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SCSL-2004-15-T
(7837 — 8050)

7837

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Ayoola, Presiding Judge
Judge A. Rajan N. Fernando
Judge Winter
Judge Gelaga King

Registrar: Mr. Robin Vincent

Date filed: 31 August 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY

MORRIS KALLON

AUGUSTINE GBAO

Case No. SCSL – 2004 – 15 – T

PROSECUTION SUBMISSIONS TO SESAY'S "APPEAL AGAINST REFUSAL OF BAIL"

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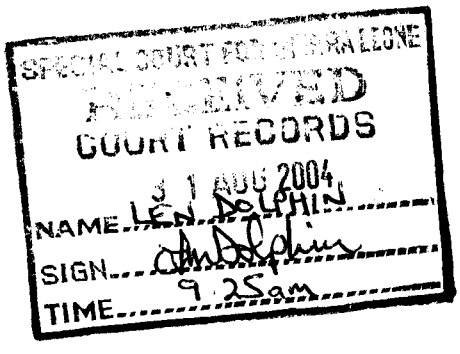

SPECIAL COURT FOR SIERRA LEONE

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The Prosecution files these submissions to the Defence "Appeal against Refusal of Bail", dated 4 August 2004, on behalf of Issa Hassan Sesay (the 'Accused'), which requested the Appeals Chamber to rule expeditiously and to grant an oral hearing on the matter.[1]

I. BACKGROUND

1. On 4 February 2004, the Accused confidentially filed a document entitled "Application for Provisional Release" (the 'Defence Application'), pursuant to Rule 65 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the 'Rules').
2. On 23 February 2004, the Government of Sierra Leone confidentially filed its submissions on the matter.
3. On 27 February 2004, the Prosecution filed its "Response to the Defence Motion for Provisional Release" (the 'Prosecution Response').

[1] Given the uncertain nature of the Defence Appeal, which could be interpreted as a "Notice of Appeal" pursuant to Rule 108 or as "Appellant's Submissions" pursuant to Rule 111, the Prosecution chooses to file this document as a document for merits of interlocutory appeals, pursuant to article 6(D)(ii)b) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone.

4. On 2 March 2004, the Defence filed its Reply to the Prosecution Response.

5. On 3 March 2004, there was an oral hearing of the matter held in Chambers.

6. On 31 March 2004, Judge Boutet issued his "Decision on Application of Issa Sesay for Provisional Release" (the "Decision"), dismissing the Defence Application.

7. On 19 April 2004, the Defence filed a document entitled "Application to Show Good Cause to Allow an Appeal of the Decision on Application of Issa Sesay for Provisional Release".

8. On 30 April, the Prosecution filed a "Response to Application to Show Good Cause to Allow an Appeal of the Decision on Application of Issa Sesay for Provisional Release".

9. On 28 July 2004, Judge Gelaga King issued his "Decision on Application for Leave to Appeal against Refusal of Bail" (the "Decision on Leave to Appeal"), granting the Accused leave to appeal the Decision.

10. On 4 August 2004, the Defence filed a document entitled "Appeal against Refusal of Bail" (the "Defence Appeal") requesting the Appeals Chamber to overturn the Decision or, in the alternative, to request Learned Judge Boutet to provide reasons in support of his Decision. Moreover, the Defence requested an oral hearing on the matter.

II. ARGUMENTS FOR WHICH THE APPEAL SHOULD BE DISMISSED

The Defence Appeal should be summarily dismissed as it fails to conform to the requirement of Rule 108

11. The nature of the Defence Appeal is uncertain, and could be considered as a "Notice of Appeal", in accordance with Rule 108, or as "Appellant's Submissions", pursuant to Rule 111. If the Defence Appeal should be interpreted as a "Notice of Appeal", it is submitted by the Prosecution that it should be rejected as it fails to conform to the requirements of Rule 108. In accordance with the jurisprudence of the ICTR, "a notice of appeal need not set out in detail the arguments that the party intends to raise in support of its grounds of

appeal."[2] The submissions in the Defence Appeal, nonetheless, relate to the substance of an appeal on the merits. These submissions should have been included in the appellant's brief pursuant to the Chamber's orders, which should have been given after the "Notice of Appeal" under Rule 108 of the Rules was filed.

12. The Prosecution submits that at this stage, filing an Appellant's brief containing its submissions on the merits of an appeal was premature. A Notice of Appeal should have been filed, allowing the Chamber the opportunity to order the time table for submitting the parties' briefs, in accordance with Rule 117 of the Rules.

13. Even if the Defence Appeal is regarded as an 'Appellant's brief' containing its submissions on the merits of the appeal, it was filed improperly, as no order was given by the Appeals Chamber to file such submissions.

Defence Appeal should be denied since the Learned Judge did not err

14. Furthermore, the Prosecution submits that the Defence Appeal should be denied since the Defence failed to establish that the Learned Judge committed an error in his decision to refuse bail. The Prosecution asserts that the Learned Judge did not err in his decision and submits the following arguments pertaining to the substance of the appeal on the merits. In addition, the Prosecution submits that the basis for granting bail is even further restricted now that the trial of the Accused has begun than it was during the pre-trial stage.

<u>The Learned Judge did not err in balancing the interests</u>

15. In paragraphs 3 to 8 of the Defence Appeal, it is submitted that the Learned Judge did not approach correctly the Defence application and that this was an error of law that invalidates the decision. The Defence argues that no weight was attached to the Accused'

[2] *Prosecutor v. Semanza*, ICTR-97-20-A, Decision on Defence Objections to the Prosecutor's Notice of Appeal, 25 July 2003 relying on *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Décision (Requête tendant à voir déclarer irrecevable l'acte d'appel du Procureur), 26 October 2001.

interests and that findings adverse to him were made without explanations as to the reasons for the findings.

16. The Defence further submits that the evidence of the Government of Sierra Leone was elevated to that of a determining factor and that this demonstrates that the Learned Judge's approach was flawed and wrong in fact and law.

17. The Prosecution submits that the weight attached to evidence is a matter to be determined only by the Learned Judge.[3] It is at his discretion to balance the evidence brought before him and to evaluate the contradictory interests of the Accused and the public interests. In his Decision, the Learned Judge considered all relevant evidence and drew the appropriate findings. The fact that the Learned Judge ruled that the public considerations outweighed the Accused' individual circumstances can not in itself constitute an error of law or fact.

18. In any event, the Prosecution submits that the Defence Appeal does not demonstrate that the Learned Judge committed an error of law in the exercise of his discretionary power to assess the evidence and balance the interests.

19. Furthermore, the Prosecution submits that there is no error of law or fact in the way the Learned Judge dealt with the submissions of the Government of Sierra Leone. In paragraph 42 of the Decision, the Learned Judge noted that the opinion of the Government of Sierra Leone was important but not decisive and that it had to be assessed within the parameters of Rule 65(B). The Judge noted further that "[h]owever, considering that the Special Court, an independent institution, has been established by means of a bilateral agreement between the United Nations and the Government of Sierra Leone, not only would it not be appropriate but it cannot be bound by the opinion expressed by the Government of Sierra Leone on the question of whether the Accused should be provisionally released or not. This is a matter for the Court and the Court only. Nonetheless, it is important to stress the fact that the present submissions have been given due consideration in so far as they provide very valuable and substantial information on

[3] As stated by the ICTR Appeals Chamber, "the weight to be accorded to [evidence is] an issue to be decided by the Trial Chamber..." See *Prosecutor v. Nyiramasuhuko & Ntahobali*, 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 QBZ Inadmissible", 2 July 2004.

the current situation in Sierra Leone and is, in this respect, an important factor in determining the public interest aspect."

20. The Prosecution submits that the Learned Judge did not elevate the evidence of the Government of Sierra Leone to a determining factor in his Decision. As he rightly noted, the question of bail "is a matter for the Court and the Court only." The Learned Judge rightly used the information on the current situation in Sierra Leone provided in the submissions of the Government of Sierra Leone and there was no error of law or fact as alleged by the Defence.

The Learned Judge did not err on the issue of the Accused' appearance for trial

21. The Defence Appeal refers exclusively to the section of the Decision entitled "Will the Accused, Issa Hassan Sesay, Appear for Trial if Granted Bail?". Hence, the Prosecution will not submit arguments relating to the question of the danger posed to the victims and witnesses if the Accused is granted bail. However, the Prosecution maintains that this issue is relevant to any consideration of bail with respect to the Accused.

22. The Defence submits that the Learned Judge failed to make a finding concerning the evidence relied upon to demonstrate the Accused' character, trustworthiness and willingness to face his trial, and that this omission constitutes an error of fact and law.

23. The Defence further submits that the Learned Judge did not properly deal with the evidence which was relied upon to show that the Accused had been aware of the Special Court prior to his arrest. According to the Defence Appeal, the Learned Judge erred in concluding that the Accused' absence of knowledge of the indictment against him was relevant, in concluding that the Accused was not aware of the seriousness of the crimes falling within the jurisdiction of the Special Court and in reaching the conclusion that the Accused would not have voluntarily surrendered to the Special Court.

24. The Defence Appeal finally submits that the Learned Judge failed to address the significance of the role that the Accused played in bringing the RUF through the disarmament process and that this was relevant evidence that should have weighed into the Learned Judge's balancing exercise.

25. It is the Prosecution's submission that the Learned Judge did not err in his analysis of the issue of the Accused' appearance for trial. The Learned Judge considered all relevant evidence and provided sufficient reasons to justify his findings.

26. The Prosecution submits that it was for the Learned Judge to decide whether to make a finding on the Accused' character and trustworthiness. The evidence relating to these issues were presented in conjunction with other arguments relating to the Accused' knowledge of the Special Court, and with the purpose of demonstrating the Accused' willingness to face his trial. It could therefore not alone be the subject of a finding from the Learned Judge.

27. As the ICTR Appeals Chamber stated in *Prosecutor v. Musema*, "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*."[4]

28. In any event, the Prosecution submits that this issue was not a primary consideration in determining this matter and even if there was an error on this point, the same does not amount to an error of law or fact, leading to grant the appeal for bail.

29. The Prosecution further submits that the Learned Judge rightly considered relevant the question of the Accused' knowledge of a sealed indictment. Indeed, the fact that the Learned Judge was not satisfied that the Accused had previous knowledge of the charges against him or that he would have surrendered to the Special Court influenced his finding relating to the risk of flight of the Accused. These questions were therefore relevant to the condition of appearance for trial posed by Rule 65(B).

30. The Prosecution submits that the Learned Judge did not fail to address the role of the Accused in the peace process. He did address the issue, as demonstrated by paragraph 51 of the Decision. It was thus his discretion to determine whether the evidence was relevant or not for the matter. It is the Prosecution's submission that Learned Judge Boutet did not err in finding that the role of the Accused in the peace process was not relevant evidence that the Accused would appear for trial. In any event, the participation of the Accused in

[4] *Prosecutor v. Musema*, ICTR-96-13-A, Judgment, 16 November 2001, para. 18 (emphasis added).

the peace process was not a primary consideration in the matter and thus no error of fact or law can be deduced from the Learned Judges findings in this regard.

Bail should not be granted once a trial has begun

31. The Prosecution further submits that the fact that the trial of the Accused has already begun, and that accused is confronted with witnesses who are testifying against him on a daily basis, creates a stronger incentive to flee than before. Hence the granting of bail could undermine the ongoing proceedings.

32. The Prosecution further submits that neither the ICTY nor the ICTR have granted bail to any accused while the trial was taking place, except for the case of *Momir Talic*, which had been granted bail for humanitarian reasons.[5] In addition, the ICTR Appeals Chamber upheld the Trial Chamber in denying provisional release due to the fact that the trial has commenced.[6]

33. The ICTY Trial Chamber granted provisional release to accused *Talic* after his trial had begun solely for humanitarian reasons, stating that "[t]he Trial Chamber believes that, given the medical condition of Talic, it would be unjust and inhumane to prolong his detention on remand until he is half-dead before releasing him. Basing itself upon the medical reports and the testimony of the medical doctors involved, the Trial Chamber is of the opinion that the gravity of Talic's current state of health is not compatible with any continued detention on remand for a long period."[7]

34. The ICTY Trial Chamber distinguished the case from other cases where provisional release was granted as "in all of those cases provisional release was sought during the pre-trial phase."[8] In deciding to grant provisional release the Chamber distinguished other ICTY decisions which deny provisional release after the trial has begun, as "[t]he

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[5] *Prosecutor v. Brdanin and Talic*, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002 ('*Brdanin and Talic*, 20 September 2002')

[6] *Prosecutor v. Ndayambaje*, ICTR Appeals Chamber, 10 January 2003, upholding the Trial Chamber's position: "considering that the Trial Chamber rightly took into account the fact that there is an ongoing trial, which commenced in... and needs to be completed in an orderly manner, and found that in these circumstance, provisional release would not be justified."

[7] *Brdanin and Talic*, 20 September 2002, para. 33.

[8] *Brdanin and Talic*, 20 September 2002, para. 26.

humanitarian basis makes this application distinct from most of the other applications considered and decided by this Tribunal".[9]

35. Importantly, the Trial Chamber stressed that "the *rationale* behind the institution of detention on remand is to ensure that the accused will be present for his/her trial. Detention on remand does not have a penal character, it is not a punishment as the accused, prior to his conviction, has the benefit of the presumption of innocence. This fundamental principle is enshrined in Article 21, paragraph 3 of the Statute and applies at all stages of the proceeding, including the trial phase."[10]

36. The Prosecution submits that since the trial has started, upholding the right of the Accused to a speedy trial, the Appeals Chamber should take into consideration the practice of the ICTY and ICTR, which is to have the Accused in detention for the duration of his trial.

Defence Appeal should be denied since the risk of flight is particularly high due to the possible non-recognition by the Accused of the Court's legality

37. Furthermore, on 11 June 2004, Accused Sesay and his two co-Accused sent a letter to their respective Defence Counsel, titled 'OUTCOME OF THE JURISDICTION MOTION BEFORE THE SUPREME COURT OF SIERRA LEONE', in which they threatened to not attend the Special Court proceedings until the motion before Sierra Leone's Supreme Court challenging the legality of the Special Court was decided. In light of such an indication that the Accused may not recognize the legitimacy of the Special Court, the risk of flight seems particularly high.

IV. CONCLUSION

38. The Prosecution submits that for the foregoing reasons, the Appeals Chamber should summarily reject the Defence Notice of Appeal or, in the alternative, deny the Defence Appeal.

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[9] *Brdanin and Talic*, 20 September 2002, para. 26.
[10] *Brdanin and Talic*, 20 September 2002, para. 29.

Freetown, 31 August 2004

For the Prosecution,

for Luc Côté

Lesley Taylor

PROSECUTION INDEX OF AUTHORITIES

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Annex 1: *Prosecutor v. Semanza*, ICTR-97-20-A, Decision on Defence Objections to the Prosecutor's Notice of Appeal, 25 July 2003

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Monica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 25 July 2003

Laurent SEMANZA
V.
THE PROSECUTOR

Case No. ICTR-97-20-A

DECISION ON DEFENCE OBJECTIONS TO THE PROSECUTION'S NOTICE OF APPEAL

Counsel for the Defence
Mr. Charles Taku

Counsel for the Prosecution
Mr. Norman Farrell

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"),

BEING SEISED of the "Defence Objections to the Prosecutions Notice of Appeal", filed

on 26 June 2003 ("Motion"), in which the Defence alleges *inter alia* that the Prosecution's Notice of Appeal is "speculative, ambiguous, and imprecise and does not conform to the requirement Rule 108 of the Rules (sic)"[1] and should therefore be struck out;

NOTING the "Prosecution's Response to 'Defence Objections to the Prosecution's Notice of Appeal'", filed on 3 July 2003 ("Response"), in which the Prosecution submits that the Motion does not show that the Prosecution's Notice of Appeal fails to conform to the requirements of the Rules of Procedure and Evidence ("Rules") and of the Practice Direction and that the Motion is frivolous;

BEING SEISED ALSO of the "Defence Application to Strick (sic) Out the Prosecution's Response to 'Defence Objections to the Prosecution's Notice of Appeal' filed on the 3 July 2003", filed on 7 July 2003 ("Application"), which alleges that the Response was filed outside of the time limit;

NOTING the "Prosecution Response to the 'Application to Strike out Prosecution's Response to 'Defence Objection to the Prosecution's Notice of Appeal' filed on 3 July 2003'", filed on 14 July 2003 ("Response to the Application");

NOTING that the Defence did not file a reply either to the Response or to the Response to the Application;

CONSIDERING that the arguments developed in the Motion are either incomprehensible, patently misleading, or relate to the substance of the appeal on the merits, and that comments relating to the substance of the appeal could be included in the Defence's Respondent's Brief in due course;

CONSIDERING that the Response was filed within the period prescribed by paragraph 11 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal dated 16 September 2002 and therefore is not filed out of time;

CONSIDERING FURTHER that a Notice of Appeal need not set out in detail the arguments that the party intends to raise in support of its grounds of appeal,[2] and that the Prosecution's Notice of Appeal complies with the requirements of Rule 108 of the Rules and the Practice Direction on Formal Requirements of Appeals from Judgement dated 16 September 2002;

FINDING that both the Motion and the Application are frivolous within the meaning of Rule 73(F) of the Rules;

FOR THE FOREGOING REASONS,

DISMISSES the Motion and the Application and **DIRECTS** the Registrar, pursuant to Rule 73(F) of the Rules, not to pay the Defence Counsel any fees or costs associated with the Motion or the Application.

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

Theodor Meron
Presiding Judge of the Appeals Chamber

Done this 25th day of July 2003,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

[1] Motion, para. 1.

[2] *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, "Décision (Requête tendant à voir déclarer irrecevable l'acte d'appel du Procureur)", 26 October 2001, p. 4.

295. The wording "are by themselves, insufficient to refute the possibility" used by the Trial Chamber [FN503] with respect to alibi evidence might be an error on a point of law, had **Musema's** evidence been sufficient to sustain a potential alibi. However, since the Trial Chamber implicitly found that **Musema** could possibly be in more than one location, at different times, on the same day, establishing the authenticity of these two documents was not essential to determining whether an alibi existed. [FN504] It was therefore open to the Trial Chamber to conclude that these two documents did not constitute a defence of alibi because they did not refute the Prosecution's theory of the case. In other words, it mattered not whether this documentary evidence was authentic, since the Trial Chamber held that it was possible for **Musema** to be in more than one place on the same day. This was a finding of fact, not of law.

FN503. Ibid., para. 740.

FN504. Moreover, the Trial Chamber had implicitly accepted the receipt as authentic in determining that the Appellant's automobile was in good working condition.

296. Two questions then ensue, namely, whether this finding constitutes an error of fact and, if so, whether the **Appeals Chamber** should intervene to correct that error. **Musema** has not really advanced any additional arguments in the instant appeal to challenge the Trial Chamber's factual finding as to distance and time. The Appeal Chamber concludes that **Musema** has demonstrated neither that the conclusion of guilt beyond a reasonable doubt is one which no reasonable tribunal could have reached, nor that any such error, if committed, would have occasioned a miscarriage of justice. Therefore, the appeal cannot prosper on this point.

Breakdown of vehicle

297. **Musema** submits that at trial, he stated that it would not have been possible for him to travel to Bisesero region in mid-May 1994, as the car was undergoing repairs, [FN505] an assertion which, in his opinion, was corroborated by the testimony of Claire Kayuku and the minutes of a meeting held at the factory on 19 May. He contends that the Trial Chamber incorrectly assessed his evidence as to the breakdown of his vehicle and the fact that he travelled to Gitarama on 18 May. With respect to the Trial Chamber's finding that there was no explanation given, **Musema** submitted that he had in fact explained that each time he drove a few kilometres, the car would break down (that is, the breakdown was not continual), that when he drove to Gitarama on 18 May, it was an "attempt" and that he did not want to take the risk to go to Gisovu. He avers that the Trial Chamber "has failed to address its mind to this part of the Defence evidence, and has come to a conclusion to the disadvantage of the Defendant without giving any consideration to the Defence case." [FN506] Therefore, the finding that there was no breakdown should, in his opinion, be dismissed as being unreasonable. [FN507]

FN505. Appellant's Brief, para. 267.

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FN506. Ibid., para. 271.

FN507. Ibid., para. 272. **Musema** submits that the Trial Chamber stated that "the fact that the Defendant advanced no details as to how he got to Gitarama is at odds with his alibi, and that to have given such details would have given support to his testimony. The Defendant has given these details. Therefore the comments made by the Trial Chamber are wrong, as they are based on a failure to read the evidence correctly."

298. **Musema** contends that the Trial Chamber unfairly blamed him for failing to produce documentary evidence of the repairs carried out from 7 to 19 May. He avers that in view of the circumstances that prevailed in the country at the time, he could not have obtained any more documentary evidence than he had offered. **Musema** also states that when the Defence team visited the garage at which the car had been repaired, it found that it had changed hands and no documentation remained. [FN508] In light of this, he submits it was unreasonable to hold against him the Defence's failure to obtain a receipt for the said repairs. [FN509]

FN508. Appellant's Brief, para. 275.

FN509. Ibid., para. 276. **Musema** submits that the "Trial Chamber illustrates by the fact that they hold this failure against the Defendant that they place a burden of proof on the Defendant."

299. The Trial Chamber stated the following:

> According to Claire Kayuku, [....] in the beginning of May, **Musema's** Pajero spent one or two weeks in a Butare garage undergoing repairs. **Musema** had explained that he had developed car problems on 7 May while in Mata, and that he remained in the Butare region until the car was repaired. A replacement car from the factory only reached him on 19 May by which time his Pajero was roadworthy. Exhibit D47, the minutes of a 19 May 1994 meeting at the factory, refers to **Musema's** broken down car and the resultant delay in returning to the factory. [FN510]

FN510. Trial Judgement, para. 730.

300. The Trial Chamber found that this evidence raised certain discrepancies in his alibi:

> The Chamber notes other discrepancies in the alibi as regards his vehicle, registration A7171, which he says developed problems on 7 May 1994 and was not repaired until 19 May 1994 in Butare, being the date on which he finally returned to Gisovu. Exhibit D45, dated 19 May 1994, includes a bill for repairs to the vehicle in April 1994 and a petrol receipt from a FINA petrol station in Gitarama dated 14 May 1994. The Chamber must raise a number of issues as regards this exhibit. If the Chamber were to follow **Musema's** version of the events, the Pajero,

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registration A7171, could not have been fit enough to drive from Butare, where he says it was being repaired, to Gitarama before 19 May 1994. Thus, notes the Chamber, the above mentioned petrol receipt puts into doubt **Musema's** testimony.

[....]

Moreover, the Chamber notes that **Musema** advanced no details, namely with which vehicle or other mode of transport, as to how he travelled to Gitarama on 18 May 1994 to collect the passports of his sons. The Chamber finds this at odds with his alibi, as, to have indicated such details would have given support to his testimony.

The Chamber notes that **Musema** kept his receipt for car repairs dated 19 April 1994, and the petrol bill of 14 May 1994, yet kept no such receipts for the repairs, which according to the Appellant, occurred between 7 and 19 May 1994. [FN511]

FN511. Trial Judgement, paras. 739 and 741 to 742, respectively.

301. **Musema** submits that these findings wrongly reflect his testimony. At trial, **Musema** stated as follows:

When I returned from the mission at the Mata factory around the 7th, the vehicle the A7171, the Pajero vehicle I was using started causing me a lot of problems. First of all, I took it to the garage. It was inspected. First I had thought that there were problems related to combustion, fuel combustion, carburetor problems and so on but whenever I withdrew the vehicle, I would drive a few kilometres and the breakdown would reoccur. Another attempt was made to repair it, I asked another inspection and in the final analysis it was realized that there was a problem on one of parts, a key, a part in the gear box. The chief of garage did everything to solve the problem and a part had to be taken away from another vehicle which had an accident. In the meantime, I tried to send a message through someone who was going to Mata because there was the agrarian engineer called Kabiraki James. K-A-B-I-R-A-K-I, who was living in Mata but was working in Gisovu. He was returning to his family. I sent a message to him asking him that at the--, I should be sent another vehicle from the Gisovu Tea Factory so that I should have a means of transport from Butare to Gisovu. This message was given to Kabiraki because I saw the messenger or the person through whom I sent the message later on, but there was no follow up. Therefore I stayed in the Butare region and I had to travel again to Gitarama but I could not take the risk of leaving Gisovu or going to Gisovu because we could have a break down which would not be repaired. That is the situation which marked this period. When for an example I went to Gitarama on the 18th, it was an attempt, the chief of Garage (sic) had told me, "Try but I do not guarantee anything.'' I made an attempt, later on moreover, the Tea Factory sent a vehicle on that day the 19th when I returned to Gisovu, we had two vehicles. We were accompanied by another vehicle belonging to the tea factory, but the vehicle at that time, the Pajero, had been repaired. I didn't have the same problems later on. I had other problems, not the same problems regarding the gear box transmission system. [FN512]

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FN512. T, 13 May 1999, pp. 45 to 47 (emphasis added).

302. Based on the above testimony by **Musema**, it is in fact clear that, although his car was breaking down, this was happening sporadically. It is **Musema's** submission that the Trial Chamber did not fully grasp this fact when it found that no explanation had been given.

303. The **Appeals Chamber** will not lightly disturb the findings of fact reached by a Trial Chamber, but rather will always give the Trial Chamber a margin of deference with respect to findings of fact. [FN513] In the light of the Prosecution evidence on record, the **Appeals Chamber** is of the view that a reasonable Trial Chamber, having had the opportunity to assess the evidence at first instance, could have rejected **Musema's** explanation of the inaccuracies contained in his statement to Swiss authorities together with those apparent on the face of his hand-written calendar. Consequently, **Musema** has demonstrated neither that the conclusion of guilt beyond a reasonable doubt is one which no reasonable tribunal could have reached, nor that the error committed occasioned a miscarriage of justice.

FN513. See this Appeal Judgement, para. 18, supra.

304. On the basis of the Prosecution evidence, the Trial Chamber was satisfied beyond reasonable doubt that **Musema** was present at the crime scenes at the times in question. In the light of such evidence, a reasonable Trial Chamber could have validly held against **Musema** the fact that he failed to produce a receipt for repairs carried out on his vehicle. Thus, the **Appeals Chamber** concludes that it was open to the Trial Chamber to find that the alibi could not reasonably be true. [FN514] **Musema** has not established that either an error of law was committed or that such error is one which invalidated the decision of the Trial Chamber. [FN515]

FN514. Ibid., para. 17, supra.

FN515. Ibid., para. 16, supra.

Other documentation

305. **Musema** submits that the Trial Chamber erred in relying on other documentary evidence tending to suggest his presence in Gisovu in mid-May. With regard to the letter on Gisovu Tea Factory headed notepaper, **Musema** stated that it was typed at ISAR offices in Rubona, whereas the Trial Chamber found that it had been written in Gisovu. According to him, there is nothing in the letter to suggest this, nor was there anything unusual for him to write a letter on a tea factory headed notepaper when carrying out official business, regardless of where he happened to be at the time. Any response to the letter would then have been sent to Gisovu. **Musema** submits that it would be far more unlikely that a tea factory director

would have written business documents headed with his home address. [FN516]

FN516. Appellant's Brief, para. 278.

306. Concerning the minutes of the meeting of 27 May, **Musema** submits that the Trial Chamber's reasoning conveys the Chamber's error in assessing the burden and standard of proof. He contends that there is nothing to suggest that the fact that he was now dealing with the vehicle breakdown meant that he must have given the original instructions. In any event, he submits that it is not for the Trial Chamber to make assumptions to the disadvantage of the defendant, and that in light of the above, there is nothing to show that he was in Gisovu on 9 May. [FN517]

FN517. Ibid., para. 280.

307. In general, **Musema** contends that the assumptions made by the Trial Chamber were wrong and that "what is most notable about the documentation concerning this period" is that there were no documents placing him in Gisovu during the middle of May. [FN518] In his opinion, the documents produced (petrol receipt, minutes of the meeting of 19 May stating that the tea factory director had been on a "tournée'' and had been unable to return due to the fact that his car had broken down) suggest that he was absent from Gisovu during the period in question. **Musema** argues that if he "had indeed been acting as ''a dedicated director of the tea factory (para. 737) during this period, it is inconceivable that there would not be a single document generated by him, or minutes of a meeting attended by him, to show that he was there." [FN519] He states that there are many documents indicating his presence at the factory at other times and submits that the "fact that the Prosecution has been unable to produce a single piece of documentary evidence to this effect, despite their access to the Tea Factory archives, casts strong doubt on their assertion that the Defendant was in Gisovu during this period." [FN520]

FN518. Ibid., para. 281.

FN519. Ibid., para. 282.

FN520. Ibid., para. 283.

308. With regard to the letter of 8 May 1994, the Trial Chamber stated:

A number of documents were tendered by the Defence to demonstrate that **Musema** was absent from Gisovu Tea Factory between 7 and 19 May 1994. Exhibit D35 is a letter dated 8 May 1994 from **Musema** to the Director-General of OCIR-thé in Kigali, annexed to which is the mission report, which **Musema** says was typed by the secretarial services of ISAR at Rubona. **Musema** explained that he made ten copies

of the report for transmission to the directors of the visited tea factories and handed over a copy for the Director-General of OCIR-thé on 10 May 1994 to the Commercial Bank in Gitarama which had a convoy going to Gisenyi. The Chamber notes that this letter, signed by **Musema**, is on Gisovu Tea Factory headed paper and moreover would appear to have been written in Gisovu. [FN521]

FN521. Trial Judgement, para. 732.

309. **Musema** wonders how the Trial Chamber reached a conclusion that the letter would appear to have been written in Gisovu, based solely on the fact that it was written on Gisovu headed paper.

310. With regard to the minutes of the meeting of 27 May, the Trial Chamber stated as follows:

According to **Musema**, a meeting with eight participants and chaired by himself was held at the factory 27 May. The report of such a meeting was tendered as exhibit D51. The report refers to the meetings of 29 April, 30 April and 19 May. The atmosphere at the tea factory was tense due to news of the war and the ongoing massacres in the Bisesero region. The meeting addressed a number of issues pertaining to the security and production of the tea factory, including losses incurred due to a breakdown which had not been repaired. This breakdown had occurred ten days before 19 May. This, concludes the Defence, demonstrates that **Musema** was not in the vicinity of the tea factory during these ten days, i.e. 10 - 19 May 1994. [FN522]

FN522. Trial Judgement, para. 596.

311. The Trial Chamber concluded:

The Chamber finds **Musema's** supposed absence from the factory on this occasion irreconcilable with his evidence during this case, evidence which tends to portray **Musema** as a dedicated director of the tea factory who at all times shared equivalent concerns for the safety of his family and for the factory, often, according to him, leaving the former to rejoin the latter, for example in April, May, June and July 1994, despite threats to his safety. Moreover, in exhibit D51, the report of the meeting of 27 May 1994, recalls the minutes of the meeting of 19 May 1994, and states "[t]he meeting of 19 May 1994 also discussed the breakdown that the manager had asked the Agronomist Benjamin KABERA to repair and which was not done in good time (after 10 days) giving rise to heavy loses (sic); [...]". This would presuppose that the Agronomist had received instructions on 9 May 1994. The Chamber also presupposes that as it was now **Musema** himself dealing with this breakdown, as the Director of the tea factory, he must have either directly or indirectly given the original instructions. [FN523]

FN523. Ibid., para. 737.

312. Given that **Musema's** own statement to Swiss authorities and his hand-written calendar contradict his contention regarding his absence from Gisovu, the **Appeals Chamber** cannot find that no reasonable tribunal of fact could have reached the conclusion of guilt beyond a reasonable doubt. Thus, **Musema** has demonstrated neither that an error of fact has been committed nor that if such an error did occur, it occasioned a miscarriage of justice.

Inaccuracies in prior statements

313. **Musema** maintains that the explanation given at trial for the inaccuracies in the Swiss statements and hand-written calendar was plausible and probable, that is, he did not have access to them at the time the statements were given and was relying on his memory, which is why his statements were inaccurate. He avers that it is difficult for any witness to recall dates with accuracy and that once he had access to the documents, he could fit his movements together. [FN524] He avers that it is difficult for any witness to recall dates with accuracy and that once he had access to the documents, he could fit his movements together. [FN525]

FN524. Appellant's Brief, paras. 284 and 285.

FN525. Ibid., para. 286.

314. **Musema** submits that the Trial Chamber's explanation that he should have been able to recall the specific dates of the attacks of 13 and 14 May, given their scale, was illogical, as it is based on the assumption that **Musema** was present at the massacre sites or thereabouts. He contends that it is perfectly possible that a witness can recall where he was when an incident occurred without, however, recalling the date of the incident. **Musema** submits that the Trial Chamber failed to address an obvious point, namely that if these attacks and their dates were so well known to him and if he fabricated an alibi to escape responsibility, why would he state in the calendar and interviews with the Swiss authorities that he was in Gisovu on those dates. He maintains that the fact that he did so suggests that he did not know the dates in question and that "[t]he logic employed by the Trial Chamber is therefore circular." [FN526]

FN526. Ibid., para. 290.

315. The Trial Chamber found:

> **Musema**, throughout his testimony, affirmed that his handwritten calendar and the Swiss statements were inaccurate, and that any errors therein were subsequently corrected as documents were uncovered during investigations from, amongst other places, Gisovu Tea Factory. In some instances, such an explanation is valid. However, as regards the present period, the Chamber cannot accept such an explanation. In the said calendar and the 16 March 1995 Swiss statement, **Musema** clearly remembers being in Gisovu between 4 and 14 May 1994, and recalls that he

was present the day the tea factory started up production. To remember such an occasion and one's presence thereat, is not, in the opinion of the Chamber, something one forgets and recalls only after seeing newly uncovered documents. Rather, it is an event which, as Director of the tea factory, **Musema** would beyond any doubt not have forgotten. [FN527]

FN527. Trial Judgement, para. 738.

316. The **Appeals Chamber** reiterates that, the task of weighing and assessing the evidence lies primarily with the Trial Chamber. Furthermore, it is for the Trial Chamber to determine whether a witness is credible or not. The **Appeals Chamber** will not lightly disturb findings of fact by a Trial Chamber, but rather will always accord the Trial Chambers a margin of deference with respect to findings of fact. [FN528] **Musema** has failed to show that no reasonable tribunal of fact could have reached the conclusion of guilt beyond a reasonable doubt. Hence, **Musema** has demonstrated neither that an error of fact has been committed nor that if such an error did occur, it occasioned a miscarriage of justice. Therefore, the appeal must fail on this point.

FN528. Appeal Judgement, para. 18, supra.

General conclusion

317. Given that the Trial Chamber, in its analysis, referred to the appropriate standard and burden of proof for the evaluation of alibi evidence, [FN529] and given also that it was careful to summarize **Musema's** alibi evidence with respect to each crime scene and that a trial judgement must be read holistically rather than as a series of independent watertight compartments, the **Appeals Chamber** has come to the conclusion that the alibi evidence was insufficient to cast reasonable doubt on the Prosecution case. Consequently, **Musema's** attempts to establish a defence of alibi failed in the face of the Prosecution case which, prima facie, proved beyond reasonable doubt that the Accused was present at the Muyira Hill and Mumataba Hill crime scenes at all relevant times in mid-May.

FN529. Trial Judgment, para. 108.

318. The **Appeals Chamber** concludes that **Musema** has failed to establish that the Trial Chamber erred by either shifting the burden of proof or by placing a higher burden on the Defence than upon the Prosecution. For these reasons, the ground of Appeal with respect to the alibi evidence tendered in relation to the mid-May attacks is dismissed.

(iv) Nyakavumu Cave (late May, early June 1994)

a. **Musema's** alibi at trial

319. According to the alibi, **Musema's** whereabouts were as follows: between 27 -- 28 May, he was at the Gisovu Tea Factory (documentary evidence and testimony of **Musema** and Claire Kayuku). On 29 May, he traveled to Shagasha. Between 30 May and 10 June, he was absent from the Gisovu Tea Factory, making a visit to Shagasha on 30 May. He rejoined a mission in Cyangugu and spent the day in Zaire on 31 May (passport and border stamps). On 1 June, he went to Shagasha and stayed there until 10 June (two exhibits to be checked). Claire Kayaku confirmed that **Musema** stayed with her until 7 or 10 June, all of the above being corroborated by the hand-written calendar.

320. With regard to **Musema's** alibi, the Trial Chamber found as follows: the attack at the cave occurred at some point between the end of May and early June and the alibi does not specifically refute **Musema's** presence at the cave; although the exact date of the attack was unclear "the witnesses all provided an overall consistent account of the events" at the cave; the alibi was rejected based on the "Doverwhelming evidence of four Prosecution witnesses" and the Trial Chamber found that it was established beyond reasonable doubt that **Musema** had participated in the attacks.

b. **Musema's** allegations and the Prosecution's response

321. **Musema** submits that the finding that the alibi did not "specifically refute" the presence of **Musema** at the cave constitutes a serious flaw in the Trial Judgement and that said finding is either incorrect or based on a false premise that places the burden of proof on **Musema**. [FN530] He maintains that this finding is, in any event, erroneous, as the alibi shows where **Musema** was during the period in question and, therefore, refutes his presence. [FN531] He contends that he has always denied being present at the cave and, therefore, the alibi specifically refutes his presence. However, he submits that if, by this finding, the majority meant that the alibi does not prove that **Musema** was not at the cave, then they would be seen as placing the burden of proof on him. [FN532]

FN530. Appellant's Brief, para. 296.

FN531. Ibid., para. 297.

FN532. Ibid., para. 298.

322. **Musema** refers to the separate opinion of Judge Aspegren who disagrees with the finding reached by the majority of the Trial Chamber, on the basis of lack of precision in witness testimonies as to the date of the attack.

323. **Musema** prays the **Appeals Chamber** to:

[...] consider the position with regard to a Defendant who is raising an alibi Defence when the Prosecution is unable to establish the date on which events are

alleged to have occurred. If it is assumed that the majority of the Trial Chamber has already found that the witnesses to the events are reliable and support a finding of guilt in the absence of other evidence, the Defence submits that it is put in an unfair position if a finding of guilt can be made on the basis that the Defence cannot show that he was elsewhere on every day during a period in question. It is submitted that if an event is alleged to have occurred on a day in a period of e.g. seven days, the Defence should succeed if it can show that the Defendant was elsewhere during a part of that period.

....The Prosecution must prove the case beyond reasonable doubt. It cannot do so if the events it alleges occur on a day within a period, and for part of that period there is a doubt as to the presence of the Defendant. Of course, there is a possibility that the events occurred on a day on which the Defendant cannot raise a doubt as to his presence. But there is also a possibility that the events alleged occurred on the day on which the Defendant can raise a doubt as to his presence. The possibility must be a reasonable one, and the Defendant is therefore entitled to the advantage of it. [FN533]

FN533. Appellant's Brief, paras. 299 - 300.

324. **Musema** submits that the Trial Chamber did not make any specific findings as to the alibi for the period in question, but simply noted that it had considered it. He contends that the alibi for this period was irrefutable and supported by documentary evidence, his own testimony and that of Claire Kayuku. [FN534] He further contends that the evidence produced substantially raises a reasonable doubt as to **Musema's** presence at the cave during the period in question and that the "fact that this evidence was not considered by the majority of the Trial Chamber shows that it erred in failing to apply the correct burden and standard of proof to Defence evidence." [FN535]

FN534. Ibid., para. 302.

FN535. Appellant's Brief, para. 305.

325. For its part, the Prosecution argues that contrary to **Musema's** assertions, the Trial Chamber carefully examined his alibi and that the Chamber's conclusion that his presence had been established beyond reasonable doubt does not constitute an abuse of discretion. The Prosecution submits that **Musema** has failed to establish that the Trial Chamber was unreasonable in rejecting his alibi, noting in particular, the fact that he was inconsistent in numerous portions of his testimony, which casts doubt on his credibility. The Prosecution further submits that the Trial Chamber did not place a burden on **Musema** but simply noted the inconsistencies in his testimony and went on to find that **Musema's** explanation was unconvincing. Finally, the Prosecution submits that mere dissatisfaction with a Trial Chamber's findings does not make out an allegation of error.

c. Discussion

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326. The Trial Chamber found as follows:

The Chamber has considered the alibi for this period.

The alibi places **Musema** in Gisovu on 27 and 28 May 1994, at the Gisovu Tea Factory, and is supported by documentary evidence and the testimonies of Claire Kayuku and of **Musema**. **Musema** travelled to Shagasha with his family on 29 April 1994. Then, according to the alibi, on 30 May 1994 until 10 June 1994, **Musema** was away from the Gisovu Tea Factory, having traveled on 30 May to Shagasha. He rejoined a technical mission in Cyangugu and spent the day in Zaïre on 31 May. Copies of his passport and the pertinent border stamps were filed in support of this alibi.

On 1 June 1994, according to the alibi, **Musema** went to Shagasha where he stayed with his family until returning to Gisovu on 10 June. Exhibit D57, issued in Cyangugu, was produced to support the alibi of **Musema** for 3 June, and exhibit D58 for 6 June 1994.

Claire Kayuku confirmed that **Musema** stayed with her and the family until 7 or 10 June 1994. The Chamber notes that all of the above evidence is corroborated by **Musema's** handwritten calendar (P68), which indicates that he left Gisovu on 29 May with his family and returned to Gisovu only on 10 June.. [FN536]

FN536. Trial Judgement, paras. 774 to 777.

327. **Musema** refers to four documents which, he submits, were not considered by the Trial Chamber. In his view, this illustrates that the Trial Chamber failed to apply the correct burden and standard of proof to defence evidence. It should be noted, however, that **Musema** is incorrect in this assertion, for when recounting the facts of **Musema's** alibi from 28 May to 10 June, the Trial Chamber did refer to each of the four documents pointed out. [FN537]

FN537. Trial Judgement, para. 603 (Exhibit D54, "authorization de sortie de fonds"), para. 613 (exhibit D59, letter of 2 June 1994), para. 612 (Exhibit D56, photocopies of his passport), para. 615 (Exhibit D57, authorization speciale de circulation CEPGL").

328. The **Appeals Chamber** notes that the possible time of the attack at Nyakavumu cave, as indicated by Witnesses H, S, D and AC is defined rather approximately. The witnesses referred to it in turn as the "end of May", "early June", and "sometime in June". [FN538] Clearly, there is imprecision. However, the **Appeals Chamber** notes that these witnesses were reliable and that it was proven beyond reasonable doubt that the attack occurred. In the light of the foregoing, the fact that there was an imprecision as to the exact date of the attack does not warrant a conclusion that it was not proven. Thus, in the opinion of the **Appeals Chamber**, the Trial Chamber correctly stated that:

FN538. T, 25 June 1999, pp.97 and 98; T, 27 January 1999, pp. 73 to 76; T, 2 February 1999, p.11.

Although the exact date of the attack is unclear from the testimonies, the Chamber notes that the witnesses all provided an overall consistent account of the events at Nyakavumu cave throughout their testimonies. The fact that the date of the attack is unclear does not, in the opinion of the Chamber, impair on the reliability of the witnesses. [FN539]

FN539. Trial Judgement, para. 778.

329. As regards the Trial Chamber's statement that:

(...)the alibi does not specifically refute the presence of **Musema** at the cave(...), [FN540]

FN540. Ibid.

The **Appeals Chamber** recalls that it falls to the accused to point to the existence of sufficient evidence in order that the issue of their existence may be raised. The **Appeals Chamber**, after careful consideration of the Trial Chamber's overall approach, finds that in so stating, the Trial Chamber wanted to stress that **Musema's** alibi did not cast a reasonable doubt on the Prosecution evidence.

D. Conclusion

330. For the foregoing reasons, the **Appeals Chamber** dismisses **Musema's** first ground of Appeal, as set out in his Appellant's Brief.

III. THE RIGHT TO A FAIR TRIAL (SECOND, FOURTH AND FIFTH GROUNDS OF APPEAL)

331. In the Appellant's view, the 2nd, 4th and 5th grounds of Appeal form part of the general argument that the Trial Chamber failed to ensure that the right of the accused to a fair trial was respected. [FN541] **Musema** submits that the grounds of appeal set out below relate to the fundamental rights of the accused, namely, the right to be informed promptly and in detail of the nature of the charges against him, the right to have adequate time for the preparation of his defence and lastly the right to be tried without undue delay. [FN542]

FN541. T (A), 28 May 2001, pp. 111 and 112.

FN542. Ibid., pp. 112 and 113.

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A. Second Ground of Appeal: Late notice of Witnesses [FN543]

FN543. As stated in the Notice of Appeal: "Late Notice of Witnesses (Counts 1,4 and 7): The Trial Chamber erred in its Decision of 20 April 1999, allowing the Prosecution to call evidence of witnesses whose statements had not been served on the Defence 60 days before the date set for trial. The evidence of the following witnesses should therefore have been excluded from the Trial Chamber's deliberations: J, P, S, M, N, AB, AD and Guichaoua" (Notice of Appeal, p. 4).

1. Arguments of the parties

332. **Musema** submits that the Trial Chamber erred on a point of law by granting the Prosecution leave, in its Decision of 20 April 1999, to call Witnesses J, P, S, M, N, AB, AD and Guichaoua. In his view, the testimonies of the above-mentioned witnesses should be excluded from the record and all findings based thereon quashed (in particular, the guilty verdict in respect of Count 7 of the Indictment). [FN544]

FN544. Appellant's Brief, para. 418.

333. Two main arguments have been advanced by the Appellant. Firstly, he argues that the Trial Chamber should not have allowed the Prosecution to vary its list of witnesses pursuant to Rule 73bis (E) of the Rules. He points out that he has never been served with the initial witness list that was submitted to the Tribunal and was therefore unaware that Witnesses S, P and J were included in this list. [FN545] It is **Musema's** contention that, the Prosecution should be granted leave to add witnesses to its list in the course of the trial only if the interests of justice so require. [FN546] Furthermore, the Appellant submits that the Prosecutor should not have been granted leave to call the aforesaid witnesses on the grounds that their statements had not been disclosed within 60 days prior to the date set for trial, and that further provisions of Rule 66 (A) (ii) were not complied with. [FN547] **Musema** explains that, in the first place, the witness statements were disclosed piecemeal and secondly, in its motion, the Prosecution did not state the reasons why the witness statements could not have been obtained and disclosed within the time-limit to the Defence. He further submits that the Trial Chamber did not give reasons for its decision and that the correct interpretation of Rule 66 of the Rules, in light of the provisions of the Statute, is that which is stated in a decision rendered by Trial Chamber I in Bagilishema [FN548], where the said Chamber held that the Prosecution could rely on witness statements disclosed after the expiration of the time-limit only where it considered that good cause had been shown. [FN549] Lastly, **Musema** argues that Witnesses P, S, and AB should have been included in the initial list of witnesses and their statements disclosed to the Defence, and also, that Witnesses J, M, N and AD should not have been allowed to give evidence without good cause being shown as to why their statements were obtained so belatedly. [FN550] **Musema** adds that, in any case, he does not need to establish prejudice in order to succeed in his arguments before the **Appeals Chamber**. [FN551]

FN545. Ibid., para.377.

FN546. Ibid., para. 383.

FN547. Ibid., para. 384.

FN548. Oral Decision rendered on 2 December 1999.

FN549. Appellant's Brief, para. 402.

FN550. Appellant's Brief, para. 408.

FN551. Ibid., para. 26.

334. The Prosecution submits that the Appellant has suffered no prejudice as a result of the fact that it was allowed to call eight material witnesses. The Prosecution recalls that at trial, the Appellant did not raise any issue as to prejudice suffered in the preparation of its defence, as a result of the non-disclosure of the list of Prosecution witnesses, nor did it object to the Prosecution's requests to be allowed to vary its initial list of witnesses. [FN552] As regards the allegations of the Appellant on the belated disclosure of the statements of eight witnesses, the Prosecution submits that the Appellant did not raise at trial any questions of "good cause" for such disclosure and that its only concern, at the time, seemed to have been the possible delay in the trial schedule. [FN553] The Prosecution submits finally that, even if the **Appeals Chamber** were to find that the Prosecution failed to discharge its obligations, the Appellant has not demonstrated how the belated disclosure of witness statements affected his ability to prepare his defence. [FN554]

FN552. Prosecution's Response, paras. 5.11 and 5.12.

FN553. Ibid., para. 5.20.

FN554. Ibid., para. 5.23.

2. Discussion

335. On 13 April 1999, the Prosecutor filed a motion for leave to vary her initial list of Prosecution witnesses, together with her pre-trial Brief pursuant to Rule 73 bis (E) of the Rules. [FN555] In that motion, the Prosecution sought leave of the Trial Chamber to: (1) delete from her initial witnesses list filed on 19

November 1998, the particulars of 11 witnesses; (2) add to the initial witness list the particulars of three witnesses who had already testified at trial, but whose names did not appear in the said list (J, P and S); (3) add to the initial witnesses list the particulars of three witnesses whose witness statements had previously been disclosed, but who did not appear in the initial list of witnesses (M, N and AB); (4) add to the initial witness list, the particulars of two new witnesses that she proposed to call in the instant case (AD and AE) and; (5) add to the initial witness list, the particulars of one expert witness, that she proposed to call in the instant case (André Guichaoua). [FN556]

FN555. Motion by the Prosecutor for leave to vary her initial list of witnesses, and for extension of time within which to conclude the presentation of her case, The Prosecutor v. Alfred **Musema**, Case No. ICTR -- 96- 13- T, filed on 13 April 1999.

FN556. Motion by the Prosecutor for leave to vary her initial list of witnesses and for an extension of time within which to conclude the presentation of her case, The Prosecutor v. Alfred **Musema**, Case No. ICTR-96-13-T, filed on 13 April 1999, p. 2.

336. The Defence responded to this motion on 15 April 1999. On 20 April 1999, the Trial Chamber rendered its decision, granting leave to the Prosecutor to vary the initial list of witnesses by adding Witnesses N, M, AB and AD, denying the Prosecutor's request for leave to vary her initial witness list by adding Witness AE and also denying her request for leave to call the expert witness or to tender his statement into evidence. [FN557] In a second Decision rendered orally on 28 April 1999, the Trial Chamber granted the Prosecutor leave to call expert witness Guichaoua. [FN558]

FN557. Decision on the Prosecutor's request for leave to call six new witnesses, The Prosecutor v. Alfred **Musema**, Case No. ICTR-96-13-T, 20 April 1999, p. 5.

FN558. T, 28 April 1999, p. 85.

337. In general, the Appellant submits that the right of the Accused to a fair trial, in particular, the right to have adequate time and facilities for the preparation of his defence, was prejudiced by the Prosecution's failure to comply with the Rules relating to disclosure of materials and to notice of the list of witnesses to the Defence in sufficient time. The Appellant advances several reasons therefor: (1) since he had never received the Prosecution's initial witness list, he did not know that Witnesses J, P and Y were not on the list; (2) the inclusion in the initial list of four additional witnesses (N, M, AB and AD), as well as the leave granted by the Trial Chamber to call an expert Witness, André Guichaoua, prejudiced the preparation of his defence; (3) the Prosecutor disclosed the witness statements in question after the expiration of the 60-day time-limit prescribed by the Rules, without showing any good cause for such an action.

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338. Therefore, the Appellant submits before the **Appeals Chamber** that his right to have adequate time and facilities for the preparation of his defence as provided for under Article 20(4)(b) of the Statute [FN559] was violated. Indeed, in his Brief in Reply, **Musema** denies that they (the Defence):

FN559. In fact, in his Appellant's Brief, **Musema** makes the following allegations: "[...] the reason for this rule is to allow the Defence and the Court to have adequate notice of the Prosecution case. This is further reflected by Rule 69 (C) of the Rules, which deals with the protection of witnesses [...]. This is entirely consonant with the spirit of the Statute, Articles 19 and 20 which deal with the right to a fair trial. In particular, Article 20 (4)(b) states that as a minimum guarantee the accused shall be entitled 'to have adequate time and facilities for the preparation of his or her defence' It is submitted that adequate time and facilities include adequate notice of witnesses for the Prosecution. The adequacy of notice permits the Defence to conduct investigations, which they would otherwise be prejudiced from doing. Apart from the obvious prejudice caused to the Defence by late notice of Prosecution witnesses, justice must not only be done but must be seen to be done. Justice is not seen to be done if the Prosecutor is allowed to add new witnesses during the course of trial without a consideration of the effect of this on the Defence."

