

The Prosecutor v. Simon BIKINDI

Case N° ICTR-2001-72

Case History

- Name : BIKINDI
- First Name : Simon
- Date of Birth : 1954
- Sex : male
- Nationality : Rwandan
- Former Official Function : Composer, singer and director of the performance group *Irindiro* Ballet
- Counts : Conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (murder and persecution)
- Date of Indictment's Amendments : 22 October 2003
- Date and Place of Arrest : 12 July 2001, in Leiden, The Netherlands
- Date of Transfer : 27 March 2002
- Date of Initial Appearance : 4 April 2002
- Date Trial Began : 18 September 2006
- Date of Judgement and content of the Sentence : 2 December 2008, Sentenced to 15 years imprisonment
- Case on Appeal

Le Procureur c. Simon BIKINDI

Affaire N° ICTR-2001-72

Fiche technique

- Nom : BIKINDI
- Prénom : Simon
- Date de naissance : 1954
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : chanteur-compositeur et directeur du ballet *Irindiro*
- Chefs d'accusation : entente en vue de commettre le génocide, complicité dans le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité (assassinat et persécution)
- Date de modification subséquente portée à l'acte d'accusation : 22 octobre 2003
- Date et lieu de l'arrestation : 12 juillet 2001, à Leiden, aux Pays-Bas
- Date du transfert : 27 mars 2002
- Date de la comparution initiale : 4 avril 2002
- Date du début du procès : 18 septembre 2006
- Date du jugement et contenu du prononcé de la peine : 2 décembre 2008, condamné à 15 ans d'emprisonnement
- Procès en appel

***Order on Defence Motion for Translation and Disclosure
of Documents in the Case-File Rules 33 (B) and 54
of the Rules of Procedure and Evidence
9 May 2005 (ICTR-2001-72-R54)***

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Flavia Lattanzi; Gberdao Gustave Kam

Simon Bikindi – Translation of documents, Translation of drafts, Disclosure of documents, Delay to translation and disclosure – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 33 (B) and 54

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber III (the “Chamber”), composed of Judge Dennis
C. M. Byron, presiding, Judge Flavia Lattanzi and Judge Gberdao Gustave Kam;

BEING SEIZED of the Motion titled “Motion by the Accused Simon Bikindi for
Translation and Disclosure of Pertinent Documents into the French Language”, filed
by the Defence Counsel on 7 March 2005;

CONSIDERING that the Defence produced a table on page : 5 and 6 of its Motion,
alleging that certain documents have not been translated or had been disclosed to him
only in “draft” form;

CONSIDERING that representations by the Registry on this table, with respect to
the status of translation and the status of disclosure of the documents in the case-file
to the Accused, are required by the Chamber in deciding the above Motion;

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evi-
dence, notably Rules 33 (B) and 54 thereof;

ORDERS the Registry to make to the Chamber, within 24 (twenty-four) hours, its
representations on the table included in the above-mentioned Defence Motion.

Done at Arusha, this 9th day of May, in French.

[Signed] : Dennis C. M. Byron; Flavia Lattanzi; Gberdao Gustave Kam

***Ordonnance relative à la requête de la défense
en traduction et en communication d'actes inscrits
au dossier Articles 33 (B) et 54 du Règlement
de procédure et de preuve
9 mai 2005 (ICTR-2001-72-R54)***

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Flavia Lattanzi; Gberdao Gustave Kam

Simon Bikindi – Traduction de documents, Traduction de “drafts”, Communication de documents, Délai pour la traduction et la communication – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 33 (B) et 54

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIÉGEANT en la Chambre de première instance III (la «Chambre») composée des
juges Dennis C. M. Byron, Président, Flavia Lattanzi et Gberdao Gustave Kam;

ÉTANT SAISI de la requête intitulée «*Motion by the Accused Simon Bikindi for
Translation and Disclosure of Pertinent Documents into the French Language*»,
déposée par le conseil de la Défense le 7 mars 2005;

CONSIDÉRANT que dans sa requête la Défense a inséré un tableau aux pages 5
et 6 où elle allègue que certains documents n'ont pas été traduits ou que seule une
version estampillée *draft* lui aurait été communiquée;

CONSIDÉRANT que les observations du Greffe par rapport à ce tableau sur l'état
de la traduction et l'état de la communication des documents au dossier à l'accusé,
sont requises dans la détermination de la Chambre sur la requête susmentionnée;

CONSIDÉRANT le Statut du Tribunal et le Règlement de procédure et de preuve
notamment en ses articles 33 (B) et 54;

ORDONNE au Greffe de produire à la Chambre dans les vingt-quatre (24) heures,
ses observations sur le tableau inséré à la requête de la Défense et susmentionné.

Fait à Arusha, le 9 mai 2005, en français.

[Signé] : Dennis C. M. Byron; Flavia Lattanzi; Gberdao Gustave Kam

***Decision on the Amended Indictment
and the Taking of a Plea Based on the Said Indictment
Article 19 of the Statute, Rule 50 of the Rules
of Procedure and Evidence
11 May 2005 (ICTR-2001-72-PT)***

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Flavia Lattanzi; Gberdao Gustave Kam

Simon Bikindi – Conspiracy to commit genocide, Genocide, Complicity in genocide, Direct and public incitement to commit genocide, Murder as Crimes against humanity, Persecution as Crimes against humanity – Indictment, Content of the indictment, Precision of the indictment, Defects of the indictment, Previous Decision, Non-respect of the order by the Prosecutor – Motion partially granted

International Instruments cited :

Rules of Procedure and Evidence, rules 50, 66 (A) (i) and 73 (A); Statute, art. 19

International Case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and 96-17)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),
SITTING as Trial Chamber III composed of Judge Dennis C. M. Byron, Presiding,
Judge Flavia Lattanzi and Judge Gberdao Gustave Kam (“Chamber”);

BEING SEIZED of the “Defence Motion Challenging the Legality of the Taking of a Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment”, filed on 5 April 2004;

CONSIDERING the “Prosecution Response to Defence Motion Challenging the Legality of the Taking of a Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment”, filed on 7 May 2004; the Defence “Reply to Prosecutor’s Response to Defence Challenging the Legality of the Taking of a Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment”, filed on 14 May 2004; the “Prosecution Further Response to Defence Motion Challenging the Legality of A Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment”, filed on 31 August 2004; the Defence “Reply to Prosecutor’s Further Response to Defence Motion Challenging the Legality of a Plea Based

***Décision relative à l'acte d'accusation modifié et au plaidoyer
de non-culpabilité fondé sur cet acte d'accusation
Articles 19 du Statut et 50 du Règlement de procédure et de preuve
11 mai 2005 (ICTR-2001-72-PT)***

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Flavia Lattanzi; Gberdao Gustave Kam

Simon Bikindi – Entente en vue de commettre le génocide, Génocide, Complicité dans le génocide, Incitation directe et publique à commettre le génocide, Assassinat constitutif de crime contre l'humanité, Persécutions constitutives de crime contre l'humanité – Acte d'accusation, Contenu de l'acte d'accusation, Précision de l'acte d'accusation, Vices de l'acte d'accusation, Décision antérieure, Non-respect de l'ordonnance par le Procureur – Requête partiellement acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 50, 66 (A) (i) et 73 (A); Statut, art. 19

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Gérard et Elizaphan Ntakirutimana, Jugement, 13 décembre 2004 (ICTR-96-10 et 96-17)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIÉGEANT en la Chambre de première instance III, composée des juges Dennis C. M. Byron, Président de Chambre, Flavia Lattanzi et Gberdao Gustave Kam («la Chambre»),

SAISI de la requête de la Défense intitulée «*Defence Motion Challenging the Legality of the Taking of a Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment*», déposée le 5 avril 2004,

VU la réponse du Procureur intitulée «*Prosecution Response to Defence Motion Challenging the Legality of the Taking of a Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment*» déposée le 7 mai 2004; la réplique de la Défense intitulée «*Reply to Prosecutor's Response to Defence Challenging the Legality of the Taking of a Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment*», déposée le 14 mai 2004; la réponse supplémentaire du Procureur intitulée «*Prosecution Further Response to Defence Motion Challenging the Legality of A Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment*», déposée le 31 août 2004; la réplique de la Défense à la réponse supplémentaire du Procureur intitulée «*Reply to Prosecutor's*

on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment”, filed on 8 September 2004;

NOTING that the Prosecutor has filed two Submissions of Particulars respectively on 22 October 2003, and 1 February 2005;

RECALLING the Decision on the Defence “Urgent Application for Stay of Proceedings and for Suspension of the 30-Day Period Pursuant to Rule 50 (C) of the Rules of Procedure and Evidence”, filed on 24 March 2004;

RECALLING the Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor’s Motion Seeking Leave to File an Amended Indictment delivered on 22 September 2003 (“Decision of 22 September 2003”);

CONSIDERING the Statute of the Tribunal (“Statute”) and the Rules of Procedure and Evidence (“Rules”);

NOW DECIDES the matter on the basis of the briefs of the parties, pursuant to Rule 73 (A) of the Rules.

Introduction

1. Simon Bikindi has been indicted for Conspiracy to commit genocide, Genocide or alternatively Complicity in genocide, Direct and public incitement to commit genocide, and Murder and Persecution as Crimes against humanity. On those six counts, he pleaded not guilty at his initial appearance on 4 April 2002. On 22 September 2003, the Chamber granted leave to amend the Indictment and partly granted a Defence Motion by requiring the Prosecutor to provide particulars. Pursuant to that Decision, the Prosecutor has filed an Amended Indictment and two Submissions of Particulars. In the meantime, the Accused had entered a not guilty plea to the Amended Indictment at a Further Initial Appearance on 8 March 2004. The Defence now moves to have the Amended Indictment declared invalid on the ground that it was never confirmed. Alternatively, the Defence alleges that there were an abuse of process and some defects in the Amended Indictment. However, as a preliminary matter, the Defence requests the Chamber not to consider the Prosecutor’s Response.

Discussions

Lateness of the Prosecutor’s Response

2. The Defence complains that the Prosecutor’s Response has not been filed within the time prescribed by the rules, and requests the Chamber not to consider it. The Prosecutor justifies the lateness in filing his response by stating that his arguments were already before the Chamber and that the issues raised by the Defence have already been decided upon by the Trial Chamber. In the interests of justice and because of the nature of the Defence Motion, the Chamber has considered the Prosecutor’s response.

Further Response to Defence Motion Challenging the Legality of a Plea Based on the Amended Indictment Dated the 22nd October 2003 and Objecting to the Form of the Said Indictment», déposée le 8 septembre 2004,

PRENANT ACTE du fait que le Procureur a déposé deux documents intitulés *Submissions of Particulars* le 22 octobre 2003 et le 1^{er} février 2005, respectivement,

RAPPELANT la Décision relative à la demande intitulée «*Defence Urgent Application for Stay of Proceedings and for Suspension of the 30-Day Period Pursuant to Rule 50 (C) of the Rules of Procedure and Evidence*», rendue le 24 mars 2004,

RAPPELANT la Décision relative à la requête de la Défense intitulée «*Motion by the Accused Simon Bikindi Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment*» et à la Requête du Procureur intitulée «*Prosecutor's Motion for Leave to File an Amended Indictment*», rendue le 22 septembre 2003 (la «*Décision du 22 septembre 2003*»),

VU le Statut du Tribunal (le «*Statut*») et le Règlement de procédure et de preuve (le «*Règlement*»),

STATUANT sur la seule base des mémoires déposés par les parties conformément à l'article 73 (A) du Règlement,

Introduction

1. Simon Bikindi a été accusé d'entente en vue de commettre le génocide, de génocide ou subsidiairement de complicité dans le génocide, d'incitation directe et publique à commettre le génocide, d'assassinat constitutif de crime contre l'humanité et de persécutions constitutives de crime contre l'humanité. Il a plaidé non coupable de ces six chefs lors de sa comparution initiale le 4 avril 2002. Le 22 septembre 2003, la Chambre a accordé au Procureur l'autorisation de modifier l'acte d'accusation et fait droit en partie à une requête de la Défense en invitant le Procureur à être plus précis dans ses allégations. Suite à cette décision, le Procureur a déposé un acte d'accusation modifié et deux documents apportant les précisions demandées. Entre-temps, l'accusé avait plaidé non coupable de tous les chefs de l'acte d'accusation modifié lors d'une nouvelle comparution initiale le 8 mars 2004. La Défense demande à présent que l'acte d'accusation modifié soit déclaré nul au motif qu'il n'a jamais été confirmé. Subsidiairement, elle fait valoir qu'il y a eu abus de procédure et que l'acte d'accusation modifié est vicié. Néanmoins, à titre préliminaire, la Défense demande à la Chambre de ne pas tenir compte de la réponse du Procureur.

Discussion

Dépôt tardif de la réponse du Procureur

2. La Défense reproche au Procureur de n'avoir pas déposé sa réponse à la requête dans les délais prescrits par le Règlement et demande à la Chambre de ne pas prendre en considération ladite réponse. Le Procureur impute le dépôt tardif de sa réponse au fait que ses conclusions sur la question étaient déjà versées au dossier et que la Chambre de première instance avait déjà statué sur les questions soulevées par la Défense. Dans l'intérêt de la justice et vu la nature de la requête de la Défense, la Chambre a tenu compte de la réponse du Procureur.

Confirmation of the Amended Indictment

3. This is the third occasion on which the Defence has argued that the Amended Indictment and the pleas based on it are invalid because the Amended Indictment was not confirmed. The Chamber recalls its two Decisions¹ denying both arguments, taken at the Further Initial Appearance and in its written Decision of 24 March 2004. Those two issues are raised again, while they are already *res judicata*. The Motion and its ancillary applications in that regard falls therefore to be dismissed.

Abuse of Process

4. The Defence alleges that there is a wilful misrepresentation and an abuse of process by the Prosecutor, because four of the six statements in support of the new allegations were interviews conducted before 4 July 2001 when the original Indictment was filed. The Accused also submits that the witness statements of AHZ, AJJ and AJK were not disclosed in due time, pursuant to Rule 66 (A) (i) of the Rules, and that the statement of ALQ is not valid because it was signed after the Decision granting leave to amend the Indictment.

5. The Chamber notes that some of the interviews disclosed to the Defence were recorded before the original Indictment was filed. However, the Chamber accepts the Prosecutor's assertion that the statements of AHZ, AJJ and AJK were not filed in support of the new charges and finds that those statements came in as additional elements in support of paragraphs of the Indictment which are based on other statements previously disclosed. No rules have been violated and the contention that the process has been abused should be rejected. The additional filings should enable the Defence to better prepare its case. The Defence request for exclusion of the statements of Witnesses AHZ, AJJ and AJK based on the alleged violation of Rule 66 (A) (i) of the Rules is therefore dismissed. The Defence complaint that the Prosecutor constructed the statement of witness ALQ after the Decision granting him leave to amend the Indictment is not supported by any evidence and is rejected with its ancillary applications.

Defects in the Indictment

6. Simon Bikindi argues that the Amended Indictment was defective because it did not include the particulars that would enable him to prepare his defence, and that the Prosecutor did not comply with the Decision of 22 September 2003. Accordingly the Accused requests that the Prosecutor be ordered to file an Amended Indictment strictly in compliance with the Decision.

¹ See : Oral Decision at the Further Initial Appearance, T. 8 March 2004, pp. 2-3; and "Decision on the Defence Urgent Application for Stay of Proceedings and for Suspension of the 30-Day Period Pursuant to rule 50 (C) of the Rules of Procedure and Evidence", 24 March 2004, para. 3.

Confirmation de l'acte d'accusation modifié

3. C'est la troisième fois que la Défense soutient que l'acte d'accusation modifié n'a pas été confirmé et qu'en conséquence sont nuls l'acte d'accusation modifié et les plaidoyers de l'accusé sur les faits qui lui sont reprochés. La Chambre rappelle les deux décisions¹ rejetant ces deux arguments, décisions qu'elle a rendues l'une oralement, lors de la nouvelle comparution initiale de l'accusé, et l'autre par écrit le 24 mars 2004. La Défense soulève de nouveau ces questions qui font l'objet de décisions déjà revêtues de l'autorité de la chose jugée. La requête et les demandes qui y sont rattachées doivent par conséquent être rejetées.

Abus de procédure

4. Selon la Défense, le Procureur a dissimulé la vérité et commis un abus de procédure, dans la mesure où quatre des six déclarations de témoins étayant les nouvelles allégations ont été faites lors d'entrevues qui ont eu lieu avant le dépôt de l'acte d'accusation initial le 4 juillet 2001. L'accusé fait également valoir que les déclarations des témoins AHZ, AJJ et AJK n'ont pas été communiquées à la Défense en temps utile, conformément à l'article 66 (A) (i) du Règlement et que la déclaration du témoin ALQ n'est pas valable car elle a été signée après la décision autorisant la modification de l'acte d'accusation.

5. La Chambre constate que certaines des entrevues communiquées à la Défense ont été enregistrées avant le dépôt de l'acte d'accusation initial. Elle accepte néanmoins l'assertion du Procureur selon laquelle les déclarations des témoins AHZ, AJJ et AJK n'ont pas été déposées à l'appui des nouveaux chefs d'accusation et conclut que lesdites déclarations ont servi d'éléments complémentaires pour étayer les paragraphes de l'acte d'accusation fondés sur des déclarations antérieurement communiquées à la Défense. Aucun article du Règlement n'a été violé et l'argument selon lequel il y aurait eu abus de procédure devrait être rejeté. Les éléments supplémentaires fournis par le Procureur devraient permettre à la Défense de mieux se préparer. La demande de la Défense tendant à faire exclure les déclarations des témoins AHZ, AJJ et AJK sur la base de la prétendue violation de l'article 66 (A) (i) du Règlement est donc rejetée. Le reproche de la Défense selon lequel le Procureur aurait établi la déclaration du témoin ALQ après avoir obtenu l'autorisation de modifier l'acte d'accusation, n'est étayé par aucun élément de preuve et est donc rejeté avec tous ses corollaires.

Vices de forme de l'acte d'accusation

6. Simon Bikindi soutient que l'acte d'accusation modifié est vicié parce qu'il n'articule pas les faits avec suffisamment de précision pour lui permettre de préparer sa défense, et que le Procureur ne s'est pas conformé à la décision du 22 septembre 2003. En conséquence, l'accusé demande à la Chambre d'ordonner au Procureur d'établir un acte d'accusation modifié respectant strictement les termes de ladite décision.

¹ Voir décision rendue oralement dans le cadre de la nouvelle comparution initiale, compte rendu de l'audience du 8 mars 2004, pp. 2 et 3; et Décision relative à la demande intitulée «Defence Urgent Application for Stay of Proceedings and for Suspension of the 30-Day Period Pursuant to rule 50 (C) of the Rules of Procedure and Evidence», 24 mars 2004, para. 3.

7. The jurisprudence of the Tribunal as recently clarified in the *Ntakirutimana* Appeals Judgement², establishes that the Indictment as the primary accusatory instrument must set out the charges against the accused in sufficient detail to enable him to prepare his defence. The Chamber's Order specifically requiring particulars is consistent with that jurisprudence. The Chamber finds it puzzling that the Prosecutor interpreted the Decision of 22 September 2003 to require the filing of a Bill of Particulars. Failure to include in the Indictment particulars that were necessary to avoid it being declared defective for vagueness and lack of specificity represented a failure to comply with the Chamber's Orders. As the proceedings are still at the pre-trial phase, the Chamber is of the view that the interests of justice demand that the required particulars be included in the Amended Indictment, while the submissions of particulars should all be withdrawn.

8. The Chamber notes that all the particulars provided in the two submissions are not related to its Orders; some of those particulars are new allegations for which no leave for amendment was granted³. This is inconsistent with the Decision of 22 September 2003⁴. The Prosecutor shall not include the new allegations referred to in this paragraph, in the Amended Indictment. The Chamber also notes that the Prosecutor did not provide all the particulars required in the Decision of 22 September 2003⁵. In relation with those particulars, the Prosecutor shall comply with the Order and provide the missing details or delete the relevant allegations from the Amended Indictment.

FOR THE REASONS ABOVE, THE CHAMBER

I. ORDERS the Prosecutor, within five days, to file an Amended Indictment containing the particulars ordered in the Decision of 22 September 2003,

² *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004.

³ The new allegations are : In the *First Submission of Particulars*, included under the paragraph pertaining to Paragraph 30 of the Indictment and Paragraph 38 (xxxii) of the Decision : Interahamwe were guarding Simon Bikindi's house; buses full of Interahamwe were seen in front of Simon Bikindi's house; Simon Bikindi distributed rifles to Interahamwe; Simon Bikindi ordered and participated in the killing of an unknown Tutsi businessman and his wife; Simon Bikindi presided over a meeting at which it was decided to establish roadblocks all over Kicukiro commune and allegedly Simon Bikindi ordered Interahamwe to search for and kill Tutsi; Simon Bikindi intervened when Interahamwe refused to allow Minister Ngirabatware and his daughter to pass a roadblock between Ruhengeri and Gisenyi. In the *Second Submission of Particulars*, under the paragraph pertaining to Paragraph 47 of the Indictment and Paragraph 38 (xli) of the Decision : Simon Bikindi with Ngeze, Rafiki, Sibomana and Hakizimana removed 8 people from their house and transported them to a mass grave where they were killed; Simon Bikindi shot and killed Gasisara in *commune rouge*.

⁴ Para. 29 of the Decision of 22 September 2003.

⁵ In relation with Paragraph 38, Sub-paragraphs (viii), (xvii), (xx), (xxvii), (xxviii), (xxix), (xxxi), (xxxii), (xxxvi), and (xli), the Prosecutor did not fully comply with the Order.

7. Il ressort de la jurisprudence du Tribunal, récemment précisée dans l'Arrêt *Ntakirutimana*², que l'acte d'accusation, principal instrument de mise en accusation, doit présenter les charges imputées à l'accusé de manière suffisamment détaillée pour permettre à la Défense de se préparer. L'ordonnance par laquelle la Chambre demande expressément au Procureur d'être plus précis dans ses allégations est conforme à cette jurisprudence. La Chambre est étonnée que le Procureur ait pu penser que la décision du 22 septembre 2003 lui demandait de déposer une liste de faits détaillés. Le fait que le Procureur ait omis d'articuler les précisions nécessaires dans l'acte d'accusation pour éviter qu'il ne soit entaché de vice en raison de son caractère vague ou de son imprécision équivaut au non-respect de l'ordonnance de la Chambre. L'ouverture du procès n'ayant pas encore eu lieu, la Chambre est d'avis qu'il est dans l'intérêt de la justice que les précisions pertinentes soient articulées dans l'acte d'accusation modifié et que tous les arguments concernant la précision des faits soient retirés.

8. La Chambre constate que les précisions apportées par le Procureur dans les documents présentés à cet effet n'ont pas de rapport avec les décisions de la Chambre; certaines d'entre elles sont de nouvelles allégations que le Procureur n'a pas obtenu l'autorisation d'inclure dans l'acte d'accusation modifié³. Cela n'est pas conforme à la décision du 22 septembre 2003⁴. Le Procureur n'inclura pas dans l'acte d'accusation modifié les nouvelles allégations visées au présent paragraphe. La Chambre relève également que le Procureur n'a pas fourni toutes les précisions demandées dans la décision du 22 septembre 2003⁵; à cet égard, il se conformera à l'ordonnance rendue par la Chambre en ajoutant les détails manquants ou en supprimant les allégations concernées de l'acte d'accusation modifié.

PAR CES MOTIFS, LA CHAMBRE

I. ORDONNE au Procureur de déposer, dans les cinq jours, un acte d'accusation modifié assorti des précisions prescrites dans la décision du 22 septembre 2003;

² *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, affaires n° ICTR-96-10-A et n° ICTR-96-17-A, Arrêt, 13 décembre 2004.

³ Les nouvelles allégations sont les suivantes : dans le premier document du Procureur intitulé *First Submission of Particulars*, section titrée *Paragraph 30 of the Indictment and Paragraph 38 (mii) of the Decision* : les *Interahamwe* gardaient la maison de Simon Bikindi; des autobus remplis d'*Interahamwe* ont été vus devant la maison de Simon Bikindi; Simon Bikindi a distribué des fusils aux *Interahamwe*; Simon Bikindi a ordonné l'assassinat d'un homme d'affaires tutsi non identifié et de l'épouse de celui-ci et y a participé; Simon Bikindi a présidé une réunion lors de laquelle il a été décidé d'ériger des barrages routiers partout dans la commune de Kicukiro, au cours de laquelle il aurait ordonné aux *Interahamwe* de rechercher et de tuer les Tutsis; Simon Bikindi est intervenu lorsque les *Interahamwe* ont empêché le Ministre Ndirakobuca et sa fille de traverser un barrage routier entre Ruhengeri et Gisenyi. Dans le second document du Procureur intitulé *Second Submission of Particulars*, section titrée, *Paragraph 47 of the Indictment and Paragraph 38 (xliv) of the Decision*, les allégations sont les suivantes : Simon Bikindi, Ngeze, Rafiki, Sibomana et Hakizimana ont enlevé huit personnes de chez elles et les ont conduites à une fosse commune où elles ont été tuées; Simon Bikindi a abattu Gasisara à la Commune rouge. [Traduction].

⁴ Par. 29 de la décision du 22 septembre 2003.

⁵ S'agissant des alinéas viii), xvii), xx), xxvii), xxviii), xxix), xxxi), xxxii), xxxvi) et xli) du paragraphe 38, le Procureur ne s'est pas entièrement conformé aux prescriptions de l'ordonnance de la Chambre.

II. ORDERS the Prosecutor to withdraw the two Submissions of Particulars filed on 22 October 2003 and 1 February 2005;

III. DENIES the Motion in all other respects.

Arusha, 11 May 2005, done in English.

[Signed] : Dennis C. M. Byron; Flavia Lattanzi; Gberdao Gustave Kam

II. ORDONNE au Procureur de retirer les deux documents intitulés *Submissions of Particulars* déposés respectivement le 22 octobre 2003 et le 1^{er} février 2005;

III. REJETTE tous les autres points de la requête.

Fait en anglais, à Arusha, le 11 mai 2005.

[Signé] : Dennis C. M. Byron; Flavia Lattanzi; Gberdao Gustave Kam

***Decision on the Prosecution Motion for Extension of Time
16 May 2005 (ICTR-2001-72-PT)***

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Flavia Lattanzi; Gberdao Gustave Kam

Simon Bikindi – Amended Indictment, Delay to file the Amended Indictment – Motion granted

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),
SITTING as Trial Chamber III composed of Judge Dennis C. M. Byron, Presiding,
Judge Flavia Lattanzi and Judge Gberdao Gustave Kam (“Chamber”);

BEING SEIZED the “Prosecutor’s Motion to Extend the Period of Time in Which
to File Amended Indictment”, filed on 12 May 2005 (“Motion”);

CONSIDERING the Defence Response filed on 13 May 2005, in which the
Defence does not oppose the Motion;

RECALLING the Decision on the Amended Indictment and the Taking of a Plea
Based on the Said Indictment, filed on 11 May;

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and
Evidence;

THE CHAMBER HEREBY

GRANTS the Motion and ORDERS the Prosecutor to file the Amended Indictment
not later than Friday 20 May 2005.

Arusha, 16 May 2005, done in English.

[Signed] : Dennis C. M. Byron, Flavia Lattanzi, Gberdao Gustave Kam

***Amended Indictment Pursuant to Decision of 11 May 2005
20 May 2005 (ICTR-2001-72-I)***

(Original : English)

1. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the
authority stipulated in Article 17 of the Statute of the International Criminal Tribunal
for Rwanda (the “Statute of the Tribunal”) charges :

SIMON BIKINDI

with Conspiracy to Commit Genocide; Genocide, or alternatively Complicity in Genocide; Direct and Public Incitement to Commit Genocide; and Murder and Persecution, as a Crime Against Humanity; offenses stipulated in Articles 2 and 3 of the Statute of the Tribunal, as set forth below :

II. The Accused :

Simon Bikindi was born on 28 September 1954 in Rwerere *commune*, Gisenyi *préfecture*, Rwanda. During the period material to this indictment, Simon Bikindi was a well-known composer and singer of popular music and director of the performance group Irindiro Ballet.

Simon Bikindi was also an official in the Ministry of Youth and Sports of the Government of Rwanda and a member of the MRND political party.

III. Charges and concise statement of facts :

COUNT 1 : CONSPIRACY TO COMMIT GENOCIDE :

The Prosecutor of the International Criminal Tribunal of Rwanda charges Simon Bikindi with Conspiracy to Commit Genocide, a crime stipulated in Article 2 (3) (b) of the Statute, in that on or between the dates of 1 January 1994 and 31 December 1994, Simon Bikindi did conspire with others, including, but not limited to, the political leadership of the MRND at the regional and national levels, including, though not limited to Callixte Nzabonimana, Juvenal Habyarimana, Joseph Nzirodera, André Ntagerura, Théoneste Bagosora; Mathieu Ndirumapfse; *Interahamwe* leaders, including Robert Kajuga; Georges Rutaganda; and other persons responsible for media programming and operations, including, though not limited to Jean-Bosco Barayagwiza, Ferdinand Nahimana, Joseph Serugendo and Félicien Kabuga, to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group, as follows :

Pursuant to Article 6 (1) of the Statute : by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged, in that :

1. Between 1 January and 31 December 1994, citizens native to Rwanda were severally identified according to the following ethnic or racial classifications : Tutsi, Hutu and Twa.

2. Between 1 January 1994 and 17 July 1994 there was a state of non international armed conflict in Rwanda

Concise Statement of Fact :

3. Simon Bikindi agreed or collaborated with Head of State Juvénal Habyarimana, Minister of Youth and Sports Callixte Nzabonimana, national *Interahamwe* leader

Robert Kajuga, national MRND political leaders, such as Mathieu Ndirumapfse, André Ntagerura and Joseph Nzirorera, and MRND-aligned military leaders, such as Theoneste Bagosora and Georges Rutaganda, to militarize the MRND *Interahamwe* youth wing and to indoctrinate *Interahamwe* militias with anti-Tutsi ideology and to disseminate anti-Tutsi propaganda, as follows :

4. During the early 1990's the tight circle of MRND party and military leaders surrounding President Habyarimana devised and implemented a strategy to consolidate their hold on government power in the face of rising domestic political opposition and the threat of military attack by the RPF. That strategy : to incite hatred and fear of the Tutsi and to characterize the Tutsi as *ibitoye*, domestic accomplices of a foreign invading enemy army. Also incorporated in that strategy : the creation of civilian militias exclusively aligned with the MRND party that would be armed, trained and sensitized to exterminate the Tutsi population.

5. Notably, in December 1991 Juvénal Habyarimana, at that time Commander in Chief of the *Forces Armées Rwandaises* (FAR) as well as Head of State, set up a military commission to devise an agenda to “defeat the enemy militarily, in the media and politically”. The commission generated a report that defined the enemy as :

Tutsis from inside or outside the country who are extremist and nostalgic for power, who have never recognized and do not yet recognize the realities of the Social Revolution of 1959, and are seeking to regain power in Rwanda by any means, including taking up arms.

Army Chief of Staff Deogratias Nsabimana caused excerpts from the report to be circulated among the military Sector Commanders.

6. Subsequently, MRND-aligned military leaders provided military training and weapons to *Interahamwe* militias and sensitized the MRND youth wing to target the Tutsi and members of the political opposition as accomplices of the enemy. This military training was organized throughout Rwanda, particularly in military camps in Kigali, in Mutara and in Gisenyi.

7. Prior to the events of April 1994, at the end of 1993 and at the beginning of 1994 Simon Bikindi participated in the campaign to defeat the enemy militarily by conducting MRND membership drives and participating in recruitment in Mutara in late 1993, and military training of *Interahamwe* militias in Mutara in late 1993, and on several occasions in January 1994 with French soldiers at Club Jaly, in Kigali, knowing and intending that such civilian militias would be deployed in exterminating campaigns against the Tutsi,

8. For example, several times in January 1994 Simon Bikindi was present and participated in military training of *Interahamwe* militias at Club Jaly, Kiyovu, in Kigali-ville. On these occasions in January 1994 Simon Bikindi, accompanied by Rucyeratabaro, Ngwige, and Bosco were driven by Simon Bikindi's driver to Club Jaly where they were to train the *Interahamwe* militias with French Soldiers. On these occasions Simon Bikindi took part in the military exercises carried out at Club Jaly, by providing drills and instructions on manipulation of arms.

9. Simon Bikindi participated in the campaign to defeat the enemy in the media by collaborating with Ferdinand Nahimana, Jean-Bosco Barayagwiza, Félicien Kabuga, André Ntagerura, Georges Rutaganda, President Juvénal Habyarimana, Callixte Nzabonimana, Joseph Serugendo and Joseph Nzirorera, to launch *Radio-Télévision Libre des Milles Collines*, S.A. (RTLM), a privately owned radio station aligned with

extremist political currents in the MRND and the CDR. Simon Bikindi was a shareholder of RTLM. In part conceived as a media alternative to Radio Rwanda, then subject to the programming restrictions of ORINFOR and the newly installed Ministry of Information, RTLM programming interspersed popular music and listener participation with news reports and anti-Tutsi propaganda.

10. Although the preamble to the statutes creating RTLM defines its purpose as facilitating the circulation of diverse ideas and objective news reporting, in actuality RTLM was created as a vehicle for anti-Tutsi propaganda. RTLM's anti-Tutsi broadcasts were often punctuated by recorded musical selections containing both instrumental music and lyrics composed and performed by Simon Bikindi. The intertwining objectives of RTLM's media programming and Simon Bikindi's musical recordings were the same : to sensitize and incite the listening public to target and commit violent acts against the Tutsis, particularly the civilian militias, the government armed forces and the masses of Rwanda's Hutu peasantry; and to extol Hutu solidarity and to target the Tutsi as accomplices of the enemy.

11. RTLM received logistical support from Radio Rwanda, the government owned radio station, and initially broadcasted its programs on the same frequencies as Radio Rwanda, enabling government-controlled Radio Rwanda broadcasts to flow seamlessly into the privately controlled programming of RTLM. Minister of Transports and Communications André Ntagerura, a longstanding senior member of the MRND, facilitated such seeming government support of RTLM by authorizing the continued broadcasts in spite of RTLM's violations of Rwanda media legislation.

12. Callixte Nzabonimana, a member of MRND, authorized and sponsored rehearsal and recording of Simon Bikindi's musical compositions and live performances of his dance troupe Irindiro Ballet through and at the Ministry of Youth and Sports in Kigali, in his capacity as Minister of Youth and Sports. Simon Bikindi organized the rehearsals and rehearsed his compositions with youth groups at the level of the *commune*, including at Rwerere *commune* and Rubavu *commune* in late 1993 and early 1994. The Minister of Youth and Sports financed the rehearsals with money being paid to the youth groups, in some instances through the *bourgmestres* of the Rwerere *commune* and Rubavu *commune*.

13. Simon Bikindi consulted with President Juvénal Habyarimana, Minister of Youth and Sports Callixte Nzabonimana and MRND aligned military authorities on Song lyrics as follows : In order to release a musical composition Simon Bikindi provided a tape with his recorded composition to Callixte Nzabonimana, who in turn would indicate what changes he thought were necessary. The recorded composition was then passed on to President Juvenal Habyarimana who would listen to the tape to ensure that it was in line with government policy and subsequently authorize its release. Simon Bikindi also recorded his compositions at the Radio Rwanda studios with assistance from Joseph Serugendo. In late 1993 Simon Bikindi made available to the RTLM for broadcast those songs that had been authorized for release, as set out above. Simon Bikindi also performed his compositions at *Interahamwe* meetings and MRND and CDR party functions, most of which were large public gatherings that were frequently held on Saturdays or Sundays at various stadiums in different parts of Rwanda, including Ruhengeri, Cyasemakamba, Nyamirambo, Cyangugu, Umuganda as well as in Rubona, Bicumbi *commune* and in Ruyenzi, Gitarama *commune*.

14. RTLM played Simon Bikindi's compositions several times a day, usually during an early morning broadcast, at lunchtime and in the early evening. After the reprise of civil hostilities in the non-international armed conflict, between April and July 1994, RTLM broadcast Simon Bikindi's compositions repeatedly throughout the day. The compositions that received intense airplay were *Bene sebahinzi* and *Naga abahutu*, songs that encouraged Hutu solidarity against a common foe.

15. Over the course of April, May, June and the first few days of July of 1994, hundreds of thousands of civilian Tutsi men, women, children and the elderly, were persecuted, attacked, sexually assaulted, tortured, sequestered, and killed in Kigali-ville and Gisenyi *préfectures* and all across Rwanda. These attacks and killings were products of the Government campaign to defeat the enemy by enlisting local administrative authorities and civilians, organized as civilian militias or acting individually, to exterminate the Tutsi.

16. The efficiency of the mobilization of Rwanda's Hutu peasantry for attacks upon the Tutsi during the period 7 April 1994 – mid July 1994, and the systematic nature of such attacks by the military forces of the Interim Government, including civilian militias equipped, trained and sensitized to target Tutsi civilians, imply planning and coordination at the highest levels of the political, military, business and media elites of MRND-affiliated governmental authorities. Simon Bikindi's musical compositions and live performances and recruitment, training and command of *Interahamwe*, were elements of the plan to mobilize civilian militias to destroy, in whole or in part, the Tutsi. Simon Bikindi's songs were a crucial part of the genocidal plan because they incited ethnic hatred of Tutsis and further incited people to attack and to kill Tutsi because they were Tutsi. As a result of the mobilizing effect of Simon Bikindi's music, members of the Ballet, including Kizito Dusengimana, were recruited into the *Interahamwe* militia, participated in military training and committed subsequent killings of Tutsis.

17. Between July 1994 and early 1995 Simon Bikindi continued to demonstrate his anti-Tutsi stance when, following the military defeat of the FAR and the retreat of the Interim Government across the border into neighbouring Zaire, he continued the anti-Tutsi campaign by composing and performing anti-Tutsi songs and by collaborating with ex-FAR military leaders and former MRND-aligned government officials to continue the anti-Tutsi campaign as a means to regain power.

COUNT 2 : GENOCIDE :

The Prosecutor of the International Criminal Tribunal of Rwanda charges Simon Bikindi with Genocide, a crime stipulated in Article 2 (3) (a) of the Statute, in that on or between the dates of 7 April 1994 and 14 July 1994 throughout Rwanda, particularly in Kigali-ville and Gisenyi *préfectures*, Simon Bikindi was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population with intent to destroy, in whole or in part, a racial or ethnic group, as such;

Pursuant to Article 6 (1) of the Statute : by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged; and

Pursuant to Article 6 (3) of the Statute : by virtue of his actual or constructive knowledge of the acts or omissions of his subordinates, including *Interahamwe* and civilian militias, particularly *Interahamwe* members of his Irindiro Ballet, and his failure to take necessary and reasonable measures to stop or prevent them, or to discipline and punish them, for their acts in the planning, preparation or execution of the crime charged;

or alternatively,

COUNT 3 : COMPLICITY IN GENOCIDE :

The Prosecutor of the International Criminal Tribunal of Rwanda charges Simon Bikindi with Complicity in Genocide, a crime stipulated in Article 2 (3) (e) of the Statute, in that on or between the dates of 1 January 1994 and 14 July 1994 throughout Rwanda, particularly Kigali-ville and Gisenyi *préfectures*, Simon Bikindi was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population with intent to destroy, in whole or in part, a racial or ethnic group, as such, as follows :

Pursuant to Article 6 (1) of the Statute : by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged; in that :

Concise Statement of Facts for Counts 2 and 3 :

18. Paragraphs 1 through 17, above, are incorporated by reference herein.

19. During the events referred to in this indictment, particularly from 6 April 1994 through the first days of July 1994, *Interahamwe* militias engaged in a campaign of extermination against Rwanda's Tutsi population. Hundreds of thousands of Tutsi men, women and children were killed.

20. Simon Bikindi, among others, planned, instigated and prepared such killings by recruiting members for the *Interahamwe* militias, organizing and participating in military training for *Interahamwe* militias, indoctrinating *Interahamwe* militias with anti-Tutsi ideology and by engaging in a propaganda campaign to characterize civilian Tutsi citizens of Rwanda as accomplices of an invading enemy, and by specifically encouraging the militias to target the Tutsi population for attack, as set out in paragraphs 21-30 below.

21. During June and early July 1994, particularly in Gisenyi *préfecture*, Simon Bikindi led, participated in, instigated and incited a campaign of violence against civilian Tutsis and against Hutus perceived to be politically opposed to the MRND and MRND-aligned political parties, resulting in numerous deaths.

22. Sometime in mid-late June 1994 Simon Bikindi and a band of *Interahamwe* that had arrived in Gisenyi from Kigali launched an attack on Tutsi living in Nyamyumba *commune*. Just prior to the attack, Simon Bikindi announced to *Interahamwe* at a roadblock in Gisenyi-town that they should search out the Tutsis and kill them, and that Hutus helping Tutsis to flee to Zaire should also be killed. After these words, Simon Bikindi led a caravan of armed *Interahamwe*, including Col. Buregeya and Noel, to Nyamyumba and killed Tutsi residents and pillaged their belongings.

23. In mid-late June 1994 Simon Bikindi addressed a MRND meeting at Umuganda Stadium in Gisenyi where he publicly stated that, "Hutus should know who the enemy is, and that the enemy is the Tutsi" and that "Hutus should hunt and search for the Tutsis and kill them". Following the meeting there was an intensive search for Tutsi that were still hiding, and as a result of this intensive search Tutsis were killed, including Ancilla and her 4 year old daughter, as set out in paragraph 28 below,

24. In June 1994, at the border between Gisenyi and Zaire, following instructions from Lt. Colonel Anatole Nsengiyumva, Simon Bikindi ordered the *Interahamwe* in his company and to whom he gave orders to take a group of Tutsi women that were trying to escape to Zaire behind a kiosk called Command Post and to kill them. The women were killed with UZI guns behind the Command Post. Shortly thereafter Simon Bikindi remarked, "See where we are now with the Tutsis".

25. In June 1994, Simon Bikindi went to Gisenyi prison in the company of Hassan Ngeze, Major Kabera, the prison Director Gasirabo and more than ten body guards. The prison guard Rukara called out the names of 12 prisoners who came out of their cells and were told to stand beside the prison latrine pit. Simon Bikindi then asked the prison director Gasirabo, why the 12 prisoners were still alive whilst in Kigali all Tutsis had been killed. The prison director Gasirabo responded that he had been given these prisoners to keep them and he did not know if they were to be killed. Ngeze then asked all the Tutsi prisoners to raise their hands in the air, and 10 of the prisoners who were Tutsi did. Reading from a list of twelve prisoners, Simon Bikindi then called out the names of Tutsi prisoners, starting with Matabaro and Kayibanda. Matabaro came forward to stand close to where Simon Bikindi stood, and he was hit in the back of the head with the back of an axe by one of the bodyguards. Simon Bikindi then called out the name of Kayibanda who was also hit on the back of the head with the back of an axe by Bikindi's body guard. Matabaro and Kayibanda both died as a result of the blows. Eight of the other persons whose names were on the list, all Tutsis, were killed by Bikindi's bodyguards, using bayonets. By reading out from a list of Tutsi prisoners, by asking why they had not yet been killed, Simon Bikindi instigated, and aided and abetted the immediate killings of two of the prisoners, namely Matabaro and Kayibanda. In respect of the other eight Tutsi prisoners who were killed immediately afterwards by Simon Bikindi's bodyguards, by his initial question as to why all the Tutsi prisoners had been not been killed before his arrival at the prison, he instigated, and aided and abetted their subsequent killings by his bodyguards.

26. At the end of June 1994, Simon Bikindi, was in charge of, and provided orders to the *Interahamwe* manning a roadblock at scout camp, near the Pentecostal church on the way to *commune rouge*, Gisenye. At this roadblock several Tutsi were massacred. By the following acts of:

- (a) exercising effective control over the *Interahamwe* who manned this roadblock;
- (b) giving orders to these *Interahamwe* to kill Tutsis at the roadblock;
- (c) several Tutsis being actually killed at the roadblock as a result of his orders;
- (d) coming to the roadblock several times,

Simon Bikindi had knowledge that several Tutsis had been killed at this roadblock as a result of his orders. Simon Bikindi ordered, instigated, aided and abetted the deaths of these Tutsis at the scout camp roadblock.

27. In early July 1994, Simon Bikindi in the company of the *Interahamwe* to whom he gave orders transported three Tutsi women by removing them from a compound in Gacuba *cellule* in Gisenyi and driving them in his car to the *commune rouge* where they were killed by the *Interahamwe*. By transporting the three Tutsi women to the *commune rouge* where he knew that they would be killed as other Tutsis were being killed at the same location, Simon Bikindi planned, instigated, and aided and abetted their killings.

28. In early July 1994, Noel and Pascal, two of the *Interahamwe* in Simon Bikindi's company and to whom he gave orders, discovered that Ancilla, a Tutsi woman, had been hiding in the ceiling of her home, in Mwara, Rubavu *commune*, Gisenyi *préfecture*, apparently protected by her Hutu husband. Simon Bikindi stated that she was one of the people fighting Hutus and that she should be taken away (killed) and was present when Noel and Pascal led Ancilla away. Noel and Pascal killed the woman and her 4-year-old daughter and buried them in a shallow grave.

29. Sexual violence against Tutsi women was systematically incorporated in the generalized attacks against the Tutsi. In leading, ordering and encouraging the campaign of extermination in Gisenyi *préfecture*, Simon Bikindi knew, or should have known, that sexual violence against civilian Tutsi was, or would be, widespread or systematic, and that the perpetrators would include his subordinates or those that committed such acts in response to his generalized orders and instructions to exterminate the Tutsi. For example, in late June 1994, at about 6pm, Simon Bikindi led a group of *Interahamwe*, including Jean Kavunderi (Noel's younger brother), Pascal, Cari, Selamani, Kabulimbo, and Sendegeya to Rubavu, and ordered them to kill all of the Tutsis in the area. In the course of executing Simon Bikindi's orders, the *Interahamwe* under his effective control also committed rapes of Tutsi women, of which Simon Bikindi was aware, by his presence and effective supervision of the killing and rape operations of the *Interahamwe* in this location. Notably, the *Interahamwe* called Sendegeya, boasted to the hearing of other persons in the vicinity of the crimes, including Simon Bikindi, after the rape and murder of Ancilla that he "had always dreamt of sleeping with a Tutsi woman and now his dream had come true". During the killings and rape perpetrated by the *Interahamwe* in Simon Bikindi's company and to whom he gave orders, including the perpetrators named above, Simon Bikindi stood by the road near the home of Ancilla to ensure his orders were carried out by the *Interahamwe*. By ordering the *Interahamwe* under his effective control to commit acts of violence against Tutsis in Rubavu *commune*, which included acts of killing and rape, and by effectively staying on the road close to the scene of these crimes to ensure his orders were followed, Simon Bikindi was aware and sanctioned the acts of rape committed by the *Interahamwe* under his effective control, notably Sendegeya's act on rape of Ancilla. Notably still, when the said *Interahamwe* boasted to the hearing of other persons in the vicinity of the crimes, including Simon Bikindi, after the rape of Ancilla, that he "had always dreamt of sleeping with a Tutsi woman and now his dream had come true", Simon Bikindi acquiesced in the acts of his co-perpetrator. Simon Bikindi thus instigated and aided and abetted the rape of Ancilla.

30. Simon Bikindi's command of the *Interahamwe* is demonstrated by the following facts :

- (a) Simon Bikindi was recognized as one of the most creative persons within the *Interahamwe* organisation and with that talent assumed the role of inspirational leader;
- (b) Simon Bikindi's participation in military training of *Interahamwe* militias in Kigali;
- (c) Simon Bikindi founded the Irindiro Ballet whose members were MRND *Interahamwe* or members of the extremist CDR;
- (d) Simon Bikindi launched an attack with the *Interahamwe* on Tutsi living in Nyamyumba *commune*. Just prior to the attack, Simon Bikindi announced to *Interahamwe* at a roadblock in Gisenyi town that they should search out the Tutsis and kill them, and that Hutus helping Tutsis to flee to Zaire should also be killed. After these words, Simon Bikindi led a caravan of armed *Interahamwe*, including Col. Buregeya and Noel, to Nyamyumba and killed Tutsi residents and pillaged their belongings;
- (e) Simon Bikindi ordered *Interahamwe* to take a group of Tutsi women that were trying to escape to Zaire behind a kiosk called Command Post and to kill them;
- (f) Simon Bikindi ordered *Interahamwe* at the roadblock at the scout camp, to kill Tutsi;
- (g) Simon Bikindi ordered *Interahamwe*, in early June 1994, in Mwara, Rubavu *commune*, Gisenyi, to kill Ancilla, a Tutsi women;
- (h) Simon Bikindi led a caravan of *Interahamwe* on the main road between Kivumu and Kayove *communes* and made anti-Tutsi announcements using his vehicle outfitted with a public address system;
- (i) Simon Bikindi incited *Interahamwe* on 26 February 1994 to attack a group of Tutsi seeking refuge in the Gatenga Youth Center in Kigali;
- (j) *Interahamwe* guarded Simon Bikindi's bar in Gatenga sector, Gikondo, Kigali; and
- (k) In early April 1994, Simon Bikindi and about 20 *Interahamwe* arrived in a bus belonging to Simon Bikindi in Kicukiro *commune*;

By virtue of his command of the *Interahamwe*, particularly as reinforced by his close association with leading figures in the national leadership of the MRND and the *Interahamwe*, coupled with his unique status as a nationally recognized performer and director of the Irindiro Ballet, Simon Bikindi ordered or directed or otherwise authorized civilian militias, particularly *Interahamwe* members of his own Irindiro Ballet, including Bosco Serumveri and Kizito Dusengimana, to persecute and kill or facilitate the killing of civilian Tutsi. By virtue of that same authority Simon Bikindi had the ability and the duty to halt, prevent, discourage or sanction persons that committed, or were about to commit, such acts, and did not do so.

COUNT 4 :

DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE :

The Prosecutor of the International Criminal Tribunal of Rwanda charges Simon Bikindi with Direct and Public Incitement to Commit Genocide, a crime stipulated in Article 2 (3) (c) of the Statute, in that on or between the dates of 1 January 1994 and

14 July 1994, Simon Bikindi was responsible for directly and publicly inciting persons, including, but not limited to, soldiers, local administrative officials, communal police, civilian militias and local residents, to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group, as such, as follows :

Pursuant to Article 6 (1) of the Statute : by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged, in that :

31. During the period 1990 to 1994, Simon Bikindi composed, performed, recorded or disseminated musical compositions extolling Hutu solidarity and characterizing Tutsi as enslavers of the Hutu. These compositions were subsequently deployed in a propaganda campaign to target Tutsi as the enemy, or as enemy accomplices, and to instigate, incite, and encourage the Hutu population to separate themselves from the Tutsi and to kill them.

32. Simon Bikindi regularly performed his musical compositions at animation sessions at *Interahamwe* meetings and at political gatherings of the MRND and CDR political parties in various stadiums in different parts of Rwanda, including, Ruhengeri, Cyasamakamba, Nyamirambo, Cyangugu, Umuganda, as well as in Rubona, Bicumbi *commune* and in Ruyenzi, Gitarama *commune*, in late 1992, in 1993 and at the beginning of 1994, in the Kigali and Gisenyi *préfectures*. Simon Bikindi often circulated about Gisenyi town and Rwerere *commune*, Gisenyi *préfecture* in late June 1993, and February and March 1994, aboard a vehicle outfitted with a public address system and performed his compositions or broadcasted recordings of his compositions. Simon Bikindi's animation sessions at MRND meetings and rallies in late 1993, early 1994 and June 1994 were often a prelude or a motivating factor in anti-Tutsi violence against individuals and property in the vicinity of those public gatherings, both leading up to the meetings or immediately thereafter. Some of these MRND meetings and rallies included one which took place at Umuganda stadium, Gisenyi, in June 1994, and one which took place at a football ground in Kivumu sector, Nyamyamba *commune*, Gisenyi *préfecture*, in 1993.

34. Simon Bikindi publicly addressed MRND and CDR adherents at party meetings with specific exhortations to work, a coded reference advocating the extermination of the Tutsi, as set out in paragraphs 35 and 36 below.

35. In February 1994, shortly following the assassinations of Martin Bucyana and Félicien Gatabazi, Simon Bikindi addressed an MRND meeting at Umuganda Stadium in Gisenyi and told the population to take their clubs, machetes and other weapons and to look for the *inyenzi* and kill them. *Inyenzi* was a derogatory reference to the Tutsi.

36. In March 1994 Simon Bikindi addressed a meeting of the CDR and encouraged those in attendance to work and to kill those opposed to the CDR and the MRND. During the period relevant to this indictment, it was well known throughout Rwanda that the CDR was opposed to the Tutsi.

37. Simon Bikindi also advocated the extermination of the Tutsi over the public radio air-waves. For example, sometime following the deaths of Bucyana Martin and another CDR-affiliated *Interahamwe*, Simon Bikindi stated in a speech of his made in Nyamirambo stadium that was recorded and then broadcast over RTLM radio sta-

tion air-waves between February 1994 and March 1994, "See how the Tutsi are exterminating you, the Hutu. If you do not react right away it's your fault".

38. During the last week of February 1994 Simon Bikindi attempted to incite violence against a group of Tutsi that had taken shelter at the Gatenga Youth Center in Kigali. When *gendarmes* prevented Simon Bikindi and the group of *Interahamwe* in his company and to whom he gave orders from attacking the youth center, Simon Bikindi telephoned the RTLM radio station to report that some Hutus were preventing Hutus from attacking the Tutsi at Gatenga, and his telephone words were broadcast over the RTLM radio station air-waves.

39. In late June 1994 in Gisenyi *préfecture* Simon Bikindi operated a vehicle outfitted with a public address system and led a caravan of *Interahamwe* on the main road between Kivumu and Kayove *communes* announcing,

"The majority population, it's you, the Hutu I am talking to. You know the minority population is the Tutsi. Exterminate quickly the remaining ones".

Simon Bikindi also used the vehicle-mounted public address system to broadcast his musical compositions in 1993 and late June 1994.

40. Simon Bikindi's Song lyrics manipulated the politics and history of Rwanda to promote Hutu solidarity. Among Simon Bikindi's most popular compositions is *Twasezereye*, a Song composed in 1987 which means "we said good bye to the feudal regime". Repeatedly broadcast over Radio Rwanda and RTLM airwaves in 1992 and 1993 *Twasezereye* was a public call for Hutu solidarity in opposition to the Arusha accords.

41. RTLM repeatedly broadcasted other Simon Bikindi compositions, notably *Bene sebahinzi*, which means "the sons of the father of the cultivators", and *Nanga bahutu*, which means "I hate these Hutu". Calls for attacks on the enemy in RTLM broadcasts were often preceded or followed by these songs composed and performed by Simon Bikindi. By the terms of Rwandan legislation governing author's rights, Simon Bikindi had a right to forbid or enjoin public broadcasts of his compositions.

COUNT 5 :

MURDER AS A CRIME AGAINST HUMANITY

The Prosecutor of the International Criminal Tribunal of Rwanda charges Simon Bikindi with Murder as a Crime against Humanity, as stipulated in Article 3 (a) of the Statute, in that on or between the dates of 7 April 1994 and 14 July 1994, Simon Bikindi was responsible for killing persons, or causing persons to be killed, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, as follows :

Pursuant to Article 6 (1) of the Statute : by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged, and

Pursuant to Article 6 (3) the Statute : by virtue of his actual or constructive knowledge; of the acts or omissions of his subordinates, including *Interahamwe* and civilian militias, particularly *Interahamwe* members of his Irindiro Ballet, and his failure to take necessary and reasonable measures to stop or prevent them, or to discipline

and punish them, for their acts in the planning, preparation or execution of the crime charged; in that :

42. During the events referred to in this indictment, particularly from 6 April 1994 through 17 July 1994, there were throughout Rwanda widespread or systematic attacks directed against a civilian population on political, ethnic or racial grounds. Notably, *Interahamwe* militias engaged in a campaign of violence against Rwanda's civilian Tutsi population and against Hutu perceived to be politically opposed to the MRND. Hundreds of thousands of civilian Tutsi men, women and children and "moderate Hutu" were killed.

43. Simon Bikindi, among others, planned, instigated and prepared such killings by recruiting members for the *Interahamwe* militias, organizing military training for *Interahamwe* militias, indoctrinating *Interahamwe* militias with anti-Tutsi ideology and by engaging in a propaganda campaign to characterize the Tutsi citizens of Rwanda as accomplices of an invading enemy and by specifically encouraging civilian militias to target Tutsi for attack.

44. During June 1994, on a date uncertain, in Nyamywnba *commune*, Gisenyi *préfecture*, Simon Bikindi participated in the killing of a wealthy Tutsi businessman (Name unknown) by leading a band of *Interahamwe* to the man's home and by ordering several *Interahamwe*, including Paulin (last name unknown) and Nokori, and members of his ballet, including Serumveri Bosco and Dusengimana Kizito, to kill the Tutsi businessman and to steal his property. The group killed the businessman and loaded his property onto Simon Bikindi's vehicle. By ordering and instigating the killing of the Tutsi businessman (Name unknown) Simon Bikindi is responsible for his death.

45. Sometime during June 1994 at the border crossing between Gisenyi and Zaire, following instructions from Col. Anatole Nsengiyumva, Simon Bikindi ordered the *Interahamwe* in his company and to whom he gave orders to kill a group of Tutsi women that were trying to escape across the border to Zaire. The women were then killed with UZI guns.

46. In early July 1994 in Murara, Rubavu *commune*, Gisenyi *préfecture*, Simon Bikindi instigated the killing of Ancilla, a Tutsi woman, by advising Noel and Pascal, two of the *Interahamwe* in his company and to whom he gave orders, that she was one of the people fighting Hutus and that she should be taken away (killed). Noel and Pascal killed the woman and her 4-year-old daughter and buried them in a shallow grave.

47. Given the generalized nature of attacks against the Tutsi during April through July 1994, Simon Bikindi is specifically responsible for the killings of numerous Tutsi set out below, that followed his exhortations in deed and in Song and in word, particularly as directed to *Interahamwe* and civilian militias :

- (a) Sometime in mid-late June 1994 Simon Bikindi and a band of *Interahamwe* that had arrived in Gisenyi from Kigali launched an attack on Tutsi living in Nyamyumba *commune*. Just prior to the attack, Simon Bikindi announced to *Interahamwe* at a roadblock in Gisenyi-town that they should search out the Tutsis and kill them, and that Hutus helping Tutsis to flee to Zaire should also be killed. After these words, Simon Bikindi led a caravan of armed *Interahamwe* including Col. Buregeya and Noel, to Nyamyumba and killed Tutsi residents and pillaged their belongings;

- (b) In June 1994, at the border between Gisenyi and Zaire, following instructions from Lt. Colonel Anatole Nsengiyumva, Simon Bikindi ordered the *Interahamwe* in his company and to whom he gave orders, to take a group of Tutsi women that were trying to escape to Zaire behind a kiosk called Command Post and to kill them. The women were killed with UZI guns behind the Command Post. Shortly thereafter Simon Bikindi remarked, "See where we are now with the Tutsis".
- (c) In June 1994, Simon Bikindi went to Gisenyi prison in the company of Hassan Ngeze, Major Kabera, the prison director Gasirabo and bodyguards. Reading from a list of twelve prisoners, Simon Bikindi called out the names of Matabaro and Kayibanda who were each in turn hit on the back of the head with the back of an axe by Bikindi's bodyguard. Matabaro and Kayibanda died as a result of the blows, ten of the persons, whose names were on the list, all Tutsis, were killed. Apart from Matabaro and Kayibanda the other 8 prisoners were killed by the bodyguards that accompanied Simon Bikindi, Hassan Ngeze, Major Kabera, and the prison director Gasirabo. The bodyguards used bayonets to kill these prisoners.
- (d) At the end of June 1994, Simon Bikindi established a roadblock at a scout camp near the Pentecostal church on the way to *commune rouge*, Gisenyi. Simon Bikindi was in charge of this roadblock and the *Interahamwe* manning it. He gave the *Interahamwe* orders on what to do at that roadblock. At the roadblock several Tutsi were killed.
- (e) In early July 1994, Simon Bikindi in the company of *Interahamwe* to whom he gave orders, transported three Tutsi women to the *Commune Rouge* where they were killed.
- (f) In early July 1994, in Murara, Rubavu *commune*, Gisenyi, Noel and Pascal, two of the *Interahamwe* in Simon Bikindi's company and to whom he gave orders, discovered that Ancilla, a Tutsi women, had been hiding in the ceiling of her home, apparently protected by her Hutu husband. Simon Bikindi stated that she was one of the people fighting Hutus and that she should be taken away (lulled) and was present when Noel and Pascal led Ancilla away. Noel and Pascal killed the women and her 4 year old daughter and buried them in a shallow grave.
- (g) In early April 1994, in Kicukiro *commune*, Simon Bikindi participated in the killing of an unnamed wealthy Tutsi man. Simon Bikindi ordered *Interahamwe* to force open the locked door of the man's house. The *Interahamwe*, in the presence of Simon Bikindi, then beat the pregnant wife of the Tutsi man on her belly with the butt of their rifle and threw grenades into the Tutsi man's house. The Tutsi man and his wife were killed as a result of these actions.
- (h) In June 1994, in Rugerero sector, Rubavu *commune*, Gisenyi *préfecture*, Simon Bikindi ordered the *Interahamwe* to kill all Tutsis in Nyamyumba *commune*, and specifically ordered the killing of Kabayiza, a Tutsi man staying in Kivumu sector, Nyamyumba *commune* as well as father Gatore Thadee and two other priests whose names are unknown. Simon Bikindi told the group of *Interahamwe* that he himself was going with them to Nyamyumba to kill the Tutsis in that *commune*. Simon Bikindi, Colonel Buregeya, Noel, one of the *Interahamwe* in Simon Bikindi's company and to whom he gave orders, and a group of *Interahamwe*

left to Nyamyumba. Upon their return, Noel reported to the other *Interahamwe* who were left behind that they had exterminated all Tutsis in Nyamyumba.

COUNT 6 :
PERSECUTION AS A CRIME AGAINST HUMANITY

The Prosecutor Of The International Criminal Tribunal For Rwanda charges Simon Bikindi with Persecution as Crime Against Humanity as stipulated in Article 3 (h) of the Statute in that between the dates of 1st January 1994 and 31st December 1994, Simon Bikindi collectively targeted persons belonging to the Tutsi ethnic group and was responsible for directly inciting persons including, but not limited to, soldiers, local administrative officers, communal police, civilian militias and civilian Hutu population to actively persecute people belonging to the Tutsi ethnic group. This conduct was committed as part of a widespread or systematic attack directed against a civilian population.

48. During the period 1990 to 1994, Simon Bikindi addressed public gatherings, composed, performed, recorded or disseminated musical compositions extolling Hutu solidarity and characterizing Tutsi as enslavers of the Hutu. These compositions were subsequently deployed in a propaganda campaign to target Tutsi as the enemy, or as enemy accomplices, and to instigate, incite, and encourage the Hutu population to separate themselves from the Tutsi, to commit acts of violence against them and to kill them. Simon Bikindi composed, wrote, performed, recorded, and disseminated musical compositions and addressed public gatherings as set out above with the specific intention of instigating persecution of all Tutsis, and of Hutus opposed to ethnic division. The basis of responsibility for the deployment of his compositions is Article 6 (1) of the Statute for aiding and abetting the persecution of Tutsis, through his songs that assimilated all Tutsis to the enemy, blamed the enemy for the problems of Rwanda, continuously made references to the 1959 revolution and its gains by the *rubanda nyamwinshi*, and finally supported the Hutu ten commandments.

The acts and omissions of Simon Bikindi detailed herein are punishable in reference to articles 22 and 23 of the Statute.

Ausha, this 20th May 2005.

[Signed] : Hassan Bubacar Jallow

***Décision relative à la requête de la défense en traduction
et en communication d'actes inscrits au dossier
Article 20 du Statut et Article 66 du Règlement
de procédure et de preuve
20 mai 2005 (ICTR-2001-72-PT)***

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Flavia Lattanzi; Gberdao Gustave Kam

Simon Bikindi – Droit à un procès équitable, Droit de comprendre les faits mis à sa charge, Droit à se voir communiquer des documents déterminés dans une langue qu'il comprend, Limitation de l'obligation de traduction à la charge du Greffe – Imprécision de la requête – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 3, 4, 5 (A), 33 (B), 47 (G), 54, 66, 66 (A), 66 (A) (i) et 73 (A); Statut, art. 5 (2), 12 bis, 16, 19 (1), 20 et 20 (4); Statut du T.P.I.Y., art. 20

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Mika Muhimana, Décision relative à la requête de la Défense aux fins de traduction des documents de l'accusation et des actes de procédure en Kinyarwanda, langue de l'accusé, et en Français, langue de son Conseil, 6 novembre 2001 (ICTR-95-1B)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Zejnil Delalić, Décision relative aux exceptions préjudicielles aux fins de disjonction d'instances soulevées par les accusés Zejnil Delalić et Zdravko Mucić, 25 septembre 1996 (IT-96-21)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIÉGEANT en la Chambre de première instance III (la «Chambre») composée des
Juges Dennis C.M. Byron, Président, Flavia Lattanzi et Gberdao Gustave Kam;

ÉTANT SAISI de la requête intitulée «*Motion by the Accused Simon Bikindi for Translation and Disclosure of Pertinent Documents into the French Language*»,
déposée par le conseil de la Défense le 7 mars 2005 (la «requête»);

RAPPELANT l'ordonnance du 9 mai 2005 relative à la requête de la Défense en
traduction et en communication d'actes inscrits au dossier par laquelle, sur la base de
l'article 54 du Règlement de procédure et de preuve (le «Règlement»), la Chambre
a ordonné au Greffe de faire des observations sur la requête conformément
à l'article 33 (B) du Règlement; et CONSIDÉRANT les observations du Greffe

soumises le 10 mai 2005 indiquant l'état de la traduction par rapport à chacun des documents énumérés dans la requête (les «observations»);

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement, notamment dans leurs dispositions pertinentes liées à la question de la langue et des droits de l'accusé à un procès équitable;

STATUE comme suit sur la base du mémoire déposé par le requérant, en l'absence de toute réponse par le Procureur dans les délais prescrits, conformément à l'article 73 (A) du Règlement.

Arguments de la Défense et observations du Greffe

1. La Défense demande à la Chambre d'ordonner la traduction en français, seule langue du Tribunal que l'Accusé comprend, d'un certain nombre d'actes de procédure dont la liste est jointe à la requête¹ et dont il n'aurait reçu qu'une copie en anglais ou une copie en français marquée *draft*; d'ordonner au Greffe d'assurer la communication de ces traductions à l'accusé et à son équipe de la Défense; et enfin d'ordonner la traduction de tout document pertinent déposé au dossier. Au nombre des actes pertinents, la Défense compte les déclarations des témoins à charge, les requêtes et tout document nécessaire à la préparation de la défense.

2. La Défense indique qu'elle avait déjà tenté d'obtenir du Greffe et du Bureau du Procureur que, systématiquement, tout document au dossier soit traduit et communiqué à l'accusé. La Défense affirme que, en dépit des promesses, tous les documents ne sont pas communiqués à l'accusé dans leur version française. Selon la Défense, l'accusé a pourtant un droit à être entendu et à comprendre l'ensemble de son dossier en vertu des articles 5 (2), 12 *bis*, 16, 19 (1) et 20 (4) du Statut, et des articles 3, 4, 5 (A) et 47 (G) du Règlement. Par ailleurs, de l'avis général de la Défense, l'absence de communication des documents pertinents au dossier dans une langue comprise par l'accusé constitue une violation de son droit à un procès équitable. À l'appui de sa requête, la Défense cite aussi bien la jurisprudence des deux Tribunaux *ad hoc*, que celles de la Cour européenne des droits de l'homme et de la *common law*.

3. Des observations soumises par le Greffe, il ressort que tous les documents requis par l'accusé sont déjà traduits, certains ayant été communiqués à l'accusé avec la mention *draft*, d'autres étant en révision. Le Greffe indique par ailleurs à la Chambre que, en raison de l'économie judiciaire, les documents traduits et estampillés *draft* ne sont pas immédiatement soumis à révision, les parties devant les considérer comme traduits en l'état. Le Greffe affirme aussi n'avoir pas reçu de demande en traduction par rapport à trois documents².

¹ Cf. pp. 6-7 de la requête.

² Les trois documents en question sont : «*Supporting Materials Pursuant to Rule 66 (A) (i)*», «*Brief in Support of the Prosecutor's Motion for Leave to File an Amended Indictment*», et «*Prosecutor's Draft Amended Indictment Filed on 7 August 2003*».

Délibérations

4. Conformément à l'article 20 du Statut, et à une jurisprudence constante des deux Tribunaux *ad hoc*³, le droit à un procès équitable implique pour l'accusé le droit de comprendre les faits mis à sa charge et pour lesquels il est poursuivi. Il en résulte pour l'accusé un droit à se voir communiquer certains documents bien déterminés dans une langue qu'il comprend, mais non que tout acte au dossier doive être produit dans les deux langues de travail du Tribunal. Ainsi, dans l'affaire *Delalic et consorts*, la jurisprudence a établi que, en vue de garantir les droits de l'accusé, seuls doivent être traduits les documents qui vont fonder le jugement au fond. Ces documents sont ceux produits à l'audience au titre des éléments de preuve et ceux joints à l'acte d'accusation pour lesquels le Procureur est soumis à une obligation de communication en vertu de l'article 66 (A) du Règlement. Toutefois l'obligation de traduction pour ces derniers ne vaut que si le Procureur a l'intention de les produire au procès.

5. Parmi les actes dont la Défense réclame la traduction, figurent des éléments justificatifs divulgués sur la base de l'article 66 (A) (i) du Règlement. Bien que ces documents fassent partie de ceux qui doivent être communiqués à l'accusé dans une langue qu'il comprend comme il résulte de la jurisprudence suscitée, la Chambre ne saurait, en l'espèce faire droit à la demande en raison de son imprécision, la Défense n'ayant pas indiqué les documents spécifiques non traduits et devant lui être communiqués.

6. Parmi les autres documents dont la traduction est demandée, la Chambre constate que, excepté trois, tous ont été traduits, certains seulement ayant été révisés. La Chambre considère que la requête de la Défense est devenue sans objet à cet égard. S'agissant du document intitulé «*Brief in Support of the Prosecutor's Motion for Leave to File an Amended Indictment*», la Chambre note que la décision relative à cette requête ayant été rendue⁴, il n'y a plus d'intérêt à en exiger la traduction en urgence. Quant au document intitulé «*Prosecutor's Draft Amended Indictment Filed on 7 August 2003*», la Chambre rappelle qu'elle a ordonné dans sa Décision du 11 mai 2005⁵, que le Procureur dépose un acte d'accusation amendé en conformité avec les précédentes ordonnances, de sorte que seul ce nouvel acte devra être traduit pour respecter le droit de l'accusé tel qu'il résulte de l'article 20 du Statut. En conséquence, la requête de la Défense ne saurait non plus prospérer relativement à ces deux autres documents.

³ Tribunal pénal international pour l'ex-Yougoslavie, *The Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21, Decision on Defence Application for Forwarding the Documents in the Language of the Accused (TC), 25 September 1996. Cette jurisprudence a inspiré celle-ci de la Chambre de première instance I du Tribunal de céans : *Le Procureur c. Mika Muhimana*, Affaire n°TPIR-95-1B-I, Décision relative à la requête de la Défense aux fins de traduction des documents de l'Accusation et des actes de procédure en Kinyarwanda, langue de l'Accusé, et en Français, langue de son Conseil, 6 novembre 2001 («*Décision Muhimana*»).

⁴ *Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment* (TC), 22 septembre 2003.

⁵ *Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment* (TC), 11 mai 2005. Cette décision a été ensuite modifiée par : *Decision on the Prosecution Motion for Extension of Time* (TC), 16 mai 2005.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense s'agissant des documents estampillés *draft* et des éléments justificatifs;

DÉCLARE la requête sans objet au surplus.

Fait à Arusha, le 20 mai 2005, en français.

[Signé] : Dennis C. M. Byron; Flavia Lattanzi; Gberdao Gustave Kam

***Order on the Compliance with the Decision Granting Leave
to Amend the Indictment and to File it
Rules 54 and 50 (A) of the Rules of Procedure and Evidence
10 June 2005 (ICTR-2001-72-R54)***

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Flavia Lattanzi; Gberdao Gustave Kam

Simon Bikindi – Amended Indictment, Limited authorization of modification, New factual allegation, Non respect of previous decision – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 50 (A) and 54

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),
SITTING as Trial Chamber III composed of Judges Dennis C. M. Byron, Presiding, Flavia Lattanzi and Gberdao Gustave Kam (“Chamber”), pursuant to Rule 54 of the Rules of Procedure and Evidence (“Rules”);

RECALLING the Chamber’s Decisions of 22 September 2003 granting leave to amend the Indictment (“Decision of 22 September 2003”), of 11 May 2005 ordering the Prosecutor to provide particulars in the Amended Indictment (“Decision of 11 May 2005”), and of 16 May 2005 granting extension of time to file the Amended Indictment (“Decision of 16 May 2005”);

CONSIDERING that on 20 May 2005, the Prosecutor has filed the Amended Indictment, pursuant to the Decisions of 11 and 16 May 2005;

HAVING REVIEWED the Amended Indictment as submitted on 20 May 2005;

CONSIDERING the Statute of the Tribunal and the Rules;

NOW DECIDES, as follows.

1. The Chambers requests the Prosecutor to present additional information to complete compliance with the Order made in Paragraph 38 (ii) of the Decision of 22 September 2003, in which the Prosecutor was ordered to specify the supporting paragraphs of the allegations included under Paragraph 3 of the Indictment. This Order was fulfilled in the Submissions of Particulars, filed by the Prosecutor on 22 October 2003, in which it was stated that the agreement alleged in Paragraph 3 of the Indictment should be inferred from the facts set out in the subsequent paragraphs. The Chamber is of the opinion that the Prosecutor should include in Paragraph 3 of the Amended Indictment a specific reference to the subsequent paragraphs which support the allegations under Paragraph 3;

***Injonction faite au Procureur d'avoir à se conformer
à la décision l'autorisant à modifier l'acte d'accusation
et à déposer celui-ci
Articles 54 et 50 (A) du Règlement de procédure et de preuve
10 juin 2005 (ICTR-2001-72-R54)***

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Flavia Lattanzi; Gberdao Gustave Kam

Simon Bikindi – Acte d'accusation modifié, Autorisation limitée de modification, Nouvelle allégation factuelle, Non-respect de la décision antérieure – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 50 (A) et 54

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIEGEANT en la Chambre de première instance III, composée des juges Dennis C. M. Byron, Président de Chambre, Flavia Lattanzi et Gberdao Gustave Kam (la «Chambre»), en vertu de l'article 54 du Règlement de procédure et de preuve (le «Règlement»),

RAPPELANT les Décisions de la Chambre datées du 22 septembre 2003 autorisant le Procureur a déposer un acte d'accusation modifié («Décision du 22 septembre 2003»), du 11 mai 2005 ordonnant au Procureur d'apporter des précisions dans l'acte d'accusation modifié («Décision du 11 mai 2005») et du 16 mai 2005 prorogeant le délai prescrit pour le dépôt de l'acte d'accusation modifié («Décision du 16 mai 2005»),

CONSIDERANT que le 20 mai 2005, le Procureur a déposé l'acte d'accusation modifié, en application des Décisions des 11 et 16 mai 2005,

AYANT EXAMINE l'acte d'accusation modifié déposé le 20 mai 2005,

VU le Statut et le Règlement du Tribunal,

STATUE ci-après

1. La Chambre demande au Procureur d'apporter des précisions complémentaires afin de se conformer pleinement à la mesure qu'elle a prescrite au paragraphe 38 (ii) de la Décision du 22 septembre 2003, lorsqu'elle a enjoint au Procureur de préciser les paragraphes étayant les allégations portées au paragraphe 3 de l'acte d'accusation. En application de la décision, le Procureur a déposé, le 22 octobre 2003, un document intitulé «*Submission of Particular*», dans lequel il expliquait que l'entente alléguée au paragraphe 3 de l'acte d'accusation devait se déduire des faits exposés dans les paragraphes subséquents. La Chambre estime que le Procureur doit insérer au paragraphe 3 de l'acte d'accusation modifié une référence précise à ceux des paragraphes subséquents qui étaient les allégations portées au paragraphe 3.

2. The Chamber notes that the Prosecutor included a new allegation in Paragraph 9 of the Amended Indictment submitted on 20 May 2005 by stating that Simon Bikindi was a shareholder of RTL. Since no leave to include such new allegation was granted to the Prosecutor, it contravenes the prohibition, in the Decision of 22 September 2003, against

“any further amendment to the original indictment other than those amendments expressly allowed”.

The newly alleged fact should therefore be removed from the Amended Indictment.

3. Finally, the Chamber, considering that the Prosecutor compelled with the Decisions of 22 September 2003 and 11 May 2005 in all other respects, and that the corrected Amended Indictment to be filed by the Prosecution contains new charges, will call the Accused for a Further Initial Appearance. The Chamber also reminds the Prosecutor of the order made in the Decision of 11 May 2005 to withdraw the two submissions of particulars filed on 22 October 2003 and 1 February 2005.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBRE

I. DIRECTS that the Prosecutor include under Paragraph 3 of the Amended Indictment a specific reference to the subsequent paragraphs which support the allegations contained in Paragraph 3; and that he remove the new allegation appearing in Paragraph 9 of the Amended Indictment;

II. ORDERS that the Prosecutor file the corrected Amended Indictment no later than 15 June 2005;

III. DIRECTS the Registrar to consult with the parties and to schedule the Further Initial Appearance as soon as practical.

Arusha, 10 June 2005, done in English.

[Signed] : Dennis C. M. Byron; Flavia Lattanzi; Gberdao Gustave Kam

2. La Chambre relève que le Procureur a fait une nouvelle allégation au paragraphe 9 de l'acte d'accusation modifié, présenté le 20 mai 2005, en déclarant que Simon Bikindi était actionnaire de RTLM. L'autorisation d'insérer cette nouvelle allégation n'ayant pas été donnée au Procureur, celui-ci a contrevenu à l'interdiction faite dans la Décision du 22 septembre 2003 de

«toute modification [...] à l'acte d'accusation initial, à l'exception de celles qui sont expressément autorisées».

En conséquence, le Procureur doit retirer le nouveau fait allégué de l'acte d'accusation modifié.

3. Enfin, attendu que le Procureur s'est conformé sous tous autres rapports, aux Décisions des 22 septembre 2003 et 11 mai 2005, et que l'acte d'accusation modifié corrigé qu'il doit déposer contient de nouvelles charges, la Chambre appellera l'accusé pour une nouvelle comparution initiale. Elle rappelle également au Procureur que la Décision du 11 mai 2005 lui a prescrit de retirer les deux communications de précisions déposées respectivement le 22 octobre 2003 et le 1^{er} février 2005.

PAR CES MOTIFS, LA CHAMBRE

I. ENJOINT au Procureur d'insérer au paragraphe 3 de l'acte d'accusation modifié une référence précise à ceux des paragraphes subséquents qui étayent les allégations portées audit paragraphe 3; et de retirer la nouvelle allégation faite au paragraphe 9 de l'acte d'accusation modifié;

II. ORDONNE au Procureur de déposer, d'ici au 15 juin 2005, l'acte d'accusation modifié corrigé;

III. CHARGE le Greffier de consulter les parties et d'organiser une nouvelle comparution initiale dès que possible.

Arusha, le 10 juin 2005.

[Signé] : Dennis C. M. Byron; Flavia Lattanzi; Gberdao Gustave Kam

The Prosecutor v. Paul BISENGIMANA

Case N° ICTR-2000-60

Case History

- Name : BISENGIMANA
- First Name : Paul
- Date of Birth : unknown
- Sex : male
- Nationality : Rwandan
- Former Official Function : Mayor of Gikoro
- Date of Indictment : 1st July 2000 ¹
- Counts : genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 4 December 2001, in Mali
- Date of Transfer : 11 March 2002
- Date of Initial Appearance : 18 March 2002
- Date Trial Began : 17 November 2005
- Date and content of the Sentence : 13 April 2006, 15 years imprisonment (pleading guilty)

¹ The text of the indictment is reproduced in the *2000 Report*, p. 540.

Le Procureur c. Paul BISENGIMANA

Affaire N° ICTR-2000-60

Fiche technique

- Nom : BISENGIMANA
- Prénom : Paul
- Date de naissance : inconnue
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : bourgmestre de Gikoro
- Date de l'acte d'accusation : 1^{er} juillet 2000 ¹
- Chefs d'accusation : génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II auxdites Conventions de 1977
- Date et lieu de l'arrestation : 4 décembre 2001, au Mali
- Date du transfert : 11 mars 2002
- Date de la comparution initiale : 18 mars 2002
- Date du début du procès : 17 novembre 2005
- Date et contenu du prononcé de la peine : 13 avril 2006, 15 ans d'emprisonnement (a plaidé coupable)

¹ Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 541.

***Decision on the Prosecutor's Request to Withdraw Prosecutor's Motion
to Amend the Indictment and Corrigendum thereof
24 August 2005 (ICTR-2000-60-I)***

(Original : English)

Trial Chamber II

Judge : Arlette Ramaroson, Presiding Judge

Paul Bisengimana – Withdrawal of a motion – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 19 (B); Practice Direction on Withdrawal of Pleadings

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING in the person of Judge Arlette Ramaroson, Presiding;

CONSIDERING the “Prosecutor’s Request to Withdraw Prosecutor’s Motion to Amend the Indictment and *Corrigendum* Thereof”, filed on 19 August 2005 (the “Motion”);

CONSIDERING the Rules of Procedure and Evidence, in particular Rule 19 (B), and the “Practice Direction on Withdrawal of Pleadings” dated 24 April 2001, which states as follows :

A party seeking to withdraw a motion, counter motion, or a response to a motion, shall do so by filing a notice of withdrawal with the registry or, if the matter is before the Trial Chamber, by oral communication to the Chamber. It shall not be necessary for the party to file a further motion requesting leave of the Trial Chamber for the withdrawal;

CONSIDERING that the Chamber has not yet issued a Decision on the “Prosecutor’s Request for Leave to Amend an Indictment Pursuant to Rule 73, 50, and 51 of the Rules of Procedure and Evidence”, which was filed on 17 June 2005 (the “Motion for Leave to Amend the Indictment”) and the *Corrigendum* filed thereafter on 23 June 2005;

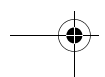
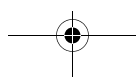
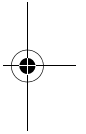
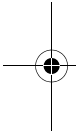
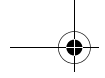
HEREBY REMINDS the Prosecution that pursuant to the Practice Direction on Withdrawal of Pleadings it was not necessary to file a further motion requesting leave of the Trial Chamber to withdraw the Motion for Leave to Amend the Indictment;

ACKNOWLEDGES receipt of communication from the Prosecution of its intent to withdraw the Motion for Leave to Amend the Indictment and *Corrigendum* Thereof, and that therefore the Motion for Leave to Amend the Indictment and its *Corrigendum* thereof has been withdrawn;

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER
DISMISSES the Prosecution’s Motion as moot.

Arusha, 24 August 2005.

[Signed] : Arlette Ramaroson



***Decision on the Prosecutor's Request
for Leave to Amend the Indictment
27 October 2005 (ICTR-2000-60-I)***

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

Paul Bisengimana – Modification of the Indictment, Applicable Standard Under to amend the Indictment, New Counts, New material facts, Judicial economy – Right of the accused to a fair trial, Right to an expeditious trial, Right of the accused to prompt notices of the charges against him/her, Right to adequate time and facilities in order to prepare his/her defence, Balance of the rights of the accused, Unfair prejudice to the accused – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rules 37, 47 (E), 47 (F), 47 (G), 50, 50 (A) (ii), 50 (B), 66, 67 (D), 68, 72, 73 and 73 (A); Statute, art. 15, 19, 19 (1), 20 and 20 (4) (c)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 (ICTR-99-50); Trial Chamber, The Prosecutor v. Mika Muhimana, Decision on Motion to Amend Indictment, 21 January 2004 (ICTR-95-1B); Appeals Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment, 12 February 2004 (ICTR-99-50); Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision On The Prosecutor's Motion For Leave To Amend The Indictment – Rule 50 Of The Rules Of Procedure And Evidence, 13 February 2004 (ICTR-98-44); Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, et al., Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment, 26 March 2004 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Tharcisse Renzaho, Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 March 2005 (ICTR-97-31); Appeals Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005, 12 May 2005 (ICTR-2000-55)

***Décision relative à la requête du Procureur
demandant l'autorisation de modifier l'acte d'accusation
27 octobre 2005 (ICTR-2000-60-I)***

(Original : Anglais)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente de Chambre; William H. Sekule; Solomy Balungi Bossa

Paul Bisengimana – Modification de l'acte d'accusation, Critères permettant la modification de l'acte d'accusation, Ajout de nouvelles charges, Ajout de nouveaux éléments factuels, Economie des ressources judiciaires du Tribunal – Droit de l'accusé à un procès équitable, Droit des accusés à un procès rapide, Droit de l'accusé d'être informé rapidement des accusations portées contre lui, Droit de disposer du temps et des facilités nécessaires à la préparation de leur défense, Mise en balance de droits de l'accusé, Préjudice injuste à l'accusé – Requête acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 37, 47 (E), 47 (F), 47 (G), 50, 50 (A) (ii), 50 (B), 66, 67 (D), 68, 72, 73 et 73 (A); Statut, art. 15, 19, 19 (1), 20 et 20 (4) (c)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Décision relative à la requête du Procureur demandant l'autorisation de disposer un acte d'accusation modifié, 6 octobre 2003 (ICTR-99-50); Chambre de première instance, Le Procureur c. Mika Muhimana, Décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation, 21 janvier 2004 (ICTR-95-1B); Chambre d'appel, Le Procureur c. Casimir Bizimungu et consorts, Décision intitulée «Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment», 12 février 2004 (ICTR-99-50); Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation, article 50 du Règlement de procédure et de preuve, 13 février 2004 (ICTR-98-44); Chambre de première instance, Le Procureur c. Augustin Nindiliyimana et consorts, Décision relative à la requête formée par le Procureur en vertu de l'article 50 du Règlement de procédure et de preuve aux fins d'être autorisé à modifier l'acte d'accusation du 20 janvier 2000 confirmé le 28 janvier 2000, 26 mars 2004 (ICTR-2000-56); Chambre de première instance, Le Procureur c. Tharcisse Renzaho, Décision sur la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 mars 2005 (ICTR-97-31); Chambre d'appel, Le Procureur c. Tharcisse Muvunyi, Décision intitulée Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005, 12 mai 2005 (ICTR-2000-55)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Enver Hadžihasanović and Amir Kubura, Décision relative à la forme de l'acte d'accusation, 17 September 2003 (IT-01-47); Trial Chamber, The Prosecutor v. Vojislav Šešelj, Décision relative à la requête de l'accusation aux fins d'obtenir l'autorisation de modifier l'acte d'accusation, 27 May 2005 (IT-03-67)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II composed of Judge Arlette Ramaroson, Presiding,
Judge William H. Sekule, and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the “Prosecutor’s Request for Leave to Amend an Indictment Pursuant to Rules 73, 50, and 51 of the Rules of Procedure and Evidence”, annexed to which is the proposed Amended Indictment (“Proposed Amended Indictment”), filed on 21 September 2005 (the “Motion”);

CONSIDERING the Accused’s “*Réponse à la requête du Procureur aux fins d’amendement de l’acte d’accusation*”, filed on 5 October 2005 (the Response);

NOTING the Supporting Materials for the amended indictment filed on 21 October 2005;

CONSIDERING the Statute of the Tribunal (the “Statute”), specifically Articles 19 and 20, and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 47 (E), (F), and (G), 50, and 73;

NOW DECIDES the matter pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

Introduction

1. Judge Pavel Dolenc confirmed the Indictment dated 10 July 2000 against the Accused Paul Bisengimana (the “Accused”) on 17 July 2000 (the “Current Indictment”). In its Motion, the Prosecution seeks leave to amend the Current Indictment as indicated below.

Submissions of the parties

The Prosecution

2. The Prosecution requests the Chamber to grant leave for it to amend the Current Indictment by withdrawing the following seven charges :

- i) Count 3, conspiracy to commit genocide;
- ii) Count 4, direct and public incitement to commit genocide;
- iii) Count 7, crimes against humanity (torture);
- iv) Count 9, crimes against humanity (other inhumane acts);
- v) Count 10, violations of the Geneva Convention (Article 4 (a) of the Statute);
- vi) Count 11, violations of the Geneva Convention (Article 4 (e) of the Statute);
- vii) Count 12, violations of the Geneva Convention (Article 4 (f) of the Statute).

T.P.I.Y. : Chambre de première instance, Le Procureur c. Enver Hadžihasanović et Amir Kubura, Décision relative à la forme de l'acte d'accusation, 17 septembre 2003 (IT-01-47); Chambre de première instance, Le Procureur c. Vojislav Šešelj, Décision relative à la requête de l'accusation aux fins d'obtenir l'autorisation de modifier l'acte d'accusation, 27 mai 2005 (IT-03-67)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal ») SIEGEANT en la Chambre de première instance II composée des juges Arlette Ramaroson, Président de Chambre, William H. Sekule et Solomy Balungi Bossa (la « Chambre »)

SAISI de la «Requête du Procureur demandant l'autorisation de modifier un acte d'accusation conformément aux articles 73, 50 et 51 du Règlement de procédure et de preuve», à laquelle est jointe en annexe le projet d'acte d'accusation modifié («Projet d'acte d'accusation modifié»), déposée le 21 septembre 2005 (la «Requête»),

CONSIDÉRANT la «Réponse à la requête du Procureur aux fins d'amendement de l'acte d'accusation» déposée par l'accusé le 5 octobre 2005 (la «Réponse»),

VU les pièces justificatives à l'appui de l'acte d'accusation modifié déposées le 21 octobre 2005,

VU le Statut du Tribunal (le «Statut»), en particulier les articles 19 et 20, et le Règlement de procédure et de preuve (le «Règlement»), en particulier les articles 47 (E), (F), et (G), 50 et 73;

STATUE sur la requête conformément à l'article 73 (A) du Règlement, sur la base des conclusions écrites des parties.

Introduction

1. Le 17 juillet 2000, le juge Pavel Dolenc a confirmé l'acte d'accusation dressé contre l'accusé Paul Bisengimana (l'«accusé») daté du 10 juillet 2000, (l'«acte d'accusation actuel»). Dans sa requête, le Procureur sollicite l'autorisation de modifier l'acte d'accusation actuel, tel qu'indiqué ci-après.

Arguments des parties

Le Procureur

2. Le Procureur demande à la Chambre de première instance de l'autoriser à modifier l'acte d'accusation actuel en retirant les sept chefs d'accusation suivants :

- i) Chef 3, entente en vue de commettre le génocide;
- ii) Chef 4, incitation directe et publique à commettre le génocide;
- iii) Chef 7, crimes contre l'humanité (torture);
- iv) Chef 9, crimes contre l'humanité (autres actes inhumains);
- v) Chef 10, violations des Conventions de Genève (Article 4 (a) du Statut);
- vi) Chef 11, violations des Conventions de Genève (Article 4 (e) du Statut);
- vii) Chef 12, violations des Conventions de Genève (Article 4 (f) du Statut).

3. The Prosecution also seeks to delete the factual allegations supporting the seven counts it proposes to withdraw.

4. In addition, the Prosecution seeks to allege “new and additional material facts” in support of the remaining counts and some “further counts or charges”, in order to bring the Proposed Amended Indictment in accord with the evidence. It submits that the additional factual allegations are the result of ongoing investigations.

5. Finally, the Prosecution seeks to re-number the paragraphs in the Proposed Amended Indictment to reflect the additions and deletions.

6. According to the Prosecution, these amendments will bring the organizational layout of the Current Indictment in accordance with the current charging practices of the Office of the Prosecutor (the “OTP”), which is reflective of the evolving jurisprudence of the Tribunal¹.

7. The Prosecution submits that Rule 50 of the Rules and the jurisprudence of the Tribunal allow for the amendment of the indictment after the initial appearance of the Accused.

8. According to the Prosecution, it is obligated by Article 15 of the Statute and Rule 37 of the Rules to investigate violations of law under the Statute. In “fulfilment of these obligations”, the Prosecution submits that it continued to investigate the case against the Accused after confirmation of the Current Indictment, which yielded new evidence, implicating the Accused in new crimes related to the remaining counts in the Current Indictment². These include crimes committed in *Ruhita cellule*, *Rwamashyongoshyo secteur*, *Gikoro Commune*, at the *Gikoro Commune* Office, in *Ruhanga cellule*, *Gicaca secteur*, *Gikoro Commune*, as well as new evidence expanding on the factual allegations regarding the events at Musha Church described in the Current Indictment.

9. The Prosecution submits that

“the new factual allegations and charges allow the Prosecutor to present the full scope of available evidence which was not previously available and establishes a *prima facie* case against the accused”³.

10. The Prosecution alleges that the evidence in support of the new charges in the Proposed Amended Indictment was disclosed to the Defence pursuant to Rules 66, 67 (D) and 68 of the Rules on the following dates : 18 February 2005, 2 March 2005, 9 May 2005, and 1 June 2005.

11. The Prosecution further submits that the amendment of the Current Indictment is in the interest of justice and will not result in any delay that might impinge upon the Accused’s right to be tried without undue delay pursuant to Articles 19 (1) and 20 (4) (c) of the Statute, as the Proposed Amended Indictment withdraws seven counts from and streamlines the Current Indictment, thereby “making it more focused” and “allowing for a more expeditious trial” and a smaller number of trial days⁴.

¹ Motion, para. 1.5.

² Genocide, complicity in genocide, extermination, murder as a crime against humanity, and rape as a crime against humanity.

³ Motion, para. 3.8.

⁴ Motion, para. 3.13.

3. Le Procureur entend également supprimer les allégations factuelles à l'appui des sept chefs d'accusation qu'il se propose de retirer.

4. En outre, il souhaite présenter des «faits essentiels nouveaux et supplémentaires» à l'appui des chefs d'accusation restants et ajouter «quelques autres chefs ou charges», afin de mettre le projet d'acte d'accusation modifié en conformité avec les éléments de preuve. Il soutient que les allégations factuelles complémentaires résultent des enquêtes en cours.

5. Enfin, le Procureur se propose de renuméroter les paragraphes du projet d'acte d'accusation modifié afin de rendre compte de ces ajouts et suppressions.

6. Selon le Procureur, ces modifications permettront d'aligner la présentation de l'acte d'accusation actuel sur la pratique de mise en accusation adoptée par le Bureau du Procureur, laquelle rend compte de la jurisprudence en évolution du Tribunal¹.

7. Le Procureur soutient que l'article 50 du Règlement et la jurisprudence du Tribunal l'autorisent à modifier l'acte d'accusation après la comparution initiale de l'accusé.

8. Le Procureur fait valoir qu'il est tenu, conformément aux articles 15 du Statut et 37 du Règlement; d'enquêter sur les violations du droit au regard du Statut. «[E]n conséquence de cette obligation», il a continué d'instruire le dossier de l'accusé après la confirmation de l'acte d'accusation actuel, ce qui lui a permis de découvrir de nouveaux éléments de preuve impliquant l'accusé dans de nouveaux crimes en rapport avec les chefs restants de l'acte d'accusation actuel². Il s'agit, entre autres, des crimes commis dans la cellule de Ruhita, secteur de Rwamashyongoshyo, dans la commune de Gikoro, et au bureau communal de Gikoro, dans la cellule de Ruhanga, secteur de Gicaca, dans la commune de Gikoro, ainsi que de nouveaux éléments de preuve développant les allégations factuelles concernant les faits survenus à l'église de Musha et décrits dans l'acte d'accusation actuel.

9. Le Procureur soutient que

«les nouvelles allégations factuelles et charges lui permettent de présenter la totalité des éléments de preuve disponibles, qui ne l'étaient pas précédemment, et d'établir qu'au vu des présomptions, il y a lieu d'engager des poursuites contre l'accusé»³.

10. Le Procureur soutient que les éléments de preuve étayant les nouveaux chefs d'accusation énoncés dans le projet d'acte d'accusation modifié ont été communiqués à la Défense conformément aux articles 66, 67 (D) et 68 du Règlement aux dates suivantes : 18 février 2005, 2 mars 2005, 9 mai 2005 et 1^{er} juin 2005.

11. Le Procureur affirme en outre que la modification de l'acte d'accusation actuel sert l'intérêt de la justice et qu'elle n'entraînera aucun retard susceptible de porter atteinte au droit de l'accusé d'être jugé sans retard excessif conformément aux articles 19 (1) et 20 (4) (c) du Statut, puisqu'il a renoncé à sept chefs dans le projet d'acte d'accusation modifié et réaménagé l'acte d'accusation initial «en le resserrant, ce qui ne pourra qu'accélérer la marche du procès» et réduire le nombre de jours de procès⁴.

¹ Requête, para. 1.5.

² Génocide, complicité dans le génocide, extermination, assassinat constitutif de crime contre l'humanité, et viol constitutif de crime contre l'humanité.

³ Requête, para. 3.9.

⁴ Requête, para. 3.13.

12. In any event, the Prosecution submits that the issue of undue delay must be seen in context, and, in that regard, no trial date has been set in this case and, given the Tribunal's calendar schedule, the trial against the Accused is unlikely to commence in the first quarter of 2006.

The Defence

13. The Defence submits that it has taken note of the proposed amendments and that it does not oppose the Motion.

Deliberations

The Applicable Standard Under Rule 50

In considering the Motion, the Chamber notes the relevant provisions of Rule 50 :

Rule 50 : Amendment of the Indictment

(A)

(i) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(ii) deciding whether to grant leave to amend the indictment, the Trial Chamber or, where applicable, a Judge shall, *mutatis mutandis*, follow the procedures and apply the standards set out in Sub-Rules 47 (E) and (F) in addition to considering any other relevant factors.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for preparation of the defence.

14. The Chamber notes the relevant provisions of Rule 47, which provide :

Rule 47 : Submission of Indictment by the Prosecutor

12. En tout état de cause, le Procureur soutient que la question du retard excessif doit être appréciée dans le contexte de la procédure; à cet égard, aucune date n'a été fixée pour l'ouverture du procès et, vu le calendrier du Tribunal, il est peu probable que le procès s'ouvre au cours du premier trimestre 2006.

La Défense

13. La Défense indique qu'elle a dûment pris note des modifications proposées et qu'elle ne s'oppose pas à la requête.

Deliberations

Le critère applicable conformément à l'article 50 du Règlement

Pour apprécier la requête, la Chambre prend note des dispositions pertinentes de l'article 50 du Règlement :

Article 50 : Modifications de l'acte d'accusation

(A)

(i) Le Procureur peut, sans autorisation préalable, modifier l'acte d'accusation, et ce, à tout moment avant sa confirmation. Ultérieurement, et jusqu'à la comparution initiale de l'accusé devant une Chambre de première instance conformément à l'article 62, il ne peut le faire qu'avec l'autorisation du juge l'ayant confirmé ou, dans des circonstances exceptionnelles, avec l'autorisation d'un juge désigné par le Président. Lors de cette comparution initiale ou par la suite, l'acte d'accusation ne peut être modifié que sur autorisation d'une Chambre de première instance donnée conformément à l'article 73. Les dispositions de l'article 47 (G) et de l'article 53 *bis* s'appliquent *mutatis mutandis* à l'acte d'accusation modifié, dès lors que l'autorisation de modifier est donnée.

(ii) Pour décider s'il est opportun d'autoriser la modification de l'acte d'accusation, la Chambre de première instance ou, le cas échéant, le juge compétent suit la procédure définie aux paragraphes (E) et (F) de l'article 47 *mutatis mutandis*, applique les normes qui y sont fixées et tient compte de tout autre élément d'appréciation pertinent.

(B) Lorsque l'acte d'accusation modifié comporte de nouveaux chefs d'accusation et que l'accusé a déjà comparu devant une Chambre de première instance conformément à l'article 62, une nouvelle comparution se tient dès que possible pour permettre à l'accusé de plaider coupable ou non coupable des nouveaux chefs qui lui sont imputés.

(C) Un délai supplémentaire de trente jours est accordé à l'accusé pour lui permettre de soulever les exceptions prévues à l'article 72 relativement aux nouveaux chefs qui lui sont imputés et, s'il y a lieu, la date du procès peut être reportée pour accorder à la défense le temps nécessaire à sa préparation.

14. La Chambre prend note des dispositions pertinentes de l'article 47 du Règlement qui se lit comme suit :

Article 47 : Présentation de l'acte d'accusation par le Procureur

(A) [...]

(B) [...]

(C) [...]

(D) [...]

(E) The reviewing judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.

(F) The reviewing Judge may :

i. Request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;

ii. Confirm each count;

iii. Dismiss each count; or

iv. Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

(G) The Indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known by the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.

(H) [...]

(I) [...]

15. The Chamber notes that after the initial appearance of the accused, a Trial Chamber is given discretion to grant leave for the amendment of an indictment, placing the burden on the Prosecution to set out the factual and legal justifications for such amendments⁵. In general,

“amendments pursuant to Rule 50 are granted in order to (a) add new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the indictment”⁶.

16. The Chamber recalls that in its evaluation of the requests to amend, it should analyse the following non-exclusive circumstances :

- i) The effect of the proposed amended Indictment on the accused persons’ right to an expeditious trial, to prompt notices of the charges against them, and to adequate time and facilities in order to prepare their defence;
- ii) Whether any additional time can be granted to the Accused for the preparation of their defence;

⁵ *Prosecutor v. Muhimana*, Case No. ICTR-1995-1B-I, Decision on Motion to Amend Indictment, 21 January 2004, para. 4 (the “*Muhimana* Decision”); *Prosecutor v. Bizimungu, et al.*, Case No. ICTR-99-50-I, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment (TC), 6 October 2003, para. 27 (the “*Bizimungu* Trial Chamber Decision”).

⁶ *Bizimungu* Trial Chamber Decision, para. 26.

- (A) ...
- (B) ...
- (C) ...
- (D) ...

(E) Le juge désigné examine chacun des chefs d'accusation et tout élément que le Procureur présenterait à l'appui de ceux-ci, afin de décider, en application de la norme énoncée à l'article 18 (1) du Statut, si un dossier peut être établi contre le suspect.

(F) Le juge désigné peut :

- i. Demander au Procureur de présenter des éléments supplémentaires à l'appui de l'un ou de la totalité des chefs d'accusation, ou de prendre toute autre mesure appropriée;
- ii. Confirmer chacun des chefs d'accusation;
- iii. Rejeter chacun des chefs d'accusation;
- iv. Surseoir à sa décision afin de permettre au Procureur de modifier l'acte d'accusation.

(G) L'acte d'accusation tel que confirmé par le juge est conservé par le Greffier qui en fait des copies certifiées conformes portant le sceau du Tribunal. Si l'accusé ne comprend aucune des deux langues officielles du Tribunal et si le Greffier sait quelle langue l'accusé comprend, l'acte d'accusation est traduit dans cette langue et cette traduction est jointe à toute copie certifiée conforme de l'acte d'accusation.

- (H) ...
- (I) ...

15. La Chambre relève qu'après la comparution initiale d'un accusé, une Chambre de première instance peut autoriser la modification d'un acte d'accusation, à charge pour le Procureur d'exposer les moyens de fait et de droit qui fondent de telles modifications⁵. En général, les modifications sollicitées en vertu de l'article 50 du Règlement sont accordées :

«a) pour ajouter de nouveaux chefs d'accusation à un acte d'accusation confirmé; b) pour étoffer et développer les allégations factuelles présentées à l'appui des chefs d'accusation initiaux déjà confirmés; c) pour apporter des changements mineurs à l'acte d'accusation»⁶.

16. La Chambre rappelle que, lorsqu'elle apprécie les demandes en modification, elle doit analyser les circonstances, non exclusives suivantes :

- i) L'effet du projet d'acte d'accusation modifié sur le droit des accusés à un procès rapide, sur leur droit d'être informés rapidement des accusations portées contre eux et sur leur droit de disposer du temps et des facilités nécessaires à la préparation de leur défense;
- ii) L'opportunité d'accorder un délai supplémentaire aux accusés pour la préparation de leur défense;

⁵ *Le Procureur c. Muhimana*, affaire n° ICTR-1995-1B-I, Décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation, 21 janvier 2004, para. 4 (la «Décision Muhimana»); *Le Procureur c. Bizimungu et consorts*, affaire n° ICTR-99-50-I, Décision relative à la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié (Chambre de première instance), 6 octobre 2003, para. 27 (la «Décision rendue par la Chambre de première instance en l'affaire Bizimungu»).

⁶ Décision rendue par la Chambre de première instance en l'affaire *Bizimungu*, para. 26.

- iii) Reasonableness of resulting delays in the scheduled start day of trial, and the length of the trial itself;
- iv) Effect on the time spent by the Accused in pre-trial detention;
- v) Nature and scope of the proposed amendment;
- vi) Whether the [A]ccused and Trial Chamber had prior notice of the Prosecutor's intention to seek leave to amend the indictment, the nature of the notice, and any improper tactical advantage gained by the Prosecution as a result of the proposed amended Indictment;
- vii) The evidentiary basis of the new charges, if any, and the timing of their discovery;
- viii) Judicial economy; and
- ix) Whether the proposed amended Indictment, through more specificity and accuracy, allows the Accused to better respond and prepare for trial, or shortens the length of the trial proceedings, thus protecting rather than prejudicing the accused persons' rights to a fair trial⁷.

17. As suggested by the ninth and final consideration listed above, the Chamber balances potentially competing rights of the Accused, such as the Accused's right to be informed promptly and in detail of the nature and cause of the charges against him, the right to have adequate time and facilities for the preparation of his defence, and the right to be tried without undue delay⁸.

18. As stated by the Chamber in the Renzaho "*Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié*" of 18 March 2005⁹, where reference was made to the ICTY jurisprudence in *Hadzhihasanović and Kubura*¹⁰, the fundamental question in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly.

19. The Chamber notes that these considerations are not exhaustive, and that not all of those listed will necessarily be relevant in particular cases. Deciding whether to grant leave to amend is therefore left to the discretion of the Trial Chamber to be determined on a case-by-case basis¹¹.

⁷ *Prosecutor v. Nindiliyimana, et al (Military II)*, Case No. ICTR-2000-56-I, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment (TC), 26 March 2004, para. 42 (citing *Prosecutor v. Bizimungu, et al.*, ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment (AC), 12 February 2004, para. 16 (the "*Bizimungu Appeals Chamber Decision*")).

⁸ *Bizimungu* Trial Chamber Decision, para. 27; *Muhimana* Decision, para. 5.

⁹ *Prosecutor v. Renzaho*, case no. ICTR-97-31-I, *Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié*, 18 March 2005, para. 47.

¹⁰ *Prosecutor v. Hadzhihasanović and Kubura*, Case no. IT-01-47-PT, *Décision relative à la forme de l'acte d'accusation*, 17 September 2003 at para. 35.

¹¹ *Nindiliyimana*, para. 41 (quoting *Bizimungu Appeals Chamber Decision*, para. 27).

- iii) Le caractère raisonnable des retards qui pourraient se produire dans l'ouverture du procès et son déroulement proprement dit;
- iv) L'incidence sur la durée de la détention provisoire des accusés;
- v) La nature et l'ampleur de la modification envisagée;
- vi) La notification préalable aux accusés et à la Chambre de première instance de l'intention du Procureur de solliciter l'autorisation de modifier l'acte d'accusation, la nature de cette notification et tout avantage illégitime que le projet d'acte d'accusation modifié conférerait au Procureur sur le plan tactique;
- vii) Les éléments de preuve étayant les accusations nouvelles, s'il y en a, et le moment où ils ont été découverts;
- viii) L'économie des ressources du Tribunal;
- ix) La probabilité que le projet d'acte d'accusation modifié permet aux accusés, grâce à son surcroît de précision et d'exactitude, de mieux répondre aux accusations et se préparer au procès ou réduit la durée de leur procès, protégeant ainsi leur droit à un procès équitable plutôt que d'y porter atteinte⁷.

17. Ainsi que le suggère le neuvième et dernier point ci-dessus, la Chambre doit mettre en balance des droits de l'accusé potentiellement antagoniques, comme le droit d'être informé dans le plus court délai et de façon détaillée de la nature et des motifs de l'accusation portée contre lui; le droit de disposer du temps et des facilités nécessaires à la préparation de sa défense et le droit d'être jugé sans retard excessif⁸.

18. Comme l'a indiqué la Chambre dans la «Décision sur la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié», rendue dans l'affaire *Renzaho* le 18 mars 2009⁹, dans laquelle elle a fait référence à la jurisprudence du TPIY dans l'affaire *Hadzhihasanovic et Kubura*¹⁰, la véritable question s'agissant d'autoriser la modification d'un acte d'accusation est de savoir si la modification causera un préjudice injuste à l'accusé.

19. La Chambre note que ces considérations ne sont pas exhaustives et que celles énoncées ne seront pas nécessairement toutes pertinentes dans des cas précis. La décision d'accorder l'autorisation de modifier un acte d'accusation est donc laissée au pouvoir d'appréciation de la Chambre de première instance, laquelle se détermine en ayant à l'esprit les circonstances particulières de la cause¹¹.

⁷ *Le Procureur c. Nindiliyimana, et consorts (Militaire II)*, affaire n° ICTR-2000-56-1, Décision relative à la requête formée par le Procureur en vertu de l'article 50 du Règlement de procédure et de preuve aux fins d'être autorisé à modifier l'acte d'accusation du 20 janvier 2000 confirmé le 28 janvier 2000, (Chambre de première instance), 26 mars 2004, para. 42 (citant *Le Procureur c. Bizimungu et consorts*, ICTR-99-50-AR50, décision intitulée «*Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment*» (Chambre d'appel), 12 février 2004, para. 16 (la «Décision rendue par la Chambre d'appel en l'affaire *Bizimungu*»)).

⁸ Décision rendue par la Chambre de première instance en l'affaire *Bizimungu*, para. 27; Décision Muhimana, para. 5.

⁹ *Le Procureur c. Renzaho*, affaire n° ICTR-97-31-I, Décision sur la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 mars 2005, para. 47.

¹⁰ *Le Procureur c. Hadzhihasanovic et Kubura*, affaire n° IT-01-47-PT, Décision relative à la forme de l'acte d'accusation, 17 septembre 2003, para. 35.

¹¹ *Nindiliyimana*, para. 41 (citant la Décision rendue par la Chambre d'appel en l'affaire *Bizimungu*, para. 27).

*On the Request to Withdraw Seven Counts
and Delete All Factual Allegations Alleged
in Support of the Withdrawn Counts*

20. The Chamber notes that the Prosecution seeks leave to withdraw seven counts and delete all factual allegations alleged in support of the withdrawn counts. Generally, amendments seeking to narrow the indictment may “increase the fairness and efficiency of proceedings, and should be encouraged and usually accepted”¹². Such amendments may result in a more expeditious trial, particularly if there is a reduction in the number of witnesses and, thus, a reduction in the number of trial days, thereby promoting judicial economy and the Accused’s right to a fair trial¹³.

21. Considering that the Defence does not oppose the Motion and that the withdrawal of seven counts and the removal of factual allegations supporting those counts will likely result in a more expeditious trial that promotes judicial economy and the rights of the Accused, the Chamber grants this Prosecution request.

*On the Request to Expand upon the Facts
and Add Further Charges in Support of the Remaining Counts
and the Potential Prejudice to the Accused*

22. The Chamber notes that,

“[n]ew charges do not prohibit a Chamber from granting the Prosecution leave to amend an indictment”¹⁴.

Rather the most important consideration for the Chamber is the potential prejudice to the Accused.

23. The Chamber notes that the Prosecution submits that it has disclosed to the Defence the evidence in support of the new charges and factual allegations. The Chamber also notes that there has been no trial date set and that the Accused does not oppose the Prosecution’s motion and in any case, any prejudice that might result from delay can be cured because the Chamber may grant the Accused additional time to challenge the Proposed Amended Indictment and prepare his defence regarding new charges and allegations contained therein¹⁵.

24. However, pursuant to Rule 50 (A) (ii), in deciding on a request to add new charges to the indictment, the Chamber notes that it is required to follow the procedures and standards under Rule 47 (E) and (F). In the present case, even though the Defence does not object to the request for addition of new charges, the Chamber is required to examine each of the counts. The Chamber shall consider any supporting

¹² *Ndindiliyimana*, para. 43 (citing *Bizimungu* Appeals Chamber Decision, Para. 19).

¹³ *Prosecutor v. Karemera, et al.*, Case No. ICTR-98-44-T, Decision On The Prosecutor’s Motion For Leave To Amend The Indictment – Rule 50 Of The Rules Of Procedure And Evidence, 13 February 2004, paras. 41-45 (the “*Karemera* Trial Chamber Decision”).

¹⁴ *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005 (AC), 12 May 2005, para. 38.

¹⁵ *Ndindiliyimana*, para. 53.

*En ce qui concerne la demande de retrait de sept chefs d'accusation
et de suppression de toutes les allégations factuelles
étayant les chefs retirés*

20. La Chambre observe que le Procureur demande l'autorisation de retirer sept chefs d'accusation et de supprimer toutes les allégations factuelles à l'appui des chefs retirés. En général, toute modification tendant à rétrécir le champ de l'acte d'accusation peut «renforcer l'équité et la rationalité du procès et devrait être encouragé[e] et généralement admis[e]»¹². De telles modifications peuvent donner lieu à un procès plus rapide, en particulier si elles s'accompagnent d'une réduction du nombre de témoins, et partant, d'une réduction du nombre de jours de procès, ce qui renforce l'économie des ressources judiciaires et le droit de l'accusé à un procès équitable¹³.

21. Étant donné que la Défense ne s'oppose pas à la requête, et que le retrait de sept chefs d'accusation et la suppression des allégations factuelles à l'appui de ces chefs aboutiront probablement à un procès plus rapide, favorisant l'économie judiciaire et les droits de l'accusé, la Chambre fait droit à la demande du Procureur.

*En ce qui concerne la demande aux fins d'élargir les faits
et d'ajouter de nouvelles charges à l'appui des chefs
d'accusation restants, et le préjudice que de telles modifications
pourraient causer à l'accusé*

22. La Chambre note que l'existence de

«nouvelles charges n'interdi[t] pas à une Chambre d'autoriser la modification d'un acte d'accusation»¹⁴.

En réalité, l'élément le plus important que la Chambre doit prendre en considération est le préjudice que la modification pourrait causer à l'accusé.

23. La Chambre observe que le Procureur dit avoir communiqué à la Défense les éléments de preuve à l'appui des charges et allégations factuelles nouvelles. Elle retient également qu'aucune date n'a été fixée pour l'ouverture du procès, que l'accusé ne s'oppose pas à la requête du Procureur et qu'en tout état de cause, il peut être remédié au préjudice qui résulterait éventuellement du retard en accordant à l'accusé un délai supplémentaire pour contester le projet d'acte d'accusation modifié et préparer sa défense relativement aux charges et allégations nouvelles qu'il contient¹⁵.

24. Toutefois, conformément à l'article 50 (A) (ii) du Règlement, pour statuer sur une requête tendant à ajouter de nouvelles charges à l'acte d'accusation, la Chambre est tenue de suivre les procédures et critères énoncés aux paragraphes (E) et (F) de

¹² *Ndindiliyimana*, para. 43 (citant la Décision rendue par la Chambre d'appel en l'affaire *Bizimungu*, para. 19).

¹³ *Le Procureur c. Karemera et consorts*, affaire n° ICTR-98-44-T, Décision relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation, article 50 du Règlement de procédure et de preuve, 13 février 2004, paras. 41 à 45 («Décision rendue par la Chambre de première instance en l'affaire *Karemera*»).

¹⁴ *Le Procureur c. Muvunyi*, affaire n° ICTR-00-55A-AR73, décision intitulée *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005* (Chambre d'appel), 12 mai 2005, para. 38.

¹⁵ *Ndindiliyimana*, para. 53.

material the Prosecutor may provide to determine whether a case exists against the Accused¹⁶. The Chamber recalls that in the *Renzaho* Decision, it was opined that the Prosecution may plead its case as it wishes, as long as it sets out the material facts that will allow the Defence to meet the case¹⁷.

25. The Chamber, noting that the Prosecution had not provided it with any supporting material in support of the requested expanded factual allegations and new charges, requested the Prosecution to file any supporting material in its possession in support of its Motion. The Chamber notes that the Prosecution filed said supporting material with the Registry on 21 October 2005 whereupon the Registry distributed the same to the Chamber on 24 October 2005.

26. Having examined the supporting material, the Chamber notes that the Prosecution has not given any demonstration as to which piece of evidence supports which expanded allegation or new charge of the Proposed Amended Indictment. The Chamber notes that this exercise should have been done by the Prosecution in the interest of judicial economy. Nonetheless, the Chamber finds that the expanded factual allegations and/or new charges in paragraphs 23-33, and paragraph 42 of the Proposed Amended Indictment are supported by the *prima facie* evidence provided in the supporting material.

27. Regarding Count V of the Proposed Amended Indictment, Rape as a Crime Against Humanity (Count 8 of the Current Indictment), paragraphs 55 and 56 therein add particulars to the allegations in paragraph 3.22 of the Current Indictment. It would appear that the amendments under paragraph 56 could have been made earlier given that the statements in support of the allegations therein date from 16 June 1998.

28. Nonetheless, the Chamber notes that no trial date has been set in this matter, that the Defence does not oppose the proposed amendments, that the allegations contained in paragraphs 55 and 56 of the Proposed Amended Indictment merely add specificity to the allegations contained in paragraph 3.22 of the Current Indictment, and that, given the Chamber's decision regarding the other new material facts and charges contained in the Proposed Amended Indictment, the Accused will be making a further appearance pursuant to Rule 50 (B)¹⁸. Accordingly, the Chamber finds that granting the Prosecution's request to add particulars to the count of Rape as a Crime Against Humanity is unlikely to prejudice the Accused and is in the interest of justice.

¹⁶ *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Leave to Amend the Indictment of 27 May 2005, paras. 13-16.

¹⁷ *Prosecutor v. Renzaho*, para 47 (citing *Prosecutor v. Hadzihasanović and Kubura*, para. 35).

¹⁸ *Prosecutor v. Mpambara*, Case No. ICTR-2001-65-I, Decision on the Prosecution's Request for Leave to File an Amended Indictment, 4 March 2005, para. 16 (noting that "the Prosecution's failure to bring the amendments forward in a timely manner is not necessarily dispositive and must be measured within the framework of the overall requirement of the fairness of the proceedings [...]").

l'article 47. En l'espèce, et bien que la Défense ne s'oppose pas à la requête en question, la Chambre doit examiner chacun des chefs d'accusation. Elle étudiera toute pièce justificative déposée par le Procureur pour déterminer s'il y a lieu de poursuivre l'accusé¹⁶. Elle rappelle que dans la Décision *Renzaho*, il a été déclaré que l'accusation est libre de plaider sa cause comme elle l'entend, à charge pour elle d'exposer les faits pertinents qui permettront à la Défense de préparer sa cause¹⁷.

25. La Chambre, relevant que le Procureur ne lui avait soumis aucune pièce justificative à l'appui des allégations factuelles élargies et des nouvelles charges, lui a demandé de déposer toute pièce justificative en sa possession à l'appui de sa requête. Elle constate que, le 21 octobre 2005, le Procureur a déposé lesdites pièces justificatives au Greffe, lequel les a distribuées à la Chambre le 24 octobre 2005.

26. Après examen des pièces justificatives, la Chambre note que le Procureur n'a pas précisé quel élément de preuve appuie quelle allégation élargie ou charge nouvelle du projet d'acte d'accusation modifié. Elle relève qu'il aurait dû faire cette démarche dans le but d'économiser les ressources judiciaires. Cependant, elle conclut que les allégations factuelles élargies et/ou nouvelles charges mentionnées aux paragraphes 23 à 33, et au paragraphe 42 du projet d'acte d'accusation modifié sont étayées par les présomptions suffisantes contenues dans les pièces justificatives.

27. En ce qui concerne le cinquième chef du projet d'acte d'accusation modifié, à savoir, viol constitutif de crime contre l'humanité (chef 8 de l'acte d'accusation actuel), les paragraphes 55 et 56 dudit projet apportent des précisions sur les allégations faites au paragraphe 3.22 de l'acte d'accusation actuel. Il semble que les modifications apportées au paragraphe 56 auraient pu être faites plus tôt vu que les déclarations à l'appui de ces allégations datent du 16 juin 1998.

28. Néanmoins, la Chambre relève qu'aucune date n'a été fixée pour la présente affaire, que la Défense ne s'oppose pas aux modifications proposées, que les allégations figurant aux paragraphes 55 et 56 du projet d'acte d'accusation modifié se limitent à préciser les allégations faites au paragraphe 3.22 de l'acte d'accusation actuel, et que, au regard de la décision de la Chambre concernant les autres charges et faits essentiels nouveaux contenus dans le projet d'acte d'accusation modifié, l'accusé comparaitra une nouvelle fois conformément à l'article 50 (B) du Règlement¹⁸. En conséquence, la Chambre conclut que le fait d'autoriser le Procureur à ajouter des précisions au chef de viol constitutif de crime contre l'humanité n'est pas susceptible de porter préjudice à l'accusé et sert l'intérêt de la justice.

¹⁶ *Le Procureur c. Seseij*, affaire n° IT-03-67-PT, Décision relative à la requête de l'accusation aux fins d'obtenir l'autorisation de modifier l'acte d'accusation, rendue le 27 mai 2005, paras. 13 à 16.

¹⁷ *Le Procureur c. Renzaho*, para. 47 (citant *Le Procureur c. Hadzhihasanovic et Kubura*, para. 35).

¹⁸ *Le Procureur c. Mpambara*, affaire n° ICTR-2001-65-I, «Décision relative à la requête du Procureur en autorisation de déposer un acte d'accusation modifié», 4 mars 2005, par. 16 (dans laquelle il est fait observer que «le fait que le Procureur n'ait pas présenté les modifications en temps voulu n'est pas nécessairement décisif et doit être considéré eu égard à l'exigence générale d'équité du procès [...]»).

29. The Trial Chamber notes that the Proposed Amended Indictment contains new charges within the meaning of Rule 50 (B) and (C) of the Rules. Therefore, the Chamber will make appropriate orders to safeguard the rights of the Accused.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Prosecution to file the Amended Indictment in both languages on or before close of business Wednesday, 2 November 2005;

ORDERS that a further appearance shall be held as soon as practicable to enable the Accused to enter a plea on the new charges;

REMINDS the Accused that within thirty days, he is entitled to file preliminary motions pursuant to Rule 72 of the Rules with respect to the new charges.

Arusha, 27 October 2005

[Signed] : Arlette Ramaroson, William H. Sekule, Solomy Balungi Bossa

Amended Indictment
31 October 2005 (ICTR-2001-60-I)

(Original : Unspecified)

The Prosecutor of the International Criminal Tribunal for Rwanda pursuant to the authority stipulated under Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the “Statute of the Tribunal”) charges :

PAUL BISENGIMANA

with Genocide pursuant to Article 2 (3) (a) of the Statute of the Tribunal; or in the alternative with, Complicity in Genocide pursuant to Article 2 (3) (e) of the Statute of the Tribunal; Murder as a Crime Against Humanity pursuant to Article 3 (a) of the Statute of the Tribunal; Extermination as a Crime Against Humanity pursuant to Article 3 (b) of the Statute of the Tribunal and Rape as a Crime Against Humanity pursuant to Article 3 (g) of the Statute of the Tribunal.

1. The events set out hereinafter occurred in the Republic of Rwanda between 1 January 1994 and 31 July 1994.

The Accused

2. Paul Bisengimana was born in Rugarama in Duha *secteur*, Gikoro *commune*, Kigali-Rural *préfecture* and was at all times referred to in this Indictment *bourgmestre* of Gikoro *commune*, Kigali-Rural *préfecture*.

29. La Chambre de première instance relève que le projet d'acte d'accusation modifié comporte de nouveaux chefs d'accusation au sens des paragraphes (B) et (C) de l'article 50 du Règlement. En conséquence, elle rendra les ordonnances propres à préserver les droits de l'accusé.

PAR CES MOTIFS. LA CHAMBRE

FAIT DROIT à la Requête;

DEMANDE au Procureur de déposer l'acte d'accusation modifié dans les deux langues au plus tard le mercredi 2 novembre 2005, à la fermeture des bureaux;

DÉCIDE qu'une nouvelle comparution doit se tenir dès que possible pour permettre à l'accusé de plaider coupable ou non coupable des nouveaux chefs qui lui sont imputés;

RAPPELLE à l'accusé qu'il dispose de trente jours pour déposer des exceptions préjudicielles relativement aux nouveaux chefs, conformément à l'article 72 du Règlement.

Arusha, le 27 octobre 2005.

[Signed] : Arlette Ramaroson; William H. Sekule : Solomy Balungi Bossa

Acte d'accusation modifié
31 octobre 2005 (ICTR-2000-60-I)

(Original : Non spécifié)

Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut»), accuse :

PAUL BISENGIMANA

de Génocide, en application de l'article 2 (3) (a) du Statut, ou, à titre subsidiaire, de Complicité dans le Génocide, en application de l'article 2 (3) (e) du Statut, ainsi que d'assassinat constitutif de crime contre l'humanité, en application de l'article 3 (a) du Statut, d'extermination constitutive de crime contre l'humanité, en application de l'article 3 (b) du Statut, et de viol constitutif de crime contre l'humanité, en application de l'article 3 (a) du Statut.

1. Les faits présentés ci-après sont survenus sur le territoire de la République rwandaise entre le 1^{er} janvier et le 31 juillet 1994.

L'Accusé

2. Né à Rugarama dans le secteur de Duha appartenant à la commune de Gikoro (préfecture de Kigali-rural), Paul Bisengimana était bourgmestre de ladite commune à toutes les dates visées dans le présent acte d'accusation.

3. Paul Bisengimana was appointed *Bourgmestre* of Gikoro *commune*, Kigali-Rural *préfecture* by the President of Rwanda on 27th May 1981 and remained in that position until the fall of Gikoro *Commune* to the Rwanda Patriotic Front between 19th and 21th April 1994.

4. As *bourgmestre* of Gikoro *commune*, Paul Bisengimana was the representative of the central government at the communal level and thus the embodiment of communal authority.

5. In his capacity as *bourgmestre* of Gikoro *commune*, Paul Bisengimana had hierarchical authority over all civil servants and all persons holding public office within the boundaries of Gikoro *commune*.

6. In particular, in his capacity as *bourgmestre* of Gikoro *commune*, Paul Bisengimana had *de jure* responsibility for the actions of all *conseillers*, communal policemen, other local government officials and all persons holding public office within the boundaries of Gikoro *commune*. In addition, in his capacity as *bourgmestre* of Gikoro *commune*, Paul Bisengimana had *de facto* command and control over military reservists and militiamen.

7. As *bourgmestre* of Gikoro *commune*, Paul Bisengimana was responsible for amongst other things, the enforcement of local laws and regulations. In that regard as *bourgmestre* of Gikoro *commune* Paul Bisengimana was responsible for ensuring peace, public order and the safety of people and property. To that end, Paul Bisengimana had a duty to protect, prevent or punish the illegal acts of his subordinates as described in the indictment, but failed to do so.

8. As *bourgmestre* of Gikoro *commune*, Paul Bisengimana had the capacity to oppose the killings of Tutsi civilians in and around the said *commune*, but rather, he acquiesced or chose to implement the program of the Interim Government to exterminate civilians identified as Tutsi and other civilian political opponents, using his subordinates.

The Charges

COUNT 1 – GENOCIDE PURSUANT TO ARTICLE 2 (3) (A) OF THE STATUTE OF THE TRIBUNAL

9. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually and in concert with others, was responsible for the killing or causing serious bodily or mental harm to members of the civilian population identified as Tutsi, with intent to destroy, in whole or in part, members of the said ethnic group.

10. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana either, planned, ordered, instigated, committed, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to article 6 (1) of the Statute.

11. In addition, the Prosecutor alleges, that Paul Bisengimana knew, or had reason to know, that his subordinates were preparing to commit or had committed one or

3. Il a été nommé bourgmestre de la commune de Gikoro (préfecture de Kigali-rural) par le Président du Rwanda le 27 mai 1981 et est resté à ce poste jusqu'à ce que sa commune tombe aux mains du Front patriotique rwandais entre le 19 et le 21 avril 1994.

4. En tant que bourgmestre de la commune de Gikoro, Paul Bisengimana était le représentant du pouvoir central à l'échelon communal et incarnait de ce fait l'autorité communale.

5. En sa qualité de bourgmestre de la commune de Gikoro, il était le supérieur hiérarchique de tous les fonctionnaires et de toutes les personnes qui exerçaient des fonctions publiques dans sa commune.

6. En particulier, il était *de jure* responsable des actes de tous les conseillers, de tous les policiers communaux, de toutes les autres autorités administratives locales et de toutes les personnes exerçant des fonctions publiques dans sa commune. En outre, toujours en sa qualité de bourgmestre de Gikoro, il exerçait *de facto* le commandement et un contrôle sur les réservistes de l'armée et les miliciens.

7. En tant que bourgmestre de la commune de Gikoro, Paul Bisengimana était chargé, entre autres choses, de veiller à l'exécution des lois et des règlements du pays. À cet égard, il se devait d'assurer la tranquillité, l'ordre public et la sécurité des personnes et des biens. Pour ce faire, il était tenu de protéger les populations et de prévenir ou punir les agissements de ses subordonnés exposés dans le présent acte d'accusation, mais il s'est abstenu de le faire.

8. Alors qu'il avait en sa qualité de bourgmestre de la commune de Gikoro, les moyens de s'opposer au massacre des civils tutsis dans ladite commune et ses environs, Paul Bisengimana a tacitement souscrit au programme du Gouvernement intérimaire visant à exterminer les civils considérés comme des Tutsis et les autres opposants politiques civils ou a décidé de mettre en œuvre ce programme par l'intermédiaire de ses subordonnés.

Accusations

PREMIER CHEF D'ACCUSATION : GENOCIDE [ARTICLE 2 (3) (A) DU STATUT]

9. En avril 1994, dans la région de Bugesera appartenant à la préfecture de Kigali-rural (République rwandaise), Paul Bisengimana s'est rendu responsable, par des actes qu'il a commis seul et de concert avec d'autres personnes, du meurtre de membres de la population civile considérés comme des Tutsis ou d'atteintes graves à leur intégrité physique ou mentale dans l'intention de détruire en tout ou en partie le groupe ethnique tutsi.

10. S'autorisant de l'ensemble des actes invoqués à l'appui de la présente accusation, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a planifié, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime considéré.

11. Le Procureur allègue en outre, en application de l'article 6 (3) du Statut, que Paul Bisengimana savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à

more of the acts referred to in Article 2 (3) (a) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6 (3) of the Statute.

Alternatively,

COUNT 2 – COMPLICITY IN GENOCIDE PURSUANT TO ARTICLE 2 (3) (E)
OF THE STATUTE OF THE TRIBUNAL

12. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana was an accomplice to killing or causing serious bodily or mental harm to members of the civilian population identified as Tutsi.

13. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana either, planned, ordered, instigated, committed, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

Particulars of the offence

14. At all times referred to in this indictment, there existed in Rwanda a minority ethnic group known as Tutsi, officially identified as such by the government in addition, the majority population was comprised of an ethnic group known as Hutu, also officially identified as such by the government.

15. The victims referred to in this indictment were civilians identified as Tutsi and politically moderate Hutu from the Bugesera region of Kigali-Rural *Préfecture*, as well as other civilians that sought refuge in the Bugesera region of Kigali-Rural *Préfecture*.

16. Paul Bisengimana spearheaded a campaign of the destruction of Tutsi homes and the killing of Tutsi civilians in his home *commune* of Gikoro in Kigali-Rural *préfecture* and its environs. The said campaign consisted of encouraging and ordering soldiers, Hutu militiamen, communal policemen, gendarmes to attack Tutsi refugees in places where they had sought refuge, such as churches, schools and public offices, resulting in thousands of death. Paul Bisengimana personally committed and ordered his subordinates to attack and kill Tutsi civilians under circumstances where he knew or ought to have known, that the Tutsi civilians were, or would be killed by persons acting under his authority.

*Events in Musha cellule, Musha Secteur,
Gikoro commune*

17. Between 8 and 13 April 1994, several thousand Tutsi civilians sought refuge at Musha Church, in Rutoma secteur, Gikoro *commune* of Kigali-Rural *préfecture* having fled from attacks on Tutsi civilians which were occurring throughout the *Préfecture* of Kigali-Rural.

commettre ou avaient commis un ou plusieurs des actes visés par l'article 2 (3) (a) du Statut et n'a pas pris les mesures nécessaires et raisonnables pour empêcher que ces actes soient commis ou en punir les auteurs.

À titre subsidiaire,

DEUXIÈME CHEF D'ACCUSATION :
COMPPLICITÉ DANS LE GÉNOCIDE [ARTICLE 2 (3) (E) DU STATUT]

12. Au cours du mois d'avril 1994, dans la région de Bugesera appartenant à la préfecture de Kigali-rural (République rwandaise), Paul Bisengimana s'est rendu complice du meurtre de membres de la population civile considérés comme des Tutsis ou d'atteintes graves à leur intégrité physique ou mentale.

13. S'autorisant de l'ensemble des actes invoqués à l'appui de la présente accusation, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a planifié, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime considéré.

Renseignements concernant le crime retenu

14. A toutes les dates visées dans le présent acte d'accusation, il existait au Rwanda un groupe ethnique minoritaire appelé le groupe tutsi et officiellement reconnu comme tel par les pouvoirs publics. La majorité de la population appartenait à un autre groupe ethnique appelé le groupe hutu qui était lui aussi officiellement reconnu comme tel par les pouvoirs publics.

15. Les victimes mentionnées dans le présent acte d'accusation étaient des civils de la région de Bugesera (préfecture de Kigali-rural) considérés comme des Tutsis ou des Hutus politiquement modérés, ainsi que d'autres civils qui avaient trouvé refuge dans cette région.

16. Paul Bisengimana a orchestré une campagne de destruction de maisons de Tutsis et de massacre de civils tutsis dans sa commune natale de Gikoro (préfecture de Kigali-rural) et les environs de celle-ci. Cette campagne, qui s'est soldée par des milliers de morts, consistait à pousser par des ordres et des encouragements les militaires, les miliciens hutus, les policiers communaux et les gendarmes à attaquer les Tutsis dans les lieux où ils s'étaient réfugiés tels que les églises, les établissements scolaires et les locaux de l'Administration. Paul Bisengimana a personnellement attaqué et tué des civils tutsis et a ordonné à ses subordonnés d'agir pareillement alors qu'il savait ou aurait dû savoir que des personnes placées sous son autorité tuaient ou tueraient les civils tutsis visés.

*Faits survenus dans la cellule de Musha
appartenant au secteur de Musha (commune de Gikoro)*

17. Entre le 8 et le 13 avril 1994, plusieurs milliers de civils tutsis fuyant les attaques que les civils tutsis essayaient dans l'ensemble de la préfecture de Kigali-rural se sont réfugiés à l'église de Musha sise dans le secteur de Rutoma appartenant à la commune de Gikoro (préfecture de Kigali-rural).

18. On or about 9 April 1994, Paul Bisengimana together with Laurent Semanza and Juvenal Rugambarara came to Musha church to count the number of people that had sought refuge there and to verify their identity cards. They let the Hutu get out of the church and tore the identity cards of Tutsi. Later the same day, Rwabukumba, a brigadier from the Gikoro communal office in Rutoma *secteur* came and locked the doors so that the refugees could not leave the church.

19. At the beginning of April 1994, Paul Bisengimana together with Laurent Semanza met with a certain Rugambajye, major in the Rwandan army, to ask for weapons for purposes of attacking Tutsi civilians who were seeking refuge in Musha church in Rutoma *secteur*, Gikoro *commune*, Kigali-Rural *préfecture*.

20. On or about 12 April 1994, Paul Bisengimana, acting in concert with soldiers from the Rwandan army, distributed weapons to *Interahamwe* militiamen and other armed civilians at Musha church. Paul Bisengimana ordered that the said weapons be used for the purpose of attacking the Tutsi civilians who sought refuge at the afore-said Musha church.

21. On or about 13 April 1994, Paul Bisengimana along with Laurent Semanza, Juvenal Rugambarara, soldiers from the Rwandan army *Interahamwe* militiamen, armed civilians and communal policemen launched an attack on Tutsi civilians seeking refuge in Musha church, using guns, grenades, machetes, pangas and other traditional weapons. The said attack resulted in the killing of thousands of Tutsi civilians who sought refuge at Musha church. During the said attack, a civilian militia named Manda, set fire to the church causing the death of thousands of refugees.

22. On 13 April 1994, during the attack at Musha church in Rutoma *secteur*, Gikoro *commune*, Paul Bisengimana together with Laurent Semanza cut the arms of a Tutsi man called Rusanganwa, with a machete, following which he bled to death.

*Events in Ruhita cellule,
Rwamashyongoshyo secteur, Gikoro commune*

23. At the beginning of April 1994, Paul Bisengimana participated in a meeting where he publicly instigated those present at the said meeting to kill Tutsi by stating that he did not want any Tutsi alive in the area.

24. In the middle of April 1994, Paul Bisengimana publicly incited *Interahamwe* militiamen to kill all Tutsi civilians in Rwamashyongoshyo *secteur*. When the said militiamen responded that they had killed all the Tutsi civilians Save for Witness VV, he ordered them to kill Witness VV, a Tutsi woman, on the pretext that people like her could later reveal the criminal atrocities that had been carried out by various perpetrators in Rwamashyongoshyo *secteur*.

25. At the beginning of April 1994, Paul Bisengimana participated in an attack on Tutsi civilians, who had sought refuge at the Gikoro *commune* office, by shouting at the refugees and ordering policemen to disarm the refugees that had gathered at the commune office.

18. Le 9 avril 1994 ou vers cette date, Paul Bisengimana, Laurent Semanza et Juvénal Rugambarara se sont rendus à l'église de Muslia pour compter les personnes qui s'y étaient réfugiées et vérifier leurs cartes d'identité. Ils ont laissé sortir les Hutus et déchiré les cartes d'identité des Tutsis. Dans le courant de la journée, Rwabukumba, brigadier en poste au bureau communal de Gikoro sis dans le secteur de Rutoma, est venu verrouiller les portes de l'église pour empêcher les réfugiés d'en sortir.

19. Au début du mois d'avril 1994, Paul Bisengimana et Laurent Semanza ont eu une entrevue avec un certain Rugambajye, major dans l'armée rwandaise, pour lui demander des armes devant servir à attaquer les civils tutsis qui s'étaient réfugiés à l'église de Musha sise dans le secteur de Rutoma appartenant à la commune de Gikoro (préfecture de Kigali-rural).

20. Le 12 avril 1994 ou vers cette date, Paul Bisengimana, agissant de concert avec des militaires de l'armée rwandaise, a distribué des armes à des miliciens *Interahamwe* et à d'autres civils armés à l'église de Musha. Il a ordonné que ces armes soient utilisées pour attaquer les civils tutsis qui s'étaient réfugiés à l'église.

21. Le 13 avril 1994 ou vers cette date, Paul Bisengimana, Laurent Semanza, Juvénal Rugambarara, des militaires de l'armée rwandaise, des miliciens *Interahamwe*, des civils armés et des policiers communaux ont lancé une attaque contre les civils tutsis qui s'étaient réfugiés à l'église de Musha au moyen d'armes à feu, de grenades, de machettes et d'autres armes traditionnelles. Cette attaque a fait des milliers de morts parmi les réfugiés tutsis. Au cours de l'attaque, un milicien civil du nom de Manda a mis le feu à l'église, causant la mort de milliers de réfugiés.

22. Le 13 avril 1994, lors de l'attaque lancée à l'église de Musha dans le secteur de Rutoma (commune de Gikoro), Paul Bisengimana et Laurent Semanza ont tranché à la machette les bras d'un Tutsi nommé Rusanganwa qui a saigné à mort par la suite.

*Faits survenus dans la cellule de Ruhita
appartenant au secteur de Rwamashyongoshyo (commune de Gikoro)*

23. Au début du mois d'avril 1994, Paul Bisengimana a pris part à une réunion au cours de laquelle il a publiquement incité l'assistance à tuer les Tutsis en déclarant qu'il ne voulait pas qu'un Tutsi ait la vie sauve dans la région.

24. À la mi-avril 1994, Paul Bisengimana a publiquement incité des miliciens *Interahamwe* à tuer tous les civils tutsis dans le secteur de Rwamashyongoshyo. Lorsque ces miliciens lui ont répondu qu'ils avaient tué tous les civils tutsis à l'exception du témoin VV, une femme tutsie, il leur a donné l'ordre de la tuer, sous prétexte que des gens comme elle pourraient par la suite révéler les crimes atroces commis par diverses personnes dans le secteur de Rwamashyongoshyo.

25. Au début du mois d'avril 1994, Paul Bisengimana a participé à une attaque lancée contre les civils tutsis qui s'étaient réfugiés au bureau communal de Gikoro en vociférant contre eux et en ordonnant à des policiers de les désarmer.

*Events at Ruhanga Protestant Church, Ruhanga cellule,
Gicaca secteur, Gikoro commune*

26. Between 8 and 10 April 1994, having fled from attacks on Tutsi civilians occurring throughout the *Préfecture* of Kigali-Rural, several Tutsi civilians sought refuge at the Ruhanga Protestant church and school in Gicaca *secteur* Gikoro *commune*.

27. Sometime at the beginning of April 1994, Paul Bisengimana came to the Ruhanga Protestant church and asked why no attacks had been launched on the Tutsi civilians gathered at the said location.

28. Between 10 and 15 April 1994, Paul Bisengimana, Brigadier Rwabukumba along with soldiers from the Presidential Guard, civilian militiamen, and communal policemen launched an attack on Tutsi civilians seeking refuge in Ruhanga school and Ruhanga Protestant Church. During the said attack, the attackers used guns, grenades, machetes, pangas and other traditional weapons, killing thousands of Tutsi civilians who had sought refuge at Ruhanga church and school.

*Events in Ruhanga cellule, Gicaca secteur,
Gikoro commune*

29. Between January and March 1994, Paul Bisengimana, Laurent Semanza and Juvenal Rugambarara participated in a meeting at Rutoma primary school, Gikoro *commune* where they urged the population to kill all TLXS and to throw them in Lake Muhazi.

30. On 7th of April 1994, Paul Bisengimana distributing boxes of grenades in Gicaca *secteur*, Gikoro *commune* to an *Interahamwe* named Rutayisire for purposes of attacking Tutsi civilians.

31. During the month of April 1994, near the ISUMO centre located between Rwa-mashyongoshyo and Gicaca *secteurs* in Gikoro *commune*, Paul Bisengimana acting in concert with several civilian militiamen participated in several attacks on Tutsi civilians. The said attacks resulted in the killing of a certain Domitilla, wife of Nicolas, her grandson and their domestic worker called Shyirakera. The trio were tied to a mattress and burnt alive.

32. On or about 10 April 1994, Paul Bisengimana addressed the civilian population in Gicaca *secteur*. During the said speech, he instigated Hutu civilians to kill their Tutsi counterparts.

33. In April 1994, on Gicaca hill, near Ruhanga church, Paul Bisengimana acting in concert with two Hutu men, namely Kamana and Habimana and other civilian militiamen, participated in an attack on Tutsi civilians. During the said attack, Paul Bisengimana was seen shooting at the said Tutsi refugees.

34. Between January and April 1994, Paul Bisengimana supervised the training of *Interahamwe* militiamen and the distribution of weapons in the region of Gikoro *commune* for purposes of attacking Tutsi civilians.

*Faits survenus au temple protestant de Ruhanga,
cellule du secteur de Gicaca (commune de Gikoro)*

26. Entre le 8 et le 10 avril 1994, plusieurs civils tutsis cherchant à se mettre à l'abri des attaques que les civils tutsis essayaient dans l'ensemble de la préfecture de Kigali-rural ont trouvé refuge à l'école et au temple protestant de Ruhanga sis dans le secteur de Gicaca (commune de Gikoro).

27. Au début du mois d'avril 1994, à une date inconnue, Paul Bisengimana s'est rendu au temple protestant de Ruhanga et a demandé pourquoi aucune attaque n'avait été lancée contre les civils tutsis qui s'y étaient rassemblés.

28. Entre le 10 et le 15 avril 1994, Paul Bisengimana, le brigadier Rwabukumba, des éléments de la Garde présidentielle, des miliciens civils et des agents de la police communale ont lancé une attaque contre les civils tutsis qui s'étaient réfugiés à l'école et au temple protestant de Ruhanga. Munis d'armes à feu, de grenades, de machettes, de *pangas* et d'autres armes traditionnelles, les assaillants ont tué des milliers de personnes parmi ces civils tutsis.

*Faits survenus dans la cellule de Ruhanga
appartenant au secteur de Gicaca (commune de Gikoro)*

29. Entre janvier et mars 1994, Paul Bisengimana, Laurent Semanza et Juvénal Rugambarara ont participé à une réunion à l'école primaire de Rutoma dans la commune de Gikoro. Au cours de cette réunion, ils ont exhorté la population à tuer tous les Tutsis et à les jeter dans le lac Muhazi.

30. Le 7 avril 1994, dans le secteur de Gicaca (commune de Gikoro), Paul Bisengimana a remis à un *Interahamwe* nommé Rutayisire des caisses de grenades devant servir à attaquer les civils tutsis.

31. En avril 1994, près de l'ISUMO situé entre le secteur de Rwamashyongoshyo et celui de Gicaca dans la commune de Gikoro, Paul Bisengimana a participé avec plusieurs miliciens civils à maintes attaques lancées contre les civils tutsis. Ces attaques ont causé la mort d'une certaine Domitilla, épouse de Nicolas, de son petit-fils et de leur domestique nommé Shyirakera. Les trois victimes ont été attachées à un matelas et brûlées vives.

32. Le 10 avril 1994 ou vers cette date, Paul Bisengimana a prononcé un discours devant la population civile du secteur de Gicaca. À cette occasion, il a incité les civils hutus à tuer leurs homologues tutsis.

33. En avril 1994, sur la colline de Gicaca, près de l'église de Ruhanga, Paul Bisengimana a participé avec deux Hutus nommés Kamana et Habimana, ainsi que d'autres miliciens civils, à une attaque lancée contre des civils tutsis. Lors de l'attaque, des gens ont vu Paul Bisengimana tirer sur ces réfugiés tutsis.

34. Entre janvier et avril 1994, Paul Bisengimana a supervisé la formation des miliciens *Interahamwe* et la distribution d'armes dans la commune de Gikoro pour préparer des attaques dirigées contre les civils tutsis.

COUNT III – MURDER, AS A CRIME AGAINST HUMANITY
PURSUANT TO ARTICLE 3 (A) OF THE STATUTE OF THE TRIBUNAL

35. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually and in concert with others, was responsible for killing or causing persons to be killed in Gikoro *commune* and its environs, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.

36. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana, either, planned, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

37. In addition, the Prosecutor alleges, that Paul Bisengimana knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 3 (a) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6 (3) of the Statute.

Particulars of the offence

38. Between 7 April, May and June 1994, there existed widespread or systematic attacks occurring throughout Rwanda, directed against a civilian population on political, ethnic or racial grounds.

39. Paul Bisengimana, acting in concert with others, participated in the planning, preparation, commission or execution of a common strategy or plan to kill Tutsi civilians and by his acts or through persons he assisted or by the acts of his subordinates with his knowledge and consent.

40. Paul Bisengimana distributed weapons to militiamen and other attackers and facilitated the transportation of the said attackers to several locations where several Tutsi civilians were killed.

41. As a direct consequence of his conduct, actions and orders, including the provision of logistical and moral support to the attackers by Paul Bisengimana, thousands of civilian men, women and children were killed.

42. Among the Tutsi civilians killed as a consequence of Paul Bisengimana's direct acts or omission are : a Tutsi man called Rusanganwa and a Tutsi woman called Domitilla.

43. Paul Bisengimana's affirmative acts during the month of April 1994, VIZ : Planning, ordering, committing, or otherwise aiding and abetting in the killing of Tutsi civilians at Ruhita *Cellule*, Rwamashyongoshyo *secteur* in Gikoro *commune*; Musha church in Gikoro *commune*; and near the ISUMO centre located between Rwamashyongoshyo and Gicaca *secteurs* in Gikoro *commune* and elsewhere, are pleaded with greater particularity at paragraphs 21, 22, 24, 28, 31, 33 and 35 above, and are hereby reiterated and incorporated herein by reference.

TROISIÈME CHEF D'ACCUSATION :
ASSASSINAT CONSTITUTIF DE CRIME CONTRE L'HUMANITÉ
[ARTICLE 3 (A) DU STATUT]

35. En avril 1994, dans la région de Bugesera appartenant à la préfecture de Kigali-rural (République rwandaise), Paul Bisengimana, agissant seul et de concert avec d'autres personnes, a tué ou fait tuer des personnes dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

36. S'autorisant de l'ensemble des actes invoqués à l'appui de la présente accusation, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a planifié ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime considéré.

37. Le Procureur allègue en outre, en application de l'article 6 (3) du Statut, que Paul Bisengimana savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre ou avaient commis un ou plusieurs des actes visés par l'article 3 (a) du Statut et n'a pas pris les mesures nécessaires et raisonnables pour empêcher que ces actes soient commis ou en punir les auteurs.

Renseignements concernant le crime retenu

38. Entre le 7 avril et le mois de juin 1994, il y a eu sur toute l'étendue du territoire rwandais des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance politique, ethnique ou raciale.

39. Paul Bisengimana a contribué à concevoir, élaborer, commander ou exécuter une stratégie commune ou un plan commun visant à tuer les civils tutsis par ses actes, par le biais de personnes qu'il a aidées ou par les actes que ses subordonnés ont commis à son su et avec son consentement.

40. Paul Bisengimana a distribué des armes à des miliciens et d'autres assaillants et facilité le transport de ces assaillants à plusieurs endroits où nombre de civils tutsis ont été tués.

41. L'une des conséquences directes de la conduite de Paul Bisengimana, de ses actes et des ordres qu'il a donnés, notamment de l'appui logistique et moral qu'il a apporté aux assaillants, a été le massacre de milliers d'hommes, de femmes et d'enfants appartenant à la population civile.

42. Parmi les civils tutsis tués en conséquence des actes directs de Paul Bisengimana ou de ses omissions figurent un homme nommé Rusanganwa et une femme nommée Domitilla.

43. Les actes positifs commis par Paul Bisengimana pendant le mois d'avril 1994 sont énoncés de manière plus détaillée aux paragraphes 21, 22, 24, 28, 31, 33 et 35 plus haut. Ils consistaient à planifier, ordonner, commettre ou de toute autre manière aider et encourager à commettre le massacre de civils tutsis dans la cellule de Ruhita appartenant au secteur de Rwamashyongoshyo (commune de Gikoro), à l'église de Musha sise dans la commune de Gikoro et près de l'ISUMO situé entre le secteur de Rwamashyongoshyo et celui de Gicaca dans la commune de Gikoro, ainsi que dans d'autres localités. Le Procureur les reprend et les incorpore dans la présente section par renvoi.

COUNT IV – EXTERMINATION,
AS CRIME AGAINST HUMANITY
PURSUANT TO ARTICLE 3 (B) OF THE STATUTE OF THE TRIBUNAL

44. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually and in concert with others, was responsible for killing or causing persons to be killed, during mass killing events in Gikoro *commune* and its environs, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.

45. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana, either, planned, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

46. In addition, the Prosecutor alleges, that Paul Bisengimana knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 3 (b) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6 (3) of the Statute.

Particulars of the offence

47. Between 7 April, May and June 1994, there existed widespread or systematic attacks occurring throughout Rwanda, directed against a civilian population on political, ethnic or racial grounds.

48. Paul Bisengimana, acting in concert with others, participated in the planning, preparation, commission or execution of a common strategy or plan to kill Tutsi civilians and by his acts or through persons he assisted or by the acts of his subordinates with his knowledge and consent.

49. Paul Bisengimana distributed weapons to militiamen and other attackers and facilitated the transportation of the said attackers to several locations where several Tutsi civilians were killed.

50. As a direct consequence of his conduct, actions and orders, including the provision of logistical and moral support to the attackers by Paul Bisengimana, thousands of civilian men, women and children were killed.

51. Paul Bisengimana's affirmative acts during the month of April 1994, VIZ : planning, ordering, committing, or otherwise aiding and abetting in the killing of Tutsi civilians at Ruhita *Cellule*, Rwamashyongoshyo *secteur* in Gikoro *commune*; Musha church in Gikoro *commune*; and near the ISUMO centre located between Rwamashyongoshyo and Gicaca *secteurs* in Gikoro *commune* and elsewhere, are pleaded with greater particularity at paragraphs 14-34 above, and are hereby reiterated and incorporated herein by reference.

QUATRIÈME CHEF D'ACCUSATION :
EXTERMINATION CONSTITUTIVE DE CRIME CONTRE L'HUMANITÉ
[ARTICLE 3 (B) DU STATUT]

44. En avril 1994, dans la région de Bugesera appartenant à la préfecture de Kigali-rural (République rwandaise), Paul Bisengimana, agissant seul et de concert avec d'autres personnes, a tué ou fait tuer des personnes lors de massacres perpétrés dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

45. S'autorisant de l'ensemble des actes invoqués à l'appui de la présente accusation, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a planifié ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime considéré.

46. Le Procureur allègue en outre, en application de l'article 6 (3) du Statut, que Paul Bisengimana savait ou avait des raisons de savoir que ses subordonnés s'approprièrent à commettre ou avaient commis un ou plusieurs des actes visés par l'article 3 (b) du Statut et n'a pas pris les mesures nécessaires et raisonnables pour empêcher que ces actes soient commis ou en punir les auteurs.

Renseignements concernant le crime retenu

47. Entre le 7 avril et le mois de juin 1994, il y a eu sur toute l'étendue du territoire rwandais des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance politique, ethnique ou raciale.

48. Paul Bisengimana a contribué à concevoir, élaborer, commander ou exécuter une stratégie commune ou un plan commun visant à tuer les civils tutsis par ses actes, par le biais de personnes qu'il a aidées ou par les actes que ses subordonnés ont commis à son su et avec son consentement.

49. Paul Bisengimana a distribué des armes à des miliciens et d'autres assaillants et facilité le transport de ces assaillants à plusieurs endroits où nombre de civils tutsis ont été tués.

50. L'une des conséquences directes de la conduite de Paul Bisengimana, de ses actes et des ordres qu'il a donnés, notamment de l'appui logistique et moral qu'il a apporté aux assaillants, a été le massacre de milliers d'hommes, de femmes et d'enfants appartenant à la population civile.

51. Les actes positifs commis par Paul Bisengimana pendant le mois d'avril 1994 sont énoncés de manière plus détaillée aux paragraphes 14 à 34 plus haut. Ils consistaient à planifier, ordonner, commettre ou de toute autre manière aider et encourager à commettre le massacre de civils tutsis dans la cellule de Ruhita appartenant au secteur de Rwamashyongoshyo (commune de Gikoro), à l'église de Musha sise dans la commune de Gikoro et près de l'ISUMO situé entre le secteur de Rwamashyongoshyo et celui de Gicaca dans la commune de Gikoro, ainsi que dans d'autres localités. Le Procureur les reprend et les incorpore dans la présente section par renvoi.

COUNT V – RAPE, AS CRIME AGAINST HUMANITY
PURSUANT TO ARTICLE 3 (G) OF THE STATUTE OF THE TRIBUNAL

52. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually and in concert with others, did cause women to be raped in Gikoro *commune* and its environs, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.

53. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana instigated or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

54. In addition, the Prosecutor alleges, that Paul Bisengimana knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 3 (g) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6 (3) of the Statute.

Particulars of the offence

55. During the month of April 1994 in Musha, Paul Bisengimana acting in concert with Laurent Semanza and soldiers from the Presidential Guard instigated a small crowd of Hutu civilians gathered in Musha *cellule*, Musha *secteur*, and Gikoro *commune* to rape and sexually violate Tutsi women.

56. Following this incident, several Tutsi women and girls, including Witness VV-K and a woman named Kayitesi, were raped and sexually violated by Hutu civilians and soldiers. By his actions, the accused directly and substantially contributed to the raping and sexual assaults of Tutsi civilians in Musha *cellule*, Musha *secteur*, Gikoro *commune*.

The acts and omissions of Paul Bisengimana detailed herein are punishable under Articles 22 and 23 of the Statute.

Signed at Arusha, the 31th October 2005.

[Signed] : Hassan Bubacar Jallow

CINQUIÈME CHEF D'ACCUSATION : VIOL CONSTITUTIF DE CRIME
CONTRE L'HUMANITÉ [ARTICLE 3 (G) DU STATUT]

52. En avril 1994, dans la région de Bugesera appartenant à la préfecture de Kigali-rural (République rwandaise), Paul Bisengimana, agissant seul et de concert avec d'autres personnes, a fait violer des femmes dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

53. S'autorisant de l'ensemble des actes invoqués à l'appui de la présente accusation, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a incité à commettre ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime considéré.

54. Le Procureur allègue en outre, en application de l'article 6 (3) du Statut, que Paul Bisengimana savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre ou avaient commis un ou plusieurs des actes visés par l'article 3 (g) du Statut et n'a pas pris les mesures nécessaires et raisonnables pour empêcher que ces actes soient commis ou en punir les auteurs.

Renseignements concernant le crime retenu

55. En avril 1994, Paul Bisengimana, agissant de concert avec Laurent Semanza et des éléments de la Garde présidentielle, a incité un petit groupe de civils hutus qui s'étaient rassemblés dans la cellule de Musha appartenant au secteur de Musha (commune de Gikoro) à violer les femmes tutsies et à commettre des actes de violence sexuelle sur elles.

56. Par la suite, plusieurs femmes et filles tutsies, dont le témoin VV-K et une femme nommée Kayitesi, ont été violées et agressées sexuellement par des civils et des militaires hutus. Par ses agissements, l'accusé a contribué de façon directe et substantielle au viol et aux agressions sexuelles dont les civiles tutsies ont été victimes dans la cellule de Musha appartenant au secteur de Musha (commune de Gikoro).

Les actes et les omissions de Paul Bisengimana exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut.

Arusha, le 31 octobre 2005.

[Signé] : Hassan Bubacar Jallow

***Decision on the Prosecution's Motion
for Protective Measures for Witnesses
10 November 2005 (ICTR-2000-60-I)***

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

Paul Bisengimana – Protective measures for Prosecution witnesses, Lack of diligence of the Prosecutor in the discharge of its duties – Frivolous motion – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 69, 73 (A) and 75; Statute, art. 14, 19 and 21

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Arlette Ramaroson, Presiding,
Judge William H. Sekule, and Judge Solomy Balungi Bossa (the “Chamber”);

CONSIDERING the “Prosecutor’s Motion for Protective Measures for Witnesses,
based on Art. 14, 19 and 21 of the Statute and Rule 69 and 75 of the Rules of Pro-
cedure and Evidence”, filed on 16 September 2005 (the “Motion”);

HAVING RECEIVED the Defence’s “*Réponse à la Requête du Procureur en
prescription de mesures de protection des témoins*”, filed on 29 September 2005 (the
“Defence Reply”);

RECALLING this Chamber’s “Decision on Prosecutor’s Motion for Protective
Measures for Victims and Witnesses”, issued on 25 August 2004 (the “Decision”);

CONSIDERING the Statute of the Tribunal (the “Statute”), in particular Articles 14,
19 and 21, and the Rules of Procedure and Evidence (the “Rules”), specifically Rules
69 and 75;

NOW DECIDES the Motion pursuant to Rule 73 (A) on the basis of the written
submissions of the Parties.

Submissions of the Parties

The Prosecution

1. The Motion is brought pursuant to Articles 14, 19 and 21 of the Statute and
Rules 69 and 75 of the Rules. The Prosecution seeks protective measures for victims
and potential Prosecution witnesses who live in Rwanda and who have not affirma-
tively waived their right to such protection¹, arguing that most of these persons have

¹ The Motion, para. 7.

expressed concern over their fate after testifying before the ICTR, considering the insecurity in Rwanda and the threats made against certain witnesses, as well as the risks they run, including even the death of some of the witnesses who were killed simply because of testifying before the Tribunal.

The Defence's Reply

2. The Defence submits that the legitimate concern for the protection of witnesses and victims must be weighed against the requirements of the revelation of the truth and the respect of the Accused's right to a diligent and fair trial². The Defence recalls the provisions of Rules 69 and 75 of the Rules and submits that the Prosecution's right to request protective measures for witnesses must be interpreted restrictively, because it is prejudicial to the rights of the Defence by its very existence³.

Deliberations

3. The Chamber recalls its Decision of 25 August 2004, in which it granted comprehensive protective measures for Prosecution witnesses, which are still in force. The Chamber notes that the Prosecution has filed another Motion for protective measures for witnesses without taking into account the said Decision. In this regard, the Prosecution has demonstrated lack of diligence in the discharge of its duties. The Chamber warns that this conduct should not be repeated by the Prosecution.

4. The Chamber regards the Motion as frivolous and moot and urges the Prosecution to observe more diligence in the discharge of its duties.

FOR THE ABOVE REASONS,
THE TRIAL CHAMBER
DENIES the Motion in its entirety.

Arusha, 10 November 2005.

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

² The Defence Reply, p. 2.

³ The Defence Reply, p. 2.

***Oral Decision on the Joint Motion for Consideration
of a Guilty Plea Agreement Between Paul Bisengimana
and the Office of the Prosecutor
17 November 2005 (ICTR-2000-60-I)***

(Original : French)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

Paul Bisengimana – Guilty plea, unequivocal nature of the guilty plea, Modification of the Indictment – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 62 (A) (iii); Statute, art. 6 (1)

MADAM PRESIDENT :

The Court is called to order.

Here is the decision or ruling of the Trial Chamber :

Considering the joint motion regarding an agreement between the parties, namely, Paul Bisengimana and the Prosecutor, and after having heard submissions by the parties, notes Bisengimana's plea with respect to the five counts including the guilty plea on the count of murder and extermination as a crime against humanity, pursuant to Article 6 (1) of the Statute, duly notes the differences observed between the plea agreement and the amended indictment in particular with respect to paragraphs 8, 19, 20, 21, 22, 28, 38, 39 and 42 of the amended indictment.

The Chamber notes that such discrepancies have an impact on the equivocal or unequivocal nature of the plea, and determined on behalf of the Accused that he has pleaded not guilty to the counts of murder pursuant to Article 6 (1), and extermination, pursuant to Article 6 (1) of the Statute as crimes against humanity. In conformity with Rule 62 (A) sub 2 of the Rules.

The Chamber at this juncture duly notes the not guilty plea entered for all the other counts.

The Chamber duly notes that the Prosecutor has undertaken to amend the indictment to ensure that it is consistent with the facts on which the parties agreed in the plea agreement. It further notes that the Defence subscribes to that commitment.

In view of that agreement, the Trial Chamber urges the parties to comply with the said commitment as soon possible, and to report to it with respect to the measures taken in that regard.

For the reasons set out above, the Chamber rejects the joint motion on the plea agreement. The Trial Chamber directs that Paul Bisengimana be remanded in custody under conditions that guarantee his security. That is the ruling of the Trial Chamber.

***Décision orale sur la requête conjointe
visant à l'examen d'un accord entre Paul Bisengimana
et le bureau du Procureur aux fins d'un plaidoyer de culpabilité
17 Novembre 2005 (ICTR-2000-60-I)***

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente de Chambre; William H. Sekule; Solomy B. Bossa

Paul Bisengimana – Plaidoyer de culpabilité, Caractère non équivoque du plaidoyer de non culpabilité, Modification de l'acte d'accusation – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 62 (A) (iii); Statut, art. 6 (1)

M^{me} LE PRÉSIDENT :

L'audience est reprise.

Voici donc la décision de la Chambre :

«Vu la requête conjointe visant à l'examen d'un accord entre les parties, en l'occurrence Paul Bisengimana et le Procureur, et ayant entendu les soumissions des parties, donne acte du plaidoyer de Paul Bisengimana, sur les cinq chefs d'accusation, y compris le plaidoyer de culpabilité sur les chefs d'accusation d'assassinat et d'extermination en tant que crimes contre l'humanité et ce, conformément à l'article 6 (1) du Statut. Donne acte des différences soulevées entre l'accord sur le plaidoyer et l'acte d'accusation amendé, notamment dans les paragraphes 8, 19, 20, 21, 22, 28, 38, 39 et 42 de l'acte d'accusation amendé.

La Chambre note que ces différences ont un impact sur le caractère équivoque ou non du plaidoyer et inscrit au nom de l'accusé qu'il a plaidé non coupable des chefs d'accusation d'assassinat conformément à l'article 6 (1) et d'extermination conformément à l'article 6 (1) du Statut en tant que crime contre l'humanité, et ce, suivant l'article 62 (A) (ii) du Règlement.

La Chambre prend acte à ce stade du plaidoyer de non culpabilité pour tous les autres chefs d'accusation.

La Chambre donne acte de ce que le Procureur s'est engagé à modifier l'acte d'accusation pour le mettre en conformité avec les faits sur lesquels les parties se sont entendues dans leur accord, sur le plaidoyer de culpabilité et de ce que la Défense appuie cet engagement.

Compte tenu de cet accord, la Chambre invite les parties à se conformer à cet engagement dans les plus brefs délais et à la tenir informée des mesures prises à cet égard.

Pour les motifs ci-dessus énoncés, la Chambre rejette la requête conjointe en examen de l'accord sur le plaidoyer de culpabilité et elle ordonne le maintien en détention de Paul Bisengimana dans des conditions qui garantissent sa sécurité».

We shall now end this session if parties or if the Prosecutor has no further submission to make.

Thank you. Stands adjourned.

[Signed] : Unspecified

Amended Indictment
23 November 2005 (ICTR-2000-60-I)

(Original : English)

The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated under Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the “Statute of the Tribunal”) charges :

PAUL BISENGIMANA

with Genocide pursuant to Article 2 (3) (a) of the Statute of the Tribunal; or in the alternative with, Complicity in genocide pursuant to Article 2 (3) (e) of the Statute of the Tribunal; Murder as a Crime against Humanity pursuant to Article 3 (a) of the Statute of the Tribunal; Extermination as a Crime against Humanity pursuant to Article 3 (b) of the Statute of the Tribunal and Rape as a Crime against Humanity pursuant to Article 3 (g) of the Statute of the Tribunal.

1. The events set out hereinafter occurred in the Republic of Rwanda between 1 January 1994 and 31 July 1994.

The Accused

2. Paul Bisengimana was born in Rugarama in Duha *secteur*, Gikoro *commune*, Kigali-Rural, *préfecture* and was at all times referred to in this Indictment *bourgmestre* of Gikoro *commune*, Kigali-Rural *préfecture*.

3. Paul Bisengimana was appointed *Bourgmestre* of Gikoro *commune*, Kigali-Rural *préfecture* by the President of Rwanda on 27th May 1981 and remained in that position until the fall of Gikoro *Commune* to the Rwanda Patriotic Front between 19th and 21 April 1994.

4. As *bourgmestre* of Gikoro *commune*, Paul Bisengimana was the representative of the central government at the communal level and thus the embodiment of communal authority.

5. In his capacity as *bourgmestre* of Gikoro *commune*, Paul Bisengimana had hierarchical authority over all civil servants and all persons holding public office within the boundaries of Gikoro *commune*.

[Signé] : Non précisé

Acte d'accusation modifié
23 novembre 2005 (ICTR-2000-60-I)

(Original : Anglais)

Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut»), accuse :

PAUL BISENGIMANA

de génocide, en application de l'article 2 (3) (a) du Statut, ou, à titre subsidiaire, de complicité dans le génocide, en application de l'article 2 (3) (e) du Statut, ainsi que d'assassinat constitutif de crime contre l'humanité, en application de l'article 3 (a) du Statut, d'extermination constitutive de crime contre l'humanité, en application de l'article 3 (b) du Statut, et de viol constitutif de crime contre l'humanité en application de l'article 3 (g) du Statut.

1. Les faits présentés ci-après sont survenus sur le territoire de la République rwandaise entre le 1^{er} janvier et le 31 juillet 1994.

L'accusé

2. Né à Rugarama dans le secteur de Duha appartenant à la commune de Gikoro (préfecture de Kigali-rural), Paul Bisengimana était bourgmestre de ladite commune à toutes les dates visées dans le présent acte d'accusation.

3. Il a été nommé bourgmestre de la commune de Gikoro (préfecture de Kigali-rural) par le Président du Rwanda le 27 mai 1981 et est resté à ce poste jusqu'à ce que sa commune tombe aux mains du Front patriotique rwandais entre le 19 et le 21 avril 1994.

4. En tant que bourgmestre de la commune de Gikoro, Paul Bisengimana était le représentant du pouvoir central à l'échelon communal et incarnait de ce fait l'autorité communale.

5. En sa qualité de bourgmestre de la commune de Gikoro, il était le supérieur hiérarchique de tous les fonctionnaires et de toutes les personnes qui exerçaient des fonctions officielles dans sa commune.

6. In particular, in his capacity as *bourgmestre* of Gikoro *commune*, Paul Bisengimana had *de jure* responsibility for the actions of all *conseillers*, communal policemen, other local government officials and all persons holding public office within the boundaries of Gikoro *commune*.

7. As *bourgmestre* of Gikoro *commune*, Paul Bisengimana was responsible for, amongst other things, the enforcement of local laws and regulations. In that regard, as *bourgmestre* of Gikoro *commune* Paul Bisengimana was responsible for ensuring peace, public order and the safety of people and property. To that end, Paul Bisengimana had a duty to protect, prevent or punish the illegal acts of his subordinates as described in the indictment, but failed to do so.

8. As *bourgmestre* of Gikoro *commune*, Paul Bisengimana had the capacity to oppose the killings of Tutsi civilians in and around the said *commune*, but took no active steps to protect Tutsi refugees in Gikoro *commune*.

The Charges

COUNT 1 – GENOCIDE PURSUANT TO ARTICLE 2 (3) (A) OF THE STATUTE OF THE TRIBUNAL.

9. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually and in concert with others, was responsible for the killing or causing serious bodily or mental harm to members of the civilian population identified as Tutsi, with intent to destroy, in whole or in part, members of the said ethnic group.

10. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana either, planned, ordered, instigated, committed, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

11. In addition, the Prosecutor alleges, that Paul Bisengimana knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 2 (3) (a) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6 (3) of the Statute.

Alternatively,

COUNT 2 – COMPLICITY IN GENOCIDE PURSUANT TO ARTICLE 2 (3) (E) OF THE STATUTE OF THE TRIBUNAL

12. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana was an accomplice to killing or causing serious bodily or mental harm to members of the civilian population identified as Tutsi.

6. En particulier, il était, à ce titre, responsable *de jure* des actes de tous les conseillers, de tous les policiers communaux, de toutes les autres autorités administratives locales et de toutes les personnes exerçant des fonctions officielles dans sa commune.

7. En tant que bourgmestre de la commune de Gikoro, Paul Bisengimana était chargé, entre autres choses, de veiller à l'application des lois et des règlements du pays. À cet égard, il se devait d'assurer la tranquillité, l'ordre public et la sécurité des personnes et des biens. À cette fin, il était tenu de protéger les populations et de prévenir ou punir les actes illicites de ses subordonnés exposés dans le présent acte d'accusation, mais il s'est abstenu de le faire.

8. En tant que bourgmestre de la commune de Gikoro, Paul Bisengimana avait le pouvoir de faire échec aux meurtres de civils tutsis perpétrés dans et autour de ladite commune mais s'est abstenu de prendre des mesures positives visant à protéger les réfugiés tutsis dans la commune de Gikoro.

Accusations

PREMIER CHEF D'ACCUSATION : GÉNOCIDE [ARTICLE 2 (3) (A) DU STATUT]

9. En avril 1994, dans la région de Bugesera appartenant à la préfecture de Kigali-rural (République rwandaise), Paul Bisengimana s'est rendu responsable, par des actes qu'il a commis seul et de concert avec d'autres personnes, du meurtre de membres de la population civile considérés comme des Tutsis ou d'atteintes graves à leur intégrité physique ou mentale dans l'intention de détruire en tout ou en partie le groupe ethnique tutsi.

10. Faisant fond sur l'ensemble des actes invoqués à l'appui de la présente accusation, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a planifié, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime susvisé.

11. Le Procureur allègue en outre, en application de l'article 6 (3) du Statut, que Paul Bisengimana savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre ou avaient commis un ou plusieurs des actes visés par l'article 2 (3) (a) du Statut et n'a pas pris les mesures nécessaires et raisonnables pour empêcher que ces actes soient commis ou en punir les auteurs.

Ou, à titre subsidiaire,

DEUXIÈME CHEF D'ACCUSATION : COMPLICITÉ DANS LE GÉNOCIDE [ARTICLE 2 (3) (E) DU STATUT]

12. Au cours du mois d'avril 1994, dans la région de Bugesera appartenant à la préfecture de Kigali-rural (République rwandaise), Paul Bisengimana s'est rendu complice du meurtre de membres de la population civile considérés comme des Tutsis ou d'atteintes graves à leur intégrité physique ou mentale.

13. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana either, planned, ordered, instigated, committed, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

Particulars of the offence

14. At all times referred to in this indictment, there existed in Rwanda a minority ethnic group known as Tutsi, officially identified as such by the government. In addition, the majority population was comprised of an ethnic group known as Hutu, also officially identified as such by the government.

15. The victims referred to in this indictment were civilians identified as Tutsi and politically moderate Hutu from the Bugesera region of Kigali-Rural *Préfecture*, as well as other civilians that sought refuge in the Bugesera region of Kigali-Rural *Préfecture*.

16. Paul Bisengimana spearheaded a campaign of the destruction of Tutsi homes and the killing of Tutsi civilians in his home *commune* of Gikoro in Kigali-Rural *préfecture* and its environs. The said campaign consisted of encouraging and ordering soldiers, Hutu militiamen, communal policemen, *gendarmes* to attack Tutsi refugees in places where they had sought refuge, such as churches, schools and public offices, resulting in thousands of death. Paul Bisengimana personally committed and ordered his subordinates to attack and kill Tutsi civilians under circumstances where he knew or ought to have known, that the Tutsi civilians were, or would be killed by persons acting under his authority.

*Events in Musha cellule, Rutoma Secteur,
Gikoro commune*

17. Between 8 and 13 April 1994, several thousand Tutsi civilians sought refuge at Musha Church, in Rutoma *secteur*, Gikoro *commune* of Kigali-Rural *préfecture* having fled from attacks on Tutsi civilians which were occurring throughout the *Préfecture* of Kigali-Rural.

18. On or about 12 April 1994, Paul Bisengimana was aware that weapons such as guns and grenades were distributed to *Interahamwe* militiamen and other armed civilians at Musha church by members of the Rwanda army. The Accused was aware that the said weapons would be used to attack Tutsi civilians who sought refuge at the afore-said Musha church.

19. On or about 13 April 1994, Paul Bisengimana was present along with Laurent Semanza, Juvenal Rugambarara, soldiers from the Rwandan army, *Interahamwe* militiamen, armed civilians and communal policemen when an attack was launched on Tutsi civilians seeking refuge in Musha church. The attackers used guns, grenades, machetes, *pangas* and other traditional weapons. The said attack resulted in the killing of thousands of Tutsi civilians who sought refuge at Musha church. During the said attack, a civilian militiaman named Manda, set fire to the church causing the death of numerous refugees.

13. Faisant fond sur l'ensemble des actes invoqués à l'appui de la présente accusation, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a planifié, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime susvisé.

Circonstances entourant le crime poursuivi

14. À toutes les dates visées dans le présent acte d'accusation, il existait au Rwanda un groupe ethnique minoritaire appelé le groupe tutsi et officiellement reconnu comme tel par les pouvoirs publics. La majorité de la population appartenait à un autre groupe ethnique appelé le groupe hutu qui était lui aussi officiellement reconnu comme tel par les pouvoirs publics.

15. Les victimes mentionnées dans le présent acte d'accusation étaient des civils de la région de Bugesera (préfecture de Kigali-rural) considérés comme des Tutsis ou des Hutus politiquement modérés, ainsi que d'autres civils qui avaient trouvé refuge dans cette région.

16. Paul Bisengimana a orchestré une campagne de destruction de maisons de Tutsis et de massacre de civils tutsis dans sa commune natale de Gikoro (préfecture de Kigali-rural) et les environs de celle-ci. Cette campagne, qui s'est soldée par des milliers de morts, consistait à pousser par des ordres et des encouragements les militaires, les miliciens hutus, les policiers communaux et les gendarmes à attaquer les Tutsis dans les lieux où ils s'étaient réfugiés tels que les églises, les établissements scolaires et les locaux de l'Administration. Paul Bisengimana a personnellement attaqué et tué des civils tutsis et a ordonné à ses subordonnés d'agir pareillement alors qu'il savait ou aurait dû savoir que des personnes placées sous son autorité tuaient ou tueraient les civils tutsis visés.

*Faits survenus dans la cellule de Musha,
secteur de Rutoma, commune de Gikoro*

17. Entre le 8 et le 13 avril 1994, plusieurs milliers de civils tutsis fuyant les attaques que les civils tutsis essayaient dans l'ensemble de la préfecture de Kigali-rural se sont réfugiés à l'église de Musha sise dans le secteur de Rutoma appartenant à la commune de Gikoro (préfecture de Kigali-rural).

18. Le ou vers le 12 avril 1994, Paul Bisengimana savait que des armes à feu et des grenades avaient notamment été distribuées aux *Interahamwe* et à d'autres civils armés à l'église de Musha par des éléments de l'armée rwandaise. L'accusé savait que lesdites armes allaient être utilisées pour attaquer les civils tutsis qui s'étaient réfugiés à l'église susnommée.

19. Le ou vers le 13 avril 1994, au moment où une attaque était lancée sur les civils tutsis qui s'étaient réfugiés dans l'église de Musha, Paul Bisengimana était présent sur les lieux, en compagnie de Laurent Semanza, de Juvénal Rugambarara, de militaires de l'Armée rwandaise, d'éléments des *Interahamwe*, de civils et d'agents de la police communale armés. Lors de ladite attaque, qui a coûté la vie à des milliers de civils tutsis qui s'étaient réfugiés à l'église de Musha, les assaillants ont fait usage d'armes à feu, de grenades, de machettes, de *pangas* et d'autres armes traditionnelles, et un élément de la milice civile dénommé Manda a mis le feu à l'église causant ainsi la mort de nombreux réfugiés.

20. Paul Bisengimana's presence at Musha church during the said attack would have had an encouraging effect on the perpetrators and given them the impression that the killing of Tutsi civilians gathered at the said church was endorsed by him.

*Events in Ruhita cellule,
Rwamashyongoshyo secteur, Gikoro commune*

21. At the beginning of April 1994, Paul Bisengimana participated in a meeting where he publicly instigated those present at the said meeting to kill Tutsi by stating that he did not want any Tutsi alive in the area.

22. In the middle of April 1994, Paul Bisengimana publicly incited *Interahamwe* militiamen to kill all Tutsi civilians in Rwamashyongoshyo *secteur*. When the said militiamen responded that they had killed all the Tutsi civilians Save for Witness VV, he ordered them to kill Witness VV, a Tutsi woman, on the pretext that people like her could later reveal the criminal atrocities that had been carried out by various perpetrators in Rwamashyongoshyo *secteur*.

23. At the beginning of April 1994, Paul Bisengimana participated in an attack on Tutsi civilians, who had sought refuge at the Gikoro *commune* office, by shouting at the refugees and ordering policemen to disarm the refugees that had gathered at the *commune* office.

*Events at Ruhanga Protestant Church, Ruhanga cellule,
Gicaca secteur, Gikoro commune*

24. Between 8 and 10 April 1994, having fled from attacks on Tutsi civilians occurring throughout the *Préfecture* of Kigali-Rural, several Tutsi civilians sought refuge at the Ruhanga Protestant church and school in Gicaca *secteur* Gikoro *commune*.

25. Between 10 and 15 April 1994, *Brigadier* Rwabukumba along with soldiers from the Presidential Guard, civilian militiamen, and communal policemen launched an attack on Tutsi civilians seeking refuge in Ruhanga School and Ruhanga Protestant Church. During the said attack, the attackers used guns, grenades, machetes, *pangas* and other traditional weapons, killing numerous Tutsi civilians who had sought refuge at Ruhanga church and school.

26. Despite his position as *Bourgmestre* of Gikoro *commune*, and his knowledge of the fact that the refugees at Musha church had been attacked on 13 April 1994, Paul Bisengimana took no active steps to protect Tutsi refugees who sought refuge at the Ruhanga Protestant church and school in Ruhanga *cellule*, Gicaca *secteur*, Gikoro *commune* between 10 and 15 April 1994.

27. The attack on Tutsi civilians gathered at the Ruhanga Protestant church and school was perpetrated as part ongoing attacks on Tutsi civilians, which was occurring in most parts of Rwanda throughout April 1994.

28. As a direct consequence of his conduct, including the provision of moral support to the attackers by Paul Bisengimana, thousands of civilian men, women and children were killed.

20. La présence de Paul Bisengimana à l'église de Musha pendant ladite attaque a eu pour effet d'encourager les assaillants et de leur donner l'impression qu'il souscrivait à la mise à mort des civils tutsis qui y étaient rassemblés

*Faits survenus dans la cellule de Ruhita,
secteur de Rwamashyongoshyo, commune de Gikoro*

21. Au début du mois d'avril 1994, Paul Bisengimana a pris part à une réunion au cours de laquelle il a publiquement incité l'assistance à tuer les Tutsis en déclarant qu'il ne voulait pas qu'un Tutsi ait la vie sauve dans la région.

22. A la mi-avril 1994, Paul Bisengimana a publiquement incité des *Interahamwe* à tuer tous les civils tutsis dans le secteur de Rwamashyongoshyo. Lorsque ces miliciens lui ont répondu qu'ils avaient tué tous les civils tutsis à l'exception du témoin VV, une femme tutsie, il leur a donné l'ordre de la tuer, sous prétexte que des gens comme elle pourraient par la suite révéler les crimes atroces commis par diverses personnes dans le secteur de Rwamashyongoshyo.

23. Au début du mois d'avril 1994, Paul Bisengimana a participé à une attaque lancée contre les civils tutsis qui s'étaient réfugiés au bureau communal de Gikoro en vociférant contre eux et en ordonnant à des policiers de les désarmer.

*Faits survenus à l'église protestante de Ruhanga,
cellule du secteur de Gicaca, commune de Gikoro*

24. Entre le 8 et le 10 avril 1994, plusieurs civils tutsis cherchant à se mettre à l'abri des attaques que les civils tutsis essayaient dans l'ensemble de la préfecture de Kigali-rural ont trouvé refuge à l'église protestante et à l'école de Ruhanga sis dans le secteur de Gicaca, commune de Gikoro.

25. Entre le 10 et le 15 avril 1994, le brigadier Rwabukumba, des éléments de la Garde présidentielle, des miliciens civils et des agents de la police communale ont lancé une attaque contre les civils tutsis qui s'étaient réfugiés à l'église protestante et à l'école de Ruhanga. Munis d'armes à feu, de grenades, de machettes, de *pangas* et d'autres armes traditionnelles, les assaillants ont tué sur les lieux de nombreux civils tutsis.

26. Nonobstant sa position de bourgmestre de la commune de Gikoro, et le fait qu'il ait été instruit de l'attaque dont les personnes réfugiées à l'église de Musha avaient été victimes le 13 avril 1994, Paul Bisengimana n'a posé aucun acte positif visant à protéger les Tutsis qui s'étaient réfugiés dans l'église protestante et l'école de Ruhanga, cellule de Ruhanga, secteur de Gicaca, commune de Gikoro, entre le 10 et le 15 avril 1994.

27. L'attaque lancée contre les civils tutsis réfugiés dans l'église protestante et l'école de Ruhanga s'inscrivait dans le cadre des attaques perpétrées contre les civils tutsis dans la majeure partie du Rwanda tout au long du mois d'avril 1994.

28. L'une des conséquences directes de la conduite de Paul Bisengimana, notamment de l'appui moral qu'il a apporté aux assaillants, a été le massacre de milliers d'hommes, de femmes et d'enfants appartenant à la population civile.

*Events in Ruhanga cellule, Gicaca secteur,
Gikoro commune*

29. Between January and March 1994, Paul Bisengimana, Laurent Semanza and Juvenal Rugambarara participated in a meeting at Rutoma primary school, Gikoro *commune* where they urged the population to kill all Tutsi and to throw them in Lake Muhazi.

30. On 7th of April 1994, Paul Bisengimana distributing boxes of grenades in Gicaca *secteur*, Gikoro *commune* to an *Interahamwe* named Rutayisire for purposes of attacking Tutsi civilians.

31. During the month of April 1994, near the ISUMO centre located between Rwa-mashyongoshyo and Gicaca *secteurs* in Gikoro *commune*, Paul Bisengimana acting in concert with several civilian militiamen participated in several attacks on Tutsi civilians. The said attacks resulted in the killing of a certain Domitilla, wife of Nicolas, her grandson and their domestic worker called Shyirakera. The trio were tied to a mattress and burnt alive.

32. On or about 10 April 1994, Paul Bisengimana addressed the civilian population in Gicaca *secteur*. During the said speech, he instigated Hutu civilians to kill their Tutsi counterparts.

33. In April 1994, on Gicaca hill, near Ruhanga church, Paul Bisengimana acting in concert with two Hutu men, namely Kamana and Habimana and other civilian militiamen, participated in an attack on Tutsi civilians. During the said attack, Paul Bisengimana was seen shooting at the said Tutsi refugees.

34. Between January and April 1994, Paul Bisengimana supervised the training of *Interahamwe* militiamen and the distribution of weapons in the region of Gikoro *commune* for purposes of attacking Tutsi civilians.

COUNT III – MURDER AS A CRIME AGAINST HUMANITY
PURSUANT TO ARTICLE 3 (A)
OF THE STATUTE OF THE TRIBUNAL

35. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually was responsible for killing or causing persons to be killed in Gikoro *commune* and its environs, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.

36. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana, either, planned, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

Particulars of the offence

37. Between 6 and 21 April 1994, there existed widespread or systematic attacks occurring in the Kigali-Rural *préfecture* in the territory of Rwanda, directed against a civilian population on political, ethnic or racial grounds.

*Faits survenus dans la cellule de Ruhanga,
secteur de Gicaca, commune de Gikoro*

29. Entre janvier et mars 1994, Paul Bisengimana, Laurent Semanza et Juvénal Rugambarara ont participé à une réunion tenue à l'école primaire de Rutoma, dans la commune de Gikoro. Au cours de cette réunion, ils ont exhorté la population à tuer tous les Tutsis et à les jeter dans le lac Muhazi.

