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(695/A - 660/A)

695/A

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, *Presiding*
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Carmel Agius

Registrar: Adama Dieng

Date: 27 December 2011

Jean-Baptiste GATETE

v.

THE PROSECUTOR

Case No. ICTR-2000-61-A

BRIEF IN REPLY

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PART I – INTRODUCTION

Background

1. On 31 March 2011, Trial Chamber III found Jean-Baptiste Gatete guilty on Count 1 (genocide) and Count 4 (extermination as a crime against humanity). He was sentenced to life imprisonment.

2. On 3 May 2011, the Appellant filed his Notice of Appeal, which was amended on 25 October 2011. On 31 October 2011, he filed his Appellant's Brief (hereinafter *"Brief"*).

3. On 12 December 2011, he was served with the Prosecution's Respondent's Brief (hereinafter *"Response"*).

4. The Appellant now files the present Brief in Reply, pursuant to Rule 113 of the RPE.

The Reply

5. The Appellant's Brief demonstrated discernible errors that require the intervention of the Appeals Chamber. For the most part, the Response merely paraphrases the Judgement, often failing to address important issues raised in the Brief. For this reason, and due to statutory limitations on the length of the Reply, the Appellant will not address each and every one of the Prosecution's arguments. The Appellant maintains all his grounds of appeal.

PART II – MATTERS OUTSIDE THE RECORD ON APPEAL

6. At two points in its Response to Ground One, the Prosecution resorts to evidence which is both outside the record on appeal and irrelevant to the issues: (1) footnote 75; and (2) paragraph 45 (including footnotes 86 and 87).

7. The Appellant respectfully submits that the Prosecution's improper resort to materials outside the record reflects their fear that they have not adequately justified their actions in failing to prosecute this case without undue delay. It is respectfully requested that these two portions of the Response be excluded from consideration as part of the appeal in this case.

Footnote 75 (evidence cited to explain delay in filing a Motion for referral to Rwanda)

8. The evidence relating to the obstacles for referral to Rwandan national courts before 2007 should have been either submitted during trial or else presented in a Motion to Present Additional Evidence under Rule 115 of the RPE.

9. Even if this Chamber decided to examine the evidence cited, it would quickly conclude that the evidence is irrelevant to the issues presented in this case. The fact that a case may not be transferred to a different jurisdiction because the death penalty is available in that jurisdiction should not excuse the Prosecution from its duty to avoid undue delay in a case that it initiated. The evidence cited by the Prosecution in footnote 75 is thus ineffective as an excuse and irrelevant to these proceedings.

Paragraph 45 (confidential material cited in violation of Prosecutor's Regulations)

10. The matters discussed in paragraph 45 should never have been raised at all. The communications with counsel and the statements by an accused concerning plea negotiations are protected by privilege[1] and the Prosecution breached its own regulation in disclosing such matters. Therefore its suggestion that it would seek leave of the Tribunal before presenting privileged materials is illogical, as it has already cited to such materials without leave of the Tribunal.

11. The Prosecution misrepresents Gatete's argument in order to justify violating the Prosecutor's Regulation. The Prosecution pretends that Gatete asserted *"that the length of*

[1] Prosecutor's Regulation No.1 (2005) concerning Matters Antecedent to the Conclusion of a Plea Agreement between the Prosecutor and an Accused: *"[...] 1. Where discussions are entered into by and between the Prosecutor and an accused represented by Counsel ("the parties") concerning the matters listed below, such discussions are confidential and all or any communication or correspondence arising therefrom shall be privileged and shall remain privileged as against either party unless an agreement is executed by the parties and filed with a Trial Chamber pursuant to Rule 62 bis. (a) A potential plea of guilty to all or part of an indictment. [...]"* [emphasis added]

delay was solely attributable to the Pre-Trial Chamber and the Prosecution" citing to paragraph 41 of Appellant's Brief, which in fact only says the following:

> "This record shows that both the Prosecution and the Trial Chamber caused undue delay in this case, which resulted in a grave miscarriage of justice."

12. Using this manufactured distortion, the Prosecution infers incorrectly that Gatete denied the fact that the negotiations even occurred and that this alleged denial equals a waiver of the confidentiality of the plea negotiations.[2] The plain language relied on by the Prosecution utterly fails to support the inference which the Prosecution seeks to draw.

13. The Prosecution's unprofessional conduct and their breach of confidentiality places Gatete's right to a fair and unbiased appeal in jeopardy. The Appeals Chamber may feel that this would warrant a disciplinary sanction, and the Defence defers to it in this regard. In any event, paragraph 45 and footnotes 86 and 87 should be disregarded.

14. In addition to violating professional rules of conduct, the evidence cited is outside the record on appeal. As already stated, Gatete respectfully requests that the Appeals Chamber ignores it on that basis.

15. The Prosecution's assertion that part of the delay could be attributable to plea negotiations is untrue and irrelevant. Plea negotiations are no excuse for failing to set a trial date. If negotiations are on-going, they are irrelevant to questions of undue delay absent some special request by the Defence to delay the trial date for purposes of plea negotiations. In this case, the negotiations were a cry for attention by a man who had been abandoned for years by the system.

16. Gatete has consistently maintained that he was not present at the crime scenes covered by the indictment in this case. Unsuccessful plea negotiations have no meaning whatsoever in terms of the truth. It should be made clear that the fact of negotiations taking place is irrelevant to the case.

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[2] Response, fn.86.

PART III – SUBMISSIONS IN REPLY

GROUND 1: UNDUE DELAY

Notice of appeal

17. The Prosecution misstates Gatete's Ground of Appeal and asks the Appeals Chamber to disregard sections 1.2.3 (undue delay caused by the Prosecution)[3] and 1.2.4 (undue delay caused by the Trial Chamber)[4] of the Brief, alleging that these sections raise issues outside the scope of the Notice of Appeal.[5]

18. The two sections do not raise any additional errors in the Judgement. Both sections highlight and support the findings made by the Trial Chamber in paragraphs 61 and 62 of the Judgement, only challenging the conclusions drawn from those paragraphs. The findings on the reasons for the delay (i.e. the conduct of the parties) are inconsistent with its ultimate legal conclusion that the delay was not undue. This aspect of Ground One is indicated in the general heading where it refers to legal errors and where it says *"despite seven years of largely unexplained delay"*.[6] This reference to ignoring its own findings on unexplained delay is then repeated in paragraph 5 of the Notice of Appeal where reference is again made to legal errors and to the *"significant and unexplained delay of over seven years"*, citing to the entire section of the Judgement dealing with undue delay (paragraphs 54 to 64), and not only the specific paragraphs dealing with complexity (paragraph 60) and prejudice (paragraph 63).