[...] Suffered no prejudice as a result of the late notice of witnesses. The temporal provisions within the procedures for trial permit opportunity and time to deal with matters that may reveal evidence favourable to the defence. The reduction in the period notice prevents a reasonable period of time for scrutiny of the allegations within the Prosecution case. [FN560]

FN560. Appellant's Brief in Reply, para.26.

339. The **Appeals Chamber** notes that the Appellant did not raise this issue before the Trial Chamber. In his Response to the Prosecutor's motion, he challenges the merit of the motion by claiming his right to be tried without undue delay under Article 20(4)(c) of the Statute. [FN561] At no time was the issue of adequate time and facilities for the preparation for his defence (under Article 20(4)(c) of the Statute) raised before the Trial Chamber. Thus, in its Decision of 20 April 1999, the Trial Chamber held that "[T]he Tribunal has noted the submission of the parties in light of their right to both a fair and an expeditious trial." [FN562] The Trial Chamber also specified that: "[T]he issue of the time necessary for the presentation of the Prosecutor's case shall be dealt with during a status conference held to that end." [FN563] The **Appeals Chamber** observes that during the said status conference held on 21 April 1999 to establish a schedule of hearings, **Musema** did not request additional time for the preparation of his defence, nor did he even raise the issue of adequate facilities for the preparation of his defence. [FN564] Again, on 27 April 1999, the Presiding Judge reminded the parties that the Trial Chamber was going to propose a new schedule of hearings, but the Appellant did not deem it necessary to respond.

FN561. **Musema's** Response to the Prosecution' s Motion is worded as follows: "[...] the Defence has urged the Trial Chamber to ensure that the Prosecution

conducts the trial against the defendant expeditiously, with the interests of justice in mind, a time limit as to how much court time could be used in evidence. [...]. Notwithstanding these efforts by the Defence and the Trial Chamber to speed the trial process with the minimum of delay and inconvenience, the Prosecution have sought to call additional witnesses, obtain further Court time which could be at the expense of time available to the Defence, and to involve the Court in issues not pertinent to the indictment against the accused. The proposed commencement of the Defence will not be effective on 3 May 1999, but at a much later date. The Defence have been preparing for the 3 May date upon which to call the accused and scheduling witnesses in the subsequent weeks available. Those arrangements are at an advanced stage and a member of the Defence team is currently in Europe attending to them. The Defence submits that the Prosecution should be ordered to call only the 5 witnesses originally scheduled by them to be called, as detailed in March, or only sufficient witnesses that will occupy one more week of Court time -- whichever is the shorter. This will thereby permit the Defence case to commence on 3 May as previously agreed." ("Defence Reply to Prosecutor's Request for Leave to Call Additional Witnesses and Call Expert Evidence", The Prosecutor v. Alfred **Musema**, Case No. ICTR 96-13-I, 15 April 1999, p. 3). In its Decision of 20 April 1999, the Trial Chamber summed up the Appellant's arguments as follows: "In response, the Defence contests that the addition of five witnesses would unduly delay the proceedings in this case and prejudice the presentation of the case of the Defence which is scheduled to commence on 3 May 1999. The Defence submits that the Trial Chamber should order the Prosecutor to call only the five previously scheduled witnesses or sufficient witnesses to occupy one more week of court time, whichever is shortest." ("Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", The Prosecutor v. Alfred **Musema**, Case No. ICTR-96-13-I, 20 April 1999, para. 7). time limit as to how much court time could be used in evidence. [...]. Notwithstanding these efforts by the Defence and the Trial Chamber to speed the trial process with the minimum of delay and inconvenience, the Prosecution have sought to call additional witnesses, obtain further Court time which could be at the expense of time available to the Defence, and to involve the Court in issues not pertinent to the indictment against the accused. The proposed commencement of the Defence will not be effective on 3 May 1999, but at a much later date. The Defence have been preparing for the 3 May date upon which to call the accused and scheduling witnesses in the subsequent weeks available. Those arrangements are at an advanced stage and a member of the Defence team is currently in Europe attending to them. The Defence submits that the Prosecution should be ordered to call only the 5 witnesses originally scheduled by them to be called, as detailed in March, or only sufficient witnesses that will occupy one more week of Court time -- whichever is the shorter. This will thereby permit the Defence case to commence on 3 May as previously agreed." ("Defence Reply to Prosecutor's Request for Leave to Call Additional Witnesses and Call Expert Evidence", The Prosecutor v. Alfred **Musema**, Case No. ICTR 96-13-I, 15 April 1999, p. 3). In its Decision of 20 April 1999, the Trial Chamber summed up the Appellant's arguments as follows: "In response, the Defence contests that the addition of five witnesses would unduly delay the proceedings in this case and prejudice the presentation of the case of the Defence which is scheduled to commence on 3 May 1999. The Defence submits that the Trial Chamber should order the Prosecutor to call only the five previously scheduled witnesses or sufficient witnesses to occupy one more week of court time, whichever is shortest." ("Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", The Prosecutor v. Alfred **Musema**, Case No. ICTR-96-13-I, 20 April 1999, para. 7).

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FN562. "Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", The Prosecutor v. Alfred **Musema**, Case No. ICTR 96-13-I, 20 April 1999, para. 18.

FN563. Ibid., para. 18.

FN564. To the question posed by the Presiding Judge as to whether other issues should be addressed during the status conference after hearing the Prosecution, the Defence did not deem it necessary to respond or to object to any issue raised by the Prosecution (T, 21 April 1999, pp. 36 and 37).

340. Furthermore, on the Appellant's argument regarding disclosure of witness statements by the Prosecution under Rule 66 of the Rules, the **Appeals Chamber** is of the view that **Musema** should have raised that issue before the Trial Chamber. However, it appears that this was not done, not even in the Defence Response to the Prosecutor's motion.

341. It should be noted that the Appellant presents arguments on appeal which he should have submitted before the Trial Chamber. However, as already stated by the **Appeals Chamber**, an appeal is not, from the point of view of the Statute, a de novo review. [FN565] Consequently, "[...] [T]he obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or the Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial de novo.'' [FN566] The **Appeals Chamber** recalls its findings in Kambanda: "The fact that the Appellant made no objection before the Trial Chamber to the Registry's decision means that, in the absence of special circumstances, he has waived his right to adduce the issue as a valid ground of appeal." [FN567] In light of the foregoing, and in the absence of exceptional circumstances warranting consideration of the ground of appeal, the **Appeals Chamber** dismisses the ground of appeal.

FN565. Akayesu Appeal Judgement, para. 177 echoing the findings of ICTY **Appeals Chamber** in the Tadic Decision (additional evidence), para 41 and in the Furundzija Appeal Judgement, para. 40.

FN566. Tadic Appeal Judgement, para. 55.

FN567. Kambanda Appeal Judgement, para. 25. See also Akayesu Appeal Judgement, para. 113. The doctrine of waiver has been asserted many times by ICTY **Appeals Chamber** in the Celebici Appeal Judgement (para. 640), Furundzija (para. 174), Tadic (para. 55).

B. Fourth Ground of Appeal: Amendment of the Indictment [FN568]

FN568. As worded in the Grounds of appeal Against Conviction and Sentence:

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Amendment of Indictment (Count 7): The Trial Chamber erred in its decision of 6 May 1999 allowing the Prosecution to amend the Indictment by adding three extra counts (Grounds of Appeal, p. 3).

342. **Musema** submits that the Trial Chamber erred in law in granting the Prosecution leave, in its Decision of 6 May 1999 (the "Decision of 6 May 1999"), to amend its Indictment, and requests that the guilty verdict in respect of Count 7 be quashed.

343. Given that the guilty verdict in respect of Count 7 has been quashed, the **Appeals Chamber** does not deem it necessary to rule on the merits of the leave to amend the Indictment. However, the **Appeals Chamber** wishes to underscore the particularly belated filing of the Prosecution's Motion of 29 April 1999 (in fact, more than three months after the taking of the witness statements by the Prosecution on 13 January 1999). The **Appeals Chamber** is of the view that, prior to granting leave for amendment of an Indictment, the Trial Chamber must pay special attention to respect for the fundamental rights of the Accused, as provided for in Articles 19 and 20 of the Statute. To that end, the Trial Chamber must ask itself whether the amendment would unjustly penalize the Accused in the conduct of his defence, bearing in mind that the more belatedly the amendment is effected, the more it is likely to penalize the Accused.

C. Fifth Ground of Appeal: Service of the Indictment [FN569]

FN569. As worded in the Grounds of Appeal Against Conviction and Sentence: "Service of Indictment (Count 7): The Trial Chamber erred in finding that the Defendant was required to respond to Counts 7, 8 and 9 of the Indictment, given that it was never served on the Defence."

344. **Musema** submits that the Prosecutor did not serve the Amended Indictment on the Defence and that the Prosecutor's failure to formally serve the Indictment must be punished. **Musema** is referring to paragraph 341 of the Trial Judgement where the Trial Chamber found that the failure to formally serve the Accused with the Amended Indictment did not infringe his rights under Articles 19 and 20 of the Statute. The Appellant submits that the Trial Chamber's finding endorses the erroneous principle that the Prosecutor does not have the duty to comply with the Rules except where failure to do so caused prejudice to the Accused. [FN570] He requests that the guilty verdict entered in respect of Count 7 be set aside. [FN571]

FN570. Appellant's Brief, paras. 459 to 464.

FN571. Ibid., para. 542.

345. Since the guilty verdict in respect of Count 7 has been quashed, the **Appeals**

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Chamber does not deem it necessary, as for the previous ground of appeal, to rule on the issue as to whether, in the circumstances of the case, the Appellant was substantially deprived of his right to be informed of the nature and cause of the charges against him, as provided for under Articles 19 and 20 of the Statute.

IV. SIXTH GROUND OF APPEAL: MULTIPLE CONVICTIONS BASED ON THE SAME SET OF FACTS

A. Arguments of the Parties

1. **Musema's** Arguments

346. **Musema** submits that the Trial Chamber erred in finding him guilty of genocide under Article 2(3)(a) of the Statute (Count 1) and of extermination under Article 3(b) of the Statute (Count 5), on the basis of the same set of facts. He requests the **Appeals Chamber** to quash the conviction for extermination.

347. In his Appellant's Brief, **Musema** considers this issue in light of the test set forth in the Akayesu Trial Judgement, where the Chamber concluded that "it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did." [FN572] After examining various elements of these crimes, such as killing, discriminatory intent, specific intent, widespread and systematic attack, and civilian population, **Musema** concludes that although these two offences can have different elements, all of the elements of extermination are, in this case, included within the definition of genocide. [FN573] He adds that the protected social interests are not different, because the civilian population protected under Article 3 is "included within the general population protected under Article 2. [FN574] He also maintains that it is not necessary to enter a conviction for both offences in order to describe fully what the accused did. [FN575] He further submits that the factual circumstances of the case are such that the elements required to prove genocide and extermination are the same, and that the same evidence was utilized to prove both charges. [FN576] He concludes that the conviction should be for genocide only.

FN572. Akayesu Judgement, para. 468.

FN573. Appellant's Brief, paras. 481 to 487.

FN574. Ibid., at para. 487.

FN575. Ibid.

FN576. Ibid.

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348. In his Brief, **Musema** also supports the reasoning of the Trial Chamber in the Kayishema/Ruzindana case on this issue. He cites the Kupreskic Trial Judgement, which lays down the principle that "when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct." [FN577] With respect to cumulative charging on the basis of the same acts, he concedes that it may be appropriate in certain circumstances. [FN578]

FN577. Ibid., at para. 494.

FN578. Appellant's Brief, para. 496. He further states that "[t]he Prosecutor does not know in advance exactly how the evidence will come out at trial, and it may be acceptable to plead two different offences to cover different possibilities."

349. During the hearing on appeal, the Appellant again endorsed the reasoning set forth by the Kupreskic Trial Chamber on the issue of multiple convictions. [FN579] He reiterated that the criteria applied in the Kayishema/Ruzindana - Trial Judgement was correct, and that the additional criterion set out by the Trial Chamber in the Akayesu Trial Judgement-the necessity to enter convictions for concurrent offences in order to describe fully what the accused did - is not an independent requirement, but rather serves as a clarification function. [FN580] With respect to cumulative charges, the Appellant asserted that the Prosecution should charge in the alternative when the offences have effectively the same elements and are designed to protect the same humanitarian values. [FN581]

FN579. T(A), 28 May 2001, p. 123.

FN580. Ibid., p. 123 and 124.

FN581. Ibid., p. 125.

350. In general, the Appellant submits that the issue should not be examined in the abstract, but should be considered "in the context of the case at hand in concreto,'' [FN582] and that in this context, the crime of extermination is absorbed by the crime of genocide. [FN583] He also submits that "once a court has reached a finding of guilt of an accused on a charge relating to a specific set of facts, any successive judicial finding of guilt on the same set of facts would violate the principle against double jeopardy, if the successive charge would effectively cover the same elements and protect the same values." [FN584] He maintains that this principle does not only apply to successive prosecutions. Finally, he contends that quashing the extermination conviction would have an impact on sentencing.

FN582. Ibid., p. 126.

FN583. Ibid.

FN584. Ibid., p. 127.

2. Prosecution's Arguments

351. In its Respondent's Brief, the Prosecution submits that an accused may be charged and convicted of genocide under Article 2(3)(a) of the Statute and of extermination under Article 3(b), on the basis of the same conduct. It discusses the issue in the context of national approaches and of the practice of this Tribunal and ICTY, and submits that the crime of genocide by killing and the crime of extermination are dissimilar. [FN585] The Prosecution concludes that the law permits charging an accused with, and convicting him of these crimes with respect to the same conduct. [FN586]

FN585. Prosecution's Response, para. 7. 119.

FN586. Ibid., at para. 7. 121.

352. During the hearing on appeal, the Prosecution stated that some portions of its Respondent's Brief had become redundant following the rendering of the Celebici Appeal Judgement. [FN587] It argued that the guidance given by ICTY **Appeals Chamber** should be accepted by this Tribunal. [FN588] With respect to cumulative charges, the Prosecution noted that **Musema**, in his Appeal Brief, had accepted this practice, and that his position therefore coincided with the approach adopted by ICTY **Appeals Chamber** in Celebici. [FN589] Thus, in the view of the Prosecution, the question of cumulative charges was not in issue in this case. [FN590] The Prosecution further stated that "it may be desirable for the **Appeals Chamber** in this case to make a general pronouncement on the matter stating that ... in the Rwanda Tribunal the practice of cumulative charges should, in general, be allowed." [FN591]

FN587. The Celebici Appeal Judgement was rendered on 20 February 2001. The Prosecution stated that other sections of its Respondent's Brief-namely, the introduction, the practice of this Tribunal, the different societal interests protected, and the conclusion-are still relevant. T(A), p. 211.

FN588. T(A), p.209.

FN589. Ibid., p.211.

FN590. Ibid., p.212.

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FN591. Ibid.

353. With respect to the issue of multiple convictions, the Prosecution stated during the hearing that it disagreed with the Appellant's position. [FN592] It pointed out in its Respondent's Brief that the Appellant was relying primarily on the Kayishema/Ruzindana Trial Judgement, but that this judgement was the only one which had dismissed the possibility of multiple convictions for genocide and extermination. [FN593] It stated that in five ICTR cases, namely **Musema**, Rutaganda, Akayesu, Kambanda, and Serushago, multiple convictions have been allowed for this pair of crimes. [FN594] The Prosecution submitted that the Appellant's position - that extermination must be considered as a lesser included offence of genocide because the two offences were charged in relation to the same set of facts and the same evidence was used - is incorrect, particularly in light of the Celebici Appeal Judgement. [FN595] It further stated that this question is a legal question, and that the conclusion of the Trial Chamber in **Musema**, that multiple convictions for genocide and extermination on the basis of the same facts are permissible, is correct. [FN596]

FN592. Ibid.

FN593. Ibid.

FN594. Ibid., p.213.

FN595. Ibid., p.213 and 214.

FN596. Ibid., p.214.

354. The Prosecution then discussed the reasoning of the Trial Chamber in **Musema**. It observed that the Chamber found that genocide and extermination constitute two different crimes, and that the Chamber rejected the majority opinion in Kayishema/Ruzindana. [FN597] In the **Musema** case, the Trial Chamber endorsed the dissenting opinion of Judge Khan in Kayishema/Ruzindana and found that "a person can be convicted on a count of genocide and a count of extermination based on the same set of facts." [FN598] The Prosecution also concurred with the Chamber's finding that a person could always be convicted for "a count of genocide, a count of crimes against humanity, and any war crime" under the Statute of the International Criminal Tribunal for Rwanda. [FN599] In the opinion of the Prosecution, this finding is correct in light of the Celebici Appeal Judgement. The Prosecution then went on to discuss the test laid down in Celebici. It further noted the Trial Chamber's discussion of the issue in Kunarac and pointed out that, in making a comparison of the elements provided for in the Statute, the facts of the instant case have no role to play. [FN600] It viewed as erroneous the Appellant's argument that the use of the same evidence to convict under multiple provisions amounted to impermissible multiple convictions. [FN601]

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FN597. Ibid.

FN598. Ibid., p.215.

FN599. Ibid.

FN600. Ibid., p.218 and 219.

FN601. Ibid., p.219.

355. The Prosecution then isolated the materially distinct element present in each offence, but not present in the other. The distinct element of genocide that must be proven is the intent to destroy in whole or in part the targeted group. [FN602] That is not an element of the offence of extermination as a crime against humanity. [FN603] The distinct element of extermination as a crime against humanity that must be proven is that the act forms part of a widespread or systematic attack against a civilian population. [FN604] This element, the Prosecution contends, is not required for the offence of genocide or war crimes. [FN605] The Prosecution further submitted that extermination as crime against humanity requires proof of another distinct element that is not required by genocide-namely, proof of a mass killing. [FN606] For genocide, the Prosecution submitted, it is "sufficient to prove that the perpetrator killed one person. [FN607]

FN602. Ibid., p.221.

FN603. Ibid.

FN604. Ibid. The Prosecution noted: "By contrast, the category of crimes against humanity ... does not focus on the rights of groups to exist. It focuses on a broad spectrum of inhumane acts, but they need to be directed at any civilian population on a widespread and systematic basis," Ibid.

FN605. Ibid., p.222.

FN606. Ibid.

FN607. Ibid.

356. For these reasons, the Prosecution concluded that double conviction for genocide and extermination as a crime against humanity is permissible. [FN608] It

further submitted that the **Appeals Chamber** could also make a pronouncement on a more general issue, namely whether multiple convictions under each of the provisions of the Statute are always permissible. [FN609]

FN608. Ibid., p.223.

FN609. Ibid., p.224.

357. In summary, the Prosecution requests the **Appeals Chamber** to confirm that cumulative charges are permitted in the legal regime in force at ICTR; to dismiss the Appellant's ground of appeal on multiple convictions; to confirm that multiple convictions for genocide and extermination as a crime against humanity are permitted before ICTR; and to confirm that multiple convictions under the different provisions of the Statute are always permitted, [FN610] or, in the alternative, to rule that multiple convictions for genocide and crimes against humanity are always permitted.

FN610. That is, convictions under Articles 2 and 3, 3 and 4, 2 and 4, and 2, 3 and 4 of the Statute.

B. Discussion

358. The issue as to whether multiple convictions based on the same set of facts are permissible has arisen in many cases before ICTR, and raises complex questions regarding fairness to the accused and the pursuit of the Tribunal's objectives. ICTR **Appeals Chamber** has yet to make a definitive pronouncement on the issue. It notes, however, that ICTY **Appeals Chamber**, in the Celebici Appeal Judgement rendered on 20 February 2001, laid down the test to be applied in determining when multiple convictions based on the same set of facts may be entered or affirmed. The Celebici test concerning multiple convictions was subsequently applied by ICTY **Appeals Chamber** in the Jelisic Appeal Judgement, rendered on 5 July 2001. ICTY Trial Chambers have also applied this test. [FN611] In Celebici, ICTY **Appeals Chamber** also made a general pronouncement on the issue of cumulative charges.

FN611. See Kunarac, Kordic, and Krstic Trial Judgements.

359. The **Appeals Chamber** considers that an examination of the Celebici test is necessary and may also provide guidance for ICTR on these issue.

360. On the issue of multiple convictions, ICTY **Appeals Chamber** in Celebici discussed previous approaches of the **Appeals Chamber**, and observed that multiple convictions based on the same acts had sometimes been upheld. [FN612] It also noted that any overlapping at the factual level had been adjusted in sentencing. [FN613] It then discussed the various national approaches to the issue, and found

that these approaches vary; for instance, it noted that while some countries allow such convictions in order to capture the full extent of the accused's culpable conduct, others reserve them for the more severe crimes, and still, others require differing statutory elements before multiple convictions may be imposed. [FN614]

FN612. Celebici Appeal Judgement, para.405.

FN613. Celebici Appeal Judgement, para. 428.

FN614. Ibid., para.406.

361. The **Appeals Chamber** in Celebici then stated:

Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this **Appeals Chamber** holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision. [FN615]

FN615. Celebici Appeal Judgement, paras. 412 and 413.

Applying this test, the **Appeals Chamber** in Celebici found that as between the Article 2 offences and Article 3 (common Article 3) offences of ICTY Statute at issue in the case, [FN616] the multiple convictions entered by the Trial Chamber could not be affirmed, because while the Article 2 offences contained a materially distinct element not contained in Article 3 (common Article 3) offences, the reverse was not the case. Following the approach set out in the second paragraph of the cited statement from Celebici, supra, convictions under Article 2 were upheld, but those entered under Article 3 (common Article 3) were quashed by the **Appeals Chamber**.

FN616. The pairs of crimes at issue in the case under ICTY Statute were: (1) willful killings under Article 2 and murders under Article 3 (common Article 3); (2) willfully causing great suffering or serious injury to body or health under Article 2 and cruel treatment under Article 3 (common Article 3); (3) torture under Article 2 and torture under Article 3 (common Article 3); (4) inhuman treatment under Article 2 and cruel treatment under Article 3 (common Article 3).

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See Celebici Appeal Judgement, para. 414.

362. In the Jelisic Appeal Judgement, ICTY **Appeals Chamber** adopted the reasoning it had followed in the Celebici case, and held that the multiple convictions entered under Article 3 and Article 5 of ICTY Statute are permissible because each Article contained a distinct element requiring proof of a fact not required by the other Article. [FN617]

FN617. The Chamber stated: "... Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Article 3 and 5 are permissible." Jelisic Appeal Judgement, para. 82.

363. In the view of the **Appeals Chamber**, the above test concerning multiple convictions reflects general, objective criteria enabling a Chamber to determine when it may enter or affirm multiple convictions based on the same acts. The **Appeals Chamber** confirms that this is the test to be applied with respect to multiple convictions arising under ICTR Statute. The **Appeals Chamber** further endorses the approach of the Celebici Appeal Judgement, with regard to the elements of the offences to be taken into consideration in the application of this test. [FN618] In applying this test, all the legal elements of the offences, including those contained in the provisions' introductory paragraph, must be taken into account.

FN618. This refers to the approach of the majority of the **Appeals Chamber** in Celebici.

364. In the case at bar, the Trial Chamber found **Musema** guilty of genocide (Count 1) and of extermination as a crime against humanity (Count 5) on the basis of the same set of facts. **Musema** requests the reversal of the conviction for extermination. The issue is whether such double conviction is permissible.

365. Applying the provisions of the test articulated above, the first issue is whether a given statutory provision has a materially distinct element not contained in the other provision, an element being regarded as materially distinct from another if it requires proof of a fact not required by the other.

366. Genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group; this is not required by extermination as a crime against humanity. Extermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide.

367. As a result, the applicable test with respect to double convictions for genocide and extermination as a crime against humanity is satisfied; these convictions are permissible. Accordingly, **Musema's** ground of appeal on this point is dismissed.

368. The **Appeals Chamber** notes that the Prosecution has also requested it to confirm that multiple convictions under different Articles of the Statute are always permitted. The **Appeals Chamber**, however, declines to give its opinion on this issue, and limits its findings to the issues raised in the appeal.

369. On the issue of cumulative charges, ICTY **Appeals Chamber** in Celebici held:

[c]umulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and ICTR. [FN619]

FN619. Celebici Appeal Judgement, para. 400.

The **Appeals Chamber** finds that the above holding on cumulative charges reflects a general principle and is equally applicable to ICTR. As a result, the **Appeals Chamber** confirms that cumulative charging is generally permitted.

C. Conclusion

370. For the reasons given above, the **Appeals Chamber** holds that convictions for genocide and extermination as a crime against humanity, based on the same set of facts, are permissible. **Musema's** ground of appeal is thus dismissed. The **Appeals Chamber** further holds that cumulative charging is generally permitted.

V. **MUSEMA'S** APPEAL AGAINST SENTENCE

A. Introduction

371. The Trial Chamber, having found the Appellant guilty of genocide, of a crime against humanity (extermination) and of a crime against humanity (rape), imposed a single sentence of life imprisonment for all counts. The **Appeals Chamber** upholds those convictions, with the exception of the conviction entered in respect of Count 7 of the Indictment (crime against humanity: rape). [FN620] Indeed, the **Appeals Chamber** found that in light of the new evidence, no reasonable tribunal of fact could have reached a conclusion different from that of the Trial Chamber and, accordingly, the conviction in respect of Count 7 is quashed. In addition to appealing against conviction, the Appellant also appealed against sentence on the

grounds that the sentence imposed by the Trial Chamber is excessive, and based on errors of law and fact. [FN621] As a remedy, he requests that the sentence be set aside and replaced with a sentence of fixed duration. [FN622]

FN620. See paras. 184 to 194, supra.

FN621. Appellant's Brief, paras. 532 and 545.

FN622. Ibid., paras. 533 and 546.

372. Before ruling on the arguments put forward by the Appellant, the **Appeals Chamber** must first address the issue as to whether a quashing of the conviction on Count 7 would impact on the sentence, that is, whether it is necessary to revise the sentence imposed for the subsisting guilty verdicts. The parties had the opportunity to state their views on the issue at the hearing of 17 October 2001. The Prosecution submitted that, in the event that the Appellant is acquitted on the count of sexual violence, the sentence imposed on the Appellant by the Trial Chamber must remain the same. [FN623] The Appellant did not contest this proposition. Counsel for the Defence acknowledged that since **Musema** was convicted of genocide (Count 1 of the Indictment), it would be difficult to argue for another sentence. [FN624]

FN623. T(CB and EB), pp. 70 to 71.

FN624. Ibid., p.75.

373. The **Appeals Chamber** entertains the arguments of the parties on this point and confirms **Musema's** conviction on the two counts of genocide and crime against humanity (extermination). The **Appeals Chamber** notes that the crimes with which the Accused is charged are of such gravity that a quashing of the conviction on Count 7 would have no effect. With respect to Count 1 (genocide), **Musema** was found guilty of involvement in several attacks that resulted in a considerable number of victims. Subject to the findings relating to Appellant's arguments in his appeal against sentence, the **Appeals Chamber** holds that a quashing of the conviction on Count 7 of the Indictment does not, in principle, entail a revision of the sentence imposed by the Trial Chamber in the exercise of its discretion.

374. In support of his appeal against the sentence, the Appellant advances the following three arguments:

(i) The Trial Chamber failed to take into account the need to develop a range of sentences based upon his relative role in the broader context of the conflict in Rwanda; [FN625]

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FN625. Appellant's Brief, paras. 506-514.

(ii) The Trial Chamber erred by failing to pass a sentence commensurate with other sentences passed by ICTR for the crime of genocide; [FN626]

FN626. Ibid., paras. 515-522.

(iii) The Trial Chamber erred by failing to take mitigating factors in the case sufficiently into account. [FN627]

FN627. Ibid., paras. 527-531.

B. Relevant Provisions of the Statute and Rules

375. The relevant provisions of the Statute and Rules applicable to the Appellant's arguments are as follows:

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress to their rightful owners.

Rule 101: Penalties

(A) A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as:

(i) Any aggravating circumstances;

(ii) Any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction;

(iii) The general practice regarding prison sentences in the courts of Rwanda;

(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 served, as referred to in Article 9(3) of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

C. **Musema's** Arguments

1. The Trial Chamber failed to take into account the need to develop a range of sentences based upon his relative role in the broader context of the conflict in Rwanda

(a) Arguments of the parties

376. The Appellant argues that the Trial Chamber failed to raise the need to develop a range of sentences "in order to reflect the relative position of the accused in the Rwandan conflict". [FN628] He submits that the Trial Chamber was under a duty to take this factor into account, and erred by failing to do so. [FN629] In support of this arguments, he refers to the dicta of the **Appeals Chamber** of ICTY in the Tadic Sentencing Appeal Judgement, in which it was held that the Trial Chamber erred in sentencing the accused, Dusko Tadic, by failing to adequately consider the "need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in former Yugoslavia". [FN630]

FN628. Appellant's Brief, para. 506.

FN629. Ibid., para.507.

FN630. Tadic Sentencing Appeal Judgement, para. 55.

377. **Musema** also refers to the finding of the Trial Chamber that, while he exercised de jure and de facto control over the employees of the Tea Factory, he did not wield control over the Kibuye préfecture population. [FN631] On the basis of that finding he argues that the Trial Chamber did not find him to be exercising "any political or civic authority in the [Kibuye] region, or in Rwanda as a whole". [FN632] Further, he submits that by failing to take into consideration the factor that the Appellant's "sphere of influence was limited to his position in the Tea Factory", the Trial Chamber erred in law. [FN633]

FN631. Trial Judgement, paras. 880 and 881.

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FN632. Appellant's Brief, para. 511.

FN633. Ibid., para. 512 to 514.

378. In response, the Prosecution asserts that, contrary to the Appellant's submission, the Trial Chamber did take the relative position of authority of the Appellant in the Rwandan conflict into account, in holding that:

The population of the Kibuye préfecture, including the villageois plantation workers, ... perceived **Musema** as a figure of authority and as someone who wielded considerable power in the region. [FN634]

FN634. Prosecution's Response, para. 8.4, referring to Trial Judgement, para. 881.

The Prosecution notes that this finding was referred to by the Trial Chamber in the sentencing section of the Trial Judgement, when addressing the aggravating circumstances, to hold that, by virtue of this perception of authority and power, **Musema** "was in a position to take reasonable measures to help in the prevention of crimes". [FN635] It submits that the Trial Chamber fulfilled its duty to take into account the need to develop a range of sentences based upon the relative position of the Accused in the Rwandan conflict. [FN636]

FN635. Trial Judgement, para. 1003.

FN636. Prosecution's Response, para. 8.7.

(b) Discussion

379. Under Article 24 of the Statute, the **Appeals Chamber** may "affirm, reverse or revise" a sentence imposed by a Trial Chamber. The jurisprudence of ICTY and ICTR reveals that the **Appeals Chamber** will not revise a sentence unless it believes that the Trial Chamber has committed a "discernible" error in exercising its discretion, or has failed to follow the applicable law. [FN637] The onus of demonstrating how the Trial Chamber ventured outside its "discretionary framework" in imposing sentence in an appeal against sentence is upon the Appellant. [FN638]

FN637. Serushago Sentencing Appeal Judgement, para. 32; Jelisic Appeal Judgement, para. 99; Celebici Appeal Judgement, para. 725; Furundzija Appeal Judgement, para. 239; Aleksovski Appeal Judgement, para. 187; and Tadic Appeal Judgement, paras. 20 and 22.

FN638. Celebici Appeal Judgement, para. 725.

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380. The factors that a Trial Chamber is obliged to take into account in sentencing a convicted person are set forth in Article 23 of the Statute and Rule 101 of the Rules. Those factors are: the general practice regarding prison sentences in the courts of Rwanda; the gravity of the offence; the individual circumstances of the convicted person; any aggravating circumstances; any mitigating circumstances, including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; and the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served. This list is not exhaustive; it was held by the **Appeals Chamber** of ICTY that it is inappropriate for it "to attempt to list exhaustively the factors that [...] should be taken into account by a Trial Chamber in determining sentence". [FN639]

FN639. Celebici Appeal Judgement, para. 718; Furundzija Appeal Judgement, para. 238.

381. In Tadic, the **Appeals Chamber** of ICTY also considered the relative position of a convicted person in a command structure to be a relevant factor in determining sentence. In that case, the **Appeals Chamber** considered that, while Tadic's criminal conduct was "incontestably heinous", his level in the command structure in comparison to his superiors was low", [FN640] and consequently, the sentence passed by the Trial Chamber was excessive. [FN641] In subsequent ICTY **Appeals Chamber** decisions, the need to establish a gradation of sentencing has been endorsed. [FN642] In the Celebici appeal, the **Appeals Chamber** held that:

FN640. Ibid., para. 56.

FN641. The sentences imposed by the Trial Chamber, which ranged from 6 to 25 years, were revised, and a sentence of 20 years' imprisonment was passed in respect of each count, to be served concurrently.

FN642. See Celebici Appeal Judgement, para. 849, and Aleksovski Appeal Judgement, para. 184.

> [e]stablishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime ... the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified. [FN643]

FN643. Celebici Appeal Judgement, para. 847.

382. It went on to state that "while the **Appeals Chamber** has determined that it is important to establish a gradation in sentencing, this does not detract from the finding that it is as essential that a sentence take into account all the

circumstances of an individual case". [FN644] It follows that the jurisprudence of ICTY acknowledges the existence of a general principle that sentences should be graduated, that is, that the most senior levels of the command structure should attract the severest sentences, with less severe sentences for those lower down the structure. This principle is, however, always subject to the proviso that the gravity of the offence is the primary consideration for a Trial Chamber in imposing sentence. [FN645]

FN644. Celebici Appeal Judgement, para. 849.

FN645. Celebici Appeal Judgement, para. 731; Aleksovski Appeal Judgement, para. 182; Krstic Trial Judgement, para. 698; Todorovic Trial Judgement, para. 31; Kupreskic Trial Judgement, para. 852; and Celebici Trial Judgement, 1225.

383. As to whether this principle should be applicable to the Trial Chambers of this Tribunal, as a general principle, this **Appeals Chamber** agrees with the jurisprudence of ICTY that the most senior members of a command structure, that is, the leaders and planners of a particular conflict, should bear heavier criminal responsibility than those lower down the scale, such as the foot soldiers carrying out the orders. But this principle is always subject to the crucial proviso that the gravity of the offence is the primary consideration of a Trial Chamber in imposing sentence; if the offence is serious enough, a Trial Chamber should not be precluded from imposing a severe penalty upon the accused, just because he is not at a high level of command.

384. In paragraphs 999 to 1004 of the Trial Judgement, the Trial Chamber sets out the circumstances of the case. It found that **Musema** was the Director of the Gisovu Tea Factory, one of the most successful tea factories in Rwanda, and that he exercised legal and financial control over his employees. He personally led certain attacks, and was perceived by individuals as a figure of authority and as someone who wielded considerable power in the region, and had powers enabling him to remove, or threaten to remove, an individual from his or her position at the tea factory. These findings show that, while no reference was made to the role played by **Musema** in the context of the larger political picture in Rwanda, the Trial Chamber did consider **Musema's** role in the Kibuye préfecture, and found him to be an influential figure of considerable importance. It follows that **Musema** was not a low-level figure in the overall Rwandan conflict. Taking into account all the circumstances of the case, including the fact that **Musema** was an influential figure of considerable importance in the Kibuye préfecture, it can be said that the offences were of utmost gravity. The Appellant has therefore failed to demonstrate that the Trial Chamber ventured outside its discretionary framework in imposing the maximum sentence of life imprisonment. Accordingly, the **Appeals Chamber** finds no error on the part of the Trial Chamber, and rejects this argument.

2. The Trial Chamber erred by failing to pass a sentence commensurate with other sentences passed by ICTR for the crime of genocide

(a) Arguments of the parties

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385. The Appellant notes that a conviction for the crime of genocide does not necessarily have to attract a sentence of life imprisonment. [FN646] He submits that the sentence of life imprisonment imposed upon **Musema** was "out of proportion with the crimes of which he was convicted", in comparison with the sentence of 15 years' imprisonment imposed upon the Accused Omar Serushago in the case of The Prosecutor v. Serushago. [FN647] While acknowledging that Serushago benefited from pleading guilty and cooperating with the Prosecution, the Appellant argues that the appropriate credit gained by the plea and cooperation should not be such that Serushago received a 15-year sentence, whereas **Musema** received a life sentence. [FN648] In comparing the two cases, he notes that Serushago's criminal conduct spanned a three month period, whereas **Musema** was convicted of crimes occurring on six occasions. Further, Serushago was a leader of a group of Interahamwe militia, while **Musema** had control only over the actions of the Tea Factory workers. [FN649]

FN646. Appellant's Brief, para. 515. At the time that the Appellant filed his brief, two persons convicted of the crime of genocide at ICTR, Ruzindana and Serushago, had received sentences of imprisonment of 25 and 15 years respectively.

FN647. Appellant's Brief, para. 522.

FN648. Ibid., para. 521.

FN649. Ibid., para. 519.

386. In response, the Prosecution submits that the Appellant has failed to discharge the burden of showing that the Trial Chamber made a discernible error in imposing a sentence of life imprisonment; it also submits that the sentence was well within the discretion of the Trial Chamber. [FN650]

FN650. Prosecution's Response, paras. 8(10) and 8(11).

(b) Discussion

387. In Celebici, the **Appeals Chamber** of ICTY held that "as a general principle such comparison [of one case with another] is often of limited assistance", and while

> It is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results". [FN651]

FN651. Celebici Appeal Judgement, para. 719.

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Similarly, it was held that:

[a] previous decision may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise a Trial Chamber is limited only by the provisions of the Statute and the Rules. [FN652]

FN652. Furundzija Appeal Judgement, para. 250.

388. As to whether the Appellant's sentence was manifestly disproportionate to the sentence imposed in the Serushago case, **Musema** was convicted of genocide and two counts of crimes against humanity (extermination and rape) on the basis of his involvement in several incidents. [FN653] He pleaded not guilty, but was found guilty at the end of the trial. The aggravating circumstances of the offences, as set out in paragraphs 1001 to 1004 of the Trial Judgement, included the following: **Musema's** role in leading the attackers during the six incidents; his use of a rifle during the attacks; his failure to prevent tea factory employees from taking part in the attacks and tea factory vehicles from being used to that effect; his failure to take reasonable measures to help in the prevention of crimes; and his failure to punish the perpetrators over whom he had control. As to the incidents, the Trial Chamber found that thousands of Tutsi refugees were killed at Muyira Hill on 13 May, and that **Musema** was among the leaders of that attack. [FN654] If found that at the end of May, **Musema** participated in the attack on Nyakavuma cave, during which over 300 Tutsi civilians died. [FN655] The mitigating circumstances included his admission that genocide occurred against the Tutsi people in Rwanda in 1994; his distress about the deaths of so many innocent people; his expression of regret that the Gisovu Tea Factory facilities may have been used by the perpetrators of atrocities; and his cooperation through his admission of facts pertaining to the case, thus, facilitating an expeditious trial. [FN656]

FN653. The incidents occurred at Gitwa Hill on 26 April 1994; Rwirambo Hill between 27 April and 3 May; Muyira Hill on 13 May; Muyira Hill on 14 May; Muyira Hill in mid-May (between 10 to 20 May); Mumataba Hill in mid-May; and Nyakavuma Cave at the end of May.

FN654. Trial Judgement, para. 902.

FN655. Ibid., para. 921.

FN656. Ibid., para. 1005 to 1007.

389. As for Serushago, he was charged with genocide and four counts of crimes against humanity (murder, extermination, torture and rape). He pleaded guilty to the genocide count and three of the counts of crimes against humanity (murder, extermination and torture), following which, a plea agreement was also entered into between the Prosecution and Serushago, which formed the basis for the

sentence. The aggravating circumstances of the case included Serushago's personal murder of four Tutsi, and the killing of 33 Tutsi by militiamen under his authority; [FN657] his leading role and enjoyment of definite authority in the region, and participation in numerous meetings during which the fate of the Tutsi was decided; [FN658] and his commission of the crimes with pre-meditation. [FN659] The mitigating circumstances consisted of Serushago's cooperation with the Prosecutor, which enabled the arrest of several high-ranking suspected persons to be carried out, including his agreement to testify for the Prosecution in other cases before the Tribunal; his voluntary surrender; his guilty plea; the political background of his family; the assistance provided by him to several Tutsi and a moderate Hutu; his individual circumstances, suggesting possible rehabilitation; and his expression of remorse and contrition. [FN660] The Trial Chamber expressed the opinion that "exceptional circumstances in mitigation" could afford him some clemency. [FN661]

FN657. Serushago Trial Judgement, para. 27.

FN658. Ibid., para. 28.

FN659. Ibid., para. 30.

FN660. Ibid., paras. 31 to 42.

FN661. Ibid., para. 42.

390. The **Appeals Chamber** finds that while there may appear to be some superficial similarities between the convictions of the two accused, the circumstances are essentially different. There are material differences between Serushago's case and that of the Appellant. While Serushago personally murdered four Tutsi, and his militiamen killed 33 others, **Musema** was involved as a leader of perpetrators in several incidents, resulting in the death of thousands of Tutsis. In Serushago's case, exceptional circumstances in mitigation were found to exist. The same cannot be said for the Appellant. The **Appeals Chamber** also understands **Musema** to be arguing that, because Serushago's criminal conduct spanned a greater period of time than **Musema's** (three months rather than five weeks), Serushago's culpability is graver than **Musema's**. This argument is not persuasive: in both cases, the criminal conduct spanned substantial periods of time. Similarly, the **Appeals Chamber** rejects the Appellant's argument that because Serushago was the leader of a group of Interahamwe militia, whereas **Musema** was "only" the leader of tea factory workers, the culpability of Serushago as a leader was greater than that incurred by **Musema**. Both accused were leaders who exercised considerable authority. Consequently, the circumstances of the two cases are not so similar to justify a claim that the Trial Chamber erred by imposing a disproportionate sentence in respect of **Musema**. As the Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion, this argument is dismissed.

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3. The Trial Chamber erred by failing to take due account of the mitigating factors in this case

(a) Arguments of the parties

391. The Appellant contends that "there was substantial mitigation which the Trial Chamber failed to take sufficiently into account" [FN662] The factors to which he refers are his "limited area of authority", his participation "in crimes on a limited number of occasions", his admission "from the outset that the crime of genocide had been committed in Rwanda", and his expression of "regret for what had happened and sympathy for the victims of genocide". [FN663]

FN662. Appellant's Brief, para. 527.

FN663. Ibid., paras. 528 to 530.

392. Additionally, **Musema** argues that the Trial Chamber should not (para. 1008 of the Trial Judgement) have expected him to show remorse for his personal role in the atrocities, as such sentiment can never be expected from a defendant who pleads not guilty.

393. In response, the Prosecution argues that while Rule 101(B)(ii) requires a Trial Chamber to consider any mitigating circumstances, the question of the due weight to be attached thereto is a matter of discretion for the Trial Chamber. [FN664] It relies upon the holding in the Serushago Sentencing Appeal Judgement that the Trial Chamber's decision "may not be disturbed on appeal unless the Appellant shows the following: (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". [FN665] The Prosecution contends that the Appellant's argument is not that the Trial Chamber failed to take into account a particular mitigating circumstance, but that the Trial Chamber failed to take sufficiently into account the mitigating circumstances. [FN666] It also submits that the Trial Chamber was free to note the absence of any remorse on the part of the Appellant. [FN667]

FN664. Prosecution's Response, para. 8.18.

FN665. Serushago Sentencing Appeal Judgement, para. 23.

FN666. Prosecution's Response, para. 8.19.

FN667. Ibid., para. 8.22.

(b) Discussion

394. The **Appeals Chamber** understands the Appellant to be not merely arguing that the Trial Chamber failed to take due account of mitigating circumstances, as suggested by the Prosecution, but, in effect, to be advancing two separate arguments. The first of these arguments is that the Trial Chamber failed to take into account mitigating circumstances that it ought to have taken into consideration in imposing sentence, namely, his "limited area of authority", and his participation in offences "on a limited number of occasions". The second argument is that, while acknowledging that the Trial Chamber took certain mitigating circumstances into account for the purpose of sentencing **Musema**, insufficient weight was accorded to them; those circumstances include his admission from the outset that genocide took place in Rwanda, and his expression of "regret for what had happened and sympathy for the victims of genocide".

395. As regards the first argument, in order for the **Appeals Chamber** to revise a sentence, the Appellant must show that the Trial Chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law. Under Rule 101(B)(ii), a Trial Chamber is required, as a matter of law, to take into account any mitigating circumstances. What constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion. The Appellant contends that the Trial Chamber should have taken into account his "limited area of authority", and his participation in offences "on a limited number of occasions". The **Appeals Chamber** disagrees. The Trial Chamber found that " **Musema** exercised de jure power and de facto control over Tea Factory employees and the resources of the Tea Factory", [FN668] and

FN668. Trial Judgement, para. 880.

[I]n relation to other members of the population of Kibuye préfecture, including thé villageois plantation workers, ... the Chamber is satisfied that such individuals perceived **Musema** as a figure of authority and as someone who wielded considerable power in the region [...] [FN669]

FN669. Ibid., para. 881.

The Givuso Tea Factory was held to be "one of the most successful tea factories in Rwanda and ... a major economic enterprise in Kibuye" [FN670] The **Appeals Chamber** has already considered the manner of **Musema's** participation in the offences. The **Appeals Chamber** is not, therefore, satisfied that the Trial Chamber erred in its determination of the applicable mitigating circumstances by failing to find that **Musema's** authority in the Kibuye préfecture, and his participation in the offences, were limited.

FN670. Ibid., para. 999.

396. The second argument is whether the mitigating circumstances that were found

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by the Trial Chamber to exist, [FN671] namely, **Musema's** admission that genocide took place in Rwanda, and his expression of regret and sympathy for the victims of genocide, were properly taken into account by the Trial Chamber when imposing sentence. With regard to the former circumstance, it is the **Appeals Chamber's** understanding that, although **Musema** did not admit any personal involvement in any genocidal activity, his admission that a genocide occurred in Rwanda considerably shortened the length of his trial, by expediting proof. Upon finding that mitigating circumstances exist, a decision as to the weight to be accorded thereto lies within the discretion of the Trial Chamber. [FN672] In sentencing the Appellant, the Trial Chamber stated that "[h]aving reviewed all the circumstances of the case, the Chamber is of the opinion that the aggravating factors outweigh the mitigating factors". The gravity of the offence is the primary consideration for a Trial Chamber in sentencing a convicted person. If a Trial Chamber finds that mitigating circumstances exist, it is not precluded from imposing a sentence of life imprisonment, where the gravity of the offence requires the imposition of the maximum sentence provided for. The **Appeals Chamber** agrees with the finding of the Trial Chamber that the offences for which **Musema** was convicted were extremely serious, and finds that the Appellant has failed to demonstrate that the Trial Chamber erred in exercising its discretion as to the weight to be accorded to the mitigating circumstances. Accordingly, this argument must fail.

FN671. Trial Judgement, paras. 1005 to 1007.

FN672. Celebici Appeal Judgement, para. 775, Kambanda Appeal Judgement, para. 124.

397. Finally, the Appellant argues that the Trial Chamber, in paragraph 1008 of the Trial Judgement, should not have expected **Musema** to have shown remorse for his personal role in the atrocities, as such sentiment can never be expected from a defendant who pleads not guilty. Under Article 20 of the Statute, which sets out the rights of the accused, an accused is entitled to a fair and public trial. Where the right to stand trial is exercised, and the accused is convicted, the **Appeals Chamber** agrees with the Appellant that it would be unreasonable to penalise him additionally for his failure to show remorse at trial. But whether this is what the Trial Chamber did has to be gathered from a contextual reading of the Trial Chamber's findings on the point. The Trial Judgement sets out the aggravating circumstances in four paragraphs, [FN673] and the mitigating circumstances in three. [FN674] It then concludes at paragraph 1008 as follow:

FN673. Trial Judgement, paras. 1001-1004.

FN674. Ibid., paras. 1005-1007.

Having reviewed all the circumstances of the case, the Chamber is of the opinion that the aggravating circumstances outweigh the mitigating circumstances, especially as on several occasions **Musema** personally led attackers to attack large numbers of Tutsi refugees and raped a young Tutsi woman. He knowingly and consciously participated in the commission of crimes and never showed remorse for his personal role in the atrocities.

On considering the context in which reference to remorse was made, the **Appeals Chamber** finds that the Trial Judgement was, on this point, alluding to the acknowledged circumstances which showed that the Accused exhibited a feeling of satisfaction in committing the crimes of which he was found guilty. In the view of the **Appeals Chamber**, it is that discernible feeling of satisfaction that the Trial Chamber was referring to when it found that the Accused "never showed remorse for his personal role in the atrocities". There is no reason why the conduct of the accused could not be regarded as an aggravating circumstance.

398. Accordingly, the Appellant's third argument must fail.

D. Conclusion

399. It follows that the Appellant has failed to demonstrate any error on the part of the Trial Chamber invalidating the sentence of life imprisonment which it imposed. The **Appeals Chamber's** quashing of the conviction on Count 7 has no impact on this finding. There is no doubt that the Trial Chamber's findings as to the sentence to be imposed on **Musema** would have been the same if it had acquitted **Musema** of the charge in question. Accordingly, the **Appeals Chamber** affirms the sentence imposed upon **Musema** by the Trial Chamber.

VI. DISPOSITION

For these reasons, the **Appeals Chamber**,

Considering Article 24 of the Statute and Rule 118 of the Rules,

Noting the respective written submissions of the parties and their oral arguments at the hearings of 28 and 29 May 2001 and of 17 October 2001,

Sitting in open court,

Unanimously dismisses the First, Second and Sixth Grounds of Appeal raised by Alfred **Musema**, subject to the following paragraph,

Finds the Appellant Alfred **Musema**, in the light of the additional evidence presented, not guilty on Count 7 (rape as crime against humanity); and holds that it is not necessary to rule on the Fourth and Fifth Grounds of Appeal for the reasons set out in paragraphs 343 and 345 of this Appeal Judgement,

Recalls that the Appellant withdrew his Third Ground of Appeal,

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Affirms the verdict of guilty entered against Alfred **Musema** on Count 1 (genocide) and Count 5 (extermination as crime against humanity),

Dismisses Alfred **Musema's** Appeal against Sentence and affirms the sentence of life imprisonment handed down,

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

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

Claude Jorda, Presiding Judge

Lal Chand Vohrah

Mohamed Shahabuddeen

Rafael Nieto-Navia

Fausto Pocar

Judge Shahabuddeen appends a Declaration to this Judgement.

Dated this sixteenth day of November 2001

At The Hague The Netherlands

Seal of the Tribunal

ATTACHMENT

DECLARATION OF JUDGE SHAHABUDDEEN

1. I support the judgement but propose to state my understanding of two points, one concerning the reliability of evidence, the other concerning the test for deciding on the effect of additional evidence.

A. Reliability of Evidence

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1. The Problem

2. The point here relates to the reproduction, in paragraph 46 of the judgement, of the holding of the ICTY **Appeals Chamber** in Kordic [FN1] that -

FN1. Prosecutor v. Dario Kordic and Mario Cerkez, IT-95-14/2-AR73.5, of 21 July 2000, para. 24.

the reliability of a statement is relevant to its admissibility, and not just to its weight. A piece of evidence may be so lacking in terms of the indicia of reliability that it is not 'probative' and is therefore inadmissible.

3. This proposition was adopted in paragraph 286 of the appeal judgement in Akayesu. [FN2] I believe that that judgement was correct, but will note that that case, like Kordic, was concerned with the question of the admissibility of an out-of-court statement, and not with evidence generally.

FN2. ICTR-96-4-A, of 1 June 2001.

4. My hesitation is that the Kordic proposition may be given a wider application than may have been intended: it could be understood as meaning that evidence of all kinds must be shown to be reliable before it is admitted. I do not think it was meant in that universal way. In general, I agree with the view expressed by J.R.W.D Jones that -

... whilst evidence may be excluded because it is unreliable, it is not required that evidence be shown to be reliable before it is admitted. The evidence need only be shown to be relevant, in order for it to be admissible. [FN3]

FN3. J.R.W.D.Jones, The Practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda, 2nd ed. (New York, 2000), at p. 415. He relied on Prosecutor v. Delalicc, Decision on Prosecutor's Oral Requests for the Admission of Exhibit 155 into Evidence, etc., IT-96-21-T, of 19 January 1998, para. 32, and on Prosecutor v. Delalicc, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, IT-96-21-T, of 19 January 1998, para. 19.

