzabonimana; (ii) prisoners fabricated evidence against

appropriate caution.⁷⁸⁴ The Trial Chamber also examined specific allegations that Witnesses CNAA and CNAC fabricated their evidence in order to receive leniency and benefits in prison.⁷⁸⁵ It heard extensive evidence on the role of the *capita général* and the resultant authority of that position in prison.⁷⁸⁶ It then found that:

Having considered the totality of the evidence, however, the Chamber finds that the evidence does not substantiate the claim that Witnesses CNAA and CNAC fabricated their testimony against Nzabonimana. Nevertheless, the Chamber will consider their testimony with appropriate caution based on individual factors relevant to each witness which are considered in other sections of this Judgement.⁷⁸⁷

281. In rejecting as speculative the Defence claim that Witnesses CNAA and CNAC received their leadership positions in exchange for their testimonies, the Trial Chamber considered the following evidence: (i) Witness CNAA testified for the Prosecution in the *Bizimungu et al.*, and *Karemera et al.*, trials in 2005 and 2007 respectively, after he became *capita général* in 2003; (ii) the hearsay and vague nature of testimonies from Defence witnesses; and (iii) Witness CNAA denied that he received special treatment in prison as a result of his testimony.⁷⁸⁸ Nzabonimana therefore fails to demonstrate that the Trial Chamber rejected the Defence claim solely for the lack of direct evidence.

282. The Appeals Chamber observes that the Trial Chamber found it unquestionably established that Witnesses CNAA and CNAC held positions of authority in the prison system and that both acknowledged their influence in the prison structure and over fellow inmates.⁷⁸⁹ Therefore, the Trial Chamber duly considered the positions of authority and the influence of both witnesses in prison. The Appeals Chamber also notes that, on appeal, Nzabonimana points to Defence evidence that the Trial Chamber already considered.⁷⁹⁰ As to Nzabonimana's argument that Witness CNAA's written evidence showed an exchange and benefits scheme for his testimony,⁷⁹¹ the Appeals Chamber observes that the Trial Chamber duly considered the evidence in its summary of Witness CNAA's testimony.⁷⁹² The Trial Chamber also noted that, in his testimony, Witness CNAA denied that the Rwandan Government forced him to testify and stated that the government merely authorised him

Nzabonimana; and (iii) there was systematic "activism against Nzabonimana" in Rwanda. See Trial Judgement, paras. 93-257.

⁷⁸⁴ Trial Judgement, paras. 226, 231. See also *ibid.*, paras. 1064, 1142, 1210, 1480.

⁷⁸⁵ Trial Judgement, paras. 224-231.

⁷⁸⁶ Trial Judgement, para. 231.

⁷⁸⁷ Trial Judgement, para. 231.

⁷⁸⁸ Trial Judgement, para. 229.

⁷⁸⁹ Trial Judgement, para. 228.

⁷⁹⁰ See Trial Judgement, paras. 193-200 (Witness T71), 203-213 (Witness T109), 214-218 (Witness T110), 219-221 (Witness Batard), para. 231, fn. 328.

⁷⁹¹ See Nzabonimana Appeal Brief, para. 177.

⁷⁹² Trial Judgement, paras. 162, 163.

to leave the country and testify.⁷⁹³ Accordingly, the Appeals Chamber considers that Nzabonimana, without showing any error, repeats the same allegations of fabrication from trial, and merely disagrees with the Trial Chamber's finding that claims of Witnesses CNAA and CNAC receiving leadership positions in exchange for testimonies were speculative.

283. Finally, the Appeals Chamber dismisses Nzabonimana's submission that the Trial Chamber made a "fundamental factual error" on when Witness CNAA became *capita général*.⁷⁹⁴ Considering the confusing and vague nature of Nzabonimana's argument, and that the Trial Chamber was aware of Witness CNAA's testimony in 1997 in the *Akayesu* trial,⁷⁹⁵ the Appeals Chamber summarily dismisses Nzabonimana's argument in this regard.⁷⁹⁶ The Appeals Chamber also finds that the exact duration of Witness CNAA's position of authority in prison, and any inconsistencies in his evidence on this matter, are not determinative of the Trial Chamber's assessment of his credibility. As already discussed, the Trial Chamber considered that Witnesses CNAA and CNAC held positions of authority in the prison system,⁷⁹⁷ and, despite these positions, it reasonably found the allegation of fabrication against these two witnesses insufficiently substantiated. On this basis, the Appeals Chamber considers that the exact duration of their position of authority is immaterial to the Trial Chamber's determination on evidence fabrication.

284. In light of the foregoing, the Appeals Chamber finds that Nzabonimana fails to demonstrate that no reasonable trier of fact could have concluded, as the Trial Chamber did, that "the Defence claim that Witnesses CNAA and CNAC received their leadership positions in exchange for their testimony to be mere speculation".⁷⁹⁸ The Appeals Chamber further finds that the Trial Chamber reasonably determined that the evidence did not substantiate the claim that Witnesses CNAA and CNAC fabricated their testimony against Nzabonimana.⁷⁹⁹ Nzabonimana's arguments in this respect are accordingly dismissed.

(ii) Defence Evidence

285. Nzabonimana submits that the Trial Chamber erred in finding that the credibility of Defence Witness T24 was undermined because he admitted to lying to the Prosecution.⁸⁰⁰ In particular, Nzabonimana submits that the Trial Chamber: (i) could not consider Witness T24's admission to

⁷⁹³ Trial Judgement, para. 163.

⁷⁹⁴ See Nzabonimana Appeal Brief, para. 174.

⁷⁹⁵ See Trial Judgement, para. 1483. See also *ibid.*, fn. 243.

⁷⁹⁶ The Appeals Chamber recalls that it cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies. See *supra*, para. 12.

⁷⁹⁷ Trial Judgement, para. 228.

⁷⁹⁸ Trial Judgement, para. 229.

⁷⁹⁹ Trial Judgement, para. 231.

⁸⁰⁰ Nzabonimana Appeal Brief, para. 181 (French original).

undermine his credibility because Prosecution investigators used unacceptable methods to obtain his testimony against Nzabonimana and that he feared repercussions;⁸⁰¹ (ii) distorted Witness T24's testimony to find that the witness provided contradictory accounts on whether he gave his 2008 statement under pressure;⁸⁰² and (iii) erred in determining that Witness T24 was free to testify and suffered no adverse consequences as a Defence witness.⁸⁰³ Nzabonimana additionally submits that the Trial Chamber restricted its assessment of duress to the testimonies of Defence Witness Mporanzi and Witness T24 and failed to consider evidence corroborating their claims of duress.⁸⁰⁴

286. The Prosecution responds that Nzabonimana simply re-argues and misstates the evidence.⁸⁰⁵ It submits that: (i) Nzabonimana ignores that several witnesses detained in Rwanda, including Witness T24, testified that they suffered no consequences by testifying for the Defence;⁸⁰⁶ and (ii) Nzabonimana's argument that Witness T24 was forced to testify for the Prosecution fails because the witness ultimately testified for the Defence and admitted that he suffered no repercussions.⁸⁰⁷ Finally, the Prosecution submits that the Trial Chamber considered other evidence of duress, to which Nzabonimana refers, but it either disbelieved or found the evidence irrelevant.⁸⁰⁸

287. The Appeals Chamber observes that the Trial Chamber explicitly considered Witness T24's testimony that: (i) Prosecution investigators, especially Djibo Moumouni, approached him several times and also approached the director of the Gitarama prison, who asked Witness T24 whether he refused to testify against Nzabonimana;⁸⁰⁹ (ii) the witness felt pressured and spoke to Investigator Moumouni to avoid being labelled a "revisionist" and suffering negative consequences from prison authorities;⁸¹⁰ (iii) he obtained information regarding Nzabonimana's activities in 1994 from a fellow inmate, and not knowing if the information was true, conveyed the information to Prosecution investigators;⁸¹¹ (iv) he signed a statement in October 2008, which summarised discussions between Witness T24 and Investigator Moumouni;⁸¹² (v) he acknowledged making the statement of his own free will and did not act under the duress from anyone whatsoever;⁸¹³ and

⁸⁰¹ Nzabonimana Appeal Brief, paras. 191, 192. *See also* Nzabonimana Notice of Appeal, para. 1.1(3),(4); Nzabonimana Appeal Brief, paras. 22, 23; AT. 29 April 2014 p. 50.

⁸⁰² Nzabonimana Appeal Brief, paras. 193, 194.

⁸⁰³ Nzabonimana Appeal Brief, para. 195.

⁸⁰⁴ Nzabonimana Appeal Brief, paras. 182, 183. *See also* Notice of Appeal, para. 4.1.5(6).

⁸⁰⁵ Prosecution Response Brief, para. 164.

⁸⁰⁶ Prosecution Response Brief, para. 168.

⁸⁰⁷ Prosecution Response Brief, para. 171.

⁸⁰⁸ Prosecution Response Brief, paras. 165, 166.

⁸⁰⁹ *See* Trial Judgement, paras. 181, 182, 233.

⁸¹⁰ Trial Judgement, paras. 183, 233.

⁸¹¹ Trial Judgement, para. 184.

⁸¹² Trial Judgement, para. 184.

⁸¹³ Trial Judgement, paras. 184, 235.

(vi) the witness confirmed that since his acceptance to cooperate with the Defence, he has suffered no constraint, duress, or pressure in prison.⁸¹⁴

288. Given the above, the Appeals Chamber notes that the Trial Chamber explicitly considered the activities of Prosecution investigators leading up to Witness T24's October 2008 statement. It is unclear, from Nzabonimana's argument, how the Trial Chamber erred, how the activities of Prosecution investigators, or how the witness's fears would undermine the Trial Chamber's finding that Witness T24 explicitly admitted to providing false information to the Prosecution, and that this admission seriously undermined the witness's credibility.⁸¹⁵ Beyond disagreeing with the Trial Chamber's assessment, Nzabonimana fails to demonstrate how the Trial Chamber erred.

289. With respect to Nzabonimana's argument that the Trial Chamber distorted Witness T24's testimony, the Appeals Chamber notes the Trial Chamber's reference to Witness T24's statement that: "[a]s far as the declaration – the statement is concerned, I did it of my own free will. I did not act under any duress from anyone whatsoever".⁸¹⁶ Having reviewed Witness T24's testimony, the Appeals Chamber notes that the witness seemed to be responding to a question regarding a discrete portion of his October 2008 statement, rather than characterising the entire statement as made of his own free will.⁸¹⁷ The Appeals Chamber finds that no reasonable trier of fact could have relied on this part of Witness T24's testimony to determine that the entire October 2008 statement was not made under pressure. However, the Appeals Chamber is not convinced that this error affects the Trial Chamber's assessment that Witness T24's credibility was seriously undermined by his admission to making false statements,⁸¹⁸ and that appropriate caution would be applied to detained witnesses, such as Witness T24.⁸¹⁹

290. In support of the argument that the Trial Chamber failed to consider other evidence of duress, Nzabonimana points to numerous paragraphs from the Trial Judgement that summarise witness testimonies.⁸²⁰ The Appeals Chamber notes that the Trial Chamber considered this evidence.⁸²¹ Although Witness T24's fears might have been a possibility, Nzabonimana fails to

⁸¹⁴ Trial Judgement, paras. 189, 238.

⁸¹⁵ Trial Judgement, para. 234. The Appeals Chamber notes that the Trial Chamber did not find Witness T24 generally not credible but exercised caution in its assessment of his evidence. *See infra*, paras. 358-362.

⁸¹⁶ Trial Judgement, para. 235, *referring to* Witness T24, T. 27 April 2010 pp. 50, 61 (closed session).

⁸¹⁷ Witness T24, T. 27 April 2010 p. 50 (closed session).

⁸¹⁸ Trial Judgement, para. 234.

⁸¹⁹ Trial Judgement, para. 239.

⁸²⁰ *See* Nzabonimana Appeal Brief, paras. 182, 183.

⁸²¹ *See* Nzabonimana Appeal Brief, paras. 182, 183. Nzabonimana points to the following as evidence corroborating duress that Witnesses Mporanzi and T24 confronted and that the Trial Chamber did not consider: (i) the evidence presented on Nyabikenke corroborated fears of both witnesses (*see ibid.*, para. 183, *referring to* Trial Judgement, paras. 120-135, 181-187); (ii) its own findings that detainees who did not confess became victims of discrimination, or that some witnesses fabricated confessions in order to be released (*see ibid.*, para. 183, *referring to* Trial Judgement, paras. 236, 237); (iii) Witness CNAC testified to having been unlawfully detained and to having disappeared (*see ibid.*, para.

explain how this undermines the Trial Chamber's assessment of Witness T24's credibility. Nzabonimana merely offers a different interpretation without showing how the Trial Chamber erred in its assessment.

291. For the foregoing reasons, the Appeals Chamber finds that Nzabonimana fails to demonstrate that the Trial Chamber erred in finding that Witness T24's credibility was undermined because he admitted to lying to the Prosecution. He also fails to demonstrate that the Trial Chamber committed an error in assessing Witness T24's credibility that would occasion a miscarriage of justice.

(b) Piecemeal Approach

292. Nzabonimana submits that instead of considering the accumulated inconsistencies between Witnesses CNAA and CNAC, the Trial Chamber erred by assessing evidence relating to paragraphs 24, 26, and 48 of the Indictment separately.⁸²² He contends that, by splitting up the testimonies of Witnesses CNAA and CNAC into the events of Rutobwe, Murambi, and Musambira, the Trial Chamber failed to draw inferences from their inconsistencies which should have led it to exclude their testimonies.⁸²³ In particular, he argues that the allegations set forth in paragraph 24 of the Indictment cannot be assessed separately from those in paragraph 26 of the Indictment, which relate to 18 April 1994.⁸²⁴ He argues that a holistic assessment of the evidence would have demonstrated that Witnesses CNAA and CNAC, who both testified on events in Rutobwe and Murambi, were mutually inconsistent, notably on what Witness Mporanzi told them on 18 April 1994 with respect to the situation of the prisoners in Rutobwe *commune*.⁸²⁵

293. The Prosecution responds that the Trial Chamber's assessment of Witnesses CNAA and CNAC was not piecemeal as the Trial Chamber considered all aspects of their testimony and was correct in finding that they corroborated each other in key respects.⁸²⁶

294. The Appeals Chamber fails to see how the Trial Chamber erred by separating its evaluation of the allegations and of the evidence adduced in relation to Indictment paragraphs. The Appeals

183, *referring to* Trial Judgement, para. 169); (iv) Witness T24 recalled that he was beaten when in detention (*see ibid.*, para. 183, *referring to* Trial Judgement, para. 192); (v) Witness T133 was told by Witness CNAC that a case was fabricated against Witness CNAC (*see ibid.*, para. 183, *referring to* Trial Judgement, para. 202); and (vi) witnesses spent years in prison without trial, some were later acquitted, or after serving their sentences, faced new charges (*see ibid.*, para. 183, *referring to, inter alia*, Trial Judgement, paras. 183, 233, 185, 190).

⁸²² Nzabonimana Appeal Brief, para. 232.

⁸²³ Nzabonimana Appeal Brief, paras. 197, 198.

⁸²⁴ Nzabonimana Appeal Brief, para. 198.

⁸²⁵ Nzabonimana Appeal Brief, para. 198. Nzabonimana's submission that the Trial Chamber overlooked the contradictions between Witnesses CNAA and CNAC on the issue of the prisoners is examined below. *See infra*, paras. 296-311.

⁸²⁶ Prosecution Response Brief, para. 174.

Chamber notes that having determined that the allegations of evidence fabrication did not undermine the credibility of Witnesses CNAA and CNAC,⁸²⁷ the Trial Chamber considered their evidence in relation to the events they testified to, recalling each time that as detained witnesses, it has treated their testimony with appropriate caution.⁸²⁸ The Appeals Chamber finds no error in this approach. The Appeals Chamber further finds that Nzabonimana fails to demonstrate that the Trial Chamber did not assess cumulatively the inconsistencies between Witnesses CNAA and CNAC. The Appeals Chamber will examine below Nzabonimana's arguments on the assessment of the credibility of Witnesses CNAA and CNAC in relation to the events at Rutobwe, Murambi, and Musambira.

295. The Appeals Chamber finds that Nzabonimana fails to demonstrate an error in the Trial Chamber's approach to considering the evidence of Witnesses CNAA and CNAC.

(c) Rutobwe

296. The Trial Chamber found that in the days leading up to 18 April 1994, Nzabonimana encouraged the killing of Tutsis by causing the release of killers of Tutsis, who had been imprisoned by *Bourgmestre* Jean-Marie Vianney Mporanzi, in Rutobwe *commune*.⁸²⁹ The Trial Chamber mainly relied on Witnesses CNAA and CNAC who provided evidence that Nzabonimana caused the release of killers and threatened *Bourgmestre* Mporanzi for having arrested them.⁸³⁰ It found however, that based on the lack of specific evidence of the crimes committed by the prisoners it could not conclude that Nzabonimana's forcible release of the Rutobwe *commune* prisoners substantially contributed to any of the ensuing killings or other crimes.⁸³¹ Accordingly, the Trial Chamber did not convict Nzabonimana of genocide based on this event.⁸³² The Appeals Chamber has upheld Nzabonimana's acquittal in respect of this charge.⁸³³

297. Accordingly, the Appeals Chamber declines to consider Nzabonimana's submissions related to the Rutobwe event,⁸³⁴ except for challenges related to the assessment of the credibility of

⁸²⁷ See Trial Judgement, paras. 1065, 1143, 1211, 1448, 1481. The Appeals Chamber recalls that the Trial Chamber conducted an overall credibility assessment in response to Nzabonimana's contention that Witnesses CNAA and CNAC fabricated their evidence. See Trial Judgement, paras. 224-231.

⁸²⁸ See Trial Judgement, paras. 1045-1057, 1064-1071 for the release of Rutobwe *commune* prisoners; Trial Judgement, paras. 1080-1105, 1142-1152, 1159-1169, 1182-1187 for the Murambi meeting; Trial Judgement, paras. 1196-1223 for the reinstatement ceremony of the *Bourgmestre* of Musambira *Commune*. See also *ibid.*, para. 226.

⁸²⁹ Trial Judgement, para. 1076.

⁸³⁰ Trial Judgement, para. 1075.

⁸³¹ Trial Judgement, para. 1723.

⁸³² Trial Judgement, para. 1723.

⁸³³ See *infra*, paras. 486-495.

⁸³⁴ Specifically, the Appeals Chamber declines to consider Nzabonimana's submissions regarding Defence Witnesses Mporanzi and T24. See Nzabonimana Appeal Brief, paras. 202, 206 (Defence Witness Mporanzi), para. 205 (Defence Witness T24).

Witnesses CNAA and CNAC.⁸³⁵ The Appeals Chamber will examine such challenges for their potential impact on the overall credibility and reliability of Witnesses CNAA and CNAC,⁸³⁶ whom the Trial Chamber relied upon for Nzabonimana's convictions in relation to the events at Murambi.

(i) Witness CNAA's Credibility

298. Nzabonimana submits that the Trial Chamber failed to properly assess Witness CNAA's credibility arguing that the witness adjusted his account in each trial in which he testified.⁸³⁷ Nzabonimana contends that in the *Karempera et al.* trial Witness CNAA testified that during the first Murambi meeting on 18 April 1994, *Bourgmestre* Mporanzi complained to the Prime Minister, in the presence of Government officials and other authorities, that Nzabonimana had released prisoners in Rutobwe *commune* and slapped him, an incident which Witness CNAA only confirmed during cross-examination in the present trial.⁸³⁸ Nzabonimana argues that the Trial Chamber erred by excluding this major omission and by finding that it was "inconsequential" as these facts were both crucial and unforgettable.⁸³⁹

299. Nzabonimana further argues that the Trial Chamber failed to properly assess Witness CNAA's testimony that *Bourgmestre* Mporanzi complained on two occasions: during a meeting at the Gitarama *préfecture* office prior to 18 April 1994, and during the first meeting at Murambi on 18 April 1994.⁸⁴⁰ He submits that the Trial Chamber overlooked the fact that this testimony contradicts Witness CNAC's testimony on this point and that there was no corroboration on the location where the witnesses heard *Bourgmestre* Mporanzi's statements.⁸⁴¹

300. Finally, Nzabonimana submits that the Trial Chamber overlooked the implausible character of Witness CNAA's testimony, and argues that in a "bid to embellish" his testimony the witness

⁸³⁵ The Appeals Chamber recalls that, as a general rule, it declines to discuss alleged errors which have no impact on the conviction or sentence. *See Kanyarukiga* Appeal Judgement para. 62; *Renzaho* Appeal Judgement, paras. 251, 384; *Krajišnik* Appeal Judgement, para. 20. The Appeals Chamber notes that the Trial Chamber relied on this event, among others, as circumstantial evidence of Nzabonimana's genocidal intent. *See* Trial Judgement, paras. 1707 (Butare Trading Centre Meeting), 1724 (Release of Killers in Rutobwe *Commune*), 1726 (Murambi Meeting), 1728 (Reinstatement Ceremony of the *Bourgmestre* of Musambira *Commune*), 1732 (Destruction of houses in Nyamabuye *Commune*), 1734 (Weapons Distribution in Tambwe *Commune*), 1736 (Tambwe *Commune* Crisis Committee). The Appeals Chamber further notes that Nzabonimana has not challenged the Trial Chamber's finding on his genocidal intent for his conviction related to the Murambi event (for Nzabonimana's conviction for the crime of conspiracy to commit genocide in relation to the Murambi event, *see* Trial Judgement, para. 1747; regarding Nzabonimana's conviction for direct and public incitement in relation to the Murambi event, as examined in the following section, the Appeals Chamber has overturned this conviction).

⁸³⁶ *See* Nzabonimana Appeal Brief, para. 208.

⁸³⁷ Nzabonimana Appeal Brief, para. 200.

⁸³⁸ Nzabonimana Appeal Brief, para. 199.

⁸³⁹ Nzabonimana Appeal Brief, para. 200.

⁸⁴⁰ Nzabonimana Appeal Brief, para. 201.

⁸⁴¹ Nzabonimana Appeal Brief, para. 201. Nzabonimana argued that Witness CNAC testified that *Bourgmestre* Mporanzi complained during the meeting of *bourgmestres* at Gitarama *préfecture* office on the morning of 18 April 1994. *See idem*.

mentioned attacks on his *commune*, while subsequent Prosecution disclosures led the Trial Chamber to believe that Witness CNAA may have been seeking to distance himself from any responsibility.⁸⁴²

301. The Prosecution responds that details about Nzabonimana's interaction with *Bourgmestre* Mporanzi only arose during cross-examination, when Witness CNAA was confronted with his testimony in *Karemera et al.* trial, and further argues that it was not a major omission that Witness CNAA did not mention during his examination-in-chief, that *Bourgmestre* Mporanzi was slapped.⁸⁴³ As to the alleged contradiction with Witness CNAC's testimony, the Prosecution submits that Nzabonimana fails to explain why *Bourgmestre* Mporanzi could not have raised Nzabonimana's orders on more than one occasion.⁸⁴⁴ The Prosecution submits that Nzabonimana's arguments on disclosure are based on material not on the record.⁸⁴⁵

302. The Appeals Chamber observes that the Trial Chamber considered each of the alleged discrepancies that Nzabonimana raises. Specifically, it examined alleged contradictions between Witness CNAA's testimony in this case and in the *Karemera et al.* case, and accepted Witness CNAA's explanation that there was no contradiction between his testimonies as *Bourgmestre* Mporanzi told him of the prisoner release both at the Murambi meeting and at a meeting at the *préfecture* office.⁸⁴⁶ When examining the Defence's challenge to Witness CNAA's credibility, the Trial Chamber further noted that the witness testified that *Bourgmestre* Mporanzi spoke of the prisoner release on different occasions.⁸⁴⁷ When examining the consistency of Witnesses CNAA's and CNAC's testimonies concerning a meeting at the Gitarama *préfecture* office prior to the Murambi meeting, where *Bourgmestre* Mporanzi addressed the prisoner release situation, the Trial Chamber recalled that Witness CNAC testified that the meeting occurred on the morning of 18 April 1994 and that Witness CNAA could not recall the date or time of the meeting but testified that it occurred on a different day.⁸⁴⁸ The Trial Chamber considered however that Witness CNAA's inability to give a precise date for the meeting had "minimal impact upon his

⁸⁴² Nzabonimana Appeal Brief, para. 207, *referring to* Callixte Nzabonimana's New Motion for Appropriate Remedies on Account of Further Violations of Rule 66(A)(ii) and Rule 68 of the Rules of Procedure and Evidence, 12 July 2013 (original French version filed on 25 June 2013).

⁸⁴³ Prosecution Response Brief, para. 182.

⁸⁴⁴ Prosecution Response Brief, para. 178.

⁸⁴⁵ Prosecution Response Brief, para. 181.

⁸⁴⁶ Trial Judgement, para. 1069. The Trial Chamber also considered the Defence's challenge to Witness CNAA's credibility for having mentioned that *Bourgmestre* Mporanzi had told him that he was struck by Nzabonimana, while in his 2007 testimony in the *Karemera et al.* trial Witness CNAA acknowledged that this was a rumour. The Trial Chamber noted that Prosecution did not elicit evidence of Nzabonimana striking Mporanzi during its direct examination of Witness CNAA but that only the Defence raised the issue in its cross-examination of Witness CNAA. *See ibid.*, para. 1070.

⁸⁴⁷ Trial Judgement, para. 1069.

⁸⁴⁸ Trial Judgement, para. 1066.

credibility, given the considerable passage of time since the events”.⁸⁴⁹ Nzabonimana fails to demonstrate any error in the Trial Chamber’s assessment.

303. The Appeals Chamber also dismisses Nzabonimana’s submission on the implausible character of Witness CNAA’s testimony as unfounded. The Appeals Chamber notes that, in support of his vague claim, Nzabonimana refers only to his own motion on appeal, which the Appeals Chamber denied.⁸⁵⁰

304. Accordingly, the Appeals Chamber considers that the Trial Chamber was clearly seized of all of Nzabonimana’s challenges, which on appeal amount to mere disagreement with the Trial Chamber’s conclusions. Moreover, Nzabonimana fails to show how the alleged inconsistencies cast the overall credibility of Witness CNAA into such doubt that no reasonable trial chamber could have relied on parts of his testimony to sustain convictions.⁸⁵¹

305. The Appeals Chamber therefore dismisses Nzabonimana’s challenges to the Trial Chamber’s assessment of Witness CNAA’s credibility in relation to the release of prisoners in Rutobwe *commune*.

(ii) Witness CNAC’s Credibility

306. Nzabonimana submits that a reasonable trier of fact would have questioned Witness CNAC’s testimony that he heard *Bourgmestre* Mporanzi’s accusations against Nzabonimana at a *bourgmestres’* meeting on 18 April 1994 at the Gitarama *préfecture* office.⁸⁵² Nzabonimana argues that the manner in which Witness CNAC made these revelations were: (i) “abrupt”, considering that the Prosecution took advantage of a question in examination-in-chief to elicit information from Witness CNAC regarding the release of the Rutobwe *commune* prisoners;⁸⁵³ and (ii) “opportunistic”, considering the “links” between Witnesses CNAC and CNAA who were housed together at the United Nations Detention Facility (“UNDF”) in Arusha.⁸⁵⁴ Furthermore, Nzabonimana submits that the Trial Chamber should not have accepted Witness CNAC’s evasive explanation that a previous statement from 2008 failed to mention the complaint made by Mporanzi

⁸⁴⁹ Trial Judgement, para. 1066.

⁸⁵⁰ See Decision on Callixte Nzabonimana’s New Motion for Remedies, 16 October 2013.

⁸⁵¹ See *Ntakirutimana* Appeal Judgement, para. 252. The Appeals Chamber recalls that the findings concerning the events at Murambi on 18 April 1994 are based, in part, on the testimony of Witness CNAA.

⁸⁵² Nzabonimana Appeal Brief, para. 203.

⁸⁵³ Nzabonimana Appeal Brief, para. 203. In support of his argument, Nzabonimana argues that neither the Prosecution Pre-Trial Brief or any will-say statements indicated that Witness CNAC was going to testify on the release of the Rutobwe *commune* prisoners that the Trial Chamber at the time argued that in asking this question the Prosecution was “stepping out of line”. He submits that the Trial Chamber violated his right to fair trial by relying on Witness CNAC’s testimony as it was obtained under unfair circumstances. See *idem*.