30. Le 7 avril 1994, dans le secteur de Gicaca, commune de Gikoro, Paul Bisengimana a remis à un *Interahamwe* nommé Rutayisire des caisses de grenades devant servir à attaquer les civils tutsis.

31. En avril 1994, près de l'ISUMO situé entre le secteur de Rwamashyongoshyo et celui de Gicaca dans la commune de Gikoro, Paul Bisengimana a participé avec plusieurs miliciens civils à de nombreuses attaques perpétrées contre les civils tutsis. Ces attaques ont coûté la vie à une certaine Domitilla, épouse de Nicolas, ainsi qu'à son petit-fils et à leur domestique nommé Shyirakera. Les trois victimes ont été attachées à un matelas et brûlées vives.

32. Le 10 avril 1994 ou vers cette date, Paul Bisengimana a prononcé un discours devant la population civile du secteur de Gicaca. À cette occasion, il a incité les civils hutus à tuer leurs homologues tutsis.

33. En avril 1994, sur la colline de Gicaca, près de l'église de Ruhanga, Paul Bisengimana a participé avec deux Hutus nommés Kamana et Habimana, ainsi que d'autres miliciens civils, à une attaque lancée contre des civils tutsis. Lors de ladite attaque, on a vu Paul Bisengimana tirer sur les réfugiés tutsis.

34. Entre janvier et avril 1994, Paul Bisengimana a supervisé la formation des *Interahamwe* et la distribution d'armes effectuées dans la commune de Gikoro en vue de la perpétration d'attaques dirigées contre les civils tutsis.

TROISIÈME CHEF D'ACCUSATION :
ASSASSINAT CONSTITUTIF DE CRIME CONTRE L'HUMANITÉ
[ARTICLE 3 (A) DU STATUT]

35. En avril 1994, dans la région de Bugesera, préfecture de Kigali-rural, République rwandaise, Paul Bisengimana, agissant seul, a tué ou fait tuer des personnes dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

36. Faisant fond sur l'ensemble des actes invoqués à l'appui de ce chef, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a planifié ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime susvisé.

Circonstances entourant le crime poursuivi

37. Entre le 6 et le 21 avril 1994, des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance politique, ethnique ou raciale ont été perpétrées dans la préfecture de Kigali-rural, au Rwanda.

38. Paul Bisengimana aided and abetted in the planning, preparation, or execution of the killing of Tutsi civilians, by his acts or through persons he assisted, with his knowledge and consent.

39. Among the Tutsi civilians killed as a consequence of Paul Bisengimana's conduct are a Tutsi man called Rusanganwa. In that regard, Paul Bisengimana was present during the attack at Musha church in Rutoma *secteur*, Gikoro *commune*, on 13 April 1994, when Rusanganwa, who had sought refuge at the said location, was murdered.

COUNT IV – EXTERMINATION, AS CRIME AGAINST HUMANITY
PURSUANT TO ARTICLE 3 (B)
OF THE STATUTE OF THE TRIBUNAL

40. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually and in concert with others, was responsible for killing or causing persons to be killed, during mass killing events in Gikoro *commune* and its environs, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.

41. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana, either, planned, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

Particulars of the offence

42. Between 6 and 21 April 1994, there existed widespread or systematic attacks occurring throughout Rwanda, directed against a civilian population on political, ethnic or racial grounds.

43. Paul Bisengimana aided and abetted in the planning, preparation, or execution of the killing of Tutsi civilians and by his acts or through persons he assisted with his knowledge and consent.

44. As a direct consequence of his conduct including the provision of moral support to the attackers by Paul Bisengimana, thousands of civilian men, women and children were killed.

45. Paul Bisengimana's affirmative acts during the month of April 1994, VIZ : aiding and abetting in the killing of Tutsi civilians Musha church in Gikoro *commune* and at the Ruhanga Protestant Church, Ruhanga *cellule*, Gicaca *secteur*, Gikoro *commune* are specified at paragraphs 17-20 and 24-28 above, and are hereby reiterated and incorporated herein by reference.

COUNT V – RAPE, AS CRIME AGAINST HUMANITY
PURSUANT TO ARTICLE 3 (G) OF THE STATUTE OF THE TRIBUNAL

46. During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually and in concert

38. Paul Bisengimana a aidé et encouragé à planifier, préparer ou exécuter le meurtre de civils tutsis, par ses actes ou par le truchement des personnes qu'il a aidées, et ce, en toute connaissance de cause et en adhérant à leurs actes.

39. Parmi les civils tutsis tués en conséquence de la conduite de Paul Bisengimana figure un homme répondant au nom de Rusanganwa. Paul Bisengimana était effectivement présent durant l'attaque perpétrée à l'église de Musha dans le secteur de Ruto-ma, commune de Gikoro, le 13 avril 1994, date à laquelle Rusanganwa, qui s'était réfugié dans ladite église, a été assassiné.

QUATRIÈME CHEF D'ACCUSATION :
EXTERMINATION CONSTITUTIVE DE CRIME CONTRE L'HUMANITÉ
[ARTICLE 3 (B) DU STATUT]

40. En avril 1994, dans la région de Bugesera, préfecture de Kigali-rural, République rwandaise, Paul Bisengimana, agissant seul et de concert avec d'autres, a tué ou fait tuer des personnes lors de massacres perpétrés dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

41. Faisant fond sur l'ensemble des actes invoqués à l'appui de ce chef, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a planifié ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime susvisé.

Circonstances entourant le crime poursuivi

42. Entre le 6 et le 21 avril 1994, des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance politique, ethnique ou raciale ont été perpétrées partout au Rwanda.

43. Paul Bisengimana a aidé et encouragé à planifier, préparer ou exécuter le meurtre de civils tutsis, par ses actes ou par l'intermédiaire des personnes qu'il a aidées et ce, en toute connaissance de cause et en adhérant à leurs actes.

44. L'une des conséquences directes de la conduite de Paul Bisengimana, notamment de l'appui moral qu'il a apporté aux assaillants, a été le massacre de milliers d'hommes, de femmes et d'enfants appartenant à la population civile.

45. Les actes positifs posés par Paul Bisengimana pendant le mois d'avril 1994, à l'effet d'aider et d'encourager à commettre le massacre de civils tutsis à l'église de Musha sise dans la commune de Gikoro et à l'église protestante de Ruhanga, cellule de Ruhanga, secteur de Gicaca, commune de Gikoro, sont articulés aux paragraphes 17 à 20 et 24 à 28 du présent acte d'accusation et ne sont repris ici que pour mémoire.

CINQUIÈME CHEF D'ACCUSATION : VIOL CONSTITUTIF DE CRIME
CONTRE L'HUMANITÉ [ARTICLE 3 (G) DU STATUT]

46. En avril 1994, dans la région de Bugesera, préfecture de Kigali-rural, République rwandaise, Paul Bisengimana, agissant seul et de concert avec d'autres per-

with others, did cause women to be raped in Gikoro *commune* and its *environs*, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.

47. For all of the acts adduced in support of this charge, the Prosecutor alleges that Paul Bisengimana instigated or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.

48. In addition, the Prosecutor alleges, that Paul Bisengimana knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 3 (g) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6 (3) of the Statute.

Particulars of the offence

49. During the month of April 1994 in Musha, Paul Bisengimana acting in concert with Laurent Semanza and soldiers from the Presidential Guard instigated a small crowd of Hutu civilians gathered in Musha *cellule*, Musha *secteur*, and Gikoro *commune* to rape and sexually violate Tutsi women.

50. Following this incident, several Tutsi women and girls, including Witness VV-K and a woman named Kayitesi, were raped and sexually violated by Hutu civilians and soldiers. By his actions, the accused directly and substantially contributed to the raping and sexual assaults of Tutsi civilians in Musha *cellule*, Musha *secteur*, Gikoro *commune*.

The acts and omissions of Paul Bisengimana detailed herein are punishable under Articles 22 and 23 of the Statute

Signed at Arusha the 23rd November 2005.

[Signed] : Hassan Bubacar Jallow

sonnes, a fait violer des femmes dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

47. Faisant fond sur l'ensemble des actes invoqués à l'appui de ce chef, le Procureur allègue, en application de l'article 6 (1) du Statut, que Paul Bisengimana a incité à commettre ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime susvisé.

48. Le Procureur allègue en outre, en application de l'article 6 (3) du Statut, que Paul Bisengimana savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre ou avaient commis un ou plusieurs des actes visés par l'article 3 (g) du Statut et n'a pas pris les mesures nécessaires et raisonnables pour empêcher que ces actes soient commis ou pour en punir les auteurs.

Circonstances entourant le crime poursuivi

49. En avril 1994 à Musha, Paul Bisengimana, agissant de concert avec Laurent Semanza et des éléments de la Garde présidentielle, a incité un petit groupe de civils hutus qui s'étaient rassemblés dans la cellule de Musha, secteur de Musha, commune de Gikoro, à violer les femmes tutsies et à les assujettir à des actes de violence sexuelle.

50. Plusieurs femmes et filles tutsies, dont le témoin VV-K et une femme nommée Kayitesi, ont été violées et agressées sexuellement par des civils et des militaires hutus. Par ses agissements, l'accusé a contribué de façon directe et substantielle au viol et aux agressions sexuelles dont les civiles tutsies ont été victimes dans la cellule de Musha, secteur de Musha, commune de Gikoro.

Les actes et les omissions de Paul Bisengimana articulés dans le présent acte d'accusation sont réprimés par les articles 22 et 23 du Statut.

Arusha, le 23 novembre 2005.

[Signé] : Hassan Bubacar Jallow

***Decision on Bisengimana's Extremely Urgent Motion
for Protective Measures for Character Witnesses
20 December 2005 (ICTR-2000-60-I)***

(Original : English)

Trial Chamber II

Judge : William H. Sekule (Designated Judge pursuant to Rule 73 (A) of the Rules)

Paul Bisengimana – Protection of victims and witnesses, In camera proceedings, Protection of personal identity, Non-disclosure of the identity of witnesses, Time of disclosure of the identity of the witness, Witnesses and Victims Support Section – Motion partially granted

International Instruments cited :

Rules of Procedure and Evidence, rules 69, 69 (C), 73 (A), 75 and 75 (A); Statute, art. 14, 19 and 21

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera, Order on Protective Measures for Prosecution Witnesses, 10 December 2004 (ICTR-98-44); Trial Chamber, The Prosecutor v. Tharcisse Renzaho, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005 (ICTR-97-31); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 (ICTR-98-41); Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Prosecution Motion for Variation, or in the Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses, 2 November 2005 (ICTR-98-44C); Appeals Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005 (ICTR-99-50)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge William H. Sekule, designated pursuant to Rule 73 (A) of the Rules (the "Chamber");

CONSIDERING Bisengimana's "*Requête en extrême urgence de la Défense aux fins de prescription de mesures de protection des témoins de moralité, Articles 14, 19 et 21 du Statut, Articles 69 et 75 du Règlement de procédure et de preuve*"¹, filed on 16 December 2005 (the "Motion");

NOTING that the Prosecution has not filed a reply;

¹ Bisengimana's extremely urgent Motion for Protective Measures for Character Witnesses, Art. 14, 19, and 21 of the Statute, Rules 69 and 75 of the Rules (Unofficial translation).

CONSIDERING the Statute of the Tribunal (the “Statute”), in particular Articles 14, 19 and 21 of the Statute, and the Rules of Procedure and Evidence (the “Rules”), specifically Rules 69 and 75;

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of the written submissions of the Defence.

Defence Submissions

1. The Motion is brought pursuant to Articles 14, 19 and 21 of the Statute and Rules 69 and 75 of the Rules. The Defence submits that it is the Tribunal’s practice to authorise the examination of witnesses after an Accused’s guilty plea to support the mitigating circumstances. In this context, the Defence notes that protective measures have been accorded to such witnesses². The Defence seeks protective measures for two character witnesses whom it intends to call at the Sentencing Hearing to be held on 19 January 2006³.

2. The Defence submits that whereas two of the witnesses it intends to call do not request protective measures, two others do.

- The Defence states that proposed Witness 3 has asked for the following protective measures : That the witness’ identity be placed under seal;
- That a pseudonym be used during the whole duration of the hearing;
- That the Prosecution team be prohibited from communicating any document or information which might reveal the witness’ identity in any manner whatsoever.

The Defence submits that these measures are justified because of the witness’ fear that the disclosure of identity might have a damaging effect on his or her professional activities⁴.

4. Further, the Defence submits that Witness 4 has requested the following protective measures :

- That the witness’ identity be placed under seal;
- That any information which might reveal the witness’ identity be only communicated to the personnel of the Witnesses and Victims Support Unit;
- That any information regarding the witness be rendered inaccessible to the public and the media, including a prohibition of taking photographs, or making audio and/or video tapes or sketches of the witness;
- That the Prosecution team be prohibited from communicating any document or information which might reveal the witness’ identity in any manner whatsoever.

The Defence submits that these measures are justified because Witness 4 fears for his or her security after testifying at the tribunal⁵.

² The Motion, para. 7, citing *Prosecutor v. Ruggiu*, ICTR-97-32-I, Transcript of 15 May 2000, pp. 49 ff (French version); *Prosecutor v. Ruggiu*, ICTR-97-32-I, *Décision relative à la requête de la défense en prescription de mesures de protection en faveur d’un témoin*, 9 May 2000.

³ The Motion, paras. 9, 11.

⁴ The Motion, paras. 12-13.

⁵ The Motion, paras. 14-15.

5. The Defence further requests that the Prosecution transmit a list of all the immediate members of the Prosecution team who will have access to the information concerning Witnesses 1, 2, 3, and 4, and to be informed in writing should the Prosecution request authorisation to contact these witnesses⁶.

Deliberations

6. The Chamber recalls that Article 21 of the Statute empowers the Tribunal to make rules for the protection of victims and witnesses and provides that protective measures may include the conduct of *in camera* proceedings and the protection of personal identity. Rule 69 provides that either party may apply to the Chamber to order non-disclosure of the identity of witnesses who may be in danger or at risk, whereas Rule 75 stipulates the power of the Chamber to order measures appropriate for the privacy or security of witnesses, and states that such measures must be consistent with the rights of the accused⁷.

7. The Chamber has considered the Defence arguments with respect to the need to safeguard the privacy and security of Witnesses 3 and 4 and finds that certain protective measures requested by the Defence are warranted.

8. The Chamber notes that the Motion contains discrepancies between the requests contained in paragraphs 12, 14, and 16, and those listed in paragraphs (a)-(h), which are also more detailed requests. The Chamber will address the different measures sought in paragraphs (a)-(h) of the Motion in turn.

9. The Chamber considers that measure (a), which requests that the identity (first name and family name) of the character witnesses concerned, as well as every document which regards them, their addresses, whereabouts, or any other document which might reveal their identity, be placed under seal, is consonant with the current practice of both the Tribunal⁸ and this Chamber⁹. Accordingly, the Chamber grants measure (a) with respect to Witnesses 3 and 4.

10. The Chamber notes that measure (b) requires that the Registry shall only communicate the identity of the witnesses concerned or any information that might reveal their identity to the Witnesses and Victims Support Section. The Chamber observes that this is consonant with the Tribunal's practice¹⁰. However, the Chamber also notes that the measure does not provide disclosure timeframes of the witnesses' identifying information to the Prosecution. The Chamber recalls that Rule 69 (C) provides that,

⁶ The Motion, para. 16.

⁷ See *Prosecutor v. Renzaho* (TC), Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 6.

⁸ See for example, *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 2.

⁹ *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.

¹⁰ *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 2; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.

“[s]ubject to Rule 75, the identity of the victim and witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for the preparation of the Prosecution and the Defence”.

The Chamber grants measure (b) with respect to Witness 4. In view of the scheduling of the Sentencing Hearing on 19 January 2006, the Chamber hereby orders that the identifying information relating to all witnesses be disclosed to the Prosecution on receipt of this Decision.

11. As for measure (c), which requests that the Prosecution shall not communicate the identity of the witnesses concerned, as well as their addresses, whereabouts, or any other information likely to reveal their identity, the Chamber observes that this request is incomplete as it does not indicate to whom communication is prohibited. The Chamber therefore denies measure (c) with regard to Witnesses 3 and 4.

12. With regard to measure (d), which requests that the Prosecution shall be prohibited from sharing, discussing, or revealing any document or other information which might reveal the witnesses' identities to anyone and in any way, the Chamber notes that this request presupposes that identifying information is restricted to certain members of the office of the Prosecutor team. The Chamber wishes to recall that restriction of access to identifying information to the members of the immediate Prosecution team has been rejected in recent decisions by the Tribunal's Appeals Chamber¹¹, for

[N]owhere in the Statute or Rules is it stated that the Prosecutor's obligations may be limited to specific teams within the Office of the Prosecutor, which in the practice of the Tribunal, are sometimes referred to as the “Prosecution” in an individual case. The ordinary meaning and context of the text of the Rules suggest that the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as whole, undivided unit, in fulfilling those obligations¹².

The Chamber is bound by the Appeals Chamber's reasoning and therefore denies this measure. However, the Chamber orders *proprio motu* pursuant to Rule 75 (A) that the Prosecution be prohibited from sharing, discussing, or revealing any document or other information which might reveal the witnesses' identities to anyone and in any way outside the Office of the Prosecutor. The Chamber decides that this measure shall apply to all potential Defence witnesses.

13. As regards measure (e), which requests that the Defence be informed by the Prosecution about all members of the immediate Prosecution team having access to the information referred to in (d), the Chamber notes that this measure presupposes that identifying information is restricted to certain members of the Office of the Prosecutor. The Chamber recalls its previous reasoning with respect to the fact that a

¹¹ See *Prosecutor v. Bagosora et al.* (AC), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, paras. 42-46; *Prosecutor v. Rwamakuba* (TC), Decision on Prosecution Motion for Variation, or in the Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses, 2 November 2005, para. 6; *Prosecutor v. Bizimungu et al.* (AC), Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005, para. 4.

¹² See *Prosecutor v. Bagosora et al.* (AC), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 43.

restriction of access to identifying information to the members of the immediate Prosecution team has been rejected by the Tribunal's Appeals chamber¹³. The Chamber therefore denies measure (e).

14. The Chamber considers that measure (f), which requests that the Prosecution inform the Defence in writing of any request for authorisation to contact the witnesses is consonant with the Tribunal's practice¹⁴ and thus grants measure (f) for Witnesses 1, 2, 3, and 4.

15. As to measure (g), allowing the Defence to designate each witness it intends to call with a pseudonym to be used in proceedings before the Tribunal, the communications and consultations between the Parties or with the public, until the Chamber decides otherwise, the Chamber is of the opinion that this measure corresponds to the Tribunal's practice¹⁵ and is necessary for the protection of witnesses. It therefore grants measure (g) with respect to Witness 3.

16. Finally, the Chamber notes that measure (h), which requests that the public and the media be prohibited from taking photographs and making sketches, or audio and/or video recordings of the witnesses concerned, unless authorised to do so by the Chamber, is consonant with the Tribunal's practice¹⁶. Therefore, the Chamber grants measure (h) with respect to Witness 4.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in part and

GRANTS the measures requested in paragraphs 8-9, 11, 13-15 above;

DENIES the measures sought in paragraphs 10 and 12 above.

Arusha, 20 December 2005.

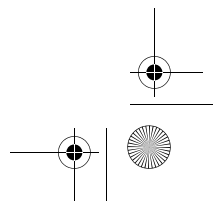
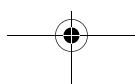
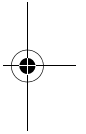
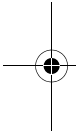
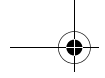
[Signed] : William H. Sekule

¹³ See *Prosecutor v. Bagosora et al.* (AC), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, paras. 42-46; *Prosecutor v. Rwamakuba* (TC), Decision on Prosecution Motion for Variation, or in the Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses, 2 November 2005, para. 6; *Prosecutor v. Bizimungu et al.* (AC), Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005, para. 4.

¹⁴ *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 3; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.

¹⁵ *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 3; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.

¹⁶ *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 3; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.



***The Prosecutor v. Augustin BIZIMUNGU,
Protais MPIRANYA, Augustin NDINDILYIMANA,
François-Xavier NZUWONEMEYE
and Innocent SAGAHUTU***

Case N° ICTR-2000-56

Case History : Augustin Bizimungu

- Name : BIZIMUNGU
- First Name : Augustin
- Date of Birth : 28 August 1952
- Sex : male
- Nationality : Rwandan
- Former Official Function : Chief of Staff of the Rwandan Army
- Date of Indictment's Confirmation : 23 January 2000 ¹
- Counts : genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest : 2 August 2002, in Angola
- Date of Transfer : 14 August 2002
- Date of Initial Appearance : 21 August 2002
- Date Trial Began : 20 September 2004

Case History : Augustin Ndindilyimana

- Name : NDINDILYIMANA
- First Name : Augustin
- Date of Birth : 1943
- Sex : male
- Nationality : Rwandan
- Former Official Function : Chief of Staff of the *gendarmérie nationale*
- Date of Indictment's Confirmation : 28 January 2000 ²

¹ The text of the indictment is reproduced in the *2000 Report*, p. 820.

² The text of the indictment is reproduced in the *2000 Report*, p. 820. The text of the Decision to confirm the indictment is reproduced in the *2000 Report*, p. 880.

***Le Procureur c. Augustin BIZIMUNGU,
Protais MPIRANYA, Augustin NDINDILIIYIMANA,
François-Xavier NZUWONEMEYE
et Innocent SAGAHUTU***

Affaire N° ICTR-2000-56

Fiche technique : Augustin Bizimungu

- Nom : BIZIMUNGU
- Prénom : Augustin
- Date de naissance : 28 août 1952
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : chef d'état-major de l'armée rwandaise
- Date de la confirmation de l'acte d'accusation : 23 janvier 2000 ¹
- Chefs d'accusation : génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 2 août 2002, en Angola
- Date du transfert : 14 août 2002
- Date de la comparution initiale : 21 août 2002
- Date du début du procès : 20 septembre 2004

Fiche technique : Augustin Nindiliyimana

- Nom : NDINDILIIYIMANA
- Prénom : Augustin
- Date de naissance : 1943
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : chef du personnel de la gendarmerie nationale
- Date de la confirmation de l'acte d'accusation : 28 janvier 2000 ²

¹ Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 821.

² Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 821. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 881.

- Counts : genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 29 January 2000, in Belgium
- Date of Transfer : 22 April 2000
- Date of Initial Appearance : 27 April 2000
- Pleading : not guilty
- Date Trial Began : 20 September 2004

Case History : François-Xavier Nzuwonemeye

- Name : NZUWONEMEYE
- First Name : François-Xavier
- Date of Birth : 30 August 1955
- Sex : male
- Nationality : Rwandan
- Former Official Function : Commander of 42nd Battalion of *Reconnaissance* of the Rwandan Army
- Date of Indictment's Confirmation : 28 January 2000³
- Counts : genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 15 February 2000, in France
- Date of Transfer : 23 May 2000
- Date of Initial Appearance : 25 May 2000
- Pleading : not guilty
- Date Trial Began : 20 September 2004

Case History : Innocent Sagahutu

- Name : SAGAHUTU
- First Name : Innocent
- Date of Birth : unknown
- Sex : male
- Nationality : Rwandan

³ The text of the indictment is reproduced in the *2000 Report*, p. 820. The text of the Decision to confirm the indictment is reproduced in the *2000 Report*, p. 886.

- Chefs d'accusation : génocide, complicité de génocide, entente en vue de commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 29 janvier 2000, en Belgique
- Date du transfert : 22 avril 2000
- Date de la comparution initiale : 27 avril 2000
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 20 septembre 2004

Fiche technique : François-Xavier Nzuwonemeye

- Nom : NZUWONEMEYE
- Prénom : François-Xavier
- Date de naissance : 30 août 1955
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : commandant du 42^e bataillon de reconnaissance de l'armée rwandaise
- Date de la confirmation de l'acte d'accusation : 28 janvier 2000³
- Chefs d'accusation : génocide, complicité de génocide, entente en vue de commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 15 février 2000, en France
- Date du transfert : 23 mai 2000
- Date de la comparution initiale : 25 mai 2000
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 20 septembre 2004

Fiche technique : Innocent Sagahutu

- Nom : SAGAHUTU
- Prénom : Innocent
- Date de naissance : inconnue
- Sexe : masculin
- Nationalité : rwandaise

³ Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 821. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 887.

- Former Official Function : Second-in-command of the *Reconnaissance* Battalion within the Rwandan Army
- Date of Indictment's Confirmation : 28 January 2000⁴
- Counts : genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest : 15 February 2000, in Denmark
- Date of Transfer : 24 November 2000
- Date of Initial Appearance : 28 November 2000
- Pleading : not guilty
- Date Trial Began : 20 September 2004

⁴ The text of the indictment is reproduced in the *2000 Report*, p. 820. The text of the Decision to confirm the indictment is reproduced in the *2000 Report*, p. 882.

- Fonction occupée au moment des faits incriminés : commandant en second du bataillon de reconnaissance de l'armée rwandaise
- Date de la confirmation de l'acte d'accusation : 28 janvier 2000⁴
- Chefs d'accusation : génocide, complicité de génocide, entente en vue de commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 15 février 2000, au Danemark
- Date du transfert : 24 novembre 2000
- Date de la comparution initiale : 28 novembre 2000
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 20 septembre 2004

⁴ Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 821. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 883.

***Decision on Defence Request for Leave to Appeal
Against the Trial Chamber's Decision of 3 November 2004
25 January 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka De Silva, Presiding judge; Taghrid Hikmet; Seon Ki Park

Augustin Nindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Protection of witnesses – Interlocutory Appeal, Certification by the Trial Chamber, Conditions for an Interlocutory Appeal – Grounds of appeal irrelevant and premature – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 69, 73 (A) and 73 (B); Statute, art. 20 (4) (a)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 (ICTR-98-44); Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II composed of Judge Asoka De Silva, Presiding, Judge Taghrid Hikmet, and Judge Seon Ki Park (the "Chamber");

BEING SEIZED of the «*Requête de la Défence aux fins d'obtenir l'autorisation de la Chambre de première instance II d'interjeter appel contre sa décision en date du 3 novembre 2004*» filed on 10 November 2004 (the "Motion")¹;

CONSIDERING the

- i) «*Observations du Procureur sur la demande en certification présentée de la défense d'Augustin Bizimungu aux fins d'obtenir l'autorisation d'interjeter appel contre la décision de la Chambre de première instance II en date du 3 Novembre 2004*» filed on 11 November 2004²;

¹ Unofficial translation : "Defence Request for Leave to Appeal the Trial Chamber's 3 November 2004 Decision".

² Unofficial translation : "Prosecution's Observations on the Request for Leave to Appeal the Chamber's Decision of 3 November 2004".

***Décision relative à la Requête de la défense
aux fins d'autorisation d'interjeter appel contre la décision
de la Chambre de première instance en date du 3 novembre 2004
25 janvier 2005 (ICTR-2000-56-T)***

(Original : Anglais)

Chambre de première instance II

Juges : Joseph Asoka De Silva, Président de Chambre; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye et Innocent Sagahutu – Protection des témoins – Appels interlocutoires, Certification par la Chambre de première instance, Conditions pour un appel interlocutoire – Motifs d'appels sans intérêts et prématurés – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 69, 73 (A) et 73 (B); Statut, art. 20 (4) (a)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Edouard Karemera et consorts, Décision de la Chambre d'appel relative à l'appel interlocutoire interjeté par le Procureur de la décision rendue le 8 octobre 2003 par la Chambre de première instance III, refusant d'autoriser le dépôt d'un acte d'accusation modifié, 19 décembre 2003 (ICTR-98-44); Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 mars 2004 (ICTR-98-42)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIEGEANT en la Chambre de première instance II, (la «Chambre») composée des juges Asoka De Silva, Président de Chambre, Taghrid Hikmet et Seon Ki Park,

SAISI de la «Requête de la Défense aux fins d'obtenir l'autorisation de la Chambre de première instance II d'interjeter appel contre sa décision en date du 3 novembre 2004», déposée le 10 novembre 2004 (la «Requête»)¹,

CONSIDERANT

- i) Les «Observations du Procureur sur la demande en certification présentée par la défense d'Augustin Bizimungu aux fins d'obtenir l'autorisation d'interjeter appel contre la décision de la Chambre de première instance II en date du 3 novembre 2004», déposée le 11 novembre 2004²;

¹ Sans objet en français.

² *Ibid.*

- ii) «*Réplique aux observations du Procureur sur la demande de certification présentée par la défense de M. Augustin Bizimungu*» filed on 19 November 2004³;

NOTING the “Decision on Bizimungu’s Motion for Reconsideration of the Chamber’s 19 March 2004 Decision on Disclosure of Prosecution Materials” of 3 November 2004 (the “Impugned Decision”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 73 (B);

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions of the Parties

The Defence

1. The Defence recalls Rule 73 (B) and submits that the Chamber’s 3 November 2004 Decision involves an issue that would significantly affect the ‘fair and expeditious conduct of the proceedings’.

2. The Defence refers to Article 20 (4) (a) on the rights of the accused to be promptly informed of the charges against him and asserts that at least, the Accused should have access to all statements made by Prosecution witnesses, as well as to the identities of those witnesses.

3. The Defence argues that in view of this right, protective measures for witnesses under Rule 69 are only to be granted in exceptional circumstances.

4. The Defence submits that the Trial Chamber made an error in balancing the time needed for the Defence to prepare its cross-examination with the need to protect witnesses. The Defence further submits that the issue at stake is not the Defence’s right to prepare cross-examinations but its ability to counter the Prosecution case in its entirety. The Defence believes it is disadvantaged if it does not have access before trial to the charges and to the evidence supporting those charges.

5. The Defence further argues that its inability to understand the full case against the accused before the start of trial, and its inability to use the testimonies of later witnesses to undermine the credibility of earlier witnesses, may have an impact on the outcome of the trial.

6. The Defence argues that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Prosecution Response

7. The Prosecution cites the Appeals Chamber Decision in *Karemera et al.* on the issue of interlocutory appeals it states that an Appeal can only be made where :

³ Unofficial translation : “Reply to Prosecution’s Observations on the Request for Leave to Appeal the Chamber’s Decision of 3 November 2004”.

- ii) La «Réplique aux observations du Procureur sur la demande en certification présentée par la défense de M. Augustin Bizimungu», déposée le 19 novembre 2004³,

PRENANT NOTE de la «Decision intitulée «*Decision on Bizimungu's Motion for Reconsideration of the chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials*» du 3 novembre 2004 (la «Décision contestée»),

CONSIDERANT le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), en particulier son article 73 (B),

STATUE sur la requête sur la base des mémoires écrits déposés par les parties en vertu de l'article 73 (A) du Règlement.

Arguments des parties

La Défense

1. La Chambre rappelle l'article 73 (B) et fait valoir que la décision rendue par la Chambre le 3 novembre 2004 touche une question susceptible de compromettre sensiblement «l'équité et la rapidité du procès».

2. La Défense se réfère au paragraphe 4 (a) de l'article 20 du Statut, relatif au droit de l'accusé à être informé, dans le plus court délai, des motifs de l'accusation portée contre lui, et affirme que l'accusé doit au moins avoir accès à toutes les déclarations faites par les témoins à charge, ainsi qu'aux renseignements concernant l'identité de ces témoins.

3. La Défense soutient qu'au vu de ce droit les mesures de protection des témoins visées à l'article 69 ne doivent être prescrites que dans des cas exceptionnels.

4. La Défense affirme que la Chambre de première instance a eu tort de considérer à parts égales le temps dont la Défense avait besoin pour préparer son contre-interrogatoire et la nécessité de protéger les témoins. Elle soutient que le problème qui se pose n'est pas celui du droit de la Défense à préparer son contre-interrogatoire, mais celui de son aptitude à faire échec, dans son intégralité, à la thèse soutenue par le Procureur. La Défense estime qu'elle est désavantagée si elle n'a pas accès avant l'ouverture du procès aux charges retenues contre son client et à leurs éléments justificatifs.

5. La Défense fait valoir par ailleurs que son incapacité à comprendre les charges retenues contre l'accusé avant l'ouverture du procès et à utiliser les dépositions des témoins comparaisant plus tard pour tester la crédibilité des témoins ayant comparu plus tôt, peut compromettre l'issue du procès.

6. La Défense soutient que le règlement immédiat de cette question par la Chambre d'appel pourrait concrètement faire progresser la procédure.

Réponse du Procureur

7. Le Procureur cite la décision rendue par la Chambre d'appel en l'affaire *Karemera et consorts* en matière d'appels interlocutoires. Elle déclare qu'un appel ne peut être interjeté que lorsque :

³ *Ibid.*

[T]he Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to a relevant consideration [...]. If the Trial Chamber has properly exercised its discretion the Appeals Chamber may not intervene solely because it may have exercised the discretion differently⁴.

8. The Prosecution believes the Chamber has properly exercised its discretion in its 3 November 2004 Decision.

The Defence Reply

9. The Defence alleges that the Prosecution has not answered the Defence's arguments and that the arguments of the Prosecution are premature and quotes Trial Chamber II's Decision in the *Prosecutor v. Ntahobali and Nyiramasuhuko* of 18 March 2004 stating that

"the submission of the ground of appeal in the Motion is irrelevant and premature. The only matter before the Trial Chamber at this stage of the proceedings is to determine whether the conditions for certification as provided under Rule 73 (B) are met or not".

10. The Defence reiterates that the Motion for certification does not relate to protective measures for witnesses but to the fundamental procedural question of disclosure of the identity of all witnesses and of their unredacted statements.

Having deliberated

11. The Chamber recalls Rule 73 (B) of the Rules :

Decision rendered on such motions [Rule 73] are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. The Chamber recalls the reasoning held by Trial Chamber II composed differently in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.* :

It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73 (B) must be exceptional indeed. This point is made clear

⁴ *Prosecutor v. Karemera et al.*, Decision on the Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, A.C., 19 December 2003.

La Chambre de première instance s'est méprise sur le principe à appliquer ou sur la règle de droit à prendre en compte dans l'exercice de son pouvoir discrétionnaire, qu'elle a attaché de l'importance à des facteurs étrangers à l'affaire ou non pertinents, ou qu'elle n'a pas suffisamment pris en compte les éléments dignes de l'être [...]. La Chambre de première instance ayant exercé à bon escient son pouvoir discrétionnaire, la Chambre d'appel ne saurait intervenir tout simplement parce qu'elle avait peut-être exercé différemment son pouvoir discrétionnaire⁴.

8. Le Procureur estime que la Chambre a exercé à bon escient son pouvoir discrétionnaire dans sa décision du 3 novembre 2004.

Réplique de la Défense

9. La Défense allègue que le Procureur n'a pas répondu à ses arguments et que l'argumentation du Procureur est prématurée. Elle cite la décision rendue par la Chambre de première instance II en l'affaire *Le Procureur c. Ntahobali et Nyiramasuhuko*, le 18 mars 2004, selon laquelle

«il est sans intérêt et prématuré de relever les griefs dans la requête. A ce stade, il s'agit uniquement pour [la Chambre] de rechercher si les conditions autorisant la certification prévues à l'article 73 (B) sont satisfaites».

10. La Défense réaffirme que la requête aux fins de certification touche non pas aux mesures de protection des témoins, mais à la question de procédure fondamentale relative à la communication de l'identité de tous les témoins et de leurs déclarations non caviardées.

Après en avoir délibéré

11. La Chambre rappelle l'article 73 (B) du Règlement :

Les décisions concernant de telles requêtes [article 73] ne sont pas susceptibles d'appel interlocutoire, à l'exclusion des cas où la Chambre de première instance a certifié l'appel après avoir vérifié que la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.

12. La Chambre rappelle le raisonnement tenu par la Chambre de première instance II composée de juges différents de ceux saisis de l'affaire *Le Procureur c. Pauline Nyiramasuhuko et consorts* :

Il convient de souligner que les cas pouvant donner lieu à des appels interlocutoires sur le fondement de l'article 73 (B) doivent être vraiment exceptionnels.

⁴ *Le Procureur c. Karemera et consorts*, Décision de la Chambre d'appel relative à l'appel interlocutoire interjeté par le Procureur de la décision rendue le 8 octobre 2003 par la Chambre de première instance III, refusant d'autoriser le dépôt d'un acte d'accusation modifié, rendue le 19 décembre 2003.

by the conditions which must be satisfied before the Trial Chamber may consider granting certification⁵.

13. The Chamber considers that the arguments advanced by the Defence are either similar to those pleaded in “Bizimungu’s Motion to Reconsider the 19 March 2004 Decision on Measures for the Protection of Victims and Witnesses” which led to the Impugned Decision, or that they relate to grounds of appeal which are irrelevant and premature.

14. Therefore, the Chamber does not find that the conditions for certification under Rule 73 (B) have been met and denies the Motion.

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER DENIES the Defence Motion.

Arusha, 25 January 2005.

[Signed] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Prosecution Motion to Vary Its List of Witnesses :
Rule 73 bis (E) of the Rules
11 February 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka De Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Computing of the filing delays, Definition of day in the Rules of Procedure and Evidence, Moment to ask for an extension of delay, Starting point of the delay of Response, Working language of the Defence Counsel, Dilatory arguments – Addition of witness to the list, Withdrawal of witness from the list, Appearance of a witness from another trial, Interests of justice, Judicial economy, Criteria to appreciate the modification of the witnesses list, Lateness in the translation of the testimony, Wrong communication in the Office of the Prosecutor, Unity of the Office of the Prosecutor, Responsibility Office of the Prosecutor, Appreciation power of the Chamber – Motion granted

⁵ *The Prosecutor v. Arsène Shalon Ntahobali and Pauline Nyiramasuhuko*, Case n° ICTR-97-21-T, “Decision on Ntahobali’s and Nyiramasuhuko’s Motion for Certification to Appeal the ‘Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible’”, 18 March 2004, para. 15.

C'est ce qui ressort des conditions à satisfaire pour que la Chambre de première instance puisse envisager d'accorder toute certification⁵.

13. La Chambre considère que les arguments avancés par la Défense sont, soit semblables à ceux exposés dans la «Requête de Bizimungu aux fins de révision de la décision du 19 mars 2004 relative aux mesures de protection des témoins de l'accusation» qui ont abouti à la décision contestée, soit portent sur des motifs d'appel sans intérêt prématurés.

14. En conséquence, la Chambre ne considère pas que les conditions permettant d'interjeter appel en vertu de l'article 73 (B) sont réunies. Elle rejette donc la présente requête.

POUR CES MOTIFS,

LA CHAMBRE DE PREMIERE INSTANCE REJETTE la requête de la Défense.

Arusha, le 25 janvier 2005.

[Signé] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Décision relative à la requête du Procureur formée en application
de l'article 73 bis (E) du Règlement aux fins de modification
de la liste des témoins à charge
11 février 2005 (ICTR-2000-56-T)***

(Original : Anglais)

Chambre de première instance II

Juges : Joseph Asoka De Silva, Président de Chambre; Taghrid Hikmet; Seon Ki Park

Augustin Ndingiyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye et Innocent Sagahutu – Computation des délais de dépôt, Définition de jour dans le Règlement de procédure et de preuve, Moment pour demander une prorogation de délai, Point de départ du délai de réponse, Langue du travail du Conseil de la Défense, Argument dilatoires – Ajout de témoins à la liste, Retrait de témoins de la liste, Comparation d'un témoin d'un autre procès, Intérêt de la justice, Economie judiciaire, Critères d'appréciation pour autoriser la modification de la liste de témoins, Retard dans la traduction des témoignages, Mauvaise communication au sein du Bureau du Procureur, Unité du Bureau du Procureur, Responsabilité du Bureau du Procureur, Pouvoir d'appréciation de la Chambre – Requête acceptée

⁵ *Le Procureur c. Arsène Shalom Ntahobali et Pauline Nyiramasuhuko*, affaire n° ICTR-97-21-T, Décision relative aux requêtes de Ntahobali et de Nyiramasuhuko aux fins de certification d'appel de la décision relative à la Requête urgente de la Défense tendant à voir déclarer irrecevables certaines parties de la déposition des témoins RV et QBZ, rendue le 18 mars 2004, para. 15

International Instrument cited :

Rules of Procedure and Evidence, rules 7 ter (B), 73 (A) and 73 bis (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 (ICTR-99-52; Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73 ter (E), 4 June 2002 (ICTR-99-46); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003 (ICTR-98-41); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II composed of Judge Asoka De Silva, Presiding, Judge Taghrir Hikmet, and Judge Seon Ki Park (the "Chamber"),

BEING SEIZED of :

The «*Requête du Procureur en variation de sa liste de témoins : Article 73 bis (E) du Règlement de procédure et de preuve*» filed on 16 December 2004 («Prosecutor's Motion»);

The «*Requête additionnelle du Procureur en variation de sa liste de témoins : article 73 bis (E) du Règlement de procédure et de preuve*» filed on 28 December 2004 («Prosecutor's Additional Motion»);

HAVING RECEIVED the :

«*Réponse à la Requête du Procureur en variation de sa liste de témoins : Article 73 bis (E) du Règlement de procédure et de preuve*» filed by Counsel for Sagahutu on 5 January 2005 («Sagahutu's Response»);

«*Requête aux fins d'obtention de délais pour répondre à la Requête du Procureur en variation de sa liste de témoins*» filed by counsel for Nzuwonemeye on 5 January 2005 («Nzuwonemeye's Motion»);

«*Réplique du Procureur à la réponse formulée par le Conseil d'Innocent Sagahutu sur la Requête en variation de témoins des 15 et 28 décembre 2004*» filed on 6 January 2005 (the «Prosecutor's Reply»);

«*Reponse aux requêtes du Procureur en variation de sa liste de témoins*» filed by Counsel for Nzuwonemeye on 11 January 2005 («Nzuwonemeye's Response»);

«*Requête afin d'obtenir un délai supplémentaire pour répondre à la requête du Procureur en variation de sa liste de témoins*» filed by Counsel for Bizimungu on 10 January 2005 («Bizimungu's Motion»);

«*Defence Response to the Prosecution Motion Seeking to Amend the Witness List*» filed by Counsel for Ndindiliyimana on 18 January 2005 («Ndindiliyimana's response»);

Instrument international cité :

Règlement de Procédure et de preuve, art. 7 ter (B), 73 (A) et 73 bis (E)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ferdinand Nahimana, Décision relative à la requête orale du Procureur en modification de la liste de témoins choisis, 26 juin 2001 (ICTR-99-52); Chambre de première instance, Le Procureur c. André Ntagerura et consorts, Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73 ter (E), 4 juin 2002 (ICTR-96-46); Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 juin 2003 (ICTR-98-41); Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 mai 2004 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIEGANT en la Chambre de première instance II, composée des juges Asoka De Silva, Président de Chambre, Taghrid Hikmet et Seon Ki Park (la «Chambre»),

ÉTANT SAISI des requêtes suivantes :

La Requête du Procureur en variation de sa liste de témoins : article 73 bis (E) du Règlement de procédure et de preuve, déposée le 16 décembre 2004 (la «requête du Procureur»),

La Requête additionnelle du Procureur en variation de sa liste de témoins : article 73 bis (E) du Règlement de procédure et de preuve, déposée le 28 décembre 2004 (la «requête additionnelle du Procureur»),

AYANT REÇU les écritures suivantes :

La Réponse à la requête du Procureur en variation de sa liste de témoins : article 73 bis (E) du Règlement de procédure et de preuve, déposée le 5 janvier 2005 par le conseil de Sagahutu (la «réponse de Sagahutu»),

La Requête aux fins d'obtention de délais pour répondre à la requête du Procureur en variation de sa liste de témoins : article 73 bis (E) du RPP, déposée le 5 janvier 2005 par le conseil de Nzuwonemeye (la «requête de Nzuwonemeye»),

La Réplique du Procureur à la réponse formulée par le conseil d'Innocent Sagahutu sur la requête en variation de témoins des 15 et 28 décembre 2004, déposée le 6 janvier 2005 (la «réplique du Procureur»),

La Réponse aux requêtes du Procureur en variation de sa liste de témoins – Article 73 bis (E) du Règlement de procédure et de preuve, déposée le 11 janvier 2005 par le conseil de Nzuwonemeye (la «réponse de Nzuwonemeye»),

La Requête afin d'obtenir un délai supplémentaire pour répondre à la requête du Procureur en variation de sa liste de témoins, déposée le 10 janvier 2005 par le conseil de Bizimungu (la «requête de Bizimungu»),

La réponse intitulée «*Defence Response to the Prosecution Motion Seeking to Amend the Witness List – Article 73 bis (E) of The Rules of Procedure and Evidence*», déposée le 18 janvier 2005 par le conseil de Ndindiliyimana (la «réponse de Ndindiliyimana»),

the «*Réplique du Procureur à la réponse formulée par le Conseil d'Innocent Sagahutu sur la Requête en variation de Témoins des 15 et 28 décembre 2004*» filed on 26 January 2005 (the «Prosecutor's Reply»);

«*Réplique du Procureur aux observations du Conseil d'Augustin Ndindiliyimana déposées le 27 janvier 2005 (cf. Requête en variation de sa liste des témoins, déposée par le Procureur le 15 décembre 2004)* filed by the Prosecution on 31 January 2005 («Prosecution rejoinder»)

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 *bis* (E) of the Rules;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

Preliminary Matter :

ON THE TIME LIMIT FOR THE DEFENCE TO FILE ITS RESPONSE

1. Pursuant to Rule 73 (E), a responding party shall file its response within five days from the date on which Counsel received the Motion.

2. Pursuant to Rule 7 *ter* (B), where a time limit is expressed in days, Saturdays, Sundays and public holidays shall be counted as days, but should the time limit expire on such a day, it shall be automatically extended to the subsequent working day.

3. The Defence for Sagahutu submits that the time limit for filing its Response expired on 3 January 2005. However, its response was filed on 5 January 2005.

4. The Defence for Nzuwonemeye filed on 5 January 2005 a Motion for Extension of Time Limit within which to file its Response. The Defence submits that it received the Prosecutor's Additional Motion on 29 December 2004. According to this time frame, the time limit for filing a response expired on 3 January 2005. However, the Defence only filed a response on 11 January 2005. The Chamber's holds, in accordance with generally accepted practice, that if the Defence wishes to apply for extension of time, it ought to have done so within the time limit set for filing the response. Having failed to do so, and having filed the response out of time, neither the motion for extension of time nor the Response filed by Nzuwonemeye can be considered by the Chamber.

5. The Defence for Bizimungu filed a motion for extension of time on 10 January 2005. It argues that Lead Counsel did not know about the Prosecutor's motions, filed on 16 December and 28 December, until 4 January. It is the Chamber's view that since the office of Lead Counsel was open from 3 January, it had an obligation to respond to the motion from that day. Furthermore, it is the responsibility of Counsel to make sure that they have made arrangements to receive service of documents in their absence. The Chamber concludes that Bizimungu's application for extension of time was filed out of time and cannot be considered by the Chamber.

6. The Defence for Ndindiliyimana filed a response on 18 January 2005 in which it argues that it did not receive the Prosecutor's Motion until 11 January 2005. It fur-

La Réplique du Procureur à la réponse formulée par le conseil d'Innocent Sagahutu sur la requête en variation de témoins des 15 et 28 décembre 2004, déposée le 26 janvier 2005 (la «réplique du Procureur»),

La Réplique du Procureur aux observations du conseil d'Augustin Ndindiliyimana déposées le 27 janvier 2005 (*cf.* requête en variation de sa liste des témoins, déposée par le Procureur le 15 décembre 2004), déposée le 31 janvier 2005 (la «duplique du Procureur»).

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), notamment en son article 73 *bis* (E),

STATUANT sur la seule base des mémoires déposés par les parties, en application de l'article 73 (A) du Règlement,

Question préliminaire

DU DÉLAI DE RÉPONSE IMPARTI À LA DÉFENSE

1. Aux termes de l'article 73 (E) du Règlement, la partie défenderesse dépose sa réponse au plus tard cinq jours après la date à laquelle elle a reçu la requête.

2. Aux termes de l'article 7 *ter* (B) du Règlement, les délais de dépôt exprimés en jours prennent en compte les samedis, dimanches et jours fériés. Toutefois, lorsqu'un tel délai expire un samedi, un dimanche ou un jour férié, il est automatiquement prorogé jusqu'au premier jour ouvrable suivant cette date.

3. La Défense de Sagahutu fait valoir qu'elle avait jusqu'au 3 janvier 2005 pour répondre à la requête du Procureur, or sa réponse a été déposée le 5 janvier 2005.

4. La Défense de Nzuwonemeye a déposé, le 5 janvier 2005, une requête en prorogation du délai prescrit pour répondre à la requête du Procureur. Elle dit avoir reçu la requête additionnelle du Procureur le 29 décembre 2004. Dans ce cas, le délai de réponse dont elle disposait expirait le 3 janvier 2005. Or elle a déposé sa réponse le 11 janvier 2005. Conformément à la pratique généralement admise, la Chambre estime que si la Défense souhaitait bénéficier d'un laps de temps plus grand pour répondre à la requête du Procureur, elle aurait dû en faire la demande avant l'expiration du délai de réponse prévu. Comme elle ne l'a pas fait et qu'elle a déposé sa réponse au-delà de la date limite, ni la requête en prorogation ni la réponse de Ndindiliyimana ne sauraient être examinées par la Chambre.

5. Dans la requête en prorogation de délai qu'elle a déposée le 10 janvier 2005, la Défense de Bizimungu fait valoir que le conseil principal n'a été informé des requêtes du Procureur, déposées les 16 et 28 décembre, que le 4 janvier. De l'avis de la Chambre, comme le cabinet du conseil principal était ouvert dès le 3 janvier, celui-ci était tenu de répondre à la requête à partir de cette date. Sans compter qu'il appartient aux conseils de prendre des dispositions pour que les actes de procédure soient reçus en leur absence. La Chambre conclut que la demande de prorogation de Bizimungu a été déposée après expiration du délai prescrit et qu'elle ne saurait dès lors examiner.

6. Le 18 janvier 2005, la Défense de Ndindiliyimana a déposé une réponse dans laquelle elle affirme n'avoir pas reçu la requête du Procureur avant le 11 janvier 2005.

ther argues that it only received the Prosecutor's Motion in French when the working language of Lead Counsel for the Defence is English. For these reasons, the Defence for Ndindiliyimana argues that the time limit to file a response does not begin to run until an English translation of the Motion is served on the Defence.

7. The Chamber notes the Defence argument, but is satisfied that Lead Counsel for Ndindiliyimana is also conversant with the French language. The Chamber further notes that on 18 January 2005, it was seized of a Motion entitled "*Requête confidentielle et en extrême urgence d'Augustin Ndindiliyimana aux fins de prendre acte que le témoin YAOC est un témoin potentiel de la Défense et d'empêcher au Procureur tout contact ultérieur avec lui*", a 6-page document which was entirely written in French and signed by Lead Counsel. This confirms that Lead Counsel is sufficiently conversant with the French Language to enable him to discharge the duties of Defence Counsel including responding to Prosecution motions. The Chamber expresses its disapproval of conduct whereby Counsel choose to discharge their functions in one language when it suits them, and on other occasions purport to insist on the other language of the Tribunal as his "working language". It is the Chamber's view that the argument of Counsel for Ndindiliyimana is a dilatory tactic and warns Counsel to desist from such behaviour in future. In addition, the Chamber wishes to note that by his own admission, Lead Counsel for Ndindiliyimana received the Prosecution Motion on January 11. Defence was therefore obliged to file its response not later than 17 January 2005. Having failed to do so, the response was filed out of time and the Chamber will not consider it.

8. For these reasons, the Trial Chamber concludes that the responses filed by Counsel for Ndindiliyimana, Sagahutu and Nzuwonomeye, and the Motion for Extension of time filed by Counsel for Bizimungu were all filed out of time. The Chamber will therefore not consider them, nor will the Chamber consider the Prosecutor's reply to the Defence responses.

Submissions of the Parties

MOTIONS BY THE PROSECUTION

9. The Prosecution seeks leave from the Chamber to add two new witnesses, Witnesses XXQ and ATZ, to the list that was filed with its Pre-Trial Brief on 17 June 2004.

10. The Prosecution indicates that it does not wish to call seven witnesses listed in the 17 June 2004 list : i.e. Witnesses GFB, GFH, BW, GFE, GFK, GHI and GFW.

11. The Prosecution quotes Rule 73 *bis* (E) in support of its Motion.

12. The Prosecution adds that the statement of Witness ATZ whom the Prosecution had not been able to find, was only taken on 9 September 2004 and disclosed to the Defence on 6 October 2004 after translation. The Prosecution indicates that Witness XXQ only recently accepted to cooperate with its Office and was the last witness to be called for the Prosecution in the *Military I* trial.

Elle soulève également le fait qu'elle n'a reçu cette requête qu'en français alors que la langue de travail du conseil principal est l'anglais. Sur cette base, elle fait valoir que le délai de réponse auquel elle est tenue ne doit commencer à courir qu'une fois reçue la version anglaise de la requête.

7. Ayant pris note des arguments de la Défense, la Chambre est toutefois convaincue que le conseil de Ndindiliyimana connaît la langue française. Elle note à cet égard le dépôt en date du 18 janvier 2005 d'une *Requête confidentielle et en extrême urgence d'Augustin Ndindiliyimana aux fins de prendre acte que le témoin YAOC est un témoin potentiel de la Défense et d'empêcher au Procureur tout contact ultérieur avec lui*, document de six pages entièrement rédigé en français et portant la signature du conseil principal. Ce fait confirme que le conseil connaît suffisamment la langue française pour l'utiliser dans l'exercice de sa fonction de défenseur et notamment pour répondre aux requêtes du Procureur. La Chambre désapprouve le parti des conseils qui, selon ce qui leur convient, tantôt choisissent d'agir dans l'une des deux langues du Tribunal, tantôt ne veulent plus utiliser que l'autre parce qu'il s'agit de leur «langue de travail». La Chambre estime que les arguments avancés en l'occurrence par le conseil de Ndindiliyimana sont de nature dilatoire et engage celui-ci à ne plus recourir à de tels procédés. En outre, la Chambre relève que de son propre aveu, le conseil de Ndindiliyimana a reçu la requête du Procureur le 11 janvier et que, cela étant, la réponse de la Défense aurait dû être déposée au plus tard le 17 janvier 2005. Ladite réponse a donc été déposée après expiration du délai prescrit et la Chambre ne saurait en être saisie.

8. Pour ces raisons, la Chambre conclut que les réponses des conseils de Ndindiliyimana, Sagahutu et Nzuwonemeye, de même que la requête en prorogation formée par le conseil de Bizimungu, ont toutes été déposées hors délai. La Chambre n'examinera donc pas ces écritures, de même qu'elle ne considérera pas la réplique du Procureur.

Conclusions des parties

REQUÊTES DU PROCUREUR

9. Le Procureur sollicite de la Chambre l'autorisation d'ajouter deux témoins, les témoins XXQ et ATZ, à ceux qui figurent dans la liste accompagnant le mémoire préalable au procès qu'il a déposé le 17 juin 2004.

10. Le Procureur indique par ailleurs qu'il n'entend plus citer sept des témoins mentionnés dans ladite liste du 17 juin 2004, à savoir les témoins GFB, GFH, BW, GFE, GFK, GHI et GFW.

11. Le Procureur fonde sa requête sur l'article 73 *bis* (E) du Règlement.

12. Le Procureur ajoute que la déclaration du témoin ATZ, témoin qu'il n'avait pu localiser auparavant, n'a été recueillie que le 9 septembre 2004 et communiquée à la Défense, après traduction, le 6 octobre 2004. Il précise également que la coopération du témoin XXQ, dernier témoin à charge à comparaître dans le procès dit *Militaires I*, ne lui avait été acquise que tout récemment.

13. The Prosecution argues that it is in the interest of justice to allow those two witnesses to be heard in view of the specificity and importance of their testimonies against Accused Augustin Bizimungu and Augustin Nindiliyimana : Witness XXQ will testify on paragraphs 22, 23, 24, 25 and 27 of the Indictment, Witness ATZ will testify on paragraphs 22, 51, 53, 73, 74, 75, 93 and 99 of the Indictment and both testimonies will shed light on the specific intent required for the crime of Genocide.

14. The Prosecution submits that it is in the interest of judicial economy to only call two witnesses while dropping seven others and that it will not prejudice the rights of the Accused as those witnesses will be called at the close of the Prosecution Case. The Prosecution indicates that the statement of Witness ATZ was disclosed to the Defence on 6 October 2004 while the transcripts of the testimony of Witness XXQ of October 2004 are attached to the Motion.

15. In its Additional Motion and for the same reasons as developed in the earlier Motion, the Prosecution seeks leave to add one more witness, Prosecution Witness AWC, to the list that was filed with its Pre-Trial Brief on 17 June 2004.

16. The Prosecution submits that the statement of this Witness was made in May 2004, but was only received by the Office of the Prosecution in December 2004. At the time of the Additional Motion, this statement had not yet been translated. The Prosecution submits that this delay was caused by the departure from the Office of the Prosecution of the two investigators who interviewed Witness AWC.

17. The Prosecution submits that the translated copy of this statement will be disclosed to the Defence as soon as possible.

18. The Prosecution submits that witness AWC will testify on Paragraphs 22, 103, 104, 105, 106, 107 and 118 of the Indictment.

Having deliberated

ON LEAVE TO AMEND THE PROSECUTION LIST OF WITNESSES

19. The Chamber recalls Rule 73 *bis* (E) of the Rules :

After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

20. The Chamber recalls that this Tribunal has held that the Prosecutor should be allowed to reinstate its list of witnesses, after consideration of several factors¹ : the

¹ *The Prosecutor v. Théoneste Bagosora et al*, Case No. ICTR-98-41-T, "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)", 21 May 2004, para. 8-12.

13. Le Procureur fait valoir que l'intérêt de la justice commande que ces deux témoins comparaissent, compte tenu de la spécificité et de l'importance de leurs témoignages contre les accusés Augustin Bizimungu et Augustin Nindiliyimana. À cet égard, la déposition du témoin XXQ portera sur les paragraphes 22, 23, 24, 25 et 27 de l'acte d'accusation, celle du témoin ATZ sur les paragraphes 22, 51, 53, 73, 74, 75, 93 et 99, et leurs deux témoignages permettront de mettre en lumière l'intention spécifique constitutive du crime de génocide.

14. Selon le Procureur, le fait de ne citer que deux témoins tout en renonçant à en appeler sept autres va dans le sens de l'économie judiciaire. Il ajoute qu'il ne sera pas porté atteinte aux droits des accusés dès lors que les nouveaux témoins ne seront entendus qu'à la fin de la présentation des moyens à charge. Le Procureur signale que la déclaration du témoin ATZ a été communiquée à la Défense le 6 octobre 2004, et qu'il joint à sa requête le compte rendu de la déposition faite par le témoin XXQ en octobre 2004.

15. Dans sa requête additionnelle, invoquant les mêmes raisons que dans la première, le Procureur demande l'autorisation d'ajouter un troisième témoin, le témoin AWC, à la liste qu'il a déposée, le 17 juin 2004, à l'appui de son mémoire préalable au procès.

16. Le Procureur fait valoir que la déclaration de ce témoin a été recueillie en mai 2004, mais qu'elle n'est parvenue au Bureau de Procureur qu'en décembre 2004 et qu'elle n'a pas encore été traduite au moment où est déposée la requête additionnelle. Il attribue ce retard au fait que les deux enquêteurs qui avaient recueilli les propos du témoin AWC ont quitté le Bureau du Procureur.

17. Le Procureur indique que la version traduite de cette déclaration sera communiquée à la Défense dès que possible.

18. Selon le Procureur, la déposition du témoin AWC portera sur les paragraphes 22, 103, 104, 105, 106, 107 et 118 de l'acte d'accusation.

Après en avoir délibéré

DE L'AUTORISATION DE MODIFIER LA LISTE DES TÉMOINS À CHARGE

19. La Chambre rappelle les termes de l'article 73 *bis* (E) du Règlement :

«Après l'ouverture du procès, le Procureur peut, s'il estime que l'intérêt de la justice le commande, saisir la Chambre de première instance d'une requête aux fins d'être autorisé à revenir à sa liste de témoins initiale ou à revoir la composition de sa liste».

20. La Chambre rappelle également les divers facteurs qu'une Chambre doit prendre en considération, selon la jurisprudence du Tribunal de céans, pour autoriser le Procureur à revenir à sa liste de témoins¹ : l'importance du témoignage proposé, la com-

¹ *Le Procureur c. Bagosora et consorts*, affaire n° ICTR-98-41-T, *Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)*, 21 mai 2004, paras. 8 à 12.

materiality of the testimony, the complexity of the case, the prejudice to the Defence (including the element of surprise), on-going investigations, replacements and corroborations of evidence². In addition, the Trial Chamber in the case of *The Prosecutor v. Bagosora et al.* expanded on these factors, and considered that Rule 73 bis (E) requires a “close analysis” of each witness, including the : sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; and the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witnesses³.

21. The Trial Chamber concurs with the reasoning of the Trial Chamber in the case of *The Prosecutor v. André Ntagerura et al.*, which held that the Tribunal should adopt a flexible approach in the exercise of its discretion relating to the matter of adding witnesses to a witness list⁴.

22. The Chamber should also consider factors such as the reasons for adding witnesses, date on which the Prosecution declared its intention to call the proposed witnesses, the stage of the trial proceedings, whether the late discovery of the witnesses arose from fresh investigations, and whether the Defence will have adequate time to make an effective cross-examination⁵.

23. The Chamber considers that the fact that the request was made at this stage of the proceedings when only four prosecution witnesses have been called out of a list of over one hundred, and that the Prosecution has indicated that the additional witnesses will be called at the end of the Prosecution case, favor allowing the Prosecution to vary its list of witnesses. The Chamber notes also that the proposed variation will promote judicial economy by reducing the total number of witnesses scheduled for trial.

24. Although the Chamber will grant the Prosecution motion to add the three witnesses, a word of caution remains in order here. The Chamber looks askance at the reasons given by the Prosecution for the delay regarding witness AWC. The Chamber refuses to accept as excusable a state of affairs in which the Prosecution Section of the Office of the Prosecutor (OTP) and the Investigation Section of the same office are so disconnected as to permit a seven-month delay purportedly between the taking

² *Id.* at para. 8 (quoting *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses”, 26 June 2001, para. 19-20).

³ *Id.* at para. 9 (quoting *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, “Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E)”, 26 June 2003, para. 14).

⁴ *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, “Decision on Defence for Ntagerura’s Motion to Amend Its Witness List Pursuant to Rule 73 ter (E)”, 4 June 2002, para. 10.

⁵ *Bagosora et al.*, Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004, paras. 9-10; *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E) (TC), 26 June 2003, paras. 14-22.

plexité de l'affaire, le préjudice causé à la Défense (notamment l'effet de surprise), les enquêtes en cours, le remplacement des témoins et la corroboration de leurs dires². Ces facteurs ont été développés par la Chambre de première instance saisie de l'affaire *Le Procureur c. Bagosora et consorts*, laquelle a estimé que l'article 73 bis (E) requerrait une «analyse attentive» du cas de chaque témoin : «à l'effet notamment d'apprécier la mesure et les délais dans lesquels les informations relatives aux témoins ont été communiquées à la Défense, la valeur probante des dépositions proposées par rapport aux témoins existants et aux allégations portées dans l'acte d'accusation, la capacité effective de la Défense de contre-interroger les témoins proposés compte tenu de facteurs tels que les éléments nouveaux contenus dans leurs dépositions, et les raisons avancées par le Procureur pour justifier l'ajout de ces témoins»³ [Traduction].

21. La Chambre estime, à l'instar de la Chambre de première instance en l'affaire *Le Procureur c. Ntagerura et consorts*, qu'elle doit faire montre de flexibilité lorsqu'il est fait appel à son pouvoir d'appréciation pour autoriser une partie à ajouter des témoins à ceux qui figurent dans sa liste⁴.

22. La Chambre doit également considérer, entre autres facteurs, les raisons pour lesquelles les nouveaux témoins sont proposés, la date à laquelle le Procureur a fait connaître son intention de les citer et le stade du procès auquel il en demande l'autorisation; elle doit encore déterminer si la découverte tardive des intéressés résulte de nouvelles enquêtes et si la Défense disposera d'un temps de préparation suffisant pour soumettre ceux-ci à un contre-interrogatoire effectif⁵.

23. De l'avis de la Chambre, le fait que le Procureur forme sa requête à un stade de la procédure où seuls quatre témoins à charge, sur plus de cent prévus, ont été entendus et qu'il indique son intention de n'appeler les témoins supplémentaires qu'à la fin de la présentation de ses moyens sont des éléments qui militent en faveur de la modification de la liste des témoins à charge. La Chambre constate également que la modification proposée favorisera l'économie judiciaire par la réduction du nombre total des témoins qui devront comparaître devant elle.

24. Ayant décidé d'accueillir la requête du Procureur et d'autoriser l'adjonction des trois témoins proposés, la Chambre estime toutefois qu'un avertissement s'impose. Elle ne saurait en effet cautionner les raisons fournies par le Procureur pour justifier le retard avec lequel il a annoncé le témoin AWC, et se refuse à tenir pour excusable le fait que l'absence de communication entre la Division des poursuites du Bureau du Procureur et la Division des enquêtes de ce même Bureau ait été telle qu'un retard

² *Ibid.*, para. 8 (citant *Le Procureur c. Nahimana et consorts*, affaire n° ICTR-99-52-T, Décision relative à la requête orale du Procureur en modification de la liste des témoins choisis, 26 juin 2001, paras. 19 et 20).

³ *Ibid.*, para. 9 (citant *Le Procureur c. Bagosora et consorts*, affaire n° ICTR-98-41-T, *Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E)*, 26 juin 2003, para. 14).

⁴ *Le Procureur c. André Ntagerura et consorts*, affaire n° ICTR-99-46-T, *Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73 ter (E)*, 4 juin 2002, para. 10.

⁵ *Le Procureur c. Bagosora et consorts*, affaire n° ICTR-98-41-T, *Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)*, 21 mai 2004, paras. 9 et 10; *Le Procureur c. Bagosora et consorts*, affaire n° ICTR-98-41-T, Chambre de première instance, *Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E)*, 26 juin 2003, paras. 14 à 22.

of a statement and its being brought to the attention of Prosecuting Counsel. The OTP is one office and the Chamber refuses to condone apportionment of blames between or among the different sections of the OTP. There is a collective responsibility for the OTP. Nor does the Chamber accept as excusable the cryptic reference to the departure of two investigators as explaining the failing here. The lapse simply should not have been allowed to occur.

NOTING THE FOREGOING REASONS,

THE TRIAL CHAMBER GRANTS the Motion and allows the Prosecution to vary its list of witnesses by adding witnesses XXQ, ATZ and AWC and deleting witnesses GFB, GFH, BW, GFE, GFK, GHI and GFW.

Arusha, 11 February 2005.

[Signed] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

de sept mois ait pu intervenir, comme le fait valoir le Procureur, entre le moment où la déclaration d'un témoin a été recueillie et celui où elle a été portée à la connaissance de l'avocat général. Le Bureau du Procureur n'est qu'un seul et même organe. La Chambre ne saurait accepter qu'une composante de cet organe rejette sur une autre la faute d'un tel fait. La responsabilité du Bureau est collective. De même, la Chambre ne saurait accepter comme excuse de ce retard l'allusion laconique qui n'aurait pas dû survenir.

PAR CES MOTIFS,

FAIT DROIT à la requête et autorise le Procureur à modifier la liste des témoins à charge à l'effet d'y ajouter les témoins XXQ, ATZ et AWC et d'en supprimer les témoins GFB, GFH, BW, GFE, GFK, GHI et GFW.

Arusha, le 11 février 2005.

[Signé] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Defence Request to Confirm That Witness YAOC
is a Potential Witness for the Defence
and to Prohibit the Prosecution from Contacting Her
18 March 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana – Interest of judicial economy, Fairness and equality between the Parties, Obligation of the parties to use respectful language in their submissions – Protection of the witnesses, New witness on the witness list – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 73 ter

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Prosecution Motion to Vary its List of Witnesses, 11 February 2005 (ICTR-2000-56)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II composed of Judge Asoka De Silva, Presiding, Judge Taghrid Hikmet, and Judge Seon Ki Park (the “Chamber”),

BEING SEIZED of the «*Requête confidentielle et en extrême urgence d’Augustin Ndindiliyimana aux fins de prendre acte que le témoin YAOC est un témoin potentiel de la Défense et d’empêcher au Procureur tout contact ultérieur avec lui*» filed on 18 January 2005 (the «Motion»)¹;

CONSIDERING the

- i) «*Observations du Procureur sur la réponse de la Défense d’Augustin Ndindiliyimana à la requête du 15 Décembre 2004 et sur la requête présentée par cette Défense aux fins de prendre acte que le témoin YAOC figure sur sa liste de témoins* » filed on 20 January 2005²;

¹ Unofficial translation : “Confidential and Extremely Urgent Defence Request to Confirm that Witness YAOC is a Potential Witness for the Defence and to Prohibit the Prosecution from Contacting Her”.

² Unofficial translation : “Observations of the Prosecution on the Response of the Defence to the Motion of 15 December 2004 and on the Motion Presented by the Defence to Confirm that Witness YAOC is on its List of Witnesses”.

- ii) «*Réplique d'Augustin Ndindiliyimana à la réponse de la défense d'Augustin Ndindiliyimana à la requête présentée par cette défense aux fins de prendre acte que le témoin YAOC figure sur sa liste de témoins*» filed on 27 January 2005³;
- iii) «*Réplique du procureur aux observations du conseil d'Augustin Ndindiliyimana déposées le 27 janvier 2005*»⁴ filed on 31 January 2005;
- iv) «*Réaction d'Augustin Ndindiliyimana au document intitulé "Réplique du Procureur aux observations du conseil d'Augustin Ndindiliyimana déposées le 27 janvier 2005"*»⁵ filed on 2 February 2005.

NOTING the Decision on Prosecution Motion to Vary its List of Witnesses of 11 February 2005 in the instant case⁶,

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"),

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

Preliminary Matter

ON THE NUMBER OF SUBMISSIONS OF THE PARTIES

1. The Chamber acknowledges receipt of the «*Réplique du procureur aux observations du conseil d'Augustin Ndindiliyimana déposées le 27 janvier 2005*» filed on 31 January, 2005, as well as the «*Réaction d'Augustin Ndindiliyimana au document intitulé "Réplique du procureur aux observations du conseil d'Augustin Ndindiliyimana déposées le 27 janvier 2005"*» filed on 2 February 2005.

2. The Chamber considers that it is not in the interest of judicial economy when Parties file a high number of consecutive submissions. The Chamber considers that the Parties should refrain from such practice in future and be mindful of filing clear and concise pleadings and limit themselves to the filing of motion, response, reply and in exceptional situations, a rejoinder. The Chamber decides to limit its considerations of the pleadings to the first three submissions filed and will not consider the «*Réplique du procureur aux observations du conseil d'Augustin Ndindiliyimana déposées le 27 janvier 2005*» or the «*Réaction d'Augustin Ndindiliyimana au document intitulé "Réplique du procureur aux observations du conseil d'Augustin Ndindiliyimana déposées le 27 janvier 2005"*».

³ Unofficial translation : "Defence Reply to the Prosecution's Observations on the Motion Presented by the Defence to Confirm that Witness YAOC is on its List of Witnesses".

⁴ Unofficial translation : "Prosecution Reply to the Observations of Defence Counsel filed on 27 January 2005".

⁵ Unofficial translation : "Defence Reply to Prosecution Reply to the Observations of Defence Counsel filed on 27 January 2005".

⁶ *The Prosecutor v. Augustin Ndindiliyimana et al*, Case n° ICTR-2000-56-T, "Decision on Prosecution Motion to Vary its List of Witnesses," 11 February 2005.

Submissions of the Parties

THE DEFENCE

1. The Defence states that in 2002, Witness YAOC was entered on its list of potential Defence witnesses.

2. The Defence submits that during proceedings on 29 September 2004 when Prosecution Witness GFS was testifying, the fact that Witness YAOC would come to testify on behalf of the Defence was made known to the Chamber. The Defence adds that the Chamber accepted that the witness could be called by the Defence and thereby authorized the Defence to call Witness YAOC.

3. The Defence argues that it would be contrary to the Decisions of this Chamber if the Prosecution took advantage of the fact that it calls witnesses first and used the identity of a potential Defence witness disclosed during proceedings to transform that witness into a Prosecution witness through fraudulent means.

4. The Defence further argues that such behaviour by the Prosecution would be both unethical and unfair.

5. The Defence refers to the Tribunal's Decision of 19 March 2004 concerning the Prosecution's request to modify and extend protective measures for victims and witnesses. In that Decision, the Defence was ordered to obtain the Chamber's written permission and to notify the Prosecution prior to contacting a witness for the Prosecution whose identity is known by the Defence.

6. The Defence argues that in accordance with the principles of fairness and equality between the Parties, the Decision of 19 March 2004 should apply in the present case to prohibit the Prosecution from contacting Witness YAOC, unless it obtains the permission of this Chamber and Defence counsel is present.

7. The Defence prays the Chamber to grant the Motion, confirm that Witness YAOC is a Defence witness, forbid the Prosecution from contacting the Witness without leave from the Chamber and without Defence counsel being present, order some protective measures for the Witness pending a Motion for protective measures for Defence witnesses and warn the Prosecution against fraudulent practice.

PROSECUTION RESPONSE

8. The Prosecution asserts that it met with Witness ATZ (Witness YAOC for the Defence) on 7-9 September 2004 in Yaoundé and therefore rejects the Defence's claim that its intention to call the witness was a reaction to remarks made during the 29 September 2004 proceedings. The Prosecution refers to Annex 1 of its 15 December 2004 Motion.

9. The Prosecution states that the Defence has not yet had to file its list of witnesses pursuant to Rule 73 *ter* and that the Defence has only filed a letter from the Witness whereas the Prosecution has a statement from that witness indicating a willingness to testify against the Accused.

10. The Prosecution notes that, while its witnesses are protected by an Order of the Trial Chamber dated 19 March 2004 and amended 3 November 2004, the Defence does not, at this time, have the benefit of a similar Order.

THE DEFENCE REPLY

11. The Defence questions the truthfulness and good faith of the Prosecution with respect to the date on which the interview and the statement were allegedly made by Witness YAOC. The Defence concludes that the 14 January 2004 statement should be excluded by the Chamber as it has been fabricated by the Prosecution.

12. The Defence asserts that the Prosecution's reliance on the Trial Chamber's Orders of 12 March 2004 and 3 November 2004 on the protection of Prosecution witnesses is groundless, as Witness YAOC has not been declared a Prosecution witness by the Trial Chamber and is therefore not subject to the Orders.

Having deliberated

13. The Chamber recalls its "Decision on Prosecution Motion to Vary its List of Witnesses" of 11 February 2005 in which the Prosecution was granted leave to amend its witness list to include, *inter alia*, Witness ATZ whom the Defence refers to as Witness YAOC in its submissions.

14. The Chamber recalls its Decision of 19 March 2004, as amended by its Decision of 3 November 2004, ordering protective measures for Prosecution witnesses.

15. The Chamber considers that, as Witness ATZ (YAOC for the Defence) has been added to the Prosecution's list of witnesses, the Defence must respect the terms of the Chamber's Orders concerning protective measures for Prosecution witnesses as they were laid out in this Trial Chamber's decisions of 19 March 2004 and 3 November 2004. Therefore, the Chamber dismisses the Defence Motion for being moot.

16. Finally, the Chamber reminds the Parties of their obligation to use respectful language in their submissions.

FOR THE FOREGOING REASONS,

THE TRIBUNAL DISMISSES the Defence Motion in all respects.

Arusha, 18 March 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Bizimungu's Urgent Motion
Pursuant to Rule 73 to Deny the Prosecutor's Objection
Raised During the 3 March 2005 Hearing
1st April 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Right of the accused to cross-examination of the witnesses, Cross-examination on the contents of discussions in pre-testimony meetings, Content of the Right of the accused to cross-examination of the witnesses, Interest of justice – Privilege for all communications between lawyer and client – Content of the disclosure obligation of the Prosecutor, Oral communications – Motion granted

International and National Instruments cited :

Rules of Procedure and Evidence, rules 70, 70 (A), 73, 90, 90 (G) (i), 90 (G) (iii), 97 and 97 (A); Statute, art. 19 and 20 (4) (a)

Law Society's Rules of Professional Conduct and the Advocates' Society Principles of Civility for Advocates in Canada, Section 62

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Bizimungu's Urgent Motion Pursuant Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing filed on 3 March 2005 (the "Motion")¹;

HAVING RECEIVED AND CONSIDERED the

- (i) Prosecutor's Response to Bizimungu's Urgent Motion Pursuant Rule 73 to Deny the Prosecutor's Objection Raised During the Audience on 3 March 2005 filed on 7 March 2005 (the "Response")²;

¹ The Motion was originally filed in French : «*Requête urgente demandant à la Chambre de rejeter l'objection soulevée par le Procureur lors de l'audience du 3 mars 2005*».

² The Reply was originally filed in French : «*Réponse du Procureur à la requête présentée par le Conseil d'Augustin Bizimungu, sollicitant le rejet de l'objection soulevée par l'accusation lors de l'audience de 3 mars 2005*».

- (ii) Bizimungu's Reply to the Prosecutor's Response filed on 10 March 2005 (the "Reply")³;
- (iii) Ndindiliyimana's Motion in Support of General Bizimungu's Urgent Motion Requesting the Chamber to Deny Prosecutor's Objection Raised on March 3rd 2005, filed on 14 March 2005 (Ndindiliyimana's "Motion in Support")⁴;
- (iv) Prosecutor's Reply to Motion in Support of General Bizimungu's Urgent Motion Requesting the Chamber Deny (*sic*) Prosecutor's Objection Raised on March 3rd, 2005 filed on 16 March 2005 (the Prosecutor's "Rejoinder")⁵.

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rules 70 and 97 of the Rules;

HEREBY DECIDES the Motion on the basis of written briefs filed by the Parties pursuant to Rule 73 of the Rules.

Submissions of the Parties

THE DEFENCE

1. Pursuant to Rule 73, the Defence seeks that the Motion be heard orally, that the Prosecutor's objection raised on 3 March 2005 be denied and that Counsel be authorized to cross-examine Prosecution witnesses on the content of their interview by the Prosecution.

2. The Defence for Bizimungu recalls that during the 3 March 2005 hearing, the Prosecution objected to a question raised by the Defence for Bizimungu on the basis that the information it sought to elicit was privileged. The Defence argues that there is no foundation in fact or in law that an interview between the Prosecution and a Witness is confidential.

3. The Defence argues that it has the right to cross-examine the witness on all matters that could affect the witness's credibility, bearing in mind that the right to cross-examination is the cornerstone of a plain and full defence as recognized in Articles 19 and 20 (4) of the Statute and in Rule 90 of the Rules.

4. The Defence argues that the Prosecution's objection pursuant to Rule 97, aims at limiting the Defence's right to cross-examine Witness GFC on the content of the discussions he may have had with the Prosecution with regard to his extra judicial statements.

5. The Defence admits that there exists a privilege for all communications between lawyer and client that are not subject to disclosure, unless the client agrees to disclosure or has voluntarily disclosed the communication. However, the Defence argues that communications between the Prosecution and a witness are not of a confidential

³The Response was originally filed in French : «*Réplique à la Réponse du Procureur à la requête présentée par le Conseil d'Augustin Bizimungu, sollicitant le rejet de l'objection soulevée par le Procureur lors de l'audience du 3 Mars 2005*».

⁴The Motion was originally filed in English.

⁵The Reply was originally filed in English.

nature and that the relation between the two can never be considered as lawyer-client relation. Furthermore, the Defence argues that the witness is by no means a client of the Prosecution.

6. The Defence submits that when the Prosecution calls a witness, it has to be aware that the communication with the witness might be part of the cross-examination by the Defence.

THE PROSECUTION

7. The Prosecution opposes the Motion and submits that in an accusatory penal system, the Parties gather and evaluate the evidence before submitting it to the judges.

8. The Prosecution further submits that the Rules of Procedure and Evidence specify which documents have to be disclosed to the other Party and recalls that Rule 70 (A) excludes some documents from disclosure or notification.

9. The Prosecution therefore argues that documents that should not be disclosed or notified do not have to be discussed.

10. The Prosecution submits that only verifiable facts can be cross-examined and Rule 90 of the Rules should not be used in support of a fishing expedition.

11. Finally, the Prosecution submits that it is up to the Party who seeks the amplification of cross-examination to show that this is in the interest of justice.

THE DEFENCE REPLY

12. The Defence for Bizimungu argues that the Prosecution has changed its argumentation by dropping its initial argument based on Rule 97 (A) raised during the hearing on 3 March 2005.

13. The Defence for Bizimungu argues that for this reason, the Prosecution's response has to be rejected as it no longer represents the initial argumentation which was the basis for the Defence's Motion. The Prosecution is not allowed to bring up new arguments that were not made during the hearing.

14. The Defence therefore asks the Chamber not to consider the Prosecution's new arguments.

15. The Defence submits that Rule 70 of the Rules is a specific exception to the Prosecution's obligation to disclose materials to the Defence.

16. The Defence further submits that as an exception to a general rule, Rule 70 (A) has to be restrictively interpreted.

17. The Defences submits that Rule 70 (A) applies to reports, memoranda, or other internal documents but does not include the communications between the Prosecution and its witnesses.

18. The Defences argues that Rule 70 (A) does not affect the Defence's right to cross-examine a witness about the meetings with the Prosecution and its witnesses.

19. The Defence submits that the credibility of a witness has to be evaluated on the totality of circumstances and therefore it is not only allowed but to wish that one

part of the cross-examination allows the Chamber to evaluate those facts emanating from the witness' memory and those that come from perception or suggestion.

20. The Defence submits that the Prosecution and its assistants do not benefit from a special status in interviewing a witness merely by virtue of being Prosecutor or assistant, and that there is nothing to indicate that the right to full cross-examination should be limited for that reason alone.

21. The Defence argues that in the interest of justice, a doubtful practice by the Prosecution in meeting a witness several times within a brief period of time during the proceedings, should be brought to light for the sake of equity and transparency.

NDINDILIYIMANA'S MOTION IN SUPPORT

22. Defence for Ndindiliyimana bases its motion mainly on the arguments brought forward by Defence for Bizimungu.

23. In addition, Defence for Ndindiliyimana argues that the scope of cross-examination, set out in Rule 90 of the Rules, explicitly includes the testing of a witness' credibility.

24. Defence for Ndindiliyimana further argues that questions posed with respect to preparatory meetings between the Prosecution and witnesses do no constitute any attempt to widen the scope of cross-examination, but rather fall into its traditional ambit, as reflected by practice before the Chambers both at the ICTR and ICTY, and as reflected by the Rules. This includes, for instance, questions designed to elicit the existence of advantages attached to a witness' testimony, or a potential modification of the witness's version of events.

PROSECUTOR'S REJOINDER

25. The Prosecution argues that the Defence's submission that it has been the practice of both the ICTY and the ICTR to allow Defence counsel to cross-examine prosecution witnesses with respect to conversations they have had with Prosecutors is misconceived and totally misleading.

26. The Prosecution submits that cross-examination is governed exclusively by Rule 90 of the Rules.

27. The Prosecution argues that cross-examination of a Prosecution witness on the contents of discussions in pre-testimony meetings with the Prosecutor is allowed only in very exceptional circumstances.

Deliberations

28. The Chamber recalls Rule 70 (A) of the Rules which provides as follows :

Notwithstanding the provisions of Rules 66 and 67, reports, *memoranda*, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

29. The Chamber also recalls Rule 97 of the Rules which provides as follows :

All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless :

(i) The client consents to such disclosure; or

(ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

30. First, the Chamber notes that Rule 70 (A) lists “reports, *memoranda*, or other internal documents” and exempts them from the Prosecutor’s disclosure obligation. It is the Chamber’s view that oral communications between Counsel and a witness in the course of preparing a witness for testimony fall outside the scope of documents protected under Rule 70 (A). Indeed, oral communication can hardly qualify as “documents” within the context of that Rule.

31. The Chamber further concludes that a Prosecution witness is not a client of the Prosecutor, and therefore the privilege provided for under Rule 97, does not apply to the relationship between the Prosecution and its witnesses.

32. The Chamber also recalls Rule 90 (G) (i) of the Rules which provides as follows :

Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness, and where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case.

33. The Chamber notes under Rule 90 (G) (i) the scope of cross-examination is limited to evidence given by the witness in chief, to the witness’s credibility, or matters relevant to the case of the cross-examining party. Rule 90 (G) (iii) gives the Chamber discretion to permit inquiry into additional matters.

34. The Chamber notes that questions posed with respect to preparatory meetings between the Prosecution and witnesses could relate to the witness’s credibility.

35. The Chamber however notes that a presumption exists that Counsel perform their duties in accordance with the ethical principles that govern the legal profession in their respective countries and that apply, *mutatis mutandis*, before the Tribunal. This includes Counsel’s conduct during preparatory meetings with witnesses. Unless a party makes a specific allegation of misconduct on the part of Counsel, in which case the allegation must be substantiated, questions that generally tend to probe into the details of communication between a lawyer and a witness during pre-testimony preparations would, if allowed by the Chamber, render the presumption nugatory.

36. The Chamber also considered the Law Society’s Rules of Professional Conduct and the Advocates’ Society Principles of Civility for Advocates in Canada. Section 62 of the Advocates’ Society Principles of Civility provides as follows :

Judges are entitled to expect Counsel will treat the Court with candour, fairness and courtesy.

37. In the instant case, the Chamber notes that the Defence has not specifically alleged any misconduct on the part of Prosecuting Counsel. In the circumstances, the Chamber concludes that questions relating to pre-testimony meetings between the Prosecutor and witnesses, while permissible, must in the absence of any substantiated allegation of misconduct be limited to the number of such meetings, the dates of the meetings, and their duration.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion in the following terms : the Defence can cross-examine a witness about pre-testimony meetings with the Prosecutor provided that such cross-examination is limited to the number of preparatory meetings, the dates of the meetings and the duration of the meetings.

Arusha, 1 April 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Ndindiliyimana's Request
for Certification of Appeal from the Decision
Dated 24 September 2004 Dismissing Applicant's Request
for Transfer of His Trial to a National Jurisdiction
6 April 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana – Request for certification of appeal, Delay for a request for certification of appeal – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 73 (C)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge
Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

BEING SEISED OF “Ndindiliyimana’s Request for Certification of Appeal from the
Decision of Trial Chamber Dated September 24, 2004 Dismissing Applicant’s Request For
Transfer of his Trial to a National Jurisdiction”, filed on 8 March 2005 (the “Motion”);

NOTING that the Prosecutor has not filed a response to the Motion;

RECALLING the Chamber’s “Decision on Defence Motions for Stay of Proceedings
and for Adjournment of the Trial, Including Reasons in Support of the Chamber’s
Oral Ruling Delivered on Monday 24 September 2004” (the “Impugned Decision”);

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Pro-
cedure and Evidence (the “Rules”) in particular Rules 73 (B) and (C) of the Rules;

HEREBY DECIDES the Motion on the basis of the written brief filed by the
Defence pursuant to Rule 73 (A) of the Rules.

Submissions by the Defence

1. The Defence requests for certification to appeal the Impugned Decision pursuant
to Rule 73 (B). The Defence submits that it has waited to the date of this request for
a copy of the Impugned Decision in French in order for the Accused to be able to
fully consult with counsel.

***Décision relative à la requête de Ndindiliyimana
en certification de l'appel de la décision
datée du 24 septembre 2004 qui rejetait sa requête
demandant le renvoi de son procès devant une juridiction nationale
6 avril 2005 (ICTR-2000-56-T)***

(Original : Anglais)

Chambre de première instance II

Juges : Joseph Asoka De Silva, Président de Chambre; Taghrid Hikmet; Seon Ki Park

*Augustin Ndindiliyimana – Demande en certification d'appel, Délai pour déposer une
demande en certification d'appel – Requête rejetée*

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 (A) et 73 (C)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIÉGEANT en la Chambre de première instance II, composée des juges Asoka de
Silva, Président de Chambre, Taghrid Hikmet et Seon Ki Park (la «Chambre»),

SAISI de la Requête de Ndindiliyimana en certification de l'appel de la Décision
datée du 24 septembre 2004 qui rejetait sa requête demandant le renvoi de son procès
devant une juridiction nationale, déposée le 8 mars 2005 (la «Requête»),

PRENANT NOTE du fait que le Procureur n'a pas déposé de réponse à ladite
requête,

RAPPELANT la décision de la Chambre, intitulée «*Decision on Defence Motions
for Stay of Proceedings and for Adjournment of the Trial, including Reasons in Sup-
port of the Chamber's Oral Ruling Delivered on Monday 24 September 2004*» (la
«décision contestée»),

VU le Statut du Tribunal (le «Statut»), et le Règlement de procédure et de preuve
(le «Règlement»),

STATUE À PRÉSENT au sujet de la requête sur la base du mémoire écrit déposé
par la Défense en application du paragraphe (A) de l'article 73 du Règlement.

Arguments de la défense

1. La Défense sollicite la certification d'appel de la décision contestée en applica-
tion du paragraphe (B) de l'article 73. Elle soutient que jusqu'à la date de rédaction
de la présente requête, elle attendait encore copie de la version française de la déci-
sion contestée, ce qui devrait permettre à l'accusé de consulter son conseil sur toutes
les questions y afférentes.

2. The Defence further submits that despite several requests by Counsel for a copy of this Decision in French, and the request of the Presiding Judge to the Registry that Counsel be provided with a copy in French, it has not been forthcoming.

3. The Defence argues that the Impugned Decision shows a total lack of supporting reasons and amounts to a denial of natural justice. Instead, the Chamber chose to ignore and evade the cogent and compelling evidence placed before it with the result that the principles of natural justice have been violated.

4. The Defence therefore submits that the Chamber's decision significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial.

Deliberations

5. The Chamber notes that the request for certification was filed on 8 March 2005, more than five months after the Impugned Decision was delivered. The Chamber recalls the provision in Rule 73 (C), which in relevant part, states :

“Requests for certification shall be filed within seven days of the filing of the impugned decision”.

6. The Chamber has thoroughly reviewed the records of proceedings from 24 September to 4 October 2004. The Chamber wishes to note that from the record, it is clear that Mr Croisier, then Counsel for Bizimungu, had requested the translation of the Impugned Decision and asked that time should not run against his client until such translation was provided¹. However, there is nothing on record to show that such a request for an extension of time was made on behalf of the Accused Ndindiliyimana.

7. The Chamber considers that the request for certification was therefore filed out of time and dismisses it.

FOR THE ABOVE REASONS, THE CHAMBER

DISMISSES the Defence Motion in its entirety.

Arusha, 6 April 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

¹ T. 30 September 2005, p. 5.

2. La Défense affirme, en outre, que ladite copie n'a pas été communiquée, malgré les demandes répétées du conseil et la demande adressée en ce sens au Greffe par le Président de Chambre.

3. Elle affirme que la décision contestée atteste l'absence totale d'éléments propres à la fonder et équivaut à un déni de justice, la Chambre ayant choisi d'ignorer purement et simplement les preuves convaincantes et irréfutables qui lui étaient présentées, et ce, au mépris des principes de justice naturelle.

4. La Défense soutient donc que la décision de la Chambre entrave considérablement le déroulement du procès, qui devrait être équitable et rapide, et en compromet l'issue.

Délibérations

5. La Chambre fait observer que la demande en certification d'appel a été déposée le 8 mars 2005, plus de cinq mois après le prononcé de la décision contestée. Elle rappelle le paragraphe (C) de l'article 73, ainsi libellé en partie :

«Les requêtes aux fins d'autorisation d'interjeter appel doivent être enregistrées dans les sept jours suivant le dépôt de la décision contestée».

6. La Chambre a minutieusement analysé les procès-verbaux d'audience allant du 24 septembre au 4 octobre 2004. Elle relève qu'il ressort manifestement de ces comptes rendus que M^e Croisier, alors conseil de Bizimungu, avait demandé la traduction de la décision contestée et que les délais impartis à son client ne soient pas remis en cause jusqu'à ce que cette traduction lui soit fournie¹. Toutefois, rien dans les procès-verbaux n'indique qu'une prorogation des délais a été demandée au nom de l'accusé Ndindiliyimana.

7. La Chambre considère que la demande en certification d'appel est donc prescrite et la rejette.

POUR CES MOTIFS,

LA CHAMBRE REJETTE la requête de la Défense dans son intégralité.

Arusha, le 6 avril 2005.

[Signé] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

¹ T. 30 septembre 2005, p. 5.

***Decision on Bizimungu's Urgent Motion
Requesting an Adjournment and a Review
of the Protective Measures Granted to Prosecution Witnesses
7 April 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Nindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Commencement and Conduct of Trial Proceedings, Adjournment of the proceedings, Oral Hearings – Rights of the Accused, Absence of a Lead Counsel for the Defence of the Accused – Cooperation of the States, Rwanda, Call to the Rwandan authorities to comply with this Tribunal's requests regarding the disclosure of the judicial files of detained witnesses – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 73; Statute, art. 19 and 20

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001 (ICTR-98-44A); Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on His Motion for Dismissal for Violation of his Right to Trial Without Undue Delay, 3 November 2004 (ICTR-99-50); Trial Chamber, The Prosecutor v. Edouard Karemera, Order on Protective Measures for Prosecution Witnesses, 10 December 2004 (ICTR-98-44); Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005 (ICTR-99-50)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II composed of Judge Asoka De Silva, Presiding, Judge Taghrid Hikmet, and Judge Seon Ki Park (the "Chamber"),

BEING SEIZED of :

- i) Bizimungu's «*Requête urgente demandant un ajournement et révision des mesures de protection accordées aux témoins de l'accusation*»¹, filed on 24 March 2005 ("Bizimungu's Motion");

¹ "Urgent Motion Requesting an Adjournment and a Review of the Protective Measures Granted to Prosecution Witnesses."

- ii) «*Réponse de la Défense de François-Xavier Nzuwonemeye au soutien de la requête urgente d'Augustin Bizimungu demandant un ajournement et révision des mesures de protection accordées aux témoins de l'accusation*»², filed on 24 March 2005 (“Nzuwonemeye’s Supporting Motion”);
- iii) «*Réponse du Procureur à la requête présentée conjointement par les Conseils d'Augustin Bizimungu et de François-Xavier Nzuwonemeye, sollicitant un ajournement à deux mois et une révision des mesures de protection applicables aux témoins de l'accusation*»³, filed on 29 March 2005 (the “Prosecutor’s Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”), in particular Articles 19 and 20 of the Statute, and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 73 of the Rules;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 of the Rules.

Submissions of the Parties

BIZIMUNGU’S MOTION

1. The Defence for Augustin Bizimungu requests this Chamber, pursuant to Articles 19 and 20 of the Statute and Rule 73 of the Rules, to :

- (i) Allow the Parties to plead the Motion orally;
- (ii) Grant an adjournment of two months in order to allow the Defence to conduct the necessary investigations following the Prosecutor’s disclosure of the identities of witnesses to be called during the next session;
- (iii) Review the 35-day deadline granted to the Prosecution for the disclosure of witnesses’ identities, and order the disclosure of the identities of all witnesses when this Chamber renders its decision.

2. The Defence recalls that in a Decision in September 2004, Trial Chamber II ordered the Prosecution to do whatever was necessary to obtain the judicial files of detained witnesses from the Rwandan authorities.

3. The Defence admits that the Prosecution did send a letter to the Rwandan authorities requesting the judicial files of nine Prosecution witnesses expected to testify during the September 2004 session, namely : AMW, ANA, ANH, ANI/KEI GAP, GFR, GFU, KJ and UB.

4. The Defence recalls that between September 2004 and January 2005, the Prosecutor transmitted to the Defence additional information regarding the following

² “François-Xavier Nzuwonemeye’s Response in Support of Augustin Bizimungu’s Urgent Motion Requesting an Adjournment and a Review of the Protective Measures Granted to Prosecution Witnesses.”

³ “The Prosecutor’s Response to the Motion Presented Jointly by Counsel for Augustin Bizimungu and François-Xavier Nzuwonemeye, Requesting an Adjournment of Two Months and a Review of the Protective Measures Granted to Prosecution Witnesses.”

witnesses : ANA, ANI/KEI, GAP, GFA, GFB, GFC, GFU, GFV, UB and UMW. The Defence also acknowledges receiving other witnesses' judicial files and unredacted statements as recently as on 21 March 2005.

5. The Defence submits, however, that despite the Prosecution's efforts to obtain the judicial files of detained witnesses, the Rwandan judicial authorities have not been responsive⁴. The Defence also cites oral directives of this Chamber requesting the Rwandan authorities to cooperate fully with this Tribunal.

6. Counsel for Bizimungu asserts, on his part, that he tried in vain during a mission to Rwanda in November 2004 to obtain copies of the judicial files of detained witnesses whose identities had been disclosed by the Prosecutor in September 2004, and that these problems are directly related to the flagrant lack of collaboration on the part of the Rwandan authorities.

7. The Defence maintains that it has also encountered problems related to the late translation of documents in Kinyarwanda; that most of the documents transmitted to the Defence had not been translated into either of the Tribunal's two working languages; and that although the Defence was able to obtain some translations, most of the time the translations were sent a few days, if not a few hours, before the witness's testimony.

8. The Defence argues that pleading the Motion orally will enable the Chamber to obtain simultaneous interpretation of the arguments presented and to render a decision without having to wait for the English translations to be transmitted by the Registry.

9. The Defence contends that it cannot determine whether it will need to conduct investigations in Rwanda on Prosecution witnesses until the Prosecution communicates the full identities and the unredacted statements of these witnesses to the Defence, and that the disclosure of the witnesses' identities is one of the essential elements that will enable the Defence to determine what kinds of investigations to conduct on the Prosecution witnesses and to gather any necessary information that was not communicated by the Prosecution.

10. Citing the Tribunal's jurisprudence in the *Kajelijeli* case, the Defence asserts that the transmission of the judicial files of a detained witness is the responsibility of the Party calling the witness in question⁵ and, therefore, that the Prosecution has a duty to obtain documents currently in the custody of the Rwandan authorities as well as to ensure their translation from Kinyarwanda into English and French.

11. The Defence maintains that an adjournment of two months is not an unreasonable delay, considering the fact that the Rwandan authorities have still not responded to the Prosecution's request of September 2004 and considering all the problems encountered during the present session with regard to having documents in Kinyarwanda translated into at least one of the Tribunal's two working languages.

⁴Prosecutor's Response to an Order of Trial Chamber II dated 3 November 2004, "[Ordering] the Prosecution to inform the Chamber by 12 November 2004 of any developments regarding its undertaking to request judicial files of Prosecution witnesses from Rwandan authorities", 8 November 2004, pp. 4830 bis-4813 bis.

⁵*The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001, paragraph 20.

12. The Defence further requests the Chamber to review its order of 3 November 2004 establishing a 35-day deadline for the disclosure of the identities of Prosecution witnesses, arguing that it is materially impossible in the present circumstances for it to conduct useful and efficient investigations within 35 days.

13. The Defence asserts that the disclosure of the identities of all witnesses in a more timely fashion would enable it to determine what investigations need to be undertaken and thus to limit the amount of travel and the costs associated with these investigations.

14. Pointing to the fundamental right of the Accused to a plain and full defence as well as to a fair and equitable trial, the Defence submits that the protective measures granted to Prosecution witnesses do not justify the restrictions imposed on the rights of the Accused.

NZUWONEMEYE'S SUPPORTING MOTION

15. The Defence for François-Xavier Nzuwonemeye supports all the arguments made by the Defence for Augustin Bizimungu, and agrees that the Defence cannot conduct a reasonable cross-examination or valid investigations without having in its possession the judicial files of detained witnesses.

16. However, the Defence would like to draw the Chamber's attention to some other cases at this Tribunal or the International Criminal Tribunal for the former Yugoslavia (ICTY) where the complete and unredacted statements as well as the identities of witnesses were communicated to the Defence before the start of trial.

17. The Defence points in particular to this Tribunal's practice in the *Casimir Bizimungu* case⁶, which it believes greatly facilitates the smooth flow of the proceedings as well as the preparation of the Defence case.

18. The Defence submits that it would be appropriate for the Chamber to order the Prosecution to adopt the same approach both from a practical point of view and to the extent that this might enable the Defence to have a better appreciation of the Prosecution's evidence.

19. While the Defence understands that the Prosecution has legitimate reasons to worry about the safety of witnesses, it also points out that the various Defence teams are made up of professionals bound by their codes of conduct and ethics, that they are subject to strict background checks by the Registry, and that they are all aware of the risks involved in divulging the identities of witnesses.

20. The Defence maintains that there is no justification for such severe protective measures and believes that a 35-day deadline for the transmission of witnesses' identities and unredacted statements is unreasonable, does not allow the Defence to conduct effective and efficient investigations, and violates the right of the Accused to a speedy and equitable trial.

21. Finally, the Defence for Nzuwonemeye wishes to draw the Chamber's attention to a problem peculiar to it. That is the fact that although Lead Counsel Mr. Ferran

⁶ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50 (also known as the 'Government II' case).

officially announced his withdrawal from the case and ceased performing any tasks on the file on 8 March 2005, it was only on 21 March 2005 that the Registry received his letter of resignation. The Defence notes that it is only after the Registrar authorises Mr. Ferran's withdrawal that the Accused can appoint a new Lead Counsel.

22. As a consequence, the Defence asserts that its preparation time will be severely reduced since, for reasons of confidentiality, a new Lead Counsel cannot start working on a file until he or she is officially appointed. Since no one knows when Mr. Ferran's resignation will take effect or when the Registrar will appoint a new Lead Counsel, the Defence submits that an additional two months would be a reasonable amount of time for it to prepare.

23. For the above reasons, the Defence prays the Chamber to : (i) grant Bizimungu's motion and issue an order adjourning the proceedings until 6 June 2005; (ii) issue an order modifying the protective measures for Prosecution witnesses; and (iii) order the Prosecution to immediately transmit to the Defence the identities and unredacted statements of all Prosecution witnesses.

THE PROSECUTOR'S RESPONSE

24. The Prosecution asserts that on 23 March 2005, the statements of all witnesses who will testify during the third session, scheduled for 9 May to 15 July 2005, were transmitted to the Defence⁷.

25. The Prosecution further asserts that only the judicial files of two witnesses, ADE and GFD, have not yet been transmitted to the Defence, and that these will be transmitted as soon as they are received from the Rwandan judicial authorities, who currently have them.

26. The Prosecution notes that since the Decision rendered by this Chamber on 3 November 2004⁸, no new circumstances have emerged.

27. Finally, the Prosecution recalls its brief submitted on 28 September 2004⁹ in response to the earlier motion by the Defence for Augustin Bizimungu, dated 23 September 2004 and points out that the Chamber's Decision dated 3 November 2004 is hardly an isolated one¹⁰.

28. For these reasons, the Prosecution urges the Chamber to deny the motion presented jointly by Counsel for Augustin Bizimungu and François-Xavier Nzuwonemeye,

⁷ Interoffice *Memorandum* dated 21 March 2005, from the Prosecutor to all the Accused and their Defence Counsel.

⁸ See Trial Chamber II, "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials", 3 November 2004.

⁹ «*Mémoire du Procureur en réponse à la requête présentée par le Conseil d'Augustin Bizimungu aux fins de révision de la décision du 19 mars 2004 relative aux mesures de protection des témoins de l'accusation*», filed on 28 September 2004.

¹⁰ See, for instance, *The Prosecutor v. Karamera et al.*, Case No. ICTR-98-44-R75, "Order on Protective Measures for Prosecution Witnesses," 10 December 2004, TC III; or *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses," 2 February 2005, TCII.

requesting an adjournment of two months and a review of the protective measures granted to Prosecution witnesses.

Having deliberated

29. The Chamber recalls Articles 19 (Commencement and Conduct of Trial Proceedings) and 20 (Rights of the Accused) of the Statute. The Chamber also recalls Rule 73 of the Rules detailing the structure of proceedings before Trial Chambers;

30. With respect to Bizimungu's request that the Motion be pleaded orally in order to avoid translation problems and save time, the Chamber notes that it does not see the need to hear the Parties on any further issues over and above the submissions made in the written pleadings. For that reason, the Chamber will decide the Motion solely on the basis of the written briefs filed.

31. Regarding the Defence prayer for adjournment of the proceedings and for review of the witness protection measures, the Chamber recalls its Decision of 3 November 2004, remains persuaded that the 35-day deadline it established for the disclosure of witness statements and identities is still adequate, and sees no reason to order a further adjournment of two months.

32. The Chamber also takes note of the Defence's acknowledgement that it has generally received communications from the Prosecution regarding unredacted witness statements and identities in a timely manner, and renews its call on the Rwandan authorities to comply with this Tribunal's requests regarding the disclosure of the judicial files of detained witnesses. The Chamber does not see any reason, at this point in time, to review the protective measures.

33. The Chamber also notes that the disclosure relates to identifying information regarding protected witnesses and that as far as the witnesses lined up for the next session are concerned, their identities have been fully disclosed by the Prosecution according to the Chamber's Decision. The only remaining issue to address is that of any other prior statement made by any of the witnesses, the disclosure of which is, at this stage, still hypothetical and the Chamber will be in a position to assess whether the Defence can plead an extension of time to conduct investigations as and when the situation arises.

34. Finally, as concerns Nzuwonemeye's complaint about the absence of a Lead Counsel for his Defence, the Chamber recalls that the Accused himself expressed the desire to proceed with Co-Counsel. In fact, on the day when Mr. Ferran announced his intention to withdraw, the Chamber questioned both the Accused and the Co-Counsel and they indicated that they were willing and able to proceed in Mr. Ferran's absence¹¹. The Chamber can nevertheless urge the Registrar to urgently look into this matter so as to avoid any delay in the proceedings.

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER DENIES the Motion in its entirety.

¹¹ English Transcript of the Proceedings, Tuesday, 8 March 2005, p. 8.

Arusha, 7 April 2005.

[Signed] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Corrigendum to Decision on the Prosecutor's Motion for an Order
for the Transfer of Detained Witnesses GLJ, AOE, GFD, GFV
Pursuant to Rules 90 bis and 73 (A)
of the Rules of Procedure and Evidence
4 May 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judge : Taghrid Hikmet

*Augustin Ndingiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and
Innocent Sagahutu – Cooperation of the States, Rwanda, Tanzania, Detained Witnesses,
Transfer to the Tribunal, Conditions of detention, Length of the temporary detention*

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 90 bis and 90 bis (B)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Taghrid Hikmet (the “Chamber”);

BEING SEISED OF the Prosecutor’s Motion for an Order for the Transfer of
Detained Witnesses Pursuant to Rules 73 (A) and 90 *bis* of the Rules of Procedure and
Evidence, filed on 21 April 2005 (the “Motion”), in which he indicated that the OTP
had requested a letter from the Rwandan Ministry of Justice to confirm that the con-
ditions for transfer of detained witnesses under the Rules are met;

TAKING INTO CONSIDERATION the letter of 26 April 2005 from the Rwandan
Ministry of Justice to the Tribunal’s Prosecutor, in which it is confirmed that the wit-
nesses in question are available during the period they are required to be present at
the Tribunal as Prosecution witnesses;

NOTING that of the witnesses in question, witness GLJ and witness AOE are cur-
rently detained by the Rwandan authorities in Kigali Central and Ruhengeri prisons
respectively and witness GFD and witness GFV are on provisional release from
Ruhengeri Prison;

TAKING INTO CONSIDERATION that the trial against the four accused will
resume on 9 May 2005;

TAKING INTO ACCOUNT the provisions in Rule 90 *bis* (B) which require that a transfer order of a detained witnesses shall be issued only after prior verification that :

The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

SATISFIED that these conditions have been met in the present case;

HEREBY ORDERS that the witnesses GLJ, AOE, GFD and GFV shall be transferred temporarily to the Tribunals Detention Facilities in Arusha for a period not exceeding three (3) months with effect from 4 May 2005, in order to testify in the trial against the four accused;

INSTRUCTS the Registry to :

- transmit the order to the Government of Rwanda and the Government of Tanzania;
- to ensure the proper conduct of transfer, including the supervision of the witness in the Detention Unit of the Tribunal;
- remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested state and which may possibly affect the length of the temporary detention, and, as promptly as possible, inform the Judges of any such change.

REQUESTS the Government of Rwanda and the Government of Tanzania to cooperate with the Registry in the implementation of this order;

Arusha, 4 May 2005.

[Signed] : Taghrid Hikmet

***Decision on Sagahutu's Motion
for Exclusion of Witnesses LMC, DX, BB, GS, CJ, GFO
13 May 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Innocent Sagahutu – Protais Mpiranya – Modification of the Prosecution's witness list, Exclusion of witnesses on a list of a severed co-accused, Obligation of the Prosecutor to present only the witnesses necessary to prove the counts in the indictment against the Accused persons – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 and 89 (C)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge
Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Sagahutu's *Requête en Exclusion des Témoins LMC, DX, BB, GS, CJ, GFO*, filed on 25 April 2005 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

(i) *Réponse du Procureur à la requête de la Défense d'Innocent Sagahutu en Exclusion des Témoins LMC, DX, BB, GS, CJ, GFO*, filed on 28 April 2005 (the "Response");

(ii) *Réplique à la Réponse du Procureur à la requête en Exclusion des Témoins LMC, DX, BB, GS, CJ, GFO*, filed on 5 May 2005 (the "Reply");

CONSIDERING the joint Indictment against Augustin Bizimungu, Augustin Ndingiriyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu as amended on 23 August 2004 (the "Amended Indictment");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rule 89 (C) of the Rules;

HEREBY DECIDES the Motion on the basis of written briefs filed by the Parties pursuant to Rule 73 of the Rules.

Submissions of the parties

The Defence

1. The Defence for Sagahutu requests the Trial Chamber to order the Prosecution to exclude witnesses LMC, DX, BB, GS, CJ and GFO from its witness list.

***Décision relative à la requête de Sagahutu intitulée «Requête en exclusion des Témoins LMC, DX, BB, GS, CJ, GFO»
13 mai 2005 (ICTR-2000-56-T)***

(Original : Anglais)

Chambre de première instance II

Juges : Joseph Asoka De Silva, Président de Chambre; Taghrid Hikmet; Seon Ki Park

Innocent Sagahutu – Protais Mpiranya – Modification de la liste de témoins à charge, Récusation des témoins placés sur la liste d'un co-accusé scindé de l'affaire, Obligation du Procureur de ne présenter que les témoins nécessaires pour établir les chefs d'accusation retenus contre les accusés – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 et 89 (C)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIÉGANT en la Chambre de première instance II, composée des juges Asoka De Silva, Président de Chambre, Taghrid Hikmet et Seon Ki Park (la «Chambre»),

SAISI DE de la requête de Sagahutu intitulée «Requête en exclusion des témoins LMC, DX, BB, GS, CJ, GFO», déposée le 25 avril 2005 (la «Requête»),

AYANT REÇU ET EXAMINÉ les documents ci-après :

- i) *Réponse du Procureur à la requête de la Défense d'Innocent Sagahutu en exclusion des témoins LMC, DX, BB, GS, CJ, GFO*, déposée le 28 avril 2005 (la «Réponse»),
- ii) *Réplique à la Réponse du Procureur à la requête en exclusion des témoins LMC, DX, BB, GS, CJ, GFO*, déposée le 5 mai 2005 (la «Réplique»),

VU l'acte d'accusation joint dressé contre Augustin Bizimungu, Augustin Ndingiyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu, tel que modifié le 23 août 2004 (l'«acte d'accusation modifié»),

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), notamment l'article 89 (C) du Règlement,

STATUE CI-APRÈS sur la Requête sur la seule base des mémoires écrits déposés par les parties, conformément à l'article 73 du Règlement.

Arguments des parties

Arguments de la Défense

1. La Défense de Sagahutu demande à la Chambre d'enjoindre au Procureur de rayer de sa liste de témoins les témoins LMC, DX, BB, GS, CJ et GFO.

2. The Defence submits that by decision rendered on 20 August 2004, the Chamber ordered the severance of the Co-Accused Major Protais Mpiranya from the proceedings and ordered the Prosecution to adjust its witness list accordingly, that is, to exclude witnesses that dealt with Major Mpiranya only.

3. The Defence argues that based on the summaries of the statements of witnesses LMC, DX, BB, GS, CJ and GFO, it is clear that they concern only Major Mpiranya and that therefore the witnesses in question should be excluded from testifying.

4. The Defence submits that the exclusion of the afore-mentioned witnesses would both respect the decision rendered on 20 August 2004, as well as guarantee the right of the Accused to be tried without undue delay, by avoiding needless testimonies that may prolong the trial.

The Prosecution

5. In his Response, the Prosecutor argues that it would be premature to exclude witnesses that have not yet testified.

6. The Prosecution submits that the exclusion of witnesses cannot be done based on the summaries of their respective statements, but only after they have testified in court and in the light of the examination-in-chief and the cross-examination. The Prosecution further submits that the summaries of witness statements cannot be considered as “testimony” in the sense of Rule 90 of the Rules.

7. The Prosecution argues that formerly Co-Accused Protais Mpiranya is still included in the amended indictment as a participant in a joint criminal enterprise and as a Co-conspirator to commit genocide. The Prosecution submits that the witnesses in question will testify to the count of conspiracy to commit genocide with which the Accused persons, together with Protais Mpiranya, are charged according to paragraph 22 of the amended indictment.

8. Furthermore, the Prosecution argues that the amended indictment mentions criminal activity of the former Rwandan Armed Forces in general, including the crimes committed by the presidential guard. According to paragraph 3 of the amended indictment, the presidential guard was, as any soldier, under the control of then Chief of Staff Augustin Bizimungu.

9. Finally, the Prosecution submits that witnesses LMC, DX, BB, GS, CJ and GFO will not exclusively testify against the accused Protais Mpiranya. In their statements to the investigators of the OTP, the witnesses in question gave not only information about crimes committed by the presidential guard under the command of Protais Mpiranya, but also about crimes committed by other battalions and other soldiers or about crimes committed by members of the presidential guard together with other soldiers.

10. For the above reasons, the Prosecutor asks the Chamber to reject the Defence Motion.

The Defence Reply

11. In its reply, the Defence argues that the Motion was not filed prematurely, rather it was filed on time and according to the criteria set out in the case of *Prosecutor v.*

2. Elle fait valoir que la Chambre a ordonné dans sa décision du 20 août 2004, la disjonction de l'instance du major Protais Mpiranya et invité le Procureur à revoir sa liste de témoins en conséquence, c'est-à-dire de rayer de celle-ci les témoins dont les déclarations ne concernaient que le major Mpiranya.

3. Elle soutient qu'il ressort à l'évidence des résumés des déclarations des témoins LMC, DX, BB, GS, CJ et GFO que celles-ci ne concernent que le major Mpiranya, et que les témoins en question devraient donc être écartés de la barre.

4. Elle fait valoir que la récusation des témoins susvisés est conforme à la décision rendue le 20 août 2004 et propre à garantir le droit de l'accusé d'être jugé sans retard excessif en évitant des dépositions inutiles qui pourraient prolonger le procès.

Arguments du Procureur

5. Dans sa Réponse, le Procureur soutient qu'il serait prématuré de récuser des témoins qui ne sont pas encore venus à la barre.

6. Il fait valoir que la récusation de témoins ne peut se faire sur la base des résumés de leurs déclarations respectives, mais seulement après leur comparution au prétoire et à la lumière de l'interrogatoire et du contre-interrogatoire. Il fait encore valoir que les résumés des déclarations des témoins ne peuvent pas être considérés comme des «témoignages» au sens de l'article 90 du Règlement.

7. Il soutient que l'ancien coaccusé Protais Mpiranya figure toujours dans l'acte d'accusation modifié en tant que participant à une entreprise criminelle commune et participant à une entente en vue de commettre le génocide. Il fait valoir que les témoins en question déposeront sur le chef d'entente en vue de commettre le génocide retenu contre les accusés et Protais Mpiranya, conformément au paragraphe 22 de l'acte d'accusation modifié.

8. Il soutient que l'acte d'accusation modifié mentionne les activités criminelles des ex-Forces armées rwandaises en général, y compris les crimes commis par la Garde présidentielle. Selon le paragraphe 3 de l'acte d'accusation modifié, la Garde présidentielle était placée, comme toute l'armée, sous le contrôle du chef d'état-major, Augustin Bizimungu.

9. Enfin, le Procureur affirme que les témoins LMC, DX, BB, CS, CJ et GFO ne déposeront pas uniquement contre l'accusé Protais Mpiranya. Dans leurs déclarations aux enquêteurs du Bureau du Procureur, ils ont non seulement donné des renseignements sur les crimes commis par la Garde présidentielle placée sous les ordres de Protais Mpiranya, mais également sur les crimes commis par d'autres bataillons et d'autres soldats ou sur les crimes commis par des membres de la Garde présidentielle avec d'autres soldats.

10. C'est pourquoi, le Procureur demande à la Chambre de rejeter la requête de la Défense.

La Réplique de la Défense

11. Dans sa réplique, la Défense soutient que la requête, loin d'avoir été déposée prématurément, l'a été à temps et conformément aux critères fixés dans l'affaire *Le*

Casimir Bizimungu. The Defence refers to paragraph 17 of the Decision of 23 January 2004, where it reads :

“Furthermore, the Trial Chamber is of the view that an objection [to the testimony of witnesses] ...should have been raised as soon as possible, at the minimum before the commencement of the evidence of the disputed witnesses”¹.

The Defence argues that this decision gained authority since the Prosecution’s appeal to it was dismissed.

12. The Defence further refers to a Decision in the case of *Prosecutor v. Kamuhanda*. In its decision on the Defence Motion for Severance and Separate Trial of 7 November 2000, the Trial Chamber stated that

“the purpose of Rule 82 (B) is in particular to protect the right of the accused to be tried expeditiously and fairly, taking into consideration the interests of justice”².

The Defence argues, based on this decision, that both the severance of Protais Mpiranya from the other accused persons and the exclusion of witnesses that will testify only against Protais Mpiranya are done in view of the right of the Accused to be tried without undue delay. If the Prosecutor were allowed to call the witnesses in question, the aforementioned decision would be rendered useless.

13. The Defence further submits that the Prosecutor indicated the witnesses in question both in his witness summaries as well as in his statements made at the Pre-Trial Conference of 17 September 2004 as witnesses testifying only against the Accused Protais Mpiranya. The Defence therefore argues that it only makes sense to exclude those witnesses that according to the Prosecution’s earlier assertions will testify against Protais Mpiranya only.

Deliberations

14. The Chamber likes to recall its Decision of 20 August 2004 which in pertinent part reads as follows :

«la Chambre observe que ... la liste des témoins pourrait nécessiter certaines modifications, notamment le retrait des témoins dont le témoignage concernait exclusivement l'accusé Protais Mpiranya...»

15. As a matter of clarification, the Chamber wishes to underscore that while it made this observation in its Decision of 20 August 2004, it did not *order* the Prosecutor to amend or otherwise revise his list of witnesses as suggested by the Defence.

16. After having carefully examined the amended Indictment of 23 August 2004, the Pre-Trial Brief, the witness summaries and the Statements already available to the Chamber, the Chamber concludes that it would be premature at this stage of the proceedings to exclude witnesses LMC, DX, BB, GS, CJ and GFO from testifying based

¹ *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme Bicomupaka, Prosper Mugiraneza*, ICTR-99-50-T.

² *The Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-99-54-T, para. 4.

Procureur c. Casimir Bizimungu. La Défense se fonde sur le paragraphe 17 de la Décision du 23 janvier 2004, ou on lit ceci :

«De plus, la Chambre de première instance est d'avis qu'une objection [aux dépositions des témoins] ... aurait dû être soulevée dès que possible, au minimum avant le commencement des comparutions des témoins en question»¹.

La Défense fait valoir que cette décision faisait autorité puisque l'appel interjeté par le Procureur contre elle a été rejeté. [Traduction]

12. La Défense fait état, en outre, de la Décision rendue par la Chambre en l'affaire *Le Procureur c. Kamuhanda*. Dans sa *Décision sur la requête de la Défense en disjonction d'instances et aux fins de procès séparé* du 7 novembre 2000, la Chambre de première instance a déclaré que

« l'article 82 (B) du Règlement vise en particulier à sauvegarder le droit de l'accusé à un procès rapide et équitable tout en tenant compte de l'intérêt de la justice »².

Se fondant sur cette décision, la Défense fait valoir que la disjonction de l'instance de Protais Mpiranya de celles des autres accusés et l'exclusion des témoins qui ne doivent déposer que contre lui tiennent compte du droit de l'accusé d'être jugé sans retard excessif. Si le Procureur était autorisé à appeler les témoins en question à la barre, la décision susmentionnée perdrait tout son sens.

13. La Défense fait encore valoir que le Procureur a désigné ces témoins, tant dans ses résumés des dépositions que dans ses déclarations faites à la conférence préalable au procès du 17 septembre 2004, comme des témoins qui ne déposeraient que contre l'accusé Protais Mpiranya. Elle soutient donc qu'il est logique de récuser ces témoins qui, selon les affirmations antérieures du Procureur, ne déposeront que contre Protais Mpiranya.

Délibérations

14. La Chambre tient à rappeler sa décision du 20 août 2004, qui se lit en partie comme suit :

«la Chambre observe que ... la liste des témoins pourrait nécessiter certaines modifications, notamment le retrait des témoins dont le témoignage concernait exclusivement l'accusé Protais Mpiranya ...»

15. Dans un souci de clarification, elle tient à souligner qu'elle a fait cette observation dans sa décision du 20 août 2004, sans pour autant enjoindre au Procureur de modifier ou de réviser sa liste de témoins, comme la Défense le proposait.

16. Ayant examiné en détail l'acte d'accusation modifié du 23 août 2004, le mémoire préalable au procès, les résumés des dépositions des témoins et les déclarations dont elle disposait déjà, la Chambre conclut qu'il serait prématuré, à ce stade de la procédure, de récuser les témoins LMC, DX, BB, GS, CJ et GFO sur la seule

¹ *Le Procureur c. Casimir Bizimungu, Justin Mugenzi, Jérôme Bicamumpaka, Prosper Mugiraneza*, affaire n° ICTR-99-50-T.

² *Le Procureur c. Jean de Dieu Kamuhanda*, affaire n° ICTR-99-54-T, para. 4.

solely on the Defence's submission that they were originally listed to testify against the formerly Co-Accused Mpiranya.

17. Having said that, the Chamber would like to remind the Prosecutor of his obligation to present only those witnesses that are necessary to prove the counts in the indictment against the Accused persons. The Chamber reminds the Prosecutor to avoid calling witnesses whose evidence is not probative of the guilt or innocence of the accused persons and may lead to needless consumption of time and resources.

FOR THE ABOVE REASONS, THE CHAMBER
DISMISSES the Motion.

Arusha, 13 May 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

base de l'argument de la Défense faisant valoir qu'ils figuraient sur la liste originelle comme devant déposer contre l'ancien coaccusé Mpiranya.

17. Ceci dit, la Chambre entend rappeler au Procureur son obligation de ne présenter que les témoins nécessaires pour établir les chefs d'accusation retenus contre les accusés. Elle rappelle au Procureur qu'il doit éviter d'appeler à la barre des témoins dont les dépositions ne permettent pas d'établir la culpabilité ou l'innocence des accusés et risquent d'occasionner un gaspillage de temps et de ressources.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Arusha, le 13 mai 2005.

[Signé] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Bizimungu's Motion to Withdraw the Appearance
of Prosecution Witnesses GFD and AOE
and Requête Urgente demande un Ajournement
17 May 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Protection of the witness, Disclosure of the judicial files of the witnesses, Translations of the judicial files, Cross-examination of the witnesses – Motion denied

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

BEING SEISED of Augustin Bizimungu’s “Motion to Withdraw the Appearance of Prosecution Witnesses GFD and AOE”, filed on 6 May 2005 and his “Urgent Motion for an adjournment”¹ filed on 9 May 2005 (the “Motions”) requesting the Trial Chamber to :

- Withdraw the appearance of Prosecution Witnesses GFD and AOE or postpone their testimony until a complete disclosure is made of documents arising from judicial proceedings in Rwanda;
- Prevent the Prosecution from calling Witnesses GFD, GFV, and AOE;
- Adjourn proceedings of the current session because the Defence is not able to cross-examine the Prosecution witnesses listed to testify during this session; or
- Postpone the appearance of Witnesses GFD, GFV, and AOE so as to enable the Defence to effectively conduct the necessary investigations to prepare its cross-examination.

CONSIDERING that the Prosecution has not filed a response to the Defence Motions;

NOTING that on 10 May 2005, at the request of the Defence for Bizimungu, the Trial Chamber heard oral arguments by the Defence and the Prosecution on the substance of the above Motions during which the Prosecution indicated that the judicial files of the concerned witnesses have now been disclosed to the Defence, and that the Defence acknowledged receipt of the concerned files;

NOTING FURTHER that on 11 May 2005, the French and English translations of the judicial files of Witness GFV were filed with the Registry and distributed to the Defence and the Chamber;

¹ *Requête Urgente Demandant un Ajournement*, filed on 9 May 2005.

RECALLING the Chamber's oral ruling of 10 May 2005, allowing the Prosecution to conduct the examination-in-chief of Witness GFD and postponing the trial to 16 May 2005 so as to allow the Defence to study the newly disclosed judicial files and prepare for cross-examination.

FOR THE ABOVE REASONS, THE CHAMBER DENIES the Motions and ORDERS

That the Defence shall proceed with cross-examination of Witness GFD when proceedings resume on 16 May 2005.

That the Prosecution shall call Witnesses GFV and AOE after the testimony of GFD and the Defence shall proceed to cross-examine them on the basis of the disclosures made.

That the Chamber may, at an appropriate time in the future, consider a Defence request to recall the above witnesses for further cross-examination if the Defence concludes that either due to inadequate disclosure or non-translation of the judicial files, it was unable to fully cross-examine the witnesses.

Arusha, 17 May 2005.

[Signed] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Sagahutu's Request for Certification
to appeal the Decision Dated 13 May 2005
Dismissing Applicant's Request for Exclusion
of Witnesses LMC, DX, BB, GS, CJ, and GFO
9 June 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndingiyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Severance of an accused, Null and void Indictment, Moment to discuss the validity of the amended Indictment, Certification to appeal, Criteria to grant a certification to appeal, Affection of the fair and expeditious conduct of the proceedings or the outcome of the trial – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 50 (A) (i), 73 (A), 73 (B) and 89 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Bizimungu et al., Decision on Bizimungu's Preliminary Motion, 15 July 2004 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Augustin Bizimungu et al., Decision on the Prosecutor Motion on Severance, 20 August 2004 (ICTR-2000-56)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Sagahutu's «*Requête aux fins d'autorisation d'interjeter appel contre la décision du 13 mai 2005 rejetant la demande d'exclusion des témoins LMX, DX, BB, GS, CJ, GFO*», filed on 19 May 2005 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

- (i) «*Observations du Procureur sur la requête de la défense d'Innocent Sagahutu aux fins d'autorisation d'interjeter appel contre la décision du 13 mai 2005 rejetant la demande d'exclusion des témoins LMX, DX, BB, GS, CJ, GFO*», filed on 23 May 2005 (the "Response")

RECALLING the Chamber's "Decision on Sagahutu's Motion for Exclusion of Witnesses LMC, DX, BB, GS, CJ, GFO", rendered on 13 May 2005 (the "Impugned Decision");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rule 73 (B) of the Rules;

HEREBY DECIDES the Motion on the basis of the written brief filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions by the Parties

THE DEFENCE

1. The Defence requests for certification to appeal the Impugned Decision pursuant to Rule 73 (B).

2. The Defence submits that the problem at hand, i.e. the request for exclusion of Witnesses LMC, DX, BB, GS, CJ, and GFO, started when the Prosecution on 22 July 2004 and in violation of Rule 50 (A) (i) presented an amended Indictment before the Chamber rendered its decision on severance of the Co-Accused Major Protais Mpiranya on 20 August 2004. The Defence further submits that after the Chamber's decision of 20 August 2004¹ declaring the Prosecution's amended Indictment of 22 July 2004 null and void, the Prosecution presented an identical amended Indictment on

¹ *The Prosecutor v. Augustin Bizimungu, Augustin Nindiliyimana, Protais Mpiranya, François-Xavier Nzuwonemeye, Innocent Sagahutu*, ICTR-2000-56-I, Decision on the Prosecutor Motion on Severance (TC), 20 August 2004, para. 15.

23 August 2004, disregarding the orders given by the Chamber in its decisions of 15 July 2004² and of 20 August 2004.

3. The Defence argues that as a consequence the Chamber is still working on the basis of the amended Indictment of 22 July 2004, which the Chamber itself declared null and void. The Defence submits that the problem would not have arisen, had the Prosecution amended the Indictment as instructed by the Chamber.

4. The Defence therefore requests the Chamber to order the Prosecution to establish a new amended Indictment implementing the amendments proposed in the Chamber's Decision of 15 July 2004 and in its Decision on severance rendered on 20 August 2004.

5. The Defence argues that contrary to the Chamber's findings in the decision of 13 May 2005, the Chamber did not merely recommend that the Prosecution modify its witness list but *ordered* it to do so in the decision of 20 August 2004. As a consequence, the Defence further argues that it would only be reasonable to order the Prosecution to exclude witnesses LMC, DX, BB, GS, CJ, and GFO, whose testimony would unduly delay the proceedings.

6. The Defence submits that the decision rendered on 13 May 2005 risks compromising the fair and expeditious conduct of the proceedings and that a resolution by the Appeals Chamber could advance the proceedings. The Defence argues that even the Prosecution's request for severance of the formerly Co-Accused Major Mpiranya was based on the assumption that the severance would best respect the right of the other accused persons to be tried without undue delay.

7. Finally, the Defence argues that the Chamber cannot remind the Prosecution to avoid calling witnesses whose evidence would lead to needless consumption of time and at the same time dismiss the Defence Motion which has exactly the same objective.

8. The Defence therefore prays the Chamber to grant certification to appeal its Decision of 13 May 2005 dismissing the Defence request for exclusion of witnesses who would testify only against the former Accused Protais Mpiranya.

THE PROSECUTION

9. In its Response, the Prosecution refers to Rule 89 (C) of the Rules which stipulates that a Chamber may admit any relevant evidence which it deems to have probative value.

10. The Prosecution submits that whether a testimony is relevant or not is a result of the Chamber's sovereign appreciation of the evidence and not subject to any appeal at this early stage of the proceedings where the only issue at hand is the appearance of witnesses.

11. Furthermore, the Prosecution submits that paragraphs 3 and 17 of the amended Indictment of 23 August 2004 make it clear that General Augustin Bizimungu as Chief of Staff of the Rwandan Army exercised control over all soldiers of that army,

² *The Prosecutor v. Augustin Bizimungu*, ICTR-00-56-I, Decision on Bizimungu's Preliminary Motion (TC), 15 July 2004.

including those in the Presidential Guard. Augustin Bizimungu's criminal responsibility for crimes committed by the Presidential Guard is referred to in paragraphs 59, 60, 68, 69, 70, 82 and 89.

12. In addition, the Prosecution submits that paragraph 22 of the amended Indictment of 23 August 2004 makes reference to Mpiranya as a co-conspirator to commit genocide, which the four accused persons are charged with.

13. In conclusion, the Prosecution prays the Chamber to dismiss the Defence request for certification to appeal.

Deliberations

14. As a preliminary matter, the Chamber would like to point out that this is neither the appropriate time nor the place to discuss the validity of the amended Indictment of 23 August 2004. The only issue before the Chamber is whether or not to grant certification to appeal the Impugned Decision under Rule 73 (B).

15. The Chamber therefore recalls Rule 73 (B) which reads as follows :

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. The Chamber notes the principle that decisions rendered under Rule 73 are "without interlocutory appeal" and that certification to appeal is an exception to that general principle. Certification *may* be granted when the two criteria set out in Rule 73 (B) are both satisfied. First, in order to exercise the discretion conferred to by Rule 73 (B), the Chamber must be satisfied that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Second, the moving party must satisfy the Chamber that an immediate resolution by the Appeals Chamber on the issue may materially advance the proceedings.

17. As regards the first criterion, namely the fact that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, the Chamber notes that the Defence merely submitted that the Decision of 13 May 2005 "risks compromising the fair and expeditious conduct of the proceedings" without showing how this would take place. The Chamber is not satisfied that this is an adequate discharge of the Defence's burden of proof.

18. Since the Defence has failed to satisfy the first condition for the exercise of the Chamber's discretion to grant certification to appeal, it is not necessary for the Chamber to consider whether or not the second condition under Rule 73 (B) has been satisfied.

FOR THE ABOVE REASONS, THE CHAMBER
DENIES the Defence Motion.

Arusha, 9 June 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Bizimungu's Motion for Certification of Appeal
from the Trial Chamber's Oral Decision of 10 May 2005
10 June 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka De Silva, Presiding; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu – Certification of interlocutory appeals, Affection of the fair and expeditious conduct of the proceedings or the outcome of the trial, Advance of the proceedings, Power of the Chamber to exercise control over the mode and order of interrogating witnesses and presenting evidence – Rights of the Accused to a full and complete cross-examination – Disclosure of documents by the Prosecutor, Charge to the Defence to establish that the evidence is in the possession of the Prosecution, Necessary probable exculpatory nature of the materials sought – Cooperation of the States, Rwanda – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (B) and 90 (F)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 October 2004 (ICTR-2001-76); Trial Chamber, The Prosecutor v. Athanase Seromba, «Décision relative à la requête de la défense aux fins de communication de pièces et de suspension du procès», 13 December 2004 (ICTR-2001-66); Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Jérôme-Clément Bicamumpaka's Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order to Disclose Exculpatory Evidence», 15 December 2004 (ICTR-99-50); Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II composed of Judge Asoka De Silva, Presiding, Judge Taghrid Hikmet, and Judge Seon Ki Park (the "Chamber");

BEING SEIZED of Bizimungu's «*Requête de la Défense aux fins d'obtenir l'autorisation de la Chambre de première instance II d'interjeter appel contre sa décision orale du 10 mai 2005*» filed on 17 May 2005 (the "Motion");

HAVING RECEIVED the "Observations du Procureur sur la requête de la défense d'Augustin Bizimungu aux fins d'obtenir l'autorisation de la Chambre de première instance II d'interjeter appel contre sa décision orale du 10 mai 2005" filed on 23 May 2005 (the "Response");

RECALLING the Chamber's Oral Decision of 10 May 2005 (the "Impugned Decision");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) of the Rules;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (B) of the Rules.

Submissions of the Parties

BACKGROUND

1. On 9 May 2005, the Defence for Augustin Bizimungu filed a Motion praying the Chamber to :

- i. Exclude the testimonies of Prosecution Witnesses GFD, GFV and AOE;
- ii. Order an adjournment of the present session due to the Defence's inability to conduct valid cross-examinations; or
- iii. Postpone the testimonies of Witnesses GFD, GFV and AOE until the Defence could conclude its investigations¹.

2. Following oral arguments in open court on 10 May 2005, the Chamber deliberated and rendered a Decision denying the Motion.

BIZIMUNGU'S MOTION

3. The Defence for Augustin Bizimungu requests the Chamber, pursuant to Rule 73 (B) of the Rules, to certify an appeal from the Impugned Decision.

4. The Defence submits that from August 2002 when Augustin Bizimungu was arrested in Angola to the present, it has encountered considerable difficulty obtaining appropriate information and documentation regarding detained witnesses from the Prosecution and from the Rwandan authorities. The Motion contains a chronological listing of the problems encountered.

5. The Defence also asserts that even when the judicial files of detained witnesses are disclosed by the Prosecution, such documents are either not disclosed in a timely

¹ *Le Procureur c. Augustin Bizimungu*, Affaire n° ICTR-00-56-T, «*Requête urgente demandant un ajournement*», 9 mai 2005.

fashion or are in Kinyarwanda without being translated into English or French, the Tribunal's working languages.

6. The Defence further asserts that the issues at stake include the fundamental right of the Accused to a full and plain defence, the timely disclosure of witness statements by the Prosecution, as well as the Defence's capacity to prepare an adequate response to the thesis propounded by the Prosecution before the Tribunal.

7. The Defence submits that pursuant to Rule 73 (B) of the Rules, this decision involves issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution of this matter by the Appeals Chamber may materially advance the proceedings.

8. Finally, the Defence maintains that it is important for the Appeals Chamber to resolve this matter now, as the same questions are likely to arise whenever a detained witness is called upon to testify.

THE PROSECUTOR'S RESPONSE

9. The Prosecution submits that Rule 90 (F) of the Rules grants the Trial Chamber the power to control the interrogation of witnesses, and that in the exercise of its discretion, the Chamber may decide how to allocate time to the Parties for the examination of witnesses.

10. The Prosecution further submits that in the case of Witness GFD, the Prosecution was required to conduct the examination-in-chief for two hours on Tuesday, 10 May 2005, while the Defence was granted six additional days to prepare and was allowed to start its cross-examination on Monday, 16 May 2005 and to continue for eighteen hours.

11. Finally the Prosecution asserts that the Chamber has fully respected the rights of the Accused, urges the Chamber to deny the Defence Motion, and provides three decisions from various Trial Chambers to support such an outcome².

Having deliberated

12. The Chamber recalls Rule 73 (B) of the Rules, which establishes a two-pronged test for the certification of interlocutory appeals. In the first instance, the Chamber *may* grant certification

“if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”.

The second criterion is met if,

² *The Prosecutor v. Aloys Simba*, Case n° ICTR-01-76-T, “Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68”, TCI, 4 October 2004; *The Prosecutor v. Casimir Bizimungu et al*, Case n° ICTR-99-50-T, “Decision on Jérôme-Clément Bicamumpaka’s Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order to Disclose Exculpatory Evidence”, TC II, 15 December 2004; and *The Prosecutor v. Athanase Seromba*, Case n° ICTR-01-66-T, TC III, «*Décision relative à la requête de la défense aux fins de communication de pièces et de suspension du procès*», 13 December 2004.

“in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

13. The Chamber also recalls Rule 90 (F) of the Rules, which grants it the power to exercise control over the mode and order of interrogating witnesses and presenting evidence, with a view to effectively ascertaining the truth and avoiding needless consumption of time.

14. The Chamber notes that subsequent to its directives in the Impugned Decision, Witnesses GFD and GFV have already testified in this matter. In the case of GFD, the Chamber allowed the Defence a period of six days between the conclusion of the examination-in-chief and the commencement of the cross-examination to complete its preparations.

15. The Chamber further recalls that when Mr. St-Laurent was appointed as Lead Counsel for the Accused Augustin Bizimungu, he was granted an adjournment of three months from October 2004 to January 2005 to prepare and familiarise himself with the case. During that time, the new Defence Counsel was expected to conduct his investigations and fully prepare his case.

16. Contrary to the claims of the Defence, the Chamber observes that granting a request for an adjournment each time a new witness is called upon to testify, or certifying a motion for interlocutory appeal whenever such a request is denied, would significantly impair the expeditious conduct of the proceedings. The Chamber is also satisfied that the denial of the Defence application is not likely to affect the outcome of the trial because the Chamber is willing to invoke other procedural steps in the course of the trial in order to ensure full respect for the rights of the Accused to a full and complete cross-examination. Such steps might include, for example, re-calling the witnesses for further cross-examination.

17. Furthermore, since the Prosecution's examination-in-chief of each witness is based on documents and statements that have previously been disclosed to the Defence, and the Defence has the opportunity to cross-examine each witness on the basis of the same documents, the level of prejudice to the Defence is minimized considerably. The Chamber is not persuaded that a decision by the Appeals Chamber on this issue could significantly affect the outcome of the trial. Therefore, the Motion fails to meet the first prong of the certification test.

18. With respect to the Defence claim that the Prosecution has either failed to disclose the entire judicial files of detained witnesses, or has not disclosed them in a timely manner, the Chamber notes that there is no obligation on the part of the Prosecution to disclose documents that are not in its possession. As the Appeals Chamber pointed out in the *Kajelijeli* case,

“the Defence must first establish that the evidence was in the possession of the Prosecution, and then must present a *prima facie* case which would make probable the exculpatory nature of the materials sought”³.

19. The Chamber is of the view that the root cause of the problems outlined in the Defence Motion is the inability or unwillingness of the Rwandan judicial authorities the conduct of investigations. This may have hampered the Defence's ability to

³ *Juvénal Kajelijeli v. The Prosecutor*, Case n° ICTR-98-44A-A, Judgement, 23 May 2005, para. 262.

properly cross-examine Prosecution witnesses. However, in the opinion of the Trial Chamber, this is not a matter that can be resolved by the Appeal Chamber through an interlocutory appeal. Thus, the Motion fails to satisfy the second criterion for certification.

20. In conclusion, the Chamber is minded to inform the Defence that, under the appropriate circumstances and with adequate information, the Chamber or the Prosecution can be persuaded to make further direct requests to the Rwandan authorities for the disclosure of the judicial files of potential witnesses.

FOR THE FOREGOING REASONS,

THE CHAMBER DENIES the Motion in its entirety.

Arusha, 10 June 2005.

[Signed] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Bizimungu's Request for Certification
to Appeal the Oral Decision Dated 8 June 2005
30 June 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Criteria for certification of appeal, Exceptional nature of the certification of appeal, Affection of the fair and expeditious conduct of the proceedings, Advance of the proceedings – Right of the Accused to a fair trial, Timely and clear notice to the Accused of the allegations against him, Conspiracy in 1994 – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 73 (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void ab initio, 13 April 2000 (ICTR-96-34); Trial Chamber, The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003 (ICTR-98-41); Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Bizimungu's Preliminary Motion, 15 July 2004 (ICTR-2000-56)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding and
Judge Seon Ki Park under Rule 15 *bis* (the “Chamber”);

BEING SEISED OF Bizimungu’s «*Requête de la Défense aux fins d’obtenir
l’autorisation de la Chambre de première instance d’interjeter appel contre sa déci-
sion orale du 8 juin*», filed on 15 June 2005 (the “Motion”);

HAVING RECEIVED AND CONSIDERED the

- (i) «*Observations du Procureur sur la Requête de la Défense d’Augustin Bizimungu
aux fins d’obtenir l’autorisation de la Chambre de première instance d’interjeter
appel contre sa décision orale du 8 juin*», filed on 16 June 2005 (the
“Response”)

RECALLING the Chamber’s oral Decision rendered on 8 June 2005 (the
“Impugned Decision”);

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Pro-
cedure and Evidence (the “Rules”) in particular Rule 73 (B) of the Rules;

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Par-
ties pursuant to Rule 73 (A) of the Rules.

Submissions by the Parties

THE DEFENCE

1. The Defence requests for certification to appeal the Impugned Decision pursuant
to Rule 73 (B).

2. The Defence submits that the Impugned Decision raises a question that affects
both the fairness and the progress and outcome of the proceedings.

3. Concerning the admissibility of events of 1994, the Defence argues that there is
no legal basis upon which to admit evidence to prove the element of *mens rea* after
having established that the relevant events were not pleaded in the Indictment.

4. The Defence submits that if a material fact is an essential part of the crime
alleged this fact has to be pleaded in the Indictment.

5. Consequently, the Defence argues that the admission of facts not pleaded in the
Indictment to prove the element of *mens rea* renders the Indictment “unacceptably
imprecise”¹. The Defence further argues that this affects the right of the Accused to
prepare his defence and the fairness, progress and outcome of the proceedings, given
the fact that the Defence will know in detail of the evidence against Augustin
Bizimungu only when the Prosecutor has finished his case.

6. Concerning the facts relating to 1993, the Defence submits that, once the Cham-
ber concludes that its temporal jurisdiction does not extend to events that took place
in 1993, the Chamber should have declared inadmissible evidence of events in 1993
related to conspiracy to commit genocide.

¹Para. 11 of the Motion.

7. The Defence argues that the exception contained in Rule 93 allowing the Chamber to hear evidence concerning conspiracy to commit genocide only applies if the criteria set out by Trial Chamber I in the *Bagosora*² case are strictly met and the decision does not cause prejudice to the Accused.

8. With respect to the second criterion of Rule 73 (B), the Defence submits that a resolution by the Appeals Chamber would materially advance the proceedings, since a decision may not only influence the ongoing deliberations of the Trial Chamber, but once and for all establish clear and precise rules concerning the admissibility of evidence not pleaded in the Indictment and evidence relating to events prior to 1994.

9. The Defence therefore prays the Chamber to grant certification to appeal its oral Decision of 8 June 2005.

THE PROSECUTION

10. The Prosecution submits that with respect to evidence on events prior to 1994, the Chamber should refer to the Decision of Trial Chamber II rendered in the present case on 15 July 2004³ in which the Chamber adhered to a ruling in the *Kabiligi and Ntabakuze* case. In that later Decision, the Chamber stated that

“... conspiracy is a continuing crime, the events that took place outside the period of the Statute can be taken into account if it can be shown that the conspiracy continued into the relevant period of the Statute”⁴.

11. The Prosecution submits that no appeal was made against the Decision of 15 July 2004 and that the ruling therefore is legally binding. Consequently, the Prosecution argues it is allowed to lead evidence on events prior to 1994 concerning the crime of conspiracy to commit genocide if this evidence leads inexorably to the genocide of 1994.

12. Concerning *mens rea*, the Prosecution submits that intention is a mental factor and not a material fact, which is required for the crime of genocide but which, contrary to the *actus reus*, does not have to be pleaded as a material fact in the Indictment.

13. The Prosecution submits that *mens rea* is mostly inferred from the circumstances of the case and can be deduced from the sum of the criminal acts.

14. The Prosecutions further submits that material facts can both be used to prove the commission of an alleged crime and to infer the existence of *mens rea*.

15. The Prosecution argues that the Defence suggestion that the Indictment is imprecise for lacking the notion of *mens rea* is ill-founded and, in conclusion, prays the Chamber to dismiss the Defence request for certification to appeal.

² *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 4-39.

³ *The Prosecutor v. Augustin Bizimungu*, ICTR-00-56-I, Decision on Bizimungu's Preliminary Motion (TC), 15 July 2004, para. 30-35.

⁴ *The Prosecutor v. Kabiligi and Ntabakuze*, ICTR-96-34-I, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *ab initio*, 13 April 2000, para. 39.

Deliberations

16. The Chamber recalls Rule 73 (B) which reads as follows :

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. The Chamber refers to its discussion of the criteria for certification under Rule 73 (B) in its “Decision on Sagahutu’s Request for Certification to Appeal the Decision Dated 13 May 2005 Dismissing Applicant’s Request for Exclusion of Witnesses LMC, DX, BB, GS, CJ and GFO” rendered on 9 June 2005⁵. In particular, the Chamber recalls the principle that decisions under Rule 73 are “without interlocutory appeal” and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73 (B) are satisfied.

18. The Chamber notes that the admissibility of Witness AOE’s evidence, in particular evidence including material facts not pleaded in the Indictment and evidence of events of 1993 arguably affect the “fair and expeditious conduct of the proceedings”. The Chamber underscores that timely and clear notice to the Accused of the allegations against him is a cornerstone of the right of the Accused to a fair trial.

19. The Chamber however is of the opinion that certification in the present case would not “materially advance the proceedings”. The Chamber has already heard Witness AOE’s evidence and ruled on what part of the evidence is admissible. Furthermore, the Chamber would like to emphasize that both the progress and the fairness of the proceedings have been respected in its oral decision of 8 June 2005 by excluding Witness AOE’s testimony relating to events not pleaded in the amended Indictment of 23 August 2004 and by declaring that, at a later stage, evidence relating to events in 1993 and the charge of conspiracy to commit genocide will be taken into consideration “only if the Prosecution establishes the existence of a conspiracy in 1994”.

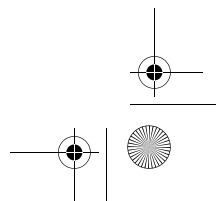
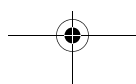
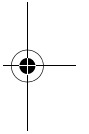
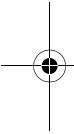
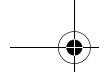
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 30 June 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

⁵ *The Prosecutor v. Augustin Bizimungu, Augustin Nindiliyimana, François-Xavier Nzuwone-meye, Innocent Sagahutu*, ICTR-2000-56-T, Decision on Sagahutu’s Request for Certification to Appeal (TC), 9 June 2005, paras. 16-17.



***Decision on Request for Certification of Appeal
from the Decision of Trial Chamber Dated June 13, 2004 (sic)
Dismissing Applicant's Request for a Citation
for Contempt of the Journalist Gatware of Radio Rwanda
for Publishing the Names of Protected Witnesses
1st July 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Seon Ki Park

Augustin Ndingiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Publication of the names of protected witnesses by a journalist, Names previously disclosed, Names of witnesses not yet redacted, Continuing obligation of the medias to respect the protective orders issued by the Tribunal – Criteria for a certification of appeal, Affection of the fair and expeditious conduct of the proceedings or the outcome of the trial, Advance of the proceedings apprehension of bias by the judges of this Chamber, Language offensive, abusive and lacking in the proper respect due to the Chamber used by Defence Counsel – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 15 bis, 46, 73 (B) and 77 (A) (ii)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II composed of Judge Asoka De Silva, Presiding, and
Judge Seon Ki Park under Rule 15 *bis* (the “Chamber”);

BEING SEIZED of Augustin Ndingiliyimana’s “Request for Certification of Appeal from the Decision of Trial Chamber dated June 13, 2004 (*sic*) Dismissing Applicant’s Request for a Citation for Contempt of the Journalist Gatware of Radio Rwanda for Publishing the Names of Protected Witnesses” filed on 20 June 2005 (the “Motion”);

HAVING RECEIVED the “*Observations du Procureur sur la requête aux fins de certification présentée par la défense d’Augustin Ndingiliyimana (cf décision de la Chambre de première instance II en date du 13 juin 2005)*” filed on 21 June 2005 (the “Response”);

RECALLING the Chamber’s oral Decision of 13 June 2005 (the “Impugned Decision”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 73 (B) of the Rules;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (B) of the Rules.

***Décision relative à la Requête intitulée
«Request for Certification of Appeal from the Decision
of Trial Chamber Dated June 13, 2004 (sic)
Dismissing Applicant's Request for a Citation
for Contempt of the Journalist Gatware of Radio Rwanda
for Publishing the Names of Protected Witnesses»
1^{er} juillet 2005 (ICTR-2000-56-T)***

(Original : Anglais)

Chambre de première instance II

Juges : Joseph Asoka De Silva, Président de Chambre; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye et Innocent Sagahutu – Diffusion de noms de témoins protégés par un journaliste, Noms des témoins précédemment dévoilés, Noms des témoins non mis sous scellés, Obligation des médias de respecter en tout temps les ordonnances portant mesures de protection en faveur des témoins – Critères de certification des appels interlocutoires, Effets sensibles sur l'équité et la rapidité du procès, ou son issue, Progression de la procédure – Suspicion de partialité de la part des juges de la Chambre, Propos offensants, injurieux et dénués du respect dû à la Chambre du Conseil de la défense – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 15 bis, 46, 73 (B) et 77 (A) (ii)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIÉGANT en la Chambre de première instance II, composée des juges Asoka De Silva, Président de Chambre, et Seon Ki Park conformément à l'article 15 bis du Règlement de procédure et de preuve (la «Chambre»),

SAISI de la demande en certification d'appel d'Augustin Ndindiliyimana intitulée «Request for Certification of Appeal from the Decision of Trial Chamber dated June 13, 2004 (sic) Dismissing Applicant's Request for a Citation for Contempt of the Journalist Gatware of Radio Rwanda for Publishing the Names of Protected Witnesses», déposée le 20 juin 2005 (la «Requête»),

AYANT REÇU les «Observations du Procureur sur la requête aux fins de certification présentée par la défense d'Augustin Ndindiliyimana (cf. décision de la Chambre de première instance II en date du 13 juin 2005», déposées le 21 juin 2005 (la «Réponse»),

RAPPELANT la Décision orale de la Chambre rendue le 13 juin 2005 (la «Décision contestée»),

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), notamment l'article 73 (B) du Règlement,

STATUE À PRÉSENT sur la requête sur la base des conclusions écrites des parties, conformément à l'article 73 (B) du Règlement.

Submissions of the Parties

NDINDILYIMANA'S MOTION

1. The Defence for Augustin Ndindiliyimana requests the Chamber, pursuant to Rule 73 (B) of the Rules, to grant certification of an appeal from the Impugned Decision.

2. The Defence submits that on 7 June 2005, Jean Gatare, a Radio Rwanda journalist based at the Tribunal, published the names of two protected witnesses who had testified for the Defence in the *Military I* trial, in violation of the Chamber's order that the names of these witnesses be placed under seal and not made public. It asserts that Counsel for the Defence received a copy of the broadcast in print form on 9 June 2005 and made it available to the Chamber on the same day, prompting the issuance of an order for the journalist in question to be brought before the Chamber for a hearing on Monday, 13 June 2005.

3. The Defence also submits that the broadcast of the names of those protected witnesses endangers the lives of those witnesses and directly affects the fairness of the trial as other potential witnesses for the Defence can no longer have any confidence that their identities will be concealed and their persons protected if they come to the Tribunal to testify. It concludes that the ability of the Defence to make full answer and defence has been gravely if not irreparably impaired.

4. The Defence asserts that the contempt "was clearly deliberate" as the journalist involved "was following the proceedings" and

"there is no doubt whatsoever that he was aware of that order and the protected status of those witnesses".

It maintains that the journalist intentionally published the priests' names "in order to sabotage" Ndindiliyimana's defence¹.

5. It is alleged in the Motion that three witnesses "who had previously agreed to testify for the defence" have since indicated that

"due to the broadcast of the names of those protected defence witnesses, they no longer believe that they will be protected and now state that they are unwilling to testify under these circumstances"².

6. According to the Defence, it intended to call as witnesses the two persons whose names were revealed in the broadcast. However, the Defence maintains, since the safety of these witnesses can no longer be guaranteed, they will not be available to the Defence. The Defence also asserts in the Motion that this has seriously undermined Ndindiliyimana's ability to defend the charges against him and has gravely undermined the integrity of the witness protection system.

7. The Defence submits that on the morning of Monday, 13 June 2005, the Chamber announced that it had considered the matter and determined that no contempt had been committed and that everyone was to blame, and so the matter was now closed.

8. The Defence alleges that it was clear that

¹ Para. 5.

² Para. 6.

Arguments des parties

REQUÊTE DE NDINDILIYIMANA

1. La Défense d'Augustin Ndindiliyimana demande qu'en vertu de l'article 73 (B) du Règlement la Chambre autorise la certification d'un appel de la Décision contestée.

2. La Défense soutient que, le 7 juin 2005, Jean Gatere, un journaliste de Radio Rwanda basé au Tribunal, a publié les noms de deux témoins protégés qui avaient déposé à décharge dans le procès dit des *Militaires I*, en violation de l'ordonnance de la Chambre prescrivant que les noms de ces témoins soient mis sous scellés et non révélés au public. Elle affirme que le conseil de la défense a reçu une copie papier de l'émission le 9 juin 2005 et l'a communiquée à la Chambre le même jour, l'incitant à rendre une ordonnance afin que le journaliste en question comparaisse devant la Chambre en audience le lundi 13 juin 2005.

3. La Défense soutient aussi que la diffusion des noms de ces témoins protégés met leur vie en danger et nuit directement à l'équité du procès vu que d'autres témoins à décharge potentiels ne peuvent plus croire que leurs identités seront tenues secrètes et leur intégrité physique protégée s'ils venaient témoigner au Tribunal. Elle conclut que la capacité effective de la Défense à répondre et à se défendre correctement a été sérieusement, voire irrémédiablement, entamée.

4. La Défense affirme que cette atteinte «était clairement délibérée» étant donné que le journaliste concerné «suivait les débats» et qu'

«il ne fait aucun doute qu'il était au courant de l'existence de cette ordonnance et du statut de ces témoins protégés».

Elle soutient que le journaliste a intentionnellement publié les noms des prêtres «pour saboter» la défense de Ndindiliyimana¹. (Traduction)

5. La Défense fait valoir dans la Requête que trois témoins «qui avaient auparavant accepté de comparaître à décharge» ont depuis indiqué qu'

«en raison de la diffusion des noms des témoins à décharge protégés, ils ne croient plus qu'ils seront protégés» et «ne veulent plus venir à la barre dans ces conditions»². (Traduction)

6. La Défense entendait citer à la barre en tant que témoins les deux personnes dont les noms ont été révélés dans l'émission. Elle soutient que, puisque la sécurité de ces personnes ne peut plus être garantie, celles-ci ne se mettront pas à sa disposition, ce qui nuit sérieusement à la faculté de Ndindiliyimana de répondre aux accusations portées contre lui et porte gravement atteinte à l'intégrité du système de protection des témoins.

7. La Défense fait valoir qu'au matin du 13 juin 2005, la Chambre a annoncé qu'elle avait examiné la question et conclu qu'aucune infraction n'avait été commise, que tout le monde était à blâmer et que la question était close.

8. La Défense allègue qu'il était clair que

¹ Para. 5.

² Para. 6.

“everyone in the courtroom, that is the Registry, the Prosecution counsel and the Judges were aware of this action”.

It further alleges that it was

“also clear that the journalist concerned was also aware of this as he neither appeared in the courtroom to answer his contempt nor dressed for such an appearance. Instead he appeared in the gallery in relaxed attire”.

It concludes that

“all parties, except the defence, were notified over the weekend of the decision to close the matter without a hearing and that a series of talks had taken place between the judges, the journalist, the prosecution, Radio Rwanda in order to cover up this issue”³.

9. The Defence asserts that the rules of natural justice demand that all issues regarding the fairness of a trial be held in open court, on the record, and with the opportunity to the parties concerned to be heard. It further asserts that the actions of the Chamber

“in dealing with this matter privately, over the weekend, outside the courtroom, and without the knowledge or participation of the defence is an egregious violation of the principles of natural justice” and of Ndindiliyimana’s right to be heard”⁴.

10. According to the Defence, whether the contempt was deliberate or inadvertent, the fact is that the names of the witnesses were revealed and certain steps should have been taken to protect the witnesses, including : (i) an order that Radio Rwanda issue a retraction; (ii) greater security under the witness protection program, such as regular reports on the security of these witnesses while they are in Rwanda; (iii) the removal of the concerned journalist’s press credentials and his expulsion from the Tribunal; and (iv) the expulsion of Radio Rwanda or its parent company from the Tribunal⁵.

11. The Defence submits that the Chamber refused to take any of these measures, and that even though the security of these witnesses had been compromised by the broadcast of their names,

“the Chamber refused to lift a finger to help them and instead added to the injury by doing nothing to rectify the situation.”

The Defence concludes that

“[t]he Chamber itself then became a party to the contempt by excusing the violation of its own order”⁶.

12. The Defence also accuses the Chamber of making a “lame attempt to excuse the contempt by taking the position that everyone was more or less to blame.” According to the Defence, this was “not only a distortion of the facts” but it also

³ Para. 10.

⁴ Para. 11.

⁵ Para. 12.

⁶ Para. 13.

«tout le monde dans la salle d'audience, à savoir le Greffe, l'avocat général et les juges étaient au courant de l'affaire».

Elle ajoute qu'

«il était aussi clair que le journaliste concerné était lui aussi au courant, attendu qu'il ne s'est ni présenté pour répondre de l'infraction commise ni vêtu pour la circonstance. Il est apparu dans la galerie dans une tenue décontractée».

Elle conclut que

«toutes les parties, à l'exception de la Défense, ont reçu notification au cours du week-end de la décision de clore la question sans tenir d'audience» et qu'«une série d'entretiens a réuni les juges, le journaliste, un membre du Bureau du Procureur et Radio Rwanda afin d'étoffer l'affaire³». (Traduction)

9. La Défense affirme que les principes élémentaires de la justice exigent que toutes les questions relatives à l'équité d'un procès soient examinées en audience publique, et dûment consignées au dossier, les parties intéressées ayant la faculté d'être entendues. Elle ajoute que la façon dont la Chambre s'est conduite

«en traitant cette question en privé, pendant le weekend, hors de la salle d'audience et à l'insu ou sans la participation de la Défense, viole sérieusement les principes élémentaires de la justice» et le droit de Ndindiliyimana à être entendu⁴. (Traduction)

10. D'après la Défense, que l'infraction ait été délibérée ou commise par mégarde, le fait est que les noms des témoins ont été révélés et que certaines mesures auraient dû être prises pour les protéger. Il aurait fallu notamment (i) rendre une ordonnance enjoignant à Radio Rwanda d'apporter un démenti; (ii) renforcer les mesures de sécurité prises au titre du programme de protection des témoins, en prévoyant par exemple l'établissement régulier de rapports sur la sécurité de ces témoins pendant qu'ils se trouvent au Rwanda; (iii) retirer sa carte de presse au journaliste concerné et l'expulser du Tribunal; et (iv) expulser Radio Rwanda ou sa société de tutelle du tribunal⁵.

11. La Défense fait valoir que la Chambre a refusé de prendre aucune de ces mesures et que, alors même que la sécurité de ces témoins était compromise par la diffusion de leurs noms,

«la Chambre a refusé de lever le petit doigt pour les aider et a plutôt ajouté au préjudice en ne faisant rien pour remédier à la situation».

La Défense conclut que

«la Chambre elle-même s'est alors rendue complice de l'infraction en excusant la violation de sa propre ordonnance»⁶. (Traduction)

12. La Défense accuse également la Chambre de «tenter maladroitement d'excuser cette infraction en prétendant que chacun était plus ou moins à blâmer». Or une telle prise de position des juges de la Chambre elle-même «non seulement déforme les faits» mais

³ Para. 10.

⁴ Para. 11.

⁵ Para. 12.

⁶ Para. 13.

“amounted to support for the revelation of the names by Radio Rwanda, and therefore amounted to an attack on the defence by the Judges of the Chamber itself, in violation of their requirement to be neutral, impartial and objective triers of fact”⁷.

13. Finally, it is alleged in the Motion that

“when defence counsel tried to object to this extralegal procedure, the Chamber made every attempt to silence him”,
denying Ndindiliyimana the right to be heard on a matter material to his defence and thus raising “the issue of an apprehension of bias by the judges of this Chamber”⁸.

THE PROSECUTOR’S RESPONSE

14. The Prosecution submits that it was the Defence Counsel for Augustin Ndindiliyimana who violated the protective order of Trial Chamber I by using the transcripts of the testimony of Witnesses DH90 and DH91 during his cross-examination without first obtaining the permission of the Chamber before which those witnesses testified. The Prosecution urges the Defence Counsel to explain to the Chamber how he obtained those transcripts.

15. The Prosecution notes that to date, Augustin Ndindiliyimana’s Defence Counsel has not yet submitted any list of its potential witnesses to the Chamber and that the Defence has never requested the Chamber to issue any protective order for its known or presumed witnesses.

16. Finally, the Prosecution points out that contrary to the assertions contained in the Defence Motion, the Prosecution was never informed of the Decision of 13 June 2005 prior to the announcement of the said Decision in open session.

Having deliberated

17. The Chamber notes that on Monday, 6 June 2005, Prosecution Witness WG revealed the names of two persons in open session during his examination-in-chief. It is noted that the references in examination-in-chief contained no reference to the fact that the named persons had given evidence before the Tribunal. On Tuesday, 7 June 2005, during cross-examination, the persons’ names were again mentioned in open session and the Chamber notes that the information that the named persons had given evidence before the Tribunal was volunteered by Counsel for Ndindiliyimana. Most of the references to the persons were made by Counsel for Ndindiliyimana by their nationality and function, but the names were mentioned by the witness under cross-examination and in due course the Chamber ordered the names to be redacted from the record. It is noted that the date of earlier testimony and the pseudonyms used by both of the persons were revealed by Defence Counsel in open session.

⁷ Para. 14.

⁸ Paras. 15 and 16.

«revient également à cautionner la révélation des noms par Radio Rwanda et, partant, à s'en prendre à la Défense, en violation de l'obligation qui leur est faite d'être des juges des faits neutres, impartiaux et objectifs»⁷. (Traduction)

13. Enfin, la Défense allègue que

«quand le conseil a essayé de s'opposer à ce procédé non conforme au Règlement, la Chambre a tout fait pour le réduire au silence»,

refusant à Ndindiliyimana le droit de se faire entendre sur un point important pour sa défense et soulevant ainsi «la question d'une suspicion de partialité de la part des juges de la chambre»⁸. (Traduction)

RÉPONSE DU PROCUREUR

14. Le Procureur soutient que c'est le conseil d'Augustin Ndindiliyimana qui a enfreint l'ordonnance de protection de la Chambre de première instance I en utilisant les comptes rendus d'audience des dépositions des témoins DH 90 et DH 91 pendant son contre-interrogatoire, sans avoir au préalable obtenu l'autorisation de la Chambre devant laquelle ces témoins avaient déposé. Le Procureur invite le conseil à expliquer à la Chambre comment il a obtenu ces comptes rendus.

15. Le Procureur note qu'à ce jour le conseil d'Augustin Ndindiliyimana n'a toujours pas soumis la liste de ses témoins potentiels à la Chambre et que la Défense n'a jamais demandé à la Chambre de rendre une ordonnance prescrivant des mesures de protection en faveur de ses témoins connus ou supposés.

16. Enfin, le Procureur précise que, contrairement à ce qu'affirme la Défense dans sa Requête, il n'a jamais été informé de la Décision du 13 juin 2005 avant le prononcé de ladite décision, fait en audience publique.

Après en avoir délibéré

17. La Chambre note que, le lundi 6 juin 2005, le témoin à charge GT a cité les noms de deux personnes en audience publique pendant son interrogatoire principal. La Chambre relève que pendant l'interrogatoire principal il n'a pas été fait référence au fait que les intéressés avaient comparu devant le Tribunal. Le mardi 7 juin 2005, lors du contre-interrogatoire, les noms de ces personnes ont de nouveau été mentionnés en audience publique et la Chambre fait remarquer que c'est le conseil de Ndindiliyimana qui a indiqué lui-même que ces personnes avaient témoigné devant le Tribunal. La plupart des références à ces personnes ont été faites par le conseil de Ndindiliyimana qui a évoqué leur nationalité et leurs fonctions, les noms ont été mentionnés par le témoin lors du contre-interrogatoire et la Chambre a fini par ordonner que les noms figurent caviardés dans le dossier. La Chambre fait observer que la date d'une déposition antérieure et les pseudonymes employés par les deux personnes ont été révélés par le conseil de la défense en audience publique.

⁷ Para. 14.

⁸ Paras. 15 et 16.

18. On Thursday, 9 June 2005, Defence Counsel for the Accused Augustin Ndindiliyimana informed the Chamber that the names of the priests had been the subject of a broadcast on Radio Rwanda on 7 June 2005. Counsel presented a copy of the broadcast in print form, argued that this constituted a violation of the Chamber's order that the names be kept under seal, and urged that the journalist responsible, Jean Gatare, should be given a citation for contempt.

19. The Chamber then instructed the Registry to bring the said journalist before the Chamber on Monday, 13 June 2005.

20. Meanwhile, the Chamber reviewed the transcripts and minutes of the proceedings and came to the conclusion that by reporting the names of the two protected witnesses in question, the journalist had not violated the Chamber's order or Rule 77 (A) (ii), since the names of the witnesses before the other Trial Chamber were initially made public in open session and the Chamber's order to place the names under seal came a day later.

21. On Monday, 13 June 2005, the Chamber instructed the Registry to place the journalist in the public gallery and announced its Decision in open session. The Chamber stated that it had found that the mention of the names of the protected persons had been made in open court a considerable time prior to their being placed under seal. The Chamber stated that it had decided that all participants in the Chamber were to be blamed for not taking appropriate action at the appropriate time and that the Chamber was satisfied that there had been no violation of Rule 77 (A) (ii). The Chamber also reminded the Parties and the representatives of media organisations of their continuing obligation to respect the protective orders issued by the Tribunal.

22. The Chamber recalls Rule 73 (B) of the Rules, which sets out the criteria for the certification of interlocutory appeals. The first criterion is fulfilled

“if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”,
while the second criterion is met if,

“in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

23. The Chamber notes that the Defence Motion fails to satisfy either prong of the two-part test. The Chamber finds it regrettable that the names of these protected witnesses were mentioned at all in the broadcast, and that they were stated as having given evidence at the Tribunal, but the Chamber notes that it had already ordered that the names be placed under seal even before it was made aware of the broadcast. The Defence has not demonstrated that any appeal can now affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

24. Secondly, the Defence has also failed to show how an immediate ruling on this issue by the Appeals Chamber might affect the proceedings in this case. In the Chamber's opinion, even if the Appeals Chamber were to order the implementation of the four proposals advanced by the Defence⁹, this would not materially advance the proceedings in this matter. Thus the Motion does not fulfil the criteria for certification.

⁹ Summarised in Paragraph 10 above.

18. Le jeudi 9 juin 2005, le conseil de l'accusé Augustin Ndindiliyimana a informé la Chambre que les noms des prêtres avaient été le sujet d'une émission sur Radio Rwanda le 7 juin 2005. Le conseil a présenté une copie papier de l'émission, arguant du fait que cela constituait une violation de l'ordonnance de la Chambre tendant à ce que les noms soient gardés sous scellés, et il a instamment demandé que le journaliste responsable, Jean Gatara, soit cité à comparaître pour outrage.

19. La Chambre a alors prié le Greffe de convoquer ledit journaliste devant la Chambre le lundi 13 juin 2005,

20. Dans l'intervalle, la Chambre a passé en revue les comptes-rendus des audiences ainsi que les procès-verbaux des débats et est arrivée à la conclusion qu'en communiquant les noms des deux témoins protégés en question le journaliste n'avait violé ni son ordonnance ni l'article 77 (A) (ii) du Règlement, puisque les noms de ces témoins avaient déjà été révélés en audience publique devant l'autre Chambre de première instance et que l'ordonnance de la Chambre prescrivant de placer les noms sous scellés avait été rendue un jour plus tard.

21. Le lundi 13 juin 2005, la Chambre a prié le Greffe de placer le journaliste dans la galerie du public et a annoncé sa décision en audience publique. La Chambre a déclaré avoir constaté qu'il avait été fait mention des noms des personnes protégées en audience publique un bon moment avant qu'ils ne soient mis sous scellés. Elle a dit qu'elle avait décidé que toutes les personnes présentes à l'audience étaient à blâmer pour ne pas avoir pris les mesures appropriées au moment opportun et qu'elle était convaincue qu'il n'y avait eu aucune violation de l'article 77 (A) (ii) du Règlement. Elle a également rappelé aux parties et aux représentants des organismes de médias leur obligation de respecter en tout temps les ordonnances portant mesures de protection en faveur des témoins rendues par le Tribunal.

22. La Chambre rappelle l'article 73 (B) du Règlement de procédure et de preuve, qui fixe les critères de certification des appels interlocutoires. Le premier critère est rempli si

«la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue»,

tandis que le deuxième critère l'est si, selon la Chambre de première instance,

«son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure».

23. La Chambre note que la Requête de la Défense ne remplit aucune de ces deux conditions. Elle trouve regrettable que les noms de ces témoins protégés aient été mentionnés dans l'émission et que l'on ait dit qu'ils avaient comparu devant le Tribunal, mais fait observer qu'elle avait déjà ordonné que les noms soient mis sous scellés avant même d'être mise au courant de l'émission. La Défense n'a pas démontré que l'appel touchait à une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue.

24. Deuxièmement, la Défense n'a pas montré en quoi un règlement immédiat de cette question par la Chambre d'appel pourrait faire progresser la procédure en l'espèce. Selon la Chambre, même si la Chambre d'appel ordonnait l'application des quatre propositions faites par la Défense⁹, une telle décision ne pourrait pas concrètement faire avancer la procédure en l'espèce. La Requête ne répond donc pas aux critères d'une certification d'appel.

⁹Résumé au paragraphe 10 *supra*.

25. The Chamber notes that Counsel claims in the Motion that this matter was decided “outside the judicial forum, in a backroom deal” to which Ndindiliyimana was not a party. He also alleges that “a series of talks had taken place” over the weekend involving “the Registry, the Prosecution counsel and the Judges” as well as “the journalist concerned” and even Radio Rwanda, and that it had been decided “to close the matter without a hearing” and “to cover up this issue.”

26. The Chamber additionally notes that Counsel charges the Chamber with “an egregious violation of the principles of natural justice” and accuses it of being “a party to the contempt by excusing the violation of its own order.” He further claims that the Chamber made a “lame attempt to excuse the contempt”, which amounted not only to “a distortion of the facts,” but also to “support for the revelation of the names” of the priests.

27. Finally, the Chamber notes that Counsel alleges in the Motion that

“when defence counsel tried to object to this extralegal procedure, the Chamber made every attempt to silence him”,

thus raising “the issue of an apprehension of bias by the judges of this Chamber”.

28. These are very serious allegations that remain unsubstantiated. Counsel is well aware of the facts in this matter and the sequence of events as set out in paragraphs 17 to 22 above.

29. The Chamber additionally finds that the language used in Defence Counsel’s Motion is offensive, abusive and lacking in the proper respect due to the Chamber. The Chamber issues a warning within the meaning of Rule 46 of the Rules of Procedure and Evidence to the Defence Counsel for Augustin Ndindiliyimana that should there be any repetition of this conduct, the Chamber will consider exercising the powers set out in Rule 46 to deal with misconduct of counsel.

FOR THE FOREGOING REASONS,

THE CHAMBER DENIES the Motion in its entirety; and

ISSUES A WARNING to Defence Counsel Christopher Black.

Arusha, 1 July 2005.

[Signed] : Joseph Asoka De Silva; Seon Ki Park

25. La Chambre fait remarquer que le conseil prétend dans la Requête que la question a été tranchée «en dehors de la salle d'audience, lors d'une tractation en coulisses» à laquelle Ndindiliyimana n'était pas partie. Il allègue aussi qu'«une série d'entretiens a eu lieu» au cours du week-end réunissant «le Greffe, un membre du Bureau du Procureur et les juges» ainsi que «le journaliste concerné» et même Radio Rwanda, et qu'il a été décidé de «clore le sujet sans tenir d'audience» et d'«étouffer l'affaire». (Traduction)

26. La Chambre note en outre que le conseil l'accuse d'avoir «violé sérieusement les principes élémentaires de la justice» et l'accuse de s'être «rendue complice de l'infraction en excusant la violation de sa propre ordonnance». Il prétend par ailleurs que la Chambre a tenté «maladroitement d'excuser cette infraction», tentative qui non seulement «déformait les faits» mais, «revenait également à cautionner la révélation des noms» des prêtres. (Traduction)

27. La Chambre relève enfin que, dans la Requête, le conseil allègue que lorsqu'il «a essayé de s'opposer à ce procédé non conforme au Règlement, la Chambre a tout fait pour le réduire au silence», soulevant ainsi la «question d'une suspicion de partialité de la part des juges de la Chambre». (Traduction)

28. Ce sont là des allégations graves qui ne sont pas étayées. Le conseil connaît très bien les faits de l'espèce et la chronologie des événements rappelés aux paragraphes 17 à 22 ci-dessus.

29. La Chambre constate en plus que les propos tenus dans la Requête présentée par le conseil de la défense sont offensants, injurieux et dénués du respect dû à la Chambre. La Chambre avertit, au sens de l'article 46 du Règlement de procédure et de preuve, le conseil d'Augustin Ndindiliyimana que si cette conduite devait se reproduire, la Chambre envisagera d'exercer les pouvoirs qui lui sont conférés par cet article pour sanctionner le mauvais comportement d'un conseil.

PAR CES MOTIFS,

LA CHAMBRE REJETTE la requête dans son intégralité, et

DONNE UN AVERTISSEMENT à Christopher Black, conseil de la défense.

Arusha, le 1^{er} juillet 2005.

[Signé] : Joseph Asoka De Silva; Seon Ki Park

***Decision on Extremely Urgent Defence Motion
to Authorise the Registry to Transmit the Official Transcripts
of Witness Testimony in the Case of
Prosecutor v. Ndindiliyimana et al., n° ICTR-2000-56-I
(a.k.a. Military II Case) Pursuant to Rule 73 of the RPE
5 July 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Aloys Simba – Protection of the witnesses, Application mutatis mutandis of the decisions regarding the protection of the witnesses

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 75 (F) (i)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Asoka De Silva, designated by the Trial Chamber pursuant to Rule 73 (A) of the Rules of Procedure and Evidence of the Tribunal (“the Rules”);

BEING SEIZED of Aloys Simba’s “*Requête en extrême urgence de la défense en vue d’autoriser le Greffe à lui communiquer les transcripts officiels d’audition des témoins dans l’affaire : Le Procureur c. Ndindiliyimana et consorts – n° ICTR-2000-56-T (dit “procès Militaires II”) (article 73 du RPP)*”¹ filed on 24 June 2005 (the “Motion”);

NOTING THAT the Prosecution and the Registry have already transmitted the requested transcripts to the Simba Defence Team;

RECALLS Rule 75 (F) (i) of the Rules, which provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal, such protective measures shall continue to have effect in any other proceedings before the Tribunal unless and until they are rescinded, varied or augmented in accordance with the procedure set out in the Rules; and

¹ «Extremely Urgent Defence Motion to Authorise the Registry to Transmit the Official Transcripts of Witness Testimony in the Case of The *Prosecutor v. Ndindiliyimana et al* – n° ICTR-2000-56-I – (a.k.a. *Military II Case*) (Pursuant to Rule 73 of the RPE)».

***Décision relative à la requête de la Défense intitulée
«Requête en extrême urgence de la défense
en vue d'autoriser le Greffe à lui communiquer les transcripts officiels
d'audition des témoins dans l'affaire :
Le Procureur c. Ndindiliyimana et Consorts – n° ICTR-2000-56-T
(dit «procès Militaires I») conformément à l'article 73
du Règlement de Procédure et de Preuve»
5 juillet 2005 (ICTR-2000-56-T)***

(Original : Anglais)

Chambre de première instance II

Juge : Joseph Asoka De Silva, Président de Chambre

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye et Innocent Sagahutu – Aloys Simba – Protection des témoins, Application mutatis mutandis des décisions de protection dans d'autres procès

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 (A) et 75 (F) (i)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIEGEANT en la personne du juge Asoka De Silva, juge désigné par la Chambre en vertu de l'article 73 (A) du Règlement de procédure et de preuve du Tribunal (le «Règlement»),

SAISI de la requête d'Aloys Simba intitulée «*Requête en extrême urgence de la défense en vue d'autoriser le Greffe à lui communiquer les transcripts officiels d'audition des témoins dans l'affaire : Le Procureur c. Ndindiliyimana et consorts – n° ICTR-2000-56-T (dit «Procès Militaires II») (article 73 du Règlement de procédure et de preuve*», déposée le 24 juin 2005 (la «Requête»),

NOTANT QUE le Procureur et le Greffe ont déjà communiqué à l'équipe de la défense de Simba les comptes rendus d'audience demandes,

RAPPELLE l'article 75 (F) (i) du Règlement selon lequel, une fois que des mesures de protection ont été ordonnées en faveur d'une victime ou d'un témoin dans le cadre d'une affaire portée devant le Tribunal, ces mesures continuent de s'appliquer *mutatis mutandis* dans toute autre affaire portée devant le Tribunal, et ce, jusqu'à ce qu'elles soient annulées, modifiées ou renforcées selon la procédure exposée dans le Règlement;

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BIZIMUNGU

ORDERS all members of the Defence Team for the Accused Aloys Simba not to disclose the transcripts of proceedings conducted in closed session, or any potentially identifying information about the witnesses, to any third parties, including other Defence Counsel at this Tribunal.

Arusha, 5 July 2005.

[Signed] : Joseph Asoka de Silva

FAIT INTERDICTION à tous les membres de l'équipe de la défense de l'accusé Aloys Simba de communiquer aux tiers, y compris d'autres conseils de la défense intervenant devant le Tribunal de céans, les procès verbaux des audiences tenues à huis clos ou tout renseignement susceptible de permettre d'identifier les témoins.

Arusha, le 5 juillet 2005.

[Signé] : Joseph Asoka De Silva

***Decision on the Prosecutor's Motion
for Additional Protective Measures for Witness AOG or 006,
Pursuant to Rules 54, 75 and 79 of the Rules
of Procedure and Evidence
7 September 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka De Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Nindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Additional Protective Measures for Witness, Reasons for additional protective measures satisfied, Out of time filing – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 54, 73 (A), 75 and 79

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet, and Judge Seon Ki Park (the “Chamber”);

BEING SEIZED OF the “*Requête du Procureur en vue d’obtenir des mesures additionnelles de protection en faveur du Témoin AOG ou 006 : Articles 54, 75 et 79 du Règlement de procédure et de preuve*”¹ (the “Motion”) and the attached “Affirmation” of the Chief of Investigations, filed on 4 August 2005;

HAVING RECEIVED Sagahutu’s “*Réponse à la Requête du Procureur en vue d’obtenir des mesures additionnelles de protection en faveur du Témoin AOG ou 006 : Articles 54, 75 et 79 du Règlement de procédure et de preuve*”² filed on 23 August 2005 (the “Response”);

NOTING that the Response was filed out of time, but satisfied with the reasons given in the accompanying explanatory note³;

HAVING CONSIDERED the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules;

RECALLING the measures already prescribed in its Decision of 19 March 2004, as amended by the Decision of 3 November 2004;

RECALLING also its Oral Decision of 31 August 2005 granting the Motion and the reasons stated therein;

¹ “The Prosecutor’s Motion for Additional Protective Measures for Witness AOG or 006, Pursuant to Rules 54, 75 and 79 of the Rules of Procedure and Evidence”.

² “Response to the Prosecutor’s Motion for Additional Protective Measures for Witness AOG or 006, Pursuant to Rules 54, 75 and 79 of the Rules of Procedure and Evidence”.

³ See “*Demande de relever la déchéance des délais*” filed together with the Response.

THE CHAMBER HEREBY ORDERS that :

The testimony of Witness AOG or 006 shall be taken via closed video link from a specified location in The Hague;

The Registry shall take all necessary administrative measures to implement this Order. The Parties shall cooperate with the Registry in putting the necessary measures in place;

Certain documents that could reveal the former identity of Witness AOG shall be disclosed to the Defence only 30 days before the scheduled date of testimony (it being specified that the Prosecutor has already disclosed all the statements that do not reveal this identity);

The current place of residence of Witness AOG as well as his new identity shall not be the subject of any disclosure;

The hearing at which Witness AOG testifies shall be closed to the public and the related transcripts shall be kept under seal.

Arusha, 7 September 2005.

[Signed] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Decision on the Prosecutor's Non-Contentious Motion
for the Transfer of Witnesses in Detention or Under Court Supervision
Pursuant to Rule 90 bis of the Rules of Procedure and Evidence
18 August 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judge : Seon Ki Park

Augustin Ndingiriyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Detained Witnesses, Transfer to the Tribunal, Prolongation of the period of the detention of the transferred witnesses – Cooperation of the States, Rwanda, Tanzania – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 90 bis and 90 bis (B)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Seon Ki Park, designated pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the “Chamber”);

BEING SEIZED OF the «*Requête non contentieuse du Procureur aux fins de transfert de témoins détenus ou placés sous contrôle judiciaire : article 90 bis du Règlement de procédure et de preuve*»¹ filed on 2 August 2005 (the “Motion”);

NOTING that the Defence has not filed a response to the Motion;

CONSIDERING the necessity of preserving the published trial schedule;

HEREBY DECIDES the Motion.

1. The Prosecutor requests Trial Chamber II (or the designated judge) to issue an order authorizing the transfer to the Tribunal of Witnesses ANH, DR, HAF and AOF, all of whom are currently either in detention or under court supervision in Rwanda.

2. The Prosecutor submits that he intends to call all four witnesses to testify in this matter during the fourth session, which is scheduled to commence on Monday, 29 August 2005 and to conclude by Friday, 28 October 2005.

3. Attached to the Motion are the Prosecutor’s letter to the Rwandan authorities, dated 28 June 2005, requesting the transfer of these detained witnesses and the reply of the Rwandan Minister of Justice, dated 14 July 2005, indicating that the said witnesses will be available to testify before the Tribunal.

4. The Prosecutor further states that the transfer of these witnesses to Arusha will not prolong the period of their detention as foreseen by the Rwandan judicial authorities and requests the Chamber to issue an order stating that the witnesses shall be remanded to the custody of the Rwandan authorities no later than 30 October 2005, unless the Trial Chamber decides otherwise.

5. The Chamber recalls Rule 90 *bis* (B) of the Rules, which requires that an order for the transfer of witnesses in custody only be issued after prior verification that the following conditions have been met :

(i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State;

6. The Chamber takes due note of the reply letter dated 14 July 2005 from the Minister of Justice of the Republic of Rwanda, appended to the Motion and is satisfied that the Rule 90 *bis* (B) conditions have been met in respect of Witnesses ANH, DR, HAF and AOF.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Motion and :

ORDERS, pursuant to Rule 90 *bis* of the Rules, that Witnesses AKH, DR, HAF and AOF be transferred, at the earliest opportunity, to the United Nations Detention Facility in Arusha, for a period not exceeding three months from the date of the transfer;

DIRECTS the Registrar :

(a) To transmit the instant Decision to the Governments of Rwanda and of Tanzania;

(b) To ensure the proper conduct of the transfer, including the supervision of the witnesses at the United Nations Detention Facility in Arusha;

¹ “The Prosecutor’s Non-Contentious Motion for the Transfer of Witnesses in Detention or Under Court Supervision Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence”.

(c) To ensure that the said witnesses are remanded to the custody of the Rwandan authorities no later than 30 October 2005, unless the Chamber decides otherwise; and

(d) To remain abreast of any changes which might occur regarding the conditions of detention of the witnesses in Rwanda which may possibly affect the length of their detention, and to inform the Chamber as promptly as possible; and

REQUESTS the Government of the Republic of Rwanda to comply with this Order, to Co-operate with the Prosecutor and the Registrar and to take the necessary steps to effect the said transfer, in collaboration with the Republic of Tanzania, the Registrar and the ICTR Witness and Victims Support Section.

Arusha, 18 August 2005.