5. Jones was not dealing with possible grounds of inadmissibility other than unreliability, and he accepted that evidence which was in fact shown to be unreliable at the admissibility stage might be then excluded as inadmissible. His focus was directed to the question whether there was a requirement that evidence must be shown to be reliable as a pre-condition of admissibility. With exceptions, I do not think that there is such a requirement.

2. In general, at the admissibility stage, the credibility of evidence (including reliability) has to be assumed; reliability goes to weight and is

assessed later

6. Under the system of the Tribunal, whatever may be the situation in particular national systems, the principle is this: reliability is a component of credibility, credibility goes to weight, and weight is assessed at the end of the proceedings.

7. Rule 89(C) of the Rules of Procedure and Evidence ("Rules") provides that a "Chamber may admit any relevant evidence which it deems to have probative value". As has been repeatedly and correctly pointed out, relevance implicitly requires some component of probative value: evidence is relevant if it is probative, that is to say, if it has a tendency to make the existence of a fact that is of consequence to the determination of the case [FN4] more probable or less probable. [FN5] Evidence which does not have this tendency to prove what has to be proved is not probative; it is therefore not relevant and is not admissible. This applies to all evidence, whether hearsay or direct. [FN6]

FN4. Stephen's definition of the word "relevant" is usually cited in works on evidence published in England. The language above derives from United States texts. See, inter alia, Rule 401 of the Federal Rules of Evidence, Evidence Rules: Federal Rules of Evidence and California Evidence Code, (Minnesota, 1995), p. 24, and McCormick on Evidence, 4th ed. (Minnesota, 1992), pp. 339ff.

FN5. As to the relevant standard of proof, McCormick on Evidence, supra, at p. 339, states that "... the objection that the inference for which the fact is offered 'does not necessarily follow' is untenable". However, in some cases a criminal standard applies, e.g., where the prosecution seeks to have a statement admitted pursuant to section 23 or section 24 of the Criminal Justice Act 1988 (U.K.).

FN6. Prosecutor v. Blaskicc, IT-95-14-T, of 21 January 1998, para. 10.

8. But a distinction has to be made between a judgement that evidence is probative and the basis on which the judgement is made. A judgement that evidence is probative is made on the basis that it is credible, including a finding that it is reliable. At the admissibility stage it is assumed, rather than found, that the evidence is credible. It is on the basis of that assumption that it is determined, at that stage, whether the evidence can advance the proof of the fact which has to be proved and is therefore probative. Evidence which cannot do that (even if it is assumed to be credible) is not probative; it is therefore not relevant and is not admissible. If, on the basis of an assumption that it is credible, it is determined that the evidence can establish the fact to be proved and is therefore admitted, the next question (to be answered at a later stage of the proceedings) is to what extent it does indeed establish the fact to be proved. It is this next question which raises the point whether the evidence is credible, including the issue whether, even if the witness is speaking truthfully, he is for one reason or another mistaken. And it is here that the presence or absence of reliability

matters.

9. In general, then, a decision to admit assumes that the evidence is credible: it assumes matters, such as reliability, which go to credibility. The assumption that the evidence is credible is then verified after the making of a decision to admit it; this is part of the exercise concerned with the assessment of the weight to be assigned to the admitted evidence. [FN7] If the evidence is then judged not credible, it is simply given no weight and eliminated from the proof, even though it was earlier admitted.

FN7. Thus, dealing with additional evidence, Viscount Dilhorne, L.C., said that it "is only after it has been admitted and, it may be, subjected to cross-examination, that its weight can be assessed ...'' See Stafford v. Director of Public Prosecutions [1973] 3 All ER 762, HL, at 764.

3. The foregoing general rule may be displaced in some cases but not in all

10. What appears to be a general rule that credibility (including reliability) is assumed at the stage of admissibility is, however, inapplicable where a different rule has been laid down by or under the Rules; further, the assumption stands rebutted if it in fact appears at that stage that the evidence is indeed unreliable. Nothing needs to be said on the latter branch; something may be said on the former.

11. In respect of hearsay, the existence of a different rule has come into being, and for good reason. Granted that hearsay evidence is considered to be admissible under Rule 89(C) [FN8] its nature and provenance call for special care when deciding to admit it. There may be cause for not admitting it where it has passed through a multitude of intermediaries before reaching the court; these are matters that can often be sufficiently explored at the stage of admissibility of the particular piece of hearsay evidence to justify non-reception on grounds of unreliability. [FN9] Subject to the qualification mentioned below, the developed jurisprudence, as it is evidenced by Kordic and other cases, accepts that reliability must be established before hearsay evidence is admitted. A rule to that effect could be founded on Rule 89(B), reading:

FN8. Exceptions permitting admissibility are of course made in made in common law countries.

FN9. In this connection, a Chamber may use the power which it has under Rule 89(E) of the Rules of Procedure and Evidence to "request verification of the authenticity of evidence obtained out of court".

In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

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12. It is recognised that in Delalic [FN10] an ICTY Trial Chamber rejected a defence submission "that a determination of reliability should be seen as a separate, first step in assessing a piece of evidence offered for admission". [FN11] As a general matter, the rejection was right. I consider, however, that the rejection is today to be regarded as qualified in the particular case of hearsay evidence: the accumulated jurisprudence demonstrates a requirement for proof of reliability before such evidence is admitted. [FN12]

FN10. Prosecutor v. Delalicc, Decision on the Motion of the Prosecution for the Admissibility of Evidence, IT-96-21-T, of 19 January 1998.

FN11. Ibid., para. 19. See likewise Prosecutor v. Delalicc, Decision on Prosecution's Oral Requests for the Admission of Exhibit 155, etc., IT-96-21-T, of 19 January 1998, paras. 31 and 32.

FN12. See Aleksovski, IT-95-14/1-AR73, of 16 February 1999, para. 15.

13. But this is said with the following qualification: it may not be practicable to make a full exploration of all the circumstances relating to the reliability of an out-of-court statement at the admissibility stage. In consequence, a Chamber may not be in a position to decide that the reliability of such a statement has or has not been definitively established; it may, however, be able to find that there are indicia of reliability. In such a case, it may admit the evidence, deferring a final decision for a later stage of the proceedings.

14. Thus, in Delalic, the Trial Chamber admitted certain out-of-court documents on the basis that there were "sufficient indicia of reliability". [FN13] In doing so, it "emphasised that this decision does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted". It added that these "are matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to be attached to these exhibits". In effect, since it treated "authenticity" as covered by "reliability", it treated "reliability" as a matter of "weight" which could be "assessed at a later stage". On this basis, it considered that definitive proof of reliability as a condition of admissibility of out-of-court statements was not necessary; provisional proof was all that was required at that threshold stage.

FN13. Prosecutor v. Delalicc, Decision on the Motion of the Prosecution for the Admissibility of Evidence, IT-96-21-T, of 19 January 1998, para. 31.

15. As to direct evidence, it may be even less feasible to explore questions of reliability at the admissibility stage; reliability may depend on the totality of the evidence and may only be capable of definitive determination at a later stage of the proceedings. A party may not always be in a position to show that its direct evidence is reliable at the admissibility stage; if, on the ground that reliability is not shown at that point, the evidence is then shut out, the court

deprives itself of the opportunity of later finding that the evidence was in fact reliable.

16. In such cases, the general principle should therefore apply: reliability should be left for assessment as part of weight. In the present matter, it is observed that it was in the final judgement that the Trial Chamber considered whether the direct evidence of certain witnesses was or was not "reliable" [FN14], the evidence having been admitted earlier. In my respectful view, that was the correct approach.

FN14. Prosecutor v. Alfred **Musema**, ICTR, 96-13-T, of 27 January 2000, paras. 696, 697, 698, 706, 709, 714,715, 717,721,724 and 745.

4. Where the Rules intend reliability to be a condition of admissibility, they say so

17. It is recognised that Rule 95 of the Rules bars admissibility in the case of unreliability, but only in particular circumstances. The Rule reads:

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. [Emphasis added].

18. The second branch of the Rule excludes evidence as not admissible if, even where the evidence is perfectly reliable [FN15], its admission is antithetical to or would seriously damage the integrity of the proceedings. It need not be considered further.

FN15. Commenting on the corresponding ICTY Rule, it was said that a Trial Chamber "will refuse to admit evidence -- no matter how probative -- if it was obtained by improper means". See Second Annual Report of the ICTY to the General Assembly, para.26, footnote 9, in ICTY Yearbook 1995, at p. 287.

19. The first branch of the Rule excludes evidence as not admissible if it was obtained by methods which cast substantial doubt on its reliability. [FN16] On a contrario reasoning, the Rule implies that, in cases not within the scope of the Rule, the principle is that proof of reliability is not a condition precedent to admissibility; reliability is to be later determined as a matter going to weight.

FN16. The prohibition applies even if the confession is otherwise voluntary under Rule 92 which provides that a "confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 [relating to the right of the accused to have counsel with him during such questioning] were complied with, be presumed to have been free and voluntary unless the contrary is proved".

20. With the exception referred to, the Rule establishes no linkage between admissibility and unreliability.

5. General legal thinking

21. Is such a linkage to be found in general legal thinking? Rule 89(A) of the Rules provides that the Chambers "shall not be bound by national rules of evidence". It does not prohibit a Chamber from consulting national rules on the subject, and that has indeed been done in other cases.

22. Accordingly, it may be noted that, in some systems, reliability is linked to admissibility, but only in limited circumstances. Thus, in one jurisdiction, legislation provides that if a "confession was or may have been obtained ... in consequence of anything said or done which was likely, in the circumstances existing at the time, to render [it] unreliable ..., the court shall not allow the confession to be given in evidence ...''. [FN17]

FN17. See s. 76(2)(b) of the Police and Criminal Evidence Act 1984 (U.K.) (emphasis added), and Cross and Tapper on Evidence, 8th ed. (London, 1995), at pp. 684-687, referring to the earlier position in New Zealand and Victoria. The partial congruence with Rule 95 may be noted.

23. So, there, the courts have been required not to admit evidence of a specific kind, namely, confessions, on the ground of unreliability arising from particular circumstances. In part, the courts of the jurisdiction concerned might already have had such a duty under the law relating to voluntariness. [FN18] The important thing, however, is that, in the case of other types of evidence, the assumption of the legislation is that, in the absence of exceptions, reliability has to be left to be considered as part of the weight of the evidence and does not have to be established before the evidence is admitted. [FN19]

FN18. In some respects, reliability is wider than voluntariness, in other respects narrower.

FN19. It may be noted that the view of the Royal Commission on Criminal Procedure, Cmnd 8092 (U.K.), was that the matters in question should go to weight and not to admissibility. The opposite view, which prevailed, had been earlier advanced in the 11th Report of the English Criminal Law Revision Committee, Cmnd 4991, paras. 61-66. And see Cross and Tapper, op. cit., at p. 684.

24. It is also useful to bear in mind the statement of the United States Supreme Court in United States v. Matlock [FN20] that "the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence".

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FN20. 415 U.S.164, at 172-173, per Justice White, delivering the opinion of the court.

6. Conclusion

25. The general principle appears to be that reliability goes to weight and not to admissibility and is to be assessed only when weight is evaluated. The general principle is displaced only by exceptions made by or under the Rules. Where exceptions do not apply, the general principle does. Accordingly, in the normal situation there is no requirement for proof of reliability as a condition of admissibility; reliability is to be left for later evaluation as part of weight.

B. The Test For Deciding On The Effect Of Additional Evidence

26. Paragraph 185 of the judgement adopts the following statement from the Kupreskic judgement of the ICTY **Appeals Chamber:**

The test to be applied by the **Appeals Chamber** in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings? ("reasonable conclusion criterion"). [FN21]

FN21. IT-95-16-A, of 23 October 2001, para. 75.

27. Supporting references were not given for that statement. None had to be, but the absence excuses inquiry.

28. The basis on which additional evidence is admitted is not the same as that on which evidence of a new fact is admitted. Otherwise, they have the same characteristics: they both represent evidence which was not before the Trial Chamber and they both involve a determination by the **Appeals Chamber** of their impact on the judgement of the Trial Chamber. It would appear that the criterion for this determination should be the same in both cases.

29. As to what is the criterion, Article 25 of the Statute of the Tribunal speaks of a new fact "which could have been a decisive factor in reaching the decision" ("decisive factor criterion"). Evidently, this is the criterion to be applied by the **Appeals Chamber** in determining the impact of a new fact on the judgement. It would appear that the same criterion should apply to the determination of the impact of additional evidence on the judgement.

30. It may be said that the decisive factor criterion yields the same result as

the reasonable conclusion criterion. But perhaps not quite. These are the reasons for hesitation.

31. In normal appellate practice, the reasonable conclusion criterion applies where all the evidence has in fact been assessed by the trial court and where the conclusion reached by the trial court on that evidence is known. The test then is whether the known conclusion reached on the assessed evidence was one which no reasonable tribunal would have reached on that evidence. Where that test is met, what is being said is that something went wrong in the handling of the case by the court below.

32. In the case of additional evidence, the evidence in question was never before the trial court and the latter never came to a conclusion on it: it is not being said that anything went wrong in the handling of the case by the court below. All that can be said by an appellate court is that the additional evidence could or could not have been a decisive factor in reaching the decision which was reached by the court below. The stress is to be laid on the word "could". What this looks to is the capacity of the additional evidence to function as a decisive factor. The lower court might or might not in fact have considered it to be a decisive factor: one never knows, for the lower court (even if it could be reconstituted) is not being interrogated. But that is not the question. The question is whether the appellate court judges that the evidence had the capacity to function as a decisive factor.

33. There is ground for apprehension as to whether the two tests yield different results in marginal but real situations. On the decisive factor criterion, it may be possible for the **Appeals Chamber** to reverse the conviction in circumstances in which it may have to maintain it on the criterion of reasonable conclusion. The decisive factor test is thus more favourable to the accused. And so it should be, for what is being dealt with is additional evidence which was not before the Trial Chamber and on which its thinking is therefore not known. It is right to make extra allowance for the possibilities involved in that circumstance. In my view, the decisive factor criterion is to be preferred.

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

Mohamed Shahabuddeen

Dated this 16th day of November 2001

At The Hague The Netherlands

Seal of the Tribunal

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ATTACHMENT

ANNEX A

PROCEEDINGS ON APPEAL

A. Appeal against Judgement and Sentence

1. On 1 March 2000 **Musema** filed his Notice of Appeal against the Judgement of the Trial Chamber, [FN1] setting out six grounds of appeal against conviction as well as several arguments against the sentence imposed by the Trial Chamber. [FN2] On 7 March 2000, the President of the **Appeals Chamber** designated Judge Lal Chand Vohrah as Pre-Hearing Judge in the instant case. [FN3] **Musema** filed his Appellant's Brief on 23 May 2000 ("Appellant's Brief"). [FN4] On 11 and 30 August 2000, the Pre-Hearing Judge granted two of the Prosecutor's motions seeking extension of the time-limit for filing the Respondent's Brief, [FN5] one of them citing the fact that the Appellant's Brief was received late and was incomplete, [FN6] and the other that the Notice on Appeal was not received. [FN7] The Prosecution finally filed its Respondent's Brief on 13 September 2000 ("Respondent's Brief"). [FN8] On 13 October 2000, **Musema** filed a motion seeking an extension of the time-limits for filing his reply, [FN9] which was granted by the Pre-Hearing Judge on 6 November 2000. [FN10] The Brief in Reply was filed on 26 October 2000 ("Brief in Reply"). [FN11] On 21 February 2001, the Pre-Hearing Judge issued an order scheduling the hearing on appeal for 28 May 2001. [FN12] On 28 and 29 May 2001, the **Appeals Chamber** heard the parties' submissions at the seat of the Tribunal at Arusha.

FN1. Grounds of Appeal against Conviction and Sentence, filed on 1 March 2000.

FN2. The grounds of appeal against the conviction are set out as follows: (1) The burden and standard of proof (errors of law and of fact); (2) Late notice of witnesses; (3) Undue delay; (4) Amendment of the Indictment; (5) Service of the Indictment; and, (6) Cumulative charges.

FN3. "[Designation of Pre-Hearing Judges]", filed on 7 March 2000.

FN4. "Grounds of Appeal against Conviction and Sentence and Appellant's Brief on Appeal", filed on 23 May 2000. On that occasion, **Musema** notified the **Appeals Chamber** of his decision to withdraw the third ground of appeal raised in his Notice of Appeal (relating to undue delay).

FN5. "Decision (Prosecution Motion for the Extension of the Time-Limit for Filing the Respondent's Brief)", rendered on 11 August 2000; "Order (Prosecution supplementary Motion for the Extension of the Time-Limit for filing the Respondent's Brief), rendered on 30 August 2000.

FN6. "Prosecution Motion for the Extension of the Time-Limit for Filing the

Respondent's Brief", filed on 18 July 2000. The Appellant responded to the said motion on 2 August 2000. Cf. "Defence Reply to Prosecution Motion dated 17 July 2000 for Extension of Time Limit for Filing the Respondent's Brief".

FN7. "Prosecution Supplementary Motion for the Extension of the Time-Limit for filing the Respondent's Brief", filed on 24 August 2000.

FN8. "Prosecution Respondent's Brief in response to Alfred **Musema's** Grounds of Appeal against Conviction and Sentence and Appellant's Brief on Appeal", filed on 13 September 2000.

FN9. "Defence Motion requesting Extension of Time Limit for filing of Brief in Reply", filed on 16 October 2000. The Prosecution responded to the said Defence motion on 18 October 2000. Cf. "Prosecution's Response to the Defence Motion requesting an Extension of the Time-Limit for filing of its Brief in Reply".

FN10. "Order", issued on 6 November 2000.

FN11. "Appellant's Brief in Reply", filed on 26 October 2000.

FN12. "Order (hearing on Appeal)", issued on 21 February 2001. The said order was preceded by two others, one describing the organization of the proceedings ("Order (Time for hearing oral submissions"), issued on 28 March 2001 and the other fixing the date of the hearing ("Scheduling Order"), issued on 17 May 2001.

B. Motions filed by **Musema**

2. Sometime before the opening of the hearing on appeal, **Musema** filed a motion requesting the **Appeals Chamber** to order the Prosecution to disclose exculpatory evidence. To this end, **Musema** informed the **Appeals Chamber** that one of the accused persons in detention at the Tribunal's Detention Facility had given him a statement by a protected witness in the case of The Prosecutor v. Elizaphan Ntakirutimana. **Musema** contended that the said statement constituted exculpatory evidence with respect to Count 7 on which the Trial Chamber had found him guilty. In his motion, the Appellant requested the **Appeals Chamber** to order the Prosecution to disclose forthwith to the Defence, all the other statements by Witness II which it may have had in its possession, as well as any other relevant document, pursuant to Rule 68 of the Rules. The Appellant also sought leave to file supplementary grounds of Appeal. [FN13]

FN13. "Defence Motion Under Rule 68 Requesting the **Appeals Chamber** to Order the Prosecution to Disclose Exculpatory Evidence in its Possession to the Defence; and for leave to File Supplementary Grounds of Appeal", filed on 19 April 2001. The Prosecution responded to the said motion on 4 May 2000. Cf. "Response to Defence

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Motion Under Rule 68 Requesting the **Appeals Chamber** to Order the Prosecution to Disclose Exculpatory Evidence in its Possession to the Defence; and for leave to File Supplementary Grounds of Appeal".

3. On 17 May 2001, the Prosecution filed a notice of intention to disclose three witness statements to Counsel for the Appellant. [FN14] On 18 May 2001, the **Appeals Chamber** responded to **Musema's** motion, indicating that he had not presented any evidence which suggested to the **Appeals Chamber** to consider the Prosecution's decision as "[unjustified]" or that the Prosecution "[failed to fulfil its obligations]". The Chamber added that **Musema** had not clearly set forth the supplementary grounds of appeal that he intended to submit and that, consequently, the **Appeals Chamber** could not consider his request. [FN15]

FN14. "Notification of Intention to Disclose Three Witness Statements to Counsel for the Appellant", filed on 17 May 2001.

FN15. "Arrêt (Defence Motion Under Rule 68 Requesting the **Appeals Chamber** to Order the Prosecution to Disclose Exculpatory Evidence in its Possession to the Defence; and for leave to File Supplementary Grounds of Appeal)", delivered on 18 May 2001.

4. At the opening of the hearing on appeal on 28 May 2001, **Musema** filed a confidential motion seeking leave to include three witness statements in his Appeal Book (Witnesses CB, EB and AC) as well as a supplementary ground of appeal based on that evidence. [FN16] In its Decision of 28 September 2001, the **Appeals Chamber**: (1) denied the motion for leave to file Witness AC's statement; (2) granted the requests for leave to file the statements of Witnesses EB and CB; (3) denied the request for leave to file a supplementary ground of appeal and ordered that the witnesses whose statements had been accepted be heard before the **Appeals Chamber**. In that same Order, the **Appeals Chamber** scheduled the hearing of the said Witnesses for 17 October 2001. [FN17]

FN16. "Confidential Motion by the Appellant to be filed under seal (i) to file two witness statements served by the Prosecutor on 18 May 2001 under Rule 68 disclosure to the Defence and; (ii) to file the Statements of Witness II served by the Prosecutor on 18 April 2001 and; (iii) to file a supplemental ground of appeal"; filed on 28 May 2001.

FN17. "Decision on the "Confidential Motion by the Appellant to be filed under seal (i) to file two witness statements served by the Prosecutor on 18 May 2001 under Rule 68 disclosure to the Defence and; (ii) to file the Statements of Witness II served by the Prosecutor on 18 April 2001 and; (iii) to file a supplemental ground of appeal"; and Scheduling Order", issued on 28 September 2001.

5. On 2 October 2001, the President of the Tribunal issued an order authorizing the **Appeals Chamber** to hold hearings in the instant case away from the seat of the Tribunal, namely at The Hague (The Netherlands). [FN18] On 11 October 2001, the

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President of ICTY ordered that Alfred **Musema**, upon being transferred to The Hague, be placed in custody at ICTY Detention Facility, and that he remain in custody until an order for his release or his continued detention is issued. [FN19] As agreed, Witnesses EB and CB as well as the parties' arguments relating to the said Witnesses were heard by the **Appeals Chamber** on 17 October 2001.

FN18. "President's authorization to the **Appeals Chamber** to hold hearings away from the seat of the Tribunal", issued on 2 October 2001.

FN19. "[President's order to have Alfred **Musema** remanded in custody at the Tribunal's Detention Facility]", issued on 11 October 2001.

C. Delivery of Judgement

6. Judgement was delivered on Friday 16 November 2001, at the seat of ICTY at The Hague.

ANNEX B

GLOSSARY

A. The Appeal

1. Filings of the parties

END OF DOCUMENT

Annex 4: *Prosecutor v. Brdanin and Talic*, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002

Case No. IT-99-36-T

IN TRIAL CHAMBER II

Before:
Judge Carmel Agius, Presiding

Judge Ivana Janu

Judge Chikako Taya

Registrar:
Mr. Hans Holthuis

Decision of:
20 September 2002

PROSECUTOR
v.
RADOSLAV BRDJANIN
and
MOMIR TALIC

DECISION ON THE MOTION FOR PROVISIONAL RELEASE OF THE ACCUSED MOMIR TALIC

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Mr. Milan Trbojevic, for Radoslav Brdjanin
Mr. Slobodan Zecevic and Ms. Natacha Fauveau-Ivanovic, for Momir Talic

TRIAL CHAMBER II ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of the "Motion for Provisional Release of Momir Talic" ("Motion") filed confidentially by the Accused Momir Talic ("Talic") on 10 September 2002.

INTRODUCTION AND PROCEDURAL BACKGROUND

• In the Motion Talic seeks to be provisionally released pursuant to Rule 65(B) to his family home in Banja Luka on the grounds of his ill-health, under the terms and conditions that he shall remain within the confines of the municipality of Banja Luka, except for occasional visits for tests, medical treatment and therapy , as may be required by the medical doctors, to the Military-Medical Academy ("VMA ") in Belgrade. The VMA, according to Talic is the only specialised institution in the territory of Bosnia and Herzegovina and Federal Republic of Yugoslavia that can deal with the illness that he is suffering from, and the place where he can receive the satisfactory medical care. Subsequently, on 18 September 2002, Talic filed an "Amendment to the Motion for Provisional Release" ("Amendment") in which the condition to remain within the confines of a certain municipality was amended and supplemented to include the municipality of Belgrade, also as an alternative to that of Banja Luka.[1]

• On 9 September 2002, following receipt of the results of a series of medical tests, Dr. P.T.L.A. Falke ("Dr. Falke") – Medical Officer of the United Nations Detention Unit ("UNDU") communicated a confidential medical report to the Registrar of this Tribunal ("Registrar") and subsequently to this Trial Chamber. In the report Dr. Falke indicated that Talic is suffering from carcinoma and that Talic is not fit to stand trial and not fit to remain in detention.

• On 10 September 2002 the Trial Chamber heard the Parties in the absence of Talic who, due to his illness, could not attend. Talic had waived his right to be present.

• During the same hearing the Trial Chamber had an opportunity to hear the testimony of Dr. Falke and to examine the documents he produced. Dr. Falke explained that the diagnosis was a carcinoma in the liquid layers of the lungs without any possible cure except palliative care with prognosis of several months maximum.[2] The diagnosis was the result of a series of tests carried out on Talic, and followed the consultation of a lung specialist and an oncologist.[3] Dr. Falke stressed again that the present state of health of Talic was incompatible with the regime of detention.[4]

• On 10 September 2002, the Trial Chamber decided to hear a second opinion[5], and through the intervention of the Registrar[6], appointed two leading experts, namely Dr. Paul Baas ("Dr. Baas") – a lung cancer specialist and primary consultant in Antoine van Leeuwenhoek Hospital in Amsterdam - and Dr. Jan van Meerbeek ("Dr. van Meerbeek") – a consultant in the Department of Pulmonary Medicine at the Erasmus Medical Centre in Rotterdam, to examine Talic and report to it.

• On 10 September 2002, the Trial Chamber received a letter of guarantees from the Government of Republika Srpska undertaking to honour all the orders made by this Trial

Chamber in the event that Talic were to be provisionally released.

• On 11 September 2002, the two medical experts testified in closed session before this Trial Chamber. Dr. Baas explained at the hearing that he had performed a medical examination of Talic in the penitentiary hospital unit and following a puncture of his pleura extracted some pleural liquid from the left side of his thoracic cavity in order to analyse it. Reserving his opinion on the final diagnosis until he obtained the results of such analysis, Dr. Baas informed the Trial Chamber that Talic is suffering from a localised but advanced form of cancer, probably originating from the lung.[7] This kind of cancer is inoperable and incurable. Chemotherapy would only serve as a palliative treatment.[8]

• Dr. van Meerbeek testified at the same hearing that he performed a medical examination of Talic in the penitentiary hospital unit and he informed the Trial Chamber that Talic is suffering of a carcinomatous pleurisy (malignant cancer cells in the left side of the thoracic cavity). He stated that this is an incurable disease , which cannot be cured by means of surgery, radiotherapy or chemotherapy.[9] The only possible treatment is palliative chemotherapy.[10] Asked by the Trial Chamber about the prognosis, Dr. van Meerbeek explained that the average survival of a patient in Talic's condition is about one year and that the chance that Talic will be alive in two years is about 40 per cent.[11]

• Both experts agreed that Talic, in his current state of health, was not unfit to remain in detention for some days pending the debate on the Motion and that for the short term Talic is fit to stand trial.[12]

• On 12 September 2002, Dr. Baas submitted a written report informing the Trial Chamber that he had carried out a cytological diagnostic test and that he was able to confirm that Talic is suffering of advanced carcinoma probably of the lung, which is inoperable and incurable.[13]

• Following the testimonies of the medical experts, the Prosecution asked that , before the Trial Chamber should proceed with the hearing on the Motion, it be granted time to discuss the various implications involved with the Prosecutor who was at the time abroad on official business.[14]

• On 12 September 2002, the Trial Chamber granted the Prosecution's Request and adjourned the hearing on the Motion to 17 September 2002, indicating that, following the testimony of the two experts, there was no clear and present danger or prejudice attached to Talic's continued detention in the UNDU for a short period pending discussion and the determination of the Motion.

• On 13 September 2002 the Defence filed a Request[15] to lift the confidentiality of the Motion and all related documents and closed session hearings, which was granted by this Trial Chamber in the course of the hearing of 17 September 2002.[16]

• On 17 September 2002, the Prosecution filed a "Prosecution's Response to Motion for Provisional Release of Momir Talic" ("Prosecution's Response") objecting to Talic being provisionally released on the grounds that he is charged with the gravest possible violations of international humanitarian law that the public perception of such provisional release could be extremely damaging to the institutional authority of the Prosecutor and her ability to conduct investigations in the territory of the former Yugoslavia. Furthermore, the Prosecution argued that victims and witnesses who have agreed to co-operate with the Prosecution will not have a favourable view of such a release and in the context of their own suffering will not understand the humanitarian motivation behind such a release. Consequently the Prosecution suggested an alternative strategy, namely that the Accused remain in detention at the VMA in Belgrade, subject to certain conditions.[17]

• In the course of the hearing of 17 September 2002, the Trial Chamber heard oral submissions by the Parties.

• At the same hearing the Representative of the Government of the Federal Republic of Yugoslavia ("FRY") was heard. He confirmed the letter of intent filed on 13 September 2002 by the Federal Ministry of Justice of the FRY in which the Ministry provided guarantees regarding Talic's provisional release for treatment in the VMA, but he was unable to take a position on the additional guarantees would eventually be necessary in case the Trial Chamber decides to put Talic at home arrest.

• On 19 September 2002 Talic provided the Trial Chamber with signed written guarantees .

• In the course of the hearing held of 19 September 2002, the Trial Chamber heard again the Representatives of the FRY and further submissions by the Parties. The Representatives of FRY provided the Trial Chamber with a letter of guarantees signed by the President of FRY undertaking the obligation to comply with all orders of the Trial Chamber to ensure that, on being summoned by the Trial Chamber, Momir Talic will be able to appear before it at any time. The guarantees are made pursuant to the provisions contained in the Law of FRY on Co-operation with this Tribunal . These guarantees include the following: (a) the obligation of the Yugoslav authorities to take charge of the accused Momir Talic from the Dutch authorities at Schiphol airport, on the day and time determined by the Trial Chamber; (b) the obligation of the Yugoslav authorities to escort the accused during his journey to FRY; (c) the obligation of the Yugoslav authorities to return the accused from the FRY to Schiphol airport and to turn him over to the Dutch authorities, on the day and time determined by the Trial Chamber; (d) the accused shall

be taken over from the Dutch authorities, escorted during the journey and return to the Dutch authorities by a representative to be appointed in due time by the Federal Government of the FRY ; (e) the obligation of the Federal Ministry of the Interior, through the appropriate secretariat of the Ministry of the Interior of the Republic of Serbia, to ensure that the accused shall report daily to the police station, that records shall be kept in this regard, and a monthly written report submitted confirming that the accused is adhering to these obligations, and to immediately inform the International Criminal Tribunal in case of accused's absence; (f) the obligation of the Yugoslav authorities to immediately arrest the accused if he tries to escape or violates any of the conditions of his provisional release from detention, and to inform the International Criminal Tribunal so that preparations can be made for his transfer back to the Tribunal.

DISCUSSION

Applicable law

• Rule 65 of the Rules of Procedure and Evidence ("Rules") sets out the basis upon which a Trial Chamber may order provisional release of an accused.

" (A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by a Trial Chamber only after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released , will not pose a danger to any victim, witness or other person.

(C) The Trial Chamber may impose such conditions upon release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others."

• Article 21(3) of the Statute of the Tribunal ("Statute") mandates that:

"*the accused shall be presumed innocent until proved guilty*".

This provision both reflects and refers to international standards as enshrined *inter alia* in Article 14(2) of the International Covenant on Civil and Political Rights of 19 December 1966 ("ICCPR") and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR").

• The Trial Chamber, in interpreting Rule 65 of the Rules, believes it must focus on the concrete situation of the individual applicant and consequently that the provision cannot be applied in *abstracto,* but must be applied with regard to the factual basis of the particular case.[18]

• The burden of proof rests on the accused to satisfy the Trial Chamber that he will appear for trial and will not pose any danger to any victim, witness or other person. It should be noted that the Trial Chamber retains discretion not to grant provisional release even if it is satisfied the accused complies with the two requirements in the Rule.[19]

• Moreover, when interpreting Rule 65, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure , that measure must be applied.[20]

• In determining the factors relevant to the decision-making process, Trial Chamber recalls what Trial Chamber I has stated:

"*First the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. It must also rely on the co-operation of States for the surveillance of accused who have been released . This calls for a more cautious approach in assessing the risk that an accused may abscond. It depends on the circumstances whether this lack of enforcement mechanism creates such a barrier that provisional release should be refused. It could alternatively call for the imposition of strict conditions on the accused or a request for detailed guarantees by the government in question.*

(...) Among other factors that may be relevant in relation to the circumstances of individual cases the following may be mentioned: completion of the Prosecution's investigation which may reduce the risk of potential destruction of documentary evidence; a change in the health of the accused or immediate family members". [21]

• The Trial Chamber must make its own assessment and decide, taking into consideration the arguments, the submissions made, the facts of the case, the law, and the final assessment will in addition depend on all the contributions, the guarantees of the accused and all the guarantees provided by the relevant authorities taken as a whole .

Application of the law to the facts

• This Trial Chamber is seised of an application by the accused Talic for provisional release on humanitarian grounds, namely on the grounds of his ill-health. The humanitarian basis makes this application distinct from most of the other applications considered and decided by this Tribunal. It is different from the cases like those of Plašvic , Gruban, Hadžihasanovic, Alagic and Kubura, for instance, because in all of those cases provisional release was sought during the pre-trial phase and there was no critical state of health involved. It is different from the *Đukic* case because in that case

too, provisional release was sought in the pre-trial stage and in addition , the terminal cancer condition of the accused was such as to be unequivocally incompatible with any kind of detention. It is being pointed out from the very outset, therefore , that Talic's case cannot be considered and dealt with in the same manner as that adopted by this Tribunal in any of the above mentioned decisions and others with which this case cannot be strictly compared.

• Still, having heard the testimonies of the medical officer of the UNDU and of the two experts appointed by this Trial Chamber in addition to the documentation made available, there can be no doubt that Talic is suffering from an incurable and inoperable locally advanced carcinoma which presently is estimated to be at stage III-B with a rather unfavourable prognosis of survival even on short term.

• The Trial Chamber is of the view that Rule 65(B) is silent on the circumstances justifying provisional release specifically to enable individual cases to be determined on their merits and by application of discretion in the interests of justice. In determining these individual cases, it is necessary to bear in mind the *rationale* for the institution of provisional release, which is linked to the *rationale* for the institution of detention on remand.

• The Trial Chamber stresses that the *rationale* behind the institution of detention on remand is to ensure that the accused will be present for his/her trial. Detention on remand does not have a penal character, it is not a punishment as the accused, prior to his conviction, has the benefit of the presumption of innocence . This fundamental principle is enshrined in Article 21, paragraph 3 of the Statute and applies at all stages of the proceeding, including the trial phase.

• The argument of the Prosecution that it would be inappropriate for this Trial Chamber to grant Talic provisional release given the stage the trial has reached and the nature of the evidence that has been brought forward to date can only be relevant in the context of an application for provisional release in so far as it may convince the Trial Chamber that once provisionally released Talic may try to abscond or in any way interfere with the administration of justice by posing a danger to any victim, witness or other person. The Trial Chamber is satisfied that no evidence has been adduced to show that there are any such clear present or future dangers .

• The Trial Chamber has also considered the submission by the Prosecution that the provisional release of Talic could be "extremely damaging to the institutional authority of the Prosecutor and her ability to conduct investigation in the territory of the former Yugoslavia and the subsequent trial in The Hague". The Trial Chamber has carefully balanced two main factors, namely the public interest, including the interest of victims and witnesses who have agreed to co-operate with the Prosecution , and the right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and of the presumption of innocence.[22] As

a result it is convinced that what would indeed be extremely damaging to the institutional authority of the Prosecutor and even more so, that of this Tribunal, is if this Trial Chamber were to disregard the stark reality of Talic' s medical condition and ignore the fact that this is a Tribunal created to assert, defend and apply humanitarian law.

• The stark reality of Talic's medical condition is that there is no escape for him from the natural consequence that his illness will ultimately bring about because his condition is incurable and inoperable and can only deteriorate with or without treatment. The stark reality is that the odds in favour of his being alive a year from now are few indeed. This scenario ultimately also means that it is very unlikely that Talic would be still alive when this trial comes to its end, or more so, that if found guilty he would be in a position to serve any sentence. Indeed this is the stark reality of the situation that this Trial Chamber is faced with. Yet the Prosecution continues to show concern with the fact that the victims and witnesses who have agreed to co-operate with its Office will not have a favourable view of such a release and in the context of their own suffering they will not understand the humanitarian motivation behind such a release. The Trial Chamber is certainly not insensitive to the concerns of the Prosecution and even more so to those of the victims and witnesses who may fail to understand as suggested by the Prosecution . It is the duty of this Trial Chamber, however, to emphasise that such concerns cannot form the basis of any decision of this Tribunal, which would be tantamount to abdicating from its responsibility to apply humanitarian law when this is appropriate . There can be no doubt that when the medical condition of the accused is such as to become incompatible with a state of continued detention, it is the duty of this Tribunal and any court or tribunal to intervene and on the basis of humanitarian law provide the necessary remedies. In this context the Trial Chamber makes reference to the recent decision of the First Section of the European Court of Human Rights *in re* Mouisel v. France,[23] which ruled for admissibility in a case which dealt with the continued detention of a person suffering from cancer requiring intensive treatment involving transfer to hospital under escort as being in violation of Article 3 of the ECHR. The Trial Chamber has no doubt at all that Talic's medical condition is such as to warrant in an unequivocal manner a prompt and effective humanitarian intervention. It would be inappropriate for this Trial Chamber to wait until Talic is on the verge of death before considering favourably his application for provisional release and in the meantime allow a situation to develop which would amount to what is described in the Mouisel decision *supra* as being an inhumane one. This is all the more so when, as stated earlier, detention on remand is not meant to serve as a punishment but only as a means to ensure the presence of the accused for the trial. The Trial Chamber, given the scenario depicted above, fails to understand the request of the Prosecution for the continued detention of Talic knowing that before long and in all probability before this trial reaches its end, his condition will not be any different from Djjukic's and would, as in that case, necessitate a practically unconditional provisional release.

• The Trial Chamber believes that, given the medical condition of Talic, it would be

unjust and inhumane to prolong his detention on remand until he is half-dead before releasing him. Basing itself upon the medical reports and the testimony of the medical doctors involved, the Trial Chamber is of the opinion that the gravity of Talic's current state of health is not compatible with any continued detention on remand for a long period. As explained in the Mouisel case, the palliative care and treatment, which Talic's condition requires, and will require more in the future , justifies a different environment. Moreover, it has rightly been pointed out by the Commander of the UNDU, as well as by the Prosecution, that security and logistical problems may arise if Talic seeks to have treatment by way of chemotherapy, while he remains in the custody of the UNDU and even if he is given treatment for some time in a hospital in The Netherlands.

• The Trial Chamber, in addition, believes that, for the same considerations outlined in the previous paragraphs, the suggestion of the Prosecution, namely that of providing for the continued detention of Talic at the VMA in Belgrade in a secure environment without the possibility of leaving that environment instead of continuing to detain him in the UNDU in the Hague, is not the appropriate solution as the circumstances that necessitate the humanitarian intervention of this Tribunal, would remain the same. The Trial Chamber, however, as stated earlier, has no doubt that Talic's case cannot be treated the same way as that of Djukic and a number of conditions attached to his release are necessary and appropriate to ensure that this on-going trial is in no way prejudiced. One of these conditions is in line with what the Prosecution has asked, namely that this Trial Chamber agrees that until and unless otherwise decided by this Tribunal, the request by Talic to enable him to return to the municipality of Banja Luka in Republika Sprska should not be acceded to. This Chamber believes that the fact that the trial against him is on-going justifies this measure or restriction and the Trial Chamber is further satisfied that no prejudice will be caused to him as a consequence because in any case he will be confined to Belgrade where he can equally have, and benefit from, the proximity of his family .

• For the same reason mentioned in the previous paragraph, namely that Talic's case cannot be treated the same as that of Djukic and a number of conditions attached to his release are necessary and appropriate to ensure that this on-going trial is in no way prejudiced, this Trial Chamber has reached the conclusion that the circumstances are such that his ability to move freely in the city to which he will be returned will be restricted. In the course of the debate before this Trial Chamber , the possibility of confining him to a specified residence under house arrest terms and conditions was explored and discussed. In this context, this Trial Chamber refers to the decision of 3 April 1996 of the then President of this Tribunal, Judge Antonio Cassese, in the Blaškic case, in which the notion of house arrest was considered *funditus*. Considering that house arrest is not a measure that is specifically dealt with by the Rules or the Statute of this Tribunal and is also not addressed by the laws of the FRY, and considering further that the notion of house arrest is more akin to the subject of non-custodial sanctions as an alternative form of post-conviction detention, this Trial Chamber believes that it is appropriate to distinguish it from the imposition of a residence requirement. The Trial Chamber believes

that the circumstances are such that the imposition of a controlled residence requirement for the time being will be sufficient. This Trial Chamber believes that such a measure would for all intents and purposes be tantamount to what would technically be classified as house arrest, at least in so far as freedom of movement is concerned and as explained in the Blaškic decision *supra* can still be considered as a form of detention.

• The Trial Chamber will also impose all those conditions which, in its opinion , on the one hand are necessary to ensure that Talic receives all the medical treatment he requires and, on the other hand are appropriate in the circumstances to ensure that the requirements of Rule 65 governing provisional release are observed.

• Having premised all the above, the Trial Chamber next turns to examine the requirements set out in Rule 65. As a matter of procedure, the Trial Chamber, before provisionally releasing Talic, is required to hear from the host country.

• On 13 September 2002 the Dutch authorities communicated in writing to this Trial Chamber that they have no objections to Talic being provisionally released on condition that he does not reside in The Netherlands thereafter.[24]

• As to the requirement that the accused satisfies the Trial Chamber that he will re-appear, in the event he recovers sufficiently to resume attending trial, the Trial Chamber takes into account and attaches importance to the Law of Co-operation passed in April 2002 by the Government of the FRY. This recent legislation sets out a procedure for the arrest and surrender of accused persons to the International Tribunal,[25] and obliges the "organs of internal affairs" to arrest such persons. Procedure of this nature did not previously exist, and the Trial Chamber accepts that the Government has taken steps to lessen chances of accused evading arrest while in the territory of the FRY. In this connection , the Trial Chamber is also satisfied that the proposed level of co-operation is satisfactory.

• In this context this Trial Chamber takes into consideration the guarantees provided by the FRY. As a whole, this Trial Chamber is satisfied with the assurances that have been put forward by the Government of the FRY, in particular that the local authorities will closely monitor Talic at his residence in Belgrade. Consequently , the Trial Chamber does not identify *in concreto* any clear and present risk that Talic will not re-appear for trial.

• As to the requirement that Talic, if provisionally released, will pose no risk to any victim, witness or other person, the Trial Chamber reiterates that no evidence or material has been adduced tending to prove that any clear and/or present danger of such risk exists and further notes that there is no suggestion that Talic has interfered with the administration of justice in any way whatsoever since March 14, 1999, the date when the indictment was confirmed against him. Nonetheless, in reaching its decision, this Trial

Chamber has striven to minimise as much as possible any such risk in the future especially by restricting Talic's residence to an area distant from the one where he initially sought to be returned and which is part of the territory covered by the Indictment.

• Finally, this Trial Chamber observes that Pursuant to Rule 65(C) the Trial Chamber "may impose such conditions upon the release of the Accused as it may determine appropriate". It is noted that Talic has consented to the imposition of any conditions necessary to his provisional release. The Trial Chamber considers that the stringent conditions and the restrictions imposed on Talic's personal liberty and found in the disposition below, can adequately satisfy the requirements set out in the Rule . Therefore, the Trial Chamber, upon balancing all the relevant circumstances as required by Rule 65 (B) and as discussed above, finds it appropriate to order that Talic should be provisionally released.

43. In reaching its decision the Trial Chamber has also taken into consideration Talic's offer to waive his right to be present, should the proceeding against him continue. The Trial Chamber is not imposing any such condition upon him as a pre -requisite for his provisional release mainly because of legal considerations, but certainly acknowledges his willingness not to obstruct the contination of the trial agains t him.

44. The Prosecution seeks a stay of the decision in order to appeal against the grant of provisional release. The Defence has entered its opposition. It is, however , fit and proper, considering the Prosecution's Response, that the grant of provisional release will therefore be stayed pending any appeal by the Prosecution.

DISPOSITION

For the foregoing reasons,

PURSUANT TO Rule 65 of the Rules

TRIAL CHAMBER II HEREBY GRANTS the Motion **AND ORDERS** the provisional release of Talic on the following terms and conditions:

Talic shall be transported to Schiphol airport in the Netherlands by the Dutch authorities .

At Schiphol airport, Talic shall be provisionally released into the custody of the designated officials of the FRY (whose names shall be provided in advance) and who shall accompany him for the remainder of his travel to his place of residence in Belgrade.

During the period of his provisional release, Talic shall agree to abide and will abide the following conditions, and the FRY shall ensure compliance with each and every of them:

To reside and remain at all times at the address provided in Belgrade[26], except for

occasional visits for tests, medical treatment and therapy, as may be required, to the VMA. For this purpose his address in Belgrade will be communicated by the Registrar to the authorities of FRY;

To inform the Representative of the Registry at the Field Office in Belgrade if he leaves the address provided for tests, medical treatment and therapy in VMA;

Without prejudice to condition a) above, to remain within the confines of the municipality of Belgrade;

Except when hospitalised at the VMA or when for reason of health unable to do so , to contact once a day the local police in Belgrade which will maintain a log and report accordingly to the Representative of the Registry at the Field Office in Belgrade at the end of each month;

To assume responsibility for, and bear all expenses necessary for his transport from Schiphol airport to Belgrade and back;

Under no circumstances will he travel to Banja Luka or any of the other municipalities covered by the Indictment, unless authorised by the Trial Chamber;

To surrender his passport to the Representative of the Registry at the Field Office in Belgrade or to the authorities of the FRY as required;

To surrender his driving license to the Representative of the Registry at the Field Office in Belgrade or to the authorities of FRY as required;

To consent to have the authorities of FRY verify his presence at the address provided in Belgrade or at the VMA, as may be required;

To consent to have a Representative of the Registry at the Field Office in Belgrade to verify his presence at the address provided in Belgrade or at the VMA, as may be required;

To consent to have a Representative of the Registrar of the Tribunal to have access to him at any time, in order to assess arrangements for his security and welfare ;

To consent to have a medical specialist appointed by the Registrar of the Tribunal to visit him once a month or as required, in order to assess and report his state of health;

Not to have any contacts with the other co-accused in the case;

Not to have any contacts whatsoever or in anyway interfere with victims or any person who may testify at his trial, or otherwise interfere in any way with the proceedings or the administration of justice;

Not to discuss his case with anyone, including the media, other than his counsel ;

Not to occupy any official position;

To comply strictly with any requirements by the authorities of FRY necessary to enable them to comply with their obligations under the order for provisional release and their guarantees;

To comply with any other and further order and/or condition the Trial Chamber may deem necessary under the circumstances;

To return to the Tribunal at such time and on such date as the Trial Chamber may order;

To comply strictly with any order of the Trial Chamber varying the terms of, or terminating, the provisional release of the accused.

REQUIRES the Dutch authorities:

To transport Talic to Schiphol airport;

At Schiphol airport, to provisionally release Talic into the custody of the designated official(s) of the FRY (whose name(s) shall be provided in advance to the Registrar of the Tribunal) and who shall accompany Talic for the remainder of his travel to his place of residence in Belgrade;

On Talic's return flight, to take custody of the accused at Schiphol airport at a date and time to be determined by the Trial Chamber seised of the case;

To transport Talic back to the UNDU or to another place indicated by the Trial Chamber .

REQUIRES the authorities of FRY to assume responsibility for:

Transport expenses, jointly and severally with Talic, from Schiphol airport to his place of residence and back;

The personal security and safety of Talic while on provisional release;

Reporting immediately to the Registrar of the Tribunal the substance of any threats to the security of Talic, including full reports of investigations related to such threats;

Facilitating, at the request of the Trial Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;

Ensuring compliance with the conditions imposed on Talic by this or any future order ;

Submitting a written report to the Registrar of the Tribunal every month as to the presence of Talic and his compliance with the terms of this order and any further order;

Immediately detaining Talic should he breach any of the terms and conditions of his provisional release and reporting immediately any such breach to the Trial Chamber ;

Respecting the primacy of the Tribunal in relation to any existing or future proceedings in the FRY concerning Talic;

Not issuing to Talic any passport or document enabling him to travel.

INSTRUCTS the Registrar of the Tribunal

To consult with the Ministry of Justice of the Netherlands and the authorities of FRY as to the practical arrangements for Talic's release and travel to Belgrade;

To keep Talic in custody until relevant arrangements are made for his travel, unless hospitalisation is needed instead;

To take any necessary measure to grant to Talic all the medical assistance he requires during the transfer from the UNDU to his place of residence in Belgrade;

To communicate to the authorities of FRY Talic's address in Belgrade;

To appoint a medical specialist to have access to Talic once a month or as may be required in order to assess his state of health and who will provide a written report to this Tribunal on such state of health.

REQUESTS the authorities of all States through which Talic will travel:

to hold Talic in custody for any time he will spend in transit at the airport;

to detain and arrest Talic pending his return to the United Nations Detention Unit , should he attempt to escape.

ORDERS

That the provisional release of Talic is stayed pending an appeal by the Prosecution pursuant to Rule 65(D), (E), (F) and (G).

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

Dated this twentieth day of September 2002
At The Hague

The Netherlands

Carmel Agius
Presiding Judge

[Seal of the Tribunal]

1 - Amendment para. 7, page 3.
2 - T. 9728, T. 9734.
3 - T. 9732.
4 - T. 9728, T. 9747.
5 - T. 9752-3.
6 - OLAD fax concerning "Review of Mr. Talic medical files" dated 10 September 2002, filed to the Trial Chamber on 13 September 2002.
7 - T. 9789.
8 - T. 9793.
9 - T. 9809.
10 - T. 9810.
11 - T. 9810 – 9811.
12 - T. 9795, T. 9818.
13 - Letter of Dr. Baas on Mr. Talic's medical condition, dated 12 September 2002.
14 - T. 9824 ff.
15 - Requête aux fins de lever la confidentialité de la requête aux fins de la mise en liberté.
16 - T. 9845.
17 - Prosecution's Response, paras. 3-5.
18 - Prosecutor v. Hadzihasanovic et al., Case No. IT-01-47-PT, *Decision Granting Provisional Release to Amir Kubura*, 19 December 2001, para. 7.
19 - See, for example, Prosecutor v. Kovacevic, Case No. IT-97-24-PT, *Decision on Defence Motion for Provisional Release*, 21 January 1998; Prosecutor v. Brdjanin and Talic, Case No. IT-99-36-PT, *Decision on Motion by Momir Talic for Provisional Release*, 28 March 2001.
20 - Prosecutor. V. Dragan Jokic, Case No. IT-02-53-PT, *Decision on Request for Provisional Release of Accused Jokic*, 28 March 2002, para. 18.
21 - Prosecutor v. Ademi, Case No. IT-01-46-PT, *Order on Motion for Provisional Release*, 20 February 2002, paras. 24-27.
22 - Prosecutor v. Blaskic, Case No. IT-95-14-T, *Decision on Motion of the Defence seeking Modification of the Conditions of Detention of General Blaskic*, 9 January 1997.
23 - Appl. 67263/01 decided on 21/3/2002.
24 - Letter by the Deputy Director Cabinet and Protocol Department, dated 12 September 2002.
25 - Law on Co-operation between the FRY and the International Tribunal, artt. 18-31.