19. Gatete respectfully submits that there is no reason to disregard these two sections of his Brief.

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[3] Brief, paras.27-29.
[4] Brief, paras.30-41.
[5] Response, para.24.
[6] Amended Notice of Appeal, p.2 (Ground One includes paragraphs 4 to 7).

Unexplained delay and conduct of the parties

20. For the record, contrary to Prosecution assertions,[7] Gatete has never argued that it was *per se* error for the Trial Chamber to omit a calculation of the length of time which passed between arrest and the start of trial. He merely observed the omission.

21. Similarly, the Prosecution avoids having to address the issues, when it makes a wild assertion that Gatete accused the judges of violating standards of professional conduct.[8] It seems to argue that, absent a violation of a judge's oath of office, the conduct of a Court may not contribute to undue delay. They totally ignore and fail to respond to the arguments raised in the United Nations Human Rights Committee decision in *Fillastre and Bizouarn v. Bolivia* and the partially dissenting opinion of Judge Short in the *Bizimungu* Judgement.[9]

22. The Prosecution wrongly states that the Defence actively contributed to the delay by indicating during the April 2007 Status Conference *"its willingness to start only at the beginning of 2008"*.[10] When reading the original version, it appears that the Counsel requested a realistic starting date for trial.[11] The Chamber itself indicates having scheduling issues because of many trials running at the same time until the end of 2007.[12]

Complexity of the proceedings

23. It is conceded that the Defence case has some relevance to an evaluation of pre-trial delay.[13] However, the breakdown of Prosecution witnesses is still relevant to a proper analysis of the complexity of the case as it sets forth the scope of the Prosecution's case and relates to the conduct of the Prosecution and the reasons for its delay. Given the simple nature of the

[7] Response, paras.26,27.
[8] Response, para.40.
[9] Brief, fn.35-38.
[10] Response, para.44.
[11] T.19.04.2007, p.2 (English) and pp.2-3 (French).
[12] T.19.04.2007, p.3 l.5-13.
[13] Response, para.30.

Prosecution's case, consisting entirely of eyewitnesses it had known for years, the unexplained nature of the delay becomes more apparent.

24. The Prosecution then argues that the case of *Renzaho* is similar to the present case and should be followed.[14] Renzaho was the prefect of Kigali-Ville prefecture and had the rank of colonel in the Rwandan army.[15] He was charged with six counts arising from a series of massacres in Kigali during a period of more than *three months* running from 7 April to 17 July 1994. The Indictment was based on Article 6(1) individual *and* on Article 6(3) command responsibility. The prosecution presented 26 witnesses, including an expert witness, and 118 exhibits over 51 days of trial.

25. Gatete's case was a much simpler case. The indictment covered a *twenty-four day* period running from 6 April to 30 April 1994. There were no experts, no war crime charges and no command responsibility issues. There were only 22 Prosecution witnesses, all eyewitnesses, with only 39 Prosecution exhibits in a trial that lasted 31 days.

26. Unlike Renzaho, Gatete was also charged with conspiracy and extermination. However, neither the conspiracy nor the extermination charges added to the complexity of the case. There were no briefings required on novel questions of law. The so-called evidence of conspiracy merely consists of unsupported inferences that are not compelled by the evidence and therefore insufficient as a matter of law. The total reliance on inferences to establish that Gatete was involved in a conspiracy or in planning the genocide is another illustration of the lack of justification for the delay in this case.

27. The case against the Appellant was not complex and the Trial Chamber committed discernible error when it found otherwise.

[14] Response, paras.34-36.
[15] *Renzaho* (AC), para.2.

Prejudice resulting from the undue delay

28. The Prosecution argues that Gatete's Closing Brief wrongly acknowledged that there had not been any objection as to the undue delay during the pre-trial phase[16] and that Gatete could therefore not fault the Chamber for the error in the Judgement. This error should not prejudice the Appellant and should not relieve the Trial Chamber of its duty to know what has been filed in the case. This is especially true when a new counsel raises the same issue subsequently, as in this case. The lack of continuity and the passage of time denied Gatete a trial without undue delay, and the fact that the delay deprived him of a ruling on his 2006 motion is only more evidence of prejudice resulting from the delay. To consider this a waiver of the objection in this context would be unjust.

29. The Prosecution then argues that the Appellant was responsible for part of the undue delay because of having exercised his right to prepare his defence after appointment of new counsel on 24 April 2009.[17] It goes on to suggest that five years of detention was enough time to prepare his defence, noting that in 2004, legal aid funds were being used to interview witnesses in numerous locations.[18] Of course, if the trial had been held in 2004 or 2005 or even 2006, this ground of appeal would not have been raised. But by 2006 the legal aid funds were withheld, and by 2009 the work done in those early years was lost and had to be recreated. The Prosecution fails to respond to the substance of the 2006 objections, which informed the Trial Chamber that without a trial date, legal aid funds were being withheld.

30. As for prejudice, the Prosecution begins by conceding that the Trial Chamber repeatedly attributes inconsistencies in witness testimony to the passage of time.[19] However, it suggests that no prejudice resulted because the Appellant had the opportunity to fully cross examine the witnesses, despite the Trial Chamber's mis-use of the passage of time to credit Prosecution witnesses and despite the destruction of the Rwankuba *secteur* office. It cites the *Kamuhanda* Appeal Judgement in support of its argument.

[16] Response, para.42.
[17] Response, para.44.
[18] Response, para.47.
[19] Response, paras.49-50.

31. In *Kamuhanda,* the Appeals Chamber quoted a passage from the *Kupreskic* Appeal Judgement which helps to illustrate the Trial Chamber's error in this case:

> "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."[20]

32. This passage is not a *carte blanche* to credit testimony by excusing inconsistencies due to the passage of time. Rather, it is a rejection of the suggestion that such evidence should be excluded automatically. It advises free admissibility, but caution, because the passage of time makes live testimony less reliable as the length of time increases over the years. The Appeals Chamber was not suggesting, as the Trial Chamber and Prosecution seem to believe, that the passage of time somehow excuses inconsistencies and avoids any reduction in probative weight. The Trial Chamber's analysis of every eyewitness is infected with this discernible error, which is prejudice arising from the undue delay in this case.

33. Nor is in-court cross-examination a complete substitute for being able to actually observe an eyewitness's vantage point.[21] Especially when the examination comes so long after the events observed and when additional memories have been reported at a late date, both cross-examination and visits to crimes scenes are useful tools for verifying testimony. Had the trial been held years earlier, Gatete would have benefited from a preserved crime scene which would allow for a fair trial. The delay seriously prejudiced Gatete's ability to demonstrate the lack of reliability of the eyewitnesses against him.

