



Genocide, War Crimes and Crimes Against Humanity

A Digest of the Case Law of the
International Criminal Tribunal for Rwanda

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Printed in the United States of America
ISBN: 1-56432-586-5
Cover design by Rafael Jimenez

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**GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY:
A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL
TRIBUNAL FOR RWANDA**

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ACKNOWLEDGEMENTS

The author of this digest is Jennifer Trahan, Consultant, Of Counsel, to the International Justice Program at Human Rights Watch, and an Independent Expert and Consultant in the field of International Justice. Ms. Trahan is also Assistant Clinical Professor of Global Affairs at N.Y.U. Richard Dicker, Director of the International Justice Program, provided overall guidance. Aisling Reidy, Senior Legal Advisor, provided the legal review. Leslie Haskell, a researcher in the Africa Division, provided additional review by the Africa Division. Mia Psorn and Linda Louie, Associates in the International Justice Program, and Anna Lopriore, Creative Manager and Photo Editor, provided additional assistance. Professor Trahan also appreciates the assistance of students and colleagues: Erica Aghedo, Carla De Ycaza, Donovan Barton, Sumit Galhotra, Kristin Gallagher, Lisa Gambone, Devyani Kacker, Alec Knight, Stephen Koppel, Maria Kyriacou, Shaya Lerner, Amber Lewis, Victoria Macchi, Lindsay Ryder, Jaclyn Shettler, David Stoelting, Scarlett Van-Syoc and Alison Welski. The digest builds on the earlier work of Jennifer Trahan (then Counsel to the International Justice Program) and Anne Ferrari (then an intern to the International Justice Program), who compiled Human Rights Watch's 2004 publication: "Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia." Ms. Trahan is also responsible for compiling Human Rights Watch's 2006 publication: "Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for the former Yugoslavia."

Professor Trahan wishes to acknowledge her late mother, Elizabeth Welt Trahan, a scholar, professor, writer and Holocaust survivor, as a source of inspiration for this volume.

Human Rights Watch is grateful to The Planethood Foundation and another donor for providing funding for this digest. Human Rights Watch is also grateful to the law firm of Schulte Roth & Zabel, LLP for providing assistance in formatting the digest.

Human Rights Watch above all acknowledges and appreciates the diligent work of the judges and their staff at the ICTR and the Appeals Chamber of the *ad hoc* tribunals in producing this extremely significant body of case law.

DEDICATION

Human Rights Watch dedicates this digest to the memory of Dr. Alison DesForges, a valued and trusted colleague and friend, who as senior advisor at Human Rights Watch was one of the world's leading authorities on the Rwandan genocide. After dedicating more than 40 years to the country and the Great Lakes region, she died on February 12, 2009, in a plane crash near Buffalo, New York.

Alison was the author of the 800-page award-winning account of the genocide, "Leave None to Tell the Story." In 1999, she received a "genius award" from the MacArthur Foundation for her work documenting the slaughter in Rwanda.

Alison appeared as an expert witness in 11 trials at the ICTR. She also appeared in judicial proceedings involving genocide suspects in four other national jurisdictions, including three trials in Belgium as well as trials in Switzerland, the Netherlands, and Canada. When she believed that individuals were falsely accused of involvement in the genocide, she worked for their freedom.

Despite having documented the killings of hundreds of thousands of Rwandans during the genocide, Alison drew the wrath of the current Rwandan government by insisting on justice not only for those responsible for the genocide but also for those in the Rwandan Patriotic Forces (RPF), the precursor to today's government, who were themselves responsible for serious crimes. Although the RPF defeated the genocidal regime, Alison believed passionately that senior RPF officials should also be held to account for the crimes that they directed or tolerated, including the murder of up to 30,000 people during and just after the genocide. To date, the ICTR and Rwandan authorities have rarely pursued these cases and even then only in a way that downplayed the nature of the crime and the involvement of senior level officials.

In 2008, the government banned Alison from the country after Human Rights Watch published an extensive analysis of judicial reforms in Rwanda, highlighting its progress while at the same time drawing attention to fair trial issues, identifying the lack of judicial independence as a major concern, and pointing to the failure to provide justice for victims of crimes committed by the Rwandan Patriotic Front.

A Human Rights Watch employee for nearly two decades, Alison oversaw all of the organization's work on the Great Lakes region of Africa and provided counsel to colleagues across the region and beyond. She also worked closely with Human Rights Watch's International Justice Program.

Alison was admired and adored by her colleagues for her extraordinary commitment to human rights principles and her tremendous generosity as a mentor and a friend. We will always miss her and will never forget the example that she provided.

FOREWORD

This book contains a digest of highlights of the jurisprudence 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 (the “ICTR”).

The book provides quick summaries or actual quotes from the Tribunal’s judgments, which are organized topically. The digest focuses on case law regarding genocide, crimes against humanity, war crimes, individual responsibility, command responsibility, sentencing, fair trial requirements, appellate review, and entering guilty pleas. The digest does not address all issues arising in a case, such as evidentiary rulings or other motion practice, and only includes judgments publicly available through December 31, 2008. Many of the judgments quoted contain citations to other judgments or documents. Human Rights Watch has not reproduced those here. Please refer to the official judgments for these additional citations.

This book does not contain analysis of, or commentary on, the decisions themselves. The headings contained in the digest and the organization of the digest have been created by the Author, not the ICTR. For reader accessibility, in some instances, “application” sections have been added, so that the reader may see how the law has been applied.

The digest is a reference tool to assist practitioners and researchers as they familiarize themselves with the case law interpreting the Statute of the International Criminal Tribunal for Rwanda (“ICTR Statute”).* The digest is not designed to substitute for reading the actual decisions, which can be found on the website of the ICTR at <http://www.ictr.org/>.

* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/Res/955 (1994), as amended, found at <http://www.ictr.org/ENGLISH/basicdocs/statute/2007.pdf>.

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SUMMARY OF JUDGMENTS AGAINST THE ACCUSED

Jean-Paul Akayesu, was *bourgmestre* of the Taba commune. The Trial Chamber found that after April 18, 1994, following a meeting with senior government officials, Akayesu failed to attempt to prevent the killing of Tutsi in Taba; instead, he not only knew of and witnessed killings, but he participated in, supervised and ordered killings. The Trial Chamber convicted him of genocide, direct and public incitement to commit genocide, and crimes against humanity (extermination, murder, rape, torture, and other inhumane acts). The Trial Chamber sentenced him to life imprisonment. The Appeals Chamber affirmed the verdict and sentence.

Emmanuel Bagambiki was Prefect of Cyangugu prefecture, where the *Interahamwe*¹ and other groups killed massive numbers of mostly Tutsi civilians between April and July 1994, including at the Gashirabwoba football field, the Shangi parish, the Mibilizi parish, the Nyamasheke parish. Bagambiki was also a member of the *Mouvement Républicain National pour la Démocratie et le Développement* (MRND),² the youth movement associated with the MRND being the *Interahamwe*. (The MRND was, up to 1994, the political party of the former President of Rwanda, Juvénal Habyarimana.) Bagambiki was found not guilty of any crimes.

Ignace Bagilishema was *bourgmestre* of the Mabanza commune in Kibuye prefecture. The Indictment alleged that Bagilishema allowed *interahamwe* militiamen to set up roadblocks to single out Tutsis, who were then handed over to Bagilishema and murdered by the communal police; that he organized and directed the massacres at the Catholic Church and Home St. Jean Complex and at the Gatwaro Stadium on April, 17-19, 2004; and that he directed attacks on Tutsis in Gishyita and Gisovu communes during April, May and June 1994. The Indictment charged Bagilishema with genocide, complicity in genocide; crimes against humanity (murder, extermination, other inhumane acts); and war crimes. The Trial Chamber acquitted him on all counts. The Appeals Chamber affirmed the acquittal.

Théoneste Bagosora was, between April 6 and 9, 1994, the highest authority in the Ministry of Defense, exercising, in the capacity of Colonel, control over the Rwandan Armed Forces. Prior to that time he had participated in several official government missions, including the negotiation process in 1992 and 1993 between the Habyarimana Government³ and the Rwandan Patriotic Front (RPF), which led to the Arusha Accords on August 4, 1993. The Trial Chamber found him responsible for the murders of: the Rwandan Prime Minister (Agathe Uwilingiyimana); four opposition politicians (Joseph Kavaruganda, the President of the Constitutional Court; Frédéric Nzamurambaho, the

¹ “[T]he word *Interahamwe* may sometimes refer to a member of a structured national and local group that was usually thought of as being the youth wing of MRND. The word may sometimes also refer to any person who took part in the massacres of 1994 and who was wearing, or not wearing, special attire.” *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 150. According to Dr. Alison Des Forges, “what separated the *Interahamwe* from other party youth wings was its access to military training.” *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 110.

² MRND is also variously defined as *Mouvement Révolutionnaire National pour le Développement*, and *Mouvement Républicain National et Démocratique*.

³ Juvénal Habyarimana was President of Rwanda just prior to the start of the genocide. The downing of his airplane, also carrying the President of Burundi, on April 6, 1994, marked the start of the genocide in Rwanda.

chairman of the *Parti Social Démocrate* and Minister of Agriculture; Landoald Ndasigwa, the vice-chairman of the *Parti Libéral* and Minister of Labor and Community Affairs; and Faustin Rucogoza, an official of the *Mouvement Démocratique Républicain* and Minister of Information); ten Belgian peacekeepers who had been part of the United Nations Assistance Mission for Rwanda (UNAMIR); and large numbers of civilians in Kigali and Gisenyi. Specifically, the Trial Chamber found him guilty of genocide based on ordering genocide at Kigali area roadblocks, and superior responsibility for genocide for crimes committed at Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, Mudende University and Nyundo Parish. The Trial Chamber also found him guilty of crimes against humanity (murder, murder of peacekeepers, extermination, rape, persecution and other inhumane acts); and war crimes (violence to life, violence to life for the murder of the peacekeepers, and outrages upon personal dignity). He was sentenced to life in prison. (The case was on appeal at the time of this publication.)

Jean-Bosco Barayagwiza was a high-ranking board member of the *Comite d'Initiative* of the *Radio Television Libre des Mille Collines* (RTLM) and founding member of the Coalition for the Defence of the Republic (CDR). The Trial Chamber convicted him of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution). The Trial Chamber sentenced him to 35 years imprisonment. The Appeals Chamber reversed convictions for (1) individual criminal responsibility for direct and public incitement to commit genocide for acts within the CDR, and for conspiracy to commit genocide, and (2) command responsibility for acts within RTLM and the CDR for genocide, direct and public incitement to commit genocide, and extermination and persecution as crimes against humanity. The Appeals Chamber affirmed convictions of individual criminal responsibility for having (1) instigated genocide by CDR members and *Impuzamugambi* (a CDR youth wing/militia) in Kigali; (2) ordered or instigated extermination as a crime against humanity by CDR members and *Impuzamugambi* in Kigali, and having planned this crime in Gisenyi prefecture; and (3) instigated persecution as a crime against humanity by CDR members and *Impuzamugambi* in Kigali. The Appeals Chamber reduced his sentence to 32 years imprisonment.

Simon Bikindi was a composer and singer, and formerly worked at the Ministry of Youth and Association Movements of the Government of Rwanda. He was perceived as an important and influential member of the MRND, and was President of the *Indiro* ballet, which performed with him at MRND rallies. He was convicted of direct and public incitement to commit genocide based on traveling on the main road between Kivumu and Kayove in Gisenyi *préfecture*, as part of a convoy of *Interahamwe*, and broadcasting that the Hutu should rise up to exterminate the Tutsi minority. On his way back, he used the system to ask if people had been killing Tutsi, who he referred to as snakes. He was not convicted regarding his songs, two of which the Trial Chamber found he had composed with the intent to disseminate pro-Hutu ideology and anti-Tutsi propaganda. The Trial Chamber sentenced him to 15 years imprisonment. (The case was on appeal at the time of this publication.)

Paul Bisengimana was *bourgmestre* of Gikoro commune in Kigali-Rural prefecture. He had previously served as headmaster of a secondary school in Nyanza and Presiding Judge of the Cantonal Court of Nyamal, Kigali prefecture. He pled guilty to aiding and abetting murder and extermination of Tutsi civilians at Musha Church, where more than a thousand Tutsi were killed, and at Ruhanga Protestant Church and School in Gikoro *commune* between April 13 and 15, 1994. The Trial Chamber, which entered the conviction as extermination, sentenced him to 15 years imprisonment.

Sylvestre Gacumbitsi was *bourgmestre* of Rusumo commune, Kibungo prefecture, and a member of the MRND party. As *bourgmestre*, he was the highest-ranking local administrative official in Rusumo commune. The Trial Chamber convicted him of planning, instigating, ordering, committing, and aiding and abetting genocide (based on killing); instigating genocide (based on serious bodily harm); planning, inciting [*sic*: should be instigating], ordering, and aiding and abetting extermination as a crime against humanity (for the Nyarubuye Parish massacres); and instigating rape as a crime against humanity. The Trial Chamber sentenced him to 30 years imprisonment. The Appeals Chamber upheld all convictions, and entered additional convictions for aiding and abetting murder as a crime against humanity, and expanded the responsibility for ordering crimes to cover all crimes committed at Nyarubuye Parish. The Appeals Chamber, which concluded that Gacumbitsi was a “primary player” in the massacre and rape of thousands, sentenced Gacumbitsi to life imprisonment.

Samuel Imanishimwe was a Lieutenant in the Rwandan Armed Forces and served as acting commander of the Cyangugu military camp, also referred to as the Karambo military camp. The Trial Chamber convicted him of command responsibility for genocide, extermination as a crime against humanity, and one count of war crimes for the Gashirabwoba football field massacre on April 12, 1994. It also convicted him of individual responsibility for murder, imprisonment and torture as crimes against humanity, and murder, torture and cruel treatment as war crimes, based on crimes at the Cyangugu military camp. The Trial Chamber sentenced him to 27 years. On appeal, the convictions related to the Gashirabwoba football field massacre were overturned due to indictment defects. The remaining convictions were affirmed, leaving a sentence of 12 years.

Gratien Kabiligi was the head of the operations bureau (G-3) of the army general staff and a General in the Rwandan Armed Forces. The Trial Chamber acquitted him of all charges.

Juvénal Kajelijeli was a leader of the *Interahamwe*, and had been a *bourgmestre* of Mukingo commune, but was in private business during April 1994. The Trial Chamber convicted him of ordering, instigating, aiding and abetting, and command responsibility for genocide and extermination as a crime against humanity for crimes in Nkuli, Mukingo, and Kigome communes, in particular at Byangabo Market, Busogo Hill, the Munyemvano compound and the Ruhengeri Court of Appeal. The Trial Chamber also convicted him of individual responsibility for direct and public incitement to commit genocide based on events at Byangabo Market. The Trial Chamber found that Kajelijeli directed *Interahamwe* mobs to massacre Tutsis in an effort to rid the Mukingo and Nkuli

communes of them, and that he played an instrumental role in transporting *Interahamwe* and providing them with weapons. As a result, more than 300 died. The Trial Chamber sentenced him to life imprisonment. On appeal, the Appeals Chamber vacated the convictions for command responsibility, found that Kajelijeli's rights were violated during arrest and detention, and reduced his sentence to 45 years imprisonment.

Jean Kambanda was former Prime Minister of the Interim Government of Rwanda. The Indictment alleged that Kambanda had control over the senior civil servants and senior military officers and, along with other senior government officials, incited and encouraged the population to murder Tutsis and moderate Hutus, including at a large rally in Butare on 19 April 1994, and in other public meetings and in the media. The Indictment further alleged that Kambanda ordered roadblocks knowing that they would be used to identify Tutsis and moderate Hutus, and distributed arms and ammunition to groups that he knew would massacre civilians. Kambanda pled guilty to all six counts against him: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (murder and extermination). The Trial Chamber sentenced him to life imprisonment. On appeal, Kambanda argued that the guilty verdict should be quashed and a new trial held, or that his sentence should be revised. The Appeals Chamber affirmed all aspects of the conviction and sentence.

Jean de Dieu Kamuhanda was Director General at the Ministry of Higher and Scientific Research and an influential member of the MRND party. The Trial Chamber convicted him of ordering, instigating, and aiding and abetting genocide (based on killing), and extermination as a crime against humanity, based on his role in an attack on April 12, 1994 against Tutsi refugees at the Parish Church and adjoining school in Gikomero commune, Kigali-Rural prefecture. The Trial Chamber sentenced him to life in prison. The Appeals Chamber vacated the convictions based on instigating and aiding and abetting, but affirmed the convictions based on ordering as to both genocide and extermination, and affirmed the sentence.

François Karera was appointed Prefect of Kigali-Rural prefecture by the Interim Government, and held that position until mid-July 1994. Previously, he was a sub-prefect at Kigali-Rural prefecture, and, earlier, *bourgmestre* of Nyarugenge urban commune. At certain periods, he was president of the MRND party in Nyarugenge commune. The Trial Chamber convicted him of genocide, and murder and extermination as crimes against humanity. Specifically, the Trial Chamber convicted him of ordering genocide in Nyamirambo sector; instigating and committing genocide during an attack on Tutsi refugees at Ntarama Church in Ntarama (south of Kigali); and instigating and aiding and abetting genocide in Rushashi commune. The Trial Chamber also convicted him of instigating and committing extermination as a crime against humanity at Ntarama Church; ordering extermination in Nyamirambo sector; and instigating and aiding and abetting extermination in Rushashi commune. Finally, the Trial Chamber convicted him of ordering, instigating, and aiding and abetting murder as a crime against humanity as to specific murders. The Trial Chamber sentenced him to life imprisonment. The Appeals Chamber reversed the convictions for: aiding and abetting genocide and extermination as a crime against humanity based on the alleged

weapons distribution in Rushashi commune; ordering genocide and extermination and murder as crimes against humanity based on the alleged murders of three individuals; ordering genocide and extermination as a crime against humanity as to another killing; and instigating murder as a crime against humanity as to another murder. The Appeals Chamber affirmed the remaining convictions and affirmed the sentence of life in prison. (The Appeals Chamber decision is not included in this Digest because it was issued subsequent to the cut-off date used for this publication.)

Clément Kayishema was the prefect of Kibuye prefecture and controlled the Gendarmerie Nationale. The Trial Chamber found that on April 17, 1994, Kayishema ordered the Gendarmerie Nationale and others to attack the Catholic Church and Home St. Jean Complex in Kibuye, and that Kayishema participated in and played a leading role in the massacres at the Complex, which left thousands dead or injured. In addition, the Trial Chamber found that Kayishema ordered the Gendarmerie Nationale, police and others to attack unarmed Tutsis who had sought refuge at the Kibuye Stadium on April 18, 1994, which left thousands dead or injured, and that Kayishema and his subordinates were present and participated in attacks at the Church in Mubuga on April 14, 1994. Kayishema also participated in and took a leadership role in attacks on Tutsis in the area of Bisesero. The Trial Chamber found Kayishema guilty of genocide, and sentenced him to life imprisonment. The Appeals Chamber affirmed the verdict and sentence.

Jean Mpambara was formerly the *bourgmestre* of Rukara commune in eastern Rwanda. He was found not guilty of genocide and extermination as a crime against humanity. The charges were based on: looting and killing in Gahini *Secteur* on April 7-8, 1994; an attack on Gahini Hospital on April 9; and two attacks at the Parish Church of Rukara where, on April 12, 1994, up to 2,000 Tutsi civilians were killed.

Mikaeli Muhimana was formerly a *conseiller* of Gishyita *Secteur*. The Trial Chamber convicted him of committing genocide, committing and abetting rape as a crime against humanity, and committing and instigating murder as a crime against humanity, for: participating in various attacks by shooting and throwing a grenade at Tutsi refugees; raping numerous Tutsi women or women whom he believed to be Tutsi; disemboweling a pregnant woman who died from her injuries; abetting others who raped Tutsi women; and instigating others to kill victims in his presence. The crimes occurred between April and June 1994, at various locations in Kibuye prefecture, including Gishyita Town, Mubuga church, Mugonero Complex and the Bisesero area. The Trial Chamber sentenced him to life in prison. On appeal, his genocide conviction was affirmed; two rape findings and one murder finding (the disemboweling) were reversed, but otherwise the convictions for rape and murder as crimes against humanity (based on numerous other rapes and murders) were affirmed. His sentence remained life in prison.

Tharcisse Muvunyi was a Lieutenant-Colonel in the Rwandan Army and, from April 7, 1994 through mid-June 1994, he assumed the position of Commander of the *École des sous-Officiers* (ESO) Camp in Butare prefecture. The Trial Chamber convicted him of aiding and abetting genocide in connection with an attack involving ESO Camp soldiers at the *Groupe scolaire* near the camp, and command responsibility for genocide based on

attacks at the Butare University Hospital, the University of Butare, the Beneberika Convent, the Mukura forest, and at various roadblocks in Butare. The Trial Chamber also convicted him of individual responsibility for direct and public incitement to commit genocide in connection with public meetings in Gikonko in Mugusa commune and Gikore Trade Center, and superior responsibility for crimes against humanity (other inhumane acts) based on mistreatment inflicted by ESO soldiers. The Trial Chamber sentenced him to 25 years imprisonment. The Appeals Chamber reversed the convictions for genocide, for other inhumane acts as a crime against humanity, and for direct and public incitement to commit genocide based on the speech Muvunyi gave at Gikonko. As to the speech Muvunyi gave at Gikore Trade Center, the Appeals Chamber quashed the conviction and ordered a retrial limited to that incident. The Appeals Chamber quashed the sentence, specifying that any new sentence could not exceed 25 years imprisonment. (The case was being re-tried at the time of this publication.)

Alfred Musema, the director of the Gisovu Tea Factory in Kibuye prefecture, a member of the "*conseil préfectorial*" in Byumba prefecture and a member of the Technical Committee in the Butare commune. The Trial Chamber found that on April 26, April 27, May 3, May 13, and May 14, 1994, Musema along with employees of the Gisovu Tea Factory participated in large-scale attacks on Tutsi refugees, that Musema took part in these attacks and also knew that his subordinates were also attacking Tutsis, but did nothing to stop them. The Trial Chamber found Musema guilty of genocide and crimes against humanity (extermination and rape), and sentenced him to life imprisonment. The Appeals Chamber affirmed the convictions for genocide and extermination as a crime against humanity, but overturned the conviction for rape as a crime against humanity. The Appeals Chamber also affirmed the sentence of life imprisonment.

Ferdinand Nahimana was founder and ideologist of RTLM. The Trial Chamber convicted him of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution). He was sentenced to life imprisonment. The Appeals Chamber reversed all convictions for individual criminal responsibility, and affirmed convictions for command responsibility as to RTLM broadcasts after April 6, 1994, for the crimes of direct and public incitement to commit genocide, and persecution as a crime against humanity. The Appeals Chamber reduced his sentence to 30 years.

Siméon Nchamihigo was a *substitut du Procureur de la République* (Deputy Prosecutor) in Cyangugu, working for the Rwandan Ministry of Justice. The Trial Chamber found him implicated in the murders of: several specific individuals; thousands of Tutsis at places where they had taken refuge (including churches); and a group of refugees removed from Kamarampaka Stadium on April 16, 1994. The Trial Chamber convicted him of nine counts of genocide, four counts of extermination as a crime against humanity, two counts of murder as a crime against humanity, and one count of other inhumane acts as a crime against humanity for his role in ordering, instigating and/or aiding and abetting the killings. The Trial Chamber sentenced him to life in prison. (The case was on appeal at the time of this publication.)

Emmanuel Ndindabahizi was Executive Secretary of the Social Democratic Party, *Parti Social Démocrate* (PSD) and, from September 1992 until April 6, 1994, *Directeur de Cabinet* in the Ministry of Finance. On April 9, 1994, he became Minister of Finance of the Interim Government until his exile from Rwanda in July 1994. The Trial Chamber found that Ndindabahizi transported attackers to a certain Gitwa Hill in the Bisesero Hills (Kibuye prefecture), distributed weapons and urged the attackers to kill Tutsis, resulting in the death of thousands; for those acts, he was convicted of instigating and aiding and abetting genocide, and committing, instigating, and aiding and abetting extermination as a crime against humanity. The Trial Chamber also found that Ndindabahizi gave encouragement, money and machetes to persons manning a certain roadblock at Gaseke, and thereafter, they killed a person; for those acts, he was convicted of instigating and aiding and abetting genocide, and murder as a crime against humanity. The Trial Chamber sentenced him to life in prison. The Appeals Chamber affirmed the convictions for genocide and extermination as a crime against humanity for the events at Gitwa Hill, but vacated the convictions for genocide and murder as a crime against humanity for the events at the Gasake roadblock. The Appeals Chamber affirmed the sentence.

Hassan Ngeze was owner and chief editor of the newspaper *Kangura*. The Trial Chamber convicted him of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution). He was sentenced to life imprisonment. The Appellate Chamber reversed convictions for individual criminal responsibility for (1) conspiracy to commit genocide and persecution as a crime against humanity; (2) having instigated genocide through matters published in *Kangura* newspaper and having ordered genocide on April 7, 1994 in Gisenyi; (3) having directly and publicly incited genocide in Gisenyi prefecture; (4) having ordered extermination as a crime against humanity on April 7, 1994 in Gisenyi. The Appeals Chamber affirmed convictions for individual criminal responsibility for having (1) aided and abetted genocide in Gisenyi prefecture; (2) directly and publicly incited genocide through matters published in *Kangura* in 1994; and (3) aided and abetted extermination as a crime against humanity in Gisenyi prefecture. The Appeals Chamber reduced his sentence to 35 years.

Eliézer Niyitegeka was a former journalist at Radio Rwanda, founding member of the *Mouvement Démocratique Républicain* (MDR) party, and Chairman of the MDR party for Kibuye prefecture from 1991 to 1994. He was also Minister of Information in Rwanda's Interim Government. The Trial Chamber convicted him of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and crimes against humanity (murder, extermination, and other inhumane acts). The Trial Chamber sentenced him to life imprisonment. The Appeals Chamber affirmed the convictions and sentence.

Anatole Nsengiyumva was Commander of the Rwandan Armed Forces in the Gisenyi operational sector. The Trial Chamber found him responsible for ordering killings in Gisenyi town, Mudende University, and Nyundo Parish in Gisenyi prefecture, and aiding and abetting killings in the Bisesero area of Kibuye prefecture. The Trial Chamber convicted him of genocide, crimes against humanity (murder, extermination,

persecution, and other inhumane acts), and war crimes (violence to life). The Trial Chamber sentenced him to life in prison. (The case was on appeal at the time of this publication.)

Aloys Ntabakuze was Commander of the elite Para Commando Battalion of the Rwandan Armed Forces. The Trial Chamber found he bore superior responsibility for crimes committed at Kabeza, Nyanza and *L'Institut Africain et Mauricien de Statistiques et d'Economie* [IAMSEA], and convicted him of genocide, crimes against humanity (murder, extermination, persecution, and other inhumane acts), and war crimes (violence to life). The Trial Chamber sentenced him to life in prison. (The case was on appeal at the time of this publication.)

André Ntagerura served as a minister in the Rwandan Government, his last appointment being Minister of Transport and Communication in the Interim Government. He was also a member of the MRND. He was found not guilty of any crimes.

Elizaphan Ntakirutimana was pastor and president of the West Rwanda Association of the Seventh Day Adventist Church based in the Mugonero Complex, Gishyita commune, Kibuye prefecture. He was the father of Gérard Ntakirutimana. The Trial Chamber convicted Elizaphan Ntakirutimana of aiding and abetting genocide (as to crimes committed both at Mugonero and Bisesero) and sentenced him to 10 years imprisonment. The Appeals Chamber quashed the conviction related to Mugonero. In relation to Bisesero, the Appeals Chamber affirmed the conviction for aiding and abetting genocide, and entered a conviction for aiding and abetting extermination as a crime against humanity. The Appeals Chamber affirmed the sentence.

Gérard Ntakirutimana was a medical doctor at the Seventh Day Adventist's hospital at Mugonero Complex, Gishyita commune (Mugonero Adventist Hospital). The Trial Chamber convicted him of genocide and murder as a crime against humanity both at Mugonero and Bisesero. The Trial Chamber sentenced him to 25 years imprisonment. Regarding the attack at the Mugonero Complex, the Appeals Chamber upheld the convictions for genocide and murder as a crime against humanity, and entered convictions for aiding and abetting genocide and aiding and abetting extermination as a crime against humanity. In relation to Bisesero (the attacks at Gitwe Hill and Mubuga Primary School), the Appeals Chamber reversed the convictions for genocide and murder as a crime against humanity, but entered convictions for aiding and abetting genocide and aiding and abetting extermination as a crime against humanity. The Appeals Chamber affirmed the sentence.

Joseph Nzabirinda was a youth *encadreur* (organizer) in Butare prefecture and became managing Director of SECOBE in Kigali. He was also a founding member of the PSD. He pled guilty to aiding and abetting murder as a crime against humanity as an accomplice by omission or "approving spectator" in the killing of two individuals. The Trial Chamber sentenced him to 7 years imprisonment.

Juvénal Rugambarara was a medical assistant and *bourgmestre* of Bicumbi commune, Kigali-Rural prefecture. He pled guilty to extermination as a crime against humanity for failing to take necessary and reasonable measures to investigate attacks by his subordinates on Tutsis gathered at Mwulire, Mabare and Nawe *secteurs* in Bicumbi commune, which resulted in the deaths of thousands of Tutsi civilians. The Trial Chamber sentenced him to 11 years imprisonment.

Georges Ruggiu, a Belgian national, was a journalist and broadcaster at RTLM, a Hutu-controlled radio station that broadcast extremist messages. Ruggiu pled guilty to direct and public incitement to commit genocide, and crimes against humanity (persecution). In the plea agreement, Ruggiu admitted that he made statements on RTLM that the population should “go to work,” meaning kill Tutsis and Hutu moderates, and made other discriminatory and threatening statements. Ruggiu also admitted knowing that his broadcasts supported the political plans and ideologies of extremist Hutus, that there was a plan to kill the Tutsis, and he admitted that there was a direct link between his broadcasts and the genocide. The Trial Chamber sentenced him to 12 years imprisonment for each count, to be served concurrently.

Georges Rutaganda was former second vice-president of the youth wing of the *Interahamwe* militia. The Trial Chamber convicted him of genocide and crimes against humanity (extermination, and murder) for (i) distributing guns and other weapons to member of the *Interahamwe* in Nyarungenge commune, Kigali prefecture; (ii) directing men under his control to take detainees to near the Amgar garage where he ordered several of them to be killed and their bodies thrown into a hole; (iii) participating in the attack at the *École Technique Officielle* (the ETO school) where thousands of unarmed Tutsis and some unarmed Hutus had sought refuge, which resulted in the deaths of a large number of Tutsis; and (iv) the killing Emmanuel Kayitare. The Trial Chamber sentenced him to life imprisonment. The Appeals Chamber affirmed the convictions for genocide and extermination as a crime against humanity, but overturned the conviction for murder as a crime against humanity (the killing of Emmanuel Kayitare). The Appeals Chamber also granted the Prosecution’s appeal, entering two new convictions for murder as a violation of Common Article 3 of the Geneva Conventions based on killings at the ETO school and killings of approximately 3,800 refugees in Nyanza. The Appeals Chamber affirmed the sentence of life imprisonment.

Vincent Rutaganira was *conseiller communal* of Mubuga *secteur* in Gishyita commune, Kibuye prefecture. He pled guilty to extermination as a crime against humanity for having, by omission, aided and abetted the massacre of thousand of Tutsi civilians who had taken refuge at Mubugu Church in April 1994. The Trial Chamber sentenced him to 6 years imprisonment.

Obed Ruzindana was a prominent commercial trader in Kigali. The Trial Chamber found that Ruzindana directed and took part in a series of massacres and mass killings in various locations in the Bisesero area in April, May and June 1994, at times in concert with Clement Kayishema, including the Mine at Nyiramurego Hill on April 15; Gitwa Cellule in early May; Bisesero Hill on May 11; Muyira Hill on May 13-14; the Cave in June (where hundreds of Tutsis trapped underground were killed by fire and smoke);

and the Hole near Muyira in early June. The Trial Chamber found Ruzindana guilty of genocide, and sentenced him to 25 years imprisonment. The Appeals Chamber affirmed the verdict and sentence.

André Rwamakuba was a medical doctor, public health specialist, and member of the MDR party. In 1992, he was appointed Director of the Kigali Health Region, and on April 9, 1994, was appointed Minister of Primary and Secondary Education in the Interim Government. He was charged with genocide, complicity in genocide, and murder and extermination as crimes against humanity in Gikomero commune and at Butare University Hospital. The Trial Chamber acquitted him of all charges.

Laurent Semanza, was *bourgmestre* of Bicumbi commune until 1993, a member of the MRND party, and had been nominated as MRND representative to the National Assembly (which was to be established pursuant to the 1993 Arusha Accords). The Trial Chamber convicted him of complicity to commit genocide and of crimes against humanity (based on extermination, rape, torture and murder). The Trial Chamber sentenced him to 24 years and six months imprisonment. The Appeals Chamber affirmed the convictions for complicity in genocide and aiding and abetting extermination as a crime against humanity regarding events at Mwulire hill. As to events at Musha church, it instead entered convictions for genocide and ordering extermination as a crime against humanity. The Appeals Chamber affirmed the convictions for rape, torture and murder as crimes against humanity. The Appeals Chamber also entered convictions for war crimes based on ordering murders at Musha church, aiding and abetting murders at Mwulire hill, and additional instances of rape, torture and murder. The Appeals Chamber sentenced Semanza to 34 years and six months imprisonment.

Athanase Seromba was a priest in Nyange parish, Kivumu commune in Kibuye prefecture. The Trial Chamber convicted him of aiding and abetting genocide and extermination as a crime against humanity for his role in the bulldozing and destruction on April 16, 1994, of the Nyange parish church holding over 1,500 Tutsi who had sought refuge there. The Trial Chamber sentenced him to 15 years imprisonment. The Appeals Chamber reversed the convictions of aiding and abetting regarding destruction of the church and instead convicted him of genocide and extermination as a crime against humanity; as to two other killings, it affirmed the conviction of aiding and abetting genocide. The Appeals Chamber sentenced Seromba to life in prison.

Joseph Serugendo was a member of the *Comité d'Initiative*, the governing board of RTLM; adviser on technical matters to RTLM; Chief of the Maintenance Section of Radio Rwanda; and a member of the enlarged National Committee of the *Interahamwe*. He pled guilty to direct and public incitement to commit genocide and extermination as a crime against humanity based on having planned, with other MRND leaders, to indoctrinate, sensitize and incite members of the *Interahamwe* to kill members of the Tutsi population; planning and aiding and abetting RTLM broadcasts that disseminated anti-Tutsi messages and ethnic hatred; and, following the destruction by Rwandan Patriotic

Front (RPF)⁴ forces of the RTLM transmitter in Kigali on or around July 4, 1994, having helped establish a makeshift studio for RTLM. The Trial Chamber sentenced him to 6 years imprisonment.

Omar Serushago was a leader of the *Interahamwe* in Gisenyi prefecture. As part of a plea agreement, Serushago admitted that he controlled several roadblocks set up in Gisenyi, identified Tutsis stopped at these roadblocks, and ordered their murders. Serushago also acknowledged taking part in other abductions and murders of Tutsis and moderate Hutus from April to July 1994, including an incident on April 20, 1994, when Serushago and others allegedly abducted about twenty Tutsis who had found refuge at a house and executed them, with Serushago further admitting that he personally murdered four of the twenty. Serushago pled guilty to genocide, and three counts of crimes against humanity (extermination, torture and murder). The Trial Chamber sentenced Serushago to fifteen years imprisonment. The Appeals Chamber affirmed the sentence.

Aloys Simba was a retired Lieutenant Colonel, former member of the “Comrades of the fifth of July” who participated in the *coup d’état* that brought former President Juvénal Habyarimana to power in 1973, member of parliament from 1989 to 1993, and MRND party chairman for Gikongoro prefecture in 1991. He was found guilty of participating in a joint criminal enterprise to kill Tutsi civilians at Murambi Technical School and Kaduha Parish in Gikongoro prefecture in southern Rwanda through his distribution of weapons and lending encouragement and approval to participants in the massacres in which thousands of Tutsi civilians died. The Trial Chamber convicted him of genocide (killing) and crimes against humanity (extermination), and sentenced him to 25 years. The Appeals Chamber affirmed both convictions and the sentence.

Protais Zigiranyirazo was brother-in-law to the late Hutu President, Juvénal Habyarimana. He had been *préfet* of Kibuye in 1973, *préfet* of Ruhengeri from 1974 until 1989, and worked as a businessman starting in 1993. The Trial Chamber found him responsible for crimes committed at Kiyovu Roadblock in Kiyovu cellule, Kigali-ville prefecture, where between 10-20 Tutsi were killed, and a massacre on April 8, 1994, at Kesho Hill, in Rwili secteur, Gaseke commune, in Gisenyi prefecture, in which an estimated 800-1,500 Tutsi were killed. Specifically, the Trial Chamber convicted him of participating in a joint criminal enterprise to commit genocide at Kesho Hill; participating in a joint criminal enterprise to commit extermination as a crime against humanity at Kesho Hill; and aiding and abetting genocide as to the killings at Kiyovu roadblock. The Trial Chamber sentenced him to 20 years imprisonment. The case was reversed on appeal. (The Appeals Chamber decision is not included in this Digest because it was issued subsequent to the cut-off date used for this publication.)

⁴ The RPF was “a predominantly Tutsi politico-military opposition group” that ultimately won the civil war and evolved into the governing party in Rwanda. *Gacumbitsi*, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, para. 54.

LISTING OF CASES INCLUDED

This compendium is current through December 31, 2008, and includes the following cases:

Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998

Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), October 2, 1998

Prosecutor v. Akayesu, Case No. ICTR-96-4-A (Appeals Chamber), June 1, 2001

Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T (Trial Chamber), June 7, 2001

Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A (Appeals Chamber), July 3, 2002

Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, Case No. ICTR-98-41-T (Trial Chamber), December 18, 2008 (known as the “Military I” trial)

Prosecutor v. Bikindi, Case No. ICTR-01-72-T (Trial Chamber), December 2, 2008

Prosecutor v. Bisengimana, Case No. ICTR-00-60-T (Trial Chamber), April 13, 2006

Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T (Trial Chamber), June 17, 2004

Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A (Appeals Chamber), July 7, 2006

Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T (Trial Chamber), December 1, 2003

Kajelijeli v. Prosecutor, Case No. ICTR 98-44A-A (Appeals Chamber), May 23, 2005

Prosecutor v. Kambanda, Case No. ICTR-97-23-S (Trial Chamber), September 4, 1998

Kambanda v. Prosecutor, Case No. ICTR-97-23-A (Appeals Chamber), October 19, 2000

Prosecutor v. Kamubanda, Case No. ICTR-95-54A-T (Trial Chamber), January 22, 2004

Kamubanda v. Prosecutor, Case No. ICTR-99-54A-A (Appeals Chamber), September 19, 2005

Prosecutor v. Karera, Case No. ICTR-01-74-T (Trial Chamber), December 7, 2007

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T (Trial Chamber), May 21, 1999

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A (Appeals Chamber), June 1, 2001

Prosecutor v. Mpambara, Case No. ICTR-01-65-T (Trial Chamber), September 11, 2006

Prosecutor v. Mubimana, Case No. ICTR- 95-1B-T (Trial Chamber), April 28, 2005

Mubimana v. Prosecutor, Case No. ICTR- 95-1B-A (Appeals Chamber), May 21, 2007

Prosecutor v. Musema, Case No. ICTR-96-13-T (Trial Chamber), January 27, 2000

Musema v. Prosecutor, Case No. ICTR-96-13-A (Appeals Chamber), November 16, 2001

Prosecutor v. Muvunyi, Case No. ICTR-2000-55 A-T (Trial Chamber), September 12, 2006
Muvunyi v. Prosecutor, Case No. ICTR-2000-55 A-A (Appeals Chamber), August 29, 2008

Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T (Trial Chamber), December 3, 2003

Nahimana, Barayagwiza and Ngeze v. Prosecutor, Case No. ICTR-99-52-A (Appeals Chamber), November 28, 2007 (known as the “Media” trial)

Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T (Trial Chamber), November 12, 2008

Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I (Trial Chamber), July 15, 2004
Ndindabahizi v. Prosecutor, Case No. ICTR-01-71-A (Appeals Chamber), January 16, 2007

Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T (Trial Chamber), May 16, 2003
Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A (Appeals Chamber), July 9, 2004

Prosecutor v. Ntagerura, Bagambiki and Imanishimwe, Case No. ICTR-99-46-T (Trial Chamber), February 25, 2004
Prosecutor v. Ntagerura, Bagambiki and Imanishimwe, Case No. ICTR-99-46-A (Appeals Chamber), July 7, 2006 (known as the “Cyangu case”)

Prosecutor v. Ntakirutimana and Ntakirutimana, Cases Nos. ICTR-96-10 & ICTR-96-17-T (Trial Chamber), February 21, 2003
Prosecutor v. Ntakirutimana and Ntakirutimana, Cases Nos. ICTR-96-10-A & ICTR-96-17-A (Appeals Chamber), December 13, 2004

Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-T (Trial Chamber), February 23, 2007

Prosecutor v. Rugambarara, Case No. ICTR-00-59-T, (Trial Chamber), November 16, 2007

Prosecutor v. Ruggiu, Case No. ICTR-97-32-I (Trial Chamber), June 1, 2000

Prosecutor v. Rutaganda, Case No. ICTR-96-3 (Trial Chamber), December 6, 1999
Rutaganda v. Prosecutor, Case No. ICTR-96-3-A (Appeals Chamber), May 26, 2003

Prosecutor v. Rutaganira, Case No. ICTR-95-IC-T (Trial Chamber), March 14, 2005

Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T (Trial Chamber), September 20, 2006

Prosecutor v. Semanza, Case No. ICTR-97-20-T (Trial Chamber), May 15, 2003
Semanza v. Prosecutor, Case No. ICTR-97-20-A (Appeals Chamber), May 20, 2005

Prosecutor v. Seromba, Case No. ICTR-2001-66-I (Trial Chamber), December 13, 2006
Prosecutor v. Seromba, Case No. ICTR-2001-66-A (Appeals Chamber), March 12, 2008

Prosecutor v. Serugendo, Case No. ICTR-2005-84-I (Trial Chamber), June 12, 2006

Prosecutor v. Serushago, Case No. ICTR-98-39 (Trial Chamber), February 5, 1999
Serushago v. Prosecutor, Case No. ICTR-98-39-A (Appeals Chamber), April 6, 2000

Prosecutor v. Simba, Case No. ICTR-01-76-T (Trial Chamber), December 13, 2005
Simba v. Prosecutor, Case No. ICTR-01-76-A (Appeals Chamber), November 27, 2007

Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-T (Trial Chamber), December 18, 2008

TOPICAL DIGEST

I) GENOCIDE (ARTICLE 2)

a) Statute

ICTR Statute, Article 2:

“1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- a) Genocide;
- b) Conspiracy to commit genocide;
- c) Direct and public incitement to commit genocide;
- d) Attempt to commit genocide;
- e) Complicity in genocide.”

b) Generally

i) elements

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 492: “A person commits the crime of genocide (Article 2(3)(a) of the Statute) if he or she commits one of the acts enumerated in Article 2(2) of the Statute (*actus reus*) with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such (‘genocidal intent’).” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2115 (similar); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 397 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 409 (similar); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 330 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 316: “The constituent elements of the crime of genocide are: first, that one of the acts listed under Article 2(2) of the Statute was committed; secondly, that this act was committed against a specifically targeted national, ethnic, racial or religious group, as such, and thirdly, that the act was

committed with intent to destroy, in whole or in part, the targeted group.” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 55 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 622: “The crime of genocide requires a finding of both *mens rea* and *actus reus*. The *mens rea* for genocide comprises the specific intent or *dolus specialis* described in the general clause of Article 2(2) of the Statute—i.e. the commission of a genocidal act ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.’ And the *actus reus* consists of any of the five acts enumerated in Article 2(2) of the Statute, as shown above.” (italics absent from original.)

See also Bagilishema, (Trial Chamber), June 7, 2001, para. 55: “Genocide . . . invites analysis under two headings: the prohibited underlying acts and the specific genocidal intent or *dolus specialis*.”

ii) genocide is international customary law and *jus cogens*

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 88: “[T]he crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*.”⁵

Rutaganda, (Trial Chamber), December 6, 1999, para. 46: “The Genocide Convention is undeniably considered part of customary international law”

iii) Rwanda is a party to the Genocide Convention

Muhimana, (Trial Chamber), April 28, 2005, para. 492: “Rwanda is a Party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, signed on 12 February 1975.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 248 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 576: “The Accused has admitted that: Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the Genocide Convention (1948) having acceded to it on 16 April 1975.”

See also Semanza, (Appeals Chamber), May 20, 2005, para. 192 (judicial notice was taken “that Rwanda became a state party to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) on 16 April 1975 . . .”).

For discussion of judicial notice, including judicial notice that genocide occurred in Rwanda, see “judicial notice,” Section (VIII)(d)(xiii) and particularly (VIII)(d)(xiii)(4), this Digest.

⁵ “*Jus cogens*” is “a principle of international law that is based on values taken to be fundamental to the international community and that cannot be set aside.” <http://research.lawyers.com/glossary/jus-cogens.html>

iv) Article 2 of the Tribunal's Statute reproduces part of the Genocide Convention

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 48: "Article 2(2) of the Statute . . . mirrors Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ('Genocide Convention')."

Kamuhanda, (Trial Chamber), January 22, 2004, para. 621: "Article 2 of the Tribunal's Statute is a reproduction of Article II and III of the Convention on the Punishment of the Crime of Genocide, which was adopted on 9 December 1948."

c) Mental state (*mens rea*): genocidal intent, specific intent, special intent, or *dolus specialis*

i) defined

Seromba, (Appeals Chamber), March 12, 2008, para. 175: "The Appeals Chamber recalls that in addition to intent and knowledge as regards the material elements of the crime of genocide, the mental element of the crime also requires that the perpetrator have acted with the specific intent to destroy a protected group as such in whole or in part."

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 523: "Article 2(2) of the Statute defines genocidal intent as the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'" *See also Rwamakuba*, (Trial Chamber), September 20, 2006, para. 1 (similar).

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 39: "[G]enocide is a crime requiring 'specific intent.' The Prosecution is required, under Article 2(2) of the Statute, to prove that the accused possessed the specific 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'" *See also Seromba*, (Trial Chamber), December 13, 2006, para. 319 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 524: "As recalled by the Appeals Chamber of ICTY in *Jelisić*, the Statute defines the specific intent required for the crime of genocide as 'the intent to accomplish certain specific types of destruction' against a targeted group. Pursuant to the Statute, therefore, specific intent implies that the perpetrator seeks to destroy, in whole or in part, a national, ethnic, racial or religious group as such, by means of the acts enumerated under Article 2 of the said Statute."

Muvunyi, (Trial Chamber), September 12, 2006, para. 478: "Because of its element of *dolus specialis* (special intent), which requires that the crime be committed with the specific intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, genocide is considered a unique crime." *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 250 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 479: "[I]t must be established that [the Accused] committed any of the enumerated acts in Article 2(2) with the specific intent to destroy, in whole or in part, a group, as such, which is defined by one of the protected categories of nationality, race, ethnicity or religion." *See also Simba*, (Trial

Chamber), December 13, 2005, para. 412 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 662 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 59 (similar).

Muhimana, (Trial Chamber), April 28, 2005, para. 495: “In addition to [the underlying crimes], the specific intent for genocide requires that the perpetrator target the victims with ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group.’” *See also Ndindababizi*, (Trial Chamber), July 15, 2004, para. 454 (similar).

Kajelijeli, (Trial Chamber), December 1, 2003, para. 803: “As with other crimes, the crime of genocide requires a finding of both *mens rea* and *actus reus*. The *mens rea* for genocide comprises of the specific intent or *dolus specialis* described in the general clause of Article 2(2) of the Statute – *i.e.* the commission of a genocidal act ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.’ And the *actus reus* consists of any of the five acts listed under Article 2(2) of the Statute”

Akayesu, (Trial Chamber), September 2, 1998, paras. 498, 520: “Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’ “[T]he offender is culpable only when he has committed one of the offences charged under Article 2(2) . . . with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 164 (similar).

See also Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 523: “It is the person who physically commits one of the enumerated acts in Article 2(2) of the Statute who must have such intent. However, an accused can be held responsible not only for committing the offence, but also under other modes of [responsibility], and the *mens rea* will vary accordingly.”

For discussion of the “*mens rea*” for planning, see Section (IV)(c)(ii); for the “*mens rea*” for instigating, see Section (IV)(d)(ii); for the *mens rea* for ordering, see Section (IV)(e)(ii); for the “*mens rea*” for committing generally, see Section (IV)(f)(ii); for the “*mens rea* for type #1” joint criminal enterprise (“JCE”), see Section (IV)(f)(iv)(9)(a); for the “*mens rea* for type #2” JCE, see Section (IV)(f)(iv)(10)(a); for the “*mens rea* for type #3” JCE, see Section (IV)(f)(iv)(11)(a); for the “*mens rea*” for aiding and abetting, see Section (IV)(g)(iii); for *mens rea* under Article 6(3), see Section (V)(c)(ii); for the “*mens rea*” of conspiracy as to genocide, see Section (I)(e)(ii)(2); for the “*mens rea*” for incitement of genocide, see Section (I)(e)(iii)(2); for the “*mens rea*” for complicity as to genocide, see Section (I)(e)(v)(2), this Digest.

ii) “intent to destroy”

1) intent may be proven through overt statements

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 454: “The requisite intent may be proven by overt statements of the perpetrator” *See also Karera*, (Trial Chamber), December 7, 2007, para. 534 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 8 (similar).

2) intent may be inferred/proven by circumstantial evidence

Seromba, (Appeals Chamber), March 12, 2008, para. 176: “[G]enocide is a crime requiring specific intent, and . . . this intent may be proven through inference from the facts and circumstances of a case.” *See also Simba*, (Appeals Chamber), November 27, 2007, para. 264 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 40 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2116 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 413 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 454 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 524: “The jurisprudence accepts that in most cases genocidal intent will be proved by circumstantial evidence. In such cases, it is necessary that the finding that the accused had genocidal intent be the only reasonable inference from the totality of the evidence.” *See also Nchamibigo*, (Trial Chamber), November 12, 2008, para. 331 (same).

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 40: “By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must usually be inferred.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 525: “[A]s stated by the Appeals Chamber in *Kayishema/Ruzindana*, ‘explicit manifestations of criminal intent are [...] often rare in the context of criminal trials.’ In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from relevant facts and circumstances. Such an approach prevents perpetrators from escaping convictions simply because such manifestations are absent. The validity of this interpretation was confirmed by the Appeals Chambers of both *ad hoc* Tribunals.” *See Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 41 (same quote absent last sentence); *Kayishema and Ruzindana*, (Appeals Chamber), June 1, 2001, para. 159 (quoted in *Rutaganda*).

Muvunyi, (Trial Chamber), September 12, 2006, para. 480: “In *Akayesu*, the Trial Chamber noted that in the absence of a confession or other admission, it is inherently difficult to establish the genocidal intent of an accused. At the same time, it noted that a Chamber may make a valid inference about the mental state of the accused on the basis of a number of factors. Thus, where it is impossible to adduce direct evidence of the perpetrator’s intent to commit genocide, such intent may be inferred from the surrounding facts and circumstances.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 625 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 806 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 93 (similar).

Compare Kamubanda, (Trial Chamber), January 22, 2004, para. 624 (“intent to commit a crime, even genocide, may not always be difficult or impossible to discern from the circumstances of the case”).

Mpambara, (Trial Chamber), September 11, 2006, para. 8: “Intent may be proven by overt statements of the perpetrator or by drawing inferences from circumstantial evidence, such as any connection to a wide-scale attack against the targeted group.”

Muhimana, (Trial Chamber), April 28, 2005, para. 496: “The perpetrator’s specific genocidal intent may be inferred from deeds and utterances.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 663: “A perpetrator’s *mens rea* may be inferred from his actions. . . .” *See also Semanza*, (Trial Chamber), May 15, 2003, para. 313 (similar).

Rutaganda, (Trial Chamber), December 6, 1999, para. 63: “[I]ntent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 167 (same).

See also “circumstantial evidence/drawing inferences,” Section (VIII)(d)(viii), this Digest.

See also “inferences do not relieve prosecution of burden of proof,” Section (VIII)(c)(iii)(3), this Digest.

3) factors in assessing genocidal intent

Seromba, (Appeals Chamber), March 12, 2008, para. 176: “[T]he Trial Chamber, in line with the Appeals Chamber’s previous holdings, stated that

the specific intent of genocide may be inferred from certain facts or indicia, including but not limited to (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts and (i) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.”

See also Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 40 (endorsing similar list); *Seromba*, (Trial Chamber), December 13, 2006, para. 320 (same list); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 252 (similar); *Kamubanda*, (Trial Chamber), January 22, 2004, para. 623 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 804 (similar).

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 40: Endorsing the Trial Chamber’s statement that evidence of genocidal intent can be inferred from “the physical targeting

of the group or of their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing.” *See also Kamubanda*, (Trial Chamber), January 22, 2004, para. 625 (quoting *Kayishema* and *Ruzindana* as to the same factors); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 527 (same factors, but adding: “the number of group members affected” and “the relative proportionate scale of the actual or attempted destruction of a group”).

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 41: “[R]elevant facts and circumstances [for inferring genocidal intent] could include ‘the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.’” *See also Semanza*, (Appeals Chamber), May 20, 2005, para. 262 (same factors); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 525 (same factors); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2116 (same factors); *Simba*, (Trial Chamber), December 13, 2005, para. 413 (same factors); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 663 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 166 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, paras. 523-24 (similar).

Nchamihigo, (Trial Chamber), November 12, 2008, para. 331: “In the absence of direct evidence, the following circumstances have been found, among others, to be relevant for establishing intent: the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the fact that the perpetrator may have targeted the same group during the commission of other criminal acts, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, whether the perpetrator acted on the basis of the victim’s membership in a protected group and the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 398 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 420 (same as *Zigiranyirazo*); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 480 (similar).

Muhimana, (Trial Chamber), April 28, 2005, para. 496: “The perpetrator’s specific genocidal intent may be inferred from . . . the general context of the perpetration, in consideration of factors such as: the systematic manner of killing; the methodical way of planning; the general nature of the atrocities, including their scale and geographical location, weapons employed in an attack, and the extent of bodily injuries; the targeting of property belonging to members of the group; the use of derogatory language towards members of the group; and other culpable acts systematically directed against the same group, whether committed by the perpetrator or others.”

Kamubanda, (Trial Chamber), January 22, 2004, para. 625: “In the ICTY Jelisić [*sic*] Judgment, the Commission of Experts Report was quoted to this effect: ‘[i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and

intellectuals, business leaders and others—the totality per se may be a strong indication of genocide regardless of the actual numbers killed.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 806 (same).

Kajelijeli, (Trial Chamber), December 1, 2003, para. 806: “[S]ome of the indicia of intent may be ‘[e]vidence such as the physical targeting of the group or of their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing.’”

See also “actual destruction not required, but may be inferential evidence of intent,” Section (I)(c)(iii)(6)(d), this Digest.

(a) strike balance between words and deeds, and actual purposeful conduct

Kamubanda, (Trial Chamber), January 22, 2004, para. 626: “The Trial Chamber in Bagilishema [*sic*] stated that when demonstrating the ‘specific intent’ of an Accused through his words and deeds, a balance has to be struck between his words and deeds and his actual purposeful conduct, especially when his intention is not clear from what he says or does.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 807 (same with italics).

Bagilishema, (Trial Chamber), June 7, 2001, para. 63: “[E]vidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused’s intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action.”

4) scale of destruction may be evidence of intent to destroy

Muhimana, (Trial Chamber), April 28, 2005, para. 498: “[T]he relative proportionate scale of the actual or attempted destruction of a group, by any act listed in Article 2 of the Statute, is strong evidence of the intent to destroy a group, in whole or in part.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 253 (similar); *Kamubanda*, (Trial Chamber), January 22, 2004, para. 629 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 810 (similar).

(a) application—scale of destruction as evidence to infer intent to destroy

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 44: “The only aspect of the Trial Chamber’s analysis that relates to the actions of others [in concluding there was intent to destroy] is its reference to ‘the scale of the massacres,’ which the Trial Chamber cited in support of its finding that the Appellant ‘acted with intent to destroy a substantial part of the targeted group.’ In the Appeals Chamber’s view, it is appropriate and consistent with the Tribunal’s jurisprudence to consider, in determining whether the Appellant meant to target a sufficiently substantial part of the Tutsi population to amount to

genocide, that the Appellant's actions took place within the context of other culpable acts systematically directed against the Tutsi population."

See also "intent to destroy considerable number/substantial part of group required" to satisfy "in whole or in part" requirement, Section (I)(c)(iii)(1), this Digest.

**5) plan or policy not required, but may be evidence of intent;
perpetrator need not have "key coordinating role"**

Simba, (Appeals Chamber), November 27, 2007, para. 260: "[A]ccording to the jurisprudence of this Tribunal as well as that of the ICTY the existence of an agreement or a plan is not an element required for a conviction for genocide."

Semanza, (Appeals Chamber), May 20, 2005, para. 260: "[F]or an accused to be convicted as perpetrator or co-perpetrator of genocide, it is not necessary that he or she fulfils a 'key coordinating role' or that a 'high level genocidal plan' be established (even if the existence of a plan to commit genocide can be useful to prove the specific intent required for genocide)."

Rutaganda, (Appeals Chamber), May 26, 2003, para. 525: "The ICTY Appeals Chamber also indicated that the existence of a plan or policy is not 'a legal ingredient' of the crime of genocide, but that proving the existence of such a plan or policy may facilitate proof of the crime."

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 94, 276: "[A]lthough a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation." "[I]t is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime." "[I]t is unnecessary for an individual to have knowledge of all details of genocidal plan or policy." "[T]he existence of such a [genocidal] plan would be strong evidence of the specific intent requirement for the crime of genocide."

**6) genocidal intent need not be formed prior to the commission
of genocidal acts, but must be present when committed**

Simba, (Appeals Chamber), November 27, 2007, para. 266: "In [the Appellant's] view, for the crime of genocide to occur, the intent to commit genocide must be formed *prior* to the commission of genocidal acts. The Appeals Chamber finds no merit in this submission. The inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent. The Trial Chamber correctly considered whether the Appellant and the physical perpetrators possessed genocidal intent at the time of the massacres."

But see Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 91: "[F]or the crime of genocide to occur, the *mens rea* must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation;

the only consideration is that the act should be done in furtherance of the genocidal intent.”

See also “pre- and post-1994 evidence of intent admissible,” under “temporal jurisdiction (*ratione temporis*),” Section (VIII)(b)(iii)(3), this Digest.

7) selective assistance does not preclude finding intent to destroy
Muhimana, (Appeals Chamber), May 21, 2007, para. 32: “In general, evidence of limited and selective assistance towards a few individuals does not preclude a trier of fact from reasonably finding the requisite intent to commit genocide.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 115: “[T]he evidence . . . in relation to the alleged acts of the Accused in favour of Tutsis before and during the events of April 1994 does not suffice to impeach the Prosecution evidence in relation to the intent of the Accused to kill the Tutsi population and his act of killing Tutsis.” *See also Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 29 (discussing same approvingly).

(a) application—selective assistance

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 571: “[T]he Trial Chamber considered . . . ‘a small circle of individuals were saved by [Ngeze’s] intervention, in particular Tutsi of the Muslim faith and Tutsi close relatives . . . The Trial Chamber added:

The Chamber also notes that in saving Witness AEU and her children, Ngeze extorted her employer, extracting the price of \$1,000 for their lives. Moreover, Witness AEU testified that those who joined in another initiative of Ngeze, presented to them as a humanitarian intervention, were in the end lured to their death by Ngeze rather than saved by him. The Chamber notes that Ngeze’s innovative method of saving Tutsi through transport by barrel also involved lucrative trading in much needed fuel that he brought back to Rwanda in the barrels. At the time of his arrest, by his own admission Ngeze had a bank balance in the region of \$ 900,000.

The Trial Chamber then concluded that the Appellant’s ‘role in saving Tutsi individuals whom he knew does not, in the Chamber’s view, negate his intent to destroy the ethnic group as such.’ The Appellant has failed to demonstrate that these findings were unreasonable.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 537: “[I]t emerges from the Trial Judgement that the Trial Chamber considered several testimonies regarding the Appellant’s unusual behaviour, such as welcoming Tutsi refugees, allowing a Tutsi arrested at a roadblock to be given food and drink and going to great lengths to save a friend’s Tutsi wife [T]he Appeals Chamber does not see on what basis it could be assumed, in this instance, that the Trial Chamber disregarded evidence randomly selected by the Appellant. In any event, the Appeals Chamber holds the view that a reasonable trier of fact could very well not take account of some of the illustrations provided by the Appellant, which appear immaterial within the context of the numerous atrocities systematically and deliberately perpetrated against members of the Tutsi group, owing to their being members of thereof.”

See also “selective assistance” as a mitigating factor, Section (VII)(b)(iii)(7)(b)(iv), this Digest.

8) lack of enthusiasm for killings/reluctant participation/lack of hard line anti-Tutsi philosophy

(a) application

Simba, (Trial Chamber), December 13, 2005, paras. 417-18: “In reaching [the] conclusion [that Simba shared genocidal intent], the Chamber has considered the arguments of the Defence that Simba could not have committed genocide, given his close association with Tutsi and his tolerant views, which it suggests resulted in his marginalization and attacks against his family in Gikongoro. There is no clear evidence that Simba was among the adherents of a hard line anti-Tutsi philosophy. It cannot be excluded that he participated in the joint criminal enterprise, as a former career military officer and public servant, out of a misguided sense of patriotism or to ensure the protection of himself and those in his care. In responding to similar arguments of lack of enthusiasm for killings or reluctant participation in relation to another specific intent crime (persecution), the Appeals Chamber in [the ICTY case] *Kvočka et al.* stated:

232. Kvočka replies that his association with the Muslim community, his political affiliation and his duty as a professional policemen are facts that disprove the existence of discriminatory intent.

233. The Appeals Chamber understands that Kvočka contends that the Trial Chamber erred in omitting to consider these circumstances when assessing his *mens rea* and argues that his personal situation was not consistent with the Trial Chamber’s finding that he intended to further the joint criminal enterprise [T]he Trial Chamber reviewed this evidence and concluded that many witnesses depicted a tolerant and politically moderate man who was close to the Muslim community, into which he had married. However, in the Appeals Chamber’s view, such findings do not preclude a reasonable trier of fact from concluding, in light of all the evidence provided, that the accused intended to further a joint criminal enterprise whose purpose was to persecute the non-Serbs.”

“Simba was physically present at two massacre sites. He provided traditional weapons, guns, and grenades to attackers poised to kill thousands of Tutsi. Simba was aware of the targeting of Tutsi throughout his country, and as a former military commander, he knew what would follow when he urged armed assailants to ‘get rid of the filth.’ The only reasonable conclusion, even accepting his submissions as true, is that at that moment, he acted with genocidal intent.”

For discussion of the joint criminal enterprise doctrine, see “joint criminal enterprise (‘JCE’),” Section (IV)(f)(iv), this Digest.

9) motive not an element of genocide; other motives do not preclude genocidal intent

Simba, (Appeals Chamber), November 27, 2007, para. 269: “The Trial Chamber did not find motive to be an element of the crime of genocide. To the contrary, it found, in accordance with established jurisprudence, that a possible personal motive for

participating in the [joint criminal enterprise] did not preclude a finding that [the accused] possessed the intent to commit genocide.” *See also Simba*, (Appeals Chamber), November 27, 2007, para. 88 (similar).

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 53: “[P]ursuant to settled jurisprudence, it is the intent (*mens rea*) that is decisive for [responsibility] purposes, not the motive (which can only be relevant to sentencing, if at all) [W]hile the Trial Chamber noted that [Ndindabahizi’s] position in the Interim Government could be relevant to a possible motive, it immediately cautiously added that this had little probative value to establish the charges and might be prejudicial to the Appellant.”

Karera, (Trial Chamber), December 7, 2007, para. 534: “The perpetrator need not be *solely* motivated by a genocidal intent and having a personal motive will not preclude such a specific intent.” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2115 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 412 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 479: “[A]n accused can be found guilty of committing genocide even if his personal motivation went beyond the criminal intent to commit genocide.”

See, e.g., Ndindabahizi, (Trial Chamber), July 15, 2004, para. 469: “[T]he presence of additional motives for the killing of Nors (as, for example, that he may have been part-Belgian) does not displace the killers’ genocidal intent.”

See also discussion of “as such” Section (I)(c)(v), this Digest, and, particularly, “as such” does not mean ‘solely because’ of group membership,” Section (I)(c)(v)(4), this Digest.

10) committing crimes as part of a widespread or systematic attack does not imply lack of genocidal intent

Rutaganda, (Appeals Chamber), May 26, 2003, para. 547: “The Appeals Chamber stresses that, in general, committing crimes as part of a widespread or systematic attack against a civilian population does not imply that such crimes, or others, were not committed with the intent of destroying, in whole or in part, a group referred to under Article 2 of the Statute.”

11) need not show anti-ethnic group utterances or affiliation with extremists groups/ no inference of intent only from affiliation with a “guilty organization”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 525: “[T]he *Kayishema/Ruzindana* Appeal Judgement reveals that making anti-Tutsi utterances or being affiliated to an extremist anti-Tutsi group is not a *sine qua non* for establishing *dolus specialis*. The Appeals Chamber holds the view that establishing such a fact may, nonetheless, facilitate proof of specific intent.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 528: Allowing specific intent to be inferred from various factors “does not imply that the guilt of an accused may be inferred only from his affiliation with ‘a guilty organisation.’”

**12) where several participants, must prove, for “committing”
genocide, that accused possessed genocidal intent**

Rutaganda, (Appeals Chamber), May 26, 2003, para. 525: “The crime of genocide sometimes implies several offenders participating in the commission of the crime. The Appeals Chamber concurs with the Appellant that in order to find a person guilty of genocide, it must be established that such a person was personally possessed of the specific intent to commit the crime at the time he did so.”

Compare “*mens rea*” for “aiding and abetting, Section (IV)(g)(iii); “*mens rea* for type #3” joint criminal enterprise, Section (IV)(f)(iv)(11)(a); *mens rea* for command responsibility, Section (V)(c)(ii), this Digest; *mens rea* for complicity as to genocide, Section (I)(e)(v)(2), this Digest. (For none of these forms of responsibility must it be established that the Accused personally possessed genocidal intent.)

iii) “in whole or in part”

**1) intent to destroy considerable number/substantial part of
group required**

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2115: “[T]he perpetrator must act with the intent to destroy at least a substantial part of the group.” See also *Karera*, (Trial Chamber), December 7, 2007, para. 534 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 479 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 8 (same as *Karera*); *Simba*, (Trial Chamber), December 13, 2005, para. 412 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 514 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 258 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 64 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 483: “At the very least, it must be shown that the intent of the perpetrator was to destroy a substantial part of the group, regardless of the number of victims actually involved.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 97: “[I]n part’ requires the intention to destroy a considerable number of individuals who are part of the group.”

2) actual extermination of entire group not required

Akayesu, (Trial Chamber), September 2, 1998, para. 497: “[G]enocide does not imply the actual extermination of [a] group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy ‘in whole or in part’ a national, ethnical, racial or religious group.” See also *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 48-49 (similar).

3) not necessary to show intent for complete annihilation

Seromba, (Trial Chamber), December 13, 2006, para. 319: “To establish specific genocidal intent, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world”

Muhimana, (Trial Chamber), April 28, 2005, para. 498: “In proving the intent to destroy ‘in whole or in part,’ it is not necessary for the Prosecution to establish that the perpetrator intended to achieve the complete annihilation of a group.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 253 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 628 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 809 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 95 (similar).

4) no numeric threshold

Seromba, (Trial Chamber), December 13, 2006, para. 319: “There is no numeric threshold of victims necessary to establish genocide.” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2115 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 412 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 498 (same as *Seromba*); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 253 (same as *Seromba*); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 628 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 809 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 479: “[T]here is no upper or lower limit to the number of victims from the protected group”

Muhimana, (Trial Chamber), April 28, 2005, para. 514: “[T]he phrase ‘destroy in whole or in part a[n] ethnic group’ does not imply a numeric approach.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 258 (similar).

5) not necessary to establish genocide throughout country

Akayesu, (Trial Chamber), September 2, 1998, n. 61: “[I]n a case other than that of Rwanda, a person could be found guilty of genocide without necessarily having to establish that genocide had taken place throughout the country concerned.”

6) destruction

(a) means material destruction by physical and biological means

Seromba, (Trial Chamber), December 13, 2006, para. 319: “The notion ‘destruction of the group’ means ‘the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.’” *See also Muhimana*, (Trial Chamber), April 28, 2005, para. 497 (same); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 253 (same); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 627 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 808 (similar).

Semanza, (Trial Chamber), May 15, 2003, para. 315: “The drafters of the Genocide Convention . . . unequivocally chose to restrict the meaning of ‘destroy’ to encompass only acts that amount to physical or biological genocide.”

(b) may include acts falling short of causing death

Muvunyi, (Trial Chamber), September 12, 2006, para. 482: “Article 2 of the Statute requires a showing that the perpetrator committed any of the enumerated acts with the intent to destroy a group. Trial Chambers at the Tribunal have tended to interpret the term broadly so that it not only entails acts that are undertaken with the intent to cause death but also includes acts which may fall short of causing death.”

(c) sexual violence as destruction

Akayesu, (Trial Chamber), September 2, 1998, para. 731: The Chambers held that acts of sexual violence can form an integral part of the process of destruction of a group. “These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”

(d) actual destruction not required, but may be inferential evidence of intent

Mpambara, (Trial Chamber), September 11, 2006, para. 8: “The *actus reus* of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 454: “The actual destruction of a substantial part of the group is not a required material element of the offence, but may assist in determining whether the accused intended to bring about that result.”

See also Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 135: “[T]here need not be a large number of victims to enter a genocide conviction.”

See also “scale of destruction may be evidence of intent to destroy,” Section (I)(c)(ii)(4), this Digest.

(e) killing of a single person may constitute genocide, where required intent is shown

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 471: “The fact that only a single person was killed on this occasion does not negate the perpetrators’ clear intent, which was to destroy the Tutsi population of Kibuye and of Rwanda, in whole or in part. Accordingly, the killers of Nsoro committed genocide.” (The conviction for the killing was reversed on appeal on other grounds. *See Ndindabahizi*, (Appeals Chamber), January 16, 2007, paras. 116-17.

(i) application

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 285: “In the present case, the Accused killed Murefu, a Tutsi. The Chamber therefore finds that he committed the crime of genocide, within the meaning of Article 6(1) of the Statute.”

iv) “a national, ethnical, racial, or religious group”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 524: “In order to prove specific intent, it must be established that the enumerated acts were directed against a group referred to under Article 2 of the Statute and committed with the intent to destroy, in whole or in part, the said group as such.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 630: “It is required to show under Article 2 that the Accused, in committing genocide intended to destroy ‘a national, ethnical, racial or religious’ group.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 811 (same).

See also “victim must belong to protected group or be believed to so belong—mistaken identities,” Section (I)(c)(iv)(5)(c), this Digest.

1) old approach: meant to cover any stable and permanent group

Akayesu, (Trial Chamber), September 2, 1998, paras. 511, 516, 701-02: The *travaux préparatoires* of the Genocide Convention indicate that “the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups.” The four groups protected by the convention share a “common criterion,” namely, “that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.” “[I]t was necessary . . . to respect the intent of the drafters . . . which, according to the *travaux préparatoires*, was clearly to protect any stable and permanent group.” “[T]he Tutsi did indeed constitute a stable and permanent group and were identified as such by all.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 57 (the Chamber held that “a subjective definition alone is not enough to determine victim groups” and, relying on the *travaux préparatoires*, held that the Genocide Convention “was presumably intended to cover relatively stable and permanent groups”)

2) group determined by subjective and objective criteria on a case-by-case basis

Muvunyi, (Trial Chamber), September 12, 2006, para. 484: “The jurisprudence of the Tribunal indicates that although the Statute does not clearly establish the criteria for determining protected groups under Article 2, the Trial Chambers have tended to decide the matter on a case-by-case basis, taking into consideration both the objective and subjective particulars, including the historical context and the perpetrator’s intent.”

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 254: “[T]he determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria. Indeed, in a given situation, the perpetrator, just like the victim, may believe that

there is an objective criterion for determining membership of an ethnic group on the basis of an administrative mechanism for the identification of an individual's ethnic group.”

Semanza, (Trial Chamber), May 15, 2003, para. 317: “The Statute of the Tribunal does not provide any insight into whether the group that is the target of an accused’s genocidal intent is to be determined by objective or subjective criteria or by some hybrid formulation. The various Trial Chambers of this Tribunal have found that the determination of whether a group comes within the sphere of protection . . . ought to be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 373: “[I]n assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the political, social and cultural context.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 163 (similar).

See also Kamuhanda, (Trial Chamber), January 22, 2004, para. 630: “Trial Chambers of this Tribunal have noted that the concept of a group enjoys no generally or internationally accepted definition, rather each group must be assessed in the light of a particular political, social, historical and cultural context.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 811 (same); *Musema*, (Trial Chamber), January 27, 2000, para. 161 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 56 (similar).

3) individual’s membership in group is subjective

Seromba, (Trial Chamber), December 13, 2006, para. 318: “As for the notion of ‘members of the group’ which represents belonging to a group, case-law considers this from a subjective standpoint, holding that the victim is perceived by the perpetrator of the crime as belonging to the group targeted for destruction. The determination of the targeted group is to be made on a case-by-case basis.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 468: “In assessing whether [a person] was a member of a protected group, in this case of the Tutsi ethnicity, the subjective intentions of the perpetrators are of primary importance.”

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 254: “Membership of a group is a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 630 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 811 (same as *Kamuhanda*).

Rutaganda, (Trial Chamber), December 6, 1999, para. 56: “[F]or the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than

an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.”

See also “victim must belong to protected group or be believed to so belong—mistaken identities,” Section (I)(c)(iv)(5)(c), this Digest.

4) national group

Akayesu, (Trial Chamber), September 2, 1998, para. 512: “[A] national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”

5) ethnical/ethnic group

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 98: “An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).”

Akayesu, (Trial Chamber), September 2, 1998, para. 513: “An ethnic group is generally defined as a group whose members share a common language or culture.”

(a) application

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2117: “It is firmly established that the Tutsi ethnicity is a protected group.”

Seromba, (Trial Chamber), December 13, 2006, para. 339: “The Chamber considers as established that the Tutsi constituted an ethnic group in Kivumu *commune* at the time of the events . . . and that they were therefore a protected group within the meaning of Article 2(2).”

Muhimana, (Trial Chamber), April 28, 2005, paras. 509-11: “The Chamber has found that, during the period addressed by the Indictment, Rwandan citizens were individually identified according to three ethnic groups: that is, *Tutsi*, *Hutu*, and *Twa*.” “The Defence does not contest that the *Tutsi* were considered a distinct group in Rwanda in 1994, stating that any question as to whether they constituted a national, ethnic, racial, or religious group in the sense of the 1948 Convention against Genocide is academic” “The Chamber concludes - having noted that the question is not in dispute between the Parties - that in Rwanda, in 1994, the *Tutsi* were a group protected by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.”

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 27-28: “Prosecution Expert Witness, Alison Des Forges, testified in *Akayesu* that there were three distinct ethnic groups in Rwanda, namely the Hutu, the Tutsi and the Twa. The Defence does not dispute the fact that in 1994 Rwandan citizens were divided into three ethnic groups, but merely points out that such division dates back to the colonial or pre-colonial period.” “Consequently, the Chamber concludes that during the period referred to in the

Indictment, Rwandan citizens were categorised into three ethnic groups, namely Tutsi, Hutu and Twa.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 257 (similar).

Akayesu, (Trial Chamber), September 2, 1998, paras. 122-24, 170-72, 701-02, n. 56, n. 57: Based on witness testimony and official classifications, the Chamber held that in Rwanda in 1994, “the Tutsi constituted a group referred to as ‘ethnic,’” and found that the Tutsi did “constitute a stable and permanent group and were identified as such by all.” The Chamber also found the following evidence sufficient to show that it was “a particular group, the Tutsi ethnic group, which was targeted”:

- evidence that at roadblocks all over the country, Tutsis were separated from Hutus and killed;
- evidence of the “propaganda campaign” by audiovisual and print media, overtly calling for the killing of Tutsis;
- classification as either Hutu or Tutsi on identity cards and birth certificates, and by law;
- individuals’ self-identification as either Hutu or Tutsi.

The Chambers held this despite its acknowledgement that the “Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population” or meet the general definition of an ethnic group, *i.e.* “members [who] speak the same language and/or have the same culture,” because both Hutu and Tutsi share the same language and culture. Also, many Hutu were also killed simply because they were “viewed as having sided with the Tutsi.”

See also Muvunyi, (Trial Chamber), September 12, 2006, para. 484 (“It is not disputed in the present case that the Tutsi are members of a protected group under the Statute.”); *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 234-35 (finding Tutsi, Hutu and Twa to be ethnic groups based on Accused’s admission); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 789 (finding the Tutsi an ethnic group); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 291 (finding the Tutsi an ethnic group).

See also “notice of Tutsi, Hutu and Twa as ethnic groups,” under “judicial notice,” Section (VIII)(d)(xiii)(3), this Digest.

(b) association of ethnic group with political agenda

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 969: “[T]he association of the Tutsi ethnic group with a political agenda, effectively merging ethnic and political identity, does not negate the genocidal animus that motivated the Accused. To the contrary, the identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi ethnicity, underscores the fact that their membership in the ethnic group, as such, was the sole basis on which they were targeted.”

(c) victim must belong to protected group or be believed to so belong—mistaken identities

Muhimana, (Trial Chamber), April 28, 2005, para. 500: “The Prosecution also has the burden of proving either that the victim belongs to the targeted ethnic, racial, national, or religious group or that the perpetrator of the crime believed that the victim belonged to the group.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 813 (similar).

Ndindababizi, (Trial Chamber), July 15, 2004, para. 468: “In assessing whether [a person] was a member of a protected group, in this case of the Tutsi ethnicity, the subjective intentions of the perpetrators are of primary importance. As stated in *Bagilishema*:

A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim should be considered by the Chamber as a member of the protected group, for the purposes of genocide.”

(i) application

Ndindababizi, (Trial Chamber), July 15, 2004, para. 469: “The Chamber is of the view that Nors [an individual whose father was German and mother Rwandese] was perceived to be, at least in part, of Tutsi ethnicity. Testimony in the present case indicates that physical traits were an important, if not decisive, indicator of ethnic identity in Rwanda in 1994. As Nors had the physical appearance of a Tutsi, he would have been understood to be Tutsi. Having a single European parent is not mutually exclusive with being perceived as part-Tutsi; indeed, several witnesses referred to him as a ‘half-caste,’ which would seem to imply that he was understood to be part-European, and part-Rwandan. It is highly improbable that he would have been targeted if his Rwandan ethnicity was perceived to be Hutu or Twa. Further, Nors was killed very soon after the Accused had instructed that Tutsi be killed, providing circumstantial support for the inference that he was, in fact, killed for that reason. Finally, the presence of additional motives for the killing of Nors (as, for example, that he may have been part-Belgian) does not displace the killers’ genocidal intent. In light of these factors, the Chamber infers that Nors was targeted because he was understood to be, at least in part, Tutsi.” *But see Ndindababizi*, (Appeals Chamber), January 16, 2007, paras. 116-17 (conviction regarding the killing of Nors reversed on appeal on other ground).

**(d) mistreatment of persons not in group not part of genocide/
killing of Hutu political opponents not part of genocide**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 496: “[T]he acts committed against Hutu political opponents cannot be perceived as acts of genocide, because the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group. In the instant case, only the Tutsi ethnic group may be regarded as a protected group under Article 2 of the Statute and Article 2 of the Convention on the Prevention and Punishment of the Crime of

Genocide, since the group of ‘Hutu political opponents’ or the group of ‘Tutsi individuals and Hutu political opponents’ does not constitute a ‘national, ethnical, racial or religious group’ under these provisions. Furthermore, although the jurisprudence of the *ad hoc* Tribunals acknowledges that the perception of the perpetrators of the crimes may in some circumstances be taken into account for purposes of determining membership of a protected group, in this instance neither the Trial Chamber nor the Prosecutor cited any evidence to suggest that the Appellants or the perpetrators of the crimes perceived Hutu political opponents as Tutsi. In other words, in the present case Hutu political opponents were acknowledged as such and were not ‘perceived’ as Tutsi. Even if the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide.”

Nchamihigo, (Trial Chamber), November 12, 2008, paras. 337-38: “[A]cts committed against ‘Hutu political opponents,’ the Hutus who are politically opposed to the MRND [*Mouvement Républicain National pour la Démocratie et le Développement*] regime in April 1994, may be crimes against humanity but they cannot be perceived as acts of genocide, because the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group under Article 2 of the Statute and Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide. The group ‘Hutu political opponents’ does not constitute a ‘national, ethnic, racial or religious group’ under these provisions.” “However, the fact that Hutu political opponents were killed in circumstances where such killings constitute crimes against humanity, does not prevent the killing of the Tutsi from constituting genocide. The charges of killing Hutu political opponents in the present case could result in convictions for crimes against humanity, but not for genocide.”

See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2145: Concluding that the killing of Alphonse Kabiligi, a Hutu of mixed parentage and suspected Rwandan Patriotic Front accomplice, who was killed as part of similar attacks on prominent political personalities, was not proven beyond reasonable doubt to be part of the genocide.

See also Akayesu, (Trial Chamber), September 2, 1998, paras. 720-21: When a woman was beaten, threatened and interrogated about the whereabouts of another person, the acts constituted “serious bodily or mental harm,” but that because the victim was Hutu, the acts “cannot constitute acts of genocide against the Tutsi group.”

(e) killing of Belgian Peacekeepers not part of genocide

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 18, 21, 2118: “During the night [of April 6, 1994], [Canadian] General Dallaire [commander of UNAMIR, the United Nations Assistance Mission for Rwanda] ordered that an UNAMIR escort be provided to the Prime Minister [Agathe Uwilingiyimana] so that she could address the nation on Radio Rwanda in the morning. Around 5.00 a.m. on 7 April 1994, 10 Belgian peacekeepers were dispatched to her residence. In the preceding hours, elements of the Reconnaissance Battalion and the Presidential Guard

had surrounded the compound and at times fired on the gendarmes and Ghanaian peacekeepers guarding the Prime Minister. After the Belgian peacekeepers arrived, the compound came under attack. The Prime Minister fled her home and hid at a neighbouring compound. She was found, killed and then sexually assaulted.” “The Belgian and Ghanaian peacekeepers were disarmed at the Prime Minister’s residence and taken to Camp Kigali around 9.00 a.m.” Camp soldiers later killed the Belgian peacekeepers.

“The Prosecution has charged the killing of the 10 Belgian peacekeepers under the count of genocide. It does not argue that these murders constituted the crime of genocide themselves. Rather, they were intended to prompt Belgium to withdraw its contingent to UNAMIR and thus facilitate the ensuing massacres. The Chamber is not satisfied that this is the only reasonable inference to draw from the killing of the Belgian peacekeepers Accordingly, the Chamber does not find that these killings constituted genocide. It also has not been proven that they were committed with the requisite genocidal intent in order to substantially assist other acts of genocide.”

6) racial group

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 98: “A racial group is based on hereditary physical traits often identified with geography.”

Akayesu, (Trial Chamber), September 2, 1998, para. 514: “The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”

7) religious group

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 98: “A religious group includes denomination or mode of worship or a group sharing common beliefs.”

Akayesu, (Trial Chamber), September 2, 1998, para. 515: “The religious group is one whose members share the same religion, denomination or mode of worship.”

v) “as such”

1) requires showing that the acts were committed *because of* group membership

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 50: “The Trial Chamber in the *Akayesu* case interpreted the concerned provision in Article 2(2) of the Statute to mean that ‘the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group.’ This interpretation was adopted by the Tribunal in subsequent cases, including by the Trial Chamber in the present case.”

Karera, (Trial Chamber), December 7, 2007, para. 534: “The [specific] victims must be targeted because of their membership in the protected group” *See also Mpambara*, (Trial Chamber), September 11, 2006, para. 8 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 485: “The term ‘as such’ has been interpreted to mean that the prohibited act must be committed against a person based on that person’s membership in a specific group and specifically because the person belonged to this group, such that the real victim is not merely the person but the group itself.” See also *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 410 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 165 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 60 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 521 (similar).

2) intent must be to destroy group as a separate and distinct entity

Bagilishema, (Trial Chamber), June 7, 2001, para. 64: The Chamber agreed “with the statement of the International Law Commission, that ‘the intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.’”

3) “as such” was used instead of “motive” in the Genocide Convention

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 49: “[D]uring the drafting of the Genocide Convention, the delegates debated whether to include the element of motive in the definition of the crime of genocide. After extensive discussion, the words ‘as such’ were introduced into the draft document to replace an explicit reference to motives made in an earlier draft. Venezuela, the author of this amendment, stated that ‘an enumeration of motives was useless and even dangerous, as such a restrictive enumeration would be a powerful weapon in the hands of the guilty parties and would help them to avoid being charged with genocide. Their defenders would maintain that the crimes had been committed for other reasons than those listed in article II.’ The Venezuelan delegate continued that ‘it was sufficient to indicate that intent was a constituent factor of the crime.’ He observed that replacing the statement of motives with the words ‘as such’ should meet the views of those who wanted to retain the statement, noting that motives were implicitly included in the words ‘as such.’”

4) “as such” does not mean “solely because” of group membership

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 363: “[T]he definition of the crime of genocide in Article 2 of the Statute, which mirrors the definition set out in the Genocide Convention, does not require that the intent to destroy a group be based solely on one of the enumerated grounds of nationality, ethnicity, race, or religion.”

Niyitegeka, (Appeals Chamber), July 9, 2004, paras. 51-53: “The Appellant proposes that the correct interpretation of the words ‘as such’ is ‘solely,’ so that a finding of the requisite specific intent would be predicated on proof that the perpetrator committed the proscribed acts against members of the protected group ‘solely because they were members of such a group.’ This proposal, if adopted, would introduce into the calculus of the crime of genocide the determination whether the perpetrator’s acts were motivated solely by

the intent to destroy the protected group, in whole or in part, or whether the perpetrator was motivated by that intent as well as other factors.”

“In *Kayishema and Ruzindana*, the Appeals Chamber cautioned that ‘criminal intent (*mens rea*) must not be confused with motive’ and stated that ‘in respect of genocide, personal motive does not exclude criminal responsibility’ provided that the genocidal acts were committed with the requisite intent. This position was reinforced in *Prosecutor v. Jelisić*, where the ICTY Appeals Chamber observed that ‘the existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.’”

“The words ‘as such,’ however, constitute an important element of genocide, the ‘crime of crimes.’ It was deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. The term ‘as such’ has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term ‘as such’ clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting ‘as such’ to mean that the proscribed acts were committed against the victims *because of* their membership in the protected group, but not *solely* because of such membership.” See *Kayishema and Ruzindana*, (Appeals Chamber), June 1, 2001, para. 161 (quoted).

See also *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, paras. 302-04: “Elizaphan Ntakirutimana submits that the Trial Chamber erred in fact and law in finding that Tutsi refugees who were attacked at the Mugonero Complex on 16 April 2004 ‘were targeted solely on the basis of their ethnic group.’” “In the view of the Appeals Chamber, the finding that the Tutsi seeking refuge at Mugonero were targeted on the basis of their ethnicity has not been shown to be unreasonable.” “The Appeals Chamber need not consider whether the Trial Chamber erred in finding that the refugees were targeted ‘solely’ for their Tutsi ethnicity because the definition of the crime of genocide does not contain such a requirement. It is immaterial, as a matter of law, whether the refugees were targeted solely on the basis of their ethnicity or whether they were targeted for their ethnicity in addition to other reasons.”

See also “motive not an element of genocide; other motives do not preclude genocidal intent,” Section (I)(c)(ii)(9), this Digest.

vi) application

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 565: In evaluating genocidal intent: “[T]he Appeals Chamber is of the view that any reasonable trier of fact would have considered the articles written by others in *Kangura* [newspaper] in order to determine whether Appellant Ngeze had genocidal intent. As owner, founder and editor-in-chief of *Kangura*, Appellant Ngeze exercised control over all the articles and editorials published in *Kangura*. Accordingly, all of these articles and editorials could legitimately be ascribed to him personally and directly.” See also *id.*, para.

567 (statement “if Habyarimana were also to die, we would not be able to spare the Tutsi” could help establish genocidal intent).

Kamubanda, (Appeals Chamber), September 19, 2005, paras. 79-82: “Under the heading ‘Intent to Destroy in Whole or in Part the Tutsi Ethnic Group,’ the Trial Chamber referred to a number of its earlier findings:

- The Appellant, at a meeting at the home of his cousin in Gikomero [Kigali-Rural prefecture] prior to the massacre, addressed those present, told them to start killing Tutsi, and distributed weapons to them.
- The Appellant arrived with armed people at the Gikomero Parish Compound.
- The Appellant ordered the armed persons whom he brought to the Parish to ‘work,’ which was understood as an order to start the killings.
- Augustin Bucundura was shot by an armed person who had come with the Appellant, while the Appellant was still present at the Parish.
- The Appellant was in a position of authority over the attackers.
- The Appellant led the attackers in the Gikomero Parish Compound and initiated the attack.
- A large number of Tutsi refugees was [sic] killed by those attackers.”

“The Appeals Chamber finds that the fact that the Appellant gave the order to attack the refugees at the Gikomero Parish Compound, thus starting a massacre which resulted in the death of a large number of Tutsi refugees, would already as such allow a reasonable trier of fact to find that the Appellant had a genocidal intent.” “In addition, the Appeals Chamber notes that Witness GEK, who had been found ‘highly credible’ by the Trial Chamber, testified about the meeting that occurred sometime between 6 and 10 April 1994 at the home of the Appellant’s cousin in Gikomero:

[A]t this meeting, the Accused addressed those present and told them that the killings in Gikomero *commune* had not yet started and that ‘those who were to assist him to start had married Tutsi women.’ The Accused told those present that he would bring ‘equipment’ for them to start, and that if their women were in the way, they should first eliminate them.

“The Appeals Chamber finds that these statements of the Appellant are direct evidence of his genocidal intent [T]he Trial Chamber did not err in holding that the Appellant had the specific intent to destroy the Tutsi ethnic group when he gave the order which resulted in the death of a large number of Tutsi refugees.” *See Kamubanda*, (Trial Chamber), January 22, 2004, paras. 643-45 (Trial Chamber’s findings that Kamuhanda had “specific intent to destroy the Tutsi ethnic group”).

Semanza, (Appeals Chamber), May 20, 2005, para. 262: “In the present case, the Trial Chamber found that ‘there were massive, frequent, large scale attacks against civilian Tutsi in Bicumbi and Gikoro communes’ and that the Appellant took part in these attacks. The Appellant has not demonstrated that the Trial Chamber’s conclusions that the principal perpetrators had the requisite intent to commit genocide and that he had knowledge of this and even shared the same intent were unreasonable.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2123-26: “Roadblocks manned primarily by civilians, at times with a soldier or gendarme at its head, proliferated throughout Kigali, beginning on 7 April 1994. The civilians were mostly members of political party militias or local inhabitants who volunteered or were pressed into service at them as part of the ‘civil defence’ efforts The roadblocks were used to check the identities of passers-by. Tutsis, persons without identification documents, and Hutu members of opposition parties were singled out. These roadblocks were sites of open and notorious slaughter and sexual assault from 7 April. The Chamber finds that, considering the purpose of roadblocks, the assailants at them intentionally killed Tutsis. The Chamber also finds that the acts of rape, sexual violence and mistreatment of Tutsis there constituted serious bodily or mental harm.” “The Chamber heard extensive evidence about the killing of Tutsi civilians throughout the Kigali area at roadblocks immediately after the death of President Habyarimana. The assailants checked the identity cards of the victims and targeted mainly Tutsis along with Hutus suspected of being sympathetic to the RPF [Rwandan Patriotic Front]. In these circumstances, the only reasonable conclusion is that the assailants who physically perpetrated the killings possessed the intent to destroy, in whole or in substantial part, the Tutsi group.” (Concluding that Bagosora ordered the crimes at the roadblocks and was aware of the genocidal intent of the perpetrators and shared it).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2127-35: “On the morning of 7 April 1994, around 300 Hutu and Tutsi refugees gathered at the Kibagabaga mosque in Remera [in the Kigali area] due to increasing insecurity in the area. A group of *Interahamwe* attacked a Tutsi refugee in front of the mosque and threatened the refugees there with attack if they did not surrender the Tutsis. That afternoon, the refugees fended off three attacks. A soldier came to the mosque for his sister, intimating that further attacks were coming. On 8 April, soldiers and *Interahamwe* surrounded the mosque, and the soldiers fired for a few minutes, killing several persons, to prompt the refugees to line up on the street. The soldiers checked identity cards and then withdrew. The *Interahamwe* then continued checking cards and killed more than 20 mostly Tutsi refugees.”

“In the Kabeza area of Kigali, members of the Para Commando Battalion [of the Rwandan Armed Forces], Presidential Guard and *Interahamwe* went from house to house on 7 and 8 April and killed people. The area was predominately Tutsi and considered sympathetic to the RPF.”

“On 8 April, soldiers wearing black berets and militiamen attacked and killed a number of Tutsi refugees at the Saint Josephite Centre. The assailants initially asked to see the refugees’ identity cards, and Hutus were asked to leave. During the course of the attack, some of the women were asked to undress before being killed and at least one woman was raped by a soldier.”

“At Karama hill near Kigali in Rubungo commune, soldiers and gendarmes killed a number of Tutsi refugees on 8 April. Many of the refugees at the school had just fled an attack at a nearby roadblock where military personnel were separating Hutus and Tutsis based on their identity cards before killing the Tutsis.”

“On 9 April 1994, a number of soldiers and gendarmes digging trenches near Kibagabaga Catholic Church were told by a high-ranking soldier to kill the refugees there. The military personnel then gave firearms and grenades to a group of *Interahamwe*

who began attacking the church. During the attack, the *Interahamwe* asked to see the identity cards of the refugees and killed the Tutsis. The military personnel watched as the attack proceeded.”

“During an attack on Gikondo Parish on the morning of 9 April, the army sealed off the Gikondo area, and gendarmes moved systematically through the neighbourhood with lists, sending Tutsis to the parish. The gendarmes checked the identity cards of the Tutsis there against their lists and burned the identity cards. The *Interahamwe* then proceeded to kill the more than 150 Tutsi refugees in an atrocious manner. The parish priests and UNAMIR [the United Nations Assistance Mission for Rwanda] military observers were forced to watch at gunpoint. Major Brent Beardsley of UNAMIR arrived shortly after the attack and described the terrible scene, which bore witness of killing, mutilation and rape. The *Interahamwe* returned later that night to finish off the survivors.”

“Considering the nature of how the attacks unfolded, the Chamber finds that soldiers gendarmes or *Interahamwe* participating in the events intentionally killed Tutsis during these events. Furthermore, the acts of rape, sexual violence and mistreatment constituted serious bodily or mental harm.”

“The Chamber heard extensive evidence about the killing of Tutsi civilians throughout Kigali area and in other parts of Rwanda in the days immediately after the death of President Habyarimana. In the course of many of the attacks, the assailants checked the identity cards of the victims or asked Hutus to leave. In these circumstances, the only reasonable conclusion is that the assailants who physically perpetrated the killings possessed the intent to destroy, in whole or in substantial part, the Tutsi group.” (Concluding that “Bagosora bears superior responsibility for the crimes committed in Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church and Gikondo Parish”; “Ntabakuze bears superior responsibility for the crimes committed in Kabeza”; and both Bagosora and Ntabakuze “would have been fully aware of the participants’ genocidal intent.”)

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2136-39: “On 11 April 1994, thousands of Tutsi refugees fled from the ETO [*École Technique Officielle*] in Kigali after the Belgian peacekeepers withdrew from the position. They were stopped at the Sonatube junction by soldiers of the Para Commando Battalion [of the Rwandan Armed Forces]. Members of the battalion as well as *Interahamwe* then marched the refugees several kilometres to Nyanza hill. A pick-up truck filled with members of the Para Commando Battalion passed the refugees. At Nyanza, they were waiting. When the refugees arrived, the soldiers opened fire. When they ran out of ammunition, they sent for more. The *Interahamwe* then killed the survivors with traditional weapons.” “Around 15 April, members of the Para Commando Battalion along with *Interahamwe* separated Tutsi from Hutu refugees at IAMSEA [*L’Institut Africain et Mauricien de Statistiques et d’Economie*]. These assailants then led around 60 Tutsis away to a location where other members of the Para Commando Battalion were waiting. The Tutsi refugees were killed.” “Given the manner in which these attacks unfolded, the Chamber finds that the assailants intentionally killed members of the Tutsi ethnic group. In view of the large number of Tutsi victims at Nyanza hill, the separation of Tutsis from Hutus at IAMSEA, and the extensive evidence of the targeting of members of this group in Rwanda, the only reasonable

conclusion is that the assailants who physically perpetrated these attacks possessed the intent to destroy, in whole or in substantial part, the Tutsi group.” (Concluding that “Ntabakuze bears superior responsibility for these crimes” and that “he was aware of the participants’ genocidal intent.”)

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2140-44: “On 7 April 1994, militiamen supported by plainclothes soldiers from the Gisenyi military camp conducted targeted killings in the vicinity of the camp, and primarily in Bugoyi *cellule*. Soldiers accompanied militiamen to the house of a Tutsi teacher, where both groups participated in killing him and his daughter. Hutus suspected of being accomplices, such as Rwabijongo and Kajanja, were also killed by militiamen, as was Rwabijongo’s Tutsi wife. These attacks were followed by the killings of Gilbert, a Tutsi, and another Tutsi man hiding in a compound with him. Mukabutare, a Tutsi, and her daughter were also singled out and killed.” “The Chamber finds that these assailants intentionally killed members of the Tutsi ethnic group. The attack focused primarily on Tutsi victims as well as some Hutus viewed as sympathetic to the RPF [Rwandan Patriotic Front]. The extensive evidence about the targeting of members of this group at this time shows, as the only reasonable conclusion, that the assailants who physically perpetrated these attacks possessed the intent to destroy, in whole or in substantial part, the Tutsi group.” (Concluding, based on circumstantial evidence, that Nsengiyumva ordered the killings; that his orders “substantially assisted” the attack; that Bagosora bears superior responsibility for the crimes; and that both Nsengiyumva and Bagosora were aware of the participants’ genocidal intent.) *See also id.*, paras. 2146-49 (finding genocide as to killings at Mudende University); *id.*, paras. 2150-54 (finding genocide as to the killings at Nyundo seminary and Nyundo parish); *id.*, paras. 2155-57 (finding genocide as to the killings in an operation in the Bisesero area of Kibuye prefecture).

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 400-02: “The Chamber found that the Prosecution proved beyond reasonable doubt that hundreds and possibly more than a thousand Tutsi civilians sought refuge on Kesho Hill [in Rwili secteur, Gaseke commune, in Gisenyi prefecture] on the morning of 8 April 1994. Following a first unsuccessful attack by assailants, the Chamber found that on the morning of 8 April 1994, the Accused arrived at Kesho Hill as part of a convoy which included officials, Presidential Guards, soldiers, *Interahamwe* and civilians.” “The Chamber further found that, upon arrival at the site, the Accused and other officials, including *bourgmestre* Bazabuhande, and Jaribu, the Director of the Rubaya Tea Factory, addressed the assailants from a position close to the road at the base of the hill [T]he Chamber did find that the crowd of assailants applauded the Accused’s speech, and immediately after the three speeches, commenced the attack using guns, grenades and traditional weapons, on the Tutsi civilians who had sought refuge on the hill. The Chamber found that between 800 and 1500 Tutsi were killed that day.” “Given the ethnicity of the victims, the scale of the killings, and the context within which they took place, the only reasonable conclusion is that the physical perpetrators of the killings possessed the intent to destroy in whole or in part the Tutsi ethnic group. Accordingly, the Chamber finds that acts of genocide, as defined under Article 2 of the Statute, took place on Kesho Hill on 8 April 1994.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 413-14: “[O]n 12 April 1994, the Accused passed through the [Kiyovu] roadblock [in Kiyovu cellule, Kigali-ville prefecture] saw about three corpses, and gave orders to the men manning the roadblock to check identity papers ‘well . . . since Tutsis have changed their identification papers.’ On 17 April 1994, the Accused passed through the roadblock again, and instructed Corporal Irandemba to find food for the men so that they could remain at the roadblock. Food was delivered on another day from Camp Kigali. On the same occasion, the Accused promised guns to those manning the roadblock. The promise came following an indication from the men that they required the guns to fight at the ‘battle front.’ Additionally, the Chamber found that those with Tutsi identity cards were taken aside and killed, and at least between 10 and 20 people were killed at the Kiyovu roadblock.” “Given the killing of Tutsi at the Kiyovu roadblock, the context within which the killings took place, and the checking of identification papers specifically for those of Tutsi ethnicity, the Chamber finds that the only reasonable conclusion is that those who physically perpetrated the killings, possessed the intent to destroy in whole, or in part, the Tutsi ethnic group. Accordingly, the Chamber finds that acts of genocide, as defined under Article 2 of the Statute, took place at the Kiyovu roadblock in April 1994.”

Nchamihigo, (Trial Chamber), November 12, 2008, paras. 332-36: “In its factual findings . . . , the Chamber has found direct evidence of Nchamihigo’s genocidal intent, as well as facts and circumstances from which it could be inferred.”

“Some Prosecution witnesses recounted words that Nchamihigo expressed. [Witness] LAG, for instance, testified that Nchamihigo asked him and others to search for Tutsi and kill them, including Father Boneza, who Nchamihigo referred to as a Tutsi. . . .”

“Prosecution Witness AOY gave direct evidence on Nchamihigo’s conduct at PSC [Cyangugu Prefecture Security Council] meetings. He testified that he and Nchamihigo both shared the common intention of exterminating the Tutsi in Cyangugu prefecture, and both participated in making plans and implementing the agreement to exterminate the Tutsi, which included the idea of sparing some Tutsi so as to mislead the international community. In particular, at the PSC meeting on 14 April 1994, Nchamihigo made specific reference to targeting Tutsi at Shangi parish.”

“Nchamihigo’s public exhibition of support for both the MRND [*Mouvement Républicain National pour la Démocratie et le Développement*] and CDR [Coalition for the Defence of the Republic] political parties has been established, as well as his participation in the recruitment of young Hutu men for militia training as *Interahamwe* and *Impuzamugambi*. In addition, most of the refugees who were specifically targeted and killed were Tutsi. At Kamarampaka Stadium, a list of selected individuals to be removed was read out, and everyone on the list except Marianne Baziruwaha was Tutsi. Nchamihigo instigated the *Interahamwe* to kill all the Tutsi removed from Kamarampaka Stadium. All of these acts took place throughout Cyangugu prefecture, and it was established that the victims were Tutsi. The Chamber has found these facts to be proven beyond reasonable doubt.”

“After considering the evidence as a whole, including Nchamihigo’s proven statements, [witness] AOY’s testimony on them sharing a common intent and behaviour

which evinced the intention to kill and the intention to destroy the Tutsi of Cyangugu prefecture, the Chamber finds that Nchamihigo held the requisite specific intent characterizing the crime of genocide which is the intent to destroy in whole or in part an ethnic group.”

Karera, (Trial Chamber), December 7, 2007, paras. 536, 539: “Defence and Prosecution witnesses testified that organized massacres of Tutsi, based on their ethnic identity, started soon after 6 April 1994. The Chamber is satisfied that the killers targeted the victims on the basis of their Tutsi ethnicity, with the intent to destroy a substantial number of Tutsis. The perpetrators were aware that the victims were Tutsis and killed them pursuant to Karera’s order kill Tutsi members of the population. Accordingly, the policemen and *Interahamwe* committed genocide in Nyamirambo sector, Kigali-Ville prefecture, in April 1994, through the killings of Kabahaye, Murekezi, Ndingutse and Palatin Nyagatare.” “Karera’s orders to kill Tutsis demonstrate his genocidal intent. He was aware of the dangerously unstable environment, having evacuated his family from Nyamirambo for safety reasons . . . , and knew that his order would lead to killings. His order to destroy houses of Tutsis as well as the destruction of the houses of Kahabaye and Felix Dix . . . also illustrate his intent.”

Karera, (Trial Chamber), December 7, 2007, paras. 541-42: “On 15 April 1994, Karera and a large group of *Interhamwe* and soldiers participated in an attack at Ntarama Church [in Ntarama, south of Kigali] They arrived on board several buses, disembarked near the church, and shot at the refugees who were gathered there. Several hundred Tutsi men, women and children were killed. The attackers’ intent to destroy a substantial number of Tutsis is clear from their acts. They committed genocide.” “Karera’s genocidal intent is also evident. Just before the attackers began shooting, he encouraged *Interahamwe* and soldiers to hurry up and attack the refugees. Furthermore, the previous day, at the Ntarama sector office, he had falsely promised the Tutsi refugees in the area that he would provide them with security reinforcement He was thus aware of their vulnerable situation. The utterances on 14 and 15 April underscore his genocidal intent.” *See id.*, paras. 543-44 (finding Karera responsible for committing and instigating genocide as to the attack on the church).

Seromba, (Trial Chamber), December 13, 2006, para. 340: “The Chamber . . . considers that it is beyond dispute that during the events of April 1994 in Nyange church, the attackers and other *Interahamwe* militiamen committed murders of [more than 1,500] Tutsi refugees in Nyange church [Nyange parish, Kibuye prefecture] and caused serious bodily or mental harm to them on ethnic grounds, with the intent to destroy them, in whole or in part, as an ethnic group.”

Simba, (Trial Chamber), December 13, 2005, para. 416: “The Chamber has heard extensive evidence, which it accepts, about the targeting of Tutsi civilians in the days immediately after the death of President Habyarimana. A great many Tutsi sought refuge at Murambi Technical School and Kaduha Parish [in Gikongoro prefecture in southern Rwanda] after Hutu militiamen burned and looted their homes. These Tutsi refugees were slaughtered by the thousands over the course of a period of around twelve hours on a single day. Given the scale of the killings and their context, the only

reasonable conclusion is that the assailants who physically perpetrated the killings possessed the intent to destroy in whole or in part a substantial part of the Tutsi group. This genocidal intent was shared by all participants . . . including Simba.”

Muhimana, (Trial Chamber), April 28, 2005, paras. 515-18: “The Chamber finds that the attacks . . . were systematically directed against the *Tutsi* group. Before the attacks on Mubuga Church [in Kibuye prefecture] commenced, *Hutu* refugees, who were intermingled with the *Tutsi*, were instructed to come out of the church. Similarly, both Prosecution and Defence witnesses testified that the refugees who had gathered on Kanyinya and Muyira Hills [Gisovu commune, Kibuye prefecture] were predominantly *Tutsi*.” “Factors such as the sheer scale of the massacres, during which a great number of *Tutsi* civilians died or were seriously injured, and the number of assailants who were involved in the attacks against *Tutsi* civilians, lead the Chamber to the irresistible conclusion that the massacres, in which the Accused participated, were intended to destroy the *Tutsi* group in whole or in part.” “The Accused targeted *Tutsi* civilians during these attacks by shooting and raping *Tutsi* victims. He also raped a young *Hutu* girl, Witness BJ, whom he believed to be *Tutsi*, but later apologised to her when he was informed that she was *Hutu*. During the course of some of the attacks and rapes, the Accused specifically referred to the *Tutsi* ethnic identity of his victims.” “Thus, the Chamber finds that the Accused’s participation in the attacks, and his words and deeds demonstrate his intent to destroy, in whole or in part, the *Tutsi* group.” See also *Muhimana*, (Appeals Chamber), May 21, 2007, para. 31 (upholding same).

Ndindabahizi, (Trial Chamber), July 15, 2004, paras. 462, 461, 463-64: “The Accused instigated, and aided and abetted, this genocide at Gitwa Hill [in the Bisesero Hills, Kibuye prefecture]. He expressly urged the attackers to kill the ‘Tutsi’ assembled there. He distributed machetes and, on at least one occasion, transported armed attackers to the site. He visited Gitwa Hill on two occasions, distributing machetes and urging an attack on the Tutsi. By his words and deeds, the Accused manifested an intent that the Tutsi on Gitwa Hill, who numbered in the thousands, should be attacked and killed. Further, the Accused was well aware that his remarks and actions were part of a wider context of ethnic violence, killing and massacres in Rwanda during this period. The Chamber finds that by urging the killing of the Tutsi on Gitwa Hill, the Accused intended to destroy, in whole or in part, the Tutsi ethnic group.”

“Even in the absence of other massacres, a brutal attack targeting several thousand members of an ethnic group, is itself indicative of the requisite intent to destroy an ethnic group, in whole or in part. Those who participated in the attacks on Gitwa Hill on 26 April and preceding days, committed genocide.”

“The words and deeds of the Accused directly and substantially contributed to the mass killing of Tutsi which subsequently took place at Gitwa Hill. When the Accused arrived, the attackers gathered around; when he spoke, they listened. His position as a Minister of Government lent his words considerable authority. The final attack was launched as little as two days after his last visit, and smaller-scale attacks occurred shortly after his visits to the Hill.”

“By his words, the Accused is guilty of instigating genocide. By his acts of material assistance, including the distribution of weapons and the transportation of attackers, in conjunction with his words of encouragement, the Accused is guilty of

aiding and abetting genocide.” See also *Ndindababizi*, (Appeals Chamber), January 16, 2007, para. 52 (upholding finding of *mens rea* for genocide).

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 259: “[A]t the meeting of 9 April, the Accused urged the *conseillers de secteur* to incite the Hutu to kill the Tutsi. Similarly, in the morning of 13 April at the Nyakarambi market, on 14 April at the Rwanteru and Kanyinya trading centres, the Accused made similar utterances to the population, and on 17 April, he instigated the rape of Tutsi women and girls. Moreover, the Accused personally killed Murefu, a Tutsi, thereby signalling the beginning of the attack at Nyarubuye Parish on 15 April 1994. The Chamber finds that at the time of the events in Rusumo *commune*, which events have been established in the factual findings above, Sylvestre Gacumbitsi had the intent to destroy, in whole or in part, the Tutsi ethnic group.” See also *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 43 (upholding finding by Trial Chamber: “[Gacumbitsi’s] repeated exhortations to crowds of people that they should kill all the Tutsis, even considered apart from his other actions, leave room for no other reasonable inference.”).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 690: “The Chamber . . . finds that the soldiers at the Gashirabwoba football field [in Cyangugu] possessed the requisite genocidal intent during the killings on 12 April 1994, that is, to destroy, in whole or in part, members of the Tutsi ethnic group. It has not been disputed that the Tutsi were considered an ethnic group during the events in 1994. The soldiers’ intention to destroy the Tutsi group, in whole or in part, can be inferred from the context of the massacre at the Gashirabwoba football field and from the other events occurring in Cyangugu at that time. The Chamber recalls that soldiers came to the football field the evening before the massacre and asked the refugees whether they were all Tutsis. The refugees informed the soldiers that there were some Hutus amongst them. Thus, the soldiers were aware that the primary ethnic composition of the refugees at the Gashirabwoba football field was Tutsi. In the Chamber’s view, the manner in which the soldiers killed the refugees and the resulting large number of victims reflect the soldiers’ intention to destroy members of the Tutsi ethnic group, in whole or in part. In reaching this conclusion, the Chamber has also considered the overwhelming evidence in this case that, at the time of the massacre at the Gashirabwoba football field, thousands of Tutsis in Cyangugu were being forced to seek refuge at parishes and schools or to hide in the bush because their Hutu neighbours and *Interahamwe* attacked them in their homes.” (However, Imanishimwe’s conviction under Article 6(3) for crimes at the Gashirabwoba football field was reversed on appeal due to indictment defects, *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 150; Ntagerura and Bagambiki were acquitted as to all crimes).⁶

Kajelijeli, (Trial Chamber), December 1, 2003, paras. 819-28: The court concluded that “[t]he words and deeds of the Accused show clearly that he directed and participated in those killings with the specific intent to destroy the Tutsi ethnical group,” based on the following:

⁶ See “where involvement in massacre pursued under 6(1) theory, error to convict under 6(3),” under “the right to be informed promptly and in detail of the nature and cause of the charge (indictment defects),” “application—‘curing’ not permitted,” Section (VIII)(c)(ix)(7)(m)(v), this Digest.

- the Accused's statement: "you very well know that it was the Tutsi that killed – that brought down the Presidential plane. What are you waiting for to eliminate the enemy?"
- "the Accused reminded those present at the Nkuli *Commune* Office of the understanding they had reached the previous evening and that it was now their 'business to act' regarding an attack on 12 Tutsi families or approximately 80 people";
- an individual reported back to the Accused as to the attack "that they had 'eliminated everything'";
- "the Accused asked *Bourgmestre* Harerimana for Police officers to assist in the killing of Tutsi";
- "at Byangabo market on the morning of 7 April 1994, . . . the Accused assembled members of the *Interahamwe*, and instructed them to '[k]ill and exterminate all those people in Rwankeri' and to 'exterminate the Tutsis.' He also ordered them to dress up and 'start to work'";
- the Accused "direct[ed] the *Interahamwe* from Byangabo market towards Rwankeri Cellule, to join [an] attack" which "killed approximately 80 entire Tutsi families";
- the Accused gave orders to "'fine comb'" the Nkuli *commune* for Tutsis, resulting in one *Intrahamwe* member murdering a Tutsi woman and her seven children in Gitwa *secteur* in the Nkuli commune;
- the Accused was present at a roadblock where the *Interahamwe* killed a Tutsi victim named Musafiri and her son, and the Accused stated: "No Tutsi should survive at Mukingo";
- when a witness pled with the Accused to stop the killings, the Accused responded by saying "that it was necessary to continue, look for those or hunt for those who had survived."

Niyitegeka, (Trial Chamber), May 16, 2003, para. 427: In finding Niyitegeka guilty of conspiracy to commit genocide, the Chamber held as follows: "Considering the Accused's participation and attendance at meetings . . . to discuss the killing of Tutsi in Bisesero, his planning of attacks against Tutsi in Bisesero, his promise and distribution of weapons to attackers to be used in attacks against Tutsi, his expression of support . . . of the Prime Minister, Jean Kambanda, and the Interim Government, and actions or inactions in failing to protect the Tutsi population, and his leadership role in conducting and speaking at the meetings . . . the Chamber finds that the Accused had the requisite intent, together with his co-conspirators, to destroy, in whole or in part, the Tutsi ethnic group."

Niyitegeka, (Trial Chamber), May 16, 2003, paras. 436-37: In finding Niyitegeka guilty of direct and public incitement to commit genocide, the Chamber held as follows: "Considering the Accused's spoken words, urging the attackers to work, thanking, encouraging and commending them for the 'work' they had done, 'work' being a reference to killing Tutsi . . . the Chamber finds that the Accused had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group."

Rutaganda, (Trial Chamber), December 6, 1999, para. 399: “The Chamber notes that many corroborating testimonies presented at trial show that the Accused actively participated in the widespread attacks and killings committed against the Tutsi group. The Chamber is satisfied that the Accused, who held a position of authority because of his social standing, the reputation of his father and, above all, his position within the Interahamwe, ordered and abetted in the commission of crimes against members of the Tutsi group. He also directly participated in committing crimes against Tutsis. The victims were systematically selected because they belonged to the Tutsi group and for the very fact that they belonged to the said group. As a result, the Chamber is satisfied beyond any reasonable doubt that, at the time of commission of all the above-mentioned acts which in its opinion are proven, the Accused had indeed the intent to destroy the Tutsi group as such.” See *Rutaganda*, (Appeals Chamber), May 26, 2003, paras. 529-30 (upholding same).

Akayesu, (Trial Chamber), September 2, 1998, paras. 117-21, 168-69: The Chamber found the following sufficient to demonstrate “intent to destroy, in whole or in part”:

- expert and other testimony showing statements of political leaders, songs, and popular slogans which evidenced an intent to eliminate all Tutsis in Rwanda;
- testimony on the cutting of Achilles’ tendons to prevent victims from fleeing;
- expert testimony and images of bodies thrown into a tributary of the Nile, showing the intent to return Tutsis to their alleged place of origin;
- testimony on the killing of newborns;
- testimony of proverbs and public statements advocating the killing of pregnant women, including Hutu women carrying fetuses of Tutsi men, because of the patrilinear society.

See also *Muvunyi*, (Trial Chamber), September 12, 2006, para. 496 (finding that the accused possessed intent to destroy, in whole or in part, the Tutsi ethnic group, as such, and entering conviction for aiding and abetting genocide). The aiding and abetting genocide conviction, however, was reversed on appeal on the grounds that “the Trial Chamber erred in inferring . . . that Muvunyi had knowledge of or tacitly approved of the killing of Tutsis at the *Groupe scolaire*” in Butare prefecture. See *Muvunyi*, (Appeals Chamber), August 29, 2008, paras. 87-88.

See also “notice of genocide in Rwanda,” under “judicial notice,” Section (VIII)(d)(xiii)(4), this Digest.

d) Underlying crimes/ *actus reus*

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 251: “The ***actus reus*** of genocide is found in each of the five acts enumerated in Article 2(2) of the Statute.” (emphasis in original.) See also *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 631 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 812 (similar).⁷

⁷ Although cases refer to the five acts enumerated in Article 2(2) of the Statute as the “*actus reus* of genocide,” because each of those five acts have an *actus reus* and a *mens rea*, it may be less confusing to use the term “underlying crimes” to describe the five acts.

i) killing members of the group

1) defined/ *actus reus*

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2117: “Killing members of the group requires a showing that the principal perpetrator intentionally killed one or more members of the group.” *See also Simba*, (Trial Chamber), December 13, 2005, para. 414 (same); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 664 (same).

Seromba, (Trial Chamber), December 13, 2006, para. 317: “[I]n *Musema*, the Trial Chamber defined ‘killing’ as ‘homicide committed with intent to cause death.’”

Muvunyi, (Trial Chamber), September 12, 2006, para. 486: For the underlying crime of killing members of the group, “the Prosecutor must also show that the accused intentionally killed one or more members of the group, and that the victim or victims belonged to the targeted protected group.”

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 255: “The case-law of the Tribunal shows that for a conviction of genocide to be entered against a person charged with killing members of a group, the Prosecution must establish that the accused planned, ordered or instigated the killing, killed or aided and abetted in the killing of one or several members of the group in question with intent to destroy, in whole or in part, the group as such. Evidence must also be tendered to show either that the victim belonged to the targeted ethnical, racial, national or religious group or that the perpetrator of the crime believed that the victim belonged to the said group.”

Kamubanda, (Trial Chamber), January 22, 2004, para. 632: “[T]he Prosecution bears the burden of proof to show that the perpetrator participated in the killing of one or more members of the targeted group”

Semanza, (Trial Chamber), May 15, 2003, para. 319: “[T]he Prosecutor must show the following elements: (1) the perpetrator intentionally killed one or more members of the group . . . ; and (2) such victim or victims belonged to the targeted ethnical, racial, national, or religious group.”

See also “victim must belong to protected group or be believed to so belong—mistaken identities,” Section (I)(c)(iv)(5)(c), this Digest.

2) mental state (*mens rea*)

(a) intent require for both “killing” and “*meurtre*”

Kayishema and Ruzindana, (Appeals Chamber), June 1, 2001, para. 151: “[T]here is virtually no difference” between the terms “killing” and “*meurtre*” as either term is linked to the intent to destroy in whole or in part. Both should refer to intentional but not necessarily premeditated murder.

Rutaganda, (Trial Chamber), December 6, 1999, para. 50: “Article 2(2)(a) of the Statute, like the corresponding provisions of the Genocide Convention, refers to ‘meurtre’ in the French version and to ‘killing’ in the English version. In the opinion of the Chamber, the term ‘killing’ includes both intentional and unintentional homicides, whereas the word ‘meurtre’ covers homicide committed with the intent to cause death. Given the presumption of innocence, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the Accused should be adopted, and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder in the Criminal Code of Rwanda, which provides, under Article 311, that ‘[h]omicide committed with intent to cause death shall be treated as murder.’” *See also Musema*, (Trial Chamber), January 27, 2000, para. 155 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, paras. 57-58 (similar).

Akayesu, (Trial Chamber), September 2, 1998, paras. 500-01: The Chamber noted that the French version of the Statute uses “*meurtre*” while the English version uses “killing.” The Chamber found that “killing” was “too general since it could . . . include both intentional and unintentional homicides whereas the term ‘*meurtre*’ . . . is more precise.” Thus, the Chamber held that “‘*meurtre*’ is homicide committed with the intent to cause death.”

(b) no premeditation required

Muvunyi, (Trial Chamber), September 12, 2006, para. 486: “A showing of premeditation is not necessary.” *See also Kayishema and Ruzindana*, (Appeals Chamber), June 1, 2001, para. 151 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 414 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 664 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 632 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 319 (similar).

Kajelijeli, (Trial Chamber), December 1, 2003, para. 813: “[I]n order to be held [responsible] for genocide by killing members of the group, the Prosecutor must show that the perpetrator, killed one or more members of the group, while the perpetrator possessed an intent to destroy the group, as such, in whole or in part. Given that the element of *mens rea* in the killing has been addressed in the special intent for genocide, there is no requirement to prove a further element of premeditation in the killing.”⁸

3) application

Seromba, (Trial Chamber), December 13, 2006, paras. 332, 334-38: “Athanase Seromba turned employees and Tutsi refugees out of Nyange parish [Kibuye prefecture]. It is the Chamber’s opinion that, by so acting, Seromba assisted in the killing of several Tutsi refugees, including Patrice and Meriam [T]he Chamber finds that Athanase Seromba held discussions with the communal authorities and accepted their decision to

⁸ This case is phrased as if the prosecution is always required to show that the accused “killed one or more members of the group.” That is not necessarily required for many forms of responsibility—“planning,” “instigating,” “ordering,” “aiding and abetting,” participation in a “joint criminal enterprise” (a form of committing), or command responsibility. *See generally* “planning,” “instigating,” “ordering,” “aiding and abetting,” “joint criminal enterprise” and “command responsibility,” Sections (IV)(c)-(e), (IV)(g), (IV)(f)(iv), and (V), this Digest. *See also* “committing: not limited to direct and physical perpetration of the crimes(s),” Section (IV)(f)(i)(1), this Digest.

destroy the church. The Chamber also concludes that Seromba spoke with the bulldozer driver and said certain words to him which encouraged him to destroy the church. Lastly, the Chamber finds that Seromba even gave advice to the bulldozer driver as to the fragile side of the church building. The Chamber is satisfied that by adopting such a line of conduct, Seromba substantially contributed to the destruction of the Nyange church, causing the death of more than 1,500 Tutsi refugees In view of the foregoing, the Chamber is satisfied beyond a reasonable doubt that the Accused had committed the *actus reus* of aiding and abetting killing of refugees in Nyange church.”

“The Chamber is satisfied that, given the security situation which prevailed in Nyange parish, Athanase Seromba could not have been unaware that by turning refugees out of the presbytery, he was substantially contributing to their being killed by the attackers Furthermore, the Chamber is of the view that Athanase Seromba could not have been unaware of the legitimising effect that his words would have on the actions of the communal authorities and the bulldozer driver. The Chamber is also of the view that Seromba knew perfectly well that his approval of the decision by the authorities to destroy Nyange church and his words of encouragement to the bulldozer driver would contribute substantially towards the destruction of the church and the death of the numerous refugees trapped inside In view of the foregoing, the Chamber is satisfied that the *mens rea* of the Accused in aiding and abetting the killing of refugees in Nyange church has been proved beyond reasonable doubt.”

Simba, (Trial Chamber), December 13, 2005, para. 415: “The Chamber has found that Simba participated in a joint criminal enterprise to kill Tutsi civilians at Murambi Technical School and Kaduha Parish [in Gikongoro prefecture in southern Rwanda] by providing weapons and lending encouragement and approval to the physical perpetrators. In its findings on criminal responsibility, the Chamber described this assistance as having a substantial effect on the killings that followed. The assailants at these sites killed thousands of Tutsi civilians. Given the manner in which the attacks were conducted, the Chamber finds that the assailants intentionally killed members of a protected group.”

Muhimana, (Trial Chamber), April 28, 2005, paras. 512-13: “The Chamber has found that, during the months of April and May 1994, the Accused participated in acts of killing members of the *Tutsi* ethnic group and causing serious bodily or mental harm to members of the *Tutsi* ethnic group.” “The Chamber finds that, through personal commission, the Accused killed and caused serious bodily or mental harm to members of the *Tutsi* group [at various locations in Kibuye prefecture]:

- (a) By taking part in attacks at Nyarutovu and Ngendombi Hills, where he shot and wounded a *Tutsi* man called Emmanuel;
- (b) By taking part in an attack at Mubuga Church, where he shot at *Tutsi* refugees and threw a grenade into the church where refugees were gathered. The grenade explosion killed a *Tutsi* man called Kaihura and seriously wounded many others. Many *Tutsi* refugees died or were injured in the attack;
- (c) By taking part in attacks at Mugonero Complex, where he raped *Tutsi* women and shot at *Tutsi* refugees. Many *Tutsi* refugees died or were injured in the attack;

- (d) By taking part in attacks at Kanyinya Hill, where he pursued and attacked *Tutsi* refugees and shot a *Tutsi* man called Nyagihigi;
- (e) By taking part in attacks at Muyira Hill, where he shot and killed the sister of Witness W, a *Tutsi*.”

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 261-62: “[A] substantial number of *Tutsi* civilians were killed in Rusumo *commune* between 7 and 18 April 1994. In particular, the Chamber found that the Accused killed Murefu, a *Tutsi* civilian, on 15 April 1994 in Nyarubuye Parish. The Chamber also found that the Accused participated in the attack on Nyarubuye Parish on 15 and 16 April 1994. Lastly, the Chamber also found that on 17 April, Chantal, a young *Tutsi* girl, died as a result of the impalement of her genitals, at the instigation of the Accused. The Chamber is persuaded that the Accused played a leading role in conducting and, especially, supervising the attack.” “The Chamber therefore finds that during the period covered by the Indictment, Sylvestre Gacumbitsi participated in the killing of *Tutsi* with the required genocidal intent.”

Kamubanda, (Trial Chamber), January 22, 2004, paras. 646-47: “The Chamber has found that a large number of members of the *Tutsi* ethnic group were killed by Interahamwe, soldiers, policemen and individuals from the local population at the Gikomero Parish Compound on 12 April 1994.” “Accordingly, the Chamber finds that genocidal killings of members of the *Tutsi* group occurred at the Gikomero Parish Compound, in Gikomero *commune*, Kigali-Rural *préfecture* [*sic*], on 12 April 1994.”

Akayesu, (Trial Chamber), September 2, 1998, paras. 114-16: The Chamber found the following evidence of widespread killings throughout Rwanda sufficient to show both “killing” and “causing serious bodily harm to members of a group”:

- testimony regarding “heaps of bodies . . . everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed;”
- testimony stating that “many wounded persons in the hospital . . . were all *Tutsi* and . . . apparently, had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles' tendon, to prevent them from fleeing;”
- testimony that the “troops of the Rwandan Armed Forces and of the Presidential Guard [were] going into houses in Kigali that had been previously identified in order to kill” and testimony of other murders elsewhere;
- “photographs of bodies in many churches” in various areas;
- testimony regarding “identity cards strewn on the ground, all of which were marked “*Tutsi*.””

See also Kajelijeli, (Trial Chamber), December 1, 2003, paras. 829-35 (findings as to killing members of the *Tutsi* group).

ii) causing serious bodily or mental harm to members of the group

1) defined/ *actus reus*

Seromba, (Appeals Chamber), March 12, 2008, para. 46: “To support a conviction for genocide [committed through the infliction of serious bodily or mental harm], the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 487: “[T]he various Trial Chambers have concluded that the intent of the framers [of the Genocide Convention, regarding the infliction of serious bodily or mental harm] was to punish serious acts of physical violence that do not necessarily result in the death of the victim.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 633: “Regarding the requirement under Article 2(2)(b) that in order to be held [responsible for] causing serious bodily or mental harm to members of the group, the International Law Commission has indicated that this covers two types of harm that may be inflicted on an individual, namely bodily harm which involves some type of physical injury and mental harm which involves some type of impairment of mental faculties. The International Law Commission further observed that the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 814 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 634: “Trial Chambers of the Tribunal have held that what is ‘bodily’ or ‘mental’ harm should be determined on a case-by-case basis” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 815 (same); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 108, 113 (similar).

(a) serious bodily harm

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2117: “The term ‘causing serious bodily harm’ refers to acts of sexual violence, serious acts of physical violence falling short of killing that seriously injure the health, cause disfigurement, or cause any serious injury to the external or internal organs or senses.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 487 (similar).

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 291: “Serious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence.” *See also Muhimana*, (Trial Chamber), April 28, 2005, para. 502 (similar).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 664: “The term causing serious bodily harm refers to serious acts of physical violence falling short of killing that seriously injure the health, cause disfigurement, or cause any serious injury to the external or internal organs or senses.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 317 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 109 (similar).

(b) serious mental harm

Seromba, (Appeals Chamber), March 12, 2008, para. 46: “[S]erious mental harm includes ‘more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat.’” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 317 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 664 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 634 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 815 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 321 (similar).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2117: “Serious mental harm refers to more than minor or temporary impairment of mental faculties.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 487: “[T]he term ‘serious mental harm’ has been interpreted to mean a significant injury to the mental faculties of the victim.”

Muhimana, (Trial Chamber), April 28, 2005, para. 502: “[S]erious mental harm can be construed as some type of impairment of mental faculties or harm that causes serious injury to the mental state of the victim.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 291 (same).

(c) harm need not be permanent or irremediable

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2117: “The serious bodily or mental harm . . . need not be an injury that is permanent or irremediable.” *See also Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 664 (same); *Semanza*, (Trial Chamber), May 15, 2003, paras. 320-22; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 59; *Musema*, (Trial Chamber), January 27, 2000, para. 156; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 51; *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 108; *Akayesu*, (Trial Chamber), September 2, 1998, para. 502.

Muhimana, (Trial Chamber), April 28, 2005, para. 502: “[Serious bodily harm] need not necessarily be irremediable.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 291 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 317: Serious mental harm “need not . . . entail permanent or irremediable harm.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 487: “An accused can be found guilty of causing serious bodily harm even if the injury suffered by the victim is not of a permanent or irremediable nature.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 634 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 815 (similar).

(d) examples of acts that qualify

Seromba, (Appeals Chamber), March 12, 2008, para. 46: “The quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs Indeed, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2117: “[Serious bodily or mental harm] can include crimes of sexual violence, including rape.”

Kamubanda, (Trial Chamber), January 22, 2004, para. 634: “[Serious bodily harm] includes non-mortal acts of sexual violence, rape, mutilations and interrogations combined with beatings and/or threats of death.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 815 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 108 (similar).

Rutaganda, (Trial Chamber), December 6, 1999, para. 51: “[S]erious bodily or mental harm” “include[s] acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 317 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 59 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 156 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 504 (similar).

Akayesu, (Trial Chamber), September 2, 1998, para. 688: Rape and other acts of sexual violence constitute infliction of “serious bodily or mental harm” on members of the group.

Akayesu, (Trial Chamber), September 2, 1998, paras. 711-12: Death threats during interrogation, alone or coupled with beatings, constitute infliction of “serious bodily or mental harm” inflicted on members of the group.

2) *mens rea*

Muvunyi, (Trial Chamber), September 12, 2006, para. 487: “For an accused to be convicted of causing serious bodily or mental harm under the Statute, it must be shown that the perpetrator, in addition to possessing the requisite *mens rea* for genocide, acted with intent to cause such harm to one or more members of the protected group in question and that the victim or victims did in fact belong to the targeted group.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 112: “The Chamber considers that an accused may be held [responsible of the infliction of serious mental harm] under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental harm in pursuit of the specific intention to destroy a group in whole or in part.”

Compare “*mens rea* for type #3” joint criminal enterprise, Section (IV)(f)(iv)(11)(a); “*mens rea*” for aiding and abetting, Section (IV)(g)(iii); *mens rea* under Article 6(3), Section

(V)(c)(ii); “*mens rea*” for complicity as to genocide, Section (I)(e)(v)(2), this Digest. (For these forms of responsibility, the accused need not possess genocidal intent.)

3) application

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 292: “[T]he Chamber has already found that the Accused publicly instigated the rape of Tutsi women and girls, and that the rape of Witness TAQ and seven other Tutsi women and girls by attackers who heeded the instigation was a direct consequence thereof. The Chamber finds that these rapes caused serious physical harm to members of the Tutsi ethnic group. Thus, the Chamber finds that, as to the specific crime of serious bodily harm, Sylvestre Gacumbitsi incurs responsibility for the crime of genocide by instigating the rape of Tutsi women and girls.”⁹ See also *Muhimana*, (Trial Chamber), April 28, 2005, paras. 512-13 (findings as to killing and causing serious bodily harm).