26 - The address was provided to the Trial Chamber as a confidential and ex parte filing on 18 September 2002.

Annex 5: *Prosecutor v. Ndayambaje*, ICTR-96-8-A, Decision on Motion to Appeal against the Provisional Release Decision of Trial Chamber II of 21 October 2002, Appeals Chamber, 10 January 2003

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Fausto POCAR, Presiding
Judge Mohamed SHAHABUDDEEN
Judge Theodor MERON

Registrar: Mr. Adama DIENG

Decision of: 10 January 2003

Elie NDAYAMBAJE
(Applicant)
v.
THE PROSECUTOR
(Respondent)

Case No. ICTR-96-8-A

DECISION ON MOTION TO APPEAL AGAINST THE PROVISIONAL RELEASE DECISION OF TRIAL CHAMBER II OF 21 OCTOBER 2002

Counsel for the Appellant
Mr. Pierre Boule
Mr. Frédérick Palardy

Counsel for the Prosecution
Ms. Silvana Arbia
Mr. Jonathan Moses

THIS BENCH 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 SEISED OF the "*Demande d'autorisation au Collège de la Chambre d'appel, d'interjeter appel de la décision de la Chambre de Première Instance II, ayant rejetée la requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l'Accusé (Article 65(D) du Règlement)*", filed on 28 October 2002 ("Application") by Elie Ndayambaje ("Applicant");

NOTING the *Decision on the Defence Motion for the Provisional Release of the Accused* ("Impugned Decision"), rendered on 21 October 2002 by Trial Chamber II ("Trial Chamber"), which dismissed the *"Requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l'Accusé (Article 65(D) du Règlement)"*, filed by the Applicant on 21 August 2002 ("Motion");

NOTING that the Motion was dismissed by the Trial Chamber, on the grounds that:

1. this Tribunal, including the Appeals Chamber, has consistently recognised that Rule 65 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), with its "exceptional circumstances" provision, is an appropriate rule governing provisional release, and that exceptional circumstances had to be proved;

2. because the Tribunal is a sovereign body, with a competence *rationae materiae* and *ratione temporis* distinct from that of the International Criminal Tribunal for the former Yugoslavia, the Judges of the Tribunal are bound to apply the ICTR Rules;

3. a lengthy detention does not constitute in itself good cause for release, [1] and that, having regard to the general complexity of the proceedings and the gravity of the offences, the Applicant's detention remains within acceptable limits;

4. since the trial of the Applicant, who is jointly tried with five others, began in June 2001, and the testimony of 14 witnesses has already been heard, provisional release would not be justified;

5. the Applicant's detention in Arusha, at a distance from his family, does not constitute exceptional circumstances; and

6. a decision to provisionally release an accused charged with serious violations of international law, including genocide, must weigh the request of the accused against community interests and the need to complete trial proceedings in an orderly manner [2], and, consequently no exceptional circumstances existed in the case to justify provisional release;

NOTING that the Applicant argues in his Application that:

1. the Trial Chamber erred when it stated in its decision that "a lengthy detention does not constitute in itself good cause for release", and it did not take into account the

exceptional nature of the Applicant's case;

2. the Trial Chamber erred when it failed to take into consideration the period of seven years that he has already spent in detention, and it further failed to take into consideration the fact that unlike the situation in *Nahimana*, his trial has not yet reached a terminal stage;

3. the Trial Chamber erred when it stated that as the trial had begun in June 2001 and fourteen witnesses had been heard since then, the circumstances of the case did not justify the Applicant's release;

4. the Trial Chamber erred by failing to formally take note of the fact that the length of his trial will require an abnormally lengthy preventive detention, and that this should have been considered as an exceptional circumstance;

5. the Trial Chamber erred when it considered, separately, the factors put forward by the Applicant in his Motion; if those grounds had been analysed together rather than separately, their effect would have led the Trial Chamber to quite a different finding with regard to the "exceptional circumstances" test, and this failure amounts to the good cause referred to in Rule 65 of the Rules;

6. the Trial Chamber erred when it failed to take into consideration the factors put forward by the Applicant cumulatively, which may have prevented it from giving these factors all the weight that such an analysis would have allowed; [3] and

7. the Trial Chamber took no account of the Appellant's submission with regard to the inherent problems in the Prosecution case, namely the absence of witnesses who were held back in Rwanda, and as a result, the cumulative effect of the grounds put forward was not fully considered;

NOTING that the Prosecution filed the "*Prosecutor's Application for Summary Rejection of the Defence's Notice of Appeal Relating to a Request to Appeal Against the Trial Chamber of First Instance's Decision Denying Provisional Release* on 29 November 2002 ("Prosecution Response"), and on 2 December 2002 filed the *Prosecutor's Corrigendum to Application for Summary Rejection of the Defence's Notice of Appeal Relating to a Request to Appeal Against the Trial Chamber of First Instance's Decision Denying Provisional Release* ("Corrigendum"), twenty-two days and twenty-five days, respectively, after the time limit for the filing of its response had expired; [4]

NOTING that the reason given by the Prosecution for its late filing is that it has yet to receive an official translation of the Application, which was filed in French;

CONSIDERING that the Prosecution did not submit a request for extension of time prior to the expiration of the deadline, and that its request was made not in its Response

but only subsequently in its Corrigendum;

CONSIDERING that Rule 116(B) of the Rules provides that "where the ability of the accused to make full answer and defence depends on the availability of a decision in an official language other than that in which it was originally issued, that circumstance shall be taken into account as a good cause...", yet there is no similar provision in the rule which is applicable to the Prosecution;

CONSIDERING that in the opinion of the Appeals Chamber, the Office of the Prosecutor must be able to work equally in English and in French;

FINDING that the Prosecution's reason for the late filing of its Response cannot be considered to constitute good cause within the meaning of Rule 116 of the Rules;

NOTING that the Applicant has not filed a Reply to the Prosecution's Response and Corrigendum;

CONSIDERING that Rule 65(B) of the Rules provides, *inter alia*, that provisional release may be ordered by a Trial Chamber only "in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person";

CONSIDERING that Rule 65(D) of the Rules also provides that decisions on provisional release "shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown," and that "... applications for leave to appeal shall be filed within seven days of filing of the impugned decision";

CONSIDERING that the Application was filed within time;

CONSIDERING that "good cause" within the meaning of Rules 65(D) of the Rules requires that a party seeking leave to appeal under that provision satisfies the bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision;

CONSIDERING that the Appeals Chamber has affirmed that the length of pre-trial detention does not constitute *per se* exceptional circumstances for the purposes of provisional release [5] ;

CONSIDERING that the Applicant has not shown any reason why the Appeals Chamber should depart from its previous jurisprudence;

CONSIDERING that the Trial Chamber rightly took into account the fact that there is an ongoing trial, which commenced in June 2001 and needs to be completed in an orderly manner, and found that in these circumstances, provisional release would not be justified;

CONSIDERING that the Applicant has not shown how the Trial Chamber may have erred in failing to conclude that the anticipated length of the Applicant's ongoing trial is an exceptional circumstance warranting provisional release;

CONSIDERING that the Applicant has failed to establish that the Trial Chamber may have erred in its assessment of the conditions for ordering provisional release of the Applicant in its conclusions reached in paragraphs 19 to 28 of the Impugned Decision;

FINDING that the Applicant therefore has failed to demonstrate good cause such that the Bench should grant leave to appeal;

HEREBY REJECTS the Prosecution's request for an extension of time, **DEEMS INADMISSIBLE** the Prosecution Response and Corrigendum, and **DISMISSES** the Application.

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

Fausto Pocar
Presiding Judge

Done this tenth day of January 2003,
The Hague,
The Netherlands.

[Seal of the Tribunal]

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[1] *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeals Chamber, Decision (On Application for Leave to Appeal Filed Under Rule 65 (D) of the Rules of Procedure and Evidence), 13 June 2001, p. 3 ("*Kanyabashi* Decision") (citing *Prosecutor v. Barayagwiza*, Case No. ICTR-97-20-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para.74).

[2] *Prosecutor v. Nahimana,* Trial Chamber Decision, 5 Sept. 2002, para. 10.

[3] The Applicant cites the 11 November 1999 decision rendered in *Prosecutor v. Kunarac and Kovac* ("Decision on the Motion for the Provisional Release of Dragoljub Kunarac"), in which, with regard to the aforementioned aspect, the Trial Chamber stated (at para. 10): "In conclusion, the Trial Chamber is of the view that, in the circumstances of the present case, none of the factors put forward by the accused, either alone or in combination, amounts to exceptional circumstances within the ambit of Rule 65 of the rules." (emphasis added)

The Applicant also submits that this principle was further clearly reaffirmed in *Prosecutor v. Kupreskic et al*, Case No. 95-16-T, Decision of 30 July 1999, p. 2: "Considering that each of these grounds, by

themselves, do not amount to the "exceptional circumstances" mentioned in Rule 65(B), and Considering, however, by a majority of the Trial Chamber (Judge Richard May dissenting) that the combination of the aforementioned grounds and their cumulative effect might be regarded as constituting an exceptional circumstance warranting provisional release for at least a limited period of time..." (emphasis added).

[4] This filing was made after the expiration of the ten-day limit prescribed in paragraph 5 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal.

[5] See *Prosecutor v. Kanyabashi*, Decision, 13 June 2001, p. 3.

Annex 2: *Prosecutor v. Nyiramasuhuko & Ntahobali*, 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 QBZ Inadmissible", 2 July 2004

2004 WL 1660244 (UN ICT (App)(Rwa))

International Criminal Tribunal for Rwanda
In the Appeals Chamber

Before: Presiding Judge Mohamed Shahabuddeen, Judge Florence Mumba, Judge Fausto Pocar, Judge Wolfgang Schomburg, Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 2 July 2004

ARSÈNE SHALOM NTAHOBALI PAULINE NYIRAMASUHUKO
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 QBZ INADMISSIBLE"

ICTR-97-21-AR73

Counsel for the Prosecution Counsel for the Defence: Ms. Silvana Arbia, Mr. Jonathan Moses, Ms. Adesola Adeboyejo, Mr. Manuel Bouwknecht Mr. Duncan Mwanyumba, Nr. Normand Marquis, Ms. Nicole Bergevin, Mr. Guy Poupart

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 "International Tribunal", respectively), is seized of appeals by Arsène Shalom Ntahobali and Pauline Nyiramasuhuko ("Ntahobali Appeal" and "Nyiramasuhuko Appeal" respectively) ("Appeals" and "Appellants", collectively) against the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible," of 16 February 2004 ("Impugned Decision"). These appeals were certified by Trial Chamber II in its "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification" dated 18 March 2004 ("Certification Decision").

2. The Appeals Chamber is also seized of two requests filed by Nyiramasuhuko for short extensions of time within which to file the Nyiramasuhuko Appeal on the

basis of illness of Lead Counsel from 20 February 2004, who was unable to work on the present appeal until Saturday, 27 March 2004. Co-Counsel, as a consequence, had to assume all trial commitments in lieu of Lead Counsel.

3. In its response, the Prosecution submitted that the Nyiramasuhuko Appeal was time barred as no extension of time had been granted at the time of filing of the Appeal.

4. Rule 116(A) of the Rules of Procedure and Evidence ("Rules") permits the Appeals Chamber to grant a motion to extend a time limit "upon a showing of good cause". In the present circumstances, the Appeals Chamber considers that the month-long illness of Lead Counsel, coupled with the Co-Counsel's added responsibilities, constitute good cause within the meaning of Rule 116(A) of the Rules. The Appeals Chamber therefore recognises the Nyiramasuhuko Appeal to have been validly filed.

5. The Appeals Chamber hereby decides these interlocutory appeals on the basis of the written submissions of the parties.

Discussion

6. By motion addressed to Trial Chamber II, Appellant Nyiramasuhuko had requested the Trial Chamber to declare inadmissible the evidence of Prosecution witnesses RV and QBZ and to order the Prosecution not to examine the witnesses on certain allegations which the Appellant deemed not to be specifically pleaded in the Indictment. The Trial Chamber dismissed this motion in the Impugned Decision, and, thereafter, both witnesses testified. On the same day as witness QBZ commenced his testimony, the Appellants sought certification to appeal against the Impugned Decision.

7. In the Certification Decision, the Trial Chamber found that the Appellants had failed to satisfy the requirements for certification provided in Rule 73(B) of the Rules. However, the Trial Chamber was of the view that the question of the admissibility of the testimony of Prosecution witnesses could significantly affect the outcome of the trial against the Appellants, to the extent that the relevant testimonies would be taken into consideration in final deliberations.

8. The principal argument of the Appellants is that the Prosecution should not be permitted to present evidence on allegations which are not clearly pleaded in the indictment. Appellant Nyiramasuhuko submits that the statements and testimony of Prosecution witnesses RV, QBZ and FAS should be declared inadmissible. Ntahobali's Appeal is concerned only with the evidence of witness QBZ.

9. It is well established that, for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with

enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence. The required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct. Although an indictment may be deemed potentially defective where it fails to plead with sufficient detail the essential aspects of the Prosecution case, the potential defect can be cured in certain circumstances, for instance, if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her, or if the indictment is duly amended.

10. In their appeals, the Appellants submit that the Trial Chamber erred by admitting the evidence of witnesses RV and QBZ, both of whom have testified before the Trial Chamber. The Appellants have conceded that witness QBZ did not testify to the allegations they sought to have declared inadmissible. Ntahobali's Appeal, which is only concerned with witness QBZ, is therefore rendered moot. Similarly, the Appeals Chamber notes that Appellant Nyiramasuhuko's motion on the admissibility of the evidence of witness FAS was dismissed by decision of the Trial Chamber on 16 April 2004. As certification of this decision has not been granted, there is no right of appeal therefrom, and the question of admissibility of witness FAS's evidence is therefore not before the Appeals Chamber.

11. In relation to witness RV, who has already testified in the trial, Appellant Nyiramasuhuko argues that the allegation of the witness that she was present at the installation of Elie Ndayambaje (co-accused in the case) as mayor in Muganza commune on 21 June 1994, was not specifically pleaded in the indictment and did not appear in any of the supporting materials. Appellant Nyiramasuhuko contends that this evidence is therefore not admissible.

12. The Appeals Chamber has reviewed the Indictment and the testimony of witness RV, and is of the view that the allegation of Appellant Nyramasuhuko's presence at the installation of Elie Ndayambaje as mayor in Muganza commune on 21 June 1994 should have been pleaded as a material fact in the indictment.

13. According to the evidence of witness RV, during the course of this gathering, Ndayambaje is alleged to have encouraged the population to kill Tutsis who were still in hiding. A similar event, namely, the swearing in ceremony of Sylvain Nsabimana as prefect (also a co-accused in this case) on 19 April 1994, at which Nyiramasuhuko is said to have been present, and during which the President of the Interim Government is said to have made an inflammatory speech, is explicitly mentioned in paragraphs 6.21 and 6.22 of the indictment. This event underpins count 1 (conspiracy to commit genocide), count 2 (genocide), count 3 (complicity in genocide), counts 5, 6, 8 and 9 (crimes against humanity) and count 10 (serious violation of article 3 common to the Geneva Conventions and Additional Protocol II) of the Indictment. Therefore, in the view of the Appeals Chamber, as Nyiramasuhuko has not been charged in the Indictment for her presence at the installation of Ndayambaje on 21 June 1994, there can be no conviction in respect of her attendance at this meeting.

14. However, whilst it may be the case that the allegation of witness RV in relation to Nyiramasuhuko's presence at the installation of Ndayambaje in Muganza commune is not specifically pleaded in the indictment, this alone does not render the evidence inadmissible.

15. Indeed, pursuant to Rule 89(C) of the Rules, the Trial Chamber may admit any relevant evidence which it deems to have probative value. It should be recalled that admissibility of **evidence** should not be confused with the assessment of the **weight** to be accorded to that **evidence**, an issue to be decided by the **Trial Chamber** after hearing the totality of the **evidence**. Consequently, although on the basis of the present indictment it is not possible to convict Nyiramasuhuko in respect of her presence at the installation of Ndayambaje, evidence of this meeting can be admitted to the extent that it may be relevant to the proof of any allegation pleaded in the Indictment.

16. The Appeals Chamber considers therefore that the Trial Chamber acted within its discretion in dismissing the Appellants' request to declare the evidence of witness RV inadmissible.

Disposition

17. For the above reasons, the Appeals Chamber dismisses the Appeals.

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

Done this 2nd day of July 2004,

At The Hague, The Netherlands.

Judge Mohamed Shahabuddeen, Presiding

Seal of the Tribunal

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Annex 3: *Prosecutor v. Musema*, ICTR-96-13-A, Judgment, 16 November 2001

2001 WL 34377583 (UN ICT (App)(Rwa))

International Criminal Tribunal for Rwanda
Appeals Chamber

Before: Presiding Judges Claude Jorda, Lal Chand Vohrah, Mohamed Shahabuddeen, Rafael Nieto-Navia, Fausto Pocar

Registry: Adama Dieng

Judgement of: 16 November 2001

ALFRED **MUSEMA** (Appellant)
v.

THE PROSECUTOR (Respondent)

JUDGEMENT

ICTR-96-13-A

Counsel for the Appellant: Steven Kay, QC, Michail Wladimiroff, Sylvia de Bertodano

Office of the Prosecutor: Carla Del Ponte, Norman Farrell, Mathias Marcussen, Sonja Boelaert-Suominen

Original: English

Original: French

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 (the **"Appeals Chamber"** and the "Tribunal" respectively) is seized of an appeal lodged by Alfred **Musema** on 1 March 2000 [FN1] ("the Appeal" and "the Appellant" respectively) against the Judgement and Sentence [FN2] rendered by Trial Chamber I on 27 January 2000 in the case of The Prosecutor v. Alfred **Musema** (the "Judgement" or "Trial Judgement" and the "Trial Chamber").

FN1. Grounds of Appeal against Conviction and Sentence, filed on 1 March 2000 ("Notice of Appeal").

2001 WL 34377583 (UN ICT (App)(Rwa))

FN2. Judgement and Sentence, The Prosecutor v. Alfred **Musema**, Case No. ICTR-96-13-T, Trial Chamber I, 27 January 2000 (the "Trial Judgement" or the "Judgement").

2. Having heard the parties and considered their written and oral submissions, the **Appeals Chamber**

HEREBY RENDERS ITS JUDGEMENT.

II. INTRODUCTION

A. Trial Proceedings

3. The amended Indictment of 6 May 1999 [FN3] (the "Amended Indictment"), on the basis of which **Musema** was tried, charged the Appellant with involvement in crimes committed during the months of April, May and June 1994 in Gisovu and Gishyita communes, Bisesero area, Kibuye préfecture, Republic of Rwanda. The Appellant's trial commenced before the Trial Chamber on 25 January 1999 and concluded on 28 June 1999. The Trial Chamber rendered Judgement and sentence on 27 January 2000.

FN3. The initial indictment against **Musema** was submitted by the Prosecutor on 11 July 1996 and was confirmed by Judge Yakov A. Ostrovsky on 15 July 1996. On 14 December 1998, the Trial Chamber confirmed an amended Indictment submitted by the Prosecutor on 20 November 1998. The Prosecutor submitted a second amended Indictment on 29 April 1999 which the Chamber confirmed on 6 May 1999. That Indictment contains the final version of the Prosecutor's charges against Alfred **Musema** (see Trial Judgement, paras. 7 and 8).

4. In his capacity as director of Gisovu tea factory, **Musema** was charged under Articles 6(1) and 6(3) of the Statute of the Tribunal (the "Statute"): (i) with bringing armed individuals to the area of Bisesero, often in concert with others, and ordering the attack on persons who had sought refuge there; (ii) with personally attacking and killing, often in concert with others, persons who had sought refuge in that area. In conformity with the Amended Indictment, **Musema** had to answer for the following nine (9) [FN4] counts punishable under the Statute:

FN4. Count 1- genocide (Article 2, (3) (a) of the Statute. Alternatively: Count 2 -- Complicity in genocide (Article 2 (3) (e) of the Statute; Count 3 -- conspiracy to commit genocide (Article 2 (3) (b); Count 4 -murder as a crime against humanity (Article 2 (3) (a) of the Statute; Count 5 -- extermination as a crime against humanity (Article 2 (3) (b) of the Statute; Count 6 -- other inhumane acts as crime against humanity (Article 3(i) of the Statute; Count 7- rape as a crime against humanity (Article 3 (g) of the Statute; Count 8 -- violence to life, health and physical or mental well-being of persons, in particular, murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment that is a violation of Article 3 Common to the Geneva Conventions and Additional Protocol II (Article 4 (a) of the Statute; Count 9 -- Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced

prostitution and any other form of indecent assault that is in violation of Article 3 Common to the Geneva Conventions and Additional Protocol II (Article 4(e) of the Statute.

- Genocide, pursuant to Article 2 (3)(a) of the Statute (Count 1);

- Complicity in genocide and conspiracy to commit genocide, pursuant to Article 2 (3)(c) and (b) of the Statute (Counts 2 and 3);

- Crimes against humanity (murder, extermination, other inhumane acts, rape), pursuant to Article 3 (a), (b),(i) and (g) of the Statute (Counts 4, 5, 6 and 7);

- Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment, pursuant to Article 4(a) of the Statute (Count 8);

- Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, pursuant to Article 4(e) of the Statute.

5. **Musema** was found guilty on the count of genocide (Count 1), the counts of crime against humanity-extermination and rape- (Counts 5 and 7) and not guilty on the remaining counts (2, 3, 4, 6, 8, and 9). The Trial Chamber imposed a single sentence of life imprisonment on **Musema** for all the counts on which he had been found guilty.

B. Appeal

6. **Musema** appealed against the conviction and sentence handed down by the Trial Chamber on 27 January 2000. The **Appeals Chamber** heard all the parties at a public hearing held at the Seat of the Tribunal on 28 and 29 May 2001. [FN5]

FN5. For more details about the Appeal proceedings, see Annex A of this Judgement.

7. Under the grounds of appeal against conviction, **Musema** alleges that the Trial Chamber erred in law and in fact pursuant to Article 24(1) (a), and (b) of the Statute and requests, as remedy that the **Appeals Chamber**:

(i) Set aside the verdict of the Trial Chamber with respect to Counts 1, 5, [FN6] and 7);

FN6. Although the Appellant has appealed against the Trial Judgement under "Count 4", the **Appeals Chamber** understands that the Appellant is rather referring to Count 5 since the Appellant was found not guilty on Count 4 (see Trial Judgement,

paras. 952 to 958).

(ii) Substitute each of the verdicts of guilty for a verdict of not guilty;

(iii) Order his immediate release.

The alleged errors in law and in fact may be summarized as follows:

(i) The Trial Chamber erred in law by setting forth criteria on the standard and burden of proof and by applying them in considering documentary evidence, false testimony, the impact of trauma, the probative value of confidential testimonies, and the defence of alibi. Moreover, the Trial Chamber committed a series of errors in law and in fact by applying the said criteria to the facts of the instant case. These allegations, which constitute the first ground of appeal, relate to Counts 1, 5, and 7 of the Amended Indictment;

(ii) The Trial Chamber erred in law in allowing the Prosecution to call witnesses whose written statements had not been disclosed to the Defence within 60 days before the date set for trial. This allegation, which constitutes the second ground of appeal, relates to Counts 1, 5 and 7 of the Amended Indictment;

(iii) The Trial Chamber erred in law by failing to order the immediate release of the Appellant on the grounds of undue delay in the pre-trial proceedings and in his transfer to the Detention Facility of the Tribunal. This allegation, which constitutes the third ground of appeal, has been dropped by the Appellant; [FN7]

FN7. Grounds of Appeal Against Conviction and Sentence and Appellant's Brief, filed on 23 May 2000, para. 540 ("Appellant's Brief.").

(iv) The Trial Chamber erred in law by granting the Prosecution leave to amend the Indictment in the course of the trial to add (3) three new counts, including Count 7. This allegation, which constitutes the fourth ground of Appeal, relates to Count 7 of the Amended Indictment;

(v) The Trial Chamber erred in law in finding that the Appellant had to answer for the new counts added to the Amended Indictment, on the grounds that said Indictment was never officially served on him. This allegation, which constitutes the fifth ground of appeal, is related to Count 7 of the amended Indictment;

(vi) The Trial Chamber erred in law in finding the Appellant guilty of two offences based on the same set of facts. This allegation which constitutes the sixth ground of appeal relates to Counts 1 and 5 of the Amended Indictment.

The first, second, fourth, fifth and sixth grounds of appeal are considered under Sub-Section II, III.A, III.B, III.C and IV of this Judgement, respectively. The **Appeals Chamber** will not rule on the third ground of appeal as the Appellant had dropped it.

8. Alternatively, **Musema** appealed against the sentence on the grounds that the Trial Chamber allegedly abused its discretion by imposing a sentence of life imprisonment. He is requesting that the **Appeals Chamber** rectify the alleged error

by replacing the sentence of life imprisonment with a fixed sentence. In support of this appeal, the Appellant advances the following 3(three) arguments:

- The sentence fails to take into account the need to lay down a range of sentences proportional to the situation of the Accused in the context of the Rwandan conflict;

- The sentence is out of proportion to the other sentences passed by the Tribunal for the crime ofgenocide;

- The sentence does not sufficiently take into account the mitigating circumstances in this case.

The arguments in support of the appeal against sentence are considered in Section V of this Judgement.

9. At the start of the hearing on appeal on 28 May 2001, **Musema** also filed a motion, that was heard in camera, to present additional evidence (statements of Witnesses CB, EB and AC), together with a request for leave to file a supplementary ground of appeal. The **Appeals Chamber** ruled on the motion on 28 September 2001 and, in its decision:

(i) Denied the request for leave to file Witness AC's statement;

(ii) Granted the request for leave to file the statements of Witnesses CB and EB;

(iii) Denied the request for leave to file a supplementary ground of appeal;

(iv) Ordered that Witnesses CB and EB be called to testify before the **Appeals Chamber**.

On 3 October 2001, the President of the Tribunal allowed the **Appeals Chamber** to sit outside the seat of the Tribunal in order that witnesses CB and EB could be heard at The Hague, The Netherlands on 17 October 2001.

10. The effect of the extra judicial and judicial statements of Witnesses CB and EB on the appeal and factual findings of the Trial Chamber is dealt with in sub-sections II.C and V of this Judgement.

II. FIRST GROUND OF APPEAL: ALLEGATION OF ERRORS OF LAW AND OF FACT IN THE TRIAL CHAMBER'S ASSESSMENT OF EVIDENCE AND IN ITS FACTUAL FINDINGS

11. In general, **Musema** argues in his first ground of appeal that the Trial Chamber's findings of guilt:

[...] were based on an evaluation of evidence that was wholly erroneous. This is owing to the fact that the Trial Chamber failed to apply the correct burden and standard of proof to the facts before it. [FN8]

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FN8. Appellant's brief, para. 49.

12. This ground of appeal raises three principal issues:

(A) Standard for appellate review: This refers, in particular, to the role of the **Appeals Chamber** when considering allegations of errors of fact and errors alleged to have been committed by the Trial Chamber in its assessment of evidence;

(B) Burden and standard of proof at trial: This refers to the test to be applied by a Trial Chamber in assessing evidence and the burden of proof that lies on each party;

(C) Application of the above principles to the facts of the case: In this section, **Musema** challenges the Trial Chamber's assessment of the evidence in the instant case, in particular, its findings as to witness credibility and the rejection of his alibi.

These issues relate generally to alleged errors in the Trial Chamber's evaluation of the evidence and to the factual findings on which the three counts for which **Musema** was convicted are based. [FN9] The **Appeals Chamber** will now address each of the issues separately.

FN9. That is, Count 1 (Genocide), Count 5 (Crime against humanity, [extermination]) and Count 7 (crime against humanity, [rape]); see Trial Judgement, Section 7: verdict.

A. Standard for Appellate Review

1. Arguments of the parties

13. **Musema** accepts that it is for the appealing party to establish the existence of an error of law or of fact. [FN10] He contends that the correct test to be applied in both cases is whether the **Appeals Chamber** was satisfied "that no reasonable Trial Chamber could have come to a different conclusion from that which had been reached by the Trial Chamber if they had directed themselves properly." [FN11] He submits that it is the duty of the Trial Chamber, as trier of fact and law, to exercise its functions properly and fairly, notwithstanding that objections may or may not have been raised by the parties. He does not accept the proposition that a party must be taken to have acquiesced in the manner in which the Trial Chamber exercised its discretion on the ground that the party did not raise an objection at the time such discretion was exercised [FN12] and contends that the role of the **Appeals Chamber** is not to apportion blame to this or that party or to judge the performance of the parties, but to determine whether there has been an error of law or of fact which invalidates the decision rendered or occasioned a miscarriage of justice. [FN13]

FN10. Appellant's Brief-in-Reply, filed on 26 October 2000, para. 5 ("Appellant's Reply").

FN11. Appellant's Reply, para. 6 (emphasis as in original).

FN12. **Musema** refutes an allegation that "rights can be implicitly waived in this manner." (Appellant's Reply, para. 7).

FN13. Appellant's Reply, para. 8. **Musema** submits that if one of these grounds exists, "this cannot be overriden by issue of waiver or estoppel. Either a decision is wrong, or it is not; the attitude of the parties at the time does not assist the **Appeals Chamber** in discharging its duties on the matter."

14. The Prosecution maintains that an error on a question of law encompasses two types of error: (i) error in the application of the substantive law; and (ii) error in the manner the Trial Chamber exercised its discretion. It submits that the nature of the burden with regard to the first error is one of persuasion rather than proof, since the **Appeals Chamber** has the latitude and discretion to decide questions of law. [FN14] However, as regards alleged errors in the exercise of judicial discretion, the Prosecution argues that it falls to the appealing party to show that the Trial Chamber abused its discretion. Absent such showing, the Prosecution submits that the Trial Chamber's decision should stand. [FN15] In respect of alleged errors of fact, the "reasonableness" standard applies. The Prosecution submits that this standard of review is "deferential in nature and in application", and requires the **Appeals Chamber** "to give a margin of deference" to the findings of fact reached by a Trial Chamber, as evidenced by several **Appeals Chamber** decisions. [FN16]

FN14. Prosecution's Response, para. 3.9.

FN15. Prosecution's Response, para. 3.11. The Prosecution also submits that a party must be taken to have acquiesced in the Trial Chamber's exercise of its discretion, unless the party objected at trial in a timely and proper manner and that if the party failed to do so, the issue of waiver must be considered, Prosecution's Response, para. 3.13. The Prosecution recognizes that even where a party fails to discharge its burden as required, the **Appeals Chamber** may "step in and, for other reasons, find that the Trial Chamber erred on the particular point of law", Prosecution's Response, para. 3.14.

FN16. Prosecution's Response, para. 3.16 with references to ICTY **Appeals Chamber** decisions in the Tadic, Aleksovski and Furundzija cases.

2. Discussion

15. Article 24(1) of the Statute provides for appeals on grounds of an error on a question of law that invalidates the decision or an error of fact which has occasioned a miscarriage of justice. The standards to be applied in both cases are well established. These standards have been uniformly accepted and applied in the

case-law of the **Appeals Chamber** of both ICTR [FN17] and ICTY [FN18] and this **Appeals Chamber** considers that no cogent argument has been put forward by **Musema** to persuade it to depart therefrom. [FN19] The **Appeals Chamber** rejects the Appellant's assertion that the applicable standard for both error of law and error of fact is whether the **Appeals Chamber** is satisfied that no reasonable Trial Chamber could have come to a different conclusion from that which had been reached by the Trial Chamber if it had directed itself properly.

FN17. Akayesu Appeal Judgement, para. 178, Kayishema/Ruzindana Appeal Judgement, para. 320.

FN18. Celebici Appeal Judgement, para. 434; Furundzija Appeal Judgement, para. 37; Tadic Appeal Judgement, para. 64.

FN19. Semanza Appeal Judgement, para. 92. The **Appeals Chamber** adopted the findings in para. 107 of the Aleksovski Appeal Judgement, and held "that in the interests of legal certainty and predictability, the **Appeals Chamber** should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."

16. Where an error on a question of law is alleged, the burden is on the appealing party to show that the error is one which invalidated the decision, although such burden is not absolute. [FN20]

FN20. Furundzija Appeal Judgement, para. 36. In para. 35, the **Appeals Chamber** held that "[w]here a party contends that a Trial Chamber made an error of law, the **Appeals Chamber**, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The **Appeals Chamber** may step in and, for other reasons, find in favour of the contention that there is an error of law."

17. As to errors of fact, the test to be applied is whether the conclusion of guilt beyond reasonable doubt is one which no reasonable tribunal of fact could have eached. [FN21] That is, the **Appeals Chamber** confirms that the standard to be applied is that of reasonableness. In order to satisfy this test, the burden rests on the appealing party to show that the Trial Chamber committed an error. The **Appeals Chamber** stresses, as it has done in the past, that an appeal is not an opportunity for a party to have a de novo review of their case. [FN22] It is particularly necessary to state this because the present appeal tends to call into question all of the factual findings relied upon to convict the Accused. An appellant who alleges an error of fact must satisfy a two-fold burden: first, show that an error was committed; and second, show that the error occasioned a miscarriage of justice. [FN23] In other words, it is not every error that will lead the **Appeals Chamber** to overturn a decision of the Trial Chamber. The

appealing party must demonstrate that the error was such that it led to a miscarriage of justice. [FN24]

FN21. Akayesu Appeal Judgement, para. 178; Celebici Appeal Judgement, paras. 434 -- 435; Tadic Appeal Judgement, para. 64; Aleksovski Appeal Judgement, para. 63; Furundzija Appeal Judgement, para. 37.

FN22. Akayesu Appeal Judgement, para. 177; Furundzija Appeal Judgement, para. 40.

FN23. Serushago Appeal Judgement, para. 22.

FN24. Akayesu Appeal Judgement, para. 178; Furundzija Appeal Judgement, para. 37. In the latter, the **Appeals Chamber** for ICTY referred to a miscarriage of justice as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."

18. The **Appeals Chamber** recalls that in determining whether or not a Trial Chamber's finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber." [FN25] 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. [FN26] But the Trial Chamber's discretion in weighing and assessing evidence is always limited by its duty to provide a "reasoned opinion in writing," [FN27] although it is not required to articulate every step of its reasoning for each particular finding it makes. [FN28] The question arises as to the extent that a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony. [FN29] There is no guiding principle on this point and, to a large extent, testimony must be considered on a case by case basis. The **Appeals Chamber** of ICTY held that: [FN30]

FN25. Furundzija Appeal Judgement, para. 37; Tadic Appeal Judgement, para. 35; Aleksovski Appeal Judgement, para. 63.

FN26. Akayesu Appeal Judgement, para. 232; Tadic Appeal Judgement, para. 64; Furundzija Appeal Judgement, para. 37; Aleksovski Appeal Judgement, para. 63; Serushago Appeal Judgement, para 22.

FN27. Article 22(2) of the Statute and Rule 88(C) of the Rules.

FN28. Celebici Appeal Judgement, para. 481.

FN29. In particular, the Prosecution has submitted that the "parameters of what

constitutes a 'reasoned opinion' have yet to be articulated by any Trial Chamber of this Tribunal or ICTY, or by the **Appeals Chamber.**" Prosecution's Response, footnote 59 and para. 4.108.

FN30. Furundzija Appeal Judgement, para. 69.

[t]he right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute. The case-law that has developed under the European Convention on Human Rights establishes that a reasoned opinion is a component of the fair hearing requirement, but that "the extent to which this duty ... applies may vary according to the nature of the decision" and "can only be determined in the light of the circumstances of the case." [FN31] The European Court of Human Rights has held that a "tribunal' is not obliged to give a detailed answer to every argument. [FN32]

FN31. Footnote reference: "See the case of Ruiz Torija v. Spain, Judgement of 9 December 1994, Publication of the European Court of Human Rights ("Eur. Ct. H. R."), Series A, vol. 303, para. 29."

FN32. Footnote reference: "Case of Van de Hurk v. The Netherlands, Judgement of 19 April 1994, Eur. Ct. H. R., Series A, vol. 288, para. 61."

19. In addition, the **Appeals Chamber** of ICTY has stated that although the evidence produced may not have been referred to by a Trial Chamber, based on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account. [FN33]

FN33. Celebici Appeal Judgement, para. 483.

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. This is particularly so in the evaluation of witness testimony, including inconsistencies and the overall credibility of a witness. A Trial Chamber is not required to set out in detail why it accepted or rejected a particular testimony. Thus, in the Celebici case, the **Appeals Chamber** of ICTY found that it is open to the Trial Chamber to accept what it described as the "fundamental features" of testimony. [FN34] It also stated that:

FN34. Ibid., para. 485.

[t]he Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial. It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole

testimony unreliable. [FN35]

FN35. Ibid., para. 498.

21. It is for an appellant to show that the finding made by the Trial Chamber is erroneous and that the Trial Chamber indeed disregarded some item of evidence, as it did not refer to it. In Celebici, the **Appeals Chamber** found that the Appellant had "failed to show that the Trial Chamber erred in disregarding the alleged inconsistencies in its overall evaluation of the evidence as being compelling and credible, and in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond reasonable doubt on these grounds." [FN36]

FN36. Ibid.

B. The Burden and Standard of Proof at Trial: General principles governing assessment of evidence by the Trial Chamber

22. **Musema** has raised six preliminary points largely based on what he alleges to be errors in the Trial Chamber's observations as to how it intended to or did assess the evidence at trial. He claims that the Trial Chamber consistently committed the said errors in its assessment of the evidence and that the failure of the Trial Chamber to apply the correct burden and standard of proof to the facts before it meant that he was wrongly convicted. [FN37]

FN37. Appellant's Brief, para. 23.

23. Before examining the Trial Chamber's precise factual findings, the **Appeals Chamber** will first briefly consider these general allegations.

1. Burden and standard of proof

(a) Arguments of the parties

24. **Musema** alleges that the Trial Chamber "consistently erred in its statements of the law regarding the burden and standard of proof." [FN38] He maintains that the Trial Chamber failed to apply the correct test in assessing evidence, whereby it is the duty of the Prosecution, save in certain cases, to prove the guilt of the accused beyond all reasonable doubt. [FN39] He cited the Tadic Appeal Judgement where "the **Appeals Chamber** found that the Trial Chamber had, in effect, wrongly directed itself on the law." [FN40]

FN38. Ibid., para. 101.

FN39. Ibid., para. 9. **Musema** points out that in some national jurisdictions, there is a burden on the Defence to prove certain "special defences" on the balance of probabilities (referring to diminished responsibility) as well as the burden in the case of confessions, (Appellant's Brief, paras. 16 to 18). Otherwise, **Musema** submits that "[t]here is nothing in the Rules to state that the burden of proof rests on the Defence in any other circumstances." Appellant's Brief, para. 19.

FN40. Ibid., para. 48.

25. **Musema** submits that the Trial Chamber's approach is based on the premise that the Defence had a burden to discharge in this case, and committed this error throughout the section of the Trial Judgement entitled "Evidentiary Matters." [FN41] Referring to the Trial Chamber's finding in paragraph 41 that it had assessed the relative weight and probative value to be accorded to each piece of evidence [FN42] he argues that "it is wrong to talk of probative value in relation to Defence evidence and contends that "testimony and exhibits are only offered by the Defence in order to cast doubt on allegations made by the Prosecution." [FN43]

FN41. Ibid., paras. 52 to 53. In his argument, **Musema** refers to paras. 32, 41 and 52 of the Trial Judgement. See also, Transcript (A), p. 52 and pp. 66 to 69, where **Musema** relies on the dissenting opinion of Judge Pillay where she states that "once the Chamber has made a finding of credibility with respect to a witness, the testimony of that witness should be accepted, unless there is a compelling reason to find otherwise." (Separate Opinion of Judge Pillay, para. 4).

FN42. Ibid., para. 54, referring to Trial Judgement, para. 41, where the Trial Chamber states that it "has assessed the relative weight and probative value to be accorded to each piece of evidence" (emphasis added). He submits that "[t]hroughout this section of the Judgement, the Trial Chamber is effectively describing a process by which evidence for each party is weighed against evidence for the other, in order to see which is more likely to be true. This describes a standard of proof based on the balance of probabilities, and not the appropriate test of proof beyond reasonable doubt."

FN43. Appellant's Brief, para. 52. See also, Transcript (A), p. 53. **Musema** submits that the Trial Chamber "fails to make a distinction between the standards it applies to evidence called by the Prosecution, and evidence called by the Defence, when it deals with matters such as reliability, probative value, and corroboration." Appellant's Brief, para. 53.

26. **Musema** refers in particular to the statement by the Trial Chamber in paragraph 52 of the Trial Judgement that "the absence of forensic evidence corroborating eyewitness testimony shall in no way affect the assessment of those testimonies". [FN44] The Appellant is of the view that this is a "totally incorrect statement of the tests to be applied to evidence". [FN45] He further submits that the Trial Chamber stated that the presence of such evidence would also not affect the assessment of testimony, whereas in fact, corroborative evidence would strengthen

the testimony under consideration. [FN46] **Musema** also submits that "testimony which is not corroborated by forensic evidence must necessarily be treated with greater caution than testimony which is so corroborated." [FN47] He avers that such a view is in fact expressed in paragraph 75 of the Trial Judgement, where the Trial Chamber stated that "any evidence which is supported by other evidence logically possesses a greater probative value than evidence which stands alone, unless both pieces of evidence are not credible." This statement, he maintains, "directly contradicts the principle" laid down above. [FN48]

FN44. Ibid., para. 55, referring to para. 52 of the Trial Judgement.

FN45. Ibid., para. 56.

FN46. That is, he submits that "Two pieces of consistent testimony will carry more weight than one" (Appellant's Brief, para. 57).

FN47. Ibid., paras. 56 to 57. See also, Appellant's Reply, para. 14. He submits that "the presence or absence of corroboration is a factor which must be considered by a Trial Chamber when evaluating witness testimony" (Para. 15).

FN48. Ibid., paras. 58 to 59.

27. The Prosecution does not dispute that: (i) the principle of presumption of innocence governs proceedings before the Tribunal; (ii) the burden of proof rests on the Prosecution; and (iii) as regards the standard of proof, it is the duty of the Prosecution to prove the guilt of the accused beyond a reasonable doubt. [FN49] However, the Prosecution disputes the allegation that the Trial Chamber erred in the application of those standards and in the evaluation of the evidence. It submits that the Trial Judgement should be considered in its entirety and that a review of the various counts and findings would give the impression that the correct standard was applied. [FN50] In support of its contention, the Prosecution cites several paragraphs in the Judgement which, in its opinion, show that the Trial Chamber did not at all shift the burden of proof, but that on the contrary, the Chamber adopted the correct approach. [FN51] It is the Prosecution's submission that **Musema's** arguments are premised on a misunderstanding of the manner in which evidence may be evaluated under the rules and regulations governing proceedings before the Tribunal. In other words, "in the legal regime of the Tribunal, a Trial Chamber has discretion to decide on the basis of a free evaluation of all of the evidence in a case, whether an accused is guilty or not guilty of the crimes charged." [FN52] Accordingly, the fact that the Chamber considered whether evidence presented by the Defence was sufficient to cast reasonable doubt on the Prosecution case, does not imply that it was placing a burden of proof on the Appellant or imposing a lower standard of proof on the Prosecution. [FN53] As regards corroboration of eyewitness testimony, the Prosecution submits that there is no provision in the Tribunal's Rules of Procedure and Evidence that requires a Trial Chamber, in assessing eyewitness testimony, to take into consideration the presence or absence of corroborative

forensic evidence. [FN54] Similarly, a Trial Chamber is not required to state that it assessed such testimony with greater care and caution. [FN55]

FN49. Prosecution's Response, paras. 4.2 and 4.3.

FN50. Regarding the importance of considering the Trial Judgement in its entirety, the Prosecution, at the Hearing on Appeal referred to the fact that **Musema** was found not guilty on five counts on the grounds that the evidence tendered raised a reasonable doubt and not guilty on four counts on the grounds that his alibi raised a reasonable doubt. T(A), p. 140. Also, T(A), pp. 144 and 152, referring to the need to consider the Judgement in its entirety.

FN51. T(A), 28 May 2001, pp. 154 to 162, referring to the Trial Judgement, paras. 649, 662 to 666, 694, 834, 844 and 845, 783 and 784, and 746 to 757.

FN52. Prosecution's Response, para. 4.20. In paras. 4.16 to 4.28 of its Response, the Prosecution discusses the court's discretion in the assessment of evidence. It submits that Rule 89 governs the admissibility of evidence and underscores the discretion that a Trial Chamber retains in its evaluation of the said evidence.

FN53. Prosecution's Response, para. 4.23. The Prosecution submits that "the language used in paragraph 32 of the Judgement simply illustrates that the Trial Chamber did what the law permits it to do: namely, to consider all of the evidence that was presented at trial before pronouncing on the guilt or innocence of the Appellant" (emphasis added).

FN54. Prosecution's Response, para. 4.32.

FN55. Ibid., para. 4.32.

b. Discussion

28. The parties agree that the appropriate standard of proof to be applied is that of proof beyond reasonable doubt, and that an accused shall benefit from the presumption of innocence. However, **Musema** argues that the Trial Chamber erred by failing to apply the correct burden of proof. In support of this argument, **Musema** refers mainly to the statement made in paragraph 32 of the Trial Judgement, to wit:

> [t]he Chamber has considered the charges against **Musema** on the basis of testimony and exhibits offered by the Parties to prove or disprove allegations made in the Indictment. [FN56]

FN56. Trial Judgement, para. 32 (emphasis added).

29. To rebut the allegation that the Trial Chamber committed an error, the Prosecution relies chiefly on the observation made by the Chamber in paragraph 649, at the start of the factual findings:

The Chamber has considered the testimonies of the witnesses, the evidence in support of the contested facts and the alibi of **Musema**. It shall now present in chronological order, its factual findings thereon. The burden of proof being on the Prosecutor, the Chamber will first consider the Prosecutor's evidence, and then, if the Chamber deems there to be a case to answer, it will consider the alibi before finally making its findings.

30. The issue before the **Appeals Chamber** is whether the statement made by the Trial Chamber in paragraph 32 of the Trial Judgement shows that the Trial Chamber incorrectly applied the relevant standard and, in particular, whether as a result, the burden of proof was ultimately placed on the Defence. It is a basic rule of interpretation that a proposition should not be construed out of context, but rather, in relation to the context. With respect to **Musema's** allegations concerning paragraph 32 of the Trial Judgement, the **Appeals Chamber** considers that the Trial Chamber was merely referring to evidence proffered by the parties and that it was not imposing on the Defence a duty to prove or disprove the allegations.

31. **Musema** refers to several other paragraphs of the Trial Judgement in support of his contention that the burden of proof was shifted. He cites the Trial Chamber's finding that the Defence "did not impair the credibility" [FN57] of a witness or establish that the testimony of a witness was "untruthful in any material respect." [FN58] **Musema** also relies on the general finding made by the Trial Chamber that it "has assessed the relative weight and probative value to be accorded to each piece of evidence in the context of all other evidence presented to it in the course of the trial [FN59] and, that "[t]he absence of forensic or real evidence shall in no way diminish the probative value of the evidence which is provided to the Chamber; in particular, the absence of forensic evidence corroborating eyewitness testimonies shall in no way affect the assessment of those testimonies [...]." [FN60]

FN57. Trial Judgement, para. 717, in which, with regard to Witness D, the Trial Chamber noted that "the cross-examination did not impair the credibility of the witness' testimony and therefore finds it to be reliable." **Musema** submits that the "Trial Chamber shows by this form of words that it looks to the Defence to impair the credibility of a witness' testimony." See Appellant's Brief, para. 209.

FN58. Trial Judgement, para. 713, where with regard to Witness AC, the Trial Chamber stated that it "considers that the Defence did not establish that the testimony of Witness AC was untruthful in any material respect. However, in light of the confusion which emerges from cross-examination, the Chamber is only willing to accept the evidence of this witness only to the extent that it is corroborated

by other testimony." **Musema** submits that it "is not for the Defence to establish anything at all, and certainly it is not for the Defence to establish that the evidence of a witness is untruthful. It is for the Prosecution to establish that the evidence of a witness is truthful. This is another example of the Trial Chamber explicitly shifting the burden of proof from the Prosecution to the Defence." See Appellant's Brief, para. 189.

FN59. Trial Judgement, para. 41.

FN60. Ibid., para. 52.

32. Having considered the above statements made by the Trial Chamber, the **Appeals Chamber** finds no reason to hold that the Trial Chamber shifted the burden of proof. The **Appeals Chamber** finds, on the contrary, that the Trial Chamber's statements reflect a proper application of the rules governing trial proceedings and the presentation of evidence. Accordingly, the **Appeals Chamber** dismisses **Musema's** arguments on this point.

33. Furthermore, **Musema** asserts that he was required to prove his alibi. The issue as to whether the Trial Chamber shifted the burden of proof with respect to alibi and required **Musema** to satisfy the Chamber of his innocence will be considered in the third part of this first ground of appeal. [FN61]

FN61. See Sub-Section II c.3 of this Appeal Judgement.

2. Corroboration of witness testimony

(a) Arguments of the parties

34. Although **Musema** does not allege that the Trial Chamber erred in not holding that witness testimonies require corroboration, he submits that where such testimony (that is, that of a single eyewitness) is the only evidence adduced, it must be viewed with extreme caution. [FN62] He avers that the high standard of proof required by the courts worldwide in such cases must equally prevail before this Tribunal.

FN62. Appellant's Brief, paras. 45 and 60.

35. For its part, the Prosecution argues that to require that the Trial Chamber exercise care and caution when examining testimonies suggests that the Trial Chamber must consider the presence or absence of corroboration when evaluating eyewitness testimony. But then, the Tribunal's Statute and Rules of Procedure and Evidence do not provide for any such requirement, nor do they require a Trial Chamber to articulate the legal standards used in assessing evidence. In any

event, it is the Prosecution's submission that since the Trial Chamber meticulously considered the uncorroborated testimony of eyewitnesses (for example, in paras. 713, 845 of the Trial Judgement), **Musema's** right to a fair trial was respected. [FN63]

FN63. Prosecution's Response, para. 4.32.

(b) Discussion

36. One of the duties of a Trial Chamber is to assess the credibility of witnesses. In discharging that duty, the Trial Chamber takes into account all the circumstances of the case. As stated in the Aleksovski Appeal Judgement, "[w]hether a Trial Chamber will rely on single witness testimony as proof of a material fact, will depend on various factors that have to be assessed in the circumstances of each case." [FN64] It may be that a Trial Chamber would require the testimony of a witness to be corroborated, but according to the established practice of this Tribunal and of the International Criminal Tribunal for the Former Yugoslavia (ICTY), that is clearly not a requirement. [FN65]

FN64. Aleksovski Appeal Judgement, para. 63, referring to Tadic Appeal Judgement, para. 65.

FN65. Kayishema/Ruzindana Appeal Judgement, paras. 154 and 229; Aleksovski Appeal Judgement, para. 62 ("the testimony of a single witness does not require as a matter of law any corroboration"); Tadic Appeal Judgement, para. 65; Celebici Appeal Judgement, paras. 492 and 506.

37. In the instant case, the Trial Chamber affirmed that it "may rule on the basis of a single testimony if, in its opinion, that testimony is relevant and credible." [FN66] It further stated that:

FN66. Trial Judgement, para. 43.

> [...] it is proper to infer that the ability of the Chamber to rule on the basis of testimonies and other evidence is not bound by any rule of corroboration, but rather on the Chamber's own assessment of the probative value of the evidence before it.
>
> The Chamber may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which are corroborated: the corroboration of testimonies, even by many witnesses, does not establish absolutely the credibility of those testimonies. [FN67]

FN67. Ibid., paras. 45 to 46.

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38. The **Appeals Chamber** is of the view that these statements correctly reflect the position of the law regarding the Trial Chamber's discretion in assessing testimonies and the evidence before it.

3. The Trial Chamber's treatment of documentary evidence

(a) Arguments of the parties

39. **Musema** challenges the Trial Chamber's findings with respect to the burden of proof applicable to the admissibility of documentary evidence and, in particular, alleges that the Trial Chamber erred in placing a burden on him to prove that the documents he tendered were reliable. [FN68] He submits that "a precondition of reliability has caused evidence in their determination, documents in their determination, to be given a standard which, as far as the Accused is concerned, negates the principle that he doesn't have to prove his case." [FN69] He contends that the Trial Chamber erred in finding that documentary evidence should only be admissible if proven to be reliable, on a balance of probabilities. He asserts that the Defence is not required to prove anything, the only burden on it being to cast reasonable doubt on the Prosecution case. [FN70] **Musema** submits that his argument in this section relates to all the documents he produced at trial. [FN71]

FN68. Appellant's Brief, paras. 61 to 66.

FN69. T(A), p. 62.

FN70. Appellant's Brief, para. 65. T(A), pp. 53 to 56. **Musema** submits that the first sentence in para. 56 of the Judgement illustrates that the Trial Chamber required him "to prove his defence if he relies on documents...on the balance of probabilities." T(A), p. 56.

FN71. Appellant's Reply, para. 20.

40. Furthermore, **Musema** argues that the Trial Chamber erred when it stated that the source of a document could be important in determining its reliability and that, "evidence produced in support of a defence of alibi from a source other than the Accused may be of greater probative value than evidence provided or produced by the Accused." [FN72] **Musema** submits that, on the contrary, since all persons are entitled to equal treatment before the Tribunal, "documents produced by him cannot be accorded a lesser status than documents produced by others". [FN73]

FN72. Appellant's Brief, paras. 61 to 62, referring to Trial Judgement, para. 63.

FN73. Appellant's Brief, paras. 61 to 63. T(A), p. 62.

41. The Prosecution submits that **Musema** has failed to point to any instances whatsoever where the Trial Chamber erred. It asserts that the Trial Chamber was at liberty to apply the balance of probabilities standard to all documentary evidence, in view of its inherent discretion in the admissibility and assessment of evidence. [FN74] At the same time, the Prosecution avers that **Musema** has failed to demonstrate how that standard affected the admissibility of any of the documents he tendered, it being understood that none was excluded, [FN75] and further submits that it is wrong to hold the view that documentary evidence produced by the Defence should not be assessed with a view to determining its reliability. [FN76] It affirms that the Trial Chamber must consider the relevance and, therefore, the reliability of a document, and that to say that the burden of proving the reliability of a document lies on the accused is not the same thing as saying that the accused bears the burden of proving his innocence or of showing that he is not guilty. The Prosecution submits that when an accused produces a document in evidence, he or she is required to show that the document is reliable to a certain extent. However, the burden of proof lies basically with the Prosecution throughout the entire case. [FN77]

FN74. Prosecution's Response, para. 4.42. T(A), p. 155.

FN75. T(A), p. 155.

FN76. Prosecution's Response, para. 4.43.

FN77. Ibid., paras. 4.43 to 4.44.

42. The Prosecution further submits that the source of a document may be properly taken into account by a Trial Chamber in assessing the reliability and credibility of the document, even where that source is the Accused himself. [FN78] It maintains that it is not unreasonable for a trier of fact to treat evidence as having less weight, when the person giving the evidence has a personal interest in the evidence being accepted. [FN79] It is the Prosecution's view that "[s]ince an accused's testimony can be examined for possible bias, the accused's role as the source of a document that is presented in support of his innocence may be reviewed for possible bias." [FN80] In the case of documents produced in support of **Musema's** alibi, the Trial Chamber was right to find that evidence in support of an alibi produced from a source other than the Accused may have greater probative value. [FN81]

FN78. Ibid., para. 4.36.

FN79. Ibid., para. 4.37.

FN80. Ibid., para. 4.38.

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FN81. Prosecution's Response, para. 4.39.

(b) Discussion

43. The **Appeals Chamber** will first deal with the argument that reliability should not be assessed in considering the admissibility of the evidence tendered by the Defence at trial. **Musema** contends that "the first sentence of paragraph 56...contains the mischief in this Judgement." [FN82] The said paragraph 56 is found in the Section of the Trial Judgement entitled "The burden of proof in relation to admissibility". In response to a question from the **Appeals Chamber** at the hearing on appeal, **Musema** submitted that the use of the word 'reliability' in this section, illustrates that the Trial Chamber was not referring to admissibility, but rather to the final evaluation of the evidence. **Musema** stated that "if you look at the Judgement, they have looked at reliability as the key phrase to seek whether a witness is to be believed or disbelieved. If they find him unreliable, they disbelieve; if he's reliable, they believe him." [FN83]

FN82. T(A), pp. 55 and 56.

FN83. Ibid., p. 57.

44. **Musema** has not provided any example of a case where documentary evidence tendered by him before the Trial Chamber was not accepted because he failed to establish, on the balance of probabilities, that it was reliable. As a preliminary point, the **Appeals Chamber** finds that the fact that the Section being referred to relates specifically to "admissibility" is, at first glance, proof that the Trial Chamber intended to apply it to admissibility of evidence. There is nothing to suggest instantly that in this Section, the Trial Chamber was ruling on the burden of proof in relation to the final assessment of evidence and that, in doing so, it was shifting the burden of proof.

45. The Trial Chamber held as follows:

54. Considered as a distinct form of evidence, documentary evidence raises a number of particular issues, both in the assessment of its admissibility and the assessment of its probative value.

The burden of proof in relation to admissibility

55. The Chamber notes that in order for a document to be admissible as evidence, the Party that seeks to rely on the document must first prove that it meets with the standards of relevance and probative value (discussed above) laid out by Sub-Rule 89(C). In other words, the burden of proof of the reliability (which, as discussed above, "runs through" the criteria of admissibility, namely relevance and probative value) of the document lies on the Party that seeks to rely on the document. When documents are admitted with the consent of both Parties, as has occurred in the instant case, the issue of proof of reliability does not arise. A

similar situation arises when a document is admitted by way of judicial notice, as a "fact of common knowledge" under Rule 94, since no proof of the fact is required. When, however, the reliability of documentary evidence is questioned, the issue arises as to the required standard of proof of reliability for the admission of evidence.

56. With certain exceptions, discussed below, the Chamber is of the opinion that the standard of proof required to establish the reliability of documentary evidence is proof on the balance of probabilities. The admission of evidence requires, under Sub-Rule 89(C), the establishment in the evidence of some relevance and some probative value. Accordingly, the standard of proof required for admissibility should be lower than the standard of proof required in the final determination of the matter at hand through the weighing up of the probative value of all the evidence before the Chamber. The admission of evidence does not require the ascertainment of the exact probative value of the evidence by the Chamber; that comes later. Admission requires simply the proof that the evidence has some probative value. Different standards of proof are appropriate for the process of admission and the process of determining the exact probative value of the same evidence.

57. Furthermore, the determination of admissibility does not go to the issue of credibility, but merely reliability. Accordingly, documentary evidence may be assessed, on the balance of probabilities, to be reliable, and as a result admitted. Later, that same evidence may be found, after examination by the Chamber, not to be credible.

58. The circumstances which give rise to exceptions to this general rule include (but are not limited to) those circumstances in which the rights of the Accused are threatened by the admission of the evidence in question, or wherever the allegations about the unreliability of the evidence demand for admissibility the most exacting standard, consistent with the allegations. In such cases, a standard of proof of "beyond reasonable doubt" may, in the opinion of the Chamber, be justified. [FN84]

FN84. Trial Judgement, paras. 54 to 58.

46. Rule 89(C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value." This means that for evidence to be admissible, each party must demonstrate its relevance and probative value. Under the case-law of the **Appeals Chamber** of ICTY [FN85] and ICTR, [FN86] it is established that the reliability of a statement made out of court may also be a relevant factor for a Trial Chamber to consider in determining admissibility. In this regard, the **Appeals Chamber** of ICTY held as follows:

FN85. Prosecutor v. Dario Kordic, Mario Cerkez, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, 21 July 2000, paras. 22 to 28 and Prosecutor v. Zlatko Aleksovski, Decision on Prosecutor's appeal on admissibility of evidence, Case No. IT-95-14/1-AR73, 16 February 1999, para. 15.

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FN86. Akayesu Appeal Judgement, para. 286.

[...] the reliability of a statement is relevant to its admissibility, and not just to its weight. A piece of evidence may be so lacking in terms of the indicia of reliability that it is not "probative" and is therefore inadmissible. [FN87]

FN87. Prosecutor v. Dario Kordic, Mario Cerkez, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, 21 July 2000, para. 24.

47. In the instant case, the Trial Chamber noted that "the burden of proof of the reliability ... of the document lies on the party that seeks to rely on the document", and that the requisite standard of proof was proof on the balance of probabilities. [FN88] Without ruling on the issue as to whether such was the appropriate standard, the **Appeals Chamber** holds that the Trial Chamber did not err in stating that for a document to be admissible as evidence, the Party relying on it must establish that it has sufficient indicia of reliability.

FN88. Trial Judgement, paras. 55 and 56.

48. The Trial Chamber also found that, "the standard of proof required for admissibility should be lower than the standard of proof required in the final determination of the matter at hand through the weighing up of the probative value of all the evidence before the Chamber." [FN89] It is the view of the **Appeals Chamber** that, in that sentence, the Trial Chamber was making a distinction between admissibility and the final assessment of evidence.

FN89. Ibid., para. 56.

49. As to the second argument that the Trial Chamber erred in stating that the source of a document could be important in determining the reliability of a document, the Trial Chamber held that:

...the source of a document may, taken in context, impact upon the assessment of the reliability or credibility (or both) of the document. For example, evidence produced in support of a defence of alibi from a source other than the Accused may be of greater probative value than evidence provided or produced by the Accused. While noting this, the Chamber emphasizes that such an understanding of the relationship between the source of documentary evidence and its probative value must in no way be interpreted as a presumption of the guilt of the Accused. The Chamber has not, in any way, allowed its assessment of the probative value of documentary evidence to interfere with the right of the Accused to a fair trial. [FN90]

FN90. Ibid., para. 63.

50. The first and second arguments overlap. Again, **Musema** has not given any instances where he attempted to adduce evidence before the Trial Chamber, which evidence the Trial Chamber rejected on the grounds that **Musema** himself was the source thereof. Every Trial Chamber is required, in assessing evidence, to determine its overall reliability and credibility. In the instant case, the Trial Chamber stated that it had "assessed the relative weight and probative value to be accorded to each piece of evidence in the context of all other evidence presented to it in the course of the trial." [FN91] It is correct to state that the sole fact that evidence is proffered by the accused is no reason to find that it is, ipso facto, less reliable. Nevertheless, the source of a document may be relevant to the Trial Chamber's assessment of the reliability and credibility of that document. Where such a document is tendered by an accused, a Trial Chamber may determine, for example, if the accused had the opportunity to concoct the evidence presented and whether or not he or she had cause to do so. This is part of the Trial Chamber's duty to assess the evidence before it.

FN91. Ibid., para. 41.

4. False testimony and Rule 91(B)5

(a) Arguments of the parties

51. **Musema** submits that the Trial Chamber erred in noting that, if he had seriously intended to make allegations of false testimony, such allegations should [have been] submitted to the Tribunal in proper motion form, under Rule 91(B)." [FN92] He argues that the Defence would be put in "an untenable position" if it had to file a motion in order to seriously allege false testimony. [FN93] **Musema** asserts that the Defence is only required to cast reasonable doubt on the Prosecution evidence, and is not required to institute proceedings against one or the other Prosecution witness in order to prove that they are lying. [FN94] On the contrary, under Rule 91(B), only the Trial Chamber has the power to initiate such proceedings. [FN95] **Musema** submits that the Trial Chamber's misapplication of the law placed an extra burden on him and implied that no allegation of false testimony would be considered unless proceedings in respect thereof were instituted under Rule 91. [FN96]

FN92. Appellant's Brief, paras. 67 and 68, referring to Trial Judgement, para. 98.

FN93. Ibid., para. 68.

FN94. Ibid., para. 68. T(A), pp. 71 and 72.

FN95. Ibid., paras. 69 and 70.

FN96. Ibid., paras. 71 and 72.

52. In the Prosecution's opinion, **Musema's** allegations reveal a misinterpretation both of the Trial Judgement and of Rule 91(B). [FN97] First, the Prosecution submits that under case-law, an accused may bring an allegation of false testimony before the Chamber, [FN98] and that once proceedings are instituted under the above-mentioned provision, the onus is on the party raising the allegation to satisfy the Chamber that there are strong grounds for believing that a witness has given false testimony. [FN99] Secondly, the Prosecution states that **Musema** fails to distinguish "between testimony that is incredible and testimony that constitutes false testimony." [FN100] It submits that the Trial Chamber simply meant to state that "challenges that go beyond an attack on credibility and implicate averments that a witness has committed perjury must be initiated and pursued consistently with Rule 91(B). [FN101] The Prosecution further submits that at no point, did the Trial Chamber impose on the Defence the additional burden alleged. [FN102]

FN97. Prosecution's Response, para. 4.47.

FN98. Ibid., para. 4.48.

FN99. Ibid., para. 4.51.

FN100. Ibid., para. 4.53. See also, T(A), p. 156.

FN101. Ibid., para. 4.54.

FN102. T(A), p. 157.

(b) Discussion

53. **Musema** has not provided any instances in which he suffered prejudice as a result of the Trial Chamber's alleged error of law. On the contrary, he seems to be making a general allegation concerning his entire case, that "[b]y its misapplication of the law [the Trial Chamber] has misjudged the challenges to evidence made by the Defence." [FN103]

FN103. Appellant's Brief, para. 72.

54. His allegation relates to paragraphs 98 and 99 of the Trial Judgement, where the Trial Chamber stated:

98. On a number of occasions in this case direct, or indirect, implications were made by one of the Parties that one or more of the witnesses had deliberately or otherwise misled the Chamber. The Chamber notes that such submissions, if

seriously intended as allegations of false testimony, should be submitted to the Tribunal in proper motion form, under Rule 91(B).

99. The Chamber reaffirms its position that false testimony is a deliberate offence, which presupposes wilful intent on the part of the perpetrator to mislead the Judges and thus to cause harm, and a miscarriage of justice. In such a motion, the onus is on the party pleading the case of false testimony to prove the falsehood of the witness' statements and to prove either that these statements were made with harmful intent or that they were made by a witness who was fully aware both of their falsehood and of their possible bearing upon the Judge's decision. In order to establish a strong basis for believing that the witness may have knowingly and wilfully given false testimony, it is insufficient to raise only doubt as to the credibility of the statements made by the witness. The Chamber affirms its opinion that, inaccurate statements cannot, on their own, constitute false testimony; an element of wilful intent to give false testimony must exist. As the **Appeals Chamber** has previously confirmed, there is an important distinction between testimony that is incredible and testimony which constitutes false testimony. The testimony of a witness may, for one reason or another, lack credibility even if it does not amount to false testimony within the meaning of Rule 91. [FN104]

FN104. Trial Judgement, paras. 98 and 99.

55. **Musema's** contention that the Defence would be placed in an untenable position if it was required to file a motion alleging false testimony each time it wished to impugn the credibility of a Prosecution witness, relates to the right of an accused to cross-examine Prosecution witnesses so as to discredit them. Article 20(4)(e) of the Statute, which provides for the rights of the accused, entitles an accused "[t]o examine, or have examined, the witnesses against him or her ...''. Rule 90(G) of the Rules, relating to the testimony of witnesses, expressly gives a party at trial the right to cross-examine a witness on matters affecting the credibility of the witness. The rule provides that "[c]ross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness [...]". Furthermore, Rule 91 of the Rules, which deals with the initiation of criminal proceedings by a Chamber in case of false testimony, does not require that a motion be brought to that effect in order to impugn the credibility of the witness. That Rule provides as follows:

False Testimony under Solemn Declaration

(A) A Chamber, on its own initiative or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

(B) If a Chamber has strong grounds for believing that a witness may have knowingly and wilfully given false evidence, the Chamber may direct the Prosecutor to investigate the matter with a view to the preparation of an indictment for false testimony.

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[...]

56. The **Appeals Chamber** has considered the Trial Chamber's observation that "direct or indirect implications were made by one of the Parties that one or more of the witnesses had deliberately or otherwise misled the Chamber" and that "such submissions, if seriously intended as allegations of false testimony, should be submitted to the Tribunal in proper motion form, under Rule 91(B)". In particular, the **Appeals Chamber** has considered the issue whether that observation invariably suggests that a Party seeking to impugn the credibility of a witness at trial is required to file a motion under Rule 91.

57. However, the **Appeals Chamber** is of the opinion that, construed in the context of the Trial Judgement, the observation merely translates the Trial Chamber's intention to highlight the impropriety of false testimony, and to remind the parties that upon being convinced that a witness had given false testimony before the Chamber, they could refer the matter to the Trial Chamber for the possible initiation of proceedings as provided for under Rule 91. Incidentally, the **Appeals Chamber** notes that **Musema** has failed to show that the Trial Chamber excluded any evidence ensuing from questions put in cross-examination which tended to impugn the credibility of Prosecution witnesses. It appears from the Trial Judgement that after a closely argued cross-examination touching on the credibility of witnesses, the Trial Chamber found at least one of the witnesses not to be reliable. [FN105]

FN105. See, for example, the Defence challenge to the credibility of Witness J in paras. 836 to 839 of the Trial Judgement, and the factual findings of the Trial Chamber in paras. 840 to 845.

5. The impact of trauma

(a) Arguments of the parties

58. **Musema** alleges that the Trial Chamber erred by holding in paragraph 100 of the Trial Judgement that it had considered the impact of trauma on the testimony of witnesses. He submits that such a consideration was appropriate only for Prosecution witnesses, and that it was therefore misplaced. [FN106] **Musema** argues that the testimony of a Prosecution witness is either credible or not credible and that if the credibility of such testimony is vitiated, the testimony must be regarded as not credible, notwithstanding the origin of the factors affecting its credibility. [FN107] However, he asserts that the Trial Chamber's reasoning is premised upon the belief that the testimony of Prosecution witnesses is credible. [FN108] **Musema** submits that the Defence witnesses did not benefit from such latitude, which again demonstrates that a higher standard of proof was imposed on defence evidence. [FN109]

FN106. Appellant's Brief, paras. 75 and 76.

FN107. Ibid., para. 77.

FN108. Ibid., para. 78.

FN109. Ibid., para. 80 to 82.

59. The Prosecution submits that **Musema** has misconstrued and misunderstood the language used in the Trial Judgement, and that he has shown a lack of familiarity with the principles underlying the ongoing practice in this Tribunal. [FN110] It submits that "the Trial Chamber correctly determined that a witness' experiences with traumatic events is a relevant factor to be considered during the evaluation of evidence received from such a witness." [FN111] Finally, the Prosecution submits that **Musema** has failed to show how and where the Trial Chamber failed to consider the effect that past traumatic events may have had on Defence witnesses. The Prosecution submits that further allegations, unsupported and unsubstantiated, are insufficient to sustain the Appellant's burden in this regard." [FN112]

FN110. Prosecution's Response, para. 4.58.

FN111. Ibid., para. 4.59. The Prosecution submits that Trial Chambers should take into account atrocities suffered, seen or experienced in assessing the credibility of witness evidence and they do so "in light of the possibility of an impaired ability to accurately describe or recount events when testifying" (Prosecution's Response, para. 4.61).

FN112. Ibid., para. 4.63.

(b) Discussion

60. Paragraph 100 of the Trial Judgement reads as follows:

Many of the witnesses who testified before the Chamber in this case have seen or have experienced terrible atrocities. They, their family or their friends have, in many cases, been the victims of such atrocities. The trauma that may have arisen, and may continue to arise, from such experiences is a matter of grave concern to the Chamber. The Chamber notes that recounting and revisiting such painful experiences is likely to be a source of great pain to the witness, and may also affect her or his ability fully or adequately, to recount the relevant events in a judicial context. The Chamber has, accordingly, considered the testimony of those witnesses in this light.

61. **Musema** alleges that the Trial Chamber erred in its observation concerning the impact of trauma on witnesses. First, as to the allegation that Defence witnesses were not treated in the same manner as Prosecution witnesses, **Musema** has put forward no proof in support thereof. As far as can be deduced from the context

in which the Trial Chamber made the said observation (that is, in the Section devoted generally to Evidentiary Matters), it is the **Appeals Chamber's** understanding that the observation in issue applies to both Prosecution and Defence witnesses. Consequently, the **Appeals Chamber** holds that the Trial Chamber, no doubt, intended that the said consideration or observation should apply to both Prosecution and Defence witnesses.

62. The **Appeals Chamber** notes that **Musema** has not cited a single instance where the Trial Chamber wrongly applied this standard to a Prosecution witness, or where it failed to apply it to a Defence witness, whereupon said witness suffered any prejudice. Once again, it is apparent that **Musema's** allegation is expressed in general terms and relates to the assessment of the overall evidence.

63. The issue here is whether the Trial Chamber's consideration of the impact of trauma was in accordance with the law. The established practice of both the Trial Chambers and the **Appeals Chamber** supports a finding that it was. Trial Chambers normally take the impact of trauma into account in their assessment of evidence given by a witness. This approach was properly adopted by the Trial Chamber in this case. Contrary to **Musema's** assertion, the **Appeals Chamber** finds that such an approach is, in fact, favourable to him. Indeed, the fact that the Trial Chamber should take into account the impact of trauma on a witness's memory implies the Trial Chamber's awareness of such factors (as in the case of the passage of time) and of their possible effect on the ability of the witness to recount events impartially and accurately.

6. Protected witnesses

(a) Arguments of the parties

64. **Musema** alleges that the Trial Chamber erred by failing to consider the fact that all of the Prosecution witnesses testified anonymously. He submits that "there is a special need for caution when testimony is given by witnesses who will not do so under their own name". [FN113] **Musema** submits, in particular, that testifying in that manner, a protected witness can show disregard for the truth with all impunity since the veracity of his testimony cannot be challenged by the public. [FN114]

FN113. Appellant's Brief, paras. 83 to 87.

FN114. Ibid., para. 88.

65. It is the Prosecution's view that **Musema's** argument is based on his belief that the mere status as a protected witness diminishes the credibility of a witness. [FN115] Yet, the Prosecution submits, there is no rule which requires a Trial Chamber to exercise "special caution" in assessing the testimony of a protected witness. [FN116] Protected witness status is a factor that a Trial Chamber may consider, but it is just one of the many factors that it may take into

account. The Prosecution contends that it does not follow that the Trial Chamber must exercise greater caution in assessing the testimonies of protected witnesses. [FN117] **Musema** has failed to demonstrate how such a rule could apply before this Tribunal. [FN118]

FN115. Prosecution's Response, para. 4.65.

FN116. Ibid., para. 4.66.

FN117. Ibid., para. 4.67.

FN118. Ibid., para. 4.67.

(b) Discussion

66. **Musema's** contention is not that the Trial Chamber erred by ordering the non-disclosure of the identities of Prosecution witnesses, but that special caution should have been exercised by the Trial Chamber in considering the testimony of such protected witnesses.

67. Article 21 of the Statute which governs the protection of victims and witnesses before the Tribunal, provides that "protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity." Rule 75(A) of the Rules, entitled "Measures for the Protection of Victims and Witnesses", provides that a Trial Chamber may "order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused". Furthermore, Rule 69(A) provides that "[i] n exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise."

68. It emerges from ICTY case-law that, in discharging its duty to order appropriate measures for the protection of victims and witnesses,

> the Tribunal has to interpret the provisions within the context of its own unique legal framework in determining where the balance lies between the accused's right to a fair and public trial, the right of the public to access information and the protection of victims and witnesses. How the balance is struck will depend on the facts of each case. [FN119]

FN119. Prosecutor v. Tadic, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, Case No.: IT-94-1-T, 31 July 1996, p.4.

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In respect of a Trial Chamber's power to order the non-disclosure of the identity of a victim or witness pursuant to Rule 69(A), it was held that:

Rule 69(A) requires the Prosecution to first establish exceptional circumstances. This is in accordance with the balance carefully expressed in Article 20.1: that "proceedings are conducted [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses". As the Prosecution correctly concedes, the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one. [FN120]

FN120. Prosecutor v. Brdanin and Tadic, Decision on Motion by Prosecution for Protective Measures, Case No.: IT-99-36-PT, 3 July 2000, para. 20 (footnote omitted).

69. Case-law acknowledges that there is inherent tension between the accused's right to a fair and public trial, on the one hand, and the protection of victims and witnesses, on the other. Moreover, under case-law, it is indisputably the duty of the Trial Chamber to determine that exceptional circumstances exist which warrant non-disclosure of the identity of victims or witnesses and such determination depends on "the facts of each case".

70. In the instant case, the Trial Chamber granted, on 20 November 1998, a Prosecution motion seeking protective measures for its witnesses. [FN121] In its decision, the Trial Chamber held that "the appropriateness of protective measures should not be based solely on the representations of the parties. Indeed, their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses". [FN122] The Trial Chamber found the "fears of the Prosecutor as being well founded", and also found that there were "sufficient factual grounds" for the imposition of protective measures under Rule 75. [FN123] As regards the non-disclosure of the identities of Prosecution witnesses, the Trial Chamber held that the Prosecution's arguments concerning the fear of reprisals and of the witnesses being attacked showed "the existence of exceptional circumstances warranting the non-disclosure of the identity of witnesses deemed to be in danger or at risk". [FN124]

FN121. Prosecutor v. **Musema**, Decision on the Prosecutor's Motion for Witness Protection, Case. No.: ICTR-96-13-T, 20 November 1998.

FN122. Ibid., para. 11.

FN123. Ibid., para. 13.

FN124. Ibid., para. 17.

71. In this instance, the Trial Chamber found that exceptional circumstances existed which justified the non-disclosure of the identities of Prosecution witnesses. In the opinion of the **Appeals Chamber**, the Trial Chamber was, in the circumstances, bound to consider the testimony of these witnesses in the same way as that of witnesses who were not afforded protective measures. Indeed, when assessing the probative value of the testimony of a protected witness, the Trial Chamber may take into consideration his status as protected witness, but it is incorrect to say that a Trial Chamber must exercise "special caution" in assessing such evidence.

C. Application to the facts of this case

72. **Musema** submits that the Trial Chamber's misapplication of the principles discussed above led to errors of fact invalidating the Trial Judgement with respect to each count on which he was convicted. [FN125] He submits that the Trial Chamber continually and consistently failed to apply the correct burden and standard of proof to the evidence. It placed a burden of proof on the Defence, and in many instances required the Defence to prove matters to a higher standard than the Prosecution. [FN126]

FN125. Appellant's Brief, para. 102.

FN126. Ibid., para. 363.

73. **Musema's** allegation is two-fold. First, he challenges the Trial Chamber's findings with regard to the credibility of Prosecution witnesses, and, secondly, takes issue with the Trial Chamber's rejection of the alibi he raised at trial. Thus, **Musema** challenges all the findings made by the Trial Chamber and thereby calls into question the entire Trial Judgement, including the guilty verdict.

1. Background to the findings made by the Trial Chamber

74. **Musema** was charged with: genocide (or, alternatively, with complicity in genocide); conspiracy to commit genocide; crimes against humanity; and serious violations of Article 3 common to the Geneva Conventions and of additional Protocol II, based on events or acts which occurred at several locations in Kibuye préfecture. The findings of the Trial Chamber in relation to each site, including those in dispute, are set out below:

75. The Trial Chamber summed up the Defence case and concluded that it revolved around three general arguments to wit: the Prosecution did not discharge its burden of proving his guilt; the Prosecution did not present sufficient evidence to satisfy the Chamber beyond reasonable doubt of his guilt; and the Prosecution did not rebut his alibi. [FN127] **Musema** was found guilty of genocide (Count 1), of crimes against humanity: extermination (Count 5) and of crimes against humanity:

rape (Count 7). The first two guilty verdicts were entered based on the totality of the events and acts that the Chamber found to have been proven, as indicated above.

FN127. Trial Judgement, para. 301. On appeal, **Musema** summarized his defence at trial as "a total denial of the charges and he provided the Chamber with the Defence of alibi that was a main issue within his trial" (T(A), p. 36).

2. Challenge to the credibility of Prosecution witnesses

76. **Musema** challenges the credibility of Witnesses M, R, F, T, N, AC, D, H, S and I who testified in relation to massacres at several sites and to sexual crimes. Save for the testimony of Witness I, [FN128] the Trial Chamber relied on the testimony of these witnesses to convict **Musema** on Counts 1, 5 and 7. **Musema** articulated his arguments by focussing on the various sites and findings on sexual crimes. The Prosecution has presented its response following the order in which **Musema's** arguments have been presented in the Appellant's Brief. The **Appeals Chamber** will thus examine **Musema's** allegations in that same order.

FN128. See discussion on Witness I in Section II C 2(f)(i) (Sexual Crimes -- Rape and Murder of Annunciata Mujawayezu).

(a) Gitwa Hill, 26 April 1994

77. Relying on the testimony of Witness M, the Trial Chamber found, beyond reasonable doubt, that an attack occurred at Gitwa Hill on 26 April 1994; that **Musema** led and participated in the attack; that he arrived aboard one of the Gisovu Tea Factory Daihatsus; that he and other persons, some of whom wore Imihurura belts and banana leaves, participated in a large-scale attack against the refugees and that **Musema**, who carried a firearm, shot into the crowd of refugees. [FN129]

FN129. Trial Judgement, paras. 679 and 890.

78. In challenging the testimony of Witness M on this site, namely, Gitwa Hill, **Musema** questions the findings of the Trial Chamber in relation to an incident which took place on 18 April 1994 at another site, namely Karongi Hill FM Station ("Karongi Hill") in respect of which Witness M had also testified. In relation to Karongi Hill, although the Trial Chamber found Witness M's evidence to be credible, it was of the opinion that the alibi cast doubt on **Musema's** presence at the site. Consequently, the Trial Chamber held that the sole testimony of Witness M on the matter was insufficient to prove beyond reasonable doubt that **Musema** had participated in the events at Karongi Hill. [FN130] **Musema** submits that this finding should, quite logically, give rise to the plausible argument that Witness M was mistaken or lying with regard to Karongi Hill and, hence the probability

that Witness M was also mistaken or lying in relation to the events on 26 April 1994 at Gitwa Hill. [FN131] In this regard, **Musema** also alleges that the Trial Chamber committed errors of fact in finding Witness M's testimony to be credible, whereas reasonable doubt had been cast on his testimony concerning Karongi Hill. [FN132] Lastly, **Musema** alleges that the Trial Chamber did not exercise "extra caution" when evaluating the uncorroborated testimony of a single witness. [FN133]

FN130. Ibid., paras. 652 to 660.

FN131. Appellant's Brief, para. 106.

FN132. **Musema** enumerates the following factors: "(i) the unlikelihood of his having been in a hut undiscovered during the course of the meeting on Karongi Hill; (ii) the unlikelihood of such a meeting having taken place at the top of Karongi Hill; (iii) the fact that Witness M first made a statement five years after the events alleged, and thirteen days before the start of the trial, and yet still claimed to recall the exact dates of incidents; (iv) the credibility of the Witness M's account with regard to his alleged observation of a rape on Karongi Hill on 19 April, particularly in light of the fact that he was 250 to 300 metres away at the time of incident; and (v) the fact that Witness M was one of four witnesses of rape incidents whose statement was taken at the same time and in the same place by the members of the Office of the Prosecution". (See Appellant's Brief, paras. 108 to 113).

FN133. Appellant's Brief, para. 107.

79. In response, the Prosecution submits inter alia; (i) that **Musema's** arguments ignore the difference between a failure of "proof finding" against the Prosecution and a credibility determination in relation to a specific witness; (ii) that Witness M's credibility remained intact throughout his testimony regarding both the Karongi Hill and Gitwa Hill incidents and, furthermore, that **Musema** fails to mount a direct attack on M's evidence on the Gitwa Hill incident; (iii) that in any event, the Trial Chamber was entitled to rely on the credible portions of Witness M's testimony; (iv) that the Trial Chamber considered the factors raised by **Musema** allegedly casting doubt on Witness M's credibility and explicitly rejected them; (v) that the testimony of a single witness, if relevant and credible, can sustain a conviction; and (vi) that no corroboration is required. [FN134]

FN134. Prosecution's Response, paras. 4.80 to 4.83.

80. The principal argument advanced by **Musema** is centred on allegations of the improbability of Witness M's testimony with respect to Karongi Hill. He concludes by raising obvious doubt as to the credibility of the witness in respect of Gitwa Hill. Such doubt, according to **Musema**, must be resolved in his favour. The **Appeals Chamber** is of the view that **Musema's** submissions on this matter are unfounded. The

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Trial Chamber found Witness M's testimony regarding Karongi Hill to be credible, since he was consistent throughout his testimony. [FN135] **Musema's** allegations whereby he challenged the credibility of the witness were specifically considered in the Trial Judgement [FN136] and the Chamber found that they did not raise doubt about Witness M's credibility. These Defence arguments were raised in their closing brief [FN137] and submitted during closing arguments. [FN138] Having considered all the arguments, the Trial Chamber was careful to identify certain issues that **Musema** also raises on appeal and concluded, in paragraph 655 of the Trial Judgement as follows:

FN135. Trial Judgement, paras. 654 and 653.

FN136. Ibid., para. 655.

FN137. Defence Closing Argument, filed on 28 June 1999.

FN138. T, 28 June 1999, pp. 105 to 106.

[t]he Chamber does not find it inherently improbable that his presence at the hut would not have been discovered. The witness clearly described his movements from one room to another within the hut to avoid detection. He gave two reasons as to why the meeting should be held at the top of Karongi hill - firstly that the assailants could get the guns there and secondly because from this vantage point they could see the refugee camp which was subsequently attacked. In the opinion of the Chamber, for the witness to have waited five years before making a statement is not significant because he only made the statement in response to an approach from the Office of the Prosecutor at that time. [FN139]

FN139. Trial Judgement, para. 655.

Musema simply repeated his submissions made during the closing arguments, and failed to provide any arguments to support his allegations that the Trial Chamber erred in its assessment of Witness M's credibility in respect of Karongi Hill. Consequently, **Musema** has failed to show that the finding of the Trial Chamber is one that could not have been reached by any reasonable tribunal.

81. Having found Witness M's evidence in relation to Karongi Hill to be credible, the Trial Chamber nonetheless acquitted **Musema** on the count relating to the attack at this site, because the alibi raised doubt as to **Musema's** presence at Karongi Hill on 18 April 1994. In the circumstances, the fact that the Trial Chamber found that the single testimony of Witness M, although credible, was not sufficient to prove guilt beyond a reasonable doubt, does not, in itself, lead to the conclusion that it erred in evaluating the witness' credibility. Although a witness may be found to be credible, the validity of a conviction based solely on his testimony may yet be affected by other factors that cast a doubt on the Prosecution case. Notwithstanding the finding that Witness M was credible, it was still open to the Trial Chamber to conclude that doubt was raised as to **Musema's** presence at Karongi

Hill. In such a case, the doubt must be resolved to the benefit of the accused, the credibility of Witness M remaining intact. The **Appeals Chamber** can see no reason to find that the Trial Chamber was in error.

82. **Musema** calls into question Witness M's testimony in respect of Gitwa Hill, without addressing any aspect of the said testimony. **Musema** relies solely on his arguments relating to Karongi Hill. As stated above, the **Appeals Chamber** is satisfied that the Trial Chamber did not err in finding the evidence of Witness M to be credible in relation to Karongi Hill. Therefore, the question as to whether there was a reasonable possibility that Witness M was mistaken or lying with regard to the events at Gitwa Hill, does not arise. In any event, a court may accept portions of a witness' testimony which are reliable for a given set of facts, whilst finding other parts of said evidence not credible with regard to another set of facts. [FN140] Therefore, supposing even that the credibility of Witness M in respect of Karongi Hill was in issue, the mere fact that the Trial Chamber relied on his testimony in relation to Gitwa Hill does not per se disclose an error on the part of the Trial Chamber.

FN140. Tadic Trial Judgement, paras. 296 to 302 (the Chamber observed that where the testimony of a witness conflicts with that of another, a Trial Chamber may accept portions of a witness' testimony as believable, whilst simultaneously deeming other parts unbelievable).

83. **Musema** also submits that the Trial Chamber was in error as it failed to exercise "extra caution" in finding him guilty of the acts that occurred at Gitwa Hill on the basis of the sole uncorroborated testimony of Witness M. The **Appeals Chamber** recalls its earlier findings that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted in evidence. What matters is the reliability and credibility accorded to the testimony. The Trial Chamber, after seeing Witness M and hearing his testimony, after observing him under cross-examination and noticing that he was not evasive, found his testimony to be credible and consistent. [FN141] The **Appeals Chamber** fails to see why it should find that, in doing so, the Trial Chamber was obliged to exercise "extra caution" in its evaluation of the entire testimony of the witness. A Trial Chamber assesses the credibility of a witness in the ordinary manner, taking into account the circumstances of the case.

FN141. Trial Judgement, para. 668.

84. For the foregoing reasons, the **Appeals Chamber** finds that **Musema** has failed to demonstrate that the Trial Chamber erred in its assessment of the credibility of Witness M for its factual findings concerning the attack on Gitwa Hill. Accordingly, the **Appeals Chamber** rejects this argument challenging the credibility of Witness M.

(b) Rwirambo Hill (end of April -- beginning of May)

85. Relying on the testimony of Witness R, the Trial Chamber found that an attack had been perpetrated at Rwirambo Hill on 27 April and on 3 May 1994. [FN142] It found that it had been proven beyond reasonable doubt that **Musema** participated in the attack; that he arrived at the scene in a red Pajero, followed by four Daihatsu pick-ups from the Gisovu Tea Factory which were carrying persons that Witness R recognized as Interahamwe; that Witness R recognized those persons from their blue uniforms which had the name "Usine à thé de Gisovu'' printed on the back and that **Musema** was armed with a rifle. [FN143] The Trial Chamber also found that while trying to flee, Witness R was injured from a bullet which came from **Musema's** direction. [FN144]

FN142. Ibid., para. 692.

FN143. Ibid., paras. 693 and 896.

FN144. Ibid.,

86. In challenging the testimony of Witness R with respect to this site namely, Rwirambo Hill, **Musema** puts forward the following main arguments which allegedly show that Witness R is unreliable:

- There were inconsistencies between the testimony given by Witness R in the instant case and his testimony in the Kayishema and Ruzindana trial; [FN145]

FN145. Appellant's Brief, paras. 139 to 140. In particular, **Musema** refers to Witness R's testimony before the Trial Chamber that he had treated the wound he sustained with cow butter, whilst in the Kayishema and Ruzindana trial, he told the court that at that time one could still find some kind-hearted Hutus from whom one could purchase penicillin and that he had the wound treated in Rwirambo. When cross--examined, he denied that he had given the first account.

- The identification of **Musema** by Witness R was suspect in view of the fact that **Musema** was a "long distance away" when Witness R saw him, and that the sighting was nothing more than a fleeting glance. [FN146] The Prosecution failed to elicit the details necessary for a proper identification to be established.

FN146. Ibid., paras. 144 to 145.

87. **Musema** further relies on the observations made by Judge Aspegren in his separate opinion appended to the Trial Judgement where he states that the "contradictions raised by the Defence are serious and important enough to cast doubt on R's credibility in the present matter, and that he is not, therefore, reliable enough." [FN147]

FN147. Appellant's Brief, para. 142.

88. As to the inconsistencies, the **Appeals Chamber** first of all notes that the arguments raised by **Musema** are not directed to those parts of Witness R's testimony which related specifically to the involvement of **Musema** in the attack. The focus of his allegations is the Trial Chamber's failure to take sufficient account of the inconsistencies concerning the treatment of Witness R's gunshot wound. Witness R testified before the Trial Chamber that he had treated the wound he sustained with cow butter whereas, in the Kayishema and Ruzindana trial, he told the court that at that time some kind-hearted Hutus could still be found, from whom one could purchase penicillin, and that he had the wound treated in Rwirambo. [FN148] The Trial Chamber noted the fact that Witness R had previously testified in the Kayishama and Ruzindana trial and that the Defence had raised a number of apparent contradictions in his testimony as regards the treatment he received for his gunshot wound. [FN149]

FN148. Ibid., para. 140.

FN149. Trial Judgement, para. 683.

89. At paragraph 402 [FN150] of the Trial Judgement, the Trial Chamber took note of the inconsistencies now being raised by **Musema** and it later concluded at paragraph 684 as follows:

FN150. "Witness R denied having ever said anything about going to Rwirambo as he couldn't have gone to Rwirambo hospital as there were barriers. He was able to recall however that he did speak about penicillin as regards to serious injuries and that some individuals were able to find ways of getting penicillin. The witness stated, after being asked by the Defence and the bench, that he did apply penicillin to his injury much later when his injury had scarred, and that he had never gone to a Hutu to ask for penicillin". See Trial Judgement, para. 402.

Having considered the arguments of the Defence as to these discrepancies and the answers of the witness thereon, the Chamber finds Witness R to be credible. The questions raised by the Defence relating to the date of his injury and the manner in which it was treated did not elicit inconsistencies between the witness' testimony in this trial and his earlier testimony of the trial of Kayishema and Ruzindana. He clarified that he had obtained penicillin not soon after the injury, which is when it was treated with cow butter, but much later. With regard to dates, the Chamber notes that 29 April falls within the time period 27 April to 3-4 May. While the specific date testimony is clearly more precise, the two testimonies are not inconsistent. [FN151]

FN151. It is noteworthy that **Musema** was selective in quoting para. 684 of the Trial Judgement insofar as he omits the first sentence in order to allege that the "Trial Chamber failed to take sufficiently into account the inconsistencies...''. See Appellant's Brief, para. 139. In addition, the **Appeals Chamber** notes that Witness R remained consistent in his testimony about the date of his injury. During the Kayishema and Ruzindana trial, he testified on 13 November 1997, stating that his injury occurred on 29 April. More than a year later, he testified

before the Trial Chamber in the instant case on 25 February 1999 and stated the date to be "between the 27th of April and the 3rd or 4th of May". See T, 25 February 1999, p. 104.

It is clear from the above findings of the Trial Chamber, that the alleged inconsistency between Witness R's testimony that he treated his wound with cow butter and his earlier testimony that he treated it with penicillin was satisfactorily explained to the Trial Chamber. [FN152] There remains the allegation of inconsistency as to whether Witness R had the wound treated in Rwirambo or not. In the opinion of the **Appeals Chamber**, this allegation is not such as would cause a reasonable Trial Chamber to reject Witness R's testimony. Considering Witness R's testimony, when taken as a whole and specifically in relation to **Musema's** involvement in the attack, the **Appeals Chamber** holds that the Trial Chamber had the discretion to find the alleged inconsistency inadequate to substantially cast doubt on Witness R's testimony. Thus, although not specifically mentioned in the Trial Judgement, it was not unreasonable for the Trial Chamber to find Witness R credible.

FN152. The **Appeals Chamber** observes that during his testimony in the Kayishema and Ruzindana trial, Witness R was examined in relation to events occurring on 13 and 14 May 1994. Witness R explained that he was still suffering from his wound on those dates and added that he was able to purchase penicillin to treat the wound. See The Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 13 November 1997, pp. 109-110. Accordingly, Witness R's explanation that he was not able to obtain penicillin soon after his injury (i.e between 27 April and 4 May) but much later (i.e 13 and 14 May), is not necessarily inconsistent.

90. With regard to **Musema's** challenge to his identification by Witness R, [FN153] the **Appeals Chamber** first recalls that neither the Statute nor the Rules oblige the Trial Chamber to require evidence of any particular kind for purposes of identification. Pursuant to Rule 89 of the Rules, a Chamber "may admit any relevant evidence which it deems to have probative value". The **Appeals Chamber** has previously acknowledged that a Trial Chamber is best placed to assess the evidence presented at trial; whether it will rely on a single witness testimony as proof of a material fact will depend on various factors that have to be assessed in the circumstances of each case. [FN154] In the same vein, it is for the Trial Chamber to assess the evidence of identification given by witnesses and to determine whether it is reliable in the light of the circumstances of the case. Unless it is shown that the Trial Chamber's assessment was wholly erroneous, the **Appeals Chamber** will defer thereto.

FN153. **Musema** refers to para. 62 of the Defence Closing Argument, filed 28 June 1999, "Therefore, examine carefully the circumstances in which the identification by each eyewitness was made. What was the witness doing at the time? What were the circumstances? Was the situation one in which he was capable of making his own identification, or is the identification based on information from someone else? Could there be grounds for an association with the accused rather than a viewing of the accused himself? How long did the witness have the person he says was the Defendant under observation? At what distance? In what light? Did anything interfere with the observation? Had the witness ever seen the accused before? If

so, how often? If only occasionally, had he any special reason for remembering him?". (See Appellant's Brief, para. 144).

FN154. Kayishema/Ruzindana Appeal Judgement, para. 187; Akayesu Appeal Judgement, para. 132; Aleksovski Appeal Judgement, para. 63; TadicAppeal Judgement, para. 65;elebi1ci Appeal Judgement, para. 506.

91. In this regard, the **Appeals Chamber** notes that, while stating that he was at a "rather lengthy distance" from **Musema**, the witness also testified that he had known **Musema** previously; [FN155] that before the attacks of 1994, he had often seen **Musema** on the road which passes by his house; [FN156] and that he had seen **Musema** during meetings at the communal office of Gisovu prior to the 1994 attacks. [FN157] Lastly, Witness R also testified that the attack occurred in the morning [FN158] and, therefore, in daylight. In his Appellant's Brief, **Musema** has not addressed the fact that Witness R had prior knowledge of his physical appearance or the circumstances actually taken into account by the Trial Chamber in its assessment of Witness R's identification of him. The **Appeals Chamber** is of the opinion that **Musema** has failed to show any flaw in the Trial Chamber's evaluation of the evidence.

FN155. T, 25 February 1999, p. 70.

FN156. Ibid., p. 92.

FN157. Ibid., p. 93.

FN158. Ibid., p. 70.

92. After seeing Witness R and hearing his testimony, and having observed him under cross-examination, the majority of the Trial Chamber decided to find his testimony reliable. Clearly, the decision is based on its overall evaluation of the testimony. The **Appeals Chamber** fails to see any cause for concluding that in doing so, the Trial Chamber erred. **Musema** further adopts the observations by Judge Aspegren [FN159] in support of his contention that the Trial Chamber was unreasonable in accepting the testimony of Witness R. The **Appeals Chamber** finds no merit in this argument and recalls the view expressed by the **Appeals Chamber** of ICTY in the Tadic Appeal Judgement that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence". [FN160] Holding the view that the conclusions by Judge Aspegren were reasonable does not mean that the findings of the majority were unreasonable. It is for **Musema** to show that the testimony of Witness R could not have been accepted by any reasonable person, that the majority of the Trial Chamber was wholly in error and that, therefore, the **Appeals Chamber** should substitute its own finding for that of the Trial Chamber. This, he has failed to do.

FN159. This line of argument was again raised by **Musema** when he challenged the credibility of Witness I's testimony. See Appellant's Brief, para. 338.

FN160. Tadic Appeal Judgement, para. 64.

93. For the foregoing reasons, the **Appeals Chamber** finds that **Musema** has failed to demonstrate that the Trial Chamber erred in its assessment of the credibility of Witness R, for its factual findings concerning the attack on Rwirambo Hill. Accordingly, the **Appeals Chamber** dismisses the argument challenging the credibility of Witness R.

(c) Muyira Hill, 13 May 1994

94. **Musema** challenges the credibility of Witnesses F, T and N with respect to the Trial Chamber's factual findings concerning the 13 May 1994 attack on Muyira Hill. His allegations regarding these witnesses focus essentially on (i) inconsistencies between their in-court testimony and their prior statements (Witnesses F, T and N); (ii) insufficient identification (Witnesses F, T and N); (iii) the implausible nature of testimony (Witness N); and (iv) violation of the right to an effective cross-examination (Witness F).

95. The Trial Chamber found (on the basis of the numerous corroborating testimonies of several witnesses) [FN161] that it was established beyond reasonable doubt that on 13 May 1994 a largescale attack was launched at Muyira Hill against 40,000 Tutsi refugees. [FN162] The Trial Chamber was also satisfied beyond reasonable doubt that **Musema** was among the leaders of the attack; that he arrived at the location in his red Pajero; that he was armed with a rifle which he used during the attack; and that thousands of Tutsi men, women and children were killed during the attack, while others were forced to flee for their lives. [FN163]

FN161. Testimonies by Witnesses F, P, T and N. (See Trial Judgement, paras. 699 to 709).

FN162. Trial Judgement, paras 747 and 901.

FN163. Ibid., paras. 748 and 902.

(i) Inconsistencies between in-court testimony and prior statements

96. **Musema** submits that the in-court evidence given by Witnesses F, T and N was marred by inconsistencies vis à vis the previous statements made by the witnesses. In considering these allegations, the **Appeals Chamber** notes that the Trial Chamber had particularly addressed the question of the assessment of prior statements. The

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Trial Chamber noted that a significant problem arises where the oral testimony of a witness contradicts, or is inconsistent with, prior statements made by the witness. [FN164] In this regard, the Trial Chamber went on to consider various classes [FN165] of prior testimony submitted as documentary evidence, which the **Appeals Chamber** will consider in the light of the allegations made by **Musema**.

FN164. Trial Judgement, para. 82.

FN165. Ibid., paras. 86 to 97.

a. Witness statements and non-judicial testimony given by Witnesses F, T and N

97. **Musema** submits that the Trial Chamber failed to properly take into account the following inconsistencies:

- Witness F had not mentioned **Musema's** name in the attack of 13 May in his prior statements; [FN166]

FN166. Appellant's Brief, para. 155. **Musema** does not specify the nature of the statements in his brief; however, it is mentioned in the Transcript of 3 February 1999, p. 57, that the statements referred to by **Musema** were two previous statements given by Witness F to "investigators of the Tribunal".

- Witness T gave an interview to Radio Rwanda on 27 January 2000 in which he stated that he saw **Musema** only once, and not twice as he had stated in his testimony; [FN167]

FN167. Ibid., para. 172.

- Witness N had made two previous statements, to wit, "on 20th March 1986 [sic] [FN168] and 14th and 16th February 1998. In neither of these had he named **Musema** as someone who was involved in the May attacks, and in neither of these had he mentioned the rape." [FN169] In addition, **Musema** submits that, the lapse of time that preceded Witness N's mentioning of sexual crimes in his statement of 13 January 1999 (nearly five years later) casts doubt on the reliability of his testimony. [FN170]

FN168. This date appears to be a typographical error.

FN169. Appellant's Brief, para. 184.

FN170. Ibid., para. 178.

98. The Prosecution gave a general response, stating that "some, if not most, of the alleged prior inconsistent statements which are now advanced by the Appellant were addressed by the Chamber in its Judgement". [FN171] The Prosecution further submits that, in order to render a witness' testimony unreliable, the inconsistencies therein must be material and substantial enough, and that **Musema** has failed to show that such inconsistencies were material. [FN172]

FN171. Prosecution's Response, para. 4.103.

FN172. Ibid., para. 4.104.

99. The **Appeals Chamber** notes that, contrary to **Musema's** allegations, the Trial Chamber specifically dealt with the issue of prior inconsistent statements and noted that a large number of witnesses who appeared before it had previously made statements which included witness declarations and, in one case, a radio interview. [FN173] The Trial Chamber went on to state as follows:

FN173. Trial Judgement, para. 84. The radio interview referred to by the Trial Chamber was in relation to a 1998 Radio Rwanda broadcast involving Witness J.

> The Chamber has evaluated the probative value of such testimonies in light of the circumstances in which they were made, and in view of other factors pertaining to the reliability of the testimonies. The circumstances it has taken into consideration include such matters as: the language in which the testimony was made or in which the interview was conducted; the access of the Chamber to transcripts of the testimonies or the interviews, and its corresponding ability to scrutinize the nature of the questions put to a witness; the accuracy of interpretation and transcription; the time lapse between the prior testimonies and the testimony at trial; the difficulties of recollection; the use or non-use of solemn declarations; and the fact of whether or not a witness had read or reviewed the statement at the time at which it was made. [FN174]

FN174. Trial Judgement, para. 85.

> In light of these factors, it is the Chamber's opinion that the probative value of such prior witness statements is, generally, lower than the probative value of positive oral testimony before a Court of law, where such testimony has been subjected to the test of cross-examination. [FN175]

FN175. Ibid., para. 86.

The **Appeals Chamber** holds that it was within the Trial Chamber's discretion to proceed in that manner; [FN176] as a trier of fact, the Trial Chamber is best placed to hear, assess and weigh the evidence presented at trial. The above-mentioned factors, which were taken into account by the Trial Chamber in assessing the testimonial evidence of the witnesses in question are, in the opinion of the **Appeals Chamber**, valid and reasonable. [FN177] The **Appeals Chamber**

recalls that "[i]t is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the **Appeals Chamber** can substitute its own finding for that of the Trial Chamber." [FN178] Thus, it falls to **Musema** to show that the alleged inconsistencies are material to the main issue of his participation in the attack of 13 May 1994, at Muyira Hill, and that the Trial Chamber erred in failing to take them into consideration.

FN176. See also Akayesu Judgement, para. 137; Rutaganda Judgement, para. 19.

FN177. The **Appeals Chambers** of ICTR and ICTY in Akayesu Appeal Judgement, para. 147, and Celebici Appeal Judgement, para. 496, have recognized the validity of this evaluation by a Trial Chamber.

FN178. Tadic Appeal Judgement, para. 64. See also: Aleksovski Appeal Judgement, para. 63; Furundzija Appeal Judgement, para. 37.

100. In the case of Witness F, the Trial Chamber noted the explanation elicited in his cross-examination with respect to the alleged discrepancy raised in his testimony, [FN179] and further noted that, in addition to the said explanation, Witness F's testimony in the Kayishema and Ruzindana trial confirmed that he had seen **Musema** during the 13 May 1994 attack. [FN180] Having considered the circumstances surrounding the inconsistency and the subsequent explanation therefor, the Trial Chamber concluded that the evidence of Witness F was reliable. The **Appeals Chamber** can see no reason to question this evaluation by the Trial Chamber as it has not been shown that no reasonable tribunal could have reached such a conclusion.

FN179. Trial Judgement, para. 702, "...[O]n cross-examination, the witness was questioned as to why he had not specifically mentioned **Musema** in his description of the May attack in his 1996 statement to the Prosecutor but mentioned him in his description of an April attack. The witness in response cited the passage in his statement where he said of the May attack, "Leading these attackers who were divided into groups were the same persons I listed before [...]"...[M]oreover, the Chamber recalls that during his testimony in the Kayishema and Ruzindana case, as confirmed during the examination in this case, Witness F stated that he had seen **Musema** during the 13 May attack."

FN180. Ibid.

101. **Musema** further submits that the in-court testimony of Witness T contradicts what the Witness said during an interview with Radio Rwanda on 27 January 2000. The **Appeals Chamber** notes that **Musema** has sought to include the transcript of this interview together with the original audio cassette as part of the record on appeal. [FN181] However, it appears to the **Appeals Chamber** that those items of evidence are not part of the record on appeal and, furthermore, that **Musema** has not requested, in accordance with Rule 115 of the Rules, to present them before

the **Appeals Chamber**. As a result, the **Appeals Chamber** will not entertain this argument. Counsel for **Musema**, who is familiar with appellate procedure, should not have made reference to such evidence in the Appellant's Brief or the "Appellant's Appeal Book" without first having sought leave to present the same.

FN181. It should be noted that the "Transcript of Radio Rwanda Broadcast 27 January 2000" was included in the "Appellant's Appeal Book" of **Musema** at pp. 133 to 136 (page numbering as assigned by the Registry).

102. As regards Witness N, **Musema** refers to two previous statements which were made by the Witness, and in neither of said statements does Witness N name **Musema** as being involved in the May attacks nor make mention of rape. **Musema** alleges that the Trial Chamber failed to take sufficient account of this fact. Having reviewed the trial transcripts [FN182] on the testimony of Witness N, the **Appeals Chamber** notes that the alleged previous statements of "20 March 1986" and "14th and 16th February 1998" were never shown to Witness N at trial. Throughout the cross-examination [FN183] of Witness N by the Defence, only the previous statement given during an interview on 13 January 1999 and signed by Witness N on 14 January was called into question. The **Appeals Chamber** further notes that the said previous statements do not form part of the record on appeal. Moreover, Counsel for **Musema** failed to follow the applicable procedure for presenting them before the **Appeals Chamber**. Consequently, they cannot be considered in support of **Musema's** submissions on this point.

FN182. T, 28 and 29 April 1999.

FN183. T, 28 April 1999, pp. 96 to 130.

103. Regarding **Musema's** other allegation concerning the lapse of five years before Witness N made his statement of 13 January 1999 on the sexual crimes, the **Appeals Chamber** notes that the Trial Chamber considered the explanation given by Witness N. According to the Trial Judgement, the witness explained that "he had been approached by two investigators to do so and that he had already brought charges in 1997 against **Musema** at the Prosecutor's office of Kibuye. He indicated that when one knows somebody has committed a crime, it is one's duty to report it." [FN184] Witness N gave this explanation during cross-examination and the Trial Chamber, finding it satisfactory, concluded that Witness N was reliable. [FN185] Consequently, the **Appeals Chamber** is satisfied that it was within the discretion of the Trial Chamber, which saw the witness, heard his testimony and observed him under cross-examination to reach this conclusion. **Musema** has failed to demonstrate any material impact that the alleged delay might have had on Witness N's testimony.

FN184. Trial Judgement, para. 431.

FN185. Ibid., para. 858.

b. Statements given by Witness T to Swiss investigators

104. In relation to prior statements made during the Swiss investigations, referred to in the Trial Judgement, [FN186] the **Appeals Chamber** first notes that the Trial Chamber assessed their probative value in conformity with the general principles discussed above, taking into account the circumstances and conditions in which the documents were produced. **Musema** submits that the Trial Chamber failed to take into account the following inconsistencies:

FN186. Trial Judgement, para. 91.

- In his previous statement to the Swiss investigators, Witness T mentioned **Musema** as a person whom he knew, and whom he had seen two or three days after the French [FN187] arrived, but he did not name **Musema** as a person who had participated in the attack of 13 May. [FN188] **Musema** contends that it was unreasonable for the Trial Chamber to find that the witness' explanation in this respect was satisfactory; [FN189]

FN187. Regarding the arrival of French troops, see generally, Trial Judgement, paras. 335 and 640.

FN188. Appellant's Brief, para. 162.

FN189. Ibid., paras. 163 and 164. **Musema's** defence submitted that, "even if taken at face value, if this witness was so traumatized that he did not remember **Musema's** involvement at this stage, he cannot be regarded as a reliable witness".

- Witness T's statement dated 20 November 1995 in which he said: "I did not see very much of what transpired on those two days (14 and 15 May) because I was in hiding," is inconsistent with his in-court testimony in which he gave a detailed account of what happened on 14 May. Witness T was unable to provide a satisfactory explanation for this inconsistency. [FN190]

FN190. Appellant's Brief, paras. 166 and 167.

105. Regarding the allegation that Witness T did not mention **Musema** as a person who participated in the attack of 13 May, the Trial Chamber noted as follows:

[i]n cross-examination, the witness was questioned by the Defence as to his previous statements and the lack of mention therein of **Musema** in relation to the above attack. Witness T explained that at the time he had not been asked specific questions about **Musema** save whether he knew him and could identify him, and whether he had seen him after the arrival of the French. The Chamber is satisfied with this explanation [...] [FN191]

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FN191. Trial Judgement, para. 706.

106. The **Appeals Chamber** notes that when cross-examined by the Defence on this issue, Witness T repeatedly stated that his previous statements were dictated by the questions actually put to him. [FN192] The **Appeals Chamber** refers, in particular, to the following exchange, resulting from the Defence questions on this point:

FN192. T, 5 February 1999, pp. 13, 20, 23, 34, 37 and 38.

Q. I am not going to ask you any detail about this statement but merely to say that in here, again there is no mention of Mr. **Musema**, when you were questioned on this occasion?

A. If I had been asked to say anything about him. I should have said so, just like I am saying now before the court. You asked me questions about Bagaragaza, Munyenzi and so on, if I had been asked questions about **Musema** I think I should have talked about him also. [FN193]

FN193. Ibid., p. 30.

Having regard to the consistency with which Witness T responded to the questions put to him on this issue, the **Appeals Chamber** is not of opinion that the Trial Chamber acted unreasonably in finding the explanation given by Witness T satisfactory.

107. **Musema** then raises another inconsistency which was not explained satisfactorily, namely the contradiction between Witness T's statement dated 20 November 1995 and his testimony in court. Basically, Witness T stated on 20 November 1995 that he did not witness much of what transpired on those two days (reference in this context is to 14 and 15 May 1994) because he was in hiding. When cross-examined by the Defence on this issue, Witness T responded as follows:

...[W]ell, what I wanted to say is that I didn't see all the events that occurred during the two days unless I want to state again here before the court ...that I witnessed the events of 14th May and on each occasion I said what I was able to see personally at the beginning of the attacks because later on when the attacks continued, we ran away in all directions. With regard to 15 th May, I think in that regard I was indeed very tired and I did state that. [FN194]

FN194. Ibid., p. 32.

108. The trial transcript of Witness T's testimony at the examination-in-chief shows that he mentioned two large-scale attacks on Muyira Hill and, although unsure of the dates, he believed that they occurred on 13 or 14 May. [FN195] Witness T stated two times that after the two major attacks everyone dispersed in order to try to hide. [FN196] The **Appeals Chamber** considers that Witness T's

testimony in court and his previous statement are not necessarily contradictory. Witness T's evidence is clear, with respect to the material facts relating to **Musema's** participation in the attacks. The Trial Chamber was right to accept the explanation given by Witness T.

FN195. T, 5 February 1999, pp. 25 and 26.

FN196. Ibid., p. 92 and p. 99.

109. In the opinion of the **Appeals Chamber**, **Musema** has failed to demonstrate that the Trial Chamber erred in failing to take account of alleged discrepancies between the in-court testimony and prior statements of Witnesses F, T and N. Consequently the argument on this point must fail.

(ii) Insufficient identification by Witnesses F, T and N

110. In challenging the reliability of his identification by Witnesses F, T and N, **Musema** raises the following points: (i) the absence of evidence elicited from Witnesses F and T to establish the circumstances under which the identification was made; and (ii) the fact that the Trial Chamber apparently failed to consider the testimony of Defence Investigator, Gillian Higgins, concerning visibility from Muyira hilltop. **Musema** asserts that said testimony casts doubt on his identification by Witnesses N and T, who testified to the events they witnessed from the hilltop.

a. Circumstances of identification

111. **Musema** submits that Witness F only saw him on three occasions prior to the events and that it is therefore unlikely that Witness F could recognize and identify him. [FN197] Furthermore, **Musema** argues that since Witnesses F and T did not produce any evidence of the circumstances in which he was purportedly identified, the testimony of identification fails to meet the evidentiary requirements for it to be considered by the Trial Chamber. [FN198]

FN197. Appellant's Brief, para. 157.

FN198. Ibid., paras. 158 and 171.

112. In the Prosecution's view, the testimonies of Witnesses F and T reveal that they knew **Musema** physically, and that therefore, **Musema's** arguments on this point are without merit; moreover, **Musema** has not discharged the burden of proof that lies on him as an appellant. [FN199]

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FN199. Prosecution's Response, para. 4.114.

113. On whether Witness F could easily recognize **Musema**, the **Appeals Chamber** finds that **Musema's** arguments are not sufficient to raise doubt as to the reliability of the contested identification testimony. The **Appeals Chamber** notes that during a meeting convened by the bourgmestre of Gisovu commune, which was one of the three occasions where F had seen **Musema** prior to the events, F was able to observe **Musema** for a period of 30 minutes. [FN200] **Musema** gives the impression that an identified suspect needs to be personally well known to the witness. [FN201] This is not the case. Prior knowledge of an identified suspect is a factor that a Trial Chamber may take into account when assessing the reliability of a witness' testimony, [FN202] but that is not a sine qua non; identification may be based on other factors. In any event, the **Appeals Chamber** is of the opinion that it was within the discretion of the Trial Chamber to accept, in support of the evidence of identification before it, the fact that Witness F had met **Musema** on several occasions.

FN200. T, 3 February 1999, p. 6.

FN201. "Therefore **Musema** was not a man well known to the witness, or whom it was likely he could easily recognize and identify" (Appellant's Brief, para. 157).

FN202. Kayishema/Ruzindana Trial Judgement, para. 71.

114. Regarding the lack of evidence showing the circumstances of identification, [FN203] the **Appeals Chamber** refers to its observations, supra, concerning a similar argument in relation to identification by Witness R (see para. 90 of this Judgement), namely that for questions of identification, the Trial Chamber is not obliged to require that the witness produce evidence of any particular kind. It is for the Trial Chamber to assess the evidence of identification and its reliability in the light of the facts of the case. It appears from the Trial Judgement that, in reaching its conclusion, the Trial Chamber took into consideration the following points:

FN203. Appellant's Brief, para. 158.

- Both Witnesses F and T saw **Musema** during the attack, bearing a firearm; [FN204]

FN204. Trial Judgement, paras. 701 and 705.

- Witness N testified to having seen **Musema** aboard his vehicle arriving at the site of the attack together with other attackers; [FN205]

FN205. Ibid., para. 707.

- Although Witness P did not personally see **Musema** during the attack, he saw **Musema's** red Pajero, which led him to conclude that **Musema** must have been present. [FN206]

FN206. Trial Judgement, para. 703.

Although corroboration is not a necessary requirement, the **Appeals Chamber** notes that there were corroborative accounts from Witnesses F, T and N of **Musema's** participation in the attack. Moreover, in their respective testimonies, Witnesses F, [FN207] T [FN208] and N [FN209] testified to having seen **Musema** arrive at the scene of the attack in a red vehicle, and to the fact that he was carrying a firearm.

FN207. T, 3 February, 1999, pp. 19 and 36.

FN208. T, 4 February, 1999, pp. 79 and 89.

FN209. T, 28 April, 1999, pp. 59 and 76.

115. In addition, the Trial transcripts reveal the following points concerning identification by Witnesses F and T:

- Both Witnesses F [FN210] and T [FN211] testified to having prior knowledge of **Musema** before the attack;

FN210. T, 3 February, 1999, pp. 6 and 7.

FN211. T, 4 February, 1999, pp. 10 and 11.

- Witness F testified that the attackers arrived at 8.00 a.m. on 13 May, [FN212] thus in daylight, and that he was at the top of Muyira Hill when he saw **Musema** arriving, but did not see him again during that day; [FN213]

FN212. Ibid., 3 February, 1999, p. 14.

FN213. Ibid., pp. 17 and 18.

- Witness T testified that the attacks started around 10 a.m. and lasted until 3.30 p.m.; [FN214] that he was at the top of Muyira Hill so that he could see the attackers arriving, [FN215]and that **Musema** was dressed in a military shirt and an ordinary pair of trousers. [FN216]

FN214. T, 4 February, 1999. p. 92.

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FN215. Ibid., 1999. p. 38.

FN216. Ibid., 1999. p. 89.

In the circumstances, the **Appeals Chamber** finds no error in the Trial Chamber's treatment of the evidence of identification given by Witnesses F and T, and notes that, in any event, there was sufficient corroboration of **Musema's** participation in the attack of 13 May 1994. All in all, it was reasonable for the Trial Chamber to hold that it was satisfied with the evidence on the identification of **Musema** as given by Witnesses F and T. Consequently, the **Appeals Chamber** finds that **Musema** has failed to show that the Trial Chamber erred in failing to take account of the alleged insufficiency of identification by Witnesses F and T. Accordingly, this ground of appeal must fail.

b. Testimony of Defence Investigator, Gillian Higgins, concerning visibility from the top of Muyira Hill (Witnesses N and T)

116. **Musema** submits that the testimony of both Witnesses T and N, who testified to having seen him in his car while they were at the top of Muyira Hill, is contradicted by the evidence proffered by the Defence Investigator, Gillian Higgins. [FN217] He asserts that on the basis of exhibit D96, a photograph and exhibit D100, a video, Gillian Higgins testified that the road where the Witnesses claimed to have witnessed the arrival of vehicles was not visible from the top of Muyira Hill. Consequently, **Musema** concludes, the Trial Chamber erred in failing to address this issue in its Judgement.

FN217. Appellant's Brief, paras. 169 and 179.

117. The Prosecution argues that, other than the requirement under Article 22(2) of the Statute that a judgement be accompanied by a "reasoned opinion" in writing, the Trial Chamber is not bound to mention every aspect of its assessment of testimonial evidence. Therefore, it must be presumed that the Trial Chamber considered all of the evidence, including photographic exhibits and the testimony of Gillian Higgins, and that the fact that reference is not made to this or that piece of evidence does not constitute an error on its part. [FN218]

FN218. Prosecution's Response, paras. 4.105 to 4.113.

118. A reading of the Trial Judgement shows that no reference is made to the evidence of Gillian Higgins or exhibits D96 and D100. The presumption can therefore be made that the Trial Chamber did not rely on the said evidence. Consequently, the **Appeals Chamber** is of the view that the issue is not so much whether the Trial Chamber erred by not addressing this matter, but rather, whether the Trial Chamber erred in not relying on the evidence in question.

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119. The exhibits and evidence of the Defence Investigator, Gillian Higgins, were produced by **Musema's** Defence on 28 May 1999, whilst the testimonies of Witnesses N and T were given, as part of the Prosecution case, on 28 April 1999 and 3 February 1999 respectively. It follows that the issues raised during the testimony of Gillian Higgins were not put to either Witness N or T for the simple reason that they had not yet been raised by the time N and T testified. However, the Trial Chamber may have decided not to take into consideration the testimony of Gillian Higgins, because it found the said testimony less credible. Although both photographic exhibit D96 and video exhibit D100 are mentioned in the Appellant's Brief, the parts of the Trial transcripts on Gillian Higgins' evidence, which were referred to by **Musema** deal exclusively with Gillian Higgins' testimony in relation to photographic exhibit D96.

120. Having reviewed the trial transcripts of Gillian Higgins' testimony, the **Appeals Chamber** notes the following relevant parts thereof:

The photos that were made that you see that form part of this panorama were all taken from the top of Muyira Hill. It represents a 360 degree view and the left-hand side of the panorama can effectively be joined up to the right hand side [...]. [FN219]

FN219. T, 28 May, 1999, p. 145.

Starting at the left-hand side of the panorama, you can see Lake Kivu is here. There is a sunken road which travels along the top here which is not visible from the top of Muyira Hill, but it is nonetheless indicated by the line of houses that you can follow around the top [...]. [FN220]

FN220. Ibid., p. 146.

Gillian Higgins was then shown Defence exhibit D7A by Counsel for the Defence and the following exchange took place:

Q. Now, can you tell the court, Ms. Higgins, what you see here?

A. I am looking at Defence exhibit 7A. This is a picture of the Bisesero Memorial site and it is taken from the road which eventually if you follow it up towards the memorial site will lead you to the Gisovu tea factory. And to put it into context, Muyira hill would be found somewhere on the left-hand side of this picture.

Q. Thank you. So this is the sunken road one cannot see from the point you have just pointed out to us from the panorama?

A. It is not possible from the view at the top of Muyira Hill to see this road, no. [FN221]

FN221. Ibid., p. 149.

The **Appeals Chamber** also notes that, on cross-examination by the Prosecution, Gillian Higgins confirmed that she did not have "fully qualified techniques for investigating"; that her acquaintance with criminal investigation is due to her professional activity as an attorney; [FN222] that the camera lens used to take the panoramic photographs was a normal lens and not the appropriate panoramic one; [FN223] that she did not visit all the roads in Bisesero and Gishyita and the roads in all the other communes; [FN224] and that she was not accompanied by a native of Kibuye when the visited the various scenes. [FN225]

FN222. Ibid., pp. 161 and162.

FN223. Ibid., p. 166.

FN224. Ibid., p. 174.

FN225. Ibid., p. 175.

121. The **Appeals Chamber** finds of particular relevance the statements elicited from Witness N when shown photograph exhibits D7A and B [FN226] during cross-examination by Counsel for the Defence. [FN227] Witness N stated: "[o]n this photograph I can see houses which were not there before." [FN228] Gillian Higgins, who was also shown exhibit D7A, as mentioned above, testified about the sunken road that was not visible, but which was indicated by a line of houses. Given the fact that the panoramic photograph (exhibit D96) was taken in March 1999, it is possible that it did not depict the conditions existing on 13 May 1994, and that on the date, the road in question could be seen from the top of Muyira Hill as the view was not obstructed by houses.

FN226. Defence exhibit D7 comprises several photographs, marked A, B, C and D, showing the monument by the road side, Rwirambo Hill and the various views of Muyira Hill.

FN227. T, 28 April 1999, pp. 114 to 119.

FN228. Ibid., p. 119.

122. In the light of the various factors discussed above, the **Appeals Chamber** is satisfied that the Trial Chamber acted reasonably in not taking into consideration the evidence of Defence Investigator, Gillian Higgins. Having had the opportunity to hear Witnesses N and T and to observe them under cross-examination, the Trial Chamber chose to find their testimonies reliable. Furthermore, the corroborated accounts by Witnesses F, N, T and P, as noted above, support the Trial Chamber's conclusions on **Musema's** participation in the attack of 13 May 1994. The **Appeals Chamber** has to defer to the Trial Chamber's findings, and the **Appeals Chamber**

fails to see how the Trial Chamber acted unreasonably in not taking account of Gillian Higgins evidence.

123. Consequently, the **Appeals Chamber** finds that **Musema** has failed to prove that the Trial Chamber erred, in not taking into account the evidence produced by Gillian Higgins when considering testimony on identification given by Witnesses N and T. Accordingly, the argument on this point must fail.

(iii) The improbable nature of Witness N's testimony

124. **Musema** argues that certain aspects of Witness N's testimony are improbable and implausible. He maintains that, given the number of people on the hill and the dangerous situation in which N was at the time, it is extremely unlikely that he would have been able to get close enough to the attackers to hear what they were saying, even if, as N stated, the refugees were speaking softly and the attackers loudly. [FN229] Secondly, he asserts that the situation described by N when recounting how rape was perpetrated in the open while fighting was still going on in the vicinity, is highly improbable. [FN230]

FN229. Appellant's Brief, paras. 181 and 182. It should be noted that the Trial Judgement, at para. 859 considered the question of how Witness N was able to hear **Musema** and found N's explanations, in the light of photo exhibits presented, to be convincing.

FN230. Appellant's Brief, para. 183.

125. As mentioned earlier (para. 15 of this Judgement), the task of the **Appeals Chamber**, as defined by Article 24 of the Statute, is to hear appeals from the decisions of Trial Chambers on the grounds of an error on a question of law invalidating the decision or of an error of fact which has occasioned a miscarriage of justice. The onus is on the Appellant to show that the Trial Chamber committed such an error, and his arguments before the **Appeals Chamber** must be directed to that end. With respect to an error of fact, the Appellant has a two-pronged burden: first he must show that the Trial Chamber actually committed such an error, and secondly that the error has occasioned a miscarriage of justice. [FN231] It is established case-law that an appeal is not a trial de novo; [FN232] an appealing party must establish an error pursuant to the principles outlined above. In the present case, the **Appeals Chamber** is satisfied that **Musema** has failed to put forward arguments in support of his assertion that certain aspects of Witness N's testimony were "implausible" or "improbable". Consequently, this argument is dismissed.

FN231. Serushago Appeal Judgement, para. 22.

FN232. Furundzija Appeal Judgement, para. 40; Kayishema/Ruzindana Appeal

Judgement, para. 177; Akayesu Appeal Judgement, para. 177.

(iv) Violation of the right to effective cross-examination of Witness F

126. **Musema** submits that Witness F had been cross-examined before his Defence conducted its investigation at the locus in quo in Rwanda. The Defence therefore had no opportunity to show him photographs thereof during cross-examination. [FN233]

FN233. Appellant's Brief, para. 159.

127. The **Appeals Chamber** finds that this argument lacks merit. **Musema** has not indicated at all that he raised this point at trial [FN234] and, if so, whether the Trial Chamber acted in a manner prejudicial to his case. The **Appeals Chamber** recalls that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, only to raise it in the event of an adverse finding against that party. Thus, if a party raises no objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the **Appeals Chamber** will find that the party "has waived his right to adduce the issue as a valid ground of appeal." [FN235] Accordingly, this argument cannot prosper.

FN234. Notwithstanding the lack of explanation, the **Appeals Chamber** has nonetheless reviewed the "Defence Closing Argument", filed on 28 June 1999, and found that this matter was not raised by **Musema** therein.

FN235. Kambanda Appeal Judgement, para. 25; Kayishema/Ruzindana Appeal Judgement, para. 91. See also, Celebici Appeal Judgement, para. 640.

128. For the foregoing reasons, the **Appeals Chamber** finds that **Musema** has failed to demonstrate that the Trial Chamber erred in its assessment of the credibility of Witnesses F, T and N for its factual findings concerning the 13 May 1994 attack on Muyira Hill. The **Appeals Chamber** thus rejects the argument challenging the credibility of Witnesses F, T and N.

(d) Muyira Hill, 14 May 1994

129. In challenging the credibility of Witnesses AC, T and D, **Musema** submits that their evidence does not sustain the Trial Chamber's factual findings concerning the 14 May 1994 attack on Muyira Hill. Regarding Witness T, **Musema** reiterates the arguments he advanced earlier to cast doubt on the credibility of his testimony with respect to the 13 May 1994 attack. The **Appeals Chamber** thus recalls its findings concerning Witness T, supra and will therefore only consider **Musema's** arguments concerning Witnesses AC and D.

130. In relation to the 14 May 1994 attack on Muyira Hill, the Trial Chamber found, on the basis of the testimonies of Witnesses AC, F, T and D, that it had been proven beyond reasonable doubt that another large-scale attack took place on Muyira Hill on 14 May 1994 against Tutsi civilians; that the attackers, who numbered about 15,000, were armed with traditional weapons, firearms and grenades; that they chanted slogans; and that **Musema**, who was armed with a rifle, was one of the leaders of that attack. [FN236]

FN236. Trial Judgement, paras. 750 and 751 and 910.

(i) Witness AC

131. In challenging the testimony of Witness AC, **Musema** puts forward the following arguments:

- The Trial Chamber accepted the testimony of Witness AC only to the extent that it was corroborated by other evidence. However, **Musema** submits that Witness AC's testimony is wholly unreliable and, even in part, was not improved by the testimony of other witnesses. [FN237]

FN237. Appellant's Brief, para. 190.

- Several features of AC's testimony before the Trial Chamber, in particular, contradictions as to when he first saw **Musema** before the May 1994 attack, the fact that he could not provide certain details when compared to his testimony at the Kayishema and Ruzindana trial and his evasiveness when asked questions about anything other than the matters on which he believed he had come to testify, show that the Trial Chamber erred in finding that Witness AC was credible. [FN238] In addition, AC gave the impression of a witness who had fabricated his evidence. [FN239]

FN238. More particularly, **Musema** submits that the following features of Witness AC's testimony demonstrate his unreliability:
- AC made no mention of **Musema** in the Kayishema and Ruzindana trial in which he gave evidence. In addition, AC did not testify to having seen Prime Minister Jean Kambanda at Nyakavumu cave, a fact which is also uncorroborated;
- AC contradicted himself during his testimony before the Trial Chamber while giving his testimony concerning the circumstances in which he had met **Musema** before the May 1994 attack;
- While giving evidence about his wife, AC could not remember her name and also stated that he could not remember the names of his children;
- When asked questions relating to an incident concerning Bagosora, he repeatedly refused to answer; and
- AC's testimony stating that he did not participate in a meeting in Kibuye, contradicts the account given in his previous statement of 12 June 1996. See Appellant's Brief, paras. 193 to 207.

FN239. Appellant's Brief, para. 205.

132. The Prosecution argues that the Trial Chamber had the discretion to accept any part of Witness AC's testimony with or without corroboration, or to accept only these parts which were corroborated. [FN240]

FN240. Prosecution's Response, paras. 4.116 to 4.119.

133. The **Appeals Chamber** first of all notes that the Trial Chamber was cognizant of the "many confusing elements" in Witness AC's testimony. At paragraph 713 of the Judgement, the Trial Chamber stated as follows:

> The Chamber notes that there was no cross-examination of this witness specific to this attack. Other issues raised on cross-examination, however, raise questions as to the reliability of the witness' testimony. There are many confusing elements in the testimony. It is unclear, for example, whether or not he attended the meeting in Kibuye. It is also unclear why he had such difficulty remembering names of gendarmes, whose names he was able to recall during his testimony in the Kayishema and Ruzindana case. When asked to explain these divergences in his testimony he was willing to provide them in this case. The Chamber considers that the Defence did not establish that the testimony of Witness AC was untruthful in any material respect. However, in light of the confusion which emerges from the cross-examination, the Chamber is willing to accept the evidence of this witness only to the extent that it is corroborated by other testimony.

Furthermore, upon review of the Trial Judgement on this issue, the **Appeals Chamber** also notes that most of the matters raised in **Musema's** arguments concerning the credibility of Witness AC were noted by the Trial Chamber. [FN241]

FN241. See for example, Trial Judgement, para. 450 (concerning AC not being able to remember the names of his wife and children); paras. 452-453 (concerning the inconsistent account of AC's statement dated 12 June 1996 regarding a meeting in Kibuye and AC's refusal to answer questions relating to an incident concerning the fact that AC did not mention Bagosora) and para. 476 (concerning the fact that Witness AC did not mention **Musema** in the Kayishema and Ruzindana trial and did not mention having seen Prime Minister Jean Kambanda at Nyakavumu cave).

134. The Trial Chamber's factual findings [FN242] based, though not entirely, on Witness AC's testimony reveal that a large-scale attack occurred on 14 May 1994 on Muyira Hill; that AC saw **Musema** arrive in his red Pajero; that the attack was led by **Musema** and Ndimbati; that **Musema**, who was carrying a firearm and a belt of ammunition, fired gunshots, which, according to AC, hit an old man by the name of Ntambiye and another called Iamuremye, [FN243] that, on being attacked by the assailants led by **Musema** and Ndimbati, the refugees defended themselves with stones, but that the military fired tear gas at them; and that the attackers left the scene at 18:00hrs. As was observed by the Trial Chamber on two occasions, there was no cross-examination of Witness AC specific to this attack. [FN244] Various aspects of Witness AC's testimony were also corroborated by the testimony

of Witnesses F, T and D in material respects. [FN245] On the question of corroboration of testimony, the **Appeals Chamber** recalls its earlier statements with regard to the Trial Chamber's discretion to assess the evidence and testimony before it. Thus, although not bound to do so, a Trial Chamber may require that the testimony of a witness be corroborated. The **Appeals Chamber** finds that it was within the discretion of the Trial Chamber to accept the evidence of AC to the extent that it was corroborated by other testimony. In this regard, the **Appeals Chamber** also recalls that "a tribunal of fact must never look at the evidence of each witness, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear to be of poor quality, but it may gain strength from other evidence of the case." [FN246]

FN242. Trial Judgement, paras 711 to 712.

FN243. The Trial Chamber, however, did not find that it was established beyond a reasonable doubt that **Musema** shot a certain Ntambiye and a certain Iamuremye during the attack. See Trial Judgement, para. 752.

FN244. Trial Judgement, para. 448 and para. 713.

FN245. Ibid., paras. 714 to 717.

FN246. Tadic Judgement (on Allegations of Contempt), para. 92. Also, see generally, Attorney General of Hong Kong v. Wong Muk Ping [1987] 2 All ER 488, PC, where the court found it "dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability."

135. Consequently, the **Appeals Chamber** finds that the Trial Chamber did not err in accepting the evidence of Witness AC on condition that it was corroborated by other testimony. Furthermore, **Musema's** submissions on the alleged unreliable features of Witness AC's testimony do not, in the view of the **Appeals Chamber**, directly challenge the material aspects of AC's evidence. Thus, notwithstanding **Musema's** arguments, Witness AC's evidence concerning **Musema's** participation in the 14 May 1994 attack which is corroborated by the evidence of Witnesses F, T and D, remains credible.

136. Regarding the allegation that Witness AC gave the impression of being a witness who had concocted his evidence, the **Appeals Chamber** notes that at the trial, **Musema's** Defence had, on several occasions, alleged that Witness AC was lying. [FN247] However, the **Appeals Chamber** notes that, apart from putting this to the witness in cross-examination, **Musema** did not pursue this matter at all. On appeal, **Musema** merely alleges that Witness AC is unreliable, without providing any examples and arguments in support. Considering therefore the principle that the onus is on the appealing party to prove that the Trial Chamber erred, the **Appeals**

Chamber finds that **Musema** has not discharged this burden.

FN247. During cross-examination by Defence Counsel, Witness AC was asked on several occasions if he was lying. See, for example, T, 25 January 1999, pp. 125, 130 and 131.

(ii) Witness D

137. **Musema's** alleges that Witness D did not properly identify him. In his submission, **Musema** argues that the Trial Chamber failed to take sufficient account of the following:

- Witness D's limited knowledge of **Musema**, as she had only seen him on two occasions before the attacks and had never spoken to him. [FN248]

FN248. Appellant's Brief, para. 211.

- It is not possible, from Witness D's testimony, to establish the circumstances of identification, whereupon the Trial Chamber could not validly rely on such testimony. [FN249] When Witness D testifies that she fled as soon as she saw the attackers, it can be assumed that she only took a fleeting glance at the attackers. Furthermore, she stated that she was five minutes' walk from the attackers on Muyira Hill; she could therefore not have identified **Musema** from that distance. [FN250]

FN249. Ibid., para. 213.

FN250. Ibid., paras. 212 and 215.

- Witness D did not mention **Musema** in the first two statements she made to investigators. [FN251]

FN251. Ibid., para. 214.

138. The **Appeals Chamber** recalls its observations in paragraph 113, supra, concerning a witness's prior knowledge of the persons identified. Prior knowledge is a factor that may be taken into account by the Trial Chamber, but it is not a sine qua non; identification may be based on other factors. In this regard, the **Appeals Chamber** notes that the second prior occasion (the first one lasting for only a few minutes) [FN252] where Witness D saw **Musema**, was a meeting that lasted one hour, at which meeting **Musema** was seated behind a table with other officials. [FN253] In the circumstances, the **Appeals Chamber** holds that it was within the discretion of the Trial Chamber to take into consideration the fact that Witness D had met **Musema** on previous occasions in order to give more weight to his testimony on **Musema's** identification.

FN252. T, 28 January 1999, p. 117.

FN253. T, pp. 123 and 124.

139. Regarding the lack of evidence which would make it possible to establish the circumstances in which identification was made, the **Appeals Chamber** refers to its previous observations concerning a similar argument in relation to identification by Witnesses R, F and T (paras. 90 and 113, supra). Hence, in issues of identification, the Trial Chamber is not obliged to require that a witness provide evidence of any particular kind. It is for the Trial Chamber to consider the evidence of identification given by a witness and to assess its credibility in light of the circumstances of the case. In its judgement, the Trial Chamber pointed out that in cross-examination, Witness D was careful to explain what she was able to see in relation to the attack of 14 May 1994. She explained that she only saw the attackers (**Musema** being one of the leaders) once they had disembarked from their vehicles and were making their way to the refugees, after which she fled. [FN254] Still, with regard to the identification of the Accused by Witness D, the Trial transcripts reveal as follows:

FN254. Trial Judgement, paras. 716 and 717.

- Witness D testified that she was on Muyira Hill on 8 a.m. when the attackers arrived. [FN255] Thus, it was during daylight;

FN255. T, 2 February 1999, p. 65.

- When cross-examined as to the distance between her and the attackers, Witness D replied: "it was a distance that I could see and identify people". [FN256]

FN256. Ibid., p. 70.

Upon further cross-examination by Counsel for the Defence, the following exchange took place:

Q. How many of the attackers were there when you decided it was better for you to run away?

A. I saw several of them.

Q. You have told us that you saw several of them. Are you able to put this in numbers at all to help us with what you said?

A. They were very many and a figure that I can advance is, would be let us [sic] about 15 thousand.

Q. And the distance between you and these attackers if you were to walk it, would take how long?

A. Not more than five minutes. [FN257]

FN257. Ibid., pp. 70 and 71.

Q. Because of everything that was happening it must have been very difficult for you to identify people within that group isn't that right?

A. Yes.

Q. And when you have told this court that you saw Alfred **Musema** in the middle of that group of about 15 thousand people that is not true is it?

A. Yes, it is true it was difficult to identify or to see all the people present but I was able to see him personally because he was in the group that was in front. [FN258]

FN258. Ibid., pp. 83 and 84 (French).

It is apparent that the distance of five minute's walk given by the witness was an estimate. Therefore, it is plausible that **Musema**, being in the group that was in front, was close enough for the witness to be able to identify him. Lastly, the **Appeals Chamber** also notes that **Musema's** participation in the attack of 14 May 1994 was further corroborated by the accounts given by Witnesses AC, F and T. Consequently, the **Appeals Chamber** fails to see how the Trial Chamber erred in its treatment of the identification of **Musema** by Witness D. On the basis of Witness D's evidence and the corroborative accounts given by other witnesses, it was reasonable for the Trial Chamber to be satisfied that Witness D had identified **Musema**. The **Appeals Chamber** emphasizes that the law does not require that evidence be corroborated, but that where it is corroborated, that fact may be taken into account in assessing the credibility of the evidence in question.

140. The Defence also submits that Witness D had not mentioned **Musema** in two previous statements made to investigators. The **Appeals Chamber** notes that this allegation is made in a general manner, without demonstrating any material bearing it may have on the reliability of Witness D's in-court testimony. Moreover, it appears that in his arguments **Musema** fails to mention the fact that, in a third previous statement, Witness D did in fact make mention of him. [FN259] Consequently, the **Appeals Chamber** finds this argument unfounded.

FN259. Ibid., p. 37.

141. For the foregoing reasons, the **Appeals Chamber** finds that **Musema** has failed to demonstrate that the Trial Chamber erred in its assessment of the credibility of Witnesses AC and D in relation to its factual findings concerning the 14 May 1994 attack on Muyira Hill. Furthermore, as **Musema** repeats his previous arguments on the credibility of Witness T, in connection with the 13 May 1994 attack, the **Appeals Chamber** reiterates its findings on these aspects concerning the credibility of Witness T. Accordingly, the **Appeals Chamber** rejects the argument

challenging the credibility of Witnesses AC, T and D.

(e) Mid-May attacks (Muyira Hill and Mumataba Hill) and Nyakavumu cave (end-of-May attack)

142. In challenging the credibility of Witnesses H and S, **Musema** submits that their evidence does not sustain the Trial Chamber's factual findings concerning two mid-May (between 10 and 20 May 1994) attacks on Muyira Hill and Mumataba Hill respectively. He also challenges the credibility of Witnesses AC, H, S and D, arguing that their evidence does not sustain the Trial Chamber's factual findings concerning the end-of-May attack at Nyakavumu cave. With regard to Witnesses AC and D, **Musema** puts forward arguments he had previously advanced to cast doubt on the credibility of both Witnesses in connection with the 14 May 1994 attack at Muyira Hill. The **Appeals Chamber** thus reiterates its findings earlier made with respect to Witnesses AC and D (para. 141, supra), and will therefore only consider **Musema's** arguments concerning Witnesses H and S.

143. The **Appeals Chamber** first of all notes the following findings of the Trial Chamber concerning these sites:

(i) On the sole basis of Witness H's testimony, the Trial Chamber found that it had been established beyond reasonable doubt that **Musema** participated in the mid-May 1994 attack on Muyira Hill against Tutsi refugees and that he led the attackers, including Interahamwe and employees of the Gisovu Tea Factory; that **Musema's** red Pajero and Gisovu Tea Factory vehicles were seen at the scene of the attack; that he launched the attack with a gunshot; and that he personally shot at refugees. It was not established, however, that anyone was hit by **Musema's** gunshot. [FN260]

FN260. Trial Judgement, paras, 753 to 754 and 911.

(ii) On the sole basis of Witness S's testimony, the Trial Chamber found that it had been proven beyond reasonable doubt that **Musema** participated in an attack on Mumataba Hill in mid-May 1994; that among the attackers, who numbered between 120 -- 150, were employees of the Gisovu Tea Factory armed with traditional weapons, and communal policemen; that in the presence of **Musema**, tea factory vehicles transported attackers to the location; that the attack, which targeted some 2 000 to 3 000 Tutsis who had sought refuge in and around a certain Sakufe's house, was launched by the blowing of whistles; that **Musema** was present and he remained next to his vehicle, with others, during the attack, and that he left the location with the attackers. [FN261]

FN261. Ibid., paras, 755 to 757 and 916.

(iii) On the basis of the evidence of four [FN262] witnesses, AC, H, S and D, the Trial Chamber found beyond a reasonable doubt that **Musema** participated in the end-of-May attack on Nyakavumu cave; that he was aboard his Pajero in a convoy, which included tea factory Daihatsus with tea factory workers on board, travelling

towards the cave; that he was armed with a rifle and that he was present at the attack during which assailants closed off the entrance to the cave with wood and leaves, and set fire thereto, and that 300 Tutsi civilians who had sought refuge in the cave died as a result of the fire. [FN263]

FN262. **Musema** also points to a fifth witness (Witness AB) in his brief (Appellant's Brief, para. 292). However, it is clear from the factual findings of the Trial Chamber (Trial Judgement, paras. 779 and 780) that this testimony was not relied on by the Trial Chamber.

FN263. Trial Judgement, paras. 780 and 921.

(i) Witness H

144. **Musema** submits that the Trial Chamber failed to take sufficient account of several factors with regard to Witness H's testimony concerning the mid-May 1994 attack on Muyira Hill and the end-of-May 1994 attack on the Nyakavumu cave. The **Appeals Chamber** will first of all consider **Musema's** allegations which are specific to each location, and then proceed to consider the allegations generally calling into question Witness H's credibility.

a. H's testimony in relation to the mid-May 1994 attack on Muyira Hill

145. **Musema** challenges the following parts of Witness H's testimony:

- There were inconsistencies in Witness H's in-court testimony regarding the location of **Musema's** vehicle [FN264] and the location where he sustained the injury to his right thigh. [FN265] Furthermore, his in-court testimony that he recognized the tea factory workers at the Muyira Hill attack by their blue uniforms contradicts his previous statement that they were wearing civilian clothes. [FN266]

FN264. Witness H originally stated that **Musema's** vehicle was at the head of the tea factory vehicles, but later testified that it was behind the other vehicles. (Appellant's Brief, para. 220).

FN265. Witness H stated that he sustained injury to his right thigh during the attack on Muyira Hill but later testified that he sustained it during the attack on Nyakavumu cave. Appellant's Brief, para. 224.

FN266. Appellant's Brief, para. 230.

- Witness H was evasive when asked how he knew that the Interahamwe were living with **Musema** in Gisovu, though it became clear that this was hearsay. [FN267]

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FN267. Ibid., para. 221.

- Witness H's identification of the tea factory vehicles from the top of Muyira Hill is questionable in the light of the evidence of Defence Investigator Gillian Higgins and of the related exhibits. [FN268]

FN268. Ibid., para. 222.

- Witness H's account to the effect that the attackers were chased right down the hill is not corroborated by any other witness, and is improbable. It is possible that he fabricated this story in order to relate it to **Musema**. [FN269]

FN269. Ibid., para. 223.

146. The **Appeals Chamber** notes right away that it is apparent from the Trial Judgement [FN270] that the Trial Chamber was cognizant of some of the above issues raised by **Musema**. In this regard, the issue of inconsistency as to the location of **Musema's** vehicle and Witness H's evidence concerning the fact that the Interahamwe were living with **Musema** in Gisovu were noted by the Trial Chamber when recalling the testimony of the Prosecution witnesses. However, these matters were not referred to in the Trial Chamber's factual findings in respect of this attack. [FN271] In addition, **Musema's** submissions concerning the inconsistency as to the location where Witness H sustained the injury to his right thigh [FN272] were not referred to in the Trial Chamber's findings. The **Appeals Chamber** is of the view that these matters are not central to Witness H's evidence on **Musema's** participation in the said attack. The facts that are germane to **Musema's** participation in the mid-May 1994 attack on Muyira Hill, to which Witness H testified, are that **Musema** led attackers, including Interahamwe and tea factory workers in blue uniforms, from Gisovu; that **Musema's** red Pajero and four tea factory vehicles stopped at Kurwirambo; that the witness gave a detailed description of the clothes the attackers were wearing and the weapons they were carrying; that **Musema** launched the attack with a gun-shot and personally shot at refugees, although Witness H could not say whether he actually hit anyone; and that, at some point during the attack, the refugees were able to drive back the assailants and attempted to grab **Musema** but were prevented from doing so by other attackers. [FN273]

FN270. (i) The fact that at a later stage of his testimony, Witness H indicated that **Musema's** Pajero was behind the convoy of vehicles coming from the tea factory whereas he had earlier stated that the vehicle was in front and (ii) the fact that the Interahamwe were, according to Witness H, living with **Musema** in Gisovu. (See Trial Judgement, para. 466).

FN271. Trial Judgement, paras. 753 and 754.

FN272. A review of the trial transcripts reveals that the witness, on two occasions, during examination-in-chief and cross-examination, reiterated his

clarification that he had sustained the wound to his foot during the attack at Muyira Hill and received a bullet in the thigh during the attack at Nyakavumu cave (See T, 27 January 1999, pp. 72 and 115).

FN273. Trial Judgement, para. 719 and 720.

147. A Trial Chamber is not obliged in its judgement to sum up and justify its findings in relation to every argument. [FN274] After seeing Witness H, hearing his testimony and observing him under cross-examination, the Trial Chamber was best placed to assess the reliability of his testimony. Clearly, this is what it did, bearing in mind its overall evaluation of the entire testimony. It may be assumed that the Trial Chamber regarded these matters as being less probative and insufficient to substantially impair Witness H's evidence. The **Appeals Chamber** is of the view that the Trial Chamber acted properly, since **Musema** failed to show that these matters were material to the overall evaluation of Witness H's evidence. The **Appeals Chamber** will therefore defer to the Trial Chamber's assessment.

FN274. Furundzija Appeal Judgement, para. 69; Celebici Appeal Judgement, para. 498.

148. Regarding the question of identification of the tea factory vehicles from the top of Muyira Hill, the **Appeals Chamber** reiterates its earlier finding that the Trial Chamber acted reasonably, in the light of the circumstances of the case, in not taking into consideration the evidence of Defence Investigator, Gillian Higgins. Consequently, the **Appeals Chamber** holds that it was within the discretion of the Trial Chamber to accept the evidence of Witness H's identification of the tea factory vehicles from his vantage point at the top of Muyira Hill. [FN275]

FN275. Furthermore, during cross-examination, Witness H explained why there would be a need for a walk of 30 minutes from the top of Muyira Hill to where the vehicles were parked. The reason was that, "one would have to walk down and make a detour and so on, but if you were looking at the vehicles you would look straight across and see the vehicles". (See T, 28 January 1999, pp. 24 to 25). The Trial Judgement also noted that there was a valley and river between the road where the vehicles were parked and the top of the hill, thus accounting for the "detour" explained by the witness. (See Trial Judgement, para. 469).

149. There is also the issue of the inconsistency between Witness H's testimony and his previous statement as to the clothes the tea factory workers were wearing during the attack on Muyira Hill. It emerges from trial transcripts, [FN276] that when asked about the said inconsistency on cross-examination, Witness H explained that some of the tea factory workers were indeed wearing blue uniforms, but that there were also others who were not wearing blue uniforms, but rather blue overalls. Witness H went on to state that his previous statement was the result of the questions put to him. The **Appeals Chamber** notes that the previous statement in question was given by Witness H on 19 November 1998 to Tribunal investigators, and recognizes the difficulty a witness may have recollecting precise details or

recounting them with the same accuracy and in the same manner whenever they are asked to relate them. The Trial Chamber relied on oral testimony given in the courtroom, [FN277] and not on prior statements, as it was in a position to directly observe the demeanour of the witness and place him in the context of all the other evidence before it. The **Appeals Chamber** finds no cause to say that, in so doing, the Trial Chamber erred.

FN276. T, 28 January 1999, pp.22 to 23.

FN277. Trial Judgement, para. 86.

150. With regard to the "improbable" nature of Witness H's testimony that the attackers were chased down the hill, the **Appeals Chamber** reiterates that an appeal is not a de novo review, [FN278] and that the onus is on **Musema** to establish the error which resulted in a miscarriage of justice. Merely alleging that this aspect of Witness H's evidence is "improbable" does not suffice to establish that the Trial Chamber erred in its assessment of the evidence. Further, the allegation that Witness H fabricated the evidence to bring himself closer to **Musema** is unsupported. **Musema** has not adduced additional evidence before the **Appeals Chamber** in order to substantiate his claim. The **Appeals Chamber** accordingly finds this argument to be without merit.

FN278. Furundzija Appeal Judgement, para. 40; Kayishema/Ruzindana Appeal Judgement, para. 178; Akayesu Appeal Judgement, para. 177.

b. H's testimony in relation to the end-of-May attack on Nyakavumu cave

151. **Musema** challenges the following parts of Witness H's testimony:

- In his previous statement taken on 19 November 1998, Witness H said that the attack in the cave took place in April, and that he lost 4 of his children in it. However, in his oral testimony in court, he stated that the attack took place at the end of May or beginning of June, and that none of his children died in it; [FN279]

FN279. Appellant's Brief, para. 226.

- Witness H's evidence concerning what he saw at Nyakavumu cave was questionable in view of the fact (i) that he was 30 minutes' walk from the cave; (ii) that, although he allegedly saw **Musema** 40 metres away from the cave, it was not established what distance it was between Witness H and **Musema**; and (iii) that Witness H admits that, at the cave incident, he gave no more than a "quick look" at **Musema**. [FN280]

FN280. Ibid., paras. 227 to 228 and 232.

152. Having noted the overwhelming evidence of Witnesses AC, H, S and D, all of whom presented consistent testimony as to the attack on the cave, the Trial Chamber found that it had been established beyond reasonable doubt that **Musema** participated in the said attack. [FN281] Those parts of Witness H's testimony referred to in the Trial Judgement's factual findings indicate that sometime around the end of May or early June, Witness H saw **Musema** briefly prior to the attack, in a convoy moving in the direction of the cave, and presumed that he must have been present at the cave; that within the convoy was **Musema's** Pajero and tea factory vehicles; that Witness H, observing from a nearby hill, saw assailants destroy houses in the vicinity for firewood and set light to the entrance of the cave; and that only one person survived the fire. [FN282]

FN281. Trial Judgement, para. 779.

FN282. Ibid., para. 761.

153. With respect to the inconsistency between Witness H's previous statement of 19 November 1998 and his oral testimony, the **Appeals Chamber** reiterates its earlier observation, supra, and finds that it was within the discretion of the Trial Chamber to give probative value to the testimony primarily because the said testimony was given before the Chamber, as opposed to prior statements. In addition, a reading of the Trial transcripts [FN283] reveals that, during the examination-in-chief and cross-examination on this issue, Witness H was careful to repeatedly explain that the investigators who took the previous statement in question misunderstood him and therefore misinterpreted what he said. For instance, when Counsel for the Defence cross-examined Witness H about his having signed and certified the said statement as true, Witness H answered as follows:

FN283. T, 27 January 1999, pp. 75 to 77, 107 to 114.

> To error [sic] is human. I think whether the error be from those who put down what I said or whether the error comes from me anyway, [anywhere][sic] somebody made an error in any case I did not say that my children died in the attack at the cave because I know very well that this is not the case. They died in mid-May. This was in 1994. [FN284]

FN284. Ibid., p.112.

> The error that was committed, is that they said that the persons in question were killed in April whereas, this is not what I said. [FN285]

FN285. Ibid., p. 113 and 114.

Although the Trial Chamber made no reference in its findings to the alleged inconsistency, the **Appeals Chamber** finds, having regard to the consistency with which Witness H responded to the questions on this issue, that it may nevertheless be assumed that the Trial Chamber considered the explanation given by Witness H as

satisfactory.

154. With regard to the allegations concerning Witness H's testimony as to what he saw at Nyakavumu cave and his identification of **Musema**, the **Appeals Chamber** notes that Witness H was asked to explain the same matters during his testimony before the Trial Chamber. [FN286] The **Appeals Chamber** further notes that Witness H had known **Musema** prior to 1994. [FN287] **Musema** makes no mention in his Appellant's Brief of the explanations given by Witness H or of the fact that the Witness had prior knowledge of him. In conformity with the principle that an appeal is not a trial de novo, the onus is on **Musema** to establish the error occasioning a miscarriage of justice. Failing such a showing, it was not unreasonable for the Trial Chamber to consider the explanations given by Witness H as satisfactory. Moreover, it was within the discretion of the Trial Chamber to consider Witness H's prior knowledge of **Musema** as strengthening his evidence of identification. Consequently, and although the Trial Chamber did not specifically mention these issues in its factual findings, it is reasonable to assume that the Trial Chamber took them into account in its overall assessment of Witness H's evidence. In any event, there was sufficient corroboration of **Musema's** participation in the attack on Nyakavumu cave from witnesses AC, S and D. On the basis of Witness H's testimony and the corroborative accounts given by other witnesses, it was reasonable for the Trial Chamber to be satisfied that Witness H had identified **Musema**.

FN286. (i) The issue of Witness H being 30 minutes' walk away from the cave was explained by the fact that there was a smaller hill between the witness and Nyakavumu cave necessitating a detour around the smaller hill (See T, 27 January 1999, pp. 81 and 82; see also Trial Judgement, para. 469); (ii) The matter concerning the distance between **Musema** and Witness H and the "quick glance" which the witness had of **Musema** was explained when H was questioned by Judge Pillay. Witness H explained that while being chased, he passed "close by'' where **Musema** was and that is when he saw him (See T, 28 January 1999, p. 61).

FN287. T, 27 January 1999, p. 14; T, 28 January 1999, p. 15; Trial Judgement, para. 466.

c. General allegations concerning Witness H's credibility

155. **Musema** submits that the Trial Chamber failed to take sufficient account of the fact, (i) that Witness H did not remember the names of his own children; [FN288] and (ii) that Witness H had problems with his eyesight which started five years ago although he stated that his problem with seeing things at a distance began about two years ago. [FN289]

FN288. Appellant's Brief, para. 225.

FN289. Ibid., para. 229.

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156. The **Appeals Chamber** notes right away that Witness H was consistent in his explanation regarding his eyesight problem during cross-examination. He stated that, although the problem started five years ago, it was not really serious, and that his eyesight only became poor two years ago. [FN290] The **Appeals Chamber** also holds that the argument that Witness H cannot remember the names of his children does not impair his credibility to the extent of vitiating his testimony on all other issues. [FN291] Thus, it was for the Trial Chamber to determine whether the Witness was reliable and his evidence credible in its entirety. Consequently, the **Appeals Chamber** must always give a margin of deference to the Trial Chamber's finding of fact unless it can be demonstrated that the Trial Chamber erred in its assessment. **Musema** has failed to do so.

FN290. T, 28 January 1999, pp. 19 and 25 and 26.

FN291. The context in which Witness H stated that he had difficulty in remembering the names of his 10 children was this: Witness H had already written the names down on a piece of paper (exhibit P3) upon the request of the Prosecution; he asked if he could have a copy of the names he had written down saying that he had problems remembering their names (See T, 27 January 1999, pp. 56 to 62).

157. **Musema** also argues that, both in respect of Muyira Hill and Nyakavumu cave, Witness H was unable to identify anyone else in **Musema's** group, despite the fact that he knew many Hutus in Gisovu commune, which ironically casts doubt on his account. [FN292] In support of this argument, **Musema** refers to the Trial transcripts on Witness H's cross-examination in relation to the attack on Nyakavumu cave. [FN293] Thus, **Musema** has not substantiated his argument in relation to Muyira Hill. With regard to Nyakavumu cave, the **Appeals Chamber** first notes that for **Musema** to say that Witness H "knew many Hutus in the Gisovu commune'' is a misrepresentation of facts. In response to the question whether he knew Hutu people within Gisovu commune, Witness H replied, "[t]hose who I knew, are those who were living in the place or the location I was working. Some members of the local population." [FN294] The **Appeals Chamber** also notes that the witness explained this on cross-examination [FN295] and upon further questions by Judge Pillay on this issue. [FN296] **Musema** has not mentioned these explanations nor demonstrated their unreasonableness in his Appellant's Brief. Consequently, the **Appeals Chamber** finds this allegation unfounded.

FN292. Appellant's Brief para. 231.

FN293. T, 28 January 1999, pp. 53 to 56.

FN294. Ibid., p. 56.

FN295. Witness H explained that he was unable to identify other persons in **Musema's** group because he was being pursued and did not have time to check. He was only able to recognize those persons whom he knew well. See T, 28 January 1999, p. 54.

FN296. Witness H further explained that there were many trees between him and **Musema's** group and thus he was not able to identify anyone else apart from **Musema**. See T, 28 January 1999, p. 62.

(ii) Witness S

158. **Musema** submits that the Trial Chamber failed to take sufficient account of several factors with regard to Witness S's testimony concerning the mid-May 1994 attack on Mumataba Hill and the end-of-May 1994 attack on the Nyakavumu cave.

159. Firstly, **Musema** challenges Witness S's identification of him and submits that there is no evidence to show that the Witness knew him before the events in question. Therefore, his identification must be deemed unreliable. [FN297] Secondly, there was little detail elicited to establish the conditions surrounding Witness S's identification of **Musema** during the events in question, and thus little to help the Trial Chamber to evaluate the reliability of the identification. [FN298]

FN297. Appellant's Brief, paras. 237 and 238.

FN298. Ibid., para. 238.

160. The **Appeals Chamber** recalls what it had earlier stated, to wit, that there is no requirement that an identified suspect be personally known to the witness. Prior knowledge of the person identified is a factor which, though not a sine qua non, may be taken into consideration by the Trial Chamber when assessing the reliability of a witness' testimony; [FN299] identification may be based on other factors. In addition, the **Appeals Chamber** has observed that under Rule 89 of the Rules, a Chamber "may admit any relevant evidence which it deems to have probative value" and is not obliged to elicit evidence of any particular kind from a witness concerning a given identification. It is for the Trial Chamber to determine if the evidence of identification given by a witness is reliable in light of the circumstances of the case. The Trial Chamber is best placed to assess the evidence. In this regard, **Musema** alleges that because of his being a "considerable distance" away, it is simply not credible that Witness S could have (i) read inscriptions on vehicles and uniforms at the mid-May 1994 Mumataba Hill incident; or (ii) heard the orders given to the attackers at the end-of-May 1994 Nyakavumu cave incident. [FN300]

FN299. Kayishema/Ruzindana Judgement, para. 71.

FN300. Appellant's Brief, para. 239.

161. With regard to the mid-May 1994 Mumataba Hill attack, the Trial Chamber noted

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in its Judgement that in cross-examination, Witness S provided a detailed description of the area of the attack by reference to Prosecution photo exhibits 20.1 and 20.2, [FN301] and that the vehicles were parked less than one kilometre from where the Witness was hiding. [FN302] The Trial Chamber then noted that, that notwithstanding, the Defence still called into question the witness' assertion that he was able to read the inscription on the tea factory vehicles. [FN303] On appeal, **Musema** repeats this allegation but does not provide further argument to demonstrate that it was implausible that Witness S could have been able to read inscriptions on vehicles or uniforms from such a distance. Furthermore, the **Appeals Chamber** notes that Witness S testified to having seen the vehicles at 10:00hrs, in the morning; [FN304] that from where he was at the summit of Mpura Hill, he could look downwards and recognize someone; that, in fact, he saw **Musema** and vehicles carrying people; [FN305] and that he was also able to recognize the vehicles not only by the inscriptions but also by their colour including **Musema's** red Pajero. [FN306] The Trial Judgement also noted that Witness S testified that **Musema** stayed by his car during the attack in the company of persons dressed in white and that **Musema** left the site around 17:00hrs. [FN307] In light of the foregoing, the **Appeals Chamber** is of the view that **Musema's** arguments do not suffice to demonstrate an error by the Trial Chamber in its evaluation of Witness S's testimony concerning the mid-May 1994 attack on Mumataba Hill.

FN301. Trial Judgement, para. 724.

FN302. Ibid., para. 473.

FN303. Ibid.

FN304. T, 2 March 1999, p. 17.

FN305. Ibid., p. 14.

FN306. Ibid., pp. 15 and 16.

FN307. Trial Judgement, paras. 471 and 472. Hence, Witness S was able to observe **Musema**, in daylight, from a distance of less than one kilometre and for a period of several hours.

162. As to whether it was plausible that Witness S could have heard the orders given to the attackers at the end of May 1994 Nyakavumu cave incident, the **Appeals Chamber** is of the view that this is an isolated allegation that must be considered from the broader perspective of the Trial Chamber's findings on the cave incident as a whole. The orders referred to by **Musema** were given by the assailants who were with him, and who shouted three times to call back those attackers who had gone beyond Nyakavumu cave. [FN308] Witness S testified that he saw **Musema**, through trees, carrying a long rifle and following the assailants who blew whistles and

shouted out the said orders three times. [FN309] Although the Trial Judgement did not mention the distance from which Witness S was able to hear the orders, it is plausible that Witness S, being close enough to identify **Musema** and hear the assailants blowing whistles, was also able to hear the orders being shouted out. Moreover, **Musema** does not dispute the other aspects of Witness S's evidence, relied on by the Trial Chamber [FN310] in relation to what he saw. More particularly, there was sufficient corroboration of **Musema's** participation in the attack on Nyakavumu cave from Witnesses AC, H and D. In light of Witness S's evidence and the corroborative accounts given by other witnesses, the **Appeals Chamber** fails to see why it was unreasonable for the Trial Chamber to rely on the evidence of Witness S.

FN308. Trial Judgement, para. 766.

FN309. Ibid., paras. 481 and 482.

FN310. Inter alia, Witness S's evidence concerning **Musema** being among the attackers and armed with a long rifle; the attackers had gathered around **Musema** for a couple of minutes and exchanged a few words, after which they destroyed a nearby house for firewood which they took to the cave and that a short while later, although he did not see the attack on the cave, he saw smoke rise. (See Trial Judgement, paras. 765 to 767).

163. For the foregoing reasons, the **Appeals Chamber** finds that **Musema** has failed to show that the Trial Chamber erred in its assessment of the credibility of Witnesses H (concerning the mid-May 1994 attacks on Muyira Hill) and S (concerning the mid-May 1994 attack on Mumataba Hill), and dismisses the argument challenging the credibility of Witnesses H and S.

164. Similarly, with regard to the end-May 1994 attack on Nyakavumu cave, the **Appeals Chamber** finds that **Musema** has failed to show that the Trial Chamber erred in its assessment of the credibility of Witnesses H and S. Furthermore, as **Musema** repeats his previous arguments on the credibility of Witnesses AC and D put forward in connection with the 14 May 1994 attack on Muyira Hill, the **Appeals Chamber** reiterates its findings on these aspects concerning the credibility of Witnesses AC and D. Accordingly, the **Appeals Chamber** rejects the argument challenging the credibility of Witnesses AC, H, S and D.

(f) Sexual Crimes

(i) Rape and murder of Annunciata Mujawayezu on 14 April 1994

165. In challenging the Trial Chamber's findings on this incident, **Musema** questions the credibility of Witness I, who, with Witnesses, L and PP, gave evidence concerning the rape and murder of Annunciata Mujawayezu on 14 April 1994. While calling into question the testimony of Witness I, **Musema** alleges that the

majority of the Trial Chamber failed to take into account several factors regarding her evidence. [FN311] **Musema** further argues that the Trial Chamber erred in its treatment of the inconsistencies between her oral testimony and her pre-trial statements regarding this incident. [FN312] Consequently, **Musema** submits that the majority of the Trial Chamber erred in law and in fact in finding him guilty of the said incident. [FN313]

FN311. Appellant's Brief, paras. 309 to 339.

FN312. Ibid., paras. 340 to 358.

FN313. Ibid., para. 359.

166. Before deciding whether or not it should proceed to consider the merits of **Musema's** arguments on this issue, the **Appeals Chamber** must first of all address the Prosecution's submission that, with regard to this particular incident, **Musema** cannot in any way appeal against the counts on which he was found guilty, namely, Counts 1, 5 and 7. [FN314] The Prosecution maintains that the Trial Chamber did not convict **Musema** of the alleged rape and killing of Annunciata Mujwayezu nor did it rely on such in determining the sentence to be imposed on **Musema**. [FN315]

FN314. "Prosecution's Response to Arguments Raised in p. 65 of the Appellant's Brief", filed on 25 July 2001, para. 14.

FN315. Ibid., para. 12.

167. Paragraphs 4.7 to 4.10 of the Amended Indictment [FN316] set out the factual allegation with respect to the rape charges and, in particular, paragraph 4.8 states:

FN316. ICTR-96-13-I (Amended Indictment of 29 April 1999), reproduced in the Trial Judgement, pp. 288 to 293.

On 14 April 1994, within the area of the Gisovu Tea Factory, Twumba cellule, Gisovu commune, Alfred **Musema**, in concert with others, ordered and encouraged the raping of Annunciata, a Tutsi woman and thereafter, ordered, that she be killed together with her son Blaise. [FN317]

FN317. Trial Judgement, p. 290.

The majority of the Trial Chamber (Judge Aspegren dissenting) [FN318] made the factual finding that it had been established beyond reasonable doubt that **Musema** ordered the rape of Annunciata Mujawayezu and the cutting off of her breast to be fed to her son. [FN319] However, despite this finding, the majority of the Trial

Chamber went on to observe that no evidence had been introduced to indicate that **Musema** ordered that she be killed, nor was there conclusive evidence that she was raped, or that her breast was cut off. [FN320] At paragraph 889 of the Trial Judgement, the Trial Chamber set out its legal findings concerning, inter alia, Count 1(Genocide) and noted as follows:

FN318. It may be noted that although Judge Aspegren's separate opinion dissents on the factual finding, he nevertheless agrees with the majority on the legal finding that, in any event, the order by **Musema** to rape Annunciata Mujawayezu is not punishable. See Trial Judgement, p. 313, at paras. 42 and 43.

FN319. Trial Judgement, para. 828.

FN320. Ibid., paras. 828 and 829.

Firstly, regarding the allegations presented under paragraph 4.8 of the Indictment, according to which **Musema**, in concert with others, ordered and abetted in the rape of Annunciata, a Tutsi, and thereafter ordered that she and her son be killed, the Chamber holds that even if it is proven that **Musema** ordered that Annunciata be raped, such order, by and of itself, does not suffice for him to incur individual criminal responsibility, given that no evidence has been adduced to show that the order was executed to produce such result, namely the rape of Annunciata. Nor has it been proven that **Musema** ordered that she and her son be killed. [FN321] (emphasis added)

FN321. Ibid., para. 889.

When making its legal findings on Count 7 (Crime against Humanity - rape), the Trial Chamber only relied on its factual findings (with respect to the allegations in para. 4.10 [FN322] of the Amended Indictment) concerning the rape of a Tutsi woman named Nyiramusugi. [FN323] The Trial Chamber subsequently found **Musema** individually criminally responsible for the rape of Nyiramusugi pursuant to Articles 3(g) and 6(1) of the Statute. [FN324] This finding does not include the incident of the rape of Anunciata Mujawayezu.

FN322. Ibid., para. 963.

FN323. Ibid., para. 966.

FN324. Ibid., para. 967.

168. The **Appeals Chamber** also notes that, in the section of the Trial Judgement on Sentencing, [FN325] no reference is made to the rape of Annunciata Mujawayezu. The Trial Chamber did not take into account this rape incident in the determination of the sentence.

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FN325. Ibid, paras. 976 to 1008.

169. It is the understanding of the **Appeals Chamber** that, although the Trial Chamber made the factual finding that **Musema** ordered the rape of Annunciata Mujawayezu, [FN326] it held that the order in itself was not sufficient for him to incur individual criminal responsibility. Consequently, the Trial Chamber did not take account of this incident, either as a basis for a conviction on the count in question, or in determining the sentence passed.

FN326. Ibid., para. 828.

170. Witness I, whose testimony **Musema** challenges, gave evidence only with respect to the rape of Annunciata Mujawayezu. Therefore, the testimony of this Witness has no bearing on the counts on which **Musema** was eventually convicted and sentenced, nor on the factual findings made by the Trial Chamber.

171. Consequently, the **Appeals Chamber** finds that **Musema's** challenge to the credibility of Witness I is misguided and, accordingly, dismisses the argument on this point.

(ii) Rape of Nyiramusugi on 13 May 1994

a. Introduction

172. In his Appellant's Brief, **Musema** submits that the Trial Chamber committed an error of fact in finding that the statements of Witness N were "clear and consistent" [FN327] As a remedy, **Musema** requests that he be acquitted on Count 7 of the Amended Indictment, namely rape as a crime against humanity. [FN328] The Trial Chamber found **Musema** guilty of this crime on account of his rape of Nyiramusugi on 13 May 1994, based on Witness N's oral testimony. [FN329]

FN327. Appellant's Brief, paras. 360 to 361 and 175 to 185.

FN328. Ibid., paras. 369 and 537.

FN329. Trial Judgement, paras. 847 to 862.

173. During the proceedings on appeal, the Appellant was granted leave to file additional evidence in relation to the rape of Nyiramusugi, namely the out-of-court statements of Witnesses CB and EB. [FN330] The **Appeals Chamber** heard these witnesses at a hearing held at The Hague on 17 October 2001("Hearing of 17 October 2001"). The parties presented arguments on the same day, in respect of the testimonies of Witnesses CB and EB before the Chamber.

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FN330. (Annex 2 of the) "Defence Motion under Rule 68 Requesting the **Appeals Chamber** to Order the Prosecution to Disclose Exculpatory Material in its Possession to the Defence: and for Leave to file Supplementary Grounds of Appeal", filed on 19 April 2000 ("Statement of Witness CB") and Annex A.2 of the "Confidential Motion by the Appellant to be filed under seal (i) to File Two Witness Statements Served by the Prosecutor on 18 May 2001 Under Rule 68 Disclosure to the Defence; and (ii) to File the Statement of Witness II Served by the Prosecutor on 18 April 2001 and to File Supplemental Ground of Appeal', filed on 28 May 2001 ("Statement of Witness EB").

174. The **Appeals Chamber** will first consider the ground of appeal raised by **Musema** in his Appellant's Brief, and then examine the impact of the statements of Witnesses CB and EB on the Trial Chamber's factual findings.

(b) Factual error alleged in Appellant's Brief

175. In his Appellant's Brief, **Musema** submits that the Trial Chamber committed an error of fact in finding that Witness N's testimony on the rape of Nyiramusugi was "clear and consistent". [FN331] However, the Appellant did not advance any specific arguments in that regard; he simply refers to his arguments on Witness N's testimony regarding the attack on Muyira Hill. [FN332]

FN331. Appellant's Brief, paras. 360 and 361.

FN332. Ibid., paras. 361 and 175 to 185.

176. Since the Appellant did not advance specific arguments regarding the ground of appeal in respect of the rape, the **Appeals Chamber** has no valid reason to review its factual findings in paragraph 128 of the instant Appeal Judgement. The Appellant has failed to establish that the Trial Chamber committed an error of fact in finding that the testimony of Witness N on the rape of Nyiramusugi was "clear and consistent". Accordingly, this ground of appeal is dismissed.

177. The **Appeals Chamber** will now address the impact of the statements of Witnesses CB and EB on the factual findings of the Trial Chamber.

(c) Errors of fact revealed by the additional evidence [FN333]

FN333. The **Appeals Chamber** recalls here the main arguments put forward by the parties during the hearing on appeal of 17 October 2001.

(i) Arguments of the parties

178. At the hearing on appeal held on 17 October 2001, the Appellant submitted that the statements of Witnesses CB and EB show that the conviction for rape, as a crime against humanity, constitutes a miscarriage of justice. [FN334]

FN334. T(A) [CB and EB], 17 October 2001, p. 57.

179. With respect, specifically, to the judicial testimony of Witness CB, the Appellant submitted that the said witness's account of events contains a number of points that were "entirely irreconcilable" with Witness N's account before the Trial Chamber, especially in terms of locations and time. [FN335] The accounts of Witnesses N and CB are allegedly "totally contradictory" as to the identity of the person who raped Nyiramusugi since CB testified that the rape was committed by one "Mika". [FN336] The testimonies of Witnesses N and CB give no indication that **Musema** raped Nyiramusugi after Mika had raped her on 13 May 1994. [FN337] The Appellant alleges that the circumstances of the rape, as described by Witness CB, show that Witness N did not tell the truth before the Trial Chamber. [FN338]

FN335. T (A) [CB and EB], pp. 60 and 61.

FN336. Ibid., p.60.

FN337. Ibid., p. 63.

FN338. Ibid., p. 73.

180. Regarding the judicial testimony of Witness EB, the Appellant asserts that the Witness testified to events that are not covered in the Amended Indictment. Witness EB describes the rape of Nyiramusugi allegedly committed by **Musema** between 15 May and 15 June 1994, [FN339] whereas Count 7 of the Amended Indictment -- one of the bases of the Appeal- charges the Appellant with the rape of Nyiramusugi on 13 May 1994. [FN340] In any case, the Appellant submits that he had raised an alibi that covered a greater part of the period between 15 May and15 June 1994. [FN341]

FN339. Ibid., p. 61.

FN340. Ibid., p. 61.

FN341. Ibid., p. 62.

181. For its part, the Prosecution argues that there is no reason to believe that the Trial Chamber's verdict or its assessment of the credibility of Witness N's

testimony would have been affected if the statements of Witnesses CB and EB been produced before the Trial Chamber. [FN342]

FN342. Ibid., p. 67.

182. The Prosecution contends that the fact that Witness CB imputes responsibility for the rape of Nyiramusugi on 13 May 1994 to one "Mika" does not mean that Nyiramusugi could not have been subsequently raped again, on the same day, by **Musema**. [FN343] Although details as to the precise time of the rape do not tally, the Prosecution asserts that the fact that Nyiramusugi was found and brought to **Musema** in the afternoon of 13 May 1994, after the attack on Muyira Hill, had not been challenged by the evidence of Witness CB. [FN344]

FN343. Ibid., p. 65.

FN344. Ibid., p.65.

183. Regarding Witness EB's statement, the Prosecution is of the view that it is the account of the rape of Nyiramusugi by the Appellant on a day other than 13 May 1994. Thus, there is no inconsistency between the statement of Witness EB and that of Witness N produced before the Trial Chamber. [FN345] In any case, the Prosecution submits that, pursuant to the Decision of 28 September 2001, the depositions by Witness EB can only be used to verify the testimony of Witness CB and not that of Witness N. [FN346]

FN345. Ibid., p. 67.

FN346. Ibid., p. 68.

(ii) Discussion

184. As recalled earlier in paragraph 14 of this Appeal Judgement, Article 24 of the Statute provides that the **Appeals Chamber** shall hear appeals on "an error of fact which has occasioned a miscarriage of justice." [FN347] Rule 118(A) of the Rules provides that "The **Appeals Chamber** shall pronounce judgement on the basis of the record on appeal and on any additional evidence as has been presented to it." [FN348]

FN347. Article 24 of the Statute.

FN348. Rule 118(A) of the Rules.

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185. In Kupreskic, the **Appeals Chamber** of ICTY stated the role of the **Appeals Chamber** in cases where the factual findings of a Trial Chamber are likely to be reviewed in light of new evidence. ICTY **Appeals Chamber** held in the above-mentioned case that:

"Where additional evidence has been admitted, the **Appeals Chamber** is then required to determine whether the additional evidence actually reveals an error of fact of such magnitude as to occasion amiscarriage of justice." [FN349]

FN349. Appeal Judgement, Prosecutor v. Zoran Kupreskic and others, Case No. IT-95-16-A, 23 October 2001, para. 72 (Kupreskic Appeal Judgement).

"[...] A miscarriage of justice may [...] be occasioned where the evidence before a Trial Chamber appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as unreliable. It is possible that the Trial Chamber may reach a conclusion of guilt based on the evidence presented at trial that is reasonable at the time [...] but, in reality, is incorrect." [FN350]

FN350. Kupreskic Appeal Judgement, para. 44.

"[...] The test to be applied by the **Appeals Chamber** in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings." [FN351]

FN351. Kupreskic Appeal Judgement; para. 75, see also para. 76.

186. It is the **Appeals Chamber's** view that such principles are also applicable before ICTR when the admission of new evidence entails a review of the Trial Chamber's factual findings. The **Appeals Chamber** finds this to be the case in this instance.

187. The Trial Chamber found the Appellant guilty of the rape of Nyiramusugi, based on evidence given by Witness N, the sole Prosecution Witness who testified, in respect of Count 7 of the Amended Indictment, which states that:

On 13 May 1994, within the area of Bisesero, in Gisovu and Gishyita communes, Kibuye préfecture, Alfred **Musema**, acting in concert with others, raped Nyiramusugi, a Tutsi woman and encouraged others accompanying her to rape and kill her. [FN352]

FN352. Amended Indictment cited in the Trial Judgement, para. 846.

In the Section of the Judgement entitled "Factual findings", the Trial Chamber found beyond reasonable doubt, based on the testimony of Witness N, "that **Musema**,

acting in concert with others raped Nyiramusugi, and by his example encouraged the others to rape her on 13 May 1994." [FN353] The facts in Witness N's testimony, relied on by the Trial Chamber to make the above findings, are set out in paragraphs 847 to 856 of the Judgement: [FN354]

FN353. Trial Judgement, para. 861. See also para. 862 of the Judgement where the Trial Chamber found that no evidence had been adduced tending to show that **Musema** may have encouraged, as alleged in the Amended Indictment, those who were with him to kill Nyiramusugi.

FN354. Footnotes omitted.

847. Witness N, a 39 year old Tutsi, testified that he sought refuge in the Bisesero area from 26 April to 13 May 1994. He stated that there were many attacks on Muyira Hill on 13 May 1994 and that he stayed on Muyira hill until that date, after which he had to flee again. He testified that he knew **Musema**. He saw **Musema** arrive at Muyira Hill aboard his red vehicle on 13 May 1994. He said that this was the first time that he had seen **Musema** during the attacks. He explained that he was able to hear **Musema** once the group moved to within a few metres of him.

848. The witness testified that **Musema** spoke to a policeman named Ruhindura, and asked him whether ayoung woman called Nyiramusugi was already dead, to which the policeman answered "no". He stated that **Musema** then asked that before anything, this girl had to be brought to him. He and the bourgmestre fired the first shots so the others would start shooting. Ruhindura while fighting and looking for the young woman caught her. The Witness stated that he knew Nyiramusugi. He used to see her when she walked to school and he used to take his cows to graze in front of her parents' house. He said that she was a young unmarried teacher.

849. Witness N testified that Nyiramusugi was caught around 15.30hrs. He said that he saw Ruhindura with four youths drag the young woman on the ground and take her to **Musema**. He said that **Musema** was carrying a rifle which he then handed to Ruhindura. The four people holding Nyiramusugi brought her to the ground. They pinned her down, two holding her arms and two holding her legs. The two holding her legs then spread them, and **Musema** placed himself between them. The witness saw **Musema** rip off Nyiramusugi's clothes and underclothes and then took off his own clothes. The witness stated that **Musema** said aloud "Today, the pride of the Tutsi shall end" and then raped the young woman. Witness N said that Nyiramusugi was a very well known Tutsi girl who was very beautiful[...].

851. The witness affirmed that the victim was Tutsi and explained that **Musema** took her by force. He stated that during the rape, Nyiramusugi struggled until **Musema** grabbed one of her arms and held it against her neck. The four assailants who initially held down the victim watched from nearby while the policeman, Ruhindura, stood further away. Witness N stated that after the rape, which he estimated lasted forty minutes, **Musema** walked over to Ruhindura, took his rifle back and left with him.

852. Witness N also testified that the four other men, who initially pinned down the victim, went back to the girl and took turns raping her. She was struggling and started rolling down toward the valley. He was able to see them rape

Nyiramusugi until they were out of sight. During the rape, he heard the victim scream and say "the only thing that I can do for you is only to pray for you."

853. Witness N added that he later saw the four attackers on the rise of the other side of the valley and saw that Nyiramusugi had been left for dead in the valley. That night, the witness and three other people went to the victim and found her badly injured. She was cut all over her body, covered with blood and nail scratches around her neck. He stated that they took her to her mother. The witness testified that the mother died the next day and that he learnt from Nyiramusugi's brother that she had been shot [....].

188. In paragraph 176 of the instant Judgement, the **Appeals Chamber** found that the Appellant had failed to show that the Trial Chamber erred in its assessment of the testimony of Witness N. In the light of new evidence, it should now be determined whether the Trial Chamber's findings were, indeed, incorrect.

189. First of all, with respect to Witness CB, the **Appeals Chamber** notes that the circumstances described by this Witness differ on various points from the evidence given by Witness N at trial. Indeed, it emerges from the evidence given by Witness CB on 17 October 2001 that:

- Nyiramusugi was raped by one "Mika" at the foot of Muyira Hill between 11a.m. and 12 noon on 13 May 1994; [FN355]

FN355. T(CB and EB), pp. 14, 15, 21 and 23. In his testimony, Witness CB testified that the rape took place "between 11:00 and 12:00, but it was not after 2 p.m, p. 19.

- Witness CB observed the incident from a bush located about 10 metres from the bush where Mika found Nyiramusugi; [FN356]

FN356. Ibid., pp. 14 and 26.

- After the rape, Mika told Nyiramusugi to go and that he would be killed by other people; [FN357]

FN357. Ibid., p. 18.

- Witness CB left the bush in which he had taken refuge around 16.00 hours, that is, when the attack on Muyira Hill ceased, and found Nyiramusugi in the bush where she had gone to hide; [FN358]

FN358. Ibid., pp. 24 and 29.

- At that time, Witness CB told Nyiramusugi that he had witnessed the rape and Nyiramusugi told him: "Mika raped me"; [FN359]

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FN359. Ibid., p. 27.

- Witness CB saw no one else rape Nyiramusugi on 13 May 1994 [FN360] and asserted that it was indeed Mika that he had seen raping Mika on that day; [FN361]

FN360. Ibid., p. 26.

FN361. Ibid., p. 23.

- Witness CB saw Nyiramusugi again on 13 May 1994 after 16.00 hours and again on the morning of 14 May 1994. [FN362]

FN362. Ibid., 20.

190. With respect to Witness EB, the **Appeals Chamber** notes that the parties admitted that the Witness related the circumstances in which **Musema** raped Nyiramusugi on a day other than 13 May 1994 and that those facts do not appear in the Amended Indictment. [FN363] Witness CB insisted on the fact that his sister Nyiramusugi had been raped and killed by **Musema** "between 15 May and 15 June [1994]." [FN364]

FN363. Ibid., 61, 62 and 67.

FN364. See in particular T(CB and EB), pp. 34 and 40.

191. The **Appeals Chamber** is of the opinion that the evidence presented by Witness CB is hardly reconcilable with Witness N's evidence at trial. Indeed, paragraph 852 of the Trial Judgement states that **Musema** raped Nyiramusugi on 13 May 1994 on Muyira Hill. For his part, Witness CB asserts that he witnessed a rape by Mika at the foot of that same hill on that same day. It is stated in paragraphs 849 and 851 of the Trial Judgement that Nyiramusugi was captured and brought to **Musema** around 15.30 hours on 13 May 1994 and that she was raped for about 40 minutes. Yet, Witness CB testified that he left his hiding place at 16.00 hours on 13 May, and that at that time, he found Nyiramusugi who told him: "Mika raped me" [FN365] Witness CB did not see anyone else rape Nyiramusugi on that day and affirmed that it was, indeed, Mika that he saw.

FN365. T(CB and EB), p. 27.

192. Regarding the testimony of Witness EB, the **Appeals Chamber** notes that the facts narrated by the Witness do not appear in the Amended Indictment. The **Appeals Chamber** notes, nonetheless, that it emerges from the said witness's testimony that Nyiramusugi was alive, at least until 15 May 1994, whereas it is stated in paragraph 853 of the Trial Judgement that Nyiramusugi was shot dead on 14 May 1994.

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193. Having considered the additional evidence admitted into the record on appeal, the **Appeals Chamber** finds that if the testimonies of Witnesses N, CB and EB had been presented before a reasonable tribunal of fact, it would have reached the conclusion that there was a reasonable doubt as to the guilt of **Musema** in respect of Count 7 of the Amended Indictment. Consequently, the Trial Chamber's factual and legal findings in relation to the rape of Nyiramusugi are incorrect and occasioned a miscarriage of justice.

194. In accordance with the standard laid down in Kupreskic, the **Appeals Chamber** finds that the appropriate remedy in the instant case is to quash the conviction handed down by the Trial Chamber in respect of Count 7 of the Amended Indictment. Accordingly, the **Appeals Chamber** finds the Appellant not guilty of rape as a crime against humanity.

3. Challenge to the Trial Chamber's assessment of **Musema's** alibi

195. The Appellant submits that the Trial Chamber shifted the burden of proof in requiring him to prove his innocence (error on a point of law). He also submits that the Trial Chamber committed an error of fact in holding that the alibi raised by **Musema** did not cast a reasonable doubt on the Prosecution evidence (error of fact). [FN366]

FN366. Notice of Appeal, pp. 2 and 5. See also Appellant's Brief, para. 97.

(a) Introduction

196. **Musema** was Director of the Gisovu Tea Factory in Kibuye préfecture. The allegations contained in the Amended Indictment concerned massacres that occurred generally in the region of Bisesero in Gisovu and Gishyita communes, Kibuye préfecture. In its Judgement, the Trial Chamber summarized **Musema's** alibi as follows: [FN367]

FN367. Trial Judgement, paras. 320 to 339.

Thus, with regard to the findings now contested on appeal, **Musema** denies having been present at Gitwa Hill (26 April 1994); Rwirambo Hill (end of April, beginning of May 1994); Muyira Hill (13 and 14 May 1994); and having participated in the two mid-May 1994 attacks on Muyira Hill and Mumataba Hill and in that of Nyakavumu cave (end of May 1994).

(b) General allegations of the parties and general findings of the **Appeals Chamber**

197. **Musema** challenges in a general manner the standard and burden of proof applied by the Trial Chamber in assessing his alibi. He submits that although the Trial Chamber at one point set out the applicable law with respect to the assessment of an alibi, it erred when applying it to the case at bar. [FN368] He submits, moreover, that the Trial Judgement shows that the Trial Chamber made an incorrect assessment of the evidence and that merely stating the correct legal standards does not suffice to cure the erroneous applications thereof in the Trial Judgement. [FN369] He submits that the Trial Chamber erred in requiring him to prove his alibi beyond a reasonable doubt, thus applying a higher standard of proof to him than that imposed on Prosecution witnesses. [FN370]

FN368. Appellant's Brief, para. 92.

FN369. Ibid., para. 92; T(A), 28 May 2001, p. 65 and 66.

FN370. Ibid., para. 97.

198. **Musema** relies in particular on paragraphs 677, 740 and 795 of the Trial Judgement to show that the Trial Chamber placed such a burden on him, as it required him to "convince" the Chamber of his alibi. [FN371] He contends that "no burden is placed on the Defence to prove absence from a particular place at a particular time; [that] the burden is on the Prosecution to prove presence of the accused at a particular place, [and that] the only role of the Defence is to cast reasonable doubt on the allegations made." [FN372]

FN371. T(A), 28 May 2001, pp. 77 and 78 and Appellant's Brief, paras. 93 to 98.

FN372. Appellant's Brief, para. 2 21.

199. The Prosecution submits that an analysis of the Trial Judgement reveals that "not only did the Trial Chamber articulate the proper legal standard regarding the defence of alibi, it applied that standard correctly." [FN373] The Prosecution further submits that the Trial Chamber has a wide discretion with respect to the assessment of evidence, and therefore contends that "in a case involving the defence of alibi, the Trial Chamber did not err in considering defence evidence in determining whether the charges against the Appellant had been proven or not proven." [FN374] Similarly, the Trial Chamber did not err in considering Defence evidence to determine if it cast a reasonable doubt on allegations made by the Prosecution. [FN375]

FN373. Prosecution's Response, para. 4.71.

FN374. Ibid., para. 4.15.

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FN375. Ibid., para. 4.75. See also, T(A), 28 May 2001 p. 157.

200. The **Appeals Chamber** recalls that the burden of proof rests with the Prosecution to prove its case beyond reasonable doubt. The sole purpose of an alibi, when raised by a defendant, is only to cast a reasonable doubt on the Prosecution case. In The Prosecutor v. Kayishema and Ruzindana, the **Appeals Chamber** endorsed the opinion expressed by the **Appeals Chamber** of ICTY [FN376] and held that the defence of alibi implies that the person who raises it should establish before the Trial Chamber that objectively he was not in a position to commit the crime. [FN377] Still, the onus is on the Prosecution to establish the facts alleged in the Indictment.

FN376. Kayishema/Ruzindana Appeal Judgement, para. 106, quoting Celebici Appeal Judgement, para. 581: "(...) the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true."

FN377. Kayishema/Ruzindana Appeal Judgement, para. 106.

201. In other words, when the alibi has been properly raised, the onus is on the Prosecution to disprove it beyond a reasonable doubt failing which the Prosecution case would raise a reasonable doubt as to the accused's responsibility. However,

"it is up to the accused to adopt a defence strategy enabling him to raise a doubt in the minds of the Judges as to his responsibility for the said crimes, and this, by adducing evidence to justify or prove alibi." [FN378]

FN378. Ibid., para. 111.

The strategy adopted by the person who raises an alibi may have an impact on a trial judge in reaching his or her conclusion. Thus, a judge must be satisfied beyond reasonable doubt that the alibi raised casts a reasonable doubt on the Prosecution case.

202. An accused does not bear the burden of proof. He must simply produce the evidence tending to show that he was not present at the time of the alleged crime. [FN379] That is, the Prosecution must establish beyond a reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. [FN380]

FN379. Ibid., para. 110: "[T]he Defence is required to disclose to the Prosecutor the place or places at which the accused claims to have been present at the time of the alleged crimes and, if it so desires, produce probative evidence tending to show that since the accused was at a particular location at a specific time, there was cause for reasonable doubt as to his presence at the scene of the crime at the alleged time. The accused is therefore at liberty to provide the Prosecution with such evidence as may establish the credibility of the alibi raised".

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FN380. Kunarac Trial Judgement, para. 625.

203. The question before the **Appeals Chamber** is whether the relevant law as to the burden and standard of proof was correctly stated, and subsequently applied by the Trial Chamber. The **Appeals Chamber** is cognizant of its primary role, which is to exercise judicial control over the impugned findings of the Trial Chamber, in accordance with Article 24 of the Statute. According to the tests applicable in case of an error of law and of fact, recalled in paragraphs 15, 16 and 17, supra, the onus is on **Musema** to show that the Trial Chamber committed an error.

204. As stated in paragraph 17 supra, with respect to errors of fact, the standard to be applied by the **Appeals Chamber** is that of reasonableness. It should be added, however, that in the opinion of the **Appeals Chamber**, this standard is extremely relative. Thus, reasonableness must be assessed on a case-by-case basis in the light of the specific circumstances of the case.

205. In setting out its general findings in the Section entitled "Evidentiary Matters," the Trial Chamber stated as follows:

In raising the defence of alibi, the Accused not only denies that he committed the crimes for which he is charged but also asserts that he was elsewhere than at the scene of these crimes when they were committed. The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. In establishing its case, when an alibi defence is introduced, the Prosecution must prove, beyond any reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful. [FN381]

FN381. Trial Judgement, para. 108 (emphasis added).

206. **Musema** accepts the above observation as a correct statement of the law as regards the burden and standard of proof. The **Appeals Chamber** is of the same opinion.

207. Certain portions of the Trial Judgement reveal that the Trial Chamber assessed the evidence before it in conformity with the principles governing the standard and burden of proof as set forth above, particularly in paragraphs 22 to 71 of the present Appeal Judgement. For example, as regards the meeting on Karongi Hill, the Trial Chamber expressed the opinion that the evidence adduced in support of the alibi, "creates doubt in the facts as alleged by the Prosecutor...'' [FN382] Similarly, with regard to the attack on Biyiniro Hill, the Trial Chamber found that the alibi was "such as to cast doubt on the allegations of the Prosecutor." [FN383] And concerning the attack of 5 June, the Trial Chamber found that the alibi was "such as to cast a reasonable doubt on the allegation of the Prosecutor as to the involvement of **Musema**" in the [said] attack. [FN384]

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FN382. Ibid., para. 658.

FN383. Ibid., para. 784.

FN384. Ibid., para. 788.

208. However, **Musema** relies on several parts of the Trial Judgement to show that the Trial Chamber misapplied the burden and standard of proof. He gives the following examples:

• In rejecting the alibi relating to Gitwa Hill, the Trial Chamber stated as follows:

The Chamber has considered the alibi and the Defence witnesses. The Chamber finds that the documentary evidence, read in conjunction with the testimony of **Musema**, raised a number of contradictions many of which were addressed by the Prosecutor.... The Chamber moreover considered the answers given by **Musema** to explain these discrepancies. However, the Chamber was not convinced by the relevant explanations, and, as such, must reject the alibi for this period. [FN385]

FN385. Trial Judgement, paras. 676 and 677 (emphasis added).

• In rejecting the alibi in respect of the attacks in May, the Trial Chamber stated:

• In the opinion of the Chamber, the receipt, and the letter of 14 May 1994, which **Musema** says he wrote in Butare, are by themselves, insufficient to refute the possibility that on the same day, yet at a different time, **Musema** was in the Bisesero region. [FN386] And,

FN386. Ibid., para. 740 (emphasis added).

...the Chamber must reject the alibi of **Musema** as regards 13 May, 14 May and mid-May 1994, as it is not supported by evidence sufficient to cast any doubt on the overwhelming reliable evidence for this period presented by the Prosecutor. [FN387]

FN387. Ibid., para. 745 (emphasis added).

• In accepting the alibi in respect of Nyarutovu cellule on 22 June, the Trial Chamber stated that,

the Chamber finds that **Musema's** alibi for this date, heavily scrutinized by the Chamber, supported by documentary evidence and oral testimony, is such as to cast doubt on the allegation of the Prosecutor as to the involvement of **Musema** in the events alleged of 22 June 1994. [FN388]

FN388. Ibid., para. 795.

• And finally, in rejecting the alibi with regard to Nyakavumu cave, the Trial Chamber noted that:

[...] the alibi does not specifically refute the presence of **Musema** at the cave[...]. [FN389]

FN389. Ibid., para. 778 (emphasis added).

209. In considering the manner in which the Trial Chamber applied the burden and standard of proof, the **Appeals Chamber** must start off by assuming that the words used in the Trial Judgement accurately describe the approach adopted by the Trial Chamber.

210. It is apparent from the above examples that, prima facie, the Trial Chamber appears to have used, on several occasions, different terms in relation to the question of alibi. The issue is whether, in doing so, the Trial Chamber applied a burden and/or standard of proof that was inconsistent with its own statement of the relevant law. The **Appeals Chamber** will therefore seek to discover the Trial Chamber's intention when it used such wording.

211. Hence, the **Appeals Chamber** will carry out below an in-depth analysis of the findings of the Trial Chamber with respect to each location. The consequences of any erroneous application of the law or unreasonable interpretation of a fact must be considered on a case-by-case basis.

(c) Errors in the assessment of the alibi with regard to specific locations

212. Having found that the Trial Chamber did not err in its findings as to the credibility of each of the witnesses on whose testimonies it relied to convict, the **Appeals Chamber** will now consider whether the Trial Chamber erred in rejecting **Musema's** alibi and, as a result, failed to acquit him.

213. However, before considering each of the locations in question, the **Appeals Chamber** notes that although, for reasons stated in the Trial Judgement, the Trial Chamber rejected the alibi raised by **Musema** in relation to the sites considered, it has found, in relation to four incidents, that the alibi was such as to cast doubt on the Prosecution's allegations.

214. First, with regard to Karongi Hill (18 April 1994), the Trial Chamber expressed the opinion that, taking into account **Musema's** alibi (the testimonies of **Musema** and Claire Kayuku), the documentary evidence (Exhibit D45), and the arguments of the Prosecution on this point, the sole testimony of Witness M was insufficient to prove beyond reasonable doubt that **Musema** was present at the

location. [FN390] Second, with regard to Biyiniro Hill (31 May 1994), the Trial Chamber found that the alibi (**Musema's** testimony) and the documents tendered in support thereof (**Musema's** passport, Exhibit D56, entitled "Autorisation de sortie de fonds" and Exhibit D54, cast doubt on the Prosecution's allegations. [FN391] Third, with regard to the attack of 5 June 1994, near Muyira Hill, the Trial Chamber found that the alibi (the testimonies of **Musema** and Claire Kayaku, together with Exhibits D57, 58 and 59) cast a reasonable doubt on the Prosecution's allegations. [FN392] Lastly, with regard to Nyarutovu cellule (22 June 1994), the Trial Chamber found that the alibi (the testimonies of **Musema** and Claire Kayuku) and the documentary evidence relating thereto (Exhibits D65, 90 and 91) cast doubt on the Prosecution's allegations. [FN393]

FN390. Trial Judgement, paras. 659 and 660.

FN391. Ibid., paras. 783 and 784.

FN392. Ibid., paras. 787 and 788.

FN393. Ibid., paras. 794 and 795.

215. In particular, the **Appeals Chamber** notes that although, with regard to each of the aforementioned locations, the Trial Chamber found the evidence of Prosecution witnesses to be consistent, [FN394] it appears nevertheless to have accepted the evidence of **Musema** and Claire Kayuku when it was corroborated or otherwise supported.

FN394. Witness M, with regard to Karongi Hill, Trial Judgement (paras. 653 and 660), Witness E, with regard to Biyiniro Hill, Trial Judgement (para. 784) and Muyira Hill, Trial Judgement (para. 788) and Witness P, with regard to Nvarutovu cellule, Trial Judgement (para. 795).

i. Gitwa Hill (26 April 1994)

a. **Musema's** alibi at trial

216. **Musema** alleges that at the time of this attack, he was on mission to several tea factories far from the scene of the massacre. [FN395] He testified that on 18 and 21 April in Gitarama, he ran into ministers who told him that he would be sent on mission. On 21 April, the authorization to sign the ordre de mission was given. In support of his alibi, **Musema** produced: the Ordre de mission detailing his mission and places to be visited (Exhibit D10); the Déclaration de créances (Exhibit D28); an interim report or the mission which he had prepared (Exhibit D29); his own testimony; and the testimony of his wife, Claire Kayuku.

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FN395. Trial Judgement, paras. 325 to 327, 520 and following.

217. The Trial Chamber (Judge Aspegren dissenting) found as follows: "Witness M was overall "credible and consistent, without at any time being evasive during his testimony"; [FN396] the alibi was not specific as to the date of the massacre, but was linked to the mission order and travel consequent thereto; [FN397] the alibi was doubtful and raised a number of material contradictions (relating, inter alia, to the plausibility of chance meetings, the date the mission actually started, the array of ministry stamps on the mission order [including the fact that according to **Musema** it had been signed in Gitarama, whereas, in fact, it was stamped as if written in Kigali] and the content of the interim report prepared by **Musema**; [FN398] and lastly, **Musema's** explanations for the contradictions and inconsistencies were unconvincing. As a result, the alibi was rejected. [FN399]

FN396. Ibid., para. 668.

FN397. Ibid., para. 669.

FN398. Ibid., paras. 676 and 677

FN399. Appellant's Brief, para. 136.

b. **Musema's** allegations and the Prosecution's response

218. **Musema** has divided his allegations in this section into four categories, focusing essentially on the four discrepancies which the Trial Chamber noted in his alibi at trial, and in relation to which it found that **Musema's** "relevant explanations" were "not convincing." [FN400] **Musema** submits that the Trial Chamber "erred in law and in fact in its assessment of the evidence with regard to this matter." [FN401] In particular, he submits that the Trial Chamber erred in its findings concerning: the implausibility of chance meetings; the date the mission actually started; the array of ministry stamps on the mission order; and the content of the interim report prepared by **Musema**.

FN400. Prosecution's Response, para. 4.87

FN401. Ibid., para. 4.88

219. As in its response to the allegations referred to in the preceding section relating to the credibility of witnesses, the Prosecution for its part, focuses essentially on the arguments presented in purely general terms. The Prosecution simply states that although Judge Aspegren gave a dissenting opinion with regard to the Trial Chamber's rejection of the alibi for this period, two judges both

acting reasonably may reach different conclusions based on the same evidence. [FN402] The Prosecution avers that "[m]ere dissatisfaction with conclusions made by the Trial Chamber does not make out a case of unreasonable findings of fact," [FN403] while with regard to Claire Kayuku it states that a Trial Chamber is not required to detail its reasoning in accepting or rejecting any piece of evidence in a case. [FN404] Finally, the Prosecution submits that **Musema** has failed to demonstrate that the Trial Chamber acted unreasonably in rejecting his defence of alibi for this period. [FN405]

FN402. Prosecution's Response, para. 4.87.

FN403. Ibid., para. 4.88.

FN404. Ibid., footnote p. 127. See also Tadic Decision (Additional Evidence), para. 74.

FN405. Ibid., para. 4.89.

c. Discussion

220. The issue here is whether the Trial Chamber erred in its evaluation of the testimonies of **Musema**, Claire Kayuku and Witness BB, the mission order (Exhibit D10), the Déclaration de créances (Exhibit D28) and the interim report (Exhibit D29). In particular, was it reasonable for the Trial Chamber to conclude "that the documentary evidence, read in conjunction with the testimony of **Musema**, "raised a number of contradictions, many of which were addressed by the Prosecutor" and that it was not convinced by **Musema's** relevant explanations? [FN406]

FN406. Trial Judgement, paras. 676 to 677.

221. Moreover, it should be recalled that the Trial Chamber noted several contradictions that had been raised, including the four addressed by **Musema**. That is to say, the Trial Chamber considered the evidence in detail, including **Musema's** explanations.

222. Turning to the allegations in question, although **Musema** submits that the Trial Chamber committed errors of fact, what he, in fact, appears to dispute is its evaluation of the evidence and arguments put forward by both parties. The Prosecution does not provide a detailed response to any of the allegations. Consequently, in considering the Prosecution case, the **Appeals Chamber** will, in the main, examine the relevant parts of the Trial Judgement.

223. As stated above, [FN407] **Musema's** alibi for the entire period under

consideration can be summarized as follows: from 14 April to early 17 April, he was at the Gisovu Tea Factory. On 17 April at 3a.m., he left Gisovu for Butare, having been woken and informed of attacks on the factory, and proceeded to Rubona on the same day. From 17 to 22 April, **Musema** stated that he remained in Rubona, save for two trips to Gitarama on 18 and 21 April. From 22 April to 7 May, **Musema** stated that he was on mission to tea factories located in Gisenyi (the Pfunda tea factory, from 22 to 25 April; Kibati, from 28 April, and stayed in Rubona from 26 to 29 April).

FN407. See, para. 196, supra.

224. It emerges from the Trial Judgement that during the trial, the Prosecution referred to "numerous previous interviews and a calendar prepared by **Musema** in 1996, all of which tend to suggest that **Musema** left Gisovu two days before that date, namely on 15 April." [FN408] Nevertheless, the Trial Chamber concluded that:

FN408. Trial Judgement, para. 657. The Prosecution relied on Exhibit P63 (a Swiss asylum interview), Exhibit P56 (a Swiss interview of 8 March 1995), Exhibit P54 (a Swiss interview of 11 February 1995) and Exhibit P68 (**Musema's** calendar) all of which indicated that **Musema** left the tea factory on 15 April, Exhibit P54 indicating that he left on the night of 15 to 16 April. Similarly, the Prosecution stated that Exhibit P 68 indicated that **Musema** was on mission from 18 April to 21 April (Trial Judgement, paras. 501 and 502). The Judgement records that it was only after the Swiss Juge d'instruction returned with relevant documentation from the factory, that he was able to recall that between 18 and 22 April, he was in Rubona and that the mission started on 22 April. (Trial Judgement, para. 503).

[a]lthough there appears to be some doubt as to the exact date of departure of **Musema**, in the opinion of the Chamber, the submissions of the Prosecutor on this issue, the testimony of **Musema** and of Claire Kayuku and the other evidence, all tend towards demonstrating not that **Musema** was at or in the vicinity of Karongi hill FM Station on 18 April, but rather that he had actually left Gisovu on a date earlier than that which he indicated in his testimony during the trial. No evidence, save the testimony of Witness M, places **Musema** at Karongi FM station on that day. The Prosecutor has not demonstrated how and when **Musema** may have traveled from Rubona to Kibuye Préfecture to lead the meeting. This, in the opinion of the Chamber, creates doubt in the facts as alleged by the Prosecutor as pertains to the participation of **Musema** in a meeting convened at Karongi hill FM Station on 18 April 1994. [FN409]

FN409. Trial Judgement, para.658.

225. **Musema** stated that on 18 and 21 April 1994, he travelled to Gitarama. He stated that on 21 April, he received the ordre de mission from the Minister of Industry, Trade and Handicraft and that he went on mission on 22 April.

226. In the Trial Judgement, the Trial Chamber set out in some detail **Musema's**

testimony as to meetings with ministers on both 18 April and 21 April. **Musema** also relies on documentary evidence (the ordre de mission) in support of his case. This issue will be considered in greater detail below. However, with regard to the chance meetings, the Trial Chamber recorded that **Musema** testified having travelled to Gitarama on 18 April to look for the heads of service of OCIR-thé and for relatives who might have been among the refugees. The Trial Chamber stated:

According to **Musema**, he did not meet anyone from OCIR-thé, but spoke with the Minister of Industry, Trade and Handicraft, Justin Mugenzi, to whom he reported the events and situation at the Gisovu Tea Factory, and asked for protection for the factory. According to **Musema**, the Minister appeared shocked at the news and assured him that he would take the appropriate measures to ensure the security of the factory. **Musema** testified that it was on this day that the Minister had indicated to him that he would be sent on mission to contact the Director-General of OCIR-thé to start up the factories. **Musema** returned the same day to Rubona where he stayed until 22 April 1994, although he did visit Gitarama on 21 April 1994, again to look for relatives among the refugees. [FN410]

FN410. Trial Judgement, para. 506.

227. Concerning the meetings of 21 April 1994, the Trial Chamber considered the circumstances of **Musema's** "chance" encounters with Ministers Justin Mugenzi and Hyacinthe Nsengiyumva at the FINA petrol station at the entrance of Gitarama. The Trial Chamber stated:

According to the alibi, **Musema**, who during this period was staying in Rubona, returned to Gitarama on 21 April 1994 where again he ran into Justin Mugenzi and also the Minister of Public Works, Water and Energy, this time at a FINA petrol station. Mugenzi told **Musema** of the security measures he had taken for the factory, and informed him that he had been unable to contact Mr Baragaza the Director-General of OCIR-thé. As such, **Musema** was to go to the north of the country to find him. The minister said he would prepare the necessary paperwork which **Musema** should pick up from the residence of Faustin Nyagahima, a director within the Ministry of Industry, Trade and Handicraft. During the meeting at the FINA station, Mugenzi authorized the Minister of Public Works, Water and Energy to sign the eventual mission order. [FN411]

FN411. Ibid., para. 670.

228. The Trial Chamber recalled the Prosecution's contention that "chance encounters with ministers, as described by **Musema**, were hardly convincing as the basis of the mission." [FN412]

FN412. Trial Judgement, para. 675. Also, in para. 518, the Trial Chamber stated: "The Prosecutor contested the veracity of the mission order, submitting that the circumstances in which the mission order was provided, namely through a chance encounter at a petrol station, were unconvincing. Had the mission been simply to contact the Director-General of OCRI-thé, as **Musema** had indicated in his

testimony, then, argued the Prosecutor, the mission should have been terminated on the day **Musema** established contact with the said Director-General".

229. The **Appeals Chamber** recalls that it falls primarily to the Trial Chamber to weigh and assess evidence. [FN413]

FN413. See supra, para. 18.

230. After careful consideration of the Trial Chamber's assessment of the evidence, the **Appeals Chamber** is of the opinion that the Trial Chamber's finding of the implausibility of the chance meetings being the basis of the mission was reasonable.

231. **Musema's** second argument concerns the Trial Chamber's findings as to the date the mission actually started. He submits that his explanation at trial regarding the date the mission to the tea factories started was adequate. In particular, he points out the Trial Chamber's reference to the fact that on the first stamp on the ordre de mission is mentioned "arrivée à Pfunda le 21:04:1994'' (See Annex B to the Trial Judgement). **Musema** submits that this date is incorrect, and should instead read 22 April. He contends that given the "prevailing conditions" and the supporting material, this explanation was adequate. [FN414]

FN414. Appellant's Brief, para. 124.

232. The Trial Chamber recalled the following:

On 22 April, **Musema** picked up the mission order (exhibit D10) from Faustin Nyagahima. The order was stamped by the Minister of Foreign Affairs, who, according to **Musema**, was the only minister at that time in Gitarama to possess a stamp. **Musema** was given two gendarmes from the military camp in Gitarama and then traveled up to the factory of Pfunda where he stayed until 25 April. With reference to exhibit D10, where **Musema** wrote "arrivée à Pfunda le 21/04/1994'', **Musema** attributed this date to an error, and affirmed that he arrived at the factory in Pfunda on 22 April. Exhibits in support of this contention include exhibit D28, a "Déclaration de Créances'' for expenses incurred by OCIR-thé (Gisovu Tea Factory) for the use of two gendarmes from 22 April 1994 up to 2 May 1994, which is signed by the Chief accountant of the Gisovu tea factory. [FN415]

FN415. Trial Judgement, para. 671.

233. **Musema** submits that the explanation he gave at trial was adequate. At the time, he stated the following:

Q. Right now let us then turn back to page 20, and the stamps on the back of the ordre de mission and we in fact see there arriviée à Pfunda le 21st of April, 1994

with a stamp and a signature. First of all was this document stamped when you arrived at Pfunda Tea Factory to show your arrival?

A. The stamp was affixed on the document at the Pfunda Tea Factory.

Q. Who stamped?

Q. It is the secretary of the factory.

Q. The signature in the middle of the stamp whose signature is it?

A. It is the signature of the director of the factory.

Q. The date, the 21st of April, 1994, is that a correct date or an incorrect date?

A. There is an error, it should be the 22.

Q. Can you explain why the wrong date was put on the document?

A. This date, this error was due to inattention, consultation timetable of course considering the time, the crisis period in which we were, but I personally know that it was the 22nd and with regard to the Tea factory or at the level of the tea factory in Gisovu this error was corrected but it was not corrected in the main document on the understanding that all these stamps in fact would only be of accounting relevance rather than as concerns the itinerary or route, it is more of an accounting document, this document.

[....]

Q. Who actually wrote the date?

A. I do not remember whether it was the director or the secretary in any case all I know is that the error is there and we had noticed it at the administrative level and we corrected it from an accounting standing point.

Q. Did you check the date and the information written upon it when you handed it to be stamped at Pfunda?

A. No, I did not check the date, definitely it would be some other explanations but I cannot certify that it was the good explanation and that is that the person who put the date considered the date of the mission order, the mission order was established on the 21st but I personally having participated in the mission, I know that I arrived on the 22nd, I did not arrive on the 21st and I did not check the date when I was reading this document. [FN416]

FN416. T, 12 May 1999, pp. 30 -- 33.

234. The **Appeals Chamber** notes that **Musema** did not challenge the Trial Chamber's finding that it was he who wrote the date and signed the ordre de mission. The **Appeals Chamber** further notes that the evidence produced includes exhibit D28, a

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"Déclaration de Créances'' for expenses incurred by OCIR-thé (Gisovu Tea Factory) for the use of two gendarmes from 22 April 1994 up to 2 May 1994, which is signed by the chief accountant of the Gisovu tea factory.

235. The **Appeals Chamber** takes up in this section, **Musema's** submissions on the authenticity of the ordre de mission. [FN417] **Musema** argues as follows:

FN417. This issue is considered in this section even though **Musema**, in his Appellant's Brief, raises the arguments when discussing the content of the interim report.

-- The majority appears to state that the ordre de mission is a forgery, albeit it was discovered by Swiss investigators and not brought out of Rwanda by the Accused; [FN418]

FN418. Appellant's Brief, para. 130.

-- The ordre de mission was supported by a number of documents which were discovered by Defence Investigators in Rwanda, at a different time, and which provided details to the same effect -- this discovery strongly supports the authenticity of the original ordre de mission; [FN419]

FN419. Ibid., para. 131. He submits that the document is supported by the interim mission report, the déclaration de créances, the mission report. He states that "[t]he fact that a number of documents, discovered at a different time, gave details to the same effect, is a strong support for the authenticity of the original."

-- If it were a forgery, it would have been unlikely that the Accused should include the stamps and names of four different ministers. Rather, he submits that it would have been more likely that he create a document in accordance with the usual practice; [FN420]

FN420. Ibid., para. 132. **Musema** submits that "the fact that this document is unusual...adds to its credibility as a genuine document created in a crisis situation."

-- The Trial Chamber failed to take into account the fact that Prosecution Witness BB confirmed the authenticity of the document, stating that he recognised the signature of his accountant. Although the Trial Chamber refers to this fact, no conclusions are drawn as to how this impacts on the authenticity of the document. [FN421]

FN421. Ibid., para. 133. See the relevant section of the Trial Judgement: paras. 553 to 555.

236. First, with regard to the stamps of the different ministries, the Trial Chamber summarised **Musema's** testimony as follows: The Trial Chamber recalled that **Musema** had stated that he was told by Faustin Nyagahima, a director within the Ministry of Industry, Trade and Handicraft, "that the Ministry of Foreign Affairs was the only ministry at that time which possessed a stamp/seal and that consequently it is this stamp which appears at the bottom of the mission order." [FN422] Concerning the stamp of the Ministry of Defence, the Trial Chamber stated:

FN422. Trial Judgement, para. 513.

According to **Musema's** testimony, the mission extension on the document was typed on at a later stage, around 7 to 10 May 1994 in Gitarama. **Musema** explained that more ministries had stamps by then, thus the stamp of the Minister of Defence, Augustin Bizimana, and his signature appear on the document. **Musema** conceded that to have the stamp of the Minister of Defence as authority for the extension of his mission was not usual practice, though he recalled that, during that whole period, the situation in Rwanda was not normal, which would explain why the Minister of Defence had signed the extension.

Musema further specified that he happened to meet the Minister of Defence in Gitarama. The Minister was an agronomist, originally from Byumba, and he and **Musema** had begun discussing the situation of finding relatives and about the past four years' conflict. The situation was still very unstable and although **Musema's** mission had come to an end he still had to visit a number of factories to establish inter-factory contacts. The stamp was to serve as a travel document. It did not extend his original mission with OCIR-thé but came into the context of the visits he wanted to make to other factories, to facilitate his movements and so as to provide him with more personal security. He added that there was no need for him to have the stamp of his ministry as the extension did not have any administrative value but only practical value. **Musema** was unable to explain why the Minister of Defence had not just given him a travel document for safe passage.

Musema conceded that it was a mistake that there was no indication as to the date on which the extension was issued. He testified that he would not have gone on the mission had the minister not guaranteed his security, and that he had to respect the mission order from a superior. [FN423]

FN423. Trial Judgement, para. 515 to 517. In his Appellant's Brief (para. 127), **Musema** explains how he stated at trial, in answer to a question, "how he had met the Minister of Defence by chance, [...] that he had finished the mission for OCIR-thé, but he ultimately had to visit other factories to establish contacts. He asked the Minister to give him a stamp to help him through checkpoints or roadblocks. This was for purely practical reasons, unconnected with the original mission. It was not the practice at the time, but was done for reasons imposed by the war situation."

237. Lastly, the Chamber recorded that **Musema** testified that he had been told by the Minister of Industry, Trade and Handicraft that he had authorised the Minister of Public Works, Water and Energy to sign the mission order on his behalf as he had to take care of other business. [FN424]

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FN424. Ibid., para. 512.

238. At trial, the Prosecution did not accept the explanations given by **Musema** in relation to the stamps on the mission orders of the Ministry of Foreign Affairs and the Ministry of Defence and contended that the documents and stamps were complete fabrications. The mission order, in the mind of the Prosecutor, was designed simply to mislead the Chamber and to conceal the extent of **Musema's** involvement in the massacres. [FN425]

FN425. Trial Judgement, para. 518.

239. As regards the Prosecution's submission that the ordre de mission was forged and that the stamps of the ministries were fabrications, the **Appeals Chamber** recalls that although Exhibit D10 (a document which **Musema** must have deemed essential to his alibi in case of a possible investigation or trial) was discovered by Swiss investigators and not brought out of Rwanda by **Musema**, he did not mention its existence when he was interrogated in 1995 by the Swiss authorities in relation to his missions. [FN426]

FN426. Exhibits p. 54 to p. 60 concerning **Musema's** eight interviews in La Chaud-de-Fonds between 11 February 1995 and 13 July 1995.

240. The **Appeals Chamber** notes also that the Trial Chamber draws no conclusions on the evidence of Claire Kayuku, which corroborated **Musema's** account that he returned to Rubona from his mission on 26 April, and stayed there overnight. The **Appeals Chamber** recalls, however, that the Trial Chamber did refer [FN427] to the evidence of Claire Kayuku and considered it. [FN428]

FN427. Trial Judgement, para. 674.

FN428. Ibid., para, 676.

241. In the opinion of the **Appeals Chamber** what the Trial Chamber is saying in paragraph 677 of its Judgement is that it is not convinced that the alibi regarding the massacres at Gitwa Hill on 26 April 1994 casts reasonable doubt on the Prosecution evidence. [FN429]

FN429. See also this Appeal Judgement, para. 201, supra.

242. Upon careful examination of the Trial Chamber's approach to the assessment of the evidence, the **Appeals Chamber** is not inclined to hold that the wording in paragraph 677 [FN430] reflects a shifting of the burden of proof. Consequently, the **Appeals Chamber** finds that **Musema** failed to establish that the Trial Chamber

committed any error of law. The **Appeals Chamber** further holds that the Trial Chamber did not err in fact and that it correctly assessed the evidence before it concerning the attack on Gitwa Hill.

FN430. Trial Judgement., para. 677, "(...)the Chamber was not convinced by the relevant explanations, and, as such, must reject the alibi for this period".

(ii) Rwirambo Hill (end of April, beginning of May 1994)

a. **Musema's** alibi at trial

243. **Musema** testified that during the period in question his movements were as follows: He stated that on 27 April, he was in Rubona, from where he left for a day trip on 28 April to Kibati factory. The Prosecution did not dispute these movements. On 29 April, he left for Gisovu with two gendarmes, arriving later in the afternoon. He stated that he remained at this factory until 2 May, on which date he left for Shagasha between 10 a.m. and 11 a. m., arriving there before 7p.m. He stated that he left the next day, 3 May.

244. The Trial Chamber found that: Witness R's testimony, which was consistent and reliable, sufficed to prove this allegation, and that the "alibi does not cast doubt on the testimony of Witness R"; (although it noted that there was "ambiguity" in Witness R's testimony as to the exact date of the attack, the Trial Chamber was satisfied that it occurred between 27 April and 3 May and on this basis concluded that the allegation was proven). [FN431] Moreover, **Musema** admitted to being in Gisovu between 29 April and 2 May; consequently, it is not excluded, in view of the distance between Gisovu and the location of the attacks, that he could have been both at the tea factory and taking part in the attacks, although at different times. [FN432] Lastly, the Trial Chamber found that to have visited Kibuye on 30 April does not rule out **Musema's** involvement in an attack that may have occurred on the same day. [FN433]

FN431. Trial Judgement, para. 692.

FN432. Ibid., para. 688.

FN433. Ibid.

b. **Musema's** allegations and the Prosecution's response

245. **Musema's** allegation concerning the attack on Rwirambo Hill is quite specific. He states the following:

The majority of the Trial Chamber failed to deal with the difficulties

experienced by a Defendant who is required to present an alibi for a date which is not certain. It is much easier to cast a doubt on allegations when the time of the allegation is known than when it is an unknown period in the course of seven days. This should have been taken into account in assessing the evidence of alibi presented by the Defendant.

In failing to take this into account the majority of the Trial Chamber failed to apply the correct burden and standard of proof.

The Defence submits that if the Prosecution cannot give a definite date but only a period of time, the Defence must succeed if it can cast reasonable doubt as to presence on any of the days in question. If this were not the case, the Defence would be prejudiced as a result of the imprecision of the witness. [FN434]

FN434. Appellant's Brief, paras. 146 to 148.

246. In response, the Prosecution states that although **Musema** challenges the Trial Chamber's assessment of his alibi, what essentially underlies his argument is the allegation that the Indictment did not state the exact date of the attack. The Prosecution maintains that under the law, the Indictment is specific as to the date of the attack and that therefore, **Musema's** "derivative claim (i.e., that the Chamber was required to take the vagueness into account when considering evidence of his alibi) must fail". [FN435] It asserts that both the Indictment and the evidence adduced at trial were legally specific with regard to date. [FN436] The Prosecution further asserts that the Tribunal has confirmed Indictments covering time periods much like that in the instant case, with the difficulties of determining the exact times and places of acts having been acknowledged. It contends that "[u]nless the date or time of an offence is a material element of the offence, such proof is 'clearly not' a prerequisite for entry of conviction." [FN437]

FN435. Prosecution's Response, para. 4.95.

FN436. Ibid., para. 4.98.

FN437. Ibid., para. 4.96.

247. The Prosecution submits that since neither date nor time was an essential element to the crimes perpetrated in this attack, the one-week period (established during trial) "meets the requirements of legal specificity." [FN438] Finally, the Prosecution avers that as the Indictment was legally sufficient with regard to date, all other alleged errors must fail, namely, the allegation of error by the Trial Chamber in failing to consider vagueness in the Indictment when considering defence evidence, and the allegation that by failing to take account of the alleged vagueness, it misapplied the burden and standard of proof. [FN439]

FN438. Prosecution's Response, para. 4.100.

FN439. Ibid., para. 4.101.

c. Discussion

248. **Musema's** argument centres on the question of specificity of the allegation as to the date. The manner in which he has presented this argument is, however, unclear. Essentially, he maintains that failure by the Trial Chamber to consider the vagueness of the Indictment in turn impacted on its overall assessment of the evidence.

249. As will be seen, there were three Indictments in this case. The trial began on 25 January 1999, based on the Second Indictment filed on 20 November 1998. The Prosecution was granted leave to amend this Indictment on 6 May 1999 and the trial ended on 28 June 1999. Neither the Second Indictment nor the Amended Indictment contain particulars as to either the said attack in general or its date; they are only confined to a general allegation of attacks at various locations in the area of Bisesero in April, May and June. The "Prosecutor's Pre-Trial Brief" [FN440] is similarly imprecise, and neither of the closing briefs refers to this particular allegation (this observation also applies to the allegations concerning the mid-May attacks considered below). [FN441] The Prosecution appears to have simply relied on the testimony of one witness, Witness R, to prove this attack, stating now on appeal, that it is "of significance...that the Prosecution convinced the Trial Chamber beyond a reasonable doubt that the attack occurred within a one-week period." [FN442] **Musema** has put forward no evidence tending to show that he raised this issue at trial, even though the Prosecution fails to state that the fact that **Musema** only raises the issue on appeal gives rise to the question as to whether his silence does not amount to a waiver.

FN440. Filed on 19 November 1998.

FN441. See this Appeal Judgement, paras. 254 to 318, infra.

FN442. Prosecution's Response, para. 4.99

250. The Trial Chamber stated as follows:

As regards Witness R, who testified to **Musema's** participation in an attack which occurred around the end of April and the beginning of May, the Chamber notes that there also existed ambiguity during this testimony as to the exact date of the attack. Notwithstanding this, while testifying in the Kayishema and Ruzindana case, the witness was clear that he was injured on 29 April, the date of the attack. Thus, the Chamber is satisfied that it has been established beyond reasonable doubt that an attack occurred between 27 April and 3 May 1994 on

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Rwirambo hill. [FN443]

FN443. Trial Judgement, para. 692.

251. It would appear therefore that the attack took place at some time during a one-week period, from 27 April to 3 May. In considering **Musema's** alibi for this period, the Trial Chamber stated as follows:

Musema stated that on 27 April he was in Rubona. On 28 April, he said he visited Kitabi factory, the stamp and date of arrival appearing on exhibit D10, and then returned to Rubona. These dates and movements were not contested by the Prosecutor. On 29 April he travelled to Gisovu with two gendarmes via Butare, Gikongoro and Gasaranda, arriving in Gisovu late in the afternoon. Exhibit D10 carries the stamp of Gisovu Tea Factory and the date of arrival, namely, 29 April 1994. **Musema** remained at the factory until 2 May taking care of business. A number of exhibits, including reports of minutes of meetings held on 29 and 30 April, and correspondence, were tendered by the Defence to support this. On 30 April he visited the Préfet of Kibuye who issued **Musema** with an "Autorisation de Circulation'', in which reference is made to the mission order. On 2 May, **Musema** said he left for Shagasha, departing between 10:00hrs and 11:00hrs and arriving there before 19:00hrs. **Musema** explained that he visited the Shagasha Tea Factory the next day which would explain why the date of 3 May 1994 appears on D10 as the date of arrival at this factory. [FN444]

FN444. Ibid., para. 687.

252. Lastly, having found the testimony of Witness R to be credible, the Trial Chamber stated as follows:

Musema admits to being in Gisovu from 29 April to 2 May attending to factory business. Thus, in the opinion of the Chamber, it is not excluded, considering the distance between Gisovu and the locations of the attacks, that **Musema** was both at the tea factory working and taking part in attacks, although at different times. Also, to have visited Kibuye on 30 April does not rule out that an attack involving **Musema** may have occurred on the same day. [FN445]

FN445. Ibid., para. 688.

253. The **Appeals Chamber** notes that there is imprecision as to the exact date of the attack. However, the **Appeals Chambers** notes also that the witnesses were reliable and that it was proven beyond reasonable doubt that the attack did in fact occur during the period between 28 April and 3 May. Therefore, the fact that there was imprecision as to the exact date of the attack does not mean that the allegation has not been established. Furthermore, the **Appeals Chamber** subscribes to the Trial Chamber's finding as articulated in the paragraph quoted above. [FN446] Accordingly, the **Appeals Chamber** rejects **Musema's** allegation as to the lack of specificity of the date and finds that he failed to show that no

reasonable trier of fact could have made a finding of guilt beyond reasonable doubt; nor has he shown that any such error occasioned a micarriage of justice.

FN446. Idem.

(iii) The two mid-May 1994 attacks at Muyira Hill and Mumataba Hill, and the Muyira Hill massacre on 13 and 14 May1994

a. **Musema's** alibi at trial

254. In support of his alibi for the period from 5 May to 19 May, **Musema** asserted that he was in Rubona for the duration of that period, with visits to Gitarama and Butare on several occasions. He further submitted that his car had broken down between 7 and 19 May while he was in Butare, and that he remained in this region until the car was repaired. In support of this assertion, **Musema** refers to the minutes of a meeting held on 19 May which mention delays resulting from the breakdown of his car. Consequently, he submitted that he could not have been in Gisovu at the time of the attacks.

255. The Trial Chamber decided to first of all consider the Prosecution's evidence with respect to each massacre, to determine "if there is a case to answer". It found that on the whole, the evidence presented by the Prosecution was reliable.

b. **Musema's** allegations and the Prosecution's response

256. **Musema** submits that the Trial Chamber erred in its evaluation of the testimony of four witnesses: Witness MH, Claire Kayuku, Nicole Pletscher and **Musema** himself. In particular, he alleges that the manner in which the Trial Chamber dealt with the alibi "provides a striking illustration of the way in which a higher burden of proof was placed on the Defence than the Prosecution." [FN447]

FN447. Appellant's Brief, para. 244.

257. In its response, the Prosecution argues that if no error is found as regards the burden and/or standard of proof applied by the Trial Chamber in assessing **Musema's** alibi for this period, then his "derivative and/or subsidiary claim of error (i.e., erroneous factual findings) must fail." [FN448] The Prosecution submits that **Musema** must demonstrate that the Trial Chamber committed an error of law in the exercise of its discretion, albeit the **Appeals Chamber** may step in and, for other reasons, find that the Trial Chamber has erred. The Prosecution further contends that a review of **Musema's** arguments shows that he has not discharged the burden of proof placed on him. [FN449] It also submits that at no time did the Trial Chamber shift the burden of proof onto the Defence as evidenced by paragraphs 726 to 745 of the Trial Judgement which detail the Trial Chamber's consideration of the alibi. The Prosecution is of the view that **Musema** seeks to

re-litigate the issues raised at trial by advancing an insufficiency-of-evidence argument couched in the form of a misapplication of the burden or standard of proof. The Prosecution declines to re-litigate the issues in this way. [FN450]

FN448. Prosecution's Response, para. 4.128.

FN449. Ibid., para. 4.132.

FN450. Ibid., para. 4.143.

c. Discussion

258. The **Appeals Chamber** will consider **Musema's** allegations seriatim.

i. Witness MH

259. **Musema** submits that the Trial Chamber's assessment of Witness MH's testimony was inappropriate, in requiring in particular, that other direct evidence should support MH's testimony. [FN451] **Musema** submits that the Trial Chamber has, in other contexts, allowed itself to be persuaded of his guilt on allegations based on the uncorroborated evidence of a single witness. Moreover, **Musema** contends that "[t]he implication that Defence evidence must be supported by other direct evidence before it can be deemed to have any probative value is not in accordance with the burden of proof, the standard of proof or the presumption of innocence." [FN452] **Musema** claims that in any event, the testimony of Witness MH was corroborated by his own testimony, and that the Trial Chamber stated no other reason for disbelieving it. [FN453] He asserts that there is nothing to show that the witness was lying or had any reason to lie. **Musema** further asserts that the Prosecution did not put the issue of lying to the witness and that the witness was not evasive in his testimony. [FN454] Although the Trial Chamber referred to the fact that the date the witness stated he last used his passport was different from that on the document, **Musema** contends that no conclusion that the witness was unreliable was clearly drawn. Moreover, **Musema** asserts that any such conclusion would have been inappropriate, as it was a mistake that was inconsequential and easy to make after a time period of over four years. [FN455]

FN451. Appellant's Brief, para. 247.

FN452. Ibid.

FN453. Appellant's Brief, paras. 248 and 249.

FN454. Ibid., para. 249.

FN455. Ibid., paras. 249 and 250.

260. The Prosecution maintains that there is no error in the Trial Chamber's evaluation of the testimony of Witness MH. [FN456] Given the Trial Chamber's discretion in the evaluation of evidence, the Prosecution is of the opinion that the Trial Chamber did not commit any error in requiring that the evidence be corroborated. [FN457]

FN456. Prosecution's Response, para. 4.134.

FN457. Ibid., para. 4.135.

261. **Musema** submits that Witness MH supported the alibi by stating that he had seen **Musema** at the residence of the Kayuku family in Rubona on 13 May 1994. [FN458] The Trial Chamber recorded MH's testimony as follows:

FN458. Appellant's Brief, para. 245.

Defence Witness MH said he saw **Musema** on 10 May and 13 May 1994. On 10 May, the witness saw **Musema** in Gitarama. He talked with him but did not remember asking him where he had come from or what he was doing. **Musema** had arrived in a vehicle, but Witness MH could not remember the type of vehicle it was, nor the colour of the vehicle. He recalled that these events dated back five years which may account for his inability to remember such details.

MH added that, on 13 May 1994, he was fleeing on his own to Burundi and had left Gitarama in the afternoon between 12:00hrs to 13:00hrs, travelling in his vehicle from Gitarama to Butare, towards the Kanyaru-Haut border post. After 45 minutes to an hour, he stopped at Rubona where he spent no more than 20 minutes. In Rubona, the witness went to the residence of the Kayuku family, being the family of **Musema's** mother-in-law, to say goodbye to them and to inform them that he was leaving Rwanda for Burundi, in transit to Kenya. He saw and spoke with **Musema**. Although he was unable to specify exactly when he met with **Musema**, he estimated it to have been around 14:00hrs, roughly one hour after leaving Gitarama.

A copy of Witness MH's passport with the entry stamp for Burundi on 13 May 1994 was introduced by the Defence as exhibit D102. On the same page as this stamp is a stamp issued at the Bujumbura airport showing the exit of Witness MH from Burundi territory on 15 May 1994. [FN459]

FN459. Trial Judgement, paras. 566 to 568.

262. Later in its Judgement, the Trial Chamber considered the testimony of MH in the context of his cross-examination by the Prosecution as follows:

Witness MH remembers meeting **Musema** in Gitarama on 10 May and in Rubona on 13

May 1994. In direct examination, Witness MH stated that he met **Musema** only once in Gitarama, most probably on 10 May 1994, although he was unable to provide the Chamber with details as to the length or subject of the conversation he had with **Musema** on this day, save that he believed they may have discussed the situation in Rwanda. The Chamber notes that in cross-examination, he indicated that they did not speak about why **Musema** had come to Gitarama and that he could not remember five years later the type and colour of the vehicle driven by **Musema**. In support of the alibi for this date, the Defence presented exhibit D46, a letter 18 May 1994, and a note entitled "A qui de droit'' dated 10 May 1994 in Gitarama. **Musema** testified to receiving this note from the Minister of Defence on 10 May 1994, and contended that, had he been in Gisovu, he would not have waited eight days to transmit it.

As regards 13 May 1994, Witness MH, who on this day was fleeing to Burundi, stated that he saw **Musema** on 13 May 1994 for approximately 20 minutes in Rubona at the residence of the Kayuku family. He confirmed this in cross-examination.

The Chamber notes that the witness testified that he had last used his passport in 1994, when in fact it was evident from the document that it had been used in 1995. [FN460]

FN460. Ibid., paras. 727 to 729.

263. The Trial Chamber concluded:

[...] as regards the meeting of 10 May with **Musema**, the witness was unable to provide any specific details, this contrasting with his testimony on the meeting of 13 May 1994, which is detailed and specific in a number of ways. The Chamber notes however that the latter testimony is uncorroborated by other Defence evidence, including **Musema's** testimony. Claire Kayuku testified that **Musema** returned to Gisovu during the middle of May to pay the employees, whereas the handwritten calendar drafted by **Musema** ...and his statements to the Swiss juge d'instruction of 16 March 1995, similarly place **Musema** in Gisovu between 4 -- 14 May. The testimony of MH is thus of little probative value as it is unsupported by any other direct evidence. [FN461]

FN461. Trial Judgement, para. 734.

264. With respect to Witness MH's testimony, the **Appeals Chamber** notes that a Trial Chamber may require in certain circumstances that the testimony of a particular witness be corroborated, but that this does not in itself support the general allegation that the Trial Chamber always required defence evidence to be corroborated. The Trial Chamber drew this conclusion based on the circumstances of the witness's testimony and on contradictions raised in the evidence that had been adduced in this case. **Musema** submits that this evidence was in fact supported by his testimony in which he stated that he was in Rubona from 7 to 19 May. Clearly, such a general assertion does not support the evidence given by Witness MH that they met at a meeting on 13 May. **Musema** does not indicate where he met Witness MH on 13 May.

ii. Claire Kayuku

265. **Musema** submits that the Trial Chamber's assessment of Claire Kayuku's testimony was incorrect. The Trial Chamber noted that in her testimony this witness indicated that **Musema** returned to Gisovu in mid-May to pay the employees, [FN462] which suggests that he was there during the massacres of 13 and 14 May. However, **Musema** maintains that elsewhere in the Trial Judgement, the Chamber notes that the expression 'mid-May' would seem to indicate a date between 10 and 20 May. [FN463] On this basis, he submits that the witness's evidence is equally consistent with his own, namely, that he paid the employees on 19 May. [FN464]

FN462. Ibid., para. 734.

FN463. Trial Judgement, para. 718.

FN464. Appellant's Brief, paras. 251 to 254.

266. In the Prosecution's opinion, **Musema** seems to argue that the Trial Chamber failed to draw certain inferences from this testimony. It is the Prosecution's submission that the Trial Chamber is not required to state its opinion on each and every aspect of a witness's testimony, nor is it required to provide details of its findings in respect of the testimony. The Prosecution further submits that the Trial Chamber was not required to draw conclusions that are in accord with **Musema's** view and that "**Musema's** displeasure with this does not give rise to a legitimate claim of error." [FN465]

FN465. Prosecution's Response, para. 4.137.

267. The Trial Chamber recorded Claire Kayuku's testimony as follows:

Defence witness Claire Kayuku, **Musema's** wife, declared she remembered that he returned to Gisovu at some time around the middle of May to pay the tea factory employees. She recalled that at the beginning of the month of May, **Musema's** red Pajero spent one or two weeks in a garage in Butare for repairs. [FN466]

FN466. Trial Judgement, para. 571.

[....]

According to Claire Kayuku, **Musema** returned to Gisovu around the middle of May to pay the tea factory employees. She added that, in the beginning of May, **Musema's** Pajero spent one or two weeks in a Butare garage undergoing repairs. **Musema** had explained that he had developed car problems on 7 May while in Mata, and that he remained in the Butare region until the car was repaired. A replacement car from the factory only reached him on 19 May by which time his Pajero was roadworthy.

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[FN467]

FN467. Ibid., para. 730.

268. As stated above, [FN468] in analysing the testimony of Witness MH with regard to the meeting on 13 May 1994, the Trial Chamber noted that it was uncorroborated, while other testimony including that of Claire Kayuku, "place **Musema** in Gisovu between 4 and 14 May". The Trial Chamber also stated that "[o]ther evidence would suggest that **Musema** was indeed in Gisovu during this period." [FN469] However, **Musema** alleges that the Trial Chamber erred, as previously in the Trial Judgement it had found that the expression mid-May referred to a date between 10 and 20 May.

FN468. See this Appeal Judgement, paras. 261, 262 and 263, supra.

FN469. Trial Judgement, para. 735.

269. With regard to what has been labelled the mid-May attacks, Witnesses S and H (the only two witnesses who made reference to these attacks) stated at trial that the attacks took place some time in the middle of May. It is apparent from the Trial Judgement that the Trial Chamber interpreted this testimony to mean that the mid-May attacks took place at some time between 10 and 20 May. [FN470] It stated as follows: "The Chamber notes that, in its opinion, the expression mid-May would seem to indicate a day between 10 and 20 May, and shall thus consider the testimonies of Witnesses H and S with this in mind." [FN471]

FN470. Ibid., para. 464.

FN471. Ibid., para. 718.

270. Turning to Claire Kayuku, the Trial Chamber recorded her testimony in three ways. The Chamber noted that she had testified that **Musema** returned to Gisovu "some time around the middle of May", that he returned "around the middle of May" and that he returned "during the middle of May". The witness testified that between 13 April and 26 May, she stayed with her family in Rubona. [FN472] She testified as follows:

FN472. T, 28 May 1999, p. 24.

Q. You mentioned that your husband had visited various place (sic) Shagasha, Kitabi, Gisakura, are those all places where there are tea factories?

A. These are places where there are tea factories.

Q. In those places, sorry, I'll split this up by asking you another question.

You mentioned that your husband was staying with you but there were periods when he was away during this time. Are you able to help us at all during that period as to when it was that he was visiting the tea factories that you told us about; Shagasha, Kitabi, Gisakura?

A. I cannot give precise dates but I know that it must have been at the end of the month of April and beginning of the month of May and later on, at the end of the month of May when we arrived in Shagasha, he also went to the Shagasha tea factory and Kitabi and Gisakura.

Q. You said that he also visited Gisovu during this period. Can you recollect when that was, what period it would have been and if you can remember the date?

A. It must have been -- in fact, I do not remember the date, it must have been around mid May. What I know is that he went to pay the employees but I do not remember the exact date. [FN473]

FN473. T, 28 May 1999, pp. 24 and 25.

271. **Musema** emphasizes that the Trial Chamber has not, in the course of the trial, always taken the same position as to what is meant by "mid-May". Nevertheless, after reviewing the submissions of the parties and the trial transcripts, the **Appeals Chamber** finds that the Trial Chamber's variant understanding of the expression "mid-May" does not constitute an error or necessarily even an inconsistency. For instance, 13 and 14 May do fall between 10 and 20 May. This is not an inconsistency. Whether or not **Musema** paid his employees on 19 May is of little consequence in determining if he could have participated in the culpable events of 13 and 14 May at Muyira Hill. Moreover, it was open to the Trial Chamber to weigh and reconcile the conflicting defence evidence by **Musema's** wife, Claire Kayuku, that she was staying with her family in Rubona from 13 April to 26 May with **Musema's** admission that he was absent from Rubona on several occasions between 5 and 19 May, and also with **Musema's** previous statement to the Swiss Authorities that he clearly remembered being in Gisovu between 4 and 14 May 1994. Consequently, the Appellant has failed to illustrate any inconsistency that would justify a finding that no reasonable tribunal of fact could have, in the circumstances, reached a conclusion of guilt beyond a reasonable doubt. Finally, **Musema** has not shown that the discrepancies to which he alludes have occasioned any miscarriage of justice. [FN474]

FN474. See this Appeal Judgement, para. 17, supra.

iii. Nicole Pletscher

272. **Musema** submits that the Trial Chamber made no finding on the testimony of Nicole Pletscher, who stated that she had received a letter from **Musema** dated 14 May, Butare. This testimony was confirmed by **Musema** who stated that he had written the letter in Butare on that date. **Musema** submits that this is clear evidence that he was not in Gisovu on 14 May, and is something the Trial Chamber should have

taken into account in determining whether it had been established beyond reasonable doubt that **Musema** participated in the Muyira Hill attacks on that date. [FN475]

FN475. Appelant's Brief, paras. 255 to 256.

273. In the Prosecution's opinion, **Musema** seems to argue that the Trial Chamber failed to make certain findings on Ms. Pletscher's testimony. Again, the Prosecution submits that the Trial Chamber is not required to state its opinion on each and every aspect of a witness's testimony, nor is it required to provide details of its findings in respect of the testimony. The Prosecution further submits that the Trial Chamber was not bound to draw conclusions that are in accord with **Musema's** view and that "**Musema's** displeasure with this does not give rise to a legitimate claim of error." [FN476]

FN476. Prosecution's Response, para. 4.137.

274. The Trial Chamber stated:

Exhibit D36, a letter, was tendered to demonstrate that **Musema** was a man not taking part in the events but just watching the events unfold and that by being in Butare on 14 May 1994, he could not have been in Muyira as alleged.

According to **Musema**, this letter was written by him on 14 May 1994 in Butare and addressed to a Swiss friend called Nicole Pletscher. He gave it to a person going to Burundi on 14 May 1994, and hoped that it would be posted in Bujumbura. **Musema** had known Nicole Pletscher since 1986 and his family and hers had become friends. The last time he saw her was on 3 April 1994 in Kigali. The next time he saw this letter was during his testimony in this case. [FN477]

FN477. Trial Judgement, paras. 572 to 573.

275. The Trial Chamber does not mention the fact that the witness testified to having received a letter from **Musema**. Similarly, later in the Trial Judgement, when recalling the evidence relied upon by **Musema** for this period, the Trial Chamber made no mention of this witness at all. [FN478] Indeed, no reference is made to her testimony in the entire Trial Judgement.

FN478. Trial Judgement, para. 725: The Chamber has considered the alibi of **Musema** for the period of 7 to 19 May, during which **Musema** testified that he was in Rubona and visited Gitarama on occasions. The Defence presented a number of documents to support the alibi and also the testimony of Witnesses MG, MH and Claire Kayuku.

276. Nicole Pletscher testified on 28 May 1999 and, when shown the letter marked "Butare 14 May", stated that she had received it from **Musema** during the month

while in Lucerne. [FN479] On cross-examination, the Prosecution presented a letter to the witness, which she identified as having personally written (Exhibit P77). [FN480] She confirmed that the letter was dated 25 April 1994 and also testified to having received a letter in Alfred's handwriting bearing a Burundi stamp. When asked to explain whether she had in fact received his letter before 25 April, she first stated that she had probably received the letter before then, and later that: "I... what should I say to affirm that I received this letter? I certify that I receive the letter, I replied another letter, there are, there are other letters it is not the answer I have given it is not related to this letter"; [FN481] After the cross-examination, she was not re-examined by **Musema**.

FN479. T, 28 May 1999, pp.99 and 100.

FN480. Ibid., pp. 111 and 112.

FN481. T, 28 May 1999, pp. 117and 118. The following exchange finally took place: "Madam do you know whether which is .. whether the letter dated 14th May...was in fact written on the 14th May or is it possible according to you that it may have been written before for example in the month of April? Do you know something about that? A: When it was written this is how I received it. Q: So you don't know anything about it? A: No.

277. With respect to **Musema's** claims that the Trial Judgement did not directly refer to all aspects of the Defence evidence tendered, the **Appeals Chamber** reiterates that a Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching a particular finding. [FN482] Although no particular evidence may have been referred to by a Trial Chamber, it may nevertheless be reasonable to assume in the light of the particular circumstances of the case, that the Trial Chamber had taken it into account. [FN483] Hence, where a Trial Chamber did not refer to any particular evidence in its reasoning, it is for the appellant to demonstrate that both the finding made by the Trial Chamber and its failure to refer to the evidence show that the evidence had been disregarded. [FN484]

FN482. See this Appeal Judgement, para. 18, supra.

FN483. Ibid., para. 19

FN484. See this Appeal Judgement para. 21, supra.

278. The **Appeals Chamber** finds that **Musema** has shown that Ms Pletscher's testimony was not referred to by the Trial Chamber. However, **Musema** has failed to show that no reasonable tribunal of fact, after taking full account of Ms Pletscher's testimony, could have reached a conclusion of guilt beyond a reasonable doubt. [FN485] Thus, **Musema** has not demonstrated that an error of fact has been

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committed, nor has he shown that if such an error did occur, it occasioned a miscarriage of justice.

FN485. Ibid., para. 17.

iv. **Musema's** evidence

279. The Trial Chamber noted discrepancies in **Musema's** evidence, particularly in relation to the information found in the handwritten calendar and to the statement given before the Swiss juge d'instruction on 16 March 1995, both of which place him in Gisovu between 4 and 14 May 1994. It is **Musema's** contention that the manner in which the said discrepancies were examined by the Trial Chamber illustrates that its assessment of the evidence was predicated on the assumption that **Musema** was guilty and that he had to prove his innocence. [FN486] As discussed below, **Musema** raises several specific arguments in support of his contention that the Trial Chamber considered the evidence in this way.

FN486. Appellant's Brief, para. 258.

280. In contrast, the Prosecution submits in a general fashion that the Trial Chamber did not shift the burden of proof nor err in any manner whatsoever in rejecting the evidence offered by **Musema** in support of his alibi. [FN487] According to the Prosecution, "the contradictions and inconsistencies which abound in Appellant's testimony (some of which he readily acknowledges on appeal) are considered in detail in the Trial Judgement, review of which explicates the propriety of the Chamber's findings in respect of his evidence." [FN488] It further submits that **Musema's** alibi rests on a claim that he was not present in Kibuye between 1 -- 19 May 1994 and, in support of said claim, relies on his own testimony, that of his wife and of Witness MH and also on a number of documents. The Trial Judgement contains details of the Chamber's consideration of **Musema's** testimony in support of his alibi. [FN489] The Prosecution asserts that **Musema** "now seeks to re-litigate the evidence on appeal by couching and advancing an insufficiency of the evidence argument in the form of a misapplication of the burden/standard of proof challenge." [FN490] As stated earlier, the Prosecution refuses to re-litigate on appeal evidence already produced at trial and submits that **Musema's** allegations of error concerning his testimony should be rejected.

FN487. Prosecution's Response, para. 4.140.

FN488. Ibid., para. 4.140.

FN489. Prosecution's Response, para. 4.142. The Prosecution refers to the following observations by the Trial Chamber: "(i) The Appellant's claim that he did not set foot in Kibuye Préfecture during the period from 7 to 19 May 1994; (ii) the fact that a handwritten calendar of the Appellant confirmed that he was

in Gisovu between 4 and 14 May 1994; (iii) The fact that in his statements during an interview with Swiss authorities on 16 March 1995, the Appellant confirmed that he was in Gisovu during the week from 4 to 13 May 1994; (iv) The fact that according to the Appellant's handwritten calendar, the factory at which he served as Director (the Gisovu Tea Factory), started production on 9 May 1994; (v) The fact that in both his handwritten calendar and statement to Swiss authorities in March 1995, the Appellant indicated that he was present at the tea factory when it started up production; (vi) The fact that evidence led by the Appellant at trial to support his alibi for the relevant period was "irreconcilable" with other evidence presented by him: evidence which seemingly portrayed him "as a dedicated director of the tea factory who at all times shared equivalent concerns for the safety of his family and for the factory, often...leaving the former to rejoin the latter"; and (vii) The fact that the Appellant acknowledged when he testified that his handwritten calendar and his statements to Swiss authorities were inaccurate."

FN490. Ibid., para. 4.143.

281. **Musema** contends that the Trial Chamber's treatment of the following issues illustrates his point: resumption of operations at the tea factory; petrol receipt; breakdown of vehicle; other documentation; and inaccuracies in prior statements.

Resumption of production at the tea factory

282. **Musema** maintains that the Trial Chamber relied on the fact that he testified to being present in the tea factory on the date operations resumed on 9 May (which date is confirmed in the hand-written calendar, mission report and Exhibit P56). **Musema** submits that he did not accept this date and repeatedly asserted that production started on 2 May. According to **Musema**, the Trial Chamber states that the mission report bears the date 9 May, whereas, in fact, it is 2 May that is mentioned on it, and that attached to it is a letter dated 8 May indicating that all tea factories were operational. Furthermore, **Musema** refers to a letter addressed to Bitihuse, which confirmed that work would resume on 2 May. **Musema** submits that the Trial Chamber did not consider the accuracy of this date. If it turns out that it is or could be the correct date, then it is **Musema's** submission that the Trial Chamber erred. **Musema** affirms that he never denied being present when the tea factory resumed production, but that he was simply mistaken as to the exact date on which this occurred. As the documentary evidence referred to above supports his assertion, he submits that said assertion is definitely correct. [FN491]

FN491. Appellant's Brief, paras. 261 to 263.

283. The hand-written calendar and statement made before the Swiss authorities on 16 March 1995 both place **Musema** in Gisovu between 4 and 13 May. **Musema** submitted that both of these were inaccurate. The Trial Chamber records this evidence as follows:

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In the handwritten calendar, **Musema** clearly indicates that on 9 May 1994, the tea factory re-started production. This date is confirmed in his mission report. Moreover in exhibit P56 **Musema** states that "[o]n 3 May, I once again visited the factories in the South West, that is, Gisakura and Shagasha. I then returned to Butare. On 7 or 8 May, I returned to Gisovu and on 9 May, I supervised the resumption of operations of the factory. I remained there until 19/20 May and travelled to Butare to join my family." [FN492]

FN492. Trial Judgement, para. 736.

284. The Trial Chamber consequently relied on three items of evidence to show that **Musema** was in Gisovu at that time, namely the mission report, the calendar and the Swiss statement. [FN493] The Trial Chamber further stated:

FN493. Exhibit P56 is the record of one of **Musema's** interviews with the Swiss authorities.

Musema, throughout his testimony, affirmed that his handwritten calendar and the Swiss statements were inaccurate, and that any errors therein were subsequently corrected as documents were uncovered during investigations from, amongst other places, Gisovu Tea Factory. In some instances, such an explanation is valid. However, as regards the present period, the Chamber cannot accept such an explanation. In the said calendar and the 16 March 1995 Swiss statement, **Musema** clearly remembers being in Gisovu between 4 and 14 May 1994, and recalls that he was present the day the tea factory started up production. To remember such an occasion and one's presence thereat, is not, in the opinion of the Chamber, something one forgets and recalls only after seeing newly uncovered documents. Rather, it is an event which, as Director of the tea factory, **Musema** would beyond any doubt not have forgotten. [FN494]

FN494. Trial Judgement, para. 738.

285. At trial, **Musema** stated that production resumed on 2 May. He also submits at present that, contrary to the Trial Chamber's findings, the mission report also confirms this fact and that annexed to it is a letter dated 8 May indicating that production had resumed in all the tea factories. In addition, he refers to a letter to Bitihuse, which states that work would resume on 2 May. **Musema** affirms that he was at the factory when production resumed, but that he was simply mistaken as to the exact date.

286. The **Appeals Chamber** will not lightly disturb findings of fact reached by a Trial Chamber, but rather, will always give the Trial Chambers a margin of deference with respect to findings of fact. [FN495] Given the Prosecution evidence on record which, in the view of the Trial Chamber, established beyond reasonable doubt that **Musema** committed the culpable acts at such locations as charged, it was open to any reasonable Trial Chamber to reject **Musema's** defence of alibi as not being reasonably and possibly true. [FN496] Consequently, **Musema** has demonstrated

neither that no reasonable tribunal of fact could have reached the conclusion of guilt beyond a reasonable doubt, nor that any such error occasioned a miscarriage of justice.

FN495. See this Appeal Judgement, para. 18, supra.

FN496. Ibid., para. 17.

Petrol receipt

287. In support of evidence of his movements on 14 May, **Musema** produced a petrol receipt dated 14 May, from a FINA filling station in Gitarama, for a cash payment made by him for fuel for the Pajero, and the letter written on 14 May in Butare (discussed above in relation to Nicole Pletscher). The Prosecution relied on the hand-written calendar and Swiss statements to establish that **Musema** was in Gisovu from 4 to 14 May.

288. The Trial Chamber found that **Musema** had claimed that his vehicle was broken down from 9 and 19 May. [FN497] However, based on the petrol receipt, the Trial Chamber found that **Musema's** car was in fact in working condition during the period in question.

FN497. Trial Judgement, para. 739.

289. In spite of these findings, **Musema** maintains that the fact that he purchased fuel in Gitarama on this day casts doubt on the allegation that he participated in the attacks on Muyira Hill, which is over 1 hour and 20 minutes away from Gitarama. [FN498] As he produced two documents whose authenticity was not contested (the receipt and letter of 14 May), he submits that he cast reasonable doubt on the Prosecution evidence. [FN499] **Musema** contends that the Trial Chamber failed to consider not only the fact that there is considerable distance between the two locations, but also that the attacks are alleged to have started at 8 a.m. and to have continued all day. **Musema** submits that the Trial Chamber failed to ask itself how, if this was the case, he could not have had time to write the letter, get petrol from Gitarama and still participate in the attacks. [FN500]

FN498. **Musema** submits that there was "substantial evidence to indicate that during the period of warfare the danger of the route and the proliferation of roadblocks would have made the journey far longer." (Appellant's Brief, para. 264).

FN499. Ibid., para. 264. **Musema** refers to the fact that the Trial Chamber stated that the documents were "insufficient to refute the possibility that on the same day, yet at a different time, **Musema** was in the Bisesero region." He states that "[o]nce again the language used shows clearly that the wrong test is being

applied: there is no burden on the Defence in a criminal trial to refute possibilities. The Defence's only task is to cast doubt on the Prosecution case" (Appellant's Brief, para. 265). He maintains that he did not seek to refute the possibility referred to, but claims to have cast a reasonable doubt on the Prosecution evidence.

FN500. Appellant's Brief, para. 266.

290. As will be seen below, **Musema** asserts that with regard to the breakdown of his car, he did not state at trial that it was out of action, but rather that it was breaking down on and off. He submits that if he was in Gitarama on 14 May, he could not have made it to Muyira Hill to participate in the attacks and that the Trial Chamber failed to take this into account.

291. The Trial Chamber stated as follows:

Exhibit D45 contains a copy of a receipt dated 14 May 1994 from a FINA petrol station in Gitarama for a cash payment made by **Musema** for fuel for the Pajero, registration number A7171. This document, contends the Defence, strikes at the Prosecutor's case by placing **Musema** elsewhere than at the scene of the massacres in Bisesero. [FN501]

FN501. Trial Judgement, para. 569.

292. It later concluded:

Whereas, if the Chamber accepts the handwritten calendar and the said Swiss statement, the FINA receipt would support the dates therein by confirming that **Musema** travelled on 14 May 1994. In the opinion of the Chamber, the receipt, and the letter of 14 May 1994 which **Musema** says he wrote in Butare, are by themselves, insufficient to refute the possibility that on the same day, yet at a different time, **Musema** was in the Bisesero region. [FN502]

FN502. Ibid., para. 740.

293. **Musema** argues that he did not have to refute any possibilities, but that it was simply sufficient for him to cast reasonable doubt on the Prosecution case. This, he submits, was done by producing two items of documentary evidence, the authenticity of which is not contested. He submits that the Trial Chamber failed to consider evidence that would justify the possibilities.

294. The **Appeals Chamber** notes that the Trial Judgement does not fully address the issue as to whether it was possible for **Musema** to travel from Gitarama to Muyira Hill on the same day.