[Signed] : Seon Ki Park

***Decision on the Prosecution's Motion Dated 9 August 2005
to Vary its List of Witnesses Pursuant to Rule 73 bis (E)
21 September 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndingiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Modification of the list of witnesses, Interests of justice, Criteria to determine the interests of justice, Materiality of the testimony, Complexity of the case, Element of “surprise” for the Defence, Ability to conduct an effective cross-examination, Justification for the addition of the witness or witnesses, On-going investigations, Replacements and corroboration of evidence, Recalling of a witness – Probative value of the evidence, Direct witness – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 73 bis (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 (ICTR-99-52); Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73 ter (E), 4 June 2002 (ICTR-99-46)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge
Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

BEING SEISED OF the «*Requête du Procureur en variation de sa liste de
témoins : Article 73 bis (E) du Règlement de Procédure et de Preuve*»¹, filed on
9 August 2005 (the “Motion”);

HAVING RECEIVED AND CONSIDERED the

- (i) “Reply of François-Xavier Nzuwonemeye’s Defense in Opposition to the
Prosecutor’s Motion Dated August 9th, 2005 and Received on August 11th, 2005
to vary its list of Witnesses Pursuant to Rule 73 bis (E) of the Rules of Procedure
and Evidence“, filed on 15 August 2005 (“Nzuwonemeye’s Response”)
- (ii) «*Réponse d’Augustin Ndindiliyimana à la Requête du Procureur en Variation de
sa liste de témoins du 9 Août 2005 (Art. 73 du Règlement de Procédure et de
Preuve)*»², filed on 16 August 2005 (“Ndindiliyimana’s Response”)
- (iii) «*Réplique du Procureur, suite à la réponse formulée par le Conseil de François-
Xavier Nzuwonemeye sur sa requête du 9 Août 2005 (Requête sur le fondement
de l’article 73 bis (E) du RPP)*»³, filed on 17 August 2005 (the “Reply”)

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Pro-
cedure and Evidence (the “Rules”) in particular Rule 73 bis (E) of the Rules;

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Par-
ties pursuant to Rule 73 (A) of the Rules.

Submissions by the Parties

THE PROSECUTION

1. The Prosecution requests for leave to vary its witness list pursuant to
Rule 73 bis (E).

2. The Prosecution’s Motion seeks two amendments to the witness list : first, it pro-
poses to replace the recently deceased Prosecution Witness HM with Witness ATW;
second, it intends to add a new witness, ANC to its list. The Prosecution submits
that if it is allowed to call Witness ANC, it will withdraw Prosecution Witnesses
DAO, IG, CE, QZ, DAY and BA from its witness list.

3. The Prosecution submits that Prosecution Witness HM, whose death was
announced to the Office of the Prosecutor on 20 June 2005, was supposed to testify
on the events at CELA in April 1994, as narrated in paragraph 77 of the Amended

¹ “The Prosecutor’s Motion to Vary His List of Witnesses Pursuant to Rule 73 bis (E) of the
Rules of Procedure and Evidence”.

² “Augustin Ndindiliyimana’s Response to the Prosecutor’s Motion to Vary His List of Wit-
nesses Pursuant to Rule 73 bis (E) of the Rules of Procedure and Evidence”.

³ “The Prosecutor’s Reply to Nzuwonemeye’s Response to the Prosecutor’s Motion to Vary His
List of Witnesses Pursuant to Rule 73 bis (E) of the Rules of Procedure and Evidence”.

Indictment of 23 August 2004. According to the Prosecution, HM would have been the only witness to testify on the said paragraph.

4. The Prosecution argues that in light of the death of Witness HM, it seems indispensable to replace him with another survivor of the events at CELA, namely Witness ATW, whom Witness HM himself mentioned in his statement of 8 March 1998.

5. The Prosecution submits that the replacement sought will not generate any new allegations and therefore there will be no element of surprise for the Defence. Furthermore, the Prosecution submits that this will not cause a delay in the proceedings.

6. Concerning Witness ANC, the Prosecution submits that it has only recently found out about the existence of this witness, a former *gendarme* and member of the guard assigned to the Accused Augustin Ndindiliyimana from April 1994 to June 1994 and who signed a statement to the ICTR investigators on 29 June 2005.

7. The Prosecution submits that the investigators of the Office of the Prosecutor were never given access to the archives of the Rwandan *gendarmerie* relating to the events of 1994 and therefore had no information that would have allowed them to identify and locate Witness ANC.

8. According to the Prosecution, if added to the list, Witness ANC will testify on paragraphs 22, 25, 53 and 73 of the Amended Indictment of 23 August 2004 and particularly on the massacres committed at Kansi parish, in which the Accused Augustin Ndindiliyimana is alleged to have been heavily involved.

9. The Prosecution argues that Witness ANC is, as a direct witness of the events in 1994, able to contribute in a decisive manner to the pursuit of justice and the discovery of the truth.

10. The Prosecution further argues that the inclusion of Witness ANC in place of Witnesses DAO, IG, CE, QZ, DAY and BA would contribute to judicial economy and enhance the efficiency and expeditious conduct of the proceedings. In addition, the Prosecution intends to call Witness ANC to testify only at the end of its case, which would, considering that there are more than sixty Prosecution witnesses left, give the Defence several months, if not a year, to conduct further investigations and prepare for cross-examination.

11. Finally, the Prosecution refers to Rule 98 of the Rules which enables the Chamber to summon witnesses and order their attendance and argues that the drafters of Rule 98 – which is rather inquisitorial and hardly known in the Common Law system – clearly made the discovery of truth the cornerstone of the proceedings. This is easily understandable according to the Prosecution, as this Tribunal is responsible for trying the most serious crimes committed by human beings, which subjects them to the most severe sanctions.

NZUWONEMEYE'S RESPONSE

12. In its Response, the Defence for Nzuwonemeye prays the Chamber to construe Rule 73 *bis* (E) cautiously, in a manner favourable to the Defence, and to deny the Prosecutor's Motion in its entirety.

13. The Defence for Nzuwonemeye argues that the Prosecutor has generally failed to meet the criteria for an application under Rule 73 *bis* (E) set out in the Decision

by the Chamber in the present case rendered on 11 February 2005⁴. The Defence submits that among other things, the criteria include the obligation on the part of the Prosecution to amply justify any delay in bringing the application, particularly in a case where granting the application will be prejudicial to the Accused.

14. The Defence for Nzuwonemeye submits that the Prosecutor has failed to demonstrate that the application, if granted, will be in the interests of justice. On the contrary, argues the Defence it would result in a “momentous injustice” against Nzuwonemeye, who is jointly charged with the other Co-Accused persons of conspiracy and joint criminal enterprise.

15. The Defence for Nzuwonemeye further submits that the application, if granted, would defeat the letter and spirit of the rest of Rule 73 *bis* which is intended to put the Accused on fair and reasonable notice to prepare his defence in order to answer the accuser(s).

16. The Defence for Nzuwonemeye refers to the above-mentioned Decision of Trial Chamber II in the present case and points out that the Prosecution’s motion at the time to vary his witness list was granted with a “word of warning”. The Defence submits that to allow the Prosecution to now call the proposed witnesses without any cogent reasons as to why the application was not brought together with the earlier motion, will be prejudicial to the Defence in the sense that it will give the Prosecution an unfair and undue advantage to strengthen its case at this late stage of the proceedings and after several months of public hearings.

17. Concerning proposed Witness ATW, Defence for Nzuwonemeye submits that apart from the fact that the Prosecution has improperly combined the application for the removal of the deceased Witness HM from the list with one for substitution, it would not be in the interest of judicial economy to call this witness since he would testify along the same lines as Witness BK, who is listed to testify this session. The Defence for Nzuwonemeye further submits that the Prosecution has not advanced any reasons why since 8 March 1998, when it knew about the existence of Witness ATW, it did not make any effort to add him to the witness list.

18. Concerning proposed Witness ANC, Defence submits that the Prosecution has not given any compelling reasons as to how this witness and Witnesses DAO, IG, CE, QZ, DAY and BA are connected apart from the fact that the Prosecution is willing to exclude them from its list, should its application to call Witness ANC be granted.

19. The Defence for Nzuwonemeye argues that the lack of access to the archives of the *gendarmérie* of Rwanda has not prevented the Prosecution from identifying and locating witnesses with the same profile as the proposed witness, for example Witness KF who is listed to testify during the fourth session, and whose statement was disclosed to the Defence on 21 June 2005, and that with reasonable diligence the Prosecution would have been able to identify him.

⁴ *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, “Decision on the Prosecutor’s Motion pursuant to Rule 73 *bis* (E) for the variation of the list of witnesses” rendered on 11 February 2005, para. 20.

NDINDILYIMANA'S RESPONSE

20. The Defence for Ndindiliyimana submits that the admission of the proposed witnesses would result in new allegations and new facts against the Accused not pleaded in the Amended Indictment of 23 August 2004 and therefore prays the Chamber to dismiss the Motion with the exception of allowing the Prosecution to withdraw Witnesses DAO, IG, CE, QZ, DAY and BA without any condition.

21. Concerning the proposed Witness ATW, the Defence for Ndindiliyimana submits that the Prosecution had known of the existence of this witness since March 1998 and had deliberately left him out of the witness list. The Defence for Ndindiliyimana alleges that it is not clear why the Prosecution had decided to do so, since in connection with other less serious allegations, the Prosecution will have at least two witnesses listed to testify. The Defence further alleges that at the time of the filing of the Pre-Trial Brief with the witness list as of June 2004, the Prosecution should have known from experience in other cases, that in a case of four Co-Accused persons, some witnesses might die, others might withdraw, while some others might disappear. The Defence submits that it constitutes a lack of diligence on the part of the Prosecution not to have listed at least a second witness concerning the events contained in paragraph 77 of the Amended Indictment of 23 August 2004 and that this is not the time to allow a correction.

22. The Defence for Ndindiliyimana submits that, contrary to the Prosecutor's assertion, ATW's testimony, if allowed, would take the Defence by surprise since it is the first time that the Defence is aware that refugees, who so far have been presented as civilians, women, children and elderly, were armed with revolvers, rifles and traditional weapons.

23. The Defence for Ndindiliyimana further submits that, had the proposed witness been included in the initial witness list and his statement been communicated to the Defence in June 2004, that is, before the beginning of the proceedings, the Defence would have adjusted its cross-examination of the witnesses who have already testified to explore this new fact. On the one hand, it would have been possible to explore, in particular, with Witnesses DA, GFU, GAP, GFC, GFR, DCK, HP and GFD, who were soldiers or communal police officers or had knowledge of military issues in 1994, the aspect of armed combatants in Kigali and around CELA in 1994, their ammunition, the possible presence of infiltrators, combatants who used revolvers, rifles, etc. On the other hand, it would have been possible to explore with Witnesses UB, ANG and GLJ who in 1994 were local officials in Kigali not far away from CELA, issues such as the events of CELA, the infiltration, the weapons available at the centre, etc.

24. The Defence for Ndindiliyimana submits that the Accused is entitled to a full and plain Defence. To accept Witness ATW with this new fact would make it necessary to recall the above-mentioned witnesses to cross-examine them again with the goal of comparing their versions with the one given by Witness ATW in order to assess their credibility and weigh their testimonies. It is clear that to recall those witnesses would cause a considerable delay in the proceedings and a waste of the Tribunal's resources.

25. With regard to the proposed Witness ANC, the Defence for Ndindiliyimana submits that the Office of the Prosecutor has always had enough resources at its disposal

to allow it to function. In addition, the Office has benefited from the co-operation of the Rwandan civilian and military authorities in the course of its investigations. In this context, the Prosecution has not shown that it took all necessary measures between 1995 and June 2005 to have access to the archives of the Rwandan *gendarmerie*. The Defence for Ndindiliyimana also points out that the Prosecution should have been able to identify and locate Witness ANC even without access to the archives of the Rwandan *gendarmerie*, since it was able to identify and locate other witnesses who were members of the *gendarmerie* in 1994. Furthermore, Defence for Ndindiliyimana submits that the Prosecution had knowledge of the guard attached to Ndindiliyimana during the events in 1994, among other things, through statements by Witnesses AMW, ANB and ATZ.

26. The Defence for Ndindiliyimana further submits that admitting the testimony of the proposed witness would result in several new allegations and new sites of massacres that are not connected to the Amended Indictment of 23 August 2004. It is argued that in order for these to be taken into consideration, it would require an amendment of the current Indictment. The new allegations include the transportation and distribution of arms to the *Interahamwe* by Ndindiliyimana and the former Minister Karemera on 15 April 1994 in Kigali; two roadblocks that were allegedly simultaneously manned by *Interahamwe* and *Gendarmes*; an alleged direct responsibility of Ndindiliyimana for the massacre in Bisesero and an alleged direct and even disciplinary control by the Accused over the militias and the soldiers. The Defence for Ndindiliyimana argues that the inclusion of the proposed witness would make it necessary to recall almost all of the 28 witnesses that have been heard so far to cross-examine them on these new allegations and compare their versions with the one given by Witness ANC in order to assess their credibility and weigh their testimonies. This again would cause a considerable delay in the proceedings and a waste of the Tribunal's resources.

PROSECUTION'S REPLY

27. The Prosecution submits that the law provides for the possibility of varying the witness list and that is not a creation or a favour to one of the Parties in the proceedings.

28. The Prosecution recalls that the ultimate goal of the proceedings is the discovery of the truth and that the search for the truth, which has to be done with due respect for the rights of the accused person, depends often on external circumstances which sometimes favour and sometimes complicate its establishment. In this context, it is no coincidence that the Rules provide for calling new witnesses during the appeal and that even a review proceeding is contained in the Statute and the Rules.

29. The Prosecution submits that Witness ATW was not included in the initial witness list for reasons of judicial economy and because of the assumption that HM's testimony would be sufficient and credible and need not be corroborated. The Prosecution further submits that the Accused Nzuwonemeye is in no way concerned by paragraph 77 of the Amended Indictment of 23 August 2004.

30. The Prosecution underscores the importance of adding Witness ANC to its list because he belonged to the same armed force as the Accused Ndindiliyimana during

the events of 1994 and because, as a Hutu, he could not be suspected of resentment or of harbouring a spirit of revenge against the Accused. The Prosecution argues that for these reasons Witness ANC would be one of the best persons to testify against the Accused.

Deliberations

31. The Chamber recalls Rule 73 *bis* (E) of the Rules :

After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

32. The Chamber notes that it may grant leave to the Prosecution to vary its witness list if it is “in the interests of justice”. In assessing whether a proposed variation is “in the interests of justice”, the Tribunal has in the past has taken the following factors into account : the materiality of the testimony; the complexity of the case; the element of “surprise” for the Defence and the ability to conduct an effective cross-examination of the proposed testimony; the justification offered by the Prosecution for the addition of the witness or witnesses; on-going investigations; as well as replacements and corroboration of evidence⁵.

33. The Chamber recalls its decision of 11 February 2005 in which it concurred with the reasoning of the Trial Chamber in the case of *The Prosecutor v. André Ntagerura et al.*, that the Tribunal should adopt a flexible approach in exercising its discretion relating to the matter of adding witnesses to a witness list⁶.

34. The Chamber notes the submission by the Defence for Ndindiliyimana that if the Motion is granted, it may be necessary to recall almost all of the witnesses who have testified so far for further cross-examination. The Chamber underscores that to grant of a motion brought under Rule 73 *bis* (E) does not necessarily imply that every witness heard so far would have to be recalled. The issue of whether or not to recall a witness has to be determined by the Chamber on a case-by-case basis, taking all necessary factors into account, and upon application properly brought by any of the Parties.

35. The issue before the Chamber, rather, is to determine the extent of the element of surprise for the Defence, were the Prosecution to be allowed to call the afore-mentioned witnesses. This, of course, has to be considered in the light of the reasons offered by the Prosecution for the addition of Witnesses ATW and ANC at this stage of the proceedings and the relevancy of their testimony.

36. The Chamber notes that the redacted statement of Witness ATW, dated 10 March 1998 and the redacted statements of Witness ANC dated 17 May 2005, 20 May 2005 and 29 June 2005, were disclosed together with the Prosecutor’s Motion on 9 August 2005. The Chamber notes the contents of all the statements. Furthermore,

⁵ *The Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 19-20.

⁶ *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46T, “Decision on Defence for Ntagerura’s Motion to Amend Its Witness List Pursuant to Rule 73 *ter* (E)”, 4 June 2002, para. 10.

the Chamber recalls the Prosecution's statement that proposed Witnesses ATW and ANC will be called to testify at the end of the Prosecution's case in 2006. Therefore, the Chamber finds that the Defence will have sufficient notice of the content of their prospective testimony. The Chamber also finds that the Defence will have enough time to conduct investigations and prepare an effective cross-examination of Witnesses ATW and ANC. It is the Chamber's considered opinion that any potential prejudice to the Defence will be remedied by the lapse of time between the amendment of the witness list and the date of testimony of the proposed witnesses.

37. The Chamber notes that proposed Witness ATW is, like the deceased Witness HM, a survivor of the massacre of refugees who had previously sought shelter at CELA in April 1994. That massacre is the subject matter of paragraph 77 of the Amended Indictment of 23 August 2004. The Chamber further notes that the only new fact brought forward by ATW's proposed testimony, that some of the civilians at the CELA had or were thought to have arms at their disposal, can sufficiently be explored during the cross-examination of proposed Witness ATW. In light of the aforementioned, the Chamber finds that it is in the interests of justice to allow the Prosecution to replace Witness HM by Witness ATW.

38. Regarding the probative value of the evidence of proposed Witness ANC in relation to existing allegations in the Amended Indictment, the Chamber notes that Witness ANC is expected to testify notably on Ndindiliyimana's role in the massacre of Tutsi refugees in the Kansi parish committed on 20 April 1994. This allegation is contained in paragraph 73 of the Amended Indictment. Witness ANC will also testify about Ndindiliyimana's alleged involvement in the distribution of weapons stockpiled at the Accused's private house to *Interahamwe* around 15 April 1994. Witness ANC is proffered as a direct witness to these events and a former member of the personal escort of the Accused Ndindiliyimana. It is the Chamber's considered opinion that his testimony on these matters will serve the interests of justice and assist the Chamber in ascertaining the truth about this aspect of the 1994 events in Rwanda.

39. The Chamber notes the Defence submissions regarding the Prosecution's lack of diligence in identifying and calling proposed Witness ANC. The Chamber, however, notes that given the fact that the Rwandan *gendarmerie* contained about 7,000 members during the events in 1994, the scope of the events and the number of persons involved in them, it is conceivable that the Prosecution might not discover certain potential witnesses even with the utmost diligence on its part. In addition, the Chamber considers that the Prosecution's proposal to withdraw Witnesses DAO, IG, CE, QZ, DAY and BA if allowed to add Witness ANC to its list will contribute significantly to judicial economy.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS leave to the Prosecution to vary its initial witness list by replacing the deceased Witness HM with Witness ATW, and by adding Witness ANC to its witness list.

GRANTS the Prosecution request to withdraw Witnesses DAO, IG, CE, QZ, DAY and BA from its initial witness list.

ORDERS the Prosecution, in accordance with paragraph 31 of the Chamber's Decision dated 3 November 2004, to disclose to the Trial Chamber and the Defence the unredacted statements of Witnesses ATW and ANC no later than 35 days before the commencement of the session in which ATW and ANC will be called to testify.

ORDERS the Prosecution to file within 3 weeks of the date of this Decision an *Addendum* to the Pre-Trial brief providing a detailed factual summary of the proposed testimony of Witnesses ANC and ATW, the paragraphs upon of the Indictment on which they will testify and the estimated duration of each witness's testimony-in-chief.

ORDERS that Witnesses ANC and ATW shall be called during the final session for the presentation of the Prosecution case.

Arusha, 21 September 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Nzuwonemeye's Motion for Reconsideration
of the Chamber's Oral Decision of 14 September 2005
on Admissibility of Witness XXO's Testimony
in the Military I Case in Evidence
10 October 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Discretionary power of the Chamber to reconsider decisions, Reasons for reconsideration, New fact, Material change, Erroneous decision – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 73 (A), 89 (C), 90 (G) (ii), 92 bis (D) and 92 bis (E); Statute, art. 20 (2) (4) (e)

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu, "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials" 3 November 2004 (ICTR-2000-56)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF the “Notice of Motion to Adduce and Tender Specific Paragraphs of Pages 30 to 31 of the Transcript in French and Pages 28 to 29 of the Transcript in English of the testimony of Prosecution Protected Witness XXO in the *Military I* Trial before Trial Chamber I on the 20th November 2003 and Page 21 of Transcript in French and Page 18 of Transcript in English of 21st November 2003 Pursuant to Rules 54, 89 (C), 90 (G) (ii), and 92 *bis* (D) and (E) of the Rules of Procedure and Evidence”, filed on 19 September 2005 (the “Motion”);

HAVING RECEIVED AND CONSIDERED the

- (i) “*Réponse du Procureur à la Requête formulée par le conseil de François-Xavier Nzuwonemeye, tendant à faire admettre en preuve certains extraits de la déposition faite par le témoin XXO dans le procès Militaire I*”, filed on 22 September 2005 (the “Response”);

RECALLING its oral Decision of 14 September 2005 on the issue of admissibility of XXO’s testimony in the *Military I* case;

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Procedure and Evidence (the “Rules”);

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions by the Parties

THE DEFENCE

1. The Defence for Nzuwonemeye urges the Chamber to reconsider its oral Decision of 14 September 2005 denying the Defence’s request to admit into evidence the transcripts of the testimony of Witness XXO in the *Military I* case.

2. The Defence for Nzuwonemeye submits that it brought the excerpts of XXO’s testimony to the attention of the Chamber on 14 September 2005 during the testimony of Prosecution Witness LN to counter Witness LN’s hearsay evidence concerning the circumstances of the death of Prime Minister Agathe Uwilingiyimana on the night of 6 to 7 April 1994.

3. The Defence further submits that a ruling on the Defence oral motion for the exclusion of Prosecution Witness LN’s hearsay testimony is still awaited.

4. The Defence argues that the first motivation of this application is to safeguard the rights of the Accused under Article 20 (2) (4) (e) of the Statute as well as the “supreme interest of Justice” and submits that his application is based on Rules 54, 89 (C), 90 (G) (ii), and 92 *bis* (D) and (E) of the Rules.

5. The Defence submits that the Chamber may grant the motion under Rule 54 for the purpose of the proper conduct of the trial. The Defence argues that it is its duty both under Rules 90 (G) (ii), and 92 *bis* (D) and (E) to bring to the attention of the Judges all material evidence of probative value and all competing and conflicting versions and theories of the commission of the alleged crimes so that the Trial Chamber can make an informed decision about the various allegations contained in the indictment.

6. The Defence further submits that, with respect to Rule 89 (C), Witness XXO’s testimony in the *Military I* case is relevant and has probative value in the present pro-

ceedings since XXO was among the guards at the premises of Prime Minister Agathe Uwilingiyimana on the night of 6 to 7 April 1994.

7. Finally, the Defence prays that, should the Chamber not grant the application, the Prosecutor be directed to facilitate access to protected Witness XXO to explore the possibility of calling him to testify.

The Prosecution

8. The Prosecution recalls that the Chamber had already decided the Defence oral Motion on 14 September 2005.

9. The Prosecution submits that this Chamber cannot admit evidence of allegations made in another case before a different Chamber.

10. Concerning the alternative prayer of the Defence, the Prosecution submits that it is not the Office of the Prosecutor that can authorize the Defence to contact the protected witness in question. Rather, this request has to be addressed to the Trial Chamber that had issued the protective measures and with the consent of the protected witness, with whom an interview is sought.

Deliberations

11. The Chamber takes note of the Defence's request to reconsider its oral Decision of 14 September 2005. The Chamber recalls its previous decision that in order for Motion for Reconsideration to succeed, the moving party has to demonstrate the discovery of a new fact, which, had it been known by the Chamber at the time, would not have allowed it to render the decision; or that there has been a material change in circumstances; or finally, that the previous decision was erroneous and therefore prejudicial to either party¹.

12. The Chamber recalls that on 14 September 2005 it denied the Defence's request to admit into evidence "at this point of the proceedings" the transcripts of Witness XXO's testimony in the *Military I* case². The Chamber further ruled that the Defence was entitled to call Witness XXO as a Defence Witness to support its case³.

13. The Chamber considers that the Defence has not brought forward any new fact which would warrant the Chamber to reach a different decision now from that of 14 September. The Defence has also failed to demonstrate that a material change in circumstances has occurred, and no reason has been given why in the Defence's view the Chamber's decision of 14 September 2005 was erroneous. The Defence has therefore not satisfied the criteria necessary to enable the Chamber to exercise its discretion to reconsider a previous Decision.

¹ *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwone-meye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials" rendered on 3 November 2004, para. 21.

² T. 14 September 2005, p. 10, 15 (ICS).

³ T. 14 September 2005, p. 7 (ICS).

14. Concerning the alternative prayer, the Chamber recalls that the Defence's request to interview protected Witness XXO to explore the possibility of calling him to testify has to be addressed to the Trial Chamber that issued the protective measures, that is Trial Chamber I.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in all respects.

Arusha, 10 October 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Defence Request
to Interview Prosecution Witness HAF
12 October 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Edouard Karemera, Mathieu Ndirumapatse, Joseph Nzirorera – Interview of the witness, Request filed in another trial – Motion granted

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Bizimungu, Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses, 19 March 2004 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Augustin Bizimungu, Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004 (ICTR-2000-56)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF a "Written Request to Interview Persons with Information Concerning Witness "T", filed by the Defence Counsel for Joseph Nzirorera on 26 July 2005 in the matter of *Prosecutor v. Karemera et al.*, before Trial Chamber III;

CONSIDERING Trial Chamber III's "Decision on Defence Written Request to Interview Prosecution Witnesses" dated 20 September 2005;

HEREBY DECIDES the Motion.

1. By its Decision of 20 September 2005, Trial Chamber III referred to this Trial Chamber a motion by the Defence for Nzirorera in the case of *Karempera et al.* to interview witness HAF who is listed as a Prosecution witness in this case. The Prosecution has indicated that it has no objection to the request by Nzirorera's Defence provided that the Defence respects all the protective measures put in place by the Chamber in its Decision of 19 March 2004 as subsequently modified.

2. In light of the Prosecution's response, the Chamber grants the request.

FOR THE FOREGOING REASONS, THE CHAMBER

ORDERS the Registrar to forward the request of the Nzirorera Defence to Witness HAF and to facilitate the interview with him if he consents to be interviewed;

ORDERS Nzirorera's Defence to respect all protective measures granted in the Chamber's Decision of 19 March 2004¹ as modified by the Decision of 3 November 2004².

Arusha, 12 October 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Ndindiliyimana's Request for Certification
to Appeal the Chamber's Decision Dated 21 September 2005
26 October 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Criteria for certification of appeal, Fairness and expeditious conduct of the proceedings, Addition of new witnesses, Advance the proceedings, Interests of justice – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 73 (B) and 73 bis (E)

International Cases cited :

¹ Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses, 19 March 2004.

² Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 4 November 2004.

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO, 11 December 2003 (ICTR-98-41); Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Sagahutu's Request for Certification to Appeal, 9 June 2005 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005, 30 June 2005 (ICTR-2000-56)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF the «*Requête en certification d'appel contre la "Decision on the Prosecution's Motion dated 9 August 2005 to vary its list of witnesses pursuant to Rule 73 bis (E)"*», filed on 26 September 2005 (the "Motion");

NOTING that the Prosecution has not filed a response;

RECALLING its Decision on the Prosecution's Motion dated 9 August 2005 to vary its list of witnesses pursuant to Rule 73 bis (E) rendered on 21 September 2005 (the "Impugned Decision");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B);

HEREBY DECIDES the Motion on the basis of the written brief filed by the Defence pursuant to Rule 73 (A) of the Rules.

Submission

1. The Defence for Ndindiliyimana requests for certification to appeal the Impugned Decision pursuant to Rule 73 (B). The Defence submits that the Impugned Decision raises a question that affects the fairness, progress and outcome of the proceedings and that a resolution by the Appeals Chamber would materially advance the proceedings.

2. The Defence submits that in paragraphs 17 to 33 of its response of 15 August 2005 to the Prosecution's Motion to vary its list of witnesses, it explained at length that the redacted statement of Witness ANC contains new charges and massacre sites that are not mentioned in the Indictment. The Defence contends that they were also not related to any of the 119 paragraphs of the Indictment. It cites as an example the allegation that the Accused transported and distributed weapons to members of the militia in the city of Kigali¹.

3. The Defence further submits that the Chamber did not pronounce itself upon the other new charges presented in Witness ANC's statement.

4. Accordingly, the Defence submits that it is clear that the Impugned Decision will fundamentally affect the fairness of the proceedings and the outcome of the trial.

¹ Paras. 13-15 of the Motion.

5. Finally, the Defence submits that a favourable decision by the Appeals Chamber will spare the Defence the burden of having to find new Defence witnesses in connection with the new charges and the new sites, and that this would help advance the proceedings and the Trial in general.

Deliberations

6. The Chamber recalls Rule 73 (B) which reads as follows :

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. The Chamber recalls its previous Decisions in which it discussed the criteria for certification under Rule 73 (B)². In particular, the Chamber notes the principle that decisions under Rule 73 are “without interlocutory appeal” and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73 (B) are satisfied.

8. The Chamber is of the view that the addition of new witnesses at this stage of the proceedings is an important issue going to the fairness and expeditious conduct of the proceedings and could affect the outcome of the trial.

9. However, the Chamber is of the opinion that an immediate resolution by the Appeals Chamber in the present case would not “materially advance the proceedings.” The Chamber recalls that by the Decision of 21 September 2005 it allowed the Prosecution to add Witnesses ANC and ATW “in the interests of justice”. In reaching that Decision, the Chamber took into account the proposed testimony of the said witnesses in relation to allegations in the Amended Indictment.

10. The Chamber further recalls that in reaching its Decision, it considered the Prosecution’s undertaking that the additional witnesses will only be called at the end of the trial. In the Chamber’s view, that would give the Defence sufficient time to investigate any allegations that Witnesses ANC and ATW may make and to prepare for cross-examination.

11. The Chamber recalls that the exercise of discretion is primarily a matter for the Trial Chamber and absent abuse, is not amenable to review by the Appeals Chamber³. The Chamber notes that the Defence has not alleged any abuse of discretion on the part of the Trial Chamber by allowing the Prosecution to add Witnesses ANC and ATW to its witness list.

² *The Prosecutor v. Augustin Bizimungu, Augustin Nindiliyimana, François-Xavier Nzuwone-meye, Innocent Sagahutu*, ICTR-00-56-T, “Decision on Sagahutu’s Request for Certification to Appeal” (TC), rendered on 9 June 2005, para. 16. 17; “Decision on Bizimungu’s Request for Certification to Appeal the Oral Decision Dated 8 June 2005” (TC), rendered on 30 June 2005.

³ *The Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, “Decision on Certification of Appeal concerning admission of written statement of Witness XXO” (TC), 11 December 2003, para. 8.

12. More importantly, however, the Chamber recalls that allowing the Prosecution to add Witnesses ANC and ATW to its witness list is a completely different matter from admitting the witnesses' testimony, in whole or in part, into evidence. The question of admissibility of evidence will be determined during the course of the witnesses' testimony, and the Defence may raise any objections at that stage. The Chamber therefore concludes that an immediate resolution of this issue by the Appeals Chamber will not "materially advance" the current proceedings.

FOR THE ABOVE REASONS, THE CHAMBER
DISMISSES the Defence Motion.

Arusha, 26 October 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Bizimungu's Motion
to Exclude the Testimony of Witness AP
28 October 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Exclusion of testimony, Power of the Chamber to admit evidence, Curing of the lack of notice, Distinction between the admissibility of evidence and the weight of the evidence – Right to be informed promptly and in detail of the charges against him, Right to have adequate time and facilities to prepare his defence, Right to examine witnesses against him – Superior responsibility – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 73, 73 (A) and 89 (C); Statute, art. 19 (1) and 20 (4)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Proposed Testimony of Witness DBY, 18 September 2003 (ICTR-98-41); Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Interlocutory Appeal Regarding Exclusion of Evidence, 19 December 2003 (ICTR-98-41); Appeals Chamber, Pauline Nyiramasuhuko et al v. The Prosecutor, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and

ABZ Inadmissible, 2 July 2004 (ICTR-97-21); Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Judgement*, 13 December 2004 (ICTR-96-10 and 96-17); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., *Decision on Sufficiency of Defence Witness Summaries*, 5 July 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

BEING SEIZED OF Augustin Bizimungu’s oral motion to have Witness AP’s testimony declared inadmissible, presented on 8 September 2005 (“the Motion”);

HAVING HEARD AND CONSIDERED the oral submissions of the Parties made on 8 September 2005 (the “Oral Responses”);

HAVING RECEIVED AND CONSIDERED the

*“Mémoire de la Défense d’Augustin Bizimungu au soutien de la requête orale présentée lors de l’audience du 8 septembre 2005 demandant de déclarer inadmissible la déposition du témoin AP à l’égard de la détermination de la responsabilité du supérieur hiérarchique”*⁴ filed on 12 September 2005 (the “Written Motion”);

“Submissions by Respondent (*sic*) Augustin Ndindiliyimana in Support of Motion to Exclude Testimony of Witness AP made by Applicant” filed on 12 September 2005 (the “Written Response”);

NOTING that the Prosecution has not filed a written submission;

RECALLING its Oral Ruling of 8 September 2005 directing the Defence to proceed with the cross-examination of Witness AP pending a final decision, and inviting the Parties to make written submissions regarding the issues raised in the Motion;

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Procedure and Evidence (the “Rules”) in particular Rule 73 of the Rules;

HEREBY DECIDES the Motion on the basis of the oral submissions and written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

Oral Submissions

THE DEFENCE FOR AUGUSTIN BIZIMUNGU

1. Following the examination-in-chief of Prosecution Witness AP on 8 September 2005, the Defence for Augustin Bizimungu orally requested the Chamber to declare Witness AP’s testimony inadmissible to the extent that it attempted to establish the superior responsibility of the commanding military officers.

⁴“Augustin Bizimungu’s Defence Brief in Support of the Oral Motion Presented on 8 September 2005 Requesting that Witness AP’s Testimony be Declared Inadmissible With Respect to Establishing the Responsibility of Hierarchical Superiors”. (Unofficial translation)

2. The Defence submitted that whereas the facts alleged in Witness AP's testimony attempted to show the responsibility of Major-General Kabiligi and his hierarchical superiors, including the Accused General Augustin Bizimungu, those facts were not mentioned in Kabiligi's own trial (also known as the "*Military I*" case).

3. Counsel for Bizimungu asserted that there was no evidence that Kabiligi did anything that could point to his responsibility or that of his superiors, and that if these allegations had at least been raised in Kabiligi's trial, Kabiligi would have had the opportunity to confront and challenge the witness.

4. The Defence further asserted that it was impossible to gauge the veracity of these allegations since the Accused was not given any notice and was unable to vindicate his fundamental right to confront his accuser.

5. Counsel for Bizimungu stated that the Tribunal's jurisprudence weighs against the admissibility of evidence adduced through indirect testimony and noted that the guilt of the Accused cannot be established through induction or inference.

THE DEFENCE FOR AUGUSTIN NDINDILIYIMANA

6. The Defence for the Accused Augustin Ndindiliyimana made an oral submission in support of Bizimungu's Motion and added that the Defence in this matter was not in a position to respond to Witness AP's account of General Kabiligi's activities during the relevant period.

7. The Defence submitted that in his direct testimony Witness AP provided general background information, but no relevant evidence concerning any of the Accused in this case, and that the witness's evidence was against General Kabiligi and not against the Reconnaissance Battalion.

THE DEFENCE FOR INNOCENT SAGAHUTU

8. The Defence for the Accused Innocent Sagahutu noted that this was a serious issue requiring a serious decision and urged that, in the interest of fairness, Witness AP's testimony should be declared inadmissible with respect to Sagahutu.

THE DEFENCE FOR FRANÇOIS-XAVIER NZUWONEMEYE

9. The Defence for the Accused François-Xavier Nzuwonemeye observed that this was a matter of fundamental human rights, natural justice and due process, and that since General Kabiligi who was the main person implicated by Witness AP's testimony was not present here to defend himself, the testimony should be excluded.

THE PROSECUTION'S RESPONSE

10. The Prosecution submitted that General Kabiligi was not here because he was not one of the Co-Accused in this case and that Witness AP was testifying against Augustin Bizimungu, not against Kabiligi.

11. The Prosecution stated that Witness AP's testimony pointed to the fact that roadblocks were being set up and manned by soldiers under Bizimungu's command, and to the fact that people were being killed openly throughout Kigali, whether by the *Interahamwe* or by soldiers, but that the superior officers did nothing to stop the killing or to protect people and property.

12. The Prosecution cited the 1962 law creating the Rwandan Army and the 1974 law establishing the Rwandan *Gendarmerie*, and noted that both forces were responsible for maintaining public order and security.

Written Submissions

THE DEFENCE FOR AUGUSTIN BIZIMUNGU

13. In its written submission in support of the oral Motion presented on 8 September 2005, the Defence for Bizimungu repeats its position that the testimony of Witness AP should be declared inadmissible with respect to Augustin Bizimungu's responsibility as a hierarchical superior.

14. The Defence submits that the prejudice caused by AP's testimony is clearly greater than its probative value. According to the Defence, it is well established in the Tribunal's jurisprudence that a Trial Chamber may exclude a piece of evidence whose probative value is outweighed by the need for a fair trial¹. The Defence also submits that evidence whose reliability cannot adequately be tested cannot have probative value².

15. The Defence asserts that Witness AP's testimony related to Kabiligi's activities and movements from April to July 1994; that Bizimungu was unaware of the facts alleged by AP; and that only Kabiligi could adequately cross-examine this witness to gauge his credibility. In the view of the Defence, admitting Witness AP's testimony would be prejudicial to the Accused Augustin Bizimungu's right to have a full and plain defence.

16. The Defence also submits that Augustin Bizimungu was not properly informed that Witness AP would be testifying against him. It notes that neither the witness's pre-trial statement nor the summary of Witness AP's testimony presented in Annexure IV to the Prosecution's Pre-Trial Brief made any reference to Augustin Bizimungu.

¹ Citing *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T «Décision relative à la déposition envisagée du Témoin DBY», 18 September 2003; and *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-A, "Decision on Prosecutor's Interlocutory Appeal Regarding Exclusion of Evidence," 19 December 2003.

² Citing *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Sufficiency of Defence Witness Summaries", 5 July 2005, para. 6.

17. According to the Defence, apart from AP's redacted statement and with the exception of paragraphs 31 to 63 of the Pre-Trial Brief, the primary indication of the content of Witness AP's testimony at the commencement of these proceedings was Annexure IV of the Pre-Trial Brief. The Defence also asserts that it was only on 5 September 2005, when the Prosecution indicated the paragraphs of the Indictment on which AP would testify, that the Defence became aware that this witness would give evidence on Bizimungu's responsibility as a hierarchical superior.

18. The Defence submits that under the circumstances, the Accused Augustin Bizimungu would suffer serious prejudice as a result of the Prosecution's method of disclosure. In the view of the Defence, the Indictment and the pre-trial statements by witnesses, rather than subsequent disclosures by the Prosecution, ought to be sufficient to inform the Accused of the charges against him.

19. Finally, citing the "serious violations" of the fundamental right of the Accused to a fair and just trial pursuant to Articles 19 (1) and 20 (4) of the Statute, the Defence requests the Chamber to declare Witness AP's testimony inadmissible to the extent that it seeks to establish Augustin Bizimungu's responsibility as a hierarchical superior.

THE DEFENCE FOR AUGUSTIN NDINDILIYIMANA

20. In its written submission, the Defence for Augustin Ndindiliyimana supports Bizimungu's oral Motion and requests that it should be granted because the testimony of Witness AP has no probative value and its acceptance will be prejudicial to the Defence case.

21. Defence for Ndindiliyimana submits that Witness AP's testimony has nothing to do with the Accused Sagahutu and Nzuwonemeye, since AP was detached from the *Reconnaissance* Battalion in order to be attached to the Army General Staff Headquarters. The Defence also submits that the testimony of Witness AP is not relevant to the charges against Bizimungu or Ndindiliyimana, or "to any of the charges before this Trial Chamber", but involves only General Kabiligi who is not before this Trial Chamber and whose actions as described by AP do not constitute criminal actions.

22. According to the Defence, AP's testimony can only be prejudicial to the Defence as it includes statements that the witness saw soldiers and *gendarmes* at certain points in the city and tries to associate them with *Interahamwe* without establishing a connection. The Defence asserts that there is no evidence whatsoever as to the identity of the dead bodies mentioned in the witness's testimony, how they came to meet their death, or the context in which that happened. It concludes that the only objective in presenting this evidence is to prejudice the Accused in the eyes of the Trial Chamber by implying that they are responsible for those deaths.

23. The Defence challenges the assertion in the Prosecution's oral response to the effect that the dead bodies in question were Tutsi civilians and that they were killed because of the active involvement of the Accused in their deaths through their subordinate personnel or due to their inaction in saving the victims.

24. Finally, the Defence submits that Witness AP's allegation of seeing a roadblock manned by *gendarmes* would be prejudicial to the Defence if admitted because such a claim was never disclosed to the Defence and it did not have the time to investigate

the claim. The Defence for Ndindiliyimana therefore prays the Chamber to grant Bizimungu's oral Motion and exclude Witness AP's testimony in its totality.

Having Deliberated

25. The Chamber recalls Article 20 (4) of the Statute, which sets out the minimum guarantees for the Accused, including the right to be informed promptly and in detail of the charges against him; the right to have adequate time and facilities to prepare his defence; and the right to examine witnesses against him.

26. The Chamber also recalls Rule 89 (C) of the Rules, which prescribes that a Chamber may admit any relevant evidence which it deems to have probative value.

27. The Chamber is mindful of the standard endorsed in the *Ntakirutimana* case, where the Appeals Chamber took into consideration such factors as whether any defect in the Indictment was cured by other Prosecution communications regarding the material facts underlying its case, and whether such information was timely, clear and consistent enough to ensure that the Accused does not suffer undue prejudice³.

28. The Chamber has examined the Prosecution's Pre-Trial Brief and notes that in Annexure IV, where the Prosecution presents a summary of Witness AP's proposed testimony, there is no mention of the Accused Bizimungu or Ndindiliyimana. Instead, only the Accused Nzuwonemeye and Sagahutu are implicated⁴.

29. The Chamber also notes that on 5 September 2005, barely two days before Prosecution Witness AP was expected to start testifying in this matter, the Prosecution issued a letter, addressed to no one in particular, indicating that AP would be testifying on the following paragraphs of the Indictment : 3, 15, 17, 21, 22, 25, 59, 69, 70, 83, 108 and 119.

30. With respect to Bizimungu, the Chamber observes that these paragraphs of the Indictment allege his superior responsibility as a high-ranking officer of the Rwandan Army during the relevant period, as well as that of Ndindiliyimana as the Chief of Staff of the National *Gendarmerie*.

31. While the Chamber agrees with the Defence that the Prosecution failed to provide sufficient notice about the specific content of Witness AP's proposed testimony, the Chamber also notes that the said witness was expected to testify to allegations already pleaded in the Indictment. As the primary charging instrument, the Indictment itself has already served notice on the Accused as to the main charges against them. Furthermore, the Chamber has examined Witness AP's pre-trial statement and con-

³ *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 34.

⁴ The summary reads as follows : "Witness will testify that following the death of President Habyarimana on 6 April 1994, Major Nzuwonemeye ordered for a parade of the *Reconnaissance* Battalion that night and requested them to check the arms of the Battalion and also assigned duties to commanders of squadrons A, B and C. Witness will say that Squadron A under the command of Captain Sagahutu was *inter alia* assigned to patrol Kigali city and to protect certain places with its heavy vehicles, which were equipped with radios. Witness will testify that the Tutsi soldiers within the army were considered as accomplices and that CRAP was an elite unit within the RAF".

cludes that it provides sufficient notice of the witness's intent to testify on the activities of soldiers and *gendarmes*.

32. Additionally, as confirmed by the Appeals Chamber in the *Nyiramasuhuko* case, while lack of notice may preclude conviction on an unpleaded allegation, the evidence may nonetheless be admitted, pursuant to Rule 89 (C), to the extent that it may be relevant in proving any allegation pleaded in the indictment⁵. Having heard all of Witness AP's testimony, including both the examination-in-chief and the cross-examination, the Chamber is satisfied that the evidence is relevant, has probative value, and is thus admissible.

33. The Chamber also echoes the Appeals Chamber's caution to the effect that

“admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence”⁶

as the latter issue can only be determined after taking the totality of the evidence into consideration.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 28 October 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Bizimungu's Motion
to Exclude the Testimony of Witness TN
28 October 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Exclusion of testimony, Power of the Chamber to admit any relevant evidence, Distinction between the admissibility of evidence and the weight of the evidence – Superior responsibility – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 73, 73 (A) and 89 (C); Statute, art. 6 (3)

⁵ *Nyiramasuhuko et al. v. The Prosecutor*, Case No. ICTR-97-21-AR73, “Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the ‘Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible’” (AC), 2 July 2004, paras. 14 and 15.

⁶ *Ibid.*, para. 15.

International Case cited :

I.C.T.R. : Appeals Chamber, Pauline Nyiramasuhuko et al. v. The Prosecutor, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible', 2 July 2004 (ICTR-97-21)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF Augustin Bizimungu's oral motion to have Witness TN's testimony declared inadmissible, presented on 20 September 2005 ("the Motion");

HAVING HEARD AND CONSIDERED the oral submissions in support of and against the Motion (the "Oral Responses");

RECALLING its Oral Ruling of 20 September 2005 directing the Defence to proceed with the cross-examination of Witness TN pending a written decision by the Chamber;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rule 73 of the Rules;

HEREBY DECIDES the Motion on the basis of the oral submissions by the Parties pursuant to Rule 73 (A) of the Rules.

Oral Submissions

THE DEFENCE FOR AUGUSTIN BIZIMUNGU

1. Following the examination-in-chief of Prosecution Witness TN on Tuesday, 20 September 2005, the Defence for Augustin Bizimungu orally requested the Chamber to reject Witness TN's testimony as inadmissible on the grounds that it was not relevant to this case and had no connection to any of the Co-Accused¹.

2. The Defence submitted that pursuant to Rule 89 (C) of the Rules, evidence can be admitted only if it is relevant and has probative value. The Defence further argued that relevance refers to a direct relation between the factual allegation and the object of litigation, but that there was no such relation between Witness TN's testimony and the charges against the Accused.

3. Counsel for Bizimungu asserted that according to Witness TN's testimony, a certain civilian gave orders to a group of men who allegedly committed rapes and other criminal acts. He also argued that there was no indication that the people who committed the acts described in the witness's testimony were actually soldiers, or that the acts they allegedly committed were brought to the attention of the Accused.

¹ T. 20 September 2005.

THE PROSECUTION'S RESPONSE

4. The Prosecution submitted that the military hierarchy had *de jure* authority over their troops and had a duty to control them. The Prosecution also cited the 1962 law creating the Rwandan Army and the 1974² law establishing the Rwandan *Gendarmerie*, and noted that under the Geneva Conventions of 1949 the armed forces were responsible for protecting civilians in wartime.

Having Deliberated

5. The Chamber recalls Rule 89 (C) of the Rules, which empowers it to admit any relevant evidence which it deems to have probative value.

6. The Chamber notes that the summary of Witness TN's testimony contained in Annexure IV to the Prosecution's Pre-Trial Brief indicates that the witness would testify to the activities of soldiers in connection with the counts of genocide, complicity in genocide, murder as a crime against humanity, rape as a crime against humanity, and war crimes³. The Chamber also notes that in a letter dated 13 September 2005, the Prosecution informed the Defence and the Chamber that Witness TN's testimony would relate to paragraphs 3, 17, 18, 22, 23, 25, 53, 59, 68, 69, 70, 116 and 119 of the Indictment, evoking the superior responsibility of the commanding military officers pursuant to Article 6 (3) of the Statute.

7. Having heard the arguments of the Parties as well as the testimony of Witness TN, including both the examination-in-chief and the cross-examination, the Chamber concludes that the evidence is relevant, has probative value, and is therefore admissible. The Chamber stresses, however, that any assessment of the weight to be accorded to the witness's testimony will come at a later stage in the proceedings⁴.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

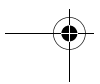
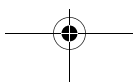
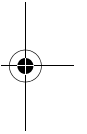
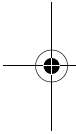
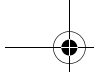
Arusha, 28 October 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

²The Chamber notes that the English Transcript refers to the "decree of 1994" (p. 25) but the French Transcript refers to 1974 (p. 31).

³The summary reads as follows: "Witness will give detailed account of how Tutsi women were used as sex slaves, forced into marriages and gang raped by soldiers assisted by Hutu civilians including *Interahamwe* in Butare *Préfecture* in April 1994 and the killing of one Philippe, a Tutsi man".

⁴*Nyiramasuhuko et al. v. The Prosecutor*, Case No. ICTR-97-21-AR73, "Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible'" (AC), 2 July 2004, para. 15.



***Decision on Nzuwonemeye's ex parte and Confidential Motion
to Obtain the Cooperation of the Kingdom of Belgium
9 November 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

François-Xavier Nzuwonemeye – Cooperation of the States, Belgium, Interview of a witness, Efforts of the Defence to contact the witness – Right of the Accused to be tried without undue delay – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 73 and 73 (A); Statute, art. 20 (4) (c) and 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF the Accused Nzuwonemeye's "*Requête ex parte et confidentielle aux fins d'obtenir la coopération du Royaume de Belgique*"¹, filed on 10 October 2005 (the "Motion");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Article 28 of the Statute and Rule 54 of the Rules;

HEREBY DECIDES the Motion on the basis of the written submission by the Defence pursuant to Rule 73 (A) of the Rules.

¹ "*Ex-parte* and Confidential Motion to Obtain the Co-operation of the Kingdom of Belgium".

***Décision relative à la requête ex parte et confidentielle
de Nzuwonemeye aux fins d'obtenir la coopération
du Royaume de Belgique
9 novembre 2005 (ICTR-2000-56-T)***

(Original : Anglais)

Chambre de première instance II

Juges : Joseph Asoka De Silva, Président de Chambre; Taghrid Hikmet; Seon Ki Park

François-Xavier Nzuwonemeye – Coopération des Etats, Belgique, Interrogatoire d'un témoin, Efforts de la défense pour contacter le témoin – Droit d'être jugé sans retard excessif – Requête acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54, 73 et 73 (A); Statut, art. 20 (4) (c) et 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première Instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Defense for Bagosora's Request to obtain the Cooperation of the Republic of Ghana, 25 mai 2004 (ICTR-98-41); Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIÈGEANT en la Chambre de première instance II, composée des juges Asoka de Silva, Président de Chambre, Taghrid Hikmet et Seon Ki Park (la «Chambre»),

SAISI de la Requête *ex parte* et confidentielle de Nzuwonemeye aux fins d'obtenir la coopération du Royaume de Belgique¹, déposée le 10 octobre 2005 (la «Requête»),

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), en particulier l'article 28 du Statut et l'article 54 du Règlement,

STATUE en vertu de l'article 73 (A), sur la base des conclusions écrites de la Défense.

¹ «Ex-parte and Confidential Motion to Obtain the Co-operation of the Kingdom of Belgium».

Submissions of the Defence

1. The Defence for Nzuwonemeye requests the Trial Chamber to issue an order aimed at securing the cooperation of the Kingdom of Belgium, where the Defence intends to meet a potential Defence witness currently in detention.

2. The Defence submits that it is in the process of conducting investigations and preparing its case by interviewing various potential Defence witnesses. The Defence asserts that since it was not kept informed about the progress of investigations at the Office of the Prosecutor, it must legitimately expect that its right to confidentiality under Article 20 (4) (c) of the Statute will be respected as it pursues its investigations and searches for evidence. The Defence therefore requests that the Prosecution not be informed about its investigations and that the current Motion be examined *ex-parte*. It also requests that the identity of the witness in question not be revealed to the public.

3. The Defence further submits that the potential witness is currently detained by the Belgian authorities and that he is represented by Counsel. The Defence states that it has contacted Counsel for the proposed witness and obtained his agreement to a meeting between his client and the Defence. The Defence notes, however, that the Belgian judge in charge of the case has refused to authorise the meeting with the potential witness.

4. The Defence argues that this witness is important to its case because he is in possession of essential information as he was present at the scene of the crimes with which the Accused Nzuwonemeye is charged in the Amended Indictment. The Defence further requests that it should be allowed to have access to the witness's case file kept by the Belgian authorities, since it may contain information that can exculpate the Accused.

5. The Defence for Nzuwonemeye submits that due to the refusal by the Belgian authorities to authorise the meeting with this potential witness, it requests the Chamber's assistance to help secure the cooperation of the Kingdom of Belgium.

6. The Defence therefore prays the Chamber to issue an order pursuant to Article 28 (2) (b) of the Statute, as well as Articles 44 and 45 of the Belgian Law on Co-operation with the International Criminal Court and International Criminal Tribunals of 29 March 2004 enabling the Defence to meet with the potential witness.

Deliberations

7. As a preliminary matter, the Chamber would like to draw the Defence's attention to the fact that Article 20 (4) (c) of the Statute contains the right of the Accused to be tried without undue delay, and contrary to the Defence submission, does not provide for an express right to confidentiality. Furthermore, the Chamber wishes to underscore that the sole basis for issuing an order for cooperation of a State with the Tribunal is Article 28 of the Statute, and, where necessary, Rule 54 of the Rules.

8. The Chamber recalls Article 28 of the Statute, which provides as follows :

Arguments de la défense

1. La Défense de Nzuwonemeye demande à la Chambre de première instance de rendre une ordonnance en vue d'obtenir la coopération du Royaume de Belgique pour pouvoir s'entretenir dans ce pays avec un témoin à décharge potentiel qui y est actuellement détenu.

2. La Défense fait valoir qu'elle mène actuellement des enquêtes et se prépare au procès en interrogeant des témoins à charge potentiels. Elle considère qu'au même titre qu'elle n'est guère informée de l'état d'avancement des enquêtes du Bureau du Procureur, elle doit légitimement disposer d'un droit à la confidentialité dans la poursuite de ses propres enquêtes et recherches de preuve tel qu'il est garanti par l'article 20 (4) (c) du Statut. Elle ne souhaite donc pas que le Procureur soit tenu au courant de ses enquêtes et demande à la Chambre de bien vouloir examiner cette requête de manière non contradictoire. Elle demande aussi que l'identité du témoin en question ne soit pas révélée au public.

3. La Défense indique que le témoin potentiel est détenu par les autorités belges et qu'il est représenté par un conseil. Elle précise qu'elle s'est mise en relation avec celui-ci et qu'il a donné son accord pour que la Défense puisse s'entretenir avec son client. La Défense fait remarquer cependant que le juge belge chargé du dossier a refusé d'autoriser la rencontre avec le témoin potentiel.

4. Selon la Défense, ce témoin est important car il détient des informations capitales, du fait qu'il était présent sur les lieux des crimes retenus dans l'acte d'accusation dressé à l'encontre de Nzuwonemeye. Elle demande en outre d'être autorisée à consulter le dossier de l'instruction qui se trouve entre les mains des autorités belges, étant donné que celui-ci pourrait contenir des renseignements de nature à disculper l'accusé.

5. Devant le refus des autorités belges de permettre à la Défense de rencontrer ce témoin potentiel, celle-ci demande l'assistance de la Chambre en vue d'obtenir la coopération du Royaume de Belgique.

6. Elle prie donc la Chambre de rendre une ordonnance aux fins d'obtenir la coopération des autorités belges conformément à l'article 28 (2) (b) du Statut et aux articles 44 et 45 de la loi belge du 29 mars 2004 portant coopération avec la Cour pénale internationale et les Tribunaux pénaux internationaux et de lui permettre de rencontrer le témoin potentiel.

Délibération

7. À titre préliminaire, la Chambre appelle l'attention de la Défense sur le fait que l'article 20 (4) (c) du Statut précise que tout accusé a le droit d'être jugé sans retard excessif, mais qu'il ne prévoit pas expressément le droit à la confidentialité, contrairement à ce qu'affirme la Défense. Par ailleurs, la Chambre tient à souligner qu'une ordonnance demandant la coopération d'un État avec le Tribunal ne peut être rendue qu'en vertu de l'article 28 du Statut et, si besoin est, en vertu de l'article 54 du Règlement.

8. La Chambre rappelle l'article 28 du Statut, qui est libellé comme suit :

1) States shall cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2) States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to :

- a) The identification and location of persons;
- b) The taking of testimony and the production of evidence;
- c) The service of documents;
- d) The arrest or detention of persons;
- e) The surrender or the transfer of the accused to the International Criminal Tribunal for Rwanda.

9. Rule 54 of the Rules specifies that a Judge or Chamber may

“issue such orders, summonses, *subpoenas*, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”.

On the basis of these powers, the Chamber is competent to direct a request for cooperation to any State to facilitate a meeting between a Party to the proceedings and a person in that State².

10. The Chamber concurs with the following criteria stipulated by Trial Chamber I in the *Bagosora* case for granting a request under Article 28 :

“The party seeking the request by the Trial Chamber must specifically identify to the extent possible the nature and purpose of the assistance sought from the State, articulate its relevance to the trial, and show that efforts to obtain the assistance have been unsuccessful”³.

11. The Chamber notes that the applicant seeks the assistance of the Kingdom of Belgium in order to interview a potential witness. The Chamber is satisfied, on the basis of the Defence Motion, that the potential witness may have information relevant to the Defence case. Further, the Chamber notes that based on the undated communication from the Defence filed with the Registry on 2 November 2005, and transmitted to the Chamber on the same day, it appears that the Defence has made efforts to contact the potential witness; secondly, that the Judge presiding over the proposed witness’s criminal trial denied the Defence request to meet with the potential witness on the ground that it is not a party to the proceedings in Belgium.

12. The Chamber is therefore satisfied that the criteria to issue an order for cooperation under Article 28 of the Statute have been met.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion;

² *The Prosecutor v. Bagosora et al.*, Decision on Request for *Subpoena* of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

³ *The Prosecutor v. Bagosora et al.*, Decision on the Defence for Bagosora’s Request to Obtain the Cooperation of the Republic of Ghana, rendered on 25 May 2004, para. 6.

«1. Les États collaborent avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire.

2. Les États répondent sans retard à toute demande d'assistance ou à toute ordonnance émanant d'une Chambre de première instance et concernant, sans s'y limiter :

- a) L'identification et la recherche des personnes;
- b) La réunion des témoignages et la production des preuves;
- c) L'expédition des documents;
- d) L'arrestation ou la détention des personnes;
- e) Le transfert ou la traduction de l'accusé devant le Tribunal.»

9. L'article 54 du Règlement précise qu'un juge ou une Chambre peut

«délivrer les ordonnances, citations à comparaître, assignations, injonctions, mandats et ordres de transfert nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès».

Ainsi habilitée, la Chambre est compétente pour adresser une demande de coopération à tout État, en vue de faciliter un entretien de l'une des parties à l'instance avec une personne se trouvant dans cet État².

10. La Chambre fait sien le critère énoncé par la Chambre de première instance I pour faire droit à une telle requête en vertu de l'article 28, dans l'affaire *Bagosora* :

«[La partie qui sollicite de la Chambre de première instance une ordonnance de demande de coopération doit au préalable préciser autant que possible la nature et le but de l'assistance demandée à cet État, indiquer la pertinence de cette demande par rapport à l'instance et établir qu'elle a fait des efforts pour obtenir cette coopération mais qu'elle n'y est pas parvenue]»³. [traduction]

11. La Chambre prend note que la Défense demande la coopération du Royaume de Belgique afin de pouvoir interroger un témoin potentiel. La Chambre estime, sur la base de la présente requête, que ce témoin potentiel pourrait détenir des renseignements qui intéressent la Défense. De plus, elle note, d'une part, que, d'après les documents non datés déposés au Greffe le 2 novembre 2005 et transmis à la Chambre le même jour, la Défense s'est efforcée d'entrer en contact avec le témoin potentiel, et, d'autre part, que le juge d'instruction [belge] chargé du dossier a refusé l'autorisation demandée par la Défense, au motif que cette dernière était étrangère à la procédure en cours en Belgique.

12. La Chambre est donc convaincue que les conditions requises pour rendre une ordonnance de demande de coopération en vertu de l'article 28 du Statut sont remplies.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête;

² *Le Procureur c. Bagosora et consorts*, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, (Chambre de première instance, 23 juin 2004, para. 4.

³ *Le Procureur c. Bagosora et consorts*, *Decision on the Defence for Bagosora's Request to Obtain the Co-operation of the Republic of Ghana*, rendue le 25 mai 2004, para. 6.

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BIZIMUNGU

RESPECTFULLY REQUESTS the Government of the Kingdom of Belgium to permit the Defence of Nzuwonemeye to meet with and interview its proposed witness (named in the Motion paper) and to have access to his case file;

DIRECTS the Registry to transmit this Decision to the relevant authorities of the Government of the Kingdom of Belgium; to collaborate with the Defence for Nzuwonemeye in the implementation of this request and to report back to the Chamber.

Arusha, 9 November 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

DEMANDE au Gouvernement du Royaume de Belgique d'autoriser la Défense de Nzuwonemeye à interroger son témoin potentiel (identifié dans la requête) et à consulter le dossier de celui-ci;

CHARGE le Greffier de transmettre la présente Décision aux autorités compétentes du Royaume de Belgique, et l'invite à agir de concert avec la Défense de Nzuwonemeye en vue de la mise en application de la présente demande et à faire rapport à la Chambre.

Arusha, le 9 novembre 2005.

[Signé] : Joseph Asoka De Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Bizimungu's Motion for Certification of Appeal
Against the Trial Chamber's Decisions of 28 October 2005
on the Admissibility of the Testimonies of Witnesses AP and TN
16 November 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Criteria for the certification of interlocutory appeals, Satisfaction of both criteria for the certification of interlocutory appeals – Hearsay evidence, Admissibility of hearsay evidence, Power of the Chamber to admit any relevant evidence – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73, 73 (B) and 89 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO, 11 December 2003 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zlatko Aleksovski, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 (IT-95-14/1)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF Augustin Bizimungu's "*Requête de la Défense aux fins d'obtenir l'autorisation de la Chambre de première instance d'interjeter appel contre ses décisions du 26 octobre 2005 (sic) portant sur l'exclusion des témoignages TN et AP*",¹ filed on 7 November 2005 ("the Motion");

HAVING RECEIVED the "*Observations du Procureur sur la requête de la défense d'Augustin Bizimungu en certification, datée du 4 novembre 2005 (sic) (témoins AP et TN)*"² filed on 8 November 2005 ("the Response");

¹ "Defence Motion for the Trial Chamber to Certify an Appeal against its Decisions of 26 October 2005 (sic) on the Exclusion of the Testimonies of TN and AP." (Unofficial Translation)

² "The Prosecutor's Observations Regarding Augustin Bizimungu's Motion for Certification, dated 4 November 2005 (sic) (Witnesses AP and TN)." (Unofficial translation.)

RECALLING its Decisions filed on 28 October 2005 on the admissibility of the testimonies of Witnesses AP³ and TN⁴ (the “Impugned Decisions”);

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Procedure and Evidence (the “Rules”) in particular Rule 73 of the Rules;

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (B) of the Rules.

Submissions of the Parties

THE DEFENCE

1. The Defence for Augustin Bizimungu requests the Trial Chamber to certify an appeal against its written Decisions rendered on 28 October 2005 on the admissibility of the testimonies of Prosecution Witnesses AP and TN.

2. The Defence submits that pursuant to Rule 73 (B) of the Rules, a Trial Chamber may grant certification for appeal if (1) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and (2) the intervention of the Appeals Chamber may materially advance the proceedings⁵.

3. The Defence asserts that the Impugned Decisions involve an issue that would significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial. The Defence further asserts that the testimonies of Witnesses AP and TN should not have been admitted into evidence because, contrary to the “best evidence rule”, those witnesses related facts which were not to their personal knowledge. According to the Defence, the testimonies of Witnesses AP and TN were based on what others told them or on their own deductions, and the Prosecution failed to show that it was unable to produce witnesses who had personal knowledge of those facts.

4. The Defence argues that the intervention of the Appeals Chamber would materially advance the proceedings on the question of the admissibility of evidence as that would affect the debates before the Trial Chamber. The Defence further argues that a definitive resolution of these issues would definitely advance the proceedings and would ensure that the Accused Bizimungu can fully exercise his rights.

5. Finally, the Defence submits that it is important to have these issues resolved once and for all in order to have clear and concise guidelines on admissibility.

³ *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, “Decision on Bizimungu’s Motion to Exclude the Testimony of Witness AP”, 28 October 2005.

⁴ *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, “Decision on Bizimungu’s Motion to Exclude the Testimony of Witness TN”, 28 October 2005.

⁵ Note here that the formulation of the second criterion as presented in para. 4 of the Motion is different from what appears in the Rules of Procedure and Evidence.

THE PROSECUTION

6. The Prosecution submits that the assertion contained in paragraph 6 of the Defence Motion⁶ is erroneous and that the Defence has failed to prove that Witnesses AP and TN testified about facts which were not to their personal knowledge.

7. The Prosecution also argues that in the Impugned Decisions, the Trial Chamber conducted a content analysis of the witnesses' testimonies and determined that they tended to support the allegations contained in the Indictment of 23 August 2004, but that the Chamber postponed any assessment of their credibility until the judgment stage.

Having deliberated

8. The Chamber recalls Rule 73 (B) of the Rules, which stipulates the criteria for the certification of interlocutory appeals. The first part of the test is satisfied

“if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”

while the second criterion is met if,

“in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

It is worth recalling that both criteria have to be satisfied in order for certification to be granted.

9. With respect to the first part of this two-pronged test, the Chamber notes that the main argument advanced by the Defence is that the testimonies of Witnesses AP and TN were based not on their personal knowledge but on hearsay and deductions⁷. The Chamber draws the Defence's attention to the fact that even if the testimonies of Witnesses AP and TN could properly be characterized as hearsay, they would not be inadmissible *per se*. This is because Rule 89 (C) empowers a Trial Chamber to admit any relevant evidence which it deems to have probative value, including hearsay evidence. In fact, as the Appeals Chamber has established in the *Aleksovski* case :

It is well settled in the practice of the Tribunal that hearsay evidence is admissible. Thus relevant out of court statements which a Trial Chamber considers probative are admissible under Rule 89 (C) [...] Accordingly, Trial Chambers have a broad discretion under Rule 89 (C) to admit relevant hearsay evidence⁸.

10. In the Chamber's view, the Defence has failed to demonstrate that any ruling by the Appeals Chamber on this issue can affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Thus the Defence has not satisfied the first criterion for certification. Having determined that the Defence has failed to meet the first part of the test, the Chamber need not consider the second part.

⁶That is the paragraph where the Defence asserts that the testimonies of Witnesses AP and TN are based on hearsay and deductions.

⁷See para. 6 of the Motion.

⁸*The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1 (AC), “Decision on Prosecutor's Appeal on Admissibility of Evidence”, 16 February 1999, para. 15.

11. Finally, the Chamber reminds the Defence that, absent abuse, the exercise of discretion by a Trial Chamber in determining the admissibility of evidence is not amenable to review by the Appeals Chamber⁹. Here, the Chamber notes that the Defence has not alleged any abuse of discretion by the Chamber in admitting the testimonies of Prosecution Witnesses AP and TN into evidence.

FOR THE ABOVE REASONS, THE CHAMBER
DENIES the Motion in its entirety.

Arusha, 16 November 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on Bizimungu's Motion
in Opposition to the Admissibility of the Testimonies
of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL AND GFO
and for Reconsideration of the Chamber's Decision of 13 May 2005
24 November 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Nindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Protais Mpiranya – Discretionary power of the Chamber to reconsider decisions, Reasons for reconsideration, New fact, Material change, Erroneous decision, Inherent power of the Chamber to reconsider its own decisions in exceptional circumstances, Clear error of reasoning, Injustice – Obligation to the Prosecutor to call only those witnesses necessary to prove the counts in the Indictment, Distinction between the admissibility of the evidence and the weight of the evidence – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 46, 73 (A), 90 (F) (ii) and 98 bis; Statute, art. 20 (4)

International Cases cited :

⁹ *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, "Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO", 11 December 2003, para. 8.

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu, Decision on Sagahutu's Motion for exclusion of Witnesses LMC, DX, BB, GS, CJ, GFO, 13 May 2005 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Sagahutu's Request for Certification to Appeal, 9 June 2005 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi's Request for Particulars of the Amended Indictment, 27 September 2005 (ICTR-98-41); Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005, 26 October 2005 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Motion to Exclude the Testimony of Witness TN, 28 October 2005 (ICTR-2000-56); Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Prosecution Motion for Variation, or in the Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses, 2 November 2005 (ICTR-98-44C)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"), SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF the Accused Bizimungu's "*Requête s'opposant à la recevabilité de la déposition des témoins LMC, DX/ANM, BB, GS, CJ/ANL et GFO*"¹, filed on 9 November 2005 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

"*Réponse du Procureur à la Requête déposée par le Conseil d'Augustin Bizimungu s'opposant à la recevabilité de la déposition des témoins LMC, ANM/DX, BB, GS, ANL/ CJ et GFO*"², filed on 11 November 2005 (the "Response");

"*Réplique de la Défense d'Augustin Bizimungu à la 'Réponse du Procureur à la Requête déposée par le Conseil d'Augustin Bizimungu s'opposant à la recevabilité de la déposition des témoins LMC, ANM/DX, BB, GS, ANL/CJ et GFO*'"³, filed on 16 November 2005 (the "Reply");

RECALLING its Decision of 13 May 2005 concerning the issue of exclusion of the testimony of Witnesses LMC, DX, BB, GS, CJ and GFO⁴;

¹ "Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO." (Unofficial translation.)

² "The Prosecutor's Response to the Motion filed by Counsel for Augustin Bizimungu in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO." (Unofficial translation.)

³ "The Defence's Reply to 'The Prosecutor's Response to the Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO'." (Unofficial translation.)

⁴ *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, "Decision on Sagahutu's Motion for exclusion of Witnesses LMC, DX, BB, GS, CJ, GFO" rendered on 13 May 2005.

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Procedure and Evidence (the “Rules”);

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions by the Parties

THE DEFENCE

1. The Defence for Bizimungu requests the Chamber to reconsider its Decision of 13 May 2005, in which the Chamber denied the Sagahutu Defence’s request for an order that the Prosecution exclude witnesses LMC, DX, BB, GS, CJ and GFO from its witness list.

2. The Defence for Bizimungu submits that neither the statements of witnesses LMC, DX, BB, GS, CJ and GFO nor the summaries of their proposed testimony, refer to the accused Bizimungu.

3. The Defence further submits that the first time it received any indication that the witnesses in question, who were originally listed to testify against the formerly co-Accused Mpiranya, would now testify against the Accused Bizimungu, was in the Prosecution’s response to Sagahutu’s Motion.

4. The Defence argues that the introduction of their testimony constitutes a new fact, of which it has not been informed in a timely, clear and consistent manner, and that this violates the right of the Accused to a fair trial.

5. The Defence further submits that contrary to the Prosecution suggestion, the testimonies of Witnesses LMC, DX, BB, GS, CJ and GFO cannot go to proof of the count of conspiracy to commit genocide, nor to Bizimungu’s superior responsibility.

6. The Defence argues that the fact that both the formerly co-Accused Mpiranya and the Accused Bizimungu held high positions in the Rwandan Armed Forces, does not prove a conspiracy and does not entail their individual criminal responsibility under the Statute.

7. The Defence submits that the Prosecution has already indicated the 15 witnesses who will testify to Bizimungu’s superior responsibility and the addition of another six witnesses would, contrary to Rule 90 (F) (ii), lead to needless consumption of time.

8. Finally, the Defence submits that the paragraphs of the Amended Indictment of 23 August 2004, that relate to Bizimungu’s superior responsibility are not pleaded with the necessary specificity. Referring to a recent Decision in the *Bagosora* case⁵, the Defence argues that it is not possible, through general references, to know with certainty the identity of the subordinates over whom the Accused had effective control and whose acts entail the Accused’s responsibility.⁶

⁵ *The Prosecutor v. Bagosora et al.*, “Decision on Kabiligi’s Request for Particulars of the Amended Indictment” rendered on 27 September 2005, paras. 12-13.

⁶ Para. 43 of the Motion.

THE PROSECUTION

9. The Prosecution asks the Chamber to dismiss the Defence Motion as ill-founded.

10. The Prosecution submits that Witnesses LMC, ANM/DX, BB and ANL/CJ will all testify to facts pleaded in the Indictment, in particular to events contained in paragraphs 48-50. Witness GS will testify to paragraphs 22-25 and paragraph 27 of the Indictment. Witness GFO forms part of the group of 30 witnesses that will be withdrawn from the Prosecution's initial witness list.

11. The Prosecution submits that all of the Defence teams have been in possession of the Indictment and the witness statements for at least two years. The Prosecution further submits that the witness summaries prepared by the Prosecution, optional under Rule 73 *bis* (B), are not a substitute for the written statements.

12. The Prosecution further submits in relation to the crime of conspiracy to commit genocide that the different actors involved in the crime have to be considered as accomplices. They share the same intent and their respective acts, although often different in nature, aim at the same objective : to accomplish the genocide.

13. Finally, the Prosecution submits that if the Defence is of the opinion that the Prosecution has not been able to prove the count of conspiracy to commit genocide, it can make an appropriate submission in a Motion under Rule 98 *bis* of the Rules at the end of the Prosecution case.

DEFENCE REPLY

14. The Defence for Bizimungu takes note of the Prosecution's announcement that Witness GFO is one of the 30 witnesses who will be dropped from the Prosecution's initial witness list and submits that, at this stage of the proceedings, the Prosecution should announce its final witness list to the Chamber and to the Defence teams.

15. The Defence submits that the Prosecution did not respond to the arguments brought forward by the Defence. The Defence further submits that the paragraphs in the Amended Indictment to which the Prosecution refers in its response, do not provide clear information that the witnesses in question will testify against Augustin Bizimungu.

16. The Defence submits that it is unfair that Bizimungu is informed in a piecemeal manner by the Prosecution that the witnesses in question will testify against him. The Defence argues that this procedure is contrary to Article 20 (4) of the Statute and violates the fundamental rights of the Accused.

17. Finally, the Defence submits that the events upon which Witnesses LMC, DX, BB, GS, CJ will testify fall into a time period, in which Marcel Gatsinzi and not Augustin Bizimungu was Chief of Staff of the Rwandan Army, and that the former had effective control over Major Mpiranya and the soldiers of the presidential guard.

Deliberations

18. The Chamber has previously ruled that in order for a motion for reconsideration to succeed, the moving party has to demonstrate the discovery of a new fact, which,

had it been known by the Chamber at the time, would not have allowed it to render the decision; or that there has been a material change in circumstances; or finally, that the previous decision was erroneous and therefore prejudicial to either party⁷.

19. Furthermore, the Chamber takes note of the Decision of 2 November 2005 in the Rwamakuba case, where Trial Chamber III ruled that

“a Trial Chamber has an inherent power to reconsider its own decisions in exceptional circumstances where (i) a clear error of reasoning in the previous decision has been demonstrated and (ii) the decision sought to be reconsidered has led to an injustice”⁸.

20. The Chamber recalls that on 13 May 2005, it denied the request by the Defence for Sagahutu to order the Prosecution to exclude Witnesses LMC, DX, BB, GS, CJ and GFO from its witness list. After examining the Amended Indictment of 23 August 2004, the Pre-Trial Brief and the witness summaries annexed to it, as well as the redacted statements, the Chamber concluded that it was premature to exclude the testimonies of Witnesses LMC, DX, BB, GS, CJ and GFO based solely on the Defence’s submission that they were originally listed to testify against the formerly co-Accused Mpiranya⁹.

21. In the same decision the Chamber reminded the Prosecution of its obligation to call only those witnesses who are necessary to prove the counts in the Indictment against the Accused persons and to avoid calling witnesses whose evidence is not probative and may lead to needless consumption of time and resources¹⁰. On 9 June 2005, the Defence’s request for certification to appeal the Chamber’s Decision of 13 May 2005 was denied¹¹.

22. The Chamber takes note of the Defence’s submission that the testimonies of Witnesses LMC, DX, BB, GS, CJ and GFO cannot go to proof of the count of conspiracy to commit genocide and to Bizimungu’s superior responsibility. The Chamber would like to draw the Defence’s attention to the fact that it has previously ruled that all admissible evidence will be assessed, and appropriate weight will be attached to it at a later stage in the proceedings¹². If the Defence is of the opinion that certain

⁷ *The Prosecutor v. Nindiliyimana et al.*, ICTR-00-56-T, Trial Chamber II, “Decision on Bizimungu’s Motion for Reconsideration of the Chamber’s 19 March 2004 Decision on Disclosure of Prosecution Materials” rendered on 3 November 2004, para. 21; “Decision on Nzuwonemeye’s Motion for Reconsideration of the Chamber’s Oral Decision of 14 September 2005 on Admissibility of Witness XXO’s Testimony in the *Military I* case in Evidence,” rendered on 10 October 2005, para. 11.

⁸ *The Prosecutor v. André Rwamakuba*, ICTR-98-44C-T, Trial Chamber III, “Decision on Prosecution Motion for Variation, or in Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses” rendered on 2 November 2005, para. 4.

⁹ Para. 16.

¹⁰ *Ibid.*

¹¹ *The Prosecutor v. Augustin Nindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, “Decision on Sagahutu’s Request for Certification to Appeal the Decision Dated 13 May 2005 Dismissing Applicant’s Request for exclusion of Witnesses LMC, DX, BB, GS, CJ and GFO” rendered on 9 June 2005.

¹² *The Prosecutor v. Augustin Nindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, “Decision on Bizimungu’s Motion to Exclude the Testimony of Witness TN” rendered on 28 October 2005, para. 7; “Decision on Bizimungu’s Motion to Exclude the Testimony of Witness AP” rendered on 28 October 2005, para. 33.

evidence is not probative of any of the counts in the Amended Indictment, it may *at a later stage* make an appropriate application either under Rule 98 *bis* or in its final submissions.

23. The Chamber takes further note of the Defence's assertion that the paragraphs in the Indictment relating to Bizimungu's superior responsibility are vague. The Chamber fails to see the relevance of this submission in relation to the motion for reconsideration of its Decision of 13 May 2005.

24. Finally, the Chamber takes note of the Defence's assertion that to allow witnesses LMC, DX, BB, GS, CJ and GFO to testify would be prejudicial to the Accused Bizimungu. The Chamber notes, however, that according to the Defence's submission, the alleged prejudice does not result from the Chamber's Decision of 13 May 2005 but rather from the Prosecution's response to the Sagahutu Motion. In light of the Chamber's reminder to the Prosecution

"to present only those witnesses who are necessary to prove the counts in the Indictment against the Accused persons"¹³

and in light of its recent ruling that the Defence may raise any objections concerning the admissibility of evidence "during the course of the witness's testimony"¹⁴, the Chamber considers that this submission lacks merit.

25. The Chamber notes that despite its length, the Motion contains no submissions concerning the criteria for reconsideration as established by the jurisprudence of the Tribunal. The Chamber also notes that the Defence's submissions on probative value and on specificity are irrelevant to the issue of reconsideration. In light of the above, the Chamber issues a warning to Defence counsel for Bizimungu under Rule 46 of the Rules. In addition, the Chamber instructs the Defence to limit itself in future applications to the relevant issues in order to avoid needless consumption of the Court's time.

FOR THE ABOVE REASONS, THE CHAMBER
DISMISSES the Defence Motion in its entirety.

Arusha, 24 November 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

¹³ Para. 16 of the Chamber's Decision of 13 May 2005.

¹⁴ *The Prosecutor v. Augustin Nindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwone-meye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, "Decision on Nindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005" rendered on 26 October 2005, para. 12.

***Decision on Bizimungu's Motion in Opposition
to the Admissibility of the Testimony of Witness AOF
2 December 2005 (ICTR-200-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Right of the accused, Content of the Indictment, Defect in the Indictment, Cure of the defects in the indictment by subsequent communications of the Prosecutor – Jurisdiction of the Tribunal, Temporal jurisdiction, Territorial jurisdiction, Power of the Chamber to admit any relevant evidence – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 47 (C), 73, 73 (B), 89 (C) and 93; Statute, art. 7, 19 and 20

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Proposed Testimony of Witness DBY, 18 September 2003 (ICTR-98-41); Trial Chamber, The Prosecutor v. Simon Bikindi, Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment, 22 September 2003 (ICTR-2001-72); Trial Chamber, The Prosecutor v. André Ntagerura et al., Judgement and Sentence, 25 February 2004 (ICTR-99-46); Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Augustin Bizimungu's Preliminary Motion, 15 July 2004 (ICTR-2000-56); Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004 (ICTR-2001-76); Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and 96-17); Appeals Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005 (ICTR-2000-55); Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Accused Tharcisse Muvunyi's Motion to Exclude Witness CCR's Testimony, 20 May 2005 (ICTR-2000-55A)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF Augustin Bizimungu's "*Requête en opposition à la recevabilité de la déposition du témoin AOF*"¹, filed on 10 November 2005 ("the Motion");

HAVING RECEIVED AND CONSIDERED the

- (i) "*Réponse du Procureur à la requête présentée par le Conseil d'Augustin Bizimungu, s'opposant à la déposition à venir du témoin AOF*"² filed on 14 November 2005 ("the Response");
- (ii) "*Réplique de la Défense du Général Augustin Bizimungu à la Réponse du Procureur à la requête en opposition à la recevabilité de la déposition du témoin AOF*"³ filed on 21 November 2005⁴ ("the Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rule 73 of the Rules;

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (B) of the Rules.

Submissions of the Parties

THE DEFENCE

1. The Defence for Augustin Bizimungu requests the Chamber to issue an immediate ruling against the admissibility of part of Prosecution Witness AOF's proposed testimony for two main reasons :

- (i) because it relates to matters not alleged in the Indictment; and
- (ii) because the facts to which the witness will testify are situated outside the temporal jurisdiction of the Tribunal as stipulated in Article 7 of the Statute.

2. With respect to the first reason, the Defence submits that the Prosecution's Pre-Trial Brief filed on 17 June 2004 contains facts that do not appear in the Amended Indictment. The Defence also submits that it was in the Pre-Trial Brief and in its Opening Statement that the Prosecution first announced that Witnesses AOE and AOF would testify to these new allegations.

3. The Defence asserts that it raised these issues during Witness AOE's testimony on 8 June 2005; that the Chamber acknowledged that the allegations concerning the events of 7 and 8 April 1994 were not contained in the Indictment; that the Chamber ruled that the witness could only be questioned about issues relating to the *mens rea* surrounding those events; and that the Chamber concluded that the evidence about events in 1993 would be taken into consideration only if the Prosecution could prove that there was a conspiracy leading up to 1994⁵.

¹ "Motion in Opposition to the Admissibility of the Testimony of Witness AOF." (Unofficial Translation).

² "The Prosecutor's Response to the Motion Presented by Augustin Bizimungu's Counsel in Opposition to the Proposed Testimony of Witness AOF". (Unofficial translation).

³ "General Bizimungu's Reply to the Prosecutor's Response to the Motion in Opposition to the Admissibility of the Testimony of Witness AOF". (Unofficial translation)

⁴ The Chamber notes that the filing was timely, pursuant to Rule 7 *ter* (B).

⁵ See para. 4 of the Motion, citing the French Transcript of 8 June 2005, p. 18 (English Transcript, p. 17).

4. As concerns the proposed testimony of Witness AOF, the Defence submits that in a preliminary statement transmitted on 21 June 2005, it is alleged that during a meeting at the Nkuli *communal* office in December 1993, Augustin Bizimungu referred to Tutsis as a dangerous plant known as “Igisura”. The Defence argues that since this allegation does not appear in the Indictment, it should not be admitted into evidence. The Defence further argues in this regard that paragraphs 27 and 29 of the Indictment are in contradiction to the proposed testimony of Witness AOF, as they point instead to meetings aimed at fighting the enemy.

5. Citing a decision by the Trial Chamber in the *Muvunyi* case⁶, the Defence submits that when a statement on prior events refers to existing charges, it can be admitted into evidence, but that if such a statement creates new charges, as in the instant case, it should not be admitted into evidence. The Defence also cites an oral decision in which the *Ntagerura* Trial Chamber held that the Prosecution could not lead evidence on allegations that were not specifically charged in the indictment⁷ as well as a portion of the Judgement and Sentence in which the Trial Chamber reiterated the same points⁸.

6. The Defence submits that allowing the Prosecution to lead evidence of allegations that are not pleaded in the Indictment would be tantamount to creating new charges and would cause irreparable prejudice to the Accused⁹. The Defence also submits that the only appropriate remedy in such a situation would be the filing by the Prosecution of a motion to amend the Indictment.

7. Regarding the second reason for the Motion, the Defence argues that Witness AOF’s proposed testimony is inadmissible because it deals with events that occurred in 1991 and 1993 and are therefore situated outside the temporal jurisdiction of the Tribunal. In particular, the Defence asserts that AOF’s statement to the effect that the Accused Bizimungu ordered the killing of five Tutsis at Nkuli in 1991 is not only an inadmissible *ultra vires* declaration, but is also a highly prejudicial statement because it tends to show Bizimungu’s bad character and propensity to commit crime. The Defence points in particular to the following excerpt from the witness’s pre-trial statement referring to the Accused Bizimungu :

“[...] He went round the caves inspecting them and thereafter gave orders to one of the soldiers to go and bring the five Tutsi who were being guarded in the vehicle of General Bizimungu. [...] When these five Tutsi were brought to the caves, General Bizimungu told the Tutsi to say their last prayers. He further told us that the five Tutsi were the accomplices who helped the RPF to attack Ruhengeri prison and free some prisoners. After this, General Bizimungu gave orders to one of the soldiers to shoot them and he did”¹⁰.

⁶ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, “Decision on Accused Tharcisse Muvunyi’s Motion to Exclude Witness CCR’s Testimony”, 20 May 2005, para. 5.

⁷ *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-96-10A-T, Transcripts of 14 February 2001, p. 101 English, p. 161 French.

⁸ *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, “Judgement and Sentence”, 25 February 2004, para. 66.

⁹ See para. 13 of the Motion.

¹⁰ Pre-trial statement of Witness AOF signed on 21 April 2004, at p. 3.

8. The Defence submits that admitting Witness AOF's testimony could prolong the trial, as the Defence intends to raise objections regarding all aspects of the testimony that it considers inadmissible. The Defence further submits that only in exceptional circumstances should a Trial Chamber admit evidence of events falling outside the Tribunal's temporal jurisdiction and argues that Rule 93 of the Rules of Procedure and Evidence provides for such exceptions.

9. Relying on decisions by the *Bagosora* Trial Chamber¹¹ and the Supreme Court of Canada¹², the Defence asserts that the prior acts of an Accused person falling outside the Tribunal's temporal jurisdiction can only be admitted into evidence after the following criteria are taken into consideration :

- i) proximity in time to similar acts;
- ii) degree of resemblance of those prior acts to the conduct charged;
- iii) the frequency of similar acts;
- iv) the circumstances surrounding the similar acts;
- v) characteristics common to the events; and
- vi) any similar factor likely to support the similar acts.

10. The Defence submits that the proposed testimony of Witness AOF does not fall under any of the recognized exceptions and that the findings of the *Bagosora* Trial Chamber should be applied *mutatis mutandis* to the present case. The Defence therefore submits that AOF's proposed testimony regarding Bizimungu's alleged involvement in the meeting in December 1993 and in the killing of the five Tutsis in 1991 should be declared inadmissible.

THE PROSECUTION

11. The Prosecution submits that in a statement to investigators from the Office of the Prosecutor on 20 and 21 April 2004, Witness AOF indicated that he would testify to the following facts : that during 1991, when Augustin Bizimungu was the Commander of the Ruhengeri military zone, Bizimungu ordered the summary killing of five Tutsis and then told the civilians who had helped him that all Tutsis were the accomplices of the enemy and should be tracked down and killed; that from 1993, Bizimungu and his associates, together with Commander Bivugabagabo, the politician Félicien Kabuga, and others, provided military training and weapons to the *Amahindure* militia in Ruhengeri; that in 1993 Bizimungu repeatedly defined the Tutsis as the enemy and compared them to a dangerous plant known as "igisura" which needed to be weeded out; that on 11 June 1994, when Bizimungu had become the Chief of Staff of the Rwandan Army, he identified certain persons as accomplices of the enemy, thus causing the death of several Tutsis in Kareba at the hands of soldiers under his command.

12. The Prosecution submits that these facts are clearly stated in paragraphs 22, 23, 24, 25, 27 and 59 of the Indictment, which describe the policies implemented by the

¹¹ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003.

¹² *R. v. Handy*, (2002) 2 R.C.S. 908, para. 83.

Hutu elites who were in control of the Rwanda Armed Forces from late 1990. According to the Prosecution, these passages also describe Bizimungu's active involvement in the training of a private militia in Ruhengeri that would later become the spearhead of the genocide.

13. The Prosecution argues that Witness AOF's proposed testimony is not aimed simply at portraying Bizimungu in a negative light, but rather at revealing a criminal enterprise that was well known from late 1990 and through which Bizimungu and his numerous associates methodically undertook different acts that inexorably led to the genocide. In support of this assertion, the Prosecution cites a decision by this Chamber which tends to support the admissibility of pre-1994 evidence to the extent that it is relevant in proving the existence of a conspiracy in 1994¹³.

14. Finally, the Prosecution also argues that Witness AOF's testimony should not be looked at in isolation, but should be examined in the context of the many Prosecution witnesses testifying to the existence of a criminal enterprise and of a deliberate pattern of conduct.

Deliberations

CHALLENGE BASED ON MATTERS NOT ALLEGED IN THE INDICTMENT

15. The Chamber recalls Article 19 of the Statute setting out the conditions under which trial proceedings will be conducted, and Article 20 stipulating the "minimum guarantees" to which an accused person is entitled. The Chamber also recalls Rule 47 (C) of the Rules, which states :

The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

16. The Chamber notes that the primary argument presented by the Defence under this rubric is that Witness AOF's proposed testimony contains an allegation that does not appear in the Indictment. According to the Defence, since this particular allegation is not supported by the Indictment, it should be declared inadmissible. The Defence argues that whereas the Indictment refers to military planning meetings that took place at Joseph Nzirorera's home in Mukingo *commune*, Witness AOF states that the meeting he attended in December 1993 was at the Nkuli *communal* office.

17. In this connection the Chamber has examined the witness's preliminary statement of 21 April 2004 and notes the following excerpt :

During this period that is in December 1993, General Augustin Bizimungu held another meeting in the conference hall of Nkuli *commune*. The people that attended this meeting were selected from all the *cellules* of Nkuli and Mukingo *commune*. These people had been selected in order to undergo training. He told

¹³ *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, "Decision on Augustin Bizimungu's Preliminary Motion", 15 July 2004. (By Trial Chamber II, differently constituted).

the gathering that the Tutsi should be hunted down and exterminated. He referred to them as a dangerous plant “Igisura” that must be uprooted¹⁴.

18. The Chamber has also examined the Amended Indictment, particularly paragraph 29, which reads as follows :

At the time, in Ruhengeri, between 1992 and 1994, Augustin Bizimungu, accompanied by Juvénal Kajelijeli and others, regularly took part in meetings that were generally held on Saturdays at the home of Joseph Nzirorera, the MRND National Secretary. The purpose of the meetings was to devise a strategy for fighting the Tutsi enemy.

19. While noting that Nkuli and Mukingo *communes* are both located in Ruhengeri *préfecture*, the Chamber agrees with the Defence that the allegations contained in the witness’s statement are distinct from those appearing in the Amended Indictment.

20. The Chamber concurs with the position taken in the *Ntakirutimana* case, where the Appeals Chamber considered such factors as whether any defect in the Indictment was cured by other Prosecution communications regarding the material facts underlying its case, and whether such information was timely, clear and consistent enough to ensure that the Accused does not suffer undue prejudice¹⁵. Here, the Chamber takes note of the Defence’s acknowledgement that in the Prosecution’s Pre-Trial Brief and Opening Statement there was some indication that Witness AOF would testify to the allegations about the meeting at the Nkuli *communal* office¹⁶.

21. The Chamber concludes that although the allegation about the meeting at the Nkuli *communal* office as contained in Witness AOF’s proposed testimony does not appear in the Amended Indictment, it falls within the pattern of what the Prosecution intends to prove according to subsequent communications in that respect. The Chamber also notes that the Defence has had ample notice and opportunity to prepare its case since at least June 2004. In the Chamber’s view, Witness AOF’s proposed testimony does not support a new charge that is not pleaded in the Indictment, but merely states a new material fact underpinning already-existing charges¹⁷. Therefore, the Chamber finds that the evidence is admissible.

CHALLENGE BASED ON THE TRIBUNAL’S TEMPORAL JURISDICTION

22. The Chamber recalls Article 7 of the Statute delineating the territorial and temporal jurisdiction of the Tribunal :

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal juris-

¹⁴ At page 4 of Witness AOF’s preliminary statement, English version.

¹⁵ *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 34.

¹⁶ The Chamber has also examined the summary of Witness AOF’s proposed testimony contained in Annexure IV to the Prosecution’s Pre-Trial Brief.

¹⁷ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, “Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005”, 12 May 2005.

diction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

23. Under this rubric, the main argument advanced by the Defence is that Witness AOF's proposed testimony refers to events which occurred in 1991 and 1993 and which therefore fall outside the temporal jurisdiction of the Tribunal. The Defence acknowledges, however, that there are exceptional circumstances where a Trial Chamber may admit evidence of events pre-dating 1994 and points to the provisions of Rule 93 of the Rules as the basis for any exceptions.

24. The Chamber observes that it is well settled in the jurisprudence of the Tribunal that, pursuant to Rule 89 (C), a Trial Chamber may admit any relevant evidence it deems to have probative value, including evidence falling outside the temporal jurisdiction of the Tribunal¹⁸. Allegations of acts that pre-date 1994 do not constitute independent charges, but may comprise relevant and admissible evidence of crimes that took place in 1994 or constitute background facts which relate to or clarify continuing events¹⁹. The Trial Chamber conducting the trial will itself deal with the admissibility and relevance of the subsidiary allegations. As stated more recently by the Appeals Chamber,

Article 7 of the Statute of the Tribunal does not preclude inclusion in an indictment of information or allegations relating to events falling outside the temporal jurisdiction of the Tribunal, provided that all of the crimes charged against the accused in the indictment are alleged to have been committed within the temporal jurisdiction period²⁰.

25. The Chamber recalls its oral ruling regarding the testimony of Prosecution Witness AOE, where it stated that the witness will be allowed to give evidence of events in 1993

"only if the Prosecution establishes the existence of a conspiracy in 1994, as alleged in the indictment"²¹.

The Chamber also recalls an earlier ruling in this matter in which it was stated that background information on events pre-dating 1994

"may be of great significance in establishing that there was a criminal enterprise for a conspiracy to commit genocide"²².

26. The Chamber therefore concludes that while the Accused cannot be convicted for crimes not charged in the Indictment or not falling within the Tribunal's temporal jurisdiction, evidence of such crimes may nonetheless be admissible for the limited purpose of establishing a pattern of conduct, such as a conspiracy, that continued into 1994.

¹⁸ *Ngeze and Nahimana v. The Prosecutor*, Case No. ICTR-96-11-AR72, "Decision on the Interlocutory Appeals", 5 September 2000, p. 6.

¹⁹ *The Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-I, "Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment", 22 September 2003, para. 34.

²⁰ *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, "Decision on Interlocutory Appeal Regarding Temporal Jurisdiction", 29 July 2004.

²¹ Transcript of 8 June 2005, at p. 17 in English, p. 18 in French.

²² *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, "Decision on Augustin Bizimungu's Preliminary Motion", 15 July 2004. (By Trial Chamber II, differently constituted)

FOR THE ABOVE REASONS, THE CHAMBER
DENIES the Motion in its entirety.

Arusha, 2 December 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on the Prosecutor's Motion for Judicial Notice
Pursuant to Rules 73 (A), 94 (A) and 89 of the Rules
and Article 7 of the Statute
6 December 2005 (ICTR-200-56-T)***

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Augustin Ndingiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Judicial Notice, Judicial efficiency, Facts of common knowledge, Standard of “reasonably indisputable” of the facts of common knowledge, Public notoriety, United Nations General Assembly Resolution, Laws and regulations in Rwanda – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 73 (A), 89, 94 (A) and 94 (B); Statute, art. 7

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000 (ICTR-97-20); Trial Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts – Rule 94 (B) of the Rules of Procedure and Evidence, 22 November 2001 (ICTR-96-10 and ICTR-96-17); Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002 (ICTR-97-21); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Judicial Notice, 11 April 2003 (ICTR-98-41); Trial Chamber, The Prosecutor v. Casimir Bizimungu, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003 (ICTR-99-50); Trial Chamber, The Prosecutor v. Athanase Seromba, Décision Relative à la Requête du Procureur aux Fins de Constat Judiciaire, 14 July 2005 (ICTR-2001-66); Trial

Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecution Motion for Judicial Notice, 9 November 2005 (ICTR-98-44)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Duško Sikirica, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000 (IT-95-8); Trial Chamber, The Prosecutor v. Radoslav Brđanin, Judgment, 1 September 2004 (IT-99-36)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

BEING SEISED OF the “Prosecutor’s Motion for Judicial Notice Pursuant to Rules 73 (A), 94 (A) and 89 of the Rules of Procedure and Evidence and Article 7 of the Statute”, filed on 28 October 2005 (the “Motion”);

HAVING RECEIVED AND CONSIDERED the

- (i) “Response to Prosecutor’s Motion for Judicial Notice Pursuant to Rules 73 (A), 94 (A) and 89 of the Rules of Procedure and Evidence and Article 7 of the Statute”, filed on 3 November 2005 by the Defence for Nzuwonemeye (the “Nzuwonemeye Response”);
- (ii) “*Réponse de la défense d’Augustin Bizimungu à la Requête du Procureur en constat judiciaire*”¹, filed on 6 November 2005 (the “Bizimungu Response”);
- (iii) “*Réplique du Procureur aux réponses apportées par la défense d’Augustin Bizimungu et de François-Xavier Nzuwonemeye à la requête en constat judiciaire du 28 octobre 2005*”², filed on 8 November 2005 (the “Reply”).

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 94 of the Rules;

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions by the Parties

THE PROSECUTION

1. The Prosecution requests the Trial Chamber to take judicial notice of the existence of various executive and legislative documents in Rwanda during the temporal jurisdiction of the Tribunal³.

¹ “Response of the Defence for Augustin Bizimungu to the Prosecutor’s Motion for Judicial Notice” (Unofficial translation).

² “The Prosecutor’s Reply to the Responses presented by the Defence for Augustin Bizimungu and for François-Xavier Nzuwonemeye to the Motion for Judicial Notice of 28 October 2005” (Unofficial translation).

³ These documents are : 1. *Ordonnance législative N° R/85/25 du 10 mai 1962 portant création de l’Armée Rwandaise*; 2. *Décret-loi du 23 janvier 1974 portant dénomination de l’Armée Rwandaise*; 3. *Arrêté Présidentiel N° 86/08 du 26 juin 1973 portant intégration de la police dans*

2. The Prosecution submits that the documents in question concern matters of common knowledge of which the Chamber should take judicial notice pursuant to Rule 94 (A). Relying on the “Decision on the Prosecutor’s Motion for Judicial Notice and Presumption of Facts” in *Prosecutor v. Semanza*⁴, as well as the “Decision on the Prosecutor’s Motion for Judicial Notice” in *Prosecutor v. Seromba*⁵, the Prosecution further submits that it is the established practice of international tribunals to take judicial notice of facts as well as of documents concerning matters of common knowledge. Such facts include those which are not in dispute among reasonable persons as well as those which are “generally known within the area of the Tribunal’s territorial jurisdiction” or those which are “readily verifiable by reference to reliable and authoritative sources”⁶.

3. The Prosecution asserts that following these criteria, the documents in question qualify for judicial notice. They are moreover publicly accessible, and their existence and content can therefore not reasonably be subject to dispute. They can be easily verified through “readily available and reliable sources such as the Rwandan authorities”⁷. Furthermore, the Prosecution submits that the documents in question are relevant to the case at hand as the Accused were high-ranking officers of the Rwandan Armed Forces at the relevant time, which must have been familiar with them. The Prosecution also points out that some of the laws are mentioned in the Indictment of 23 August 2004 (particularly at paragraphs 17, 18, 19, 20 and 21) and the Pre-Trial Brief of 17 June 2004 (particularly at paragraphs 48, 49, 50, 51 and 69).

l’Armée Rwandaise; 4. Décret-loi du 23 janvier 1974 portant dénomination de la Gendarmerie Nationale; 5. Décret-loi N° 38/79 du 3 décembre 1979 modifiant le décret-loi du 23 janvier 1974 portant dénomination de l’Armée Rwandaise; 6. Arrêté Présidentiel N° 413/02 du 13 décembre 1978 portant règlement de discipline des Forces Armées Rwandaises; 7. Décret-loi N° 12/79 du 7 mai 1979 sur le régime des armes à feu et de leurs munitions; 8. Décret du 7 décembre 1960 sur les mesures intéressant la sécurité publique (milices privées et exhibitions paramilitaires); 9. Arrêté Ministériel N° 963/07 du 22 novembre 1983 portant désignation des officiers de police judiciaire et définition de leurs compétences; 10. Décret-loi N° 9/80 du 7 juillet 1980, confirmé par la loi N° 01/82 du 26 janvier 1982, modifié par la loi organique N° 12/85 du 7 mai 1985 portant code d’organisation et de compétence judiciaires; 11. Loi N° 28/91 du 18 juin 1991 sur les partis politiques; 12. Décret-loi N° 01/81 du 16 janvier 1981 sur recensement, carte d’identité, domicile et résidence des Rwandais; 13. Constitution de la République Rwandaise du 10 juin 1991; 14. Code pénal Rwandais; 15. Code de procédure pénale du 23 février 1963; 16. Adhésion du Rwanda aux Conventions de Genève du 12 août 1949: Arrêté Présidentiel N° 605/16 du 28 septembre 1984 portant adhésion aux protocoles additionnels aux conventions de Genève du 12 août 1949, et Loi du 3 septembre 1952 portant approbation des Conventions de Genève; 17. Accords d’Arusha du 30 octobre 1992 tel qu’amendés le 9 janvier et le 3-4 août 1993.

⁴ Case No. ICTR-97-20-I, 3 November 2000 [hereinafter ‘*Semanza* Judicial Notice Decision’].

⁵ Case No. ICTR-2001-66-T, 14 July 2005 [hereinafter ‘*Seromba* Judicial Notice Decision’].

⁶ Motion, para. 9, referring to *Semanza* Judicial Notice, paras. 23 & 25; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on the Prosecutor’s Motion for Judicial Notice and Admission of Evidence, 15 May 2002, para. 38 [hereinafter ‘*Nyiramasuhuko* Judicial Notice Decision’]; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor’s Motion for Judicial Notice, 11 April 2003, para. 44 [hereinafter ‘*Bagosora* Judicial Notice Decision’].

⁷ Motion, para. 12.

4. Finally, the Prosecution stresses that the act of having the documents in question judicially noticed would not relieve it of the obligation to prove beyond reasonable doubt “the very controversial core elements of the crimes” charged in the Indictment⁸.

RESPONSE BY THE DEFENCE FOR NZUWONEMEYE

5. The Defence for Nzuwonemeye moves the Trial Chamber to deny the Prosecution Motion in its entirety. It submits that the Prosecution has misinterpreted Rule 94 (A) and is consequently trying to “circumvent the proper procedure of tendering evidence before this Trial Chamber”⁹, thereby denying the Accused his right to a fair trial. The Defence points out that there is a distinction between Rule 94 (A), which relates only to *facts* of common knowledge, and Rule 94 (B), which refers to “adjudicated facts or documentary evidence.”

6. In support of its submissions, the Defence cites the *Semanza* Judicial Notice Decision¹⁰, which in its view is the only decision in which judicial notice was taken of the content of documents under Rule 94 (A), and at that time subsection (B) had not yet been adopted. Furthermore, the Defence refers to the *Nyiramasuhuko* Judicial Notice Decision¹¹, in which the Trial Chamber took judicial notice only of the existence and authenticity, but not the content of certain documents. The Defence finally points to the “Decision on the Prosecutor’s Motion for Judicial Notice” in *Prosecutor v. Bizimungu et al.*¹², in which the Chamber held that

“a vague and generalised request to take judicial notice of the content of an entire batch of documents is insufficient to invoke Rule 94 (B)”¹³.

7. The Defence concludes that the appropriate legal basis for taking judicial notice of documents is to be found in Rule 94 (B) which relates to documentary evidence from other proceedings before the Tribunal. Only documents 1, 2, 3, 4, 12 and 13 have been adjudicated in this manner. Therefore, none of the other documents qualify for judicial notice, and consequently judicial notice cannot be taken of their existence or their content. The Defence does not object to documents 4 and 13, as these have already been tendered into evidence by the Defence for Augustin Bizimungu as exhibits D 25 and D 26. With regard to documents 1, 2, 3 and 12, the Defence contends that only their existence and authenticity have been adjudicated upon and can thus be judicially noticed for that limited purpose; however, the content of these documents would have to be entered into evidence through a witness. The Defence therefore objects to the Chamber’s taking judicial notice of the content of those documents.

⁸ Motion, para. 4.

⁹ Nzuwonemeye Response, para. 2.

¹⁰ Nzuwonemeye Response, para. 7.

¹¹ Nzuwonemeye Response, para. 8.

¹² Case No. ICTR-99-50-I, 2 December 2003 [hereinafter ‘*Bizimungu* Judicial Notice Decision’].

¹³ *Ibid.*, para. 38.

RESPONSE BY THE DEFENCE FOR BIZIMUNGU

8. The Defence for Augustin Bizimungu similarly objects and advances essentially the same arguments as the Defence for Nzuwonemeye. In addition, it refers to the *Bizimungu* Judicial Notice Decision, arguing that the Trial Chamber in that case restrictively interpreted Rule 94 in that it held that Rule 94 (A) did not apply to documents but only to facts of public notoriety. The Defence submits that the Chamber may only take judicial notice of those legislative documents which have been admitted in the past, and may do so only pursuant to Rule 94 (B), with the sole aim of recognizing the existence and authenticity of these documents.

9. Moreover, the Defence submits that the taking of judicial notice would be seriously prejudicial to the rights of the Accused to have a fair trial. According to the Defence, the Prosecution's attempt to have these documents judicially noticed without an appropriate legal debate will have the effect of binding the Chamber to the Rwandan legislation in reaching its factual and legal conclusions about the guilt of the Accused¹⁴.

THE PROSECUTION'S REPLY

10. In its Reply, the Prosecution submits that laws are, by definition, matters of common knowledge. It further contends that taking judicial notice of the laws in force in Rwanda in 1994 is very advantageous in that it would favour the speediness and efficaciousness of the debates. The Prosecution submits that it is impossible to judge those responsible for a military structure without knowing the laws by which they were bound, and what their obligations and prerogatives were. The Prosecution also wishes to recall that in its Motion, it is not asking the Chamber to draw any conclusion of a legal or factual nature, but merely seeking that the Chamber take judicial notice of the existence and applicability of the legislative documents in question.

11. The Prosecution also points out that no Trial Chamber of the ICTR has ever refused to take judicial notice of a law or regulation applicable in Rwanda in 1994. Taking judicial notice in this way does not presume what the Chamber's Decision will be with regard to the eventual judicial or factual analysis. Finally, the Prosecution recalls the *Bagosora* Judicial Notice Decision¹⁵ and the *Seromba* Judicial Notice Decision¹⁶, which in its view prove that Rule 94 (A) is an appropriate legal basis on which to take judicial notice of the documents listed by the Prosecution.

¹⁴ Para. 27 of the Bizimungu Response.

¹⁵ *Bagosora* Judicial Notice Decision, para. 53.

¹⁶ *Seromba* Judicial Notice Decision, para. 14.

Deliberations

JUDICIAL NOTICE PURSUANT TO 94 (A) : FACTS OF COMMON KNOWLEDGE

12. The Chamber recalls that according to the Tribunal's jurisprudence judicial notice is a mechanism that fosters judicial efficiency and consistency by permitting parties to dispense with the obligation to present formal proof of "facts of common knowledge" or public notoriety where the proof of such facts would be both difficult and "prohibitively time consuming"¹⁷.

13. The Chamber further recalls that "facts of common knowledge" have been defined as encompassing

"those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature"¹⁸.

The requirement that such facts must be "reasonably indisputable" has been interpreted to mean that they must be

"either generally known within the territorial jurisdiction of a court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be called into question"¹⁹.

The Chamber agrees that courts may take judicial notice of matters which are

"so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary"²⁰.

Consequently, the Chamber recalls that judicial notice may not be taken of "facts involving interpretation or legal characterisations of facts"²¹.

14. With respect to the type of document that may be judicially noticed, the Chamber notes that judicial notice of the adoption of a United Nations General Assembly Resolution under Rule 94 (A) was taken by a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia²². Moreover, the Chamber recalls that in the *Semanza* Judicial Notice Decision, the Chamber found that there is

¹⁷ *Bagosora* Judicial Notice Decision, para. 43; *Semanza* Judicial Notice Decision, para. 20; *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 28; See also Judge Richard May & Marieke Wierda, *International Criminal Evidence*, Ardsley, New York 2002, para. 4.97, p. 134.

¹⁸ *Semanza* Judicial Notice Decision, para. 23.

¹⁹ *Semanza* Judicial Notice Decision, para. 24. See also *Prosecutor v. Sikirica*, Case No. IT-95-8-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000.

²⁰ *Archibold Criminal Pleading, Evidence and Practice*, England 2000, para. 10-71.

²¹ *Sikirica* Judicial Notice.

²² *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, para. 152 (A/RES/46/242 of 25 August 1992).

“ample precedent in this Tribunal to take judicial notice of the existence and authenticity of such documents [as legislative and administrative regulations] without taking judicial notice of the contents thereof”²³.

Similarly, in the *Nyiramasuhuko* Judicial Notice Decision, the Chamber held that certain Rwandan laws and parts of laws, as well as the Rwandan Constitution were

“proper subjects for judicial notice, pursuant to Rule 94 (A), as they are matters of public notoriety that should not normally require proof”²⁴.

Moreover, in the *Bagosora* Judicial Notice Decision, the Chamber found that “the relevant legislative, executive, and administrative and organizational laws of Rwanda” could properly qualify for judicial notice²⁵. It explained that it was

“well settled that the legislation and documents relating to the administrative organisation of a geographic area and the legislative law of a country fall within matters of common knowledge, which may fairly be judicially noticed”²⁶.

The Chamber agrees with these findings.

15. Accordingly, the Chamber is of the view that the existence of the laws and regulations in Rwanda annexed to the Motion cannot reasonably be disputed and consequently constitutes a “fact of common knowledge” within the meaning of Rule 94 (A) which is suitable for judicial notice by this Chamber.

16. With respect to applicability, the Chamber notes that the laws and regulations it is being asked to take judicial notice of were enacted over a period of four decades, *i.e.* between 1952 and 1993. However, it is not certain which of the laws and regulations were applicable in Rwanda in 1994 since any of them could have been repealed or amended by subsequent legislation. Furthermore, taking judicial notice of the applicability of these laws and regulations may lead the Chamber to draw legal conclusions that are not beyond dispute. Therefore, the applicability of the documents in question in Rwanda in 1994 is not a proper subject for judicial notice and the Motion is denied in that respect.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion in part and

TAKES JUDICIAL NOTICE of the existence of the following laws and regulations in Rwanda pursuant to Rule 94 (A) :

1. *Ordonnance législative N° R/85/25 du 10 mai 1962 portant création de l'Armée Rwandaise*;
2. *Décret-loi du 23 janvier 1974 portant dénomination de l'Armée Rwandaise*;
3. *Arrêté Présidentiel N° 86/08 du 26 juin 1973 portant intégration de la police dans l'Armée Rwandaise*;

²³ *Semanza* Judicial Notice Decision, para. 38.

²⁴ *Nyiramasuhuko* Judicial Notice Decision, para. 133.

²⁵ *Bagosora* Judicial Notice Decision, para. 45.

²⁶ *Ibid.*, para. 53. See also *Le Procureur c. Seromba*, Affaire No. TPIR-2001-66-T, *Décision Relative à la Requête du Procureur aux Fins de Constat Judiciaire*, 14 juillet 2005; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-R94, Decision on Prosecution Motion for Judicial Notice, 9 November 2005, para. 10.

4. *Décret-loi du 23 janvier 1974 portant dénomination de la Gendarmerie Nationale;*
Décret-loi N° 38/79 du 3 décembre 1979 modifiant le décret-loi du 23 janvier 1974 portant dénomination de l'Armée Rwandaise;
5. *Arrêté Présidentiel N° 413/02 du 13 décembre 1978 portant règlement de discipline des Forces Armées Rwandaises;*
6. *Décret-loi N° 12/79 du 7 mai 1979 sur le régime des armes à feu et de leurs munitions;*
5. *Décret du 7 décembre 1960 sur les mesures intéressant la sécurité publique (milices privées et exhibitions paramilitaires);*
 - 1) *Arrêté Ministériel N° 963/07 du 22 novembre 1983 portant désignation des officiers de police judiciaire et définition de leurs compétences;*
 - 2) *Décret-loi N° 9/80 du 7 juillet 1980, confirmé par la loi N° 01/82 du 26 janvier 1982, modifié par la loi organique N° 12/85 du 7 mai 1985 portant code d'organisation et de compétence judiciaires;*
 - 3) *Loi N° 28/91 du 18 juin 1991 sur les partis politiques;*
 - 4) *Décret-loi N° 01/81 du 16 janvier 1981 sur recensement, carte d'identité, domicile et résidence des Rwandais;*
 - 5) *Constitution de la République Rwandaise du 10 juin 1991;*
 - 6) *Code pénal Rwandais;*
 - 7) *Code de procédure pénale du 23 février 1963;*
 - 8) *Adhésion du Rwanda aux Conventions de Genève du 12 août 1949 : Arrêté Présidentiel N° 605/16 du 28 septembre 1984 portant adhésion aux protocoles additionnels aux conventions de Genève du 12 août 1949, et Loi du 3 septembre 1952 portant approbation des Conventions de Genève;*
 - 9) *Accords d'Arusha du 30 octobre 1992 tel qu'amendés le 9 janvier et le 3-4 août 1993.*

DENIES the Motion in all other respects.

Arusha, 6 December 2005.

[Signed] : Joseph Asoka de Silva; Taghrid Hikmet; Seon Ki Park

***Decision on the Prosecutor's Ex-Parte Motion
for the Transfer of Witnesses Detained
or Placed Under Court Supervision Pursuant to Rules 54 and 90 bis
of the Rules of Procedure and Evidence
14 December 2005 (ICTR-2000-56-T)***

(Original : English)

Trial Chamber II

Judge : Joseph Asoka de Silva

Augustin Nindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu – Transfer of witnesses, Mandatory provisions for the transfer of witnesses – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 54, 73 (A), 90 bis and 90 bis (B)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),
SITTING as Trial Chamber II, composed of Judge Asoka de Silva, designated pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the “Chamber”);

BEING SEIZED OF the “Prosecutor’s *Ex-Parte* Motion for the Transfer of Witnesses Detained or Placed Under Court Supervision Pursuant to Rules 54 and 90 *bis* of the Rules of Procedure and Evidence” filed on 6 December 2005 (the “Motion”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 54 and 90 *bis* of the Rules;

NOW DECIDES the Motion on the basis of the written brief filed by the Prosecution pursuant to Rule 73 (A) of the Rules.

THE PROSECUTION’S SUBMISSIONS

1. The Prosecution requests the Chamber to “urgently” order the temporary transfer to the Tribunal’s Detention Facility in Arusha of six witnesses, all of whom are currently either in detention or under court supervision in Rwanda. The witnesses bear the following pseudonyms : DO, ANF, AOF, GFA, XXQ, and GFQ.

2. The Prosecution submits that the proceedings in this matter “are scheduled to resume on 16 January 2005” (*sic*) and that during the forthcoming session it intends to call all six witnesses to testify. It asserts that in view of the published trial schedule, the witnesses are required to be present in Arusha “no later than 6 January 2005” (*sic*) and to remain at the Detention Facility “for a period not exceeding three months”. The Prosecution further submits that the actual length of the witnesses’ stay in Arusha “is dependent on the pace of the proceedings and the effective date of their transfer to Arusha”.

3. Attached to the Motion are a letter from the Prosecutor to the Rwandan authorities, dated 10 November 2005, requesting the transfer of these witnesses and the reply of the Rwandan Minister of Justice, dated 1 December 2005, confirming that the said witnesses are available to testify before the Tribunal.

Having deliberated

4. The Chamber recalls Rule 90 *bis* (B) of the Rules, which requires that an order for the transfer of witnesses in custody only be issued after prior verification that the following conditions have been met :

- (i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
- (ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State;

5. The Chamber notes that the reply letter dated 1 December 2005 from the Minister of Justice of the Republic of Rwanda, appended to the Motion, states that the above witnesses will be available to testify before the Tribunal in this matter. However, the letter does not state whether the presence of the proposed witnesses is required for ongoing criminal proceedings in Rwanda during the period the witnesses are required by the Tribunal, nor does it indicate whether or not the transfer of the said witnesses will extend the period of their detention.

6. The Chamber therefore concludes that the mandatory provisions of Rule 90 *bis* (B) have not been satisfied.

7. Finally, with respect to the “urgent” aspect of the Motion, the Chamber reminds the Prosecution of the need to conduct its work in a diligent and timely manner so as to avoid unnecessary delay in the proceedings.

FOR THESE REASONS, THE CHAMBER HEREBY

DENIES the Motion as currently formulated without prejudice to the right of the prosecution to file a fresh Motion with the appropriate supporting material.

Arusha, 14 December 2005.

[Signed] : Joseph Asoka De Silva

The Prosecutor v. Laurent BUCYIBARUTA

Case N° ICTR-2005-85

Case History

- Name : BUCYIBARUTA
- First Name : Laurent
- Date of Birth : 1944
- Sex : male
- Nationality : Rwandan
- Former Official Function : *Préfet* of Gikongoro
- Date of Indictment's Confirmation : 17 June 2005
- Counts : Direct and public incitement to commit genocide, Genocide, Complicity in genocide, Extermination as crime against humanity, Murder as crime against humanity, Rape as crime against humanity
- Date and Place of Arrest : 20 July 2007, Saint-André-des-Vergers (France)
- Date of Transfer : Not transferred to the Tribunal
- Case Transferred to French Jurisdiction on the 20th November 2007

Le Procureur c. Laurent BUCYIBARUTA

Affaire N° ICTR-2005-85

Fiche technique

- Nom : BUCYIBARUTA
- Prénom : Laurent
- Date de naissance : 1944
- Sex : masculin
- Nationality : Rwandaise
- Fonction occupée au moment des faits incriminés : Préfet de Gikongoro
- Date de la confirmation de l'acte d'accusation : 17 juin 2005
- Chefs d'accusation : Incitation directe et publique à commettre le génocide, Génocide, Complicité dans le génocide, Extermination constitutive de crime contre l'humanité, Assassinat constitutif de crime contre l'humanité, Viol constitutif de crime contre l'humanité
- Date et lieu de l'arrestation : 20 juillet 2007, Saint-André-des-Vergers (France)
- Date du transfert : Non transféré au tribunal
- Renvoyé le 20 novembre 2007 devant les juridictions nationales françaises

Indictment
16 June 2005 (ICTR-2005-85-I)

(Original : English)

I. The Prosecutor of the United Nations International Criminal Tribunal for Rwanda ("The Prosecutor"), pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute"), charges :

LAURENT BUCYIBARUTA

With :

- Count 1 : Direct and public indictment incitement to commit genocide
- Count 2 : Genocide or alternatively,
- Count 3 : Complicity in genocide
- Count 4 : Extermination as crime against humanity
- Count 5 : Murder as crime against humanity
- Count 6 : Rape as crime against humanity

II. The Accused

1. Laurent Bucyibaruta was born in Rwanda in 1944, in Musange *Commune*, Gikongoro *Préfecture*, Rwanda.

2. At times referred to in this indictment, Laurent Bucyibaruta held the following positions :

- (a) He was the *Bourgmestre* of Musange *Commune* from 13 October 1973 to 22 November 1974, then *sous-préfet*, in Butare and then Gisenyi *Préfectures*;
- (b) He had also been a Member of Parliament during the single-party era that ended in 1991;
- (c) About 1985 he was appointed the *Préfet* of Kibungo *Préfecture* and remained in that position until about 1992;
- (d) Subsequently, he was appointed the *Préfet* of Gikongoro *Préfecture*, from 4 July 1992, a position he held until mid-July 1994;
- (e) He remained a member of MRND party after the advent of the multiparty system in Rwanda in 1991.

3. By virtue of his position and authority as the *Préfet* of Gikongoro *Préfecture*, Laurent Bucyibaruta was the representative of the executive branch of the government in the *Préfecture*. In his capacity as the administrator of the *Préfecture* Laurent Bucyibaruta was responsible for ensuring peace, law, public order and the safety of goods and persons. In the performance of his duties, or in maintaining law and public order, he had the authority to request the intervention of the Army and the National *Gendarmerie*.

Acte d'accusation
16 juin 2005 (ICTR-2005-85-I)

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda (le «Procureur»), en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le « Statut ») accuse :

LAURENT BUCYIBARUTA

des crimes énumérés ci-après :

- Incitation directe et publique à commettre le génocide (chef 1)
- Génocide (chef 2) ou, à titre subsidiaire,
- Complicité dans le génocide (chef 3)
- Extermination constitutive de crime contre l'humanité (chef 4)
- Assassinat constitutif de crime contre l'humanité (chef 5)
- Viol constitutif de crime contre l'humanité (chef 6)

II. L'accusé

1. Laurent Bucyibaruta est né en 1944 au Rwanda, dans la commune de Musange (préfecture de Gikongoro)

2. A l'époque des faits visés dans le présent acte d'accusation, les états de service de Laurent Bucyibaruta se présentaient comme suit :

- a) Bourgmestre de la commune de Musange du 13 octobre 1973 au 22 novembre 1974, il avait exercé par la suite la fonction de sous-préfet respectivement dans la préfecture de Butare et celle de Gisenyi;
- b) Il avait également été député à l'Assemblée nationale à l'ère du parti unique qui a pris fin en 1991;
- c) Nommé préfet de Kibungo vers 1985, il avait occupé ce poste jusqu'aux alentours de 1992;
- d) Par la suite, il avait été nommé préfet de Gikongoro le 4 juillet 1992 et a occupé ce poste jusqu'à la mi-juillet 1994;
- e) Il est resté militant du parti politique dénommé MRND après l'avènement du multipartisme au Rwanda en 1991.

3. De fait de la fonction de préfet de Gikongoro qu'il remplissait et du pouvoir qu'il avait à ce titre, Laurent Bucyibaruta représentait l'exécutif dans la préfecture. En sa qualité d'administrateur de la préfecture, il était chargé d'assurer la tranquillité, le respect de la loi, l'ordre public et la sécurité des personnes et des biens. Dans l'exercice de ses fonctions ou pour assurer le respect de la loi et l'ordre public, il était habilité à requérir l'intervention de l'armée et de la gendarmerie nationale.

4. By virtue of his position and authority as the *Préfet* of Gikongoro *Préfecture* Laurent Bucyibaruta had authority over all the civil servants and holders of public office in the *Préfecture* including :

All the *Sous-Préfets*;

All the *Bourgmestres* of the *Communes* and all staff of the administrative services of the *Communes*;

All *Conseillers* of Sectors and Chief of *Cellules*;

All the heads of government services who were *ex-officio* members of the *Préfectoral* conference presided over by the *Préfet*;

All the staff in the *Préfecture* administration;

All the civil servants in the *Préfecture*, and

The Coordinator for Civil Defence for Gikongoro and Butare *Préfectures*.

5. By virtue of his position, as head of the *Préfectoral* committee of the *Interhamwe*, the youth wing of the MRND party in Gikongoro *Préfecture*, Laurent Bucyibaruta exercised authority and control over the *Interahamwe* and the others members of the MRND political party in Gikongoro *Préfecture*.

III. Charges and concise statement of facts

6. At all times referred to in this indictment there existed in Rwanda a minority ethnic or racial group known as Tutsis, officially identified as such by the government. The majority of the population was comprised of an ethnic or racial group known as Hutus, officially identified as such by the government.

7. During the course of 1994, particularly between 6 April 1994 and 17 July 1994, throughout Rwanda, soldiers, *Interahamwe* militia and armed civilians targeted and attacked Tutsis on the basis that they were Tutsis, with intent to destroy, in whole or in part, the Tutsi ethnic group as such. Hundreds of thousands of civilian Tutsis were killed.

Count 1 : Direct and public incitement to commit genocide

The Prosecutor charges Laurent Bucyibaruta with direct and public incitement to commit genocide, a crime stipulated in Article 2 (3) (c) of the Statute, in that from 1 January 1994 through 17 July 1994, throughout Rwanda, Laurent Bucyibaruta was responsible for the direct and public incitement of persons to kill or cause serious bodily or mental harm to members of the Tutsi racial and ethnic group with intent to destroy, in whole or in part, a racial ethnic group, as such, as outlined in paragraphs 8 through 21.

4. Du fait de la fonction de préfet de Gikongoro qu'il remplissait et du pouvoir qu'il avait à ce titre, Laurent Bucyibaruta avait autorisé sur tous les fonctionnaires et les autres agents de l'Administration publique en service dans la préfecture, notamment :

Tous les préfets;

Tous les bourgmestres et tout le personnel des services administratifs des communes;

Tous les conseillers de secteur et les responsables de cellule;

Tous les chefs des services de l'Etat, qui étaient membres de droit de la conférence préfectorale présidée par le préfet;

Tous les agents de l'administration préfectorale;

Tous les fonctionnaires; et

Le coordinateur de la défense civile des préfectures de Gikongoro et de Butare.

5. En sa qualité de chef du comité préfectoral du mouvement *Interahamwe*, l'organisation des jeunes du MRND, dans la préfecture de Gikongoro, Laurent Bucyibaruta exerçait son autorité et un contrôle sur les *Interahamwe* et les autres membres du MRND dans ladite préfecture de Gikongoro.

III. Accusations et exposé succinct des faits

6. A l'époque de tous les faits visés dans le présent acte d'accusation, il existait au Rwanda un groupe ethnique ou racial minoritaire dénommé le groupe tutsi et officiellement considéré comme tel par les pouvoirs publics. La majorité de la population appartenait à un autre groupe ethnique ou racial dénommé le groupe hutu qui était lui aussi officiellement considéré comme tel par les pouvoirs publics.

7. Au cours de l'année 1994, en particulier entre le 6 avril et le 17 juillet, sur l'ensemble du territoire rwandais, des militaires, des miliciens *Interahamwe* et des civils armés ont pris pour cible les Tutsis et les ont attaqués parce qu'ils étaient tutsis, dans l'intention de détruire, en tout ou en partie, le groupe ethnique tutsi comme tel. Des centaines de milliers de civils tutsis ont été tués.

Chef 1 : Incitation directe et publique à commettre le génocide

Le Procureur accuse Laurent Bucyibaruta d'incitation directe et publique à commettre le génocide, crime prévu à l'article 2 (3) (c) du Statut, en ce que du 1^{er} janvier au 17 juillet 1994, sur l'ensemble du territoire rwandais, Laurent Bucyibaruta a incité directement et publiquement des gens à tuer les membres du groupe racial ou ethnique tutsi à porter gravement atteinte à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, ainsi qu'il est indiqué aux paragraphes 8 à 21.

CONCISE STATEMENT OF FACTS FOR COUNT 1

Individual Criminal Responsibility

8. Pursuant to Article 6 (1) of the Statute, the accused, Laurent Bucyibaruta, is individually responsible for the crime of Direct and Public Incitement to Commit Genocide because he committed the act of delivering public speeches that defined the enemy as all members of the Tutsi racial or ethnic group and urged his listeners to attack and kill the Tutsi. In addition, the accused wilfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the commission of genocide against the Tutsi racial or ethnic group, and persons identified as Tutsis or presumed to support Tutsis in Gikongoro *Préfecture*, Rwanda. To fulfil this criminal purpose, the accused acted with Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyiridandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndararizi, le lieutenant-colonel Augustin Rwamanya, Joachim Hategikamana, Charles Munyaneza, and others, all such actions being taken either directly or through co-perpetrators, for at least the period of 1 January 1994 through 17 July 1994. The particulars that give rise to his individual responsibility are set forth in paragraphs 9 through 21.

9. On a date in March 1993, at a training meeting at CIPEP, Gikongoro town, attended by among others, all *Borugmestres*, *Conseillers* and *Responsables* of Gikongoro *Préfecture* and Aloys Simba, Damien Biniga and Faustin Sebhura, Laurent Bucyibaruta spoke calling on his audience to proceed to register Tutsis in the *Préfecture* separately from the Hutus. Two registers were subsequently issued to *Responsables* for the registration of the persons of their *cellules*, one for Hutu and one for Tutsi. By doing so, he committed direct and public incitement to commit genocide.

10. On a day in December 1993, at a public rally in Gikongoro market, attended by among others, Aloys Simba, Damien Biniga and Charles Munyaneza, Laurent Bucyibaruta, spoke urging the persons present to contribute money to buy arms to fight the Tutsi enemy, whom he referred to as the *Inyenzi*. By doing so, he committed direct and public incitement to commit genocide.

11. On a day within the period from late 1993 to early 1994, before the start of the April 1994 killings, at a public meeting in Gikongoro market called by Aloys Simba to raise funds for supplying the *Interahamwe* with arms for the killing of Tutsis, Laurent Bucyibaruta spoke urging the population to be prepared to defend themselves against the Tutsi enemy and personally contributed 200,000 FRW as an example for the population to follow. A total amount of about 2.5 million FRW was collected thereafter. By doing so, he committed direct and public incitement to commit genocide.

12. On a day within the period from late 1993 to early 1994, before the start of the April 1994 killings, at a public meeting in front of the shop of Mujyambere in Gikongoro town, Laurent Bucyibaruta spoke urging the persons present to be prepared

EXPOSÉ SUCCINCT DES FAITS RELATIF AU CHEF 1

Responsabilité pénale individuelle

8. En application de l'article 6 (1) du Statut, l'accusé Laurent Bucyibaruta est individuellement responsable du crime d'incitation directe et publique à commettre le génocide pour avoir prononcé des discours publics dans lesquels il définissait l'ennemi comme étant l'ensemble des membres du groupe racial ou ethnique tutsi et exhortait son auditoire à attaquer les Tutsis pour les tuer. En outre, il a participé sciemment et délibérément à une entreprise criminelle commune dont l'objet, le but et la conséquence prévisible étaient de commettre le génocide du groupe racial ou ethnique tutsi et des personnes considérées comme des Tutsis ou présumées soutenir les Tutsis dans la préfecture de Gikongoro (Rwanda). Pour atteindre ce but criminel, l'accusé a agi de concert avec Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyiridandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndabaranzi, le lieutenant-colonel Augustin Rwamanya, Joachim Hategikamana, Charles Munyaneza et d'autres personnes, soit directement, soit par l'intermédiaire de coauteurs, pendant au moins la période allant du 1^{er} janvier au 17 juillet 1994. Les faits détaillés qui donnent lieu à sa responsabilité pénale individuelle sont exposés aux paragraphes 9 à 21.

9. En mars 1993, au cours d'une réunion de formation au CIPEP dans la ville de Gikongoro et à laquelle ont participé, entre autres personnes, tous les bourgmestres, les conseillers et les responsables de cellule de la préfecture de Gikongoro, Aloys Simba, Damien Biniga et Faustin Sebhura, Laurent Bucyibaruta a pris la parole pour inviter son auditoire à enregistrer séparément les Tutsis et les Hutus de la préfecture. Par la suite, deux registres dont l'un était destiné aux Hutus et l'autre aux Tutsis ont été remis à chacun des responsables de cellule en vue de l'inscription des habitants de leurs cellules. Par ces actes, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

10. En décembre 1993, au cours d'un rassemblement public qui a eu lieu au marché de Gikongoro et auquel ont participé, entre autres personnes, Aloys Simba, Damien Biniga et Charles Munyaneza, Laurent Bucyibaruta a pris la parole pour exhorter l'assistance à contribuer financièrement à l'achat d'armes permettant de combattre l'ennemi tutsi qu'il a appelé *Inyenzi*. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

11. Entre la fin de 1993 et le début de 1994, avant le déclenchement des massacres d'avril 1994, lors d'une réunion publique tenue au marché de Gikongoro qu'Aloys Simba avait convoquée pour collecter des fonds permettant de doter les *Interahamwe* d'armes nécessaires au massacre des Tutsis, Laurent Bucyibaruta a pris la parole pour demander instamment à la population de se préparer à se défendre contre l'ennemi tutsi et a personnellement versé une contribution de 200 000 francs rwandais pour donner l'exemple. Une somme totale d'environ 2,5 millions de francs rwandais a été réunie par la suite. Par ces actes, il a perpétré le crime d'incitation directe à commettre le génocide.

12. Entre la fin de 1993 et le début de 1994, avant le déclenchement des massacres d'avril 1994, lors d'une réunion publique tenue devant la boutique de Mujiyambere dans la ville de Gikongoro, Laurent Bucyibaruta a pris la parole pour demander ins-

to defend themselves against the Tutsi enemy by contributing money to purchase fire-arms and ammunition for soldiers, *Gendarmes* and *Interahamwe*. By doing so, he committed direct and public incitement to commit genocide.

13. On or about 23 March 1994, at a public meeting in Gikongoro market, Laurent Bucyibaruta spoke, telling the population that the enemy that had to be fought was the Tutsi, and that everyone should be on alert. By doing so, he committed direct and public incitement to commit genocide.

14. On a day in April 1994, a few days after the death of President Habyarimana, Laurent Bucyibaruta went around in the area of Gikongoro town in a car, using a megaphone to address the population. Laurent Bucyibaruta spoke stating that the Tutsis had killed the President so all Tutsis must be looked for and killed. By doing so, he committed direct and public incitement to commit genocide.

15. On or about 9 April 1994, Laurent Bucyibaruta met with the *Interahamwe* and officials of the *Préfectoral* administration, including Emmanuel Nteziryayo, Denys Kamodoka and Juvenal Ndabarinze, among others, at Petrorwanda gas station in Gaserenda trading centre. Laurent Bucyibaruta spoke calling on the *Interahamwe* to be deployed to kill Tutsis. By doing so, he committed direct and public incitement to commit genocide.

16. On or about 10 April 1994, at a public meeting held in the Nyamagabe *Communal* Office, attended by Colonel Aloys Simba, Captain Faustin Sebhura, *Sous-Préfet* Biniga, *Bourgmestre* of Nyamagabe *Commune* Semakwavu, the representative of the MRND political party, *Conseillers* of sectors and other officials of the *Préfecture* and the population, Laurent Bucyibaruta spoke calling for the killing of Tutsis who had gathered in surrounding schools and churches in Gikongoro *Préfecture*, such as Kigeme Parish, and CERAI School and Murambi Technical School. By doing so, he committed direct and public incitement to commit genocide.

17. On or about 13 April 1994, Laurent Bucyibaruta met with the *Interahamwe* and officials of the *Préfectoral* administration of Gikongoro, including *Bourgmestres* and *Conseillers* in CIPEP, a complex in Gikongoro town, which includes the *Préfecture's* Hall. During that meeting, Laurent Bucyibaruta spoke urging the *Bourgmestres* and *Conseillers* of Gikongoro to see that no Tutsis in the *Préfecture* are left alive. He stated that he had received orders from Kigali that the Tutsis should be assembled in locations where they would be easily accessible to the authorities at the right time. He added that authorities failing to comply with the order would be dismissed and that any Tutsis refusing to go to the indicated locations would be killed. By doing so, he committed direct and public incitement to commit genocide.

18. On or about 13 April 1994, at a public rally at Nyamagabe market, Laurent Bucyibaruta spoke calling on the Hutu population present to ensure that no Tutsis are allowed to escape but to be sent to Murambi Technical School to be killed. By doing so, he committed direct and public incitement to commit genocide.

tamment à l'assistance de préparer à se défendre contre l'ennemi tutsi en contribuant financièrement à l'achat d'armes à feu et de munitions destinées aux militaires, aux gendarmes et aux *Interahamwe*. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

13. Le 23 mars 1994 ou vers cette date, lors d'une réunion publique tenue au marché de Gikongoro, Laurent Bucyibaruta a pris la parole pour dire à la population que l'ennemi à combattre était le Tutsi et que chacun devait être en état d'alerte maximale. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

14. En avril 1994, quelques jours après la mort du Président Habyarimana, Laurent Bucyibaruta a sillonné la ville de Gikongoro en voiture pour s'adresser à la population à l'aide d'un mégaphone. L'accusé déclarait que les Tutsis avaient tué le Président et qu'il fallait donc rechercher tous les Tutsis pour les tuer. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

15. Le 9 avril 1994 ou vers cette date, Laurent Bucyibaruta s'est entretenu avec les responsables *Interahamwe* et les responsables de l'administration préfectorale, notamment Emmanuel Nteziryayo, Denys Kamodoka et Juvénal Ndabarinze, à la station d'essence Petrorwanda sise au centre commercial de Gasarenda. Dans son intervention, il a invité les *Interahamwe* à se déployer pour tuer tous les Tutsis. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

16. Le 10 avril 1994 ou vers cette date, lors d'une réunion publique qui s'est tenue au bureau communal de Nyamagabe et à laquelle ont participé le colonel Aloys Simba, le capitaine Faustin Sebhura, le sous-préfet Biniga, Semakwavu, bourgmestre de la commune de Nyamagabe, le représentant du MRND, les conseillers de secteur, d'autres autorités de la préfecture et la population, Laurent Bucyibaruta a pris la parole pour préconiser le massacre des Tutsis qui s'étaient regroupés dans les écoles et les églises environnantes de la préfecture de Gikongoro, telles que l'église paroissiale de Kigeme, le CERA et l'école technique de Murambi. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

17. Le 13 avril 1994 ou vers cette date, Laurent Bucyibaruta a tenu une réunion avec les *Interahamwe* et les responsables de l'administration préfectorale de Gikongoro, y compris les bourgmestres et les conseillers, au CIPEP, complexe contenant les bureaux de la préfecture de la ville de Gikongoro. Durant cette réunion, il a pris la parole pour exhorter les bourgmestres et les conseillers de Gikongoro à veiller à ce qu'aucun des Tutsis de la préfecture n'ait la vie sauve. Il a déclaré avoir reçu de Kigali l'ordre de rassembler les Tutsis dans des lieux où les autorités pourraient facilement avoir accès à eux au moment opportun. Il a ajouté que les autorités qui ne se conformeraient pas à cet ordre seraient démis de leurs fonctions et que tout Tutsi qui refuserait de se rendre aux endroits désignés serait tué. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

18. Le 13 avril 1994 ou vers cette date, lors d'un rassemblement public qui a eu lieu au marché de Nyamagabe, Laurent Bucyibaruta a pris la parole pour demander à la population hutue présente de faire en sorte qu'aucun Tutsi ne s'échappe, en veillant plutôt à ce que tous soient envoyés à l'école technique de Murambi pour y être tués. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

19. On or about 15 April 1994, Laurent Bucyibaruta met with officials of the *Pré-fectoral* administration, including Faustin Sebhura, Denys Kamodoka, and Félicien Semakwavu, and Colonel Aloys Simba, at PDAG Guest House in Gikongoro town. Laurent Bucyibaruta spoke urging those present not to allow Tutsis to remain in hiding but to be assembled at specified locations including Murambi Technical School to be killed. By doing so, he committed direct and public incitement to commit genocide.

20. On or about 20 April 1994, Laurent Bucyibaruta attended a meeting at the Gendarmerie barracks in Gikongoro town. Other officials who attended were Aloys Simba, Damien Biniga, Faustin Sebhura, and Charles Munyaneza. At the meeting Laurent Bucyibaruta spoke calling for the killing of Tutsis at Kaduha Parish and Health Centre, Murambi Technical School and Cyanika Parish. By doing so, he committed direct and public incitement to commit genocide.

21. On or about 22 April 1994, Laurent Bucyibaruta, accompanied by Sebhura, Semakwavu and Celes Semigabo, the Prosecutor of Gikongoro, went to Gikongoro Prison and publicly stated that the Tutsis were the enemy urging all Hutus therein to kill all Prisoners of the Tutsi ethnic group. By doing so, he committed direct and public incitement to commit genocide.

Count 2 : Genocide

The Prosecutor charges Laurent Bucyibaruta with Genocide, a crime stipulated in Article 2 (3) (a) of the Statute, in that from 1 January 1994 through 17 July 1994, throughout Rwanda, Laurent Bucyibaruta was responsible for killing or causing serious bodily or mental harm to members of the Tutsi racial or ethnic group with intent to destroy, in whole or in part, a racial or ethnic group, as such, as outlined in paragraphs 22 through 43.

Or alternatively,

Count 3 : Complicity in Genocide

The Prosecutor charges Laurent Bucyibaruta with Complicity in Genocide, a crime stipulated in Article 2 (3) (e) of the Statute, in that from 1 January 1994 through 17 July 1994, throughout Rwanda, Laurent Bucyibaruta was responsible for killing or causing serious bodily or mental harm to members of the Tutsi racial or ethnic group with intent to destroy, in whole or in part, a racial or ethnic group, as such, and that his assistance would contribute to the crime of genocide, as outlined in paragraphs 22 through 43.

19. Le 15 avril 1994 ou vers cette date, Laurent Bucyibaruta s'est entretenu avec les responsables de l'administration préfectorale, dont Faustin Sebhura, Denys Kamodoka et Félicien Semakwavu, ainsi que le colonel Aloys Simba, au «*guest house*» du PDAG dans la ville de Gikongoro. Il a pris la parole pour exhorter l'assistance à ne pas laisser les Tutsis dans leurs cachettes et à veiller au contraire à ce qu'ils soient rassemblés à des endroits expressément désignés tels que l'école technique de Murambi en vue de leur massacre. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

20. Le 20 avril 1994 ou vers cette date, Laurent Bucyibaruta a participé à une réunion à la caserne de gendarmerie de la ville de Gikongoro. Au nombre des autres responsables présents figuraient Aloys Simba, Damien Biniga, Faustin Sebhura et Charles Munyaneza. Au cours de la réunion, Laurent Bucyibaruta a pris la parole pour préconiser le massacre des Tutsis qui se trouvaient à la paroisse et au centre de santé de Kaduha, à l'école technique de Murambi et à la paroisse de Cyanika. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

21. Le 22 avril 1994 ou vers cette date, Laurent Bucyibaruta, accompagné de Subuhura, Semakwavu et Celes Semigabo, procureur de Gikongoro, s'est rendu à la prison de Gikongoro où il a déclaré publiquement que les Tutsis étaient l'ennemi et a exhorté tous les Hutus qui s'y trouvaient à tuer tous les prisonniers appartenant au groupe ethnique tutsi. Par cet acte, il a perpétré le crime d'incitation directe et publique à commettre le génocide.

Chef 2 : Génocide

Le Procureur accuse Laurent Bucyibaruta de génocide, crime prévu à l'article 2 (3) (a) du Statut, en ce que du 1^{er} janvier au 17 juillet 1994, sur l'ensemble du territoire rwandais, Laurent Bucyibaruta s'est rendu responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique ou mentale, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, ainsi qu'il est exposé aux paragraphes 22 à 43.

Ou, à titre subsidiaire,

Chef 3 : Complicité dans le génocide

Le Procureur accuse Laurent Bucyibaruta de complicité dans le génocide, crime prévu à l'article 2 (3) (e) du Statut, en ce que du 1^{er} janvier au 17 juillet 1994, sur l'ensemble du territoire rwandais, Laurent Bucyibaruta s'est rendu responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique ou mentale, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel ou en sachant que d'autres personnes avaient l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi comme tel et que son aide contribuerait à la perpétration du crime de génocide, ainsi qu'il est exposé aux paragraphes 22 à 43.

CONCISE STATEMENTS OF FACTS
FOR COUNTS 2 AND 3

Individual Criminal Responsibility

22. Pursuant to article 6(1) of the Statute, Laurent Bucyibaruta, is individually responsible for the crimes of Genocide or Complicity in Genocide because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes. With respect to the commission of those crimes, Laurent Bucyibaruta ordered those over whom he had effective control as a result of his position and authority described in paragraphs 2 through 5 above, and he instigated and aided and abetted those over whom he did not have effective control. In addition, the accused wilfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the commission of genocide against the Tutsi racial or ethnic group, and persons identified as Tutsis or presumed to support the Tutsis in Gikongoro *Préfecture*, Rwanda. To fulfil this criminal purpose, the accused acted with Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyirindandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndabarinzi, Lt. Col Rwamanya Augustin, Joachim Hze-gikamana, Charles Munyaneza and others, all such actions being taken either directly or through co-perpatrators, for at least the period of 1 January 1994 through 17 July 1994. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 23 through 35.

The massacres

23. Between 7 April 1994 and 17 July 1994, Laurent Bucyibaruta, ordered Tutsis and moderate Hutu civilians to assemble at specified locations in Gikongoro *Préfecture*. Believing they would be safe from attacks by the *Interahamwe*, the Tutsis and moderate Hutu civilians obeyed these orders. Tutsi inmates in Gikongoro Prison also believed they would be safe. At dates specified below, the Tutsis were massacred. By ordering the Tutsis to be assembled together, Laurent Bucyibaruta aided and abetted the killing of the Tutsis.

Kibeho Parish and health centre, Mubuga *Commune*, Gikongoro : 11 to 15 April 1994

Murambi Technical School, Nyamagabo *Commune*, Gikongoro : 18 to 21 April 1994

Cyanika Parish, Karama *Commune*, Gikongoro : 21 April 1994

Kaduha parish and health centre, Karambu *Commune*, Gikongoro : 21 April 1994

Gikongoro Prison, Gikongoro : 22 April 1994

Ecole des Filles of Kibeho, Mubuga *Commune*, Gikongoro : 7 May 1994

EXPOSÉ SUCCINCT DES FAITS
RELATIFS AUX CHEFS D'ACCUSATION 2 ET 3

Responsabilité pénale individuelle

22. En application de l'article 6 (1) du Statut, l'accusé Laurent Bucyibaruta est individuellement responsable du crime de génocide ou de complicité dans le génocide pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, Laurent Bucyibaruta a non seulement utilisé de ses fonctions et de ses pouvoirs indiqués aux paragraphes 2 à 5 plus haut pour ordonner aux personnes placées sous son contrôle effectif de le perpétrer, mais encore incité et aidé et encouragé des personnes sur lesquelles il n'exerçait aucun contrôle effectif à le faire. En outre, il a participé sciemment et délibérément à une entreprise criminelle commune dont l'objet, le but et la conséquence prévisible étaient de commettre le génocide du groupe racial ou ethnique tutsi et des personnes considérées comme des Tutsis ou présumées soutenir les Tutsis dans la préfecture de Gikongoro (Rwanda). Pour atteindre ce but criminel, l'accusé a agi de concert avec Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyirindandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndararizi, le lieutenant-colonel Augustin Rwamanya, Joachim Hategekimana, Charles Munyaneza et d'autres personnes, soit directement, soit par l'intermédiaire de coauteurs, pendant au moins la période allant du 1^{er} janvier au 17 juillet 1994. Les faits détaillés qui donnent lieu à sa responsabilité pénale individuelle sont exposés aux paragraphes 23 à 35.

Les massacres

23. Entre le 7 avril et le 17 juillet 1994, Laurent Bucyibaruta a ordonné à des civils hutus modérés et tutsis de se regrouper à des endroits expressément désignés dans la préfecture de Gikongoro. Croyant qu'ils y seraient à l'abri des attaques perpétrées par les *Interahamwe*, les intéressés ont obtempéré à ces ordres. Les détenus tutsis de la prison de Gikongoro croyaient également qu'ils seraient en sécurité. Aux dates indiquées ci-après, les Tutsis susvisés ont été massacrés. Pour leur avoir ordonné de se rassembler, Laurent Bucyibaruta s'est rendu complice du massacre de ces Tutsis.

Paroisse et centre de santé de Kibeho dans la commune de Mubuga (préfecture de Gikongoro) : du 11 au 15 avril 1994

Ecole technique de Murambi dans la commune de Nyamagabo (préfecture de Gikongoro) : du 18 au 21 avril 1994

Paroisse de Cyanika dans la commune de Karama (préfecture de Gikongoro) : 21 avril 1994

Paroisse et centre de santé de Kaduha dans la commune de Karambu (préfecture de Gikongoro) : 21 avril 1994

Prison de Gikongoro (préfecture de Gikongoro) : 22 avril 1994

Ecole de filles de Kibeho dans la commune de Mubuga (préfecture de Gikongoro) : 7 mai 1994

Kibeho Parish

24. From 11 April 1994 to 15 April 1994, Kibeho Parish was repeatedly attacked and the Tutsis therein killed by large groups of *Interahamwe* and armed civilians, supported by soldiers, *Gendarmes* and Policemen, on the orders and instigation of Laurent Bucyibaruta. The killings were led by subordinates to Laurent Bucyibaruta, namely Damien Biniga, *Sous-Préfet* of Munini, Charles Nyiridandi, *Bourgmestre* of Kabuga, Emmanuel Nteziryayo, *Bourgmestre* of Mudasomwa, Félicien Semakwavu, *Bourgmestre* of Nyamagabe and Silas Mugerangabo, *Bourgmestre* of Rwamiko. Laurent Bucyibaruta thus ordered and instigated and aided and abetted the killings of Tutsis in Kibeho Parish.

Murambi technical School

25. On or about 10 April 1994, Laurent Bucyibaruta accompanied by Félicien Semakwavu, *Bourgmestre* of Nyamagabe *Commune*, used a megaphone to lure Tutsi refugees in hiding, to their deaths in Murambi Technical School. Laurent Bucyibaruta stated that he would provide food and security for the refugees at Murambi Technical School. The Tutsis who came out of hiding were killed in Murambi Technical School on 20 and 21 April 1994 by *gendarmes*, *Interahamwe* and *communal* policemen and armed Hutu civilians, co-perpetrators in the joint criminal enterprise referred to in paragraph 22 of this indictment. Laurent Bucyibaruta thus committed and aided and abetted these killings.

26. On or about 11 April 1994, Laurent Bucyibaruta, accompanied by Faustin Sebhura and Félicien Semakwavu came to CERAI School, where many refugees had gathered, and ordered and instigated them to go to Murambi Technical School knowing they would be killed there, and personally escorted the refugees to Murambi. These Tutsis were killed in Murambi Technical School on 20 and 21 April 1994 by the *Interahamwe* and soldiers, co-perpetrators in the joint criminal enterprise referred to in paragraph 22 of this indictment. Laurent Bucyibaruta thus committed and aided and abetted these killings.

27. On or about 11 April 1994, Laurent Bucyibaruta, accompanied by Faustin Sebhura and Félicien Semakwavu came to Kigeme Diocese, where about 100 refugees, mainly Tutsis, had gathered. Following the orders of Laurent Bucyibaruta, the refugees were escorted to Gikongoro Diocese by *gendarmes*, and subsequently moved to Murambi Technical School where they were killed on 20 and 21 April 1994 by the *Interahamwe* and soldiers, co-perpetrators in the joint criminal enterprise referred to in paragraph 22 of this indictment. Laurent Bucyibaruta thus committed and aided and abetted these killings.

28. On or about 12 April 1994, Laurent Bucyibaruta accompanied by Faustin Sebhura and Félicien Semakwavu came to Gikongoro Diocese, where thousands of refugees, mainly Tutsis had gathered. Following the orders of Laurent Bucyibaruta, the refugees were escorted to Murambi Technical School by *gendarmes*, killed on 20 and 21 April 1994 by the *Interahamwe* and soldiers co-perpetrators in the joint

Paroisse de Kibeho

24. Du 11 au 15 avril 1994, d'important groupes d'*Interahamwe* et de civils armés, appuyés par des militaires, des gendarmes et des policiers, ont attaqué à plusieurs reprises la paroisse de Kibeho et tué les Tutsis qui s'y trouvaient, sur ordre et à l'instigation de Laurent Bucyibaruta. Ces massacres étaient dirigés par des subordonnés de Laurent Bucyibaruta, à savoir Damien Biniga, sous-préfet de Munini, Charles Nyiridandi, bourgmestre de Mubuga, Emmanuel Nteziryayo, bourgmestre de Mudasomwa, Félicien Semakwavu, bourgmestre de Nyamagabe, et Silas Mugerangabo, bourgmestre de Rwamiko. Par les actes susvisés, Laurent Bucyibaruta a ordonné, incité à commettre et aidé et encouragé à commettre le massacre des Tutsis à la paroisse de Kibeho.

Ecole technique de Murambi

25. Le 10 avril 1994 ou vers cette date, Laurent Bucyibaruta, accompagné de Félicien Semakwavu, bourgmestre de la commune de Nyamagabe, a utilisé un porte-voix pour attirer dans les bras de la mort les guettant à l'école technique de Murambi les réfugiés tutsis qui se cachaient. Il a dit qu'il y fournirait de la nourriture à ces réfugiés et garantirait leur sécurité. Les Tutsis qui sont sortis de leurs cachettes ont été tués à l'école technique de Murambi les 20 et 21 avril 1994 par des gendarmes, des *Interahamwe*, des policiers communaux et des civils hutus armés parties à l'entreprise criminelle commune visée au paragraphe 22 du présent acte d'accusation. Par les actes susvisés, Laurent Bucyibaruta a commis et aidé et encouragé à commettre ce massacre.

26. Le 11 avril 1994 ou vers cette date, Laurent Bucyibaruta, accompagné de Faustin Sebhura et de Félicien Semakwavu, s'est rendu au CERAI où nombre de réfugiés s'étaient rassemblés, leur a ordonné d'aller à l'école technique de Murambi et les a incités à le faire, tout en sachant qu'ils y seraient tués. En outre, il les a personnellement escortés jusqu'à Murambi. Les 20 et 21 avril 1994, ces Tutsis ont été tués à l'école technique de Murambi par des *Interahamwe* et des militaires parties à l'entreprise criminelle commune visée au paragraphe 22 du présent acte d'accusation. Par les actes susvisés, Laurent Bucyibaruta a commis et aidé et encouragé à commettre ce massacre.

27. Le 11 avril 1994 ou vers cette date, Laurent Bucyibaruta, accompagné de Faustin Sebhura et de Félicien Semakwavu s'est rendu au diocèse de Kigeme où une centaine de réfugiés, en majorité tutsis, s'étaient rassemblés. Sur l'ordre de Laurent Bucyibaruta, ces réfugiés ont été escortés jusqu'au diocèse de Gikongoro par des gendarmes et conduits par la suite à l'école technique de Murambi où ils ont été tués les 20 et 21 avril 1994 par des *Interahamwe* et des militaires parties à l'entreprise criminelle commune visée au paragraphe 22 du présent acte d'accusation. Par l'acte susvisé, Laurent Bucyibaruta a donc commis et aidé et encouragé à commettre ce massacre.

28. Le 12 avril 1994 ou vers cette date, Laurent Bucyibaruta, accompagné de Faustin Sebhura et de Félicien Semakwavu, s'est rendu au diocèse de Gikongoro où des milliers de réfugiés, en majorité tutsis, s'étaient rassemblés. Sur l'ordre de Laurent Bucyibaruta, ces réfugiés ont été escortés jusqu'à l'école technique de Murambi par des gendarmes et tués les 20 et 21 avril 1994 par des *Interahamwe* et des militaires parties

criminal enterprise referred to in paragraph 22 of this indictment. Laurent Bucyibaruta thus committed and aided and abetted these killings.

29. From about 18 April 1994, on the orders and instigation of Laurent Bucyibaruta, a small group of *Interahamwe* militiamen, supported by soldiers and armed Hutu civilians, co-perpetrators in the joint criminal enterprise referred to in paragraph 22 of this indictment, surrounded and repeatedly attacked and killed Tutsi refugees at Murambi Technical School. Some of the weapons used in the attacks, such as machetes and sickles, were provided by Laurent Bucyibaruta and Faustin Sebhura. Laurent Bucyibaruta thus committed and aided and abetted these killings.

30. At about 03.00 hours on 21 April 1994, on the orders of Laurent Bucyibaruta, a major massacre was carried out on Murambi Technical School by a large group of attackers comprising soldiers, *gendarmes*, *Interahamwe* and armed Hutu civilians, led by Aloys Simba and Faustin Sebhura, all co-perpetrators in the joint criminal enterprise referred to in paragraph 22 of this indictment. Surrounded by roadblocks to prevent their escape, and weakened by lack of food and water, the Tutsis were killed with heavy guns, arms, grenades, machetes, clubs and other traditional weapons. Laurent Bucyibaruta personally shot at the Tutsis with a firearm. Laurent Bucyibaruta thus committed the act of killing and also ordered, instigated and aided and abetted these killings.

31. At about 07.00 hours on 21 April 1994, Laurent Bucyibaruta, accompanied by Aloys Simba and Faustin Sebhura examined the massacre site at Murambi Technical School. While Aloys Simba expressed his satisfaction about the results of the killing campaign, Laurent Bucyibaruta rewarded those who were active in the killings by giving them some of the victim's cows, thus aiding and abetting these killings and instigating subsequent killings of Tutsis that occurred in Cyanika and Kaduha Parishes later that day.

Cyanika Parish

32. In the morning of 21 April 1994, during the attack on Murambi Technical School, Laurent Bucyibaruta accompanied by his subordinate Faustin Sebhura, ordered the attackers of Murambi, including soldiers, *gendarmes*, *Interahamwe* and armed civilians to go to Cyanika Parish to kill the Tutsi there. Following Laurent Bucyibaruta's orders and instigation, the attackers, using guns, grenades and traditional weapons, went to Cyanika Parish and massacred thousands of Tutsi civilians. Laurent Bucyibaruta thus ordered, instigated and aided and abetted these killings.

Kaduha Parish

33. At about 05.00 hours, on or about 21 April 1994, Laurent Bucyibaruta ordered and instigated soldiers, *gendarmes*, *Interahamwe* and armed civilians to attack Kaduha Parish. As a result, a large group of attackers who were co-perpetrators in the join

à l'entreprise criminelle commune visée au paragraphe 22 du présent acte d'accusation. Par l'acte susvisé, Laurent Bucyibaruta a donc commis et aidé et encouragé à commettre ce massacre.

29. D'une date située aux alentours du 18 avril 1994 jusqu'au 20 avril 1994, sur ordre et à l'instigation de Laurent Bucyibaruta, un petit groupe de miliciens *Interahamwe*, appuyés par des militaires et des civils hutus armés parties à l'entreprise criminelle commune visée au paragraphe 22 du présent acte d'accusation, a encerclé, attaqué à maintes reprises et tué des réfugiés tutsis qui se trouvaient à l'école technique de Murambi. Certaines des armes utilisées, telles que les machettes et les faucilles, avaient été fournies par Laurent Bucyibaruta et Faustin Sebhura. Par les actes susvisés, Laurent Bucyibaruta a commis et aidé et encouragé à commettre ce massacre.

30. Le 21 avril 1994 vers 3 heures du matin, sur l'ordre de Laurent Bucyibaruta, un massacre de grande envergure a été perpétré à l'école technique de Murambi par un important groupe d'assaillants composé de militaires, de gendarmes, d'*Interahamwe* et de civils armés dirigés par Aloys Simba et Faustin Sebhura, toutes parties à l'entreprise criminelle commune visée au paragraphe 22 du présent acte d'accusation. Entourés de barrages routiers pour les empêcher de fuir et affaiblis par la faim et la soif, les Tutsis qui s'y trouvaient ont été tués au moyen d'armes lourdes, d'armes légères, de grenades, de machettes, de gourdins et d'autres armes traditionnelles. Laurent Bucyibaruta a personnellement tiré sur ces Tutsis. Par les actes susvisés, il a non seulement commis des meurtres, mais a également ordonné, incité à commettre et aidé et aidé et encouragé à commettre le massacre en question.

31. Le 21 avril 1994 vers 7 heures du matin, Laurent Bucyibaruta, accompagné d'Aloys Simba et de Faustin Sebhura, a inspecté le lieu où le massacre s'était déroulé à l'école technique de Murambi. Outre qu'Aloys Simba s'est félicité des résultats de la campagne de massacres, Laurent Bucyibaruta a récompensé les personnes qui avaient participé activement à l'opération en leur donnant les vaches de certaines victimes. Par cet acte, il s'est rendu complice du massacre perpétré et a incité les assaillants à perpétrer les autres massacres de Tutsis qui se sont produits par la suite à la paroisse de Cyanika et à celle de Kaduha dans le courant de la journée.

Paroisse de Cyanika

32. Le matin du 21 avril 1994, durant l'attaque lancée à l'école technique de Murambi, Laurent Bucyibaruta, accompagné de son subordonné Faustin Sebhura, a ordonné aux assaillants qui étaient des militaires, des gendarmes, des *Interahamwe* et des civils armés, de se rendre la paroisse de Cyanika pour tuer les Tutsis. En exécution de l'ordre donné par Laurent Bucyibaruta et à son instigation, les assaillants, munis d'armes à feu, de grenades et d'armes traditionnelles, se sont rendus à la paroisse de Cyanika et y ont massacré des milliers de civils tutsis. Par les actes susvisés, Laurent Bucyibaruta a ordonné, incité à commettre et aidé et encouragé à commettre ce massacre.

Paroisse de Kaduha

33. Le 21 avril 1994 ou vers cette date, aux environs de 5 heures du matin, Laurent Bucyibaruta a ordonné à des militaires, des gendarmes, des *Interahamwe* et des civils armés d'attaquer la paroisse de Kaduha et les a incités à le faire. En conséquence,

criminal enterprise referred to in paragraph 22 of this indictment, comprising soldiers, *gendarmes*, *Interahamwe* and armed civilians, led by Colonel Simba, attacked Kaduha Parish using guns, grenades and traditional weapons, and killed thousands of Tutsi civilians. Colonel Simba provided the guns and ammunition used in this attack. Laurent Bucyibaruta thus committed and aided and abetted these killings.

Gikongoro Prison

34. On or about 22 April 1994, Laurent Bucyibaruta, accompanied by Faustin Sebura went to Gikongoro Prison and ordered the Chief Warden of the Prison, to produce a list of Tutsi prisoners to be killed. On the orders of Laurent Bucyibaruta, 250 Tutsi prisoners were killed by Hutus inmates that evening and their bodies loaded in a lorry from MINITRAP and transported to Murambi for burial in mass graves. Laurent Bucyibaruta thus ordered, instigated and aided and abetted these killings.

Ecole des filles of Kibeho

35. On or about 7 May 1994, Laurent Bucyibaruta ordered and instigated *gendarmes*, *Interahamwe* and Hutus civilians, co-perpetrators in the joint criminal enterprise referred to in paragraph 22 of this indictment, to attack *Ecole des filles* of Kibeho. The attackers used guns, grenades and traditional weapons, resulting in about 90 pupils, mainly Tutsis, killed. Laurent Bucyibaruta thus committed, instigated and aided and abetted these killings.

Criminal Responsibility as a Superior

36. Pursuant to Article 6 (3) of the Statute, the accused, Laurent Bucyibaruta, is responsible for the crimes of Genocide or Complicity in Genocide because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates of were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included all the *Sous-Préfets*, all the *Bourgmestres* of the *Communes* and all staff of the administrative services of the *Commune*, all *Conseillers* of sectors and Chiefs of *Cellules*, all the heads of government services who were *ex-officio* members of the *Préfectoral* conference presided over by the *Préfet*, all the staff in the *Préfecture* administration, all the civil servants in the *Préfecture*, members of the armed forces, active and retired, *gendarmerie* and *communal* police, members of the *Interahamwe* in Gisenyi *Préfecture*. The particulars of the acts of the subordinates are set forth in paragraphs 37 through 43.

37. Laurent Bucyibaruta, as *Préfet* of Gikongoro *Préfecture* in the period including January 1994 to about 17 July 1994, had authority and control over all civil servants and holders of public office in his *Préfecture* including soldiers, active and retired, *communal* policemen, *gendarmes* and *Interahamwe* militia and was their superior. As

un important groupe d'assaillants parties à l'entreprise criminelle commune visée au paragraphe 22 du présent acte d'accusation a attaqué la paroisse de Kaduha au moyen d'armes à feu, de grenades et d'armes traditionnelles et tué des milliers de civils tutsis. Ce groupe était composé de militaires, de gendarmes, d'*Interahamwe* et de civils armés dirigés par le colonel Simba qui avait fourni les armes à feu et les munitions utilisées au cours de l'attaque. Par les actes susvisés, Laurent Bucyibaruta a commis et aidé et encouragé à commettre le massacre en question.

Prison de Gikongoro

34. Le 22 avril 1994 ou vers cette date, Laurent Bucyibaruta, accompagné de Faustin Sebhura, s'est rendu à la prison de Gikongoro et a ordonné au directeur de la prison d'établir une liste de prisonniers tutsis à tuer. Sur l'ordre de Laurent Bucyibaruta, 250 prisonniers tutsis ont été tués par des codétenus hutus dans la soirée. Chargés dans un camion du MINITRAP, leurs cadavres ont été transportés à Murambi et enterrés dans des charniers. Par les actes susvisés, Laurent Bucyibaruta a ordonné, incité à commettre et aidé et encouragé à commettre ce massacre.

Ecole de filles de Kibeho

35. Le 7 mai 1994 ou vers cette date, Laurent Bucyibaruta a ordonné à des gendarmes, des *Interahamwe* et des civils hutus parties à l'entreprise criminelle commune visée au paragraphe 22 du présent acte d'accusation d'attaquer l'Ecole de filles de Kibeho et les a incités à le faire. Ces assaillants se sont servis d'armes à feu, de grenades et d'armes traditionnelles, causant la mort d'environ 90 élèves, en majorité tutsies. Par les actes susvisés, Laurent Bucyibaruta commis, incité à commettre et aidé et encouragé à commettre ce massacre.

Responsabilité pénale du supérieur hiérarchique

36. En application de l'article 6 (3) du Statut, l'accusé Laurent Bucyibaruta est responsable du crime de génocide ou de complicité dans le génocide en ce que ses subordonnés ont commis certains actes criminels qu'il savait ou avait des raisons de savoir que les intéressés étaient sur le point de commettre ou avaient commis et il n'a pas pris les mesures nécessaires et raisonnables pour les prévenir ou pour en punir les auteurs. Au nombre de ces subordonnés figuraient tous les sous-préfets, tous les bourgmestres et tout le personnel des services administratifs des communes, tous les conseillers de secteur et les responsables de cellule, tous les chefs des services de l'État qui étaient membres de droit de la conférence préfectorale présidée par le préfet, tous les agents de l'administration préfectorale, tous les fonctionnaires en service dans la préfecture, les membres des forces armées encore en activité ou retraités, les gendarmes, les agents de la police communale et les membres de la milice *Interahamwe* de la préfecture de Gisenyi. Les détails de leurs actes sont exposés aux paragraphes 37 à 43.

37. En sa qualité de préfet de Gikongoro durant une période dont une partie va de janvier à une date située aux alentours du 17 juillet 1994, Laurent Bucyibaruta avait autorité et exerçait un contrôle sur tous les fonctionnaires et les autres agents de l'Administration publique en service dans sa préfecture, notamment les militaires (en activités ou à la retraite), les policiers communaux, les gendarmes et les miliciens

such he had effective control over these employees and militia in the sense of having the power to prevent or punish their acts.

Kibeho

38. Between 11 April 1994 and 15 April 1994, Damien Biniga, *Sous-Préfet* of Munini, Charles Nyiridandi, *Bourgmestre* of Mubuga, Emmanuel Nteziryayo, *Bourgmestre* of Mudasomwa, Félicien Semakwavu, *Bourgmestre* of Nyamagabe and Silas Mugerangabo, *Bourgmestre* of Rwamiko, who were subordinates of Laurent Bucyibaruta, led repeated attacks on Tutsi civilians in Kibeho Parish, supported by soldiers, *gendarmes*, policemen and a large group of *Interahamwe* and armed civilians. As a result thousands of Tutsis were massacred. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Murambi

39. On or about 12 April 1994, Faustin Sebhura, captain of the *Gendarmerie* and Frodouard Havuga, *Sous-Préfet* of Gikongoro, who were subordinates of Laurent Bucyibaruta, set up roadblocks at Kabeza Trading Centre on the road to Murambi Technical School as well as at the entrance to the Murambi Technical School. At these roadblocks, many Tutsi civilians were killed from 12 April 1994 to 21 April 1994. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary measures to prevent the killings or to punish the perpetrators thereof.

Cyanika

40. At about 07.00 hours on or about 21 April 1994, a large group of attackers comprising soldiers, *gendarmes*, *Interahamwe*, who were subordinates to Laurent Bucyibaruta, were joined by armed Hutu civilians in attacks on Tutsis at Cyanika Parish. The attackers used guns, grenades, and traditional weapons, and as a result, thousands of Tutsi civilians were massacred. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Kaduha

41. On or about 20 April 1994, Colonel Simba, a retired soldier and Coordinator for Civil Defence in Gikongoro and Butare *Préfectures*, who was a subordinate of Laurent Bucyibaruta, distributed guns and ammunition to soldiers. These guns and ammunition were used in the killing of Tutsis in Kaduha Parish the next day. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Interahamwe. En outre, il était leur supérieur hiérarchique. A ce titre, il exerçait un contrôle effectif sur ces employés et miliciens en ce sens qu'il avait le pouvoir de prévenir ou de punir leurs actes.

Kibeho

38. Entre le 11 et le 15 avril 1994, Damien Biniga, sous-préfet de Munini, Charles Nyiridandi, bourgmestre de Mubuga, Emmanuel Nteziryayo, bourgmestre de Mudasomwa, Félicien Semakwavu, bourgmestre de Nyamagabe, et Silas Mugerangabo, bourgmestre de Rwamiko, qui étaient des subordonnés de Laurent Bucyibaruta, ont dirigé des attaques répétées lancées contre des civils tutsis à la paroisse de Kibeho par des militaires, des gendarmes, des policiers et d'importants groupes d'*Interahamwe* et de civils armés. Des milliers de Tutsis ont été massacrés lors de ces attaques. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces massacres et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour les prévenir ou en punir les auteurs.

Murambi

39. Le 12 avril 1994 ou vers cette date, Faustin Sebhura, capitaine de gendarmerie, et Frodouard Havuga, sous-préfet de Gikongoro, qui étaient des subordonnés de Laurent Bucyibaruta, ont établi des barrages routiers au centre commercial de Kabeza sur la route menant à l'école technique de Murambi et à l'entrée de ladite école. Nombre de civils tutsis ont été tués à ces barrages routiers du 12 au 21 avril 1994. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour le prévenir ou en punir les auteurs.

Cyanika

40. Le 21 avril 1994 ou vers cette date, aux environs de 7 heures du matin, un important groupe d'assaillants composé de militaires, de gendarmes et d'*Interahamwe*, qui étaient des subordonnés de Laurent Bucyibaruta, a reçu le renfort de civils hutus armés lorsqu'il attaquait des Tutsis à la paroisse de Cyanika. Les assaillants se sont servis d'armes à feu, de grenades et d'armes traditionnelles. En conséquence, des milliers de civils tutsis ont été massacrés. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour le prévenir ou en punir les auteurs.

Kaduha

41. Le 20 avril 1994 ou vers cette date, le colonel Simba, militaire à la retraite et coordonnateur de la défense civile dans les préfectures de Gikongoro et de Butare qui était un des subordonnés de Laurent Bucyibaruta, a distribué des armes à feu et des munitions à des militaires. Ces armes à feu et munitions ont été utilisées pour massacrer des Tutsis à la paroisse de Kaduha le lendemain. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour le prévenir ou en punir les auteurs.

42. At about 05.00 hours, on or about 21 April 1994, a large group of attackers comprising uniformed soldiers, national policemen, *gendarmes* and *Interahamwe*, who were subordinates of Laurent Bucyibaruta, joined by armed civilians, attacked Kaduha Parish using guns, grenades and traditional weapons. The attack continued until about 17.00 hours, as a result of which thousands of Tutsis were killed. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Ecole de filles

43. In the morning on or about 7 May 1994, *Gendarmes* and *Interahamwe*, who were subordinates to Laurent Bucyibaruta, were joined by armed Hutu civilians in attacks on Tutsi pupils in the *Ecole des Filles* of Kibeho. As a result, about 90 Tutsi pupils were killed. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Count 4: Extermination as crime against humanity

The Prosecutor charges Laurent Bucyibaruta with Extermination as crime against humanity Article 3 (b) of the Statute, in that from 1 January 1994 through 17 July 1994, in Gikongoro *Préfecture*, Rwanda, Laurent Bucyibaruta was responsible individually and through the acts of his subordinates, for the extermination, as part of a widespread or systematic attack against the civilian population, on political, ethnic or racial grounds, of persons who sought refuge at various locations including Kibeho, Murambi, Cyanika, Kaduha and at roadblocks throughout the *Préfecture*, as outlined in paragraphs 44 through 58.

CONCISE STATEMENT OF FACTS FOR COUNT 4

Individual Criminal Responsibility

44. Pursuant to Article 6 (1) of the Statute, the accused Laurent Bucyibaruta, is individually responsible for the crime of extermination as a crime against humanity because he planned, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes. With respect to the commission of those crimes, Laurent Bucyibaruta ordered those over whom he had effective control as a result of his position and authority described in paragraphs 2 through 5 above, and he instigated and aided and abetted those over whom he did not have effective control. In addition, the accused wilfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the commission of crimes against humanity against the Tutsi racial or ethnic group, and persons identified as Tutsis or presumed to support the Tutsis or to be politically opposed to "Hutu Power" in Gikongoro *Préfecture*, Rwanda on racial, ethnic or political grounds.

42. Le 21 avril 1994 ou vers cette date, aux environs de 5 heures du matin, un important groupe d'assaillants composé de militaires en uniforme, de membres de la police nationale, de gendarmes et d'*Interahamwe*, qui étaient des subordonnés de Laurent Bucyibaruta, a attaqué la paroisse de Kaduha au moyen d'armes à feu, de grenades et d'armes traditionnelles, avec le renfort de civils armés. L'attaque s'est poursuivie jusqu'aux environs de 17 heures, causant la mort de milliers de Tutsis. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour le prévenir ou en punir les auteurs.

Ecoles de filles

43. Le 7 mai 1994 ou vers cette date, dans la matinée, des gendarmes et des *Interahamwe*, qui étaient des subordonnés de Laurent Bucyibaruta, ont reçu le renfort de civils hutus armés lorsqu'ils attaquaient des élèves tutsies à l'École des filles de Kibeho. Environ 90 élèves tutsies ont trouvé la mort lors de cette attaque. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour le prévenir ou en punir les auteurs.

Chef 4 : Extermination constitutive de crime contre l'humanité

Le Procureur accuse Laurent Bucyibaruta d'extermination constitutive de crime contre l'humanité, infraction prévue à l'article 3 (b) du Statut, en ce que du 1^{er} janvier au 17 juillet 1994, dans la préfecture de Gikongoro (Rwanda), Laurent Bucyibaruta s'est rendu responsable, par ses actes personnels et ceux de ses subordonnés, de l'extermination, dans le cadre d'une attaque généralisée ou systématique dirigée contre la population civile en raison de son appartenance politique, ethnique ou raciale, des personnes qui s'étaient réfugiées à divers endroits, notamment dans les localités de Kibeho, Murambi, Cyanika et Kaduha, et de celles arrêtées à des barrages routiers dans toute la préfecture, ainsi qu'il est exposé aux paragraphes 44 à 58.

EXPOSÉ SUCCINCT DES FAITS RELATIFS AUX CHEFS D'ACCUSATION 4

Responsabilité pénale individuelle

44. En application de l'article 6 (1) du Statut, l'accusé Laurent Bucyibaruta est individuellement responsable du crime d'extermination constitutive de crime contre l'humanité pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, Laurent Bucyibaruta a non seulement utilisé de ses fonctions et de ses pouvoirs indiqués aux paragraphes 2 à 5 plus haut pour ordonner aux personnes placées sous son contrôle effectif de le perpétrer, mais encore incité et aidé et encouragé des personnes sur lesquelles il n'exerçait aucun contrôle effectif à le faire. En outre, il a participé sciemment et délibérément à une entreprise criminelle commune dont l'objet, le but et la conséquence prévisible étaient de commettre des crimes contre l'humanité à l'encontre du groupe racial ou ethnique tutsi et des personnes considérées comme des Tutsis ou présumées soutenir les Tutsis ou être des

To fulfil this criminal purpose, the accused acted with Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyirindandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndabarinzi, Lt. Col Rwamanya Augustin, Joachim Hategikamana, Charles Munyaneza, and others, all such actions being taken either directly or through co-perpetrators, for at least the period of 1 January 1994 through 17 July 1994. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 45 through 50.

Kibeho Parish

45. Between 11 and 15 April 1994, Laurent Bucyibaruta ordered and instigated massive killings of Tutsi civilians in Kibeho Parish, by the *Interahamwe*, armed civilians, policemen and soldiers, co-perpetrators in the joint criminal enterprise referred to in paragraph 44 of this indictment. Thousands of Tutsis were killed as a result from 11 to 15 April 1994 and by so doing, Laurent Bucyibaruta committed and aided and abetted their killing.

Murambi Technical School

46. At about 03.00 hours on 21 April 1994, a major massacre was committed on Tutsis at Murambi Technical School, on the orders of Laurent Bucyibaruta. A large group of attackers comprising soliders, *gendarmes*, *Interahamwe* and armed civilians, co-perpetrators in the joint criminal enterprise referred to in paragraph 44 of this indictment, encircled and attacked and killed Tutsis in this location with heavy guns, arms, grenades, machetes, clubs and other traditional weapons, resulting in about 40.000 deaths. Laurent Bucyibaruta committed and aided and abetted these killings.

Cyanika Parish

47. In the morning of 21 April 1994, during the attack on Murambi Technical School, Laurent Bucyibaruta ordered and instigated the attackers of Murambi, including soldiers, Gendarmes, *Interahamwe* and armed civilians to go to Cyanika Parish to attack and kill the Tutsis who had taken refuge there. These attackers were the co-perpetrators in the joint criminal enterprise referred to in paragraph 44 of this indictment. Following Laurent Bucyibaruta's orders and instigation, the attackers, using guns, grenades, and traditional weapons, went to Cyanika Parish and massacred thousands of Tutsi civilians on 21 April 1994. Laurent Bucyibaruta thus committed and aided and abetted these killings.

Kaduha Parish

48. At about 05.00 hours, on or about 21 April 1994, a major massacre was committed on Tutsis in Kaduha Parish on the orders and instigation of Laurent Bucyibaruta. A large group of attackers comprising soldiers, *gendarmes*, *Interahamwe* and

adversaires politiques du mouvement «Hutu Power» dans la préfecture de Gikongoro (Rwanda), en raison de leur appartenance raciale, ethnique ou politique. Pour atteindre de but criminel, l'accusé a agi de concert avec Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyirindandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndabarinzi, le lieutenant-colonel Augustin Rwamanya, Joachim Hategekimana, Charles Munyaneza et d'autres personnes, soit directement, soit par l'intermédiaire de coauteurs, pendant au moins la période allant du 1^{er} janvier au 17 juillet 1994. Les faits détaillés qui donnent lieu à sa responsabilité pénale individuelle sont exposés aux paragraphes 45 à 50.

Paroisse de Kibeho

45. Entre le 11 et le 15 avril 1994, Laurent Bucyibaruta a ordonné à des *Interahamwe*, des civils armés, des policiers et des militaires, parties à l'entreprise criminelle commune visée au paragraphe 44 du présent acte d'accusation de tuer en masse les civils tutsis qui se trouvaient à la paroisse de Kibeho et les a incités à le faire. En conséquence, des milliers de Tutsis ont été tués du 11 au 15 avril 1994. Par ces actes, Laurent Bucyibaruta a commis et aidé et encouragé à commettre leur massacre.

Ecole technique de Murambi

46. Le 21 avril 1994, vers 3 heures du matin, les Tutsis ont fait l'objet d'un massacre de grande envergure à l'école technique de Murambi sur l'ordre de Laurent Bucyibaruta. Un important groupe d'assaillants composé de militaires, de gendarmes, d'*Interahamwe* et de civils armés parties à l'entreprise criminelle commune visée au paragraphe 44 du présent acte d'accusation a encerclé, attaqué et tué des Tutsis à cet endroit au moyen d'armes lourdes, d'armes légères, de grenades, de machettes, de gourdins et d'autres armes traditionnelles. Environ 40 000 personnes y ont trouvé la mort. Laurent Bucyibaruta a commis et aidé et encouragé à commettre ce massacre.

Paroisse de Cyanika

47. Le matin du 21 avril 1994, durant l'attaque lancée à l'école technique de Murambi, Laurent Bucyibaruta a ordonné aux assaillants, qui étaient des militaires, des gendarmes, des *Interahamwe* et des civils armés, de se rendre à la paroisse de Cyanika pour attaquer et tuer les Tutsis qui s'y étaient réfugiés et les a incités à le faire. Ces assaillants étaient des parties à l'entreprise criminelle commune visée au paragraphe 44 du présent acte d'accusation. A la suite de l'ordre et des paroles d'incitation de Laurent Bucyibaruta, les intéressés, munis d'armes à feu, de grenades et d'armes traditionnelles se sont rendus à la paroisse de Cyanika et ont massacré des milliers de civils tutsis le 21 avril 1994. Par les actes susvisés, Laurent Bucyibaruta a commis et aidé et encouragé à commettre ce massacre.

Paroisse de Kaduha

48. Le 21 avril 1994 ou vers cette date, aux environs de 5 heures du matin, les Tutsis ont fait l'objet d'un massacre de grande envergure à la paroisse de Kaduha sur l'ordre et à l'instigation de Laurent Bucyibaruta. Un important groupe d'assaillants

armed civilians led by the subordinates of Laurent Bucyibaruta including Joachim Hategikamana the *Sous-Préfet* of Kaduha and Colonel Simba, Coordinator for Civil Defence for Gikongoro and Butare *Préfectures*, co-perpetrators in the joint criminal enterprise referred to in paragraph 44 of this indictment, attacked Kaduha Parish using guns, grenades, and traditional weapons, causing the deaths of thousands of Tutsi civilians. Laurent Bucyibaruta thus committed and aided and abetted these killings.

Gikongoro Prison

49. In the evening on or about 22 April 1994, following Laurent Bucyibaruta's orders and instigation, a group of Hutu prisoners, co-perpetrators in the joint criminal enterprise referred to in paragraph 44 of this indictment, armed with traditional weapons they had brought from the Murambi massacre site, attacked and killed all the Tutsi prisoners in Gikongoro Prison. About 250 Tutsi prisoners were killed that evening. The following morning, their bodies were loaded in a lorry from MINITRAP and transported to Murambi for burial in mass graves. Laurent Bucyibaruta thus committed and aided and abetted these killings.

Ecole des filles of Kibeho

50. On or about 7 May 1994, Laurent Bucyibaruta ordered and instigated *gendarmes*, *Interahamwe* and Hutu civilians, co-perpetrators in the joint criminal enterprise referred to in paragraph 22 of this indictment, to attack *Ecole des Filles* of Kibeho. The attackers used guns, grenades and traditional weapons, resulting in about 90 pupils, mainly Tutsis, killed. Laurent Bucyibaruta thus committed, instigated and aided and abetted these killings.

Criminal Responsibility as a Superior

51. Pursuant to Article 6 (3) of the Statute, the accused, Laurent Bucyibaruta, is responsible for the crime of Extermination as a crime against humanity because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included all *Sous-Préfets*, all the *Bourgmestres* of the *Communes* and all staff of the administrative services of the *Communes*, all *Conseillers* of sectors and Chiefs of *Cellules*, all the heads of government services who were *ex-officio* members of the *Prefectoral* conference presided over by the *Préfet*, all the staff in the *Préfecture* administration, all the civil servants in the *Préfecture*, members of the armed forces, active and retired, *gendarmerie* and *communal* police, members of the *Interahamwe*, in Gisenyi *Préfecture*. The particulars of the acts of the subordinates are set forth in paragraphs 52 through 58.

52. Laurent Bucyibaruta, as *Préfet* of Gikongoro *Préfecture* in the period including January 1994 to about 17 July 1994, had authority and control over all civil servants

composé de militaires, de gendarmes, d'*Interahamwe* et de civils armés dirigés par des subordonnés de Laurent Bucyibaruta, dont Joachim Hategekimana, sous-préfet de Kaduha, et le colonel Simba, coordonnateur de la défense civile dans les préfectures de Gikongoro et de Butare, tous parties à l'entreprise criminelle commune visée au paragraphe 44 du présent acte d'accusation, a attaqué la paroisse de Kaduha au moyen d'armes à feu de grenades et d'armes traditionnelles, occasionnant la mort de milliers de civils tutsis. Par les actes susvisés, Laurent Bucyibaruta a commis et aidé et encouragé à commettre ce massacre.

Prison de Gikongoro

49. Le 22 avril 1994 ou vers cette date, dans la soirée, un groupe de prisonniers hutus parties à l'entreprise criminelle commune visée au paragraphe 44 du présent acte d'accusation s'est servi d'armes traditionnelles ramenées du lieu de massacre de Murambi pour attaquer et tuer tous les codétenus tutsis dans la prison de Gikongoro sur ordre et à l'instigation de Laurent Bucyibaruta. Environ 250 prisonniers tutsis ont été tués ce soir-là. Le lendemain matin, leurs cadavres ont été chargés dans un camion du MINITRAP et transportés à Murambi pour être enterrés dans des charniers. Par les actes susvisés, Laurent Bucyibaruta a commis et aidé et encouragé à commettre ce massacre.

Ecole des filles de Kibeho

50. Le 7 mai 1994 ou vers cette date, Laurent Bucyibaruta a ordonné à des gendarmes, des *Interahamwe* et des civils hutus parties à l'entreprise criminelle commune visée au paragraphe 44 du présent acte d'accusation d'attaquer l'Ecole des filles de Kibeho et les a incités à le faire. Ces assaillants se sont servis d'armes à feu, de grenades et d'armes traditionnelles, causant alors la mort d'environ 90 élèves, en majorité tutsies. Par les actes susvisés, Laurent Bucyibaruta a commis, incité à commettre et aidé et encouragé à commettre ce massacre.

Responsabilité pénale du supérieur hiérarchique

51. En application de l'article 6 (3) du Statut, l'accusé Laurent Bucyibaruta est responsable du crime d'extermination constitutive de crimes contre l'humanité en ce que ses subordonnés ont commis certains actes criminels qu'il savait ou avait des raisons de savoir que les intéressés étaient sur le point de commettre ou avaient commis et il n'a pas pris les mesures nécessaires et raisonnables pour les prévenir ou pour en punir les auteurs. Au nombre de ces subordonnés figuraient tous les sous-préfets, tous les bourgmestres et tout le personnel des services administratifs des communes, tous les conseillers de secteur et les responsables de cellule, tous les chefs des services de l'État qui étaient membres de droit de la conférence préfectorale présidée par le préfet, tous les agents de l'administration préfectorale, tous les fonctionnaires en service dans la préfecture, les membres des forces armées encore en activité ou retraités, les gendarmes, les agents de la police communale et les membres de la milice *Interahamwe* de la préfecture de Gisenyi. Les détails de leurs actes sont exposés aux paragraphes 52 à 58.