Compare Seromba, (Appeals Chamber), March 12, 2008, paras. 47-49: “The Appeals Chamber notes that the Trial Chamber did not clearly differentiate the *actus reus* of the underlying crime and the *actus reus* for aiding and abetting that crime. The Trial Chamber suggested that ‘[Athanase] Seromba’s refusal to allow the refugees to get food from the banana plantation substantially contributed to their physical weakening’ and that ‘[Athanase] Seromba’s order prohibiting refugees from getting food from the banana plantation, his refusal to celebrate mass in Nyange church [Nyange parish, Kibuye prefecture], and his decision to expel employees and Tutsi refugees’ facilitated their ‘living in a constant state of anxiety.’ Beyond these vague statements, the only other reference in the Trial Judgement to the underlying acts that caused serious bodily or mental harm is the conclusory statement that ‘it is beyond dispute that during the events of April 1994 in Nyange church, the attackers and other *Interahamwe* militiamen [...] caused serious bodily or mental harm to [the Tutsi refugees] on ethnic grounds, with the intent to destroy them, in whole or in part, as an ethnic group.’” “The Trial Chamber failed to define the underlying crime to which Athanase Seromba’s actions supposedly contributed. It also had a duty to marshal evidence regarding the existence of the underlying crime that caused serious bodily or mental harm, and its parsimonious statements fail to do so [T]herefore, Athanase Seromba’s conviction for aiding and abetting such a crime cannot stand.”

iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

1) defined/ *actus reus*

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 115-16: “[D]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” “include[s] circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion” and “methods of destruction which do not

⁹ Although this case refers to the rapes as having “caused serious physical harm to members of the Tutsi ethnic group,” it is a “substantial contribution,” not causation, that is required. See “*actus reus*/ participation (element 1): contribution must have substantially contributed to, or had a substantial effect on, the completion of the crime,” Section (IV)(b)(iv)(1), this Digest.

immediately lead to the death of members of the group.” “[T]he conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period.”

Akayesu, (Trial Chamber), September 2, 1998, paras. 505-06: This phrase [deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part] means “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.” This includes, “*inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 157 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 52 (similar).

2) application

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 548: The Chamber held that although the Tutsi group in Kibuye were “deprived of food, water and adequate sanitary and medical facilities,” “these deprivations were *not* the deliberate creation of conditions of life . . . intended to bring about their destruction” because these “deprivations . . . were a result of the persecution of the Tutsis, with the intent to exterminate them within a short period of time thereafter.” Furthermore, the Chambers found that the times periods “were not of sufficient length or scale to bring about destruction of the group.”

iv) imposing measures intended to prevent births within the group

Akayesu, (Trial Chamber), September 2, 1998, paras. 507-08: “[I]mposing measures intended to prevent births within the group” includes: “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example . . . is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.” The Chamber noted that the measures may be mental as well as physical. “For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 158; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 53; *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 117.

v) forcibly transferring children of the group to another group

Akayesu, (Trial Chamber), September 2, 1998, para. 509: “[T]he objective [of the crime of forcibly transferring children of the group to another group] is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 159; *Rutaganda*, (Trial Chamber),

December 6, 1999, para. 54; *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 118.

e) Punishable acts

i) genocide

See discussion above. For planning genocide, see “planning,” Section (IV)(c); for instigating genocide, see “instigating,” Section (IV)(d); for ordering genocide, see “ordering,” Section (IV)(e); for committing genocide, see “committing,” Section (IV)(f); for aiding and abetting genocide, see “aiding and abetting,” Section (IV)(g); for command responsibility as to genocide, see Section (V), this Digest.

ii) conspiracy to commit genocide

1) defined/ *actus reus*

(a) agreement between two or more persons to commit genocide

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 894: “Conspiracy to commit genocide under Article 2(3)(b) of the Statute has been defined as ‘an agreement between two or more persons to commit the crime of genocide.’ The existence of such an agreement between individuals to commit genocide (or ‘concerted agreement to act’) is its material element (*actus reus*)” See also *Seromba*, (Appeals Chamber), March 12, 2008, para. 218 (similar); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 896 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 92 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2087 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 405 (similar); *Seromba*, (Trial Chamber), December 13, 2006, para. 345 (similar).

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 389: “The *actus reus* [of conspiracy to commit genocide] is entering into an agreement to pursue a common objective of committing genocide”

Seromba, (Trial Chamber), December 13, 2006, para. 345: “[T]he essential element of the crime of conspiracy to commit genocide is ‘the act of conspiracy itself, in other words, the process (*“procédé”*) of conspiracy [...] and not its result.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1042: “The offence of conspiracy requires the existence of an agreement, which is the defining element of the crime of conspiracy.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 787: “[C]onspiracy to commit genocide is to be defined as, [a]n agreement between two or more persons to commit the crime of genocide.” See also *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 389 (similar); *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1041 (same); *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 423 (same); *Ntakirutimana*

and *Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 798 (same); *Musema*, (Trial Chamber), January 27, 2000, para. 191 (source of quote).

(b) agreement may be inferred

Seromba, (Appeals Chamber), March 12, 2008, para. 221: “Th[e] *actus reus* can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on other evidence. However, as in any case where the Prosecution intends to rely on circumstantial evidence to prove a particular fact upon which the guilt of the accused depends, the finding of the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.” *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 896 (similar); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 389 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2088 (similar).

See, e.g., Seromba, (Trial Chamber), December 13, 2006, para. 346: “[I]n *Niyitegeka*, the Chamber inferred the existence of conspiracy to commit genocide from the participation by the Accused in meetings held for the purpose of planning the massacre of Tutsi, his words and the leadership he exercised during those meetings, his involvement in the planning of attacks against the Tutsi and his role in the distribution of weapons to the attackers.”

(c) formal agreement not required

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 898: “[T]he Appeals Chamber considers that the agreement need not be a formal one. It stresses in this respect that the United States Supreme Court has also recognized that the agreement required for conspiracy ‘need not be shown to have been explicit.’ The Appellant is thus mistaken in his submission that a tacit agreement is not sufficient as evidence of conspiracy to commit genocide. The Appeals Chamber recalls, however, that the evidence must establish beyond reasonable doubt a concerted agreement to act, and not mere similar conduct.” *See also Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1045.

Bikindi, (Trial Chamber), December 2, 2008, para. 405: “The agreement need not be formal.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 787: “The agreement in a conspiracy is one that may be established by the prosecutor in no particular manner, but the evidence must show that an agreement had indeed been reached. The mere showing of a negotiation in process will not do . . . :

It may be that an agreement in the strict sense required by the law of contract is not necessary but the parties must at least have reached a decision to perpetuate the unlawful object”

(d) concerted or coordinated action may show agreement

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 896-97: “[A] concerted agreement to commit genocide may be inferred from the conduct of the

conspirators.” “The Appeals Chamber takes the view that the concerted or coordinated action of a group of individuals can constitute evidence of an agreement. The qualifiers ‘concerted or coordinated’ are important: as the Trial Chamber recognized, these words are ‘the central element that distinguishes conspiracy from “conscious parallelism,” the concept put forward by the Defence to explain the evidence in this case.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2088: “The concerted or coordinated action of a group of individuals can constitute evidence of an agreement. The qualifiers ‘concerted or coordinated’ are important: it is not sufficient to simply show similarity of conduct.”

Bikindi, (Trial Chamber), December 2, 2008, para. 405: “[The agreement] can be proved by evidence of meetings to plan genocide, but it can also be inferred from other evidence, such as the conduct of the conspirators or their concerted or coordinated action.”

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1047: “[C]onspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework. A coalition, even an informal coalition, can constitute such a framework so long as those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of their common purpose.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 346 (endorsing first sentence).

(e) inferring conspiracy from the interaction between institutions

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 907: “The Appeals Chamber is of the opinion that in certain cases the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions. As explained above, the existence of the conspiracy would, however, have to be the only reasonable inference to be drawn from the evidence.” *See also id.*, para. 1048 (similar). (The Appeals Chamber, however, found no conspiracy; *see id.*, para. 910.)

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2088: “In certain cases the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions.”

(f) overt act not a required element

For discussion of why overt acts are not required for conspiracy, see *Nabimana, Barayagwiza and Ngeze*, (Appeals Chamber), Partly Dissenting Opinion of Judge Shahabuddeen, November 28, 2007, paras. 2-6.

(g) conspiracy need not be successful/ is an inchoate offense

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 720: “[T]he crime of direct and public incitement to commit genocide is an inchoate offence, like conspiracy to commit genocide (Article 2(3)(b) of the Statute)”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 389: “The crime of conspiracy to commit genocide is complete at the moment of agreement regardless of whether the common objective is ultimately achieved.”

Bikindi, (Trial Chamber), December 2, 2008, para. 405: “As an inchoate crime, conspiracy to commit genocide is punishable even if the crime of genocide has not actually been committed.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 788 (similar); *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 423 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 194 (similar).

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1044: “[C]onspiracy is an inchoate offence”

See also “inchoate and continuing crimes,” Section (I)(c)(iii)(3)(a), this Digest.

(2) mens rea

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 894: “[T]he individuals involved in the [conspiratorial] agreement must have the intent to destroy in whole or in part a national, ethnical, racial or religious group as such (*mens rea*).” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2087 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 405 (similar).

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 389: “[T]he *mens rea* [of conspiracy to commit genocide] is the intent to enter into such an agreement [to pursue a common objective of committing genocide]. The Prosecution must also prove that the accused shared the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, with his co-conspirators.”

Seromba, (Trial Chamber), December 13, 2006, para. 347: “The *mens rea* of the crime of conspiracy to commit genocide is the same as the intent required for the crime of genocide, and rests on the specific intent to commit genocide.”

Musema, (Trial Chamber), January 27, 2000, para. 192: The *mens rea* of the crime of conspiracy to commit genocide “rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.” The “requisite intent for the crime of conspiracy to commit genocide is . . . the intent required for the crime of genocide, that is the *dolus specialis* of genocide.”

(3) application

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2089-90: “The Tribunal’s case law has addressed the issue of conspiracy in eight cases:

Kajelijeli, Kambanda, Musema, Nahimana et al., Niyitegeka, Ntagerura et al., Ntakirutimana and Seromba. Of the eight cases, a conspiracy was found by the Trial Chamber to exist in three of them: *Kambanda, Nahimana et al.* and *Niyitegeka*. Prime Minister Jean Kambanda pleaded guilty to conspiring with other ministers and officials in his government to commit genocide after 8 April 1994. The conspiracy conviction in *Niyitegeka* concerned a specific attack in the Bisesero region of Kibuye prefecture in June 1994 and was based on his participation and statements in several meetings in that region around the same time. In *Nahimana et al.*, the Trial Chamber convicted the three Accused ‘for consciously interact[ing] with each other, using the institutions they controlled [*Kangura* newspaper, RTLM (*Radio Télévision Libre des Mille Collines*) and the CDR (*Coalition pour la défense de la République*) political party] to promote a joint agenda, which was the targeting of the Tutsi population for destruction.’ The Appeals Chamber, however, reversed the finding in *Nahimana et al.* because, while the factual basis for the conviction was consistent with a joint agenda to commit genocide, it was not the only reasonable conclusion from the evidence.”

“It is also noteworthy that in the *Kajelijeli* case, the Prosecution charged the Accused with an overarching conspiracy including military personnel, members of the government and political leaders to commit genocide which spanned from 1990 to 1994. The Trial Chamber found that the Accused participated in creating lists of Tutsis as well as discussions on the arming and training militiamen to fight the RPF [the Tutsi-led Rwandan Patriotic Front] and its accomplices. The Trial Chamber, however, was not satisfied on this evidence alone that these actions were taken for the purpose of eliminating Tutsis.”

Niyitegeka, (Trial Chamber), May 16, 2003, para. 428: “Bearing in mind that the Accused and others acted together as leaders of attacks against Tutsi . . . taking into account the organized manner in which the attacks were carried out, which presupposes the existence of a plan, and noting, in particular, that the Accused sketched a plan for an attack in Bisesero at a meeting . . . to which the people in attendance . . . agreed, the Chamber finds that the above facts evidence the existence of an agreement [*i.e.*, conspiracy] between the Accused and others . . . to commit genocide.” (The Appeals Chamber affirmed the conviction.)

Compare Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 906: “The Appeals Chamber finds that, even if th[e] evidence is capable of demonstrating the existence of a conspiracy to commit genocide among the Appellants, on its own it is not sufficient to establish the existence of such a conspiracy beyond reasonable doubt. It would also have been reasonable to find, on the basis of this evidence, that the Appellants had collaborated and entered into an agreement with a view to promoting the ideology of ‘Hutu power’ in the context of the political struggle between Hutu and Tutsi, or even to disseminate ethnic hatred against the Tutsi, without, however, going as far as their destruction in whole or in part. Consequently, a reasonable trier of facts could not conclude that the only reasonable inference was that the Appellants had conspired together to commit genocide.”

Compare Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2092-93, 2097, 2107-13: “[T]he question under consideration is not

whether there was a plan or conspiracy to commit genocide in Rwanda. Rather, it is whether the Prosecution has proven beyond reasonable doubt based on the evidence in this case that the four Accused committed the crime of conspiracy.” “[T]he Accused are charged with a conspiracy pre-dating 7 April and not a conspiracy which was formed after that date.”

“[T]he Prosecution acknowledges that its case is principally circumstantial. There are only a few alleged meetings which could be characterised as planning genocide. The allegations instead refer, among other things, to statements made by the Accused, their affiliation with certain clandestine organisations, general warnings, of which some were circulated publicly, that the *Interahamwe* or groups with the military were plotting assassinations and mass killings, and their role in the preparation of lists as well as the arming and training of civilians.”

“[T]he Chamber cannot exclude that there were in fact plans prior to 6 April to commit genocide in Rwanda. As the Prosecution argues, there are certain indications in the evidence of a prior plan or conspiracy to perpetrate a genocide as well as other politically motivated killings in Rwanda, which could have been triggered upon the resumption of hostilities between the government and the RPF [Rwandan Patriotic Front] or following some other significant event.” “For example, a cycle of ethnic violence against Tutsi civilians has often followed attacks by the RPF or earlier groups associated with Tutsis, such as *Union Nationale Rwandaise* party”

“At the same time, there was also a campaign to secretly arm and train civilian militiamen and efforts to put in place a ‘civil defence’ system made up of ‘resistance’ groups The Chamber found that Bagosora, Nsengiyumva and Kabiligi were involved in some of these efforts in varying degrees. In particular, the outlines of the core of the proposed civil defence system were recorded as notes in Bagosora’s agenda, during meetings at the Ministry of Defence in early 1993, after the RPF resumed hostilities and advanced towards Kigali. Furthermore, lists primarily aimed at identifying suspected accomplices of the RPF and opponents of the Habyarimana regime or MRND [*Mouvement Républicain National pour la Démocratie et le Développement*] party were prepared and maintained by the army However, in the context of the ongoing war with the RPF, this evidence does not invariably show that the purpose of arming and training these civilians or the preparation of lists was to kill Tutsi civilians.”

“After the death of President Habyarimana, these tools were clearly put to use to facilitate killings. When viewed against the backdrop of the targeted killings and massive slaughter perpetrated by civilian and military assailants between April and July 1994 as well as earlier cycles of violence, . . . these preparations are completely consistent with a plan to commit genocide. However, they are also consistent with preparations for a political or military power struggle. The Chamber recalls that, when confronted with circumstantial evidence, it may only convict where it is the only reasonable inference. It cannot be excluded that the extended campaign of violence directed against Tutsis, as such, became an added or an altered component of these preparations.”

“Furthermore, the Chamber observes that the evidence in this case only implicates the Accused in varying degrees in these efforts. It is possible that some military or civilian authorities did intend these preparations as part of a plan to commit genocide. However, the Prosecution has not shown that the only reasonable inference based on the credible evidence in this trial was that this intention was shared by the Accused.”

“Other or newly discovered information, subsequent trials or history may demonstrate a conspiracy involving the Accused prior to 6 April to commit genocide. This Chamber’s task, however, is narrowed by exacting standards of proof and procedure, the specific evidence on the record before it and its primary focus on the actions of the four Accused in this trial. In reaching its finding on conspiracy, the Chamber has considered the totality of the evidence, but a firm foundation cannot be constructed from fractured bricks.”

“Accordingly, the Chamber is not satisfied that the Prosecution has proven beyond reasonable doubt that the four Accused conspired amongst themselves or with others to commit genocide before it unfolded on 7 April 1994.”

Compare Seromba, (Trial Chamber), December 13, 2006, para. 350: “The Chamber finds that the Prosecution has not established beyond a reasonable doubt that Athanase Seromba prepared a list of Tutsi sought after, or that he ordered or supervised the attack against the refugees on 15 April 1994 or that he ordered the destruction of Nyange church [Nyange parish, Kibuye prefecture] on 16 April 1994. As regards the facts established against Seromba, such as prohibiting the refugees from getting food from the banana plantation, or refusing to celebrate mass, the Chamber is of the view that these facts, in and of themselves, are not sufficient to establish the existence of a conspiracy to commit genocide.”

iii) direct and public incitement to commit genocide

1) defined/ *actus reus*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 677: “A person may be found guilty of the crime specified in Article 2(3)(c) of the Statute if he or she directly and publicly incited the commission of genocide (the material element or *actus reus*) and had the intent directly and publicly to incite others to commit genocide (the intentional element or *mens rea*).” See also *Bikindi*, (Trial Chamber), December 2, 2008, para. 419 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, paras. 500-01: “The Chamber notes that there is limited jurisprudence on direct and public incitement as an offence at international law. In both *Akayesu* and *Nahimana*, this Tribunal considered the International Military Tribunal (IMT) cases of *Streicher* and *Fritzsche* which dealt with incitement to murder and extermination as crimes against humanity. After *Nuremberg*, this Tribunal’s judgement in *Akayesu* was the first occasion on which an international tribunal considered direct and public incitement to commit genocide as a specific offence. The *Akayesu* Trial Chamber considered the meaning of incitement under both the common law and civil law traditions and concluded that under the Genocide Convention and Article 2(3)(c) of the Statute, direct and public incitement means:

directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places at public gatherings, or through the sale or dissemination, offer for sale or display of written or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.”

“The Chamber notes that the *Akayesu* definition of direct and public incitement received tacit approval from the Appeals Chamber, and has been consistently applied in other decisions of the Tribunal. The Chamber therefore adopts the *Akayesu* Trial Chamber’s definition of direct and public incitement, as well as its elaboration of the ‘direct’ and ‘public’ elements of that offence.” See also *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, paras. 1011-15 (cited in *Muvunyi*); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 850-55; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431; *Akayesu*, (Trial Chamber), September 2, 1998, para. 559 (source of quote).

Serugendo, (Trial Chamber), June 12, 2006, para. 9: “The elements of the offence of direct and public incitement to commit genocide under Article 2 3(c) of the Statute are described in both the Plea Agreement and the Tribunal jurisprudence as:

- that the accused incited others to commit genocide;
- that the incitement was direct;
- that the incitement was public; and
- that the accused had the specific intent to commit genocide, that is, destroying in whole or in part a national, ethnic, racial or religious group.”

See also *Muvunyi*, (Trial Chamber), September 12, 2006, para. 466: “[D]irect and public incitement is only relevant in the context of genocide”

(a) direct

Muvunyi, (Trial Chamber), September 12, 2006, para. 502: “The ‘direct’ element requires more than a vague or indirect suggestion of incitement, and implies that the expression which is alleged to be inciteful, specifically provoke another to engage in criminal conduct.” See also *Bikindi*, (Trial Chamber), December 2, 2008, para. 387 (similar).

Kajelijeli, (Trial Chamber), December 1, 2003, para. 852: “The ‘direct’ element of incitement to commit genocide requires ‘[s]pecifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.’ In civil law systems, provocation, the equivalent of incitement, is regarded as being direct where it is aimed at causing a specific offence to be committed.” See also *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431; *Akayesu*, (Trial Chamber), September 2, 1998, para. 557 (source).

(i) view statements in context: consider cultural and linguistic factors and audience/no explicit appeal to commit genocide required

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 698, 700-03: “In conformity with the *Akayesu* Trial Judgement, the Trial Chamber considered that it was necessary to take account of Rwanda’s culture and language in determining whether a speech constituted direct incitement to commit genocide.” “The Appeals Chamber agrees that the culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to

examine how a speech was understood by its intended audience in order to determine its true message.” “The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide.” “The Appeals Chamber is not persuaded that the *Streicher* and *Fritzsche* cases demonstrate that only discourse explicitly calling for extermination, or discourse that is entirely unambiguous for all types of audiences, can justify a conviction for direct and public incitement to commit genocide.” “The Appeals Chamber therefore concludes that it was open to the Trial Chamber to hold that a speech containing no explicit appeal to commit genocide, or which appeared ambiguous, still constituted direct incitement to commit genocide in a particular context.” *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 711 (discussing the importance of considering context).

Bikindi, (Trial Chamber), December 2, 2008, para. 387: “To determine whether a speech rises to the level of direct and public incitement to commit genocide, context is the principal consideration, specifically: the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, *i.e.* whether the members of the audience to whom the message was directed understood its implication. A direct appeal to genocide may be implicit; it need not explicitly call for extermination, but could nonetheless constitute direct and public incitement to commit genocide in a particular context.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 502: “In considering whether incitement is direct, the specific context in which it takes place is important. Cultural and linguistic factors, as well as the kind of audience the message is addressed to, could help determine whether a particular speech qualifies as direct incitement. An important consideration for the Trial Chamber is whether the members of the audience to whom the message was directed immediately understood its implication.” *See also Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1011 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, paras. 557-58 (similar).

Kajelijeli, (Trial Chamber), December 1, 2003, para. 853: “The *Akayesu* Trial Chamber based itself on the evidentiary findings it made and opined that the direct element of incitement should be viewed in the light of its cultural and linguistic content.”

(ii) purpose of the speech is a factor

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 706: “The Appeals Chamber is of the opinion that the purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide, and it can see no error in this respect on the part of the Trial Chamber.”

(iii) political or community affiliation of the author

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 713: “The Appeals Chamber . . . notes, on the one hand, that the relevant issue is not whether the author of the speech is from the majority ethnic group or supports the government’s

agenda (and by implication, whether it is necessary to apply a stricter standard), but rather whether the speech in question constitutes direct incitement to commit genocide. On the other hand, it recognises that the political or community affiliation of the author of a speech may be regarded as a contextual element which can assist in its interpretation.”

(iv) application—considering words in context

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 739: “The Appeals Chamber would begin by pointing out that the [*Radio Télévision Libre des Mille Collines*] broadcasts must be considered as a whole and placed in their particular context. Thus, even though the terms *Inyenzi* and *Inkotanyi* may have various meanings in various contexts (as with many words in every language), the Appeals Chamber is of the opinion that it was reasonable for the Trial Chamber to conclude that these expressions could in certain cases be taken to refer to the Tutsi population as a whole. The Appeals Chamber further considers that it was reasonable to conclude that certain RTLM broadcasts had directly equated the Tutsi with the enemy.”¹⁰

(b) public

Muvunyi, (Trial Chamber), September 12, 2006, para. 503: “The Chamber agrees with the *Akayesu* judgement that the drafters of the Genocide Convention only intended to criminalize public incitement and to rule out what may constitute private forms of incitement. In determining its ‘public’ character, the Chamber must consider the place where the incitement occurred and whether attendance was selective or limited. There is no requirement that the incitement message be addressed to a certain number of people or that it should be carried through a specific medium such as radio, television, or a loudspeaker. However, both the number and the medium may provide evidence in support of a finding that the incitement was public.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 851 (similar).

Akayesu, (Trial Chamber), September 2, 1998, para. 556: Whether incitement is “public” should be evaluated on the basis of two factors: “the place where the incitement occurred and whether or not assistance was selective or limited.” In civil law systems, words are “public where they [are] spoken aloud in a place that [is] public by definition. According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.” *See also Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431 (quoting *Akayesu*); *Ruggiu*, (Trial Chamber), June 1, 2000, para. 17 (quoting *Akayesu*).

(c) incitement

Kajelijeli, (Trial Chamber), December 1, 2003, para. 850: “In the common law jurisdictions, incitement to commit a crime is defined as encouraging or persuading another to commit the crime, including by use of threats or other forms of pressure, whether or not the crime is actually committed. Civil law systems punish direct and

¹⁰ “*Inyenzi*” means cockroaches in Kinyarwanda, and “*Inkotanyi*” refers to an organization of refugees who left Rwanda starting in 1959; both terms were used to describe the Tutsis. *See Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 739 & n. 1736.

public incitement assuming the form of provocation, which is defined as an act intended directly to provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication.” *See also Akayesu*, (Trial Chamber), September 2, 1998, para. 555 (similar).

(i) incitement need not be successful/causal relationship not required

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 766: “The Appeals Chamber summarily dismisses Appellant Ngeze’s argument that the genocide would have occurred even if the *Kangura* [newspaper] articles had never existed, because it is not necessary to show that direct and public incitement to commit genocide was followed by actual consequences.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, paras. 1015, 1029: “In *Akayesu*, the Tribunal considered in its legal findings on the charge of direct and public incitement to genocide that ‘there was a causal relationship between the Defendant’s speech to [the] crowd and the ensuing widespread massacres of Tutsis in the community.’ The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement. [W]hen this potential is realized, a crime of genocide as well as incitement to genocide has occurred.” “With regard to causation . . . incitement is a crime regardless of whether it has the effect it intends to have.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1007: “In considering whether particular expression constitutes a form of incitement on which restrictions would be justified, the international jurisprudence does not include any specific causation requirement linking the expression at issue with the demonstration of a direct effect.”

Akayesu, (Trial Chamber), September 2, 1998, para. 562: Even where “incitement failed to produce the result expected by the perpetrator,” unsuccessful acts of incitement can be punished. *See also Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1013 (similar); *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431 (similar); *Ruggiu*, (Trial Chamber), June 1, 2000, para. 16 (similar).

But see Kajelijeli, (Trial Chamber), December 1, 2003, para. 852: “[T]he Prosecution is obliged to prove a definite causation between the act characterized as incitement, or provocation in this case, and a specific offence.”

(ii) is an inchoate offence/punishable without genocide occurring

Bikindi, (Trial Chamber), December 2, 2008, para. 419: “As an inchoate crime, public and direct incitement to commit genocide is punishable even if no act of genocide has resulted therefrom.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 505: “As an inchoate offence or *infraction formelle*, incitement to commit genocide is punishable as such, irrespective of whether or not it succeeded in producing the result intended.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 855: “[T]he crime of incitement is an inchoate offence under common law systems whereby the communication alone is punishable, irrespective of the accomplishment of the object of the communication. The Trial Chamber in *Akayesu* took the view that, ‘[g]enocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.’ This Chamber agrees.” See *Akayesu*, (Trial Chamber), September 2, 1998, para. 562 (source of quote).

See also “inchoate and continuing crimes,” Section (I)(e)(iii)(3)(a), this Digest.

**(d) the acts constituting direct and public incitement to
commit genocide must be identified**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 726: “[T]he Appeals Chamber is of the opinion that the acts constituting direct and public incitement to commit genocide must be clearly identified.”

2) *mens rea*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 677: “[T]he [required] intent directly and publicly to incite others to commit genocide . . . presupposes a genocidal intent.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 466: “The Prosecution must . . . prove that a person accused of direct and public incitement to commit genocide shared the special intent of the principal perpetrator.”

Muvunyi, (Trial Chamber), September 12, 2006, paras. 504-05: “The *Akayesu* Trial Chamber explained the mental element required for direct and public incitement to commit genocide as follows:

The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must himself have the specific intent to commit genocide, namely, to destroy in whole or in part, a national, ethnical, racial or religious group as such.”

“The Appeals Chamber has restated and affirmed the Trial Chamber’s analysis of *mens rea* for direct and public incitement to commit genocide.” See also *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1012 (quoting *Akayesu*); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 854 (relying on *Akayesu*); *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431 (similar); *Ruggiu*, (Trial Chamber), June 1, 2000, para. 14 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 560 (source of quote).

(a) in the context of the media, language used is an indicator of intent

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1001: “Editors and publishers have generally been held responsible for the media they control. In determining the scope of this responsibility, the importance of intent, that is the purpose of the communications they channel, emerges from the jurisprudence – whether or not the purpose in publicly transmitting the material was of a *bona fide* nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities). The actual language used in the media has often been cited as an indicator of intent.”

(b) that genocide occurred does not show intent to incite

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 709: “The Appeals Chamber is not persuaded that the mere fact that genocide occurred demonstrates that the journalists and individuals in control of the media intended to incite the commission of genocide. It is, of course, possible that these individuals had the intent to incite others to commit genocide and that their encouragement contributed significantly to the occurrence of genocide (as found by the Trial Chamber), but it would be wrong to hold that, since genocide took place, these individuals necessarily had the intent to incite genocide, as the genocide could have been the result of other factors.”

3) incitement is not a continuing crime

(a) inchoate and continuing crimes

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 720: “The Appeals Chamber considers that the notions ‘inchoate’ and ‘continuing’ are independent of one another. An inchoate offence (*‘crime formel’* in civil law) is consummated simply by the use of a means or process calculated to produce a harmful effect, irrespective of whether that effect is produced. In other words, an inchoate crime penalizes the commission of certain acts capable of constituting a step in the commission of another crime, even if that crime is not in fact committed [T]he crime of direct and public incitement to commit genocide is an inchoate offence”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 721: “A continuing crime implies an ongoing criminal activity. According to Black’s Law Dictionary, a continuing crime is:

1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...]
2. A crime (such as driving a stolen vehicle) that continues over an extended period.”

(b) incitement is complete when uttered or published

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 723: “The Appeals Chamber is of the opinion that the Trial Chamber erred in considering that incitement to commit genocide continues in time ‘until the completion of the acts contemplated.’ The Appeals Chamber considers that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is

uttered or published, even though the effects of incitement may extend in time. The Appeals Chamber accordingly holds that the Trial Chamber could not have jurisdiction over acts of incitement having occurred before 1994 on the grounds that such incitement continued in time until the commission of the genocide in 1994.”

But see Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), Partly Dissenting Opinion of Judge Shahabuddeen, November 28, 2007, paras. 21-35 (direct and public incitement to commit genocide is a continuous crime).

See also “temporal jurisdiction (*ratione temporis*),” Section (VIII)(b)(iii), this Digest.

(c) application—incitement as complete when uttered

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 724-25: “The Appeals Chamber . . . recalls that, even where offences may have commenced before 1994 and continued in 1994, the provisions of the Statute on the temporal jurisdiction of the Tribunal mean that a conviction may be based only on criminal conduct having occurred during 1994. Thus, . . . the Appellants could be convicted only for acts of direct and public incitement to commit genocide carried out in 1994.”

“The Appeals Chamber would, however, add that, even if a conviction for incitement could not be based on any of the 1993 RTLM [*Radio Télévision Libre des Mille Collines*] broadcasts, the Trial Chamber could have considered them, for example as contextual elements of the 1994 broadcasts. Thus the Appeals Chamber is of the opinion that the 1993 broadcasts could explain how the RTLM listeners perceived the 1994 broadcasts and the impact these broadcasts may have had. Similarly, the pre-1994 *Kangura* [newspaper] issues were not necessarily inadmissible, since they could be relevant and have probative value in certain respects.”

4) freedom of expression and relationship to hate speech

Bikindi, (Trial Chamber), December 2, 2008, paras. 379-83: “There is a right to freedom of expression under customary international law. This is demonstrated by numerous international instruments which incorporate the right to freedom of expression, the widespread integration of such protections into domestic legal systems and the dispositions of numerous international, regional, and domestic courts that have interpreted such a right. Notably, all of the following international and regional instruments contain provisions protecting freedom of expression: the Universal Declaration of Human Rights (‘UDHR’); the International Covenant on Civil and Political Rights (‘ICCPR’); the International Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’); the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’); the American Convention on Human Rights (‘ACHR’); and the African Charter on Human and Peoples’ Rights (‘ACHPR’). These provisions have been widely incorporated into numerous domestic legal systems, and there exists widespread domestic jurisprudence supporting the right to freedom of expression.”

“However, this right is not absolute. It is restricted by the very same conventions and international instruments that provide for it. For example, the UDHR states that everyone should be free from incitement to discrimination. Similarly, the ICCPR prohibits war propaganda, as well as the advocacy of national, racial or religious

hatred that constitutes incitement to discrimination, hostility, or violence, and the CERD aims to outlaw all forms of expression that explicitly lead to discrimination. Each of the regional conventions mentioned above also restrict the freedom of expression: the ECHR recognises that there are ‘duties and responsibilities’ that accompany the freedom of expression and thus limit its application; the ECHR allows for legal liability regarding acts that harm the rights or reputations of others, or that threaten the protection of national security, public order, or public health or morals and considers as offences punishable by law any propaganda for war and advocacy of national, racial or religious hatred that constitute incitements to lawless violence; and the ACHPR restricts the right to that which is ‘within the law.’ The Chamber notes that the restrictions on this right have been interpreted in the jurisprudence of the various adjudicating bodies created from the international and regional instruments above. The Chamber also notes that a large number of countries have barred the advocacy of discriminatory hate in their domestic legislation.”

“Prohibited expression can take different forms including incitement to hatred alone, to discrimination or to violence. Given the varied approaches cited above, for the purposes of this Judgement the Chamber will use ‘hate speech’ as an umbrella term for these forms of expression.”

“Hate speech is not criminalised *per se* under the statute of the Tribunal, and the Chamber recognises the importance of protecting the right to freedom of expression. Protecting free expression is widely considered to allow for open debate on societal values, encourage artistic and scholarly endeavours, and lead to freedom of conscience and self-fulfilment. Due to such benefits, freedom of expression is widely considered to be the very foundation of successful democracies. In fact, a failure to protect expression may allow repressive regimes to flourish.”

“Nevertheless, the Chamber is of the opinion that there is a discernable hierarchy of expression, one which requires the Chamber to treat different forms of expression differently. Whereas most forms of expression clearly remain within the limits of the legality, others are unequivocally of a criminal nature and should be sanctioned as such.”

See also Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1010: “The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards.”

5) hate speech and relationship to direct and public incitement to commit genocide

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 692-93, 715: “The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion. In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and

public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the *travaux préparatoires* to the Genocide Convention.”

“[W]hen a defendant is indicted pursuant to Article 2(3)(c) of [the] Statute, he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide.”

“The Appeals Chamber is of the opinion that the Trial Chamber did not confuse mere hate speech with direct incitement to commit genocide. Moreover, it was correct in holding that the context is a factor to consider in deciding whether discourse constitutes direct incitement to commit genocide. For these reasons, the Appeals Chamber concludes that the Trial Chamber committed no error with respect to the notion of direct incitement to commit genocide.”

Bikindi, (Trial Chamber), December 2, 2008, para. 388: “While most direct and public incitements to commit genocide would be preceded or accompanied by hate speech, only the former, which actually calls for genocide, is punishable under Article 2(3)(c) of the Statute. The *travaux préparatoires* of the Genocide Convention supports this conclusion as the Genocide Convention was only intended to criminalise direct appeals to commit acts of genocide and not all forms of incitement to hatred.”

Compare “view statements in context: consider cultural and linguistic factors and audience/no explicit appeal to commit genocide required,” Section (I)(e)(iii)(1)(a)(i), this Digest.

6) distinguishing incitement from legitimate use of media

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, paras. 1020-21: “[I]t is critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred.” “[S]peech constituting ethnic hatred results from the stereotyping of ethnicity combined with its denigration.”

(a) importance of tone

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1022: “[T]he accuracy of the statement is only one factor to be considered in the determination of whether a statement is intended to provoke rather than to educate those who receive it. The tone of the statement is as relevant to this determination as is its content.”

(b) importance of context

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1022: “The Chamber also considers the context in which the statement is made to be important. A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement.”

See also “view statements in context: consider cultural and linguistic factors and audience/no explicit appeal to commit genocide required,” Section (I)(c)(iii)(1)(a)(i), this Digest.

(c) distinguish informative or educational use

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1024: “The Chamber recognizes that some media are advocacy-oriented and considers that the issue of importance to its findings is not whether the media played an advocacy role but rather the content of what it was actually advocating. In cases where the media disseminates views that constitute ethnic hatred and calls to violence for informative or educational purposes, a clear distancing from these is necessary to avoid conveying an endorsement of the message and in fact to convey a counter-message to ensure that no harm results from the broadcast. The positioning of the media with regard to the message indicates the real intent of the message, and to some degree the real message itself.”

(d) distinguish legitimate mobilization of civil defense

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1025: “The Chamber accepts that the media has a role to play in the protection of democracy and where necessary the mobilization of civil defence for the protection of a nation and its people. What distinguishes both *Kangura* [newspaper] and RTL [radio] from an initiative to this end is the consistent identification made by the publication and the radio broadcasts of the enemy as the Tutsi population. Readers and listeners were not directed against individuals who were clearly defined to be armed and dangerous. Instead, Tutsi civilians and in fact the Tutsi population as a whole were targeted as the threat.”

**(e) ethnically specific expressions by the majority population
not subject to stricter standard**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 713: “The Appeals Chamber . . . notes . . . that the relevant issue is not whether the author of the speech is from the majority ethnic group or supports the government’s agenda (and by implication, *whether it is necessary to apply a stricter standard*), but rather whether the speech in question constitutes direct incitement to commit genocide.” (emphasis added). *Reversing Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1008 (“The special protections for this kind of speech [speech of the so-called ‘majority population,’ in support of the government] should accordingly be adapted, in the Chamber’s view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered.”).

7) music lyrics can constitute incitement

Bikindi, (Trial Chamber), December 2, 2008, para. 384: “The Chamber considers that international definitions of expression and speech are broad enough to include artistic expression such as songs. Expression has been defined as the freedom to ‘impart information and ideas,’ ‘either in writing or in print, in the form of art, or through any other media of his choice’; and ‘express and disseminate his opinions.’ The speech prohibited has been defined broadly as ‘propaganda,’ ‘advocacy of [. . .] hatred,’ and the

‘dissemination of ideas.’ The Chamber therefore considers that the words accompanying a score of music are comparable from a legal perspective to the words used in a speech.”

8) difference between instigation and incitement

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 678-79: “The Appeals Chamber considers that a distinction must be made between instigation under Article 6(1) of the Statute and public and direct incitement to commit genocide under Article 2(3)(c) of the Statute. In the first place, instigation under Article 6(1) of the Statute is a mode of responsibility; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute. By contrast, direct and public incitement to commit genocide under Article 2(3)(c) is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide. In other words, the crime of direct and public incitement to commit genocide is an inchoate offence, punishable even if no act of genocide has resulted therefrom. This is confirmed by the *travaux préparatoires* to the Genocide Convention, from which it can be concluded that the drafters of the Convention intended to punish direct and public incitement to commit genocide, even if no act of genocide was committed, the aim being to forestall the occurrence of such acts. The Appeals Chamber further observes — even if this is not decisive for the determination of the state of customary international law in 1994 — that the Statute of the International Criminal Court also appears to provide that an accused incurs criminal responsibility for direct and public incitement to commit genocide, even if this is not followed by acts of genocide.” “The second difference is that Article 2(3)(c) of the Statute requires that the incitement to commit genocide must have been direct and public, while Article 6(1) does not so require.”

See “instigating,” Section (IV)(d), this Digest.

9) application

(a) song lyrics

Bikindi, (Trial Chamber), December 2, 2008, paras. 247-50: “The Chamber is of the view that one cannot properly interpret Bikindi’s songs without considering the cultural, historical and political context in which they were composed and disseminated. In its assessment, the Chamber has therefore taken into consideration the Rwandan poetic tradition of spoken and unspoken Kinyarwanda asserted by Prosecution Expert Karangwa, which further supports its finding that although Bikindi’s songs were filled with metaphors and imagery, their message was clearly understood. The fact that Rwanda has suffered from ethnic division throughout the second half of the twentieth century is not controversial. The worsening of the conflict with the RPF [Rwandan Patriotic Front] at the beginning of the 1990’s marked an upsurge of political and ethnic tensions in the country. At that time in Rwanda, Tutsi were considered by many as accomplices of the so-called *Inkotanyi*. The Chamber notes that [the songs] *Nanga*

Abahutu and *Bene Sebahinzi* were composed and *Twasezereye*, *Nanga Abahutu* and *Bene Sebahinzi* were recorded and disseminated in this context of rising ethnic tension.”¹¹

“Although the historical references in the songs were accurate, the Chamber notes the context in which Bikindi referred to them. Reminding people what happened during the monarchy, referring to events before 1959 against a backdrop of highly politicized propaganda and inter-ethnic relationships already fragile and precarious due to those historical realities, is not neutral in the Chamber’s opinion.”

“While the Chamber considers it possible that two qualified experts could analyse the same text and arrive at different interpretations, given the context of historical ethnic differentiation and subjugation, and surrounding ethnic tension preceding the terrible events of 1994, the Chamber accepts the interpretation of Bikindi’s songs offered by the experts called by the Prosecution that Bikindi’s songs referred to relations between Hutu and Tutsi, painting Tutsi in a negative light and that *Nanga Abahutu* and *Bene Sebahinzi* in particular advocated Hutu unity against a common foe and incited ethnic hatred.”

“The Chamber notes that this interpretation is supported by how Bikindi’s songs were interpreted by journalists on RTLM [*Radio Télévision Libre des Mille Collines*]. If the songs were as innocent as portrayed by the Defence, they could not have been used in the manner they were. The Chamber heard no evidence of RTLM journalists commenting on Bikindi’s other songs, such as wedding songs, because they did not fit into RTLM’s agenda at the time. This interpretation is further confirmed by numerous witnesses called by the Prosecution, who all testified that their understanding of the songs was anti-Tutsi and pro-Hutu.” *But see id.*, paras. 254-55 (finding insufficient evidence that songs were composed with specific intent to incite attacks and killings); *id.*, paras. 263-64, 421 (finding insufficient evidence that Bikindi played any role in the dissemination or deployment of the songs in 1994). Bikindi was thus acquitted at the Trial Chamber level of direct and public incitement to commit genocide as to the songs.

**(b) words conveyed by public address system urging
destruction of the Tutsi ethnic group**

Bikindi, (Trial Chamber), December 2, 2008, paras. 422-24: “The Chamber has found that the Prosecution proved beyond reasonable doubt that towards the end of June 1994, in Gisenyi *préfecture*, Bikindi traveled on the main road between Kivumu and Kayove as part of a convoy of *Interahamwe*, in a vehicle outfitted with a public address system broadcasting songs, including Bikindi’s. When heading towards Kayove, Bikindi used the public address system to state that the majority population, the Hutu, should rise up to exterminate the minority, the Tutsi. On his way back, Bikindi used the same system to ask if people had been killing Tutsi, who he referred to as snakes.” “The Chamber finds that both statements, broadcast over loudspeaker, were made publicly. The Chamber also finds that Bikindi’s call on ‘the majority’ to ‘rise up and look everywhere possible’ and not to ‘spare anybody’ immediately referring to the Tutsi as the minority unequivocally constitutes a direct call to destroy the Tutsi ethnic group. Similarly, the Chamber considers that Bikindi’s address to the population on his way

¹¹ The latter three titles were translated as: *Twasezereye* (“We Said Good Bye to the Feudal Regime”), *Nanga Abahutu* (“I Hate These Hutu”), and *Bene Sebahinzi* (“The Sons of the Father of the Cultivators”), although there was a dispute as to the accuracy of the translations of the titles. See *Bikindi*, (Trial Chamber), December 2, 2008, para. 187. For discussion of the term “*Inkotanyi*,” see prior footnote, this Digest.

back from Kayove, asking ‘Have you killed the Tutsis here?’ and whether they had killed the ‘snakes’ is a direct call to kill Tutsi, pejoratively referred to as snakes. In the Chamber’s view, it is inconceivable that, in the context of widespread killings of the Tutsi population that prevailed in June 1994 in Rwanda, the audience to whom the message was directed, namely those standing on the road, could not have immediately understood its meaning and implication. The Chamber therefore finds that Bikindi’s statements through loudspeakers on the main road between Kivumu and Kayove constitute direct and public incitement to commit genocide.” “Based on the words he proffered and the manner he disseminated his message, the Chamber finds that Bikindi deliberately, directly and publicly incited the commission of genocide with the specific intent to destroy the Tutsi ethnic group.”

(c) words at meetings understood to urge killing and extermination

Muvunyi, (Trial Chamber), September 12, 2006, para. 507: “The Chamber has found that at a meeting held at Gikonko [in Mugusa Commune] in April or May 1994, the Accused addressed a crowd of Hutu male civilians during which he equated Tutsis to ‘snakes’ that should be killed. The Chamber further found that the Accused chastised the *bourgmestre* of Gikonko for hiding a Tutsi man, and asked the latter to produce the said Tutsi so that he could be killed. As a result, a Tutsi man named Vincent Nkurikiyinka, was taken from his hiding place and killed by the mob. The Chamber concludes that Muvunyi’s words were spoken in public, were directed to a group of assembled Hutu civilians, and were intended to provoke the said civilians to kill Tutsis. Indeed, when considered in the context of the language and culture of Rwanda, equating Tutsis to snakes was, in the words of socio-linguistic expert Ntakirutimana, synonymous with condemning members of this ethnic group to death. The Chamber is satisfied that Muvunyi knew that his audience immediately understood the genocidal implication of his words and therefore that he had the requisite intent to destroy members of the Tutsi ethnic group in whole or in part as such.” *See also id.*, paras. 509, 510 (similar findings as to “a public meeting held in Gikore in May 1994” where “Muvunyi made a speech in which he called for the killing of Tutsis, the destruction of Tutsi property, associated Tutsis with the enemy at a time of war, and denigrated Tutsi people by associating them with snakes and poisonous agents”; the Trial Chamber found him guilty of direct and public incitement to commit genocide under Article 6(1) of the Statute).

But see Muvunyi, (Appeals Chamber), August 29, 2008, paras. 125-32 (overturning the conviction for direct and public incitement in relation to the speech at Gikonko as relying on uncorroborated accomplice testimony where the accomplice had a “motive to enhance Muvunyi’s role in the crimes and to diminish his own”); *id.*, paras. 134-48 (ordering a retrial as to Muvunyi’s conviction regarding the speech at the Gikore Trade Center because the Trial Chamber insufficiently explained why it relied on certain witness testimony and not other witness testimony).¹²

Kajelijeli, (Trial Chamber), December 1, 2003, paras. 856-58: “The Chamber has . . . found that, on the morning of 7 April 1994, the Accused instructed the *Interahamwe* at

¹² For further discussion of the case, see “whether the Trial Chamber is required to individually address inconsistencies within and/or amongst witness testimonies in the judgment,” Section (VIII)(d)(xi)(8), this Digest.

Byangabo Market [in Mukingo commune] and incited the crowd assembled there to '[k]ill and exterminate all those people in Rwankeri' and to 'exterminate the Tutsis.' He also ordered the *Interahamwe* to dress up and 'start to work.'" "The Chamber has also already found that the Accused acted with the requisite intent to destroy the Tutsi ethnic group in whole or in part." "The Chamber therefore finds that on 7 April 1994, at Byangabo market, Mukingo *Commune* the Accused incited directly and in public the *Interahamwe* and the crowd to commit Genocide against the Tutsi population."

Niyitegeka, (Trial Chamber), May 16, 2003, paras. 436-37: "Considering the Accused's spoken words, urging the attackers [in Bisesero] to work, thanking, encouraging and commending them for the 'work' they had done, 'work' being a reference to killing Tutsi . . . the Chamber finds that the Accused had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group" and found him responsible for "inciting attackers to cause the death and serious bodily and mental harm of Tutsi refugees."

(d) use of RTLM

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, paras. 1031-34: "RTLM [radio station] broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase 'heating up heads' captures the process of incitement systematically engaged in by RTLM, which after 6 April 1994 was also known as 'Radio Machete.' The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active."

"[T]he Chamber notes the broadcast of 4 June 1994, by Kantano Habimana, as illustrative of the incitement engaged in by RTLM. Calling on listeners to exterminate the *Inkotanyi*, who would be known by height and physical appearance, Habimana told his followers, 'Just look at his small nose and then break it.' The identification of the enemy by his nose and the longing to break it vividly symbolize the intent to destroy the Tutsi ethnic group."¹³

The Chamber "found beyond a reasonable doubt that Nahimana was responsible for RTLM programming" and found him "guilty of direct and public incitement to genocide . . . pursuant to Article 6(1) and Article 6(3) of the Statute." (The Appeals Chamber upheld Nahimana's Article 6(3) conviction for incitement for RTLM broadcasts after April 6, 1994, but not for broadcasts between January 1 and April 6. *See Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, paras. 754, 758, 857. The Appeals Chamber also held only 1994 broadcasts were within the jurisdiction of the ICTR; *id.*, para. 314. The Appeals Chamber held that it was error to convict under both Article 6(1) and 6(3) for the same acts; *see id.*, paras. 487-88.)

For discussion of particular RTLM broadcasts and whether each constituted direct and public incitement to commit genocide, see *id.*, paras. 735-58; *but see Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), Partly Dissenting Opinion of Judge Shahabuddeen, November 28, 2007, para. 69 (no need to look at each RTLM broadcast individually).

¹³ For discussion of the term "*Inkotanyi*," see fn 10 this Digest.

(e) writings in *Kangura* newspaper

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, paras. 1036-38: “Many of the writings published in *Kangura* combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices. The [article entitled] *Appeal to the Conscience of the Hutu* and the cover of *Kangura* No. 26 are two notable examples in which the message clearly conveyed to the readers of *Kangura* was that the Hutu population should ‘wake up’ and take the measures necessary to deter the Tutsi enemy from decimating the Hutu. The Chamber notes that the name *Kangura* itself means ‘to wake up others.’ What it intended to wake the Hutu up to is evidenced by its content, a litany of ethnic denigration presenting the Tutsi population as inherently evil and calling for the extermination of the Tutsi as a preventive measure. The Chamber notes the increased attention in 1994 issues of *Kangura* to the fear of an RPF [Rwandan Patriotic Front] attack and the threat that killing of innocent Tutsi civilians that would follow as a consequence.” “As founder, owner and editor of *Kangura*, Hassan Ngeze directly controlled the publication and all of its contents Ngeze used the publication to instill hatred, promote fear, and incite genocide. It is evident that *Kangura* played a significant role, and was seen to have played a significant role, in creating the conditions that led to acts of genocide.” The Chamber found Ngeze, for his role as founder, owner and editor of *Kangura*, guilty of direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute. *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, paras. 885-86, 775 (incitement conviction upheld by the Appeals Chamber, but modified to only cover *Kangura* issues published in 1994). For discussion of the *Kangura* issues and whether each constituted direct and public incitement to commit genocide, see *id.*, paras. 771-74.

iv) attempt to commit genocide

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 720: “[T]he crime of direct and public incitement to commit genocide is an inchoate offence, like . . . attempt to commit genocide (Article 2(3)(d) of the Statute).”

v) complicity in genocide

1) defined/ *actus reus*

Rutaganira, (Trial Chamber), March 14, 2005, para. 63: “The case-law of both *ad hoc* Tribunals has . . . determined a form of complicity in aiding and abetting provided for under Article 6(1). Thus, in *Furundžija*, an ICTY Trial Chamber held that complicity ‘consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.’”

Semanza, (Trial Chamber), May 15, 2003, paras. 393, 395: “[P]rior jurisprudence has defined the term complicity as aiding and abetting, instigating, and procuring.” “[C]omplicity to commit genocide in Article 2(3)(e) refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.”

Akayesu, (Trial Chamber), September 2, 1998, paras. 533-37: The Chamber defined complicity “per the Rwandan Penal Code,” listing the following as elements of complicity in genocide:

- “complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
- complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;
- complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide crime [*sic*], gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide.”

See also Bagilishema, (Trial Chamber), June 7, 2001, paras. 69-70 (also quoting Rwandan Penal Code); *Musema*, (Trial Chamber), January 27, 2000, para. 179 (same).

(a) complicity requires a positive act

Akayesu, (Trial Chamber), September 2, 1998, para. 548: “[C]omplicity requires a positive act, i.e. an act of commission, whereas aiding and abetting may consist in failing to act or refraining from action.”

(b) genocide required

Akayesu, (Trial Chamber), September 2, 1998, paras. 527-31: “[C]omplicity can only exist when there is a punishable, principal act, in the commission of which the accomplice has associated himself. Complicity, therefore, implies a predicate offence committed by someone other than the accomplice.” “[F]or an accused to be found guilty of complicity of genocide, it must, first of all, be proven . . . that the crime of genocide has, indeed, been committed.” *See also Musema*, (Trial Chamber), January 27, 2000, paras. 170-73 (similar).

(c) principal perpetrator need not be identified or convicted

Akayesu, (Trial Chamber), September 2, 1998, para. 531: A person may be tried for complicity in genocide “even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 174 (similar).

2) *mens rea*

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 499: “In its Judgement, the Trial Chamber followed the approach adopted by the *Akayesu* Trial Chamber that the *dolus specialis* required for genocide was required for each mode of participation under Article 6(1) of the Statute, including aiding and abetting. Surprisingly, when considering the *mens rea* requirement for complicity under Article 2(3)(e) of the Statute, the Trial Chamber in *Akayesu* considered that it ‘implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.’ ‘Knowingly’ in the context of genocide means knowledge of the principal offender’s genocidal intent. The Trial Chamber in *Akayesu* summarized its position as follows:

In conclusion, the Chamber is of the opinion that an accused is [responsible] as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

The Trial Chamber in *Semanza* took a similar approach holding that: ‘In cases involving a form of accomplice [responsibility], the *mens rea* requirement will be satisfied where an individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime. The accused need not necessarily share the *mens rea* of the principal perpetrator: the accused must be aware, however, of the essential elements of the principal’s crime including the *mens rea*.’”

Semanza, (Trial Chamber), May 15, 2003, para. 395: “The accused must have acted intentionally and with the awareness that he was contributing to the crime of genocide, including all its material elements.”

Akayesu, (Trial Chamber), September 2, 1998, paras. 540-45: “[T]he intent of the accomplice is . . . to knowingly aid or abet one or more persons to commit the crime of genocide.” “Therefore . . . an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.” Thus, “an accused is [responsible] as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” See also *Bagilishema*, (Trial Chamber), June 7, 2001, para. 71 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 183 (similar).

See also “*mens rea*” under “aiding and abetting genocide,” Section (IV)(g)(ii)(11)(c), this Digest (genocidal intent also not required as to aider and abetter).

3) relationship between complicity and aiding and abetting

Semanza, (Appeals Chamber), May 20, 2005, para. 316: “[T]he ICTY Appeals Chamber held in *Krstić* that ‘the terms “complicity” and “accomplice” may encompass conduct broader than that of aiding and abetting.’ “[A]n individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime,’ while ‘there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group.’ This was reaffirmed in *Ntakirutimana*, where this Appeals Chamber said: ‘[i]n reaching this conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of [responsibility] from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same *mens rea*, while other forms of complicity may require proof of specific intent.’”

Muvunyi, (Trial Chamber), September 12, 2006, para. 460: “The Chamber notes that accomplice [responsibility] under Article 6(1) is different from the substantive crime of complicity in genocide under Article 2(3)(e) of the Statute.”

Akayesu, (Trial Chamber), September 2, 1998, paras. 546-48: Individual criminal responsibility under Article 6(1) of the ICTR Statute covers “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute.” These require specific genocidal intent, namely, “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such,” whereas complicity in genocide does not. Another difference is that, “complicity requires a positive act, i.e., an act of commission”¹⁴

But see Semanza, (Trial Chamber), May 15, 2003, para. 394: “[T]here is no material distinction between complicity in Article 2(3)(e) [complicity in genocide] of the Statute and the broad definition accorded to aiding and abetting in Article 6(1). The Chamber further notes that the *mens rea* requirement for complicity to commit genocide in Article 2(3)(e) mirrors that for aiding and abetting and the other forms of accomplice [responsibility] in Article 6(1).”

For discussion of “aiding and abetting,” see Section (IV)(g), this Digest. For discussion of the *mens rea* of aiding and abetting, see “*mens rea*—aiding and abetting,” Section (IV)(g)(iii), this Digest.

See also cumulative convictions “genocide and complicity in genocide impermissible,” Section (VII)(a)(iv)(2)(a), this Digest.

II) CRIMES AGAINST HUMANITY (ARTICLE 3)

a) Statute

ICTR Statute, Article 3:

“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;
- g) Rape;
- h) Persecutions on political, racial and religious grounds;
- i) Other inhumane acts.”

¹⁴ Aiding and abetting does not require genocidal intent. See “*mens rea*” under “aiding and abetting genocide,” Section (IV)(g)(ii)(11)(c), this Digest.

b) Overall requirements/ *chapeau*

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2165: “For an enumerated crime under Article 3 to qualify as a crime against humanity, the Prosecution must prove that there was a widespread or systematic attack against the civilian population on national, political, ethnic, racial or religious grounds.” *See also Ziguranyirazo*, (Trial Chamber), December 18, 2008, para. 430 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, paras. 428 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 20 (similar); *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 1 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 41 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 421 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 354: “Article 3 of the Statute, which deals with crimes against humanity, contains a general element that is applicable to all the acts listed therein: perpetration of any of those acts by an accused will constitute a crime against humanity only if it was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” *See also Nchamibigo*, (Trial Chamber), November 12, 2008, para. 340 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 525 (similar); *Rutaganira*, (Trial Chamber), March 14, 2005, para. 48 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 297 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 511: “[U]nder Article 3 of the Statute, the definition of ‘Crimes Against Humanity’ consists of two layers. The first layer, (‘General Elements’) is to the effect that a crime against humanity must be committed as part of a ‘widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds.’ The second layer lists six specific (‘underlying’) crimes, plus one residual category of ‘other inhumane acts’ which qualify as crimes against humanity when committed in the context of a widespread or systematic attack on a civilian population on any of the enumerated discriminatory grounds.”

Mpambara, (Trial Chamber), September 11, 2006, para. 11: “[T]he chapeau requirements for a crime against humanity must . . . be satisfied. First, the crime must have been committed as part of a widespread or systematic attack Second, the attack must be carried out against a civilian population on ‘national, political, ethnic, racial or religious grounds.’” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 657 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 864 (same as *Kamuhanda*).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 698: “The Chamber explained in the *Semanza* Judgement that in connection with crimes against humanity, the Prosecutor must prove: (1) that there was an attack; (2) that the attack was widespread or systematic; (3) that the attack was directed against any civilian population; (4) that the attack was committed on national, political, ethnical, racial or religious grounds; and (5) that the accused acted with knowledge of the broader context of the attack and with knowledge that his act(s) formed part of the attack.”

But see *Akayesu*, (Trial Chamber), September 2, 1998, para. 578: Crimes against humanity can be broken down into four essential elements, namely: “(i) *the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health*; (ii) the act must be committed as part of a wide spread [*sic*] or systematic attack; (iii) the *act* must be committed against members of the civilian population; (iv) the *act* must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.” (emphasis added.) See also *Semanza*, (Appeals Chamber), May 20, 2005, para. 268 (quoting *Akayesu* approvingly).¹⁵

i) the act must be committed as part of a “widespread or systematic attack” (element 1)

Semanza, (Trial Chamber), May 15, 2003, para. 326: “A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds.”

1) attack

(a) defined

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 918: “[F]or purposes of Article 3 of the Statute, an attack against a civilian population means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraphs (a) to (i) of the Article.” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2165 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 917: “According to the *Kayishema and Ruzindana* Trial Judgement:

The attack is the event of which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.”

See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 122 (source).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 916: “According to the [ICTY’s] *Kunarac et al.* Trial Judgement, an attack ‘can be described as a course of conduct involving the commission of acts of violence.’”

Nzabirinda, (Trial Chamber), February 23, 2007, para. 21: “[A]ttack’ has been defined as ‘an unlawful act, event, or series of events of the kind listed in Article 3 (a) through (i) of the Statute.’” See also *Seromba*, (Trial Chamber), December 13, 2006, para. 355 (similar);

¹⁵ Early cases require that the act “be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health.” See *Akayesu*, (Trial Chamber), September 2, 1998, para. 578; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 66; *Musema*, (Trial Chamber), January 27, 2000, para. 201. This requirement does not appear in later cases, with the exception of the Appeals Chamber in *Semanza*.

The *Akayesu* Trial Chamber, in the quotation in text, also uses the word “act” in places where other cases use the word “attack.” Indeed, the *Akayesu* Trial Chamber later contradicts itself by using the (more accurate) formulation with the word “attack.” See *Akayesu*, (Trial Chamber), September 2, 1998, para. 595 (“a) [the underlying act] must be perpetrated as part of a widespread or systematic attack; b) the *attack* must be against the civilian population; c) the *attack* must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds”) (emphasis added).

Muvunyi, (Trial Chamber), September 12, 2006, para. 512 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 42 (same); *Muhimana*, (Trial Chamber), April 28, 2005, para. 526 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 298 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 660 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 867 (same as *Kamuhanda*); *Akayesu*, (Trial Chamber), September 2, 1998, para. 581 (similar).

(b) not same as armed conflict/ need not require use of armed force

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 916-17: “[T]he Appeals Chamber of [the] ICTY [in *Kunarac*], . . . added the following:

The concepts of ‘attack’ and ‘armed conflict’ are not identical. Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it. Also, the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.”

“This position is reiterated in the [ICTY’s] *Kordić and Čerkez* Appeal Judgement and was adopted in a number of ICTY Trial judgements.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 661: “[A]n attack committed on specific discriminatory grounds need not necessarily require the use of armed force; it could also involve other forms of inhumane treatment of the civilian population.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 868 (same).

Akayesu, (Trial Chamber), September 2, 1998, para. 581: An attack may . . . be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner.” *See also Semanza*, (Trial Chamber), May 15, 2003, para. 327 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 205 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 70 (similar).

(c) attack distinct from underlying acts

Muvunyi, (Trial Chamber), September 12, 2006, para. 516: “The ‘attack’ is an element distinct from the acts enumerated in Article 3 of the Statute. There must exist an attack on a civilian population which is discriminatory and widespread or systematic before the perpetrator can be found to have committed a crime against humanity.”

(d) random acts or acts committed for personal reasons excluded

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 122-23, n.28: “The elements of the attack effectively exclude . . . acts carried out for purely personal motives and those outside of a broader policy or plan.”¹⁶ “Either of these conditions [widespread or systematic] will serve to exclude isolated or random inhumane acts committed for purely personal reasons.”

¹⁶ But see “plan or policy relevant but not required,” Section (II)(b)(i)(4)(a), this Digest.

Akayesu, (Trial Chamber), September 2, 1998, paras. 578-79: The act must be committed as “part of a wide spread [*sic*] or systematic attack and not just a random act of violence.” See also *Rutaganda* (Trial Chamber), December 6, 1999, para. 67 (“the *actus reus* cannot be a random inhumane act, but rather an act committed as part of an attack”).

2) either “widespread or systematic”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 920: “It is well established that the attack must be widespread *or* systematic. In particular, the Appeals Chamber has held that the conjunction ‘*et*’ in the French version of Article 3 of the Statute is a translation error.” (emphasis in original) See also *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 662-63 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 869-70 (same as *Kamuhanda*).

Karera, (Trial Chamber), December 7, 2007, para. 551: “The general requirements for a crime against humanity are intended to be read as disjunctive elements.” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2165 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 421 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 512: “In accordance with customary international law, the twin elements ‘widespread’ or ‘systematic’ should be read disjunctively and not as cumulative requirements.”

Bisengimana, (Trial Chamber), April 13, 2006, para. 43: “The Chamber notes that, based on the practice of this Tribunal and the ICTY, the applicable standard is ‘widespread or systematic’ and not ‘widespread and systematic.’”

Ndindababizi, (Trial Chamber), July 15, 2004, para. 477: “The enumerated offence must be part of an attack which has two characteristics before qualifying as a crime against humanity. First, the attack must be either widespread or systematic Second, the attack must be ‘against any civilian population on national, political, ethnic racial or religious grounds.’ In other words, the attack as a whole, but not the individual offence, must be committed on these particular grounds.”

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 299: “The attack must be widespread or systematic.” See *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 101 (approving of same).

Akayesu, (Trial Chamber), September 2, 1998, para. 579, n. 144: The attack must contain one of the alternate conditions of being widespread or systematic, not both, as in the French text of the Statute. “Customary international law requires only that the attack be either widespread or systematic.” See also *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 439; *Semanza*, (Trial Chamber), May 15, 2003, para. 328; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 804; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 77; *Musema*, (Trial Chamber), January 27, 2000, para. 203; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 68; *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 123 & n. 26.

See also Seromba, (Trial Chamber), December 13, 2006, para. 356: “This attack must be widespread or systematic. In practice, these two criteria tend to overlap.”

3) widespread

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 920: “The Appeals Chamber . . . recalls that: ‘widespread’ refers to the large-scale nature of the attack and the number of victims” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2165 (similar).

Nchamihigo, (Trial Chamber), November 12, 2008, para. 340: “[W]idespread’ refers to the scale of the attack” *See also Simba*, (Trial Chamber), December 13, 2005, para. 421 (similar).

Karera, (Trial Chamber), December 7, 2007, para. 551: “[W]idespread’ refers to the large scale of an attack, involving many victims” *See also Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 101 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 21 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 512 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 11 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 527 (similar); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 477 (same); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 299 (similar); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 804 (similar); *Bagilishema* (Trial Chamber), June 7, 2001, para. 77 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 123 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 356: “‘Widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 204 (same); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 69 (same); *Akayesu*, (Trial Chamber), September 2, 1998, para. 580 (source).

Bisengimana, (Trial Chamber), April 13, 2006, para. 44: “The ‘widespread’ element of the attack has been given slightly different meanings in the Tribunal’s judgements. The Chamber notes, however, that this element is always taken to refer to the scale of the attack, and sometimes to the number of victims. The Chamber adopts the *Kajelijeli* Judgement definition, which is ‘large scale, involving many victims.’” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 664 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 871 (similar).

4) systematic

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 920: “The Appeals Chamber . . . recalls that:

. . . ‘systematic’ refers to ‘the organised nature of the acts of violence and the improbability of their random occurrence.’ Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.”

See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2165 (similar to first sentence of quote).

Nchamibigo, (Trial Chamber), November 12, 2008, para. 340: “[S]ystematic’ describes [an attack’s] organised nature, as distinguished from random and unrelated acts.” *See also Karera*, (Trial Chamber), December 7, 2007, para. 551 (same); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 512 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 11 (similar).

Nzabirinda, (Trial Chamber), February 23, 2007, para. 21: “The Chamber adopts the *Kajelijeli* Judgement’s definition of . . . ‘systematic’ which describes the organised nature of the attack.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 45 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 421 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 356: “‘Systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.”¹⁷

Ndindababizi, (Trial Chamber), July 15, 2004, para. 477: “[S]ystematic’ refers to an organized pattern of conduct, as distinguished from random or unconnected acts committed by independent actors.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 666 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 872 (same as *Kamuhanda*).

(a) plan or policy relevant but not required

Seromba, (Appeals Chamber), March 12, 2008, para. 149: “[W]hile the existence of a plan can be evidentially relevant, it is not a separate legal element of a crime against humanity” *See also Nabimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 922 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 84 (similar); *Seromba*, (Trial Chamber), December 13, 2006, para. 356 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 527 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 329 (similar).

Semanza, (Appeals Chamber), May 20, 2005, para. 269: “[T]he Prosecution did not have to prove the existence of a high-level policy against the Tutsi: although the existence of a policy or plan may be useful to establish that the attack was directed against a civilian population and that it was widespread and systematic, it is not an independent legal element.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 512 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 299 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 101 (approving of *Gacumbitsi* Trial Chamber formulation).

Muhimana, (Trial Chamber), April 28, 2005, para. 527: “The concept of a ‘systematic’ attack, within the meaning of Article 3 of the Statute, refers to a deliberate pattern of conduct but does not necessarily require the proof of a plan.” *See also Gacumbitsi*, (Trial

¹⁷ See prior footnote.

Chamber), June 17, 2004, para. 299 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 101 (approving of *Gacumbitsi* Trial Chamber formulation).

Kamubanda, (Trial Chamber), January 22, 2004, para. 665: “There has been some debate in the jurisprudence of this Tribunal about whether or not the term ‘systematic’ necessarily contains a notion of a policy or a plan. The Chamber agrees with the reasoning followed in *Semanza* [*sic*] and finds that the existence of a plan is not [*sic*] independent legal element of Crimes against Humanity. In *Semanza* [*sic*], ICTR Trial Chamber II endorsed the jurisprudence of the Appeals Chamber of the ICTY in *Kunarac* [*sic*], that whilst ‘the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, [...] the existence of such a plan is not a separate legal element of the crime.’” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 872 (same with italics).

But see Akayesu, (Trial Chamber), September 2, 1998, para. 580: “There must however be some kind of preconceived plan or policy.” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 77; *Musema*, (Trial Chamber), January 27, 2000, para. 204; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 69; *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 123-24, 581.

(b) use of substantial resources not an element

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 922: “Contrary to what certain early Tribunal judgements might be taken to imply, ‘substantial resources’ do not constitute a legal element of crimes against humanity.”

5) crime must form part of the widespread or systematic attack

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 934: “Whereas the crime *per se* must be committed as part of a widespread and systematic attack, preparatory acts, instigation or aiding and abetting can be accomplished before the commission of the crime and the occurrence of the widespread and systematic attack.”

Seromba, (Trial Chamber), December 13, 2006, para. 360: “There must be a nexus between the criminal act and the attack.”

See also Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), Partly Dissenting Opinion of Judge Meron, November 28, 2007, paras. 17-21 (there was a lack of nexus between *Nahimana* and the widespread and systematic attack).

Compare Semanza, (Appeals Chamber), May 20, 2005, para. 269: “[T]he Prosecution did not have to prove the existence of an armed conflict: contrary to Article 5 of the ICTY Statute, Article 3 of the ICTR Statute does not require that the crimes be committed in the context of an armed conflict.”

(a) need not share all the same features

Bisengimana, (Trial Chamber), April 13, 2006, para. 50: “The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 669 (same); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 875-76 (same); *Semanza*, (Trial Chamber), May 15, 2003, para. 330 (source).

Kajelijeli, (Trial Chamber), December 1, 2003, para. 866: “An act may form part of the widespread or systematic attack without necessarily sharing all the same features, such as the time and place of commission of the other acts constituting the attack. In determining whether an act forms part of a widespread or systematic attack, the Chamber will consider its characteristics, aims, nature, and consequence.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 659 (same as first sentence).

Semanza, (Trial Chamber), May 15, 2003, para. 326: “Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.”

(b) underlying crime need not be widespread or systematic

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 102: “[I]t is not rape *per se* that must be shown to be widespread or systematic, but rather the attack itself (of which the rapes formed part).”

Seromba, (Trial Chamber), December 13, 2006, para. 357: “It is in not a requirement that the criminal act must, in and of itself, be widespread or systematic.”

**(c) a single murder may constitute a crime against humanity/
multiplicity of victims of act not required except for
extermination**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 924: “The Appeals Chamber considers that, except for extermination, a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population.”

Seromba, (Trial Chamber), December 13, 2006, para. 357: “A single murder may constitute a crime against humanity if it is perpetrated within the context of a widespread or systematic attack.”

Compare case law discussing “widespread,” Section (II)(b)(i)(3), this Digest, where it is relevant that the “attack” be against a multiplicity of victims.

6) application—widespread or systematic attack

Bikindi, (Trial Chamber), December 2, 2008, para. 430: “It is not disputed in this case that a genocide characterised by widespread killings of Tutsi civilians occurred from April to July 1994 in Rwanda.”

Bisengimana, (Trial Chamber), April 13, 2006, paras. 46-47: “In the Plea agreement, the Accused admits that from 7 April 1994, massacres of the Tutsi population and the murder of numerous political opponents were perpetrated throughout the territory of Rwanda, including Gikoro *commune*. These crimes were carried out by militiamen, military personnel, and *gendarmes*.” “Based on the facts contained in the Plea Agreement, the Chamber is convinced that widespread attacks were committed in Gikoro *commune* in April 1994 because the attacks resulted in a larger number of victims.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 707-08: “Prosecution Expert Witness Guichaoua testified that, subsequent to 6 April 1994, there were widespread attacks against the Tutsi population across Rwanda. This opinion was amply supported by the evidence presented in this case, particularly with respect to the various massacre sites. Imanishimwe acknowledged that there was ‘inter-ethnic killing’ throughout Rwanda in April and May 1994. Moreover, Bagambiki does not dispute that there were widespread attacks against the civilian population in Cyangugu during the events referred to in the indictment. Having considered the totality of the evidence, and in particular the evidence concerning the ethnic composition of the individuals who sought refuge at the various sites in Cyangugu, the Chamber finds that from April to June 1994 there was a widespread attack against the civilian Tutsi population of Cyangugu.”

“The Chamber further finds that the evidence reflects that there was a related systematic attack on political grounds against civilians with suspected ties to the RPF [Rwandan Patriotic Front]. For example, the Chamber recalls that assailants demanded the removal of seventeen people from Kamarampaka Stadium and Cyangugu Cathedral because they were suspected of financially contributing to or communicating with the RPF. Sixteen of these refugees were later killed. The Chamber further notes that the assailants threatening to attack Shangi parish demanded the removal of a number of refugees whom the assailants thought to be armed and connected with the RPF. Furthermore, the Chamber’s findings concerning the events at the Karambo military camp indicate that a number of civilians were arrested, detained, mistreated, and executed because of suspected ties to the RPF.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 686: “[B]etween 7 and 14 April 1994, killings of members of the Tutsi group occurred on a mass scale in Mukingo *commune*, Nkuli *commune* and at the Ruhengeri Court of Appeal in Kigombe *commune*. These attacks were carried out by groups of attackers and were directed against a large number of victims on the basis of their Tutsi ethnicity. The targets were whole populations of people of Tutsi ethnicity such as neighbourhoods, or places of shelter and refuge. Entire families and neighbourhoods were eliminated. Thus, the Chamber finds that during April 1994 in Mukingo *commune* and neighbouring *communes* within Ruhengeri *prefecture*, there was a widespread attack upon a civilian Tutsi group, carried out on the basis of ethnicity.”

Akayesu, (Trial Chamber), September 2, 1998, para. 173: “The “widespread” requirement was met, in part, because of the scale of the events that took place. “Around the country, a massive number of killings took place within a very short time frame. Tutsi were clearly the target of the attack.” The systematic nature of the attack was evidenced by the “unusually large shipments of machetes into the country shortly before it occurred,” “the structured manner in which the attack took place,” the fact that “[t]eachers and intellectuals were targeted first,” and the fact that through the “media and other propaganda, Hutu were encouraged systematically to attack Tutsi.”

See also “notice of widespread or systematic attacks in Rwanda in 1994” under “judicial notice,” Section (VIII)(d)(xiii)(2), this Digest.

**ii) the attack must be directed against a civilian population
(element 2)**

Nzabirinda, (Trial Chamber), February 23, 2007, para. 22: “[T]he attack must be directed against a civilian population.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 358 (same); *Muhimana*, (Trial Chamber), April 28, 2005, para. 528 (same); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 300 (same).

Semanza, (Trial Chamber), May 15, 2003, para. 326: “A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds.”

But see Akayesu, (Trial Chamber), September 2, 1998, para. 578: “[T]he *act* must be committed against members of the civilian population.” (emphasis added). *See also Akayesu*, (Trial Chamber), September 2, 1998, para. 582 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 80 (similar).¹⁸

1) civilian defined

Bisengimana, (Trial Chamber), April 13, 2006, para. 48: “The *Akayesu* Judgement definition of ‘civilian population’ has been consistently followed in the jurisprudence of the Tribunal:

[...] people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.”

See also Seromba, (Trial Chamber), December 13, 2006, para. 358 (quoting same language from *Akayesu*); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 513 (relying on same language from *Akayesu*); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 667 (quoting same language from *Akayesu*); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 873-74 (quoting same language from *Akayesu*); *Musema*, (Trial Chamber), January 27, 2000, para. 207 (“‘civilian population,’ . . . was defined as people who were not taking any active part in the hostilities”); *Rutaganda*, (Trial Chamber), December 6, 1999, para.

¹⁸ See footnote 15 above, explaining that most cases require that the “attack” be committed against the civilian population.

72 (same as *Musema*); *Akayesu*, (Trial Chamber), September 2, 1998, para. 582 (source of quote in *Bisengimana*).

See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 127-29: Because crimes against humanity may be committed “inside or outside the context of an armed conflict,” “the term civilian must be understood within the context of war as well as relative peace.” Thus, “a wide definition of civilian is applicable and, in the context of the situation of Kibuye *Prefecture* where there was no armed conflict, includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force.”

2) presence of non-civilians does not change civilian character of population/ civilians must be the primary object of the attack

Nzabirinda, (Trial Chamber), February 23, 2007, para. 22: “As stated in the *Semanza* Judgement, ‘a civilian population remains civilian in nature even if there are individuals within it who are not civilians.’” See *Semanza*, (Trial Chamber), May 15, 2003, para. 330 (source of quote).

Seromba, (Trial Chamber), December 13, 2006, para. 358: “The presence of certain non-civilians in this group does not change its civilian character.” See also *Muhimana*, (Trial Chamber), April 28, 2005, para. 528 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 79 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 207 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 72 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 128 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 582 (similar).

Bisengimana, (Trial Chamber), April 13, 2006, para. 48: According to the *Akayesu* Judgement: “Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.” See also *Muvunyi*, (Trial Chamber), September 12, 2006, para. 513 (relying on same language from *Akayesu*); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 300 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 667 (quoting same language from *Akayesu*); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 873-74 (quoting same language from *Akayesu*).

Semanza, (Trial Chamber), May 15, 2003, para. 330: “A civilian population must be the primary object of the attack.”

3) consider situation of victim when crimes committed, not status

Bisengimana, (Trial Chamber), April 13, 2006, para. 49: “As noted in [the] *Blaškić* Judgement, ‘the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.’” See also *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 668 (similar).

4) population—does not require that crimes against humanity be directed against the entire population

Bisengimana, (Trial Chamber), April 13, 2006, para. 50: “[T]he term ‘population’ does not require that crimes against humanity be directed against the entire population of a geographical territory or area.” *See also Kamubanda*, (Trial Chamber), January 22, 2004, para. 669 (same); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 875-76 (same); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 80 (source).

Bagilishema, (Trial Chamber), June 7, 2001, para. 80: “The requirement that the prohibited acts must be directed against a civilian ‘population’ does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity.” “Instead the ‘population’ element is intended to imply crimes of a collective nature and thus excludes single or isolated acts which, although possibly constituting crimes under national penal legislation, do not rise to the level of crimes against humanity.”

5) application—civilian population

Bisengimana, (Trial Chamber), April 13, 2006, paras. 52-53: “In the Plea Agreement, the Accused admits that massacres of the Tutsi population and the murder of numerous political opponents were perpetrated. He further admits that the attacks against Tutsi civilians gathered at Musha Church and at Ruhanga Protestant Church and School in Gikoro *commune* were part of the ongoing attacks against Tutsi civilians occurring in most parts of Rwanda during April 1994.” “Based on the facts contained in the Plea Agreement, the Chamber is convinced that the widespread attacks in Gikoro *commune* were committed against a civilian population.”

iii) the attack must be committed on national, political, ethnic, racial or religious grounds (discriminatory grounds) (element 3)

1) the attack must be on discriminatory grounds

Nzabirinda, (Trial Chamber), February 23, 2007, para. 23: “[T]he attack must be committed on discriminatory grounds. The Chamber recalls the *Akayesu* Judgement, where the ‘discriminatory grounds’ element was considered to be jurisdictional in nature, limiting the jurisdiction of the Tribunal to crimes committed on ‘national, political, ethnic, racial or religious grounds.’” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 54 (same as second sentence); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 301 (similar to *Nzabirinda*).

Seromba, (Trial Chamber), December 13, 2006, para. 359: “The attack against a civilian population must have been committed with discriminatory intent. That is, it must have been committed against a population ‘on national, political, ethnic, racial or religious grounds.’”

Muhimana, (Trial Chamber), April 28, 2005, para. 529: “The attack against the civilian population must have been carried out on a discriminatory basis, that is, on national, political, ethnic, racial or religious grounds.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 671: “Article 3 of the Statute provides that the attack against the civilian population be committed on ‘national, political, ethnical, racial or religious grounds.’ This provision is jurisdictional in nature, limiting the jurisdiction of the Tribunal to a narrow category of Crimes, and not intended to alter the definition of Crimes against Humanity in international law.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 514 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 672; *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 877 (same).

Semanza, (Trial Chamber), May 15, 2003, para. 331: “Article 3 of the Statute requires that the attack against the civilian population be committed ‘on national, political, ethnical, racial or religious grounds.’” *See also Akayesu*, (Trial Chamber), September 2, 1998, para. 595 (similar).¹⁹

2) describes nature of the attack, not *mens rea* of the accused/perpetrator

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2166: “The . . . requirement that crimes against humanity have to be committed ‘on national, political, ethnic, racial or religious grounds’ does not mean that a discriminatory *mens rea* must be established.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 359 (similar).

Bagilishema, (Trial Chamber), June 7, 2001, para. 81: “[T]he qualifier ‘on national, political, ethnic, racial or religious grounds,’ which is peculiar to the ICTR Statute should, as a matter of construction, be read as a characterisation of the nature of the ‘attack’ rather than of the *mens rea* of the perpetrator. The perpetrator may well have committed an underlying offence on discriminatory grounds identical to those of the broader attack; but neither this, nor for that matter any discriminatory intent whatsoever, are prerequisites of the crime, so long as it was committed as part of the broader attack.”

See also Semanza, (Appeals Chamber), May 20, 2005, paras. 268-69: “The *Akayesu* . . . Appeals Chamber . . . explained:

The meaning to be collected from Article 3 of the Statute is that even if the accused did not have a discriminatory intent when he committed the act charged against a particular victim, he nevertheless knew that his act could further a discriminatory attack against a civilian population; the attack could even be perpetrated by other persons and the accused could even object to it. As a result, where it is shown that the accused had knowledge of such objective nexus, the Prosecutor is under no obligation to go forward with a showing that the crime charged was committed against a particular victim with a discriminatory intent. In this connection, the only known exception in customary international law relates to cases of persecutions.”

¹⁹ The formulation that “the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds,” *Akayesu*, (Trial Chamber), September 2, 1998, para. 578 (emphasis added), appears incorrect. It is the “attack” that must be committed on one or more discriminatory grounds.

“The Appeals Chamber considers that the above is a correct statement of the law.” *See Akayesu*, (Appeals Chamber), June 1, 2001, para. 467 (source of quote).

See also “discriminatory intent not required for acts other than persecution,” Section (II)(b)(iv)(2), this Digest.

3) acts committed against persons outside discriminatory categories may be covered

Nzabirinda, (Trial Chamber), February 23, 2007, para. 23: “[I]n the *Kajelijeli* Judgement the Chamber noted that:

such acts committed against persons outside the discriminatory categories need not necessarily fall out with the jurisdiction of the Tribunal, if the perpetrator’s intention in committing these acts is to support or further the attack on the group discriminated against on one of the enumerated grounds.”

See also Bisengimana, (Trial Chamber), April 13, 2006, para. 54 (same); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 301 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 672-73 (same language as quoted); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 878 (source of quoted language).

Muhimana, (Trial Chamber), April 28, 2005, para. 529: “[T]he victim’s membership in a national, political, ethnic, racial or religious group is irrelevant, provided that the perpetrator’s intention is to support or further an attack against a civilian population on one of the enumerated discriminatory grounds.” *See also Murunyi*, (Trial Chamber), September 12, 2006, para. 514 (similar).

Semanza, (Trial Chamber), May 15, 2003, para. 331: “Acts committed against persons outside the discriminatory categories may nevertheless form part of the attack where the act against the outsider supports or furthers or is intended to support or further the attack on the group discriminated against on one of the enumerated grounds.”

See, e.g., Muhimana, (Trial Chamber), April 28, 2005, para. 561: “The Chamber finds that the Accused chose his rape victims because he believed that they were *Tutsi*. Whether the victims were in fact *Tutsi* [one, in fact, was Hutu] is irrelevant in the determination of the Accused’s criminal responsibility. The Chamber concludes, on the basis of the Accused’s conduct, that he raped his victims with the knowledge that the rapes formed part of a widespread and systematic attack on the *Tutsi* civilian population.”

4) political grounds

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 130: “Political grounds include party political beliefs and political ideology.”

5) national, ethnical, racial, or religious grounds

See Sections (I)(c)(iv)(4)–(7), this Digest.

6) application—discriminatory grounds

Bisengimana, (Trial Chamber), April 13, 2006, paras. 55-56: “In the Plea Agreement, Paul Bisengimana acknowledges that massacres of the *Tutsi* population and the murder of

numerous political opponents were perpetrated. He acknowledges that from 7 April 1994, in all regions of the country, Tutsis fleeing from massacres sought refuge in locations that they considered to be safe. In many of these places, the refugees were attacked, abducted, and massacred, often with the complicity of some of the authorities.” “Based on the Plea Agreement, the Chamber finds that the widespread attacks against the civilian population were committed on discriminatory grounds because most of the victims were Tutsis.”

iv) *mens rea* (element 4)

1) knowledge of the broader context of the attack and that acts form part of the attack

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 86: “[F]or crimes against humanity ‘the accused must have acted with knowledge of the broader context of the attack, and with knowledge that his act formed part of the widespread and systematic attack against the civilian population.’” *See also* *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 24 (same language as quoted); *Seromba*, (Trial Chamber), December 13, 2006, para. 360 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 57 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 302 (similar); *Kamubanda*, (Trial Chamber), January 22, 2004, paras. 675-76 (same language as quoted); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 880-81 (similar).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2166: “As concerns the *mens rea* [for crimes against humanity], the perpetrator must have acted with knowledge of the broader context and knowledge that his acts formed part of the attack, but need not share the purpose or goals of the broader attack.” *See also* *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 430 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 551 (similar); *Murunyi*, (Trial Chamber), September 12, 2006, para. 516 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 421 (similar).

Mpambara, (Trial Chamber), September 11, 2006, para. 11: “The perpetrator must know that his acts form part of this discriminatory attack but need not possess the discriminatory intent.”²⁰

Muhimana, (Trial Chamber), April 28, 2005, para. 530: “[T]he perpetrator must have acted knowing that the act formed part of a widespread or systematic attack against a civilian population.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 478: “The requirement that the commission of the enumerated offence be ‘part of’ the attack supplies the *mens rea* unique to crimes against humanity. The perpetrator need not intend to discriminate on one of the enumerated grounds, but must, at a minimum, know that his action is part of a widespread or systematic attack against civilians on discriminatory grounds.”

²⁰ See “discriminatory intent not required for acts other than persecution,” Section (II)(b)(iv)(2), this Digest.

Niyitegeka, (Trial Chamber), May 16, 2003, para. 442: “[T]he crime must be committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The Accused need not act with discriminatory intent, but he must know that his act is part of this widespread or systematic attack.”²¹

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 133-34: “The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act” “[T]he accused must have acted with knowledge of the broader context of the attack Part of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.” See also *Bagilishema*, (Trial Chamber), June 7, 2001, para. 94 (similar); *Ruggiu*, (Trial Chamber), June 1, 2000, para. 20 (same as *Kayishema*).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 133-34: To be held responsible, the perpetrator must have “actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan.” See also *Rutaganda*, (Trial Chamber), December 6, 1999, para. 71; *Musema*, (Trial Chamber), January 27, 2000, para. 206.

But see “plan or policy relevant but not required,” Section (II)(b)(i)(4)(a), this Digest.

2) discriminatory intent not required for acts other than persecution

Akayesu, (Appeals Chamber), June 1, 2001, paras. 447-69: The Appeals Chamber ruled that the Trial Chamber had committed an error of law in finding that intent to discriminate on national, political, ethnic, racial or religious grounds was an essential element for crimes against humanity. “Article 3 . . . does not require that all crimes against humanity . . . be committed with a discriminatory intent.” The Appeals Chamber held that “Article 3 restricts the jurisdiction of the Tribunal to crimes against humanity committed in a specific situation, that is, ‘as part of a widespread or systematic attack against any civilian population’ on discriminatory grounds.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 514: “In *Akayesu*, the Appeals Chamber stated that except for the offence of persecution, international humanitarian law does not require proof of a discriminatory intent for all crimes against humanity.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 430: The perpetrator need not possess discriminatory intent.

²¹ See prior footnote.

Semanza, (Trial Chamber), May 15, 2003, para. 332: “There is no requirement that the enumerated acts other than persecution be committed with discriminatory intent.”

See also “discriminatory grounds” “describes nature of the attack, not *mens rea* of the accused/perpetrator,” Section (II)(b)(iii)(2), this Digest.

For the *mens rea* requirements as to the underlying crimes, see Section (II)(c), this Digest.

3) application

Bisengimana, (Trial Chamber), April 13, 2006, paras. 58-60: “In the Plea Agreement, the Accused admits that from 7 April 1994, massacres of the Tutsi population and the murder of numerous political opponents were perpetrated in Gikoro *commune*. He acknowledges that the attacks against the Tutsi civilians gathered at Musha Church and at Ruhanga Protestant Church and School were part of the ongoing attacks against Tutsi civilians which were occurring in most parts of Rwanda.” “Based on the Plea Agreement, the Chamber is convinced that the Accused knew the broader context of the attacks occurring in Rwanda in April 1994 and knew that his acts formed part of widespread attacks committed against Tutsi civilians.” “The Chamber finds that the attacks at Musha Church and at Ruhanga Protestant Church and School in Gikoro *commune* in April 1994 were launched against Tutsi civilians on discriminatory grounds and were of a widespread nature because they resulted in a large number of victims.”

Muhimana, (Trial Chamber), April 28, 2005, paras. 559-60: “The Chamber recalls its finding that the Accused participated in attacks against *Tutsi* during April, May, and June 1994 and that in doing so, he intended to destroy the *Tutsi* ethnic group.” “Consequently, the Chamber finds that the Accused knew that all of these rapes were part of a discriminatory, widespread, and systematic attack against *Tutsi* civilians.” See also *id.*, paras. 579-80 (similar findings regarding the underlying crime of killing).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 709, 742: “Given the respective positions of authority of Bagambiki and Imanishimwe during the relevant period, and considering, in particular, the evidence concerning the various prefectural security council meetings in which they discussed the ongoing events, it is inconceivable that Bagambiki or Imanishimwe could have been unaware of these attacks at the time of the events.” “From the totality of the evidence of what occurred at the [Cyangugu] military camp and in the region, the only reasonable inference that may be drawn is that Imanishimwe acted intentionally in ordering civilians to be killed and with an awareness that he was ordering the principal perpetrators to commit murder as part of the widespread attack against the civilian population against the civilian population in Cyangugu.”

v) both state and non-state actors covered

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 125-26: Stating that “crimes against humanity are . . . ‘instigated or directed by a Government or by any organization or group,’” the Chamber held that the “Tribunal’s jurisdiction covers both State and non-State actors.”

vi) application—*chapeau*

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 433: “The Chamber recalls it took judicial notice that between 6 April and 17 July 1994, there were, throughout Rwanda, widespread and systematic attacks against the civilian population based on Tutsi ethnic identification. The Chamber considers that someone in the Accused’s position of authority, particularly after seeing corpses [*sic*] at the Kiyovu roadblock [in Kiyovu cellule, Kigali-ville prefecture], would have been aware of the aforementioned context of widespread and systematic attacks against Tutsi in Rwanda. Accordingly, the Chamber finds beyond reasonable doubt that when the Accused participated in the Kesho Hill massacre [in Rwili secteur, Gaseke commune, in Gisenyi prefecture], and issued instructions at the Kiyovu roadblock, as found above, he did so with knowledge of the broader context and knowledge that his acts formed part of the discriminatory attacks occurring throughout Rwanda in 1994. The Chamber therefore finds that the *chapeau* requirements for crimes against humanity are met.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2167: “The Chamber has considered the totality of the evidence, in particular concerning the ethnic composition of the individuals who sought refuge at various sites as well as the actual or perceived political leanings of many of those killed or singled out at roadblocks in the days after President Habyarimana’s death. It finds that there were widespread and systematic attacks against the civilian population on ethnic and political grounds between April and July 1994. It is inconceivable that the principal perpetrators of these attacks as well as the Accused did not know that their actions formed part of this attack. As high-ranking military officers, the Accused would have been familiar with the situation unfolding both nationally and in areas under their control. Many of the attacks or massacres were open and notorious. The Chamber has also concluded that Bagosora, Ntabakuze and Nsengiyumva ordered *or* authorised many of these attacks.” (emphasis added.)²²

Nchamihigo, (Trial Chamber), November 12, 2008, paras. 341-42: “The Chamber has found that there were attacks against the civilian population of Cyangugu prefecture. Thousands of civilians were killed. These civilians were Tutsi or Hutu political opponents, and they were killed at places where they had sought refuge (Gihundwe sector, Hanika parish, Mibilizi parish and hospital, Nyakanyinya school, Nyamasheke parish, and Shangi parish). Civilians were killed after being removed from Kamarampaka Stadium. Civilians were killed at their homes and in the street. There was evidence that at the roadblocks those trying to flee were stopped, their identities controlled, and their fate decided accordingly. The Chamber believed that the killings were planned at PSC [Cyangugu Prefecture Security Council] meetings and has found that Nchamihigo participated in two of those meetings. The Chamber is satisfied that the attack against the civilian population was both widespread and systematic. The Chamber believed the evidence that these attacks were aimed at destroying the Tutsi and RPF [Rwandan Patriotic Front] supporters or those who were opposed to the

²² See “alternative convictions not proper: must establish criminal responsibility unequivocally,” Section (VII)(a)(ii), this Digest.

incumbent authorities. They were therefore committed on ethnic or racial, and political grounds.” “On the basis of all the evidence, the Chamber has found that there was a widespread and systematic attack against *[sic]* civilian population of Cyangugu prefecture on racial or ethnic and political grounds. Considering Nchamihigo’s position as Deputy Prosecutor in Cyangugu and his role in the events as established in the factual findings, the Chamber has no doubt that he knew that his acts were part of such widespread and systematic attack.”

Karera, (Trial Chamber), December 7, 2007, para. 553: “[I]t is clear that a widespread or systematic attack against Tutsi civilians took place in the prefectures of Kigali-Ville and Kigali-Rural, between 6 April and June 1994. Considering Karera’s participation in attacks in Kigali-Ville and Kigali-Rural prefectures . . . , as well as his high official position in the Rwandan administration, the Chamber finds that Karera was aware that such an attack took place.” *See also id.*, paras. 554-56.

Seromba, (Trial Chamber), December 13, 2006, paras. 369-70: “The Chamber finds that the conditions required for the commission of crime against humanity have been satisfied in this case. Indeed, the Chamber is satisfied that there were attacks against the Tutsi in Kivumu *commune* in April 1994. The attack which culminated in the destruction of Nyange church on 16 April 1994 was ‘widespread’ in the sense that it was massive, carried out collectively and directed against a multiplicity of victims. The attack was also ‘systematic’ inasmuch as the factual findings tend to show that it was thoroughly organized and followed a regular pattern, starting with the surrounding of the church on 12 April 1994 up to its destruction on 16 April 1994, coupled with the intensification of the attacks against the refugees on 14 and 15 April 1994. Lastly, the Chamber finds that the attack was directed against the Tutsi civilian population that had sought refuge in Nyange church on discriminatory grounds Furthermore, the Chamber finds that Accused Athanase Seromba had knowledge of the widespread and systematic nature of the attack and the underlying discriminatory grounds. The Chamber is satisfied that Seromba also knew that the crime of extermination committed against the Tutsi refugees was part of that attack.”

Simba, (Trial Chamber), December 13, 2005, paras. 423-24: “The evidence in this case amply supports the conclusion that there were widespread attacks against the Tutsi population in Gikongoro prefecture in April 1994. Witnesses recounted Hutu militiamen burning and looting Tutsi homes in the days immediately following the death of President Habyarimana on 6 April. Thousands of Tutsi then congregated at parishes and schools. The evidence of the killings at the five massacre sites as well as their massive scale can lead to no other conclusion. Having considered the totality of the evidence, and in particular the evidence concerning the ethnic composition of the individuals who sought refuge at the various sites, the Chamber finds that in April 1994 there was a widespread attack against the civilian Tutsi population of Gikongoro on ethnic grounds.”

“The Chamber finds it inconceivable that Simba, and the other participants in the joint criminal enterprise, did not know during the massacres of 21 April that their actions formed part of a widespread attack against the Tutsi civilian population. Simba

was familiar with the situation in Rwanda nationally from his time in Kigali and Gitarama town. Those who sought refuge at his home in Kigali recounted soldiers looking for Tutsi. He passed roadblocks from Kigali to Gitarama town where militiamen threatened his Tutsi passengers. He was warned by Witness MIB that the road to Gikongoro was not safe because assailants were killing Tutsi. The Chamber found that on 21 April, Simba was present at two massacre sites distributing weapons and speaking with assailants. In addition, other prominent participants in the joint criminal enterprise, such as Prefect Bucyibartua, Captain Sebhura, and Bourgmestre Semakwavu, attended various meetings with local authorities to discuss the lack of security in the region. They were present during the massacres and directed attackers from Murambi Technical School to Cyanika Parish [in Gikongoro prefecture]. The assailants who physically perpetrated the massacres also must have been aware of the broader context, particularly given the scale of the atrocities.”

Muhimana, (Trial Chamber), April 28, 2005, paras. 531-33: “In the instant case, the Chamber has found that several attacks were carried out against *Tutsi* refugees between April and May 1994 in Gishyita *Commune*: on 9 and 11 April 1994, *Tutsi* residents were attacked at Nyarutovu; on 15 April 1994, numerous *Tutsi* refugees were attacked at Mubuga Church; the next day, 16 April 1994, refugees, mainly *Tutsi*, were attacked at Mugonero Complex; in May 1994, *Tutsi* were attacked on Kanyinya Hill; on 13 and 14 May 1994, *Tutsi* were attacked on Muyira Hill. At Mubuga Church and Mugonero Complex, the assailants instructed *Hutu* refugees to separate from the crowd. During these attacks, many *Tutsi* were killed or seriously injured.” “Considering the circumstances and nature of the attacks, as well as evidence that, in some instances, assailants instructed *Hutu* refugees to separate from the *Tutsi*, the Chamber finds that the *Tutsi* civilians were targeted on the basis of their ethnicity, within the meaning of Article 3 of the Statute and that many died or were seriously injured.” “The Chamber, therefore, finds that discriminatory, widespread, and systematic attacks were directed against groups of *Tutsi* civilians in Gishyita *Commune* and in the Bisesero area, between April and June 1994.”

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 303-04, 306: “The Chamber has already found that there were attacks against Tutsi refugees in Nyarubuye Parish during three consecutive days, from 15 to 17 April 1994. Hutu refugees at the parish had been asked to separate themselves from the crowd, thus an indeterminate number of them were saved from the attack. Many Tutsi were killed there. After the first attack on the parish on 15 April 1994, the attackers returned there the following day, and the day after, to finish off survivors. Between 7 April and 18 April 1994, other Tutsi were killed or subjected to attacks and acts of discrimination. Tutsi refugees and Tutsi inhabitants of Rusumo *commune* were attacked and their property looted. On 13 April 1994, the Accused expelled his tenants, Tutsi women, knowing that by so doing he was exposing them to the imminent risk of being targeted by Hutu attackers. The utterances and actions of the Accused at the meeting of 9 April 1994, and during the public meetings he held on the days preceding the attack on the parish, demonstrate the systematic nature of the attack. Weapons were assembled in preparation for the attacks. The Accused conferred daily with military officials to coordinate actions to be undertaken. He travelled to various locations in Rusumo *commune* disseminating his instructions. Once

the population was mobilized, it started attacking Tutsi in different locations, but the most serious attack – the attack on the parish – occurred after reinforcements had come from a group of *Interahamwe*.” “The Chamber finds that the Accused’s instructions to the attackers contained a discriminatory element, which prevailed during the attacks and in the selection of victims.”

“The said attacks, which were carried out by groups of attackers, were directed against numerous victims, on the ground that they belonged to the Tutsi ethnic group. The victims were attacked particularly in their areas of residence or in places where they had sought refuge. Tutsi families were decimated. The Chamber therefore finds that a discriminatory, widespread and systematic attack was carried against a group of Tutsi civilians during the month of April 1994 in Rusumo *commune*.”

Kamubanda, (Trial Chamber), January 22, 2004, paras. 677-83: “[T]he Accused admitted that between 1 January 1994 and 17 July 1994 there were throughout Rwanda widespread or systematic attacks against a civilian population with the specific objective of extermination of the Tutsi.” “The Chamber has accepted that by 12 April 1994, several thousand men, women and children, mainly of Tutsi origin, along with their cattle, had taken refuge at the Parish.” “The Chamber has found that a large number of Tutsi were killed on 12 April 1994 at the Gikomero Parish Compound, Gikomero commune.” “The Chamber has also found that a large number of Tutsi were killed on or about the 13 April 1994 in Gishaka, Gikomero commune.” “The evidence of both Parties shows that these Tutsi victims had taken refuge in Gikomero Parish Compound and Gishaka fleeing prior attacks against them that occurred in other areas of Kigali-Rural, such as Rubungo.” “Thus, the Chamber finds that killings of members of the Tutsi ethnic group occurred on a mass scale in Gikomero commune during April 1994. The targets were whole populations of Tutsi ethnicity, attacked at places such as where they took shelter and refuge. The Chamber further finds that this constitutes a widespread attack upon a civilian Tutsi ethnic group.” “The Chamber finds that the attack of Gikomero Parish Compound on 12 April 1994 was part of a widespread attack against the Tutsi civilian population in Rwanda and particularly in Kigali-Rural.”

c) Underlying offenses

i) the individual acts contain their own elements and need not contain the elements of crimes against humanity

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 135: “The crimes themselves need not contain the three elements of the attack (i.e. widespread or systematic, against any civilian population, on discriminatory grounds), but must form *part of* such an attack. Indeed, the individual crimes contain their own specific elements.”

ii) murder

1) defined/ *actus reus*

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 442: “Murder requires proof of the following three elements: (1) the death of a victim; (2) that the death was the result of an act or an omission of the perpetrator; and (3) that the perpetrator, at the time of the act or omission, intended to kill the victim or, in the absence of such a specific

intent, knew that death was a probable consequence of the act or omission.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 429 (same).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2169: “Murder is the intentional killing of a person without any lawful justification or excuse or the intentional infliction of grievous bodily harm leading to death with knowledge that such harm will likely cause the victim’s death.” *See also Karera*, (Trial Chamber), December 7, 2007, para. 558 (same); *Muhimana*, (Trial Chamber), April 28, 2005, para. 568 (similar).

Nzabirinda, (Trial Chamber), February 23, 2007, para. 25: “Murder is the intentional killing of a person by an act or an omission, or the intentional infliction of grievous bodily harm, committed by the offender with knowledge that such harm is likely to cause the victim’s death or with reckless disregard as to whether or not death will result, with no lawful justification or excuse.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 87 (similar); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 487 (similar).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 140: “The accused is guilty of murder if the accused, engaging in conduct which is unlawful:

1. causes the death of another;
2. by a premeditated act or omission;
3. intending to kill any person or, [sic]
4. intending to cause grievous bodily harm to any person.”

See also Bagilishema, (Trial Chamber), June 7, 2001, para. 84 (same elements).

Akayesu, (Trial Chamber), September 2, 1998, para. 589: “The Chamber defines murder as the unlawful, intentional killing of a human being. The requisite elements of murder are:

1. the victim is dead;
2. the death resulted from an unlawful act or omission of the accused or a subordinate;
3. at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues [sic] or not.”

See also Musema, (Trial Chamber), January 27, 2000, para. 215 (similar, including crimes against humanity *chapeau*); *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 80-81 (same).

(a) omissions covered

See Nzabirinda, (Trial Chamber), February 23, 2007, para. 25 (omissions covered); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 140 (same).

(b) when punishable as a crime against humanity

Nzabirinda, (Trial Chamber), February 23, 2007, para. 25: “Murder is punishable as a crime against humanity when it has been committed as part of a widespread or systematic attack against a civilian population on discriminatory grounds.” *See also*

Bisengimana, (Trial Chamber), April 13, 2006, para. 87 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 568 (similar); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 487 (similar).

(c) no requirement that the accused personally commit the killing

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 546: “Murder as a crime against humanity under Article 3(a) does not require the Prosecution to establish that the accused personally committed the killing. Personal commission is only one of the modes of [responsibility] identified under Article 6(1) of the ICTR Statute. All modes of [responsibility] under that Article are applicable to the crimes defined in Articles 2 to 4 of the Statute. Similarly, an accused can also be convicted of a crime defined in Articles 2 to 4 of the Statute on the basis of his responsibility as a superior according to Article 6(3) of the ICTR Statute.”

See also Akayesu, (Trial Chamber), September 2, 1998, para. 589 (death may result from the act or omission of the accused “or a subordinate,” and the intent may be that of the accused “or a subordinate”).

(d) murder and extermination same except for scale

Bisengimana, (Trial Chamber), April 13, 2006, para. 87: “The Chamber recalls that it is the scale of the killings that distinguishes extermination from murder as a crime against humanity.”

Kamubanda, (Trial Chamber), January 22, 2004, para. 686: “The Chamber notes that apart from the question of scale, the essence of the crimes of murder as a Crime against Humanity and extermination as a Crime against Humanity is the same.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 886 (same).

For discussion of extermination, see Section (II)(c)(iii), this Digest; *see also* “difference from crime of murder,” under “extermination,” Section (II)(c)(iii)(1)(c), this Digest.

2) *mens rea*

Nzabirinda, (Trial Chamber), February 23, 2007, para. 25: “The *mens rea* as to murder includes “the intentional infliction of grievous bodily harm, committed by the offender with knowledge that such harm is likely to cause the victim’s death or with reckless disregard as to whether or not death will result” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 87 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 589 (similar).

Muhimana, (Trial Chamber), April 28, 2005, para. 569: “The Chamber agrees with the Trial Chamber in *Semanza* that:

. . . it is premeditated murder (assassinat) that constitutes a crime against humanity in Article 3(a) of the Statute. Premeditation requires that, at a minimum, the accused held a deliberate plan to kill prior to the act causing death, rather than forming the intention simultaneously with the act. The prior intention need not be held for very long; a cool moment of reflection is

sufficient. The Chamber observes that the requirement that the accused must have known that his acts formed part of a wider attack on the civilian population generally suggests that the murder was pre-planned. The Chamber emphasises that the accused need not have premeditated the murder of a particular individual; for crimes against humanity it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds.”

See also Semanza, (Trial Chamber), May 15, 2003, para. 339 (source of quoted language).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 700: “In the *Semanza* Judgement, the Chamber found that premeditated murder constitutes a crime against humanity under Article 3(a) of the Statute. The Chamber explained that premeditation requires that the accused held the intention to murder prior to committing the act causing death. The Chamber emphasises that the accused need not have premeditated the murder of a particular individual; it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 137-40: The Chamber disagreed with the Trial Chamber’s holding in *Akayesu*, and stated that “*assassinat*” in the French version of the Statute, and not “murder,” (in the English version of the Statute) was the correct term. The Chamber noted that “premeditation is always required for *assassinat*” whereas it is not with “murder.” “If in doubt, a matter of interpretation should be decided in favour of the accused; in this case, the inclusion of premeditation is favourable to the accused.” The Chamber thus held that “murder and *assassinat* should be considered together in order to ascertain the standard of *mens rea*.” “When murder is considered along with *assassinat* the Chamber finds that the standard of *mens rea* required is intentional and premeditated killing.” The Chamber held that “[t]he result is premeditated when the actor formulated his intent to kill after a cool moment of reflection,” and that “[t]he result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 84 (relying on *Kayishema and Ruzindana*).

But see Akayesu, (Trial Chamber), September 2, 1998, para. 588: “Customary International Law dictates that it is the act of ‘Murder’ that constitutes a crime against humanity and not ‘Assassinat.’ There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 79; *Musema*, (Trial Chamber), January 27, 2000, para. 214.

See also discussion of murder under Article 4 (war crimes), Section (III)(d)(i)(1), this Digest.

(a) *mens rea* of an aider or abettor of murder

Bisengimana, (Trial Chamber), April 13, 2006, para. 88: “With respect to the Accused’s *mens rea* as an aider or abettor of murder as a crime against humanity, the Chamber

should consider whether the Accused knew of the criminal intent of the principal perpetrator and knew that his actions assisted in the commission of the crime.”

For discussion of the *mens rea* for aiding and abetting generally, see Section (IV)(g)(iii), this Digest.

3) application

(a) killings of Tutsis and Hutus believed to be RPF accomplices were murder

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2170-72: “The Chamber has already determined that the killing of Tutsis at roadblocks in Kigali between 7 and 9 April 1994, as well as during the attacks in Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Nyanza hill, IAMSEA [*L’Institut Africain et Mauricien de Statistiques et d’Economie*], Gisenyi town on 7 April, Mudende University, Nyundo Parish and Bisesero constituted genocide. On the same basis, the Chamber is satisfied that these intentional murders were conducted on ethnic grounds.”

“Some Hutus were likely killed during these attacks, even though they were principally directed at Tutsis. As they formed part of the attack on ethnic grounds they constitute murder as a crime against humanity. At roadblocks, in Kabeza, and during the targeted killings in Gisenyi town on 7 April, there is evidence that the killings were also conducted on political grounds. In particular, roadblocks were equally established to identify members of the political opposition and those suspected of being RPF [Rwandan Patriotic Front] accomplices. Kabeza was viewed as a neighbourhood populated by Tutsis and individuals sympathetic to the RPF. The killings in Gisenyi town also mirror targeted assassinations on political grounds conducted at the same time in Gisenyi and in Kigali. These crimes therefore formed part of the attack on political grounds.” (Concluding that “Bagosora bears responsibility for the crimes committed at Kigali area roadblocks, Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Gisenyi town on 7 April, Mudende University and Nyundo Parish as a superior under Article 6(3)”; “Ntabakuze is responsible as a superior for crimes committed in Kabeza, Nyanza hill and IAMSEA”; “Nsengiyumva is responsible for ordering or aiding and abetting the killings in Gisenyi town on 7 April, Mudende University, Nyundo Parish and Bisesero”; and that “the assailants and the Accused were aware that these events formed part of widespread and systematic attacks against the civilian population on ethnic and political grounds.”)

(b) killing of Belgian Peacekeepers was murder

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2174-77: “On the morning of 7 April 1994, 10 Belgian peacekeepers dispatched to escort Prime Minister Agathe Uwilingiyimana to Radio Rwanda were arrested and disarmed during an attack by Rwandan soldiers on her residence. The peacekeepers were taken to Camp Kigali where four were beaten to death by a mob of soldiers. The beatings did not stop even though some officers at the camp tried to verbally intervene. Six peacekeepers were able to seek refuge in the UNAMIR [United Nations Assistance Mission for Rwanda] office there and fend off the assailants for several hours after

disarming a Rwandan soldier. They were later killed by high powered weapons. In view of the circumstances surrounding these attacks, the Chamber finds that these murders were premeditated.”

“Considering their status as United Nations peacekeepers and that they were disarmed, the Chamber is satisfied that the victims could not be considered as combatants. The fact that the peacekeepers were able to obtain a weapon during the course of the attack in order to defend themselves against a mob of soldiers intending to kill them can in no way alter this conclusion.”

“The peacekeepers were arrested and disarmed during the course of an attack on the Prime Minister, which the Chamber concluded above was part of the attack against the civilian population on political grounds. UNAMIR and the Belgian contingent in particular were also seen as sympathetic to the RPF [Rwandan Patriotic Front] and Tutsis in general Immediately after the death of the President, the Belgian contingent was blamed for downing his plane by RTL [Radio Télévision Libre des Mille Collines] as well as by some of the assailants at the camp. Therefore, it is clear that the killing of the peacekeepers formed part of the widespread and systematic attack on political and ethnic grounds.” (Concluding that “Bagosora bears superior responsibility for the crimes committed against these individuals” and that “[t]he assailants and Bagosora were aware that these attacks formed part of widespread and systematic attacks against the civilian population on ethnic and political grounds”)

(c) killing of prominent personalities or opposition political officials was murder

See Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2178-79 (concluding that Bagosora bore superior responsibility for the murders on April 7, 1994, by “members of elite army units, including the Presidential Guard, Para Commando Battalion and Reconnaissance Battalion,” of Prime Minister “Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa and Faustin Rucogoza, who were all prominent personalities or opposition political officials”).

(d) additional murders

See Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2180-85 (concluding that Bagosora bore superior responsibility for 17 murders at *Centre Christus* in the Remera area of Kigali; individual responsibility (ordering) for the murder of Augustin Muharangari, Director of the Rwandan Bank of Development on April 8, 1994; and superior responsibility for the murder of Alphonse Kabiligi on April 7, 1994; also concluding that Nsengiyumva bore individual responsibility (ordering) for the murder of Alphonse Kabiligi).

Bisengimana, (Trial Chamber), April 13, 2006, paras. 92-95: “It is not disputed that a Tutsi man named Rusanganwa was murdered with premeditation. On the basis of the facts admitted by the Accused, the Chamber finds that the Accused was present when Rusanganwa was murdered during the attack at Musha Church [in Gikoro commune].”

“The Chamber is convinced that Paul Bisengimana knew that the murder of Rusanganwa was part of a widespread attack against Tutsis *[sic]* civilians on ethnic grounds. The Chamber is also convinced, based on the factual circumstances of the case

that Paul Bisengimana knew the criminal intent of the perpetrator of the murder of Rusanganwa”

“The Chamber finds that the Accused participated in Rusanganwa’s murder by being present when the crime was committed. The Accused was aware that his presence would encourage the criminal conduct of the principal perpetrator and give the impression that he endorsed the murder. Moreover, the Chamber recalls that the Accused acknowledges that he had the means to oppose the killings of Tutsi civilians but that he remained indifferent to the attacks.”

“The Chamber is satisfied that the Accused is individually criminally responsible pursuant to Article 6(1) of the Statute for aiding and abetting the murder of a Tutsi civilian named Rusanganwa at Musha Church in Gikoro *commune* in April 1994.” (Due to cumulative conviction concerns, however, the conviction was entered for aiding and abetting extermination, *see id.*, paras. 102-03.)²³

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 689: “[T]he Chamber has found beyond a reasonable doubt that soldiers participated in the massacre of mainly Tutsi civilian refugees at the Gashirabwoba football field on 12 April 1994. The Chamber has found that at least fifteen soldiers arrived at the field, surrounded the mainly Tutsi refugees, opened fire with their guns, and threw grenades at them for thirty minutes after the refugees asked for peace. The scale of these killings of the Tutsi refugees and the length of time required to kill such a large number of victims prove that these killings were intentional.” (However, Imanishimwe’s conviction as to crimes at the Gashirabwoba football field was overturned on appeal due to indictment defects, *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, at para. 150; Ntagerura and Bagambiki were acquitted as to all crimes.)

See also Karera, (Trial Chamber), December 7, 2007, paras. 559-61 (finding Karera guilty of murder as a crime against humanity); *Muhimana*, (Trial Chamber), April 28, 2005, para. 570 (findings as to murder).

iii) extermination

1) defined/ *actus reus*

Seromba, (Appeals Chamber), March 12, 2008, para. 189: “The Appeals Chamber recalls that extermination as a crime against humanity under Article 3(b) of the Statute is the act of killing on a large scale. The Appeals Chamber stresses that in the jurisprudence of both *ad hoc* Tribunals, the necessary *actus reus* underlying the crime of extermination consists of any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2191 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 522: “[T]he crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or

²³ See “murder and extermination impermissible” where based on the same set of facts, under “cumulative convictions,” Section (VII)(a)(iv)(3)(e), this Digest.

systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions this result.” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 431 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 552 (similar); *Seromba*, (Trial Chamber), December 13, 2006, para. 361 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 9 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 422 (similar).²⁴

Mpambara, (Trial Chamber), September 11, 2006, para. 9: “The *actus reus* of the offence is that the perpetrator participates with others in a collective or ongoing mass killing event.”

Bisengimana, (Trial Chamber), April 13, 2006, para. 70: “[E]xtermination consists of an act or a combination of acts, which contributes to the killing of a large number of individuals.” *See also Niyitegeka*, (Trial Chamber), May 16, 2003, para. 450 (same).

Ndindababizi, (Trial Chamber), July 15, 2004, para. 479: “[E]xtermination requires that the perpetrator intend to commit acts directed at a group of individuals collectively, and whose effect is to bring about a mass killing.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 698: “The material element of extermination is the large-scale killing of a substantial number of civilians.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 144: The Chamber defined the requisite elements of extermination: (1) “[t]he actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s);” (2) “having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and;” (3) “being aware that his act(s) or omission(s) forms part of a mass killing event;” (4) “where, his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”²⁵ *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 89 (similar).

Akayesu, (Trial Chamber), September 2, 1998, para. 592: The Chamber defined the following as essential elements of extermination:

- (1) “the accused or his subordinate participated in the killing of certain named or described persons; (2) the act or omission was unlawful and intentional; (3) the unlawful act or omission must be part of a widespread or systematic attack; (4) the attack must be against the civilian population; (5) the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.”

See also Musema, (Trial Chamber), January 27, 2000, para. 218 (same elements); *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 83-84 (same elements).

²⁴ The language “widespread or systematic killing” arguably conflates the definition of extermination with the *chapeau* requirement of a “widespread or systematic attack.” The underlying crimes as to crimes against humanity need not be widespread or systematic. *See* “the individual acts contain their own elements and need not contain the elements of crimes against humanity,” Section (II)(c)(i), this Digest.

²⁵ For discussion of whether recklessness or gross negligence suffices for the mental state of extermination, *see* “whether recklessness suffices,” under “*mens rea*,” Section (II)(c)(iii)(2)(a), this Digest.

(a) how large in scale: no numerical minimum/determine case-by-case

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 516: “The expressions ‘on a large scale’ or ‘large number’ do not . . . suggest a numerical minimum.” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2191 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 552 (similar); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 23 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 422 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 87 (similar).

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 309: “‘Large scale’ does not suggest a numerical minimum; it must be determined on case-by-case basis using a common sense approach.”

Kamubanda, (Trial Chamber), January 22, 2004, para. 692: “[T]he killings must have been committed on a large scale for the Chamber to find the Accused guilty of extermination. There is no conclusive authority on how many murders constitute extermination. The first judgments concerning extermination as a Crime against Humanity considered that ‘large scale’ does not suggest a numeric minimum. It must be determined on a case-by-case basis, using a common-sense approach.”

(b) perpetrator’s contribution/indirect contributions

Seromba, (Appeals Chamber), March 12, 2008, para. 189: “[A]s the Appeals Chamber has previously considered in the *Ndindabahizi* Appeal Judgement, for the *actus reus* of extermination to be fulfilled, it is sufficient that the accused participated in measures *indirectly* causing death.” See *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 123 & n. 268.

Mpambara, (Trial Chamber), September 11, 2006, para. 9: “The [perpetrator’s] act need not directly cause any single victim’s death, but must contribute to a mass killing event. As to the nature of the contribution required, a standard of ‘sufficient contribution’ has been adopted in some cases, assessed according to ‘the actions of the perpetrator, their impact on a defined [victim] group, and awareness [by the accused] of the impact on the defined group.’”

Bisengimana, (Trial Chamber), April 13, 2006, para. 70: “It is irrelevant that the accused’s participation in the act is remote or indirect.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 479: “Extermination may be committed less directly than murder, as by participation in measures intended to bring about the deaths of a large number of individuals, but without actually committing a killing of any person. Causation must nevertheless be established by naming or describing the victims, and by establishing the manner in which the accused contributed to, or participated in, their deaths. Whether an accused has contributed sufficiently to the mass killing depends on a concrete assessment of the facts.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 84: “[T]his act or omission [for the crime of extermination] includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals.”

See also Semanza, (Appeals Chamber), May 20, 2005, para. 271: “The Appellant . . . argues that the Trial Chamber erred in convicting him of extermination because there was no proof of preparation and organization of the murders However, an accused need not have planned, ordered or executed the massacres to be convicted of extermination. Indeed, Article 6(1) refers also to other modes of participation.”

See also “*actus reus*/ participation (element 1): contribution must have substantially contributed to, or had a substantial effect on, the completion of the crime,” Section (IV)(b)(iv)(1), this Digest.

(c) difference from crime of murder

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 516: “[T]he Trial Chamber followed the *Akayesu* Trial Judgement in defining extermination as ‘a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder.’” *See Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 813 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, paras. 591, 813.

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 431: “Extermination as a crime against humanity is . . . distinguishable from murder as it requires that the killings occur on a mass scale.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 361 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 70 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 422 (similar).

Rutaganira, (Trial Chamber), March 14, 2005, para. 49: “[T]he Tribunal has consistently held that, by its very nature, extermination is a crime which is directed against a group of individuals as distinct from murder in that it must be perpetrated on a ‘large scale.’” *See Nahimana*, (Trial Chamber), December 3, 2003, para. 1061; *Akayesu*, (Trial Chamber), September 2, 1998, para. 591.

Ndindababizi, (Trial Chamber), July 15, 2004, para. 479: “This [mass killing requirement] distinguishes the offence [of extermination] from murder, whose material element may be satisfied by the killing of a single person, and proof that the perpetrator intended the death of that single person alone, albeit as part of a widespread or systematic attack.”

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 309: “It is the settled jurisprudence of this Tribunal that extermination, by its very nature, is a crime that is directed against a group of individuals, but different from murder in that it requires an element of mass

destruction that is not required for murder.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 691 (similar).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 701: “Extermination is mass or large scale killing; it may be differentiated from murder in that it is directed against a population rather than against individuals.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 694: “In order to give practical meaning to the charge of extermination, as distinct from murder, there must in fact be a large number of killings, and the attack must be directed against a group, such as a neighbourhood, as opposed to any specific individuals within it.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1061: “The Chamber agrees that in order to be guilty of the crime of extermination, the Accused must have been involved in killings of civilians on a large scale but considers that the distinction is not entirely related to numbers. The distinction between extermination and murder is a conceptual one that relates to the victims of the crime and the manner in which they were targeted.”

See also “murder and extermination same except for scale” under the crime of murder, Section (II)(c)(i)(1)(d), this Digest.

(d) extermination as a crime against humanity

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 516: “As a crime against humanity, for the purposes of the ICTR Statute, the act of killing must occur within the context of a widespread or systematic attack against the civilian population for national, political, ethnic, racial or religious grounds.”

(e) single or limited number of killings not extermination/ killing or aiding single or limited number of killings in context of mass killing

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 309: “Responsibility for a single or a number of killings is insufficient for a finding of extermination.” *See also Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 701 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, paras. 692-94: “Trial Chamber I in *Bagilishema* [*sic*] held that:

A perpetrator may nonetheless be guilty of extermination if he kills, or creates conditions of life that kill, a single person, providing that the perpetrator is aware his or her acts or omissions form part of a mass killing event, namely mass killings that are proximate in time and place and thereby are best understood as a single or sustained attack.”

“In contrast, more recent judgments have held that ‘responsibility for a single or a limited number of killings is insufficient.’ This most recent approach appears to be more in conformity with established jurisprudence that an element of mass destruction is required for extermination.”

“The Chamber is satisfied that a single killing or a small number of killings do not constitute extermination. In order to give practical meaning to the charge of extermination, as distinct from murder, there must in fact be a large number of killings, and the attack must be directed against a group, such as a neighbourhood, as opposed to any specific individuals within it. However, the Chamber may consider evidence under this charge relating to the murder of specific individuals as an illustration of the extermination of the targeted group.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 890-93 (same with italics).

Compare Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 529, 530: If the Trial Chamber “meant that aiding and abetting the crime of extermination requires that the acts of assistance provided by the Accused to the main perpetrators effectively resulted in the killing of a large number of people. This interpretation of aiding and abetting would . . . constitute a legal error.” “[I]f the mass killing in question occurs, the fact that the weapon procured by the accused ‘only’ killed a limited number of persons is irrelevant to determining the accused’s responsibility as an aider and abettor of the crime of extermination.”

Compare Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2192-93: “Several of the events charged as extermination when viewed separately do not satisfy the threshold of killing on a large-scale, in particular the targeted political assassinations. However, the Chamber has considered the events for which the Accused have been held responsible together since they are essentially part of the same widespread and systematic attacks against the civilian population on political and ethnic grounds.”

Compare Bagilishema, (Trial Chamber), June 7, 2001, para. 88: “A perpetrator may nonetheless be guilty of extermination if he kills, or creates the conditions of life that kill, a single person, providing that the perpetrator is aware that his or her acts or omissions form part of a mass killing event, namely mass killings that are proximate in time and place and thereby are best understood as a single or sustained attack.”

Compare Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, n. 8. to para. 645: “It is important to note that an accused may be guilty of extermination . . . when sufficient evidence is produced that he or she killed a single person as long as this killing was a part of a mass killing event.”

See also Mpambara, (Trial Chamber), September 11, 2006, para. 9: “The [perpetrator’s] act need not directly cause any single victim’s death, but must contribute to a mass killing event.”

(f) no plan or policy required

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 84: “[T]he ICTY Appeals Chamber has emphasized that proof of a plan or policy is not a prerequisite to a conviction for extermination.”

(g) responsibility not limited to persons exercising power and authority or who had the capacity to be instrumental in large scale killings

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 538-39: “Elizaphan and Gérard Ntakirutimana argued that extermination charges are reserved for persons exercising power and authority or who otherwise had the capacity to be instrumental in the large scale killings.” “The argument . . . stems from an erroneous interpretation of the *Vasiljević* Trial Judgement.”

(h) precise description or designation by name of victims not required

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 517, 518, 521: “In finding that an element of the crime of extermination was the ‘killing of certain named or described persons’ the Trial Chamber purported to be following the *Akayesu* Trial Judgement, which it found had since been followed in *Rutaganda* and *Musema*” “The Appeals Chamber agrees with the Prosecution that customary international law does not consider a precise description or designation by name of victims to be an element of the crime of extermination” “It is sufficient that the Prosecution satisfy the Trial Chamber that mass killings occurred. In this case that element was satisfied by the Trial Chamber’s findings that hundreds of people were killed at the Mugonero Complex and that thousands of people were killed in Bisesero. To require greater identification of those victims would, as the Prosecution argued, increase the burden of proof to such an extent that it hinders a large number of prosecutions for extermination.” *See Akayesu*, (Trial Chamber), September 2, 1998, para. 592.

Karera, (Trial Chamber), December 7, 2007, para. 552: “[F]or the crime of extermination,] [t]he Prosecution need not name the victims.”

See also “pleading mass crimes: scale of crimes may make it impracticable to require a high degree of specificity,” Section (VIII)(c)(xix)(6)(l), this Digest.

(i) particularly large number of victims may be an aggravating factor

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 135: “As for extermination, the *actus reus* requires ‘killing on a large scale.’ While this does not ‘suggest a numerical minimum,’ a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime if the extent of the killings exceeds that required for extermination.”

See “large number of victims/deaths of women, children and orphans” as an aggravating factor, Section (VII)(b)(iii)(6)(b)(iii), this Digest.

(j) aiding and abetting extermination—elements

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 530: “The *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the

perpetration of that crime. This support must have a substantial effect upon the perpetration of the crime. The requisite *mens rea* is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal. If it is established that the accused provided a weapon to one principal, knowing that the principal will use that weapon to take part with others in a mass killing, as part of a widespread and systematic attack against the civilian population, and if the mass killing in question occurs, the fact that the weapon procured by the accused ‘only’ killed a limited number of persons is irrelevant to determining the accused’s responsibility as an aider and abettor of the crime of extermination.”

See also “aiding and abetting,” Section (IV)(g), this Digest.

See “*actus reus*/participation (element 1): contribution must have substantially contributed to, or had a substantial effect on, the completion of the crime,” Section (IV)(b)(iv)(1), this Digest.

See “single or limited number of killings not extermination/killing or aiding single or limited number of killings in context of mass killing,” Section (II)(c)(iii)(1)(e), this Digest.

2) *mens rea*

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 86: “The Trial Chamber . . . implicitly applied the correct requirement [for the crime of extermination] by finding that the actions of the Appellant revealed his ‘intention to participate in a large scale massacre in Nyarubuye.’ As the Appeals Chamber recently explained:

the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, *and that the accused intended by his acts or omissions this result.*”²⁶

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 431: “The *mens rea* for extermination is the intent to perpetrate or to participate in a mass killing.” *See also* *Seromba*, (Trial Chamber), December 13, 2006, para. 361 (similar).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2191: “The *mens rea* of extermination requires that the accused intend to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their deaths in a widespread or systematic manner.”²⁷

Mpambara, (Trial Chamber), September 11, 2006, para. 10: “The *mens rea* of extermination is that the accused must intend by his actions to bring about the deaths on a large-scale.”

²⁶ See prior footnote.

²⁷ See prior footnote.

Ndindababizi, (Trial Chamber), July 15, 2004, para. 480: “The *mens rea* for the offence of extermination is that the Accused participated in the imposition of measures against many individuals intending that their deaths should be brought about on a large-scale.”

Semanza, (Trial Chamber), May 15, 2003, para. 341: “[I]n the absence of express authority in the Statute or in customary international law, international criminal [responsibility] should be ascribed only on the basis of intentional conduct. [T]he mental element for extermination is the intent to perpetrate or participate in a mass killing.” *See also Simba*, (Trial Chamber), December 13, 2005, para. 422 (same as second sentence); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 701 (similar to second sentence).

See, e.g., Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 86, 88: “While the Trial Chamber did not expressly outline the *mens rea* requirement specific to the crime of extermination, it implicitly applied the correct requirement by finding that the actions of the Appellant revealed his ‘intention to participate in a large scale massacre in Nyarubuye.’” “The actions of the Appellant in planning the extermination of Tutsis from 8 through 15 April 1994, as well as his subsequent actions from 15 through 17 April 1994, show that the Appellant had the intent to massacre a large number of individuals, and that he knew that his acts furthered a widespread and systematic attack against the Tutsis [T]he Trial Chamber did not err in assessing the Appellant’s *mens rea*.”

(a) whether recklessness suffices

Kamubanda, (Trial Chamber), January 22, 2004, paras. 695-96: “In Bagilishema [*sic*] and Kayishema and Ruzindana [*sic*] it was held that extermination is not limited to intentional acts or omissions but also covers reckless or grossly negligent conduct of the accused. The Chamber notes that more recent judgments have taken a slightly different approach, with Semanza [*sic*] holding that:

[...] in the absence of express authority in the Statute or in customary international law, international criminal [responsibility] should be ascribed only on the basis of intentional conduct.”

“We do not interpret Bagilishema [*sic*] and Kayishema and Ruzindana [*sic*] to suggest that a person may be found guilty of a Crime against Humanity if he or she did not possess the requisite *mens rea* [*sic*] for such a crime, but rather to suggest that reckless or grossly negligent conduct are indicative of the offender’s *mens rea* [*sic*]. Understood in that way, the Semanza [*sic*] position is not at odds with the Bagilishema [*sic*] and Kayishema and Ruzindana [*sic*] judgments.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 894-95 (same with italics).

See Ndindababizi, (Trial Chamber), July 15, 2004, para. 480: “Given the facts of the present case, there is no need to consider whether recklessness would also satisfy the *mens rea* of extermination.”

But see Bisengimana, (Trial Chamber), April 13, 2006, paras. 71-72: “To establish the *mens rea* of extermination, the Prosecution must prove that the accused intended the killings, or *was reckless or grossly negligent* as to whether the killings would result and was aware that

his acts or omissions formed part of a mass killing event. The accused must also be shown to have known of the vast scheme of collective murders directed against a civilian population on discriminatory grounds and to have been willing to take part in that scheme. As an aider or abettor of extermination as a crime against humanity, the Chamber should consider whether the Accused knew of the criminal intent of the principal perpetrator and knew that his actions assisted in the commission of the crime.”

“Therefore, in order to be convicted of extermination as a crime against humanity, an accused must have (i) participated in the mass killing of others, or in the creation of conditions of life leading to the mass killing of others; (ii) intended the killings, or been *reckless or grossly negligent* as to whether the killings would result; and (iii) been aware that his acts or omissions formed part of a mass killing event.” (emphasis added.)

But see Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 144: The mental state for extermination is that the accused “intended the killing” or was “reckless or grossly negligent as to whether the killing would result,” and was “aware that his act(s) or omission(s) form[] part of a mass killing event.” (emphasis added.) *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 89 (quoting same).

3) application

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 941: “Regarding RTLM [*Radio Télévision Libre des Mille Collines*] broadcasts after 6 April 1994, the Appeals Chamber has already found that these broadcasts substantially contributed to the killing of large numbers of Tutsi. It accordingly follows that they substantially contributed to the extermination of Tutsi.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 532, 534: “With respect to Elizaphan Ntakirutimana, the remaining findings [after various factual findings were quashed due to lack of notice] are: one day in May or June 1994, he transported armed attackers who were chasing Tutsi survivors at Murambi Hill [Bisesero region, Kibuye prefecture]; one day in the middle of May 1994, he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them; on this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers, who then chased these refugees singing, ‘Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests’; one day on May or June 1994 Elizaphan Ntakirutimana was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers, and he was part of a convoy which included attackers; and sometime between 17 April and early May 1994, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero, and he went to a church in Murambi where many Tutsi were seeking refuge and ordered attackers to destroy the roof of the church.”

“The Appeals Chamber finds that in carrying out these acts of participation Elizaphan Ntakirutimana knew that the intent of the actual perpetrators was the extermination of the Tutsi refugees and that he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at Murambi. Accordingly, the Appeals Chamber holds that these factual findings support the mass killing element of the crime of extermination, that Elizaphan Ntakirutimana had the required *mens rea* for

aiding and abetting extermination and accordingly finds that Elizaphan Ntakirutimana incurred individual criminal responsibility for aiding and abetting the extermination of the Tutsi as a crime against humanity.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2192-93: “Several of the events charged as extermination when viewed separately do not satisfy the threshold of killing on a large-scale, in particular the targeted political assassinations. However, the Chamber has considered the events for which the Accused have been held responsible together since they are essentially part of the same widespread and systematic attacks against the civilian population on political and ethnic grounds. In this respect, the Chamber emphasises the relatively brief time period in which these crimes were committed and that each of them were [*sic*] based on the same set of orders or authorisation from the Accused.”