Conclusion

34. The Trial Chamber did not fulfill its duty to protect Gatete's right to a trial without undue delay. Seven years with only 3 status conferences,[22] the destruction of the *secteur*

[20] Kupreskic (AC), para.31
[21] Brief, Ground 2.
[22] The mention of only 2 status conferences instead of 3 in the Brief (paras.5,31) was a clerical error which does not affect the legitimacy of Gatete's claim, as the first conference was only held in 2007 and the two last in 2009, 7 years after his arrest.

office and the failure to properly assess the effects of time on eyewitness testimony all worked together to deny Gatete a fair trial.

35. For the foregoing reasons, Ground One should be granted.

GROUND 2: CONDUCT OF THE SITE VISIT

Notice of appeal

36. The Prosecution argues that Gatete exceeded the scope of his Notice of Appeal in impugning *"specific findings in the Judgement, including on the credibility of witnesses"*.[23] The Prosecution fails to identify any of these findings and this allegation should be summarily dismissed. In any case, the credibility of witnesses was introduced at this stage to demonstrate Gatete's prejudice resulting from the unfair conduct of the site visit despite the Defence's objections and was therefore properly pleaded in the Notice of Appeal. It is worth noting that the Prosecution wrongly considers that the Notice of Appeal provided for procedural issues only,[24] and relies on irrelevant case law that has nothing to do with the issue at stake.[25]

Practice Direction and procedural issues

37. The Prosecution first argues that *"all of Gatete's arguments on the conduct of the site visit must fail"* because the Trial Chamber *"considered"* the Practice Direction on Site Visit (hereafter *"the Practice Direction"*) and provided for a report and opportunities to file written objections.[26] The Appellant recalls that the Trial Chamber is bound by the Practice Directions and should not limit itself to merely "considering" them.[27] The Prosecution adds that *"the Chamber also enjoyed considerable discretion in determining the manner in which [the site*

[23] Response, para.55.
[24] See Amended Notice of Appeal, para.8, which goes beyond mere procedural issues.
[25] Response, fn.114 citing to Bikindi (AC), para.96. However, in *Bikindi*, the Appeals Chamber only concluded that: *"the alleged error in failing to keep a proper record of the site visit was not properly pleaded in the Appellant's Notice of Appeal, which only refers to the alleged error in failing to take judicial notice of Operation Turquoise."*
[26] Response, para.54.
[27] Brief, para.61.

visit] was conducted, subject only to the accused fair trial rights".[28] It cites to the *Munyakazi* Appeal Judgement, which deals with the general principle of a trial chamber's discretion in the conduct of the proceedings, which remains undisputed. The Appellant insists that a Trial Chamber conducting a site visit remains bound by the Practice Direction, which describes the specific elements of fair trial to be applied when conducting a site visit. The only evidence in this case was eyewitness testimony, which could be objectively tested on site, and was not. There is no report on the vantage points of the only sources of evidence in the case. The unfair conduct of the site visit impaired Gatete's right to a fair trial and constitutes a denial of justice requiring the intervention of the Appeals Chamber.

38. The Prosecution emphasizes that a Trial Chamber must allow observations for the record during a site visit only when necessary.[29] Here, the Trial Chamber allowed observations, but not contemporaneous ones. The Defence does not dispute the Trial Chamber's discretion on that particular issue, as set forth in the Practice Direction. However, in a case where:

- The only evidence is eyewitness evidence;
- The witnesses claimed to have been hidden from view and still able to observe clearly;
- The Prosecution had knowledge of the location of those vantage sites and the Defence did not;
- The Prosecution did not disclose the exact location of its witnesses before, during and even after the site visit;

then it was an abuse of discretion to disallow requests to visit the vantage points of those witnesses and to disallow contemporaneous observations for the record during the site visit.

Objective site visit to test in-court testimonies

39. The Prosecution wrongly asserts that *"At no point in these submissions did Gatete contest the hiding places of AIZ and BBR* [...]". The Defence continuously tried to locate the Prosecution witnesses. It requested the Trial Chamber to visit their vantage points and then challenged their ability to witness the events.[30] It is incorrect to say that there was no dispute on the hiding place of BBR. The Prosecution's description of BBR's hiding location

[28] Response, para.56.
[29] Response, para.59.
[30] Brief, para.65 and fn.58,106.

illustrates the confusion surrounding this issue.[31] The need to verify the hidden vantage point from which the witness claimed to have been able to both see and hear Gatete is obvious from the lack of clarity in the testimony.

40. The Prosecution repeatedly tries to demonstrate that the Trial Chamber did not have to observe the witnesses' vantage points during the site visit, by arguing that *"the site visit findings were neither crucial to nor determinative of the Chamber's findings of Gatete's guilt"*, *"Any site visit findings (...) are only secondary to live in-court testimony and can, at best, only emphasize or reinforce certain aspects of such testimony"* and *"the site visit observations only served to reinforce what was already known through the direct in-court evidence"*.[32]

41. The Prosecution considers in-court testimony of the utmost probative value. It argues that no other type of evidence could overturn it, and that the evidence arising from a site visit would be of a secondary nature. It relies on irrelevant case law[33] in which the Appeals Chamber merely preferred in-court testimony to prior statements (*Akayesu*) or documentary evidence (*Simba*). The whole purpose of a site visit is to test in-court testimony against the objective environment to see if they are consistent. One does not obviate the need for the other. The Appeals Chamber has itself relied on objective evidence from a site visit to overrule a Trial Chamber's judgement based on in-court testimonies.[34] No matter how consistent the in-court testimonies, the witnesses in Gatete's case would have been found incredible if the real location of their hiding places had been proved to be incompatible with their in-court stories. The Prosecution's arguments are especially misplaced, coming from the party who knew precisely where the vantages points were located, but who never disclosed them to the Defence or the Trial Chamber.

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[31] Response, para.69. The location of the *secteur* office and its courtyard could not be assessed during the site visit, following the destruction of the site a few days prior to the visit. In any case, the Prosecution misrepresents once more the evidence in that BBR placed the meeting at the secteur office, (T.11.11.2009, p.4 l.36-37, p.5 l.1-5), he described the courtyard as being "*more or less large*" and not merely "large" as the Prosecution bluntly asserts, and clearly stated that Gatete was standing "*in front of the secteur office*" (T.11.11.2009 p.24 l.30-32), which is in direct contradiction with his stating that his view of the office was blocked by a row of three houses (T.11.11.2009 p.23 l.11-12) [Emphasis added].

[32] Response, paras.64-65 [Emphasis added].

[33] Response, fn.134.

[34] See e.g. *Zigiranyirazo* (AC), paras.23,30,44,54,56,68-69.