52. En sa qualité de préfet de Gikongoro, durant une période dont une partie va de janvier à une date située aux alentours du 17 juillet 1994, Laurent Bucyibaruta

and holders of public office in his *Préfecture* including soldiers, active and retired, *communal* policemen, *gendarmes* and *Interahamwe* militia and was their superior. As such he had effective control over these employees and militia in the sens of having the power to prevent or punish their acts.

Kibeho

53. Between 11 April 1994 and 15 April 1994, Damien Biniga, *Sous-Préfet* of Munini, Charles Nyiridandi, *Bourgmestre* of Mubuga, Emmanuel Nteziryayo, *Bourgmestre* of Mudasomwa, Félicien Semakwavu, *Bourgmestre* of Nyamagabe and Silas Mugerangabo, *Bourgmestre* of Rwamiko, who were subordinates of Laurent Bucyibaruta, led repeated attacks on Tutsi civilians in Kibeho Parish, supported by soldiers, *gendarmes*, policemen and a large group of *Interahamwe* and armed civilians. As a result thousands of Tutsis were massacred. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Murambi

54. On or about 12 April 1994, Faustin Sebhura, captain of the *Gendarmerie* and Frodouard Havuga, *Sous-Préfet* of Gikongoro, who were subordinates of Laurent Bucyibaruta, set up roadblocks at Kabeza Trading Centre on the road to Murambi Technical School as well as at the entrance to the Murambi Technical School. At these roadblocks, many Tutsi civilians were killed from 12 April 1994 to 20 April 1994. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Cyanika

55. At bout 07.00 hours on or about 21 April 1994, a large group of attackers comprising soldiers, *Gendarmes*, *Interahamwe*, who were subordinates to Laurent Bucyibaruta, were joined by armed Hutu civilians in attacks on Tutsis at Cyanika Parish. The attackers used guns, grenades, and traditional weapons, and as a result, thousands of Tutsi civilians were massacred. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Kaduha

56. On or about 20 April 1994, Colonel Simba, a retired soldier and Coordinator for Civil Defence in Gikongoro and Butare *Préfectures*, who was a subordinate of Laurent Bucyibaruta, distributed guns and ammunition to soldiers. These guns and ammunition were used in the killing of Tutsis in Kaduha Parish the next day. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take

avait autorité et exerçait un contrôle sur tous les fonctionnaires et les autres agents de l'Administration publique en service dans la préfecture, notamment les militaires (en activité ou à la retraite), les policiers communaux, les gendarmes et les miliciens *Interahamwe*. En outre, il était leur supérieur hiérarchique. A ce titre, il exerçait un contrôle effectif sur ces employés et miliciens en ce sens qu'il avait le pouvoir de prévenir ou de punir leurs actes.

Kibeho

53. Entre le 11 et le 15 avril 1994, Damien Biniga, sous-préfet de Munini, Charles Nyiridandi, bourgmestre de Mubuga, Emmanuel Nteziryayo, bourgmestre de Mudasmwa, Félicien SEMKAWAVU, bourgmestre de Nyamagabe, et Silas Muderangabo, bourgmestre de Rwamiko, qui étaient des subordonnés de Laurent Bucyibaruta, ont dirigé des attaques répétées lancées contre des civils tutsis à la paroisse de Kibeho par des militaires, des gendarmes, des policiers et d'importants groupes d'*Interahamwe* et de civils armés. Des milliers de Tutsis ont été massacrés lors de ces attaques. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces massacres et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour les prévenir ou en punir les auteurs.

Murambi

54. Le 12 avril 1994 ou vers cette date, Faustin Sebhura, capitaine de gendarmerie, et Frodouard Havuga, sous-préfet de Gikongoro, qui étaient des subordonnés de Laurent Bucyibaruta, ont établi des barrages routiers au centre commercial de Kabeza sur la route menant à l'école technique de Murambi et à l'entrée de ladite école. Nombre de civils tutsis ont été tués à ces barrages routiers du 12 au 20 avril 1994. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour les prévenir ou en punir les auteurs.

Cyanika

55. Le 21 avril 1994 ou vers cette date, aux environs de 7 heures du matin, un important groupe d'assaillants composé de militaires, de gendarmes et d'*Interahamwe*, qui étaient des subordonnés de Laurent Bucyibaruta, a reçu le renfort de civils hutus armés lorsqu'il attaquait des Tutsis de la paroisse Cyanika. Les assaillants se sont servis d'armes à feu, de grenades et d'armes traditionnelles. En conséquence, des milliers de civils tutsis ont été massacrés. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour les prévenir ou en punir les auteurs.

Kaduha

56. Le 20 avril 1994 ou vers cette date, le colonel Simba, militaire à la retraite et coordonnateur de la défense civile dans les préfectures de Gikongoro et de Butare qui était un des subordonnés de Laurent Bucyibaruta, a distribué des armes à feu et des munitions à des militaires. Ces armes à feu et munitions ont été utilisées pour massacrer des Tutsis à la paroisse de Kaduha le lendemain. Laurent Bucyibaruta était ou

necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

57. At about 05.00 hours, on or about 21 April 1994, a large group of attackers comprising uniformed soldiers, national policemen, *gendarmes* and *Interahamwe*, who were subordinates of Laurent Bucyibaruta, joined by armed civilians, attacked Kaduha Parish using guns, grenades and traditional weapons. The attack continued until about 17.00 hours, as a result of which thousands of Tutsis were killed. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Ecole des filles

58. In the morning on or about 7 May 1994, *gendarmes* and *Interahamwe*, who were subordinates to Laurent Bucyibaruta, were joined by armed Hutu civilians in attacks on Tutsi pupils in the *Ecole des Filles* of Kibeho. As a result, about 9 Tutsi pupils were killed. Laurent Bucyibaruta knew or had reason to know of the killings and failed or refused to take necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Count 5 : Murder as a crime against humanity

The Prosecutor charges Laurent Bucyibaruta with murder as a crime against humanity, a crime stipulated in Article 3 (a) of the Statute, in that from 1 January through 17 July 1994, in Gikongoro *Préfecture*, Rwanda, Laurent Bucyibaruta is responsible individually and through the acts of his subordinates, for the murder as part of a widespread or systematic attacks against the civilian population, on political, ethnic or racial grounds, of persons within Gikongoro town and Gikongoro Prison, as outlined in paragraphs 59 through 61.

CONCISE STATEMENT OF FACTS FOR COUNT 5

Individual Criminal Responsibility

59. Pursuant to Article 6 (1) of the Statute, the accused, Laurent Bucyibaruta, is individually responsible for the crime of murder as a crime against humanity because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of this crime. With respect to the commission of this crime, Laurent Bucyibaruta ordered those over whom he had effective control as a result of his position and authority described in paragraphs 2 through 5, and he instigated and aided and abetted those over whom he did not have effective control. In addition, the accused wilfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the commission of crimes against humanity against the Tutsi racial or ethnic group and persons identified as

avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour les prévenir ou en punir les auteurs.

57. Le 21 avril 1994 ou vers cette date, aux environs de 5 heures du matin, un important groupe d'assaillants composé de militaires en uniforme, de membres de la police nationale, de gendarmes et d'*Interahamwe*, qui étaient des subordonnés de Laurent Bucyibaruta, a attaqué la paroisse de Kaduha au moyen d'armes à feu, de grenades et d'armes traditionnelles, avec le renfort de civils armés. L'attaque s'est poursuivie jusqu'aux environs de 17 heures, causant la mort de milliers de Tutsis. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour les prévenir ou en punir les auteurs.

Ecoles de filles

58. Le 7 mai 1994 ou vers cette date, dans la matinée, des gendarmes et des *Interahamwe*, qui étaient des subordonnés de Laurent Bucyibaruta, ont reçu le renfort de civils hutus armés lorsqu'ils attaquaient les élèves tutsies à l'École des filles de Kibeho. Environ 90 élèves tutsies ont trouvé la mort lors de cette attaque. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre des mesures nécessaires ou raisonnables pour les prévenir ou en punir les auteurs.

Chef 5 : Assassinat constitutif de crime contre l'humanité

Le Procureur accuse Laurent Bucyibaruta d'assassinat constitutif de crime contre l'humanité, infraction prévue à l'article 3 (a) du Statut, en ce que du 1^{er} janvier au 17 juillet 1994, dans la préfecture de Gikongoro (Rwanda), Laurent Bucyibaruta s'est rendu responsable, par ses actes personnels et ceux de ses subordonnés, de l'assassinat d'un certain nombre de personnes commis à l'intérieur de la ville et de la prison de Gikongoro, dans le cadre d'une attaque généralisée ou systématique dirigée contre la population civile en raison de son appartenance politique, ethnique ou raciale, ainsi qu'il est exposé aux paragraphes 59 à 61.

EXPOSÉ SUCCINCT DES FAITS RELATIFS AU CHEF 5

Responsabilité pénale individuelle

59. En application de l'article 6 (1) du Statut, l'accusé Laurent Bucyibaruta est individuellement responsable du crime d'assassinat constitutif de crime contre l'humanité pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, Laurent Bucyibaruta a non seulement utilisé de ses fonctions et de ses pouvoirs indiqués aux paragraphes 2 à 5 plus haut pour ordonner aux personnes placées sous son contrôle effectif de le perpétrer, mais encore incité et aidé et encouragé des personnes sur lesquelles il n'exerçait aucun contrôle effectif à le faire. En outre, il a participé sciemment et délibérément à une entreprise criminelle commune dont l'objet, le but et la conséquence prévisible étaient de commettre des crimes con-

Tutsi or presumed to support the Tutsis or to be politically opposed to “Hutu Power” in Gikongoro *Préfecture*, Rwanda, on racial, ethnic or political grounds. To fulfil this criminal purpose, the accused acted with Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyirindandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndabarinzi, Lt. Col Rwamanya Augustin, Joachim Hategekimana, Charles Munyaneza, and others, all such actions being taken either directly or through co-perpetrators, for at least the period of 1 January 1994 through 17 July 1994. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 60 through 61.

Gendarmerie Barracks Gikongoro

60. On or about 20 April 1994, in the barracks of the *gendarmerie* in Gikongoro town, Laurent Bucyibaruta was present when a Tutsi *gendarme*, Ndagijimana was ordered by Sebhura a co-perpetrator in the joint criminal enterprise referred to in paragraph 59 of this indictment, to be arrested and brought to the barracks to be killed as part of the campaign to eliminate all Tutsis. The *gendarme* was arrested and subsequently killed behind the barracks for the sole reason that he was Tutsi. By acquiescing in the arrest order, Laurent Bucyibaruta aided and abetted the murder of the Tutsi *gendarme*, Ndagijimana. Laurent Bucyibaruta thus aided and abetted this murder.

Gikongoro Prison

61. On or about 23 April 1994, in Gikongoro Prison, Laurent Bucyibaruta ordered Hutu prisoners, co-perpetrators in the joint criminal enterprise referred to in paragraph 59 of this indictment, to kill three Tutsi priests, Padre Kanizio, Padre Rene and another priest whose name is unknown. They were killed by Hutu prisoners using clubs. Laurent Bucyibaruta thus committed and aided and abetted these killings.

Count 6 : Rape as a crime against humanity

The Prosecutor charges Laurent Bucyibaruta with rape as a crime against humanity, a crime stipulated in Article 3 (g) of the Statute, in that from 1 January through 17 July 1994, in Gikongoro *Préfecture*, Rwanda, Laurent Bucyibaruta is responsible individually and through the acts of his subordinates, for rape as part of a widespread or systematic attacks against the civilian population, on political, ethnic or racial grounds, of females within Gikongoro *Préfecture*, notably in Murambi, Uwabahima and Kibeho, as outlined in paragraphs 62 through 75.

tre l'humanité à l'encontre du groupe racial ou ethnique tutsi et des personnes considérées comme des Tutsis ou présumées soutenir les Tutsis ou être des adversaires politiques du mouvement « Hutu Power » dans la préfecture de Gikongoro (Rwanda), en raison de leur appartenance raciale, ethnique ou politique. Pour atteindre de but criminel, l'accusé a agi de concert avec Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyirindandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndabarinzi, le lieutenant-colonel Augustin Rwamanya, Joachim Hategekimana, Charles Munyaneza et d'autres personnes, soit directement, soit par l'intermédiaire de coauteurs, pendant au moins la période allant du 1^{er} janvier au 17 juillet 1994. Les faits détaillés qui donnent lieu à sa responsabilité pénale individuelle sont exposés aux paragraphes 60 et 61.

Caserne de gendarmerie de Gikongoro

60. Le 20 avril 1994 ou vers cette date, Laurent Bucyibaruta était présent dans la caserne de gendarmerie de la ville de Gikongoro lorsque Sebhura, partie à l'entreprise criminelle commune visée au paragraphe 59 du présent acte d'accusation, a ordonné d'arrêter un gendarme tutsi nommé Ndagijimana et de l'amener à la caserne pour le tuer dans le cadre de la campagne d'élimination de tous les Tutsis. Ce gendarme a été arrêté et tué par la suite derrière la caserne pour l'unique raison qu'il était tutsi. Pour avoir tacitement souscrit à l'ordre d'arrestation, Laurent Bucyibaruta a aidé et encouragé à commettre l'assassinat du gendarme tutsi Ndagijimana, se rendant ainsi complice de cet assassinat.

Prison de Gikongoro

61. Le 23 avril ou vers cette date, dans la prison de Gikongoro, Laurent Bucyibaruta a ordonné aux prisonniers hutus, parties à l'entreprise criminelle commune visée au paragraphe 59 du présent acte d'accusation, de tuer trois prêtres tutsis, à savoir le père Kanizo, le père René et un autre dont le nom est inconnu. Ces prisonniers hutus les ont tués à coups de gourdins. Par l'acte susvisé, Laurent Bucyibaruta a commis et aidé et encouragé à commettre ces meurtres.

Chef 6 : Viol constitutif de crime contre l'humanité

Le Procureur accuse Laurent Bucyibaruta de viol constitutif de crime contre l'humanité, infraction prévue à l'article 3 (g) du Statut, en ce que du 1^{er} janvier au 17 juillet 1994, dans la préfecture de Gikongoro (Rwanda), Laurent Bucyibaruta s'est rendu responsable, par ses actes personnels et ceux de ses subordonnés, du viol d'un certain nombre de femmes commis dans la préfecture de Gikongoro, notamment à Murambi, Uwabahima et Kibeho, dans le cadre d'une attaque généralisée ou systématique dirigée contre la population civile en raison de son appartenance politique, ethnique ou raciale, ainsi qu'il est exposé aux paragraphes 62 à 74.

CONCISE STATEMENT OF FACTS FOR COUNT 6

Individual Criminal Responsibility

62. Pursuant to Article 6 (1) of the Statute, the accused, Laurent Bucyibaruta, is individually responsible for the crime of rape as a crime against humanity because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of this crime. With respect to the commission of this crime, Laurent Bucyibaruta ordered those over whom he had effective control as a result of his position and authority described in paragraphs 2 through 5, and he instigated and aided and abetted those over whom he did not have effective control. In addition, the accused wilfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the commission of crimes against humanity against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsis or to be politically opposed to "Hutu Power" in Gikongoro *Préfecture*, Rwanda, on racial, ethnic or political grounds. To fulfil this criminal purpose, the accused acted with Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyirindandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndabarinzi, Lt. Col Rwamanya Augustin, Joachim Hategekimana, Charles Munyaneza, and others, all such actions being taken either directly or through co-perpetrators, for at least the period of 1 January 1994 through 17 July 1994. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 63 through 64.

Murambi

63. On or about 12 April 1994, Laurent Bucyibaruta ordered and instigated the setting up of roadblocks by soldiers, the *Interhamwe* and armed civilians, co-perpetrators in the joint criminal enterprise referred to in paragraph 62 of this indictment. At these roadblocks, Tutsi women and girls were repeatedly raped by soldiers, the *Interhamwe* and armed civilians. At Murambi, these roadblocks were set up at Kabeza Trading centre on the road to Murambi Technical School as well as at the entrance to the Murambi Technical School. Laurent Bucyibaruta thus committed and aided and abetted these rapes.

Ecole des Filles of Kibeho

64. On or about 7 May 1994, Laurent Bucyibaruta ordered and instigated the attack on *Ecole des Filles* of Kibeho by *gendarmes*, *Interahamwe* and Hutu civilians, during which many Tutsi girls were raped by attackers. Laurent Bucyibaruta thus committed and aided and abetted these rapes.

Criminal Responsibility as a Superior

65. Pursuant to Article 6 (3) of the Statute, the accused, Laurent Bucyibaruta, is responsible for the crime of rape as a crime against humanity because specific

EXPOSÉ SUCCINCT DES FAITS RELATIFS AUX CHEFS D'ACCUSATION 6

Responsabilité pénale individuelle

62. En application de l'article 6 (1) du Statut, l'accusé Laurent Bucyibaruta est individuellement responsable du crime de viol constitutif de crime contre l'humanité pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, Laurent Bucyibaruta a non seulement utilisé de ses fonctions et de ses pouvoirs indiqués aux paragraphes 2 à 5 plus haut pour ordonner aux personnes placées sous son contrôle effectif de le perpétrer, mais encore incité et aidé et encouragé des personnes sur lesquelles il n'exerçait aucun contrôle effectif à le faire. En outre, il a participé sciemment et délibérément à une entreprise criminelle commune dont l'objet, le but et la conséquence prévisible étaient de commettre des crimes contre l'humanité à l'encontre du groupe racial ou ethnique tutsi et des personnes considérées comme des Tutsis ou présumées soutenir les Tutsis ou être des adversaires politiques du mouvement « Hutu Power » dans la préfecture de Gikongoro (Rwanda), en raison de leur appartenance raciale, ethnique ou politique. Pour atteindre de but criminel, l'accusé a agi de concert avec Faustin Sebhura, Damien Biniga, Joseph Ntegeyintwali, Frodouard Havuga, Aloys Simba, Félicien Semakwavu, Emmanuel Nteziryayo, Charles Nyirindandi, Silas Mugerangabo, Celes Semigabo, Denys Kamodoka, Juvénal Ndabarinzi, le lieutenant-colonel Augustin Rwamanya, Joachim Hategekimana, Charles Munyaneza et d'autres personnes, soit directement, soit par l'intermédiaire de coauteurs, pendant au moins la période allant du 1^{er} janvier au 17 juillet 1994. Les faits détaillés qui donnent lieu à sa responsabilité pénale individuelle sont exposés aux paragraphes 63 et 64.

Murambi

63. Le 12 avril 1994 ou vers cette date, Laurent Bucyibaruta a ordonné à des militaires, des *Interahamwe* et des civils armés parties à l'entreprise criminelle commune visée au paragraphe 62 du présent acte d'accusation de mettre en place des barrages routiers, et les a incités à le faire. À maintes reprises, des femmes et des filles tutsies ont été violées à ces barrages routiers par des militaires, des *Interahamwe* et des civils armés. À Murambi, des barrages ont été établis au centre commercial de Kabeza sur la route menant à l'école technique de Murambi et à l'entrée de ladite Ecole. Par les actes susvisés, Laurent Bucyibaruta a commis et aidé et encouragé à commettre ces viols.

Ecoles des filles de Kibeho

64. Le 7 mai 1994 ou vers cette date, Laurent Bucyibaruta a ordonné à des gendarmes, des *Interahamwe* et des civils hutus d'attaquer l'École des filles de Kibeho et les a incités à le faire. Au cours de cette attaque, nombre de filles tutsies ont été violées par les assaillants. Par les actes susvisés, Laurent Bucyibaruta a ordonné, incité à commettre et aidé et encouragé à commettre ces viols.

Responsabilité pénale du supérieur hiérarchique

65. En application de l'article 6 (3) du Statut, l'accusé Laurent Bucyibaruta est responsable du crime de viol constitutif de crime contre l'humanité en ce que ses sub-

criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included all *Sous-Préfets*, all the *Bourgmestres* of the *Communes* and all staff of the administrative services of the *Communes*, all *Conseillers* of sectors and Chiefs of *Cellules*, all the heads of government services who were *ex-officio* members of the *Préfectoral* conference presided over by the *Préfet*, all the staff in the *Préfecture* administration, all the civil servants in the *Préfecture*, members of the armed forces, active and retired, *gendarmerie* and *communal* police, members of the *Interahamwe*, in Gisenyi *Préfecture*. The particulars of the acts of the subordinates are set forth in paragraphs 66 through 75.

Murambi

66. On or about 12 April 1994, Faustin Sebhura, Captain of the *Gendarmerie* and Frodouard Havuga, *Sous-Préfet* of Gikongoro, who were subordinates of Laurent Bucyibaruta, supervised the setting up of roadblocks by soldiers, the *Interahamwe* and armed civilians at Kabeza Trading Centre on the road to Murambi Technical School as well as at the entrance to the Murambi Technical School, at which many Tutsi women and girls were raped. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

67. On a date in mid-April 1994, armed *Interahamwe* in Gikongoro, who were subordinates of Laurent Bucyibaruta, took BIF-1 to the *Bureau Communal* of Murambi and raped her. BIF-1 escaped and hid near Mwogo River, until Hutu *Interahamwe* men manning the roadblocks nearby, found her with BIF-1's cousin called E, and another woman (name unknown). The three women were taken back to the *Bureau Communal* of Murambi, where BIF-1 was raped by about twenty of these *Interahamwe* men. One of the women (name unknown) was killed with a club, and E was raped and then killed with a sword. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

Ecole des Filles of Kibeho

68. On or about 7 May 1994, *gendarmes*, *Interahamwe* and Hutu civilians, who were subordinates of Laurent Bucyibaruta, using guns, grenades and traditional weapons attacked *Ecole des Filles* of Kibeho and raped many Tutsi girls during this attack. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

ordonnés ont commis certains actes criminels qu'il savait ou avait des raisons de savoir que les intéressés étaient sur le point de commettre ou avaient commis et il n'a pas pris les mesures nécessaires et raisonnables pour les prévenir ou pour en punir les auteurs. Au nombre de ces subordonnés figuraient tous les sous-préfets, tous les bourgmestres et tout le personnel des services administratifs des communes, tous les conseillers de secteur et les responsables de cellule, tous les chefs des services de l'État qui étaient membres de droit de la conférence préfectorale présidée par le préfet, tous les agents de l'administration préfectorale, tous les fonctionnaires en service dans la préfecture, les membres des forces armées encore en activité ou retraités, les gendarmes, les agents de la police communale et les membres de la milice *Interahamwe* de la préfecture de Gisenyi. Les détails de leurs actes sont exposés aux paragraphes 66 à 75.

Murambi

66. Le 12 avril 1994 ou vers cette date, Faustin Sebhura, capitaine de gendarmerie, et Frodouard Havuga, sous-préfet de Gikongoro, qui étaient des subordonnés de Laurent Bucyibaruta, ont supervisé la mise en place de barrages routiers par des militaires, des *Interahamwe* et des civils armés au centre commercial de Kabeza sur la route menant à l'école technique de Murambi et à l'entrée de ladite école. Nombre de femmes et de filles tutsies ont été violées à ces barrages routiers. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

67. A la mi-avril 1994, des *Interahamwe* armés de Gikongoro, qui étaient des subordonnés de Laurent Bucyibaruta, ont emmené BIF-1 au bureau communal de Murambi et l'ont violée. Elle s'est échappée par la suite et s'est cachée près de la rivière Mwogo jusqu'à ce que des hommes hutus membres de la milice *Interahamwe* qui tenaient les barrages routiers établis proximité la trouvent en compagnie de sa cousine connue sous le pseudonyme de E et d'une autre femme (non identifiée). Les trois femmes ont été ramenées au bureau communal de Murambi où BIF-1 a été violée par une vingtaine de ces *Interahamwe*. L'une d'entre elles en l'occurrence la femme non identifiée a été ruée coups de gourdin, tandis qu'E a été violée et ensuite tuée avec une épée. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

Ecole des filles de Kibeho

68. Le 7 mai 1994 ou vers cette date, des gendarmes, des *Interahamwe* et des civils hutus, qui étaient des subordonnés de Laurent Bucyibaruta, se sont servis d'armes à feu, de grenades et d'armes traditionnelles pour attaquer l'École des filles de Kibeho et ont violé de nombreuses filles tutsies au cours de cette attaque. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

Munyinya

69. On or about 16 April 1994 a group of young *Interahamwe* men, who were subordinates of Laurent Bucyibaruta, including Runyurana went to the home of BFT-1 and raped her. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

Nzega

70. On or about 20 April 1994 a group of ten *Interahamwe*, including Daniel (last name unknown) and Nzabandora, who were subordinates of Laurent Bucyibaruta, went to the home of BIG-1 and raped her in front of her children. Shortly after this group of *Interahamwe* had left the home of BIG-1, the leader of the *Interahamwe*, Haruna, who was a subordinate of Laurent Bucyibaruta, returned to the home of BIG-1 and raped her. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

Uwabahima

71. On or about 2 April 1994 a group of *Interahamwe*, including Vianney Ndindabahizi, Gakwandi Damien and Ndayisaba Rwagasore, who were subordinates of Laurent Bucyibaruta, chased BIH-1 as she walked to her sister's home and beat and raped her. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

72. Between 10 April to 27 April 1994 a group of *Interahamwe*, including Sabuhuro, Museveni, Sekamana, Ndangamira, Nsengimana, Katabiroro, Twahirwa, Rwagasore, Cyamusanganye, Jean Katabirara, Bigumaho and Yofes, who were subordinates of Laurent Bucyibaruta, came to the home of BII-1, took her to a trench approximately 30 meters from her home and raped her. At the same time, this group of *Interahamwe*, also took BIJ-1 and BIK-1 from their Aunt BII-1's home, to a pit behind the house, and raped both of them. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

73. On or about 10 April 1994 a group of *Interahamwe*, including Twagiramuzza, who was subordinate of Laurent Bucyibaruta, came to the home of BIL-1 and beat and raped her. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

74. On an unknown date about end of May 1994, a group of *Interahamwe*, including Ntakirutimana, Ndekekzi, Katabiroro, Nbanda, Museveni, Sebhuro and others attacked and looted the house of BIM's father. While the looting was going on, one of the attackers (name unknown to witness) seized the witness and raped her, alleging that BIM had earlier refused to marry a Hutu. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

Munyinya

69. Le 16 avril 1994 ou vers cette date, un groupe de jeunes hommes appartenant à la milice *Interahamwe* qui étaient des subordonnés de Laurent Bucyibaruta, dont Runyurana, s'est rendu chez BFT-1 et l'a violée. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

Nzega

70. Le 20 avril 1994 ou vers cette date, un groupe de dix *Interahamwe*, dont Daniel (nom de famille inconnu) et Nzadandora, qui étaient des subordonnés de Laurent Bucyibaruta, s'est rendu chez BIG-1 et l'a violée en présence de ses enfants. Peu après le départ de ce groupe d'*Interahamwe* du domicile de BIG-1, Haruna, chef des *Interahamwe* qui était un des subordonnés de Laurent Bucyibaruta, y est retourné et l'a violée. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

Uwabahima

71. Le 20 avril 1994 ou vers cette date, un groupe d'*Interahamwe*, dont Vianney Ndinabahizi, Gakwandi Damien et Ndayisaba Rwagasore, qui étaient des subordonnés de Laurent Bucyibaruta, a poursuivi BIH-1 lorsqu'elle se rendait à pied chez sa sœur, l'a frappée et l'a violée. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

72. Entre le 10 et le 27 avril 1994, un groupe d'*Interahamwe*, dont Sabuhuro, Museveni, Sekamana, Ndangamira, Nsengimana, Katabiroro, Twahirwa, Rwagasore, Cyamusanganye, Jean Katabirara, Bigumaho et Yofes, qui étaient des subordonnés de Laurent Bucyibaruta, est venu chez BII-1, l'a emmenée dans un fossé situé à une trentaine de mètres de la maison et l'a violée. Il a également emmené BIJ-1 et BIK-1, qui se trouvaient chez leur tante BII-1, dans une fosse située derrière la maison et les a violées. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

73. Le 10 avril 1994 ou vers cette date, un groupe d'*Interahamwe*, dont Twagiramukiza, qui étaient des subordonnés de Laurent Bucyibaruta, est venu chez BIL-1 et l'a frappée et violée. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

74. A une date inconnue située vers la fin de mai 1994, un groupe d'*Interahamwe*, dont Ntakirutimana, Ndekekzi, Katabiroro, Nbanda, Museveni et Sebuho, a attaqué et pillé la maison du père de BIM. Pendant le pillage, l'un des assaillants (dont BIM ne connaît pas le nom) a saisi BIM et l'a violée, au motif qu'elle aurait auparavant refusé d'épouser un Hutu. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

Rwigoma

75. On an unknown date about mid-June 1994, Nzamuramba Hamuduni, an *Interahamwe* raped BIE-1 while two other *Interahamwe* men, including Nkurunziza, who were subordinates of Laurent Bucyibaruta, beat BIE-1 on the head with clubs. Laurent Bucyibaruta knew or had reason to know of these rapes and failed or refused to take reasonable measures to prevent the rapes or to punish the perpetrators thereof.

The acts and omissions of Laurent Bucyibaruta detailed herein are punishable pursuant to Articles 22 and 23 of the Statute.

Arusha, Tanzania, this 16th June 2005.

[Signed] : Hassan Bubacar Jallow

Rwigoma

75. A une date inconnue située vers la mi-juin 1994, un *Interahamwe* nommé Nzamuramba Hamuduni a violé BIE-1 pendant que deux autres *Interahamwe*, dont Nkurunziza, qui étaient des subordonnés de Laurent Bucyibaruta, la frappaient à la tête avec des gourdins. Laurent Bucyibaruta était ou avait des raisons d'être au courant de ces viols et il s'est abstenu ou a refusé de prendre des mesures raisonnables pour les prévenir ou en punir les auteurs.

Les actes et les omissions de Laurent Bucyibaruta exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut.

Arusha (Tanzanie), le 16 juin 2005.

[Signé] : Hassan Bubacar Jallow

The Prosecutor v. Sylvestre GACUMBITSI

Case N° ICTR-2001-64

Case History

- Name : GACUMBITSI
- First Name : Sylvestre
- Date of Birth : 1947
- Sex : male
- Nationality : Rwandan
- Former Official Function : Mayor of Rurumo
- Date of Indictment's Confirmation : 20 June 2001
- Counts : genocide and, alternatively, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest : 20 June 2001, in Kigoma, in Tanzania
- Date of Transfer : 20 June 2001
- Date of Initial Appearance : 26 June 2001
- Pleading : not guilty
- Date Trial Began : 28 July 2003
- Date and content of the Sentence : 17 June 2004, 30 years imprisonment
- Appeal from the sentence : 7 July 2006, life imprisonment
- Date and Place of imprisonment : 20 June 2001, at the United Nations Detention Facility (Arusha)

The Prosecutor v. Sylvestre GACUMBITSI

Case N° ICTR-2001-64

Fiche technique

- Nom : GACUMBITSI
- Prénom : Sylvestre
- Date de naissance : 1947
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : bourgmestre de Rurumo
- Date de la confirmation de l'acte d'accusation : 20 juin 2001
- Chefs d'accusation : génocide et, alternativement, complicité de génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu d'arrestation : 20 juin 2001, à Kigoma, en Tanzanie
- Date du transfert : 20 juin 2001
- Date de la comparution initiale : 26 juin 2001
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 28 juillet 2003
- Date et contenu du prononcé de la peine : 17 juin 2004, 30 ans d'emprisonnement
- Appel : la Chambre d'appel l'a condamné à la prison à vie pour le restant de ses jours (7 juillet 2006)
- Date et lieu d'emprisonnement : 20 juin 2001, au Centre de détention du Tribunal (Arusha)

***Ordonnance pour convocation
d'une conférence de mise en état
8 février 2005 (ICTR-2001-64-A)***

(Original : Français)

Chambre d'appel

Juge : Weinberg de Roca, Juge de la mise en état en appel

Sylvestre Gacumbitsi – Conférence de mise en état d'appel

Instrument international cité :

Règlement de Procédure et de preuve, art. 65 bis (A) et 65 bis (B)

NOUS, Inés Mónica Weinberg de Roca, juge de la mise en état en appel dans cette affaire¹,

ATTENDU qu'en vertu de l'article 65 *bis* (A) et (B) du Règlement de procédure et de preuve du Tribunal international,

«[l]a Chambre d'appel ou un juge de la Chambre d'appel peut convoquer une conférence de mise en état»

pour organiser, entre les parties, des échanges de vues propres à assurer un déroulement rapide de l'instance;

ATTENDU que le jugement de la chambre de première instance a été rendu le 17 juin 2004 et que Sylvestre Gacumbitsi reste en détention en attendant que son appel soit entendu;

ATTENDU qu'une conférence de mise en état serait utile pour discuter toute question afférente à cette affaire et pour faire en sorte que celle-ci procède sans délai inutile;

ORDONNONS aux Parties de se présenter devant nous pour une conférence de mise en état le 8 mars 2005 à 16:30 à la salle S-355, troisième étage, aile Serengeti du Centre International des Congrès d'Arusha.

Fait en français et en anglais, le texte français faisant foi.

Fait le 8 février 2005, à La Haye (Pays-Bas).

[Signé] : Inés Mónica Weinberg de Roca

¹ Ordonnance portant désignation d'un juge de la mise en état en appel, 21 septembre 2004.

***Ordonnance concernant mémoire en réplique
1^{er} mars 2005 (ICTR-2001-64-A)***

(Original : Français)

Chambre d'appel

Juge : Weinberg de Roca, Juge de la mise en état en appel

Sylvestre Gacumbitsi – Langues de travail du Tribunal, Mémoire en réplique

NOUS, Inés Monica Weinberg de Roca, juge de la mise en état en appel dans cette affaire¹,

ATTENDU que la réponse du Procureur au mémoire d'appel de Sylvestre Gacumbitsi a été déposée le 12 novembre 2004², mais seulement en langue anglaise;

ATTENDU que la version française de la Réponse a été déposée le 1^{er} mars 2005;

ORDONNONS à l'appelant Sylvestre Gacumbitsi de déposer son mémoire en réplique au plus tard le 16 mars 2005.

Fait en français et en anglais, le texte français faisant foi.

Fait le 1^{er} mars 2005, à La Haye (Pays-Bas).

[Signé] : Inés Monica Weinberg de Roca

¹ Ordonnance portant désignation d'un juge de la mise en état en appel, 21 septembre 2004.

² *Respondent's Brief*, 12 novembre 2004, («Réponse»).

Order
24 March 2005 (ICTR-2001-64-A)

(Original : French)

Appeals Chamber

Judge : Inés Mónica Weinberg de Roca, Pre-Appeal Judge

Sylvestre Gacumbitsi – Renewal of the contracts of the Legal Assistant and Co-Counsel, New delay for time filing of the briefs, Request for allocation of additional hours, Function of the Registry – Motion partially granted

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in the present matter¹,

CONSIDERING the “*Requête en extrême urgence*” filed confidentially by the Appellant, Sylvestre Gacumbitsi, on 22 March 2005 (the “Motion” and the “Appellant”), wherein the Appellant requests the Pre-Appeal Judge (i) to order the Registry to renew, for a period of six months, the contract of the Legal Assistant assigned to the Appellant; (ii) to order the Registry to allocate 100 additional hours to his Co-Counsel; and (iii) to order that the time-limit for filing the reply brief should start to run only from notification of renewal of the contracts of the Legal Assistant and Co-Counsel²;

WHEREAS it is not necessary to await the expiry of the time-limit for filing a reply before ruling on the Motion;

WHEREAS at the status conference held on 8 March 2005, the Registry undertook to process by 11 March 2005, at the latest, the oral request by the Appellant for the renewal of the contract of his Legal assistant³, but whereas the Registry has still not processed the request for renewal of the contract of the Appellant’s Legal Assistant;

WHEREAS at the same status conference, it was explained to Lead Counsel for the Appellant that the request for allocation of additional hours to Co-Counsel could not be addressed at the conference, that such request should be made in writing to the Registry, and that any appeal against the Registry decision should comply with the official procedure⁴;

WHEREAS at the same status conference, the Appellant requested and obtained an extension of the time-limit for filing the reply brief until 23 March 2005⁵;

¹ Order appointing a Pre-Appeal Judge, 21 September 2004.

² Motion, p. 2.

³ Transcript of the Status Conference held on 8 March 2005 (English version), p. 7.

⁴ *Ibid.*, pp. 5-6.

⁵ *Ibid.*, pp. 2-3.

Ordonnance
24 mars 2005 (ICTR-2001-64-A)

(Original : Français)

Chambre d'appel

Juge : Inés Mónica Weinberg de Roca, Juge de la mise en état en appel

Sylvestre Gacumbitsi – Renouvellement du contrat de son assistant juridique et co-conseil, Nouveau délai pour le dépôt de mémoires, Demande d'accroissement du nombre d'heures allouées, Fonction du Greffe – Requête partiellement acceptée

NOUS, Inés Mónica Weinberg de Roca, juge de la mise en état en appel dans cette affaire¹,

VU la «Requête en extrême urgence» déposée confidentiellement par l'appelant Sylvestre Gacumbitsi le 22 mars 2005 («Requête» et «Appelant»), par laquelle l'appelant demande à la juge de la mise en état (i) d'ordonner au greffe de renouveler le contrat de l'assistant juridique assigné à l'appelant pour une durée de six mois, (ii) d'ordonner au greffe d'accorder 100 heures supplémentaires pour son co-conseil et (iii) d'ordonner que le délai pour le dépôt du mémoire en réplique ne commence à courir qu'à compter de la notification du renouvellement des contrats de l'assistant juridique et du co-conseil²;

ATTENDU qu'il n'est pas nécessaire d'attendre l'expiration du délai de dépôt d'une réponse pour décider de la requête;

ATTENDU que, lors de la conférence de mise en état tenue le 8 mars 2005, le Greffe s'est engagé à traiter au plus tard le 11 mars 2005 de la demande présentée oralement par l'appelant en vue du renouvellement du contrat de son assistant juridique³, mais qu'il appert que la question du renouvellement du contrat de l'assistant juridique de l'appelant n'a toujours pas été traitée par le Greffe;

ATTENDU que, lors de cette même conférence de mise en état, il a été expliqué au conseil principal de l'appelant que la demande d'accroissement du nombre d'heures allouées au co-conseil ne pouvait être traitée pendant la conférence, qu'une telle demande devait être faite par écrit au Greffe et que tout appel éventuel de la décision du Greffe devait se faire conformément à la procédure prévue⁴;

ATTENDU que, lors de cette même conférence de mise en état, l'appelant a demandé et obtenu prorogation du délai pour le dépôt du mémoire en réplique jusqu'au 23 mars 2005⁵;

¹ Ordonnance portant désignation d'un juge de la mise en état en appel, 21 septembre 2004.

² Requête, p. 2.

³ Procès-verbal de la conférence de mise en état tenue le 8 mars 2005 (version anglaise), p. 7.

⁴ *Id.*, pp. 5-6.

⁵ *Id.*, pp. 2-3.

WHEREAS the Appellant has not demonstrated any unforeseen changes since the status conference held on 8 March 2005 to justify further extension of the time-limit for filing the reply brief⁶;

FOR THE FOREGOING REASONS :

ORDER the Registry to process, no later than 29 March 2005, the Appellant's request for renewal of the contract of his Legal Assistant;

ORDER the Appellant to file his reply brief no later than 29 March 2005.

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

Done on 24 March 2005 at The Hague (The Netherlands).

[Signed] : Inès Monica Weinberg de Roca

***Order replacing a Judge in a Case before the Appeals Chamber
15 July 2005 (ICTR-2001-64-A)***

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

Sylvestre Gacumbitsi – André Ntagerura – Judge before the Appeals Chamber, Assignment of a judge, Replacement of a judge before the Appeals Chamber, Commune seat of the Appeals Chamber with ICTY – Interest of an effective management of the case

International Instrument cited :

Statute, art. 11 (3), 12 bis, 13 (3), 13 (4) and 14 (4)

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and

⁶In this regard, the fact that the Registry has not yet processed the request for renewal of the Legal Assistant's contract is not a reason for an extension considering that, as far as the Appellant is concerned, the issue of renewal of the Legal Assistant's contract was distinct from that of extension of the time-limit for filing the reply brief : Transcript of the status conference held on 8 March 2005 (English version), p. 2.

ATTENDU que l'appelant n'a pas démontré de changement imprévu depuis la conférence de mise en état tenue le 8 mars 2005 qui justifierait une prorogation supplémentaire du délai de dépôt du mémoire en réplique⁶;

POUR CES MOTIFS :

ORDONNONS au Greffe de traiter au plus tard le 29 mars 2005 de la demande de l'appelant en vue du renouvellement du contrat de son assistant juridique;

ORDONNONS à l'appelant de déposer son mémoire en réplique au plus tard le 29 mars 2005.

Fait en français et en anglais, le texte français faisant foi.

Fait le 24 mars 2005, à La Haye (Pays-Bas).

[Signé] : Inés Mónica Weinberg de Roca

***Ordonnance portant remplacement d'un juge
dans une affaire devant la Chambre d'appel
15 juillet 2005 (ICTR-2001-64-A)***

(Original : Anglais)

Chambre d'Appel

Juge : Theodor Meron, Président de Chambre

Sylvestre Gacumbitsi – André Ntagerura – Juge devant la Chambre d'appel, Assignment d'un juge, Remplacement d'un juge dans l'affaire devant le Tribunal, Siège commun de la Chambre d'appel avec le TPIY – Intérêt d'une bonne administration de l'affaire

Instrument international cité :

Statut, art. 11 (3), 12 bis, 13 (3), 13 (4) et 14 (4)

NOUS, THEODOR MERON, Président de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de géno-

⁶À cet égard, le fait que le Greffe n'ait pas encore traité de la demande de renouvellement du contrat de l'assistant juridique ne constitue pas une raison justifiant la prorogation puisque, même pour l'Appelant, la question du renouvellement du contrat de l'assistant juridique de l'Appelant était distincte de la question de la prorogation du délai pour le dépôt du mémoire en réplique : Procès-verbal de la conférence de mise en état tenue le 8 mars 2005 (version anglaise), p. 2.

Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 (“Tribunal”),

NOTING the appeals lodged by The Office of the Prosecutor on 16 July 2004 and by Sylvestre Gacumbitsi on 20 July 2004 against the Judgement rendered by Trial Chamber III on 17 June 2004;

CONSIDERING the composition of the Tribunal as set out in Document IT/222 of the International Tribunal for the former Yugoslavia, issued on 17 November 2003;

NOTING the “President’s Assignment of Judge Andréia Vaz to the Appeals Chamber and Judge Inés Weinberg de Roca to a Trial Chamber” of 24 February 2005 (“Tribunal President’s Re-Assignment Order”), made by Judge Erik Møse, President of the Tribunal, which reads as follows :

RECALLING that on 31 January 2003, the General Assembly elected eleven permanent judges to the Tribunal in conformity with Article 12 *bis* of its Statute;

HAVING CONSIDERED Article 13 (3) of the Statute, which provides that the President, after consultation with the permanent judges of the Tribunal, shall assign two of the permanent judges elected in accordance with Article 12 *bis* of the Statute to be members of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia;

TAKING INTO ACCOUNT Article 13 (4) of the Statute, according to which members of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Criminal Tribunal for Rwanda;

TAKING ALSO INTO ACCOUNT Article 14 (4) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, according to which two of the judges elected in accordance with the Statute of the International Criminal Tribunal for Rwanda shall be assigned by the President of the Tribunal, in consultation with the President of the International Criminal Tribunal for the Former Yugoslavia, to be members of the Appeals Chamber and permanent judges of the International Criminal Tribunal for the Former Yugoslavia;

RECALLING that on 4 June 2003, Judge Mehmet Güney and Judge Inés Weinberg de Roca were assigned to the Appeals Chambers of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia;

HAVING CONSULTED with the permanent judges of the International Criminal Tribunal for Rwanda and the President of the International Criminal Tribunal for the Former Yugoslavia, and bearing in mind the need to ensure the interests of the Tribunal as a whole and, in particular, the need to ensure trial experience from the Tribunal in the work of the Appeals Chamber and appeals experience in the work of the Trial Chambers;

ASSIGNS Judge Andréia Vaz to the Appeals Chambers of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, and Judge Inés Weinberg de Roca to Trial Chamber III of the International Criminal Tribunal for Rwanda. These assignments shall take effect from 15 August 2005.

cide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1^{er} janvier et le 31 décembre 1994 (le «Tribunal»),

VU les appels interjetés par le Bureau du Procureur le 16 juillet 2004 et par Sylvestre Gacumbitsi le 20 juillet 2004 contre le jugement rendu par la Chambre de première instance III le 17 juin 2004;

VU la composition du Tribunal telle qu'elle est exposée dans le document IT/222 du Tribunal international pour l'ex-Yougoslavie, établi le 17 novembre 2003;

VU l'«Ordonnance du Président portant nomination de la juge Andrézia Vaz à la Chambre d'appel et de la juge Inés Weinberg de Roca à une Chambre de première instance» (l'«Ordonnance du Président du Tribunal portant réaffectation de juges»), rendue le 24 février 2005 par le juge Erik Møse, Président du Tribunal, qui est libellée comme suit :

RAPPELANT que, le 31 janvier 2003, l'Assemblée générale a élu onze juges permanents du Tribunal conformément à l'article 12 *bis* du Statut du Tribunal;

Vu l'article 13 (3) du Statut, qui dispose que le Président, après avoir consulté les juges permanents du Tribunal, nomme deux des juges permanents élus conformément à l'article 12 *bis* du Statut à la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie;

Vu l'article 13 (4) du Statut, selon lequel les juges siégeant à la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie siègent également à la Chambre d'appel du Tribunal pénal international pour le Rwanda;

Vu l'article 14 (4) du Statut du Tribunal pénal international pour l'ex-Yougoslavie, selon lequel deux des juges nommés conformément au Statut du Tribunal pénal international pour le Rwanda seront nommés par le Président dudit Tribunal, en consultation avec le Président du Tribunal pénal international pour l'ex-Yougoslavie, membres de la Chambre d'appel et juges permanents du Tribunal pénal international pour l'ex-Yougoslavie;

RAPPELANT que, le 4 juin 2003, le juge Mehmet Güney et la juge Inés Weinberg de Roca ont été nommés à la Chambre d'appel du Tribunal pénal international pour le Rwanda et du Tribunal pénal international pour l'ex-Yougoslavie;

AYANT CONSULTÉ les juges permanents du Tribunal pénal international pour le Rwanda et le Président du Tribunal pénal international pour l'ex-Yougoslavie, et compte tenu de la nécessité de veiller à l'intérêt du Tribunal dans son ensemble et, en particulier, de faire profiter, dans le cadre de leurs travaux respectifs, la Chambre d'appel de l'expérience des procès en première instance et les Chambres de première instance, de l'expérience de la procédure en appel;

NOMME la juge Andrézia Vaz à la Chambre d'appel du Tribunal pénal international pour le Rwanda et du Tribunal pénal international pour l'ex-Yougoslavie, et la juge Inés Weinberg de Roca à la Chambre de première instance III du Tribunal pénal international pour le Rwanda. Ces nominations prennent effet à compter du 15 août 2005.

CONSIDERING that the case *Prosecutor v. Sylvestre Gacumbitsi*, Case n° ICTR-01-64-A (“*Gacumbitsi*”) is in its pre-appeal phase and that, thus, no hearing in this case has been held;

CONSIDERING further that it is in the interest of an effective management of the case to ensure that no undue delay will result from the implementation of the Tribunal President’s Re-Assignment Order;

PURSUANT TO Articles 11 (3) and 13 (4) of the Statute of the Tribunal;

HEREBY ASSIGN, with effect from 15 August 2005, Judge Fausto Pocar to replace Judge Inés Weinberg de Roca in the present case;

AND ORDER that in the case of *Gacumbitsi*, the Appeals Chamber shall be constituted, as of 15 August 2005, as follows :

Judge Mohamed Shahabuddeen

Judge Florence Mumba

Judge Mehmet Güney

Judge Fausto Pocar

Judge Wolfgang Schomburg

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

Done this 15th day of July 2005, at The Hague, The Netherlands.

[Signed] : Theodor Meron

***Decision on the Appellant’s Rule 115 Motion
and Related Motion by the Prosecution
21 October 2005 (ICTR-2001-64-A)***

(Original : English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding Judge; Florence Mumba; Mehmet Güney; Fausto Pocar; Wolfgang Schomburg

Sylvestre Gacumbitsi – Etienne Nzabonimana – Belgium – Qualification as an expert witness – Admission on Appeal of Additional Evidence, Delay for a Request of Admission on Appeal of Additional Evidence, Identification of the grounds of appeal, Risk of a denial of justice, Research Additional Evidence of on Appeal – Motion denied

International Instruments cited :

ATTENDU que l'affaire *Le Procureur c. Sylvestre Gacumbitsi*, affaire n° ICTR-01-64-A (l'«affaire *Gacumbitsi*») est actuellement en la phase de mise en état en appel et que, donc, aucune audience n'a été tenue dans cette affaire;

ATTENDU par ailleurs que l'intérêt d'une bonne administration de l'affaire commande que l'on veille à ce que la mise en œuvre de l'Ordonnance du Président du Tribunal portant réaffectation de juges n'entraîne aucun retard indu;

Vu les articles 11 (3) et 13 4) du Statut du Tribunal;

NOMMONS le juge Fausto Pocar en remplacement de la juge Inés Weinberg de Roca dans la présente affaire et, ce, à compter du 15 août 2005;

ET ORDONNONS qu'à compter du 15 août 2005, la Chambre d'appel, dans l'affaire *Ntagerura*, sera composée des juges suivants :

Mohamed Shahabuddeen

Florence Murnba

Mehmet Güney

Fausto Pocar

Wolfgang Schornburg

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

FAIT à La Haye (Pays-Bas), le 15 juillet 2005.

[Signé] : Theodor Meron

***Décision relative à la requête de l'appelant
fondée sur l'article 115 du Règlement
et à la requête connexe du Procureur
21 octobre 2005 (ICTR-2001-64-A)***

(Original : Anglais)

Chambre d'appel

Juges : Mohammed Shahabuddeen, Président; Florence Mumba; Mehmet Güney; Fausto Pocar; Wolfgang Schornburg

Sylvestre Gacumbitsi – Etienne Nzabonimana - Belgique – Qualification de témoin expert, – Admission de moyens de preuve supplémentaires en phase d'appel, Délai pour la demande en admission de moyens de preuve supplémentaires en phase d'appel, Identification des moyens d'appel, Risque de déni de justice, Recherche de moyens de preuve en phase d'appel – Requêtes rejetées

Instrument international cité :

Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal; Rules of Procedure and Evidence, rules 94 bis, 115 and 115 (A)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Decision on the Admission of Additional Evidence, 14 April 2005 (ICTR-2001-71); Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005 (IT-98-34); Appeals Chamber, The Prosecutor v. Vidoje Blagojević et al., Decision on Appellant Vidoje Blagojević's Motion for Admission of Additional Evidence Pursuant to Rule 115, 21 July 2005 (IT-02-60)

Introduction

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal") is seized of an appeal filed by Sylvestre Gacumbitsi ("Appellant") and by the Prosecution against the Judgement rendered in this case by Trial Chamber III of the International Tribunal on 17 June 2004 ("Trial Judgement").

2. The Appeals Chamber is seized of a motion for the admission of additional evidence at the appeal stage ("Motion") filed, pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), by the Appellant on 18 July 2005.¹ The Prosecution filed a response to this request on 28 July 2005 ("Response").² A French translation of that Response was filed on 7 September 2005, and the Appellant has not filed a reply. The Prosecution also filed a Motion to Seek Leave to File Supplementary Material Relating to Gacumbitsi's Rule 115 Application on 7 September 2005 ("Prosecution's Motion"). A French translation of the Prosecution's Motion was filed on 22 September 2005.

¹Extremely Urgent Motion for Admission on Appeal of Additional Evidence and Expert Witness Testimony, signed 15 July 2005, official English translation filed 8 August 2005.

²Prosecutor's Response to *Requête en extrême urgence aux fins d'admission en appel des moyens de preuve supplémentaires et d'un témoin expert*, 28 July 2005.

Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal; Règlement de Procédure et de preuve, art. 94 bis, 115 et 115 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Emmanuel Ndindabahizi, Decision on the Admission of Additional Evidence, 14 avril 2005 (ICTR-2001-71); Chambre d'appel, Le Procureur c. Ferdinand Nahimana et consorts, Décision relative à la requête de l'appelant Ferdinand Nahimana aux fins de mesures d'assistance du Greffe en phase d'appel, 3 mai 2005 (ICTR-99-52)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Mladen Naletilić et Vinko Martinović, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 mai 2005 (IT-98-34); Chambre d'appel, Le Procureur c. Vidoje Blagojević et al., Decision on Appellant Vidoje Blagojević's Motion for Admission of Additional Evidence Pursuant to Rule 115, 21 juillet 2005 (IT-02-60)

Introduction

1. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1^{er} janvier et le 31 décembre 1994 (le «Tribunal international») est saisie d'un appel interjeté par Sylvestre Gacumbitsi (l'«appelant») et par le Procureur contre le jugement rendu en l'espèce par la Chambre de première instance III du Tribunal international le 17 juin 2004 (le «Jugement»).

2. La Chambre d'appel est saisie d'une requête aux fins d'admission en appel de moyens de preuve supplémentaires (la «requête») déposée en vertu de l'article 115 du Règlement de procédure et de preuve du Tribunal international (le «Règlement»), par l'appelant le 18 juillet 2005¹. Le 28 juillet 2005, le Procureur a déposé une réponse à cette Requête, la («Réponse»)². Le 7 septembre 2005, la traduction en français de cette réponse a été déposée; l'appelant n'a pas déposé de réplique. Le 7 septembre 2005, le Procureur a également déposé une Requête du Procureur aux fins d'autorisation de présenter des moyens de preuve supplémentaires relativement à la Requête de Gacumbitsi formée sur le fondement de l'article 115 (la «Requête du Procureur»). La traduction en français de la Requête du Procureur a été déposée le 22 septembre 2005.

¹ Requête en extrême urgence aux fins d'admission en appel des moyens de preuve supplémentaires et d'un témoin expert, datée du 15 juillet 2005; la traduction officielle a été déposée le 8 août 2005.

² Réponse du Procureur à la Requête en extrême urgence aux fins d'admission en appel des moyens de preuve supplémentaires et d'un témoin expert, 28 juillet 2005.

3. On 12 October 2005, the Appellant filed a Response to the Prosecution's Motion.³ This submission is in violation of the 10-day filing deadline for responses to motions on appeal set forth by the relevant Practice Direction, and provides no argument as to why there is good cause for the delay.⁴ However, even if it were timely filed, the Appeals Chamber would not consider the Response to the Prosecution's Motion. The filing is incoherent and does not comply with the Practice Direction's requirement that responses to motions "clearly state whether or not the motion is opposed and the grounds therefore".⁵ Moreover, in light of the Appeals Chamber's disposition of the Prosecution's Motion below, it is in any event unnecessary to address the Appellant's response to it.

4. The relief requested by the Appellant in the Motion is threefold. First, the Appellant seeks to introduce the report of a purported "expert" witness, Paul Ndengejeho. Second, he asks the Appeals Chamber to approve his defence counsel's travel to Brussels in order to obtain the records of a certain recent proceeding at the Belgian *Cour d'Assises* that he claims is relevant to his case; he states that the Registry has refused to authorize funds for the travel absent the Appeals Chamber's approval. Third, he asks for an extension of the 75-day time limit ordinarily applicable under Rule 115 in order for him to obtain the evidence he seeks from Belgium⁶.

5. At the outset, the Appeals Chamber notes that the Motion was filed confidentially. There is no apparent reason for this classification. No protected witnesses are involved, and the Appellant gives no reason as to why the Motion or the Decision on it needs to be confidential. Proceedings before the Appeals Chamber,

"which include the parties' filings as part of the proceedings, shall be public unless there are exceptional reasons for keeping them confidential"⁷.

The Appeals Chamber can see none here, and for this reason, both the Motion and this Decision should be public.

³ *Réponse à la requête du Procureur datée du 7 septembre 2005*, 12 October 2005. The cover page of this document bears a date of 5 October 2005, which was the deadline for the submission, calculated from the date on which the French translation of the Prosecution's Motion was filed on 22 September 2005. However, the Registrar's records show that the facsimile transmission was not received until 12 October 2005.

⁴ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 16 September 2002, para. 11.

⁵ *Ibid.*

⁶ See Motion, paras. H-I.

⁷ *Prosecutor v. Naletilič and Martinović*, Case No. IT-98-34-A, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3.

3. Le 12 octobre 2005, l'appelant a déposé une réponse à la Requête du Procureur³. L'appelant ne s'est pas conformé au délai de dix jours prévu pour le dépôt de réponses à des requêtes en appel fixé par la directive pratique pertinente, et n'a avancé aucun argument indiquant qu'il existerait des motifs valables justifiant ce retard⁴. Toutefois, même si elle avait déposée dans les délais impartis, la Chambre d'appel n'aurait pas examiné la réponse à la requête du Procureur car, en plus de manquer de cohérence, elle ne se conforme pas à la Directive pratique stipulant que la partie adverse indique dans sa réponse «clairement si elle s'oppose ou non à la requête et expos[e], le cas échéant, les raisons de cette opposition»⁵. Au demeurant, vu la décision plus loin que rend la Chambre d'appel relativement à la Requête du Procureur, il est en tout état de cause inutile de se pencher sur la réponse de l'appelant à cette requête.

4. La réparation demandée par l'appelant dans sa Requête a trois volets. L'appelant tente en premier lieu de faire admettre le rapport d'un prétendu témoin «expert», Paul Ndengejeho. En deuxième lieu, il sollicite que la Chambre d'appel accepte que son conseil se rende à Bruxelles aux fins de se procurer le dossier d'un certain procès tenu récemment à la Cour d'Assises belge, qui serait susceptible de servir les intérêts de sa cause; il ajoute que le Greffe a refusé d'autoriser la prise en charge du voyage sans l'approbation de la Chambre d'appel. Il demande, en troisième lieu, une prorogation du délai de 75 jours, qui s'applique généralement sous le régime de l'article 115, afin de lui permettre de se procurer les éléments de preuve qu'il recherche en Belgique⁶.

5. D'emblée, la Chambre d'appel relève que la Requête a été déposée sous le sceau de la confidentialité. Rien apparemment ne justifie cette classification. Aucun témoin protégé n'est impliqué et l'appelant n'avance aucun motif justifiant la nécessité de placer la Requête ou la décision sous le sceau de la confidentialité. Les procédures devant la Chambre d'appel,

«qui comportent le dépôt d'écritures par les parties dans le cadre de la procédure, sont publiques sauf si des motifs exceptionnels justifient qu'elles ne le soient pas [TRADUCTION]»⁷.

La Chambre d'appel n'en voit aucun ici, et pour cette raison, aussi bien la Requête que la décision devraient être publiques.

³ Réponse à la Requête du Procureur datée du 7 septembre 2005, 12 octobre 2005. La page de garde de ce document porte la date du 5 octobre 2005, qui était la date limite de dépôt, calculée à partir de la date à laquelle la traduction en français de la Requête du Procureur a été déposée, c'est-à-dire le 22 septembre 2005. Toutefois, les archives du Greffe indiquent que le document envoyé par télécopieur n'a été reçu que le 12 octobre 2005.

⁴ Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 16 septembre 2002, para. 11.

⁵ *Ibid.*

⁶ Voir Requête, para. H-I.

⁷ *Le Procureur c. Naletilic et Martinovic*, affaire n° IT-98-34-A, *Decision on Vinko Martinovic's withdrawal of confidential status of appeal brief*, 4 mai 2005, p. 3.

I. Report of Paul Ndengejeho

6. Before the Trial Chamber, the Defence sought, on 23 October 2003, to introduce as a “statement of [an] expert witness”, pursuant to Rule 94 *bis* of the Rules, a report written by one Paul Ndengejeho⁸. In a Decision of 11 November 2003, the Trial Chamber held that Mr. Ndengejeho did not qualify as an expert, and refused to admit his report on this ground and on the ground that parts of it were irrelevant to the case. Nevertheless, the Trial Chamber held that Mr. Ndengejeho could testify as a fact witness. The defence, however, subsequently withdrew Mr. Ndengejeho from its witness list.

7. The Appellant now seeks to introduce Mr. Ndengejeho’s report at the appeal stage pursuant to a Rule 115 motion. He points to the fact that, on 29 March 2005, the Trial Chamber in the case of *Prosecutor v. Simba* accepted Mr. Ndengejeho’s status as an expert witness and admitted his report.⁹ This inconsistency, he argues, merits the report’s admission at the appeal stage¹⁰.

8. The Appellant’s contentions do not in any respect satisfy Rule 115’s requirements. In the first place, Mr. Ndengejeho’s report is in no meaningful respect “additional evidence” at the appeal stage. Evidence that was available at trial may be admitted pursuant to Rule 115 if a failure to do so would cause a miscarriage of justice¹¹. But the report was not merely *available* at trial. Rather, the Appellant actually sought to introduce the evidence, but the Trial Chamber refused to admit it. The Appellant has already challenged this refusal in his Appellant’s Brief¹², and the Appeals Chamber will deal with the issue in its judgement on the merits.

9. Even assuming that the exclusion of the evidence was improper and that admission via Rule 115 at the appeal stage is an appropriate remedy for an improper exclusion at trial, the Motion does not satisfy Rule 115’s other requirements. First, it is not timely. The report was obviously available to the Appellant even at trial, and on appeal he could easily have filed a Rule 115 motion for its admission within the 75 days allowed by the Rules, rather than wait until over a year after the Trial Judgement¹³. It was already his position that the exclusion of the report was in error; he did not need the decision of the Trial Chamber in the *Simba* case to alert him either to the report’s existence or to the possibility of error. And even after the report was admitted in *Simba*, the Appellant waited nearly four months to file his motion, a delay for which he gives no reason amounting to “good cause” required by Rule 115 (A).

⁸ Mr. Ndengejeho was referred to in the Trial Chamber by the first name “Pascal”, but here is referred to by both parties as Paul.

⁹ *Prosecutor v. Simba*, Case No. ICTR-2001-76-T, T. 29 March 2005, pp. 18-23.

¹⁰ Motion, paras. 13-14.

¹¹ See, e.g., *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-A, Decision on Appellant Vidoje Blagojević’s Motion for Admission of Additional Evidence Pursuant to Rule 115, 21 July 2005, para. 6.

¹² Appellant’s Brief, 4 Oct. 2004, paras. 92-93, 102-113.

¹³ See Rule 115 (A) of the Rules.

I. Rapport de Paul Ndengejeho

6. Le 23 octobre 2003, devant la Chambre de première instance, la Défense a demandé à présenter, en tant que «déposition d'un témoin expert» en application de l'article 94 *bis* du Règlement, un rapport établi par Paul Ndengejeho⁸. Dans une décision du 11 novembre 2003, la Chambre de première instance a conclu que M. Ndengejeho ne pouvait prétendre à la qualité d'expert et a refusé, pour ce motif, de verser son rapport aux débats de l'instance, et pour le motif également que certains éléments dudit rapport n'étaient pas pertinents en l'espèce. Elle a néanmoins estimé que M. Ndengejeho pouvait être entendu comme témoin des faits. Par la suite, la Défense a cependant retiré M. Ndengejeho de la liste des témoins.

7. L'appelant tente maintenant de présenter le rapport de M. Ndengejeho en phase d'appel sous le couvert d'une requête fondée sur l'article 115. Il fait remarquer que le 29 mars 2005, la Chambre de première instance, en l'affaire *Le Procureur c. Simba*, a reconnu à M. Ndengejeho la qualité de témoin expert et admis son rapport⁹. Cette incohérence, fait-il valoir, justifie l'admission du rapport en phase d'appel¹⁰.

8. Les arguments de l'appelant ne satisfont nullement aux critères de l'article 115 du Règlement. Tout d'abord, le rapport de M. Ndengejeho n'est en aucune façon «un élément de preuve supplémentaire» en phase d'appel. Des éléments de preuve disponibles au moment du procès peuvent être admis en application de l'article 115 si le fait de ne pas les admettre entraînerait un déni de justice¹¹. Cependant, le rapport n'était pas simplement disponible au moment du procès. En fait, l'appelant avait demandé de le faire verser aux débats, mais la Chambre de première instance avait rejeté sa demande. L'appelant s'est déjà élevé contre ce rejet dans son Mémoire de l'appelant¹², et la Chambre d'appel se penchera sur la question dans son arrêt au fond.

9. A supposer même que l'exclusion du rapport ait été injustifiée et que son admission par le truchement de l'article 115 en phase d'appel soit un recours approprié contre une exclusion abusive en première instance, la Requête ne satisfait pas aux autres exigences de l'article 115. Tout d'abord, elle a été déposée hors délais. Le rapport était manifestement disponible à l'appelant même lors du procès et, en appel, il aurait facilement pu déposer une requête sur le fondement de l'article 115 aux fins de le faire admettre dans le délai des 75 jours prescrit par le Règlement, au lieu d'attendre jusqu'à plus d'un an après le prononcé du jugement¹³. Il soutenait déjà que l'exclusion du rapport était une erreur et n'avait point besoin de la décision de la Chambre de première instance dans l'affaire *Simba* pour se rendre compte de l'existence du rapport ou de la possibilité d'une erreur. Et même lorsque le rapport a été versé aux débats dans l'affaire *Simba*, l'appelant a attendu pratiquement quatre mois pour déposer sa Requête, un retard pour lequel il n'avance aucune explication susceptible de constituer un «motif valable» au sens de l'article 115 (A).

⁸ M. Ndengejeho a été désigné en première instance par le prénom «Pascal», mais en la présente phase d'appel, il est appelé Paul par les deux parties.

⁹ *Le Procureur c. Simba*, affaire n° ICTR-2001-76-T, compte rendu de l'audience du 29 mars 2005, pp. 20 à 29.

¹⁰ Requête, paras. 13 et 14.

¹¹ Voir par exemple, *Le Procureur c. Blagojevic et consorts*, affaire n° IT-02-60-A, *Decision on Appellant Vidoje Blagojevic's Motion for Admission of Additional Evidence to Rule 115*, 21 juillet 2005, para. 6.

¹² Mémoire de l'appelant, 4 octobre 2004, paras. 92 et 93, 102 à 113.

¹³ Voir l'article 115 (A) du Règlement.

10. In addition, the Appellant also did not point to any particular finding in the Trial Judgement that the report would call into question¹⁴, nor did he explain how it would do so, beyond the generic statements that it would have

“given the Trial Chamber a better insight into the situation of Rusomo *commune* in the Rwanda of the 1990s, thereby leading the Trial Chamber to find that Gacumbitsi, *bourgmestre* of Rusomo *commune*, never planned, incited, or participated in the organization of the genocide”¹⁵,

and that it offers “a very good image of Gacumbitsi”¹⁶. Nor does the Appellant explain to which grounds of appeal his request relates¹⁷. The Appellant thus has not met his burden to establish that the evidence is material and that its exclusion on appeal would lead to a miscarriage of justice¹⁸.

11. The aforementioned flaws in the Motion are each sufficient to merit its dismissal. The Appeals Chamber will not, therefore, consider the related issues raised in the submissions, such as whether the Trial Chamber should have admitted the report or whether the Prosecution’s position in the *Gacumbitsi* and *Simba* cases was inconsistent.

II. Request for Approval of Travel to Belgium

12. The Appellant’s next request is not a Rule 115 motion for the admission of additional evidence. Rather, the Appellant argues that his counsel should be authorized – *i.e.*, funded by the International Tribunal – to travel to Brussels to obtain certain evidence that might be relevant to a future Rule 115 motion. Specifically, he contends that evidence given in a Belgian court proceeding against Étienne Nzabonimana, allegedly the head of the *Interahamwe* in Kibungo *préfecture* and one of the alleged perpetrators of the Nyarubuye massacres, is likely to be relevant to this case. The Appellant maintains that the evidence will show that Mr. Nzabonimana, and not the Appellant himself, is responsible for the massacres for which the Appellant was convicted¹⁹.

13. Given that the Appellant is not at this stage seeking to introduce the evidence but merely to investigate it, the Prosecution’s contention that he has not properly appended the evidence is not relevant²⁰. The Prosecution’s other arguments, concerning whether the Appellant has satisfied the requirements that the evidence be material and that it could affect the verdict, are more on point. In order to determine whether the

¹⁴ See *id.*

¹⁵ Motion, para. 15.

¹⁶ *Id.* at para. 12.

¹⁷ See Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 7 (b).

¹⁸ See *id.* at para. 7 (d); see also *Ndindabahizi v. Prosecutor*, No. ICTR-01-71-A, Decision on the Admission of Additional Evidence, 14 April 2005, p. 5.

¹⁹ Motion, paras. 3-6.

²⁰ See Response, paras. 5-6 and 8.

10. Au surplus, l'appelant n'a pas non plus indiqué la conclusion de fait spécifique de la Chambre de première instance que le rapport remettrait en question¹⁴; il n'a pas non plus expliqué en quoi consisterait cette remise en question, outre les déclarations d'ordre général soulignant qu'il aurait permis aux

«juges d'instance de mieux comprendre la place de la commune de Rusomo [*sic*] dans le Rwanda des années 1990 et partant de savoir que son bourgmestre Gacumbitsi n'a jamais planifié, incité ou participé à l'organisation du génocide»¹⁵,

et qu'il offrait «une image de qualité de Gacumbitsi»¹⁶. L'appelant n'identifie pas non plus les moyens d'appel sur lesquels porte sa demande¹⁷. L'appelant ne s'est donc pas acquitté de sa charge consistant à établir que les moyens de preuve étaient pertinents et que leur exclusion en appel entraînerait un déni de justice¹⁸.

11. Chacun des vices susmentionnés de la Requête suffit à justifier son rejet. Par conséquent, la Chambre d'appel n'examinera pas les questions connexes soulevées, notamment la question de savoir si la Chambre de première instance aurait dû admettre le rapport ou si la position du Procureur dans les affaires *Gacumbitsi* et *Simba* manquait de cohérence.

II. Demande d'approbation du voyage en Belgique

12. La demande suivante de l'appelant n'est pas une requête formée sur le fondement de l'article 115 aux fins d'admission de moyens de preuve supplémentaires. L'appelant fait plutôt valoir que son conseil devrait être autorisé – c'est-à-dire que le Tribunal international prenne en charge ses frais de voyage – à se rendre à Bruxelles en vue de se procurer certains éléments de preuve qui pourraient présenter un intérêt en vue d'une future requête fondée sur l'article 115. Il fait valoir, en particulier, que les dépositions recueillies dans un procès tenu en Belgique contre Etienne Nzabonimana, le chef présumé des *Interahamwe* dans la préfecture de Kibungo et un des auteurs présumés des massacres de Nyarubuye, pourraient être pertinentes en l'espèce. L'appelant soutient que les moyens de preuve démontreront que M. Nzabonimana et non l'appelant lui-même, est responsable des massacres pour lesquels l'appelant a été condamné¹⁹.

13. Dès lors que l'appelant, à ce stade, cherche non pas à présenter des moyens de preuve, mais simplement à les rechercher, l'argument du Procureur selon lequel il n'a pas dûment présenté les moyens de preuve est hors de propos²⁰. Les autres arguments du Procureur touchant à la question de savoir si l'appelant a satisfait aux critères exigeant que les moyens de preuve soient pertinents et qu'ils auraient pu

¹⁴ Voir *id.*

¹⁵ Requête, para. 15.

¹⁶ *Ibid.*, para. 12.

¹⁷ Voir Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, 4 juillet 2005, para. 7 (b).

¹⁸ Voir *Ibid.*, para. 7 (d) ; voir également *Ndindabahizi c. Le Procureur*, affaire n° ICTR-2001-71-A, Décision relative à la présentation de moyens de preuve supplémentaires, 14 avril 2005, p. 5.

¹⁹ Requête, paras. 3 à 6.

²⁰ Voir Réponse, paras. 5 et 6 et 8.

Tribunal's resources should be expended on an investigation at the appeal stage, it is relevant for the Appeals Chamber to consider whether it is likely that the evidence thereby obtained would meet the requirements for subsequent admission under Rule 115.

14. The Appeals Chamber in the *Media Case* recently addressed, and denied, a similar request. It set forth the relevant legal standards :

The Appeals Chamber... recalls the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the former Yugoslavia ("ICTY") to the effect that an appeal pursuant to Article 24 of the Statute of the Tribunal (or pursuant to Article 25 of the Statute of the ICTY) is not a *de novo* trial, and that the appeal is not an opportunity to remedy any failures or oversights by a party during the pre-trial and trial phases. Investigations should be made during the pre-trial and trial stage. As to Rule 115, it provides for a corrective measure and its purpose is to deal with the situation *where a party is in possession of material* that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial. Rule 115 does not imply that the Registrar must fund investigations at the appeal stage.

In an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party shows, for example, that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice (in other words, the investigation will not merely be a fishing expedition), and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence²¹.

15. Here, the relevant information, which the Appellant possesses and which motivates the request for further investigation is described as "certain information and dispatches distributed by the media (radio, television, newspapers) and on the Internet (lemonde.fr, nouvelobs.fr, liberation.fr, dh.net)", which documented the conviction and sentencing of Mr. Nzabonimana and his half-brother by the Belgian court on 28 June 2005. Plainly, this information was not available and could not have been discovered at the Appellant's trial. The question is whether it constitutes "specific information that needs to be further investigated in order to avoid a miscarriage of justice", such that the "investigation will not merely be a fishing expedition".

16. The Appeals Chamber considers that, as in the *Media Case*, the Appellant's contentions on this point are vague. Notably, he does not provide copies of any of the media reports on which he relies, making it impossible to determine whether the information therein included is sufficiently "specific" and merits further investigation. Moreover, his description of the information simply asserts, without further explana-

²¹ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Ferdinand Nahimana's Motion for Assistance of the Registrar at the Appeal Stage, 3 May 2005, paras. 2-3 (quotation marks and citations omitted; emphasis in the original).

influer sur l'issue du procès, sont mieux fondées. Afin de déterminer si les ressources du Tribunal devraient être consacrées à une enquête en phase d'appel, il conviendrait que la Chambre d'appel examine dans quelle mesure les moyens de preuve ainsi obtenus répondraient aux critères d'admission ultérieures sous le régime de l'article 115.

14. La Chambre d'appel dans l'affaire dite des *Medias* a récemment examiné et rejeté une requête similaire. Elle a énoncé les normes juridiques pertinentes ci-après :

La Chambre d'appel ... rappelle la jurisprudence du Tribunal et celle du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY») à l'effet qu'un recours introduit en vertu de l'article 24 du Statut du Tribunal (ou de l'article 25 du TPIY) n'est pas un procès *de novo*, et que le procédure d'appel n'a pas pour vocation de permettre aux parties de remédier à leurs propres erreurs ou négligences durant les phases de mise en état et du procès. Les enquêtes devraient être menées durant les phases de mise en état et du procès. S'agissant de l'article 115, il autorise la prise de mesures correctrices et a pour but de régir les situations où *une partie est en possession de pièces*, dont elle ne disposait pas au moment du procès en première instance et qui constituent des moyens de preuve supplémentaires concernant un fait ou une question en litige lors du procès. L'article 115 n'implique pas que le Greffe doit prendre en charge les frais afférents aux enquêtes en phase d'appel.

Exceptionnellement, la Chambre d'appel peut ordonner au Greffe de prendre en charge les frais afférents aux enquêtes en phase d'appel, si la partie requérante démontre, par exemple, qu'elle est en possession d'une information spécifique nécessitant une enquête plus approfondie afin d'éviter un déni de justice (en d'autres termes, l'enquête en phase d'appel ne consistera pas en une simple recherche à l'aveuglette d'information), et que cette information spécifique n'était pas disponible au moment du procès et n'aurait pu être découverte alors malgré toute la diligence voulue²¹.

15. En l'espèce, l'information pertinente en la possession de l'appelant et qui est à l'origine de la demande d'une enquête plus approfondie est présentée comme «quelques informations et dépêches diffusées par les médias (radio, télévision, journaux) et sur internet (lemonde.fr, nouvelobs.fr, liberation.fr, dh.net)», faisant état de ce que M. Nzabonimana et son demi-frère avaient été reconnus coupables par le tribunal belge le 28 juin 2005. À l'évidence, cette information n'était pas disponible et n'aurait pu être découverte lors du procès de l'appelant. La question est de savoir si elle constitue « une information spécifique nécessitant une enquête plus approfondie afin d'éviter un déni de justice », en d'autres termes si « l'enquête ne consistera pas en une simple recherche à l'aveuglette de l'information ».

16. La Chambre d'appel estime que, comme dans l'affaire dite des *Médias*, les arguments de l'appelant à ce sujet sont vagues. Il est à noter qu'il ne fournit de copies d'aucune des dépêches qu'il invoque, rendant ainsi impossible de déterminer si l'information qu'elles contiennent est suffisamment « spécifique » et mérite une enquête plus approfondie. En outre, sa description de l'information se borne simple-

²¹ *Le Procureur c. Nahimana et consorts*, affaire n° ICTR-99-52-A, Décision relative à la requête de l'appelant Ferdinand Nahimana aux fins de mesures d'assistance du Greffe en phase d'appel, 3 mai 2005, paras. 2 et 3 (guillemets et citations non reproduits; souligné dans l'original).

tion, that the trial results demonstrate that Mr. Nzabonimana planned, directed, and financed the genocide in Kibungo *préfecture*, that the *Interahamwe* who committed the genocide were under Mr. Nzabonimana's command, and that they were not travelling in vehicles from Rusomo *commune*. He does not point to particular findings in the Trial Judgement in his own case that are inconsistent with these results, and does not explain why, if the information had been available to the Trial Chamber, it could have resulted in a material difference in the decision. The Trial Chamber never held that the Appellant *and no one else* was responsible for the genocide in Kibungo *préfecture*. Indeed, it is obvious that the Appellant could not have committed these massacres single-handedly, and that multiple persons could bear criminal responsibility. If there is any specific reason to believe the evidence presented at the Belgian trial could undermine the Trial Chamber's findings in this case, the Appellant has not provided it. What is left is a mere "fishing expedition". The Appeals Chamber will not authorise it.

17. The Prosecution's Motion seeks leave to file two documents from the Belgian court proceeding : the Judgement and the questions addressed to the members of the jury. The Prosecution asserts that these documents reinforce the Prosecution's position that no further investigation is warranted, although it provides no explanation for this argument²². In light of the fact that the Appeals Chamber has decided not to authorize funding of the investigation, it need not decide the Prosecution's Motion, which can be dismissed as moot. The Prosecution has not suggested that the documents it submits should themselves be admitted as additional evidence at the appeal stage.

18. In light of the fact that the Appeals Chamber is not ordering an investigation at the appeal stage, the Appellant's request for a further extension of time in order to complete the investigation is moot.

Disposition

The Motion is hereby DENIED. The Prosecution's Motion is DISMISSED as moot. The Registrar is directed to reclassify the Motion as public.

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

Done on 21 October 2005, The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

²²Prosecution's Motion, para. 6.

ment à affirmer, sans autre explication, que l'issue du procès démontre que M. Nzabonimana avait planifié, dirigé et financé le génocide perpétré dans la préfecture de Kibungo, que les *Interahamwe* qui avaient commis le génocide était sous le commandement de M. Nzabonimana; et qu'ils ne se déplaçaient pas à bord des véhicules de la commune de Rusomo [sic]. Il n'identifie aucune conclusion que la Chambre de première instance aurait dégagée dans sa propre affaire qui soit en contradiction avec ces conclusions, et n'explique pas en quoi l'information, si elle avait été en la possession de la Chambre de première instance, aurait modifié substantiellement le Jugement. La Chambre de première instance n'a jamais conclu que l'appelant, à l'exclusion de toute autre personne, était responsable du génocide perpétré dans la préfecture de Kibungo. En effet, il est évident que l'appelant n'aurait pu à lui tout seul commettre des massacres, et que la responsabilité pénale pour ces massacres pourrait être partagée par une multitude de personnes. S'il existe un motif précis incitant à croire que les dépositions faites au procès tenu en Belgique pourraient entamer les conclusions de la Chambre de première instance en l'espèce, l'appelant ne l'a pas fourni. Il ne reste plus qu'une simple «recherche à l'aveuglette d'information». La Chambre d'appel ne l'autorisera pas.

17. La Requête du Procureur tend à obtenir l'autorisation de déposer deux pièces ayant trait au procès tenu en Belgique : l'Arrêt de la Cour d'Assises et les questions du jury. Le Procureur soutient que sa position sort confortée d'une lecture de ces documents, à savoir qu'aucune enquête supplémentaire n'est justifiée, bien qu'il ne fournisse aucune explication à l'appui de cette affirmation²². Dès lors que la Chambre d'appel a décidé de ne pas autoriser la prise en charge des frais afférents à la conduite de cette enquête, point n'est besoin pour elle de statuer sur la Requête du Procureur, qui peut être rejetée au motif qu'elle est sans objet. Le Procureur n'a pas proposé que les pièces qu'il soumet soient elles-mêmes admises comme moyens de preuve supplémentaires en phase d'appel.

18. Dès lors que la Chambre d'appel n'ordonne pas la conduite d'une enquête en phase d'appel, la demande de l'appelant d'une autre prorogation de délai pour mener à terme l'enquête est sans objet.

Dispositif

La requête est rejetée. La requête du Procureur est rejetée au motif qu'elle est sans objet. Instruction est donnée au Greffier de reclasser la requête comme publique.

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

Fait le 21 octobre 2005, à La Haye (Pays-Bas).

[Signé] : Mohamed Shahabuddeen

²² Requête du Procureur, para. 6.

***Order Replacing a Judge in a Case before the Appeals Chamber
18 November 2005 (ICTR-2001-64-A)***

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Sylvestre Gacumbitsi – Appeals Chamber, Replacement of a Judge before the Appeals Chamber, Assignment of a new Judge

I, FAUSTO POCAR, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994,

NOTING the Prosecution's Notice of Appeal filed by the Office of the Prosecutor on 16 July 2004 and the "*Acte d'appel*" filed by Sylvestre Gacumbitsi on 20 July 2004 against the Judgement rendered by the Trial Chamber on 17 June 2004;

NOTING the expiration of the term of Judge Florence Mumba, a member of the Appeals Chamber, effective 16 November 2005;

CONSIDERING the composition of the Appeals Chamber as set out in document IT/242 of the International Tribunal for the former Yugoslavia, issued on 17 November 2005;

CONSIDERING that this case is in its pre-appeal phase and that, thus, no hearing in this case has been held;

HEREBY ASSIGN, with immediate effect, Judge Liu Daqun and Judge Theodor Meron to replace Judge Florence Mumba and myself, Judge Fausto Pocar, in the present case;

AND ORDER that the Bench in *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-01-64-A, shall be composed as follows :

Judge Mohamed Shahabuddeen, Presiding Judge
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

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

Done this 18th day of November 2005, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

Scheduling Order
8 December 2005 (ICTR-2001-64-A)

(Original : English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding Judge; Mehmet Güney; Liu Daqun; Theodor Meron; Wolfgang Schomburg

Sylvestre Gacumbitsi – Absence of pending motion, Schedule of the hearings

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (“Tribunal”);

NOTING the “Judgement” rendered in this case by Trial Chamber III on 17 June 2004;

NOTING the “*Acte d’appel*” filed by Sylvestre Gacumbitsi (“Appellant”) on 20 July 2004; the “*Mémoire de l’appellant*” filed by the Appellant on 4 October 2004; the “Respondent’s Brief” filed by the Prosecution on 12 November 2004; and the “*Mémoire en réplique*” filed by the Appellant on 1 April 2005;

NOTING FURTHER the “Prosecution’s Amended Notice of Appeal” filed on 16 December 2004; the “Appellant’s Brief” filed by the Prosecution on 28 September 2004; the “*Mémoire de l’intimé*” filed by Sylvestre Gacumbitsi on 10 January 2005; and the “Prosecution’s Reply to Defence’s Response” filed on 19 January 2005;

CONSIDERING that the filing of the briefs in these appeals is complete and that no other motion is currently pending in this case;

RECALLING that in a letter filed on 21 October 2005 the Appeals Chamber enquired with Mr. Kouengoua as to his availability for hearings in this case from 8 to 10 February 2006 and that the Appeals Chamber has not received an answer;

HEREBY ORDERS that the hearings of the appeals shall take place on Wednesday, 8 February 2006, and Thursday, 9 February 2006, in Arusha, Tanzania;

INFORMS the parties that the timetable of the hearings will be as follows :

Wednesday, 8 February 2006 :

The Appeal of Sylvestre Gacumbitsi

2:00 p.m.-2:15 p.m. Introductory Statement by the Presiding Judge (15 minutes)

2:15 p.m.-4:15 p.m. Submissions of the Appellant (2 hours)

4:15 p.m.-4:45 p.m. *Pause* (30 minutes)

4:45 p.m.-6:00 p.m. Response of the Prosecution (1 hour and 15 minutes; to be continued)

Thursday, 9 February 2006 :

The Appeal of Sylvestre Gacumbitsi (continued)

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GACUMBITSI

9:00 a.m.-9:45 a.m. Continued Response of the Prosecution (45 minutes)

9:45 a.m.-10:15 a.m. Reply by the Appellant (30 minutes)

10:15 a.m.-10:25 a.m. Personal Address by Sylvestre Gacumbitsi (optional)

The Appeal of the Prosecution

11:00 a.m.-1:00 p.m. Submissions of the Prosecution (2 hours)

1:00 p.m.-3:00 p.m. *Pause* (2 hours)

3:00 p.m.-5:00 p.m. Response of the Appellant (2 hours)

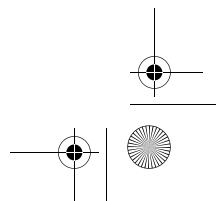
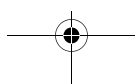
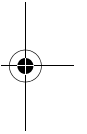
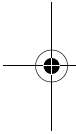
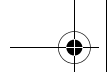
5:00 p.m.-5:30 p.m. *Pause* (30 minutes)

5:30 p.m.-6:00 p.m. Reply by the Prosecution (30 minutes)

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

Dated this 8th day of December 2005, at The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen



***Decision on the Appellant's Motion of 8 December 2005
16 December 2005 (ICTR-2001-64-A)***

(Original : English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding Judge; Mehmet Güney; Liu Daqun;
Theodor Meron; Wolfgang Schomburg

*Sylvestre Gacumbitsi – Translation of the documents, Function of the Registrar,
Assistance of the Registrar in conducting an investigation, Interests of Justice –
Motion partially granted*

International Instrument cited :

Rules of Procedure and Evidence, rule 3 (E)

International Cases cited :

*I.C.T.R. : Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision
on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the
Appeal Stage, 3 May 2005 (ICTR-99-52); Appeals Chamber, The Prosecutor v.
Ferdinand Nahimana et al., Decision on the Appellant's Rule 115 Motion and Related
Motion by the Prosecution, 21 October 2005 (ICTR-99-52)*

Introduction

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal") is seized of an "Extremely Urgent Motion" ("*Requête en Extrême Urgence*", referred to hereinafter as "Motion") filed by Sylvestre Gacumbitsi ("Appellant") on 9 December 2005.

2. The Appellant seeks (1) the urgent translation into French of the "Scheduling Order" filed on 8 December 2005 and the "Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution" filed on 21 October 2005 ("Rule 115 Decision"); (2) an order that he be provided with copies of all statements of witnesses and *parties civiles* in a Belgian court proceeding in the case of *Nzabonimana et al.*; and (3) a delay of the Appeal Hearing, which is currently scheduled for 8-9 February 2006, until 22 February 2006, to allow him to review these statements. The Prosecution has not yet responded. However, the Appeals Chamber considers that in the

***Décision relative à la requête de l'appelant du 8 décembre 2005
16 décembre 2005 (ICTR-2001-64-A)***

(Original : Anglais)

Chambre d'appel

Juges : Mohamed Shahabuddeen, Président; Mehmet Güney; Liu Daqun; Théodor Meron; Wolfgang Schomburg

Sylvestre Gacumbitsi – Traduction de documents, Fonction du Greffier, Assistance du Greffe pour la conduite d'une enquête, Intérêt de la Justice – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 3 (E)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Ferdinand Nahimana et consorts, Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 mai 2005 (ICTR-99-52); Chambre d'appel, Le Procureur c. Ferdinand Nahimana et consorts, Décision relative à la requête de l'appelant fondée sur l'article 115 du Règlement et à la requête connexe du Procureur, 21 octobre 2005 (ICTR-99-52)

Introduction

1. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1^{er} janvier et le 31 décembre 1994 (le «Tribunal international») est saisie d'une *Requête en extrême urgence* (la «Requête») déposée par Sylvestre Gacumbitsi (l'«appelant») le 9 décembre 2005.

2. L'appelant sollicite la prescription des mesures ci-après : (1) la traduction d'urgence en français de l'ordonnance intitulée *Scheduling Order* (l'«ordonnance portant calendrier») rendue le 8 décembre 2005 et la décision intitulée *Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution* (la *Décision relative à la requête de l'appelant fondée sur l'article 115 et à la requête connexe du Procureur*, déposée le 21 octobre 2005, la «*Décision relative à l'article 115*»); (2) la communication de copies de toutes les déclarations des témoins et des parties civiles faites au cours du procès tenu en Belgique en l'affaire *Nzabonimana et consorts*; et (3) le report au 22 février 2006 des débats en appel qui devraient se tenir les 8 et 9 février 2006, afin de lui permettre de prendre connaissance de ces déclarations. Le Procureur n'a pas encore répondu. Toutefois, la Chambre d'appel considère que

interests of justice it should decide the matter prior to the International Tribunal's recess rather than waiting for the response to be filed. Because the motion is being denied (apart from the request for translations), the Prosecution's interests will not be prejudiced¹.

3. The Appeals Chamber agrees that the Appellant should be provided with the French translations he seeks and will request the Registry of the International Tribunal to provide them forthwith. The Appeals Chamber notes that, in general, counsel should address requests for translation to the Registry, in accordance with Rule 3 (E) of the Rules of Procedure and Evidence of the International Tribunal ("the Rules").

4. The Appellant's request for materials from the Belgian court proceedings was effectively disposed of by the Rule 115 Decision, which the Appellant has apparently been unable to review because it has not yet been translated into French. That decision dealt, *inter alia*, with a request by the Appellant for the International Tribunal's assistance in enabling his counsel to travel to Brussels to obtain materials from the same proceedings. Although he now seeks only copies of the relevant statements and not financing for travel, the shortcoming of the present Motion is essentially the same.

5. As in his previous motion, the Appellant has not demonstrated grounds for obtaining the assistance of the Registrar in conducting an investigation. The Appeals Chamber noted in the *Media Case* :

In an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party shows, for example, that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice (in other words, the investigation will not merely be a fishing expedition), and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence².

Here, as in his previous motion, the Appellant has failed to point to any specific information he has that suggests that the material from the Belgian proceedings needs to be further investigated in order to avoid a miscarriage of justice.

¹Just before this Decision was to be filed, on 14 December 2005, the Prosecution filed a "Prosecutor's Response to '*Requête en Extrême Urgence*'" ("Response"). The Appeals Chamber has not considered it. To do so without giving the Appellant a chance to reply would prejudice the Appellant, but to delay this decision in order to wait for the reply (which would require first waiting for the Response to be translated into French) would also prejudice the Appellant by impairing his ability to prepare effectively for his appeal hearing. Under these unusual circumstances, the Appeals Chamber feels that deciding the matter now without considering the Response is the fairest approach.

²*Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar at the Appeal Phase, 3 May 2005 ("*Media Case*"), para. 3 (quotation marks and citations omitted).

l'intérêt en justice commande qu'elle statue sur la question avant les vacances judiciaires du Tribunal international au lieu d'attendre que la réponse soit déposée. Etant donné que la Chambre d'appel rejette la Requête (à l'exception de la demande de traduction), il ne sera pas porté atteinte aux intérêts du Procureur¹.

3. La Chambre d'appel convient que les traductions en français que l'appelant sollicite devraient lui être fournies et invitera le Greffe à les lui fournir dans les plus brefs délais. Elle fait observer qu'en général, le conseil devrait adresser les demandes de traduction au Greffe, conformément à l'article 3 (E) du Règlement de procédure et de preuve du Tribunal international (le «Règlement»).

4. La demande de l'appelant tendant à obtenir des pièces ayant trait au procès tenu en Belgique a effectivement été tranchée par la Décision relative à l'article 115, dont l'appelant n'a apparemment pas été en mesure d'en prendre connaissance parce qu'elle n'a pas encore été traduite en français. Dans cette décision, la Chambre s'est notamment prononcée sur la demande d'assistance de l'appelant adressée au Tribunal international afin de permettre à son conseil de se rendre à Bruxelles pour se procurer des pièces relatives à ce même procès. Bien qu'il ne sollicite actuellement que des copies des dépositions pertinentes et non la prise en charge des frais afférents au voyage, le vice entachant la présente Requête est essentiellement le même.

5. Comme dans sa requête précédente, l'appelant n'a pas présenté de motifs justifiant l'obtention de l'assistance du Greffe pour la conduite d'une enquête. La Chambre d'appel a fait observer dans l'affaire dite des *Médias* ce qui suit :

Exceptionnellement, la Chambre d'appel ne peut ordonner au Greffe de prendre en charge les frais afférents aux enquêtes en phase d'appel, si la partie requérante démontre, par exemple, qu'elle est en possession d'une information spécifique nécessitant une enquête plus approfondie afin d'éviter un déni de justice (en d'autres termes, l'enquête en phase d'appel ne consistera pas en une simple recherche à l'aveuglette d'information), et que cette information spécifique n'était pas disponible au moment du procès et n'aurait pu être découverte alors malgré toute la diligence voulue².

Dans la présente Requête, comme dans la précédente, l'appelant n'a identifié aucune information spécifique en sa possession qui laisserait entendre que les pièces ayant trait au procès tenu en Belgique nécessitent une enquête plus approfondie afin d'éviter un déni de justice.

¹ Juste avant que cette décision ne soit déposée, le 14 décembre 2005, le Procureur a déposé une réponse intitulée *Prosecutor's Response to Requête en Extrême Urgence* (la «Réponse»). La Chambre d'appel n'en a pas tenu compte. En tenir compte sans donner la possibilité à l'appelant de répliquer porterait atteinte aux intérêts de ce dernier ; pour autant, le fait de retarder la présente décision afin d'attendre la réplique (ce qui nécessiterait d'abord d'attendre que la Réponse soit traduite en français) nuirait également à l'appelant en compromettant sa capacité de se préparer effectivement en vue des débats dans le cadre de son appel. Dans ces circonstances inhabituelles, la Chambre d'appel est d'avis que le fait de statuer sur la question maintenant sans tenir compte de la Réponse constitue la démarche la plus équitable.

² *Le Procureur c. Nahimana et consorts*, affaire n° ICTR-99-52-A, Décision relative à la requête de l'appelant Ferdinand Nahimana aux fins de mesures d'assistance du Greffe en phase d'appel, 3 mai 2005, paras. 2 et 3 (guillemets et citations non reproduites).

6. As explained in the Rule 115 Decision, the mere fact that the Belgian court convicted other people for crimes stemming from the same events is insufficient to meet this standard :

[The Appellant's] description of the information simply asserts, without further explanation, that the trial results demonstrate that Mr. Nzabonimana planned, directed, and financed the genocide in Kibungo *préfecture*, that the *Interahamwe* who committed the genocide were under Mr. Nzabonimana's command, and that they were not travelling in vehicles from Rusomo *commune*. He does not point to particular findings in the Trial Judgement in his own case that are inconsistent with these results, and does not explain why, if the information had been available to the Trial Chamber, it could have resulted in a material difference in the decision. The Trial Chamber never held that the Appellant *and no one else* was responsible for the genocide in Kibungo *préfecture*. Indeed, it is obvious that the Appellant could not have committed these massacres single-handedly, and that multiple persons could bear criminal responsibility. If there is any specific reason to believe the evidence presented at the Belgian trial could undermine the Trial Chamber's findings in this case, the Appellant has not provided it. What is left is a mere "fishing expedition". The Appeals Chamber will not authorise it³.

The same analysis is applicable to the present Motion. The Appeals Chamber likewise sees no significance in the additional fact, emphasized in the Motion, that certain witnesses in his own trial also testified in the Belgian proceeding⁴. The Appellant has not established, for instance, any reason to believe that these witnesses' statements in Belgium contradicted their testimony in his own case in a way that would undermine the basis for his conviction. He thus has not shown that the International Tribunal's assistance in this matter is necessary or justified⁵.

7. The Appellant has not established good cause for a delay in his appeal hearing. In particular, he has not demonstrated that access to the materials from the Belgian proceeding is necessary in order to enable him to prepare for the hearing as scheduled.

Disposition

The Motion is hereby GRANTED insofar as it seeks French translations of the Scheduling Order and Rule 115 Decision, and is otherwise DENIED. The Registrar

³ Rule 115 Decision, para. 16.

⁴ Motion, paras. 30-32.

⁵ Nor has the Appellant demonstrated any basis for his oblique suggestion that the Prosecution may have failed to comply with its obligation under Rule 66 to disclose exculpatory evidence in its possession. See Motion, para. 34. Indeed, there is no reason to believe that the Prosecution is in possession of the material the Appellant seeks at all.

6. Ainsi qu'il est expliqué dans la Décision relative à l'article 115, le simple fait que le tribunal belge ait condamné d'autres personnes pour des crimes à raison des mêmes faits ne suffit pas à satisfaire à ce critère :

[La] description de l'information [par l'appelant] se borne simplement à affirmer, sans autre explication, que l'issue du procès démontre que M. Nzabonimana avait planifié, dirigé et financé le génocide perpétré dans la préfecture de Kibungo, que les *Interahamwe* qui avaient commis le génocide était sous le commandement de M. Nzabonimana; et qu'ils ne se déplaçaient pas à bord des véhicules de la commune de Rusomo [*sic*]. Il n'identifie aucune conclusion que la Chambre de première instance aurait dégagée dans sa propre affaire qui soit en contradiction avec ces conclusions, et n'explique pas en quoi l'information, si elle avait été en la possession de la Chambre de première instance, aurait modifié substantiellement le Jugement. La Chambre de première instance n'a jamais conclu que l'appelant, à l'exclusion de toute autre personne, était responsable du génocide perpétré dans la préfecture de Kibungo. En effet, il est évident que l'appelant n'aurait pu à lui tout seul commettre des massacres, et que la responsabilité pénale pour ces massacres pourrait être partagée par une multitude de personnes. S'il existe un motif précis incitant à croire que les dépositions faites au procès tenu en Belgique pourraient entamer les conclusions de la Chambre de première instance en l'espèce, l'appelant ne l'a pas fourni. Il ne reste plus qu'une simple «recherche à l'aveuglette d'information». La Chambre d'appel ne l'autorisera pas³.

La même analyse s'applique à la présente requête. La Chambre d'appel ne voit également aucune pertinence dans le fait supplémentaire, mis en relief dans la requête, que certains témoins qui ont déposé dans son propre procès aient également déposé dans le procès tenu en Belgique⁴. L'appelant n'a pas établi, par exemple, qu'il y avait lieu de croire que les déclarations de ces témoins en Belgique contredisaient les dépositions qu'ils ont faites dans son propre procès, tant et si bien qu'elles remettraient en cause le fondement de sa condamnation. Il n'a donc pas établi que l'aide du Tribunal international en la matière est nécessaire ou justifiée⁵.

7. L'appelant n'a pas établi l'existence d'un motif valable justifiant le report des débats dans le cadre de son appel. Qui plus est, il n'a pas démontré que l'accès aux pièces relatives au procès tenu en Belgique est nécessaires afin de lui permettre de se préparer en vue de l'audience telle que prévue.

Dispositif

Il est fait droit à la Requête en ce qui concerne la demande de traduction en français de l'Ordonnance portant calendrier et de la Décision relative à l'article 115;

³ *Décision relative à l'article 115*, para. 16.

⁴ Requête, paras. 30 à 32.

⁵ L'appelant n'a pas établi non plus le fondement de son allusion comme quoi le Procureur a pu faillir à l'obligation que lui impose l'article 66 de communiquer les moyens de preuve disculpatoires en sa possession. Voir Requête, para. 34. En effet, rien n'autorise à croire que le Procureur est en possession des pièces que recherche l'appelant.

is requested to provide French translations of the Scheduling Order and Rule 115 Decision as well as the present decision to the Appellant on an urgent basis, and in any event no later than 6 January 2006 at 12 :00 pm.

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

Done on 16 December 2005.

The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

pour le surplus, la requête est rejetée. Le Greffier est invité à fournir de toute urgence à l'appelant les traductions en français de l'Ordonnance portant calendrier et de la Décision relative à l'article 115 ainsi que la présente décision, et ce, en tout état de cause, le 6 janvier 2006 à 12 heures au plus tard.

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

Fait le 16 décembre 2005, à La Haye (Pays-Bas).

[Signé] : Mohamed Shahabuddeen

The Prosecutor v. Jean-Baptiste GATETE

Case N° ICTR-2000-61

Case History

- Name : GATETE
- First Name : Jean-Baptiste
- Date of Birth : 1953
- Sex : male
- Nationality : Rwandan
- Former Official Function : Mayor of Murambi
- Indictment : 13 December 2000 (Under seal)
- Date of Indictment's Confirmation : 19 December 2000
- Counts : genocide, complicity in genocide, conspiracy to commit genocide, extermination as a crime against humanity, murder as a crime against humanity, rape as a crime against humanity
- Date and Place of Arrest : 11 September 2002, in Congo
- Date of Transfer : 13 September 2002
- Date of Initial Appearance : 20 September 2002
- Pleading : not guilty

Le Procureur c. Jean-Baptiste GATETE

Affaire N° ICTR-2000-61

Fiche technique

- Nom : GATETE
- Prénom : Jean-Baptiste
- Date de naissance : 1953
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : bourgmestre de Murambi
- Acte d'accusation : 13 décembre 2000, (Sous scellés)
- Date de la confirmation de l'acte d'accusation : 19 décembre 2000
- Chefs d'accusation : génocide, complicité dans le génocide, entente en vue de commettre le génocide, extermination constitutive de crimes contre l'humanité, meurtre constitutif de crimes contre l'humanité, viol constitutif de crimes contre l'humanité
- Date et lieu de l'arrestation : 11 septembre 2002, Congo
- Date du transfert : 13 septembre 2002
- Date de la comparution initiale : 20 septembre 2002
- Précision sur le plaidoyer : non coupable

***Decision on the Prosecution's request for leave
to file an amended indictment
21 April 2005 (ICTR-2000-61-I)***

(Original: Unspecified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Jean-Baptiste Gatete – Conditions to meet to obtain the amendment of the Indictment after the initial appearance of the Accused, Greater particularity the mode of criminal liability, Absence of prejudice to the Accused – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 50

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 (ICTR-98-44); Trial Chamber, The Prosecutor v. Mikaeli Muhimana, Decision on Motion to Amend Indictment, 21 January 2004 (ICTR-95-1B); Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Motion to Amend Indictment, 26 January 2004 (ICTR-2001-76); Trial Chamber, The Prosecutor v. Aloys Simba, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004 (ICTR-2001-76); Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and 96-17)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),
SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF "The Prosecutor's Submission and Request for Leave to File an Amended Indictment Complying with the Chamber's Order of 29 March 2004", filed on 27 November 2004;

NOTING that the Defence has not filed a response;

HEREBY DECIDES the motion.

Introduction

1. The Indictment was confirmed against the Accused on 19 December 2000. The Accused was arrested on 11 September 2002 and was transferred to the Tribunal on 13 September 2002. The Accused made his initial appearance on 20 September 2002 and pleaded not guilty to all charges in the Indictment. In its decision of 29 March

2004, the Chamber ordered the Prosecution to provide more specific information in relation to several paragraphs of the Indictment¹. Pursuant to this order, the Prosecution now seeks leave to file an amended indictment (“the Amended Indictment”). No date has yet been set for trial.

Submissions

2. According to the Prosecution, the Amended Indictment provides precise factual allegations, specific dates and times frames, names of victims and co-perpetrators and accurately reflects the Accused’s level and modes of participation in the crimes alleged, including his participation in a joint criminal enterprise. A substantial volume of the evidence relied on in the Amended Indictment has already been disclosed to the Accused.

Deliberations

3. Rule 50 provides that after the initial appearance of the Accused, an Indictment may only be amended by leave of the Trial Chamber. The Chamber must weigh three factors in determining whether to grant leave : the ameliorating effect of the changes on the clarity and precision of the case to be met; the diligence of the Prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage; and the likely delay or any other prejudice to the Defence caused by the amendment². In addition, the Chamber must also determine whether a *prima facie* case exists with respect to any new charges in the proposed amendments³.

4. The Prosecution has eliminated much of the general background information contained in the original Indictment. It has also withdrawn certain factual allegations as well as the counts of direct and public incitement to commit genocide and violations of Article 3 common to the Geneva Conventions and Additional Protocol II. In addition, the proposed Amended Indictment particularizes the allegations in the current Indictment by, *inter alia*, specifying dates and times, locations, names of victims, and names of other individuals present or involved in the alleged attacks. The majority of these particulars correspond to information requested by the Defence and which the Prosecution was ordered to provide in the Chamber’s decision of 29 March 2004. Other amendments describe additional incidents, proximate in time and in place to those alleged in the initial Indictment.

¹ *Gatete*, Decision on Defence Preliminary Motion (TC), 29 March 2004.

² *Karemera et al.*, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003; *Simba*, Decision on Motion to Amend Indictment (TC), 26 January 2004, para. 9; *Muhimana*, Decision on Motion to Amend Indictment (TC), 21 January 2004, para. 6.

³ Rule 50 (A) (ii) states : “In deciding whether to grant leave to amend the indictment, the Trial Chamber or, where applicable, a Judge shall, *mutatis mutandis*, follow the procedures and apply the standards set out in Sub-Rules 47 (E) and (F) in addition to considering any other relevant factors”.

5. The Amended Indictment also advances with greater particularity the mode of criminal liability joint criminal enterprise. Though not using the words “joint criminal enterprise”, paragraph 6.6 of the original Indictment alluded to this mode of liability when it alleged that

“Jean Baptiste Gatete, in his position of authority and acting in concert with others, participated in the planning, preparation or execution of a common scheme, strategy or plan to exterminate the Tutsi, by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent”.

The Amended Indictment has not therefore added a new form of responsibility, but rather eliminated the ambiguity arising from the formulation used in the original Indictment concerning the Prosecution’s intent to argue this form of participation. Recent jurisprudence of this Tribunal identifies three forms of joint criminal enterprise, basic, systemic, and extended, each characterized by a distinct mental element⁴. Although the Prosecution has not specifically mentioned the three forms by name, the Chamber is of the opinion that the formulation of the allegation of joint criminal enterprise in the Amended Indictment indicates the Prosecution’s intent to argue all three forms⁵.

6. In sum, the added particulars in the Amended Indictment better reflect the case the Prosecution will present at trial and provide further notice to the Accused of the nature of the charges against him. Granting leave to file the Amended Indictment would therefore enhance the fairness of the trial by clarifying the Prosecution’s case and allowing the Defence to streamline its investigations and better prepare for trial. Most of the amendments are brought in response to the Chamber’s decision of 29 March 2004, ordering the Prosecution to amend the Indictment to provide more specific information. Therefore, there is no issue of the Prosecution’s lack of diligence in bringing the amendments.

7. While some of the amendments describe new incidents, such incidents are similar in character and proximate in time and place to incidents already enumerated in the existing Indictment. They are described with enough specificity to permit focused investigations by the Defence, if necessary. No date has yet been set for trial. Therefore, the Chamber cannot identify any prejudice to the Accused by allowing the amendments. The Prosecution has also disclosed additional witness statements, which

⁴ *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 463-467; *Simba*, Decision on the Defence’s Preliminary Motion Challenging the Second Amended Indictment (TC), 14 July 2004, paras. 8-10.

⁵ See para. 9 of the Amended Indictment, which alleges, “In addition, the accused participated in a joint criminal enterprise. The purpose of this joint criminal enterprise was the destruction, in whole or in part, of the Tutsi racial or [ethnic] group in Byumba and Kibungo *préfectures* as well as throughout all of Rwanda. To fulfil this criminal purpose, the accused, acting individually or with others known and unknown, significantly contributed to the joint criminal enterprise. The crimes enumerated within this Indictment were within the object of the joint criminal enterprise. Alternatively, the crimes enumerated were the natural and foreseeable consequences of the joint criminal enterprise and the accused and others known and unknown, were aware that such crimes were the likely outcome of the joint criminal enterprise. Despite his awareness of the foreseeable consequences, Jean-Baptiste Gatete and others known and unknown, knowingly and wilfully participated in the joint criminal enterprise”.

along with earlier disclosure, contain allegations which are reflected in the amendments.

8. The Chamber notes that paragraphs 16 to 28 supporting Counts 1 to 3 are repeated verbatim twice in support of Counts 4 and 5⁶. Instead, the Prosecution should incorporate paragraphs 16 to 28 by reference under Counts 4 and 5 and remove paragraphs 34 to 47 and 49 to 61.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution leave to amend the Indictment in accordance with Annex C of its motion and paragraph 8 of the present decision;

ORDERS that the Amended Indictment be filed with the Registry immediately.

Arusha, 21 April 2005.

[Signed]: Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

⁶In addition, paragraphs 43 and 46 are identical.

Amended Indictment
10 May 2005 (ICTR-2000-61-I)

(Original : English)

I. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the “Statute of the Tribunal”) charges:

JEAN-BAPTISTE GATETE

With:

Count 1 : Genocide; or in the alternative

Count 2 : Complicity in genocide

Count 3 : Conspiracy to commit genocide

Count 4 : Crimes against humanity (Extermination)

Count 5 : Crimes against humanity (Murder), and

Count 6 : Crimes against humanity (Rape), all offences stipulated in Articles 2, 3 and 4 of the Statute of the Tribunal

II. The Accused

1. Jean-Baptiste Gatete was born in 1953 in Rwankuba *secteur*, Murambi *commune*, Bymaba *Préfecture*, Rwanda and was *bourgmestre* of Murambi *commune*, in Byumba *Préfecture*, from 1987 until June 1993. He was a member of the national congress of the MRND and was active in party politics at both national and prefectural levels. He was dismissed as *bourgmestre* in 1993 during the administration of Dismas Nsen-giyaremye’s Second Multiparty Government of 1992 amidst allegations that he persecuted the Tutsis of Murambi. Thereafter he was appointed *Directeur* in the Ministry of Women and Family Affairs, then headed by Pauline Nyiramasuhuko.

3¹. Jean-Baptiste Gatete was also appointed President of the MRND in Murambi *commune* in June 1993.

4. During the period covered by this indictment, Jean-Baptiste Gatete was an *Interahamwe* leader. Though no longer formally affiliated with the local public administration, he continued to exercise influence over communal police, *gendarmes* and civilian militias in Byumba and Kibungo *Préfectures* due to his former status as *bourgmestre* of Murambi, his national leadership role in the MRND political party and his leadership status among the *Interahamwe*.

¹ The misnumbering of the paragraphs is due to a material of the Tribunal.

Acte d'accusation modifié
10 mai 2005 (ICTR-2000-61-I)

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut du Tribunal»), accuse :

JEAN-BAPTISTE GATETE

des infractions suivantes :

- Chef 1 – Génocide ou, à titre subsidiaire,
- Chef 2 – Complicité dans le génocide,
- Chef 3 – Entente en vue de commettre le génocide,
- Chef 4 – Extermination constitutive de crime contre l'humanité,
- Chef 5 – Assassinat constitutif de crime contre l'humanité,
- Chef 6 – Viol constitutif de crime contre l'humanité.

Toutes ces infractions sont prévues aux articles 2, 3 et 4 du Statut du Tribunal.

II. L'accusé

1. Né en 1953 dans le secteur de Rwankuba, commune de Murambi, préfecture de Byumba (Rwanda), Jean-Baptiste Gatete a été bourgmestre de la commune de Murambi de 1987 à juin 1993. Membre du Congrès national du MRND, il faisait activement de la politique partisane tant à l'échelon national qu'à l'échelon préfectoral. Accusé d'avoir persécuté les Tutsis de Murambi, il a été relevé de ses fonctions de bourgmestre en 1993 sous le deuxième gouvernement pluripartiste formé par Dismas Nsengiyaremye en 1992. Par la suite, il a été nommé directeur au Ministère de la famille et de la promotion féminine dirigé à l'époque par Pauline Nyiramasuhuko.

3¹. En juin 1993, Jean-Baptiste Gatete a également été nommé Président du MRND dans la commune de Murambi.

4. A l'époque visée dans le présent acte d'accusation, Jean-Baptiste Gatete était un des dirigeants du mouvement *Interahamwe*. Il n'appartenait plus officiellement à l'administration publique locale, mais a continué d'exercer son influence sur la police communale, les gendarmes et les milices civiles dans les préfectures de Byumba et Kibungu, en raison de sa qualité d'ex-bourgmestre de la commune de Murambi, du rôle de premier plan qu'il jouait à l'échelon national au sein du MRND et de sa qualité de dirigeant du mouvement *Interahamwe*.

¹ L'erreur dans la numérotation des paragraphes provient du Tribunal.

III. Concise statement of facts, including charges :

5. Between 1 January and 31 December, 1994, citizens native to Rwanda were classified according to the following ethnic or racial classifications : Tutsi, Hutu and Twa.

6. Between 6 April and 17 July 1994, throughout Rwanda, there were widespread or systematic attacks against a civilian population based on Tutsi ethnic or racial identification, political opposition, real or perceived, to the MRND, or perceived sympathies to the Tutsi. As a result of these attacks, large numbers of ethnically or racially identified Tutsis and of persons perceived to be politically opposed to the MRND, including moderate Hutus, were killed.

7. During the period covered by this indictment, Jean-Baptiste Gatete, acted individually or as part of a joint criminal enterprise with the following individuals and groups: Ret. Col. Rwagafirita, Lt. Col. Nyuriyekubona, Lt. Mihigo, Emmanuel Habimana (Cyasa), Jean de Dieu Mwange, Célestin Senkware, Jean Bizimungu, Gérard Kayonza, Jean Mpambara, Kigarama *bourgmestre* Mugiraneza, *Conseiller*, Gaspar Kamali, Gasigwa Karangwa, Augustin Nkundabazungu, the *Interahamwe*, the *Forces Armées Rwandaises* (FAR), the Presidential Guard, communal police, civilian militia and others, known and unknown. The object and purpose of the joint criminal enterprise was to commit genocide and crimes against humanity targeting the Tutsi racial or ethnic group. In execution of the joint criminal enterprise Jean-Baptiste Gatete acted with members of the enterprise with the intent to destroy the Tutsi population in whole or in part as well as those believed to be sympathetic to the Tutsis.

8. Jean-Baptiste Gatete, acted individually or in concert with other members of the joint criminal enterprise in the following ways

- Killed members of the Tutsi ethnic group;
- Trained, indoctrinated, encouraged, provided intelligence to, transported and distributed arms to members of the *Interahamwe*, the *Amahindure*, “Civil Defence Forces”, and other militiamen who murdered, caused serious bodily and mental harm, raped and pillaged Tutsi group members;
- Met with local administrative officials to plan and organize the distribution of weapons and instigation of civilians to kill and rape Tutsi group membes.

Charges

INDIVIDUAL CRIMINAL LIABILITY : ARTICLE 6 (1) OF THE STATUTE

9. The accused, Jean-Baptiste Gatete, is individually responsible for the crimes alleged against him in this indictment under Articles 2, 3, and 6 (1) of the Statute. The accused planned, instigated, ordered, committed or otherwise aided and abetted

III. Exposé succinct des faits et accusations

5. Entre le 1^{er} janvier et le 31 décembre 1994, les citoyens rwandais autochtones étaient répartis selon la classification ethnique ou raciale suivante : Tutsis, Hutus et Twas.

6. Entre le 6 avril et le 17 juillet 1994, sur toute l'étendue du territoire du Rwanda, des attaques généralisées ou systématiques ont été lancées contre une population civile en raison de son appartenance au groupe ethnique ou racial tutsi, de son opposition politique réelle ou supposée au MRND ou de la sympathie qu'elle était soupçonnée d'avoir pour les Tutsis. Ces attaques ont causé la mort de nombreuses personnes dont certaines étaient des membres du groupe ethnique ou racial tutsi et d'autres, notamment les Hutus modères, considérées comme politiquement opposées au MRND.\$\$

7. Au cours de la période visée dans le présent acte d'accusation, Jean-Baptiste Gatete a agi seul ou dans le cadre d'une entreprise criminelle commune à laquelle participaient aussi les individus et groupes suivants : le colonel à la retraite Rwagafrita, le lieutenant-colonel Nyuriyekubona, le lieutenant Mihigo, Emmanuel Habimana (Cyasa), Jean de Dieu Mwange, Célestin Senkware, Jean Bizimungu, Gérard Kayonza, Jean Mpambara, Mugiraneza, bourgmestre de la commune de Kigarama, le conseiller Gaspar Kamali, Gasigwa Karangwa, Augustin Nkundabazungu, les *Interahamwe*, les Forces armées rwandaises (FAR), la Garde présidentielle, la police communale, les milices civiles et d'autres personnes connues ou inconnues. L'entreprise criminelle commune avait pour objet et pour but le génocide du groupe racial ou ethnique tutsi et la perpétration de crimes contre l'humanité à l'encontre de ce groupe. En exécution de l'entreprise, Jean-Baptiste Gatete a commis des actes en collaboration avec d'autres parties à celle-ci dans l'intention de détruire la population tutsie en tout ou en partie et les personnes présumées avoir de la sympathie pour les Tutsis.

8. Agissant seul ou de concert avec d'autres parties à l'entreprise criminelle commune, Jean-Baptiste Gatete :

- a tué des membres du groupe ethnique tutsi;
- a entraîné, endoctriné, encouragé, informé, transporté et armé des membres du mouvement *Interahamwe*, du mouvement *Amahindure* et des «forces de défense civile» ainsi que d'autres miliciens, lesquels ont tué des membres du groupe tutsi, porté gravement atteinte à leur intégrité physique et mentale, commis des viols sur leurs personnes ou saccagé leurs biens;
- s'est entretenu avec des autorités administratives locales pour planifier et organiser des distributions d'armes et l'incitation de civils à tuer et à violer les membres du groupe tutsi.

Accusations

RESPONSABILITÉ PÉNALE INDIVIDUELLE (ARTICLE 6 DU STATUT DU TRIBUNAL)

9. En application des articles 2, 3 et 6 du Statut du Tribunal, l'accusé Jean-Baptiste Gatete est individuellement responsable des crimes qui lui sont reprochés dans le présent acte d'accusation. Il a planifié, incité à commettre, ordonné, commis ou de

in the planning, preparation or execution of these crimes. In addition, the accused participated in a joint criminal enterprise. The purpose of this joint criminal enterprise was the destruction, in whole or in part, of the Tutsi racial or ethnic group in Byumba and Kibungo *Préfectures* as well as throughout all of Rwanda. To fulfil this criminal purpose, the accused, acting individually or with others known and unknown, significantly contributed to the joint criminal enterprise. The crimes enumerated within this indictment were within the object of the joint criminal enterprise. Alternatively, the crimes enumerated were natural and foreseeable consequences of the joint criminal enterprise and the accused and others known and unknown were aware that such crimes were the likely outcome of the joint criminal enterprise. Despite his awareness of the foreseeable consequences, Jean-Baptiste Gatete, and others known and unknown, knowingly and wilfully participated in the joint criminal enterprise.

Counts 1 and 2 : Genocide, or alternatively Complicity in genocide :

10. The Prosecutor charges Jean-Baptiste Gatete with Genocide, a crime stipulated in Article 2 (3) (a) and Article 6 (1) of the Statute, in that on or between the dates of 6-30 April 1994, Byumba and Kibungo *Préfectures*, Rwanda, Jean-Baptiste Gatete, with intent to destroy, in whole or in part, the Tutsi racial or ethnic group, or knowing that other people intended to destroy, in whole or in part, the Tutsi racial or ethnic group, planned, instigated, ordered, committed or otherwise aided and abetted those other people in the planning, preparation or execution of killings or causing serious bodily or mental harm to members of the Tutsi group, as outlined in the factual paragraphs below;

Alternatively,

11. The Prosecutor charges Jean-Baptiste Gatete with Complicity in genocide, a crime stipulated in Article 2 (3) (e) and Article 6 (1) of the Statute, in that on or between the dates of 6-30 April 1994, Byumba and Kibungo *Préfectures*, Rwanda, Jean-Baptiste Gatete, with intent to destroy, in whole or in part, the Tutsi racial or ethnic group, or knowing that other people intended to destroy, in whole or in part, the Tutsi racial or ethnic group, and knowing that his assistance would contribute to the crime of genocide, planned, instigated, ordered, committed or otherwise aided and abetted those other people in the planning, preparation or execution of the killing or causing serious bodily or mental harm to members of the Tutsi group, as outlined in the factual paragraphs below;

Count 3 : Conspiracy to commit genocide

12. The Prosecutor charges Jean-Baptiste Gatete with Conspiracy to commit genocide, a crime stipulated in Article 2 (3) (b) and Article 6 (1) of the Statute, in that on or between the dates of 6-30 April 1994 in Byumba and Kibungo *Préfectures*, Rwanda, Jean-Baptiste Gatete, with intent to destroy, in whole or in part, the Tutsi racial or ethnic group, or knowing that other people intended to destroy, in whole or in part, the Tutsi racial or ethnic group, conspired by making an agreement with others, including, but not limited to, local administrative officials, such as Murambi *bourgmestre* Jean de Dieu Mwange and Kayonza *bourgmestre*, Célestin Senkware and

toute autre manière aidé et encouragé à planifier, préparer ou exécuter ces crimes. En outre, il a participé à une entreprise criminelle commune dont le but était de détruire, en tout ou en partie, le groupe racial ou ethnique tutsi dans les préfectures de Byumba et Kibungu ainsi que dans toutes les autres préfectures du Rwanda. Pour atteindre ce but criminel, l'accusé, agissant seul ou de concert avec des personnes connues ou inconnues, a contribué de façon sensible à l'entreprise en question. Les crimes énumérés dans le présent acte d'accusation s'inscrivaient dans l'objet de celle-ci ou en étaient des conséquences naturelles et prévisibles. L'accusé et les personnes connues ou inconnues susvisées savaient que l'entreprise criminelle commune risquait de déboucher sur ces crimes. Bien qu'ils fussent ainsi conscients des conséquences prévisibles de l'entreprise, ils y ont sciemment et délibérément pris part.

Chefs 1 et 2 : Génocide ou, a titre subsidiaire, Complicité dans le génocide

10. Le Procureur accuse Jean-Baptiste Gatete de génocide, crime prévu aux articles 2 (3) (a) et 6 (1) du Statut du Tribunal, en ce que le 6 et le 30 avril 1994 ou entre ces dates, dans les préfectures de Byumba et Kibungu (Rwanda), l'accusé, dans l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi ou conscient que d'autres personnes étaient animées de cette intention, a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé lesdites personnes à planifier, préparer ou exécuter le meurtre de membres du groupe racial ou ethnique tutsi ou des actes portant gravement atteinte à leur intégrité physique ou mentale, comme l'attestent les faits relatés ci-dessous.

A titre subsidiaire,

11. Le Procureur accuse Jean-Baptiste Gatete de complicité dans le génocide, crime prévu aux articles 2 (3) (e) et 6 (1) du Statut du Tribunal, en ce que le 6 et le 30 avril 1994 ou entre ces dates, dans les préfectures de Byumba et Kibungu (Rwanda), l'accusé, dans l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi ou conscient que d'autres personnes étaient animées de cette intention et sachant que son assistance contribuerait à la perpétration du crime de génocide, a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé lesdites personnes à planifier, préparer ou exécuter le meurtre de membres du groupe racial ou ethnique tutsi ou des actes portant gravement atteinte à leur intégrité physique ou mentale, comme l'attestent les faits relatés ci-dessous.

Chef 3 : Entente en vue de commettre le génocide

12. Le Procureur accuse Jean-Baptiste Gatete d'entente en vue de commettre le génocide, crime prévu aux articles 2 (3) (b) et 6 (1) du Statut du Tribunal, en ce que le 6 et le 30 avril 1994 ou entre ces dates, dans les préfectures de Byumba et Kibungu (Rwanda), l'accusé, dans l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi ou conscient que d'autres personnes étaient animés de cette intention, s'est entendu avec certaines personnes – dont des autorités administratives locales telles que Jean de Dieu Mwange, bourgmestre de Murambi, Célestin Senkware, bourgmestre de Kayonza, et divers conseillers de secteur, ainsi que des

various *conseillers de secteur*, *Interahamwe* leaders, communal police, and the political leadership of the MRND at the regional and national levels, including, though not limited to, members of the Interim Government of 8 April 1994, to kill or cause serious bodily or mental harm to members of the Tutsi group, as outlined in the factual paragraphs below;

Factual basis for counts 1-3

Prior to 7 April 1994 :

13. Prior to and during April 1994, Jean-Baptiste Gatete met with the *Interahamwe*, other influential MRND members, such as Interior Minister Munyazesa Faustin, Mwange, Nkundabazungu, and Bizimungu among others, and military officers, met on diverse dates, such as sometime in October 1991 and April 1992, at several locations in Byumba and Kibungo *Préfectures*. Every Friday there were meetings at Communal Offices attended by Jean-Baptiste Gatete during which weapons were distributed and plans made for containment of Tutsis.

14. Prior to April 1994, as Murambi *bourgmestre*, Jean-Baptiste Gatete participated in recruiting, commanding and organizing Murambi *commune*'s *Interahamwe* militia and their military training. Jean-Baptiste Gatete regularly trained and rewarded *Interahamwe* marksmen for their efforts.

15. Beginning of October 1990, Jean-Baptiste Gatete organized an operation known as *coup de poing*, to search homes for weapons and RPF accomplices. Jean-Baptiste Gatete arrested many Tutsi throughout Byumba and the surrounding areas and imprisoned them or had them killed, some of whom were Masandi from Nyabisundi and Paul Karera from Gabiro, Rwankuba *secteur*. For example, on or about 3 October 1990, Jean-Baptiste Gatete with the *Interahamwe* arrested several Tutsi, including Jonathan Sebusandi and Thomas Kagabo, executed them, and threw them in a ditch. And on or about 4 October 1990, Jean-Baptiste Gatete arrested approximately sixteen people he considered *Inkotanyi* accomplices, stripped them of identity cards, and then brought those people to a location where they were all killed.

April 1994 – Byumba

16. On or about 6 April until 30 April 1994, Jean-Baptiste Gatete assembled the *Interahamwe* and planned and participated in the sealing off of all roads and exits throughout Byumba in *communes* such as Murambi. As Jean-Baptiste Gatete circulated around the various roadblocks, he participated in the identification and the killing of Tutsi civilians by providing lists of names of Tutsi that should not be allowed through. He ordered others present at roadblocks to kill those Tutsi, and he also manned the roadblocks himself. Tutsi were killed by the *Interahamwe* at roadblocks with weapons distributed by Jean-Baptiste Gatete.

17. On or about 7 April 1994, Jean-Baptiste Gatete held meetings with local administrative officials in various *secteurs* and *cellules* of Murambi *commune* including Rwankuba, Gakenke, Kiramuzi, Gakoni and Nyabisindu for the purpose of distributing

dirigeants du mouvement *Interahamwe*, des policiers communaux et les responsables régionaux et nationaux du MRND, notamment des membres du Gouvernement intérimaire du 8 avril 1994 – pour tuer des membres du groupe tutsi ou porter gravement atteinte à leur intégrité physique ou mentale, comme l’attestent les faits relatés ci-dessous.

Faits étayant les chefs 1 à 3

Avant le 7 avril 1994

13. Avant et pendant le mois d’avril 1994, Jean-Baptiste Gatete s’est entretenu à diverses dates avec des *Interahamwe*, d’autres membres influents du MRND – dont le Ministre de l’intérieur Faustin Munyazesa, Mwange, Nkundubazungu et Bizimungu – et des officiers de l’armée dans plusieurs localités de la préfecture de Byumba et de celle de Kibungo. Certains de ces entretiens ont eu lieu en octobre 1991 et en avril 1992. Chaque vendredi se tenaient aux bureaux communaux, avec la participation de Jean-Baptiste Gatete, des réunions à l’occasion desquelles des armes étaient distribuées et des plans conçus en vue de contenir les Tutsis.

14. Avant le mois d’avril 1994, en sa qualité de bourgmestre de Murambi, Jean-Baptiste Gatete a pris part au recrutement, au commandement, à l’organisation et à la formation militaire de la milice *Interahamwe* de sa commune. Il entraînait régulièrement les tireurs d’élite de la milice et les récompensait de leurs efforts.

15. A partir du mois d’octobre 1990, Jean-Baptiste Gatete a mené une opération dite «coup de poing» qui consistait à fouiller les maisons pour vérifier si des armes et des complices du FPR s’y trouvaient. Il a arrêté de nombreux Tutsis dans l’ensemble de la préfecture de Byumba et ses environs pour les emprisonner ou les faire tuer. Parmi ces personnes figuraient Masandi et Paul Kabera qui habitaient respectivement Nybisundu et Gabiro, localités du secteur de Rwankuba. Le 3 octobre 1990 ou vers cette date, Jean-Baptiste Gatete et les *Interahamwe* ont arrêté plusieurs Tutsis, dont Jonathan Sebusandi et Thomas Kagabo, les ont exécutés et ont jeté leurs corps dans une fosse. De même, le 4 octobre 1990 ou vers cette date, Jean-Baptiste Gatete a arrêté quelque seize personnes qu’il considérait comme des complices des *Inkotanyi*, les a dépouillées de leurs cartes d’identité et les a amenées dans un lieu où elles ont toutes été tuées.

En avril 1994 dans la préfecture de Byumba

16. Le 6 avril 1994, vers cette date ou de celle-ci au 30 avril 1994, Jean-Baptiste Gatete a réuni les *Interahamwe* pour organiser le barrage de toutes les routes et issues de la préfecture de Byumba, notamment dans la commune de Murambi, et a pris part à cette opération. Pendant qu’il faisait la tournée des divers barrages routiers, il a participé à l’identification et au meurtre de civils tutsis en fournissant des listes de Tutsis qu’il ne fallait pas laisser passer. Il a ordonné à des personnes présentes aux barrages routiers de tuer lesdits Tutsis et a lui-même tenu des barrages. Les *Interahamwe* ont tué des Tutsis à des barrages routiers à l’aide d’armes distribuées par Jean-Baptiste Gatete.

17. Le 7 avril 1994 ou vers cette date, Jean-Baptiste Gatete a tenu des réunions avec des autorités administratives locales dans divers secteurs et cellules de la commune de Murambi, notamment Rwankuba, Gakenke, Kiramuzi, Gakoni et Nyabisindu,

weapons and investigating civilian militias to exterminate Tutsi civilians whom he blamed for President Habyarimana's death. For example, at approximately 2 am, Jean-Baptiste Gatete conducted meetings with local administrative officials in Nyabisindu to distribute weapons and to instigate civilian militias to kill Tutsi civilians whom he blamed for President Habyarimana's death. Then, at approximately 8 am, Jean-Baptiste Gatete conducted a meeting in Byumba *Préfecture*, Rwankuba *Secteur*, with local *Interahamwe* administrative officials including Jean de Dieu Mwange, the new Murambi *bourgmestre*, and *Conseiller de secteur*, Jean Bizimungu to again distribute weapons and to investigate civilian militias to exterminate Tutsi civilians whom he blamed for President Habyarimana's death. Tutsis were killed with the weapons distributed by Jean-Baptiste Gatete.

18. During the morning of 7 April 1994, Jean-Baptiste Gatete facilitated the transport of the *Interahamwe* through various Murambi *communes secteurs* and *cellules*, including Akarambo, Gakoni, Nyabisindu, Kiramuruzi, and Rwankuba, and commanded the *Interahamwe*, some of whom were Rupia, Serena Gauframa and Rwasibo, to kill the civilian Tutsis. Some examples, Jean-Baptiste Gatete, with Murambi *bourgmestre*, Jean de Dieu Mwange, transported a convoy of armed *Interahamwe* to Akarambo *cellule* where Gatete ordered the *Interahamwe* to burn, loot and pillage Tutsi homes and to rape and kill civilian Tutsis. BCS's family was killed in their Akarambo home by the *Interahamwe* on the orders of Jean-Baptiste Gatete, who was also present during the killings. Also killed was Aisha Mukerkeyisoni, a Tutsi from Kiramuruzi. Then or about 8 April 1994, BAT was raped by two *Interahamwe*, the son of Nyamuhara and Karemera. The *Interahamwe* raped and killed Tutsis as a result of the actions of Jean-Baptiste Gatete.

19. On or about 7 April 1994, in Rwankuba, Jean-Baptiste Gatete with Jean Bizimungu and Gérard Kayonza, the local President of the *Interahamwe*, incited the local population to pillage Tutsi homes and attack, rape and murder Tutsis. For example, in Rwankuba, Jean Bizimungu organized attacks against Tutsis with Gérard Kayonza, which were then instigated by Jean-Baptiste Gatete who commanded them to "Exterminate all the families [of Tutsis] ...". The family of AIM and AIM's brother and his family were killed among others as a result of Jean-Baptiste Gatete's actions.

20. On or about 7 April 1994 to 12 April 1994, Jean-Baptiste Gatete circulated through various *secteurs* of Murambi *commune*, including Kiramuruzi, Gakenke, Rwankuba, Rubona, and Nyabysindu where he incited and instigated the *Interahamwe* with a megaphone, commanding and ordering them to kill Tutsis. For example, on 7 April 1994, in Rwankuba, Jean-Baptiste Gatete instigated the *Interahamwe* with a megaphone, telling them to gather other *Interahamwe* and to start the "work" of killing the Tutsis. Jean-Baptiste Gatete promised the *Interahamwe* a reward of cattle when the Tutsi extermination was completed. As soon as Jean-Baptiste Gatete departed, *conseiller de secteur* Jean Bizimungu ordered the *Interahamwe* to start the killing. The *Interahamwe* killed Tutsi civilians as a result of the actions of Jean-Baptiste Gatete.

21. On or about 8 April 1994, at Nyagasambu at a roadblock on the road to Rwankuba, Jean-Baptiste Gatete instigated and ordered civilians to hunt down and exterminate Tutsis, including the "baby in the womb". Jean-Baptiste Gatete also gave

dans le but de distribuer des armes et d'inciter des milices civiles à exterminer les civils tutsis, auxquels il attribuait la mort du Président Habyarimana. Vers 2 heures, par exemple, il a tenu une réunion avec des autorités administratives locales à Nyabisindu pour distribuer des armes et inciter des milices civiles à tuer les civils tutsis, qu'il considérait comme les responsables de la mort du Président Habyarimana. Vers 8 heures, il a tenu une autre réunion dans le secteur de Rwankuba (préfecture de Byumba) avec des autorités administratives locales, dont le nouveau bourgmestre de Murambi, Jean de Dieu Mwange, et le conseiller de secteur Jean Bizimungu. Il s'agissait encore de distribuer des armes et d'inciter des milices civiles à exterminer les civils tutsis, auxquels Jean-Baptiste Gatete reprochait la mort du Président. Des Tutsis ont été tués à l'aide des armes distribuées par Jean-Baptiste Gatete.

18. Dans la matinée du 7 avril 1994, Jean-Baptiste Gatete a contribué au transport des *Interahamwe* dans divers secteurs et cellules de la commune de Murambi, dont Akarambo, Gakoni, Nyabisindu, Kiramuruzi et Rwankuba, et a ordonné aux intéressés, parmi lesquels se trouvaient Rupia, Serena Gauframa et Rwasibo, de tuer les civils tutsis. Par exemple, en compagnie de Jean de Dieu Mwange, bourgmestre de Murambi, il a transporté un groupe d'*Interahamwe* armé jusqu'à la cellule d'Akarambo où il a ordonné à ceux-ci non seulement de piller, de saccager et d'incendier les maisons des Tutsis, mais aussi de violer et de tuer les civils tutsis. La famille du témoin BCS a été massacrée dans sa concession sise à Akarambo par les *Interahamwe* sur ordre de Jean-Baptiste Gatete qui a également assisté au massacre. Parmi les victimes figurait aussi Aisha Murekeyisoni, tutsie de Kiramuruzi. Le 8 avril 1994 ou vers cette date, BAT a été violée par deux *Interahamwe*, à savoir Karemera et le fils de Nyamuhara. Les *Interahamwe* ont violé et tué des Tutsis par suite des actes de Jean-Baptiste Gatete.

19. Le 7 avril 1994 ou vers cette date à Rwankuba, Jean-Baptiste Gatete, accompagné de Jean Bizimungu et de Gérard Kayonza, président local des *Interahamwe*, a incité la population locale saccager les maisons des Tutsis ainsi qu'à attaquer, violer et tuer les civils tutsis. Par exemple, Jean Bizimungu a organisé avec Gérard Kayonza des attaques dirigées contre les Tutsis à Rwankuba à l'instigation de Jean-Baptiste Gatete qui leur avait demandé d'exterminer «toutes les familles» de Tutsis. La famille du témoin AIM, son frère, la famille de celui-ci et d'autres personnes ont été tués par suite des actes de Jean-Baptiste Gatete.

20. Le 7 avril 1994, vers cette date ou de celle-ci au 12 avril 1994, Jean-Baptiste Gatete a sillonné divers secteurs de la commune de Murambi, dont ceux de Kiramuruzi, Gakenke, Rwankuba, Rubona et Nyabysindu, où il s'est servi d'un mégaphone pour inciter les *Interahamwe* à agir et leur ordonner de tuer les Tutsis. Le 7 avril 1994 à Rwankuba, par exemple, il a incité à l'aide de ce mégaphone les *Interahamwe* à agir en leur demandant de réunir d'autres *Interahamwe* pour commencer à «travailler», c'est-à-dire à tuer les Tutsis. Il leur a promis de les récompenser par du bétail à la fin de la campagne d'extermination des Tutsis. Dès le départ de Jean-Baptiste Gatete, le conseiller de secteur Jean Bizimungu a donné aux *Interahamwe* l'ordre de commencer le massacre. Les *Interahamwe* ont tué des civils tutsis par suite des actes de Jean-Baptiste Gatete.

21. Le 8 avril 1994 ou vers cette date, à un barrage routier établi à Nyagasambu, sur la route de Rwankuba, Jean-Baptiste Gatete a incité des civils à traquer les Tutsis pour les exterminer, jusqu'à «l'enfant qui est dans le ventre de sa mère», et leur a

the civilian militia dogs to facilitate the hunt. Tutsi civilians were killed as a result of Jean-Baptiste Gatete's efforts.

22. On or about 11 April 1994, Jean-Baptiste Gatete ordered, supervised and participated in the killings and rapes of civilian Tutsis at Kiziguro *paroisse* complex, a church and hospital where thousands of civilian Tutsis had taken refuge. Assisted by several FAR soldiers armed with rifles, Gasigwa Karangwa and the Kiziguro *Interahamwe* leader, Nkundabazungu, Jean-Baptiste Gatete and his group of *Interahamwe* broke through the portals of the church compound, forced the Tutsi refugees to exit the church sanctuary, and killed the refugees. A number of refugees were forced to transport dead Tutsis to a nearby mass grave, then killed and tossed into the grave. Several thousands civilian Tutsi men, women and children, including Kalemera, the school inspector, Munana, a teacher, Claver Karurange, Gapfizi and BCS's brother, were slaughtered during the 11 April 1994 Kiziguro *paroisse* complex massacre.

23. On or about and between 12 to 14 April 1994, Jean-Baptiste Gatete instigated, commanded and facilitated displaced Hutu peasants to target Tutsis moving southward through Murambi and Kibungo *Préfectures*. He ordered displace Hutu's in those regions to kill the interspersed civilian Tutsis. Tutsis were killed as a result of Jean-Baptiste Gatete's actions.

April 1994 – Kibungo

24. On or about 10 April 1994, Jean-Baptiste Gatete arrived in Rukara *commune* in adjoining Kibungo *Préfecture* and held a meeting with the *bourgmestre* Jean Mpambara. Thereafter, thousands of Tutsi refugees who took shelter at Rukara *paroisse* were ordered to leave the church. When they refused, the *Interahamwe* armed with firearms, grenades, machetes and traditional weapons attacked the church and killed numerous Tutsi civilians.

25. On or about 10 to 11 April 1994, Jean-Baptiste Gatete, with Kayonza *bourgmestre* Célestin Senkware, transported armed soldiers, and the *Interahamwe*, to Mukarange *paroisse* compound. Together they attacked the Mukarange *paroisse* compound where Tutsi refugees were located. Tutsis were raped and killed as a result of Jean-Baptiste Gatete's actions. For example : A woman named Odette who was taking refuge at the Mukarange church, took her child to the toilet outside the compound and were immediately killed. The parish priest, Father Bosco, asked Jean-Baptiste Gatete to do something to stop the killing. Jean-Baptiste Gatete refused.

26. On or about and between 10 April to 15 April 1994, Jean-Baptiste Gatete arrived in Kayonza *commune* with a group of armed *Interahamwe*. Jean-Baptiste Gatete, with Kayonza *bourgmestre* Célestin Senkware, instigated a crowd assembled in the *bureau communal* courtyard. Present in the courtyard were local residents, including a number of Tutsi women, and the recently arrived *Interahamwe*. To instigate those *Interahamwe* present, Jean-Baptiste Gatete reported that Tutsi populations in other areas had been decimated, and he commanded the *Interahamwe* to rape and then kill Tutsis.

ordonné de le faire. Pour faciliter la traque, il a procuré des chiens à la milice civile. Des civils tutsis ont été tués par suite des initiatives de Jean-Baptiste Gatete.

22. Le 11 avril 1994 ou vers cette date, Jean-Baptiste Gatete a non seulement ordonné et supervisé le massacre et le viol de civils tutsis au complexe de la paroisse de Kiziguro, mais également participé à ces actes. Des milliers de civils tutsis avaient trouvé refuge dans ce complexe constitué d'une église et d'un hôpital. Aidés de plusieurs militaires des FAR, armés de fusils, ainsi que de Gasigwa Karangwa et de Nkundabazungu, chef des *Interahamwe* de Kiziguro, Jean-Baptiste Gatete et son groupe d'*Interahamwe* ont forcé les portails de l'enceinte de l'église, ont obligé les réfugiés tutsis à sortir du sanctuaire de l'église et les ont tués. Nombre de réfugiés ont été sommés de porter les cadavres de certaines victimes jusqu'à un charnier sis à proximité, puis tués et jetés dans la fosse. Plusieurs milliers d'hommes, de femmes et d'enfants appartenant à la population civile tutsie, dont Kaleméra, inspecteur de l'enseignement, Munana, enseignant, Claver Karurange, Gapfizi et le frère du témoin BCS, ont été massacrés au complexe de la paroisse de Kiziguro le 11 avril 1994.

23. Le 12 et le 14 avril 1994, vers ces dates ou entre celles-ci, Jean-Baptiste Gatete a incité des paysans hutus déplacés à s'en prendre aux Tutsis qui se dirigeaient vers le sud en passant par la commune de Murambi et la préfecture de Kibungo, leur a ordonné d'agir de la sorte et leur a facilité la tâche. Il a ordonné aux Hutus déplacés qui se trouvaient dans ces régions de tuer les civils tutsis ainsi dispersés. Des Tutsis ont été tués par suite des actes de Jean-Baptiste Gatete.

En avril 1994 dans la préfecture de Kibungo

24. Le 10 avril 1994 ou vers cette date, Jean-Baptiste Gatete est arrivé dans la commune de Rukara, appartenant à la préfecture voisine de Kibungo, et s'est entretenu avec le bourgmestre Jean Mpambara. Par la suite, des milliers de réfugiés tutsis qui avaient trouvé asile à la paroisse de Rukara ont reçu l'ordre de quitter l'église. Lorsqu'ils ont refusé d'obéir, les *Interahamwe*, munis d'armes à feu, de grenades, de machettes et d'armes traditionnelles, ont attaqué l'église et tué de nombreux civils tutsis.

25. Les 10 et 11 avril 1994 ou vers ces dates, Jean-Baptiste Gatete, en compagnie de Célestin Senkware, bourgmestre de Kayonza, a transporté des militaires armés et des *Interahamwe* la paroisse de Mukarange. Ensemble, ils ont attaqué la paroisse où se trouvaient des réfugiés tutsis. Des Tutsis ont été violés ou tués par suite des actes de Jean-Baptiste Gatete. Par exemple, une femme nommée Odette qui s'était réfugiée à l'église de Mukarange a amené son enfant se soulager à l'extérieur de la paroisse et tous les deux ont été tués immédiatement. Lorsque le père Bosco, curé de la paroisse, a demandé à Jean-Baptiste Gatete de faire quelque chose pour arrêter la tuerie, celui-ci lui a opposé une fin de non-recevoir.

26. Le 10 et le 15 avril 1994 vers ces dates ou entre celles-ci, Jean-Baptiste Gatete est arrivé dans la commune de Kayonza avec un groupe d'*Interahamwe* armés. En compagnie de Célestin Senkware, bourgmestre de Kayonza, il a incité une foule qui s'était rassemblée dans la cour du bureau communal à agir. Il y avait là des membres de la population locale, dont un certain nombre de femmes tutsies, et les *Interahamwe* qui venaient d'arriver. Pour inciter ces *Interahamwe* à agir, Jean-Baptiste Gatete a annoncé que la population tutsie avait été décimée dans d'autres régions. En outre, il leur a donné l'ordre de violer les Tutsies et de les tuer par la suite.

On or about and between 10 April to 15 April 1994, Jean-Baptiste Gatete with a group of armed *Interahamwe* at the Kayonza *bureau communal* courtyard ordered the segregation of Tutsis and commanded that the Tutsis be taken to a mass grave. At the grave, Jean-Baptiste Gatete karate kicked Gatere's knee breaking it through. Jean-Baptiste Gatete then ordered the *Interahamwe* to kill Gatere, what they did. Tutsis were raped and killed at that location as a result of Jean-Baptiste Gatete's actions.

27. After the rapes and the killings, the *Interahamwe* returned to the Kayonza *bureau communal* courtyard where Jean-Baptiste Gatete addressed them again, ordering and instigating them to go to the adjoining *secteurs* of Nyarusage, Nkamba and Giparara to rape and exterminate the remaining Tutsis. Both Jean-Baptiste Gatete and Célestin Senkware provided their vehicles to the *Interahamwe* to facilitate the attacks. Tutsis were raped and killed as a result of Jean-Baptiste Gatete's actions.

28. Mid to late April 1994, Jean-Baptiste Gatete arrived in Rulenge, Rukira *commune* with a caravan of armed Murambi communal police, civilian militias and the *bourgmestres* of Kabarondo and Kigarama *communes*. Jean-Baptiste Gatete publicly castigated the local residents for not massacring the Tutsis. Jean-Baptiste Gatete ordered the *Interahamwe* to rape and kill Tutsis in Rukira, including women and children. The following morning, those *Interahamwe*, some of whom were Emmanuel Rukiramakuba, Ephraim, Fabien and Rwabirekezi, destroyed Tutsi homes and raped and killed Tutsi civilians in Rukira. For example, Jean-Baptiste Gatete ordered Fabien to kill a Ugandan woman who was perceived to be Tutsi. Also killed were Vedaste Kalisa, Ferdinand Sanane and Sanene's wife, and Nzoyori, a girl from Binengo.

29. On or about 15 April 1994, at Cyasemakamba, in Kibungo, Jean-Baptiste Gatete briefed his armed men comprising policemen, and *Interahamwe* and then handed his men and the briefing over to Lt. Mihigo. Thereafter, Lt. Mihigo and those militia briefed by Jean-Baptiste Gatete attacked the *Economat*, where approximately 400 people were killed.

30. On or about 19 April 1994, at Cyasemakamba, in Kibungo, Jean-Baptiste Gatete, Retired Col. Rwagafirita, Lt. Mihigo, Gacumbitsi, Jean Mpambara, Mugiraneza, Lt. Col. Nyuriyekubona, Ntahimana and Rudakubana and others convened a meeting the purpose of which was to remove Godfrey Ruzindana, Kibungo *Préfet* and member of the Social Democratic Party (PSD). By the end of the meeting Ruzindana, who was later killed, was replaced with Huye Rudakubana.

31. On or about the night of 19 April 1994, in Kibungo, Jean-Baptiste Gatete attended a security meeting with Ret. SGT. Major Rwatoro, Birengo *bourgmestre*, Ntahimana, Ret. Col. Rwagafirita, Lt. Col. Nyuriyekubona, Kayonza *bourgmestre* Senkware, Kigarama *bourgmestre*, Mugiraneza and others to share intelligence regarding the Rwandan Patriotic Front, RPF.

32. On or about 21 April 1994, in Kibungo, Jean-Baptiste Gatete and other authorities organized, ordered and facilitated the *Interahamwe* militia and soldiers to fight the RPF at the front.

Le 10 et le 15 avril 1994, vers ces dates ou entre celles-ci, dans la cour du bureau communal de Kayonza, Jean-Baptiste Gatete, accompagné d'un groupe d'*Interahamwe* armés, a ordonné que les Tutsis soient séparés des autres personnes présentes et amenés à un charnier. Au charnier, Jean-Baptiste Gatete a rompu d'un coup de pied de karaté le genou de Gatare, puis a ordonné aux *Interahamwe* de tuer celui-ci et ils l'ont fait. Des Tutsis ont été violés ou tués dans ce lieu par suite des actes de Jean-Baptiste Gatete.

27. Après la perpétration des viols et des meurtres en question, les *Interahamwe* sont rentrés à la cour du bureau communal de Kayonza où Jean-Baptiste Gatete a pris la parole à nouveau pour leur ordonner d'aller violer et exterminer les Tutsis qu'il y avait encore dans les secteurs voisins de Nyarusage, Nkamba et Giparara et les inciter à agir de la sorte. Jean-Baptiste Gatete et Célestin Senkware ont mis leurs véhicules à la disposition des *Interahamwe* pour faciliter les attaques. Des Tutsis ont été violés ou tués par suite des actes de Jean-Baptiste Gatete.

28. Entre le milieu et la fin du mois d'avril 1994, Jean-Baptiste Gatete est arrivé à Rulenge, dans la commune de Rukira, avec une caravane de personnes constituée de policiers communaux de Murambi munis d'armes, de miliciens civils et des bourgmestres des communes de Kabarondo et Kigarama. Il a publiquement et sévèrement fait grief à la population locale de n'avoir pas massacré les Tutsis. En outre, il a ordonné aux *Interahamwe* de violer et de tuer les Tutsis de Rukira, y compris les femmes et les enfants. Le lendemain matin, ces *Interahamwe*, parmi lesquels se trouvaient Emmanuel Rukiramakuba, Ephraïm, Fabien et Rwabirekezi, ont détruit les maisons de Tutsis et violé et tué des civils tutsis à Rukira. Jean-Baptiste Gatete a, par exemple, donné à Fabien l'ordre de tuer une Ougandaise considérée comme tutsie. Ont également été tués Védaste Kalisa, Ferdinand Sanane, l'épouse de Sanane et une fille de Binego nommée Nzoyori.

29. Le 15 avril 1994 ou vers cette date, à Cyasemakamba, dans la préfecture de Kibungo, Jean-Baptiste Gatete a donné des instructions à ses hommes armés, en l'occurrence des policiers et des *Interahamwe*; après quoi il a confié ses hommes et les instructions au lieutenant Mihigo. Par la suite, le lieutenant Mihigo et les miliciens à qui Jean-Baptiste Gatete avait donné des instructions ont attaqué l'Economat, où environ 400 personnes ont été tuées.

30. Le 19 avril 1994 ou vers cette date, Jean-Baptiste Gatete, le colonel à la retraite Rwagafirita, le lieutenant Mihigo, Gacumbitsi, Jean Mpambara, Mugiraneza, le lieutenant-colonel Nyuriyekubona, Ntahimana, Rudakubana et d'autres personnes ont tenu à Cyasemakamba, dans la préfecture de Kibungo, une réunion tendant à faire démettre de ses fonctions Godfrey Ruzindana, préfet de Kibungo et membre du Parti social-démocrate («PSD»). Avant la fin de la réunion, Ruzindana, qui sera tué par la suite, a été remplacé par Huye Rudakubana.

31. Dans la nuit du 19 avril 1994 ou vers ce moment, Jean-Baptiste Gatete, le sergent-chef à la retraite Rwatoro, Ntahimana, bourgmestre de Birengo, le colonel à la retraite Rwagafirita, le lieutenant-colonel Nyuriyekubona, Senkware, bourgmestre de Kayonza, Mugiraneza, bourgmestre de Kigarama, et d'autres personnes ont participé à une réunion de sécurité dans la préfecture de Kibungo pour apporter les uns aux autres des renseignements relatifs au Front patriotique rwandais («FPR»).

32. Le 21 avril 1994 ou vers cette date, dans la préfecture de Kibungo, Jean-Baptiste Gatete et d'autres responsables ont organisé les miliciens *Interahamwe* et les militaires pour qu'ils aillent combattre le FPR au front, leur ont ordonné d'aller le faire et leur ont apporté le concours nécessaire.

Count 4 : Extermination as a crime against humanity :

33. The Prosecutor charges Jean-Baptiste Gatete with Extermination as a crime against humanity, a crime stipulated in Article 3 (b) and Article 6 (1) of the Statute, in that on or between the dates of 6 April and 30 April 1994, in Byumba and Kibungo *Préfectures*, Rwanda, Jean-Baptiste Gatete, with intent to participate in the elimination of a number of individuals and knowing his action was part of a vast murderous enterprise, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the extermination, or killing of any civilian population as part of a widespread or systematic attack against that civilian population on national, political, racial, religious or ethnic grounds, as outlined in the factual paragraphs below :

Factual basis for extermination

Byumba

34. Paragraphs 16 through 23 above are incorporated by reference herein.

Kibungo

35. Paragraphs 23 through 28 above are incorporated by reference herein.

Count 5 : Murder as a crime against humanity

36. The Prosecutor charges Jean-Baptiste Gatete with Murder as a crime against humanity, a crime stipulated in Article 3 (a) and Article 6 (1) of the Statute, in that on or between the dates of 6 April and 30 April 1994, in Byumba and Kibungo *Préfectures*, Rwanda, Jean-Baptiste Gatete, with intent to kill, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the killing of any civilian population as part of a widespread or systematic attack against that civilian population on national, political, racial, religious or ethnic grounds, as outlined in the factual paragraphs below :

Factual basis for murder

Byumba

37. Paragraphs 16 through 23 above are incorporated by reference herein.

Kibungo

38. Paragraphs 23 through 28 above are incorporated by reference herein.

Chef 4 : Extermination constitutive de crime contre l'humanité

33. Le Procureur accuse Jean-Baptiste Gatete d'extermination constitutive de crime contre l'humanité, au sens des articles 3 (b) et 6 (1) du Statut du Tribunal, en ce que le 6 et le 30 avril 1994 ou entre ces dates, dans les préfectures de Byumba et Kibungu (Rwanda), l'accusé, dans l'intention de prendre part à l'élimination d'un certain nombre de personnes et sachant que ses actes s'inscrivaient dans une vaste entreprise meurtrière, a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter l'extermination d'une population civile, c'est-à-dire son massacre, dans le cadre d'une attaque généralisée ou systématique dirigée contre cette population civile en raison de son appartenance nationale, politique, raciale, religieuse ou ethnique, comme l'attestent les faits relatés ci-dessous.

Faits étayant le chef d'extermination

Préfecture de Byumba

34. Les paragraphes 16 à 23 ci-dessus sont incorporés par référence dans la présente section.

Préfecture de Kibungu

35. Les paragraphes 24 à 28 ci-dessus sont incorporés par référence dans la présente section.

Chef 5 : Assassinat constitutif de crime contre l'humanité

36. Le Procureur accuse Jean-Baptiste Gatete d'assassinat constitutif de crime contre l'humanité, au sens des articles 3 (a) et 6 (1) du Statut du Tribunal, en ce que le 6 et le 30 avril 1994 ou entre ces dates, dans les préfectures de Byumba et Kibungu (Rwanda), l'accusé, dans l'intention de tuer, a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le massacre d'une population civile dans le cadre d'une attaque généralisée ou systématique dirigée contre cette population civile en raison de son appartenance nationale, politique, raciale, religieuse ou ethnique, comme l'attestent les faits relatés ci-dessous.

Faits étayant le chef d'assassinat

Préfecture de Byumba

37. Les paragraphes 16 à 23 ci-dessus sont incorporés par référence dans la présente section.

Préfecture de Kibungu

38. Les paragraphes 24 à 28 ci-dessus sont incorporés par référence dans la présente section.

39. On or about 12 April 1994, Jean-Baptiste Gatete, *bourgmestre* Jean de Dieu Mwange, Célestin Senkware, communal police and *Interahamwe*, conducted an inspection of identity cards of travellers on the Kibungo road through Kayonza *commune*. At one roadblock Jean-Baptiste Gatete, several *Interahamwe* and communal police including a policeman named Deo, chase AIX's husband, a Tutsi, and Kamuzinzi, a Hutu moderate and political party opponent, from his car. Jean-Baptiste Gatete ordered the police to shoot AIX's husband and Kamuzinzi. The communal policeman shot and killed them upon orders from Jean-Baptiste Gatete. Thereafter, Jean-Baptiste Gatete ordered the *Interahamwe* to kill the occupants of Kamuzinzi's vehicle, which was driven by Mahmud. The *Interahamwe* immediately killed the occupants including Mahmud. Jean-Baptiste Gatete appropriated the vehicle.

40. On or about 12 April 1994 in Rutonde, Jean-Baptiste Gatete, Célestin Senkware and several others, shot and killed Mulinda, a refugee hiding in a swamp. Before and after the time of killing, Jean-Baptiste Gatete and others were patrolling the hills and valleys to search out and kill civilians Tutsis.

41. On or about 14 April 1994 in Kayonza *commune*, Jean-Baptiste Gatete ordered *Interahamwe* to kill Butare, a businessman. The *Interahamwe*, following Jean-Baptiste Gatete's orders to kill Butare, hacked him to death with machetes and knives.

Count 6 : Rape as crime against humanity

42. The Prosecutor charges Jean-Baptiste Gatete with Rape as a crime against humanity, a crime stipulated in Article 3 (a) and Article 6 (1) of the Statute, in that on or between the dates of 6 April and 30 April 1994, in Byumba and Kibungo *Préfectures*, Rwanda, Jean-Baptiste Gatete, with intent to rape occur, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution or killing of any civilian population as part of a widespread or systematic attack against that civilian population on national, political, racial, religious or ethnic grounds, as outlined in the factual paragraphs below :

Factual basis for rape

Byumba

43. On or about 8 and 9 April 1994, Jean-Baptiste Gatete facilitated the transport of his civilian militias to the center of Akarambo *cellule*. Jean-Baptiste Gatete commanded and incited the *Interahamwe* to attack and rape Tutsi women. On or about 8 April 1994, BAT was raped by two *Interahamwe*, the son of Nyamuhara and Karemera. On or about 9 April 1994, AVO was raped by an *Interahamwe* named Kagerangabo. The *Interahamwe* raped Tutsi women in Akarambo *cellule*.

39. Le 12 avril 1994 ou vers cette date, Jean-Baptiste Gatete, le bourgmestre Jean de Dieu Mwange, Célestin Senkware, des policiers communaux et des *Interahamwe* ont procédé au contrôle des cartes d'identité des voyageurs sur la route de Kibungo passant par la commune de Kayonza. A un barrage routier, Jean-Baptiste Gatete et un groupe d'*Interahamwe* et de policiers communaux, dont un policier nommé Deo, ont fait sortir l'époux du témoin AIX qui était tutsi et un certain Kamuzinzi, Hutu modéré et membre de l'opposition, du véhicule de ce dernier. Jean-Baptiste Gatete a ordonné à la police d'abattre l'époux du témoin AIX et Kamuzinzi. Le policier communal susmentionné les a tués par balles sur l'ordre de Jean-Baptiste Gatete. Ensuite, celui-ci a ordonné aux *Interahamwe* de tuer les autres occupants du véhicule de Kamuzinzi, au volant duquel se trouvait Mahmud. Les *Interahamwe* ont immédiatement tué ces personnes, y compris Mahmud. Jean-Baptiste Gatete s'est approprié le véhicule.

40. Le 12 avril 1994 ou vers cette date, à Rutonde, Jean-Baptiste Gatete, Célestin Senkware et plusieurs autres personnes ont abattu Mulinda, un réfugié qui se cachait dans un marécage. Avant et après la perpétration de ce meurtre, Jean-Baptiste Gatete et ses acolytes ont patrouillé sur les collines et dans les vallées pour traquer les civils tutsis et les tuer.

41. Le 14 avril 1994 ou vers cette date, dans la commune de Kayonza, Jean-Baptiste Gatete a donné à des *Interahamwe* l'ordre de tuer un commerçant nommé Butare. En exécution de cet ordre, les *Interahamwe* ont tué Butare à coups de machettes et de couteaux.

Chef 6 : Viol constitutif de crime contre l'humanité

42. Le Procureur accuse Jean-Baptiste Gatete de viol constitutif de crime contre l'humanité, au sens des articles 3 (a) et 6 (1) du Statut du Tribunal, en ce que le 6 et le 30 avril 1994 ou entre ces dates, dans les préfectures de Byumba et Kibungo (Rwanda), l'accusé, dans l'intention de causer des viols, a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le massacre d'une population civile dans le cadre d'une attaque généralisée ou systématique dirigée contre cette population civile en raison de son appartenance nationale, politique, raciale, religieuse ou ethnique, comme l'attestent les faits relatés ci-dessous.

Faits étayant le chef de viol

Préfecture de Byumba

43. Les 8 et 9 avril 1994 ou vers ces dates, Jean-Baptiste Gatete a facilité le transport de ses miliciens civils jusqu'au centre de la cellule d'Akarambo. Il a ordonné aux *Interahamwe* d'attaquer les femmes tutsies pour les violer et a incité les intéressés à agir de la sorte. Le 8 avril 1994 ou vers cette date, BAT a été violée par deux *Interahamwe*, à savoir Karemera et le fils de Nyamuhara. Le 9 avril 1994 ou vers cette date, AVO a été violée par un *Interahamwe* du nom de Karerangabo. Les *Interahamwe* ont violé des Tutsies dans la cellule d'Akarambo.

Kibungo

44. On or about 10 to 11 April 1994, Jean-Baptiste Gatete, with Kayonza *bourgmestre* Célestin Senkware, transported armed soldiers, and the *Interahamwe*, to the Mukarange *paroisse* compound where Tutsi refugees were located. Tutsi were raped and killed as a result of Jean-Baptiste Gatete's actions.

45. On or about and between 10 and 15 April 1994, in Kayonza, Jean-Baptiste Gatete, with Célestin Senkware, Kayonza *bourgmestre*, commanded the *Interahamwe* to rape Tutsi women assembled in the *bureau communal* courtyard. Tutsi women were dragged off by the *Interahamwe* and raped.

46. After the rapes and the killings, the *Interahamwe* returned to Kayonza *bureau communal* courtyard where Jean-Baptiste Gatete addressed them again, ordering and instigating to go to the adjoining *secteurs* of Nyarusage, Nkamba and Giparara to rape and exterminate the remaining Tutsis. Both Jean-Baptiste Gatete and Célestin Senkware provided their vehicles to the *Interahamwe* to facilitate the attacks. Tutsis were raped and killed as a result of Jean-Baptiste Gatete's actions.

The acts and omissions of Jean-Baptiste Gatete detailed herein are punishable in reference to Articles 22 and 23 of the statute.

Arusha, this 10th of May 2005.

[Signed]: Hassan Bubacar Jallow

Préfecture de Kibungo

44. Les 10 et 11 avril 1994 ou vers ces dates, Jean-Baptiste Gatete, en compagnie de Célestin Senkware, bourgmestre de Kayonza, a transporté des militaires armés et des *Interahamwe* à la paroisse de Mukarange. Ensemble, ils ont attaqué la paroisse où se trouvaient des réfugiés tutsis. Des Tutsis ont été violés ou tués par suite des actes de Jean-Baptiste Gatete.

45. Le 10 et le 15 avril 1994, vers ces dates ou entre celles-ci, dans la commune de Kayonza, Jean-Baptiste Gatete, accompagné de Célestin Senkware, bourgmestre de Kayonza, a ordonné aux *Interahamwe* de violer des femmes tutsies qui s'étaient rassemblées dans la cour du bureau communal. Des Tutsies ont été emmenées de force par les *Interahamwe* et violées.

46. Après la perpétration des viols et des meurtres, les *Interahamwe* sont rentrés à la cour du bureau communal de Kayonza où Jean-Baptiste Gatete a pris la parole à nouveau pour leur ordonner d'aller violer et exterminer les Tutsis qu'il y avait encore dans les secteurs voisins de Nyarusage, Nkarnba et Giparara et les inciter à agir de la sorte. Jean-Baptiste Gatete et Célestin Senkware ont mis leurs véhicules à la disposition des *Interahamwe* pour faciliter les attaques. Des Tutsis ont été violés et tués par suite des actes de Jean-Baptiste Gatete.

Les actes et les omissions de Jean-Baptiste Gatete exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut du Tribunal.

Arusha, le 10 mai 2005.

[Signé] : Hassan Bubacar Jallow

The Prosecutor v. Félicien KABUGA

Case N° ICTR-98-44B

Case History

- Name : KABUGA
- First Name : Félicien
- Date of Birth : 1935
- Sex : male
- Nationality : Rwandan
- Former Official Function : businessman
- Indictment : 13 December 2000 (Under seal)
- Counts : conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of Indictment's Severance : 1st September 2003 (Case N° ICTR-98-44B) (before : Bizimana Augustin, Kajelijeli Juvénal, Karemera Eduard, Ngirumpatse Mathieu, Nzabonimana Callixte, Nzirorera Joseph and Rwa-makuba André)
- Accused at large.

Le Procureur c. Jean-Baptiste GATETE

Affaire N° ICTR-2000-61

Fiche technique

- Nom : KABUGA
- Prénom : Félicien
- Date de naissance : 1935
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : hommes d'affaires
- Acte d'accusation : 13 décembre 2000 (sous scellés)
- Chefs d'accusation : entente en vue de commettre le génocide, génocide, complicité dans le génocide, incitation publique et directe à commettre le génocide, crimes contre l'humanité violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de la disjonction de l'acte d'accusation : 1^{er} septembre 2003 (Affaire n° ICTR-98-44B) (auparavant : Bizimana Augustin, Kajelijeli Juvénal, Karemera Eduard, Ndirumapfse Mathieu, Nzabonimana Callixte, Nzirorera Joseph et Rwamakuba André)
- Accusé en fuite.

***Decision on the Amended Indictment
Rules 47 and 50 of the Rules of Procedure and Evidence
24 June 2005 (ICTR-98-44B-PT)***

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Florence Rita Arrey; Gberdao Gustave Kam

Félicien Kabuga – Accused Still at Large – Modification of Rule 50 of the Rules, New Standard : filing of supporting material necessary for the determination of a prima facie case by the Chamber to grant the amendment of the indictment – Right of the Accused to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him or her – Order to amend the Indictment

International Instrument cited :

Rules of Procedure and Evidence, rules 47, 47 (E), 50 and 73 (A); Statute, art. 18 and 20 (4) (a)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Bizimana, Édouard Karemera, Callixte Nzabonimana, André Rwamakuba, Mathieu Ndirumapfse, Joseph Nzirorera, and Félicien Kabuga, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli, 6 July 2000 (ICTR-98-44); Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on the Prosecutor's Motion for Severance of Félicien Kabuga's Trial and for Leave to Amend the Accused's Indictment, 1 September 2003 (ICTR-98-44); Appeals Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17); Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on the Prosecution Conditional Motion for Leave to Amend the Indictment and on the Defence Counter-Motion Objecting to the Form of the Recast Indictment, 2 March 2005 (ICTR-2001-73)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),
SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding,
Florence Rita Arrey, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the Prosecutor's Motion for Confirmation of Amended Indictment Pursuant to Rule 50 of the Rules of Procedure and Evidence filed on 2 October 2003 ("First Motion");

BEING FURTHER SEIZED of the Prosecutor's Motion for Leave to File Substitute Amended Indictment filed on 1 October 2004 ("Second Motion");

NOTING that the Accused, Félicien Kabuga, is still at large and cannot therefore respond to the Prosecutor's Motions;

HAVING REVIEWED the Supporting Materials filed by the Prosecutor on 19 October 2004, and listed in the confidential Annexure to this Decision;

CONSIDERING the Statute of the Tribunal ("Statute"), especially Article 18, and the Rules of Procedure and Evidence ("Rules"), notably Rule 50;

RECALLING the Decision of 1 September 2003 granting the Prosecutor's Motion for Severance and Leave to Amend the Indictment¹;

NOW DECIDES, pursuant to Rule 73 (A) of the Rules, solely on the basis of the written Motions of the Prosecutor.

Introduction

1. The first Indictment was filed against Félicien Kabuga in August 1997². On 28 August 1998, a second Indictment was confirmed including Félicien Kabuga among other Accused³. On 1 September 2003, before the trial in *Karemera et al.* started, the Chamber granted the Prosecutor's Motion for Severance and Leave to Amend the Indictment with regard to Félicien Kabuga only. Following the Decision on Severance and Amendment, the Prosecutor filed his First Motion and his Second Motion. Following the Chamber's request through the Court Management Section, the Prosecutor filed Supporting Materials on 19 October 2004 exclusively to the Chamber's attention.

Arguments of the Prosecution

2. In the First Motion, the Prosecutor requests confirmation of the Amended Indictment, pursuant to Rule 50 (A) of the Rules. The Prosecutor argues that the Motion can be disposed of without awaiting a Defence response because the Accused is a fugitive, has not appeared before any Trial Chamber and has no legal representation. The Prosecutor adds that the President is expected to assign a Judge to confirm the Amended Indictment pursuant to the same provision, because the Confirming Judge, Judge Navanethem Pillay, is no longer serving at the Tribunal.

3. In the Second Motion, the Prosecutor files a Substitute Amended Indictment which reflects the latest case law, with special regard to the pleading of the form of criminal responsibility, and which provides greater specificity. The Prosecutor also indicates that he strikes Count 6 (Murder as a Crime against Humanity) because of

¹ *The Prosecutor v. Édouard Karemera et al.* (Case n° ICTR-98-44-I), Decision on the Prosecutor's Motion for Severance of Félicien Kabuga's Trial and for Leave to Amend the Accused's Indictment (TC), 1 September 2003.

² *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, 30 October 1997.

³ *The Prosecutor v. Augustin Bizimana, Édouard Karemera, Callixte Nzabonimana, André Rwamakuba, Mathieu Ndirumapatse, Joseph Nzirodera, Félicien Kabuga, Juvénal Kajelijeli*, Case No. ICTR-98-44-I, Confirmation and Non Disclosure of the Indictment (Judge Navanethem Pillay), 29 August 1998.

the inconsistency of the accounts on the single incident charged. The Prosecutor affirms that under the new Rule 50 (A) (i) of the Rules, the Amended Indictment must be examined, following the standards set forth in Rule 47 (E) of the Rules. Subsequently, the Prosecutor requests a review of the Amended Indictment, submitted with the Second Motion, and files the documents listed in the Confidential Annex of this Decision, as Supporting Materials.

Deliberations

4. Trial Chamber III was assigned to hear the joint trial of seven Accused⁴ including Félicien Kabuga. Then the Chamber ordered the severance of the trial of Félicien Kabuga from the other Accused and granted leave to amend the Indictment by ordering the filing of a separate Amended Indictment against Félicien Kabuga not later than 30 days from the Decision of 1 September 2003. Therefore the Chamber is still seized of the present case.

5. In this case, the Accused was previously charged jointly with other Accused. Although there was an initial appearance with respect to the other Accused who were already in custody, there was no initial appearance made with respect to Félicien Kabuga since to date he has not been apprehended. In addition, Félicien Kabuga has not been served with the previous Indictment. If and when he is brought before the Tribunal, he will appear on the Amended Indictment. Furthermore, since the Decision of 1 September 2003, the Rules have been amended, and the new Rule 50 requires the Trial Chamber to examine the *prima facie* case before granting leave to amend an Indictment. Also in accordance with the new rule, the filing of supporting material is necessary for the determination of a *prima facie* case.

6. Considering the above circumstances, the Chamber is of the opinion that it is in the interests of justice to examine the Amended Indictment to ensure that it is adequately amended. The review to determine a *prima facie* case examines the supporting materials provided by the Prosecutor, in light of Article 18 of the Statute and Rule 47 (E) of the Rules. This implies an assessment of whether the allegations included in the Indictment are supported by the materials disclosed by the Prosecutor to the Chamber.

7. Moreover, Article 20 (4) (a) of the Statute states that the accused has a right “[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him or her”. Responsible to ensure a fair trial and the preservation of the rights of the Accused, the Chamber must consider whether the Indictment is sufficiently specific thereby providing adequate detail to the Accused

⁴ *The Prosecutor v. Augustin Bizimana, Édouard Karemera, Callixte Nzabonimana, André Rwamakuba, Mathieu Ndirumpatse, Joseph Nzirorera, and Félicien Kabuga*, Case No. ICTR-98-44-I. The Case against Juvénal Kajelijeli has already been severed: Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli (TC), 6 July 2000.

for the preparation of his defence. In addition, the *Ntakirutimana* Appeals Judgement⁵ requires that the Prosecutor specifies in the Indictment the material facts on which he builds his case. In light of those provisions and the jurisprudence, the Chamber emphasises that the Prosecutor should ensure that the relevant material facts in his possession are pleaded in the Indictment.

8. The Chamber finds that the allegation whereby Félicien Kabuga placed his business and his home at the disposal of the *Interahamwe* “for the training in the use of arms” as referenced in Paragraphs 28 and 43 of the Amended Indictment, is without supporting material. The Chamber therefore finds no *prima facie* case for this assertion. Consequently the Prosecutor should provide material in his possession to support the allegation, or remove it from the Amended Indictment.

9. A *prima facie* case has been found for the subsequent factual allegations, but the Chamber notes that the Indictment remains deficient as follows :

- (i) In general the dates referred to the Indictment should be in accordance with the supporting materials provided by the Prosecutor;
- (ii) Some material acts appearing in the supporting materials are not pleaded in the indictment;
- (iii) In Paragraph 5 of the Indictment, there is an allegation of an agreement between Félicien Kabuga, Ferdinand Nahimana, Jean-Bosco Barayagwiza, Joseph Nziroera, Edouard Karemera, Mathieu Ndirumpatse and Anatole Nsengiyumva “to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, the Tutsi ethnic group, as described in paragraphs 6 through 15”, and none of the materials disclosed supports the existence of such an agreement;
- (iv) In Paragraphs 7, 48 and 63 of the Indictment, the allegation that RTLM was founded in furtherance of the hate campaign is not supported by any of the materials disclosed. A similar allegation in Paragraph 17 of the Indictment that RTLM was founded in order to further the anti-Tutsi campaign is also not sustained by the supporting materials.
- (v) In relation to Paragraphs 9, 19, 34, 50, 59, 66 and 76 of the Indictment, the allegation that RTLM “broadcast information identifying the location of Tutsi” is not supported by any of the materials disclosed.
- (vi) With regard to Paragraphs 11, 21 and 36 of the Indictment, the agreement related to the establishment of FDN to support the *Interahamwe* “to kill and cause serious bodily or mental harm to members of the Tutsi population” was not found to be supported by the materials disclosed.
- (vii) Finally, the allegation in Paragraphs 13, 22 and 37 of the Indictment that Félicien Kabuga, apart from being the president of the provisional committee, was signatory to several bank accounts is not supported by the materials disclosed.

10. Concerning the charges of individual criminal liability, the Chamber finds that wherever the Prosecutor alleges that the Accused had *de facto* control over RTLM,

⁵ *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004.

Interahamwe and administrative officers among others alleged perpetrators and was in a position to prevent or punish criminal conduct, especially in Paragraphs 2, 8, 18, 31, 49, 56, 64 and 72 of the Amended Indictment, additional details are required to allow the Accused to know the charges against him. As the Chamber has previously ruled in *Zigiranyirazo* Case⁶, the pleading of family ties is not sufficient to support an allegation of command responsibility. The Chamber also finds that the allegation contained in Paragraph 44 of the Amended Indictment has not given sufficient particulars about the control the Accused allegedly exercised and the protection allegedly provided to the Accused by persons under his alleged control. Those details in Paragraphs 2 and 44 should be provided by including further information upon which this allegation is grounded.

FOR THOSE REASONS, THE CHAMBER,

I. ORDERS the Prosecutor to provide

- (A) the required details in the Indictment as mentioned in Paragraphs 9 and 10 above, and
- (B) additional material to support Paragraphs 28 and 43 of the Amended Indictment within five days, or to remove them;

II. ORDERS the Prosecutor to file the Amended Indictment before 28 June 2005.

Arusha, 24 June 2005, done in English.

[Signed] : Dennis C. M. Byron; Florence Rita Arrey; Gberdao Gustave Kam

***Décision sur la Requête du Procureur en Prorogation
de délai pour se conformer à la décision du 24 juin 2005
relative à l'acte d'accusation amendé
Article 54 du Règlement de procédure et de preuve
28 juin 2005 (ICTR-98-44B)***

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Florence Rita Arrey; Gberdao Gustave Kam

⁶ *The Prosecutor v. Protais Zigiranyirazo*, Case n° ICTR-2001-73-R50, Decision on the Prosecution Conditional Motion for Leave to Amend the Indictment and on the Defence Counter-Motion Objecting to the Form of the Recast Indictment (TC), 2 March 2005, Paras. 17-20.

Félicien Kabuga – Pouvoir général d'émettre de la Chambre de première instance toute ordonnance qu'elle juge appropriée – Situation exceptionnelle où aucune des personnes ayant une connaissance suffisante du dossier pour prendre les mesures requises n'est présente – Dépôt d'un acte d'accusation modifié

Instrument international cité :

Règlement de Procédure et de preuve, art. 54

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),
SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des
Juges Dennis C. M. Byron, Président, Florence Rita Arrey et Gberdao Gustave Kam;

SAISI de la requête du Procureur intitulée «*Prosecutor's Motion to Extend the Time Limits in Which to File an Amended Indictment Pursuant to Rule 54 of the Rules*», déposée le 27 juin 2005;

RAPPELANT la Décision du 24 juin 2005 relative à l'acte d'accusation amendé, dans laquelle la Chambre a ordonné au Procureur de soumettre des éléments justificatifs additionnels, d'apporter des précisions supplémentaires à l'acte d'accusation amendé, et de déposer l'acte d'accusation amendé dans sa version corrigée au plus tard le 28 juin 2005;

CONSIDÉRANT le Statut du Tribunal et le Règlement de procédure et de preuve notamment en son Article 54 qui prévoit qu'un Juge ou une Chambre dispose d'un pouvoir général d'émettre toute ordonnance qu'il ou elle juge appropriée;

CONSIDÉRANT que le Bureau du Procureur est confronté à une situation exceptionnelle où aucune des personnes ayant une connaissance suffisante du dossier pour prendre les mesures requises par la Décision du 24 juin 2005 n'est actuellement au siège du Tribunal, et que le Procureur ne semble pouvoir se conformer à la Décision qu'au plus tard le 8 juillet 2005;

CONSIDÉRANT que l'Accusé n'est pas encore arrêté, et qu'il ne saurait y avoir de préjudice pour lui en raison de la prorogation de délai demandée par le Procureur;

La Chambre est d'avis qu'il convient d'accéder à la requête du Procureur en lui accordant la prorogation de délai souhaitée.

PAR CES MOTIFS,

LA CHAMBRE

ORDONNE au Procureur de déposer l'acte d'accusation amendé conformément à la Décision du 24 juin 2005, au plus tard le 8 juillet 2005.

Arusha, le 28 juin 2005, fait en Français.

[Signé] : Dennis C. M. Byron; Florence Rita Arrey; Gberdao Gustave Kam

The Prosecutor v. Juvénal KAJELIJELI

Case N° ICTR-98-44A

Case History

- Name : KAJELIJELI
- First Name : Juvénal
- Date of Birth : unknown
- Sex : male
- Nationality : Rwandan
- Former Official Function : Mayor of Mukingo
- Date of Indictment's Confirmation : 29 August 1998
- Counts : genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of Indictment's Amendments : 25 January 2000
- Date and Place of Arrest : 5 June 1998, in Benin
- Date of Transfer : 10 September 1998
- Date of Initial Appearance : 19 April 1999
- Pleading : not guilty
- Date of Indictment's Severance : 6 July 2000 – Bizimana, Kabuga, Karemera, Ndirumapfse, Nzabonimana, Nzirodera and Rwamakuba
- Date Trial Began : 13 March 2001
- Date and content of the Sentence : 1st December 2003, life imprisonment for genocide and crime against humanity, 15 years of imprisonment for direct and public incitement to commit genocide
- Appeal from the Sentence : 23 Mai 2005, the sentence reduced to 45 years

Le Procureur c. Juvénal KAJELIJELI

Affaire N° ICTR-98-44A

Fiche technique

- Nom : KAJELIJELI
- Prénom : Juvénal
- Date de naissance : inconnue
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : bourgmestre de Mukingo
- Date de la confirmation de l'acte d'accusation : 29 août 1998
- Chefs d'accusation : génocide, ou subsidiairement complicité de génocide, entente en vue de commettre le génocide, incitation publique et directe à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date des modifications subséquentes portées à l'acte d'accusation : 25 janvier 2000
- Date et lieu de l'arrestation : 5 juin 1998, au Bénin
- Date du transfert : 10 septembre 1998
- Date de la comparution initiale : 19 avril 1999
- Précision sur le plaidoyer : non coupable
- Date de la disjonction de l'acte d'accusation : 6 juillet 2000 – Bizimana, Kabuga, Karemera, Ngirumpatse, Nzabonimana, Nzirodera et Rwamakuba
- Date du début du procès : 13 mars 2001
- Date et contenu du prononcé de la peine : 1^{er} décembre 2003, emprisonnement à vie des chefs de génocide et de crime contre l'humanité, 15 ans d'emprisonnement pour incitation directe et publique à commettre le génocide
- Appel : 23 mai 2005, la peine réduite à 45 ans d'emprisonnement

***Decision on Appellant's Urgent Motion for Confidential
Translation and Interpretation for the Appeal Hearing
2 February 2005 (ICTR-98-44A-A)***

(Original : English)

Appeals Chamber

Judge : Florence Ndepele Mwachande Mumba, Pre-Appeal Judge

Juvénal Kajelijeli – Confidential Translation and Interpretation for the Appeal Hearing, Defence Counsel and Detention Management Section, Interests of justice – Motion partially granted

International Case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Scheduling Order, 17 December 2004 (ICTR-98-44A)

I, FLORENCE NDEPELE MWACHANDE MUMBA, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 (“Tribunal”);

BEING SEISED OF the “Appellant’s Urgent Motion For Confidential Translation & Interpretation In Connection With the Scheduled March 7 2005 Appeal Hearing” (“Resubmitted Motion”) filed on 31 January 2005 by Counsel for Kajelijeli (“Appellant”), and “Appellant’s Urgent Motion For Confidential Translation & Interpretation Pre-, During & Post December 10 Hearing” (“Motion”) filed on 3 December 2004 by the Appellant, in which the Appellant seeks the provision by the Tribunal of an interpreter not working for the Tribunal to provide the interpretation of communications between counsel and client before, during and after the appeal hearing;

NOTING the letter from the Defence Counsel and Detention Management Section (“DCDMS”) responding to the Appellant’s request dated 29 November 2004 filed by the Appellant¹ on 3 December 2004 in which the DCDMS reiterated its denial of the Appellant’s request for their Legal Assistant Ms Juliette Chinaud to assist with the interpretation before during and after the Appeal hearing;

NOTING “Answers by Defence Counsel and Detention Management Section to Specific Matters Raised For the Appeals Chamber” filed by the Registry on 24 January 2005 in which they clarified the Registry’s position regarding the Motion;

NOTING that the interpretation services of Mr Emilien Dusabe were used throughout the trial and have not been withdrawn by the Tribunal²;

¹ Motion, Exhibit 4.

² “Answers by Defence Counsel and Detention Management Section to Specific Matters Raised for the Appeals Chamber” page 2.

NOTING that when the Appellant filed the Motion Mr Emilien Dusabe was unavailable for the appeal;

NOTING further that the Appellant does not object to Mr Emilen Dusabe's services;

CONSIDERING that the Appeals Chamber has rescheduled the hearing to 7 March 2005³ and that both the Resubmitted Motion and the Motion are now moot;

CONSIDERING that it is in the interests of justice to provide Appellant with the said services;

HEREBY REQUEST the Registrar to facilitate the provision of Mr Emilien Dusabe for the Appeal hearing scheduled for Monday 7 March 2005.

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

Done this 2nd day of February 2005, at the Hague, The Netherlands.

[Signed] : Florence Ndepele Mwachande Mumba

***Decision to Vary the Decision on Appellant's Urgent Motion
for Confidential Translation and Interpretation
for the Appeal Hearing
9 February 2005 (ICTR-98-44A-A)***

(Original : English)

Appeals Chamber

Judge : Florence Ndepele Mwachande Mumba, Pre-Appeal Judge

*Juvénal Kajelijeli – Confidential Translation and Interpretation for the Appeal Hearing,
Revision of the Decision – Motion granted*

I, FLORENCE NDEPELE MWACHANDE MUMBA, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Tribunal");

NOTING the request by letter from Counsel for Juvenal Kajelijeli ("Appellant") dated 1 February 2005, in which the Appellant states that he is advised that Mr Emilien Dusabe is not expected to return to Arusha on or before 7 March 2005, and requests an expeditious resolution of the Appellant's request for translations;

³ *Prosecutor v Kajelijeli*, Case N° ICTR-98-44A-A, Scheduling Order, filed on 17 December 2004.

NOTING the “Decision On Appellant’s Urgent Motion For Confidential Translation And Interpretation For The Appeal Hearing” (“Decision”), filed on 2 February 2005 in which the Registry was requested to facilitate the provision of Mr Dusabe for translation and interpretation at the Appeal hearing scheduled for Monday 7 March 2005;

NOTING that the Appellant is prepared to accept the services of Ms Juliette Chinaud as an interpreter;

HEREBY VARIES THE DECISION and REQUESTS the Registrar to facilitate the provision of Ms Juliette Chinaud for the translation and interpretation at the Appeal hearing scheduled for Monday 7 March 2005.

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

Done this 9th day of February 2005, at the Hague, The Netherlands.