⁸⁵⁴ Nzabonimana Appeal Brief, para. 203.

at the *bourgmestres*' meeting at the Gitarama *préfecture* office because he was answering questions put to him by investigators.⁸⁵⁵

307. The Prosecution responds that Nzabonimana's claim, regarding the manner in which the witness made the revelations, is incorrect and that, in any event, the Trial Chamber remedied any possible prejudice by postponing Witness CNAC's cross-examination for three months.⁸⁵⁶ The Prosecution also responds that Witnesses CNA and CNAC did not discuss their testimony in the case and, in any event, a mere risk of collusion is insufficient to render testimony inadmissible.⁸⁵⁷ As to Witness CNAC's explanation on his 2008 statement, the Prosecution responds that Nzabonimana simply disagrees with the Trial Chamber's assessment without demonstrating any error.⁸⁵⁸

308. The Appeals Chamber understands Nzabonimana's main argument to be that he lacked notice that Witness CNAC was going to testify on the release of prisoners in Rutobwe. The Appeals Chamber finds however that this issue has no impact on the Trial Chamber's assessment of Witness CNAC's credibility and, therefore, has no impact on Nzabonimana's convictions.⁸⁵⁹

309. As to the alleged links between Witnesses CNA and CNAC, the Appeals Chamber recalls the Trial Chamber's finding that Defence evidence relating to the alleged fabrication of evidence did not undermine the credibility of their testimonies.⁸⁶⁰ The Appeals Chamber has found that Nzabonimana failed to demonstrate that the Trial Chamber erred in this respect,⁸⁶¹ and considers that Nzabonimana's submission, regarding the witnesses staying together at the UNDF at the time of their testimonies, demonstrates no error in the Trial Chamber's assessment of Witness CNAC's credibility.

⁸⁵⁵ Nzabonimana Appeal Brief, para. 204. *See also* Exhibit D100 (Witness CNAC's Statement of 11 November 2008).

⁸⁵⁶ Prosecution Response Brief, para. 180.

⁸⁵⁷ Prosecution Response Brief, para. 187.

⁸⁵⁸ Prosecution Response Brief, para. 183.

⁸⁵⁹ In any event, the Appeals Chamber notes that during Witness CNAC's examination-in-chief, the Trial Chamber ruled on a Defence's objection to a question, that the Prosecution posed and that the witness had not yet answered, on whether *Bourgmestre* Mporanzi told the witness when he had been confronted by Nzabonimana. The Trial Chamber did not, as argued by Nzabonimana, observe that the Prosecution was stepping out of line. Rather, the Trial Chamber noted that the Prosecution conceded that it was stepping out of line with regard to the question and agreed to withdraw it – or not proceed. On that basis, the Trial Chamber decided to sustain the objection with regard to that question, the third one, while it noted the observations made by the Defence to the two first questions, asked by the Prosecution and answered by the witness without an objection raised by the Defence. *See* Witness CNAC, T. 16 December 2009 pp. 59, 65 (closed session). The Appeals Chamber further observes that Nzabonimana elected to cross-examine Witness CNAC on the release of the Rutobwe *commune* prisoners. *See* Witness CNAC, T. 12 April 2010 pp. 21, 22 (closed session). The Appeals Chamber also finds that Nzabonimana's undeveloped submission that "in-court testimony obtained under unfair circumstances is inadmissible" is insufficient to demonstrate that the Trial Chamber violated his fair trial right.

⁸⁶⁰ Trial Judgement, paras. 224-239.

⁸⁶¹ *See supra*, paras. 275-284.

310. Regarding Witness CNAC's 2008 statement, the Appeals Chamber notes the Trial Chamber's observation that Witness CNAC did not mention either the release of prisoners or the assertion that Nzabonimana struck *Bourgmestre* Mporanzi in his 2003 or 2008 statements.⁸⁶² The Trial Chamber further noted that Witness CNAC's 2008 statement indicated that it was the first time he was being interviewed about Nzabonimana and found the explanation that, during the interview, he simply answered the general questions posed to him by investigators to be reasonable.⁸⁶³ Nzabonimana fails to demonstrate that no reasonable trier of fact could have accepted this explanation.

311. The Appeals Chamber therefore dismisses Nzabonimana's challenges to the Trial Chamber's assessment of Witness CNAC's credibility in relation to the release of prisoners in Rutobwe *commune*.

(d) Murambi

312. The Trial Chamber found that the Defence evidence corroborated the Prosecution evidence with regard to a meeting at Murambi on 18 April 1994.⁸⁶⁴ Prosecution Witnesses CNA and CNAC as well as Defence Witnesses Mporanzi and T24 all attested to the meeting with the *bourgmestres* and to Nzabonimana's presence.⁸⁶⁵ Based on the totality of evidence, the Trial Chamber found that on 18 April 1994 the Prime Minister of Rwanda and other members of the Interim Government, including Nzabonimana, held a meeting at Murambi for the *bourgmestres* of Gitarama *préfecture*.⁸⁶⁶ Witnesses CNA, CNAC, Mporanzi, and T24, as well as a journalist from Radio Rwanda were among the attendees at the meeting.⁸⁶⁷

313. The Trial Chamber found that Nzabonimana ordered the killing of *bourgmestres* and other local officials opposed to the massacre of Tutsis during a meeting held at Murambi on 18 April 1994, and the ministers present, including Nzabonimana, used the meeting to threaten the *bourgmestres*.⁸⁶⁸ Based on this event, the Trial Chamber convicted Nzabonimana of direct and public incitement to commit genocide and conspiracy to commit genocide.⁸⁶⁹

(i) Alleged Errors in Assessing Prosecution Evidence

⁸⁶² Trial Judgement, para. 1071.

⁸⁶³ Trial Judgement, para. 1071.

⁸⁶⁴ Trial Judgement, para. 1158.

⁸⁶⁵ Trial Judgement, para. 1158.

⁸⁶⁶ Trial Judgement, para. 1158.

⁸⁶⁷ Trial Judgement, para. 1158.

⁸⁶⁸ Trial Judgement, para. 1179.

⁸⁶⁹ Trial Judgement, paras. 1747, 1749, 1773, 1775, 1800.

314. The Trial Chamber considered that Witnesses CNAA and CNAC corroborated each other's accounts regarding what occurred during the second Murambi meeting with the Gitarama *bourgmestres*, and found that Nzabonimana and other Government officials threatened the *bourgmestres* as a means of ensuring their participation in the genocide.⁸⁷⁰

315. Nzabonimana submits that the Trial Chamber erred in finding that the testimonies of Witnesses CNAA and CNAC corroborated each other.⁸⁷¹ Nzabonimana also submits that the Trial Chamber erred in its assessment of their credibility when it accepted their explanations for omissions and inconsistencies with previous statements.⁸⁷²

316. The Prosecution responds that the Trial Chamber's assessment of the mutually corroborative testimonies of Witnesses CNAA and CNAC was reasonable.⁸⁷³ It further submits that Nzabonimana fails to show that it was wholly unreasonable for the Trial Chamber to consider inconsistencies with previous statements and find that differences did not detract from the overall reliability of Witnesses CNAA and CNAC.⁸⁷⁴

a. Witnesses CNAA's and CNAC's Alleged Contradictions

317. Nzabonimana submits that based solely on the first meeting at Murambi, the Trial Chamber could not find that Witnesses CNAA and CNAC corroborated each other.⁸⁷⁵ Nzabonimana points to differences between their testimonies on Prime Minister Jean Kambanda's reaction to *Préfet* Fidèle Uwizye's concerns on the insecurity in Gitarama.⁸⁷⁶ He insists that the discrepancies in their testimonies cannot reasonably appear to be minor.⁸⁷⁷ In Nzabonimana's view, their discrepant testimonies demonstrate strikingly different attitudes that Kambanda had towards the Tutsi population in Gitarama *préfecture*.⁸⁷⁸ Nzabonimana further submits that the Trial Chamber erroneously found no significant difference between the account of Witness CNAC, that Kambanda

⁸⁷⁰ Trial Judgement, para. 1161.

⁸⁷¹ Nzabonimana Appeal Brief, para. 196.

⁸⁷² Nzabonimana Appeal Brief, para. 196.

⁸⁷³ Prosecution Response Brief, para. 173.

⁸⁷⁴ Prosecution Response Brief, para. 189.

⁸⁷⁵ Nzabonimana Appeal Brief, para. 213.

⁸⁷⁶ Nzabonimana Appeal Brief para. 210. Nzabonimana submits that the difference is not minor as according to Witness CNAA, the Prime Minister summarily dismissed Uwizye's the concern, while Witness CNAC testified that the Prime Minister reacted positively to a proposal to assist Tutsi refugees. *See idem*.

⁸⁷⁷ Nzabonimana Appeal Brief, para. 211.

⁸⁷⁸ Nzabonimana Appeal Brief, para. 211. Nzabonimana further submits that the Trial Chamber contradicted itself by first acknowledging "substantial differences" between the testimonies of Witnesses CNAA and CNAC, and then finding the differences to be minor. *See ibid.*, para. 209.

was present at the second meeting on 18 April 1994, and the account of Witness CNAA, who refuted Kambanda's presence during the second meeting.⁸⁷⁹

318. The Prosecution responds that the Trial Chamber correctly found that Witnesses CNAA and CNAC corroborated each other in key respects.⁸⁸⁰ It submits that Nzabonimana fails to show how the Trial Chamber unreasonably found inconsistencies in the testimonies of Witnesses CNAA and CNAC to be minor.⁸⁸¹

319. The Appeals Chamber recalls that every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others.⁸⁸² It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.⁸⁸³ It is ultimately within the discretion of the trial chamber to evaluate inconsistencies that may arise amongst witnesses' testimonies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.⁸⁸⁴

320. The Trial Chamber expressly noted consistencies and differences between the accounts of Witnesses CNAA and CNAC.⁸⁸⁵ It found that Witnesses CNAA and CNAC provided largely consistent and corroborating accounts of the events of 18 April 1994, leading up to a meeting held for the *bourgmestres* at Murambi.⁸⁸⁶

321. In particular, the Trial Chamber noted that "there were few substantial differences" between the testimonies of Witnesses CNAA and CNAC, the most significant being the response *Préfet* Uwizeye received to his plea for assistance during the first meeting.⁸⁸⁷ According to the Trial Chamber, Witness CNAA testified that Kambanda summarily dismissed Uwizeye's concerns and then promptly left the meeting, while Witness CNAC testified that the Prime Minister reacted warmly to the Bishop of Kabgayi's offer to provide refuge for Tutsis at his diocese.⁸⁸⁸ The Trial

⁸⁷⁹ Nzabonimana Appeal Brief, para. 214. Nzabonimana submits that, also according to Witness Mporanzi, Kambanda was present at the second meeting on 18 April 1994. *See idem, referring to* Trial Judgement, paras. 1117-1119.

⁸⁸⁰ Prosecution Response Brief, para. 174.

⁸⁸¹ Prosecution Response Brief, paras. 175, 176, 184.

⁸⁸² *See, e.g., Gatete* Appeal Judgement, para. 205; *Ntawukulilyayo* Appeal Judgement, para. 24, *referring to Munyakazi* Appeal Judgement, para. 103; *Nahimana et al.* Appeal Judgement, para. 428.

⁸⁸³ *See, e.g., Bizimungu* Appeal Judgement, para. 327; *Gatete* Appeal Judgement, para. 205; *Hategukimana* Appeal Judgement, para. 82.

⁸⁸⁴ *See, e.g., Ndahimana* Appeal Judgement, para. 93; *Munyakazi* Appeal Judgement, para. 71; *Rukundo* Appeal Judgement, para. 207.

⁸⁸⁵ Trial Judgement, paras. 1146, 1147.

⁸⁸⁶ Trial Judgement, para. 1146.

⁸⁸⁷ Trial Judgement, para. 1147.

⁸⁸⁸ Trial Judgement, para. 1147.

Chamber considered these differences to be minor and outweighed by the overall consistency between the two testimonies.⁸⁸⁹

322. Having reviewed the relevant parts of the record⁸⁹⁰ and the Trial Chamber's assessment of the evidence of Witnesses CNAA and CNAC, the Appeals Chamber finds that Nzabonimana has not demonstrated that no reasonable trier of fact could have concluded, as the Trial Chamber did, that this discrepancy on Kambanda's reaction was minor and outweighed by the overall consistency between the two testimonies. By focusing only on this discrepancy in the first meeting at Murambi,⁸⁹¹ Nzabonimana ignores that the Trial Chamber expressly noted substantial and numerous consistencies between Witnesses CNAA and CNAC.⁸⁹²

323. With respect to Kambanda's presence during the second meeting, the Trial Chamber acknowledged the following discrepancy between Witnesses CNAA's and CNAC's accounts: "Witness CNAC indicated that during the first part of the meeting with the *bourgmestres*, Prime Minister Kambanda was present and listened to their problems and dispensed advice. However, Witness CNAA made no mention of this occurrence".⁸⁹³ The Trial Chamber did not find this discrepancy to significantly diminish the credibility of the Prosecution evidence.⁸⁹⁴ In reaching this conclusion, the Trial Chamber observed that Witness CNAC's evidence was clear that only after Kambanda left did the remaining government officials, including Nzabonimana, begin describing the Tutsis as the "enemy" while threatening the assembled *bourgmestres* to collaborate with the

⁸⁸⁹ Trial Judgement, para. 1147. The Appeals Chamber is of the view that the Trial Chamber's finding on the "most significant difference" reflects the comparison of all discrepancies among themselves in order to identify which one deserves particular consideration. The Appeals Chamber finds no contradiction with the Trial Chamber's finding that this difference is rather minor when assessed in the context of the overall consistency between the testimonies of Witnesses CNAA and CNAC. *See idem.*

⁸⁹⁰ Witness CNAA testified that: "After the prime minister spoke, the former *préfet* of Gitarama, Fidèle Uwizeye, also took the floor. He said that we were facing important problems connected to the massacre and that [solutions] had to be found for those problems. He also talked about the numerous refugees who had just come to Kabgayi in Gitarama. When the prime minister heard those things, he said that he was very busy. He left the meeting" (*see* Witness CNAA, T. 15 December 2009 p. 9 (closed session) (*as corrected* in p. 10)). Witness CNAC testified that: "[Fidèle] Uwizeye asked the meeting to take a decision concerning these refugees who were living in a situation of insecurity and who did not have any food to survive, and who simply were not receiving any assistance", and Father Nsengiyumva responded promising that "the refugees could be received in homes – in the houses in the diocese, and that the government had to ensure the safety of those refugees, and that for his part, the diocese was going to provide food to those refugees. Prime Minister Jean Kambanda accepted that proposition – that proposal and asked that it be adopted as such" (*see* Witness CNAC, T. 16 December 2009 p. 68 (closed session)).

⁸⁹¹ *See* Nzabonimana Appeal Brief, paras. 209-213.

⁸⁹² According to the Trial Chamber, these consistencies include: "[T]he series of events beginning at the *préfecture* office and culminating in a meeting convened by the Prime Minister at the seat of the Interim Government in Murambi; their depiction of the Prime Minister's speech during the first meeting at Murambi as providing a broad overview of the Government's military approach to fighting the RPF; their description of the composition of the invitees to the first meeting; the presence of Ministers, including Nzabonimana and Witness T82, and other high-ranking national Government officials; the fact that no Minister took the floor during the meeting; *Préfet* Uwizeye's impassioned plea for assistance on behalf of his *préfecture*; and the fact that the *bourgmestres* were not informed of a second meeting convened specifically for them until after the first meeting at Murambi" (*see* Trial Judgement, para. 1146).

⁸⁹³ Trial Judgement, para. 1162.

⁸⁹⁴ Trial Judgement, para. 1162.

Interahamwe.⁸⁹⁵ From these findings, the Appeals Chamber understands that the Trial Chamber considered the threats to have been made in the Prime Minister's absence. On this basis, the Appeals Chamber finds that the Trial Chamber did not err in finding that Witnesses CNAA's and CNAC's accounts corroborated each other, while still acknowledging a discrepancy between both testimonies.⁸⁹⁶ The Trial Chamber was therefore reasonable in finding that the difference did not diminish the credibility of the Prosecution evidence. Nzabonimana fails to demonstrate any error in this regard.⁸⁹⁷

324. In light of the foregoing, the Appeals Chamber is not convinced that, based solely on the first meeting at Murambi, the Trial Chamber erred in finding that Witnesses CNAA and CNAC corroborated each other. Nzabonimana's arguments on the alleged contradictions between Witnesses CNAA and CNAC are therefore dismissed.

b. Witness CNAA's Credibility

325. Nzabonimana submits that the Trial Chamber erroneously accepted Witness CNAA's interpretation that the word "enemy" was synonymous with "Tutsis",⁸⁹⁸ thus allowing the alteration of the words that the witness attributed to Nzabonimana.⁸⁹⁹ Nzabonimana argues that in a prior statement, Witness CNAA claimed that Nzabonimana referred to "enemy", rather than "Tutsis" as he mentioned in his testimony at trial.⁹⁰⁰ He also points to a 1996 statement, where Witness CNAA did not mention Nzabonimana, nor threats against the *bourgmestres*, in the context of the Murambi meeting.⁹⁰¹ Nzabonimana claims that the Trial Chamber overlooked the gradual transformation of Witness CNAA's successive statements on the content of the Murambi meeting.⁹⁰² Nzabonimana further submits that Witness CNAA cannot be considered credible because, given the small number

⁸⁹⁵ Trial Judgement, para. 1162.

⁸⁹⁶ The Appeals Chamber notes that, according to Witness CNAA's testimony, Kambanda was not present at the second meeting because he left during the first meeting. *See* Witness CNAA, T. 15 December 2009 p. 9 (closed session). Witness CNAC testified that the Prime Minister was still present during the second meeting. *See* Witness CNAC, T. 16 December 2009 p. 69 (closed session).

⁸⁹⁷ The Trial Chamber did not make any determination on when the Prime Minister left or whether he left during the first or second meeting. The Appeals Chamber finds that it would have been clearer for the Trial Chamber to explicitly state that it found it unnecessary to determine the exact time when the Prime Minister left or whether he left during the first or second meeting. In this respect, the Appeals Chamber notes the Trial Chamber's finding that "[a]mong those who attended the meeting included Prime Minister Kambanda, *bourgmestres*, national heads of political parties and Interim Government Ministers". While this finding does not specify which part of the meeting is concerned, the Trial Chamber consistently held that it further found that "the Ministers present at the meeting, including Nzabonimana, used this meeting to threaten the *bourgmestres*", without any reference to the Prime Minister. *See* Trial Judgement, para. 1179. Despite the lack of clarity, the Appeals Chamber finds that whether the Prime Minister was still present during the second meeting held at Murambi is not material to the Trial Chamber's finding on the threats made by the Ministers present. *See infra*, para. 399.

⁸⁹⁸ Nzabonimana Appeal Brief, paras. 220, 221.

⁸⁹⁹ Nzabonimana Appeal Brief, para. 219, *referring to* Trial Judgement, para. 1163.

⁹⁰⁰ Nzabonimana Appeal Brief, para. 220.

⁹⁰¹ Nzabonimana Appeal Brief, para. 219. *See also* Exhibit D87A (Witness CNAA's Statement of 22 May 1996).

of participants and radio reports admitted into evidence, it was impossible to miss Kambanda's presence during the second meeting.⁹⁰³

326. The Prosecution responds that the words "enemy" and "accomplices" were used interchangeably to refer to Tutsis.⁹⁰⁴ It adds that Witness CNAA was responding to questions about *Bourgmestre* Jean-Paul Akayesu in his 1996 statement.⁹⁰⁵ According to the Prosecution, the fact that a witness incriminates an accused person, even if increasingly over time or through successive testimonies, does not in itself provide a basis for rejecting the witness's testimony.⁹⁰⁶ The Prosecution further responds that, by simply asserting that it was impossible for a witness to err about when Kambanda left, Nzabonimana does not show how the Trial Chamber was unreasonable.⁹⁰⁷

327. With respect to Nzabonimana's words, the Appeals Chamber notes that the Trial Chamber explicitly considered the different words that Witness CNAA attributed to Nzabonimana – "Tutsis", in his testimony at trial, and "enemy" and "accomplices" in a prior statement.⁹⁰⁸ The Trial Chamber recalled Witness CNAA's explanation during trial that: (i) the common goal of the ministers was to carry out the genocide; (ii) he could not recount what was said word for word, given the time elapsed; (iii) the enemy was the Tutsis during the genocide; and (iv) the idea behind the words was the same.⁹⁰⁹ The Trial Chamber considered the witness's explanations to be satisfactory, especially given the context of the targeted killings at the time and the fact that Tutsis were described as the enemy.⁹¹⁰ The Appeals Chamber finds the Trial Chamber's assessment to be reasonable.

328. With respect to Witness CNAA's 1996 statement, the Trial Chamber expressly considered that the witness did not mention Nzabonimana in relation to the Murambi meeting.⁹¹¹ The Trial Chamber recalled the witness's explanations that the statement referred to the morning meeting, whereas Nzabonimana only spoke in the afternoon, and that the statement related specifically to *Bourgmestre* Akayesu.⁹¹² The Trial Chamber found the witness's explanations reasonable.⁹¹³ The

⁹⁰² Nzabonimana Appeal Brief, para. 215.

⁹⁰³ Nzabonimana Appeal Brief, para. 214.

⁹⁰⁴ Prosecution Response Brief, para. 191, *referring to* Trial Judgement, para. 1163; Witness CNAA, T. 15 December 2009 pp. 57, 58. The Prosecution therefore argues that it did not matter whether Nzabonimana said that it was the Tutsis (Witness CNAA T. 15 December 2009 pp. 57, 58) or the enemy or the accomplices (Witness CNAA's Statement of 14 August 2003) who should not be supported. *See idem. See also* Exhibit D89 (Witness CNAA's Statement of 14 August 2003).

⁹⁰⁵ Prosecution Response Brief, para. 192.

⁹⁰⁶ Prosecution Response Brief, para. 197.

⁹⁰⁷ Prosecution Response Brief, para. 184.

⁹⁰⁸ Trial Judgement, para. 1163.

⁹⁰⁹ Trial Judgement, para. 1163.

⁹¹⁰ Trial Judgement, para. 1163.

⁹¹¹ Trial Judgement, para. 1149. *See also* Exhibit D87A (Witness CNAA's Statement of 22 May 1996).

⁹¹² Trial Judgement, para. 1149.

⁹¹³ Trial Judgement, para. 1149.

Appeals Chamber does not detect any error in this regard. The Appeals Chamber also does not find that the Trial Chamber overlooked the gradual transformation of Witness CNAA's statements, especially in light of the fact that the 1996 statement already mentions that none of the speeches of the members of the government was aimed at pacifying the situation or stopping the killings.⁹¹⁴

329. In the Appeals Chamber's view, Nzabonimana also fails to demonstrate that the Trial Chamber erroneously assessed Witness CNAA's credibility in relation to Kambanda's presence. As already discussed, the Trial Chamber considered that, compared to Witness CNAC's testimony, Witness CNAA made no mention of Kambanda's presence during the second meeting with the *bourgmestres*.⁹¹⁵ The Trial Chamber determined that this discrepancy did not significantly diminish the credibility of Prosecution evidence.⁹¹⁶ Nzabonimana fails to demonstrate how Witness CNAA's testimony that Kambanda left during the first meeting, compared to Witness CNAC's testimony, that he left during the second meeting, impacts Witness CNAA's credibility as a whole. Contrary to what Nzabonimana submits, the question is not whether it was possible for Witness CNAA to miss Kambanda's presence, but rather when the Prime Minister left and when the threats were made. Recalling that the Trial Chamber reasonably found that both witnesses consistently testified that the threats were made after Kambanda's departure,⁹¹⁷ the Appeals Chamber finds no merit in Nzabonimana's arguments.

330. Nzabonimana's arguments on Witness CNAA's credibility are accordingly dismissed.

c. Witness CNAC's Credibility

331. Nzabonimana submits that the Trial Chamber erroneously considered it immaterial that Witness CNAC, in his 2001 confession, omitted to mention the threats during the Murambi meeting.⁹¹⁸ He argues that it also erred in accepting Witness CNAC's explanation on the absence of Nzabonimana's name in the Prosecution's interview notes.⁹¹⁹ According to Nzabonimana, the Trial Chamber erroneously found the interview notes to be hearsay, even though the witness confirmed that their content reflected statements he gave in the *Karemera et al.* trial.⁹²⁰ Nzabonimana further claims that the Trial Chamber failed to consider that the words Witness CNAC attributed to Nzabonimana in this trial were the same as those the witness attributed to Karemera in the

⁹¹⁴ Exhibit D87A (Witness CNAA's Statement of 22 May 1996), p. 4 ("*n'allaient pas dans le sens de pacifier ou d'arrêter les tueries*").

⁹¹⁵ Trial Judgement, para. 1162.

⁹¹⁶ Trial Judgement, para. 1162.

⁹¹⁷ See *supra*, para. 323.

⁹¹⁸ Nzabonimana Appeal Brief, para. 216. Nzabonimana argues that even if Witness CNAC did not name the speakers in his 2001 confession, the witness also made no mention of the threats. See *idem*.

⁹¹⁹ Nzabonimana Appeal Brief, para. 217, referring to, *inter alia*, Trial Judgement, para. 1168.

Karemera et al. proceedings.⁹²¹ Nzabonimana submits that the Trial Chamber overlooked the gradual transformation of Witness CNAC's successive statements with respect to the content of the Murambi meeting,⁹²² and consistently accepted Witness CNAC's evasive explanations for his omissions.⁹²³

332. The Prosecution responds that the Trial Chamber reasonably found it unproblematic that Witness CNAC did not mention Nzabonimana in his 2001 confession because the witness did not name any other participants of the meeting.⁹²⁴ As for the interview notes, the Prosecution responds that: (i) there was no contradiction between Witness CNAC's testimony at trial and interviews he gave in *Karemera et al.*;⁹²⁵ (ii) Nzabonimana fails to acknowledge the Trial Chamber's finding that all the ministers made similar statements supporting the genocide;⁹²⁶ and (iii) Nzabonimana shows no error in the Trial Chamber's finding that Witness CNAC's testimony could not be impeached by the interview notes, which the witness neither prepared nor signed.⁹²⁷

333. The Appeals Chamber notes the Trial Chamber's observation that Witness CNAC's 2001 confession did not mention Nzabonimana in relation to the Murambi meeting.⁹²⁸ According to the Trial Chamber, this omission was not material since in the confession he did not name any attendees.⁹²⁹ The Appeals Chamber further observes that the Trial Chamber did not expressly consider the witness's omission of the threats in the 2001 confession.⁹³⁰ However, the Appeals Chamber notes that in the 2001 confession, a *Pro Justicia* document, Witness CNAC was answering questions regarding his role in killings, not about the conduct of the accused before this Tribunal.⁹³¹

334. As for the interview notes, the Trial Chamber considered the document to be hearsay and thus unreliable to impeach Witness CNAC's testimony.⁹³² In this regard, the Trial Chamber observed that the witness did not sign the document, which was an interview summary that the Prosecution prepared.⁹³³ The Appeals Chamber finds that the Trial Chamber reasonably

⁹²⁰ Nzabonimana Appeal Brief, para. 218.

⁹²¹ Nzabonimana Appeal Brief, para. 218.

⁹²² Nzabonimana Appeal Brief, para. 215.

⁹²³ Nzabonimana Appeal Brief, para. 217.

⁹²⁴ Prosecution Response Brief, para. 198.

⁹²⁵ Prosecution Response Brief, para. 200.

⁹²⁶ Prosecution Response Brief, para. 201.

⁹²⁷ Prosecution Response Brief, para. 202.

⁹²⁸ Trial Judgement, para. 1152.

⁹²⁹ Trial Judgement, para. 1152.

⁹³⁰ See Trial Judgement, para. 1152.

⁹³¹ Exhibit D97 (Witness CNAC's *Pro Justicia* of 29 November 2001).

⁹³² Trial Judgement, para. 1167.

⁹³³ Trial Judgement, para. 1167.

characterised the interview notes as hearsay, and that, in any event, any error in this regard would have no impact on its assessment of Witness CNAC's credibility.

335. The Appeals Chamber further observes that the Trial Chamber specifically addressed the Defence assertion that Witness CNAC attributed the same words to Nzabonimana and Karemera.⁹³⁴ The Trial Chamber noted Witness CNAC's testimony that several ministers spoke at the meeting,⁹³⁵ and that, according to Witness CNAA, the ministers reiterated the same message encouraging genocide.⁹³⁶ According to the Trial Chamber, that similar words were attributed to Nzabonimana and Karemera did not undermine the consistent and corroborated testimony that important personalities delivered essentially the same message to the *bourgmestres*.⁹³⁷ The Appeals Chamber considers the Trial Chamber's assessment to be reasonable. The Appeals Chamber further observes that Nzabonimana simply repeats arguments that the Trial Chamber already addressed, without demonstrating any errors.