Prosecution's duty to assist the Tribunal

42. The Prosecution does not deny knowing the exact hiding places of its witnesses, but considers that it *"is not required to give evidence, that is left to the witnesses of the case"*.[35] However, the Prosecution is under the obligation to disclose evidence if it is material to the preparation of the Defence.[36] The witnesses' exact locations were requested by the Defence prior to the site visit,[37] and the Prosecution should even have provided it in advance so that the Defence could prepare effectively for the site visit. Additionally, if the vantage points had been helpful for the Prosecution, it most certainly would have used them as evidence. The fact that it did not may suggest that the evidence had some exculpatory effect which should have been disclosed to the Defence under Rule 68(A) of the RPE. Eventually, the Defence recalls that the Prosecution Regulations provides for a duty to *"assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused"*.[38] That the Prosecution would deem normal not to disclose elements crucial to a case does not conform to the standards set out before this Tribunal.

Questioning of persons present at the sites visited

43. The Prosecution contests the fact that the Judges questioned persons present on location, arguing that Gatete's *"offers not a shred of evidence to support this accusation against the Judges, nor is it supported by anything contained in the record"*.[39] However, Gatete filed submissions immediately following the site visit to raise this issue, which is part of the case file.[40] The Prosecution never opposed it. The submissions were left unaddressed by the Trial Chamber, and were not even considered in the Judgement, denying Gatete his right to appeal.

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[35] Response, para.71.
[36] Rule 66(B) of the RPE.
[37] Defence Submissions on the Site Visit, filed 30 April 2010, para.17(iii) and (iv); Defence Supplemental Submissions on the Site Visit, filed 24 May 2010, para.10(iii) and (iv). The Defence made requests for observations in connection with all locations for which convictions were entered.
[38] Prosecutor's Regulation No.2 (1999), para.2(h).
[39] Response, para.78.
[40] Defence submissions Regarding the Site Visit of 26-31 October 2010, filed 5 November 2010, paras.7-12.

Conclusion

44. For the foregoing reasons, Ground 2 should be granted.

GROUND 3: ERRORS IN THE FACTUAL FINDINGS

45. In its response to Ground 3 of the Appellant's Brief, the Prosecution fails to address the real issues raised. Instead, it argues that the Appellant based his challenges on "*a mistaken understanding of the concept of corroboration*".[41] However, the Brief correctly states the case law on corroboration[42] and demonstrates that the Trial Chamber committed discernable errors in its assessment of factual findings that resulted in various miscarriages of Justice.

Subground 3.1: Crimes committed in the Rwankuba *secteur*

Evidence relating to the killings

46. The Prosecution misstates the issue raised by Gatete relating to the absence of a causation link between the alleged meeting and the killings in the area. Gatete never argued that "*the Chamber relied on only one attack from Mumpara*".[43] In fact, in the very preceding sentence the Appellant's Brief states "*The Trial Chamber correctly noted that hours elapsed between the gathering and the beginning of the attacks in Rwankuba*".[44] Gatete specifically addressed the witnesses' assertions that there had been different attacks including one on Gituza hill, one in Mumpara, and one coming from Mumpara.[45]

47. The core of Gatete's argument is that the Prosecution did not demonstrate that the persons who were allegedly present at the *secteur* office were the ones who actually participated in the attacks that occurred in the Rwankuba area. The participation of "*the*

[41] Response, para.82.
[42] Brief, para.159.
[43] Response, para.94.
[44] Brief, para.105.
[45] Brief, paras.105-106.

Interahamwe who received Gatete's order" was never proven in any of the different attacks described by BBR and AIZ, contrary to the Prosecution unsubstantiated assertion.[46]

48. The Prosecution extrapolates the evidence in order for it to fit its unsupported allegations. It relies on three different attacks to prove causation, but those attacks were never described as sequential by the witnesses who merely spoke of a number of different sporadic attacks. The Prosecution asserts that *"AIZ also described this sequence of three different attacks on the Tutsi in Rwankuba secteur"*, without referring to any evidence in the record.[47] However, AIZ never described more than having witnessed "attacks" during that day.[48] The Prosecution further claims that *"the killing started subsequent to Gatete's speech"*.[49] Yet again, the transcripts cited states the contrary: AIZ insists he did not witness the beginning of the massacres and that no violence occurred after the alleged meeting.[50]

49. The Prosecution wrongly asserts that, according to BBR, Gatete rewarded the Interahamwe for the killings.[51] However, BBR merely stated that *bourgmestre* Mwange gave a cow to the Interahamwe at the Cerai school.[52]

Assessment of the Prosecution evidence

50. In contesting the collusion between witnesses AIZ and BBR, the Prosecution doubts the fact that they testified repeatedly in other cases.[53] Both witnesses however clearly stated this in their in-court testimonies.[54]

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[46] Response, para.96.
[47] Response, para.97.
[48] T.11.11.2009, pp.49-50.
[49] Response, para.97.
[50] The French version of the transcripts is explicit: *"lorsque j'ai quitté l'endroit où je me cachais, les violences n'avaient pas encore commencé. Ce n'est que par la suite que cela a été le cas et que les membres de la population ont commencé à en tuer d'autres."* (T.11.11.2009, p.64). The Prosecution relies on the English translation, drawing a causation link from the word *"subsequently"*, which was only a time reference: *"When I left my hiding place, the violence had not started. It only started subsequently. That is when the local inhabitants started killing others."* (T.11.11.2009, p.61).
[51] Response, para.95.
[52] T.11.11.2009, p.11: While BBR stated in his prior statement that *Interahamwe* had declared that a cow had been given by Gatete (D20), he stated at the bar that he saw Mwange give a cow, that he did not get close to them and merely thought the cow was a reward.
[53] Response, para.88.
[54] T.11.11.2009, p.34 l.16-37, p.38 l.5-8 and p.35 l.1-13 (CS).

51. Additionally, the lengthy discussion of the words alleged to have been spoken in front of the Rwankuba *secteur* office is irrelevant to the issues in the case.[55] The Appellant never discussed the wording alleged by the witnesses but rather contested that the meeting took place at all and insists that he was not present in Rwankuba that day.

Assessment of the Defence evidence

52. The Prosecution once more distorts the evidence in asserting that Defence witness LA41 admitted she may have returned to her place of business after 7 am, implying that she could have missed the gathering.[56] She clearly stated that *"It could have been some minutes after seven"*.[57] Both AIZ and BBR were at home around 7am and then went to the secteur office.[58] LA41 was therefore home when the meeting allegedly took place and could have witnessed it, had it occurred. No reasonable trier of fact could have summarily set aside her consistent statement, nor those of the corroborating Defence witnesses, direct neighbours who could not have missed the alleged meeting, had it occurred.

53. The Response requires no further reply in relation to errors in the factual findings, other than to reassert reliance on the arguments made in Subground 3.1 of the Brief.

Conclusion

54. For the foregoing reasons, Subground 3.1 should be granted.

[55] Response, paras.92-93.
[56] Response, para.104.
[57] T.02.03.2010, p.33.
[58] Judgement, para.105.