“It is clear therefore that the following killings satisfy either in themselves or collectively the requirement of killings on a large-scale: Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza. . . , Alphonse Kabiligi . . . and Augustin Maharangari . . . as well as civilians at roadblocks in the Kigali area between 7 and 9 April . . . , at *Centre Christus* . . . , the Kibagabaga Mosque . . . , Kabeza . . . , the Saint Josephite Centre . . . , Karama hill and Kibagabaga Catholic Church . . . , Gikondo Parish . . . , Nyanza hill . . . , IAMSEA [*L’Institut Africain et Mauricien de Statistiques et d’Economie*] . . . , Gisenyi town . . . , Nyundo Parish . . . , Mudende University . . . and Bisesero Each of these killings were [*sic*] conducted on the basis of ethnic and political grounds As also noted above, the assailants and the Accused were aware that these attacks formed part of widespread and systematic attacks against the civilian population on ethnic and political grounds” *See id.*, paras. 2194, 2196-97 (finding Bagosora, Ntabakuze and Nsengiyumva responsible for extermination as a crime against humanity).

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 434-36: “The Chamber recalls that hundreds and possibly over a thousand Tutsi were killed on Kesho Hill [in Rwili secteur, Gaseke commune, in Gisenyi prefecture] on 8 April 1994. The Chamber therefore finds beyond reasonable doubt that the *actus reus* requirement of large scale killings, for the crime of extermination as a crime against humanity, is met.” “With regard to the Accused’s criminal responsibility, . . . the Chamber found that he participated in a JCE [joint criminal enterprise] to kill Tutsi on Kesho Hill. In view of the large scale killings which occurred, as well as the large number of assailants who were armed with a variety of weapons, the Chamber finds that the only reasonable inference is that all those who participated in the JCE intended to kill Tutsi on a mass scale. Accordingly, the Chamber finds beyond reasonable doubt that the Accused and the assailants intentionally participated in a JCE at Kesho Hill to kill members of the Tutsi ethnic group on a mass scale.” “The Chamber therefore finds that the Accused committed extermination as a crime against humanity through his participation in the JCE to kill Tutsi at Kesho Hill.”²⁸

²⁸ For discussion of “joint criminal enterprise,” see Section (IV)(f)(iv), this Digest.

Seromba, (Trial Chamber), December 13, 2006, para. 365: The Chamber is of the view that the destruction of the [Nyange] church [Nyange parish, Kibuye prefecture], which resulted in the death of 1,500 Tutsi refugees, constitutes the crime of extermination within the meaning of Article 3 of the Statute.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 190: “With respect to Athanase Seromba’s *mens rea*, the Appeals Chamber is satisfied that the role he played in the events that led to the destruction of the church, his knowledge that such destruction would inevitably result in the death of a large number of Tutsi civilians, as well as his awareness of the widespread and systematic attack against the Tutsi population occurring at the time, all demonstrate that he possessed the required intent to commit extermination.”

Bisengimana, (Trial Chamber), April 13, 2006, paras. 65-66, 73-76: “The Accused acknowledges that:

- a) On or about 12 April 1994, weapons such as guns and grenades were distributed to *Interahamwe* militiamen and other armed civilians at Musha Church [in Gikoro commune] by members of the Rwandan Army.
- b) He was aware of this and the fact that these weapons would be used to attack Tutsi civilians seeking refuge at Musha Church.
- c) On or about 13 April 1994, an attack was launched against the Tutsi civilians seeking refuge at Musha Church. The attackers used guns, grenades, machetes, pangas and other traditional weapons.
- d) This attack resulted in the killing of more than a thousand Tutsi civilians.
- e) During the attack, a civilian militiaman named Manda set fire to the Church, causing the death of many refugees.
- f) The Accused was present during the attack, along with Laurent Semanza, soldiers from the Rwandan Army, *Interahamwe* militiamen, armed civilians and communal policemen.
- g) His presence at Musha Church during the attack would have had an encouraging effect on the perpetrators and given them the impression that he endorsed the killing of Tutsi civilians gathered there.”

“Paul Bisengimana acknowledges that he had the means to oppose the killings of Tutsi civilians in Gikoro *commune*, but that he remained indifferent to the attack.” “Based on the facts admitted by the Accused and recalling the Chamber’s findings that the attack on Musha Church in Gikoro *commune* was launched against Tutsi civilians on discriminatory grounds, was widespread and resulted in a large number of victims, the Chamber finds that this attack amounts to extermination.” “The Chamber finds that the Accused participated in the attack against Musha Church by being present and that he was aware that his presence would have encouraged the criminal conduct of the perpetrators of the attack.” “The Chamber is convinced that the Accused knew of the criminal intent of the principal perpetrators because of his admission that he was aware that arms had been distributed to *Interahamwe* militiamen and other armed civilians at Musha Church and that these weapons would be used to attack the Tutsi population who had sought refuge there.” “Accordingly, the Chamber is satisfied that Paul Bisengimana’s presence at Musha Church on or about 13 April 1994 aided and abetted the extermination of Tutsi civilians there.” *See id.*, paras. 67-69, 77-80 (similar findings as to extermination at Ruhanga Protestant Church and School).

Simba, (Trial Chamber), December 13, 2005, paras. 425, 426: “The assailants at Murambi Technical School and Kaduha Parish [in Gikongoro prefecture in southern Rwanda] killed thousands of Tutsi civilians in what can only be said to be a large-scale killing, which was part of the widespread attack on ethnic grounds. Simba participated in this large-scale killing as a participant in the joint criminal enterprise to kill Tutsi at these two sites by distributing weapons and lending approval and encouragement to the physical perpetrators. In its findings on criminal responsibility, the Chamber described this assistance as having a substantial effect on the killings that followed. Given the manner in which the attacks were conducted, the nature of the weapons used, and the number of victims, the Chamber finds beyond reasonable doubt that Simba and the assailants intentionally participated in a mass killing of members of the Tutsi ethnic group.” “The Chamber finds beyond reasonable doubt that Simba is criminally responsible under Article 6(1) of the Statute based on his participation in a joint criminal enterprise to kill Tutsi civilians at Murambi Technical School and Kaduha Parish. Therefore, the Chamber finds Simba guilty on Count 3 of the Indictment for extermination as a crime against humanity.”²⁹

Rutaganira, (Trial Chamber), March 14, 2005, para. 53: “[T]he Chamber finds that the massacres committed at Mubuga church [Gishyita commune, Kibuye prefecture] between 14 and 17 April 1994 [in which thousands of Tutsi refugees were killed or wounded] had been perpetrated on a large scale and had caused thousands of casualties” and qualified as the crime of extermination.

Ndindabahizi, (Trial Chamber), July 15, 2004, paras. 482-84: “The Chamber has found that the Accused visited Gitwa Hill [in the Bisesero Hills, Kibuye prefecture] on two occasions, urging the attackers to kill the Tutsi refugees, and distributing machetes and other weapons. On one occasion, he also transported attackers who were identified as *Interahamwe* to Gitwa Hill. He was known to be a Government Minister and people gathered around him during these visits attentively and respectfully. His words and deeds would undoubtedly have had a substantial motivating impact on the attackers. As little as two days after the Accused’s final visit, there was a massive attack on the Hill, resulting in the deaths of thousands of Tutsi. This final attack had been preceded by smaller-scale attacks, including one which occurred in his presence and which he appears to have initiated.”

“[T]he specific requirements for the offence of extermination are satisfied. The Accused intended to bring about the deaths of the Tutsi besieged on Gitwa Hill on a massive scale. He manifested this intent directly, by urging that the Tutsi be killed. The material element of the crime is satisfied by his distribution of weapons, transportation of attackers, and verbal encouragement of the attack. As a Government Minister, these words and deeds contributed substantial moral support and official approval for the devastating attack which occurred shortly thereafter. Accordingly, the Accused contributed substantially to the mass killing of Tutsi which ensued.”

“The general requirements for a crime against humanity are also satisfied. The evidence is overwhelming that there were widespread attacks against Tutsi in Rwanda, and in Kibuye Prefecture, during this period. The Accused overtly manifested his intent

²⁹ See prior footnote.

to kill the civilian refugees at Gitwa Hill because they were Tutsi, knowing that ethnic massacres were occurring throughout Rwanda. At the least, he had knowledge of the widespread nature of the attacks and their discriminatory nature, and knew that an attack on Gitwa Hill would be part of those widespread attacks.”

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 310-12: “[T]he Chamber is of the view that the high numerical strength of the victims of the Nyarubuye Parish massacres [in Rusumo commune] supports a finding of widespread killing. It is established that many persons of Tutsi and Hutu origin had taken refuge in the parish on the days preceding the attack. Some witnesses testified that there were several thousand refugees there. It is also established that Hutu were asked to separate themselves from Tutsi during the massacre. The massacre lasted several hours and the attackers returned to finish off survivors during the following two days. Witness accounts show sufficiently that it was a large-scale massacre that resulted in numerous deaths. The fact is corroborated by Prosecution Witness Patrick Fergal Keane who, weeks later, saw many corpses.” “Considering the leading role of the Accused in preparing and launching the attack, as well as his subsequent visits to the parish to instigate attackers to kill survivors, and the fact that he supervised their actions, the Chamber does not doubt the Accused’s intention to participate in a large scale massacre in Nyarubuye.” “The Chamber finds that the Accused had knowledge of such a widespread and systematic attack against a civilian population in Rusumo in April 1994 because, at the local level, he planned and led certain operations.”

Kamubanda, (Trial Chamber), January 22, 2004, paras. 697-99: “The Chamber recalls its findings . . . that Tutsis were killed at Gikomero Parish Compound [in Gikomero commune, Kigali-Rural prefecture] and that the Accused participated in this killing by ordering, instigating and aiding and abetting the commission of the crime.” “The material element of extermination is the large-scale killing of a substantial number of civilians. Although the evidence does not indicate the specific number of victims to enable a specific finding of the number of deaths at the Gikomero Parish Compound, the evidence clearly shows that large numbers of Tutsi civilians were killed there during the attack, in which the Accused participated. On the basis of reliable and credible evidence, the Chamber finds that the scale of killings at the Gikomero Parish Compound is sufficient to be termed extermination, and that the principal perpetrators of the killings committed extermination as a Crime against Humanity.” “The Chamber finds that the Accused participated in the attack at Gikomero Parish Compound, and that the Accused was fully aware that his actions formed part of a widespread attack. On the basis of the evidence and in view of the scale of this event, the Chamber is convinced that the Accused ordered, instigated, and aided and abetted the principal perpetrators of the attack at the Gikomero Parish Compound against the Tutsi civilians, who had gathered there in large numbers to seek shelter and refuge.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 904: “The Chamber finds that within the context of th[e] attack, and in full knowledge that his actions formed a part of that attack, the Accused directed attacks against neighbourhoods and places of shelter and refuge where Tutsis were grouped in large numbers. Hundreds of Tutsis within Mukingo, Nkuli and Kigombe *communes* in Ruhengeri prefecture were exterminated as a

direct result of the Accused's participation by ordering and supervising, or, in the case of the attack upon the Ruhengeri Court of Appeal, by aiding, these attacks. *See id.*, paras. 896-903 (additional details as to extermination).

Niyitegeka, (Trial Chamber), May 16, 2003, para. 454: "[B]y his participation in attacks against Tutsi, and his acts of shooting at Tutsi refugees, which contributed to the killing of a large number of individuals, and his killing of the three persons, the Accused is . . . responsible . . . for extermination committed as part of a widespread and systematic attack on the civilian Tutsi population on ethnic grounds"

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 438: "In view of the Chamber's finding that at least 10 to 20 people were killed at the Kiyovu roadblock [in Kiyovu cellule, Kigali-ville prefecture], it does not find beyond reasonable doubt that the requirement of large scale killings, as required for the crime of extermination, has been met."

iv) enslavement

(no law presently)

v) deportation

(no law presently)

vi) imprisonment

1) defined

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 702: "Imprisonment as a crime against humanity refers to arbitrary or otherwise unlawful detention or deprivation of liberty. It is not every minor infringement of liberty that forms the material element of imprisonment as a crime against humanity; the deprivation of liberty must be of similar gravity and seriousness as the other crimes enumerated as crimes against humanity enumerated in Article 3 (a) to (i). In assessing whether the imprisonment constitutes a crime against humanity, the Chamber may take into account whether the initial arrest was lawful, by considering, for example, whether it was based on a valid warrant of arrest, whether the detainees were informed of the reasons for their detention, whether the detainees were ever formally charged, and whether they were informed of any procedural rights. The Chamber may also consider whether the continued detention was lawful. When a national law is relied upon to justify a deprivation of liberty, this national law must not violate international law."

2) application

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 754-56: "[T]he Chamber has found that an unknown number of Tutsi and Hutu civilians were arrested under suspicion of being RPF [Rwandan Patriotic Front] accomplices and were taken to Karambo military camp [in Cyangugu] where soldiers mistreated them. The Chamber has found that the only reasonable inference to be drawn from the totality of the evidence is that Imanishimwe issued orders authorizing the arrest and detention of civilians with suspected ties to the RPF These arrests were not based on valid warrants, nor were these civilians ever formally charged and informed of their procedural rights. The Chamber finds that the soldiers acted intentionally in the

execution of Imanishimwe's orders to incarcerate civilians at Karambo military camp. The Chamber finds that the principal perpetrators, soldiers who were also involved in the mistreatment and questioning of these detainees about suspected ties to the RPF, were aware that their acts formed part of a systematic attack on political grounds against the civilian population in Cyangugu." "The Chamber finds that by issuing orders authorizing the arrest and detention of civilians with suspected ties to the RPF and by having knowledge that these acts were carried out, Imanishimwe acted intentionally and with awareness that he was encouraging his subordinates to commit crimes against humanity. These orders substantially contributed to the imprisonment of civilians at the Karambo military camp, given Imanishimwe's authority as the camp commander." "Consequently, the Chamber finds beyond a reasonable doubt that Imanishimwe is criminally responsible under Article 6(1) of the Statute for imprisonment as a crime against humanity" (The conviction was affirmed on appeal.)

vii) torture

1) defined/ *actus reus*

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 703: "Torture as a crime against humanity is the intentional infliction of severe physical or mental pain or suffering for prohibited purposes including: obtaining information or a confession; punishing, intimidating, or coercing the victim or a third person; or discriminating against the victim or a third person."

Akayesu, (Trial Chamber), September 2, 1998, paras. 593-95: "The Tribunal interprets the word 'torture'. . . in accordance with the definition of torture set forth in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." "The Chamber defines the essential elements of torture as:

- (i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:
 - (a) to obtain information or a confession from the victim or a third person;
 - (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
 - (c) for the purpose of intimidating or coercing the victim or the third person;
 - (d) for any reason based on discrimination of any kind.
- (ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity."

But see "no 'public official requirement,'" Section (II)(c)(vii)(4), this Digest.

2) torture as a crime against humanity

Akayesu, (Trial Chamber), September 2, 1998, para. 595: "The Chamber finds that torture is a crime against humanity if the following further elements are satisfied:

- a) Torture must be perpetrated as part of a widespread or systematic attack;
- b) the attack must be against the civilian population;

- c) the attack must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds.”

3) rape constitutes torture

Akayesu, (Trial Chamber), September 2, 1998, paras. 597, 687: “Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity.”

But see “no ‘public official requirement,’” directly below.

4) no “public official requirement”

Semanza, (Appeals Chamber), May 20, 2005, para. 248: “In the *Kunarac et al.* Appeal Judgement, the ICTY Appeals Chamber explained that the public official requirement is not a requirement outside the framework of the Torture Convention:

Furthermore, in the [ICTY’s] *Furundžija* Trial Judgement, the Trial Chamber noted that the definition provided in the Torture Convention related to ‘the purposes of [the] Convention.’ The accused in that case had not acted in a private capacity, but as a member of armed forces during an armed conflict, and he did not question that the definition of torture in the Torture Convention reflected customary international law. In this context, and with the objectives of the Torture Convention in mind, the Appeals Chamber in the *Furundžija* case was in a legitimate position to assert that ‘at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity.’ This assertion, which is tantamount to a statement that the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally.

The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.

This was recently reaffirmed in the [ICTY’s] *Kvočka et al.* Appeal Judgement.”

Semanza, (Trial Chamber), May 15, 2003, paras. 342-43: “In *Akayesu*, the Trial Chamber relied on the definition of torture found in the . . . Convention Against Torture The ICTY Appeals Chamber has since explained that while the definition contained in the Convention Against Torture is reflective of customary international law . . . , it is not identical to the definition of torture as a crime against humanity. [T]he ICTY Appeals Chamber has confirmed that, outside the framework of the Convention Against Torture, the ‘public official’ requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity.” Thus, the Chamber rejected the “public official” requirement.

5) application

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 759-60: “The Chamber has . . . found that soldiers [in the Karambo military camp in Cyangugu] under Imanishimwe’s effective control and in his presence severely beat Witness MG and another detainee and hammered a long nail into the foot of one of the other detainees, removed the nail, and then hammered it into the foot of another detainee while questioning them about their suspected affiliation with the RPF [Rwandan Patriotic Front] and accusing them of collaborating with the enemy. As a result of this treatment, Witness MG could not stand up for several days. In addition, the two detainees who were injured with the nail screamed in pain in their cell. Soldiers later removed the two detainees who were never seen or heard from again.”

“[T]he Chamber finds that, in mistreating Witness MG and the other three detainees at the Karambo camp, the soldiers were acting intentionally and with the prohibited purpose of obtaining information or confessions from the detainees or of punishing them. Additionally, the Chamber finds that the severe beating as well as the mistreatment with the long nail amounted to infliction of severe physical pain. The Chamber has found that the soldiers at the camp had knowledge that their actions formed part of a systematic attack on political grounds. Thus, the Chamber finds that the soldiers committed torture as a crime against humanity.” *See also id.*, paras. 761-62 (finding Imanishimwe responsible for ordering and aiding and abetting the torture). (The convictions were affirmed on appeal.)

Compare Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 758: Where “two of the [other] victims were in a position to forcibly escape from detention, the Chamber conclude[d] that the mistreatment was not such as to cause severe suffering or pain sufficient for a finding of torture.” *See also id.*, paras. 799-800 (finding mistreatment that was not “torture” to be the war crime of cruel treatment).

See also discussions of torture and cruel treatment under Article 4 (war crimes), Sections (III)(d)(i)(2)-(3), this Digest.

viii) rape

1) defined/ *actus reus*

(a) the original “Akayesu” approach

Akayesu, (Trial Chamber), September 2, 1998, paras. 597-98, 688: “[R]ape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of object and body parts Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity. . . .” “The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”

Musema, (Trial Chamber), January 27, 2000, paras. 220-21, 226-29: The Chamber adopted the definition of rape and sexual violence set forth in *Akayesu*, and further stated that “variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual.” Concurring with the approach set forth in *Akayesu*, the Chamber stated that the “essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.” Since “there is a trend in national legislation to broaden the definition of rape” and an ongoing evolution and incorporation of the understanding of rape into principles of international law, “a conceptual definition is preferable to a mechanical definition of rape” because it will “better accommodate evolving norms of criminal justice.”

Muhimana, (Trial Chamber), April 28, 2005, paras. 537-40: “The first judgement in which an international criminal tribunal defined rape as a crime against humanity and an instrument of genocide was issued on 2 September 1998 in the case *Prosecutor v. Akayesu*, by Trial Chamber I of the ICTR Emphasizing that ‘the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts,’ the *Akayesu* Judgement defined rape and sexual violence as:

a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”

“Recognizing that rape has been historically defined in national jurisdictions as ‘non-consensual sexual intercourse,’ the *Akayesu* Trial Chamber found this description too mechanical, insofar as ‘variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.’ As an example, the *Akayesu* Trial Chamber referred to its factual finding that a piece of wood was thrust into the sexual organs of a woman as she lay dying - a physically invasive act of the victim’s body, which it found to constitute rape.”

“Consonant with the definition of rape in *Akayesu*, this Chamber notes with approval the *Furundžija* Trial Chamber’s conclusion that:

The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.”

“The Chamber observes that the *Akayesu* definition of rape was endorsed by Trial Chamber I of this Tribunal in *Musema* and *Niyitegeka*, and by Trial Chamber II of the ICTY in *Delalic*. No appeal was taken as to this issue in any of these cases.” See *Akayesu*, (Trial Chamber), September 2, 1998, paras. 598, 688; *Musema*, (Trial Chamber), January 27, 2000, paras. 229, 907, 933, 936; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 456 (“rape being ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’”).

(b) the “Kunarac” approach—retreat from “Akayesu”?

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 151: “In the *Kunarac* case, the ICTY Appeals Chamber defined rape as follows:

the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”

See also *Bagosora*, *Kabiligi*, *Ntabakuze* and *Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2199 (similar).

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 321: “The Chamber is of the opinion that any penetration of the victim’s vagina by the rapist with his genitals or with any object constitutes rape, although the definition of rape under Article 3(g) of the Statute is not limited to such acts alone.”

Kamubanda, (Trial Chamber), January 22, 2004, paras. 705-07, 709: “In *Akayesu* [*sic*] the Trial Chamber considered that the traditional mechanical definition of rape did not adequately capture its true nature and instead offered a definition of rape as:

A physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”

“This conceptual definition of rape was approved in *Musema* [*sic*], where the Chamber highlighted the difference between ‘a physical invasion of a sexual nature’, and ‘any act of a sexual nature’ as being the difference between rape and sexual assault. Meanwhile, a Trial Chamber of the ICTY handed down the *Furundžija* [*sic*] Judgment, in which that Chamber preferred the following more detailed definition related to objects and body parts:

Most legal systems in the common and civil law world consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.”

“This definition substantially modified and completed by Trial Chamber II in the *Kunarac* [*sic*] Judgment has been endorsed by the Appeals Chamber. It reads as follow:

The *actus reus* [*sic*] of the crime of rape in international law is constituted by: the sexual penetration, however slight:

- (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for

this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."

"Given the evolution of the law in this area, endorsed in the Furundžija/Kunarac [*sic*] approach by the ICTY Appeals Chamber, the Chamber finds the latter approach of persuasive authority and hereby adopts the definition as given in Kunarac [*sic*] and quoted above." See also Kajelijeli, (Trial Chamber), December 1, 2003, paras. 910-15 (same with italics).

Semanza, (Trial Chamber), May 15, 2003, paras. 344-45: "The *Akayesu* Judgement enunciated a broad definition of rape The Appeals Chamber of the ICTY [in *Kunarac*] . . . affirmed a narrower interpretation defining the material element of rape . . . as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator." "While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunarac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber."

(c) interpreting the "Kunarac" and "Akayesu" approaches as consonant

Muvunyi, (Trial Chamber), September 12, 2006, paras. 517-18, 520-22: "The jurisprudence of the *ad hoc* Tribunals reveals a rather chequered history of the definition of rape. Initially, in the *Akayesu* Judgement, this Tribunal proposed that a conceptual approach to defining rape would be more useful to international law and opined that a mechanical approach with its focus on objects and body parts, was unsuitable. The *Akayesu* Trial Chamber therefore proceeded to define rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.' The broader concept of 'sexual violence,' according to *Akayesu*, 'includes rape [and] is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.' The Chamber notes that this definition was endorsed in the *Musema*, *Nyitegeka*, and *Muhimana* Judgements."

"However, in both *Furundžija* and *Kunarac*, ICTY Trial Chambers reverted to defining rape in terms of sexual penetration through the use of body parts or other objects under forceful or otherwise coercive circumstances. The definition of rape as sexual penetration of the vagina, anus, or mouth of the victim by the penis of the perpetrator or some other object used by him under coercive or forceful circumstances was partially approved by the Appeals Chamber in *Kunarac*. However, the Appeals Chamber expressed the view that *Furundžija* and earlier decisions defined rape more narrowly than was required under international law and reasoned that the emphasis on coercion, force, or threat of force did not recognise other factors that could render an act of sexual penetration non-consensual or non-voluntary. Consequently, the Appeals Chamber approved the definition of rape as:

[t]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose

must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."

"In *Mubimana* this Tribunal expressed the view that the *Akayesu* and *Kunarac* definitions of rape are not incompatible and noted that "[w]hereas *Akayesu* referred broadly to a "physical invasion of a sexual nature," *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape."

"The Chamber agrees with the above analysis and considers that the underlying objective of the prohibition of rape at international law is to penalise serious violations of sexual autonomy. A violation of sexual autonomy ensues whenever a person is subjected to sexual acts of the genre listed in *Kunarac* to which he/she has not consented, or to which he/she is not a voluntary participant. Lack of consent therefore continues to be an important ingredient of rape as a crime against humanity. The fact that unwanted sexual activity takes place under coercive or forceful circumstances may provide evidence of lack of consent on the part of the victim."

"The Chamber considers that in their result, both the *Akayesu* and *Kunarac* definitions of rape reflect this objective of protecting individual sexual autonomy and therefore are not incompatible. The broad language in *Akayesu* that rape constitutes 'physical invasion of a sexual nature,' when properly interpreted, could include 'sexual penetration' as stipulated in *Kunarac*. The Chamber therefore concludes that the offence of rape exists whenever there is sexual penetration of the vagina, anus or mouth of the victim, by the penis of the perpetrator or some other object under, circumstances where the victim did not agree to the sexual act or was otherwise not a willing participant to it."

Mubimana, (Trial Chamber), April 28, 2005, paras. 542-43, 547, 549-51: "The [ICTY's *Kunarac*] Trial Chamber's articulation of the elements of the crime of rape was as follows:

The *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.

The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."

"When the *Kunarac* Appeals Chamber concurred with the Trial Chamber's 'definition,' it is clear that it was approving the elements set out by the Trial Chamber . . ."

"The Chamber notes that the definition of rape, as enunciated in *Akayesu*, has not been adopted *per se* in all subsequent jurisprudence of the *ad hoc* Tribunals. The ICTR Trial Chambers in *Semanza*, *Kajelijeli* and *Kamuhanda*, for example, described only the physical elements of the act of rape, as set out in *Kunarac*, and thus seemingly shifted their analyses away from the conceptual definition established in *Akayesu*."

"This Chamber considers that *Furundžija* and *Kunarac*, which sometimes have been construed as departing from the *Akayesu* definition of rape – as was done in *Semanza* – actually are substantially aligned to this definition and provide additional details on the constituent elements of acts considered to be rape." "The Chamber takes

the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a ‘physical invasion of a sexual nature,’ *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.” “On the basis of the foregoing analysis, the Chamber endorses the conceptual definition of rape established in *Akayesu*, which encompasses the elements set out in *Kunarac*.”

(d) that rapist knew victim and may have had personal motivation, does not preclude finding rape

Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 103, 107: “The Appellant specifically contends that the rape of Witness TAQ was isolated because she had known her attacker previously. But this fact does not mean that her rape was isolated from the widespread and systematic attack. Indeed, the genocide and extermination campaign in Rwanda was characterized in significant part by neighbours killing and raping neighbours. Moreover, as the ICTY Appeals Chamber has recognized, even in the event that ‘personal motivations can be identified in the defendant’s carrying out of an act, it does not necessarily follow that the required nexus with the attack on a civilian population must also inevitably be lacking.’ Whether or not the perpetrator and victim are acquainted, the question is simply whether the totality of the evidence proves a nexus between the act and the widespread or systematic attack.” “[T]he acquaintance between Witness TAQ and her assailant does not mean that her rape cannot constitute a crime against humanity.”

(e) non-consent and knowledge thereof are elements of rape

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 153: “*Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 521: “Lack of consent . . . continues to be an important ingredient of rape as a crime against humanity.”

(i) force or threat of force provides evidence of non-consent, but force is not an element of rape

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2199: “Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.”

Muhimana, (Trial Chamber), April 28, 2005, paras. 544-46: “In analyzing the relationship between consent and coercion, the Appeals Chamber acknowledged that coercion provides clear evidence of non-consent. The Appeals Chamber in *Kunarac* opined as follows:

. . . with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal’s prior definitions of rape. However, in explaining its focus on the absence of consent as the condition *sine qua non* of rape, the Trial Chamber did not disavow the Tribunal’s earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. In

particular, the Trial Chamber wished to explain that there are ‘factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.’ A narrow focus on force or threat of force could permit perpetrators to evade [responsibility] for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

The Appeals Chamber notes, for example, that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate ‘in the future against the victim or any other person’ is a sufficient indicium of force so long as ‘there is a reasonable possibility that the perpetrator will execute the threat.’ While it is true that a focus on one aspect gives different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.”

“Similarly, the Chamber also recalls that the *Furundžija* Trial Chamber acknowledged that ‘any form of captivity vitiates consent.’”

“Accordingly, the Chamber is persuaded by the Appellate Chamber’s analysis that coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape.”

See also Akayesu, (Trial Chamber), September 2, 1998, para. 688: “[C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances”

(ii) circumstances prevailing in most genocide, war crimes and crimes against humanity cases will be almost universally coercive/true consent not possible

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 151: “The ICTY Appeals Chamber in *Kunarac* ‘immediately emphasized that “the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent [or a rape victim] will not be possible.’””

Muhimana, (Trial Chamber), April 28, 2005, para. 546: “[T]his Chamber concurs with the opinion that circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.”

(iii) not necessary to introduce evidence of victim’s words, conduct or relationship to the perpetrator

Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 155, 157: “The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all of the relevant and admissible

evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim. Indeed, the Trial Chamber did so in this case." "Knowledge of non[-]consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent."

(iv) accused may seek to prove consent, subject to caveats

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 156: "Under certain circumstances, the accused might raise reasonable doubt by introducing evidence that the victim specifically consented. However, pursuant to Rule 96(ii) of the Rules, such evidence is inadmissible if the victim:

- (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
- (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

Additionally, even if it admits such evidence, a Trial Chamber is free to disregard it if it concludes that under the circumstances the consent given was not genuinely voluntary."

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 151: "Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances." See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2199 (same); *Semanza*, (Trial Chamber), May 15, 2003, para. 344 (same).

(f) acts of sexual violence short of rape may be prosecuted as other inhumane acts, torture, persecution or enslavement

Kamuhanda, (Trial Chamber), January 22, 2004, para. 710: "Other acts of sexual violence which may fall outside of this specific definition may of course be prosecuted, and would be considered by the Chamber under other categories of crimes for which the Tribunal has jurisdiction, such as other inhumane acts." See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 916 (same).

Semanza, (Trial Chamber), May 15, 2003, para. 45: "[T]he Chamber recognises that other acts of sexual violence that do not satisfy this narrow definition [of rape] may be prosecuted as other crimes against humanity . . . such as torture, persecution, enslavement, or other inhumane acts."

See "other inhumane acts," "torture" and "persecution" as crimes against humanity, Sections (II)(c)(x), (II)(c)(vii), (II)(c)(ix), this Digest. (This Digest does not contain cases on enslavement.)

2) *mens rea*

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 151: “In the *Kunarac* case, the ICTY Appeals Chamber . . . [stated]:

. . . The *mens rea* [for rape] is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2200: “The *mens rea* for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 519 (similar); *Kamubanda*, (Trial Chamber), January 22, 2004, para. 710 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 915 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 346 (similar).

3) application

Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 107, 102: “[T]he Trial Chamber found:

on 16 April 1994, around 9 a.m., the Accused, who was driving around in Rubare *cellule*, Nyarubuye *secteur*, using a megaphone, asked that Hutu young men whom . . . girls had refused to marry should be looked for so that they should have sex with the young girls, adding that ‘in the event that they—the young girls—resisted, they had to be killed in an atrocious manner.’ Placed in context, and considering the attendant audience, such an utterance from the Accused constituted an incitement, directed at this group of attackers on which the *bourgmestre* had influence, to rape Tutsi women. That is why, immediately after the utterance, a group of attackers attacked Witness TAQ and seven other Tutsi women and girls with whom she was hiding, and raped them.

Given these factual findings, which have not been shown to be unreasonable, it was reasonable for the Trial Chamber to conclude that the Appellant’s words substantially contributed to the rapes of Witness TAQ, as well as that of the seven other Tutsis.”

“In the case at hand, the Trial Chamber reasonably concluded that there was a widespread and systematic attack against Tutsis in Rusumo Commune. Its further conclusion that the rapes formed part of this attack was also reasonable in light of the finding that ‘the victims of rape were chosen because of their Tutsi ethnic origin, or because of their relationship with a person of the Tutsi ethnic group.’” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, paras. 321, 323-25, 328, 330.

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2201-03: “The Chamber has found that acts of rape occurred during attacks on civilians at Kigali area roadblocks . . . , the Saint Josephite Centre . . . and Gikondo Parish It is clear that, given the circumstances surrounding these attacks, there could have been no consent for these acts of sexual violence and that the perpetrators would have known this fact. The Chamber has determined that the crimes at these locations were committed as part of a wide-spread and systematic attack on ethnic and political grounds” (Concluding Bagosora bore superior responsible for those rapes as a crime against humanity.)

Muvunyi, (Trial Chamber), September 12, 2006, para. 524: “The evidence provided in this case shows that Tutsi women as young as 17 years old were raped by soldiers during the months of April and May 1994 in the Butare and Gikongoro *préfectures*. The evidence before the Chamber establishes that Witnesses TM, QY and AFV were raped at various locations in Butare between April and May 1994. In each case, the evidence points to sexual penetration of the victim’s vagina under circumstances in which they did not consent to such penetration. Moreover, each of these events took place in the context of widespread attacks against civilians in Butare in 1994. The legal requirements for the offence of rape as a crime against humanity have therefore been satisfied.” *But see id.*, para. 526 (finding the Accused not guilty of rape because the Indictment alleged soldiers from the Ngoma Camp committed the rapes, and the evidence at trial was that soldiers from the ESO Camp committed the rapes); *see also Muvunyi*, (Appeals Chamber), August 29, 2008, paras. 160-65 (affirming same).

See also Muhimana, (Trial Chamber), April 28, 2005, paras. 552-54 (rape convictions); *but see Muhimana*, (Appeals Chamber), May 21, 2007, paras. 50-52 (reversing two of the rape convictions); *see also Muhimana*, (Appeals Chamber), Joint Partly Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, May 21, 2007 (disagreeing with reversals).

See also Kajelijeli, (Trial Chamber), December 1, 2003, paras. 917-25 (detailing how rape as a crime against humanity occurred, but concluding that Article 6(1) and Article 6(3) responsibility were not found regarding the Accused).

But see Kajelijeli, (Trial Chamber), December 1, 2003, Dissenting Opinion Of Judge Arlette Ramaroson, paras. 61, 69, 72, 97-100: Detailing testimony as to rape and showing the Accused’s link to various rapes and maintaining he should have been found guilty for instigating, ordering and aiding and abetting rape as a crime against humanity:

“Kajelijeli not only instigated the *Interahamwe*, but he also, by the same token, gave orders to forcefully rape and kill Tutsi women. Following this instigation, Tutsi women were raped at different locations where Kajelijeli was with his *Interahamwe*, either when he dropped them off at the location or when he sent them there. There is no doubt that in the cases listed earlier, the *Interahamwe* acted on the orders of Kajelijeli, the more so as he appeared in the immediate vicinity of the sites of the rapes, at the very locations where the rapes took place, or had just left the location.”

“The presence of Kajelijeli at the scene of the crime and the fact that he witnessed the rape prove that he abetted and supported the perpetrators of the crime and that he knew that his presence was interpreted by his *Interahamwe* as an encouragement. . . .”

“With regard to *mens rea*, Kajelijeli had the intent and willingness to participate in the commission of rape, and he was quite aware that by his acts (in this case, the act of ordering, instigating the commission of a crime, aiding and abetting the *Interahamwe*), he knowingly contributed to the criminal conduct of his *Interahamwe*, and he was aware that his participation had a significant effect on the commission of the rape.”

“I am convinced that the acts of rape and sexual violence were exclusively perpetrated against Tutsi women (of which only some cases were reported to us) and were committed grounds of their ethnicity. The women were raped on orders from Kajelijeli because they were Tutsi, that is, members of the group that was targeted by the

attacks. The reactions of some *Interahamwe* during the rapes prove that too. According to Witness GDF, for example, three *Interahamwe* who raped her spoke in shocking and contemptuous terms such as: ‘Allow me to taste the vagina of a Tutsi woman.’ the fourth said ‘I cannot fall on a Tutsi [woman]’ and jabbed a cigarette stub into her sexual organ and kicked her.”

“Rape is a component of the process to destroy the Tutsi ethnic group, especially its mind and its very existence. The intent to destroy the minds and lives of Tutsi women can be inferred from the utterances made by Kajelijeli when he arrived at the location where [Witness] GDO’s daughter was raped. GDO was traumatized by the rape of her disabled daughter and still suffers the consequences GDF was also traumatized by the rape that she suffered, and her sister lost her mind due to her own experience. Joyce was raped and killed in an atrocious manner.”

“*Rapes were part of a widespread attack.* They were committed throughout Ruhengeri *préfecture* where the *Interahamwe* gang-raped. The victims were found in different locations. These rapes took place at the same time as the genocide.”

“I am satisfied beyond a reasonable doubt that . . . Kajelijeli is, pursuant to Article 6(1) of the Statute, criminally responsible for the crime of rape”

ix) persecution on political, racial and religious grounds

1) defined/ *actus reus*

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 985: “The Appeals Chamber reiterates that ‘the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).’” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2208 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 435 (similar).

Serugendo, (Trial Chamber), June 12, 2006, para. 10: “The elements of the crime against humanity of persecution under Article 3 (h) of the Statute are described in both the Plea Agreement and the Tribunal jurisprudence as:

- the accused committed specific violations of basic or fundamental rights;
- the specific crimes were committed due to political or racial discrimination;
- the accused had real or constructive knowledge of the general context in which the offences were committed;
- the crimes were committed as part of widespread or systematic attacks against a civilian population; and
- the attacks were carried out on political, ethnic, racial or religious grounds.”

Semanza, (Trial Chamber), May 15, 2003, paras. 348-49: “Persecution may take diverse forms and does not necessarily require a physical act.” “[P]ersecution may include acts enumerated under other sub-headings of crimes against humanity, such as murder or deportation, when they are committed on discriminatory grounds. Persecution may also

involve a variety of other discriminatory acts, not enumerated elsewhere in the Statute, involving serious deprivations of human rights.”

Ruggiu, (Trial Chamber), June 1, 2000, para. 21: Quoting the ICTY [in *Kupreskić*], the Trial Chamber “summarized the elements that comprise the crime of persecution as follows: a) those elements required for all crimes against humanity under the Statute, b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, c) discriminatory grounds.”

(a) whether discrimination on ethnic grounds is covered

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2209: “The enumerated grounds of discrimination for persecution in Article 3 (h) of the Statute do not expressly include ethnic grounds, which is included in the list of discriminatory grounds for the attack contained in the *chapeau* of Article 3. Notwithstanding, the Appeals Chamber in the *Nahimana et al.* case held that discrimination on ethnic grounds could constitute persecution if the accompanying violation of rights was sufficiently serious, such as killings, torture and rape. It affirmed a conviction for persecution based on the supervision of roadblocks where Tutsis were killed.” See *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, paras. 986-88, 1002.

See also *Semanza*, (Trial Chamber), May 15, 2003, para. 350 (“[T]he enumerated grounds of discrimination for persecution in Article 3(h) . . . do not include national or ethnic grounds, which are included in the list of discriminatory grounds for the attack contained in the *chapeau* of Article 3.”).

(b) persecution also defined in terms of impact

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1073: “[T]he crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence.”

(c) persecution is broader than incitement

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1078: “[P]ersecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms.”

(d) not necessary that every act of persecution be of same gravity as other crimes against humanity, but must be cumulatively

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 987, 985: “[I]t is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which

these underlying acts take place is particularly important for the purpose of assessing their gravity.” “Furthermore, it is not necessary that these underlying acts of persecution amount to crimes in international law.”

Compare Bikindi, (Trial Chamber), December 2, 2008, para. 435: “The underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of equal gravity to the crimes listed under Article 3 of the Statute.”

2) *mens rea*: discriminatory intent required

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 985: The *mens rea* for persecution is that the acts are “carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).” See also *Bikindi*, (Trial Chamber), December 2, 2008, para. 435 (same).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 674: “The Chamber notes that a specific discriminatory intent is required for the charge of persecution as Crime against Humanity.” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 879 (same).

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1071: “[T]he crime of persecution specifically requires a finding of discriminatory intent on racial, religious or political grounds. The Chamber notes that this requirement has been broadly interpreted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) to include discriminatory acts against all those who do not belong to a particular group.”

See also “discriminatory intent not required for acts other than persecution,” Section (II)(b)(iv)(2), this Digest.

(a) discriminatory intent may be inferred

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2208: “The required discriminatory intent can be inferred from circumstantial evidence, such as the nature of the attack and the circumstances surrounding it.”

3) hate speech as persecution

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 986: “The Appeals Chamber considers that hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings, and therefore constitutes ‘actual discrimination.’ In addition, the Appeals Chamber is of the view that speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes ‘actual discrimination.’ However, the Appeals Chamber is not satisfied that hate speech alone can amount to a violation of the rights to life, freedom and physical integrity of the human being. Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group,

imprison or physically injure them.” *See also Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1072.

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), Partly Dissenting Opinion of Judge Fausto Pocar, November 28, 2007, para. 3: “[T]he Appeal Judgement does not appear to rule definitively on the question whether a hate speech can *per se* constitute an underlying act of persecution. In my opinion, the circumstances of the instant case are, however, a perfect example where a hate speech fulfils the conditions necessary for it to be considered as an underlying act of persecution. Indeed, the hate speeches broadcast on RTLM [*Radio Télévision Libre des Mille Collines*] by Appellant Nahimana’s subordinates were clearly aimed at discriminating against the Tutsi and led the population to discriminate against them, thus violating their basic rights. Taken together and in their context, these speeches amounted to a violation of equivalent gravity as other crimes against humanity. Consequently, the hate speeches against the Tutsi that were broadcast after 6 April 1994 – that is, after the beginning of the systematic and widespread attack against this ethnic group – were *per se* underlying acts of persecution.” *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), Partly Dissenting Opinion of Judge Shahabuddeen, November 28, 2007, para. 20 (“where statements are relied upon, the gravity of persecution as a crime against humanity can be established without need for proof that the accused advocated the perpetration of genocide or extermination.”).

Bikindi, (Trial Chamber), December 2, 2008, paras. 390-95, 397: “In contrast to the crime of direct and public incitement to commit genocide . . . , hate speech that does not directly call for genocide may, in certain contexts, constitute persecution as a crime against humanity.”

“The crime of persecution consists of an act or omission that discriminates in fact and that denies or infringes upon a fundamental right laid down in international customary or treaty law, and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.”

“Underlying acts of persecution need not be considered crimes in international law. For example, harassment, humiliation, psychological abuse, as well as denial of the rights of employment, freedom of movement, proper judicial process, and proper medical care have been recognised as underlying acts of persecution. It follows that it is not necessary to find that certain hate speech was in and of itself a crime under international law in order to regard such a speech as an underlying act of persecution. The Chamber is satisfied that hate speech may in certain circumstances constitute a violation of fundamental rights, namely a violation of the right to respect for dignity when that speech incites to hate and discrimination, or a violation of the right to security when it incites to violence.”

“The Appeals Chamber [in *Nahimana*] recently recalled that the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of equal gravity to the crimes listed under Article 3 of the Statute. It also held that hate speeches may be considered of equal gravity to the crimes listed under Article 3 of the Statute if they occur as part of a larger campaign of persecution. In its determination, the Appeals Chamber considered the cumulative effect of all the underlying acts of the crime of persecution, namely the cumulative effect of the hate

speeches and the direct calls to commit genocide broadcast in the context of a campaign of anti-Tutsi violence.”

“The question remains as to whether hate speech occurring in isolation could be considered to be of equal gravity to the other crimes listed under Article 3. In such a scenario, the hate speech would occur without any other underlying acts of persecution, and as such, would be the only act discriminating against the group. However, given that a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds would have to be established in order to support a conviction for persecution under the Tribunal’s Statute, the Chamber considers that the same facts that would lead it to find the existence of such an attack could also support a finding of many other underlying acts of persecution, as both must be committed on discriminatory grounds.”

“Finally, depending on the message conveyed and the context, the Chamber does not exclude the possibility that songs may constitute persecution as a crime against humanity.”

“While there is murky ground between some forms of expression, at some point, in the words of Judge Shahabuddeen, ‘[n]o margin of delicate appreciation is involved.’ There are cases that are made up of simple criminality, in which the perpetrators know what they are doing and why they are doing it. These are the cases that will be punished under the Statute, no less.”

(a) application—hate speech as persecution

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 988, 995: “In the present case, the hate speeches made after 6 April 1994 were accompanied by calls for genocide against the Tutsi group and all these speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence (killings, torture and ill-treatment, rapes . . .) and of destruction of property. In particular, the speeches broadcast by RTLM [*Radio Télévision Libre des Mille Collines*] – all of them by subordinates of Appellant Nahimana – , considered as a whole and in their context, were, in the view of the Appeals Chamber, of a gravity equivalent to other crimes against humanity. The Appeals Chamber accordingly finds that the hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus after the beginning of a systematic and widespread attack against the Tutsi) themselves constituted underlying acts of persecution. In addition, as explained below, some speeches made after 6 April 1994 did in practice substantially contribute to the commission of other acts of persecution against the Tutsi; these speeches thus also instigated the commission of acts of persecution against the Tutsi.”

“The acts characterized as acts of genocide committed against the Tutsi also constituted acts of persecution, and hence these broadcasts also instigated the commission of acts of persecution. Furthermore, the Appeals Chamber is of the view that hate speeches and direct calls for genocide broadcast by RTLM after 6 April 1994, while a massive campaign of violence against the Tutsi population was being conducted, also constituted acts of persecution.” *But see Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), Partly Dissenting Opinion of Judge Meron, November 28, 2007, paras. 3-16, 21, 22 (“hate speech” cannot be the basis of a crimes against humanity conviction for

persecution; Nahimana's crimes against humanity conviction should be reversed and his sentence reduced).

Compare Bikindi, (Trial Chamber), December 2, 2008, paras. 436-40 (finding that Bikindi's composition of songs to encourage ethnic hatred was not persecution where there was no evidence of him performing or disseminating the songs in 1994).

4) application—persecution

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1002, 1010: "The Appeals Chamber considers that murders of Tutsi at the roadblocks after 6 April 1994 . . . constituted acts of persecution. In consequence, it finds that the supervision of roadblocks by the Appellant [Barayagwiza] substantially contributed to the commission of acts of persecution, and it finds the Appellant guilty pursuant to Article 6(1) of the Statute for having instigated persecution." "As the Trial Chamber found, a person who possesses genocidal intent necessarily possesses the intent required for persecution. The Appeals Chamber finds that the Appellant [Ngeze] had the required *mens rea* for persecution. It also finds that, on the basis of the acts committed by the Appellant, he also possessed the intent to instigate others to commit persecution against Tutsi."

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2210-16: "The Chamber has found Bagosora, Ntabakuze and Nsengiyumva responsible variously for the killings of Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza, Alphonse Kabiligi and Augustin Maharangari as well as of civilians at Kigali area roadblocks between 7 and 9 April, *Centre Christus*, Kabeza, the Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Gikondo Parish, Nyanza hill, IAMSEA [*L'Institut Africain et Mauricien de Statistiques et d'Economie*], Gisenyi town on 7 April, Mudende University, Nyundo Parish and Bisesero It has also held Bagosora responsible for the rapes committed at Kigali area roadblocks, the Saint Josephite Centre and Gikondo Parish."

"The Chamber has already determined that these crimes formed part of the widespread and systematic attack against civilians on ethnic and political grounds These crimes are also charged in their respective Indictments as persecution."

"In the Chamber's view, these acts of killing and rape equally establish the *actus reus* of persecution. Furthermore, the circumstances surrounding the attacks clearly evince that the perpetrators had the requisite discriminatory intent on ethnic or political grounds. In particular, for many of these crimes, the Chamber has already found that the assailants possessed genocidal intent The assailants and the Accused were aware that these attacks formed part of widespread and systematic attacks against the civilian population on ethnic and political grounds" (Finding Bagosora, Ntabakuze and Nsengiyumva responsible for persecution as a crime against humanity.)

Ruggiu, (Trial Chamber), June 1, 2000, para. 22: In the case at hand, the Trial Chamber discerned "a common element" when examining the acts of persecution admitted to by the accused. "Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by

depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually from humanity itself.” (Ruggiu pled guilty to persecution as a crime against humanity.)

See also “application—hate speech as persecution,” immediately prior section.

x) other inhumane acts

1) residual category recognized by customary international law/does not violate *nullum crimen sine lege*

Muvunyi, (Trial Chamber), September 12, 2006, para. 527: “The crime of ‘other inhumane acts’ encompasses acts not specifically listed as crimes against humanity, but which are nevertheless of comparable nature, character, gravity and seriousness to the enumerated acts in sub-articles (a) to (h) of Article 3. The inclusion of a residual category of crimes in Article 3 recognizes the difficulty in creating an exhaustive list of criminal conduct and the need for flexibility in the law’s response. The ICTY Appeals Chamber recently noted that the crime of ‘other inhumane acts’ cannot in itself violate the principle of *nullum crimen sine lege certa* as it proscribes conduct which is forbidden under customary international law.”³⁰

See also Kamuhanda, (Trial Chamber), January 22, 2004, para. 716: “In Kayishema and Ruzindana [*sic*] the Trial Chamber noted that since the Nuremberg Charter, the category ‘other inhumane acts’ has been maintained as a useful category for acts not specifically stated but which are of comparable gravity.”³¹ *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 931 (same with italics).

2) defined/ *actus reus*

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2218: “The crime of inhumane acts is a residual clause for serious acts which are not otherwise enumerated in Article 3. They must be similar in gravity to the acts envisaged in Article 3 and must cause mental or physical suffering or injury or constitute a serious attack on human dignity.” *See also Nyitegeka*, (Trial Chamber), May 16, 2003, para. 460 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 527: “The crime of ‘other inhumane acts’ encompasses acts not specifically listed as crimes against humanity, but which are nevertheless of comparable nature, character, gravity and seriousness to the enumerated acts in sub-articles (a) to (h) of Article 3.”

³⁰ *Nullum crimen sine lege* translates to “no crime without law,” and refers to the prohibition on ex post facto laws.

³¹ The “Nuremberg Charter” refers to the Charter of the International Military Tribunal (Nuremberg), annexed to the London Agreement of August 8, 1945, signed by the United States, the Provisional Government of the French Republic, the United Kingdom, and the Soviet Union.

Kamuhanda, (Trial Chamber), January 22, 2004, para. 718: “In Kayishema and Ruzindana [*sic*] the position was summarised that:

[...] for an accused to be has [*sic*] found guilty of Crimes against Humanity for other inhumane acts, he must commit an act of similar gravity and seriousness to the other enumerated crimes”

See also Kajelijeli, (Trial Chamber), December 1, 2003, para. 933 (same with italics).

Musema, (Trial Chamber), January 27, 2000, para. 232: “[T]he inhumane act or omission must: (a) [b]e directed against member(s) of the civilian population; (b)[t]he perpetrator must have discriminated against the victim(s), on one or more of the enumerated discriminatory grounds; (c) [t]he perpetrator’s act or omission must form part of a widespread or systematic attack and the perpetrator must have knowledge of this attack.”

Akayesu, (Trial Chamber), September 2, 1998, para. 585: The list of acts enumerated in Article 3(a)-(h) of the Statute is not exhaustive. “Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 77 (similar).

(a) gravity determined on a case-by-case basis

Muvunyi, (Trial Chamber), September 12, 2006, para. 527: The crime of other inhumane acts encompasses crimes “of comparable nature, character, gravity and seriousness to the enumerated acts in sub-articles (a) to (h) of Article 3 Whether an act falls within the ambit of Article 3(i) has to be determined on a case-by-case basis.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 717 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 932 (similar); *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 460; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 92 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 150-51 (similar).

(b) nexus required

Kamuhanda, (Trial Chamber), January 22, 2004, para. 717: “[T]he Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to the mental or physical health of the victim.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 932 (same); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 151 (similar).

(c) types of crimes covered

Muvunyi, (Trial Chamber), September 12, 2006, para. 528: “With respect to the *actus reus* of the offence, inhumane acts have been found to include sexual violence, forcible transfer of civilians, mutilation, beatings and other types of severe bodily harm.”

Akayesu, (Trial Chamber), September 2, 1998, para. 688: “Sexual violence falls within the scope of ‘other inhumane acts,’ set forth [in] Article 3(i) of the Tribunal’s Statute.”

See also discussion of rape and sexual violence as causing serious bodily or mental harm to members of the group under Article 2 (genocide), Section (I)(d)(ii)(3); rape under Article 3 (crimes against humanity), Section (II)(c)(viii); sexual violence as an outrage upon personal dignity under Article 4 (war crimes), Section (III)(d)(v)(1), this Digest.

(d) third party mental suffering covered

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 153: “The Chamber is in no doubt that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends.”

See, e.g., *Kamubanda*, (Trial Chamber), January 22, 2004, para. 718: *Kayishema and Ruzindana* [*sic*] states:

In the *Niyitegeka* [*sic*] Judgment, Trial Chamber I has found that by perpetrating gross acts of sexual violence upon a dead woman’s body, the Accused caused mental suffering to civilians, his actions constituted a serious attack on the human dignity of the Tutsi community as a whole, and that these acts were part of a widespread and systematic attack against the civilian Tutsi population on ethnic grounds.”

See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 933 (same with italics); see *Niyitegeka*, Trial Chamber, May 16, 2003, paras. 316, 465-67 (crime constituted “other inhumane acts”).

3) *mens rea*

(a) generally

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2218: “The *mens rea* required [for other inhumane acts] is the intent to inflict serious bodily or mental harm upon the victim and the knowledge that the act or omission is part of a widespread and systematic attack.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 529: “The act or omission must *deliberately* cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.” See also *Bagilishema*, (Trial Chamber), June 7, 2001, para. 92 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 151 (similar).

Kamubanda, (Trial Chamber), January 22, 2004, para. 718: Quoting *Kayishema and Ruzindana*, [for the crime against humanity of other inhumane acts, the *mens rea* is] “the intention to cause the other inhumane act, . . . with knowledge that the act is perpetrated within the overall context of the attack” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 933 (same); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 154, 583 (source).

(b) mental state where act causes third party suffering

Muvunyi, (Trial Chamber), September 12, 2006, para. 529: “If the inhumane act is witnessed by a third party, ‘an accused may be held [responsible] under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was

likely to cause serious mental suffering and was reckless as to whether such suffering would result. Accordingly, if at the time of the act, the accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party.” See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 153 (similar).

Compare *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 717: “Inhumane Acts are only those which deliberately cause suffering. Therefore, where third parties observe acts committed against others, in circumstances in which the Accused may not have had an intention to injure those third parties by their observation of these acts, the Accused may still be held accountable for their mental suffering.” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 923 (same).

4) application

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2219, 2221-23: “The sole reference in the Indictments to inhumane treatment is the sexual assault of Prime Minister Uwilingiyimana. The Chamber found that a bottle was inserted into her vagina after her death” “However, . . . notice was provided in the Prosecution’s Pre-Trial Brief for the prevention of refugees killed at Nyanza hill from seeking sanctuary, the sheparding of Tutsis to Gikondo Parish to be killed in a house of worship, the stripping of women at the Saint Josephite centre and the torture and murder of Alphonse Kabiligi in front of his family.”³²

“The Chamber is satisfied that each of these acts conducted in the course of the attacks against the Prime Minister, Alphonse Kabiligi as well as the civilians at Gikondo Parish, Nyanza hill and the Saint Josephite Centre constitutes a serious attack on human dignity. In the circumstances of the attacks, it is clear that they were perpetrated with the intent to cause serious bodily or mental harm to the victims. The Chamber has already determined that the assailants would have been aware that they formed part of the wide-spread and systematic attack against the civilian population on ethnic and political grounds” (Concluding Bagosora bore superior responsibility for the crimes against the Prime Minister, Alphonse Kabiligi and the civilians at the Saint Josephite Centre and Gikondo Parish; Ntabakuze bore superior responsibility for the crimes committed during the Nyanza hill massacre; Nsengiyumva bore individual responsibility as to Alphonse Kabiligi.)

Muvunyi, (Trial Chamber), September 12, 2006, para. 530: “The Chamber recalls its factual findings relating to the treatment of [certain witnesses] at the *Économat General*, the Butare Cathedral and at [the] ESO [*École des sous-Officiers* Camp in Butare prefecture], the open humiliation of the two Tutsi women . . . at various roadblocks in Butare, the beatings and injuries caused to Tutsi civilians by ESO soldiers at Beneberika Covent and *Groupe scolaire*, and is satisfied that the treatment meted out to these people by ESO soldiers constitute inhumane treatment within the meaning of Article 3(i) of the Statute. See also *id.*, paras. 426, 436-37, 456 (detailing mistreatment at Butare Cathedral,

³² As to how notice of charges may be provided in the prosecution’s pre-trial brief, see “certain defects in the indictment may be ‘cured’ by timely, clear and consistent information,” Section (VIII)(c)(xix)(7), this Digest.

Beneberika Convent, the *Groupe scolaire*—where orphan children were beaten—and at various roadblocks in Butare and Gikongoro).

Kajelijeli, (Trial Chamber), December 1, 2003, paras. 934-36: “The Chamber found that, at Rwankeri cellule [Mukingo commune, Ruhengeri prefecture] on 7 April 1994, the *Interahamwe* raped and killed a Tutsi woman called Joyce. Furthermore, the Chamber found that they pierced her side and her sexual organs with a spear, and then covered her dead body with her skirt.” “The Chamber found that, at Rwankeri cellule on 7 April 1994, a Tutsi girl named Nyiramburanga was mutilated by an *Interahamwe* who cut off her breast and then licked it.” “The Chamber finds that these acts constitute a serious attack on the human dignity of the Tutsi community as a whole. Cutting a woman’s breast off and licking it, and piercing a woman’s sexual organs with a spear are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them. Furthermore, given the circumstances under which these acts were committed, the Chamber finds that they were committed in the course of a widespread attack upon the Tutsi civilian population.” *But see id.*, paras. 937-39 (Kajelijeli’s responsibility for other inhumane acts not proven).

Niyitegeka, (Trial Chamber), May 16, 2003, paras. 465, 467: “[T]he acts committed with respect to Kabanda [decapitation, castration and piercing his skull with a spike] and the sexual violence to the dead woman’s body [insertion of a sharpened piece of wood into her genitalia] are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole.” “[B]y his act of encouragement during the killing, decapitation and castration of Kabanda, and the piercing of his skull, and his association with the attackers who carried out these acts, and his ordering of *Interahamwe* to perpetrate the sexual violence on the body of the dead woman, the Accused is . . . responsible for inhumane acts committed as part of a widespread and systematic attack on the civilian Tutsi population on ethnic grounds.” (The convictions were affirmed on appeal.)

Akayesu, (Trial Chamber), September 2, 1998, para. 697: Akayesu was “judged criminally responsible under Article 3(i) for the following other inhumane acts: (i) the forced undressing of [a woman] outside the bureau communal, after making her sit in the mud . . . ; (ii) the forced undressing and public marching of [a woman] naked at the bureau communal; (iii) the forced undressing of [three women] and the forcing of the women to perform exercises naked in public near the bureau communal.”

III) WAR CRIMES (ARTICLE 4)

a) Statute

ICTR Statute, Article 4:

“The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional

Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) 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;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of terrorism;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
- h) Threats to commit any of the foregoing acts.”

b) Generally

i) applicability needs to be assessed

Akayesu, (Trial Chamber), September 2, 1998, paras. 604-07: The Security Council took a more expansive approach in drafting the ICTR Statute than the ICTY Statute, insofar as they “included within the subject-matter jurisdiction of the . . . Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 . . . includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, [and] for the first time criminalizes common article 3 of the four Geneva Conventions.” “[A]n essential question which should be addressed . . . is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law.” The Chamber also noted the Secretary General’s statement at the establishment of the ICTY that “in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are beyond any doubt part of customary law.”³³ Accordingly, the Chamber found it necessary to assess the applicability of Common Article 3 and Additional Protocol II individually.

ii) Common Article 3 and list of prohibited acts in Statute are part of customary international law

Akayesu, (Trial Chamber), September 2, 1998, paras. 608-09, 616: The Chamber concluded that Common Article 3 is customary law, noting that most states’ penal codes “have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3.” The Chamber also noted that the ICTY

³³ *Nullum crimen sine lege* translates to “no crime without law,” and refers to the prohibition on ex post facto laws.

Trial Chamber in the *Tadić* judgment held that Common Article 3 was customary international humanitarian law, as did the ICTY Appeals Chamber. However, the Chamber also noted the Secretary General's statement that Additional Protocol II³⁴ "as a whole was not deemed . . . to have been universally recognized as customary international law," and stated that the Appeals Chamber in *Tadić* "concurred with this view inasmuch as many provisions of . . . Protocol [II] can now be regarded as declaratory of existing rules or as having crystallized in emerging rules of customary law, but not all." However, it did conclude that "[t]he list in Article 4 of the Statute . . . comprises *serious* violations of the fundamental humanitarian guarantees which . . . are recognized as part of international customary law." See *Prosecutor v. Tadić*, Case No. IT-94-1 (Trial Chamber), May 7, 1997, para. 609; *Prosecutor v. Tadić*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paras. 116, 134.

Compare Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 156-58, 597-98: It was unnecessary to consider whether the Four Geneva Conventions of 1949³⁵ and Additional Protocol II thereto of 1977 (Protocol II) were "considered customary international law that imposes criminal [responsibility] for their serious breaches." Rwanda was a party to the four Geneva Conventions and Protocol II, and they were in force prior to the events. Furthermore, "all the offences enumerated in Article 4 of the Statute, also constituted crimes under the laws of Rwanda." Also, the Rwandan Patriotic Front (RPF) "had stated to the International Committee of the Red Cross (ICRC) that it was bound by the rules of international humanitarian law."

See also *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 86-90: The Court relied on the judgments in *Akayesu* and *Kayishema and Ruzindana* in holding that, "at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the guarantees provided for by the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute." See also *Semanza*, (Trial Chamber), May 15, 2003, para. 353 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 242 (similar).³⁶

See also *Semanza*, (Appeals Chamber), May 20, 2005, para. 192 (judicial notice taken "that, at the time at issue, Rwanda was a state party to the Geneva Conventions of 12 August 1949 and their additional Additional Protocol II of 8 June 1977."); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 744 (judicial notice taken that Rwanda was a party to the Geneva Conventions and Additional Protocol II).

For discussion of "judicial notice," see "judicial notice," Section (VIII)(d)(xiii), this Digest.

³⁴ "Additional Protocol II" refers to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

³⁵ The "Four Geneva Conventions of 1949" refers to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; and Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

³⁶ The "1977 Additional Protocols" refers to Additional Protocols I and II to the Four Geneva Conventions.

iii) individual criminal responsibility applies

Akayesu, (Trial Chamber), September 2, 1998, para. 616: “[I]t is clear that the authors of such egregious violations [of Common Article 3 of the four 1949 Geneva Conventions, and of Article 4 of Additional Protocol II—which are covered by Article 4 of the ICTR Statute] must incur individual criminal responsibility for their deeds.”

iv) “serious violation” of Common Article 3 or Protocol II required; list of prohibited acts in Article 4 of the Statute are serious violations

Kamuhanda, (Trial Chamber), January 22, 2004, para. 736: “Pursuant to Article 4 of the Statute, the Tribunal has been granted jurisdiction to prosecute serious violations of Common Article 3 and of Additional Protocol [II]. A ‘serious violation’ within the context of Article 4, in the opinion of this Tribunal, constitutes a breach of a rule protecting important humanitarian values with grave consequences for the victim. On this basis, the Tribunal has expressed the view, with which this Chamber concurs, that the acts articulated in Article 4 of the Statute, constituting serious violations of Common Article 3 and Additional Protocol II, entail individual criminal responsibility.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 184: “The competence of the Chamber is limited to serious violations of Common Article 3 and Protocol II.” The Chamber held that “‘serious violations’ should be interpreted as breaches involving grave consequences” and that the list of prohibited acts in Article 4 “undeniably should be recognised as serious violations entailing individual criminal responsibility.” *See also Musema*, (Trial Chamber), January 27, 2000, paras. 286-88 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 106 (similar).

Akayesu, (Trial Chamber), September 2, 1998, para. 616: “The Chamber understands the phrase ‘serious violation’ to mean ‘a breach of rule protecting important values [which] must involve grave consequences for the victim.’” *See also Semanza*, (Trial Chamber), May 15, 2003, para. 370 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 102 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 286 (similar).

c) Overall requirements/ *chapeau*

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 766: “The Chamber explained in the *Semanza* Judgement that in connection with crimes within the scope of Article 4 of the Statute, the Prosecutor must prove, at the threshold, the following elements: (1) the existence of a non-international armed conflict on the territory of the concerned state; (2) the existence of a nexus between the alleged violation and the armed conflict; and (3) the victims were not directly taking part in the hostilities at the time of the alleged violation. If these elements are proven beyond a reasonable doubt, the Chamber will proceed to assess whether the accused is responsible for a specific violation of Common Article 3 or Additional Protocol II.” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2229 (same elements); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 737 (similar); *Semanza*, (Trial Chamber), May 15, 2003, paras. 354-371, 512 (cited).

But see Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 169: “[I]n order for an act to breach Common Article 3 and Protocol II,” the following elements must be shown: (1) “armed conflict . . . of a non-international character,” (2) a “link between the accused and the armed forces,” (3) “the crimes must be committed *ratione loci* and *ratione personae*,” and (4) “there must be a nexus between the crime and the armed conflict.”

See also “link between the accused and the armed forces—rejected,” Section (III)(c)(iv), this Digest.

i) armed conflict of a non-international character (element 1)

Kamuhanda, (Trial Chamber), January 22, 2004, para. 721: “The provisions of Common Article 3 and Additional Protocol II, as incorporated in Article 4 of the Statute, are expressly applicable to alleged offences committed within the context of conflicts of a non-international character.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 91: “Offences alleged to be covered by Article 4 of the Statute must, as a preliminary matter, have been committed in the context of a conflict of a non-international character satisfying the requirements of Common Article 3, which applies to ‘armed conflict not of an international character’”

Akayesu, (Trial Chamber), September 2, 1998, paras. 601-02: “Common Article 3 applies to ‘armed conflicts not of an international character.’” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 99 (similar).

1) “non-international” defined

Kamuhanda, (Trial Chamber), January 22, 2004, para. 722: “[N]on-international armed conflicts referred to in Common Article 3 are conflicts with armed forces on either side engaged in hostilities that are in many respects similar to an international war, but take place within the confines of a single country.”

Musema, (Trial Chamber), January 27, 2000, para. 247: “[A] non-international conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory.”

2) “armed conflict” defined

Musema, (Trial Chamber), January 27, 2000, para. 248: “The expression ‘armed conflicts’ introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 93: “[W]hether or not a situation can be described as an ‘armed conflict,’ meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis. Hence, in dealing with this issue, the *Akayesu*

Judgement suggested an ‘evaluation test,’ whereby it is necessary to evaluate the intensity and the organization of the parties to the conflict to make a finding on the existence of an armed conflict. This approach also finds favour with the Trial Chamber in this instance.”

Akayesu, (Trial Chamber), September 2, 1998, paras. 619-21, 625: The Chamber quoted the ICTY Appeals Chamber in *Tadić* stating that “an armed conflict exists whenever there is [. . .] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [. . .] in the case of internal conflicts, a peaceful settlement is reached.” “[A]n armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict.”

The Chamber also noted the ICRC commentary on Common Article 3 which suggests useful criteria for determining armed conflicts:

“That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.

- (a) That the *de jure* Government has recognized the insurgents as belligerents; or
- (b) that it has claimed for itself the rights of a belligerent; or
- (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
- (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.”

(a) internal disturbances excluded

Rutaganda, (Trial Chamber), December 6, 1999, para. 92: “[I]t is clear that mere acts of banditry, internal disturbances and tensions, and unorganized and short-lived insurrections are to be ruled out.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 171: “Certain types of internal conflicts, which fall below a minimum threshold, are not recognised by Article 1(2) of Protocol II as non-international armed conflict, namely, ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.’” *See also Musema*, (Trial Chamber), January 27, 2000, para. 248 (similar).

Akayesu, (Trial Chamber), September 2, 1998, para. 620: The term “armed conflict” “suggests the existence of hostilities between armed forces organized to a greater or lesser extent,” which necessarily “rules out situations of internal disturbances and tensions.”

3) whether conflict meets the requirements depends on objective evaluation, not conclusions of the parties

Semanza, (Trial Chamber), May 15, 2003, para. 357: “Classification of a conflict as one to which Common Article 3 and/or Additional Protocol II applies depends on an analysis of the objective factors set out in the respective provisions.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 101: “Whether a conflict meets the material requirements of [Common Article 3 and Additional Protocol II] is a matter of objective evaluation of the organization and intensity of the conflict and of the forces opposing one and another.”

Akayesu, (Trial Chamber), September 2, 1998, para. 603: “[T]he ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict . . . [O]n the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills respective pre-determined criteria.”

Akayesu, (Trial Chamber), September 2, 1998, para. 624: Conditions required to apply Additional Protocol II “have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict.”

4) higher threshold required for conflicts covered by Additional Protocol II

Kamubanda, (Trial Chamber), January 22, 2004, para. 723: “Additional Protocol II develops and supplements Common Article 3. Specifically, Additional Protocol II applies to conflicts taking place ‘in the territory of a High contracting party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.’” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 94 (same quote).

Kamubanda, (Trial Chamber), January 22, 2004, para. 724: “Article 1 of Additional Protocol II sets out the material requirements for applicability:

- ‘(i) the occurrence of an armed conflict in the territory of a High Contracting party, namely, Rwanda, between its armed forces and dissident armed forces or other armed groups;
- (ii) the responsible command of the dissident armed forces or other organized armed groups;
- (iii) the exercise of control by dissident armed forces or other organized armed groups, enabling them to carry out sustained and concerted military operations;
- (iv) the implementation of Additional Protocol II by the dissident armed forces or other organized armed groups.’”

See also Rutaganda, (Trial Chamber), December 6, 1999, para. 95 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 171 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 623 (similar).

Rutaganda, (Trial Chamber), December 6, 1999, para. 94: “[C]onflicts covered by Additional Protocol II have a higher intensity threshold than Common Article 3 If an internal armed conflict meets the material conditions of Additional Protocol II, it then also automatically satisfies the threshold requirements of the broader Common Article 3.” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 100 (similar).

(a) armed conflict under Protocol II

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 170: “An armed conflict which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, in accordance with Protocol II, should be considered as a non-international armed conflict.”

Akayesu, (Trial Chamber), September 2, 1998, para. 625: “Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term, ‘armed forces’ of the High Contracting Party is to be defined broadly so as to cover all armed forces as described within national legislations.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 256 (similar).

(b) responsible command

Akayesu, (Trial Chamber), September 2, 1998, para. 626: “[R]esponsible command . . . entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 257.

(c) carrying out “sustained and concerted military operations”

Akayesu, (Trial Chamber), September 2, 1998, para. 626: The “armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 258 (similar).

(d) able to implement Additional Protocol II

Akayesu, (Trial Chamber), September 2, 1998, para. 626: The “armed forces must be able to . . . apply Additional Protocol II.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 258 (similar).

5) application—non-international armed conflict

Rutaganda, (Appeals Chamber), May 26, 2003, para. 561: “[I]t was not disputed at trial that, at the time of the ETO [*École Technique Officielle*] and Nyanza killings . . . the government and army of Rwanda (Rwandan Armed Forces, or ‘RAF’), on the one hand, and the Rwandan Patriotic Front (‘RPF’), on the other, were engaged in a non-international armed conflict satisfying the requirements of common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2230: “The evidence reflects that, on 1 October 1990, the RPF, made up mostly members of Rwanda’s community of exiled Tutsis living in surrounding countries, invaded the territory of Rwanda from Uganda. The initial invasion was repulsed by Rwandan government forces, but the RPF [Rwandan Patriotic Front] remained in a portion of the northern border region of Rwanda. Between October 1990 and April 1994, the RPF and the Rwandan government negotiated several cease fire agreements, which were frequently violated. In August 1993, the parties to the conflict had finally agreed to a peace agreement, the Arusha Accords, which called for the integration of forces and the political participation of the RPF in a Broad-Based Transitional Government At the time active hostilities resumed between the RPF and the Rwandan government in April 1994, they were awaiting the integration of forces and the creation of the Broad-Based Transitional Government provided for by the Arusha Accords. In view of these circumstances, it is established that during the relevant period an armed conflict of a non-international character existed on the territory of Rwanda.”³⁷

Kamubanda, (Trial Chamber), January 22, 2004, para. 738: “It has been established, for the purposes of this case, that a state of non-international armed conflict existed in Rwanda as of 6 April 1994 to mid-July 1994 when the Accused left the country.” *See also id.*, para. 242 (similar).

See also “notice of existence of internal armed conflict” under “judicial notice,” Section (VIII)(d)(xiii)(5), this Digest.

ii) nexus between the alleged violation and the armed conflict (element 2)

Rutaganda, (Appeals Chamber), May 26, 2003, para. 557: “[T]he Trial Chamber held that there must be a nexus between the offence and an armed conflict in order to satisfy the material requirements of common Article 3 of the Geneva Conventions and of Article 1 of Additional Protocol II to the Geneva Conventions.”

Akayesu, (Appeals Chamber), June 1, 2001, para. 438, n. 807: The ICTY Appeals Chamber has developed the test that “[t]here must be a nexus between the violations and the armed conflict.”

Kamubanda, (Trial Chamber), January 22, 2004, para. 733: “For a criminal offence to fall within the ambit of Article 4 of the Statute, the Chamber must be satisfied that a nexus existed between the alleged breach of Common Article 3 or of Additional Protocol II and the underlying armed conflict.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 169: “[T]here must be a nexus between the crime and the armed conflict.” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 105 (similar).

³⁷ The “Arusha Accords” refers to a set of five accords (or protocols) signed in Arusha, Tanzania on August 4, 1993, by the government of Rwanda and the Rwandan Patriotic Front (RPF). They were ostensibly to end the conflict between the Government and RPF and result in power-sharing.

1) offence must be closely related to the hostilities

Rutaganda, (Appeals Chamber), May 26, 2003, para. 557: “According to the Trial Chamber, the nexus requirement means that ‘the offence must be *closely related* to the hostilities or committed *in conjunction with* the armed conflict.’” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2231 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 735 (similar); *Semanza*, (Trial Chamber), May 15, 2003, paras. 368-69 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 105 (similar); *Musema*, (Trial Chamber), January 27, 2000, paras. 259-62 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 104-05 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, paras. 569, 570: Endorsing the standard articulated in the [ICTY’s] *Kunarac* Appeal Judgement:

“The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established . . . that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict . . .”

“This Chamber agrees with the criteria highlighted and with the explanation of the nexus requirement given by the ICTY Appeals Chamber in the *Kunarac* Appeal Judgement. It is only necessary to explain two matters. First, the expression ‘under the guise of the armed conflict’ does not mean simply ‘at the same time as an armed conflict’ and/or ‘in any circumstances created in part by the armed conflict.’ . . . Second, [p]articular care is needed when the accused is a non-combatant.” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2231 (same indented quote); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 735 (same indented quote).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 185-90: “[O]nly offences, which have a nexus with the armed conflict,” are covered. “[T]he term ‘nexus’ should not be understood as something vague and indefinite. A direct connection between the alleged crimes . . . and the armed conflict should be established *factually*. No test, therefore, can be defined *in abstracto*. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed.”

See also *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 734: “The objective of this requirement of a nexus between the crimes committed and the armed conflict can best be appreciated in light of the underlying humanitarian purpose of these instruments to protect victims of internal conflicts, not victims of offences unrelated to the hostilities, however reprehensible such offences may be.”

2) factors for establishing nexus

Rutaganda, (Appeals Chamber), May 26, 2003, para. 569: Endorsing the standard articulated in the *Kunarac* Appeal Judgement:

“In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following

factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.”

See also Kamuhanda, (Trial Chamber), January 22, 2004, paras. 734-35 (similar factors, and specifying: “[t]hese criteria are not exhaustive of the factors indicating the existence of a close relationship between a particular offence and an armed conflict.”).

Compare Kamuhanda, (Trial Chamber), January 22, 2004, para. 739: “For the Accused to incur criminal responsibility under Article 4 of the Statute, it is incumbent on the Prosecution to prove beyond reasonable doubt that he was directly engaged in the hostilities, acting for one of the conflicting parties in the execution of their respective conflict objectives. Accordingly, it is the Prosecution's responsibility to prove that the Accused was either a member of the armed forces under the military command of the belligerent parties or that, by virtue of his authority as a public civilian official representing the Government, he was legitimately mandated or expected to support the war efforts.”

See also “link between the accused and the armed forces—rejected,” Section (III)(c)(iv), this Digest (making clear that it is not required that the perpetrator be linked to the belligerent parties).

3) actual hostilities not required in area of crimes; protections apply to whole state, not just “theatre of combat”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 732: “The protection afforded to victims of armed conflicts under Common Article 3 and Additional Protocol II, as incorporated by Article 4 of the Statute, extends throughout the territory of the state where the hostilities are occurring, without limitation to the ‘war front’ or to the ‘narrow geographical context of the actual theatre of combat operations,’ once the objective, material conditions for applicability of these provisions have been satisfied.” *See also Semanza*, (Trial Chamber), May 15, 2003, para. 367 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 284 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 102-03 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 182-83 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 635 (similar).

Bagilishema, (Trial Chamber), June 7, 2001, para. 101: “Once the material requirements of Common Article 3 or Additional Protocol II have been met, these instruments will immediately be applicable not only within the limited theatre of combat but also in the whole territory of the State engaged in the conflict. Consequently, the parties engaged in the hostilities are bound to respect the provisions of these instruments throughout the relevant territory.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 105: “[I]t is not necessary that actual armed hostilities have broken out in Mabanza *commune* and Kibuye Prefecture for Article 4 of the Statute to be applicable. Moreover, it is not a requirement that fighting was

taking place in the exact time-period when the acts the offences alleged occurred were perpetrated.”

4) application—nexus to armed conflict

Rutaganda, (Appeals Chamber), May 26, 2003, para. 577: “The Appeals Chamber is of the view that no reasonable trier of fact could have concluded, as did the Trial Chamber, that the Prosecution had failed to establish a nexus between the acts committed by Rutaganda and the armed conflict, with respect to the ETO [*École Technique Officielle*] killings. As noted above, . . . the Trial Chamber found that the Prosecution had established a nexus between the ETO killings and the armed conflict. Given the Trial Chamber’s other conclusion that:

- Rutaganda participated in the attack on Tutsi refugees at the ETO school;
- He exercised *de facto* influence and authority over the *Interahamwe*;
- The *Interahamwe* were armed with guns, grenades and clubs;
- The *Interahamwe*, alongside the soldiers of the Presidential Guard, entered the ETO compound throwing grenades, firing guns and killing the refugees with machetes and clubs; and
- The victims of the killings were persons protected under common Article 3 of the Geneva Conventions and Additional Protocol II,

the Appeals Chamber concludes that no reasonable trier of fact could have failed to find that a nexus between the armed conflict and Rutaganda’s participation in the particular killings charged . . . had been established beyond a reasonable doubt.” *See also id.* paras. 578-79 (finding same as to Nyanza attack); *id.*, para. 584 (allowing Prosecution’s appeal and convicting Rutaganda of war crimes).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2232-36: “As reflected in the evidence and previous case law, the ongoing armed conflict between the Rwandan government forces and the RPF [Rwandan Patriotic Front], which was identified with the Tutsi ethnic minority in Rwanda and many members of the political opposition, both created the situation and provided a pretext for the extensive killings and other abuses of members of the civilian population in Rwanda. The killings began within hours of the death of President Habyarimana and on the same day the active hostilities resumed between the RPF and government forces.”

“The Chamber has described the following targeted assassinations of prominent personalities and political opposition figures as military operations: Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza, Alphonse Kabiligi and Augustin Maharangari as well as the killings at various sites in the Kigali area and Gisenyi as military operations. The killing of the Belgian peacekeepers occurred at a military camp after they had been disarmed earlier during the course of an attack on the Prime Minister’s residence. Some of the assailants were blaming the peacekeepers for shooting down the President’s plane, which triggered the resumption of hostilities.”

“For the most part, soldiers, often from elite units, were the main perpetrators of the crimes or acted in conjunction with gendarmes and militiamen. The participation of military personnel in the attacks substantially influenced the manner in which the killings and other crimes were executed.”

“With respect to crimes committed at roadblocks, the Chamber has highlighted their relationship to the military’s civil defence efforts and noted the frequent mixing of military and civilian personnel at them. The evidence shows that the pretext of the killings at them was to identify RPF infiltrators. The dispatch of militiamen, trained by military authorities in Gisenyi, to Bisesero was done to ostensibly assist with an operation against RPF operatives in the area.”

“In the Chamber’s view, the military and civilian assailants were acting in furtherance of the armed conflict or under its guise. Accordingly, the Chamber finds it established that the alleged violations of Articles 4(a) and 4(e) of the Statute had the requisite nexus to the armed conflict between Rwandan government forces and the RPF.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 793: Where soldiers arrested witnesses because of their suspected ties to the RPF, and beat and mistreated others due to alleged RFP [Rwandan Patriotic Front] collaboration: “The Chamber finds that the soldiers’ actions were motivated by their search for enemy combatants and those associated with them or, at least, that their actions were carried out under the pretext of such a search. As such, the Chamber considers that the soldiers were acting in furtherance of the armed conflict or under its guise. Likewise, the Chamber considers that when soldiers took part in the massacre of refugees at the Gashirabwoba football field on 12 April 1994, they did so under the guise of the underlying armed conflict. This is sufficient to establish that the alleged violations of Article 4(a) had the requisite nexus to the armed conflict.”

Compare Kamubanda, (Trial Chamber), January 22, 2004, paras. 740-41, 743: “This Chamber has found on the basis of evidence presented during trial that, at the time of the events alleged in the Indictment, the Accused distributed weapons to members of the Interahamwe and others engaged in the attacks in Gikomero and that the Accused himself participated in the crimes against the Tutsi population at Gikomero on 12 April 1994.” “. . . However, the Prosecution has not shown sufficiently how and in what capacity the Accused supported the Government effort against the RPF [Rwandan Patriotic Front]. No convincing evidence has been presented to demonstrate that the Accused, either in a private capacity or in his role as a civil servant, worked with the military, actively supported the war effort or that the Accused’s actions were closely related to the hostilities or committed in conjunction with the armed conflict.” “In the present case, as distinguished from Rutaganda [*vis*], insufficient evidence has been established to enable a finding that there is a nexus between any crimes committed by the Accused and any conflict—either a conflict generally raging in Rwanda or one specifically affecting the material regions indicated in the Indictment.”

Compare Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 598-604: The Prosecution failed to establish a nexus between the armed conflict and the alleged offense. The “allegations show only that the armed conflict had been used as pretext to unleash an official policy of genocide.” “[S]uch allegations cannot be considered as evidence of a direct link between the alleged crimes and the armed conflict.”

iii) the victims were not directly taking part in the hostilities at the time of the alleged violation (element 3)

1) persons covered: those not directly taking part in hostilities

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2229: “In connection with crimes within the scope of Article 4 of the Statute, the Prosecution must prove . . . that the victims were not directly taking part in the hostilities at the time of the alleged violation.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 737 (similar); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 859 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, paras. 730-31: “The protections of both Common Article 3 and Additional Protocol II, as incorporated in Article 4 of the Statute, extend to persons taking no active part in the hostilities. In view of the jurisprudence of the International Tribunals, an alleged victim, under Article 4 of the Statute, is ‘any individual not taking part in the hostilities.’” “The criterion applied in the Tadic [*sic*] Judgment to determine the applicability of Article 4 to alleged victims of armed conflicts is: ‘whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities.’ If the answer to this question is the negative, then the alleged victim was a person protected under Common Article 3 and Additional Protocol II.”

Semanza, (Trial Chamber), May 15, 2003, paras. 363-66: “[B]oth Common Article 3 and Additional Protocol II protect persons not taking an active part in the hostilities. The ICTY Appeals Chamber emphasised that Common Article 3 covers ‘any individual not taking part in the hostilities.’ This is also the position taken by this Tribunal.”

See also Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 605-08: The enumerated Articles of Protocol II would protect “interned or detained persons, deprived of their liberty for reasons related to the armed conflict,” “wounded, sick and shipwrecked persons,” “religious and medical personnel,” as well as the civilian population and individual civilians.

See also Akayesu, (Trial Chamber), September 2, 1998, para. 629: “[P]ersons taking no active part in the hostilities” (from Common Article 3(1)) and “all persons who do not take a direct part or who have ceased to take part in hostilities” (from Article 4 of Additional Protocol II) may be treated synonymously.

2) the presence of non-civilians does not deprive a population of its civilian character

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 179-80: “[A]ll persons who are not combatants might be considered civilians.” The Chamber noted “that there is a certain distinction between the terms ‘civilians’ and ‘civilian population.’ There are civilians who accompany the armed forces or are attached to them. Civilians could even be among combatants who take a direct part in the hostilities. There is clear confirmation of this fact in Protocol II which stipulates that, ‘civilians shall enjoy the protection afforded by this part unless and for such time as they take a direct part in the

hostilities.’ However, the civilian population as such does not participate in the armed conflict. Article 50 of Protocol I emphasises, ‘the presence within the civilian population of individuals who do not come within the definition of civilian does not deprive the population of its civilian character.’”

3) analyzing whether the victim was directly taking part in the hostilities

Semanza, (Trial Chamber), May 15, 2003, paras. 363-66: “The question to be answered . . . is whether, at the time of the alleged offence, the alleged victim was directly taking part in the hostilities. If the answer is negative, the alleged victim was a person protected by Common Article 3 and Additional Protocol II. To take a direct part in hostilities means, for the purposes of these provisions, to engage in acts of war that strike at personnel or equipment of the enemy armed forces.”

Rutaganda, (Trial Chamber), December 6, 1999, paras. 100-01, n. 32: “[T]he civilian population comprises all persons who are civilians,” which is to say that the “civilian population is made up of persons who are not combatants or persons placed *hors de combat*, in other words, who are not members of the armed forces.” “[I]f civilians take a direct part in the hostilities, they then lose their right to protection as civilians *per se* and could fall within the class of combatant. To take a ‘direct’ part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.” Since the class of civilians is broadly defined “it will be a matter of evidence on a case-by-case basis to determine whether a victim has the status of civilian.”

4) application—whether the victim was directly taking part in hostilities/ using weapons in self-defense

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2237-40: “At the time of the alleged violations, most of the victims were primarily unarmed Tutsi civilians who were either murdered in their homes, at places of refuge such as religious sites and schools, or at roadblocks on their way to these sanctuaries while fleeing the resumption of hostilities or other attacks.”

“There is evidence that the refugees at Nyundo Parish used traditional weapons to defend themselves against the repeated attacks by militiamen. The Chamber is not satisfied that the use of rudimentary defensive weapons changes the status of the victims. Even if those with weapons for self-defence could be characterised as combatants, their possible presence within groups of refugees does not deprive those who are non-combatants of their protected status.”

“The Belgian peacekeepers were highly trained members of the Belgian army’s Para Commando Battalion. As part of UNAMIR [the United Nations Assistance Mission for Rwanda], they were neutral in the conflict between the Rwandan government forces and the RPF [Rwandan Patriotic Front] Furthermore, they had been disarmed well before the attack against them at Camp Kigali. The fact that one of the Belgians was able to obtain a weapon and use it for self-defence during the course of the attack does not alter their status. This happened only after the mob of soldiers at the camp began brutally beating the peacekeepers to death” “Therefore, the Chamber

finds beyond reasonable doubt that the victims of the alleged violations of Articles 4(a) and 4(e) of the Statute were not taking active part in the hostilities.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 792: “[T]he Chamber finds beyond a reasonable doubt that the victims, mainly Tutsi refugees gathered at various sites in Cyangugu and other Tutsi civilians in the prefecture, were not taking a direct part in the non-international armed conflict in Rwanda at the time they suffered the alleged violations of Article 4(a) of the Statute.”

See also Rutaganda, (Appeals Chamber), May 26, 2003, para. 561 (“The Appeals Chamber . . . notes that it was not disputed on appeal that the victims of the ETO [*École Technique Officielle*] and Nyanza killings were persons protected under Common Article 3 of the Geneva Conventions and Additional Protocol II”).

See also Kamuhanda, (Trial Chamber), January 22, 2004, para. 576 (“The Accused has admitted that: . . . [t]he victims . . . were protected persons, according to the provisions of Articles 3 common to [the] Geneva conventions and additional protocol [II]”).

iv) link between the accused and the armed forces—rejected

Akayesu, (Appeals Chamber), June 1, 2001, paras. 425-45: The Appeals Chamber held that the Trial Chamber erred as a matter of law by (a) applying the “public agent or government representative test” in interpreting Article 4 and (b) holding that “the category of persons likely to be held responsible for violations of Article 4 . . . includes ‘only . . . individuals . . . belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfill the war efforts.’”

“[T]he Trial Chamber erred on a point of law in restricting the application of common Article 3 to a certain category of persons.” “[I]n actuality authors of violations of common Article 3 will likely fall into one of these categories” since “common Article 3 requires a close nexus between violations and the armed conflict.” “This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute.”

Kamuhanda, (Trial Chamber), January 22, 2004, paras. 726-29: “Common Article 3 and Additional Protocol II do not specify classes of potential perpetrators but rather indicate who are bound by the obligations imposed by their provisions to protect victims and potential victims of armed conflicts”

“However, further clarification of the class of potential perpetrators is unnecessary in view of the principal purpose of these instruments, which is to protect victims of armed conflicts. Indeed it is well established from the jurisprudence of the International Tribunals that the protections of Common Article 3, as incorporated in Article 4 of the Statute, imply effective punishment of perpetrators, whoever they may be”

“The Akayesu [*sic*] Appeals Chamber also held that there need be no requisite link between the perpetrator and one of the parties to the conflict. Specifically, the Appeals Chamber stated that ‘such a special relationship is not a condition precedent to the application of Common Article 3 and, hence, of Article 4 of the Statute.’”

“Accordingly, criminal responsibility for the commission of any act covered by Article 4 of the Statute is not conditional on any defined classification of the alleged perpetrator.”

Semanza, (Trial Chamber), May 15, 2003, paras. 358-62: “Common Article 3 and Additional Protocol II . . . do not specify classes of potential perpetrators, rather they indicate who is bound by the obligations imposed thereby.” “[F]urther clarification in respect of the class of potential perpetrators is not necessary in view of the core purpose of Common Article 3 and Additional Protocol II: the protection of victims. [T]he protections of Common Article 3 imply effective punishment of perpetrators, whoever they may be.” “[C]riminal responsibility for acts covered by Article 4 of the Statute does not depend on any particular classification of the alleged perpetrator.”

But see Kamuhanda, (Trial Chamber), January 22, 2004, para. 739: “[I]t is the Prosecution’s responsibility to prove that the Accused was either a member of the armed forces under the military command of the belligerent parties or that, by virtue of his authority as a public civilian official representing the Government, he was legitimately mandated or expected to support the war efforts.”

1) civilians may be responsible for war crimes

Musema, (Trial Chamber), January 27, 2000, paras. 274-75: It is “well-established that the post-World War II Trials unequivocally support the imposition of individual criminal [responsibility] for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians [responsible] for breaches of the laws of war is, moreover, favoured by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities.” Thus, the Accused, as a civilian, “could fall in the class of individuals who may be held responsible for serious violations of international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II.”

d) Underlying offenses

i) 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

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2242: “Article 4 (a) of the Statute prescribes that the Tribunal has the power to prosecute persons who committed or ordered serious violations of Common Article 3 or Additional Protocol II amounting to: ‘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.’”

1) murder

(a) defined

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2242: “The specific violation of murder requires the unlawful, intentional killing of another person.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 765: “The specific violation of murder requires the intentional killing of another which need not be accompanied by a showing of premeditation.”

Semanza, (Trial Chamber), May 15, 2003, para. 373: “Murder under Article 4 refers to the intentional killing of another which need not be accompanied by a showing of premeditation. The Chamber reaches this conclusion having considered the use of the term ‘*meurtre*’ as opposed to ‘*assassinat*’ in the French version of the Statute.”

Musema, (Trial Chamber), January 27, 2000, para. 215: The elements of murder under Article 4(a) of the Statute are: “(a) [t]he victim is dead; (b) [t]he death resulted from an unlawful act or omission of the Accused or a subordinate; (c) [a]t the time of the killing the Accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim’s death, and is reckless as to whether or not death ensues.”

See also discussion of “murder” under Article 3 (crimes against humanity), Section (II)(c)(ii), this Digest.

(b) application

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2243-44: “[T]he Chamber has found Bagosora responsible for ordering under Article 6 (1) of the Statute the killing of Augustin Maharangari and the crimes committed at Kigali area roadblocks from 7 to 9 April. He is also [responsible] as a superior under Article 6 (3) for the killings of Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza and the 10 Belgian peacekeepers as well as the civilians at *Centre Christus*, Kabeza, the Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, including Alphonse Kabiligi, Mudende University and Nyundo Parish. It held Ntabakuze responsible as a superior under Article 6 (3) for the killings at Kabeza, Nyanza hill and IAMSEA [*L’Institut Africain et Mauricien de Statistiques et d’Economie*]. Nsengiyumva was found responsible under Article 6 (1) for ordering the killings in Gisenyi town, Mudende University, Nyundo Parish and aiding and abetting the killings in Bisesero.”

“It follows from those findings, that these killings also amount to murder under Article 4 (a) of the Statute. As discussed above, in the circumstances of these attacks, it is clear that the perpetrators were aware that the victims were not taking an active part in the hostilities. Furthermore, each of these crimes against these individuals not taking an active part in the hostilities had a nexus to the non-international armed conflict between the Rwandan government and the RPF [Rwandan Patriotic Front].”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 794: “The Chamber has found that soldiers under Imanishimwe’s effective control participated in the killing of refugees at the Gashirabwoba football field. A group of at least fifteen armed soldiers surrounded the refugees and, after the refugees had raised their hands and asked for peace, the soldiers fired and threw grenades at them for about thirty minutes, killing many of the refugees. The Chamber consequently finds that in doing so the soldiers engaged in intentional killing of the refugees within the scope of Article 4(a) of the Statute.” (However, Imanishimwe’s conviction as to crimes at the Gashirabwoba football field was overturned on appeal due to Indictment defects, *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 150.)

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 795: “The Chamber has . . . found that soldiers under Imanishimwe’s effective control and acting on Imanishimwe’s orders killed or facilitated the killing of Witness LI’s brother and his classmate and Witness MG’s sister and her cellmate Mbembe” *See id.* (finding Imanishimwe responsible under Article 6(3)); *id.*, paras. 743, 763 (finding Imanishimwe responsible under Article 6(1) for ordering the crimes and entering the conviction under Article 6(1)).

2) torture

(a) defined

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 765: “Torture under Article 4 has the same essential elements as those set forth for torture as a crime against humanity.”

Musema, (Trial Chamber), January 27, 2000, para. 285: The elements of torture under Article 4(a) of the Statute are: “Intentionally inflicting severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or a third person information or a confession, or punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering only arising from, inherent to or incidental to, lawful sanctions.”

See also discussion of torture as “serious bodily harm” underlying genocide, Section (I)(d)(ii), this Digest, and “torture” as a crime against humanity, Section (II)(c)(vii), this Digest.

(b) application

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 796-97: “The Chamber has found that soldiers under Imanishimwe’s effective control and in his presence severely beat Witness MG and another detainee and hammered a long nail into the foot of one detainee, removed the nail, and hammered it into the foot of another detainee while questioning them whether they were members of the RPF [Rwandan

Patriotic Front] and accusing them of collaborating with the enemy. As a result of this mistreatment, Witness MG could not stand up for several days, and the two detainees who had been mistreated with the nail screamed in pain in their cell. Later, soldiers removed those two detainees from the cell, and they were never seen or heard from again.” “[T]he Chamber finds that, in mistreating Witness MG and the other three detainees, the soldiers were acting intentionally and with the aim of obtaining information or confessions from the detainees or punishing them. Additionally, the Chamber finds that the severe beating and mistreatment with the long nail amounted to infliction of severe physical pain. Consequently, the Chamber finds beyond a reasonable doubt that this mistreatment constituted torture within the scope of Article 4(a) of the Statute.”

3) cruel treatment

(a) defined

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 765: “Cruel treatment has been defined as an intentional act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity. The Chamber adopts this definition. The Chamber notes and accepts that cruel treatment is treatment causing serious mental or physical suffering, including that which may be short of the severe suffering required for a finding of torture.”

(b) application

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 799-800: “The Chamber has found that soldiers under Imanishimwe’s effective control and partly in his presence mistreated seven refugees in their custody upon arresting them near Cyangugu Cathedral on 11 April 1994. The mistreatment included the soldiers kicking the detainees and beating them, including with the butts of their rifles. This mistreatment started upon arrest and continued for approximately half a day. During part of the mistreatment at Karambo military camp [in Cyangugu], the soldiers told the detainees that they were going to beat them to death. Eventually, after soldiers took the other detainees away, Witness LI and another detainee forced their way from their cell, and Witness LI ran and swam to safety in Zaire.”

“Considering the evidence on the record, including the fact that following their mistreatment, two of the victims were in a position to forcibly escape from detention, the Chamber concludes that the mistreatment was not such as to cause severe suffering or pain sufficient for a finding of torture. The Chamber has no doubt, however, that the soldiers’ mistreatment of the detained refugees was intentional and that, because of its long duration and the way it was carried out, it caused serious physical suffering to the victims. Consequently, the Chamber finds that this mistreatment constituted cruel treatment within the scope of Article 4(a) of the Statute.”

ii) collective punishments

(no law presently)

iii) taking of hostages

(no law presently)

iv) acts of terrorism
(no law presently)

v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2250: “Article 4 (e) of the Statute prescribes that the Tribunal has the power to prosecute persons who committed or ordered serious violations of Common Article 3 or Additional Protocol II amounting to: ‘Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.’”

1) defined/ *actus reus*

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2250: “Outrages upon personal dignity have been defined as any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.”

(a) includes sexual violence

Akayesu, (Trial Chamber), September 2, 1998, para. 688: “Sexual violence falls within the scope of . . . ‘outrages upon personal dignity,’ set forth in Article 4(e) of the Statute.”

See also discussion of rape and sexual violence as causing “serious bodily or mental harm” to members of the group under Article 2 (genocide), Section (I)(d)(ii)(3); rape under Article 3 (crimes against humanity), Section (II)(c)(viii); and sexual violence as an “other inhumane act” under Article 3, Section (II)(c)(x)(2)(c), this Digest.

(b) humiliating and degrading treatment

Musema, (Trial Chamber), January 27, 2000, para. 285: The elements of “humiliating or degrading treatment” under Article 4(e) are: “Subjecting victims to treatment designed to subvert their self-regard. Like outrages upon personal dignity, these offences may be regarded as a lesser forms [*sic*] of torture; moreover ones in which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority.”

(c) rape

Musema, (Trial Chamber), January 27, 2000, paras. 285, 220-21, 226: The elements of rape under Article 4(e) of the Statute are: “[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive [V]ariations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual [T]he essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.”

See also discussion of rape and sexual violence as causing “serious bodily or mental harm” to members of the group under Article 2 (genocide), Section (I)(d)(ii)(3); rape as torture under Article 3 (crimes against humanity), Section (II)(c)(vii)(3); and rape under Article 3, Section (II)(c)(viii), this Digest.

(i) application—rape as an outrage upon personal dignity

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2252-54: “In its findings on genocide and rape as a crime against humanity, the Chamber found Bagosora responsible as a superior for the rape of women at Kigali area roadblocks between 7 and 9 April, the Saint Josephite Centre and Gikondo Parish” “It follows from those findings, that the rapes of these individuals also amount to rape under Article 4 (e) of the Statute [I]n the circumstances of these attacks, it is clear that the perpetrators were aware that the victims were not taking an active part in the hostilities. Furthermore, each of these crimes against individuals not taking an active part in the hostilities has a nexus to the non-international armed conflict between the Rwandan government and the RPF [Rwandan Patriotic Front].” (Concluding that Bagosora bore superior responsibility for the rapes as outrages upon personal dignity.)

(d) indecent assault

Musema, (Trial Chamber), January 27, 2000, para. 285: The elements of “indecent assault” under Article 4(e) of the Statute are: “The accused caused the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual.”

2) *mens rea*

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2250: “The *mens rea* of the crime [of outrages upon personal dignity] requires that the accused knew that his act or omission would have such effect.”

vi) pillage

(no law presently)

vii) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples

(no law presently)

viii) threats to commit any of the foregoing acts

(no law presently)

IV) INDIVIDUAL CRIMINAL RESPONSIBILITY (ARTICLE 6(1))

a) Statute

ICTR Statute, Article 6:

“1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

b) Generally

i) individual criminal responsibility for serious violations of international law is customary international law

Muvunyi, (Trial Chamber), September 12, 2006, para. 459: “The principle of individual responsibility for serious violations of international criminal law is one of the key indicators of a paradigm shift from a view of international law as law exclusively made for and by States, to a body of rules with potential application to individuals. It is now recognized that the principle of individual responsibility for serious violations of international law, affirmed in Article 6(1) of the Statute, is reflective of customary international law. Indeed, it has been established since the Versailles Treaty and especially the Nuremberg and Tokyo trials, that crimes under international law are physically committed by individuals and that irrespective of their official status, only by punishing such individuals for their criminal conduct, can the fundamental values of international law have meaning and efficacy.”³⁸

ii) five forms of participation covered

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 267: “Article 6(1) of the Statute reflects the criminal law principle that criminal [responsibility] is incurred by individuals who participate in and contribute to the crime in various ways according to the five forms of participation covered by Article 6(1) of the Statute.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 588: “Article 6(1) reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit that crime, but also by individuals who participate in and contribute to the commission of a crime in other ways, ranging from its initial planning to its execution, as specified in the five categories of acts in this Article: planning, instigating, ordering, committing, or aiding and abetting.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 31 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 757 (same).

See also Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 193-97, 207: The Chamber rejected the defense’s argument that “planning, instigation, ordering,

³⁸ The “Versailles Treaty” refers to the Treaty of Versailles of June 28, 1919, ending World War I. The “Nuremberg and Tokyo trials” refer to the trials before the International Military Tribunal at Nuremberg, and the International Military Tribunal for the Far East (Tokyo) held after the close of World War II to try senior Axis officials of war crimes, crimes against humanity and crimes against the peace. *See* Charter of the International Military Tribunal (Nuremberg), annexed to the London Agreement of August 8, 1945; International Military Tribunal for the Far East (IMTFE) Charter (Tokyo).

committing,' should be read cumulatively, but separately from, 'aiding and abetting,'" and "that 'aiding and abetting' should also be read cumulatively." The Chamber instead chose to read the phrases disjunctively, holding that individual criminal responsibility only requires that "any one of the modes of participation delineated in Article 6(1) . . . be shown." "[E]ach of the modes of participation may, independently, give rise to criminal responsibility."³⁹

iii) applies to all three categories of crimes

Kamuhanda, (Trial Chamber), January 22, 2004, para. 587: "Article 6(1) addresses criminal responsibility for unlawful conduct of an accused and is applicable to all three categories of crimes: genocide and derivative crimes; Crimes against Humanity; and violations of Article 3 Common to the Geneva Conventions and Additional Protocol II."

As to genocide, *see also* "conspiracy to commit genocide," "direct and public incitement to commit genocide," "attempt to commit genocide," and "complicity in genocide," Sections (I)(e)(ii)-(v), this Digest.

iv) required elements: *actus reus* and *mens rea*

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 198: There is a "two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6(1). This test required the demonstration of (i) participation . . . that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime."

See also Rutaganira, (Trial Chamber), March 14, 2005, para. 85: "Under the case-law of the *ad hoc* Tribunals, there must be a temporal and geographical connection between criminal participation under Article 6(1) and the perpetration of the crime."

1) *actus reus*/ participation (element 1): contribution must have substantially contributed to, or had a substantial effect on, the completion of the crime

Muvunyi, (Trial Chamber), September 12, 2006, para. 460: "[T]he participation of the Accused must have substantially contributed to, or have had a substantial effect on, the completion of the crime." *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 590 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 759 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 379 (similar).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 199: "What constitutes the *actus reus* and the requisite contribution inevitably varies with each mode of participation set out in Article 6(1). What is clear is that the contribution to the undertaking be a substantial one, and this is a question of fact for the Trial Chamber to consider."

³⁹ As to aiding and abetting, see "either aiding or abetting alone suffices, Section (IV)(g)(i), but "the terms are usually used conjunctively," Section (IV)(g)(ii)(1)(b), this Digest.

See also *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 492: “Where a person is accused of having planned, instigated, ordered or aided and abetted the commission of genocide by one or more other persons pursuant to Article 6(1) of the Statute, the Prosecutor must establish that the accused’s acts or omissions substantially contributed to the commission of acts of genocide.” See also *Bikindi*, (Trial Chamber), December 2, 2008, para. 409 (similar).

See also *Rutaganira*, (Trial Chamber), March 14, 2005, para. 85: “[P]articipation may occur before, during or after the act is committed and be geographically separated therefrom.”

Compare as to joint criminal enterprise, “the participation of the accused: significant contribution to the JCE required,” Section (IV)(f)(iv)(8)(c), this Digest.

2) *mens rea* (element 2)

Seromba, (Trial Chamber), December 13, 2006, para. 306: “The requisite *mens rea* for [planning, instigating and ordering] is the direct intent of the perpetrator in relation to his own planning, instigating, or ordering.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 198: “[K]nowledge or intent” requires “awareness by the actor of his participation in a crime.”

Akayesu, (Trial Chamber), September 2, 1998, para. 479: “[T]he forms of participation referred to in Article 6(1), cannot render their perpetrator criminally [responsible] where he did not act knowingly”⁴⁰

See also “*mens rea*” as to planning, Section (IV)(c)(ii); “*mens rea*” as to instigating, Section (IV)(d)(ii); “*mens rea*” as to ordering, Section (IV)(e)(ii); “*mens rea*” as to committing, Section (IV)(f)(ii); “*mens rea* for type #1” JCE, Section (IV)(f)(iv)(9)(a); “*mens rea* for type #2” JCE, Section (IV)(f)(iv)(10)(a); “*mens rea* for type #3” JCE, Section (IV)(f)(iv)(11)(a); “*mens rea*” for aiding and abetting, Section (IV)(g)(iii), this Digest.

v) crime must have occurred, except for genocide

Kamuhanda, (Trial Chamber), January 22, 2004, para. 589: “Pursuant to Article 6(1), an individual’s participation in the planning or preparation of an offence within the Tribunal’s jurisdiction will give rise to criminal responsibility only if the criminal act is actually committed. Accordingly, crimes which are attempted but not consummated are not punishable, except for the crime of genocide, pursuant to Article 2(3)(b),(c) and (d) of the Statute.” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 758 (same); *Semanza*, (Trial Chamber), May 15, 2003, para. 378 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 115; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 34; *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, n. 80; *Akayesu*, (Trial Chamber), September 2, 1998, para. 473 (similar).

⁴⁰ *Akayesu* also goes on to include where the perpetrator “should have had such knowledge.” See also *Akayesu*, (Trial Chamber), September 2, 1998, para. 479. However, that formulation appears to conflate the *mens rea* as to Article 6(1), and the *mens rea* as to Article 6(3), only the latter of which includes the “had reason to know” formulation. See ICTR Statute, Art. 6(3).

For discussion of additional modes of responsibility as to genocide, see Section (I)(e), this Digest.

vi) individual and command responsibility distinguished

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 202: The Chamber distinguished individual, from command responsibility, stating that individual responsibility is based “not on the duty to act, but from the encouragement and support that might be afforded to the principals of the crime”

As to where there is both individual and command responsibility, see “cumulative convictions under Article 6(1) and 6(3): impermissible if for the same conduct; convict under Article 6(1) and consider superior position as an aggravating factor,” Section (VII)(a)(iv)(7), this Digest.

vii) responsibility for acts committed by others

Rutaganda, (Trial Chamber), December 6, 1999, para. 35: “[T]he Accused may . . . be held criminally [responsible] for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed or aided and abetted another in the commission of such acts.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 117 (similar).

viii) responsibility for omissions

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, paras. 333-34: “[T]he Trial Chamber defined the requirements for criminal responsibility for an omission as a principal perpetrator:

- (a) the accused must have had a duty to act mandated by a rule of criminal law;
- (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime.”

“It is not disputed by the parties that an accused can be held criminally responsible for omissions under Article 6(1) of the Statute. Neither do they dispute that any criminal responsibility for omissions requires an obligation to act.” (Leaving unresolved whether the “obligation to act must stem from a rule of criminal law, or [whether] any legal obligation is sufficient.”)

Rutaganda, (Trial Chamber), December 6, 1999, para. 41: “[A]n accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 123 (similar).

See, e.g., Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 660 (analyzing whether Bagambiki had a legal duty to act under Rwandan domestic law, but concluding that the “legal duty was not mandated by a rule of criminal law,” and thus “any omission . . . does not result in criminal [responsibility].”)

c) Planning

i) defined/ *actus reus*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 479: “The *actus reus* of ‘planning’ requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.”

Seromba, (Trial Chamber), December 13, 2006, para. 303: “Participation by ‘planning’ presupposes that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 271 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 592 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 761 (same as *Kamuhanda*); *Musema*, (Trial Chamber), January 27, 2000, para. 119 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 37 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 480 (similar).

Mpambara, (Trial Chamber), September 11, 2006, para. 20: “Planning is the formulation of a design by which individuals will execute a crime.”

Muhimana, (Trial Chamber), April 28, 2005, para. 503: “Planning occurs when one or more persons contemplate and take any steps towards commission of a crime.”

Semanza, (Trial Chamber), May 15, 2003, para. 380: “‘Planning’ envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime.”

See also Bagilishema, (Trial Chamber), June 7, 2001, para. 30: “An individual who participates directly in planning to commit a crime under the Statute incurs responsibility for that crime even when it is actually committed by another person.”

1) contribution must be substantial

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 479: “It is sufficient to demonstrate that the planning was a factor substantially contributing to [the] criminal conduct.”

Seromba, (Trial Chamber), December 13, 2006, para. 303: “With respect to this mode of participation [planning], the Prosecution must demonstrate that the level of participation of the accused was substantial and that the planning was a material element in the commission of the crime.”

Mpambara, (Trial Chamber), September 11, 2006, para. 20: “Participation in such planning must be substantial, such as actually formulating the criminal plan or endorsing a plan proposed by another, for individual [responsibility] to arise.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 592 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 761 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 380 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 30 (similar).

ii) *mens rea*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 479: “The *mens rea* for [planning] entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.”

iii) application

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 271-78: “On 9 April 1994, Sylvestre Gacumbitsi, as *bourgmestre* of Rusumo *commune*, convened a meeting of *conseillers de secteurs* and instructed them to organize meetings at the *secteur* level between 9 and 12 April, without the knowledge of Tutsi, and to incite Hutu to kill Tutsi. On 10 April 1994, Sylvestre Gacumbitsi, together with communal policemen, received boxes of weapons at the Kibungo *gendarmerie* camp, and had the boxes delivered to various *secteurs*. On 11 April, Sylvestre Gacumbitsi met successively with Majors Ndekezi and Nsabimana, as well as with *Interahamwe* leader, Cyasa. Together, they travelled to several areas in Rusumo *commune* on 11 April 1994. The Accused then visited several *secteurs* in Rusumo on 12 April 1994 to check whether the *conseillers* had held such meetings with the local population. The same day, he met the local CDR [*Coalition pour la défense de la République*] leader, André, in Gasenyi and reiterated his request of 10 April, namely, not to let people flee to Tanzania.”

“In the morning of 13 April 1994, at the Nyakarambi market, the Accused, using a megaphone, addressed a crowd of about one hundred people who had assembled at his request. He issued various instructions and asked the crowd not to let anyone escape. The instructions were directed at the Hutu majority and aimed at preventing Tutsi from escaping from the attacks, and preparing Hutu to eliminate Tutsi.”

“On 14 April 1994, at the Rwanteru trading centre, the Accused addressed about a hundred people and urged them to arm themselves with machetes and participate in the fight against the enemy, stressing that all the Tutsi had to be driven away. After his speech, the Accused drove towards Kigarama, followed by some of the people. In Kigarama, the attackers attacked the house and property of a Tutsi called Callixte, and also looted the property of other Tutsi. Led by Juvénal Ntamwemizi, who was identified as the Accused’s representative, another group, composed of people who had also listened to the Accused’s speech in Rwanteru, attacked the property of a Tutsi called Buhanda.”

“The Chamber finds that these attacks resulted from the instigation stirred up by the Accused at the Rwanteru trading centre: the Kigarama attack took place under his direct supervision, while Buhanda’s house was attacked under the supervision of his representative.”

“In the afternoon of 14 April 1994, the Accused, together with some armed communal policemen, went to the Kanyinya trading centre, where he told a group of about ten people: ‘Others have already completed their work. Where do you stand?’ Soon after he left, a group of attackers set up and led by two demobilized soldiers, Nkaka and Sendama, started attacking Tutsi targets.”

“On 14 April 1994, after addressing the crowd at the Kanyinya commercial centre, the Accused, still accompanied by communal policemen, went to the Gisenyi commercial centre, where he addressed about 40 people, mainly Hutu. The Accused urged them to kill the Tutsi and throw their bodies into the River Akagera. He also

asked boatmen to remove their canoes from the river to prevent the Tutsi from using them to cross the river.”

“Furthermore, the Accused met with various political and military officials, notably Colonel Rwagafirita from whom he received boxes of weapons that he had unloaded in various areas of the *commune*.”

“All such facts amount to acts of preparation for the massacres of the Tutsi in Rusumo *commune*. Sylvestre Gacumbitsi’s involvement leads the Chamber to find that he planned the murder of Tutsi in Rusumo *commune* in April 1994.”⁴¹

d) Instigating

i) defined/ *actus reus*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 480: “The *actus reus* of ‘instigating’ implies prompting another person to commit an offence.” See also *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 382 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 504 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 279 (same as *Muhimana*); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 593 (same as *Muhimana*); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 762 (similar).

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 117: “Instigating means prompting another person to commit an offence, thus requiring a subsequent criminal action.”

Seromba, (Trial Chamber), December 13, 2006, para. 304: “Participation by ‘instigating’ implies urging or encouraging another person to commit a crime.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 464: “To ground individual responsibility for instigation pursuant to Article 6(1), the Accused must have encouraged, urged, or otherwise prompted another person to commit an offence under the Statute.” See also *Semanza*, (Trial Chamber), May 15, 2003, para. 381 (similar).

Mpambara, (Trial Chamber), September 11, 2006, para. 18: “Instigation is urging or encouraging, verbally or by other means of communication, another person to commit a crime, with the intent that the crime will be committed.” See also *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 456 (same).

See also *Bagilishema*, (Trial Chamber), June 7, 2001, para. 30: “An individual who instigates another person to commit a crime incurs responsibility for that crime.”

1) both positive acts and omissions covered

Muvunyi, (Trial Chamber), September 12, 2006, para. 464: “[I]nstigation may arise from a positive act or a culpable omission.” See also *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 593 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 762 (same as *Kamuhanda*).

⁴¹ See also discussion of *Gacumbitsi* under “instigating,” “application,” Section (IV)(d)(iii), this Digest.

2) acts must substantially contribute to the commission of the crime

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 660: “The Appeals Chamber recalls that, for a defendant to be convicted of instigation to commit a crime under Article 6(1) of the Statute, it must be established that the acts charged contributed substantially to the commission of the crime, but they need not be a *sine qua non* condition for its commission.” *See also id.*, para. 480 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 595: “[F]or the Appellant to be convicted under Article 6(1) of the Statute [for instigating genocide], it must have been established that specific acts or omissions of the Appellant themselves constituted an instigation to the commission of genocide. An alternative would be that specific acts or omissions of the Appellant may have substantially contributed to instigation by others.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 382: “It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 304 (similar).

Nchamibigo, (Trial Chamber), November 12, 2008, para. 368: “The *Kordić and Čerkez* Appeal Judgement established that the legal causation requirement for instigation as sufficing to show that the accused’s instigation substantially contributed to the conduct of another person committing the crime; it is not necessary to prove that the crime would not have been committed without involvement of the accused. The period of time which elapsed between the instigation and the commission of the criminal act is a relevant consideration in determining whether there has been a substantial contribution; the longer the lapse of time, the weaker the link.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 464: “The instigation of the Accused must have a substantial nexus to the actual commission of the crime.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 466: “The instigation of the accused must have a substantial effect on the actual commission of the crime”

Mpambara, (Trial Chamber), September 11, 2006, para. 18: “In accordance with general principles of accomplice [responsibility], instigation does not arise unless it has directly and substantially contributed to the perpetration of the crime by another person.” *See also Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 456 (similar).

Bagilishema, (Trial Chamber), June 7, 2001, para. 30: “By urging or encouraging another person to commit a crime, the instigator may contribute substantially to the commission of the crime.”

See, e.g., *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 502: “The Appeals Chamber recalls that it suffices for *Kangura* [newspaper] publications, RTLM [*Radio Télévision Libre des Mille Collines*] broadcasts and CDR [Coalition for the Defence of the Republic political party] activities to have substantially contributed to the commission of acts of genocide in order to find that those publications, broadcasts and activities instigated the commission of acts of genocide; they need not have been a pre-condition for those acts.”

Compare *Gacumbitsi*, (Appeals Chamber), July 7, 2006, paras. 128-29: “The Trial Chamber held that conviction for instigation requires proof ‘of a causal connection between the instigation and the *actus reus* of the crime.’ It found ‘no evidence of a link’ between the Appellant’s words and the rapes recounted by [certain] [w]itnesses”

“As the *Kordic and Cerkez* Appeal Judgement established, ‘it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused’; rather, ‘it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.’ Thus, the Prosecution has correctly stated the causation requirement for instigation. However, there is no indication that the Trial Chamber misunderstood this requirement. Its reference to a ‘causal connection between the instigation and the *actus reus* of the crime’ does not specify what kind of causation must be proven, and without more it cannot be inferred that the Trial Chamber required that the instigation be the *sine qua non* of the rapes.”

Compare *Muhimana*, (Trial Chamber), April 28, 2005, para. 504: “Proof is required of a causal connection between the instigation and the *actus reus* of the crime.” See also *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 279 (same); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 593 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 762 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 381 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 30 (same).

See also “*actus reus*/participation (element 1): contribution must have substantially contributed to, or had a substantial effect on, the completion of the crime,” Section (IV)(b)(iv)(1), this Digest.

(a) application—substantial contribution

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 515: “The Appeals Chamber notes that the Trial Chamber found that in several instances after 6 April 1994 the naming of persons of Tutsi origin on the airwaves contributed to the commission of acts of genocide The Trial Chamber also referred to instances of RTLM [*Radio Télévision Libre des Mille Collines*] broadcasting information designed to facilitate the killing of Tutsi The Appeals Chamber is of the opinion that it has not been demonstrated that it was unreasonable for the Trial Chamber to find that the RTLM broadcasts after 6 April 1994 substantially contributed to the killing of these individuals.” But see *id.*, paras. 601, 594, 599 (reversing *Nahimana*’s conviction for instigating genocide under Article 6(1); concluding that “the role of founder of RTLM does not in itself sufficiently establish that [*Nahimana*] substantially contributed to the commission of the crime of genocide.”).

Nchamihigo, (Trial Chamber), November 12, 2008, para. 369: “The Chamber is mindful that a two-week time period may reduce the impact of the instigation. However, the Chamber considers that the particularity of [Nchamihigo’s] call for intervention at Shangi parish and the immediate decision to dispatch Munyakazi’s *Interahamwe* leaves no room for reasonable doubt. The Chamber concludes that Nchamihigo’s call for intervention on 14 April 1994 and subsequent encouragement and hospitality substantially contributed to the killings at Shangi parish perpetrated by Munyakazi’s *Interahamwe*. In this way, Nchamihigo instigated Munyakazi’s *Interahamwe* to kill the Tutsi refugees at Shangi parish. He did so with the intent to destroy in whole or in part the Tutsi group. As such, the Chamber finds Nchamihigo guilty of Genocide”

Compare Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 519: “[I]here was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt that the *Kangura* [newspaper] publications in the first months of 1994 substantially contributed to the commission of acts of genocide between April and July 1994. Therefore, the Appeals Chamber is of the opinion that the Trial Chamber erred in finding Appellant Ngeze guilty of the crime of genocide . . . for having ‘instigated’ the killing of Tutsi civilians as founder, owner and editor of *Kangura*.” *See also id.*, para. 410 (the Appeals Chamber was “not persuaded that a reasonable trier of fact could find, on the evidence, that, by inviting the participants to read pre-1994 issues of *Kangura*, the [newspaper] competition contributed significantly to acts of genocide or crimes against humanity in 1994.”); *compare id.*, para. 886 (upholding incitement conviction for Ngeze for articles published in *Kangura*).

3) crime must occur

Mpambara, (Trial Chamber), September 11, 2006, para. 18: “Unlike the crime of direct and public incitement, instigation does not give rise to [responsibility] unless the crime is ultimately committed.” *See also Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 456 (similar).

See also “crimes must have occurred, except for genocide,” Section (IV)(b)(v), this Digest.

For discussion of “direct and public incitement to commit genocide,” see Section (I)(e)(iii), this Digest.

4) presence not required

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 660: “The Appeals Chamber . . . recalls that, contrary to what the Appellant appears to contend, the accused does not need to be actually present when the instigated crime is committed.”

5) effective control not required

Semanza, (Appeals Chamber), May 20, 2005, para. 257: “For an accused to be convicted of instigating, it is not necessary to demonstrate that the accused had ‘effective control’ over the perpetrator. The requirement of ‘effective control’ applies in the case of

responsibility as a superior under Article 6(3) of the Statute. In the case at hand, even though the Trial Chamber found that it had not been proven that the Appellant had effective control over others (and thus refused to convict him on the basis of his superior responsibility), this does not mean that the Appellant could not be convicted for instigating.”

For discussion of responsibility under Article 6(3), see Section (V), this Digest. *See also* “existence of a superior-subordinate relationship (element 1)” “requires a formal or informal hierarchical relationship with effective control,” Section (V)(c)(i)(1), this Digest.

6) proof of exact language used not required

Semanza, (Appeals Chamber), May 20, 2005, para. 296: “The Appellant argues that the Prosecution failed to plead and prove the precise instigating language he allegedly used. [However] . . . , it is not necessary to charge and prove the ‘exact’ instigating language used by an accused.”

7) no requirement that instigating be “direct and public”

Akayesu, (Appeals Chamber), June 1, 2001, paras. 474-83: The Appeals Chamber ruled that the *Akayesu* Trial Chamber erred as a matter of law in finding that the term “instigated” under Article 6(1) must be “direct and public.” “Direct and public” instigation was not required.

Muvunyi, (Trial Chamber), September 12, 2006, para. 464: “Instigation differs from incitement in that it does not have to be direct or public. Therefore, private, implicit or subdued forms of instigation could ground [responsibility] under Article 6(1) if the Prosecution can prove the relevant causal nexus between the act of instigation and the commission of the crime.”

Muhimana, (Trial Chamber), April 28, 2005, para. 504: “Instigating need not be direct or public” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 593 (similar)

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 279: “Instigating need not be direct and public.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 762 (same); *Semanza*, (Trial Chamber), May 15, 2003, para. 381 (same).

Compare “direct and public incitement to commit genocide,” Section (I)(e)(iii), this Digest; “difference between instigation and incitement,” Section (I)(e)(iii)(8), this Digest.

ii) *mens rea*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 480: “The *mens rea* for [instigating] is the intent to instigate another person to commit a crime or at a minimum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 382 (same).

Muvunyi, (Trial Chamber), September 12, 2006, para. 465: “The *mens rea* required to establish a charge of instigating a statutory crime is proof that the Accused directly or

indirectly intended that the crime in question be committed and that he intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts.”

iii) application

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 664-65: “The Appeals Chamber finds that it has not been shown that the Trial Chamber was in error when it found that certain of Appellant Barayagwiza’s acts in the context of his CDR [political party] activities instigated the commission of genocide.” “[T]he Appeals Chamber is of the view that there can be no doubt that the Appellant had the intent to instigate others to commit genocide. The Appellant’s conviction for instigating the commission of genocidal acts by members of the CDR and its *Impuzamugambi* (CDR youth group [militia]) is therefore upheld.”

Karera, (Trial Chamber), December 7, 2007, para. 543: “Given Karera’s position of authority and influence, the Chamber finds that by travelling with *Interahamwe* and soldiers to Ntarama and verbally urging them to attack Tutsis, he encouraged them to attack the Tutsi refugees at Ntarama Church [in Ntarama, south of Kigali, which they did, slaughtering several hundred]. By his words and acts, Karera substantially contributed to the attack, thus instigating genocide.”

Karera, (Trial Chamber), December 7, 2007, paras. 545-46: “Many Tutsis were killed in Rushashi from 7 April 1994 The Chamber is satisfied that such attacks formed part of the broader genocidal campaign aimed at destroying the Tutsi ethnic group, in whole or in part, which took place in Rwanda.” “The Chamber has found that Karera was aware that from 7 April 1994, roadblocks were set up in Rushashi commune and that Tutsis were killed at them It has also found that between April and June, Karera held meetings in Rushashi, where he raised money for weapons, encouraged youths to join the *Interahamwe*, and urged crimes against the Tutsi These statements instigated the commission of crimes against Tutsis. As an authority figure, Karera’s encouragement would have a substantial effect in the killings which followed. His threats against those who did not participate in anti-Tutsi acts would be taken seriously.”

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 279-80: “[T]he Accused, at various locations, publicly instigated the population to kill the Tutsi. For example, the Accused made speeches at the Rwanteru commercial centre [in Rusumo commune] where, following his instigation, those who listened to his speeches participated, shortly after, in looting property belonging to the Tutsi and in killing the Tutsi.” “The Chamber finds that Sylvestre Gacumbitsi incited [*sic*: should be instigated] the killing of Tutsi in Rusumo commune in April 1994.”⁴²

See also *Ndindabahizi*, (Trial Chamber), July 15, 2004, paras. 462, 461, 463-64 (finding Ndindabahizi guilty of instigating genocide at Gitwa Hill in the Bisesero Hills, Kibuye Prefecture).

⁴² The Trial Chamber’s finding follows a discussion of the case law regarding “instigating,” so the reference to “inciting” appears to be a typographical error. See *Gacumbitsi*, (Trial Chamber), June 17, 2004, paras. 279-80.

Compare Kamuhanda, (Appeals Chamber), September 19, 2005, para. 66 (finding “the Trial Chamber’s conclusion that the Appellant instigated assailants to kill members of the Tutsi ethnic group . . . not supported by the evidence”).

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 405: “With regard to the allegation that the Accused instigated the killings on Kesho Hill [on April 8, 1994 in Rwili secteur, Gaseke commune, in Gisenyi prefecture], the Chamber recalls that the Accused was not the sole person to address the assailants, and the Chamber does not know what he said to them during his speech. The Chamber therefore does not consider that the only reasonable inference to be made from the circumstances is that the Accused prompted the assailants to attack. Accordingly, the Chamber does not find beyond reasonable doubt that the Accused instigated the killings of Tutsi at Kesho Hill.” (A joint criminal enterprise, however, was proven as to the crimes at Kesho Hill.)

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 417: “The Chamber notes the Accused’s instructions relating to identity cards and food to the persons manning the [Kiyovu] roadblock. However, the Chamber considers that there was no evidence to suggest that the Accused’s instructions were perceived by those manning the roadblock as an instruction, or a prompting, to kill Tutsi. The Chamber therefore does not consider that his acts or words were such that they prompted those manning the roadblock to kill. Accordingly, the Chamber does not find the Accused criminally responsible through instigating the killings at the roadblock.” (Aiding and abetting, however, was proven as to the killings at Kiyovu roadblock.)

e) Ordering

i) defined/ *actus reus*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 481: “With respect to ordering, a person in a position of authority may incur responsibility for ordering another person to commit an offence, if the person who received the order actually proceeds to commit the offence subsequently.”

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 365: “The Appeals Chamber has on many occasions recalled the constitutive elements of this mode of responsibility [ordering]: . . . the material element (or *actus reus*) is established when a person uses his position of authority to order another person to commit a crime . . .”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 381: “The *actus reus* for ‘ordering’ is that a person in a position of authority orders another person to commit an offence or orders an act or omission.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 467: “Ordering under Article 6(1) requires that a person in a position of authority uses that position to issue a binding instruction to or otherwise compel another to commit a crime punishable under the Statute.”

Mpambara, (Trial Chamber), September 11, 2006, para. 19: “The *actus reus* of ordering is that a person in a position of authority instructs another person to commit an offence.” See also *Muhimana*, (Trial Chamber), April 28, 2005, para. 505 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 281 (same as *Muhimana*).

Kamubanda, (Trial Chamber), January 22, 2004, para. 594: “‘Ordering,’ implies a situation in which an individual with a position of authority uses such authority to impel another, who is subject to that authority, to commit an offence.” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 763 (same).

See also *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 268: “‘Commanding,’ as a form of participation, corresponds rather to the form of participation expressed in ‘ordering,’ as used in the Statute”

1) formal superior-subordinate relationship/effective control not required

Seromba, (Appeals Chamber), March 12, 2008, paras. 201-02: “The Appeals Chamber recalls that[:]

[...] superior responsibility under Article 6(3) of the Statute is a distinct mode of responsibility from individual responsibility for ordering a crime under Article 6(1) of the Statute. Superior responsibility under Article 6(3) of the Statute requires that the accused exercise ‘effective control’ over his subordinates to the extent that he can prevent them from committing crimes or punish them after they committed the crimes. To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act.”

“[T]he Trial Chamber erred in law when it considered effective control as an element necessary to prove that Athanase Seromba participated in the crimes by ‘ordering,’ within the meaning of Article 6(1) of the Statute.” See *Seromba*, (Trial Chamber), December 13, 2006, para. 305.

Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 181-82: “The Appeals Chamber agrees with the Prosecution that ordering does not require the existence of a formal superior-subordinate relationship. But the Trial Chamber did not misapprehend the law in this respect. It held:

The Trial Chamber is of the opinion that the issue must be determined in light of the circumstances of the case. The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles. Such authority may also be *de jure* or *de facto*. . . . *Such a situation does not, ipso facto, lead to the conclusion that a formal superior-subordinate relationship exists between the person giving the order and the person executing it.* As a matter of fact, instructions given outside a purely informal context by a superior

to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an ‘order’”

“[A]fter finding that no formal superior-subordinate relationship existed, the Trial Chamber proceeded to consider whether, under the circumstances of the case, the Appellant’s statements nevertheless were perceived as orders. This is in accordance with the most recent judgements of the Appeals Chamber. In the *Semanza* Appeal Judgement, the Appeals Chamber explained:

As recently clarified by the ICTY Appeals Chamber in *Kordić and Čerkez*, the *actus reus* of ‘ordering’ is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused’s order.

The Appeals Chamber notes that this element of ‘ordering’ is distinct from that required for [responsibility] under Article 6(3) of the Statute, which does require a superior-subordinate relationship (albeit not a formal one but rather one characterized by effective control). Ordering requires no such relationship -- it requires merely authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener.” See also *Semanza*, (Appeals Chamber), May 20, 2005, para. 361 (quoting *Kordić and Čerkez*).

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 75: “Superior responsibility under Article 6(3) of the Statute requires that the accused exercise ‘effective control’ over his subordinates to the extent that he can prevent them from committing crimes or punish them after they committed the crimes. To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act. In the *Semanza* Appeal Judgement, the Appeals Chamber made clear that no formal superior-subordinate relationship is required.” See *Semanza* (Appeals Chamber), May 20, 2005, para. 361 (cited).

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 381: “It is not necessary to demonstrate the existence of a formal relationship of subordination between the accused and the perpetrator; rather, it is sufficient to prove that the accused was in some position of authority that would compel another to commit a crime following the accused’s order.” See also *Mpambara*, (Trial Chamber), September 11, 2006, para. 19 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 467: “In *Semanza*, the Appeals Chamber held that ‘no formal superior-subordinate relationship between the Accused and the perpetrator is required’ to establish the *actus reus* of ‘ordering’ under Article 6(1). However, proof of such a relationship may be evidentially relevant to show that the person alleged to have issued the order, was in a position of authority.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 594: “No formal superior-subordinate relationship is required for a finding of ‘ordering’ so long as it is demonstrated that the accused possessed the authority to order. The position of authority of the person who gave an order may be inferred from the fact that the order was obeyed.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 763 (same as first sentence).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 612: “The finding of a position of authority for purposes of ‘ordering’ under Article 6(1) is not synonymous with the presence of ‘effective control’ for purposes of responsibility under Article 6(3). It is settled that the two provisions are distinct: [*visu*] and, in our view, so are the considerations for responsibility under them.”

But see Akayesu, (Trial Chamber), September 2, 1998, para. 483: “Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 121 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 39 (similar).

For discussion of the superior-subordinar relationship necessary for command responsibility, see “existence of a superior-subordinate relationship (element 1),” Section (V)(c)(i), this Digest.

2) authority required for ordering may be informal or purely temporary in nature

Semanza, (Appeals Chamber), May 20, 2005, para. 363: “[A]uthority creating the kind of . . . relationship envisaged under Article 6(1) of the Statute for ordering may be informal or of a purely temporary nature.”

3) no requirement that order be in writing

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 76: “There is no requirement that an order be given in writing or in any particular form”

4) order may be proven by circumstantial evidence

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 76: “[T]he existence of an order may be proven through circumstantial evidence.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 468: “The responsibility for ordering the commission of a crime could . . . be proved by circumstantial evidence, but as required by the jurisprudence, the Chamber will thoroughly evaluate such evidence and treat it with caution.”