[Signed] : Florence Ndepele Mwachande Mumba

***Order Concerning the Hearing of the Appeal
18 February 2005 (ICTR-98-44A-A)***

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Juvénal Kajelijeli – Matters for the Hearing of the Appeal

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;

BEING SEIZED of an appeal by Juvénal Kajelijeli (“Appellant”) against the Judgement and Sentence rendered by Trial Chamber II on 1 December 2003 in the case of *Prosecutor v. Juvénal Kajelijeli* (“Appeal”);

NOTING the “Amended Notice of Appeal” filed by the Appellant on 28 April 2004; “Grounds of Appeal Against Conviction and Sentence and Appellant’s Brief on Appeal” filed by the Appellant on 22 April 2004 (“Appellant’s Brief”); “Respondent’s Brief” filed by the Prosecution on 1 June 2004; and “Appellant’s Brief-in-Reply” filed by the Appellant on 2 August 2004;

NOTING the “Scheduling Order”, filed on 17 December 2004, which set the date of the hearing of the merits of the Appeal in this case to 7 March 2005 (“Hearing”);

HEREBY INFORMS the parties that during the Hearing, without prejudice to any matter the Parties or the Chamber may wish to raise, the Appeals Chamber would welcome if the Parties would, *inter alia*, further develop their submissions on the following points :

Alleged errors related to the assessment of credibility and testimony of Witness JK 312¹;

Alleged errors related to the assessment of credibility and testimony of Witness JK 27²;

Alleged error in denying the Appellant's motion concerning arbitrary arrest and illegal detention (Trial Chamber II Decision of 8 May 2000)³; and

Alleged error in finding that it was the Appellant's wife who deserved credit for sheltering Tutsi refugees⁴.

CONSIDERING that the identification of these points is in no way an expression of an opinion on the merits of the Appeal.

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

Done this 18th day of February 2005, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

***Decision on Second Defence Motion for the Admission
of Additional Evidence Pursuant to Rule 115
of the Rules of Procedure and Evidence
7 March 2005 (ICTR-98-44A-A)***

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Juvénal Kajelijeli – Motion for admission of additional evidence, Evidence available at trial, Risk of miscarriage of justice – Motion denied

International Instrument cited :

¹ See Appellant's Brief, paras. 137-147.

² See Appellant's Brief, paras. 148-150.

³ See Appellant's Brief, paras. 355-372.

⁴ See Appellant's Brief, para. 401.

Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 September 2002; Rules of Procedure and Evidence, Rules 115 and 115 (A)

International and National Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Barayagwiza's Motion for Determination of Time Limits, 5 March 2004 (ICTR-99-52); Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, "Decision on Defence Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence", 28 October 2004 (ICTR-98-44A); Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 (ICTR-99-46)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 (IT-98-33); Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on Evidence, 31 October 2003 (ICTR-95-14); Appeals Chamber, The Prosecutor v. Mornir Nikolić, Decision on Motion to Admit Additional Evidence, 9 December 2004 (IT-02-60/1)

Rwanda :

Special Trial Chamber of the Ruhengeri Court for Genocide and Other Crimes against Humanity, The Prosecutor v. Augustin Habyambre, Schadrack Sendugo, Schadrack Nikobasanzwe, Aron Basabose, Ntahontuye alias Giponda, Augustin Nduhuye, Mburanumwe alias Habimana, Peter Makuza, Mpozembizi alias Baramira, Andre Barera and Haganirimfura, Case File RP : 030/R1/99, 12 May 2000

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 ("International Tribunal");

BEING SEISED OF the "Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence" ("Second Rule 115 Motion")¹, filed by Juvénal Kajelijeli ("Appellant") on 15 February 2005, in which the Appellant seeks to have the following items admitted as additional evidence on appeal :

- a. The Judgement of the Special Trial Chamber of the Ruhengeri Court for Genocide and Other Crimes against Humanity in the case of the *Prosecutor v. Augustin Habyambre et al.*², ("Judgement of the Special Trial Chamber");

¹ This is the second motion for additional evidence filed by the Appellant. The first "Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence" was filed on 16 February 2004 ("First Rule 115 Motion").

² *The Prosecutor v. Augustin Habyambre, Schadrack Sendugo, Schadrack Nikobasanzwe, Aron Basabose, Ntahontuye alias Giponda, Augustin Nduhuye, Mburanumwe alias Habimana, Peter Makuza, Mpozembizi alias Baramira, Andre Barera and Haganirimfura, Case File RP : 030/R1/99, 12 May 2000.*

b. Contents of a file showing the criminal charges and interviews concerning a certain Dominique Gatsimbanyi before the Prosecutor-General of the Supreme Court of the Ministry of Justice of Kigali ("Prosecutor-General's Investigation file");

NOTING the "Prosecutor's Response to 'Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Evidence and Procedure'" ("Response"), filed by the Office of the Prosecutor ("Prosecution") on 24 February 2005, in which the Prosecution objects to the admission of additional evidence under the Second Rule 115 Motion for the following reasons :

- the Second Rule 115 Motion was filed 403 days after the Trial Judgement was rendered and the Appellant does not show good cause for the late filing³;
- the proposed evidence was available at trial, as conceded by the Appellant⁴;
- the Appellant fails to demonstrate that any of the proposed additional evidence would have had an impact on the verdict⁵;

NOTING the "Appellant's Reply to Prosecutor's Response to 'Defense Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Evidence and Procedure'" ("Reply"), filed by the Appellant on 2 March 2005, two days after the deadline without any justification⁶;

NOTING that the Trial Chamber rendered its Judgement in this case on 1 December 2003 ("Trial Judgement");

CONSIDERING that under Rule 115 (A) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"),

"[a] party may apply by motion to present additional evidence before the Appeals Chamber" and that said motion "must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay";

NOTING that the Judgement of the Special Trial Chamber was issued on 12 May 2000⁷ and that the Appellant has not indicated when the Prosecutor-General's Investigation file came into existence;

NOTING that the Appellant submits that he only became aware of both documents in October 2004, but received the documents in January 2005 when he had them informally translated⁸;

CONSIDERING however, that the Appellant has conceded that the documents were available at trial and that they could have been discovered through the exercise of due diligence⁹, which concession is inconsistent with a claim of good cause for the delay in submitting the Second Rule 115 Motion;

³ Response, paras. 3-6.

⁴ Response, paras. 7-10.

⁵ Response, paras. 13-17, 33.

⁶ The Reply was due on 28 February 2005. See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 September 2002, para. 12.

⁷ Second Rule 115 Motion, para. 15.

⁸ *Ibid.*, footnotes 1 and 2. See also Reply, para. 5.

⁹ *Ibid.*, para. 4.

FINDING, therefore, that the Second Rule 115 Motion was not filed on time¹⁰ and that the Appellant has failed to establish good cause to justify the delay;

CONSIDERING, in any event, that evidence that was unavailable at trial and could not have been discovered through the exercise of due diligence¹¹ is admissible under Rule 115 of the Rules if it is relevant to a material issue, is credible and if it *could* have had an impact on the verdict¹²;

NOTING that the Appellant argues that the proposed evidence *could* impact on the Trial Chamber's findings relevant to Counts 2 (genocide) and 6 (crimes against humanity) that the Appellant played a central role in convening a meeting on the evening of 6 April 1994 for planning massacres in Nkuli *commune* and in organizing their commission the following morning¹³, which findings, according to him, were solely based on evidence provided by Witness GDD¹⁴;

FINDING, however, that the proposed evidence was available at trial in light of the Appellant's concession of the same and that it is therefore inadmissible on that ground even if it could have affected the verdict¹⁵;

CONSIDERING that evidence that was available at trial or could have been discovered through the exercise of due diligence is nevertheless admissible if the moving party shows that its exclusion *would* lead to a miscarriage of justice, in that, if it had been admitted at trial it *would* have affected the verdict when assessed in the context of the evidence admitted at trial and not in isolation¹⁶;

NOTING the Appellant's submission that the Judgement of the Special Trial Chamber contains findings concerning massacres and killings that occurred in Nkuli *commune* in 1994¹⁷, in which of the fifty-two witnesses referred to therein, not a single witness accused the Appellant of committing or being involved in the killings¹⁸;

¹⁰ Because the Judgement in this case was delivered on 1 December 2003, any motions for additional evidence were due no later than 14 February 2004 (although as this was a Saturday, the motions could be filed as late as 16 February 2004); see also *Prosecutor v. Ferdinand Nahimana et al.*, Case n° ICTR-99-52-A, "Decision on Barayagwiza's Motion for Determination of Time Limits", 5 March 2004.

¹¹ See *Prosecutor v. Ntagerura, et al.*, Case n° ICTR-99-46-A, "Decision on Prosecution Motion for Admission of Additional Evidence", 10 December 2004 ("*Ntagerura* Rule 115 Decision"), para. 9; *M. Nikolić v. Prosecutor*, Case n° IT-02-60/1-A, "Decision on Motion to Admit Additional Evidence," 9 December 2004 ("*M. Nikolić* Rule 115 Decision"), para. 21; *Prosecutor v. Blaškić*, Case n° IT-95-14-A, "Decision on Evidence," 31 October 2003, p. 3 ("*Blaškić* Decision on Evidence"); *Prosecutor v. Krstić*, Case n° IT-98-33-A, "Decision on Applications for Admission of Additional Evidence on Appeal", 5 August 2003 ("*Krstić* Rule 115 Decision"), p. 3.

¹² *Ntagerura* Rule 115 Decision, para. 10; *M. Nikolić* Rule 115 Decision, para. 23.

¹³ Second Rule 115 Motion, paras 13, 26, 33.

¹⁴ *Ibid.*, paras. 13-18.

¹⁵ *Ibid.*, para. 4.

¹⁶ *Ntagerura* Rule 115 Decision, para. 11; *Kajelijeli v. The Prosecutor*, Case n° ICTR-98-44A-A, "Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence", 28 October 2004, para. 11 ("*Kajelijeli* Rule 115 Decision"); *Blaškić* Decision on Evidence, p. 3; *Krstić* Rule 115 Decision, p. 4.

¹⁷ Second Rule 115 Motion, para. 11.

¹⁸ *Ibid.*, para. 12.

NOTING the Appellant's submission that a review of the Prosecutor-General's Investigation file reveals that none of the twenty-five witnesses who were interviewed and interrogated in connection with the prosecution of the former *bourgmestre* of Nkuli commune named the Appellant as having participated in killings and massacres that occurred in Nkuli in April 1994¹⁹;

NOTING the Appellant's contention that the proposed evidence underscores the unreliability and falsity of Witness GDD's testimony and its admission is therefore required to prevent a miscarriage of justice²⁰;

NOTING the Prosecution's submission that the fact that the Appellant's name has not been mentioned by witnesses in both the Judgement of the Special Trial Chamber and the Prosecutor-General's Investigation file is irrelevant because :

the focus was not on the Appellant²¹;

the Second Rule 115 Motion does not claim or demonstrate that any of the witnesses in any way exculpates the Appellant²²;

the Second Rule 115 Motion does not explain whether the witnesses gave evidence in respect of the same crime or criminal events in Nkuli that were the subject of the Appellant's convictions²³;

the Appellant misreads the Judgement of the Special Trial Chamber²⁴;

CONSIDERING that subparagraphs a., b. and c. above are self-explanatory and that the Appeals Chamber's reading of the Judgement of the Special Tribunal confirms sub-paragraph d.;

CONSIDERING this Appeals Chamber's Decision on the Appellant's First Rule 115 Motion²⁵ in which it was noted that there were findings of fact, other than the evidence of Witness GDD, to support the finding of guilt against the Appellant on Counts 2 and 6;

CONCLUDING therefore that :

- the Second Rule 115 Motion was filed out of time and that the Appellant has not met his burden to show good cause for the late filing;
- in any event, the proposed evidence was available at trial and is therefore inadmissible on that ground; and
- the Appellant has failed to meet the burden of demonstrating that evidence that was available to him at trial is nevertheless admissible on appeal because it
- *would* have affected the verdict when assessed in the context of the evidence admitted at trial and not in isolation;

¹⁹ *Ibid.*, para. 21.

²⁰ *Ibid.*, para. 23.

²¹ Response, paras. 19, 21 and 28.

²² Response, paras. 20, 22, 23 and 30.

²³ Response, paras. 24 and 25.

²⁴ Response, para. 27.

²⁵ See *Kajelijeli* Rule 115 Decision, para. 14, in which the additional evidence proffered by the Appellant with his First Rule 115 Motion was intended to disprove the testimony of Witness GDD. See also Trial Judgement, paras. 826-828 and 896-904, where the Trial Chamber made a finding, *inter alia*, that the Appellant directed and participated in the killings in Nkuli, Mukingo and Kigombe *Communes* on the basis of the testimonies of Witnesses GDQ and GBH.

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KAJELIJELI

HEREBY DISMISSES the Second Rule 115 Motion.

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

Done this 7th day of March 2005, at Arusha, Tanzania.

[Signed] : Fausto Pocar

Scheduling Order
20 April 2005 (ICTR-98-44A-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele
Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Juvénal Kajelijeli – Schedule

International Instrument cited :

Rules of Procedure and Evidence, Rule 118 (D)

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 (“International Tribunal”);

PURSUANT to Rule 118 (D) of the Rules of Procedure and Evidence of the International Tribunal;

HEREBY ORDERS that a public hearing shall be held in Arusha, Tanzania on 20 May 2005 at 10.30 a.m. to deliver the judgement in this Appeal.

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

Done this 20th day of April 2005, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

Scheduling Order
25 April 2005 (ICTR-98-44A-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele
Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Juvénal Kajelijeli – Schedule, Interests of justice, Attendance of the Counsel

International Instrument cited :

Rules of Procedure and Evidence, Rule 118 (D)

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 (“International Tribunal”);

NOTING its “Scheduling Order” issued 20 April 2005 in which the Appeals Chamber ordered that a public hearing shall be held in Arusha, Tanzania on 20 May 2005 for delivery of the judgement in this Appeal;

NOTING that upon receipt of the Appeals Chamber’s Scheduling Order of 20 May 2005, Lead Counsel for the Appellant notified the Appeals Chamber that he would not be able to attend the delivery of the judgement due to an irreconcilable scheduling conflict but that he would be available on alternative dates;

CONSIDERING that no co-Counsel is available in this Appeal to attend the delivery of the judgement on 20 May 2005 and that it would be in the interests of justice for Lead Counsel for the Appellant to be present during the delivery of the judgement;

PURSUANT to Rule 118 (D) of the Rules of Procedure and Evidence of the International Tribunal;

HEREBY ORDERS that the public hearing to be held in Arusha, Tanzania, to deliver the judgement in this Appeal is re-scheduled for 23 May 2005 at 9.30 a.m.

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

Done this 25th day of April 2005, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

Judgement
23 May 2005 (ICTR-98-44A-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Juvénal Kajelijeli – Joseph Nzirorera – Benin – Genocide, direct and public incitement to commit genocide, extermination as a crime against humanity – Grounds of appeal, Error of law, Impact of Trauma on the testimonies, Error of fact, Denial of motions, Appeal against the sentence, Standards for appellate review – Evidence, Burden of the proof, Standard of the proof, Allegation of “double standard” of evaluation the evidence, Reliability of the testimonies, Credibility of the witness – Criminal responsibility, Specific intent to commit genocide, Concurrent conviction for individual and superior responsibility, Authority of the superior, De facto civilian superior, Aggravating factor of the superior position, Superior-Subordinate Relationship, Existence of a hierarchical chain of authority, Requisite degree of effective control, Effective control at the time of the commission of the offence, Material ability to prevent or punish criminal conduct, Same nature of the control exercised by a civilian superior as that exercised by a military commander – Power of the Trial Chamber to evaluate the probative value of evidence – Tribunal’s personal jurisdiction, Tribunal’s temporal jurisdiction – Doctrine of res judicata, Opportunity for the Appeals Chamber to correct mistake the Trial Chamber has made, Balance between the fundamental rights of the accused and the essential interests of the international community, Discretion of the Chamber under the circumstances of a case to decline to exercise jurisdiction – Fundamental rights of the accused during his/her arrest and detention, Right to a fair trial, Rights of the suspect, Right as a suspect to assistance of counsel, Right to be promptly informed of the reasons for his or her arrest, Right to be promptly brought before a Judge, Right to be informed promptly in a language he or she understands of the reason for the arrest, Right to freedom from an arrest contrary to due process of law, Right to be brought promptly before a Judge or official authorized to exercise judicial power, Right to Counsel during Questioning, Possibility to waive his/her right to counsel during questioning, Right to an initial appearance without delay – Indigent accused, Right to free legal assistance, Right to waive the right to counsel, Right to an expeditious trial – Cooperation of the States, Respect the human rights of the suspect, Right to liberty and security of person, Principle of international division of labour in prosecuting crimes, Length of the pre-trial detention of a suspect – Prosecutorial duty of due diligence, Obligation of the Prosecutor to determine whether evidence is exculpatory – Customary international law – United Nations High Commissioner for Refugees – Interpretation of the Rules of Procedure and Evidence – Miscarriage of justice – Reasoned Opinion of the Trial Chamber – Role of the Appeals Chamber – Sentence, General practice regarding prison sentences in the courts of Rwanda, Gravity of the offences or totality of the conduct, Individual circumstances of the accused, Mitigating factors, Aggravating factor, Time spent in detention pending transfer to the Tribunal, Obligation to individualize penalties, Rem-

Arrêt
23 mai 2005 (ICTR-98-44A-A)

(Original : Anglais)

Chambre d'appel

Juges : Fausto Pocar, Président; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Juvénal Kajelijeli – Joseph Nzirorera – Bénin – Génocide, Incitation publique et directe à commettre le génocide, Extermination en tant que crime contre l'humanité – Moyens d'appel, Erreur de droit, Impact du traumatisme sur les témoignages, Erreur de fait, Rejet des requêtes, Appel contre la sentence, Standards pour une révision en appel – Preuve, Charge de la preuve, Standard de la preuve, règle du «deux poids, deux mesures» dans l'appréciation des moyens de preuve, Crédibilité des témoignages, Crédibilité des témoins – Responsabilité criminelle, Intention spécifique de commettre le génocide, Cumul de culpabilité individuelle et en tant que supérieur, Autorité du supérieur, Supérieur civil de facto, Circonstance aggravante du chef de la position de supérieur, Relation de subordination, Existence d'une chaîne de responsabilité, Degré de contrôle effectif requis, Contrôle effectif sur ses subordonnés au moment où l'infraction a été commise, Capacité matérielle à prévenir ou punir le comportement criminel, Nature identique du contrôle exercé par un supérieur civil et du contrôle exercé par un chef militaire – Pouvoir de la Chambre de première instance d'évaluer la valeur probatoire de la preuve – Compétence personnelle du Tribunal, Compétence temporelle du Tribunal – Doctrine du Res judicata, Possibilité pour la Chambre d'appel de corriger toute erreur qu'aurait commise la Chambre de première instance, équilibre entre les droits fondamentaux de l'accusé et l'intérêt primordial de la communauté internationale, Pouvoir discrétionnaire de la Chambre d'appel dans les circonstances données d'une affaire pour de se déclarer incompétente – Droits fondamentaux de l'appelant au cours de son arrestation et de sa détention, Droit à un procès équitable, Droit du suspect, Droit du suspect à l'assistance d'un Conseil, Droit du suspect d'être informé dans le plus court délai des raisons de son arrestation, Droit du suspect d'être traduit dans le plus court délai devant un juge, Droit du suspect d'être informé dans le plus court délai dans une langue qu'il comprend des raisons de son arrestation, Droit du suspect de ne pas être victime d'une arrestation effectuée au mépris de la légalité, Droit d'être traduit dans le plus court délai devant un juge ou une autre autorité habilitée par la loi à exercer des fonctions judiciaires, Droit à un conseil durant les interrogatoires, Droit de renoncer à l'assistance d'un conseil pendant les interrogatoires, Droit d'obtenir une comparution initiale sans délai – Accusé indigent, Droit à une assistance juridique gratuite, Droit de renoncer au droit à un conseil, Droit d'être jugé rapidement par le Tribunal – Coopération des Etats, Respect des droits de l'Homme de l'accusé, Droit à la liberté et à la sécurité de sa personne, Principe de la répartition des tâches au plan international en matière de poursuite d'auteurs de crimes, Durée de la période de détention provisoire du suspect – Obligation de diligence faite au Procureur, Obligation faite au Procureur de déterminer la nature disculpatoire des preuves – Droit international coutumier – Haut Commissariat des Nations Unies aux Réfugiés – Interpré-

edy for violation of fundamental rights of the accused – Reduction of the life-imprisonment to 45 years of imprisonment

International and National Instruments cited :

Directive on the Assignment of Defence Counsel; Practice Direction on Formal Requirements for Appeals from Judgement; Rules of Procedure and Evidence, rules 2, 2 (A), 40, 40 (A) (i), 40 (A) (iii), 40 bis, 40 bis (A), 40 bis (B), 40 bis (D), 40 bis (E), 42, 42 (B), 44 bis (D), 45 47, 47 (H) (ii), 62, 62 (A) (i), 68, 89, 90 (G), 90 (G) (iii), 92 bis, 92 bis (A), 101, 101 (B) (i), 101 (D), 103 (B), 107, 111, 115 and 119; Statute, art. 1, 6 (1), 6 (3), 7, 9 (3), 17, 19 (1), 19 (3), 20 (4) (d), 23, 24, 28, 28 (1) and 28 (2) (d); ICTY Statute, art. 7 (1) and 7 (3)

International Covenant on Civil and Political Rights, art. 2 (3) (a), 9, 9 (1), 9 (2), 9 (3), 14 (3) (a) and 14 (3) (d)

African Charter on Human and Peoples' Rights, Art. 6, 7 (1), 7 (3), 7 (4), 7 (5) and 8 (2) (d)

European Convention on Human Rights, art. 5 (1) (c), 5 (2), 5 (3), 6 (3) (a) and 6 (3) (c)

American Convention on Human Rights

U.N. Security Council Resolution 955

Standard Minimum Rules for the Treatment of Prisoners, art. 92

U.N. Human Rights Commission Resolutions 1998/38

U.N. Human Rights Committee, General Comment No. 8

Art. 104 (4) of the German Constitution (the "Grundgesetz")

Vienna Convention on Consular Relations, art. 36 (b)

Article 18 (4) of the Benin Constitution

International Case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Judgement, 3 November 1999 (ICTR-97-19); Appeals Chamber, The Prosecutor v. Omar Serushago, Sentencing Appeal Judgement, 14 February 2000 (ICTR-98-39); Appeals Chamber,

tation des Règles de procédure et de preuve – Dénier de justice – Motivation de la Chambre de première instance – Rôle de la Chambre d'appel – Sentence, Grille générale des peines d'emprisonnement appliquée par les tribunaux rwandais, Gravité des infractions et l'ensemble du comportement de leur auteur, Situation personnelle de l'accusé, Circonstances atténuantes, Circonstances aggravantes, Temps passé en détention avant le transfert au Tribunal, Obligation d'individualiser les peines, Réparation de la violation des droits fondamentaux de l'accusé – Réduction de la peine d'emprisonnement à vie en une peine de 45 ans d'emprisonnement

Instruments internationaux et nationaux cités :

Directive relative à la commission d'office de conseil de la Défense; Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement; Règlement de procédure et de preuve, art. 2, 2 (A), 40, 40 (A) (i), 40 (A) (iii), 40 bis, 40 bis (A), 40 bis (B), 40 bis (D), 40 bis (E), 42, 42 (B), 44 bis (D), 45, 47, 47 (H) (ii), 62, 62 (A) (i), 68, 89, 90 (G), 90 (G) (iii), 92 bis, 92 bis (A), 101, 101 (B) (i), 101 (D), 103 (B), 107, 111, 115 and 119; Statut, art. 1, 6 (1), 6 (3), 7, 9 (3), 17, 19 (1), 19 (3), 20 (4) (d), 23, 24, 28, 28 (1), 28 (2) (d); Statut du T.P.I.Y., art. 7 (1), 7 (3)

Pacte international des droits civils et politiques, art. 2 (3) (a), 9, 9 (1), 9 (2), 9 (3), 14 (3) (a), 14 (3) (d)

Charte africaine des droits de l'Homme et des peuples, Art. 6, 7 (1), 7 (3), 7 (4), 7 (5), 8 (2) (d)

Comité des droits de l'homme des Nations Unies, Observation générale n° 8

Convention de Vienne sur les relations consulaires, art. 36 (b)

Convention européenne des droits de l'Homme, art. 5 (1) (c), 5 (2), 5 (3), 6 (3) (a), 6 (3) (c)

Convention interaméricaine des droits de l'Homme

Ensemble des règles minima pour le traitement des détenus, art. 92

Résolution 955 du Conseil de Sécurité des Nations Unies

Résolutions de la Commission des droits de l'homme des Nations Unies 1998/38

Art. 104 (4) de la Constitution Allemande (la "Grundgesetz")

Art. 18 (4) de la Constitution du Bénin

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Jean Bosco Barayagwiza, Arrêt, 3 novembre 1999 (ICTR-97-19); Chambre d'appel, Le Procureur c. Omar Serushago, Jugement (Appel de la sentence), 14 février 2000 (ICTR-98-39); Chambre d'appel, Le

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- A. *Décision énonçant que l'article 68 du Règlement n'oblige le Procureur qu'à communiquer les éléments de preuve se trouvant sous sa garde et sous son contrôle*
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- A. *Appel de la sentence (vingt-cinquième moyen d'appel)*
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 - 2. Défaut de porter à l'actif de l'appelant l'hébergement de civils tutsis dans sa maison de Mukingo
 - 3. Défaut présumé d'accorder suffisamment de poids à la déposition du témoin JK 312
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XXIV. DISPOSITION

XXV. ANNEX A – PROCEDURAL BACKGROUND

- A. *Notice of Appeal and Briefs*
- B. *Assignment of Judges*
- C. *Additional Evidence*
- D. *Hearing of the Appeal*

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 seized of an appeal by Juvénal Kajelijeli against the Judgement and Sentence rendered by Trial Chamber II on 1 December 2003 in the case of *The Prosecutor v. Juvénal Kajelijeli* (“Trial Judgement”)¹.

I. INTRODUCTION

A. *The Appellant*

2. The Appellant, Juvénal Kajelijeli, was born on 26 December 1951 in Mukingo Commune, Rwinzovu Sector, Ruhengeri Préfecture, Rwanda². The Appellant was *bourgmestre* of Mukingo Commune from 1988 to 1993 and was re-appointed to that post on 26 June 1994, remaining until mid-July 1994³. As *bourgmestre*, he exercised important responsibilities at the *commune* level: he represented executive power, had authority over civil servants, and could request intervention by *commune* police forces⁴. Furthermore, the Appellant was a leader of the *Interahamwe* with control over the *Interahamwe* in Mukingo Commune, and he had influence over the *Interahamwe* in Nkuli Commune⁵. The Appeals Chamber notes that the Amended Indictment, which forms the basis of the convictions, does not charge the Appellant for the 1994 genocide in Rwanda in its entirety⁶. The Trial Chamber's convictions rather ascribe him criminal responsibility related to selected incidents.

¹For ease of reference, two annexes are appended to this Judgement: Annex A – Procedural Background and Annex B – Cited Materials/Defined Terms.

²Trial Judgement, para. 5.

³Trial Judgement, paras. 6, 739.

⁴Trial Judgement, para. 277.

⁵Trial Judgement, para. 404.

⁶See generally *Kajelijeli*, Amended Indictment, 25 January 2001.

1. Annulation des déclarations fondées sur la responsabilité du supérieur hiérarchique (article 6 (3) du Statut)
2. Conclusions concernant les violations des droits de l'appelant lors de son arrestation et pendant sa détention

XXIV. DISPOSITIF

XXV. ANNEXE A – RAPPEL DE LA PROCÉDURE

- A. *Acte d'appel et mémoires*
- B. *Désignation des juges*
- C. *Moyens de preuve supplémentaires*
- D. *Audition de l'appel*

1. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1^{er} janvier et le 31 décembre 1994 (la «Chambre d'appel» et le «Tribunal», respectivement) est saisie de l'appel de Juvénal Kajelijeli contre le jugement portant condamnation prononcé par la Chambre de première instance II le 1^{er} décembre 2003 en l'affaire *Le Procureur c. Juvénal Kajelijeli* (le «jugement»)¹.

I. INTRODUCTION

A. *L'appelant*

2. L'appelant, Juvénal Kajelijeli, est né le 26 décembre 1951 dans la commune de Mukingo, secteur de Rwinzovu, préfecture de Ruhengeri, au Rwanda². Bourgmestre de la commune de Mukingo de 1988 à 1993, il a été nommé de nouveau le 26 juin 1994 à ce poste qu'il a occupé jusqu'à la mi-juillet 1994³. En sa qualité de bourgmestre, il assumait d'importantes responsabilités au niveau communal : il représentait le pouvoir exécutif, avait autorité sur les fonctionnaires en poste dans sa commune et pouvait réquisitionner la police communale⁴. Il était en outre un des dirigeants des *Interahamwe* : il exerçait son autorité sur ceux de la commune de Mukingo et exerçait aussi une influence sur ceux de la commune de Nkuli⁵. La Chambre d'appel prend acte de ce que l'acte d'accusation modifié, qui fonde les déclarations de culpabilité prononcées, ne retient pas contre l'appelant le génocide perpétré au Rwanda en 1994 dans son ensemble⁶. La Chambre de première instance a plutôt retenu sa responsabilité pénale à raison de certains faits précis.

¹ Toutes fins utiles, deux annexes sont jointes au présent arrêt : l'annexe A – Rappel de la procédure, et l'annexe B – Jurisprudence citée/Définitions et abréviations.

² Jugement, para. 5.

³ *Ibid.*, paras. 6 et 739.

⁴ *Ibid.*, para. 277.

⁵ *Ibid.*, para. 404.

⁶ Voir de façon générale l'acte d'accusation modifié du 25 janvier 2001 établi contre Kajelijeli.

B. *The Judgement and Sentence*

3. The Trial Chamber convicted the Appellant pursuant to Article 6 (1) of the Statute for ordering, instigating, and aiding and abetting crimes, as well as Article 6 (3) for failing to prevent crimes committed in the *communes* of Nkuli, Mukingo, and Kigome, in particular at Byangabo Market, Busogo Hill, the Munyemvano compound and the Ruhengeri Court of Appeal in April 1994⁷. These crimes included genocide (Count 2) and extermination as a crime against humanity (Count 6)⁸. With respect to the events at Byangabo Market, he was further convicted of direct and public incitement to commit genocide pursuant to Article 6 (1) of the Statute (Count 4)⁹. The Trial Chamber found that the Appellant was present at various sites where he directed *Interahamwe* mobs to massacre Tutsis in an effort to rid the Mukingo and Nkuli *Communes* of them¹⁰. He also played an instrumental role in transporting members of the *Interahamwe* militia and providing them with weapons¹¹. This resulted in the deaths of more than 300 people¹². The Trial Chamber sentenced the Appellant to imprisonment for the remainder of his life for the convictions on each of Counts 2 and 6, and to imprisonment for fifteen years for his conviction on Count 4, with all sentences to run concurrently, and with credit for time served¹³.

C. *The Appeal*

4. As indicated in the Appellant's Amended Notice of Appeal ("Amended Notice of Appeal") and his Brief on Appeal ("Appellant's Brief"), the Appellant is appealing against the convictions, the sentence, and the Trial Chamber's denial of three of his motions. He requests the Appeals Chamber to overturn the verdicts on Counts 2, 4, and 6 and release him, or, in the alternative, to order a retrial and release him on bail, or, in the alternative, to quash the sentence of imprisonment for life and replace it with a determinate sentence¹⁴. The Appellant has divided his grounds of appeal into four categories: errors of law, errors of fact, denial of motions, and appeal against the sentence. Within these categories, the Appeals Chamber has identified twenty-five grounds of appeal. All grounds of the appeal are reviewed and considered in the present Judgement.

D. *Standards for Appellate Review*

5. The Appeals Chamber recalls some of the requisite standards for appellate review pursuant to Article 24 of the Statute. This provision addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice. It is settled jurisprudence in the Appeals Chamber of the ICTR and the ICTY that:

⁷ Trial Judgement, paras. 817-845, 896-907.

⁸ Trial Judgement, para. 942.

⁹ Trial Judgement, paras. 856-861, 942.

¹⁰ See, e.g., Trial Judgement, paras. 832, 988.

¹¹ See, e.g., Trial Judgement, paras. 824, 834.

¹² See Trial Judgement, paras. 822, 824, 834.

¹³ Trial Judgement, paras. 968, 969.

¹⁴ Amended Notice of Appeal, p. 28; Appellant's Brief, p. 5.

B. Le jugement portant condamnation

3. La Chambre de première instance a condamné l'appelant en vertu, d'une part, de l'article 6 (1) du Statut pour avoir ordonné, incité à commettre ainsi qu'aidé et encouragé à commettre des crimes et, d'autre part, de l'article 6 (3) du Statut pour ne pas avoir empêché les crimes commis dans les communes de Nkuli, Mukingo et Kigome, en particulier au marché de Byangabo, sur la colline de Busogo, dans la concession de Munyemvano et à la cour d'appel de Ruhengeri en avril 1994⁷. Au nombre de ces crimes figuraient le génocide (chef d'accusation 2) et l'extermination constitutive de crime contre l'humanité (chef d'accusation 6)⁸. Relativement aux faits survenus au marché de Byangabo, il a été en outre déclaré coupable d'incitation directe et publique à commettre le génocide en application de l'article 6 (1) du Statut (chef d'accusation 4)⁹. La Chambre de première instance a constaté que l'appelant était présent à différents endroits où il avait ordonné à des groupes d'*Interahamwe* de massacrer des Tutsis en vue d'en débarrasser les communes de Mukingo et de Nkuli¹⁰. Il a également joué un rôle essentiel en assurant le transport de miliciens *Interahamwe* et en leur fournissant des armes¹¹. Plus de 300 personnes ont ainsi perdu la vie¹². La Chambre de première instance a condamné l'appelant à une peine d'emprisonnement à vie au titre de chacun des chefs 2 et 6 et à une peine d'emprisonnement de quinze ans au titre du chef 4, la confusion des peines étant prononcée et la durée de la période passée en détention devant être déduite¹³.

C. L'appel

4. Ainsi qu'il est indiqué dans l'acte d'appel modifié de l'appelant (l'«acte d'appel modifié») et dans son mémoire d'appel, l'appelant interjette appel des déclarations de culpabilité et de la peine prononcée ainsi que du rejet de trois de ses requêtes par la Chambre de première instance. Il prie la Chambre d'appel d'annuler les condamnations prononcées au titre des chefs 2, 4 et 6 et de le remettre en liberté ou, subsidiairement, d'ordonner la tenue d'un nouveau procès et de le libérer sous caution, ou, plus subsidiairement, d'annuler la peine d'emprisonnement à vie et de lui substituer une peine à durée déterminée¹⁴. L'appelant a articulé ses moyens d'appel en quatre catégories : erreurs de droit, erreurs de fait, rejet de requêtes et appel de la peine prononcée. Au sein de ces catégories, la Chambre d'appel a recensé 25 moyens d'appel qui sont tous examinés dans le présent arrêt.

D. Critères d'examen en appel

5. La Chambre d'appel rappelle certains des critères applicables à l'examen en appel au sens de l'article 24 du Statut. Cette disposition vise les erreurs sur un point de droit qui invalident la décision et les erreurs de fait qui ont entraîné un déni de justice. Selon la jurisprudence constante de la Chambre d'appel du TPIR et du TPIY,

⁷ Jugement, paras. 817 à 845 et 896 à 907.

⁸ *Ibid.*, para. 942.

⁹ *Ibid.*, paras. 856 à 861 et 942.

¹⁰ Voir par exemple jugement, paras. 832 et 988.

¹¹ *Ibid.*, paras. 824 et 834.

¹² Voir jugement, paras. 822, 824 et 834.

¹³ Jugement, paras. 968 et 969.

¹⁴ Acte d'appel modifié, p. 28; mémoire de l'appelant, p. 5.

A party alleging that there is an error of law must advance arguments in support of the contention and explain how the error invalidates the decision; but, if the 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 law¹⁵.

As regards 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”¹⁶.

6. A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber’s rejection of them constituted such error as to warrant the intervention of the Appeals Chamber¹⁷. Arguments of a party 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 merits¹⁸.

7. In order for the Appeals Chamber to assess a party’s arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenges are being made¹⁹. Further,

“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”²⁰.

8. Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.²¹ Furthermore, the Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning²².

¹⁵ *Vasiljević* Appeal Judgement, para. 6 (internal citations omitted). See also, *e.g.*, *Blaškić* Appeal Judgement, para. 14; *Niyitegeka* Appeal Judgement, para. 7; *Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.

¹⁶ *Krstić* Appeal Judgement, para. 40 (internal citations omitted). See also, *e.g.*, *Blaškić* Appeal Judgement, paras. 16-19; *Niyitegeka* Appeal Judgement, para. 8.

¹⁷ *Niyitegeka* Appeal Judgement, para. 9.

¹⁸ *Niyitegeka* Appeal Judgement, para. 9. See also, *e.g.*, *Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.

¹⁹ Practice Direction on Formal Requirements for Appeals from Judgement, para. 4 (b). See also *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Vasiljević* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

²⁰ *Vasiljević* Appeal Judgement, para. 12. See also *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al.* Appeal Judgement, paras. 43, 48.

²¹ *Niyitegeka* Appeal Judgement, para. 11. See also, *e.g.*, *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, para. 47.

²² *Niyitegeka* Appeal Judgement, para. 11. See also, *e.g.*, *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 12; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, para. 48.

[u]ne partie qui relève une erreur de droit doit présenter des arguments à l'appui de ses allégations et expliquer en quoi l'erreur invalide la décision; cependant, même si ses arguments se révèlent insuffisants, son recours n'est pas automatiquement rejeté car la Chambre d'appel peut intervenir et juger, pour d'autres raisons, qu'il y a erreur de droit¹⁵.

S'agissant des erreurs de fait, il est de jurisprudence constante que la Chambre d'appel se gardera d'infirmer à la légère les constatations opérées par une Chambre de première instance.

«Lorsque la Défense allègue que la Chambre de première instance a commis une erreur de fait, la Chambre d'appel doit faire crédit à la Chambre de première instance pour l'appréciation qu'elle a portée sur les éléments de preuve présentés au procès. Elle n'infirmera les constatations de la Chambre de première instance que lorsqu'aucun juge du fait n'aurait raisonnablement pu parvenir à la même conclusion ou lorsque celle-ci est totalement erronée. En outre, la constatation erronée sera infirmée ou réformée uniquement s'il en est résulté une erreur judiciaire»¹⁶.

6. Une partie ne saurait se contenter de répéter en appel des arguments ayant échoué en première instance, à moins de démontrer que leur rejet a entraîné une erreur telle qu'elle justifie l'intervention de la Chambre d'appel¹⁷. La Chambre d'appel peut d'emblée rejeter, sans avoir à les examiner sur le fond, les arguments présentés par une partie qui n'ont aucune chance d'aboutir à l'annulation ou à la révision de la décision contestée¹⁸.

7. Afin de permettre à la Chambre d'appel d'apprécier les arguments qu'elle invoque en appel, la partie appelante doit fournir les références précises renvoyant aux pages pertinentes du compte rendu d'audience ou aux paragraphes du jugement contesté¹⁹. En outre,

«on ne saurait s'attendre à ce que la Chambre d'appel examine en détail les conclusions des parties si elles sont obscures, contradictoires ou vagues, ou si elles sont entachées d'autres vices de forme flagrants»²⁰.

8. Il convient enfin de rappeler que la Chambre d'appel dispose du pouvoir discrétionnaire qui est le sien de ne retenir que les arguments qui méritent une réponse motivée par écrit²¹. Elle rejettera en outre sans motivation détaillée les arguments qui sont manifestement mal fondés²².

¹⁵ Arrêt *Vasiljević*, para. 6 (notes de bas de page omises). Voir aussi par exemple arrêt *Blaškić*, para. 14; arrêt *Niyitegeka*, para. 7; arrêt *Rutaganda*, para. 20; arrêt *Musema*, para. 16.

¹⁶ Arrêt *Krstić*, para. 40 (notes de bas de page omises). Voir aussi par exemple arrêt *Blaškić*, paras. 16 à 19; arrêt *Niyitegeka*, para. 8.

¹⁷ Arrêt *Niyitegeka*, para. 9.

¹⁸ *Id.* Voir aussi par exemple arrêt *Blaškić*, para. 13; arrêt *Rutaganda*, para. 18.

¹⁹ Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, para. 4 b). Voir aussi arrêt *Blaškić*, para. 13; arrêt *Niyitegeka*, para. 10; arrêt *Vasiljević*, para. 11; arrêt *Rutaganda*, para. 19; arrêt *Kayishema et Ruzindana*, para. 137.

²⁰ Arrêt *Vasiljević*, para. 12. Voir aussi arrêt *Blaškić*, para. 13; arrêt *Niyitegeka*, para. 10; arrêt *Kunarac et consorts*, paras. 43 et 48.

²¹ Arrêt *Niyitegeka*, para. 11. Voir aussi par exemple arrêt *Rutaganda*, para. 19; arrêt *Kunarac et consorts*, para. 47.

²² Arrêt *Niyitegeka*, para. 11. Voir aussi par exemple arrêt *Blaškić*, para. 13; arrêt *Vasiljević*, para. 12; arrêt *Rutaganda*, para. 19; arrêt *Kunarac et consorts*, para. 48.

II. ALLEGED INCORRECT APPLICATION OF LAW
TO THE FACTS OF THE CASE (GROUND OF APPEAL 4)

9. Under this ground of appeal, the Appellant alleges distinct errors relating to (i) the impact of trauma on the testimony of witnesses, (ii) use of different standards in the assessment of evidence, and (iii) misapplication of Rule 90 (G) of the Tribunal's Rules of Procedure and Evidence ("Rules"). The Appeals Chamber considers each of these sub-grounds in turn.

A. Impact of Trauma

10. The Appellant submits that the Trial Chamber erred as a matter of law in accepting that the impact of trauma could explain "inconsistent witness statements, conflicts, contradictions and gaps in memory" of Prosecution witnesses upon whose testimony the Trial Chamber relied in its Judgement²³. The Appellant concedes that some Prosecution witnesses who were victims or witnesses of atrocities may have experienced trauma in recollecting such events and that their evidence may have been affected by this trauma²⁴. The Appellant argues, however, that none of the Prosecution witnesses upon whose testimony the Trial Chamber based its findings falls into this witness category and that, consequently, the impact of trauma cannot account for their inconsistent evidence²⁵.

11. The Prosecution responds that the Trial Chamber was entitled to take the impact of trauma into account when assessing the reliability of Prosecution witnesses, and observes that the impugned passage from the Trial Judgement appears in a general section addressing matters of credibility²⁶.

12. In making his submission on this point, the Appellant points to paragraph 37 of the Trial Judgement²⁷. The impugned text reads as follows :

The Chamber notes that many of the witnesses who have testified before it have seen and experienced atrocities. They, their relatives or their friends have in several cases, been the victims of such atrocities. The Chamber notes that recounting and revisiting such painful experiences is likely to affect the witness's ability to recount the relevant events in a judicial context. The Chamber also notes that some of the witnesses who testified before it may have suffered – and may have still continued to suffer – stress-related disorders²⁸.

13. The Appeals Chamber considers that there is no error in the Trial Chamber's statements regarding the impact of trauma. First, despite the Appellant's suggestion, it was clearly proper for the Trial Chamber to address the issue of trauma in the first place : many of the witnesses on both sides had, for instance, directly observed atroc-

²³ Amended Notice of Appeal, para. 11; Appellant's Brief, paras. 61, 62.

²⁴ Appellant's Brief, para. 62.

²⁵ Appellant's Brief, para. 62.

²⁶ Respondent's Brief, para. 76.

²⁷ See Amended Notice of Appeal, para. 11; Appellant's Brief, para. 61.

²⁸ Trial Judgement, para. 37.

II. APPLICATION ERRONÉE DU DROIT AUX FAITS DE LA CAUSE (QUATRIÈME MOYEN D'APPEL)

9. Dans le cadre de ce moyen d'appel, l'appelant allègue l'existence de différentes erreurs ayant trait à (i) l'impact des traumatismes sur les dépositions de témoins; (ii) l'application de critères différents à l'appréciation des éléments de preuve; et (iii) l'application erronée de l'article 90 (G) du Règlement de procédure et de preuve du Tribunal (le «Règlement»). La Chambre d'appel examinera chacune des branches de ce moyen d'appel.

A. Impact des traumatismes

10. L'appelant fait valoir que la Chambre de première instance a commis une erreur de droit en tenant pour acquis que l'impact du traumatisme pouvait expliquer «les incohérences dans les déclarations de témoin, les divergences, les contradictions et les oublis» relevés dans les dépositions de témoins à charge sur lesquels se fonde le jugement²³. L'appelant convient que certains témoins à charge qui ont été victimes ou témoins oculaires d'atrocités ont pu subir un traumatisme en se les remémorant et que leur déposition a pu s'en ressentir²⁴. Il soutient cependant qu'aucun des témoins à charge sur la déposition desquels la Chambre de première instance a fait fond pour dégager ses conclusions n'entraîne dans cette catégorie et que, partant, l'impact du traumatisme ne peut expliquer les contradictions dont sont entachés leurs témoignages²⁵.

11. Le Procureur réplique que la Chambre de première instance était en droit de tenir compte de l'impact du traumatisme pour apprécier la fiabilité des témoins à charge et fait remarquer que le passage incriminé du jugement apparaît dans une section générale traitant des questions de crédibilité²⁶.

12. L'appelant attire l'attention sur le paragraphe 37 du jugement²⁷ qui dit ce qui suit :

La Chambre relève que nombre de témoins qui ont comparu devant elle avaient vu et enduré des atrocités. Dans plusieurs cas, des membres de leur famille, certains de leurs amis ou eux-mêmes en avaient été victimes. Il est à noter que le récit et l'évocation de ces expériences douloureuses sont susceptibles de retentir sur l'aptitude du témoin à relater les faits dans un prétoire. La Chambre relève également que certains témoins qu'elle a entendus ont peut-être souffert – et continuent sans doute de souffrir – de troubles psychologiques²⁸.

13. La Chambre d'appel estime que la Chambre de première instance n'a pas commis d'erreur dans les passages qu'elle a consacrés à l'impact du traumatisme. En premier lieu, malgré ce que laisse entendre l'appelant, il était manifestement approprié pour celle-ci d'aborder directement la question du traumatisme : nombre de personnes

²³ Acte d'appel modifié, para. 11; mémoire de l'appelant, paras. 61 et 62.

²⁴ Mémoire de l'appelant, para. 62.

²⁵ *Id.*

²⁶ Mémoire de l'intimé, para. 76.

²⁷ Voir acte d'appel modifié, para. 11; mémoire de l'appelant, para. 61.

²⁸ Jugement, para. 37.

ities, and others had been victims²⁹. Indeed, several Defence witnesses specifically testified that they were traumatized (and this alone would justify the Trial Chamber's discussion, even if the Prosecution witnesses had not also suffered trauma)³⁰. Second, the Trial Chamber's commentary on this issue consists principally of direct quotations from the ICTY Appeals Chamber's Judgements in the *Kupreškic* and *Celebici* cases, which held that the Trial Chamber should take the likely distorting effects of trauma into account when considering witness testimony; that the Trial Chamber is free nonetheless to accept the fundamental features of testimony despite the impact of trauma; and that trauma may sometimes explain minor inconsistencies in testimony without necessarily impugning the credibility of the testimony as to the major events that occurred³¹. These principles are sound, and the Trial Chamber was correct to cite them.

*B. Alleged Use of Different Standards
in the Assessment of Evidence*

14. The Appellant submits that the Trial Chamber erred in law when it based its Judgement "in whole" upon

"the inconsistent testimony of murderers, thieves, and embezzlers, most of whom had been sanctioned by or arrested and detained by the Appellant"

while "discrediting" the Appellant's alibi evidence on the ground that the Defence witnesses were biased in favour of the Appellant³². The Appellant argues that this demonstrates the Trial Chamber's application of a "double standard" in evaluating the evidence³³.

15. The Appellant highlights that six Prosecution witnesses³⁴ upon whose evidence, in his view, the Judgement is based have been sanctioned or arrested by him and argues that they would "likely bear a grudge" against him and, therefore, that they were "likely to testify falsely"³⁵. The Appellant disputes the Trial Chamber's holding that it could not find any link between the criminal conduct of the witnesses, his role in sanctioning them, and any reason why the witnesses would bear a grudge against him or wish to testify against him falsely³⁶.

²⁹ See, e.g., Trial Judgement, paras. 498-508 (witnesses from both sides testifying regarding the murder of Rukara); 652-655, 662-665 (testimonies of rape victims).

³⁰ Trial Judgement, paras. 542, 580, 589.

³¹ See Trial Judgement, paras. 37-40.

³² Amended Notice of Appeal, paras. 12-17; Appellant's Brief, paras. 63-79.

³³ Appellant's Brief, para. 79.

³⁴ The Appellant does not identify who these six witnesses are (see Appellant's Brief, para. 64), but he does name the following seven Prosecution witnesses as "common criminals most of whom the Appellant himself had sanctioned or arrested and imprisoned": GBV, GBE, GBH, GAO, GDD, GDQ, GAP. See Appellant's Brief, para. 63 n. 3.

³⁵ Appellant's Brief, para. 79.

³⁶ Amended Notice of Appeal, para. 13; Appellant's Brief, para. 65.

qui ont comparu devant elle, tant à charge qu'à décharge, ont été les témoins directs d'atrocités tandis que d'autres en ont été les victimes²⁹. Plusieurs témoins à décharge ont d'ailleurs expressément affirmé avoir été traumatisés (et ce fait, à lui seul, justifierait l'examen de la question par la Chambre de première instance, même si les témoins à charge n'avaient pas subi, eux, de traumatisme)³⁰. En deuxième lieu, les observations de la Chambre de première instance sur ce point consistent essentiellement en des citations directes extraites des arrêts *Kupreškic* et *Celebici* de la Chambre d'appel du TPIY qui a estimé que la Chambre de première instance devait tenir compte, lorsqu'elle examine la déposition d'un témoin, du fait que le traumatisme que celui-ci a subi est susceptible de fausser sa perception des événements, que celle-ci pouvait néanmoins admettre les principaux éléments de la déposition malgré l'impact du traumatisme et que celui-ci peut parfois expliquer les contradictions mineures constatées dans la déposition sans que celle-ci se voie nécessairement remise en cause pour ce qui est des faits principaux qui se sont produits³¹. Ces principes sont bien fondés et c'est à juste titre que la Chambre de première instance les a cités.

*B. Recours à des normes différentes
pour apprécier les éléments de preuve*

14. L'appelant fait valoir que la Chambre de première instance a commis une erreur de droit lorsqu'elle a fondé «en totalité» son jugement sur

«les dépositions contradictoires de meurtriers, de voleurs, d'escrocs qui, pour la plupart, avaient été sanctionnés ou arrêtés et placés en détention par l'appelant»

tout en «mettant en doute» les éléments de preuve relatifs à l'alibi de l'appelant au motif que les témoins à décharge ont fait montre de parti pris en faveur de celui-ci³². L'appelant soutient que cela démontre que la Chambre a appliqué la règle du «deux poids, deux mesures» dans l'appréciation des moyens de preuve³³.

15. L'appelant souligne que six témoins à charge³⁴ sur les dires desquels la Chambre de première instance a fondé son jugement avaient été sanctionnés ou arrêtés et placés en détention par lui et affirme qu'ils «lui en voulaient probablement» et qu'ils «feraient sans doute un faux témoignage»³⁵. L'appelant conteste la conclusion de la Chambre de première instance selon laquelle celle-ci n'a pu établir de lien entre le comportement criminel des témoins à charge, les sanctions qu'il a prises à leur égard et tout motif qui ferait qu'ils lui en veulent ou voudraient faire un faux témoignage contre lui³⁶.

²⁹ Voir par exemple jugement, paras. 498 à 508 (dépositions des témoins des deux parties au sujet du meurtre de Rukara); 652 à 655 et 662 à 665 (dépositions de victimes de viol).

³⁰ Jugement, paras. 542, 580 et 589.

³¹ Voir jugement, paras. 37 à 40.

³² Acte d'appel modifié, paras. 12 à 17; mémoire de l'appelant, paras. 63 à 79.

³³ Mémoire de l'appelant, para. 79.

³⁴ L'appelant n'identifie pas ces six témoins (voir mémoire de l'appelant, para. 64), mais il cite nommément les sept témoins à charge ci-après qu'il qualifie de «criminels de droit commun dont la plupart avaient été sanctionnés ou arrêtés et emprisonnés par l'appelant lui-même»: GBV, GBE, GBH, GAO, GDD, GDQ et GAP. Voir mémoire de l'appelant, para. 63, note 3.

³⁵ Mémoire de l'appelant, para. 79.

³⁶ Acte d'appel modifié, para. 13; mémoire de l'appelant, para. 65.

16. Conversely, the Appellant notes, the Trial Chamber “chose to discredit” his alibi witnesses, Defence Witnesses LMR 1 and JK 312, because he was a close relative of one and had saved the life of the other³⁷.

17. The Prosecution responds that it was the Trial Chamber’s responsibility to weigh the evidence and choose between divergent testimonies and that, by raising the present issue, the Appellant is merely attempting to reargue his case before the Appeals Chamber³⁸. The Prosecution highlights that the Trial Chamber considered the matter of bias of witnesses and provided careful reasons for its assessment of witnesses’ credibility³⁹.

18. A review of the Trial Chamber’s assessment of the credibility of Prosecution witnesses reveals that the Chamber was alert to the issue of a possible bias of the witnesses against the Appellant and that it considered it in the overall assessment of their credibility⁴⁰. The Appeals Chamber also recalls that having considered the allegations of the witnesses’ bias, the Trial Chamber decided to treat the testimony of one of them, Witness GBV, with caution⁴¹. The bare allegation that a witness is a “common criminal” who is biased against the Appellant because the Appellant arrested or sanctioned the person for his alleged misdeeds does not, in itself, diminish the creditworthiness of the witness’s testimony. In the view of the Appeals Chamber, the Appellant’s submissions under the present ground of appeal do not show that the Trial Chamber erred in the assessment of the credibility of the witnesses alleged by the Appellant to be biased against him.

19. Furthermore, the Appellant’s argument that the Trial Chamber “discredited” his alibi evidence because Defence witnesses were biased in his favour is based upon a misconstruction of the Trial Chamber’s findings. The Appellant alleges that the Trial Chamber did not find Defence Witness JK 312 credible, “in the main part”, because the Appellant had once saved his life⁴². However, a review of the relevant portion of the Trial Judgement reveals that the Trial Chamber found the testimony of Witness JK 312 not credible as regards the alibi on grounds of the external and internal inconsistency of his testimony as well as his demeanour during testimony; the fact that the Appellant once saved the witness was mentioned only as a “final point” in the detailed analysis of his testimony by the Trial Chamber⁴³. As regards the Appellant’s argument concerning Defence Witness LMR 1, the Appeals Chamber observes that while the Trial Chamber noted the close relationship between Witness LMR 1 and the Appellant, it did not reject the witness’s testimony on this ground, but, rather, found that its scope was insufficient to preclude the Appellant’s involvement in the alleged criminal acts⁴⁴.

³⁷ Amended Notice of Appeal, para. 15; Appellant’s Brief, paras. 67, 79.

³⁸ Respondent’s Brief, para. 77.

³⁹ See Respondent’s Brief, para. 77, n. 32.

⁴⁰ See, e.g., Trial Judgement, paras. 146-156.

⁴¹ See Trial Judgement, para. 147.

⁴² Amended Notice of Appeal, para. 15.

⁴³ See Trial Judgement, para. 223; see also detailed discussion of Witness JK 312’s credibility *infra* Chapter V.

⁴⁴ See Trial Judgement, paras. 224, 227. Nevertheless, the Trial Chamber stated that it will consider “the full evidence adduced in relation to the alibi when making its findings”. *Id.*, para. 231.

16. L'appelant fait par contre observer que la Chambre «a choisi de mettre en doute» les dépositions des témoins appuyant son alibi, LMR 1 et JK 312, au motif qu'il était un parent proche de l'un et avait sauvé la vie de l'autre³⁷.

17. Le Procureur réplique qu'il appartenait à la Chambre de première instance d'apprécier les éléments de preuve et de choisir entre des dépositions divergentes et qu'en soulevant la présente question, l'appelant tente simplement de plaider de nouveau sa cause devant la Chambre d'appel³⁸. Le Procureur souligne que la Chambre de première instance a examiné la question du parti pris des témoins et a soigneusement motivé l'appréciation qu'elle a faite de leur crédibilité³⁹.

18. Il ressort de l'appréciation qu'elle a faite de la crédibilité des témoins à charge que la Chambre de première instance avait conscience de la possibilité d'un parti pris de ceux-ci à l'encontre de l'appelant et qu'elle en a tenu compte dans son appréciation globale de leur crédibilité⁴⁰. La Chambre d'appel rappelle également qu'après avoir examiné les allégations de partis pris des témoins, la Chambre de première instance a décidé de traiter avec prudence la déposition de l'un d'eux, le témoin GBV⁴¹. La simple allégation qu'un témoin est un «criminel de droit commun» qui serait prévenu à l'encontre de l'appelant parce que celui-ci l'avait fait arrêter ou l'avait sanctionné pour les méfaits qu'il a commis n'entame pas en soi la crédibilité de sa déposition. De l'avis de la Chambre d'appel, il ne ressort pas de l'argumentation que développe l'appelant dans le cadre de ce moyen d'appel que la Chambre de première instance a versé dans l'erreur dans son appréciation de la crédibilité des témoins qui, selon l'appelant, auraient fait preuve de parti pris à son encontre.

19. Au surplus, l'argument de l'appelant reprochant à la Chambre de première instance d'avoir «mis en doute» les éléments de preuve à l'appui de son alibi parce que les témoins à décharge faisaient montre d'un parti pris en sa faveur est fondé sur une interprétation erronée des conclusions de la Chambre. L'appelant allègue que la Chambre n'a pas jugé crédible le témoin à décharge JK 312 «en grande partie» parce qu'il lui avait précédemment sauvé la vie⁴². Toutefois, il ressort du passage pertinent du jugement que la Chambre de première instance n'a pas jugé crédible la déposition du témoin JK312 en ce qui concerne l'alibi motif pris des contradictions externes et internes de ses propos, de même que de son comportement à la barre; le fait que l'appelant avait une fois sauvé la vie au témoin n'a été mentionné que comme «point final» de l'analyse détaillée de sa déposition par la Chambre⁴³. S'agissant de l'argument de l'appelant concernant le témoin à décharge LMR 1, la Chambre d'appel fait observer que si la Chambre de première instance a pris acte des rapports étroits qui liaient le témoin LMR 1 à l'appelant, elle n'a cependant pas rejeté la déposition du témoin pour ce motif, mais a plutôt estimé qu'elle ne suffisait pas à écarter la participation de l'appelant aux actes criminels allégués⁴⁴.

³⁷ Acte d'appel modifié, para. 15; mémoire de l'appelant, paras. 67 et 79.

³⁸ Mémoire de l'intimé, para. 77.

³⁹ Voir mémoire de l'intimé, para. 77, note 32.

⁴⁰ Voir par exemple jugement, paras. 146 à 156.

⁴¹ Voir jugement, para. 147.

⁴² Acte d'appel modifié, para. 15.

⁴³ Voir jugement, para. 223; voir également l'examen approfondi de la crédibilité du témoin JK312, *infra*, chapitre V.

⁴⁴ Voir jugement, paras. 224 et 227. Néanmoins, la Chambre de première instance a déclaré qu'elle examinerait «l'ensemble des éléments de preuve produits relativement à l'alibi» (para. 231).

20. Finally, in his Appellant's Brief, the Appellant also argues that the Trial Chamber's findings with respect to the credibility of Defence Witnesses MEM and RGM are "other examples of its application of a double standard" in evaluating Defence evidence in the Trial Judgement⁴⁵. Having considered the Appellant's arguments on this point as well as the relevant portions of the record, the Appeals Chamber does not consider the Trial Chamber's assessment of the credibility of these two witnesses as shedding any light on the allegation of a double standard in the Trial Chamber's evaluation of Defence evidence.

21. Accordingly, the appeal under this sub-ground is dismissed.

C. Alleged Misapplication of Rule 90 (G) of the Rules

22. Lastly under this ground of appeal, the Appellant submits that the Trial Chamber erred in law in dismissing his attack on the credibility of Prosecution witnesses, particularly Witnesses GBV, GBE, GAO, GAS, and GAP, on the basis that the Appellant did not confront the witnesses with the allegations of a motive to give false testimony.⁴⁶ The Appellant charges that the Trial Chamber "misapplied this requirement from Rule 90 (G)" of the Rules as amended on 27 May 2003 which stipulates, *inter alia*, the following :

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness⁴⁷.

23. The Appellant alleges that in holding him to such a standard the Trial Chamber committed a legal error because this standard only came into force after the close of his trial. The Appellant recalls that during his trial Rule 90 (G) of the Rules merely provided, in relevant part, that

"[c]ross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness"⁴⁸.

Therefore, the Appellant argues, he was under no obligation to put to the witnesses the allegations of a motive to give false testimony⁴⁹.

24. The Prosecution responds that the Trial Chamber did not hold the Appellant to the standard prescribed in Rule 90 (G) (ii) as amended after the close of the Appellant's trial⁵⁰. Rather, the Prosecution submits, the Trial Chamber applied a measure of fairness and common sense⁵¹. In the view of the Prosecution, it is unfair to a witness to make allegations to discredit him or her without putting those allegations to the witness for a response⁵². Moreover, the Prosecution submits that a Trial Chamber

⁴⁵ Trial Judgement, para. 70.

⁴⁶ Amended Notice of Appeal, para. 18; Appellant's Brief, paras. 80-93.

⁴⁷ Appellant's Brief, para. 87.

⁴⁸ Appellant's Brief, para. 90.

⁴⁹ Appellant's Brief, para. 92.

⁵⁰ Respondent's Brief, para. 78.

⁵¹ Respondent's Brief, para. 78.

⁵² Respondent's Brief, para. 79.

20. Finalement, dans son mémoire, l'appelant soutient aussi que les conclusions de la Chambre de première instance concernant la crédibilité des témoins à décharge MEM et RGM constituaient «d'autres exemples de l'application qu'elle a faite de la règle du deux poids deux mesures» dans l'appréciation des témoignages à décharge dans le jugement⁴⁵. Après avoir examiné les arguments de l'appelant sur ce point ainsi que les passages pertinents du dossier, la Chambre d'appel ne considère pas que l'appréciation que la Chambre de première instance a faite de la crédibilité de ces deux témoins conforte tant soit peu le grief fait à la Chambre de première instance d'avoir pratiqué le deux poids deux mesures dans l'appréciation des témoignages à décharge.

21. En conséquence, cette branche du moyen d'appel est rejetée.

C. Application erronée de l'article 90 (G) du Règlement

22. Enfin, toujours dans le cadre de ce moyen d'appel, l'appelant fait valoir que la Chambre de première instance a commis une erreur de droit en rejetant sa remise en cause de la crédibilité de certains témoins à charge, en particulier les témoins GBV, GBE, GAO, GAS et GAP, motif pris de ce qu'il n'avait pas fait état devant ceux-ci des raisons qu'ils avaient de faire un faux témoignage contre lui⁴⁶. L'appelant soutient que la Chambre «a mal appliqué l'article 90 (G) du Règlement», tel que modifié le 27 mai 2003, qui prévoit notamment ce qui suit :

ii) Lorsqu'une partie procède au contre-interrogatoire d'un témoin qui est en mesure de déposer sur un point portant sur la cause quelle défend, elle doit le confronter aux éléments dont elle dispose qui contredisent les dépositions dudit témoin⁴⁷.

23. L'appelant allègue qu'en lui imposant cette règle, la Chambre de première instance a commis une erreur de droit parce que cette disposition n'est entrée en vigueur qu'après la clôture de son procès. L'appelant rappelle que lors de son procès, l'article 90 (G) du Règlement portait simplement, dans la partie visée, que

«[l]e contre-interrogatoire se limite aux points évoqués dans l'interrogatoire principal ou ayant trait à la crédibilité du témoin»⁴⁸.

Par conséquent, fait-il valoir, il n'était nullement tenu d'interroger les témoins sur les raisons qu'ils avaient de faire un faux témoignage contre lui⁴⁹.

24. Le Procureur réplique que la Chambre de première instance n'a pas exigé de l'appelant qu'il se conforme à la règle établie à l'article 90 (G) (ii) du Règlement, dans sa rédaction modifiée après la clôture de son procès⁵⁰. Elle a plutôt fait preuve, selon lui, d'équité et de bon sens⁵¹. De l'avis du Procureur, il serait injuste vis-à-vis d'un témoin d'avancer des allégations pour le discréditer sans les lui soumettre pour qu'il puisse y répondre⁵². En outre, le Procureur soutient que la Chambre de première

⁴⁵ Jugement, para. 70.

⁴⁶ Acte d'appel modifié, para. 18; mémoire de l'appelant, paras. 80 à 93.

⁴⁷ Mémoire de l'appelant, para. 87.

⁴⁸ *Ibid.*, para. 90.

⁴⁹ *Ibid.*, para. 92.

⁵⁰ Mémoire de l'intimé, para. 78.

⁵¹ *Id.*

⁵² Mémoire de l'intimé, para. 79.

cannot assess such allegations if it has not had the opportunity to observe the witness's reaction to them⁵³.

25. As the Appellant correctly points out, in relation to Prosecution Witnesses GBV, GBE, GAO, GAS, and GAP, the Trial Chamber noted that the Appellant did not put to these witnesses his allegations concerning their credibility. The Trial Chamber addressed this point in paragraph 157 of the Judgement :

The Chamber finds that there were many instances in which the Defence made no reference to these allegations about Prosecution witnesses during cross-examination of these witnesses, thus not giving the Witness an opportunity to answer on the record. This factor has been taken into account by the Chamber in making its findings on the Defence attack on the credibility of Prosecution Witnesses.

26. In the view of the Appeals Chamber, when weighing the Appellant's allegations going to the credibility of the Prosecution witnesses, the Trial Chamber was entitled to take into account the fact that the Appellant did not put such allegations to the witnesses for their reactions. Indeed, without the benefit of observing the witnesses' reactions to such allegations, the Trial Chamber was not in a position to determine whether there was merit in the Appellant's charges. Contrary to the Appellant's claim, there is no indication that the Trial Chamber based its position on this matter on the version of Rule 90 (G) which came into effect after the Appellant's trial. Accordingly, this sub-ground of appeal is dismissed.

III. ALLEGED ERROR IN REJECTING EVIDENCE OF DEFENCE'S TUTSI WITNESSES THAT THE APPELLANT SAVED THEIR LIVES (GROUND OF APPEAL 5)

27. The Appellant submits that the Trial Chamber erred in law and fact when it decided to reject the testimony of Defence Witnesses RHU 21, RHU 26, ZLA, and JK 312 that he had saved their lives⁵⁴. The Appellant further contends that the Trial Chamber erred in finding that the evidence brought by these four Defence witnesses

“did not sufficiently impeach the Prosecution evidence in connection with the *mens rea* element to make out a charge of genocide”⁵⁵.

Specifically, the Appellant contends that the evidence that he was providing refuge to the four Tutsi witnesses on 8 April 1994, discredits Prosecution Witness GBH's claim that the Appellant and the *Interahamwe* were searching for Tutsi survivors to kill on the same date⁵⁶.

⁵³ Respondent's Brief, para. 79.

⁵⁴ Amended Notice of Appeal, paras. 19, 20; Appellant's Brief, para. 99.

⁵⁵ Amended Notice of Appeal, para. 20. See also Appellant's Brief, para. 99.

⁵⁶ Appellant's Brief, para. 102.

instance ne peut apprécier de telles allégations si elle n'a pas eu l'occasion d'observer la réaction qu'elles suscitent chez le témoin⁵³.

25. Ainsi que le fait remarquer à juste titre l'appelant concernant les témoins à charge GBV, GBE, GAO, GAS et GAP, la Chambre de première instance a relevé qu'il n'avait pas fait état devant ces témoins de ses allégations mettant en cause leur crédibilité. La Chambre s'est penchée sur cette question au paragraphe 157 du jugement :

La Chambre conclut que dans nombre de cas, la Défense n'a nullement évoqué ces allégations portées contre les témoins à charge en les contre-interrogeant, privant ainsi ces derniers de l'occasion d'y répondre. La Chambre a tenu compte de cet élément en se prononçant sur les griefs soulevés par la Défense contre la crédibilité des témoins à charge.

26. De l'avis de la Chambre d'appel, au moment d'examiner les allégations de l'appelant mettant en cause la crédibilité des témoins à charge, il était loisible à la Chambre de première instance de tenir compte du fait qu'il n'avait pas fait état de ces allégations devant les témoins pour qu'ils y répondent. Privée en effet de la possibilité d'observer la réaction des témoins à de telles allégations, la Chambre de première instance n'était pas en mesure de se prononcer sur le bien-fondé des griefs de l'appelant. Contrairement à ce que celui-ci prétend, rien n'autorise à croire que la Chambre s'est fondée sur la version de l'article 90 (G) du Règlement qui est entrée en vigueur après la clôture du procès de l'appelant. En conséquence, cette branche du moyen d'appel est rejetée.

III. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN REJETANT LES DÉPOSITIONS DES TÉMOINS
À DÉCHARGE TUTSIS DONT L'APPELANT AVAIT SAUVÉ LA VIE
(CINQUIÈME MOYEN D'APPEL)

27. L'appelant fait valoir que la Chambre de première instance a commis une erreur de droit et de fait lorsqu'elle a décidé de rejeter les dépositions des témoins à décharge RHU 21, RHU 26, ZLA et JK 312 qui ont dit qu'il leur avait sauvé la vie⁵⁴. L'appelant fait valoir de surcroît que la Chambre a versé dans l'erreur en concluant que les dépositions de ces quatre témoins à décharge

«n'étaient pas suffisantes pour permettre de rejeter les éléments de preuve à charge établissant que l'accusé était animé de l'intention criminelle requise pour être accusé de génocide»⁵⁵.

Il fait valoir, en particulier, que les moyens de preuve établissant qu'il hébergeait les quatre réfugiés tutsis le 8 avril 1994 réfutent les propos du témoin à charge GBH indiquant que l'appelant et les *Interahamwe* traquaient ce jour là les rescapés tutsis pour les tuer⁵⁶.

⁵³ *Id.*

⁵⁴ Acte d'appel modifié, paras. 19 et 20; mémoire de l'appelant, para. 99.

⁵⁵ Acte d'appel modifié, para. 20. Voir également mémoire de l'appelant, para. 99.

⁵⁶ Mémoire de l'appelant, para. 102.

28. The Prosecution responds that the Trial Chamber gave careful consideration to the testimony of the four witnesses in question, but concluded that even if their evidence were accepted, it would not have had a bearing on the Trial Chamber's final conclusion that the Appellant was involved in the killing of a large number of Tutsi victims with the specific intent to commit genocide⁵⁷. The Prosecution observes that the Trial Chamber's findings in this regard were based on the testimony of several Prosecution witnesses, and not only on the testimony of Witness GBH, as alleged by the Appellant⁵⁸. The Prosecution submits that the Trial Chamber's conclusion that the Appellant had the specific intent to commit genocide was correct because the Trial Chamber interpreted the Appellant's words and deeds against a demonstrated background or context of general purposeful action, instead of merely weighing those specific acts and deeds against each other⁵⁹. According to the Prosecution, it was therefore reasonable for the Trial Chamber to hold that the Appellant's attacks on and killings of Tutsis outweighed any actions that he might have taken to help a very small number of Tutsi individuals⁶⁰.

29. In the view of the Appeals Chamber, a review of the Trial Judgement reveals that the Trial Chamber did not reject the testimony of Witnesses RHU 21, RHU 26, ZLA, and JK 312, as the Appellant suggests. The Trial Chamber carefully considered the evidence of all four witnesses⁶¹, but found that it did not suffice to impeach the Prosecution's evidence regarding the Appellant's participation in the killings of Tutsis, and his specific intent to commit genocide⁶². The Trial Chamber's conclusion that the Appellant participated in the killing of Tutsis and that he had the specific intent to commit genocide was based on evidence of a series of Prosecution witnesses, and not only, as the Appellant suggests, on the evidence of Witness GBH⁶³. Therefore, the Appellant's contention that the testimony of Witnesses RHU 21, RHU 26, ZLA, and JK 312 outweighs and discredits the testimony of Witness GBH, is not persuasive. Accordingly, the Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber's findings in this regard were unreasonable or erroneous and dismisses the present ground of appeal to this extent.

30. The Appeals Chamber also notes the Appellant's submission under this ground of appeal that the Trial Chamber erred in fact by mischaracterizing his Mukingo residence as belonging to Defence Witness SMR 2 by referring to it as "her home", "her place", and "her house"⁶⁴. The Appellant argues that, in doing so, the Trial Chamber ignored his role in providing refuge to the Tutsi refugees⁶⁵, and credited Witness SMR 2, instead of him, with saving their lives.⁶⁶ The Appeals Chamber considers this

⁵⁷ Respondent's Brief, para. 85.

⁵⁸ Respondent's Brief, para. 85.

⁵⁹ Respondent's Brief, para. 91.

⁶⁰ Respondent's Brief, paras. 90, 91.

⁶¹ Trial Judgement, paras. 99-113.

⁶² Trial Judgement, para. 115.

⁶³ See Trial Judgement, paras. 483, 624 (GAP); paras. 400, 491, 492, 499, 519, 531, 534, 545, 621, 695 (GAO); paras. 529, 708, 712-714 (GDQ); paras. 546, 553 (GBV); para. 591 (GBG and ACM); paras. 465, 469, 472, 476, 606-609, 695, 697 (GDD).

⁶⁴ Appellant's Brief, paras. 107, 108.

⁶⁵ Amended Notice of Appeal, paras. 21-23; Appellant's Brief, paras. 107, 108.

28. Le Procureur réplique que la Chambre de première instance a examiné soigneusement la déposition des quatre témoins visés, mais a estimé que même si leur témoignage était accepté il n'influerait pas sur sa conclusion finale selon laquelle l'appelant avait participé au massacre d'un grand nombre de Tutsis dans l'intention spécifique de commettre le génocide⁵⁷. Le Procureur fait observer que les constatations opérées par la Chambre sur ce point étaient fondées sur la déposition de plusieurs témoins à charge, et non sur celle du seul témoin GBH, ainsi que l'allègue l'appelant⁵⁸. Il fait valoir que c'est à bon droit que la Chambre a conclu que l'appelant était animé de l'intention spécifique de commettre le génocide parce qu'elle a interprété ses propos et actes en les plaçant dans un cadre ou contexte établi d'actions délibérées d'ordre général, au lieu de se borner à les évaluer les uns par rapport aux autres⁵⁹. Selon le Procureur, il était donc raisonnable pour la Chambre de première instance de juger que les attaques et les meurtres perpétrés par l'appelant contre des Tutsis comptaient davantage que les mesures qu'il pouvait avoir prises pour venir en aide à un nombre très restreint de Tutsis⁶⁰.

29. De l'avis de la Chambre d'appel, il ressort du jugement que la Chambre de première instance n'a pas rejeté les dépositions des témoins RHU 21, RHU 26, ZLA et JK 312, ainsi que le laisse entendre l'appelant. La Chambre de première instance a soigneusement examiné les dépositions des quatre témoins⁶¹, mais a conclu qu'elles ne suffisaient pas à entamer la valeur probante des moyens à charge tendant à établir la participation de l'appelant au massacre de Tutsis et son intention spécifique de commettre le génocide⁶². La conclusion de la Chambre selon laquelle l'appelant a participé au massacre de Tutsis et était animé de l'intention spécifique de commettre le génocide était fondée sur les dépositions d'un certain nombre de témoins à charge et non uniquement, ainsi que le suggère l'appelant, sur celle du témoin GBH⁶³. En conséquence, l'argument de l'appelant, qui veut que les dépositions des témoins RHU 21, RHU 26, ZLA et JK 312 comptent davantage que celle du témoin GBH, et la discréditent, n'emporte pas la conviction. Par conséquent, la Chambre d'appel juge que l'appelant n'a pas établi que les conclusions de la Chambre de première instance sur ce point étaient déraisonnables ou erronées et rejette dès lors ce moyen d'appel.

30. La Chambre d'appel prend également acte du grief de l'appelant reprochant dans le cadre de ce moyen d'appel à la Chambre de première instance d'avoir commis une erreur de fait en présentant à tort la résidence qu'il possède à Mukingo comme appartenant au témoin à décharge SMR 2 en la désignant en ces termes : «chez elle» et «sa maison»⁶⁴. L'appelant fait valoir que la Chambre a ainsi ignoré le rôle qu'il a joué en hébergeant des réfugiés tutsis⁶⁵ et a attribué au témoin SMR 2, et non à

⁵⁷ Mémoire de l'intimé, para. 85.

⁵⁸ *Id.*

⁵⁹ Mémoire de l'intimé, para. 91.

⁶⁰ *Ibid.*, paras. 90 et 91.

⁶¹ Jugement, paras. 99 à 113.

⁶² *Ibid.*, para. 115.

⁶³ Voir jugement, paras. 483 et 624 (GAP); paras. 400, 491 et 492, 499, 519, 531, 534, 545, 621 et 695 (GAO); paras. 529, 708 et 712 à 714 (GDQ); paras. 546 et 553 (GBV); para. 591 (GBG et ACM); paras. 465, 469, 472, 476, 606 à 609, 695 et 697 (GDD).

⁶⁴ Mémoire de l'appelant, paras. 107 et 108.

⁶⁵ Acte d'appel modifié, paras. 21 à 23; mémoire de l'appelant, paras. 107 et 108.

submission below in connection with the appeal against the sentence where the Appellant has also raised this argument⁶⁷.

IV. ALLEGED ERROR IN REJECTING THE APPELLANT'S ARGUMENT
THAT PROSECUTION WITNESSES WHO WERE ARRESTED BY HIM
HAD A MOTIVE TO TESTIFY FALSELY (GROUND OF APPEAL 6)

31. The Appellant submits that the Trial Chamber erred in law and fact in finding that Prosecution Witnesses GBE, GBH, GAO, GDD, GDQ, and GBV were credible witnesses in spite of the fact that these witnesses had a motive to testify falsely against him⁶⁸.

32. The Prosecution responds that the allegations of tainted motivation stem mainly from the Appellant's testimony and that, in most cases, the Appellant did not put these allegations to the witnesses in cross-examination, leaving the Trial Chamber without the opportunity to assess the witnesses' reactions to such allegations⁶⁹.

33. The Appeals Chamber has already addressed this matter above under Ground of Appeal 4⁷⁰. A review of the Trial Chamber's assessment of the credibility of Prosecution witnesses reveals that the Trial Chamber was alert to the issue of a possible bias of the witnesses against the Appellant and that it considered this matter in the overall assessment of their credibility⁷¹. The Appeals Chamber also recalls that having considered the allegations of the witnesses' bias, the Trial Chamber decided to treat the testimony of one of them, Witness GBV, with caution⁷². The bare allegation that a witness is biased against the Appellant because the Appellant arrested or sanctioned the person for his alleged misdeeds does not, in itself, diminish the credit of the witness's testimony. The Appeals Chamber finds that the Appellant's submissions under the present ground of appeal do not show that the Trial Chamber erred in the assessment of the credibility of the witnesses alleged by the Appellant to be biased against him.

34. Under this ground of appeal, the Appellant also argues that the credibility of Witnesses GAO, GDD, and GDQ suffered for additional reasons. The Appellant contends that since these three witnesses are incarcerated in Rwanda, they had a motive to testify falsely against him in exchange for a lighter sentence⁷³. In the view of the Appeals Chamber, this is an unsubstantiated assertion in which the Appellant fails to identify any error on the part of the Trial Chamber.

⁶⁶ Appellant's Brief in Reply, para. 26.

⁶⁷ See *infra* Chapter XXIII.

⁶⁸ Amended Notice of Appeal, paras. 24-36; Appellant's Brief, paras. 110-130.

⁶⁹ Respondent's Brief, para. 93.

⁷⁰ See *supra* Chapter II.

⁷¹ See, e.g., Trial Judgement, paras. 146-156, 467, 704.

⁷² See Trial Judgement, para. 147.

⁷³ Appellant's Brief, paras. 121, 124, 128.

lui, le mérite de leur avoir sauvé la vie⁶⁶. La Chambre d'appel examinera ce grief plus loin dans le cadre de l'examen des moyens d'appel avancés contre la sentence où l'appelant a également soulevé cet argument⁶⁷.

IV. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN REJETANT L'ARGUMENT DE L'APPELANT
SELON LEQUEL LES TÉMOINS À CHARGE QU'IL AVAIT ARRÊTÉS
AVAIENT UN MOTIF DE FAIRE DE FAUX TÉMOIGNAGES CONTRE LUI
(SIXIÈME MOYEN D'APPEL)

31. L'appelant fait valoir que la Chambre de première instance a commis une erreur de droit et de fait en concluant que les témoins à charge GBE, GBH, GAO, GDD, GDQ et GBV étaient des témoins crédibles malgré le fait qu'ils avaient une raison de faire de faux témoignages contre lui⁶⁸.

32. Le Procureur réplique que les allégations de motif suspect découlent principalement de la déposition de l'appelant et que, dans la plupart des cas, celui-ci n'a pas contre-interrogé ces témoins sur ces allégations, privant ainsi la Chambre de la possibilité d'apprécier leurs réactions face à de telles allégations⁶⁹.

33. La Chambre d'appel a déjà examiné cette question plus haut dans le cadre du quatrième moyen d'appel⁷⁰. Il ressort de l'appréciation que la Chambre de première instance a faite de la crédibilité des témoins à charge que celle-ci était consciente de la possibilité d'un parti pris des témoins à l'encontre de l'appelant et qu'elle en a tenu compte dans son évaluation globale de leur crédibilité⁷¹. La Chambre d'appel rappelle également qu'après avoir examiné les allégations de parti pris des témoins, la Chambre de première instance a décidé de traiter avec prudence la déposition de l'un d'entre eux, le témoin GBV⁷². La simple allégation qu'un témoin a un préjugé défavorable contre l'appelant parce celui-ci l'aurait arrêté ou sanctionné pour les actes répréhensibles qu'il aurait commis n'entame pas en soi la crédibilité de la déposition du témoin. La Chambre d'appel estime que les arguments présentés par l'appelant dans le cadre de ce moyen d'appel n'établissent pas que la Chambre de première instance a versé dans l'erreur dans son appréciation de la crédibilité des témoins que l'appelant prétend être prévenus contre lui.

34. Dans le cadre de ce moyen d'appel, l'appelant soutient également que la crédibilité des témoins GAO, GDD et GDQ était compromise pour d'autres raisons. Il fait valoir qu'incarcérés au Rwanda, ces trois témoins avaient une raison de faire un faux témoignage contre lui en échange d'un adoucissement de leur peine⁷³. De l'avis de la Chambre d'appel, il s'agit là d'une assertion non fondée qui ne reproche aucune erreur à la Chambre de première instance.

⁶⁶ Mémoire en réplique de l'appelant, para. 26.

⁶⁷ Voir *infra*, chapitre XXIII.

⁶⁸ Acte d'appel modifié, paras. 24 à 36; mémoire de l'appelant, paras. 110 à 130.

⁶⁹ Mémoire de l'intimé, para. 93.

⁷⁰ Voir *supra*, chapitre II.

⁷¹ Voir par exemple jugement, paras. 146 à 156, 467 et 704.

⁷² Voir jugement, para. 147.

⁷³ Mémoire de l'appelant, paras. 121, 124 et 128.

35. The Appellant further submits that the Trial Chamber erred in finding Witness GAO credible, notwithstanding his “conflicting, contradictory and impeached testimony”⁷⁴. However, the Appellant fails to provide any detail to this argument and does not point the Appeals Chamber to any place in the record to support his claim. In such circumstances, the Appeals Chamber need not consider this submission further⁷⁵.

36. Finally, the Appellant submits that the Trial Chamber erred in its legal and factual findings that Witness GDD was credible, failing to consider the testimony of Defence Witness JK27 that Witness GDD was a “thief, drunk, liar”⁷⁶. This argument is premised upon a misrepresentation of the facts. The Trial Judgement reflects that in assessing the credibility of Witness GDD, the Trial Chamber did consider the evidence of Witness JK27, including the allegations that Witness GDD was a liar who stole things from his family⁷⁷. The Trial Chamber concluded its analysis as follows :

“Having considered fully the testimony of Witness GDD viewed in the light of the evidence presented in the case as a whole, and taking into account the demeanour of the Witness during his testimony, the Chamber finds Witness GDD to be a credible witness”⁷⁸.

The Appeals Chamber finds that the Appellant failed to show any error in this finding.

37. In view of the foregoing, the Appeals Chamber dismisses this ground of appeal in its entirety.

V. ALLEGED ERROR IN ASSIGNING THE BURDEN OF PROOF ON ALIBI AND ASSUMPTION OF FACTS NOT IN EVIDENCE WITH RESPECT TO THE ALIBI (GROUND OF APPEAL 7)

38. The Appellant submits that the Trial Chamber committed an error of law with respect to the burden of proof regarding the alibi⁷⁹. The Appellant then contends that the Trial Chamber erred in assessing the alibi evidence of Witnesses JK 312 and JK 27⁸⁰. Each of these submissions is now addressed in turn.

⁷⁴ Appellant’s Brief, para. 120.

⁷⁵ Practice Direction on Formal Requirements for Appeals from Judgement, paras. 4 (b), 13. See also *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Vasiljević* Appeal Judgement, paras. 11, 12; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

⁷⁶ Appellant’s Brief, paras. 123, 125.

⁷⁷ Trial Judgement, para. 467.

⁷⁸ Trial Judgement, para. 467.

⁷⁹ Amended Notice of Appeal, para. 37; Appellant’s Brief, para. 131.

⁸⁰ Amended Notice of Appeal, paras. 38-49; Appellant’s Brief, paras. 137-150.

35. L'appelant soutient en outre que la Chambre de première instance a versé dans l'erreur en jugeant le témoin GAO crédible en dépit des déclarations «divergentes et contradictoires qu'il a faites à la barre et qui ont été mises en doute»⁷⁴. Il ne développe toutefois pas cet argument ni n'attire l'attention de la Chambre d'appel sur aucun élément du dossier qui l'écarterait. Dès lors, la Chambre d'appel n'est point tenue d'examiner plus avant cet argument⁷⁵.

36. Enfin, l'appelant fait valoir que la Chambre de première instance a commis une erreur dans ses conclusions juridiques et factuelles en déclarant le témoin GDD crédible en dépit de la déposition du témoin à décharge JK 27 qui a qualifié ce témoin «de voleur, de soûlard et de menteur»⁷⁶. Cet argument repose sur une présentation erronée des faits. Il ressort du jugement que, pour évaluer la crédibilité du témoin GDD, la Chambre a effectivement pris en considération la déposition du témoin JK 27, notamment l'allégation accusant l'intéressé d'être un menteur qui avait soustrait des biens à sa propre famille⁷⁷. La Chambre de première instance a conclu son analyse comme suit :

«Ayant examiné à fond la déposition du témoin GDD au regard de l'ensemble de la preuve produite en l'espèce et compte tenu de son comportement à l'audience, la Chambre juge le témoin GDD digne de foi»⁷⁸.

La Chambre d'appel estime que l'appelant n'a établi l'existence d'aucune erreur dans cette conclusion.

37. Pour les raisons qui précèdent, la Chambre d'appel rejette ce moyen d'appel dans son intégralité.

V. ERREUR DANS L'ATTRIBUTION DE LA CHARGE DE LA PREUVE
EN MATIÈRE D'ALIBI ET FAITS TENUS POUR ACQUIS À CE SUJET
SANS QU'ILS AIENT ÉTÉ VERSÉS AUX DÉBATS (SEPTIÈME MOYEN D'APPEL)

38. L'appelant soutient que la Chambre de première instance a commis une erreur de droit en ce qui concerne la charge de la preuve relativement à l'alibi⁷⁹. Il lui reproche ensuite d'avoir commis une erreur dans l'évaluation de l'alibi fourni pour les témoins JK312 et JK27⁸⁰. Nous examinerons à présent chacun de ces arguments.

⁷⁴ *Ibid.*, para. 120.

⁷⁵ Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, para. 4 (b) et 13. Voir également arrêt *Blaškić*, para. 13; arrêt *Niyitegeka*, para. 10; arrêt *Vasiljević*, paras. 11 et 12; arrêt *Rutaganda*, para. 19; arrêt *Kayishema et Ruzindana*, para. 137.

⁷⁶ Mémoire de l'appelant, paras. 123 et 125.

⁷⁷ Jugement, para. 467.

⁷⁸ *Id.*

⁷⁹ Acte d'appel modifié, para. 37; mémoire de l'appelant, para 131.

⁸⁰ Acte d'appel modifié, paras. 38 à 49; mémoire de l'appelant, paras. 137 à 150.

A. Burden of Proof

39. According to the Appellant, the Trial Chamber erred in law by failing to require the Prosecution to disprove each alibi witness's testimony beyond reasonable doubt⁸¹. The Appellant submits that when an alibi is introduced, the Prosecution is required to "eliminate the reasonable possibility that the alibi is true"⁸². The Appellant proposes that the Prosecution cannot be permitted to ignore the alibi evidence and rely on its case in chief, but, rather, that it must attack the alibi evidence.⁸³ The Appellant argues that the Prosecution failed to impeach his alibi witnesses, Witnesses JK 312 and JK 27, through cross-examination or rebuttal and that it thus did not meet its burden of proof with regard to the alibi evidence.⁸⁴

40. The Prosecution responds that the Appellant has misstated the legal burden on the Prosecution in relation to an alibi⁸⁵. Instead of having to disprove each alibi witness's testimony beyond reasonable doubt, the Prosecution has the burden to prove the Appellant's guilt beyond reasonable doubt in spite of the alibi evidence⁸⁶. The Prosecution disagrees that there is any affirmative burden upon it to attack the alibi or to impeach alibi witnesses through cross-examination or rebuttal⁸⁷. The Prosecution agreed during the hearing of the Appeal that although an alibi is not a specific defence, the Prosecution has the full burden of proving that the Appellant was at the crime site⁸⁸. The Prosecution stated :

"... it is clear that the Prosecutor has this burden of proof beyond a reasonable doubt... It really is a free evaluation of all of the evidence recognising which party has the burden of proof and the arrival at a conclusion of conviction..."⁸⁹.

41. The Appeals Chamber notes that the Trial Chamber formulated the burden of proof regarding the alibi in the following terms :

165. As has been held by the Appeals Chamber in the *Čelebići Case*, the submission of an alibi by the Defence does not constitute a defence in its proper sense. The relevant section of the judgement reads : "It is a common misuse of the word to describe an alibi as a "Defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true sense at all. By raising this issue, the defendant does no more than [*sic*] require the prosecution to eliminate the reasonable possibility that the alibi is true."

⁸¹ Appellant's Brief, para. 131.

⁸² Appellant's Brief, para. 133, citing *Celebici Case Appeal Judgement*, para. 581.

⁸³ Appellant's Brief, paras. 132, 133.

⁸⁴ Appellant's Brief, para. 136.

⁸⁵ Respondent's Brief, para. 105.

⁸⁶ Respondent's Brief, paras. 107-110.

⁸⁷ Respondent's Brief, para. 109.

⁸⁸ See Appeal Hearing, T. 7 March 2005 pp. 29, 43-45.

⁸⁹ Appeal Hearing, T. 7 March 2005 p. 44.

A. Charge de la preuve

39. Selon l'appelant, la Chambre de première instance a commis une erreur de droit en n'obligeant pas le Procureur à démontrer au-delà de tout doute raisonnable la fausseté de l'alibi fourni par chacun des témoins⁸¹. Il soutient que lorsqu'un alibi est invoqué, le Procureur est tenu d'«écarter l'hypothèse raisonnable que l'alibi soit vrai»⁸². Il avance qu'on ne saurait permettre au Procureur de faire fi de la preuve d'alibi et de se fonder sur les seuls éléments de preuve qu'il a présentés à charge; il doit, au contraire, attaquer l'alibi⁸³. Il soutient que le Procureur n'est pas parvenu à mettre en doute la sincérité des témoins d'alibi JK 312 et JK 27, ni par le contre-interrogatoire ni par la présentation de moyens de preuve en réplique, et qu'il ne s'est dès lors pas acquitté de la charge de la preuve qui pèse sur lui en ce qui concerne la preuve d'alibi⁸⁴.

40. Le Procureur répond que l'appelant a exposé de manière inexacte la charge de la preuve qui pèse sur le Procureur relativement à un alibi⁸⁵. Au lieu de devoir démontrer au-delà de tout doute raisonnable la fausseté de l'alibi fourni par chacun des témoins, le Procureur a plutôt la charge de prouver au-delà de tout doute raisonnable la culpabilité de l'appelant en dépit des preuves d'alibi⁸⁶. Contrairement à celui-ci, le Procureur estime qu'il n'est pas tenu d'attaquer l'alibi ou de mettre en doute la sincérité des témoins d'alibi par le contre-interrogatoire ou la présentation de moyens de preuve en réplique⁸⁷. Il a reconnu lors de l'examen de l'appel que, bien qu'un alibi ne soit pas un moyen de défense à proprement parler, il avait la charge entière de prouver que l'appelant se trouvait sur le lieu du crime⁸⁸. Il a déclaré ce qui suit :

«... Il est évident que c'est au Procureur qu'il incombe de prouver au-delà de tout doute [raisonnable] ... [Il s'agit d'apprécier librement l'ensemble de la preuve] en reconnaissant à qui incombe le fardeau de la preuve et [de conclure à la] culpabilité ...»⁸⁹.

41. La Chambre d'appel note que la Chambre de première instance a énoncé le fardeau de la preuve en ce qui concerne l'alibi en ces termes :

165. Comme la Chambre d'appel l'a affirmé dans l'affaire *Celebici*, le fait que la Défense invoque un alibi ne constitue pas un moyen de défense au sens propre. La section pertinente de l'arrêt se lit comme suit : C'est une erreur commune de qualifier l'alibi de «moyen de défense». Si un accusé invoque un alibi, il nie simplement avoir été en mesure de commettre le crime qu'on lui impute. Il ne s'agit absolument pas d'un moyen de défense au sens propre. En soulevant cette question, l'accusé impose seulement à l'accusation d'écarter l'hypothèse raisonnable que l'alibi est vrai.

⁸¹ Mémoire de l'appelant, para. 131.

⁸² *Ibid.*, para. 133, citant l'arrêt *Celebici*, para. 581.

⁸³ Mémoire de l'appelant, paras. 132 et 133.

⁸⁴ *Ibid.*, para. 136.

⁸⁵ Mémoire de l'intimé, para. 105.

⁸⁶ *Ibid.*, paras. 107 à 110.

⁸⁷ *Ibid.*, para. 109.

⁸⁸ Voir compte rendu de l'audience d'appel du 7 mars 2005, p. 33 et 34 ainsi que 47 à 49.

⁸⁹ *Ibid.*, p. 49.

166. Therefore, as consistently held throughout the jurisprudence of the Tribunal and as asserted by the Defence, when an alibi is submitted by the Accused the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all respects. Indeed, the Prosecution must prove “that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence”. If the alibi is reasonably possibly true, it will be successful⁹⁰.

42. The Appeals Chamber finds no error in this statement. The Appeals Chamber has recently confirmed that when a defendant pleads an alibi, he is denying that he was in a position to commit the crimes with which he is charged because he was elsewhere than at the scene of the crime at the time of its commission⁹¹. The Appeals Chamber recalls that :

It is settled jurisprudence before the two *ad hoc* Tribunals that in putting forward an alibi, a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution’s case. The burden of proving beyond reasonable doubt the facts charged remains squarely on the shoulders of the Prosecution. Indeed, it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true⁹².

43. Nothing in the foregoing requires the Prosecution, however, specifically to disprove each alibi witness’s testimony beyond reasonable doubt. Rather, the Prosecution’s burden is to prove the accused’s guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi. Accordingly, the Appeals Chamber cannot accept the Appellant’s claim that the Trial Chamber erred by not requiring the Prosecution to so disprove the testimonies of Witnesses JK 312 and JK 27 and dismisses this sub-ground of appeal.

B. Alleged Errors Relating to Witness JK312

1. Credibility

44. The Appellant submits that the Trial Chamber committed four errors in assessing the credibility of Witness JK312. First, the Appellant submits, the Trial Chamber committed a gross error by “falsely ascribing testimony” to Witness JK 312 that on 8 April 1994 he stood outside his house, “chit-chatting” with visitors, and then using this evidence to discredit him⁹³. Second, the Appellant submits that the Trial Chamber erred when it arbitrarily found that Witness JK 312’s testimony that he walked to the Appellant’s house on the morning of 7 April 1994 was implausible, despite a lack of evidence to support this finding⁹⁴. The Appellant alleges that the Trial Chamber com-

⁹⁰ Trial Judgement, paras. 165, 166 (internal citations omitted).

⁹¹ See *Niyitegeka* Appeal Judgement, para. 60 citing *Kayishema and Ruzindana* Appeal Judgement, para. 106.

⁹² *Niyitegeka* Appeal Judgement, para. 60 (internal citations omitted). See also *Čelebići Case* Appeal Judgement, para. 581; *Musema* Appeal Judgement, para. 202; *Kayishema and Ruzindana* Appeal Judgement, para. 113.

⁹³ Trial Judgement, para. 206; Amended Notice of Appeal, paras. 39, 40; Appellant’s Brief, para. 140.

⁹⁴ Amended Notice of Appeal, para. 45; Appellant’s Brief, paras. 141, 142.

166. Par suite, comme il est de jurisprudence constante au Tribunal et comme l'affirme la Défense, lorsqu'un accusé invoque un alibi, c'est au Procureur seul qu'il incombe d'établir sous tous les aspects sa culpabilité au-delà de tout doute raisonnable. De fait, le Procureur doit prouver que «l'accusé était présent et qu'il a commis les crimes qui lui sont imputés et discréditer son alibi». Si l'alibi est vraisemblable, il doit être retenu⁹⁰.

42. La Chambre d'appel ne voit aucune erreur dans cet exposé du droit. Elle a récemment confirmé que lorsqu'un accusé invoque un alibi, il nie avoir été en mesure de commettre le crime qui lui est reproché parce qu'il se trouvait au moment des faits dans un lieu autre que celui où le crime a été commis⁹¹. La Chambre d'appel rappelle que :

Il est de jurisprudence constante aux deux Tribunaux spéciaux que l'accusé qui invoque un alibi est simplement tenu de présenter des preuves soulevant un doute raisonnable quant à la preuve rapportée par le Procureur. La charge de prouver les faits incriminés au-delà de tout doute raisonnable continue de peser entièrement sur le Procureur. En effet, il lui incombe d'établir au-delà de tout doute raisonnable qu'en dépit de l'alibi, les faits allégués sont néanmoins vrais⁹².

43. Cependant, rien dans ce qui précède n'exige que le Procureur réfute expressément l'alibi fourni par chaque témoin au-delà de tout doute raisonnable. La charge de la preuve qui pèse sur le Procureur est plutôt de prouver au-delà de tout doute raisonnable la culpabilité de l'accusé par rapport aux crimes allégués en dépit de l'alibi invoqué. C'est pourquoi la Chambre d'appel ne peut pas accepter l'affirmation de l'appelant selon laquelle la Chambre de première instance a commis une erreur en n'obligeant pas le Procureur à démontrer la fausseté des dépositions des témoins JK 312 et JK 27 et rejette en conséquence cette branche du moyen d'appel.

B. Erreurs concernant le témoin JK312

1. Crédibilité

44. L'appelant soutient que la Chambre de première instance a commis quatre erreurs dans l'évaluation de la crédibilité du témoin JK 312. Premièrement, fait-il valoir, elle a commis une erreur grave en «faisant dire à tort» au témoin JK 312 que, le 8 avril 1994, il se tenait debout devant sa maison, en train de «bavarder» avec des visiteurs et en se servant ensuite de ces propos pour le discréditer⁹³. Elle a commis une deuxième erreur lorsqu'elle a arbitrairement conclu que la déposition du témoin JK 312 selon laquelle il s'était rendu à pied chez l'appelant dans la matinée du 7 avril 1994 était peu plausible, en dépit du fait qu'il n'existait aucune preuve pour étayer cette conclusion⁹⁴. Elle a commis une troisième erreur lors de l'évaluation de la dépo-

⁹⁰ Jugement, paras. 165 et 166 (notes de bas de page omises).

⁹¹ Voir arrêt *Niyitegeka*, para. 60, citant l'arrêt *Kayishema et Ruzindana*, para. 106.

⁹² Arrêt *Niyitegeka*, para. 60 (notes de bas de page omises). Voir également l'arrêt *Čelebići*, para. 581, l'arrêt *Musema*, para. 202, et l'arrêt *Kayishema et Ruzindana*, para. 113.

⁹³ Jugement, para. 206; acte d'appel modifié, paras. 39 et 40; mémoire de l'appelant, para. 140.

⁹⁴ Acte d'appel modifié, para. 45; mémoire de l'appelant, paras. 141 et 142.

mitted a third error in assessing the witness's testimony when it found that Witness JK 312's testimony was purposefully evasive⁹⁵. Finally, the Appellant submits that the Trial Chamber erred by failing to make any logical correlation between the witness's credibility and the fact that he saved Witness JK 312's life in 1992⁹⁶.

45. The Prosecution concedes that it is unable to find any reference in the record to Witness JK 312's "chit-chatting" with visitors in front of his house on 8 April 1994, but submits that this characterization of the witness's testimony by the Trial Chamber does not undermine the fairness of the trial or make the conviction unsafe⁹⁷. The Prosecution submits that this was only one of many factors considered by the Trial Chamber in determining Witness JK 312's lack of credibility⁹⁸. According to the Prosecution, in determining that the witness was not credible, the Trial Chamber also considered the following factors: the implausibility that the witness, a Tutsi, walked to the Appellant's house in the morning of 7 April 1994 to ask for assistance; the witness's purposeful evasiveness; the witness's demeanour, which indicated that he was more interested in protecting the Appellant than in giving straightforward answers; and the fact that the Appellant saved the witness's life in 1992⁹⁹.

46. The Appeals Chamber notes that the Trial Chamber assessed the credibility and reliability of Witness JK 312 as follows:

The Chamber has considered the testimony of Defence Witness JK 312, and finds that it is not credible as regards the alibi of the Accused. This witness testified that on 7 April 1994, he walked to the Accused's house to ask for assistance. As a Tutsi who was admittedly fearing for his life, the Chamber finds it implausible that he would have walked to the house of the Accused, especially in view of the fact that according to his own testimony, he was able to make a telephone call to the Accused that same morning, and discuss his safety and to request assistance. The Chamber found the Witness to be purposefully evasive when asked questions under cross-examination, in relation to the Accused's ability to assist him and the reason why it was the Accused that he went to for assistance. From the observations of the Chamber, it was apparent in the witness's demeanour that in answering these questions and others, the witness appeared more interested in protecting the Accused than in giving straightforward answers to questions put to him. Furthermore, in relation to the events of 8 April, the Chamber finds it highly unlikely that, at a time when Tutsis were being openly massacred, Defence witness JK 312 could stand in front of his house and chit-chat with his visitors, especially since according to his own testimony he had only the previous day requested shelter from the Accused in a state of desperation. As a final point, the Chamber notes that according to the witness's own testimony, the Accused once saved the witness's life in 1992¹⁰⁰.

⁹⁵ Amended Notice of Appeal, para. 46; Appellant's Brief, paras. 143, 144.

⁹⁶ Amended Notice of Appeal, para. 48; Appellant's Brief, para. 147.

⁹⁷ Respondent's Brief, para. 114.

⁹⁸ Respondent's Brief, para. 115.

⁹⁹ Respondent's Brief, para. 115.

¹⁰⁰ Trial Judgement, para. 223.

sition de ce témoin quand elle a conclu que celui-ci était délibérément évasif⁹⁵. Enfin, elle en a commis une quatrième en n'établissant pas la moindre corrélation logique entre le fait que l'appelant a sauvé la vie au témoin JK 312 en 1992 et la crédibilité de ce dernier⁹⁶.

45. Le Procureur reconnaît qu'il est incapable de trouver dans le dossier le moindre passage indiquant que le témoin JK 312 était en train de «bavarder» avec des visiteurs devant sa maison le 8 avril 1994, mais il soutient que cette caractérisation de la déposition du témoin par la Chambre de première instance ne compromet en rien l'équité du procès ni ne rend la déclaration de culpabilité sujette à caution⁹⁷. Il soutient qu'il s'agit là d'un facteur parmi tant d'autres que la Chambre de première instance a examinés pour conclure à l'absence de crédibilité du témoin JK 312⁹⁸. Selon le Procureur, pour établir que le témoin n'était pas crédible, la Chambre de première instance a également pris en compte les éléments suivants : l'invraisemblance du fait que le témoin, un Tutsi, se soit rendu à pied chez l'appelant dans la matinée du 7 avril 1994 pour demander de l'aide; le caractère délibérément évasif des réponses qu'il a données; son comportement qui laissait supposer qu'il se souciait davantage de protéger l'appelant que de répondre directement aux questions qui lui étaient posées et le fait que l'appelant lui avait sauvé la vie en 1992⁹⁹.

46. La Chambre d'appel note que la Chambre de première instance a apprécié la crédibilité et la fiabilité du témoin JK 312 comme suit :

Ayant examiné la déposition du témoin à décharge JK 312, la Chambre la trouve peu crédible au sujet de l'alibi de l'accusé. Le témoin a dit s'être rendu à pied au domicile de l'accusé le 7 avril 1994 pour demander de l'aide. La Chambre juge peu plausible que Tutsi qui – on en conviendra – craignait pour sa vie, le témoin se soit rendu à pied chez l'accusé, surtout quand on sait qu'il a lui-même dit dans sa déposition l'avoir appelé au téléphone pour l'entretenir de sa sécurité et demander de l'aide. La Chambre conclut que le témoin a été délibérément évasif lorsque pendant son contre-interrogatoire on lui a demandé en quoi l'accusé aurait été en mesure de lui porter assistance et ce qui l'avait poussé à s'adresser à l'accusé. La Chambre a constaté à l'audience qu'en répondant à ces questions et à d'autres, le témoin paraissait plus soucieux de protéger l'accusé que de répondre directement aux questions qui lui étaient posées. En outre, s'agissant des faits survenus le 8 avril, la Chambre considère fort improbable qu'alors que des Tutsis étaient massacrés au grand jour, le témoin à décharge JK 312 ait pu se tenir devant sa porte à bavarder avec des visiteurs, surtout quand on sait qu'il avait selon ses propres dires la veille seulement, en proie au désespoir, appelé l'accusé à son aide. Enfin, la Chambre relève que selon la propre déposition du témoin, l'accusé lui avait une fois sauvé la vie en 1992¹⁰⁰.

⁹⁵ Acte d'appel modifié, para. 46; mémoire de l'appelant, paras. 143 et 144.

⁹⁶ Acte d'appel modifié, para. 48; mémoire de l'appelant, para. 147.

⁹⁷ Mémoire de l'intimé, para. 114.

⁹⁸ *Ibid.*, para. 115.

⁹⁹ *Id.*

¹⁰⁰ Jugement, para. 223.

47. The Appeals Chamber now considers in turn the alleged errors concerning the assessment of Witness JK 312's credibility. A review of the Trial Judgement and relevant transcripts reveals that the Trial Chamber erroneously attributed to Witness JK 312 evidence given by Witness JK 311 that he "chit-chatted" with his friends outside his house on 8 April 1994. Paragraph 206 of the Judgement summarizes this evidence under the heading of Defence Witness JK 312, but the related footnote refers to the closed session testimony of Witness JK 311¹⁰¹.

48. The Appeals Chamber accordingly finds that the Trial Chamber erred by attributing a portion of the testimony of Witness JK 311 to Witness JK 312 and by taking such evidence into account in deciding that Witness JK 312 was not credible as regards the alibi.

49. The Appeals Chamber now turns to the contention of error in finding it implausible that Witness JK 312 walked to the Appellant's house. The Appellant contends that the Trial Chamber lacked evidence that would support such a finding. The Appeals Chamber cannot accept this argument. The Trial Chamber carefully explained the basis for its finding, namely that, by the witness's own admission, he feared for his safety, and that there was no need for the walk as Witness JK 312 spoke with the Appellant over the telephone¹⁰². The Appellant has not shown that the Trial Chamber's finding on this point was unreasonable.

50. The Appeals Chamber next examines the Appellant's submission of error on the part of the Trial Chamber in finding Witness JK 312 to have been purposefully evasive. The Appeals Chamber recalls the observation made at paragraph 223 of the Trial Judgement that Witness JK 312 was

"purposefully evasive when asked questions under cross-examination, in relation to the Accused's ability to assist him and the reason why it was the Accused that he went to for assistance"¹⁰³.

A review of the relevant portion of the transcript suggests that some of the witness's apparent "evasiveness" may have been due to interpretation difficulties¹⁰⁴. However, the Appeals Chamber notes that the Trial Chamber's finding that the wit-

¹⁰¹ See Trial Judgement, para. 206 n. 303.

¹⁰² See Trial Judgement, para. 223 ("As a Tutsi who was admittedly fearing for his life, the Chamber finds it implausible that he would have walked to the house of the Accused, especially in view of the fact that according to his own testimony, he was able to make a telephone call to the Accused that same morning, and discuss his safety and to request assistance.").

¹⁰³ Trial Judgement, para. 223.

¹⁰⁴ For example, the witness, who was testifying in French, gave an answer to a simple "why" question posed by the Prosecution in English, which appeared to be evasive:

Q. Witness, you went to Mr. Kajelijeli for assistance that day. *Why did you go to him?*

A. I said so this morning. I went to him in the morning on the 7th of April '94.

Q. I said why.

A. I went to him to ask him more information, but also to ask him for some help as he had done in the past. I thought he could help me once again.

T. 16 September 2002 p. 76 (emphasis added).

In the French version of the transcript, however, the exchange is slightly different. It is apparent from the French transcript that the witness was initially asked "when" he went to the Appellant's house and not "why" he went there:

47. La Chambre d'appel examinera à présent successivement les erreurs qui auraient été commises dans l'évaluation de la crédibilité du témoin JK 312. L'examen du jugement et des comptes rendus d'audience pertinents montre que la Chambre de première instance a attribué à tort au témoin JK 312 les propos du témoin JK 311 qui «bavardait» avec ses amis devant sa maison le 8 avril 1994. Le paragraphe 206 du jugement résume ce témoignage en visant le témoin à décharge JK 312, mais la note de bas de page qui s'y rapporte renvoie à la déposition faite à huis clos par le témoin JK 311¹⁰¹.

48. La Chambre d'appel conclut en conséquence que la Chambre de première instance a commis une erreur en attribuant une partie de la déposition du témoin JK 311 au témoin JK 312 et en prenant en considération ces dires pour affirmer que le témoin JK 312 n'était pas crédible en ce qui concerne l'alibi.

49. La Chambre d'appel en vient à présent à l'erreur que la Chambre de première instance aurait commise en concluant qu'il est peu plausible que le témoin JK 312 se soit rendu à pied chez l'appelant. L'appelant soutient que la Chambre de première instance ne disposait pas d'éléments de preuve pour étayer une telle conclusion. La Chambre d'appel ne peut accepter cet argument. La Chambre de première instance a minutieusement expliqué le fondement de sa conclusion, à savoir que le témoin JK 312, de son propre aveu, craignait pour sa sécurité et n'avait nullement besoin de se déplacer puisqu'il avait parlé à l'appelant au téléphone¹⁰². L'appelant n'a pas démontré que la conclusion de la Chambre de première instance sur ce point était déraisonnable.

50. La Chambre d'appel examinera ensuite l'argument de l'appelant reprochant à la Chambre de première instance d'avoir commis une erreur en estimant que le témoin JK 312 a été délibérément évasif. La Chambre d'appel rappelle l'observation faite au paragraphe 223 du jugement, selon laquelle le témoin JK 312

«a été délibérément évasif lorsque, pendant son contre-interrogatoire, on lui a demandé en quoi l'accusé aurait été en mesure de lui porter assistance et ce qui l'avait poussé à s'adresser à l'accusé»¹⁰³.

L'examen de la partie pertinente du compte-rendu d'audience tend à indiquer que le «caractère apparemment évasif» du témoin serait sans doute dû, dans une certaine mesure, à des difficultés tenant à la traduction¹⁰⁴. Toutefois, la Chambre d'appel note que la conclusion de la Chambre de première instance selon laquelle le témoin était

¹⁰¹ *Ibid.*, para. 206, note 303.

¹⁰² Voir jugement, para. 223 («La Chambre juge peu plausible que Tutsi qui – on en conviendra – craignait pour sa vie, le témoin se soit rendu à pied chez l'accusé, surtout quand on sait qu'il a lui-même dit dans sa déposition l'avoir appelé au téléphone pour l'entretenir de sa sécurité et demander de l'aide»).

¹⁰³ Jugement, para. 223.

¹⁰⁴ Par exemple, le témoin, qui s'exprimait en français, a donné une réponse qui paraissait être évasive à une question simple commençant par «pourquoi», que lui a posée le Procureur en anglais :

Q. Monsieur le Témoin, vous êtes allé ce jour-là chez M. Kajelijeli demander de l'aide. Pourquoi étiez-vous allé chez lui?

R. Je l'ai dit ce matin, je suis allé chez lui, dans la matinée et en date du 7 avril 1994.

Q. J'ai dit pourquoi.

R. Je suis allé pour lui demander, exactement ... pour avoir de plus amples informations, mais aussi, pour lui demander secours aussi. Comme il l'avait fait dans le passé, j'espérais alors qu'il pouvait m'aider, une fois encore.

ness was being evasive when answering questions on cross-examination was also, significantly, based on the Trial Chamber's observation of the witness's demeanour¹⁰⁵. The Appeals Chamber stresses that a Trial Chamber is best placed to evaluate the demeanour of witnesses giving live testimony. In view of this consideration, and giving due weight to the Trial Chamber's stated observation of the witness's demeanour, the Appeals Chamber is not in a position to conclude that the Trial Chamber's finding of purposeful evasiveness on the part of Witness JK 312 was erroneous.

51. Finally, the Appeals Chamber finds that in assessing the credibility of Witness JK312, the Trial Chamber was entitled to take into account, among other factors, the fact that the Appellant had saved the witness's life.

52. Having considered the alleged errors in the Trial Chamber's assessment of the credibility of Witness JK 312, the Appeals Chamber finds that it has not been shown that no reasonable trier of fact could have reached the same finding. Although the Trial Chamber erred by attributing a portion of Witness JK 311's testimony to Witness JK312 and then took such evidence into account in weighing the credibility of Witness JK312, the Appeals Chamber finds that the Trial Chamber's credibility assessment of Witness JK312 was otherwise careful and detailed and that its conclusion was based on appropriate factors, such as weighing the witness's demeanour and considering the plausibility of his testimony, which have not been undermined on appeal. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

2. Factual Errors

53. The Appellant submits that the Trial Chamber erred by failing to take due note of the specific times when Witness JK 312 called him, and the times when the witness arrived at and left from the Appellant's home in Nkuli in the morning of 7 April 1994¹⁰⁶.

Q. Monsieur le Témoin, vous dites s'être rendu au domicile de Monsieur Kajelijeli pour solliciter une assistance. *Quand est-ce que vous êtes allé à son domicile?*

LE TÉMOIN JK 312 : *R.* Je l'ai dit ce matin, je suis allé chez lui, dans la matinée, et en date du 7 avril 94.

Q. J'ai demandé quelle raison... pour quelle raison vous êtes allé chez lui?

R. Je suis allé pour lui demander, exactement... pour avoir de plus amples informations, mais aussi, pour lui demander secours aussi. Comme il l'avait fait dans le passé, j'espérais alors qu'il pouvait m'aider, une fois encore.

T. 16 September 2002 p. 135 (emphasis added).

¹⁰⁵ See Trial Judgement, para. 223 ("From the observations of the Chamber, it was apparent in the witness's demeanour that in answering these questions and others, the witness appeared more interested in protecting the Accused than in giving straightforward answers to questions put to him.").

¹⁰⁶ Amended Notice of Appeal, para. 38; Appellant's Brief, paras. 137, 138.

évasif dans ses réponses aux questions qui lui étaient posées lors du contre-interrogatoire était basée aussi dans une large mesure sur l'observation que la Chambre avait faite du comportement du témoin¹⁰⁵. La Chambre d'appel souligne qu'une Chambre de première instance est la mieux placée pour apprécier le comportement des témoins qui déposent en personne devant elle. De ce fait, et si l'on accorde le poids qu'il faut à l'observation que la Chambre de première instance déclare avoir faite du comportement du témoin, la Chambre d'appel n'est pas en mesure d'affirmer que la conclusion de la Chambre de première instance relativement au caractère évasif du témoin JK 312 était entachée d'erreur.

51. Enfin, la Chambre d'appel conclut qu'en évaluant la crédibilité du témoin JK 312, la Chambre de première instance avait le droit de prendre en considération, entre autres facteurs, le fait que l'appelant avait sauvé la vie au témoin.

52. Ayant examiné les erreurs que la Chambre de première instance aurait commises dans l'évaluation de la crédibilité du témoin JK 312, la Chambre d'appel conclut qu'il n'a pas été démontré qu'aucun juge des faits raisonnable n'aurait pu parvenir à la même conclusion. Bien que la Chambre de première instance ait commis une erreur en attribuant une partie du témoignage du témoin JK 311 au témoin JK 312, puis en ait tenu compte pour évaluer la crédibilité du témoin JK 312, la Chambre d'appel estime que l'évaluation que la Chambre de première instance a faite de la crédibilité de ce témoin était à tous autres égards minutieuse et détaillée et que sa conclusion était basée sur des éléments appropriés, tels que la prise en considération du comportement du témoin et du caractère plausible de sa déposition, autant de facteurs qui n'ont pas été mis en cause en appel. En conséquence, la Chambre d'appel rejette cette branche du moyen d'appel.

2. Erreurs de fait

53. L'appelant soutient que la Chambre de première instance a commis une erreur en ne tenant pas dûment compte des moments précis auxquels le témoin JK 312 l'avait appelé ainsi que de l'heure à laquelle celui-ci était arrivé chez l'appelant à Nkuli et de celle à laquelle il était parti dans la matinée du 7 avril 1994¹⁰⁶.

Compte rendu de l'audience du 16 septembre 2002, p. 76 (non souligné dans l'original).

Toutefois, dans la version française du compte rendu, le dialogue est légèrement différent. Il ressort clairement de la transcription française qu'au début, la question qui avait été posée au témoin était «quand» est-ce qu'il s'était rendu chez l'appelant et non «pourquoi» :

Q. Monsieur le Témoin, vous dites [vous] être rendu au domicile de Monsieur Kajelijeli pour solliciter une assistance. Quand est-ce que vous êtes allé à son domicile?

LE TÉMOIN JK 312 : R. Je l'ai dit ce matin, je suis allé chez lui, dans la matinée, et en date du 7 avril 94.

Q. J'ai demandé quelle raison ... pour quelle raison vous êtes allé chez lui?

R. Je suis allé pour lui demander, exactement ... pour avoir de plus amples informations, mais aussi, pour lui demander secours aussi. Comme il l'avait fait dans le passé, j'espérais alors qu'il pouvait m'aider, une fois encore.

Compte rendu de l'audience du 16 septembre 2002, p. 135 (non souligné dans l'original).

¹⁰⁵ Voir jugement, para. 223 («La Chambre a constaté à l'audience qu'en répondant à ces questions et à d'autres, le témoin paraissait plus soucieux de protéger l'accusé que de répondre directement aux questions qui lui étaient posées»).

¹⁰⁶ Acte d'appel modifié, para. 38; mémoire de l'appelant, paras. 137 et 138.

54. The Prosecution responds that the times provided by Witness JK 312 were imprecise and that they were mere “estimates”, the witness having admitted that

“everything seemed to be in a dream that morning and he had difficulty concentrating and focusing on specific events”¹⁰⁷.

As a result, the Prosecution argues that it was reasonable for the Trial Chamber not to regard timing as a critical aspect of Witness JK 312’s testimony¹⁰⁸.

55. The Appeals Chamber notes that in reviewing the evidence of Witness JK 312, the Trial Chamber did not specify the times given by the witness¹⁰⁹. However, the Appeals Chamber recognizes that the witness’s time references were made in the context of a situation he described as “chaos” and during which he had difficulty concentrating and focusing¹¹⁰. Additionally, the Appeals Chamber notes that Witness JK 312 himself characterized his recollections of time as “estimates”¹¹¹. Considering that the time references provided by the witness were thus not reliable and, moreover, that the Trial Chamber considered Witness JK 312 to be not credible as to the Appellant’s alibi, the Appeals Chamber finds that the omission of the Trial Chamber to note the times given by the witness did not constitute an error that could have occasioned a miscarriage of justice. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

C. Alleged Errors Relating to Witness JK27

56. The Appellant submits that the Trial Chamber erred by failing to make findings in respect of the testimony of Witness JK 27 that he saw the Appellant at the *commune* office and at his home on three occasions on 7 April 1994¹¹². The Appellant argues that the Trial Chamber’s failure to make any specific finding concerning the credibility of Witness JK27 undermines the findings and verdict of the Trial Chamber.¹¹³

¹⁰⁷ Respondent’s Brief, para. 116.

¹⁰⁸ Respondent’s Brief, para. 116.

¹⁰⁹ See Trial Judgement, paras. 110, 196, 222.

¹¹⁰ See T. 16 September 2002 pp. 68, 69, 71, 72.

¹¹¹ T. 16 September 2002 p. 94:

Q. The Prosecutor, before the break, had said to you, how could you explain that you remembered the times, for example, when you made a call to Kajelijeli when you heard of the President’s death, when you went to his house and the time that you left there?

A. You know, when I was scared in a scary situation, I was aware, I am a person who is aware of things. Can you imagine that I cover a distance of 400, 500 metres, and I was able to calculate the time I spent. I left immediately as soon as I got to my sitting room. There was a clock in the sitting room. I saw it. But, then, from that time onwards all that I did is estimations. So this is why I said it took me 20 to 30 minutes. You see, these are estimations, these are estimates; however, given that I had other things to do than look at the clock every time, so part of my confidence – I do hope anyway I have responded to your question, sir.

¹¹² Amended Notice of Appeal, para. 49; Appellant’s Brief, paras. 148, 149.

¹¹³ Appellant’s Brief, para. 150.

54. Le Procureur répond que les indications de temps fournies par le témoin JK 312 étaient imprécises et n'étaient que des «estimations», le témoin ayant reconnu que

«tout s'était passé comme dans un rêve ce matin-là et qu'il avait du mal à se concentrer sur des faits précis»¹⁰⁷.

Partant, le Procureur soutient qu'il était raisonnable pour la Chambre de première instance de n'avoir pas considéré les indications de temps données par le témoin JK 312 comme étant un aspect essentiel de sa déposition¹⁰⁸.

55. La Chambre d'appel note que la Chambre de première instance, lorsqu'elle a examiné la déposition du témoin JK 312, a passé sous silence les indications de temps données par le témoin¹⁰⁹. La Chambre d'appel reconnaît toutefois que celles-ci ont été fournies dans le contexte d'une situation que le témoin a qualifiée de «chaotique», durant laquelle il avait du mal à se concentrer¹¹⁰. Elle note en outre que le témoin JK 312 lui-même parle des indications de temps qu'il a données comme étant des «estimations»¹¹¹. Étant donné que les indications de temps fournies par le témoin JK 312 n'étaient pas fiables et que la Chambre de première instance a estimé en outre que celui-ci n'était pas crédible eu égard à l'alibi de l'appelant, la Chambre d'appel conclut que le fait que la Chambre de première instance ait omis de tenir compte des indications de temps fournies par le témoin ne constituait pas une erreur qui pourrait entraîner un déni de justice. En conséquence, la Chambre d'appel rejette cette branche du moyen d'appel.

C. Erreurs concernant le témoin JK27

56. L'appelant fait valoir que la Chambre de première instance a commis une erreur en n'effectuant pas de constatations relativement à la déposition du témoin JK 27 qui a déclaré avoir vu l'appelant au bureau communal et à son domicile à trois reprises le 7 avril 1994¹¹². Il soutient que le fait pour la Chambre de première instance de n'avoir opéré aucune constatation précise en ce qui concerne la crédibilité de ce témoin fragilise les conclusions auxquelles elle est parvenue et la décision qu'elle a rendue¹¹³.

¹⁰⁷ Mémoire de l'intimé, para. 116.

¹⁰⁸ *Id.*

¹⁰⁹ Voir jugement, paras. 110, 196 et 222.

¹¹⁰ Compte rendu de l'audience du 16 septembre 2002, p. 119 à 122 et 125 à 128 (huis clos).

¹¹¹ *Ibid.*, pp. 168 et 169 :

Q. Avant la pause, Le Procureur vous a demandé comment expliquez-vous que vous puissiez vous souvenir, de l'heure à laquelle vous avez téléphoné à Kajelijeli lorsque vous avez appris la mort du Président, de l'heure à laquelle vous êtes allé chez lui et de l'heure à laquelle vous en êtes parti? [retraduction].

R. Quoique j'étais, disons, dans une situation de peur, j'étais parfaitement conscient, j'étais une personne consciente. Imaginez-vous que j'ai parcouru 400, 500 mètres. Bien, je pouvais facilement estimer le temps que je passais. Normalement, je me suis levé; aussitôt que je suis arrivé dans mon salon, il y avait une pendule au salon. J'ai vu. Mais, à partir de ce moment-là, ce que je fais, c'est estimer. Et c'est la raison pour laquelle je dis entre [20] et 30 minutes..., vous voyez, [ce sont des] estimations. Évidemment, comme ma préoccupation était de... de ne pas regarder, à chaque fois, l'heure, j'avais une partie de ma conscience. J'espère que j'ai répondu à votre question.

¹¹² Acte d'appel modifié, para. 49; mémoire de l'appelant, paras. 148 et 149.

¹¹³ Mémoire de l'appelant, para. 150.

57. The Prosecution responds that the Trial Chamber did consider and make a finding on Witness JK27's testimony, as evidenced by paragraphs 221 and 225 of the Judgement¹¹⁴. The Prosecution further argues that a Trial Chamber is not required to articulate every step of its reasoning and that the Appellant has failed to show that no reasonable tribunal of fact could have reached a conclusion of guilt beyond a reasonable doubt, after taking Witness JK 27's evidence into account¹¹⁵.

58. The Appeals Chamber notes that the Trial Chamber's consideration of Witness JK 27's evidence concerning the alibi is found in paragraphs 194, 221, and 225 of the Judgement and reads as follows :

194. Defence Witness JK 27 testified that at around 7:30 am on the morning of 7 April 1994, he took a bus to his parents' home in Nkuli. Defence Witness JK 27 testified that upon arrival at his parents' home he first saw the Accused at around 9:00am, then at 11am while the Accused was at the *bureau communal*, and then at 3:00pm in front of the [Accused's] house talking to others¹¹⁶. The Witness testified that he saw the Accused clearly and that there were no structures or objects to interfere with his vision.

221. Defence Witness JK 27 stated that he saw the Accused on three occasions on the 7 April 1994, twice at the Nkuli *Commune* Office, at 9:00am and at 11:00am. And thereafter once in front of his house, which is nearby, at around 3 :00pm.

225. Having considered the evidence of the alibi witnesses in relation to the events of 6 and 7 April 1994, the Chamber finds that the alibi is not credible in relation to these days.

59. The Appeals Chamber notes that while the Trial Chamber recalled Witness JK 27's evidence and ultimately found the alibi for the period included in that evidence not credible, the Trial Chamber did not explicitly state its position on the credibility of Witness JK 27. The Appeals Chamber is mindful of the position expressed in the *Musema* Appeal Judgement that a Trial Chamber "is not required to set out in detail why it accepted or rejected a particular testimony"¹¹⁷. The Appeals Chamber in *Musema* explained the Trial Chamber's duty in this regard as follows :

In the first place, the task of weighing and assessing evidence lies with the Trial Chamber. Furthermore, it is for the Trial Chamber to determine whether a witness is credible or not. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. But the Trial Chamber's discretion in weighing and assessing evidence is always limited by its duty to provide a "reasoned opinion in writing", although it is not required to articulate every step of its reasoning for each particular finding it makes. The question arises as to the extent that a Trial Chamber is obliged to set out its rea-

¹¹⁴ Respondent's Brief, para. 119.

¹¹⁵ Respondent's Brief, para. 118.

¹¹⁶ T. 17 September 2002 p. 105.

¹¹⁷ *Musema* Appeal Judgement, para. 20.

57. Le Procureur rétorque que la Chambre de première instance a bel et bien tenu compte de la déposition du témoin JK 27 et a tiré une conclusion à ce sujet ainsi qu'en témoignent les paragraphes 221 et 225 du jugement¹¹⁴. Il soutient en outre qu'une Chambre de première instance n'est pas tenue d'expliquer chaque étape de son raisonnement et que l'appelant n'a pas démontré qu'aucun juge des faits raisonnable n'aurait pu, sur la base de la déposition du témoin JK 27¹¹⁵, conclure à la culpabilité de l'accusé au-delà de tout doute raisonnable.

58. La Chambre d'appel note que la Chambre de première instance a examiné la déposition du témoin JK 27 concernant l'alibi aux paragraphes 194, 221 et 225 du jugement qui se lisent comme suit :

194. Le témoin à décharge JK 27 a déclaré avoir pris un autobus pour se rendre chez ses parents à Nkuli, vers 7 h 30 dans la matinée du 7 avril 1994. Il a dit avoir d'abord vu l'accusé vers 9 heures à son arrivée chez ses parents, puis à 11 heures alors que celui-ci se trouvait au bureau communal et par la suite à 15 heures devant la maison [de l'accusé] pendant qu'il bavardait avec d'autres personnes. Le témoin a affirmé avoir clairement vu l'accusé et qu'il n'y avait aucun bâtiment ou objet pouvant lui obstruer la vue¹¹⁶.

221. Le témoin à décharge JK 27 a dit avoir vu l'accusé à trois reprises le 7 avril 1994 : deux fois au bureau communal de Nkuli à 9 heures et à 11 heures et une fois devant son domicile, sis à proximité, aux alentours de 15 heures.

225. Ayant examiné les dépositions des témoins tendant à établir l'alibi de l'accusé pour les 6 et 7 avril 1994, la Chambre conclut que l'alibi invoqué n'est pas crédible relativement à ces deux jours-là.

59. La Chambre d'appel note que si la Chambre de première instance a bien fait état de la déposition du témoin JK 27 et a estimé au bout du compte que l'alibi pour la période incluse dans la déposition n'était pas crédible, elle ne s'est pas explicitement prononcée sur la crédibilité du témoin JK 27. La Chambre d'appel est consciente de la position qu'elle a exprimée dans l'arrêt *Musema*, à savoir qu'une Chambre de première instance «n'est pas tenue d'exposer dans le détail les raisons qui l'ont conduite à admettre ou à rejeter un témoignage donné»¹¹⁷. Dans cette affaire, la Chambre d'appel a expliqué comme suit en quoi consiste la tâche qui incombe à une Chambre de première instance :

Il incombe en premier lieu à la Chambre de première instance de peser et d'apprécier la preuve. Au surplus, c'est à elle qu'il appartient d'établir si un témoin est crédible. La Chambre d'appel souscrira dans une certaine mesure aux conclusions factuelles de la Chambre de première instance en toutes circonstances. Mais la latitude qu'à la Chambre de première instance de peser et d'apprécier les éléments de preuve est toujours limitée par l'obligation qui lui est faite de produire une sentence «établie par écrit et motivée», quand bien même elle n'est pas tenue d'y expliquer chaque étape de son raisonnement tou-

¹¹⁴ Mémoire de l'intimé, para. 119.

¹¹⁵ *Ibid.*, para. 118.

¹¹⁶ Compte rendu de l'audience du 17 septembre 2002, p. 105.

¹¹⁷ Arrêt *Musema*, para. 20.

sons for accepting or rejecting a particular testimony. There is no guiding principle on this point and, to a large extent, testimony must be considered on a case by case basis¹¹⁸.

60. In the circumstances of the present case, the Appeals Chamber finds that the Trial Chamber discharged its duty in respect of assessing the testimony of Witness JK 27. As paragraphs 194 and 221 of the Trial Judgement demonstrate, the Trial Chamber reviewed the witness's evidence and, in paragraph 225, concluded that the alibi attested to by Witnesses JK 27, JK 312, and LMR 1 was not credible. While this finding could have been elaborated by inclusion of a discussion of Witness JK 27's credibility, the Trial Chamber's failure to do so falls short of violating the Appellant's right to a "reasoned opinion", which does not ordinarily demand a detailed analysis of the credibility of particular witnesses. In *Musema*, for instance, the Appeals Chamber held that a Trial Chamber is not necessarily required even to "refer to any particular evidence or testimony in its reasoning", much less give specific reasons for discrediting it¹¹⁹. The ICTY Appeals Chamber has also so held¹²⁰. What *is* required is for the Trial Chamber to provide clear, reasoned findings of fact as to each element of each crime charged¹²¹ – a requirement that may be satisfied by a number of different approaches to the assessment of particular evidence, depending on the circumstances. For instance, a Trial Chamber may provide a general overview of how it assessed the credibility of witnesses without detailing each step of that analysis witness-by-witness¹²²; or it may focus principally on the witnesses whose testimony is most relevant to the critical questions it must decide. The Trial Chamber here combined both approaches, commencing with an introductory discussion of its methodology¹²³, describing in some detail the testimony of each witness, and explaining the reasons for its credibility assessments of those it deemed most important while providing more conclusory statements regarding others.

61. Under some circumstances, a reasoned explanation of the Trial Chamber's assessment of a particular witness's credibility is a crucial component of a "reasoned opinion" – for instance, where there is a genuine and significant dispute surrounding a witness's credibility and the witness's testimony is truly central to the question whether a particular element is proven. So, for instance, the ICTR and ICTY Appeals Chambers have both held that where a finding that the accused was present at a crime scene is based on identification evidence from a single eye-witness under stress or

¹¹⁸ *Musema* Appeal Judgement, para. 18 (internal citations omitted).

¹¹⁹ *Musema* Appeal Judgement, para. 20 (emphasis added) ("This is particularly so in the evaluation of witness testimony, including inconsistencies and the overall credibility of a witness.").

¹²⁰ *Kvočka et al.* Appeal Judgement, para. 23; *Celebici Case* Appeal Judgement, paras. 483, 485, 498.

¹²¹ *Kordic and Cerkez* Appeal Judgement, para. 383; *Kvočka et al.* Appeal Judgement, para. 23.

¹²² *Rutaganda* Appeal Judgement, paras. 217, 228.

¹²³ See Trial Judgement, paras. 37-44.

chant à chaque conclusion à laquelle elle sera parvenue. La question est de savoir dans quelle mesure une Chambre de première instance est tenue d'exposer les raisons qui l'ont amenée à admettre ou à rejeter telle ou telle déposition. Sur ce sujet, il n'y a pas de principe directeur et l'on doit dans une large mesure procéder au cas par cas¹¹⁸.

60. Dans les circonstances de l'espèce, la Chambre d'appel estime que la Chambre de première instance s'est acquittée de sa tâche en ce qui concerne l'évaluation de la déposition du témoin JK 27. Comme le démontrent les paragraphes 194 et 221 du jugement, la Chambre de première instance a examiné la déposition du témoin et, au paragraphe 225, a conclu que l'alibi fourni par les témoins JK 27, JK 312 et LMR 1 n'était pas crédible. Cette conclusion aurait pu être explicitée par une analyse de la crédibilité du témoin JK 27, mais cette omission de la part de la Chambre de première instance ne constitue pas véritablement une violation du droit de l'appelant à une «décision motivée», qui n'exige pas généralement une analyse détaillée de la crédibilité de tel ou tel témoin. Dans l'affaire *Musema*, par exemple, la Chambre d'appel a dit qu'une Chambre de première instance n'était pas forcément tenue d'«évoqu[er] telle preuve ou tel témoignage à l'occasion de son raisonnement», encore moins d'exposer les raisons précises qui l'ont amenée à les discréditer¹¹⁹. C'est ce qu'a jugé aussi la Chambre d'appel du TPIY¹²⁰. En revanche, ce qui *est* exigé de la Chambre de première instance, c'est d'opérer des constatations de fait claires et motivées relativement à chacun des éléments de chaque crime imputé à l'accusé¹²¹, obligation dont elle peut s'acquitter de diverses façons pour apprécier tel ou tel moyen de preuve en fonction des circonstances. Ainsi, une Chambre de première instance peut donner un aperçu général de la manière dont elle a apprécié la crédibilité des témoins sans pour autant exposer en détail chaque étape de cette analyse pour chacun de ceux-ci¹²²; elle peut aussi se concentrer surtout sur les témoins dont les dépositions intéressent le plus les questions cruciales qu'elle doit trancher. La Chambre de première instance a allié ici les deux approches; elle a commencé par un exposé introductif de sa méthodologie¹²³, puis a décrit de façon assez détaillée la déposition de chaque témoin et a motivé l'appréciation qu'elle a portée sur la crédibilité des témoins qu'elle considère comme les plus importants, tandis que pour d'autres elle s'est bornée à formuler des observations d'ordre plus général sans les justifier.

61. Dans certaines circonstances, un exposé motivé de l'appréciation que la Chambre de première instance a portée sur la crédibilité d'un témoin donné *constitue* un élément essentiel d'une «décision motivée» – par exemple, lorsque la crédibilité d'un témoin prête réellement et manifestement à controverse et que sa déposition est absolument essentielle pour décider si un élément particulier a été prouvé. C'est ainsi par exemple que les Chambres d'appel du TPIR et du TPIY ont toutes deux affirmé que lorsque la conclusion que l'accusé était présent sur le lieu du crime reposait sur

¹¹⁸ *Ibid.*, para. 18 (notes de bas de page omises).

¹¹⁹ *Ibid.*, para. 20 (non souligné dans l'original) : «Il en est ainsi s'agissant en particulier d'évaluer les témoignages, y compris les incohérences et, dans l'ensemble, la crédibilité d'un témoin».

¹²⁰ Arrêt *Kvočka et consorts*, para. 23; arrêt *Celebici*, paras. 483, 485 et 498.

¹²¹ Arrêt *Kordic et Cerkez*, para. 383; arrêt *Kvočka et consorts*, para. 23.

¹²² Arrêt *Rutaganda*, paras. 217 et 228.

¹²³ Voir jugement, paras. 37 à 44.

other conditions likely to undermine accuracy, that witness's credibility must be discussed – a requirement that reflects the well-demonstrated infirmities of such eye-witness testimony¹²⁴.

62. No such special circumstances are present here. Witness JK 27 is one of many witnesses on both sides who testified to the Appellant's whereabouts on 7 April 1994. The Trial Chamber might reasonably have decided that, even if there was no inherent reason to doubt Witness JK 27's testimony if considered alone, when it was considered alongside all the other testimony, the overall weight of the evidence proved beyond a reasonable doubt that the Appellant was where the Prosecution said he was at each of the crucial times. And indeed, the Trial Judgement provides a reason that, even if assumed to be true, Witness JK 27's alibi testimony is not irreconcilable with the Prosecution's case: the distances between the relevant locations are short and

“the Accused was in a position to move around from one place to another within the *communes* of Mukingo and Nkuli within a short space of time”¹²⁵.

Witness JK 27 testified only to having seen the Appellant at three discrete times, not to his continuous presence in Nkuli during that day; the testimony thus does not provide a complete “alibi” even taken at face value¹²⁶. For this reason, Witness JK27's testimony was not so centrally important that the Trial Chamber was required to assess its credibility in detail; and even if the Trial Chamber were deemed to have erred, that error would not provide a reason to disturb the Judgement. Accordingly, the Appeals Chamber dismisses the present and last sub-ground raised under this ground of appeal.

¹²⁴ *Bagilishema* Appeal Judgement, para. 75; *Kupreškić et al.* Appeal Judgement, paras. 39, 40, 135.

¹²⁵ Trial Judgement, para. 696 (“Furthermore, the Chamber notes that all the major sites in Mukingo and Nkuli *communes* where the Accused is alleged to have been involved are within short distances of each other. The Chamber finds that during the events alleged to have happened from 6 April to 14 April 1994, the Accused was in a position to move around from one place to another within the *communes* of Mukingo and Nkuli within a short space of time. The evidence presented by the Defence regarding difficulty of movement is of little persuasive value. According to the evidence before it, the Chamber finds no impossibility in the Accused's presence at several different locations within the Nkuli or Mukingo *Communes* on the same day or evening”).

¹²⁶ Even if the various witnesses provided somewhat varying accounts of where the Appellant was at certain particular times of the day, such inconsistencies are to be expected in witness recollections of stressful situations and need not all be explained by the Trial Chamber. See *Kvočka et al.* Appeal Judgement, para. 23 (“Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail”).

l'identification faite par un témoin oculaire unique dans des conditions difficiles ou dans toute autre situation susceptible de mettre en cause l'exactitude de sa déposition, la crédibilité de ce témoin doit être analysée – condition qui s'explique par les faiblesses bien démontrées du témoignage oculaire¹²⁴.

62. Nous ne sommes pas en présence de telles circonstances spéciales en l'espèce. Le témoin JK 27 est un des nombreux témoins des deux parties à avoir indiqué à la barre où se trouvait l'appelant le 7 avril 1994. La Chambre de première instance pourrait avoir raisonnablement décidé que, même s'il n'y avait aucune raison particulière de douter de la déposition du témoin JK 27, envisagée seule, lorsqu'on l'examine en même temps que toutes les autres dépositions, il est établi au-delà de tout doute raisonnable, au vu de l'ensemble des éléments de preuve, que l'appelant se trouvait là où le Procureur a dit qu'il était à chacun des moments cruciaux. Le jugement explique d'ailleurs que l'alibi fourni par le témoin JK 27, à supposer qu'il soit vrai, n'est pas incompatible avec la thèse du Procureur : les distances qui séparent les différents lieux en cause sont courtes et

«l'accusé était en mesure de se déplacer d'un lieu à l'autre dans les communes de Mukingo et de Nkuli en un court laps de temps»¹²⁵.

Le témoin JK 27 a seulement déclaré avoir vu l'appelant à trois moments différents, il n'a pas dit que celui-ci était resté en permanence à Nkuli cette journée-là; aussi, la déposition de ce témoin ne fournit-elle pas un «alibi» complet même si on y ajoute foi¹²⁶. La déposition du témoin JK 27 ne revêtait donc pas une importance à ce point capitale que la Chambre de première instance était tenue d'en évaluer la crédibilité de manière circonstanciée; et même si l'on estimait que la Chambre de première instance a commis une erreur, celle-ci ne saurait justifier que l'on modifie le jugement. En conséquence, la Chambre d'appel rejette cette dernière branche du moyen d'appel.

¹²⁴ Arrêt *Bagilishema*, para. 75; arrêt *Kupreškic et consorts*, paras. 39, 40 et 135.

¹²⁵ Jugement, para. 696 : «La Chambre relève en outre que tous les principaux lieux des communes de Mukingo et de Nkuli où l'accusé se serait trouvé sont séparés par de courtes distances. Elle conclut qu'à l'époque des faits qui se seraient produits du 6 au 14 avril 1994, l'accusé était en mesure de se déplacer d'un lieu à l'autre dans les communes de Mukingo et de Nkuli en un court laps de temps. Les éléments de preuve à décharge tendant à établir qu'il était difficile de se déplacer n'ont guère de valeur probante. Au vu des éléments de preuve dont elle a été saisie, la Chambre considère qu'il n'est pas impossible que l'accusé ait été présent en plusieurs lieux différents dans les communes de Nkuli ou de Mukingo le même jour ou le même soir».

¹²⁶ Même si les divers témoins ont donné des informations quelque peu différentes quant aux endroits où se trouvait l'appelant à certains moments précis de la journée, il est normal de constater de telles incohérences dans le souvenir que les témoins ont de situations de forte tension et la Chambre de première instance n'a pas à expliquer toutes ces incohérences. Voir l'arrêt *Kvočka et consorts*, para. 23 : «Sachant qu'un témoignage renferme souvent des contradictions mineures qui ne mettent pas en cause sa fiabilité, la Chambre de première instance peut apprécier le témoignage et décider si, pris dans son ensemble, il est fiable, sans avoir à fournir d'explication détaillée».

VI. ALLEGED ERROR IN FINDINGS WITH RESPECT
TO THE DISTRIBUTION OF TUTSI PROPERTIES
TO *INTERAHAMWE* (GROUND OF APPEAL 8)

63. The Appellant submits that the Trial Chamber erred in its factual finding that he was involved in the distribution of Tutsi properties to the *Interahamwe*¹²⁷. Additionally, the Appellant contends that the Trial Chamber failed to provide a reasoned analysis of this finding, which, according to him, is erroneous and against the weight of the evidence¹²⁸. In his reply, the Appellant also argues that the Trial Chamber ignored the testimony of Witnesses RHU 23, MEM, and RGM¹²⁹. Finally, the Appellant argues that the Trial Chamber erred in finding Witness GAP credible given internal conflicts and contradictions between his prior statements and trial testimony¹³⁰.

64. The Prosecution responds that the Trial Chamber's finding that Tutsi properties were distributed to the *Interahamwe* and that the Appellant was involved in this is based on an examination of the testimony of each relevant witness¹³¹. The Prosecution further notes that the Appellant did not point to any contradictions between the prior statements of Witness GAP and his testimony¹³².

65. A review of the Trial Judgement reveals that, in respect of the distribution of Tutsi properties to the *Interahamwe* and the Appellant's role in this, the Trial Chamber took into account the testimony of Prosecution Witnesses GDQ, GAP, and GAO, and Defence Witnesses RHU 23, RGM, MEM, as well as that of the Appellant¹³³. The Appeals Chamber consequently finds no support for the Appellant's contention that the Trial Chamber ignored the testimony of the Defence witnesses or that it failed to provide a reasoned opinion on this point.

66. Under this ground of appeal, the Appellant also argues that the Trial Chamber erred in finding Witness GAP to be credible. To support this argument, the Appellant points the Appeals Chamber to two paragraphs of the Trial Judgement in which the Trial Chamber set out the evidence of Witness GAP concerning a matter not related to the distribution of Tutsi properties¹³⁴. The Appeals Chamber is at a loss to understand how these paragraphs, which say nothing about the Trial Chamber's views on Witness GAP's credibility, could demonstrate an error on the part of the Trial Chamber. Additionally, the Appeals Chamber notes that despite his allegations under this ground of appeal, the Appellant makes no attempt to show any internal conflicts or contradictions between Witness GAP's prior statements and his testimony or any particular error of the Trial Chamber in evaluating his credibility.

¹²⁷ Amended Notice of Appeal, paras. 51, 52; Appellant's Brief, para. 152.

¹²⁸ Appellant's Brief, para. 153.

¹²⁹ Appellant's Brief in Reply, para. 44.

¹³⁰ Amended Notice of Appeal, para. 50; Appellant's Brief, para. 151.

¹³¹ Respondent's Brief, para. 123.

¹³² Respondent's Brief, para. 122.

¹³³ Trial Judgement, para. 313-320.

¹³⁴ See Amended Notice of Appeal, para. 50; Appellant's Brief, para. 151 referring to Trial Judgement, paras. 251, 252.

VI. ERREUR DANS LES CONCLUSIONS
RELATIVES À LA DISTRIBUTION DES BIENS DES TUTSIS
AUX *INTERAHAMWE* (HUITIÈME MOYEN D'APPEL)

63. L'appelant soutient qu'est erronée la constatation de fait opérée par la Chambre de première instance selon laquelle il a pris part à la distribution des biens de Tutsis aux *Interahamwe*¹²⁷. Il prétend en outre qu'elle n'a pas motivé cette constatation qui, selon lui, est entachée d'erreur et va à l'encontre des preuves qui ont été produites¹²⁸. Dans son mémoire en réplique, l'appelant fait valoir également que la Chambre de première instance n'a pas tenu compte des dépositions des témoins RHU 23, MEM et RGM¹²⁹. Enfin, il soutient qu'elle a commis une erreur en concluant que le témoin à charge GAP était crédible malgré les incompatibilités et contradictions internes relevées entre ses déclarations antérieures et la déposition qu'il a faite à l'audience¹³⁰.

64. Le Procureur répond que la constatation effectuée par la Chambre de première instance selon laquelle les biens de Tutsis ont été distribués aux *Interahamwe* et l'appelant a pris part à cette distribution est fondée sur une analyse de la déposition de chacun des témoins concernés¹³¹. Il fait observer en outre que l'appelant n'a relevé aucune contradiction entre les déclarations antérieures du témoin GAP et sa déposition à l'audience¹³².

65. Il ressort du jugement qu'en ce qui concerne la distribution des biens de Tutsis aux *Interahamwe* et le rôle que l'appelant y a joué, la Chambre de première instance a pris en considération les dépositions des témoins à charge GDQ, GAP et GAO, des témoins à décharge RHU 23, RGM, MEM et de l'appelant lui-même¹³³. La Chambre d'appel estime en conséquence que le grief fait à la Chambre de première instance de n'avoir pas tenu compte des dépositions des témoins à décharge ou de n'avoir pas motivé la constatation en question est dénué de fondement.

66. Dans le cadre de ce moyen d'appel, l'appelant soutient également que la Chambre de première instance a commis une erreur en concluant que le témoin GAP était crédible. Pour étayer cet argument, l'appelant attire l'attention de la Chambre d'appel sur deux paragraphes du jugement dans lesquels la Chambre de première instance relate ce que le témoin GAP a déclaré au sujet d'une question sans rapport avec la distribution des biens de Tutsis¹³⁴. La Chambre d'appel est bien en peine de comprendre comment ces paragraphes, où la Chambre de première instance ne se prononce pas sur la crédibilité du témoin GAP, pourraient démontrer une erreur de la part de celle-ci. En outre, la Chambre d'appel note qu'en dépit des allégations qu'il a faites sous ce moyen d'appel, l'appelant ne s'efforce nullement de mettre en évidence une quelconque incompatibilité ou contradiction interne qui existerait entre les déclarations antérieures du témoin GAP et sa déposition ou une quelconque erreur que la Chambre de première instance aurait commise dans l'évaluation de la crédibilité de ce témoin.

¹²⁷ Acte d'appel modifié, paras. 51 et 52; mémoire de l'appelant, para. 152.

¹²⁸ Mémoire de l'appelant, para. 153.

¹²⁹ Mémoire en réplique de l'appelant, para. 44.

¹³⁰ Acte d'appel modifié, para. 50; mémoire de l'appelant, para. 151.

¹³¹ Mémoire de l'intimé, para. 123.

¹³² *Ibid.*, para. 122.

¹³³ Jugement, paras. 313 à 320.

¹³⁴ Voir l'acte d'appel modifié, para. 50; mémoire de l'appelant, para. 151 renvoyant au jugement, paras. 251 et 252.

67. The Appeals Chamber therefore finds that the Appellant has failed to show that the Trial Chamber erred in finding that he played a role in the distribution of Tutsi properties to the *Interahamwe*. Consequently, this ground of appeal is dismissed.

VII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS ACTIVELY INVOLVED IN THE TRAINING OF *INTERAHAMWE* (GROUND OF APPEAL 9)

68. The Appellant submits that the Trial Chamber erred in its factual finding that he was actively involved in the training of the *Interahamwe*¹³⁵. The Appellant argues that this finding is largely based upon the “vague” eye-witness testimony of Witness GBH¹³⁶ which has not been confirmed by other non-detained Prosecution witnesses, such as Witnesses GBE, GBV, GBG, and ACM who, in the Appellant’s view, “ought to have seen” such training if it had taken place¹³⁷. Additionally, the Appellant disputes the Trial Chamber’s characterization of Witness GBH’s testimony on his association with the *Interahamwe* as “detailed”¹³⁸.

69. The Appellant further submits that the Trial Chamber erred by mischaracterizing “major irreconcilable differences” in the testimony of Witnesses GAP, GDD, and GAO concerning *Interahamwe* training as “minor ambiguities”¹³⁹. According to the Appellant, the Trial Chamber erred in finding testimonies of Witnesses GDD, GAO, and GBE on his involvement in *Interahamwe* training to be credible¹⁴⁰. The Appellant also submits that the Trial Chamber erred in basing its factual findings on the evidence of Witness GBV whose testimony was vague and lacked credibility and Witness GAP who lacked credibility and whose testimony was not corroborated¹⁴¹. The Appellant argues that if *Interahamwe* training did take place in public, as alleged by the detained Witnesses GAP, GDD, and GAO, then the Prosecution should have been able to produce evidence of this from non-detained witnesses¹⁴².

70. Finally, the Appellant contends that in reaching the conclusion that he was involved in *Interahamwe* training, the Trial Chamber ignored the testimony of all Defence witnesses, especially Witness RGM¹⁴³. The Appellant highlights that Defence Witnesses RGM, MEM, TLA, RHU 23, and RHU 31 testified that they were not aware of *Interahamwe* training in the given area¹⁴⁴.

¹³⁵ Amended Notice of Appeal, paras. 53-66; Appellant’s Brief, paras. 157-171.

¹³⁶ Amended Notice of Appeal, para. 64; Appellant’s Brief, paras. 157, 159.

¹³⁷ Appellant’s Brief, paras. 159, 162.

¹³⁸ Amended Notice of Appeal, para. 66; Appellant’s Brief, para. 171.

¹³⁹ Amended Notice of Appeal, para. 65; Appellant’s Brief, paras. 158, 163, 164, 165.

¹⁴⁰ Amended Notice of Appeal, paras. 53-55, 61.

¹⁴¹ Amended Notice of Appeal, paras. 59, 62.

¹⁴² Appellant’s Brief, paras. 160, 161, 170.

¹⁴³ Appellant’s Brief, para. 168.

¹⁴⁴ Amended Notice of Appeal, para. 63; Appellant’s Brief, para. 169.

67. La Chambre d'appel conclut donc que l'appelant n'a pas démontré que la Chambre de première instance a commis une erreur en constatant qu'il a joué un rôle dans la distribution des biens de Tutsis aux *Interahamwe*. En conséquence, ce moyen d'appel est rejeté.

VII. LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT CONCLU À TORT QUE L'APPELANT A ACTIVEMENT PARTICIPÉ
À L'ENTRAÎNEMENT DES *INTERAHAMWE* (NEUVIÈME MOYEN D'APPEL)

68. L'appelant soutient que la Chambre de première instance a commis une erreur de fait en concluant qu'il a activement participé à l'entraînement des *Interahamwe*¹³⁵. Il affirme que cette conclusion est, dans une large mesure, fondée sur la déposition «vague» du témoin oculaire à charge GBH¹³⁶ qui n'a pas été confirmée par d'autres témoins à charge non détenus comme les témoins GBE, GBV, GBG et ACM qui, selon lui, «auraient dû ... voir» cet entraînement si celui-ci avait eu lieu¹³⁷. De plus, il conteste le fait que la Chambre a qualifié de «précise» la déposition du témoin GBH concernant ses liens avec les *Interahamwe*¹³⁸.

69. L'appelant soutient en outre que la Chambre de première instance a commis une erreur pour n'avoir pas relevé les «divergences majeures irréconciliables» contenues dans les dépositions des témoins à charge GAP, GDD et GAO au sujet de l'entraînement des *Interahamwe* et pour les avoir qualifiées à tort d'«ambiguïtés mineures»¹³⁹. Il estime que la Chambre a commis une erreur en jugeant crédibles les dépositions des témoins GDD, GAO et GBE sur sa participation à l'entraînement des *Interahamwe*¹⁴⁰. Il soutient également que la Chambre a commis une erreur de fait en s'appuyant sur la déposition vague et peu crédible du témoin GBV et sur la déposition non corroborée du témoin GAP, lui aussi peu crédible¹⁴¹. Selon lui, si la formation des *Interahamwe* s'était effectivement déroulée dans des lieux publics comme l'ont déclaré les témoins détenus GAP, GDD et GAO, le Procureur aurait été en mesure d'en rapporter la preuve par des témoins autres que des personnes détenues¹⁴².

70. Enfin, l'appelant affirme qu'en concluant qu'il a pris part à l'entraînement des *Interahamwe*, la Chambre de première instance n'a accordé aucune considération aux dépositions des témoins à décharge, surtout du témoin RGM¹⁴³. Il souligne que les témoins à décharge RGM, MEM, TLA, RHU 23 et RHU31 ont déclaré à la barre n'avoir pas été au courant de la formation dispensée aux *Interahamwe* aux endroits indiqués¹⁴⁴.

¹³⁵ Acte d'appel modifié, paras. 53 à 66; mémoire de l'appelant, paras. 157 à 171.

¹³⁶ Acte d'appel modifié, para. 64; mémoire de l'appelant, paras. 157 et 159.

¹³⁷ Mémoire de l'appelant, paras. 159 et 162.

¹³⁸ Acte d'appel modifié, para. 66; mémoire de l'appelant, para. 171.

¹³⁹ Acte d'appel modifié, para. 65; mémoire de l'appelant, paras. 158 et 163 à 165.

¹⁴⁰ Acte d'appel modifié, paras. 53 à 55 et 61.

¹⁴¹ *Ibid.*, para. 59 et 62.

¹⁴² Mémoire de l'appelant, paras. 160, 161 et 170.

¹⁴³ *Ibid.*, para. 168.

¹⁴⁴ Acte d'appel modifié, para. 63; mémoire de l'appelant, para. 169.

71. The Prosecution responds that the Trial Chamber's finding on this point is based on the strength of the corroborating testimony of four witnesses, Witnesses GBH, GDD, GAO, and GAP and that the Appellant fails to demonstrate any error on the part of the Trial Chamber in respect of its finding that the Appellant was involved in the training of the *Interahamwe*¹⁴⁵.

72. A review of the relevant portion of the Trial Judgement reveals that the Trial Chamber considered the testimony of numerous Prosecution and Defence witnesses before reaching its conclusion that the Appellant was involved in the training of the *Interahamwe*¹⁴⁶. The Appellant contends that the Trial Chamber's conclusion on this point is largely based on the testimony of Witness GBH. It is apparent, however, that the Trial Chamber founded its conclusion on the evidence given by Witnesses GBH, GDD, GAO, and GAP¹⁴⁷. The Appeals Chamber notes that the Appellant contends that there are "irreconcilable differences" among the testimony of Witnesses GAP, GDD, and GAO concerning *Interahamwe* training, but fails to indicate any specific discrepancy or point the Appeals Chamber to any place in the record that might support his claim.

73. The Appellant also asserts that Witnesses GDD, GAO, GBE, GBV, and GAP lacked credibility. However, in the submissions made in respect of the present ground of appeal, the Appellant fails to explain why these witnesses lacked credibility or provide any support for his argument. In such circumstances, the Appeals Chamber cannot consider these submissions further.

74. In support of his claim that the Trial Chamber erred in making the present finding, the Appellant also argues that other, non-detained witnesses ought to have seen such trainings and that the Prosecution should have been able to produce their evidence. In the view of the Appeals Chamber such an argument cannot support a claim of an error on the part of the Trial Chamber. It would be entirely speculative and inappropriate for the Tribunal to enter into a consideration of what other evidence could have been brought. The Trial Chamber assessed the relevant evidence before it and made its decision on such basis. A contention of error on the part of a Trial Chamber cannot be substantiated by an assertion that other evidence ought to have been led.

75. Finally, the Appeals Chamber does not accept the Appellant's argument that the Trial Chamber "ignored" the testimony of all Defence witnesses, particularly Witness RGM, on the issue of *Interahamwe* training. In the Trial Judgement, the Trial Chamber clearly noted the relevant evidence of several Defence witnesses, including the testimony of Witnesses RGM, JK 312, and MEM, to the effect that they were not aware of any military training of the *Interahamwe* in Mukingo Commune¹⁴⁸. While the Trial Chamber did not expressly recall the testimony of Witnesses RHU 31 and RHU 23 that they were not aware of *Interahamwe* training in their area, it does not necessarily follow that the Trial Chamber failed to consider this evidence in reaching

¹⁴⁵ Respondent's Brief, paras. 127-131.

¹⁴⁶ See Trial Judgement, paras. 333-395.

¹⁴⁷ Trial Judgement, para. 400.

¹⁴⁸ See Trial Judgement, para. 367. See also Trial Judgement, para. 393 (noting the evidence of Witness TLA that there was no military training of youths at the Isimbi house).

71. Le Procureur répond que la conclusion de la Chambre de première instance sur cette question repose sur les dépositions concordantes de quatre témoins, à savoir les témoins GBH, GDD, GAO et GAP, et que l'appelant n'a pas établi que c'est à tort que la Chambre a conclu qu'il avait participé à l'entraînement des *Interahamwe*¹⁴⁵.

72. Il ressort de l'examen des parties pertinentes du jugement qu'elle a rendu, que la Chambre de première instance a évalué les dépositions de nombreux témoins à charge et à décharge avant de conclure que l'appelant a pris part à la formation des *Interahamwe*¹⁴⁶. L'appelant affirme que la conclusion dégagée par la Chambre sur ce point est, dans une large mesure, fondée sur la déposition du témoin GBH. Il apparaît cependant que la Chambre a basé sa conclusion sur les dépositions des témoins GBH, GDD, GAO et GAP¹⁴⁷. La Chambre d'appel relève que l'appelant affirme qu'il y a des «divergences ... irréconciliables» entre les dépositions des témoins GAP, GDD et GAO en ce qui concerne la formation des *Interahamwe*, mais sans en mentionner une expressément ou appeler son attention sur un passage quelconque du dossier qui étayerait son affirmation.

73. L'appelant affirme également que les témoins GDD, GAO, GBE, GBV et GAP étaient peu crédibles. Cependant, dans ses arguments en ce qui concerne ce moyen d'appel, il n'a ni précisé en quoi ces témoins étaient peu crédibles ni étayé son affirmation. Dans ces circonstances, la Chambre d'appel ne peut examiner plus avant ces arguments.

74. À l'appui du reproche qu'il adresse à la Chambre de première instance d'avoir commis une erreur en dégageant la conclusion en question, l'appelant fait aussi valoir que les autres témoins non détenus devraient avoir vu ces entraînements et que le Procureur devrait avoir été en mesure d'en rapporter la preuve par leur intermédiaire. La Chambre d'appel estime qu'un tel argument ne saurait étayer l'allégation reprochant à la Chambre de première instance d'avoir commis une erreur. Il serait totalement hypothétique et malvenu pour le Tribunal de commencer à se demander quel autre élément de preuve pourrait avoir été produit. La Chambre de première instance a apprécié les éléments de preuve pertinents dont elle a été saisie et a rendu sa décision en conséquence. On ne saurait établir qu'elle a commis une erreur en affirmant que d'autres éléments de preuve auraient dû être produits.

75. Enfin, la Chambre d'appel rejette l'argument de l'appelant selon lequel la Chambre de première instance n'a accordé aucune considération aux dépositions des témoins à décharge, notamment du témoin RGM, en ce qui concerne la question de la formation des *Interahamwe*. Dans le jugement qu'elle a rendu, la Chambre de première instance a manifestement pris acte des dépositions pertinentes de plusieurs témoins à décharge, y compris les témoins RGM, JK 312 et MEM, qui ont affirmé n'avoir pas été au courant d'une quelconque formation militaire donnée aux *Interahamwe* dans la commune de Mukingo¹⁴⁸. Même si la Chambre de première instance

¹⁴⁵ Mémoire de l'intimé, paras. 127 à 131.

¹⁴⁶ Voir jugement, paras. 333 à 395.

¹⁴⁷ Jugement, para. 400.

¹⁴⁸ Voir jugement, para. 367. Voir également jugement, para. 393 (où il est fait état de la déposition du témoin TLA selon laquelle il n'y a eu aucun entraînement militaire donné à de jeunes gens à la maison Isimbi).

its conclusion¹⁴⁹. Furthermore, the Appeals Chamber considers that evidence of witnesses that they were unaware of *Interahamwe* training in their area does not necessarily controvert evidence of witnesses who testified to the existence of such training.

76. The Appeals Chamber therefore finds that the Appellant has failed to show any error on the part of the Trial Chamber relating to this ground of appeal and, accordingly, dismisses the present ground in its entirety.

VIII. ALLEGED ERRORS IN FINDING THAT THE APPELLANT
EXERCISED LEADERSHIP AND EFFECTIVE CONTROL OVER THE *INTERAHAMWE*
AND THAT HE HAD THE AUTHORITY TO STOP THE KILLINGS IN MUKINGO,
NKULI, AND KIGOMBE *COMMUNES* (GROUNDS OF APPEAL 10 AND 21)

77. Grounds of Appeal 10, alleged error in finding that the Appellant exercised leadership and effective control over the *Interahamwe*¹⁵⁰, and 21, alleged error in finding that the Appellant had the authority to stop the killings in Mukingo, Nkuli, and Kigombe *Communes*¹⁵¹, raise related issues concerning the Appellant's superior position over the *Interahamwe*. Consequently, the Appeals Chamber considers them together in the present chapter.

A. The Parties' Submissions

78. The Appellant submits that the Trial Chamber erred in law and fact in its findings concerning his superior responsibility over the *Interahamwe* in Mukingo, Nkuli, and Kigombe *Communes*¹⁵². The Appellant argues that the Trial Chamber's findings were in error because they were against the weight of the evidence ignoring the testimony of the most credible witness on the issue – Defence Witness RGM, who he claims was the “undisputed” president of the *Interahamwe* in Mukingo *Commune*¹⁵³

¹⁴⁹ See *Musema* Appeal Judgement, para. 20 (“It does not necessarily follow that because a Trial Chamber did not refer to any particular evidence or testimony in its reasoning, it disregarded it.”).

¹⁵⁰ Amended Notice of Appeal, paras. 67-76; Appellant's Brief, paras. 172-194; Appellant's Brief in Reply, paras. 47-49.

¹⁵¹ Amended Notice of Appeal, paras. 129-131; Appellant's Brief, paras. 347-354; Appellant's Brief in Reply, paras. 95, 96. The Appeals Chamber notes that although the Appellant does not refer to Kigombe *Commune* in the title of his Ground of Appeal 21, he contests the findings of the Trial Chamber with regard to Kigombe *Commune* as well in the text of his Notice of Appeal and Brief.

¹⁵² Appellant's Brief, paras. 172-194 referring to Trial Judgement, paras. 404, 609, 626, 739, 781.

¹⁵³ Amended Notice of Appeal, para. 68; Appellant's Brief, para. 189.

n'a pas expressément rappelé les dépositions des témoins RHU 31 et RHU 23 qui ont dit n'avoir pas été au courant de la formation militaire dispensée à des *Interahamwe* dans leur région, il ne s'ensuit pas forcément qu'elle les a méconnues en dégageant sa conclusion¹⁴⁹. De plus, la Chambre d'appel estime que le fait que ces témoins affirment ignorer que des séances de formation avaient été organisées à l'intention des *Interahamwe* dans leur région ne met pas nécessairement en cause les dépositions des témoins ayant affirmé que de tels entraînements ont eu lieu.

76. Partant, la Chambre d'appel conclut que l'appelant n'a pas prouvé que la Chambre de première instance a commis une quelconque erreur en ce qui concerne ce moyen d'appel. Elle le rejette par conséquent dans son intégralité.

VIII. LA CHAMBRE DE PREMIÈRE INSTANCE AURAIT CONCLU À TORT
QUE L'APPELANT A EXERCÉ SON AUTORITÉ ET UN CONTRÔLE EFFECTIF
SUR LES *INTERAHAMWE* ET AVAIT L'AUTORITÉ NÉCESSAIRE
POUR METTRE FIN AUX TUERIES DANS LES COMMUNES DE MUKINGO,
DE NKULI ET DE KIGOMBE (DIXIÈME ET VINGT ET UNIÈME MOYENS D'APPEL)

77. Le dixième moyen d'appel qui fait grief à la Chambre de première instance d'avoir commis une erreur en concluant que l'appelant a exercé son autorité et un contrôle effectif sur les *Interahamwe*¹⁵⁰ et le vingt et unième qui lui reproche d'avoir conclu à tort qu'il avait l'autorité nécessaire pour mettre fin aux tueries dans les communes de Mukingo, Nkuli et Kigombe¹⁵¹ soulèvent des questions liées à sa responsabilité de supérieur hiérarchique sur les *Interahamwe*. Aussi, la Chambre d'appel les examinera-t-elle ensemble dans le présent chapitre.

A. Arguments des parties

78. L'appelant soutient que les conclusions que la Chambre de première instance a tirées en ce qui concerne sa responsabilité de supérieur hiérarchique vis-à-vis des *Interahamwe* dans les communes de Mukingo, Nkuli et Kigombe¹⁵² sont entachées d'une erreur de droit et de fait. Il affirme que ces conclusions sont erronées car elles vont à l'encontre des éléments de preuve produits : elles méconnaissent la déposition du témoin le plus fiable sur cette question, à savoir le témoin à décharge RGM qui, selon lui, était le président «incontestable» des *Interahamwe* dans la commune de Mukingo¹⁵³, mais

¹⁴⁹ Voir arrêt *Musema*, para. 20 («Il ne s'ensuit pas forcément que, dès lors qu'une Chambre de première instance n'a pas évoqué telle preuve ou tel témoignage à l'occasion de son raisonnement, c'est qu'elle l'a méconnu»).

¹⁵⁰ Acte d'appel modifié, paras. 67 à 76; mémoire de l'appelant, paras. 172 à 194; mémoire en réplique de l'appelant, paras. 47 à 49.

¹⁵¹ Acte d'appel modifié, paras. 129 à 131; mémoire de l'appelant, paras. 347 à 354; mémoire en réplique de l'appelant, paras. 95 et 96. La Chambre d'appel relève que même s'il ne mentionne pas la commune de Kigombe dans l'intitulé du vingt et unième moyen d'appel, dans son acte d'appel et dans son mémoire, l'appelant conteste également les conclusions dégagées par la Chambre de première instance en ce qui concerne cette commune.

¹⁵² Mémoire de l'appelant, paras. 172 à 194, faisant référence au jugement, paras. 404, 609, 626, 739 et 781.

¹⁵³ Acte d'appel modifié, para. 68; mémoire de l'appelant, para. 189.

– while considering the insufficient evidence of Prosecution Witnesses GBV, ACM, GBG, GDQ, GAP, GBH, GAO, GDD, GDF, and GBE to be probative¹⁵⁴.

79. The Appellant contends that the Prosecution failed to adduce the necessary evidence to demonstrate beyond reasonable doubt that he had effective control over subordinates, as required by the jurisprudence of the Tribunal¹⁵⁵. In particular, the Appellant points out that the Prosecution failed to prove that the *Interahamwe* was a civilian militia exercising a similar discipline to the military or that the Appellant exercised the requisite trappings of authority such as an awareness of a chain of command, the practice of issuing and obeying orders, or the expectation that insubordination may lead to disciplinary sanctions¹⁵⁶. Instead, according to the Appellant, the Prosecution merely produced broad allegations of his leadership, which cannot prove that he exercised effective control over the *Interahamwe*¹⁵⁷.

80. The Prosecution responds that the Appellant has failed to demonstrate that the Trial Chamber erred in finding a superior-subordinate relationship between him and the *Interahamwe* or that he had effective control over the *Interahamwe*¹⁵⁸. The Prosecution argues that the Appellant misinterprets the requirements for proving command responsibility of a civilian superior under Article 6 (3) of the Statute¹⁵⁹. The Prosecution submits that the Trial Chamber applied the correct test and properly found that it had been satisfied¹⁶⁰. Additionally, the Prosecution notes that regardless of whether the Appellant incurs liability under Article 6 (3) of the Statute, he continues to incur criminal responsibility for his individual acts pursuant to Article 6 (1) of the Statute.¹⁶¹

B. Concurrent Convictions under Article 6 (1) and Article 6 (3) of the Statute

81. The Appeals Chamber recalls that under Count 2, genocide, and Count 6, extermination as a crime against humanity, the Trial Chamber found the Appellant responsible both individually, pursuant to Article 6 (1) of the Statute, and as a superior, pursuant to Article 6 (3)¹⁶². The Appeals Chamber notes that the convictions for individual and superior responsibility under each of these counts are based on the same facts¹⁶³. The jurisprudence of the ICTY Appeals Chamber provides that concurrent conviction for individual and superior responsibility in relation to the same count based on the same facts constitutes legal error invalidating the Trial Judge-

¹⁵⁴ Appellant's Brief, paras. 176, 177, 350, 351, 353.

¹⁵⁵ Appellant's Brief, paras. 178-188, 190-193; Appellant's Brief in Reply, paras. 47-49.

¹⁵⁶ Appellant's Brief, paras. 185-187.

¹⁵⁷ Appellant's Brief, paras. 180, 190-194.

¹⁵⁸ Respondent's Brief, paras. 132, 133, 136-139.

¹⁵⁹ Respondent's Brief, para. 140.

¹⁶⁰ Respondent's Brief, paras. 142, 145.

¹⁶¹ Respondent's Brief, para. 146.

¹⁶² Trial Judgement, paras. 842, 843, 905, 906.

¹⁶³ See Trial Judgement, paras. 842, 843, 905, 906.

juge probantes les dépositions laissant à désirer des témoins à charge GBV, ACM, GBG, GDQ, GAP, GBH, GAO, GDD, GDF et GBE¹⁵⁴.

79. L'appelant affirme que le Procureur n'a pas produit les éléments de preuve nécessaires pour établir au-delà de tout doute raisonnable qu'il exerçait un contrôle effectif sur ses subordonnés, comme l'exige la jurisprudence du Tribunal¹⁵⁵. Il souligne en particulier que le Procureur n'a pas prouvé que les *Interahamwe* constituaient une milice civile soumise à une discipline semblable à celle des militaires ou que l'autorité qu'il exerçait s'accompagnait de signes extérieurs, tels que la conscience de l'existence d'une structure hiérarchique, l'habitude de donner des ordres et d'obéir à des ordres ou le fait de savoir que toute insubordination pouvait exposer à des mesures disciplinaires¹⁵⁶. Au contraire, selon l'appelant, le Procureur s'est borné à faire des affirmations d'ordre général sur son rôle de dirigeant, ce qui ne permet pas d'établir qu'il a exercé un contrôle effectif sur les *Interahamwe*¹⁵⁷.

80. Le Procureur répond que l'appelant n'a pas démontré que la Chambre de première instance a commis une erreur en concluant qu'il existait entre les *Interahamwe* et lui une relation de subordination ou qu'il exerçait un contrôle effectif sur ceux-ci¹⁵⁸. Il affirme que l'appelant se méprend sur les critères permettant d'établir la responsabilité du supérieur hiérarchique civil au regard de l'article 6 (3) du Statut¹⁵⁹. Il soutient que la Chambre de première instance a appliqué le critère approprié et a estimé à juste titre qu'il a été satisfait¹⁶⁰. En outre, le Procureur fait observer qu'indépendamment du fait de savoir si la responsabilité de l'appelant est engagée ou non en vertu de l'article 6 (3) du Statut, celui-ci ne répond pas moins pénalement de ses propres actes en vertu de l'article 6 (1)¹⁶¹.

*B. Cumul des déclarations de culpabilité
au regard des articles 6 (1) et 6 (3) du Statut*

81. La Chambre d'appel rappelle qu'en ce qui concerne les deuxième et sixième chefs d'accusation (respectivement génocide et extermination constitutive de crime contre l'humanité), la Chambre de première instance a conclu que l'accusé est pénalement responsable à titre individuel en application de l'article 6 (1) du Statut et en tant que supérieur hiérarchique en application de l'article 6 (3) du Statut¹⁶². La Chambre d'appel relève que les déclarations de culpabilité à titre individuel et en tant que supérieur hiérarchique pour ces deux chefs d'accusation procèdent des mêmes faits¹⁶³. Il ressort de la jurisprudence de la Chambre d'appel du TPIY que le cumul de déclarations de culpabilité prononcées à titre individuel et en tant que supérieur hiérarchique pour le même chef d'accusation à raison des mêmes faits constitue une

¹⁵⁴ Mémoire de l'appelant, paras. 176 et 177, 350 et 351 ainsi que 353.

¹⁵⁵ *Ibid.*, paras. 178 à 188, 190 à 193; mémoire en réplique de l'appelant, paras. 47 à 49.

¹⁵⁶ Mémoire de l'appelant, paras. 185 à 187.

¹⁵⁷ *Ibid.*, paras. 180 et 190 à 194.

¹⁵⁸ Mémoire de l'intimé, paras. 132, 133 et 136 à 139.

¹⁵⁹ *Ibid.*, para. 140.

¹⁶⁰ *Ibid.*, paras. 142 et 145.

¹⁶¹ *Ibid.*, para. 146.

¹⁶² Jugement, paras. 842, 843, 905 et 906.

¹⁶³ *Id.*

ment¹⁶⁴. The Appeals Chamber endorses this position. Accordingly, the Appeals Chamber vacates the Appellant's convictions for genocide and extermination as a crime against humanity under Counts 2 and 6 in so far as they are based on a finding of superior responsibility under Article 6 (3).

C. Whether the Appellant Held a Superior Position

82. However, in spite of vacating the Appellant's convictions made on the basis of Article 6 (3) responsibility, the Appeals Chamber considers that it is still necessary to determine, for purposes of sentencing, whether the Trial Chamber was correct in its finding that the Appellant held a *de facto* superior position as a civilian over the *Interahamwe*. The ICTY Appeals Chamber has held that in relation to a particular count where a Trial Chamber has convicted an accused under the legal requirements of both Articles 7 (1) and 7 (3) of the ICTY Statute,

“a Trial Chamber should enter a conviction on the basis of Article 7 (1) only, and consider the accused's superior position *as an aggravating factor* in sentencing”¹⁶⁵.

Indeed,

“where the Trial Chamber finds that both direct responsibility and responsibility as superior are proved [...] the Trial Chamber *must* take into account the fact that both types of responsibility were proved in its consideration of the sentence”¹⁶⁶.

Clearly, before taking an accused's superior position into account at sentencing, the Trial Chamber must have found that the accused's superior position was proven at trial. As held by the ICTY Appeals Chamber,

“only those matters which are *proved beyond reasonable doubt* against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence”¹⁶⁷.

¹⁶⁴ In *Kordić and Čerkez*, the ICTY Appeals Chamber stated the following in that regard:

The provisions of Article 7 (1) and Article 7 (3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7 (1) and Article 7 (3) of the Statute. Where both Article 7 (1) and Article 7 (3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7 (1) only, and consider the accused's superior position as an aggravating factor in sentencing. ... The Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7 (1) and Article 7 (3) of the Statute in relation to the same counts based on the same facts, as reflected in the Disposition of the Trial Judgement, constitutes a legal error invalidating the Trial Judgement in this regard. *Kordić and Čerkez* Appeal Judgement, paras. 34, 35 (citations omitted). See also *Blaškić* Appeal Judgement, paras. 91, 92.

¹⁶⁵ *Kordić and Čerkez* Appeal Judgement, para. 34 quoting *Blaškić* Appeal Judgement, para. 91.

¹⁶⁶ *Čelebići Case* Appeal Judgement, para. 745 (emphasis added).

¹⁶⁷ *Čelebići Case* Appeal Judgement, para. 763 (emphasis added).

erreur de droit de nature à invalider la décision sur ce point¹⁶⁴. La Chambre d'appel fait sienne cette position. En conséquence, elle annule les condamnations pour génocide et extermination constitutive de crime contre l'humanité prononcées contre l'appelant sur la base des deuxième et sixième chefs d'accusation dans la mesure où elles sont fondées sur la responsabilité du supérieur hiérarchique en application de l'article 6 (3) du Statut.

C. L'appelant était-il un supérieur hiérarchique ?

82. Bien qu'ayant annulé les déclarations de culpabilité prononcées à l'encontre de l'accusé en application de l'article 6 (3) du Statut, la Chambre d'appel estime toutefois nécessaire de déterminer, aux fins du prononcé de la peine, si la Chambre de première instance était fondée à conclure que l'appelant avait la qualité de supérieur hiérarchique civil de fait des *Interahamwe*. La Chambre d'appel du TPIY a jugé, dans le cas d'un chef d'accusation pour lequel une Chambre de première instance a déclaré un accusé coupable en application à la fois des articles 7 (1) et 7 (3) du Statut du TPIY, que

«la Chambre de première instance devrait prononcer une déclaration de culpabilité sur la seule base de l'article 7 (1) et retenir la place de l'accusé dans la hiérarchie comme *une circonstance aggravante*»¹⁶⁵.

En effet,

«lorsque la Chambre de première instance conclut que la responsabilité directe et la responsabilité du supérieur ont toutes deux été établies, il *doit* en être tenu compte dans la sentence»¹⁶⁶.

Il est clair qu'avant de tenir compte de la position de supérieur hiérarchique d'un accusé au moment du prononcé de la peine, la Chambre de première instance doit avoir conclu que celle-ci a été établie au procès. Comme l'a dit la Chambre d'appel du TPIY,

«seuls les faits *établis au-delà de tout doute raisonnable* peuvent faire l'objet d'une condamnation ou être pris en compte comme circonstance aggravante»¹⁶⁷.

¹⁶⁴ Dans l'affaire *Kordić et Čerkez*, la Chambre d'appel du TPIY a déclaré ce qui suit à cet égard :

Les dispositions de l'article 7 (1) et de l'article 7 (3) du Statut font apparaître des formes distinctes de responsabilité pénale. Cependant, la Chambre d'appel estime qu'il est malvenu de déclarer un accusé coupable d'un chef d'accusation précis sur la base à la fois de l'article 7 (1) et de l'article 7 (3) du Statut. Lorsque, pour le même chef, la responsabilité de l'accusé est mise en cause sur la base de ces deux articles et que les conditions juridiques nécessaires pour ce faire sont réunies, la Chambre de première instance devrait prononcer une déclaration de culpabilité sur la seule base de l'article 7 (1) et retenir la place de l'accusé dans la hiérarchie comme une circonstance aggravante ... La Chambre d'appel estime en conséquence que déclarer l'Appelant coupable d'un même fait sur la base des articles 7 (1) et 7 (3) du Statut, comme c'est le cas dans le dispositif du Jugement, constitue une erreur de droit de nature à invalider la décision sur ce point. Arrêt *Kordić et Čerkez*, paras. 34 et 35 (notes de bas de page omises). Voir également arrêt *Blaškić*, paras. 91 et 92.

¹⁶⁵ Arrêt *Kordić et Čerkez*, para. 34, citant l'arrêt *Blaškić*, para. 91.

¹⁶⁶ Arrêt *Čelebići*, para. 745 (non souligné dans l'original).

¹⁶⁷ *Ibid.*, para. 763 (non souligné dans l'original).

The Appeals Chamber agrees with these holdings.

1. *The Trial Chamber's Test for Establishing a Superior-Subordinate Relationship*

83. The Appellant argues that the Trial Chamber erred in law in finding that the Appellant exercised a superior-subordinate relationship over the *Interahamwe* without having any evidence before it demonstrating that his exercise of *de facto* authority as a civilian was “accompanied by the trappings of the exercise of *de jure* authority”¹⁶⁸. The Appellant submits that such “trappings” include

“awareness of a chain of command, the practice of issuing and obeying orders and the expectation that insubordination may lead to disciplinary action”¹⁶⁹.

By way of example, the Appellant argues that the Prosecution should have been required to prove that the *Interahamwe* operated as a civilian militia that had a similar structure or exercised a similar system of discipline to the military¹⁷⁰.

84. The Appeals Chamber notes that the Trial Chamber applied the following test for establishing that a superior-subordinate relationship existed between the Appellant and the *Interahamwe* :

The test for assessing a superior-subordinate relationship, pursuant to Article 6 (3), is the existence of a *de jure* or *de facto* hierarchical chain of authority, where the accused exercised effective control over his or her subordinates as of the time of the commission of the offence. The cognizable relationship is not restricted to military hierarchies, but may apply to civilian authorities as well¹⁷¹.

85. The Appeals Chamber recalls that a superior is one who possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment¹⁷². Furthermore, it is settled both in ICTR and ICTY jurisprudence that the definition of a superior is not limited to military superiors; it also may extend to *de jure* or *de facto* civilian superiors¹⁷³. The Appeals Chamber finds that the Trial Chamber correctly incorporated these elements into its definition of a superior.

86. Furthermore, the Appeals Chamber recalls that a superior-subordinate relationship requires that it be found beyond reasonable doubt that the accused was able to exercise effective control over his or her subordinates¹⁷⁴. Under the effective control test, superiors, whether military or civilian, must have the *material* ability to prevent or punish criminal conduct¹⁷⁵. The Appeals Chamber further finds that the Trial

¹⁶⁸ Appellant's Brief, paras. 183, 184 quoting *Čelebići Case* Trial Judgement, paras. 183, 646.

¹⁶⁹ Appellant's Brief, paras. 185 (quoting *Čelebići Case* Trial Judgement, para. 646), 186, 187, 191.

¹⁷⁰ Appellant's Brief, paras. 186, 191; Appellant's Brief in Reply, para. 49.

¹⁷¹ See Trial Judgement, para. 773.

¹⁷² *Bagilishema* Appeal Judgement, para. 50 citing *Čelebići Case* Appeal Judgement, para. 192.

¹⁷³ *Bagilishema* Appeal Judgement, para. 51; see also *Čelebići Case* Appeal Judgement, paras. 196, 197.

¹⁷⁴ *Bagilishema* Appeal Judgement, para. 52.

¹⁷⁵ *Čelebići Case* Appeal Judgement, para. 256 (internal citations omitted) (emphasis added); see also *Bagilishema* Appeal Judgement, para. 51 quoting *Musema* Trial Judgement, para. 135.

La Chambre d'appel souscrit à ces conclusions.

1. Critère utilisé par la Chambre de première instance pour établir la relation de subordination

83. L'appelant fait valoir que la Chambre de première instance a commis une erreur de droit en concluant qu'il y avait une relation de subordination entre les *Interahamwe* et lui, sans avoir été saisie d'une preuve quelconque établissant que l'autorité de fait qu'il exerçait en tant que civil était «accompagnée de tous les signes extérieurs de l'autorité *de jure*»¹⁶⁸. L'appelant soutient qu'au nombre de ces «signes extérieurs» il y a

«la conscience de l'existence d'une structure hiérarchique, l'habitude de donner des ordres et d'obéir à des ordres et le fait de savoir que toute insubordination peut exposer à des mesures disciplinaires»¹⁶⁹.

À titre d'exemple, l'appelant affirme que le Procureur aurait dû être tenu de prouver que les *Interahamwe* étaient une milice civile dotée d'une structure similaire à celle de l'armée ou appliquant un régime disciplinaire semblable à celui qui a cours dans celle-ci¹⁷⁰.

84. La Chambre d'appel rappelle que la Chambre de première instance a appliqué le critère suivant pour établir l'existence d'une relation de subordination entre l'appelant et les *Interahamwe* :

Le critère permettant d'apprécier le lien de subordination visé à l'article 6 (3) réside dans l'existence d'une hiérarchie *de jure* ou *de facto* par laquelle l'accusé exerçait un contrôle effectif sur ses subordonnés au moment où l'infraction a été commise. Loin de se limiter aux hiérarchies militaires, ce lien de subordination peut également être pris en considération dans le cas des autorités civiles¹⁷¹.