Subground 3.2: Crimes committed in Kiziguro Parish

Assessment of the Prosecution evidence

55. As regards Gatete's alleged visits prior to 11 April 1994 at the Kiziguro parish, the Prosecution errs in two ways. First, it repeatedly fails to take into account that corroboration implies the recollection of *"a same fact or sequence of linked facts."*[59] Second, when it accurately takes this factor into account, it adopts a wrongly expanded definition of the *"same fact or a sequence of linked facts"*. It indeed implies that the 8th, 9th and 10th alleged visits at the parish can constitute the "same fact or a sequence of linked facts", and therefore, that witnesses BVS, BBJ and BBP corroborate each other.[60] The Prosecution uses its expanded definition of corroboration to state that BVS was indeed corroborated, but then confusingly admits that she was not corroborated.[61]

56. However, each of these alleged visits are clearly separate events that differ drastically from one another and cannot be deemed a *"same fact or a sequence of linked facts"*: they differ as regards the date (8 / 9 / 10 April) and time (morning / afternoon / night), the persons allegedly present (Kamali / Nkundabazungu / other persons / priests / *Interahamwe*), and the alleged course of the visit itself.[62]

57. The Prosecution distorts the evidence and the Judgement in stating that, prior to the 11th of April, Gatete ensured that the priests and gendarmes left before the massacre.[63] It goes as far as stating that Gatete removed the priests.[64] The only evidence in the case shows that "*[b]y 11 April, the priests and gendarmes had left the parish*"[65], with no further detail. The

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[59] While it correctly states that corroboration implies "*the compatibility between two prima facie credible testimonies regarding the same fact or a sequence of linked facts*", it then omits the requirement of the "same fact or a sequence of linked facts" in its analysis. Indeed, it claims that "*the Appeals Chamber does not require testimony to be identical for them to be corroborated, it suffices that they are compatible with each other. The evidence of all three witnesses - BVS, BBP and BBJ - is corroborated under this standard*". Response, para.111. See also para.113: The Prosecution repeats its error in stating that BVS's testimony on the visit of the 9th "*is compatible with the testimony of his visits of 10 April 1994 (...) and is thus corroborated.*"

[60] Response, paras.111-114.

[61] Response, para.113 *in fine.*

[62] Response, para.112.

[63] Response, para.108,112,114.

[64] Response, para.112.

[65] Judgement, para.327.

Prosecution artificially creates a link between Gatete's alleged visit and fails to demonstrate a prior planning of the attack.

Assessment of the Defence evidence

58. Contrary to the Prosecution's unsubstantiated assertion,[66] the Trial Chamber indeed dismissed the four Defence witnesses' testimony in only 3 sentences[67] and solely because of their criminal background and alleged minimization of their the role, and not at all on their individual merits. The case law cited by the Defence was highly relevant[68] and the oriented interpretation made by the Prosecution unconvincing.[69] Even if they may have minimised their role, this would not impact their credibility *per se* as they have no interest to lie as to Gatete's personal role in the attack – they had already identified the true leaders they were obeying to and did not dissociate themselves from the attackers.[70]

59. In so doing, the Prosecution does not challenge the Defence's major argument: all Defence witnesses were well-positioned and could not have seen Nkundabazungu but not Gatete who was allegedly with him.[71]

60. The Response requires no further reply in relation to errors in the factual findings, other than to reassert reliance on the arguments made in Subground 3.2 of the Brief.

Conclusion

61. For the foregoing reasons, Subground 3.2 should be granted.

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[66] Response, para.126.
[67] Judgement, para.332.
[68] Brief, paras.147-148,150.
[69] Response, fn.327. In *Kamuhanda*, despite the context, the Appeals Chamber's finding relied on by Gatete did relate to accomplices' testimony being crucial basis to determine *other participants*' role in the scheme (*Kamuhanda* (AC), para.142).
[70] T.10.03.2010, pp.44-45,48 (LA27); T.15.03.2010, pp.61,67 (LA32); T.09.03.2010, pp.58-59,73,75 (LA84); T.11.03.2010, pp.28-29,31 (Kampayana).
[71] Brief, paras.129-143. See also Response, paras.136-141.

Subground 3.3: Crimes committed in Mukarange Parish

Identification issues

62. The Prosecution mischaracterizes the Brief as being based solely on the lack of in-court identification in connection with Mukarange[72] and then denies that a witness' failure to identify the accused in-court would have relevance. However, the lack of in-court identification from witnesses living far away from Murambi *commune*, who had absolutely no reason to know its former *bourgmestre*, is highly relevant, given their lack of prior knowledge of the Appellant. The Prosecution does not explain why the witnesses relating to Mukarange were treated differently than those testifying in relation to Rwankuba and Kiziguro.[73] Nor does it address the mis-identification of the Appellant as being the current *bourgmestre*.

63. Moreover, and contrary to the Prosecution assertion, BVP had no previous knowledge of Gatete.[74] BVP did not occupy any special position in April 1994 that would have rendered him *"well acquainted"* with political authorities in the country.[75] At that time he was a farmer and trader and never said otherwise;[76] he was appointed *conseiller de secteur* in October 1994 only and had no public function before that.[77] As to BVR, the Prosecution expressly admits that his prior knowledge of Gatete was not elicited.[78]

64. The Prosecution further misstates the evidence when saying that Gatete *"wielded considerable influence by virtue of his former position as bourgmestre and his current position in the national government"*.[79] As demonstrated in the Brief, a former *bourgmestre* among more than one hundred in Rwanda, even if he had briefly occupied a civil servant position in a Ministry, would not necessarily have been known by every farmer or mason[80] throughout the country.

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[72] Response, para.143.
[73] See e.g. for Rwankuba and Kiziguro: T.20.10.2009, p.26; T.21.10.2009, p.7 (CS), p.62; T.05.11.2009, pp.25-26; T.11.11.2009, pp.3,42-43.
[74] Response, paras.144-145 and fn.377. BVP was asked *if he knew* Gatete but not *how* (T.02.11.2009, p.4).
[75] Response, para.144.
[76] Identification sheet (P9); T.02.11.2009, p.32 l.6-9. He also said that he had been a teacher and that he was in prison prior to the events of 1994, but did not specify any period of time (T.02.11.2009, p.34 l.34-37).
[77] T.02.11.2009, p.32 l.10-15.
[78] Response, para.145.
[79] Response, para.144.
[80] See identification sheets of AWF (P8), BVP (P9) and BVR (P10).

65. Hence identification was not proven by the Prosecution, nor was it assessed with all due caution by the Chamber.

BVR's accomplice testimony

66. As to BVR's unreliable testimony, the Prosecution adds to the existing confusion. Judicial records necessarily exist, as he was arrested in 1997, was detained, allegedly asked for forgiveness, was convicted and seemed to be completing the term of his sentence in Rwanda at the time of his testimony.[81] The absence of any disclosure is troubling. Contrary to the Prosecution's assertion, disclosure of these judicial records was not voluntary, but was specifically ordered by the Trial Chamber:[82]

> "**II. ORDERS** the Prosecution, pursuant to Rules 54 and 98 of the Rules, to:
> (i) Use all best efforts to make enquiries with the Rwandan authorities as to whether judicial records exist in respect of Witnesses BVR and BVQ [...]
> (ii) If such judicial records exist, obtain and disclose these to the Defence immediately [...]"