5) causal link/substantial contribution between order and crime required

Nchamihigo, (Trial Chamber), November 12, 2008, para. 352: “The crimes of genocide, murder and extermination require proof of a causal link between the order which Nchamihigo gave the *Interahamwe*, and Nsengumuremyi’s murder. The crime is not

committed when the order is given unless the specific consequences set out in the Statute occur.”

(a) application

Nchamihigo, (Trial Chamber), November 12, 2008, para. 352: In the present case, the consequence did occur but the evidence has not established that Nsengumuremyi’s death resulted from the order Nchamihigo gave. [Witness] LAG gave unequivocal evidence that neither he nor his group were involved in Nsengumuremyi’s killing; both Prosecution and Defence witnesses point to Lieutenant Kajisho as the killer. No evidence was adduced from which the Chamber could find that Nchamihigo gave orders to or instigated Lieutenant Kajisho to kill Nsengumuremyi, or that the grenades Nchamihigo distributed aided and abetted Lieutenant Kajisho to kill Nsengumuremyi. The finding of fact that the killing was executed in that manner does not allow the imposition of criminal responsibility on Nchamihigo for [ordering] that killing.”

See also “*actus reus*/participation (element 1): contribution must have substantially contributed to, or had a substantial effect on, the completion of the crime,” Section (IV)(b)(iv)(1), this Digest.

ii) *mens rea*

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 481: “Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order.”

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 365: “The Appeals Chamber has on many occasions recalled the constitutive elements of this mode of responsibility [ordering]: . . . the requisite mental element (or *mens rea*) is established when such person acted with direct intent to give the order.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 381: “The requisite *mens rea* [for ordering] is the awareness of the substantial likelihood that a crime will be committed in the execution of [an] order. The crime must be effectively committed subsequently by the person who received the order.”

Seromba, (Trial Chamber), December 13, 2006, para. 306: “The requisite *mens rea* for [planning, instigating and ordering] is the direct intent of the perpetrator in relation to his own planning, instigating, or ordering.”

iii) application

Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 184, 185, 187: “The Trial Chamber found that, as *bourgmestre*, the Appellant was the highest authority and most influential person in the commune, with the power to take legal measures binding all residents. His role in the genocide demonstrated his authority: he convened meetings with the *conseillers*; asked them to organize meetings to tell people to kill Tutsis, and verified that these meetings had been held; and directly instructed *conseillers*, other leaders, and the

Hutu population to kill and rape Tutsis. The Trial Chamber pointed to several instances in which the Appellant ‘instructed,’ ‘ordered,’ or ‘directed’ the attackers in general, not just the communal policemen:

- On 14 April 1994, after giving a speech telling people ‘to arm themselves with machetes and . . . to hunt down all the Tutsi,’ the Appellant led assailants to Kigarama [Kigarama commune, Kibungo prefecture], where they engaged in an attack on Tutsis ‘carried out under the Appellant’s personal supervision.’
- At Nyarubuye Parish [in Rusumo commune] on 15 April 1994, the Appellant ‘*instructed* the communal police and the *Interahamwe* to attack the refugees and prevent them from escaping,’ which they did.
- On 16 April 1994, the Appellant ‘directed’ an attack at Nyarubuye Parish, during which the assailants ‘finished off’ survivors and looted the parish building.
- On 17 April 1994, the Appellant ordered a group of attackers to kill fifteen Tutsi survivors of previous attacks at Nyarubuye Parish, which they immediately did.”

“These findings made clear that the Appellant had authority over the attackers in question and that his orders had a direct and substantial effect on the commission of these crimes. In view of these facts, no reasonable trier of fact could find that the Appellant’s words were not perceived as orders by the attackers in general, not just the communal police, to commit these crimes.” “Accordingly, the Trial Chamber erred in fact by not convicting the Appellant for ordering the crimes committed by all attackers, not just the communal policemen, at Nyarubuye Parish on 15, 16, and 17 April 1994 and on 14 April 1994 at Kigarama.” See *Gacumbitsi*, (Trial Chamber), June 17, 2004, paras. 283-84 (only finding Gacumbitsi responsible for ordering communal policemen at Nyarubuye Parish to kill Tutsi).

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 76: “The Appeals Chamber finds that a reasonable trier of fact could conclude from the fact that the order to start the massacre [given by Kamuhanda] was directly obeyed by the attackers that this order had direct and substantial effect on the crime, and that the Appellant had authority over the attackers, regardless of their origin.” Compare *Kamuhanda*, (Trial Chamber), Judge Maqutu’s Separate and Concurring Opinion on the Verdict, January 22, 2004, para. 57 (“in my view there is no direct credible evidence that the Accused ordered the killing of the Tutsis by saying ‘mukore’ (work).”).

Semanza, (Appeals Chamber), May 20, 2005, paras. 363-64: “In the present case, the evidence is that the Appellant directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees at Musha church [in Gikoro commune]. According to the Trial Chamber, the refugees ‘were then executed on the directions’ of the Appellant. On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute.”⁴³ “The Appeals Chamber, Judge Pocar dissenting, therefore enters a conviction for ordering genocide

⁴³ Compare “formal superior-subordinate relationship/ effective control not required” for “ordering,” Section (IV)(e)(i)(1), this Digest.

and for ordering extermination in relation to the massacre at Musha church.” (For discussion of Judge Pocar’s dissent, see “Appeals Chamber entering a new conviction; whether that violates the right to an appeal,” Section (VIII)(e)(ii)(14), this Digest.)

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2182: “Soldiers killed Augustin Maharangari, the Director of the Rwandan Bank of Development, at his residence on 8 April 1994. The evidence reflects that Maharangari was suspected of being an RPF [Rwandan Patriotic Front] accomplice. His killing also mirrors other targeted assassinations in the wake of the death of President Habyarimana It is clear that his killing was premeditated and conducted on political grounds. The Chamber has considered, as the only reasonable inference, that Bagosora in the exercise of his authority between 6 and 9 April ordered the political assassinations conducted throughout Kigali and Gisenyi prefecture He therefore is responsible for ordering, under Article 6 (1), the murder of Maharangari. The assailants and Bagosora were aware that these killings formed part a systematic attack against the civilian population on political grounds”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2183-85: “Alphonse Kabiligi was brutally murdered on the evening of 7 April. During the course of the attack, soldiers asked to see his identity card and noted that it was bad that he was from Butare prefecture. They also demanded to see his RPF documents before cutting off his arm and taking him outside and shooting him. The Chamber has found that Kabiligi was on a list of suspected accomplices of the RPF [Rwandan Patriotic Front] maintained by the Rwandan army. It is clear that his murder was premeditated and on political grounds.”

“In assessing Nsengiyumva’s responsibility, the Chamber has viewed the killing of Alphonse Kabiligi in connection with the participation of soldiers and militiamen in the killings at Mudende University . . . and the other targeted killings on 7 April in Gisenyi town Given the nature of these assaults and the involvement of soldiers under Nsengiyumva’s command . . . , the Chamber finds as the only reasonable conclusion that the killing of Alphonse Kabiligi was ordered by Nsengiyumva, the highest military authority in the area. In making this finding, the Chamber has taken into consideration that Nsengiyumva met with military officers on the night of 6 to 7 April in order to discuss the situation in the aftermath of the death of President Habyarimana Furthermore, it has viewed these events in the context of the other parallel crimes being committed in Kigali by elite units and other soldiers in the wake of the death of President Habyarimana, which were also ordered or authorised by the highest military authority In the Chamber’s view, Nsengiyumva’s orders to these assailants to participate in the crimes substantially assisted in their execution.”

“Bagosora bears superior responsibility for the murder of Alphonse Kabiligi The assailants and the Accused were aware that this killing formed part of a systematic attack against the civilian population on political grounds”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 655: “The Chamber has . . . found that, on 11 April 1994, soldiers participated in the arrest, detention, and mistreatment of seven civilians, including Prosecution Witness LI, as well as in the execution of Witness LI’s brother and his classmate. Given the Chamber’s

inference that Imanishimwe issued an order authorizing the arrest, detention, mistreatment, and execution of individuals having suspected connections with the RPF [Rwandan Patriotic Front], the Chamber finds that Imanishimwe can be held criminally responsible under Article 6(1) for ordering his subordinates to commit these acts.”

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 404: “With respect to the allegation of ordering the attack [on April 8, 1994 at Kesho Hill in Rwili secteur, Gaseke commune, in Gisenyi prefecture], the Chamber recalls that it was unable to make a finding beyond reasonable doubt on what the Accused said during his speech to the crowd of assailants. Although the assailants applauded after the speech, and then commenced their attack, without knowledge of the Accused’s words, the Chamber cannot find beyond reasonable doubt that the Accused either explicitly, or implicitly, ordered the assailants to attack the Tutsi on Kesho Hill.” (A joint criminal enterprise, however, was proven as to the crimes at Kesho Hill.)

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 416: “The Chamber finds that although the Accused had a position of authority over his guard, Corporal Irandemba, who was in charge of the [Kiyovu] roadblock [in Kiyovu cellule, Kigali-ville prefecture], there was no evidence of the Accused issuing orders to kill Tutsi. There was no conclusive evidence on who, if anyone, gave orders to the men at the roadblock to kill Tutsi, or, who, if anyone, ordered the establishment of the roadblock. Accordingly, the Chamber cannot find beyond reasonable doubt that the Accused either explicitly, or implicitly, ordered the killing of Tutsi at the Kiyovu roadblock.” (Aiding and abetting, however, was proven as to the killings at the Kiyovu roadblock.)

f) Committing

i) defined/ *actus reus*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 478: “The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 302 (similar).

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 60: “[T]he term ‘committed’ in Article 6(1) of the Statute has been held to refer ‘generally to the direct and physical perpetration of the crime by the offender himself.’” *See also Muhimana*, (Trial Chamber), April 28, 2005, para. 506 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 285 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 383 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 463: “Generally speaking, ‘committed’ under Article 6(1) has been interpreted to mean ‘direct and physical perpetration’ of the crime by the accused himself or his culpable omission to fulfil a duty imposed by law and attracting a penal sanction.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 595: “To ‘commit’ a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation

in a manner punishable by penal law. In this sense, there may be one or more perpetrators in relation to the same crime where the conduct of each perpetrator satisfies the requisite elements of the substantive offence.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 764 (same).

1) committing: not limited to direct and physical perpetration of the crime(s)

Seromba, (Appeals Chamber), March 12, 2008, para. 161: “The Appeals Chamber recalls that[:]

[i]n the context of genocide, however, ‘direct and physical perpetration’ need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.

The jurisprudence makes clear that ‘committing’ is not limited to direct and physical perpetration and that other acts can constitute direct participation in the *actus reus* of the crime. The question of whether an accused acts with his own hands, *e.g.* when killing people, is not the only relevant criterion. The Appeals Chamber therefore finds, Judge Liu dissenting, that the Trial Chamber erred in law by holding that ‘committing’ requires direct and physical perpetration of the crime by the offender. To remedy this error, the Appeals Chamber will apply the correct legal standard—*i.e.*, whether Athanase Seromba’s actions were ‘as much an integral part of the genocide as were the killings which [they] enabled.’ . . . [The issue is whether] Seromba became a principal perpetrator of the crime itself by approving and embracing as his own the decision to commit the crime and thus should be convicted for committing genocide.”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 60: “In the context of genocide, however, ‘direct and physical perpetration’ need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.”

Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, paras. 23-25: As to “the Trial Chamber’s observation that “[c]ommitting” refers generally to the direct and physical perpetration of the crime by the offender himself”:

“First, attention is invited to the word ‘generally’ in the Trial Chamber’s statement. It is accepted that the statement does not deny that there can be a ‘committing’ where the accused acts through a joint criminal enterprise. However, there are not two rules, but one; it is not the position that non-JCE cases are governed by the ‘direct and physical perpetration’ rule and JCE cases by another rule which, mysteriously, exempts them from the application of the ‘direct and physical perpetration’ rule. The matter always turns on whether there is ‘direct and physical perpetration.’ What happens is that, in the circumstances of a case of JCE, there is a ‘direct and physical perpetration’ even though the accused is not in personal contact with the victim: the JCE is his instrument. But I see no reason why the rationale of that view has to be limited to that situation. Why, for example, can there not be ‘direct and physical perpetration’ where the accused perpetrates his crime through the instrumentality of another, even though no JCE is involved and even though there is no personal contact between the accused and the victim? . . .”

“Second, I agree with the Appeals Chamber that proof of personal killing is not required to show ‘the direct and physical perpetration of the crime by the offender himself.’”

But see Seromba, (Appeals Chamber), Dissenting Opinion of Judge Liu, March 12, 2008, paras. 2, 5, 6, 10, 18: “[T]he Appeals Chamber in *Gacumbitsi* did not say, as implied by the Majority that ‘committing’ *per se* is not limited to direct and physical perpetration and that other acts can constitute direct participation in the *actus reus* of the crime, but that,

[i]n the context of genocide, [...] ‘direct and physical perpetration’ need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.”

. . . “[T]he factual findings contained in the Trial Judgement do not, in my respectful view, show a direct and active participation in the genocidal acts that were taking place in the parish.” . . . “[I]n this Tribunal, where there is no physical perpetration of the offence, commission has only ever been extended within the context of a JCE and that such JCE should be pleaded.”

“Article 25(3)(a) of the ICC [International Criminal Court] Statute provides, [A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person] (a) [c]ommits such a crime, whether as an individual, *jointly with another or through another person*, regardless of whether that other person is criminally responsible.

What the above Article shows is that this Tribunal unlike that of the ICC does not define ‘committing’ as ‘committing through another person.’”

“I disagree with the Majority that the Trial Chamber erred in finding that Athanase Seromba’s participation in crimes amounted to aiding and abetting genocide and extermination. The Majority’s extension of the definition of ‘committing’ is not only inconsistent with the jurisprudence of this Tribunal and that of the ICTY, but has been applied by the Majority without any indication of the criteria or legal basis. This Judgement marks a turning point in the jurisprudence of this Tribunal. It has opened the door for an accused to be convicted of committing an offence, where there is no direct perpetration of the *actus reus* of the offence, and where the essential elements of JCE have not been pleaded and proved by the Prosecution, as the accused’s acts can in any case be subsumed by this new definition of ‘committing.’”

But see Gacumbitsi, (Appeals Chamber), Partially Dissenting Opinion Of Judge Güney, July 7, 2006, paras. 3-5: “The central element in the majority’s reasoning seems to be that ‘[i]n the context of genocide, however, “direct and physical perpetration” need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.’ With all due respect, I am of the view that the majority sets aside the established jurisprudence and gives a new meaning to ‘committing,’ without providing convincing reasons for doing so.”

“According to the *Tadic* Appeal Judgement, ‘committing’ refers to a) ‘the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law’; or b) ‘participation in the realization of a common design or purpose’ (or participation in a joint criminal enterprise). Until the present case, ‘committing’ has always been understood in one of those two ways, and attempts to extend the meaning of ‘committing’ further have not been accepted.”

“Pursuant to this jurisprudence, the Appellant will have ‘committed’ genocide if a) he physically perpetrated one of the acts listed at Article 2(2) of the Statute (with the relevant intent); or b) he participated in a joint criminal enterprise to commit genocide . . .”

ii) *mens rea*

Seromba, (Appeals Chamber), March 12, 2008, para. 173: “[A]n accused evinces the requisite *mens rea* for committing a crime when he acts with an intent to commit that crime.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 461: “An accused who is alleged to have ‘committed’ an offence, in the sense of direct physical perpetration, must possess the requisite *mens rea* for the underlying offence.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 463 (same).

iii) application

Seromba, (Appeals Chamber), March 12, 2008, paras. 177-78, 174, 182: “The Appeals Chamber particularly notes that, in any event at least on 16 April 1994, Athanase Seromba approved and joined the decision of Kayishema, Ndahimana, Kanyarukiga, Habarugira and other persons to destroy the church when no other means were available to kill the Tutsis who were seeking refuge inside. Further, Athanase Seromba advised the bulldozer driver on where the weakest side of the church was and directed him to destroy the church, assuring him that it would be Hutus who would be able to rebuild it. The Appeals Chamber notes that this in effect meant killing the Tutsis inside the church. Indeed, Athanase Seromba knew that there were approximately 1,500 Tutsis in the church and that the destruction of the church would necessarily cause their death.” “Moreover, on two occasions, already before the destruction of the church on 16 April 1994, Athanase Seromba turned away Tutsi refugees from the presbytery, whereupon two of them were killed . . .”

“The Appeals Chamber finds, Judge Liu dissenting, that the only reasonable conclusion to be drawn is that, by his acts, Athanase Seromba intended that the approximately 1,500 Tutsi refugees be killed. Therefore, the *mens rea* requirement for committing is satisfied. The Appeals Chamber is satisfied that the acts of Athanase Seromba were not carried out merely with the knowledge that they would assist in the killing of the refugees.”

“The Appeals Chamber finds that Athanase Seromba crossed the line separating aiding and abetting from committing genocide and became a principal perpetrator in the crime itself.” *See also id.*, paras. 171-72; *but see Seromba*, (Appeals Chamber), Dissenting Opinion of Judge Liu, March 12, 2008, paras. 18, 16 (“I disagree with the Majority that the Trial Chamber erred in finding that Athanase Seromba’s participation in crimes amounted to aiding and abetting”; also, “mere knowledge that the destruction of the church would necessarily cause the death of approximately 1,500 Tutsi refugees does not exactly correlate with ‘an intention to destroy in whole or in part’ the Tutsis.”).

Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 60-61: “[T]he accused was physically present at the scene of the Nyarubuye Parish massacre [in Rusumo commune], which he ‘directed’ and ‘played a leading role in conducting and, especially, supervising.’ It was he who personally directed the Tutsi and Hutu refugees to separate -- and that action,

which is not adequately described by any other mode of Article 6(1) [responsibility], was as much an integral part of the genocide as were the killings which it enabled”

“The Appeals Chamber is persuaded that in the circumstances of this case, the modes of [responsibility] used by the Trial Chamber to categorize this conduct – ‘ordering’ and ‘instigating’ – do not, taken alone, fully capture the Appellant’s criminal responsibility. The Appellant did not simply ‘order’ or ‘plan’ genocide from a distance and leave it to others to ensure that his orders and plans were carried out; nor did he merely ‘instigate’ the killings. Rather, he was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed. The Appeals Chamber finds by majority, Judge Güney dissenting, that this constitutes ‘committing’ genocide.” *But see Gacumbitsi*, (Appeals Chamber), Partially Dissenting Opinion Of Judge Güney, July 7, 2006, para. 5 (“‘playing a leading role in conducting and . . . supervising’ the attack and directing the refugees to separate do not constitute the physical perpetration by the Appellant of one of the acts listed at Article 2(2) of the Statute.”).

Karera, (Trial Chamber), December 7, 2007, para. 543: “Given Karera’s position of authority and influence, the Chamber finds that by travelling with *Interahamwe* and soldiers to Ntarama and verbally urging them to attack Tutsis, he encouraged them to attack the Tutsi refugees at Ntarama Church [in Ntarama, south of Kigali, which they did, slaughtering several hundred]. . . . By being present during the attack and participating through shooting, he is . . . guilty of committing genocide.”⁴⁴

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 285: “In the present case, the Accused killed Murefu, a Tutsi. The Chamber therefore finds that he committed the crime of genocide, within the meaning of Article 6(1) of the Statute.”

But see Ndindabahizi, (Appeals Chamber), Partially Dissenting Opinion Of Judge Güney, January 16, 2007, paras. 2-5: By “distributing weapons, transporting attackers and encouraging” the attackers who committed the killings, Ndindabahizi may have “instigated” and “aided and abetted” genocide at Gitwa Hill, but he did not “commit” it; arguing that the majority holding “blurs the essential distinction between ‘committing’ a crime and other forms of [responsibility] recognised by the Statute and the jurisprudence.” “If any act of participation in a crime amounts to committing the crime, then all modes of [responsibility] are subsumed in the expression ‘committed’ in Article 6(1) of the Statute and become redundant.”

iv) joint criminal enterprise (“JCE”)

Mpambara, (Trial Chamber), September 11, 2006, para. 13: “A joint criminal enterprise arises when two or more persons join in a common and shared purpose to commit a crime under the Statute.”

⁴⁴ Note that encouraging and being present during crimes tends to be considered “aiding and abetting.” See “aiding and abetting,” Section (IV)(g), this Digest.

1) JCE is a form of “commission”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 478: Commission covers “participation in a joint criminal enterprise.” *See also Muruny*, (Trial Chamber), September 12, 2006, para. 463 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 385 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 462: “The ICTY Appeals Chamber has previously held that the modes of [responsibility] identified under Article 7(1) of the ICTY Statute [the equivalent of Article 6(1) of the ICTR Statute] include participation in a joint criminal enterprise as a form of ‘commission’ under that Article.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 380: “[T]he theory of ‘joint criminal enterprise’ (‘JCE’), which, although not explicitly referred to in the Statute, has been held by the Appeals Chamber to be a form of ‘commission’ under Article 6(1).”

See also Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Schomburg On The Criminal Responsibility Of The Appellant For Committing Genocide, July 7, 2006, para. 16: “The concept of joint criminal enterprise is not expressly included in the Statute and it is only one possibility to interpret ‘committing’ in relation to the crimes under the ICTR and ICTY Statutes.”

2) JCE is a mode of responsibility, not a crime in itself

Nchamihigo, (Trial Chamber), November 12, 2008, para. 327: “JCE is not a crime but a mode of [responsibility].”

Mpambara, (Trial Chamber), September 11, 2006, para. 14: “As the Appeals Chamber has aptly remarked, a ‘joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself.’” *See also id.*, para. 38 (similar).

3) JCE is recognized by the ICTR; ICTY jurisprudence applies

Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, paras. 37, 48: “As to the state of the law in the ICTR, it is recognised that joint criminal enterprise was not applied in this Tribunal until after its elucidation by the ICTY Appeals Chamber. For some time now, however, [JCE] has had a firm foundation in the jurisprudence of the ICTR.” “Many decisions have followed the [ICTY’s] *Tadic* holding; JCE is now well established in the ICTR’s jurisprudence.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 468: “[W]hile joint criminal enterprise [responsibility] is firmly established in the jurisprudence of the ICTY this is only the second ICTR case in which the Appeals Chamber has been called upon to address this issue. Given the fact that both the ICTY and the ICTR have mirror articles identifying the modes of [responsibility] by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute.”

See also Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, paras. 42-52 (discussing “co-perpetratorship” theory and concluding it has not been adopted by the ICTR and ICTY as an alternative to JCE); *Gacumbitsi*, (Appeals Chamber), Separate Opinion Of Judge Schomburg On The Criminal Responsibility Of The Appellant For Committing Genocide, July 7, 2006, paras. 16-23 (discussing co-perpetrators).

4) JCE is not a judicial creation

Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, para. 40: “A suggestion that the doctrine of JCE was *created* by *Tadić* is not correct. In *Tadić* the Appeals Chamber was putting forward a judicial construct developed out of its analysis of scattered principles of law gathered together for the purpose of administering international criminal law. The expression ‘joint criminal enterprise’ can be found in those principles.”

5) JCE is customary international law

Simba, (Trial Chamber), December 13, 2005, para. 385: “Article 6 (1) does not make explicit reference to ‘joint criminal enterprise.’ However, the Appeals Chamber has previously held that participating in a joint criminal enterprise is a form of [responsibility] which exists in customary international law” *See also Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 463 (JCE is customary international law).

6) there are three types/categories of JCE

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 158: There are “three categories of ‘joint criminal enterprise’ (JCE)”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 463: “In the jurisprudence of the ICTY three categories of joint criminal enterprise have been identified as having the status of customary international law.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 383: “The jurisprudence of both *ad-hoc* Tribunals establishes three categories of JCE: basic, systemic and extended.” *See also Nchamihigo*, (Trial Chamber), November 12, 2008, para. 327 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 15 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 386 (similar).

7) the *actus reus* of each is the same

Simba, (Appeals Chamber), November 27, 2007, para. 77: “[T]he Appeals Chamber recalls that the three categories of JCE vary only with respect to the *mens rea* element, not with regard to the *actus reus*.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 383: “The *actus reus* is common to all three categories [of JCE].”

Nchamihigo, (Trial Chamber), November 12, 2008, para. 327: “The Appeals Chamber in *Tadić* has stated that the *actus reus* remains the same for each category of JCE”

See also Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 467 (“The *mens rea* differs according to the category of joint criminal enterprise under consideration.”); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 385 (similar).

8) elements of the *actus reus*

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 383: As to the *actus reus* for each category of JCE: “First, a plurality of persons is required Second, the existence of a common plan, design or purpose, which amounts to, or involves, the commission of a crime provided for in the Statute, must be established Third, the accused must have participated in the common purpose, either by participating directly in the commission of the agreed crime itself, or by assisting or contributing to the execution of the common purpose.” *See also Simba*, (Trial Chamber), December 13, 2005, para. 387 (similar).

Nchamihigo, (Trial Chamber), November 12, 2008, para. 327: The *actus reus* for each category of JCE “requires: (i) a plurality of persons involved in the JCE, (ii) a common purpose or plan which amounts to or involves the commission of a crime provided for in the Statute, and (iii) the accused’s participation in the common purpose.”

(a) a plurality of persons (element 1)

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 383: As to the “plurality of persons,” “[t]hey need not be organised in a military, political or administrative structure.” *See also Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 466 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 387 (same as *Zigiranyirazo*).

(b) the existence of a common plan or purpose which amounts to or involves the commission of a crime under the Statute (element 2)

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 383: As to “the existence of a common plan, design or purpose,” “[t]here is no need for the plan, design or purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.” *See also Simba*, (Appeals Chamber), November 27, 2007, para. 74 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 466 (similar); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 327 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 387 (similar).

Compare Simba, (Appeals Chamber), November 27, 2007, para. 90: “[I]t is well established that ‘planning’ is not an element of a JCE. The material element of a JCE is the ‘common purpose’” *See also Simba*, (Appeals Chamber), November 27, 2007, para. 250 (similar).

Compare Mpambara, (Trial Chamber), September 11, 2006, para. 13: “Unlike conspiracy, no specific agreement to commit the crime need be shown: the common purpose may arise spontaneously and informally, and the persons involved need not be associated through a formal organization.”

(c) participation of the accused: significant contribution to the JCE required (element 3)

Simba, (Appeals Chamber), November 27, 2007, para. 303: “The Appeals Chamber notes that the Trial Chamber expressly acknowledged that a showing of substantial contribution is not required as a matter of law. The Trial Chamber correctly interpreted the law on this matter. The Appeals Chamber recalls that although an accused’s contribution to a JCE need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is found to be responsible.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 383: “Although the contribution [of the accused] need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.”

Simba, (Trial Chamber), December 13, 2005, para. 387: As to “the participation of the accused,” “[t]his participation need not involve commission of a specific crime under one of the provisions (for example, murder, extermination, torture, or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.” See also *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 466 (similar); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 327 (similar).

See also *Simba*, (Appeals Chamber), November 27, 2007, para. 296: “[P]hysical presence at the time a crime is committed by the physical perpetrator is not required for [responsibility] to be incurred by a participant in a JCE.”

See also *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 384: “[T]he Chamber recalls that the principal perpetrators carrying out the *actus reus* of the crimes do not have to be members of the JCE. What matters in such cases is whether the crime in question forms part of the common purpose and whether at least one member of the JCE used the principal perpetrator acting in accordance with the common plan.”

But see *Mpambara*, (Trial Chamber), September 11, 2006, para. 13: “Any act or omission which assists or contributes to the criminal purpose may attract [responsibility]: there is no minimum threshold of significance or importance, and the act need not independently be a crime.”

Note that for other forms of responsibility, a “substantial contribution” is required. See “*actus reus*/participation (element 1): contribution must have substantially contributed to, or had a substantial effect on, the completion of the crime,” Section (IV)(b)(iv)(1), this Digest.

9) type #1: the “basic” JCE

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 158: “The first (or ‘basic’) category encompasses cases in which ‘all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention’ to commit the crime that is charged.” See also

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 463 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 386 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 463: “An example [of the first category of JCE] is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.”

(a) *mens rea* for type #1

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 467: “The basic form [of JCE] requires the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 385 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 388 (similar).

Mpambara, (Trial Chamber), September 11, 2006, para. 14: “A co-perpetrator (a term used to refer to a participant in a joint criminal enterprise) [of a ‘type 1’ joint criminal enterprise] must intend by his acts to effect the common criminal purpose. Mere knowledge of the criminal purpose of others is not enough: the accused must intend that his or her acts will lead to the criminal result. The *mens rea* is, in this sense, no different than if the accused committed the crime alone Determining whether a co-perpetrator possessed the necessary intent may be more difficult than in the case of a single perpetrator who, of necessity, must physically commit the crime. Although the *actus reus* may be satisfied by any participation, no matter how insignificant, ‘the significance and scope of the material participation of an individual in a joint criminal enterprise may be relevant in determining whether that individual had the requisite *mens rea*.’”⁴⁵

Simba, (Trial Chamber), December 13, 2005, para. 388: As to the *mens rea* for the basic form of JCE, “[w]here the underlying crime requires a special intent, such as discriminatory intent, the accused, as a member of the joint criminal enterprise, must share the special intent.”

10) type #2: the “systemic” JCE

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 464: “The second category is a ‘systemic’ form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.”

(a) *mens rea* for type #2

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 467: “The systemic form [of JCE] . . . requires personal knowledge of the system of ill-treatment (whether proved by express testimony or as a matter of reasonable inference

⁴⁵ It is likely not correct that “participation, no matter how insignificant” would suffice as to the *actus reus*. *See* “participation of the accused: significant contribution to the JCE required (element 3),” Section (IV)(f)(iv)(8)(c), this Digest.

from the accused's position of authority), as well as the intent to further this system of ill-treatment."

11) type #3: the "extended" JCE

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 158: "The third (or 'extended') category [of JCE] concerns cases in which the crime charged, 'while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose.'" *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 385 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 465: "The third category is an 'extended' form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians."

(a) *mens rea* for type #3

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 467: As to *mens rea*, "the extended form of joint criminal enterprise, requires the intention to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arises 'only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk' – that is, being aware that such a crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise."

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 385: Extended JCE "requires the intention to participate in and further the common criminal purpose of a group and to contribute to the JCE and the commission of its crimes. Additionally, responsibility for a crime other than the one which was part of the common design arises only if, under the circumstances of the case: (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group; and (ii) the accused willingly took that risk."

12) participation in a JCE by omission

Mpambara, (Trial Chamber), September 11, 2006, paras. 24, 38: "Involvement in a joint criminal enterprise may . . . be proven by evidence characterized as an omission. The objective element of participation is satisfied as long as the accused has 'committed an act or an omission which contributes to the common criminal purpose.' Although it is

hard to imagine that total passivity could demonstrate the requisite intent for co-perpetratorship, an omission in combination with positive acts might have great significance. The Appeals Chamber [in *Kvočka*] upheld an inference of guilt where an omission was combined with a series of other findings concerning the position and conduct of the accused, namely:

that he held a high-ranking position in the camp and had some degree of authority over the guards; that he had sufficient influence to prevent or halt some of the abuses but that he made use of that influence only very rarely; that he carried out his tasks diligently, participating actively in the running of the camp; that through his own participation, in the eyes of other participants, he endorsed what was happening in the camp.

The failure of the accused to intervene more frequently was an omission; but its significance in proving the criminal mental state of the accused, and its consequence for the victims, depended on a series of positive acts preceding the omission.”

“[A] person is not guilty of participating in a joint criminal enterprise merely because he knows that others are about to commit a crime, and yet does nothing to prevent the crime from being committed. The proper inquiry in such a case is whether, by doing nothing, the person (i) intended to commit, or to contribute to the commission of, the crime; and (ii) actually did contribute to the crime. Any evidence which tends to prove these elements of the crime [is] relevant.”

(a) application—JCE by omission (not proven)

Mpambara, (Trial Chamber), September 11, 2006, paras. 104-05: “The question for determination is whether the alleged failure to immediately evacuate or otherwise assist the refugees [at Gahini Hospital in Gahini *Secteur*] shows that the Accused [a *bourgmestre*] was part of a joint criminal enterprise to kill the refugees at the hospital, or that he aided and abetted the attacks, which would require that he substantially contributed to them. The uncontradicted evidence . . . was that the Accused did leave law enforcement officers – indeed, that he left all his escorts – at the hospital while he returned to Rwamagana to request additional *gendarmes*. The Chamber is aware that some witnesses suggested that the *gendarmes* and police colluded with the attackers; indeed, *Mpambara* shared that suspicion. Nevertheless, the Accused explained that he had no better option than to deploy the forces at his disposal. The Prosecution failed to adduce any direct evidence that the Accused was colluding with the police or *gendarmes* to have the refugees killed”

“The Chamber finds that the Prosecution has not shown beyond a reasonable doubt that the Accused’s alleged inaction was for the purpose of assisting the attackers in killing the Tutsi refugees at the hospital [T]he Chamber entertains a reasonable doubt that the Accused’s conduct had a substantial effect on the commission of the crimes, so as to make him [responsible] as an aider and abettor, or that he intended thereby to commit crimes by participating in a joint criminal enterprise.” *See also id.*, para. 75 (similar findings as to the attacks in Ibiza and Umwiga *cellules* on April 7 and 8, 1994).

13) distinguishing JCE from aiding and abetting; there is no aiding and abetting a JCE

Mpambara, (Trial Chamber), September 11, 2006, paras. 17, 37: “Joint criminal enterprise may be distinguished from aiding and abetting in two respects. Aiding and abetting requires a ‘substantial effect upon the perpetration of the crime’; by contrast, no minimum threshold of participation is required in a joint criminal enterprise. The extent or significance of the contribution may, however, be important in showing that the perpetrator possessed the requisite criminal intent. The aider and abettor, on the other hand, need only be aware of the criminal intent of the principal whom he assists or encourages. A person who contributes substantially to the commission of a crime by another person, and who shares the intent of that other person, is criminally [responsible] both as a co-perpetrator and as an aider and abettor.”⁴⁶

“[A]iding and abetting is a form of accomplice [responsibility], whereas participation in a joint criminal enterprise is a form of direct commission, albeit with other persons. There are important differences in the mental and objective elements for each of these forms of participation As the Appeals Chamber has stated, ‘it would be inaccurate to refer to aiding and abetting a joint criminal enterprise.’ The fact that the same material facts may prove both aiding and abetting and participation in a joint criminal enterprise does not diminish the importance of distinguishing between the two.”

See also Simba, (Trial Chamber), December 13, 2005, para. 387: “The Appeals Chamber in [the ICTY decision] *Kvočka et al.* [at para. 90] provided guidance on distinguishing between joint criminal enterprise and other forms of [responsibility], such as aiding and abetting.”

14) application—type #1 JCE

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 406-10: “The Chamber now . . . consider[s] whether the Accused participated in a JCE to kill Tutsi on Kesho Hill [in Rwili secteur, Gaseke commune, in Gisenyi prefecture]. The Chamber first recalls that there were a plurality of people who were involved in the attack on Kesho Hill, whether through physically perpetrating the attack themselves, or through speaking to the assailants immediately before the attack. These people included Presidential Guard, soldiers, *Interahamwe*, and civilians, as well as *bourgmestre* Bazabuhande, Director Jaribu, and the Accused.”

“Regarding the common plan, design or purpose, there were at least hundreds, if not over a thousand assailants who arrived, many of whom were armed with a range of weapons. They arrived together as part of a convoy, and participated in a meeting where the *bourgmestre* Bazabuhande, the Accused, and Director Jaribu, delivered speeches. In the Chamber’s view, the attack can only be described as a coordinated operation backed by Presidential Guards, soldiers, *Interahamwe*, and civilians, armed with guns, grenades and traditional weapons, with organisational support from prominent personalities, such as, the Accused, the *bourgmestre* and Jaribu. The Chamber considers that prior planning and coordination is the only reasonable explanation for the manner in which the

⁴⁶ It is likely not correct that “no minimum threshold of participation is required in a joint criminal enterprise.” See “participation of the accused: significant contribution to the JCE required (element 3),” Section (IV)(f)(iv)(8)(c), this Digest.

perpetrators conducted the attack on Tutsi at Kesho Hill. Indeed, this finding is supported further as it appears that prior planning and coordination, resulting in a large number of well-armed assailants and the presence of officials to provide encouragement, distinguished this attack from the prior unsuccessful attack. Accordingly, the Chamber finds that the only reasonable inference from the evidence is that a common criminal purpose existed to kill Tutsi on Kesho Hill.”

“With respect to whether the Accused shared the common purpose of killing Tutsi, the Chamber recalls that the Accused arrived at the massacre site with the assailants. He, as well as the *bourgmestre* and Jaribu, met with, and addressed the assailants who then applauded and immediately commenced their attack. The assailants’ applause indicates to the Chamber that the Accused’s view, as well as that of the *bourgmestre* and Jaribu, was received well by the assailants. Furthermore, the Accused did not leave the massacre site until the after attack had commenced. The Chamber therefore considers that the Accused, the *bourgmestre*, Jaribu and the assailants shared the common purpose of killing Tutsi, thus being members of the basic form of JCE. Additionally, recalling the Chamber’s finding that the assailants who physically perpetrated the killings possessed the genocidal intent, given the scale of the killings and their context, the Chamber finds that genocidal intent was also shared by all participants in the JCE, including the Accused.”

“Finally, given the influence which the Accused’s position of authority yielded, the Chamber considers that his arrival at the site with the assailants, his speech to the assailants, and his presence when the attack commenced, would have demonstrated support for the attack and thus, amounted to a form of encouragement to the assailants. Indeed, the applause that followed the Accused’s speech, and the immediate commencement of the attack after the speeches, demonstrates the significant effect which the Accused, and the other speakers, had on the assailants’ conduct. Accordingly, the Chamber finds that the Accused significantly contributed to the execution of the joint criminal purpose to kill Tutsi at Kesho Hill by encouraging assailants to attack.” “For the foregoing reasons, the Chamber finds that the Accused committed genocide through participating in the JCE to kill Tutsi at Kesho Hill.”

Simba, (Trial Chamber), December 13, 2005, paras. 401-03, 406-07, 419: “The three massacres on 21 April at Murambi Technical School, Cyanika Parish, and Kaduha Parish [in Gikongoro prefecture] can only be described, in the Chamber’s view, as a highly coordinated operation involving local militiamen backed by gendarmes, armed with guns and grenades, and with the organizational and logistical support offered by local authorities and prominent personalities such as Simba who provided encouragement, direction, and ammunition. This operation was conducted over the course of a period of around twelve hours on a single day and involved the killing of thousands of Tutsi concentrated at three geographically proximate locations. Prior planning and coordination is the only reasonable explanation for the manner in which the perpetrators conducted these three massive assaults. The Chamber notes in addition, prior to 21 April, *Interahamwe*, relying principally on traditional weapons, had been largely unsuccessful in attacking refugees at these locations. Therefore, the added elements of coordination, official encouragement, well-armed gendarmes, and the use of guns and grenades proved decisive.”

“In the Chamber’s view, the only reasonable inference from the evidence is that a common criminal purpose existed to kill Tutsi at these three sites The Chamber finds that the massive scale and relative efficiency of the slaughter by necessity demanded the involvement of a plurality of persons, each carrying out a particular role at one or more of the massacres. In addition to the physical perpetrators of the crimes, other prominent participants in the enterprise included Simba, Prefect Bucyibaruta, Captain Sebhura, and Bourgmestre Semakwavu.”

“Simba participated in the joint criminal enterprise through his acts of assistance and encouragement to the physical perpetrators of the crimes at Murambi Technical School and Kaduha Parish. In the Chamber’s view, Simba’s actions at those two sites had a substantial effect on the killings which followed. Witness KSY noted that the attackers at Murambi continued with renewed enthusiasm after Simba’s departure. Moreover, the use of guns and grenades, which Simba distributed at Kaduha Parish, was a decisive factor in the success of these assaults. The Chamber notes that Simba was a respected national figure in Rwandan society and well-known in his native region. Therefore, the assailants at those places would have viewed his presence during the attacks, however brief, as approval of their conduct, particularly after Simba’s invocation of the government.”

“The Chamber finds beyond reasonable doubt that Simba shared the common purpose of killing Tutsi at Murambi Technical School and Kaduha Parish based on his presence and specific actions at the two sites. He also distributed the means to implement the killings during an ongoing massacre at Murambi Technical School. In addition, after leaving the massacre at Murambi, he distributed guns and grenades to assailants at Kaduha Parish and urged them to ‘get rid of the filth.’” (Convicting Simba of genocide through participation in a joint criminal enterprise as to killings at Murambi Technical School and Kaduha Parish, but not Cyanika Parish, as to which the Trial Chamber found doubt as to whether Simba shared the common purpose of killing Tutsi; the conviction was affirmed on appeal.)

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 418-19: “Although the killings at the Kiyovu roadblock [in Kiyovu cellule, Kigali-ville prefecture] may suggest that there was a concerted plan to kill Tutsi at the roadblock, the Chamber considers that there is insufficient evidence to conclude beyond reasonable doubt to the existence of a JCE to which the Accused would have been part. First, there is no conclusive evidence on who would have been the members of the criminal enterprise alleged by the Prosecution. The Chamber recalls in this respect that it found that Witness BCW, who was himself Tutsi, was compelled to man the roadblock. The evidence is also unclear as to who perpetrated the killings, that is, as to who would have executed the common purpose. Second, the existence of a JCE is not the only reasonable inference available from the evidence insofar as the killing of 10 to 20 people perpetrated at the roadblock could very well have occurred in the absence of any specific and concerted plan. Finally, the Chamber considers that the evidence on the Accused’s role in relation to the roadblock is insufficient to prove that the Accused shared the alleged common plan, design or purpose beyond reasonable doubt. Although the evidence suggests that the Accused approved the killings, it does not follow that the Accused had knowledge of a plan consisting of killing Tutsi at the Kiyovu roadblock and agreed to it.” “Therefore, the Chamber finds that the Prosecution failed to prove

beyond reasonable doubt the existence of a JCE to kill Tutsi at the Kiyovu roadblock to which the Accused would have been part.”

For the requirements of pleading JCE, see “pleading joint criminal enterprise,” Section (VIII)(c)(xix)(6)(o), this Digest.

g) Aiding and abetting

Nzabirinda, (Trial Chamber), February 23, 2007, para. 16: “Aiding and abetting is a form of accessory [responsibility]. The *actus reus* of the crime is not performed by the accused but by another person [the principal offender or principal perpetrator].” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 33 (similar).

Nzabirinda, (Trial Chamber), February 23, 2007, para. 15: “Article 6(1) reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit the crime, but also by individuals who participate in and contribute to the commission of the crime in other ways, such as aiding and abetting.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 460 (similar mentioning “accomplices”).⁴⁷

Rutaganda, (Trial Chamber), December 6, 1999, para. 43: “The aider and abettor assists or facilitates another in the accomplishment of a substantive offence.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 126 (similar).

i) either aiding or abetting alone suffices

Muvunyi, (Trial Chamber), September 12, 2006, para. 471: “[I]ndividual criminal responsibility can be incurred where there is either aiding or abetting, but not necessarily both.”

Akayesu, (Trial Chamber), September 2, 1998, para. 484: “[E]ither aiding or abetting alone is sufficient to render the perpetrator criminally [responsible].”

ii) defined/ *actus reus*

Muvunyi, (Appeals Chamber), August 29, 2008, para. 79: “[A]n aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.” *See also Muhimana*, (Appeals Chamber), May 21, 2007, para. 189 (similar); *Seromba*, (Appeals Chamber), March 12, 2008, para. 139 (similar as to extermination).

Seromba, (Appeals Chamber), March 12, 2008, para. 44: “[T]o establish the *actus reus* of aiding and abetting . . . , it must be proven that the alleged aider and abettor committed acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime.” *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber),

⁴⁷ For discussion of accomplices, see “distinguishing complicity/ accomplices from aiding and abetting,” Section (IV)(g)(vi), and “relationship between complicity and aiding and abetting,” Section (I)(e)(v)(3), this Digest.

November 28, 2007, para. 482 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 370 (similar); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 386 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 307: “Participation by ‘aiding and abetting’ refers to any act of assistance or support in the commission of the crime. Such mode of participation may take the form of tangible assistance, or verbal statements.”

Mpambara, (Trial Chamber), September 11, 2006, para. 16: “Aiding and abetting . . . refer to any form of assistance or encouragement given to another person to commit a crime under the Statute.” *See also Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 457 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 597: “‘Aiding and abetting,’ pursuant to the jurisprudence of the ad hoc Tribunals, relates to acts of assistance that intentionally provide encouragement or support to the commission of a crime.” *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 766 (same).

Rutaganda, (Trial Chamber), December 6, 1999, para. 43: “[A]iding and abetting include all acts of assistance in either physical form or in the form of moral support” *See also Musema*, (Trial Chamber), January 27, 2000, para. 126 (similar).

1) aiding and abetting differentiated

(a) the concepts are distinct

Muvunyi, (Trial Chamber), September 12, 2006, para. 470: “The jurisprudence has been fairly consistent in interpreting ‘aiding and abetting’ as distinct legal concepts.” *See also Muhimana*, (Trial Chamber), April 28, 2005, para. 507 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 596 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 765 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 384 (similar).

Akayesu, (Trial Chamber), September 2, 1998, para. 484: “Aiding” and “abetting” are not synonymous.

(b) the terms are usually used conjunctively

Mpambara, (Trial Chamber), September 11, 2006, para. 16: “Aiding and abetting, though distinct concepts, are frequently combined”

Bisengimana, (Trial Chamber), April 13, 2006, para. 32: “In legal usage, including that of the Statute and of the case law of the Tribunal and the International Criminal Tribunal for the Former Yugoslavia (the ‘ICTY’), the two terms [aiding and abetting] are so often used conjunctively that they are treated as a single broad legal concept.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 596 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 765 (similar).

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 457: “Aiding and abetting, though distinct concepts, are almost universally used conjunctively. . . .”

(c) the meaning of aiding

Bisengimana, (Trial Chamber), April 13, 2006, para. 32: “‘Aiding’ means assisting another to commit a crime.” *See also* *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 596 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 765 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 484 (similar).

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 286: “*Aiding* means assisting or helping another to commit a crime.” *See also* *Muhimana*, (Trial Chamber), April 28, 2005, para. 507 (same without italics); *Semanza*, (Trial Chamber), May 15, 2003, para. 384 (same without italics).

Muvunyi, (Trial Chamber), September 12, 2006, para. 470: “[Aiding] implies assistance . . .”

(d) the meaning of abetting

Muvunyi, (Trial Chamber), September 12, 2006, para. 470: Abetting “implies facilitating, encouraging, or advising the commission of a crime.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 471: “‘Abetting . . . would involve facilitating the commission of an act by being sympathetic thereto.’” *See also* *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 787 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 484 (same).

Bisengimana, (Trial Chamber), April 13, 2006, para. 32: “‘Abetting’ means facilitating, encouraging, advising or instigating the commission of a crime.” *See also* *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 596 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 765 (similar).

Muhimana, (Trial Chamber), April 28, 2005, para. 507: “Abetting means facilitating, advising, or instigating the commission of a crime.” *See also* *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 286 (similar).

Semanza, (Trial Chamber), May 15, 2003, para. 384: “[T]he term ‘abetting’ means encouraging, advising, or instigating the commission of a crime.”

2) assistance must substantially contribute/have substantial effect

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 117: “[A] conviction for aiding and abetting presupposes that the support of the aider and abetter has a substantial effect upon the perpetrated crime.” *See also* *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 140 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 469 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 16 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 766 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 33 (similar).

Bisengimana, (Trial Chamber), April 13, 2006, para. 33: “The Prosecution is required to demonstrate that the accused carried out an act of substantial practical assistance, encouragement, or moral support to the principal offender, culminating in the latter’s

actual commission of the crime [T]he assistance . . . must have a substantial effect on the commission of the crime.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 766 (similar).

Rutaganira, (Trial Chamber), March 14, 2005, paras. 88-89: “Both *ad hoc* Tribunals have held that for criminal responsibility under Article 6(1) to attach, the act of aiding and abetting must have a decisive and substantial effect on the commission of the crime by the principal perpetrator.” “In the light of such case-law, the Chamber is of the opinion that for an accused to incur criminal responsibility under Article 6(1) of the Statute, it must be shown that his or her participation has substantially contributed to, or has had a substantial effect on the consummation of a crime under the Statute.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 457: “[A]iding and abetting is a form of accomplice [responsibility] that requires direct and substantial contribution to the perpetration of the crime by another person.”⁴⁸

Rutaganda, (Trial Chamber), December 6, 1999, para. 43: “[A]ny act of participation must substantially contribute to the commission of the crime.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 126 (similar).

(a) application—substantial contribution/ effect (not proven)

Ndindabahizi, (Appeals Chamber), January 16, 2007, paras. 116-17: “In relation to the question whether the Appellant’s actions on 20 May 1994 substantially contributed to the killing of Mr. Nors on 26 May 1994 . . . it is unclear whether the Appellant’s acts substantially contributed to Mr. Nors’s killing . . . six days after these acts or even later.” “[T]he Prosecution failed to establish a link between the murder of Mr. Nors at the Gaseke roadblock and a substantial contribution of the Appellant. Without that crime being committed, the Appellant cannot be held [responsible] for instigating and aiding and abetting genocide for the murder of Mr. Nors” “No reasonable trier of fact could have concluded beyond reasonable doubt that the killing of Mr. Nors was a result attributable to the Appellant’s acts.” *But see Ndindabahizi*, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, January 16, 2007, paras. 2, 18, 20, 22 (Arguing that there was a “straight nexus . . . between Ndindabahizi’s visit to the roadblock and the killing of Mr[.] Nors.” “He distributed machetes and money to the persons who were manning the roadblock and asked them why Tutsis were being allowed to go through the roadblock without being killed; he then left. The Trial Chamber also found that a Mr[.] Nors was killed by those manning the roadblock shortly after the appellant’s visit; he was killed because he was perceived to be a Tutsi.” Concluding, however, that acquittal for the killing was proper because “the prosecution created an ambiguity as to whether . . . the charge was withdrawn”).

Kamuhanda, (Appeals Chamber), September 19, 2005, paras. 68, 72: “The Appeals Chamber agrees, Judge Schomburg dissenting, with the Appellant that the evidence does not support any connection between the distribution of weapons and the subsequent attack on the Gikomero Parish Compound [in Gikomero commune, Kigali-Rural

⁴⁸ See prior footnote.

prefecture]. It was neither established that the persons present during the meeting in the house of the Appellant's cousin took part in the attack, nor that the weapons he distributed were used at all." "[A] link between the participants of the meeting in the home of the Appellant's cousin [where Kamuhanda distributed weapons] and the attackers has not been established"

See also Kamuhanda, (Appeals Chamber), Separate And Partially Dissenting Opinion Of Judge Mohamed Shahabuddeen, September 19, 2005, paras. 395-96, 398: Agreeing with the Appeals Chamber's finding that there was no nexus between the weapons distribution and the Gikomero Parish Compound massacre due to a lack of a finding of nexus or substantial contribution by the Trial Chamber: "my opinion being that the Trial Chamber did not make that finding." "[W]hen it comes to an element of the offence, a clear finding is necessary." "Principles of deference do not require the Appeals Chamber to uphold a judgement on the basis that the Trial Chamber *could* reasonably have made the necessary factual finding when, as it seems to me, the Trial Chamber did not in fact do so." "[I]t is not for the Appeals Chamber to fill in that lacuna in the trial judgement."

But see Kamuhanda, (Appeals Chamber), Separate Opinion Of Judge Wolfgang Schomburg, September 19, 2005, paras. 367, 370, 383, 386-89: "I respectfully disagree with the decision of the majority" "The Trial Chamber made a finding on the nexus between the distribution of the weapons and the massacre based on the entirety of the evidence which was before it." "The Appellant's words, when considered in the close temporal and geographical context of the massacre at Gikomero Parish Compound, allow a reasonable trier of fact to find that the distribution of weapons substantially contributed – both physically and psychologically – to the massacre, a finding the Trial Chamber did indeed make." (But agreeing with the Appeals Chamber's conclusion that Kamuhanda should not be convicted of both aiding and abetting and ordering based on the same facts, and thus agreeing with the decision to find him responsible for ordering only).

3) assistance need not be indispensable

Seromba, (Trial Chamber), December 13, 2006, para. 307: "Aiding and abetting must have a substantial effect on the commission of the crime, but does not necessarily constitute an indispensable element, i.e. a *conditio sine qua non*, of the crime." *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 469 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 33 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 766 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 33 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 597: "Such acts of assistance . . . need not have actually caused the consummation of the crime by the actual perpetrator, but must have had a substantial effect on the commission of the crime by the actual perpetrator."

4) assistance need not be at same time offense is committed

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 482: "[T]he *actus reus* of aiding and abetting may occur before, during or after the principal

crime.” *See also Kamubanda*, (Trial Chamber), January 22, 2004, para. 597 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 766 (similar).

Nzabirinda, (Trial Chamber), February 23, 2007, para. 16: “The accused’s participation may take place at the planning, preparation or execution stage of the crime . . . occurring before or after the act of the principal offender.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 33 (same).

Seromba, (Trial Chamber), December 13, 2006, para. 307: “Except in the case of the ‘approving spectator,’ assistance may be provided prior to or during the commission of the crime” *See also Kamubanda*, (Trial Chamber), January 22, 2004, para. 597 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 766 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 385 (similar).

Bagilishema, (Trial Chamber), June 7, 2001, para. 33: “The assistance need not be provided at the same time that the offence is committed.”

For discussion of “the ‘approving spectator,’” see Section (IV)(g)(ii)(9), this Digest.

5) assistance may consist of physical acts, practical assistance, verbal statements or moral support

Ndindababizi, (Trial Chamber), July 15, 2004, para. 457: “The assistance and encouragement may consist of physical acts, verbal statements, or even mere presence.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 766: “The contribution of an aider and abettor . . . may take the form of practical assistance, encouragement or moral support”

Semanza, (Trial Chamber), May 15, 2003, para. 385: “[E]ncouragement or support may consist of physical acts, verbal statements, or, in some cases, mere presence as an ‘approving spectator.’”

For discussion of how presence combined with authority can constitute “assistance,” see “the ‘approving spectator,’” Section (IV)(g)(ii)(9)(b), this Digest.

6) presence generally not required

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 372: “[C]ontrary to Imanishimwe’s assertion, proof that he was present during the massacre is not necessary here. The ICTY Appeals Chamber [in *Blaskić*] has had occasion to point out that an aider and abettor may participate before, during or after the crime has been perpetrated and at a certain distance from the scene of the crime. The Appeals Chamber adopts these findings”

Seromba, (Trial Chamber), December 13, 2006, para. 307: “[I]t is not necessary for the person providing assistance to be present during the commission of the crime.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 471 (similar); *Bisengimana*, (Trial

Chamber), April 13, 2006, para. 35 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 484 (similar).

Bagilishema, (Trial Chamber), June 7, 2001, para. 33: “[T]he participation in the commission of the crime does not require actual physical presence or physical assistance.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 43: “[I]t is not necessary that the person aiding and abetting another to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the offence.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 125 (similar).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 200: “It is not presupposed that the accused must be present at the scene of the crime, nor that his contribution be a direct one. That is to say . . . the role of the individual in the commission of the offence need not always be a tangible one. This is particularly pertinent where the accused is charged with ‘aiding’ or ‘abetting’ of a crime.”

Compare “presence required” as to “the ‘approving spectator,’” Section (IV)(g)(ii)(9)(a), this Digest.

7) authority over principal perpetrator not required

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 672: “[I]n order to convict a defendant of aiding and abetting another in the commission of a crime, it is unnecessary to prove that he had authority over that other person; it is sufficient to prove that the defendant’s acts or omissions substantially contributed to the commission of the crime by the principal perpetrator.” *See also id.*, para. 966 (similar).

Muhimana, (Appeals Chamber), May 21, 2007, para. 189: “For an accused to be convicted of abetting an offence, it is not necessary to prove that he had authority over the principal perpetrator.”

8) tacit approval and encouragement may suffice

Muvunyi, (Appeals Chamber), August 29, 2008, para. 80: “An accused may be convicted of aiding and abetting when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime. In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence at or very near the crime scene, especially if considered together with his prior conduct, which allows the conclusion that the accused’s conduct amounted to official sanction of the crime and thus substantially contributed to it. The question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry.” *But see id.*, paras. 73-88 (reversing aiding and abetting genocide conviction: “[T]he Appeals Chamber finds that the Trial Chamber erred in inferring from the evidence presented that Muvunyi had knowledge of or tacitly approved of the killing of Tutsis at the *Groupe scolaire*”).

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 386: “In cases where aiding and abetting by tacit approval and encouragement has been applied, the combination of a position of authority and physical presence at the crime scene have allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 33: “Mere encouragement or moral support by an aider and abettor may amount to ‘assistance.’ The accomplice need only be ‘concerned with the killing.’”

See “the ‘approving spectator,’” immediately below.

9) the “approving spectator”

Seromba, (Trial Chamber), December 13, 2006, para. 307: “[Participation] may also consist in the mere presence of the accused at the scene of the crime, conceptualized in the theory of the ‘approving spectator.’”

Muvunyi, (Trial Chamber), September 12, 2006, para. 472: “[Responsibility] for aiding and abetting can also be incurred by way of omission such as the case of the so-called ‘approving spectator’ where a person in a position of authority is present either at the scene of the crime or within its immediate vicinity, under circumstances where his presence leads the perpetrators to believe that he approved, encouraged or was giving moral support to their actions.”

Niyitegeka, (Trial Chamber), May 16, 2003, para. 461 “[I]n *Bagilishema*, it was held that presence, when combined with authority, may constitute assistance, in the form of moral support. An approving spectator, who is held in such respect by other perpetrators that his presence encourages them in their conduct, may be guilty in a crime against humanity.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 200-01: “[A]n approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct” may be held responsible.

See also “aiding and abetting by omission,” Section (IV)(g)(ii)(10), this Digest.⁴⁹

(a) presence required

Nzabirinda, (Trial Chamber), February 23, 2007, para. 18: “Unlike other forms of aiding and abetting, ‘criminal responsibility as an “approving spectator” does require actual

⁴⁹ Some cases discuss “aiding and abetting by omission” and some discuss the “approving spectator” theory. While the doctrines appear to substantially overlap, Trial Chambers have been inconsistent as to whether these doctrines are the same. Although the Trial Chamber in *Muvunyi* suggested that the doctrines are the same, the Trial Chamber in *Zigiranyirazo* more recently suggested that they were not. Compare *Muvunyi*, (Trial Chamber), September 12, 2006, para. 472 (“[responsibility] for aiding and abetting can also be incurred by way of omission such as the case of the so-called ‘approving spectator’”), with *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 386 (“This form of aiding and abetting [approval and encouragement combined with a position of authority and physical presence] is not, strictly speaking, criminal responsibility for omission”).

presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.” See also *Seromba*, (Trial Chamber), December 13, 2006, para. 308 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 386 (similar).

(b) presence alone insufficient/must have a significant legitimizing or encouraging effect

Seromba, (Trial Chamber), December 13, 2006, para. 308: “In the case of the ‘approving spectator,’ the mere presence of the accused at the scene of the crime is insufficient in itself to establish that he has aided and abetted the commission of the crime, unless it is shown to have a significant legitimizing or encouraging effect on the actions of the principal offender The authority of the accused constitutes an important factor in assessing of [*sic*] the impact of the accused’s presence.”

Bisengimana, (Trial Chamber), April 13, 2006, para. 34: “Mere presence at the crime scene may constitute aiding and abetting where it is demonstrated to have a significant encouraging effect on the principal offender, particularly if the individual standing by was the superior of the principal offender or was otherwise in a position of authority. In those circumstances, an omission may constitute the *actus reus* of aiding and abetting, provided that this failure to act had a decisive effect on the commission of the crime.”

Ndindababizi, (Trial Chamber), July 15, 2004, para. 457: “The presence of a person in a position of authority at a place where a crime is being committed, or at which crimes are notoriously committed, may convey approval for those crimes which amounts to aiding and abetting. It is not the position of authority itself that is important, but rather the encouraging effect that a person holding the office may lend to events.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 600: “An accused’s position of superior authority, in and of itself, does not suffice to conclude that the accused, by his or her mere presence at the scene of the crime, encouraged or supported the offence. The presence of the accused at the crime site, however, may be perceived as a significant indicium of his or her encouragement or support.” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 769 (same).

Bagilishema, (Trial Chamber), June 7, 2001, para. 34: The Chamber held that “presence, when combined with authority, may constitute assistance (the *actus reus* of the offence) in the form of moral support” and that “an approving spectator who is held in such respect by other perpetrators that his presence encourages them in their conduct, may be guilty [of] a crime against humanity.” “Insignificant status may, however, put the ‘silent approval’ below the threshold necessary for the *actus reus*.”

(c) *mens rea*

Seromba, (Trial Chamber), December 13, 2006, para. 310: “The requisite *mens rea* in the more specific case of the ‘approving spectator’ is for the accused to know that his presence would be seen by the perpetrator of the crime as encouragement or support.” See also *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 600 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 389 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 472: “The *mens rea* required for [responsibility] as an approving spectator is knowledge on the part of the Accused that the perpetrators would see his presence as approval or encouragement.”

Bisengimana, (Trial Chamber), April 13, 2006, para. 36: “With respect to an aider and abettor who is in a position of authority *vis-à-vis* the principal offender, his *mens rea* may be deduced from the fact that he knew that his presence would be interpreted by the principal offender as a sign of support or encouragement.”

See also Seromba, (Trial Chamber), December 13, 2006, para. 310: “The *mens rea* of the approving spectator may be deduced from the circumstances, and may include prior concomitant behaviour, for instance allowing crimes to go unpunished or providing verbal encouragement to commit such crimes.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 769 (similar).

(d) application—approving spectator

Nzabirinda, (Trial Chamber), February 23, 2007, paras. 31-35, 38: “The Accused admitted that he attended several meetings at the Sahera *secteur* office [Ngoma commune, Butare prefecture] where only Hutu and killers that the Accused knew as his neighbours were present. He admitted that he was present at such meetings as an ‘approving spectator.’ He also admitted that, following the meetings, systematic attacks were launched on Tutsi families living on his hill. He further admitted that during one attack, Pierre Murara was murdered at a location close to the meeting place, where the Accused was present as an ‘approving spectator.’”

“Although he knew that systematic killings had occurred after the meetings, the Accused never stopped attending them, knowing that the purpose of the meetings was in reality to prepare and encourage the hunting down and killing of Tutsi. At the meetings, the Accused did not at any time or in no manner openly object to these killings.”

“The Accused admitted that as a former youth *encadreur*, political personality, intellectual and a relatively affluent businessman, he did exert obvious moral authority over the population of his *secteur*, especially its youth, and over the country people living on his hill. The Accused also admitted that his presence at the meetings had a decisive influence on the criminal elements in their midst as he was a person held in high esteem by his fellow citizens, and with the circumstances prevailing in his *secteur*, conveyed the impression of his being an ‘approving spectator.’ He also knew that his silence would be considered by the assailants as tacit approval of the preparations for the killings.”

“The Accused also admitted that after 19 April 1994, roadblocks were erected in his *secteur* and that he knew that they were used for identity checks and were one of the means employed in the campaign of killings in the *secteur*; that, at the request of the authorities, he had manned the Kabuga roadblock on two occasions, along with some *Interahamwe* of Sahera *secteur*; that he had encouraged the murder of Joseph Mazimpaka by Mugenzi near the Kabuga roadblock where the Accused was present as an ‘approving spectator.’”

“The Accused admitted that the murders of Joseph Mazimpaka and Pierre Murara were committed in his *secteur*, at a location close to those of the meetings and roadblocks respectively where he was present as an ‘approving spectator.’”

“On the basis of the facts acknowledged by the Accused with respect to the murders of Pierre Murara and Joseph Mazimpaka, the Chamber found the Accused criminally responsible not only for the attendance and encouragement that he provided as an ‘approving spectator’ at the preparatory meetings but also for his presence as an ‘approving spectator’ close to the locations where Pierre Murara and Joseph Mazimpaka were murdered.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 762: “The Chamber . . . finds that Imanishimwe aided and abetted in the torture of Witness MG and the other three detainees with him under Article 6(1) of the Statute, given Imanishimwe’s presence in the immediate vicinity during the mistreatment. The Chamber finds that the principal perpetrators would have perceived Imanishimwe’s presence during the torture as approval of their specific conduct and methods of torture and that it would have had a substantial effect on their continued criminal acts, in light of Imanishimwe’s role as camp commander, his failure to stop the torture, the nature and frequency of unlawful acts occurring at the camp between April and July 1994, his presence during prior mistreatment, and the Chamber’s inference that Imanishimwe issued orders authorizing the mistreatment of civilians with suspected connections to the RPF [Rwandan Patriotic Front].”

10) aiding and abetting by omission

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 370: “[T]he *actus reus* of aiding and abetting may, in certain circumstances, be perpetrated through an omission.”

Nzabirinda, (Trial Chamber), February 23, 2007, para. 17: “With respect to criminal responsibility incurred through omission, a person’s mere presence at the crime scene may constitute aiding and abetting where it is demonstrated that his presence had a significant encouraging effect on the principal offender, particularly if the individual standing by was the superior of the principal offender or was otherwise in a position of authority. In such circumstances, an omission to act may constitute the *actus reus* of aiding and abetting, provided that the failure to act had a decisive effect on the commission of the crime. This form of criminal responsibility ‘is derived not from the omission alone, but from the omission combined with the choice to be present.’”

Mpambara, (Trial Chamber), September 11, 2006, paras. 22-23: “Evidence which is characterized as an omission can be used to show that an accused aided and abetted a crime. A well-established example is the mere presence of a person in authority at the scene of a crime. Such presence could ‘bestow[] legitimacy on, or provide[] encouragement to, the actual perpetrator,’ particularly when the accused is in a position of some authority over the attacker. [Responsibility] is not automatic, even for a person of high office, and must be proven by showing that the accused’s inaction had an encouraging or approving effect on the perpetrators; that the effect was substantial; and that the accused knew of this effect and of the perpetrator’s criminal intention, albeit

without necessarily sharing the perpetrators' criminal intent. Of course, by choosing to be present, the accused is taking a positive step which may contribute to the crime. Properly understood, criminal responsibility is derived not from the omission alone, but from the omission combined with the choice to be present."

"Other examples of aiding and abetting through failure to act are not to be easily found in the annals of the *ad hoc* Tribunals. The Appeals Chamber has left the category open, observing that 'in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting.' On the other hand, inaction without being present at the scene of a crime has been excluded as a basis for proving these elements:

Criminal responsibility as an 'approving spectator' does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.

This would not, of course, preclude aiding and abetting [responsibility] for a person who had previously committed positive acts of assistance or encouragement which contributed substantially to the commission of a crime in his absence."

Rutaganira, (Trial Chamber), March 14, 2005, paras. 64-65: "The Chamber must also satisfy itself that aiding and abetting as provided for in Article 6(1) can be constituted by an omission and not only by an act. For instance, in *Blaškić*, the ICTY Trial Chamber held that 'the *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*.' In *Rutaganda*, the Trial Chamber of the Tribunal held that 'an accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.'" "Accordingly, the Chamber finds that participation by omission in extermination as a crime against humanity as admitted to by the Accused Vincent Rutaganira is covered under Article 6(1) of the Statute." See *Rutaganda*, (Trial Chamber), December 6, 1999, para. 41.

See also *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 16: "The accused's participation . . . may take the form of a positive act or an omission" See also *Bisengimana*, (Trial Chamber), April 13, 2006, para. 33 (same); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 597 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 766 (similar).

See also "the 'approving spectator,'" Section (IV)(g)(ii)(9), this Digest.⁵⁰

(a) criteria

Rutaganira, (Trial Chamber), March 14, 2005, para. 68: "In determining participation by omission in extermination as a crime against humanity as admitted to by the Accused, the Chamber addressed the following questions:

- (i) Did the Accused have authority and did he choose to not exercise it?
- (ii) Did the Accused have a moral authority over the principals such as to prevent them from committing the crime and did he choose not to exercise it?

⁵⁰ See prior footnote.

(iii) Was the Accused under a legal duty to act which he failed to fulfill?”

For application of these criteria, see *id.*, paras. 69-84 (analyzing Rutaganira’s power to act, moral authority, and legal duties).

(b) substantial contribution or effect requirement

Rutaganira, (Trial Chamber), March 14, 2005, paras. 89-90: “With respect to aiding and abetting by omission, such [substantial] contribution or effect [which is required for aiding and abetting] can be assessed only against the effectiveness of any action taken to prevent the commission of the crime.” “The Chamber finds that in the instant case, Vincent Rutaganira’s intervention saved some people who had been targeted by attackers. It can be inferred from such a finding that a similar intervention by the Accused against some civilians who participated in the attacks on Mubuga church would have had the same decisive effect in sparing human lives.”

(c) international law places duty to act upon persons vested with public authority

Rutaganira, (Trial Chamber), March 14, 2005, paras. 78-79: “The Chamber wishes to add, *ad abundantiam*, that international law also places upon a person vested with public authority a duty to act in order to protect human life. Indeed, the State to which it falls to carry out international obligations, can only act through all its representatives, be they in the upper reaches or at lower levels of Government. The State itself can fulfil its international obligations and not incur any responsibility not only because of its representatives’ respect for human rights but also by reason of actions taken, in the performance of their duties, to prevent any violation of the said rights. Hence, the need to incorporate international standards in municipal law, as provided for by all relevant international agreements. The State of Rwandan [*sic*] did so, in particular, with respect to the standards set forth in international human rights instruments, international humanitarian law and respecting individual criminal responsibility for crimes against humanity and war crimes.” “Consequently, as any person, all public authorities have a duty not only to comply with the basic rights of the human person, but also to ensure that these are complied with, which implies a duty to act in order to prevent any violation of such rights.”

(d) duty to act exists even if personal risk is involved

Rutaganira, (Trial Chamber), March 14, 2005, para. 81: “[V]iolence to physical well-being suffered by thousands of people during the said events affects the very fundamental interests of Humanity as a whole, and the protection of such interests cannot be counterbalanced by the mere personal risk that may have been faced by any person in a position of authority who failed to act in order to assist people whose lives were in danger.”

(e) application—aiding and abetting by omission

Rutaganira, (Trial Chamber), March 14, 2005, paras. 86, 95-98, 87: “Vincent Rutaganira stood a few metres away from the place where the attackers assembled before and after the attacks. Thus, he was in a position to observe them as they assembled near his house and subsequently to know that attacks were being perpetrated on Mubuga church, between 14 and 17 April 1994.”

“The Chamber finds that, as reflected in the guilty plea agreement, the Accused knew that between 8 and 15 April 1994, thousands of Tutsi civilians had sought refuge at Mubuga church, in Mubuga *secteur* (Gishyita *commune*) from attacks targeting their ethnic group. Vincent Rutaganira admits that the attack on the Tutsi civilians who had assembled in Mubuga church was part of a widespread and systematic attack. Indeed, the Chamber notes that, by virtue of his position as *conseiller communal* for Mubuga *secteur*, the Accused must have known about the serious events that were occurring in his *secteur* and the crimes that were being perpetrated there on a large scale.” “In the light of the above the Chamber finds that the Accused knew about the general context in which the massacres were being perpetrated at Mubuga church during the relevant period, namely that his omissions were part of a widespread and systematic attack targeted at the civilian population on ethnic grounds.”

“The Chamber finds that Vincent Rutaganira was aware not only of his duties as *conseiller communal* for Mubuga *secteur* but also of his moral authority *vis à vis* the civilian population in his *secteur*. Indeed, Vincent Rutaganira admits that ‘[although he was *conseiller* of Mubuga *secteur*, he did not act to protect the Tutsis who had sheltered at Mubuga church in Mubuga *secteur* (Gishyita *commune*) between 8 and 15 April 1994].’” “Accordingly, the Chamber finds that the Accused was aware that his failure to act would further the commission of the crime.”

“Therefore, the Chamber finds that Vincent Rutaganira participated by omission in extermination as a crime against humanity both before and during the massacre of refugees perpetrated at Mubuga church.”

11) aiding and abetting genocide

(a) aiding and abetting genocide is a crime, even if not included in the Genocide Convention

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 371: “[T]he Appellant argues that he could not have been charged and convicted of aiding and abetting genocide because aiding and abetting was not included in the Genocide Convention and is therefore not an act punishable under the Convention or under Article 6(1) of the Statute. The Appeals Chamber does not subscribe to such an interpretation of the Convention or the Statute. As recently held in the [ICTY’s] *Krstić* Appeal Judgement, the prohibited act of complicity in genocide, which is included in the Genocide Convention and in Article 2 of the Statute, encompasses aiding and abetting. Moreover, Article 6(1) of the Statute expressly provides that a person ‘who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.’ Accordingly, [responsibility] for the crime of genocide, as defined in Article 2 of the Statute, may attach on grounds of conduct characterized as aiding and abetting.”

(b) defined/ *actus reus*

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 508: “[T]o establish that Gérard Ntakirutimana aided and abetted genocide requires proof that (i) by his acts and conduct Gérard Ntakirutimana assisted, encouraged or lent moral support to the perpetration of genocide by others which had a substantial effect upon

the perpetration of that crime, and (ii) Gérard Ntakirutimana knew that the above acts and conduct assisted the commission of genocide by others.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 471: “Aiding and abetting genocide refers to ‘all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.’”

(c) *mens rea*

Seromba, (Appeals Chamber), March 12, 2008, para. 56: “[I]n cases of crimes requiring specific intent, such as genocide, it is not necessary to prove that the aider and abettor shared the *mens rea* of the principal, but that he must have known of the principal perpetrator’s specific intent.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 364: “The requisite *mens rea* for aiding and abetting genocide is the accomplice’s knowledge of the genocidal intent of the principal perpetrators.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 409 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 500-01: “The ICTY Appeals Chamber has explained, on several occasions, that an individual who aids and abets other individuals committing a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime. More recently, as the Prosecution argued at the Appeal hearing, in the *Krstić* case the ICTY Appeals Chamber considered that the same principle applies to the Statute’s prohibition of genocide and that ‘[t]he conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator’s genocidal intent is permitted by the Statute and case-law of the Tribunal.’ In reaching this conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of [responsibility] from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same *mens rea*, while other forms of complicity may require proof of specific intent.”

“The Appeals Chamber endorses this view and finds that a conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator’s genocidal intent is permitted by the Statute and case-law of this Tribunal. Accordingly, the Trial Chamber erred in determining that the *mens rea* for aiding and abetting genocide requires intent to commit genocide.”⁵¹

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 387: “The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor, or his omissions, assist in the commission of the crime by the principal. It is not necessary for the accused to know the precise crime that was intended and that was committed, but he must be aware of its essential elements.”

⁵¹ For discussion of complicity, see “distinguishing complicity/ accomplices from aiding and abetting,” Section (IV)(g)(vi), and “relationship between complicity and aiding and abetting,” Section (I)(e)(v)(3), this Digest.

Muvunyi, (Trial Chamber), September 12, 2006, para. 470: “With respect to aiding and abetting genocide, the only mental element required is proof that the Accused knew of the genocidal intent of the actual perpetrator, but he need not share this specific intent.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 457: “In relation to the requisite mental element, it is now firmly established that the person aiding and abetting need not possess the principal’s intent to commit genocide, but must at the least have knowledge of the principal’s general and specific intent.”

See also Seromba, (Appeals Chamber), March 12, 2008, para. 57: “[T]here is no requirement of a ‘plan’ in order to establish an intent to aid and abet genocide.”

(d) application—aiding and abetting genocide

Seromba, (Appeals Chamber), March 12, 2008, paras. 183-84: “The Trial Chamber found that Athanase Seromba turned Tutsi employees and Tutsi refugees out of Nyange parish [in Kibuye prefecture] and thereby assisted in the killing of several Tutsi refugees, including Patrice and Meriam. It found that in light of the security situation that prevailed in Nyange parish, he could not have been unaware that he thereby substantially contributed to their being killed by the attackers. The Trial Chamber found that based on this conduct, Athanase Seromba aided and abetted the killing of refugees in Nyange church, and found him guilty of aiding and abetting genocide.”

“The Appeals Chamber is not convinced that, based on these factual findings, it was unreasonable for the Trial Chamber to find that Athanase Seromba aided and abetted in the killing of the refugees, including Meriam and Patrice, instead of finding him guilty of ‘committing.’ The Appeals Chamber observes that the circumstances of this case are similar to those in the *Gacumbitsi* case, where the Appeals Chamber found that Sylvestre Gacumbitsi, by expelling his tenants who were subsequently killed, and ‘knowing that by so doing he was exposing them to the risk of being targeted by Hutu attackers on grounds of their ethnic origin’ aided and abetted murder. The Appeals Chamber therefore affirms the Trial Chamber’s finding that Athanase Seromba aided and abetted genocide in relation to the killings of Patrice and Meriam, which are separate acts from the killings resulting from the destruction of the church.”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 672: “In the instant case, the Appellant [Ngeze] himself identified and selected Tutsi at the roadblocks; he also gave instructions to those manning the roadblocks [in Gisenyi prefecture] to stop and search every vehicle which passed, to ask for identity cards from those in the vehicles, and to set aside those whose identity cards indicated that they were Tutsi, who were then taken to *Commune Rouge* and killed The Appeals Chamber is of the view that the Trial Chamber was entitled to conclude on the basis of these factual findings that the Appellant aided and abetted the commission of genocide. Furthermore, there is no doubt that the Appellant was aware that his acts were contributing to the commission of genocide by others.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 509: “It is clear from the Trial Chamber’s findings . . . that it found that the attacks were carried out with intent to destroy, in its whole, the Tutsi population at the Mugonero Complex

and in Bisesero. [Furthermore,] . . . it found that by his conduct and participation in the attacks Gérard Ntakirutimana had the intent to destroy, in whole, the Tutsi ethnic group. The only reasonable inference from . . . the above findings is that Gérard Ntakirutimana had knowledge that his acts and conduct had a substantial effect upon the commission of genocide by others. Accordingly, the Appeals Chamber finds that by the other acts of assistance identified by the Trial Chamber Gérard Ntakirutimana incurred criminal responsibility as an aider and abettor to genocide.” *See also id.*, paras. 491-92 (it was error to limit findings of responsibility for genocide to killings and harm personally inflicted, where Gérard Ntakirutimana was also charged with assisting others in committing genocide).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 532-33: “With respect to Elizaphan Ntakirutimana, the remaining findings [after various factual findings were quashed due to lack of notice] are: one day in May or June 1994, he transported armed attackers who were chasing Tutsi survivors at Murambi Hill [Bisesero region, Kibuye prefecture]; one day in the middle of May 1994, he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them; on this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers, who then chased these refugees singing, ‘Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests’; one day on May or June 1994 Elizaphan Ntakirutimana was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers, and he was part of a convoy which included attackers; and sometime between 17 April and early May 1994, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero, and he went to a church in Murambi where many Tutsi were seeking refuge and ordered attackers to destroy the roof of the church.” “These findings are sufficient to sustain the Trial Chamber’s finding of criminal responsibility on the part of Elizaphan Ntakirutimana for aiding and abetting the crime of genocide. The Appeals Chamber is satisfied that in carrying out these acts Elizaphan Ntakirutimana assisted, encouraged or lent moral support to the perpetration of genocide by others, and that his acts had a substantial effect upon the perpetration of that crime, and that he knew that these acts and conduct assisted the commission of genocide by others.” *See also id.*, para. 364 (finding *mens rea* for aiding and abetting genocide as to Elizaphan Ntakirutimana regarding attacks in Bisesero).

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 422-24, 426: “The Chamber will . . . consider the instructions issued by the Accused [at the Kiyovu roadblock in Kiyovu cellule, Kigali-ville prefecture]. In this respect, the Accused’s position of authority generally, and more specifically over Corporal Irandemba, his guard, who was in charge of the roadblock, is relevant. The Chamber considers that the Accused’s instruction to check identity cards ‘well’ with specific reference to Tutsi, after having seen dead bodies at the roadblock, and in light of the context of widespread and systematic attacks against Tutsi in Rwanda at that time, indicated to those manning the roadblock, his approval of, and support to, the killings. In the circumstances, the Chamber considers that the only reasonable conclusion is that his instruction must have been perceived by the people manning the roadblock as an encouragement to kill Tutsi. Additionally, in view of the Accused’s authority, and the Chamber’s finding that those with Tutsi identity cards were taken aside and killed, the Chamber has no doubt that his

encouragement substantially impacted on the perpetrators of the killings of Tutsi at the roadblock. Indeed, checking identity cards was a necessary step in the process of killing Tutsi at the roadblock and by his instruction that this be done well, the Accused encouraged the acts of killing which followed.”

“Additionally, the Chamber considers that the Accused’s instruction to Corporal Irandemba, to ensure that the men received food so that they could remain at the roadblock and continue with their duties, which was, to take Tutsi aside and kill them, would have had a substantial effect on the perpetration of the killings. Not only did his instruction have the effect of providing practical assistance to the killers, as food was delivered on another day from Camp Kigali, but it further demonstrated to Corporal Irandemba the Accused’s support for the killings, thereby encouraging even more the commission of the crimes.”

“Furthermore, the Chamber finds that in view of the above, particularly the context within which the roadblock existed, the killing of Tutsi at the roadblock, the Accused having seen corpses at the roadblock, and having issued instructions to check identity cards well, with specific reference to Tutsi, shows beyond reasonable doubt that the Accused, at the very least, knew that those he encouraged and assisted possessed genocidal intent. Thus, the Chamber finds beyond reasonable doubt that the Accused possessed the requisite intent for aiding and abetting genocide at the Kiyovu roadblock.”

“Accordingly, the Chamber finds that, through the instructions he issued, the Accused substantially contributed to the killings of Tutsi at the Kiyovu roadblock, thereby aiding and abetting the commission of acts of genocide.”

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 286: “[T]he Accused, on several occasions, drove the attackers in a convoy, with the vehicle in which he was always leading the convoy. The attackers were transported in communal vehicles, the use of which the Accused was in a position to prevent. That the Accused was leading the convoy is sufficient proof that he consented to the use of such vehicles. Lastly, the Accused was present throughout the attack on the Tutsi in Rusumo. The Accused was also at Nyarubuye Parish on 15 April, and in the vicinity of the parish on 16 and 17 April 1994. The Chamber therefore finds that Sylvestre Gacumbitsi aided or abetted in the perpetration of the massacres, thereby encouraging the commission of the crime of genocide in Rusumo *commune* in April 1994.”

See also Ndindabahizi, (Trial Chamber), July 15, 2004, paras. 462, 461, 463-64 (finding Ndindabahizi guilty of aiding and abetting genocide at Gitwa Hill in the Bisesero Hills, Kibuye prefecture).

See also Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Dissenting Opinion of Judge Williams, paras. 6-8, 16 (arguing that Bagambiki should have been convicted under Article 6(1) for aiding and abetting genocide in relation to the Gashirabwoba Football Field massacre, as to which Bagambiki was acquitted).

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 421 (the Accused’s providing firearms to persons at the Kiyovu roadblock was not part of aiding and abetting conviction because the arms were intended to support the battlefield, not for use at the roadblock).

iii) *mens rea*—aiding and abetting

Muvunyi, (Appeals Chamber), August 29, 2008, para. 79: “The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 56 (same); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 189 (same); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 370 (similar).

Nzabirinda, (Trial Chamber), February 23, 2007, para. 19: “The *mens rea* of an aider and abettor is demonstrated by proof of his knowledge that his act is assisting the commission of the crime by the principal offender. The aider and abettor must have known the intent of the principal offender” *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 482 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 36 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 599 (similar, but adding that the aider and abettor “must be seen to have acted with awareness that he or she . . . supported the commission of the crime”); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 768 (same as *Kamuhanda*).

Seromba, (Trial Chamber), December 13, 2006, para. 309: “The *mens rea* of aiding and abetting requires that the accused be aware that his conduct would contribute substantially to the commission of the *actus reus* of the offence or that the perpetration of the crime would be the possible and foreseeable result of his conduct It is not necessary, however, that the accused share the *mens rea* of the principal offender.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 470: “The mental element required for [responsibility] as an aider and abettor is knowledge of the Accused that his conduct (either a positive act or culpable omission) assists the principal perpetrator in the commission of the crime.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, paras. 461, 471 (similar).

Mpambara, (Trial Chamber), September 11, 2006, para. 16: “The aider and abettor need not (although he or she may) share the principal’s criminal intent, but must at least know that his or her acts are assisting the principal to commit the crime.”

Rutaganira, (Trial Chamber), March 14, 2005, para. 92: “Pursuant to the case-law of the Tribunal and of ICTY, the Chamber is of the opinion that the *mens rea* of an accomplice [in that case, an aider and abetter] lies in his knowledge of, on the one hand, the *mens rea* of the principal perpetrator of the crime and, on the other hand, of the fact that his conduct would further the perpetration of the crime.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 32: “An accomplice must *knowingly* provide assistance to the perpetrator of the crime, that is, he or she must know that it will contribute to the criminal act of the principal. Additionally, the accomplice must have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.”

See also Seromba, (Appeals Chamber), March 12, 2008, para. 146: “[T]he requisite *mens rea* for aiding and abetting the crime of extermination is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal perpetrator(s).”

See also N̄zabirinda, (Trial Chamber), February 23, 2007, para. 26: “The *mens rea* as an aider or abettor of murder, as a crime against humanity, is that the accused knew of the criminal intent of the principal perpetrator and knew that his actions or omissions assisted the principal to commit the crime.”

But see Akayesu, (Trial Chamber), September 2, 1998, para. 485: “[W]hen dealing with a person [a]ccused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such; whereas . . . the same requirement is not needed for complicity in genocide.”

See also discussion of “*mens rea*” for Article 6(1) generally, Section (IV)(b)(iv)(2), this Digest.

1) the accused must be aware of the essential elements of the crime, but not the precise offense

N̄zabirinda, (Trial Chamber), February 23, 2007, para. 19: “[A]lthough he need not know the precise offence being committed by the principal offender, [the aider and abettor] must be aware of the essential elements of the crime.”

Seromba, (Trial Chamber), December 13, 2006, para. 309: “The accused must be aware of the essential elements of the crime, including the *mens rea* of the principal offender.”

2) *mens rea* must exist at the time of support

Seromba, (Appeals Chamber), March 12, 2008, paras. 57-58: “[T]he Appeals Chamber does not consider that the Prosecution was required to establish that Athanase Seromba had the requisite *mens rea* to aid and abet genocide prior to the arrival of the Tutsi refugees at the church. Rather, only at the time that he provided support to the principal perpetrators through his acts found to have formed the *actus reus* in question, must he have known the specific intent of the perpetrators.” “The Appeals Chamber therefore finds that Athanase Seromba has failed to show any error in the Trial Chamber’s analysis of the required mental element when finding that he had the requisite *mens rea* for aiding and abetting genocide.”

See also “*mens rea*” as to “the ‘approving spectator,’” Section (IV)(g)(ii)(9)(c), this Digest.

See also “*mens rea*” as to “aiding and abetting genocide,” Section (IV)(g)(ii)(11)(c), this Digest.

3) application—*mens rea*

Seromba, (Appeals Chamber), March 12, 2008, para. 65: “[T]he relevant *mens rea* for aiding and abetting genocide is knowledge of the principal perpetrator’s specific genocidal intent. No specific ties between the aider and abettor and the principal perpetrators are required by law. Moreover, the Appeals Chamber considers that Athanase Seromba has failed to substantiate any error by the Trial Chamber when it found that ‘Athanase Seromba could not have been unaware of the intention of the attackers and other *Interahamwe* militiamen to commit acts of genocide against Tutsi refugees in Nyange parish [Kibuye prefecture].’ It was not unreasonable for the Trial Chamber to conclude that due to the situation which prevailed throughout Rwanda and specifically based on the attacks he personally witnessed, as established by the evidence before the Trial Chamber, Athanase Seromba knew of the genocidal intent of the attackers and other *Interahamwe* militia.” (However, the aiding and abetting conviction was largely reversed by the Appeals Chamber because the majority of the crimes were held to have constituted “committing.”)

Seromba, (Appeals Chamber), March 12, 2008, para. 146: “[T]he requisite *mens rea* for aiding and abetting the crime of extermination is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal perpetrator(s). This standard was correctly applied by the Trial Chamber. Indeed, the Trial Chamber first considered that Athanase Seromba could not have been unaware of the legitimising effect his words would have on the actions of the communal authorities and the bulldozer driver, before finding that he had the requisite knowledge that his approval of the authorities’ decision to destroy the church and his encouraging words to the bulldozer driver would substantially contribute to the destruction of the church and the death of the numerous refugees inside.” (However, the aiding and abetting conviction was largely reversed by the Appeals Chamber because the majority of the crimes were held to have constituted “committing.”)

iv) application—aiding and abetting

Muhimana, (Appeals Chamber), May 21, 2007, para. 190: “The Appeals Chamber is not convinced that the Trial Chamber erred in convicting the Appellant for abetting the rape of Witness BG when he gave permission to Mugonero to ‘take away’ Witness BG. The Trial Chamber concluded that the Appellant was a well-known and influential person in his community. The Trial Chamber further found that the Appellant knew that Mugonero wanted to rape the witness. The Appeals Chamber considers that a reasonable trier of fact could find that the Appellant’s actions in such circumstances amounted to encouragement which had a substantial affect on Mugonero’s subsequent rape of Witness BG. In the *Semanza* Appeal Judgement, the Appeals Chamber reached a similar conclusion in respect of an ‘influential’ accused who encouraged the rape of Tutsi women by giving ‘permission’ to rape them.” See *Semanza*, (Appeals Chamber), May 20, 2005, paras. 256, 257.

Karera, (Trial Chamber), December 7, 2007, para. 547: “The Chamber has . . . found that in April or May, Karera brought over twenty guns to the Rushashi commune office, which were aimed for use at the roadblocks By bringing guns, the Chamber

considers that Karera assisted in the killings of Tutsis. He therefore aided and abetted in the killings of Tutsis.”

See also Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Dissenting Opinion of Judge Williams, para. 15 (arguing Bagambiki aided and abetted in the murder of sixteen refugees who were killed after being removed from Kamarampaka Stadium and Cyanguu Cathedral—a crime as to which Bagambiki was acquitted).

See also “application—approving spectator,” Section (IV)(g)(ii)(9)(d); “application—aiding and abetting by omission,” Section (IV)(g)(ii)(10)(e); “application—aiding and abetting genocide,” Section (IV)(g)(ii)(11)(d), this Digest.

v) distinguishing joint criminal enterprise from aiding and abetting

See “distinguishing JCE from aiding and abetting; there is no aiding and abetting a JCE,” Section (IV)(f)(iv)(13), this Digest.

vi) distinguishing complicity/accomplice from aiding and abetting

Semanza, (Appeals Chamber), May 20, 2005, para. 316: “[T]he ICTY Appeals Chamber held in *Krstić* that ‘the terms “complicity” and “accomplice” may encompass conduct broader than that of aiding and abetting.’ “[A]n individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime,’ while ‘there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group.’ This was reaffirmed in *Ntakirutimana*, where this Appeals Chamber said: ‘[i]n reaching this conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of [responsibility] from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same *mens rea*, while other forms of complicity may require proof of specific intent.’”

See also “relationship between complicity and aiding and abetting,” Section (I)(e)(v)(3), this Digest.

V) COMMAND RESPONSIBILITY (ARTICLE 6(3))

a) Statute

Article 6:

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

b) Generally

i) command responsibility is customary international law

Muvunyi, (Trial Chamber), September 12, 2006, para. 473: “Article 6(3) of the Statute lays down the principle of superior or command responsibility which is well established in customary international law and specifically mentioned in the Geneva Conventions on international humanitarian law.”

ii) command responsibility historically

Kamuhanda, (Trial Chamber), January 22, 2004, para. 601: “Article 6(3) of the ICTR Statute addresses the criminal responsibility of a superior by virtue of his or her knowledge of the acts and omissions of subordinates and for failure to prevent, discipline, or punish the criminal acts of his or her subordinates in the preparation and execution of the crimes charged. The principle of superior responsibility, which derives from the principle of individual criminal responsibility as applied in the Nuremberg and Tokyo trials, was subsequently codified in Article 86 of the Additional Protocol I to the Geneva Conventions in 1977.”⁵² See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 770 (same).

iii) whether both individual criminal responsibility and command responsibility are possible

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 210: “The finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally, or in the alternative, under Article 6(3). The two forms of responsibility are not mutually exclusive. The Chamber must, therefore, consider both forms of responsibility charged in order to fully reflect the culpability of the accused in light of the facts.”

But see “cumulative convictions under Article 6(1) and 6(3): impermissible if for the same conduct; convict under Article 6(1) and consider superior position as an aggravating factor,” Section (VII)(a)(iv)(7), this Digest.

iv) Article 6(3) applies to all forms of individual criminal responsibility by a subordinate

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 485-86: “In the *Blagojević and Jokić* Appeal Judgement, the ICTY Appeals Chamber confirmed that an accused may be held responsible as a superior not only where a subordinate

⁵² The “Nuremberg and Tokyo trials” refer to the trials before the International Military Tribunal at Nuremberg, and the International Military Tribunal for the Far East (Tokyo) held after the close of World War II to try senior Axis officials of war crimes, crimes against humanity and crimes against the peace. See Charter of the International Military Tribunal (Nuremberg), annexed to the London Agreement of August 8, 1945; International Military Tribunal for the Far East (IMTFE) Charter (Tokyo).

committed a crime referred to in the Statute of ICTY, but also where a subordinate planned, instigated or otherwise aided and abetted in the planning, preparation or execution of such a crime” “The Appeals Chamber endorses this reasoning and holds that an accused may be held responsible as a superior under Article 6(3) of the Statute where a subordinate ‘planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute,’ provided, of course, that all the other elements of such responsibility have been established.”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 865: “[I]t is not necessary for the Appellant’s subordinates to have killed Tutsi civilians: the only requirement is for the Appellant’s subordinates to have committed a criminal act provided for in the Statute, such as direct and public incitement to commit genocide.”

c) Elements

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 484: “The Appeals Chamber recalls that, for the [responsibility] of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been committed; and (4) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.” *See also Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 143 (similar).

Karera, (Trial Chamber), December 7, 2007, para. 563: “The following three elements must be proven to hold a civilian or a military superior criminally responsible pursuant to Article 6(3) for crimes committed by subordinates: (a) the existence of a superior-subordinate relationship; (b) the superior’s knowledge or reason to know that the criminal acts were about to be or had been committed by his subordinates; and (c) the superior’s failure to take necessary and reasonable measures to prevent such criminal acts or to punish the perpetrator.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 474 (similar but phrased as four elements); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 627 (same as *Karera*); *Kamubanda*, (Trial Chamber), January 22, 2004, para. 603 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 772 (same as *Kamubanda*); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 38 (similar).

i) existence of a superior-subordinate relationship (element 1)

1) requires a formal or informal hierarchical relationship with effective control

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 341: “[T]he Trial Chamber’s general definition of superior responsibility [was as follows]:

a superior-subordinate relationship is established by showing a formal or informal hierarchical relationship. The superior must have possessed the power

or the authority, *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The superior must have had effective control over the subordinates at the time the offence was committed. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders.

This definition is consistent with the settled jurisprudence of both this Tribunal and the ICTY.” See also *Karera*, (Trial Chamber), December 7, 2007, para. 564 (same language as quoted); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 628 (same language as quoted).

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 84, 85: “The Appeals Chamber notes that the Trial Chamber applied the following test for establishing that a superior-subordinate relationship existed between the Appellant and the *Interahamwe*:

The test for assessing a superior-subordinate relationship, pursuant to Article 6(3), is the existence of a *de jure* or *de facto* hierarchical chain of authority, where the accused exercised effective control over his or her subordinates as of the time of the commission of the offence. The cognisable relationship is not restricted to military hierarchies, but may apply to civilian authorities as well.”⁵³

“The Appeals Chamber finds that the Trial Chamber correctly incorporated these elements into its definition of a superior.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 604: “The test for assessing a superior-subordinate relationship, pursuant to Article 6(3), is the existence of a *de jure* [*de jure*] or *de facto* [*de facto*] hierarchical chain of authority, where the accused exercised effective control over his or her subordinates as of the time of the commission of the offence.”

Semanza, (Trial Chamber), May 15, 2003, para. 401: “A superior-subordinate relationship requires a formal or informal hierarchical relationship where a superior is senior to a subordinate.”

2) effective control requires the material ability to prevent and/or punish

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 341: “[T]he Appeals Chamber recalls the conclusion of the ICTY Appeals Chamber in *Blaškić*:

The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.”

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 86: “[T]he Appeals Chamber recalls that a superior-subordinate relationship requires that it be found beyond reasonable doubt that the accused was able to exercise effective control over his or her subordinates. Under the effective control test, superiors, whether military or civilian, must have the *material* ability to prevent or punish criminal conduct.”

⁵³ For discussion of the application of Article 6(3) to civilians, see “Article 6(3) applies to civilian superiors,” Section (V)(d), this Digest.

Bagilishema, (Appeals Chamber), July 3, 2002, para. 50: “The power or authority to prevent or to punish does not arise solely from a *de jure* authority conferred through official appointment. Hence, ‘as long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.’”

Muvunyi, (Trial Chamber), September 12, 2006, para. 475: “While the formal legal status of the Accused may be relevant to the determination of effective control, the power to prevent or punish cannot be inferred solely on the basis of the existence of formal status. Indeed, as stated by the Appeals Chamber in the *Kajelijeli* Judgement, power or authority for the purposes of Article 6(3) responsibility can be attributed to superiors who hold their positions either on a *de jure* or a *de facto* basis. For this purpose, effective control reflects the superior’s material ability to prevent or punish the commission of offences by his subordinates. Where *de jure* authority is proved, a court may presume the existence of effective control on a *prima facie* basis. Such a presumption can, however, be rebutted by showing that the superior had ceased to possess the necessary powers of control over subordinates who actually committed the crimes.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 51 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 605: “By effective control, it is meant that the superior, whether a military commander or a civilian leader, must have possessed the material ability, either *de jure* [*sic*] or *de facto* [*sic*], to prevent or to punish offences committed by subordinates. The test to assess a superior-subordinate relationship, in the words of the Appeals Chamber in *Bagilishema* [*sic*], is:

[...] whether the accused exercised effective control over his or her subordinates; this is not limited to asking whether he or she had *de jure* [*sic*] authority. The ICTY Appeals Chamber held in the *Celebici* [*sic*] Appeal Judgment that ‘[a]s long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.’”

See also Kajelijeli, (Trial Chamber), December 1, 2003, para. 774 (same with italics).

Bagilishema, (Trial Chamber), June 7, 2001, paras. 39, 45: The “decisive criterion in determining who is a superior is his or her ability, as demonstrated by duties and competence, to effectively control his or her subordinates.” “[T]he essential element is not whether a superior had authority over a certain geographical area, but whether he or she had effective control over the individuals who committed the crimes”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 229-31: “The principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3).” The Chamber agreed with the ICTY’s decision in *Prosecutor v. Mucic et al.*, where it was held that “the superior have [*sic*] effective control over the persons committing the [crimes], in the sense of having the material ability to prevent and punish the commission of these

offences.” “[T]he ability to prevent and punish a crime is a question that is inherently linked with the given factual situation.”⁵⁴

See also Karera, (Trial Chamber), December 7, 2007, para. 564 (“This requirement [of effective control] is not satisfied by a simple showing of an accused individual’s general influence”); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 628 (similar).

See, e.g., Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 882 (“Although the Appellant doubtless exerted substantial influence over CDR [Coalition pour la défense de la République political party] militants and *Impuzamugambi* [CDR youth wing/militia], that is insufficient – absent other evidence of control – to conclude that he had the material capacity to prevent or punish the commission of crimes by all CDR militants and *Impuzamugambi*”).

3) consider both *de facto* and *de jure* authority

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 625: “The test for effective control is not the possession of *de jure* authority, but rather the material ability to prevent or punish the proven offences. Possession of *de jure* authority may obviously imply such material ability, but it is neither necessary nor sufficient to prove effective control.”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 143: “[The Trial Chamber’s] analysis focuses on the Appellant’s *de jure* authority -- specifically, whether the ‘law’ placed him in power and whether he was ‘a superior within a formal administrative hierarchy.’ The Trial Chamber does not appear to have considered the Appellant’s *de facto* authority. This was an error. A superior ‘possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment.” *See also Bagilishema*, (Appeals Chamber), July 3, 2002, paras. 59-62 (failure to consider *de facto* authority was error).

Bagilishema, (Appeals Chamber), July 3, 2002, para. 50: “Under Article 6(3), a commander or superior is the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate’s crime or to punish the commission of a crime by a subordinate after the crime is committed.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 39: “A position of command is a necessary condition for the imposition of command responsibility, but the existence of such a position cannot be determined by reference to formal status alone.” “The factor that determines [responsibility] is the actual possession, or non-possession, of a position of command over subordinates.” “[A]lthough a person’s *de jure* position as a commander in certain circumstances may be sufficient to invoke responsibility under Article 6(3), ultimately it is the actual relationship of command (whether *de jure* or *de facto*) that is required for command responsibility.”

⁵⁴ Most cases use the formulation “prevent or punish,” although *Kayishema* uses the formulation “prevent and punish.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 217-23: The Chamber held that it is “under a duty . . . to consider the responsibility of all individuals who exercised effective control, whether that control be *de jure* or *de facto*.” “The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates.” The Chamber must “be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility.” The Chamber noted that concentrating upon the *de jure* powers of the accused would improperly represent the situation at the time, and could prejudice either side by improperly representing the authority of the accused. “Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to [find] command responsibility.”

(a) not necessary for authority to arise from official appointment

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 85: “The Appeals Chamber recalls that a superior is one who possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment”

Muvunyi, (Trial Chamber), September 12, 2006, para. 51: “As stated by the Appeals Chamber in the *Celebici* Judgement, the absence of a formal appointment is not fatal to a finding of criminal responsibility, provided it can be shown that the superior exercised effective control over the actions of his subordinates.”

(b) not limited to military command style structures

Semanza, (Trial Chamber), May 15, 2003, para. 401: “The relationship is not limited to a strict military command style structure.”

(c) error to require both *de facto* and *de jure* authority to establish effective control

Bagilishema, (Appeals Chamber), July 3, 2002, para. 61: “[T]he Trial Chamber wrongly held that both *de facto* and *de jure* authority need to be established before a superior can be found to exercise effective control over his or her subordinates.”

(d) chain of command may be direct or indirect

Kamuhanda, (Trial Chamber), January 22, 2004, para. 602: “The chain of command between a superior and subordinates may be either direct or indirect.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 771 (same).

4) application—superior/subordinate relationship

Kajelijeli, (Trial Chamber), December 1, 2003, paras. 780-81: “The Chamber found that the Accused was a leader of *Interahamwe* with control over the *Interahamwe* in Mukingo commune, and that he also had influence over the *Interahamwe* of Nkuli commune from 1 January 1994 to July 1994 and that from 6 April 1994 to 14 April 1994, at least, he held and maintained effective control over *Interahamwe* in Mukingo and Nkuli communes.”

“Therefore the Chamber finds that . . . the Accused had a superior-subordinate relationship with the *Interahamwe* of Mukingo and Nkuli *Communes*.”

See also “Application” of Article 6(3), Section (V)(e), this Digest.

ii) *mens rea*: “knew” or “had reason to know” that subordinate was about to commit or had committed crime (element 2)

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 791: “Under Article 6(3) of the Statute, the *mens rea* of superior responsibility is established when the accused ‘knew or had reason to know’ that his subordinate was about to commit or had committed a criminal act.” *See also Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 225 (similar).

Bagilishema, (Appeals Chamber), July 3, 2002, para. 37: As to *mens rea*, “[t]he Trial Chamber must be satisfied that, pursuant to Article 6(3) of the Statute, the accused either ‘knew’ or ‘had reason to know,’ whether such a state of knowledge is proved directly or circumstantially.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 629: “A superior will be found to have possessed or will be imputed with the requisite *mens rea* sufficient to incur criminal responsibility provided that: (i) the superior had actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit, were committing, or had committed, a crime under the statute; or (ii) the superior possessed information providing notice of the risk of such offences by indicating the need for additional investigations in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by subordinates.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 609 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 778 (same as *Kamuhanda*); *Bagilishema*, (Trial Chamber), June 7, 2001, para. 46 (similar).

Kamuhanda, (Trial Chamber), January 22, 2004, para. 608: “A superior is under a duty to act where he or she knew or had reason to know that subordinates had committed or were about to commit offences covered by Articles 2, 3, and 4 of the Statute.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 777 (same), para. 775 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 606 (similar).

1) factors for determining knowledge

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 648: “In determining whether a superior, despite his pleas to the contrary, must have possessed the requisite knowledge of the offences, the following indicia are relevant: (a) the number of illegal acts; (b) the type of illegal acts; (c) the scope of illegal acts; (d) the time during which the illegal acts occurred; (e) the number and type of troops involved; (f) the logistics involved; (g) the geographical location of the acts; (h) the widespread occurrence of the acts; (i) the tactical tempo of the operations; (j) the *modus operandi* of similar illegal acts; (k) the officers and staff involved; and (l) the location of the commander at the time.”

2) “reason to know”

Bagilishema, (Appeals Chamber), July 3, 2002, para. 28: “The ‘had reason to know’ standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused actually knew that crimes had been committed or were about to be committed.”

Akayesu, (Trial Chamber), September 2, 1998, para. 479: It is not required “that the superior acted knowingly to render him criminally [responsible]; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof. In a way, this is [responsibility] by omission or abstention.”

(a) “reason to know” requires some general information which would put one on notice, but does not require specific details

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 791: “The ‘reason to know’ standard is met when the accused had ‘some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates’; such information need not provide specific details of the unlawful acts committed or about to be committed by his subordinates. The Appellant is therefore wrong when he contends that direct personal knowledge, or full and perfect awareness of the criminal discourse, was required in order to establish his superior responsibility.” *See also id.*, para. 840 (similar).

Bagilishema, (Appeals Chamber), July 3, 2002, para. 42: “The *Čelebići* Appeal Judgement makes it clear that ‘a showing that a superior *had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates* would be sufficient to prove that he “had reason to know.”’ The Appeals Chamber endorses the finding of the ICTY Appeals Chamber in the *Čelebići* Appeal Judgement that the information does not need to provide specific details about unlawful acts committed or about to be committed by his subordinates.” (emphasis in original.)

(b) general information about situation prevailing in Rwanda did not show “reason to know”

Bagilishema, (Appeals Chamber), July 3, 2002, para. 42: “[T]he Appeals Chamber . . . deems it necessary to make a distinction between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time [which he did], and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes [which he did not].”

(c) Trial Chamber must assess whether superior had sufficient information to create “reason to know”

Bagilishema, (Appeals Chamber), July 3, 2002, para. 44: “[I]t is for the Trial Chamber to assess, *in concreto*, whether a superior has in his possession sufficient information [to constitute ‘reason to know’].”

3) no strict liability/knowledge not presumed from superior status alone

Kamuhanda, (Trial Chamber), January 22, 2004, para. 607: “A superior in a chain of hierarchical command with authority over a given geographical area will not be held strictly [responsible] for subordinates’ crimes. While an individual’s hierarchical position may be a significant indicium that he or she knew or had reason to know about subordinates’ criminal acts, knowledge will not be presumed from status alone.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 776 (same); *Semanza*, (Trial Chamber), May 15, 2003, para. 404 (similar); *Bagilishema*, (Trial Chamber), June 7, 2001, paras. 44-45 (similar).

4) no criminal responsibility for negligence

Bagilishema, (Appeals Chamber), July 3, 2002, paras. 32-37: “[W]ith regard to the concept of ‘criminal negligence’ challenged by the Prosecution, the Appeals Chamber observes that the Trial Chamber identified criminal negligence as a ‘third basis of [responsibility].’ This form was qualified as [responsibility] by omission, which takes the form of ‘criminal dereliction of a public duty.’”

“The Appeals Chamber wishes to recall and to concur with the *Čelebići* jurisprudence, whereby a superior’s responsibility will be an issue only if the superior, whilst some general information was available to him which would put him on notice of possible unlawful acts by his subordinates, did not take the necessary and reasonable measures to prevent the acts or to punish the perpetrators thereof.”

“The Statute does not provide for criminal [responsibility] other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.”

“References to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought, as the Judgement of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them.”

“ . . . It is better, however, that Trial Chambers do not describe superior responsibility in terms of negligence at all.”

“ . . . In the Appeals Chamber’s view, the Trial Chamber should not have considered this third form of responsibility, and, in this sense, it committed an error of law.” (The error, however, did not invalidate the Judgement because the requisite knowledge for command responsibility was not shown.)

But see Bagilishema, (Trial Chamber), June 7, 2001, para. 46 (finding *mens rea* met where “the absence of knowledge is the result of *negligence* in the discharge of the superior’s duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she should have known.”) (emphasis added); *Akayesu*, (Trial Chamber), September 2, 1998, para. 489 (“[I]t is certainly proper to ensure that there has been malicious intent, or, at least, ensure that

negligence was so serious as to be tantamount to acquiescence or even malicious intent.”) (emphasis added).

For application as to *mens rea*, see “Application” of Article 6(3), Section (V)(e), this Digest. For discussion of civilian superiors, see “Article 6(3) applies to civilian superiors,” Section (V)(d), this Digest.

iii) the failure to take necessary and reasonable measures to prevent the crime, and/or punish the perpetrator (element 3)

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 630: “A superior may incur responsibility only for having failed to take ‘necessary and reasonable measures’ to prevent or punish a crime under the Statute committed by subordinates.”⁵⁵

Kamuhanda, (Trial Chamber), January 22, 2004, para. 610: “Where it is demonstrated that an individual is a superior, pursuant to Article 6(3), with the requisite knowledge, then he or she will incur criminal responsibility only for failure to take ‘necessary and reasonable measures’ to prevent or punish crimes subject to the Tribunal’s jurisdiction committed by subordinates.” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 779 (same).

Bagilishema, (Trial Chamber), June 7, 2001, para. 38: The third element is “the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.”

1) necessary and reasonable measures are those within a superior’s “material possibility”/ extent of effective control guides assessment

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 630: “The degree of the superior’s effective control guides the assessment of whether the individual took reasonable measures to prevent, stop, or punish a subordinates’ [*sic*] crime.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 610: “[Necessary and reasonable] measures have been described as those within the ‘material possibility’ of the superior, even though the superior lacked the ‘formal legal competence’ to take these measures. Thus a superior has a duty to act in those circumstances in which he or she has effective control over subordinates, and the extent of an individual’s effective control, under the circumstances, will guide the assessment of whether he or she took reasonable measures

⁵⁵ While cases formulate this element as the responsibility to prevent or punish, the measures are not alternative options. See “measures are not alternative options,” Section (V)(c)(iii)(2), this Digest. As to whether there is a duty to “prevent or punish” or “prevent and punish” the formulation could be considered to be as follows. If the superior has taken reasonable measures to prevent the commission of the crime and has succeeded, there is no obligation to punish since no crime occurred and the word “or” is appropriate. If the superior has taken reasonable measures to prevent the commission of the crime but failed, the superior has an obligation to punish the perpetrators, which would absolve the superior of criminal responsibility. If, the superior has taken no reasonable steps to prevent a crime, a violation has already occurred; however, the superior still has a continuing obligation to punish the perpetrators of the crime. In these latter instances, the word “and” is appropriate. If only one word is used, it seems preferable to use “and,” because the word “or” fails to reflect that there are two distinct legal obligations. Given that the ICTR Statute uses the term “or,” the “and/or” formulation is a possible solution.

to prevent, stop, or punish a subordinate's crimes." *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 779 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 406 (similar).

Bagilishema, (Trial Chamber), June 7, 2001, paras. 47-48: Noting that Article 6(3) states that a superior is expected to take "necessary and reasonable measures" to prevent or punish crimes under the Statutes, the Chamber held "'necessary' to be those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; and, 'reasonable' to be those measures which the commander was in a position to take in the circumstances."

The Chamber held that a "superior may be held responsible for failing to take only such measures that were within his or her powers," and that "it is the commander's degree of effective control – his or her material ability to control subordinates – which will guide the Chamber in determining whether he or she took reasonable measures to prevent, stop, or punish the subordinates' crimes." "Such a material ability must not be considered abstractly, but must be evaluated on a case-by-case basis, considering all the circumstances."

2) measures are not alternative options

Semanza, (Trial Chamber), May 15, 2003, para. 407: "The obligation to prevent or punish is not a set of alternative options. If a superior is aware of the impending or ongoing commission of a crime, necessary and reasonable measures must be taken to stop or prevent it. A superior with such knowledge and the material ability to prevent the commission of the crime does not discharge his responsibility by opting simply to punish his subordinates in the aftermath."

Bagilishema, (Trial Chamber), June 7, 2001, para. 49: "[T]he obligation to prevent or punish does not provide the Accused with alternative options. For example, where the Accused knew or had reason to know that his or her subordinates were about to commit crimes and failed to prevent them, the Accused cannot make up for the failure to act by punishing the subordinates afterwards."

See, e.g., Kajelijeli, (Trial Chamber), December 1, 2003, paras. 840-41, 843 (finding that "the Accused failed to take the necessary and reasonable measures to prevent the acts of genocide committed by his subordinates," but that there was "insufficient evidence for the Chamber to find that the Accused failed to take the necessary and reasonable measures to punish the acts of genocide committed by his subordinates," and entering a conviction under Article 6(3)).

3) unnecessary to consider where the accused ordered the crimes

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 223-24: It is only necessary to consider whether the accused "knew or had reason to know and failed to prevent or punish the commission of the crimes" when he did not in fact order them. When the accused ordered the crimes, "then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish." "However, in all other circumstances, the Chamber must give full consideration to the elements of 'knowledge' and 'failure to prevent and punish.'"

4) failure to punish may arise from failure to create or sustain an environment of discipline and respect for the law

Bagilishema, (Trial Chamber), June 7, 2001, para. 50: “The Chamber is of the view that, in the case of failure to punish, a superior’s responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law. For example, in *Celebici*, the Trial Chamber cited evidence that Mucic, the accused prison warden, never punished guards, was frequently absent from the camp at night, and failed to enforce any instructions he did happen to give out. In *Blaskic*, the accused had led his subordinates to understand that certain types of illegal conduct were acceptable and would not result in punishment. Both Mucic and Blaskic tolerated indiscipline among their subordinates, causing them to believe that acts in disregard of the dictates of humanitarian law would go unpunished. It follows that command responsibility for failure to punish may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates.”

5) omission as a failure of the duty to prevent and/or punish

Mpambara, (Trial Chamber), September 11, 2006, paras. 25-27: “[Responsibility] for an omission may arise . . . where the accused is charged with a duty to prevent or punish others from committing a crime. The culpability arises not by participating in the commission of a crime, but by allowing another person to commit a crime which the Accused has a duty to prevent or punish.”

“The circumstances in which such a duty has been recognized in international criminal law are limited indeed. As stated by the Appeals Chamber in [the ICTY’s] *Tadic* [decision]:

The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).

Article 6(3) of the Statute creates an exception to this principle in relation to a crime about to be, or which has been, committed by a subordinate. Where the superior knew or had reason to know of the crime, he or she must ‘take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.’ . . .”

“ . . . [Responsibility] for failing to discharge a duty to prevent or punish requires proof that: (i) the Accused was bound by a specific legal duty to prevent a crime; (ii) the accused was aware of, and wilfully refused to discharge, his legal duty; and (iii) the crime took place.”

6) application—necessary and reasonable measures

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 792: “Having found that Appellant [Nahimana] had the power to prevent or punish the broadcasting of criminal discourse by RTLM [*Radio Télévision Libre des Mille Collines*], the Trial Chamber did not need to specify the necessary and reasonable measures that he could have taken. It needed only to find that the Appellant had taken none.”

Compare Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 650: “The Chamber finds that the Prosecutor did not prove beyond a reasonable doubt that Bagambiki failed to take necessary and reasonable measures to punish Kamana for his role in the massacre. The Chamber notes that Bagambiki suspended Kamana, which was the extent of the disciplinary measures available to a prefect under the law on the organisation of the commune. A bourgmestre’s suspension involves a disciplinary proceeding allowing the bourgmestre to explain his actions and appeal to higher authorities. As such, a suspension is one component of a larger process involving authorities in addition to and beyond the prefect. The Chamber has no evidence about what followed the suspension or if Bagambiki took other actions as well. The Prosecutor submitted no evidence indicating what other possible forms of punishment were available to Bagambiki, as prefect, and indicating that Bagambiki failed to take these measures.”

See also “Application” of Article 6(3), Section (V)(e), this Digest.

d) Article 6(3) applies to civilian superiors

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 85: “[I]t is settled both in ICTR and ICTY jurisprudence that the definition of a superior is not limited to military superiors; it also may extend to *de jure* or *de facto* civilian superiors.” *See also Bagilishema*, (Appeals Chamber), July 3, 2002, para. 51 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 473: “While the principle [of command responsibility] was initially applied to the responsibility of military commanders for the criminal actions of their subordinates during war (hence the term ‘command responsibility’), it is now clearly established that both civilian and military superiors may, under appropriate circumstances, be held responsible for the actions of those under their authority or command.”

Kamubanda, (Trial Chamber), January 22, 2004, para. 604: “The cognisable [superior/subordinate] relationship is not restricted to military hierarchies, but may apply to civilian authorities as well.” *See also Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 976 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 148 (similar).

Kamubanda, (Trial Chamber), January 22, 2004, para. 602: “The jurisprudence of both the ICTR and the ICTY has recognised that a civilian or a military superior, with or without official status, may be held criminally responsible for offences committed by subordinates who are under his or her effective control. *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 771 (same).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 213-15: “[T]he application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one.” The Statute “makes no limited reference to the responsibility to be incurred by military commanders alone; [r]ather the more generic term of ‘superior’ is used.” The use of “‘Head[s] of State or Government’ or ‘responsible Government officials’ in Article 6(2), clearly reflects the intention of the drafters to

extend this provision of superior responsibility beyond military commanders.” The Chamber stated that “[t]he jurisprudence also supports this interpretation” and cited the ICTR’s *Kambanda* and *Serushago* cases involving the former prime minister and a “prominent local civilian” and militia leader pleading guilty to charges under Article 6(3).

But see Akayesu, (Trial Chamber), September 2, 1998, para. 491: “[I]n the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6(3), to civilians remains contentious”

i) effective control required

Bagilishema, (Appeals Chamber), July 3, 2002, para. 50: “The *effective control* test applies to all superiors, whether *de jure* or *de facto*, military or civilian.” *See also Bagilishema*, (Appeals Chamber), July 3, 2002, para. 56 (similar).

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 819: “Article 6(3) provides that civilian leaders may incur criminal responsibility for acts committed by their subordinates or others under their ‘effective control.’”

Musema, (Trial Chamber), January 27, 2000, para. 141: “[A] civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law.” *See also Niyitegeka*, (Trial Chamber), May 16, 2003, para. 472 (quoting same).

1) de jure power

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 787: “The Appellant [Nahimana] . . . contends that the Trial Chamber could not conclude that he possessed a *de jure* power, since neither the law of Rwanda, nor the RTLM [*Radio Télévision Libre des Mille Collines*] Statutes or any other official document so provided. The Appeals Chamber recalls that a person possesses a *de jure* power when legally vested with such power. The Chamber is of the view that this power can derive from law, from a contract or from any other legal document; it may have been conferred orally or in writing and may be proved by documentary or any other type of evidence.”

2) assess on a case-by-case basis

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 788: “The Appeals Chamber . . . recalls that the authority enjoyed by a defendant must be assessed on a case-by-case basis, so as to determine whether he had the power to take necessary and reasonable measures to prevent the commission of the crimes charged or to punish their perpetrators. Consequently, while the Appeals Chamber concedes that mere membership of a collegiate board of directors [of RTLM radio] does not suffice, *per se*, to establish the existence of effective control, it considers, nonetheless, that such membership may, taken together with other evidence, prove control.” *See also id.*, para. 605 (similar).

Bagilishema, (Appeals Chamber), July 3, 2002, para. 51: “[T]he *Musema* Trial Judgement . . . pointed out [in discussing civilian responsibility under Article 6(3)] that ‘it is appropriate to assess on a case-by-case basis the power of authority actually devolved on

an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration.” See *Musema*, (Trial Chamber), January 27, 2000, para. 135.

ii) effective control for civilian superiors: need not be of the same nature as military commanders

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 605, 785: “[T]he case-law of the *ad hoc* Tribunals affirms that there is no requirement that the *de jure* or *de facto* control exercised by a civilian superior must be of the same nature as that exercised by a military commander in order to incur superior responsibility: every civilian superior exercising effective control over his subordinates, that is, having the material ability to prevent or punish the subordinates’ criminal conduct, can be held responsible under Article 6(3) of the Statute.”

“[C]ivilian leaders need not be vested with prerogatives similar to those of military commanders in order to incur such responsibility under Article 6(3) of the Statute: it suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent or punish the criminal conduct of subordinates. For the same reasons, it does not have to be established that the civilian superior was vested with ‘excessive powers’ similar to those of public authorities. Moreover, the Appeals Chamber cannot accept the argument that superior responsibility under Article 6(3) of the Statute requires a direct and individualized superior subordinate relationship.”

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 87: “The Appeals Chamber rejects the Appellant’s argument that in order to establish ‘effective control’ by a *de facto* civilian superior it is required that there be an additional finding that the superior exercised the trappings of *de jure* authority or that he or she exercised authority comparable to that applied in a military context. The Appeals Chamber recalls its holding in *Bagilishema* that under the ‘effective control’ test, there is no requirement that the ‘control exercised by a civilian superior must be of the same *nature* as that exercised by a military commander.’ Rather, ‘it is sufficient that, for one reason or another, the accused exercises the required “degree” of control over his subordinates, namely that of *effective* control.’ Likewise, the Appeals Chamber finds that there is no requirement of a finding that a *de facto* civilian superior exercised the trappings of *de jure* authority generally. What is essential is that the *de facto* civilian superior possessed the requisite *degree* of effective control. Of course, evidence that a *de facto* civilian superior exercised control in a military fashion or similar in form to that exercised by *de jure* authorities may strengthen a finding that he or she exercised the requisite degree of effective control. However, the Appeals Chamber concludes that neither is necessary for establishing effective control.”

Bagilishema, (Appeals Chamber), July 3, 2002, paras. 51-53, 55: “In the *Čelebići* case, it was held that:

[...] the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise *a degree of control over their subordinates which is similar to that of military commanders . . .*”

“[T]he establishment of civilian superior responsibility requires proof beyond reasonable doubt that the accused exercised effective control over his subordinates, in the sense that he exercised a degree of control over them which is similar to the degree

of control of military commanders. It is not suggested that ‘effective control’ will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander.”

“In the instant case, the Trial Chamber relied on the *Čelebići* Trial Judgement, which was affirmed by the ICTY Appeals Chamber, in holding that:

[...] for a civilian superior’s degree of control to be ‘similar to’ that of a military commander, the control over subordinates must be ‘effective,’ and the superior must have the ‘material ability’ to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by the ‘the trappings of the exercise of *de jure* authority.’ The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.”

“The Appeals Chamber holds the view that the Trial Chamber’s approach to the notion of ‘effective control’ in relation to [*sic*] civilian superior was erroneous in law, to the extent that it suggested that the control exercised by a civilian superior must be of the same nature as that exercised by a military commander. As the Appeals Chamber has already stated, this is not the case. It is sufficient that, for one reason or another, the accused exercises the required ‘degree’ of control over his subordinates, namely, that of effective control. However, as conceded by the Prosecution, this error did not affect the verdict as the Appeals Chamber is satisfied that the Accused did not possess the required *mens rea*. The Appeals Chamber therefore concludes that this error does not render the decision invalid.” (Finding errors with *Bagilishema*, (Trial Chamber), June 7, 2001, paras. 42-43.)

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 819: “Article 6(3) provides that civilian leaders may incur criminal responsibility for acts committed by their subordinates or others under their ‘effective control,’ although the control exercised need not be of the same nature as that exercised by a military commander.”

iii) whether military has more active duty to be informed about subordinates than civilian superiors

Muvunyi, (Trial Chamber), September 12, 2006, paras. 363, 473: “[T]he Chamber recalls the view expressed in *Kayishema and Ruzindana* that military superiors have a more active duty to inform themselves of the activities of their subordinates when they knew, or, owing to the circumstances, should have known that those subordinates were committing or about to commit crimes.” “In *Kayishema and Ruzindana*, the Trial Chamber concurred with the distinction drawn in the Rome Statute of the International Criminal Court (the ‘ICC’) with respect to the mental element required for superior responsibility of military commanders *vis-à-vis* other superiors. The Chamber in that case noted that Article 28 of the Statute of the ICC imposes a more active duty on military superiors to control the activities of subordinates under their effective command and control where they ‘knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.’ Under such

circumstances, the military commander is under an obligation to take all necessary and reasonable measures to prevent or punish criminal acts committed by his subordinates. On the other hand, non-military superiors are only expected to have known or consciously disregarded information which clearly indicated that their subordinates were committing or about to commit crimes. The Chamber agrees with this distinction and notes that the nature of military service and discipline is consistent with the expectation that superior military officers have a more active duty to inquire about the possible criminal behaviour of men under their command and to prevent or punish such behaviour when it occurs.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 227-28: The Chamber differentiates between “military commanders and other superiors.” Under the Rome Statute of the International Criminal Court, a military commander has a “more active duty . . . to inform himself of the activities of his subordinates when he ‘knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.’” For all other superiors, they must have “known, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.” The Chamber stipulated that this does not “demand a *prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control.”

Compare ICTR Statute, Art. 6(3) (test of “knew or had reason to know” as to all superior relationships), with Rome Statute of the International Criminal Court, Art. 28(a)(i), Art. 28(b)(i) (standard for military commander: “knew or, owing to the circumstances at the time, should have known”; standard for other superiors: “knew, or consciously disregarded information”).

e) Application

i) Barayagwiza and RTLM

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 606-08, 630: “[T]he Appeals Chamber is of the opinion that the Trial Chamber systematically identified the facts permitting it to find that the Appellant [Barayagwiza] had superior responsibility over the employees and journalists of RTLM [*Radio Television Libre des Milles Collines*]. With regard to the Appellant’s superior status and effective control, . . . the Judgement cites the following facts:

- Appellant Barayagwiza was ‘No. 2’ at RTLM;
- The Appellant represented the radio at the highest level in meetings with the Ministry of Information;
- The Appellant controlled the finances of the company;
- The Appellant was a member of the Steering Committee, which functioned as a board of directors for RTLM, to which RTLM announcers and journalists were accountable;
- The Appellant chaired the Legal Committee.”

“ . . . [T]he Judgement deals with the criminal nature of the RTLM broadcasts . . . and relies on the facts below as establishing that the Appellant knew or had reason to know that his subordinates had committed or were about to commit criminal acts, and

that he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators:

- Appellant Barayagwiza was fully aware, as early as October 1993, of the fact that the message conveyed by RTLM was causing concern;
- He nonetheless defended RTLM's editorial policy at meetings with the Ministry of Information in 1993 and 1994;
- He acknowledged that there was a problem and tried to address it, thereby demonstrating his own sense of responsibility for RTLM programming;
- Ultimately, the concern was not addressed and RTLM programming followed its trajectory, steadily increasing in vehemence and reaching a pitched frenzy after 6 April."

"Similarly, . . . the Trial Chamber held that, even after 6 April 1994, Appellants Nahimana and Barayagwiza (1) still had the powers vested in them as office-holding members of the governing body of RTLM and the *de facto* authority to give orders to RTLM employees and journalists, as evidenced by Appellant Nahimana's intervention to halt RTLM attacks on UNAMIR [the United Nations Assistance Mission for Rwanda] and General Dallaire; (2) 'knew what was happening at RTLM'; and (3) failed to exercise the authority vested in them 'to prevent the genocidal harm that was caused by RTLM programming.'" "The Appeals Chamber considers that [Barayagwiza] has failed to show that it was unreasonable for the Trial Chamber to find that he was a superior exercising effective control over employees and journalists of RTLM before 6 April 1994." "The Appeals Chamber has . . . found that Appellant Barayagwiza could . . . be held [responsible] on the basis of superior responsibility for RTLM broadcasts before 6 April 1994." (However, because "the Appeals Chamber . . . also concluded that it could not be held beyond reasonable doubt that RTLM broadcasts between 1 January and 6 April 1994 constituted direct and public incitement to commit genocide," Barayagwiza's Article 6(3) conviction for direct and public incitement was found erroneous, *id.*, para. 858).⁵⁶

ii) Nahimana and RTLM

1) superior position and capacity to prevent and/or punish

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 794-95, 803, 822: "[T]he Appeals Chamber observes that the Trial Chamber relied on the following facts in order to find that Appellant Nahimana had superior status and exercised effective control over RTLM employees from the station's creation until 6 April 1994:

- The Appellant was 'number one' at RTLM;
- The Appellant represented RTLM at the highest level in meetings with the Ministry of Information;
- The Appellant controlled the finances of RTLM;
- The Appellant was a member of the Steering Committee, which functioned as a board of directors for RTLM, and to which the staff and journalists of RTLM were accountable;
- The Appellant was responsible for RTLM editorial policy."

⁵⁶ "General Dallaire" refers to Canadian Lieutenant-General Roméo Dallaire, who was commander of UNAMIR.

“The Trial Chamber found . . . that even after 6 April 1994 Appellant Nahimana retained the authority vested in him as an office-holding member of the governing body of RTLM and had *de facto* authority to intervene with RTLM employees and journalists, as is evidenced by his intervention with RTLM personnel to halt attacks on UNAMIR and General Dallaire.”

“[T]he Appeals Chamber is of the view that the Trial Chamber could reasonably conclude that the evidence showed that [Nahimana] played a role of primary importance in the creation of RTLM. Furthermore, although this fact alone would not suffice to demonstrate that the Appellant was a superior exercising effective control over RTLM staff in 1994, it was reasonable to find that that role suggested that the Appellant was vested with a certain authority with respect to RTLM staff, even in 1994.”

“[T]he Appeals Chamber is of the view that a reasonable trier of fact could have found, on the basis of the confirmed factual findings, that Appellant Nahimana was a superior and had the material capacity to prevent or punish the broadcasting of criminal discourse by RTLM staff at least until 6 April 1994.” *See id.*, para. 834 (finding material capacity to prevent or punish).

2) *mens rea*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 840, 841, 857: “[T]he Appeals Chamber finds that the Appellant [Nahimana] ‘knew or had reason to know,’ as soon as he received the letter of 25 October 1993, or at least from the meeting of 26 November 1993 at the Ministry of Information. Moreover, the Appeals Chamber considers that the meeting of 10 February 1994, at which the Minister of Information repeated the concerns raised by the promotion of ethnic division by RTLM, leaves no doubt that Appellant Nahimana had the mental element required pursuant to Article 6(3) of the Statute. Indeed, from that moment the Appellant ‘had general information in his possession which would put him on notice of possible unlawful acts by his subordinates’; such information did not need to ‘contain precise details of the unlawful acts committed or about to be committed by his subordinates.’ In this respect, the Appeals Chamber stresses that the fact that no crime was denounced at the time or that the Ministry of Information did not describe the broadcasts as criminal is irrelevant: the Appellant had at a minimum reason to know that there was a significant risk that RTLM journalists would incite the commission of serious crimes against the Tutsi, or that they had already done so.”

“The Appeals Chamber notes, moreover, that the Appellant himself admitted having heard RTLM broadcasts after 6 April 1994 calling for violence against the Tutsi population. Therefore, there can be no doubt that the Appellant ‘knew or had reason to know’ that his RTLM subordinates were preparing to broadcast, or had already broadcast, speeches inciting the killing of Tutsi, and there is no need to address the Appellant’s other arguments in this respect.” “The Appeals Chamber accordingly upholds [Nahimana’s] conviction for direct and public incitement to commit genocide, pursuant to Article 6(3) of the Statute.”

3) failure to take measures to prevent and/or punish

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 850 (rejecting Nahimana’s argument that it was too risky for him to take measures to prevent

and/or punish his subordinates because his “position as personal adviser to the interim President protected him against such risks.”).

iii) Barayagwiza and CDR militants and *Impuzamugambi* (not proven)

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 882-83: “The Appeals Chamber is not convinced that the evidence cited by the Trial Chamber suffices to establish the effective control of [Barayagwiza] over all CDR [political party] militants and *Impuzamugambi* [CDR youth wing/militia] in all circumstances. In particular, as noted by the Trial Chamber, the leaders of a political party ‘cannot be held accountable for all acts committed by party members or others affiliated to the party.’ Although the Appellant doubtless exerted substantial influence over CDR militants and *Impuzamugambi*, that is insufficient – absent other evidence of control – to conclude that he had the material capacity to prevent or punish the commission of crimes by all CDR militants and *Impuzamugambi*.” “Accordingly, the Appeals Chamber sets aside the Appellant’s conviction pursuant to Article 6(3) of the Statute for direct and public incitement to commit genocide on account of acts by CDR militants and *Impuzamugambi*.”

iv) Kajelijeli and control over the *Interahamwe*

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 90-91: “[T]he Appeals Chamber finds that the Trial Chamber did make the requisite factual findings to conclude, beyond reasonable doubt, that the Appellant exercised *de facto* effective control over the *Interahamwe* as a civilian. The Appeals Chamber recalls that in *Kayishema and Ruzindana*, one of the Appellants was found to have exercised *de facto* superior control over the *Interahamwe* on the basis of evidence which identified him as ‘leading, directing, ordering, instructing, rewarding and transporting’ the assailants to carry out attacks. The Appeals Chamber in that case affirmed the Trial Chamber’s holding that such evidence demonstrated that he played a ‘pivotal role’ in leading the execution of the massacres. Likewise, in this case, the Trial Chamber found *inter alia* that the assailants in the attacks in Nkuli and Mukingo Communes reported back daily to the Appellant on what had been achieved; the Appellant instructed the *Interahamwe* to kill and exterminate Tutsis and ordered them to dress up and start the work; the Appellant directed the *Interahamwe* from Byangabo Market to Rwankeri *Cellule* to join that attack; the Appellant transported armed assailants; the Appellant ordered and supervised attacks; the Appellant bought beers for the *Interahamwe* while telling them that he hoped they had not spared anyone; and the Appellant played a vital role in organizing and facilitating the *Interahamwe* in the massacre at Ruhengeri Court of Appeal by procuring weapons, rounding up the *Interahamwe* and facilitating their transportation.”