85. La Chambre d'appel rappelle que le supérieur hiérarchique est celui qui détient le pouvoir ou l'autorité, *de jure* ou *de facto*, sur des subordonnés; il n'est pas nécessaire que cette autorité ou ce pouvoir soit conféré par une nomination officielle¹⁷². En outre, il ressort de la jurisprudence constante tant du TPIR que du TPIY que la définition du supérieur hiérarchique ne vise pas seulement les commandants militaires, elle peut également s'appliquer aux supérieurs civils *de jure* ou *de facto*¹⁷³. La Chambre d'appel conclut que la Chambre de première instance a dûment pris ces éléments en compte dans la définition qu'elle a donnée du supérieur hiérarchique.

86. Par ailleurs, la Chambre d'appel rappelle que pour démontrer l'existence d'une relation de subordination, il importe qu'il soit établi, au-delà de tout doute raisonnable, que l'accusé était en mesure d'exercer un contrôle effectif sur ses subordonnés¹⁷⁴. Selon ce critère du contrôle effectif, les supérieurs hiérarchiques, qu'ils soient militaires ou civils, doivent avoir la capacité *matérielle* d'empêcher ou de punir un comportement criminel¹⁷⁵.

¹⁶⁸ Mémoire de l'appelant, paras. 183 et 184, citant l'arrêt *Čelebići*, paras. 183 et 646.

¹⁶⁹ *Ibid.*, para. 185 (citant l'arrêt *Čelebići*, paras. 646), 186, 187 et 191.

¹⁷⁰ *Ibid.*, paras. 186 et 191; mémoire en réplique de l'appelant, para. 49.

¹⁷¹ Voir jugement, para. 773.

¹⁷² Arrêt *Bagilishema*, para. 50, citant l'arrêt *Čelebići*, para. 192.

¹⁷³ *Ibid.*, para. 51; voir également l'arrêt *Čelebići*, paras. 196 et 197.

¹⁷⁴ Arrêt *Bagilishema*, para. 52.

¹⁷⁵ Arrêt *Čelebići*, para. 256 (notes de bas de page omises) (non souligné dans l'original); voir également l'arrêt *Bagilishema*, para. 51, citant le jugement *Musema*, para. 135.

Chamber correctly articulated this effective control test in its definition of the superior-subordinate relationship.

87. The Appeals Chamber rejects the Appellant's argument that in order to establish "effective control" by a *de facto* civilian superior it is required that there be an additional finding that the superior exercised the trappings of *de jure* authority or that he or she exercised authority comparable to that applied in a military context. The Appeals Chamber recalls its holding in *Bagilishema* that under the "effective control" test, there is no requirement that the

"control exercised by a civilian superior must be of the same *nature* as that exercised by a military commander"¹⁷⁶.

Rather,

"it is sufficient that, for one reason or another, the accused exercises the required 'degree' of control over his subordinates, namely that of *effective control*"¹⁷⁷.

Likewise, the Appeals Chamber finds that there is no requirement of a finding that a *de facto* civilian superior exercised the trappings of *de jure* authority generally. What is essential is that the *de facto* civilian superior possessed the requisite *degree* of effective control. Of course, evidence that a *de facto* civilian superior exercised control in a military fashion or similar in form to that exercised by *de jure* authorities may strengthen a finding that he or she exercised the requisite degree of effective control. However, the Appeals Chamber concludes that neither is necessary for establishing effective control.

2. The Trial Chamber's Application of the Superior-Subordinate Relationship Test

88. Next, the Appellant argues that the Trial Chamber erred in its findings that he was a leader with effective control over the *Interahamwe* in Mukingo and Nkuli *Communes* from 1 January 1994 to July 1994 and that, as such, he had the authority to prevent or stop the killings that occurred in Mukingo, Nkuli, and Kigombe *Communes* in April 1994. According to the Appellant, these findings were against the weight of the evidence presented at trial¹⁷⁸.

89. The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber's reliance upon the testimony of Witnesses GBV, ACM, GBG, GDQ, GAP, and GBH as evidence of his leadership role or its reliance upon the testimony of Witnesses GAO, GBV, GDQ, GDD, ACM, GDF, GBE, and GBG to establish that the Appellant was seen to have issued orders to attackers to kill Tutsis was unreasonable or occasioned a miscarriage of justice. The Appellant makes general assertions that the testimony of these witnesses lacked credibility or reliability in that they were vague or contradictory and that their testimonies consisted of "fabrications, exaggeration and lies"¹⁷⁹

¹⁷⁶ *Bagilishema* Appeal Judgement, para. 55.

¹⁷⁷ *Bagilishema* Appeal Judgement, para. 55 (emphasis added).

¹⁷⁸ Amended Notice of Appeal, para. 68; Appellant's Brief, paras. 176, 177, 189, 194, 350, 351, 353, referring to Trial Judgement, paras. 404, 609, 626, 739, 781.

¹⁷⁹ Appellant's Brief, paras. 176, 177, 353.

Elle conclut en outre que la Chambre de première instance a bien énoncé ce critère dans sa définition de la relation de subordination.

87. La Chambre d'appel rejette l'argument de l'appelant qui estime que pour établir qu'un supérieur civil *de facto* a exercé un «contrôle effectif», il est nécessaire de conclure également que l'autorité *de jure* qu'il exerçait s'accompagnait des signes extérieurs voulus ou qu'il a exercé une autorité comparable à celle exercée dans le contexte militaire. Elle rappelle sa décision dans l'arrêt *Bagilishema*, à savoir que le critère du «contrôle effectif» n'exige pas que

«le contrôle exercé par un supérieur civil [soit] de la même *nature* que le contrôle exercé par un chef militaire»¹⁷⁶.

Au contraire,

«[i]l suffit que, pour une raison ou pour une autre, l'accusé exerce le “degré” de contrôle pertinent sur ses subordonnés, soit celui du contrôle *effectif*»¹⁷⁷.

De même, elle conclut qu'il n'est pas nécessaire d'établir que l'autorité *de jure* qu'exerce un supérieur civil *de facto* s'accompagne de façon générale des signes extérieurs voulus; l'essentiel est que celui-ci possède le *degré* de contrôle effectif requis. Il va de soi que la preuve qu'un supérieur civil *de facto* a exercé un contrôle de manière militaire ou ressemblant dans sa forme à celui exercé par des autorités *de jure* peut conforter la conclusion qu'il a exercé le degré de contrôle effectif requis. La Chambre d'appel conclut toutefois qu'aucune de ces conditions n'est nécessaire pour établir le contrôle effectif.

2. Application du critère de relation de subordination par la Chambre de première instance

88. L'appelant affirme ensuite que la Chambre de première instance a versé dans l'erreur en concluant qu'il était l'un des dirigeants ayant exercé un contrôle effectif sur les *Interahamwe* dans les communes de Mukingo et Nkuli du 1er janvier au mois de juillet 1994 et qu'il avait, en cette qualité, l'autorité nécessaire pour empêcher ou faire cesser les tueries survenues dans les communes de Mukingo, Nkuli et Kigombe en avril 1994. Il estime que ces conclusions vont à l'encontre des preuves produites en première instance¹⁷⁸.

89. La Chambre d'appel conclut que l'appelant n'a pas démontré en quoi le fait pour la Chambre de première instance de s'être appuyée sur les dépositions des témoins GBV, ACM, GBG, GDQ, GAP et GBH pour prouver son rôle de dirigeant ou sur les dépositions des témoins GAO, GBV, GDQ, GDD, ACM, GDF, GBE et GBG pour établir qu'il a été vu donnant des ordres aux assaillants de tuer les Tutsis est déraisonnable ou a entraîné un déni de justice. L'appelant affirme de façon générale que les dépositions de ces témoins étaient peu crédibles ou peu fiables parce qu'elles étaient vagues ou contradictoires et qu'elles étaient «des inventions, des exagérations ou des mensonges»¹⁷⁹, sans

¹⁷⁶ Arrêt *Bagilishema*, para. 55.

¹⁷⁷ *Id.* (non souligné dans l'original).

¹⁷⁸ Acte d'appel modifié, para. 68; mémoire de l'appelant, paras. 176 et 177, 189, 194, 350 et 351 ainsi que 353, renvoyant au jugement, paras. 404, 609, 626, 739 et 781.

¹⁷⁹ Mémoire de l'appelant, paras. 176 et 177 ainsi que 353.

without establishing that no reasonable Trial Chamber could have relied upon such testimony to find the Appellant's exercise of effective control. In addition, the Appeals Chamber finds that the Appellant has failed to show the Trial Chamber's error in finding his superior relationship over the *Interahamwe*. The Appellant merely states that the testimony of the Defence witnesses outweighs that of the Prosecution witnesses, and only mentions the testimony of Defence Witness RGM in particular, asserting that Witness RGM was the most credible witness on the issue of the Appellant's leadership role over the *Interahamwe* in Mukingo Commune¹⁸⁰. Again, the Appellant fails to specifically demonstrate how the Trial Chamber erred in the weighing process and, instead, lists in a footnote all of the witnesses he presented at trial to challenge the Prosecutor's contention that he was present and participated in attacks in Mukingo, Nkuli, and Kigombe Communes¹⁸¹. The Appeals Chamber emphasizes that an appeal is not a trial *de novo* and that it is not for the Appeals Chamber to reassess all of the evidence presented at trial with regard to the issue at hand on the basis of these general assertions alone.

90. Furthermore, the Appeals Chamber finds that the Trial Chamber did make the requisite factual findings to conclude, beyond reasonable doubt, that the Appellant exercised *de facto* effective control over the *Interahamwe* as a civilian. The Appeals Chamber recalls that in *Kayishema and Ruzindana*, one of the Appellants was found to have exercised *de facto* superior control over the *Interahamwe* on the basis of evidence which identified him as "leading, directing, ordering, instructing, rewarding and transporting" the assailants to carry out attacks¹⁸². The Appeals Chamber in that case affirmed the Trial Chamber's holding that such evidence demonstrated that he played a "pivotal role" in leading the execution of the massacres¹⁸³. Likewise, in this case, the Trial Chamber found *inter alia* that the assailants in the attacks in Nkuli and Mukingo Communes reported back daily to the Appellant on what had been achieved; the Appellant instructed the *Interahamwe* to kill and exterminate Tutsis and ordered them to dress up and start the work; the Appellant directed the *Interahamwe* from Byangabo Market to Rwankeri Cellule to join that attack; the Appellant transported armed assailants; the Appellant ordered and supervised attacks; the Appellant bought beers for the *Interahamwe* while telling them that he hoped they had not spared

¹⁸⁰ The Appeals Chamber rejects the Appellant's assertion in his Notice of Appeal that the Trial Chamber "ignored" the testimony of Witness RGM. See Appellant's Amended Notice of Appeal, para. 68. The Appeals Chamber notes that in para. 527 of the Trial Judgement, the Trial Chamber carefully assessed the credibility of Witness RGM and found him to be unreliable with regard to his testimony on the presence of the Appellant at the scenes of the crimes because he seemed to deliberately remove the Appellant from any of the events with which he was charged. Nevertheless, the Trial Chamber found that Witness RGM did provide detailed and informed evidence with regard to many of the events at issue in the trial and took the witness's testimony into account several times throughout the Trial Judgement. See, e.g., Trial Judgement, paras. 538-541, 564, 600, 615, 621, 633, 635, 678, 700. The Appeals Chamber finds that the Appellant fails to demonstrate how the Trial Chamber's conclusions with regard to the testimony of Witness RGM were unreasonable. See also discussion of Witness RGM *infra* Chapter XI.

¹⁸¹ See Appellant's Brief, para. 353 n. 204.

¹⁸² *Kayishema and Ruzindana* Appeal Judgement, para. 299.

¹⁸³ *Kayishema and Ruzindana* Appeal Judgement, para. 299.

établir qu'aucune Chambre de première instance raisonnable n'aurait pu se fonder sur de tels témoignages pour conclure à l'exercice du contrôle effectif par l'appelant. De plus, la Chambre d'appel estime que l'appelant n'a pas démontré l'erreur commise par la Chambre de première instance en concluant qu'il se trouvait dans une position de supérieur hiérarchique par rapport aux *Interahamwe*. Il se borne à déclarer que les dépositions des témoins à décharge ont une valeur probante supérieure à celles des témoins à charge et ne mentionne que la déposition du témoin à décharge RGM en particulier, affirmant que celui-ci était le témoin le plus fiable s'agissant de son rôle de dirigeant des *Interahamwe* dans la commune de Mukingo¹⁸⁰. Une fois encore, l'appelant ne démontre pas concrètement en quoi la Chambre de première instance a commis une erreur en procédant à l'appréciation des éléments de preuve, il se borne plutôt à dresser dans une note de bas de page une liste de tous les témoins qu'il a présentés au procès pour réfuter les allégations du Procureur selon lesquelles il était présent et avait participé aux attaques survenues dans les communes de Mukingo, Nkuli et Kigombe¹⁸¹. La Chambre d'appel souligne que la procédure d'appel ne saurait être l'occasion d'un procès *de novo* et qu'il ne lui incombe pas, sur la base de ces seules assertions générales, de réévaluer tous les éléments de preuve produits au procès en ce qui concerne cette question.

90. De plus, la Chambre d'appel estime que la Chambre de première instance a effectué les constatations de fait requises pour conclure au-delà de tout doute raisonnable que l'appelant, en tant que civil, a exercé un contrôle effectif *de facto* sur les *Interahamwe*. Elle rappelle que dans l'affaire *Kayishema et Ruzindana*, il a été jugé que l'un des appelants avait exercé, en sa qualité de supérieur hiérarchique, un contrôle *de facto* sur les *Interahamwe* sur la base de dépositions indiquant qu'on l'avait vu «diriger, orienter, ordonner, donner des instructions, récompenser et transporter» les assaillants pour lancer des attaques¹⁸². Dans cette affaire, la Chambre d'appel avait confirmé la conclusion de la Chambre de première instance qui avait estimé que de tels éléments de preuve témoignaient du «rôle crucial» que celui-ci avait joué dans l'orchestration des massacres perpétrés¹⁸³. De même, dans le cas d'espèce, la Chambre de première instance a conclu, entre autres, que les assaillants impliqués dans les attaques lancées contre les communes de Nkuli et Mukingo rendaient quotidiennement compte de ce qui avait été accompli à l'appelant, que celui-ci a ordonné aux *Interahamwe* de tuer et d'exterminer des Tutsis, d'aller s'habiller et de commencer le travail, qu'il a ordonné aux *Interahamwe* de se rendre du marché de Byangabo à la cellule de Rwankeri pour se joindre aux assaillants,

¹⁸⁰ La Chambre d'appel rejette l'affirmation faite par l'appelant dans son acte d'appel selon laquelle la Chambre de première instance «a méconnu» la déposition du témoin RGM. Voir l'acte d'appel modifié de l'appelant, para. 68. Elle relève qu'au paragraphe 527 du jugement, la Chambre de première instance a méticuleusement évalué la crédibilité du témoin RGM et conclu que sa déposition sur la présence de l'appelant sur les lieux des crimes n'était pas crédible parce qu'il a semblé avoir voulu délibérément distancer l'accusé des faits qui lui sont reprochés. Cependant, la Chambre de première instance a estimé que le témoin RGM a évoqué de façon détaillée et en connaissance de cause nombre de faits litigieux et elle a plusieurs fois tenu compte de sa déposition dans le jugement. Voir le jugement, paras. 538 à 541, 564, 600, 615, 621, 633, 635, 678 et 700. La Chambre d'appel conclut que l'appelant n'a pas démontré le caractère déraisonnable des conclusions dégagées par la Chambre de première instance en ce qui concerne la déposition du témoin RGM. Voir aussi, au chapitre XI, la discussion concernant ce témoin.

¹⁸¹ Voir mémoire de l'appelant, para. 353, note de bas de page 203.

¹⁸² Arrêt *Kayishema et Ruzindana*, para. 299.

¹⁸³ *Id.*

anyone; and the Appellant played a vital role in organizing and facilitating the *Interahamwe* in the massacre at Ruhengeri Court of Appeal by procuring weapons, rounding up the *Interahamwe* and facilitating their transportation¹⁸⁴.

91. On the basis of the foregoing, the Appeals Chamber affirms the Trial Chamber's conclusion that the evidence adduced at trial established beyond reasonable doubt that the Appellant held a *de facto* superior position as a civilian over the *Interahamwe*. Consequently, the Trial Chamber was obliged to take the Appellant's superior position into account as an aggravating factor at sentencing.

IX. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT
AT THE CANTEEN IN NKULI COMMUNE ON 6 APRIL 1994
(GROUND OF APPEAL 11)

92. The Appellant submits that the Trial Chamber erred in finding Prosecution Witness GDD to be credible and in relying on his uncorroborated testimony¹⁸⁵. While the Appellant acknowledges that corroboration is not required as a general rule considering, in his view, that there were discrepancies between the witness's prior written statements, that the witness committed serious crimes before April 1994, and that he had a "clear motive" to testify falsely, the Appellant argues that the Trial Chamber should have required corroboration of his testimony before relying on it to find that the Appellant participated in a meeting at Nkuli canteen on 6 April 1994 as well as in a distribution of weapons at the Nkuli Commune office between 5 and 6 a.m. on 7 April 1994¹⁸⁶.

93. The Prosecution responds that the Appellant has failed to demonstrate any error on the part of the Trial Chamber in considering and rejecting the argument, made at trial, that Witness GDD had a motive to testify falsely¹⁸⁷. The Prosecution further points out that the Trial Chamber has considered the alleged inconsistencies between the witness's written statements and submits that the Appellant is merely attempting to reargue his case on appeal¹⁸⁸.

94. Under Ground of Appeal 6 addressed above, the Appeals Chamber has already considered and dismissed the Appellant's submission that the Trial Chamber erred in finding Witness GDD to be credible¹⁸⁹. Accordingly, arguments taken into account in connection with that ground of appeal need not be revisited here. The Appellant makes two additional claims under the present ground of appeal: that Witness GDD

¹⁸⁴ Trial Judgement, para. 739. See also Trial Judgement, paras. 531, 559, 597, 625.

¹⁸⁵ Amended Notice of Appeal, paras. 77-83.

¹⁸⁶ Appellant's Brief, paras. 195-207.

¹⁸⁷ Respondent's Brief, para. 149.

¹⁸⁸ Respondent's Brief, para. 150.

¹⁸⁹ See *supra* Chapter IV.

qu'il a transporté des assaillants armés, qu'il a ordonné et supervisé des attaques, qu'il a acheté de la bière aux *Interahamwe* en leur disant qu'il espérait qu'ils n'avaient épargné personne et qu'il a joué un rôle essentiel en ce qu'il a organisé et facilité les opérations des *Interahamwe* pendant le massacre perpétré à la cour d'appel de Ruhengeri, et ce en procurant des armes, en rassemblant les *Interahamwe* et en facilitant leur transport¹⁸⁴.

91. Sur la base de ce qui précède, la Chambre d'appel confirme la conclusion dégagée par la Chambre de première instance qui a estimé que les éléments de preuve produits établissaient au-delà de tout doute raisonnable que l'appelant, en sa qualité de civil, occupait *de facto* une position de supérieur hiérarchique vis-à-vis des *Interahamwe*. En conséquence, la Chambre de première instance se devait de tenir compte de la position de supérieur hiérarchique de l'appelant comme circonstance aggravante lors du prononcé de la peine.

IX. LA CHAMBRE DE PREMIÈRE INSTANCE AURAIT CONCLU À TORT
QUE L'APPELANT SE TROUVAIT À LA CANTINE DE LA COMMUNE DE NKULI
LE 6 AVRIL 1994 (ONZIÈME MOYEN D'APPEL)

92. L'appelant soutient que la Chambre de première instance a versé dans l'erreur en concluant que le témoin à charge GDD était crédible et en se fondant sur sa déposition non corroborée¹⁸⁵. Il reconnaît que la corroboration n'est pas exigée en règle générale, mais estime que, compte tenu des divergences entre les déclarations écrites antérieures du témoin, des crimes graves commis par celui-ci avant avril 1994 et du «motif manifeste» qu'il avait de faire un faux témoignage, la Chambre de première instance aurait dû exiger que sa déposition soit corroborée avant d'y ajouter foi et de conclure que l'appelant a participé à une réunion tenue à la cantine de Nkuli le 6 avril 1994 ainsi qu'à la distribution d'armes au bureau communal de Nkuli entre 5 heures et 6 heures du matin le 7 avril 1994¹⁸⁶.

93. Le Procureur répond que l'appelant n'a pas démontré que la Chambre de première instance a commis une erreur lorsqu'elle a rejeté, après l'avoir examiné, l'argument présenté au procès selon lequel le témoin GDD avait un motif de faire un faux témoignage¹⁸⁷. Il souligne en outre que la Chambre de première instance a examiné les divergences qui existeraient entre les déclarations écrites du témoin et soutient que l'appelant tente tout simplement de plaider de nouveau sa cause devant la Chambre d'appel¹⁸⁸.

94. Au sixième moyen d'appel considéré plus haut, la Chambre d'appel a déjà examiné et rejeté le reproche adressé par l'appelant à la Chambre de première instance d'avoir déclaré à tort le témoin GDD crédible¹⁸⁹. En conséquence, point n'est besoin de revenir ici sur les arguments pris en compte dans le cadre de ce moyen d'appel. L'appelant formule deux autres griefs dans ce onzième moyen d'appel, à savoir que

¹⁸⁴ Jugement, para. 739. Voir également paras. 531, 559, 597 et 625.

¹⁸⁵ Acte d'appel modifié, paras. 77 à 83.

¹⁸⁶ Mémoire de l'appelant, paras. 195 à 207.

¹⁸⁷ Mémoire de l'intimé, para. 149.

¹⁸⁸ *Ibid.*, para. 150.

¹⁸⁹ Voir chapitre IV ci-dessus.

“expected something in return” for his testimony and that his witness statements reveal inconsistencies.

95. The Appeals Chamber notes that during cross-examination at trial, Witness GDD admitted that when he was first approached by Prosecution investigators, he asked what he could receive for providing information to them¹⁹⁰. However, when the investigator told the witness that there was nothing the Tribunal could do for him, Witness GDD expressed his disappointment but agreed to provide truthful information¹⁹¹. In the view of the Appeals Chamber, there is nothing in this which would support a claim that the Trial Chamber erred in finding Witness GDD to be credible. Rather, the exchange between the witness and the investigator shows that when Witness GDD agreed to provide information to Prosecution investigators, he did so with the clear understanding that he would receive no “help” in return.

96. The Appeals Chamber now turns to the claim of inconsistent written statements. The Appellant highlights that Witness GDD’s first statement, from June 2000, does not mention the Appellant’s role in convening the night-time meeting in Nkuli *Commune* on 6 April 1994 and his activities in the morning on 7 April 1994, whereas his second statement, given in July 2000, does allege these activities. The Appellant appears to argue that the Trial Chamber’s decision to credit the testimony of Witness GDD in spite of the discrepancies between the two statements shows that the Trial Chamber failed to exercise caution in assessing his credibility¹⁹². The Appeals Chamber finds that the fact that he did not identify the Appellant on the first occasion does not make his testimony unreliable. Moreover the jurisprudence of this Tribunal recognizes that a Trial Chamber has the discretion to accept a witness’s evidence, notwithstanding inconsistencies between said evidence and his or her previous statements, as it is up to the Trial Chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned¹⁹³. The Appeals Chamber notes that during cross-examination, Defence counsel questioned Witness GDD about the discrepancies in the two written statements at length and that the witness explained the omissions¹⁹⁴. In reaching the conclusion that Witness GDD was credible, the Trial Chamber recalled the Defence arguments concerning the differences between the witness’s statements as well as his explanation for them¹⁹⁵. The Appeals Chamber therefore finds that on appeal, the Trial Chamber’s acceptance of Witness GDD’s explanations has not been shown to be unreasonable.

¹⁹⁰ T. 3 October 2001 p. 134.

¹⁹¹ T. 3 October 2001 p. 134. (“Well, I told him – I asked him, you know, if I were to give you information, what would it be my interest, or what interest I derive from it? He told me there wouldn’t be anything because ICTR – how should I put it? Yes, thank you. So he told me that ICTR could not issue instructions or go against instructions issued by Court in Rwanda. So I said, thank you. I am disappointed because I would want to be released, but since ICTR cannot do anything about my case, well, I will tell you the truth.”).

¹⁹² Appellant’s Brief, paras. 199, 201-203.

¹⁹³ *Rutaganda* Appeal Judgement, para. 443. See also *Musema* Appeal Judgement, para. 89; *Celebici Case* Appeal Judgement, para. 497; *Kupreškic et al.* Appeal Judgement, para. 156.

¹⁹⁴ See T. 4 October 2001 pp. 68-100.

¹⁹⁵ Trial Judgement, para. 467.

le témoin GDD «escomptait quelque chose en retour» de sa déposition et que ses déclarations révèlent des contradictions.

95. La Chambre d'appel relève qu'au cours du contre-interrogatoire pendant le procès, le témoin GDD a reconnu avoir demandé aux enquêteurs du Procureur, lorsque ceux-ci ont pris contact avec lui pour la première fois, ce qu'il pourrait obtenir en contrepartie des informations qu'il leur fournirait¹⁹⁰. Toutefois, quand l'enquêteur lui a répondu que le Tribunal ne pouvait rien faire pour lui, il a fait part de sa déception mais a accepté de dire la vérité¹⁹¹. De l'avis de la Chambre d'appel, rien dans ces propos ne vient étayer le grief fait à la Chambre de première instance d'avoir versé dans l'erreur en jugeant le témoin GDD crédible. Au contraire, il ressort de l'échange de propos entre l'enquêteur et le témoin que celui-ci a accepté de fournir des informations aux enquêteurs du Procureur et l'a fait en sachant parfaitement qu'il ne recevrait aucune «aide» en retour.

96. La Chambre d'appel se penchera à présent sur le grief tiré des contradictions entre les déclarations écrites. L'appelant souligne que la première déclaration écrite du témoin GDD, datée de juin 2000, ne mentionne ni le rôle que l'appelant a joué en convoquant la réunion tenue dans la commune de Nkuli le soir du 6 avril 1994 ni ses activités dans la matinée du 7 avril 1994, alors qu'il en fait état dans sa deuxième déclaration faite en juillet 2000. L'appelant semble soutenir que la décision de la Chambre de première instance d'ajouter foi à la déposition du témoin GDD en dépit des contradictions relevées dans ses deux déclarations montre qu'elle n'a pas fait preuve de circonspection dans l'évaluation de sa crédibilité¹⁹². La Chambre d'appel estime que le fait que le témoin n'a pas mentionné l'appelant la première fois n'entache pas la crédibilité de sa déposition. En outre, il ressort de la jurisprudence du Tribunal de céans qu'une Chambre de première instance peut accepter la déposition d'un témoin, malgré l'existence de contradictions entre celle-ci et ses déclarations antérieures, dans la mesure où il lui revient de déterminer si la disparité alléguée est insuffisante pour jeter un doute sur la déposition du témoin concerné¹⁹³. La Chambre d'appel relève que pendant le contre-interrogatoire le conseil de la Défense a longuement interrogé le témoin GDD sur les contradictions relevées dans ses deux déclarations écrites et que celui-ci a expliqué les omissions constatées¹⁹⁴. En déclarant le témoin GDD crédible, la Chambre de première instance a rappelé l'argumentation développée par la Défense au sujet des divergences entre les déclarations du témoin ainsi que les explications qu'il a fournies¹⁹⁵. En conséquence, la Chambre d'appel estime qu'il n'a pas été démontré que la décision d'accepter les explications données par le témoin GDD était abusive.

¹⁹⁰ Compte rendu de l'audience du 3 octobre 2001, pp. 153 et 154.

¹⁹¹ *Id.* («Moi, je lui ai dit, je lui ai demandé : Si je vous donnais des informations, ... quel serait [l'intérêt pour moi] ? Est-ce que vous pourriez m'aider à demander la libération de la part de l'Etat ? Il m'a répondu non, parce que le TPIR n'est pas là pour, comment m'exprimer ... ? Oui, merci. Donc, il m'a dit que le TPIR ne peut pas donner des instructions [ou aller à l'encontre d']instructions données par les tribunaux au Rwanda. Donc, j'ai dit merci, je suis déçu parce que moi je voulais que je sois libéré mais, parce que le TPIR ne pouvait rien faire sur mon dossier ... j'ai dit, je suis prêt à vous [dire la] vérité»).

¹⁹² Mémoire de l'appelant, paras. 199 et 201 à 203.

¹⁹³ Arrêt *Rutaganda*, para. 443. Voir également l'arrêt *Musema*, para. 89 ; l'arrêt *Celebici*, para. 497, et l'arrêt *Kupreškic et consorts*, para. 156.

¹⁹⁴ Voir compte rendu de l'audience du 4 octobre 2001, pp. 71 à 105.

¹⁹⁵ Jugement, para. 467.

97. Accordingly, the Appeals Chamber concludes that the Appellant has failed to show that the Trial Chamber erred in finding Witness GDD to be credible and in relying on his uncorroborated testimony. The appeal raised under this ground is therefore dismissed.

X. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT
AT THE MUKINGO *COMMUNE* OFFICE ON THE MORNING OF 7 APRIL 1994
(GROUND OF APPEAL 12)

98. The Appellant submits that the Trial Chamber erred in law and fact in failing to take Witness GAP's testimony and written statements as a whole into consideration in making findings concerning the events at the Mukingo *Commune* office in the morning of 7 April 1994¹⁹⁶. The Appellant also argues that the Trial Chamber erred in law and fact in accepting Witness GAP's testimony of the events notwithstanding the internal contradictions and inconsistencies in his written statements and trial testimony, and contradictions with other witnesses¹⁹⁷. In particular, the Appellant submits that in assessing the credibility of Witness GAP, the Trial Chamber failed to consider the fact that his testimony conflicted with that of Witness RHU 31¹⁹⁸. Additionally, the Appellant submits that the Trial Chamber erred in assessing the credibility of Witness GAP by not bearing in mind that the witness had a motive to lie because he could expect to receive benefits from testifying and, through his testimony, obtain the conviction of the Appellant¹⁹⁹.

99. The Prosecution responds that the Appellant has failed to identify any errors made by the Trial Chamber in respect of the credibility assessment of Witness GAP²⁰⁰. According to the Prosecution, the Appellant has failed to indicate what conflicts exist between the testimonies of Witnesses GAP and RHU 31 and submits that in a case of conflict, it falls to the Trial Chamber to decide which testimony carries more weight²⁰¹. Finally, the Prosecution observes that the Trial Chamber considered the testimony of Witness GAP in relation to that of Witness RHU 31 and argues that the Appellant has failed to demonstrate any error in the Trial Chamber's consequent finding²⁰².

100. The Appeals Chamber notes that in contesting the Trial Chamber's acceptance of Witness GAP's evidence concerning the events in Mukingo in the morning of 7 April 1994, the Appellant alleges, *inter alia*,

“internal contradictions and inconsistencies with the witness’ [*sic*] prior statements [and] trial testimony”²⁰³.

¹⁹⁶ Amended Notice of Appeal, para. 84; Appellant's Brief, para. 208.

¹⁹⁷ Amended Notice of Appeal, para. 86; Appellant's Brief, para. 210.

¹⁹⁸ Amended Notice of Appeal, para. 85; Appellant's Brief, para. 209.

¹⁹⁹ Appellant's Brief, para. 211.

²⁰⁰ Respondent's Brief, para. 154.

²⁰¹ Respondent's Brief, paras. 155, 156.

²⁰² Respondent's Brief, para. 157.

²⁰³ Appellant's Brief, para. 210.

97. Partant, la Chambre d'appel conclut que l'appelant n'a pas démontré que la Chambre de première instance a versé dans l'erreur en déclarant le témoin GDD crédible et en se fondant sur sa déposition non corroborée. Ce moyen d'appel est donc rejeté.

X. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN CONCLUANT QUE L'APPELANT
SE TROUVAIT AU BUREAU COMMUNAL DE MUKINGO
LE MATIN DU 7 AVRIL 1994 (DOUZIÈME MOYEN D'APPEL)

98. L'appelant affirme que la Chambre de première instance a commis une erreur de droit et de fait en ne tenant pas compte dans leur ensemble de la déposition et des déclarations écrites du témoin GAP dans les constatations qu'elle a effectuées concernant les faits survenus au bureau communal de Mukingo le matin du 7 avril 1994¹⁹⁶. Il soutient aussi qu'elle a commis une erreur de droit et de fait en ajoutant foi à la déposition du témoin GAP relativement à ces faits malgré les contradictions et incohérences constatées tant entre ses propres déclarations écrites et sa déposition à la barre qu'entre son témoignage et les dépositions d'autres témoins¹⁹⁷. Il fait notamment valoir qu'elle n'a pas tenu compte des divergences entre la déposition du témoin GAP et celle du témoin RHU 31 dans son appréciation de la crédibilité du premier¹⁹⁸. Il lui fait en outre grief d'avoir commis une erreur dans son appréciation de la crédibilité du témoin GAP en faisant abstraction du fait que celui-ci avait un motif de mentir car il pouvait s'attendre à tirer certains avantages de sa déposition et obtenir ainsi la condamnation de l'appelant¹⁹⁹.

99. Le Procureur répond que l'appelant n'a identifié aucune erreur commise par la Chambre de première instance dans son appréciation de la crédibilité du témoin GAP²⁰⁰. Il ajoute que l'appelant n'a pas indiqué les divergences qui existaient entre les dépositions des témoins GAP et RHU 31 et affirme qu'en cas de divergences, c'est à la Chambre de première instance qu'il revient de décider laquelle des dépositions est la plus probante²⁰¹. Il fait enfin remarquer que la Chambre de première instance a rapproché la déposition du témoin GAP de celle du témoin RHU 31 et soutient que l'appelant n'a pas démontré que la Chambre avait commis une erreur dans sa conclusion à cet égard²⁰².

100. La Chambre d'appel relève que, pour critiquer la décision de la Chambre de première instance d'avoir ajouté foi aux dires du témoin GAP concernant les faits survenus à Mukingo le matin du 7 avril 1994, l'appelant invoque notamment

«les contradictions et incohérences ... entre [l]es déclarations antérieures [du témoin] et sa déposition à la barre»²⁰³.

¹⁹⁶ Acte d'appel modifié, para. 84; mémoire de l'appelant, para. 208.

¹⁹⁷ Acte d'appel modifié, para. 86; mémoire de l'appelant, para. 210.

¹⁹⁸ Acte d'appel modifié, para. 85; mémoire de l'appelant, para. 209.

¹⁹⁹ Mémoire de l'appelant, para. 211.

²⁰⁰ Mémoire de l'intimé, para. 154.

²⁰¹ *Ibid.*, paras. 155 et 156.

²⁰² *Ibid.*, para. 157.

²⁰³ Mémoire de l'appelant, para. 210.

However, the Appellant does not point to any particular contradiction or inconsistency, leaving the Appeals Chamber unable to assess the merit of this argument.

101. The Appellant also submits that Witness GAP's testimony contradicted testimonies of other witnesses, namely Witness RHU 31, and that the Trial Chamber failed to consider this in assessing the credibility of Witness GAP. The Appellant notes that Witness RHU31 testified that when he arrived at the Mukingo *Commune* office around 8.30 a.m. on 7 April 1994, neither Witness GAP nor the *bourgmestre* was then present and that they did not come there before the witness left at 11 a.m.²⁰⁴ The Appellant asserts, however, that the Defence confronted Witness GAP with his pre-trial statement in which, according to the Appellant, the witness stated that in the morning of 7 April 1994 the *bourgmestre* ordered him to remain at the *commune* office "that day"²⁰⁵. The Appellant appears to argue that Witness GAP's credibility has been undermined by the discrepancy between his pre-trial statement that he was ordered to remain at the *commune* office on 7 April 1994 and Witness RHU 31's testimony that he did not see Witness GAP there between 8.30 and 11 a.m. The Appeals Chamber considers that the Appellant failed to present this argument in a clear manner and with proper references to the record²⁰⁶. This does not assist the Appeals Chamber in considering the merits of the Appellant's argument and, significantly, such a manner of presenting an appeal is not in compliance with the Practice Direction on Formal Requirements for Appeals from Judgements²⁰⁷. From the Appellant's submission it nevertheless appears that the Defence confronted the witness with his written statement in court and the Appeals Chamber therefore infers that the Trial Chamber was aware of this issue when considering the testimony of Witness GAP.

102. The Appeals Chamber notes that the Trial Chamber considered differences between the testimonies of Witnesses GAP and RHU 31²⁰⁸. However, the Trial Chamber found the testimony of Witness RHU 31 about the events of the morning of 7 April 1994 "to be of questionable value", given the context of the situation to which the testimony was related²⁰⁹. As the trier of fact, a Trial Chamber has to choose between divergent accounts of a particular event²¹⁰. In the present instance, considering all the relevant evidence, the Trial Chamber decided to accord greater weight to the testimony of Witness GAP than to that given by Witness RHU 31. In the view of the Appeals Chamber, the Appellant has not shown this decision to be in error.

103. Finally, the Appellant asserts that the Trial Chamber failed to bear in mind that Witness GAP had a motive to lie because he could expect to receive benefits from testifying against the Appellant. In support of this proposition, the Appellant recalls the witness's statement at trial that were he to take the Appellant back to

²⁰⁴ Appellant's Brief in Reply, para. 58.

²⁰⁵ Appellant's Brief in Reply, para. 57.

²⁰⁶ See Appellant's Brief in Reply, n. 39.

²⁰⁷ See Practice Direction on Formal Requirements for Appeals from Judgements, paras. 4 (b), 9.

²⁰⁸ See Trial Judgement, para. 481.

²⁰⁹ Trial Judgement, para. 481.

²¹⁰ *Rutaganda* Appeal Judgement, para. 21.

L'appelant n'ayant toutefois porté aucune contradiction ou incohérence précise à l'attention de la Chambre d'appel, celle-ci n'est pas en mesure d'apprécier le bien-fondé de cet argument.

101. L'appelant fait aussi valoir que la déposition du témoin GAP contredit celles d'autres témoins, dont RHU 31, et que la Chambre de première instance n'a pas tenu compte de ce fait dans son appréciation de la crédibilité du témoin GAP. Il fait remarquer que le témoin RHU 31 a déclaré qu'à son arrivée au bureau communal de Mukingo vers 8 h 30 le 7 avril 1994, ni le témoin GAP ni le bourgmestre ne s'y trouvaient et qu'ils n'étaient pas venus avant son départ à 11 heures²⁰⁴. L'appelant affirme toutefois que la Défense a présenté au témoin GAP la déclaration qu'il avait faite avant le procès et dans laquelle il avait, selon l'appelant, déclaré que le matin du 7 avril 1994 le bourgmestre lui avait donné l'ordre de rester au bureau communal «ce jour-là»²⁰⁵. L'appelant semble prétendre que la crédibilité du témoin GAP se trouve entamée par la contradiction existant entre cette déclaration selon laquelle il avait reçu l'ordre de rester au bureau communal le 7 avril 1994 et la déposition du témoin RHU 31 qui a dit ne pas l'avoir vu au bureau communal entre 8 h 30 et 11 heures. La Chambre d'appel estime que l'appelant n'a pas clairement exposé cet argument et qu'il n'a pas fourni les références voulues au dossier de l'affaire²⁰⁶. La Chambre d'appel ne se trouve pas par là même en mesure d'apprécier le bien-fondé de cet argument, mais point important, cette façon de procéder n'est pas conforme à la Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement²⁰⁷. Il ressort toutefois de l'argumentation de l'appelant que la Défense a présenté au témoin sa déclaration écrite au cours de l'audience. La Chambre d'appel en déduit donc que la Chambre de première instance était consciente de cette question lorsqu'elle a apprécié la déposition du témoin GAP.

102. La Chambre d'appel relève que la Chambre de première instance s'est penchée sur les divergences entre les dépositions des témoins GAP et RHU 31²⁰⁸. La Chambre de première instance a toutefois jugé «douteuse» la déposition du témoin RHU 31 concernant les faits survenus le matin du 7 avril 1994 vu le contexte de la situation sur laquelle portait la déposition²⁰⁹. En sa qualité de juge des faits, une Chambre de première instance doit choisir entre des versions divergentes d'un fait donné²¹⁰. En l'espèce, après avoir examiné l'ensemble des moyens de preuve pertinents, la Chambre de première instance a décidé d'accorder plus de poids à la déposition du témoin GAP qu'à celle du témoin RHU 31. La Chambre d'appel estime que l'appelant n'a pas démontré le caractère erroné de cette décision.

103. Enfin, l'appelant affirme que la Chambre de première instance n'a pas pris en considération le fait que le témoin GAP avait un motif de mentir car celui-ci pouvait s'attendre à tirer profit de son témoignage à charge contre l'appelant. Au soutien de

²⁰⁴ Mémoire en réplique de l'appelant, para. 58.

²⁰⁵ *Ibid.*, para. 57.

²⁰⁶ *Ibid.*, note de bas de page 39.

²⁰⁷ Voir Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, para. 4 (b) et 9.

²⁰⁸ Jugement, para. 481.

²⁰⁹ *Id.*

²¹⁰ Arrêt *Rutaganda*, para. 21.

Rwanda, he would be “a free man”²¹¹. Indeed, the Appeals Chamber notes, the witness made such a statement during cross-examination²¹². However, placed in the context of the rest of the witness’s testimony on this point, the witness appears to have been referring to the fact that he committed the crimes for which he is now detained on the orders of the Appellant and that if, indeed, the Appellant were present in Rwanda he, rather than the witness, would be charged with the offences. In any event, the witness expressly refuted the Defence counsel’s suggestion that the Rwandan authorities told him that he would be set free if he would testify against the Appellant or that the authorities made any promises to him before he proceeded to testify at the Tribunal²¹³. Accordingly, the Appeals Chamber finds that the Appellant has failed to establish that Witness GAP had a motive to lie in his testimony against the Appellant.

104. The Appeals Chamber holds that it has not been established that the Trial Chamber failed to take Witness GAP’s evidence as a whole into consideration when making findings relating to the events at the Mukingo *Commune* office in the morning of 7 April 1994 and that the Appellant has not shown that the Trial Chamber erred in finding Witness GAP to be credible and in accepting his testimony. Accordingly, this ground of appeal is dismissed.

XI. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT
AT BYANGABO MARKET ON THE MORNING OF 7 APRIL 1994
(GROUND OF APPEAL 13)

105. The Appellant submits that the Trial Chamber erred in fact in finding that he assembled *Interahamwe* at Byangabo market in the morning of 7 April 1994 and instructed them to exterminate the Tutsi.²¹⁴ In support of this submission, the Appellant alleges several errors on the part of the Trial Chamber in evaluating the evidence.

²¹¹ Appellant’s Brief, para. 211 citing T. 3 December 2001 p. 48.

²¹² T. 3 December 2001 p. 48.

²¹³ T. 3 December 2001 pp. 48-50. See also T. 4 December 2001 pp. 78, 79 (re-examination):

Q. Thank you very much. Now, I want to ask you – I want you to tell this court about the charges you currently face in Rwanda. You told this court, in cross-examination, that you were not facing the death penalty and you also told this court that you are not likely to be imprisoned. Were you, in any way, asked by the Rwandan authorities to come and testify in this court in return for a lighter sentence?

A. No, the Rwandan authorities have not made any promise to me. They never promised to give me a lighter sentence. Besides, I’m very sure that I’ll be found innocent, because all the charges brought against me, in fact, should have been brought against Kajelijeli, because he is the one who committed the acts that are being charged to me.

²¹⁴ Amended Notice of Appeal, para. 104; Appellant’s Brief, para. 212.

cette affirmation, l'appelant rappelle que le témoin a déclaré à l'audience que s'il parvenait à ramener l'appelant au Rwanda, il serait «un homme libre»²¹¹. La Chambre d'appel relève que le témoin a effectivement fait cette déclaration au cours du contre-interrogatoire²¹². Replacée toutefois dans le contexte du reste de la déposition du témoin à ce sujet, cette déclaration semble faire référence au fait qu'il est détenu pour avoir commis des crimes sur ordre de l'appelant et que si celui-ci se trouvait au Rwanda, c'est lui et non le témoin qui aurait à répondre des crimes qui lui sont reprochés. En tout état de cause, le témoin a catégoriquement rejeté la thèse du conseil de la Défense selon laquelle les autorités rwandaises lui auraient dit qu'il serait libéré s'il témoignait contre l'appelant et il a nié que celles-ci lui eussent fait quelque promesse que ce soit avant de venir déposer devant le Tribunal²¹³. En conséquence, la Chambre d'appel estime que l'appelant n'a pas prouvé que le témoin GAP avait un motif de mentir en témoignant contre lui.

104. La Chambre d'appel estime qu'il n'a pas été prouvé que la Chambre de première instance n'a pas tenu compte de l'ensemble du témoignage de GAP concernant les faits survenus au bureau communal de Mukingo le matin du 7 avril 1994 et que l'appelant n'a pas démontré que celle-ci avait commis une erreur en concluant que le témoin GAP était crédible et en ajoutant foi à sa déposition. En conséquence, ce moyen d'appel est rejeté.

XI. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN CONCLUANT QUE L'APPELANT SE TROUVAIT
AU MARCHÉ DE BYANGABO LE MATIN DU 7 AVRIL 1994
(TREIZIÈME MOYEN D'APPEL)

105. L'appelant soutient que la Chambre de première instance a commis une erreur de fait en concluant qu'il avait rassemblé des *Interahamwe* au marché de Byangabo le matin du 7 avril 1994 et qu'il leur avait donné pour consigne d'exterminer les Tutsis²¹⁴. À l'appui de cet argument, il allègue plusieurs erreurs commises par la Chambre de première instance dans son appréciation de la preuve.

²¹¹ Mémoire de l'appelant, para. 211, citant le compte rendu de l'audience du 3 décembre 2001, p. 52.

²¹² Compte rendu de l'audience du 3 décembre 2001, pp. 51 et 52.

²¹³ *Ibid.*, pp. 51 à 54. Voir aussi compte rendu de l'audience du 4 décembre 2001, pp. 85 et 86 (interrogatoire supplémentaire) :

Q. Je vous remercie infiniment. A présent, je voudrais que vous parliez à la Chambre des charges qui sont présentement retenues contre vous au Rwanda. Vous avez déclamé (*sic*) devant la Chambre, lors du contre-interrogatoire, que la peine de mort n'était pas retenue contre vous. Et vous avez également affirmé qu'il est plausible que vous ne couriez pas une peine d'emprisonnement. Les autorités rwandaises vous ont-elles approché pour vous demander de venir déposer devant le Tribunal, et qu'en récompense vous bénéficiez d'une peine plus légère?

LE TÉMOIN GAP : R. Non, les autorités rwandaises ne m'ont fait aucune promesse et ne m'ont jamais promis de réduire ma peine. D'ailleurs, je suis sûr de gagner mon procès, car toutes les charges qui me sont imputées devraient, en fait, être imputées à Kajelijeli, car c'est lui qui a commis les actes qui me sont reprochés.

²¹⁴ Acte d'appel modifié, para. 104; mémoire de l'appelant, para. 212.

A. Witness GAO

106. The Appellant argues that the Trial Chamber erred in law and fact in holding as “insignificant” contradictions and inconsistencies between the testimonies of Witnesses GAO, GBV, GDQ, and GBE.²¹⁵ The Appellant particularly highlights alleged inconsistencies between the testimonies of Witnesses GAO and GBV, such as that Witness GBV claimed that a certain Rukara was killed with a club with nails, while Witness GAO claimed that he was killed with a small axe²¹⁶; that contrary to the testimony of Witness GBV, Witness GAO testified that there was no need for the *Interahamwe* to go home to put on their uniforms since they were already wearing them²¹⁷; and that Witness GAO testified that it was Lt. Mburuburengero rather than the Appellant who ordered the killing of Tutsi, whereas Witness GBV did not mention any inciting speech from Lt. Mburuburengero²¹⁸.

107. The Appellant alleges other errors of the Trial Chamber relating to the assessment of Witness GAO’s credibility. The Appellant asserts that the Trial Chamber erred in finding Witness GAO credible despite his admission of false statements, contradictions between trial testimony and prior statements, and impeachment of his testimony by expert forensic evidence²¹⁹. The Appellant contends that Witness GAO’s confession to the Rwandan authorities entered into evidence as Defence Exhibit 8c is at odds with the witness’s testimony before the Tribunal in several important respects²²⁰.

108. Finally, in respect of Witness GAO, the Appellant argues that in paragraph 523 of the Judgement, the Trial Chamber erred in law by requiring the Prosecution merely to prove the “possibility” of the Appellant’s guilt rather than applying the “beyond reasonable doubt” standard when it evaluated Witness GAO’s testimony of the Appellant’s presence at Byangabo on the morning of 7 April 1994²²¹.

109. The Prosecution responds that the alleged inconsistencies concerning Witnesses GAO, GDQ, and GBV were considered and reconciled by the Trial Chamber²²². This, in the Prosecution’s view, is also the case with the alleged inconsistencies between Witness GAO’s prior statements and in-court testimony; the Trial Chamber considered these arguments and chose to prefer the witness’s testimony over his written statements²²³. The Prosecution submits that the Appellant has failed to argue that this was an unreasonable approach for the Trial Chamber to take²²⁴. Additionally, the Prosecution argues that the Trial Chamber has not erred in assessing Witness GAO’s testimony in paragraph 523 of the Trial Judgement; rather, the Trial Chamber found that

²¹⁵ Amended Notice of Appeal, para. 88; Appellant’s Brief, para. 218.

²¹⁶ Appellant’s Brief, para. 214.

²¹⁷ Appellant’s Brief, para. 214.

²¹⁸ Appellant’s Brief, para. 217.

²¹⁹ Amended Notice of Appeal, para. 91; Appellant’s Brief, paras. 221, 222.

²²⁰ Appellant’s Brief, para. 215; Appellant’s Brief in Reply, para. 61.

²²¹ Amended Notice of Appeal, para. 92; Appellant’s Brief, para. 219.

²²² Respondent’s Brief, para. 160.

²²³ Respondent’s Brief, para. 160.

²²⁴ Respondent’s Brief, para. 160.

A. Témoin GAO

106. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en jugeant «insignifiantes» les contradictions et les incohérences entre les dépositions des témoins GAO, GBV, GDQ et GBE²¹⁵. Il souligne en particulier les contradictions qui auraient été relevées entre les dépositions des témoins GAO et GBV, comme le fait que le témoin GBV a déclaré qu'un nommé Rukara avait été tué à coups de gourdin clouté alors que selon le témoin GAO il aurait été tué à l'aide d'une petite hache²¹⁶, que, contrairement à la version du témoin GBV, le témoin GAO a déclaré que les *Interahamwe* n'avaient pas besoin de retourner chez eux pour mettre leurs uniformes puisqu'ils les portaient déjà²¹⁷ et que le témoin GAO a déclaré que c'était le lieutenant Mburuburengero et non l'appelant qui avait donné l'ordre de tuer les Tutsis alors que dans la déposition du témoin GBV, il n'est nullement question de propos incendiaires tenus par le lieutenant Mburuburengero²¹⁸.

107. L'appelant relève d'autres erreurs commises par la Chambre de première instance dans son appréciation de la crédibilité du témoin GAO. Il affirme qu'elle a déclaré à tort ce témoin crédible, malgré que celui-ci ait reconnu avoir fait de fausses déclarations, que des contradictions aient été relevées entre sa déposition et ses déclarations antérieures et qu'un expert ait récusé sa déposition²¹⁹. L'appelant affirme que les aveux du témoin GAO devant les autorités rwandaises qui ont été versés au dossier comme pièce à conviction 8c de la Défense contredisent sa déposition devant le Tribunal sur plusieurs points importants²²⁰.

108. Enfin, l'appelant soutient que, dans son appréciation de la déposition du témoin GAO au sujet de la présence de l'appelant à Byangabo le matin du 7 avril 1994, la Chambre de première instance a commis une erreur de droit au paragraphe 523 du jugement en exigeant que le Procureur prouve simplement qu'il n'est pas exclu que l'appelant soit coupable plutôt que d'appliquer la norme plus stricte de la culpabilité «au-delà de tout doute raisonnable»²²¹.

109. Le Procureur répond que la Chambre de première instance a examiné et concilié les contradictions éventuelles entre les dépositions des témoins GAO, GDQ et GBV²²². Il en est de même, toujours d'après le Procureur, de celles qui existeraient entre les déclarations antérieures du témoin GAO et sa déposition. Après avoir examiné ces arguments, la Chambre de première instance a accordé plus de poids à la déposition à l'audience du témoin plutôt qu'à ses déclarations écrites antérieures²²³. Selon le Procureur, l'appelant n'a pas fait valoir que l'approche adoptée par la Chambre de première instance était déraisonnable²²⁴. Il soutient en outre qu'au paragraphe 523 du jugement la Chambre de première instance n'a commis aucune erreur

²¹⁵ Acte d'appel modifié, para. 88; mémoire de l'appelant, para. 218.

²¹⁶ Mémoire de l'appelant, para. 214.

²¹⁷ *Id.*

²¹⁸ Mémoire de l'appelant, para. 217.

²¹⁹ Acte d'appel modifié, para. 91; mémoire de l'appelant, paras. 221 et 222.

²²⁰ Mémoire de l'appelant, para. 215; mémoire en réplique de l'appelant, para. 61.

²²¹ Acte d'appel modifié, para. 92; mémoire de l'appelant, para. 219.

²²² Mémoire de l'intimé, para. 160.

²²³ *Id.*

²²⁴ *Id.*

it was possible for both the Appellant and Lt. Mburuburengero to be at Byangabo market at the same time giving orders²²⁵.

110. A review of the Trial Chamber's assessment of the evidence related to the events at Byangabo market in the morning of 7 April 1994 reveals that the Trial Chamber carefully considered the testimonies as well as the credibility of the witnesses. The Trial Chamber considered discrepancies between the various accounts of the events and reconciled them to reach findings that, in the view of the Appeals Chamber, have not been shown to be unreasonable. The Appeals Chamber finds that the Appellant's submissions in this regard and in respect of the credibility of Witnesses GAO, GBV, GDQ, and GBE under this ground of appeal have been insufficient to show an error on the part of the Trial Chamber. For instance, the Appellant argues that testimonies of Witnesses GAO and GBV differed as to the specific type of weapon used to kill Rukara. While this is true, the Appellant has not shown why the Trial Chamber's characterization of this difference as "insignificant and not affecting the Witness's credibility" is erroneous. The Appeals Chamber notes that the Trial Chamber reached this conclusion after considering the evidence related to the killing as a whole²²⁶. The Appeals Chamber considers that, taken in this context, the finding that the discrepancy is insignificant cannot be held to be unreasonable.

111. In respect of the Appellant's claim of error concerning the finding that Witness GAO was credible despite contradictions between his prior statements and in-court testimony, the Appeals Chamber notes the detailed consideration given to this matter in the Trial Judgement²²⁷. The Trial Chamber took account of the Appellant's arguments concerning the witness's credibility and analyzed the issue as follows :

The Witness explained in court that he could not read the written documents produced on his behalf, nor authorize their content. When confronted with an illiterate Witness such as is the case with Witness GAO, the Chamber gives considerably more weight to the Witness's in-court testimony than to written statements. In this case, the Chamber is satisfied that the Witness's demeanour and his responses to the questions on the stand, were satisfactory both in explaining the discrepancies between the written documents and the oral testimony and in providing reliable information as to his eye-witness testimony regarding the killings in Byangabo Market and at the Ruhengeri Court of Appeal²²⁸.

112. This discussion reveals that faced with discrepancies between prior statements and testimony, the Trial Chamber was persuaded to credit the testimony after considering a host of factors, including the witness's demeanour and responses to questions on the stand. The Appeals Chamber finds that the Appellant has not shown the approach taken by the Trial Chamber to be unreasonable or erroneous.

²²⁵ Respondent's Brief, para. 161.

²²⁶ See Trial Judgement, para. 519.

²²⁷ See Trial Judgement, para. 522.

²²⁸ Trial Judgement, para. 522.

dans son appréciation de la déposition du témoin GAO. Elle a plutôt conclu qu'il n'était pas exclu que l'appelant et le lieutenant Mburuburengero se fussent trouvés au marché de Byangabo en même temps en train de donner des ordres²²⁵.

110. La Chambre de première instance, en évaluant la preuve relative aux faits survenus au marché de Byangabo le matin du 7 avril 1994, a procédé à un examen approfondi des dépositions des témoins et de leur crédibilité. La Chambre d'appel estime qu'après avoir examiné les contradictions entre les différents récits des événements et avoir concilié ceux-ci, la Chambre de première instance a tiré des conclusions dont le caractère déraisonnable n'a pas été démontré. La Chambre d'appel estime que les arguments développés par l'appelant à cet égard ainsi qu'à l'égard de la crédibilité des témoins GAO, GBV, GDQ et GBE dans le cadre du présent moyen d'appel n'établissent pas de manière suffisante que la Chambre de première instance a versé dans l'erreur. L'appelant invoque, par exemple, des contradictions entre les dépositions des témoins GAO et GBV au sujet du genre d'arme utilisé pour tuer Rukara. Même si c'est le cas, il n'a pas démontré en quoi la Chambre de première instance a commis une erreur en déclarant que cette divergence était «insignifiante et n'entam[ait] pas la crédibilité [du témoin]». La Chambre d'appel observe que la Chambre de première instance est arrivée à cette conclusion après avoir examiné l'ensemble de la preuve relative à ce meurtre²²⁶. Elle estime que, dans ce contexte, la conclusion selon laquelle cette contradiction est insignifiante ne peut être jugée déraisonnable.

111. S'agissant de l'erreur qu'aurait commise la Chambre de première instance en jugeant crédible le témoin GAO malgré les contradictions entre ses déclarations antérieures et sa déposition, la Chambre d'appel s'en remet à l'examen détaillé qu'a fait la Chambre de première instance de cette question dans le jugement²²⁷. Tenant compte des arguments avancés par l'appelant au sujet de la crédibilité du témoin, elle a procédé à l'analyse qui suit :

Celui-ci [le témoin] a précisé à la Chambre qu'il ne savait ni lire les documents écrits produits en son nom ni en approuver la teneur. En présence d'un témoin illettré comme GAO, la Chambre accorde beaucoup plus de poids à sa déposition à l'audience qu'à ses déclarations écrites. En l'espèce, elle estime que le comportement du témoin et ses réponses aux questions à la barre viennent expliquer les contradictions relevées entre les documents écrits et sa déposition à l'audience et rendre compte de ce qu'il avait été témoin oculaire des meurtres commis au marché de Byangabo et à la Cour d'appel de Ruhengeri²²⁸.

112. Il ressort de ce passage que, devant les contradictions entre les déclarations antérieures du témoin et sa déposition, la Chambre de première instance a été convaincue d'ajouter foi à celle-ci après avoir pris en compte plusieurs facteurs, dont le comportement du témoin et ses réponses aux questions à la barre. La Chambre d'appel conclut que l'appelant n'a pas démontré que l'approche adoptée par la Chambre de première instance était déraisonnable ou erronée.

²²⁵ Mémoire de l'intimé, para. 161.

²²⁶ Jugement, para. 519.

²²⁷ *Ibid.*, para. 522.

²²⁸ *Id.*

113. The Appeals Chamber also finds that the Appellant's final argument relating to Witness GAO under this ground of appeal is devoid of merit. Referring to paragraph 523 of the Trial Judgement, the Appellant contends that the Trial Chamber erred as a matter of law in applying the standard of "possibility" rather than "beyond reasonable doubt" in evaluating Witness GAO's testimony of the Appellant's presence at the Byangabo market²²⁹. The Appeals Chamber notes that paragraph 523 of the Trial Judgment does not concern the proof of the fact that the Appellant was at the market at the relevant time, rather, it concerns the Trial Chamber's finding that Lt. Mburuburengero was in all likelihood present at the market in the morning of 7 April 1994. The Trial Chamber only referred to "possibility" when it observed that Lt. Mburuburengero's presence "does not rule out the *possibility* that the Accused was also there that morning"²³⁰. In the subsequent section of the Trial Judgment, the Trial Chamber proceeded to consider whether the Appellant indeed was at the market. Accordingly, the Appeals Chamber holds that the Trial Chamber did not apply the standard of "possibility" as to the presence of the Appellant at Byangabo market.

B. Witness GDQ

114. The Appellant alleges that the Trial Chamber erred in law and fact in inferring facts not in evidence, namely that Witness GDQ saw the Appellant at the same time as the other witnesses, and in failing to reconcile conflicts between the testimonies of Witnesses GDQ and GDD as to the whereabouts of the Appellant in the morning of 7 April 1994²³¹.

115. The Appeals Chamber notes that at paragraph 525 of the Judgement, the Trial Chamber stated :

"Prosecution Witness GDQ placed the Accused at the market that morning but could not recall the time. However, it is reasonable to infer that the time is the same as the sightings by Witnesses GAO and GBV, as GDQ saw the Accused arrive just before Rukara was killed"²³².

The Appeals Chamber recalls that Witnesses GAO and GBV testified to seeing the Appellant in the vicinity of the market around the time when Rukara was killed. Noting that the Trial Chamber linked sighting the Appellant to the time immediately preceding Rukara's killing, the approximate time when Witnesses GAO and GBV also saw the Appellant²³³, the Appeals Chamber is at a loss to understand the Appellant's contention that the Trial Chamber has "inferred a fact not in evidence" by concluding that Witness GDQ saw the Appellant around the same time as the other two witnesses. In the view of the Appeals Chamber, therefore, the Appellant has not shown that the Trial Chamber erred in this regard.

²²⁹ See Amended Notice of Appeal, para. 92.

²³⁰ Trial Judgement, para. 523 (emphasis added).

²³¹ Amended Notice of Appeal, para. 93; Appellant's Brief, para. 220; Appellant's Brief in Reply, paras. 62, 65.

²³² Trial Judgement, para. 525.

²³³ See Trial Judgement, paras. 499, 500.

113. La Chambre d'appel estime aussi que le dernier argument invoqué par l'appelant concernant le témoin GAO dans le cadre de ce moyen d'appel est dénué de tout fondement. Se référant au paragraphe 523 du jugement, l'appelant soutient que la Chambre de première instance a commis une erreur de droit en appliquant le critère de la «possibilité» (*ce qui ... n'exclut pas que ...*) plutôt que celui de la conviction «au-delà de tout doute raisonnable» dans son appréciation de la déposition du témoin GAO au sujet de la présence de l'appelant au marché de Byangabo²²⁹. La Chambre d'appel fait observer que le paragraphe 523 du jugement ne concerne pas la preuve de la présence de l'appelant au marché à l'époque considérée, mais expose plutôt la conclusion de la Chambre de première instance selon laquelle le lieutenant Mburuburengero se trouvait, selon toute vraisemblance, au marché le matin du 7 avril 1994. Elle a ensuite poursuivi en disant «ce qui à l'évidence n'exclut pas que l'accusé *se soit* aussi trouvé en ces lieux ce matin-là»²³⁰. Dans la section suivante du jugement, la Chambre de première instance a abordé la question de savoir si l'appelant se trouvait effectivement au marché. Par conséquent, la Chambre d'appel conclut que, pour se prononcer sur la présence de l'appelant au marché de Byangabo, la Chambre de première instance n'a pas appliqué le critère de la «possibilité».

B. Témoin GDQ

114. L'appelant fait grief à la Chambre de première instance d'avoir commis une erreur de droit et de fait en déduisant des faits dont la preuve n'a pas été rapportée, à savoir que le témoin GDQ a vu l'appelant au même moment que les autres témoins, et en faisant abstraction des contradictions entre les dépositions des témoins GDQ et GDD au sujet de l'endroit où se trouvait l'appelant le matin du 7 avril 1994²³¹.

115. La Chambre d'appel fait remarquer qu'au paragraphe 525 du jugement, la Chambre de première instance a dit ce qui suit :

«Selon le témoin à charge GDQ, l'accusé se trouvait au marché ce matin-là, encore qu'il n'ait pu se souvenir de l'heure. Toutefois, on en déduira raisonnablement que l'heure est la même que celle à laquelle les témoins GAO et GBV y ont vu l'accusé, puisque le témoin GDQ l'a vu arriver peu avant que Rukara ne soit tué»²³².

La Chambre d'appel rappelle que les témoins GAO et GBV ont déclaré à la barre avoir vu l'appelant à proximité du marché à peu près au moment où Rukara a été tué. Compte tenu du fait que la Chambre de première instance a conclu que le témoin avait vu l'appelant immédiatement avant que Rukara ne soit tué, soit environ au moment où les témoins GAO et GBV ont aussi vu l'appelant²³³, la Chambre d'appel ne s'explique pas que celui-ci puisse affirmer que la Chambre de première instance a «déduit un fait dont la preuve n'a pas été rapportée» en concluant que le témoin GDQ l'avait vu à peu près au même moment que les deux autres témoins. La Chambre d'appel estime par conséquent que l'appelant n'a démontré aucune erreur de la part de la Chambre de première instance à cet égard.

²²⁹ Voir acte d'appel modifié, para. 92.

²³⁰ Jugement, para. 523 (non souligné dans l'original).

²³¹ Acte d'appel modifié, para. 93; mémoire de l'appelant, para. 220; mémoire en réplique de l'appelant, paras. 62 et 65.

²³² Jugement, para. 525.

²³³ *Ibid.*, paras. 499 et 500.

116. The Appeals Chamber considers that the Appellant's argument concerning the conflict between the testimonies of Witnesses GDQ and GDD is not presented in a manner which would enable the Appeals Chamber to assess its merit. Moreover, the Appellant introduces this argument for the first time in his Brief in Reply²³⁴. The Appellant asserts that Witness GDQ testified

"that at 6:30 a.m. on April 7, 1994 he saw Appellant driving his vehicle and traveling from his home in Rwinzovu where his second wife resided on his way to Byangabo Market"²³⁵.

The Appellant continues :

"If GDQ is to be believed his testimony conflicts with that of Witness GDD who claimed that at the same time Appellant was awakened from his home in Nkuli and was supervising the distribution of weapons at the *commune* office before embarking for Mukingo"²³⁶.

In support of this, the Appellant cites paragraph 485 of the Trial Judgement²³⁷. In that paragraph, the Trial Chamber summarized the testimony of Witness GDD, in relevant part, as follows :

"Prosecution Witness GDD testified that the Accused provided weapons to the young militants at the Nkuli *bureau communal* between 5:00 am and 6:00 am on 7 April 1994, before he left for Mukingo *commune*"²³⁸.

It is not apparent from this where the alleged conflict lies. As stated above,

"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"²³⁹.

C. Witness GBE

117. The Appellant submits that the Trial Chamber erred in law and fact in failing to evaluate the contradictions between testimonies of Witnesses GBE and GDQ concerning the presence of Witness MEM and the absence of the Appellant at Byangabo in the morning of 7 April 1994²⁴⁰.

118. The Appellant correctly points out that Witness GBE testified that he was an eye-witness of the killing of Rukara and that he did not see the Appellant in the morning of 7 April 1994²⁴¹. Witness GDQ testified that Rukara was killed in the pres-

²³⁴ The Appeals Chamber recalls that the Appellant's Brief in Reply is to be "limited to arguments in reply to the Respondent's Brief". Practice Direction on Formal Requirements for Appeals from Judgement, para. 6. The Appellant has not identified which argument from the Respondent's Brief this submission is in reply to and, indeed, it does not appear that the Prosecution has addressed this matter in the Respondent's Brief.

²³⁵ Appellant's Brief in Reply, para. 62.

²³⁶ Appellant's Brief in Reply, para. 62.

²³⁷ See Appellant's Brief in Reply, n. 45.

²³⁸ Trial Judgement, para. 485.

²³⁹ *Vasiljević* Appeal Judgement, para. 12. See also *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al.* Appeal Judgement, paras. 43, 48.

²⁴⁰ Amended Notice of Appeal, para. 94; Appellant's Brief, para. 213.

²⁴¹ See Trial Judgement, para. 503.

116. La Chambre d'appel estime que la manière dont l'appelant a présenté son argumentation relativement aux contradictions entre les dépositions des témoins GDQ et GDD ne lui permet pas d'en apprécier le bien-fondé. De plus, l'appelant avance cet argument pour la première fois dans son mémoire en réplique²³⁴. Selon l'appelant, le témoin GDQ

«a déclaré avoir vu le 7 avril 1994, à 6 h 30 du matin, l'appelant qui, au volant de sa voiture, venait de chez lui à Rwinzovu où résidait sa seconde épouse et se rendait au marché de Byangabo»²³⁵,

et l'appelant de continuer :

«Si l'on ajoute foi aux propos du témoin GDQ, ceux-ci contredisent ceux du témoin GDD qui a affirmé qu'au même moment, quelqu'un réveillait l'appelant chez lui à Nkuli et que celui-ci supervisait la distribution d'armes au bureau communal avant de partir pour Mukingo»²³⁶.

L'appelant cite le paragraphe 485 du jugement à l'appui de cette thèse²³⁷. Dans ce paragraphe, la Chambre de première instance résume les parties pertinentes de la déposition du témoin GDD en ces termes :

«Selon le témoin à charge GDD, l'accusé a fourni des armes aux jeunes militants au bureau communal de Nkuli entre 5 heures et 6 heures du matin le 7 avril 1994, avant de partir pour la commune de Mukingo»²³⁸.

Aucune contradiction ne semble ressortir de ce paragraphe. Comme il a été indiqué plus haut,

«on ne saurait s'attendre à ce que la Chambre d'appel examine en détail les conclusions des parties si elles sont obscures, contradictoires ou vagues, ou si elles sont entachées d'autres vices de forme flagrants»²³⁹.

C. Témoin GBE

117. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en n'évaluant pas les contradictions entre les dépositions des témoins GBE et GDQ au sujet de la présence du témoin MEM et de l'absence de l'appelant à Byangabo le matin du 7 avril 1994²⁴⁰.

118. L'appelant fait remarquer, à juste titre, que le témoin GBE qui a déclaré avoir été témoin du meurtre de Rukara n'avait pas vu l'appelant le matin du 7 avril 1994²⁴¹. Le témoin GDQ a dit, lui, que Rukara avait été tué en présence de l'appe-

²³⁴ La Chambre d'appel rappelle que le mémoire en réplique de l'appelant «ne traitera que des arguments en réplique au Mémoire de l'Intimé» (Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, para. 6). L'appelant n'a pas identifié l'argument du mémoire de l'intimé auquel répond cette conclusion; il ne semble d'ailleurs pas que le Procureur ait traité de cette question dans son mémoire.

²³⁵ Mémoire en réplique de l'appelant, para. 62.

²³⁶ *Id.*

²³⁷ Voir mémoire en réplique de l'appelant, note de bas de page 45.

²³⁸ Jugement, para. 485.

²³⁹ Arrêt *Vasiljević*, para. 12. Voir aussi l'arrêt *Blaškić*, para. 13, l'arrêt *Niyitegeka*, para. 10, et l'arrêt *Kunarac et consorts*, paras. 43 et 48.

²⁴⁰ Acte d'appel modifié, para. 94; mémoire de l'appelant, para. 213.

²⁴¹ Voir jugement, para. 503.

ence of the Appellant²⁴². The Trial Chamber was aware of these accounts and noted in the Judgement that several witnesses testified that they were at the market and did not see the Appellant there²⁴³. After considering the whole of the evidence relating to the events at Byangabo market in the morning of 7 April 1994, including events immediately preceding those which took place at the market²⁴⁴, the Trial Chamber concluded that the Appellant was then present at the market²⁴⁵. Therefore, while the Trial Chamber did not specifically mention the difference between the testimonies of Witnesses GBE and GDQ, the Appeals Chamber finds that the Trial Chamber's conclusion in respect of the Appellant's presence at the market has not been shown to be unreasonable.

D. Witness MEM

119. The Appellant submits that the Trial Chamber erred in law and fact when it failed to acknowledge the testimony of Witness MEM concerning the fact that the Appellant was not present at Byangabo²⁴⁶. The Appellant also argues that the Trial Chamber erred in law and fact in finding that Witness MEM's testimony was tainted and in failing to take note that Witnesses GBE and GAO corroborated Witness MEM's testimony about his role at Byangabo, thereby enhancing his credibility²⁴⁷. Finally, in respect of Witness MEM, the Appellant contends that the Trial Chamber erred in law and fact in assuming facts that were not in evidence concerning Witness MEM's ability to see the Appellant at Byangabo in the morning of 7 April 1994²⁴⁸.

120. The Prosecution responds that the Appellant fails to demonstrate that the Trial Chamber's finding that Witness MEM might not have been able to see the Appellant at the market from his vantage point was in error²⁴⁹. The Prosecution recalls that Witness TLA testified that when Witness MEM fled from the market he came to a house next to the one occupied by Witness TLA and that the two men spoke over the wall separating the two houses²⁵⁰. According to the Prosecution, Witness TLA testified that he was not able to see the whole of the Byangabo market from his house²⁵¹. In the Prosecution's view, considering that the two houses were next to each other and that Witness TLA could not see all of the market from his house, it was reasonable for the Trial Chamber to conclude that Witness MEM might not have seen all of the mar-

²⁴² See Trial Judgement, para. 501.

²⁴³ See Trial Judgement, para. 526.

²⁴⁴ See Trial Judgement, para. 529.

²⁴⁵ Trial Judgement, para. 530.

²⁴⁶ Amended Notice of Appeal, para. 87.

²⁴⁷ Amended Notice of Appeal, paras. 89, 90; Appellant's Brief, paras. 213, 230, 232; Appellant's Brief in Reply, para. 70.

²⁴⁸ Amended Notice of Appeal, para. 95; Appellant's Brief, para. 233; Appellant's Brief in Reply, paras. 72, 73.

²⁴⁹ Respondent's Brief, para. 164.

²⁵⁰ Respondent's Brief, para. 166.

²⁵¹ Respondent's Brief, para. 166.

lant²⁴². La Chambre de première instance était consciente de ces différentes versions des faits et a fait observer dans le jugement que plusieurs témoins avaient déclaré qu'ils se trouvaient au marché mais n'y avaient pas vu l'appelant²⁴³. Après avoir examiné l'ensemble de la preuve concernant les faits survenus au marché de Byangabo le matin du 7 avril 1994, y compris ceux qui se sont produits immédiatement avant ceux du marché²⁴⁴, la Chambre de première instance a conclu que l'appelant était au marché à ce moment-là²⁴⁵. Par conséquent, même si la Chambre de première instance n'a pas expressément fait état de la contradiction entre les dépositions des témoins GBE et GDQ, la Chambre d'appel conclut qu'il n'a pas été démontré que la conclusion de la Chambre de première instance au sujet de la présence de l'appelant au marché était déraisonnable.

D. Témoin MEM

119. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en ne tenant pas compte de la déposition du témoin MEM qui a déclaré que l'appelant ne se trouvait pas à Byangabo²⁴⁶. Il fait aussi valoir que la Chambre de première instance a commis une erreur de droit et de fait en concluant que la déposition du témoin était sujette à caution et en ne tenant pas compte du fait que les témoins GBE et GAO avaient corroboré les propos du témoin MEM au sujet de son rôle à Byangabo, ce qui aurait renforcé sa crédibilité²⁴⁷. Enfin, l'appelant affirme que la Chambre de première instance a commis une erreur de droit et de fait en tenant pour acquis des faits au sujet desquels aucune preuve n'avait été présentée en ce qui concerne le point de savoir si le témoin MEM avait été en mesure de voir l'appelant à Byangabo le matin du 7 avril 1994²⁴⁸.

120. Le Procureur répond que l'appelant ne démontre pas qu'était erronée la conclusion de la Chambre de première instance selon laquelle le témoin MEM n'a peut-être pas été en mesure de voir l'appelant au marché de son poste d'observation²⁴⁹. Le Procureur rappelle qu'aux dires du témoin TLA, lorsque le témoin MEM a fui le marché, il est entré dans une maison voisine de celle qu'il occupait et les deux hommes se sont parlé par-dessus le mur séparant les deux maisons²⁵⁰. Selon le Procureur, le témoin TLA a déclaré que, de sa maison, il n'était pas en mesure de voir l'ensemble du marché de Byangabo²⁵¹. Il estime qu'étant donné la proximité des deux maisons et l'impossibilité pour le témoin TLA de voir l'ensemble du marché de sa maison, il était raisonnable pour la Chambre de première instance de conclure

²⁴² *Ibid.*, para. 501.

²⁴³ *Ibid.*, para. 526.

²⁴⁴ *Ibid.*, para. 529.

²⁴⁵ *Ibid.*, para. 530.

²⁴⁶ Acte d'appel modifié, para. 87.

²⁴⁷ *Ibid.*, paras. 89 et 90; mémoire de l'appelant, paras. 213, 230 et 232; mémoire en réplique de l'appelant, para. 70.

²⁴⁸ Acte d'appel modifié, para. 95; mémoire de l'appelant, para. 233; mémoire en réplique de l'appelant, para. 72 et 73.

²⁴⁹ Mémoire de l'intimé, para. 164.

²⁵⁰ *Ibid.*, para. 166.

²⁵¹ *Id.*

ket from his house²⁵². In any event, the Prosecution submits that the Trial Chamber found that Witness MEM was not telling the whole truth about the relevant events and asserts that the Appellant failed to demonstrate that this finding was unreasonable²⁵³.

121. The Appeals Chamber finds that the Appellant's submission that the Trial Chamber failed to acknowledge the testimony of Witness MEM that the Appellant was not present at Byangabo in the morning of 7 April 1994 is not well grounded. First, the Trial Chamber recalled this testimony when summarizing Witness MEM's testimony²⁵⁴. Second, in assessing the witness's evidence, the Trial Chamber stated: "He claims not to have seen the Accused at the market that morning"²⁵⁵. The Trial Chamber had Witness MEM's evidence relating to the events at Byangabo before it and summarized it in the Judgement at length²⁵⁶; however, the Trial Chamber found that the witness was "not telling the whole truth" about the events of the morning of 7 April 1994²⁵⁷. In the view of the Appeals Chamber, the Appellant has not shown that the Trial Chamber erred in its evaluation of the credibility of Witness MEM. Additionally, the Trial Chamber's conclusion that Witness MEM could not have had a clear view of the entire market from his house has not been shown to be unreasonable. Such a conclusion is not an assumption of facts not in evidence, it is a conclusion based on the evidence on the record.

E. Witness RGM

122. The Appellant submits that the Trial Chamber erred in law and fact in finding that Witness RGM was not a credible witness despite the fact that he played a central role in the events at Byangabo and was not impeached by the Prosecution²⁵⁸.

123. The Prosecution responds by noting that the Appellant has failed to specify any reason why the Trial Chamber erred in assessing the credibility of Witness RGM or why that finding was unreasonable²⁵⁹.

124. The Appeals Chamber observes that upon setting out the evidence relevant to the events at Byangabo market in the morning of 7 April 1994, the Trial Chamber proceeded to assess the credibility of individual witnesses who testified about the

²⁵² Respondent's Brief, para. 166.

²⁵³ Respondent's Brief, para. 167.

²⁵⁴ Trial Judgement, para. 511 ("Defence Witness MEM testified that he did not see the Accused at Byangabo Market at the time of Rukara's beating. The Witness confirmed that he did not see the Accused, the Accused's vehicle or the communal vehicle in or around Byangabo Market between 6:30 am and 4:00 pm on 7 April 1994").

²⁵⁵ Trial Judgement, para. 526.

²⁵⁶ See Trial Judgement, paras. 495, 509-511.

²⁵⁷ Trial Judgement, para. 526.

²⁵⁸ Amended Notice of Appeal, para. 96; Appellant's Brief, paras. 224-228; Appellant's Brief in Reply, paras. 68, 69.

²⁵⁹ Respondent's Brief, para. 163.

que le témoin MEM a pu ne pas voir l'ensemble du marché de sa maison²⁵². En tout état de cause, il affirme que la Chambre de première instance a conclu que le témoin MEM ne disait pas toute la vérité au sujet des faits pertinents et fait valoir que l'appelant n'a pas démontré que cette conclusion était déraisonnable²⁵³.

121. La Chambre d'appel estime que n'est pas fondé le grief de l'appelant reprochant à la Chambre de première instance de n'avoir pas tenu compte des dires du témoin MEM qui a affirmé à la barre que l'appelant ne se trouvait pas à Byangabo le matin du 7 avril 1994. Premièrement, la Chambre de première instance a rappelé ces propos dans le résumé qu'elle a fait de la déposition du témoin²⁵⁴. Deuxièmement, en évaluant ladite déposition, la Chambre de première instance a déclaré : «Il dit n'avoir pas vu l'accusé au marché ce matin-là»²⁵⁵. La Chambre de première instance était saisie de la déposition du témoin MEM concernant les faits survenus à Byangabo et en a fait un résumé détaillé dans le jugement²⁵⁶. Elle a toutefois conclu que le témoin «ne di[sait] pas toute la vérité» au sujet des faits qui se sont produits le matin du 7 avril 1994²⁵⁷. La Chambre d'appel estime que l'appelant n'a pas démontré que la Chambre de première instance avait commis une erreur dans son appréciation de la crédibilité du témoin MEM. De plus, il n'a pas été démontré que la conclusion de la Chambre de première instance selon laquelle le témoin MEM ne pouvait pas avoir une vue imprenable du marché tout entier à partir de sa maison était déraisonnable. Cette conclusion n'est pas une supposition fondée sur des faits non établis, elle est étayée par des éléments de preuve versés au dossier.

E. Témoin RGM

122. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en concluant que le témoin RGM n'était pas crédible bien qu'il ait joué un rôle clé dans les faits survenus à Byangabo et que sa crédibilité ne fût pas attaquée par le Procureur²⁵⁸.

123. Dans son mémoire en réponse, le Procureur fait observer que l'appelant n'a pas précisé en quoi la Chambre de première instance avait commis une erreur dans son appréciation de la crédibilité du témoin RGM ou pour quelle raison cette conclusion était déraisonnable²⁵⁹.

124. La Chambre d'appel relève qu'après avoir exposé les éléments de preuve relatifs aux faits survenus au marché de Byangabo le matin du 7 avril 1994, la Chambre de première instance a évalué la crédibilité des témoins qui ont déposé à ce sujet.

²⁵² *Id.*

²⁵³ Mémoire de l'intimé, para. 167.

²⁵⁴ Jugement, para. ? («Le témoin à décharge MEM a dit n'avoir pas vu l'accusé au marché de Byangabo au moment où Rukara a été battu. Il a confirmé n'avoir pas vu l'accusé, son véhicule ou le véhicule de la commune au marché de Byangabo ou dans ses environs entre 6 h 30 et 16 heures le 7 avril 1994»).

²⁵⁵ Jugement, para. 526.

²⁵⁶ *Ibid.*, paras. 495 et 509 à 511.

²⁵⁷ *Ibid.*, para. 526.

²⁵⁸ Acte d'appel modifié, para. 96; mémoire de l'appelant, para. 224 à 228; mémoire en réplique de l'appelant, para. 68 et 69.

²⁵⁹ Mémoire de l'intimé, para. 163.

events. In respect of Witness RGM, the Trial Chamber concluded that he was not a credible witness with regard to the presence of the Appellant at any of the events involved in the case²⁶⁰. The Trial Chamber acknowledged his key role in the atrocities and found Witness RGM to be informative of the events and their surrounding circumstances²⁶¹. However, the Trial Chamber concluded that “Witness RGM’s mission in testifying was to remove the Accused from the events with which the Prosecution charges him”²⁶². The Appeals Chamber considers that as the trier of fact and with the benefit of observing witnesses testify before it, the Trial Chamber was well positioned to assess the credibility of individual witnesses against the whole of the evidence and finds that the Appellant has not shown that the finding in respect of Witness RGM’s credibility was unreasonable.

F. Witness MLNA

125. The Appellant argues that the Trial Chamber erred in law and fact in ignoring the totality of the testimony of Witness MLNA in finding that although Witness MLNA was at Byangabo at the relevant time, he “might have” missed the Appellant, and in applying the standard of “might have” rather than “beyond reasonable doubt” in this finding²⁶³.

126. The Prosecution submits that the Appellant has misunderstood the Trial Chamber’s use of the words “might have”; in its view this does not go to any standard, but rather relates to the admission of Witness MLNA that it was possible that the Appellant could have been at the market and that Witness MLNA missed him²⁶⁴.

127. With regard to the Appellant’s contention that the Trial Chamber ignored the totality of the evidence of Witness MLNA, the Appeals Chamber notes that in mounting this challenge, the Appellant has failed to specify which aspect of the testimony the Trial Chamber may have missed and how doing so has occasioned a miscarriage of justice. In such circumstances, the Appeals Chamber cannot proceed to consider the merits of this submission.

128. Pointing to paragraph 528 of the Trial Judgement, the Appellant also contends that the Trial Chamber applied a standard of “might have” rather than “beyond reasonable doubt” in assessing the evidence. The Appeals Chamber finds that this argument is premised upon a misunderstanding of the impugned text. The Trial Chamber employed the words “might have” not as a standard of proof of the Appellant’s guilt, but in recalling Witness MLNA’s own admission that the Appellant may have been at the market and that the witness “might have” missed him²⁶⁵. A Trial Chamber is entitled, when reviewing the evidence, to say what “might have” been the case, in

²⁶⁰ Trial Judgement, para. 527.

²⁶¹ Trial Judgement, para. 527.

²⁶² Trial Judgement, para. 527.

²⁶³ Amended Notice of Appeal, paras. 97, 98; Appellant’s Brief, paras. 238, 239; Appellant’s Brief in Reply, para. 76.

²⁶⁴ Respondent’s Brief, paras. 170-172.

²⁶⁵ See Trial Judgement, paras. 528, 496.

Pour ce qui est du témoin RGM, elle a conclu qu'il n'était pas crédible en ce qui concerne la présence de l'appelant au moment des faits objet de la cause²⁶⁰. La Chambre de première instance a reconnu le rôle clé qu'il a joué dans les atrocités et a conclu qu'il l'avait éclairée sur les faits et les circonstances qui les ont entourés²⁶¹. Elle a toutefois estimé que «le témoin RGM a[vait] voulu par sa déposition distancier l'accusé des faits qui lui sont reprochés»²⁶². La Chambre d'appel estime qu'en tant que juge des faits ayant eu l'avantage d'observer les témoins à l'audience, la Chambre de première instance était bien placée pour évaluer la crédibilité des témoins pris individuellement à la lumière de l'ensemble de la preuve. Elle conclut que l'appelant n'a pas démontré que la conclusion de la Chambre de première instance relative à la crédibilité du témoin RGM était déraisonnable.

F. Témoin MLNA

125. L'appelant fait grief à la Chambre de première instance d'avoir commis une erreur de droit et de fait en ignorant totalement la déposition du témoin MLNA, en concluant que même si celui-ci se trouvait à Byangabo au moment des faits, il était possible qu'il «n'ait pas vu» l'appelant et en appliquant le critère de la «possibilité» plutôt que celui de la conviction «au-delà de tout doute raisonnable» pour arriver à cette conclusion²⁶³.

126. Le Procureur répond que l'appelant a mal compris le sens de la formulation utilisée par la Chambre de première instance; il est d'avis que cette formulation n'a rien à voir avec quelque critère que ce soit et qu'elle reflète plutôt le propre aveu du témoin MLNA qui a reconnu qu'il était possible que l'appelant ait pu se trouver au marché mais qu'il ne l'ait pas vu²⁶⁴.

127. En ce qui concerne le grief de l'appelant tiré de ce que la Chambre de première instance a ignoré l'ensemble de la déposition du témoin MLNA, la Chambre d'appel relève qu'en formulant cette objection, l'appelant n'a pas précisé les éléments de la déposition ignorés par la Chambre de première instance et dans quelle mesure ce défaut a entraîné un déni de justice. Dans ces circonstances, la Chambre d'appel n'est pas en mesure d'examiner le bien-fondé de cet argument.

128. Citant le paragraphe 528 du jugement, l'appelant soutient aussi qu'en appréciant la preuve, la Chambre de première instance a appliqué le critère de la «possibilité» plutôt que celui de la conviction «au-delà de tout doute raisonnable». La Chambre d'appel estime que cet argument est fondé sur une interprétation erronée du paragraphe contesté. La Chambre de première instance a utilisé la formulation qu'elle a retenue non pas comme une norme de preuve servant à déterminer la culpabilité de l'appelant mais pour rappeler l'aveu même du témoin MLNA qui a reconnu que l'appelant avait pu se trouver au marché et que le témoin «avait pu» ne pas le voir²⁶⁵. En examinant la preuve,

²⁶⁰ Jugement, para. 527.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Acte d'appel modifié, paras. 97 et 98; mémoire de l'appelant, paras. 238 et 239; mémoire en réplique de l'appelant, para. 76.

²⁶⁴ Mémoire de l'intimé, paras. 170 à 172.

²⁶⁵ Voir jugement, paras. 528 et 496.

the process of coming to a final assessment of what was proved beyond reasonable doubt. The Appeals Chamber therefore finds no merit in the present submission.

G. *Witness TLA*

129. The Appellant submits that the Trial Chamber erred in law and fact in failing to acknowledge the testimony of Witness TLA that the Appellant was not present at Byangabo and address whether celebrations took place at the Appellant's bar on 7 April 1994, and in failing to evaluate the witness's testimony contradicting Witness GAO's evidence of the Appellant's presence at the bar in the morning of 7 April 1994 and contradicting the testimony of Witness GBE concerning the events of that day²⁶⁶.

130. The Prosecution responds by noting that when a Trial Chamber does not specifically address a testimony of a witness, it cannot be assumed that the Chamber did not consider it²⁶⁷. In any event, the Prosecution argues, the Trial Chamber did consider the evidence of Witness TLA, as is clear from paragraph 532 of the Trial Judgement²⁶⁸. The inference therefore must be drawn that the Trial Chamber considered the evidence of Witness TLA in relation to the totality of the evidence in concluding that the Appellant was at Byangabo market on the morning of 7 April 1994²⁶⁹.

131. In respect of the Appellant's submission that the Trial Chamber failed to acknowledge the testimony of Witness TLA and failed to address contradictions between his testimony and that of Witnesses GAO and GBE, the Appeals Chamber notes that the Trial Judgement contains a lengthy summary of Witness TLA's testimony relating to the events at Byangabo market on 7 April 1994²⁷⁰. Additionally, at paragraph 532, the Trial Chamber specifically mentioned evidence given by Witness TLA. The Appeals Chamber therefore cannot accept the submission that the Trial Chamber did not acknowledge the witness's testimony.

132. While the Trial Chamber did not specifically refer to Witness TLA's testimony concerning the events at the Appellant's bar, it cannot be concluded that the Trial Chamber failed to consider this evidence. This is particularly so because in the present instance, the Trial Chamber has taken care in the Judgement to set out the witness's testimony in detail and noted it in the paragraph immediately following the one in question here²⁷¹. The Appeals Chamber considers it reasonable to conclude that the Trial Chamber, having seen the witnesses give their testimonies and having found Witnesses GAO and GBE to be credible, decided to prefer their evidence concerning the events over the testimony of Witness TLA²⁷².

²⁶⁶ Amended Notice of Appeal, paras. 87, 99, 102, 103; Appellant's Brief, paras. 233-236; Appellant's Brief in Reply, para. 75.

²⁶⁷ Respondent's Brief, para. 168.

²⁶⁸ Respondent's Brief, para. 169.

²⁶⁹ Respondent's Brief, para. 169.

²⁷⁰ Trial Judgement, paras. 513-516.

²⁷¹ See Trial Judgement, para. 532.

²⁷² See *Čelebići Case* Appeal Judgement, para. 481.

une Chambre de première instance est en droit de dire ce qui «a pu» se produire avant d'arriver à une évaluation définitive de ce qui a été établi au-delà de tout doute raisonnable. En conséquence, la Chambre d'appel conclut que le présent argument est sans fondement.

G. Témoin TLA

129. L'appelant affirme que la Chambre de première instance a commis une erreur de droit et de fait en ne tenant pas compte de la déposition du témoin TLA selon laquelle l'appelant ne se trouvait pas à Byangabo, en ne recherchant pas si des célébrations avaient eu lieu au bar de l'appelant le 7 avril 1994 et en ne tenant pas compte de la déposition du témoin qui contredisait celle du témoin GAO relative à la présence de l'appelant au bar le matin du 7 avril 1994 et celle du témoin GBE au sujet des faits survenus ce même jour²⁶⁶.

130. Dans son mémoire en réponse, le Procureur fait remarquer que le fait pour une Chambre de première instance de ne pas mentionner expressément la déposition d'un témoin ne veut pas nécessairement dire qu'elle ne l'a pas prise en considération²⁶⁷. En tout état de cause, affirme le Procureur, il ressort du paragraphe 532 du jugement que la Chambre de première instance a bien tenu compte de la déposition du témoin TLA²⁶⁸. Il faut donc en déduire qu'elle a considéré celle-ci à la lumière de l'ensemble de la preuve pour conclure que l'appelant se trouvait au marché de Byangabo le matin du 7 avril 1994²⁶⁹.

131. Quant au reproche adressé par l'appelant à la Chambre de première instance d'avoir ignoré la déposition du témoin TLA et passé sous silence les contradictions entre sa déposition et celle des témoins GAO et GBE, la Chambre d'appel fait observer que le jugement contient un long résumé de la déposition du témoin TLA relative aux faits survenus au marché de Byangabo le 7 avril 1994²⁷⁰. De plus, au paragraphe 532, la Chambre de première instance a expressément mentionné la déposition du témoin TLA. La Chambre d'appel ne saurait donc accepter l'argument selon lequel la Chambre de première instance n'a pas tenu compte de la déposition du témoin.

132. Même si la Chambre de première instance n'a pas évoqué expressément la déposition du témoin TLA au sujet des faits survenus au bar de l'appelant, on ne peut en conclure qu'elle n'en a pas tenu compte. Ceci est particulièrement vrai en l'espèce où la Chambre de première instance a pris soin dans le jugement d'exposer la déposition du témoin de façon détaillée et d'en faire état dans le paragraphe qui suit immédiatement celui dont il est question plus haut²⁷¹. La Chambre d'appel estime raisonnable de conclure que la Chambre de première instance, après avoir observé les témoins au cours de leurs dépositions et jugé les témoins GAO et GBE crédibles, a décidé d'accorder plus de poids à leur version des faits qu'à celle du témoin TLA²⁷².

²⁶⁶ Acte d'appel modifié, paras. 87, 99, 102 et 103; mémoire de l'appelant, paras. 233 à 236; mémoire en réplique de l'appelant, para. 75.

²⁶⁷ Mémoire de l'intimé, para. 168.

²⁶⁸ *Ibid.*, para. 169.

²⁶⁹ *Id.*

²⁷⁰ Jugement, paras. 513 à 516.

²⁷¹ *Ibid.*, para. 532.

²⁷² Voir arrêt *Čelebići*, para. 481.

133. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal in its entirety.

XII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT
DURING THE KILLINGS AT RWANKERI ON THE MORNING OF 7 APRIL 1994
(GROUND OF APPEAL 14)

134. The Appellant submits that the Trial Chamber erred in its legal and factual findings that the Prosecution met the burden of proving beyond reasonable doubt that he participated and directed the *Interahamwe* in the attacks against Tutsi civilians in Rwankeri *Cellule*²⁷³. In support of this submission, the Appellant raises several arguments.

135. The Appellant argues that testimonies of Witnesses GAO and GBV concerning the weapons available to the *Interahamwe* are inconsistent²⁷⁴. The Appellant submits that the Trial Chamber accepted the testimony of Witness GBV that the attackers at Rwankeri were armed with weapons including guns²⁷⁵. In contrast, the Appellant argues, Witness GAO testified that the attacking *Interahamwe* had no guns and that the Appellant facilitated their obtaining weapons from Major Bizabarimana²⁷⁶. The Appellant also submits that the Trial Chamber erred in law and fact in crediting the “illogical” testimony of Witness GBV that he saw weapons in the vehicle driven by the Appellant because if that were the case, then there would have been no need for the Appellant to obtain weapons from Major Bizabarimana²⁷⁷. The Appellant further argues that if Witness GBV is to be believed, there was no need for Witness RGM to request weapons from the Appellant since the *Interahamwe* were already armed²⁷⁸. He also submits that

“since soldiers were armed and on the scene, there was no need for RGM to request that Appellant obtain weapons from Major Bizabarimana as testified by GAO”²⁷⁹.

136. The Appellant submits that Witness GAO’s confession contradicted his testimony since the witness claimed that soldiers used guns and grenades to kill Tutsis at Rwankeri and did not mention the Appellant’s involvement in the killings at Rwankeri²⁸⁰.

137. The Appellant further submits that the Trial Chamber erred in law and fact by ignoring the contradictory testimonies of Witnesses GBV, GAP, and RHU31 con-

²⁷³ Appellant’s Brief, para. 240.

²⁷⁴ Appellant’s Brief, para. 247.

²⁷⁵ Appellant’s Brief in Reply, para. 77.

²⁷⁶ Appellant’s Brief in Reply, para. 78.

²⁷⁷ Appellant’s Brief, para. 248.

²⁷⁸ Appellant’s Brief, para. 249.

²⁷⁹ Appellant’s Brief, para. 256.

²⁸⁰ Appellant’s Brief, para. 249; Appellant’s Brief in Reply, para. 79.

133. Pour les raisons qui précèdent, la Chambre d'appel rejette ce moyen d'appel dans son intégralité.

XII. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE POUR AVOIR CONCLU QUE L'APPELANT
ÉTAIT PRÉSENT LORS DES MASSACRES COMMIS À RWANKERI
DANS LA MATINÉE DU 7 AVRIL 1994
(QUATORZIÈME MOYEN D'APPEL)

134. L'appelant soutient que la Chambre de première instance a versé dans l'erreur dans ses constatations de fait et conclusions de droit lorsqu'elle a estimé que le Procureur a prouvé au-delà de tout doute raisonnable que l'appelant a participé aux attaques contre des civils tutsis dans la cellule de Rwankeri et en a donné l'ordre aux *Interahamwe*²⁷³. À l'appui de cette affirmation, il avance plusieurs arguments.

135. L'appelant fait valoir que les dépositions des témoins GAO et GBV concernant les armes dont disposaient les *Interahamwe* sont contradictoires²⁷⁴. Il soutient que la Chambre de première instance a accepté la déposition du témoin GBV selon laquelle les assaillants, à Rwankeri, étaient armés, notamment de fusils²⁷⁵, alors que le témoin GAO a déclaré, lui, que les assaillants *Interahamwe* n'avaient pas d'armes à feu et que l'appelant les avait aidés à obtenir des armes du major Bizabarimana²⁷⁶. Il soutient également que la Chambre de première instance a commis une erreur de droit et de fait en ajoutant foi à la déposition «illogique» du témoin GBV selon laquelle il aurait vu des armes dans le véhicule que conduisait l'accusé car, si effectivement lesdites armes se trouvaient dans le véhicule, l'appelant n'aurait alors nullement eu besoin de se procurer des armes auprès du major Bizabarimana²⁷⁷. L'appelant soutient en outre que si l'on devait croire le témoin GBV, RGM n'aurait pas alors eu besoin de demander des armes à l'appelant puisque les *Interahamwe* étaient déjà armés²⁷⁸. Il affirme aussi que

«puisque les soldats étaient armés et se trouvaient sur les lieux, le témoin RGM n'avait pas besoin de demander que l'appelant se procure des armes auprès du major Bizabarimana, comme l'a affirmé le témoin GAO»²⁷⁹.

136. L'appelant soutient que les aveux que le témoin GAO a faits aux autorités rwandaises contredisent sa déposition puisqu'il a prétendu que les soldats avaient utilisé des fusils et des grenades pour tuer les Tutsis à Rwankeri et n'a pas dit que l'appelant avait participé à ces massacres²⁸⁰.

137. L'appelant soutient en outre que la Chambre de première instance a commis une erreur de droit et de fait en ne tenant pas compte des dépositions contradictoires

²⁷³ Mémoire de l'appelant, para. 240.

²⁷⁴ *Ibid.*, para. 247.

²⁷⁵ Mémoire en réplique de l'appelant, para. 77.

²⁷⁶ *Ibid.*, para. 78.

²⁷⁷ Mémoire de l'appelant, para. 248.

²⁷⁸ *Ibid.*, para. 249.

²⁷⁹ *Ibid.*, para. 256.

²⁸⁰ *Ibid.*, para. 249; mémoire en réplique de l'appelant, para. 79.

cerning whether the Appellant was driving the commune vehicle in the morning of 7 April 1994²⁸¹.

138. The Appellant argues that the Trial Chamber erred in law and fact in making no findings with respect to the testimony of Witnesses RGM, MLNA, and RHU23 that the Appellant was not present at Rwankeri in the morning of 7 April 1994²⁸². He submits that Witnesses RGM and MLNA confirmed that they did not see the Appellant or his vehicle at Rwankeri, thereby contradicting Witnesses GAO and GBV²⁸³.

139. The Appellant submits that the Trial Chamber erred in law and fact by failing to take note of the testimony of Witness TLA who contradicted Witnesses GAO and GBE concerning the events of 7 April 1994²⁸⁴. The Appellant notes that the Trial Chamber relied on Witness GBE in making a finding that the Appellant was drinking with the *Interahamwe* at his bar during the day on 7 April 1994 whereas Witness TLA testified that the bar was closed all day²⁸⁵.

140. Referring to paragraph 548 of the Trial Judgement, the Appellant argues that the Trial Chamber erred in law and fact in crediting the testimony of Witness GBH that the Appellant was looking for Tutsi survivors on 8 April 1994²⁸⁶.

141. Finally, the Appellant submits that the Trial Chamber failed to take a balanced approach to evaluating the testimonies of Defence as opposed to Prosecution witnesses²⁸⁷.

142. The Prosecution responds that under this ground of appeal, the Appellant merely repeats arguments made at trial without demonstrating any error on the part of the Trial Chamber²⁸⁸. In respect of the Appellant's submission that the testimony of Witnesses GAO and GBV regarding weapons are inconsistent, the Prosecution responds that there is no inconsistency and that the Appellant's argument is premised on speculation that because he had obtained arms from one source, he would not have also obtained them from another source²⁸⁹.

143. The Prosecution submits that contrary to the Appellant's assertion, no conflict exists in the testimony of Witnesses GAP and GBV concerning the *commune* vehicle²⁹⁰. Moreover, the Prosecution submits, Witness RGM's testimony that he did not see the Appellant or his vehicle at Rwankeri on 7 April 1994 is not evidence that the Appellant was not there and it does not contradict the testimony of Witnesses GAO or GBV²⁹¹.

²⁸¹ Amended Notice of Appeal, para. 107; Appellant's Brief, para. 251; Appellant's Brief in Reply, paras. 82, 83.

²⁸² Amended Notice of Appeal, paras. 105, 108, 109; Appellant's Brief, para. 253; Appellant's Brief in Reply, para. 81.

²⁸³ Appellant's Brief, paras. 257, 260.

²⁸⁴ Appellant's Brief, para. 261.

²⁸⁵ Appellant's Brief, paras. 263, 264; Appellant's Brief in Reply, para. 81.

²⁸⁶ Amended Notice of Appeal, para. 106.

²⁸⁷ Appellant's Brief, para. 252.

²⁸⁸ Respondent's Brief, para. 174.

²⁸⁹ Respondent's Brief, para. 176.

²⁹⁰ Respondent's Brief, para. 180.

²⁹¹ Respondent's Brief, para. 181.

des témoins GBV, GAP et RHU 31 concernant le point de savoir si l'appelant conduisait le véhicule communal le matin du 7 avril 1994²⁸¹.

138. Il reproche à la Chambre de première instance d'avoir commis une erreur de droit et de fait en ne se prononçant pas sur les dépositions des témoins à décharge RGM, MLNA et RHU23 qui ont affirmé que l'appelant ne se trouvait pas à Rwankeri dans la matinée du 7 avril 1994²⁸². Il soutient que les témoins RGM et MLNA ont confirmé ne pas l'avoir vu, ni lui ni son véhicule, ce jour-là à Rwankeri, ce qui contredit les dépositions des témoins GAO et GBV²⁸³.

139. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en ne prenant pas en considération la déposition du témoin TLA qui a contredit les témoins GAO et GBE concernant les événements du 7 avril 1994²⁸⁴. Il fait observer qu'elle s'est fondée sur le témoin GBE pour conclure qu'il était en train de boire dans son débit de boissons avec des *Interahamwe* dans la journée du 7 avril 1994, alors que le témoin TLA a déclaré que le débit de boissons était resté fermé toute cette journée-là²⁸⁵.

140. Se référant au paragraphe 548 du jugement, l'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en ajoutant foi à la déposition du témoin GBH qui a dit qu'il traquait les survivants tutsis le 8 avril 1994²⁸⁶.

141. Enfin, l'appelant fait grief à la Chambre de première instance de n'avoir pas apprécié de manière comparable les dépositions des témoins à décharge et à charge²⁸⁷.

142. Le Procureur répond que, dans ce moyen d'appel, l'appelant ne fait que reprendre des arguments qu'il a avancés au procès sans démontrer la moindre erreur de la part de la Chambre de première instance²⁸⁸. À l'argument de l'appelant invoquant les contradictions entre les dépositions des témoins GAO et GBV au sujet des armes, le Procureur répond qu'il n'y en a pas et que cet argument suppose que l'appelant, ayant déjà obtenu des armes d'une source, ne s'en serait pas procuré ailleurs²⁸⁹.

143. Le Procureur soutient que contrairement à ce qu'affirme l'appelant, il n'existe aucune incompatibilité entre les dépositions des témoins GAP et GBV concernant le véhicule de la commune²⁹⁰. La déclaration du témoin RGM selon laquelle il n'avait pas vu l'appelant ou son véhicule à Rwankeri le 7 avril 1994 ne prouve pas non plus que l'appelant n'y était pas et elle n'entre pas non plus en contradiction avec les dépositions des témoins GAO et GBV²⁹¹.

²⁸¹ Acte d'appel modifié, para. 107; mémoire de l'appelant, para. 251; mémoire en réplique de l'appelant, para. 82 et 83.

²⁸² Acte d'appel modifié, paras. 105, 108 et 109; mémoire de l'appelant, para. 253; mémoire en réplique de l'appelant, para. 81.

²⁸³ Mémoire de l'appelant, paras. 257 et 260.

²⁸⁴ *Ibid.*, para. 261.

²⁸⁵ *Ibid.*, paras. 263 et 264; mémoire en réplique de l'appelant, para. 81.

²⁸⁶ Acte d'appel modifié, para. 106.

²⁸⁷ Mémoire de l'appelant, para. 252.

²⁸⁸ Mémoire de l'intimé, para. 174.

²⁸⁹ *Ibid.*, para. 176.

²⁹⁰ *Ibid.*, para. 180.

²⁹¹ *Ibid.*, para. 181.

144. As for the testimony of Witnesses MLNA and TLA, the Prosecution submits that the Trial Chamber found neither to have been a reliable witness and that, even if their testimonies were relied upon, they would not have proven that the Appellant was not at Rwankeri at the relevant time²⁹². In response to the Appellant's submissions concerning the differing testimonies of Witnesses GBE and TLA about events at the Appellant's bar, the Prosecution notes that the Trial Chamber found Witness GBE reliable in view of the fact that unlike Witness TLA, he gave detailed evidence relating to this event²⁹³.

145. In respect of the Appellant's allegation of an inconsistency in the testimony of Witnesses GAO and GBV concerning weapons available to the *Interahamwe*, the Appeals Chamber observes that Witnesses GAO and GBV were describing two different situations. Witness GAO was referring to an attack at Rwamikeri in Rwankeri where the Appellant was not present at the time the *Interahamwe* decided they needed guns to overcome the Tutsi there²⁹⁴, whereas Witness GBV's testimony concerns the situation at Rudatinya's house, where the Appellant was present and where the attackers were armed with weapons including guns²⁹⁵. In light of this, the Appeals Chamber does not see how such testimony of Witnesses GAO and GBV could be inconsistent; it appears that one group of attackers initially lacked guns while the other group, with the Appellant, already had some. Additionally, the Appellant has failed to show how the Trial Chamber erred in accepting Witness GBV's testimony that he saw weapons in the Appellant's vehicle. The Appellant argues that Witness GBV's testimony on this point was "illogical" because if it were true, then the Appellant would not have needed to request weapons from Major Bizabarimana. The Appeals Chamber considers that inasmuch as this argument is based on speculation, it cannot substantiate a challenge to the Trial Chamber's finding. Moreover, considering the context as presented in the record, the Appeals Chamber finds nothing unreasonable or erroneous in the Trial Chamber's acceptance of this evidence.

146. The Appeals Chamber is not in a position to consider the merits of the Appellant's argument that Witness GAO's confession in Rwanda contradicted his testimony during the Appellant's trial because the Appellant did not provide any reference to the record in support of this point.

147. The Appellant submits that the Trial Chamber ignored the contradictory testimony of Witnesses GBV, GAP, and RHU31 as to whether the Appellant drove the commune vehicle in the morning of 7 April 1994. The Appeals Chamber notes that Witness GAP stated that the commune vehicle, a red Toyota Hi-Lux, was parked at the *commune* office on 7 April 1994²⁹⁶, whereas Defence Witness RHU31 testified that the vehicle was not at the *commune* office at 8.30 a.m. on that day²⁹⁷, and Wit-

²⁹² Respondent's Brief, para. 182.

²⁹³ Respondent's Brief, para. 182.

²⁹⁴ Trial Judgement, para. 545; T. 23 July 2001 pp. 26-28.

²⁹⁵ Trial Judgement, para. 546.

²⁹⁶ T. 4 December 2001 p. 61.

²⁹⁷ Trial Judgement, para. 518.

144. Quant aux dépositions des témoins MLNA et TLA, le Procureur soutient que la Chambre de première instance n'a jugé aucun d'eux fiable et que, même si on avait ajouté foi à leurs dépositions, elles n'auraient pas pour autant prouvé que l'appelant n'était pas à Rwankeri pendant la période considérée²⁹². En réponse aux arguments de l'appelant concernant les témoignages divergents des témoins GBE et TLA au sujet de ce qui s'est passé au débit de boissons de l'appelant, le Procureur fait observer que la Chambre de première instance a conclu que le témoin GBE était digne de foi, compte tenu de ce qu'il a fait, contrairement au témoin TLA, une relation détaillée de ce qui s'y était passé²⁹³.

145. Quant au grief tiré des contradictions que l'appelant aurait relevées entre les dépositions des témoins GAO et GBV concernant les armes à la disposition des *Interahamwe*, la Chambre d'appel fait observer que ces témoins décrivaient deux situations différentes : le témoin GAO faisait allusion à une attaque qui a eu lieu à Rwankeri, où l'appelant n'était pas présent lorsque les *Interahamwe* ont décidé qu'il leur fallait des armes à feu pour venir à bout des Tutsis à cet endroit²⁹⁴, tandis que la déposition du témoin GBV a trait à la situation qui régnait chez Rudatinya, où l'appelant était présent et où certains des assaillants étaient armés, notamment de fusils²⁹⁵. Cela étant, la Chambre d'appel ne voit pas comment les dépositions de ces deux témoins pourraient se contredire. Il semble qu'un groupe d'assaillants manquait au début d'armes à feu alors que l'autre, dans lequel se trouvait l'appelant, en possédait déjà quelques-unes. En outre, l'appelant n'a pas montré en quoi la Chambre de première instance a commis une erreur en acceptant les dires du témoin GBV qui a affirmé avoir vu des armes dans le véhicule de l'appelant. L'appelant soutient que la déposition du témoin GBV sur ce point était « illogique » parce que, si elle était vraie, l'appelant n'aurait alors pas eu à demander des armes au major Bizabarimana. La Chambre d'appel considère que cet argument, dès lors qu'il repose sur des suppositions, ne peut justifier la remise en question de la conclusion de la Chambre de première instance. En outre, vu le contexte tel qu'il est présenté dans le dossier, la Chambre d'appel estime que la Chambre de première instance n'a ni agi de manière déraisonnable ni commis d'erreur en acceptant ces éléments de preuve.

146. La Chambre d'appel n'est pas en mesure d'examiner le bien-fondé de l'argument de l'appelant tiré de ce que les aveux faits par le témoin GAO au Rwanda contredisent sa déposition lors du procès, l'appelant n'ayant fourni aucune référence à l'appui dans le dossier.

147. L'appelant soutient que la Chambre de première instance n'a tenu aucun compte des dépositions contradictoires des témoins GBV, GAP et RHU31 sur la question de savoir si l'appelant avait conduit le véhicule de la commune dans la matinée du 7 avril 1994. La Chambre d'appel relève que le témoin GAP a déclaré que le véhicule de la commune, une Toyota Hilux rouge, était garé au bureau communal le 7 avril 1994²⁹⁶, tandis que le témoin à décharge RHU31 a dit que le véhicule ne se trouvait pas au bureau communal à 8 h 30 ce jour-là²⁹⁷, et le témoin GBV que

²⁹² *Ibid.*, para. 182.

²⁹³ *Id.*

²⁹⁴ Jugement, para. 545; compte rendu de l'audience du 23 juillet 2001, p. 31 et 32.

²⁹⁵ Jugement, para. 546.

²⁹⁶ Compte rendu de l'audience du 4 décembre 2001, p. 61.

ness GBV testified that the Appellant drove the vehicle in the morning of 7 April 1994²⁹⁸. The Appellant therefore correctly submits that the testimonies on this point are inconsistent. However, the Appeals Chamber considers that it cannot be concluded that the Trial Chamber “ignored” this inconsistency. A Trial Chamber is not obliged to explain in its judgement every step of its reasoning²⁹⁹. In the present instance, it was not unreasonable for the Trial Chamber to find that on 7 April 1994 the Appellant was moving around in the red Toyota vehicle belonging to the *commune*, given the evidence on the record, including that of Witness GBE³⁰⁰.

148. The Appellant asserts that the Trial Chamber committed a legal and factual error in failing to make findings in respect of the testimony of Witnesses RGM, MLNA, and RHU 23 that the Appellant was not present at Rwankeri at the relevant time. As recalled in connection with the preceding ground of appeal, the Trial Chamber found Witness RGM to be not credible with respect to the Appellant’s presence at any of the events involved in the case and the Appeals Chamber has affirmed that finding³⁰¹. Accordingly, the Appeals Chamber finds that the Appellant’s present submission in respect of Witness RGM is not well founded. As concerns the testimony of Witness MLNA, the Appeals Chamber recalls that the Trial Chamber summarized it in the Judgement at some length, including noting that the Appellant was not among a group of 300 to 400 people proceeding towards Rwankeri and Busogo Hill to kill Tutsis³⁰². While the Trial Chamber did not specifically address Witness MLNA’s evidence in its findings, it is clear that it decided to prefer the testimony of Witnesses GAO, GBV, and GBE³⁰³. The Appeals Chamber reiterates that a Trial Chamber need not explain every step of its reasoning³⁰⁴. Moreover, it appears that Witness MLNA’s testimony on this point was not of a nature capable of changing the Trial Chamber’s finding and, accordingly, any failure to take account of it in reaching that finding could not have constituted an error occasioning a miscarriage of justice, justifying revision of the finding on appeal. Finally, while the Appellant correctly states that the Trial Chamber did not make a finding in respect of Witness RHU 23’s testimony concerning the Appellant’s alleged absence from Rwankeri, the Appellant failed to point the Appeals Chamber to the parts of the record supporting this proposition, leaving it unable to consider the merit of this submission further.

149. Under the present ground of appeal the Appellant repeats his submission made in respect of Witness TLA under Ground of Appeal 13. The Appeals Cham-

²⁹⁸ Trial Judgement, para. 551.

²⁹⁹ *Niyitegeka* Appeal Judgement, paras. 115, 124; *Bagilishema* Appeal Judgement, para. 88; *Musema* Appeal Judgement, para. 18; *Kayishema and Ruzindana* Appeal Judgement, para. 165; *Čelebići Case* Appeal Judgement, para. 481; *Furundžija* Appeal Judgement, para. 69.

³⁰⁰ See Trial Judgement, para. 557.

³⁰¹ Trial Judgement, para. 527. See *supra* Chapter XI.

³⁰² Trial Judgement, paras. 542, 543.

³⁰³ See Trial Judgement, paras. 544-549.

³⁰⁴ *Niyitegeka* Appeal Judgement, paras. 115, 124; *Bagilishema* Appeal Judgement, para. 88; *Musema* Appeal Judgement, para. 18; *Kayishema and Ruzindana* Appeal Judgement, para. 165; *Čelebići Case* Appeal Judgement, para. 481; *Furundžija* Appeal Judgement, para. 69.

l'appelant était au volant du véhicule dans la matinée du 7 avril 1994²⁹⁸. L'appelant soutient à raison que les dépositions sur ce point sont contradictoires. Toutefois, la Chambre d'appel estime qu'elle ne peut pas conclure que la Chambre de première instance a «délibérément ignoré» cette contradiction. Une Chambre de première instance n'est pas tenue d'expliquer dans son jugement chaque étape de son raisonnement²⁹⁹. En l'espèce, compte tenu des éléments de preuve existant dans le dossier, notamment la déposition du témoin GBE, il n'était pas déraisonnable pour la Chambre de première instance de conclure que le 7 avril 1994 l'appelant circulait à bord de la Toyota rouge appartenant à la commune³⁰⁰.

148. L'appelant affirme que la Chambre de première instance a commis une erreur de droit et de fait en ne se prononçant pas sur les dépositions des témoins RGM, MLNA et RHU 23 qui ont dit que l'appelant ne se trouvait pas à Rwankeri au moment des faits. Comme il a été rappelé à l'occasion de l'examen du moyen d'appel précédent, la Chambre de première instance a jugé que le témoin RGM n'était pas crédible s'agissant de la présence de l'appelant à l'un quelconque des événements en cause dans la présente affaire, conclusion que la Chambre d'appel a confirmée³⁰¹. Aussi la Chambre d'appel juge-t-elle que l'argument que l'appelant avance ici concernant le témoin RGM n'est pas bien fondé. Pour ce qui est de la déposition du témoin MLNA, la Chambre d'appel rappelle que la Chambre de première instance l'a résumée de façon assez détaillée dans le jugement, faisant notamment observer que l'appelant ne faisait pas partie de la foule forte de 300 à 400 personnes qui se dirigeait vers Rwankeri et la colline de Busogo pour aller tuer les Tutsis³⁰². La Chambre de première instance ne s'est pas particulièrement arrêtée sur la déposition du témoin MLNA dans ses conclusions, mais il est clair qu'elle a décidé de retenir plutôt celles des témoins GAO, GBV et GBE³⁰³. La Chambre d'appel réitère qu'une Chambre de première instance n'est pas tenue d'expliquer chaque étape de son raisonnement³⁰⁴. En outre, il appert que la déposition du témoin MLNA sur ce point n'était pas de nature à changer la conclusion tirée par la Chambre de première instance et que le fait de ne pas en avoir tenu compte pour parvenir à cette conclusion n'aurait pu constituer une erreur entraînant un déni de justice et justifiant la révision de cette conclusion en appel. Enfin, l'appelant signale à juste titre que la Chambre de première instance ne s'est pas prononcée sur la déposition du témoin RHU 23 relativement à l'absence, de l'appelant à Rwankeri, mais il a omis d'indiquer à la Chambre d'appel les parties précises du dossier qui étayaient cette affirmation, ce qui la met dans l'impossibilité d'examiner plus avant le bien-fondé de cet argument.

149. Dans ce moyen d'appel, l'appelant reprend l'argumentation qu'il a avancée concernant le témoin TLA dans le treizième moyen d'appel. Il est inutile pour la

²⁹⁷ Jugement, para. 518.

²⁹⁸ *Ibid.*, para. 551.

²⁹⁹ Arrêt *Niyitegeka*, paras. 115 et 124; arrêt *Bagilishema*, para. 88; arrêt *Musema*, para. 18; arrêt *Kayishema et Ruzindana*, para. 165; arrêt *Čelebići*, para. 481; arrêt *Furundžija*, para. 69.

³⁰⁰ Voir jugement, para. 557.

³⁰¹ Jugement, para. 527. Voir *supra* chapitre XI.

³⁰² Jugement, paras. 542 et 543.

³⁰³ *Ibid.*, paras. 544 à 549.

³⁰⁴ Arrêt *Niyitegeka*, paras. 115 et 124; arrêt *Bagilishema*, para. 88; arrêt *Musema*, para. 18; arrêt *Kayishema et Ruzindana*, para. 165; arrêt *Čelebići*, para. 481; arrêt *Furundžija*, para. 69.

ber need not consider this submission anew and refers to its findings made above³⁰⁵.

150. In his Amended Notice of Appeal, referring to paragraph 548 of the Trial Judgement, the Appellant submits that the Trial Chamber

“erred in law and fact in crediting Witness GBH that the Appellant was looking for Tutsi survivors on April 8, 1994 and inspecting dead bodies”³⁰⁶.

This is the Appellant’s entire submission on this point. The Appeals Chamber emphasizes that, as a starting point, the appealing party must identify the alleged error. Because the Appellant failed to do so, the Appeals Chamber cannot consider this submission further.

151. Lastly, under this ground of appeal, the Appeals Chamber cannot consider the Appellant’s submission that the Trial Chamber failed to take a balanced approach to the evidence because the Appellant did not develop this argument in any way, cited no examples of disparate treatment, and provided no references to the Judgement or to the record.

152. For the foregoing reasons, the Appeals Chamber finds that this ground of appeal is not founded and, therefore, dismisses it in its entirety.

XIII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT DURING THE KILLINGS AT MUNYEMVANO’S COMPOUND (GROUND OF APPEAL 15)

153. The Appellant submits that the Trial Chamber erred in law and fact when it found that on 7 April 1994 he was present at Munyemvano’s compound in Rwankeri and that he supervised and commanded the attacks that took place there³⁰⁷. Such a finding, according to the Appellant, was against the weight of the evidence³⁰⁸. The Appellant supports this claim with the following arguments.

154. The Appellant submits that the Trial Chamber erred in law and fact in setting aside the testimonies of Witnesses MLCF, RHU 25, RHU 23, RHU 29, and KAA concerning the fact that he was not present at Munyemvano’s compound and in accepting as credible the contradictory testimony of Witnesses ACM and GBG³⁰⁹. The Appellant argues that the Trial Chamber erred in law and fact when it “ignored” the testimony of Witnesses RHU 29 and RHU 23, and in finding credible the testimony of Witnesses ACM and GBG concerning killings at the compound on 7 April 1994³¹⁰.

³⁰⁵ See *supra* Chapter XI.

³⁰⁶ Amended Notice of Appeal, para. 106.

³⁰⁷ Amended Notice of Appeal, para. 115; Appellant’s Brief, para. 265.

³⁰⁸ Amended Notice of Appeal, para. 115; Appellant’s Brief, para. 265.

³⁰⁹ Amended Notice of Appeal, para. 114; Appellant’s Brief, para. 290. Although the Amended Notice of Appeal refers to Witness “GBE”, it is clear from the Appellant’s Brief and from the cited text of the Trial Judgement that the Appellant is referring to Witness “GBG”.

³¹⁰ Amended Notice of Appeal, paras. 110, 112, 113; Appellant’s Brief in Reply, para. 86.

Chambre d'appel de se pencher à nouveau sur celle-ci; elle renvoie donc aux conclusions qu'elle a dégagées plus haut³⁰⁵.

150. Dans son acte d'appel modifié, l'appelant, se référant au paragraphe 548 du jugement, soutient que la Chambre de première instance a

«commis une erreur de droit et de fait en ajoutant foi aux dires du témoin GBH qui a affirmé que, le 8 avril 1994, l'appelant traquait les rescapés tutsis et inspectait les cadavres»³⁰⁶.

C'est là toute l'argumentation que l'appelant avance sur ce point. La Chambre d'appel rappelle séance tenante que la partie appelante est tenue d'identifier l'erreur alléguée. Comme l'appelant ne l'a pas fait, elle ne peut examiner cet argument plus avant.

151. Enfin, la Chambre d'appel ne peut pas examiner le grief fait dans ce moyen d'appel par l'appelant à la Chambre de première instance de ne pas avoir apprécié de manière comparable des dépositions des témoins, faute pour l'appelant d'avoir développé cet argument, d'avoir cité des exemples de différence de traitement et d'avoir fait état d'éléments du jugement ou du dossier étayant cette affirmation.

152. Pour les raisons qui précèdent, la Chambre d'appel conclut que ce moyen d'appel n'est pas fondé et, en conséquence, le rejette dans sa totalité.

XIII. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN CONCLUANT QUE L'APPELANT ÉTAIT PRÉSENT
LORS DES MASSACRES À LA CONCESSION DE MUNYEMVANO
(QUINZIÈME MOYEN D'APPEL)

153. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en concluant que le 7 avril 1994 il était présent dans la concession de Munyemvango à Rwankeri et qu'il avait supervisé et commandé les attaques qui y ont eu lieu³⁰⁷. Cette conclusion, selon l'appelant, va à l'encontre des éléments de preuve produits³⁰⁸. L'appelant avance les arguments suivants à l'appui de cette affirmation.

154. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en écartant les dépositions des témoins MLCF, RHU 25, RHU 23, RHU 29 et KAA qui ont affirmé qu'il n'était pas présent à la concession de Munyemvango et en jugeant crédibles les dépositions contradictoires des témoins ACM et GBG³⁰⁹. Il fait valoir qu'elle a commis une erreur de droit et de fait en «ignorant délibérément» les dépositions des témoins RHU 29 et RHU 23 et en jugeant crédibles celles des témoins ACM et GBG au sujet des massacres perpétrés dans la concession le 7 avril 1994³¹⁰.

³⁰⁵ Voir *supra* chapitre XI.

³⁰⁶ Acte d'appel modifié, para. 106.

³⁰⁷ *Ibid.*, para. 115; mémoire de l'appelant, para. 265.

³⁰⁸ *Id.*

³⁰⁹ Acte d'appel modifié, para. 114; mémoire de l'appelant, para. 290. Bien que l'acte d'appel modifié vise le témoin «GBE», il ressort clairement du mémoire de l'appelant et de l'extrait du jugement cité que l'appelant se réfère au témoin «GBG».

³¹⁰ Acte d'appel modifié, paras. 110, 112 et 113; mémoire en réplique de l'appelant, para. 86.

155. The Appellant contends that the testimonies of Witnesses ACM and GBG are so contradictory on crucial points that they are irreconcilable³¹¹. The Appellant notes that Witness GBG contradicted Witness ACM by testifying that he did not see Tutsis being assembled and marched from the compound and that, after the killings at the compound, *Interahamwe* started shooting and destroying houses³¹². In the Appellant's view, Witness GBG also contradicted Witness ACM in testifying that he did not see the Appellant dressed in an *Interahamwe* uniform³¹³. The Appellant further alleges that Witness ACM contradicted Witness GBG by testifying that she saw Ndayambaje shoot and kill a certain Gateyiteyi whereas Witness GBG testified that Gateyiteyi was shot by the Appellant³¹⁴.

156. The Appellant also submits that contradictions exist between the written statements of Witness ACM and her testimony in court³¹⁵. For instance, according to the Appellant, Witness ACM never stated in her written statements that she witnessed any killings at Busogo Parish whereas at trial she testified that she saw the Appellant supervising the killings there³¹⁶.

157. The Prosecution responds that such differences as there may be in the testimony of Witnesses ACM and GBG concerning the attack on Tutsis at the compound are due to the witnesses' different vantage points³¹⁷. Other differences, such as whether the Appellant was dressed in an *Interahamwe* uniform, are in the view of the Prosecution "insignificant" and do not affect the core of their testimonies³¹⁸. In respect of the alleged contradictions between Witness ACM's written statements and her testimony, the Prosecution responds that rather than contradictions they are omissions and that, in any event, Witness ACM testified that her statements were not read back to her after she had been interviewed and that she noticed errors in the statements for the first time when the statements were read to her in Arusha³¹⁹. Finally, the Prosecution responds that rather than "ignore" the testimony of Witnesses RHU 23 and RHU 29, the Trial Chamber considered them and found them to be unpersuasive, and argues that Witnesses RHU 23, RHU 25, and RHU 29 were evasive and that their evidence was internally contradictory³²⁰.

158. As the Appellant points out, the testimonies of Witnesses ACM and GBG concerning the events at Munyemvano's compound on 7 April 1994 differ in several respects. The Appeals Chamber notes that after summarizing their testimonies relating to the events at the compound, the Trial Chamber noted the differences between their accounts³²¹. Taking into consideration the fact that Witnesses ACM and GBG were victims of the attack at the compound, the Trial Chamber stated :

³¹¹ Appellant's Brief, para. 267.

³¹² Appellant's Brief, paras. 274, 284.

³¹³ Appellant's Brief, para. 275.

³¹⁴ Appellant's Brief, para. 287.

³¹⁵ Appellant's Brief, paras. 277, 281.

³¹⁶ Appellant's Brief, para. 286.

³¹⁷ Respondent's Brief, para. 186.

³¹⁸ Respondent's Brief, paras. 187, 189.

³¹⁹ Respondent's Brief, paras. 190, 193, 195.

³²⁰ Respondent's Brief, para. 197.

³²¹ See Trial Judgement, paras. 592-594.

155. L'appelant affirme que les dépositions des témoins ACM et GBG comportent de telles contradictions sur des points essentiels qu'il n'est pas possible de concilier ces dépositions³¹¹. Il fait observer que le témoin GBG a contredit le témoin ACM en déclarant qu'il n'avait pas vu les Tutsis qu'on aurait rassemblés et emmenés de la concession et qu'après les massacres à cet endroit, des *Interahamwe* se sont mis à tirer des coups de feu et à détruire des maisons³¹². Selon lui, le témoin GBG a aussi contredit le témoin ACM en déclarant n'avoir pas vu l'appelant en uniforme des *Interahamwe*³¹³. Il allègue en outre que le témoin ACM a contredit le témoin GBG en déclarant qu'elle a vu Ndayambaje abattre un certain Gateyiteyi alors que, selon GBG, c'est l'appelant qui aurait abattu Gateyiteyi³¹⁴.

156. L'appelant soutient également qu'il existe des contradictions entre les déclarations écrites du témoin ACM et sa déposition devant le Tribunal³¹⁵. Ainsi, selon lui, le témoin ACM n'a jamais déclaré dans ses déclarations écrites avoir été témoin d'un massacre à la paroisse de Busogo, alors qu'au procès devant la Chambre elle a affirmé avoir vu l'appelant superviser les massacres dans cette localité³¹⁶.

157. Le Procureur répond que les divergences qui peuvent exister entre les dépositions des témoins ACM et GBG concernant l'attaque contre les Tutsis à la concession de Munyemvano tiennent au fait que les deux témoins se trouvaient à des endroits différents³¹⁷. D'autres divergences (l'appelant était-il en uniforme des *Interahamwe*?) sont, de l'avis du Procureur, «sans importance» et n'ont aucune incidence sur les éléments essentiels de leurs dépositions³¹⁸. Pour ce qui est des contradictions entre les déclarations écrites du témoin ACM et sa déposition, le Procureur répond qu'il s'agit davantage d'omissions que de contradictions et que, dans tous les cas, ce témoin a indiqué à l'audience que ses déclarations ne lui avaient pas été relues après qu'elle eut été interrogée et que c'est quand celles-ci lui ont été lues pour la première fois à Arusha qu'elle a remarqué qu'elles contenaient des erreurs³¹⁹. Enfin, le Procureur répond que la Chambre de première instance n'a pas «ignoré» les dépositions des témoins RHU 23 et RHU 29, elle les a examinées mais les a trouvées peu convaincantes; il soutient en outre que les témoins RHU 23, RHU 25 et RHU 29 étaient évasifs et que leurs dépositions comportaient des contradictions internes³²⁰.

158. Comme le relève l'appelant, les dépositions des témoins ACM et GBG au sujet des faits survenus à la concession de Munyemvano le 7 avril 1994 divergent à maints égards. La Chambre d'appel note que la Chambre de première instance, après avoir résumé leurs dépositions relatives aux faits qui s'y sont déroulés, a pris acte des divergences entre leurs récits respectifs³²¹. Tenant compte du fait que les témoins ACM et GBG étaient des victimes de l'attaque qui a eu lieu dans cette concession, la Chambre de première instance a dit ce qui suit :

³¹¹ Mémoire de l'appelant, para. 267.

³¹² *Ibid.*, paras. 274 et 284.

³¹³ *Ibid.*, para. 275.

³¹⁴ *Ibid.*, para. 287.

³¹⁵ *Ibid.*, paras. 277 et 281.

³¹⁶ *Ibid.*, para. 286.

³¹⁷ Mémoire de l'intimé, para. 186.

³¹⁸ *Ibid.*, paras. 187 et 189.

³¹⁹ *Ibid.*, paras. 190, 193 et 195.

³²⁰ *Ibid.*, para. 197.

³²¹ Voir jugement, paras. 592 à 594.

“Although there are differences between the testimonies of Prosecution Witness GBG and ACM – such as a difference between the numbers of attackers given, and the type of attire the Accused was wearing – the Chamber can make an allowance, as both Witnesses were in fear of their lives, and the Witnesses’ attention would have been otherwise focused than paying attention to details”³²².

The Appeals Chamber observes, however, that the Trial Chamber made this allowance only in respect of differences not directly relating to the Appellant’s role in or responsibility for the events. Noting that Witness GBG identified the Appellant as the person who shot Gateyiteyi, whereas Witness ACM testified that Gateyiteyi was killed by Ndayambaje, the Trial Chamber declined to rely on their testimonies and found that the identity of Gateyiteyi’s killer had not been established³²³. It thus appears that the Trial Chamber credited the testimonies of these witnesses to the extent to which they corroborated each other. The Appeals Chamber finds that the Appellant has not shown this to be an erroneous or an unreasonable approach.

159. In respect of the Appellant’s submission relating to contradictions between Witness ACM’s written statements and her testimony in court, the Appeals Chamber recalls that the witness explained that she signed the statements without having them read to her and that she did not notice errors in them until arriving to testify at the Tribunal³²⁴. In light of this explanation, which the Appellant does not now contest, the Trial Chamber’s acceptance of her testimony cannot be held to have been erroneous or unreasonable.

160. Accordingly, in the view of the Appeals Chamber, it has not been established that the Trial Chamber erred in assessing the weight of the evidence given by Witnesses ACM and GBG in connection with the events at Munyemvano’s compound on 7 April 1994.

161. The Appellant also submits that the Trial Chamber erred in “ignoring” or “setting aside” testimonies of Witnesses MLCF, RHU 25, RHU 23, RHU 29, and KAA that the Appellant was not at the compound on 7 April 1994. The Appeals Chamber notes that the Trial Chamber recalled and summarized at length the testimony of each of these witnesses in the Judgement³²⁵. The Appellant has failed to refer the Appeals Chamber to the record, citing only paragraph 597 of the Trial Judgement where the Trial Chamber made the finding that the Appellant was present during the attack at Munyemvano’s compound. As it is incumbent on the appealing party to identify the

³²² Trial Judgement, para. 595.

³²³ Trial Judgement, para. 595.

³²⁴ T. 11 December 2001 p. 87 (“A. I signed my statement soon after I made it. Q. Did they read the statement back to you in Kinyarwanda and ask you whether or not that statement was truthful and accurate? A. No, when I made my statement, it was not re-read to me – it was not read back to me. I had confidence in these people. They said they had – they had written down the statement I gave to them, and I signed without it being read back to me.”). See also T. 11 December 2001 p. 98; T. 12 December 2001 p. 17.

³²⁵ See Trial Judgement, paras. 579-581 (MLCF); 573, 574, 577, 578 (RHU25); 575, 582, 583 (RHU23); 584, 585 (RHU29); 587-590 (KAA).

«La Chambre comprend que les témoins à charge GBG et ACM aient divergé, notamment quant au nombre des assaillants et à la mise de l'accusé, car craignant pour leur vie, ces deux témoins auraient eu l'attention captée par autre chose que des détails»³²².

La Chambre d'appel fait toutefois observer que la Chambre de première instance avait tenu compte de cette possibilité particulière uniquement en ce qui concerne les divergences qui n'ont pas directement trait au rôle de l'appelant ou à sa responsabilité dans les faits survenus. Notant que le témoin GBG a identifié l'appelant comme étant celui qui a abattu Gateyiteyi, tandis que le témoin ACM a déclaré que Gateyiteyi a été tué par Ndayambaje, la Chambre de première instance s'est refusée à s'appuyer sur leurs dépositions et a estimé que l'identité du meurtrier de Gateyiteyi n'avait pas été établie³²³. Il appert donc que la Chambre de première instance a ajouté foi aux dépositions de ces témoins dans la mesure où elles se corroboraient mutuellement. La Chambre d'appel estime que l'appelant n'a pas montré en quoi cette démarche serait erronée ou déraisonnable.

159. En ce qui concerne le grief tiré par l'appelant des contradictions entre les déclarations écrites du témoin ACM et sa déposition à l'audience, la Chambre d'appel rappelle que le témoin a expliqué avoir signé les déclarations sans qu'elles lui aient été relues et que ce n'est qu'à son arrivée à Arusha pour témoigner devant le Tribunal qu'elle a décelé les erreurs³²⁴. Au vu de cette explication, que l'appelant ne conteste pas au demeurant, on ne peut pas considérer que la décision de la Chambre de première instance d'accepter la déposition du témoin ait été entachée d'erreur ou déraisonnable.

160. En conséquence, la Chambre d'appel estime qu'il n'a pas été établi que la Chambre de première instance a mal évalué la valeur des éléments de preuve produits par les témoins ACM et GBG relativement aux faits survenus à la concession de Munyemvano le 7 avril 1994.

161. L'appelant soutient également que la Chambre de première instance a commis une erreur pour avoir «ignoré» ou «écarté» les dépositions des témoins MLCF, RHU 25, RHU 23, RHU 29 et KAA selon lesquelles l'appelant n'était pas à la concession le 7 avril 1994. La Chambre d'appel fait observer que, dans son jugement, la Chambre de première instance a rappelé et résumé en détail la déposition de chacun de ces témoins³²⁵. L'appelant n'a renvoyé la Chambre d'appel à aucun élément du dossier, il s'est borné à invoquer le paragraphe 597 du jugement dans lequel la

³²² Jugement, para. 595.

³²³ *Id.*

³²⁴ Compte rendu de l'audience du 11 décembre 2001, p. 97 («R. J'ai signé ma déclaration immédiatement après l'avoir faite. Q. Cette déclaration vous a-t-elle été relue en kinyarwanda, et vous a-t-il également été demandé d'attester qu'elle reflétait fidèlement vos propos? R. Non, lorsque j'ai fait ma déclaration, elle ne m'a pas été relue. J'avais confiance en ces personnes et je me disais qu'elles avaient rédigé ce que je leur avais raconté et j'ai signé sans que lecture de la déclaration me soit faite»). Voir aussi les comptes rendus des audiences du 11 décembre 2001, p. 98, et du 12 décembre 2001, pp. 22 et 23.

³²⁵ Voir jugement, paras. 579 à 581 (MLCF); 573, 574, 577 et 578 (RHU 25); 575, 582 et 583 (RHU 23); 584 et 585 (RHU 29); 587 à 590 (KAA).

alleged errors and support its claims with arguments and references, in the present instance the Appellant, at a minimum, should have specified the passages in the testimony of Witnesses MLCF, RHU 25, RHU 23, RHU 29, and KAA, which he believes support his claim.

162. Referring to the Trial Judgement, the Appeals Chamber notes that Witness MLCF stated that he did not see the Appellant among the attackers at Busogo Parish Convent on 7 April 1994³²⁶. Witness RHU25 testified that he did not see the Appellant at the convent on 7 April 1994³²⁷. Witness KAA testified that he did not see the Appellant at Busogo Parish during the massacre on 7 April 1994³²⁸. It does not appear that Witnesses MLCF, RHU25, or KAA referred to Munyemvano's compound or to the Appellant's presence or absence from there. Consequently, and noting the inadequate manner in which the Appellant presented this argument, it is not clear how the testimony of Witnesses MLCF, RHU 25, and KAA could lend support to the Appellant's contention that he was not at Munyemvano's compound at the relevant time.

163. The Appeals Chamber notes that Witnesses RHU23 and RHU29 did testify that by the morning of 7 April 1994 the inhabitants of Munyemvano's compound had already fled to Busogo³²⁹. However, the Trial Chamber found that these witnesses "gave unpersuasive accounts that there was no massacre that occurred at Munyemvano's compound" and declined to accept their testimonies³³⁰. In the view of the Appeals Chamber, it has not been established that the Trial Chamber, upon seeing all the witnesses testify and upon reviewing the relevant evidence, erred or acted unreasonably in preferring the testimonies of Witnesses ACM and GBG over those of Witnesses RHU 23 and RHU 29.

164. Accordingly, this ground of appeal is dismissed.

XIV. ALLEGED ERROR IN MAKING NO FINDING ON THE APPELLANT'S PRESENCE DURING KILLINGS AT BUSOGU CONVENT (GROUND OF APPEAL 16)

165. The Appellant submits that the fact that the Trial Chamber made no finding that he was present at the Busogo Parish Convent during the killings on 7 April 1994 is inconsistent with its finding that he was present at Munyemvano's compound³³¹. The Appellant argues that since the Trial Chamber relied on Witness ACM to make findings in respect of the Appellant's involvement in the events at Munyemvano's

³²⁶ Trial Judgement, para. 581.

³²⁷ Trial Judgement, para. 578.

³²⁸ Trial Judgement, para. 590.

³²⁹ Trial Judgement, paras. 582 (RHU 23), 584 (RHU 29).

³³⁰ Trial Judgement, para. 596.

³³¹ Amended Notice of Appeal, para. 116; Appellant's Brief, para. 299.

Chambre de première instance a conclu qu'il était présent lors de l'attaque à la concession de Munyemvano. Comme c'est à la partie appelante qu'il incombe d'identifier les erreurs alléguées et d'étayer ses allégations par des arguments et des références, en l'espèce l'appelant aurait dû tout au moins préciser les passages des dépositions des témoins MLCF, RHU 25, RHU 23, RHU 29 et KAA qui, selon lui, étayaient ses allégations.

162. Se reportant au jugement, la Chambre d'appel note que le témoin à décharge MLCF a déclaré n'avoir pas vu l'appelant parmi les assaillants au couvent de la paroisse de Busogo le 7 avril 1994³²⁶. Le témoin à décharge RHU 25 a dit ne pas l'y avoir vu non plus le 7 avril 1994³²⁷. Le témoin KAA, lui, a déclaré n'avoir pas vu l'appelant à la paroisse de Busogo lors du massacre commis le 7 avril 1994³²⁸. Il ne semble pas que les témoins MLCF, RHU25 ou KAA faisaient allusion à la concession de Munyemvano ou à la présence ou l'absence de l'appelant à cet endroit. Par conséquent, et vu la manière inadéquate dont l'appelant a présenté son argument, l'on ne saurait dire au juste comment les dépositions des témoins MLCF, RHU 25 et KAA pourraient cautionner l'affirmation de l'appelant selon laquelle il ne se trouvait pas à la concession de Munyemvano au moment des faits.

163. La Chambre d'appel note que les témoins RHU 23 et RHU 29 ont effectivement dit à la barre qu'au matin du 7 avril 1994 tous ceux qui se trouvaient à la concession de Munyemvano avaient déjà fui pour se rendre à Busogo³²⁹. «N'étant pas convaincue de ce qu'il n'y a[vait] pas eu de massacre dans la concession de Munyemvano selon les témoins à décharge RHU 29 et RHU 23», la Chambre de première instance a toutefois écarté leurs dépositions³³⁰. De l'avis de la Chambre d'appel, il n'a pas été établi que la Chambre de première instance, après avoir entendu tous les témoins qui ont déposé et après avoir examiné les moyens de preuve pertinents, a commis une erreur ou agi de façon déraisonnable en retenant les dépositions des témoins ACM et GBG plutôt que celles des témoins RHU 23 et RHU 29.

164. Ce moyen d'appel est par conséquent rejeté.

XIV. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN NE SE PRONONÇANT PAS SUR LA PRÉSENCE
DE L'APPELANT LORS DES TUERIES AU COUVENT DE BUSOGO
(SEIZIÈME MOYEN D'APPEL)

165. L'appelant soutient que le fait que la Chambre de première instance ne se soit pas prononcée sur sa présence au couvent de la paroisse de Busogo lors des tueries qui ont été commises le 7 avril 1994 est en contradiction avec sa conclusion selon laquelle il était présent à la concession de Munyemvano³³¹. Selon lui, dès lors que la Chambre de première instance s'est appuyée sur la déposition du témoin ACM pour

³²⁶ Jugement, para. 581.

³²⁷ *Ibid.*, para. 578.

³²⁸ *Ibid.*, para. 590.

³²⁹ *Ibid.*, paras. 582 (RHU 23) et 584 (RHU 29).

³³⁰ *Ibid.*, para. 596.

³³¹ Acte d'appel modifié, para.116; mémoire de l'appelant, para. 299.

compound, and since Witness ACM also claimed in her trial testimony that she saw the Appellant at Busogo Parish supervising the killings, it is

“unreasonable for any trier of fact after evaluating the testimony as a whole to reach a finding that the proofs established beyond a reasonable doubt that Appellant was present and participated in the killings at either Munyemvano’s compound or the Busogo Parish”³³².

166. The Prosecution responds that, if anything, this shows that the Trial Chamber exercised caution in making findings concerning the Appellant’s presence at massacre sites³³³.

167. After reviewing the Trial Chamber’s findings concerning the events at Munyemvano’s compound and Busogo Parish, the Appeals Chamber is unable to find merit in the Appellant’s present argument. As discussed in connection with the preceding ground of appeal, it appears that the Trial Chamber accorded probative value to Witness ACM’s testimony going to the Appellant’s role in or responsibility for events when it was corroborated. A Trial Chamber is entitled to rely on any evidence it deems to have probative value and it may accept a witness’s testimony only in part if it considers other parts of his or her evidence not reliable or credible³³⁴. Therefore, the Trial Chamber cannot be considered to have erred when it accepted Witness ACM’s corroborated testimony of the Appellant’s role at Munyemvano’s compound while, at the same time, preferring not to rely on her uncorroborated evidence to find that the Appellant also played a role in the events at Busogo Parish. Accordingly, this ground of appeal is dismissed.

XV. ALLEGED ERROR IN ACCEPTING TESTIMONY OF WITNESS GDD
THAT HE KILLED TUTSIS ON THE APPELLANT’S ORDERS
(GROUND OF APPEAL 17)

168. The Appellant submits that the Trial Chamber erred in law and fact in accepting the uncorroborated testimony of Witness GDD that on 8 April 1994 he killed members of a Tutsi family in Nkuli *Commune*³³⁵. The Appellant argues that Witness GDD’s veracity

“was called into question by virtue of the fact of his criminal records, his reputation in the community for dishonesty and the inconsistencies between his statements given to the ICTR investigators and his trial testimony”³³⁶.

³³² Appellant’s Brief, paras. 303, 304.

³³³ Respondent’s Brief, para. 198.

³³⁴ *Musema* Appeal Judgement, para. 82.

³³⁵ Amended Notice of Appeal, para. 117; Appellant’s Brief, para. 305.

³³⁶ Appellant’s Brief, para. 307.

conclure à sa participation aux faits qui se sont produits à la concession de Munyemvango et dès lors que ce témoin a également prétendu l'avoir vu à la paroisse de Busogo en train de superviser les massacres,

«il est peu raisonnable pour tout juge des faits de conclure, après avoir apprécié la déposition dans son ensemble, que la preuve établissait au-delà de tout doute raisonnable que l'appelant se trouvait à la concession de Munyemvango ou à la paroisse de Busogo et avait participé aux tueries qui y ont été commises»³³².

166. Le Procureur répond que cela démontre plutôt que la Chambre de première instance a fait preuve de prudence en tirant les conclusions relatives à la présence de l'appelant sur les lieux des massacres³³³.

167. Après avoir examiné les constatations opérées par la Chambre de première instance concernant les faits qui se sont produits à la concession de Munyemvango et à la paroisse de Busogo, la Chambre d'appel estime infondé l'argument développé par l'appelant. Comme cela a été expliqué à propos du précédent moyen d'appel, il semble que la Chambre de première instance a tenu pour probante la déposition du témoin ACM en ce qui concerne le rôle ou la responsabilité de l'appelant dans les faits survenus, lorsque cette déposition était corroborée. Une Chambre de première instance est en droit de se fonder sur tout élément de preuve qu'elle estime probant et peut n'accepter qu'en partie la déposition d'un témoin si elle considère que d'autres parties ne sont pas fiables ou crédibles³³⁴. En conséquence, on ne peut pas considérer que la Chambre de première instance a commis une erreur pour avoir accepté la partie corroborée de la déposition du témoin ACM sur le rôle de l'appelant à la concession de Munyemvango tout en préférant, dans le même temps, ne pas s'appuyer sur les éléments non corroborés de sa déposition pour conclure que l'appelant avait également joué un rôle dans les événements qui se sont produits à la paroisse de Busogo. Ce moyen d'appel est par conséquent rejeté.

XV. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN RETENANT LA DÉPOSITION DU TÉMOIN GDD
SELON LAQUELLE IL AVAIT TUÉ DES TUTSIS
SUR ORDRES DE L'APPELANT (DIX-SEPTIÈME MOYEN D'APPEL)

168. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en retenant la déposition non corroborée du témoin GDD selon laquelle, le 8 avril 1994, il avait tué des membres d'une famille tutsie dans la commune de Nkuli³³⁵. Il fait valoir que la sincérité de ce témoin

«était sujette à caution du fait de ses antécédents judiciaires, de sa réputation de malhonnêteté au sein de la communauté et des contradictions entre ses déclarations aux enquêteurs du TPIR et sa déposition à l'audience»³³⁶.

³³² Mémoire de l'appelant, paras. 303 et 304.

³³³ Mémoire de l'intimé, para. 198.

³³⁴ Arrêt *Musema*, para. 82.

³³⁵ Acte d'appel modifié, para. 117; mémoire de l'appelant, para. 305.

³³⁶ Mémoire de l'appelant, para. 307.

In consideration of this, the Appellant contends, the Trial Chamber's failure to view Witness GDD's testimony with "great caution" and not requiring corroboration was erroneous³³⁷.

169. The Prosecution responds that the only discrepancy raised by the Appellant between Witness GDD's testimony and his prior statements was credibly explained during cross-examination³³⁸.

170. As recently stated in the *Niyitegeka* case,

"[t]he Appeals Chamber has consistently held that a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness's testimony for the proof of a material fact"³³⁹.

The Appeals Chamber notes that the Trial Chamber carefully considered the challenges to Witness GDD's credibility in the Trial Judgement and found this witness to be credible³⁴⁰. The Appeals Chamber recalls that it previously dismissed the Appellant's submissions that the Trial Chamber erred in finding Witness GDD to be credible³⁴¹. Having reviewed Witness GDD's testimony and the Trial Chamber's assessment of his credibility, the Appeals Chamber cannot identify any error of the Trial Chamber in accepting and relying on Witness GDD's testimony without corroboration. Therefore, this ground of appeal is dismissed.

XVI. ALLEGED ERROR IN FINDING THAT THE APPELLANT FACILITATED KILLINGS
AT THE RUHENGERI COURT OF APPEAL
(GROUND OF APPEAL 18)

171. The Appellant asserts that the Trial Chamber erroneously found that he played a vital role as an organizer and facilitator of the *Interahamwe* and other attackers in connection with the attack at the Ruhengeri Court of Appeal on 14 April 1994 by procuring weapons, "rounding up" *Interahamwe*, and facilitating their transportation by buying petrol for their vehicles³⁴². In this regard, the Appellant submits that the Trial Chamber erred in law and fact in accepting as credible the uncorroborated testimony of Witness GAO concerning events that took place on 14 April 1994³⁴³. In support of this submission, the Appellant argues that neither Witness GAO's 7 May

³³⁷ Appellant's Brief, para. 308.

³³⁸ Respondent's Brief, para. 201.

³³⁹ *Niyitegeka* Appeal Judgement, para. 92. See also, *e.g.*, *Rutaganda* Appeal Judgement, para. 29; *Musema* Appeal Judgement, paras. 36-38; *Celebici Case* Appeal Judgement, para. 506; *Aleksovski* Appeal Judgement, paras. 62-63; *Kupreškic et al.* Appeal Judgement, para. 33.

³⁴⁰ Trial Judgement, para. 467.

³⁴¹ See *supra* Chapters IV and IX.

³⁴² Amended Notice of Appeal, paras. 119-121; Appellant's Brief, para. 318.

³⁴³ Amended Notice of Appeal, para. 118; Appellant's Brief, para. 309.

Au vu de ces éléments, l'appelant soutient que la Chambre de première instance a versé dans l'erreur en n'examinant pas la déposition de ce témoin «avec beaucoup de circonspection» et en n'ayant pas exigé qu'elle soit corroborée³³⁷.

169. Le Procureur répond que la seule contradiction relevée par l'appelant entre la déposition du témoin GDD et ses déclarations antérieures a été expliquée de façon crédible lors du contre-interrogatoire³³⁸.

170. Comme il vient d'être dit dans l'affaire *Niyitegeka*,

«[I]l est de jurisprudence constante à la Chambre d'appel que la Chambre de première instance est l'organe le mieux placé pour apprécier la valeur probante des éléments de preuve et qu'elle peut, en fonction des résultats de son appréciation, s'appuyer sur les propos d'un seul témoin pour conclure qu'un fait essentiel a été établi»³³⁹.

La Chambre d'appel note que la Chambre de première instance a examiné avec soin les griefs formulés à l'égard de la crédibilité du témoin GDD dans le jugement et a conclu que ce témoin était digne de foi³⁴⁰. Elle rappelle qu'elle avait auparavant rejeté les arguments de l'appelant selon lesquels la Chambre de première instance a commis une erreur en jugeant le témoin GDD digne de foi³⁴¹. Après avoir examiné la déposition du témoin GDD et l'appréciation portée par la Chambre de première instance sur la crédibilité de celui-ci, la Chambre d'appel ne voit pas quelle erreur la Chambre de première instance aurait commise en retenant la déposition du témoin GDD sans exiger qu'elle soit corroborée et en se fondant sur celle-ci pour statuer. En conséquence, ce moyen d'appel est rejeté.

XVI. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN CONCLUANT QUE L'APPELANT
AVAIT FACILITÉ LES TUERIES SURVENUES
À LA COUR D'APPEL DE RUHENGARI (DIX-HUITIÈME MOYEN D'APPEL)

171. L'appelant soutient que la Chambre de première instance a conclu à tort qu'il avait joué un rôle primordial en ce qu'il avait organisé et facilité les activités des *Interahamwe* et d'autres assaillants lors de l'attaque lancée contre la Cour d'appel de Ruhengeri le 14 avril 1994 en leur procurant des armes, «en rassemblant» des *Interahamwe* et en achetant de l'essence pour leurs véhicules³⁴². À cet égard, l'appelant fait valoir que la Chambre de première instance a commis une erreur de droit et de fait en tenant pour crédible la déposition non corroborée du témoin GAO concernant les faits survenus le 14 avril 1994³⁴³. À l'appui de cet argument, il fait valoir que ni

³³⁷ *Ibid.*, para. 308.

³³⁸ Mémoire de l'intimé, para. 201.

³³⁹ Arrêt *Niyitegeka*, para. 92. Voir également, par exemple, l'arrêt *Rutaganda*, para. 29; l'arrêt *Musema*, para. 36 à 38; l'arrêt *Celebici*, para. 506; l'arrêt *Aleksovski*, paras. 62 et 63; et l'arrêt *Kupreškic et consorts*, para. 33.

³⁴⁰ Jugement, para. 467.

³⁴¹ Voir *supra* chapitres IV et IX.

³⁴² Acte d'appel modifié, paras. 119 à 121; mémoire de l'appelant, para. 318.

³⁴³ Acte d'appel modifié, para. 118; mémoire de l'appelant, para. 309.

1999 statement nor his 2 February 1999 confession letter to the Rwandan authorities mentions the attack at the Ruhengeri Court of Appeal³⁴⁴. Additionally, the Appellant contends that had he indeed provided weapons to Witness GAO, the witness would have included this information in his confession or in his prior statement³⁴⁵. The Appellant further submits that Witness GAO's testimony that the Appellant was at Byangabo on 14 April 1994 contradicts the testimony of Witness RGM³⁴⁶. Finally, the Appellant argues that the Trial Chamber failed to give a reasoned basis for its decision on the credibility of Witness RGM³⁴⁷.

172. The Prosecution responds that while claiming an error of law and fact, the Appellant merely seeks a re-examination of evidence adduced at trial without showing how the Trial Chamber committed an error of law or an error of fact leading to a miscarriage of justice³⁴⁸. The Prosecution submits that while relying partly on the eye-witness evidence of Witness GAO, the Trial Chamber considered testimonies of other witnesses, both Prosecution and Defence, including Witnesses GAP, RGM, FBM, as well as the Appellant³⁴⁹. The Prosecution recalls that Witness RGM corroborated a number of the facts testified to by Witness GAO, including the use of two Daihatsu vehicles during the attack at the Ruhengeri Court of Appeal³⁵⁰. As for the alleged omission of the attack at the Court of Appeal from Witness GAO's prior statement and confession, the Prosecution argues that the fact of the attack is not contested and that, in any event, Witness GAO explained his prior statements during cross-examination³⁵¹. Moreover, the Prosecution submits, the Trial Chamber's decision to discount Witness RGM's testimony concerning the Appellant's absence during the relevant events was well reasoned and supported by the record³⁵².

173. The Appellant submits that Witness GAO's testimony that the Appellant was at Byangabo on 14 April 1994 is contradicted by Witness RGM's testimony. The Appeals Chamber recalls that it affirmed the Trial Chamber's finding that Witness RGM was not credible with regard to the presence of the Appellant at any of the sites involved in the case³⁵³. Moreover, the Appeals Chamber finds that the contradiction now alleged between the testimony of Witnesses GAO and RGM is not founded on the record. In the part of the record to which the Appellant points in support of the present argument Witness GAO testified as follows :

And Kajelijeli came to the petrol — Rwanda petrol station which belonged to a certain Baheza Esdras. ... And Kajelijeli was there with Baheza, Esdras, together with the Chief Warrant Officer Karorero. At the time, I was on the road on the upper side of that petrol station, and Kajelijeli spoke to me personally. He asked me to go and assist the others. I replied that I did not have the tools. He said,

³⁴⁴ Appellant's Brief, paras. 310, 311.

³⁴⁵ Appellant's Brief, para. 312.

³⁴⁶ Appellant's Brief, paras. 312-314; Appellant's Brief in Reply, para. 88.

³⁴⁷ Appellant's Brief, paras. 315-317.

³⁴⁸ Respondent's Brief, para. 203.

³⁴⁹ Respondent's Brief, para. 205.

³⁵⁰ Respondent's Brief, para. 210.

³⁵¹ Respondent's Brief, para. 207.

³⁵² Respondent's Brief, paras. 211, 212.

³⁵³ See Trial Judgement, para. 527. See also *supra* Chapter XI.

la déclaration du 7 mai 1999 du témoin GAO ni sa lettre d'aveu du 2 février 1999 aux autorités rwandaises ne mentionnent l'attaque perpétrée à la Cour d'appel de Ruhengeri³⁴⁴. Au surplus, il soutient que s'il lui avait effectivement procuré des armes, le témoin GAO en aurait fait état dans sa lettre d'aveu ou dans sa déclaration antérieure³⁴⁵. L'appelant fait aussi valoir que la déposition du témoin GAO indiquant qu'il se trouvait à Byangabo le 14 avril 1994 est en contradiction avec celle du témoin RGM³⁴⁶. Enfin, l'appelant soutient que la Chambre n'a pas motivé sa décision relative à la crédibilité du témoin RGM³⁴⁷.

172. Le Procureur réplique qu'en faisant état d'une erreur de droit et de fait, l'appelant veut simplement obtenir un réexamen des éléments de preuve produits au procès sans établir en quoi la Chambre de première instance a commis une erreur de droit ou de fait ayant entraîné un déni de justice³⁴⁸. Le Procureur fait valoir que tout en faisant fond partiellement sur la déposition du témoin oculaire GAO, la Chambre de première instance a pris en considération les dépositions d'autres témoins, tant à charge qu'à décharge, notamment celles de GAP, RGM, FBM et de l'appelant³⁴⁹. Il rappelle que le témoin RGM a corroboré un certain nombre de faits rapportés par le témoin GAO, y compris l'utilisation de deux véhicules Daihatsu durant l'attaque contre la Cour d'appel de Ruhengeri³⁵⁰. Quant au fait que le témoin GAO n'aurait pas mentionné l'attaque contre la Cour d'appel dans sa déclaration antérieure et ses aveux, le Procureur soutient que l'attaque elle-même n'est pas contestée et qu'en tout état de cause, le témoin GAO s'est expliqué sur ses déclarations antérieures lors de son contre-interrogatoire³⁵¹. Par ailleurs, le Procureur fait valoir que la décision de la Chambre d'écarter les dires du témoin RGM concernant l'absence de l'appelant lors des faits en question était bien motivée et étayée par le dossier³⁵².

173. L'appelant fait valoir que la déposition du témoin GAO selon laquelle l'appelant se trouvait à Byangabo le 14 avril 1994 est contredite par celle du témoin RGM. La Chambre d'appel rappelle qu'elle a confirmé la conclusion de la Chambre qui a estimé que le témoin RGM n'était pas crédible en ce qui concerne la présence de l'appelant à l'un quelconque des endroits visés en l'espèce³⁵³. Elle estime en outre que la contradiction maintenant alléguée entre les dépositions des témoins GAO et RGM n'est pas étayée par le dossier. Dans la partie du dossier que l'appelant invoque à l'appui de cet argument, le témoin GAO a déclaré ce qui suit :

Et Kajelijeli est venu à la station d'essence Petro-Rwanda qui appartenait à un certain Baheza Estras ... Et Kajelijeli s'y trouvait avec ce Baheza Estras et l'adjudant-chef Karorero. À ce moment-là, moi, je me trouvais sur la route qui se trouvait en haut de cette station-service, et Kajelijeli m'a adressé la parole en personne. Il m'a demandé d'aller aider les autres. J'ai rétorqué que je n'avais

³⁴⁴ Mémoire de l'appelant, paras. 310 et 311.

³⁴⁵ *Ibid.*, para. 312.

³⁴⁶ Mémoire de l'appelant, paras. 312 à 314; mémoire en réplique de l'appelant, para. 88.

³⁴⁷ Mémoire de l'appelant, paras. 315 à 317.

³⁴⁸ Mémoire de l'intimé, para. 203.

³⁴⁹ *Ibid.*, para. 205.

³⁵⁰ *Ibid.*, para. 210.

³⁵¹ *Ibid.*, para. 207.

³⁵² *Ibid.*, paras. 211 et 212.

³⁵³ Voir jugement, para. 527. Voir également *supra* chapitre XI.

“Don’t worry, come with me. Get on board the vehicle. The tools are available, and you will be given them”. So, I went on board the vehicle. He was on the steering, and sitting by him was the Chief Warrant Officer Karorero. Baheza remained – stayed behind at the petrol station. So, I went on board the vehicle. Kajelijeli was driving. And so we move right up to Nkuli. ... When we got to the home of the chief warrant officer, we got down from that vehicle and the chief warrant officer gave me four grenades. ... So, we continued on our way, and we got to the house of the chairman of the CDR. He was known as Gervais. ... The purpose of our visit was to seek reinforcements, you know, from other members of the CDR. We secured reinforcements. And we went back down, and when we got to petrol – Rwanda Petrol Station, it was Kajelijeli who bought petrol for us personally. After taking petrol, we went down right to Byangabo. When we got to Byangabo, I gave one of the Chinese made grenades to ... And other *Interahamwes* got on board the vehicle and we went to the Court of Appeal to kill³⁵⁴.

174. During cross-examination, Witness GAO specified that after purchasing petrol, the Appellant remained at the petrol station :

“The last place where I saw Kajelijeli before our departure to the Court of Appeal was the Pétrole Rwanda petrol station after he had paid for the petrol”³⁵⁵.

From Witness GAO’s testimony, it appears that after purchasing petrol the Appellant stayed at the petrol station while Witness GAO went “down” to Byangabo where he gave a grenade to Witness RGM and then proceeded to the Court of Appeal. Contrary to the Appellant’s argument, Witness GAO did not claim that the Appellant went to the Byangabo market on the day of the attack at the Court of Appeal and, therefore, Witness RGM’s testimony that he did not see the Appellant at Byangabo during that day does not contradict Witness GAO’s testimony.

175. In addressing the Trial Chamber’s alleged failure to provide a reasoned basis for its decision on Witness RGM’s credibility, the Appeals Chamber recalls its earlier finding made in connection with Ground of Appeal 13³⁵⁶. Under that ground of appeal, the Appeals Chamber found that the Appellant has not shown that the Trial Chamber erred in its finding concerning Witness RGM’s credibility. The Appeals Chamber also recalls that a Trial Chamber is not required to set out in detail why it accepted or rejected a particular testimony³⁵⁷. Nevertheless, the Trial Judgement in the present case reflects that the Trial Chamber evaluated Witness RGM’s credibility carefully and that it reached a reasoned conclusion that has not been shown to be erroneous or unreasonable on appeal.

176. In support of his argument that accepting the uncorroborated testimony of Witness GAO was legally and factually erroneous, the Appellant submits under this ground of appeal that Witness GAO’s prior statement and confession letter do not mention the Ruhengeri Court of Appeal attack and that the witness “would have” included in these statements that the Appellant provided him with weapons, if it indeed were true. The Appeals Chamber considers that the Appellant’s present line

³⁵⁴ T. 23 July 2001 pp. 40, 41.

³⁵⁵ T. 24 July 2001 pp. 64, 65.

³⁵⁶ See *supra* Chapter XI.

³⁵⁷ *Musema* Appeal Judgement, para. 20.

pas d'outils. Il a dit : «Ne t'en fais pas, viens avec moi, monte dans le véhicule, les outils sont disponibles, on va t'en donner.» Je suis monté dans le véhicule. Il était au volant lui-même et, à côté de lui, était l'adjudant-chef Karorero, tandis que Baheza est resté à la station. Je suis donc monté dans le véhicule. Kajelijeli a conduit et nous sommes montés jusqu'à Nkuri ... Arrivés chez l'adjudant-chef, nous sommes descendus du véhicule et l'adjudant-chef m'a remis quatre grenades... Nous avons poursuivi la route et nous sommes arrivés chez le Président de la CDR qui s'appelait Gervais... Le but de notre visite était de lui demander des renforts, d'autres membres de la CDR. Nous avons obtenu ces renforts. Nous sommes redescendus et, arrivés à la station d'essence Petro-Rwanda, c'est Kajelijeli en personne qui nous a acheté de l'essence. Après avoir pris de l'essence, nous sommes descendus jusqu'à Byangabo et, arrivés à Byangabo, j'ai donné une grenade de marque chinoise à ... et d'autres *Interahamwe* sont montés dans le véhicule, et nous nous sommes rendus à la Cour d'appel pour tuer³⁵⁴.

174. Contre-interrogé, le témoin GAO a précisé qu'après s'être procuré du carburant, l'appelant était demeuré à la station d'essence :

«Le dernier endroit où j'ai vu Kajelijeli, avant que nous partions pour la Cour d'appel, c'est à la station d'essence de Petro-Rwanda, après qu'il ait payé l'essence»³⁵⁵.

Il ressort de la déposition du témoin GAO qu'après qu'il eut payé l'essence, l'appelant est resté à la station d'essence tandis que le témoin GAO est «descendu» à Byangabo où il a donné une grenade au témoin RGM et s'est rendu ensuite à la Cour d'appel. Contrairement à ce qu'affirme l'appelant, le témoin GAO n'a pas prétendu que l'appelant était allé au marché de Byangabo le jour de l'attaque contre la Cour d'appel; dès lors, les propos du témoin RGM selon lesquels il n'avait pas vu l'appelant à Byangabo ce jour-là ne contredisent point la déposition du témoin GAO.

175. Quant au fait que la Chambre de première instance n'aurait pas motivé sa décision concernant la crédibilité du témoin RGM, la Chambre d'appel rappelle sa conclusion antérieure dégagee relativement au treizième moyen d'appel³⁵⁶. Elle a alors estimé que l'appelant n'avait pas démontré que la Chambre de première instance avait versé dans l'erreur en statuant sur la crédibilité du témoin RGM. Elle rappelle également que la Chambre de première instance n'est pas tenue d'exposer dans le détail les raisons qui l'ont conduite à admettre ou à rejeter un témoignage donné³⁵⁷. Néanmoins, il ressort du jugement en l'espèce que la Chambre a apprécié minutieusement la crédibilité du témoin RGM et qu'elle a dégagé une conclusion motivée dont le caractère erroné ou déraisonnable n'a pas été établi en appel.

176. À l'appui de son argument selon lequel le fait d'accepter la déposition non corroborée du témoin GAO constituait une erreur de droit et de fait, l'appelant fait valoir dans le cadre de ce moyen d'appel que la déclaration antérieure et la lettre d'aveux du témoin GAO ne faisaient pas état de l'attaque contre la Cour d'appel de Ruhengeri et que le témoin y «aurait» indiqué qu'il lui avait fourni des armes si effectivement tel avait été le cas. La Chambre d'appel considère que l'argumentation

³⁵⁴ Compte rendu de l'audience du 23 juillet 2001, pp. 48 à 50.

³⁵⁵ Compte rendu de l'audience du 24 juillet 2001, p. 78.

³⁵⁶ Voir *supra* chapitre XI.

³⁵⁷ Arrêt *Musema*, para. 20.

of argument is not convincing. First, to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility. Moreover, the Appellant presented this argument to the Trial Chamber, as reflected in the Trial Judgment³⁵⁸, and on appeal he has failed to show how the Trial Chamber erred in considering it. Second, the Appellant has not explained how the fact that, in his view, Witness GAO's prior statement or confession letter do not mention the Ruhengeri Court of Appeal attack undermines the witness's credibility. The Appeals Chamber notes that Witness GAO testified about the attack, and the fact that an attack indeed took place there was confirmed by Prosecution Witness GAP as well as Defence Witnesses RGM and FMB and the Appellant himself³⁵⁹.

177. Regarding the Appellant's facilitation of the killings at the Ruhengeri Court of Appeal, the Appeals Chamber finds that the Trial Chamber considered the evidence concerning the relevant events with care and with regard for the credibility of the witnesses tendering it. Despite the arguments submitted by the Defence against the credibility of Witness GAO, the Trial Chamber accorded weight to his testimony about these events because he was an eye-witness and because other evidence on the record, particularly that of Defence Witness RGM, corroborated important aspects of his testimony.

178. Accordingly, the Appeals Chamber dismisses this ground of appeal.

XVII. ALLEGED ERROR IN FINDING THAT THE APPELLANT
WAS PRESENT AT A ROADBLOCK
DURING THE KILLING OF KANOTI'S WIFE
(GROUND OF APPEAL 19)

179. The Appellant submits that the Trial Chamber erred in law and fact in finding that Witness GDQ was a credible witness concerning the death of a wife of a certain Kanoti, notwithstanding the fact that his testimony was impeached by Witness MLNL³⁶⁰. In support of the present submission, the Appellant argues that Witness MLNL contradicted Witness GDQ's testimony that Kanoti's wife was killed at a road-block by testifying that Kanoti's second wife, a Tutsi, was alive in March 2000³⁶¹. The Appellant points out that the Trial Chamber drew incorrect conclusions from the testimony of Witness MLNL concerning Kanoti's wives³⁶². The Appellant further submits that the Trial Chamber erred in finding that a road-block was set up in front of Witness GDQ's house on 8 April 1994³⁶³; that a Tutsi woman and her son were sin-

³⁵⁸ Trial Judgement, para. 619.

³⁵⁹ See Trial Judgement, paras. 613-617.

³⁶⁰ Amended Notice of Appeal, para. 122; Appellant's Brief, para. 319.

³⁶¹ Appellant's Brief, paras. 323, 324.

³⁶² Appellant's Brief in Reply, paras. 91-93.

³⁶³ Amended Notice of Appeal, para. 124.

de l'appelant n'est pas convaincante. Tout d'abord, donner à entendre que si quelque chose avait été vraie, un témoin en aurait fait état dans une déclaration ou une lettre d'aveux relève manifestement de la spéculation et ne saurait, en principe, fonder le reproche adressé à la Chambre de première instance d'avoir commis une erreur dans son appréciation de la crédibilité du témoin. En outre, l'appelant a présenté cet argument à la Chambre de première instance ainsi qu'il ressort du jugement³⁵⁸ et, en appel, il n'a pas établi en quoi celle-ci a versé dans l'erreur en l'examinant. Deuxièmement, l'appelant n'a pas expliqué en quoi la non-mention de l'attaque contre la Cour d'appel de Ruhengeri dans la déclaration antérieure et la lettre d'aveux du témoin GAO entame la crédibilité de ce témoin. La Chambre d'appel fait observer que le témoin GAO a déposé au sujet de l'attaque et que le fait qu'une attaque se soit effectivement produite là-bas a été confirmé par le témoin à charge GAP de même que par les témoins à décharge RGM et FMB et l'appelant lui-même³⁵⁹.

177. Quant à l'accusation reprochant à l'appelant d'avoir facilité les tueries à la Cour d'appel de Ruhengeri, la Chambre d'appel estime que la Chambre de première instance a examiné les éléments de preuve concernant les faits en question avec attention et en tenant compte de la crédibilité des témoins déposant à ce sujet. Malgré les arguments invoqués par la Défense pour attaquer la crédibilité du témoin GAO, la Chambre de première instance a accordé du poids à sa déposition concernant ces faits parce qu'il avait été témoin direct de ceux-ci et que d'autres témoignages versés au dossier, en particulier celui du témoin à décharge RGM, corroboraient des pans importants de sa déposition.

178. En conséquence, la Chambre d'appel rejette ce moyen d'appel.

XVII. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN CONCLUANT QUE L'APPELANT ÉTAIT PRÉSENT
À UN BARRAGE ROUTIER AU MOMENT DU MEURTRE
DE L'ÉPOUSE DE KANOTI (DIX-NEUVIÈME MOYEN D'APPEL)

179. L'appelant fait valoir que la Chambre de première instance a commis une erreur de droit et de fait en concluant que le témoin GDQ était crédible en ce qui concerne la mort de l'épouse d'un certain Kanoti bien que son témoignage ait été démenti par le témoin MLNL³⁶⁰. À l'appui de cet argument, l'appelant soutient que le témoin MLNL a contredit les propos du témoin GDQ selon lesquels l'épouse de Kanoti avait été tuée à un barrage routier en affirmant que la seconde épouse de Kanoti, une Tutsie, était en vie en mars 2000³⁶¹. L'appelant souligne que la Chambre de première instance a tiré des conclusions incorrectes de la déposition du témoin MLNL concernant les épouses de Kanoti³⁶². Il fait valoir de surcroît qu'elle a versé dans l'erreur en concluant qu'un barrage routier avait été mis en place devant le domicile du témoin GDQ le 8 avril 1994³⁶³;

³⁵⁸ Jugement, para. 619.

³⁵⁹ *Ibid.*, paras. 613 à 617.

³⁶⁰ Acte d'appel modifié, para. 122; mémoire de l'appelant, para. 319.

³⁶¹ Mémoire de l'appelant, paras. 323 et 324.

³⁶² Mémoire en réplique de l'appelant, paras. 91 à 93.

³⁶³ Acte d'appel modifié, para. 124.

gled out and killed there on 8 April 1994³⁶⁴; and that the Appellant was then present at the road-block and that he said: “No Tutsi should survive in Mukingo”³⁶⁵. The Appellant also submits that the Trial Chamber erred in failing to require the Prosecution to prove its case beyond reasonable doubt when it accepted the possibility that Witness GDQ did not correctly identify the victim as Kanoti’s wife³⁶⁶. Finally, the Appellant argues that Witness GDQ testified falsely that he did not participate in the killing of Tutsis during the events in April 1994 which, according to him, is apparent from the confession letter of Witness GAO indicating that on 7 April 1994 Witness GDQ was in the company of refugees armed with weapons “and they pointed out the hiding place of a Tutsi girl who was subsequently killed”³⁶⁷.

180. The Prosecution responds that the Appellant “mischaracterizes” the Trial Chamber’s finding which was that a woman thought to be Tutsi and her son were singled out and killed, rather than that a wife of Kanoti was killed³⁶⁸. In respect of Witness GDQ, the Prosecution recalls that he was subjected to cross-examination during trial and that although he denied participating in a specific crime referred to by counsel, he admitted that he was charged with participation in the genocide³⁶⁹. Finally, the Prosecution appears to deny that Witness MLNL contradicted Witness GDQ’s testimony by pointing out the confusion regarding the number of wives that Kanoti had³⁷⁰.

181. The Appeals Chamber notes that the Appellant has failed to develop or substantiate his submissions made in the Amended Notice of Appeal that the Trial Chamber erred in finding that a road-block was set up in front of Witness GDQ’s house on 8 April 1994, that a Tutsi woman and her son were singled out and killed there on that date, and that the Appellant was then present at the road-block and that he said: “No Tutsi should survive in Mukingo”³⁷¹. Consequently, the Appeals Chamber will not further address these submissions.

182. The Appeals Chamber recalls that at trial the Defence challenged the credibility of Witness GDQ by arguing that Witness MLNL contradicted his testimony that Kanoti’s wife was killed on 8 April 1994 because Witness MLNL saw her alive in the year 2000³⁷². The Trial Chamber considered this challenge and observed that the possibility exists that Witness GDQ misidentified the victim of the killing as Kanoti’s wife³⁷³. The Trial Chamber also took into account the fact that Witness MLNL testified that Kanoti had married several times and that it could have been a different or previous wife of Kanoti who was killed at the road-block³⁷⁴. Accordingly, the Trial Chamber found that the identity of the woman killed at the road-block had not been

³⁶⁴ Amended Notice of Appeal, para. 123.

³⁶⁵ Amended Notice of Appeal, para. 125.

³⁶⁶ Appellant’s Brief, paras. 325, 326.

³⁶⁷ Appellant’s Brief, paras. 320, 321.

³⁶⁸ Respondent’s Brief, para. 215.

³⁶⁹ Respondent’s Brief, para. 216.

³⁷⁰ Respondent’s Brief, para. 217.

³⁷¹ See Amended Notice of Appeal, para. 125.

³⁷² Trial Judgement, para. 713.

³⁷³ Trial Judgement, para. 713.

³⁷⁴ Trial Judgement, para. 713.

qu'une femme tutsie et son enfant avaient été pris à partie et tués à cet endroit le 8 avril 1994³⁶⁴ et que l'appelant était alors présent au barrage routier et aurait dit : «[A]ucun Tutsi ne doit survivre à Mukingo»³⁶⁵. L'appelant fait également valoir que c'est à tort que la Chambre de première instance n'a pas exigé du Procureur qu'il établisse sa thèse au-delà de tout doute raisonnable dès lors qu'elle a admis qu'il était fort possible que le témoin GDQ n'ait pas formellement identifié la victime comme étant l'épouse de Kanoti³⁶⁶. Enfin, l'appelant soutient que le témoin GDQ a fait un faux témoignage en affirmant qu'il n'avait pas participé à la mise à mort de Tutsis lors des faits survenus en avril 1994, ce qui, à son avis, ressort de la lettre d'aveux du témoin GAO indiquant que le témoin GDQ était, le 7 avril 1994, en compagnie de réfugiés armés «et qu'ils avaient désigné l'endroit où se cachait une jeune fille tutsie qui avait ultérieurement été tuée»³⁶⁷.

180. Le Procureur réplique que l'appelant a «dénaturé» la conclusion de la Chambre de première instance selon laquelle une femme prise pour une Tutsie et son fils avaient été pris à partie et tués et non pas qu'une épouse de Kanoti avait été tuée³⁶⁸. Concernant le témoin GDQ, le Procureur rappelle qu'il a été soumis à un contre-interrogatoire au procès et que bien qu'il ait nié avoir pris part à la perpétration du crime évoqué par le conseil, il a reconnu être accusé de participation au génocide³⁶⁹. Enfin, le Procureur semble nier que le témoin MLNL ait contredit la déposition du témoin GDQ, attirant l'attention sur la confusion entourant le nombre d'épouses qu'avait Kanoti³⁷⁰.

181. La Chambre d'appel relève que l'appelant n'a ni développé ni étayé les arguments qu'il a invoqués dans son acte d'appel modifié selon lesquels la Chambre de première instance avait versé dans l'erreur en concluant qu'un barrage routier avait été mis en place devant la maison du témoin GDQ le 8 avril 1994, qu'une femme tutsie et son fils avaient été pris à partie et tués là-bas ce jour-là et que l'appelant se trouvait alors au barrage routier et avait dit : «[A]ucun Tutsi ne doit survivre à Mukingo»³⁷¹. En conséquence, la Chambre d'appel n'examinera pas plus avant ces arguments.

182. La Chambre d'appel rappelle qu'au procès, la Défense a attaqué la crédibilité du témoin GDQ en soutenant que le témoin MLNL avait contredit ses propos selon lesquels l'épouse de Kanoti avait été tuée le 8 avril 1994 car le témoin MLNL l'avait vue en vie en 2000³⁷². La Chambre de première instance a examiné cette allégation et fait observer qu'il était possible que le témoin GDQ avait identifié à tort la victime du meurtre comme étant l'épouse de Kanoti³⁷³. Elle a également pris en considération le fait que le témoin MLNL avait dit que Kanoti s'était marié à plusieurs reprises et qu'il aurait pu s'agir d'une autre épouse ou d'une ex-épouse qui avait été tuée au barrage routier³⁷⁴. En conséquence, elle a estimé que l'identité de la femme tuée au

³⁶⁴ *Ibid.*, para. 123.

³⁶⁵ *Ibid.*, para. 125.

³⁶⁶ Mémoire de l'appelant, paras. 325 et 326.

³⁶⁷ *Ibid.*, paras. 320 et 321.

³⁶⁸ Mémoire de l'intimé, para. 215.

³⁶⁹ *Ibid.*, para. 216.

³⁷⁰ *Ibid.*, para. 217.

³⁷¹ Voir acte d'appel modifié, para. 125.

³⁷² Jugement, para. 713.

³⁷³ *Id.*

³⁷⁴ *Id.*

proven³⁷⁵. However, the Trial Chamber concluded that the doubt about the victim's identity did not damage Witness GDQ's credibility in respect of the killing in general³⁷⁶. The Appeals Chamber recalls Witness MLNL's testimony that Kanoti "got married in a vague manner"³⁷⁷ and that

"Kanoti normally married from time to time. He took a wife today, he left her tomorrow, he took another and that is how he was"³⁷⁸.

In the view of the Appeals Chamber, considering the record, the Trial Chamber did not act unreasonably or erroneously in concluding as it did.

183. Next, the Appellant appears to allege an error on the part of the Trial Chamber in failing to require the Prosecution to prove its case beyond reasonable doubt. The Appellant submits as follows :

The Chamber in its finding failed to require the Prosecution to prove its case beyond a reasonable doubt by finding that there was a "distinct possibility that Kanoti's wife" was seen alive in 2000. The Chamber also found that there was "also the possibility that witness GDQ did not correctly identify as Kanoti's wife the woman who accompanied Kanoti that day." ... The Appellant submits that the burden of proof is on the Prosecutor to prove each and every element of the crime against Appellant. The Trial Chamber erred in failing to hold the Prosecutor to her burden of proof beyond a reasonable doubt³⁷⁹.

184. The Appeals Chamber notes that in this submission the Appellant fails to identify the alleged error. He appears to argue that the Trial Chamber committed a legal error in respect of the burden of proof required for the Prosecution's case. However, the Appellant himself described the burden as a requirement to prove "each and every element of the crime" against him. The victim's identity, however, is not necessarily an element of the crime and, consequently, the alleged error cannot be a legal error relating to the burden of proof. In the circumstances under consideration here, the question of the victim's identity could only be an issue to be considered in the assessment of Witness GDQ's credibility. As discussed above, the Trial Chamber took this issue into consideration in weighing the witness's credibility in respect of the killing of the woman and its conclusion about Witness GDQ's credibility in respect of this event has not been shown to be erroneous. The Appeals Chamber holds that, having found the witness's testimony about the event to be credible, the Trial Chamber was entitled to find that the events were proven beyond reasonable doubt while, in the exercise of caution, declining to extend that finding to the identity of the victim.

185. Finally, the Appellant asserts that Witness GDQ testified falsely that he did not participate in the killing of Tutsis during April 1994³⁸⁰. The Appellant submits

³⁷⁵ Trial Judgement, para. 713.

³⁷⁶ Trial Judgement, para. 713.

³⁷⁷ T. 11 December 2002 pp. 59, 60.

³⁷⁸ T. 11 December 2002 p. 62.

³⁷⁹ Appellant's Brief, paras. 325, 326.

³⁸⁰ Appellant's Brief, para. 320.

barrage routier n'avait pas été établie³⁷⁵, mais elle a toutefois conclu que les doutes concernant l'identité de la victime n'avaient pas entamé la crédibilité du témoin GDQ quant au meurtre en général³⁷⁶. La Chambre d'appel rappelle les propos du témoin MLNL indiquant que Kanoti «[convolait sans trop de formalités]»³⁷⁷ et que

«Kanoti, normalement, se mariait de temps en temps. Il prenait [une] femme aujourd'hui, il la laiss[ait] le lendemain, en prenait] une autre, c'est comme ça qu'il était»³⁷⁸.

La Chambre d'appel estime, au vu du dossier, que la Chambre de première instance n'a pas agi de façon déraisonnable ou erronée en tirant la conclusion à laquelle elle est parvenue.

183. L'appelant semble ensuite reprocher à la Chambre de première instance de ne pas avoir exigé du Procureur qu'il établisse sa thèse au-delà de tout doute raisonnable. Il fait valoir ce qui suit :

La Chambre a omis d'exiger du Procureur qu'il établisse sa thèse au-delà de tout doute raisonnable en concluant qu'il «se [pouvait] fort bien qu'il ait bel et bien vu l'épouse de Kanoti vivante en 2000». Elle a également constaté qu'«il se [pouvait] également que le témoin GDQ n'ait pas formellement identifié la femme qui accompagnait Kanoti ce jour-là comme étant l'épouse de Kanoti». ... L'appelant fait valoir que la charge incombe au Procureur d'établir chacun des éléments constitutifs du crime retenu contre lui. La Chambre a versé dans l'erreur en n'exigeant pas du Procureur qu'il respecte la norme de la preuve au-delà de tout doute raisonnable³⁷⁹.

184. La Chambre d'appel relève que l'appelant n'identifie pas dans cet argument l'erreur qui aurait été commise. Il semble faire valoir que la Chambre de première instance a commis une erreur de droit relativement à la charge de la preuve qui incombe au Procureur. Il a toutefois lui-même dit que celle-ci exigeait d'établir «chacun des éléments constitutifs du crime» retenu contre lui. Or, l'identité de la victime n'est pas nécessairement un élément constitutif du crime de sorte que l'erreur alléguée ne saurait être une erreur de droit ayant trait à la charge de la preuve. Dans les circonstances de l'espèce, la question de l'identité de la victime ne pouvait être considérée que dans le cadre de l'appréciation de la crédibilité du témoin GDQ. Ainsi qu'il est exposé plus haut, la Chambre de première instance a pris ce point en considération en appréciant la crédibilité du témoin relativement au meurtre de la femme et il n'a pas été démontré que la conclusion qu'elle a tirée à ce sujet était erronée. La Chambre d'appel estime qu'ayant jugé crédible la déposition du témoin concernant ces faits, la Chambre de première instance était en droit de conclure qu'ils étaient établis au-delà de tout doute raisonnable tout en s'abstenant, par précaution, de se prononcer sur l'identité de la victime.