67. The Prosecution's report filed pursuant to this order merely refers to letters sent by the OTP to Rwandan authorities (no copy was served), to efforts to visit another witness (BVQ) and to public holidays that interrupted the efforts. Regarding BVR, surprisingly, only two steps were detailed by the OTP despite its claim of having used his best efforts: on 26 November 2009, *"[i]nvestigators have been trying to contact the officer responsible for him for sometime but without any success"* and, on 1 December 2009, *"[i]nvestigators were also able to contact the officer responsible for witness BVR, but were subsequently unable to meet with the officer and obtain any records"*. No further explanation was given as to the Prosecution's inability to meet the officer in charge. No further explanation was given as to the persistent failure to obtain determinative objective elements to test BVR's credibility.[83]

68. Notwithstanding this serious breach, it is the absence of any mention of this procedural issue in the Judgement which constitutes discernible error, especially given the fact that the

[81] Response, para.151; Brief, para.208.
[82] Decision on Defence Motion for Disclosure of Rwandan Judicial Records pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, filed 23 November 2009.
[83] Report on the Results of the Enquiries with the Rwandan Authorities made by the Prosecutor in Respect of Witnesses BBQ, BVR and BVQ, filed 1 December 2009.

Trial Chamber acknowledged the importance of the judicial records in its 2009 Decision.[84] The Defence reiterates that BVR's whole testimony was, to say the least, confusing. It is worth mentioning that the Prosecution unfairly blames the Appellant of *"accus[ing] him of thinking that he was a free man"*.[85] Those are exactly BVR's words as recorded, rendering his testimony even more unreliable.[86]

69. The Response requires no further reply in relation to errors in the factual findings, other than to reassert reliance on the arguments made in Subground 3.3 of the Brief.

Conclusion

70. For the foregoing reasons, Subground 3.3 should be granted.

GROUND 4: MODES OF RESPONSIBILITY

Notice of appeal

71. Contrary to the Prosecution's contention, all arguments under Ground 4 were properly pleaded in the amended Notice of Appeal, which included both legal and factual issues.[87] The issue of notice of cumulative charging was merely one of the arguments included in Subground 4.1, showing that the Trial Chamber chose to rule *ultra petita* despite the Prosecution's clear and consistent Indictment.[88]

72. Despite the misleading paragraph 6 of the Response, unjustified inferences of planning were firmly presented in the Notice of Appeal.[89] Other factual challenges merely result from Subground 4.1 and from the need to alternatively identify relevant modes of liability amongst

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[84] Decision on Defence Motion for Disclosure of Rwandan Judicial Records pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, filed 23 November 2009, para.30.
[85] Response, para.150.
[86] T.02.11.2009, p.65 l.18-20 (*"Q. Witness, during your testimony today you told the Chamber that you are a free man, a free citizen, and you have been since 2003; do you remember that? A. I do remember."*).
[87] Response, paras.6,178,183. See also Amended Notice of Appeal, paras.26-30.
[88] Response, paras.177-181.
[89] Amended Notice of Appeal, paras.27-29.

those cumulatively and equivocally retained by the Trial Chamber. However, the Appellant's main request remains the quashing of all convictions against him because of the use of unsupported inferences as to planning, as well as flawed reasoning as to cumulative modes of responsibility, with considerable ambiguity created as to the scope of his alleged criminal responsibility.

Duty to unequivocally describe the criminal conduct

73. The Prosecution misstates the Appellant's Brief when citing that a Chamber has "*a duty to choose the most relevant mode of liability*", being "*one*" head of liability,[90] while Gatete has never pleaded for any binding *single mode of liability approach*. Indeed, he never challenged that an accused can be convicted under several modes of liability.[91] He merely submitted that a Chamber has *"a duty to choose the most relevant modes of liability"*.[92] Fully capturing the nature of the criminal conduct[93] does not justify an illogical accumulation of every conceivable mode of liability. The aim of any legal finding shall remain to give an unambiguous picture of the accused's participation.

74. The Prosecution further mischaracterizes the appeal as Gatete has never contended that there was more than one conviction or a duplication of penalty.[94] The Brief extracts[95] indeed mention only *one* conviction under several modes of liability or generally the *two* convictions under Counts 1 and 4. This being said, the Defence also rightly referred to Judge Schomburg's opinion that one conviction must not *give the impression* of punishing twice for the same conduct.[96]

75. The Prosecution wrongly submits that, if this ground of appeal were to succeed, it would not affect the verdict.[97] The ambiguity of the Trial Chamber's legal findings on Gatete's level of involvement does undermine its analysis and may ultimately invalidate the

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[90] Response, para.165.
[91] Response, paras.166-167.
[92] Brief, para.225.
[93] Response, para.163 citing to Judgement, paras.594,601,608.
[94] Response, para.169.
[95] Response, fn.434 referring to Brief, paras.227,231,234,240.
[96] Brief, paras.225-226 citing to *Kamuhanda* (AC), para.389 (Separate Opinion of Judge Schomburg).
[97] Response, para.176.

conviction. Their implications are relevant for sentencing too, as a lower level of involvement may warrant a reduction of sentence.[98]

Incompatible modes of liability

76. Contrary to the Prosecution's contention, incompatible modes of responsibility do exist.[99] It is indisputable that a principal perpetrator cannot at the same time be an accomplice in the same crime or in the same intertwined set of facts.

77. As to the incoherent findings of responsibility under both *committing* and *aiding and abetting*, the authorities cited by Gatete were indeed highly relevant and the Response does not show otherwise.[100] The Trial Chamber's findings in *Mpambara*, unchallenged in appeal, were all but unmeritorious:[101]

> "The Prosecution argues that it seeks to prove "criminal responsibility for commission by aiding and abetting the physical perpetrators in furtherance of a JCE". This statement is legally incoherent: aiding and abetting is a form of accomplice liability, 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 which have been discussed above. 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. [...]" [citing to *Kvocka* (AC), para.91]

78. The Appeals Chamber's findings in *Seromba* also reflect the established practice of not convicting under both modes of responsibility as a perpetrator and an accomplice.[102] In *Kvocka*, the Appeals Chamber has further held that the distinction between the two forms of

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[98] See e.g. *Ntawukulilyayo* (AC), para.244.
[99] Response, para.168.
[100] Response, para.172; Brief, paras.227-228.
[101] *Mpambara* (TC), para.37 *[emphasis added]*.
[102] *Seromba* (AC), paras.184-185,206 (the Appeals Chamber concluded that it was not unreasonable to find that Seromba aided and abetted in the killings of two refugees "*instead*" of finding him guilty of committing; it clearly distinguished these acts from those relating to the destruction of the church, for which it raised Seromba's level of involvement from aiding and abetting to committing). See also *Zigiranyirazo* (TC), para.411 (the Trial Chamber found "*unnecessary*" to make a finding under aiding and abetting in light of its conclusion that the Accused committed genocide through his participation in a JCE).

participation is important, both to accurately describe the crime and to fix an appropriate sentence.[103]

79. As to the incoherent findings of responsibility under both *committing* and *planning*, the only counter-argument given by the Prosecution is that references are made to non-binding decisions from Trial Chambers.[104] However, it is a long-established principle before international jurisdictions not to convict under both committing and planning.[105] The fact that it was not challenged by the Prosecution in those cases and therefore not yet endorsed by the Appeals Chamber does not render it less accurate.