“On the basis of the foregoing, the Appeals Chamber affirms the Trial Chamber’s conclusion that the evidence adduced at trial established beyond reasonable doubt that the Appellant held a *de facto* superior position as a civilian over the *Interahamwe*.” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 839-41, 843 (finding responsibility under Article 6(3)). The Article 6(3) conviction was vacated by the Appeals Chamber, however, because a conviction under Article 6(1) was entered covering the same facts.

See also “cumulative convictions under Article 6(1) and 6(3): impermissible if for the same conduct; convict under Article 6(1) and consider superior position as an aggravating factor,” Section (VII)(a)(iv)(7), this Digest.

v) Karera and control over communal policemen in Nyamirambo

Karera, (Trial Chamber), December 7, 2007, paras. 565-66: “The Chamber has found that in April 1994, Karera exercised authority over the three communal policemen, Charles Kalimba, Habimana and Kabarate, who were stationed in his house in Nyamirambo and who manned the roadblock nearby The policemen followed Karera’s orders to kill Tutsi and destroy their houses. The Chamber has further found that during the phone conversation between 7 and 15 April, Karera ordered the policemen to spare the lives of Callixte and Augustin and their relatives, and that this order was followed Further, between 7 and 15 April, Karera ordered policeman Kalimba not to destroy the houses of Witness BMH and Enode, and, while other houses in the area were destroyed, these were not The Chamber considers that they followed his order. The Chamber is accordingly satisfied that Karera had effective control over the communal policemen based at his house in Nyamirambo, and thus that a superior-subordinate relationship existed between Karera and the communal policemen.” “The Chamber has found that all the killings by the communal policemen were committed in furtherance of Karera’s orders. Therefore, it follows that also the two other elements under Article 6 (3) are satisfied. He was aware that the criminal acts were about to be committed by his subordinates, and, by ordering the crimes, he clearly failed to prevent them. Karera therefore also bears responsibility for the crimes under that provision.” (But not entering conviction under Article 6(3) because Article 6(1) conviction was entered, *see id.*, para. 566). *Compare Karera*, (Trial Chamber), December 7, 2007, para. 567 (finding that a superior-subordinate relationship between Karera and the *Interahamwe* had not been established).

See also “cumulative convictions under Article 6(1) and 6(3): impermissible if for the same conduct; convict under Article 6(1) and consider superior position as an aggravating factor,” Section (VII)(a)(iv)(7), this Digest.

vi) Muvunyi and control over ESO Camp soldiers in Butare

Muvunyi, (Trial Chamber), September 12, 2006, paras. 51, 497: “Muvunyi exercised the powers of the office of ESO [*École des sous-Officiers*] Commander on the basis of law, and had effective control over the actions of ESO soldiers even though he might not have been formally appointed as such.” “[T]he Accused is individually responsible as a superior for the killing of Tutsi civilians by ESO soldiers at the Butare University Hospital, at the University of Butare, at the Beneberika Convent, at Mukura forest, and at various roadblocks in Butare. In light of the material and human resources available to the Accused as Commander of ESO, he exercised effective control over the attackers in the sense of his material ability to prevent or punish their criminal wrongdoing. The Accused failed to take necessary and reasonable measures to prevent the killings or to punish the perpetrators. For the above reasons, the Chamber finds that the Accused bears superior responsibility under Article 6(3) of the Statute for the crime of genocide.” *See also id.*, paras. 157, 261, 290, 303, 372 (details as to command responsibility for: killings at roadblocks in Kigali; an attack at the Butare University Hospital; an attack at

the Beneberika Convent; attacks on Tutsi lecturers and students at the University of Butare; and attacks on Tutsi refugees at the Mukura Forest).

But see Muvunyi, (Trial Chamber), September 12, 2006, para. 541: “[I]f at his level, [the Accused] found it impossible to rein in [his] subordinates, he had a duty and a responsibility to report their criminal behaviour to officers higher up the chain of command. To sit down and fold his hands on the basis that he could not do anything about the serious crimes being committed by his subordinates, was at a minimum, a dereliction of his duties.” (emphasis added.)

vii) Imanishimwe and control over soldiers of the Karambo military camp in Cyangugu

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 652: “The Chamber finds that Imanishimwe had both *de jure* authority and effective control over the soldiers of the Karambo military camp in Cyangugu. The Chamber recalls that Imanishimwe stated that he was commander of the Karambo military camp and that he gave a detailed description of his command structure. He also testified about numerous instances of issuing orders to and of deploying his soldiers. The Chamber is also satisfied that he had effective control over his soldiers and the material ability to prevent or punish offences. Indeed, Imanishimwe attested to disciplining one of his officers for failing to pay for drinks and also testified about arresting a number of soldiers suspected of plotting to kill him. The Chamber notes that there is no evidence indicating that Imanishimwe lacked effective control over soldiers from the Karambo military camp.” *See also id.*, paras. 654, 691, 744 (finding Imanishimwe had superior responsibility for crimes at the Gashirabwoba football field); *but see Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 150, para. 150 (reversing the conviction due to Indictment defects).

See also Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 645 (finding “that Bagambiki was a superior with effective control over Bourgmestre Kamana and the Kagano commune police”).

Compare Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 636-39, 641-43 (finding no superior-subordinate relationship between Bagambiki and *gendarmes* in Cyangugu or soldiers of the Karambo camp).

VI) ALIBI AND SPECIAL DEFENSES

a) Rule

Excerpt from Rule 67, ICTR Rules of Procedure and Evidence—Reciprocal Disclosure of Evidence:

“(A) As early as reasonably practicable and in any event prior to the commencement of the trial: . . .

(ii) the Defence shall notify the Prosecutor of its intent to enter:

(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been

present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

- (b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.”

b) Alibi

- i) burden of proof for alibi: proof beyond a reasonable doubt that accused was present and committed crimes/no reasonable likelihood that the alibi is true**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 417: “The Appeals Chamber recalls that, in raising an alibi defence, the defendant is claiming that, objectively, he was not in a position to commit the crime. It is for the accused to decide what line of defence to adopt in order to raise doubt in the mind of the judges as to his responsibility for the offences charged, in this case by producing evidence tending to support or to establish the alleged alibi. The only purpose of an alibi is to cast reasonable doubt on the Prosecutor’s allegations, which must be proven beyond reasonable doubt. In alleging an alibi, the accused merely obliges the Prosecution to demonstrate that there is no reasonable likelihood that the alibi is true. In other words, the Prosecution must establish beyond a reasonable doubt that, ‘despite the alibi, the facts alleged are nevertheless true.’”

Simba, (Appeals Chamber), November 27, 2007, para. 184: “The Trial Chamber correctly set out the legal standard on alibi evidence when stating:

In assessing the alibi, the Chamber recalls that it is settled jurisprudence before the two *ad hoc* Tribunals that in putting forward an alibi, a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution case. The alibi does not carry a separate burden. The burden of proving beyond reasonable doubt the facts charged remains squarely on the shoulders of the Prosecution. Indeed, it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.”

See also Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 42-43 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 60 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 300 (source of quote); *Muhimana*, (Trial Chamber), April 28, 2005, para. 13 (similar).

Muhimana, (Appeals Chamber), May 21, 2007, para. 27: “[T]he Trial Chamber followed established jurisprudence when it considered the Appellant’s alibi and correctly reasoned as follows:

The Trial Chamber is satisfied that the evidence of the Defence witnesses does not raise a reasonable doubt as to whether the Accused was present at the

various locations where he is alleged to have committed or participated in the commission of crimes. This finding in no way undermines the Accused's presumption of innocence, and the Trial Chamber has made its factual findings bearing in mind that the Prosecution alone bears the burden of proving beyond a reasonable doubt the allegations made against the Accused."

Semanza, (Appeals Chamber), May 20, 2005, para. 160: "[T]he Prosecution need not 'rebut' the alibi specifically but must instead prove that, notwithstanding the alibi evidence, the totality of the evidence demonstrates beyond a reasonable doubt that the accused committed the alleged offences."

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 168: "[T]he Appeals Chamber's Judgement in *Musema* . . . adopted the following statement of law:

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.*"

(emphasis in original.) See also *Kamuhanda*, (Appeals Chamber), September 19, 2005, paras. 38, 197-98 (quoting language in italics; agreeing with Trial Chamber's formulation of the burden of proof regarding alibi; dismissing the argument "that the Trial Chamber erred in law by reversing the burden of proof"); *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 83-85 (Trial Chamber's formulation); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 61 (same quote as *Ntakirutimana*); *Musema*, (Appeals Chamber), November 16, 2001, para. 205 (source of quote); *Muhimana*, (Trial Chamber), April 28, 2005, para. 14 (same quote as *Ntakirutimana*); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 25 (same quote as *Ntakirutimana*); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 167 (quoting language in italics).

Niyitegeka, (Appeals Chamber), July 9, 2004, paras. 60-61: "[W]here a defendant raises an alibi 'he is merely denying that he was in a position to commit the crime with which he was charged,' specifically that he was elsewhere than at the scene of the crime at the time of its commission. . . ." "In the view of this Chamber, the Trial Chamber correctly stated that the Prosecution bears the burden of proof and that an alibi defence does not bear a separate burden. The Trial Chamber affirmed that the alibi would succeed if it is reasonably possibly true. It added that even where the alibi is rejected it remains the task of the Prosecution to establish the offences charged beyond reasonable doubt[.]" See also *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 172 (similar).

Kajelijeli, (Trial Chamber), December 1, 2003, para. 167: "Pursuant to Rule 67(A)(ii), the Defence is solely required at the pre-trial phase—in addition to the notification of his intention to rely on the alibi—to disclose to the Prosecution the evidence upon which the Defence intends to rely to establish the alibi. Thus, during the trial the Defence

bears no onus of proof of the facts in order to avoid conviction. But, during the trial, the Accused may adduce evidence, including evidence of alibi, in order to raise reasonable doubt regarding the case for the Prosecution. It must be stressed, however, that the failure of the Defence to submit credible and reliable evidence of the Accused's alibi must not be construed as an indication of his guilt." *See Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 42 (finding no error in Trial Chamber's statement of law).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 234: "[T]he burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects notwithstanding that the Defence raised alibi. After all, the accused is presumed innocent until the Prosecution has proved his guilt under Article 20(3) of the Statute. The accused is only required to raise the defence of alibi and fulfil the specific requirements of Rule 67(A)(ii) of the Rules."

See also "presumption of innocence," "burden of proof beyond reasonable doubt," Sections (VIII)(c)(iii)-(VIII)(c)(iii)(1), this Digest. *See also* "prosecution bears burden of proof beyond a reasonable doubt" under "[g]eneral considerations regarding the evaluation of evidence," Section (VIII)(d)(i), this Digest.

1) alibi not a "defense"

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 66: "The Appeals Chamber recalls

that an alibi 'does not constitute a defence in its proper sense.' In general, a defence comprises grounds excluding criminal responsibility although the accused has fulfilled the legal elements of a criminal offence. An alibi, however, is nothing more than the denial of the accused's presence during the commission of a criminal act."

See also Kamuhanda, (Appeals Chamber), September 19, 2005, para. 167 (same).

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 167: "[A]n alibi differs from a defence in the above-mentioned sense in one crucial aspect. In the case of a defence, the criminal conduct has already been established and is not necessarily disputed by the accused who argues that due to specific circumstances he or she is not criminally responsible, *e.g.* due to a situation of duress or intoxication. In an alibi situation, however, the accused 'is denying that he was in a position to commit the crimes with which he is charged because he was elsewhere than at the scene of the crime at the time of its commission.' An alibi, in contrast to a defence, is intended to raise reasonable doubt about the presence of the accused at the crime site, this being an element of the prosecution's case, thus the burden of proof is on the prosecution."

Kajelijeli, (Trial Chamber), December 1, 2003, para. 165: "As has been held by the Appeals Chamber in the *Čelibić Case*, the submission of an alibi by the Defence does not constitute a defence in its proper sense . . . :

'It is a common misuse of the word to describe an alibi as a "Defence." If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true

sense at all. By raising this issue, the defendant does no more than *[sic]* require the Prosecution to eliminate the reasonable possibility that the alibi is true.”
See Kajelijeli, (Appeals Chamber), May 23, 2005, para. 42 (finding no error in Trial Chamber’s statement of law).

ii) assessing alibi evidence

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 68: “In assessing alibi evidence a Chamber must consider whether the Defence raised a reasonable doubt about the Prosecution’s allegations. On appeal, the Appeals Chamber then has to consider whether the Trial Chamber’s method of assessing the alibi evidence was erroneous. If additional evidence has been admitted, the Appeals Chamber will first determine, on the basis of the trial record alone, whether a reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. Only if this is the case, will it determine whether, on the basis of the trial record and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt.”

1) may factor in lack of notice when weighing credibility of alibi

Semanza, (Appeals Chamber), May 20, 2005, para. 93: “The Trial Chamber [held] . . . that ‘where, as in this case, the Defence fails to show good cause for its failure to act in accordance with Rule 67(A)(ii)(a) [requiring the defendant to give advanced notice of reliance on alibi], the Chamber may take into account this failure when weighing the credibility of the alibi’”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 82: “[T]he Chamber may take such failure [to notify the Prosecution of intent to advance an alibi] into account when weighing the credibility of the alibi.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 164 (same).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 237: “[W]here good cause is not shown, for the application of Rule 67(B), the Trial Chamber is entitled to take into account this failure when weighing the credibility of the defence of alibi and/or any special defences presented.”

See “defence obligation to notify prosecution of intent to rely on alibi,” Section (VI)(b)(iii), this Digest.

2) proper to consider relationship between witness and accused if done in light of all the circumstances

Semanza, (Appeals Chamber), May 20, 2005, paras. 119-20: “In the Appellant’s view, the Trial Chamber disbelieved the alibi witnesses simply because of their relationships with him.” “The Appeals Chamber is not convinced of this. The Trial Chamber assessed each witness on an individual basis. It never concluded that some witnesses were not credible merely because they were related to or acquainted with the Appellant. While the Trial Chamber rightly considered the relationship between a witness and the Appellant as a relevant element in the assessment of the witness’s credibility, that assessment was

always done in light of all the circumstances, after consideration of the witness's testimony in its totality. For instance, the Trial Chamber found that the credibility of [certain w]itnesses . . . was not called into question only by their close personal relationships to the Appellant, but also by their incredible, unreliable or exaggerated assertions.”

3) lack of rebuttal witnesses does not give alibi greater weight

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 239-40: Rule 85⁵⁷ permits the Prosecution to bring evidence to rebut the alibi. The Chamber noted that they “will accord no extra weight to the accused's defence of alibi merely because the Prosecution did not call witnesses in rebuttal.”

iii) defence obligation to notify prosecution of intent to rely on alibi

Rutaganda, (Appeals Chamber), May 26, 2003, paras. 241-44: “Rule 67(A)(ii) relates to the reciprocal disclosure of evidence at the pre-trial stage of the case and places upon the Defence the obligation to notify the Prosecution of its intent to enter a defence of alibi and to specify the evidence upon which it intends to rely to establish the alibi. This allows the Prosecution to organise its evidence and to prepare its case prior to the commencement of the trial on the merits. As the Appeals Chamber explained in *Kayishema and Ruzindana*:

[...] the purpose of entering a defence of alibi or establishing it at the stage of reciprocal disclosure of evidence is only to enable the Prosecutor to consolidate evidence of the accused's criminal responsibility with respect to the crimes charged. Thus during the trial, 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 [*sic*], by adducing evidence to justify or prove the alibi.”

“Rule 67(A)(ii) does not require the Defence to produce the probative evidence to be used to establish the accused's whereabouts at the time of the commission of the offence. The extent and nature of the evidence that the Defence uses to cast doubt on the prosecution case is a matter of strategy which is for the Defence to decide.”

“To ensure a good administration of justice and efficient judicial proceedings, any notice of alibi should be tendered in a timely manner, ideally before the commencement of the trial. However, were the Defence to fail in this regard, Rule 67(B) provides that the Defence may still rely on evidence in support of an alibi at trial.”

“There is no requirement under Rule 67(A)(ii) for the Defence to notify the Chamber, in addition to the Prosecutor, of its intent to enter an alibi Prior to the

⁵⁷ Rule 85 states:

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) Evidence for the prosecution;
- (ii) Evidence for the defence;
- (iii) Prosecution evidence in rebuttal;
- (iv) Defence evidence in rejoinder;
- (v) Evidence ordered by the Trial Chamber pursuant to Rule 98.
- (vi) Any relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

(C) The accused may, if he so desires, appear as a witness in his own defence.

commencement of the trial, the Defence is obliged to disclose alibi evidence only to the Prosecution and not to the Trial Chamber.” See *Kayishema and Ruzindana* (Appeals Chamber), June 1, 2001, para. 111 (quoted).

Nchamihigo, (Trial Chamber), November 12, 2008, para. 20: “Rule 67 (A)(ii)(a) of the Rules envisages that the Defence shall give notice of its intention to rely on an alibi before the commencement of the trial.” See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 235 (similar).

Kamubanda, (Trial Chamber), January 22, 2004, para. 82: “Pursuant to Rule 67(A)(ii) the Defence shall notify the Prosecution of its intent to advance an alibi as early as reasonably practicable, and in any event, prior to the commencement of the Trial. Although Rule 67(B) provides that the failure to give such notice does not limit the right of the Accused to rely on the alibi” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 164 (same).

1) proper to allow prosecution to call rebuttal witnesses where defense failed to give proper notice of alibi

Semanza, (Appeals Chamber), May 20, 2005, para. 28: “The Trial Chamber allowed the Prosecution to call rebuttal witnesses because it found that the Defence had not notified the Prosecution of its intent to plead an alibi, contrary to the requirement of Rule 67.”

2) application—notice of alibi

Rutaganda, (Appeals Chamber), May 26, 2003, paras. 254-56, 259, 261: Because “prior to the commencement of the trial, the Appellant had in fact given a Notice of alibi to the Prosecution for the 6 and 12 April 1994[,] [t]he Trial Chamber . . . erred in finding that there was no notice of alibi for this period. This error, however, did not occasion a miscarriage of justice, as it did not prevent the Appellant from relying on the alibi at trial.”

“[A]s regards the alibi for 11 April 1994, the Appeals Chamber finds that the Trial Chamber did not err in finding that no notice was given to the Prosecution. Although in the Appellant’s opening arguments he made known his intention to call witnesses in support of his alibi of 11 April 1994, the Appeals Chamber holds that, placed in context, it cannot be said that such an act constitutes a clear notice of alibi.” “Although Rule 67 does not require that the Chamber be notified of the defence of alibi, the Appeals Chamber does not find that it was unreasonable for the Trial Chamber to have concluded, as pertains to 11 April, that there was no record of the alibi. Moreover, given that the alibi was not disclosed to prosecution witnesses, it was not unreasonable for the Trial Chamber to note that the alibi was not introduced at any stage during the pre-trial proceedings but kept until the end of the trial.”

“[N]onetheless [t]he Judgement shows clearly that the Trial Chamber duly considered the entire alibi evidence relied on by the Appellant” The Appeals Chamber concluded that the Trial Chamber committed no error in rejecting the alibi for April 11.

Nchamihigo, (Trial Chamber), November 12, 2008, para. 20: “Nchamihigo filed an alibi notice on 19 April 2007, long after the close of the Prosecution case. Rule 67 (B) of the

Rules specifies that failure of the Defence to provide such notice shall not limit the right of the accused to rely on an alibi defence. This provision is consistent with the principle of the presumption of innocence and the duty of the Prosecution to prove guilt beyond reasonable doubt. In the present case, compliance at such a late stage in the proceedings deprived the Prosecution of the opportunity to adduce evidence related to the alibi. It also raised the question whether the alibi was recently concocted to fit the evidence adduced against Nchamihigo.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 239: The defense did not inform the prosecutor prior to the commencement of trial about their intent to rely upon alibi, and the prosecutor filed a motion requesting compliance with Rule 67(A)(ii). The Chamber held that “despite the non-compliance with its order” it would “consider the defence of alibi.”

iv) raising an alibi for the first time on appeal

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 66: “The first issue is whether an Appellant is permitted to raise a new alibi on appeal. Pursuant to Rule 67(A)(ii)(a), the Prosecution has to be provided with notice of an alibi argument as early as practicable and prior to the commencement of trial. While Rule 67(B) states that failure to provide such notice ‘shall not limit the right of the accused’ to rely on an alibi defence, the jurisprudence permits a Trial Chamber to consider the failure to provide the requisite notice in its assessment of the alibi. The same legal principle applies in a situation where an alibi is raised for the first time on appeal. Rule 67 provides that the Defence can still raise an alibi even if no prior notice is provided; however, if for example the Appellant could have been reasonably expected to raise the new alibi during trial, the Appeals Chamber can take particular note of the failure to provide timely notice to the Prosecution in its assessment of the alibi. This does not contradict the finding of the ICTY Appeals Chamber that an ‘accused, generally, cannot raise a defence for the first time on appeal.’”

v) application—alibi

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 474 (reversing the Trial Chamber’s finding on alibi and concluding that “it has not been established beyond reasonable doubt that the Appellant took part in a distribution of weapons on 8 April 1994”); *Rwamakuba*, (Trial Chamber), September 20, 2006, paras. 70-82, 195-200 (accepting the accused’s alibi defense and finding another alibi created “additional doubt on the Prosecution’s case”).

Compare Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 70 (finding additional evidence unpersuasive and affirming Trial Chamber’s rejection of alibi); *Semanza*, (Appeals Chamber), May 20, 2005, paras. 122-85 (affirming Trial Chamber’s rejection of alibi: “The Appeals Chamber is not convinced by the arguments of the Appellant that the Trial Chamber erred in finding that he was at Musha church, Mwulire hill and Mabare mosque”); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, paras. 134-37 (affirming Trial Chamber’s rejection of alibi); *Niyitegeka*, (Appeals Chamber), July 9, 2004, paras. 81-89 (rejecting alibi argument phrased as fair trial violation); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 250 (finding the

Accused does not have an alibi for 12 to 17 April 1994 because, “none of the Defence Witnesses’ testimonies exclude the possibility that the Accused left Rubaya for periods between 12 and 17 April 1994”); *Nchamihigo*, (Trial Chamber), November 12, 2008, paras. 30-31 (rejecting alibi testimony); *Karera*, (Trial Chamber), December 7, 2007, paras. 457-510 (rejecting alibi: whereas the defense evidence placed the Accused sometimes in Ruhengeri, the Accused did not consistently and exclusively remain there; there was “reliable and credible evidence” placing him at crime scenes); *Simba*, (Trial Chamber), December 13, 2005, paras. 374-84 (rejecting alibi as to time of key massacres); *Simba*, (Appeals Chamber), November 27, 2007, para. 203 (affirming Trial Chamber); *Muhimana*, (Trial Chamber), April 28, 2005, paras. 12, 15, 63 (rejecting Accused’s alibi “that he remained at his home in Gishyita continuously mourning his dead son from 8 to 16 April, 1994”); *Muhimana*, (Appeals Chamber), May 21, 2007, paras. 113-14, 122-23 (affirming Trial Chamber); *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 87-176 (summarizing witness testimony and arguments as to alibi and ruling alibi “not credible”), *aff’d on appeal*; but see *Kamuhanda*, (Appeals Chamber), Dissenting Opinion Of Judge Inés Mónica Weinberg De Roca, September 19, 2005, paras. 437-38 (“[T]he Trial Chamber committed several errors in assessing the alibi.” “I would order a retrial.”).

See also *Bikindi*, (Trial Chamber), December 2, 2008, paras. 22-25 (where the prosecution “concede[d] that Simon Bikindi left Rwanda on 4 April 1994 and returned via Gisenyi, around 12 June 1994,” and the prosecution agreed not to pursue allegations during that interval, there was no longer an issue as to alibi).

VII) CHARGING, CUMULATIVE CONVICTIONS AND SENTENCING

a) Cumulative charges, alternative and cumulative convictions

i) cumulative charges permitted

Simba, (Appeals Chamber), November 27, 2007, para. 276: “[I]t is established jurisprudence that cumulative charging is allowed on the basis 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.’ Under this reasoning, cumulative charging on the basis of the same set of facts is permissible.” See also *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 343 (similar); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 863 (similar to first sentence).

Semanza, (Appeals Chamber), May 20, 2005, paras. 308-09: “The ICTY Appeals Chamber stated in *Čelebići* that ‘[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 Appeals Chamber explained that ‘[t]he 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.’ For that reason, the Appeals Chamber noted in *Čelebići*, ‘cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.’ This Appeals Chamber confirmed in *Musema*, an ICTR case, that ‘the above holding on cumulative charges reflects a general principle and is equally applicable’ to

ICTR cases.” “[T]he Prosecution was entitled to bring overlapping charges.” *See Musema*, (Appeals Chamber), November 16, 2001, para. 369 (quoted).

Musema, (Appeals Chamber), November 16, 2001, para. 369: “[C]umulative charging is generally permitted.”

1) possible to charge more than one criminal offence arising out of a single incident

Ndindababizi, (Trial Chamber), July 15, 2004, para. 491: “It is well-established that an accused may be charged with more than one criminal offence arising out of a single incident.”

2) possible to charge genocide, crimes against humanity and war crimes

Rutaganda, (Trial Chamber), December 6, 1999, para. 117: Genocide, crimes against humanity, and war crimes “have disparate ingredients and . . . their punishment is aimed at protecting discrete interests [and thus] multiple offenses may be charged on the basis of the same acts in order to capture the full extent of the crimes committed by an accused.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 297 (same).

3) possible to charge more than one form of Article 6(1) responsibility

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 483: “The Appeals Chamber . . . recall[s] that the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused’s conduct.”

4) possible to charge multiple categories of joint criminal enterprise

Simba, (Appeals Chamber), November 27, 2007, para. 77: “[A]n indictment may charge a defendant cumulatively with multiple categories [of joint criminal enterprise based on the same conduct].”

5) possible to charge genocide and complicity in genocide

Simba, (Appeals Chamber), November 27, 2007, para. 67: “[C]ommission and complicity in genocide are two different punishable acts of genocide which may both be pleaded in an Indictment.”

ii) alternative convictions not proper: must establish criminal responsibility unequivocally

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 122: “While an accused can be convicted for a single crime on the basis of several modes of [responsibility], alternative convictions for several modes of [responsibility] are, in general, incompatible with the principle that a judgement has to express unambiguously the scope of the convicted person’s criminal responsibility. This principle requires, *inter alia*, that the sentence corresponds to the totality of guilt incurred by the convicted person. This totality of

guilt is determined by the *actus reus* and the *mens rea* of the convicted person. The modes of [responsibility] may either augment (e.g., commission of the crime with direct intent) or lessen (e.g., aiding and abetting a crime with awareness that a crime will probably be committed) the gravity of the crime. Thus, the criminal [responsibility] of a convicted person has to be established unequivocally.”

For discussion of “gravity” for purposes of sentencing, see Section (VII)(b)(iii)(2), this Digest.

1) application

Ndindabahizi, (Appeals Chamber), January 16, 2007, paras. 121, 123: Where the Trial Chamber stated “at paragraph 485 of the Trial Judgement:

[T]he Chamber finds that the Accused himself committed the crime of extermination. He participated in creating, and contributed to, the conditions for the mass killing of Tutsi on Gitwa Hill on 26 April 1994, by distributing weapons, transporting attackers, and speaking words of encouragement that would have reasonably appeared to give official approval for an attack. **Alternatively**, the Chamber finds that by these words and deeds, the Accused directly and substantially contributed to the crime of extermination committed by the attackers at Gitwa Hill, and is thereby guilty of both instigating, and of aiding and abetting, that crime. (emphasis added).”

“[T]he Appeals Chamber finds, by majority, Judge Güney dissenting, that the Trial Chamber did not convict the Appellant in the alternative. Rather, the Trial Chamber was seeking to provide a further characterisation of the Appellant’s criminal conduct. The Trial Chamber was convinced beyond a reasonable doubt that the Appellant committed acts constituting extermination, namely by distributing weapons, transporting attackers and speaking words of encouragement. Furthermore, the Trial Chamber also found that by such encouragement, the Appellant instigated and aided and abetted the crime of extermination. Therefore, the Trial Chamber wanted to emphasize that a full characterisation of the Appellant’s conduct had to cumulatively refer to various modes of [responsibility]. The Appeals Chamber notes, however, that it is for a Trial Chamber to identify unambiguously the mode(s) of [responsibility] for which an accused is convicted and the relation between them.” *But see Ndindabahizi*, (Appeals Chamber), Partially Dissenting Opinion Of Judge Güney, January 16, 2007 (disagreeing that the conduct at issue could constitute “commission” of extermination).

See also cumulative convictions for “multiple forms of Article 6(1) individual criminal responsibility,” Section (VII)(a)(iv)(8), this Digest.

iii) cumulative convictions

1) permitted based on same conduct where each crime involves a materially distinct element

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1019: “[C]umulative 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. The test to be applied with respect to

cumulative convictions is to take account of all the legal elements of the offences, including those contained in the provisions' introductory paragraph."

Simba, (Appeals Chamber), November 27, 2007, para. 277: "[I]t is well established that cumulative convictions entered under different statutory provisions but based on the same conduct are permissible if each statutory provision involved has a materially distinct constitutive 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." *See also* *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 425 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 368 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 542 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 491 (similar to first sentence); *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1090; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, paras. 863-64.

Rutaganda, (Trial Chamber), December 6, 1999, paras. 110-19: The Chamber re-affirmed the test set out by the Trial Chamber in *Akayesu*, establishing when a person can be charged and convicted for two or more offenses in relation to the same facts. The Chamber disagreed with the majority finding in *Kayishema and Ruzindana* which held that the cumulative charges were improper because the crimes involved some of the same elements, the evidence relied upon to prove them was the same, and the protected social interests were the same. *See Akayesu*, (Trial Chamber), September 2, 1998, para. 468 (cited); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 627 (cited).

2) where test not met, enter conviction under the more specific provision containing a materially distinct element

Semanza, (Appeals Chamber), May 20, 2005, para. 315: "The general test for cumulative convictions was recently reaffirmed in the [ICTY's] *Krstić* Appeal Judgement:

The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other. An element is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter."

See also Bisengimana, (Trial Chamber), April 13, 2006, para. 96 (same quote from *Krstić*); *Musema*, (Appeals Chamber), November 16, 2001, paras. 361, 363 (similar, but adding: "In applying this test, *all* the legal elements of the offences, including those contained in the provisions' introductory paragraph must be taken into account"); *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 578, 581 (similar to *Musema*); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 746, 749-50 (similar to *Musema*).

Bisengimana, (Trial Chamber), April 13, 2006, para. 97: "The *Celebici* Judgement explains that when facts are regulated by two different provisions, a conviction should be entered only under the provision that contains an additional materially distinct element."

3) whether the same conduct violates two statutory provisions is a question of law

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1020: “[L]ike the ICTY Appeals Chamber, the Appeals Chamber considers that whether the same conduct violates two distinct statutory provisions is a question of law.”

4) test for cumulative convictions should not be applied mechanically

Bisengimana, (Trial Chamber), April 13, 2006, para. 98: “The Chamber takes note that the distinct elements test for permissible cumulative convictions should not be applied mechanically or blindly. The ICTY Appeals Chamber has urged that this test be applied carefully to avoid prejudice to the accused.”

iv) application—cumulative convictions

1) permitted for genocide, crimes against humanity and war crimes

Semanza, (Appeals Chamber), May 20, 2005, para. 368: “In *Rutaganda*, the Appeals Chamber considered the question of whether cumulative convictions could be entered on the basis of the same set of facts for serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute), genocide (Article 2 of the Statute) and crimes against humanity (Article 3 of the Statute). The Appeals Chamber stated that convictions under Article 4 of the Statute for ‘war crimes’ had a materially distinct element not required for the convictions on genocide and crimes against humanity, ‘namely the existence of a nexus between the alleged crimes and the armed conflict satisfying the requirements of common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II.’ It added that a conviction for genocide and crimes against humanity each required proof of materially distinct elements not required under Article 4, namely proof of specific intent (*dolus specialis*) for genocide, and proof of a widespread or systematic attack against a civilian population for crimes against humanity.” See also *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 583 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, paras. 468-70 (similar).

Compare Musema, (Appeals Chamber), November 16, 2001, para. 368: In response to a request by the Prosecutor to the Appeals Chamber “to confirm that multiple convictions under different Articles of the Statute are always permitted,” the Appeals Chamber “decline[d] to give its opinion on the issue and limit[ed] its findings to the issues raised on appeal.” See also *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 583-84 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 752 (similar).

See, e.g., *Semanza*, (Appeals Chamber), May 20, 2005, paras. 369-70: “Simultaneous convictions are permissible for war crimes, crimes against humanity and complicity to commit genocide as each has a materially distinct element.” “In the view of the Appeals Chamber, the Trial Chamber erred when it failed to enter convictions for serious violations of Common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II thereto . . . for having aided and abetted the intentional murders committed at Musha church and Mwulire hill [Gikoro commune] and . . . for having

instigated the rape and torture of Victim A and murder of Victim B, and for having committed torture and intentional murder of Rusanganwa.”

2) cumulative convictions under Article 2 (genocide)

(a) genocide and complicity in genocide impermissible

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1056: “[T]he crime of complicity in genocide and the crime of genocide are mutually exclusive, as one cannot be guilty as a principal perpetrator and as an accomplice with respect to the same offence.” See also *Bagilishema* (Trial Chamber), June 7, 2001, para. 67 (similar); *Musema*, (Trial Chamber), January 27, 2000, para. 175 (similar); *Akayesu*, (Trial Chamber), September 2, 1998, para. 532 (similar).

See also *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 428 (where an accused was found guilty of genocide, the court did not examine the charges of complicity in genocide); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2162 (same); *Karera*, (Trial Chamber), December 7, 2007, para. 549 (same); *Muhimana*, (Trial Chamber), April 28, 2005, para. 520 (same); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 295 (same); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 695 (same); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 654 (same); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 847 (same).

(b) whether cumulative convictions are permitted for genocide and conspiracy to commit genocide

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1043: “The Appeals Chamber in *Musema* has affirmed that distinct crimes may justify multiple convictions, provided that each statutory provision that forms the basis for a conviction has a materially distinct element not contained in the other. The Chamber notes that planning is an act of commission of genocide, pursuant to Article 6(1) of the Statute. The offence of conspiracy requires the existence of an agreement, which is the defining element of the crime of conspiracy. Accordingly, the Chamber considers that the Accused can be held criminally responsible for both the act of conspiracy and the substantive offence of genocide that is the object of the conspiracy.” (The Appeals Chamber in *Nahimana* did not rule on this issue because the conspiracy convictions were reversed and thus the point became moot; see *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 1022.)

Kajelijeli, (Trial Chamber), December 1, 2003, paras. 789-93: “In considering whether a person may be punished for both conspiracy to commit genocide and genocide itself, the Trial Chamber in *Musema* first looked at the practice of civil law systems by which, if the conspiracy is successful and the substantive offence is consummated, the accused will only be convicted of the substantive offence and not of the conspiracy.” “The same Trial Chamber noted that under common law, an accused can in principle be convicted of both conspiracy and a substantive offence, in particular where the objective of the conspiracy extends beyond the offences actually committed. The Trial Chamber expressed the view that the common law approach has been the subject of criticism.” “Finally, in *Musema* the Trial Chamber opted to adopt the definition most favourable to

the Accused, whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts, in keeping with the intention of the Genocide Convention (1948) as shown in the *Travaux Préparatoires*.” “On the other hand, the Trial Chamber in *Niyitegeka* while finding Niyitegeka guilty of the crime of genocide convicted and punished him for conspiracy to commit genocide as well.” “In the particular circumstances of the case here under consideration, we do not feel called upon to express a preference regarding which of the *Musema* or *Niyitegeka* approach to follow.”

See Niyitegeka, (Trial Chamber), May 16, 2003, paras. 420, 429 (finding Niyitegeka guilty of the crime of genocide and conspiracy to commit genocide).

But see Musema, (Trial Chamber), January 27, 2000, para. 198: “[T]he accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts.”

3) cumulative convictions under Article 3 (crimes against humanity)

(a) persecution and other inhumane acts permissible

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1026 (cumulative convictions for persecution and other inhumane acts permissible); *but see Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), Partly Dissenting Opinion of Judge Güney, November 28, 2007, para. 1 (disagreeing).

But see “other inhumane acts and any other crime against humanity impermissible,” Section (VII)(a)(iv)(3)(g), this Digest.

(b) extermination and persecution permissible

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1026-27 (cumulative convictions for extermination and persecution permissible); *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1080 (similar); *but see Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), Partly Dissenting Opinion of Judge Güney, November 28, 2007, para. 4 (disagreeing).

(c) rape and torture permissible

See Semanza, (Appeals Chamber), May 20, 2005, para. 319 (cumulative convictions for rape and torture permissible).

(d) murder and torture permissible

See Semanza, (Appeals Chamber), May 20, 2005, para. 320 (cumulative convictions for murder and torture permissible).

(e) murder and extermination impermissible

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 542: “Conviction for murder as a crime against humanity and conviction for extermination as a crime against humanity, based on the same set of facts . . . cannot be cumulative. Murder as a crime against humanity does not contain a materially distinct element from

extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a mass scale.” See also *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 344 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, paras. 102-03 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 745 (similar); *Semanza*, (Trial Chamber), May 15, 2003, paras. 504-05 (similar).

See also *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 687: “[T]he Chamber finds it appropriate to consider the evidence relating to the killing of specific individuals as examples of targeting populations or groups of people for purposes of extermination, rather than murder specifically. This position accords with the Chamber’s finding on the law relating to cumulative convictions on the same facts for murder and extermination.” See also *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 886 (similar).

(i) murder and extermination permissible where based on different facts

See, e.g., *Semanza*, (Appeals Chamber), May 20, 2005, para. 321: “[T]he extermination count does not impermissibly overlap with the murder convictions, because the convictions were for different crimes involving different factual scenarios.”

(f) multiple murder convictions permissible where based on different victims

See, e.g., *Semanza*, (Appeals Chamber), May 20, 2005, para. 319 (multiple murder convictions permissible where based on different facts).

(g) other inhumane acts and any other crime against humanity impermissible

Nchamihigo, (Trial Chamber), November 12, 2008, para. 344: “[T]he crime of Other Inhumane Acts [where based on the same facts as other crimes against humanity convictions] is subsumed by every other Crime against Humanity as it requires no additional element to any other Crime against Humanity.”

But see “persecution and other inhumane acts permissible,” Section (VII)(a)(iv)(3)(a), this Digest.

4) cumulative convictions under Article 2 (genocide) and Article 3 (crimes against humanity) permissible

(a) genocide and crimes against humanity permissible

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1029: “It is established case-law that cumulative convictions for genocide and crimes against humanity are permissible on the basis of the same acts, as each has a materially distinct element from the other, namely, on the one hand, ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group,’ and, on the other, ‘a widespread or systematic attack against a civilian population.’” See also *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 426 (similar); *Semanza*, (Appeals

Chamber), May 20, 2005, para. 318 (similar); *Nchamibigo*, (Trial Chamber), November 12, 2008, para. 344 (similar)

See also cumulative convictions “permitted for genocide, crimes against humanity and war crimes,” Section (VII)(a)(iv)(1), this Digest.

**(b) genocide and extermination as a crime against humanity
permissible**

See Simba, (Appeals Chamber), November 27, 2007, para. 277 (cumulative convictions for genocide and extermination as a crime against humanity permissible); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 542 (similar); *Musema*, (Appeals Chamber), November 16, 2001, para. 369 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, paras. 492-93 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 577 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 745, 751 (similar).

But see Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 577-78, 590 (the accused could not be convicted “for genocide as well as for crimes against humanity based on murder and extermination because the later two offences are subsumed fully by the counts of genocide”); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, Separate Opinion of Judge Pavel Dolenc, para. 71 (“[G]enocide consumes extermination as a crime against humanity and murder as a violation of Article 3 common to the Geneva Conventions”).

**(c) genocide and persecution as a crime against humanity
permissible**

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1032 (cumulative convictions for genocide and persecution as a crime against humanity permissible).

**(d) genocide and murder as a crime against humanity
permissible**

See Ndindabahizi, (Trial Chamber), July 15, 2004, para. 492 (cumulative convictions for genocide and murder as a crime against humanity permissible); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 864 (same). *But see Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 577-78, 590.

**(e) direct and public incitement to commit genocide and
persecution as a crime against humanity permissible**

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1034-36 (cumulative convictions for direct and public incitement to commit genocide and persecution as a crime against humanity permissible).

**5) cumulative convictions under Article 3 (crimes against
humanity) and Article 4 (war crimes) permissible**

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 427: “With regard to the convictions under Articles 3 and 4 of the Statute on the basis of the same

facts, the Appeals Chamber observes that each of them requires a materially distinct element not required for the other. Whereas conviction under Article 3 requires proof of a widespread or systematic attack against a civilian population, conviction under Article 4 requires the existence of a nexus between the acts in question and the armed conflict. The Appeals Chamber finds that the Trial Chamber committed no error by entering cumulative convictions under Articles 3 (murder and torture) and 4 (murder and cruel treatment) of the Statute based on the same set of facts.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 579 (similar).

See also cumulative convictions “permitted for genocide, crimes against humanity and war crimes,” Section (VII)(a)(iv)(1), this Digest.

6) cumulative convictions under Article 2 (genocide) and Article 4 (war crimes) permissible

See cumulative convictions “permitted for genocide, crimes against humanity and war crimes,” Section (VII)(a)(iv)(1), this Digest.

But see Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Separate Opinion of Judge Pavel Dolenc, para. 71 (“For the reasons which are explained in my separate opinion in the *Semanza* Judgement, in a case of inter-article ideal concurrence of crimes, genocide consumes extermination as a crime against humanity and murder as a violation of Article 3 common to the Geneva Conventions.”); *see Semanza*, Separate and Dissenting Opinion of Judge Pavel Dolenc (Trial Chamber), May 15, 2003.

**7) cumulative convictions under Article 6(1) and 6(3):
impermissible if for the same conduct; convict under Article
6(1) and consider superior position as an aggravating factor**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 487-88: “The Appeals Chamber recalls that it is inappropriate to convict an accused for a specific count under both Article 6(1) and Article 6(3) of the Statute. When, for the same count and the same set of facts, the accused’s responsibility is pleaded pursuant to both Articles and the accused could be found [responsible] under both provisions, the Trial Chamber should rather enter a conviction on the basis of Article 6(1) of the Statute alone and consider the superior position of the accused as an aggravating circumstance.” “The Appeals Chamber notes that in the instant case the Trial Chamber convicted the Appellants on several counts under both Article 6(1) and Article 6(3) in respect of the same set of facts, which was an error.” *See also id.*, para. 667 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 142 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 566 (similar).

See, e.g., Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 81-82, 318-19 (vacating Article 6(3) convictions where the Accused was also held responsible pursuant to Article 6(1), but no change in sentence because superior position was an aggravating factor); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, paras. 2161, 2189, 2197, 2216, 2223, 2248 (examining both individual and command responsibility as to the same accused for the same crime, but convicting on the former

and taking the latter into account during sentencing); *Karera*, (Trial Chamber), December 7, 2007, paras. 565-66, 577 (finding command responsibility, but not entering conviction under Article 6(3) because Article 6(1) conviction was entered, and superior position was considered as an aggravating factor); *Gacumbitsi*, (Trial Chamber), June 17, 2004, paras. 290, 315, 332 (where the Trial Chamber found the Accused responsible under Article 6(1) for committing genocide, it did not examine responsibility under Article 6(3)); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 795, 743, 763 (finding 6(1) and 6(3) responsibility for killing or facilitating the killing of Witness LI's brother and his classmate and Witness MG's sister and her cellmate, but entering conviction under 6(1)).

Compare Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 623: "If an accused may be held criminally responsible for a crime under either Article 6(1) or Article 6(3), the Chamber will enter a conviction on the form of responsibility that best characterises the accused's role in the crime. In such an event, the Chamber will consider the other form of responsibility in sentencing in order to reflect the totality of the accused's culpable conduct."

See also "abuse of position of influence and authority," as an aggravating factor, Section (VII)(b)(iii)(6)(b)(i), this Digest.

8) multiple forms of Article 6(1) individual criminal responsibility

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 122: "[A]n accused can be convicted for a single crime on the basis of several modes of [responsibility]"

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 508: "[A] finding by the Trial Chamber that the accused had the intent to commit genocide and did so by killing and causing harm to members of the group does not per se prevent a finding that he also knowingly aided and abetted other perpetrators of genocide."

See, e.g., Ndindababizi, (Appeals Chamber), January 16, 2007, para. 137 ("[T]he Trial Chamber convicted the Appellant for instigating and aiding and abetting genocide at Gitwa Hill [in the Bisesero Hills, Kibuye prefecture], as well as for committing, instigating and aiding and abetting extermination at Gitwa Hill."); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 204 ("The Appeals Chamber recalls that the Appellant played a central role in planning, instigating, ordering, committing, and aiding and abetting genocide and extermination in his commune of Rusumo, where thousands of Tutsis were killed or seriously harmed.").

Compare Kamuhanda, (Appeals Chamber), September 19, 2005, para. 77: "The factual findings of the Trial Chamber support the Appellant's conviction for aiding and abetting as well as for ordering the crimes. Both modes of participation form distinct categories of responsibility. In this case, however, both modes of responsibility are based on essentially the same set of facts: the Appellant 'led' the attackers in the attack and he ordered the attackers to start the killings. On the facts of this case, with the Appeals Chamber disregarding the finding that the Appellant distributed weapons for the purposes of determining whether the Appellant aided and abetted the commission of the

crimes, the Appeals Chamber does not find the remaining facts sufficiently compelling to maintain the conviction for aiding and abetting. In this case the mode of responsibility of ordering fully encapsulates the Appellant's criminal conduct at the Gikomero Parish Compound [in Gikomero commune, Kigali-Rural prefecture]." *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 411 ("Although the Accused's acts in relation to the attack at Kesho Hill may also constitute aiding and abetting genocide, the Chamber finds it unnecessary to make a finding under that mode of [responsibility] in light of its conclusion that the Accused 'committed' genocide through his participation in a JCE.").

See also Kamuhanda, (Appeals Chamber), Separate And Partially Dissenting Opinion Of Judge Mohamed Shahabuddeen, September 19, 2005, paras. 405, 407-09, 411, 413: "The rule requiring conviction only for the more specific offence operates as between crimes. . . . There is no reason why a single crime cannot be perpetrated by multiple methods." "[A]n accused is 'individually responsible for the crime' referred to in articles 2 to 4 of the Statute if he does any of the acts mentioned in article 6(1) Obviously, that responsibility can result from the doing of one or more of the prescribed acts." "That the accused does several such acts may affect the appropriate penalty, but does not have the effect of multiplying his conviction for responsibility for the crime referred to in the Statute; his conviction for this remains one and singular."

"In this case, there was only one conviction in respect of each relevant count of the indictment (genocide and extermination). The Trial Chamber merely made legal findings explaining that each of these convictions could be supported by multiple legal theories corresponding to the various methods or modes of [responsibility] prescribed by article 6(1). These findings were appropriate." "[T]here is no illogicality arising from contradictory assumptions of fact in holding that the accused can both aid and abet another to commit a crime and can order that other to commit that crime."

"A Trial Chamber is free to find that the accused engaged responsibility for a crime referred to in the Statute by doing several of the acts mentioned in article 6(1). Were it otherwise, there would be failure to define the true measure of the criminal conduct of the accused." (Concluding that Kamuhanda should have been found responsible for both ordering and aiding and abetting.) *See also Kamuhanda*, (Appeals Chamber), Separate Opinion of Presiding Judge Theodore Meron, September 19, 2005, para. 366 ("I agree with Judge Shahabuddeen that 'there is no reason why a single crime cannot be perpetrated by multiple methods'"); *Kamuhanda*, (Appeals Chamber), Separate Opinion Of Judge Inés Mónica Weinberg De Roca On Paragraph 77 Of The Judgement, September 19, 2005, para. 417 (agreeing with Judge Shahabuddeen).

(a) impermissible to convict for multiple categories of joint criminal enterprise based on the same conduct

Simba, (Appeals Chamber), November 27, 2007, para. 77: "The Appeals Chamber recalls that . . . a defendant may not be convicted of multiple categories [of joint criminal enterprise] based on the same conduct"

b) Sentencing

i) instruments governing

1) Article 23, ICTR Statute: 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.”

2) Rule 100 of the Rules of Procedure and Evidence: Sentencing Procedure on a Guilty Plea

“(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence .

...

3) Rule 101 of the Rules of Procedure and Evidence: 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 cooperation 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

(C) 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.”

ii) general principles governing determination of sentences

1) considerations listed in Statute and Rules not mandatory or exhaustive

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 290: “The Appeals Chamber recalls . . . that the factors to be taken into account by the Trial Chamber at sentencing as listed in these provisions [Article 23 of the Statute and Rule 101 of the Rules of Procedure and Evidence] are by no means exhaustive.” *See also* *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2260 (similar); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 383 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 571 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 429 (similar).

Rutaganda, (Trial Chamber), December 6, 1999, paras. 458-59: “[A]s far as the individualization of penalties is concerned, the judges of the Chamber cannot limit themselves to the factors mentioned in the Statute and the Rules. Here again, their unfettered discretion in assessing the facts and attendant circumstances should enable them to take into account any other factor that they deem pertinent Similarly, the factors referred to in the Statute and in the Rules cannot be interpreted as having to be applied cumulatively in the determination of the sentence.” *See also* *Ruggiu*, (Trial Chamber), June 1, 2000, para. 34 (similar); *Kambanda*, (Trial Chamber), September 4, 1998, paras. 30-31 (similar).

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, paras. 3-4: The enumerated circumstances set out in the Statute and the Rules “are not necessarily mandatory or exhaustive. It is a matter of individualising the penalty considering the totality of the circumstances.” The Chamber has “unfettered discretion to go beyond the circumstances stated in the Statute and Rules to ensure justice in matters of sentencing.” *See also* *Ruggiu*, (Trial Chamber), June 1, 2000, para. 35 (similar to first sentence).

2) Trial Chamber has broad discretion as to sentencing

Seromba, (Appeals Chamber), March 12, 2008, para. 228: “Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize the penalties to fit the circumstances of the convicted person and the gravity of the crime.” *See also* *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 1037 (similar); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 451 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 445 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 549: “A Trial Chamber has considerable discretion when determining a sentence”

Karera, (Trial Chamber), December 7, 2007, para. 572: “In determining the sentence, the Chamber has considerable, though not unlimited, discretion resulting from its obligation to individualize penalties to fit the circumstances of the accused and the crimes.” *See also* *Serugendo*, (Trial Chamber), June 12, 2006, para. 81 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 431 (same as *Serugendo*).

Rugambarara, (Trial Chamber), November 16, 2007, para. 13: “[T]he determination of the sentence is left to the discretion of the Chamber.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 109 (same).

Seromba, (Trial Chamber), December 13, 2006, para. 376: “The Chamber has unfettered discretion in sentencing persons found guilty of crimes falling within its jurisdiction.”

Serugendo, (Trial Chamber), June 12, 2006, para. 37: “Determination of the appropriate sentence is left to the discretion of each Trial Chamber, although guidance as to which factors should be taken into account is provided by both the Statute and the Rules.”

See also “appellate review of sentencing,” Section (VIII)(e)(iii), this Digest.

3) no set sentencing ranges

Rugambarara, (Trial Chamber), November 16, 2007, para. 12: “The Statute and the Rules do not provide for specific penalties for any of the crimes within the jurisdiction of the Tribunal.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 50 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 37 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 108 (same); *Rutaganira*, (Trial Chamber), March 14, 2005, para. 106 (similar); *Kambanda*, (Trial Chamber), September 4, 1998, para. 11 (similar).

Kamuhanda, (Trial Chamber), Judge Maqutu’s Dissent on the Sentence, January 22, 2004, para. 4: “The International Tribunal has no system or [sentencing] guidelines of the nature that [Rwanda’s] Gacaca courts have”

4) factors to consider

Seromba, (Appeals Chamber), March 12, 2008, para. 228: “Both Article 23 of the Statute and Rule 101 of the Rules contain general guidelines for Trial Chambers, directing them to take into account the following factors in sentencing: the gravity of the offence; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of Rwanda; and aggravating and mitigating circumstances.” *See also Rugambarara*, (Trial Chamber), November 16, 2007, para. 13 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 51 (similar).⁵⁸

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1038: “The factors that a Trial Chamber is obliged to take into account in sentencing a defendant are set out in Article 23 of the Statute and in Rule 101 of the Rules. They are:

⁵⁸ Some cases suggest that the Trial Chamber will consider aggravating and mitigating circumstances *and* the personal circumstances of the accused. *See, e.g., Seromba*, (Appeals Chamber), March 12, 2008, para. 228; *Bisengimana*, (Trial Chamber), April 13, 2006, para. 109; *Rutaganira*, (Trial Chamber), March 14, 2005, para. 115; *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 337; *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 755; *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 946. Other cases, however, suggest that “aggravating and mitigating circumstances” are individual or personal circumstances—in other words, these are not two separate inquiries. *See, e.g., Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 1038; *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 290; *Karera*, (Trial Chamber), December 7, 2007, para. 571; *Simba*, (Trial Chamber), December 13, 2005, para. 429.

- (1) the general practice regarding prison sentences in the courts of Rwanda. However, Trial Chambers are not obliged to conform to that practice but need only to take account of it;
- (2) the gravity of the offences (*i.e.* the gravity of the crimes of which the accused has been convicted, and the form or degree of responsibility for these crimes). It is well established that this is the primary consideration in sentencing;
- (3) the individual circumstances of the accused, including aggravating and mitigating circumstances
- (4) the extent to which any sentence imposed on the defendant by a court of any State for the same act has already been served.”

See also Kajelijeli, (Appeals Chamber), May 23, 2005, para. 290 (similar, but adding credit for time spent in detention pending transfer to the Tribunal, trial, or appeal); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2260 (similar to *Kajelijeli*); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 449 (similar to *Nahimana*); *Bikindi*, (Trial Chamber), December 2, 2008, para. 443 (same as *Zigiranyirazo*); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 383 (similar to *Kajelijeli*); *Simba*, (Trial Chamber), December 13, 2005, para. 429 (similar to *Nahimana*).

Karera, (Trial Chamber), December 7, 2007, para. 571: “In deciding the appropriate sentence, the Chamber shall consider (i) the gravity of the offences or totality of the conduct; (ii) the individual circumstances of the accused, including aggravating and mitigating circumstances; and (iii) the general practice regarding prison sentences in Rwanda.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 378 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 532 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 589 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 378: “Pursuant to Rule 101(B) of the Rules, the Chamber must . . . take into account the following factors:

- (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 a convicted person for the same act has already been served (...).”

See also Bisengimana, (Trial Chamber), April 13, 2006, para. 109 (similar); *Rutaganira*, (Trial Chamber), March 14, 2005, para. 115 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 337 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 755 (similar, but adding credit for time served in custody pending trial); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 946 (similar to *Kamuhanda*).

Serugendo, (Trial Chamber), June 12, 2006, paras. 35-36: “Article 23 of the Statute provides a non-exhaustive list of the factors to be taken into account by the Trial Chamber in determining the sentence and reads in its relevant parts:

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”

“Rule 101 of the Rules further states in its relevant parts:

. . . (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”

5) only prison sentences dispensed; may impose life imprisonment

Karera, (Trial Chamber), December 7, 2007, para. 571: “Pursuant to Article 23 of the Statute and Rule 101 of the Rules of Procedure and Evidence, the Tribunal may impose a term of imprisonment up to and including the remainder of an accused’s life.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 443 (similar); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 12 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 50 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, paras. 532-33 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 107 (similar); *Mubimana*, (Trial Chamber), April 28, 2005, para. 589 (similar).

Kambanda, (Trial Chamber), September 4, 1998, para. 10: “[T]he only penalties the Tribunal can impose on an accused who pleads guilty or is convicted as such are prison terms up to and including life imprisonment The Statute of the Tribunal excludes other forms of punishment such as the death sentence, penal servitude or a fine.” *See also Serushago*, (Trial Chamber), February 5, 1999, para. 12 (same); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 448 (similar).

6) Tribunal may impose restitution

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 880: “[T]he Tribunal may impose . . . the restitution of property or proceeds acquired by criminal conduct.”

7) goals of sentencing

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1057: “[T]he Appeals Chamber is of the opinion that, in view of the gravity of the crimes in respect of which the Tribunal has jurisdiction, the two main purposes of sentencing are retribution and deterrence; the purpose of rehabilitation should not be given undue weight.” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 449 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 443 (same as *Zigiranyirazo*).

Kamubanda, (Appeals Chamber), September 19, 2005, para. 351: “The Appeals Chamber first notes that while national reconciliation and the restoration and maintenance of peace are important goals of sentencing, they are not the only goals. Indeed, the Trial Chamber correctly referred to ‘deterrence, justice, reconciliation, and the restoration and

maintenance of peace’ as being among the goals consistent with Security Council Resolution 955 of 8 November 1994 which set up the Tribunal. These goals cannot be separated but are intertwined, and, in any case, nothing in Resolution 955 indicates that the Security Council intended that one should prevail over another.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2260: “The penalty imposed should reflect the goals of retribution, deterrence, rehabilitation, and the protection of society.” *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 383 (same); *Karera*, (Trial Chamber), December 7, 2007, para. 571 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 429 (similar); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 498 (similar); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, paras. 882, 887 (similar); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 2 (similar).

Rugambarara, (Trial Chamber), November 16, 2007, para. 11: “The Tribunal was established to prosecute and punish the perpetrators of the atrocities in Rwanda in 1994 so as to end impunity. It was also created to contribute to the process of national reconciliation, the restoration and maintenance of peace and to ensure that the violations of international humanitarian law in Rwanda are halted and effectively redressed. The Chamber considers that a fair trial and, in the event of a conviction, a just sentence, contribute towards these goals. Furthermore, deterrence, retribution and rehabilitation are relevant principles considered by the Chamber when imposing a sentence.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 49 (same); *Serugendo*, (Trial Chamber), June 12, 2006, paras. 31, 33 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 106 (similar to second and third sentences of *Rugambarara*); *Ruggiu*, (Trial Chamber), June 1, 2000, paras. 32-33 (similar to *Rugambarara*).

Muvunyi, (Trial Chamber), September 12, 2006, para. 532: “In Resolution 955 (1994) which established the Tribunal, the United Nations Security Council reasoned that holding individuals responsible for the serious violations of international humanitarian law committed in Rwanda in 1994, would further the objectives of justice, deterrence, reconciliation and the restoration and maintenance of peace in that country. These objectives largely reflect the goals of sentencing in criminal law which are retribution, deterrence, rehabilitation, and societal protection.” *See also Muhimana*, (Trial Chamber), April 28, 2005, para. 588 (similar to first sentence).

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 335-36: “The preamble to the United Nations Security Council resolution 955 establishing the Tribunal emphasized the need to further the goals of deterrence, justice, reconciliation, and restoration and maintenance of peace.” “In deciding the sentence to impose on the Accused, the Chamber will take into account all the factors likely to contribute to the achievement of the above goals. In view of the gravity of the offences committed in Rwanda in 1994, it is of the utmost importance that the international community condemn the said offences in a manner that will prevent a repetition of those crimes either in Rwanda or elsewhere. The Chamber will also take into account reconciliation among Rwandans towards which, pursuant to the same resolution, the Tribunal is mandated to contribute.” *See also*

Kamuhanda, (Trial Chamber), January 22, 2004, paras. 753-54 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, paras. 944-45 (similar).

Rutaganda, (Trial Chamber), December 6, 1999, para. 456: “[I]t is clear that the penalties imposed on accused persons found guilty . . . must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on [the] other hand, at deterrence, namely to dissuade for ever [*sic*], others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 986 (similar); *Kambanda*, (Trial Chamber), September 4, 1998, para. 28 (similar).

See also *Simba*, (Appeals Chamber), Partially Dissenting Opinion Of Judge Schomburg, November 27, 2007, para. 2 (“This International Tribunal was established to avoid impunity”); *Seromba*, (Trial Chamber), December 13, 2006, para. 376 (citing the goals of “retribution, deterrence, reprobation, rehabilitation, national reconciliation, protection of society and restoration of peace”); *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 210 (citing the goals of reconciliation and restoration of peace and security in Rwanda); *Kamuhanda*, (Trial Chamber), Judge Maqutu’s Dissent on the Sentence, January 22, 2004, para. 4 (citing goals of “firmly and robustly punish[ing] genocide and crimes against humanity with the object hopefully of helping Rwanda’s reconciliation”).

(a) retribution

Rutaganira, (Trial Chamber), March 14, 2005, paras. 108-09: “Retribution is the expression of the social disapproval attached to a criminal act and to its perpetrator and demands punishment for the latter for what he has done. The sentences handed down by the International Criminal Tribunal are therefore an expression of humanity’s outrage against the serious violations of human rights and international humanitarian law which an accused has been found guilty of committing. Retribution meets the need for justice and may also appease the anger caused by the crime to the victims and within the community as a whole.” “In citing retribution as a major purpose of the sentence, the Chamber underscores the gravity of the crime to which the Accused has pleaded guilty, given the specific circumstances of the instant case.”

(b) deterrence

Karera, (Trial Chamber), December 7, 2007, para. 571: “Specific emphasis is placed on general deterrence, to demonstrate ‘that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights.’” See also *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 484 (same).

Rutaganira, (Trial Chamber), March 14, 2005, paras. 110, 112: “With the sentence, an attempt is made to deter, that is, to discourage people from committing similar crimes. The main result sought is to discourage people from committing a second offence (special deterrence) since the penalty should also result in discouraging other people from carrying out their criminal plans (general deterrence).” “With respect to general deterrence, a sentence would contribute to strengthening the legal system which

criminalizes the conduct charged and to assuring society that its criminal system is effective.”

Kamubanda, (Trial Chamber), January 22, 2004, para. 754: “In view of the grave nature of the crimes committed in Rwanda in 1994, it is essential that the international community condemn them in a manner that carries a substantial deterrent factor against their reoccurrence anywhere, whether in Rwanda or elsewhere.” *See also Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 336 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 945 (same as *Kamubanda*).

(c) rehabilitation

Rutaganira, (Trial Chamber), March 14, 2005, para. 113: “By ‘rehabilitation,’ the Chamber understands the need to take into account the ability of the person found guilty to be rehabilitated; such rehabilitation goes hand in hand with his reintegration into society.”

(i) weight to accord rehabilitation

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1057: “[T]he purpose of rehabilitation should not be given undue weight.”

(d) reconciliation

(i) sentence of life in prison does not undermine goal of reconciliation

Kamubanda, (Appeals Chamber), September 19, 2005, para. 351: “The Appellant contends that sentencing him to life imprisonment would deprive ‘both his fellow Rwandans and their country of what they could learn from him upon his release’ and therefore not serve the goal of national reconciliation. The Appeals Chamber is not persuaded by this argument. The Trial Chamber was free to conclude that any advantage in terms of national reconciliation gained by the Appellant’s eventual release was either minimal or was outweighed by the harms to both general deterrence and national reconciliation that would be created by a lenient sentence that was not perceived to reflect the gravity of the crimes committed. Moreover, too lenient a sentence might also undermine other fundamental principles of sentencing, in particular proportionality, by giving the impression that the punishment does not reflect the gravity of the crimes committed”

(e) goals served by guilty plea

Rugambarara, (Trial Chamber), November 16, 2007, para. 30: “A guilty plea may have a mitigating effect on the sentence by: the showing of remorse, repentance, the contribution to reconciliation, the establishment of the truth, the encouragement of other perpetrators to come forward, the sparing of a lengthy investigation and a trial and thus time, effort and resources, and the fact that witnesses are relieved from giving evidence in court.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 65 (same); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 126 (similar, but adding: “[t]he timing of the guilty plea is also a factor”).

Nzabirinda, (Trial Chamber), February 23, 2007, para. 68: “[A] guilty plea may contribute to the process of national reconciliation in Rwanda.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 139 (similar).

Serugendo, (Trial Chamber), June 12, 2006, paras. 55, 57: A guilty plea “may: demonstrate repentance, honesty, and readiness to take responsibility; help establish the truth; contribute to peace and reconciliation; set an example to other persons guilty of committing crimes; relieve witnesses from giving evidence in court; and save the Tribunal’s time and resources.” “Moreover, the Chamber is of the view that the guilty plea of the Accused may contribute to the process of national reconciliation in Rwanda. Further, by pleading guilty prior to the commencement of the trial, the Accused relieved the victims of the need to open old wounds.”

Serugendo, (Trial Chamber), June 12, 2006, paras. 32, 34, 52: “A guilty plea indicates that an accused is admitting the veracity of the charges contained in an indictment. This also means that the accused acknowledges responsibility for his actions, which tends to further a process of reconciliation. A guilty plea protects victims from having to relive their experiences and re-open old wounds [by testifying]. As a side-effect, albeit not really a significant mitigating factor, it also saves the Tribunal’s resources.” “The Chamber is of the opinion that, when an accused pleads guilty, he or she takes an important step in these processes. By pleading guilty, the Accused should be seen as setting an example that may encourage others to acknowledge their personal involvement in the massacres committed in Rwanda in 1994.” “*Serugendo*’s guilty plea will assist in the administration of justice and in the process of national reconciliation in Rwanda.”

Rutaganira, (Trial Chamber), March 14, 2005, para. 114: “[W]hen an accused pleads guilty, he is taking an important step towards rehabilitation and reintegration. Such admission of guilt is likely to contribute to the search for the truth; it shows the resolve of an accused to accept responsibility vis-à-vis the injured party and society as a whole, which may contribute to reconciliation which is one of the goals pursued by the Tribunal.”

For discussion of procedures for entering a guilty plea, see “[a]ccepting guilty pleas,” Section (VIII)(f), this Digest.

iii) determining penalties/sentencing practices

1) taking account of Rwandan law/practice

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1063: “The Appeals Chamber recalls that, while the Trial Chamber must take account of the general practice regarding sentences in the Rwandan courts, it is well established in the jurisprudence that the Trial Chamber is not bound by that practice. The Trial Chamber is therefore ‘entitled to impose a greater or lesser sentence than that which would have been imposed by the Rwandan courts.’” *See also Serugendo*, (Trial Chamber), June 12, 2006, para. 75 (similar to first sentence); *Ruggiu*, (Trial Chamber), June 1, 2000, para. 31

(similar to first sentence); *Serushago*, (Appeals Chamber), April 6, 2000, para. 30 (same as *Ruggiu*).

Semanza, (Appeals Chamber), May 20, 2005, paras. 376, 345: “Article 23(1) of the Statute provides that, in determining the terms of imprisonment, ‘Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.’ Similarly, Rule 101(B)(iii) of the Rules indicates that the Trial Chamber ‘shall take into account . . . such factors as . . . the general practice regarding prison sentences in the courts of Rwanda.’” “[T]he Trial Chamber made explicit reference to ‘the sentencing practice in the Rwandan courts.’ That is all the Tribunal’s Statute requires – ‘recourse to the general practice regarding prison sentences in the courts of Rwanda.’” *See also Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 548 (similar to first sentence of *Semanza*).

Rugambarara, (Trial Chamber), November 16, 2007, para. 50: “Article 23 of the Statute and Rule 101 of the Rules mandate the Tribunal to take into account the general practice regarding prison sentences in the courts of Rwanda.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 102 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 192 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 591 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 402: “Rwandan law and sentences passed by the Rwandan courts are to be used only as a reference, since such reference is but one of the factors that must be taken into account in determining sentence. In fact, the Tribunal can only impose on the Accused a sentence of imprisonment for the remainder of his life and not the death sentence, which is applied in Rwanda.”⁵⁹ *See also Kambanda*, (Trial Chamber), September 4, 1998, paras. 22 (similar).

Rutaganira, (Trial Chamber), March 14, 2005, para. 163: “In determining the sentence to be imposed on the Accused, the Chamber will . . . review sentencing practice in Rwanda. Under the Statute and the Rules, such practice is but one of the factors to be taken into account by the Chamber in sentencing.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 501: “The Chamber has also found guidance in the practice of sentencing in Rwanda, as referred to in previous judgements of the Tribunal.”

Kambanda, (Trial Chamber), September 4, 1998, para. 41: “Reference to the Rwandan sentencing practice is intended as a guide to determining an appropriate sentence and does not fetter the discretion of the judges of the Trial Chamber to determine the sentence.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 984 (similar); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 454 (similar); *Serushago*, (Trial Chamber), February 5, 1999, para. 18 (similar).

See also Simba, (Appeals Chamber), Partially Dissenting Opinion Of Judge Schomburg, November 27, 2007, para. 2: “[P]ursuant to Article 23(1) of the International Tribunal’s

⁵⁹ The death penalty in Rwanda has since been abolished.

Statute, we shall have recourse to the general practice regarding prison sentences in the courts of Rwanda It would be contrary to this mandate to mete out punishment which is more lenient than sentences handed down in Rwanda, in particular vis-à-vis subordinates, as opposed to those standing trial as their superiors before the International Tribunal.”

(a) application

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 455: “[U]nder Rwandan law, genocide and crimes against humanity carry the possible penalties of life imprisonment, or life imprisonment with special provisions, depending on the nature of the accused’s participation.” See also *Bikindi*, (Trial Chamber), December 2, 2008, para. 447 (similar); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 388 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 584 (similar and stating: “this as one factor supporting the imposition of a heavy penalty upon Karera”).

Simba, (Trial Chamber), December 13, 2005, para. 434: “Under Rwandan law, genocide and crimes against humanity carry the possible penalties of death or life imprisonment, depending on the nature of the accused’s participation.”⁶⁰

Kamuhanda, (Trial Chamber), January 22, 2004, para. 766: “The Chamber notes that for the most serious crimes, comparable to a conviction by this Tribunal for Genocide or Extermination as a Crime against Humanity, a convict under the Rwandan judicial system would be liable to the death penalty. In regard to lower categories of crimes in Rwanda, a Rwandan court would have the power to impose a life sentence. Thus, the Chamber regards this as one factor supporting the imposition of a heavy penalty upon Kamuhanda.”⁶¹ See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 6-7 (similar).

For further discussion of Rwandan law as to sentencing, see *Rugambarara*, (Trial Chamber), November 16, 2007, paras. 51, 52; *Nzabirinda*, (Trial Chamber), February 23, 2007, paras. 103-04; *Seromba*, (Trial Chamber), December 13, 2006, paras. 400-01; *Serugendo*, (Trial Chamber), June 12, 2006, paras. 76-78; *Bisengimana*, (Trial Chamber), April 13, 2006, paras. 193-95; *Muhimana*, (Trial Chamber), April 28, 2005, para. 592; *Rutaganira*, (Trial Chamber), March 14, 2005, paras. 164-66; *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 511; *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 964.

2) gravity

(a) gravity is a key/primary factor in sentencing

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1060: “[T]he effective gravity of the offences committed is the deciding factor in the determination of the sentence[.]”

⁶⁰ See prior footnote.

⁶¹ See prior footnote.

Muhimana, (Appeals Chamber), May 21, 2007, para. 233: “[T]he gravity of the offences committed is the primary consideration when imposing a sentence.” *See also Rutaganira*, (Trial Chamber), March 14, 2005, para. 117 (similar).

Kamubanda, (Appeals Chamber), September 19, 2005, para. 357: “The gravity of the crime is a key factor that the Trial Chamber considers in determining the sentence.” *See also Rutaganira*, (Appeals Chamber), May 26, 2003, para. 591 (same).

Karera, (Trial Chamber), December 7, 2007, para. 583: “[T]he penalty must first and foremost be commensurate to the gravity of the offence.” *See also Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 510 (same); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 354 (similar); *Kamubanda*, (Trial Chamber), January 22, 2004, para. 765 (similar).

Serugendo, (Trial Chamber), June 12, 2006, para. 39: “The gravity of the offence is a factor of primary importance in determining an appropriate sentence.”

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 344: “[U]nder Article 23(2) of the Statute, the gravity of the crimes committed must be taken into account in determining sentence.” *See also Kamubanda*, (Trial Chamber), January 22, 2004, para. 760 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 953 (similar).

Kambanda, (Trial Chamber), September 4, 1998, para. 57: “The degree of magnitude of the crime is still an essential criterion for evaluation of sentence.”

(b) there is no hierarchy of crimes

Rutaganira, (Appeals Chamber), May 26, 2003, para. 590: “The Trial Chamber . . . found that the crime of genocide constitutes the ‘crime of crimes’ which must be taken into account in deciding the sentence. The Appeals Chamber recalls that there is no hierarchy of crimes under the Statute”

Seromba, (Trial Chamber), December 13, 2006, para. 381: “The Chamber recalls that an evaluation of the gravity of offences is based on the crimes charged against the accused, that is, the individual circumstances under which the offences were committed, and not on a hierarchy of crimes.”

Compare Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1060: “[A]lthough there is no pre-established hierarchy between crimes within the jurisdiction of the Tribunal, and international criminal law does not formally identify categories of offences, it is obvious that, in concrete terms, some criminal behaviours are more serious than others”

But see Niyitegeka, (Appeals Chamber), July 9, 2004, para. 53 (referring to genocide as the “‘crime of crimes’”); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 8-9 (genocide is “an offence of the most extreme gravity.” Previous ICTR judgments held “that genocide constitutes the ‘crime of crimes’”).

But see Kambanda, (Trial Chamber), September 4, 1998, paras. 12-14, 16: “[T]he Statute does not rank the various crimes . . . and thereby, the sentence to be handed down.” “In theory, the sentences are the same for each of the three crimes, namely a maximum term of life imprisonment.” However, “[t]he Chamber has no doubt that despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity.” The Chamber found it difficult “to rank genocide and crimes against humanity in terms of their respective gravity” and held that crimes against humanity and genocide are “crimes which particularly shock the collective conscience.” However, the Chamber stated that the “crime of genocide is unique because of its element of *dolus specialis* (special intent)” and held that “genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.” See also *Serushago*, (Trial Chamber), February 5, 1999, para. 15 (“genocide is unique because of its element of *dolus specialis* (special intent)”; *Musema*, (Trial Chamber), January 27, 2000, para. 981 (“because of its element of *dolus specialis* (special intent) . . . genocide constitutes the ‘crime of crimes’”).

(c) all crimes within the Tribunal’s jurisdiction are serious

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 451: “All crimes under the Tribunal’s Statute are serious violations of international humanitarian law.” See also *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 590 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2263 (same as *Zigiranyirazo*); *Bikindi*, (Trial Chamber), December 2, 2008, para. 445 (same as *Zigiranyirazo*); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 387 (same as *Zigiranyirazo*); *Karera*, (Trial Chamber), December 7, 2007, para. 574 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 538 (similar); *Serigendo*, (Trial Chamber), June 12, 2006, para. 81 (same as *Karera*); *Simba*, (Trial Chamber), December 13, 2005, para. 431 (same as *Karera*).

(i) gravity of genocide

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 457: “Genocide is, by definition, a crime of the most serious gravity which affects the very foundations of society and shocks the conscience of humanity.” See also *Bikindi*, (Trial Chamber), December 2, 2008, para. 448 (same).

Bikindi, (Trial Chamber), December 2, 2008, para. 448: “Directly and publicly inciting others to commit [genocide] is, in the Chamber’s opinion of similar gravity [to genocide].”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 590: “The Appeals Chamber . . . notes that the Trial Chamber considered the extreme gravity of the crime of genocide, with which the Appellant was charged”⁶²

⁶² In these cases, the seriousness of a crime is considered when evaluating gravity. In other cases, it is considered as an aggravating factor. See “seriousness of crimes” as an aggravating factor, Section (VII)(b)(iii)(6)(b)(xiii), this Digest. It may not matter how it is characterized as long as it is only considered once.

(ii) gravity of crimes against humanity

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 457: “Extermination as a crime against humanity is, in the Chamber’s opinion, of similar gravity [to genocide].”

Rugambarara, (Trial Chamber), November 16, 2007, para. 19: “Crimes against humanity are very serious offences because they are heinous in nature and shock the collective conscience of mankind.”

Rugambarara, (Trial Chamber), November 16, 2007, para. 54: “[E]xtermination as a crime against humanity constitutes a very serious offence and is a gross violation of international humanitarian law.” *See also Rutaganira*, (Trial Chamber), March 14, 2005, para. 169 (similar).

Bisengimana, (Trial Chamber), April 13, 2006, para. 112: “The gravity and heinous nature of extermination and murder as crimes against humanity and their absolute prohibition render their commission inherently aggravating.”

(iii) gravity of genocide and crimes against humanity

Nzabirinda, (Trial Chamber), February 23, 2007, para. 56: “Genocide and crimes against humanity are inherently very serious offences because they are heinous in nature and shock the collective conscience of mankind.” *See also Serugendo*, (Trial Chamber), June 12, 2006, para. 46 (similar); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 499 (similar).

Muhimana, (Trial Chamber), April 28, 2005, para. 603: “Genocide and murder and rape as crimes against humanity rank amongst the gravest of crimes. The Chamber has no doubt that principal perpetrators of such crimes deserve a heavy sentence.”

(d) whether zeal/sadism are relevant to gravity

Simba, (Appeals Chamber), November 27, 2007, para. 320: “[Z]eal and sadism are factors to be considered, where appropriate, as aggravating factors rather than in the assessment of the gravity of an offence.”

But see Simba, (Appeals Chamber), Partially Dissenting Opinion Of Judge Liu Daqun, November 27, 2007, para. 6: “[T]he Majority’s decision to *proprio motu* find that the Trial Chamber erred in considering zeal and sadism in its assessment of the gravity of the offence is unsupported by the jurisprudence which has broadly defined elements that may be considered under ‘gravity.’” *See also id.*, paras. 2-5 (discussing cases).

See also “zeal and sadism/violent and cruel nature of conduct” as an aggravating factor, Section (VII)(b)(iii)(6)(b)(vii), this Digest.

See “may not evaluate same factor in considering gravity and aggravating circumstances,” Section (VII)(b)(iii)(2)(g), this Digest.

(e) where saving lives not at stake, crime less serious

Rugambarara, (Trial Chamber), November 16, 2007, para. 20: Under the caption of “gravity”: “The Chamber notes . . . that the Accused is only charged with *post facto* knowledge of the crimes. Saving lives was therefore not at stake, which makes the crime less serious than if it were otherwise.”

(f) not required to give credit for lack of active participation

Rugambarara, (Trial Chamber), November 16, 2007, para. 20: “The Chamber finds that Rugambarara’s failure to act constitutes a very serious offence and a gross violation of international humanitarian law. The Chamber also recalls that ‘Trial Chambers, when assessing the gravity of the offence, have no obligation to take into account what the accused did *not* do.’ Furthermore the Chamber is not required to give the Accused credit for the fact that he did not order, plan or instigate the crimes.”

See also “lack of personal participation in killing/absence from murder venue not mitigating factors,” Section (VII)(b)(iii)(7)(b)(*xvi*), this Digest.

(g) may not evaluate same factor in considering gravity and aggravating circumstances

Semanza, (Appeals Chamber), May 20, 2005, para. 338: “With respect to the number of deaths, the Trial Chamber observed that it had already considered this factor in assessing the gravity of the offence of extermination and that it therefore could not also consider the same factor as an aggravating factor in the sentence for extermination.”

Bikindi, (Trial Chamber), December 2, 2008, para. 452: “The Chamber has already taken into consideration Bikindi’s form of participation in assessing the gravity of the offence [and therefore will not consider it as an aggravating factor].”

3) the sentence must be individualized: consider totality of conduct; take into account the particular circumstances of the case and the form and degree of participation

Simba, (Appeals Chamber), November 27, 2007, para. 336: “The Appeals Chamber . . . endorses the view taken by the Trial Chamber that there are a ‘multitude of variables, ranging from the number and types of crimes committed to the personal circumstances of the individual’ which need to be taken into account in order to individualise sentences. In the instant case, the Trial Chamber expressly recognised the gravity of the crimes for which the Appellant was responsible while at the same time taking into consideration his role in the commission of these crimes.”

Kamuhanda, (Appeals Chamber), September 19, 2005, paras. 351, 357: “It is settled case law before both the ICTR and the ICTY that the underlying principle is that Trial Chambers must tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime.” “The principle of individualization requires that each sentence be pronounced on the basis of the individual circumstances of the accused and the gravity of the crime.”

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 359: “The principle of proportionality . . . implies that sentences ‘must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.’” *See also Muhimana*, (Appeals Chamber), May 21, 2007, para. 234 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 562 (similar); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 591 (similar); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 19 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 39 (similar); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 883 (similar); *Kambanda*, (Trial Chamber), September 4, 1998, para. 58 (similar).

Semanza, (Appeals Chamber), May 20, 2005, para. 385: “[T]he Trial Chamber’s [conscientious] approach . . . was premised on the need to individualise the sentence in light of the particular circumstances of the case. It indicated that it should ‘go beyond the abstract gravity of the crime to take into account the particular circumstances of the case, as well as the form of and degree of the participation of the accused.’”

Akayesu, (Appeals Chamber), June 1, 2001, para. 416: “The right to take into account other pertinent factors goes hand in hand with the overriding obligation to individualize a penalty to fit the individual circumstances of the accused, the overall scope of his guilt and the gravity of the crime[,] the overriding consideration being that the sentence to be imposed must reflect the totality of the accused’s criminal conduct.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2263: “When determining a sentence, a Trial Chamber has considerable, though not unlimited, discretion on account of its obligation to individualise penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes for which the accused has been convicted.” *See also Nchamihigo*, (Trial Chamber), November 12, 2008, para. 387 (same); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 810 (similar); *Semanza*, (Trial Chamber), May 15, 2003, para. 560 (same as *Ntagerura*).

Karera, (Trial Chamber), December 7, 2007, para. 574: “In assessing the gravity of the offence, the Chamber must take into account the particular circumstances of the case, and the form and degree of [the Accused’s] participation in the crime.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 54 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 538 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 39 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 178 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 591 (similar); *Rutaganira*, (Trial Chamber), March 14, 2005, para. 117 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, paras. 344 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 760 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 953 (similar).

Rugambarara, (Trial Chamber), November 16, 2007, para. 15: “The Chamber understands its obligation to ensure that the sentence is commensurate with the individual facts of the case and the individual circumstances of the offender.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 52 (similar); *Serugendo*, (Trial

Chamber), June 12, 2006, para. 39 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 110 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 594 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 963 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 383: “The Chamber recalls that the individual circumstances of the accused are perceived in the jurisprudence of the *ad hoc* tribunals as a factor for individualizing the penalty. The Chamber further considers that individual circumstances should be understood to be any personal circumstance of the accused which may either aggravate or mitigate sentence.”

(a) the longest sentence must be reserved for the most serious offences

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1060: “[T]he principle of gradation or hierarchy in sentencing requires that the longest sentences be reserved for the most serious offences.” *See also Kamuhanda*, (Trial Chamber), January 22, 2004, para. 760 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 953 (same as *Kamuhanda*).

Muhimana, (Trial Chamber), April 28, 2005, para. 591: “Pursuant to Article 23 (2) of the Statute and Rule 101 (A) of the Rules, the Tribunal considers the principle of gradation in sentencing. Thus, the more heinous the crime, the heavier the sentence will be.”

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 344: “[T]he more heinous the crime, the heavier the sentence will be. Such interpretation of Article 23(2) underpins the Prosecution’s submission that the maximum sentence is required for the most serious offenders.”

See also Semanza, (Trial Chamber), May 15, 2003, para. 559: “The penalty of life imprisonment, the highest penalty available at this Tribunal, should be reserved for the most serious offenders.”

(b) life imprisonment reserved for those who planned or ordered atrocities (particularly those with authority), or committed crimes with zeal or sadism

Nchamihigo, (Trial Chamber), November 12, 2008, para. 388: “At this Tribunal, a sentence of life imprisonment is generally reserved for those who planned or ordered atrocities and those who participated in the crimes with especial zeal or sadism. Offenders receiving the most severe sentences also tend to be senior authorities.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 403 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 538 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, paras. 83, 89 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 434 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 500 (similar).

Karera, (Trial Chamber), December 7, 2007, para. 583: “Life imprisonment [has] . . . been imposed on those at a lower level who planned or ordered atrocities or if they participated in the crimes with particular zeal or sadism.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 815. “[L]ife imprisonment, which is the highest penalty permissible under the ICTR Statute, should be reserved for the most serious offenders, such as individuals who planned, led, or ordered a particular criminal act, or individuals who committed crimes with particular cruelty, and underscores the significance of the principle of gradation in sentencing, which allows the Chamber to distinguish among crimes, based on their gravity.”

Compare Simba, (Trial Chamber), December 13, 2005, paras. 435-36 (finding that because “Simba had no formal position within the government, military or political structures of the government” at the time of the crimes; because the Trial Chamber was “not convinced” that Simba “was the architect of the massacres” or “played a role in their planning” and because of lack of “evidence [of] any particular zeal or sadism,” the Trial Chamber concluded he did not deserve “the most serious sanction available,” *i.e.*, life in prison); *but see Simba*, (Appeals Chamber), Partially Dissenting Opinion Of Judge Schomburg, November 27, 2007, paras. 1, 3 (arguing that Simba, as a “primary player” should have been sentence to life, not 25 years).

See also “Trial Chamber may impose life sentence even if there are mitigating circumstances,” Section (VII)(b)(iii)(7)(a)(viii), this Digest.

(c) principal perpetration generally warrants higher sentence than aiding and abetting

Semanza, (Appeals Chamber), May 20, 2005, para. 388: “[A] higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than merely aids and abets exterminations.”

Nchamihigo, (Trial Chamber), November 12, 2008, para. 388: “In the Tribunal’s jurisprudence, principal perpetration generally warrants a higher sentence than aiding and abetting. However, this alone does not mean that a life sentence is the only appropriate sentence for a principal perpetrator of Genocide and Crimes against Humanity.” *See also Serugendo*, (Trial Chamber), June 12, 2006, para. 83 (same); *Simba*, (Trial Chamber), December 13, 2005, para. 434 (same first sentence as *Nchamihigo*).

Nzabirinda, (Trial Chamber), February 23, 2007, para. 109: “The Chamber is mindful of the reasoning in the *Semanza* Judgement that a higher sentence is likely to be imposed on ‘one who orders rather than merely aids and abets exterminations.’ The Chamber . . . recalls that ‘the modes of [responsibility] may either augment (*e.g.*, commission of the crime with direct intent) or lessen (*e.g.*, aiding and abetting a crime with awareness that a crime will probably be committed) the gravity of the crime.’”

Seromba, (Trial Chamber), December 13, 2006, para. 403: “[D]irect participation of an accused in crimes committed generally attracts a higher sentence than criminal participation by way of aiding and abetting the commission of the crimes.”

See, e.g., Nchamihigo, (Trial Chamber), November 12, 2008, para. 388: “The Chamber has found that Nchamihigo agreed with others to destroy the Tutsi population in Cyangugu.

He instigated the massacre of thousands of Tutsi and Hutu political opponents at places of refuge, including churches. The victims included people of both genders and of all ages. He personally ordered, instigated and aided and abetted systematic killings of influential Tutsi and Hutu political opponents. He instigated militias to commit those crimes. He looted property from victims. The Chamber determined that Nchamihigo was a principal perpetrator.”

**(d) secondary or indirect forms of participation generally
punished with a less severe sentence**

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 201: “The Trial Chamber properly stated . . . that ‘secondary or indirect forms of participation are generally punished with a less severe sentence.’”

Semanza, (Appeals Chamber), May 20, 2005, para. 388: “The Appeals Chamber recently held in *Krstić* that ‘aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator.’ The Appeals Chamber endorses this reasoning to the extent that a higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than merely aids and abets exterminations.”

Karera, (Trial Chamber), December 7, 2007, para. 583: “Secondary or indirect forms of participation have usually entailed a lower sentence.” *See also* *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 110 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 87 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 199 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 593 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 813 (similar).

(e) joint perpetrators not *a priori* subject to same punishment

Kambanda, (Trial Chamber), September 4, 1998, para. 29: “[I]t is true that ‘among the joint perpetrators of an offence or among the persons guilty of the same type of offence, there is only one common element: the target offence which they committed with its inherent gravity. Apart from this common trait, there are, of necessity fundamental differences in their respective personalities and responsibilities: their age, their background, their education, their intelligence, their mental structure It is not true that they are *a priori* subject to the same intensity of punishment.’”

**(f) life imprisonment in general should not be imposed where
guilty plea**

Serugendo, (Trial Chamber), June 12, 2006, para. 89: “[T]he maximum sentence should in general not be imposed where an accused has pleaded guilty. The Chamber reiterates that some form of consideration should be given to those who have confessed their crimes in order to encourage others to come forward.”

But see *Kambanda*, (Trial Chamber), September 4, 1998 (life imprisonment imposed where guilty plea); *Kambanda*, (Appeals Chamber), October 19, 2000 (affirmed).

**(g) maximum International Criminal Court term of thirty years
not binding**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1067-68: “Appellant Barayagwiza argues that the Statute of the International Criminal Court provides for a maximum fixed term of imprisonment of 30 years.” “This provision does not bind the Tribunal, and the Appellant has not shown that it reflects the state of international customary law in force in 1994. The Appeals Chamber recalls that Rule 101(A) of the Rules does not limit the length of the custodial sentence that can be imposed by the Tribunal.”

**4) single sentence may cover all counts as to which an accused is
found guilty**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1042-43: “[T]he Appeals Chamber [in *Kambanda*] has held that Trial Chambers may impose a single sentence in respect of multiple convictions in the following circumstances:

Where the crimes ascribed to an accused, regardless of their characterisation, form part of a single set of crimes committed in a given geographic region during a specific time period, it is appropriate for a single sentence to be imposed for all convictions, if the Trial Chamber so decides.”

“The Appeals Chamber [in *Kambanda*] has further held that, when the acts of the accused are linked to the systematic and widespread attack which occurred in 1994 in Rwanda against the Tutsi, this requirement is fulfilled and a single sentence for multiple convictions can be imposed. The Appeals Chamber reaffirms the position stated in the *Kambanda* Appeal Judgement. In the present case, since the acts of the Appellants were all linked to the genocide of the Tutsi in Rwanda in 1994, the Trial Chamber could impose a single sentence.”

Kambanda, (Appeals Chamber), October 19, 2000, paras. 101-02: “[N]othing in the Statute or Rules expressly states that a Chamber must impose a separate sentence for each count on which an accused is convicted.” “[T]he Statute is sufficiently liberally worded to allow for a single sentence to be imposed. Whether or not this practice is adopted is within the discretion of the Chamber [A] Chamber is not prevented from imposing a global sentence in respect of all counts for which an accused has been found guilty.” *See also Seromba*, (Trial Chamber), December 13, 2006, para. 404 (same as first sentence); *Musema*, (Trial Chamber), January 27, 2000, para. 989 (similar to *Kambanda*).

Karera, (Trial Chamber), December 7, 2007, para. 585: “The Chamber has the discretion to impose a single sentence and notes that this practice is usually appropriate where the offences may be characterized as belonging to a single criminal transaction.” *See also Simba*, (Trial Chamber), December 13, 2005, para. 445 (same); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 497 (similar); *Nyitegeka*, (Trial Chamber), May 16, 2003, para. 483 (similar); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 917 (similar).

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 917: “[T]he decision whether to impose a single sentence is left entirely to the discretion of the

Chamber, so long as the fundamental consideration in imposing sentence is the totality of the criminal conduct of the accused.”

See also Seromba, (Trial Chamber), December 13, 2006, para. 404: “Under Rule 101(C) of the Rules, the Chamber has discretion to determine whether the sentences it has passed [in the absence of a single, global sentence] are to be served consecutively or concurrently.” *See also Ndindababizi*, (Trial Chamber), July 15, 2004, para. 497 (similar); *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 483 (same as *Ndindababizi*).

5) sentencing in other ICTR/ICTY cases

(a) comparison with other cases of limited assistance

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1066: “Trial Chambers are under an obligation to tailor penalties to fit the gravity of the crime and the individual circumstances of the case and of each accused; a comparison of cases is thus often of limited assistance.” *See also id*, para. 1046 (similar); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 232 (similar).

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 361: “The question of the guidance that may be provided by previous sentences rendered before the ICTR and the ICTY has been extensively dealt with by the ICTY Appeals Chamber in the *Dragan Nikolic* case:

The guidance that may be provided by previous sentences rendered by the International Tribunal and the ICTR is not only ‘very limited’ but is also not necessarily a proper avenue to challenge a Trial Chamber’s finding in exercising its discretion to impose a sentence. The reason for this is twofold. First, whereas such comparison with previous cases may only be undertaken where the offences are the same and were committed in substantially similar circumstances, when differences are more significant than similarities or mitigating and aggravating factors differ, different sentencing might be justified. Second, Trial Chambers have an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime, with due regard to the entirety of the case, as the triers of fact.”

Semanza, (Appeals Chamber), May 20, 2005, para. 394: “[A]s a general principle, comparison to other cases in support of a move to have the sentence increased may indeed provide guidance if it relates to the same offence, in particular if the crimes were committed in substantially similar circumstances. However, such comparison may be of limited value given that each case has its own particular circumstances and that the aggravating and mitigating factors may dictate different results. Ultimately, the decision as to the length of sentence is a discretionary one, turning on the circumstances of the case.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 455: “In determining an appropriate sentence, the Appeals Chamber has stated that ‘sentences of like individuals in like cases should be comparable.’ However, it has also noted the inherent limits to this approach because ‘any given case contains a multitude of variables, ranging from the

number and type of crimes committed to the personal circumstances of the individual.” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2264 (same); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 53 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 105 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 82 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 198 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 432 (similar).

See also *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 812: “The Chamber notes that the practice of awarding a single sentence for the totality of an accused’s conduct makes it difficult to determine the range of sentences for each specific crime. Notwithstanding this difficulty, it is possible to ascertain general ranges of sentences which may provide useful guidance to the Chamber in determining the appropriate sentence in this case.” See also *Semanza*, (Trial Chamber), May 15, 2003, para. 562 (same).

See, e.g., *Bikindi*, (Trial Chamber), December 2, 2008, para. 447: “The Chamber has . . . considered the general sentencing practice at the Tribunal, paying particular attention to the *Kajelijeli* and *Ruggiu* Trial Judgements in which Juvénal Kajelijeli and Georges Ruggiu were convicted for direct and public incitement to commit genocide and sentenced for that offence to 15 and 12 years’ imprisonment respectively. However, the Chamber has found the comparison with those two cases of very limited assistance given the different circumstances of this case.”

(b) sentencing practices in ICTR and ICTY cases: principal perpetrators

(i) generally

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 362: “[A] review of the ICTR’s case law finds that those who, like the Appellant, have been convicted of genocide as a principal perpetrator have frequently been sentenced to life imprisonment. In any case, the Trial Chamber is not bound by previous sentencing practices.” See also *Muhimana*, (Trial Chamber), April 28, 2005, para. 593 (principal perpetrators convicted of genocide have received fifteen years to life).

See *Karera*, (Trial Chamber), December 7, 2007, para. 583 (principal perpetrators convicted of genocide and extermination as a crime against humanity have received twenty-five years to life); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 813 (principal perpetrators convicted of either genocide or extermination as a crime against humanity, or both, have received fifteen years to life); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 510 (similar to *Ntagerura*); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 765 (similar to *Ntagerura*); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 963 (similar to *Ntagerura*); *Semanza*, (Trial Chamber), May 15, 2003, para. 563 (similar to *Ntagerura*).

See *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 110 (principal perpetrators convicted of crimes against humanity, such as murder, have received ten years to life); *Serugendo*, (Trial Chamber), June 12, 2006, para. 87 (principal or co-perpetrators

convicted of the crime against humanity of persecution have received five years to life); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 199 (principal perpetrators convicted of crimes against humanity such as murder and extermination have received ten years to life).

(ii) playing a central role in planning, instigating, ordering, committing and aiding and abetting genocide and extermination, and instigating rape, warranted life sentence, not thirty years

Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 204-06: “The Appeals Chamber is of the view that, although the Trial Chamber correctly noted that the sentence should first and foremost be commensurate with the gravity of the offences and the degree of [responsibility] of the convicted person, it then disregarded these principles in imposing a sentence of only thirty years’ imprisonment on the Appellant. The Appeals Chamber recalls that the Appellant played a central role in planning, instigating, ordering, committing, and aiding and abetting genocide and extermination in his commune of Rusumo, where thousands of Tutsis were killed or seriously harmed. The Trial Chamber also found the Appellant guilty of instigating rape as a crime against humanity, noting that he had exhibited particular sadism in specifying that where victims resisted, they should be killed in an atrocious manner. The Appellant was thus convicted of extremely serious offences. Moreover, unlike in most of the other cases in which those convicted for genocide have received less than a life sentence, there were no especially significant mitigating circumstances here. Instead, the Appellant was a primary player, a leader in the commune who used his power to bring about the brutal massacre and rape of thousands.” “The Appeals Chamber concludes that in light of the massive nature of the crimes and the Appellant’s leading role in them, as well as the relative insignificance of the purported mitigating factors, the Trial Chamber ventured outside its scope of discretion by imposing a sentence of only thirty years’ imprisonment.” “The Appeals Chamber considers that the maximum sentence is warranted in the Appellant’s case and that there are no significant mitigating circumstances that would justify imposing a lesser sentence than imprisonment for the remainder of his life.”

(iii) fifteen-year sentences inadequate for ordering genocide and extermination; twenty-five years imposed

Semanza, (Appeals Chamber), May 20, 2005, paras. 388-89: “Despite the Trial Chamber’s conscientious treatment of the Appellant’s sentence, the Appeals Chamber is not satisfied that the 15-year sentences for complicity in genocide and aiding and abetting extermination that the Trial Chamber imposed are commensurate with the gravity of the Appellant’s offences, as determined by the Appeals Chamber. The Appeals Chamber has concluded above that the Appellant’s actions at Musha church [in Gikoro commune] amounted to perpetration in the form of ordering rather than mere complicity in genocide and aiding and abetting extermination. This form of direct perpetration entails a higher level of culpability than complicity in genocide and aiding and abetting extermination convictions entered by the Trial Chamber” “On balance, the Appeals Chamber concludes, Judge Pocar dissenting, that the 15-year sentences for complicity in genocide and for aiding and abetting extermination should be

increased by 10 years to reflect the Appellant's responsibility for ordering genocide and extermination at Musha church. Thus, the Appeals Chamber determines that the Appellant's sentence for these offences should be 25 years' imprisonment." (For discussion of Judge Pocar's dissent, see "Appeals Chamber entering a new conviction; whether that violates the right to an appeal," Section (VIII)(e)(ii)(14), this Digest.)

(c) sentencing practices in ICTR and ICTY cases: secondary or indirect perpetrators, and single crimes against humanity

(i) generally

See *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 98 (in *Furundzija*, eight year sentence imposed for encouraging, by his presence, outrages upon personal dignity and rape; in *Rutaganira*, six year sentence imposed for encouraging, by his presence and by omission, extermination as a crime against humanity); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 813 (Ruggiu sentenced to twelve years for incitement to commit genocide after guilty plea; Elizaphan Ntakirutimana sentenced to ten years for aiding and abetting genocide); *Muhimana*, (Trial Chamber), April 28, 2005, para. 593 (similar as to *Ntakirutimana*); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 354 (similar to *Ntagerura*); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 963 (same as *Ntagerura*); *Semanza*, (Trial Chamber), May 15, 2003, para. 563 (same as *Ntagerura*).

Semanza, (Trial Chamber), May 15, 2003, para. 564: "In the jurisprudence of the two Tribunals, rape as a crime against humanity has resulted in specific sentences between twelve years and fifteen years. Torture as a crime against humanity has been punished with specific sentences between five years and twelve years. Murder as a crime against humanity has been punished by specific fixed term sentences ranging from twelve years to twenty years. In other cases, convictions for these crimes have formed part of a single sentence of a fixed term or of life imprisonment for the totality of the conduct of the Accused."

(ii) sentences of seven years for instigating rape and eight years for instigating six murders adequate

Semanza, (Appeals Chamber), May 20, 2005, paras. 390, 395: "[T]he Prosecution submits that the Trial Chamber erred in imposing a 7-year sentence for instigating rape and an 8-year sentence for instigating the murder of 6 people. It argues that the sentences are manifestly disproportionate to the gravity of these crimes, do not accord with sentences imposed for similar crimes by the Tribunal, and that the Trial Chamber did not reasonably consider the appropriate penalty which would have been imposed under Rwandan law." "Although the Trial Chamber may have imposed lesser sentences than in other cases, it has not been shown that in so doing it acted outside its discretion."

6) aggravating circumstances

(a) generally

(i) Trial Chamber obliged to take into account

Serugendo, (Trial Chamber), June 12, 2006, para. 40: “In determining the sentence, the Chamber is obliged to take into account any aggravating and mitigating circumstances . . .”

(ii) what constitute aggravating circumstances and weight to give them left to Trial Chamber’s discretion

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 458: “The Chamber has wide discretion in determining what constitutes . . . aggravating circumstances and the weight to be accorded thereto.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 449 (same).

Serugendo, (Trial Chamber), June 12, 2006, para. 40: “[T]he weight to be given to [aggravating] circumstances is within the discretion of the Chamber.”

For discussion of appellate review of sentencing, see “appellate review of sentencing,” Section (VIII)(e)(iii), this Digest.

(iii) must prove beyond reasonable doubt

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 82: “As held by the ICTY Appeals Chamber, ‘only those matters which are *proved beyond reasonable doubt* against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence.’” (emphasis in original.)

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2271: “[A]ggravating circumstances need to be proven beyond reasonable doubt.” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 458 (same); *Bikindi*, (Trial Chamber), December 2, 2008, para. 449 (same); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 389 (same); *Karera*, (Trial Chamber), December 7, 2007, para. 576 (same); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 14 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 53 (similar); *Seromba*, (Trial Chamber), December 13, 2006, para. 388 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 533 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 40 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 111 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 438 (same as *Bagosora*); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 502 (similar).

(iv) may not evaluate same factor in considering gravity and aggravating circumstances

See, e.g., Semanza, (Appeals Chamber), May 20, 2005, para. 338: “With respect to the number of deaths, the Trial Chamber observed that it had already considered this factor in assessing the gravity of the offence of extermination and that it therefore could not also consider the same factor as an aggravating factor in the sentence for extermination.”

Bikindi, (Trial Chamber), December 2, 2008, para. 452: “The Chamber has already taken into consideration Bikindi’s form of participation in assessing the gravity of the offence [and therefore will not consider it as an aggravating factor].”

(v) aggravating factor may not be an element of the crime

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 137: “[T]he Appeals Chamber recalls that ‘where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing.’” See also *Bagosora*, *Kabiligi*, *Ntabakuze* and *Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2271 (similar); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 389 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 576 (similar); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 22 (same language as quoted in *Ndindabahizi*); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 60 (same language as quoted in *Ndindabahizi*); *Seromba*, (Trial Chamber), December 13, 2006, para. 388 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 438 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 502 (similar).

See, e.g., *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 137: “[T]he Trial Chamber convicted the Appellant for instigating and aiding and abetting genocide at Gitwa Hill [in the Bisesero Hills (Kibuye prefecture)], as well as for committing, instigating and aiding and abetting extermination at Gitwa Hill. These convictions were based on the factual finding that the Appellant transported assailants at Gitwa Hill, distributed weapons there and encouraged the killing of Tutsi. The Trial Chamber could not also refer to these same factual findings as aggravating circumstances. Accordingly, the Trial Chamber erred in finding that the fact that the Appellant ‘actively influenced others to commit crimes, by distributing machetes and money’ constituted an aggravating circumstance.”

See, e.g., *Rugambarara*, (Trial Chamber), November 16, 2007, para. 26: “The Chamber recalls that an element of the offence itself cannot constitute an aggravating factor. As such, Rugambarara’s position as a superior is not aggravating since it constitutes an element of the crime under Article 6(3) of the Statute.”

(vi) Trial Chamber may balance aggravating against mitigating factors

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 268: “[T]he jurisprudence of the Tribunal clearly permits a Trial Chamber to balance aggravating factors against mitigating factors in determining the sentence. The Trial Chamber in *Kayishema* and *Ruzindana* balanced the relevant factors in a similar manner, and the Appeals Chamber did not suggest that such an approach was inadmissible, but rather affirmed that approach as within the discretion of the Trial Chamber. The same was true in *Akayesu*, where the Trial Chamber concluded that ‘the aggravating factors overwhelm the mitigating factors,’ an approach that was upheld on appeal.” (Rejecting argument that the Trial Chamber erred by balancing aggravating and mitigating factors against each other.) See *Kayishema* and *Ruzindana*, (Appeals Chamber), June 1, 2001, para. 366 (cited);

Akayesu, (Appeals Chamber), June 1, 2001, paras. 416-17 (cited, quoting *Akayesu* Trial Chamber).

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 352: “[The] mitigating circumstances must be balanced against the aggravating circumstances in determining sentence.”

See, e.g., Karera, (Trial Chamber), December 7, 2007, para. 582 (“The Chamber is of the view that the aggravating circumstances outweigh the mitigating circumstances”); *Bisengimana*, (Trial Chamber), April 13, 2006, paras. 180-83 (balancing aggravating against mitigating circumstances); *Musema*, (Trial Chamber), January 27, 2000, paras. 1008 (“the aggravating circumstances outweigh the mitigating circumstances”); *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 471-73 (the “aggravating factors outweigh the mitigating factors”); *Kambanda*, (Trial Chamber), September 4, 1998, para. 62 (the “aggravating circumstances . . . negate the mitigating circumstances”).

Compare Nchamihigo, (Trial Chamber), November 12, 2008, para. 394 (balancing gravity and mitigating factors: “In the Chamber’s view, after weighing the gravity of the crime against Nchamihigo’s circumstances, no mitigation is warranted.”).

See also “aggravating factors must be pled,” Section (VIII)(c)(xix)(6)(t), this Digest.

(b) particular aggravating circumstances

(i) abuse of position of influence and authority

Seromba, (Appeals Chamber), March 12, 2008, para. 230: “The Appeals Chamber recalls that the abuse of a position of influence and authority in society can be taken into account as an aggravating factor in sentencing.” *See also Rugambarara*, (Trial Chamber), November 16, 2007, para. 27 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 61 (similar); *Kambanda*, (Trial Chamber), September 4, 1998, para. 44 (similar).

Simba, (Appeals Chamber), November 27, 2007, para. 284: “[T]he Appeals Chamber recalls that it is settled in the jurisprudence of the Tribunal and the ICTY that a superior position in itself does not constitute an aggravating factor. Rather, it is the abuse of such position which may be considered as an aggravating factor.” *See also Ndindababizi*, (Appeals Chamber), January 16, 2007, para. 136 (similar).

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 347: “The high position of an accused has previously been considered as an aggravating factor both before the ICTR and the ICTY. In *Kambanda*, for example, the Appeals Chamber found the fact that ‘Jean Kambanda, as Prime Minister of Rwanda was entrusted with the duty and authority to protect the population and he abused this trust,’ to constitute an aggravating circumstance. In *Aleksowski*, the ICTY Appeals Chamber maintained that the Appellant’s ‘superior responsibility as a warden seriously aggravated the Appellant’s offences, and that instead of preventing it, he involved himself in violence against those whom he should have been protecting’ The Appeals Chamber in *Kayishema and Ruzindana* further clarified that a position of authority by itself does not amount to an aggravating factor, but that the ‘the manner in which an accused exercises his command’

can justify a finding of a high position of authority as an aggravating circumstance. More recently, in *Ntakirutimana*, the Appeals Chamber affirmed the Trial Chamber's holding that the abuse of the Appellant's personal position in the community to commit the crimes was an aggravating circumstance." See *Kambanda*, (Appeals Chamber), October 19, 2000, para. 61(B)(vii)(cited); *Kayishema and Ruzindana*, (Appeals Chamber), June 1, 2001, para. 358 (cited); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 563 (finding abuse of position an aggravating factor).

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 91: "[T]he Trial Chamber was obliged to take the Appellant's superior position into account as an aggravating factor at sentencing."

(A) permissible to consider absent finding of superior position for command responsibility

Semanza, (Appeals Chamber), May 20, 2005, para. 336: "It is true that the Trial Chamber found 'that the evidence of the Accused's influence in this case [did] not sufficiently demonstrate that he was a superior in some formal or informal hierarchy with effective control over the known perpetrators.' But that finding is not inconsistent with the finding that his 'prominence and influence made it more likely that others would follow his negative example.' As the Trial Chamber itself explained, the Appellant 'no longer held the post of bourgmestre,' but he 'had been appointed to serve in the parliament that was to be established pursuant to the Arusha Accords, and he was still widely regarded in his locality as an influential person.' The question of criminal responsibility as a superior is analytically distinct from the question of whether an accused's prominent status should affect his or her sentence. It was within the Trial Chamber's competence and reasonable for it to conclude that the Appellant did not hold a hierarchical position sufficient to render him [responsible] for criminal responsibility as a superior while also finding that his influence was substantial enough to constitute an aggravating factor."⁶³

(B) not inconsistent to consider position of influence as aggravating and accomplishments achieved in position as mitigating

Semanza, (Appeals Chamber), May 20, 2005, para. 399: "[T]he Appeals Chamber finds no merit in the Prosecution's argument that there exists a contradiction in the Trial Chamber's reasoning that the Appellant's position of influence was an aggravating factor, whereas his previous accomplishments as bourgmestre were considered in mitigation."

(C) application

Seromba, (Appeals Chamber), March 12, 2008, para. 230: "In the present case, the Trial Chamber established that Athanase Seromba was acting as a priest at Nyange parish [Kibuye prefecture] during April 1994 and that during this period Tutsi refugees sought refuge at the parish. In this context, the Trial Chamber considered the Prosecution's averment that Athanase Seromba betrayed the trust of his parishioners and found that

⁶³ The "Arusha Accords" refers to a set of five accords (or protocols) signed in Arusha, Tanzania on August 4, 1993, by the government of Rwanda and the Rwandan Patriotic Front (RPF). They were ostensibly to end the conflict between the Government and RPF and result in power-sharing.

his status and his ‘betrayal of trust’ constituted aggravating circumstances. This finding is not based on Athanase Seromba’s position as a priest, as such, but rather on his abuse of a position of trust. The Appeals Chamber finds no error in this.” See also *Seromba*, (Trial Chamber), December 13, 2006, paras. 385, 390 (Trial Chamber’s findings).

Simba, (Appeals Chamber), November 27, 2007, para. 310: “The Trial Chamber found that the influence the Appellant derived from his stature made it likely that others would follow his example, and that this was an aggravating factor. The Appeals Chamber recalls that the Trial Chamber implicitly found that the Appellant abused this influence. . . . [T]he Appellant participated in the attack against Murambi Technical School and Kaduha Parish [in Gikongoro prefecture in southern Rwanda] by lending encouragement and approval to the attackers and that, since the Appellant was a respected national figure in Rwandan society and well-known in his native region (Gikongoro), the assailants at those places would have viewed his presence during the attacks as approval of their conduct, particularly after his invocation of government support The Trial Chamber therefore did fully take into account as aggravating factors the Appellant’s stature in Rwanda society, as well as the abuse of the influence he derived from it.” But see *Simba*, (Appeals Chamber), Partially Dissenting Opinion Of Judge Schomburg, November 27, 2007, para. 3 (arguing that life imprisonment, not 25 years, should have been imposed: “Aloys Simba was a principal perpetrator with stature in Rwandan society as a prominent former political and military figure who abused his position and influence to encourage the death of thousands, proven not only for one occasion. Like Sylvestre Gacumbitsi, he was a ‘primary player.’”); see *Simba*, (Trial Chamber), December 13, 2005, para. 439 (Trial Chamber’s findings).

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 136: “[T]he Trial Chamber was entitled to refer to the Appellant’s position as a Minister in the Interim Government in sentencing, in accordance with the case law of the Tribunal which recognizes that the abuse of a position of influence and authority in society can be taken into account as an aggravating factor. The Trial Chamber did not find that the Appellant’s position in the Interim Government in itself called for a harsher sentence. Instead, it found that it was the wrongful exercise of his powers that constituted the aggravating circumstance. The Appeals Chamber finds no error in this.” See *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 508 (Trial Chamber’s findings).

Nchamibigo, (Trial Chamber), November 12, 2008, para. 391: “Among the aggravating factors, the Chamber notes Nchamhigo’s stature in Rwandan society. As a Deputy Prosecutor, he was expected to uphold the rule of law and principles of morality. He had a perceived position that demanded obedience and compliance to his instructions. The Chamber further observes the way in which he committed his crimes. The Chamber considers it highly aggravating that he promoted violence, planned and actively participated in killings, ordered and instigated others to follow suit. Prosecution witnesses testified that because of his position they believed that they could participate in the killings without suffering consequences. Thus he promoted an environment of impunity for mass atrocity.”

Karera, (Trial Chamber), December 7, 2007, paras. 578-79: “The wrongful manner in which Karera exercised his influence and authority during the genocide . . . amounts to an aggravating factor. Since 1974 and until his exile in July 1994, Karera held official positions in the civil administration as *bourgmestre*, subprefect and prefect. He also held an important post in the political hierarchy, having served as the president of the MRND [*Mouvement Républicain National pour la Démocratie et le Développement*] party in Nyarugenge commune. The influence Karera derived from these positions made it likely that others would follow his example. Prior to 17 April 1994, Karera was not formally appointed as prefect. However, he did exercise at least some of the authority which would normally have fallen under the prefect, and not within the capacity of a sub-prefect for economic and technical affairs, in particular in relation to security matters.” “With respect to the massacre at Ntarama Church [in Ntarama, south of Kigali] on 15 April 1994, the Chamber considers Karera’s role an aggravating circumstance. Instead of providing security, as he had falsely promised the refugees at the Ntarama sector office the previous day, he encouraged *Interahamwe* and soldiers to hurry up and attack the refugees, who had sought refuge in a traditional safe haven. ”

Muvunyi, (Trial Chamber), September 12, 2006, para. 539: “[T]hroughout the events referred to in the Indictment . . . , the Accused was a senior military officer in the Rwandan Army. The Chamber has found that from about the 7 April 1994 to 15 June 1994, he was the most senior military officer in Butare. Apart from his superior military position, the accused was well-known in Butare and other parts of Rwanda as an active sportsman and basketball player who often participated in athletic and other sports events alongside his military colleagues and members of the civilian population. The official and social standing of the Accused therefore placed him among the leaders of the Butare community, with capacity to influence the course of many events including the conduct of his subordinate officers. The position of trust held by the Accused carried with it authority and responsibility to take all reasonable measures to protect members of the civilian population from attack. In the Chamber’s view, the fact that the accused failed to prevent soldiers under his command from committing wide scale atrocities against Tutsi civilians in Butare was an aggravating factor.” (Note that most of Muvunyi’s convictions, however, were overturned on appeal and the case was remanded for partial re-trial., see *Muvunyi*, (Appeals Chamber), August 29, 2008.)

Serugendo, (Trial Chamber), June 12, 2006, paras. 47-49: “The Chamber finds that Serugendo’s position as a member of the managerial staff of the RTLM [*Radio Television Libre des Milles Collines*], the authority he therefore exercised over the personnel of the radio station, and his active role in ensuring the proper functioning of the radio station are indeed aggravating factors.” “Accordingly, Serugendo’s position of authority qualifies as an aggravating circumstance, in accordance with the case law of the Tribunal, due to the far-reaching consequences of his improper exercise of his or her authority and power.” “However, the Chamber notes that Serugendo was not a particularly high-ranking or influential personality in Rwanda during 1994. Nor did he personally make anti-Tutsi or inflammatory statements over the RTLM or commit any violent acts during the massacres in Rwanda.”

Bisengimana, (Trial Chamber), April 13, 2006, para. 120: “The Chamber finds that the Accused’s position as *bourgmestre* of Gikoro *commune* during the events, and the fact that he was an educated person, are aggravating factors. As representative of the executive power at the communal level, the Chamber finds that the Accused had a duty to protect the population in the *commune*, he did not take any action to prevent the massacres which occurred there. Instead, he knowingly encouraged the killers at Musha Church [in Gikoro commune] by being present when the attack was launched that resulted in the death of more than a thousand Tutsi refugees. Further, he failed to prevent the subsequent massacres at Ruhanga Protestant Church and School [in Gikoro commune], which resulted in many Tutsis being killed.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 818-19: “Imanishimwe, as commander of the Karambo military camp in Cyangugu, abused his position as a trained military officer responsible for the command of his soldiers It is particularly egregious that, as a military officer with the mandate to provide national security, Imanishimwe was responsible for his subordinates’ attacks on and mistreatment of numerous individuals, primarily of Tutsi ethnicity” “. . . As [camp commander], he would have been respected by his subordinates and would have set an example by his behaviour. The Chamber finds that Imanishimwe was in a position to exert effective control over the soldiers under his command and that he could have played a significant role in the prevention of crimes. However, instead of doing so, Imanishimwe ordered, aided and abetted in, or sanctioned the commission of the crimes in Cyangugu prefecture. Accordingly, the Chamber finds that the command role played by Imanishimwe in Cyangugu prefecture to constitute an aggravating factor in sentencing.”

Kamuhanda, (Trial Chamber), January 22, 2004, para. 764: “The Chamber finds that the high position Kamuhanda held as a civil servant can be considered as an aggravating factor. Kamuhanda was a respected man, influential, and considered to be an intellectual. He was in the position to know and to appreciate the dignity and value of life, and also the value and importance of a peaceful coexistence between communities. He was in the position to promote the value of tolerance. Instead of doing so, he blamed people who were living peacefully for not taking part in the campaign of violence. He instigated and led an attack to kill people who had taken shelter in a place universally recognised to be a sanctuary, the Compound of the Gikomero Parish Church [in Gikomero commune, Kigali-Rural prefecture]. As a result of this attack many people were massacred. The Chamber considers these to be gravely aggravating factors.” *See Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 348 (approving of Trial Chamber’s finding that Kamuhanda’s high position was an aggravating circumstance).

Kamuhanda, (Trial Chamber), Judge Maqutu’s Dissent on the Sentence, January 22, 2004, paras. 13, 10: “People of stature such as the Accused[,] who was in a position of leadership, cannot be allowed to abdicate moral responsibility and claim they were afraid to do what is expected of them” “It seems to me that (from the beginning) the Accused went along with the genocide out of opportunism and because his moral courage had deserted him. He ingratiated himself to the powers of the day that were exterminating the Tutsis by leading a genocidal attack on the Tutsi who had sought sanctuary at the Gikomero Protestant Parish. Having acquired the credentials of a

genocidaire of the Tutsis, he was now firmly in the camp of the former Rwandan government that was leading the extermination of the Tutsi and moderate Hutu The view I take is that the Accused had already allowed himself to be used as a tool of the genocidal extremists who were running Rwanda.” (Arguing, however, that Kamuhanda’s sentence should have been 25 years, not life in prison.)

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, paras. 900-05: The Trial Chamber considered as aggravating: that as a highly respected personality and a man wielding certain authority within the Seventh Day Adventist Church, Elizaphan Ntakirutimana “abused the trust placed in him”; he “distanced himself from his Tutsi pastors and his flock in the hour of their need”; and his presence at the scenes of attack could only be construed by attackers as an approval of their actions.

Musema, (Trial Chamber), January 27, 2000, paras. 1002-04: The Trial Chamber considered as aggravating that: as Director of the Gisovu Tea Factory, Musema “took no steps to prevent tea factory employees or vehicles from taking part in the attacks” even though he exercised legal and financial control over employees; as a figure of authority who wielded considerable power in the region, he “was in a position to take reasonable measures to help in the prevention of crimes”; he “did nothing to prevent the commission of the crimes”; and he “took no steps to punish the perpetrators over whom he had control.”

See also Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 563 (considering as aggravating “that Gérard Ntakirutimana [a medical doctor] . . . abused his personal position in the community to commit the crimes”); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 590 (considering as aggravating the abuse of Rutaganda’s position of authority); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber) December 18, 2008, para. 2272 (considering as aggravating Bagosora and Nsengiyumva’s roles as superiors); *Bikindi*, (Trial Chamber), December 2, 2008, para. 451 (considering as aggravating “Bikindi’s stature in Rwandan society as a well-known and popular artist perceived to be an influential member of the MRND [*Mouvement Républicain National pour la Démocratie et le Développement* political party] and an important figure in the *Interahamwe*,” which status Bikindi “abused” “by using his influence to incite genocide”); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 62 (considering as aggravating that “Nzabirinda - a youth organizer, an intellectual and a successful businessman held in high esteem in the community – had abused the obvious moral authority he exerted on the youth of his *commune* and the population of his *secteur*”); *Muhimana*, (Trial Chamber), April 28, 2005, para. 604 (considering as aggravating that “Muhimana was a *conseiller* and a well-known person in the Gishyita *Commune*, . . . and occupied a position of influence in the community” yet actively participated in the atrocities); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 345 (considering as aggravating Gacumbitsi’s status “as *bourgmestre* and the most important and influential personality of Rusumo *commune*”); *see Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 191 (finding no error as to same); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 962 (considering as aggravating that “Kajelijeli used his considerable influence to bring together people in order to commit the massacres”); *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 499 (considering as aggravating that Niyitegeka was a “well-known and

influential figure in his native prefecture of Kibuye, where his crimes were committed,” and he “abused the trust placed in him by the population,” as he held an official position at the national level at the time the crimes were committed); *Semanza*, (Trial Chamber), May 15, 2003, para. 573 (considering as aggravating the “influence and relative importance” of Semanza in Bicumbi commune); *Kayishema and Ruzindana*, (Trial Chamber), Sentence, May 21, 1999, para. 15 (considering as aggravating “the abuse of power and betrayal of . . . high level office” as prefect); *Akayesu*, (Trial Chamber), October 2, 1998 (considering as aggravating that Akayesu’s status as *bourgmestre* made him the most senior government personality in Taba and in this capacity he was responsible for protecting the population, which he failed to do); *Kambanda*, (Trial Chamber), September 4, 1998, para. 61 (considering as aggravating that Kambanda abused the “duty and authority” entrusted to him as Prime Minister “to protect the population”).

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 459-60: “The Prosecution argues that the aggravating circumstances in this case include: Zigiranyirazo’s position as a trusted and influential person in his community, as evidenced by his having been a Member of Parliament, a *préfet*, the President’s brother-in-law and a member of *Akazu*” “The Chamber notes Zigiranyirazo’s stature in Rwandan society as a former politician and brother-in-law of the President. However, the Chamber considers that the influence he derived from his status was not significant enough to amount to an aggravating factor.”⁶⁴ *See also Rugambarara*, (Trial Chamber), November 16, 2007, para. 28 (“The Chamber considers that Juvénal Rugambarara did not hold a high level of authority. His position as *bourgmestre* of Bicumbi commune made him an immediate superior and can therefore not constitute an aggravating factor.”).

(ii) flight of the Accused

Seromba, (Trial Chamber), December 13, 2006, para. 391: “[I]t is not in contention that the Accused used an identity other than his own to go into exile in Italy, as attested to by the passport issued to him by the then Zaïrian authorities. The Chamber notes, however, that other priests who were with the Accused at Nyange church during the events of April 1994 did not adopt this stratagem. Furthermore, these priests who remained in Rwanda were even prosecuted, but all of them were acquitted. Therefore, the Chamber finds that the flight of Athanase Seromba represents an aggravating circumstance.”

(iii) large number of victims/deaths of women, children and orphans

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 135: “[T]he Trial Chamber did not err in considering the large number of victims at Gitwa Hill [in the Bisesero Hills, Kibuye prefecture] as an aggravating circumstance relevant to the sentence.”

⁶⁴ “Many Prosecution [w]itnesses referred to a group known as the *Akazu*, which was said to be organised around the President and the family of his wife and drawn from the northern regions of Rwanda. It held enough power to influence decisions in Rwanda, including those pertaining to employment and promotions, bank loans and political decisions.” *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 98. “Regarding the *Akazu*, considering the testimony of Expert Witness Dr. Alison Des Forges, as corroborated by multiple Prosecution witnesses, the Chamber finds it is proven beyond reasonable doubt that a power group consisting primarily of members of the extended family of the President existed before and during the genocide.” *Id.*, para. 103.

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 135: “As for extermination, the *actus reus* requires ‘killing on a large scale.’ While this does not ‘suggest a numerical minimum,’ a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime if the extent of the killings exceeds that required for extermination.” *See also Rugambarara*, (Trial Chamber), November 16, 2007, para. 23 (similar).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2272: “The large number of Tutsi victims during the course of the attacks and massacres is also aggravating with respect to each of the Accused’s conviction for genocide, which is a crime with no numeric minimum of victims.” *See also Nchamihigo*, (Trial Chamber), November 12, 2008, para. 391 (similar).

Serugendo, (Trial Chamber), June 12, 2006, para. 90: “The number of victims which resulted from the incitement to genocide and persecutions is indeed an aggravating factor.” *See also Simba*, (Trial Chamber), December 13, 2005, para. 440 (similar as to genocide).

(4) application

See Karera, (Trial Chamber), December 7, 2007, para. 579 (considering as aggravating: “[t]he large number of victims and the irreparable harm caused to them and their families”); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 24 (considering as aggravating that the crimes to which Rugambarara confessed “involve the deaths of thousands of Tutsi civilians in Mwulire, Mabare and Nawe *secteurs*, Bicumbi *commune*”); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 539 (considering as aggravating “the ethnic separation and subsequent killing of orphan children at the *Groupe scolaire* by soldiers under the command of the Accused in collaboration with civilian militia”); *Rutaganira*, (Trial Chamber), March 14, 2005, para. 143 (considering as aggravating “that many women and children were killed in Mubuga Church”); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 764 (considering as aggravating that “many people were massacred” in the attack at Gikomero Parish Church in Gikomero commune, Kigali-Rural prefecture); *Semanza*, (Trial Chamber), May 15, 2003, para. 571 (considering as aggravating “the number of victims killed as a result of the Accused’s conduct at Musha church and Mwulire Hill [in Gikoro commune]”).

(iv) attacks where refugees sought sanctuary: hospitals and churches

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 357: Evaluating in discussing gravity: “[T]he Trial Chamber took into account the facts that the attack was directed against a place ‘universally recognized to be a sanctuary, the Compound of the Gikomero Parish Church’ [in Gikomero commune, Kigali-Rural prefecture]”).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 563: “[T]he Appeals Chamber has considered the following aggravating factors, namely that Gérard Ntakirutimana . . . participated in attacks at the Mugonero [hospital] Complex, where he was a doctor, as well as in other safe havens in which refugees had sought

shelter.” See *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, paras. 911-12 (similar finding by Trial Chamber).

Karera, (Trial Chamber), December 7, 2007, paras. 580, 579: “[A]ccording to the jurisprudence, attacking a place of safe haven such as a church, constitutes a form of zeal.” (Considering as aggravating that the attack was on refugees “who had sought refuge in a traditional safe haven”).

Muhimana, (Trial Chamber), April 28, 2005, para. 605: “Mika Muhimana participated in attacks against *Tutsi* civilians who had sought refuge in churches and a hospital, which are traditionally regarded as places of sanctuary and safety. This constitutes an aggravating factor.”

Kayishema and Ruzindana, (Trial Chamber), Sentence, May 21, 1999, para. 14: The Trial Chamber considered as aggravating: the “zeal” with which the crimes were committed (*i.e.*, attacking places traditionally regarded as safe havens).

See also “zeal and sadism/violent and cruel nature of conduct,” Section (VII)(b)(iii)(6)(b)(vii), this Digest.

(v) young age of victims

Muhimana, (Trial Chamber), April 28, 2005, para. 607: “The Chamber recalls that one of Mika Muhimana’s victims, Witness BJ, was only fifteen years old when Mika Muhimana raped her. The young age of the victim is an aggravating factor.”

(vi) rape in the presence of others/public humiliation

Muhimana, (Trial Chamber), April 28, 2005, paras. 608-09, 611, 613: “The Chamber has found that others, such as *Interahamwe*, were present, assisted, or participated in the following rapes committed by the Accused:

- (a) Gorette Mukashyaka and Languida Kamukina, in Mika Muhimana’s house;
- (b) Agnes Mukagatere, in the cemetery of Mubuga Church;
- (c) Mukasine Kajongi and the daughters of Amos Karera, in the basement of Mugonero Hospital;
- (d) Witness AU, in the basement of Mugonero Hospital;
- (e) Witness BJ Murekatete and Mukasine, in the basement of Mugonero Hospital.”

“From the victim’s perspective, to be raped in the presence of other people, compounds the public humiliation and constitutes an aggravating factor. The Chamber finds this aggravating factor to exist in each of the above-mentioned rapes.” “After raping two young *Tutsi* women in his home, Mika Muhimana led them out, paraded them naked, and invited onlookers to look at their naked bodies. This public humiliation is an aggravating factor.” “The atrocious crimes that Mika Muhimana committed against *Tutsi* women were calculated to degrade and humiliate them. This is an aggravating factor which weighs on his sentence.” But see *Muhimana*, (Appeals Chamber), May 21, 2007, paras. 50-52 (reversing the findings of rape as to Kamukina and Mukashyaka).

(vii) zeal and sadism/violent and cruel nature of conduct

Simba, (Appeals Chamber), November 27, 2007, para. 320: “[Z]eal and sadism are factors to be considered, where appropriate, as aggravating factors rather than in the assessment of the gravity of an offence.” *But see Simba*, (Appeals Chamber), Partially Dissenting Opinion Of Judge Liu Daqun, November 27, 2007, para. 6 (zeal and sadism may be considered regarding gravity).

Karera, (Trial Chamber), December 7, 2007, para. 580: “[Z]eal in committing the crime can be an aggravating factor.”

Compare “whether zeal/sadism are relevant to gravity,” Section (VII)(b)(iii)(2)(d), this Digest.

(A) application

Nchamihigo, (Trial Chamber), November 12, 2008, para. 391: “[N]ote must be taken of [Nchamihigo’s] cruelty and disregard for personal dignity. [Witness] LDC saw him looting Trojean Ndayisaba’s house while Ndayisaba’s wife and daughter were burning to death. [Witness] BRK testified that Nchamihigo ordered the *Interahamwe* to bury corpses in a latrine. The Chamber considers that these factors and the distances he travelled, the number of locations at which he intervened cumulatively place him in the category of exhibiting extreme zeal in killing.”

Karera, (Trial Chamber), December 7, 2007, para. 580: “There is no evidence that Karera killed anyone with his own hands, but according to the jurisprudence, attacking a place of safe haven such as a church, constitutes a form of zeal.”

Muhimana, (Trial Chamber), April 28, 2005, paras. 610, 612, 614: “The Chamber also notes the particularly violent and cruel nature of the Accused’s conduct. For example, while raping Witness AU, he repeatedly banged her head against the ground.” “The Chamber recalls the incident where the Accused used a machete to cut the pregnant woman Pascasie Mukaremera from her breasts down to her genitals and remove her baby, who cried for some time before dying. After disembowelling the woman, the assailants accompanying Muhimana then cut off her arms and stuck sharpened sticks into them. This savage attack upon a pregnant woman deserves condemnation in the strongest possible terms and constitutes a highly aggravating factor.” “The Chamber finds that Mika Muhimana’s active participation in the decapitation of Assiel Kabanda, and the subsequent public display of his severed head, constitute an aggravating factor.” *But see Muhimana*, (Appeals Chamber), May 21, 2007, paras. 213-28 (reversing conviction for murder of Mukaremera due to Indictment defect).

Niyitegeka, (Trial Chamber), May 16, 2003, para. 499: The Chamber considered the following to be aggravating: the callous nature of some of the murders; the fact that Niyitegeka “joined in the jubilation over the killing, decapitation and castration of Kabanda, and the piercing of his skull through the ears with a spike”; and the cruel and insensitive disregard for human life and dignity shown by the order he gave for a sharpened piece of wood to be inserted into the genitalia of a dead Tutsi woman.

Kayishema and Ruzindana, (Trial Chamber), Sentence, May 21, 1999, paras. 14, 17: The Chamber considered the following to be aggravating: the “zeal” with which the crimes were committed (*i.e.*, attacking places traditionally regarded as safe havens); the “heinous means” by which killings were committed; the “methodical and systematic execution of . . . [the] crimes”; “the behaviour . . . after the criminal act, . . . notably [the] inaction to punish the perpetrators” or smiling or laughing as survivors testified during trial.

(viii) lack of remorse

Rutaganda, (Appeals Chamber), May 26, 2003, para. 590: “The other factors which weighed in favour of a heavier penalty were that the Appellant . . . never showed remorse for the commission of the crimes.”

(ix) effect on the lives of victims

Muhimana, (Trial Chamber), April 28, 2005, para. 615: “Mika Muhimana’s actions have left many dead and others traumatized or with physical disabilities.”

Kayishema and Ruzindana, (Trial Chamber), Sentence, May 21, 1999, para. 16: The Chamber considered the following to be aggravating: the irreparable harm suffered by victims and their families.

(x) personal participation

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 563: “[T]he Appeals Chamber has considered the following aggravating factors, namely that Gérard Ntakirutimana . . . personally shot at Tutsi refugees, including Charles Ukobizaba”

Niyitegeka, (Trial Chamber), May 16, 2003, para. 499: The Trial Chamber considered as aggravating: instead of promoting peace and reconciliation in his capacity as Minister of Information, Niyitegeka actively participated in the commission of massacres and influenced others to commit crimes while also, in some instances, giving instructions to attackers or acting as one of their leaders.

Ruggiu, (Trial Chamber), June 1, 2000, paras. 49-51: The Chamber considered the following to be aggravating: the role of the accused in the commission of the offenses (the accused, who was a journalist and broadcaster, played a crucial role in the incitement of ethnic hatred and violence and his broadcasts incited massacres of the Tutsi population); and the fact that even once the accused became aware that the broadcasts were contributing to the massacres, he made a deliberate choice to continue his employment with the radio station.

Serushago, (Trial Chamber), February 5, 1999, paras. 28-30: The Trial Chamber considered as aggravating: Serushago played a leading role in the commission of the crimes and personally murdered four Tutsi; he gave orders as a *de facto* leader and several victims were executed on his orders; his voluntary participation; and that he “committed the crimes knowingly and with premeditation.”

Akayesu, (Trial Chamber), October 2, 1998: The Trial Chamber considered as aggravating: Akayesu consciously chose to participate in the systematic killings in Taba; he “publicly incited people to kill”; he ordered the killing of a number of persons; he participated in the killings; and he supported the rape of many women in the bureau communal through his presence and acts.

See also Simba, (Trial Chamber), December 13, 2005, para. 440 (considering as aggravating “that Simba supplied the attackers with guns and grenades at Kaduha Parish [which] types of weaponry greatly facilitated the slaughter during the attacks on 21 April”); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 912 (considering as aggravating that Gerard Ntakirutimana “personally shot at Tutsi refugees”); *Musema*, (Trial Chamber), January 27, 2000, para. 1002 (considering as aggravating that Musema “led attackers who killed a large number of Tutsi refugees” and “was armed with a rifle and used the weapon during the attacks”); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 13 (considering as aggravating the voluntary commission of and participation in the offenses).

(xi) education

Karera, (Trial Chamber), December 7, 2007, para. 581: “The Chamber recalls that Karera was an educated person with an academic record and a role in the Rwandan education sector. In spite of this, he participated in the crimes. This is also an aggravating factor.”

Nzabirinda, (Trial Chamber), February 23, 2007, para. 63: “Joseph Nzabirinda ‘was an educated person who could appreciate the dignity and value of human life and was aware of the need for a peaceful coexistence between communities.’ The Chamber considers this factor to be aggravating.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 120 (similar as to Bisengimana).

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 910: The Chamber considered the following to be aggravating: Gerard Ntakirutimana was a prominent personality, one of the few individuals in his area of origin to have achieved a higher education; as a medical doctor, “he took lives instead of saving them.”

(xii) prior criminal conduct

Kamuhanda, (Trial Chamber), January 22, 2004, para. 759: “The Chamber notes that there is no evidence of any previous criminal conduct on the part of Kamuhanda, and the Chamber finds no aggravating circumstances in his conduct prior to 1994.” (Suggesting that previous criminal conduct could be an aggravating circumstance.)

Compare “lack of previous criminal record” as a “mitigating factor,” Section (VII)(b)(iii)(7)(b)(x), this Digest.

(xiii) seriousness of crimes

Bisengimana, (Trial Chamber), April 13, 2006, para. 117: “The Chamber recalls that the seriousness of the crimes and the extent of the involvement of the Accused in their commission are factors to be considered in assessing aggravating circumstances.”

“Crimes against humanity are inherently aggravating offences because they are heinous in nature and shock the collective conscience of mankind.”

Gacumbitsi, (Trial Chamber), June 17, 2004, para. 345: “The seriousness of the crimes committed, particularly genocide, but also the particularly atrocious rapes that some victims suffered, . . . constitute aggravating circumstances.”

Ruggiu, (Trial Chamber), June 1, 2000, paras. 47-48: The Chamber considered the gravity of the offenses (genocide and crimes against humanity) to be aggravating.

Musema, (Trial Chamber), January 27, 2000, para. 1001: The Chamber considered the “extremely serious” offenses (genocide) to be aggravating. *See also Serushago*, (Trial Chamber), February 5, 1999, para. 27 (similar).

Kambanda, (Trial Chamber), September 4, 1998, para. 61: The Chamber considered as aggravating: the “intrinsic gravity” of the crimes and “their widespread, atrocious and systematic character, [which] is particularly shocking to the human conscience.”

Compare “all crimes within the Tribunal’s jurisdiction are serious,” Section (VII)(b)(iii)(2)(c), this Digest (where the seriousness of crimes is considered in evaluating gravity, not as an aggravating factor). *See also* “may not evaluate same factor in considering gravity and aggravating circumstances,” Section (VII)(b)(iii)(6)(a)(iv), this Digest. Thus, the seriousness of crime may be considered as an aggravating factor or in evaluating gravity, but not both.

(xiv) crimes committed over lengthy period of time

Niyitegeka, (Trial Chamber), May 16, 2003, para. 499: The Trial Chamber considered as aggravating the “prolonged nature of [Niyitegeka’s] participation in widespread and systematic attacks against defenseless civilians.”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 912: The Trial Chamber considered as aggravating that Gerard Ntakirutimana’s crimes were committed over a lengthy period of time (approximately two and a half months).

See also “short duration of involvement in crimes not mitigating,” Section (VII)(b)(iii)(7)(b)(xx), this Digest.

(xv) whether assertion of alibi/denial of guilt is an aggravating factor

Kayishema and Ruzindana, (Appeals Chamber), June 1, 2001, paras. 362-63: “The Trial Chamber . . . found Kayishema’s assertion of an ‘alibi defence’ and his repeated protestations of innocence as an aggravating factor in light of the gravity of the crimes for which he is convicted. The Chamber, in a footnote, referred to the [ICTY’s] *Tadić* Sentencing Judgement of 14 July 1997 for support. In that Judgement, the Chamber stated that ‘Tadić has in no relevant way cooperated with the Prosecutor of the International Tribunal. Indeed, he has at all times denied his guilt for the crimes of which he has been convicted. Consequently, he is not entitled to any mitigation

pursuant to . . . Rule 101(B)(ii).’ That Chamber found denials of guilt as a factor preventing any mitigation. It did not find this factor as an aggravating circumstance.” “The Appeals Chamber finds that it is not necessary for it to pronounce on whether the assertion of an alibi and persistent denials of guilt constitute aggravating circumstances. The Appeals Chamber concludes that even if the Trial Chamber were found to have erred on this point, such error would not invalidate the sentence imposed on Kayishema.”

(xvi) lack of cooperation with the prosecution not an aggravating factor

Bisengimana, (Trial Chamber), April 13, 2006, para. 127: “[T]he Accused did not cooperate with the Prosecutor. The Chamber considers at the outset of its deliberations on mitigating circumstances that the lack of cooperation by the Accused with the Office of the Prosecutor can not be considered as an aggravating factor.”

7) mitigating circumstances

(a) generally

(i) Trial Chamber decides what is a mitigating factor

Simba, (Appeals Chamber), November 27, 2007, para. 328: “The Appeals Chamber recalls that neither the Statute nor the Rules exhaustively define the factors which may be considered as mitigating factors. Consequently, under the jurisprudence of this Tribunal, ‘what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion.’” *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 1038 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 294 (similar).

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 458: “The Chamber has wide discretion in determining what constitutes mitigating . . . circumstances” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 449 (same).

(ii) Trial Chamber required to take into account

Muhimana, (Appeals Chamber), May 21, 2007, para. 231: “Pursuant to Rule 101(B)(ii) of the Rules, a Trial Chamber is required to take into account any mitigating circumstances in determining a sentence.” *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 1038 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, paras. 430, 436 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 294 (similar).

Compare Muhimana, (Appeals Chamber), May 21, 2007, para. 231: “[T]he Appellant made no sentencing submissions at trial. In such circumstances, the Trial Chamber’s determination that there were no mitigating circumstances was within its discretion and does not constitute a legal error. If an accused fails to put forward relevant information, the Appeals Chamber considers that, as a general rule, a Trial Chamber is not under an obligation to seek out information that counsel did not see fit to put before it at the appropriate time.”

(iii) must be proven by a balance of probabilities

Simba, (Appeals Chamber), November 27, 2007, para. 328: “The burden of proof which must be met by an accused with regard to mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt, but proof on the balance of probabilities – the circumstance in question must exist or have existed ‘more probably than not.’” *See also Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 294 (same).

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 458: “[M]itigating circumstances need only be established on a ‘balance of probabilities.’” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 2271 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 449 (same as *Zigiranyirazo*); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 389 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 576 (similar); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 14 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 53 (same as *Rugambarara*); *Seromba*, (Trial Chamber), December 13, 2006, para. 394 (similar); *Murunyi*, (Trial Chamber), September 12, 2006, para. 533 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 40 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 111 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 438 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 502 (similar).

Muhimana, (Appeals Chamber), May 21, 2007, para. 231: “The accused . . . bears the burden of establishing mitigating factors by a preponderance of the evidence.”

(iv) weight to accord left to Trial Chamber’s discretion

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1038: “[T]he weight to be accorded [to a mitigating circumstance] is a matter for the Trial Chamber to determine in the exercise of its discretion.” *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, paras. 430, 436 (same and similar); *Seromba*, (Trial Chamber), December 13, 2006, para. 394 (similar).

Simba, (Appeals Chamber), November 27, 2007, para. 328: “Once a Trial Chamber determines that certain evidence constitutes a mitigating circumstance, the decision as to the weight to be accorded to that mitigating circumstance . . . lies within the wide discretion afforded to the Trial Chamber at sentencing.” *See also Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 294 (same); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 458 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 449 (same as *Zigiranyirazo*).

See, e.g., Niyitegeka, (Appeals Chamber), July 9, 2004, para. 266: “In a case involving mitigating circumstances, the jurisprudence of the Tribunal is clear that ‘a decision as to the weight to be accorded thereto lies within the discretion of the Trial Chamber.’ Here, the Trial Chamber decided that the mitigating factors deserved ‘little weight’ because the Chamber found that ‘when faced with the choice between participating in massacres of civilians or holding fast to his principles, [the Appellant] chose the path of ethnic bias and participated in the massacres committed in Rwanda at the time.’ Although the Appellant was found to have saved the lives of certain refugees on one occasion, he also ‘took the lives of others, and deliberately committed crimes of a heinous nature against

civilians prior to and after this episode.’ The Appellant has not shown that the Trial Chamber’s decision exceeded the discretion conferred upon it in matters of sentencing.”

For discussion of appellate review of sentencing, see “appellate review of sentencing,” Section (VIII)(e)(iii), this Digest.

(v) personal circumstances of limited weight

Rugambarara, (Trial Chamber), November 16, 2007, para. 57: “[W]hile Rugambarara’s personal circumstances [family situation, prior good character, lack of prior criminal record and good conduct in detention] are relevant in the mitigation of the sentence, the Chamber is of the view that such factors cannot play a significant role in mitigating international crimes and therefore the weight to be accorded to them is limited.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 108 (similar).

See, e.g., Serugendo, (Trial Chamber), June 12, 2006, para. 91: The Accused’s “family situation, his good character prior to these events, his lack of prior criminal convictions and his age, while factors in mitigation, are of substantially less weight [than other mitigating factors].”

See “prior good character and accomplishments,” “family situation,” “lack of previous criminal record,” “good conduct while in detention,” “age and state of health of the accused” as mitigating factors, Sections (VII)(b)(iii)(7)(b)(i), (ix), (x), (xi) and (xii), this Digest.

(vi) must be presented at trial

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1103: “[M]itigating circumstances must be presented at trial.”

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 354: “As noted by the ICTY Appeals Chamber, an Appellant cannot expect the Appeals Chamber to consider new mitigating circumstances on appeal:

As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised.

The Appeals Chamber need not therefore address the Appellant’s contention that his young age and his family situation [first argued on appeal] should have been taken into account by the Trial Chamber as a mitigating circumstance.”

(vii) may not be directly related to the offense

Nzabirinda, (Trial Chamber), February 23, 2007, para. 64: “Mitigating circumstances may not be directly related to the offence.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 125 (same).

Serugendo, (Trial Chamber), June 12, 2006, para. 41: “Mitigating circumstances may also include those not directly related to the offence.”

(viii) Trial Chamber may impose life sentence even if there are mitigating circumstances; no automatic “credit”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1038: “[T]he existence of mitigating circumstances does not automatically imply a reduction of sentence or preclude the imposition of a sentence of life imprisonment[.]”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 267: “[N]othing prevents a Trial Chamber from imposing a life sentence in light of the gravity of the crimes committed, even if the evidence in the case reveals the existence of mitigating circumstances. As the Appeals Chamber stated in *Musema*, ‘[i]f 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.’ Proof of mitigating circumstances does not automatically entitle the Appellant to a ‘credit’ in the determination of the sentence; rather, it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination.” See *Musema*, (Appeals Chamber), November 16, 2001, para. 396 (quoted).

(ix) reduction of sentence due to mitigating circumstances does not diminish gravity of the offence

Ruggiu, (Trial Chamber), June 1, 2000, para. 80: “Mitigation of punishment in no way reduces the gravity of the crime or the guilty verdict against a convicted person.”

Kambanda, (Trial Chamber), September 4, 1998, paras. 37, 56: “[T]he principle must always remain that the reduction of the penalty stemming from the application of mitigating circumstances must not in any way diminish the gravity of the offence.” “[A] finding of mitigating circumstances relates to assessment of sentence and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime.”

(b) particular mitigating circumstances

(i) prior good character and accomplishments

Seromba, (Appeals Chamber), March 12, 2008, para. 235: “The Appeals Chamber . . . reiterates the finding made in the *Semanza* Appeal Judgement that . . . ‘it was within the Trial Chamber’s discretion to take into account as mitigation in sentencing the Appellant’s previous good character [...]’”

Semanza, (Appeals Chamber), May 20, 2005, para. 397: “Trial Chambers of both International Tribunals have to a greater or lesser extent taken into account an accused’s previous good character in mitigation, as well as accomplishments in functions previously held.” See also *Gacumbitsi*, (Appeals Chamber), July 7, 2006, paras. 195-96 (finding the holding on prior good character of the Appeals Chamber in *Semanza* applicable).

Seromba, (Trial Chamber), December 13, 2006, para. 26: “[E]vidence of prior good character is taken into consideration at the time of sentencing [S]uch evidence may

be relevant if it is shown to be particularly probative in relation to the charges against the accused”

See, e.g., Karera, (Trial Chamber), December 7, 2007, para. 582: “Prior contributions to community development have been considered by both Tribunals as a mitigating factor and the Chamber accords this some weight.”

(A) application

Semanza, (Appeals Chamber), May 20, 2005, paras. 334, 397-98: “The Trial Chamber . . . noted the Appellant’s contention that his ‘twenty years of development efforts . . . should be considered in deciding on the appropriate sentence,’ and it ‘considered the prior character and accomplishments of the Accused in mitigation of his sentence.’” “Trial Chambers of both International Tribunals have to a greater or lesser extent taken into account an accused’s previous good character in mitigation, as well as accomplishments in functions previously held. For instance, in *Niyitegeka* the Trial Chamber considered in mitigation that the accused was a person of good character prior to the events ‘and that as a public figure and a member of the MDR [*Mouvement Démocratique du Rwanda*], he advocated democracy and opposed ethnic discrimination.’ Similarly, in *Ntakirutimana*, the Trial Chamber found as a mitigating factor that Elizaphan Ntakirutimana was a ‘highly respected personality within the Seventh-Day Adventist Church of the West-Rwanda Field and beyond’ and that he led an ‘exemplary life as a church leader.’ The Trial Chamber also noted Gérard Ntakirutimana’s good character, and that he had testified that his return to Rwanda in 1993 was prompted by ‘his hope to contribute to development and to promote peace within his country.’” “The Appeals Chamber is of the view that it was within the Trial Chamber’s discretion to take into account as mitigation in sentencing the Appellant’s previous good character and accomplishments as bourgmestre”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 265: “The Appellant’s assertion that the Trial Chamber failed to consider [evidence of prior good character] is incorrect. The Trial Chamber stated that it ‘considered in mitigation the fact that the Accused was a person of good character prior to the events. As a public figure and a member of the MDR [*Mouvement Démocratique Républicain*], he advocated democracy and opposed ethnic discrimination. As such, he proved courageous, despite threats to his life and property.”

Rugambarara, (Trial Chamber), November 16, 2007, paras. 40, 41, 43: “Both Parties submit that Rugambarara was a person of good character with no history of extremism before the events of 1994.” “The Defence adduced evidence that as a medical assistant, Rugambarara took care of all his patients without discrimination and had excellent relationships with Tutsi, some of whom were close friends of his family. The Defence further submits that as *bourgmestre*, Rugambarara abolished the practice of reinserting the Tutsi ethnicity of ID holders who had changed their ethnicity to Hutu in the 1960s, and that he spearheaded an initiative at the national level to abolish the reference to ethnicity on identification cards.” “The Chamber accepts that Rugambarara was a person of good character before the events of 1994, with no history of ethnic discrimination. The Chamber accepts th[is as a] mitigating factor[.]”

Nzabirinda, (Trial Chamber), February 23, 2007, paras. 89, 92: “The Parties submitted that the Accused was indifferent to ethnicity, never discriminated on that basis and had excellent relationships and friendships with Hutu and Tutsi alike. Further, the Accused’s wife is Tutsi and the relations he had with his family-in-law went further than simple cordiality.” “On the basis of the witnesses’ testimonies, the Chamber is satisfied that Joseph Nzabirinda was a person of good character before his involvement in the crimes committed in Sahera *secteur* in April 1994, with no history of ethnic discrimination. The Chamber finds that th[is] factor[] constitute[s a] mitigating circumstance[].”

Muvunyi, (Trial Chamber), September 12, 2006, para. 543: “The Chamber . . . considers that the good character of the Accused prior to 1994, his position as a husband and father of three children, and the fact that he spent most of his life working for the defence of his country are mitigating factors. Moreover, many Defence witnesses portrayed the Accused as a highly respected individual and devoted worshipper, an avid sportsman and basketball player who actively participated in the life of his community alongside his military colleagues, as well as members of the civilian population. Furthermore, the Chamber has heard evidence indicating that prior to 1994, the Accused never discriminated against anyone on the basis of ethnicity.” (Note that most of Muvunyi’s convictions were overturned on appeal and the case was remanded for partial re-trial.)

Bisengimana, (Trial Chamber), April 13, 2006, paras. 149-50: “The Chamber considers that the Accused was an educated person with a high level of responsibility in Gikoro *commune* at the time of the events. The Chamber recalls that Witnesses . . . testified that Paul Bisengimana was esteemed as a *bourgmestre*, that he brought prosperity and development to Gikoro *commune* throughout his term of office and that he worked to improve the life of its population. These witnesses also testified about development projects carried out in Gikoro *commune* by the Accused. Further, according to Witnesses . . . , Paul Bisengimana had a strong sense of responsibility because of his role as a widower, father and *bourgmestre*.” “The Chamber is satisfied by the witnesses’ testimonies that the Accused was a person of good character before he got involved in the crimes committed in Gikoro *commune* in April 1994 and that this constitutes a mitigating factor.”

See also Seromba, (Trial Chamber), December 13, 2006, para. 395 (considering “Seromba’s good reputation” as a mitigating factor); *Serugendo*, (Trial Chamber), June 12, 2006, para. 65 (considering under mitigating factors: “Serugendo was of good character and had no record of extremism before 1994”); *Rutaganira*, (Trial Chamber), March 14, 2005, paras. 122-25, 127 (considering as mitigating that prior to the events at issue, “Rutaganira was a man of upstanding character who placed the public interest over his personal interest and that his sense of duty and presence during the events of 1994 enabled him to save lives”); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 352 (considering “the work done by the Accused as *bourgmestre* certainly constitutes a mitigating circumstance, just like his conduct prior to April 1994 [There was testimony] that the Accused was of good character and had good relations with the Tutsi prior to the death of President Habyarimana. . . .”); *Semanza*, (Trial Chamber), May 15, 2003, paras. 579-84 (considering as mitigating the prior character and accomplishments of Semanza—bringing prosperity

and development to his region); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 895 (considering as mitigating: Elizaphan Ntakirutimana was “a highly respected personality within the Seventh Day Adventist Church of the West-Rwanda Field” and until 1994 he, as a pastor, led an “exemplary life as a church leader”; he was a “highly religious and tolerant person,” who showed no ethnic bias, including in times of unrest and ethnic tension, for over half a century); *Ruggiu*, (Trial Chamber), June 1, 2000, paras. 61-68 (considering Ruggiu’s character).

Compare Seromba, (Trial Chamber), December 13, 2006, para. 27: “In the present case, the Chamber finds that the Defence only adduced evidence of the Accused’s good character after the hearing had been declared closed, thus making [it] impossible for the Prosecution to present arguments on this point. Furthermore, the Chamber finds that by merely submitting that the Accused’s conduct had ‘[...] had [*sic*] never been viewed with disfavour by the faithful of Nyange parish prior to the events of 6 April 1994 [...],’ the Defence has failed to show that evidence of the Accused’s good character is particularly probative to the charges against him.”

Compare Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 820: “The Chamber notes that Imanishimwe’s background prior to the 1994 conflict in Rwanda, . . . includes work with several religious and benevolent associations, as well as a university degree in social sciences and military studies, followed by five years of military command experience. The Chamber does not consider Imanishimwe’s background, as submitted by the Defence, to be a factor to mitigate his sentence.” *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, paras. 434-41 (no error by Trial Chamber regarding mitigating factors).

Compare Kamuhanda, (Trial Chamber), January 22, 2004, paras. 757-58: “[T]he Chamber notes the fact that prior to his involvement in the genocide, Kamuhanda was widely regarded as a good man, who did a lot to help his commune and his country.” “However, the Chamber finds by a majority, Judge Maqutu dissenting, that given the gravity of the Crimes for which the Accused has been found guilty, there are insufficient reasons to conclude that there are any mitigating factors in this case.” *But see Kamuhanda*, (Trial Chamber), Judge Maqutu’s Dissent on the Sentence, January 22, 2004, para. 6 (arguing that Kamuhanda’s sentence should have been 25 years, not life in prison: “Evidence has been given that shows the accused was a good man. It has been shown that he belonged to a group of intellectuals who were not happy with the promotion of ethnic divisions between the Hutu and Tutsi.”).

See also “pre-1994 evidence of prior good conduct admissible as a mitigating circumstance,” Section (VIII)(b)(iii)(4), this Digest.

(B)weight to accord

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1069: “[T]he Appeals Chamber recalls that, according to the jurisprudence of the Tribunal and of the ICTY, the previous good moral character of the accused carries little weight in the determination of the sentence.” *See also Seromba*, (Appeals Chamber), March 12, 2008,

para. 235 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 195 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 398 (similar).

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 301: “[U]nder the jurisprudence of this Tribunal and the ICTY, evidence of prior conduct, good or bad, is rarely considered probative.”

Seromba, (Trial Chamber), December 13, 2006, para. 26: “The Chamber notes that evidence of the good character of the accused prior to the events for which he is indicted is, generally, of limited probative value in international criminal law.”

See also “personal circumstances of limited weight,” Section (VII)(b)(iii)(7)(a)(v), this Digest.

(C) application—weight to accord

Seromba, (Appeals Chamber), March 12, 2008, para. 235: “The Appeals Chamber . . . reiterates the finding made in the *Semanza* Appeal Judgement that

. . . [I]n this case, the Trial Chamber does not indicate how much weight, if any, it attaches to the Appellant’s previous character and accomplishments. Thus, it is not clear that these mitigating factors unduly affected the sentence, given the nature of the offences. Consequently the Appeals Chamber finds no discernible error on the part of the Trial Chamber.”

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 354: “[The Trial Chamber] did note that the Appellant was, prior to his involvement in the genocide, ‘widely regarded as a good man, who did a lot to help his *commune* and his country.’ The fact that it decided that there are insufficient reasons to conclude that there are any mitigating factors in this case was clearly within its discretion”

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 301: “[T]he Trial Chamber’s decision to give little weight to the testimony of the four Defence witnesses who testified as to the Appellant’s pre-1994 good conduct towards Tutsis was within the wide discretion given to the Trial Chamber at sentencing. This conclusion is warranted in light of the totality of the evidence in support of the grave offences for which the Appellant was convicted and when considering that under the jurisprudence of this Tribunal and the ICTY, evidence of prior conduct, good or bad, is rarely considered probative.” *Compare id.*, paras. 309-11: “[T]he Trial Chamber erred in failing to give [Kajelijeli] some credit for the sheltering of four Tutsis in the Mungo home” “Nevertheless, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion in finding that . . . even if this evidence were taken into account as a mitigating circumstances, it carries little weight.”

Karera, (Trial Chamber), December 7, 2007, para. 582: “The Chamber does not consider that there are any significant mitigating circumstances. Since 1958, Karera was a teacher and later became a director of primary education. He helped build schools and establish a soccer team for Kigali city Prior contributions to community development have been considered by both Tribunals as a mitigating factor and the Chamber accords this

some weight. There is no evidence that Karera discriminated against Tutsis before April 1994, and this is also accorded some weight by the Chamber.”

Niyitegeka, (Trial Chamber), May 16, 2003, paras. 496-98: The Chamber considered that Niyitegeka was “a person of good character prior to the events” and as a public figure and a member of the Mouvement Democratique Republicain (MDR), he advocated democracy and opposed ethnic discrimination. However, the Chamber held that this carried little weight because when faced with the choice between participating in massacres of civilians or holding fast to his principles, Niyitegeka chose the path of ethnic bias and participated in the massacres.

See also Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 908 (considering that Gerard Ntakirutimana was a person of good character and did not profess or show any ethnic bias until April 1994, but deeming this to “carry little weight”).

(ii) voluntary surrender

Seromba, (Appeals Chamber), March 12, 2008, para. 236: “[V]oluntary surrender, alone or in conjunction with other factors, has been considered as a mitigating circumstance in a number of cases before the Tribunal and before the ICTY.”

(A) timing of surrender

Seromba, (Trial Chamber), December 13, 2006, para. 397: “The Chamber notes that voluntary surrender of an accused may constitute a mitigating circumstance. The Chamber considers that the circumstances and time frames surrounding the surrender of the accused must be assessed on a case by case basis. Thus, for example, in [the ICTY’s] *Blaskić* [case], the fact that the accused surrendered only after having prepared his defence, and in [the ICTY’s] *Simić* [case], the fact that the accused surrendered three years after the surrender of other individuals in the same circumstances, limited the mitigating effect of those surrenders. The Chamber notes, on the contrary, that in [the ICTY’s] *Babić* [case], the voluntary surrender of the accused was considered as a mitigating circumstance because it happened ‘soon after the confirmation of an indictment against him,’ while in [the ICTY’s] *Plavšić* [case], the voluntary surrender of the accused to the Tribunal’s authorities 20 days after having learned about the Indictment, was considered as a mitigating circumstance.”

(B) application

Seromba, (Trial Chamber), December 13, 2006, para. 398: “In this case, the Chamber notes that Accused Athanase Seromba surrendered to the authorities of the Tribunal on 6 February 2002, without the arrest warrant issued against him being executed by the Italian authorities. The Chamber finds this to be a voluntary surrender and, therefore, considers the voluntary surrender of the Accused as a mitigating circumstance in determining the sentence.”

Rutaganira, (Trial Chamber), March 14, 2005, para. 145: “The Chamber, in keeping with consistent case-law, finds that Vincent Rutaganira’s voluntary surrender to the Tribunal after a warrant of arrest had been issued against him is reflective of his respect for the

international administration of justice. Therefore, the Chamber finds that his voluntary surrender is a mitigating circumstance.”

See also Serushago, (Trial Chamber), February 5, 1999, para. 34 (considering Serushago’s “voluntary surrender” as a mitigating factor).

(iii) guilty plea

Nzabirinda, (Trial Chamber), February 23, 2007, para. 68: “The Chamber recalls that an acknowledgement of guilt may constitute proof of the perpetrator’s honesty, that some form of consideration should be afforded to those who have confessed their crimes, in order to encourage others to come forward, and that a guilty plea may contribute to the process of national reconciliation in Rwanda.”

Serugendo, (Trial Chamber), June 12, 2006, paras. 55, 57: “The jurisprudence of the Tribunal has accepted that a guilty plea may go to the mitigation of sentence” “The Chamber concurs with previous decisions of this Tribunal that some form of consideration should be given to those who have confessed their crimes in order to encourage others to come forward.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 139 (similar).

Rutaganira, (Trial Chamber), March 14, 2005, paras. 147-50: “The Chamber notes that Vincent Rutaganira is only the fourth accused person to plead guilty before this Tribunal. In several cases, the Tribunal has held that a guilty plea should be considered as a mitigating circumstance.” “In *Serushago*, the accused pleaded guilty to genocide and crimes against humanity. In light of his guilty plea, Serushago was sentenced to a single term of 15 years of imprisonment for all the crimes of which he has been convicted. In *Ruggiu*, the accused pleaded guilty to the crime of direct and public incitement to commit genocide and of crime against humanity (persecution). Taking his guilty plea into account, the Chamber sentenced him to 12 years of imprisonment.” “In *Erdemovic*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia considered a guilty plea as a mitigating circumstance.” “In the light of such case-law of both *ad hoc* Tribunals, the Chamber finds that since a guilty plea is always an important factor in establishing the truth about a crime, it should cause a reduction in the sentence that would have been otherwise handed down.”

See also “goals served by guilty plea,” and “[a]ccepting guilty pleas,” Sections (VII)(b)(ii)(7)(e) and (VIII)(f), this Digest.

(A) timing of guilty plea

Rugambarara, (Trial Chamber), November 16, 2007, para. 30: “The timing of the guilty plea is also a factor to be considered in sentencing.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 65 (same); *Serugendo*, (Trial Chamber), June 12, 2006, para. 55 (similar).

Serugendo, (Trial Chamber), June 12, 2006, para. 58: “[T]he timely nature of the guilty plea facilitates the administration of justice and saves the Tribunal’s resources.”

Rutaganira, (Trial Chamber), March 14, 2005, para. 151: “[T]he Chamber wishes to stress that a guilty plea serves public interest better if it is entered before the commencement or at the initial phase of the trial, thus enabling the Tribunal to save time and resources.”

See, e.g., Rutaganira, (Trial Chamber), March 14, 2005, para. 152: “The Chamber, recalling that Vincent Rutaganira pleaded guilty before the commencement of the trial, finds that his guilty plea’s contribution to the search for the truth must redound to his benefit. Accordingly, the Chamber will take such guilty plea into account in sentencing.”

(B) application

Rugambarara, (Trial Chamber), November 16, 2007, para. 35: “Rugambarara’s change of plea has indeed saved judicial time and resources, and may contribute to the process of national reconciliation in Rwanda. The Chamber considers these factors as mitigating.”

Nzabirinda, (Trial Chamber), February 23, 2007, para. 71: “The Chamber finds that Joseph Nzabirinda’s change of plea to one of guilty together with public regrets and remorse constitutes recognition of his responsibility, has saved judicial time and resources, and may contribute to the process of national reconciliation in Rwanda. Therefore, the Chamber finds that Joseph Nzabirinda’s guilty plea is a factor to be considered in mitigation of the sentence.” *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 140 (similar as to Bisengimana).

Serugendo, (Trial Chamber), June 12, 2006, paras. 58-60: “The Chamber finds that Serugendo’s change of plea to one of guilty is a mitigating circumstance. The plea was accompanied by a publicly expressed acknowledgement of his responsibility” “Therefore, the Chamber recognises the importance of Serugendo’s guilty plea as an expression of his readiness to take responsibility, and as a contribution to reconciliation in Rwanda.” “The Chamber concludes that Joseph Serugendo’s guilty plea is an important factor going to the mitigation of sentence.”

Kambanda, (Trial Chamber), September 4, 1998, paras. 61-62: The Trial Chamber considered that Kambanda’s guilty plea “is likely to encourage other individuals to recognize their responsibilities during the tragic events”; and that guilty pleas are “generally considered, in most national jurisdictions, including Rwanda, as a mitigating circumstance”—but finding the aggravating circumstances negated the mitigating circumstances.

See also Ruggiu, (Trial Chamber), June 1, 2000, paras. 53-55 (considering Ruggiu’s guilty plea); *Serushago*, (Trial Chamber), February 5, 1999, para. 35 (considering Serushago’s “guilty plea”).

See also “sincere remorse” as a mitigating factor, Section (VII)(b)(iii)(7)(b)(v), this Digest.

(iv) selective assistance

(A) application

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 265: “The Trial Chamber . . . considered, ‘[i]n mitigation of the Accused’s sentence,’ the evidence that he ‘intervened and saved a group of refugees from Interahamwe who accused them of being Inkotanyi’ and from this inferred that ‘the Accused thus saved these refugees’ lives.’”

Rugambarara, (Trial Chamber), November 16, 2007, para. 37: “[T]he Chamber accepts the evidence that Rugambarara personally assisted Tutsi refugees by way of moral and material support in Bicumbi *commune* during the 1994 events. Rugambarara’s acts contributed to saving some of their lives. In the Chamber’s view, this constitutes a mitigating factor.”

Nzabirinda, (Trial Chamber), February 23, 2007, para. 77: “Joseph Nzabirinda personally assisted Tutsi refugees by way of moral, financial and material support in Sahera *secteur* during the 1994 events and . . . he assisted in organising the departure of certain refugees to Burundi Joseph Nzabirinda’s acts contributed to saving the lives of some of the Tutsi refugees. Therefore, the Chamber finds that Joseph Nzabirinda’s assistance to certain victims constitutes a mitigating factor.”

Serugendo, (Trial Chamber), June 12, 2006, paras. 68-69: “Witness AX, a Tutsi, who testified that on 10 or 11 April 1994, he was chased by armed attackers. Serugendo rescued the witness by transporting him in his car and refusing to relinquish him to the angry mob. This evidence was uncontested by the Prosecution.” “The Chamber accepts that Serugendo saved the life of Witness AX during the genocide as a factor in mitigation.”

Rutaganira, (Trial Chamber), March 14, 2005, paras. 153-55: “The parties agree that Vincent Rutaganira provided assistance to certain victims and saved their lives.” “Witness TRV-4 testified that he was saved from death through Vincent Rutaganira’s intervention. Witness Immaculée Nyiramasimbi, the Accused’s spouse, testified that she and her husband had hidden some Tutsi in their house for some weeks and, in particular, a woman who stayed for three months.” “On this evidence which is not challenged . . . , the Chamber finds that Vincent Rutaganira’s assistance to persons targeted by attackers in their *secteur* should operate to mitigate his sentence.”

See also Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 909 (considering that Gerard Ntakirutimana provided or offered shelter to several Tutsi, including a colleague and friends, a house-help and orphaned children); *Ruggiu*, (Trial Chamber), June 1, 2000, paras. 73-74 (considering Ruggiu’s assistance to victims); *Serushago*, (Trial Chamber), February 5, 1999, para. 38 (considering Serushago’s assistance to certain Tutsi victims).

Compare Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1106: “In its discussion of the Appellant’s individual circumstances, the Trial Chamber took account of his submission that he had saved the lives of Tutsi in 1994. However, it

did not give significant weight to this, as it found that '[h]is power to save was more than matched by his power to kill.' The Appeals Chamber cannot find any error in the exercise of its discretion by the Trial Chamber."

Compare Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2273: The Trial Chamber "has considered Bagosora's efforts to facilitate the evacuation of orphans at the behest of the French government It has also assessed the selective assistance that Nsengiyumva rendered to some Tutsis in Gisenyi prefecture in 1994, in particular Witness XX, a Tutsi nun and family friend, after the Nyundo Parish massacre Furthermore, the Chamber has taken into account Ntabakuze's role in facilitating UNAMIR [the United Nations Assistance Mission for Rwanda] convoys and the general positive view of him held by certain UNAMIR and foreign officers and high ranking opposition officials In the Chamber's view, this selective assistance carries only limited weight as a mitigating factor."

Compare Nchamihigo, (Trial Chamber), November 12, 2008, para. 393: "There was evidence that [Nchamihigo] assisted members of his family and others of Tutsi origin, but only a few people close to him were involved. His assistance to the religious sisters is also very limited and selective. This evidence carries limited weight as a mitigating factor."

Compare Simba, (Trial Chamber), December 13, 2005, para. 442: "The Chamber has also noted Simba's role in assisting several members of his family and others close to him after the death of President Habyarimana, but is mindful of the rather selective assistance he provided. This evidence carries limited weight as a mitigating factor." *See also Simba*, (Appeals Chamber), November 27, 2007, para. 282 (noting that selective assistance and tolerance of Tutsis were considered by the Trial Chamber).

Compare Niyitegeka, (Trial Chamber), May 16, 2003, paras. 494-95 (considering that Niyitegeka intervened and saved a group of refugees from the *Interahamwe* militia; however, this carried limited weight since he also took the lives of others); *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 471-73 (considering Rutaganda's assistance to certain individuals—helping people to evacuate and providing food and shelter to some refugees—but found this outweighed by "aggravating factors" since "Rutaganda occupied a high position in the *Interahamwe*" and he "knowingly and consciously participated in the commission of such crimes and never showed remorse for what he inflicted upon the victims.").

But see Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 465: "[T]he Chamber finds that Zigiranyirazo's good relationship with Tutsi and the assistance he provided to some Tutsi before and during the genocide does not warrant mitigation. The Chamber considers that Zigiranyirazo's good relationship with some Tutsi employees and Tutsi business associates is not significant and shall not have any bearing on sentencing in this case."

But see Bikindi, (Trial Chamber), December 2, 2008, paras. 457-58: "[T]he Chamber finds that Bikindi's good relationship with Tutsi and the assistance he provided to some Tutsi

before and during the genocide does not warrant mitigation. The Chamber considers that Bikindi's good relationship with some Tutsi neighbours and Tutsi members of his ballet is not significant and shall not have any bearing on sentencing in this case. The Chamber also observes that Bikindi only provided selective assistance to Tutsi during the genocide, namely Tutsi in his circle, such as the members of his troupe. Such selective assistance is not decisive in the chamber's view. The chamber also notes that, while Bikindi took care of a young Tutsi orphan during his exile in Zaire, by the individual's own admission, Bikindi was not aware of her ethnicity." "The Chamber therefore concludes that there are no mitigating circumstances that should be taken into account in the determination of the sentence."

But see Muvunyi, (Trial Chamber), September 12, 2006, para. 540: "The Chamber has . . . considered evidence from several defence witnesses that the accused was responsible for protecting and thus saving the lives of Tutsi civilians The Chamber does not consider this to be a mitigating factor. On the contrary, the Chamber considers that the selective exercise by the accused of his power to protect civilians based on friendship or family ties, was further evidence of his abuse of office and authority. His duty was to protect all civilians in danger irrespective of ethnicity or personal relationships. The Chamber further considers that the Accused was one of the people entrusted with responsibility for the security of the civilian population in Butare. By using his power, influence and official resources to protect his friends and family while leaving the vast majority of Tutsi civilians at the mercy of the genocidal killers, the Accused abused the trust and confidence placed in him by members of his society." (Note that most of Muvunyi's convictions were overturned on appeal and the case was remanded for partial re-trial.)

But see Bisengimana, (Trial Chamber), April 13, 2006, para. 159: "The Chamber . . . considers . . . that it is established that some Tutsis civilians were temporarily sheltered at Paul Bisengimana's house in 1994. However, . . . the Chamber considers that . . . Paul Bisengimana fled with his family and left the refugees behind and that some of the refugees were subsequently killed. [T]he Chamber does not find . . . that it is established that the Accused protected Tutsis refugees and thus saved their lives Accordingly, the Chamber rejects this alleged mitigating circumstance."

But see Kajelijeli, (Trial Chamber), December 1, 2003, para. 951: "The Chamber considers that assisting in the evacuation of one Tutsi man and his family is insufficient to mitigate Kajelijeli's sentence, in light of the number of Tutsis whom Kajelijeli not only failed to protect, but whose deaths he actively brought about." *But see Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 298 (error to find that saving Tutsis prior to 1994 could not be taken into account on jurisdictional grounds).

See also "pre-1994 evidence of prior good conduct admissible as a mitigating circumstance," under "jurisdiction," Section (VIII)(b)(iii)(4), this Digest.

See also "selective assistance does not preclude finding intent to destroy" as to genocide, Section (I)(c)(ii)(7), this Digest.

(v) sincere remorse

Rugambarara, (Trial Chamber), November 16, 2007, para. 33: “For remorse to be considered mitigating, the Chamber must be satisfied that the expression of remorse is sincere.” See also *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 69 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 63 (similar).

(A) application

Rugambarara, (Trial Chamber), November 16, 2007, paras. 32, 34: “[Rugambarara] asked the families of the victims in Bicumbi *commune* in particular and the people of Rwanda in general for forgiveness for his failure to punish his subordinates and added that he felt deep remorse.” “After considering Rugambarara’s public expression of regret and remorse, the Chamber is satisfied that Rugambarara’s expression of remorse is sincere.”

Nzabirinda, (Trial Chamber), February 23, 2007, paras. 67, 70: “[Nzabirinda] requested forgiveness from the families of the two victims, Pierre Murara and Joseph Mazimpaka, and from the people of Rwanda for the crimes for which he is responsible by his omission to act for which he suffers deep remorse.” “After considering Joseph Nzabirinda’s public expression of regrets and remorse for the crimes he committed, the Chamber is satisfied that Joseph Nzabirinda’s expression of remorse is sincere.”

Bisengimana, (Trial Chamber), April 13, 2006, paras. 137, 138: “[T]he Accused admitted that he had failed in his duty to protect human life and that he did not show the courage that his citizens expected from their *bourgmestre*. He asked for pardon from the families that lost people in his *commune* and he publicly expressed remorse for not having been able to save those innocent people, which was his first duty.” “The Chamber finds that . . . the Accused publicly expressed regrets and remorse for the crimes that he committed.”

Rutaganira, (Trial Chamber), March 14, 2005, paras. 156-58: “The parties agree that Vincent Rutaganira sincerely repented for having failed to act on behalf of the victims of the Mubuga Church massacre [in Gishyita commune, Kibuye prefecture] and that he is still remorseful for having failed to intervene in order to protect victims from the tragic events that took place in his *secteur*.” “The Chamber notes that, at his further initial appearance on 8 December 2004, Vincent Rutaganira expressed regret and asked for forgiveness as follows:

as the *conseiller* for the *secteur*, I regret not being able to save the people who were at the church and I will never be able to forget the horror that I saw the day after the attacks that have left deep wounds in my heart. Once again, I ask for forgiveness from the families of the victims, and that is why I surrendered in order to tell the truth.”

“The Chamber finds in mitigation that the expression of regret and remorse by the Accused is sincere.”

See also *Serugendo*, (Trial Chamber), June 12, 2006, paras. 64, 63 (considering that “[b]oth in the Plea Agreement and during the Sentencing Hearing, Serugendo publicly expressed regret and remorse for his crimes” and accepting the remorse as genuine); *Ruggiu*, (Trial Chamber), June 1, 2000, paras. 69-72 (considering Ruggiu’s regret and remorse); *Musema*,

(Trial Chamber), January 27, 2000, paras. 1005-06 (considering as mitigating: Musema “admitted the genocide against the Tutsi people in Rwanda in 1994”; he “expressed his distress about the deaths of so many innocent people and paid tribute to all victims of the tragic events”; and he expressed deep regret that the facilities of the Gisovu Tea Factory (of which he was Director) may have been used by the perpetrators of atrocities); *Serushago*, (Trial Chamber), February 5, 1999, para. 40 (considering Serushago’s “[p]ublic expression of remorse and contrition”).

(vi) substantial cooperation with the prosecution

Nzabirinda, (Trial Chamber), February 23, 2007, para. 73: “It is for the Trial Chamber to weigh the circumstances relating to any cooperation, and ‘the evaluation of the accused’s co-operation depends both on the quantity and quality of the information he provides.’”

Kambanda, (Trial Chamber), September 4, 1998, para. 36: “[S]ubstantial co-operation by the accused with the Prosecutor could only be one mitigating circumstance, among others, when the accused pleads guilty plea [*sic*] or shows sincere repentance.”

(A) application

Serugendo, (Trial Chamber), June 12, 2006, paras. 61-62: “Both the Prosecution and Defence concur that Serugendo has provided substantial cooperation to the Prosecution. This co-operation is described as wide-ranging, leading to the clarification of many areas of investigative doubt, in relation also to crimes previously unknown by the Prosecution. Consequently, he can be seen as setting an example that may encourage others to acknowledge their personal involvement in the massacres that occurred in Rwanda in 1994.” “[I]t is clear that Serugendo’s co-operation with the Prosecution has been substantial. The Chamber finds this factor to be a significant mitigating circumstance.”

Musema, (Trial Chamber), January 27, 2000, para. 1007: The Chamber considered that Musema’s co-operation through his admission of facts pertaining to the case facilitated an expeditious trial, and his continuous co-operation throughout the trial contributed to proceedings without undue delay.

Serushago, (Trial Chamber), February 5, 1999, paras. 31-33: The Chamber considered that Serushago’s “cooperation with the Prosecutor was substantial and ongoing”: “[it] enabled the Prosecutor to organize and . . . successfully carry out the ‘NAKI’ (Nairobi-Kigali) operation, which resulted in the arrest of several high-ranking persons suspected of being responsible for the events of 1994” “Furthermore, . . . Serushago has agreed to testify as a witness for the Prosecution in other trials pending before the Tribunal.”

See also Ruggiu, (Trial Chamber), June 1, 2000, paras. 56-58 (considering Ruggiu’s cooperation with the prosecutor); *Kambanda*, (Trial Chamber), September 4, 1998, paras. 61-62 (considering Kambanda’s past and present cooperation with the prosecutor as a mitigating circumstance—but finding the aggravating circumstances negate the mitigating circumstances).

Compare Nzabirinda, (Trial Chamber), February 23, 2007, para. 74: “There is no dispute regarding Joseph Nzabirinda’s offer to cooperate with the Prosecution in the future. However, at this stage of the proceedings, the Chamber considers that this offer cannot be considered as a mitigating circumstance in and of itself, insofar as there has been no demonstration of any substantial cooperation, within the meaning of Rule 101 (B)(ii), apart from the Guilty Plea which the Chamber has already taken into account.”

See also “lack of cooperation with the prosecution not an aggravating factor,” Section (VII)(b)(iii)(6)(b)(xv), this Digest.

(vii) duress/necessity

Rutaganira, (Trial Chamber), March 14, 2005, para. 161: “The Chamber fully endorses the finding by the Appeals Chamber of ICTY [in *Erdemović*] that ‘*duress does not afford a complete defence to a soldier charged with a crime against humanity and/or war crime involving the killing of innocent human beings.*’ However, it is the Chamber’s opinion that duress may be considered as a mitigating circumstance.” (emphasis in original.)

(A) application

Rutaganira, (Trial Chamber), March 14, 2005, paras. 159, 162: “Both parties plead as a mitigating circumstance the real danger faced by Vincent Rutaganira or a member of his immediate family of being killed if the Accused had objected to the killings that were taking place in his *secteur*.” “The Chamber admits that there was duress in the instant case. In light of all the above, it finds that such duress goes to mitigation.”

Compare Nzabirinda, (Trial Chamber), February 23, 2007, paras. 93-95: “The Parties submit that, if the Accused had directly opposed the events in Sahera *secteur* [Ngoma commune, Butare prefecture] there would have been a real risk that he or a member of his close family would have been killed. Indeed, as a PSD [*Parti Social Démocrate*] party member he was personally threatened, and a target for the *Interahamwe* and the soldiers who were responsible for the massacres in Butare. Further, the lives of the Accused’s wife, a Tutsi, and their children were also threatened. Therefore the Parties submitted that the prevailing circumstances faced by the Accused and his family should be considered as a factor in mitigation of the sentence.” “Witness LZI testified that Nzabirinda was threatened during the events. Joseph Nzabirinda also submitted in court that he was under psychological pressure, which forced him to take part in meetings and to go to the roadblocks in order not to confirm the suspicion that being a member of the PSD party was equivalent to being an accomplice of the enemies.” “The Chamber considers that this submission in respect of prevailing circumstances of necessity contradicts the facts in the Plea Agreement”

(viii) superior orders

Article 7(4), ICTR Statute:

“The fact that an accused person acted *pursuant to an order* of a government or of a superior shall not relieve him or her of criminal responsibility, but *may be considered in mitigation* of punishment if the International Tribunal for Rwanda determines that justice so requires.” (emphasis added).

Compare Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2274: “The Chamber is aware that Nsengiyumva and Ntabakuze were at times following superior orders in executing their crimes, which is a mitigating factor under Article 6 (4) of the Statute. However, given their own senior status and stature in the Rwandan army, the Chamber is convinced that their repeated execution of these crimes as well as the manifestly unlawful nature of any orders they received to perpetrate them reflects their acquiescence in committing them. No mitigation is therefore warranted on this ground.”

(ix) family situation

Rugambarara, (Trial Chamber), November 16, 2007, para. 39: “The Chamber notes that the fact that an accused is married and has children may, under certain circumstances, be considered as mitigating.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 80 (similar).

Serugendo, (Trial Chamber), June 12, 2006, para. 66: “The jurisprudence of the Tribunal has taken into consideration various personal circumstances as mitigating factors, such as [the Accused’s] family situation.”

(A) weight to accord

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1069: “As to a defendant’s family situation, the Tribunal and the ICTY do not treat it as an important factor, save in exceptional circumstances, the main factor being the gravity of the crimes.”

Serugendo, (Trial Chamber), June 12, 2006, para. 66: “[T]he Tribunal has generally attached only limited importance to [personal circumstances, including family situation].”

(B) application

Rugambarara, (Trial Chamber), November 16, 2007, para. 39: “In the instant case, the personal and family situation of the Accused, as a married man with children, leads the Chamber to believe in his chances of rehabilitation after his release. The Chamber therefore finds this personal situation to be a mitigating circumstance.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 81 (similar).

Serugendo, (Trial Chamber), June 12, 2006, para. 67: “The Chamber notes that Serugendo is married and that he is 53 years old. It considers that these factors taken together amount to personal circumstances of a kind which may be accorded some, although very limited, weight in mitigation.”

Bisengimana, (Trial Chamber), April 13, 2006, paras. 143, 144: “The Chamber notes that the fact that the Accused is married and has children may, in the circumstances, be considered mitigating. The Chamber agrees that the social, professional and family background of the Accused also has to be taken into account.” “[T]he personal and family situation of the Accused, a married man with children, lead the Chamber to

believe in his chances of rehabilitation, and the Chamber therefore finds this situation to be a mitigating circumstance.”

Rutaganira, (Trial Chamber), March 14, 2005, paras. 120-21: “As testified to in open session by the Accused and his wife, nine children were born of their union. Moreover, his wife testified that she serves in the new Government as deputy mayor in charge of women’s development in her *commune*.” “The Chamber is of the view that such evidence augurs well for the potential rehabilitation of the Accused into the local community and his joining the national reconciliation process.” (Considered under heading “individual circumstances” not mitigating factors.)⁶⁵

See also Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 896 (considering Elizaphan Ntakirutimana was married with seven children); *Serushago*, (Trial Chamber), February 5, 1999, para. 39 (considering Serushago’s young age, his six children (two of whom were very young), and the possibility of his rehabilitation).

Compare Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1107-08: “Appellant Ngeze submits that the Trial Chamber erred in disregarding his family situation (an ‘aged mother’ and children under the age of 16). In this respect, he cites the *Jelisić* case, in which the Trial Chamber took into consideration the fact that the accused was the father of a young son.” “The Appeals Chamber notes that, in general, the Tribunal and the ICTY do not accord great weight to the family situation of the accused, given the gravity of the crimes committed. Therefore, even if the Trial Chamber had erred, such error could not have had any impact in this particular case, given the gravity of the crimes committed by the Appellant and the absence of exceptional family circumstances.”

Compare Nchamihigo, (Trial Chamber), November 12, 2008, para. 393 (“The Chamber does not question the fact that [Nchamihigo] is a good father. However, this is not a factor which has high impact on the sentence.”); *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 908 (considering the Accused was 44 years old at sentencing, married, with three children—but deemed this to “carry little weight”).

(x) lack of previous criminal record

Rugambarara, (Trial Chamber), November 16, 2007, para. 43: “The Chamber . . . accepts the unchallenged assertion that [the Accused] had no previous criminal record. The Chamber accepts th[is as a] mitigating factor[.]” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 92 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 65 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 165 (similar).

Rutaganira, (Trial Chamber), March 14, 2005, paras. 128-30: “Both parties cited Vincent Rutaganira’s lack of a criminal record” “The Chamber notes that the ICTY viewed

⁶⁵ Some cases view family circumstances, personality and general conduct of the accused, lack of a prior criminal record, good conduct in detention, and old age or sickness as “individual circumstances,” not “mitigating circumstances.” *See, e.g., Rutaganira*, (Trial Chamber), March 14, 2005. Most cases appear to view these factors as mitigating circumstances. It may not matter how they are categorized, as long as each factor is only considered once.

the lack of criminal convictions as a mitigating circumstance” “[T]he Chamber finds that the Accused has no criminal convictions and will so note.” (Considered under heading “individual circumstances” not mitigating factors.)⁶⁶

See also Ruggiu, (Trial Chamber), June 1, 2000, paras. 59-60 (considering Ruggiu’s absence of a criminal record).

Compare “prior criminal conduct” as an aggravating factor, Section (VII)(b)(iii)(6)(b)(xii), this Digest.

(A) weight to accord

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1069: “[T]he lack of a previous criminal record ‘is a common characteristic among many accused persons which is accorded little if any weight in mitigation absent exceptional circumstances.’” *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 439 (same).

(xi) good conduct while in detention

Rutaganira, (Trial Chamber), March 14, 2005, para. 129: “The Chamber notes that the ICTY viewed . . . the comportment and behaviour of the Accused while in the Detention Facility [as a mitigating factor].”

But see “personal circumstances of limited weight,” Section (VII)(b)(iii)(7)(a)(v), this Digest.

(A) application

Rugambarara, (Trial Chamber), November 16, 2007, para. 43: “[T]he Chamber considers that the statement of the UNDF [United Nations Detention Facility] Commanding Officer demonstrates Rugambarara’s good conduct while in detention. The Chamber accepts th[is as a] mitigating factor[.]” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 92 (similar as to Nzabirinda).

Bisengimana, (Trial Chamber), April 13, 2006, para. 164: Noting under the heading mitigating circumstances: “The Chamber recalls that it admitted on 3 February 2006 the Certificate of Good Conduct signed by the Commander of the UNDF. This Certificate indicates that between the Accused’s transfer to the UNDF on 11 March 2002 and the date of the Certificate (22 December 2005), the Accused was never the subject of any disciplinary action and conducted himself well at all times.”

Rutaganira, (Trial Chamber), March 14, 2005, paras. 128, 131: “Both parties cited Vincent Rutaganira’s . . . good conduct since being remanded in custody at the United Nations Detention Facility in Arusha.” “The Chamber shall take such good conduct into consideration when determining the sentence.” (Considered under heading “individual circumstances” not mitigating factors.)⁶⁷

⁶⁶ See prior footnote.

⁶⁷ See prior footnote.

(xii) age and state of health of the accused/family being victimized

Simba, (Appeals Chamber), November 27, 2007, para. 287: “The Appeals Chamber recalls that the age and state of health of an accused person may be relevant factors in sentencing”

Serugendo, (Trial Chamber), June 12, 2006, para. 72: “Ill health has been considered as a mitigating factor in sentencing by both this Tribunal and the ICTY. The weight it has been accorded has varied. There is no case law concerning the significance of terminal illness. The Chamber shares the view of the ICTY that when the medical condition of an accused is such as to become incompatible with a state of continued detention, it is the duty of the Tribunal to provide the necessary remedies.”

Rutaganira, (Trial Chamber), March 14, 2005, para. 134: “The Chamber notes that in some cases, age was taken into account in determining sentence.”

But see “personal circumstances of limited weight,” Section (VII)(b)(iii)(7)(a)(v), this Digest.

(A) application

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 569: “Despite the seriousness of the[] acts [committed], the Appeals Chamber agrees that special consideration should be given to [Elizaphan Ntakirutimana’s] individual and mitigating circumstances, notably his age and his state of health”

Serugendo, (Trial Chamber), June 12, 2006, paras. 74, 92, 94: “The Chamber considers that the Accused’s current state of health [suffering from a terminal illness], as established by the Medical Report, constitutes a significant mitigating circumstance in sentencing. Further, the palliative care and ongoing treatment necessary to treat his condition requires a modified regime of detention.” “[T]he Chamber finds Serugendo’s ill health, and consequently reduced life expectancy and quality of life, to be a significant factor in mitigation.” “[I]t is clear that Serugendo is not in a position to serve a sentence under normal prison conditions. He has recently been diagnosed with a terminal illness, has very fragile health and a poor prognosis. The Tribunal must continue to ensure that he receives adequate medical treatment, including hospitalization to the extent needed.”

Bisengimana, (Trial Chamber), April 13, 2006, paras. 174-75: “The Chamber finds no merit in the Defence’s submission that the Accused’s alleged fragile health at the time of the events should be considered in the determination of a fair sentence [E]ven if it [were] established that the Accused did suffer from his liver condition at the time of the events, there is no evidence that this would have had an impact on his participation in the massacres.” “Nonetheless, the Chamber considers that the combination of the Accused’s age and his current state of health [being treated for ‘several illnesses’] . . . constitutes a mitigating circumstance.”

Rutaganira, (Trial Chamber), March 14, 2005, para. 136: “It is the Chamber’s view that, in the instant case, the advanced age of the Accused [60 years] as well as the state of his health [suffering from diabetes and partial disability] could be taken into account in determining his sentence.” (Considered under heading “individual circumstances” not mitigating factors.)⁶⁸

See also Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, paras. 898 (considering Elizaphan Ntakirutimana’s age of 78 years and his frail health); *Rutaganda*, (Trial Chamber), December 6, 1999, paras. 471-73 (considering Rutaganda’s poor health to be mitigating, but outweighed by “aggravating factors”).

Compare Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1094-95: “[Barayagwiza] contends that the Trial Chamber in fact gave him a life sentence, since he would be more than 80 years old at the time of his release and, having regard to the average life expectancy in Tanzania, it is unlikely that he will ever be released.” “The Appeals Chamber is not convinced by the Appellant’s arguments.”

Compare Simba, (Appeals Chamber), November 27, 2007, para. 287: “With regard to his age, the Appellant merely submits that, because he was 65 years old at the time of his conviction, a sentence of 25 years would in effect be equivalent to a sentence to prison for the rest of his life since ‘life expectancy in sub-Saharan Africa for males is 45 years.’ This does not demonstrate how the Trial Chamber abused its discretion in determining the sentence.”

Compare Semanza, (Appeals Chamber), May 20, 2005, para. 334: “The Trial Chamber specifically noted that the Appellant argued that he was himself a victim of the events of 1994 [insofar as his daughter was assassinated and his property destroyed] and that he suffered ill health. The Trial Chamber concluded that these factors were not relevant mitigating considerations in the Appellant’s sentencing.”

(xiii) prior moderate political views and service to country

Simba, (Appeals Chamber), November 27, 2007, para. 330: “[T]he Trial Chamber took into account only two mitigating factors, the Appellant’s prior moderate political views and his service to his country.”

(A) application

Simba, (Trial Chamber), December 13, 2005, para. 441: “The Chamber finds few mitigating circumstances. Simba spent much of his life and career before 1994 engaged in professions devoted to the public service of his country. His political views before April 1994 appear to have been relatively moderate. Such evidence can in no way exonerate or excuse Simba for his participation in the killings. However, it provides a somewhat nuanced picture and may imply that his participation in the massacres resulted from misguided notions of patriotism and government allegiance rather than extremism

⁶⁸ See prior footnote.

or ethnic hatred. The Chamber also notes that Simba does not deny the existence of genocide in Rwanda and condemned the massive slaughter that occurred.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 506: “In mitigation of the Accused’s sentence, the Chamber has considered evidence that, before his participation in the Interim Government, the Accused was a member of the [Social Democratic Party], which was a moderate political party [perceived as pro-Rwandan Patriotic Front].”

(xiv) participation in relatively few criminal events

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 507: “The Chamber . . . takes into account that the Accused has been found guilty of participating in relatively few criminal events.”

(xv) fair trial violations, but not length of proceedings

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1072-73, 1075: “Appellant Barayagwiza contends that his sentence should have been reduced because of the undue delay in trying him. He argues that the delay between his arrest and his conviction (7 years, 8 months and 5 days) is abusive, inexcusable and solely attributable to the Trial Chamber and to the Prosecutor.” “[T]he Appeals Chamber notes that the length of the proceedings is not one of the factors that a Trial Chamber must consider, even as a mitigating circumstance, in the determination of the sentence.” “In the present case, the Appeals Chamber has already found that some initial delays, attributable to the Prosecutor or to the Cameroonian authorities, violated the fundamental rights of the Appellant, and the Trial Chamber reduced the Appellant’s sentence in accordance with the instructions given in the Decision of 31 March 2000.”

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 323-24: The Appeals Chamber reduced Kajelijeli’s life sentence to a sentence of 45 years imprisonment because he “was impermissibly detained for a total of 306 days in Benin and the [United Nations Detention Facility] because 1) he was not promptly informed of the reasons for his arrest or of the provisional charges against him, and 2) he was not promptly granted an initial appearance before a Judge or an official acting in a judicial capacity without undue delay.”

See also Semanza, (Appeals Chamber), May 20, 2005, paras. 325-28 (granting a six-month reduction in sentence for rights violations).

See also “the right to be promptly informed of the reasons for arrest” and “remedy” thereunder, Sections (VIII)(c)(v)-(VIII)(c)(v)(7), this Digest.

(xvi) lack of personal participation in killing/absence from murder venue not mitigating factors

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1054: “In these circumstances [where the Appellant was found guilty of extremely serious crimes], the Trial Chamber was entitled to hold that the fact that the Appellant had not personally committed acts of violence did not mitigate his guilt, as the Appellant had

carried out preliminaries to acts of violence, substantially contributing to the commission of such acts by others.” *See also id.*, paras. 1098-99 (similar).

Nzabirinda, (Trial Chamber), February 23, 2007, paras. 86-87: “Based on these admitted facts, the Chamber considers that Joseph Nzabirinda’s presence as an ‘approving spectator’ in the vicinity of the crime scenes, encouraged the preparation and the commission of the murders of Pierre Murara and Joseph Mazimpaka. Accordingly, the Chamber rejects the Defence arguments that the fact that Joseph Nzabirinda was not physically present at the venue of the murder is a mitigating factor as it is established that he was in the immediate vicinity of the crime scenes and knew that he would encourage the commission of the crimes.” “Therefore, the Chamber does not consider that this form of participation warrants consideration as a mitigating factor in sentencing.”

Bisengimana, (Trial Chamber), April 13, 2006, paras. 178-79: “The Chamber recalls that Paul Bisengimana did not personally commit any violent act during the massacres.” “However, the Chamber does not agree with the Defence’s submissions ‘that Paul Bisengimana did nothing more than be present at a given time during the attack perpetrated against the Tutsis who had taken refuge at Musha Parish Church [in Gikoro commune].’ The Chamber recalls that the Accused was aware that an attack would be launched against the refugees at Musha Church using weapons that had been distributed, and that he had the means to oppose the killings but chose not to act. Moreover, the Chamber recalls that the Accused was present when the attack was launched and more than a thousand people were murdered at Musha Church, including Rusanganwa, and that he knew that his presence would have an encouraging effect on the criminal actions of the perpetrators. Therefore, recalling that the Accused was a person of authority with an obligation to protect the refugees, the Chamber does not consider his form of participation in the Musha Church massacres to be a mitigating circumstance.”

Rutaganira, (Trial Chamber), March 14, 2005, para. 138: “[I]n the opinion of the Chamber, this [lack of active participation in the killings] goes to [the Accused’s] criminal conduct rather than to mitigation.”

But see Muvunyi, (Trial Chamber), September 12, 2006, para. 542: “[E]xcept for the crime of incitement, the Prosecution has not proved that the Accused at any time gave direct orders for the commission of the crimes for which he has been convicted, or that he was present and directly participated in or encouraged the commission of those crimes. This circumstance must be taken into account in determining the sentence to impose on the Accused.” (Note that most of Muvunyi’s convictions were overturned on appeal and the case was remanded for partial re-trial.)

But see Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 897 (considering as mitigating that Elizaphan Ntakirutimana did not personally participate in killings, nor was he found to have fired on refugees or carried a weapon); *Ruggiu*, (Trial Chamber), June 1, 2000, paras. 77-78 (considering as mitigating that Ruggiu did not personally participate in the killings).

(xvii) lack of high position in Rwanda

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1104-05: “The Appellant submits that he was neither part of the Government nor of the military [H]e stresses that he was given the same sentence as the former Prime Minister Jean Kambanda, although he did not hold the same position in the country’s hierarchy, nor was he one of the main architects of the strategy of genocide.” “In the opinion of the Appeals Chamber, the Appellant has failed to show that the Trial Chamber erred. Even if Appellant Ngeze was not part of the Government or of the military, this does not suffice to show that the Trial Chamber abused its discretion in imposing a sentence of life imprisonment [later reduced to 35 years]. The Trial Chamber found that the Appellant had committed very serious crimes and that he had abused the public’s trust while using his newspaper to instigate genocide.”

Compare Ruggiu, (Trial Chamber), June 1, 2000, paras. 75-76: The Chamber considered Ruggiu’s position with *Radio Television Libres des Mille Collines* and in political life (*i.e.*, he was a subordinate at the radio station and played no part in formulating editorial policy). “The Chamber takes note of this absence of authority as a factor in favour of the accused.”

Compare Akayesu, (Trial Chamber), October 2, 1998 (considering as mitigating that Akayesu was “not a very high official in the government hierarchy in Rwanda” and his influence and power was not commensurate with the events).

(xviii) young age of the accused at time of crimes not mitigating

Seromba, (Appeals Chamber), March 12, 2008, para. 237: “[T]he Appeals Chamber notes that the Trial Chamber’s reference to the age of Athanase Seromba could be misunderstood. The Appeals Chamber therefore deems it necessary to clarify that age of thirty-one years cannot serve as a mitigating factor, *i.e.* Athanase Seromba’s age at the time when he committed the crimes.”

(xix) good relations of accused’s family with neighbors of all ethnic groups not mitigating

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 198: “The Appeals Chamber finds that the Trial Chamber erred in considering that the good relationships of the Appellant’s family with its neighbors constituted a factor in mitigation. While there is no exhaustive list of what constitutes a mitigating circumstance, the fact that the Appellant’s family has good relationships with its neighbors of all ethnic groups cannot be considered to constitute an ‘individual circumstance’ of the Appellant and should not be considered in sentencing.”

(xx) short duration of involvement in crimes not mitigating

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 199: “The Prosecution . . . submits that it is ‘hardly a mitigating factor that the Appellant’s active involvement in the events was of short duration.’ The Trial Chamber, however, did not consider the short duration of the Appellant’s involvement to be a mitigating factor. Rather, the Trial

Chamber merely noted that the duration of the Appellant's involvement was not so long that it might constitute an aggravating factor. The Appeals Chamber sees no error in this observation."

See also "crimes committed over lengthy period of time," as an aggravating factor, Section (VII)(b)(iii)(6)(b)(xiv), this Digest.

(xxi) prevailing war situation

Rugambarara, (Trial Chamber), November 16, 2007, para. 47: Under heading "War Situation in Bicumbi Commune in April 1994": "[a]lthough the Defence did not adduce evidence to sustain these assertions, the Chamber accepts as facts of common knowledge that there was an armed conflict in Rwanda in 1994 and as a result there was renewed political intolerance, interethnic tensions and an influx of refugees into the Bicumbi commune. The Chamber accepts that this particular environment could have made it difficult for Rugambarara to exercise his full authority. The Chamber considers this as a mitigating factor." *But see id.*, para. 56 (not listing the prevailing war situation as a mitigating factor the court took into account).

(xxii) political background of family

Serushago, (Trial Chamber), February 5, 1999, para. 36: The Trial Chamber considered Serushago's "family and social background," *i.e.*, "the political background of his family played a crucial role in his involvement with the . . . militia" and strong ties of friendship between his father and President Habyarimana led him to "play a prominent role in *Interahamwe* circles." (The Trial Chamber found that based on a review of all the mitigating circumstances, they "may afford" Serushago "some clemency," but unclear which particular ones it considered, *see id.*, para. 42.)

8) credit for time served

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1038: "[C]redit shall be given for any period of detention of the defendant prior to final judgement." *See also Karera*, (Trial Chamber), December 7, 2007, para. 572 (similar); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 59 (similar); *Nzabirinda*, (Trial Chamber), February 23, 2007, para. 112 (same as *Rugambarara*); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 546 (similar); *Serugendo*, (Trial Chamber), June 12, 2006, para. 95 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 196 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 429 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 357 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 768 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 966 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1112: "[P]ursuant to Rule 101(D) of the Rules, the Chambers are obliged to give credit for any period during which a convicted person was held in provisional detention."

Bikindi, (Trial Chamber), December 2, 2008, para. 443: "[T]he Trial Chamber shall ensure that any penalty imposed by a court of any State on the accused for the same act

has already been served, and shall credit the accused for any time spent in detention pending his surrender to the Tribunal and during trial.”

See, e.g., Kajelijeli, (Trial Chamber), December 1, 2003, para. 966: “[The] period [of detention] also covers the periods during which Kajelijeli was detained solely on the basis of the Rwandan warrant of arrest because this warrant was based on the same allegations that form the subject matter of this trial [F]airness requires that account be taken of the total period Kajelijeli spent in custody.”

See also Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 467 (awarding credit for time served); *Bikindi*, (Trial Chamber), December 2, 2008, para. 459 (same); *Rugambarara*, (Trial Chamber), November 16, 2007, para. 60 (same); *Nzabirinda*, (Trial Chamber), February 23, 2007, paras. 113, 117 (same); *Seromba*, (Trial Chamber), December 13, 2006, para. 405 (same); *Muvunyi*, (Trial Chamber), September 12, 2006, paras. 546-47 (same); *Serugendo*, (Trial Chamber), June 12, 2006, para. 95 (same); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 204 (same as corrected in “Corrigendum-Judgement And Sentence”); *Simba*, (Trial Chamber), December 13, 2005, para. 444 (same); *Rutaganira*, (Trial Chamber), March 14, 2005, para. 171 (same); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 337 (same); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 828 (same); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 769 (same); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 967 (same).

VIII) MISCELLANEOUS

a) General considerations regarding legal interpretation

i) sources of law

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 209: “[T]he Appeals Chamber will rely upon the relevant provisions found in the sources of law for this Tribunal, *i.e.*, its Statute, the Rules and customary international law as reflected *inter alia* in the International Covenant on Civil and Political Rights (‘ICCPR’). The Appeals Chamber will also refer to the relevant provisions found in regional human rights treaties as persuasive authority and evidence of international custom, namely, the African Charter on Human and Peoples’ Rights (‘ACHPR’), the European Convention on Human Rights (‘ECHR’), and the American Convention on Human Rights (‘ACHR’).”

ii) Appeals Chamber may consider cases rendered after Trial Chamber judgment

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, paras. 125, 127: “Imanishimwe submits that [certain cases] may not be considered as a source of law since such case-law postdates the Judgement.” “The Appeals Chamber recalls that the principle of legality, or the *nullum crimen sine lege* doctrine, does not prevent a court from determining an issue through a process of interpretation and clarification of the applicable law; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular provisions. The Appeals Chamber wishes to clarify that when it interprets certain provisions of the Statute or the Rules, it is merely identifying what the proper interpretation of that

provision has always been, even though it was not previously expressed that way. Imanishimwe's argument that the principle of legality precludes consideration of case-law developed subsequent to the Trial Judgement cannot succeed."

b) Jurisdiction

Rwamakuba, (Trial Chamber), September 20, 2006, para. 1: "This Tribunal has the authority to prosecute persons responsible for serious violations of international humanitarian law, including genocide and crimes against humanity, committed in the territory of Rwanda and Rwandan citizens responsible for such crimes committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994." *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 3 (similar); ICTR Statute, Articles 1 and 7 (source).

i) subject matter jurisdiction (*ratione materiae*)

Rutaganira, (Trial Chamber), March 14, 2005, para. 3: "The jurisdiction *ratione materiae* of the Tribunal covers genocide, crimes against humanity, serious violations of Article 3 Common to the four Geneva Conventions and of Additional Protocol II thereto, with its personal jurisdiction being limited to natural persons." *See also Bisengimana*, (Trial Chamber), April 13, 2006, para. 17 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 4 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 4 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 4 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 4 (similar).

ii) territorial jurisdiction (*ratione loci*)

Kamuhanda, (Trial Chamber), January 22, 2004, para. 4: "Pursuant to the Statute, the Tribunal has the authority to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states."

iii) temporal jurisdiction (*ratione temporis*)

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 309: "Article 7 of the Statute provides that 'the temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.'"

Kajelijeli, (Trial Chamber), December 1, 2003, para. 4: "Under Article 1 of the Statute, *ratione temporis* jurisdiction is limited to acts committed between 1 January 1994 and 31 December 1994." *See also Rwamakuba*, (Trial Chamber), September 20, 2006, para. 48 (similar); *Bisengimana*, (Trial Chamber), April 13, 2006, para. 17 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 4 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 4 (similar); *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 4 (similar).

1) crime must have occurred in 1994

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 310, 313, 314: "There is no doubt that . . . an accused can only be held responsible by the Tribunal for a crime . . . having been committed in 1994." "In the opinion of the

Appeals Chamber, [statements by delegations at the ICTR Statute's adoption and the Secretary-General's Report] clearly indicate[] that it was the intention of the framers of the Statute that the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present in 1994. Further, such a view accords with the principle that provisions conferring jurisdiction on an international tribunal or imposing criminal sanctions should be strictly interpreted. Accordingly, the Appeals Chamber finds that it must be shown that:

- 1- The crime with which the accused is charged was committed in 1994;
- 2- The acts or omissions of the accused establishing his responsibility under any of the modes of responsibility referred to in Article 6(1) and (3) of the Statute occurred in 1994, and at the time of such acts or omissions the accused had the requisite intent (*mens rea*) in order to be convicted pursuant to the mode of responsibility in question."

"The Appeals Chamber finds that the Trial Chamber was wrong insofar as it convicted the Appellants on the basis of criminal conduct which took place prior to 1994"

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 200: "The Trial Chamber . . . rejected the Appellant's arguments challenging its temporal jurisdiction because under the well-established case law of the Tribunal, indictments may refer to events or crimes occurring before 1994 as long as the Trial Chamber does not find the accused accountable for crimes committed prior to 1994. On interlocutory appeal of this decision, the Appeals Chamber affirmed [this ruling]"

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2091: "[T]he Chamber notes that a number of the allegations . . . precede the Tribunal's temporal jurisdiction of 1 January to 31 December 1994. The Chamber is mindful that it can only convict the Accused of criminal conduct occurring [*vis*] in 1994. Nevertheless, the Appeals Chamber has held that the provisions of the Statute on the temporal jurisdiction of the Tribunal do not preclude the admission of evidence on events prior to 1994, if the Chamber deems such evidence relevant and of probative value and there is no compelling reason to exclude it The Chamber therefore does not find it necessary to address the challenge by the Defence to the pleading of the pre-1994 incidents in the Indictments since they are not themselves material facts on which a conviction can be based."

Bikindi, (Trial Chamber), December 2, 2008, para. 26: "The Chamber is mindful that it has jurisdiction only in respect of crimes committed between 1 January and 31 December 1994, which means that the acts or omissions of the Accused establishing his responsibility under any of the modes of [responsibility] referred to in Article 6(1) and (3) of the Statute must have occurred in 1994."

2) continuing crimes

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 317: "Contrary to what the Trial Chamber appears to have held . . . , even where such [continuing] conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994." *See id.*, (Appeals Chamber), November 28, 2007, paras. 885-86, 775 (incitement

conviction upheld by the Appeals Chamber, but modified to only cover *Kangura* newspaper issues published in 1994); *Bikindi*, (Trial Chamber), December 2, 2008, para. 26 (quoting *Nahimana*).

But see Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), Partly Dissenting Opinion of Judge Shahabuddeen, November 28, 2007, paras. 40, 45, 48: “The Appeals Chamber disregarded the pre-1994 *Kangura* publications because it held that they were outside of its temporal jurisdiction. For this reason, it did not make a finding as to whether those publications provided evidence on which a trier of fact could reasonably find that the appellants had incited genocide. However, [it is] my view that a pre-1994 incitement can give rise to [responsibility] for inciting genocide in 1994” “The appellants were deliberately pounding out a series of drumbeats with the expectation that, incrementally, these would one day explode in the national genocide which in fact took place. The appellants could not be prosecuted for any [responsibility] accruing in the years before 1994; but they would have [responsibility] as from 1 January 1994 for previous publications and could be prosecuted for that [responsibility].” “[Ngeze] invited the public to read the pre-1994 articles. Since those articles incited genocide, by inviting the public in 1994 to read those articles the appellant in 1994 (the jurisdictional year) did commit an act which incited genocide. It was the act of inviting readers to read the old articles that mattered, not the physical reproduction of the articles.”

But see Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), Partly Dissenting Opinion of Judge Fausto Pocar, November 28, 2007, para. 2: “I am not convinced that it is correct to hold that a conviction can be based solely on that part of the criminal conduct which took place in 1994. Insofar as offences are repeated over time and are linked by a common intent or purpose, they must be considered as a continuing offence, that is a single crime. There can thus be no question of excluding a part of this single offence and relying only on acts committed after 1 January 1994.”

3) pre- and post-1994 evidence of intent admissible

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 561: “[C]onsideration of evidence of events prior to 1 January 1994” is acceptable “to establish Appellant Barayagwiza’s criminal intent in 1994”

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 68-69: A meeting that occurred in 1992 could not be considered as a basis for the conviction of conspiracy to commit genocide, but could be considered “as it relates to the proof of other allegations in the indictment, such as circumstantial evidence relating to the Accused’s *mens rea*.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2091: “Such evidence [of pre-1994 events] can be relevant to . . . establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994”

Bikindi, (Trial Chamber), December 2, 2008, para. 28: “In the present case, . . . the Chamber has admitted, considered and relied on considerable evidence relating to pre-

1994 acts as means of clarifying the context and establishing by inference certain elements of Bikindi's conduct in 1994, notably his *mens rea*.”

Karera, (Trial Chamber), December 7, 2007, paras. 511, 524: “[T]he Indictment alleges that Karera continued an anti-Tutsi campaign between July and December 1994 in a refugee camp in Zaire (now the Democratic Republic of Congo)” “The Defence argues that the evidence is inadmissible as being outside the time[-]frame of the Indictment It is true that Karera is charged with crimes committed between 6 April and 14 July 1994, whereas paragraph 20 of the Indictment relates to subsequent events. However, these incidents fall within the temporal and geographical jurisdiction of the Tribunal. Rule 89 (C) of the Rules of Procedure and Evidence allows the Chamber to ‘admit any relevant evidence which it deems to have probative value.’ The Prosecution has adduced the evidence primarily to prove Karera’s genocidal intent. This is relevant. Even though evidence may not relate to a count in the proper sense, it may still have probative value.” (Ultimately, however, the Trial Chamber did not rely on such subsequent events, *see id.*, para. 539.)

See also “Trial Chamber may admit any relevant evidence it deems to have probative value,” Section (VIII)(d)(iii), this Digest.

4) pre-1994 evidence of prior good conduct admissible as a mitigating circumstance

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 298: “The Appeals Chamber does not agree with the Trial Chamber’s conclusion that the Appellant’s allegation that he saved Tutsis prior to 1994 could not be taken into account as a mitigating circumstance simply on the basis that events prior to 1 January 1994 are outside the Tribunal’s temporal jurisdiction. It is true that Articles 1 and 7 of the Tribunal’s Statute limit the scope of the Tribunal’s temporal jurisdiction from 1 January to 31 December 1994. However, that temporal framework refers to the Tribunal’s competence *to prosecute and try* serious violations of international humanitarian law such that no one may be indicted for a crime that occurred outside that prescribed timeframe. This provision does not bar the introduction of such evidence at *sentencing*, although prior acts of the defendant, as explained below, are rarely considered probative for sentencing purposes in any event.” *Compare id.*, para. 300 (Trial Chamber was entitled to exclude such testimony where the issues of the appellant’s conduct prior to 1994 towards Tutsis was not fully explored or determined at trial).

See also “prior good character and accomplishments” and “selective assistance” as mitigating factors, Sections (VII)(b)(iii)(7)(b)(i), (VII)(b)(iii)(7)(b)(iv), this Digest.

5) pre-1994 evidence may establish a pattern, design, or systematic course of conduct by the accused, or provide context

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2091: “Such evidence [of pre-1994 events] can be relevant to: clarify a given context . . . [or] demonstrating a deliberate pattern of conduct.”

Bikindi, (Trial Chamber), December 2, 2008, para. 27: “[T]he provisions of the Statute relating to the Tribunal’s temporal jurisdiction do not preclude the Chamber from admitting and considering evidence concerning events that occurred prior to 1994 where, for example, the purpose of such evidence is to . . . clarify a given context; . . . or . . . demonstrate a deliberate pattern of conduct.”

Rwamakuba, (Trial Chamber), September 20, 2006, para. 48: “Evidence of events prior to 1994 that can establish a ‘pattern, design or systematic course of conduct by the accused’ or provide a context or background to crimes falling within the temporal jurisdiction of the Tribunal is . . . admissible.”

6) pre-1994 evidence regarding credibility and propensity to commit crimes admissible

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 319-20: “Rule 89(C) of the Rules permits a Trial Chamber ‘to admit any relevant evidence which it deems to have probative value.’” There was no error by the Trial Chamber “in accepting evidence concerning the Appellant’s involvement in events having occurred in March 1992 and in drawing certain inferences in that regard.” (Under heading “[c]redibility and propensity to commit crimes.”)

See also “Trial Chamber may admit any relevant evidence it deems to have probative value,” Section (VIII)(d)(iii), this Digest.

7) application—temporal jurisdiction

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 407: “[T]he Appeals Chamber is of the view that the Trial Chamber erred in convicting the Appellant on the basis of *Kangura* [newspaper] issues published outside the temporal jurisdiction of the Tribunal. The Appeals Chamber allows the Appellant’s appeal on this point and accordingly sets aside his convictions for genocide, direct and public incitement to commit genocide and persecution based on the pre-1994 issues of *Kangura*.”

See also *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 706 (finding a meeting held in 1993 to be “outside the temporal scope of the Tribunal’s jurisdiction”).

c) Fair trial rights

i) Statute

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
- (g) Not to be compelled to testify against himself or herself or to confess guilt.

ii) **generally**

1) **balance rights and justice**

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 206: “The Appeals Chamber is mindful that it must maintain the correct balance between ‘the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.’”

2) **decline to exercise jurisdiction where serious and egregious rights violations would prove detrimental to the court’s integrity—such as where the accused was subjected to inhuman, cruel or degrading treatment, or torture**

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 206: “While a Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction, it should only do so ‘where to exercise that jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the court’s integrity.’ For example, ‘in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment.’ However, those cases are exceptional and, in most circumstances, the ‘remedy of setting aside jurisdiction, will . . . be disproportionate.’” (Finding that rights were violated during the initial arrest and detention prior to the initial appearance, but that the violations did not “rise to the requisite level of egregiousness” to warrant the Tribunal’s loss of jurisdiction.)

3) where rights violated, the accused is entitled to an effective remedy

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 322: “Article 2(3)(a) of the [International Covenant on Civil and Political Rights] stipulates that ‘[a]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.’” *See also id.*, para. 255 (similar).

Rwamakuba, (Trial Chamber), September 20, 2006, para. 218: “The Appeals Chamber [in *Barayagwiza*, *Kajelijeli* and *Semanza*] held that ‘any violation of the accused’s rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the [International Covenant on Civil and Political Rights].’ The Appeals Chamber has previously ordered or decided the reduction of an accused’s sentence where he was found guilty at trial. In the *Barayagwiza* and *Semanza* cases, it also decided that ‘if the [accused] [was] not found guilty, he shall receive financial compensation.’” *See Barayagwiza*, Prosecutor’s Request for Review or Reconsideration (Appeals Chamber), para. 75 (cited); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 322 (cited); *Semanza*, (Appeals Chamber), Decision of May 31, 2000 (cited).

iii) presumption of innocence

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 89: “Pursuant to Article 20(3) of the Statute, an accused shall be presumed innocent until proven guilty.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 30 (same); *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 234 (similar).

1) burden of proof beyond reasonable doubt

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 170: “The Appeals Chamber recalls that Article 20(3) of the Statute provides that an accused shall be presumed innocent until proven guilty. This Article embodies a general principle of law, that the Prosecution bears the onus of establishing the guilt of the accused beyond reasonable doubt.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 140: “The Appeals Chamber recalls that the presumption of innocence does not require the trial chamber to determine whether the accused is ‘innocent’ of the fact at issue; it simply forbids the trial chamber from convicting the accused based on any allegations that were not proven beyond a reasonable doubt.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 89: “This presumption [of innocence] places on the Prosecution the burden of establishing the guilt of the accused, a burden which remains on the Prosecution throughout the entire trial. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt. Accordingly, the Chamber determined whether it was satisfied that every element of the crime charged and of the mode of [responsibility] and any fact indispensable for a conviction were proved beyond reasonable doubt by the Prosecution.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 30 (same).

Nchamihigo, (Trial Chamber), November 12, 2008, paras. 12-13: “Article 20 (3) of the Statute guarantees the presumption of innocence of each accused person. The burden of proving the guilt of the accused beyond reasonable doubt rests solely on the Prosecution and never shifts to the Defence. It is not sufficient for the Chamber to prefer prosecution evidence to defence evidence. The Chamber must be satisfied beyond all reasonable doubt that the accused is guilty before a verdict may be entered against him or her.” “While the Defence does not have to adduce rebuttal evidence to the Prosecution case, the Prosecution will fail to discharge its burden of proof if the Defence presents evidence that raises a reasonable doubt regarding the Prosecution case. An accused person must be acquitted if there is any reasonable explanation for the evidence other than his or her guilt. Refusal to believe or rely upon defence evidence does not automatically amount to a guilty verdict. The Chamber must still determine whether the evidence it does accept establishes the accused’s guilt beyond reasonable doubt.”

Rwamakuba, (Trial Chamber), September 20, 2006, para. 32: “Each accused is presumed innocent. Accordingly, the Prosecution bears the onus of establishing the accused’s guilt beyond reasonable doubt. The Defence does not have to adduce rebuttal evidence to the Prosecution’s case. The Prosecution will fail to discharge its persuasive burden of proof if the Defence’s evidence raises a reasonable doubt within the Prosecution’s case. This principle also applies when the accused denies commission of the crimes with which he is charged because he was not at the scene of the crime at the time of its commission: ‘the Prosecution’s burden is to prove the accused’s guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi.’ According to the settled jurisprudence, if the defence is reasonably possibly true, it must be successful.”

See also “burden of proof for alibi: proof beyond a reasonable doubt that accused was present and committed crimes/no reasonable likelihood that the alibi is true,” Section (VI)(b)(i); “prosecution bears burden of proof beyond a reasonable doubt” under “[g]eneral considerations regarding the evaluation of evidence,” Section (VIII)(d)(i), this Digest.

**(a) application—defence argument that burden of proof
erroneously shifted**

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 159: “A review of the passages in which the Trial Chamber states that it is not ‘convinced’ or ‘persuaded’ by Defence arguments shows that, rather than imposing a burden on the Appellants, the Trial Chamber merely rejected Defence challenges to witness credibility . . . [T]he Trial Chamber found that the Appellants’ arguments seeking to raise a reasonable doubt failed to do so . . . The Appeals Chamber considers that nothing in the Trial Judgement suggests that the use of the terms ‘convinced’ or ‘persuaded’ reflected an impermissible burden on the Appellants; rather, these words simply express the Trial Chamber’s conclusion that the Prosecution proved that its witnesses were credible beyond a reasonable doubt despite the Defence’s arguments to the contrary.”

2) taking judicial notice of generally known facts does not violate the presumption of innocence

Semanza, (Appeals Chamber), May 20, 2005, paras. 191-92: “[T]he Appellant argues that, in taking judicial notice of certain facts, the Trial Chamber violated the presumption of innocence and the right to a fair trial by shifting the burden of proof from the Prosecution to the Defence.” “The Statute of the Tribunal provides that ‘[t]he accused shall be presumed innocent until proven guilty according to the provisions of the . . . Statute.’ The Trial Chamber in this case was careful to note that it could take judicial notice of facts of common knowledge under Rule 94 of the Rules, but that it could not ‘take judicial notice of inferences to be drawn from the judicially noticed facts.’ The Chamber emphasized that the ‘burden of proving the Accused’s guilt, therefore, continue[d] to rest squarely upon the shoulders of the Prosecutor for the duration of the trial proceeding,’ and it stated that ‘the critical issue [was] what part, if any, . . . the Accused play[ed] in the events that took place.’ As these passages suggest, the Trial Chamber struck an appropriate balance between the Appellant’s rights under Article 20(3) and the doctrine of judicial notice by ensuring that the facts judicially noticed were not the basis for proving the Appellant’s criminal responsibility. Instead, the Chamber took notice only of general notorious facts not subject to reasonable dispute The Appeals Chamber finds that these judicially noted facts did not relieve the Prosecution of its burden of proof; they went only to the manner in which the Prosecution could discharge that burden in respect of the production of certain evidence which did not concern the acts done by the Appellant.”

Rwamakuba, (Trial Chamber), September 20, 2006, para. 2: “As the Appeals Chamber recalled, this ruling [taking judicial notice of genocide in Rwanda and widespread or systematic attacks against Tutsis] does not lessen the Prosecution’s burden of proof: it must still demonstrate that the specific events alleged in an Indictment constituted genocide or a crime against humanity and that the conduct and mental state of an Accused establishes his culpability for such crimes.”

For additional discussion of notice, see “judicial notice,” Section (VIII)(d)(xiii), this Digest.

3) inferences do not relieve prosecution of burden of proof

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 41: “The Appeals Chamber emphasizes that the inferential approach does not relieve the Prosecution of its burden to prove each element of its case, including genocidal intent, beyond reasonable doubt. Rather, it is simply a different means of satisfying that burden.”

Rwamakuba, (Trial Chamber), September 20, 2006, para. 37: “Pursuant to the established jurisprudence, the criminal intent of an accused may be proved through inferences from the facts and circumstances of a case. This approach does not relieve the Prosecution of its burden of proving each element of its case, including genocidal intent, beyond reasonable doubt.”

See also “circumstantial evidence/drawing inferences,” Section (VIII)(d)(viii); as to genocide, see “intent may be inferred/proven by circumstantial evidence,” Section (I)(c)(ii)(2), this Digest.

iv) the right to remain silent/right against self-incrimination
(no law presently located)

v) the right to be promptly informed of the reasons for arrest
Kajelijeli, (Appeals Chamber), May 23, 2005, para. 224: “Under international human rights law, Article 9 of the ICCPR [International Covenant on Civil and Political Rights] establishes that everyone has the right to liberty and security of person and no one shall be subject to arbitrary arrest and deprivation of liberty without due process of law. Article 5(1)(c) of the ECHR [European Convention for the Protection of Human Rights and Fundamental Freedoms] specifies that ‘the lawful arrest . . . of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so,’ is permissible, but only where it is effected according to due process of law.”

1) prosecution may request urgent, provisional measures for state to arrest a suspect
Kajelijeli, (Appeals Chamber), May 23, 2005, para. 218: “Under Rule 40 of the Rules, the Prosecution may request a State, as a matter of urgency, for provisional measures to arrest a suspect, place him into custody and to take all measures necessary to prevent escape of that suspect in accordance with the State’s obligations under Article 28 of the Tribunal’s Statute. Article 28 of the Statute requires States to cooperate fully with the Tribunal This obligation was first mandated by the Security Council under Resolution 955 when it established this Tribunal pursuant to Chapter VII of the Charter of the United Nations.”

2) third state and prosecution have overlapping responsibility where state arrests suspect
Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 220, 233: “[U]nder Rule 40 of the Rules, the Prosecution and Benin had overlapping responsibilities during the first period of the Appellant’s arrest and detention in Benin. This flows from the rationale that the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person. Under the prosecutorial duty of due diligence, the Prosecution is required to ensure that, once it initiates a case, ‘the case proceeds to trial in a way that respects the rights of the accused.’” “[I]t is not acceptable for the Prosecution, acting alone under Rule 40, to get around . . . time limits or the Tribunal’s responsibility to ensure the rights of the suspect in provisional detention upon transfer to the Tribunal’s custody under Rules 40 and 40*bis*, by using its power under Rule 40 to keep a suspect under detention in a cooperating State.”

3) suspect has right to be promptly informed of the reasons for his arrest even where arrest by third state

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 226, 227: “[T]he manner in which the arrest was carried out was not according to due process of law because the Appellant was not promptly informed of the reasons for his arrest. As held by the Appeals Chamber in *Semanza*, a suspect arrested at the behest of the Tribunal has a right to be promptly informed of the reasons for his or her arrest, and this right comes into effect from the moment of arrest and detention.” “The Appellant claims . . . that at the time of the arrest, he asked the Benin authorities as to the reasons for his arrest and was informed that he would find them out at a later date. The Prosecution failed to rebut this argument. Consequently, . . . the Appellant’s right to be informed of the reasons as to why he was being deprived of his liberty was not properly guaranteed.” *See Semanza*, (Appeals Chamber), May 20, 2005, para. 78 (cited).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 105: “A suspect arrested by the Tribunal has the right to be informed promptly of the reasons for his or her arrest. The Appeals Chamber has acknowledged that confirmation and service of the indictment may follow some time after arrest, but the individual must be informed in substance of the nature of the charges against him at the time of his arrest or shortly thereafter.”

4) provisional detention without charges must be as short as possible

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 229: “Under international human rights law, no one shall be subject to arbitrary detention without due process of law pursuant to the right to liberty and security of person as found in Article 9 of the ICCPR [International Covenant on Civil and Political Rights]. Subsequent to arrest and detention, everyone has the right to be informed promptly in a language he or she understands of the nature and cause of the charges against him or her pursuant to Articles 9(2) and 14(3)(a) of the ICCPR Generally, international human rights standards view provisional detention of a suspect without charge as an exception, rather than the rule. However, such detention is lawful under international law as long as it is as short as possible, not extending beyond a reasonable period of time”

5) right to a remedy for violation of fair trial rights

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 322: “Where a suspect or an accused’s rights have been violated during the period of his unlawful detention pending transfer and trial, Article 2(3)(a) of the ICCPR stipulates that ‘[a]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.’” *See also id.*, para. 255 (similar).

6) application—delay in charging/provisional charges

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 231: “[T]he Appeals Chamber finds that it erred in failing to find that [Kajelijeli’s] detention in Benin for a total of 85 days without charge and without being brought promptly before a Judge was clearly unlawful and was in violation of his rights under the Tribunal’s Statute and Rules as well as

international human rights law [T]he Appellant's prolonged detention in Benin was unreasonable The Appeals Chamber does not accept that 85-days' delay after a suspect's arrest may be considered 'prompt' or 'immediate' within the meaning of this Tribunal's Statute or Rules. Additionally, although 90 days may be permissible for the finalizing of a formal indictment, 85 days of provisional detention without even an informal indication of the charges to be brought against the suspect is not reasonable under international human rights law, given that nothing less than an individual's fundamental right to liberty is at issue [T]he Appellant should have been informed as soon as possible after his arrest on 5 June 1998 of any reliable information possessed by the Prosecution with regard to why he was considered a suspect and as to any provisional charges against him."

Semanza, (Appeals Chamber), May 20, 2005, para. 324: "The Appeals Chamber concluded that the Appellant's right to be promptly informed of the charges against him was violated during his first period of detention [in the Cameroons] because of the 18-day lapse between his arrest and his being informed of the charges against him. With respect to the second period of detention [also in the Cameroons], the Appeals Chamber found that Appellant was already made aware of the charges against him during his first detention. Thus, if any violation of the Appellant's rights occurred, it was 'less serious' than the violation during the initial detention."

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 106-07: "Rule 40 *bis* (D) requires the order of transfer to state the 'provisional charge' against the suspect. The order for Kabiligi's transfer indicated that he was the G-3 officer in charge of operations and exercised *de facto* and *de jure* authority over officers and soldiers of the Rwandan army, including certain units of the Presidential Guard, Para Commando Battalion and Reconnaissance Battalion, who participated in massacres of the Tutsi civilian population with the assistance of militiamen. Ntabakuze's transfer order stated that he was the commander of the Para Commando Battalion and exercised *de facto* and *de jure* authority over members of his unit. It further noted that these subordinates participated in massacres of the Tutsi civilian population along with other units, and specified that they killed Hutu and Tutsi politicians at the camp of the Presidential Guard. Both orders also referred to possible charges of genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II." "In the Chamber's view, the orders for the transfer of Kabiligi and Ntabakuze adequately informed them of the substance of the provisional charges against them."

See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 105: "In the *Semanza* case, the Appeals Chamber concluded that a reference to the accused being provisionally detained 'for serious violations of international humanitarian law and crimes within the jurisdiction of the Tribunal' adequately described the substance of the charges to satisfy the requirement of notice at that stage."

7) remedy

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 323: The Appeals Chamber reduced Kajelijeli's life sentence to a sentence of 45 years imprisonment because "the Appeals

Chamber . . . found that the Appellant was impermissibly detained for a total of 306 days in Benin and the [UN Detention Facility] because 1) he was not promptly informed of the reasons for his arrest or of the provisional charges against him, and 2) he was not promptly granted an initial appearance before a Judge or an official acting in a judicial capacity without undue delay.”⁶⁹

Semanza, (Appeals Chamber), May 20, 2005, paras. 325, 327, 328: “Having found these violations [an 18-day lapse in being informed of the charges against him and violation of the right to challenge the lawfulness of the detention], the Appeals Chamber then considered the question of remedy. It observed that the question of prejudice ‘must be assessed . . . in the light of the circumstances of the case.’ The Chamber determined that ‘the remedy sought by the Appellant, namely his release, [was] disproportionate’ to the rights violation. Instead, it decided ‘that for the violation of his rights, the Appellant [was] entitled to a remedy which shall be given when judgement is rendered by the Trial Chamber.’ Specifically, the Appeals Chamber instructed the Trial Chamber that, if it found the Appellant guilty, it should reduce his sentence to account for the violation of his rights.” “It was reasonable for the Trial Chamber to [take the violations into account] in the context of mitigating circumstances, since it is the finding of a mitigating factor that results in the reduction of a sentence.” “The Trial Chamber appropriately dealt with these issues . . . [and] granted a six-month reduction in the sentence for the rights violations.”

See also “fair trial violations, but not length of proceedings” as a mitigating factor, Section (VII)(b)(iii)(7)(b)(xv), this Digest.

vi) the right to be brought promptly before a judge/the right to challenge the lawfulness of detention

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 230, 246: “Article 9 of the ICCPR [International Covenant on Civil and Political Rights] provides that upon arrest and provisional detention, everyone has the right to be brought promptly before a Judge or official authorized to exercise judicial power. The Human Rights Committee has interpreted Article 9 to mean that any delay in being brought before a Judge should not exceed a few days” “Under Article 19(3) of the Statute and Rule 62 of the Rules, once an accused is taken into the custody of the Tribunal, the accused is to appear before a Trial Chamber or a Judge *without delay* to be formally charged. The Trial Chamber or Judge shall read the accused the indictment, satisfy itself that the rights of the accused are being respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 87: “In accordance with Rules 40 *bis* (J) and 62, a ‘suspect’ or an ‘accused’ has the right to be brought before a judge or a Trial Chamber without delay upon his transfer to the Tribunal.”

⁶⁹ For discussion of “the right to be brought promptly before a judge/ the right to challenge the lawfulness of detention,” see next section, this Digest.

1) application

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 250: “The Appeals Chamber emphasizes that Rule 62 is unequivocal that an initial appearance is to be scheduled without delay. There are other purposes for an initial appearance apart from entering a plea including: reading out the official charges against the accused, ascertaining the identity of the detainee, allowing the Trial Chamber or Judge to ensure that the rights of the accused while in detention are being respected, giving an opportunity for the accused to voice any complaints, and scheduling a trial date or date for a sentencing hearing, in the case of a guilty plea, without delay. The Appeals Chamber therefore finds that, . . . the 211-day delay between the Appellant’s transfer to the Tribunal and the initial appearance before a Judge of this Tribunal constitutes extreme undue delay.” *See also id.*, para. 323 (reducing Kajelijeli’s life sentence to 45 years because 1) he was not promptly informed of the reasons for his arrest or of the provisional charges against him, and 2) he was not promptly granted an initial appearance before a Judge or an official acting in a judicial capacity without undue delay).

Semanza, (Appeals Chamber), May 20, 2005, para. 324: “The Appeals Chamber . . . considered the Appellant’s claim that he was not afforded an opportunity to challenge the lawfulness of his detention, because the Trial Chamber did not hear his habeas corpus petition. The Appeals Chamber concluded that ‘the Appellant’s right to challenge the lawfulness of his detention was violated.’”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 91: “The 27 day period between Kabiligi’s transfer to the Tribunal on 18 July 1997 and his first appearance before a judge on 14 August 1997 amounts to delay. In the present case, there is no documentary evidence explaining the delay, but in view of its duration it is, on the face of it, a violation of his right to be brought before a judge without delay” *See also id.*, paras. 92-93 (“The 125 day period between the confirmation of Kabiligi’s Indictment on 15 October 1997 and his initial appearance on 17 February 1998 appears unduly lengthy” but “is not attributable to the Tribunal”).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 95-96: “The Chamber considers that any delay between Bagosora’s transfer [on January 23, 1997] and his initial appearance should be calculated to 20 February 1997, when he first appeared before a Trial Chamber. This period amounts to 28 days. The fact that he did not enter his plea at this time cannot be attributed to the Tribunal since it resulted from the travel difficulties of his assigned counsel which were beyond its control.” “The Chamber considers that the 28 day delay in holding Bagosora’s initial appearance is too long and constitutes a violation of his right to be brought before a judge without delay. The Bagosora Defence’s failure to raise this challenge until its Closing Brief indicates that there was minimal, if any, prejudice as a result of this violation.”

2) remedy

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 87, 97: “A violation of this right [to be brought before a judge or Trial Chamber without delay] may entail a remedy, including an apology, reduction of sentence or financial compensation in the event of an acquittal. In each case where the Appeals Chamber has

accorded a remedy for a violation of this right, the accused promptly challenged the violation.” “According to the Appeals Chamber, any violation, even if it entails a relative degree of prejudice, requires a proportionate remedy. The Appeals Chamber has also held that in practice, the effective remedy for violations of fair trial rights will take the form of equitable or declaratory relief. The delays found above are not like in *Rwamakuba* or *Kajelijeli* where financial compensation or the reduction of a sentence are warranted. Those cases involved excessive delays before the initial appearance and were coupled with other serious fair trial rights violations including the right to counsel for extended periods. In the Chamber’s view, the appropriate remedy for the violation of the rights of Kabiligi and Bagosora in view of the circumstances of this case is formal recognition that they occurred.”⁷⁰

vii) the right to be tried without undue delay

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 1074, 1076: “The right to be tried without undue delay is provided in Article 20(4)(c) of the [ICTR] Statute. This right only protects the accused against *undue* delays. Whether there was undue delay is a question to be decided on a case by case basis. The following factors are relevant:

- the length of the delay;
- the complexity of the proceedings (the number of counts, the number of accused, the number of witnesses, the quantity of evidence, the complexity of the facts and of the law);
- the conduct of the parties;
- the conduct of the authorities involved; and
- the prejudice to the accused, if any.”

“[B]ecause of the Tribunal’s mandate and of the inherent complexity of the cases before the Tribunal, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts. There is no doubt that the present case is particularly complex, due *inter alia* to the multiplicity of counts, the number of accused, witnesses and exhibits, and the complexity of the facts and the law, and that the proceedings could be expected to extend over an extended period.” *See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 75 (similar to first paragraph).

1) application

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 78-81, 84: “Turning to the question of whether there has been undue delay in the trial generally, it is common ground that the proceedings have been lengthy. This can be explained by the particular complexity of the case. The three Indictments against the four Accused each charged direct and superior responsibility and between 10 and 12 counts, including conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (murder, extermination, rape, persecution and other inhumane acts) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (violence to

⁷⁰ See *Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A (Appeals Chamber), Decision on Appeal against Decision on Appropriate Remedy, September 13, 2007 (affirming Trial Chamber’s award of \$2,000 compensation for violation of the right to legal assistance based on a lack of legal counsel for 125 days).

life and outrages upon personal dignity). Over the course of 408 trial days, the Chamber heard 242 witnesses, received nearly 1,600 exhibits and issued around 300 written decisions.”

“The Accused were senior military officers, allegedly individually responsible for thousands of deaths which occurred throughout the country from April to July 1994. The testimonies involved numerous sites and events. While a few of these accounts concerned only one of the Accused, most of the evidence was relevant, either directly or circumstantially, to two or more of them. The prominence of the Accused as well as their alleged role in planning and executing the crimes committed in Rwanda required evidence covering nearly four years, from October 1990 to July 1994.”

“In the *Nahimana et al.* case, the Appeals Chamber held that a period of seven years and eight months between the arrest of Jean-Bosco Barayagwiza and his judgement did not constitute undue delay, apart from some initial delays which violated his fundamental rights. In particular, the Appeals Chamber reasoned that Barayagwiza’s case was particularly complex due to the multiplicity of counts, the number of accused, witnesses and exhibits as well as the complexity of the facts and law. It further noted that comparisons with time frames in domestic criminal courts were not particularly persuasive given the inherent complexity of international proceedings.”

“Like the present case, the *Nahimana et al.* case involved multiple Indictments and requests for amendments and joinder. This case is also two to three times the size of the *Nahimana et al.* case. There was a need for intervals between the trial segments to allow the parties to prepare in view of the massive amounts of disclosure relevant to the case, the need to translate a number of documents, and the securing of witnesses and documents located around the world. Extensive cross-examination by four Defence teams took time.”

“In view of the size and complexity of this trial, in particular in comparison to the *Nahimana et al.* case, the Chamber does not consider that there has been any undue delay in the proceedings.” *See also Nahimana*, (Appeals Chamber), November 28, 2007, paras. 1072-77 (cited; similar holding); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 77 (finding that the period from Bagosora’s arrest in the Cameroons to his transfer to the Tribunal did not constitute undue delay, and that the delay was not the Tribunal’s responsibility).

See also “fair trial violations, but not length of proceedings” as a mitigating factor, Section (VII)(b)(iii)(7)(b)(xv), this Digest.

viii) the right to a fair and public trial

ICTR Statute, Art. 20(2): “In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing”

1) right to a fair trial

See, e.g., Ndindabizi, (Appeals Chamber), January 16, 2007, para. 74: “The Appellant submits that the Trial Chamber violated his right to fair proceedings by ignoring some of the evidence he presented, by examining it in a manner that was systematically unfavourable to him, and by omitting to address fundamental points raised by the Defence.” (Arguments rejected by Appeals Chamber.)

(a) violated by Government interference with witnesses

Simba, (Appeals Chamber), November 27, 2007, para. 41: “The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses crucial to the Defence case refuse to testify due to State interference. In such cases, it is incumbent on the Defence to, first, demonstrate that such interference has in fact taken place and, second, exhaust all available measures to secure the taking of the witness’s testimony.”

Simba, (Trial Chamber), December 13, 2005, paras. 46-47: “In *Bagosa et al.*, this Chamber observed that proven threats or interference made by state officials towards prospective or confirmed witnesses as well as non-cooperation or active obstruction would be a serious violation of a state’s duty to cooperate with the Tribunal reflected in Article 28 of the Statute. This in turn could result in a violation of an Accused’s fair trial rights.” “Relevant case law reflects that the Defence must establish, on the balance of the probabilities, that government interference with the presentation of its evidence occurred. The proposed evidence must relate to specific allegations or charges against the Accused. The Defence also bears the burden to exhaust all available measures afforded by the Statute and Rules to obtain the presentation of the evidence. For a remedy to be granted at the post-trial phase there must be evidence of material prejudice.” See *Bagosa et al.*, Decision on Motion Concerning Alleged Witness Intimidation (Trial Chamber), December 28, 2004, paras. 7-10.

(i) application

Simba, (Trial Chamber), December 13, 2005, paras. 50-51: “It is not appropriate for a state official to warn a potential witness that he will be viewed as opposing the government if he testifies in ongoing criminal proceedings, particularly if the potential witness is detained in the custody of the state and dependent on it for his welfare. In the Chamber’s view, the interference with Witness HBK by local officials in Gikongoro may have dissuaded his attendance at trial prior to the close of the Defence case on 29 March 2005.” “[T]he Chamber asked the WVSS [Witness and Victim Support Section] to investigate and to bring these allegations to the attention [of] the Rwandan government for appropriate action.” See also *Simba*, (Appeals Chamber), November 27, 2007, paras. 60, 56 (“The Trial Chamber . . . found that Rwandan government authorities had interfered with [witness] HBK . . .,” but “HBK’s . . . failure to testify was not prejudicial to the Appellant”); compare *Simba*, (Trial Chamber), December 13, 2005, para. 48 (finding burden not met to show Government intimidation or interference with respect to Witness BJK1).

(b) violation of Rule 68 disclosure obligations

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 262: “[T]he ICTY Appeals Chamber has affirmed that the Prosecution has the obligation to determine whether evidence is exculpatory under Rule 68 [which provides for mandatory disclosure of exculpatory evidence]. This Appeals Chamber follows that position and considers that in order to allege a breach of Rule 68, the Defence must first establish that the evidence was in the possession of the Prosecution, and then must present a *prima facie* case which would make probable the exculpatory nature of the materials sought. If the Defence satisfies the Tribunal that the Prosecution has failed to comply with its Rule 68 obligations, then

the Tribunal must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate.”

(i) mandatory disclosure of witness statements

Niyitegeka, (Appeals Chamber), July 9, 2004, paras. 30-32, 37: “Pursuant to Rule 66(A)(ii) of the Rules, the Prosecutor has a duty, *inter alia*, to make available to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial. The Appeals Chamber notes that neither the ICTR nor ICTY has provided a clear definition of the term ‘statement.’ In particular, the jurisprudence has not made a clear distinction between ‘statements’ and ‘internal documents prepared by a party [which] are not subject to disclosure or notification’ under Rules 66 and 67 of the Rules.”

“A record of a witness interview, ideally, is composed of all the questions that were put to a witness and of all the answers given by the witness. The time of the beginning and the end of an interview, specific events such as requests for breaks, offering and accepting of cigarettes, coffee and other events that could have an impact on the statement or its assessment should be recorded as well.”

“Such an interview must be recorded in a language the witness understands. As soon as possible after the interview has been given, the witness must have the chance to read the record or to have it read out to him or her and to make the corrections he or she deems necessary and then the witness must sign the record to attest to the truthfulness and correctness of its content to the best of his or her knowledge and belief. A co-signature by the investigator and interpreter, if any, concludes such a record.”

“In the present case, the Appellant has not sufficiently demonstrated that additional records exist that have not been disclosed to the Defence. Without a showing of the availability of such records it has not been established that the Prosecution did not fulfil its duty to disclose pursuant to Rule 66(A)(ii) of the Rules” *See also id.*, paras. 33-35 (questions put to witnesses by the prosecution must also be disclosed, to the extent they exist).

(c) other requirements of a fair trial

See “the right to an independent and impartial tribunal,” “the right to call/cross-examine witnesses (‘equality of arms’),” and “the right to have adequate time and facilities for the preparation of a defense (‘equality of arms’),” Sections (VIII)(c)(xv), (VIII)(c)(xi)-(xii), this Digest. (All three rights are described as components of the right to a fair trial.)

ix) the right of the accused to be tried in his or her presence

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 96: “[P]ursuant to Article 20(4)(d) of the Statute, the accused is entitled to be present at trial.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 129: “Article 20 (4)(d) of the Statute provides that an accused has a right ‘to be tried in his or her presence.’ The Appeals Chamber has interpreted this right to mean the Accused’s physical presence in the courtroom. Any restriction on this fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.”

1) illness of one of the accused

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 129: “The Appeals Chamber held that the right to an expeditious trial guaranteed to all accused in a joint trial is a relevant consideration for a Trial Chamber in balancing whether or not to proceed in the absence of one of the Accused due to illness.”

See, e.g., Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 130-31 & n. 118 (finding no violation of Nsengiyumva’s right to be present at trial based on his absence for four days while he was sick, where there was a joint trial, his defense had closed, there was no showing of the relevance to him of the testimony heard in his absence, and none of the witnesses who appeared during those four days were adverse to him, and contrasting the cases of *Zigiranyirazo*, *Karemera et al.* and *Stanišić and Simotović* which were in the prosecution phase or had not yet started at the time of absence).

2) right to be present may be waived if the accused refuses to attend trial

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 99, 107: “[T]he Appeals Chamber is not convinced that the precedents cited by the Appellant support the view that a trial in the absence of the accused is prohibited for and by the *ad hoc* Criminal Tribunals where an accused who has been apprehended and informed of the charges against him refuses to be present for trial. Conversely, in a recent interlocutory decision, this Appeals Chamber explicitly held that the right of an accused person to be present at trial is not absolute and that an accused before this Tribunal can waive that right.” “[H]owever firmly the right of the accused to be tried in his presence may be established in international law, that did not . . . preclude the beneficiary of such right from refusing to exercise it. Insofar as it is the accused himself who chooses not to exercise his right to be present, such waiver cannot be assimilated to a violation by a judicial forum of the right of the accused to be present at trial. Such right is clearly aimed at protecting the accused from any outside interference which would prevent him from effectively participating in his own trial; it cannot be violated when the accused has voluntarily chosen to waive it.”

(a) waiver must be free, unequivocal, and done with full knowledge

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 109: “[T]he Appeals Chamber concludes that waiver by an accused of his right to be present at trial must be free and unequivocal (though it can be express or tacit) and done with full knowledge. In this latter respect, the Appeals Chamber finds that the accused must have had prior notification as to the place and date of the trial, as well as of the charges against him or her. The accused must also be informed of his/her right to be present at trial and be informed that his or her presence is required at trial.” *See also id.*, paras. 110-16 (finding that Barayagwiza “freely, explicitly and unequivocally” waived his right to be present during trial).

(b) in the “interests of justice” to assign counsel where the accused refuses to attend trial

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 109: “The Appeals Chamber finds . . . that, where an accused who is in the custody of the Tribunal decides voluntarily not to be present at trial, it is in the interests of justice to assign him or her Counsel in order, in particular, to guarantee the effective exercise of the other rights enshrined in Article 20 of the Statute.”

x) the right to counsel/the right to effective assistance of counsel

1) the right to counsel

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 243: “Under Article 20(4)(d) of the Tribunal’s Statute and Rules 44*bis*(D) and 45 of the Rules, an accused is entitled, as a minimum guarantee, to assistance of counsel of his or her own choosing.”

(a) right exists from the moment of transfer to the Tribunal

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 245: “Rule 44*bis* of the Rules clearly obliges the Registrar to provide a detainee with duty counsel, with no prejudice to the accused’s right to waive the right to counsel. It constitutes a violation of Rule 44*bis* of the Rules and provision 10*bis* of the Directive on the Assignment of Defence Counsel not to assign duty counsel, in spite of ongoing efforts to assign counsel of choice in light of the outstanding initial appearance. Also, the wording of Rule 44*bis*(D) is sufficiently clear (‘unrepresented at any time’) to find that such a duty exists from the very moment of transfer to the Tribunal and is not confined to purposes of the initial appearance only.”

(b) applies during prosecution questioning

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 234: “Under Article 17 of the Tribunal’s Statute, the Prosecution has the power to question suspects. When questioned, a suspect has the right to assistance of counsel, and legal assistance shall be assigned to him or her if he or she does not have sufficient means to pay for counsel. This right to counsel during questioning is restated in Rule 42 of the Rules. Rule 42 also provides that a suspect may voluntarily waive that right but that questioning will cease if the suspect later expresses the desire for assistance of counsel, and will only resume once counsel has been provided.”

2) the right of an indigent accused to counsel

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 243: “Where an accused is indigent, the Tribunal’s Registry shall assign counsel to him or her without requiring payment, according to established procedure.”

(a) not entitled to choose counsel

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 265: “[T]he Appeals Chamber recalls that the right of an indigent defendant to effective representation does not entitle him to choose his own counsel.”

3) the right to effective assistance of counsel

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 130: “The Appeals Chamber has for long recognized, pursuant to Article 20(4)(d) of the Statute, the right of an indigent accused to be represented by competent counsel. Articles 13 and 14 of the Directive on the Assignment of Defence Counsel set out the qualifications and formal requirements that the Registrar must verify prior to the assignment of any counsel; the presumption of competence enjoyed by all counsel working with the Tribunal is predicated upon these guarantees. Therefore, for an appeal alleging incompetence of trial counsel to succeed, an appellant must rebut the presumption of competence of said counsel by demonstrating that there was gross professional misconduct or negligence which occasioned a miscarriage of justice.”

For application regarding the right to effective legal assistance, see *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, paras. 117-28, 130-69.

(a) conflict of interest between attorney and client

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 158: “[T]he Appeals Chamber endorses the ICTY’s view that ‘[a] conflict of interests between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice.’”

4) application—remedy for gap in, or lack of, representation

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 237, 253: “[T]he Appellant was in the custody of the Tribunal for a total of 211 days prior to any initial appearance during which he was without assigned counsel for 147 days.” This was a “violation[] of the Appellant’s right to counsel” (*Kajelijeli*’s life sentence was reduced to 45 years based on this and other violations, *see id.*, para. 323.)

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 91: “In this initial period [between Kabiligi’s transfer to the Tribunal on 18 July 1997 and his first appearance before a judge on 14 August 1997], there was a violation of Kabiligi’s right to counsel during a custodial interrogation by the Prosecution. However, the Chamber has previously addressed that violation and accorded him a remedy by denying the Prosecution’s request to admit the transcript of the interview into evidence and excluding portions of other testimony based on it.”

Rwamakuba, (Trial Chamber), September 20, 2006, paras. 217, 219: “Trial Chamber II . . . found that there was a violation of Rwamakuba’s right to legal assistance during the first months of his detention at the [United Nations Detention Facility], from 22 October 1998 until 10 March 1999, and that the delay in assigning him duty Counsel further caused a delay in his initial appearance.” “[T]he Appeals Chamber . . . considered that ‘it [was] open to [Rwamakuba] to invoke the issue of the alleged violation of his fundamental human rights by the Tribunal in order to seek reparation as the case may be, at the appropriate time.’” *See Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A (Appeals Chamber), Decision on Appeal against Decision on Appropriate Remedy,

September 13, 2007 (affirming Trial Chamber's award of \$2,000 compensation for violation of the right to legal assistance based on a lack of legal counsel for 125 days).

See also Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 170-79 (hearing witness testimony during a gap in representation after old counsel stopped representing one of the accused and prior to the arrival of new counsel was inappropriate, and, at minimum, the testimony should not have been considered regarding that accused).

**xi) the right to call/cross-examine witnesses ("equality of arms"),
and the right to raise objections**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 180-81: "[The] right to have the witnesses against [the Accused] examined and to obtain the attendance and examination of witnesses on [the Accused's] behalf under the same conditions as witnesses against him [is] provided in Article 20(4)(e) of the Statute (Article 21(4)(e) of the Statute of ICTY)." "The Appeals Chamber accepts the view that the concept of a fair trial includes equal opportunity to present one's case and the fundamental right that criminal proceedings should be adversarial in nature, with both prosecution and accused having the opportunity to have knowledge of and comment on the observations filed or evidence adduced by either party. Considering the latter right under the principle of equality of arms, the Appeals Chamber of ICTY held that Article 21(4)(e) of the Statute of ICTY:

...serves to ensure that the accused is placed in a position of procedural equality in respect of obtaining the attendance and examination of witnesses with that of the Prosecution. In other words, the same set of rules must apply to the right of the two parties to obtain the attendance and examination of witnesses."

See also Simba, (Trial Chamber), December 13, 2005, para. 46 (similar to first sentence).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 44: "With regard to the principle of equality of arms between the Accused and the Prosecution, which is another component of the right to a fair trial in criminal law, it is stated, *inter alia*, in Article 20(4)(e) of the Statute that in the determination of any charge against the accused pursuant to the Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

"To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

**1) Trial Chamber has discretion as to the modalities of
examination**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 182: "The Appeals Chamber recalls that the Trial Chamber has discretion to determine the modalities of examination-in-chief, cross-examination and reexamination so as to accord with the purposes of Rule 90(F). In this regard, it should be emphasised that:

the Presiding Trial Judge is presumed to have been performing, on behalf of the Trial Chamber, his duty to exercise sufficient control over the process of examination and cross-examination of witnesses, and that[,] in this respect, it is

the duty of the Trial Chamber and of the Presiding Judge, in particular, to ensure that cross-examination is not impeded by useless and irrelevant questions. When addressing a submission concerning the modalities of examination, cross-examination or re-examination of witnesses, the Appeals Chamber must ascertain whether the Trial Chamber properly exercised its discretion and, if not, whether the accused's defence was substantially affected."

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 253: "[I]t is the primary responsibility of the Trial Chamber to exercise control over the mode and order of witnesses, and that, in doing so, it has to make the interrogation effective for the ascertainment of the truth and avoid needless consumption of time."

See, e.g., Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 184-92 (discussing the time allotted to counsel for cross-examination).

(a) application

Rutaganda, (Appeals Chamber), May 26, 2003, paras. 140, 375: "[T]he Appeals Chamber considers that the Trial Chamber did not, as the Appellant contends, systematically prohibit leading questions during cross-examination; neither did it prevent his Counsel from challenging witnesses' answers. The Appeals Chamber holds that the interventions of the Trial Chamber mentioned by the Appellant fall within the ambit of the Presiding Judge's role to prevent the proceedings from stagnating through repetitive or confused questions, or to ensure that the Defence does not, through its questions to the witness, put words into the witness's mouth." "As to whether Judge Aspegren was entitled to ask the question in issue, the Appeals Chamber recalls that the Rules contain no provisions on leading questions Moreover, the Appeals Chamber reaffirms that leading questions *per se* are not proscribed before the Tribunal."

2) the right to raise objections

Rutaganda, (Appeals Chamber), May 26, 2003, paras. 143, 145: "The Appeals Chamber recalls that the Rules of the Tribunal do not contain any specific provision on the right to raise objections during the presentation of evidence." "The Appeals Chamber notes that . . . the trial record shows that the parties, notably the Defence, were able, where appropriate during the hearings, including periods outside the cross-examination of witnesses, to voice their objections before the Tribunal relating to the presentation of evidence by the other party. Furthermore, the Appellant raised by way of motion a number of objections during the trial relating to the presentation of evidence by the Prosecution. The Appeals Chamber points out that in *Tadić* and in *Semanza*, . . . the Defence also made objections by way of written motion. Accordingly, the position adopted by the Trial Chamber preserved, in a fair manner, the right of the parties to bring to the notice of the Tribunal any objections they might have had to the presentation of evidence by the other party."

3) party who fails to cross-examine a witness upon a particular statement tacitly accepts the truth

Rutaganda, (Appeals Chamber), May 26, 2003, para. 310: "The Appeals Chamber considers that a party who fails to cross-examine a witness upon a particular statement

tacitly accepts the truth of the witness's evidence on the matter. Therefore the Trial Chamber did not commit an error of law in the case at bar, in inferring that the Appellant's failure to cross-examine Witness Q on the weapons distribution meant that he did not challenge the truth of the witness's evidence on the matter."

xii) the right to have adequate time and facilities for the preparation of a defense ("equality of arms")

1) does not amount to material equality of financial and/or human resources; evaluation depends on the circumstances of the case

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 220: "As to the principle of equality of arms, . . . this does not amount to material equality between the parties in terms of financial and/or human resources. As to the right to have adequate time and facilities for the preparation of a defence, that right is enshrined in Article 20(4)(b) of the Statute. When considering an appellant's submission regarding this right, the Appeals Chamber must assess whether the Defence as a whole, and not any individual counsel, was deprived of adequate time and facilities. Furthermore, the Appeals Chamber agrees with the Human Rights Committee that 'adequate time' for the preparation of the defence cannot be assessed in the abstract and that it depends on the circumstances of the case. The Appeals Chamber is of the view that the same goes for 'adequate facilities.' A Trial Chamber 'shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.' However, it is for the accused who alleges a violation of his right to have adequate time and facilities for the preparation of his defence to draw the Trial Chamber's attention to what he considers to be a breach of the Tribunal's Statute and Rules; he cannot remain silent about such a violation, then raise it on appeal in order to seek a new trial."

Kayishema and Ruzindana, (Appeals Chamber), June 1, 2001, paras. 63-71: During proceedings before the Trial Chamber, Kayishema filed a motion calling for full equality of arms between the prosecution and the defence in terms of the means and facilities placed at their disposal. The Appeals Chamber held that the Trial Chamber did not commit an error in law in dismissing the motion. "The right of an accused to a fair trial implies the principle of equality of arms between the Prosecution and Defence" and "the Trial Chamber rightly held that [t]he notion of equality of arms is laid down in Article 20 of the Statute," specifically Article 20(2) and Article 20(4). However, "equality of arms . . . does not necessarily amount to the material equality of possessing the same financial and/or personal resources." The Appeals Chamber quoted the ICTY Appeals Chamber in *Tadic* which held that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case." The Appeals Chamber also endorsed the ruling by the Trial Chamber in *Kayishema* which held that the rights of the accused and equality between the parties should not be confused with the equality of means and resources, and that the rights of the accused should not be interpreted to mean that the defence is entitled to the same means and resources as the prosecution. See *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 55-60.

2) Trial Chamber is best positioned to consider issue

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 19: “The accused of course has a right, under Article 20(4)(b) of the Statute, to ‘adequate time and facilities for the preparation of his or her defence.’ But it is the Trial Chamber that is best positioned to consider the demands of trial preparation in each particular case and to set a schedule that respects that right while also avoiding undue delay in the administration of justice. The Appeals Chamber thus will only reverse a Trial Chamber’s scheduling decision upon a showing of abuse of discretion resulting in prejudice, that is, rendering the trial unfair.”

3) translations: the right to defend against the charges encompasses being able to present arguments in one of the working languages of the Tribunal

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 246: “A combined reading of Articles 20 and 31 of the Statute shows that the Accused’s right to defend himself against the charges against him implies his being able, in full equality with the Prosecutor, to put forward his arguments in one of the working languages of the Tribunal and to be understood by the Judges.”

4) application

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 222-46, 251 (discussing alleged violations of the right to have adequate time and facilities for the preparation of the defense, and finding that “equality of arms” was violated where the accused was not permitted to call an expert witness).

xiii) the right to a reasoned opinion

1) duty to provide clear, reasoned findings of fact as to each element of each crime charged

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 60-61: “[T]he Appellant’s right to a ‘reasoned opinion,’ . . . does not ordinarily demand a detailed analysis of the credibility of particular witnesses. In *Musema*, for instance, the Appeals Chamber held that a Trial Chamber is not necessarily required even to ‘refer to any particular evidence or testimony in its reasoning,’ much less give specific reasons for discrediting it. The ICTY Appeals Chamber has also so held. What *is* required is for the Trial Chamber to provide clear, reasoned findings of fact as to each element of each crime charged -- a requirement that may be satisfied by a number of different approaches to the assessment of particular evidence, depending on the circumstances. For instance, a Trial Chamber may provide a general overview of how it assessed the credibility of witnesses without detailing each step of that analysis witness-by-witness; or it may focus principally on the witnesses whose testimony is most relevant to the critical questions it must decide. The Trial Chamber here combined both approaches, commencing with an introductory discussion of its methodology, describing in some detail the testimony of each witness, and explaining the reasons for its credibility assessments of those it deemed most important while providing more conclusory statements regarding others.”

“Under some circumstances, a reasoned explanation of the Trial Chamber’s assessment of a particular witness’s credibility *is* a crucial component of a ‘reasoned opinion’ – for instance, where there is a genuine and significant dispute surrounding a

witness's credibility and the witness's testimony is truly central to the question whether a particular element is proven." See *Musema*, (Appeals Chamber), November 16, 2001, para. 20 (cited).

See, e.g., *Mpambara*, (Trial Chamber), September 11, 2006, para. 43: "The Chamber has not considered it necessary to explicitly address each and every argument presented by the parties: some arguments are discussed only generally or indirectly, or not at all where the Chamber did not consider it necessary to do so."

See also "Trial Chamber not obligated to set forth all reasoning or evidence considered," under "appellate review," Section (VIII)(e)(ii)(13); "whether the Trial Chamber is required to individually address inconsistencies within and/or amongst witness testimonies in the judgment," Section (VIII)(d)(xi)(8); "Appeals Chamber has discretion which submissions merit a detailed reasoned opinion in writing," Section (VIII)(e)(ii)(12), this Digest.

2) reasoned opinion requirement enhanced where witness identified the accused in difficult circumstances

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 61, 288: "[T]he ICTR and ICTY Appeals Chambers have both held that where a finding that the accused was present at a crime scene is based on identification evidence from a single eye-witness under stress or other conditions likely to undermine accuracy, that witness's credibility must be discussed – a requirement that reflects the well-demonstrated infirmities of such eye-witness testimony." "The Appeals Chamber observes that the Appellant fails to point to any place in the Trial Judgement where the Trial Chamber allegedly erred by failing in its 'enhanced duty' to provide a reasoned opinion."

Bagilishema, (Appeals Chamber), July 3, 2002, para. 75: Quoting the ICTY's *Kupreškić* Appeal Judgement:

"While a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a 'reasoned opinion.' In particular, a reasoned opinion must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence."

See also "identification of the accused" "if made under difficult circumstances, consider with caution," under "evaluating witness testimony," Section (VIII)(d)(xi)(25)(a), this Digest.

xiv) the right to an appeal

Semanza, (Appeals Chamber), Dissenting Opinion of Judge Pocar, May 20, 2005, para. 1: "[A]n accused [has a] fundamental right to an appeal as enshrined in Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR)"

See also “Appeals Chamber entering a new conviction; whether that violates the right to an appeal,” Section (VIII)(e)(ii)(14), this Digest.

xv) the right to an independent and impartial tribunal

1) independence implies institution not subject to external authority and has complete freedom in decision-making

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 28, 19: “The right of an accused to be tried before an independent tribunal is an integral component of his right to a fair trial as provided in Articles 19 and 20 of the Statute.” “[I]ndependence is a functional attribute which implies that the institution or individual possessing it is not subject to external authority and has complete freedom in decision-making; independence refers in particular to the mechanisms aimed at shielding the institution or person from external influences.”

See also “the right to a fair and public trial,” Section (VIII)(c)(viii), this Digest.

2) the duty of judges to be impartial

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 47, 19: “The right of an accused to be tried before an impartial tribunal is an integral component of his right to a fair trial as provided in Articles 19 and 20 of the Statute. Furthermore, Article 12 of the Statute cites impartiality as one of the essential qualities of any Tribunal Judge, while Rule 14(A) of the Rules provides that, before taking up his duties, each Judge shall make a solemn declaration that he will perform his duties and exercise his powers ‘impartially and conscientiously.’ The requirement of impartiality is again recalled in Rule 15(A) of the Rules, which provides that ‘[a] judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality.’” “Impartiality is a personal attribute which implies lack of bias and prejudice; it addresses the conduct and frame of mind to be expected of the Judges in a given case.”

Rutaganda, (Appeals Chamber), May 26, 2003, paras. 37, 39: “[T]he duty to be impartial . . . is provided for in Articles 12 and 20 of the Statute, Rule 85(B) of the Rules, as well as in the general principles of international law.” “The Appeals Chamber recalls that impartiality is one of the duties that judges pledge themselves to uphold at the time they take up their duties; and this applies throughout the judge’s term of office in the Tribunal. This is a component of the right to a fair trial that is recognized in Articles 19 and 20 of the Statute.”

3) presumption of independence/impartiality of Tribunal judges

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 28: “The independence of the Judges of the Tribunal is guaranteed by the standards for their selection, the method of their appointment, their conditions of service and the immunity they enjoy. The Appeals Chamber further notes that the independence of the Tribunal as a judicial organ was affirmed by the Secretary-General at the time when the Tribunal was created, and the Chamber reaffirms that this institutional independence means that the Tribunal is entirely independent of the organs of the United Nations and of any State

or group of States. Accordingly, the Appeals Chamber considers that there is a strong presumption that the Judges of the Tribunal take their decisions in full independence, and it is for the Appellant to rebut this presumption.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 42: “The Appeals Chambers of ICTY and ICTR emphasized in *Akayesu* and *Furundžija* respectively that Judges of the International Tribunal must be presumed to be impartial, and, in the instant case, the Chamber endorses the test for admissibility of an allegation of partiality set forth in the *Akayesu* Appeal Judgement, wherein it was held that:

‘[...] There is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal, and has also been recognised in municipal law.

In the absence of evidence to the contrary, it must be assumed that the judges of the International Tribunal “can disabuse their minds of any irrelevant personal beliefs or predispositions.” It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that the Judge in question was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality.’

“The Judges of this Tribunal and those of ICTY often try more than one case at the same time, which cases, given their very nature, concern issues which necessarily overlap. It is assumed, in the absence of evidence to the contrary, that by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.”

See also *Semanza*, (Appeals Chamber), May 20, 2005, para. 13 (similar); *Nyitegeka*, (Appeals Chamber), July 9, 2004, para. 45 (same as *Semanza*); *Akayesu*, (Appeals Chamber), June 1, 2001, para. 91 (source of quote).

See, e.g., *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, paras. 30-46 (rejecting arguments that the Tribunal lacked independence due to alleged pressure exerted by the Government of Rwanda, statements by a UN spokesman, and statements by the prosecutor).

4) test for determining judicial bias

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 47, 49-50: “In the *Akayesu* Appeal Judgement, the Appeals Chamber recalled the criteria set out by the ICTY Appeals Chamber regarding the obligation of impartiality incumbent upon a Judge:

That there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

(i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the

promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

(ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."

"The test of the reasonable observer, properly informed, refers to 'an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality, apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.' The Appeals Chamber must therefore determine whether such a hypothetical fair-minded observer, acting in good faith, would accept that a Judge might not bring an impartial and unprejudiced mind to the issues arising in the case." *See also Rutaganda*, (Appeals Chamber), May 26, 2003, paras. 39-41 (endorsing the *Akayesu* Appeal Judgment's approach); *Akayesu*, (Appeals Chamber), June 1, 2001, paras. 49-50 (source).

See also Rutaganda, (Appeals Chamber), May 26, 2003, para. 46 (there are two types of bias "actual" bias and "apparent bias").

(a) no need to entertain sweeping or abstract allegations of bias/ must set forth arguments in a precise manner

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 135: "With regard to the allegation of bias on the part of the Trial Chamber, the Appeals Chamber recalls that it cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality enjoyed by the Judges of the Tribunal. In the case at bar, the Appeals Chamber notes that Imanishimwe simply stated his allegation without substantiating it in any way. Hence, Imanishimwe's allegation that there was no reasoned opinion cannot be tantamount to a demonstration of bias on the part of the Trial Judges."

Rutaganda, (Appeals Chamber), May 26, 2003, para. 43: "[T]he Appellant must set forth the arguments in support of his allegation of bias in a precise manner, and . . . the Appeals Chamber cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality."

(b) alleged differential treatment of prosecution and defense witnesses

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, paras. 261-63: "The Prosecution submits that the Trial Chamber's exercise of its discretion in its different treatment of Prosecution and Defence accomplice witnesses, and the greater degree of scrutiny to which it subjected the testimony of Prosecution witnesses, resulted in an appearance of unfairness, which 'in itself is a further error on a question of law.' The Prosecution stresses . . . that in the present case the appearance of equality between the parties is in question." (The arguments were rejected.)

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 133: "[A] Trial Chamber should not apply differing standards in its treatment of evidence of the Prosecution and the Defence."

See also Simba, (Appeals Chamber), November 27, 2007, paras. 230-35 (argument that the Trial Chamber was more lenient towards prosecution witnesses than towards defense alibi witnesses rejected); *Kamuhanda*, (Appeals Chamber), September 19, 2005, paras. 47-50 (finding no bias; defense witnesses were not held to a “stricter standard” where the Trial Chamber rejected testimony of both prosecution and defense witnesses due to inconsistencies); *Niyitegeka*, (Appeals Chamber), July 9, 2004, paras. 65-80 (rejecting argument that the Trial Chamber failed to apply the same standards in assessing defense and prosecution evidence).

(c) application—bias

See Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 51-90 (rejecting arguments as to judicial bias based on visits by Judges Pillay and Møse to Rwanda, and participation of judges in earlier trials); *Semanza*, (Appeals Chamber), May 20, 2005, paras. 15-58 (rejecting arguments of bias); *Niyitegeka*, (Appeals Chamber), July 9, 2004, paras. 43-46 (finding no evidence of bias on the part of the trial judges); *Rutaganda*, (Appeals Chamber), May 26, 2003, paras. 50-68, 95-124 (evaluating Judge Kama’s treatment of witnesses and finding no bias; evaluating judges’ treatment of the accused and finding it would not lead a reasonable observer to find bias).

For discussion of Government interference with witnesses, *see* “right to a fair trial” “violated by Government interference with witnesses,” Section (VIII)(c)(viii)(1)(a), this Digest.

xvi) duty of prosecutor to act independently; impermissible motives in selecting prosecutions

Akayesu, (Appeals Chamber), June 1, 2001, paras. 94-96: “[I]nvestigation and prosecution of persons responsible for serious violations within the jurisdiction of the Tribunal fall to the Prosecutor and . . . it is her responsibility to ‘assess the information received or obtained and decide whether there is sufficient basis to proceed.’” “[I]n many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. [T]he Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation in indictments.” To show the Prosecutor is proceeding on a selective basis, “the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor’s policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds were not prosecuted.”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, paras. 870-71: “Article 15(2) of the Statute requires the Prosecutor to act independently and prevents her from seeking or receiving instructions from a government or any other source. According to the standard articulated by the ICTY Appeals Chamber in *Delalić*, where an appellant alleged selective prosecution, he or she must demonstrate that the Prosecutor improperly exercised her prosecutorial discretion in relation to the appellant himself or herself. It follows that the Accused . . . must show that the Prosecutor’s decision to

prosecute them or to continue their prosecution was based on impermissible motives, such as ethnicity or political affiliation, and that she failed to prosecute similarly situated suspects of different ethnicity or political affiliation. In view of the failure of the Defence to adduce any evidence to establish that the Prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute the Accused, the Chamber does not find it necessary to consider the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued.”

xvii) the right to self-representation

xviii) the right to appear as a witness in one’s own defense

Seromba, (Appeals Chamber), March 12, 2008, paras. 19-20: Requiring the defendant to testify before the last witness, if he intended to testify, did not “unreasonably interfere[] with [his] right to testify,” where done, in part, to accommodate a late request that the final witness be allowed to testify by video-link from South Africa, and the defendant was provided the opportunity to take the stand a second time after that testimony.

xix) the right to be informed promptly and in detail of the nature and cause of the charge (indictment defects)

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 58: “Article 20(4)(a) of the Statute of the Tribunal guarantees the accused the right to ‘be informed promptly and in detail ... of the nature and cause of the charge against him.’” *See also Semanza*, (Appeals Chamber), May 20, 2005, para. 67 (similar); *Nchamibigo*, (Trial Chamber), November 12, 2008, para. 32 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 12 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 24 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 29 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 14 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 451 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 28 (similar).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 28-29: “[F]air notice [is of paramount importance] to the integrity of the proceedings and because of the Chamber’s duty to ensure the fundamental fairness of the trial.” “In accordance with Article 20(4)(a) of the Statute, an accused has a fundamental right ‘to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.’ This provision is based on Article 14(3)(a) of the International Covenant on Civil and Political Rights and is substantially similar to the guarantee in Article 6(3)(a) of the European Convention on Human Rights.” *See also Muhimana*, (Appeals Chamber), Partly Dissenting Opinion of Judge Schomburg on the Interpretation of the Right to Be Informed, May 21, 2007, para. 2 (the right is also found in the African Charter on Human and Peoples’ Rights).

1) must set out a concise statement of facts and crimes charged

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 16: “The form of an indictment is primarily governed by Article 17(4) of the Statute requiring the Prosecution to set out, *inter alia*, a concise statement of the facts and the crime(s) charged, and Article 20(4) of the Statute enshrining, *inter alia*, an accused’s right to be informed promptly and

in detail of the nature and cause of the charge against him or her.” *See also Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 28 (indictment must plead “a concise statement of the facts of the case, and the crime with which an accused is charged”).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 121: “The Appeals Chamber reaffirms that the Prosecution must not only inform the accused of the nature and cause of the charges against him in the indictment, but must also provide a concise description of the facts underpinning those charges.” *See also Semanza*, (Appeals Chamber), May 20, 2005, para. 85 (right to be informed “of the nature and cause of the charges”).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 469: “Article 17(4) of the Statute provides that the indictment must set out ‘a concise statement of the facts and the crime or crimes with which the accused is charged.’ Likewise, Rule 47(C) of the Rules provides that the indictment shall set out not only the name and particulars of the suspect but also ‘a concise statement of the facts of the case.’” *See also Semanza*, (Appeals Chamber), May 20, 2005, para. 67 (similar).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 29: “[T]he *nature of the charge* refers to the precise legal qualification of the offence, and the *cause of the charge* refers to the facts underlying it.” (emphasis in original.)

2) charges must be sufficiently clear for the accused to prepare his defense

Semanza, (Appeals Chamber), May 20, 2005, para. 67: “The ultimate concern in considering questions related to an indictment and its amendments is whether the Defence was informed sufficiently and clearly enough to be able to prepare its case.” *See also id.*, para. 85 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 470 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 13 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 470: “[T]he Prosecution’s obligation to set out a concise statement of the facts in the indictment must be interpreted in the light of the provisions of Articles 20(2), 20(4)(a) and 20(4)(b) of the Statute, which provide that in the determination of charges against him or her the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature of the charges against him or her and to have adequate time and facilities for the preparation of his or her defence.” *See also Rwamakuba*, (Trial Chamber), September 20, 2006, para. 13 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 301: “An Indictment is aimed at providing the accused with ‘a description of the charges against him with sufficient particularity to enable him to mount his defence.’ Accordingly, the indictment must be sufficiently specific, meaning that it must reasonably inform the accused of the material charges, and their criminal characterisation.”

Ndindababizi, (Trial Chamber), July 15, 2004, para. 28: “[A]n indictment must define the Prosecution case with sufficient particularity, and accuracy, to enable an accused to prepare his defence.”

3) may only convict of crimes charged in the indictment

Muvunyi, (Appeals Chamber), August 29, 2008, para. 18: “In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.” See also *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 28 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 110 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 29 (similar).

For examples, see “reversing convictions based on indictment defect not cured,” Section (VIII)(c)(xix)(8), this Digest.

4) the importance to international justice of dismissing defective charges

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Separate Opinion of Judge Pavel Dolenc, paras. 3-6: “One may consider that [dismissing defective charges] runs contrary to the interests of international justice. However, I strongly believe that the ultimate interest of international justice, the universal application of the rule of law, may be achieved only by respecting the basic rights of an accused to a fair trial and due process. Even when trying cases involving the most serious crimes, the Tribunal is responsible for ensuring a fair trial.”

“Even if the Prosecution’s evidence shows that an accused may be guilty of the most despicable crimes, he must be acquitted if the accused was not given fair and detailed notice in the indictment of the material facts and of the charges against him.”

“In my opinion, the legitimacy and legacy of this Tribunal rests as much on the fairness of the proceedings as on the substance of the Judgements that we deliver. It is only through fair and equitable proceedings that international justice is achieved. Moreover, we cannot lose sight of the effect of the Tribunal’s jurisprudence on international and national guarantees to a fair trial. If the international tribunals fail to provide a model of fairness, we send the wrong message to other courts.”

“I understand that the importance of a fair trial may appear pale in comparison to the gravity of the massive human rights abuses which occurred in Rwanda in 1994. However, it is only through a fair trial that we can achieve any lasting justice. Through justice this Tribunal seeks to contribute to reconciliation. As [dissenting] Justice Murphy of the United States Supreme Court [in *In re Yamashita*] explained nearly sixty years ago:

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance. In this, the first case involving this momentous problem ever to reach this Court, our responsibility is both lofty and difficult. We must insist, within the confines of our proper jurisdiction, that the highest standards of justice be applied in this trial of an enemy commander conducted under the authority of the United States. Otherwise stark retribution will be free

to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.”⁷¹

See also Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, paras. 62-63: “Throughout this case, as in others, there has been concern with fairness to the accused. That concern is of course proper: the liberty of the accused is important” “Thus, fairness to the accused has to be honoured, however inconvenient may be the consequences for the prosecution. The scope of a trial is fixed by the indictment; on a fair reading, the indictment, either original or as cured, must tell the accused exactly what he is charged with. A court must insist on that. Yet, it seems to me that it is the substance which matters: sophistication in applying the relevant standards cannot be extended to the point of rendering the task of the prosecution unreasonably hazardous.”

5) functions of the indictment

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), Judge Schomburg’s Dissenting Opinion, July 7, 2006, para. 2: “The two main functions of any indictment [are] namely:

- informing the accused of the charges against him or her (*information function* which enshrines the fundamental right to be heard) and
- limiting the individual and material scope of the charges (*limitation function*).

6) pleading requirements

(a) charges and material facts must be pled with sufficient precision to provide notice

Muvunyi, (Appeals Chamber), August 29, 2008, para. 18: “The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 27 (similar); *Simba*, (Appeals Chamber), November 27, 2007, para. 63 (similar); *Muhimana*, (Appeals Chamber), May 21, 2007, paras. 76, 167 (same as *Seromba*); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 49 (same as *Muvunyi* Appeal); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 110 (same as *Muvunyi* Appeal); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 17 (same as *Muvunyi* Appeal); *Muvunyi*, (Trial Chamber), September 12, 2006, paras. 24, 401 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 451 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 30 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 322: “The indictment is pleaded with sufficient particularity only if it sets out the material

⁷¹ The *Yamashita* case was a petition for *habeas corpus* to the U.S. Supreme Court by Japanese General Tomoyuki Yamashita, who had been Commanding General of the Fourteenth Army Group of the Japanese Imperial Army and the Military Governor on the Philippine Islands from October 1944 until September 1945. He had been convicted by a U.S. military tribunal sitting in the Philippines. The petition was denied, and Yamashita was executed. *See In re Yamashita*, 327 U.S. 1 (1946).

facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence.”

Nchamibigo, (Trial Chamber), November 12, 2008, para. 32: “[Article 20(4)(a) of the Statute] translates into an obligation for the Prosecution to . . . plead all material facts in the Indictment with as much specificity as possible.”

(b) the prosecution is expected to “know its case”

Muvunyi, (Appeals Chamber), August 29, 2008, para. 18: “The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds.” *See also* *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 27 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 26 (same); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 194 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 110 (same); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 17 (same); *Bikindi*, (Trial Chamber), December 2, 2008, para. 403 (similar); *Nchamibigo*, (Trial Chamber), November 12, 2008, para. 32 (similar); *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 28 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, paras. 24, 401 (similar); *Simba*, (Trial Chamber), December 13, 2005, para. 14 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 451 (similar).

(c) where a material fact is not in the prosecution’s possession

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 26: “If the Defence is denied the material facts of the accused’s alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation for trial until then. A trial chamber must be mindful of whether proceeding to trial in such circumstances is fair to the accused.” *See also* *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 22 (similar to first sentence); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 194 (similar to *Ntakirutimana*).

Muhimana, (Trial Chamber), April 28, 2005, para. 451: “If the Prosecution does not plead material facts in the Indictment but includes them in its Pre-Trial Brief or raises them at the trial, it will be difficult for the Defence to investigate the new information before the start of the trial. The test to be applied by the Trial Chamber is whether the accused had enough details of the charges to prepare a defence to them.”

As to the prosecution’s raising facts in the pre-trial brief and having that “cure” defective charges, see “certain defects in the indictment may be ‘cured’ by timely, clear and consistent information,” Section (VIII)(c)(xix)(7), this Digest.

(d) indictment that does not plead material facts, or does not plead them with the required specificity, is defective

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 322: “An indictment which fails to duly set forth the specific material facts underpinning the charges against the accused is defective.” *See also* *Kamuhanda*, (Appeals Chamber),

September 19, 2005, para. 17 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 39 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 324: “An indictment may also be defective when the material facts that the Prosecutor invokes are pleaded without sufficient specificity.” *See also* *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 16 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 22 (similar); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 402: (similar).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 27: “An indictment may also be defective when the material facts are pleaded without sufficient specificity, for example, when the times mentioned refer to broad date ranges, the places are only vaguely indicated, and the victims are only generally identified.”

For discussion of indictments with broad date ranges, places only vaguely indicated and victims only generally identified, see “discrepancies/vagueness as to dates,” “discrepancies/vagueness as to location,” and “failure to plead details as to murder victims,” Sections (VIII)(c)(xix)(6)(s)(ii)-(iii), and (VIII)(c)(xix)(6)(n)(iv), this Digest.

**(e) a defect may be considered harmless only if the defence
was not materially impaired/ there was no prejudice to the
accused**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 326: “The defect can be deemed harmless only if it is established that the accused’s ability to prepare his defence was not materially impaired. Where the failure to give sufficient notice of the legal and factual reasons for the charges against him violated the right to a fair trial, no conviction can result.”

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 28: “If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial, or, in other words, whether the defect caused any prejudice to the Defence.” *See also id.*, para. 325 (similar).

**(f) read the indictment as a whole and consider the schedule
of particulars**

Muvunyi, (Appeals Chamber), August 29, 2008, para. 21: “In this assessment [of the sufficiency of the Indictment], the Appeals Chamber takes into account both the Indictment as well as the Schedule of Particulars, which the Trial Chamber permitted the Prosecution to file ‘in order to arrange [its] current pleading in a clearer manner’ and in particular to set out ‘the factual allegations which refer specifically to a type of responsibility under Article [...] 6(3) of the Statute.’”

Seromba, (Appeals Chamber), March 12, 2008, para. 27: “The Appeals Chamber has held that an indictment must be considered as a whole.”

Semanza, (Appeals Chamber), May 20, 2005, para. 90: “The Trial Chamber did not fundamentally alter or amend the Indictment as the Appellant contends. The Trial Chamber simply considered the factual allegations relevant to separate charges together on the basis of their overlapping and related circumstances. Far from effecting an amendment of the Indictment, this aggregation of facts is a valid, indeed common, method of legal analysis. The Appeals Chamber recalls that indictments must be read as a whole.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 30: “In assessing an indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.”

Compare “may not rely on allegations pled regarding other counts,” Section (VIII)(c)(xix)(6)(r)(i), this Digest.

See also “accused not given notice by factual allegations in other indictment where joint trial,” Section (VIII)(c)(xix)(6)(u), this Digest.

(g) general allegations do not render an indictment defective

Seromba, (Appeals Chamber), March 12, 2008, para. 27: “Where an indictment contains some allegations of a general nature, this alone does not render it defective. Other allegations in the indictment may sufficiently plead the material facts underpinning the charges in the indictment.”

(h) need not plead the evidence

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 322: “Under Articles 17(4), 20(2), 20(4)(a) and 20(4)(b) of the Statute and Rule 47(C) of the Rules, the Prosecutor must state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proved.” *See also* *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 21 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 85 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, paras. 24-25, 470 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 193 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 12 (similar); *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 13 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 165 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 451 (similar); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 28 (similar).

Ndindababizi, (Trial Chamber), July 15, 2004, para. 28: “[T]he indictment need not achieve the impossible standard of reciting all aspects of the evidence against the accused as it will unfold at trial.”

See also *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 227 (“Factors relating to witness credibility need not be pleaded in the indictment”); *id.*, para. 238 (similar).

(i) whether a fact is material depends on case/what is a material fact

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 322: “[T]he issue as to whether a fact is material or not cannot be determined in the abstract: whether or not a fact is considered ‘material’ depends on the nature of the Prosecution’s case.” See also *Simba*, (Appeals Chamber), November 27, 2007, para. 63 (similar); *Ndindababizi*, (Appeals Chamber), January 16, 2007, para. 16 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 23 (similar); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 17 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 25 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 193 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 14 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 166 (similar).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Separate Opinion of Judge Pavel Dolenc, para. 21: “In practical terms, the material facts of the crime answer the following seven questions, which guide any criminal investigation, prosecution, and judgment: Who (is alleged perpetrator); Where; When; What (was committed or omitted); Whom to (victim); What means; and Why (motive). Answers to these seven questions are necessary in order to individualize the accused, the alleged crime, the mode of the Accused’s participation, and the form of his criminal responsibility.”

(j) amount of detail required turns on crime charged and proximity of the accused to the crime

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 324: “[T]he Prosecutor’s characterization of the alleged criminal conduct and the proximity between the accused and the crime charged are decisive factors in determining the degree of specificity with which the Prosecutor must plead the material facts of his case in the indictment.” See also *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 23 (similar).

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 17: “In *Kupreškic*, the ICTY Appeals Chamber held as follows:

A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused”

See also *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 301 (similar); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 33 (similar).

(k) criminal acts physically committed by the accused must specify, where feasible, the identity of the victim, the time and place of the events and the means by which the acts were committed

Muvunyi, (Appeals Chamber), August 29, 2008, para. 120: “[C]riminal acts that were physically committed by the accused must be set forth in the indictment specifically, including where feasible ‘the identity of the victim, the time and place of the events and

the means by which the acts were committed.” See also *Seromba*, (Appeals Chamber), March 12, 2008, para. 27 (similar); *Muhimana*, (Appeals Chamber), May 21, 2007, paras. 76, 167 (similar); *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 16 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 23 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 49 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 25 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 193 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 111 (similar); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 17 (same); *Nchamihigo*, (Trial Chamber), November 12, 2008, para. 33 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 14 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 74: “The Appeals Chamber recalls that the situation is different . . . when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. Proof of a criminal act against a named or otherwise identified individual can be a significant boost to the Prosecution’s case; in addition to showing that the accused committed one crime, it can support the inference that the accused was prepared to do likewise to other unidentifiable victims and had the requisite *mens rea* to support a conviction. As a consequence, the Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the ‘sheer scale’ of the crime made it impossible to identify that individual in the indictment. Quite the contrary: the Prosecution’s obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual.”

Karera, (Trial Chamber), December 7, 2007, para. 13: “Allegations of physical perpetration of a criminal act by an accused must appear in an Indictment. The legal basis on which an individual is being charged, meaning individual criminal responsibility under Article 6 (1) of the Statute or command responsibility under Article 6 (3), must also be explicitly set forth in the Indictment.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 32: “In cases where the Prosecutor alleges that an accused personally ‘committed’ criminal acts within the meaning of Article 6(1), an indictment generally must plead with particularity the identity of the victims, the time and place of the events, and the means by which the acts were committed. The Chamber, however, does not expect the Prosecutor to perform an impossible task and recognises that the nature or scale of the crimes, the fallibility of witnesses’ recollections, or witness protection concerns may prevent the Prosecution from fulfilling its legal obligations to provide prompt and detailed notice to the accused. If a precise date cannot be specified, a reasonable range of dates should be provided. If victims cannot be individually identified, then the indictment should refer to their category or position as a group. Where the Prosecution cannot provide greater detail, then the indictment must clearly indicate that it provides the best information available to the Prosecutor.”

Compare “pleading mass crimes: scale of crimes may make it impracticable to require a high degree of specificity,” Section (VIII)(c)(xix)(6)(l), this Digest.

See also “failure to plead details as to murder victims,” “discrepancies/vagueness as to dates,” Sections (VIII)(c)(xix)(6)(n)(iv), (VIII)(c)(xix)(6)(s)(ii), this Digest.

For further discussion of pleading Article 6(1) and Article 6(3) responsibility, see “pleading Article 6(1)” and “pleading Article 6(3),” Sections (VIII)(c)(xix)(6)(n)-(VIII)(c)(xix)(6)(p), this Digest.

(i) application

Muhimana, (Appeals Chamber), May 21, 2007, para. 78: General allegations that Muhimana “participated in the search for and attacks on *Tutsi* civilians” did not provide adequate notice. “The Appellant could not have known, on the basis of the Indictment alone, that he was being charged as part of this attack with personally killing Tutsis with a grenade, seriously wounding Witness BC, and killing her children.”

Kamuhanda, (Appeals Chamber), September 19, 2005, paras. 18-20: “[T]he distribution of weapons was a material fact”; “[t]he Indictment alleged that the Appellant distributed weapons in Kigali-Rural *préfecture* in April 1994 ‘on several occasions,’ without further specifying the dates or locations of the alleged distributions. In the context of this case, the distribution of weapons was a criminal act which the Appellant, according to the Indictment, committed personally. At a minimum, the Prosecution was therefore required to provide the Appellant with information ‘in detail’ about ‘the time and place of the events and the means’ by which the alleged distributions were committed.” “The Prosecution’s failure to include a detailed pleading of this fact therefore rendered the Indictment defective.”

Mpambara, (Trial Chamber), September 11, 2006, paras. 167-68, 171-72: “The Defence objects that it did not have adequate notice of the allegation that the Accused was present during the beating of a young man named Murenzi on the morning of 7 April at Gahini Hospital.” “The Indictment contains no specific reference to this event.” “The lack of connection between the material fact and the paragraphs in the Indictment points to a more fundamental issue: the conduct would, on its own, be a criminal act which should, in principle, have been expressly pleaded in the Indictment. Although the Accused is not himself alleged to have beaten Murenzi, his alleged involvement is precise, specific, and, if proven, is probably sufficient to show that he was guilty of a crime. The implication of the allegation is that his presence, combined with his inaction, had an encouraging effect on the attackers. In these circumstances, the requirement that ‘acts that were physically committed by the accused personally must be set forth in the indictment specifically’ applies to this allegation.” “Accordingly, the Chamber considers that the allegation of the Accused’s presence during the beating of Murenzi has not been charged as a distinct criminal act, and has only been considered above to the extent necessary to set the scene for events at Gahini Hospital on 9 April.”

See also *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 33 (failure to include the murder victim’s name or any of the circumstances surrounding his killing where one of the accused was alleged to have personally committed the murder rendered the Indictment defective).

For further requirements as to pleading Article 6(1) responsibility, see “pleading Article 6(1),” Section (VIII)(c)(xix)(6)(n), this Digest.

For discussion of “curing” a defective indictment, see “certain defects in the indictment may be ‘cured’ by timely, clear and consistent information,” Section (VIII)(c)(xix)(7), this Digest.

(l) pleading mass crimes: scale of crimes may make it impracticable to require a high degree of specificity

Muvunyi, (Appeals Chamber), August 29, 2008, para. 58: “[I]n certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes.” See also *Muhimana*, (Appeals Chamber), May 21, 2007, paras. 79, 197 (same but with internal quotes); *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 16 (similar to *Muvunyi*); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 50 (same as *Muvunyi* with internal quotes); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 23 (similar to *Muvunyi*); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 25 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 193 (same as *Ntakirutimana*); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber) December 18, 2008, para. 114 (same as *Muvunyi*); *Karera*, (Trial Chamber), December 7, 2007, para. 14 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 73: “The [ICTY’s] *Kupreškić* Appeal Judgement elaborated that, in situations in which the crimes charged involve hundreds of victims, such as where the accused is alleged to have participated ‘as a member of an execution squad’ or ‘as a member of a military force,’ the nature of the case might excuse the Prosecution from ‘specify[ing] every single victim that has been killed or expelled.’ This observation allows for the fact that, in many of the cases before the two International Tribunals, the number of individual victims is so high that identifying all of them and pleading their identities is effectively impossible. The inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused’s ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim.”

Mpambara, (Trial Chamber), September 11, 2006, para. 166: “[D]etails concerning crimes on a broad scale, in which the accused played an indirect role, may be pleaded with less specificity.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Separate Opinion of Judge Pavel Dolenc, para. 23: “The jurisprudence of this Tribunal and of the International Criminal Tribunal for the Former Yugoslavia recognizes that, given the nature of the crimes under our jurisdiction, it will sometimes be impossible or unreasonably difficult for the Prosecution to give precise details of every material fact . . . In a case of mass killings committed by a group of attackers, it may be impracticable to require a high degree of specificity regarding the identities of individual victims or the exact time and location of each specific murder. If the victims can not be individually

identified, then the indictment should describe the category of victims as a group. In other instances it may be reasonable to plead a range of dates where a precise date can not be specified because of the nature of a recurring event or because of vagueness in the recollection of a key witness.”

Compare Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 96, 99: “[T]he ‘sheer scale’ discussion in *Kupreškić* does not apply to situations in which the Prosecution contends that the accused personally killed a specific, identifiable person. The ‘sheer scale’ exception allows the pleading of charges without the names of victims in situations where it would be impracticable to identify them. In this situation, it was clearly practicable to identify Esdras a victim; he was so identified by a witness at trial.” “The Appeals Chamber considers therefore that the Trial Chamber erred in concluding that convictions could be based on the uncharged killing of Esdras.”

See also “failure to plead details as to murder victims,” “discrepancies/vagueness as to dates,” “discrepancies/vagueness as to location,” Sections (VIII)(c)(xix)(6)(n)(iv), (VIII)(c)(xix)(6)(s)(ii), (VIII)(c)(xix)(6)(s)(iii), this Digest.

(m) where newly discovered information or evidence turned out differently than expected

Muvunyi, (Appeals Chamber), August 29, 2008, para. 18: “Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings, or the exclusion of evidence outside the scope of the indictment.” *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 27 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 194 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 110 (same).

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 196: “A Trial Chamber faced with a situation in which ‘the evidence turns out differently than expected’ may not simply find that the error has been cured, but rather should take one or more of the steps envisioned by *Kupreškić*, including excluding the evidence or ordering the Prosecution to move to amend the indictment. In considering a motion to amend the indictment, a Trial Chamber should naturally consider whether the Prosecution has previously provided clear and timely notice of the allegation such that the Defence has had a fair opportunity to conduct investigations and prepare its response. On appeal, however, amendment of the indictment is no longer possible. Rather, the question is whether the error of trying the accused on a defective indictment ‘invalidat[ed] the decision’ and warrants the Appeals Chamber’s intervention.”

Ndindababizi, (Trial Chamber), July 15, 2004, para. 29: “Where the evidence at trial turns out differently than expected, and a specific objection is interposed by the Defence, the Trial Chamber should consider measures such as amendment of the indictment, an adjournment, or exclusion of the evidence in question.” *See also Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 26 (similar).

Compare Karera, (Trial Chamber), December 7, 2007, para. 16: “The Appeals Chamber has found that a defect in the Indictment may also be cured through a Prosecution motion for the addition of a witness, ‘provided any possible prejudice to the Defence was alleviated by, for example, an adjournment to allow the Defence time to prepare for cross-examination of the witness.’ It further recognized that defects in an indictment ‘may arise at a later stage of the proceedings because the evidence turns out differently than expected.’ In these instances, the Chamber must assess the timing of the information designed to cure the defect, the impact of the newly discovered information on the Prosecution case, and the importance of the new information to the ability of the accused to prepare his or her defence. The Chamber must then decide ‘whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.’”

For discussion of “curing” a defective indictment, see “certain defects in the indictment may be ‘cured’ by timely, clear and consistent information,” Section (VIII)(c)(xix)(7), this Digest.

(n) pleading Article 6(1)

(i) identify the particular acts or course of conduct of the accused

Seromba, (Appeals Chamber), March 12, 2008, para. 27: “Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the ‘particular acts’ or ‘the particular course of conduct’ on the part of the accused which forms the basis for the charges in question.” See also *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 25 (same); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 111 (same).

Nchamihigo, (Trial Chamber), November 12, 2008, para. 328: “[T]he mode and extent of an accused’s participation in an alleged crime are material facts which must be clearly set forth in the indictment.”

Mpambara, (Trial Chamber), September 11, 2006, para. 166: “An allegation that the Accused physically committed a criminal act is not only material, but must be specifically pleaded in the Indictment; it may not be communicated by other means.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 31: “The mode and extent of an accused’s participation in an alleged crime are always material facts that must be clearly set forth in the indictment. The materiality of other facts and the specificity with which the Prosecutor must plead these facts depend on the form of participation alleged in the indictment and the proximity of the accused to the underlying crime.” See also *Simba*, (Trial Chamber), December 13, 2005, para. 389 (same as first sentence).

See also “criminal acts physically committed by the accused must specify, where feasible, the identity of the victim, the time and place of the events and the means by which the acts were committed,” Section (VIII)(c)(xix)(6)(k), this Digest.

**(ii) simply quoting Article 6(1) discouraged/
insufficient**

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 122: “As recently noted by the Appeals Chamber:

it has long been the practice of the Prosecution to merely quote the provisions of Article 6(1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under Article 6(1) of the Statute. The Appeals Chamber reiterates that, to avoid any possible ambiguity, it would be advisable to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged. Nevertheless, even if an individual count of the indictment does not indicate precisely the form of responsibility pleaded, an accused might have received clear and timely notice of the form of responsibility pleaded, for instance in other paragraphs of the indictment.”

See also *Semanza*, (Appeals Chamber), May 20, 2005, para. 357 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 259 (same language as quoted); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 473 (similar).

Semanza, (Appeals Chamber), May 20, 2005, para. 357: “The practice of both the ICTY and the ICTR requires that the Prosecution plead the specific mode or modes of [responsibility] for which the accused is being charged. The Prosecution has repeatedly been discouraged from the practice of simply restating Article 6(1) of the Statute unless it intends to rely on all of the modes of [responsibility] contained therein, because of the ambiguity that this causes.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 22: “In the Chamber’s view, while it is desirable that forms of participation under Article 6(1) be specifically pleaded in the Indictment, there is no rule of law requiring such a form of pleading except where the Prosecution alleges joint criminal enterprise. In *Semanza*, the Appeals Chamber referred to the Prosecutor’s long established practice of merely quoting the provisions of Article 6(1) and added that it would be ‘advisable’ to plead the specific form of 6(1) responsibility in relation to each individual count of the indictment. However, the Appeals Chamber did not state that this was a mandatory requirement. The majority in *Gacumbitsi* indicated that in determining whether the form of participation has been adequately pleaded so as to give the accused clear and timely notice, the indictment must be considered as a whole.” (Note that most of Muvunyi’s convictions were overturned on appeal, many for pleading defects.)

Mpambara, (Trial Chamber), September 11, 2006, para. 29: “The level of specificity required to describe the accused’s mode of participation in a crime has been explained as follows:

If an indictment merely quotes the provisions of Article [6(1)] without specifying which mode or modes of responsibility are being pleaded, then the charges

against the accused may be ambiguous. When the Prosecution is intending to rely on all modes of responsibility in Article [6(1)], then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the Prosecution's case, or because the Prosecution has failed to plead material facts for the modes of responsibility it is alleging."

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 37: "[Each] count must . . . clearly identify the mode of the accused's alleged participation in the crime; mere reference to Article 6(1) of the Statute, which lists multiple forms of individual criminal responsibility, is insufficient."

See also Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, para. 56: "In another case, the Appeals Chamber said that it is 'advisable' for the prosecution to be specific [as to the form of Article 6(1) responsibility being pled], and not simply to quote the charging provisions of the Statute. That advice is valuable. However, I would hesitate to elevate it to a universal procedural requirement, more particularly as the Appeals Chamber recognised that 'it has long since been the practice of the Prosecution to merely quote the provisions of Article 6(1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under' that provision."

See also Bikindi, (Trial Chamber), December 2, 2008, para. 403: "[W]hereas the Prosecution is entitled to charge an accused with all modes of [responsibility] provided for in the Statute, the Chamber stresses that the Prosecution is expected to know its case before proceeding to trial. The Prosecution may not rely on the Chamber's authority to choose the appropriate legal characterisation of the accused's conduct, as it does in the present case, to excuse its failure to only plead the mode(s) of [responsibility] which reflects the accused's conduct and on which it intends to adduce evidence."

See also Rwamakuba, (Trial Chamber), September 20, 2006, para. 18: "[T]he Indictment includes only a general reference to Article 6(1) of the Statute in relation to each of the four counts. In accordance with the settled jurisprudence, such general reference implies that the Accused is prosecuted for all forms of individual participation set out by Article 6(1) of the Statute, namely planning, instigating, ordering, committing and aiding and abetting in the planning, preparation or execution of a crime. The Appeals Chamber and some Trial Chambers have stated that this provision is interpreted '[to cover] first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.'"

(iii) failure to plead specific form of individual responsibility not fatal where indictment described the accused's role

Muhimana, (Trial Chamber), April 28, 2005, paras. 490-91: "The Indictment charges the Accused with criminal responsibility, under Article 6 (1) of the Statute, but fails to detail the form of his alleged participation in the crime of genocide. Article 6 (1) . . . identifies five forms of criminal responsibility" The Chamber considers that the

Prosecution's failure to indicate the precise form of the Accused's alleged participation is not fatal because the factual allegations of the Indictment adequately describe the Accused's role in the crimes. Accordingly, the Chamber has considered all forms of participation, under Article 6(1), relevant to its factual findings, in making its legal findings on the Accused's criminal responsibility." *See also id.*, para. 573 (similar).

**(iv) failure to plead details as to murder victims:
consider whether mass crimes sufficiently pled;
failure to identifying victim excusable where
identity not known**

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 240: "The Appellant is correct that 'the identity of the victim,' if known to the Prosecution, should be pleaded in the indictment. *Kupreškić* stated: '[S]ince the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so.' But this statement necessarily recognizes that there will be some situations where the Prosecution is not in a position to name a victim. This appears to be such a situation. Witness DAF, the only witness to testify to the murder, stated that he did not know the victim. The Prosecution is not obliged to forgo a charge relating to a murder simply because the victim cannot be identified. Rather, in the instant case, the victim's identity could not and need not have been pleaded in the indictment."

See, e.g., Kamuhanda, (Trial Chamber), January 22, 2004, paras. 686-87: "The Chamber finds that there was insufficient distinction drawn in the Indictment between the general allegations of murder as a Crime against Humanity and extermination as a Crime against Humanity. The Chamber also notes that the Indictment does not specify the identities of victims for whom the Accused is charged with murder." "After consideration of the evidence in this case, the Chamber finds it appropriate to consider the evidence relating to the killing of specific individuals as examples of targeting populations or groups of people for purposes of extermination, rather than murder specifically."

See also Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, paras. 8-10: "It is settled jurisprudence that, in the case of a mass killing, individual victims do not have to be specifically referred to in the indictment. If the indictment does refer to them, it is only by way of illustration of the crime; there may be hundreds of illustrations. The Appeals Chamber indeed embraces a similar logic when, examining the extermination count, it says that, '[a]lthough' the indictment 'lists certain specific victims, this is only by way of example;' failure to give evidence of their deaths did not invalidate the charge."

"What must be borne in mind is the distinction between the material facts necessary to establish an offence and the evidence adduced to prove those material facts. The material facts must be pleaded, the evidence need not. When an indictment alleges genocide, proof of any one killing is not a *material fact* as it would be in a case of murder; it is *evidence* of a material fact, namely, that the intent of the accused was the destruction of a group, as a group. Each individual killing does not have to be specifically referred to in the indictment."

“In sum, it was not necessary to mention the killing of Mr. Murefu in the count of the indictment relating to genocide as if the appellant was being charged in that count with murdering him. The Trial Chamber did not err in admitting the evidence of his death on the charge for genocide though excluding it on the charge for murder. The Appeals Chamber is of a different view. I respectfully disagree with it.” *See also Gacumbitsi*, (Appeals Chamber), Separate Opinion Of Judge Schomburg On The Criminal Responsibility Of The Appellant For Committing Genocide, July 7, 2006, paras. 9, 13 (“[A]lthough the Prosecution is generally obliged to plead the identity of individual victims with the greatest possible precision, this is not required in the case of genocide.” Arguing that the killing of a certain Mr. Murefu was evidence of genocide, and thus did not need to be expressly pled).

Compare Bikindi, (Trial Chamber), December 2, 2008, paras. 13-17 (indictment that pled that Bikindi participated in a campaign of violence against civilian Tutsi resulting in numerous deaths, but failed to plead that two individuals in particular were murdered, was defective as to those two murders).

See also “pleading mass crimes: scale of crimes may make it impracticable to require a high degree of specificity,” Section (VIII)(c)(xix)(6)(l), this Digest.

See also “failure to plead details as to murder victims,” Section (VIII)(c)(xix)(6)(n)(iv), this Digest.

(v) pleading accomplice responsibility

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, paras. 33, 35: “Where an accused is charged with a form of accomplice [responsibility], the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime.” “The specificity required to plead the identity of the victims, the time and place of the events, and the means by which the acts were committed is not as high where criminal responsibility is predicated on accomplice [responsibility] or superior responsibility. The Chamber emphasises, however, that the accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged subordinates or accomplices. Thus, pleading accomplice or superior responsibility does not obviate the Prosecution’s obligation to particularise the underlying criminal events for which it seeks to hold the accused responsible, particularly where the accused was allegedly in close proximity to the events.”

See also “less precision acceptable when pleading subordinates’ acts” under “pleading Article 6(3),” Section (VIII)(c)(xix)(6)(p)(iv), this Digest.

(vi) pleading continuing crimes

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 232: “The notice requirements of [the ICTY’s] *Kupreskić* [case] apply to the material facts of all criminal acts, including criminal activity that arises as a consequence of earlier criminal activity.”

(vii) pleading omissions

Rwamakuba, (Trial Chamber), September 20, 2006, paras. 26, 28: “Until the submission made at the latest stage by the Prosecution in its Closing Brief, there was . . . no indication in the Indictment, the Pre-Trial Brief or the Opening Statement that the charges against the Accused included a responsibility, as a Minister of the Interim Government, for not having denounced the crimes committed against the Tutsi or for not dissociating himself from the Government, and for a failure to discharge the duties entrusted to him as a member of the Government.” “It would therefore be contrary to the fundamental right of the Accused to a fair trial, including his right to defend himself and to know the charges against him, if the Chamber were to accede to a Prosecution request to find the Accused criminally responsible for omissions which were neither set forth in the Indictment nor subsequently notified by timely, clear, and consistent information from the Prosecution. The Prosecution is expected to know its case before it goes to trial rather than seek to mould its case at the end of the trial depending on how the evidence unfolded.”

For discussion of how information in a pre-trial brief or opening statement can “cure” an indictment defect, see “certain defects in the indictment may be ‘cured’ by timely, clear and consistent information,” Section (VIII)(c)(xix)(7), this Digest.

(viii) pleading incitement/instigating

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 726: “[T]he Appeals Chamber is of the opinion that the acts constituting direct and public incitement to commit genocide must be clearly identified.”

Semanza, (Appeals Chamber), May 20, 2005, para. 296: “The Appellant argues that the Prosecution failed to plead and prove the precise instigating language he allegedly used. [However] . . . , it is not necessary to charge and prove the ‘exact’ instigating language used by an accused.”

(o) pleading joint criminal enterprise

(i) JCE must be specifically pled

Simba, (Appeals Chamber), November 27, 2007, para. 63: “Failure to specifically plead JCE, including the supporting material facts and the category, constitutes a defect in the indictment.”

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 24: “Where the Prosecution relies on a theory of joint criminal enterprise, the Prosecution must specifically plead this mode of responsibility in the indictment; failure to do so will result in a defective indictment.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 398 (similar).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 34: “If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the accused criminally responsible as a principal perpetrator of the underlying crimes rather

than as an accomplice, the indictment should plead this in an unambiguous manner . . . ”

(ii) JCE may be pled by using “common purpose” or “criminal enterprise”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 165: “The words ‘joint criminal enterprise’ are not contained in the Indictment. This absence does not in and of itself indicate a defect. As the Appeals Chamber noted in *Ntakirutimana*, the [ICTY’s] *Tadić* Appeal Judgement used interchangeably the expressions ‘joint criminal enterprise,’ ‘common purpose,’ and ‘criminal enterprise.’ It is possible that other phrasings might effectively convey the same concept. The question is not whether particular words have been used, but whether an accused has been meaningfully ‘informed of the nature of the charges’ so as to be able to prepare an effective defence.” See *Ntakirutimana*, (Appeals Chamber), December 13, 2004, n. 783 (cited).

Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, paras. 29, 33: “To rely on JCE, an indictment need not plead the doctrine *ipsissima verba* if the intention is apparent.” “My conclusion from a review of [the case law] is that it is enough if the indictment alleges in substance that the accused was ‘acting in concert with others’ in pursuit of a ‘common purpose.’”

Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Schomburg On The Criminal Responsibility Of The Appellant For Committing Genocide, July 7, 2006, para. 7: “[T]he Prosecution is not required to plead any legal interpretation or legal theory concerning a mode of participation, which does not appear in the Statute – be it named, for example, direct or indirect perpetratorship, co-perpetratorship, joint principals, joint criminal enterprise, or the like.”

(iii) “committing” insufficient to plead JCE

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 24: “Although joint criminal enterprise is a means of ‘committing,’ it is insufficient for an indictment to merely make broad reference to Article 6(1) of the Statute.”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 167: “[T]he Prosecution’s assertion that the allegations in the Indictment that the Appellant was responsible for ‘committing’ crimes should be read to encompass a JCE theory is similarly untenable and inconsistent with [the ICTY case of] *Kvočka*, It is not enough for the generic language of an indictment to ‘encompass’ the possibility that JCE is being charged. Rather, JCE must be pleaded specifically. Otherwise, an accused could reasonably infer that references to ‘committing’ crimes are meant to refer to acts that he personally perpetrated.”

Bikindi, (Trial Chamber), December 2, 2008, para. 398: “Although joint criminal enterprise is a means of ‘committing,’ it is insufficient for the Prosecution to merely make broad reference to Article 6(1) of the Statute, as the Prosecution does in the Indictment. The Chamber finds the Indictment defective in this respect.” (The defect, however, was found “cured” by the pre-trial brief.)

See also *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 475: “[I]n the *Krnjelac* Appeal Judgement . . . , the ICTY Appeals Chamber held that:

. . . when the Prosecution charges the ‘commission’ of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment - for instance in a pre-trial brief - the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial.”

For discussion of “curing,” see “certain defects in the indictment may be ‘cured’ by timely, clear and consistent information,” Section (VIII)(c)(xix)(7), this Digest.

(iv) must plead purpose of the enterprise, identity of the participants, nature of the accused’s participation, and the period of the enterprise

Simba, (Appeals Chamber), November 27, 2007, para. 63: “In cases where the Prosecution intends to rely on a theory of JCE, the Prosecution must plead the purpose of the enterprise, the identity of its participants, the nature of the accused’s participation in the enterprise and the period of the enterprise.” See also *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 24 (similar).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 34: “In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused’s participation in the enterprise.”

Compare *Simba*, (Appeals Chamber), November 27, 2007, para. 74: “It is well established that a JCE need not be previously arranged or formulated and may materialise extemporaneously. Since ‘organization’ is not an element of JCE, it need not be pleaded in the Indictment.”

(v) should plead form/type of JCE

Simba, (Appeals Chamber), November 27, 2007, para. 63: “The Indictment should . . . clearly indicate which form of JCE is being alleged.” See also *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 34 (similar).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 24: “In order for an accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged.”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 162: “[The ICTY case of] *Kvočka* unambiguously established that failure to plead a JCE theory, including the category of JCE and the material facts supporting the theory, constitutes a defect in the indictment.”

Bikindi, (Trial Chamber), December 2, 2008, para. 400: “As to the category of joint criminal enterprise alleged, the Prosecution stated that it intended to rely on all categories of joint criminal enterprise. In this respect, the Chamber recalls that cumulative charging is allowed under the Statute on the basis 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.’ In the present case, the Chamber considers that the Prosecution was clearly in a position to determine with more specificity which category of joint criminal enterprise it would rely on; the Prosecution cannot reasonably argue that it intends to rely on the second category of joint criminal enterprise in a case where it does not even allege the existence of a system of ill-treatment. The Chamber is of the view that by pleading all three categories of joint criminal enterprise, the Prosecution failed to properly inform Bikindi as to which form of joint criminal enterprise was being alleged.” (The defect, however, became moot as no JCE was proven.)

Compare Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 475: “[I]n the *Krnjelac* Appeal Judgement . . . , the ICTY Appeals Chamber held that: . . . The Appeals Chamber . . . considers that it is *preferable* for an indictment alleging the accused’s responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic[, systemic,] or extended) of joint criminal enterprise envisaged.” (emphasis added.)

See also Gacumbitsi, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, paras. 35-36: “As to the category of JCE on which the prosecution intended to rely, it is true that the indictment did not expressly indicate this as is seemingly required by the Appeals Chamber in *Kvočka*. But that case does not exclude statements by implication Here the material facts presented in the indictment naturally indicated the basic or first category of JCE. The prosecution sought to hold the appellant responsible for crimes perpetrated by a group of which he was a member, that crime being within a purpose common to all members of the group. The aim of the prosecution was fully within the first category of JCE. The prosecution did not seek to impose [responsibility] for crimes that, though foreseeable, were beyond the group’s objective, as permitted by the third category of JCE; nor did the allegations fall into the second category of an ongoing ‘system’ of ill-treatment. So it must have been apparent to the appellant that the first category was intended. In these circumstances, to assert that it was the duty of the prosecution to state the exact category into which the case fell looks procrustean in practice and excessive in law.” “As to the necessary material facts to support the case being brought under the first category of JCE, the indictment included a reference to ‘the purpose of the enterprise, the identity of the participants, and the nature of the accused’s participation in the enterprise.’”

For discussion of the three types of JCE, see “type #1: the ‘basic’ JCE,” “type #2: the ‘systemic’ JCE,” and “type #3: the ‘extended’ JCE,” Sections (IV)(f)(iv)(9)-(11), this Digest.

For discussion of cumulative charging, see “cumulative charges permitted” and “possible to charge multiple categories of joint criminal enterprise,” Sections (VII)(a)(i) and (VII)(a)(i)(4), this Digest.

(vi) may plead form/type of JCE by pleading *mens rea*

Simba, (Appeals Chamber), November 27, 2007, para. 77: “[T]he Appeals Chamber recalls that the three categories of JCE vary only with respect to the *mens rea* element, not with regard to the *actus reus*. Accordingly, an accused will have sufficient notice of the category of JCE with which he is being charged where the indictment pleads the *mens rea* element of the respective category.”

See, e.g., Simba, (Appeals Chamber), November 27, 2007, para. 78 (no error to fail to set forth the type of JCE where the “shared state of mind [required for] the first category of JCE was explicitly pleaded”).

For discussion of the three different JCE *mens rea* requirements, see “*mens rea* for type #1,” “*mens rea* for type #2,” and “*mens rea* for type #3,” Sections (IV)(f)(iv)(9)(a), (IV)(f)(iv)(10)(a), (IV)(f)(iv)(11)(a), this Digest.

(vii) application—pleading joint criminal enterprise

Simba, (Appeals Chamber), November 27, 2007, paras. 67-68: “Under each Count of the Indictment the Appellant is explicitly charged for his participation in a JCE. It is clear from the concise statement of facts that the alleged common criminal purpose comprised the killing of Tutsi at Murambi Technical School, Kaduha Parish, Cyanika Parish, and Kibeho Parish in Gikongoro prefecture, and Gashoba Hill and Rugongwe Trading Centre in Butare prefecture. The fact that the material facts underpinning this theory of responsibility reflect that he was charged with taking a leading position within the JCE is not in any way incompatible with his participation in that enterprise.” “[T]he Appeals Chamber is satisfied that the Indictment put the Appellant adequately on notice that he was being charged with participation in a JCE.” *See also id.*, paras. 69-75 (reviewing Trial Chamber judgment regarding pleading participants in the JCE and finding no error).

Simba, (Trial Chamber), December 13, 2005, paras. 391, 396: “[T]he Indictment refers to ‘joint criminal enterprise’ under all four counts in connection with responsibility under Article 6 (1). This reference places the language in the Indictment into a clear context. In addition, the Appeals Chamber in [the ICTY’s] *Krnjelac* [case] stated that the general requirement to plead all requisite elements of joint criminal enterprise in the Indictment does not prevent the Prosecution in limited circumstances from providing adequate notice by elaborating on its theory in its Pre-trial Brief in light of the facts alleged. In this case, the Prosecution did provide additional detail in its Pre-trial Brief.” “The Chamber finds that the manner in which the Prosecution has given notice of its theory of joint criminal enterprise in the present case has not in any way rendered the trial unfair.”

Compare Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 44: “[T]he Prosecution waited until the first day of trial, when it gave its Opening Statement,

to allude to its intention of relying upon joint criminal enterprise. It then waited until it delivered its Final Trial Brief to develop its arguments on this mode of [JCE responsibility] as it directly related to the Accused's individual criminal responsibility. In neither its Opening Statement nor its Final Trial Brief did the Prosecution specify which form of joint criminal enterprise it had relied upon As a result, the Appeals Chamber finds that the Accused were not provided with timely, clear and consistent notice that their individual criminal responsibility would be invoked under the theory of joint criminal enterprise."

Compare Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 479, 482: "Review of the Indictments reveals that no express reference was made by the Prosecution to joint criminal enterprise, common plan or purpose – or even to the fact that it intended to charge the Accused for co-perpetration of genocide, *i.e.*, not only for physically committing genocide but also for assisting those who physically committed it while sharing the same genocidal intent. The only express reference to joint criminal enterprise is to be found in the Prosecution's Pre-Trial Brief . . . and is repeated in the Prosecution's Closing Brief In the Appeals Chamber's view, the mere reference by the Prosecution to the joint criminal enterprise illustrating the '*dolus eventualis*' doctrine in its Pre-Trial and Closing Briefs cannot be understood as an unambiguous pleading of participation in the first form of joint criminal enterprise which is the form the Prosecution advances on this appeal." "Additionally, and contrary to the [ICTY's] *Tadić* and *Furundžija* cases relied upon by the Prosecution, the Trial Chamber obviously did not understand the Indictments to mean that the Accused committed genocide by way of participation in a joint criminal enterprise. As such, the Appeals Chamber considers that the Prosecution did not plead joint criminal enterprise [responsibility], or even its various elements, with sufficient clarity in the Indictments."

Compare Nchamihigo, (Trial Chamber), November 12, 2008, para. 328: "In its preliminary paragraphs, the Indictment did allege JCE, identified its purpose, and named participants. But in the paragraphs where the Indictment detailed the factual allegations on which the crimes charged were based, JCE was not specified as a form of commission. Instead, the paragraphs specified in each case whether Nchamihigo ordered, instigated or otherwise aided and abetted the crimes. In its closing brief, the Prosecution mentioned JCE only in general terms and did not relate it to any particular event. In these circumstances, the Chamber considers that Nchamihigo did not have adequate notice that his [responsibility] for any event would depend on his participation in a joint criminal enterprise."

See also Gacumbitsi, (Appeals Chamber), July 7, 2006, paras. 172-73 (finding JCE not clearly pled in the indictment); *but see Gacumbitsi*, (Appeals Chamber), Separate Opinion Of Judge Shahabuddeen, July 7, 2006, paras. 29, 33 (dissenting); *Gacumbitsi*, (Appeals Chamber), Separate Opinion Of Judge Schomburg On The Criminal Responsibility Of The Appellant For Committing Genocide, July 7, 2006, para. 7 (dissenting).

For discussion of "curing," including by pre-trial brief, see "certain defects in the indictment may be 'cured' by timely, clear and consistent information," Section (VIII)(c)(xix)(7), this Digest.

(p) pleading Article 6(3)

Muvunyi, (Appeals Chamber), August 29, 2008, para. 19: “If the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6(3) of the Statute, the Indictment should plead the following: (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.” See also *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 323 (same elements); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 26 (same elements); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 112 (same).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 33: “Where superior responsibility is alleged, the relationship of the accused to his subordinates is most material, as are his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Separate Opinion of Judge Pavel Dolenc, para. 22: “The concise statement of facts of a charge for superior responsibility pursuant to Article 6(3) of the Statute should clearly and precisely allege, in case of failure to prevent a crime: (i) sufficient particulars of the underlying crime so that it may be identified without any ambiguity; (ii) particulars of the subordinate perpetrator(s); (iii) the legal or factual basis for establishing a superior-subordinate relationship between the accused and the principal perpetrators; (iv) a description of the necessary and reasonable measures, within the accused’s authority, duty, and disposal which the accused failed to take; (v) a statement that the accused had knowledge, or sufficient information to conclude, that his subordinates were about to commit a crime; and (vi) an allegation that these measures, if applied, may have prevented the subordinate from committing the crime. In case of failure to punish a subordinate perpetrator, an indictment charging Article 6(3) [responsibility] should also set forth the necessary, reasonable, and available measures within the accused’s authority that it is alleged he failed to take.”

(i) mere mention of Article 6(3) does not suffice

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 158: “In the instant case, the Prosecution simply invokes Article 6(3) of the Statute without providing the Accused with all the material facts underpinning the charges under that Article. The Prosecution seems to consider mere mention of Article 6(3) to be the key to a conviction under this Article. The Appeals Chamber cannot but denounce this approach. It reaffirms that if the Prosecution intends to charge a superior with

individual criminal responsibility pursuant to Article 6(3) of the Statute, it must plead the material facts underpinning the charges in the indictment, and that failure to do so may be remedied only if the missing material facts are provided in a clear, consistent and timely manner.”

(ii) need not plead exact identity of subordinates; can identify by group

Muvunyi, (Appeals Chamber), August 29, 2008, para. 55: “The Appeals Chamber is not satisfied that Muvunyi has shown that . . . the Indictment fails to sufficiently identify his subordinates. A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur [responsibility] under Article 6(3) of the Statute. Paragraph 3.34(i) refers to ‘soldiers from the ESO [*École des Sous-Officiers* Camp in Butare prefecture]’ and Count 1 states that the allegation in this paragraph would be pursued under Article 6(3) of the Statute. In addition, . . . the Indictment specifies that ESO soldiers were under Muvunyi’s command. On the basis of the Indictment, therefore, Muvunyi would have known that he was being charged as a superior for the criminal acts of ESO Camp soldiers at the University of Butare.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 113: “A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur [responsibility] under Article 6 (3) of the Statute. The Appeals Chamber has held that an accused is sufficiently informed of his subordinates where they are identified as coming from a particular camp and under their authority. It has also held that physical perpetrators of the crimes can be identified by category in relation to a particular crime site.”

(iii) alleging wrong soldiers committed the attack rendered indictment defective

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 34-35, 37, 40: Where the Indictment alleged Muvunyi ordered the soldiers of the Ngoma camp to go to the Beneberika Convent and kidnap the refugees at the Convent including women and children, and that soldiers of the ESO [*École des Sous-Officiers*] and Ngoma Camp participated in cruel treatment, but the Trial Chamber convicted Muvunyi for responsibility of ESO camp soldiers at the Beneberika Convent: “[t]he Appeals Chamber [found] the Indictment is defective because it does not identify ESO Camp soldiers among the perpetrators of the attack at the Beneberika Convent.” *See also id.*, paras. 160-66 (pleading wrong soldiers committed rapes rendered the indictment defective).

(iv) less precision acceptable when pleading subordinates’ acts

Muvunyi, (Appeals Chamber), August 29, 2008, para. 58: “[T]he Appeals Chamber has previously stated that ‘the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts

themselves are often not very much in issue.” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 114 (same).

(v) pleading identity of victims and manner and means of attack

Muvunyi, (Appeals Chamber), August 29, 2008, para. 60: “[W]ith respect to the pleading of the identity of the victims and the manner and means of the killings, paragraph 3.34(i) of the Indictment identifies the victims as ‘Tutsi lecturers and students from the University of Butare’ and states that ESO [*École des Sous-Officiers*] Camp soldiers went to the university ‘to kill’ them. The Appeals Chamber considers that, in the circumstances noted above, this adequately identifies the victims and pleads the manner and means of the attack.”

(vi) pleading knowledge of crimes and failure to prevent and/or to punish

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 43-44: “[T]he Prosecution contends that the following language in the Schedule of Particulars adequately pleads these material facts:

[...] [F]or all of the acts described at paragraphs [*sic*] 3.27 of the indictment the Prosecutor alleges that the accused knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 2(3)(a) and (e) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6(3) of the Statute.”

“The above-quoted language mainly repeats the legal elements of superior responsibility, but fails to set out the underlying material facts. The Indictment is therefore defective in this respect. For these elements, proper notice requires the Prosecution to plead: *the conduct of the accused* by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and *the conduct of the accused* by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.”

Nabimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 323: “As regards this last element [the conduct of the accused by which he may be found to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who committed them], it will be sufficient in many cases to plead that the accused did not take any necessary and reasonable measure to prevent or punish the commission of criminal acts.”

Compare Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 115: “[A] Trial Chamber may infer knowledge of the crimes from the widespread and systematic nature and a superior’s failure to prevent or punish them from their continuing nature. These elements follow from reading the Indictment as a whole.”

Compare Mpambara, (Trial Chamber), September 11, 2006, para. 27: “[Responsibility] for failing to discharge a duty to prevent or punish requires proof that: (i) the Accused was bound by a specific legal duty to prevent a crime; (ii) the accused was aware of, and wilfully refused to discharge, his legal duty; and (iii) the crime took place. Although the Prosecution need not use any magic formulation of words, the pleadings must at least, in substance, articulate these three elements.”

See, e.g., Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 366: “[T]he Appeals Chamber notes . . . that the Barayagwiza Indictment does not plead the fact that Appellant Barayagwiza was charged with failure to take necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof. The Barayagwiza Indictment is therefore defective in that it does not inform the Appellant of one of the material facts underpinning the charge based on Article 6(3) of the Statute.” But, even though the defect was not cured, where Barayagwiza failed to raise the issue during trial, Barayagwiza did not, on appeal, demonstrate “material prejudice.”

See, e.g., Mpambara, (Trial Chamber), September 11, 2006, paras. 31-35, 40 (holding that the “duty to prevent or punish the crimes” was not adequately set forth in the indictment or cured).

For discussion of waiver, see “time to raise/waiver of indictment defects,” Section (VIII)(c)(xix)(9), this Digest.

(vii) application—pleading 6(3)

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 46-47: “[T]he Appeals Chamber has identified several uncured defects in the Indictment relating to the notice of the material facts underlying Muvunyi’s conviction as a superior for the crimes committed by ESO [École des Sous-Officiers Camp in Butare prefecture] Camp soldiers at the Beneberika Convent: the Indictment does not implicate ESO Camp soldiers in the attack; it fails to plead their role in the kidnapping and killing of refugees; and it does not plead the material facts related to Muvunyi’s knowledge of the crimes or failure to prevent them or to punish the perpetrators. Accordingly, the Trial Chamber erred in law in convicting Muvunyi of genocide based on the role played by ESO Camp soldiers in this attack.” “For the foregoing reasons, the Appeals Chamber . . . reverses [Muvunyi’s] conviction for genocide for this event.”

Muvunyi, (Appeals Chamber), August 29, 2008, para. 22: “[P]aragraph 3.29 of the Indictment clearly alleges a specific attack on wounded refugees at the Butare University Hospital around 15 April 1994 where Muvunyi and a section of soldiers allegedly separated and killed Tutsi refugees. In contrast, the evidence which underpins Muvunyi’s conviction . . . refers to an event sometime after 20 April 1994 wherein ESO Camp soldiers – in the absence of Muvunyi – participated in the abduction of Tutsis from the hospital and their subsequent killing elsewhere. The variances between the Indictment and the evidence with respect to the dates of the attack, the soldiers’ conduct during the attack, and Muvunyi’s presence and participation in the attack reflect that paragraph 3.29 of the Indictment alleges a different criminal event than the one for

which he was convicted. As a result, the Appeals Chamber finds that Muvunyi did not have adequate notice of the material facts giving rise to superior responsibility for the abductions and killings at the Butare University Hospital after 20 April 1994.”

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 89, 92, 94: “The Trial Chamber convicted Muvunyi pursuant to Article 6(3) of the Statute for genocide based, in part, on the role played by ESO Camp soldiers in killing Tutsi refugees at the Mukura forest.” “[T]he Trial Chamber noted that this location was not mentioned in . . . the Indictment. However, it concluded that [the Indictment’s list of massacre sites] was not intended to be exhaustive. The Trial Chamber was satisfied that Muvunyi received notice in a timely, clear, and consistent manner of the Prosecution’s intent to lead evidence on the attack through the summary of the anticipated evidence [of certain witnesses] annexed to the Pre-Trial Brief as well as their unredacted statements which were disclosed to him at least twenty-one days prior to their respective testimony.” “[T]he Appeals Chamber considers that Muvunyi could not have known, on the basis of the Indictment alone, that he was being charged in connection with the attack at the Mukura forest because this attack is not mentioned in the Indictment.”

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 149, 150, 153: “The Trial Chamber convicted Muvunyi as a superior . . . for other inhumane acts as a crime against humanity . . . based on the role played by ESO Camp soldiers in the mistreatment of [individuals at the *Économat général*, Butare Cathedral, the ESO Camp, various roadblocks, the Beneberika Convent and *Groupe scolaire*]. The Trial Chamber made the factual findings . . . pursuant to allegations contained in paragraph 3.47 of the Indictment, which states: ‘During the events referred to in this indictment, soldiers of the ESO and Ngoma Camp participated in the meting out of cruel treatment to Tutsi civilians by beating them with sticks, tree saplings and or rifle butts.’” “Paragraph 3.44 of the Indictment refers to soldiers preventing wounded survivors of an attack from receiving medical attention at the Butare University Hospital.” “[T]he Indictment, charging other inhumane acts as a crime against humanity, is plainly defective in relation to the conviction entered by the Trial Chamber pursuant to it. From the Indictment alone, Muvunyi would not have known that he would be held responsible for the crime of other inhumane acts based on the criminal acts of ESO Camp soldiers, other than those alleged in paragraph 3.44 of the Indictment.”

See also Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 356-57 (holding that material facts of Article 6(3) were adequately set forth in the indictment); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, paras. 152-58 (analysis of command responsibility allegations and whether defects in the indictment were cured).

(q) pleading *mens rea*

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 347: “With respect to *mens rea*, the Appeals Chamber recalls that the indictment may either (i) plead the state of mind of the accused, in which case the facts by which that matter is to be established are matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred.”

(i) pleading *mens rea* for genocide

Simba, (Appeals Chamber), November 27, 2007, para. 264: “The Appeals Chamber has previously held that genocidal intent can be proven through inference from the facts and circumstances of a case. Correspondingly, the Appeals Chamber has held that it is sufficient if the evidentiary facts from which the state of mind is to be inferred are pleaded.”

See, e.g., Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 348: “The Appeals Chamber notes that, for each of the counts in the Nahimana Indictment that are based on Article 2 of the Statute, the Prosecution pleads Appellant Nahimana’s intent ‘to destroy, in whole or in part, an ethnic or racial group as such.’ The Appeals Chamber therefore considers that the Prosecution satisfied its obligation to plead in the Indictment the Accused’s *mens rea*, in this case the intent to commit genocide.”

See also “intent may be inferred/proven by circumstantial evidence,” Section (I)(c)(ii)(2), this Digest.

(r) pleading conspiracy to commit genocide

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 344: “Defined as an agreement between two or more persons to commit the crime of genocide, the crime of conspiracy as set forth in Article 2(3)(b) of the Statute comprises two elements, which must be pleaded in the indictment: (i) an agreement between individuals aimed at the commission of genocide; and (ii) the fact that the individuals taking part in the agreement possessed the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such.”

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 92: “[T]he Appeals Chamber considers that, at a minimum, conspiracy to commit genocide consists of an agreement between two or more persons to commit the crime of genocide. The existence of such an agreement between Bagambiki, Imanishimwe, and potentially other persons, should thus have been pleaded in the Bagambiki/Imanishimwe Indictment as a material fact.”

For discussion of the elements of conspiracy to commit genocide, see “conspiracy to commit genocide” Section (I)(e)(ii), this Digest.

(i) may not rely on allegations pled regarding other counts

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 70: “The Chamber rejected the argument that it ‘can hold Zigiranyirazo accountable for conspiring to commit genocide on the basis of evidence and allegations pleaded in connection with the Counts of genocide, complicity in genocide, and the crimes against humanity of extermination and murder.’”

See, e.g., Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 73, 77: “[T]he Prosecution led evidence of the Accused’s participation in an attack against Tutsi gathered at Kesho Hill [in Rwili secteur, Gaseke commune, in Gisenyi prefecture] on 8 April 1994 in support of allegations pleaded in the Indictment under the counts of genocide, or, alternatively, complicity in genocide. In its Closing Brief, the Prosecution submits that this evidence should also be considered in connection with the count of conspiracy to commit genocide.” “The Chamber is of the view that to the extent the Prosecution sought to include these allegations as part of the count of conspiracy to commit genocide, it should have pleaded the allegations unambiguously in the concise statement of facts supporting that count. The Chamber finds that the Indictment was defective in this respect.” *See also id.*, paras. 79-80 (refusing to consider fact pled as part of charge of murder as a crime against humanity as pertaining to the conspiracy charge).

Compare “read the indictment as a whole,” Section (VIII)(c)(xix)(6)(f), this Digest.

(ii) evidence of meetings not properly pled as to conspiracy may be relevant to other allegations properly pled

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 144: “The Chamber . . . may still consider the evidence of meetings for which the Prosecution failed to provide notice to the extent they are relevant to the proof of other allegations properly pleaded in the Indictment.”

(iii) application

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 100: “The Appeals Chamber has found that [the Indictment] failed to plead the material fact that Bagambiki, Imanishimwe and others agreed to commit genocide, and that [it] was too vague, because it did not indicate the nature of Bagambiki’s and Imanishimwe’s participation in [certain] meetings.” *See also Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 70 (similar).

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 27, 29: “[T]he Prosecution should have expressly pleaded the following material facts [if it intended a certain meeting to be part of the charge of conspiracy to commit genocide]: that the Accused attended a meeting at Kanombe on the night of 6 April 1994; the names of the other persons alleged to be at the meeting, including the Accused’s sister, Agathe Kanziga; and that the Accused participated in drawing up a list of persons to be killed at that meeting. The Chamber finds that the Indictment is therefore defective in that respect.” (The Trial Chamber also rejected that this defect was cured.) “The Chamber therefore concludes that the Prosecution failed to discharge its burden to properly inform Zigiranyirazo that it intended to rely on this meeting as a fact underpinning the charge of conspiracy to commit genocide, and that this failure materially impaired the Accused’s ability to prepare his defence with respect to the meeting.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 30, 32, 33: “Prosecution Witness AVY testified that he was summoned to serve as a security guard at a meeting at Umuganda Stadium in Gisenyi in the ‘last week of April’ 1994, and that during the

meeting the Accused addressed the crowd and encouraged killings.” “The Prosecution contends that the allegations concerning Umuganda Stadium are contained in paragraphs 5, 7 and 9 of the Indictment” “The Chamber considers that paragraph 5 does not refer to any specific meetings at which such attacks were planned, prepared or facilitated, or where any agreement to plan, prepare or facilitate such attacks was reached. To the extent that this paragraph is intended to allege specific material facts, as opposed to generally introduce the Prosecution’s conspiracy charge, the Chamber finds that it is defective.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 37, 38: “The introductory sentence of paragraph 9 [of the Indictment] alleges that the Accused attended meetings in April 1994 with military leaders in Gisenyi and Ruhengeri, including Colonel Anatole Nsengiyumva. The paragraph does not refer to any specific meetings. The Chamber does not consider that this sentence provided the Defence with any notice of the rally at Umuganda Stadium in the last week of April 1994 to which Witness AVY testified.” “The Chamber considers the allegations regarding the meeting at Umuganda Stadium to be material facts which ought to have been specifically pleaded.”

See also Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 65 (pleading “various meetings to plan, organize and facilitate attacks on Tutsi in Gisenyi *préfecture* is too general to provide adequate notice of any specific meeting”); *see also id.* para. 35 (similar).

(s) discrepancies/vagueness

(i) minor discrepancies acceptable, as long as not prejudicial to the defense

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 471: “In the *Rutaganda* case, the Appeals Chamber found that, before holding that an alleged fact is not material or that differences between the wording of the indictment and the evidence adduced are minor, a trial chamber should generally ensure that such a finding is not prejudicial to the accused. An example of such prejudice would be vagueness capable of misleading the accused as to the nature of the criminal conduct with which he is charged.” *See Rutaganda*, (Appeals Chamber), May 26, 2003, para. 303 (cited).

(ii) discrepancies/vagueness as to dates

Muvunyi, (Appeals Chamber), August 29, 2008, para. 58: “The Appeals Chamber notes that . . . the Indictment specifies the dates of the attack only as ‘during the events referred to in this indictment,’ thereby providing a date range from mid-April through June 1994. This date range appears broad; however, a broad date range, in and of itself, does not invalidate a paragraph of an indictment.”

Ndindabahizi, (Appeals Chamber), January 16, 2007, paras. 19-20: “A date may be considered to be a material fact if it is necessary in order to inform a defendant clearly of the charges so that he may prepare his defence. If a date is found to constitute a material fact, it must be pleaded with sufficient specificity, as stated by the ICTY Appeals Chamber:

An indictment may also be defective when the material facts are pleaded without sufficient specificity, such as, unless there are special circumstances, when the times refer to broad date ranges [...].”

“The precision with which dates have to be charged varies from case to case. It has also been acknowledged by the ICTY Appeals Chamber that ‘[...] an accused may be charged with having participated [...] in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings [...].’ Also, the ICTY Appeals Chamber held that ‘there may be instances where the sheer scale of the alleged crimes “makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.”’ In cases where timing is of material importance to the charges, more specific information should be provided. However, in particular in light of the events that occurred in Rwanda in 1994, the Appeals Chamber is mindful of the fact that it is not always possible to be precise as to the specific date on which the crimes charged were committed. Nevertheless, these considerations have to be balanced with the accused’s right to be informed in detail about the nature and cause of the charge against him in order to allow a comprehensive defence to be raised.”

Nchamihigo, (Trial Chamber), November 12, 2008, paras. 36-37: “The precision with which dates have to be charged varies from case to case, and a broad date range, in and of itself, does not invalidate a paragraph of an indictment. In certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes.” “Nevertheless, these considerations have to be balanced with Nchamihigo’s right to be informed in detail and in time about the nature and cause of the charges against him or her to prepare his defence.”

See, e.g., Ndindabahizi, (Appeals Chamber), January 16, 2007, paras. 21-22: Where the Indictment alleged “the Accused ‘led or participated’ in attacks on Tutsi civilians at Gitwa Hill ‘over the course of several days, between 13 and 26 April 1994,” the Appeals Chamber held:

“The Indictment alleges that over the course of 13 days a continued attack was sustained against Tutsi refugees taking shelter at Gitwa Hill. Thus, the Prosecution case was premised upon a series of attacks which took place over the course of several days. The Defence itself also characterised the Prosecution case in this manner during closing arguments when it stated that the Appellant was accused in paragraphs 15 and 20 of the Indictment of ‘being in charge of a series of attacks.’”

“Given the nature of the Prosecution case, the date range of 13 days sufficiently specified the date range for the crimes alleged. It provided the Appellant with enough information to know the nature of the charges against him and to prepare his defence. His participation was found to have occurred at various specific dates within the time period pleaded in the Indictment.” *See Ndindabahizi*, (Trial Chamber), July 15, 2004, paras. 32-34 (quoting the indictment and finding pleading of the date range acceptable).

See, e.g., Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 13: “[T]he use of the phrase [in the indictment] ‘on or about’ to which the Appellant objects, is not enough to undermine the notice that was given to the Appellant.”

See, e.g., Rutaganda, (Appeals Chamber), May 26, 2003, paras. 296, 304-05: Where the Indictment pled: “On or about 6 April 1994, Georges RUTAGANDA distributed guns and other weapons to *Interahamwe* members in Nyarugenge commune, Kigali,” and the Trial Chamber found that Rutaganda “distributed weapons on 8 and 15 April 1994, and on or around 24 April 1994,” the Appeals Chamber held that the Indictment contained “a sufficiently concise description of the criminal conduct with which the accused was charged,” and “the Appellant suffered [no] prejudice.” *See also id.*, paras. 302-03, 306 (detailing reasoning).

Compare Muvunyi, (Appeals Chamber), August 29, 2008, paras. 114, 121-22: “The Trial Chamber convicted Muvunyi pursuant to Article 6(1) of the Statute for direct and public incitement to commit genocide based, in part, on a speech he gave in Gikonko in Mugusa Commune.”

“[T]he Appeals Chamber agrees with Muvunyi that the reference in . . . the Indictment to a meeting ‘in Mugusa Commune sometime in late April 1994’ did not provide him with adequate notice that he would be held responsible for the specific meeting in Gikonko at the end of May or in June 1994.”

“[T]he Indictment indicates that the list of meetings therein is not exhaustive [listing a number of meetings preceded by the words “such as”], thus potentially incriminating Muvunyi in other events in Butare prefecture. While in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes, this is not the case with respect to Muvunyi’s address in Gikonko at the end of May or June 1994. The Indictment was thus defective because it did not adequately plead the material facts related to the approximate time or place of this crime.”

Compare Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 70-71: “In *Rutaganda*, the Appeals Chamber confronted the situation in which an Indictment specifically pleaded that the accused distributed weapons ‘on or about 6 April 1994,’ but the Trial Chamber held that distribution occurred ‘on 8 and 15 April 1994, and on or around 24 April 1994.’ The Appeals Chamber held that this discrepancy did not violate the rights of the accused, stating that ‘in general, minor differences between the indictment and the evidence presented at trial are not such as to prevent the Trial Chamber from considering the indictment in the light of the evidence presented at trial.’ In that case, however, the Indictment ‘d[id] not show that the Prosecution necessarily envisaged only a single act of weapons distribution’ and the accused had shown no prejudice due to the variation in the date of the distribution. The posture in this case is different. The Bisesero Indictment did not mention the Murambi or Gitwe attacks at all, let alone indicate a general date for their occurrence. Moreover, the information that the Prosecution suggests remedied this defect in the Indictment – Annex B and Witness FF’s witness statements – not only reflected that the attacks occurred in different months, but actually *excluded* the dates proffered at trial by stating that the witness was elsewhere on those dates. The Defence would have been quite justified in thinking, based on Witness FF’s witness statements, that it did not need to present an alibi for a Murambi attack on 18 April 1994. Had the Appellants known of

the dates that the Prosecution eventually advanced at trial, they might have challenged Witness FF's trial testimony by seeking out witnesses who would support the testimony given in Witness FF's statement, such as the 'Hutu colleague' who welcomed Witness FF into her home for the day of 18 April, according to the statement."

See also Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 41 (discussion of broad and open-ended date ranges and vague identification of locations).

(iii) discrepancies/vagueness as to location

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 75-76: "[The ICTY decision in] *Kupreškić* did not expressly address the application of its 'sheer scale' pronouncement to material facts regarding the location of crimes. There may well be situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations. In cases concerning physical acts of violence perpetrated by the accused personally, however, location can be very important. If nothing else, notice of the alleged location of the charged activity permits the Defence to focus its investigation on that area. When the Prosecution seeks to prove that the accused committed an act at a specified location, it cannot simultaneously claim that it is impracticable to specify that location in advance." "In this case, the Prosecution specifically sought to show, through the evidence of Witness FF, that Gérard Ntakirutimana participated in an attack at Kidashya Hill. Witness FF's identification of that location itself refutes the argument that identifying it was somehow 'impracticable.' The 'sheer scale' discussion in *Kupreškić* therefore does not apply here."

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 66: "[T]he allegation in the Bisesero Indictment that the Appellants participated in attacks 'in the area of Bisesero which continued almost on a daily basis for several months' does not adequately inform them that the Prosecution intended to charge participation in specific attacks at Murambi or at Gitwe [A]n Indictment must 'delve into particulars' where possible." *See also id.*, para. 81 (same allegation did not provide notice as to an attack at Mutiti).

Muhimana, (Trial Chamber), April 28, 2005, paras. 421-22: "In a similar situation which arose in *Niyitegeka*, the Appeals Chamber held that general allegations of attacks occurring in 'Kibuye' or in 'Bisesero' did not give specific notice of the location of an attack occurring on Muyira Hill. Neither did the Indictment disclose the date of the attack. In the opinion of the Appeals Chamber, these omissions created a presumption that the Defence was materially impaired in answering the allegation. The Prosecution failed to rebut this presumption." "Although in the instant case the Indictment does specify a date, 28 June 1994, the allegation as to the location is equally as vague as that which the Appeals Chamber rejected as insufficient in *Niyitegeka*. Similarly, in the present case, the Prosecution failed to demonstrate that it provided clear, timely, and consistent notice to the Defence in order to cure the defect."

Compare Muhimana, (Appeals Chamber), May 21, 2007, paras. 168-70, 179-81 (indictment that alleged rapes at “Mugonero hospital” gave sufficient notice of rapes in the basement of the hospital; indictment that alleged rapes at the medical school in the Mugonero complex gave sufficient notice of rapes in the basement of the hospital).

Compare Karera, (Trial Chamber), December 7, 2007, para. 183: “According to paragraph 33 of the Indictment, Kahabaye was killed at the roadblock in front of Karera’s house on 7 April 1994. Based on the evidence, the Chamber has found that he was killed in the neighbouring commune between 8 and 10 April. In the present case, these discrepancies had limited significance. The identity of the victim was known, there was proximity in time, and Karera gave the order to kill Tutsi at the roadblock in front of his house. As mentioned above . . . , the Defence did not make any contemporaneous objection and the Chamber cannot see that the minor variance between the Indictment and the evidence at trial caused any prejudice to the Defence.”

Compare Kamubanda, (Trial Chamber), January 22, 2004, paras. 57, 59: Where the indictment alleged the Accused supervised killing in Gikomero commune, Kigali-Rural prefecture, the Trial Chamber held: “the Indictment is not vague and that it sufficiently gave the Defence notice of the allegations relating to Kigali-Rural Préfecture within which the Catholic Parish of Gishaka is located.” Additionally the Prosecutor’s opening statement “sets out allegations with respect to the involvement of the Accused in events that occurred in Gishaka Parish. It is also noted that the Prosecutor filed exhibits identifying locations at the Gishaka Catholic Parish.”

See also Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 41 (discussion of broad and open-ended date ranges and vague identification of locations).

(t) aggravating factors must be pled

Simba, (Appeals Chamber), November 27, 2007, para. 82: “[F]or sentencing purposes, a Trial Chamber may only consider in aggravation circumstances pleaded in the Indictment.”

(u) accused not given notice by factual allegations in other indictment where joint trial

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 60: Where the defendants were tried under two separate indictment, and the Prosecution argued the indictments should be read as a whole, the Appeals Chamber held: “although Ntagerura was mentioned in the Bagambiki/Imanishimwe Indictment, the Appeals Chamber cannot conclude that he was put on notice that the allegations in that Indictment would underpin the charges in the Indictment against him.”

(v) error for Trial Chamber to view evidence where no adequate notice

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, paras. 69, 67: “The Appeals Chamber notes that despite having found defects in some paragraphs of the Indictments, the Trial Chamber continued to make factual findings on the basis of such paragraphs.” “The Appeals Chamber considers that the statement made by the

ICTY Appeals Chamber in *Kupreškic et al.* that ‘it might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused’ does not permit a Trial Chamber to consider material facts of which the accused was not adequately put on notice The Appeals Chamber emphasises that if the indictment is found to be defective at trial, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. No conviction may be pronounced where the accused’s right to a fair trial has been violated because of a failure to provide him with sufficient notice of the legal and factual grounds underpinning the charges against him.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Separate Opinion of Judge Pavel Dolenc, para. 4: “[W]here there has not been fair notice to the accused, a Chamber should not consider the evidence of the Prosecution, because this evidence has not necessarily been tested and challenged by the adversarial methods of well-prepared cross-examination or defence evidence presented in the defence case.”

See also Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), Judge Schomburg’s Dissenting Opinion, July 7, 2006, para. 2: “I am of the opinion that not only is the Indictment against André Ntagerura vague, but it must also be declared null and void as none of the crimes with which the Accused is charged is sufficiently pleaded and the scope of the charges is not sufficiently defined.”

(w) prosecution should remove facts it does not intend to prove

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 43: “The Prosecution should make every effort to ensure not only that the indictment specifically pleads the material facts that the Prosecution intends to prove but also that any facts that it does not intend to prove are removed. The same applies to other communications that give specific information regarding the Prosecution’s intended case, such as the Pre-Trial Brief. It would be a serious breach of ethics for the Prosecution to draw the Defence into lengthy and expensive investigations of facts that the Prosecution does not intend to prove at trial.”

7) certain defects in the indictment may be “cured” by timely, clear and consistent information

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 20, 120: “An indictment lacking . . . precision is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 100 (same); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 325 (similar); *Simba*, (Appeals Chamber), November 27, 2007, para. 64 (similar); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 76 (similar); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 195 (same as *Muvunyi*); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 30 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 49 (similar); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 24 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 356 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 195 (similar); *Bagosora, Kabiligi*,

Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 116 (same as *Muvunyi*); *Simba*, (Trial Chamber), December 13, 2005, para. 135 (similar).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 29: “When challenges to an indictment are raised on appeal, amendment of the indictment is no longer possible and so the question is whether the error of trying the accused on a defective indictment ‘invalidat[ed] the decision’ and warrants the Appeals Chamber’s intervention. In making this determination, the Appeals Chamber does not exclude the possibility that, in some instances, the prejudicial effect of a defective indictment can be ‘remedied’ if the Prosecution has provided the accused with clear, timely and consistent information detailing the factual basis underpinning the charges against him or her, which compensates for the failure of the indictment to give proper notice of the charges.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 402: “[A] vague or otherwise defective indictment can be cured through these means if it merely fails to set out the particulars of the Prosecution case with sufficient specificity.”

(a) assess whether accused was in a reasonable position to understand the charges, whether the defect caused prejudice or whether the trial was rendered unfair

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 27: “The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the *Kupreškić* Appeal Judgement put it, whether the trial was ‘rendered unfair’ by the defect.” See also *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 18 (similar).

Karera, (Trial Chamber), December 7, 2007, para. 15: “Defects in an Indictment may be ‘cured’ in exceptional circumstances if the Prosecution subsequently provides the accused with ‘timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.’ . . . Finding that a defect in the Indictment has been cured depends on ‘whether the accused was in a reasonable position to understand the charges against him or her.’ The presence of a material fact somewhere in the Prosecution disclosures during the course of a case does not suffice to give reasonable notice; rather, it must be evident that the material fact will be relied upon as part of the Prosecution case.” See also *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 14 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 29 (similar).

(b) prosecution’s pre-trial brief, opening statement, or witness charts annexed to pre-trial brief may “cure” defects

Muvunyi, (Appeals Chamber), August 29, 2008, para. 28: “[T]he Appeals Chamber has previously held that a pre-trial brief can, in certain circumstances, cure a defect in an indictment” See also *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 116 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 325 “This information [pled in the Indictment] could, *inter alia* and depending on the circumstances, be supplied in the Prosecutor’s pre-trial brief or opening statement.” *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 130 (similar); *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 39 (similar).

Simba, (Appeals Chamber), November 27, 2007, para. 64: “In determining whether a defective indictment was cured, the Appeals Chamber has previously looked at information provided in the Prosecution’s pre-trial brief, its opening statement, as well as the witness charts annexed to the Prosecution pre-trial brief. The Appeals Chamber has furthermore held that an accused’s submissions at trial, for example the motion for judgement of acquittal, final trial brief or closing arguments, may assist in some instances in determining to what extent the accused was put on notice of the Prosecution’s case.” *See also Mpambara*, (Trial Chamber), September 11, 2006, para. 30 (similar).

Karera, (Trial Chamber), December 7, 2007, para. 15: “[T]he Prosecution Pre-Trial Brief (together with any annexes and charts of witnesses) and the Prosecution’s opening statement are adequate sources of disclosure [to cure a defective indictment].”

Muvunyi, (Trial Chamber), September 12, 2006, para. 402: “It is clear from the jurisprudence of the *ad hoc* Tribunals that in certain limited circumstances the Prosecution may cure a defective indictment by giving timely, clear and consistent notice to the Defence through subsequent communications such as the Pre-Trial Brief, witness statements, or the opening statement.”

Mpambara, (Trial Chamber), September 11, 2006, para. 165: “A Trial Chamber may permit material facts to be communicated to the Defence after the filing of the indictment as, for example, through the Pre-Trial Brief, opening statement, or other communications which make clear to the Defence that the material fact is part of the Prosecution case, and how it is relevant to the charges.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 29: “Where a defect in the indictment in relation to certain evidence adduced is only raised at the end of the trial, the Trial Chamber may consider whether the defect has been cured by notice to the Defence by other means, such as the Prosecution Pre-trial Brief, disclosure of evidence, or proceedings at trial.”

Compare Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 66 (being critical of having to “sift through voluminous disclosures, witness statement, and written or oral submissions in order to determine what facts may form the basis of the accused’s alleged crimes . . .”).

For application, see “application—‘curing’ permitted,” and “application—‘curing’ not permitted,” Sections (VIII)(c)(xix)(7)(l)-(m), this Digest.

(c) service of witness statements alone not a “cure”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 221: “As a general matter, ‘mere service of witness statements by the prosecution pursuant to the disclosure requirements’ of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.” *See also Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 27 (same quoted language); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 197 (similar); *Karera*, (Trial Chamber), December 7, 2007, para. 15 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 30 (similar); *Muhimana*, (Trial Chamber), April 28, 2005, para. 452 (similar).

Compare Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 57: “The ICTY Appeals Chamber was recently confronted with similar circumstances in the *Naletilic and Martinovic* case: the material facts concerning a particular incident were not pleaded in the indictment, but were included in a chart of witnesses that set forth the facts to which each witness would testify and clearly identified the charges in the indictment to which those facts corresponded. The Appeals Chamber held that this ‘rather detailed information . . . was sufficient to put Martinovic on notice of what specific incident was being alleged,’ and thus cured the defect in the indictment Likewise, in *Ntakirutimana*, the Appeals Chamber held that a witness statement, when taken together with ‘unambiguous information’ contained in a Pre-Trial Brief and its annexes, was sufficient to cure a defect in an indictment.”

Compare Bikindi, (Trial Chamber), December 2, 2008, para. 20: “The Chamber is of the opinion that the Summary of Anticipated Testimony of Prosecution Witnesses, together with the written statements of [two witnesses] provided timely, clear and consistent information sufficient to put Bikindi on notice that the Prosecution intended to charge him with genocide on the basis of the . . . [two] killings [not sufficiently pled in the Indictment].”

For application, see “application—‘curing’ permitted,” and “application—‘curing’ not permitted,” Sections (VIII)(c)(xix)(7)(l)-(m), this Digest.

(d) closing brief not a “cure”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 78: “The Chamber recalls that the first time the Prosecution gave notice of its intention to hold Zigiranyirazo accountable for conspiracy on the basis of the allegations with respect to Kesho Hill [in Rwili secteur, Gaseke commune, in Gisenyi prefecture] was in its Closing Brief. The Chamber considers that this was not timely or clear enough to cure the defect, and that this materially impaired the Accused’s ability to prepare his defence.” *See also id.*, para. 72 (material in the prosecution’s closing brief failed to provide the defence with “timely, clear and consistent information”).

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 665: “The Prosecutor also alleged in its closing brief that Ntagerura should be held criminally responsible for deliberately inflicting on members of the Tutsi ethnic group conditions of life calculated to bring about their destruction, which is a crime under Article 2(2)(c)

of the Statute. The Chamber will not consider this allegation however because it was not charged in the Ntagerura Indictment.”

See also Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2219-21 (excluding incidents of inhumane treatment presented only in the prosecution’s closing brief).

See also Seromba, (Trial Chamber), December 13, 2006, para. 313 (excluding the “approving spectator” theory where presented only in the final trial brief).

(e) in evaluating acceptability of “cure,” consider timing, importance of the information to accused’s ability to prepare the defence, and impact of the newly-disclosed material

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 27: “*Kupreškić* considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in the Prosecution’s pre-trial brief, during disclosure of evidence, or through proceedings at trial. In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution’s case are relevant.” *See also Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 197 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 29 (similar).

See, e.g., “application—‘curing’ not permitted,” “‘cure’ must be timely,” Section (VIII)(c)(xix)(7)(m)(x), this Digest.

(f) burden on prosecution to show “cure” caused no prejudice/ ability to prepare the defense was not materially impaired

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 77: “[O]n the question of whether communications of information sufficed to cure an indictment defect, the Prosecution bears the burden of demonstrating that the new [information] that became known at trial caused no prejudice to the Appellant.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 58: “The [indictment] defect may only be deemed harmless ‘through demonstrating that [the accused’s] ability to prepare their defence was not materially impaired.’ *Kupreškić* places this burden of showing that the Defence was not materially impaired squarely on the Prosecution.”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 198: “In considering whether a defect in the indictment has been cured by subsequent disclosure, the question arises as to which party has the burden of proof on the matter. Although the Judgement in [the ICTY’s] *Kupreškić* [case] did not address this issue expressly, the Appeals Chamber’s discussion indicates that the burden in that case rested with the Prosecution. *Kupreškić* stated that, in the circumstances of that case, a breach of ‘the substantial safeguards that an indictment is intended to furnish to the accused’ raised the presumption ‘that such a

fundamental defect in the . . . Indictment did indeed cause injustice.’ The defect could only have been deemed harmless through a demonstration ‘that [the Accused’s] ability to prepare their defence was not materially impaired.’ *Kupreskić* clearly imposed the duty to make that showing on the Prosecution, since the absence of such a showing led the Appeals Chamber to ‘uph[o]ld the objections’ of the accused.”

See also “time to raise/waiver of indictment defects” and “burden of proof as to indictment defects,” Sections (VIII)(c)(xix)(9)-(10), this Digest.

(g) “cure” may not lead to a radical transformation of the case

Muvunyi, (Appeals Chamber), August 29, 2008, para. 20: “[T]he principle that a defect in an indictment may be cured is not without limits. In this respect, the Appeals Chamber has previously emphasized:

[T]he ‘new material facts’ should not lead to a ‘radical transformation’ of the Prosecution’s case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.”

See also id., para. 165 (same); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 406 (similar); *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 18 (similar); *Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, (Trial Chamber), December 18, 2008, para. 116 & footnote 96 (similar).

See, e.g., “‘cure’ not permitted where indictment alleged wrong soldiers committed rapes; would have been a radical transformation,” Section (VIII)(c)(xix)(7)(m)(iii), this Digest.

(h) omitted counts or charges not subject to “cure”/ must amend the indictment; only “vagueness” or “ambiguity” may be “cured”

Muvunyi, (Appeals Chamber), August 29, 2008, para. 156: “The omission of a count or charge from an indictment cannot be cured by the provision of timely, clear, and consistent information.”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 325: “A clear distinction has to be drawn between vagueness or ambiguity in the indictment and an indictment which omits certain charges altogether. While it is possible to remedy ambiguity or vagueness in an indictment by providing the defendant with timely, clear and consistent information detailing the factual basis underpinning the charges, omitted charges can be incorporated into the indictment only by formal amendment under Rule 50 of the Rules.” *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 32 (similar).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 126: “The Appeals Chamber reiterates that no new charges may be introduced outside the

indictment, which is the only accusatory instrument of the Tribunal. Indeed, this is the view held by the Trial Chamber Nonetheless, the Appeals Chamber does not consider that an indictment may not be ‘supplemented, completed or corrected’ under any circumstances. There is consistent jurisprudence that a defective indictment due to ambiguity or vagueness can be cured, in some instances, if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.”

Karera, (Trial Chamber), December 7, 2007, para. 15: “Omission of a count or charge from the Indictment cannot be cured but ‘omission of a material fact underpinning a charge in the Indictment can, in certain cases, be cured by the provision of timely, clear and consistent information.’”

Muvunyi, (Trial Chamber), September 12, 2006, paras. 405-06: “[T]he Prosecution cannot amend an existing charge in an indictment or introduce a new charge without following the proper procedure. Rule 50 deals with the amendment of indictments. Once the indictment is confirmed it can be amended only with leave of the Confirming Judge or the Trial Chamber, as the case may be. If new charges are added when the accused has already made an initial appearance before a Trial Chamber, a further appearance shall be held in order to enable the accused to enter a plea on the new charges.” “These provisions would be null and void if the Prosecution could amend existing charges merely by giving notice in the opening statement or Pre-Trial Brief. As mentioned earlier, if the existing charge were merely vague or otherwise defective, such defects could be cured by providing timely, clear, and consistent notice. However, when these are new charges, the matter has to be referred to the Chamber to have the indictment amended.” (Note that most of Muvunyi’s convictions were overturned on appeal, several for indictment defects.)

See, e.g., Bikindi, (Trial Chamber), December 2, 2008, para. 418: “The Trial Chamber considers that the allegation . . . [in] the Prosecution Pre-Trial Brief that Bikindi was charged with direct and public incitement to commit genocide under Article 6(3) of the Statute for his responsibility as a superior constitutes a new charge which, to be considered as validly made, would have required the Prosecution to seek leave to amend the Indictment. Accordingly, the Chamber considers that Bikindi is not charged . . . pursuant to Article 6(3) of the Statute.”

(i) error for Trial Chamber not to consider whether indictment defects were “cured”

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 65: “[I]t is apparent from the Trial Judgement that the Trial Chamber did not consider whether the defects in the Indictments were cured [T]he Appeals Chamber considers that the Trial Chamber, in fulfilling its obligation to consider whether or not the trial was fair, should have evaluated whether the defects were cured. The Trial Chamber erred in failing to do so. As a result, where applicable, the Appeals Chamber will consider the Prosecution’s argument that the defects in the Indictments were cured.” *See also id.*, para. 134 (it was error to proceed to make factual findings as to events found to be vaguely pled in the Indictment “without first determining whether [the Accused] received timely,

clear and consistent information detailing the factual basis underpinning the allegations in question”).

(j) “cures” must be the exception/used in a limited number of cases

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 325: “The Appeals Chamber would nonetheless emphasize that the possibility of curing defects in the indictment is not unlimited.”

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 114: “Although the Appeals Chamber allows that defects in an indictment may be ‘remedied’ under certain circumstances, it emphasizes that this should be limited to exceptional cases. In the present case, the Appeals Chamber is disturbed by the extent to which the Prosecution seeks to rely on this exception.”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 55: “As the ICTY Appeals Chamber explained in *Kupreškic*:

[I]n some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.”

See also *Gacumbitsi*, (Appeals Chamber), Joint Separate Opinion Of Judges Liu and Meron, July 7, 2006, para. 3 (endorsing same).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 125: “The Appeals Chamber . . . stresses to the Prosecution that the practice of failing to allege known material facts in an indictment is unacceptable and that it is only in exceptional cases that such a failure can be remedied, 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.’ The Appeals Chamber emphasises that, when material facts are unknown at the time of the initial indictment, the Prosecution should make efforts to ascertain these important details through further investigation and seek to amend the indictment at the earliest opportunity.”

Karera, (Trial Chamber), December 7, 2007, para. 15: “Defects in an Indictment may be ‘cured’ in exceptional circumstances”

Muhimana, (Trial Chamber), April 28, 2005, para. 452: “Where an Indictment fails to include material facts, or sufficient detail on those material facts, this constitutes a material defect in what is the principal accusatory instrument, and curative action must be taken. Few Indictments with material defects are likely to be cured by information given to the Defence outside the Indictment, in view of the factual and legal complexity of the crimes heard by the *ad hoc* tribunals. It is a possibility in a few cases that the Prosecution might cure the defect by giving timely, clear, and consistent information concerning the factual basis of the charge in relatively uncomplicated cases Clear

notice must be given and, until that time, the Defence is entitled to assume that the material facts enumerated in the Indictment are exhaustive and represent the case it has to meet.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 65: “In [the ICTY’s] *Kupreskic* [case], . . . [t]he Appeals Chamber . . . emphasised that ‘in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases [where curing is permitted].’”

(k) cumulative effect of indictment defects: consider whether trial rendered unfair

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 114: “Even if the Prosecution had succeeded in arguing that the defects in the Indictments were remedied in each individual instance, the Appeals Chamber would still have to consider whether the overall effect of the numerous defects would not have rendered the trial unfair in itself.”

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 123: “[T]he Chamber has acknowledged that in a number of instances the Indictments against the Accused were defective with respect to several of the specific factual allegations advanced by the Prosecution. It determined that in many of these cases the defects were cured by timely, clear and consistent information, normally found in the Pre-Trial Brief or a motion to add a witness. The Appeals Chamber has held that, even if a Trial Chamber finds that the defects in the indictment have been cured by post-indictment submissions, it should consider whether the extent of these defects materially prejudiced the accused’s right to a fair trial by hindering the preparation of a proper defence.”

(i) application—cumulative defects

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 124-27: “The Chamber observes that, where defects have been cured, they relate to more generally worded paragraphs and do not add new elements to the case. The curing for the most part was based on the Pre-Trial Brief and its revision filed nearly a year before the Prosecution began presenting the majority of its witnesses in June 2003. Furthermore, there have been a number of breaks throughout the proceedings which have allowed the parties to conduct investigations and prepare for evidence in upcoming trial sessions. The Chamber has also frequently exercised its discretion, where appropriate, to exclude evidence, to postpone all or part of a witness’s testimony, and to grant recall for further cross-examination.”

“At its core, this case is, and has always been, about the alleged role of the Accused as senior military leaders who were involved in planning and preparations of the genocide and then used their authority to unleash the violence which occurred after the death of President Habyarimana. The Indictments clearly plead this role. When the individual Indictments are read as a whole they reasonably identify their subordinates by category with further geographic and temporal details related to individual events. The specific massacres and crimes, whether specifically pleaded in the Indictments or cured

through timely, clear and consistent information, remain largely undisputed. The identity of many of the principal perpetrators are also not for the most part in dispute. Knowledge of the crimes has flowed mainly from their open and notorious or widespread and systematic nature. Furthermore, the Accused's exercise of authority to advance the crimes or fail to prevent them is a product of their clearly identified positions and the organised nature of the attacks. Notice of their knowledge as well as their participation in the crimes follow from reading the Indictments as a whole."

"In the final analysis, the Defence teams' ability to prepare their case is amply demonstrated by their ultimate success in impeaching much of the Prosecution's evidence against them, through cross-examination, argumentation and evidence. A careful consideration of the Defence conduct during the course of trial and in their final submissions plainly reflects that they have mastered the case." "Accordingly, the trial has not been rendered unfair due to the number of defects in the Indictments which have been cured."

(l) application—"curing" permitted

Muhimana, (Appeals Chamber), May 21, 2007, para. 82: "In the *Gacumbitsi* Appeal Judgement, the Appeals Chamber held that a summary of an anticipated testimony in an annex to the Prosecution's pre-trial brief could, in certain circumstances, cure a defect in an indictment. The circumstance at hand is similar to that in the *Gacumbitsi* case in that the summary of the anticipated testimony provides greater detail that is consistent with a general allegation pleaded in the Indictment. The Pre-Trial Brief therefore provided the Appellant with timely, clear, and consistent information sufficient to put him on notice that he was being charged with committing genocide by throwing a grenade at Tutsis, wounding Witness BC, and killing her three children at Ngendombi Hill. Therefore, the Appellant has failed to demonstrate that the Trial Chamber erred in its consideration of his arguments pertaining to the vagueness of . . . the Indictment." *See also id.*, paras. 201, 223 (similar).

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 58: "By majority, the Appeals Chamber holds, Judge Liu and Judge Meron dissenting, that the circumstances in this case are materially indistinguishable from those in *Naletilic and Martinovic*, and that the summary of Witness TAQ's testimony was sufficient to clarify the general statement, already included in the genocide section of the Indictment, that 'Sylvestre Gacumbitsi killed persons by his own hand.' The summary clearly alleged the killing of Mr. Murefu and connected it to the genocide, did not conflict with any other information that was provided to the Appellant, and was provided in advance of the trial. It therefore unambiguously constituted 'timely, clear, and consistent information' sufficient to put the Appellant on notice that he was being charged with committing genocide through the killing of Mr. Murefu." *But see Gacumbitsi*, (Appeals Chamber), Joint Separate Opinion Of Judges Liu and Meron, July 7, 2006 (arguing that chart entry annexed to pre-trial brief did not cure defect as to pleading Gacumbitsi killed Mr. Murefu, which was the basis of the Trial Chamber's conviction for "committing" genocide).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 38, 39, 41: "In order to satisfy *Kupreskić* . . . the disclosure made in the Pre-Trial Brief and Annex B must . . . be found to be timely, such that the Defence suffered no prejudice

from the failure of the Indictment to allege specifically that Gérard Ntakirutimana killed Ukobizaba.” “Unlike in *Kupreskić*, where the unpleaded facts represented a ‘drastic change in the Prosecution case’ and were coupled with ‘ambiguity as to the pertinence’ of the underlying evidence, which was only disclosed in the weeks before trial, here the fact of Ukobizaba’s killing fit directly into the Prosecution’s case as pleaded in the Mugonero Indictment, was clearly supported by two previously-disclosed witness statements, and was made unambiguously known to the Appellants two months before trial.” “. . . [W]hile Gérard Ntakirutimana is correct that the witness statements alone were not sufficient to overcome the defect in the Indictment, the explicit mention of Ukobizaba’s murder in the Pre-Trial Brief and Annex B’s identification of [certain witnesses] as the witnesses on which the Prosecution would rely, when combined with the previously-disclosed statements of those two witnesses, constitute the ‘timely, clear, and consistent information’ required by *Kupreskić*.”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 225: “Although the Muyira Hill attack of 13 May 1994 was not specifically alleged in the indictment, it was clear from the Prosecution’s Pre-Trial Brief that the Prosecution intended to charge the Appellant with participation in an attack on that date and at that location, and that testimony would be adduced stating that the Appellant was armed and shot at Tutsi refugees Accordingly, the Prosecution gave the Appellant clear, consistent and timely information that the Prosecution would offer evidence of the Appellant’s role in the 13 May 1994 attack at Muyira Hill and would do so through Witness GGY. Thus, any defect in the indictment in this regard was cured.” *See also id.*, paras. 236-37 (other pleading defect cured by information in the pre-trial brief).

Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, paras. 2219-21: “The sole reference in the Indictments to inhumane treatment is the sexual assault of Prime Minister Uwilingiyimana” “However, the Chamber accepts that notice was provided in the Prosecution’s Pre-Trial Brief for the prevention of refugees killed at Nyanza hill from seeking sanctuary, the sheparding of Tutsis to Gikondo Parish to be killed in a house of worship, the stripping of women at the Saint Josephite centre and the torture and murder of Alphonse Kabiligi in front of his family.” (But excluding incidents of inhumane treatment presented only in the prosecution’s closing brief.)

See also Seromba, (Appeals Chamber), March 12, 2008, paras. 104-05 (alleged defect in indictment “was cured by timely, clear, and consistent information” in summary of witness statement annexed to the Prosecution’s final pre-trial brief, which was provided more than three weeks prior to trial).

See also Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 375-79 (imprecise locations pled in the indictment cured through summary of witness statements).

See also Kamuhanda, (Appeals Chamber), September 19, 2005, paras. 25-27 (through the pre-trial brief and summary witness statement, “the Prosecution provided the Appellant with timely, clear and consistent information about the alleged distribution of weapons in the homes of his cousins in Gikomero”).

See also Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 100-02 (cure accepted as to allegation that Gérard Ntakirutimana participated in an attack at Mubuga Primary School in June 1994); *id.*, paras. 103-05 (cure accepted as to allegation that Elizaphan Ntakirutimana transported armed attackers chasing Tutsi survivors at Murambi Hill); *id.*, paras. 106-08 (cure accepted as to allegation that Elizaphan Ntakirutimana transported attackers and pointed out fleeing refugees in Nyarutovu cellule); *id.*, para. 119 (cure accepted as to allegation that Elizaphan Ntakirutimana was in a convoy which included attackers).

See also Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 46, 48 (pleading defect “was cured by the fact that the allegation of procurement of weapons, ammunition and gendarmes was included in the Pre-Trial Brief”; rejecting argument that “curing” information was “buried among 83 statements disclosed” where “unambiguous information” was also supplied in the Pre-Trial Brief and Annex B, and Gerard Ntakirutimana failed to identify any particular prejudice).

See also Karera, (Trial Chamber), December 7, 2007, paras. 420-21 (finding that “timely, clear and consistent” notice of “distribution of weapons in Rushashi was mentioned in the Pre-Trial Brief and its Annex with summaries of anticipated testimonies” and in the Opening Statement).

(m) application—“curing” not permitted

(i) may not add major massacre site through “cure”

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 94, 98, 100: “While in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes, this is not the case with respect to this attack. If the Prosecution had intended to establish Muvunyi’s [responsibility] for the Mukura forest attack, both the occurrence of this attack and the details of his [responsibility] should have been pleaded in the Indictment. Mukura forest was a major massacre site and the Prosecution had in its possession information about this attack several months before filing the initial indictment against Muvunyi in November 2000.” “The Pre-Trial Brief and the annexed witness summaries do not simply add greater detail in a consistent manner to a more general allegation already pleaded in the Indictment.”

“[T]he Appeals Chamber must also view the notice provided by the Pre-Trial Brief against the backdrop of the Prosecution’s unsuccessful attempt to amend the indictment before the start of trial. In rejecting the Prosecution’s motion, the Trial Chamber reasoned ‘that to amend the indictment on the eve of trial, and in doing so, introduce new material elements as the Prosecutor seeks to do, is likely to cause substantial prejudice [...] to [Muvunyi’s] right to prepare his defence.’ This rationale applies with equal force to the introduction of a new massacre site to the charges against Muvunyi by way of summaries of anticipated evidence in the Pre-Trial Brief Accordingly, the Trial Chamber erred in law in the particular circumstances of this case in finding that the summaries of anticipated evidence . . . annexed to the Pre-Trial Brief cured the defect in the Indictment.”

(ii) may not expand to new locations and new perpetrators through “cure”

Muvunyi, (Appeals Chamber), August 29, 2008, para. 155: “The Prosecution’s contention that any defect in the Indictment was cured by the Schedule of Particulars and the summaries of anticipated testimony annexed to its Pre-Trial Brief fails to address the fundamental problem with . . . the Indictment: the count is not vague; it is narrowly tailored and charges the crime of other inhumane acts as a crime against humanity based on one specific event [at Butare University Hospital]. By adding paragraph 3.47 of the Indictment as support for Count 5 in the Schedule of Particulars, the Prosecution essentially amended the Indictment and expanded the charge of other inhumane acts as a crime against humanity from a single event alleged in paragraph 3.44 where ESO Camp soldiers allegedly prevented wounded refugees from going to the Butare University Hospital to acts of cruel treatment by ESO and Ngoma Camp soldiers during every event alleged in the Indictment” *See also id.*, para. 28 (similar).

(iii) “cure” not permitted where indictment alleged wrong soldiers committed rapes; would have been a radical transformation

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 160-66: Where the Indictment alleged that “*Interahamwe* and soldiers from the Ngoma camp raped and sexually violated women during the course of several attacks in Butare Prefecture and places responsibility on Muvunyi for failing to prevent or to punish these crimes,” but the Trial Chamber found that the rapes were committed by different perpetrators (soldiers of the ESO [*École des Sous-Officiers*] camp), and the Trial Chamber did not permit the Indictment defect to be “cured” because such curing would be a “radical transformation” of the Prosecution case, the Appeals Chamber upheld the Trial Chamber’s holding.

“The Appeals Chamber agrees with the Trial Chamber that the addition of the rape allegation implicating ESO Camp soldiers amounted to a radical transformation of the Prosecution’s case on this count. This is not a case where the Indictment pleaded the alleged perpetrators in a general or vague manner, which the Prosecution then sought to cure through timely, clear, and consistent information. Indeed, the perpetrators of the rapes set out in . . . the Indictment are specifically identified as *Interahamwe* and soldiers from the Ngoma Camp. [The relevant paragraph] makes no mention of soldiers from the ESO Camp [who were found to have perpetrated the rapes] ‘It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges.’ Consequently, the Trial Chamber did not err in law by finding that it would be prejudicial to consider the evidence of rape by ESO Camp soldiers in light of the rape allegation in the Indictment.” *See Muvunyi*, (Trial Chamber), September 12, 2006, paras. 403-04, 409 (Trial Chamber findings that rapes, otherwise proven, were not properly pled and rejecting proposed cure as a “radical transformation of the Prosecution case”).

(iv) murder charges excluded where witness summary modified rather than supplemented indictment

Muhimana, (Appeals Chamber), May 21, 2007, para. 224: Where the Trial Chamber found that Muhimana cut open a pregnant woman, Pascaste Mukaremera, with a machete and removed her child, who cried before dying, and Mukaremera also died, the Appeals Chamber reversed the murder conviction due to Indictment defects. The Appeals Chamber held that the summary of a witness's testimony annexed to the Pre-Trial Brief as to the murder "does not simply add greater detail in a consistent manner with a more general allegation already pleaded in the Indictment," but rather "modifies the time, location, and physical perpetrator"

But see Muhimana, (Appeals Chamber), Partly Dissenting Opinion of Judge Schomburg on the Interpretation of the Right to Be Informed, May 21, 2007, paras. 15, 14: "The Defence was clearly informed about the material facts underlying the alleged crime. Defence Counsel referred to the crime as described by Witness AW in cross-examination, thus showing that the Defence was completely aware of the time, place and manner of the alleged crime, and in particular that the Appellant was alleged to have committed the crime himself. Consequently, the defects of the Indictment were cured and the defence was in no way prejudiced." "[I]t is irresponsible to acquit an accused who was informed about the charges against him and had the possibility (and made indeed use of it) to defend himself against a slightly varied charge, however concrete and known in detail to him. In the case before us, the accused was in no doubt about the alleged concrete criminal conduct against which he had to defend himself. This is all that matters."

(v) where involvement in massacre pursued under 6(1) theory, error to convict under 6(3)

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, paras. 144, 146, 148-50: "Having read the contradictory information contained in the Prosecution's Pre-Trial Brief and in its Final Trial Brief, the Appeals Chamber considers that the Prosecution failed to pursue its allegation that Imanishimwe incurred responsibility for the crimes [at Gashirabwoba football field] under Article 6(3) of the Statute, *i.e.* the form of responsibility under which he was convicted." "[I]n the Prosecution Pre-Trial Brief . . . , the Prosecution states without any ambiguity in the body of these paragraphs that it intends to charge the Accused by virtue of his responsibility pursuant to Article 6(1) only[.]" "Similar inconsistencies are found in the Prosecution Final Trial Brief." "[T]he Appeals Chamber considers that the Prosecution failed to pursue the charges relating to Gashirabwoba under Article 6(3) of the Statute, but focused solely on criminal responsibility under Article 6(1) of the Statute" "The Appeals Chamber . . . set[s] aside the guilty verdict against Imanishimwe for the Gashirabwoba events based on Article 6(3) of the Statute." *See also id.*, para. 164 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, Separate Opinion of Judge Pavel Dolenc, para. 69 (Imanishimwe should not be found guilty for "ordering his subordinate soldiers to participate in a massacre on 12 April 1994 at Gashirabwoba football field" because the theory was not contained in the Indictment).

(vi) no “cure” where only one sentence in annex to pre-trial brief

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 57: “[T]here is only one sentence in Annex B to the Pre-Trial Brief alleging that Elizaphan Ntakirutimana conveyed attackers to Mugonero. When viewed together with the Pre-Trial Brief itself, which failed to state the allegation even though it contained similar facts regarding Bisesero, it cannot be said that the Prosecution clearly or consistently informed the Defence that it intended to rely on the transport of attackers as the basis for the Mugonero Indictment’s count of genocide against Elizaphan Ntakirutimana. Even if Annex B is considered sufficient notice that Witness MM would testify that Elizaphan Ntakirutimana conveyed attackers, the Annex and the statements disclosed did not communicate the important role that the testimony of five other witnesses . . . would have in proving this allegation. In this context, the Pre-Trial Brief and Annex B thereto did not provide clear, consistent, or timely information regarding the Prosecution’s case on this point.” *See also id.*, paras. 109-12 (attempted cure rejected); *id.*, para. 120 (attempted cure rejected, but because the Trial Chamber “did not rely on these findings in convicting Elizaphan Ntakirutimana” “no prejudice resulted from the error.”).

(vii) no “cure” where contradictory positions taken as to purpose of evidence

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 28: “Regarding whether the defect [in the conspiracy to commit genocide charge as to a certain meeting] was cured, the Chamber notes that the Prosecution has taken contradictory positions with respect to its purpose in eliciting Bagaragaza’s evidence of the 6 April 1994 Meeting. The Prosecution acknowledged that the Accused could not be convicted of conspiracy to commit genocide on the basis of the 6 April 1994 meeting at Kanombe, but asked that the evidence be heard and weighed as the Chamber saw fit. The Defence is entitled to rely on this statement. Having stated that it was not seeking conviction on this event, the Prosecution cannot now seek conviction at the end of trial. The Chamber is of the view that such inconsistent statements have not provided clear and consistent notice to the Defence with regard to their intention to rely on the allegations with respect to the 6 April 1994 Meeting.”

(viii) “cure” must provide clear and consistent information

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 57-58: “The Pre-Trial Brief and the annexed summary of Witness ATN’s proposed testimony do not provide additional, consistent details that relate to a more general allegation in the Indictment.” . . . “None of these pre-trial disclosures provided the Defence with accurate notice of Witness ATN’s actual testimony, which differed in significant respects from the allegations in the Indictment and the Pre-Trial Brief, as well as the summary of his proposed testimony annexed to the Pre-Trial Brief.” “In light of the above, the Chamber does not consider that the Prosecution provided the Defence with clear and consistent information regarding the meetings in Nyundo, or the Accused’s participation in those meetings. The Prosecution was aware of the need to provide detailed allegations regarding meetings, had ample time to seek to amend the Indictment to

include Witness ATN's specific allegations." *See also id.*, paras. 40-45 (cure of defective conspiracy pleadings not "clear and consistent" where annex to the pre-trial brief contained a summary of proposed witness testimony regarding a meeting at Gisenyi Stadium, 4 or 5 days after the death of President Habyarimana; this could not be a "cure" regarding a meeting at Umuganda Stadium in "the last week of April").

(ix) "approving spectator" theory excluded where only in final trial brief

Seromba, (Trial Chamber), December 13, 2006, para. 313: "[I]n its Final Trial Brief, the Defence advanced arguments on the theory of the *approving spectator*. The Chamber, however, notes that neither the Indictment nor the Prosecutor's Pre-Trial Brief refers to the theory of the *approving spectator*. It therefore deduces that the Prosecutor had no intention of arguing this form of participation in relation to the charges against Accused Athanase Seromba. Consequently, the Chamber will not consider the theory of the *approving spectator* in its findings."

See also "closing brief not a 'cure,'" Section (VIII)(c)(xix)(7)(d), this Digest.

(x) "cure" not permitted to change identity of murder victim or add a new allegation of murder

Gacumbitsi, (Trial Chamber), June 17, 2004, paras. 187-88: "The evidence given by Witnesses TAK and TBH relates to the murder, on 14 April 1994, at or near the home of the Accused, of a Tutsi man called Kanyogote, who was accompanied by his two children. Paragraph 33 of the Indictment contains a different allegation: that of murder by the Accused, at his home in April 1994, of a Tutsi woman and her three children" "[T]hat the Prosecutor mentioned the murder of Kanyogote and his children in his Pre-Trial Brief is not such as to cure the vagueness in the Indictment, especially as such brief does not establish a link between the new allegation and paragraph 33 of the Indictment. The Pre-Trial Brief does not seek to render the Indictment more specific, but rather alters the Indictment substantially by either changing the identity of the victims referred to in paragraph 33 or including a new allegation of murder. The Pre-Trial Brief cannot be used as an instrument to amend the Indictment substantially. Such amendment must comply with the provisions of Rule 50 of the Rules of Procedure and Evidence."

(xi) "cure" must be timely

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 84: Statement that provided clear and consistent information did not cure Indictment defect where only disclosed "four days before the beginning of trial and eleven days before Witness HH began testifying": "[t]he Prosecution cannot wait until four days before trial to give clear notice that it will pursue an additional allegation of personal physical wrongdoing."

8) reversing convictions based on indictment defect not cured

(a) application

Muvunyi, (Appeals Chamber), August 29, 2008, para. 32: “[T]he Appeals Chamber finds that paragraph 3.29 of the Indictment does not plead the material facts giving rise to superior responsibility for the abductions and killings at the Butare University Hospital after 20 April 1994. By convicting Muvunyi of genocide for these crimes, the Trial Chamber erred in law by expanding the charges against the accused to encompass unpleaded crimes Accordingly, the Appeals Chamber . . . reverses [Muvunyi’s] conviction for genocide for this event.” *See also id.*, paras. 46-47 (reversing conviction for superior responsibility for the crimes committed by ESO [*École des Sous-Officiers*] Camp soldiers at the Beneberika Convent); *id.*, paras. 89-101 (reversing Muvunyi’s conviction for genocide based on the attack at the Mukura forest because the indictment was defective and attempted cure rejected); *id.*, paras. 102, 108, 112-13 (reversing conviction for genocide based on killings at roadblocks); *id.*, paras. 157-58 (reversing conviction for other inhumane acts as a crime against humanity based on the mistreatment of Prosecution Witnesses YAN, YAO, QY, and AFV, as well as other Tutsi civilians during the attacks at the Beneberika Convent and the *Groupe scolaire*).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 59: “The Prosecution has not shown that it cured the failure of the Mugonero Indictment to plead that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex. Accordingly, the Trial Chamber erred in concluding that a conviction could be based on this unpleaded material fact.” *See also id.*, para. 115 (“[t]he Appeals Chamber finds that the Trial Chamber . . . erred in convicting Elizaphan Ntakirutimana based on his alleged presence at and transportation of attackers to an attack at Mubuga” where the allegation was not pled or cured); *id.*, paras. 63-71 (locations not pled or cured so genocide conviction vacated); *id.*, para. 79 (“[t]he Prosecution has . . . not shown that the witness-stand revelation of an attack at Kidashya Hill was fair to the Appellants[;] [t]he Trial Chamber erred in basing a conviction on that material fact”); *id.*, para. 91 (“the Appeals Chamber finds that the Trial Chamber erred in resting a conviction on the allegation of an attack at Muyira Hill on 13 May 1994 and on the allegation that Gérard Ntakirutimana shot and killed the wife of Nzamwita”).

Niyitegeka, (Appeals Chamber), July 9, 2004, paras. 212-23: “The Appeals Chamber concludes that the Prosecution has not shown that the failure to plead the Kivumu attack in the indictment was cured by subsequent communication of information. The Trial Chamber therefore committed an error of law by convicting the Appellant in reliance on evidence of his participation in an attack at Kivumu at the end of April or the beginning of May 1994.” *See also id.*, paras. 229-35, 247-48, 269 (similar errors regarding participation in an attack at Muyira Hill on May 14, 1994; however, the errors did not invalidate the decision because no conviction rested solely on the insufficiently pled attacks and no change of sentence was warranted).

Karera, (Trial Chamber), December 7, 2007, para. 324: “The Defence . . . submits that evidence relating to a massacre in Rwankuba parish should be excluded as it was not pleaded. The Chamber notes that neither the Indictment, the Pre-Trial Brief nor the

Opening Statement mentioned this event. Consequently, it will not consider this evidence due to lack of proper notice. A similar situation arises with respect to the killing of Gatete in connection with Count 4 (murder).” *See also id.*, para. 199 (similar findings regarding the killing of twenty Tutsi men—something neither pled nor cured).

9) time to raise/waiver of indictment defects

(a) defects should be raised pre-trial

Semanza, (Appeals Chamber), May 20, 2005, para. 88: “[T]he [Trial] Chamber noted that ‘allegations of vagueness should normally be dealt with at the pre-trial stage,’ citing the Appeals Chamber’s decision in *Kupreškić*, and it stated that the Appellant had not explained his delay in raising many of his specific challenges to the Indictment.” (But then examining defects later raised.)

Seromba, (Trial Chamber), December 13, 2006, para. 14: “The Chamber notes that under Article 72 of the Rules of Procedure and Evidence, defects in the form of the Indictment must, in principle be raised during the pre-trial phase of the proceedings, unless leave is granted by the Chamber to a party to do so at a later stage in the proceedings.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 22: “[G]enerally, the Defence must raise objections to the form of the Indictment at the pre-trial stage”

(b) defects may also be raised when evidence is introduced or by motion

Muvunyi, (Appeals Chamber), August 29, 2008, para. 123: “[T]he Appeals Chamber has held:

[O]bjections based on lack of notice should be specific and timely As to timeliness, the objection should be raised at the pre-trial stage (for instance in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced.”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 51: “As the Appeals Chamber stated in the *Niyitegeka* case:

. . . . In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation”

See also Kamuhanda, (Appeals Chamber), September 19, 2005, para. 21 (same language quoted); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 199 (source of quote).

(c) consideration of defects at the deliberations stage

Seromba, (Trial Chamber), December 13, 2006, para. 17: “[A]n amendment of a defective indictment may be allowed even at the stage of deliberations of the Trial Chamber only if the Trial Chamber has first ordered a reopening of the hearing. Consequently, the

Chamber considers that the issue here is to determine whether the Defence arguments submitted in support of its allegations of defects in the Indictment are such as would justify an amendment of the Indictment for the sake of fairness of the trial. In such a case, the Chamber would have to reopen the hearing.”

Compare Simba, (Trial Chamber), December 13, 2005, para. 15: “In the Tribunal’s jurisprudence, precedent exists to consider the form of the Indictment at the judgement stage. However, the Chamber declines to consider issues that were either adjudicated or should properly have been raised during the pre-trial phase of the proceedings.”

(d) defects may also be raised for the first time on appeal

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 51: “As the Appeals Chamber stated in the *Niyitegeka* case:

... The importance of the accused’s right to be informed of the charges against him under Article 20(4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.”

See also Niyitegeka, (Appeals Chamber), July 9, 2004, para. 200 (source of quote).

Kamubanda, (Appeals Chamber), September 19, 2005, para. 21: “[T]he Defence did not object to the introduction of Witness GEK’s testimony at trial; rather, it challenged her credibility during cross-examination. However, even in such a case, the Appeals Chamber may choose to intervene *proprio motu*, considering the importance of the accused’s right to be informed of the charges against him and the possibility of serious prejudice to the accused if the Prosecution informs him about crucial facts for the first time at trial.”

For discussion of burden shifting when defects are first raised on appeal, see “defect first raised on appeal: accused bears burden of showing ability to prepare defence was materially impaired,” Section (VIII)(c)(xix)(10)(c), this Digest.

(e) whether silence may constitute a waiver

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 52: “Normally, the Defence’s silence would constitute a waiver of the argument [as to indictment defects]: ‘a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party.’” *See also Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 51 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 199 (same language quoted).

But see Mpambara, (Trial Chamber), September 11, 2006, para. 165: “Even in the absence of a contemporaneous objection to the admission of evidence outside of the scope of the indictment, the Chamber may not base a conviction upon material facts of which the accused does not have reasonable notice.”

But see “burden of proof as to indictment defects,” Section (VIII)(c)(xix)(10), this Digest—suggesting that late objections to pleading defects result in burden shifting, not waiver, and “defects may also be raised for the first time on appeal,” directly above.

**(f) if Trial Chamber treated challenge as timely raised,
Appeals Chamber should not invoke waiver**

Muhimana, (Appeals Chamber), May 21, 2007, para. 80: “The Appeals Chamber has held that, where a Trial Chamber has treated a challenge to an indictment as being adequately raised, the Appeals Chamber should not invoke the waiver doctrine.”

See, e.g., Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 54: “The Appellant repeatedly brought the [indictment defect] issue to the Trial Chamber’s attention in its briefing, and the Prosecution never suggested that he had waived his objection by not raising it earlier. And the Trial Chamber actually decided the issue, albeit in the context of murder alone and not genocide. In *Ntakirutimana*, the Appeals Chamber recognized that where the Trial Chamber has treated a challenge to an indictment as being adequately raised, the Appeals Chamber should not invoke the waiver doctrine. In light of these circumstances, the Appeals Chamber holds that the Appellant did not waive his objection to the pleading defect.” *See Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 23 (cited).

10) burden of proof as to indictment defects

**(a) defect timely raised at trial: prosecution bears burden to
show defense was not materially impaired/defect caused
no prejudice**

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 327: “When . . . an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecutor to prove on appeal that the ability of the accused to prepare a defence was not materially impaired.” *See also Muhimana*, (Appeals Chamber), May 21, 2007, paras. 80, 199 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 31, 138 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, paras. 49, 51 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 77: “[T]he question is whether it was fair to the Appellant to be tried and convicted based on an allegation as to which neither he nor the Prosecution had actual or specific notice. On this question . . . the Prosecution bears the burden of demonstrating that the new incidents that became known at trial caused no prejudice to the Appellant.” *See also id.*, para. 98 (prosecution burden to show failure to plead a material fact was “harmless”); *id.*, para. 112 (prosecution burden of showing “no unfairness to the Accused”).

See, e.g., Muvunyi, (Appeals Chamber), August 29, 2008, para. 27: “Muvunyi raised these [particular pleading] issues at the commencement of his trial. It therefore falls to the Prosecution to prove that Muvunyi’s defence was not materially impaired by these defects.” *See also id.*, paras. 41, 96 (same as to other indictment defects).

See, e.g., Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 381: “The Appeals Chamber notes that Appellant Barayagwiza had complained about the vagueness of the dates before the Trial Chamber. It was therefore incumbent on the Prosecutor to demonstrate that the Appellant’s ability to prepare his defence had not been significantly impaired. The Appeals Chamber considers that the Prosecutor did this. The content of Witness AHB’s cross-examination carried out by Counsel for the Appellant and the fact that, in his Closing Brief, the Appellant specifically contested at length AHB’s testimony about the distribution of weapons in Mutura *commune*, ‘a week after the assassination of President Habyarimana,’ show that the Appellant’s ability to prepare his defence was not significantly impaired.”⁷²

(b) defect raised at end of trial: whether the objection was so untimely that the burden of proof shifted

Muvunyi, (Appeals Chamber), August 29, 2008, para. 123: “[T]he Appeals Chamber has held:

. . . [A]n objection raised later at trial will not automatically lead to a shift in the burden of proof: the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objection earlier in the trial.”

Karera, (Trial Chamber), December 7, 2007, para. 17: “Objections play an important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against the accused. They should be specific and timely. Ordinarily, this means that an objection must be raised at the time the impugned evidence is sought to be introduced. However, the Appeals Chamber has noted that it is not always possible to do so and has clarified that the timeliness of an objection depends on the precise circumstances of the situation:

[W]hen an objection based on lack of notice is raised at trial (albeit later than at the time the evidence was adduced), the Trial Chamber should determine whether the objection was so untimely as to consider that the burden of proof has shifted from the Prosecution to the Defence in demonstrating whether the accused’s ability to defend himself has been materially impaired. In doing so, the Trial Chamber should take into account factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced and whether the Defence has shown that the objection was raised as soon as possible thereafter.”

Compare Ndindabahizi, (Trial Chamber), July 15, 2004, para. 29: “When [indictment defects are] raised at the end of trial, the Defence has the burden of showing that its preparation was materially impaired by the defect in the indictment, notwithstanding any additional curative disclosure of the Prosecution case.”

⁷² As to whether the Trial Chamber should consider what defense counsel understood at the time of the filing of the closing brief, consider “charges must be sufficiently clear for the accused to *prepare* his defense,” (VIII)(c)(xix)(2) (emphasis added), this Digest.

See, e.g., Muvunyi, (Appeals Chamber), August 29, 2008, paras. 123-24: Where the Trial Chamber did not consider Muvunyi's objection to a certain indictment defect as timely, the burden of showing prejudice shifted to him, a burden he did not carry.

See, e.g., Karera, (Trial Chamber), December 7, 2007, para. 19: "The Chamber notes that the Defence did not object to any of this evidence at the time it was admitted or at the close of the Prosecution case. Nor did it make a general pre-trial objection. Rather, the Defence makes these exclusion requests for the first time in its closing submissions. It offers no explanation for failing to object to this evidence at the time it was admitted or at a later point during the trial proceedings. The Chamber finds that there is no reasonable explanation for the Defence's lack of objections at an earlier stage in the trial. In the exercise of its discretion, it holds that the burden of proof has shifted to the Defence to demonstrate that the lack of notice prejudiced the Accused in the preparation of his defence." *See also id.*, para. 322 (similar).

(c) defect first raised on appeal: accused bears burden of showing ability to prepare defence was materially impaired

Seromba, (Appeals Chamber), March 12, 2008, para. 103: "When an appellant raises a defect in an indictment for the first time on appeal, he bears the burden of showing that his ability to prepare his defence was materially impaired." *See also id.*, para. 29 (similar); *Nabimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 327 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 31 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, paras. 49, 51 (similar).

See, e.g., Niyitegeka, (Appeals Chamber), July 9, 2004, para. 206: "Because the Appellant waived this objection [as to an indictment defect] in the Trial Chamber, it falls to him to prove that the failure to plead in the indictment the allegation that the Appellant transported weapons on 10 April 1994 materially impaired his defence." *See also id.*, paras. 208-11 (same as to different facts).

d) General considerations regarding the evaluation of evidence

i) prosecution bears burden of proof beyond a reasonable doubt

Rutaganda, (Appeals Chamber), May 26, 2003, para. 172: "The Appeals Chamber recalls that the standard of proof to be applied is that of proof beyond a reasonable doubt, and that the burden of proof lies on the Prosecution, insofar as the Accused enjoys the benefit of the presumption of innocence."

Rwamakuba, (Trial Chamber), September 20, 2006, para. 98: "[T]he Accused is presumed innocent and does not have to prove anything. If the evidence adduced by the Defence raises reasonable doubt, the Prosecution has failed to establish the guilt of the Accused."

Muhimana, (Trial Chamber), April 28, 2005, para. 15: "[T]he Prosecution alone bears the burden of proving beyond reasonable doubt the allegations made against the Accused."

See, e.g., Rutaganda, (Appeals Chamber), May 26, 2003, paras. 169-84 (evaluating alleged errors regarding burden of proof).

See also “burden of proof for alibi,” Section (VI)(b)(i); “taking judicial notice of generally known facts does not violate the presumption of innocence,” Section (VIII)(c)(iii)(2); “inferences do not relieve prosecution of burden of proof,” Section (VIII)(c)(iii)(3), this Digest.

1) applies to each fact on which conviction is based

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, paras. 170, 175: “[T]he ICTY Appeals Chamber has left no doubt that the standard of proof ‘beyond reasonable doubt’ is not limited to the ultimate question of guilt[.]” “The Appeals Chamber recalls that the presumption of innocence requires that each fact on which an accused’s conviction is based must be proved beyond a reasonable doubt. The Appeals Chamber agrees with the Prosecution’s argument that ‘if facts which are essential to a finding of guilt are still doubtful, notwithstanding the support of other facts, this will produce a doubt in the mind of the Trial Chamber that guilt has been proven beyond a reasonable doubt.’ Thus, if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction.”

ii) national rules of evidence not binding

Simba, (Appeals Chamber), November 27, 2007, para. 38: “It is well established that according to Rule 89 of the Rules, a Trial Chamber is not bound by national rules of evidence and has the discretion to admit any relevant evidence it deems to have probative value.” *See also* *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 22 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 26: “[U]nder Rule 89 of the Rules, Trial Chambers are not bound by domestic rules of evidence. They apply rules of evidence which, in the spirit of the Statute and of general principles of law, permit a fair outcome of the case Interpretation of some of the Rules may indeed be guided by the domestic system it is patterned after, but under no circumstances can it be subordinated to it.”

Nchamihigo, (Trial Chamber), November 12, 2008, para. 11: “Rule 89 (A) of the Rules of Procedure and Evidence (‘Rules’) specifically provides that the Chamber shall not be bound by national rules of evidence. However, in cases not otherwise provided for, Rule 89 (B) of the Rules states that 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.” *See also* *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 33 (similar); *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 24 (similar); *Kamubanda*, (Trial Chamber), January 22, 2004, para. 33 (similar); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 36 (same as *Kamubanda*).

Muvunyi, (Trial Chamber), September 12, 2006, para. 10: “[T]he Chamber is not bound to follow national rules of evidence, and shall apply rules of evidence which best favour a fair determination of the matter.”

iii) Trial Chamber may admit any relevant evidence it deems to have probative value

Simba, (Appeals Chamber), November 27, 2007, para. 103: “The Appeals Chamber recalls that pursuant to Rule 89(C) of the Rules, a chamber may admit any relevant evidence which it deems to have probative value.” *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 387 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 269 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 189 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 86 (similar); *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 33 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 22 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 25 (similar).

Nchamihigo, (Trial Chamber), November 12, 2008, para. 14: “Rule 89 (C) of the Rules grants the Chamber discretionary power to admit any relevant evidence which it deems to have probative value.” *See also Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 22 (similar); *Ntagerura, Bagambiki, and Imanishimwe*, (Trial Chamber), February 25, 2004, para. 25 (similar).

Simba, (Trial Chamber), December 13, 2005, para. 28: “In *Ntahobali and Nyiramasubuko*, the Appeals Chamber explained the Trial Chamber’s authority to admit any relevant evidence which it deems to have probative value even where it is not possible to convict an accused on such evidence due to lack of notice.”

1) not appropriate to speculate what other evidence could have been brought

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 74: “It would be entirely speculative and inappropriate for the Tribunal to enter into a consideration of what other evidence could have been brought.”

2) probative value is separate determination from admissibility

Rutaganda, (Appeals Chamber), May 26, 2003, para. 266: “As the Appeals Chamber has previously indicated, the threshold to be met before ruling that evidence is inadmissible is high. It must be shown that the evidence is so lacking in terms of the indicia of reliability as to be devoid of any probative value. In the opinion of the Appeals Chamber, this should not be interpreted to mean that definite proof of reliability is necessary for the evidence to be admitted. According to the Appeals Chamber, provisional proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.” *See also id.*, paras. 33, 149, 382 (similar).

Muvunyi, (Trial Chamber), September 12, 2006, para. 10: “The Rules give the Trial Chamber discretion to admit any relevant evidence which it deems to have probative value. According to the Appeals Chamber, in determining admissibility, the Trial Chamber need only consider that evidence is relevant and displays sufficient indicia of reliability. The question of probative value should be determined at the end of the trial.”

3) evidence of facts not pled may be excluded if prejudicial effect outweighs probative value

Simba, (Trial Chamber), December 13, 2005, paras. 28-29: “[E]ven if evidence of unpleaded facts may bear some general relevance to the case, the Trial Chamber may still decide to exclude it in the interests of justice when its admission could lead to unfairness in the trial proceedings such as when the probative value of the proposed evidence is outweighed by its prejudicial effect.” “In the Chamber’s view, the prejudicial effect of considering these unpleaded events outweighs its probative value in relation to establishing Simba’s criminal responsibility for the five alleged massacres in the Indictment.”

4) Trial Chamber not required to follow other Trial Chamber’s ruling on documentary evidence

Simba, (Appeals Chamber), November 27, 2007, para. 132: “[T]he probative value of a document may be assessed differently in different cases, depending on the circumstances.”

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 104: “A Trial Chamber has discretion in the appreciation of evidence presented by the parties in the case before it, and there is no unfairness simply because another Trial Chamber decided otherwise in another case in respect of a particular piece of evidence.”

See also “Trial Chamber not bound by other Trial Chamber’s finding on witness credibility,” Section (VIII)(d)(xi)(32), this Digest.

iv) Trial Chamber has primary responsibility for assessing evidence and the decision to admit or exclude it

Simba, (Appeals Chamber), November 27, 2007, para. 19: “[T]he decision to admit or exclude evidence pursuant to Rule 89(C) of the Rules is one that falls within the discretion of the Trial Chamber”

Muhimana, (Appeals Chamber), May 21, 2007, para. 135: “[T]he primary responsibility for assessing . . . the probative value of evidence lies with the Trial Chambers.”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 86: “the Trial Chamber, as trier of fact, is in the best position to evaluate the probative value of evidence and to determine which evidence it will rely upon in making its findings.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 28: “[A]s a general rule, a Trial Chamber is primarily responsible for assessing and weighing the evidence presented at trial”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 493: “In light of the jurisprudence of the International Tribunal and the ICTY, the Trial Chamber is best placed to hear, assess and weigh the evidence presented at trial.”

1) Appeals Chamber owes “margin of deference” to Trial Chamber’s evaluation of evidence

Simba, (Appeals Chamber), November 27, 2007, para. 19: “[T]he decision to admit or exclude evidence pursuant to Rule 89(C) of the Rules is one that falls within the discretion of the Trial Chamber and therefore, warrants appellate intervention only in limited circumstances.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 28: “[T]he Trial Chamber has the inherent discretion to decide what approach is most appropriate for the assessment of evidence in the circumstances of the case.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 493: “[U]nless the Appellant establishes that the Trial Chamber committed an error of law or fact warranting the Appeals Chamber’s intervention, the Appeals Chamber has to give a margin of deference to the Trial Chamber’s evaluation of the evidence presented at trial.”

See also Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 398: “The Appeals Chamber recalls that the Trial Chamber has the inherent discretion to decide what approach it deems most appropriate for the assessment of evidence in the circumstances of the case; however, ‘whenever such approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice.’”

But see Rutaganda, (Appeals Chamber), May 26, 2003, para. 188: “[W]hen the Appellant . . . contend[s] that the approach taken by the Trial Chamber to assess the evidence in the instant case is inappropriate, he is raising an argument that the Appeals Chamber considers irrelevant.”

See also “Trial Chamber best placed to assess witness credibility,” Section (VIII)(d)(xi)(1); “Appeals Chamber will not lightly overturn Trial Chamber’s determination as to witness credibility,” Section (VIII)(d)(xi)(7)(a); “deference due to Trial Chamber in deeming expert qualified and evaluating expert testimony,” Section (VIII)(d)(xii)(4); and “deference due to Trial Chamber particularly in evaluating witness testimony,” under “appellate review,” Section (VIII)(e)(ii)(4)(a), this Digest.

v) authenticity and proof of ownership important for assessment of the weight to accord evidence

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 94: “Factors such as authenticity, and proof of authorship, assumed the greatest importance in the Chamber’s assessment of the weight to be attached to individual pieces of documentary evidence.”

See also Bikindi, (Trial Chamber), December 2, 2008, para. 37 (same).

vi) admissibility of written witness statements/ general preference for in-court testimony

Simba, (Appeals Chamber), November 27, 2007, para. 103: “[T]here is a general, though not absolute, preference for live testimony before this Tribunal. As stated in the *Akayesu* Appeal Judgement,

the general principle is that Trial Chambers of the Tribunal shall hear live, direct testimony [and] prior statements of witnesses who appear in court are as a rule relevant only insofar as they are necessary to a Trial Chamber in its assessment of the credibility of a witness. It is not the case . . . that they should or could generally in and of themselves constitute evidence that the content thereof is truthful. For this reason, live testimony is primarily accepted as being the most persuasive evidence before a court [I]t falls to the Trial Chamber to assess and weigh the evidence before it, in the circumstances of each individual case, to determine whether or not the evidence of the witness as a whole is relevant and credible.

This is consistent with Rule 90(A) of the Rules which states in part that witnesses shall, in principle, be heard directly.” See *Akayesu*, (Appeals Chamber), June 1, 2001, paras. 134-35 (source).

Ndindababizi, (Appeals Chamber), January 16, 2007, paras. 94, 98: “[T]he Trial Chamber must weigh ‘[f]actors in favour of admitting evidence in the form of a written statement’ and ‘[f]actors against admitting evidence in the form of a written statement.’” “[T]he decision on whether to admit written statements (or parts thereof) is a discretionary one Rule 92bis of the Rules itself provides that the existence of ‘factors which make it appropriate for the witness to attend for cross-examination’ weighs against admitting evidence in the form of a written statement.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 33: “The Appeals Chamber emphasizes that the Rules of both this Tribunal and the ICTY generally reflect a preference for direct, live, in-court testimony.” See also *id.*, para. 149 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 269: The Trial Chamber did not err in refusing to admit witness statement where information as to “the circumstances in which the statements were taken was very limited.” “Few details, if any, were available to the Trial Chamber in relation to the circumstances in which the statements were taken, the identity of the interviewers, the nature of the questioning, and whether the witnesses had spoken under oath or solemn declaration. Without further details, the Trial Chamber had the inherent discretion not to admit the statements.”

1) statements of non-testifying individuals used during cross-examination may be admitted

Simba, (Appeals Chamber), November 27, 2007, para. 20: “The Appeals Chamber recognizes . . . that there are well established exceptions to the Tribunal’s preference for direct, live, in-court testimony and agrees with the Trial Chamber’s reasoning that, as a matter of law, statements of non-testifying individuals used during cross-examination may be admitted into evidence, even if they do not conform to the requirements of Rules 90(A) and 92bis of the Rules, provided the statements are necessary to the Trial

Chamber's assessment of the witness's credibility and are not used to prove the truth of their contents."

vii) hearsay evidence admissible; must be assessed for credibility and relevance

Muvunyi, (Appeals Chamber), August 29, 2008, para. 70: "It is well established that, as a matter of law, it is permissible to base a conviction on . . . hearsay evidence. However, caution is warranted in such circumstances." *See also Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 115 (similar); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 34 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 23 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 509: "The Appeals Chamber recalls . . . that it is settled jurisprudence that hearsay evidence is admissible as long as it is of probative value" *See also Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 115 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 159 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 276: "[T]he discretion granted the Trial Chamber under Rule 89(C) should be counterbalanced with the caution required in admitting hearsay evidence."

Rutaganda, (Appeals Chamber), May 26, 2003, para. 153: "The Appeals Chamber recalls that the inclusion of witness statements containing hearsay evidence in the trial record does not *ipso facto* entail one conclusion or another as to their reliability or probative value."

Rwamakuba, (Trial Chamber), September 20, 2006, para. 34: "A Chamber . . . has a broad discretion to admit hearsay evidence, even when it cannot be examined at its source and when it is not corroborated by direct evidence."

Muvunyi, (Trial Chamber), September 12, 2006, para. 12: "[H]earsay evidence is not *per se* inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt."

Kamuhanda, (Trial Chamber), January 22, 2004, para. 42: Rule 89(C) "makes provision for the admission of hearsay evidence even when it cannot be examined at its source and when it is not corroborated by direct evidence. The Chamber, however, notes that though evidence may be admissible, the Chamber has discretion to determine the weight afforded to this evidence. The Chamber makes its decision as to the weight to be given to testimony based on tests of 'relevance, probative value and reliability.' Accordingly, the Chamber notes that evidence, which appears to be 'second-hand,' is not, in and of itself, inadmissible; rather it is assessed, like all other evidence, on the basis of its credibility and its relevance." *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 45 (similar).

See also Rutaganda, (Appeals Chamber), May 26, 2003, para. 35: “The Appeals Chamber concurs with the analysis made by the Appeals Chamber in the *Akayesu* Appeal Judgement wherein it was held that when a witness testifies, their evidence is admitted in that, in the absence of timely objection, it becomes part of the trial record, as reflected in the transcripts, and that the main safeguard applicable to the reliability of the evidence in this case is the preservation of the right to cross-examine the witness on the hearsay evidence which has been called into question.” *See also id.*, paras. 148, 150 (similar); *Akayesu*, (Appeals Chamber), June 1, 2001, para. 287 (cited).

1) application

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 115: “The finding that Mr. Nors was killed shortly after the Appellant’s visit was . . . based only on vague and unverifiable hearsay Hence, the Appeals Chamber finds, by majority, Judge Shahabuddeen dissenting, that the Trial Chamber failed to adhere to this principle [that a Trial Chamber must be cautious about admitting hearsay evidence] and that no reasonable trier of fact could have reached the conclusion beyond reasonable doubt that Mr. Nors was killed shortly after the Appellant’s visit on or about 20 May 1994.”

See Rutaganda, (Appeals Chamber), May 26, 2003, paras. 151-61 (evaluating alleged hearsay evidence and finding no errors in the Trial Chamber’s treatment of it).

See Kamuhanda, (Trial Chamber), January 22, 2004, para. 498 (acquitting Kamuhanda of rape as a crime against humanity where evidence of rapes was based on hearsay).

viii) circumstantial evidence/ drawing inferences

Muvunyi, (Appeals Chamber), August 29, 2008, para. 70: “It is well established that, as a matter of law, it is permissible to base a conviction on circumstantial . . . evidence.” *See also Muhimana*, (Appeals Chamber), May 21, 2007, para. 49 (similar).

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 72: “[I]t is . . . permissible to rely on circumstantial evidence to prove material facts.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, Dissenting Opinion of Judge Williams, para. 2: “It is established law that circumstantial evidence, that is, indirect evidence from a witness who saw or heard something, can be used to draw a reasonable inference on another fact.”

1) inference must be the only reasonable one based on the evidence

Seromba, (Appeals Chamber), March 12, 2008, para. 221: “[A]s in any case where the Prosecution intends to rely on circumstantial evidence to prove a particular fact upon which the guilt of the accused depends, the finding of the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 524: “The jurisprudence accepts that in most cases genocidal intent will be proved by

circumstantial evidence. In such cases, it is necessary that the finding that the accused had genocidal intent be the only reasonable inference from the totality of the evidence.” *See also Nchamibigo*, (Trial Chamber), November 12, 2008, para. 331 (same).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, paras. 304, 306: “In the *Čelebići* Appeal Judgement, the ICTY Appeals Chamber set out the standard of proof applicable to circumstantial evidence as follows:

A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.”

“It is settled jurisprudence that the conclusion of guilt can be inferred from circumstantial evidence only if it is the only reasonable conclusion available on the evidence. Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, it must reach such a conclusion beyond reasonable doubt. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.”

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 399: “The Appeals Chamber recalls its findings in respect of the method of assessment of circumstantial evidence. With regard to the inferential approach as a means of assessing circumstantial evidence, it refers to its previous exposition that the required standard of proof – beyond a reasonable doubt – necessitates that the accused can be found guilty on the basis of circumstantial evidence only where this is the sole possible reasonable inference from the available evidence. The same requirement must apply in inferring from the available evidence that there is an act upon which the accused’s guilt depends and in inferring a finding upon which the accused’s guilt depends from several distinct factual findings.”

Bikindi, (Trial Chamber), December 2, 2008, para. 30: “[I]t has been necessary on certain occasions for the Chamber to draw inferences from circumstantial evidence. In such cases, the Chamber drew the only reasonable conclusion available from the evidence. Where there was another conclusion reasonably open from that evidence inconsistent with the guilt of the Accused, the Chamber did not enter a finding of guilt.” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 89 (similar); *Mpambara*, (Trial Chamber), September 11, 2006, para. 42 (similar).

See also “inferences do not relieve prosecution of burden of proof,” Section (VIII)(c)(iii)(3), this Digest.

ix) linguistic discrepancies and typographical errors

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 531: “The Appeals Chamber observes that minor linguistic discrepancies or typographical errors may occur in the process of translating and transcribing witnesses’ testimonies and other judicial documents into the two working languages of the Tribunal. It is nevertheless important to assess whether the purported linguistic discrepancies between the English and French versions of the transcripts on the one hand, and between the transcripts and the Judgement on the other, led the Trial Chamber to make erroneous findings occasioning a miscarriage of justice.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 235: “The Appeals Chamber recalls that apart from the provisions of Rule 81(A) of the Rules, which require that a full and accurate record be kept of all the proceedings, Rule 76 of the Rules provides that ‘Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality.’ . . . Although interpretation does not require word for word translation, it must be as accurate as possible, while taking into account, among others, the language level and cultural context of the person being interpreted.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 95-96: “In a number of instances, the Chamber identified discrepancies between the French and English versions of the transcripts of testimonies given in Kinyarwanda. In those instances, because the testimonies given in Kinyarwanda were first interpreted in French, and then from French to English before being transcribed in English, the Chamber relied on the French version as more authentic. When in doubt, the Chamber resorted to the original testimony in Kinyarwanda with the assistance of the Tribunal’s Languages Support Section.” “The Chamber also took into account that, as a result of translation and transcription, names of individuals or locations given by witnesses which were similar, but not identical, may actually have referred to the same place or person.”

x) managerial decisions, such as whether to conduct site visit, left to Trial Chamber’s discretion

Simba, (Appeals Chamber), November 27, 2007, para. 16: “The Appeals Chamber notes that ‘managerial decisions, such as whether to make a site visit, are left to the discretion of the Trial Chamber.’ In the instant case, the Appellant does not demonstrate that the Trial Chamber abused its discretion in finding that site visits were unnecessary to assess the credibility of the evidence and the charges against the Appellant.”

xi) evaluating witness testimony

1) Trial Chamber best placed to assess witness credibility

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 124: “[A]s the trier of fact and with the benefit of observing witnesses testify before it, the Trial Chamber was well positioned to assess the credibility of individual witnesses against the whole of the evidence”

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 50: “The Appeals Chamber stresses that a Trial Chamber is best placed to evaluate the demeanour of witnesses giving live testimony.”

2) presumption of witness credibility

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 194: “The Appeals Chamber recalls that statements made by witnesses in court are presumed to be credible at the time they are made; the fact that the statements are taken under oath and that witnesses can be cross-examined constitute at that stage satisfactory indicia of reliability.” *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 388 (similar).

3) rare to find live testimony so lacking in reliability as to be inadmissible

Rutaganda, (Appeals Chamber), May 26, 2003, para. 35: “The Appeals Chamber . . . holds that in these circumstances, although the decision will always depend on the facts of the case, it is unlikely, considering the stage of the proceedings and, in particular, in the absence of any objection, that a Trial Chamber would find that the live testimony of a witness it had just heard, was so lacking in terms of indicia of reliability as to be inadmissible.”

See also “to discredit witness entirely, must show inconsistencies are so fatal to credibility that they permeate the testimony and render it incredible,” Section (VIII)(d)(xi)(15), this Digest.

4) Trial Chamber has discretion in assessing weight and credibility of witness testimony

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 194: “[T]he Trial Chamber has full discretionary power in assessing the appropriate weight and credibility to be accorded to the testimony of a witness.”

Simba, (Appeals Chamber), November 27, 2007, para. 211: “[T]he Appeals Chamber recalls that it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness testimony to prefer.”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 95: “The jurisprudence of both the ICTR and the ICTY shows that Trial Chambers have the primary responsibility for assessing and weighing evidence, determining whether a witness is credible and the evidence reliable, and according the tendered evidence its proper weight.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 207: “The Appeals Chamber recalls that the task of weighing and assessing evidence lies, first, with the Trial Chamber, and that it is therefore for the Trial Chamber to determine whether or not a witness is credible. Furthermore, it falls to the Trial Chamber to take the approach it considers most appropriate for the assessment of evidence.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 493: “[I]t is for the Trial Chamber to establish whether a witness is credible or not. Likewise, whether it will rely on one or more testimonies as proof of a material fact will depend on various factors that have to be assessed in the circumstances of each case Where there are two conflicting testimonies, it falls to the Trial Chamber, before which the witness testified, to decide which of the testimonies has more weight.”

See also Rutaganda, (Appeals Chamber), May 26, 2003, para. 28: “[I]t is incumbent on the Trial Chamber to consider whether a witness is reliable and whether evidence presented is credible.”

See also Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 388: “The decision to admit [witness testimony] does not in any way prejudice the weight and credibility that the Trial Chamber will, in its own discretionary assessment, accord to the evidence.”

See also “Trial Chamber has primary responsibility for assessing evidence and the decision to admit or exclude it,” Section (VIII)(d)(iv); “Appeals Chamber owes ‘margin of deference’ to Trial Chamber’s evaluation of evidence,” Section (VIII)(d)(iv)(1), this Digest.

5) factors in assessing witness credibility

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 194: “Th[e] assessment [of weight and credibility of witness testimony] is based on a number of factors, including the witness’s demeanour in court, his role in the events in question, the plausibility and clarity of his testimony, whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence, any prior examples of false testimony, any motivation to lie, and the witness’s responses during cross-examination.” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 90 (similar); *Bikindi*, (Trial Chamber), December 2, 2008, para. 31 (same as *Zigiranyirazo*).

Kamuhanda, (Appeals Chamber), September 19, 2005, paras. 179, 181: “The Appeals Chamber notes the following statement made by the ICTY Appeals Chamber in the *Kupreškic et al.* case:

As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses’ testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the ‘fundamental features’ of the evidence. The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence.

However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.”

“The Appeals Chamber endorses the above-mentioned statement made in the *Kupreškić et al.* Appeal Judgement and notes that while factors such as influence of third persons or evidentiary inconsistencies do not require the trier of fact to not rely on the evidence, they are to be taken into consideration in weighing the evidence. The trier of fact is bound to consider such factors in deciding whether the evidence is reliable.” *See also* *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 23 (also quoting *Kupreškić*); *Kamuhanda*, (Trial Chamber), January 22, 2004, paras. 36-37 (quoting *Kupreškić* and relying on similar language from the ICTY’s *Delalić* Appeal); *Kajelijeli*, (Trial Chamber), December 1, 2003, para. 39 (same as *Kamuhanda*).

Nchamihigo, (Trial Chamber), November 12, 2008, para. 15: “The jurisprudence on the recollection of details is . . . well formulated. The events about which the witnesses testified occurred more than a decade before the trial. Discrepancies attributable to the lapse of time or the absence of record keeping, or other satisfactory explanation, do not necessarily affect the credibility or reliability of the witnesses. The Chamber will evaluate the testimony of each witness in the context of the testimony as a whole and determine to what extent it can believe and rely on the testimony. In making this assessment, the Chamber will consider whether the testimony was inconsistent with prior statements made by the witness and, if so, the cause of the inconsistency. The Chamber will also consider the internal consistency and integrity of the testimony and the context in which it was given. The Chamber will compare the testimony of each witness with the testimony of other witnesses and with the surrounding circumstances. The Chamber will explain the criteria on which it acts on a case-by-case basis.”

Rwamakuba, (Trial Chamber), September 20, 2006, para. 40: “The Chamber will use various criteria in its assessment of the evidence, such as internal discrepancies in the witness’ testimony, inconsistencies with other witnesses’ testimony, inconsistencies with the witness’ prior statements, relationship between the witness and the Accused and other witnesses, the criminal record of the witness, the impact of trauma on a witness’ memory, discrepancies in translation, social and cultural factors, and the demeanour of the witness.”

Rwamakuba, (Trial Chamber), September 20, 2006, para. 35: “The probative value to be attached to testimony is determined according to its credibility and reliability. When a witness is found to be credible, a Chamber must also determine whether his or her evidence is reliable. When applying these criteria, a Chamber must consider the evidence as a whole, including other witnesses’ testimonies and the exhibits admitted.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 23: “The Chamber may consider a variety of elements in assessing the credibility of witnesses, including contradictions between the witness’s testimony and any prior written statements; inconsistencies or implausibilities within the testimony; and other features of the witness’s testimony. These elements must be considered in light of other factors, including the passage of time, the horrific nature of the events described, and cultural factors which may explain apparent discrepancies.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 156: “In considering what weight should be given to a specific [w]itness testimony, the totality of the testimony (demeanour, corroboration, credibility, etc.) of the witnesses is taken into account by the Chamber.”

For discussion of how social and cultural factors, the lapse of time, and trauma can impact witness testimony, see “Trial Chamber may consider social and cultural factors in assessing witness testimony,” “discrepancies in testimony may occur where events took place over a decade ago,” and “trauma does not prevent person from being a credible witness,” Sections (VIII)(d)(xi)(16)-(18), this Digest.

See also “corroboration is a factor in assessing credibility,” Section (VIII)(d)(xi)(6)(c); “Trial Chamber has main responsibility of evaluating inconsistencies in witness testimony,” Section (VIII)(d)(xi)(7); “whether the Trial Chamber is required to individually address inconsistencies within and/or amongst witness testimonies in the judgment, Section (VIII)(d)(xi)(8), this Digest.

6) corroboration of witness testimony not required

Muvunyi, (Appeals Chamber), August 29, 2008, para. 128: “[A] Trial Chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony” See also *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 652 (similar); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 101 (same) & para. 120 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 72 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 92 (similar).

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 170: “As recently stated in the *Niyitegeka* case, ‘[t]he Appeals Chamber has consistently held that a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness’s testimony for the proof of a material fact.’” See also *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 949 (similar); *Rwamakuba*, (Trial Chamber), September 20, 2006, para. 34 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 132: “[T]here is no requirement that convictions be made only on evidence of two or more witnesses. Corroboration is simply one of many potential factors in the Trial Chamber’s assessment of a witness’s credibility. If the Trial Chamber finds a witness credible, that witness’s testimony may be accepted even if not corroborated. Similarly, even if a Trial Chamber finds that a witness’s testimony is inconsistent or otherwise problematic enough to warrant its rejection, it might choose to accept the evidence nonetheless because it is corroborated by other evidence.”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 92: “[A]cceptance of and reliance upon uncorroborated evidence, *per se*, does not constitute an error in law.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 493: “It may be that a Trial Chamber would require the testimony of a witness to be corroborated, but according to the established practice of the *ad hoc* tribunals, that is not a requirement.”

Nchamihigo, (Trial Chamber), November 12, 2008, para. 14: “Corroboration of evidence is not necessarily required and a Chamber may rely on a single witness’ testimony as proof of a material fact. As such, a sole witness’ testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt.”

Compare Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 92: “The Chamber . . . recalls that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. However, when only one witness presented evidence on a particular incident, the Chamber examined the evidence with particular care before accepting it as a sufficient basis for entering a finding of guilt.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 33 (same).

(a) corroboration not a rule of customary international law

Muvunyi, (Trial Chamber), September 12, 2006, para. 11: “[T]he Appeals Chamber has held that corroboration is not a rule of customary international law and as such shall ordinarily not be required by Trial Chambers.” *See also id.*, para. 181 (similar). (The Appeals Chamber, however, reversed the Trial Chamber for relying on uncorroborated accomplice testimony where the accomplice had “motive to enhance Muvunyi’s role in the crimes and to diminish his own.” *See Muvunyi*, (Appeals Chamber), August 29, 2008, paras. 125-32.)

Kamuhanda, (Trial Chamber), January 22, 2004, para. 38: “[T]he Trial Chamber notes the finding in the Tadic [*sic*] Appeals Judgment that corroboration of evidence is not a customary rule of international law and as such should not be ordinarily required by the International Tribunal.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 41 (same with italics).

For discussion of evaluating accomplice testimony, see “testimony of convicted persons, accomplices, persons who face criminal charges to be viewed with caution,” Section (VIII)(d)(xi)(26), this Digest.

(b) when testimony corroborates other testimony

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 428: “[T]he Appeals Chamber is of the view that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.”

(c) corroboration is a factor in assessing credibility

Simba, (Appeals Chamber), November 27, 2007, para. 24: “[C]orroboration is simply one of many potential factors in the Trial Chamber’s assessment of a witness’s credibility.”

(d) Trial Chamber has discretion to disregard corroborated evidence

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 239: “[T]he Trial Chamber quoted the *Musema* Trial Judgement to the effect that a Trial Chamber is not bound by any rule of corroboration, but

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.

The Appeals Chamber finds that the Trial Chamber’s approach to corroborative evidence, as articulated above, is correct The Trial Chamber correctly held that it is free to disregard evidence even if it is corroborated by other evidence. But this does not by any means suggest that the Trial Chamber is not *permitted* to take corroborative evidence into account; rather, it has discretion to do so.” See *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 40, quoting *Musema*, (Trial Chamber), January 27, 2000, para. 46.

(e) Trial Chamber has discretion to take corroboration into account

Seromba, (Appeals Chamber), March 12, 2008, para. 79: “[A] Trial Chamber has the discretion to decide in the circumstances of the case whether corroboration is necessary.” See also *Muhimana*, (Appeals Chamber), May 21, 2007, para. 49 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 29: “[T]he issue as to whether it is necessary to rely on one or several witness testimonies to establish proof of a material fact depends on different factors that have to be assessed in the circumstances of each case. It is possible for one Trial Chamber to prefer that a witness statement be corroborated, but neither the jurisprudence of the International Tribunal nor of the ICTY makes this an obligation. Where testimonies are divergent, it is the duty of the Trial Chamber, which heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit.”

Bagilishema, (Appeals Chamber), July 3, 2002, para. 79: “[I]t is well settled that ‘the testimony of a single witness on a material fact may be accepted as evidence without the need for corroboration.’ However, the Appeals Chamber considers that this jurisprudence cannot be interpreted to mean that a Trial Chamber cannot resort to corroboration; the Trial Chamber can do so by virtue of its discretion. In the present case, the Trial Chamber was entitled to verify the facts and assess the credibility of witnesses by reference to the testimony of other witnesses.”

Ndindababizi, (Trial Chamber), July 15, 2004, para. 24: “Testimony by more than one witness on matters relevant to the same event enhances the reliability of evidence, but is not a necessary condition for a finding of reliability. It is well-established that a Chamber may consider a material fact proven by uncorroborated testimony which it considers to be reliable. On the other hand, a Chamber may determine that, in the absence of corroboration, the testimony is unreliable.”

(f) corroboration of sexual violence victim not required

Muvunyi, (Trial Chamber), September 12, 2006, para. 11: “With respect to sexual offences, Rule 96(i) specifically provides that the Trial Chamber shall not require corroboration of the evidence of a victim of sexual violence.”

7) Trial Chamber has main responsibility of evaluating inconsistencies in witness testimony

Muvunyi, (Appeals Chamber), August 29, 2008, para. 144: “It is within a Trial Chamber’s discretion to assess any inconsistencies in the testimony of witnesses, and to determine whether, in the light of the overall evidence, the witnesses were nonetheless reliable and credible.”

Simba, (Appeals Chamber), November 27, 2007, para. 103: “As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses’ testimonies. It is within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the ‘fundamental features’ of the evidence. It may do this by relying on live testimony or documentary evidence.”

Muhimana, (Appeals Chamber), May 21, 2007, para. 135: “In fulfilling this responsibility [to assess the credibility of witnesses and the probative value of evidence], a Trial Chamber has the duty to evaluate inconsistencies that may arise in the evidence. Where a Trial Chamber has based its findings on testimony that is inconsistent with prior out-of-court statements or other evidence, this does not necessarily constitute an error. However, the Trial Chamber is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 443: “[T]he Trial Chamber should take account of any inconsistencies in a witness’s testimony. The Appeals Chamber, however, emphasises that it falls to the trier of fact to assess the inconsistencies highlighted in testimony and determine whether they impugn the entire testimony.”

(a) Appeals Chamber will not lightly overturn Trial Chamber’s determination as to witness credibility

Simba, (Appeals Chamber), November 27, 2007, para. 116: “The Appeals Chamber will not lightly overturn findings of a trier of fact who was able to directly assess the demeanor of a witness giving live testimony.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 253: “[T]he Appeals Chamber will only intervene in cases where the Appellant has demonstrated that evidence relied upon could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous. It should also be stressed that with regard to the assessment of the credibility of a witness and the reliability of testimony, the Trial Chamber may accept a witness’s testimony despite the existence of contradictory statements. It therefore falls to the Trial Chamber to assess the contradictions pointed out and determine whether the witness — in the light of his entire testimony — was reliable, and his testimony credible.”

See also “Appeals Chamber owes ‘margin of deference’ to Trial Chamber’s evaluation of evidence,” Section (VIII)(d)(iv)(1); “deference due to Trial Chamber particularly in evaluating witness testimony,” under “appellate review,” Section (VIII)(e)(ii)(4)(a), this Digest.

8) whether the Trial Chamber is required to individually address inconsistencies within and/or amongst witness testimonies in the judgment

Muhimana, (Appeals Chamber), May 21, 2007, para. 58: “[W]hile a Trial Chamber is required to consider inconsistencies and any explanations offered in respect of them when weighing the probative value of evidence, it does not need to individually address them in the Trial Judgement.”

Muhimana, (Appeals Chamber), May 21, 2007, para. 99: “The Appeals Chamber reiterates that a Trial Chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony.” *See also id.*, para. 72 (similar); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 554 (similar).

Muhimana, (Appeals Chamber), May 21, 2007, para. 176: “A Trial Chamber is not required to set out in detail why it accepted or rejected a witness’s testimony, or justify its evaluation of testimony in cases where there are discrepancies in the evidence. It is also not obliged in its judgement to recount and justify its findings in relation to every submission made at trial.”

But see Muvunyi, (Appeals Chamber), August 29, 2008, paras. 134-48: Ordering retrial where Trial Chamber did not provide sufficient reasons for preferring the testimony of Witnesses YAI and CCP over that of Witness MO78 as a basis for its conviction for incitement of genocide for Muvunyi’s speech at the Gikore Trade Center:

“The Appeals Chamber recalls . . . that a Trial Chamber has an obligation to provide a reasoned opinion. In this instance, the Appeals Chamber considers that the Trial Chamber did not provide sufficient reasons for preferring the testimony of Witnesses YAI and CCP over that of Witness MO78. The Trial Chamber did not point to any inconsistencies in the evidence of Witness MO78 nor did it identify any reasons for doubting his credibility. The Trial Chamber appears to have deemed Witness MO78 unreliable solely on the basis that his evidence differed from that of Witnesses YAI and CCP. Such an approach is of particular concern given the Trial Chamber’s express

recognition of the need to treat the evidence of Witnesses YAI and CCP, unlike the evidence of Witness MO78, with caution [due to numerous inconsistencies in their testimonies]. The Appeals Chamber therefore finds that the Trial Chamber failed to provide a reasoned opinion on this point.” “In such circumstances, the Appeals Chamber is forced to conclude that Muvunyi’s conviction for direct and public incitement to commit genocide on the basis of his alleged speech at the Gikore Trade Center is not safe and, accordingly, quashes it [and ordered a retrial on this charge].”

See also “Trial Chamber not obligated to set forth all reasoning or evidence considered,” under “appellate review,” Section (VIII)(e)(ii)(13), this Digest.

Compare “reasoned opinion requirement enhanced where witness identified the accused in difficult circumstances,” under “fair trial rights,” Section (VIII)(c)(xiii)(2), this Digest; “identification of the accused” “if made under difficult circumstances, consider with caution,” under “evaluating witness testimony,” Section (VIII)(d)(xi)(25)(a), this Digest.

9) Trial Chamber had discretion to accept or reject witness testimony

Seromba, (Appeals Chamber), March 12, 2008, para. 116: “[I]t is within a Trial Chamber’s discretion to accept or reject a witness’s testimony, after seeing the witness, hearing the testimony, and observing him or her under cross-examination.”

10) Trial Chamber may accept part of testimony and reject part

Muvunyi, (Appeals Chamber), August 29, 2008, para. 128: “[I]t is not unreasonable for a trier of fact to accept some, but reject other parts of a witness’s testimony.” *See also* *Seromba*, (Appeals Chamber), March 12, 2008, para. 110 (similar); *Simba*, (Appeals Chamber), November 27, 2007, para. 212 (similar); *Kamubanda*, (Appeals Chamber), September 19, 2005, para. 248 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, paras. 184, 215, 280 (similar); *Ndindababizi*, (Trial Chamber), July 15, 2004, para. 23 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 474: “[T]he existence of reasonable doubt as to the truth of a statement by a witness is not evidence that the witness lied with respect to that aspect of his testimony, nor that the witness is not credible with respect to other aspects.”

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 167: “A Trial Chamber is entitled to rely on any evidence it deems to have probative value and it may accept a witness’s testimony only in part if it considers other parts of his or her evidence not reliable or credible.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 237: “The fact that a witness’s testimony may not provide sufficient detail to prove a particular fact beyond reasonable doubt does not mean that the witness’s testimony should be discredited.”

(a) application

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 138: Upholding witness testimony despite some inconsistencies because “on the critical elements of her testimony against the Appellant, [the testimony] was unwavering”; “[i]n the final analysis, the need to defer to the Trial Chamber on issues of credibility, particularly given the importance of witness demeanour, leads the Appeals Chamber to hold that these inconsistencies do not make it unreasonable for the Trial Chamber to have credited [the] evidence.”

See, e.g., Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 91: “When deciding whether or not to rely on certain aspects of a witness’s testimony, the Chamber [sometime discounted parts, and] sometimes relied on other parts of the testimony deemed to be reliable and credible.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 32 (same).

11) minor inconsistencies in witness testimony acceptable

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 136: “The Appeals Chamber has previously noted the following:

It is . . . normal for a witness who testified in several trials about the same event or occurrence to focus on different aspects of that event, depending on the identity of the person at trial and depending on the questions posed to the witness by the Prosecution. It is, moreover, not unusual for a witness’s testimony about a particular event to improve when the witness is questioned about the event again and has his memory refreshed. The witness may become more focused on the event and recall additional details.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 258: Where “[t]he Trial Chamber concluded that the variations between the accounts given by both witnesses were minor and could not outweigh the ‘overwhelming and convincing similarities’ between the two accounts, . . . the Trial Chamber not unreasonably concluded that the variations in their accounts did not undermine the core of their testimonies or the credibility of their statements.”

See also Semanza, (Appeals Chamber), May 20, 2005, para. 241: “[T]wo witnesses in the same general area do not necessarily have identical observations and recollections about who was present and what was said.”

See, e.g., Mubimana, (Appeals Chamber), May 21, 2007, para. 156: “The Trial Chamber reasoned that any inconsistency in Witness AT’s account related to ‘minor details’ and, with respect to discrepancies as to the location of the crime, simply resulted from trauma, the passage of time, and the witness’s lack of familiarity with the surgical theatre. The Appellant has not demonstrated that, in these circumstances, this was an unreasonable basis for assessing any discrepancy or vagueness in the witness’s evidence related to the location of the crime.”

See also “discrepancies in testimony may occur where events took place over a decade ago,” and “trauma does not prevent person from being a credible witness,” Sections (VIII)(d)(xi)(17)-(18), this Digest.

**12) Trial Chamber may accept witness testimony despite
inconsistency with prior statements**

Seromba, (Appeals Chamber), March 12, 2008, para. 116: “[A] Trial Chamber has the discretion to accept a witness’s evidence, notwithstanding inconsistencies between the evidence and his prior statements, as it is up to the Trial Chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the witness’s credibility.” *See also Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 96 (similar); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 443 (similar).

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 96: “It is not a legal error *per se* to accept and rely on evidence that varies from prior statements or other evidence. However, a Trial Chamber is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence”

Muvunyi, (Trial Chamber), September 12, 2006, para. 14: “In determining witness credibility, the Trial Chamber has discretion to assess inconsistencies between a witness’s pre-trial statements and his evidence in court and to determine the appropriate weight to be attached to such inconsistencies. The mere fact that inconsistencies exist does not mean that the witness completely lacks credibility.”

Ndindabahizi, (Trial Chamber), July 15, 2004, para. 22: “The parties made submissions on alleged discrepancies between the prior written statements of witnesses and testimony before the Chamber. The Chamber has considered these submissions fully in assessing the credibility of witnesses.”

See also Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 26: “The Chamber notes that differences between prior statements and testimony in court may be due to various factors, such as the lapse of time, the language used, the questions put to the witness, the accuracy of interpretation and transcription, and the impact of trauma on the witness. However, when the inconsistencies cannot be explained to the satisfaction of the Chamber, the probative value of the testimony may be questioned.”

See, e.g., Muhimana, (Appeals Chamber), May 21, 2007, para. 138 (applying same).

See also “discrepancies in testimony may occur where events took place over a decade ago,” and “trauma does not prevent person from being a credible witness,” Sections (VIII)(d)(xi)(17)-(18), this Digest.

13) prior consistent statements may not bolster witness credibility, except to rebut charge of recent fabrication

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 147-48, 155: “The Rules of Procedure and Evidence of the Tribunal do not expressly forbid the use of prior consistent statements to bolster credibility. However, the Appeals Chamber is of the view that prior consistent statements cannot be used to bolster a witness’s credibility, except to rebut a charge of recent fabrication of testimony. The fact that a witness testifies in a manner consistent with an earlier statement does not establish that the witness was truthful on either occasion; after all, an unlikely or untrustworthy story is not made more likely or more trustworthy simply by rote repetition. Another reason supporting this position is that, if admissible and taken as probative, parties would invariably adduce numerous such statements in a manner that would be unnecessarily unwieldy to the trial.” “However, there is a difference between using a prior consistent statement to bolster the indicia of credibility observed at trial and rejecting a Defence challenge to credibility based on alleged inconsistencies between testimony and earlier statements. The former is a legal error, while the latter is simply a conclusion that the Defence’s arguments are not persuasive.” (Finding that Gérard Ntakirutimana had not shown any instances where the Trial Chamber impermissibly used prior consistent statements to bolster witness credibility.)

14) Trial Chamber may accept witness testimony despite inconsistencies with other testimony

Muhimana, (Appeals Chamber), May 21, 2007, para. 58: “[T]he presence of inconsistencies within or amongst witnesses’ testimonies does not *per se* require a reasonable Trial Chamber to reject the evidence as being unreasonable.”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 70: “As a general matter, the mere existence of inconsistencies between the testimonies of Witnesses TBH and TAW does not necessarily undermine either witness’s credibility. The Appeals Chamber defers to the Trial Chamber’s judgements on issues of credibility, including its resolution of disparities among different witnesses’ accounts, and will only find that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.”

15) to discredit witness entirely, must show inconsistencies are so fatal to credibility that they permeate the testimony and render it incredible

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 254: “An appellant who wishes a court to draw the inference that a particular witness cannot be credited at all on the grounds that a particular portion of that witness’s testimony is wrought with irredeemable inconsistencies has a high evidentiary burden: he or she must explain why the alleged inconsistencies are so fatal to the witness’s overall credibility that they permeate his entire testimony and render all of it incredible.”

See also “rare to find live testimony so lacking in reliability as to be inadmissible,” Section (VIII)(d)(xi)(3), this Digest.

16) Trial Chamber may consider social and cultural factors in assessing witness testimony

Rutaganda, (Appeals Chamber), May 26, 2003, paras. 222, 230, 232: “[T]he Trial Judgement . . . [stated]:

The Chamber has also taken into consideration various social and cultural factors in assessing the testimony of some of the witnesses. Some of these witnesses were farmers and people who did not have a high standard of education, and they had difficulty in identifying and testifying to some of the exhibits, such as photographs of various locations, maps etc. [...] These witnesses also experienced difficulty in testifying as to dates, times, distances, colours and motor vehicles. . . .”

“It is clear that the difficulties faced by a witness in estimating distances or giving a geographical direction must be taken into account in assessing the scope and reliability of certain aspects of his testimony; but these do not affect the testimony as a whole or its credibility.” “[T]he Appeals Chamber is of the opinion that the Trial Chamber did not commit the alleged errors of law.” (emphasis in original.)

17) discrepancies in testimony may occur where event took place over a decade ago

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 91: “The Chamber recognises that a significant period of time has elapsed between the events alleged in the Indictment and the testimonies given in court. Therefore, lack of precision or minor discrepancies between the evidence of different witnesses, or between the testimony of a particular witness and a prior statement, while calling for cautious consideration, was not regarded in general as necessarily discrediting the evidence.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 32 (similar).

See, e.g., Muhimana, (Trial Chamber), April 28, 2005, para. 65: “The Chamber notes the discrepancy between the testimonies of Witnesses AW and W in relation to the date of the first attack at Nyarutovu. Whereas Witness AW testified that the attack occurred on 8 April 1994, Witness W recalled the date of the attack as 9 April 1994. The Chamber is of the view that in situations where witnesses are called to testify on events which took place over a decade ago, discrepancies relating to the time and date of the event may occur.” *See also Muhimana*, (Appeals Chamber), May 21, 2007, para. 70 (upholding same).

See, e.g., Kamuhanda, (Trial Chamber), January 22, 2004, para. 35: “The Chamber recognizes . . . the time that had elapsed between the time of the events in question and the testimonies of the Witnesses.” *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 38 (similar).

18) trauma does not prevent person from being a credible witness

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 290: “The Appeals Chamber observes that the Trial Chamber was aware of the difficult situation of the witnesses and duly took it into account:

The Chamber notes that many of the Witnesses who have testified before it have seen and experienced atrocities. They, their relatives, or their friends have, in many instances, been the victims of such atrocities. The Chamber notes that

recounting and revisiting such painful experiences may affect the Witness's ability to recount the relevant events fully or precisely in a judicial context

This approach to assessing the effects of trauma on testimony—recognizing that trauma may impair perceptions or memory and may explain apparent inconsistencies, but does not necessarily render it impossible for witnesses to testify credibly and reliably—is consistent with the approach the Appeals Chamber recently affirmed in the *Kajelijeli* case.” See *Kamuhanda*, (Trial Chamber), January 22, 2004, para. 34 (source of quoted language).

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 13: “[T]here is no error in the Trial Chamber’s statements regarding the impact of trauma. First, despite the Appellant’s suggestion, it was clearly proper for the Trial Chamber to address the issue of trauma in the first place: many of the witnesses on both sides had, for instance, directly observed atrocities, and others had been victims. Indeed, several Defence witnesses specifically testified that they were traumatized (and this alone would justify the Trial Chamber’s discussion, even if the Prosecution witnesses had not also suffered trauma). Second, the Trial Chamber’s commentary on this issue consists principally of direct quotations from the ICTY Appeals Chamber’s Judgements in the *Kupreškić* and *Čelebići* cases, which held that the Trial Chamber should take the likely distorting effects of trauma into account when considering witness testimony; that the Trial Chamber is free nonetheless to accept the fundamental features of testimony despite the impact of trauma; and that trauma may sometimes explain minor inconsistencies in testimony without necessarily impugning the credibility of the testimony as to the major events that occurred. These principles are sound, and the Trial Chamber was correct to cite them.”

Muvunyi, (Trial Chamber), September 12, 2006, para. 14: “[T]he Chamber notes that many of the witnesses who appeared before it had themselves suffered, or were witnesses to, untold physical and psychological suffering during the 1994 events in Rwanda. In many cases, giving evidence before the Tribunal entailed reliving these horrific experiences thereby provoking strong psychological and emotional reactions. This situation may impair the ability of such witnesses to clearly articulate their stories or to present them in a full and coherent manner. When the effect of trauma is considered alongside the lapse of time from 1994 to the present the Chamber believes that the mere fact that inconsistencies exist in a witness’s story does not mean that the witness is not credible. Such inconsistencies go to the weight of the evidence rather than the credibility of the witness.”

Kajelijeli, (Trial Chamber), December 1, 2003, para. 37: “The Chamber notes that many of the witnesses who have testified before it have seen and experienced atrocities. They, their relatives or their friends have in several cases, been the victims of such atrocities. The Chamber notes that recounting and revisiting such painful experiences is likely to affect the witness’s ability to recount the relevant events in a judicial context. The Chamber also notes that some of the witnesses who testified before it may have suffered—and may have still continued to suffer—stress-related disorders.”

See also Rutaganda, (Appeals Chamber), May 26, 2003, paras. 217-19, 221 (no error for the Trial Chamber to take into consideration the impact of trauma on witness testimony).

See, e.g., Muhimana, (Appeals Chamber), May 21, 2007, para. 139: “[T]he Appellant argues that, as a matter of law, the Trial Chamber should have rejected Witness BG’s evidence because she admitted that in 1995 she was ‘suffering from mental dementia and trauma’ and that no subsequent evidence was led to establish that she regained mental health. However, a review of the trial record reveals that at no point did Witness BG suggest that she suffered from ‘dementia.’ Moreover, the witness indicated that she had received counselling for the trauma she suffered. Additionally, the Appellant fails to cite any evidence on the record revealing that Witness BG was incapable of understanding her obligations while testifying as a witness before the Tribunal. Therefore, the Appeals Chamber is not convinced that the Trial Chamber erred in relying on her testimony.”

**19) that witness or witness’ family was a victim of the accused
does not necessarily imply bias**

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 71: “[T]he mere fact that a witness or his family was a victim of an accused does not necessarily imply a bias that discredits that witness’s testimony. This Tribunal, like criminal courts everywhere, routinely relies on the testimony of victims of crime, who, one would assume, are as motivated as anyone to see that justice is done with accuracy. It is for the trier of fact to determine whether a particular witness may have an incentive to distort the truth, and here the Appellant has not demonstrated that the Trial Chamber’s assessment was in error.”

20) evaluating witness bias

Kamuhanda, (Trial Chamber), January 22, 2004, para. 171: “Clearly, there is a potential for bias The one [w]itness is the wife and the other a family friend and neighbour with whom the Kamuhanda family may well have gone through a difficult time together. Although a potential for bias tends to taint the testimony of a [w]itness, since it is harder to show that such evidence is independent of all motives of interest, this will not always be the case. There may indeed be instances when the testimony of a [w]itness with a basis for bias may come with evident indicia of reliability which will assist the search for the truth. That said, it needs also be said that the evidence of a [w]itness from whom bias might be expected is not helped by material contradictions.”

21) evaluating recanted trial testimony

See Kamuhanda, (Appeals Chamber), September 19, 2005, paras. 212-21 (where, on appeal, witness recanted trial testimony, Appeals Chamber found the recantation not credible where the trial testimony was consistent with earlier statements and corroborated by other witnesses).

**22) absence of fact from prior statement does not render trial
testimony unreliable**

Muhimana, (Appeals Chamber), May 21, 2007, para. 152: “As the Appeals Chamber has previously held, ‘to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness’s credibility.’”

23) young age of witness at time of events: not reason to discount testimony but warrants some caution

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 94: “The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness TAX’s testimony despite her young age at the time of the events [11 years old]. There is no rule requiring a Trial Chamber to reject *per se* the testimony of a witness who was a child at the time of the events in question, and the Appellant did not demonstrate that Witness TAX was not reliable or credible.”

Simba, (Trial Chamber), December 13, 2005, para. 78: “The young age of the witness at the time of the events is not in itself a sufficient reason to discount his testimony, but implies that it should be evaluated with some caution.”

See also Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 326 (discounting vague testimony of person who was 12 years old at the time of the crimes); *Karera*, (Trial Chamber), December 7, 2007, para. 135 (accepting testimony of witnesses who were 11 and 17 years old at the time of the events in question); *Muvunyi*, (Trial Chamber), September 12, 2006, para. 287 (finding a witness to be “very credible and [to have] provided a clear and convincing account of what she experienced” despite the fact that she was 11 years old in 1994).

24) membership in *Ibuka* and family relationships among witnesses not reason to discredit testimony

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 303: “[T]he Defence challenges the evidence offered by the Prosecution Witnesses who survived the Kesho Hill attack [in Rwili secteur, Gaseke commune, in Gisenyi prefecture] in that they are all members of *Ibuka* [an umbrella organization for the survivor organizations in Rwanda] and that they are in one way, or another, related. According to the Defence, given their close relationship, there is a likelihood of collusion. With regard to membership of *Ibuka*, and the relationships among the survivors, the Chamber considers this merely coincidental and a consequence of the fact they all live, or have lived, in the general area of Kesho Hill [where a massacre occurred]. In the Chamber’s view, their relationships as neighbours or extended family, and their membership of *Ibuka*, do not adversely affect their evidence. Furthermore, the Chamber considers that, had the witnesses colluded, and had their evidence been rehearsed, as suggested by the Defence, there would be far greater uniformity in the testimonies.”

25) identification of the accused

(a) if made under difficult circumstances, consider with caution

Kamubanda, (Appeals Chamber), September 19, 2005, para. 234: “The Appeals Chamber observes that it is well established in the jurisprudence of the ICTR and the ICTY that ‘a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction.’ In particular, the Trial

Chamber has to assess the credibility of the witness and determine whether the evidence provided by the witness is reliable. A witness may be credible—*i.e.*, in general worthy of belief—and still not, *in concreto*, trustworthy, because she may simply be mistaken due to difficulties in observation.”

Bagilishema, (Appeals Chamber), July 3, 2002, para. 75: “The Appeals Chamber observes . . . that the Trial Chamber was right in proceeding with caution with respect to the question of the identification of the Accused at [a crime location]. As the Appeals Chamber of the ICTY indicated in the *Kupreskić* Appeal Judgement, a Trial Chamber must proceed with extreme caution when assessing a witness’ identification of an accused made under difficult circumstances:

In cases before this Tribunal, a Trial Chamber must always, in the interests of justice, proceed with extreme caution when assessing a witness’ identification of the accused made under difficult circumstances”

Karera, (Trial Chamber), December 7, 2007, para. 313: “The Appeals Chamber has stressed that the Trial Chamber must always, in the interests of justice, proceed with extreme caution when assessing the identification of an accused made under difficult circumstances.”

Ndindababizi, (Trial Chamber), July 15, 2004, para. 24: “The Chamber is aware of the inherent difficulties and risks of identification evidence. As stated by the ICTY Appeals Chamber in *Kupreskić*:

A reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction. Domestic criminal law systems from around the world recognise the need to exercise extreme caution before proceeding to convict an accused person based upon the identification evidence of a witness made under difficult circumstances.”

See also “reasoned opinion requirement enhanced where witness identified the accused in difficult circumstances,” under “the right to a reasoned opinion,” Section (VIII)(c)(xiii)(2), this Digest.

(b) factors to consider in assessing identification

Niyitegeka, (Appeals Chamber), July 9, 2004, paras. 100-01: “The Appellant argues that the Trial Chamber erred in assessing identification/recognition evidence. In relation to the Defence assertion that identification evidence triggers a warning that the Judges must give to themselves, the Trial Chamber stated in its Judgement:

The Chamber accepts that identification evidence has inherent difficulties due to the vagaries of human perception and recollection. Therefore, the Chamber has carefully assessed and weighed the identification evidence adduced, taking into account the following factors: prior knowledge of the Accused, existence of adequate opportunity in which to observe the Accused, reliability of witness testimonies, conditions of observation of the Accused, discrepancies in the evidence or the identification, the possible influence of third parties, the

existence of stressful conditions at the time the events took place, the passage of time between the events and the witness's testimony, and the general credibility of the witness.”

“This methodology reveals no error of law; indeed, it conforms to the cautious approach endorsed by the Appeals Chamber in other cases.” *See also id.*, para. 113 (similar); *Ndindabahizi*, (Trial Chamber), July 15, 2004, para. 24 (listing and weighing same factors as quoted).

Bagilishema, (Appeals Chamber), July 3, 2002, paras. 76, 78-79: “After stating . . . that ‘a bare allegation of the presence of the Accused’ should be treated ‘with caution’ and that ‘a lack of detail will raise doubts,’ the Trial Chamber set out its general approach to assessing evidence in view of the need to proceed with caution as indicated above: the Trial Chamber first indicated that it ‘will examine the testimonies of other witnesses’ and that it may ‘look to prior statements,’ in order to ‘clarify or test a witness’s allegations.’ The Trial Chamber then went on to say that if ‘corroboration is not found through this process, doubts will remain and presence will not have been established.’ Finally, it stated that, in any event, ‘it is incumbent on the Prosecution to adduce sufficient evidence to convince the Chamber that the Accused was present and, if so, to demonstrate his role during the events.’” “[T]he Appeals Chamber is of the view that by adopting such an approach, the Trial Chamber was simply exercising the required caution.” “The Appeals Chamber fails to see in what way the approach adopted by the Trial Chamber for corroboration constitutes an error.”

See also Kamubanda, (Appeals Chamber), September 19, 2005, para. 240: “[E]vidence given by the witnesses who had not previously seen the Appellant should be accepted with caution.”

See also Kamubanda, (Appeals Chamber), September 19, 2005, para. 252: “Normally, it is possible to recognize a person within a time-span of one or two minutes, and a reasonable trier of fact can accept such an identification.”

See also Kamubanda, (Appeals Chamber), September 19, 2005, para. 298: “[N]either the Rules nor the jurisprudence of the Tribunal obliged the Trial Chamber to require a particular type of identification evidence.”

(c) error to give weight to in-court identification

Kamubanda, (Appeals Chamber), September 19, 2005, para. 243: “To the extent that the Trial Chamber’s language suggests that weight should be given to an identification given for the first time by a witness while testifying, who identifies the accused while he is standing in the dock, it is misleading. Courts properly assign little or no credence to such identifications. The Appeals Chamber notes, for instance, that an ICTY Trial Chamber held in *Kumarac et al.*:

Because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial (or, where more than one person is on trial, the particular person on trial who most closely resembles the man who committed the offence charged), no positive probative weight has been given by the Trial Chamber to these ‘in court’ identifications.

This view was confirmed by the ICTY Appeals Chamber, which held ‘that the Trial Chamber was correct in giving no probative weight to in-court identification.’ It is thus not sufficient to support the credibility of an in-court identification, contrary to the Trial Chamber’s suggestion, that the witness be able to scan the whole courtroom for the accused, for the context of the trial makes it clear who the accused is.”

(d) application—identification

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 300: “The Appeals Chamber notes that this witness did not identify the Appellant in the strict sense of the word, but rather testified that other people present identified one of the attackers as a person called ‘Kamuhanda.’ As stated earlier, it was not erroneous to rely on this type of hearsay evidence as corroborative evidence.”

See, e.g., Semanza, (Appeals Chamber), May 20, 2005, paras. 202-24 (review of the Trial Chamber’s findings that the “identification evidence [identifying the accused] was reliable, coherent and corroborated”).

For discussion of corroboration, see “corroboration of witness testimony not required,” Section (VIII)(d)(xi)(6). For discussion of hearsay, see “hearsay evidence admissible; must be assessed for credibility and relevance,” Section (VIII)(d)(vii), this Digest.

26) testimony of convicted persons, accomplices, persons who face criminal charges to be viewed with caution

Muvunyi, (Appeals Chamber), August 29, 2008, para. 128: “The Appeals Chamber has previously held that reliance upon evidence of accomplice witnesses *per se* does not constitute a legal error. The Appeals Chamber noted, however, that ‘considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of circumstances in which it was tendered.’”

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 439: “[The Appeals Chamber] recalls that the jurisprudence of both *ad hoc* Tribunals does not *a priori* exclude the testimony of convicted persons, including those who could be qualified as ‘accomplices,’ *stricto sensu*, of the accused. This jurisprudence requires that such testimonies be treated with special caution, the main question being to assess whether the witness concerned might have motives or incentives to implicate the accused.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 13 (treat “evidence of accomplices or detained witnesses” “with caution”).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 206: “An analysis of the . . . jurisprudence demonstrates that in assessing the reliability of accomplice evidence the Trial Chamber must consider whether the particular witness has a specific motive to testify as it did and to lie.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 129: “[A] witness who faces criminal charges that have not yet come to trial ‘may have real or perceived gains to be made by incriminating accused persons’ and may be tempted or

encouraged to do so falsely. This risk, when properly raised and substantiated, should be considered by the Trial Chamber.”

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 181: “[T]he mere fact that an incarcerated suspect had a possible incentive to perjure himself on the stand in order to gain leniency from the prosecutorial authorities is not sufficient, by itself, to establish that the suspect did in fact lie. The authorities cited by the Appellant are not to the contrary: none shows that an in-custody informant must necessarily be treated as unreliable.”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 98: “The ordinary meaning of the term ‘accomplice’ is ‘an associate in guilt, a partner in crime.’ Nothing in the Statute or the Rules of the Tribunal prohibits a Trial Chamber from relying upon testimony of those who were partners in crime of persons being tried before it. As stated above, a Chamber may admit any relevant evidence which it deems to have probative value. Accomplice testimony is not *per se* unreliable, especially where an accomplice may be thoroughly cross-examined. However, considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of the circumstances in which it was tendered. In the view of the Appeals Chamber, reliance upon evidence of accomplice witnesses *per se* does not constitute a legal error.”

Nchamihigo, (Trial Chamber), November 12, 2008, para. 17: “It is accepted both as a matter of law and common sense that the testimony of accomplices [witnesses who admitted to participating in the crimes charged] may be tainted by motives or incentives to falsely implicate an accused to gain some benefit or advantage in regard to their own case or sentence. A Chamber must therefore look at the testimony of accomplices, and the circumstances under which it has come to be delivered, with caution. However, there is no rule requiring corroboration in the assessment of accomplice testimony. The Chamber may rely on the testimony of an accomplice who has not been corroborated if, after careful examination, the Chamber is convinced of the truthfulness and reliability of the witness. Testimony which supports the evidence adduced by an accomplice may bolster and strengthen the reliance that can be placed on it.”

Compare Kajelijeli, (Appeals Chamber), May 23, 2005, para. 18: “The bare allegation that a witness is a ‘common criminal’ who is biased against the Appellant because the Appellant arrested or sanctioned the person for his alleged misdeeds does not, in itself, diminish the creditworthiness of the witness’s testimony.”

Compare Kajelijeli, (Appeals Chamber), May 23, 2005, para. 26: “[T]he Trial Chamber was entitled to take into account the fact that the Appellant did not put such allegations [of a motive to give false testimony] to the witnesses for their reactions. Indeed, without the benefit of observing the witnesses’ reactions to such allegations, the Trial Chamber was not in a position to determine whether there was merit in the Appellant’s charges.”

For extensive discussion of case law as to accomplice testimony, see *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, paras. 203-05, 233-34.

(a) application

Muvunyi, (Appeals Chamber), August 29, 2008, paras. 125-32: Overturning conviction which relied on uncorroborated accomplice testimony where accomplice had “motive to enhance Muvunyi’s role in the crimes and to diminish his own.” “[T]he Appeals Chamber is not satisfied that a reasonable trier of fact could have relied on Witness YAQ’s evidence alone in finding that Muvunyi addressed a crowd of attackers in Gikonko in May or June 1994.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 164: “The Chamber is concerned with possible improper motives for [a certain witness] testimony. He was tried, convicted, and sentenced to life imprisonment for crimes committed during the genocide, and was awaiting appeal at the time of his testimony In addition, the Chamber notes that [the witness] suggests that the Accused led him to commit his crimes; in other words, he appears to blame the Accused for his actions [G]iven his admitted willingness to lie in order to avoid punishment, and the expressed belief that the Accused is essentially responsible for his crimes, the Chamber considers it possible that [the witness] may have been motivated to testify in order to receive more favourable treatment on appeal.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 319-20: “With regard to [a certain defense witness], the Chamber has misgivings regarding his testimony. The Chamber notes that [the witness] was convicted by a Rwandan Court for the murder of two girls during the genocide. Furthermore, the Chamber has concerns regarding inconsistencies in his testimony as to whether he was, or was not, armed with a nail-studded club. In view of his acknowledgment that he would have received a greater sentence had he been found to have killed anyone on Kesho Hill [in Rwili secteur, Gaseke commune, in Gisenyi prefecture], the Chamber finds his testimony that he did not use a nail-studded club to commit violent acts, and his later contradictory evidence that he did not carry such a club, to be self-serving and unconvincing. Additionally, the Chamber notes [the witness] failure to mention Bagaragaza in his confession letter to Rwandan authorities on 30 October 2005, notwithstanding his testimony that Bagaragaza told them to ‘exterminate the people on Kesho.’” “Therefore, in light of his criminal history and contradictory testimony, the Chamber does not find [the witness] to be a credible witness.”

Nchamihigo, (Trial Chamber), November 12, 2008, para. 53: “In the Chamber’s view, [witnesses] LDC and BRJ could have motive to incriminate Nchamihigo in order to get lesser sentences in their own cases. Moreover, their status as accomplices requires that the Chamber exercise great caution in the assessment of their testimony.”

Compare Gacumbitsi, (Trial Chamber), June 17, 2004, para. 87: “Witness TBH’s loss of his Rwandan civic rights would not, per se, warrant, as the Defence alleges, the dismissal of his evidence by this Tribunal, whose Statute and Rules of Procedure and Evidence do not subject the admissibility of evidence to requirements of Rwandan national law.”

(b) unrelated murder by witness does not *per se* render witness not credible

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 142: “[T]he perpetrator of a murder is not necessarily prone to commit an offence against the proper administration of justice. In fact, there is nothing inherent in a murder conviction, particularly one wholly unrelated to the facts of the case at hand, that *per se* precludes a witness’s testimony from being deemed credible by the trier of fact. Indeed, the testimony of persons allegedly involved in the planning and execution of murders and other terrible crimes is often a crucial basis for the conviction of other participants in the scheme, in this Tribunal, in the ICTY, and in other courts. It is for the trier of fact to take into account criminal convictions and any other relevant evidence concerning the witness’s character along with all the other relevant factors—for instance, the witness’s demeanour, the content of her testimony, and its consistency with other evidence—in determining whether the witness is credible. Here, the Trial Chamber did so, and found that in light of all these factors, the unrelated murder conviction did not provide a reason to doubt the truthfulness of [the witness’s] testimony.”

27) parties may discuss upcoming testimony with witness unless attempt is made to influence content

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 74: “It is not inappropriate *per se* for the parties to discuss the content of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth.”

(a) suspicion witness was paid for his testimony and subordinated other witnesses would cast serious doubt on witness’ credibility

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 545: “The Appeals Chamber considers that if the Trial Chamber had been aware of the fact that the Prosecutor’s investigator questioned [Witness AFX’s] moral character, suspecting him of having been involved in the subornation of other witnesses and of being prepared to testify in return for money – the Trial Chamber would have been bound to find that these matters cast serious doubt on Witness AFX’s credibility. Hence, like any reasonable trier of fact, it would have disregarded his testimony, or at least would have required that it be corroborated by other credible evidence. The Appeals Chamber accordingly decides to dismiss Witness AFX’s testimony insofar as it is not corroborated by other credible evidence.”

(b) perquisites paid to prosecution witness warrants caution as to testimony

Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 139-40: “[T]he Chamber notes the perquisites provided by the Prosecution to Bagaragaza, including direct payments prior to his arrest, the payment of costs incurred in relocating and supporting his family, and promises made to Bagaragaza related to the venue of his own trial as well as his own relocation after trial. While not inherently unreasonable, the Chamber considers such benefits warrant additional caution when considering Bagaragaza’s evidence.” “Under these circumstances, the Chamber considers it unsafe to accept Bagaragaza’s

uncorroborated hearsay testimony regarding the Accused's alleged support for the *Interahamwe*."

Compare Muvunyi, (Trial Chamber), September 12, 2006, para. 56 (payment to witness of US \$5,000.00 by the Office of the Prosecutor for "compensation for material and financial loss he suffered as a result of his quick relocation from Rwanda to another state, leaving behind his house and business" was held not to have colored or changed witness' testimony).

28) knowingly and willfully giving false testimony (which provides basis to proceed against witness) distinct from discrepancies in testimony

Simba, (Appeals Chamber), November 27, 2007, paras. 31-32: "[T]he Prosecutor has independent authority to initiate investigations on statutory crimes and to assess whether the information forms a sufficient basis to proceed against persons suspected of having committed such crimes. However, Rule 91(B)(i) of the Rules specifically provides that '[i]f a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony.' Such action lies within the discretion of the Trial Chamber and is contingent on its conviction that a witness 'has knowingly and wilfully given false testimony.' On the other hand, a credibility determination may be based, but does not necessarily depend, on a judicial finding that a witness has given false testimony." "The Appeals Chamber stresses that the mere existence of discrepancies between a witness's testimony and his earlier statements does not constitute strong grounds for believing that a witness may have knowingly and wilfully given false testimony . . . [T]he Appellant does not show that the Trial Chamber erred in not directing the Prosecution to investigate Witness YH for false testimony."

See also Niyitegeka, (Appeals Chamber), July 9, 2004, para. 253: "[T]he Trial Chamber noted that the Defence asserted that some Prosecution witnesses fabricated their testimony and noted that the Defence did not file any application under Rule 91 dealing with false testimony. The Trial Chamber expressed its view that 'a distinction is to be made between credibility issues and false testimony' and correctly noted that the party moving an application under Rule 91 has the onus to prove the alleged falsehood. Nothing in this, or indeed in the Trial Chamber's assessment of the credibility of individual witnesses, supports the Appellant's submission that when weighing Prosecution evidence the Trial Chamber took into account the fact that the Defence did not make an application under Rule 91."

29) testimony by the accused after having heard other evidence to be taken into account

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 392-93: "In the present case the Trial Chamber made the following general observation:

The Chamber also notes that the two Accused chose to testify at the very end of the case, and thus did so with the benefit of having heard the evidence presented by the other Defence witnesses. The Chamber has taken this factor into

account in considering the weight to be accorded to the evidence given by the Accused.”

“The Appeals Chamber finds no error in such an approach. In weighing evidence, a trial chamber, must consider, *inter alia*, the context in which it was given, including, in respect of testimony, whether it was given with the benefit of having heard other evidence in the case. When an accused testifies in support of his or her alibi after having heard other alibi evidence, a trial chamber is obligated to take this into account when assessing the weight to be given to such testimony.”

30) no automatic preference for documentary evidence over oral testimony

Simba, (Appeals Chamber), November 27, 2007, para. 132: “The Appeals Chamber . . . has . . . dismissed the argument that as a matter of law documentary evidence should be preferred to oral testimony.”

31) witness testimony may be considered by Trial Chamber beyond the scope of how it was offered

Kamubanda, (Appeals Chamber), September 19, 2005, para. 113: “The Appeals Chamber notes that neither the Statute nor the Rules nor general principles of procedural law prevent the Trial Chamber from considering that part of the testimony of a Defence witness which goes beyond the scope originally intended by the Defence, as long as it remains within the scope of the indictment.”

32) Trial Chamber not bound by other Trial Chamber’s finding on witness credibility

Rwamakuba, (Trial Chamber), September 20, 2006, para. 110: “The Chamber has discretionary power to assess the evidence brought before it and cannot be bound by the assessment of [a witness]’ credibility made in the *Kamubanda* case.”

See also “Trial Chamber not required to follow other Trial Chamber’s ruling on documentary evidence,” Section (VIII)(d)(iii)(4), this Digest.

xii) expert witnesses

1) provides specialized knowledge, such as technical, scientific, or other expertise

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 198: “[T]he evidence of an expert witness is meant to provide specialized knowledge – be it a skill or knowledge acquired through training – that may assist the fact finder to understand the evidence presented. The Appeals Chamber recently held:

Expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise; their views need not be based upon firsthand knowledge or experience. Indeed, in the ordinary case the expert witness lacks personal familiarity with the particular case, but instead offers a view based on his or her specialized knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside the lay person’s ken.”

Simba, (Appeals Chamber), November 27, 2007, para. 174: “[T]he evidence of an expert witness is meant to provide specialised knowledge that may assist the fact finder to understand the evidence presented.” *See also Semanza*, (Appeals Chamber), May 20, 2005, para. 303 (similar).

Semanza, (Appeals Chamber), May 20, 2005, para. 303: “Expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise; their views need not be based upon firsthand knowledge or experience. Indeed, in the ordinary case the expert witness lacks personal familiarity with the particular case, but instead offers a view based on his or her specialized knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside the layperson’s ken.”

2) Trial Chamber decides whether to admit person as expert, and assesses reliability and probative value of expert’s report and testimony

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 199: “It is for the Trial Chamber to decide whether, on the basis of the evidence presented by the parties, the person proposed can be admitted as an expert witness. The expert is obliged to testify ‘with the utmost neutrality and with scientific objectivity.’ The party alleging bias on the part of an expert witness may demonstrate such bias through cross-examination, by calling its own expert witnesses or by means of an expert opinion in reply. Just as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.”

Simba, (Appeals Chamber), November 27, 2007, para. 174: “It is for the Trial Chamber to decide whether, on the basis of the evidence presented by the parties, the person proposed can be admitted as an expert witness. Just as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.”

3) factors for evaluating expert testimony

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 93: “When assessing and weighing the evidence of the expert witnesses, the Chamber considered factors such as the professional competence of the expert, the position held by the expert, the scope of his expertise, the methodologies used, the credibility of the findings made in light of these factors and other evidence, and the relevance and reliability of their evidence.” *See also Bikindi*, (Trial Chamber), December 2, 2008, para. 36 (same).

4) deference due to Trial Chamber in deeming expert qualified and evaluating expert testimony

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 31: “The determination of whether an expert witness is qualified is subject to the Trial Chamber’s discretion.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 367: “In assessing the reliability of the expert evidence, the Trial Chamber may, pursuant to Rule 89 of the Rules, admit any relevant evidence which it deems to have probative value. In the absence of any showing by the Appellant that no reasonable trier of fact could have discounted [the

expert's] evidence, the Appeals Chamber must *a priori* give a margin of deference to the Trial Chamber's assessment of the evidence presented at trial and to its factual findings, as the Trial Chamber is best placed to hear the witnesses and assess the probative value of their evidence."

5) expert report may be admitted without expert testifying

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 31: "Rule 94 *bis* . . . sets forth a procedure by which an expert's report can be accepted into evidence without that expert testifying. In other respects, the admission of expert testimony is governed only by the general provision of Rule 89, which entrusts the Trial Chamber with broad discretion to employ rules of evidence that '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.'"

Compare Rutaganda, (Appeals Chamber), May 26, 2003, para. 164: "The Appeals Chamber points out that, whereas the Rules lay down a specific procedure for admitting an expert witness's report without hearing the witness, subject to its acceptance by the opposing party, they do not require a '*voir dire*' examination of the person called as an expert. The Appeals Chamber recalls that, pursuant to Rule 89(A) of the Rules, the Chambers are not bound by national rules of evidence. In the instant case, the Trial Chamber clearly chose an approach that consists in having the qualifications of the persons called as experts by the Prosecution clarified during their examination-in-chief by the Prosecution and cross-examination by Counsel for the Appellant. This amounts to admitting the witness statement before having ruled on the admission of the witness as an expert. The Appeals Chamber considers that, where the Rules are silent as to the procedure for taking expert evidence at the hearing, and in accordance with the provisions of Rule 89(B) of the Rules, this approach does not appear to be contrary to the spirit of the Statute and the general principles of law, and was such as would permit a fair determination of the case."

6) expert may not testify as to disputed facts unless also called as a fact witness

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 509: "[T]he role of expert witnesses is to assist the Trial Chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses."

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 120: "[A]n expert witness cannot testify on the acts and conduct of the Accused unless the witness is also being called as a factual witness and having a statement disclosed in accordance with the applicable rules concerning factual witnesses. An expert witness may, however, 'testify on certain facts relating to his or her expertise.'"

See, e.g., Semanza, (Appeals Chamber), May 20, 2005, para. 304: "The Trial Chamber appropriately credited [Professor Guichaoua's] general testimony concerning the behaviour of officials during the events of 1994, but not his specific testimony speculating on the Appellant's behaviour."

See, e.g., Zigiranyirazo, (Trial Chamber), December 18, 2008, paras. 146, 148: “Expert Witness Dr. Alison Des Forges . . . referred to reports regarding a meeting at the Presidential home [of former Rwandan President Habyarimana] at Kanombe on the night of 6 April 1994. According to her sources, ‘discussion was not limited to the expression of condolences, but also touched on plans for the immediate future, including political plans, and, in that sense, could be called a political meeting.’ She also stated that: ‘According to one witness, Zigiranyirazo was one of those who expressed the determination to kill Tutsi in reprisal for the shooting down of the airplane. Madam Habyarimana was another person who expressed that sentiment, as I believe did, at least, one of her children.’” “[R]ecalling the general rule that expert witnesses are not to testify to the acts and conduct of the Accused unless they also testify as fact witnesses, the Chamber notes that Dr. Des Forges testified as an expert witness only. However, her testimony on the 6 April 1994 Meeting was more like that of a factual witness, than that of an expert witness, and therefore, the Chamber would not accept her testimony even if it were offered as proof of the meeting.”

7) serving as expert in one trial does not automatically qualify person as expert in another trial

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 32: “[I]t is not relevant that [the proposed expert] may have been recognized as an expert in the *Semanza* and *Simba* trials. Inherent in the notion of discretion is that different Trial Chambers are permitted to reach different decisions within that sphere of discretion, even if they are each presented with the same question. Moreover, the questions faced by the Trial Chambers were not in fact the same. A witness’s qualification as an expert turns on the contribution he or she can make to a Trial Chamber’s analysis of a particular case. Thus, the same person might be qualified as an expert in one case and not in another.”

8) conceding expert’s qualifications waived ability to cross-examine expert on same

Semanza, (Appeals Chamber), May 20, 2005, para. 301: “Having conceded that Professor Guichaoua was qualified, counsel subsequently waived the opportunity, when it was presented, to cross-examine Professor Guichaoua on the matters of his competence and qualifications.”

9) application—expert qualifications

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 32: “[T]he Appeals Chamber agrees with the Trial Chamber’s holding that it had the discretion to reject Mr. Ndengejeho as an expert witness *proprio motu* even if no timely motion was filed opposing him. Moreover, the Trial Chamber did not abuse its discretion in deciding that Mr. Ndengejeho did not qualify as an expert. The Trial Chamber correctly recalled that ‘in contributing special knowledge to assist the Chamber, the expert must do so with the utmost neutrality and with scientific objectivity.’ It then found:

The Chamber is of the opinion that certain elements in the report submitted by Ndengejeho are not relevant to the instant case and cannot constitute an expert’s contribution to justice. Furthermore, on the basis of the information about Mr. Ndengejeho brought to the Chamber’s attention, his curriculum vitae and his

report, the Chamber is of the opinion that Ndengejeho is not an expert within the meaning of Rule 94*bis* of the Rules.

The Appellant does not show any error in this analysis. The fact that Mr. Ndengejeho is a professor and a former Rwandan minister does not automatically qualify him as an expert witness; it was left to the Trial Chamber's discretion to determine whether, based on the circumstances of the particular case, his background gave him a special insight."

Semanza, (Appeals Chamber), May 20, 2005, para. 304: "[T]he Prosecution tendered Professor Guichaoua's testimony as a sociologist who was in Rwanda for part of April 1994 and who is an expert in questions of genocide. His testimony was based on research conducted within the scope of his expertise; it was not founded on personal experience. The Trial Chamber appropriately credited his general testimony concerning the behaviour of officials during the events of 1994 The Trial Chamber acted well within its discretion in concluding that the expert witness was qualified. The Appeals Chamber is satisfied that the expert's testimony was appropriately admitted into evidence."

See also Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, paras. 277-85 (rejecting arguments that experts lacked required qualifications).

xiii) judicial notice

1) proper to take judicial notice of facts of common knowledge/ not reasonably subject to dispute

Semanza, (Appeals Chamber), May 20, 2005, para. 194: "Rule 94 provided that '[a] Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.' The Rule was later amended to provide, in addition, for the taking of judicial notice of adjudicated facts or documentary evidence As the ICTY Appeals Chamber explained in *Prosecution v. Milošević*, Rule 94(A) 'commands the taking of judicial notice' of material that is 'notorious.' The term 'common knowledge' encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute [T]he fact that the Appellant did dispute some of the facts judicially noticed before the Trial Chamber did not prevent the Trial Chamber from qualifying the facts as facts of common knowledge [Here], . . . the Appeals Chamber considers that the [disputed] facts were not the subject of a 'reasonable' dispute. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in considering that the facts . . . were 'facts of common knowledge' within the meaning of Rule 94" *See also Semanza*, (Appeals Chamber), May 20, 2005, para. 197 (similar).

See also "taking judicial notice of generally known facts does not violate the presumption of innocence," Section (VIII)(c)(iii)(2), this Digest.

2) notice of widespread or systematic attacks in Rwanda in 1994

Semanza, (Appeals Chamber), May 20, 2005, para. 192: The Trial Chamber took notice "that widespread or systematic attacks against a civilian population based on Tutsi ethnic

identification occurred” *See also Zigiranyirazo*, (Trial Chamber), December 18, 2008, paras. 10, 433 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 4: “The Chamber recalls that in the present case, it has already taken judicial notice of the fact that widespread killings occurred in Rwanda in 1994, and that this fact is no longer subject to reasonable dispute.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 16 (similar).

Rwamakuba, (Trial Chamber), September 20, 2006, para. 2: “The Appeals Chamber has held that . . . widespread or systematic attacks against a civilian population based on Tutsi ethnic identification occurred in Rwanda between April and July 1994 [is a fact] of common knowledge not subject to reasonable dispute.”

3) notice of Tutsi, Hutu and Twa as ethnic groups

Semanza, (Appeals Chamber), May 20, 2005, para. 192: The Trial Chamber took notice “that Rwandan citizens were classified by ethnic group between April and July 1994.”

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 10: “The Chamber . . . took judicial notice that . . . between 6 April and 17 July 1994, citizens native to Rwanda were severally identified according to the ethnic classifications of Hutu, Tutsi and Twa, which were protected groups falling within the scope of the Genocide Convention of 1948” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 484 (similar).

Seromba, (Trial Chamber), December 13, 2006, para. 4: “The Chamber . . . has . . . taken judicial notice of the fact that during the events referred to in this Indictment, Tutsi, Hutu and Twa were identified as ethnic or racial groups.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 16 (similar).

Kajelijeli, (Trial Chamber), December 1, 2003, paras. 241-42: The Chamber took judicial notice of the fact that: “Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa.” “Accordingly, it has been established for the purposes of this case that the Tutsi in Rwanda were an ethnic group.” *See also Semanza*, (Trial Chamber), May 15, 2003, para. 422 (similar).

4) notice of genocide in Rwanda

Zigiranyirazo, (Trial Chamber), December 18, 2008, para. 10: “The Chamber . . . took judicial notice that . . . between 6 April and 17 July 1994, genocide against the Tutsi ethnic group occurred in Rwanda During the attacks, some Rwandan citizens killed, or caused serious bodily harm, or mental harm, to persons perceived as Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.”

Seromba, (Trial Chamber), December 13, 2006, para. 5: “[The Trial Chamber] notes that the Appeal Chamber recently stated in *Kamukama* that the genocide perpetrated in Rwanda is a fact of common knowledge. The Trial Chamber nevertheless emphasizes that taking judicial notice of facts of common knowledge does not relieve the Prosecution of its

burden to prove that the Accused was criminally responsible for the specific events alleged in the Indictment.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 16 (similar); *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Prosecutor’s Interlocutory Appeal on Judicial Notice (Appeal Chamber), June 16, 2006, para. 35 (cited).

Rwamakuba, (Trial Chamber), September 20, 2006, para. 2: “The Appeals Chamber has held that genocide . . . based on Tutsi ethnic identification occurred in Rwanda between April and July 1994 [is a fact] of common knowledge not subject to reasonable dispute.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 16 (similar).

Compare Semanza, (Appeals Chamber), May 20, 2005, para. 198: “The Trial Chamber expressly declined to take judicial notice of the ‘fundamental question’ of ‘whether “genocide” took place in Rwanda,’ explaining that, “[n]otwithstanding the overabundance of official reports, including United Nations reports confirming the occurrence of genocide, this Chamber believes that the question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional elemental crime.”

5) notice of existence of internal armed conflict

Semanza, (Appeals Chamber), May 20, 2005, paras. 192, 198: The Trial Chamber took notice “that there was an armed conflict not of an international character in Rwanda between 1 January 1994 and 17 July 1994.” “The Appeals Chamber is satisfied that the Trial Chamber appropriately concluded that the internal nature of the conflict in Rwanda is a fact of common knowledge that is beyond reasonable dispute.”

Ntagerura, Bagambiki, and Imanishimwe, (Trial Chamber), February 25, 2004, para. 74: “The Chamber previously took judicial notice that ‘[b]etween 1st January 1994 and 17th July 1994, in Rwanda, there was an armed conflict not of international character.’ . . . The Chamber also emphasises that there is ample precedent in this Tribunal to support the view that the conflict in Rwanda met the criteria of a non-international armed conflict.” *See also Muvunyi*, (Trial Chamber), September 12, 2006, para. 16 (similar).

6) other notice taken

(a) state ratification of international treaties

See Semanza, (Appeals Chamber), May 20, 2005, para. 192 (judicial notice taken “that Rwanda became a state party to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) on 16 April 1975; and that, at the time at issue, Rwanda was a state party to the Geneva Conventions of 12 August 1949 and their additional Additional Protocol II of 8 June 1977”). *See also Kajelijeli*, (Trial Chamber), December 1, 2003, para. 744 (similar).

(b) organizational divisions within Rwanda

See Kajelijeli, (Trial Chamber), December 1, 2003, para. 244 (judicial notice taken of Rwanda’s *préfectures*, *communes*, *secteurs* and *cellules*, and regarding the position of a *bourgmestre*).

e) Precedent and appellate review

i) precedential value of prior decisions

1) Appeals Chamber should follow its previous decisions on issues of law

Rutaganda, (Appeals Chamber), May 26, 2003, para. 26: “The Appeals Chamber recalls that, once it has determined the law applicable to a particular issue, it should in principle follow its previous decisions, in the interests of certainty and predictability of the law.”

2) prior interlocutory decisions ordinarily treated as binding within the same case

Kajelijeli, (Appeals Chamber), May 23, 2005, paras. 202-03: “[T]he Appeals Chamber ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions. This principle prevents parties from endlessly relitigating the same issues, and is necessary to fulfil the very purpose of permitting interlocutory appeals: to allow certain issues to be finally resolved before proceedings continue on other issues.”

“There is an exception to this principle, however. In a Tribunal with only one tier of appellate review, it is important to allow a meaningful opportunity for the Appeals Chamber to correct any mistakes it has made. Thus, under the jurisprudence of this Tribunal, the Appeals Chamber may reconsider a previous interlocutory decision under its ‘inherent discretionary power’ to do so ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.’”

3) Trial Chambers not mutually bound by their decisions

Rutaganda, (Appeals Chamber), May 26, 2003, para. 188: “Trial Chambers, which are courts with coordinate jurisdiction, are not mutually bound by their decisions, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive. The fact that a bench of the Trial Chamber comprises the same Judges in any two cases does not alter the validity of this principle.”

4) *res judicata*

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 202: “Th[e] [*res judicata*] doctrine refers to a situation when ‘a final judgement on the merits’ issued by a competent court on a claim, demand or cause of action between parties constitutes an absolute bar to ‘a second lawsuit on the same claim’ between the same parties. The doctrine of *res judicata* is not directly applicable [to proceedings before the ICTR] . . . , because it applies not to the effects of prior interlocutory appeals decisions on further proceedings in the same case, but instead to the effects of final *judgements* in one case on proceedings in a subsequent and different case.”

ii) appellate review

1) Statute

Article 24: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
 - (a) An error on a question of law invalidating the decision; or
 - (b) An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

2) standard generally

Muvunyi, (Appeals Chamber), August 29, 2008, para. 8: “The Appeals Chamber reviews . . . errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 9 (same); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 11 (same); *Simba*, (Appeals Chamber), November 27, 2007, para. 8 (similar); *Mubimana*, (Appeals Chamber), May 21, 2007, para. 6 (same); *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 8 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 6 (similar); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 5 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 7 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 11 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 7 (similar).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 11: “The Appeals Chamber recalls the standards for appellate review pursuant to Article 24 of the Statute Article 24 addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 17: “Article 24 of the Statute sets forth the circumstances under which a convicted person and/or the Prosecutor may appeal against the judgement and/or sentence of a Trial Chamber. Under this provision, a party wishing to appeal must specify the error alleged and show that such error falls under the jurisdiction of the Appeals Chamber”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 18: “[W]here a party alleges that an error of law or of fact has been committed, that party must go on to show that the alleged error invalidates the decision or occasions a miscarriage of justice. Discharging this burden of proof is primordial for the appeal to succeed. Indeed, the Appeals Chamber is, in principle, not required to consider the arguments of a party if they do not allege an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice Where a party is unable to explain in what way an alleged error invalidates a decision or occasions a miscarriage of justice, it should, as a general rule, refrain from appealing on grounds of such error.”

3) errors of law: a legal error that invalidates the decision

Muvunyi, (Appeals Chamber), August 29, 2008, para. 9: “As regards errors of law, the Appeals Chamber has stated:

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant’s arguments do not support the

contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.”

See also Seromba, (Appeals Chamber), March 12, 2008, para. 10 (same); *Simba*, (Appeals Chamber), November 27, 2007, para. 8 (similar); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 7 (same); *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 9 (same); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 11 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 7 (same); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 6 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 5 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 7 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 11 (same); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 7 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 446: “Article 24(1) of the Statute refers only to errors of law *invalidating the decision*, that is legal errors which, if proven, affect the verdict.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 20: “With regard to the burden of proof specifically associated with allegations of errors of law, the Appeals Chamber recalls that in its capacity as the final arbiter of the law of the international Tribunal, it must, in principle, determine whether an error of procedural or substantive law was indeed made, where a party raises an allegation in this connection. Indeed, case law recognizes that the burden of proof on appeal in respect of errors of law is not absolute. In fact, the Appeals Chamber does not cross-check the findings of the Trial Chamber on matters of law merely to determine whether they are reasonable, but indeed to determine whether they are correct. Nevertheless, the party alleging an error of law must, at the very least, identify the alleged error, present arguments in support of his contention, and explain in what way the error invalidates the decision. An alleged legal error that does not have the potential to cause the impugned decision to be reversed or revised is, in principle, not legal and may thus be dismissed as such.”

(a) Appeals Chamber may also hear arguments of significance to the Tribunal’s jurisprudence

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 12: “Exceptionally, the Appeals Chamber may also hear arguments where a party has raised a legal issue which would not lead to the invalidation of the judgement, but which is of general significance for the Tribunal’s jurisprudence.”

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 13: “[T]here are situations where the Appeals Chamber may . . . agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal.’ As the final arbiter of the law applied by the Tribunal, the Appeals Chamber must give the Trial Chambers guidance for their interpretation of the law.”

(b) Appeals Chamber may raise issues *proprio motu*

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 13: “[I]here are situations where the Appeals Chamber may raise questions *proprio motu*”

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 297: “[O]n issues of alleged errors of law, the Appeals Chamber, as the final arbiter of law, has discretion to consider issues raised on appeal even in the absence of substantial arguments by the parties.”

(c) Appeals Chamber to apply correct legal standard

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 13: “If the Appeals Chamber finds that the Trial Chamber applied a wrong legal standard:

it is open to the Appeals Chamber to articulate the correct legal standard and to review the relevant findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record, in the absence of additional evidence, and must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by [one of the parties], before that finding is confirmed on appeal.”

(d) Appeals Chamber need not address arguments not developed beyond notice of appeal

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 181: “[T]he Appellant has failed to develop or substantiate his submissions made in the Amended Notice of Appeal Consequently, the Appeals Chamber will not further address these submissions.”

**4) errors of fact: those that caused a “miscarriage of justice”—
no reasonable trier of fact could have reached the same finding
or the finding is wholly erroneous**

Muvunyi, (Appeals Chamber), August 29, 2008, para. 10: “As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber:

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

See also Seromba, (Appeals Chamber), March 12, 2008, para. 11 (same); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 8 (same); *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 10 (same); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 8 (same); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 7 (same); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 5 (same); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, paras. 12, 177 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 8 (same and source of quote), para. 102 (similar). *See also Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 14 (similar, but adding that the Appeals Chamber gives deference to the Trial Chamber “since [it] is in a better position to evaluate testimony, as well as the demeanour of

witnesses”); *Simba*, (Appeals Chamber), November 27, 2007, para. 9 (similar to *Nahimana*); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 213 (similar to *Nahimana*); *Semanza*, (Appeals Chamber), May 20, 2005, para. 8 (similar to *Nahimana*).

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 86: “[T]he Appellant will be successful only if he can show that no reasonable trier of fact would have decided as the Trial Chamber did.” *See also Simba*, (Appeals Chamber), November 27, 2007, para. 212 (similar).

Ntagerura, Bagambiki and Imanishimwe, (Appeals Chamber), July 7, 2006, para. 305: “As the ICTY Appeals Chamber made clear in the *Kordić and Čerkez* Appeal Judgement, the *Čelebići* standard on circumstantial evidence has to be distinguished from the standard of appellate review. The Appeals Chamber notes that the Tribunal’s law on appellate proceedings, namely whether ‘no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt,’ permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial.”⁷³

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 128: “The Appeals Chamber recalls that it

will not question factual findings where there was reliable evidence on which the Trial Chamber could reasonably base its findings. It is further admitted that two judges, both acting reasonably, can come to different conclusions, both of which are reasonable. A party that limits itself to alternative conclusions that may have been open to the Trial Chamber has little chance of succeeding in its appeal, unless it establishes that no reasonable tribunal of fact ‘*could have* reached the finding of guilt beyond reasonable doubt.’”

See also Rutaganda, (Appeals Chamber), May 26, 2003, para. 22 (same).

See also Rutaganda, (Appeals Chamber), May 26, 2003, paras. 21-23, 512, 534 (elaborating on standard for showing error of fact).

(a) deference due to Trial Chamber particularly in evaluating witness testimony

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, paras. 316, 178, 204, 269: “The Appeals Chamber recalls that it will not lightly disturb findings of fact by a trial chamber, and will substitute the assessment of the trial chamber only if no reasonable trier of fact could have arrived at the same conclusion. The trial chamber has the advantage of observing witnesses in person and is, as such, better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. The Appeals Chamber emphasises that it is not a legal error *per se* to accept and rely on evidence that varies from prior statements or other evidence. However, a trial chamber is bound to take into account inconsistencies and any explanations offered in respect of

⁷³ Compare “circumstantial evidence/ drawing inferences,” “inference must be the only reasonable one based on the evidence,” Section (VIII)(d)(viii)(1), this Digest.

them when weighing the probative value of the evidence. Also, as previously noted, a trial chamber may find parts of a witness's testimony credible and rely on them, whilst rejecting other parts as not credible."

"[D]eference to the finder of fact is particularly appropriate where the factual challenges concern the issues of witness credibility. These are the kinds of questions that the trier of fact is particularly well suited to assess, for '[t]he Trial Chamber directly observed the witness and had the opportunity to assess her evidence in the context of the entire trial record.'"

"[T]he Trial Chamber is in a unique position to evaluate the demeanour of the testifying witness, to question the witnesses directly about the gaps or inconsistencies in their testimonies, and to evaluate their credibility on the basis of the witnesses' reaction to the difficult questions put to them by the parties or by the judges."

"The Trial Chamber, as the assessor of the witness's demeanour, was best placed to ascertain where the witness was embellishing his testimony and to separate these parts from the core of the witness's evidence."

Bagilishema, (Appeals Chamber), July 3, 2002, para. 12: "The Appeals Chamber has . . . repeatedly explained the reasons for . . . deference to the factual findings of the Trial Chambers. As the ICTY Appeals Chamber put it in the *Kupreškić* Appeal Judgement:

The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points."

See also "Appeals Chamber owes 'margin of deference' to Trial Chamber's evaluation of evidence," Section (VIII)(d)(iv)(1), this Digest.

(b) Appeals Chamber may not substitute its own findings of fact absent Trial Chamber error

Seromba, (Appeals Chamber), Dissenting Opinion of Judge Liu, March 12, 2008, para. 12: "[O]nly where the evidence relied upon by the Trial Chamber could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber."

Rutaganda, (Appeals Chamber), May 26, 2003, para. 505: "[T]he Appeals Chamber, in accordance with the established practice of the Tribunal, cannot substitute its own finding for that of the Trial Chamber. It is settled case-law that an appeal is not a *de novo* review. Based on this principle, therefore, it does not fall to the Appeals Chamber to conduct a *de novo* trial of the Appellant as regards the killing of Emmanuel Kayitare and/or to determine whether a different assessment of the evidence presented at trial would have sustained a finding of guilt. According to the standards applicable on appeal, the Appeals Chamber must enter a judgement of acquittal 'if an appellant is able to establish that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it.' Considering the Judgement in the instant case, such a

standard requires the Appeals Chamber to assess the evidence presented at trial as an indivisible whole.”

Bagilishema, (Appeals Chamber), July 3, 2002, para. 11: “As the Appeals Chambers of both the ICTR and the ICTY have repeatedly stressed, an appeal is not an opportunity for a *de novo* review of the case. The Appeals Chamber ‘will not lightly disturb findings of fact by a Trial Chamber.’ Because ‘[t]he task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber, [...] [i]t is only when 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.’ Two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.”

See also Seromba, (Appeals Chamber), Dissenting Opinion of Judge Liu, March 12, 2008, para. 11: “[T]he Majority consistently supplements the Trial Chamber’s findings with the testimony of witnesses simply because the ‘Trial Chamber found them to be credible.’ As a result, the Appeal Judgement is replete with direct transcript testimony from which the Trial Chamber has not made specific findings of fact. There are various problems with this approach, first and foremost of which is that it runs contrary to one of the cardinal principles of the Appeals Chamber: that, ‘the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber’ because the Appeals Chamber is not in a position to assess the demeanour of a witness and the entirety of the evidence. The Majority’s supplementation of the Trial Chamber’s findings defeats the purpose of this principle, especially in view of the fact that the Appeals Chamber has no way of knowing why the Trial Chamber decided not to make findings on the said portions of witnesses’ testimonies.”

See also “Appeals Chamber owes ‘margin of deference’ to Trial Chamber’s evaluation of evidence,” Section (VIII)(d)(iv)(1), this Digest.

(c) criticizing Trial Chamber’s reasoning does not show error of fact

Bagilishema, (Appeals Chamber), July 3, 2002, para. 88: “Simply criticising the reasoning adopted by the Trial Chamber is not an adequate demonstration that the Trial Chamber committed an error of fact.”

(d) whenever Trial Chamber’s approach leads to an unreasonable assessment of the facts, consider if there was error in the method

Kamubanda, (Appeals Chamber), September 19, 2005, para. 209: “The Appeals Chamber notes the Appellant’s reference to the *Kayishema and Ruzindana* Appeal Judgement, stating that whenever a Trial Chamber’s approach to the assessment of evidence ‘leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the

method of assessment or in its application thereof.” See *Kayishema and Ruzindana*, (Appeals Chamber), June 1, 2001, para. 119 (source of quote).

(e) sample application

Muvunyi, (Appeals Chamber), August 29, 2008, para. 70: “[T]he Appeals Chamber is not persuaded that the Trial Chamber acted reasonably and with the requisite degree of caution in relying on the evidence of Witnesses NN and KAL about these events. No reasonable trier of fact could have concluded that ESO camp soldiers ‘systematically sought and killed Tutsi lecturers and students’ in circumstances where it heard no evidence about even a single incident.”⁷⁴

5) standard of review where prosecution appeals acquittal

Bagilishema, (Appeals Chamber), July 3, 2002, paras. 8-9, 13-14: “The present appeal is filed by the Prosecution against acquittal by the Trial Chamber.” “With regard to allegations of errors on a question of law, the Appeals Chamber considers that the standards of review are the same for the two types of appeal: following the example of a party appealing against conviction, an appeal by the Prosecution against acquittal, which alleges that the Trial Chamber committed an error on a question of law, must establish that the error invalidates the decision.”

“[As to errors of fact,] [t]he same standard of unreasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, as when considering an appeal by the accused, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the challenged finding.” “Under Article 24(1)(b) of the Statute, the Prosecution, like the accused, must demonstrate ‘an error of fact that occasioned a miscarriage of justice.’ For the error to be one that occasioned a miscarriage of justice, it must have been ‘critical to the verdict reached.’ Because the Prosecution bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber’s factual errors create a reasonable doubt as to his guilt. The Prosecution faces a more difficult task. It must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused’s guilt has been eliminated.” See also *Muvunyi*, (Appeals Chamber), August 29, 2008, para. 10 (similar as to error of fact); *Seromba*, (Appeals Chamber), March 12, 2008, para. 11 (same as *Muvunyi*); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 24 (similar to *Muvunyi*).

6) standard of review where additional evidence admitted on appeal

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 15: “As for the standard of review where additional evidence has been admitted on appeal, the [ICTY’s] *Naletilić and Martinović* Appeal Judgement recalled that:

⁷⁴ There are countless instances where an Appeals Chamber reviews Trial Chamber findings of fact. This Digest is only including one such instance as an example.

[t]he Appeals Chamber in [the ICTY's] *Kupreškić* [case] established the standard of review when additional evidence has been admitted on appeal, and held:

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.

The standard of review employed by the Appeals Chamber in that context was whether a reasonable trier of fact could have been satisfied beyond reasonable doubt as to the finding in question, a deferential standard. In that situation, the Appeals Chamber in *Kupreškić* did not determine whether it was satisfied *itself*, beyond reasonable doubt, as to the conclusion reached, and indeed, it did not need to do so, because the outcome in that situation was that no reasonable trier of fact could have reached a finding of guilt.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 473: “Where additional evidence has been admitted on appeal, the Appeals Chamber is required to determine whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice. In accordance with Rule 118(A) of the Rules and the relevant jurisprudence, the test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted 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? Where the Appeals Chamber finds that a reasonable trier of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber *together with* the additional evidence, it must uphold the Trial Chamber decision.”

See also Kamuhanda, (Appeals Chamber), September 19, 2005, para. 215: “If additional evidence admitted on appeal is subsequently determined by the Appeals Chamber to be irrelevant or not credible, it provides no basis for disturbing the Trial Chamber’s judgement, since it could not have been a decisive factor if the Trial Chamber had considered it.”

7) appeal is not an opportunity to reargue the case

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 89: “[A]n appeal is not a trial *de novo* and . . . it is not for the Appeals Chamber to reassess all of the evidence presented at trial with regard to the issue at hand” *See also Semanza*, (Appeals Chamber), May 20, 2005, para. 9 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 15: “By contrast with the procedure in certain national legal systems, the appeals procedure laid down by Article 24 of the Statute—as well as by Article 25 of the ICTY Statute—is of a corrective nature, and is thus ‘not an opportunity for the parties to reargue their case.’”

8) a party cannot merely repeat on appeal arguments that did not succeed at trial

Muvunyi, (Appeals Chamber), August 29, 2008, para. 11: “A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber’s rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 12 (same); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 395 (similar); *Simba*, (Appeals Chamber), November 27, 2007, para. 10 (same); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 9 (same); *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 11 (same); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 9 (same); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 8 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 6 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 9 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 13 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 9 (similar); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 18 (similar).

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 395: “A simple dismissal of . . . objections cannot amount to proof of an error invalidating the Trial Chamber’s decision or of prejudice affecting the preparation of the Appellant’s defence.”

9) arguments lacking the potential for reversal or revision may be dismissed without consideration on the merits

Muvunyi, (Appeals Chamber), August 29, 2008, para. 11: “Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 12 (same); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 16 (similar); *Simba*, (Appeals Chamber), November 27, 2007, para. 10 (same); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 9 (same); *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 11 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 13 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 9 (same); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 8 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 6 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 9 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 13 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 9 (similar); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 18 (similar).

10) precise references to transcript pages or paragraphs challenged required

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 511: “[T]he Appellant omits to indicate the specific references to the transcripts which mention these acts, and hence has not complied with the requirements for making submissions at the appeal stage.”

Muvunyi, (Appeals Chamber), August 29, 2008, para. 12: “In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise

references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 13 (same); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 16 (similar); *Simba*, (Appeals Chamber), November 27, 2007, para. 11 (same); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 10 (same); *Ndindababizi*, (Appeals Chamber), January 16, 2007, para. 12 (similar); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 13 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 10 (similar); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 9 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 6 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 10 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, paras. 14, 396 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, paras. 10, 172 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 396: “Absent a specific reference, the Appeals Chamber cannot be expected to consider the given submission.”

Rutaganda, (Appeals Chamber), May 26, 2003, para. 19: “An appellant must . . . clearly set out his grounds of appeal as well as the arguments in support of each ground; he must also refer the Appeals Chamber to the precise parts of the record on appeal invoked in support of his allegations.”

11) Appeals Chamber not required to consider in detail obscure, contradictory, vague, or otherwise insufficient submissions

Muvunyi, (Appeals Chamber), August 29, 2008, para. 12: “[T]he Appeals Chamber cannot be expected to consider a party’s submissions in detail if they are obscure, contradictory, vague or if they suffer from other formal and obvious insufficiencies.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 13 (same); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 16 (similar); *Simba*, (Appeals Chamber), November 27, 2007, para. 11 (same); *Muhimana*, (Appeals Chamber), May 21, 2007, para. 10 (same); *Ndindababizi*, (Appeals Chamber), January 16, 2007, para. 12 (same); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 13 (same); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 10 (same); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 9 (same); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 7 (same); *Semanza*, (Appeals Chamber), May 20, 2005, para. 10 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 14 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, paras. 10, 172 (same); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 19 (similar).

See also Niyitegeka, (Appeals Chamber), July 9, 2004, para. 172: “The failure to identify impugned evidence or alleged errors constitutes an ‘obvious insufficiency.’”

12) Appeals Chamber has discretion which submissions merit a detailed reasoned opinion in writing

Muvunyi, (Appeals Chamber), August 29, 2008, para. 12: “[T]he Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and will dismiss arguments which are evidently unfounded without providing

detailed reasoning.” *See also Seromba*, (Appeals Chamber), March 12, 2008, para. 13 (same); *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 17 (similar); *Simba*, (Appeals Chamber), November 27, 2007, para. 11 (same); *Mubimana*, (Appeals Chamber), May 21, 2007, para. 10 (same); *Ndindabahizi*, (Appeals Chamber), January 16, 2007, para. 12 (same); *Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 14 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 10 (same); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 10 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 8 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, para. 11 (similar); *Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 15 (similar); *Niyitegeka*, (Appeals Chamber), July 9, 2004, para. 11 (similar); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 19 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 19: “The Appeals Chamber should focus its attention on the essential issues of the appeal. In principle, therefore, the Appeals Chamber will dismiss, without providing detailed reasons, those submissions made by appellants in their briefs or in their replies, or presented orally during the appeal hearing, which are evidently unfounded.”

Compare “the right to a reasoned opinion,” Section (VIII)(c)(xiii), this Digest.

13) Trial Chamber not obligated to set forth all reasoning or evidence considered

Seromba, (Appeals Chamber), March 12, 2008, para. 94: The Trial Chamber “was not obligated to set forth every step of its reasoning or to cite every piece of evidence it considered.”

Simba, (Appeals Chamber), November 27, 2007, para. 152: “[T]he Appeals Chamber recalls that a Trial Chamber has the obligation to provide a reasoned opinion, but is not required to articulate the reasoning in detail.”

Simba, (Appeals Chamber), November 27, 2007, para. 173: “The Appeals Chamber recalls that, while required to give a reasoned opinion, the trier of fact is not obliged to articulate every step of its reasoning.” *See also id.*, para. 267 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 65 (similar); *Kamuhanda*, (Appeals Chamber), September 19, 2005, para. 32 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 147 (similar); *Semanza*, (Appeals Chamber), May 20, 2005, paras. 130, 149 (similar); *Rutaganda*, (Appeals Chamber), May 26, 2003, para. 536 (similar); *Bagilishema*, (Appeals Chamber), July 3, 2002, para. 88 (similar).

Ndindabahizi, (Appeals Chamber), January 16, 2007, para. 75: “[T]he Appeals Chamber recalls that:

[T]he Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial [...]. [I]t is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is

not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.”

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 74: “[T]he Trial Chamber did not specifically address all of the Appellant’s arguments. But it can be assumed to have been aware of the arguments presented to it and was not obligated to discuss all of them”

Kamuhanda, (Appeals Chamber), September 19, 2005, para. 257: “[T]he Trial Chamber is not obliged to refer to every piece of evidence in its judgement, nor does it have to articulate every step in its reasoning. When assessing identification evidence, the Trial Chamber ‘must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting *negatively* on the reliability of the identification evidence.’” (emphasis in original.)

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 59: “The Appeals Chamber is mindful of the position expressed in the [ICTY’s] *Musema* Appeal Judgement that a Trial Chamber ‘is not required to set out in detail why it accepted or rejected a particular testimony.’ The Appeals Chamber in *Musema* explained the Trial Chamber’s duty in this regard as follows:

In the first place, the task of weighing and assessing evidence lies with the Trial Chamber. Furthermore, it is for the Trial Chamber to determine whether a witness is credible or not. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. But the Trial Chamber’s discretion in weighing and assessing evidence is always limited by its duty to provide a ‘reasoned opinion in writing,’ although it is not required to articulate every step of its reasoning for each particular finding it makes. The question arises as to the extent that a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony. There is no guiding principle on this point and, to a large extent, testimony must be considered on a case by case basis.”

See also Simba, (Appeals Chamber), November 27, 2007, para. 152 (similar).

Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 432: “The Appeals Chamber reiterates that in writing a reasoned opinion the Trial Chamber need not address every detail that influences its conclusion.”

Niyitegeka, (Appeals Chamber), July 9, 2004, para. 124: “[A] Trial Chamber need not articulate in its Judgement every factor it considered in reaching a particular finding and the fact that the Chamber did not discuss [a] matter in the Judgement does not constitute an error.”

Compare “the right to a reasoned opinion,” particularly “duty to provide clear, reasoned findings of fact as to each element of each crime charged” and “reasoned opinion requirement enhanced where witness identified the accused in difficult circumstances,” Sections (VIII)(c)(xiii)(1)-(2), this Digest.

See also “whether the Trial Chamber is required to individually address inconsistencies within and/or amongst witness testimonies in the judgment,” Section (VIII)(d)(xi)(8), this Digest.

(a) where Trial Chamber did not refer to evidence, does not mean it was disregarded

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 75: “[T]he Appeals Chamber recalls that:

. . . It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence [...]. If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber’s finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.”

See also *Kamubanda*, (Appeals Chamber), September 19, 2005, paras. 32, 91 (similar).

Rutaganda, (Appeals Chamber), May 26, 2003, para. 536: “The Appeals Chambers of both *ad hoc* Tribunals have held that although the evidence produced may not have been referred to by a Trial Chamber, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account. Where evidence is not referred to in the Judgement, it is for the Appellant to show that the Trial Chamber indeed disregarded it.” *See also* *Simba*, (Appeals Chamber), November 27, 2007, para. 152 (similar to first sentence).

(b) where alleged failure by Trial Chamber to consider evidence, Appellant must show it would have affected the Trial Chamber judgment

Kamubanda, (Appeals Chamber), September 19, 2005, para. 105: “[T]he Appeals Chamber recalls that it is not sufficient for an appellant to show that the Trial Chamber did not refer to a particular piece of evidence:

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* [*sic*], 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.’

An appellant who alleges that the Trial Chamber failed to provide a reasoned opinion in writing therefore not only has to show the lacuna in the Trial Chamber’s reasoning, but also has to demonstrate that the evidence allegedly disregarded by the Trial Chamber would have affected the Trial Judgement.” (italics missing in original.)

14) Appeals Chamber entering a new conviction; whether that violates the right to an appeal

See Semanza, (Appeals Chamber), May 20, 2005 (entering, on appeal, new convictions for war crimes and “ordering”).

Semanza, (Appeals Chamber), Separate Opinion of Judge Shahabuddeen and Judge Güney, May 20, 2005, paras. 5, 7, 8: “It is said that recognised international human rights instruments enjoin that there must be a right of appeal from a conviction and that, as there is no right of appeal from the Appeals Chamber, the Appeals Chamber is without power to substitute a conviction for an acquittal. The judgement of the Appeals Chamber is to the opposite effect, and we respectfully agree with it.”

“The case law establishes that the principles of recognised international human rights instruments are intended to secure fairness to the accused. We are not convinced by arguments of unfairness where the conviction by the Appeals Chamber was on a charge duly preferred, where the merits of the case relating to this charge were litigated in the Trial Chamber, where the judgement of the Trial Chamber was in favour of the accused in the sense that he was convicted of a lesser offence than that charged and acquitted of the latter, and where the Prosecution then exercised its statutory right to appeal to the Appeals Chamber from that judgement.”

“In such a situation, the Appellant would have had a full opportunity to argue both at trial and on appeal about the correctness of a submission that he be convicted for the offence as charged.”

But see Semanza, (Appeals Chamber), Dissenting Opinion of Judge Pocar, May 20, 2005, paras. 1, 4: “In this judgement, the Appeals Chamber 1) reverses the acquittals entered by the Trial Chamber with regard to Counts 1, 7 and 13 and enters new convictions under each; and 2) reverses the conviction entered by the Trial Chamber under Count 5 and enters a more serious conviction under that count. I agree with the majority’s reasoning and conclusion that the Trial Chamber erred in its acquittals and conviction of the Appellant under these counts. However, I do not agree that we, as the Appeals Chamber, have competence to remedy these errors by subsequently entering new or more serious convictions on appeal. For the reasons provided in my Dissenting Opinion in the *Rutaganda* case, I believe that such an approach is in violation of an accused’s fundamental right to an appeal as enshrined in Article 14(5) of the International Covenant on Civil and Political Rights (‘ICCPR’), given that the Appeals Chamber is the court of last resort in this Tribunal.” “In my view, reversal of acquittals and entry of new convictions or reversal of convictions and entry of more serious convictions on appeal cannot be in conformity with the fundamental right to an appeal under Article 14(5) of the ICCPR and therefore, I dissent.” (Suggesting the proper course would have been to remit/remand the case to the Trial Chamber, or note the Trial Chamber’s error but not enter a new conviction.) *See Rutaganda*, (Appeals Chamber), Dissenting Opinion of Judge Pocar, May 26, 2003 (cited).

15) retrial

Muvunyi, (Appeals Chamber), August 29, 2008, para. 148: “[A]n order for retrial is an exceptional measure to which resort must necessarily be limited. In the present situation, the Appeals Chamber is well aware that Muvunyi has already spent over eight

years in the Tribunal's custody. At the same time, the alleged offence is of the utmost gravity and interests of justice would not be well served if retrial were not ordered to allow the trier of fact the opportunity to fully assess the entirety of the relevant evidence and provide a reasoned opinion." *See id.*, paras. 134-48 (Trial Chamber erred in insufficiently explaining why it relied on certain witness testimony and not other witness testimony in convicting for incitement of genocide in relation to a speech at Gikore Trade Center).⁷⁵

iii) appellate review of sentencing

1) Appeals Chamber may affirm, reverse, or revise sentence

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1037: "Article 24 of the Statute allows the Appeals Chamber to 'affirm, reverse or revise' a sentence imposed by a Trial Chamber." *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 429 (similar).

2) Appeals Chamber will not revise a sentence unless Trial Chamber committed discernible error

Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 1037: "Generally, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless it has been shown that the latter committed a manifest error in exercising its discretion, or failed to follow the applicable law." *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals Chamber), July 7, 2006, para. 429 (similar); *Gacumbitsi*, (Appeals Chamber), July 7, 2006, para. 111 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 291 (similar).

Simba, (Appeals Chamber), November 27, 2007, para. 306: "The Appeals Chamber recalls that the Trial Chamber has considerable discretion in determining an appropriate sentence, which includes the weight given to mitigating and aggravating circumstances. As a general rule, the Appeals Chamber will not revise a sentence unless 'it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law.' The Appeals Chamber will only intervene if a Trial Chamber ventures outside its 'discretionary framework' in imposing a sentence and commits a 'discernable' error."⁷⁶

Simba, (Appeals Chamber), November 27, 2007, para. 336: "The Appeals Chamber observes that the Trial Chamber correctly noted that it has 'considerable, though not unlimited, discretion on account of its obligation to individualize penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes for which the accused has been convicted.'" *See also Ntagerura, Bagambiki and Imanishimwe*, (Appeals

⁷⁵ Compare "Trial Chamber not obligated to set forth all reasoning or evidence considered," Section (VIII)(e)(ii)(13), this Digest.

⁷⁶ For discussion of Trial Chamber deference as to the weight and determination of aggravating and mitigating factors, see "what constitute aggravating circumstances and weight to give them left to Trial Chamber's discretion," Section (VII)(b)(iii)(6)(a)(i); "Trial Chamber decides what is a mitigating factor," Section (VII)(b)(iii)(7)(a)(i); and "weight to accord [to mitigating factors] left to Trial Chamber's discretion," Section (VII)(b)(iii)(7)(a)(iv), this Digest.

Chamber), July 7, 2006, para. 429 (similar); *Kajelijeli*, (Appeals Chamber), May 23, 2005, para. 291 (similar).⁷⁷

Ndindababizi, (Appeals Chamber), January 16, 2007, para. 132: “The Appeals Chamber recalls the applicable standard of review for sentencing:

The Appeals Chamber’s review of an appeal of the sentencing portion of a judgement is not *de novo*. Trial Chambers are vested with broad discretion to tailor the penalties to fit the individual circumstances of the accused and the gravity of the crime. As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a ‘discernible error’ in exercising its discretion. It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence. A Trial Chamber’s sentencing decision may therefore only be disturbed on appeal if the Appellant shows that the Trial Chamber erred in the weighing process either by taking into account what it ought not to have considered or by failing to take into account what it ought to have considered.”

See also Semanza, (Appeals Chamber), May 20, 2005, para. 312 (same).

Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 205: “The Appeals Chamber is . . . fully cognizant of the margin of discretion to which Trial Chambers are entitled in sentencing. This discretion is not, however, unlimited. It is the Appeals Chamber’s prerogative to substitute a new sentence when the one given by the Trial Chamber simply cannot be reconciled with the principles governing sentencing at the Tribunal. This is such a case.”

Kajelijeli, (Appeals Chamber), May 23, 2005, para. 291: “The Appeals Chamber . . . recalls that under Article 24 of the Statute, its review of the Trial Chamber’s determination of a sentence on appeal is of a corrective nature only rather than a *de novo* sentencing proceeding The appellant in principle bears the burden of demonstrating that there has been a discernible error in the exercise of the Trial Chamber’s discretion by showing that ‘(a) the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account in the weighing process involved in the exercise of its discretion; and (b) if it did, that this resulted in a miscarriage of justice.’ As long as the Trial Chamber has observed the proper limits of the discretionary framework afforded to it at sentencing without committing any discernible errors, the Appeals Chamber will not intervene.”

See, e.g., Semanza, (Appeals Chamber), May 20, 2005, paras. 378-80: “The Trial Chamber, in its discussion on applicable sentencing ranges, reviewed the Rwandan Penal Code . . . [and] Rwandan Organic Law” “The Trial Chamber also considered sentences imposed in other cases before the International Tribunal and reviewed any mitigating and aggravating factors.” “The Trial Chamber thus carefully considered the relevant factors, general as well as individualised, in determining the appropriate sentence the Appellant should receive. Although his sentence may have been more severe in

⁷⁷ For discussion of individualization of sentences, see “the sentence must be individualized: consider totality of conduct; take into account the particular circumstances of the case and the form and degree of participation,” Section (VII)(b)(iii)(3), this Digest. For discussion of “gravity,” see Section (VII)(b)(iii)(2), this Digest.

Rwandan courts, the Trial Chamber acted within its discretion when it imposed a lesser sentence. The Appeals Chamber is unable to find a discernible error in the reasoning of the Trial Chamber.”

See also “Trial Chamber has broad discretion as to sentencing,” Section (VII)(b)(ii)(2), this Digest. For “sentencing in other ICTR/ICTY cases,” see Section (VII)(b)(iii)(5), this Digest. For application of aggravating and mitigating factors in particular cases, see “particular aggravating circumstances,” Section (VII)(b)(iii)(6)(b) and “particular mitigating circumstances,” Section (VII)(b)(iii)(7)(b), this Digest.

3) Appeals Chamber may pass a new sentence for a new conviction

Semanza, (Appeals Chamber), Separate Opinion of Judge Shahabuddeen and Judge Güney, May 20, 2005, para. 4: “The doctrine that the Appeals Chamber would not interfere in the Trial Chamber’s exercise of a sentencing discretion unless there is a discernible error by the Trial Chamber does not inhibit the Appeals Chamber in passing sentence for a new conviction.” (The Majority inherently adopted this approach, because it entered new war crimes convictions, as well as a new conviction for “ordering.”)

Compare “Appeals Chamber entering a new conviction; whether that violates the right to an appeal,” Section (VIII)(e)(ii)(14), this Digest.

f) Accepting guilty pleas

i) Rule

Rule 62(B) of the Rules of Procedure and Evidence, ICTR:

If an accused pleads guilty in accordance with Rule 62 (A)(v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:

- (i) is made freely and voluntarily;
- (ii) is an informed plea;
- (iii) is unequivocal; and
- (iv) is based on sufficient facts for the crime and accused’s participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case.

See also Rule 62(A), Rule 62*bis*.

ii) guilty plea must be voluntary

Kambanda, (Appeals Chamber), October 19, 2000, para. 61: “[A] voluntary plea requires two elements, namely that ‘an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty’ and ‘the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentences.’”

Bisengimana, (Trial Chamber), April 13, 2006, para. 21: “Pursuant to Rule 62 (B)(i), (ii), and (iii) of the Rules, the Chamber first asked if the guilty plea was made freely and voluntarily; in other words, if the Accused was fully aware of what he was doing and was

not threatened or pressured to so plea. The Accused answered that he was aware of what he was doing, that there were no threats against him, and that he pleaded guilty of his own will.” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 11 (similar).

iii) guilty plea must be informed

Kambanda, (Appeals Chamber), October 19, 2000, para. 75: “[T]he standard for determining whether a guilty plea is informed is . . . that the accused must understand the nature of a guilty plea and the consequences of pleading guilty in general, the nature of the charges against him, and the distinction between any alternative charges and the consequences of pleading guilty to one rather than the other.”

Bisengimana, (Trial Chamber), April 13, 2006, para. 22: “[T]he Chamber asked the Accused if the plea was informed: that is if the Accused clearly understood the nature of the charges brought against him and the consequences of the plea for each of the counts. The Accused answered that he pleaded ‘advisedly.’” *See also Nzabirinda*, (Trial Chamber), February 23, 2007, para. 12 (similar).

iv) guilty plea must be unequivocal

Kambanda, (Appeals Chamber), October 19, 2000, para. 84: “[W]hether a plea of guilty is equivocal must depend on a consideration, *in limine*, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law.”

Nzabirinda, (Trial Chamber), February 23, 2007, para. 13: “[T]he Chamber asked whether the plea was unequivocal: that is whether the Accused understood that he could not challenge any facts alleged in the indictment. The Accused responded that his plea was unequivocal.”

Bisengimana, (Trial Chamber), April 13, 2006, para. 23: “[T]he Chamber asked the Accused if his plea was unequivocal: that is whether the Accused knew that the plea was not compatible with any defence that would contradict it. The Accused answered that there was absolutely no incompatibility.”

v) sentencing recommendation of the parties not binding on the Trial Chamber

Rugambarara, (Trial Chamber), November 16, 2007, para. 16: “Recommendations on the range of the sentence . . . are not binding on the Chamber.” *See also Serugendo*, (Trial Chamber), June 12, 2006, para. 8 (similar).

Bisengimana, (Trial Chamber), April 13, 2006, para. 184: “The Plea Agreement signed by the Parties recommends that the Accused be sentenced to between 12 and 14 years’ imprisonment The Parties indicate that they clearly understand that their sentencing recommendation do not bind the Chamber.”

Compare Serugendo, (Trial Chamber), June 12, 2006, para. 80: “Although both parties acknowledge that, pursuant to Rule 62 *bis* (B), the Chamber is not bound by the [sentencing] recommendations of the parties, the Appeals Chamber has nevertheless

emphasised that Trial Chambers shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially from that recommendation, give reasons for the departure.”

vi) inapplicability of *non bis in idem* to withdrawn counts

Nzabirinda, (Trial Chamber), February 23, 2007, paras. 45-46: “The Chamber recalls that Article 9(1) of the Statute prohibits against a second trial of an accused for the same serious violation of international humanitarian law.” “As the Appeals Chamber observed, ‘the term “tried” implies that proceedings in the national court constituted a trial for the acts covered by the indictment brought against the Accused by the Tribunal and at the end of which trial a final judgement is rendered.’ Accordingly, in the particular circumstances of this case where counts have been withdrawn without a final judgement, the principle of *non bis in idem* does not apply and cannot be invoked to bar potential subsequent trials of the accused before any jurisdiction.”

vii) application—accepting guilty pleas

Rugambarara, (Trial Chamber), November 16, 2007, paras. 6-8: “After questioning the Accused, the Chamber was satisfied that Rugambarara understood that when an accused pleads not guilty, he is presumed innocent until proven guilty beyond reasonable doubt and that in pleading guilty, he was waiving his right to a fair trial, including the right to cross-examine Prosecution witnesses. Rugambarara also understood that his plea, if accepted, would result in a conviction with imprisonment associated thereto. Furthermore, Rugambarara acknowledged the existence of the Plea Agreement. He confirmed that his Counsel had fully explained to him the terms of the Plea Agreement, and that he understood the nature of the charges against him.”

“The Accused indicated that his guilty plea was made out of his own free will and with no guarantees or promises, other than those set out in the Plea Agreement. The Accused confirmed that he was satisfied with the explanations provided in the Indictment and that he could not challenge any of the facts alleged in the Indictment after the plea. Rugambarara further confirmed that his plea was made without any pressure or coercion.” “The Chamber was satisfied that the guilty plea by the Accused was made freely, voluntarily, unequivocally and was informed.”

Nzabirinda, (Trial Chamber), February 23, 2007, para. 10: “The Chamber informed the Accused of the consequences of his plea. The Chamber stated that when an accused pleads not guilty, he is presumed innocent unless guilt is established beyond reasonable doubt. An accused who pleads not guilty therefore has a right to a fair trial, including, the right to cross-examine Prosecution witnesses, to call Defence witnesses, and to testify in his defence. The Chamber asked the Accused whether he understood that in entering a plea, he would renounce these rights. The Accused responded in the affirmative.”

Serugendo, (Trial Chamber), June 12, 2006, paras. 6, 7, 11: “[T]he Plea Agreement records Serugendo’s desire ‘to contribute to the necessary process of national reconciliation in Rwanda.’” “The Plea Agreement acknowledges that Serugendo agreed to plead guilty ‘freely and voluntarily.’ He also understands that, by entering into the Plea Agreement, he has given up the rights related to the presumption of innocence and to a full trial.

The undertakings contained in the Plea Agreement include Serugendo's co-operation with the Prosecution."

"At the Plea Hearing on 15 March 2006, the Chamber confirmed that the plea was based on sufficient facts to establish the crimes and Serugendo's participation in their commission. Following its conclusion that the plea was voluntary, informed and unequivocal, in conformity with Rule 62 (B) of the Rules, the Chamber entered a finding of guilt for each count to which Serugendo pleaded guilty."

Bisengimana, (Trial Chamber), April 13, 2006, paras. 18, 20, 24, 25: "The Chamber notes that there is no specific provision in the Statute regarding guilty pleas and plea agreements. The relevant provisions of the Rules regarding the procedure relating to guilty pleas and plea agreements are Rule 62 (B) and Rule 62 *bis*."

"The Chamber summarised the consequences of the plea. It indicated that when an accused pleads not guilty, he is presumed innocent until his guilt is established beyond reasonable doubt. In consequence, an accused pleading not guilty has a right to a fair trial; to cross-examine Prosecution witnesses, to call Defence witnesses, and to testify in his defence. The Chamber asked the Accused if he understood that by pleading guilty, he was renouncing these rights. The Accused responded that he understood and that he consciously waived these rights."

"[T]he Chamber notes the following elements of the Plea Agreement: the Accused elected freely, 'with full knowledge of the facts,' to plead guilty; the Accused decided to plead guilty after a long reflection during which he became fully aware of the scope and consequences of the offences he had committed; the Accused decided to change his plea after being fully briefed on the legal consequences of so changing and having accepted these consequences; the Accused's decision to plead guilty was voluntary, informed and unequivocal."

"In its oral ruling of 7 December 2005, the Chamber was satisfied that, on account of the absence of any disagreement on the part of the Prosecutor and the Accused about the facts of the case, the plea was based on sufficient facts to establish the crimes and the participation of the Accused in their commission. The Chamber stated that the requirements of Rule 62 (B) were met . . ."

Rutaganira, (Trial Chamber), March 14, 2005, paras. 28, 47: "Pursuant to Rule 62(B)(i) to (iii) of the Rules, the Chamber proceeded to satisfy itself of the validity of the said guilty plea. In so doing, it asked the Accused if his plea was voluntary, if he had made it freely, knowingly and without coercion, threat or promise; if the Accused had understood well the nature of the charges and the consequences of his plea; if he was aware that the guilty plea was incompatible with any grounds of defence; if he had indeed signed the Agreement containing his plea. The Accused having responded in the affirmative to all these questions, the Chamber found the guilty plea of Vincent Rutaganira to have been done freely and voluntarily, to have been an informed, unequivocal and sincere plea."

"Under Rule 62(B)(iv), in determining the Accused's responsibility for the crime to which he pleaded guilty, the Chamber must not only satisfy itself that all the elements of the crime of extermination [to which Rutaganira pled guilty] are present, but also ascertain the form of Vincent Rutaganira's participation in the perpetration of the said crime."

For further discussion of guilty pleas, see “goals served by guilty plea,” Section (VII)(b)(ii)(7)(e); “guilty plea” as a mitigating circumstances, Section (VII)(b)(iii)(7)(b)(iii); “life imprisonment in general should not be imposed where guilty plea,” Section (VII)(b)(iii)(3)(f), this Digest.

GLOSSARY OF DEFINED TERMS

ACHPR

The African Charter on Human and Peoples' Rights

ACHR

The American Convention on Human Rights

Additional Protocol I or Protocol I

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977

Additional Protocol II or Protocol II

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977

Akazu

According to *Zigiranyirazo*, (Trial Chamber), December 18, 2008, para. 98: "Many Prosecution [w]itnesses referred to a group known as the *Akazu*, which was said to be organised around the [former] President [Habyarimana] and the family of his wife and drawn from the northern regions of Rwanda. It held enough power to influence decisions in Rwanda, including those pertaining to employment and promotions, bank loans and political decisions."

Arusha Accords

A set of five accords (or protocols) signed in Arusha, Tanzania on August 4, 1993, by the government of Rwanda and the Rwandan Patriotic Front (RPF); also known as the Arusha Peace Agreement. They were ostensibly to end the conflict between the Government and RPF and result in power-sharing.

CDR

Coalition pour la défense de la République (Coalition for the Defense of the Republic), a stridently anti-Tutsi political party

CERD

The International Convention on the Elimination of All Forms of Racial Discrimination

Commune Rouge

A place in Gisenyi town where people were taken to be killed

ESO

École des Sous-Officiers, a military school in Butare Prefecture

ETO

École Technique Officielle, a technical school in Kigali where Tutsi were massacred

ECHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms

Juvénal Habyarimana

The President of Rwanda just prior to the start of the genocide. The downing of his airplane, also carrying the President of Burundi, on April 6, 1994, in Kigali, marked the start of the genocide in Rwanda.

IAMSEA

L'Institut Africain et Mauricien de Statistiques et d'Economie

Ibuka

An umbrella organization for the survivor organizations in Rwanda

ICC

The International Criminal Court

ICCPR

The International Covenant on Civil and Political Rights

ICRC

The International Committee of the Red Cross

ICTR or the Tribunal

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

ICTY

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Impuzamugambi

CDR youth wing/Hutu militia

Inkotanyi

Kinyarwanda term for warriors or fierce fighters

Interahamwe

Kinyarwanda term for “those who work together.” The term refers to groups of young Hutu males who carried out killings during the 1994 genocide.

According to *Gacumbitsi*, (Trial Chamber), June 17, 2004, para. 150: “[T]he word *Interahamwe* may sometimes refer to a member of a structured national and local group that was usually thought of as being the youth wing of MRND. The word may sometimes also refer to any person who took part in the massacres of 1994 and who was wearing, or not wearing, special attire.”

Inyenzi

Kinyarwanda term for “cockroach.” This pejorative word was used to describe the RPF and later all Tutsi.

JCE

Joint criminal enterprise, a means of “committing” a crime. For discussion of joint criminal enterprise, see Section (IV)(f)(iv), this Digest.

Kangura

Kinyarwanda term for “wake others up.” It refers to a Hutu extremist newspaper that served to fuel ethnic hatred.

MDR

Mouvement Démocratique Républicain (Democratic Republican Movement), a political party rooted in Parmehutu, which led the revolution of 1959 and unseated the Tutsi aristocracy.

MRND

Mouvement Républicain National pour la Démocratie et le Développement (National Republican Movement for Development and Democracy). The MRND was the sole political party in Rwanda until 1990, led by its founder Juvénal Habyarimana. Certain of its members were among the architects of the genocide.

OAU

Organization of African Unity

PSC

Cyangugu Prefecture Security Council

PSD

Parti Social Démocrate (Social Democratic Party). A political party.

RDF

Rwandan Defense Forces, the current military in Rwanda

RPF

Rwandan Patriotic Front, an armed movement initially composed largely of Rwandas who had lived in exile for a generation. It has now transformed into the dominant political party in Rwanda

According to the Separate Opinion Of Judge Shahabuddeen in Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 54: the RPF was “a predominantly Tutsi politico-military opposition group” that ultimately won the civil war and evolved into the governing party in Rwanda.

RTLM

Radio Télévision Libre des Mille Collines (Radio Television of One Thousand Hills). It was used to incite anti-Tutsi sentiment, thereby fueling the genocide.

Rules

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Statute

Statute of the International Criminal Tribunal for Rwanda, established by Security Council Resolution 955 in November 1994

The Four Geneva Conventions or The Geneva Conventions

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August, 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August, 1949; Convention (III) relative to the Treatment of Prisoners of War, 12 August, 1949; and Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August, 1949

The 1977 Additional Protocols

Additional Protocols I and II to the Four Geneva Conventions

UDHR

Universal Declaration of Human Rights

UN

United Nations

UNAMIR

United Nations Assistance Mission for Rwanda

UNDF

United Nations Detention Facility