336. The Appeals Chamber also observes that the Trial Chamber additionally did not find discrepancies between Witness CNAC's testimony and the interview notes to be significant.⁹³⁸ The Trial Chamber accepted the witness's explanation that Nzabonimana was not mentioned because the interviews were conducted in the context of Karemera's conduct, and that he had no reason to mention Nzabonimana's presence or utterances at this meeting.⁹³⁹ The Trial Chamber also observed that the interview notes specifically stated that the list of Government Ministers present was not exhaustive.⁹⁴⁰ Given the above, the Appeals Chamber is not convinced that the Trial Chamber erred in accepting the witness's explanation. Nzabonimana also fails to demonstrate any "transformation" of Witness CNAC's evidence in successive statements about the Murambi meeting.

337. Nzabonimana's arguments on Witness CNAC's credibility are therefore dismissed.

d. Reliance on Witnesses CNAA and CNAC for findings on Nzabonimana's order to kill *bourgmestres*

338. Nzabonimana submits that, given Witnesses CNAA's and CNAC's varying accounts over time on who spoke at the Murambi meeting and what Nzabonimana allegedly said, the Trial

⁹³⁴ Trial Judgement, para. 1169.

⁹³⁵ Trial Judgement, para. 1169.

⁹³⁶ Trial Judgement, para. 1169.

⁹³⁷ Trial Judgement, para. 1169.

⁹³⁸ Trial Judgement, para. 1168.

⁹³⁹ Trial Judgement, para. 1168.

⁹⁴⁰ Trial Judgement, para. 1168.

Chamber adopted a “holistic approach” to “circumvent the quest” for his exact words.⁹⁴¹ Nzabonimana argues that the Trial Chamber merely repeated Witness CNAA’s interpretation of Nzabonimana’s alleged utterances, but ignored that the utterances were made in a different context than those to which Witness CNAC testified.⁹⁴² According to Nzabonimana, the Trial Chamber simply concluded that the “ministers present at the meeting”, including Nzabonimana, used this meeting to threaten the *bourgmestres*, but did not identify the ministers present, or what they said.⁹⁴³ Nzabonimana adds that the Trial Chamber prejudiced him when it refused to admit transcripts of *Préfet* Uwizeye’s testimony in the *Bizimungu et al.* trial.⁹⁴⁴

339. Nzabonimana further submits that the Trial Chamber erroneously convicted him of ordering the killing of *bourgmestres* without determining his exact words, his alleged order, or the intended audience.⁹⁴⁵ Finally, he submits that the Trial Chamber erred by accepting the testimonies of Witnesses CNAA and CNAC with respect to the order to kill, but not for the killings that allegedly resulted from the Murambi meeting.⁹⁴⁶

340. The Prosecution responds that Nzabonimana fails to show that the Trial Chamber’s assessment of evidence and findings on the Murambi meeting were unreasonable.⁹⁴⁷ The Prosecution submits that Nzabonimana’s claim, that the Trial Chamber should have admitted *Préfet* Uwizeye’s transcript from *Bizimungu et al.*, is undeveloped.⁹⁴⁸ With regard to the subsequent killings, the Prosecution argues that the Trial Chamber had the discretion to rely on some but not all of Witnesses CNAA’s and CNAC’s testimony.⁹⁴⁹

341. The Trial Chamber considered that Witnesses CNAA and CNAC corroborated each other’s accounts on circumstances during the second meeting at Murambi with the Gitarama *bourgmestres*.⁹⁵⁰ According to the Trial Chamber:

Both witnesses described a scenario where the *bourgmestres* were intimidated by various high-ranking Government officials, including Nzabonimana, who took turns making various threats toward the *bourgmestres*, including death or removal from office, if they did not participate in the Government agenda to eliminate the “enemy,” which was understood to be the Tutsis. Both attributed similar menacing quotes to Nzabonimana, namely that if they did not collaborate with the *Interahamwe*, they would be deemed accomplices of the *Inkotanyi*, or Tutsis. As a result, there would be no security in their *communes* and they would suffer the consequences. The Trial Chamber considered that Witnesses CNAA and CNAC have provided internally credible and

⁹⁴¹ Nzabonimana Appeal Brief, para. 222.

⁹⁴² Nzabonimana Appeal Brief, para. 223.

⁹⁴³ Nzabonimana Appeal Brief, para. 223.

⁹⁴⁴ Nzabonimana Appeal Brief, para. 224.

⁹⁴⁵ Nzabonimana Appeal Brief, paras. 222, 223, 247, 248.

⁹⁴⁶ Nzabonimana Appeal Brief, para. 231.

⁹⁴⁷ Prosecution Response Brief, para. 234.

⁹⁴⁸ Prosecution Response Brief, para. 177.

⁹⁴⁹ Prosecution Response Brief, para. 185.

⁹⁵⁰ Trial Judgement, para. 1161.

consistent accounts of a meeting in which Nzabonimana and other Government officials threatened the *bourgmestres* as a means of ensuring their participation in the genocide.⁹⁵¹

342. The Appeals Chamber observes that Witness CNAA testified that :

[...] Callixte Nzabonimana, like other ministers who were present – well, they imposed themselves on us who were at the meeting. And he told us – or, rather, he imposed himself on us and told us that anyone who was working for the administration who would show any support to the Tutsi would be seen as an enemy.⁹⁵² [...]

[...] Callixte Nzabonimana said that some *bourgmestres* no longer enjoyed the confidence of their people because those *bourgmestres* were supporting the *Inkotanyis* and the Tutsis, and that those *bourgmestres* had to be removed from their post. [...] In a nutshell, all the ministers said almost the same thing, saying that we had to stop supporting the Tutsis. This was actually the first meeting in Gitarama during which high-level officials in the country were making such statements.⁹⁵³ [...]

343. Witness CNAC testified that:

[Nzabonimana] also took the floor and he gave some explanations on the problems which we had raised and which concerned the *Interahamwe* group which was armed and which was using those weapons to kill people. He said that the people who were claiming that the *Interahamwes* were worsening the security situation were people who were against the *Interahamwes*. He said that the *Interahamwes* had shown their authority in Kigali town because, as he said, if they had not been there, Kigali town would have fallen into the hands of the enemy. He asked the *bourgmestre* to collaborate with the *Interahamwes* if they wanted security to reign in their *communes*. And he also warned us by saying, "If you do not collaborate with the *Interahamwe*, there will be no security in your *communes* and you will suffer the consequences." That is what he told us during that meeting.⁹⁵⁴

344. The Appeals Chamber notes that both witnesses do not attribute the same words to Nzabonimana. Specifically, the utterances the Trial Chamber referenced appear to stem largely from Witness CNAC's testimony.⁹⁵⁵ However, this does not mean that the Trial Chamber erred in observing that both witnesses "attributed similar menacing quotes to Nzabonimana".⁹⁵⁶ Both Prosecution witnesses provided consistent accounts of the meeting at Murambi, where Nzabonimana and other government officials threatened the *bourgmestres* to ensure their participation in the genocide.⁹⁵⁷ Also, the Trial Chamber reasonably found that both witnesses described a scenario where high-ranking government officials, including Nzabonimana, took turns threatening *bourgmestres* and where the *bourgmestres* felt intimidated.⁹⁵⁸ In the Appeals Chamber's view, it was not necessary for the Trial Chamber to determine Nzabonimana's exact words, the identity of all the ministers present, or precisely what they said. The Appeals Chamber also recalls

⁹⁵¹ Trial Judgement, para. 1161 (internal reference omitted).

⁹⁵² Witness CNAA, T. 14 December 2009 p. 64 (*as corrected by* p. 64, lines 28, 31, 32).

⁹⁵³ Witness CNAA, T. 15 December 2009 p. 10 (closed session).

⁹⁵⁴ Witness CNAC, T. 16 December 2009 p. 71 (closed session).

⁹⁵⁵ See Trial Judgement, para. 1161, *referring to* Witness CNAA, T. 15 December 2009 pp. 10, 11 (closed session); Witness CNAC, T. 16 December 2009 pp. 70, 71 (closed session).

⁹⁵⁶ See Trial Judgement, para. 1161.

⁹⁵⁷ See Trial Judgement, para. 1161.

⁹⁵⁸ See Trial Judgement, para. 1161.

that two *prima facie* credible testimonies need not be identical in all aspects in order to be corroborative and that corroboration may exist even when some details differ.⁹⁵⁹

345. Turning to Nzabonimana's alleged "orders", the Appeals Chamber recalls the Trial Chamber's finding that "Nzabonimana ordered the killing of *bourgmestres* and other local officials opposed to the massacres" during the Murambi meeting.⁹⁶⁰ The Appeals Chamber is unable to see how this finding was supported by the evidence of Witnesses CNAA and CNAC. Indeed, Witness CNAC only referenced the killing of *bourgmestres* when explaining how he understood Nzabonimana's threat and the possible consequences.⁹⁶¹ As noted earlier, Witness CNAA only stated that "Callixte Nzabonimana said that some *bourgmestres* no longer enjoyed the confidence of their people because those *bourgmestres* were supporting the *Inkotanyi* and the Tutsis, and that those *bourgmestres* had to be removed from their post".⁹⁶² At no point do the testimonies of Witnesses CNAA and CNAC reveal that Nzabonimana instructed a person under his authority to commit an offence. The Appeals Chamber therefore finds that the Trial Chamber erroneously determined that Nzabonimana ordered the killing of *bourgmestres* and other local officials. However, since Nzabonimana was not convicted of ordering genocide but of conspiracy to commit genocide and direct and public incitement to commit genocide in relation to the Murambi meeting,⁹⁶³ the Appeals Chamber considers that this error has no impact on the verdict.

346. The Appeals Chamber notes that Nzabonimana's argument regarding *Préfet Uwizeye's* transcript from the *Bizimungu et al.* case is undeveloped as he fails to indicate any request he made to admit the transcript.⁹⁶⁴ Furthermore, Nzabonimana points to a decision that does not relate to *Préfet Uwizeye's* transcript from the *Bizimungu et al.* proceedings.⁹⁶⁵ The Appeals Chamber thus summarily dismisses his argument in this regard.

347. The Appeals Chamber now turns to arguments that the Trial Chamber erred by accepting Witnesses CNAA's and CNAC's testimonies on the order to kill, while rejecting their evidence on the deaths following the Murambi meeting.⁹⁶⁶ Recalling that it is not unreasonable for a trier of fact

⁹⁵⁹ See *supra*, para. 184.

⁹⁶⁰ Trial Judgement, para. 1179.

⁹⁶¹ Witness CNAC, 16 December 2009 p. 71 (closed session) ("Q. Now, Witness, what did you understand him to mean by the words, 'you would suffer the consequences'? A. For us, the consequences he was referring to was the fact that we ran the risk of being removed from our positions or that we could even be killed"). See also Trial Judgement, para. 1160.

⁹⁶² Witness CNAA, T. 15 December 2009 p. 10 (closed session).

⁹⁶³ See Trial Judgement, paras. 1747, 1749, 1773, 1775.

⁹⁶⁴ See Nzabonimana Appeal Brief, para. 224.

⁹⁶⁵ See Nzabonimana Appeal Brief, para. 224, referring to 30 April 2012 Decision.

⁹⁶⁶ Nzabonimana Appeal Brief, para. 231.

to accept some, but reject other parts of a witness's testimony,⁹⁶⁷ the Appeals Chamber notes the Trial Chamber's observation that the testimonies of Witnesses CNAA and CNAC on the killing of local officials after the Murambi meeting were inconsistent, vague, and based entirely on hearsay.⁹⁶⁸ Specifically, it considered that the witnesses merely asserted, in a conclusory manner, that the deaths resulted from the meetings, and that only Witness CNAA testified to the killings of *Conseillers* Bernard Twagiramukiza and Wallace Gasigwa.⁹⁶⁹ As a result, the Trial Chamber held that the Prosecution demonstrated no evidentiary nexus between the Murambi meeting and the deaths and did not establish beyond a reasonable doubt that Nzabonimana's utterances at the Murambi meeting substantially contributed to the deaths of local officials.⁹⁷⁰ The Appeals Chamber sees no error in this assessment. Therefore, the Appeals Chamber finds that Nzabonimana fails to demonstrate how the Trial Chamber erred in accepting the testimonies of Witnesses CNAA and CNAC as corroborated and consistent on the Murambi meeting, while rejecting their evidence on the killings as inconsistent, vague, and hearsay.

348. Based on the foregoing, the Appeals Chamber considers that Nzabonimana fails to demonstrate the Trial Chamber committed any error warranting the Appeals Chamber's intervention.

e. Conclusion

349. Accordingly, the Appeals Chamber finds that Trial Chamber did not err in finding that the testimonies of Prosecution Witnesses CNAA and CNAC corroborated each other. The Appeals Chamber also considers that the Trial Chamber did not err in the assessment of Witnesses CNAA's and CNAC's credibility. Nzabonimana's arguments challenging the Prosecution's evidence with respect to the event at Murambi on 18 April 1994 are dismissed.

(ii) Defence Evidence

350. Nzabonimana submits that the Trial Chamber excluded, without providing valid reasons, Defence evidence showing that Witnesses CNAA and CNAC could not be believed beyond reasonable doubt.⁹⁷¹ In particular, Nzabonimana submits that the Trial Chamber erred, to his prejudice, by excluding Defence Witness T24's testimony on the incorrect basis that the witness "did not hear much of what was said", while, Nzabonimana argues, the witness testified that he "did

⁹⁶⁷ See, e.g., *Ndahimana* Appeal Judgement, para. 183; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155.

⁹⁶⁸ Trial Judgement, para. 1187.

⁹⁶⁹ Trial Judgement, para. 1187.

⁹⁷⁰ Trial Judgement, para. 1187.

⁹⁷¹ Nzabonimana Appeal Brief, para. 227.

not expect much from that meeting”.⁹⁷² In Nzabonimana’s view, without this error the Trial Chamber would not have found Witness T24’s testimony to have little probative value or overlooked that Witness T24 corroborated Witness Mporanzi on the absence of threats made by Nzabonimana and on the general dissatisfaction from the *bourgmestres* regarding security problems.⁹⁷³

351. Nzabonimana also submits that the Trial Chamber erred by failing to devote the requisite attention to Exhibit D86.⁹⁷⁴ He claims that Exhibit D86 reveals the “lies” of Witnesses CNAA and CNAC and corroborates Witnesses T24’s and Mporanzi’s evidence that the Murambi meeting was intended to find solutions to reinstate peace, that Prime Minister Kambanda announced measures to maintain security, that the *bourgmestres* expressed concerns during the second meeting, and that the government promised to help them.⁹⁷⁵

352. Nzabonimana further submits that the Trial Chamber erred by dismissing the evidence of Defence Witness T133, which it erroneously categorised as hearsay evidence, while admitting Witness CNAC’s hearsay evidence.⁹⁷⁶ Nzabonimana submits that, by erroneously dismissing Witness T133’s evidence, Nzabonimana was deprived of evidence corroborating Witnesses Mporanzi and T24, which would have in turn led the Trial Chamber to further question the credibility of Witnesses CNAA and CNAC.⁹⁷⁷

353. The Prosecution responds that Witness T24 admitted to lying,⁹⁷⁸ and that his recollection of the Murambi meeting was vague.⁹⁷⁹ It therefore argues that the Trial Chamber’s possibly erroneous reliance on the English transcripts does not affect its overall conclusion that Witness T24’s testimony had “little probative value”.⁹⁸⁰ The Prosecution further submits that Nzabonimana fails to show how it was unreasonable for the Trial Chamber to reject the “second-hand account” contained in Exhibit D86.⁹⁸¹ Finally, the Prosecution argues that contrary to Nzabonimana’s claim, Witness

⁹⁷² Nzabonimana Appeal Brief, para. 226, *referring to* Trial Judgement, para. 1176 and Witness T24, T. 27 April 2010 p. 5.

⁹⁷³ Nzabonimana Appeal Brief, para. 226.

⁹⁷⁴ Nzabonimana Appeal Brief, para. 228.

⁹⁷⁵ Nzabonimana Appeal Brief, para. 228.

⁹⁷⁶ Nzabonimana Appeal Brief, para. 229.

⁹⁷⁷ Nzabonimana Appeal Brief, para. 229. Nzabonimana contends that Witness T133 corroborated Witnesses Mporanzi and T24 on the fact that the main purpose of the Murambi meeting was the issue of refugees, that no one was threatened, and that Nzabonimana did not speak. *See idem*. Nzabonimana further submits that the Trial Chamber did not proceed to look for corroboration between Defence witnesses when their testimonies were assessed in light of the Defence evidence. *See ibid.*, para. 230. The Appeals Chamber notes that Nzabonimana’s submissions relating to corroboration of Defence evidence are dealt with in the following section. *See infra*, paras. 358-362.

⁹⁷⁸ Prosecution Response Brief, para. 205.

⁹⁷⁹ Prosecution Response Brief, para. 205.

⁹⁸⁰ Prosecution Response Brief, para. 206.

⁹⁸¹ Prosecution Response Brief, para. 232.

T133's testimony about the meeting was hearsay,⁹⁸² and that in any event his evidence that Witness Mporanzi did not mention the threats Nzabonimana made at the meeting is undermined by Witness T133's concession that Witness Mporanzi did not tell him what every speaker said during the meeting.⁹⁸³

354. The Appeals Chamber notes that according to the English version of the transcript, Witness T24 stated that "[...] I did not hear much at that meeting",⁹⁸⁴ while in the French version of the transcript Witness T24 stated that "[...] *je n'attendais pas grand-chose de cette réunion*".⁹⁸⁵ The Appeals Chamber observes a difference between the transcripts – the witness stating that he did not hear much or he was not expecting much from the meeting. However, the Appeals Chamber is not persuaded that the Trial Chamber's assessment of Witness T24's testimony would have been different on the basis of the French version of the transcript. In this respect, the Appeals Chamber notes that the Trial Chamber found Witness T24's evidence to have little probative value because Witness T24 was unable to: (i) provide many details of the meeting, including the identities of the ministers in attendance apart from Nzabonimana;⁹⁸⁶ (ii) provide details of what was said during the meeting;⁹⁸⁷ and (iii) recall whether Nzabonimana or any other *bourgmestre* took to the floor.⁹⁸⁸ The Appeals Chamber further notes that the Trial Chamber's finding of the limited probative value was in addition to its determination that the witness's credibility was seriously undermined by his admission to providing a false statement.⁹⁸⁹ Given the Trial Chamber's findings on Witness T24, the Appeals Chamber finds that Nzabonimana fails to demonstrate that the Trial Chamber erred in not considering corroboration between Witnesses Mporanzi's and T24's testimony.

355. As to Exhibit D86, the Appeals Chamber observes that the Trial Chamber considered the exhibit and its contents.⁹⁹⁰ The Trial Chamber accepted Witness CNAA's explanation that the radio report mentioned only part of what was said at the meeting and it noted that the report contained a second-hand account of the proceedings.⁹⁹¹ Nzabonimana fails to demonstrate how it was unreasonable for the Trial Chamber to prefer and rely on the first-hand testimony of Prosecution witnesses.

⁹⁸² Prosecution Response Brief, para. 207.

⁹⁸³ Prosecution Response Brief, para. 207.

⁹⁸⁴ Witness T24, T. 27 April 2010 p. 5 (closed session).

⁹⁸⁵ Witness T24, T. 27 April 2010 p. 6 (French) (closed session).

⁹⁸⁶ Trial Judgement, para. 1176.

⁹⁸⁷ Trial Judgement, para. 1176.

⁹⁸⁸ Trial Judgement, para. 1176.

⁹⁸⁹ Trial Judgement, para. 1175.

⁹⁹⁰ Trial Judgement, para. 1164.

⁹⁹¹ Trial Judgement, para. 1164. *See also* Exhibit D86 (Transcript of Radio Rwanda Broadcast, 19 April 1994).

356. Finally, the Appeals Chamber notes that the Trial Chamber found Witness T133's testimony of limited probative value because it was entirely hearsay and the witness acknowledged that his *bourgmestre* did not inform him of everything that occurred during the meeting.⁹⁹² In this regard, the Trial Chamber considered that Witness T133 did not attend the Murambi meeting and conceded that his *bourgmestre* was his sole source of information.⁹⁹³ The Appeals Chamber finds no error in the Trial Chamber classifying Witness T133's evidence as hearsay. Nzabonimana therefore fails to demonstrate that the Trial Chamber erred in preferring the first-hand testimony of the Prosecution witnesses over the hearsay testimony of Witness T133, and in not using T133's testimony to corroborate Witnesses Mporanzi and T24.

357. Nzabonimana's arguments are accordingly dismissed.

(iii) Use of Corroboration

358. Nzabonimana submits that the Trial Chamber erroneously used corroboration to favour the Prosecution.⁹⁹⁴ Nzabonimana argues that, on one hand, the Trial Chamber consistently relied on Witnesses T24 and Mporanzi, whom it found generally not credible, to corroborate Prosecution witnesses – an approach the Tribunal has deemed unreasonable.⁹⁹⁵ Nzabonimana submits that, on the other hand, the Trial Chamber consistently disregarded the testimonies of Witnesses T24 and Mporanzi, on the pretext that they were not generally credible, when they contradicted Prosecution evidence.⁹⁹⁶

359. Nzabonimana further submits that the Trial Chamber erred by relying on Defence witnesses to corroborate Prosecution witnesses on disputed facts.⁹⁹⁷ He submits that based on the witnesses acknowledgment of facts not in dispute, the Trial Chamber erroneously concluded that Prosecution and Defence witnesses corroborated each other in all aspects of their testimonies, including contentious issues such as Nzabonimana's presence at the Murambi meeting.⁹⁹⁸ Specifically, he argues that Witnesses T24 and Mporanzi rebutted the accounts given by Witnesses CNAA and

⁹⁹² Trial Judgement, para. 1177.

⁹⁹³ Trial Judgement, paras. 1128-1131.

⁹⁹⁴ Nzabonimana Appeal Brief, para. 6. The Appeals Chamber notes that Nzabonimana's arguments are made under the "preliminary issue" section of his Appeal Brief and it has decided to examine them as they are linked to his challenges made under his Fifth Ground of Appeal.

⁹⁹⁵ Nzabonimana Appeal Brief, paras. 7, 9, referring to *Muvunyi I* Appeal Judgement, para. 131; *Rutaganda* Appeal Judgement paras. 496-506; *Nsengimana* Trial Judgement, para. 443. Nzabonimana submits that this approach enabled the Trial Chamber to establish and enhance the credibility of Prosecution witnesses. See *ibid.*, para. 7.

⁹⁹⁶ Nzabonimana Appeal Brief, para. 8.

⁹⁹⁷ Nzabonimana Appeal Brief, para. 10.

⁹⁹⁸ Nzabonimana Appeal Brief, para. 10.

CNAC regarding, *inter alia*, the Murambi meeting on 18 April 1994, and yet the Trial Chamber found that they corroborated each other.⁹⁹⁹

360. The Prosecution responds that contrary to Nzabonimana's argument, trial chambers can consider witnesses to partially corroborate each other, and argues that the jurisprudence Nzabonimana refers to is not on point.¹⁰⁰⁰ The Prosecution further submits that Nzabonimana incorrectly claims that the Trial Chamber found corroboration where witnesses in fact contradicted each other.¹⁰⁰¹ It argues that the Trial Chamber did not find that Witnesses Mporanzi and T24 corroborated all allegations on the Murambi meeting, it simply found that they corroborated certain elements of Prosecution evidence.¹⁰⁰²

361. The Appeals Chamber notes that, contrary to Nzabonimana's submission, the Trial Chamber did not find Witnesses T24 and Mporanzi "generally not credible" but that their credibility was "seriously undermine[d]" due to their admission of having provided false statements to Prosecution investigators.¹⁰⁰³ Thus, in the Appeals Chamber's view, the Trial Chamber's finding on their credibility did not amount to a conclusion that the witnesses could not be relied upon at all, but reflected a cautious approach in its assessment of their evidence. This did not bar the Trial Chamber from considering some aspects of Witnesses T24's and Mporanzi's testimonies to corroborate Prosecution evidence. Recalling again that it is not unreasonable for a trial chamber to accept some parts of a witness's testimony while rejecting others,¹⁰⁰⁴ the Appeals Chamber finds no error in the Trial Chamber's reliance on Witnesses T24's and Mporanzi's evidence to corroborate Prosecution evidence while rejecting it elsewhere.¹⁰⁰⁵ Nzabonimana fails to demonstrate that the Trial Chamber used corroboration to favour the Prosecution.

362. In addition, the Appeals Chamber observes that, contrary to Nzabonimana's claim, the witnesses did not dispute his presence at the Murambi meeting.¹⁰⁰⁶ All four witnesses testified to the existence of the Murambi meeting on 18 April 1994 and Nzabonimana's attendance.¹⁰⁰⁷ The Trial Judgement accurately reflected the testimony of the four witnesses, from which the Trial

⁹⁹⁹ Nzabonimana Appeal Brief, para. 11, *referring, inter alia*, to Trial Judgement, para. 1158.

¹⁰⁰⁰ Prosecution Response Brief, para. 10.

¹⁰⁰¹ Prosecution Response Brief, para. 11.

¹⁰⁰² Prosecution Response Brief, para. 11.

¹⁰⁰³ Trial Judgement, paras. 143, 234.

¹⁰⁰⁴ *See, e.g., Ndahimana Appeal Judgement*, para. 183; *Bagosora and Nsengiyumva Appeal Judgement*, para. 243; *Ntawukulilyayo Appeal Judgement*, para. 155.

¹⁰⁰⁵ *Cf. Šainović et al. Appeal Judgement*, para. 632, where the Appeals Chamber found that the Trial Chamber was entitled to partly rely on a witness's testimony as corroboration on one part of his evidence, while placing little weight on other parts of his evidence.

¹⁰⁰⁶ *See Nzabonimana Appeal Brief*, para. 11, *referring to, inter alia*, Trial Judgement para. 1158.

¹⁰⁰⁷ Trial Judgement, paras. 1082-1089 (Witness CNAA), 1091-1103 (Witness CNAC), 1108-1121 (Witness Mporanzi), 1124-1125 (Witness T24).

Chamber found that they corroborated each other on this fact.¹⁰⁰⁸ Accordingly, the Appeals Chamber dismisses Nzabonimana's arguments on the use of corroboration in their entirety.

(e) Musambira

363. The Trial Chamber found that in May 1994 Nzabonimana was present at the reinstatement ceremony of the *bourgmestre* of Musambira *commune* during which Nzabonimana accused the attending *bourgmestres* of not being supportive of the killings of Tutsis, warned them that they could be replaced by *Interahamwe*, and refused to denounce the killings of Tutsis.¹⁰⁰⁹ The Trial Chamber relied on the eyewitness evidence of Witnesses CNAA and CNAC whose testimony it found credible.¹⁰¹⁰ However, the Trial Chamber found that there was insufficient evidence that Nzabonimana's words at the meeting substantially contributed to any subsequent crime, and, accordingly, it did not convict him of genocide based on this event.¹⁰¹¹ The Trial Chamber found, nevertheless, that the evidence provided circumstantial evidence of Nzabonimana's genocidal intent.¹⁰¹²

364. Nzabonimana challenges the Trial Chamber's assessment of the discrepancies between Witness CNAA's testimony and previous statements and makes various other challenges with respect to this event.¹⁰¹³

(i) Witness CNAA's Credibility

365. Nzabonimana submits that the Trial Chamber failed to consider a substantial modification between Witness CNAA's testimony, where he added the fact that *bourgmestres* would be replaced by members of Nzabonimana's party, and a previous statement from 2008, which was the only time Witness CNAA mentioned the Musambira meeting.¹⁰¹⁴ Nzabonimana further submits that the Trial Chamber erred in assessing differences between Witness CNAA's testimonies in the *Karemura et al.* and Nzabonimana trials.¹⁰¹⁵ In particular, he contends that, at trial, he was alleged to have accused the *bourgmestres* of not supporting the killings, threatened to replace them with

¹⁰⁰⁸ Trial Judgement, para. 1158.

¹⁰⁰⁹ Trial Judgement, para. 1224. *See also ibid.*, para. 1727.

¹⁰¹⁰ Trial Judgement, para. 1223. *See ibid.*, paras. 1213, 1214, 1221.

¹⁰¹¹ Trial Judgement, para. 1728. *See also ibid.*, para. 1225.

¹⁰¹² Trial Judgement, para. 1728. In the Trial Judgement's legal finding section on conspiracy to commit genocide, the Trial Chamber found that the words spoken by Nzabonimana in the Musambira meeting established the intent to encourage the *bourgmestres* and the population to kill Tutsis. *See ibid.*, para. 1746.

¹⁰¹³ Nzabonimana Appeal Brief, paras. 233-241. Contrary to what Nzabonimana submits in paragraph 232 of his Appeal Brief, he does not develop any argument on the alleged inconsistencies between Witnesses CNAA and CNAC with respect to this event.

¹⁰¹⁴ Nzabonimana Appeal Brief, paras. 233, 237. Nzabonimana asserts that Witness CNAA did not mention the Musambira meeting in his earlier statements in 1996 and 2003 and that in the 2008 statement, the witness only accused the *bourgmestres* of being useless and inefficient. *See idem.*

¹⁰¹⁵ Nzabonimana Appeal Brief, para. 234.

Interahamwe, and refused to denounce the massacres on the radio.¹⁰¹⁶ Nzabonimana argues that Witness CNAA's evidence in the *Karemera et al.* trial was that Nzabonimana denied responsibility for blaming the *bourgmestres* for not doing anything to address the security situation, and that he challenged the fact that he had to denounce the situation for which he did not consider himself responsible.¹⁰¹⁷ In Nzabonimana's view, Witness CNAA attributed different words to him and provided "radically different" testimonies in the *Karemera et al.* trial and in this case when describing the same meeting.¹⁰¹⁸

366. The Prosecution responds that the omission in mentioning the Musambira meeting in Witness CNAA's earlier statements was not significant since they did not focus on Nzabonimana.¹⁰¹⁹ The Prosecution further submits that the Trial Chamber reasonably found that the substance of Witness CNAA's recollection was the same between his testimony at trial and his 2008 statement.¹⁰²⁰ The Prosecution responds that Witness CNAA's testimony in the *Karemera et al.* trial was consistent with his testimony in this case where the witness simply provided additional information.¹⁰²¹ It argues that Nzabonimana has not shown that the Trial Chamber erred in accepting the witness's explanation that he gave the additional information regarding Nzabonimana's threat to replace the *bourgmestres* since Nzabonimana was the accused in this case.¹⁰²²

367. The Appeals Chamber notes that the Trial Chamber explicitly considered the alleged omissions and contradictions raised by Nzabonimana. In particular, with respect to Witness CNAA's 2008 statement, the Trial Chamber noted that the witness indicated that he testified in three previous cases and that he was "willing this time around to talk in more detail about [...] Nzabonimana".¹⁰²³ The Trial Chamber considered that this reasonably accounted for the previous omissions on the Musambira meeting, as the 2008 statement was Witness CNAA's first to specifically address Nzabonimana.¹⁰²⁴ Nzabonimana merely repeats on appeal the same arguments raised at trial without demonstrating how the Trial Chamber erred.¹⁰²⁵ In the same vein, the Appeals Chamber observes that the Trial Chamber explicitly considered that the witness did not mention that Nzabonimana wanted to replace the *bourgmestres* in Witness CNAA's 2008 statement.¹⁰²⁶

¹⁰¹⁶ Nzabonimana Appeal Brief, para. 236.

¹⁰¹⁷ Nzabonimana Appeal Brief, para. 236.

¹⁰¹⁸ Nzabonimana Appeal Brief, paras. 234-236.

¹⁰¹⁹ Prosecution Response Brief, para. 193.

¹⁰²⁰ Prosecution Response Brief, para. 195.

¹⁰²¹ Prosecution Response Brief, para. 194.

¹⁰²² Prosecution Response Brief, para. 194.

¹⁰²³ Trial Judgement, para. 1218, *referring to* Exhibit D94A (Witness CNAA's Statement of 2 October 2008).

¹⁰²⁴ Trial Judgement, para. 1218.

¹⁰²⁵ See Trial Judgement, para. 1218; Nzabonimana Closing Brief, paras. 542, 543.

¹⁰²⁶ Trial Judgement, para. 1219, *referring to* Nzabonimana Closing Brief, para. 543.

Nzabonimana merely disagrees with the Trial Chamber's conclusions without substantiating any alleged error.

368. The Trial Chamber also addressed the alleged contradiction between Witness CNAA's testimony in the *Karemera et al.* and Nzabonimana trials regarding the Musambira event. In the Appeals Chamber's view, the Trial Chamber reasonably accepted Witness CNAA's explanation that he was not providing comprehensive information about Nzabonimana in the *Karemera et al.* case since Nzabonimana was not on trial in that case.¹⁰²⁷ The Appeals Chamber considers that the fact that Witness CNAA did not testify that Nzabonimana threatened to replace the *bourgmestres* with *Interahamwe*, in a separate proceeding involving different accused, does not undermine the witness's credibility. Furthermore, a review of the trial record shows that Witness CNAA only mentioned the threat to replace *bourgmestres* in response to follow-up questions on who, according to Nzabonimana, would be in a position to perform the work of the *bourgmestres*.¹⁰²⁸ The Appeals Chamber further finds that the Trial Chamber reasonably found that the two testimonies were not materially inconsistent,¹⁰²⁹ and that "[i]n both instances, Witness CNAA recounted that the *bourgmestres* accused Nzabonimana of being responsible for violence in Gitarama, and Nzabonimana dismissed their calls to denounce the violence".¹⁰³⁰ Nzabonimana has not demonstrated how the Trial Chamber erred in its assessment of the differences between Witness CNAA's testimony in the *Karemera et al.* and Nzabonimana trials.

(ii) Other Alleged Errors

369. Nzabonimana submits that the Trial Chamber erred in concluding that Nzabonimana was not necessarily against the killings despite finding that: (i) the reinstatement of the *bourgmestre* of Musambira *commune* was requested by the *bourgmestres*; (ii) his presence was welcomed by the population; and (iii) he did not support the illegal activities of the *Interahamwe* against the legitimate authority of the *bourgmestres*.¹⁰³¹ He further submits that the Trial Chamber erred in "blaming" him for refusing to denounce the killings on the radio since he denied any responsibility during the meeting and Witnesses CNAA and CNAC doubted whether he spoke on the radio.¹⁰³² Nzabonimana also submits that the Trial Chamber erred in "disassociating the testimonies of Witnesses CNAA and CNAC" on the words attributed to Nzabonimana and ignoring the fact that he

¹⁰²⁷ Trial Judgement, para. 1217.

¹⁰²⁸ See Witness CNAA, T. 15 December 2009 pp. 6, 7 (closed session).

¹⁰²⁹ Trial Judgement, para. 1217.

¹⁰³⁰ Trial Judgement, para. 1217.

¹⁰³¹ Nzabonimana Appeal Brief, para. 239. Nzabonimana submits that the Trial Judgement is based on "speculative arguments made up of inferences". See *idem*.

¹⁰³² Nzabonimana Appeal Brief, para. 240.

could not be held responsible for the subsequent replacement of officials.¹⁰³³ According to Nzabonimana, the Trial Chamber erred in concluding that Witness CNAC's testimony established that Nzabonimana accused the *bourgmestres* of not supporting the killing of Tutsis.¹⁰³⁴

370. The Prosecution responds that Nzabonimana presents no analysis to support his claim that the Trial Chamber erred in finding that he was not necessarily against the killings.¹⁰³⁵ The Prosecution responds that Witnesses CNAA and CNAC were not doubtful about whether Nzabonimana gave a radio address denouncing the killings but rather testified that Nzabonimana refused to denounce the violence.¹⁰³⁶ According to the Prosecution, the fact that the Trial Chamber simply found the evidence was too general to establish a causal link between Nzabonimana's words and any subsequent dismissal of officers, did not preclude the Trial Chamber from crediting other aspects of Witnesses CNAA's and CNAC's evidence.¹⁰³⁷

371. The Trial Chamber found that Nzabonimana's support for the reinstatement of the *bourgmestre* of Musambira *commune* did not necessarily establish that Nzabonimana was against the killings.¹⁰³⁸ The Appeals Chamber notes that the Trial Chamber considered Witness CNAC's testimony, which it found consistent with Witness CNAA's testimony, that the *bourgmestres* confronted Nzabonimana about the violence committed by the *Interahamwe* and asked him to publicly denounce the violence on Radio Rwanda.¹⁰³⁹ The Trial Chamber also considered Witness CNAC's testimony that Nzabonimana: (i) told the *bourgmestres* that they were "not fully assuming their responsibilities"; (ii) accused them of collaborating with the enemy; (iii) told them that if they were tired, they should resign and allow the *Interahamwe* to take over; and (iv) refused to denounce the violence.¹⁰⁴⁰ The Appeals Chamber finds that Nzabonimana fails to demonstrate that no reasonable trier of fact could have made the impugned finding or that the Trial Chamber speculated in making it.

372. With respect to Nzabonimana's argument that he was "blamed" for refusing to denounce the killings on the radio, the Appeals Chamber understands that he is challenging the Trial Chamber's finding that he refused to denounce killings. In this respect, the Appeals Chamber notes the Trial Chamber's finding that Witnesses CNAA and CNAC provided consistent evidence that the *bourgmestres* voiced their concerns to Nzabonimana about the killings and requested Nzabonimana

¹⁰³³ Nzabonimana Appeal Brief, para. 241.

¹⁰³⁴ Nzabonimana Appeal Brief, para. 238.

¹⁰³⁵ Prosecution Response Brief, para. 226.

¹⁰³⁶ Prosecution Response Brief, para. 229.

¹⁰³⁷ Prosecution Response Brief, para. 186.

¹⁰³⁸ Trial Judgement, para. 1222.

¹⁰³⁹ Trial Judgement, para. 1221.

¹⁰⁴⁰ Trial Judgement, para. 1221.

to publicly denounce the killers, but Nzabonimana refused.¹⁰⁴¹ In the Appeals Chamber's view, irrespective of whether the witnesses knew if Nzabonimana spoke on the radio, there is no error in the Trial Chamber finding that Nzabonimana refused to denounce the killings of Tutsis.

373. Nzabonimana provides no references and fails to articulate his argument that the Trial Chamber erred by "disassociating the testimonies of Witnesses CNAA and CNAC" on the words attributed to Nzabonimana.¹⁰⁴² The Appeals Chamber rejects Nzabonimana's contention that the Trial Chamber overlooked the fact that the subsequent replacement of officials could not be attributed to him. Indeed, the Trial Chamber found that, given the general nature of the Prosecution evidence and the time elapsed after the reinstatement ceremony, a causal link between Nzabonimana's involvement in the Musambira event and the subsequent dismissals of officials was not established.¹⁰⁴³ The Appeals Chamber also dismisses Nzabonimana's argument that the Trial Chamber erred in considering Witness CNAC's testimony to find that Nzabonimana accused the *bourgmestres* of not supporting the killing of Tutsis.¹⁰⁴⁴ Nzabonimana fails to provide references and equally fails to substantiate his allegation of error.

374. Nzabonimana's arguments are therefore summarily dismissed.

(iii) Conclusion

375. The Appeals Chamber therefore dismisses in their entirety Nzabonimana's arguments on the assessment of evidence in relation to the Musambira event.

(f) Conclusion

376. Based on the foregoing, the Appeals Chamber dismisses Nzabonimana's arguments in relation to the assessment of evidence under his Fifth Ground of Appeal.

¹⁰⁴¹ Trial Judgement, para. 1214, *referring to, inter alia*, Witness CNAA, T. 15 December 2009 pp. 5-7 (closed session); Witness CNAA, T. 16 December 2009 p. 20 (closed session); Witness CNAC, T. 17 December 2009 pp. 3, 4 (closed session); Witness CNAC, T. 13 April 2010 pp. 6, 27, 29 (closed session). The Appeals Chamber notes that Witness CNAA testified that Nzabonimana was asked to address the population over Radio Rwanda in order to condemn the massacres, and never did. *See* Witness CNAA, T. 15 December 2009 p. 5 (closed session). Witness CNAC testified that Nzabonimana refused when asked to denounce the acts of violence, and that he was asked to publicly condemn them on Radio Rwanda. *See* Witness CNAC, T. 17 December 2009 p. 3 (closed session).

¹⁰⁴² *See* Nzabonimana Appeal Brief, para. 241.

¹⁰⁴³ Trial Judgement, para. 1225.

¹⁰⁴⁴ *See* Nzabonimana Appeal Brief, para. 238.

3. Direct and Public Incitement to Commit Genocide

377. The Trial Chamber convicted Nzabonimana for direct and public incitement to commit genocide, based, in part, on his conduct at the Murambi meeting, in Gitarama *préfecture*.¹⁰⁴⁵ In particular, the Trial Chamber found that, on 18 April 1994, the Prime Minister of Rwanda and other members of the Interim Government, including Nzabonimana, held a meeting for the *bourgmestres* of Gitarama *préfecture*.¹⁰⁴⁶ The Trial Chamber found that Nzabonimana's speech, which consisted of an explicit threat to kill persons opposing the massacre of Tutsis, constituted a direct call to commit genocide, and also concluded that Nzabonimana had the requisite *mens rea* to incite the genocide publicly.¹⁰⁴⁷

378. Nzabonimana submits that the elements of direct and public incitement were not established and that the Trial Chamber erred by characterising as public the alleged incitement of 18 April 1994.¹⁰⁴⁸ In particular, Nzabonimana argues that the Trial Chamber erred in confusing the *mens rea* and the *actus reus* of the crime when it determined that the incriminating message was "intended to be broadcast to the public", in lieu of assessing whether it was made public.¹⁰⁴⁹ Nzabonimana contends that, despite the presence of a journalist, the incriminating message had not been made public by the media and was only addressed to a limited group of local and national authorities gathered in Murambi.¹⁰⁵⁰ Nzabonimana further contends that the Trial Chamber erred in law and in fact by finding that the incriminating message directly incited the commission of genocide because it was ambiguous and distorted.¹⁰⁵¹

379. The Prosecution responds that the Trial Chamber did not confuse the public element of the *actus reus* of the incitement with the *mens rea* but rather identified both of them in its discussion of the law and assessed each element separately, albeit in the same paragraph.¹⁰⁵² The Prosecution submits that an inciting speech, dealing with public matters,¹⁰⁵³ delivered to a gathering of public

¹⁰⁴⁵ Trial Judgement, paras. 1773, 1775, 1800.

¹⁰⁴⁶ Trial Judgement, para. 1158. *See also ibid.*, para. 1769. The Trial Chamber further found that during the meeting Nzabonimana ordered the killing of *bourgmestres* and other local officials opposed to the massacre of Tutsis. *See ibid.*, para. 1179. *See also ibid.*, para. 1769. The Appeals Chamber recalls that it found that the Trial Chamber erred in entering this finding. *See supra*, paras. 339, 345.

¹⁰⁴⁷ Trial Judgement, paras. 1771, 1772.

¹⁰⁴⁸ Nzabonimana Notice of Appeal, para. 5.4; Nzabonimana Appeal Brief, paras. 253-257.

¹⁰⁴⁹ Nzabonimana Appeal Brief, paras. 253-255.

¹⁰⁵⁰ Nzabonimana Appeal Brief, para. 256; Nzabonimana Reply Brief, para. 75. *See also* AT. 29 April 2014 pp. 52, 53. Nzabonimana submits that the Trial Chamber relied on Exhibit D86 (Transcript of Radio Rwanda Broadcast, 19 April 1994) to establish the intent to broadcast and that despite indicating that the document in question did not mention threats issued by the Government, it still convicted Nzabonimana of direct and public incitement to commit genocide. *See* Nzabonimana Appeal Brief, para. 254.

¹⁰⁵¹ Nzabonimana Appeal Brief, para. 257.

¹⁰⁵² Prosecution Response Brief, para. 248.

¹⁰⁵³ AT. 29 April 2014 pp. 26, 36-38.

officials, addressed in their function as public officials, is public.¹⁰⁵⁴ Therefore, it argues that the incitement was public as Nzabonimana's threat was made in a public setting when he spoke during a large meeting of public officials.¹⁰⁵⁵ The Prosecution adds that the public nature of the incitement was further demonstrated by the presence of a journalist, who subsequently broadcast a report of the meeting to the public at large.¹⁰⁵⁶ It finally contends that it is clear from the Trial Judgement that Nzabonimana's incitement consisted of ordering that persons opposing the massacres should be killed, thus directly inciting genocide.¹⁰⁵⁷

380. Nzabonimana replies that the fact that public officials were convened in their function as public officials excludes the characterisation of the meeting as public.¹⁰⁵⁸ Nzabonimana contends that these officials were selected and convened in their official capacity and that the meeting was purely private.¹⁰⁵⁹ He further replies that the meeting was held in a closed room devoid of any public character.¹⁰⁶⁰

381. The Appeals Chamber recalls that a person may be found guilty of direct and public incitement to commit genocide, pursuant to Article 2(3)(c) of the Statute, if he or she directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).¹⁰⁶¹

382. In the legal findings supporting Nzabonimana's conviction for direct and public incitement to commit genocide in relation to the Murambi meeting, the Trial Chamber found that Nzabonimana's speech constituted a direct call to commit genocide and that "Nzabonimana possessed the requisite *mens rea* to satisfy the 'public' element of the crime of direct and public incitement to commit genocide".¹⁰⁶² With respect to the "public" element, the Trial Chamber stated the following:

The Chamber recalls that present during this meeting were the Prime Minister, other members of the Interim Government, *bourgmestres* of Gitarama *préfecture* and other local political officials. In addition, a journalist from Radio Rwanda was present during the meeting with the *bourgmestres*. The journalist subsequently broadcast a report regarding the meeting. Given these circumstances, the Chamber considers that the evidence established that the message of the meeting was intended

¹⁰⁵⁴ Prosecution Response Brief, para. 239. *See also* AT. 29 April 2014 pp. 26, 36-40.

¹⁰⁵⁵ Prosecution Response Brief, paras. 238, 239. *See also* AT. 29 April 2014 pp. 26, 36-40.

¹⁰⁵⁶ Prosecution Response Brief, para. 243. *See also* AT. 29 April 2014 pp. 26, 40. In the Prosecution's view, the fact that the subsequent media coverage did not include Nzabonimana's threats does not detract from the public nature of the meeting. *See* Prosecution Response Brief, para. 243. According to the Prosecution during oral submissions, *bourgmestres* attending the Murambi meeting later spread the genocidal message to the general public. *See* AT. 29 April 2014 pp. 38, 39.

¹⁰⁵⁷ Prosecution Response Brief, para. 235.

¹⁰⁵⁸ Nzabonimana Reply, para. 77.

¹⁰⁵⁹ Nzabonimana Reply, para. 77. *See also* AT. 29 April 2014 p. 52.

¹⁰⁶⁰ Nzabonimana Reply, para. 78. *See also* AT. 29 April 2014 p. 52.

¹⁰⁶¹ *See supra*, paras. 121, 231.

¹⁰⁶² Trial Judgement, paras. 1771, 1772.

to be broadcast to the public at large and evinces that Nzabonimana had the requisite *mens rea* to incite genocide publicly.¹⁰⁶³

383. The Appeals Chamber observes that the Trial Chamber did not make an express finding that the alleged incitement was public. The Trial Chamber only analysed whether Nzabonimana had the requisite *mens rea* to publicly incite genocide.¹⁰⁶⁴ Accordingly, the Appeals Chamber considers that the Trial Chamber failed to assess whether the incitement was actually public and enter a finding on this element of the crime. The Trial Chamber therefore erred in law by failing to provide a reasoned opinion on this aspect of the *actus reus* of the crime of direct and public incitement to commit genocide.

384. In these circumstances, the Appeals Chamber has reviewed the Trial Chamber's factual findings and the relevant evidence on the record to determine whether a reasonable trier of fact could have found beyond reasonable doubt that the incitement was public.¹⁰⁶⁵ The Appeals Chamber recalls that when assessing the "public" element of incitement, it can take into account the place where the incitement occurred and whether the attendance was selected or limited.¹⁰⁶⁶ Additionally, the Appeals Chamber recalls that the number of persons and the medium through which the message is conveyed may be considered in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public.¹⁰⁶⁷

385. The Appeals Chamber notes that the attendance at the Murambi meeting appeared to be limited and selected as it only involved a group of public officials,¹⁰⁶⁸ and did not involve the public at large.¹⁰⁶⁹ The Appeals Chamber observes that the meeting was first convened by the *préfet* of Gitarama *préfecture*¹⁰⁷⁰ and that the group of public officials was then reconvened by the Prime Minister.¹⁰⁷¹ In addition, there is no evidence on the record showing that members of the public were invited or attended the meeting.¹⁰⁷² The Appeals Chamber is therefore satisfied that the public at large could not attend this meeting. The Appeals Chamber considers that the mere presence of a

¹⁰⁶³ Trial Judgement, para. 1772 (internal reference omitted).

¹⁰⁶⁴ Trial Judgement, para. 1772.

¹⁰⁶⁵ Cf. *Bizimungu* Appeal Judgement, para. 23; *Ndindiliyimana et al.* Appeal Judgement, para. 293; *Bagosora and Nsengiyumva* Appeal Judgement, para. 683.

¹⁰⁶⁶ See *supra*, paras. 127, 231.

¹⁰⁶⁷ See *supra*, para. 231.

¹⁰⁶⁸ Trial Judgement, para. 1158. The Appeals Chamber notes that a journalist, Witness Mporanzi and Witness T24 were also present. See *idem*.

¹⁰⁶⁹ Witness CNAA, T. 14 December 2009 p. 64; Witness CNAA, T. 15 December 2009 pp. 7-9 (closed session); Witness CNAA, T. 16 December 2009 p. 2 (closed session); Witness CNAC, T. 16 December 2009 pp. 57, 59, 66 (closed session); Witness T24, T. 26 April 2010 pp. 57, 59 (closed session); Witness T24, T. 27 April 2010 pp. 2, 3; Witness Mporanzi, T. 25 May 2010 p. 70.

¹⁰⁷⁰ Trial Judgement, paras. 1082, 1091, 1092, 1106, 1123, 1138, 1144, 1145, 1153, 1154, 1155.

¹⁰⁷¹ Trial Judgement, paras. 1082, 1083, 1092, 1093, 1107, 1123, 1124, 1144, 1145, 1153, 1154, 1155, 1158.

¹⁰⁷² Trial Judgement, paras. 1080-1141.

journalist¹⁰⁷³ does not automatically render the meeting public, rather it is the broadcast of the incriminating message which would render the incitement public. In this respect, the Appeals Chamber notes the Trial Chamber's acknowledgement that the incriminating message was not disseminated by the media.¹⁰⁷⁴ Furthermore, the Appeals Chamber is of the view that the evidence does not support a finding that the meeting occurred in a public place.¹⁰⁷⁵

386. The Appeals Chamber is also not persuaded by the Prosecution's submission that an inciting speech, which discussed public matters, delivered to a gathering of public officials, addressed in their function as public officials, is necessarily public. In support of this argument the Prosecution underlines that, in light of the purpose and object of the crime of incitement, inciting public officials rather than "a gathering of random members of the population" creates a greater risk that genocide will actually occur because public officials "have the authority and the means to trigger massacres".¹⁰⁷⁶ While this may be the case, the Appeals Chamber fails to see how this supports the public nature of the incitement at the Murambi meeting.

387. In light of the foregoing, the Appeals Chamber finds that the attendance at the Murambi meeting was selected and limited, that the location was not a public place, and that the incriminating message was not broadcasted. The Appeals Chamber therefore finds that no reasonable trier of fact could have found that the incitement was public.

388. The Appeals Chamber accordingly finds that the Trial Chamber erred in convicting Nzabonimana for direct and public incitement to commit genocide in relation to the Murambi meeting and that it need not address the remainder of Nzabonimana's arguments.

4. Conspiracy to Commit Genocide

389. The Trial Chamber convicted Nzabonimana of conspiracy to commit genocide in relation to, *inter alia*, the agreement beginning on 18 April 1994 at the Murambi meeting.¹⁰⁷⁷ Having considered the concerted and coordinated actions of Nzabonimana and the Ministers of the Interim Government, the Trial Chamber found the only reasonable inference to be that an agreement with the specific intent to destroy Rwanda's Tutsi population in whole or in part materialised on 18 April 1994.¹⁰⁷⁸ It further considered that the conduct of Nzabonimana and Prime Minister Jean

¹⁰⁷³ See Trial Judgement, para. 1180.

¹⁰⁷⁴ Trial Judgement, fn. 2195 where the Trial Chamber noted that the broadcast "did not include a summation of the threats issued by the Government". See also Exhibit D86 (Transcript of Radio Rwanda Broadcast, 19 April 1994).

¹⁰⁷⁵ Witness CNAA, T. 15 December 2009 pp. 7, 8 (closed session); Witness Mporanzi, T. 25 May 2010 p. 70; Witness T24, T. 26 April 2010 p. 57 (closed session).

¹⁰⁷⁶ Prosecution Response Brief, paras. 239, 240. See also AT. 29 April 2014 p. 39.

¹⁰⁷⁷ Trial Judgement, paras. 1747, 1749, 1800. See also *ibid.*, para. 1817.

¹⁰⁷⁸ Trial Judgement, para. 1747.

Kambanda after the 18 April 1994 meeting reinforced its conclusion that Nzabonimana, other ministers, and the Prime Minister of the Interim Government entered into an agreement to encourage the destruction of the Tutsi population, as such, in Gitarama *préfecture*.¹⁰⁷⁹

390. Nzabonimana submits that the elements of the conspiracy were not established and that, assuming they were established, the inference drawn by the Trial Chamber from the circumstantial evidence was not the only reasonable one.¹⁰⁸⁰

391. The Appeals Chamber recalls that conspiracy to commit genocide, under Article 2(3)(b) of the Statute, requires “an agreement between two or more persons to commit the crime of genocide”¹⁰⁸¹ and the individuals involved must have the intent to destroy in whole or in part a national, ethnical, racial or religious group as such.¹⁰⁸² The agreement constitutes the *actus reus*.¹⁰⁸³ This *actus reus* can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on other evidence.¹⁰⁸⁴ In particular, a concerted agreement to commit genocide may be inferred from the conduct of the conspirators.¹⁰⁸⁵ Further, the agreement need not be formal and a tacit agreement may be sufficient as evidence of conspiracy to commit genocide.¹⁰⁸⁶

392. The Appeals Chamber also recalls that where the Prosecution intends to rely on circumstantial evidence to prove a particular fact upon which the guilt of the accused depends, the finding of the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.¹⁰⁸⁷

(a) Murambi

393. The Trial Chamber determined that beginning on 18 April 1994 at the Murambi meeting, Nzabonimana agreed with other members of the Interim Government, specifically Prime Minister

¹⁰⁷⁹ Trial Judgement, para. 1747. *See also ibid.*, para. 1746.

¹⁰⁸⁰ Nzabonimana Notice of Appeal, paras. 5.5.2, 5.5.3; Nzabonimana Appeal Brief, paras. 273-300. Nzabonimana’s challenge that the Murambi meeting was not established has been examined in another section. *See* Nzabonimana Notice of Appeal, para. 5.5.2(5). *See supra*, paras. 312-362. The Appeals Chamber considers that Nzabonimana’s arguments on Witness CNAL have been withdrawn since they are not developed in his Appeal Brief (*see* Nzabonimana Notice of Appeal, para. 5.5.2(7),(8)). It also notes that Nzabonimana fails to develop in his Appeal Brief his argument that the Trial Chamber erred in finding the events in Nyakabanda established (*see* Nzabonimana Notice of Appeal, para. 5.5.2(6)).

¹⁰⁸¹ *See supra*, para. 255.

¹⁰⁸² *Nahimana et al.* Appeal Judgement, para. 894.

¹⁰⁸³ *Seromba* Appeal Judgement, paras. 218, 221; *Nahimana et al.* Appeal Judgement, para. 894. *See also Gatete* Appeal Judgement, para. 260.

¹⁰⁸⁴ *Seromba* Appeal Judgement, para. 221; *Nahimana et al.* Appeal Judgement, para. 896.

¹⁰⁸⁵ *Nahimana et al.* Appeal Judgement, para. 896.

¹⁰⁸⁶ *Nahimana et al.* Appeal Judgement, para. 898.

¹⁰⁸⁷ *Seromba* Appeal Judgement, para. 221; *Nahimana et al.* Appeal Judgement, para. 896. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 88.

Kambanda, Prosper Mugiraneza as well as Defence Witnesses T82 and T83 to encourage the killing of members of the Tutsi population.¹⁰⁸⁸ The Trial Chamber recalled that at the Murambi meeting, the ministers directed their threats at the assembled *bourgmestres*.¹⁰⁸⁹ According to the Trial Chamber, the evidence established that in the days prior to the Murambi meeting some of the *bourgmestres* in Gitarama *préfecture* were actively protecting Tutsis.¹⁰⁹⁰ The Trial Chamber then held that “members of the Interim Government therefore assembled the *bourgmestres* at the Murambi meeting, where they threatened to remove the *bourgmestres* from their posts if they did not stop supporting the Tutsi population”.¹⁰⁹¹

(i) Elements of Conspiracy

394. Nzabonimana submits that the Trial Chamber convicted him for events at the Murambi meeting absent evidence of an agreement.¹⁰⁹² Nzabonimana contends that the Trial Chamber made no finding on whether, by virtue of a pre-existing agreement to kill Tutsis, *bourgmestres* were brought together in Murambi with the premeditated purpose of issuing threats to stop them from protecting Tutsis.¹⁰⁹³ Nzabonimana argues that the Trial Chamber disregarded evidence that the meeting was organised on an impromptu basis, without prior consultation between the Prime Minister and the other ministers.¹⁰⁹⁴ He also claims that the Trial Chamber overlooked evidence contradicting the execution of a prior agreement.¹⁰⁹⁵ Nzabonimana avers that, if conspiracy requires premeditation, no evidence was adduced that other ministers, aside from the Prime Minister, were informed about the first or second meeting at Murambi before they took place.¹⁰⁹⁶

395. Nzabonimana further contends that no evidence was adduced to support an agreement being reached during the Murambi meeting, and that the Trial Chamber failed to characterise the factual circumstances of the agreement.¹⁰⁹⁷ In this regard, he argues that the Trial Chamber could not base the conspiracy conviction on section 3.5.7.3.2 of the Trial Judgement, where it neither determined

¹⁰⁸⁸ Trial Judgement, para. 1744.

¹⁰⁸⁹ Trial Judgement, para. 1744, referring to section 3.5.7.3.2, “Murambi Meeting – Nzabonimana Ordered the Killing of *Bourgmestres* and Other Local Officials” (see *ibid.*, paras. 1159-1181). See also *ibid.*, para. 1745.

¹⁰⁹⁰ Trial Judgement, para. 1745. The Trial Chamber recalled that the *bourgmestre* of Nyabikenke *commune* staved off attacks upon the refugees at the *commune* office on 13 April 1994 (see *idem*, referring to section 3.5.2.3.2, “Cyayi Centre and Nyabikenke *Commune* Office Attacks – Attempted Attack on 13 April 1994”, paras. 862-866). It further considered that Witness Mporanzi, *bourgmestre* of Rutobwe *commune*, placed killers in prison prior to 18 April 1994 (see *idem*, referring to section 3.5.6.3, “Release of Killers in Rutobwe *Commune*”, paras. 1063-1076).

¹⁰⁹¹ Trial Judgement, para. 1745.

¹⁰⁹² Nzabonimana Appeal Brief, paras. 273-283; Nzabonimana Reply Brief, para. 66.

¹⁰⁹³ Nzabonimana Appeal Brief, paras. 275, 276.

¹⁰⁹⁴ Nzabonimana Appeal Brief, para. 278.

¹⁰⁹⁵ See Nzabonimana Appeal Brief, para. 279, where Nzabonimana submits that Kambanda’s attitude of reacting “warmly” to the offer by the bishop of Kabgayi to provide refuge to Tutsis, as testified to by Witness CNAC, ruled out a prior agreement. See also Nzabonimana Reply Brief, para. 67.

¹⁰⁹⁶ Nzabonimana Appeal Brief, para. 277 (French original).

¹⁰⁹⁷ Nzabonimana Appeal Brief, paras. 280-283.

the ministers present nor what they said.¹⁰⁹⁸ Nzabonimana avers that the Trial Chamber limited itself to the vague and imprecise standard of “the ministers present”,¹⁰⁹⁹ but then proceeded to infer *ex-nihilo* that an agreement existed between him, Kambanda, Mugiraneza, Witness T82, and Witness T83.¹¹⁰⁰ Nzabonimana argues that, given Kambanda’s absence during the second meeting at Murambi, the Trial Chamber could not find the second meeting to be an expression of a conspiracy that included Kambanda.¹¹⁰¹

396. The Prosecution responds that the conspiracy was proved through the concerted and coordinated actions of Nzabonimana and other ministers, who threatened *bourgmestres* opposed to the genocide.¹¹⁰² It argues that: (i) a premeditated plan is not required for conspiracy, and even if the meeting was “impromptu” an agreement existed to present a unified force to threaten the *bourgmestres*;¹¹⁰³ (ii) the Trial Chamber was not required to identify every co-conspirator by name and it makes no difference exactly what each minister said because their speeches all struck the same general theme;¹¹⁰⁴ and (iii) even if Kambanda was not present during the threats at Murambi, Kambanda was a co-conspirator and showed his agreement during the weapons distribution at Nyakabanda.¹¹⁰⁵

397. Nzabonimana replies that the Prosecution does not contradict his arguments but instead follows the contradictory reasoning of the Trial Chamber regarding Kambanda.¹¹⁰⁶

398. The Appeals Chamber is not persuaded that premeditation or the existence of a pre-existing agreement is an element of the crime of conspiracy to commit genocide and Nzabonimana fails to provide any supporting reference to the Tribunal’s jurisprudence.¹¹⁰⁷ On this basis, the Appeals Chamber dismisses Nzabonimana’s arguments related to a prior agreement or to the “impromptu” nature of the meeting.

¹⁰⁹⁸ Nzabonimana Appeal Brief, para. 282, *referring to* Trial Judgement, para. 1744. *See also* Nzabonimana Reply Brief, para. 66.

¹⁰⁹⁹ Nzabonimana Appeal Brief, para. 283, *referring to* Trial Judgement, para. 1179. *See also* Nzabonimana Reply Brief, para. 66.

¹¹⁰⁰ Nzabonimana Appeal Brief, para. 283, *referring to* Trial Judgement, para. 1744. *See also* Nzabonimana Reply Brief, para. 66.

¹¹⁰¹ Nzabonimana Appeal Brief, para. 280, *referring to* Trial Judgement, paras. 1144, 1179; Nzabonimana Reply Brief, para. 67.

¹¹⁰² Prosecution Response Brief, paras. 172, 173, 209.

¹¹⁰³ Prosecution Response Brief, para. 218.

¹¹⁰⁴ Prosecution Response Brief, paras. 213, 221.

¹¹⁰⁵ Prosecution Response Brief, para. 221, *referring to* Trial Judgement, paras. 1292, 1746.

¹¹⁰⁶ Nzabonimana Reply Brief, paras. 68, 69.

¹¹⁰⁷ The Appeals Chamber observes that, in support of this contention, Nzabonimana merely cites an article. *See* Nzabonimana Appeal Brief, para. 277, fn. 466, *referring to* “*Le procès de Nuremberg devant les principes modernes du droit pénal international*”, The Hague Academy of International Law, Donnedieu de Vabres, p. 529.

399. The Appeals Chamber is also not convinced that the Trial Chamber convicted Nzabonimana of conspiracy to commit genocide without factual basis.¹¹⁰⁸ The Trial Chamber determined that an agreement materialised at the Murambi meeting on 18 April 1994.¹¹⁰⁹ The Appeals Chamber notes the Trial Chamber’s determination that Interim Government Ministers, including Nzabonimana, used the Murambi meeting to threaten to remove *bourgmestres* from their posts if they did not stop supporting the Tutsi population.¹¹¹⁰ According to the Trial Chamber, the purpose of the agreement was to encourage the killing of Tutsis.¹¹¹¹ The Appeals Chamber observes that these conclusions were based on the Trial Chamber’s factual determinations from section 3.5.7.3.2 of the Trial Judgement.¹¹¹² In this regard, the Trial Chamber considered and found that: (i) Kambanda and other members of the Interim Government, including Nzabonimana, “held a meeting for the *bourgmestres* of Gitarama *préfecture*”;¹¹¹³ (ii) Nzabonimana and other Interim Government officials took turns making various threats at the assembled *bourgmestres* as a means to ensure their participation in the genocide;¹¹¹⁴ and (iii) the *bourgmestres* were intimidated.¹¹¹⁵

400. As for Nzabonimana’s argument on the presence of other ministers, the Appeals Chamber is not convinced that the Trial Chamber’s reference to “the ministers present” is too vague.¹¹¹⁶ Recalling that a conspiracy requires an agreement between “two or more persons”,¹¹¹⁷ the Appeals Chamber considers that finding that Nzabonimana agreed with “other members of the Interim Government”¹¹¹⁸ is a sufficient basis for the finding of conspiracy to commit genocide. Thus, any possible error with respect to the identification by name of the members of the Interim Government would not result in a miscarriage of justice nor impact the Trial Chamber’s finding of a conspiracy.

401. The Appeals Chamber is equally not convinced that the Trial Chamber was required to determine the exact utterances of the ministers present.¹¹¹⁹ In the Appeals Chamber’s view, the ministers’ specific words were not material to the Trial Chamber’s finding of a conspiracy. In this

¹¹⁰⁸ Nzabonimana Appeal Brief, paras. 280-283.

¹¹⁰⁹ Trial Judgement, para. 1747.

¹¹¹⁰ See Trial Judgement, paras. 1179, 1745.

¹¹¹¹ Trial Judgement, para. 1744.

¹¹¹² Trial Judgement, para. 1744.

¹¹¹³ Trial Judgement, para. 1158.

¹¹¹⁴ Trial Judgement, paras. 1161, 1162, 1179. See also *ibid.*, paras. 1744, 1745.

¹¹¹⁵ Trial Judgement, para. 1161.

¹¹¹⁶ See Nzabonimana Appeal Brief, para. 283, referring to Trial Judgement, para. 1179.

¹¹¹⁷ *Seromba* Appeal Judgement, paras. 218, 221; *Nahimana et al.* Appeal Judgement, para. 894.

¹¹¹⁸ Trial Judgement, para. 1744.

¹¹¹⁹ See Nzabonimana Appeal Brief, para. 281. Nzabonimana additionally submits that it was paradoxical that two of Nzabonimana’s co-conspirators, Mugiraneza and T82 were acquitted in separate judgements. See *idem*. The Appeals Chamber recalls that two reasonable triers of fact may reach different but equally reasonable conclusions when assessing the reliability of a witness and determining the probative value of the evidence presented at trial and an error cannot be established by simply demonstrating that other trial chambers have exercised their discretion in a different way. See *Lukić and Lukić* Appeal Judgement, para. 396, referring to *Krnjelac* Appeal Judgement, paras. 11, 12. See also *Rutaganda* Appeal Judgement, para. 188. The Appeals Chamber therefore finds that the Trial Chamber was entitled to reach a different conclusion than cases involving Mugiraneza and Witness T82.

regard, the Trial Chamber considered consistent evidence, from Witnesses CNA and CNAC, that the ministers present at the second meeting took turns threatening *bourgmestres* to ensure their participation in the genocide, and all “reiterated the common theme” that *bourgmestres* who supported Tutsis would be removed from their posts.¹¹²⁰

402. In light of the foregoing, the Appeals Chamber finds that Nzabonimana fails to demonstrate any error occasioning a miscarriage of justice and thus dismisses his submissions on the absence of evidence of an agreement.

(ii) Inferences from Circumstantial Evidence

403. Nzabonimana submits that the agreement to destroy Rwanda’s Tutsi population was not the only reasonable inference that could be drawn from the evidence.¹¹²¹ He argues that the Trial Chamber failed to consider other equally reasonable inferences,¹¹²² specifically that: (i) the objective of the meeting was to deal with the war and security issues, without a pre-conceived plan to eliminate Tutsis;¹¹²³ and (ii) since the second meeting was “impromptu”, the ministers’ statements reflected “conscious parallelism” rather than “concerted” actions.¹¹²⁴

404. The Prosecution responds that the ministers’ conduct allowed no other reasonable inference than a conspiracy to commit genocide.¹¹²⁵ The Prosecution submits that Nzabonimana ignores direct evidence of his own and other ministers’ explicit calls for genocide.¹¹²⁶

405. The Appeals Chamber recalls that Nzabonimana failed to demonstrate that the Tribunal’s jurisprudence requires premeditation or the existence of a pre-existing agreement to establish conspiracy to commit genocide.¹¹²⁷ Thus, the question of a pre-conceived plan is irrelevant to the finding of conspiracy and Nzabonimana’s arguments could be dismissed on this basis only. Regarding the meeting’s objective, the Appeals Chamber notes the Trial Chamber’s explicit consideration that during the first meeting Kambanda provided an overview of the Interim Government’s military approach to fighting the RPF.¹¹²⁸ The Appeals Chamber finds that the fact that the state of war was also discussed is insufficient to demonstrate an error from the Trial

¹¹²⁰ Trial Judgement, paras. 1086, 1087, 1100, 1101, 1103, 1159-1161, 1179. *See also ibid.*, paras. 1744, 1745.

¹¹²¹ Nzabonimana Appeal Brief, paras. 290-294.

¹¹²² Nzabonimana Appeal Brief, para. 290, *referring to* Trial Judgement, paras. 1744-1747.

¹¹²³ Nzabonimana Appeal Brief, para. 292.

¹¹²⁴ Nzabonimana Appeal Brief, para. 293, *referring to Nahimana et al.* Appeal Judgement, para. 897.

¹¹²⁵ Prosecution Response Brief, para. 173.

¹¹²⁶ Prosecution Response Brief, para. 231. *See also ibid.*, para. 220.

¹¹²⁷ *See supra*, para. 398.

¹¹²⁸ *See* Trial Judgement, para. 1146. The Appeals Chamber also notes that the Trial Chamber considered Kambanda’s conduct. *See, e.g., ibid.*, paras. 1096, 1144-1147. The Appeals Chamber considers that his conduct does not undermine that a conspiracy to commit genocide was the only reasonable inference drawn from the concerted and coordinated actions of Nzabonimana and the Ministers of the Interim Government.

Chamber in finding that the only reasonable inference was that an agreement materialised on 18 April 1994 to encourage the killing of Tutsis.

406. The Appeals Chamber is equally not convinced by Nzabonimana's argument that, since the meeting was "impromptu", the conduct of ministers was more consistent with "conscious parallelism" rather than "concerted" actions.¹¹²⁹ Irrespective of the impromptu or planned nature of the meeting, the Trial Chamber found that the agreement materialised on 18 April 1994. As already discussed, the Appeals Chamber recalls the Trial Chamber's considerations that: (i) the Interim Government held a meeting *for the bourgmestres*;¹¹³⁰ and (ii) ministers, including Nzabonimana, "imposed themselves" on the *bourgmestres*, supported the killings, took turns making various threats, and "used" the meeting to threaten the *bourgmestres* to stop protecting the Tutsis.¹¹³¹ This determination, along with the assembling of *bourgmestres*, formed the basis of the Trial Chamber's finding of a conspiracy.¹¹³² The Appeals Chamber finds no error in the Trial Chamber's finding that the only reasonable inference that could be drawn from the concerted and coordinated actions of Nzabonimana and other members of the Interim Government was that an agreement to commit genocide materialised at the meeting on 18 April 1994.

407. Given the above, the Appeals Chamber dismisses Nzabonimana's arguments that the Trial Chamber failed to consider other reasonable inferences in relation to the Murambi meeting of 18 April 1994.

(iii) Conclusion

408. Based on the foregoing, the Appeals Chamber finds that Nzabonimana does not demonstrate an error in the Trial Chamber's determination of conspiracy to commit genocide in relation to the Murambi meeting to warrant the Appeals Chamber's intervention.

(b) Musambira and Nyakabanda

409. Nzabonimana submits that the Trial Chamber erred by relying on events at Musambira and Nyakabanda as circumstantial evidence of an agreement at Murambi.¹¹³³ Nzabonimana argues that the reinstatement ceremony at Musambira *commune* could not be used as circumstantial evidence of the conspiracy because the ceremony was antithetical to the ministers' encouragement, at the

¹¹²⁹ Nzabonimana Appeal Brief, para. 293.

¹¹³⁰ Trial Judgement, para. 1158 (emphasis added). *See also ibid.*, paras. 1144-1146.

¹¹³¹ *See* Trial Judgement, paras. 1159-1162, 1179, 1744, 1745.

¹¹³² Trial Judgement, paras. 1744, 1745, 1747.

¹¹³³ Nzabonimana Notice of Appeal, para. 5.5.3(6)-(8); Nzabonimana Appeal Brief, paras. 284, 286.

Murambi meeting, to kill Tutsis.¹¹³⁴ According to Nzabonimana, while ministers allegedly threatened *bourgmestres* at Murambi for not supporting massacres committed by the *Interahamwe*, they nevertheless granted the reinstatement of a *bourgmestre* in Musambira who had been driven away by the *Interahamwe*.¹¹³⁵ Nzabonimana also submits, as alternate inferences, that: (i) the political opposition explained the controversy between him and the MDR *bourgmestres*;¹¹³⁶ and (ii) the *Interahamwe*, rather than Interim Government orders, were to blame for insecurity concerns that *bourgmestres* raised at Musambira.¹¹³⁷

410. As to the weapons distribution at Nyakabanda, Nzabonimana submits that the Trial Chamber could not infer a concerted or coordinated action from his mere presence, a neutral fact and passive conduct.¹¹³⁸ Referring to paragraph 1729 of the Trial Judgement, Nzabonimana avers that the Trial Chamber found that he could not be held liable for his mere presence at Nyakabanda, yet used the same facts to find an expression of conspiracy.¹¹³⁹ According to Nzabonimana, assuming that the Trial Chamber was justified to rely on his mere passive presence, this fact alone was insufficient to infer the crime of conspiracy.¹¹⁴⁰ He also argues that words attributed to Kambanda at Nyakabanda could not be linked to incriminating utterances from the second meeting at Murambi because Kambanda was not present at that meeting.¹¹⁴¹

411. Finally, according to Nzabonimana, the fact that no criminal consequence followed the Murambi and Musambira events is a strong indication that another equally reasonable inference, consistent with the absence of a conspiracy, could be drawn.¹¹⁴²

412. The Prosecution responds that, after the Murambi meeting, members of the conspiracy, including Nzabonimana and Kambanda, continued to act in accordance with their agreement.¹¹⁴³ The Prosecution responds that Nzabonimana's complicated arguments of another reasonable inference at Musambira ignore his explicit refusal to publicly denounce the killings, even when the *bourgmestres* requested him to do so.¹¹⁴⁴ It maintains that Nzabonimana repeated essentially the

¹¹³⁴ Nzabonimana Appeal Brief, paras. 286, 295; Nzabonimana Reply Brief, para. 73.

¹¹³⁵ Nzabonimana Appeal Brief, para. 295. *See also* Nzabonimana Reply Brief, para. 73.

¹¹³⁶ Nzabonimana Appeal Brief, paras. 296, 297, *referring to* Trial Judgement, paras. 1198, 1205, 1207, 1217.

¹¹³⁷ Nzabonimana Appeal Brief, paras. 298, 300.

¹¹³⁸ Nzabonimana Appeal Brief, para. 284. *See also* Nzabonimana Reply Brief, para. 73.

¹¹³⁹ Nzabonimana Appeal Brief, para. 284.

¹¹⁴⁰ Nzabonimana Appeal Brief, para. 285. *See also* Nzabonimana Reply Brief, para. 73.

¹¹⁴¹ Nzabonimana Appeal Brief, para. 284.

¹¹⁴² Nzabonimana Appeal Brief, para. 294, *referring to* Trial Judgement, paras. 1182-1187, 1225.

¹¹⁴³ Prosecution Response Brief, para. 216, *referring to* Trial Judgement, para. 1746.

¹¹⁴⁴ Prosecution Response Brief, para. 227, *referring to* Trial Judgement, paras. 1198, 1205, 1224.

same threats against the *bourgmestres* at Musambira *commune*,¹¹⁴⁵ and that the Trial Chamber was entitled to rely on these threats as further evidence of the conspiracy.¹¹⁴⁶

413. The Prosecution further responds that Nzabonimana's presence at Nyakabanda signalled his support for Kambanda's message and was consistent with Nzabonimana's conduct at the Murambi meeting.¹¹⁴⁷ Finally, the Prosecution responds that the lack of "established consequences" following the Murambi and Musambira events is irrelevant since conspiracy to commit genocide is an inchoate offence.¹¹⁴⁸

414. The Appeals Chamber recalls the Trial Chamber's finding that the conspiracy to destroy Rwanda's Tutsi population in whole or in part materialised on 18 April 1994 based, *inter alia*, on the conduct of members of the Interim Government at the Murambi meeting.¹¹⁴⁹ As for the conduct of Nzabonimana and Kambanda after 18 April 1994 at Musambira and Nyakabanda, the Trial Chamber explicitly stated that these events "reinforced the message of the Murambi meeting"¹¹⁵⁰ and "reinforce[d] the conclusion that Nzabonimana, other Ministers and the Prime Minister of the Interim Government entered into an agreement to encourage the destruction of the Tutsi population, as such in Gitarama *préfecture*".¹¹⁵¹

415. With respect to events at Musambira *commune*, the Trial Chamber found that Nzabonimana was present at the reinstatement ceremony of the *bourgmestre* of Musambira, he accused *bourgmestres* of not supporting the killings of Tutsis, he warned *bourgmestres* that they could be replaced by *Interahamwe*, and he refused to denounce the killings.¹¹⁵² On this basis, the Appeals Chamber finds it reasonable for the Trial Chamber to conclude that the reinstatement ceremony at Musambira reinforced the message from the Murambi meeting to encourage the killing of Tutsis.¹¹⁵³ The Appeals Chamber is thus not persuaded by Nzabonimana's argument that the reinstatement ceremony was antithetical to the conspiracy that materialised at the Murambi

¹¹⁴⁵ Prosecution Response Brief, para. 216, *referring to* Trial Judgement, paras. 1224, 1746.

¹¹⁴⁶ Prosecution Response Brief, para. 225, *referring to* Trial Judgement, para. 1746.

¹¹⁴⁷ Prosecution Response Brief, para. 222.

¹¹⁴⁸ Prosecution Response Brief, para. 230.

¹¹⁴⁹ Trial Judgement, paras. 1744, 1745, 1747.

¹¹⁵⁰ Trial Judgement, para. 1746.

¹¹⁵¹ Trial Judgement, para. 1747. Considering Nzabonimana's presence during Kambanda's weapons distribution and speech at Nyakabanda as well as Nzabonimana's conduct at the reinstatement ceremony at Musambira, the Trial Chamber determined that the words spoken at these events "establish that these activities were undertaken with the intent to encourage the *bourgmestres* and the population to kill Tutsis". *See ibid.*, para. 1746.

¹¹⁵² Trial Judgement, para. 1224. The Trial Chamber explicitly considered that Nzabonimana's support for the reinstatement did not necessarily establish that he was against the killings since the public reinstatement served as an assertion of the legitimate public force by the Government in Musambira *commune* and that "[i]n his capacity as Minister, Nzabonimana thus served as a representative of the Government at the ceremony. Nzabonimana could both support the supremacy of the national Government and support the killings". *See ibid.*, paras. 1220-1222. The Appeals Chamber recalls that it dismissed Nzabonimana's arguments on the assessment of evidence in relation to the Musambira event. *See infra*, paras. 363-375.

meeting.¹¹⁵⁴ The Appeals Chamber is also not convinced by either of Nzabonimana's alternative inferences relating to the political opposition in Gitarama and the *Interahamwe* as the source of the *bourgmestres*' insecurity concerns. The Appeals Chamber considers that these alternatives fail to negate the Trial Chamber's finding that Nzabonimana's above-mentioned conduct at Musambira reinforced the conclusion that he and his co-conspirators entered into an agreement to commit genocide, which materialised at Murambi.¹¹⁵⁵

416. Turning to events at Nyakabanda, the Appeals Chamber is not persuaded that the Trial Chamber erroneously found Nzabonimana's mere presence at the weapons distribution to reinforce the conclusion that he and his co-conspirators entered into an agreement at Murambi to commit genocide. The Appeals Chamber observes the Trial Chamber's determination that Nzabonimana was present at Nyakabanda when Kambanda distributed weapons to the Ndiza Battalion for the purpose of fighting the Tutsi "enemy".¹¹⁵⁶ The Appeals Chamber finds it reasonable for the Trial Chamber to rely on and conclude that this event reinforced the finding on the existence of an agreement between Ministers of the Interim Government to encourage the killing of Tutsis.¹¹⁵⁷ In addition, the Appeals Chamber finds Nzabonimana's reference to paragraph 1729 of the Trial Judgement to be misguided.¹¹⁵⁸ At paragraph 1729, the Trial Chamber found Nzabonimana not guilty of genocide for merely attending the meeting because the Indictment alleged an active conduct. Furthermore, the Appeals Chamber finds Nzabonimana's submission, that the Trial Chamber relied only on his mere presence to infer the crime of conspiracy, devoid of merit. As stated earlier, the Trial Chamber inferred the agreement based on events at the Murambi meeting.¹¹⁵⁹ The Appeals Chamber thus dismisses Nzabonimana's argument in relation to Nyakabanda.

417. Finally, recalling that conspiracy to commit genocide is an inchoate offence,¹¹⁶⁰ the Appeals Chamber does not see how, in itself, the lack of criminal consequences following events at Murambi and Musambira supports another reasonable inference.

418. For the reasons above, the Appeals Chamber dismisses Nzabonimana's arguments in relation to events at Musambira and Nyakabanda *communes*.

¹¹⁵³ Trial Judgement, para. 1746.

¹¹⁵⁴ See Nzabonimana Appeal Brief, para. 295.

¹¹⁵⁵ Trial Judgement, paras. 1746, 1747.

¹¹⁵⁶ Trial Judgement, paras. 1285, 1292. With respect to Nzabonimana's arguments on Kambanda's words, the Appeals Chamber recalls that the group of other members of the Interim Government was sufficient to find that Nzabonimana conspired with one or more persons to commit genocide. See *supra*, para. 400. Accordingly, Nzabonimana's argument is moot.

¹¹⁵⁷ Trial Judgement, paras. 1746, 1747.

¹¹⁵⁸ See Nzabonimana Appeal Brief, para. 284.

(c) Conclusion

419. Based on the foregoing, the Appeals Chamber finds that Nzabonimana fails to demonstrate any error warranting the Appeals Chamber's intervention and therefore dismisses his arguments in relation to his conviction for conspiracy to commit genocide under his Fifth Ground of Appeal.

5. Conclusion

420. For the foregoing reasons, the Appeals Chamber dismisses Nzabonimana's submissions concerning his conviction for conspiracy to commit genocide under his Fifth Ground of Appeal and grants the Fifth Ground of Appeal, in part, as it relates to his conviction for direct and public incitement to commit genocide in relation to Murambi. The Appeals Chamber therefore reverses Nzabonimana's conviction for direct and public incitement to commit genocide based on his conduct at the Murambi meeting. The impact of this finding, if any, on sentencing will be considered in the relevant section below.

¹¹⁵⁹ See *supra*, paras. 394-402.

¹¹⁶⁰ See *Gatete* Appeal Judgement, para. 262.

F. Alleged Errors Relating to Nyamabuye (Ground 6)

421. The Trial Chamber found that, in April 1994, Nzabonimana visited the Nyamabuye *commune* office and told the Hutu civilians present to destroy the house of a deceased Tutsi, Jean de Dieu Mpambara, and to cover it up so that in the event of an enquiry his death would not be known.¹¹⁶¹ The Trial Chamber did not find Nzabonimana guilty of genocide with respect to his statement at the Nyamabuye *commune* office but found that it provided circumstantial evidence of his intent to destroy, in whole or in substantial part the Tutsi ethnic group, as such.¹¹⁶² It further found that the fact that Nzabonimana's statement was ultimately obeyed provided further evidence of Nzabonimana's influence at that time.¹¹⁶³

422. Nzabonimana submits that the Trial Chamber erred in fact and in law in making unfavourable factual findings with respect to the Nyamabuye event.¹¹⁶⁴ In particular, Nzabonimana submits that he did not receive clear and consistent notice of the alleged acts.¹¹⁶⁵ Nzabonimana also submits that the Trial Chamber erred in its assessment of Prosecution Witness CNAA's credibility and erroneously found that Defence Witness T71 corroborated Witness CNAA's testimony.¹¹⁶⁶ Nzabonimana argues that the Trial Chamber failed to consider contradictions within Witness CNAA's testimony, as well as between his testimony at trial and earlier statements that he had made in the *Bizimungu et al.* and *Karempera et al.* trials.¹¹⁶⁷ He argues that Witness T71's testimony contradicts Witness CNAA's testimony in every respect.¹¹⁶⁸

423. The Prosecution responds that Nzabonimana's claim that the Indictment was defective is moot because Nzabonimana was not convicted for the Nyamabuye event.¹¹⁶⁹ It further responds that Nzabonimana ignores and fails to explain why the Trial Chamber's acceptance of Witness CNAA's explanation was unreasonable.¹¹⁷⁰ The Prosecution submits that Witness T71 corroborated Witness CNAA on key aspects, even though he disagreed about Nzabonimana's implication in the event.¹¹⁷¹

¹¹⁶¹ Trial Judgement, para. 1730. *See also ibid.*, para. 1491.

¹¹⁶² Trial Judgement, para. 1732.

¹¹⁶³ Trial Judgement, para. 1732.

¹¹⁶⁴ Nzabonimana Notice of Appeal, paras. 6.1-6.[4]; Nzabonimana Appeal Brief, paras. 302-315.

¹¹⁶⁵ Nzabonimana Notice of Appeal, para. 6.3; Nzabonimana Appeal Brief, paras. 310-314.

¹¹⁶⁶ Nzabonimana Appeal Brief, paras. 302-309, 312, 313. *See also ibid.*, paras. 14, 15. Nzabonimana also submits that the Trial Chamber erred by distorting and setting aside the testimony of Witness T71. *See* Notice of Appeal, para. 6.2(2). The Appeals Chamber considers that Nzabonimana has withdrawn the argument, since it is not developed in his Appeal Brief.

¹¹⁶⁷ Nzabonimana Appeal Brief, para. 302.

¹¹⁶⁸ Nzabonimana Appeal Brief, paras. 306-309.

¹¹⁶⁹ Prosecution Response Brief, para. 253.

¹¹⁷⁰ Prosecution Response Brief, para. 250.

¹¹⁷¹ Prosecution Response Brief, para. 251.

424. The Appeals Chamber recalls that, as a general rule, it declines to discuss alleged errors which have no impact on the conviction or sentence.¹¹⁷² The Trial Chamber did not convict Nzabonimana for his statement at the Nyamabuye *commune* office, but relied on his statement as circumstantial evidence of his genocidal intent and as further evidence of his influence at the time.¹¹⁷³ As the Trial Chamber relied on several other events as circumstantial evidence of Nzabonimana's intent to destroy, in whole or in substantial part, the Tutsi ethnic group, as such,¹¹⁷⁴ the Appeals Chamber finds that the Nyamabuye event does not underpin Nzabonimana's convictions. Similarly, the Trial Chamber's reference to this event as further evidence of Nzabonimana's influence has no impact on his convictions or his sentence.¹¹⁷⁵ The Appeals Chamber therefore declines to consider Nzabonimana's challenges in relation to the Nyamabuye event.

425. As to the assessment of the credibility of Witness CNAA, the Appeals Chamber finds that Nzabonimana fails to demonstrate how the alleged contradictions within his testimony and with prior statements made in other proceedings undermine the overall credibility of Witness CNAA.¹¹⁷⁶ In any event, the Trial Chamber did consider that Witness CNAA's omission to provide all the information about Nzabonimana in previous trials did not impact his credibility regarding this event because those cases concerned different defendants.¹¹⁷⁷ The Appeals Chamber does not detect any error in the Trial Chamber's assessment.

426. For the foregoing reasons, the Appeals Chamber dismisses Nzabonimana's Sixth Ground of Appeal.

¹¹⁷² *Kanyarukiga* Appeal Judgement para. 62; *Renzaho* Appeal Judgement, paras. 251, 384; *Krajišnik* Appeal Judgement, para. 20. In this respect, the Appeals Chamber notes Nzabonimana's contradictory submissions claiming on the one hand that the Trial Chamber did not convict him, and on the other hand, that he be acquitted in respect of the event at Nyamabuye. See Nzabonimana Notice of Appeal, paras. 6.1(2), 6.[4].

¹¹⁷³ Trial Judgement, para. 1732.

¹¹⁷⁴ Trial Judgement, paras. 1707 (Butare Trading Centre Meeting), 1724 (Release of Killers in Rutobwe *Commune*), 1726 (Murambi Meeting), 1728 (Reinstatement Ceremony of the *Bourgmestre* of Musambira *Commune*), 1734 (Weapons Distribution in Tambwe *Commune*), 1736 (Tambwe *Commune* Crisis Committee).

¹¹⁷⁵ The Appeals Chamber recalls that the Trial Chamber relied on Nzabonimana's influence among other factors to establish his substantial contribution to the attacks in relation to the Cyayi and Nyabikenke events (see Trial Judgement, paras. 1712, 1713, 1714). See *supra*, paras. 136, 137, 140-144. Further, influence is not a required element for genocide or any other crime of which Nzabonimana was convicted. It also recalls that the Trial Chamber considered the abuse of influence, not influence alone, as an aggravating factor in sentencing. See *infra*, para. 464.

¹¹⁷⁶ The Appeals Chamber recalls that the findings concerning the events at Murambi on 18 April 1994 are based, in part, on the testimony of Witness CNAA.

¹¹⁷⁷ Trial Judgement, para. 1483.

G. Alleged Errors Relating to Tambwe (Ground 7)

427. The Trial Chamber convicted Nzabonimana of conspiracy to commit genocide (Count 2) based, in part, on its conclusion that, in May 1994, he entered into an agreement with Jean-Damascene Ukirikyeyezu to encourage the killing of members of the Tutsi population in Tambwe *commune*.¹¹⁷⁸ The Trial Chamber reached this conclusion having found that Nzabonimana and Ukirikyeyezu entered into an agreement to form a Crisis Committee with the purpose of disguising the killings from the international community and on another occasion distributed weapons and encouraged their use for the killing of Tutsis.¹¹⁷⁹

428. Nzabonimana submits that the Trial Chamber erred in convicting him of conspiracy to commit genocide based on the events in Tambwe *commune*.¹¹⁸⁰ In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing: (i) the notice provided to Nzabonimana for this crime; and (ii) the legal elements of the crime.

1. Notice

429. Nzabonimana submits that the Trial Chamber erred in finding that paragraphs 49 and 58 of the Indictment provided him with notice that he entered into a conspiracy with Ukirikyeyezu to kill Tutsis.¹¹⁸¹ In particular, Nzabonimana submits that the Trial Chamber erred in finding that the Indictment reasonably identified his alleged co-conspirators.¹¹⁸² He argues that the Prosecution's Opening Statement merely refers to the Interim Government's role in the conspiracy.¹¹⁸³

430. Moreover, Nzabonimana contends that the Indictment failed to notify him of the circumstances of the agreement with Ukirikyeyezu and instead merely described two isolated events, the formation of a Crisis Committee and the distribution of weapons, in which Ukirikyeyezu allegedly participated.¹¹⁸⁴ Nzabonimana contends that the Indictment does not allege any nexus between these two events.¹¹⁸⁵ According to Nzabonimana, it is impossible to tell from the Indictment whether these incidents are part of the same conspiracy or two separate conspiracies.¹¹⁸⁶ Furthermore, Nzabonimana argues that the Prosecution failed to present any evidence concerning

¹¹⁷⁸ Trial Judgement, paras. 1748, 1749.

¹¹⁷⁹ Trial Judgement, para. 1748. *See also ibid.*, paras. 1538, 1583, 1591, 1599.

¹¹⁸⁰ Nzabonimana Notice of Appeal, paras. 7.1-7.3; Nzabonimana Appeal Brief, paras. 316-384.

¹¹⁸¹ Nzabonimana Notice of Appeal, paras. 7.1, 7.2; Nzabonimana Appeal Brief, paras. 316-328.

¹¹⁸² Nzabonimana Appeal Brief, para. 320.

¹¹⁸³ Nzabonimana Appeal Brief, para. 320, *referring to* Trial Judgement, para. 1743, fn. 2182, *citing* Prosecution Opening Statement, T. 19 November 2009 p. 11.

¹¹⁸⁴ Nzabonimana Appeal Brief, para. 317.

¹¹⁸⁵ Nzabonimana Appeal Brief, para. 319.

¹¹⁸⁶ Nzabonimana Appeal Brief, para. 319.

what transpired prior to the Crisis Committee meeting and the distribution of weapons in Tambwe *commune* which might indicate a conspiracy.¹¹⁸⁷

431. Nzabonimana contends that the allegations in the Indictment “radically” differed from the evidence presented.¹¹⁸⁸ In particular, Nzabonimana submits that the Trial Chamber lacked an evidentiary basis for finding that the Interim Government had a policy to disguise the killings from the international community and the role that Nzabonimana or Ukirikyeyezu played in the design or adoption of that policy.¹¹⁸⁹ Nzabonimana further argues that the meeting did not take place in Ruhango *cellule* as the Trial Chamber found.¹¹⁹⁰ Finally, Nzabonimana submits that the Prosecution failed to prove any of the criminal consequences of the incidents alleged in paragraphs 49 and 58 of the Indictment.¹¹⁹¹

432. The Prosecution responds that the Indictment sufficiently pleads Nzabonimana’s conspiracy with Ukirikyeyezu at Tambwe *commune*.¹¹⁹²

433. Count 2 of the Indictment charges Nzabonimana with conspiracy to commit genocide.¹¹⁹³ Specifically, paragraph 59 of the Indictment alleges that:

[...] between 1 January and 31 July 1994, **Callixte NZABONIMANA** with other persons, including but not limited to Ministers, including those of the Interim Government of 9 April 1994, the leadership of Rwandan Armed Forces (FAR), Gendarmerie, Presidential Guard, the political leaders of the MRND, the MRD-Hutu Power faction, the PL-Hutu Power faction, other Hutu-Power factions of opposition parties, and various local administration officials, conspired to kill or cause serious bodily and mental harm to members of the Tutsi population, with the intent to destroy in whole or in part, a racial or ethnic group.

434. In the Trial Judgement, the Trial Chamber observed that paragraph 59 of the Indictment referred only to the categories of people with whom Nzabonimana allegedly conspired.¹¹⁹⁴ The Trial Chamber noted, however, that the Indictment identified the specific individuals with whom Nzabonimana allegedly conspired in other paragraphs pleaded in support of the count of conspiracy and that, thus, the Indictment when read as a whole adequately informed Nzabonimana of the identity of his alleged co-conspirators.¹¹⁹⁵

435. In particular, paragraphs 49 and 58 of the Indictment pertain to events in Tambwe *commune*. Paragraph 49 of the Indictment states:

¹¹⁸⁷ Nzabonimana Appeal Brief, para. 321.

¹¹⁸⁸ Nzabonimana Appeal Brief, para. 325.

¹¹⁸⁹ Nzabonimana Appeal Brief, paras. 322, 326.

¹¹⁹⁰ Nzabonimana Appeal Brief, para. 326.

¹¹⁹¹ Nzabonimana Appeal Brief, paras. 323, 327.

¹¹⁹² Prosecution Response Brief, paras. 255-261.

¹¹⁹³ Indictment, paras. 59, 60.

¹¹⁹⁴ Trial Judgement, para. 1743.

¹¹⁹⁵ Trial Judgement, para. 1743.

On or about 15 May 1994, in collaboration with the Interim Government's policy of forming Crisis Committees throughout the country as a way of disguising the killings from the international community, **Callixte NZABONIMANA**, in the company of Major Jean Damascene UKIRIKYEYEZU, a member of the Civil Defence in *Gitarama*, presided over a meeting in *Ruhango* cellule, *Nyamagana* secteur, *Tambwe* commune, *Gitarama* prefecture, where the Crisis Committee of that commune was selected. The meeting was also convened to address the issue of Hutu's [*sic*] fighting over the property of Tutsi. Many Tutsi caught on roadblocks were killed on the orders of this committee and they included NYABUGAJU, RUHEZAMBIGO AND LANGUIDA.

Paragraph 58 of the Indictment states:

In May 1994, **Callixte NZABONIMANA**, acting in concert with **T92** and Jean Damascene UKIRIKYEYEZU brought a lorry full of weapons to the *Tambwe* communal office. The Accused ordered that the weapons be distributed to the population. The weapons were distributed and were used to kill Tutsi in various attacks in *Tambwe* commune.

436. The Trial Chamber found that Nzabonimana and Ukirikyeyezu entered into an agreement to establish a Crisis Committee to disguise the killings from the international community.¹¹⁹⁶ In addition, the Trial Chamber found that, in late April or early May 1994, Nzabonimana and Ukirikyeyezu distributed weapons and encouraged their use against Tutsis.¹¹⁹⁷ The Trial Chamber considered the concerted and coordinated nature of these actions and inferred, based on the totality of the evidence, that an agreement with the specific intent to destroy the Tutsi population in whole or in part materialised between Nzabonimana and Ukirikyeyezu in May 1994.¹¹⁹⁸

437. 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.¹¹⁹⁹ The Appeals Chamber further recalls that in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.¹²⁰⁰

438. The Appeals Chamber observes that paragraph 59 of the Indictment alleges that between 1 January 1994 and 31 July 1994 Nzabonimana conspired with, *inter alios*, Ministers, including those of the Interim Government of 9 April 1994, military, and political party officials, to kill or cause serious bodily and mental harm to members of the Tutsi population with the intent to destroy in whole or in part a racial or ethnic group. Paragraphs 49, 58, and 60 of the Indictment provide greater specificity as to the material facts underpinning Nzabonimana's conviction for conspiracy to commit genocide, namely his participation with Ukirikyeyezu in a Crisis Committee meeting and

¹¹⁹⁶ Trial Judgement, para. 1748.

¹¹⁹⁷ Trial Judgement, para. 1748.

¹¹⁹⁸ Trial Judgement, para. 1748.

¹¹⁹⁹ See, e.g., *Bizimungu* Appeal Judgement, para. 46; *Ndindiliyimana et al.* Appeal Judgement, para. 171; *Šainović et al.* Appeal Judgement, para. 262.

¹²⁰⁰ See *supra*, para. 254.

their role in the distribution of weapons in Tambwe *commune* for the purpose of killing Tutsi civilians.

439. Specifically, for the purposes of notice, these allegations provide a basis for inferring that Nzabonimana and Ukirikyeyezu conspired to commit genocide. Consequently, there is no merit in Nzabonimana's submission that the Trial Chamber erred in finding that paragraphs 49 and 58 of the Indictment provided greater specificity as to the identity of the specific individuals with whom Nzabonimana conspired. Indeed, Ukirikyeyezu is clearly identified in paragraph 49 of the Indictment as a member of the Rwandan army, which is among the categories specified in paragraph 59 of the Indictment, and he is again mentioned in paragraph 58 of the Indictment. Moreover, paragraph 60 of the Indictment clearly states that the acts alleged in paragraphs 49 and 58 of the Indictment are intended to support the charge of conspiracy. For the purposes of notice, the Appeals Chamber is not convinced that any greater specificity was required.

440. In addition, the Appeals Chamber finds no merit in Nzabonimana's submission that the Indictment did not clearly indicate whether these two incidents formed a single conspiracy or two conspiracies. As mentioned above, it follows from paragraph 60 of the Indictment that both events were pleaded in support of the count of conspiracy. In addition, paragraphs 48 and 59 refer to both Nzabonimana and Ukirikyeyezu and relate to events in the same locality. In these circumstances, the Appeals Chamber is not satisfied that any greater specificity was required to connect the two events to the allegation of Nzabonimana's participation in a conspiracy to commit genocide. The Appeals Chamber also summarily dismisses Nzabonimana's argument relating to the alleged insufficiency of evidence to establish that the events in Tambwe *commune* demonstrate the existence of a conspiracy. Submissions relating to the insufficiency of evidence have no bearing on determining whether a trial chamber erred in finding that the requisite notice was provided.

441. Finally, the Appeals Chamber is not satisfied that Nzabonimana has demonstrated any difference between the Trial Chamber's findings and the allegations pleaded in the Indictment. The Trial Chamber clearly found that the purpose of the Crisis Committee was to conceal the killings from the international community and that the meeting occurred in Ruhango *cellule*, as alleged in paragraph 49 of the Indictment.¹²⁰¹ Nzabonimana's mere assertion that the evidence did not support these findings or provide greater context for his role in formulating the policy does not impugn the notice he received in the Indictment of the material facts underpinning his conviction. Furthermore, the fact that the evidence did not establish that Tutsis were in fact killed as a result of these

¹²⁰¹ Trial Judgement, paras. 1578, 1591, 1599, 1748.

incidents does not have any bearing on the sufficiency of notice for the inchoate crime of conspiracy, which requires only the act of entering into an agreement to commit genocide.¹²⁰²

442. Accordingly, the Appeals Chamber finds that Nzabonimana has failed to demonstrate that he lacked notice of the material facts underpinning his conviction for conspiracy to commit genocide.

2. Conspiracy to Commit Genocide

443. Having considered the concerted and coordinated actions of Nzabonimana and Ukirikyeyezu, the Trial Chamber found the only reasonable inference to be that an agreement materialised between them in May 1994 with the specific intent to destroy the Tutsi population in whole or in part, as such.¹²⁰³ In reaching this finding the Trial Chamber considered that: (i) Ukirikyeyezu and Nzabonimana entered into an agreement to establish the Crisis Committee, the purpose of which was to disguise the killings from the international community;¹²⁰⁴ and (ii) in late April to early May 1994, Nzabonimana and Ukirikyeyezu distributed weapons and encouraged that the weapons be used against the Tutsis.¹²⁰⁵ On this basis, the Trial Chamber convicted Nzabonimana of conspiracy to commit genocide.¹²⁰⁶

444. Nzabonimana submits that the Trial Chamber accepted evidence on events in Tambwe *commune* that do not support the inference that he and Ukirikyeyezu entered into an agreement to destroy the Rwandan Tutsi population.¹²⁰⁷ Nzabonimana maintains that the Trial Chamber erroneously found Ukirikyeyezu a co-conspirator because Ukirikyeyezu was not reliably identified.¹²⁰⁸ Nzabonimana contends that Prosecution Witness CNAK was unable to identify the military officer present during the weapons distribution or the establishment of the Crisis Committee.¹²⁰⁹ Nzabonimana argues that the Trial Chamber erred by considering that Defence Witness T92's evidence on Ukirikyeyezu's identity corroborated Witness CNAK's evidence.¹²¹⁰ In this respect, Nzabonimana submits that Witness T92 denied the occurrence of the "meetings", including his presence, as Witness CNAK alleged.¹²¹¹ Nzabonimana adds that Witness T92 was

¹²⁰² See *Gatete* Appeal Judgement, para. 260.

¹²⁰³ Trial Judgement, para. 1748.

¹²⁰⁴ See Trial Judgement, para. 1748. See also *ibid.*, paras. 1583, 1591, 1599.

¹²⁰⁵ See Trial Judgement, para. 1748. See also *ibid.*, para. 1538.

¹²⁰⁶ Trial Judgement, paras. 1748, 1749.

¹²⁰⁷ Nzabonimana Notice of Appeal, para. 7.1.3; Nzabonimana Appeal Brief, para. 329.

¹²⁰⁸ Nzabonimana Appeal Brief, para. 343.

¹²⁰⁹ Nzabonimana Appeal Brief, para. 343. Nzabonimana submits that, while it is alleged in paragraphs 49 and 58 of the Indictment that Nzabonimana's co-conspirator regarding Tambwe charges was Ukirikyeyezu, Witness CNAK testified that he did not remember the name of the military officer who accompanied Nzabonimana in Tambwe. See *idem*, referring to Witness CNAK, T. 25 November 2009 p. 51.

¹²¹⁰ Nzabonimana Appeal Brief, para. 343, referring to Trial Judgement, para. 1527.

¹²¹¹ Nzabonimana Appeal Brief, para. 343, referring to Trial Judgement, para. 1527.

found not to be credible.¹²¹² Nzabonimana further contends that the Prosecution did not produce any evidence relating to Ukirikyeyezu's conduct, and that the finding that Ukirikyeyezu distributed weapons is erroneous since Witness CNAK testified that Nzabonimana alone spoke and distributed weapons.¹²¹³

445. With respect to the establishment of the Crisis Committee, Nzabonimana submits that the Trial Chamber erroneously found evidence to justify the inference that he and Ukirikyeyezu had entered into an agreement to kill the Rwandan Tutsi population.¹²¹⁴ Regarding the weapons distribution at Tambwe *commune*, Nzabonimana submits that the Trial Chamber erred by: (i) relying on Witness CNAK's testimony to determine that Nzabonimana brought weapons to allow the people to ensure the security of the country and themselves from the "enemy", meaning Tutsis;¹²¹⁵ and (ii) concluding without evidentiary basis that, after the weapons distribution, he and Ukirikyeyezu "encouraged the population" to use the weapons against Tutsis.¹²¹⁶

446. The Prosecution responds that the Trial Chamber reasonably found an agreement to destroy the Tutsi population based on the cooperation between Nzabonimana and Ukirikyeyezu at Tambwe.¹²¹⁷ The Prosecution responds that Witness T92 corroborated Witness CNAK's evidence that an officer responsible for the Civil Defence was present in Gitarama at the time.¹²¹⁸ It submits that Witness T92 simply supplemented the name, Ukirikyeyezu, for the officer in charge of the Civil Defence, about whom Witness CNAK testified.¹²¹⁹ The Prosecution adds that the Trial Chamber correctly found that Nzabonimana and Ukirikyeyezu were involved in the weapons distribution,¹²²⁰ and that Nzabonimana fails to demonstrate that the Trial Chamber was unreasonable in accepting Witness CNAK's testimony that it was public knowledge that the enemy was the Tutsis.¹²²¹

447. Nzabonimana replies that the Trial Chamber merely refers to the totality of evidence, while the evidence does not reveal coordination.¹²²² He submits that the Trial Chamber's conclusion on

¹²¹² Nzabonimana Appeal Brief, para. 343, *referring to* Trial Judgement, para. 1535.

¹²¹³ Nzabonimana Appeal Brief, para. 344, *referring to* Witness CNAK, T. 25 November 2009 p. 52.

¹²¹⁴ Nzabonimana Appeal Brief, paras. 337-342.

¹²¹⁵ Nzabonimana Appeal Brief, para. 331.

¹²¹⁶ Nzabonimana Appeal Brief, para. 333, *referring to* Trial Judgement, para. 1748.

¹²¹⁷ Prosecution Response Brief, para. 254.

¹²¹⁸ Prosecution Response Brief, para. 267.

¹²¹⁹ Prosecution Response Brief, para. 267.

¹²²⁰ Prosecution Response Brief, para. 268.

¹²²¹ Prosecution Response Brief, para. 262, *referring to* Witness CNAK, T. 25 November 2009 p. 52 (closed session).

¹²²² Nzabonimana Reply Brief, para. 81.

the existence of a plan is not sufficiently reasoned, and further that the Trial Chamber was drawing inference upon inference.¹²²³

448. The Appeals Chamber recalls again that conspiracy to commit genocide, under Article 2(3)(b) of the Statute, requires “an agreement between two or more persons to commit the crime of genocide”.¹²²⁴ The Appeals Chamber further recalls that where the Prosecution intends to rely on circumstantial evidence to prove a particular fact upon which the guilt of the accused depends, the finding of the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.¹²²⁵

449. As recalled above, the Trial Chamber convicted Nzabonimana of conspiracy to commit genocide on the basis of an agreement between Nzabonimana and Ukirikyeyezu to encourage the killing of Tutsis, which it inferred from Nzabonimana’s and Ukirikyeyezu’s agreement to establish the Crisis Committee and from their distribution of weapons. The Appeals Chamber will consider whether the Trial Chamber erred in finding that Ukirikyeyezu was Nzabonimana’s co-conspirator.

450. With respect to both events which form the basis of Nzabonimana’s conviction for conspiracy concerning Tambwe *commune*, the Trial Chamber considered Witness CNAK’s testimony that a military officer who was responsible for Civil Defence accompanied Nzabonimana and concluded that that officer was Ukirikyeyezu.¹²²⁶ Specifically, with respect to the distribution of weapons, the Trial Chamber observed that Witness CNAK did not know the name of the individual who accompanied Nzabonimana, but that he described him as “a military officer who was responsible for Civil Defence”.¹²²⁷ The Trial Chamber then stated that “Witness T92 gave corroborating evidence that Jean-Damascene Ukirikyeyezu was a Major and was President of Civil Defence in Gitarama”.¹²²⁸ With respect to the Crisis Committee, the Trial Chamber determined that “[a]lthough Witness CNAK did not provide the name of the officer, [it] note[d] that Witness T92 testified that Jean-Damascene Ukirikyeyezu was a major and was President of Civil Defence in Gitarama”.¹²²⁹ The Trial Chamber then found that Nzabonimana came to establish the Crisis Committee with Ukirikyeyezu.¹²³⁰ The Appeals Chamber therefore considers that, for both events, the Trial Chamber relied on Witness T92’s evidence regarding Ukirikyeyezu’s positions in the

¹²²³ Nzabonimana Reply Brief, para. 81.

¹²²⁴ See *supra*, paras. 255, 391.

¹²²⁵ Seromba Appeal Judgement, para. 221; *Nahimana et al.* Appeal Judgement, para. 896. See also *Mugenzi and Mugiraneza* Appeal Judgement, para. 88.

¹²²⁶ Trial Judgement, paras. 1495, 1544.

¹²²⁷ Trial Judgement, para. 1527.

¹²²⁸ See Trial Judgement, para. 1527 (internal reference omitted). The Appeals Chamber observes that the Trial Chamber did not mention Ukirikyeyezu’s presence or involvement in its factual conclusions on the weapons distribution. See *ibid.*, para. 1538.

¹²²⁹ See Trial Judgement, para. 1570.

military and Civil Defence as corroborative and supplementary of Witness CNAK's evidence that Nzabonimana was accompanied by an officer responsible for Civil Defence.¹²³¹

451. The Appeals Chamber observes that, in relation to both events, the Trial Chamber had before it no evidence that Ukirikyeyezu was present. The Trial Chamber concluded that Ukirikyeyezu was present on the basis of Witness CNAK's testimony that a military officer who was responsible for Civil Defence accompanied Nzabonimana and Witness T92, and Witness T92's evidence concerning Ukirikyeyezu's positions in the military and Civil Defence.¹²³² The Appeals Chamber notes that while Witness T92 testified that he knew Ukirikyeyezu and his positions,¹²³³ Witness T92 denied seeing Nzabonimana and Ukirikyeyezu during the 1994 events, denied attending the meeting during which the Crisis Committee was established, and denied distributing arms with Nzabonimana and Ukirikyeyezu.¹²³⁴ The Appeals Chamber further notes that the Trial Chamber found Witness T92 not credible with respect to both events.¹²³⁵

452. In these circumstances, the Appeals Chamber finds that no reasonable trier of fact could have considered Witness T92's evidence as corroborative of Witness CNAK's evidence. As Witness CNAK did not identify Ukirikyeyezu, and as the Trial Chamber had before it no other evidence that it was Ukirikyeyezu who accompanied Nzabonimana, the Appeals Chamber finds that the Trial Chamber erred in determining that Ukirikyeyezu was present during the establishment of the Crisis Committee and the weapons distribution and that he was, therefore, Nzabonimana's co-conspirator.

453. Accordingly, the Appeals Chamber finds that the evidence before the Trial Chamber in respect of Tambwe *commune* could not lead a reasonable trier of fact to conclude that the only reasonable inference was that Nzabonimana and Ukirikyeyezu entered into an agreement to destroy the Rwandan Tutsi population. The Appeals Chamber therefore dismisses Nzabonimana's remaining arguments as moot.¹²³⁶

¹²³⁰ Trial Judgement, para. 1583.

¹²³¹ Trial Judgement, paras. 1527, 1570.

¹²³² Trial Judgement, paras. 1495, 1503, 1544, 1570.

¹²³³ When asked if he knew Ukirikyeyezu, Witness T92 answered that he knew the name and that "[h]e was a major, a member of parliament, Jean-Damascène Ukuliyeyezu. I know that he was also appointed *préfet* of Gitarama and that he was also appointed a member – or, the president of civil defence in Gitarama". See Witness T92, T. 19 May 2010 p. 16.

¹²³⁴ Witness T92, T. 19 May 2010 pp. 18, 19; Witness T92, T. 19 May 2010 pp. 53, 71 (closed session). See also Trial Judgement, paras. 1503, 1534, 1564, 1579.

¹²³⁵ See Trial Judgement, paras. 1535, 1580.

¹²³⁶ See Nzabonimana Notice of Appeal, para. 7.2; Nzabonimana Appeal Brief, paras. 345-384.

3. Conclusion

454. For the foregoing reasons, the Appeals Chamber grants Nzabonimana's Seventh Ground of Appeal. The Appeals Chamber reverses Nzabonimana's conviction for conspiracy to commit genocide in relation to Tambwe *commune*. The impact of this finding, if any, on sentencing will be considered below.

H. Alleged Errors Relating to Sentencing (Ground 8)

455. The Trial Chamber sentenced Nzabonimana to a single term of life imprisonment for his convictions for genocide (Count 1), conspiracy to commit genocide (Count 2), direct and public incitement to commit genocide (Count 3), and extermination as a crime against humanity (Count 4).¹²³⁷

456. Nzabonimana submits that the Trial Chamber erred in fact and in law in imposing a patently disproportionate sentence.¹²³⁸ In the alternative to quashing his convictions, Nzabonimana submits that a reduction of sentence is warranted as the Trial Chamber engaged in double-counting aggravating circumstances and failed to properly exercise its discretion when considering mitigating circumstances.¹²³⁹ Nzabonimana submits that, although the Trial Chamber was not obliged to consider mitigating circumstances given his refusal to address them, the Trial Chamber erred in the exercise of its discretion by failing to consider other mitigating circumstances that were available in the evidence, the alleged prejudice suffered, and the conduct of the Prosecution.¹²⁴⁰

457. The Prosecution responds that, by failing to make any submission on mitigating circumstances at trial, Nzabonimana waived his arguments on appeal.¹²⁴¹ Similarly, the Prosecution argues that Nzabonimana waived on appeal his arguments on the Trial Chamber's assessment of aggravating circumstances as he failed to identify the substance of the Trial Chamber's alleged errors in his Notice of Appeal.¹²⁴² In any event, the Prosecution submits that the Trial Chamber did not engage in double-counting and Nzabonimana does not present any argument showing any abuse of discretion.¹²⁴³

458. In addressing this ground of appeal, the Appeals Chamber bears in mind that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.¹²⁴⁴ As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by

¹²³⁷ Trial Judgement, paras. 1800, 1822.

¹²³⁸ Nzabonimana Notice of Appeal, p. 59; Nzabonimana Appeal Brief, paras. 385-395.

¹²³⁹ Nzabonimana Notice of Appeal, pp. 59-61; Nzabonimana Appeal Brief, paras. 29, 385-395.

¹²⁴⁰ Nzabonimana Appeal Brief, paras. 385, 390-395. Nzabonimana argues that in choosing to exercise its discretion to consider mitigating circumstances, the Trial Chamber was obliged to do this according to the law. He further argues that having been acquitted of the majority of the charges, there was no way he could have anticipated being convicted on "the basis of a few paragraphs in the Indictment". *See ibid.*, para. 390.

¹²⁴¹ Prosecution Response Brief, paras. 305, 306.

¹²⁴² Prosecution Response Brief, para. 307.

¹²⁴³ Prosecution Response Brief, paras. 308-312.

¹²⁴⁴ *See, e.g., Bizimungu* Appeal Judgement, para. 372; *Ndindiliyimana et al.* Appeal Judgement, para. 418; *Ndahimana* Appeal Judgement, para. 218.

the trial chamber unless it has been shown that the trial chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law.¹²⁴⁵

1. Preliminary Matters

459. The Appeals Chamber recalls that under Rule 86(C) of the Rules, the parties shall address matters of sentencing in their closing arguments. It is thus the accused's prerogative to identify any mitigating circumstances before the trial chamber and he cannot raise them for the first time on appeal.¹²⁴⁶ As Nzabonimana made no submissions on sentencing in his closing brief and arguments at trial,¹²⁴⁷ the Appeals Chamber will not consider his contention that the Trial Chamber should have considered the Prosecution's alleged poor conduct, alleged prejudice suffered in presenting his case, and the fact that he welcomed Tutsis into his house during the events.¹²⁴⁸

460. The Appeals Chamber notes that Nzabonimana refers to aggravating circumstances only in the subheading of Ground 8 of his Notice of Appeal but that he does not allege any error in this respect.¹²⁴⁹ The Appeals Chamber finds that this cursory reference to aggravating circumstances is insufficient to provide the requisite notice within the meaning of Rule 108 of the Rules.¹²⁵⁰ Consequently, Nzabonimana's submissions in his Appeal Brief on alleged errors pertaining to aggravating circumstances impermissibly exceed the scope of his Notice of Appeal.¹²⁵¹ The Appeals Chamber nevertheless considers that it is in the interests of justice to examine these arguments. As the Prosecution responded to these contentions despite its implicit objection to their consideration, the Appeals Chamber considers that there is no unfairness to the Prosecution in this respect.¹²⁵²

¹²⁴⁵ See, e.g., *Bizimungu* Appeal Judgement, para. 372; *Ndindiliyimana et al.* Appeal Judgement, para. 418; *Ndahimana* Appeal Judgement, para. 218.

¹²⁴⁶ See, e.g., *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kupreškić et al.* Appeal Judgement, para. 414.

¹²⁴⁷ See Trial Judgement, para. 1816. See also Nzabonimana Appeal Brief, para. 385. Despite Nzabonimana not making sentencing submissions, the Trial Chamber did address mitigating circumstances and considered his contribution towards the development of Gitarama *préfecture* and lack of expression of negative sentiments against Tutsis prior to the events of April 1994 to be of limited weight. See Trial Judgement, paras. 1812, 1816, 1820.

¹²⁴⁸ See Nzabonimana Appeal Brief, paras. 392-394. In addition, the Appeals Chamber considers that the Trial Chamber did not err in the exercise of its discretion in choosing to consider mitigating circumstances when it was under no obligation to do so, or because it did not consider the circumstances that Nzabonimana raises for the first time on appeal. See *ibid.*, paras. 390, 391.

¹²⁴⁹ See Nzabonimana Notice of Appeal, p. 59.

¹²⁵⁰ Rule 108 of the Rules requires, *inter alia*, that the appellant "indicate the substance of the alleged errors".

¹²⁵¹ In this respect, the Appeals Chamber observes that the issue is about the scope of the appeal rather than waiver, as mentioned by the Prosecution. See Prosecution Response Brief, paras. 305, 307.

¹²⁵² Cf. *Gatete* Appeal Judgement, para. 20; *Ntabakuze* Appeal Judgement, fn. 255; *Bagosora and Nsengiyumva* Appeal Judgement, para. 381.

2. Alleged Double-Counting Between Aggravating Circumstances and Elements of the Crime

461. In determining the appropriate sentence, the Trial Chamber considered as aggravating circumstances Nzabonimana's abuse of influence, the large number of victims at the Nyabikenke *commune* office in excess of the threshold for extermination as a crime against humanity, and the fact that the victims were particularly vulnerable.¹²⁵³

462. Nzabonimana submits that the Trial Chamber erred by finding that the release of prisoners from Rutobwe *commune* and the order to destroy a Tutsi house in Nyamabuye *commune* constituted aggravating circumstances while also considering these events in inferring his genocidal intent, one of the elements of the crime of genocide, of which he was convicted.¹²⁵⁴ Nzabonimana adds that the Trial Chamber could not consider influence as an aggravating circumstance while considering it in relation to the commission of certain crimes.¹²⁵⁵ He argues that the Trial Chamber also erred by considering the number of victims at the Nyabikenke *commune* office as an aggravating circumstance while also relying upon this fact in satisfaction of one of the elements of the crime of extermination as a crime against humanity.¹²⁵⁶

463. The Prosecution responds that the Trial Chamber did not rely on the Rutobwe and Nyamabuye incidents to double-count any element of an offence, but cited these events alongside other findings to infer Nzabonimana's genocidal intent and to illustrate Nzabonimana's abuse of his position of influence.¹²⁵⁷ The Prosecution submits that the abuse of his position was not relied upon by the Trial Chamber to establish Nzabonimana's genocidal intent or any other element of his convictions.¹²⁵⁸ The Prosecution also submits that the Trial Chamber did not engage in double-counting regarding the number of victims at the Nyabikenke *commune* office incident and properly considered it as an aggravating circumstance as the Trial Chamber only considered the number of victims beyond those required to establish extermination as a crime against humanity.¹²⁵⁹

464. The Appeals Chamber recalls that a factor considered by a trial chamber as an element of a crime cannot also be considered as an aggravating circumstance.¹²⁶⁰ The Appeals Chamber also recalls that the Trial Chamber convicted Nzabonimana of instigating genocide for the killings of

¹²⁵³ Trial Judgement, paras. 1818, 1819.

¹²⁵⁴ Nzabonimana Appeal Brief, paras. 386, 387.

¹²⁵⁵ Nzabonimana Appeal Brief, para. 388.

¹²⁵⁶ Nzabonimana Appeal Brief, para. 389.

¹²⁵⁷ Prosecution Response Brief, para. 309.

¹²⁵⁸ Prosecution Response Brief, para. 309.

¹²⁵⁹ Prosecution Response Brief, para. 310, referring to *Ndindabahizi* Appeal Judgement, para. 135.

¹²⁶⁰ *Dordević* Appeal Judgement, para. 936. See also *Bizimungu* Appeal Judgement, para. 380; *Ndindabahizi* Appeal Judgement, para. 137; *Blaškić* Appeal Judgement, para. 693, referring to *Vasiljević* Appeal Judgement, paras. 172, 173.

Tutsis at the Nyabikenke *commune* office on 15 April 1994.¹²⁶¹ The Trial Chamber noted “the extensive circumstantial evidence of Nzabonimana’s genocidal intent” which included, *inter alia*, Nzabonimana’s forcible release of prisoners in Rutobwe *commune* and his statement at the Nyamabuye *commune* office to destroy the house of a dead Tutsi.¹²⁶² The Appeals Chamber observes that the Trial Chamber considered Nzabonimana’s abuse of influence, not his mere influence, as an aggravating circumstance, and specifically, Nzabonimana’s encouragement for the intensification of the massacres instead of using his position of authority and his influence to protect Tutsis.¹²⁶³ Furthermore, contrary to Nzabonimana’s submission, the release of the Rutobwe *commune* prisoners and his order of destruction of a house in Nyamabuye *commune* served as examples of Nzabonimana’s abuse of his position of influence and were not aggravating circumstances in themselves.¹²⁶⁴ Thus, the Appeals Chamber rejects Nzabonimana’s contention that the Trial Chamber engaged in double-counting in relation to his influence and the events in Rutobwe and Nyamabuye *communes*.

465. Turning to Nzabonimana’s submission regarding double-counting the number of victims at the Nyabikenke *commune* office as both an element of extermination as a crime against humanity and an aggravating circumstance, the Appeals Chamber recalls that, with respect to extermination as a crime against humanity, “a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime if the extent of the killings exceeds that required for extermination”.¹²⁶⁵ As the Trial Chamber considered that the large number of victims at the Nyabikenke *commune* office exceeded the threshold for extermination as a crime against humanity, the Appeals Chamber finds that it did not err in taking the number of victims into consideration as an aggravating circumstance. The Appeals Chamber therefore rejects Nzabonimana’s submission that the Trial Chamber engaged in impermissible double-counting in considering the number of victims at the Nyabikenke *commune* office as an aggravating circumstance.

466. In light of the foregoing, the Appeals Chamber dismisses Nzabonimana’s Eighth Ground of Appeal.

¹²⁶¹ Trial Judgement, paras. 1718, 1737.

¹²⁶² Trial Judgement, paras. 1717, 1724, 1732.

¹²⁶³ Trial Judgement, para. 1818.

¹²⁶⁴ Trial Judgement, para. 1818.

¹²⁶⁵ *Ndahimana* Appeal Judgement, para. 231; *Ndindabahizi* Appeal Judgement, para. 135. The Appeals Chamber recalls that while extermination as a crime against humanity has been found in relation to the killing of thousands of persons, it has also been found in relation to fewer killings, such as the killings of approximately 60 individuals and less. See *Ndahimana* Appeal Judgement, para. 231, referring to *Lukić and Lukić* Appeal Judgement, paras. 537, 544, fns. 1564-1567.

IV. APPEAL OF THE PROSECUTION

A. Alleged Error Relating to Nzabonimana's Conviction for Instigating Genocide and Extermination in Nyabikenke Commune Office (Ground 1)

467. The Trial Chamber convicted Nzabonimana of instigating genocide and extermination as a crime against humanity under Article 6(1) of the Statute based on his role in the killing of Tutsis at the Nyabikenke *commune* office, Gitarama *préfecture*, on 15 April 1994.¹²⁶⁶ As recalled earlier, the Trial Chamber found that on 13 April 1994, assailants attempted an unsuccessful attack against Tutsis who sought refuge at the Nyabikenke *commune* office.¹²⁶⁷ It further found that in the afternoon of 14 April 1994, Nzabonimana held a meeting at the Cyayi centre, where approximately 30 people were present,¹²⁶⁸ during which he told them to prioritise the massacre of Tutsis before taking their property¹²⁶⁹ and threatened Evariste Munyagatare.¹²⁷⁰ The Trial Chamber also found that the night and day following Nzabonimana's remarks, Hutu civilians, *Interahamwe*, and *commune* policemen attacked the Nyabikenke *commune* office,¹²⁷¹ resulting in the deaths of between 15 and 60 Tutsi refugees, including Munyagatare.¹²⁷²

468. The Trial Chamber observed that, following Nzabonimana's remarks, the attacks against the Tutsis in the *commune* office "escalated in their intensity and character".¹²⁷³ Recalling, *inter alia*, that Nzabonimana was an influential figure in Gitarama *préfecture* and based on the totality of evidence, the Trial Chamber concluded that the only reasonable inference from the evidence was that Nzabonimana's remarks substantially contributed to the "continuance and ultimate success" of the attack.¹²⁷⁴ The Trial Chamber further found that by saying that Tutsis should be massacred, together with issuing a threat against a Tutsi, Nzabonimana prompted others to carry out and continue the genocidal attack upon the *commune* office, and that he intended to do so.¹²⁷⁵

469. The Prosecution submits that the Trial Chamber erred in convicting Nzabonimana only for instigating rather than for committing or, alternatively, ordering, genocide and extermination as a

¹²⁶⁶ Trial Judgement, paras. 1718, 1737, 1786, 1787, 1790, 1795, 1800.

¹²⁶⁷ Trial Judgement, paras. 866, 938. *See also ibid.*, para. 1709.

¹²⁶⁸ Trial Judgement, paras. 887, 938. *See also ibid.*, paras. 1710, 1711.

¹²⁶⁹ Trial Judgement, paras. 887, 938. *See also ibid.*, para. 1710.

¹²⁷⁰ Trial Judgement, paras. 938. *See also ibid.*, para. 1710.

¹²⁷¹ Trial Judgement, paras. 902, 910, 913, 927, 936, 939. *See also ibid.*, para. 1711. The Trial Chamber found that the attack occurred between 3.00 and 4.00 a.m. and at approximately 10.00 a.m. until the afternoon on 15 April 1994. *See ibid.*, paras. 913, 936, 1711.

¹²⁷² Trial Judgement, paras. 936, 939. *See also ibid.*, paras. 1711, 1785, 1795. *See also* Rule 115 Decision.

¹²⁷³ Trial Judgement, para. 1714.

¹²⁷⁴ Trial Judgement, paras. 1712-1715. *See also ibid.*, para. 92.

¹²⁷⁵ Trial Judgement, para. 1717.

crime against humanity in relation to the killings at the Nyabikenke *commune* office.¹²⁷⁶ It argues that the Trial Chamber failed to provide an explanation as to why it rejected these modes of liability,¹²⁷⁷ and requests the Appeals Chamber to enter a conviction on this basis for genocide (Count 1) and extermination (Count 4), or alternatively murder, as a crime against humanity (Count 5), in order to fully reflect the criminality of Nzabonimana's conduct.¹²⁷⁸

470. Nzabonimana responds that the Prosecution's appeal should be dismissed.¹²⁷⁹ He further requests that the Appeals Chamber refrain from entering a new conviction based on a more severe legal characterisation at this stage, as it would deny him the right to appeal the new conviction.¹²⁸⁰

471. As a preliminary matter, in so far as the Prosecution argues that the Trial Chamber failed to provide an explanation for rejecting the modes of liability of committing and ordering, a review of the Trial Judgement reflects that the Trial Chamber explained in detail the legal elements of each mode of liability under Article 6(1) of the Statute relevant to the crimes, including committing and ordering.¹²⁸¹ Since the Trial Chamber stated that it would discuss these modes of liability in its legal findings "where applicable",¹²⁸² the Appeals Chamber considers that the Trial Chamber implicitly considered the applicability of these modes of liability to the alleged crimes. The Appeals Chamber finds no error in the Trial Chamber's decision to only explicitly discuss the form of responsibility it concluded was most appropriate. Accordingly, the Prosecution has not shown that the Trial Chamber erred in this respect.

472. The Appeals Chamber now considers, in turn, whether the Trial Chamber erred in not convicting Nzabonimana on the basis of the modes of responsibility of committing or ordering in relation to the events at the Cyayi centre and the Nyabikenke *commune* office.

1. Committing

473. The Prosecution submits that Nzabonimana should have been convicted under the mode of liability of committing since his role in the attack at the Nyabikenke *commune* office was "integral to its commission" and that his actions went far beyond mere instigation.¹²⁸³ The Prosecution contends that "[a] person providing a contribution that is equally important as – or more important

¹²⁷⁶ Prosecution Notice of Appeal, para. 2; Prosecution Appeal Brief, paras. 2, 4, 11, 23-57, 69. *See also* AT. 29 April 2014 p. 56.

¹²⁷⁷ Prosecution Appeal Brief, paras. 24, 25.

¹²⁷⁸ Prosecution Notice of Appeal, para. 2; Prosecution Appeal Brief, paras. 23, 25, 50, 56, 57, 69.

¹²⁷⁹ Nzabonimana Response Brief, paras. 12, 17, 93.

¹²⁸⁰ Nzabonimana Response Brief, para. 15.

¹²⁸¹ Trial Judgement, paras. 1692-1700.

¹²⁸² Trial Judgement, para. 1700.

¹²⁸³ Prosecution Appeal Brief, paras. 4, 11, 24, 26, 49, 50. *See also* Prosecution Reply Brief, paras. 31, 32; AT. 29 April 2014 pp. 56, 63.

than – the carrying out of the *actus reus*, cannot be assessed as a mere accessory”.¹²⁸⁴ The Prosecution further submits that the accused’s presence is not required for “integral part commission”¹²⁸⁵ and that, with the exception of Nzabonimana’s absence during the attack, Nzabonimana’s conduct meets all of the indicators considered by the Appeals Chamber in previous cases,¹²⁸⁶ namely that: (i) he fully exercised his influence over the physical perpetrators;¹²⁸⁷ (ii) he fully embraced the decision to commit the crime as his own;¹²⁸⁸ and (iii) his conduct enabled the crimes.¹²⁸⁹

474. The Prosecution argues that Nzabonimana’s power and influence were established from, *inter alia*, the fact that he was highly respected in his hometown, Nyabikenke *commune*, and throughout Gitarama *préfecture* as he was “one of the highest ranking officials in Rwanda”.¹²⁹⁰ The Prosecution further argues that Nzabonimana fully embraced the decision to commit the crimes as his own considering “[h]is leadership role, his personal order to massacre the Tutsis and his threat that the Tutsis’ time would come soon”.¹²⁹¹ The Prosecution contends that the fact that, following his remarks, Nyabikenke authorities turned “from defending the Tutsis [at the Nyabikenke *commune* office] to massacring them” demonstrates that Nzabonimana’s exercise of influence was as compelling as that in the *Seromba*, *Gacumbitsi*, and *Munyakazi* cases.¹²⁹² The Prosecution asserts that Nzabonimana enabled the killings as much as or more than Gacumbitsi or Munyakazi who had simply led assailants on the ground.¹²⁹³ The Prosecution contends that Nzabonimana’s conduct is part of “his wider campaign of genocide”.¹²⁹⁴

475. Nzabonimana responds that the Prosecution’s theory in relation to his influence and authority as well as “campaign of genocide” is new and distorted.¹²⁹⁵ Nzabonimana contends that the Trial Chamber only made vague isolated findings on his influence and never found that he exercised “compelling authority” over anyone.¹²⁹⁶ According to Nzabonimana, his conduct is not

¹²⁸⁴ Prosecution Appeal Brief, para. 26. *See also* Prosecution Reply Brief, para. 32.

¹²⁸⁵ Prosecution Appeal Brief, paras. 44-48.

¹²⁸⁶ Prosecution Appeal Brief, paras. 27, 49.

¹²⁸⁷ Prosecution Appeal Brief, paras. 28-38, *referring to, inter alia, Seromba* Appeal Judgement, paras. 170, 171, *Gacumbitsi* Appeal Judgement, paras. 2, 60; *Munyakazi* Appeal Judgement, paras. 2, 136.

¹²⁸⁸ Prosecution Appeal Brief, paras. 39-41, *referring to, inter alia, Seromba* Appeal Judgement, para. 171. The Prosecution contends that although the relevant indicator was not specifically considered by the Appeals Chamber in *Gacumbitsi* or *Munyakazi*, the leadership roles of the accused showed that they embraced the decision to commit the crimes. *See ibid.*, para. 39.

¹²⁸⁹ Prosecution Appeal Brief, paras. 42, 43, *referring to, inter alia, Gacumbitsi* Appeal Judgement, para. 60; *Munyakazi* Appeal Judgement, para. 135. *See also* AT. 29 April 2014 p. 63.

¹²⁹⁰ Prosecution Appeal Brief, paras. 29-31. *See also* Prosecution Reply Brief, paras. 17-27.

¹²⁹¹ Prosecution Appeal Brief, para. 40.

¹²⁹² Prosecution Appeal Brief, paras. 29, 35. *See also ibid.*, paras. 32-38.

¹²⁹³ Prosecution Appeal Brief, para. 43.

¹²⁹⁴ Prosecution Appeal Brief, paras. 15-22.

¹²⁹⁵ Nzabonimana Response Brief, paras. 13, 18-20, 22, 24-29, 41.

¹²⁹⁶ Nzabonimana Response Brief, paras. 19, 25. *See also* AT. 29 April 2014 pp. 68, 69.

comparable to that found to constitute committing in the *Seromba*, *Gacumbitsi*, and *Munyakazi* cases, where the accused were either present, led, or supervised the attack.¹²⁹⁷ Comparing other cases where “exhortations to kill [...] prior to a criminal attack” were characterised as instigating, Nzabonimana contends that the elevation of the legal characterisation of his conduct to committing is unwarranted.¹²⁹⁸ He stresses that liability for committing should be limited to cases involving the active participation at the time of the crime and that adopting a broader interpretation would blur the distinction between this mode of criminal responsibility and others.¹²⁹⁹

476. The Prosecution replies that Nzabonimana’s submissions are unfounded and without merit.¹³⁰⁰ It further asserts that the Prosecution’s case regarding Nzabonimana’s power and authority was not new as it was alleged in the Indictment, the Prosecution Pre-Trial Brief, and the Prosecution Opening Statement.¹³⁰¹

477. As correctly recalled by the Trial Chamber, acts other than physical perpetration can constitute direct participation in the *actus reus* of a crime.¹³⁰² The question is whether an accused’s conduct “was as much an integral part of the genocide as were the killings which it enabled”.¹³⁰³ In the cases where the Appeals Chamber has concluded that an accused’s role constituted an integral part of the crimes, the accused were present at the scene of the crime and participated, supervised, directed, played a leading role, or otherwise fully exercised influence over the perpetrators.¹³⁰⁴ However, in this case, the Trial Chamber did not find that Nzabonimana was present during the attack and, further, did not find that he supervised, played a leading role, or fully exercised influence over the perpetrators.

478. Consequently, the Prosecution has failed to demonstrate that the Trial Chamber erred in not concluding that Nzabonimana committed genocide and extermination, or alternatively murder, as a crime against humanity at the Nyabikenke *commune* office.

¹²⁹⁷ Nzabonimana Response Brief, paras. 44-66.

¹²⁹⁸ Nzabonimana Response Brief, paras. 67, 68, referring to *Ndindabahizi* Trial Judgement, paras. 458, 464; *Nchamihigo* Trial Judgement, paras. 369-371, 373-378; *Karera* Trial Judgement, paras. 543, 546, 548; *Kajelijeli* Trial Judgement, paras. 829, 832, 833, 836.

¹²⁹⁹ Nzabonimana Response Brief, paras. 13, 44, 69.

¹³⁰⁰ Prosecution Reply Brief, paras. 11-16, 28-30, 44-49.

¹³⁰¹ Prosecution Reply Brief, paras. 4, 6-10, 20.

¹³⁰² Trial Judgement, para. 1696. See *Munyakazi* Appeal Judgement, para. 135; *Seromba* Appeal Judgement, para. 161; *Gacumbitsi* Appeal Judgement, para. 60.

¹³⁰³ *Gacumbitsi* Appeal Judgement, para. 60. See also *Munyakazi* Appeal Judgement, para. 135; *Seromba* Appeal Judgement, para. 161.

¹³⁰⁴ See *Seromba* Trial Judgement, paras. 239, 269; *Seromba* Appeal Judgement, para. 171; *Gacumbitsi* Appeal Judgement, para. 60. See also *Munyakazi* Appeal Judgement, para. 136.

2. Ordering

479. The Prosecution submits that, in the alternative, Nzabonimana should have been convicted for ordering the attack.¹³⁰⁵ The Prosecution submits that the Trial Chamber found that Nzabonimana ordered the massacre.¹³⁰⁶ It also contends that Nzabonimana occupied a position of authority which would have compelled the physical perpetrators to carry out the crimes, meeting the *actus reus* of ordering.¹³⁰⁷ The Prosecution argues that Nzabonimana possessed the required *mens rea* for this mode of liability.¹³⁰⁸

480. Nzabonimana responds that the Trial Chamber did not establish that the perpetrators of the attack were those present at the Cyayi centre when Nzabonimana gave his remarks.¹³⁰⁹ He submits that the required causal link was absent as the offence should be committed by the person who received the order.¹³¹⁰ Nzabonimana also submits that there was no direct evidence that an order was issued to the *bourgmestre* or to policemen,¹³¹¹ and that the circumstantial evidence does not lead to the only reasonable conclusion that Nzabonimana gave an order to attack the *commune* office.¹³¹²

481. The Prosecution replies that there was direct evidence that he gave an order at the Cyayi centre meeting¹³¹³ and that it was the only reasonable conclusion from the factual findings.¹³¹⁴

482. The Appeals Chamber recalls that ordering requires that a person in a position of authority instruct another person to commit an offence.¹³¹⁵ The authority envisaged by ordering requires no formal superior-subordinate relationship between the accused and the perpetrator¹³¹⁶ and may be informal or of a purely temporary nature.¹³¹⁷ It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime.¹³¹⁸ A person in a position of authority may incur responsibility for ordering if the order has a direct and

¹³⁰⁵ Prosecution Notice of Appeal, para. 2; Prosecution Appeal Brief, paras. 2, 4, 25, 51, 56, 57. *See also* AT. 29 April 2014 pp. 56, 63, 64, 66.

¹³⁰⁶ Prosecution Appeal Brief, para. 52, *referring to* Trial Judgement, paras. 1785, 1795. *See also* AT. 29 April 2014 pp. 63, 66.

¹³⁰⁷ Prosecution Appeal Brief, paras. 51, 53, 54.

¹³⁰⁸ Prosecution Appeal Brief, para. 55.

¹³⁰⁹ Nzabonimana Response Brief, paras. 73, 75.

¹³¹⁰ Nzabonimana Response Brief, paras. 75, 76.

¹³¹¹ Nzabonimana Response Brief, paras. 77-79.

¹³¹² Nzabonimana Response Brief, paras. 80-92.

¹³¹³ Prosecution Reply Brief, para. 59.

¹³¹⁴ Prosecution Reply Brief, para. 61.

¹³¹⁵ *Bagosora and Nsengiyumva* Appeal Judgement, para. 277; *Setako* Appeal Judgement, para. 240; *Kordić and Čerkez* Appeal Judgement, para. 28.

¹³¹⁶ *Setako* Appeal Judgement, para. 240; *Nahimana et al.* Appeal Judgement, fn. 1162; *Kordić and Čerkez* Appeal Judgement, para. 28.

¹³¹⁷ *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 363.

substantial effect on the commission of the illegal act.¹³¹⁹ Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order.¹³²⁰

483. The Appeals Chamber notes that the Trial Chamber found that Nzabonimana was an influential political personality in Gitarama *préfecture* during the events of April to July 1994.¹³²¹ However, the Trial Chamber made no findings on his position of authority, informal or temporary, over the recipients of the alleged order or the direct perpetrators of the attack sufficient to establish Nzabonimana's responsibility for ordering under Article 6(1) of the Statute.¹³²² The Appeals Chamber notes that in paragraphs 1785 and 1795 of the Trial Judgement, the Trial Chamber indeed referred to Nzabonimana's remarks as "orders".¹³²³ However, nowhere in the Trial Judgement did it find that the attack at the Nyabikenke *commune* office was subsequently committed by the persons who received the alleged order.¹³²⁴ In fact, the Trial Chamber made no findings that the persons who were present at the Cyayi centre, where Nzabonimana made the remarks, were the same as those who committed the killings at the Nyabikenke *commune* office.

484. Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in not concluding that Nzabonimana ordered the killings at the Nyabikenke *commune* office.

3. Conclusion

485. Accordingly, the Appeals Chamber dismisses the Prosecution's First Ground of Appeal.

¹³¹⁸ *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361. See also *Gacumbitsi* Appeal Judgement, para. 182.

¹³¹⁹ *Ndindiliyimana et al.* Appeal Judgement, paras. 291, 365; *Setako* Appeal Judgement, para. 240; *Renzaho* Appeal Judgement, para. 315.

¹³²⁰ *Bagosora and Nsengiyumva* Appeal Judgement, fn. 642; *Renzaho* Appeal Judgement, para. 315; *Nahimana et al.* Appeal Judgement, para. 481.

¹³²¹ Trial Judgement, para. 92. See also *ibid.*, para. 1712.

¹³²² Cf. *Renzaho* Appeal Judgement, para. 320; *Boškoski and Tarčulovski* Appeal Judgement, para. 75.

¹³²³ Trial Judgement, paras. 1785, 1795.

¹³²⁴ Cf. *Ndindiliyimana et al.* Appeal Judgement, para. 368.

B. Alleged Errors Relating to the Release of Prisoners in Rutobwe Commune (Ground 2)

486. The Trial Chamber found that, in the days leading up to 18 April 1994, Nzabonimana encouraged the killing of Tutsis by causing “the release of killers of Tutsis”, who had been imprisoned by *bourgmestre* Jean-Marie Vianney Mporanzi, in Rutobwe *commune*.¹³²⁵ It further found that killings in Rutobwe *commune* intensified after the release of the prisoners.¹³²⁶ However, the Trial Chamber found that there was insufficient evidence to conclude that the release of the prisoners substantially contributed to the commission of a specific crime.¹³²⁷ Accordingly, it did not convict Nzabonimana of genocide based on this event.¹³²⁸

487. The Prosecution submits that the Trial Chamber erred in failing to convict Nzabonimana of aiding and abetting the killing of Tutsis in Rutobwe *commune* through the forcible release of prisoners.¹³²⁹ According to the Prosecution, all of the elements of aiding and abetting genocide were found by the Trial Chamber: (i) the killings for the *actus reus* of genocide; (ii) Nzabonimana’s substantial contribution by releasing the killers for the *actus reus* of aiding and abetting; and (iii) his knowledge of the killers’ genocidal intent for the *mens rea*.¹³³⁰ The Prosecution submits that the Trial Chamber accepted the evidence that the prisoners, once set free, committed genocidal killings when it found that the killings in Rutobwe *commune* intensified after the release of the prisoners.¹³³¹ The Prosecution further submits that the Trial Chamber erred when concluding that it could not find that Nzabonimana’s conduct had substantially contributed to any of the ensuing crimes since he released the very criminals who later killed Tutsis in the same *commune* where they had been imprisoned.¹³³² The Prosecution submits that the Trial Chamber erred in fact when finding that no detail was provided as to the victims, dates or locations,¹³³³ and erred in law in requiring such details in addition to the elements of the crime that were proven.¹³³⁴ In this respect, the Prosecution argues that the Trial Chamber’s error is further compounded by its reliance on the *Kalimanziira*

¹³²⁵ Trial Judgement, para. 1076. *See also ibid.*, para. 1719.

¹³²⁶ Trial Judgement, para. 1076. *See also ibid.*, para. 1719. The Trial Chamber further found that Nzabonimana must have known the genocidal intent of the released prisoners. *See ibid.*, para. 1720.

¹³²⁷ Trial Judgement, para. 1723.

¹³²⁸ Trial Judgement, para. 1723.

¹³²⁹ Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 5, 14, 58-69. *See also* Prosecution Reply Brief, paras. 90, 91; AT. 29 April 2014 pp. 56, 66.

¹³³⁰ Prosecution Appeal Brief, paras. 5, 59-61. *See also* Prosecution Reply Brief, paras. 82, 83.

¹³³¹ Prosecution Appeal Brief, para. 59.

¹³³² Prosecution Appeal Brief, paras. 60, 63. *See also* Prosecution Reply Brief, paras. 83, 86-88.

¹³³³ Prosecution Appeal Brief, para. 62, *referring to* Trial Judgement, paras. 1067, 1076, 1719, 1722. *See also* Prosecution Reply Brief, para. 83.

¹³³⁴ Prosecution Appeal Brief, paras. 5, 64-66, *referring to* Karera Appeal Judgement, para. 318; Ntakirutimana Appeal Judgement, para. 517. *See also* Prosecution Reply Brief, para. 83.

Appeal Judgement since the Appeals Chamber in that case did not require additional details, but instead found the evidence insufficient in relation to the existence of killings.¹³³⁵

488. Nzabonimana responds that the Trial Chamber correctly acquitted him due to insufficient evidence of killings.¹³³⁶ Nzabonimana submits that the Prosecution erroneously contends that the Trial Chamber implicitly acknowledged the existence of crimes committed by the released prisoners and that the evidence of these crimes was sufficient.¹³³⁷ Nzabonimana further submits that the Prosecution confuses the Trial Chamber's finding that killings intensified following the release of the prisoners with proof beyond reasonable doubt of "crimes specifically connected" to the reprehensible conduct.¹³³⁸ Nzabonimana contends that the evidence of Prosecution Witness CNAA was vague hearsay and that Defence Witness Mporanzi's testimony mentioned no particular crime and provided no specific elements, rendering it impossible to establish a nexus between the murders and the release of prisoners.¹³³⁹ Nzabonimana submits that the Trial Chamber simply required specific and sufficient evidence that murders were committed.¹³⁴⁰ Nzabonimana finally argues that the Trial Chamber correctly relied on the *Kalimanzira* Appeal Judgement.¹³⁴¹

489. The Appeals Chamber recalls that in determining substantial contribution for aiding and abetting, it has assessed whether a "link" or "connection" between the conduct of the aider and abettor and the crime has been demonstrated.¹³⁴² Such conduct must have a substantial effect upon the perpetration of the crime.¹³⁴³ Whether a particular contribution qualifies as "substantial" is a "fact-based inquiry", and need not "serve as condition precedent for the commission of the crime".¹³⁴⁴

490. The Trial Chamber recalled that it had heard evidence that the released prisoners: (i) organised themselves after their release and then carried out various crimes against Tutsis in Rutobwe *commune* between 21 and 30 April 1994, including demolishing houses and killings; and

¹³³⁵ Prosecution Appeal Brief, para. 67, referring to *Kalimanzira* Appeal Judgement, paras. 77-79. See also Prosecution Reply Brief, para. 89.

¹³³⁶ Nzabonimana Response Brief, paras. 114, 128.

¹³³⁷ Nzabonimana Response Brief, para. 118.

¹³³⁸ Nzabonimana Response Brief, para. 119.

¹³³⁹ Nzabonimana Response Brief, paras. 121, 125, 126. See also AT. 29 April 2014 p. 73.

¹³⁴⁰ Nzabonimana Response Brief, para. 127.

¹³⁴¹ Nzabonimana Response Brief, paras. 123, 124, 126. Nzabonimana argues that the Prosecution's reference to the *Ntakirutimana* and *Karera* Appeal Judgements is irrelevant and further points to the *Muvunyi I* Appeal Judgement where he submits the Appeals Chamber reversed a conviction for genocide due to the imprecise nature of the hearsay evidence in relation to relevant murders. See *ibid.*, paras. 123, 124, 126, 127.

¹³⁴² See, e.g., *Ndindabahizi* Appeal Judgement, paras. 116-117; *Kamuhanda* Appeal Judgement, paras. 68, 72.

¹³⁴³ See, e.g., *Ndahimana* Appeal Judgement, para. 147; *Kalimanzira* Appeal Judgement, paras. 74, 86; *Rukundo* Appeal Judgement, para. 52.

¹³⁴⁴ *Ntawukulilyayo* Appeal Judgement, para. 214; *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 52.

(ii) carried out attacks in Nyamabuye *commune*.¹³⁴⁵ The Trial Chamber nonetheless found that the Prosecution failed to provide specific evidence of the crimes the released prisoners had allegedly committed after their release.¹³⁴⁶ The Trial Chamber noted that no detail had been provided concerning the alleged victims, dates, or locations.¹³⁴⁷

491. Contrary to the Prosecution's submission, the Trial Chamber did not accept the evidence that the criminals, once set free, committed genocidal killings nor did it find that details were provided.¹³⁴⁸ The Appeals Chamber finds that it is clear that the Trial Chamber considered the evidence to be insufficient to connect Nzabonimana's conduct in releasing the prisoners in Rutobwe *commune* to the commission of any specific crime.¹³⁴⁹ Furthermore, the Appeals Chamber is of the view that the Trial Chamber did not require "additional details" as a matter of law, but rather noted examples of evidence that were not before it.¹³⁵⁰ Nowhere in its findings did the Trial Chamber require the Prosecution to "specifically identify the perpetrators" or provide "certain named or described" victims, as asserted by the Prosecution. Thus, the Appeals Chamber considers that Nzabonimana's acquittal was not based on any additional legal requirements, but rather on the insufficiency of evidence.

492. In this respect, the Appeals Chamber notes that the Prosecution points to the evidence of Witness CNAA and Witness Mporanzi to support its submission that the Trial Chamber accepted evidence that the released criminals committed genocidal killings.¹³⁵¹ The Trial Chamber stated that it heard evidence that between 21 and 30 April 1994 the prisoners carried out various crimes including demolishing houses and killings in Rutobwe *commune*.¹³⁵² The Trial Chamber found that Witness Mporanzi corroborated Witness CNAA's testimony that prisoners committed crimes after their release, and that after about 20 April 1994, the "perpetrators were doing whatever they wanted", including killing Tutsis.¹³⁵³ The Appeals Chamber observes, however, that neither Witness CNAA nor Witness Mporanzi referred to a particular incident or provided details of the killings. Moreover, Witness CNAA testified to attacks in Nyamabuye *commune*,¹³⁵⁴ and not

¹³⁴⁵ Trial Judgement, para. 1722.

¹³⁴⁶ Trial Judgement, para. 1723.

¹³⁴⁷ Trial Judgement, para. 1723.

¹³⁴⁸ See Prosecution Appeal Brief, para. 62, where the Prosecution submits that the victims were Tutsis, the location was Rutobwe *commune*, and the dates were between 21 and the end of April 1994. See also Prosecution Reply Brief, para. 83.

¹³⁴⁹ See Trial Judgement, paras. 1723, 1724.

¹³⁵⁰ See Trial Judgement, para. 1723.

¹³⁵¹ See Prosecution Appeal Brief, para. 59.

¹³⁵² Trial Judgement, para. 1722.

¹³⁵³ Trial Judgement, para. 1067, referring to Witness Mporanzi, T. 26 May 2010 pp. 10, 11. See also *ibid.*, para. 1062.

¹³⁵⁴ Witness CNAA, T. 15 December 2009 p. 2 (closed session).

Rutobwe *commune* as alleged in the Indictment,¹³⁵⁵ and he provided no description of the attacks.¹³⁵⁶ His testimony that he learned from the released prisoners that they were given authorisation by the governor and “one of the ministers” to kill Tutsis,¹³⁵⁷ is similarly vague. While Witness Mporanzi testified that after the release, the prisoners organised themselves to attack Tutsis and started killing cows, demolishing houses, cutting down banana trees, and “killing people that they could find”,¹³⁵⁸ his testimony is vague and devoid of detail. Furthermore, it is unclear from Witness Mporanzi’s testimony whether he was referring to the released prisoners when describing the events between 21 April 1994 and towards the end of April 1994 where “perpetrators” were “killing if they wanted”.¹³⁵⁹ The Appeals Chamber finds, therefore, that the Trial Chamber reasonably concluded that there was insufficient evidence to find that the release of prisoners substantially contributed to the commission of a specific crime.¹³⁶⁰

493. Finally, the Appeals Chamber dismisses the Prosecution’s argument concerning the *Kalimanzira* Appeal Judgement.¹³⁶¹ Like in *Kalimanzira*, the Trial Chamber in the present case found insufficient evidence of the underlying crimes which precluded a finding of substantial contribution.¹³⁶²

494. The Appeals Chamber therefore finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in not finding Nzabonimana guilty of aiding and abetting genocide for the release of prisoners in Rutobwe *commune*.

495. Accordingly, the Appeals Chamber dismisses the Prosecution’s Second Ground of Appeal.

¹³⁵⁵ See Indictment, para. 24. Witness CNAA testified that Nyamabuye *commune* borders Rutobwe *commune*. See Witness CNAA, T. 15 December 2009 p. 2 (closed session).

¹³⁵⁶ See Witness CNAA, T. 15 December 2009 pp. 2, 3 (closed session).

¹³⁵⁷ Witness CNAA, T. 15 December 2009 p. 2 (closed session).

¹³⁵⁸ Witness Mporanzi, T. 26 May 2010 pp. 10, 11.

¹³⁵⁹ Witness Mporanzi, T. 26 May 2010 p. 10.

¹³⁶⁰ The Appeals Chamber notes that, in his Response, Nzabonimana challenges the Trial Chamber’s credibility assessment of Prosecution Witnesses CNAA and CNAC and Defence Witness Mporanzi whose evidence underpins the Trial Chamber’s finding that Nzabonimana released the Rutobwe *commune* prisoners. See Nzabonimana Response Brief, paras. 96-113. The Appeals Chamber understands that Nzabonimana is seeking to provide additional arguments to support his acquittal in respect of this event, without having used the provision foreseen in Article 5 of the Practice Direction on Formal Requirements for Appeals from Judgement, 5 July 2005. As the Appeals Chamber found no error under this ground of appeal, there is no need to examine further Nzabonimana’s arguments challenging the factual findings. Further, any challenge to the assessment of evidence on this event has been examined in Nzabonimana’s appeal, to the extent that such error could have an impact on Nzabonimana’s conviction or sentence. See *infra*, paras. 296-311.

¹³⁶¹ See Trial Judgement, para. 1723, fn. 2168.

¹³⁶² See *Kalimanzira* Appeal Judgement, paras. 76-78.

V. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON NZABONIMANA'S SENTENCE

496. The Appeals Chamber recalls that it has reversed Nzabonimana's conviction for direct and public incitement to commit genocide in relation to the Murambi meeting on 18 April 1994,¹³⁶³ and for conspiracy to commit genocide in relation to the establishment of a Crisis Committee and weapons distribution at Tambwe *commune*.¹³⁶⁴ However, the Appeals Chamber has affirmed Nzabonimana's convictions for genocide and extermination as a crime against humanity in relation to the events at the Cyayi centre on 14 April 1994 and at the Nyabikenke *commune* office on 15 April 1994.¹³⁶⁵ The Appeals Chamber has also affirmed his convictions for direct and public incitement in relation to events at the Butare trading centre and the Cyayi centre,¹³⁶⁶ as well as his convictions for conspiracy to commit genocide in relation to the Murambi meeting on 18 April 1994.¹³⁶⁷ In the circumstances of this case, the Appeals Chamber, affirms Nzabonimana's sentence of life imprisonment.

¹³⁶³ See *supra*, paras. 388, 420.

¹³⁶⁴ See *supra*, para. 454.

¹³⁶⁵ See *supra*, paras. 149, 156, 157.

¹³⁶⁶ See *supra*, paras. 133, 235.

¹³⁶⁷ See *supra*, paras. 419, 420.

VI. DISPOSITION

497. 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 29 April 2014;

SITTING in open session;

GRANTS Nzabonimana's Fifth Ground of Appeal, in part, and **REVERSES** his conviction for direct and public incitement to commit genocide in relation to the Murambi meeting on 18 April 1994 in Gitarama *préfecture*;

GRANTS Nzabonimana's Seventh Ground of Appeal and **REVERSES** his conviction for conspiracy to commit genocide in relation to events at the Tambwe *commune*;

DISMISSES Nzabonimana's appeal in all other respects;

DISMISSES the Prosecution's appeal in its entirety;

AFFIRMS Nzabonimana's convictions for instigating genocide and extermination as a crime against humanity at the Cyayi centre on 14 April 1994 resulting in the killings of Tutsis at the Nyabikenke *commune* office on 15 April 1994;

AFFIRMS Nzabonimana's convictions of direct and public incitement to commit genocide in relation to events at the Butare trading centre on 12 April 1994, and at the Cyayi centre on 14 April 1994;

AFFIRMS Nzabonimana's conviction of conspiracy to commit genocide in relation to the Murambi meeting on 18 April 1994;

AFFIRMS the sentence of life imprisonment imposed on Nzabonimana by the Trial Chamber, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 18 February 2008;

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, Nzabonimana is to remain

in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

Judge Afande appends a separate opinion.

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

Judge Mehmet Güney, Presiding

Judge William H. Sekule

Judge Arlette Ramaroson

Judge Khalida Rachid Khan

Judge Koffi Kumelio A. Afande

Done this 29th day of September 2014 at Arusha, Tanzania.

[Seal of the Tribunal]

VII. SEPARATE OPINION OF JUDGE KOFFI KUMELIO A. AFANDE

1. In this Judgement, the Appeals Chamber rejects Nzabonimana's submission that the Trial Chamber engaged in impermissible double-counting between aggravating circumstances and elements of the crime in relation to his influence and the events in Rutobwe and Nyamabuye *communes*.¹ While I agree with this conclusion, I have a degree of unease with the reasoning in paragraph 464 of this Appeal Judgement, which, in my view, does not necessarily support the outcome but rather suggests that there was, indeed, double-counting. I wish to clarify very briefly my own position as to why the Trial Chamber did not commit any error in this regard.

2. The Trial Chamber found that, in the days prior to 18 April 1994, Nzabonimana encouraged the killing of Tutsis by causing the release of killers of Tutsis in Rutobwe *commune*, who had been imprisoned.² It further found that, in April 1994, Nzabonimana visited the Nyamabuye *commune* office and told the Hutu civilians present to destroy the house of a dead Tutsi.³ The Trial Chamber considered that Nzabonimana's actions in relation to the release of the prisoners and his order for the destruction of the Tutsi house provided circumstantial evidence of his genocidal intent.⁴ In its sentencing considerations, the Trial Chamber found that the two incidents "further display Nzabonimana's abuse of his position of influence to stoke the genocide in Gitarama *prefecture*."⁵ The Trial Chamber considered Nzabonimana's abuse of influence as an aggravating factor in determining his sentence.⁶

3. While Nzabonimana's actions in relation to the release of the prisoners and his order for the destruction of the Tutsi house constituted circumstantial evidence relevant to the Trial Chamber's determination that he possessed genocidal intent, they are not, *per se*, an element required to establish criminal liability for genocide. The Trial Chamber further considered that these events constituted evidence supporting the conclusion that Nzabonimana abused his influence, which abuse, in turn, was considered by the Trial Chamber to be an aggravating factor. Accordingly, while the Trial Chamber relied on these events as circumstantial evidence showing that Nzabonimana possessed genocidal intent and abused his position, in themselves they were neither elements of the crime of genocide nor aggravating circumstances. By attributing to Nzabonimana's actions the evidentiary value it deemed relevant in the overall circumstances of this case, the Trial Chamber acted within the scope of its discretion.

¹ Appeal Judgement, para. 464.

² Trial Judgement, paras. 1076, 1719.

³ Trial Judgement, paras. 1488-1491, 1730.

⁴ Trial Judgement, paras. 1724, 1732.

4. For the reasons set out above, I believe that Nzabonimana's argument that the Trial Chamber engaged in impermissible double-counting between aggravating circumstances and elements of the crime is unsubstantiated.

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

Done this 29th day of September 2014,
At Arusha,
Tanzania

Judge Koffi Kumelio A. Afande

[Seal of the Tribunal]

⁵ Trial Judgement, para. 1818. The Trial Chamber explicitly held that Nzabonimana could not be held criminally responsible for his actions in relation to the two incidents. *See* Trial Judgement, para. 1818.

⁶ Trial Judgement, para. 1818.

VIII. ANNEX A – PROCEDURAL HISTORY

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

A. Notices of Appeal and Briefs

2. Trial Chamber III of the Tribunal rendered the judgement in this case on 31 May 2012 and issued its written Trial Judgement in English on 25 June 2012. Both parties appealed.

1. Nzabonimana's Appeal

3. Nzabonimana filed his notice of appeal on 24 July 2012.¹ On 7 September 2012, the Pre-Appeal Judge granted, in part, a motion filed by Nzabonimana for an extension of time to file his briefs, and ordered him to file his appeal brief no later than 40 days from the date on which he was served with the French translation of the Trial Judgement, and to file his response brief no later than 15 days from the date on which he was served with the French translation of the Trial Judgement or the French translation of the Prosecution appeal brief.² The French versions of the Trial Judgement and of the Prosecution appeal brief were served on Nzabonimana on 18 and 26 June 2013, respectively.³

4. On 22 July 2013, the Pre-Appeal Judge denied Nzabonimana's motion for an extension of the word limit for his appeal brief.⁴ On 23 July 2013, Nzabonimana filed a motion seeking to amend his notice of appeal.⁵ On 29 July 2013, Nzabonimana filed his appeal brief.⁶

5. On 30 August 2013, the Appeals Chamber granted in part Nzabonimana's Motion to Amend Notice of Appeal, where it: (i) instructed Nzabonimana to file a revised notice of appeal no later than 4 September 2013; (ii) granted the Prosecution's motion to strike Nzabonimana's appeal brief; (iii) ordered Nzabonimana to file a revised appeal brief not exceeding 30,000 words no later than

¹ *Acte d'appel*, 24 July 2012.

² Decision on Extension of Time Limits, 7 September 2012. *See also Requête en extension de délai pour le dépôt du Mémoire d'appelant et du mémoire d'intimé*, 26 July 2012; Prosecutor's Response to Callixte Nzabonimana's *Requête en extension de délai pour le dépôt du mémoire d'appelant et du mémoire d'intimé*, 30 July 2012; *Réplique à la Prosecutor's Response to Callixte Nzabonimana's Requête en extension de délai pour le dépôt du mémoire d'appelant et du mémoire d'intimé*, 1 August 2012.

³ The French version of the Trial Judgement was filed on 17 June 2013 and the French version of the Prosecution appeal brief was filed on 3 April 2013.

⁴ Decision on Callixte Nzabonimana's Motion for an Extension of the Word Limit for his Appellant's Brief, 22 July 2013.

⁵ *See* Callixte Nzabonimana's Urgent Motion for Leave to Amend Notice of Appeal, 7 August 2013 (original French version filed on 23 July 2013) ("Motion to Amend Notice of Appeal").

⁶ *Mémoire d'appelant*, 29 July 2013, *as corrected by Mémoire d'appelant*, 9 August 2013. *See also Corrigendum au Mémoire d'appelant*, 1 August 2013; *Corrigendum au Mémoire d'appelant*, 5 August 2013.

4 September 2013; (iv) and instructed the Prosecution to file its response brief to the amended appeal brief no later than 13 September 2013.⁷

6. On 4 September 2013, Nzabonimana filed his amended notice of appeal and amended appeal brief.⁸ On 13 September 2013, the Prosecution filed its response brief.⁹ On 30 September 2013, Nzabonimana filed his reply brief.¹⁰ On 7 October 2013, the Pre-Appeal Judge ordered Nzabonimana to file a confidential version of the amended appeal brief filed on 10 September 2013 no later than 14 October 2013 and the Prosecution to file a public redacted version of its response brief no later than 14 October 2013.¹¹

2. Prosecution's Appeal

7. The Prosecution filed its notice of appeal on 29 June 2012.¹² On 12 September 2012, the Prosecution filed its appeal brief.¹³ On 9 July 2013, Nzabonimana filed his confidential response brief.¹⁴ On 24 July 2013 the Prosecution filed its reply brief.¹⁵

3. Other issues

8. On 16 October 2013, the Appeals Chamber denied in its entirety Nzabonimana's motion for remedies in relation to the Prosecution's alleged violations of Rules 66(A)(ii) and 68 of the Rules.¹⁶

⁷ Decision on Callixte Nzabonimana's Motion to Amend his Notice of Appeal and the Prosecution's Motion to Strike Nzabonimana's Appeal Brief, 30 August 2013.

⁸ Amended Notice of Appeal, 3 December 2013 (original French version filed on 4 September 2013); *Mémoire d'Appelant Amendé*, 4 September 2013, as corrected by Amended Appellant's Brief Public Corrigendum, 3 December 2013 (original French version filed on 10 September 2013). See also *Corrigendum au Mémoire d'appelant amendé*, 10 September 2013; *Corrigendum bis au mémoire d'appelant amendé*, 13 September 2013.

⁹ Prosecution Response Brief, 13 September 2013 (confidential).

¹⁰ Brief in Reply, 19 December 2013 (original French version filed on 30 September 2013).

¹¹ Order on the Status of Briefs, 7 October 2013 ("Order on the Status of Briefs"). The Prosecution filed its public redacted response brief on 8 October 2013 (see Prosecution Response Brief, 8 October 2013), and Nzabonimana filed a confidential version of his amended appeal brief on 10 October 2013 (see *Mémoire d'appelant amendé confidentiel corrigendum*, 10 October 2013).

¹² Prosecutor's Notice of Appeal, 29 June 2012; *Corrigendum* to Prosecutor's Notice of Appeal, 23 August 2012.

¹³ Prosecution Appeal Brief, 12 September 2012.

¹⁴ Nzabonimana's Response Brief, 5 September 2013 (confidential) (original French version filed on 9 July 2013). Pursuant to the Order on the Status of Briefs, Nzabonimana filed a public redacted version of his response brief on 10 October 2013.

¹⁵ Prosecution Reply Brief, 24 July 2013.

¹⁶ Decision on Callixte Nzabonimana's New Motion for Remedies, 16 October 2013; Callixte Nzabonimana's New Motion for Appropriate Remedies on Account of Further Violations of Rules 66(A)(ii) and 68 of the Rules of Procedure and Evidence, 12 July 2013 (original French version filed on 25 June 2013) (public with confidential and public annexes). On 17 June 2013, the Pre-Appeal Judge dismissed without prejudice previous motions for violation of practice directions. See Decision on Prosecution's Motions to Strike and for Extension of Time, and on Nzabonimana's Motions for Extension of Words and for Remedies, 17 June 2013; *Requête de Callixte Nzabonimana afin d'obtenir les réparations appropriées compte tenu de nouvelles violations des articles 66(A)ii et 68 du Règlement de procédure et de preuve*, 11 June 2013 (public with confidential and public annexes); *Requête abrégée de Callixte Nzabonimana afin d'obtenir les réparations appropriées compte tenu de nouvelles violations des articles 66(A)ii et 68 du Règlement de procédure et de preuve*, 13 June 2013.

On 22 April 2014, the Appeals Chamber denied Nzabonimana's motion seeking to admit additional evidence on appeal.¹⁷

B. Assignment of Judges

9. On 3 July 2012, the Presiding Judge of the Appeals Chamber assigned the following Judges to the appeal: Judge Mehmet Güney (Presiding), Judge Fausto Pocar, Judge Arlette Ramaroson, Judge Andréia Vaz, and Judge Khalida Rachid Khan.¹⁸ On 7 September 2012, the Presiding Judge, Judge Mehmet Güney, designated himself as the Pre-Appeal Judge.¹⁹

10. On 19 March 2013, the Presiding Judge of the Appeals Chamber replaced Judge Andréia Vaz with Judge William H. Sekule.²⁰ On 29 January 2014, the Presiding Judge of the Appeals Chamber replaced Judge Fausto Pocar with Judge Koffi Kumelio A. Afande.²¹

C. Appeal Hearing

11. On 29 April 2014, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 31 March 2014.²²

¹⁷ Decision on Callixte Nzabonimana's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, 22 April 2014.

¹⁸ Order Assigning Judges to a Case Before the Appeals Chamber, 3 July 2012.

¹⁹ Order Assigning a Pre-Appeal Judge, 7 September 2012.

²⁰ Order Replacing a Judge in a Case Before the Appeals Chamber, 19 March 2013.

²¹ Order Replacing a Judge in a Case Before the Appeals Chamber, 29 January 2014.

²² Scheduling Order, 31 March 2014.

IX. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

AKAYESU Jean-Paul

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (“Akayesu Appeal Judgement”).

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 (“Akayesu Trial Judgement”).

BAGILISHEMA Ignace

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002 (“Bagilishema Appeal Judgement”).

BAGOSORA Théoneste et al.

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 (“Bagosora and Nsengiyumva Appeal Judgement”).

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”).

BIZIMUNGU Casimir et al.

The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Proper Mugiraneza, Case No. ICTR-99-50-T, Judgement and Sentence, pronounced on 30 September 2011, filed on 19 October 2011 (“Bizimungu et al. Trial Judgement”).

GACUMBITSI Sylvestre

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

HATEGEKIMANA Ildephonse

Ildephonse Hategekimana v. The Prosecutor, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 (“Hategekimana Appeal Judgement”).

KAJELIJELI Juvénal

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B. Defined Terms and Abbreviations

AT.	Transcript from hearings on appeal in the present case. All references are to the official English transcript, unless otherwise indicated.
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
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MDR	<i>Mouvement démocratique républicain</i>

MRND	<i>Mouvement révolutionnaire national pour la démocratie et le développement</i> [before 5 July 1991] <i>Mouvement républicain national pour la démocratie et le développement</i> [after 5 July 1991]
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	<i>Callixte Nzabonimana v. The Prosecutor</i> , Case No. ICTR-98-44D-A, Prosecution Appeal Brief, 12 September 2012
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RPF	Rwandan (also Rwandese) Patriotic Front
Rules	Rules of Procedure and Evidence of the Tribunal
Statute	Statute of the Tribunal established by Security Council Resolution 955 (1994)
T.	Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated.
Trial Chamber	Trial Chamber III of the Tribunal

Trial Judgement	<i>The Prosecutor v. Callixte Nzabonimana</i> , Case No. ICTR-98-44D-T, Judgement and Sentence, pronounced on 31 May 2012, issued in writing on 25 June 2012
Tribunal <i>or</i> ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
UNDF	United Nations Detention Facility