80. Gatete therefore maintains his request to the Appeals Chamber to quash all convictions against him, as it is impossible to know which level of involvement was attributed to his alleged conduct. Alternatively, it requests to retain the most favorable mode only, i.e. aiding and abetting.

JCE subsuming other modes of liability

81. As to the legally redundant conviction under JCE and modes of participation to this JCE, the Prosecution again distorts Gatete's arguments. The Appellant has never pleaded for a *single mode of liability approach.*[106] The *Setako* and *Renzaho* Trial Judgements which, according to the Prosecution's contention, would show the reverse of Gatete's allegation, indeed support the Chambers' practice to convict under one/several mode(s) of liability *or alternatively* under participating in a JCE.[107]

82. More importantly, the Prosecution does not challenge the major argument advanced by the Appellant that, in the present case, planning, ordering, instigating, aiding and abetting

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[103] *Kvocka* (AC), para.91.
[104] Response, para.175; Brief, paras.231-232.
[105] See e.g. *Archbold International Criminal Courts: Practice, Procedure and Evidence* (Sweet & Maxwell, 2009), p.853.
[106] Response, paras.173-174; Brief, paras.234-237.
[107] Response, para.174 and fn.449. *Setako* (TC), para.474 and fn.574 (choosing to convict for ordering although the facts would also support a conviction for instigating *or* aiding and abetting *or* participating in a JCE); *Renzaho* (TC), para.766 and fn.857 (choosing to convict for ordering and aiding and abetting although the facts would also support a conviction for participating in a JCE).

were already analysed as Gatete's modes of participation to the JCE and were therefore subsumed. Further findings were indisputably legally redundant.[108]

Responsibility for planning

83. In relation to the Trial Chamber's use of circumstantial evidence to find that the Appellant was responsible for planning the genocide, the Prosecution fails to address any of the authorities cited in the Appellant's Brief.[109] The only legal argument put forward is the bare assertion that *"[f]or planning, all that needs to be proved is the actus reus and the mens rea"* followed by other general principles.[110] The Prosecution does not at all challenge the Tribunal's practice which, as demonstrated in the Brief, is clearly one of caution when planning is inferred from circumstantial evidence.[111] The Prosecution's sole attempt to rely on *Renzaho* is irrelevant, as it only reiterates a general principle in relation to circumstantial evidence and responsibility for ordering.[112]

84. The Appellant does not contest that the attacks were organized. However, he denies that he participated in the planning, and he denies even being present at the time of the crimes. None of the evidence cited in the Response even remotely refers to such planning activities.

85. As to the Rwankuba *secteur* meeting, the Prosecution does not cite to any evidence supporting the inference of planning. Its peremptory assertion that *"such a meeting [...] could not have emerged spontaneously"* and that *"Interahawme were awaiting Gatete's arrival and instructions"* are unsubstantiated and do not refer to any evidence.[113] The Prosecution does not challenge that another reasonable conclusion was possible, especially in the context of the hours immediately following the President's death, and indeed it admitted that its two witnesses spontaneously came to the *secteur* office with the purpose of assessing the situation.[114]

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[108] Brief, paras.235-236.
[109] Response, paras.184-188.
[110] Response, para.184.
[111] Brief, paras.271-275.
[112] Response, fn.473 citing to *Renzaho* (AC), para.318.
[113] Response, para.185 and fn.476.
[114] Response, fn.476.

86. For the Kiziguro parish massacre, the Prosecutor refers to no concrete evidence of any discussion or formulation of a plan to attack the parish.[115] It significantly relies on BBJ's uncorroborated account of a night of singing, dancing, and drinking before the massacre, which was expressly discredited by the Trial Chamber.[116]

87. Also for the Mukarange parish massacre, the Prosecution does not identify any concrete evidence to support an inference of planning.[117] Contrary to its assertion,[118] hearsay evidence of a meeting prior to Mukarange was not accepted by the Trial Chamber as part of its findings.[119] Once again, the fact that the attack must have been planned is irrelevant to the question of whether Gatete was responsible for planning it. That he allegedly came with boxes of guns and grenades may demonstrate intent to provide material support but is clearly insufficient to prove that *he* planned the massacre.

88. The evidence was therefore wholly insufficient to compel an inference of planning as the *only* reasonable conclusion, especially in light of the established approach of caution adopted by this Tribunal. The Prosecution failed to demonstrate otherwise. If Gatete's responsibility for planning were to be affirmed in appeal, it would potentially extend the scope of this mode of liability to all participants who allegedly had a role in a visibly organized attack and not only to those who had a firmly proven substantial role in planning.

Conclusion

89. For the foregoing reasons, Ground 4 should be granted.

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[115] Response, para.186.
[116] Judgment, para.323.
[117] Response, para.187.
[118] Response, fn.481.
[119] Judgement, para.406; see also Brief, para.297.

GROUND 5: SENTENCE

Number of victims as aggravating evidence

90. The Prosecution argues that the Trial Chamber's reference to *"loss of life on a massive scale"* was *"not a numerical estimate of the number of victims"*.[120] The Prosecution's argument simply ignores the discernible error which is clear from the plain meaning of the words in the Judgement. Simply put, *"loss of life"* must refer to the killings of the victims in this case. The phrase *"on a massive scale"* must refer to the large number of victims. Because one of the crimes forming the basis of the sentence was extermination, the Trial Chamber was correct to emphasize the large number of killings when it analysed the gravity of the crimes; but to then also consider them as an aggravating circumstance is discernible error, as set out in the Brief.

91. The Prosecution argues that the number of victims is not an element of genocide, therefore it was not an error to consider the number of victims as an aggravating factor for genocide.[121] However, there was a single sentence given in this case, based on the totality of the conduct found. The Trial Chamber did not keep the legal definitions separate when weighing the evidence, but gave a single sentence for the totality of the evidence, with special emphasis on the *"loss of life on a massive scale"*. Given this emphasis, it was discernible error to also use the number of victims as an aggravating factor.