185. Enfin, l'appelant soutient que le témoin GDQ a fait un faux témoignage lorsqu'il a affirmé n'avoir pas participé à la mise à mort de Tutsis en avril 1994³⁸⁰. Selon

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ Compte rendu de l'audience du 11 décembre 2002, p. 47.

³⁷⁸ *Ibid.*, p. 49.

³⁷⁹ Mémoire de l'appelant, paras. 325 et 326.

³⁸⁰ *Ibid.*, para. 320.

that the falsehood of this testimony is proven by the contents of the confession letter of Witness GAO where Witness GDQ is identified as participating in the events³⁸¹. The Appeals Chamber cannot accept this assertion. The Appeals Chamber recalls that Witness GAO disowned parts of the confession letter referred to and that he explained at length why the letter did not truthfully describe the events³⁸². In the view of the Appeals Chamber, this confession letter cannot be used to successfully challenge the credibility of another witness. Moreover, during re-cross-examination Witness GAO specifically rejected the part of the confession letter upon which the Appellant relies in support of his present argument³⁸³.

186. Accordingly, the Appeals Chamber dismisses this ground of appeal.

XVIII. ALLEGED ERROR IN FINDING THAT THE APPELLANT
WAS PRESENT AND PARTICIPATED IN THE OVERALL KILLINGS
IN MUKINGO COMMUNE (GROUND OF APPEAL 20)

187. The Appellant submits that the Trial Chamber erred in the following factual findings because they were against the weight of the evidence: (i) that on 7 April 1994, the Appellant participated in an attack on Tutsi civilians at Busogo Hill, Rwankeri *Cellule*, Mukingo *Commune*³⁸⁴; (ii) that on 7 April 1994, the Appellant ordered, supervised, and participated in the attacks and killings of Tutsis in their homes or places of shelter in Mukingo *Commune*³⁸⁵; and (iii) that on 7 April 1994, the Appellant and the director of ISAE bought beer for the *Interahamwe* and the Appellant told the *Interahamwe* that he hoped they had not spared anyone³⁸⁶.

188. The Prosecution responds that under the present ground of appeal the Appellant merely repeats arguments made in other submissions on appeal³⁸⁷.

189. The Appeals Chamber now considers the Appellant's submissions in turn. The Appellant alleges a factual error on the part of the Trial Chamber in finding that on 7 April 1994 he participated in an attack on Tutsi civilians at Busogo Hill in Rwankeri. In support of this submission, the Appellant argues that whereas the Trial Chamber relied on the testimony of Witnesses GAO and GBV to reach its finding, the Appellant called witnesses who testified that while killings took place at Busogo Hill on the date in question, the Appellant was not then present³⁸⁸. The Appellant underpins this argument with a reference to the testimony of a single Defence witness, Witness RGM³⁸⁹. The Appeals Chamber recalls the discussion under Ground of

³⁸¹ Appellant's Brief, para. 320.

³⁸² T. 26 November 2001 pp. 104-126; T. 27 November 2001 pp. 6-92; T. 28 November 2001 pp. 63-79.

³⁸³ T. 27 November 2001 pp. 18, 19.

³⁸⁴ Amended Notice of Appeal, para. 126; Appellant's Brief, para. 327.

³⁸⁵ Amended Notice of Appeal, para. 127; Appellant's Brief, para. 330.

³⁸⁶ Amended Notice of Appeal, para. 128; Appellant's Brief, para. 341.

³⁸⁷ Respondent's Brief, para. 220.

³⁸⁸ Appellant's Brief, para. 328.

³⁸⁹ See Appellant's Brief, n. 199.

lui, le caractère mensonger du témoignage est prouvé par la teneur de la lettre d'aveux du témoin GAO où il est dit que le témoin GDQ a participé aux faits³⁸¹. La Chambre d'appel ne peut accepter cette assertion. Elle rappelle que le témoin GAO a désavoué diverses parties de cette lettre et qu'il a expliqué en détail les raisons pour lesquelles elle ne donne pas une description exacte des faits³⁸². De l'avis de la Chambre d'appel, cette lettre d'aveux ne peut utilement servir à décrédibiliser un autre témoin. En outre, lors de son contre-interrogatoire, le témoin GAO a expressément désavoué la partie de la lettre que l'appelant invoque à l'appui de son argument³⁸³.

186. En conséquence, la Chambre d'appel rejette ce moyen d'appel.

XVIII. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN CONCLUANT QUE L'APPELANT ÉTAIT PRÉSENT
LORS DES TUERIES DANS LA COMMUNE DE MUKINGO
ET Y AVAIT PRIS PART (VINGTIÈME MOYEN D'APPEL)

187. L'appelant fait valoir que la Chambre de première instance a opéré à tort les constatations de fait suivantes qui vient à l'encontre de la preuve : (i) l'appelant a participé le 7 avril 1994 à une attaque lancée contre des civils tutsis sur la colline de Busogo, cellule de Rwankeri, commune de Mukingo³⁸⁴, (ii) le 7 avril 1994, dans la commune de Mukingo, l'appelant a ordonné d'attaquer et de tuer des Tutsis chez ceux ou dans les endroits où ils s'étaient réfugiés, a supervisé ces opérations et y a participé³⁸⁵, et (iii) le 7 avril 1994, l'appelant et le directeur de l'ISAE ont acheté de la bière pour les *Interahamwe* et l'appelant leur a dit qu'il espérait qu'ils n'avaient épargné personne³⁸⁶.

188. Le Procureur réplique que l'appelant se borne dans ce moyen d'appel à réitérer des arguments invoqués ailleurs dans son mémoire d'appel³⁸⁷.

189. La Chambre d'appel examinera maintenant chacun des arguments de l'appelant. Celui-ci reproche à la Chambre de première instance d'avoir commis une erreur de fait en concluant que le 7 avril 1994, il avait participé à une attaque contre des civils tutsis sur la colline de Busogo à Rwankeri. Il fait valoir à ce sujet que la Chambre de première instance s'est certes fondée sur les dépositions des témoins GAO et GBV pour dégager sa conclusion, mais qu'il avait appelé à la barre des témoins qui ont affirmé que si des meurtres avaient bien été commis sur la colline de Busogo à la date en question, lui ne s'y trouvait pas³⁸⁸. L'appelant invoque à l'appui la déposition d'un seul témoin à décharge, le témoin RGM³⁸⁹. La Chambre

³⁸¹ *Id.*

³⁸² Comptes rendus des audiences du 26 novembre 2001, pp. 111 à 138, du 27 novembre 2001, pp. 6 à 106, et du 28 novembre 2001, pp. 75 à 95.

³⁸³ Compte rendu de l'audience du 27 novembre 2001, pp. 18 à 20.

³⁸⁴ Acte d'appel modifié, para. 126; mémoire de l'appelant, para. 327.

³⁸⁵ Acte d'appel modifié, para. 127; mémoire de l'appelant, para. 330.

³⁸⁶ Acte d'appel modifié, para. 128; mémoire de l'appelant, para. 341.

³⁸⁷ Mémoire de l'intimé, para. 220.

³⁸⁸ Mémoire de l'appelant, para. 328.

³⁸⁹ Voir mémoire de l'appelant, note 199.

Appeal 14 relating to the Appellant's claim that the Trial Chamber erred in finding that the Appellant was present during the killings at Rwankeri in the morning of 7 April 1994 as well as its consideration of the Trial Chamber's assessment of Witness RGM's credibility in Grounds of Appeal 13 and 18³⁹⁰. As discussed therein, the Trial Chamber found Witness RGM to be not credible with respect to the Appellant's presence at or absence from any of the events involved in the case and, on appeal, this finding has not been shown to be erroneous or unreasonable. The Appellant advances no additional arguments under this ground of appeal to show that the Trial Chamber erred in the assessment of Witness RGM's credibility or, indeed, to show anything substantiating his assertion that the weight of the evidence favours an opposite finding to the one made by the Trial Chamber. The Appeals Chamber finds that the Appellant has failed to present arguments under the present ground of appeal which would justify an appellate interference with the Trial Chamber's impugned finding.

190. The Appellant next alleges a factual error in the finding that on 7 April 1994 he ordered, supervised, and participated in attacks on and killings of Tutsis in Mukingo *Commune*. In support of this submission, the Appellant merely reiterates some of his arguments made in connection with his earlier submissions concerning the events at Byangabo centre, Rwankeri, Munyemvano's compound, and in respect of an 8 April 1994 killing at a road-block in front of Witness GDQ's house³⁹¹ without any references to the record and, indeed, without adding anything further. The Appeals Chamber need not revisit these arguments. It suffices to recall the findings made under Grounds of Appeal 13, 14, 15, and 19³⁹². The Appeals Chamber finds that under the present ground of appeal the Appellant has not submitted anything to show that the Trial Chamber reached the impugned finding against the weight of the evidence.

191. Finally, the Appellant submits that the Trial Chamber erred in fact when it found that in the evening of 7 April 1994, the Appellant and the director of ISAE bought beer for the *Interahamwe* and that the Appellant told them that he hoped that they had not spared anyone. The Appellant supports his submission by asserting that this finding is based on the testimony of Witness GAO which, in his view, is a "complete fabrication" from a witness whose credibility has been "seriously damaged"³⁹³. The Appellant notes that Witness RHU23 testified that the ISAE canteen where the gathering was said to have taken place was in fact closed the entire day and that Witness RHU23 was the only person with the key to access it³⁹⁴. The Appellant also notes that Witness GDD, who in his view likewise lacks credibility, testified that in

³⁹⁰ See *supra* Chapters XI, XVI.

³⁹¹ The Appellant makes no attempt to explain how findings about this event, which took place on 8 April 1994, could support his contention of an error in the Trial Chamber's findings of his responsibility for events that took place on 7 April 1994.

³⁹² See *supra* Chapters XI, XII, XIII, XVII.

³⁹³ Appellant's Brief, paras. 342, 344.

³⁹⁴ Appellant's Brief, para. 343.

d'appel rappelle son analyse, au quatorzième moyen d'appel, du grief fait à la Chambre de première instance d'avoir conclu à tort que l'appelant était présent lors des tueries commises à Rwankeri le matin du 7 avril 1994 ainsi que l'examen auquel elle s'est livrée, sous les treizième et dix-huitième moyens d'appel, de l'appréciation de la crédibilité du témoin RGM par la Chambre de première instance³⁹⁰. Ainsi qu'il y est indiqué, la Chambre de première instance a jugé le témoin RGM non crédible quant au point de savoir si l'appelant était présent ou absent au moment de l'un quelconque des faits visés en l'espèce et, en appel, il n'a pas été démontré que cette conclusion était erronée ou déraisonnable. Dans le cadre de ce dix-huitième moyen d'appel, l'appelant n'avance pas de nouveaux arguments tendant à établir que la Chambre de première instance a versé dans l'erreur dans son appréciation de la crédibilité du témoin RGM ou étayant de quelque façon que ce soit son affirmation selon laquelle le poids de la preuve militait en faveur d'une constatation opposée à celle qu'a opérée la Chambre de première instance. La Chambre d'appel estime que l'appelant n'a pas invoqué dans ce moyen d'appel d'éléments qui la fonderaient à censurer la constatation litigieuse.

190. L'appelant allègue ensuite qu'est erronée la constatation selon laquelle, le 7 avril 1994, dans la commune de Mukingo, il aurait ordonné d'attaquer et de tuer des Tutsis, aurait supervisé ces opérations et y aurait participé. À l'appui de ce grief, l'appelant se borne à réitérer certains des arguments qu'il a déjà avancés concernant d'une part, les faits survenus au centre de Byangabo, à Rwankeri et à la concession de Munyemvano et, d'autre part, les meurtres commis le 8 avril 1994 au barrage routier devant le domicile du témoin GDQ³⁹¹ sans faire aucune référence au dossier et, d'ailleurs, sans invoquer d'éléments nouveaux. Point n'est besoin pour la Chambre d'appel de réexaminer ces arguments. Il lui suffit de rappeler les conclusions dégagées au regard des treizième, quatorzième, quinzième et dix-neuvième moyens d'appel³⁹². La Chambre d'appel estime qu'au titre du présent moyen d'appel, l'appelant n'a produit aucun élément tendant à établir que la Chambre de première instance a effectué la constatation litigieuse au mépris de la preuve produite.

191. Enfin, l'appelant fait valoir que la Chambre de première instance a constaté à tort que le 7 avril 1994 au soir, lui-même et le directeur de l'ISAE avaient acheté de la bière pour les *Interahamwe* et que lui, l'appelant, leur avait dit qu'il espérait qu'ils n'avaient épargné personne. À l'appui de ce grief, il affirme que cette constatation est fondée sur les dires du témoin GAO qui, à son avis, sont l'«invention pure et simple» d'un témoin dont la crédibilité «a été considérablement entamée»³⁹³. L'appelant relève que le témoin RHU23 a dit que la cantine de l'ISAE où aurait eu lieu le regroupement était en fait restée fermée toute la journée et que ce témoin était le seul à en détenir les clés³⁹⁴. L'appelant relève aussi que le témoin GDD qui, à son avis, n'est pas non plus digne de foi, a dit que le soir du 7 avril, l'appelant était en train

³⁹⁰ Voir *supra*, chapitres XI et XVI.

³⁹¹ L'appelant n'entreprend nullement d'expliquer en quoi les constatations opérées concernant ce fait survenu le 8 avril 1994 pourraient étayer son allégation d'erreur dans les conclusions de la Chambre quant à sa responsabilité pour des faits survenus le 7 avril 1994.

³⁹² Voir *supra*, chapitres XI, XII, XIII et XVII.

³⁹³ Mémoire de l'appelant, paras. 342 et 344.

³⁹⁴ *Ibid.*, para. 343.

the evening of that day the Appellant was celebrating with the *Interahamwe* at a different location and that if Witnesses GAO and GDD were to be believed, the Appellant was celebrating at two different places at the same time³⁹⁵.

192. The Appeals Chamber notes that under this ground of appeal, the Appellant does not present any support for his proposition that Witness GAO's testimony was a fabrication and that the witness's credibility has been damaged. In these circumstances, the Appeals Chamber can only recall that the Appellant has not prevailed under other grounds of appeal in which he alleged that Witness GAO's testimony was not credible³⁹⁶.

193. The Appeals Chamber notes that the Trial Chamber took into account Witness RHU23's testimony that he did not see the Appellant at the ISAE canteen in the evening of 7 April 1994³⁹⁷. However, after assessing Witness RHU23's appearance in court, the Trial Chamber found his testimony to lack credibility³⁹⁸. The Appellant does not argue under this ground of appeal that the Trial Chamber erred in its assessment of Witness RHU23's credibility and makes no effort to show such an error.

194. Finally, the Appeals Chamber recalls that the Trial Chamber addressed the alleged incompatibility of Witness GDD's and Witness GAO's testimony concerning the Appellant's whereabouts in the evening of 7 April 1994. After taking the evidence into account, the Trial Chamber found as follows :

The Chamber notes that the Prosecution evidence apparently places the Accused in two different locations on the same evening of 7 April 1994. Witness GAO places the Accused at celebrations happening at the ISAE. Witness GDD places the Accused at the Nkuli *commune* office. This raises the issue of the mobility of the Accused. The Chamber has considered the evidence of the witnesses carefully, as well as examined the exhibits tendered at trial. Some of this evidence bears on the matter of distances and the correlation of localities. The distances are short between these places. The Chamber notes that Kajelijeli was an important figure in the community : he possessed a vehicle of his own and, according to his own testimony, the necessary documents permitting mobility. Having considered the totality of the evidence, the Chamber finds that during the evening of 7 April 1994, the Accused was in a position easily to commute the distance involved in a travel between the ISAE and the Nkuli *commune* office, thus enabling him to attend both places in the same evening³⁹⁹.

195. The Appeals Chamber finds that the Appellant has not shown any error in the finding of the Trial Chamber on this point.

196. Accordingly, the Appeals Chamber dismisses this ground of appeal in its entirety.

³⁹⁵ Appellant's Brief, para. 345.

³⁹⁶ See Grounds of Appeal 6, 9, 13, 14, 18.

³⁹⁷ See Trial Judgement, para. 699.

³⁹⁸ Trial Judgement, para. 701.

³⁹⁹ Trial Judgement, para. 695.

de fêter avec les *Interahamwe* à un autre endroit et qu'il se serait ainsi trouvé, si l'on croyait les témoins GAO et GDD, à deux endroits différents au même moment à faire la fête³⁹⁵.

192. La Chambre d'appel relève que, dans le cadre de ce moyen d'appel, l'appelant ne présente aucun argument à l'appui de son allégation qualifiant la déposition du témoin GAO d'invention et laissant entendre que la crédibilité du témoin a été entamée. Cela étant, la Chambre d'appel ne peut que rappeler qu'elle a écarté d'autres moyens d'appel dans lesquels l'appelant avait allégué que la déposition du témoin GAO n'était pas crédible³⁹⁶.

193. La Chambre d'appel relève que la Chambre de première instance a pris en considération la déposition du témoin RHU 23 qui a affirmé n'avoir pas vu l'appelant à la cantine de l'ISAE dans la soirée du 7 avril 1994³⁹⁷. Toutefois, après avoir évalué cette déposition, la Chambre l'a jugée peu digne de foi³⁹⁸. L'appelant ne soutient pas dans ce moyen d'appel que la Chambre a versé dans l'erreur dans son appréciation de la crédibilité du témoin RHU 23 et ne s'attache pas à établir l'existence d'une telle erreur.

194. Enfin, la Chambre d'appel rappelle que la Chambre de première instance s'est arrêtée sur l'incompatibilité qui existerait entre les dépositions des témoins GDD et GAO concernant l'endroit où se trouvait l'appelant dans la soirée du 7 avril 1994. Après avoir pris en considération les éléments de preuve, la Chambre de première instance a conclu comme suit :

La Chambre relève que les éléments de preuve à charge situent l'accusé en deux lieux différents le même soir du 7 avril 1994. Dans sa déposition, le témoin GAO a dit que l'accusé était à une célébration à l'ISAE, alors que pour le témoin GDD, l'accusé se trouvait au bureau communal de Nkuli. Il importe par conséquent d'examiner la question de la mobilité de l'accusé. La Chambre a attentivement examiné les divers témoignages et interrogé les pièces à conviction produites en l'espèce. Certains des éléments de preuve en question portent sur les distances et l'emplacement des localités les unes par rapport aux autres. Celles-ci ne sont pas éloignées les unes des autres. La Chambre retient que Kajelijeli était une personnalité au sein de la collectivité; il avait son propre véhicule et disposait, selon ses propres dires, des documents nécessaires pour se déplacer. Ayant examiné l'ensemble des éléments de preuve, la Chambre conclut que dans la soirée du 7 avril 1994, l'accusé a pu aisément parcourir la distance qui séparait l'ISAE du bureau communal de Nkuli et se trouver ainsi en ces deux lieux le même soir³⁹⁹.

195. La Chambre d'appel estime que l'appelant n'a établi l'existence d'aucune erreur dans la conclusion de la Chambre de première instance sur ce point.

196. En conséquence, la Chambre d'appel rejette ce moyen d'appel dans son intégralité.

³⁹⁵ *Ibid.*, para. 345.

³⁹⁶ Voir moyens d'appel 6, 9, 13, 14 et 18.

³⁹⁷ Jugement, para. 699.

³⁹⁸ *Ibid.*, para. 701.

³⁹⁹ *Ibid.*, para. 695.

XIX. ALLEGED ERROR IN DENYING A MOTION
CONCERNING THE ARBITRARY ARREST AND ILLEGAL DETENTION
OF THE APPELLANT (GROUND OF APPEAL 22)

197. Under this ground of appeal, the Appellant submits that the Trial Chamber committed an error of law in dismissing his preliminary motions challenging the Tribunal's temporal and personal jurisdiction. In particular, he emphasizes that the Trial Chamber's dismissal of his motion challenging the Tribunal's personal jurisdiction on the basis of the illegality of his arrest and detention, amongst other alleged human rights violations ("Decision of 8 May 2000")⁴⁰⁰, was in error⁴⁰¹. The Appellant contends that the Appeals Chamber should now review these Trial Chamber decisions because his interlocutory appeals against them were dismissed on procedural grounds. The Appellant argues that because the Appeals Chamber has never considered the merits of his jurisdictional objections on appeal, it is not barred by the doctrine of *res judicata* from doing so now⁴⁰². Finally, the Appellant submits that upon review, the Appeals Chamber should find that this Tribunal lacks jurisdiction over his case⁴⁰³. Alternatively, the Appellant seeks to have the evidence obtained by the Prosecution subsequent to his alleged illegal arrest and detention suppressed⁴⁰⁴.

198. In response, the Prosecution raises four objections to this ground of appeal. First, the Prosecution claims that the Appellant is precluded under the doctrine of *res judicata* from presenting this ground, which raises, *de novo*, issues that are similar to those already brought before the Appeals Chamber and disposed of on interlocutory appeal. This ground, the Prosecution submits, amounts to an abuse of the appeals procedure⁴⁰⁵. Second, the Prosecution contends that this ground is inadmissible because the Appellant fails to explain how the Trial Chamber erred either in law or in fact or what was the impact of any alleged error on the Trial Chamber's findings of guilt against him⁴⁰⁶. Third, and without prejudice to its first two objections to this ground, the Prosecution argues that, on the merits, the Decision of 8 May 2000 was correct in finding that the Appellant was neither arbitrarily arrested nor illegally detained under the Tribunal's Statute and Rules. Furthermore, the Prosecution claims that the Appellant was not denied the right to challenge the legality

⁴⁰⁰ *Kajelijeli*, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing ("Decision of 8 May 2000").

⁴⁰¹ The Appeals Chamber notes that while the heading of this ground of appeal suggests that the Appellant is only challenging the Trial Chamber's Decision of 8 May 2000 on personal jurisdiction, he, in fact, is also challenging a later decision on jurisdiction by the Trial Chamber as to its temporal jurisdiction: *Kajelijeli*, Decision on the Defence Motion Objecting to the Jurisdiction of the Tribunal ("Decision of 13 March 2001"). See Appellant's Brief, para. 371.

⁴⁰² Amended Notice of Appeal, para. 132; Appellant's Brief, paras. 355-372; Appellant's Brief in Reply, paras. 97, 98.

⁴⁰³ Appeal Hearing, T. 7 March 2005 p. 12.

⁴⁰⁴ Appeal Hearing, T. 7 March 2005 p. 13.

⁴⁰⁵ Respondent's Brief, paras. 230, 235-247.

⁴⁰⁶ Respondent's Brief, paras. 231, 248-252.

XIX. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN REJETANT UNE REQUÊTE
CONCERNANT L'ARRESTATION ARBITRAIRE ET LA DÉTENTION ILLÉGALE
DE L'APPELANT (VINGT-DEUXIÈME MOYEN D'APPEL)

197. Dans ce moyen d'appel, l'appelant fait valoir que la Chambre de première instance a commis une erreur de droit en rejetant ses exceptions d'incompétence *ratione temporis* et *ratione personae*. Il souligne en particulier que c'est à tort que celle-ci a rejeté son exception d'incompétence *ratione personae* du Tribunal sur la base de l'illégalité de son arrestation et de sa détention (la «Décision du 8 mai 2000»⁴⁰⁰), sans oublier d'autres violations des droits de l'homme⁴⁰¹. L'appelant soutient que la Chambre d'appel devrait maintenant réexaminer ces décisions de la Chambre de première instance dès lors que les appels interlocutoires qu'il a interjetés contre elles ont été rejetés pour des motifs d'ordre procédural. L'appelant soutient que la Chambre d'appel, dès lors qu'elle n'a jamais examiné son exception d'incompétence au fond, ne saurait être empêchée par le principe de l'autorité de la chose jugée, de le faire maintenant⁴⁰². Il fait enfin valoir qu'après examen, la Chambre d'appel devrait constater que le Tribunal de céans n'a pas compétence pour connaître de son affaire⁴⁰³. À titre subsidiaire, il demande que les éléments de preuve obtenus par le Procureur à la suite de son arrestation et de sa détention présumées illégales soient écartés⁴⁰⁴.

198. En réponse, le Procureur soulève quatre objections à ce moyen d'appel. En premier lieu, il soutient que le principe de l'autorité de la chose jugée empêche l'appelant de présenter ce moyen d'appel qui soulève de nouveau des questions dont la Chambre d'appel a déjà été saisie par recours interlocutoire et qu'elle a déjà tranchées. Ce moyen d'appel, fait-il valoir, constitue un abus de la procédure d'appel⁴⁰⁵. En deuxième lieu, il soutient que ce moyen d'appel est irrecevable car l'appelant n'explique ni l'erreur de droit ou de fait commise par la Chambre de première instance, ni l'impact d'une telle erreur sur le verdict de culpabilité que celle-ci a prononcé à son encontre⁴⁰⁶. En troisième lieu, et sous réserve de ses deux premières objections, le Procureur fait valoir que c'est à bon droit que la Décision du 8 mai 2000 a conclu sur le fond que l'appelant n'avait été ni arbitrairement arrêté ni illégalement détenu en vertu du Statut et du Règlement du Tribunal. Il affirme au surplus,

⁴⁰⁰ Affaire *Kajelijeli*, Décision sur la requête concernant l'arrestation arbitraire et la détention illégale de l'accusé et relative à la notification de la requête en urgence de la Défense aux fins de compléter le dossier de l'audience du 8 décembre 1999 («Décision du 8 mai 2000»).

⁴⁰¹ La Chambre d'appel fait remarquer que si l'intitulé de ce moyen d'appel donne à penser que l'appelant ne conteste que la décision du 8 mai 2000 relative à la compétence *ratione personae*, il conteste en fait également une décision ultérieure rendue par la Chambre de première instance sur sa compétence *ratione temporis* : Affaire *Kajelijeli*, Décision relative à l'exception d'incompétence du Tribunal soulevée par la Défense («Décision du 13 mars 2001»). Voir mémoire de l'appelant, para. 371.

⁴⁰² Acte d'appel modifié, para. 132; mémoire de l'appelant, paras. 355 à 372; mémoire en réplique de l'appelant, paras. 97 et 98.

⁴⁰³ Compte rendu de l'audience d'appel du 7 mars 2005, p. 13 à 15.

⁴⁰⁴ *Ibid.*, pp. 15 et 16.

⁴⁰⁵ Mémoire de l'intimé, paras. 230 et 235 à 247.

⁴⁰⁶ *Ibid.*, paras. 231 et 248 à 252.

of his arrest⁴⁰⁷. Finally, the Prosecution argues that even if the Appeals Chamber were to find that there were some irregularities in the Appellant's arrest and detention, the Appellant's rights were in no way egregiously violated such that the Tribunal is deprived of jurisdiction⁴⁰⁸.

A. Procedural History

199. Before addressing the Appellant's arguments under this ground of appeal, the Appeals Chamber considers it useful to recall the procedural history with regard to the adjudication of the Appellant's previous challenges to the Tribunal's jurisdiction. The Appellant first filed a *pro se* motion on 9 November 1998 challenging the Tribunal's personal jurisdiction on grounds that his arrest and initial detention in Benin and his subsequent detention in the United Nations Detention Facility ("UNDF") were illegal. After hearing oral submissions from the parties, the Trial Chamber denied the Appellant's motion in its Decision of 8 May 2000, finding that none of the Appellant's rights had been violated under the Tribunal's Statute and Rules with regard to the his arrest, his right to be informed of the charges against him, his right to an initial appearance without delay, and his right to counsel. The Appellant filed a notice of appeal against this decision, which the Appeals Chamber dismissed. In its decision of 10 August 2000, the Appeals Chamber found that the notice lacked specificity in that it did not mention any ground of appeal or the relief sought, and that the Appellant failed to cure this deficiency within the deadline it had set for doing so ("Decision of 10 August 2000")⁴⁰⁹.

200. Thereafter, the Appellant filed a second challenge to the Tribunal's jurisdiction in a motion contesting the Amended Indictment that was issued against him. The Appellant again argued that the Trial Chamber lacked personal jurisdiction because his arrest and detention were unlawful⁴¹⁰. Furthermore, the Appellant contested the Trial Chamber's temporal jurisdiction on grounds that the factual allegations in the Amended Indictment occurred before 1994 and thus, were in violation of Articles 1 and 7 of the Tribunal's Statute⁴¹¹. The Trial Chamber rejected, in its Decision of 13 March 2001, the Appellant's arguments in this second motion with regard to personal jurisdiction as being barred by its Decision of 8 May 2000 disposing of those

⁴⁰⁷ Respondent's Brief, paras. 233, 253-269.

⁴⁰⁸ Respondent's Brief, paras. 234, 270-277.

⁴⁰⁹ See *Kajelijeli*, Order, 10 August 2000. See also *Kajelijeli*, Scheduling Order, 26 July 2000; *Kajelijeli*, Order (On Motion to Grant Relief from Dismissal of Appeal), 12 December 2000.

⁴¹⁰ See Decision of 13 March 2001, para. 1.

⁴¹¹ See Decision of 13 March 2001, para. 1. Article 1 of the Tribunal's Statute provides, in relevant part, that "[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law ... between 1 January 1994 and 31 December 1994" Article 7 of the Tribunal's Statute states that "... [t]he temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."

que l'appelant n'a point été privé du droit de contester la légalité de son arrestation⁴⁰⁷. Enfin, en quatrième lieu, il fait valoir que même si la Chambre d'appel devait conclure que l'arrestation et la détention de l'appelant étaient entachées d'irrégularités, il n'y a eu aucune violation flagrante des droits de l'appelant de nature à priver la Chambre de première instance de sa compétence⁴⁰⁸.

A. Rappel de la procédure

199. Avant d'examiner les arguments de l'appelant au titre de ce moyen d'appel, la Chambre d'appel estime utile de procéder à un rappel des faits relativement aux décisions rendues sur les exceptions d'incompétence du Tribunal soulevées antérieurement. L'appelant a tout d'abord présenté, le 9 novembre 1998, une exception d'incompétence *ratione personae pro se* du Tribunal au motif que son arrestation et son placement en détention au Bénin de même que sa détention ultérieure au Quartier pénitentiaire des Nations Unies (le «Quartier pénitentiaire») étaient illégaux. Après avoir entendu les conclusions orales des parties, la Chambre de première instance a rejeté l'exception de l'appelant par sa Décision du 8 mai 2000, elle a estimé qu'aucun des droits qu'il tient du Statut et du Règlement du Tribunal n'avait été violé en ce qui concerne son arrestation, son droit d'être informé des charges retenues contre lui, son droit de faire une comparution initiale dans les plus brefs délais et son droit d'être représenté par un conseil. L'appelant a déposé un acte d'appel contre cette décision, que la Chambre d'appel a rejeté. Dans sa décision du 10 août 2000, la Chambre d'appel a estimé que l'acte d'appel pêchait par son imprécision en ce sens qu'il ne mentionnait aucun moyen d'appel ni n'indiquait la réparation demandée et que l'appelant n'avait pas purgé ce vice dans le délai imparti («Décision du 10 août 2000»)⁴⁰⁹.

200. L'appelant a ensuite soulevé une deuxième exception d'incompétence dans le cadre d'une requête contestant l'acte d'accusation modifié établi à son encontre. Il a de nouveau fait valoir que la Chambre de première instance était incompétente *ratione personae* attendu que son arrestation et sa détention étaient illégales⁴¹⁰. Il a en outre contesté la compétence *ratione temporis* de celle-ci au motif que les allégations dans l'acte d'accusation modifié visaient des faits qui s'étaient produits avant 1994 et violaient par là même les articles premier et 7 du Statut du Tribunal⁴¹¹. La Chambre de première instance a rejeté, dans sa décision du 13 mars 2001, les arguments invoqués par l'appelant dans cette deuxième exception d'incompétence *ratione personae*,

⁴⁰⁷ *Ibid.*, paras. 233 et 253 à 269.

⁴⁰⁸ *Ibid.*, paras. 234 et 270 à 277.

⁴⁰⁹ Voir affaire *Kajelijeli*, Ordonnance du 10 août 2000. Voir également affaire *Kajelijeli*, Ordonnance portant calendrier du 26 juillet 2000 et Ordonnance (Requête en réparation du préjudice causé par le rejet d'un acte d'appel), du 12 décembre 2000.

⁴¹⁰ Voir décision du 13 mars 2001, para. 1.

⁴¹¹ *Id.* Aux termes de l'article premier du Statut du Tribunal, «[l]e Tribunal international pour le Rwanda est habilité à juger les personnes présumées responsables de violations graves du droit international humanitaire commises ... entre le 1^{er} janvier et le 31 décembre 1994 ...». Aux termes de l'article 7 du Statut du Tribunal, «... [l]a compétence *ratione temporis* du Tribunal international s'étend à la période commençant le 1^{er} janvier 1994 et se terminant le 31 décembre 1994».

same arguments (“Decision of 13 March 2001”)⁴¹². The Trial Chamber also rejected the Appellant’s arguments challenging its temporal jurisdiction because under the well-established case law of the Tribunal, indictments may refer to events or crimes occurring before 1994 as long as the Trial Chamber does not find the accused accountable for crimes committed prior to 1994⁴¹³. On interlocutory appeal of this decision, the Appeals Chamber affirmed, on 16 November 2001, the Trial Chamber’s reasoning with regard to its temporal jurisdiction over the Appellant’s case (“Decision of 16 November 2001”)⁴¹⁴. The Appeals Chamber declined to comment on the Appellant’s arguments contesting the Tribunal’s personal jurisdiction noting that an appeal on that issue had already been dismissed⁴¹⁵. The Appeals Chamber indicated that at a later stage in the trial, the Appellant could raise before the Trial Chamber all issues relating to his fundamental rights and any demands for reparation⁴¹⁶.

*B. The Appellant’s Jurisdictional Objections
and Preclusive Effects of Prior Appeals Chamber Decisions*

201. The Appeals Chamber now considers whether, in light of its Decision of 10 August 2000 and its Decision of 16 November 2001, it may nevertheless reconsider the arguments addressed therein in considering the Appellant’s submission under this ground of appeal that the Trial Chamber erred in rejecting them and in finding that it had jurisdiction.

202. The parties have addressed the effects of these prior interlocutory appeals decisions by reference to the doctrine of *res judicata*. This doctrine refers to a situation when “a final judgement on the merits” issued by a competent court on a claim, demand or cause of action between parties constitutes an absolute bar to “a second lawsuit on the same claim” between the same parties⁴¹⁷. The doctrine of *res judicata* is not directly applicable to this case, because it applies not to the effects of prior interlocutory appeals decisions on further proceedings in the same case, but instead to the effects of final *judgements* in one case on proceedings in a subsequent and different case⁴¹⁸. However, a similar principle applies to cases like this one: the Appeals Chamber ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those deci-

⁴¹² Decision of 13 March 2001, para. 6.

⁴¹³ Decision of 13 March 2001, para. 5.

⁴¹⁴ Decision of 16 November 2001, p. 4.

⁴¹⁵ Decision of 16 November 2001, p. 4.

⁴¹⁶ Decision of 16 November 2001, p. 4.

⁴¹⁷ *Black’s Law Dictionary* (8th ed. 2004). A limited exception to the doctrine of *res judicata* barring review of final judgements is found under Article 25 of the Statute and Rules 120 and 121 of the Rules whereby a final judgement may be reviewed when a new fact is discovered that was not known at the time of the original proceedings either before the Trial or Appeals Chambers, could not have been discovered through the exercise of due diligence, and could have been a decisive factor in reaching the final decision.

⁴¹⁸ Under this Tribunal’s jurisprudence, interlocutory appeal decisions are not considered “final judgements” unless they terminate the proceedings between the parties, which is not the case here. See *Barayagwiza*, Decision (Prosecutor’s Request for Review or Reconsideration), paras. 49, 51.

jugeant qu'il était forclos à les faire valoir par sa décision du 8 mai 2000 qui avait déjà statué sur ceux-ci («Décision du 13 mars 2001»)⁴¹². La Chambre a également rejeté les arguments de l'appelant contestant sa compétence *ratione temporis* parce que, selon la jurisprudence consacrée du Tribunal, les actes d'accusation peuvent faire référence à des événements ou à des crimes commis antérieurement à 1994 dès lors que la Chambre ne juge pas la responsabilité de l'accusé engagée à raison de crimes commis avant 1994⁴¹³. Saisie de l'appel interlocutoire de cette décision, la Chambre d'appel a confirmé, le 16 novembre 2001, le raisonnement de la Chambre de première instance concernant sa compétence *ratione temporis* sur la cause de l'appelant («Arrêt du 16 novembre 2001»)⁴¹⁴. La Chambre d'appel s'est refusée à se prononcer sur les arguments de l'appelant contestant la compétence *ratione personae* du Tribunal, prenant acte du fait qu'un recours sur cette question avait déjà été rejeté⁴¹⁵. La Chambre d'appel a indiqué que l'appelant pourrait soulever en temps opportun devant la Chambre de première instance toutes questions ayant trait à ses droits fondamentaux et toute demande de réparation⁴¹⁶.

*B. Des exceptions d'incompétence de l'appelant et de la forclusion
encourue du fait de décisions antérieures de la Chambre d'appel*

201. La Chambre d'appel se penche maintenant sur la question de savoir si, au vu de sa Décision du 10 août 2000 et de son Arrêt du 16 novembre 2001, elle peut néanmoins réexaminer les arguments qui y sont traités en examinant le grief de l'appelant reprochant à la Chambre de première instance, dans le cadre de ce moyen d'appel, de les avoir rejetés à tort et de s'être déclarée compétente.

202. Les parties ont traité des effets de ces décisions relatives à des appels interlocutoires antérieurs en faisant intervenir le concept de l'autorité de la chose jugée. Ce concept vise les situations dans lesquelles «un jugement définitif au fond» rendu par un tribunal compétent sur une prétention, une demande ou une cause d'action entre des parties constitue un empêchement absolu à «une seconde action en justice sur la même question» [traduction] entre les mêmes parties⁴¹⁷. Le principe de l'autorité de la chose jugée n'est pas d'application directe en l'espèce, en ce sens qu'il ne vise pas les effets d'arrêts interlocutoires antérieurs sur les procédures ultérieures dans la même affaire, mais plutôt les effets de jugements *définitifs* prononcés dans une affaire donnée sur des procédures engagées dans une affaire ultérieure et différente⁴¹⁸.

⁴¹² Décision du 13 mars 2001, para. 6.

⁴¹³ *Ibid.*, para. 5.

⁴¹⁴ Arrêt du 16 novembre 2001, p. 4.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Black's Law Dictionary* (8^e éd. 2004). Les articles 25 du Statut et 120 et 121 du Règlement prévoient une exception limitée au principe de l'autorité de la chose jugée qui interdit le réexamen de jugements définitifs. Aux termes de ces dispositions, un jugement définitif peut faire l'objet d'une demande en révision s'il est découvert un fait nouveau qui n'était pas connu au moment du procès en première instance ou en appel, dont la découverte n'aurait pu intervenir malgré toutes les diligences effectuées et qui aurait pu être un élément décisif du jugement définitif.

⁴¹⁸ Selon cette jurisprudence du Tribunal, les arrêts interlocutoires ne sont considérés comme des «jugements définitifs» que s'ils mettent fin à la procédure entre les parties, ce qui n'est pas le cas en l'espèce. Voir Arrêt *Barayagwiza*, (Demande du Procureur en révision ou réexamen), paras. 49 et 51.

sions. This principle prevents parties from endlessly relitigating the same issues, and is necessary to fulfil the very purpose of permitting interlocutory appeals : to allow certain issues to be finally resolved before proceedings continue on other issues.

203. There is an exception to this principle, however. In a Tribunal with only one tier of appellate review, it is important to allow a meaningful opportunity for the Appeals Chamber to correct any mistakes it has made⁴¹⁹. Thus, under the jurisprudence of this Tribunal, the Appeals Chamber may reconsider a previous interlocutory decision under its “inherent discretionary power” to do so “if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”⁴²⁰.

204. The Appeals Chamber holds that its interlocutory decision of 16 November 2001 rejected, on its merits, the Appellant’s argument concerning the Tribunal’s temporal jurisdiction. The Appellant is thus precluded from re-litigating that issue now. The Appellant has not demonstrated that this is an exceptional case meriting discretionary reconsideration; it has not demonstrated a “clear error” in the Appeals Chamber’s reasoning, nor the necessity of reconsideration to prevent an injustice.

205. Likewise, the Appeals Chamber finds that the Appellant may not re-litigate the issue of the Tribunal’s personal jurisdiction. The Appeals Chamber squarely held, in its 16 November 2001 decision, that the Appellant procedurally lost his entitlement to raise his personal jurisdiction objection by failing to file a sufficiently specific notice of appeal, even after the Appeals Chamber had allowed him extra time to do so after his initial failure. This holding disposed of the personal jurisdiction objection. The Appellant has not demonstrated any cause to reconsider this determination on a discretionary basis : there is no clear error in the Appeals Chamber’s reasoning, nor is reconsideration necessary to prevent an injustice.

206. As will be discussed *infra* in detail, the Appeals Chamber does find that the Appellant’s rights were in fact violated during his initial arrest and detention prior to his initial appearance. However, even if it were to reconsider the issue of its personal jurisdiction, the Appeals Chamber does not find that these newly and more detailed submitted breaches rise to the requisite level of egregiousness amounting to the Tribunal’s loss of personal jurisdiction. The Appeals Chamber is mindful that it must maintain the correct balance between

“the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law”⁴²¹.

⁴¹⁹ Cf. *Celebici Case Sentencing Appeal Judgement*, paras. 48-60.

⁴²⁰ *Nahimana et al*, Decision on Jean-Bosco Barayagwiza’s Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, p. 2.

⁴²¹ *Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, para. 30.

Toutefois, un principe semblable s'applique à des affaires comme la présente : la Chambre d'appel s'estime généralement liée par ses arrêts interlocutoires antérieurs tant pour les procédures en cours dans la même affaire que pour toutes les questions définitivement tranchées par ces arrêts. Ce principe empêche les parties de faire rejurer indéfiniment les mêmes questions et s'avère nécessaire pour la réalisation de l'objectif même des appels interlocutoires, à savoir faire en sorte que certaines questions soient définitivement tranchées avant de poursuivre l'examen d'autres questions.

203. Il existe cependant une exception à ce principe. Devant un Tribunal international ne comptant qu'un seul degré d'appel, il importe que la Chambre d'appel ait une réelle possibilité de corriger toute erreur qu'elle aurait commise⁴¹⁹. Ainsi, selon la jurisprudence du Tribunal de céans, la Chambre d'appel peut réexaminer un arrêt interlocutoire antérieur en vertu de son «pouvoir discrétionnaire inhérent» «si une erreur manifeste de raisonnement a été mise en évidence ou si cela se révèle nécessaire pour éviter une injustice» [traduction]⁴²⁰.

204. La Chambre d'appel estime que son arrêt interlocutoire du 16 novembre 2001 a rejeté, au fond, l'argument de l'appelant concernant la compétence *ratione temporis* du Tribunal. L'appelant est ainsi empêché de faire rejurer cette question maintenant. Il n'a pas rapporté la preuve qu'il s'agissait là d'une situation exceptionnelle méritant d'être réexaminée par la Chambre d'appel dans l'exercice de son pouvoir discrétionnaire; il n'a pas mis en évidence une «erreur manifeste» dans le raisonnement de la Chambre d'appel ni la nécessité d'un réexamen pour éviter une injustice.

205. Par ailleurs, la Chambre d'appel estime que l'appelant ne peut pas faire rejurer la question de la compétence *ratione personae* du Tribunal. Elle a conclu nettement dans son arrêt du 16 novembre 2001 que l'appelant avait perdu, au plan procédural, son droit de soulever une exception d'incompétence *ratione personae*, faute d'avoir déposé un acte d'appel suffisamment précis, même après qu'elle lui eut accordé un délai supplémentaire à cet effet. Cet arrêt a définitivement tranché l'exception d'incompétence *ratione personae*. L'appelant n'a mis en évidence aucun motif de réexamen de cette décision sur une base discrétionnaire : il n'existe pas d'erreur manifeste dans le raisonnement de la Chambre d'appel ni de nécessité de réexamen pour éviter une injustice.

206. Ainsi qu'il sera exposé plus loin en détail, la Chambre d'appel estime que les droits de l'appelant ont effectivement été violés lors de son arrestation et de sa détention provisoire avant sa comparution initiale. Toutefois, même si elle devait réexaminer la question de sa compétence *ratione personae*, la Chambre d'appel juge que ces manquements nouveaux exposés de manière plus détaillée n'atteignent pas le seuil de gravité requis pour faire perdre au Tribunal sa compétence *ratione personae*. La Chambre d'appel est consciente qu'elle doit maintenir un juste équilibre entre

«les droits fondamentaux de l'accusé et l'intérêt primordial de la communauté internationale qui s'attache à la poursuite de personnes présumées responsables de violations graves du droit international humanitaire»⁴²¹.

⁴¹⁹ Voir Arrêt *Celebici* relatif à la sentence, paras. 48 à 60.

⁴²⁰ Affaire *Nahimana et consorts*, *Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005*, p. 2.

⁴²¹ Affaire *Dragan Nikolić*, Décision relative à l'appel interlocutoire concernant la légalité de l'arrestation, para. 30.

While a Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction, it should only do so

“where to exercise that jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the court’s integrity”⁴²².

For example,

“in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment”⁴²³.

However, those cases are exceptional and, in most circumstances, the “remedy of setting aside jurisdiction, will ... be disproportionate”⁴²⁴. The Appeals Chamber gives due weight to the violations alleged by the Appellant; however, it does not consider that this case falls within the exceptional category of cases highlighted above.

207. On the basis of the foregoing, the Appeals Chamber dismisses the Appellant’s submission that it should reconsider the decisions rejecting his objections to the jurisdiction of this Tribunal.

C. The Appellant’s Arrest and Detention

208. However, the Appeals Chamber deems it appropriate to step in *proprio motu* in order to consider whether, for other reasons, the Trial Chamber committed an error of law in the Trial Judgement in light of its Decision of 8 May 2000⁴²⁵. In particular, the Appeals Chamber will determine whether the Trial Chamber erred in failing to find that the Appellant’s fundamental rights during his arrest and detention were violated and, if so, whether he is entitled to some remedy other than the Appellant’s request that his case be dismissed for lack of personal jurisdiction⁴²⁶.

⁴²² *Barayagwiza*, Decision, 3 November 1999, para. 74.

⁴²³ *Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, para. 114, affirmed by *Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, paras. 28, 30.

⁴²⁴ *Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, para. 30.

⁴²⁵ *Niyitegeka* Appeal Judgement, para. 7. See also *Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.

⁴²⁶ The Appeals Chamber notes that the Appellant failed to argue this issue before the Trial Chamber even after being directed to do so by the Appeals Chamber in its interlocutory Decision of 16 November 2001. However, the Appeals Chamber considers that this oversight by the Appellant does not bar it from considering the issue here *proprio motu*. The Appeals Chamber is convinced by the Appellant’s argument at the Appeal Hearing that he failed to raise that argument because he did not understand the Decision of 16 November 2001 as finding that he was illegally arrested and detained, contrary to the Trial Chamber’s Decision of 8 May 2000, and thus that he was entitled to seek some form of alternative remedy. See Appeal Hearing, T. 7 March 2005 p. 15. The Appellant stated that had he so understood, he would have raised the question of an alternative remedy before the Trial Chamber. *Id.*

S'il est vrai qu'une Chambre peut exercer son pouvoir discrétionnaire dans les circonstances données d'une affaire pour se déclarer incompétente, elle ne devrait le faire cependant que

«lorsqu'au vu des violations graves et flagrantes dont les droits de l'accusé font l'objet, l'exercice d'une telle compétence pourrait s'avérer préjudiciable à l'intégrité du tribunal»⁴²².

Par exemple,

«le fait qu'un accusé fasse l'objet de mauvais traitements graves, voire même inhumains, cruels ou dégradants, ou d'actes de torture avant d'être livré au Tribunal, peut constituer un obstacle juridique»⁴²³.

Toutefois, ces cas sont exceptionnels et, dans la plupart des circonstances, «la solution consistant pour la juridiction saisie à se déclarer incompétente est ... disproportionnée»⁴²⁴. La Chambre d'appel tient compte ainsi qu'il se doit des violations alléguées par l'appelant; toutefois, elle ne considère pas que la présente espèce relève de la catégorie exceptionnelle d'affaires visées plus haut.

207. Pour les raisons qui précèdent, la Chambre d'appel rejette l'argument de l'appelant l'invitant à réexaminer les décisions rejetant les exceptions qu'il a soulevées à la compétence du Tribunal de céans.

C. Arrestation et détention de l'appelant

208. Toutefois, la Chambre d'appel juge approprié d'intervenir d'office pour rechercher si la Chambre de première instance a entaché, pour d'autres raisons, son jugement d'une erreur de droit eu égard à la décision qu'elle a rendue le 8 mai 2000⁴²⁵. En particulier, elle déterminera si la Chambre de première instance a commis une erreur en ne concluant pas à la violation des droits fondamentaux de l'appelant au cours de son arrestation et de sa détention et, le cas échéant, s'il a droit à une réparation autre que le rejet qu'il a demandé pour cause d'incompétence *ratione personae* du Tribunal⁴²⁶.

⁴²² Arrêt *Barayagwiza*, 3 novembre 1999, para. 74.

⁴²³ Affaire *Dragan Nikolić*, Décision relative à l'exception d'incompétence du Tribunal soulevée par la Défense, para. 114, confirmé par *Dragan Nikolić*, Décision relative à l'appel interlocutoire concernant la légalité de l'arrestation, paras. 28 et 30.

⁴²⁴ Affaire *Dragan Nikolić*, Décision relative à l'appel interlocutoire concernant la légalité de l'arrestation, para. 30.

⁴²⁵ Arrêt *Niyitegeka*, para. 7. Voir également arrêt *Rutaganda*, para. 20; arrêt *Musema*, para. 16.

⁴²⁶ La Chambre d'appel relève que l'appelant n'a pas évoqué cette question devant la Chambre de première instance, même après que la Chambre d'appel lui eut enjoint de le faire dans sa décision interlocutoire du 16 novembre 2001. Elle estime toutefois que cette omission de l'appelant ne l'empêche pas d'examiner de sa propre initiative la question dans le présent arrêt. La Chambre d'appel est convaincue par l'argument présenté par l'appelant lors de l'audience d'appel, à savoir qu'il n'avait pas soulevé cette question pour la raison qu'il n'avait pas compris que la Décision du 16 novembre 2001 concluait à l'illégalité de son arrestation et de sa détention, contrairement à la Décision du 8 mai 2000, et que de ce fait, il était en droit de demander une réparation. Voir compte rendu de l'audience d'appel du 7 mars 2005 pp. 17 et 18. L'appelant a déclaré que s'il l'avait compris ainsi, il aurait soulevé la question de réparation devant la Chambre de première instance. *Id.*

209. In the following review of the Trial Chamber's findings, the Appeals Chamber will rely upon the relevant provisions found in the sources of law for this Tribunal, *i.e.*, its Statute, the Rules and customary international law⁴²⁷ as reflected *inter alia* in the International Covenant on Civil and Political Rights ("ICCPR")⁴²⁸. The Appeals Chamber will also refer to the relevant provisions found in regional human rights treaties as persuasive authority and evidence of international custom, namely, the African Charter on Human and Peoples' Rights ("ACHPR")⁴²⁹, the European Convention on Human Rights ("ECHR")⁴³⁰, and the American Convention on Human Rights ("ACHR")⁴³¹.

1. Alleged Violations during Period from Arrest in Benin until Transfer to Arusha

210. The Appeals Chamber notes that the undisputed facts surrounding the Appellant's initial arrest and detention in Benin until his transfer to Arusha, Tanzania ("first period of arrest and detention") are as follows. On 8 May 1997, the Appellant arrived in Benin where he subsequently applied to the United Nations High Commissioner for Refugees ("UNHCR") for recognition of his claim to refugee status⁴³². On 5 June 1998, the Appellant was arrested at the request of the Tribunal's Office of the Prosecutor by Benin authorities in the home of Joseph Nzirorera without an arrest warrant and was placed into custody⁴³³. The next day, on the 6th of June, the Prosecution sent a letter to the Ministry of Justice of Benin requesting the Appellant's arrest⁴³⁴. On 12 June 1998, the Appellant was questioned by two investigators from the Prosecution. Over two months later, on 24 August 1998, the Prosecution filed a request before a Judge of the Tribunal for an order for transfer and provisional detention of the Appellant⁴³⁵. On 29 August 1998, a Judge of the Tribunal confirmed an indictment against the Appellant and several other accused and issued an Order and arrest warrant for the Appellant's transfer from Benin to the UNDF in Arusha, Tanzania⁴³⁶. Finally, on 7 September 1998, the Appellant was released from the custody of Benin authorities and handed over to the Tribunal, arriving at the UNDF on 9 September 1998. In total, the Appellant was in the custody of the authorities of

⁴²⁷ See *Barayagwiza*, Decision, 3 November 1999, para. 40.

⁴²⁸ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171.

⁴²⁹ African [Banjul] Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1982).

⁴³⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222.

⁴³¹ American Convention on Human Rights, 1144 U.N.T.S. 123.

⁴³² See UNHCR Attestation for Mr. Juvénal Kajelijeli dated 11 September 1997, Annex to Appellant's *pro se Requête portant sur l'arrestation arbitraire et la détention illégale du suspect Juvénal Kajelijeli*, 9 November 1998, filed 20 November 1998.

⁴³³ Decision of 8 May 2000, Preamble and paras. 3, 16.

⁴³⁴ Annex to Appellant's *pro se Requête portant sur l'arrestation arbitraire et la détention illégale du suspect Juvénal Kajelijeli*, 9 November 1998, filed 20 November 1998. See also Decision of 8 May 2000, para. 13.

⁴³⁵ Prosecution Request for an Order for Transfer and Provisional Detention under Rule 40 *bis*, 24 August 1998.

⁴³⁶ Decision of 8 May 2000, Preamble; *Mandat d'Arrêt et Ordonnance de Placement en Détention*, 29 août 1998.

209. Dans l'examen auquel elle procédera ci-après des conclusions de la Chambre de première instance, la Chambre d'appel s'appuiera sur les dispositions pertinentes des sources du droit applicable au Tribunal de céans, à savoir, son Statut, son Règlement et le droit international coutumier⁴²⁷ tel qu'il trouve sa traduction notamment dans le Pacte international relatif aux droits civils et politiques⁴²⁸. La Chambre d'appel évoquera également les dispositions pertinentes de traités régionaux relatifs aux droits de l'homme comme sources pouvant éclairer la coutume internationale et comme faisant preuve de celle-ci, notamment la Charte africaine des droits de l'homme et des peuples⁴²⁹, la Convention européenne des droits de l'homme⁴³⁰ et la Convention américaine relative aux droits de l'homme⁴³¹.

1. Violations qui auraient été commises durant la période allant de l'arrestation au Bénin jusqu'au transfert à Arusha

210. La Chambre d'appel prend acte des faits incontestables suivants relatifs à l'arrestation et à l'incarcération de l'appelant au Bénin jusqu'à son transfert à Arusha, en Tanzanie («première période d'arrestation et de détention»). Le 8 mai 1997, l'appelant est arrivé au Bénin où il a par la suite déposé auprès du Haut Commissaire des Nations Unies pour les réfugiés (le «HCR») une demande réclamant le statut de réfugié⁴³². Le 5 juin 1998, les autorités béninoises ont, à la demande du Bureau du Procureur du Tribunal, arrêté l'appelant au domicile de Joseph Nzirorera sans présenter de mandat d'arrêt, et l'ont placé en détention⁴³³. Le lendemain, le 6 juin, le Procureur a adressé au Ministère de la justice du Bénin une lettre demandant l'arrestation de l'appelant⁴³⁴. Le 12 juin 1998, deux enquêteurs du Procureur ont interrogé l'appelant. Plus de deux mois plus tard, le 24 août 1998 précisément, le Procureur a déposé une requête devant un juge du Tribunal demandant que soit rendue une ordonnance de transfert et de placement en détention provisoire de l'appelant⁴³⁵. Le 29 août 1998, un juge du Tribunal a confirmé l'acte d'accusation dressé contre l'appelant et plusieurs autres accusés et a délivré une ordonnance et un mandat d'arrêt pour le transfert de l'appelant du Bénin au quartier pénitentiaire à Arusha (Tanzanie)⁴³⁶. Enfin, le

⁴²⁷ Voir arrêt *Barayagwiza*, 3 novembre 1999, para. 40.

⁴²⁸ Pacte international relatif aux droits civils et politiques, Nations Unies, *Recueil des Traités*, vol. 999, p. 171.

⁴²⁹ Charte africaine des droits de l'homme et des peuples, Nations Unies, *Recueil des Traités*, vol. 1520, p. 217.

⁴³⁰ Convention de sauvegarde des droits de l'homme et des libertés fondamentales, Nations Unies, *Recueil des Traités*, vol. 213, p. 222 («Convention européenne des droits de l'homme»).

⁴³¹ Convention américaine relative aux droits de l'homme, Nations Unies, *Recueil des Traités*, vol. 1144, p. 123.

⁴³² Voir attestation du HCR à l'attention de M. Juvénal Kajelijeli, datée du 11 septembre 1997, jointe à la Requête portant sur l'arrestation arbitraire et la détention illégale du suspect Juvénal Kajelijeli, 9 novembre 1998, déposée par l'appelant le 20 novembre 1998.

⁴³³ Décision du 8 mai 2000, préambule et paras. 3 et 16.

⁴³⁴ Annexe de la Requête portant sur l'arrestation arbitraire et la détention illégale du suspect Juvénal Kajelijeli, 9 novembre 1998, déposée par l'appelant le 20 novembre 1998. Voir également Décision du 8 mai 2000, para. 13.

⁴³⁵ Requête aux fins de transfert et de placement en détention provisoire en vertu de l'article 40 bis du Règlement de procédure et de preuve du Tribunal pénal international pour le Rwanda, 24 août 1998.

⁴³⁶ Décision du 8 mai 2000, préambule; mandat d'arrêt et ordonnance de placement en détention, 29 août 1998.

Benin from the date of his initial arrest until his transfer to the custody of the Tribunal for 95 days. During this period, the Appellant was in the custody of Benin authorities for 85 days before being served with an arrest warrant or a confirmed indictment.

(a) The Parties' Submissions

211. The Appellant submits that, contrary to the Trial Chamber's findings in its Decision of 8 May 2000, his rights as protected under this Tribunal's Statute and Rules as well as international human rights law were violated during his first period of arrest and detention in Benin. First, the Appellant argues that his arrest and detention were unlawful under Rule 40 of the Rules and were arbitrary. He maintains that this is evidenced by the fact that he was arrested without a warrant. Furthermore, the Appellant contends that although the Prosecution made a request to the Benin authorities for his arrest, the Prosecution has failed to show that it had any reliable information, prior to his arrest on 5 June 1998, tending to show that he may have committed crimes within the Tribunal's jurisdiction and thus could be considered a suspect. The Appellant argues that the only reason he was seized on 5 June 1998 was because he was in the presence of a suspect for whom the Prosecution had the requisite reliable information, Joseph Nzirorera. Therefore, the Appellant contends that his arrest and subsequent detention in Benin were unlawful under the Tribunal's Statute and Rules and under Article 9 (1) of the ICCPR⁴³⁷.

212. Second, the Appellant argues that his rights to be informed promptly of the reason for his arrest as well as of the charges against him under Article 9 (2) of the ICCPR were violated during this first period of arrest and detention. The Appellant states that when he was arrested, he asked the Benin authorities as to the reasons for his arrest and was told that he would be informed of them at some later time. The Appellant notes that it was not until after 29 August 1998 that he was served in Benin with copies of a warrant for his arrest, an order of surrender, an order of confirmation and non-disclosure, and a redacted version of the amended indictment from the Tribunal. The Appellant argues that his right to be informed promptly of the charges against him in a language he understands was violated because of all of these documents, only the redacted and amended indictment was in French and that, because of the redactions, his name was not on the indictment nor was he able to understand the charges against him⁴³⁸.

213. Finally, the Appellant contends that during his questioning by the Prosecution on 12 June 1998, his right as a suspect to assistance of counsel under Rule 42 of the Tribunal's Rules was violated⁴³⁹.

⁴³⁷ Appeal Hearing, T. 7 March 2005 pp. 8-10.

⁴³⁸ Appeal Hearing, T. 7 March 2005 pp. 10, 11.

⁴³⁹ Appeal Hearing, T. 7 March 2005 p. 12.

7 septembre 1998, l'appelant a été remis au Tribunal par les autorités béninoises, il est arrivé au quartier pénitentiaire le 9 septembre 1998. L'appelant a été sous la garde des autorités béninoises à compter de la date de son arrestation initiale jusqu'à son transfert et sa remise au Tribunal, soit pendant 95 jours. Durant ladite période, l'appelant a passé 85 jours sous la garde des autorités béninoises sans que lui soit notifié un mandat d'arrêt ou un acte d'accusation confirmé.

a) Arguments des parties

211. L'appelant soutient que, contrairement aux conclusions dégagées par la Chambre de première instance dans sa Décision du 8 mai 2000, ses droits garantis par le Statut et le Règlement du Tribunal ainsi que par les instruments internationaux relatifs aux droits de l'homme ont été violés durant la première période d'arrestation et de détention au Bénin. Premièrement, l'appelant soutient que son arrestation et sa détention étaient illégales au regard de l'article 40 du Règlement et arbitraires. Il maintient que son arrestation sans mandat d'arrêt en est la preuve. En outre, il fait valoir que s'il est vrai que le Procureur a adressé une demande aux autorités béninoises pour son arrestation, il n'a pas montré qu'il disposait, avant son arrestation le 5 juin 1998, d'informations fiables tendant à prouver qu'il avait pu commettre des crimes relevant de la compétence du Tribunal de sorte qu'il pourrait être considéré comme un suspect. L'appelant avance que l'unique raison pour laquelle il a été appréhendé le 5 juin 1998 était qu'il se trouvait en présence de Joseph Nzirorera, suspect pour lequel le Procureur disposait des informations fiables requises. En conséquence, l'appelant soutient que son arrestation et sa détention subséquente au Bénin étaient illégales au regard du Statut et du Règlement du Tribunal ainsi que de l'article 9 (1) du Pacte international relatif aux droits civils et politiques⁴³⁷.

212. Deuxièmement, l'appelant fait valoir que le droit qu'il tient de l'article 9 (2) du Pacte international relatif aux droits civils et politiques d'être informé sans délai des raisons de son arrestation ainsi que des accusations portées contre lui, a été violé durant la première période d'arrestation et de détention. Il déclare avoir demandé aux autorités béninoises lors de son arrestation les raisons de celle-ci et s'être vu répondre qu'il en serait informé ultérieurement. L'appelant fait remarquer que ce n'est qu'après le 29 août 1998 qu'il a reçu notification au Bénin des copies d'un mandat d'arrêt, d'un ordre de remise, d'un ordre de confirmation et de non-divulgaration ainsi que d'une version caviardée de l'acte d'accusation modifié, délivrés par le Tribunal. L'appelant fait valoir que son droit d'être informé dans le plus court délai des accusations portées contre lui dans une langue qu'il comprend a été violé, car de tous les documents précités, seul l'acte d'accusation caviardé et modifié était en français et, en raison du caviardage, il ne pouvait ni voir son nom ni comprendre les accusations portées à son encontre⁴³⁸.

213. Enfin, l'appelant soutient que lors de son interrogatoire par le Procureur le 12 juin 1998, son droit en tant que suspect à l'assistance d'un conseil en application de l'article 42 du Règlement du Tribunal a été violé⁴³⁹.

⁴³⁷ Compte rendu de l'audience d'appel du 7 mars 2005, pp. 8 à 11.

⁴³⁸ *Ibid.*, pp. 11 à 13.

⁴³⁹ *Ibid.*, pp. 13 et 14.

214. The Prosecution responds that the Appellant fails to show that the Trial Chamber committed an error when it found that the Appellant's rights were not violated during his first period of arrest and detention in Benin. The Prosecution submits that under Rule 40 of the Rules, a warrant of arrest is not mandatory when arresting a suspect. Rule 40 empowers the Prosecution to request a State, either orally or in writing, to arrest a suspect and place him in custody in cases of urgency. In this case, the Prosecution states that it acted on reliable information with regard to the Appellant's role in committing crimes within the Tribunal's jurisdiction when it requested Benin to arrest the Appellant. The Prosecution argues that the Appellant's contention that it only obtained incriminating information on the Appellant subsequent to the 5 June 1998 arrest is mere speculation to be given no weight. Finally, the Prosecution argues that the length of the Appellant's detention in Benin was not unlawful under Rule 40 *bis* in that he was served with an indictment within 90 days⁴⁴⁰.

215. The Prosecution further responds that the Appellant fails to demonstrate that the Trial Chamber erred when it found that he had been promptly informed of the charges against him during this first period of detention. The Prosecution notes that the Appellant was served with a copy of the redacted indictment in French at the same time as being served with a warrant for his arrest and contends that the Appellant's claim that he could not understand the charges as being against him in the redacted indictment, is without merit⁴⁴¹.

216. Finally, the Prosecution argues that the Appellant fails to show that the Trial Chamber was in error when it found that his right to counsel during his interview with the Prosecution during this first period of detention was not violated because of the Appellant's waiver. The Prosecution notes that under Rule 42 (B), a suspect being investigated may waive the right to counsel. The Prosecution points out that the Appellant's waiver is proven by the tapes of the interview and the Appellant accepted the integrity of those tapes at trial. Thus, the Prosecution contends that the Trial Chamber committed no error in finding waiver of the right to counsel⁴⁴².

(b) *Discussion*

217. The Appeals Chamber first finds that, for the most part during the Appellant's first period of arrest and detention, the Appellant was a "suspect" within the meaning of the Rules and thus the provisions within the Tribunal's Statute and Rules pertaining to the rights of suspects were applicable to him. Under Rule 2 of the Rules, a suspect is defined as a

"person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction".

⁴⁴⁰ Respondent's Brief, paras. 254-257.

⁴⁴¹ Respondent's Brief, para. 268.

⁴⁴² Respondent's Brief, para. 260.

214. Le Procureur répond que l'appelant ne démontre pas que la Chambre de première instance a commis une erreur en concluant à la non-violation de ses droits durant la première période d'arrestation et de détention au Bénin. Il soutient que l'article 40 du Règlement n'exige pas de présenter un mandat d'arrêt lors de l'arrestation d'un suspect. L'article 40 habilite le Procureur à demander à un État, oralement ou par écrit, en cas d'urgence, de procéder à l'arrestation et au placement en garde à vue d'un suspect. En l'espèce, le Procureur déclare qu'en demandant au Bénin d'arrêter l'appelant, il a agi sur la base d'informations fiables en ce qui concerne le rôle de ce dernier dans la commission de crimes relevant de la compétence du Tribunal. Le Procureur soutient que le grief de l'appelant lui reprochant de n'avoir obtenu des informations tendant à l'incriminer qu'après son arrestation le 5 juin 1998 n'est que pure spéculation à laquelle aucune importance ne doit être accordée. Enfin, le Procureur fait valoir que la durée de détention de l'appelant au Bénin n'était pas illégale au regard de l'article 40 *bis* du Règlement dès lors qu'il a reçu notification d'un acte d'accusation dans un délai de 90 jours⁴⁴⁰.

215. Le Procureur ajoute que l'appelant n'établit pas que la Chambre de première instance a commis une erreur en concluant qu'il avait été informé dans le plus court délai des accusations portées contre lui, durant la première période de détention. Il fait observer que l'appelant a reçu notification en même temps d'une copie caviardée de l'acte d'accusation en français et d'un mandat d'arrêt décerné à son encontre, et il soutient que la prétention de l'appelant selon laquelle il n'a pas compris que les accusations portées dans l'acte d'accusation caviardé le visaient est sans fondement⁴⁴¹.

216. Enfin, le Procureur fait valoir que l'appelant ne démontre pas que la Chambre de première instance a commis une erreur en concluant que son droit à l'assistance d'un conseil lors de son interrogatoire par le Procureur durant cette première période de détention n'a pas été violé du fait qu'il y a renoncé. Le Procureur fait observer qu'en vertu de l'article 42 (B) du Règlement, un suspect qui est interrogé peut renoncer à son droit à l'assistance d'un conseil. Il souligne que ce fait a été établi grâce aux cassettes de l'interrogatoire dont l'appelant a reconnu l'intégrité au procès. Par conséquent, le Procureur avance que la Chambre de première instance n'a pas commis d'erreur en concluant à la renonciation du droit à l'assistance d'un conseil⁴⁴².

b) Discussion

217. La Chambre d'appel souligne tout d'abord que, pendant la plus grande partie de la première période d'arrestation et de détention de l'appelant, celui-ci était un «suspect» au sens du Règlement, si bien que les dispositions du Statut et du Règlement du Tribunal concernant les droits des suspects trouvaient à s'appliquer dans son cas. Selon l'article 2 du Règlement, on entend par suspect

«[t]oute personne physique au sujet de laquelle le Procureur possède des informations fiables qui tendent à montrer qu'elle aurait commis une infraction relevant de la compétence du Tribunal».

⁴⁴⁰ Mémoire de l'intimé, paras. 254 à 257.

⁴⁴¹ *Ibid.*, para. 268.

⁴⁴² *Ibid.*, para. 260.

A suspect becomes an “accused” upon confirmation of an indictment against him in accordance with Rule 47⁴⁴³, which, in this case, occurred on 29 August 1998, prior to the Appellant’s arrival in Arusha on 9 September 1998.

218. Under Rule 40 of the Rules, the Prosecution may request a State, as a matter of urgency, for provisional measures to arrest a suspect, place him into custody and to take all measures necessary to prevent escape of that suspect in accordance with the State’s obligations under Article 28 of the Tribunal’s Statute⁴⁴⁴. Article 28 of the Statute requires States to cooperate fully with the Tribunal in its investigation and prosecution of persons accused of committing serious violations of international humanitarian law and to provide assistance, without undue delay, when requested for the arrest and detention of persons⁴⁴⁵. This obligation was first mandated by the Security Council under Resolution 955 when it established this Tribunal pursuant to Chapter VII of the Charter of the United Nations.⁴⁴⁶

219. The Appeals Chamber notes that the Statute and Rules of the Tribunal are silent with regard to the manner and method in which an arrest of a suspect is to be effected by a cooperating State under Rule 40 of the Rules at the urgent request of the Prosecution. For example, no mention is made of ensuring the suspect’s right to be promptly informed of the reasons for his or her arrest or the right to be promptly brought before a Judge⁴⁴⁷. It is for the requested State to decide how to implement its obligations under international law⁴⁴⁸.

220. The Appeals Chamber finds that under Rule 40 of the Rules, the Prosecution and Benin had overlapping responsibilities during the first period of the Appellant’s arrest and detention in Benin. This flows from the rationale that the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person. Under the prosecutorial duty of due diligence, the Prosecution is required to ensure that, once it initiates a case, “the case proceeds to trial in a way that respects the rights of the accused”⁴⁴⁹. With regard to the responsibility of the Benin authorities, the Appeals Chamber is mindful of the fact that a cooperating State, when effecting an urgent arrest and detention pursuant to the Prosecution’s request under Rule 40 of the Rules, must strike a balance between two different obligations under international law. First, the State is required under Security Council Resolution 955 and Article 28 of the Tribunal’s Statute to comply fully without undue delay with any requests for

⁴⁴³ See Rules 2 (A), 47 (H) (ii).

⁴⁴⁴ See Rule 40 (A) (i) and (iii).

⁴⁴⁵ See Statute, art. 28 (1) and (2) (d).

⁴⁴⁶ U.N. Security Council Resolution 955, para. 2.

⁴⁴⁷ Rule 40 (A) (i) of the Rules merely states that “[i]n case of urgency, the Prosecutor may request any State: (i) To arrest a suspect and place him in custody”

⁴⁴⁸ U.N. Security Council Resolution 955, para. 2, provides, in pertinent part that:

all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary *under their domestic law to implement the provisions* of the present resolution and the Statute, including the obligation of States to comply with requests for assistance ... under Article 28 of the Statute... (emphasis added).

⁴⁴⁹ *Barayagwiza*, Decision, 3 November 1999, paras. 91, 92.

Un suspect devient «accusé» après confirmation d'un acte d'accusation dressé contre lui conformément à l'article 47 du Règlement⁴⁴³, ce qui en l'espèce a été fait le 29 août 1998, avant l'arrivée de l'appelant à Arusha le 9 septembre 1998.

218. En application de l'article 40 du Règlement, le Procureur peut demander à un État, en cas d'urgence, de prendre des mesures conservatoires afin d'arrêter un suspect, de le placer en garde à vue et de prendre toute mesure nécessaire pour empêcher son évasion l'État étant tenu de se conformer à cette demande en vertu de l'article 28 du Statut du Tribunal⁴⁴⁴. Cet article fait obligation aux États de collaborer pleinement avec le Tribunal à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire et de fournir leur assistance sans retard lorsqu'il leur est demandé de procéder à l'arrestation et à la détention de personnes⁴⁴⁵. Cette obligation a été imposée par le Conseil de sécurité dans sa résolution 955 lorsqu'il a créé le Tribunal en application du chapitre VII de la Charte des Nations Unies⁴⁴⁶.

219. La Chambre d'appel relève que le Statut et le Règlement du Tribunal sont muets sur les modalités selon lesquelles l'État saisi d'une demande urgente du Procureur doit procéder à l'arrestation d'un suspect en vertu de l'article 40 du Règlement. Par exemple, on ne trouve aucune disposition garantissant le droit du suspect d'être informé dans le plus court délai des raisons de son arrestation ou d'être traduit dans le plus court délai devant un juge⁴⁴⁷. Il revient à l'État requis de décider de la manière de s'acquitter de ses obligations en vertu du droit international⁴⁴⁸.

220. La Chambre d'appel estime que l'article 40 du Règlement imposait au Procureur et aux autorités béninoises des responsabilités concomitantes durant la première période d'arrestation et de détention de l'appelant au Bénin. Ceci découle du principe que la répartition des tâches au plan international, en matière de poursuite d'auteurs de crimes, ne doit pas se faire au détriment de la personne appréhendée. L'obligation de diligence faite au Procureur astreint celui-ci, dès qu'il met l'action en mouvement, à «veiller à conduire la cause au procès, les droits de l'accusé étant dûment respectés»⁴⁴⁹. En ce qui concerne la responsabilité des autorités béninoises, la Chambre d'appel ne perd pas de vue le fait que lorsqu'un État procède en cas d'urgence à une arrestation et à un placement en détention sur la demande du Procureur en application de l'article 40 du Règlement, il doit trouver un juste équilibre

⁴⁴³ Voir articles 2 (A) et 47 (H) (ii) du Règlement.

⁴⁴⁴ Voir article 40 (A) (i) et (iii) du Règlement.

⁴⁴⁵ Voir le paragraphe 1 et l'alinéa 2 (d) de l'article 28 du Statut.

⁴⁴⁶ Résolution 955 du Conseil de sécurité des Nations Unies, para. 2.

⁴⁴⁷ L'article 40 (A) (i) du Règlement énonce simplement qu'«[e]n cas d'urgence, le Procureur peut demander à tout État : i) De procéder à l'arrestation et au placement en garde à vue d'un suspect ...».

⁴⁴⁸ La résolution 955 du Conseil de sécurité des Nations Unies prévoit en son paragraphe 2 ce qui suit : Décide que tous les États apporteront leur pleine coopération au Tribunal international et à ses organes, conformément à la présente résolution et au Statut du Tribunal international, et qu'ils prendront toutes mesures nécessaires *en vertu de leur droit interne pour mettre en application les dispositions* de la présente résolution et du Statut, y compris l'obligation faite aux États de donner suite aux demandes d'assistance ... conformément à l'Article 28 du Statut [non souligné dans l'original].

⁴⁴⁹ Arrêt *Barayagwiza*, 3 novembre 1999, paras. 91 et 92.

assistance from the Tribunal in fulfilling the weighty task of investigating and prosecuting persons accused of committing serious violations of international humanitarian law. On the other hand, the cooperating State still remains under its obligation to respect the human rights of the suspect as protected in customary international law, in the international treaties to which it has acceded⁴⁵⁰, as well as in its own national legislation.

221. Therefore, a shared burden exists with regard to safeguarding the suspect's fundamental rights in international cooperation on criminal matters. A Judge of the requested State is called upon to communicate to the detainee the request for surrender (or extradition) and make him or her familiar with any charge, to verify the suspect's identity, to examine any obvious challenges to the case, to inquire into the medical condition of the suspect, and to notify a person enjoying the confidence of the detainee⁴⁵¹ and consular officers⁴⁵². It is, however, not the task of that Judge to inquire into the merits of the case. He or she would not know the reasons for the detention in the absence of a provisional or final arrest warrant issued by the requesting State or the Tribunal. This responsibility is vested with the judiciary of the requesting State, or in this case, a Judge of the Tribunal, as they bear principal responsibility for the deprivation of liberty of the person they requested to be surrendered.

222. Accordingly, the Prosecution is under a two-pronged duty. The request to the authorities of the cooperating State has to include a notification to the judiciary, or at least, by way of the Tribunal's primacy, a clause reminding the national authorities to promptly bring the suspect before a domestic Judge in order to ensure that the apprehended person's rights are safeguarded by a Judge of the requested State as outlined above. In addition, the Prosecution must notify the Tribunal in order to enable a Judge to furnish the cooperating State with a provisional arrest warrant and transfer order.

⁴⁵⁰ In this regard, the Appeals Chamber notes that the Republic of Benin acceded to the ICCPR on 12 March 1992 and to the ACHPR on 20 January 1986.

⁴⁵¹ Numerous international bodies have condemned incommunicado detention. See Standard Minimum Rules for the Treatment of Prisoners, art. 92; U.N. Human Rights Commission Resolutions 1998/38, para. 5, and 1997/38, para. 20; U.N. Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, para. 926 (d); Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission, 1982-1983; *Mukong v. Cameroon*, para. 9.4; *El-Megreisi v. Libyan Arab Jamahiriya*, para. 5.4; *Suárez Rosero Case*, para. 91 (describing detainee's being cut off from communication with his family as cruel, inhuman, and degrading treatment). See also Art. 104 (4) of the German Constitution (the "Grundgesetz"): "A relative or a person enjoying the confidence of the person in custody *shall* be notified without delay of any judicial decision imposing or continuing a deprivation of freedom." (Emphasis added). The rationale behind this constitutional norm is that it is an inalienable duty to inform relatives or good friends of a person as to any deprivation of liberty. This provision is based upon lessons learned in Germany from World War II whereby legal safeguards must exist such that never again should the judiciary be able to abuse its power by causing human beings to just disappear.

⁴⁵² See Vienna Convention on Consular Relations, art. 36 (b).

entre deux obligations différentes en droit international. D'une part, l'État est requis, en vertu de la résolution 955 du Conseil de sécurité et de l'article 28 du Statut du Tribunal, de répondre en tous points et sans retard à toute demande d'assistance du Tribunal dans l'accomplissement de la lourde tâche qui est la sienne de rechercher et de juger les personnes accusées d'avoir commis des violations graves du droit international humanitaire. D'autre part, l'État qui coopère demeure tenu de respecter les droits individuels du suspect protégés par le droit international coutumier, par les traités internationaux auxquels il a adhéré⁴⁵⁰ ainsi que par sa propre législation nationale.

221. En conséquence, il existe un devoir partagé de sauvegarder les droits fondamentaux du suspect dans le cadre de la coopération internationale en matière pénale. Un juge de l'État requis est appelé à communiquer au détenu la demande de remise (ou d'extradition) et à l'informer de toute accusation portée à son encontre, à vérifier son identité, à examiner toute contestation manifeste de la régularité de l'affaire, à s'enquérir de l'état de santé du suspect et à porter la situation du détenu à la connaissance d'une personne jouissant de sa confiance⁴⁵¹ et des fonctionnaires consulaires⁴⁵². Toutefois, il ne revient pas à ce juge d'examiner le fond de l'affaire. Il ne connaît pas les raisons de la détention en l'absence d'un mandat d'arrêt provisoire ou définitif émis par l'État requérant ou le Tribunal. Le pouvoir judiciaire de l'État requérant ou, en l'espèce, un juge du Tribunal est investi de cette responsabilité, puisqu'il est le principal responsable de la mesure de privation de liberté prise à l'encontre de la personne dont il a demandé la remise.

222. Le Procureur est donc tenu d'une double obligation. La demande adressée aux autorités de l'État qui coopère doit inclure une notification au pouvoir judiciaire, ou tout au moins, en raison de la primauté du Tribunal, une clause rappelant aux autorités nationales de présenter dans le plus court délai le suspect devant un juge national afin de s'assurer que les droits de la personne appréhendée sont protégés par un juge de l'État requis, tel qu'il est indiqué plus haut. En outre, le Procureur doit aviser le Tribunal pour permettre à un de ses juges de fournir à l'État qui coopère un mandat d'arrêt provisoire et un ordre de transfert.

⁴⁵⁰ À cet égard, la Chambre d'appel remarque que la République du Bénin a adhéré au Pacte international relatif aux droits civils et politiques le 12 mars 1992 et à la Charte africaine des droits de l'homme et des peuples le 20 janvier 1986.

⁴⁵¹ Bon nombre d'organismes internationaux ont condamné la détention au secret. Voir Ensemble des règles minima pour le traitement des détenus, art. 92; Résolutions de la Commission des droits de l'homme 1998/38, para. 5, et 1997/38, para. 20; Commission des droits de l'homme des Nations Unies, Rapport du Rapporteur spécial sur la torture et les autres peines ou traitements cruels, inhumains ou dégradants, para. 926 (d); Commission interaméricaine des droits de l'homme, Rapport annuel de la Commission interaméricaine, 1982-1983; *Mukong c. Cameroun*, para. 9.4; *El-Megreisi c. Jamahiriya arabe libyenne*, para. 5.4; affaire *Suárez Rosero*, para. 91 (qualifiant de traitement cruel, inhumain et dégradant le fait pour le prisonnier d'avoir été empêché de communiquer avec sa famille). Voir également art. 104 (4) de la Constitution allemande («Grundgesetz»): «Toute décision juridictionnelle ordonnant ou prolongeant une privation de liberté doit être portée sans délai à la connaissance d'un parent de la personne détenue ou d'une personne jouissant de sa confiance» [non souligné dans l'original]. Cette norme constitutionnelle se justifie par le fait qu'il existe un devoir absolu d'informer les parents ou proches d'une personne de toute mesure de privation de liberté dont celle-ci fait l'objet. Cette disposition est le fruit des leçons que l'Allemagne a tirées de la Deuxième Guerre mondiale et qui fait que des garanties juridiques doivent exister afin que plus jamais les organes judiciaires ne puissent abuser de leur pouvoir en causant tout simplement la disparition d'êtres humains.

⁴⁵² Voir Convention de Vienne sur les relations consulaires, art. 36 (b).

223. In this context, the Appeals Chamber recalls the words of Judge Vohrah, which, although made in relation to the status of an accused, apply to suspects as well :

if an accused is arrested or detained by a state at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible⁴⁵³.

(i) The Arrest and the Right to be Promptly Informed of the Reasons for the Arrest

224. Under international human rights law, Article 9 of the ICCPR establishes that everyone has the right to liberty and security of person and no one shall be subject to arbitrary arrest and deprivation of liberty without due process of law. Article 5 (1) (c) of the ECHR specifies that

“the lawful arrest ... of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so,”

is permissible, but only where it is effected according to due process of law⁴⁵⁴. With regard to being informed of the reasons for the arrest, Article 9 (2) of the ICCPR stipulates that everyone who is arrested shall be informed promptly in a language he or she understands of the reason for the arrest and shall also be informed promptly of any charge against him or her⁴⁵⁵.

225. In this case, the Trial Chamber found that the Appellant’s arrest as a suspect in Benin was not arbitrary and was in accordance with due process of law⁴⁵⁶. The Trial Chamber held that under Rule 40 of the Rules, there was no requirement that the Prosecutor provide a warrant of arrest or even have evidence that the Appellant may have committed a crime within the jurisdiction of the Tribunal when requesting Benin to urgently arrest the Appellant. As to the manner and execution of the arrest pursuant to the Prosecutor’s request, the Trial Chamber held that responsibility lies with the cooperating State to organize, control, and carry out the arrest in accordance with its domestic law. The Trial Chamber found that there was no violation of the

⁴⁵³ *Semanza*, Decision, 31 May 2000, Declaration of Judge Lal Chand Vohrah, para. 6.

⁴⁵⁴ See also ACHR, Art. 7 (1), (3).

⁴⁵⁵ Article 9 (2) of the ICCPR states that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” See also ECHR, art. 5 (2).

⁴⁵⁶ The Appeals Chamber notes that the Trial Chamber failed to say anything in its Decision of 8 May 2000 on whether the Appellant’s detention subsequent to his arrest in Benin prior to the issuance of the indictment against him on 29 August 1998 was unlawful.

223. Dans ce contexte, la Chambre d'appel rappelle les propos du juge Vohrah qui, bien que visant la situation d'un accusé, s'appliquent aux suspects également :

Si un État arrête ou place en détention un accusé à la demande ou sous l'autorité du Tribunal, celui-ci, même si l'accusé n'est pas encore placé sous sa garde effective, a la responsabilité d'accorder toute mesure de réparation dont il dispose pour tenter d'atténuer les effets de toute violation dans toute la mesure du possible⁴⁵³ [traduction].

i) *L'arrestation et le droit d'être informé dans le plus court délai des raisons de l'arrestation*

224. En vertu du droit international relatif aux droits de l'homme, l'article 9 du Pacte international relatif aux droits civils et politiques prévoit que tout individu a droit à la liberté et à la sécurité de sa personne et que nul ne peut faire l'objet d'une arrestation arbitraire et être privé de sa liberté, si ce n'est conformément à la procédure prévue par la loi. L'article 5 (1) de la Convention européenne des droits de l'homme précise que

«[n]ul ne peut être privé de sa liberté, sauf dans les cas suivants : ... c) s'il a été arrêté ... en vue d'être conduit devant l'autorité judiciaire compétente, lorsqu'il y a des raisons plausibles de soupçonner qu'il a commis une infraction ou qu'il y a des motifs raisonnables de croire à la nécessité de l'empêcher de commettre une infraction ou de s'enfuir après l'accomplissement de celle-ci»,

mais uniquement lorsque l'arrestation s'effectue conformément à la procédure prévue par la loi⁴⁵⁴. Quant au droit d'être informé des raisons de l'arrestation, l'article 9 (2) du Pacte international relatif aux droits civils et politiques dispose que tout individu arrêté sera informé, au moment de son arrestation, dans une langue qu'il comprend des raisons de cette arrestation et recevra notification, dans le plus court délai, de toute accusation portée contre lui⁴⁵⁵.

225. En l'espèce, la Chambre de première instance a conclu que l'arrestation de l'appelant en tant que suspect au Bénin n'était pas arbitraire et s'était effectuée conformément à la procédure prévue par la loi⁴⁵⁶. Elle a jugé que l'article 40 du Règlement n'imposait pas au Procureur l'obligation de présenter un mandat d'arrêt ou même de disposer de preuves que l'appelant aurait commis un crime relevant de la compétence du Tribunal lorsqu'il a demandé au Bénin de procéder d'urgence à son arrestation. En ce qui concerne les modalités d'exécution de l'arrestation conformément à la demande du Procureur, elle a indiqué que l'État qui coopère est responsable

⁴⁵³ Affaire *Semanza*, Décision du 31 mai 2000, déclaration du juge Lal Chand Vohrah, para. 6.

⁴⁵⁴ Voir également Convention américaine relative aux droits de l'homme, art. 7 (1) et 7 (3).

⁴⁵⁵ L'article 9 (2) du Pacte international relatif aux droits civils et politiques est ainsi libellé : «Tout individu arrêté sera informé, au moment de son arrestation, des raisons de cette arrestation et recevra notification, dans le plus court délai, de toute accusation portée contre lui». Voir également Convention européenne des droits de l'homme, art. 5 (2).

⁴⁵⁶ La Chambre d'appel relève que la Chambre de première instance n'a pas indiqué dans sa Décision du 8 mai 2000 si la détention de l'appelant après son arrestation au Bénin mais avant la délivrance de l'acte d'accusation dressé contre lui le 29 août 1998 était illégale ou non.

Appellant's right to be promptly informed of the reasons for his arrest and of the charges against him. The Trial Chamber noted that responsibility for promptly informing the Appellant of the reasons for his arrest lay with the Benin authorities, and it was disputed whether or not information was passed to the Appellant at the time of his arrest. Furthermore, the Trial Chamber found that the Appellant was immediately informed of the charges against him because, after the indictment was confirmed against him on 29 August 1998, he was served a copy of his arrest warrant and the redacted indictment shortly thereafter while still in Benin prior to his transfer to the UNDF on 9 September 1998⁴⁵⁷.

226. The Appeals Chamber does not agree. Although the Appellant was lawfully apprehended pursuant to Rule 40 of the Rules, the manner in which the arrest was carried out was not according to due process of law because the Appellant was not promptly informed of the reasons for his arrest. As held by the Appeals Chamber in *Semanza*, a suspect arrested at the behest of the Tribunal has a right to be promptly informed of the reasons for his or her arrest, and this right comes into effect from the moment of arrest and detention⁴⁵⁸. Before providing the reasons for this conclusion, the Appeals Chamber first notes that in making an urgent Rule 40 request, the Prosecution is not required to provide the suspect with a copy of a warrant for the arrest⁴⁵⁹. Furthermore, the Appeals Chamber finds that in this case, the Appellant's right to freedom from an arrest contrary to due process of law was not violated due to the lack of an arrest warrant by the Prosecution or the Benin authorities, given the exigencies of the circumstances in which he was arrested. Nevertheless, the Appeals Chamber does not agree with the Trial Chamber that the Prosecution was not required to have evidence tending to show that the Appellant may have committed crimes within this Tribunal's jurisdiction at the time it made its Rule 40 request to the Benin authorities. By making a Rule 40 request for the urgent arrest of a *suspect*, the Prosecution is, by definition under Rule 2 of the Rules, making the claim that it possesses "reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction". Indeed, in this case, the Prosecution represented in its request letter of 6 June 1998 to the Benin authorities only that it had

"compelling and consistent evidence of [the Appellant's] participation in crimes committed in the Republic of Rwanda between 1st January and 31st December 1994"⁴⁶⁰.

227. With regard to the manner in which the Appellant's arrest was carried out, the Appeals Chamber first finds that the arrest was lawfully initiated under Rule 40 of the Rules. The Appeals Chamber notes that the parties agreed that, on 5 June 1998, the Appellant was arrested by the Benin authorities at the urgent request of the

⁴⁵⁷ Decision of 8 May 2000, paras. 42-44.

⁴⁵⁸ *Semanza*, Decision, 31 May 2000, para. 78.

⁴⁵⁹ See *Semanza*, Decision, 31 May 2000, n. 106 citing *Barayagwiza*, Decision, 3 November 1999.

⁴⁶⁰ Appeal Hearing, T. 7 March 2005 p. 51.

de l'organisation, du contrôle et de l'exécution de l'arrestation conformément à son droit interne. La Chambre de première instance a conclu que le droit de l'appelant d'être informé dans le plus court délai des raisons de son arrestation et des accusations portées contre lui n'a pas été violé. Elle a relevé qu'il incombait aux autorités béninoises d'informer l'appelant dans le plus court délai des raisons de son arrestation, et que le point de savoir si l'appelant avait été informé au moment de son arrestation était controversé. Elle a en outre conclu que l'appelant a immédiatement été informé des charges pesant sur lui car, après confirmation de l'acte d'accusation dressé contre lui le 29 août 1998, une copie de son mandat d'arrêt et l'acte d'accusation caviardé lui ont été signifiés peu après alors qu'il se trouvait encore au Bénin avant son transfert au quartier pénitentiaire le 9 septembre 1998⁴⁵⁷.

226. La Chambre d'appel ne partage pas ce point de vue. L'appelant a certes été appréhendé légalement conformément à l'article 40 du Règlement, mais son arrestation ne s'est pas déroulée dans le respect de la légalité, car il n'a pas été informé dans le plus court délai des raisons de son arrestation. Comme l'a déclaré la Chambre d'appel dans l'affaire *Semanza*, un suspect arrêté sur ordre du Tribunal bénéficie du droit d'être informé sans délai des raisons de son arrestation, et ce droit s'exerce dès l'arrestation et le placement d'un suspect en garde à vue⁴⁵⁸. Avant de donner les raisons sur lesquelles se fonde cette conclusion, la Chambre d'appel relève d'abord qu'en formulant une demande urgente conformément à l'article 40 du Règlement, le Procureur n'est pas tenu de présenter au suspect une copie d'un mandat d'arrêt⁴⁵⁹. Elle estime en outre qu'en l'espèce, le droit de l'appelant de ne pas être victime d'une arrestation effectuée au mépris de la légalité n'a pas été violé en raison de l'absence d'un mandat d'arrêt émanant du Procureur ou des autorités béninoises, vu les conditions dans lesquelles il a été arrêté. Néanmoins, la Chambre d'appel n'estime pas comme la Chambre de première instance que le Procureur n'était pas tenu de posséder des éléments de preuve tendant à montrer que l'appelant avait pu commettre des crimes relevant de la compétence du Tribunal de ceans au moment où il a transmis sa demande aux autorités béninoises en vertu de l'article 40. En formulant une demande aux fins de l'arrestation en urgence d'un suspect en vertu de l'article 40, le Procureur affirme, selon la définition que l'article 2 du Règlement donne de ce terme, qu'il possède des «informations fiables qui tendent à montrer [que le suspect] aurait commis une infraction relevant de la compétence du Tribunal». Au demeurant, le Procureur a simplement déclaré dans sa requête du 6 juin 1998 adressée aux autorités béninoises qu'il existait

«à l'endroit de [l'appelant] des indices graves et concordants de participation aux crimes commis dans la République du Rwanda entre le 1^{er} janvier et le 31 décembre 1994»⁴⁶⁰.

227. En ce qui concerne la manière dont l'arrestation de l'appelant s'est déroulée, la Chambre d'appel conclut d'emblée que celle-ci a été légalement effectuée en vertu de l'article 40 du Règlement. Elle relève que les parties ont convenu que l'appelant a été arrêté le 5 juin 1998 par les autorités béninoises à la demande urgente du Procureur. Au moment de son arrestation par lesdites autorités au domicile de Joseph Nzi-

⁴⁵⁷ Décision du 8 mai 2000, paras. 42 à 44.

⁴⁵⁸ Affaire *Semanza*, Décision du 31 mai 2000, para. 78.

⁴⁵⁹ *Ibid.*, note 106, citant l'arrêt *Barayagwiza* du 3 novembre 1999.

⁴⁶⁰ Compte rendu de l'audience d'appel du 7 mars 2005, p. 51 [de la version anglaise].

Prosecution. At the time of the Appellant's arrest by the Benin authorities in the home of Joseph Nziroera, two ICTR investigators were also present⁴⁶¹. Although the Prosecution concedes that the Appellant is correct in that his discovery was fortuitous, the Appeals Chamber is convinced by the Prosecution's argument that his subsequent arrest under Rule 40 was not made on the basis that he was in the presence of a known accused. The Prosecution argues that as the ICTR investigators were in the process of investigating the case of Joseph Nziroera with regard to crimes committed in Ruhengeri *Préfecture*, they had reliable information on the Appellant as a suspect due to his prominence in Mukingo *Commune* in Ruhengeri *Préfecture*. The Appellant failed to address this argument. However, the Appeals Chamber notes that it is disputed whether the Appellant was promptly informed of the reasons for his arrest. The Appellant claims in this appeal that at the time of the arrest, he asked the Benin authorities as to the reasons for his arrest and was informed that he would find them out at a later date⁴⁶². The Prosecution failed to rebut this argument⁴⁶³. Consequently, the Appeals Chamber finds that in the absence of any evidence to the contrary, the Appellant's right to be informed of the reasons as to why he was being deprived of his liberty was not properly guaranteed.

ii. *The Appellant's Detention in Benin*

228. Subsequent to a suspect's arrest by a cooperating State under Rule 40 of the Rules, Rule 40 *bis* allows for the Prosecution, within a reasonable period of time, to request a Judge of this Tribunal to issue an order for the transfer of the suspect from the custody of that State to the custody of the Tribunal for purposes of provisional detention prior to issuance of an arrest warrant and indictment against the suspect by a Judge⁴⁶⁴. That request shall include any provisional charges against the suspect and a summary of the material on which the Prosecution relies for those charges, and shall be served upon the suspect along with the Judge's order granting the request as soon as possible upon transfer⁴⁶⁵. The Judge's order shall include the grounds for ordering the transfer, including the reasons why he or she thinks that there is reliable information tending to show that the suspect may have committed a crime within the Tribunal's jurisdiction⁴⁶⁶.

229. Under international human rights law, no one shall be subject to arbitrary detention without due process of law pursuant to the right to liberty and security of person as found in Article 9 of the ICCPR⁴⁶⁷. Subsequent to arrest and detention, everyone has the right to be informed promptly in a language he or she understands of the nature and cause of the charges against him or her pursuant to Articles 9 (2) and

⁴⁶¹ Appeal Hearing, T. 7 March 2005 pp. 10, 48.

⁴⁶² Appeal Hearing, T. 7 March 2005 p. 11.

⁴⁶³ See Respondent's Brief, paras. 268, 269.

⁴⁶⁴ See generally Rule 40 *bis*.

⁴⁶⁵ Rule 40 *bis* (E).

⁴⁶⁶ See Rule 40 *bis* (A), (B), (D), (E).

⁴⁶⁷ Article 9 (1) of the ICCPR states that :

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law...

See also ACHR, art. 7 (1), (3); ACHPR, art. 6.

rorera, deux enquêteurs du TPIR étaient également présents⁴⁶¹. Le Procureur reconnaît certes que l'appelant a raison de dire que sa découverte a été fortuite, mais la Chambre d'appel est cependant convaincue par l'argument du Procureur selon lequel l'arrestation subséquente de l'appelant en vertu de l'article 40 du Règlement n'a pas été effectuée en se basant sur le fait qu'il se trouvait en compagnie d'un accusé connu. Le Procureur soutient que les enquêteurs du TPIR, du fait qu'ils menaient des enquêtes relativement à l'affaire Nzirorera au sujet de crimes commis dans la préfecture de Ruhengeri, étaient en possession d'informations fiables sur l'appelant en tant que suspect, en raison de son rang dans la commune de Mukingo, préfecture de Ruhengeri. L'appelant n'a pas répondu à cet argument. Toutefois, la Chambre d'appel relève que le point de savoir si l'appelant a été informé dans le plus court délai des raisons de son arrestation est controversé. L'appelant maintient dans le présent recours avoir demandé aux autorités béninoises au moment de son arrestation les raisons de celle-ci et s'être vu répondre qu'on les lui communiquerait plus tard⁴⁶². Le Procureur n'a pas réfuté cet argument⁴⁶³. En conséquence, la Chambre d'appel conclut qu'en l'absence de preuve contraire, le droit de l'appelant d'être informé des raisons pour lesquelles on le privait de sa liberté n'a pas été convenablement garanti.

ii) *La détention de l'appelant au Bénin*

228. Après l'arrestation d'un suspect par un État en vertu de l'article 40 du Règlement, l'article 40 *bis* habilite le Procureur à demander dans un délai raisonnable à un juge du Tribunal de rendre une ordonnance portant transfert du suspect de l'État où il est détenu au Tribunal, aux fins de sa détention provisoire avant la délivrance par un juge d'un mandat d'arrêt et d'un acte d'accusation contre lui⁴⁶⁴. La requête doit mentionner tout chef d'accusation provisoire retenu contre le suspect et un sommaire des éléments sur lesquels le Procureur s'est appuyé pour étayer ces accusations, et elle doit être notifiée au suspect en même temps que l'ordonnance du juge faisant droit à la requête, dès que possible après le transfert⁴⁶⁵. L'ordonnance du juge doit indiquer les motifs pour lesquels il ordonne le transfert, y compris les raisons pour lesquelles il estime qu'il existe des informations fiables tendant à montrer que le suspect aurait commis un crime relevant de la compétence du Tribunal⁴⁶⁶.

229. Selon les normes du droit international relatif aux droits de l'homme, nul ne peut être détenu arbitrairement en violation des garanties prévues par la loi, toute personne jouissant du droit à la liberté et à la sécurité ainsi qu'il est énoncé à l'article 9 du Pacte international relatif aux droits civils et politiques⁴⁶⁷. En application des

⁴⁶¹ *Ibid.*, pp. 11 et 54.

⁴⁶² *Ibid.*, p. 12.

⁴⁶³ Voir mémoire de l'intimé, paras. 268 et 269.

⁴⁶⁴ Voir d'une manière générale l'article 40 *bis* du Règlement.

⁴⁶⁵ Article 40 *bis* (E) du Règlement.

⁴⁶⁶ Voir article 40 *bis* (A), (B), (D) et (E) du Règlement.

⁴⁶⁷ L'article 9 (1) du Pacte international relatif aux droits civils et politiques est ainsi libellé : Tout individu a droit à la liberté et à la sécurité de sa personne. Nul ne peut faire l'objet d'une arrestation ou d'une détention arbitraire. Nul ne peut être privé de sa liberté, si ce n'est pour des motifs, et conformément à la procédure prévus par la loi. Voir également la Convention américaine relative aux droits de l'homme, art. 7 (1) et 7 (3); Charte africaine des droits de l'homme et des peuples, art. 6.

14 (3) (a) of the ICCPR⁴⁶⁸. The suspect's right to be promptly informed of the charges against him or her serves two purposes: 1) it "counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect" by giving the suspect "the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings"; and 2) it "gives the suspect information he requires in order to prepare his defence"⁴⁶⁹. Generally, international human rights standards view provisional detention of a suspect without charge as an exception, rather than the rule⁴⁷⁰. However, such detention is lawful under international law as long as it is as short as possible, not extending beyond a reasonable period of time⁴⁷¹. The Human Rights Committee has found that pre-trial detention of a suspect without appearance before a Judge and without charge for 42 days is unreasonable under Article 9 of the ICCPR⁴⁷². On this issue, the Appeals Chamber recalls that as an exception, in light of the complexity of the charges faced by accused persons before this Tribunal, provisional detention of a suspect without being formally charged for a maximum of 90 days is warranted under the law of this Tribunal so long as the protections provided for the suspect's rights under Rules 40 and 40 *bis* of the Rules are adhered to⁴⁷³.

230. In addition, Article 9 of the ICCPR provides that upon arrest and provisional detention, everyone has the right to be brought promptly before a Judge or official authorized to exercise judicial power⁴⁷⁴. The Human Rights Committee has interpreted Article 9 to mean that any delay in being brought before a Judge should not exceed a few days⁴⁷⁵. The Human Rights Committee has decided that under this article, four-days' delay is too long⁴⁷⁶, let alone lapses of 11 days, 22 days, or ten weeks⁴⁷⁷. Article 5 (3) of the ECHR also requires that the suspect be brought promptly before a Judge or officer able to exercise judicial power upon arrest. The European Court of

⁴⁶⁸ See also ECHR, art. 6 (3) (a); ACHR, art. 7 (4).

⁴⁶⁹ *Barayagwiza*, Decision, 3 November 1999, paras. 80, 81.

⁴⁷⁰ See U.N. Human Rights Committee, General Comment N° 8, para. 3; *Barayagwiza*, Decision, 3 November 1999, para. 62.

⁴⁷¹ See U.N. Human Rights Committee, General Comment N° 8, para. 3; *Barayagwiza*, Decision, 3 November 1999, para. 63.

⁴⁷² See *Campbell v. Jamaica*, para. 7.1. See also *Valentini de Bazzano v. Uruguay*, paras. 9, 10 (finding that eight months provisional detention without charge was in violation of Article 9 (2)); *Carballal v. Uruguay*, paras. 2.2, 2.5, 13 (deciding that 1 year detention between arrest and formal filing of charges was in violation of Article 9 (2)).

⁴⁷³ *Barayagwiza*, Decision, 3 November 1999, para. 62.

⁴⁷⁴ Article 9 (3) of the ICCPR states that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release ..." See also ACHR, art. 7 (5).

⁴⁷⁵ See U.N. Human Rights Committee, General Comment N° 8, para. 2.

⁴⁷⁶ *Freemantle v. Jamaica*, para. 7.4.

⁴⁷⁷ *Lobban v. Jamaica*, para. 8.3; *Casafranca v. Peru*, para. 7.2; *Jones v. Jamaica*, para. 9.3.

articles 9 (2) et 14 (3) (a) de ce Pacte, tout individu arrêté et placé en détention a le droit d'être informé, dans le plus court délai, dans une langue qu'il comprend, de la nature et des motifs des accusations portées contre lui⁴⁶⁸. Le droit du suspect d'être informé dans le plus court délai des accusations portées contre lui sert un double objectif, à savoir, 1) il «fait échec à toute velléité de la poursuite de faire durer la garde à vue du suspect» en lui donnant «l'occasion de contester l'infraction qui lui est imputée et d'obtenir sa remise en liberté avant l'ouverture des procédures relatives au procès», et 2) il «permet au suspect d'accéder aux informations requises pour préparer sa défense»⁴⁶⁹. D'une manière générale, au regard des normes internationales applicables en matière de droits de l'homme, la détention provisoire d'un suspect sans accusation est l'exception plutôt que la règle⁴⁷⁰. Toutefois, une telle détention est légale au regard du droit international tant qu'elle est aussi brève que possible, qu'elle n'excède pas des délais raisonnables⁴⁷¹. Le Comité des droits de l'homme a conclu que la détention d'un suspect pendant 42 jours avant jugement, sans comparution devant un juge et sans accusation, est abusive au regard de l'article 9 du Pacte international relatif aux droits civils et politiques⁴⁷². À ce sujet, la Chambre d'appel rappelle que comme exception, vu la complexité des charges retenues contre les accusés devant ce Tribunal, la détention provisoire d'un suspect sans que celui-ci ait été officiellement mis en accusation pendant une durée maximale de 90 jours est justifiée au regard du droit applicable au Tribunal, tant que les garanties prévues aux articles 40 et 40 *bis* du Règlement pour préserver les droits du suspect sont respectées⁴⁷³.

230. Par ailleurs, l'article 9 du Pacte international relatif aux droits civils et politiques prévoit que tout individu arrêté et placé en détention provisoire sera traduit dans le plus court délai devant un juge ou une autre autorité habilitée par la loi à exercer des fonctions judiciaires⁴⁷⁴. Le Comité des droits de l'homme a interprété l'article 9 comme voulant dire que le délai pour traduire quelqu'un devant un juge ne doit pas dépasser quelques jours⁴⁷⁵. Il a décidé qu'au regard de cet article, un délai de quatre jours était trop long⁴⁷⁶, sans parler d'un délai de 11 ou 22 jours ou de 10 semaines⁴⁷⁷. L'article 5 (3)

⁴⁶⁸ Voir également Convention européenne des droits de l'homme, art. 6 (3) (a); Convention américaine relative aux droits de l'homme, art. 7 (4).

⁴⁶⁹ Arrêt *Barayagwiza*, 3 novembre 1999, paras. 80 et 81.

⁴⁷⁰ Voir Comité des droits de l'homme des Nations Unies, Observation générale n° 8, para. 3; arrêt *Barayagwiza*, 3 novembre 1999, para. 62.

⁴⁷¹ Voir Comité des droits de l'homme des Nations Unies, Observation générale n° 8, para. 3; arrêt *Barayagwiza*, 3 novembre 1999, para. 63.

⁴⁷² Voir *Campbell c. Jamaïque*, para. 7.1. Voir également *Valentini de Bazzano c. Uruguay*, paras. 9 et 10 (un placement en détention provisoire pendant une durée de huit mois sans accusation constitue une violation de l'article 9 (2)); *Carballal c. Uruguay*, para. 2.2, 2.5 et 13 (un an de détention entre l'arrestation et la mise en accusation officielle constitue une violation de l'article 9 (2)).

⁴⁷³ Arrêt *Barayagwiza*, 3 novembre 1999, para. 62.

⁴⁷⁴ L'article 9 (3) du Pacte international relatif aux droits civils et politiques est ainsi libellé : «Tout individu arrêté ou détenu du chef d'une infraction pénale sera traduit dans le plus court délai devant un juge ou une autre autorité habilitée par la loi à exercer des fonctions judiciaires, et devra être jugé dans un délai raisonnable ou libéré ...» Voir également Convention américaine relative aux droits de l'homme, art. 7 (5).

⁴⁷⁵ Voir Comité des droits de l'homme des Nations Unies, Observation générale n° 8, para. 2.

⁴⁷⁶ *Freemantle c. Jamaïque*, para. 7.4.

⁴⁷⁷ *Lobban c. Jamaïque*, para. 8.3; *Casafranca c. Pérou*, para. 7.2; *Jones c. Jamaïque*, para. 9.3.

Human Rights has specified that two days' delay under this article is permissible⁴⁷⁸; however, four days and six hours constitute a violation even in complex cases, let alone one week or longer⁴⁷⁹.

231. Although the Trial Chamber did not discuss the legality of the Appellant's detention in Benin in its 8 May 2000 decision, the Appeals Chamber finds that it erred in failing to find that his detention in Benin for a total of 85 days without charge and without being brought promptly before a Judge was clearly unlawful and was in violation of his rights under the Tribunal's Statute and Rules as well as international human rights law. The Appeals Chamber finds that the Prosecution is responsible for these violations because it failed to make a request within a reasonable time under Rules 40 and 40 *bis* for the Appellant's provisional arrest and transfer to the Tribunal. Moreover, its request would have included the provisional charges, which would then have been served on the Appellant⁴⁸⁰. Although Rules 40 and 40 *bis* do not explicitly state how long a suspect may permissibly remain in the provisional custody of a cooperating State pursuant to a Rule 40 request, the Appellant's prolonged detention in Benin was unreasonable. The evidence on the record indicates that the Appellant was never informed by a Judge of the charges against him, even provisionally, until sometime between 29 August 1998 and 7 September 1998, when he was formally served with an arrest warrant and a copy of the redacted indictment against him from the Tribunal⁴⁸¹. The Appeals Chamber does not accept that 85-days' delay after a suspect's arrest may be considered "prompt" or "immediate" within the meaning of this Tribunal's Statute or Rules⁴⁸². Additionally, although 90 days may be permissible for the finalizing of a formal indictment, 85 days of provisional detention without even an informal indication of the charges to be brought against the suspect is not reasonable under international human rights law, given that nothing less than an individual's fundamental right to liberty is at issue. While it is true that the Appellant was served with the arrest warrant and redacted indictment within days of their issuance by a Judge of this Tribunal on 29 August 1998, at a minimum, the Appellant should have been informed as soon as possible after his arrest on 5 June 1998 of any reliable information possessed by the Prosecution with regard to why he was considered a

⁴⁷⁸ *Graužinis v. Lithuania*, para. 25.

⁴⁷⁹ *Brogan and Others v. The United Kingdom*, paras. 6, 62; *Tepe v. Turkey*, paras. 64-70; *Öcalan v. Turkey*, para. 106.

⁴⁸⁰ Rule 40 *bis* (A) and (E).

⁴⁸¹ The Appeals Chamber rejects the Prosecution's argument that its duty to inform the suspect as soon as possible of the reasons why he or she is considered a suspect and of any provisional charges against him or her was fulfilled by its questioning of the Appellant on 12 June 1998. See Appeal Hearing, T. 7 March 2005 p. 51.

⁴⁸² *Cf. Semanza*, Decision, 31 May 2000, para. 87 (finding that 18 days' delay between the time the Appellant was taken into custody and informed of the charges brought against him by the Prosecution constituted a violation of the Appellant's right to be promptly informed of the nature of the charges against him).

de la Convention européenne des droits de l'homme exige également qu'en cas d'arrestation le suspect soit aussitôt traduit devant un juge ou un magistrat habilité à exercer des fonctions judiciaires. La Cour européenne des droits de l'homme a précisé qu'un délai de deux jours au regard de cet article est permis⁴⁷⁸, mais que quatre jours et six heures constituent cependant une violation même dans des affaires complexes, sans parler d'une semaine ou plus⁴⁷⁹.

231. Bien que la Chambre de première instance n'ait pas abordé la question de la légalité de la détention de l'appelant au Bénin dans sa Décision du 8 mai 2000, la Chambre d'appel juge cependant qu'elle a commis une erreur en ne concluant pas que la détention au Bénin pour un total de 85 jours sans accusation et sans comparution dans le plus court délai devant un juge était manifestement illégale et constituait une violation des droits que l'appelant tient du Statut et du Règlement du Tribunal ainsi que des instruments internationaux relatifs aux droits de l'homme. La Chambre d'appel conclut que le Procureur est responsable de ces violations car il n'a pas formulé de demande dans un délai raisonnable en application des articles 40 et 40 *bis* du Règlement en vue de l'arrestation provisoire et du transfert de l'appelant au Tribunal. De plus, sa requête aurait dû comporter des chefs d'accusation provisoires qui auraient alors été notifiés à l'appelant⁴⁸⁰. Bien que les articles 40 et 40 *bis* du Règlement n'indiquent pas explicitement combien de temps un État peut maintenir un suspect en détention provisoire conformément à une requête présentée en vertu du premier de ces articles, la détention prolongée de l'appelant au Bénin était abusive. Il ressort du dossier de l'affaire que l'appelant n'a jamais été informé par un juge des charges pesant contre lui, même à titre provisoire, si ce n'est entre le 29 août 1998 et le 7 septembre 1998, lorsqu'on lui a officiellement notifié un mandat d'arrêt et une copie de la version caviardée de l'acte d'accusation dressé contre lui par le Tribunal⁴⁸¹. La Chambre d'appel estime qu'on ne peut considérer qu'un suspect, qui n'est informé des accusations portées à son encontre que 85 jours après son arrestation, a été informé «dans le plus court délai» ou «immédiatement» au sens du Statut ou du Règlement du Tribunal⁴⁸². En outre, bien qu'un délai de 90 jours soit permis aux fins de la préparation d'un acte d'accusation officiel, il n'est pas raisonnable au regard des normes du droit international relatif aux droits de l'homme de garder un suspect en détention provisoire pendant 85 jours sans même lui indiquer de manière formelle les charges retenues à son encontre, alors que c'est le droit fondamental d'un individu à la liberté qui est en cause. S'il est vrai que l'appelant a reçu notification du mandat d'arrêt et de l'acte d'accusation caviardé dans les jours qui ont suivi leur

⁴⁷⁸ *Graužinis c. Lituanie*, para. 25.

⁴⁷⁹ *Brogan et autres c. Royaume-Uni*, paras. 6 et 62; *Tepe c. Turquie*, paras. 64 à 70; *Öcalan c. Turquie*, para. 106.

⁴⁸⁰ Article 40 *bis* (A) et (E) du Règlement.

⁴⁸¹ La Chambre d'appel rejette l'argument du Procureur selon lequel celui-ci s'est acquitté de sa responsabilité d'informer le plus tôt possible le suspect des raisons pour lesquelles il est considéré comme tel et de tous autres chefs d'accusation provisoires retenus contre lui, en l'interrogeant le 12 juin 1998. Voir compte rendu de l'audience d'appel du 7 mars 2005, p. 57.

⁴⁸² Voir Décision *Semanza* du 31 mai 2000, para. 87 (concluant qu'un délai de 18 jours entre le moment où l'appelant a été placé en garde à vue et le moment où il a été informé de la nature des accusations portées contre lui par le Procureur constituait une violation du droit de l'appelant d'être informé dans le plus court délai de la nature des accusations portées contre lui).

suspect and as to any provisional charges against him⁴⁸³. The Appeals Chamber considers that the Prosecution was able to directly request the Benin authorities to do so on its behalf, given that it stated that when it sent its request letter of 6 June 1998 to the Benin authorities, it had compelling and consistent evidence of the Appellant's participation in the commission of crimes in Rwanda⁴⁸⁴.

232. Furthermore, the Appeals Chamber finds that as a result of the Prosecution's failure to make a Rule 40 *bis* transfer and provisional detention request within a reasonable period of time, the Appellant was not promptly brought before a Judge, either of this Tribunal or in Benin during the first period of his detention of 95 days. The Appeals Chamber notes that there are important purposes underlying the right to be promptly brought before a Judge in the requested State, *inter alia* : to allow for the suspect to be informed of the provisional charges against him or her; to ascertain the identity of the detained suspect⁴⁸⁵; to ensure that the suspect's rights are being respected while in detention; and to give the suspect an opportunity to voice any complaints. The Appeals Chamber considers that this violation of the Appellant's right is not solely attributable to the Prosecution. The Appeals Chamber notes in this context that the Benin Constitutional Court found, in response to a motion filed by the Appellant before it on 24 August 1998, that his detention from 5 June 1998 to 7 September 1998 by the Benin Director of Police and the Benin General Public Prosecutor Office, was in violation of the Constitution of Benin⁴⁸⁶. Nevertheless, although the violation is not solely attributable to the Tribunal, it has to be recalled that it was the Prosecution, thus an organ of the Tribunal, which was the requesting institution responsible for triggering the Appellant's apprehension, arrest and detention in Benin.

233. The Appeals Chamber emphasizes that "it is important that Rule 40 and Rule 40 *bis* be read together" and restrictively interpreted⁴⁸⁷. The purpose of Rule 40 and Rule 40 *bis* is to place time limits on the provisional detention of a suspect prior to issuance of an indictment⁴⁸⁸ and to ensure that certain rights of the suspect are

⁴⁸³ See *Semanza*, Decision, 31 May 2000, n. 104 (citing *Barayagwiza*, Decision, 3 November 1999).

⁴⁸⁴ Appeal Hearing, T. 7 March 2005 p. 51.

⁴⁸⁵ For example, Milan and Miroslav Vuckovic were transferred to the ICTY instead of Predrag and Nenad Banovic, see *Sikirica et al.*, None [*sic*] Parties Milan and Miroslav Vuckovic's Motion for an Order Compelling Discovery, 2 September 1999. See also *Kolundzija*, Order on Non-Party Motion for Discovery, 29 September 1999. Similarly, Agim Murtezi was brought before the ICTY on the basis of an indictment in which the true identity of the perpetrator was uncertain, see *Limaj et al.*, Order to Withdraw the Indictment against Agim Murtezi and Order for His Immediate Release, 28 February 2003.

⁴⁸⁶ Decision DCC 00-064, The Constitutional Court, *République du Bénin*, 24 October 2000. Article 18 (4) of the Benin Constitution stipulates that "no one can be held for a period beyond 48 hours without a decision from a Magistrate to whom the person is presented, this timeframe can only be exceeded exceptionally as provided for by law and that cannot exceed a period of eight days".

⁴⁸⁷ *Barayagwiza*, Decision, 3 November 1999, paras. 46, 53.

⁴⁸⁸ *Barayagwiza*, Decision, 3 November 1999, paras. 46, 53.

délivrance par un juge du Tribunal de céans le 29 août 1998, on aurait dû à tout le moins porter à sa connaissance le plus tôt possible après son arrestation le 5 juin 1998 les informations fiables en la possession du Procureur en ce qui concerne les raisons pour lesquelles il était considéré comme suspect et les accusations provisoires portées à son encontre⁴⁸³. La Chambre d'appel estime que le Procureur était en mesure de demander directement aux autorités béninoises de le faire en son nom, vu qu'il a déclaré au moment où il a communiqué sa requête du 6 juin 1998 auxdites autorités qu'il existait à l'endroit de l'appelant des indices graves et concordants de sa participation à la commission de crimes au Rwanda⁴⁸⁴.

232. En outre, la Chambre d'appel conclut que, comme le Procureur n'a pas présenté de requête aux fins de transfert et de placement en détention provisoire conformément à l'article 40 *bis* du Règlement dans un délai raisonnable, l'appelant n'a pas été traduit dans le plus court délai devant un juge, soit du Tribunal de céans soit au Bénin, durant sa première période de détention de 95 jours. La Chambre d'appel relève que le droit d'être traduit dans le plus court délai devant un juge dans l'État requis a plusieurs finalités importantes qui sont, notamment : de permettre au suspect d'être informé des accusations provisoires pesant contre lui, de vérifier son identité⁴⁸⁵, de s'assurer que ses droits sont respectés pendant qu'il est détenu et de lui donner la possibilité d'exprimer tous griefs. Selon la Chambre d'appel, cette violation du droit de l'appelant n'est pas imputable qu'au Procureur. Elle note dans ce contexte que la Cour constitutionnelle du Bénin a conclu, en réponse à une requête de l'appelant dont elle a été saisie le 24 août 1998, que sa détention, du 5 juin 1998 au 7 septembre 1998, par le Directeur de la police béninoise et le Parquet général béninois, était en violation de la Constitution béninoise⁴⁸⁶. Néanmoins, bien que la violation ne soit pas imputable uniquement au Tribunal, il convient de rappeler que c'était le Procureur, soit un organe du Tribunal, qui était l'institution qui, par sa demande, a provoqué l'interpellation, l'arrestation et le placement en détention de l'appelant au Bénin.

233. La Chambre d'appel souligne qu'«il importe d'interpréter l'article 40 à la lumière de l'article 40 *bis*» et que ces deux dispositions doivent faire l'objet d'une interprétation restrictive⁴⁸⁷. Les articles 40 et 40 *bis* ont pour objet de limiter la durée de la détention provisoire du suspect avant la délivrance d'un acte d'accusation⁴⁸⁸ et

⁴⁸³ *Ibid*, n° 104 (citant arrêt *Barayagwiza*, 3 novembre 1999).

⁴⁸⁴ Compte rendu de l'audience d'appel du 7 mars 2005, p. 51 [de la version anglaise].

⁴⁸⁵ Par exemple, Milan et Miroslav Vucković ont été transférés au TPIY au lieu de Predrag et Nenad Banovic, voir affaire *Sikirica et consorts*, *None [sic] Parties Milan and Miroslav Vucković's Motion for an Order Compelling Discovery*, 2 septembre 1999. Voir également affaire *Kolundzija*, *Order on Non-Party Motion for Discovery*, 29 septembre 1999. De même, Agim Murtezi a été traduit devant le TPIY sur la base d'un acte d'accusation dans lequel la véritable identité de l'auteur était incertaine, voir *Limaj et consorts*, *Order to Withdraw the Indictment against Agim Murtezi and Order for His Immediate Release*, 28 février 2003.

⁴⁸⁶ Décision DCC 00-064, Cour constitutionnelle, République du Bénin, 24 octobre 2000. L'article 18, paragraphe 4, de la Constitution béninoise est ainsi libellé : «Nul ne peut être détenu pendant une durée supérieure à quarante-huit heures que par la décision d'un magistrat auquel il doit être présenté. Ce délai ne peut être prolongé que dans des cas exceptionnellement prévus par la loi et qui ne peut excéder une période supérieure à huit jours».

⁴⁸⁷ Arrêt *Barayagwiza*, 3 novembre 1999, paras. 46 et 53.

⁴⁸⁸ *Id*.

respected during that time. The Appeals Chamber considers that it is not acceptable for the Prosecution, acting alone under Rule 40, to get around those time limits or the Tribunal's responsibility to ensure the rights of the suspect in provisional detention upon transfer to the Tribunal's custody under Rules 40 and 40 *bis*, by using its power under Rule 40 to keep a suspect under detention in a cooperating State⁴⁸⁹. The Appeals Chamber notes the Prosecution's submission, made at the Appeal Hearing, that the 95-days' delay in the Appellant's transfer to the custody of this Tribunal was due to the fact that the period in which the Appellant was arrested was an extremely busy one for the Prosecution with numerous ongoing investigations against dozens of suspects and numerous indictments being drafted simultaneously⁴⁹⁰. While the Appeals Chamber is sympathetic to the workload carried by the Prosecution at that time, in no way does this fact justify the Appellant's arbitrary provisional detention in Benin without charge for 85 days, and detention in Benin without appearance before a Judge for a total of 95 days.

iii. *The Appellant's Right to Counsel during Questioning*

234. Under Article 17 of the Tribunal's Statute, the Prosecution has the power to question suspects. When questioned, a suspect has the right to assistance of counsel, and legal assistance shall be assigned to him or her if he or she does not have sufficient means to pay for counsel.⁴⁹¹ This right to counsel during questioning is restated in Rule 42 of the Rules. Rule 42 also provides that a suspect may voluntarily waive that right but that questioning will cease if the suspect later expresses the desire for assistance of counsel, and will only resume once counsel has been provided⁴⁹².

235. The Trial Chamber found that prior to his interrogation by the Prosecution on 12 June 1998, the Appellant waived his right to counsel under Rule 42 (B). The Trial Chamber noted that the Appellant accepted the integrity of the tapes recording that

⁴⁸⁹ *Barayagwiza*, Decision, 3 November 1999, paras. 46, 53.

⁴⁹⁰ Appeal Hearing, T. 7 March 2005 p. 52.

⁴⁹¹ Article 17 provides, in relevant part that:

2. The Prosecutor shall have the power to question suspects to collect evidence and to conduct on-sight investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

⁴⁹² Rule 42 of the Rules states, in relevant part, that:

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it; ...

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

de garantir le respect de certains de ses droits durant cette période. La Chambre d'appel juge inacceptable que le Procureur, agissant seul en vertu de l'article 40, élude ces délais ou la responsabilité qu'a le Tribunal de garantir les droits du suspect placé en détention provisoire après son transfert au Tribunal conformément aux articles 40 et 40 *bis*, en usant du pouvoir que lui confère l'article 40 pour maintenir un suspect en détention dans un État qui coopère⁴⁸⁹. La Chambre d'appel note l'argument invoqué par le Procureur à l'audience d'appel selon lequel le délai de 95 jours pour le transfert et la remise de l'appelant au Tribunal était dû au fait que l'époque à laquelle celui-ci a été arrêté était extrêmement chargée pour le Bureau du Procureur appelé à mener de nombreuses enquêtes contre des dizaines de suspects et à établir dans un même temps de nombreux actes d'accusation⁴⁹⁰. Sans être indifférente devant la charge de travail que le Procureur devait assurer à l'époque, la Chambre d'appel n'en estime pas moins que cette situation ne justifie en aucun cas la détention provisoire arbitraire de l'appelant au Bénin sans accusation, pendant 85 jours, et la détention au Bénin sans comparution devant un juge pendant une durée totale de 95 jours.

iii) *Le droit de l'appelant à l'assistance d'un conseil pendant l'interrogatoire*

234. En vertu de l'article 17 du Statut du Tribunal, le Procureur est habilité à interroger des suspects. Tout suspect interrogé a le droit d'être assisté d'un conseil, et un défenseur doit lui être commis d'office s'il n'a pas les moyens de le rémunérer⁴⁹¹. Ce droit à l'assistance d'un conseil pendant l'interrogatoire est réaffirmé à l'article 42 du Règlement qui prévoit également qu'un suspect peut y renoncer mais que l'interrogatoire doit néanmoins cesser si le suspect, qui a initialement renoncé à son droit à l'assistance d'un conseil, s'en prévaut ultérieurement, l'interrogatoire ne devant reprendre que lorsque le suspect a obtenu l'assistance d'un conseil⁴⁹².

235. La Chambre de première instance a conclu qu'avant son interrogatoire par le Procureur le 12 juin 1998, l'appelant avait renoncé à son droit à l'assistance d'un conseil conformément à l'article 42 (B) du Règlement. Elle a noté que l'appelant a reconnu l'intégrité des cassettes sur lesquelles l'enregistrement de cet interrogatoire a

⁴⁸⁹ *Id.*

⁴⁹⁰ Compte rendu de l'audience d'appel du 7 mars 2005, p. 52 [de la version anglaise].

⁴⁹¹ Les dispositions pertinentes de l'article 17 du Statut sont ainsi libellées :

2. Le Procureur est habilité à interroger les suspects ... à réunir des preuves et à procéder sur place à des mesures d'instruction. Dans l'exécution de ces tâches, le Procureur peut, selon que de besoin, solliciter le concours des autorités de l'État concerné.

3. Tout suspect interrogé a le droit d'être assisté d'un conseil de son choix, y compris celui de se voir attribuer d'office un défenseur, sans frais, s'il n'a pas les moyens de le rémunérer ...

⁴⁹² Les dispositions pertinentes de l'article 42 du Règlement sont ainsi libellées :

A) Avant d'être interrogé par le Procureur, le suspect est informé de ses droits dans une langue qu'il parle et comprend, à savoir :

i) Le droit à l'assistance d'un conseil de son choix ou, s'il est indigent, à la commission d'office d'un conseil à titre gratuit;

B) L'interrogatoire d'un suspect ne peut avoir lieu qu'en présence de son conseil, à moins que le suspect n'ait renoncé à son droit à l'assistance d'un conseil. L'interrogatoire doit néanmoins cesser, si un suspect qui a initialement renoncé à son droit à l'assistance d'un conseil, s'en prévaut ultérieurement; l'interrogatoire ne doit reprendre que lorsque le suspect a obtenu de son chef ou d'office l'assistance d'un conseil.

interview. Furthermore, the Trial Chamber considered that the Appellant conceded that he had been informed of his rights prior to the interview and subsequently waived his right to counsel. Thus, the Trial Chamber concluded that because the Appellant voluntarily waived his right to counsel during questioning, there had been no violation of the Appellant's rights under Rule 42 of the Rules⁴⁹³.

236. The Appeals Chamber finds that the Trial Chamber did not err in finding that there was no violation of the Appellant's rights during the interrogation of 12 June 1998. The Appeals Chamber notes that on appeal, the Appellant did not challenge the Trial Chamber's conclusion that there had been voluntary waiver or his concession of the same, and only summarily stated that his right to counsel had been violated under Rule 42. The Appeals Chamber sees no reason to further discuss the apparently undisputed question whether the waiver was voluntary.

2. Alleged Violations during Period from Transfer to Arusha until Initial Appearance

237. With regard to the Appellant's detention at the UNDF in Arusha until his initial appearance before this Tribunal ("second period of detention"), the Appeals Chamber notes that the undisputed facts are as follows. After being transferred to the seat of the Tribunal on 9 September 1998, proceedings were initiated the following day, 10 September 1998, to assign counsel to the Appellant⁴⁹⁴. A separate initial appearance for the Appellant was scheduled for 19 October 1998. On 14 October 1998, the Prosecution filed a redacted indictment for the purpose of a joint initial appearance by the Appellant and several others scheduled for 24 November 1998⁴⁹⁵. Both the separate and joint initial appearances were subsequently postponed. On 9 November 1998, the Appellant filed a *pro se* Motion challenging the illegality of his arrest and detention⁴⁹⁶. Finally, on 2 February 1999, Professor Lennox Hinds was assigned as counsel on the Appellant's behalf. Following assignment of counsel, an initial appearance was rescheduled for 10 March 1999, but was postponed at the request of counsel. Eventually, the Appellant's first initial appearance was held on 7 and 8 April 1999. Thus, the Appellant was in the custody of the Tribunal for a total of 211 days prior to any initial appearance during which he was without assigned counsel for 147 days.

(a) The Parties' Submissions

238. The Appellant submits that his rights under the Tribunal's Rules and Directives were violated during the second period of detention. First, the Appellant argues that his right to counsel was unconscionably violated when considering that he remained

⁴⁹³ Decision of 8 May 2000, paras. 37-39.

⁴⁹⁴ Memorandum by Deputy Chief of the Tribunal's Legal and Defence Facility Management ("LDFMS"), 10 December 1999; see also Decision of 8 May 2000, para. 25.

⁴⁹⁵ Decision of 8 May 2000, Preamble.

⁴⁹⁶ Appellant's *pro se* Requête portant sur l'arrestation arbitraire et la détention illégale du suspect Juvénal Kajelijeli, 9 November 1998, filed 20 November 1998.

été consigné. De plus, elle a estimé que l'appelant a reconnu avoir été informé de ses droits avant l'interrogatoire et qu'il a ensuite renoncé à son droit à l'assistance d'un conseil. Partant, la Chambre de première instance a conclu qu'il n'y a pas eu violation des droits de l'appelant au regard de l'article 42 du Règlement, l'appelant ayant renoncé à son droit à l'assistance d'un conseil durant l'interrogatoire⁴⁹³.

236. La Chambre d'appel conclut que la Chambre de première instance n'a pas commis d'erreur en jugeant que les droits de l'appelant n'ont point été violés durant l'interrogatoire du 12 juin 1998. La Chambre d'appel relève que l'appelant n'a pas contesté en appel la conclusion dégagée en première instance, à savoir qu'il avait de son plein gré renoncé à ce droit ou reconnu cette renonciation et qu'il s'est borné à affirmer sans plus d'explications que son droit à l'assistance d'un conseil a été violé au regard de l'article 42 du Règlement. La Chambre d'appel ne voit pas de raison d'examiner plus avant la question apparemment non contestée de savoir si l'appelant a renoncé à ce droit de son plein gré.

2. Violations qui auraient été commises entre le transfert à Arusha et la comparution initiale

237. S'agissant de la détention de l'appelant au Quartier pénitentiaire à Arusha jusqu'à sa comparution initiale devant le Tribunal la («seconde période de détention»), la Chambre d'appel note que les faits non contestés se sont déroulés comme suit : après son transfert au siège du Tribunal le 9 septembre 1998, des démarches ont été entreprises le lendemain, le 10 septembre 1998, en vue de la commission d'office d'un conseil pour la défense de l'appelant⁴⁹⁴. La comparution initiale de celui-ci uniquement était prévue pour le 19 octobre 1998. Le 14 octobre 1998, le Procureur a déposé un acte d'accusation caviardé en vue de la comparution initiale de l'appelant avec plusieurs coaccusés le 24 novembre 1998⁴⁹⁵. Par la suite, les deux comparutions initiales de l'accusé, seul ou avec ses coaccusés, ont été reportées. Le 9 novembre 1998, l'appelant a déposé en son propre nom une requête dénonçant l'illégalité de son arrestation et de sa détention⁴⁹⁶. Enfin, le 2 février 1999, M^e Lennox Hinds a été commis à la défense de l'appelant. Une nouvelle comparution initiale a été alors programmée pour le 10 mars 1999, mais elle a été reportée à la demande du conseil. Finalement, la comparution initiale de l'appelant a eu lieu les 7 et 8 avril 1999. Il est donc resté sous la garde du Tribunal pendant 211 jours au total avant sa comparution initiale et, pendant 147 jours, il n'avait pas de conseil pour assurer sa défense.

a) Les arguments des parties

238. L'appelant fait valoir que ses droits garantis par le Règlement et les directives du Tribunal ont été violés pendant la seconde période de détention. Premièrement,

⁴⁹³ Décision du 8 mai 2000, paras. 37 à 39.

⁴⁹⁴ Mémoire déposé le 10 décembre 1999 par l'adjoint au Chef de la Section de l'administration des questions relatives aux conseils de la défense et au quartier pénitentiaire; voir aussi Décision du 8 mai 2000, para. 25.

⁴⁹⁵ Décision du 8 mai 2000, préambule.

⁴⁹⁶ Requête portant sur l'arrestation arbitraire et la détention illégale du suspect Juvénal Kajelijeli, 9 novembre 1998, déposée par l'appelant lui-même, le 20 novembre 1998.

in detention for 147 days before Defence counsel was assigned to him. He contends that the Trial Chamber erred in its decision of 8 May 2000 in finding that his right to counsel was not violated on the basis of his lack of cooperation with the Tribunal's Registry in the assignment of counsel. The Appellant points out that under the Tribunal's Rules and Directives, duty counsel could have been assigned to him in the interim. As a consequence of not having counsel during this period, the Appellant notes that he had to file his first challenge to the Tribunal's jurisdiction in November 1998 *pro se*⁴⁹⁷.

239. Second, the Appellant submits that his right to an initial appearance before a Trial Chamber or a Judge without delay upon transfer to the Tribunal's custody under Rule 62 of the Rules was violated. The Appellant argues that the delay in assigning him permanent counsel was no excuse for delaying his initial appearance given that duty counsel could have been assigned to him for the specific purpose of representing him at the appearance. As a consequence, the Appellant notes that he was unconscionably prevented from raising before a Judge any issues he had with regard to violation of his rights or to his case generally for 211 days⁴⁹⁸.

240. The Prosecution responds that the Appellant fails to show that the Trial Chamber erred in finding that his right to counsel was not violated upon transfer to Arusha. The Prosecution submits that a Trial Chamber may take into consideration the conduct of the accused or counsel as a factor when determining whether there has been undue delay in the assignment of counsel. The Prosecution notes that an indigent accused has no absolute right to counsel of his or her choice and that the Appellant's conduct, by repeatedly choosing counsel not on the Registrar's list, contributed to the delay. The Prosecution argues that the Appellant fails to rebut the Trial Chamber's finding that he frustrated serious efforts by the Registry to secure assigned counsel on his behalf, a process which the Registry initiated as soon as the Appellant was transferred to Arusha⁴⁹⁹.

241. Finally, the Prosecution responds that the Appellant fails to demonstrate any error on the part of the Trial Chamber in finding that his right to an initial appearance under Rule 62 was not violated. The Prosecution contends that the delay was not unreasonable in light of the Appellant's frustration of the Registry's efforts to assign him counsel. The Prosecution argues that because the Appellant requested counsel, because Rule 62 (A) (i) requires the Trial Chamber to satisfy itself that the right of an accused to counsel is respected, and because an initial appearance under Rule 62 is a significant step in the proceedings before the Tribunal that includes, among other things, the entry by an accused of a plea, assignment of counsel to the Appellant was necessary prior to holding the initial appearance. Furthermore, the Prosecution points out that the importance of counsel at the initial appearance is evidenced by the fact that once the Appellant was assigned counsel, counsel further postponed the appearance in order to examine the indictment for irregularities. This postponement, in the

⁴⁹⁷ Appeal Hearing, T. 7 March 2005 p. 12.

⁴⁹⁸ Appeal Hearing, T. 7 March 2005 pp. 12, 13.

⁴⁹⁹ Respondent's Brief, paras. 261, 263.

l'appelant soutient que son droit à l'assistance d'un conseil a été violé de manière inadmissible si on considère qu'il a passé 147 jours en détention avant qu'un conseil ne lui soit attribué. Il soutient que le Tribunal a versé dans l'erreur en décidant le 8 mai 2000 que son droit à l'assistance d'un conseil n'avait pas été violé du fait de son manque de collaboration avec le Greffe du Tribunal dans le processus de commission d'office d'un conseil. L'appelant souligne que, selon le Règlement et les directives du Tribunal, un conseil de permanence aurait pu lui être commis d'office dans l'intervalle. Du fait qu'il n'avait pas de conseil pendant cette période, l'appelant signale qu'il a dû présenter lui-même sa première requête contestant la compétence du Tribunal en novembre 1998⁴⁹⁷.

239. Deuxièmement, l'appelant soutient que son droit, que lui reconnaît l'article 62 du Règlement, de comparaître sans délai, après son transfert au Tribunal, devant une Chambre de première instance ou devant un juge désigné parmi ses membres, a été violé. Il soutient que le retard enregistré dans la commission d'un conseil permanent à sa défense ne pouvait pas justifier le retard de sa comparution initiale étant donné qu'un conseil de permanence aurait pu lui être commis à seule fin de le représenter lors de cette comparution. En conséquence, l'appelant fait observer que, pendant 211 jours, il a été empêché de manière inadmissible de saisir un juge de toute question concernant la violation de ses droits ou son dossier en général⁴⁹⁸.

240. Le Procureur répond que l'appelant n'a pas démontré que la Chambre de première instance a commis une erreur lorsqu'elle a conclu que son droit à l'assistance d'un conseil n'avait pas été violé après son transfert à Arusha. Il fait valoir que la conduite de l'accusé ou de son conseil est un facteur dont une Chambre de première instance peut tenir compte pour déterminer s'il y a eu retard excessif dans l'attribution d'un conseil. Le Procureur fait observer qu'un accusé indigent n'a aucun droit absolu au conseil de son choix et qu'en l'espèce, la conduite de l'appelant, qui n'a cessé de choisir des conseils qui ne figuraient pas sur la liste du Greffier, a contribué au retard accusé dans la commission d'office d'un conseil. Il fait valoir que l'appelant ne réfute pas la conclusion de la Chambre de première instance qu'il a entravé les efforts réels que le Greffe avait faits pour lui attribuer un conseil, et ce dès après son transfert à Arusha⁴⁹⁹.

241. Enfin, le Procureur répond que l'appelant ne démontre pas que la Chambre de première instance a commis une erreur en concluant à la non-violation de son droit de comparaître sans délai selon l'article 62 du Règlement. Il argue que ce retard n'était pas déraisonnable, l'appelant ayant entravé les efforts déployés par le Greffe pour commettre un conseil à sa défense. Il fait valoir que, l'appelant ayant demandé à être représenté par un conseil, il était nécessaire de lui en commettre un avant la comparution initiale car, d'une part, l'article 62 (A) (i) du Règlement fait obligation à la Chambre de première instance de s'assurer que le droit de l'accusé à l'assistance d'un conseil est respecté et, d'autre part, la comparution initiale prévue par l'article 62 du Règlement est une étape importante de la procédure devant le Tribunal dès lors que l'appelant y est notamment appelé à dire s'il plaide coupable ou non coupable. En outre, le Procureur souligne que l'importance de l'assistance d'un conseil lors de la comparution initiale ressort du fait que dès que l'appelant a bénéficié de la com-

⁴⁹⁷ Compte rendu de l'audience d'appel du 7 mars 2005, pp. 13 et 14.

⁴⁹⁸ *Ibid.*, pp. 13 à 16.

⁴⁹⁹ Mémoire de l'intimé, paras. 261 et 263.

Prosecution's view, is further evidence that the delay was not unreasonable. Finally, the Prosecution submits that even if the delay in holding the initial appearance is not entirely imputable to the Appellant⁵⁰⁰, the delay itself caused him no material prejudice because throughout this time, the Appellant was fully aware of the charges against him and the Registry made all attempts to ensure protection of his rights⁵⁰¹.

(b) *Discussion*

242. The Appeals Chamber recalls its previous finding that during the second period of detention in Arusha, the Appellant had the status of an accused under Rules 2 and 47 of the Rules and thus, all of the provisions in the Tribunal's Statute and Rules relevant to the rights of an accused applied⁵⁰².

(i) *The Right to Counsel*

243. Under Article 20 (4) (d) of the Tribunal's Statute and Rules 44 *bis* (D) and 45 of the Rules, an accused is entitled, as a minimum guarantee, to assistance of counsel of his or her own choosing⁵⁰³. Where an accused is indigent, the Tribunal's Registry shall assign counsel to him or her without requiring payment, according to established procedure⁵⁰⁴.

244. The Trial Chamber held that there was no violation of the Appellant's right to counsel because

“it was clear that serious efforts were made by the Registry to secure an assigned Counsel for the Accused [and] that the Accused frustrated these efforts by selecting Counsel whose names were not on the Registrar's drawn up list”,

among other delay tactics. Thus, in the Trial Chamber's view, the Appellant abused his right to counsel in his failure to follow established procedure⁵⁰⁵.

245. The Appeals Chamber finds that the Trial Chamber erred in this finding. Rule 44 *bis* of the Rules clearly obliges the Registrar to provide a detainee with duty counsel, with no prejudice to the accused's right to waive the right to counsel. It constitutes a violation of Rule 44 *bis* of the Rules and provision 10 *bis* of the Directive on the Assignment of Defence Counsel not to assign duty counsel, in spite of ongoing efforts to assign counsel of choice in light of the outstanding initial appearance. Also,

⁵⁰⁰ The Appeals Chamber notes that the Prosecution concedes that it bears some responsibility for the scheduling of the initial appearance, although the Prosecution contends that “primary responsibility ... rests with the Registry”. The Prosecution points out that because the Appellant was initially named in an indictment with seven co-accused, the Registry was seeking to organize an initial appearance for all of the accused and was attempting to first assign counsel to represent each of the accused. See Respondent's Brief, paras. 262, 265.

⁵⁰¹ Respondent's Brief, paras. 262-267.

⁵⁰² See *supra* para. 217.

⁵⁰³ See also ICCPR, art. 14 (3) (d); ECHR, art. 6 (3) (c); ACHR, art. 8 (2) (d).

⁵⁰⁴ See Directive on the Assignment of Defence Counsel.

⁵⁰⁵ Decision of 8 May 2000, paras. 40, 41.

mission d'office d'un conseil, celui-ci a demandé de reporter à nouveau cette comparution pour vérifier les irrégularités éventuelles de l'acte d'accusation. De l'avis du Procureur, ce report prouve une fois de plus que le retard n'était pas déraisonnable. Enfin, le Procureur fait valoir que, même si l'appelant n'est pas entièrement responsable du retard enregistré dans la tenue de la comparution initiale⁵⁰⁰, ce retard ne lui a causé aucun préjudice important dès lors que, pendant tout ce temps, il était parfaitement au courant des accusations portées contre lui et que le Greffier faisait tout son possible pour sauvegarder ses droits⁵⁰¹.

b) *Discussion*

242. La Chambre d'appel rappelle qu'elle a conclu que, pendant la seconde période de détention à Arusha, l'appelant avait le statut d'accusé au sens des articles 2 et 47 du Règlement et que, de ce fait, toutes les dispositions du Statut et du Règlement du Tribunal régissant les droits d'un accusé trouvaient à s'appliquer⁵⁰².

i) *Droit à l'assistance d'un conseil*

243. L'article 20 (4) (d) du Statut et les articles 44 *bis* (D) et 45 du Règlement du Tribunal reconnaissent à l'accusé, à titre de garantie minimale, le droit à l'assistance d'un défenseur de son choix⁵⁰³. Lorsque l'accusé est indigent, le Greffe du Tribunal lui commet d'office un conseil à titre gratuit aux conditions prévues⁵⁰⁴.

244. La Chambre de première instance a jugé qu'il n'y avait pas eu violation du droit de l'appelant à l'assistance d'un défenseur parce qu'il

«est clair que des efforts réels ont été faits par le Greffe aux fins de la commission d'office d'un conseil à l'accusé [et qu'il] est également établi que l'accusé a contrecarré ces démarches en choisissant des avocats qui ne figuraient pas sur la liste établie par le Greffier»,

entre autres tactiques dilatoires utilisées. Elle a ainsi estimé qu'en refusant de respecter la procédure établie, l'appelant a abusé de son droit à l'assistance d'un conseil⁵⁰⁵.

245. La Chambre d'appel considère que cette conclusion de la Chambre de première instance est entachée d'erreur. L'article 44 *bis* du Règlement enjoint en effet clairement au Greffier de fournir au détenu un conseil de permanence, l'accusé conservant toujours la faculté de renoncer à son droit à l'assistance d'un conseil. Indé-

⁵⁰⁰ La Chambre d'appel note que le Procureur reconnaît qu'il a une certaine responsabilité dans le report de la comparution initiale, bien qu'il affirme que «la plus grande responsabilité... incombe au Greffier» [traduction]. Le Procureur souligne que dans la mesure où l'appelant avait d'abord été inclus dans un acte d'accusation mettant aussi en cause sept coaccusés, le Greffe a cherché à organiser une comparution initiale pour tous les accusés et a tenté d'abord de commettre un conseil pour la défense de chacun des accusés. Voir mémoire de l'intimé, paras. 262 et 265.

⁵⁰¹ Mémoire de l'intimé, paras. 262 à 267.

⁵⁰² Voir *supra*, para. 217.

⁵⁰³ Voir aussi Pacte international relatif aux droits civils et politiques, art. 14 (3) (d); Convention européenne des droits de l'homme, art. 6 (3) (c); Convention américaine relative aux droits de l'homme, art. 8 (2) (d).

⁵⁰⁴ Voir Directive relative à la commission d'office de conseil de la Défense.

⁵⁰⁵ Décision du 8 mai 2000, paras. 40 à 41.

the wording of Rule 44 *bis* (D) is sufficiently clear (“unrepresented at any time”) to find that such a duty exists from the very moment of transfer to the Tribunal and is not confined to purposes of the initial appearance only.

ii. *The Right to an Initial Appearance*

246. Under Article 19 (3) of the Statute and Rule 62 of the Rules, once an accused is taken into the custody of the Tribunal, the accused is to appear before a Trial Chamber or a Judge *without delay* to be formally charged. The Trial Chamber or Judge shall read the accused the indictment, satisfy itself that the rights of the accused are being respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea.

247. The Trial Chamber found that the Appellant’s right to an initial appearance without delay was not violated because the record reflects that the Appellant contributed to the delay in assignment of counsel and thus was to blame for the delay in the scheduling of his initial appearance⁵⁰⁶.

248. The Appeals Chamber does not agree with the Trial Chamber in this regard. The difficulties in assigning the Appellant counsel in this case should not have been an obstacle for the Tribunal to ensure that the Appellant’s initial appearance was scheduled without delay. The Appeals Chamber agrees with the Prosecution that it is important and indeed ideal for an accused to have the assistance of counsel at the initial appearance to provide guidance, in particular, for entering a plea. Furthermore, the Appeals Chamber considers that Rule 62 (A) (i) states that at the initial hearing, the Trial Chamber or Judge shall “[s]atisfy itself or himself that the right of the accused to counsel is respected”. In addition, the Trial Chamber or Judge could ordered assignment of duty counsel to the Appellant for purposes of representation at the initial appearance and would have had the opportunity to facilitate the Registry’s further attempts to assign the Appellant counsel.

249. Furthermore, the Appeals Chamber notes that apart from the assignment of counsel issue and the Appellant’s role in creating delay, the Registry conceded that in this case, the initial appearance was also delayed in part due to the fact that the Appellant had been jointly indicted with several other accused. It was difficult at the time for the Tribunal’s Court Management Section to find a date acceptable to all, with all being duly represented by counsel⁵⁰⁷.

⁵⁰⁶ Decision of 8 May 2000, para. 45.

⁵⁰⁷ Decision of 8 May 2000, para. 28 referring to the written brief of 7 February 2000 filed by Mr. Antoine Mindua, a representative of the Registry.

pendamment des efforts déployés pour commettre un conseil à la défense d'un accusé, le fait de ne pas lui commettre d'office un conseil de permanence en vue de la comparution initiale constitue une violation des dispositions de l'article 44 *bis* du Règlement et de l'article 10 *bis* de la Directive relative à la commission d'office de conseil de la Défense. De plus, le libellé de l'article 44 *bis* (D) est suffisamment clair («En cas de non-représentation [...] à tout moment») pour indiquer que cette obligation s'impose à partir du moment précis du transfert au Tribunal et qu'elle ne se limite pas uniquement aux impératifs de la comparution initiale.

ii) *Droit à la tenue d'une comparution initiale*

246. Aux termes des articles 19 (3) du Statut et 62 du Règlement, après son transfert au Tribunal, l'accusé comparaît *sans délai* devant une Chambre de première instance ou devant un juge désigné parmi ses membres pour être officiellement mis en accusation. La Chambre de première instance ou le juge désigné donne lecture à l'accusé de l'acte d'accusation, s'assure que ses droits sont respectés, confirme qu'il a compris le contenu de l'acte d'accusation et l'invite à dire s'il plaide coupable ou non coupable.

247. La Chambre de première instance a conclu que le droit de l'appelant à une comparution initiale sans délai n'avait pas été violé parce qu'il ressortait du dossier que l'appelant avait contribué au retard intervenu dans la commission d'office de son conseil et était donc responsable du retard enregistré dans la fixation de la date de la comparution initiale⁵⁰⁶.

248. La Chambre d'appel ne partage pas l'opinion de la Chambre de première instance sur ce point. Les difficultés rencontrées pour commettre d'office un conseil à l'appelant en l'espèce n'empêchaient pas le Tribunal de veiller à ce que l'accusé fasse sa comparution initiale sans délai. Elle convient avec le Procureur qu'il est important et en effet idéal que, lors de sa comparution initiale, l'accusé soit assisté par un conseil pour le guider, surtout en ce qui concerne le point de savoir s'il doit plaider coupable ou non coupable. En outre, la Chambre d'appel considère que l'article 62 (A) (i) du Règlement dispose que lors de la comparution initiale, la Chambre de première instance ou le juge désigné «s'assure que le droit de l'accusé à l'assistance d'un conseil est respecté». De même, la Chambre de première instance ou le juge aurait pu ordonner la commission d'office d'un conseil de permanence à l'appelant pour le représenter lors de sa comparution initiale et aurait eu la possibilité de faciliter les démarches entreprises ultérieurement par le Greffier pour commettre un conseil pour la défense de l'appelant.

249. De même, la Chambre d'appel note qu'indépendamment de la question de la commission d'office d'un conseil et du rôle joué par l'appelant dans le retard enregistré à cet égard, le Greffe a reconnu qu'en l'espèce, la comparution initiale de l'appelant a aussi été retardée en partie parce que celui-ci avait été mis en accusation avec plusieurs autres personnes. Il était difficile pour la Section de l'administration des Chambres de trouver une date acceptable pour tous, chacun étant dûment représenté par un conseil⁵⁰⁷.

⁵⁰⁶ *Ibid.*, para. 45.

⁵⁰⁷ *Ibid.*, para. 28 relatif au mémoire du 7 février 2000 déposé par M. Antoine Mindua, représentant du Greffe.

250. The Appeals Chamber emphasizes that Rule 62 is unequivocal that an initial appearance is to be scheduled without delay. There are other purposes for an initial appearance apart from entering a plea including : reading out the official charges against the accused, ascertaining the identity of the detainee⁵⁰⁸, allowing the Trial Chamber or Judge to ensure that the rights of the accused while in detention are being respected, giving an opportunity for the accused to voice any complaints, and scheduling a trial date or date for a sentencing hearing, in the case of a guilty plea, without delay⁵⁰⁹. The Appeals Chamber therefore finds that, under the plain meaning of Rule 62, the 211-day delay between the Appellant's transfer to the Tribunal and the initial appearance before a Judge of this Tribunal constitutes extreme undue delay.

3. Conclusion

251. On the basis of the foregoing, the Appeals Chamber concludes that during the first period of the Appellant's arrest and detention, the Appellant's rights were violated as follows. First, the Appellant's right to be informed of the reasons for his arrest at the time of his arrest as required under Article 9 (2) of the ICCPR was not properly ensured. Second, the Appellant was arbitrarily detained in Benin for 85 days without an arrest warrant and a transfer order from the Tribunal being submitted to the Benin authorities by the Prosecution within a reasonable time and without being promptly informed of the charges against him in violation of Rule 40 of the Rules and Articles 9 (2) and 14 (3) (a) of the ICCPR. Finally, the Appellant was detained in Benin for a total of 95 days without being brought before a Judge or an official acting in a judicial capacity in clear violation of Article 9 of the ICCPR.

252. In this case, irrespective of any responsibility of Benin for violations of the Appellant's rights during the first period of arrest and detention, on which this Tribunal does not have competence to pronounce, the Appeals Chamber finds that fault is attributable to the Prosecution for violations to the Appellant's rights during this first period of arrest and detention. The Prosecution failed to effect its prosecutorial duties with due diligence out of respect for the Appellant's rights following its Rule 40 request to Benin. Thus, the Appellant is entitled to a remedy from the Tribunal.

253. With regard to the violations of the Appellant's right to counsel and to an initial appearance without delay during the second period of his detention in the custody of the Tribunal, the Appeals Chamber finds that responsibility for those violations is attributable to the Tribunal, notwithstanding any attribution of fault to the Appellant. Under Article 19 (1) of the Tribunal's Statute, the Appellant's right to an expeditious trial before this Tribunal that fully respects his rights as an accused is absolute. The Appellant, therefore, is entitled to a remedy in this Judgement⁵¹⁰.

⁵⁰⁸ See *supra* n. 484.

⁵⁰⁹ See generally Rule 62.

⁵¹⁰ Cf. *Barayagwiza*, Decision, 3 November 1999, para. 73.

250. La Chambre d'appel souligne que l'article 62 du Règlement dit clairement que la comparution initiale doit avoir lieu sans délai. Cette formalité n'a pas pour seul objet de demander à l'accusé s'il plaide coupable ou non coupable, elle a aussi pour objet de lui donner lecture de l'acte d'accusation et de vérifier l'identité du détenu⁵⁰⁸, de permettre à la Chambre de première instance ou au juge désigné de s'assurer que les droits de l'accusé en détention sont respectés, de donner à celui-ci l'occasion d'exprimer des plaintes éventuellement et de fixer sans délai la date du procès ou de l'audience pour le prononcé de la peine s'il plaide coupable⁵⁰⁹. La Chambre d'appel considère donc qu'au regard du sens ordinaire de l'article 62, le délai de 211 jours qui s'est écoulé entre le transfert de l'appelant au Tribunal et sa comparution initiale devant un de ses juges constitue un délai tout à fait excessif.

3. Conclusion

251. Au vu de ce qui précède, la Chambre d'appel conclut que pendant la première période de l'arrestation et de la détention de l'appelant, ses droits ont été violés de la manière suivante : tout d'abord, le droit de l'appelant d'être informé, au moment de son arrestation, civils et politiques, n'a pas été adéquatement respecté. Ensuite, l'appelant a été détenu arbitrairement au Bénin pendant 85 jours sans que le Procureur transmette dans un délai raisonnable aux autorités béninoises un mandat d'arrêt et une ordonnance de transfert émanant du Tribunal et sans qu'il soit informé dans le plus court délai des accusations portées contre lui, en violation de l'article 40 du Règlement et des articles 9 (2) et 14 (3) (a) du Pacte international relatif aux droits civils et politiques. Enfin, l'appelant a été détenu au Bénin pendant 95 jours au total sans être traduit devant un juge ou une autre autorité exerçant des fonctions judiciaires, en violation flagrante de l'article 9 du Pacte international relatif aux droits civils et politiques.

252. En l'espèce, quelle que soit la responsabilité du Bénin dans la violation des droits de l'appelant au cours de sa première période d'arrestation et de détention, à l'égard de laquelle le Tribunal de céans n'est pas habilité à se prononcer, la Chambre d'appel estime que le Procureur est responsable de la violation des droits de l'appelant pendant cette période. Le Procureur ne s'est pas acquitté de ses obligations en matière de poursuite avec la diligence voulue dans le respect des droits de l'appelant, après avoir saisi les autorités béninoises de sa requête en vertu de l'article 40 du Règlement. L'appelant a donc droit à une réparation de la part du Tribunal.

253. S'agissant de la violation des droits de l'appelant à l'assistance d'un conseil et à une comparution initiale sans délai au cours de sa seconde période de détention au quartier pénitentiaire, la Chambre d'appel estime que le Tribunal est responsable de ces violations nonobstant toute faute qu'aurait commise l'appelant. Selon l'article 19 (1) du Statut du Tribunal, le droit de l'appelant d'être jugé rapidement par le Tribunal dans le plein respect de ses droits d'accusé est absolu. Par conséquent, l'appelant a droit à une réparation que fixera le présent arrêt⁵¹⁰.

⁵⁰⁸ Voir *supra* n° 484.

⁵⁰⁹ Voir en général l'article 62.

⁵¹⁰ Cf. arrêt *Barayagwiza*, 3 novembre 1999, para. 73.

4. *The Remedy*

254. Having found that the Trial Chamber erred in its Trial Judgement in failing to find that the Appellant's fundamental rights were violated during his arrest and detention prior to his initial appearance due to its decision of 8 May 2000, the Appeals Chamber now turns to the issue of an appropriate remedy.

255. The Appeals Chamber recalls that it has already considered that dismissing this case for lack of jurisdiction as a remedy would be disproportionate⁵¹¹. However, the Appeals Chamber reiterates that any violation of the accused's rights entails the provision of an effective remedy pursuant to Article 2 (3) (a) of the ICCPR. The Appeals Chamber considers that under the jurisprudence of this Tribunal, where the Appeals Chamber has found on interlocutory appeal that an accused's rights have been violated, but not egregiously so, it will order the Trial Chamber to reduce the accused's sentence if the accused is found guilty at trial⁵¹². With this in mind, the Appeals Chamber will take into consideration its findings here on violations of the Appellant's rights when it turns to the task of determining the Appellant's sentence in this Judgement in order to provide for an appropriate remedy.

XX. ALLEGED ERROR IN DENYING MOTIONS SEEKING DISCLOSURE OF PRIOR STATEMENTS AND EXCLUSION OF THE TESTIMONY OF DETAINED PROSECUTION WITNESSES (GROUND OF APPEAL 23)

256. The Appellant submits that the Trial Chamber committed errors of law in denying two interlocutory Defence motions relating to prior statements of detained Prosecution Witnesses GAO, GDD, GAP, and GDQ⁵¹³. In the first decision, the Trial Chamber denied the Appellant's request that the Prosecution be ordered to disclose, pursuant to Rule 68 of the Rules, prior statements given by detained witnesses to Rwandan authorities on the basis that the Prosecution was not shown to be in possession of such statements⁵¹⁴. In the second decision, the Trial Chamber dismissed the Appellant's motion to exclude the evidence given by the detained Prosecution witnesses on the ground that the Defence had the opportunity to cross-examine the witnesses⁵¹⁵.

257. The Appellant first argues that these prior statements should have been disclosed by the Prosecution to the Defence pursuant to Rule 68 because they "could

⁵¹¹ See *supra* para. 206.

⁵¹² See *Semanza*, Decision, 31 May 2000, para. 129; *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), para. 75.

⁵¹³ Appellant's Brief, paras. 373-377.

⁵¹⁴ *Kajelijeli*, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001.

⁵¹⁵ *Kajelijeli*, Decision on Kajelijeli's Motion to Exclude Statements and Testimonies of Detained Witnesses, 14 June 2002.

4. Réparation

254. Ayant estimé que la Chambre de première instance a entaché son jugement d'une erreur en ne concluant pas à la violation des droits fondamentaux de l'appelant au cours de son arrestation et de sa détention avant sa comparution initiale du fait de la décision qu'elle a rendue le 8 mai 2000, la Chambre d'appel se penche maintenant sur la question de la réparation qu'il convient d'accorder.

255. La Chambre d'appel rappelle qu'elle a déjà estimé que le rejet de l'affaire pour cause d'incompétence serait une réparation disproportionnée⁵¹¹. Cependant, elle réaffirme que tout accusé dont les droits ont été violés dispose d'un recours utile conformément à l'article 2 (3) (a) du Pacte international relatif aux droits civils et politiques. Selon la jurisprudence du Tribunal de céans, dans le cas où la Chambre d'appel, sur appel interlocutoire, conclut à la violation des droits de l'accusé même si celle-ci ne revêt pas un caractère flagrant, elle ordonnera à la Chambre de première instance de réduire la peine qui sera infligée à l'accusé s'il est jugé coupable à l'issue du procès⁵¹². Cela étant, la Chambre d'appel tiendra compte des conclusions qu'elle a tirées dans ce chapitre quant à la violation des droits de l'appelant lorsqu'il lui appartiendra de fixer dans le présent arrêt la peine à lui infliger pour lui accorder une réparation appropriée.

XX. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE AURAIT COMMISE EN REJETANT LES REQUÊTES AUX FINS DE COMMUNICATION DE DÉCLARATIONS ANTÉRIEURES ET D'EXÉCUTION DES DÉPOSITIONS DE TÉMOINS À CHARGE DÉTENUS (VINGT-TROISIÈME MOYEN D'APPEL)

256. L'appelant soutient que la Chambre de première instance a erré en droit en rejetant deux requêtes interlocutoires de la Défense relatives à des déclarations antérieures des témoins à charge détenus GAO, GDD, GAP et GDQ⁵¹³. Dans sa première décision, la Chambre de première instance a rejeté la requête de l'appelant demandant d'ordonner au Procureur de communiquer, conformément à l'article 68 du Règlement, les déclarations antérieures que des témoins détenus avaient faites aux autorités rwandaises, motif pris de ce qu'il n'avait pas été démontré que le Procureur était en possession de ces déclarations⁵¹⁴. Dans sa deuxième décision, la Chambre de première instance a rejeté la requête de l'appelant aux fins d'exclusion de la déposition des témoins à charge détenus au motif que la Défense avait eu l'occasion de contre-interroger ces témoins⁵¹⁵.

257. L'appelant affirme premièrement que le Procureur aurait dû communiquer ces déclarations antérieures à la Défense conformément à l'article 68 du Règlement, parce

⁵¹¹ Voir *supra*, para. 206.

⁵¹² Voir Décision *Semanza* du 31 mai 2000, para. 129; arrêt *Barayagwiza* (Demande du Procureur en révision ou réexamen), para. 75.

⁵¹³ Mémoire de l'appelant, paras. 373 à 377.

⁵¹⁴ Affaire *Kajelijeli*, *Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence*, 5 juillet 2001.

⁵¹⁵ Affaire *Kajelijeli*, *Decision on Kajelijeli's Motion to Exclude Statements and Testimonies of Detained Witnesses*, 14 juin 2002.

affect the credibility of the Prosecution's witnesses"⁵¹⁶. According to the Appellant, since the Prosecution knew that the Prosecution witnesses were arrested and had either confessed or given other statements to the Rwandan authorities, it was obligated either to obtain these statements or to confirm that the statements did not exist⁵¹⁷. The Appellant submits that the Trial Chamber also erred in simply accepting the Prosecution's assertion that it did not have any such statements in its possession, rather than ordering the Prosecution to make efforts to ascertain whether such statements existed⁵¹⁸. In the Appellant's view, the Trial Chamber's failure to order the Prosecution to ascertain whether such statements existed in Rwanda prejudiced his right to a fair trial by shifting the burden of obtaining exculpatory information in the possession of Prosecution witnesses onto the Defence⁵¹⁹. The Appellant explains that he was able to obtain the statements of Witnesses GAO and GDD, but that he was then forced to expend considerable resources to authenticate these documents, which were challenged by the Prosecution⁵²⁰.

258. The Appellant also alleges that, in spite of repeated applications and notwithstanding the Trial Chamber's powers under Article 28 of the Statute and the Agreement on Cooperation and Judicial Assistance between the Tribunal and the Rwandan government, the Trial Chamber did not assist the Defence in its efforts to obtain and authenticate the prior statements given by Prosecution witnesses to Rwandan authorities⁵²¹.

259. Finally, the Appellant submits that the Trial Chamber should have excluded the testimonies of these detained witnesses or exercised extreme caution in evaluating them⁵²². The Appellant contends that the Trial Chamber, by failing to do so, prejudiced the Appellant who was unable to introduce evidence tending to further impact the credibility of Witnesses GDD, GAP, and GDQ based upon their prior statements⁵²³.

260. The Prosecution responds that this ground of appeal does not meet the requirements of Article 24 of the Statute, and is therefore inadmissible⁵²⁴. The Prosecution argues that the Appellant fails to explain how the Trial Chamber erred in its assessment of the credibility of the witnesses in question, and fails to identify the impact of this evidence on the final verdict⁵²⁵. The Prosecution also argues that the Appellant has misread the Prosecutor's obligation under Rule 68⁵²⁶.

⁵¹⁶ Appellant's Brief, para. 373.

⁵¹⁷ Appellant's Brief, para. 373.

⁵¹⁸ Appellant's Brief, para. 374.

⁵¹⁹ Appellant's Brief, paras. 374, 375.

⁵²⁰ Appellant's Brief, para. 376.

⁵²¹ Appellant's Brief, para. 376.

⁵²² Appellant's Brief, para. 377.

⁵²³ Appellant's Brief, para. 377.

⁵²⁴ Respondent's Brief, para. 278.

⁵²⁵ Respondent's Brief, para. 278.

⁵²⁶ Respondent's Brief, para. 280.

qu'elles «étaient de nature à ébranler la crédibilité des témoins à charge»⁵¹⁶. Selon l'appelant, comme le Procureur savait que les témoins à charge avaient été arrêtés et qu'ils avaient fait des aveux ou des déclarations devant les autorités rwandaises, il lui incombait d'obtenir ces déclarations ou de confirmer leur inexistence⁵¹⁷. L'appelant fait valoir que la Chambre de première instance a aussi versé dans l'erreur en acceptant tout simplement la réponse du Procureur qui a affirmé n'avoir aucune de ces déclarations en sa possession, au lieu de lui intimer l'ordre de faire tout son possible pour s'assurer que ces éléments n'existaient pas⁵¹⁸. De l'avis de l'appelant, le fait que la Chambre n'ait pas ordonné au Procureur de confirmer l'existence de ces déclarations au Rwanda a porté préjudice à son droit à un procès équitable en déplaçant la charge de la preuve et en forçant ainsi la Défense à obtenir des éléments de preuve à décharge détenus par des témoins à charge⁵¹⁹. L'appelant explique qu'il a pu obtenir les déclarations des témoins GAO et GDD, mais qu'il lui a fallu consacrer beaucoup de ressources à l'authentification de ces documents qui étaient contestés par le Procureur⁵²⁰.

258. L'appelant allègue aussi que la Chambre de première instance, malgré les demandes répétées dont elle a été saisie et nonobstant les pouvoirs qu'elle tenait de l'article 28 du Statut et de l'Accord de coopération et d'entraide judiciaire entre le Tribunal international et le Gouvernement rwandais, n'a pas aidé la Défense dans ses efforts en vue d'obtenir et d'authentifier les déclarations antérieures des témoins à charge aux autorités rwandaises⁵²¹.

259. Enfin, l'appelant fait valoir que la Chambre de première instance aurait dû exclure les dépositions de ces témoins détenus ou les apprécier en faisant preuve d'une très grande circonspection⁵²². Selon lui, faute de ce faire, la Chambre de première instance lui a porté préjudice en le mettant dans l'impossibilité de présenter des éléments de preuve tendant à entamer davantage la crédibilité des témoins GDD, GAP et GDQ sur la base de leurs déclarations antérieures⁵²³.

260. Le Procureur répond que ce moyen d'appel ne satisfait pas aux exigences de l'article 24 du Statut et qu'il est donc irrecevable⁵²⁴. Il affirme que l'appelant n'indique pas quelle erreur la Chambre de première instance aurait commise dans son évaluation de la crédibilité des témoins en question ni quels effets cet élément de preuve aurait eus sur la décision finale⁵²⁵. Il soutient aussi que l'appelant a mal interprété les obligations que lui impose l'article 68 du Règlement⁵²⁶.

⁵¹⁶ Mémoire de l'appelant, para. 373.

⁵¹⁷ *Id.*

⁵¹⁸ Mémoire de l'appelant, para. 374.

⁵¹⁹ *Ibid.*, paras. 374 et 375.

⁵²⁰ *Ibid.*, para. 376.

⁵²¹ *Id.*

⁵²² *Ibid.*, para. 377.

⁵²³ *Id.*

⁵²⁴ Mémoire de l'intimé, para. 278.

⁵²⁵ *Id.*

⁵²⁶ *Ibid.*, para. 280.

*A. The Ruling that Rule 68 Only Requires Disclosure of Evidence
in the Custody and Control of the Prosecution*

261. At trial, the Defence sought disclosure, pursuant to Rule 68, of

“copies of any agreements between witnesses, particularly those convicted and serving sentences in Rwanda and the Tribunal and/or the government of Rwanda concerning their testimony”

as well as

“all documents related to trial testimony, plea agreements and/or statements made by those convicted individuals in connection with their trials, pleas, or sentencing in Rwanda”⁵²⁷.

The Prosecution denied being in possession of such items⁵²⁸. In the impugned Decision of 5 July 2001, the Trial Chamber dismissed the motion, reasoning that Rule 68 only requires disclosure of evidence in the custody or control of the Prosecution⁵²⁹.

262. The Appeals Chamber recalls that the ICTY Appeals Chamber has affirmed that the Prosecution has the obligation to determine whether evidence is exculpatory under Rule 68⁵³⁰. This Appeals Chamber follows that position and considers that in order to allege a breach of Rule 68, the Defence must first establish that the evidence was in the possession of the Prosecution, and then must present a *prima facie* case which would make probable the exculpatory nature of the materials sought⁵³¹. If the Defence satisfies the Tribunal that the Prosecution has failed to comply with its Rule 68 obligations, then the Tribunal must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate⁵³².

263. The Appeals Chamber finds that in the present case, the Appellant has failed to demonstrate that the Trial Chamber erred in finding that the Prosecution was not in possession of any prior statements the detained witnesses may have given to the Rwandan authorities. The Appellant rather appears to argue that since the detained witnesses were called by the Prosecution, it was the Prosecution’s duty to obtain the statements. The Appeals Chamber does not accept such an extension of the scope of Rule 68.

⁵²⁷ *Kajelijeli*, Decision on Kajelijeli’s Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence, para. 10.

⁵²⁸ *Kajelijeli*, Decision on Kajelijeli’s Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence, para. 11.

⁵²⁹ *Kajelijeli*, Decision on Kajelijeli’s Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence, para. 14.

⁵³⁰ *Blaskic* Appeal Judgment, para. 268.

⁵³¹ See *Blaskic* Appeal Judgment, para. 268.

⁵³² See *Krstic* Appeal Judgement, para 153.

*A. Décision énonçant que l'article 68 du Règlement
n'oblige le Procureur qu'à communiquer les éléments de preuve
se trouvant sous sa garde et sous son contrôle*

261. Lors du procès, la Défense a demandé communication, en vertu de l'article 68 du Règlement,

«des copies de tous les accords qui auraient été conclus entre les témoins, surtout ceux qui ont été condamnés et qui purgent leur peine au Rwanda, et le Tribunal et/ou le Gouvernement rwandais au sujet de leur déposition» [traduction]

ainsi que de

«tous les documents relatifs aux dépositions des témoins, les accords de reconnaissance de culpabilité et/ou les déclarations faites par ces condamnés en rapport avec leurs procès, leurs plaidoyers ou les peines prononcées à leur encontre au Rwanda» [traduction]⁵²⁷.

Le Procureur a nié être en possession de ces éléments⁵²⁸. Par la décision contestée du 5 juillet 2001, la Chambre de première instance a rejeté la requête, au motif que l'article 68 du Règlement n'exige que la communication des éléments de preuve se trouvant sous la garde ou le contrôle du Procureur⁵²⁹.

262. La Chambre d'appel rappelle que la Chambre d'appel du TPIY a confirmé que le Procureur avait l'obligation de déterminer si les éléments de preuve étaient de nature à disculper l'accusé selon l'article 68⁵³⁰. Notre Chambre se rallie à cette position et considère que pour invoquer une violation de l'article 68, la Défense doit d'abord établir que les éléments de preuve en question se trouvent en la possession du Procureur et ensuite présenter un commencement de preuve qui accrédite l'idée que les éléments recherchés pourraient disculper l'accusé⁵³¹. Si le Tribunal est convaincu par la Défense que le Procureur a failli aux obligations que lui impose l'article 68, il doit alors examiner si la Défense a subi un préjudice suite à ce manquement avant de déterminer s'il est opportun de lui accorder une réparation⁵³².

263. La Chambre d'appel estime qu'en l'espèce l'appelant n'a pas démontré que la Chambre de première instance avait commis une erreur en concluant que le Procureur n'était pas en possession des déclarations antérieures que les témoins détenus avaient pu faire aux autorités rwandaises. L'appelant semble plutôt faire valoir qu'étant donné que les témoins détenus avaient été appelés à la barre par le Procureur, il revenait à ce dernier d'obtenir ces déclarations. La Chambre d'appel n'accepte pas un tel élargissement du champ d'application de l'article 68.

⁵²⁷ Affaire Kajelijeli, *Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence*, para. 10.

⁵²⁸ *Ibid.*, para. 11.

⁵²⁹ *Ibid.*, para. 14.

⁵³⁰ Arrêt *Blaškić*, para. 268.

⁵³¹ *Id.*

⁵³² Voir arrêt *Krstić*, para. 153.

*B. Assistance to the Appellant in Obtaining the Prior Statements
of Detained Prosecution Witnesses*

264. The Appeals Chamber notes that, contrary to the assertions of the Appellant, the trial record reveals that the Trial Chamber did take steps to assist the Appellant in obtaining the statements of the four detained Prosecution witnesses.

265. Witness GAO initially testified before the Trial Chamber from 23 to 25 July 2001. During his examination, Witness GAO made reference to a confession or plea agreement with the Rwandan authorities, but stated that that document was in Rwanda⁵³³. The Trial Chamber ordered that this statement should be made available to the Defence and indicated that the Defence could seek assistance from the Registry or the Chamber in securing it⁵³⁴. The following day, the Trial Chamber denied a Defence request for a subpoena as being premature⁵³⁵. The Trial Chamber reiterated that if the Defence was unable to obtain the document, then it should seek assistance from the Trial Chamber⁵³⁶. On 2 November 2001, the Trial Chamber ordered the recall of Witness GAO for further examination on his statements to the Rwandan authorities⁵³⁷. The Trial Chamber also ordered the Prosecution

“to make all possible efforts to obtain, and to provide the Defense with the prior statements made before the Rwandan Authorities of detained witnesses GDD, GDQ, and GAP”⁵³⁸.

266. Witness GAO was recalled from 26 to 28 November 2001. During his testimony, the Defence tendered six purported prior statements of the witness for identification. The witness questioned the authenticity and veracity of these documents and the Prosecution moved to have them excluded under Rule 95 on grounds of doubts about their quality and the means by which they were obtained⁵³⁹. Three of these documents were subsequently admitted into evidence⁵⁴⁰. The Prosecution informed the Tribunal that it had received a letter from the Prosecutor General of Rwanda stating that the files of the detained witnesses could not be made available in this case because doing so would seriously compromise the security and safety of survivors and potential witnesses and would compromise the investigation and prosecution of suspects still at large⁵⁴¹.

267. The Appeals Chamber finds that the Appellant has not demonstrated any error on the part of the Trial Chamber in respect of this sub-ground of appeal. The Trial

⁵³³ T. 24 July 2001 p. 113.

⁵³⁴ T. 24 July 2001 pp. 14, 15, 113-115.

⁵³⁵ T. 25 July 2001 pp. 28, 29.

⁵³⁶ T. 25 July 2001 pp. 28-30.

⁵³⁷ *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, para 23.

⁵³⁸ *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, para. 23.

⁵³⁹ T. 28 November 2001 pp. 6-14.

⁵⁴⁰ T. 28 November 2001 p. 55; Trial Judgement, para. 31; *Kajelijeli*, Decision on Kajelijeli's Request to Admit into Evidence the Statements of GAO, 1 July 2003.

⁵⁴¹ T. 28 November 2001 pp. 4, 5.

B. Aide fournie à l'appelant pour obtenir les déclarations antérieures des témoins à charge détenus

264. La Chambre d'appel note que, contrairement à ce qu'affirme l'appelant, le dossier de l'affaire révèle que la Chambre de première instance a pris les mesures nécessaires pour aider l'appelant à obtenir les déclarations des quatre témoins à charge détenus.

265. Le témoin GAO a d'abord déposé devant la Chambre de première instance du 23 au 25 juillet 2001. Au cours de son interrogatoire, le témoin GAO a fait état d'aveux faits aux autorités rwandaises ou d'un accord sur le plaidoyer conclu avec celles-ci, mais a indiqué que ce document se trouvait au Rwanda⁵³³. La Chambre de première instance a ordonné que ce document soit mis à la disposition de la Défense et a indiqué que celle-ci pouvait demander l'assistance du Greffier ou de la Chambre pour se le procurer⁵³⁴. Le lendemain, la Chambre de première instance a refusé de délivrer l'injonction de produire demandée par la Défense, la jugeant prématurée⁵³⁵. Elle a réaffirmé que si la Défense n'était pas en mesure d'obtenir le document, elle devrait alors solliciter son assistance⁵³⁶. Le 2 novembre 2001, la Chambre de première instance a ordonné le rappel du témoin GAO pour un nouvel interrogatoire sur ses déclarations aux autorités rwandaises⁵³⁷. Elle a aussi demandé au Procureur

«de tout mettre en œuvre pour obtenir les déclarations antérieures faites par les témoins détenus GDD, GDQ et GAP aux autorités rwandaises et de les transmettre à la Défense» [traduction]⁵³⁸.

266. Le témoin GAO a été rappelé à la barre du 26 au 28 novembre 2001. Au cours de sa déposition, la Défense a présenté pour identification six déclarations antérieures que le témoin aurait faites. Celui-ci a contesté l'authenticité et la véracité de ces documents et le Procureur a demandé leur exclusion en vertu de l'article 95 du Règlement en raison du doute suscité par leur qualité et la manière dont ils ont été obtenus⁵³⁹. Trois de ces documents ont été par la suite admis comme éléments de preuve⁵⁴⁰. Le Procureur a informé le Tribunal qu'il avait reçu une lettre du Procureur général du Rwanda indiquant que les dossiers de ces témoins détenus ne pouvaient pas être mis à disposition en l'instance parce que cela compromettrait sérieusement la sécurité des survivants et des témoins potentiels et que les enquêtes en cours sur les affaires concernant certains suspects en liberté en seraient également compromises⁵⁴¹.

267. La Chambre d'appel estime que l'appelant n'a pas démontré que la Chambre de première instance a commis une erreur concernant cette branche du moyen d'appel. La Chambre a rendu des ordonnances visant à aider la Défense à obtenir des autorités

⁵³³ Compte rendu de l'audience du 24 juillet 2001, pp. 133 et 134.

⁵³⁴ *Ibid.*, pp. 16 à 18 ainsi que 134 et 135.

⁵³⁵ Compte rendu de l'audience du 25 juillet 2001, pp. 32 à 34.

⁵³⁶ *Ibid.*, p. 32 à 35.

⁵³⁷ Affaire *Kajelijeli*, *Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO*, para. 23

⁵³⁸ *Id.*

⁵³⁹ Compte rendu de l'audience du 28 novembre 2001, pp. 7 à 17.

⁵⁴⁰ *Ibid.*, pp. 66 et 67; jugement, para. 31; affaire *Kajelijeli*, *Decision on Kajelijeli's Request to Admit into Evidence the Statements of GAO*, 1^{er} juillet 2003.

⁵⁴¹ Compte rendu de l'audience du 28 novembre 2001, pp. 4 à 6.

Chamber issued orders aimed at assisting the Defence in obtaining the prior statements from Rwanda. Instead of requesting further assistance from the Trial Chamber, in the form of *subpoenas* or other orders addressed to the Rwandan authorities, the Defence sought exclusion of the witnesses' testimonies.

*C. The Decision Not to Exclude Evidence
of Detained Witnesses*

268. After the appearances of Witnesses GAO, GDD, GDQ, and GAP⁵⁴², the Defence moved to have their testimonies excluded from evidence on the basis that the Defence still had not received their prior statements to the Rwandan authorities and that the Defence, therefore, had not been able to complete their cross-examination⁵⁴³. On 14 June 2002, the Trial Chamber held that the witnesses' testimonies were properly admitted into evidence and that the Defence had not demonstrated that this evidence prejudiced Kajelijeli's right to a fair trial⁵⁴⁴. The Trial Chamber noted that the weight to be accorded to the evidence of these witnesses would be determined at a later stage⁵⁴⁵.

269. The Appeals Chamber notes that the broad structure of Rule 89 authorizes the Trial Chamber to admit any relevant evidence which it deems to have probative value. The Trial Chamber in the present case clearly indicated to the Appellant that the eventual weight to be accorded to the evidence would be assessed later, presumably at the time of deliberation in preparation of the judgement after hearing the submissions of the parties. The Appeals Chamber finds no error in such an approach.

270. The Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber erred in its decision not to exclude the evidence of the four detained Prosecution witnesses. Moreover, the Appeals Chamber observes that the Appellant has failed to show in this ground of appeal that any error the Trial Chamber may have committed in this regard has resulted in any legal or factual error in the Trial Judgement.

271. Accordingly, this ground of appeal is dismissed.

⁵⁴² Witness GDD testified from 2 to 4 October 2001. Witness GAP testified from 28 November to 4 December 2001. Witness GDQ testified from 5 to 6 December 2001. Before each of these witnesses was excused, the Defence reserved the right to recall them once their prior statements were received. T. 4 October 2001 p. 163; T. 5 October 2001 pp. 34; T. 4 December 2001 p. 119; T. 6 December 2001 pp. 61, 62.

⁵⁴³ *Requête en Extrême Urgence de la Défense aux fins d'Exclusion de la Cause des Déclarations et dépositions des témoins détenus GDD, GDQ, GAP et GAO*, 18 April 2002.

⁵⁴⁴ *Kajelijeli*, Decision on Kajelijeli's Motion to Exclude Statements and Testimonies of Detained Witnesses, paras. 11-13.

⁵⁴⁵ *Kajelijeli*, Decision on Kajelijeli's Motion to Exclude Statements and Testimonies of Detained Witnesses, para. 13.

rwandaises les déclarations antérieures des témoins. Plutôt que de solliciter encore l'assistance de la Chambre de première instance en la priant de délivrer des injonctions ou d'autres ordonnances à l'adresse des autorités rwandaises, la Défense a demandé l'exclusion des dépositions des témoins.

*C. Décision de ne pas exclure les dépositions
des témoins détenus*

268. Après la comparution des témoins GAO, GDD, GDQ et GAP⁵⁴², la Défense a demandé l'exclusion de leurs dépositions au motif qu'elle n'avait toujours pas reçu les déclarations antérieures qu'ils avaient faites aux autorités rwandaises et qu'en conséquence, elle n'avait pas été en mesure d'achever leur contre-interrogatoire⁵⁴³. Le 14 juin 2002, la Chambre de première instance a conclu que les dépositions de ces témoins avaient été admises à bon droit et que la Défense n'avait pas démontré qu'elles portaient atteinte au droit de Kajelijeli à un procès équitable⁵⁴⁴. La Chambre de première instance a noté que le poids à accorder à ces témoignages serait déterminé ultérieurement⁵⁴⁵.

269. La Chambre d'appel fait remarquer que la formulation large de l'article 89 du Règlement autorise la Chambre de première instance à recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante. En l'espèce, la Chambre de première instance a clairement indiqué à l'appelant que le poids éventuel à accorder aux témoignages serait évalué plus tard, probablement au moment du délibéré en vue de la rédaction du jugement, après avoir entendu les parties en leurs observations. La Chambre d'appel ne trouve aucune erreur dans cette approche.

270. La Chambre d'appel conclut que l'appelant n'a pas démontré que la Chambre de première instance a commis une erreur en décidant de ne pas exclure les dépositions de ces quatre témoins à charge détenus. En outre, elle note, s'agissant de ce moyen d'appel, que l'appelant n'a pas démontré que l'erreur qu'aurait pu commettre en l'occurrence la Chambre de première instance a entraîné une erreur de droit ou de fait dans son jugement.

271. En conséquence, ce moyen d'appel est rejeté.

⁵⁴² Le témoin GDD a déposé du 2 au 4 octobre 2001, le témoin GAP du 28 novembre au 4 décembre 2001 et le témoin GDQ les 5 et 6 décembre 2001. Avant que chacun de ces témoins ne soit autorisé à se retirer, la Défense s'est réservée le droit de les rappeler lorsqu'elle aurait obtenu leurs déclarations antérieures. Comptes rendus des audiences du 4 octobre 2001, p. 177, du 5 octobre 2001, p. 35, du 4 décembre 2001, p. 132, et du 6 décembre 2001, p. 71.

⁵⁴³ Requête en extrême urgence aux fins d'exclusion de la cause des déclarations et témoignages des témoins détenus GDD, GDQ, GAP et GAO, déposée le 18 avril 2002.

⁵⁴⁴ Affaire *Kajelijeli*, *Decision on Kajelijeli's Motion to Exclude Statements and Testimonies of Detained Witnesses*, paras. 11 à 13.

⁵⁴⁵ *Ibid.*, para. 13.

XXI. ALLEGED ERROR IN DENYING A MOTION SEEKING ADMISSION
INTO EVIDENCE OF A RENTAL RECEIPT
(GROUND OF APPEAL 24)

272. The Appellant submits that the Trial Chamber erred in law and fact by denying a Defence motion to admit a rental receipt into evidence pursuant to Rule 92 *bis* of the Rules after the close of the Defence case⁵⁴⁶. The Defence sought to admit the receipt in order to disprove a Prosecution allegation that the Appellant participated in a committee to distribute Tutsi property⁵⁴⁷. Defence Witness RHU23 testified that he rented abandoned land for which he received a rental receipt, which the Defence used to support its theory that abandoned Tutsi property was rented by the *commune* authorities in compliance with the applicable laws of Rwanda⁵⁴⁸.

273. According to the Appellant, the Trial Chamber contradicted itself in the impugned decision by finding both that the Defence was not able to introduce the receipt into evidence at the time of Witness RHU 23's testimony because it had been accidentally left in Rwanda, and that the Defence

“offers no explanation why it did not attempt to introduce this information as evidence during the Defence case”⁵⁴⁹.

The Appellant also submits that the Trial Chamber erred in its translation of the receipt, and thereby failed to understand its probative value⁵⁵⁰. The Appellant points out that the receipt clearly states that it is for “*igisinde*”, which translates to “rent of a land”⁵⁵¹. In the Appellant's view, this demonstrates that the document is probative because it corroborates the Appellant's testimony and tends to refute the Prosecution's allegations⁵⁵².

274. The Prosecution responds that the Appellant cannot reargue the motion before the Appeals Chamber, without demonstrating how the Trial Chamber committed an error of law invalidating its decision or an error of fact leading to a miscarriage of justice⁵⁵³. The Prosecution disagrees with the Appellant's translation of the word *igisinde*⁵⁵⁴. The Prosecution argues that nothing in the receipt, even read in accordance with the Appellant's proposed translation, supports the Appellant's position that Witness RHU 23 rented “Tutsi abandoned land”⁵⁵⁵.

⁵⁴⁶ Appellant's Brief, paras. 378-387; *Kajelijeli*, Decision on Kajelijeli's Motion to Admit Into Evidence Rental Receipts of Witness RHU23 Pursuant to Rule 92 *bis* (A), 1 July 2003.

⁵⁴⁷ Appellant's Brief, paras. 378-382.

⁵⁴⁸ Appellant's Brief, paras. 379-381.

⁵⁴⁹ Appellant's Brief, para. 384.

⁵⁵⁰ Appellant's Brief, paras. 385-387.

⁵⁵¹ Appellant's Brief, para. 386.

⁵⁵² Appellant's Brief, para. 387.

⁵⁵³ Respondent's Brief, para. 300. The Prosecution cites to *Rutaganda* Appeal Judgement, paras. 15, 18, 20; *Kupreškić et al.* Appeal Judgement, para. 27; *Bagilishema* Appeal Judgement, para. 10; *Musema* Appeal Judgement, para. 18.

⁵⁵⁴ Respondent's Brief, para. 303.

⁵⁵⁵ Respondent's Brief, para. 303.

XXI. ERREUR QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISE EN REFUSANT L'ADMISSION D'UNE QUITTANCE DE LOYER
COMME MOYEN DE PREUVE (VINGT-QUATRIÈME MOYEN D'APPEL)

272. L'appelant soutient que la Chambre de première instance a commis une erreur de droit et de fait en rejetant la requête de la Défense tendant à l'admission d'une quittance de loyer comme moyen de preuve en application de l'article 92 *bis* du Règlement après la fin de la présentation des moyens de la Défense⁵⁴⁶. La Défense voulait faire admettre la quittance afin de réfuter une allégation du Procureur reprochant à l'appelant d'avoir siégé à un comité chargé de distribuer les biens des Tutsis⁵⁴⁷. Le témoin à décharge RHU 23 avait en effet déclaré avoir loué une terre abandonnée et avoir reçu à cette occasion une quittance de loyer que la Défense a utilisée pour étayer sa thèse selon laquelle les terres abandonnées par les Tutsis avaient été données en location par les autorités communales conformément aux lois en vigueur au Rwanda⁵⁴⁸.

273. Selon l'appelant, la Chambre de première instance s'est contredite dans la décision contestée en concluant que la Défense, d'une part, n'a pas été en mesure de verser au dossier cette quittance lors de la déposition du témoin RHU 23 parce qu'elle avait été laissée par mégarde au Rwanda et, d'autre part,

«n'avance aucune explication quant au fait qu'elle n'a pas tenté de produire cette pièce comme preuve lors de la présentation de ses moyens» [traduction]⁵⁴⁹.

L'appelant soutient également que la Chambre de première instance a commis une erreur de fait dans la traduction qu'elle a fait faire de la quittance, erreur qui lui a fait méconnaître la valeur probante de cette pièce⁵⁵⁰. Il fait observer que la quittance mentionne clairement qu'elle a été établie pour «*igisinde*», soit pour «louage de terre»⁵⁵¹. De l'avis de l'appelant, cela démontre que cette pièce a une valeur probante dès lors qu'elle corrobore les propos de l'appelant et tend à démentir les allégations du Procureur⁵⁵².

274. Le Procureur répond que l'appelant ne peut pas débattre de nouveau de la requête devant la Chambre d'appel sans démontrer en quoi la Chambre de première instance a commis une erreur de droit qui invalide sa décision ou une erreur de fait qui a entraîné un déni de justice⁵⁵³. Le Procureur n'est pas d'accord avec la traduction du terme *igisinde* donnée par l'appelant⁵⁵⁴. Il soutient que rien dans la quittance, ni même dans la traduction proposée par l'appelant, n'étaye sa position selon laquelle le témoin RHU 23 louait «des terres abandonnées par les Tutsis»⁵⁵⁵.

⁵⁴⁶ Mémoire de l'appelant, paras. 378 à 387; affaire *Kajelijeli*, *Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU23 Pursuant to Rule 92 bis (A)*, 1^{er} juillet 2003.

⁵⁴⁷ Mémoire de l'appelant, paras. 378 à 382.

⁵⁴⁸ *Ibid.*, paras. 379 à 381.

⁵⁴⁹ *Ibid.*, para. 384.

⁵⁵⁰ *Ibid.*, paras. 385 à 387.

⁵⁵¹ *Ibid.*, para. 386.

⁵⁵² *Ibid.*, para. 387.

⁵⁵³ Mémoire de l'intimé, para. 300. Le Procureur renvoie aux paragraphes 15, 18 et 20 de l'arrêt *Rutaganda*; para. 27 de l'arrêt *Kupreškić et consorts*; para. 10 de l'arrêt *Bagilishema*; para. 18 de l'arrêt *Musema*.

⁵⁵⁴ Mémoire de l'intimé, para. 303.

⁵⁵⁵ *Id.*

275. The Appeals Chamber notes that in the decision on the motion, the Trial Chamber admonished the Defence for bringing the motion to admit further evidence after the close of its case, without offering any further explanation for the delay⁵⁵⁶. The Trial Chamber then observed that the Defence made no arguments as to how the rental receipt, which is not a statement of a witness, could be admitted pursuant to Rule 92 *bis*⁵⁵⁷. Finally, the Trial Chamber found that the document lacked probative value because the document did not appear to be a receipt for the sale or rent of land⁵⁵⁸.

276. The Appeals Chamber finds that the Appellant's submission that the impugned decision is contradictory, because it finds both that the witness forgot the receipt in Rwanda and that the Defence failed to provide a reason for the delay, is without merit. Witness RHU 23 testified that he still had a receipt for a rental transaction in 1994⁵⁵⁹. In a document submitted in support of the motion to have the receipt admitted into evidence, Defence counsel explained that the witness inadvertently left the receipt in Rwanda and that the Defence was therefore unable to introduce the receipt into evidence during Witness RHU 23's testimony⁵⁶⁰. No explanation was offered for the delay between the witness's return to Rwanda and the filing of the motion. In the view of the Appeals Chamber, a reasonable interpretation of the Trial Chamber's decision discloses no contradiction. The Trial Chamber merely noted the proffered reason why the receipt was not adduced at the time of the witness's testimony and then observed that the Defence had failed to provide any reason why it did not seek to adduce the receipt during its case, which closed on 24 April 2003, approximately seven months after Witness RHU 23 testified.

277. The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber erred in rejecting the admission of the document pursuant to Rule 92 *bis* (A)⁵⁶¹. The Appeals Chamber notes that in seeking the admission of the receipt, the Defence specifically relied on Rule 92 *bis*, without, however, meeting the admissibility requirements prescribed therein. The Appellant's suggestion that the receipt could be construed as a written statement of Witness RHU 23 within the meaning of Rule 92 *bis* (A) is unpersuasive⁵⁶². The receipt is not a written statement of a witness and does not comply with any of the other requirements of admissibility under Rule 92 *bis*.

⁵⁵⁶ *Kajelijeli*, Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU 23 Pursuant to Rule 92 *bis* (A), paras. 4, 7.

⁵⁵⁷ *Kajelijeli*, Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU 23 Pursuant to Rule 92 *bis* (A), para. 5.

⁵⁵⁸ *Kajelijeli*, Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU 23 Pursuant to Rule 92 *bis* (A), para. 6.

⁵⁵⁹ T. 25 September 2002 p. 40.

⁵⁶⁰ Certification in Support of Extremely Urgent Motion to Admit Into Evidence RHU-23's Rental Receipt Pursuant to Rule 92 *bis* (A), 10 June 2003, para. 3.

⁵⁶¹ Certification in Support of Extremely Urgent Motion to Admit into Evidence RHU-23's Rental Receipt Pursuant to Rule 92 *bis* (A), para. 5.

⁵⁶² Brief in Reply, para. 104.

275. La Chambre d'appel relève que, dans sa décision, la Chambre de première instance a admonesté la Défense pour avoir introduit la requête aux fins d'admission de moyens de preuve supplémentaires après la fin de la présentation de ses moyens, sans fournir la moindre justification de ce retard⁵⁵⁶. La Chambre de première instance a ensuite fait observer que la Défense n'a avancé aucun argument au soutien de l'admission de la quittance de loyer, qui n'est pas une déclaration de témoin, conformément à l'article 92 *bis* du Règlement⁵⁵⁷. Enfin, elle a conclu que cette pièce n'avait pas de valeur probante parce que rien n'autorisait à croire qu'il s'agissait d'une quittance relative à la vente ou au louage de terre⁵⁵⁸.

276. La Chambre d'appel estime que le grief de contradiction que l'appelant formule à l'encontre de la décision contestée au motif que la Chambre de première instance y conclut à la fois que le témoin a oublié la quittance au Rwanda et que la Défense n'a pas été en mesure de justifier ce retard est sans fondement. Le témoin RHU 23 a déclaré qu'il avait encore une quittance d'un contrat de louage conclu en 1994⁵⁵⁹. Dans un document présenté à l'appui de la requête aux fins d'admission de la quittance à titre de preuve, le conseil de la Défense a expliqué que le témoin RHU23 l'avait laissée par inadvertance au Rwanda et que la Défense se trouvait ainsi dans l'impossibilité de la verser au dossier lors de la déposition du témoin⁵⁶⁰. Aucune explication n'a été fournie pour justifier le délai qui s'est écoulé entre le retour du témoin au Rwanda et le dépôt de la requête. De l'avis de la Chambre d'appel, une interprétation raisonnable de la décision de la Chambre de première instance ne révèle aucune contradiction. Celle-ci a tout simplement pris acte de la raison invoquée pour laquelle la quittance n'avait pas été présentée au moment de la déposition du témoin, avant de faire observer que la Défense n'avait pas expliqué pourquoi elle n'avait pas cherché à la produire durant la phase de présentation de ses moyens, qui s'est achevée le 24 avril 2003, soit près de sept mois après la déposition du témoin RHU 23.

277. La Chambre d'appel estime que l'appelant n'a pas démontré que la Chambre de première instance a commis une erreur en refusant d'admettre cette pièce conformément à l'article 92 *bis* (A) du Règlement⁵⁶¹. Elle note qu'en demandant le versement au dossier de la quittance, la Défense s'est expressément fondée sur l'article 92 *bis*, sans toutefois satisfaire aux conditions d'admissibilité qui y sont énoncées. L'argument de l'appelant proposant de voir dans la quittance une déclaration écrite du témoin RHU 23 au sens de l'article 92 *bis* (A) est peu convaincant⁵⁶². La quittance n'est pas une déclaration écrite de témoin et ne satisfait à aucune des autres conditions d'admissibilité qu'énonce l'article 92 *bis*.

⁵⁵⁶ Affaire *Kajelijeli*, *Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU 23 Pursuant to Rule 92 bis (A)*, paras. 4 et 7.

⁵⁵⁷ *Ibid.*, para. 5.

⁵⁵⁸ *Ibid.*, para. 6.

⁵⁵⁹ Compte rendu de l'audience du 25 septembre 2002, pp. 71 et 72.

⁵⁶⁰ *Certification in Support of Extremely Urgent Motion to Admit into Evidence RHU-23's Rental Receipt Pursuant to Rule 92 bis (A)*, 10 juin 2003, para. 3.

⁵⁶¹ *Ibid.*, para. 5.

⁵⁶² Mémoire en réplique de l'appelant, para. 104.

278. The Appellant has also challenged the Trial Chamber's finding that the receipt did not appear *prima facie* to be a receipt for the sale or rental of land. The Appeals Chamber has not been supplied with a definitive translation of the word *igisinde*, without which it is impossible to determine whether the Trial Chamber erred in its own translation. However, even accepting the Appellant's translation, it has not been shown that the Trial Chamber's translation, and its subsequent finding that the document was inadmissible because it was not probative, had any effect on the outcome of its decision. Before discussing the probative value of the document, the Trial Chamber had already found that the Defence had failed to make its case for the admission of the document under Rule 92 *bis* (A)⁵⁶³.

279. Moreover, the Appellant has failed to show that the Trial Chamber's rejection of the document had any effect on the factual findings in the Trial Judgement. In the Judgement, the Trial Chamber concluded that it was

“satisfied that Tutsi properties were distributed to the *Interahamwe* and that the Accused was involved in the distribution”,

though it did not find any specific dates of distribution⁵⁶⁴. In reaching this conclusion, the Trial Chamber relied on the evidence of a number of witnesses including Prosecution Witness GAP, who testified that on 9 April 1994 the Appellant began distributing Tutsi land to the *Interahamwe*⁵⁶⁵, and on Prosecution Witness GAO, who testified that the Appellant set up a committee and began to sell Tutsi property between 12 and 14 April 1994⁵⁶⁶. The Trial Chamber also referred to the testimony of Witness RHU 23, but found elsewhere in the Judgement that Witness RHU 23 lacked credibility, noting that his testimony was “filled with exaggerations and inconsistencies on important points”⁵⁶⁷.

280. Even if the Appeals Chamber were to accept the Appellant's translation of the document in question, the Appellant has not demonstrated that the Trial Chamber erred in law in refusing to admit it. Moreover, the Appellant has not shown that the Trial Chamber's error of fact, if any, occasioned a miscarriage of justice. Accordingly, the appeal under this ground is dismissed.

⁵⁶³ *Kajelijeli*, Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU 23 Pursuant to Rule 92 *bis* (A), para. 5.

⁵⁶⁴ Trial Judgement, para. 323.

⁵⁶⁵ Trial Judgement, para. 314.

⁵⁶⁶ Trial Judgement, para. 315.

⁵⁶⁷ Trial Judgement, para. 701.

278. L'appelant a également contesté la conclusion de la Chambre de première instance selon laquelle la quittance ne semblait pas, de prime abord, être une quittance relative à la vente ou au louage de terre. La Chambre d'appel n'a pas reçu de traduction faisant autorité du terme *igisinde*, sans laquelle il est impossible de dire si la Chambre de première instance a commis une erreur dans sa propre traduction. Toutefois, même si on accepte la traduction de l'appelant, il n'a pas été démontré que celle de la Chambre de première instance et la conclusion ultérieure que celle-ci a tirée (inadmissibilité de la pièce pour défaut de valeur probante) aient eu un quelconque effet sur l'issue de sa décision. Avant d'examiner la valeur probante de la pièce, la Chambre de première instance avait déjà conclu que la Défense n'avait pas établi la validité de sa thèse en faveur de l'admission de cette pièce en vertu de l'article 92 bis (A) du Règlement⁵⁶³.

279. En outre, l'appelant n'a pas démontré que le rejet de la pièce par la Chambre de première instance a eu un quelconque effet sur les constatations de fait opérées dans le jugement. En effet, dans son jugement, la Chambre de première instance a conclu qu'elle

«[était] convaincue que les biens de Tutsis ont été distribués aux *Interahamwe* et que l'accusé [avait] pris part à la distribution de ces biens»,

quoi qu'elle n'ait avancé aucune date précise à laquelle ces distributions ont été faites⁵⁶⁴. Pour dégager cette conclusion, la Chambre de première instance s'est fondée sur la déposition d'un certain nombre de témoins, dont le témoin à charge GAP qui a déclaré que le 9 avril 1994 l'appelant avait commencé à distribuer les terres des Tutsis aux *Interahamwe*⁵⁶⁵, et le témoin à charge GAO qui a affirmé à la barre que l'appelant avait créé un comité et commencé à vendre les biens des Tutsis entre le 12 et le 14 avril 1994⁵⁶⁶. La Chambre de première instance s'est également référée à la déposition du témoin RHU23, mais a conclu ailleurs dans le jugement que ce témoin manquait de crédibilité, jugeant sa déposition «truffée, sur des points importants, d'exagérations et de contradictions»⁵⁶⁷.

280. Même si la Chambre d'appel devait accepter la traduction de la pièce en question faite par l'appelant, celui-ci n'a pas démontré que la Chambre de première instance a commis une erreur de droit en refusant de l'admettre. En outre, l'appelant n'a pas rapporté la preuve que l'erreur de fait commise le cas échéant par la Chambre de première instance a entraîné un déni de justice. En conséquence, ce moyen d'appel est rejeté.

⁵⁶³ Affaire *Kajelijeli*, *Decision on Kajelijeli's Motion to Admit into Evidence RHU-23's Rental Receipt Pursuant to Rule 92 bis (A)*, para. 5.

⁵⁶⁴ Jugement, para. 323.

⁵⁶⁵ *Ibid.*, para. 314.

⁵⁶⁶ *Ibid.*, para. 315.

⁵⁶⁷ *Ibid.*, para. 701.

XXII. ALLEGED ERRORS
CONCERNING THE BURDEN AND STANDARD OF PROOF
AND THE PROVISION OF A REASONED OPINION
(GROUNDS OF APPEAL 1, 2, 3)

281. The Appellant raises three grounds of appeal which fail to meet the requisite standards for consideration by the Appeals Chamber pursuant to Article 24 of the Statute or which do not merit a reasoned opinion in writing⁵⁶⁸. Such grounds are set out in this chapter.

*A. Alleged Error
Concerning the Burden of Proof (Ground of Appeal 1)*

282. The Appellant submits that the Trial Chamber erred in law in failing to apply the correct test to the evidence before it: that in order to make a finding of guilt it must be satisfied beyond reasonable doubt that the Prosecution proved the guilt⁵⁶⁹. The Appellant further submits that the Trial Chamber committed a legal error in assuming that the Defence had to prove his case and that it had to disprove the Prosecution's case⁵⁷⁰. The Prosecution responds that the Trial Chamber committed no error in respect of the burden of proof and that it did not shift this burden away from the Prosecution to the Defence⁵⁷¹.

283. The Appeals Chamber notes that the Appellant's submissions on this point are presented in very general terms, without identifying any decision of the Trial Chamber that was incorrect as a matter of law and without making any reference to the record. The only exception is the Appellant's submission on the burden of proof relating to the alibi, in respect of which the Appellant presented more detailed submissions. The Appeals Chamber has addressed that matter above under Ground of Appeal 7⁵⁷². The remainder of the submissions presented under this ground of appeal are dismissed for vagueness.

*B. Alleged Error
Concerning the Standard of Proof (Ground of Appeal 2)*

284. The Appellant submits that the Trial Chamber erred in law by failing to require the Prosecution to prove its case beyond reasonable doubt, by failing to scrutinize the credibility of questionable witnesses, and by failing to require corroboration of Prosecution evidence given by a single witness⁵⁷³. The Appellant further submits that the Trial Chamber erred as a matter of law in applying a higher standard of proof to evidence given by Defence witnesses than to evidence provided by Prosecution wit-

⁵⁶⁸ For a discussion of the applicable standards, see *supra* Chapter I.

⁵⁶⁹ Amended Notice of Appeal, para. 2; Appellant's Brief, para. 23.

⁵⁷⁰ Amended Notice of Appeal, paras. 3, 4; Appellant's Brief, para. 23.

⁵⁷¹ Respondent's Brief, paras. 45-55.

⁵⁷² See *supra* Chapter V.

⁵⁷³ Amended Notice of Appeal, paras. 5-7.

XXII. ERREURS QUE LA CHAMBRE DE PREMIÈRE INSTANCE
AURAIT COMMISES CONCERNANT LA CHARGE
ET LA NORME D'ADMINISTRATION DE LA PREUVE
AINSI QUE LA MOTIVATION DE SES DÉCISIONS
(PREMIER, DEUXIÈME ET TROISIÈME MOYENS D'APPEL)

281. L'appelant invoque trois moyens d'appel qui ne satisfont pas aux conditions requises pour que la Chambre d'appel les examine conformément à l'article 24 du Statut ou qui ne méritent pas une réponse motivée par écrit⁵⁶⁸. Ces moyens d'appel sont exposés dans le présent chapitre.

*A. Erreur concernant la charge de la preuve
(premier moyen d'appel)*

282. L'appelant soutient que la Chambre de première instance a commis une erreur de droit en n'appliquant pas le critère d'appréciation approprié lors de l'examen des éléments de preuve dont elle a été saisie, à savoir qu'avant de conclure à la culpabilité de l'accusé, elle doit être convaincue que le Procureur a établi cette culpabilité au-delà de tout doute raisonnable⁵⁶⁹. L'appelant soutient en outre qu'elle a commis une autre erreur de droit en postulant que la Défense devait rapporter la preuve de ses affirmations et réfuter les moyens du Procureur⁵⁷⁰. Le Procureur répond que la Chambre de première instance n'a commis aucune erreur en ce qui concerne la charge de la preuve et qu'elle n'a pas mis sur les épaules de la Défense le fardeau de la preuve qui pesait sur le Procureur⁵⁷¹.

283. La Chambre d'appel note que les griefs de l'appelant sur ce point sont présentés en des termes très généraux, sans qu'il n'ait identifié la moindre décision de la Chambre de première instance qui était incorrecte en droit et sans renvoyer à une quelconque partie du dossier. La seule exception est le grief relatif à la charge de la preuve se rapportant à l'alibi, à propos duquel l'appelant a exposé des arguments plus détaillés. La Chambre d'appel a examiné ce point plus haut sous le septième moyen d'appel⁵⁷². Les autres griefs exposés dans le cadre de ce moyen d'appel sont rejetés pour cause d'imprécision.

*B. Erreur concernant la norme d'administration de la preuve
(deuxième moyen d'appel)*

284. L'appelant soutient que la Chambre de première instance a commis une erreur de droit en n'exigeant pas du Procureur qu'il fournisse les éléments de preuve permettant d'établir au-delà de tout doute raisonnable le bien-fondé de ses accusations, en n'examinant pas minutieusement la crédibilité des témoins à charge sujets à caution et en n'exigeant pas que toute preuve à charge provenant d'un témoin unique soit corroborée par une autre source⁵⁷³. L'appelant soutient en outre que la Chambre

⁵⁶⁸ Pour une analyse des normes applicables, voir *supra* chapitre I.

⁵⁶⁹ Acte d'appel modifié, para. 2; mémoire de l'appelant, para. 23.

⁵⁷⁰ Acte d'appel modifié, paras. 3 et 4; mémoire de l'appelant, para. 23.

⁵⁷¹ Mémoire de l'intimé, paras. 45 à 55.

⁵⁷² Voir *supra* chapitre V.

⁵⁷³ Acte d'appel modifié, paras. 5 à 7.

nesses⁵⁷⁴. The Prosecution responds that contrary to the Appellant's submission, the Trial Chamber took a more exacting approach to the standard of proof than is required: it applied the standard at the fact-finding stage to every individual evidentiary component of the Prosecution's case rather than merely to the determination of the ultimate issues, the elements of each offence, as required⁵⁷⁵.

285. The Appeals Chamber observes that under this ground of appeal, the Appellant fails to point to any decision of the Trial Chamber that was incorrect as a matter of law and that no reference is made to the record. In such circumstances, the Appeals Chamber is not in a position to consider this matter further and, accordingly, dismisses this ground of appeal in its entirety.

*C. Alleged Error in Failing to Provide a Reasoned Opinion
(Ground of Appeal 3)*

286. The Appellant submits that the Trial Chamber erred in law by failing to provide a reasoned opinion⁵⁷⁶. The Appellant recalls that in *Kupreškić* the ICTY Appeals Chamber held that the "reasoned opinion" requirement includes a difficult circumstances doctrine pursuant to which the duty to articulate adequate reasoning is stronger when the conviction is based on the uncorroborated testimony of a single witness who made an identification in trying circumstances⁵⁷⁷. The Appellant contends that as in *Kupreškić*, in this case, the Trial Chamber had an "enhanced duty" to provide a reasoned opinion because most of the Prosecution witnesses were detainees convicted of crimes of "moral turpitude" and, in many cases, it was the Appellant who was responsible for their arrest and detention⁵⁷⁸. In the Appellant's view, the Trial Chamber failed to satisfy this "enhanced duty"⁵⁷⁹. Furthermore, the Appellant submits that the Trial Chamber relied on evidence that could not have been accepted by any reasonable tribunal, given that it was uncorroborated evidence of detained witnesses with criminal histories, and that the Appellant had played a role in many of their arrests⁵⁸⁰.

287. The Prosecution responds that the Appellant's present submission is only an attempt to reargue his case on appeal⁵⁸¹. The Prosecution argues that the Appellant's reliance on *Kupreškić* is misguided since one of the critical issues in that case was the reliability of credible witnesses bearing on eye-witness identification in difficult conditions, a situation which does not exist in this case⁵⁸².

⁵⁷⁴ Amended Notice of Appeal, para. 8.

⁵⁷⁵ Respondent's Brief, paras. 62, 63.

⁵⁷⁶ Amended Notice of Appeal, para. 9.

⁵⁷⁷ Appellant's Brief, para. 53.

⁵⁷⁸ Appellant's Brief, paras. 54, 55.

⁵⁷⁹ Appellant's Brief, para. 55.

⁵⁸⁰ Appellant's Brief, paras. 57-59.

⁵⁸¹ Respondent's Brief, para. 68.

⁵⁸² Respondent's Brief, paras. 70-72.

de première instance a commis une erreur de droit en appliquant aux dépositions faites par les témoins à décharge une norme de preuve plus élevée que celle qu'elle a appliquée aux témoins à charge⁵⁷⁴. Le Procureur répond que, contrairement à ce qu'affirme l'appelant, la Chambre de première instance a adopté en ce qui concerne la norme d'administration de la preuve une approche plus rigoureuse qu'il ne fallait et qu'elle l'a appliquée à chacun des éléments des preuves à charge au stade de l'établissement des faits et non pas simplement, comme il se doit, à l'appréciation des questions fondamentales, les éléments constitutifs de chaque infraction⁵⁷⁵.

285. La Chambre d'appel fait observer que, dans ce moyen d'appel, l'appelant n'a ni précisé les décisions de la Chambre de première instance qui seraient incorrectes en droit ni renvoyé au dossier. Dans ces conditions, la Chambre d'appel n'est pas en mesure d'examiner cette question plus avant et rejette en conséquence ce moyen d'appel dans sa totalité.

*C. Erreur que la Chambre de première instance
aurait commise pour cause de défaut de motivation
(troisième moyen d'appel)*

286. L'appelant soutient que la Chambre de première instance a commis une erreur de droit en ne motivant pas certaines de ses conclusions⁵⁷⁶. Il rappelle que, dans l'affaire *Kupreškić*, la Chambre d'appel du TPIY a conclu à l'existence d'une «obligation de motivation» notamment en cas d'application de la règle dite des «conditions difficiles» qui impose une obligation accrue de suffisamment motiver la décision lorsque le verdict de culpabilité se fonde sur la déposition non corroborée d'un seul témoin qui a identifié une personne dans des conditions difficiles⁵⁷⁷. Il soutient qu'en l'espèce, comme dans l'affaire *Kupreškić*, la Chambre de première instance a une «obligation accrue» de motiver ses décisions car la plupart des témoins à charge étaient des détenus accusés de crimes dénotant une «turpitude morale» et que, dans de nombreux cas, c'était l'appelant qui avait été responsable de leur arrestation et détention⁵⁷⁸. De l'avis de l'appelant, la Chambre de première instance n'a pas respecté cette «obligation accrue» [traduction] qui lui incombait⁵⁷⁹. En outre, il soutient qu'elle s'est fondée sur des éléments de preuve qu'aucun tribunal raisonnable n'aurait pu accepter étant donné qu'il s'agissait de témoignages non corroborés de témoins au casier judiciaire chargé, à l'arrestation de bon nombre desquels l'appelant avait contribué⁵⁸⁰.

287. Le Procureur répond que l'appelant tente simplement, sous le couvert de ce grief, de plaider de nouveau sa cause en appel⁵⁸¹. Il soutient que c'est à tort que l'appelant se fonde sur l'arrêt *Kupreškić* puisque l'une des questions fondamentales dans cette affaire était celle de la fiabilité de témoins crédibles qui avaient identifié l'accusé dans des conditions difficiles, ce qui n'est pas le cas en l'espèce⁵⁸².

⁵⁷⁴ *Ibid.*, para. 8.

⁵⁷⁵ Mémoire de l'intimé, paras. 62 et 63.

⁵⁷⁶ Acte d'appel modifié, para. 9.

⁵⁷⁷ Mémoire de l'appelant, para. 53.

⁵⁷⁸ *Ibid.*, paras. 54 et 55.

⁵⁷⁹ *Ibid.*, para. 55.

⁵⁸⁰ *Ibid.*, paras. 57 à 59.

⁵⁸¹ Mémoire de l'intimé, para. 68.

⁵⁸² *Ibid.*, paras. 70 à 72.

288. The Appeals Chamber observes that the Appellant fails to point to any place in the Trial Judgement where the Trial Chamber allegedly erred by failing in its “enhanced duty” to provide a reasoned opinion. Further, the Appellant appears to complain not about the Trial Chamber’s failure to articulate reasons for its findings, but rather about the findings themselves, again, however, without identifying where in the Trial Judgement such errors were made and without any reference to the record⁵⁸³. Issues related to the Trial Chamber’s factual findings are addressed above in this Judgement to the extent that they were properly raised under other grounds of appeal. Because the present ground of appeal fails to identify the portions of the Trial Judgement in which the Trial Chamber allegedly failed to provide a reasoned opinion, and instead makes general, unsupported arguments about the lack of credibility of the Prosecution evidence and the Trial Chamber’s alleged error in relying upon it, the Appeals Chamber considers this ground of appeal to be unsubstantiated and vague and, accordingly, dismisses it.

XXIII. SENTENCING

289. The Appeals Chamber recalls that at trial, the Appellant was convicted for genocide (Count 2); direct and public incitement to commit genocide (Count 4); and extermination as a crime against humanity (Count 6)⁵⁸⁴. The Trial Chamber sentenced the Appellant to imprisonment for the remainder of his life for Count 2 as well as Count 6, and to imprisonment for fifteen years for his conviction on Count 4, with all three sentences to run concurrently⁵⁸⁵. The Trial Chamber then reduced the Appellant’s fifteen-year sentence under Count 4 by five years, five months and twenty-five days as credit for time served pursuant to Rule 101 (D) of the Rules⁵⁸⁶.

290. The combined effect of Article 23 of the Statute and Rule 101 of the Rules is *inter alia* that⁵⁸⁷, in imposing a sentence, the Trial Chamber shall consider the following factors : (i) the general practice regarding prison sentences in the courts of Rwanda; (ii) the gravity of the offences or totality of the conduct⁵⁸⁸; (iii) the individual circumstances of the accused, including aggravating and mitigating circumstances; and (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served⁵⁸⁹. The Appeals Chamber recalls, however, that the factors to be taken into account by the Trial Chamber at sentencing

⁵⁸³ See Appellant’s Brief, para. 59.

⁵⁸⁴ Trial Judgement, para. 942.

⁵⁸⁵ Trial Judgement, paras. 968, 969.

⁵⁸⁶ Trial Judgement, para. 970. The Appeals Chamber notes that this credit encompassed the total period the Appellant was in custody pending surrender and trial, including his period of arrest and detention in Benin prior to transfer to the custody of the Tribunal. See Trial Judgement, paras. 965-967.

⁵⁸⁷ Cf. *Blaškić* Appeal Judgement, para. 679.

⁵⁸⁸ *Čelebici Case* Appeal Judgement, para. 429.

⁵⁸⁹ Statute, art. 9 (3).

288. La Chambre d'appel fait observer que l'appelant n'a attiré son attention sur aucun passage du jugement où la Chambre de première instance aurait commis une erreur pour avoir failli à son « obligation accrue » de motivation. En outre, l'appelant semble non pas faire grief à la Chambre de première instance de ne pas avoir motivé ses conclusions, mais plutôt critiquer les conclusions elles-mêmes, sans pour autant, une fois encore, identifier les passages du jugement entachés d'erreurs et sans aucune référence au dossier⁵⁸³. Les questions que soulèvent les constatations de fait opérées par la Chambre de première instance sont examinées plus haut dans le présent arrêt dans la mesure où elles ont été correctement soulevées dans le cadre d'autres moyens d'appel. Du fait que le présent moyen d'appel n'identifie pas les parties du jugement dans lesquelles la Chambre de première instance n'aurait pas motivé ses conclusions et se borne plutôt à avancer des arguments à caractère général et infondés sur l'absence de crédibilité des éléments de preuve à charge et sur l'erreur que la Chambre de première instance aurait commise en s'appuyant sur ceux-ci, la Chambre d'appel considère que ce moyen d'appel est dénué de fondement et vague et le rejette en conséquence.

XXIII. DÉTERMINATION DE LA PEINE

289. La Chambre d'appel rappelle qu'à l'issue du procès, l'appelant avait été déclaré coupable de génocide (chef d'accusation 2), d'incitation directe et publique à commettre le génocide (chef 4) et d'extermination constitutive de crime contre l'humanité (chef 6)⁵⁸⁴. La Chambre de première instance l'a condamné à une peine d'emprisonnement à vie au titre des chefs d'accusation 2 et 6 et à une peine d'emprisonnement de quinze ans au titre du chef 4, les trois peines étant confondues⁵⁸⁵. Elle a ensuite, conformément à l'article 101 (D) du Règlement, déduit de la peine d'emprisonnement de quinze ans infligée pour le chef 4, le temps que l'accusé avait passé en détention provisoire, soit cinq ans, cinq mois et vingt-cinq jours⁵⁸⁶.

290. Il résulte notamment de l'effet conjugué des articles 23 du Statut et 101 du Règlement que la Chambre de première instance doit⁵⁸⁷, lorsqu'elle prononce une peine, tenir compte des facteurs suivants : i) la grille générale des peines d'emprisonnement appliquée par les tribunaux rwandais ; ii) la gravité des infractions et l'ensemble du comportement de leur auteur⁵⁸⁸ ; iii) la situation personnelle de l'accusé, notamment les circonstances aggravantes et circonstances atténuantes ; et iv) la mesure dans laquelle cette personne a déjà purgé toute peine qui pourrait lui avoir été infligée par une juridiction nationale pour le même fait⁵⁸⁹. La Chambre d'appel rappelle tou-

⁵⁸³ Voir mémoire de l'appelant, para. 59.

⁵⁸⁴ Jugement, para. 942.

⁵⁸⁵ *Ibid.*, paras. 968 et 969.

⁵⁸⁶ *Ibid.*, para. 970. La Chambre d'appel fait observer que la durée à déduire couvre la période totale que l'appelant a passée en détention provisoire en attendant d'être remis au Tribunal et d'être jugé, y compris la période de son arrestation et de sa détention au Bénin avant son transfert au Tribunal. Voir le jugement, paras. 965 à 967.

⁵⁸⁷ Voir arrêt *Blaškić*, para. 679.

⁵⁸⁸ Arrêt *Čelebici*, para. 429.

⁵⁸⁹ Art. 9 (3) du Statut.

as listed in these provisions are by no means exhaustive⁵⁹⁰. Finally, it shall credit the accused for any time spent in detention pending transfer to the Tribunal, trial, or appeal.

291. The Appeals Chamber further recalls that under Article 24 of the Statute, its review of the Trial Chamber's determination of a sentence on appeal is of a corrective nature only rather than a *de novo* sentencing proceeding. The role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact that have occasioned a miscarriage of justice⁵⁹¹. When determining a sentence, a Trial Chamber has considerable, though not unlimited, discretion on account of its obligation to individualize penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes for which the accused has been convicted⁵⁹². Consequently, as a general rule, the Appeals Chamber will not substitute a sentence for that of a Trial Chamber, unless

“it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law”⁵⁹³.

The appellant in principle bears the burden of demonstrating that there has been a discernible error in the exercise of the Trial Chamber's discretion by showing that

“(a) the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account in the weighing process involved in the exercise of its discretion; and (b) if it did, that this resulted in a miscarriage of justice”⁵⁹⁴.

As long as the Trial Chamber has observed the proper limits of the discretionary framework afforded to it at sentencing without committing any discernible errors, the Appeals Chamber will not intervene⁵⁹⁵.

⁵⁹⁰ *Musema* Appeal Judgement, para. 380 citing *Celebici Case* Appeal Judgement, para. 718; *Furundžija* Appeal Judgement, para. 238. See also *Blaškić* Appeal Judgement, para. 680.

⁵⁹¹ *Akayesu* Appeal Judgement, paras. 178, 408 citing *Celebici Case* Appeal Judgement, paras. 724-725; *Kayishema and Ruzindana*, Appeal Judgement, para. 320; *Musema* Appeal Judgement, para. 15. See also *Dragan Nikolić* Sentencing Appeal Judgement, para. 8.

⁵⁹² *Celebici Case* Appeal Judgement, para. 717; *Vasiljević* Appeal Judgement, para. 9; *Blaškić* Appeal Judgement, para. 680; *Dragan Nikolić* Sentencing Appeal Judgement, para. 9.

⁵⁹³ *Serushago* Sentencing Appeal Judgement, para. 32. See also *Aleksovski* Appeal Judgement, para. 187; *Tadić* Sentencing Appeal Judgement, paras. 20-22; *Celebici Case* Appeal Judgement, para. 725; *Blaškić* Appeal Judgement, para. 680.

⁵⁹⁴ *Serushago* Sentencing Appeal Judgement, para. 23. See also *Kayishema and Ruzindana* Appeal Judgement, para. 366; *Dragan Nikolić* Sentencing Appeal Judgement, para. 9.

⁵⁹⁵ *Aleksovski* Appeal Judgement, para. 187; *Furundžija* Appeal Judgement, para. 239; *Tadić* Sentencing Appeal Judgement, para. 22; *Celebici Case* Appeal Judgement, para. 725; *Jelisic* Appeal Judgement, para. 99; *Serushago* Sentencing Appeal, para. 32; *Akayesu* Appeal Judgement, para. 409; *Dragan Nikolić* Sentencing Appeal Judgement, para. 9.

tefois que la liste des éléments que la Chambre de première instance doit prendre en compte lors de la détermination de la peine et qui sont énumérés dans ces dispositions n'est pas exhaustive⁵⁹⁰. Enfin, la durée de la période pendant laquelle l'accusé a été placé en détention provisoire en attendant d'être remis au Tribunal ou en attendant d'être jugé par une Chambre de première instance ou par la Chambre d'appel est, le cas échéant, déduite de la durée totale de sa peine.

291. La Chambre d'appel rappelle en outre qu'en vertu de l'article 24 du Statut, le contrôle qu'elle exerce en appel sur la peine prononcée par la Chambre de première instance ne revêt qu'un caractère correctif, il ne constitue pas une nouvelle procédure de détermination de la peine. Le rôle de la Chambre d'appel se limite à corriger les erreurs de droit qui invalident une décision et les erreurs de fait qui ont entraîné un déni de justice⁵⁹¹. Lorsqu'elle prononce une peine, une Chambre de première instance jouit d'un pouvoir discrétionnaire très large, mais non illimité, en raison de l'obligation qu'elle a d'individualiser la peine pour tenir compte de la situation personnelle de l'accusé et de rendre compte de la gravité des crimes pour lesquels celui-ci a été condamné⁵⁹². Ainsi, en général, la Chambre d'appel ne substituera pas sa sentence à celle prononcée en première instance sauf si

«elle est convaincue que la Chambre de première instance a commis une erreur dans l'exercice de son pouvoir discrétionnaire, ou si elle s'est écartée du droit applicable»⁵⁹³.

En principe, la charge de démontrer que la Chambre de première instance a commis une erreur apparente dans l'exercice de son pouvoir discrétionnaire repose sur l'appelant qui doit démontrer :

«a) que la Chambre de première instance avait, soit pris en considération des éléments dont elle n'aurait pas dû tenir compte, soit refusé de tenir compte d'éléments qu'elle aurait dû prendre en considération lorsqu'il s'est agi pour elle d'user de sa compétence discrétionnaire pour apprécier chacune des circonstances atténuantes à sa juste valeur; et b) que l'erreur en question a donné lieu à un déni de justice»⁵⁹⁴.

Tant que la Chambre de première instance, en fixant une peine, n'outrepasse pas les limites de son pouvoir discrétionnaire et ne commet pas d'erreurs apparentes, la Chambre d'appel n'interviendra pas⁵⁹⁵.

⁵⁹⁰ Arrêt *Musema*, para. 380, citant l'arrêt *Celebici*, para. 718; arrêt *Furundžija*, para. 238. Voir également arrêt *Blaškić*, para. 680.

⁵⁹¹ Arrêt *Akayesu*, paras. 178 et 408 citant l'arrêt *Celebici*, paras. 724 et 725; arrêt *Kayishema et Ruzindana*, para. 320; arrêt *Musema*, para. 15. Voir également *Dragan Nikolić*, Arrêt relatif à la sentence, para. 8.

⁵⁹² Arrêt *Celebici*, para. 717; arrêt *Vasiljević*, para. 9; arrêt *Blaškić*, para. 680; affaire *Dragan Nikolić*, arrêt relatif à la sentence, para. 9.

⁵⁹³ Arrêt *Serushago*, para. 32. Voir également l'arrêt *Aleksovski*, para. 187; l'arrêt *Tadić*, paras. 20 à 22; l'arrêt *Celebici*, para. 725; l'arrêt *Blaškić*, para. 680.

⁵⁹⁴ Arrêt *Serushago*, para. 23. Voir également l'arrêt *Kayishema et Ruzindana*, para. 366; affaire *Dragan Nikolić*, arrêt relatif à la sentence, para. 9.

⁵⁹⁵ Arrêt *Aleksovski*, para. 187; arrêt *Furundžija*, para. 239; arrêt *Tadić*, para. 22; arrêt *Celebici*, para. 725; arrêt *Jelisić*, para. 99; arrêt *Serushago*, para. 32; arrêt *Akayesu*, para. 409; *Dragan Nikolić*, arrêt relatif à la sentence, para. 9.

A. Appeal against the Sentence (Ground of Appeal 25)

292. The Appellant argues under Ground of Appeal 25 that the Trial Chamber erred in sentencing him to imprisonment for life because it failed to accept, as a mitigating factor⁵⁹⁶, all of the evidence proffered by the Appellant in support of his contention that he saved the lives of Tutsis⁵⁹⁷. Consequently, the Appellant requests the Appeals Chamber to quash his sentence and to substitute the sentence with a determinate one⁵⁹⁸.

293. Specifically, the Appellant contends that the Trial Chamber erred in making the following findings⁵⁹⁹ when considering his alleged mitigating circumstances :

that the allegation that the Appellant saved Tutsis prior to 1 January 1994 may not be considered as a mitigating circumstance;
that the “handful of Tutsi civilians” who received shelter at the home of the Appellant’s second wife should not be credited to the Appellant but to his wife; and

that the testimony of Witness JK 312 that the Appellant assisted in the evacuation of a Tutsi family on or about 8 April 1994, while accepted by the Trial Chamber, was insufficient to mitigate the Appellant’s sentence⁶⁰⁰.

294. In considering an appeal alleging errors with regard to the Trial Chamber’s consideration of mitigating circumstances, the Appeals Chamber recalls that under Rule 101 (B) (ii) of the Rules, a Trial Chamber is *required* to take into account any mitigating circumstances in determining a sentence⁶⁰¹. Neither the Statute nor the Rules exhaustively define the factors which may be considered as mitigating factors. Consequently, under the jurisprudence of this Tribunal, the category of mitigating circumstances has been left open and

⁵⁹⁶ The Appeals Chamber notes that in his Amended Notice of Appeal, at paras. 139, 140, the Appellant raised two additional sub-grounds of appeal under this ground with respect to alleged errors by the Trial Chamber in giving weight to the following aggravating factors at sentencing: 1) that the Appellant directed and participated in the killings in various locations in Ruhengeri *Préfecture*; and 2) that the Appellant used his considerable influence to bring people together to commit massacres and acted as a bridge between military and civilian spheres to for the purpose of attacking and massacring Tutsi civilians. However, the Appellant failed to raise these alleged errors again in his Brief, Brief in Reply or at the Appeal Hearing, or to develop any specific arguments or cite to any authorities in support of his contention that the Trial Chamber committed error in this regard. Thus, the Appeals Chamber declines to consider these sub-grounds, finding that the Appellant’s right to appeal as to them is waived. See *Kayishema and Ruzindana* Appeal Judgement, para. 46.

⁵⁹⁷ Amended Notice of Appeal, paras. 135-138; Appellant’s Brief, paras. 394-404; Brief in Reply, paras. 108, 109. See also Trial Judgement, para. 968.

⁵⁹⁸ Appellant’s Brief, paras. 403, 404.

⁵⁹⁹ See Trial Judgement, paras. 948-951.

⁶⁰⁰ Amended Notice of Appeal, paras. 135-138; Appellant’s Brief, para. 401; Brief in Reply, para. 108.

⁶⁰¹ *Serushago* Sentencing Appeal Judgement, para. 22. See also *Musema* Appeal Judgement, para. 395.

A. Appel de la sentence (vingt-cinquième moyen d'appel)

292. Dans le cadre de ce moyen d'appel, l'appelant soutient que la Chambre de première instance a commis une erreur en le condamnant à une peine d'emprisonnement à vie car elle n'a pas reconnu comme circonstances atténuantes⁵⁹⁶ tous les éléments de preuve qu'il a fournis pour étayer son affirmation selon laquelle il a sauvé la vie à des Tutsis⁵⁹⁷. En conséquence, il demande à la Chambre d'appel d'annuler la peine d'emprisonnement à vie et d'y substituer une peine d'emprisonnement de durée déterminée⁵⁹⁸.

293. Plus précisément, l'appelant soutient que la Chambre de première instance a commis une erreur pour avoir conclu⁵⁹⁹ lors de l'examen des circonstances atténuantes qu'il invoquait :

que le fait qu'il aurait sauvé la vie à des Tutsis avant le 1^{er} janvier 1994 ne pouvait être retenu comme circonstance atténuante;

qu'il n'y avait nullement lieu de porter à son actif le fait qu'une poignée de civils tutsis avaient trouvé refuge chez sa seconde épouse, et que s'il fallait rendre honneur à quelqu'un à cet égard, c'était davantage à l'épouse qu'à l'appelant qu'il convenait de le faire; et

que le fait qu'il avait, selon la déposition du témoin JK 312, aidé à l'évacuation d'une famille tutsie le 8 avril 1994 ou vers cette date, bien qu'acceptée par la Chambre de première instance, n'était pas propre à atténuer la peine de l'appelant⁶⁰⁰.

294. Appelée à statuer sur un appel reprochant à la Chambre de première instance d'avoir commis des erreurs dans son examen des circonstances atténuantes, la Chambre d'appel rappelle qu'aux termes de l'article 101 (B) (ii) du Règlement, une Chambre de première instance *doit* tenir compte de toutes les circonstances atténuantes lorsqu'elle prononce une peine⁶⁰¹. Or, ni le Statut ni le Règlement ne définissent de manière exhaustive les éléments qui peuvent être considérés comme circonstances atténuantes. En conséquence, la jurisprudence du Tribunal a laissé ouverte la catégorie des circonstances atténuantes et

⁵⁹⁶ La Chambre d'appel note qu'aux paragraphes 139 et 140 de son acte d'appel modifié, l'appelant a soulevé dans le cadre de ce moyen d'appel deux autres griefs concernant des erreurs que la Chambre de première instance aurait commises en accordant du poids aux circonstances aggravantes suivantes lors de la détermination de la peine à infliger : 1) le fait que l'appelant a dirigé des tueries en divers lieux dans la préfecture de Ruhengeri et y a participé; 2) le fait que l'appelant a usé de son influence considérable pour rassembler des gens afin qu'ils commettent des massacres et a servi de courroie de transmission entre les milieux militaire et civil dans le dessein d'attaquer et de massacrer les civils tutsis. Toutefois, l'appelant n'a pas soulevé de nouveau ces erreurs dans son mémoire ou son mémoire en réplique ou encore à l'audience d'appel; il n'a non plus développé d'argumentation spécifique ni cité aucune jurisprudence à l'appui de son affirmation reprochant à la Chambre de première instance d'avoir commis une erreur à cet égard. De ce fait, la Chambre d'appel se refuse à examiner ces griefs, estimant que l'appelant a renoncé à son droit d'interjeter appel à cet égard. Voir l'arrêt *Kayishema et Ruzindana*, para. 46.

⁵⁹⁷ Acte d'appel modifié, paras. 135 à 138; mémoire de l'appelant, paras. 394 à 404; mémoire en réplique de l'appelant, paras. 108 et 109. Voir également jugement, para. 968.

⁵⁹⁸ Mémoire de l'appelant, paras. 403 et 404.

⁵⁹⁹ Voir jugement, paras. 948 à 951.

⁶⁰⁰ Acte d'appel modifié, paras. 135 à 138; mémoire de l'appelant, para. 401; mémoire en réplique de l'appelant, para. 108.

⁶⁰¹ Affaire *Serushago*, arrêt relatif à la sentence, para. 22. Voir aussi arrêt *Musema*, para. 395.

“what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion”⁶⁰².

The burden of proof which must be met by an accused with regard to mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt⁶⁰³, but proof on the balance of probabilities – the circumstance in question must exist or have existed “more probably than not”⁶⁰⁴. Once a Trial Chamber determines that certain evidence constitutes a mitigating circumstance, the decision as to the weight to be accorded to that mitigating circumstance also lies within the wide discretion afforded to the Trial Chamber at sentencing⁶⁰⁵.

1. Alleged Failure to Consider that the Appellant Allegedly Saved Lives of Tutsis before 1 January 1994

295. The Appeals Chamber first turns to the Appellant’s allegation that the Trial Chamber erred in law in failing to consider as a mitigating circumstance the fact that he allegedly saved Tutsis before 1 January 1994 as a mitigating circumstance. The Prosecution does not contest the factual basis for this argument⁶⁰⁶.

296. In this regard, the Trial Chamber held at paragraph 948 of the Trial Judgement that :

[it] will not consider as a mitigating circumstance the fact that Kajelijeli had allegedly saved Tutsi lives before 1994. First, the Chamber notes that this time period is outside the Chamber’s jurisdiction. And, secondly, the Prosecution was, at the instance of objections from the Defence, prevented from leading the inquiry into Kajelijeli’s possible involvement in Tutsi deaths and mistreatment prior to 1994, with the result that this subject matter was not fully explored at trial.

297. Before reviewing this conclusion, the Appeals Chamber notes that the Appellant has failed to put forward any arguments as to *why* the Trial Chamber’s decision at paragraph 948 of the Trial Judgement was in error or to identify any case law in support thereof, contrary to the requirements of Rule 111 of the Rules⁶⁰⁷. The Appellant simply states that the Trial Chamber’s failure to consider this alleged mitigating circumstance on the basis of the Tribunal’s temporal jurisdiction was in error and

⁶⁰² *Musema* Appeal Judgement, para. 395.

⁶⁰³ *Celebici Case* Appeal Judgement, para. 763.

⁶⁰⁴ *Celebici Case* Appeal Judgement, para. 590.

⁶⁰⁵ *Niyitegeka* Appeal Judgement, para. 266, referring to *Musema* Appeal Judgement, para. 396 and *Kayishema and Ruzindana* Appeal Judgement, para. 366.

⁶⁰⁶ The Prosecution merely generally asserts that 1) the Appellant has failed to demonstrate any error made by the Trial Chamber with respect to its finding that there are no circumstances to mitigate the culpability of the Appellant; 2) according to the Tribunal’s jurisprudence the fact that an accused has saved Tutsi lives does not automatically serve as a mitigating factor in sentencing; 3) even if the Trial Chamber had considered this a mitigating factor, the sentence imposed by the Trial Chamber reflects the gravity of the crimes of which the Appellant was found guilty and falls well within its discretionary framework. See Respondent’s Brief, paras. 308-311, 314.

⁶⁰⁷ Rule 111 of the Rules states that “[a]n Appellant’s brief *setting out all the arguments and authorities* shall be filed ...”. (Emphasis added).

«la Chambre de première instance apprécie ce qui constitue une circonstance atténuante dans l'exercice de son pouvoir d'appréciation»⁶⁰².

L'accusé qui invoque des circonstances atténuantes n'est pas tenu, comme dans le cas des circonstances aggravantes, d'en rapporter la preuve au-delà de tout doute raisonnable⁶⁰³, mais plutôt «sur la base de l'hypothèse la plus probable»⁶⁰⁴. Une fois qu'une Chambre de première instance a déterminé que tel ou tel élément de preuve constitue une circonstance atténuante, la question du poids à lui accorder relève aussi du pouvoir discrétionnaire étendu dont jouit la Chambre pour fixer la peine⁶⁰⁵.

1. *Grief reprochant à la Chambre de première instance de ne pas avoir tenu compte du fait que l'appelant aurait sauvé la vie à des Tutsis avant le 1^{er} janvier 1994*

295. La Chambre d'appel se penche d'abord sur l'allégation de l'appelant selon laquelle la Chambre de première instance a commis une erreur de droit en décidant de ne pas retenir comme circonstance atténuante le fait qu'il aurait sauvé la vie à des Tutsis avant le 1^{er} janvier 1994. Le Procureur ne conteste pas le fondement factuel de cet argument⁶⁰⁶.

296. Voici ce que la Chambre de première instance a dit à ce propos au paragraphe 948 du jugement :

La Chambre ne retiendra pas comme circonstance atténuante le fait que Kajelijeli aurait sauvé la vie de Tutsis avant 1994. D'une part, elle fait observer que cette époque déborde la compétence de la Chambre. D'autre part, le Procureur n'a pu, en raison des objections soulevées par la Défense, s'intéresser à l'implication éventuelle de Kajelijeli dans la mort de Tutsis et les mauvais traitements infligés à des Tutsis avant 1994, de sorte que cette question n'a pas été pleinement élucidée durant le procès.

297. Mais avant d'analyser cette conclusion, la Chambre d'appel fait observer que l'appelant n'a pas exposé *les raisons* pour lesquelles la décision prise par la Chambre de première instance au paragraphe 948 du jugement était erronée ni mentionné de précédent au soutien de sa thèse, contrairement aux exigences de l'article 111 du Règlement⁶⁰⁷. L'appelant se borne à affirmer que le refus de la Chambre de première

⁶⁰² Arrêt *Musema*, para. 395.

⁶⁰³ Arrêt *Celebici*, para. 763.

⁶⁰⁴ *Ibid.*, para. 590.

⁶⁰⁵ Arrêt *Niyitegeka*, para. 266, renvoyant à l'arrêt *Musema*, para. 396, et à l'arrêt *Kayishema et Ruzindana*, para. 366.

⁶⁰⁶ Le Procureur se contente tout simplement d'affirmer d'une façon générale : 1) que l'appelant n'a pas démontré que la Chambre de première instance a commis une erreur en concluant à l'absence de facteurs d'atténuation de sa culpabilité; 2) que, d'après la jurisprudence du Tribunal, le fait qu'un accusé ait sauvé la vie à des Tutsis ne constitue pas automatiquement un facteur d'atténuation de la peine; 3) que même si la Chambre de première instance avait considéré ce fait comme un facteur atténuant, la peine qu'elle a infligée rend compte de la gravité des crimes dont l'appelant a été reconnu coupable et relève du pouvoir discrétionnaire de la Chambre. Voir mémoire de l'intimé, paras. 308 à 311 et 314.

⁶⁰⁷ L'article 111 du Règlement se lit comme suit : «Le mémoire de l'appelant, *qui expose tous les éléments de droit et de fait*, est déposé ... [non souligné dans l'original].

resulted in a manifestly unfair and unjust sentence against him⁶⁰⁸. On this basis alone, the Appeals Chamber is entitled to find that the Appellant's claim fails⁶⁰⁹. However, on issues of alleged errors of law, the Appeals Chamber, as the final arbiter of law, has discretion to consider issues raised on appeal even in the absence of substantial arguments by the parties⁶¹⁰. Because an appeal relating to the Trial Chamber's alleged failure to take account of a mitigating circumstance under the Rules is a matter of law⁶¹¹, the Appeals Chamber decides to exercise its discretionary power to consider this part of the Appellant's ground of appeal on its merits.

298. The Appeals Chamber does not agree with the Trial Chamber's conclusion that the Appellant's allegation that he saved Tutsis prior to 1994 could not be taken into account as a mitigating circumstance simply on the basis that events prior to 1 January 1994 are outside the Tribunal's temporal jurisdiction. It is true that Articles 1 and 7 of the Tribunal's Statute limit the scope of the Tribunal's temporal jurisdiction from 1 January 1994 to 31 December 1994. However, that temporal framework refers to the Tribunal's competence *to prosecute and try* serious violations of international humanitarian law such that no one may be indicted for a crime that occurred outside that prescribed timeframe⁶¹². This provision does not bar the introduction of such evidence at *sentencing*, although prior acts of the defendant, as explained below, are rarely considered probative for sentencing purposes in any event.

299. However, the Appeals Chamber finds that the Trial Chamber's conclusion that the Appellant's allegation that he saved Tutsis prior to 1 January 1994 could not be taken into account as a mitigating circumstance because the "subject matter was not fully explored at trial" was within the bounds of its discretion. As noted above, a mitigating circumstance proffered by the accused has to be proven on the balance of probabilities⁶¹³. Furthermore, once a mitigating factor has been determined to exist, the decision as to the weight to be accorded the mitigating circumstance lies within the wide discretion afforded to the Trial Chamber in its sentencing determination. Proof of mitigating circumstances

⁶⁰⁸ Amended Notice of Appeal, para. 135; Appellant's Brief, paras. 401, 403; Brief in Reply, paras. 108, 109.

⁶⁰⁹ *Akayesu* Appeal Judgement, para. 404 citing *Kambanda* Appeal Judgement, para. 98.

⁶¹⁰ *Akayesu* Appeal Judgement, para. 404 citing *Kambanda* Appeal Judgement, para. 98.

⁶¹¹ *Kambanda* Appeal Judgement, para. 116.

⁶¹² See generally *Simba*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004; *Ngeze and Nahimana*, Decision on the Interlocutory Appeals, 5 September 2000. See also *Kajelijeli*, Arrêt (*Appel de la Décision Du 13 mars 2001 Rejetant la "Defence Motion Objecting to the Jurisdiction of the Tribunal"*), 16 November 2001.

⁶¹³ See *supra* para. 294.

instance de prendre en considération cette circonstance atténuante en raison de la compétence *ratione temporis* du Tribunal était entaché d'erreur et a entraîné le prononcé à son encontre d'une peine manifestement déraisonnable et injuste⁶⁰⁸. Sur ce seul fondement, la Chambre d'appel est en droit de conclure que ce grief de l'appelant ne saurait prospérer⁶⁰⁹. Toutefois, en cas d'allégation d'erreurs de droit, la Chambre d'appel, en tant qu'arbitre en dernier ressort du droit, est investie du pouvoir discrétionnaire d'examiner toute question soulevée en appel par les parties, même en l'absence d'arguments de fond des parties⁶¹⁰. Du fait que le grief reprochant à la Chambre de première instance de ne pas avoir tenu compte d'une circonstance atténuante alors que le Règlement l'exige constitue une question de droit⁶¹¹, la Chambre d'appel décide d'exercer son pouvoir discrétionnaire et d'examiner au fond cette partie du moyen d'appel de l'appelant.

298. La Chambre d'appel ne partage pas la conclusion de la Chambre de première instance selon laquelle l'allégation de l'appelant qui soutient avoir sauvé la vie de Tutsis avant 1994 ne pouvait pas être retenue comme circonstance atténuante, simplement parce que les faits survenus avant le 1^{er} janvier 1994 débordent la compétence *ratione temporis* du Tribunal. Il est vrai que les articles premier et 7 du Statut du Tribunal circonscrivent l'étendue de la compétence temporelle du Tribunal entre le 1^{er} janvier et le 31 décembre 1994. Mais ce cadre temporel se réfère à la compétence du Tribunal pour poursuivre et juger les personnes présumées coupables de violations graves du droit international humanitaire de sorte que nul ne peut être mis en accusation pour un crime commis en dehors de ce cadre temporel prescrit⁶¹². Cette disposition n'empêche pas de présenter de tels éléments de preuve lors de la détermination de la peine, bien qu'il soit rare, en tout état de cause, que des actes antérieurs de l'accusé soient considérés comme ayant une valeur probante aux fins de la détermination de la peine, comme cela est expliqué ci-dessous.

299. Cependant, la Chambre d'appel estime que la Chambre de première instance jouissait bien du pouvoir discrétionnaire de décider que l'allégation de l'appelant selon laquelle il avait sauvé la vie de Tutsis avant le 1^{er} janvier 1994 ne pouvait être considérée comme circonstance atténuante parce que «cette question n'a pas été pleinement élucidée durant le procès». Comme il a été indiqué plus haut, l'accusé qui invoque une circonstance atténuante doit en rapporter la preuve sur la base de l'hypothèse la plus probable⁶¹³. En outre, une fois que l'existence d'une telle circonstance a été établie, la question du poids à lui accorder relève du pouvoir discrétionnaire étendu dont jouit la Chambre de première instance pour fixer la peine. L'existence avérée de circonstances atténuantes

⁶⁰⁸ Acte d'appel modifié, para. 135; mémoire de l'appelant, paras. 401 et 403; mémoire en réplique de l'appelant, paras. 108 et 109.

⁶⁰⁹ Arrêt *Akayesu*, para. 404, citant l'arrêt *Kambanda*, para. 98.

⁶¹⁰ *Id.*

⁶¹¹ Arrêt *Kambanda*, para. 116.

⁶¹² Voir, de manière générale, les affaires *Simba* (*Decision on Interlocutory Appeal Regarding Temporal Jurisdiction*, 29 juillet 2004) et *Ngeze et Nahimana* (Décision sur les appels interlocutoires, 5 septembre 2000). Voir également arrêt *Kajelijeli* (Appel de la Décision du 13 mars 2001 rejetant la «*Defence Motion Objecting to the Jurisdiction of the Tribunal*»), 16 novembre 2001.

⁶¹³ Voir *supra*, para. 294.

“does not automatically entitle the Appellant to a ‘credit’ in the determination of the sentence; it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination”⁶¹⁴.

300. In this case, four witnesses testified to the Appellant saving Tutsis prior to 1994⁶¹⁵. However, the Trial Chamber considered that during the Prosecution’s case, the Defence continuously objected to or attempted to limit⁶¹⁶ the Prosecution’s questions put to its witnesses with regard to any bad conduct of the Appellant towards Tutsis prior to 1994, citing the Tribunal’s temporal jurisdiction as a bar to such questioning⁶¹⁷. As a consequence, the Trial Chamber found that the issue of the Appellant’s conduct prior to 1994 towards Tutsis, whether good or bad, was not fully explored or determined at trial⁶¹⁸. The Trial Chamber correctly concluded that it was not able to take into account and ascribe weight to the four witnesses’ testimonies as evidence on this issue given that the Prosecution had not been able to fully present evidence to the contrary, thereby testing the credibility and probative value of that evidence on this particular question. The Appeals Chamber finds that the Trial Chamber’s conclusion was properly within the bounds of its discretion.

301. In any event, the Trial Chamber found that if it did accept the Appellant’s proffered evidence in this regard as mitigating, the weight of that evidence, even when taken together with the Appellant’s alleged good conduct towards Tutsis during the events of April 1994, was insufficient to impeach the Prosecution evidence going to the Appellant’s intent to kill Tutsis and his acts of killing Tutsis⁶¹⁹. Under the circumstances of this case, the Appeals Chamber finds that the Trial Chamber’s decision to give little weight to the testimony of the four Defence witnesses who testified as to the Appellant’s pre-1994 good conduct towards Tutsis was within the wide discretion given to the Trial Chamber at sentencing. This conclusion is warranted in light of the totality of the evidence in support of the grave offences for which the Appellant was convicted and when considering that under the jurisprudence of this Tribunal and the ICTY, evidence of prior conduct, good or bad, is rarely considered probative⁶²⁰.

⁶¹⁴ *Niyitegeka* Appeal Judgement, para. 267.

⁶¹⁵ See Trial Judgement, paras. 101, 104 (ZLA); 102, 107 (RHU26); 105 (SMR2); 106 (RHU21).

⁶¹⁶ See, e.g., T. 11 December 2001 pp. 11-16.

⁶¹⁷ See Trial Judgement, para. 114.

⁶¹⁸ See Trial Judgement, paras. 114, 948.

⁶¹⁹ See Trial Judgement, para. 115.

⁶²⁰ For example, in *Kupreškić*, the Trial Chamber held that:

(i) generally speaking, evidence of the accused’s character prior to the events for which he is indicted before the International Tribunal is not a relevant issue inasmuch as (a) by their nature as crimes committed in the context of widespread violence and during a national or international emergency, war crimes and crimes against humanity may be committed by persons with no prior convictions or history of violence, and that consequently evidence of prior good, or bad, conduct on the part of the accused before the armed conflict began is rarely of any probative value before

«n'ouvre pas automatiquement droit, pour l'appelant, à ce que celles-ci soient prises en considération en diminution de sa peine; bien au contraire, elle exige tout simplement que la Chambre de première instance en tienne compte dans sa décision finale»⁶¹⁴.

300. En l'espèce, quatre témoins ont dit à la barre que l'appelant avait sauvé la vie de Tutsis avant 1994⁶¹⁵. Toutefois, la Chambre de première instance a estimé que, lors de la présentation des moyens à charge, la Défense n'a cessé de contester ou de tenter de limiter les questions que le Procureur posait à ses témoins⁶¹⁶ au sujet de faits répréhensibles dont l'appelant se serait rendu coupable vis-à-vis des Tutsis avant 1994, excipant de l'incompétence temporelle du Tribunal pour s'opposer à ce genre de question⁶¹⁷. En conséquence, la Chambre de première instance a conclu que la question de la conduite de l'appelant envers les Tutsis avant 1994, qu'elle ait été bonne ou mauvaise, n'avait pas été examinée à fond ou tranchée au procès⁶¹⁸. La Chambre de première instance a conclu à bon droit qu'elle n'était pas en mesure de tenir compte des dépositions des quatre témoins et de leur attribuer valeur probante à ce sujet étant donné que le Procureur n'avait pas pu apporter pleinement la preuve contraire et ainsi tester la crédibilité et la valeur probante de ces témoignages sur ce point précis. La Chambre d'appel estime que la conclusion de la Chambre de première instance s'inscrivait parfaitement dans le cadre de l'exercice de son pouvoir discrétionnaire.

301. Toujours est-il que la Chambre de première instance a estimé que même si elle retenait les éléments de preuve produits à cet égard par l'appelant comme étant des circonstances atténuantes, le poids de ces éléments, même conjugués à la bonne conduite que l'appelant aurait eue à l'égard des Tutsis durant les événements d'avril 1994, ne suffisait pas à entamer la valeur des moyens à charge tendant à montrer qu'il avait été animé de l'intention de tuer les Tutsis et qu'il avait tué des Tutsis⁶¹⁹. Dans les circonstances de l'espèce, la Chambre d'appel conclut que la décision de la Chambre de première instance d'accorder peu de valeur aux dépositions des quatre témoins à décharge qui ont témoigné sur la bonne conduite de l'appelant à l'égard des Tutsis avant 1994 s'inscrivait dans le cadre du pouvoir discrétionnaire étendu dont jouit la Chambre de première instance en matière de détermination de la peine. Cette conclusion se justifie au vu de l'ensemble des éléments de preuve présentés à l'appui des graves infractions dont l'appelant a été déclaré coupable et de la jurisprudence du Tribunal de céans et du TPIY selon laquelle la preuve d'une conduite antérieure, bonne ou mauvaise, est rarement considérée comme ayant une valeur probante⁶²⁰.

⁶¹⁴ Arrêt *Niyitegeka*, para. 267.

⁶¹⁵ Voir jugement, paras. 101 et 104 (ZLA); 102 et 107 (RHU26); 105 (SMR2); 106 (RHU21).

⁶¹⁶ Voir par exemple compte rendu de l'audience du 11 décembre 2001, pp. 11 à 17.

⁶¹⁷ Voir jugement, para. 114.

⁶¹⁸ *Ibid.*, paras. 114 et 948.

⁶¹⁹ *Ibid.*, para. 115.

⁶²⁰ Par exemple, dans l'affaire *Kupreškić*, la Chambre de première instance a affirmé ce qui suit : (i) de manière générale, les éléments de preuve portant sur la moralité de l'Accusé avant les événements pour lesquels il est accusé devant le Tribunal international ne sont pas pertinents dans la mesure où a) par leur nature, des crimes commis dans un contexte de violence généralisée et durant un état d'urgence national ou international, les crimes de guerre et les crimes contre l'humanité peuvent être commis par des personnes au casier judiciaire vierge et sans passé de violence et que, de ce fait, les éléments tendant à prouver la bonne ou mauvaise conduite de

2. Alleged Failure to Credit the Appellant for the Provision of Refuge to Tutsi Civilians in his Mukingo Home

302. The Appeals Chamber next considers the Appellant's allegation that the Trial Chamber erred in law and fact by concluding that no credit is due to him for the "handful of Tutsi civilians" who received shelter in his Mukingo home⁶²¹. The Appellant argues that the Trial Chamber mischaracterized his Mukingo home as "the home of his second wife", thus disregarding the testimony of Witnesses RHU 21 and RHU 26 that they owed their lives and those of their family members to him for providing them refuge at *his* Mukingo home for up to two months as well as the testimony of Witness SMR 2 that the Appellant instructed his wife to protect and shelter these Tutsis. The Appellant characterizes this finding as "incredible", along with its corollary that the Appellant's wife should deserve credit for providing shelter in the Mukingo home to the Tutsi civilians in question, not him⁶²².

303. The Prosecution responds that it can accept that the Mukingo home belonged to the Appellant. However, the Prosecution points out that the day the Tutsi civilians arrived at that home, the Appellant was not there and it was the wife, not the Appellant, who decided to shelter them without consulting him. According to the Prosecution, when the Appellant arrived at the home, his wife told him that *she* had visitors and the Appellant only spent a few moments in the house before leaving. Thus, the Prosecution contends that the Trial Chamber's finding that credit for sheltering these Tutsis belongs to the Appellant's wife was not unreasonable. In any event, the Prosecution maintains that saving these Tutsis could not in any way, as a mitigating circumstance, outweigh the culpability of the Appellant and prevent the Trial Chamber from deciding the sentence as it did⁶²³.

the International Tribunal, and (b) as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity therewith.

Kupreškić et al., Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999 (emphasis added); cf. *Bagilishema* Trial Judgement, para. 116; *Ntakirutimana* Trial Judgement, para. 732; *Niyitegeka* Trial Judgement, para. 375. The ICTY Appeals Chamber in *Kupreškić* affirmed the Trial Chamber's decision not to accord much weight to evidence of prior measures taken by Appellant Josipović to care for Muslims in jeopardy, such as lending an HVO army vest to a Muslim and stopping soldiers from killing a Muslim; of prior acts to promote positive relations with his Muslim neighbors despite the conflict; and of the Appellant's prior good character in not displaying any nationalist or ethnic prejudices as mitigating circumstances. *Kupreškić et al.* Appeal Judgement, paras. 428, 430.

Likewise, in *Niyitegeka*, the Appeals Chamber found that the Trial Chamber did not erroneously conclude that the appellant's case "was not one of the exceptional cases where due consideration and weight ought to be given to the evidence of [prior] good character". *Niyitegeka* Appeal Judgement, para. 264. The Appeals Chamber found that the Trial Chamber did not exceed its discretion in giving little weight to evidence that the appellant "proved courageous" and "saved [...] refugees' lives" in light of the gravity of the crimes the appellant was found to have committed. *Niyitegeka* Appeal Judgement, paras. 265, 266, citing *Niyitegeka* Trial Judgement, paras. 494, 496.

⁶²¹ Amended Notice of Appeal, para. 136.

⁶²² Amended Notice of Appeal, paras. 136-138; Appellant's Brief, para. 401.

⁶²³ Appeal Hearing, T. 7 March 2005 p. 54.

2. Défaut de porter à l'actif de l'appelant l'hébergement de civils tutsis dans sa maison de Mukingo

302. La Chambre d'appel examine ensuite l'allégation de l'appelant selon laquelle la Chambre de première instance a commis une erreur de droit et de fait en concluant qu'il n'y avait pas lieu de porter à son actif le fait qu'une «poignée de civils tutsis» avait trouvé refuge dans sa maison de Mukingo⁶²¹. L'appelant soutient que la Chambre de première instance a qualifié à tort sa maison de Mukingo comme étant celle de «sa seconde épouse», ignorant ainsi les dépositions des témoins RHU 21 et RHU 26 qui ont déclaré qu'ils lui devaient la vie et celle des membres de leurs familles pour leur avoir offert un refuge dans sa maison de Mukingo pendant à peu près deux mois ainsi que la déposition du témoin SMR 2 selon laquelle l'appelant avait donné pour instructions à son épouse de protéger et de recueillir ces Tutsis. L'appelant qualifie d'«incroyable» cette conclusion, de même que la conséquence qui en a été tirée, à savoir que l'hébergement des civils tutsis susmentionnés dans sa maison de Mukingo doit être porté à l'actif de son épouse et non au sien⁶²².

303. Le Procureur se dit prêt à accepter que la maison de Mukingo appartenait à l'appelant. Il fait toutefois remarquer que le jour où les civils tutsis y sont arrivés, l'appelant ne s'y trouvait pas et que c'est son épouse et non lui qui a décidé de les héberger sans le consulter. Selon le Procureur, lorsque l'appelant est arrivé à la maison, son épouse lui a dit qu'elle avait des visiteurs et l'appelant n'a passé que quelques instants dans la maison avant de s'en aller. Il soutient donc que la conclusion de la Chambre de première instance portant l'hébergement de ces Tutsis à l'actif de l'épouse de l'appelant n'était pas déraisonnable. En tout état de cause, le Procureur soutient que même si le fait d'avoir sauvé ces Tutsis constituait une circonstance atténuante, il n'aurait en aucun cas pu effacer la culpabilité de l'appelant et empêcher la Chambre de première instance de prononcer la peine qu'elle a infligée⁶²³.

l'Accusé avant le conflit armé ont rarement une valeur probante aux yeux du Tribunal international et b) le droit pénal a pour principe général de ne pas admettre les moyens relatifs à la moralité de l'Accusé pour prouver que celui-ci tend à se comporter ainsi.

Affaire *Kupreskić et consorts*, Décision relative aux éléments de preuve portant sur la moralité de l'accusé et le moyen de défense *Tu Quoque*, 17 février 1999; voir jugement *Bagilishema*, para. 116; jugement *Ntakirutimana*, para. 732; jugement *Niyitegeka*, para. 375. Dans l'affaire *Kupreskić*, la Chambre d'appel du TPIY a confirmé la décision de la Chambre de première instance de ne pas accorder beaucoup de poids aux témoignages relatifs aux mesures antérieures prises par l'appelant Josipović en faveur de Musulmans en danger, telles que le prêt à un Musulman d'une veste d'uniforme HVO et le fait d'empêcher des militaires de tuer un Musulman, aux initiatives qu'il avait prises pour favoriser les bonnes relations avec ses voisins musulmans en dépit du conflit et à sa bonne moralité, l'appelant n'ayant jamais manifesté de préjugés nationalistes ou ethniques. Arrêt *Kupreskić et consorts*, para. 428 et 430. De même, dans l'affaire *Niyitegeka*, la Chambre d'appel a estimé que la Chambre de première instance n'avait pas conclu à tort que le cas de l'appelant «ne faisait pas partie des cas exceptionnels dans lesquels on doit accorder aux éléments de preuve de bonne moralité [antérieure] toute l'importance et tout le poids qui leur sont dus». Arrêt *Niyitegeka*, para. 264. La Chambre d'appel a conclu que la Chambre de première instance n'avait pas outrepassé son pouvoir souverain d'appréciation en jugeant que ne pesaient pas très lourd dans la balance les éléments de preuve établissant que l'appelant avait «fai[t] preuve de courage» et «sauvé la vie [de] réfugiés» au vu de la gravité des crimes dont il avait été convaincu. Arrêt *Niyitegeka*, paras. 265 et 266, citant le jugement *Niyitegeka*, paras. 494 et 496.

⁶²¹ Acte d'appel modifié, para. 136.

⁶²² *Ibid.*, paras. 136 à 138; mémoire de l'appelant, para. 401.

⁶²³ Compte rendu de l'audience d'appel du 7 mars 2005, pp. 61 et 62.

304. In paragraph 950 of the Trial Judgement the Trial Chamber found that :

no credit is due to Kajelijeli on the basis that a handful of Tutsi civilians received shelter at the home of Kajelijeli's second wife. The Chamber finds that it was the wife that took these refugees in and stayed with them, and not Kajelijeli. Hence, any credit due in this regard will more appropriately go to the wife of Kajelijeli, and not to Kajelijeli himself.

305. The Appeals Chamber notes that the Trial Chamber summarized the testimony of Witness RHU 21 with regard to his seeking shelter in the Mukingo home as follows :

Defence Witness RHU 21, a Tutsi male, testified that the Accused had saved his life twice. The first time was in 1990, when the Witness was arrested by the authorities of his *cellule* and was transferred and detained at the Mukingo *bureau communal*; the Accused had the Witness released. The Witness testified that the second time the Accused saved the Witness' life was in April 1994, when he sought shelter at the home of the Accused in Mukingo *commune*. The witness, upon learning of the death of President Habyarimana on 6 April 1994 at home, immediately became afraid because it was being said that the Tutsis and their accomplices had brought down the plane. *The Witness went to find shelter at house [sic] of the Accused* because of his previous show of humanity. After a few hours in the bush, the Witness arrived at the Accused's house at 2:00am. The Witness testified that he was with his first wife. *The Witness testified that the Accused's wife showed them a room where they would spend the daytime hours during the month-and-a-half the witness and his wife remained at the home of the Accused.* The Witness confirmed that another person, a Tutsi woman, and her baby also sought refuge at the home of the Accused⁶²⁴.

306. The Appeals Chamber further notes the testimony of Witness RHU26 as to her reasons for seeking shelter at the Mukingo home, the summary of which reads as follows :

Defence Witness RHU26 testified that she was frightened after learning of the death of the President and decided to flee her home, carrying her child on her back. *The Witness sought refuge at the home of the Accused* because "He was a good man". The Witness explained that she was referring to the assistance the Accused gave Tutsis in 1992, when he had gathered the Tutsi at the ISAE and fetched *gendarmes* from Ruhengeri to ensure their safety. *The Witness testified that she saw the Accused's wife when she arrived at the residence of the Accused.* The witness confirmed that she was not a friend of the Accused's wife before seeking refuge but became her friend after the ordeal. *The Accused's wife immediately took the witness to a room where a Tutsi husband and wife, were hiding.* However, in her written statement, the Witness only mentioned finding the Tutsi husband at the Accused's house on 7 April 1994. The Witness explained the discrepancy as a mistake of the person who took down the statement. The Witness testified that for the rest of the day, the refugees prayed, *and did not see the Accused*⁶²⁵.

⁶²⁴ Trial Judgement, para. 106, referring to T. 10 December 2002 pp. 40, 41, 44, 46-48, 60-61 (emphasis added).

⁶²⁵ Trial Judgement, para. 107, referring to T. 30 September 2002 pp. 11, 12, 18-21, 37, 38 (internal citations omitted and emphasis added).

304. Au paragraphe 950 du jugement, la Chambre de première instance a opéré la constatation suivante :

[I]l n'y a nullement lieu de porter à l'actif de Kajelijeli le fait qu'une poignée de civils tutsis ont trouvé refuge chez sa seconde épouse. En effet, relève-t-elle, c'est celle-ci et non Kajelijeli qui a recueilli ces réfugiés et est restée avec eux. Par conséquent, s'il faut rendre honneur à quelqu'un à cet égard, c'est davantage à l'épouse de Kajelijeli qu'à lui-même qu'il convient de le faire.

305. La Chambre d'appel relève que la Chambre de première instance a résumé en ces termes la déposition du témoin RHU 21 qui a dit être venu chercher refuge dans cette maison de Mukingo :

Selon le témoin à décharge RHU 21, d'ethnie tutsie, l'accusé lui a sauvé la vie à deux reprises. Une première fois en 1990 lorsque, arrêté par les autorités de sa cellule, transféré et placé en détention au bureau communal de Mukingo, il l'a fait relâcher; puis en avril 1994, lorsqu'il s'est réfugié chez l'accusé dans la commune de Mukingo. Ayant appris la mort du Président Habyarimana le 6 avril 1994 chez lui, le témoin fut saisi de peur parce que l'on disait que les Tutsis et leurs complices avaient abattu l'avion. Le témoin est allé chercher refuge chez l'accusé, celui-ci ayant précédemment fait montre d'humanisme. Après avoir passé quelques heures dans les bois, le témoin est arrivé chez l'accusé à 2 heures du matin. Le témoin a dit avoir été en compagnie de sa première épouse. L'épouse de l'accusé leur aurait montré une pièce où ils passeront la journée durant le mois et demi que le témoin et sa femme ont séjourné chez l'accusé. Le témoin a confirmé qu'une autre personne, une femme tutsie et son bébé avaient également trouvé refuge chez l'accusé⁶²⁴.

306. La Chambre d'appel prend acte en outre de la déposition du témoin RHU 26 qui a expliqué les raisons pour lesquelles elle a cherché refuge chez l'appelant à Mukingo. En voici le résumé :

Le témoin à décharge RHU 26 a dit avoir pris peur en apprenant la mort du Président et avoir décidé de s'enfuir de chez elle, portant son enfant sur le dos. Le témoin s'est réfugié chez l'accusé parce que c'était «un homme qui était bon». Le témoin pensait en l'occurrence à l'aide que celui-ci avait apportée aux Tutsis en 1992, lorsqu'il avait rassemblé les Tutsis à l'ISAE et était allé chercher des gendarmes de Ruhengeri pour assurer leur protection. Le témoin a dit avoir vu l'épouse de l'accusé en arrivant chez ce dernier. Elle a confirmé que si elle n'était pas une amie de la femme de l'accusé avant de s'être réfugiée chez lui, elle l'est devenue au sortir de cette épreuve. L'épouse de l'accusé a immédiatement emmené le témoin dans une pièce où se cachait un couple tutsi. Cependant, dans sa déclaration écrite, le témoin avait dit n'avoir trouvé que le mari tutsi chez l'accusé le 7 avril 1994. Le témoin a voulu voir dans cette incohérence une erreur de la personne qui avait recueilli la déclaration. Selon le témoin, les réfugiés ont prié le reste de la journée et n'ont pas vu l'accusé⁶²⁵.

⁶²⁴ Jugement, para. 106, faisant référence au compte rendu de l'audience du 10 décembre 2002, pp. 30 à 36 ainsi que 46 et 47 (non souligné dans l'original).

⁶²⁵ Jugement, para. 107, faisant référence au compte rendu de l'audience du 30 septembre 2002, pp. 19 à 23, 32 à 40 et 69 à 71 (notes de bas de page omises et non souligné dans l'original).

307. Finally, the Appeals Chamber notes the testimony of Witness SMR 2 as summarized in the Trial Judgement on this particular incident in the Mukingo home :

Defence Witness SMR 2, a close relative of the Accused, testified that the Accused's second wife learned of the death of the President on the night of 7 April 1994 [*sic*] when two Tutsis, Defence Witness RHU 21 and his wife, arrived at the home of the Accused's second wife in Mukingo *commune* at approximately 2:00am seeking refuge. The witness was acquainted with the man and woman and identified them in her testimony. These refugees lived in Ruhini-giro *secteur* which is nearby to the home of the Accused's second wife in Rwn-izovu *secteur*. The witness testified that RHU-21 was panic-stricken because he heard people talking about the death of President Habyarimana. She also testified that RHU 21 had previously been in prison because he was regarded as an accomplice of the *Inkotanyi* and that the Accused, when he was *bourgmestre*, had been responsible for his release. *RHU 21 had come to the house of the Accused because he was confident that the Accused would help him.* [...] The Witness testified that between 8:30 am and 9:00 am, a Tutsi woman, Defence Witness RHU 26, and her child arrived *at the home of the Accused's second wife* seeking refuge. The Witness identified the woman in her testimony, and testified that the woman and the Accused's second wife had a friendly relationship⁶²⁶.

308. At the Appeals hearing, the Appellant argued that the Trial Chamber mischaracterized these witnesses' testimonies, ignoring Witnesses RHU 21 and RHU 26's statements that they fled to the Mukingo house because they felt they could trust the Appellant to protect them and they knew he was a good man⁶²⁷. Furthermore, the Appellant contested the Trial Chamber's failure to recognize that Witness SMR 2's testimony indicates that the decision to provide refuge in the Mukingo home was a collective one made between the Appellant and his second wife⁶²⁸.

309. The Appeals Chamber agrees with the Appellant that the Trial Chamber erred in failing to give him some credit for the sheltering of four Tutsis in the Mukingo home, regardless of who actually owned the home, the Appellant or his second wife⁶²⁹. Further examination of the testimony of Witnesses SMR 2, RHU 21, and RHU 26 reveals that the Appellant visited the Mukingo home approximately one day and a half after Witness RHU 21 and his wife and Witness RHU 26 and her small child had arrived in order to fetch his wife and the children and take them to safety. The Appellant only stayed there for about 30-40 minutes. During that time, his wife

⁶²⁶ Trial Judgement, para. 105, referring to T. 19 September 2002 pp. 76, 77, 79, 81, 82; T. 23 September 2002 pp. 9, 10, 12.

⁶²⁷ Appeal Hearing, T. 7 March 2005 p. 20.

⁶²⁸ Appeal Hearing, T. 7 March 2005 p. 60.

⁶²⁹ The Appeals Chamber notes that the evidence on the trial record is not clear on this point. Witnesses RHU 21 and RHU 26, both testified that the Mukingo home belonged to the Appellant. However, Witness SMR 2 was much more closely related to the Appellant and was aware of the property distribution between the Appellant and his wives. In any event, the Appeals Chamber finds that this is a non-issue. The Trial Chamber did not primarily rely upon its finding that the home belonged to the second wife in concluding that no credit was due to the Appellant for hiding the Tutsis in the Mukingo home. Rather, the key findings were that it was the wife who took the Tutsis in and who eventually stayed with them.

307. Enfin, la Chambre d'appel prend acte aussi de la déposition du témoin SMR 2 au sujet de ce fait précis à Mukingo, telle qu'elle est résumée dans le jugement :

Le témoin à décharge SMR 2, proche parent de l'accusé, a déclaré que la seconde épouse de l'accusé avait appris la mort du Président dans la nuit du 7 avril 1994 [sic] lorsque deux Tutsis, le témoin à décharge RHU 21 et sa femme, sont venus chercher refuge chez la seconde épouse de l'accusé dans la commune de Mukingo vers 2 heures du matin. Le témoin connaissait le couple et l'a identifié lors de sa déposition. Ces réfugiés vivaient dans le secteur de Ruhingiro non loin de chez la seconde épouse de l'accusé, dans le secteur de Rwnizovu. Selon le témoin, le témoin RHU 21 était terrorisé parce qu'il avait entendu des gens parler de la mort du Président Habyarimana. Toujours selon elle, le témoin RHU 21 avait précédemment séjourné en prison, étant considéré comme complice des *Inkotanyi*, et étant bourgmestre, l'accusé lui avait rendu la liberté. Le témoin RHU 21 était venu chez l'accusé confiant que celui-ci l'aiderait. [...] Le témoin a dit qu'entre 8 h 30 et 9 heures, une femme tutsie, le témoin à décharge RHU 26, et son enfant étaient venus chercher refuge chez la seconde épouse de l'accusé. Le témoin a identifié la femme en question lors de sa déposition et déclaré que la femme et la seconde épouse de l'accusé entretenaient des liens d'amitié⁶²⁶.

308. Lors de l'audience d'appel, l'appelant a fait valoir que la Chambre de première instance avait mal appréhendé les dépositions de ces témoins, elle a ignoré les déclarations des témoins RHU 21 et RHU 26 qui ont dit être allés chercher refuge chez l'appelant à Mukingo parce qu'ils savaient qu'ils pouvaient compter sur lui pour les protéger et qu'il était bon⁶²⁷. De plus, il a critiqué le fait que la Chambre de première instance n'ait pas reconnu que la conclusion à tirer de la déposition du témoin SMR 2 était que l'hébergement des réfugiés dans la maison de Mukingo était une décision collective de l'appelant et de sa seconde épouse⁶²⁸.

309. La Chambre d'appel considère, comme l'appelant, que la Chambre de première instance a commis une erreur en ne lui reconnaissant aucun mérite pour l'hébergement des quatre Tutsis dans la maison de Mukingo, quel que soit le propriétaire réel de celle-ci, l'appelant ou sa seconde épouse⁶²⁹. Un examen plus approfondi des dépositions des témoins SMR 2, RHU 21 et RHU 26 révèle que l'appelant est venu à la maison de Mukingo une journée et demie environ après que le témoin RHU 21 et son épouse aient ainsi que le témoin RHU 26 et son jeune enfant soient arrivés. Il venait chercher

⁶²⁶ Jugement, para. 105, faisant référence aux comptes rendus des audiences du 19 septembre 2002, pp. 141 à 144, 146 et 147, 149 à 153, et du 23 septembre 2002, pp. 15 à 22.

⁶²⁷ Compte rendu de l'audience d'appel du 7 mars 2005, pp. 23 et 24.

⁶²⁸ *Ibid.*, pp. 69 et 70.

⁶²⁹ La Chambre d'appel relève que la preuve versée au dossier n'est pas tout à fait claire sur ce point. Les témoins RHU 21 et RHU 26 ont tous les deux déclaré que la maison de Mukingo appartenait à l'appelant. Cependant, le témoin SMR 2 était beaucoup plus proche de l'appelant et était au courant de la répartition des biens entre l'appelant et ses épouses. Quoi qu'il en soit, pour la Chambre d'appel, c'est un faux problème. La Chambre de première instance ne s'est pas principalement fondée sur le fait que la maison appartenait à sa seconde épouse pour conclure qu'il ne fallait reconnaître aucun mérite à l'appelant pour avoir caché des Tutsis dans la maison de Mukingo. Sa conclusion s'appuyait plutôt sur le fait que c'était son épouse qui avait recueilli les Tutsis et que c'était elle qui, enfin de compte, était restée avec eux.

showed the Appellant the four Tutsis hiding in the home and told him that if he evacuated the children, then the persons who sought refuge in the home would be unsafe. The Appellant greeted and assured the Tutsis. Afterwards, he decided not to evacuate his wife and the children because he would also need to move the Tutsis with them and this would endanger the lives of his family as well as the Tutsis. After the Appellant left, his wife and children stayed behind with the Tutsis⁶³⁰.

310. On the basis of this evidence considered by the Trial Chamber, the Appeals Chamber finds that the Trial Chamber committed an error of fact because no reasonable trier of fact could have come to the conclusion that the Appellant did not deserve *any* credit for the refuge given to the four Tutsis in the Mukingo home where his second wife and children were staying. Consequently, the Appeals Chamber also finds that the Trial Chamber erred as a matter of law in failing to take into account, as a mitigating circumstance, that the Appellant offered words of comfort to the Tutsis hiding in the Mukingo home and made a decision not to evacuate his wife and children partly on account of these Tutsis.

311. Nevertheless, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion in finding that, in any event, even if this evidence were taken into account as a mitigating circumstance, it carries little weight. This evidence can in no way, even when taken together with the testimony of other witnesses as to the Appellant's alleged good conduct towards Tutsis before and during 1994, diminish the weight of the evidence going to the Appellant's culpability for intent to commit genocide and acts of genocide against Tutsis such that a reduction in the Trial Chamber's sentence should result⁶³¹. The Appeals Chamber notes that Witnesses RHU 21 and RHU 26 both testified to having known the Appellant since he was a baby or small boy. Such selective assistance to Tutsis who are known by the Appellant and had previously been assisted by the Appellant as in the case of Witness RHU 21, is not decisive⁶³². Furthermore, it was the Appellant's wife who made the initial decisions to hide the Tutsis when they came to the Mukingo home. It was also the Appellant's wife who first pointed out that evacuation of her and the children would put the Tutsis in jeopardy. Finally, she and the children were the ones who actually stayed behind with the Tutsis for over a month and a half while the Appellant left after staying for little more than half an hour⁶³³.

312. In conclusion, the Appeals Chamber agrees with the Trial Chamber with regard to the testimony of these three witnesses pertaining to the events at the Mukingo home, finding that it is not "so exceptional" that due weight ought to have been accorded to this evidence in mitigation by the Trial Chamber⁶³⁴.

⁶³⁰ T. 19 September 2002 pp. 85-88; T. 30 September 2002 pp. 21, 22; T. 10 December 2002 pp. 47, 48.

⁶³¹ See Trial Judgement, para. 115.

⁶³² Cf. *Kvočka et al.* Appeal Judgement, para. 693.

⁶³³ See generally T. 19 September 2002; T. 23 September 2002; T. 30 September 2002; T. 10 December 2002.

⁶³⁴ Cf. *Niyitegeka* Appeal Judgement, paras. 264-266.

sa femme et ses enfants pour les mettre à l'abri et n'y est resté que 30 à 40 minutes environ. C'est à ce moment-là que son épouse lui a montré les quatre Tutsis qui se cachaient dans la maison. Elle lui a dit que s'il évacuait les enfants, les personnes qui avaient trouvé refuge dans leur maison ne seraient pas en sécurité. L'appelant a salué les Tutsis et les a rassurés. Par la suite, il a décidé de ne pas évacuer son épouse et ses enfants parce qu'il aurait fallu qu'il emmène aussi les Tutsis, mettant ainsi en danger la vie de sa famille et celle des Tutsis. Après son départ, sa femme et ses enfants sont restés avec les Tutsis⁶³⁰.

310. La Chambre d'appel conclut, au vu des éléments de preuve examinés par la Chambre de première instance, que celle-ci a commis une erreur de fait car aucun juge des faits raisonnable n'aurait pu arriver à la conclusion qu'il ne fallait reconnaître *aucun* mérite à l'appelant pour avoir hébergé quatre Tutsis dans la maison de Mukingo où demeuraient sa femme et ses enfants. Partant, la Chambre d'appel conclut aussi que la Chambre de première instance a commis une erreur de droit en ne considérant pas comme circonstance atténuante le fait pour l'appelant d'avoir réconforté les Tutsis qui se cachaient dans la maison de Mukingo et d'avoir pris la décision de ne pas évacuer sa femme et ses enfants en partie à cause de ces Tutsis.

311. Néanmoins, la Chambre d'appel estime que la Chambre de première instance n'a pas abusé de son pouvoir d'appréciation lorsqu'elle a conclu que, quoi qu'il en soit, même si ces éléments de preuve étaient retenus comme une circonstance atténuante, ceux-ci n'avaient pas grande valeur. Même considérés avec les dépositions d'autres témoins au sujet des actes que l'appelant aurait posés en faveur des Tutsis avant 1994 et pendant cette année-là, ces éléments de preuve ne peuvent entamer la valeur des moyens à charge tendant à établir l'intention de l'appelant de commettre le génocide et des actes de génocide visant les Tutsis, de sorte qu'il y aurait lieu de réduire la peine prononcée par la Chambre de première instance⁶³¹. La Chambre d'appel fait remarquer que les témoins RHU 21 et RHU 26 ont tous les deux déclaré connaître l'appelant depuis qu'il était bébé ou tout petit. L'assistance sélective apportée aux Tutsis que l'appelant connaissait et avait déjà aidés, comme dans le cas du témoin RHU 21, n'est pas un facteur déterminant⁶³². Du reste, c'est son épouse qui a pris initialement la décision de cacher les Tutsis lorsqu'ils se sont présentés à la maison de Mukingo. C'est également elle qui lui a d'abord fait remarquer que son évacuation avec les enfants risquait de mettre en danger la vie des Tutsis. Enfin, ce sont elle et les enfants qui sont effectivement restés avec les Tutsis pendant plus d'un mois et demi alors que l'appelant n'est demeuré là-bas qu'un peu plus d'une demi-heure avant de repartir⁶³³.

312. Pour conclure, la Chambre d'appel porte la même appréciation que la Chambre de première instance sur les dépositions de ces trois témoins concernant les faits survenus à la maison de Mukingo; elle estime que le comportement de l'appelant n'était pas à ce point «exceptionnel» que la Chambre de première instance aurait dû en tenir dûment compte et le considérer comme une circonstance atténuante⁶³⁴.

⁶³⁰ Comptes rendus des audiences du 19 septembre 2002, pp. 157 à 164, du 30 septembre 2002, pp. 38 à 42, et du 10 décembre 2002, pp. 34 à 36.

⁶³¹ Voir jugement, para. 115.

⁶³² Voir arrêt *Kvočka et consorts*, para. 693.

⁶³³ Voir en général les comptes rendus des audiences des 19, 23 et 30 septembre 2002 ainsi que 10 décembre 2002.

⁶³⁴ Voir arrêt *Niyitegeka*, paras. 264 à 266.

3. *Alleged Failure to Give Sufficient Weight to Witness JK 312's Testimony*

313. Finally, the Appeals Chamber assesses the Appellant's allegation that the Trial Chamber erred in finding that evidence of the Appellant's assistance to one Tutsi family in evacuating them, while credible, was insufficient to mitigate the Appellant's sentence. The Appeals Chamber notes that no arguments, no analysis of the testimony of Witness JK312 on which the Trial Chamber relied for this finding, and no case law are offered by the Appellant. Accordingly, the Appeals Chamber dismisses this submission without further reasoning.

4. *Conclusion*

314. The Appeals Chamber agrees with the Trial Chamber in that the Appellant's aforementioned conduct *vis-à-vis* "a handful of Tutsi civilians"⁶³⁵ clearly does not outweigh the gravity of the crimes for which the Appellant has been charged and convicted and, consequently, dismisses the Appellant's Ground of Appeal 25.

B. *Implications of Other Findings of the Appeals Chamber*

315. The Appeals Chamber now turns to consider its other findings in this Judgment that are relevant in its review of the Appellant's sentence as handed down by the Trial Chamber.

1. *Vacating of Convictions Based on Superior Responsibility under Article 6 (3) of the Statute*

316. The Appeals Chamber recalls that it vacated the Trial Chamber's convictions against the Appellant under Count 2 for genocide and Count 6 for extermination, a crime against humanity, in so far as they were based upon a finding of his superior responsibility under Article 6 (3) of the Tribunal's Statute. The Appeals Chamber found that because the Trial Chamber held the Appellant directly responsible for these crimes pursuant to Article 6 (1) of the Statute on the basis of the same set of facts, it committed an error of law and only one conviction under each count should be entered against the Appellant pursuant to Article 6 (1)⁶³⁶.

317. The Appeals Chamber further recalls that it held that, nevertheless, the Trial Chamber was required to take the Appellant's superior position over the *Interahamwe* into account as an aggravating factor at sentencing if it found beyond reasonable doubt that the Appellant held such a superior position⁶³⁷. The Appeals Chamber found under Grounds of Appeal 10 and 21 that the Trial Chamber did find beyond reasonable doubt that the Appellant exercised a superior position over the *Interahamwe*⁶³⁸.

⁶³⁵ Trial Judgment, para. 950.

⁶³⁶ See *supra* Chapter VIII.

⁶³⁷ See *supra* Chapter VIII.

⁶³⁸ See *supra* Chapter VIII.

3. Défaut présumé d'accorder suffisamment de poids à la déposition du témoin JK 312

313. La Chambre d'appel en vient enfin au grief de l'appelant reprochant à la Chambre de première instance d'avoir commis une erreur en concluant que l'aide qu'il a apportée à l'évacuation d'une famille tutsie, tout en étant crédible, n'était pas propre à atténuer la peine prononcée à son encontre. La Chambre d'appel relève que l'appelant n'a présenté ni argumentation ni analyse de la déposition du témoin JK 312 sur laquelle la Chambre de première instance a fondé sa conclusion et qu'il n'a non plus cité aucun précédent. Par conséquent, la Chambre d'appel rejette ce grief sans plus ample justification.

4. Conclusion

314. Tout comme la Chambre de première instance, la Chambre d'appel estime que la conduite susvisée de l'appelant vis-à-vis d'une «poignée de civils tutsis»⁶³⁵ ne compense manifestement pas la gravité des crimes qui lui sont reprochés et dont il a été déclaré coupable et elle rejette par conséquent le vingt-cinquième moyen d'appel.

B. Conséquences découlant des autres conclusions de la Chambre d'appel

315. La Chambre d'appel examine maintenant les autres conclusions qu'elle a dégagées dans le présent arrêt et dont il y a lieu de tenir compte pour réexaminer la sentence prononcée par la Chambre de première instance.

1. Annulation des déclarations fondées sur la responsabilité du supérieur hiérarchique (article 6 (3) du Statut)

316. La Chambre d'appel rappelle qu'elle a annulé les déclarations de culpabilité prononcées par la Chambre de première instance contre l'appelant au titre du chef 2 (génocide) et du chef 6 (extermination constitutive de crime contre l'humanité) dans la mesure où elles étaient fondées sur sa responsabilité en tant que supérieur hiérarchique prévue à l'article 6 (3) du Statut du Tribunal. La Chambre d'appel a estimé que la Chambre de première instance, pour avoir reconnu l'appelant directement responsable de ces crimes en application de l'article 6 (1) du Statut sur la base des mêmes faits, a commis une erreur de droit et aurait dû seulement le déclarer coupable de chacun de ces chefs en application de l'article 6 (1) du Statut⁶³⁶.

317. La Chambre d'appel rappelle en outre avoir déclaré que la Chambre de première instance était néanmoins tenue de considérer la qualité de supérieur hiérarchique de l'appelant vis-à-vis des *Interahamwe* comme une circonstance aggravante dans la fixation de la peine si elle était convaincue au-delà de tout doute raisonnable que l'appelant était investi de cette qualité⁶³⁷. La Chambre d'appel a estimé, dans le cadre de l'examen des dixième et vingt et unième moyens d'appel, que la Chambre de première instance a effectivement conclu au-delà de tout doute raisonnable que l'appelant exerçait des fonctions de supérieur hiérarchique vis-à-vis des *Interahamwe*⁶³⁸.

⁶³⁵ Jugement, para. 950.

⁶³⁶ Voir *supra* chapitre VIII.

⁶³⁷ *Id.*

⁶³⁸ *Id.*

318. The Appeals Chamber notes that the Trial Chamber explicitly stated that it took into account the following aggravating factors in determining the Appellant's sentence :

The Chamber had considered the submissions of the Parties and finds the following aggravating factors when considering the culpability of Kajelijeli for the crimes for which he has been found guilty. The Chamber finds that Kajelijeli used his considerable influence to bring together people in order to commit the massacres. He acted as a bridge between the military and civilian spheres in an effort to attack and massacre the civilian Tutsi population; and he ordered, incited and led a large group of people to that enterprise. He saw to it that weapons were provided to the killers so that the attacks would be more devastating. He directed and participated in the killings that went on in various locations around Ruhengeri *Préfecture*. And even when requested to stop the killings because it was the time to bury the dead, he was unwavering in his genocidal resolve, insisting that it was necessary to continue⁶³⁹.

The Appeals Chamber further notes that the Trial Chamber expressly considered the Prosecution's submissions on aggravating factors relating to the Appellant's position as a superior⁶⁴⁰. The Appeals Chamber also considers that he was sentenced to life imprisonment twice under both Counts 2 and 6 for genocide and extermination. In this context, although the Trial Chamber only clearly considered the severity of the Appellant's *direct* participation in these crimes as an aggravating factor in the text of its Judgement, the Appeals Chamber is satisfied that the Trial Chamber fully recognized, as an aggravating factor, that the Appellant also held a superior position over others committing the crimes charged under Counts 2 and 6 as is reflected in the resulting sentence imposed⁶⁴¹.

319. On the basis of the foregoing, the Appeals Chamber concludes that its vacating of the Trial Chamber's convictions of the Appellant as a superior pursuant to Article 6 (3) of the Statute under Counts 2 and 6 has no resulting impact on the Appellant's sentence.

2. Finding of Violations to the Appellant's Rights during his Arrest and Detention

320. The Appeals Chamber recalls that it concluded that the Appellant's fundamental rights were violated during his arrest and detention prior to his initial appearance and consequently, that he is entitled to a remedy⁶⁴². The Appeals Chamber therefore finds it appropriate to reduce the Appellant's sentences as imposed by the Trial Chamber for his convictions at trial, which have been affirmed in this appeal⁶⁴³.

⁶³⁹ Trial Judgement, paras. 961-962.

⁶⁴⁰ Trial Judgement, paras. 958, 959.

⁶⁴¹ Cf. *Čelebići Case* Appeal Judgement, para. 746.

⁶⁴² See *supra* paras. 251-255.

⁶⁴³ See *Semanza*, Decision, 3 May 2000, para. 129; *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), para. 5.

318. La Chambre d'appel note que la Chambre de première instance a expressément déclaré avoir pris en considération les circonstances aggravantes suivantes en déterminant la peine :

Ayant examiné les arguments des parties, la Chambre retient les circonstances aggravantes suivantes en appréciant la culpabilité de Kajelijeli à raison des crimes dont il a été convaincu. La Chambre retient que Kajelijeli a usé de son influence considérable pour rassembler des gens afin qu'ils commettent des massacres. Il a servi de courroie de transmission entre les milieux militaire et civil dans le dessein d'attaquer et de massacrer la population civile tutsie, et a ordonné à un large groupe de personnes de se livrer à cette entreprise, les y a incitées et les a conduites. Il a veillé à ce que des armes soient procurées aux meurtriers de sorte que les attaques soient plus dévastatrices. Il a dirigé les tueries qui ont été perpétrées en divers lieux dans la préfecture de Ruhengeri et y a participé. Qui plus est, même lorsqu'il a été prié de mettre fin aux massacres parce que le moment était venu d'enterrer les morts, il est demeuré imperturbable dans sa détermination génocide, persistant à dire qu'il fallait continuer⁶³⁹.

La Chambre d'appel relève en outre que la Chambre de première instance a expressément examiné les arguments du Procureur au sujet des circonstances aggravantes découlant de la qualité de supérieur hiérarchique de l'appelant⁶⁴⁰. La Chambre d'appel estime aussi qu'il a été deux fois condamné à une peine d'emprisonnement à vie au titre des chefs 2 et 6 pour génocide et extermination. Dans ce contexte, même si à la lecture du jugement, la Chambre de première instance semble manifestement avoir uniquement considéré comme circonstance aggravante le degré de participation *directe* de l'appelant à la perpétration de ces crimes, la Chambre d'appel est convaincue que la Chambre de première instance a aussi pleinement considéré comme circonstance aggravante le fait que l'appelant était également le supérieur hiérarchique de ceux qui ont commis les crimes imputés aux chefs 2 et 6 ainsi que l'atteste la peine prononcée par la Chambre⁶⁴¹.

319. Compte tenu de ce qui précède, la Chambre d'appel conclut que sa décision d'annuler les déclarations de culpabilité prononcées à l'encontre de l'appelant par la Chambre de première instance au titre des chefs 2 et 6 du fait des fonctions qu'il exerçait en tant que supérieur hiérarchique en application de l'article 6 (3) du Statut n'a aucune incidence sur les peines qui lui ont été infligées.

2. Conclusions concernant les violations des droits de l'appelant lors de son arrestation et pendant sa détention

320. La Chambre d'appel rappelle qu'elle a conclu à la violation des droits fondamentaux de l'appelant lors de son arrestation et pendant sa détention avant sa comparution initiale et qu'il a par conséquent droit à réparation⁶⁴². Elle estime donc indiqué de réduire les peines infligées à l'appelant par la Chambre de première instance par suite des condamnations qui ont été prononcées en première instance et qui sont confirmées dans le cadre du présent appel⁶⁴³.

⁶³⁹ Jugement, paras. 961 et 962.

⁶⁴⁰ *Ibid.*, paras. 958 et 959.

⁶⁴¹ Voir arrêt *Čelebići*, para. 746.

⁶⁴² Voir *supra*, paras. 251 à 255.

⁶⁴³ Voir Décision *Semanza* du 31 mai 2000, para. 129; arrêt *Barayagwiza* (Demande du Procureur en révision ou réexamen), para. 75.

321 Before doing so, Appeals Chamber notes that the Appellant had two life imprisonment sentences imposed against him for his convictions under Counts 2 and 6 for genocide and extermination respectively, and a third sentence of fifteen years for his conviction for direct and public incitement to commit genocide under Count 4. The Trial Chamber also gave the Appellant credit for time served pursuant to Rule 101 (D) of the Rules consisting of five years, five months and twenty-five days, which it deducted from his fifteen-year sentence. The Trial Chamber held that all three sentences are to run concurrently.⁶⁴⁴

322. The Appeals Chamber notes that the Trial Chamber granted credit⁶⁴⁵ to the Appellant pursuant to Rule 101 (D) for time served pending surrender and trial as foreseen mandatorily under all circumstances and in each case. Therefore this credit was not a remedy for the suspect or accused's rights having been violated during the period of his prolonged detention pending transfer and trial. Where a suspect or an accused's rights have been violated during the period of his unlawful detention pending transfer and trial, Article 2 (3) (a) of the ICCPR stipulates that

“[a]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.

323. In reducing the Appellant's sentences, the Appeals Chamber recalls that it found that the Appellant was impermissibly detained for a total of 306⁶⁴⁶ days in Benin and the UNDF because (1) he was not promptly informed of the reasons for his arrest or of the provisional charges against him, and (2) he was not promptly granted an initial appearance before a Judge or an official acting in a judicial capacity without undue delay⁶⁴⁷.

324. The Appeals Chamber finds that under the circumstances of this case, in view of the serious violations of the Appellant's fundamental rights during his arrest and detention in Benin and the UNDF from 5 June 1998 to 6 April 1999, and considering the Appellant's entitlement to an effective remedy for those violations under the Tribunal's law and jurisprudence and Article 2 (3) (a) of the ICCPR, the Appellant's two life sentences and fifteen years' sentence as imposed by the Trial Chamber shall be set aside and converted into a single sentence consisting of a fixed term of imprisonment of

⁶⁴⁴ Trial Judgement paras. 965-970.

⁶⁴⁵ Trial Judgement, paras. 966, 967, 970.

⁶⁴⁶ This figure of 306 days is composed of the following: 95 days in the custody of the Republic of Benin from the arrest on 5 June 1998 to the Appellant's transfer to the Tribunal on 7 September 1998 plus 211 days in the custody of the Tribunal from 8 September 1998 to 6 April 1999. See *supra* Chapter XIX.

⁶⁴⁷ The Appellant was impermissibly detained for 85 days before being informed of the reasons for his arrest or of the provisional charges against him and for a further 221 days before his initial appearance before a Judge. See *supra* Chapter XIX.

321. La Chambre d'appel relève auparavant que l'appelant a été condamné à deux peines d'emprisonnement à vie au titre des chefs 2 et 6 pour génocide et extermination respectivement, et à quinze ans d'emprisonnement au titre du chef 4 pour incitation directe et publique à commettre le génocide. Conformément à l'article 101 (D) du Règlement, la Chambre de première instance a aussi déduit de la peine de quinze ans d'emprisonnement la durée de la période que l'appelant a passée en détention, soit cinq ans, cinq mois et vingt-cinq jours. La Chambre de première instance a prononcé la confusion des trois peines⁶⁴⁴.

322. La Chambre d'appel relève que, conformément à l'article 101 (D) du Règlement, la Chambre de première instance a déduit de la peine de l'appelant⁶⁴⁵ la durée de la période qu'il a passée en détention provisoire en attendant qu'il soit remis au Tribunal et jugé par une Chambre de première instance comme cela se passe obligatoirement dans toutes les circonstances et dans toutes les affaires. Partant, cette déduction n'a pas été ordonnée en réparation de la violation des droits du suspect ou de l'accusé pendant sa longue détention en attendant son transfert et son procès. En cas de violation des droits d'un suspect ou d'un accusé pendant qu'il était détenu illégalement en attendant sa remise au Tribunal et son procès, l'article 2 (3) (a) du Pacte international relatif aux droits civils et politiques prévoit que

«toute personne dont les droits et libertés reconnus dans le présent Pacte auront été violés disposera d'un recours utile, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles».

323. Pour réduire les peines prononcées à l'encontre de l'appelant, la Chambre d'appel rappelle qu'elle est arrivée à la conclusion qu'il avait été illégalement détenu, au total, pendant 306⁶⁴⁶ jours au Bénin et au quartier pénitentiaire parce qu'il (1) n'a pas été informé dans le plus court délai des motifs de son arrestation ou des accusations portées provisoirement contre lui et (2) n'a pas pu faire sa comparution initiale dans le plus court délai devant un juge ou une autorité habilitée à exercer des fonctions judiciaires⁶⁴⁷.

324. La Chambre d'appel conclut que dans les circonstances de l'espèce, vu la gravité des violations des droits fondamentaux de l'appelant lors de son arrestation et pendant sa détention au Bénin et au quartier pénitentiaire du 5 juin 1998 au 6 avril 1999 et vu le droit de l'appelant à une réparation effective pour ces violations que lui reconnaissent les textes fondamentaux et la jurisprudence du Tribunal ainsi que l'article 2 (3) (a) du Pacte international relatif aux droits civils et politiques, les deux peines d'emprisonnement à vie et la peine d'emprisonnement de quinze ans infligées à l'appelant par la Chambre de première instance sont annulées et confondues en une

⁶⁴⁴ Jugement, para. 965 à 970.

⁶⁴⁵ *Ibid.*, paras. 966, 967 et 970.

⁶⁴⁶ Ce chiffre de 306 jours a été calculé comme suit : 95 jours sous la garde de la République du Bénin depuis l'arrestation de l'appelant le 5 juin 1998 jusqu'à sa remise au Tribunal le 7 septembre 1998, plus 211 jours sous la garde du Tribunal du 8 septembre 1998 au 6 avril 1999. Voir *supra* chapitre XIX.

⁶⁴⁷ L'appelant a été détenu pendant 85 jours avant d'être informé des motifs de son arrestation ou des accusations portées provisoirement contre lui et pendant 221 jours supplémentaires avant sa comparution initiale devant un juge, ce qui est inadmissible. Voir *supra* chapitre XIX.

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45 years. Pursuant to Rule 101 (D) of the Rules, the Appellant shall receive credit for time already served in detention as of 5 June 1998.

XXIV. DISPOSITION

325. For the foregoing reasons, THE APPEALS CHAMBER, unanimously
PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 7 March 2005;

SITTING in open session;

VACATES the Appellant's convictions under Counts 2 and 6 for genocide and extermination as a crime against humanity insofar as they are based on a finding of the Appellant's superior responsibility under Article 6 (3) of the Statute;

DISMISSES the appeal in all other respects;

FINDS, *proprio motu*, that the Appellant's fundamental rights were seriously violated during his arrest and detention and, therefore :

SETS ASIDE the sentences imposed by the Trial Chamber and CONVERTS them into a single sentence of 45 years of imprisonment, subject to credit being given under Rule 101 (D) of the Rules for the period already spent in detention from 5 June 1998;

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

ORDERS, in accordance with Rules 103 (B) and 107 of the Rules, that Juvénal Kajelijeli is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

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

Signed on the twelfth day of May 2005 at The Hague, The Netherlands, and issued this twenty-third day of May 2005 at Arusha, Tanzania.

[Signed] : Fausto Pocar; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

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peine unique d'emprisonnement de 45 ans. Conformément à l'article 101 (D) du Règlement, la durée de la période qu'il a passée en détention provisoire depuis le 5 juin 1998 sera déduite de cette peine.

XXIV. DISPOSITIF

325. Par ces motifs, LA CHAMBRE D'APPEL, statuant à l'unanimité, CONFORMÉMENT aux articles 24 du Statut et 118 du Règlement, VU les conclusions écrites des parties et les arguments qu'elles ont présentés à l'audience du 7 mars 2005,

SIÉGEANT en audience publique,

ANNULE les déclarations de culpabilité prononcées à l'encontre de l'appelant au titre des chefs 2 et 6 pour génocide et extermination constitutive de crime contre l'humanité dans la mesure où elles se fondent sur sa responsabilité en tant que supérieur hiérarchique prévue à l'article 6 (3) du Statut;

REJETTE l'appel pour le surplus;

CONCLUT, de sa propre initiative, que les droits fondamentaux de l'appelant ont été gravement violés lors de son arrestation et pendant sa détention et par conséquent :

ANNULE les peines prononcées par la Chambre de première instance et les CONFOND en une seule peine de 45 ans d'emprisonnement, le temps déjà passé en détention depuis le 5 juin 1998 étant à déduire de sa peine conformément à l'article 101 (D) du Règlement;

DECLARE l'arrêt immédiatement exécutoire en vertu de l'article 119 du Règlement;

ORDONNE, conformément aux articles 103 (B) et 107 du Règlement, que Juvénal Kajelijeli reste sous la garde du Tribunal en attendant son transfèrement dans l'État où il purgera sa peine.

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

Signé le 12 mai 2005 à La Haye (Pays-Bas), prononcé le 23 mai 2005 à Arusha (Tanzanie).

[Signé] : Fausto Pocar; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca



XXV. ANNEX A – PROCEDURAL BACKGROUND

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

A. Notice of Appeal and Briefs

327. The Trial Judgement was delivered in English on 1 December 2003. On 8 December 2003 the Appellant filed a motion seeking an extension of time for filing his Notice of Appeal and Brief on the ground that the French text of the Trial Judgement was not yet available⁶⁴⁸. On 17 December 2003 the Pre-Appeal Judge granted the requested extension and ordered the Appellant to file his Notice of Appeal no later than 31 December 2003 and his Brief no later than 29 March 2004⁶⁴⁹. The Appellant filed his Notice of Appeal on 31 December 2003. Because of the continued unavailability of the French text of the Trial Judgement and due to other translation issues, the Pre-Appeal Judge extended the deadline for the filing of the Appellant's Brief to no later than 22 April 2004⁶⁵⁰. On 21 April 2004, upon receiving the French text of the Trial Judgement, the Appellant moved for leave to vary the grounds of appeal⁶⁵¹. On 22 April 2004, the Pre-Appeal Judge granted leave to file the Amended Notice of Appeal and Brief on the same date⁶⁵². The Appellant filed his Brief on 22 April 2004 and the Amended Notice of Appeal on 28 April 2004. The Prosecution filed its Respondent's Brief on 1 June 2004 and the Appellant filed his Brief in Reply on 30 July 2004.

328. On 16 December 2003, the Prosecution filed a motion seeking an extension of time to file its Notice of Appeal on the ground that the Dissenting Opinion of Judge Ramaroson was not yet available in English⁶⁵³. The Pre-Appeal Judge denied this request on 17 December 2003 and ordered the Prosecution to file its Notice of Appeal by 31 December 2003⁶⁵⁴. On 5 January 2004 the Prosecution moved for an acceptance of the filing of its Notice of Appeal out of time⁶⁵⁵. The Appeals Chamber unanimously denied this motion on 23 January 2004 because the Prosecution failed to show good cause for not filing its Notice of Appeal within the prescribed time limit⁶⁵⁶.

⁶⁴⁸ Notice of Motion for an Extension of Time to File Appellant's Notice of Appeal and Brief Pursuant to Rules 108, 111 and 116 of RPE, 8 December 2003.

⁶⁴⁹ Decision on Motion for an Extension of Time to File Appellant's Notice of Appeal and Brief, 17 December 2003.

⁶⁵⁰ Order on Motion for Extension of Time, 5 April 2004. See also Order Granting an Extension of Time for Filing of Translation of Trial Judgement and Appellant's Brief, 23 February 2004; Order Granting an Extension of Time for Filing of Translation of Trial Judgement and Appellant's Brief, 13 February 2004.

⁶⁵¹ Notice of Extremely Urgent Motion for Leave to Vary Grounds of Appeal, 21 April 2004.

⁶⁵² Order on Extremely Urgent Motion for Leave to Vary Grounds of Appeal, 22 April 2004.

⁶⁵³ Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal, 16 December 2003.

⁶⁵⁴ Decision on Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal, 17 December 2003.

⁶⁵⁵ Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time, 5 January 2004.

⁶⁵⁶ Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time, 23 January 2004.

XXV. ANNEXE A – RAPPEL DE LA PROCÉDURE

326. Les principaux aspects de la procédure en appel sont résumés ci-après.

A. Acte d'appel et mémoires

327. Le jugement en première instance a été prononcé en anglais le 1^{er} décembre 2003. Le 8 décembre 2003, l'appelant présente une requête en prorogation du délai imparti pour déposer son acte d'appel et son mémoire au motif que la version française du jugement n'est pas encore disponible⁶⁴⁸. Le 17 décembre 2003, le juge de la mise en état en appel autorise la prorogation et ordonne à l'appelant de déposer son acte d'appel au plus tard le 31 décembre 2003 et son mémoire au plus tard le 29 mars 2004⁶⁴⁹. L'appelant dépose son acte d'appel le 31 décembre 2003. La version française du jugement n'étant pas encore disponible et d'autres problèmes de traduction ayant été soulevés, le juge de la mise en état en appel reporte au plus tard au 22 avril 2004 le dépôt du mémoire de l'appelant⁶⁵⁰. Le 21 avril 2004, après avoir reçu la version française du jugement, l'appelant présente une requête en vue de se voir autorisé à modifier ses moyens d'appel⁶⁵¹. Le 22 avril 2004, le juge de la mise en état en appel autorise le dépôt de l'acte d'appel modifié et du mémoire de l'appelant le même jour⁶⁵². L'appelant dépose son mémoire le 22 avril 2004 et l'acte d'appel modifié le 28 avril 2004. Le Procureur dépose son mémoire le 1^{er} juin 2004 et l'appelant son mémoire en réplique le 30 juillet 2004.

328. Le 16 décembre 2003, le Procureur présente une requête aux fins de prorogation du délai pour déposer son acte d'appel au motif que l'opinion dissidente du juge Ramaroson n'est pas encore disponible en anglais⁶⁵³. Le 17 décembre 2003, le juge de la mise en état en appel rejette cette requête et enjoint au Procureur de déposer son acte d'appel au plus tard le 31 décembre 2003⁶⁵⁴. Le 5 janvier 2004, le Procureur présente une requête tendant à obtenir l'autorisation de déposer son acte d'appel hors délai⁶⁵⁵. Le 23 janvier 2004, la Chambre d'appel rejette à l'unanimité cette requête au motif que le Procureur n'a présenté aucun motif valable justifiant son défaut de déposer son acte d'appel dans les délais prévus⁶⁵⁶.

⁶⁴⁸ *Notice of Motion for an Extension of Time to File Appellant's Notice of Appeal and Brief Pursuant to Rules 108, 111 and 116 of RPE*, 8 décembre 2003.

⁶⁴⁹ *Decision on Motion for an Extension of Time to File Appellant's Notice of Appeal and Brief*, 17 décembre 2003.

⁶⁵⁰ *Order on Motion for Extension of Time*, 5 avril 2004. Voir aussi *Order Granting an Extension of Time for Filing of Translation of Trial Judgement and Appellant's Brief*, 23 février 2004; *Order Granting an Extension of Time for Filing of Translation of Trial Judgement and Appellant's Brief*, 13 février 2004.

⁶⁵¹ *Notice of Extremely Urgent Motion for Leave to Vary Grounds of Appeal*, 21 avril 2004.

⁶⁵² *Order on Extremely Urgent Motion for Leave to Vary Grounds of Appeal*, 22 avril 2004.

⁶⁵³ *Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal*, 16 décembre 2003.

⁶⁵⁴ *Decision on Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal*, 17 décembre 2003.

⁶⁵⁵ *Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time*, 5 janvier 2004.

⁶⁵⁶ *Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time*, 23 janvier 2004.

B. Assignment of Judges

329. On 10 December 2003 the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal : Judge Theodor Meron, Judge Mohamed Shahabuddeen, Judge Florence Mumba, Judge Fausto Pocar, and Judge Inés Mónica Weinberg de Roca⁶⁵⁷. Judge Mumba was designated the Pre-Appeal Judge⁶⁵⁸. On 31 August 2004, Judge Wolfgang Schomburg was assigned to replace Judge Meron⁶⁵⁹.

C. Additional Evidence

330. On 16 February 2004, the Appellant filed a motion for the admission of additional evidence⁶⁶⁰. Finding that the motion constituted an incomplete and deficient filing, the Pre-Appeal Judge ordered the Appellant to file an *addendum* to the motion⁶⁶¹. The Appellant filed an *addendum* to the motion on 8 March 2004⁶⁶². Finding that the Appellant's submissions were not sufficiently detailed as to the availability of the additional evidence during trial, the Pre-Appeal Judge ordered the Appellant to file a detailed explanation of how and when the Defence obtained the evidence sought for admission under Rule 115, and whether such evidence could have been discovered at trial through the exercise of due diligence⁶⁶³. Finally, on 13 May 2004 the Appellant confidentially filed a detailed explanation on the availability of additional evidence⁶⁶⁴. However, the Appeals Chamber dismissed the request for admission of additional evidence on 28 October 2004⁶⁶⁵.

331. On 15 February 2005, the Appellant filed a second motion for the admission of additional evidence⁶⁶⁶. Finding that this motion was filed out of time without a

⁶⁵⁷ Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 10 December 2003.

⁶⁵⁸ Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 10 December 2003.

⁶⁵⁹ Order of the Presiding Judge Replacing a Judge in a Case Before the Appeals Chamber, 31 August 2004.

⁶⁶⁰ Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 16 February 2004.

⁶⁶¹ Order for the Defence to File Additional Evidence in Support of Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 27 February 2004.

⁶⁶² *Addendum* to Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence and Reply to Prosecutor's Response, 8 March 2004.

⁶⁶³ Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 4 May 2004.

⁶⁶⁴ Defence's Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 13 May 2004. See also Decision on Notice of Leave to File Extremely Urgent Motion for Permission to Supplement Defence's Detailed Explanation Filed on May 24 2004, 15 June 2004.

⁶⁶⁵ Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004.

⁶⁶⁶ Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 15 February 2005.

B. Désignation des juges

329. Le 10 décembre 2003, le Président de la Chambre d'appel nomme les juges Theodor Meron, Mohamed Shahabuddeen, Florence Mumba, Fausto Pocar et Inés Mónica Weinberg de Roca pour siéger au sein de la formation chargée d'entendre l'appel⁶⁵⁷. Le juge Mumba est nommé juge de la mise en état en appel⁶⁵⁸. Le 31 août 2004, le juge Wolfgang Schomburg est nommé en remplacement du juge Meron⁶⁵⁹.

C. Moyens de preuve supplémentaires

330. Le 16 février 2004, l'appelant dépose une requête tendant à l'admission de moyens de preuve supplémentaires⁶⁶⁰. Jugeant la requête incomplète et entachée de vices, le juge de la mise en état en appel enjoint à l'appelant de déposer un additif à la requête⁶⁶¹. Le 8 mars 2004, l'appelant dépose un additif à la requête⁶⁶². Estimant les arguments de l'appelant insuffisamment détaillés sur la question de la disponibilité des moyens de preuve supplémentaires pendant le procès, le juge de la mise en état en appel enjoint à l'appelant de fournir des explications détaillées sur la façon dont la Défense a obtenu les éléments de preuve dont elle sollicite l'admission sur le fondement de l'article 115 du Règlement, sur la date à laquelle elle les a obtenus et sur le point de savoir si ces éléments de preuve auraient pu être découverts pendant le procès en exerçant la diligence voulue⁶⁶³. Le 13 mai 2004, l'appelant fournit à titre confidentiel des explications détaillées concernant la disponibilité des moyens de preuve supplémentaires⁶⁶⁴. La Chambre d'appel rejette toutefois la demande d'admission de moyens de preuve supplémentaires le 28 octobre 2004⁶⁶⁵.

331. Le 15 février 2005, l'appelant dépose une deuxième requête tendant à l'admission de moyens de preuve supplémentaires⁶⁶⁶. La Chambre la rejette, estimant que

⁶⁵⁷ *Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge*, 10 décembre 2003.

⁶⁵⁸ *Id.*

⁶⁵⁹ *Order of the Presiding Judge Replacing a Judge in a Case Before the Appeals Chamber*, 31 août 2004.

⁶⁶⁰ *Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence*, 16 février 2004.

⁶⁶¹ *Order for the Defence to File Additional Evidence in Support of Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence*, 27 février 2004.

⁶⁶² *Addendum to Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence and Reply to Prosecutor's Response*, 8 mars 2004.

⁶⁶³ *Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence*, 4 mai 2004.

⁶⁶⁴ *Defence's Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence*, 13 mai 2004. Voir aussi *Decision on Notice of Leave to File Extremely Urgent Motion for Permission to Supplement Defence's Detailed Explanation Filed on May 24 2004*, 15 juin 2004.

⁶⁶⁵ *Décision relative à la Requête de la Défense intitulée «Defence Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence»*, 28 octobre 2004.

⁶⁶⁶ *Requête de la Défense tendant à l'admission de moyens de preuve supplémentaires sur le fondement de l'article 115 du Règlement de procédure et de preuve*, 15 février 2005.

showing of good cause for the late filing; that, in any event, the proposed evidence was available at trial; and that the Appellant had failed to demonstrate that had the evidence been admitted at trial it would have affected the verdict, the Appeals Chamber dismissed it⁶⁶⁷.

D. Hearing of the Appeal

332. On 16 November 2004, the Appeals Chamber ordered that the hearing of the appeal take place on 10 December 2004⁶⁶⁸. Because of a medical emergency concerning the Lead Counsel's spouse and in the absence of a co-counsel, the Appeals Chamber had to postpone the hearing⁶⁶⁹. Pursuant to a Scheduling Order of 17 December 2004⁶⁷⁰, and an Order Concerning the Hearing of the Appeal dated 18 February 2005⁶⁷¹, the Appeals Chamber heard the parties' oral arguments on 7 March 2005 in Arusha, Tanzania. At the close of the hearing, the Accused made use of the opportunity to address the Chamber himself with some remarks.

⁶⁶⁷ Decision on Second Defence Motion for the Admission of Additional Evidence Pursuant to Rule 155 of the Rules of Procedure and Evidence, 7 March 2005.

⁶⁶⁸ Scheduling Order, 16 November 2004.

⁶⁶⁹ Order Postponing the Hearing of the Appeal, 7 December 2004.

⁶⁷⁰ Scheduling Order, 17 December 2004.

⁶⁷¹ Order Concerning the Hearing of the Appeal, 18 February 2005.

celle-ci a été déposée hors délai sans qu'aucun motif valable n'ait été invoqué pour justifier ce retard, qu'en tout état de cause, les éléments de preuve proposés étaient disponibles au moment du procès et que l'appelant n'a pas démontré que leur admission au procès aurait influé sur le verdict⁶⁶⁷.

D. Audition de l'appel

332. Le 16 novembre 2004, la Chambre d'appel ordonne que l'appel soit entendu le 10 décembre 2004⁶⁶⁸, mais doit reporter l'audience à cause d'une urgence médicale concernant l'épouse du conseil principal, le co-conseil étant absent⁶⁶⁹. Conformément à l'ordonnance portant calendrier du 17 décembre 2004⁶⁷⁰ et à une autre ordonnance datée du 18 février 2005⁶⁷¹, la Chambre d'appel entend les parties en leurs arguments le 7 mars 2005 à Arusha (Tanzanie). À la fin de l'audience, l'accusé use de la faculté qui est la sienne de présenter quelques observations à la Chambre.

⁶⁶⁷ *Decision on Second Defence Motion for the Admission of Additional Evidence Pursuant to Rule 155 of the Rules of Procedure and Evidence*, 7 mars 2005.

⁶⁶⁸ *Scheduling Order*, 16 novembre 2004.

⁶⁶⁹ *Order Postponing the Hearing of the Appeal*, 7 décembre 2004.

⁶⁷⁰ *Scheduling Order*, 17 décembre 2004.

⁶⁷¹ *Order Concerning the Hearing of the Appeal*, 18 février 2005.

The Prosecutor v. Callixte KALIMANZIRA

Case N° ICTR-2005-88

Case History

- Name : KALIMANZIRA
- First Name : Callixte
- Date of Birth : 1953
- Sex : male
- Nationality : Rwandan
- Former Official Function : *Chef de cabinet*, Ministry of the Interior and Ministry of the Interior between 6 April and 25 May 1994
- Date of Indictment's Confirmation : 21 July 2005
- Counts : Genocide, Complicity in Genocide, Direct and Public Incitement to commit Genocide
- Date and Place of Arrest : 8 November 2005, in Arusha, Tanzania (Surrendered to the Tribunal)
- Date of Transfer : 8 November 2005
- Date of Initial Appearance : 14 November 2005
- Pleading : not guilty
- Date Trial began : 5 August 2008
- Date and content of the Sentence : 22 June 2009, Sentenced to 30 years imprisonment

Le Procureur c. Callixte KALIMANZIRA

Affaire N° ICTR-2000-61

Fiche technique

- Nom : KALIMANZIRA
- Prénom : Callixte
- Date de naissance : 1953
- Sexe : masculin
- Nationality : rwandaïse
- Fonction occupée au moment des faits incriminés : Directeur de cabinet du ministre de l'intérieur puis Ministre de l'intérieur entre le 6 avril et le 25 mai 1994
- Date de la confirmation de l'acte d'accusation : 21 juillet 2005
- Chefs d'accusation : génocide, entente en vue de commettre le génocide, incitation publique et directe à commettre le génocide
- Date et lieu de l'arrestation : 8 novembre 2005, à Arusha, Tanzanie (reddition au Tribunal)
- Date du transfert : 8 novembre 2005
- Date de la comparution initiale : 14 novembre 2005
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 5 août 2008
- Date et contenu du prononcé : 22 juin 2009, condamné à 30 ans de prison

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KALIMANZIRA

Indictment
21 July 2005 (ICTR-2005-88-I)

(Original : English)

I. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute"), charges :

CALLIXTE KALIMANZIRA

with the crimes set forth below :

- I. Genocide, pursuant to Article 2 (3) (a) and Article 6 (1) of the Statute or, in the alternative;
- II. Complicity in Genocide, pursuant to Article 2 (3) (e) and Article 6 (1) of the Statute;
- III. Direct and Public Incitement to commit Genocide, pursuant to Article 2 (3) (c) and Article 6 (1) of the Statute.

II. The Accused :

1. Callixte Kalimanzira was born in 1953 in Muganza *commune*, Butare *préfecture*, Republic of Rwanda. He was trained as an agronomist and held several top posts in the Government.

2. During the events referred to in this Indictment, Callixte Kalimanzira was a very close ally of President Théodore Sindikubwabo and Prime Minister Jean Kambanda, he being a native of their province and a member of the same party as President Sindikubwabo and, in addition, one of a very few senior civil servants from the province. He was a senior civil servant who had held the following positions :

- (i) *Sous-préfet* of Butare and of Byumba;
- (ii) Co-ordinator of Agricultural services at the Kigali *préfecture*;
- (iii) Director of the Rural Development Section at the Presidency of the Republic;
- (iv) Secretary General of the Ministry of the Interior;
- (v) *Chef de cabinet*, Ministry of the Interior, a position he kept under the Interim Government. Between 6 April and 25 May, he was the acting Minister of the Interior;
- (vi) Prominent member of the *Mouvement républicain national pour le développement* (MRND); and
- (vii) Consequently, exercised in Butare *préfecture*, *de jure* and *de facto* authority over *bourgmestres*, *conseillers de secteur*, *cellule* officials, the *nyumbakumi* (head of

Arrêt
21 juillet 2005 (ICTR-2005-88-I)

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda agissant en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda [le «Statut»] accuse :

CALLIXTE KALIMANZIRA

des crimes énumérés ci-après :

- I. Génocide, en application de l'article 2 (3) (a) et de l'article 6, paragraphe 1, du Statut; ou à titre subsidiaire,
- II. Complicité dans le génocide, en application de l'article 2 (3) (e) et de l'article 6, paragraphe 1, du Statut;
- III. Incitation directe et publique au génocide, en application de l'article 2 (3) (c) et de l'article 6, paragraphes 1 du Statut.

II. L'accusé :

1. Callixte Kalimanzira est né en 1953 à la commune de Muganza, préfecture de Butare, République Rwandaise, ingénieur agronome de formation, il avait occupé plusieurs positions importantes dans l'administration publique.

2. A l'époque des faits visés dans le présent acte d'accusation, Callixte Kalimanzira était très proche du Président Théodore Sindikubwabo et du Premier Ministre Jean Kambanda du fait d'être originaire de la même province qu'eux, membres du même parti que le Président Sindikubwabo et de surcroît l'un de rares haut fonctionnaire originaire de cette province. Il était haut fonctionnaire et avait occupé les fonctions suivantes;

- i) Sous-préfet de Butare et de Byumba;
- ii) Coordinateur des services agricoles de la préfecture Kigali;
- iii) Directeur à la présidence de la République chargé de la section du développement rural;
- iv) Secrétaire Général du Ministre de l'intérieur;
- v) Directeur de cabinet du ministre de l'intérieur, poste qu'il avait gardé jusque sous le régime du gouvernement intérimaire. Durant la période du 6 avril au 25 mai il avait assuré l'intérim du Ministre de l'intérieur;
- vi) Membre prééminent du Mouvement Républicain National pour la Démocratie et le Développement [«MRND»] et,
- vii) Par conséquent exerçait dans la préfecture de Butare un contrôle de droit et sur les bourgmestres, les conseillers de secteur, les responsables de cellule, les *nyum-*

each group of 10 houses), administrative staff, *gendarmes*, communal police, the *Interahamwe*, militiamen and civilians, in that he could order these persons to commit or refrain from committing unlawful acts and discipline or punish them for their unlawful acts or omission.

III. Charges and concise statement of facts

3. Butare *préfecture* is situated in the south of Rwanda and stretches up to its border with Burundi. In 1994, it was noted for its dense Tutsi population. Politically, it was a stronghold of the *Parti Libéral* (PL), which was opposed to MRND. For that reason, in particular, the *Interahamwe* were unable to establish a foothold in the area. In early April, its *préfet*, Jean Baptiste Habyalimana, a Tutsi and pro-PL, publicly opposed the massacres.

4. During the entire period referred to in this Indictment, there was in Rwanda a minority racial or ethnic group known as “Tutsi” and officially identified as such by the Rwandan authorities. The majority of Rwanda’s population was composed of a racial or ethnic group known as “Hutu”, also officially identified as such by the Rwandan authorities.

5. Between 6 April and 17 July 1994, throughout Rwanda and in Butare *préfecture*, in particular, *Interahamwe* militiamen, communal police, *gendarmes*, soldiers of the Rwandan Armed Forces (FAR) and armed civilians targeted and attacked members of a civilian population identified as belonging to the Tutsi ethnic or racial group or considered as sympathizing with the Tutsi. During the attacks, some Rwandans killed persons they suspected of belonging to the Tutsi ethnic group or caused them serious bodily or mental harm. These attacks resulted in the death of a large number of persons identified as members of the Tutsi ethnic or racial group.

Count 1 : Genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Callixte Kalimanzira with Genocide, a crime provided for in Article 2 (3) (a) of the Statute of the Tribunal, in that between 1 January 1994 and 31 December 1994, Callixte Kalimanzira was responsible for killing and causing serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such.

Or, in the alternative,

Count 2 : Complicity in Genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Callixte Kalimanzira with Complicity in Genocide, a crime provided for in Article 2 (3) (e) of

bakumi (chefs de chaque ensemble de dix maisons), le personnel administratif, les gendarmes, les agents de la police communale, les *Interahamwe*, les miliciens et les civils, en ce qu'il pouvait ordonner à ces personnes de commettre ou de s'abstenir de commettre des actes illégaux et les discipliner ou les punir pour leurs actes ou omissions contraires à la loi.

III. Accusations et exposé succinct des faits :

3. La préfecture de Butare se situe au sud du Rwanda et s'étend jusqu'à la frontière avec le Burundi. Sur le plan démographique elle se singularisait, en 1994, par une forte concentration de la population Tutsi. Sur le plan politique, elle était un fief du *Parti Libéral* [PL] opposé au MRND. Cela avait, notamment, empêché les *Interahamwe* de s'y implanter. Au début du mois d'avril son préfet Jean Baptiste Habyimana d'origine Tutsi et d'obédience PL s'y est ouvertement opposé aux massacres.

4. Durant toute la période visée dans le présent acte d'accusation, il existait au Rwanda un groupe racial ou ethnique minoritaire connu sous le nom de «groupe Tutsi» et officiellement identifié comme tel par les Pouvoirs Publics Rwandais. La majorité de la population rwandaise était constituée d'un groupe racial ou ethnique connu sous le nom de «groupe Hutu», lui aussi officiellement identifié comme tel par les Pouvoirs Publics Rwandais.

5. Entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais et à la préfecture de Butare en particulier, des miliciens *Interahamwe*, des agents de la police communale, des gendarmes, des militaires des Forces Armées Rwandaises [FAR] et des civils armés ont pris pour cible et attaqué la population civile identifiée comme appartenant au groupe ethnique ou racial Tutsi ou considérée comme sympathisante avec les Tutsi. Au cours des attaques, certains citoyens rwandais ont tué des personnes soupçonnées d'appartenir au groupe ethnique Tutsi ou porté gravement atteinte à leur intégrité physique ou mentale. Ces attaques ont entraîné la mort d'un grand nombre de personnes identifiées comme membres du groupe ethnique ou racial Tutsi.

Premier chef d'accusation : Génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Callixte Kalimanzira de Génocide, crime prévu par l'article 2 (3) (a) du Statut du Tribunal, en ce que entre le 1^{er} janvier 1994 et le 31 décembre 1994, Callixte Kalimanzira est responsable de meurtres et d'atteintes graves à l'intégrité physique ou mentale de membres de la population Tutsi, commis avec l'intention de détruire en tout ou en partie un groupe ethnique ou racial comme tel.

Ou subsidiairement,

Deuxième chef d'accusation : Complicité dans le génocide

Le Procureur du Tribunal Pénal International pour le Rwanda accuse Callixte Kalimanzira de complicité dans le génocide, crime prévu par l'article 2 (3) (e) du statut

the Statute in that between 1 January 1994 and 31 December 1994, Callixte Kalimanzira was an accomplice to the killing or in causing serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such.

CONCISE STATEMENT OF FACTS FOR COUNTS 1 AND 2

Individual criminal responsibility

6. Callixte Kalimanzira is individually responsible, pursuant to Article 6 (1) of the Statute, for the crime of genocide or complicity in genocide in that he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or commission of the crimes. Moreover, Callixte Kalimanzira used his position as described in section II above (under the heading “The Accused”) to incite and order persons under his authority to commit the crimes alleged in this Indictment. The particulars of the crime for which he incurs individual criminal responsibility are set out in paragraphs 7 to 17 below.

Presence and movements of the Accused in Butare préfecture after 6 April 1994 to instigate and supervise the genocide

7. In launching the massacre of Tutsi in Butare *préfecture*, President Théodore Sindikubwabo, along with a powerful delegation of Interim Government dignitaries, travelled to Butare on 19 April 1994 to incite the population to commit genocide. As the Minister of the Interior was absent, Callixte Kalimanzira, *Chef de cabinet*, Ministry of the Interior, served as master of ceremonies at the meeting of the Interim Government officials and the people. He gave the floor to participants, who incited the people to kill Tutsi as was already being done in other *préfectures*. The inflammatory speeches delivered by Government officials during the meetings in respect of which Callixte Kalimanzira showed no disapproval, triggered the massacre of thousands of Tutsi in Butare *préfecture*. By so doing, Callixte Kalimanzira aided and abetted the massacre of Tutsi which occurred afterwards.

8. Between April and mid-July 1994, Callixte Kalimanzira visited Butare on several occasions, together with senior Interim Government dignitaries, including President Théodore Sindikubwabo, Prime Minister Jean Kambanda and the Minister for Family and Women’s Affairs, Pauline Nyiramasuhuko, as well as senior local Government officials, such as the *préfet*, Alphonse Nteziryayo, and high-ranking officers of the Rwandan Armed Forces (FAR), including Tharcisse Muvunyi. The purpose of the visits, in which Callixte Kalimanzira participated, was to sensitize the population to the Government’s policy and incite them to kill the Tutsi. The visits resulted in the killing of thousands of Tutsi in Butare *préfecture*.

en ce que entre le 1^{er} janvier 1994 et le 31 décembre 1994, Callixte Kalimanzira est complice de meurtres et d'atteintes graves à l'intégrité physique ou mentale de membres de la population Tutsi, commis dans l'intention de détruire en tout ou en partie un groupe ethnique ou racial comme tel.

RELATION CONCISE DES FAITS RELATIFS
AUX PREMIER ET DEUXIÈME CHEFS D'ACCUSATION

Responsabilité pénale individuelle

6. En application de l'article 6 (1) du Statut, l'accusé Callixte Kalimanzira est individuellement responsable du crime de génocide ou de celui de complicité dans le génocide pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ces crimes. Callixte Kalimanzira a, par ailleurs, usé de son statut telle que décrit dans la section II ci-dessus (intitulée l'accusé) pour inciter à commettre et ordonner aux personnes placées sous son autorité de commettre les crimes visés sous cette charge. Les faits détaillés par lesquels il a engagé sa responsabilité pénale individuelle sont exposés aux paragraphes suivants 7 à 17.

*Présence et déplacements de l'accusé dans la préfecture de Butare
après le 6 Avril 1994 pour initier et superviser le génocide*

7. Pour lancer les massacres des Tutsi à la préfecture de Butare, le Président Théodore Sindikubwabo accompagné d'une imposante délégation du gouvernement intérimaire s'est rendu à Butare le 19 avril 1994 pour inciter la population à commettre le génocide. En l'absence du Ministre de l'intérieur et en tant que directeur de cabinet de ce Ministre Callixte Kalimanzira a servi de maître de cérémonie au meeting du gouvernement intérimaire avec la population. Il a donné la parole aux participants qui ont incité la population à massacrer les Tutsi comme cela se faisait déjà dans d'autres préfectures. Les discours incendiaires prononcés par les membres du gouvernement lors de ce meeting, vis-à-vis desquels Callixte Kalimanzira n'a jamais manifesté aucune désapprobation, ont engendré les massacres de milliers de Tutsi dans la préfecture de Butare. Ainsi, l'intéressé a aidé et encouragé à perpétrer le massacre de ces Tutsi qui s'est produit par la suite.

8. Entre Avril et mi-Juillet 1994 Callixte Kalimanzira s'est rendu à plusieurs reprises dans la préfecture de Butare avec de hautes personnalités du gouvernement intérimaire y compris le Président Théodore Sindikubwabo, le Premier ministre Jean Kambanda et la ministre de la Famille et de la promotion féminine Pauline Nyiramasuhuko, de hauts agents de l'autorité locale tels que le préfet Alphonse Nteziryayo et d'officiers supérieurs des FAR tels que le colonel Tharcisse Muvunyi. Ces déplacements auxquels Callixte Kalimanzira a pris part avaient pour but de sensibiliser la population à la politique du gouvernement et de l'inciter à massacrer les Tutsi. Par conséquent des milliers de Tutsi ont été tués dans la préfecture de Butare.

*Callixte Kalimanzira's involvement in the killings on Kabuye hill,
Ndora commune, Kisagara secteur*

9. On or about 23 April 1994, thousands of Tutsi civilians gathered on Kabuye hill, located in Ndora *commune*. Callixte Kalimanzira personally encouraged them to take refuge on the hill, promising them protection and food. Instead of being protected, they were attacked and killed by the Hutu with the full knowledge of and in the presence of Callixte Kalimanzira. In fact, Callixte Kalimanzira personally sought communal police and military reinforcement to assist in the attack. Thousands of Tutsi were killed on Kabuye hill.

10. On or about 23 April 1994, at the time of the attacks at Kabuye hill, Callixte Kalimanzira discussed the progress of the killings at the hill with such local authorities as *Sous-Préfet* Dominique Ntawukuriryayo, Fidèle Uwizeye and Bernadette Mukarungwa, Member of Parliament, in front of *Bourgmestre* Fidèle Uwizeye's house. Having realized that the attackers had not been able to exterminate all the people gathered on the hill because they were too many, they decided to go to the site and supervise the operations. Thus, Callixte Kalimanzira personally supervised the attacks against the Tutsi who had gathered on Kabuye hill, resulting in the death of thousands of Tutsi.

*Callixte Kalimanzira's involvement in the killings at the roadblock
erected at Buzana river and at Mwirango*

11. In late April 1994, about 100 Tutsi women, men and children were led by Callixte Kalimanzira to a roadblock at River Buzana, at the border of the Ngoma and Nyaruhengeri *communes*. Callixte Kalimanzira was accompanied by Colonels Tharcisse Muvunyi and Alphonse Nteziryayo and a military escort. Many of the Tutsi being escorted were seriously wounded, particularly, at the Achilles heel. Callixte Kalimanzira decided that the Tutsi who could no longer continue the journey should be finished off on the spot, at the roadblock, and ordered that the rest of the Tutsi be killed a few kilometres further away, at Mwirango. Callixte Kalimanzira supervised the elimination on the spot of Tutsi who were too weak to continue the journey. In fact, he personally beat some Tutsi to death. The remaining Tutsi were led to Mwirango, where about 50 of them were killed on his orders.

Other incitements to kill Tutsi followed by killings

12. On or about 5 June 1994, Callixte Kalimanzira, together with Colonel Tharcisse Muvunyi and some soldiers, went to Gasagara centre, Muganza *secteur*. He incited the people to eliminate the Tutsi, including those who were still in their mothers' wombs. Later, in a speech to the public at the Gikondo *commune* office, he stated that all Tutsi who were still alive, including women, young girls, the elderly and children, had to be killed. As a result of the incitement, several women and young girls were killed.

13. In early May 1994, Callixte Kalimanzira stopped at a roadblock located at the Kibilizi *secteur* and told those who were manning it to be discreet in their hunt for the Tutsi as foreigners were monitoring events in Rwanda. He also asked them to

*Implication de Callixte Kalimanzira dans les massacres
survenus à la colline de Kabuye, commune de Ndora, secteur de Kisagara*

9. Vers le 23 avril 1994 des milliers de civils Tutsi se sont amassés sur la colline de Kabuye située à la commune de Ndora. Callixte Kalimanzira les a personnellement encouragés à se réfugier sur la colline en leur promettant d'être protégés et nourris. Au lieu d'être protégés, ils ont été attaqués et massacrés par des Hutu au su et au vu de Callixte Kalimanzira. Callixte Kalimanzira a même personnellement cherché des renforts de policiers communaux et de militaires pour soutenir l'attaque. Des milliers de Tutsi ont été massacrés à la colline de Kabuye.

10. Vers le 23 avril 1994, pendant la période où les attaques se sont déroulées à la colline de Kabuye, Callixte Kalimanzira a discuté de la progression des massacres à la colline avec les agents de l'autorité locale Dominique Ntawukuriryayo sous-préfet et Fidèle Uwizeye et Bernadette Mukarurangwa membre du parlement devant la maison du bourgmestre Fidèle Uwizeye. Ayant constaté que les assaillants n'ont pas pu exterminer toutes les personnes regroupées sur la colline du fait qu'ils étaient trop nombreux ils ont décidé d'aller contrôler la situation sur place. Callixte Kalimanzira a ainsi personnellement supervisé les attaques des Tutsi regroupés sur la colline Kabuye qui ont engendrées des milliers de victimes Tutsi.

*Implication de Callixte Kalimanzira dans les massacres
survenus au barrage routier situé sur la rivière de Buzana
et ceux survenus à Mwirango*

11. Vers fin avril 1994 environ une centaine de femmes, d'hommes et d'enfants Tutsi ont été dirigés par Callixte Kalimanzira vers un barrage routier situé sur la rivière de Buzana à la frontière entre les communes de Ngoma et Nyaruhengeri. Callixte Kalimanzira était accompagné du colonel Tharcisse Muvunyi du colonel Alphonse Nteziryayo et d'une escorte militaire. Beaucoup des Tutsi escortés étaient gravement blessés notamment aux tendons d'Achille. Callixte Kalimanzira décida qu'il fallait achever sur place au niveau de la barrière les Tutsi qui n'avaient plus la force d'avancer et donna l'ordre d'exécuter les autres quelques kilomètres plus loin à Mwirango. Callixte Kalimanzira a supervisé sur place l'élimination des Tutsi qui étaient trop faibles pour continuer à marcher. Il a même personnellement battu des Tutsi jusqu'à ce que mort s'en suive. Le reste des Tutsi ont été emmenés à Mwirango où environ une cinquantaine parmi eux ont été exécutés selon ses ordres.

Autres incitations aux massacres des Tutsi suivies de tueries

12. Vers le 5 juin 1994 Callixte Kalimanzira s'était rendu avec le col. Tharcisse Muvunyi et des soldats au centre de Gasagara au secteur de Muganza. Il a appelé la population à éliminer les Tutsi y compris ceux qui sont encore dans l'utérus de leurs mères. Plus tard, au bureau de la commune de Gikondo, il s'est adressé au public en disant que tous les Tutsi qui sont encore en vie doivent être tués y compris les femmes, les jeunes filles, les vieux et les enfants. Suite à ces incitations plusieurs femmes et jeunes filles ont été effectivement tuées.

13. Au début du mois de mai 1994, à une barrière située au Secteur Kibilizi, Callixte Kalimanzira s'est arrêté et s'est adressé aux personnes qui tenaient la barrière en leur disant de rester discrètes lors de leurs chasses contre les Tutsi parce que des

completely destroy all the houses of Tutsi without leaving a trace and to tell the Tutsi that peace had been restored so that they should come out of hiding.

14. On or about 5 June 1994, Callixte Kalimanzira addressed the Hutu population at the Gikondo *commune* office, stressing that all Tutsi who were still alive, including women, young girls, the elderly and children had to be killed because, if RPF won the war, they would, as potential witnesses, be the ones to denounce the killers. Immediately after the meeting, two old women and eight young girls were killed. They were : Mukamazimpaka, Salafina Nyaraneza, Mukaruyonza and her mother, Nyaramisago, Goretha Umubeyeyi, Anasthasia Nakabonye, Apolinararaia and Kimonyo's two daughters. Additionally, 10 to 15 Tutsi children were also killed following Callixte Kalimanzira 's order to the Hutu population.

*Call for the erection of roadblocks, supervision of roadblocks,
call on the population to arm themselves
in order to kill the Tutsi*

15. Between mid-April and late June 1994, Callixte Kalimanzira incited the population to erect roadblocks in order to eliminate the Tutsi. He was often personally present at the roadblocks to supervise their operations. Many Tutsi were killed at the roadblocks erected on the instructions of Callixte Kalimanzira and supervised by him.

*Callixte Kalimanzira's involvement
in the distribution of weapons*

16. Two days after President Juvénal Habyarimana's death, Callixte Kalimanzira went to Kigembe *commune* in a vehicle carrying a carton loaded with machetes, which he handed over to Bonaventure Nkundabakora, reminding him that he had fulfilled his promise to bring him weapons. The machetes provided by Callixte Kalimanzira were used to kill Tutsi. Moreover, Callixte Kalimanzira periodically replenished the stock of bladed weapons at the Muganza *commune* office. The weapons were distributed to the population under Callixte Kalimanzira 's supervision and used to kill the Tutsi.

*Callixte Kalimanzira's involvement in training members
of the population in the handling of weapons*

17. In May 1994, a public rally was held at the Muganza *commune* football field for the purpose of training people to handle weapons. Callixte Kalimanzira, Chrysoologue Bimenyimana, the *bourgmestre* of Muganza, and Alphonse Nteziryayo, the *préfet* of Butare, were present at the training session. Callixte Kalimanzira personally demonstrated to participants how to shoot arrows. Those who were trained to use weapons under Callixte Kalimanzira's supervision subsequently took part in the killing of Tutsi in the area.

étrangers effectuaient un contrôle des événements au Rwanda. Il leur a également demandé de détruire complètement toutes les maisons des Tutsi et d'effacer toute trace de ces maisons et de dire aux Tutsi que la paix est revenue afin qu'ils sortent de leurs cachettes.

14. Vers le 5 juin 1994 Callixte Kalimanzira s'est adressé à la population Hutu, au bureau de la commune de Gikondo, en ordonnant que tous les Tutsi qui sont encore en vie doivent être tués y compris les femmes, les jeunes filles, les vieux et les enfants, parce que si le Front patriotique rwandais [«FPR»] gagne la guerre ils seront des témoins potentiels pour dénoncer les tueurs. Juste après cette réunion deux vieilles femmes et huit jeunes filles ont été tuées. Il s'agit de Mukamazimpaka, Nyaraneza Salafina, Mukaruyonza et sa mère, Nyaramisago, Umubeyeyi Goretha, Nakabonye Anastasia, Apolinarara et les deux filles de Kimonyo. Par ailleurs, 10 à 15 enfants Tutsi ont été également tués suite à l'ordre intimé par Callixte Kalimanzira à la population Hutu.

*Appel à la mise en place des barrières, contrôle des barrières,
appel de la population à s'armer dans le but de tuer les Tutsi*

15. Durant mi-avril à fin juin 1994 Callixte Kalimanzira a incité la population à ériger des barrages pour éliminer les Tutsi. Il était souvent personnellement présent sur les lieux de ces barrages pour contrôler leur fonctionnement. Beaucoup de Tutsi ont été massacrés au niveau de ces barrages dressées sur instruction de Callixte Kalimanzira et supervisés par lui.

*Implication de Callixte Kalimanzira
dans la distribution d'armes*

16. Deux jours après la mort du Président Juvénal Habyarimana, Callixte Kalimanzira s'est rendu à la commune de Kigembe dans une voiture contenant une boîte remplie de machettes qu'il a données à Bonaventure Nkundabakora et lui a rappelé qu'il avait tenu sa promesse de lui apporter des armes. Les machettes fournies par Callixte Kalimanzira ont été utilisées pour massacrer des Tutsi. Par ailleurs, Callixte Kalimanzira alimentait périodiquement un stock d'armes blanches au bureau communal à Muganza. Ces armes ont été distribuées à la population sous la supervision de Callixte Kalimanzira et ont été utilisées pour massacrer les Tutsi.

*Implication de Callixte Kalimanzira dans l'entraînement
de la population à l'utilisation des armes*

17. Au mois de mai 1994 un rassemblement public ayant pour objectif d'initier la population au maniement des armes a été tenu à la commune de Muganza au terrain de football. Callixte Kalimanzira, Bimenyimana Chrysologue, bourgmestre de Muganza et Alphonse Nteziryayo, Préfet de Butare, y étaient présents. Callixte Kalimanzira montra lui-même aux participants comment tirer avec des flèches. La population initiée au maniement des armes sous la supervision de Callixte Kalimanzira a ensuite contribué aux massacres des Tutsi dans la région.

Count 3 : Direct and Public Incitement to Commit Genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Callixte Kalimanzira with direct and public incitement to commit genocide, a crime provided for in Article 2 (3) (c) of the Statute of the Tribunal, in that between 1 January 1994 and 17 July 1994, Callixte Kalimanzira incurred responsibility for directly and publicly inciting people, including local Government officials, communal police, the *Interahamwe*, *gendarmes*, soldiers and civilians to participate in killing or in causing serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such.

CONCISE STATEMENT OF FACTS FOR COUNT 3

Individual criminal responsibility

18. Callixte Kalimanzira is individually responsible, pursuant to Article 6 (1) of the Statute, for the crime of direct and public incitement to commit genocide in that he planned, instigated, ordered to commit or otherwise aided and abetted in the planning, preparation or commission of crimes. The particulars of the crime for which he incurs individual criminal responsibility are set out in paragraphs 19-27 below.

19. In late March 1994, local Government officials held a meeting at the Gisagara commercial centre in Nyamigango *cellule*, Gisagara *secteur*, Ndora *commune*. At the meeting, Callixte Kalimanzira took the floor to incite the people to arm themselves and prepare to fight the “enemy”. He also encouraged those who could manufacture traditional weapons to do so. Furthermore, he promised to supply firearms to the people.

20. On or about 9 April 1994, a meeting was held in Kanage *cellule*, Mukindo *secteur*, Kibayi *commune*. At that meeting, Callixte Kalimanzira told Burundian refugees that the Interim Government had confidence in them, that President Juvénal Habyarimana had taken care of them and that President Théodore Sindikubwabo would behave in a similar manner; he also told them that it was the same enemy who chased them from Burundi who was responsible for the death of Presidents Habyarimana and Ntaryamira. He then appealed to them not to leave the country, stating that the reason for his coming was to bring them traditional weapons with which to defend themselves against the “enemy”.

21. On or about mid-April 1994, Callixte Kalimanzira, together with three soldiers, went to the Jaguar roadblock located in front of the Gisagara Catholic Church and gave a rifle to Marcel Ntirusekanwa who was in charge of the roadblock. Callixte Kalimanzira told Marcel Ntirusekanwa that the gun was to be used to kill the Tutsi.

22. On or about late April 1994, Callixte Kalimanzira appeared at a roadblock located at the border between Muganza/Remera *secteurs* and the Kirarambogo junction in a vehicle with *gendarmes*. He reminded those manning the roadblock that they had to carry weapons and kill Tutsi. On that occasion, Callixte Kalimanzira slapped someone because he was not carrying a weapon, forced another unarmed person into his vehicle and headed for Gisagara.

**Troisième chef d'accusation :
Incitation directe et publique au génocide**

Le Procureur du Tribunal pénal international pour le Rwanda accuse Callixte Kalimanzira d'incitation directe et publique au génocide, crime prévu par l'article 2 (3) (c) du Statut du Tribunal, en ce que entre le 1^{er} janvier le 17 juillet 1994, Callixte Kalimanzira est responsable d'avoir directement et publiquement incité des personnes y compris des autorités locales, des policiers communaux, des *interahamwe*, des gendarmes, des soldats et des civils à commettre des meurtres et des atteintes graves à l'intégrité physique ou mentale de membres de la population Tutsi, commis avec l'intention de détruire en tout ou en partie un groupe ethnique ou racial comme tel.

RELATION CONCISE DES FAITS RELATIFS
AUX TROISIÈME CHEF D'ACCUSATION

Responsabilité pénale individuelle

18. En application de l'article 6 (1) du Statut, l'accusé Callixte Kalimanzira est individuellement responsable du crime d'incitation directe et publique au génocide pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. Les faits détaillés par lesquels il a engagé sa responsabilité pénale individuelle sont exposés aux paragraphes suivants 19-27.

19. Vers la fin du mois de mars 1994, une réunion a été tenue par les autorités locales à la cellule de Nyamigango secteur Gisagara commune de Ndora (au centre commercial de Gisagara). Callixte Kalimanzira y avait pris la parole pour inciter la population à s'armer pour se préparer à combattre «l'ennemi». Il a également encouragé ceux qui savent fabriquer des outils traditionnels à le faire. Il a, par ailleurs, promis de fournir des armes à feu à la population.

20. Vers le 9 avril 1994 une réunion s'est tenue à la cellule Kanage secteur Mukindo commune Kibayi. Lors de cette réunion Callixte Kalimanzira s'est adressé aux réfugiés Burundais en leur disant que le gouvernement intérimaire leur faisait confiance, que le Président Juvénal Habyarimana avait pris soin d'eux et que le Président Théodore Sindikubwabo allait agir de même et que l'ennemi qui les avait chassés du Burundi est le même que celui qui a tué les Présidents Habyarimana et Ntaryamira. Il les a ensuite exhortés à ne pas quitter le pays et leur a affirmé que la raison de sa présence parmi eux était de leur apporter des armes traditionnelles pour se défendre contre «l'ennemi».

21. Vers mi-avril 1994 Callixte Kalimanzira s'est rendu à la barrière dite du Jaguar située devant l'église catholique de Gisagara avec trois soldats et a donné un fusil à Marcel Ntirusekanwa qui était le responsable de la barrière. Callixte Kalimanzira a dit à Marcel Ntirusekanwa que le fusil devait être utilisé pour tuer les Tutsi.

22. Vers fin avril 1994 Callixte Kalimanzira s'est présenté dans un barrage, situé aux frontières des secteurs Muganza/Remera et le croisement de Kirarambogo, dans un véhicule transportant des gendarmes. Il insista auprès des personnes présentes à la barrière qu'elles devaient toutes porter des armes et tuer les Tutsi. Lors de cet incident, Callixte Kalimanzira gifla une personne pour motif qu'elle n'était pas armée et força une autre personne qui ne portait pas d'arme dans son véhicule et s'en alla vers Gisagara.

23. On or about late April and early May 1994, Callixte Kalimanzira attended a public meeting held at the Nyabisagara football field in Kabgayi *commune*. At the meeting, speakers, including Kalimanzira, thanked the Hutu for the efforts they had made to eliminate the Tutsi.

24. On or about late April and early May 1994, a few days after the public meeting at the Nyabisagara football field in Kabgayi *commune* referred to in paragraph 23 above, Callixte Kalimanzira went to the Ramiko primary school and congratulated the people present on “the work” that had been done. He also urged them to remain vigilant and continue to carry weapons and eliminate the Tutsi.

25. In May 1994, Callixte Kalimanzira stopped at a roadblock located at a place called Sakindi, in Kibinzi *secteur*. Several armed persons were manning the roadblock. Callixte Kalimanzira told them that they should kill the Tutsi discreetly, destroy their houses and plant banana trees in the locations where the houses used to stand so no traces would be left for foreigners to see. He further urged them to tell the Tutsi who were in hiding that peace had been restored so they should come out of hiding. This was simply a ploy to locate and kill them.

26. In May 1994, Callixte Kalimanzira appeared at a roadblock in a pick-up with armed soldiers. He got out of the vehicle and encouraged those manning the roadblock to continue the identity check of everyone and to keep searching for the Tutsi enemy. On that same occasion, he questioned a motorcyclist who was going through an identity check at the roadblock and whose identify card bore the label “Hutu”, criticizing him for not carrying a weapon with which to kill the Tutsi in spite of the instructions issued to that effect.

27. Between mid-April and June 1994, Callixte Kalimanzira checked if everyone was carrying a weapon with which to kill the Tutsi and did not hesitate to warn, assault and even threaten to severely punish those who failed to carry a weapon. On or about late April and early May 1994, Callixte Kalimanzira hit a Hutu with a club, criticizing him for not carrying a weapon with which to kill the Tutsi.

The acts and omissions of Callixte Kalimanzira detailed herein are punishable in reference to Articles 22 and 23 of the Statute.

Arusha, Tanzania; Date : 21 July 2005.

[Signed] : Hassan Bubacar Jallow

23. Vers fin Avril début Mai 1994 Callixte Kalimanzira a participé à une réunion publique à la commune de Kibayi au terrain de football de Nyabisagara. Lors de cette réunion les orateurs y compris Kalimanzira, ont remercié la population Hutu pour les efforts qu'elle a déployé pour essayer d'éradiquer les Tutsi.

24. Vers fin Avril début Mai 1994, et quelques jours après la réunion publique à la commune de Kibayi au terrain de football de Nyabisagara, comme mentionnée dans le paragraphe 23 ci-dessus, Callixte Kalimanzira s'est rendu à l'école primaire de Ramiko et a exprimé à l'assistance sa gratitude pour « le travail » qui a été accompli. Il l'a, en outre, exhorté à rester vigilante et à continuer à porter des armes et à éliminer les Tutsi.

25. En mai 1994, Callixte Kalimanzira s'est arrêté au niveau d'une barrière située à un endroit appelé Sakindi au secteur de Kibinzi. Plusieurs personnes armées gardaient la barrière. Callixte Kalimanzira leur a dit qu'il fallait tuer les Tutsi discrètement et qu'il fallait détruire leurs maisons et planter des bananiers sur les terrains où se trouvaient les demeures détruites afin de ne pas laisser de trace pour les regards des étrangers. Il leur a dit aussi qu'il fallait dire aux Tutsi qui se cachaient que la paix est revenue pour qu'ils sortent de leurs cachettes afin de les tuer.

26. Dans le mois de mai 1994 Callixte Kalimanzira s'est présenté au niveau d'une barrière dans un pick-up qui transportait des soldats armés. Il est descendu du véhicule et a encouragé ceux qui supervisaient la barrière à continuer à contrôler tout le monde et à chercher l'ennemi Tutsi. Lors du même incident, il a interpellé un motocycliste qui subissait un contrôle d'identité à la barrière, dont la carte d'identité portait la mention Hutu, en lui reprochant de ne pas porter d'arme pour tuer les Tutsi en dépit des instructions.

27. Entre mi-avril et juin 1994, Callixte Kalimanzira contrôlait si tout le monde portait une arme pour tuer les Tutsi et n'hésitait pas à mettre en garde, y compris en les molestant et en les menaçant de sanctions graves, ceux qui n'en portaient pas. Vers la fin du mois d'avril début mai 1994 Callixte Kalimanzira avait personnellement frappé un Hutu avec un gourdin en lui reprochant de ne pas porter d'arme pour tuer les Tutsi.

Les actes et les omissions de Callixte Kalimanzira exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut du Tribunal.

Arusha, Tanzanie, en date du 21 juillet 2005.

[Signé] : Hassan Bubacar Jallow

The Prosecutor v. Jean de Dieu KAMUHANDA

Case N° ICTR-99-54A

Case History

- Name : KAMUHANDA
- First Name : Jean de Dieu
- Date of Birth : 3 March 1953
- Sex : Male
- Nationality : Rwandan
- Former Official Function : Minister for Culture and Education

- Date of Indictment's Confirmation : 1 October 1999
- Counts : Genocide, Conspiracy to Commit Genocide, Complicity in Genocide, Crimes against Humanity and Serious Violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 26 November 1999, in France
- Date of Transfer : 7 March 2000
- Date of Initial Appearance : 24 March 2000
- Pleading : Not guilty
- Date of Indictment's Severance : 7 November 2000 – Bicomumpaka, Bizimungu, Karemera, Mugenzi, Mugiraneza, Niyitegeka et Rwamakuba

- Date Trial Began : 17 April 2001
- Trial recommenced : 3 September 2001
- Date and content of the Sentence : 22 January 2004, life imprisonment (for genocide) and life imprisonment (crime against humanity – extermination), cumulative penalties
- Appeal : 19 September 2005 (confirmation of the penalties)

Le Procureur c. Jean de Dieu KAMUHANDA

Affaire N° ICTR-99-54A

Fiche technique

- Nom : KAMUHANDA
- Prénom : Jean de Dieu
- Date de naissance : 3 mars 1953
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Ministre de l'enseignement supérieur et de la culture
- Date de la confirmation de l'acte d'accusation : 1^{er} octobre 1999
- Chefs d'accusation : génocide, entente en vue de commettre le génocide, complicité de génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 26 novembre 1999, en France
- Date du transfert : 7 mars 2000
- Date de la comparution initiale : 24 mars 2000
- Précision sur le plaidoyer : non coupable
- Date de la disjonction de l'acte d'accusation : 7 novembre 2000 – Bica-mumpaka, Bizimungu, Karemera, Mugenzi, Mugiraneza, Niyitegeka et Rwa-makuba
- Date du début du procès : 17 avril 2001
- Réouverture du procès : 3 septembre 2001
- Date et contenu du prononcé du jugement : 22 janvier 2004, emprisonnement à vie (pour génocide) et emprisonnement à vie (pour crime contre l'humanité – extermination), les deux peines étant cumulatives
- Appel : 19 septembre 2005, décision confirmée

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Scheduling order
18 April 2005 (ICTR-99-54A-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Jean de Dieu Kamuhanda – Appeals Schedule

International Instrument cited :

Rules of Procedure and Evidence, rule 114

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 (“International Tribunal”);

NOTING the “Judgment and Sentence” rendered in this case by Trial Chamber II on 22 January 2004;

NOTING the *Acte d’Appel du Jugement 22 janvier 2004* filed by Jean de Dieu Kamuhanda (“the Appellant”) on 6 August 2004; the *Memoire en Appel – en Application de l’Article 111 du RPP* (“Appellant’s Appeal Brief”) filed by the Appellant on 19 October 2004; and the Respondent’s Brief filed by the Office of the Prosecutor (“Prosecution”) on 29 November 2004;

NOTING the “Decision on Appellant’s Motion for Admission of Additional Evidence on Appeal” filed on 12 April 2005, whereby the Appellant was granted leave pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) to present as additional evidence the testimony of Witnesses GAA and GEX (“Additional Witnesses”), before the Appeals Chamber on a date to be specified;

CONSIDERING that the issue of the Appellant’s alibi is central to the determination of the appeal;

PURSUANT to Rule 114 of the Rules;

HEREBY ORDERS THAT:

The Additional Witnesses shall be heard in Arusha on Wednesday, 18 May 2005;

The final arguments of the Parties shall be heard in Arusha on Thursday, 19 May 2005, during which time the Appeals Chamber invites the Parties, without prejudice to any matter the Parties or the Chamber may wish to raise, and without in any way expressing an opinion on the merits of the Appeal, to specifically address and further develop their submissions on the special defence of alibi advanced by the Appellant;

AND INFORMS the parties that the timetable of the hearings shall be as follows :

	<i>Wednesday, 18 May 2005</i>
	<i>Evidentiary Hearing</i>
10 :00 a.m.	Testimony of Witness GAA, followed by testimony of Witness GEX
	<i>Thursday, 19 May 2005</i>
	<i>Appeal Hearing</i>
9 :30 a.m. – 9 :45 a.m.	Introductory Statement by the Presiding Judge (15 minutes)
9 :45 a.m. – 11 :45 a.m.	Submissions of the Appellant (2 hours)
11 :45 a.m. – 12 :15 p.m.	<i>Pause (30 minutes)</i>
12 :15 p.m. – 1 :00 p.m.	Response of the Prosecution (45 minutes)
1 :00 p.m. – 3 :00 p.m.	<i>Pause (2 hours)</i>
3 :00 p.m. – 4 :15 p.m.	Continued Response of the Prosecution (1 hour and 15 minutes)
4 :15 p.m. – 4 :45 p.m.	Pause (30 minutes)
4 :45 p.m. – 5 :15 p.m.	Reply by the Appellant (30 minutes)
5 :15 p.m. – 5 :30 p.m.	Brief Personal Address by Jean de Dieu Kamuhanda (optional)

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

Done this 18th day of April 2005, At The Hague, The Netherlands

[Signed] : Florence Ndepele Mwachande Mumba

***Decision on Jean de Dieu Kamuhanda's Motion
for an Extension of Time
19 April 2005 (ICTR-99-54A-A)***

(Original : English)

Appeals Chamber

Judge : Florence Mumba, Pre-Appeal Judge

Jean de Dieu Kamuhanda – Extension of time, Good cause, Translation – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 113 and 116 (A)

I, FLORENCE NDEPELE MWACHANDE MUMBA, a Judge of 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 (“International Tribunal”) and Pre-Appeal Judge in this case¹;

BEING SEISED of “*Requête en Extrême Urgence aux Fins de Prorogation de Délai Pour le Dépôt des Conclusions en Duplique*” (“Request”), filed by Jean de Dieu Kamuhanda (“Appellant”) on 14 April 2005, in which the Appellant seeks an extension of time to file his brief in reply on 27 April 2005;

NOTING the Prosecutor’s Urgent Response to “*Requête en Extrême Urgence aux Fins de Prorogation de Délai Pour le Dépôt des Conclusions en Duplique*” (“Response”) filed by the Office of the Prosecutor (“Prosecution”) on 18 April 2005 in which the Prosecution opposes the Request because it was made over four months after the filing was due and, therefore, may cause prejudice to the Prosecution if the Appeals Chamber decides to hear this case in the near future²;

NOTING Respondent’s Brief filed by the Prosecution on 29 November 2004;

NOTING Rule 113 of the Rules and Procedures of Evidence of the International Tribunal (“Rules”) that provides that an Appellant may file a brief in reply within fifteen days after the filing of the Respondent’s brief;

CONSIDERING that under Rule 116 (A) of the Rules, the Appeals Chamber may grant a motion for an extension of time upon a showing of good cause;

CONSIDERING that in the Request, the Appellant submits, *inter alia*, that the Respondent’s Brief was filed on 29 November 2004 in English, without a translation into French, his working language, and that it was therefore not possible to consider filing a brief in reply until he was given a draft translation of the Appellant’s Brief into French on 11 April 2005;

NOTING that the Appellant has delayed in filing the Request³;

CONSIDERING that an official translation of the Respondent’s Brief has not yet been filed;

CONSIDERING that the Appellant does not object to the use of the draft translation and requests 16 days from the date of receipt of the draft translation of the Respondent’s Brief to file his brief in reply;

FINDING that the argument raised by the Appellant constitutes good cause justifying an extension of time;

¹ Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 9 February 2004.

² Response, para. 2.

³ The Respondent’s Brief having been filed on 29 November 2004, the Appellant should have filed the Request within 15 days thereof. Instead, the Appellant filed the Request on 14 April 2005, that is, 136 days after the filing of the Respondent’s Brief. The Appellant has failed to provide any explanation for his delay. The Appellant is hereby reprimanded for failing to give notice to the Prosecution or to this Chamber that he intended to file a brief in reply and for delaying in filing the Request.

PURSUANT TO Rule 116 of the Rules;

HEREBY GRANT the request and ORDER the Appellant to submit his brief in reply not later than 27 April 2005.

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

[Signed] : Florence Ndepele Mwachande Mumba

***Order for the Transfer of Detained Witness GEK
13 May 2005 (ICTR-99-54A-A)***

(Original : English)

Appeals Chamber

Judge : Florence Ndepele Mwachande Mumba, Pre-Appeal Judge

*Jean de Dieu Kamuhanda – Detained witness, Transfer of detained witness –
Cooperation of the States, Rwanda*

International Instrument cited :

Rules of Procedure and Evidence, rules 90 bis and 115

I, FLORENCE NDEPELE MWACHANDE MUMBA, Judge of 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 (“Tribunal”);

BEING SEIZED OF the “Prosecutor’s Extremely Urgent Motion for an Order for the Transfer of Detained Witness GEK, pursuant to Rules 90 *bis*, 107 and 115, *Ex Parte*”, filed by the Prosecution on 12 May 2005 (“Transfer Motion”);

NOTING the “Decision on Appellant’s Motion for Admission of Additional Evidence on Appeal” filed on 12 April 2005, whereby the Appellant was granted leave pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) to present as additional evidence the testimony of Witnesses GAA and GEX (“Additional Witnesses”), before the Appeals Chamber on a date to be specified (“Rule 115 Decision”);

NOTING the “Scheduling Order” of 18 April 2005, ordering that the Additional Witnesses shall be heard in Arusha on 18 May 2005;

NOTING that Rule 115 of the Rules provides that rebuttal material may be presented by any party affected by a motion for the admission of additional evidence;

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NOTING that the Rule 115 Decision stipulated that the Additional Witnesses shall be heard by the Appeals Chamber “together with any rebuttal evidence submitted by the Prosecutor and admitted on appeal”;

NOTING the “Prosecutor’s Extremely Urgent Motion for Leave to Call Rebuttal Evidence, pursuant to Rules 54, 85, 107, and 115” filed by the Prosecution on 12 May 2005 (“Rebuttal Evidence Motion”) whereby the Prosecution seeks leave to present rebuttal evidence in the form of testimony of Witnesses GEK and GAG in Arusha on 18 May 2005;

NOTING the Prosecution’s submission made in the Transfer Motion that Witness GEK is detained in Rwanda;

NOTING that Rule 90 *bis* of the Rules provides as follows :

“Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.”

CONSIDERING the urgency of the matter, issue this Order before determining the admissibility of the rebuttal evidence of Witness GEK;

FOR THE FOREGOING REASONS,

GRANT the Transfer Motion;

ORDER that Witness GEK who is detained in Rwanda and whose personal appearance as a witness has been requested by the Prosecutor of this Tribunal, be temporarily transferred to the Detention Unit of the Tribunal and returned to the authorities of the State of Rwanda within the period of 13 May 2005 until 23 May 2005;

DIRECT the Registrar of this Tribunal to urgently transmit this Order to the authorities of the State of Rwanda;

FURTHER DIRECT the Registrar of this Tribunal to immediately implement this Order.

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

Done this 13th day of May 2005, At The Hague, The Netherlands.

[Signed] : Florence Ndepele Mwachande Mumba

***Oral Decision (Rule 115 and Contempt of False Testimony)
19 May 2005 (ICTR-99-54A-A)***

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Jean de Dieu Kamuhanda – False testimony, Bribery attempt, Discrepancies in testimony given by the witnesses, Interests of justice – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 77 (A) (iv), 77 (C) (i), 91 (B) and 115

The next thing I will read is the decision of the Bench on the motion of the Defence.

Over the past two days, we have heard from two Defence witnesses under Rule 115, provisions for hearing additional evidence on appeal. We have also heard from two Prosecution witnesses who were presented in the rebuttal to the Appellant's additional evidence, and we are now presented with a new motion by the Appellant to call yet two more witnesses who, the Appellant alleges, will challenge the testimony of one of the Prosecution's rebuttal witnesses. I will briefly summarise the Appellant's justification for this motion.

At today's Rule 115 hearing a Prosecution witness alleged that two Tribunal employees approached her at the United Nations safe house where she was staying while testifying before this Tribunal in another case. She further alleged that these two Tribunal employees offered to pay her money and give her substantial assistance in other ways if she would come back to this Court and recant her trial testimony in the *Kamuhanda* case. The Appellant would now like to call these two Tribunal employees, presumably, for the purpose of getting them to deny having offered any bribes to the Prosecution witness in question.

For two reasons, the Appeals Chamber is not persuaded that this is appropriate. First, this is a Rule 115 hearing, which is intended to be a sharply delimited proceeding for entering discrete, specific evidence into the record; it is not intended to be a trial within a trial that opens the door to the exploration of every issue that might be raised during the hearing. Presenting these two witnesses would be a rejoinder to a rebuttal to the Defence's original Rule 115 evidence, and there is no guarantee that it would end there.

Second, the Appeals Chamber is not convinced that the witness's testimony will make a material difference to the Defence's case. The Appeals Chamber simply does not believe that such evidence on the record would be at all helpful in assessing the credibility of the Prosecution's rebuttal witnesses. The Appeals Chamber does not foreclose the possibility that if sufficiently compelling or unexpected evidence surfaces during a Rule 115 hearing, it might be required in the interests of justice to expand

the hearing beyond its original scope. But under the circumstances of this case the Appellant has failed to convince the Chamber that such truly exceptional circumstances exist. The Appellant's motion is denied.

I will now deal with matters pertaining to contempt and false testimony.

During the course of Rule 115 proceedings over the past two days, the Appeals Chamber has noted significant discrepancies in testimony given by the witnesses, which may amount to false testimony. In addition, the Chamber has been given reason to believe that there may have been attempts to pervert the course of justice with respect to this appeal in the form of the solicitation of false testimony. Both such forms of behaviour are specifically prohibited by the Rules of Procedure and Evidence. Rule 77 (A) (iv) provides that the Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with the administration of justice, including any person who, (iv), threatens, intimidates, causes an injury, or offers a bribe to, or otherwise interferes with a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness.

Rule 91 (B) of the Rules of Procedure and Evidence provides, *inter alia*, that if the Chamber has strong grounds for believing that the witness has knowingly and wilfully given false testimony it may, one, direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony.

The Chamber wishes to make it very clear to the parties, to the witnesses, who have appeared before us during the past two days, and to future witnesses, as well as to all others connected to these proceedings, that the Tribunal will not tolerate such occurrences. The giving of false testimony before the Court, as well as the interference with the testimony of other witnesses who may appear before the Court, are unacceptable practices, both for the impact that they have on the trial as well as the impact that they have on the Tribunal's mission to seek justice and establish the truth.

Accordingly, the Appeals Chamber refers the matter to the Prosecutor for general investigation and, in particular :

1. Directs the Prosecutor, pursuant to Rule 77 (C) (i) of the Rules, to investigate allegations made in evidence given before the Appeals Chamber during the Rule 115 hearing, to the effect that Tribunal employees may have attempted to interfere with the witness who had given evidence in proceedings before this Tribunal; and,
2. Directs the Prosecutor, pursuant to Rule 91 (B), to investigate discrepancies emanating from the Rule 115 hearing testimony and the consequent possibility of false testimony with a view to the preparation and submission of an indictment for false testimony.

The Appeals Chamber stresses that in so directing the Prosecutor, it leaves it to his discretion to take the eventual steps and measures which he deems necessary and appropriate under the circumstances.

We have now finished with the rulings by the Chamber and we will proceed to do the hearing of the appeal, and we start with the Appellant's submissions; one and a half hours, Madam Condé.

[Signed] : Unspecified

Scheduling Order
19 July 2005 (ICTR-99-54A-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Jean de Dieu Kamuhanda – Appeals schedule

International Instrument cited :

Rules of Procedure and Evidence, rule 118 (D)

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 (“Tribunal”);

PURSUANT to Rule 118 (D) of the Rules of Procedure and Evidence of the Tribunal;

HEREBY ORDERS that a public hearing shall be held in Arusha, Tanzania on 19 September 2005 at 10.00 a.m. to deliver the judgement in this appeal.

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

Done this 19th day of July 2005, At The Hague, The Netherlands.

[Signed] : Theodor Meron