92. The Prosecution relies on dicta from *Ndindabahizi* which posits the *possibility* that in a given case the number of victims exterminated might be sufficient in scale to justify its consideration as an aggravating factor, even though a large number of victims is required as an element of the offense.[122] It however restricts this possibility to cases where *the extent of the killings exceeds that required for extermination.*[123] The Defence still has trouble understanding in which case the requirement of a large number of victims would be exceeded. In any event, the Trial Chamber failed to specify that point.

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[120] Response, para.102.
[121] Response, para.203.
[122] Response, para.204.
[123] *Ndindabahizi* (AC), para.135.

93. The language cited from *Ndindabahizi* is dicta because it was not applied to the facts in that case, and indeed no Chamber has ever before been confronted with a set of facts which justified the use of such a rule. Yet the Prosecution argues that in this case, where there were 25 to 30 victims in connection with Rwankuba and hundreds and *"possibly thousands"* in connection with Kiziguro and Mukarange, it is time to apply this rule for the first time.

94. There is nothing in this case that should result in Gatete being singled out for special treatment.

95. Even assuming for purposes of argument that the *dicta* properly stated the law, this case remains an inappropriate one to apply such a rule, where the Trial Chamber can only rely on speculation to imagine a sliding scale of killings which may or may not justify the imposition of such an extraordinary exception to the general rule that an element of a crime should not be considered also as an aggravating factor.

Assessment of other aggravating factors

96. The Prosecution concedes that when determining a sentence, each case must be examined on its own facts.[124] The Prosecution is therefore disingenuous when it complains that case law has not been cited to support the Appellant's arguments for a reduced sentence. The facts of this case are unique. The extraordinary undue delay, the failure to provide a fair site visit in a case with total dependence on eyewitnesses, the unsupported inferences of planning and other unsupported findings and sentencing errors all resulted in a miscarriage of justice and invalidated the sentence, requiring at the very least a substantial reduction of the life sentence.

Conclusion

97. For the foregoing reasons, Ground 5 should be granted.

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[124] Response, para.207.

PART IV – RELIEF REQUESTED

98. For the foregoing reasons, the Appellant respectfully requests that the Appeals Chamber:

ALLOW the present appeal;

REVERSE the Trial Judgement dated 31 March 2011;

ORDER the acquittal of the Appellant on the counts of genocide and extermination as a crime against humanity;

ORDER his immediate release.

Or, alternatively,

ORDER a substantial reduction of his sentence.

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Dated: 27 December 2011

Respectfully submitted,

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ANNEXE TO GATETE'S BRIEF IN REPLY
Jurisprudence, definitions and abbreviations

I. JURISPRUDENCE

1.1. International Criminal Tribunal for Rwanda

AKAYESU

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* (AC)")

BIKINDI

The Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-A, Judgement, 18 March 2010 ("*Bikindi* (AC)")

BIZIMUNGU ET AL.

The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérome-Clément Bicamumpaka and Prosper Mugiraneza, Case No. ICTR-99-50-T, Judgement and sentence, 30 September 2011 ("*Bizimungu* (TC)")

KAMUHANDA

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* (AC)")

MPAMBARA

The Prosecutor v. Jean Mpambara, Case No. ICTR-01-65-T, Judgement, 11 September 2006 ("*Mpambara* (TC)")

NDINDABAHIZI

The Prosecutor v. Emmanuel Ndindabahizi, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* (AC)")

NTAWUKULILYAYO

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-A, Judgement, 14 December 2011 ("*Ntawukulilyayo* (AC)")

RENZAHO

The Prosecutor v. Tharcisse Renzaho, Case No. ICTR-97-31-A, Judgement, 1 April 2011 (*Renzaho* (AC)")

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* (AC)")

SETAKO

The Prosecutor v. Ephrem Setako, Case No. ICTR-04-81-T, Judgement and sentence, 25 February 2010 ("*Setako* (TC)")

SIMBA

The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-A, Judgement, 27 November 2007 ("*Simba* (AC)")

ZIGIRANYIRAZO

The Prosecutor v. Protais Zigiranyirazo, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ("*Zigiranyirazo* (AC)")

The Prosecutor v. Protais Zigiranyirazo, Case No. ICTR-01-73-T, Judgement, 18 December 2008 ("*Zigiranyirazo* (TC)")

1.2. International Criminal Tribunal for the Former Yugoslavia

KUPRESKIC ET AL.

The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic and Vladimir Santic, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreskic* (AC)")

KVOCKA ET AL.

The Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic and Dragoljub Prcac, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvocka* (AC)")

1.3. United Nations Human Rights Committee

Fillastre and Bizouarn v. Bolivia, Commission n°336/1988, UN Doc.CCPR/C/43/D336/1988 (1991)

II. DEFINITIONS AND ABBREVIATIONS

Amended Notice of Appeal

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-A, Notice of Appeal, 25 October 2011

Appellant

Jean-Baptiste Gatete

Brief

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-A, Appellant's Brief, 2 November 2011

Defence Closing Brief

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-T, The Closing Brief of Jean-Baptiste Gatete, 25 June 2010

Fn.

Footnote

CS

Closed session

ICTR *or* Tribunal

International Criminal Tribunal for Rwanda

Indictment

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-T, Second Amended Indictment, 7 July 2009

JCE

Joint criminal enterprise

Judgement

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-T, Judgement and Sentence, 31 March 2011

L.

Line

Notice of Appeal

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-A, Notice of Appeal, 3 May 2011

OTP

Office of the Prosecutor

P. (pp.)

Page (pages)

Para. (paras.)

Paragraph (paragraphs)

Practice Direction

Practice Direction on Site Visits, adopted by the President of the International Criminal Tribunal for Rwanda on 3 May 2010

Response

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-A, Prosecution Respondent's Brief, 12 December 2011

Rules/RPE

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, adopted pursuant to Article 14 of the Statute

Statute

Statute of the International Criminal Tribunal for Rwanda, established by Security Council Resolution 955

T.

Transcript

United Nations
Nations Unies

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Case Name:	The Prosecutor vs. **Jean-Baptiste Gatete**		**Case Number:** ICTR-2000-61-A	
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☐ The Language Services Section of the ICTR / Arusha.
☐ The Language Services Section of the ICTR / The Hague.
☐ An accredited service for translation; see details below:

Name of contact person:
Name of service:
Address:
E-mail / Tel. / Fax:

☐ **DEFENCE** is overseeing translation.
The document is submitted to an accredited service for translation (fees will be submitted to DCDMS):

Name of contact person:
Name of service:
Address:
E-mail / Tel. / Fax:

III - TRANSLATION PRIORITISATION (For Official use ONLY)

☐ Top priority	**COMMENTS**	☐ Required date:
☐ Urgent		☐ Hearing date: