PART TWO: THE LAW

I. APPLICABLE LAW TO INDICTMENTS

14. The applicable law to indictments is well established by consistent jurisprudence before the ICTY and ICTR. In this regard, the Appeals Chamber in its judgment regarding *Kvocka et al* on 28 February 2005 held that, in order to comply with the Defendant's right to a fair trial, the Prosecution must plead *all material facts underpinning the charges* in the indictment, and not merely list the charges against the accused. Otherwise, the defendant may not be able to prepare his defence adequately.[1] Hence:

> "[…] *an indictment is defective if it fails to plead required material facts*."[2]

This consistent jurisprudence was recently reaffirmed by the Appeals Chamber in the *Muhimana* Judgement.[3]

Absence of Facts in the Indictment/Contradiction with Facts at Trial

15. In the event of a joint indictment being brought against several accused, Rule 82(A) states that each of them must be accorded the same rights as if they were tried separately. Therefore, when read in conjunction with Rule 47(C), each accused must be presented with the material facts relevant to each allegation being brought against each of them. Pleading each fact *precisely* against each individual accused is essential to the Prosecution's characterization of the alleged criminal conduct in the indictment. Failing this, the indictment should be considered defective and in violation of the rights of the accused to a fair trial:

> *The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.* For example, if the Prosecution alleges that an accused personally committed the criminal acts in question, the indictment should include *details which explain this allegation*, such as the identity of the victim, the time and place of the events, and the means by which the offence was committed.[4] [Footnotes omitted, Emphasis added]
> […]
> 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 places are only generally indicated, and the victims are only generally identified*.

[1] *The Prosecutor v. Miroslav Kvoćka, Mlado Radić, Zoran Zigić and Dragoljub Prcać*, 28 February 2005 (ICTY AC), *at* 27.
[2] *Ibid at* 28.
[3] AC Judgment Case No. ICTR-95-1B-8, paras 213-228, decided May 21, 2007.
[4] *Ibid.*

> Other defects in an indictment may arise at a later stage of the proceedings if the evidence at trial turns out to be different from that expected. *In such circumstances, the Trial Chamber must consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.*[5] [Footnotes omitted, Emphasis added]

16. When joining the indictments to charge the accused under the theory of joint criminal enterprise, the Prosecution is tied by the same responsibility to plead in *each* of the indictments:

    i. The purpose of the enterprise,
    ii. The identity of the participants, and
    iii. The nature of the Accused's participation in the enterprise.[6]

Finally, the indictment should clearly specify which form of joint criminal enterprise is being alleged.

The *Cyangugu* Trial Chamber's holding in this matter was confirmed by the Appeals Chamber, which then refused to consider the arguments of the Prosecutor to reach a conviction under a theory of joint criminal enterprise that had not been pleaded unequivocally and with precision in the indictment:

> [s]i le Procureur entend s'appuyer sur la théorie de l'entreprise criminelle commune pour retenir la responsabilité pénale de l'accusé comme auteur matériel des crimes principaux plutôt que comme complice, *il doit le dire sans équivoque dans l'acte d'accusation* et *préciser la forme d'entreprise criminelle commune* qu'il invoquera. Loin de se contenter d'alléguer que l'accusé a participé à une entreprise criminelle commune, il doit indiquer *l'objet* de cette entreprise, *l'identité* des autres parties et la *nature de la participation* de l'accusé. *En conséquence, la Chambre ne retiendra pas les arguments du Procureur, qui n'ont été avancés pour la première fois que lors de la présentation de ses réquisitions, pour conclure à la responsabilité pénale des accusés sur le fondement de cette théorie.*[7] [Footnotes omitted, Emphasis added]

17. The *Cyangugu* Appeals Chamber was very clear on this matter by rejecting the Prosecutor's attempt to read the indictments as a joint document against all Accused in support of the alleged criminal acts committed under the theory of joint criminal enterprise:

> L'argument du Procureur selon lequel les Actes d'accusation « sont devenus, en droit, un seul acte d'accusation » est rejeté. *Il appartenait au Procureur de déposer un nouvel acte d'accusation joint et unique contre les trois Accusés*.[8] [Emphasis added]

18. It submitted that, in the present case, by failing to plead all material facts in support of the alleged criminal acts and modes of liability, imputed to Major Ntabakuze, the Prosecution produced a defective Indictment and the Chamber cannot reach a conviction on those

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[5] *Ibid at* 31.
[6] *Ibid at* 28.
[7] *The Prosecutor v.André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, (*Cyangugu* Appeals Judgment), 7 July 2006 (ICTR), *at* 33.
[8] *See supra* note 6 (*Cyangugu* AC Judgment, ICTR), *at* 6..

charges. Furthermore, by reading the three separate Indictments as a single document under the pretence that the defendants are joined in the same trial, the Prosecution has violated Rule 82(A) and contradicted established jurisprudence.

19. Concerning other modes of liability, the Appeals Chamber was just as specific with regards to the Prosecutor's responsibility to *plead all facts essential* to each mode of responsibility which is alleged.

> *If an indictment merely quotes the provisions of Article 7(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 7(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.[9] [Footnotes omitted, Emphasis added]

20. More recently, with regards to the alleged responsibility under Article 6(3), the *Cyangugu* Appeals Chamber reiterated on July 07, 2006 the points made in *Kvocka et al., supra,* and added further useful elements:

> Lorsque la responsabilité du supérieur hiérarchique prévue à l'article 6(3) du Statut est invoquée, les *faits essentiels qui doivent être énoncés dans l'acte d'accusation* sont les suivants : 1) le fait que l'accusé était le *supérieur hiérarchique* de certaines personnes suffisamment identifiées sur lesquelles il exerçait un *contrôle effectif* - en ce sens qu'il avait la capacité matérielle d'empêcher ou de punir leur conduite criminelle - et *dont les actes engageraient sa responsabilité* ; 2) les *actes criminels* commis par les personnes dont il aurait eu la responsabilité ; 3) le comportement de l'accusé qui permet de conclure qu'il *savait ou avait des raisons de savoir* que ses subordonnés s'apprêtaient à commettre les crimes considérés ou les avaient commis ; et 4) le comportement de l'accusé qui permet de conclure qu'il n'a *pas pris les mesures nécessaires et raisonnables pour empêcher* que de tels actes ne soient commis ou en *punir* les auteurs. [10] [Emphasis added; Footnotes omitted]

21. An indictment is the only accusatory instrument before the Chamber, and while new allegations cannot be brought other than via the indictment, the latter can *sometimes* be "cured", provided it be done with clear and timely notice of the allegations to the accused, "*such that the Defence has a fair opportunity to conduct investigations and to prepare its response notwithstanding the defective indictment*."[11] This has been reiterated by the *Cyangugu* Appeals Chamber in July 2006:

> Il est en effet de jurisprudence constante qu'un acte d'accusation vicié en raison de son ambiguïté ou de son imprécision peut, dans certaines circonstances, être purgé si le Procureur fournit *en temps voulu* à l'accusé des *informations claires et cohérentes* concernant les faits sur lesquels reposent les accusations portées contre lui.[12]

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[9] *See supra* note 1 (*Kvoćka* AC Judgment, ICTY), *at* 29.
[10] *See supra* note 6 (*Cyangugu* AC Judgment, ICTR), *at* 26.
[11] *See supra* note 1 (*Kvoćka* AC Judgment, ICTY), *at* 32.
[12] *See supra* note 6 (*Cyangugu* AC Judgment, ICTR), *at* 126.

Failing this, the defence of the Accused may be seriously impaired:

> Lorsqu'on se demande si le Procureur a purgé l'acte d'accusation d'un vice et si l'accusé subit encore le moindre préjudice, c'est, dans les deux cas, pour déterminer si procès a été rendu inéquitable. A cet égard, la Chambre d'appel réaffirme qu'un acte d'accusation vague ou ambigu *qui n'est pas purgé de ses vices par la communication en temps voulu d'informations claires et cohérentes porte en soi préjudice à l'accusé*. Le vice dont il est entaché ne peut être jugé anodin que s'il est établi que celui-ci n'a pas sensiblement compromis la capacité de l'accusé de préparer sa défense.[13] [Footnotes omitted]

And even then, the burden of reversing this finding of lack of clear and coherent notice rests on the Prosecution:

> When an accused raises the issue of lack of notice before the Trial Chamber, the *burden rests on the Prosecution* to demonstrate that the accused's ability to prepare a defence was not materially impaired.[14] [Footnotes omitted, Emphasis added]

In this regard, it is important to emphasize that the prejudice arises not from an inability to prepare to cross-examine at witness, or to respond to the particular evidence, that is outside of the indictment alone, the larger prejudice arises from not having formal Notice from the Prosecution of the offenses it considers has been proved by its evidence, which is the function of the Indictment…notice as to charges to be met, not merely evidence to be challenged. New evidence at trial, without a formal indictment, amended to conform *with* that evidence, can never "cure" an incomplete indictment informally, if the Defence is *ever* to understand the case which it must meet.

22. The Chamber also held that even when successfully remedied, it is *the duty of the Appeals Chamber to consider if the magnitude of the identified deficiencies would not have rendered the trial unfair in itself*:

> La Chambre d'appel doit se montrer préoccupée par la démarche du Procureur dans la présente affaire. Elle ne saurait trop rappeler que l'acte d'accusation, seul instrument de mise en accusation, doit exposer la thèse du Procureur de manière circonstanciée. Si, dans certains cas, un acte d'accusation vicié peut être réputé « purgé », la Chambre d'appel réitère *qu'il ne peut exister qu'un nombre limité d'affaires qui entrent dans cette catégorie*. Dans le cas d'espèce, la Chambre d'appel est troublée par l'ampleur avec laquelle le Procureur cherche à recourir à cette exception. Même si les arguments du Procureur selon lesquels les Actes d'accusation avaient été purgés de leurs vices s'étaient révélés prospères dans chacun des cas, il aurait malgré tout été du *devoir de la Chambre d'appel de considérer si l'ampleur des vices identifiés n'aurait pas rendu le procès inéquitable en soi*.[15] [Emphasis added; Footnotes omitted]

In this case the unfairness arises from the Defence never having received a formal statement from the Prosecution in the form of an Indictment that specifically describes the offenses that the Prosecution intends to prove with its evidence. Without such notice of the charges (not

[13] *See supra* note 6 (*Cyangugu* AC Judgment, ICTR), *at* 30
[14] *See supra* note 1 (*Kvočka* AC Judgment, ICTY), *at* 35
[15] *See supra* note 6 (*Cyangugu* AC Judgment, ICTR), *at* 114

just the facts), the Indictment is flawed and cannot be cured by means other than formal indictment.

23. Finally, it should be noted that the highly conditional language of the Kvocka Appeals Chamber, that it "does not exclude the possibility that in some instances, the prejudicial effect of a defective indictment can be 'remedied'",[16] is a very clear indication of the thoroughly exceptional nature of remedying a defective indictment. It has been the consistent position of the Ntabakuze Defence throughout this trial that the Ntabakuze/Kabiligi Indictment is fatally flawed due to extreme vagueness, which vagueness was objected to even before the trial began with no remedial amendments ever having been sought by the Prosecution. In the instant case, although the Prosecution never sought to amend the Indictment against Major Ntabakuze, this Chamber has deemed vast deficiencies in the Indictment to have been "cured" by the simple expedient of introduction of the evidence into the trial record, without any requirement that the Prosecution notify the Defence what the Prosecution considers the specific offense, arising from that evidence, to be. It is submitted that this wholesale "curing," which is actually an informal *sub-silentio* re-writing of the intitial indictment, cannot be consistent with Rules that require a formal amendment of the Indictment, and jurisprudence that limits new evidence to filling in details of specific allegations in the Indictment. (See AC Judgement against Muhimana on 21 May 2007, para. 224).

Vague "catch-all" charges in the Indictment

24. With regards to non-amended parts of the indictment, or "catch-all charges", such as paragraph 6.36 of the Indictment, the Appeals Chamber upheld the same standard of '*clear and coherent information*' than for amendments brought to the Indictment. Indeed, while the *Cyangugu* Appeals Chamber upheld the Trial Chamber's decision that the Accused was simply insufficiently informed by the Indictment on specific allegations charged under Article 6(3), but had knowledge of these allegations brought against him[17], it however later concluded that he was not informed *in a clear and coherent manner* of his alleged responsibility under Article 6(3) and could thus not be expected to respond to these allegations. Therefore the trial was considered unfair and the Trial Chamber erred in finding a conviction under Article 6(3) for this specific allegation:

[16] *See supra* note 1 (*Kvoćka* AC Judgment, ICTY), *at* 34
[17] *See supra* note 6 (*Cyangugu* AC Judgment, ICTR), *at* 129

> La Chambre d'appel considère que la capacité d'Imanishimwe à préparer sa défense s'agissant des allégations relatives à Gashirabwoba a été sensiblement compromise. Outre le fait qu'Imanishimwe n'ait pas été informé en temps voulu de façon *claire et cohérente* des faits essentiels sur lesquels le Procureur entendait se fonder pour les accusations portées au titre de l'article 6(3) du Statut, la Chambre d'appel conclut qu'Imanishimwe était en droit de comprendre des écritures postérieures à l'acte d'accusation que, pour Gashirabwoba, le Procureur avait décidé de ne pas soutenir ses poursuites sous l'article 6(3) du Statut. De l'avis de la Chambre d'appel, Imanishimwe n'était pas informé du fait qu'il aurait à répondre de la mise en cause de sa responsabilité de supérieur hiérarchique pour le massacre de Gashirabwoba. Le procès a dès lors été rendu *inéquitable*. *En conséquence, la Chambre d'appel conclut que la Chambre de première instance ne pouvait prononcer de déclaration de culpabilité sur la base de l'article 6(3) du Statut pour les faits commis* au terrain de football de Gashirabwoba.[18] [Emphasis added; Footnotes omitted]

25. Therefore, the Appeals Chamber confirmed the ICTY jurisprudence in *Kvocka et al.*, according to which the Trial Chamber can *only* convict the accused for crimes *clearly and coherently charged* in the indictment:

> *Where the failure to give sufficient notice of the legal and factual reasons for the charges against him has violated the right to a fair trial, no conviction may result.*[19] [Footnotes omitted, Emphasis added]

26. In the present Indictment, the Prosecution seems to charge the Accused under Article 6(3) for violations of Common Article 3 of the Geneva Conventions and Additional Protocol II for allegations contained in paragraph 6.36. The allegation is described in very broad terms and does not specifically refer to the Accused or to his alleged mode of participation. According to the *Cyangugu* Appeals Chamber's holding *supra*, the Prosecution failed to inform the Accused clearly and coherently as to his alleged superior responsibility in these incidents. Therefore, the Defence submits that the capacity of the Accused to defend himself on these allegations is significantly impaired and that no conviction should be reached on that charge.

27. Furthermore, while the Trial Chamber held on June 29, 2006 held that evidence brought in support of allegation 6.36 of the indictment should not be excluded since, *on the basis of the Pre-Trial Brief and the DBQ Decision, that the Accused had timely, clear and consistent notice of these events and that he was in a position to reasonably understand that these material facts were relevant to paragraph 6.36 of the Indictment*,[20] the Chamber failed to take into account the Appeals Chamber's conclusion in *Naletilic*, according to which *clear and coherent notice is not nearly sufficient for 'catch-all charges'* and that the Prosecution:

> […] was obliged to allege in the Indictment the *specific acts or course of conduct* of Naletilic *himself* that formed the basis for his liability. In this respect, the Indictment was *inadequate*. The Trial Chamber's findings reveal that one incident in particular was critical to the establishment of Naletilic's command responsibility, namely, his observation of the beating of

[18] *See supra* note 6 (*Cyangugu* AC Judgment, ICTR), *at* 164
[19] *See supra* note 1 (*Kvočka* AC Judgment, ICTY), *at* 33
[20] *The Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, 29 June 2006 (ICTR TC I), Decision on Ntabakuze Motion or Exclusion of Evidence, *at* 35

> Witness Y during his transportation to Ljubuski prison.
> […]
> Naletilic's knowledge of the mistreatment of Witness Y constituted a *material fact which should have been pleaded in the Indictment*. In its *absence*, the Appeals Chamber finds that the Trial Chamber *erred in failing to find that the Indictment was defective* with respect to Naletilic's responsibility for events alleged to have occurred in Ljubuski prison under Counts 11 and 12.[21] [Emhasis added ; Footnotes omitted]

28. In the present Indictment, the Prosecution merely describes in paragraph 6.36 the implication of elements of the Rwandan Army, the Gendarmerie and *Interahamwe* in massacres of civilian Tutsis, failing to include the Para Commando Battalion. In spite of this, the Prosecutor brought allegations against the Accused, implicating him as superior, allegations which therefore *fall outside of the indictment* and cannot serve as the basis for a conviction on this charge.

29. This conclusion follows the prior jurisprudence on '*umbrella*' *crimes*, such as the *Stakic* Trial Chamber Judgment of 31 July 2003, where the Chamber found that *so called* '*umbrella*' *crimes do not preclude the necessity that an indictment must specifically plead the material aspects of the case in relation to such crimes with the same specificity as other crimes*:

> In relation to the specificity of the charges, the Trial Chamber recalls the Kupreskic et al. Appeals Judgement which states that the Prosecution must charge particular acts as persecutions – as already discussed above. The Appeals Chamber reasoned that "the fact that the offence of persecutions is a *so-called 'umbrella' crime* does *not mean that an indictment need not specifically plead the material aspects* of the Prosecution case with the same detail as other crimes. The crime of persecutions cannot, because of its nebulous character, be used as a catch-all charge" and the Trial Chamber rejects any attempt by the Prosecution to do so by using the open- ended term "including".
> For this reason, the Trial Chamber will not consider any other denial of fundamental rights not expressly mentioned by the Prosecution in the Indictment. *The Accused is not sufficiently informed of, and therefore unable to defend himself against, any charges other than those explicitly stated in the Indictment*.[22] [Emphasis added; Footnotes omitted]

30. As the present trial has progressed, it has become increasingly clear that the overwhelmingly vast majority of the evidence presented by the Prosecution concerns matters not mentioned anywhere in the indictment (except perhaps in the most general, vague and unclear terms). Consequently, the Ntabakuze Defence has filed a plethora of pleadings at various times during the trial seeking exclusion of evidence falling outside the scope of the indictment.

31. For example, in its 21 October 2004 Motion for acquittal, the Defence requested among others the exclusion of large numbers of allegations falling outside the scope of the

[21] *The Prosecutor v. Mladen Naletilic and Vinko Martinovic* (*Tuta and Stela* AC Judgment), 3 May 2006 (ICTY), *at* 91
[22] *The Prosecutor v. Milomir Stakic*, 31 July 2003 (ICTY TC II), *at* 771 and 772

indictment and paragraphs in the indictment not proven by the Prosecution. In its decision, the Trial Chamber held that 98 *bis* motion was not intended to resolve these particular issues.

32. On 28 March 2006, the Ntabakuze Defence filed a comprehensive Motion for Exclusion of Evidence Outside the Scope of the indictment, followed a few days later, by a supplement to that Motion seeking exclusion of further material outside the scope of the indictment. On 29 June 2006, the Trial Chamber granted, in part, the Ntabakuze Defence motion for exclusion of evidence falling outside the scope of the indictment.

33. On 18 September 2006, the Appeals Chamber granted, in part, the Ntabakuze Defence appeal of the Decision of the Trial Chamber of 29 June 2006 on questions of law related to the exclusion of evidence. On 5 October 2006, after being invited to do so by the Chamber, the Ntabakuze Defence filed, submissions regarding the application of the Appeals Chamber's 18 September 2006 Decision on questions of law related to the exclusion of evidence, in the Reconsideration of the original Motions which the Appeals Chamber instructed the trial Chamber to undertake. Less than a week before the due date of this Brief, the Chamber has decided the reconsideration issue, in its 17 April 2007 Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision, and agrees with its own earlier conclusions. The Ntabakuze Defence respectfully disagrees with both the reasoning and the result in this Decision, however this Brief is not the proper forum to elaborate upon that disagreement.

34. *Some* such evidence not mentioned in the Indictment *has* been excluded, while *other* such evidence remains part of the trial record. It is submitted that, notwithstanding its *admission*, evidence concerning allegations of criminal conduct of the accused which appears nowhere in the Indictment *cannot* ground a conviction for the accused, since he has *not been charged* with such conduct. As stated *supra* "a Trial Chamber can *only* convict the accused of crimes *which are charged in the indictment*."

35. It is suggested that the Chamber, having admitted such evidence, must necessarily have done so in order to use it for some purpose *other than* as material facts underpinning a conviction (such as, for example, "background", "context" or "corroboration") and it is submitted that, except perhaps in the most exceptional of circumstances (which, it is submitted, do *not* exist

in this trial), it would be *a grave error of law* were the Chamber to convict any Accused of crimes for which he has not been charged in the Indictment.

36. While the Ntabakuze Defence has made every effort to meet every factual allegation against the Major Ntabakuze, it has never been put on notice as to the offenses which the Prosecutor considers to be those for which Major Ntabakuze must answer, or the mode of participation the Prosecution asserts to be its case. The Chamber will note that there are many, many different and contradictory factual allegations from Prosecution witnesses, the Ntabakuze Defence has only received some indication of the case the Prosecution intends to prove in the Prosecution Brief, following the completion of the Defence case. It also continues to be our position that the vast majority of allegations against this particular accused fall outside the parameters of the Indictment, such that, in the absence of any attempt to amend and clarify the Indictment by the Prosecutor, the accused could not at any time know definitively what the charges are to which the alleged acts and conduct constitute material facts. Furthermore, it is submitted that the very volume of such evidence outside the indictment (being *most* of the evidence) has rendered the trial fundamentally unfair. We continue to maintain this position and will so argue, wherever appropriate, in these present submissions.

II. OTHER LEGAL ISSUES

A. THE STANDARD OF PROOF: EXPOSITION ON REASONABLE DOUBT

37. The 'golden thread' of criminal justice is contained in Article 20(3) of the Statute:

> The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

38. As recently as 1997, the Supreme Court of Canada expounded upon the relationship between the concepts of the "presumption of innocence" and "reasonable doubt":

> [T]he standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.[23]

39. That Court further elaborated on the definition of what constitutes "reasonable doubt":

> [A] reasonable doubt should not be described as an "ordinary" concept. Jurors should not be invited to apply to the determination of guilt in a criminal trial the same standard of proof that they would apply to the decisions they are required to make in their everyday lives, or even to the most important of these decisions. In this aspect, I agree with the comments of Scott C.J.M. set out in the judgment below (at pp. 234-35):
> Reasonable doubt, no matter how elusive the concept, cannot be equated to an ordinary everyday phrase. It is not, as we have seen, a "perfectly ordinary concept" -- far from it. The reason for this is that the word "reasonable" can, depending on the circumstances, have two very different meanings. The first is the meaning thoroughly canvassed by Wood J.A. in *Brydon*. The other more common use is that in ordinary parlance: we hold "reasonable" views, we have "reasonable" opinions, and we make "reasonable" prognostications. <u>This is the standard by which we make our everyday decisions and by which we habitually govern ourselves. It is a standard of probability and, often within that, at the low end of the scale. It is very different from the criminal standard of proof which requires a much higher degree of certitude to arrive at a conclusion of guilt</u>.[24] [Emphasis in the original]

40. That Court, as well, provided a model jury charge on the definition of "reasonable doubt":

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

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[23] *R. v. Lifchus, [1997] 3 S.C.R. 320* at paragraph 27.
[24] *Ibidem* at paragraph 23.

> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.[25] [Emphasis added]

41. With regards to the applicability of this standard of proof, the *Winship* doctrine, established by the U.S. Supreme Court in 1970, holds that the burden of proof is only discharged when *every fact necessary to constitute the crime* has been proven beyond reasonable doubt:

> **"**Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon *proof beyond a reasonable doubt of every fact* necessary to constitute the crime with which he is charged."[26] [Emphasis added]

This holding was confirmed by the same court in 1977, borrowing the expression "*ingredients* of an offence", which, like "*Winship*'s *facts*", refer to the *elements* of a crime.[27]

42. This is also what the ICTY Trial Chamber II referred to in its 1998 *Delalić et al.* judgment by not only reminding that the burden of proving the case beyond reasonable doubt rested on the Prosecution, but also that this standard applied to each *fact essential to the Prosecution's claim* consistent with the approach of the United States Supreme Court in *In re: Winship*:

> It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden of proving *all facts essential to their claims* normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings.[28] [Emphasis added]

43. In 2003, the same Trial Chamber in *Orić* clearly stated the scope of that burden and stressed that it applied to each element of each crime charged:

> Article 21(3) of the Statute bestows a presumption of innocence on the Accused. The burden of establishing the guilt of the Accused lies firmly on the Prosecution. Rule 87(A) of the Rules provides that, in so doing, *the Prosecution must prove beyond reasonable doubt each element of a crime* with which the Accused is charged.[29] [Emphasis added]

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[25] *Ibidem* at paragraph 39.
[26] *See In re Winship*, 397 U.S. 358, 364 (1970)
[27] *See Patterson v. New York*, 432 U.S. 197 (1977)
[28] *Čelebići* TC II Judgment, 16 November 1998 (ICTY), at. 599
[29] *The Prosecutor v. Naser Orić*, 30 June 2006 (ICTY), *at* 15.

The Trial Chamber elaborated this in its oral summary of the Judgment by stating:

> Regarding the crime of murder, the Prosecution was required to *prove the following elements beyond reasonable doubt*: First, that the person alleged to have been killed in the indictment is indeed *dead*; second, that the death was caused by an *act or an omission*, notwithstanding an obligation to act, of the accused, or by a person for whose acts or omissions the accused bears criminal responsibility; and third, the act or omission was committed with an *intent* to kill or inflict grievous bodily harm or serious injury in the knowledge and with the acceptance that such act or omission was more likely than not to cause death. [Emphasis added]

44. In 2005, the Chamber in *Limaj et al.* reiterated that *each and every element* of each count must be proven *beyond reasonable doubt* as well as *the form of liability* charged:[30]

> Accordingly, the Chamber has determined *in respect of each of the counts charged* against each of the Accused, whether it is satisfied *beyond reasonable doubt*, on the basis of the whole of the evidence, that *every element of that crime* and *the forms of liability charged* in the Indictment have been established. In so doing, in respect of some issues, it has been necessary for the Chamber to draw one or more inferences from facts established by the evidence. Where, in such cases, more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that count.[31] [Emphasis added]

45. In light of the above, it is established that the Prosecution must prove, with competent evidence, *each "element of the crime and the forms the liability charged in the Indictment" beyond a reasonable doubt*. Furthermore, in the determination of what falls within the realm of these elements, it is important to note that each of the allegations brought against the Accused by the Prosecution, and which must all be pleaded in the Indictment, are not merely facts, which can be bundled together from which to draw inferences. Rather each and every allegation presented amounts to a separate element of each crime, the elements of which have to be proven beyond a reasonable doubt. Therefore, it is submitted that *each* of these allegations has to be proven *separately* beyond a reasonable doubt, and for any one of these allegations to be so proven, *each* essential element of the allegation must be *separately* proven *beyond a reasonable doubt*.

46. The mental state of the Accused is also an element of each crime, and has to be proven beyond a reasonable doubt. Indeed, drawing from the analogy of the common law definition of first-degree murder, any conviction on such a charge is reached if, and only if, the *intent* to kill is also proven. This is particularly the case with a specific intent crime, such as

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[30] *The Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, 30 November 2005 (ICTY), *at* 10. *See also The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe* (The "*Cyangugu*" case), 7 July 2006 (ICTR Appeals), *at* 174§2 and 175.

[3131] *Čelebići* Appeals Judgment, 20 February 2001 (ICTY), *at* 458.

"genocide," which the Appeal Chamber has made clear must be specifically pleaded and proved with respect to both subordinates and superiors.[32]

47. This principle was recently reaffirmed in the 2006 U.S. Supreme Court decision, *Clark v. Arizona*:

> The presumption of innocence is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged, *including the mental element or mens rea*. The modern tendency is to describe the *mens rea* required to prove particular offenses in specific terms, […]. As applied to *mens rea* (and every other element), the force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is *proof beyond a reasonable doubt that a defendant's state of mind* was in fact what the charge states. [33] [Emphasis added; Reference omitted]

48. In the context of a charge under command responsibility (Article 6(3)), the ICTR Appeals Chamber confirmed the Trial Chamber's holding in *Bagilishema*, according to which the mental state of the superior must also be proven beyond reasonable doubt:[34]

> In paragraph 896 of the Judgment, the Trial Chamber set forth the standard for establishing the Accused's *mens rea* under Article 6(3) of the Statute:
> [...] the knowledge element of superior responsibility will be fulfilled if the Accused actually knew of one or more crimes committed or about to be committed in connection with a roadblock, or alternatively was put on notice and failed to inquire further.
> The Trial Chamber further considered "'knowledge' [as] an indispensable element of [...] the liability of a superior [...]", by holding that "*the mental element of knowledge [must be] demonstrated beyond reasonable doubt*." [Emphasis added; Reference omitted]

It is therefore submitted that for each allegation presented by the Prosecution, either under Article 6(1) or 6(3), *each* constitutive element must be proven *beyond reasonable doubt*, and that for each of these allegations, the mental state of the Accused also has to reach the same standard of proof.

49. Now, with regards to the crime of genocide, the gravity of this crime requires proof of a heightened degree of intent (*dolus specialis*), the intent to destroy a specific group. Whereas there is no requirement to prove that the offence was committed as part of a plan or policy[35], it is established that the specific *mens rea* requirement *cannot be presumed* but must be *proven beyond reasonable doubt* by the Prosecution.[36] Without a proof beyond reasonable doubt of the specific mental state (*dolus specialis*) of the Accused, it is submitted that the

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[32] See, Appeals Chamber Judgement in *Blagojevich and Jokich*, para. 123 May 9, 2007.
[33] *See Clark v. Arizona* 126 S.Ct. 2709 (2006). *See also Sandstrom v. Montana* 442 U.S. 510 (1979), *and Supra* note 7 (oral summary of the Judgment)
[34] *The Prosecutor v. Ignace Bagilishema*, Appeals Chamber, 3 July 2002 (ICTR), *at* 29
[35] *Jelisic* Appeals Judgment, Appeals Chamber, 5 July 2005 (ICTY), *at* 48 "the existence of a plan or policy is not a legal ingredient of the crime [of genocide]."
[36] *See Sandstrom v. Montana*, 442 U.S. 510 (1979)

necessary threshold to reach a conviction of genocide will not be met, and that the charge, provided the *dolus generalis* is proven, will only reach a conviction of murder, under violations of Common Article 3 of the Geneva Conventions and Additional Protocol II (Article 4 ICTR St.).

50. This was confirmed by the ICTR Trial Chamber I in *Ntakirutimana* (2003), which held that the Prosecution must also prove beyond a reasonable doubt that the Accused had the intent to destroy members of a particular group, *"as such"*:

> The elements of genocide within the meaning of Article 2 of the Statute are well established. [Reference omitted] In order for a conviction on this count to be entered, the Chamber must find that the following two elements have been proved beyond a reasonable doubt:
> (i) That Elizaphan Ntakirutimana or Gérard Ntakirutimana killed or caused serious bodily or mental harm to members of an ethnic or racial group; [Reference omitted] and
> (ii) That the killing or causing of serious bodily or mental harm was committed with *intent* to destroy, in whole or in part, that *ethnic or racial group*, *as such*. [Emphasis added]
> **(…)**
> The elements of "aiding and abetting" within the meaning of Article 6(1) are well established. [Reference omitted] In order for the Chamber to enter a conviction on this count, it must find that the following three elements have been proved beyond a reasonable doubt:
> (i) That Elizaphan Ntakirutimana provided to persons practical assistance ("aiding"), or facilitated the commission of the crime by being sympathetic thereto ("abetting"); [Reference omitted]
> (ii) That the act of aiding or abetting contributed substantially to the commission of the crime of genocide; and
> (iii) That the Accused provided such assistance or encouragement with the *intent* to commit genocide, that is, the intent to destroy, in whole or in part, an *ethnic or racial group*, *as such*.[37] [Emphasis added]

It is therefore submitted that for liability to attach with regards to the crime of genocide, the nexus between the *intent* to commit the offence and *members of the particular group* targeted must be proven beyond reasonable doubt. It is only once each element sustains conviction that they can be put together to sustain the whole crime.

51. Consequently, the prosecution *always* bears the burden of establishing the guilt of the accused, according to the above-mentioned standards. In terms of Rule 87(A) of the Rules of Procedure and Evidence, that burden is only discharged with proof beyond all reasonable doubt of each and every one of the elements of each offense charged, including the mental element. It is submitted that in the case of Aloys Ntabakuze the prosecution have plainly failed to discharge that burden.

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[37] *The Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Trial Chamber I, February 2003 (ICTR), *at* 784, 787

52. In determining whether the prosecution has discharged its burden, it is submitted that the Chamber should carefully consider whether there is any reasonable interpretation of the evidence admitted other than the guilt of the Accused.[38] Any ambiguity or doubt should be resolved in favour of the accused in accordance with the principle of *in dubio pro reo*[39] in conformity with the holding in the *Čelebići* case:

> At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.[40]

B. THE PERSUASIVE VALUE OF CIRCUMSTANTIAL EVIDENCE

53. Circumstantial evidence is not considered to be of less probative value than direct evidence.[41] Therefore, in evaluating circumstantial evidence as a means of proof beyond a reasonable doubt of any act, omission, transaction, crime, charge or essential element of any count, it is submitted that the Chamber must exercise caution to avoid using a 'balance of probability' reasoning at any stage of the evaluation.

54. In the event of proof being made by circumstantial evidence, in order to convict, the Chamber must unequivocally find that the Prosecution's theory of interpretation of that evidence *must* be the *only* conclusion that *can* reasonably be arrived at. The *Cyangugu* Appeas Chamber in 2006 recalled that the jurisprudence on the issue has been consistent[42] and that the Court must show that it is convinced beyond a reasonable doubt of the conclusion inferred from circumstantial evidence:

> "[…]un accusé ne peut être déclaré coupable sur la base d'éléments de preuve circonstancielle *que si sa culpabilité est la seule déduction raisonnable qui s'impose* au vu de l'élément de preuve produit. Qu'elle décide de déduire l'existence d'un fait particulier emportant la culpabilité de l'accusé sur la base d'éléments de preuve directe ou circonstancielle, la Chambre de première instance *doit démontrer que cette déduction s'impose à elle au-delà de tout doute raisonnable*. Si une autre déduction autorisant à penser que le fait visé a pu ne pas exister pouvait être raisonnablement tirée des éléments de preuve, la culpabilité de l'accusé au-delà de tout doute raisonnable ne peut être prononcée."[43]

If *any* other interpretation of the evidence is reasonably *possible* then raising that other interpretation (especially if supported by some Defence evidence, will mean that a

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[38] *Prosecutor v Halilovic*, Judgement, 16 November 2005 (ICTY), at 9

[39] Idem; see further *Prosecutor v Dusko Tadic*, Case No IT-94-1-A, Decision on the Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998, par 73: 'Any doubt should be resolved in favour of the Appellant in accordance with the principle in *dubio pro reo*';

[40] *Prosecutor v Delalic et al* ("*Celebici*" case), Judgment, par 601

[41] *See The Prosecutor v. Naser Oric*, 30 June 2006 (ICTY), *at* 21.

[42] *See Celibici*, February 2001 (ICTY App), *at* 458; *See also Vasiljevic*, *at* 120; *Krstic*, *at* 41; and *Kvo~ka et al.*, *at* 237

[43] *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe* (The "*Cyangugu*" case), 7 July 2006 (ICTR Appeals), *at* 306.

reasonable doubt *has* been raised by the Defence. This is clearly so *even* if a Trial Chamber were to consider the Defence theory or explanation to be less *probable* than the Prosecution's theory. In such a circumstance, the Accused, benefiting from the presumption of innocence, *must* be acquitted, -- otherwise any resultant conviction based upon the Chamber's finding of one theory to be more probable than another, even much more *probable*, would have been based upon the standard of 'a balance of probabilities', and *not* on that of 'proof beyond all reasonable doubt'.

C. BURDEN AND STANDARD OF PROOF IN RELATION TO ALIBI

55. Although Major Ntabakuze did not present any comprehensive alibi defence in this case, in certain instances some evidence presented by the defence about the specific movements of Major Ntabakuze may tend to counter allegations regarding his conduct made by some prosecution witnesses since the Major Ntabakuze was not at the specified location at the time specified, being elsewhere at that time. It is submitted that the same standards should apply with regard to assessing these alibi elements as would apply in assessing an alibi *per se*.

56. It is well settled that, in the face of the introduction of alibi, the burden of proof remains on the prosecution. The standard remains that of disproving the alibi beyond a reasonable doubt. If an alibi is reasonably possibly true it should be accepted. While the defence must raise the issue of alibi, it is no more than a statement that he was somewhere else at the time of the alleged crime. Accordingly there is no shift in the burden of proof or alteration in the standard of proof, which applies generally.

57. Accordingly it was held in *Kayishema and Ruzindana*[44] that:

> …the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects notwithstanding that the Defence raised alibi.

58. The Appeals Chamber in *Kayishema and Ruzindana*[45] confirms what was stated in the *Čelebići* case where the Appeals Chamber more precisely explains that:

> 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 that issue, the defendant

[44] *Prosecutor v Kayishema and Ruzindana*, Judgment, par 234
[45] *Ibidem* at par 103

> does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.[46]

59. It is equally clear that while the burden remains on the prosecution the standard of proof remains the same: beyond all reasonable doubt. Thus, in the case of *Musema*, confirmed in the case of *Niyitegeka*,[47] the Appeals Chamber held that:

> 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.[48]

60. In *Niyitigeka* it was affirmed that, 'It is settled jurisprudence before the two, ad hoc Tribunals that in putting forward an alibi, a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution's case.'[49] It again affirmed the Trial Chamber's formulation that 'the alibi would succeed if it is reasonably possibly true.'[50]

D. **DIRECT RESPONSIBILITY**

61. Under article 6(1) of the Statute, responsibility for having ordered the commission of a crime attaches if both material and mental elements are proven beyond a reasonable doubt. The Appeals Chamber in *Cyangugu* relied on the *Blaskic* Appeals' definition of the required mental element:[51]

> The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness [*conscience*] of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[52] [Emphasis added; Footnote omitted]

62. Based on this analysis, the Appeals Chamber in *Cyangugu* considered that, in light of the evidence presented, it was not established that the Accused had *'in a way or another, explicitly or implicitly, given instruction to his subordinates to attack the Tutsis*.[53] Therefore

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[46] *Prosecutor v Delalic et al*, Appeals Chamber judgment, par 581
[47] *Prosecutor v Niyitigeka*, Appeals Chamber judgment of 9 July 2004, par 61
[48] *Prosecutor v Musema*, Appeals Chamber judgment, par 202
[49] *Prosecutor v Niyitigeka*, Appeals Chamber judgment of 9 July 2004, at par 60
[50] *Prosecutor v Niyitigeka*, Appeals Chamber judgment of 9 July 2004, at par 61
[51] *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe* (The "*Cyangugu*" case), 7 July 2006 (ICTR Appeals), *at* 365
[52] Arrêt *Blaskic*, par. 42.
[53] *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe* (The "*Cyangugu*" case), 7 July 2006 (ICTR Appeals), *at* 366. [Unofficial translation]

the responsibility under Article 6(1) for ordering the commission of the crime was not established.

63. It is submitted that, considering the facts in questions and the allegations brought against Major Ntabakuze by the Prosecution with regards to crimes allegedly committed by the Para Commando Battalion under his command at the time, the evidence presented does not establish beyond reasonable doubt that Major Ntabakuze *explicitly or implicitly instructed* such crimes to be committed.

64. Alternatively, under the liability theory of aiding and abetting, while it is established that the material element can be constituted by an omission,

> The Trial Chamber further stated 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*." [54]

under this theory of liability, the following cumulative conditions, as laid down in the *Cyangugu* Trial Chamber III judgment and confirmed on Appeals, must be met:

> The Chamber finds that, in order to hold an accused criminally responsible for an omission as a principal perpetrator, the following elements must be established: (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.[55]

65. The Appeals Chamber in *Cyangugu* stressed that establishing that omission amounts to approval of the participation of subordinates to the alleged crime, if it is also established from the evidence that this approval had *some impact* on and '*specifically intended to enable'* the commission of the crime. If such impact is not established, it is submitted that such liability should not attach.[56]

66. Furthermore, ICTY jurisprudence has established that responsibility by omission also requires a showing of intent *wherein the perpetrator foresees as more likely than not that the death of the victim could occur as a consequence of his act or omission, and he nevertheless accepts the risk.*[57] The Chamber also recalled that negligence and gross negligence or recklessness do not satisfy the *mens rea* requirement. Therefore, it is submitted that the mere

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[54] *The Prosecutor v. Tihomir Blaskic*, 29 July 2004, (ICTY Appeals), para 47
[55] *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe* (The "*Cyangugu*" case), 25 february 2004 (ICTR TC III), *at* 659
[56] *Cyangugu* Appeals, 7 July 2006, para. 374, 275
[57] *The Proscutor v. Naser Oric,* 2006 WL 2574250, UN ICT (Trial)(Yug), 30 Jun 2006 at 348; *See also* Stakic Trial Judgement, para. 587, see also para. 277 et seq., 286 et seq., supra.

absence of the Accused from the place of the alleged crimes and his failure to fulfill his *duty to act* are not enough to establish criminal responsibility for aiding and abetting under Article 6(1).

E. **COMMAND RESPONSIBILITY**

67. It is an established principle of international customary law, applicable to both international and internal armed conflicts that superiors can be held to individual criminal responsibility for failure to prevent or to punish crimes committed by subordinates. The elements that must be satisfied in order to invoke individual criminal responsibility are:

(i) the existence of a superior-subordinate relationship;

(ii) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof. [58]

68. The nature of the superior-subordinate relationship is well explained in the Judgement of *Pavle Strugar* before the ICTY:

> The superior-subordinate relationship lies in the very heart of the doctrine of a commander's liability for the crimes of his subordinates. It is the position of command over the perpetrator which forms the legal basis for the superior's duty to act, and for his corollary liability for a failure to do so. Indeed, as was held in previous jurisprudence, the doctrine of command responsibility is "*ultimately predicated upon the power of the superior to control the acts of his subordinates*." [Emphasis added]
>
> The existence of such a position of command derives in essence from the "actual possession or non-possession of powers of control over the actions of subordinates." In determining the degree of control to be exercised by the superior over the subordinate, the Appeals Chamber endorsed the effective control standard and held that:
> The concept of *effective control* over a subordinate - in the sense of a *material ability to prevent or punish* criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[59] [Emphasis added; References omitted]

69. The Appeals Chamber elaborated on the characterization of this relationship in the *Čelebići* Judgement:

> What counts is his *material ability*, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.
> In respect of the meaning of a commander or superior as laid down in Article 7(3) of the Statute, the Appeals Chamber held in *Aleksovski*:

[58] *Prosecutor v. Pavle Strugar*, Judgement (TC), 31 January 2005, at paragraphs 357 and 358.
[59] *Ibidem,* at paragraphs 359 and 360.

> Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the *required mental element* failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision.[60] [Emphasis added; References omitted]

> 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.[61] [Emphasis added; References omitted]

70. With regards to the mental element, the *Čelebići* Trial Judgment held that, while a superior's *actual knowledge* that his subordinates were committing or were about to commit a crime cannot be presumed, it may be established by circumstantial evidence, including the number, type and scope of illegal acts, time during which the illegal acts occurred, number and types of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, modus operandi of similar illegal acts, officers and staff involved, and location of the commander at the time.[62] As established above, this must be proven *beyond a reasonable doubt*.

71. The Appeals Chamber elaborated on the meaning of the phrase "had reason to know" in the *Blaškič* Appeals Judgement, making reference to its earlier *Čelebići* Judgement, indicating clearly that he must have been put on notice by information available to him:

> The Appeals Chamber considers that the *Čelebići* Appeal Judgment has settled the issue of the interpretation of the standard of "had reason to know." In that judgment, the Appeals Chamber stated that "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates." Further, the Appeals Chamber stated that "[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish." There is no reason for the Appeals Chamber to depart from that position. … [References omitted][63]

72. The Appeals Chamber furthermore made it clear that criminal negligence is not a basis for liability under international criminal law:

> … [T]he Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that "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." It expressed that "[r]eferences to 'negligence' in the context of

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[60] *Prosecutor v Delalic et al* ("*Celebici*" case), Appeal Chamber Judgement, 20 February 2001, at paragraphs 190 and 191.
[61] *Prosecutor v Delalic et al* ("*Celebici*" case), Appeal Chamber Judgement, 20 February 2001, at paragraph 198.
[62] *Prosecutor v Delalic et al* ("*Čelebići*" case), Trial Chamber II Judgement, 16 November 1998, at paragraph 386; *See also* Kordic Trial Judgement, para 427; Blaskic Trial Judgement, para 307; Strugar Trial Judgement, para 368.
[63] *Prosecutor v.Tihomir Blaškič,* Appeal Judgement, 29 July 2004, at paragraph 62.

> superior responsibility are likely to lead to confusion of thought....” The Appeals Chamber expressly endorses this view. [References omitted][64]

73. However, the Prosecutor in his Final Brief has concluded that such liability should attach by the simple fact of a failure of the superior to exercise the ‘due diligence’ required by the nature of his duties.[65] It is submitted that such failure amounts to negligence, which, as established above, is not a basis for liability under international criminal law. While it is correct that the wording in Article 6(3), ‘*had reason to know*’, imposes a lower threshold requirement of *intent* than under Article 6(1), such intent cannot limit itself to mere *awareness* of the superior position and of the reason that should have alerted the superior to the relevant crimes of his subordinates.

74. Such an interpretation of the level of intent required would incorporate a level of vicariousness obscuring the actual degree of the defendant’s personal culpability, which would be in contradiction with the premise that the criminal liability of principal perpetrators has to be individualized and clearly established.

75. Indeed, while the Trial Chamber in *Akayesu* concluded that *it is not required ‘that the superior acted knowingly to render him criminally liable’*, it added that the failure to prevent the crime cannot be the result of *mere negligence* but that:

> “[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*.”[66]

76. Therefore, a degree of intent higher than negligence is required for liability to attach under Article 6(3) (‘*had reason to know*’), and the superior position of the Accused requiring him to act with due diligence does not merely suffice to presume knowledge:

> Although an individual’s command position may be a significant indicator that he or she knew about the crimes, *such knowledge may not be presumed* on the basis of his or her position alone.[67]

77. With regards to genocidal intent, as established *supra* this requires a special showing of a heightened degree of intent, i.e. the nexus between the *intent* to commit the offence and *members of the particular group* targeted, which must be proven beyond reasonable doubt. The *Krstić* judgment expressed some concern with vicarious criminal liability within the context of genocidal joint criminal enterprise, and the Appeals Chamber insisted that the

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[64] *Prosecutor v.Tihomir Blaškič,* Appeal Judgement, 29 July 2004, at paragraph 63.
[65] Prosecutor’s Brief, 1 March 2007, *at* 2020.
[66] Akayesu, (Trial Chamber), September 2, 1998, para. 479, 489
[67] Bagilishema, ICTR TC I, 7 June 2001, para 45.

Prosecutor prove the accused's specific genocidal intent, and not just knowledge of the genocidal intent of other individuals:[68]

> As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This *knowledge on his part alone cannot support an inference of genocidal intent*. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been *unequivocally established*. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator.[69]

78. As specified by the Court *supra*, genocide is one of the worst crimes known to humankind. Therefore, it is submitted, that for criminal liability to attach under the second prong of Article 6(3) ('*had reason to know*') a higher degree of intent is required than mere knowledge that a crime is about to be or was committed. The failure to prevent must go beyond negligence to discharge one's military duties. This reasoning led the Appeals Chamber to reverse the conviction of the Accused in the *Blagojevich* Case, in the absence of evidence or the Accused's knowledge of mass killings could not be inferred for acts alone.[70]

79. Concerning the third prong of Article 6(3), the question of whether a superior failed to take all necessary and reasonable measures was examined in the Judgment of *Pavle Strugar* before the ICTY:

> The question of whether a superior has failed to take all necessary and reasonable measures to prevent the commission of an offence or to punish the perpetrators is *intrinsically connected to the question of that superior's position of power*. As the Tribunal's definition of a "superior" requires the existence of effective control, whether *de jure* or *de facto*, a superior will be held responsible for failing to take such measures that are within his material possibility. Therefore the question whether a superior had explicit legal capacity to take such measures will be immaterial if he had the material ability to act.[71] [References omitted]

80. All three elements were concisely put by the Trial Chamber III *Cyangugu* Judgment[72] and confirmed by the Appeals chamber in July 2006, thus reflecting a constant jurisprudence in both the ICTY and ICTR:

> The Chamber stated in the *Semanza* Judgement that 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

[68] Krstic, Appeal Judgment, 19 april 2004, 131-133
[69] Ibidem, para 134.
[70] Specific genocidal intent cannot be inferred from opportunistic killings or even mass transfer of refugees, but must be proved beyond a reasonable doubt. Appeals Chamber Decision in *Blagojevich,* para. 123, May 7, 2007.
[71] *Prosecutor v. Pavle Strugar*, Judgement (TC), 31 January 2005, at paragraph 372.
[72] Trial Chamber judgment in Cyangugu case, para 628 to 630

> the *material ability to prevent* the commission of the offence *or to punish* the principal offenders. This requirement is *not satisfied by a showing of general influence* on the part of the accused. [Emphasis added; Reference omitted]
> 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. [Emphasis added; Reference omitted]

> 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. *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' crime.* [Emphasis added; Reference omitted]

81. Consistent with the jurisprudence cited *supra,* the Appeals Chamber in *Cyangugu*[73] recalled that in *Blaskic* the ICTY gave examples of *effective control* and stressed that these are more a matter of evidence than law:

> The Appeals Chamber also notes the Appellant's argument that to establish that effective control existed at the time of the commission of subordinates' crimes, *proof is required that the accused was not only able to issue orders but that the orders were actually followed*. The Appeals Chamber considers that this provides *another example of effective control* exercised by the commander. 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.[74] [Emphasis added; Reference omitted]

82. The Appeals Chamber then confirmed the Trial Chamber's finding that establishing the *'effective control'* element was equivalent to establishing the material capacity to prevent or punish the criminal acts[75].

> La définition donnée par la Chambre de première instance et le paragraphe 637 du Jugement indiquent clairement que la Chambre de première instance avait bien considéré que le *critère du « contrôle effectif » en tant que préalable pour établir la responsabilité du supérieur hiérarchique équivalait à la capacité matérielle d'empêcher ou punir une conduite criminelle*. En conséquence, la Chambre d'appel estime que la Chambre de première instance n'a pas commis d'erreur dans sa définition du lien de subordination. [Emphasis added, Reference omitted]

83. Finally, the ICTY confirmed in 2005 that substantive influence over a subordinate is not enough to meet the 'effective control' threshold:

> A degree of control which falls short of the threshold of effective control is insufficient for liability to attach under Article 7(3). "*Substantial influence*" over subordinates which does not meet the threshold of effective control *is not sufficient* under customary law to serve as a

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[73] *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe* (The "*Cyangugu*" case), 7 July 2006 (ICTR Appeals), *at* 341
[74] *The Prosecutor v. Tihomir Blaskic*, 29 July 2004, (ICTY Appeals), para 69
[75] *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe* (The "*Cyangugu*" case), 7 July 2006 (ICTR Appeals), *at* 342

> means of exercising command responsibility and, therefore, to impose criminal liability.[76] (Emphasis added]

84. The Appeals Chamber also made it clear in *Blaškič* that one should not be held simultaneously liable for both direct and command responsibility for the same count:

> The Appeals Chamber considers that the provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing.[77] [References omitted]

F. ADMISSIBILITY ISSUES AND PURPOSES FOR WHICH CERTAIN EVIDENCE CAN BE USED

85. It is submitted that there are several fundamentally different types of documentary evidence, and the issues of admissibility and use differ depending on which category of evidence is being treated. Essentially, these categories consist of (a) Contemporaneous Documents, (b) Statements (c) Judicial Documents and (d) Analytical Books and Reports. A related category of evidence, which will be discussed in the same vein, is (e) Expert Evidence (Testimony and Reports) about Facts at Issue.

a. Contemporaneous Documentary Evidence

86. Contemporaneous documents are material evidence, which, it is submitted, speak for themselves. Provided there are circumstantial guarantees of their authenticity, they make evidence of their contents, inasmuch as their contemporaneous character implies that they were not created with an eye to being used in court as a substitute for testimony, and it is unlikely that they are a confection intended to deceive the court.

b. Statements

87. Witness statements, *except* for those admitted under the regime of Rule 92*bis* (as a form of written testimony), do *not* speak to the truth of their contents, but rather, for the fact of their

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[76] *The Prosecutor v. Sefer Halilovic,* Trial Chamber I, 16 November 2005 (ICTY), *at* 59, citing *Celebici* Appeal Judgement, *at*. 266. *See also Čelebići,* (ICTY App. 2001), *at* 266; *Semanza* Trial Judgment (ICTR 2003), *at* 402; *Cyangugu*, (ICTR TCIII 2004), *at* 628.

[77] *Prosecutor v.Tihomir Blaškič,* Appeal Judgement, 29 July 2004, at paragraph 91.

utterance. They are generally admitted for the purpose of providing context, usually in a situation wherein the witness was questioned about their contents. Essentially, they are admitted to clearly show what the witness was talking about. Their contents are thus not facts in evidence. It is submitted that should the contents of a statement differ from the same witness's testimony in court, even without considering the truth of the statement, the fact of its difference implies that the testimony may not be reliable.

88. The Chamber has distinguished two types of circumstances in which statements, other than 92*bis* statements, have been admitted, and distinguished the use to which such documents are put. Of the first type, the Chamber has said:

> The Chamber has allowed documents to be admitted into evidence for the purpose of impeaching the credibility of a witness on cross-examination. In this instance, the document is presented to the witness, and the witness is asked to explain any discrepancies between the statement and his or her testimony before the Chamber. The admitted document may then be relied upon in the Chamber's assessment of the witness' credibility and in its ultimate determination of the case.[78]

89. It is submitted that even though the contents of the document are in evidence for the purpose of impeaching the witness's credibility, they must only be used that way, that is, discrediting the witness's testimony by the fact that the earlier statement is different. They must not be used, however, as a substitute for the discredited testimony, as facts in the case, for such would be violating the very clear directive of the Appeals Chamber that statements admitted for the truth of their contents can *only* be admitted under Rule 92*bis*.[79]

90. Of the second type, the Chamber has said:

> The Chamber has also admitted documents, including witness statements, into evidence for the limited purpose of providing context for a witness' testimony. Here, the document or witness statement – often originating from a different witness – is shown or read to the witness for his or her response to the contents contained therein. The document may be admitted as an exhibit and may become part of the record, but will only be used to assist the Chamber in understanding the testimony of the witness on the stand.[80]

c. Judicial documents

91. It is submitted that judicial documents speak for themselves inasmuch as they reflect the findings of a court, or are a record of such proceedings. They do not, however, make independent proof of the facts of the case they are dealing with. Thus, they may tell us that

[78] Decision on Nsengiyumva Motion to Admit Documents as Exhibits, 26 February 2007, at paragraph 6.
[79] See the quotation from *Galic* and related footnote, in Decision on Nsengiyumva Motion to Admit Documents as Exhibits, 26 February 2007, at paragraph 4.
[80] Decision on Nsengiyumva Motion to Admit Documents as Exhibits, 26 February 2007, at paragraph 7.

an individual was found guilty (or not guilty) of a certain offence, and upon what basis that finding was made, but they neither prove nor disprove the underlying facts of that case. With regard to judgements of this Tribunal, of course, the Chamber is entitled to take judicial notice of judicially adjudicated facts.

d. Analytical Books and Reports

92. It is submitted that analytical books and reports can *only* serve the purpose of assisting the Chamber in interpreting and understanding the evidence, or placing it into historical context. They can not be used to put facts at issue about the acts and conduct of the Accused into evidence, as such would be a clear violation of Rule 92*bis*, which precludes such written evidence about the acts and conduct of the accused.

e. Expert Evidence about Facts at Issue

93. It is submitted that the purpose of expert evidence is to enlighten the Chamber with the *interpretation* of evidence before the court, for which their expertise will assist the court in having a clearer understanding. It is not the purpose of expert testimony to give evidence of *facts* other than those within the personal knowledge of the expert. Any references to facts at issue made by the expert are not themselves evidence of these facts, but are merely illustrations of the basis of the formation of the expert opinion. An expert's references to facts at issue are analogous to the tendering of statements used in cross-examination; they provide context, but *not* content.

G. WEIGHT ISSUES

a. Hearsay

94. The general principle on the treatment of hearsay evidence is that such evidence is admissible provided it is relevant and probative for the purposes of Rule 89 (C).[81] It will be excluded if the Chamber finds that it is so lacking in indicia of reliability that it lacks probative value.[82] However, one must clearly distinguish the question of admissibility of

[81] *Prosecutor v Akeyesu*, Case No , Appeals Chamber judgment of , par 284 et sec
[82] Ibid, at par 286

evidence from that of its assessment for the purposes of the final determination of the case. As the Appeals Chamber has noted:

> That a Trial Chamber admits a hearsay statement, does not necessarily imply that it accepts it as reliable and probative. Those are qualities which a Trial Chamber will freely consider at the end of the trial when weighing and evaluating the evidence as a whole, in light of the context and of the nature of the evidence itself, including the credibility and reliability of the relevant witness. [83]

95. It is submitted that hearsay evidence, by its very nature carries with it inherent dangers. Where an out of court statement is made by someone other than the witness testifying, problems may arise as to the reliability of account of what this third person said. Further, there may be an inability to assess the reliability and credibility of this third person, as well as an inability to assess the accuracy of perception of this third person. These difficulties may be partially overcome if the maker of the statement comes forward and testifies to his own experience as well as the fact that he made such out of court statement. However, in cases where the maker of the statement remains unknown to the Chamber, these dangers remain very much alive. Therefore, it is understandable that the Trial Chamber in *Akayesu* pledged to treat hearsay evidence 'with caution', an approach approved by the Appeals Chamber in the same case.

96. It has been said that cross-examination provides some form of protection against the dangers inherent in hearsay evidence. The cross-examining party is however placed in an insidious position where by putting questions to the witness on the circumstances surrounding the making and his hearing of the out of court statement, that party risks firming up the reliability of that evidence. From the Chamber's point of view, regardless of the extent of cross-examination on the issue, the fundamental question must be whether, following cross-examination, the circumstances surrounding the making of the statement have been sufficiently clarified such that the Chamber is in a position to rely on that evidence as a basis for a finding of fact. In the case of prosecution hearsay evidence, of an issue going to culpability of the accused, it is submitted a Chamber can never rely solely on hearsay evidence for a finding of fact, given that in reaching that finding it must be sure beyond all reasonable doubt.

97. As this Trial Chamber has itself very clearly stated:

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[83] Ibid, at par 292

> Evidence whose reliability cannot adequately be tested by the Defence cannot have probative value.[84]

Hearsay evidence, by its very nature, being the declaration of someone absent from the proceedings, who can not be cross-examined, is not susceptible of having its reliability *adequately tested* by the Defence[85], and it can not, standing alone, have any probative value whatsoever. The Chamber is thus invited to treat all hearsay evidence with the greatest of caution, and in particular, to refrain from basing any conviction for any charge on unsubstantiated hearsay evidence.

b. Expert Testimony

98. It is submitted as well that Expert evidence must be treated with extreme care as a basis for conviction. This is especially so where an expert, such as Alison Des Forges, is a historian not applying the rigorous forms of research methodology required for proof beyond all reasonable doubt, and particularly where the "factual basis" upon which her expertise is based consists largely of unattributed hearsay, which can neither be verified nor tested in any way by the Defence. So, where a view is not actually substantiated to the Chamber by the expert with documentation and concrete sources, and the opinion is based on the research methods of a historian given without substantiation, it should not form the basis of proof of any element of a crime.

c. Identification evidence

99. Identification evidence is another form of evidence, which demands caution on the part of the Trial Chamber. As the Appeals Chamber noted in the case of *Kunarac* before the ICTY:

> … a Trial Chamber must be especially rigorous in assessing identification evidence.[86]

100. There are inherent dangers in identification evidence which arise out of a number of factors including the trauma of the witness, the light and whether conditions under which the identification was made, the possibility of misidentification through influences such as the false confirmation of others and subsequent information received by the witness. In

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[84] *Decision on Admissibility of Evidence of Witness DBQ*, 18 November 2003, at paragraph 8 (and reiterated at paragraph 24).

[85] This is, of course the reason that hearsay evidence is routinely *excluded* in Common Law jurisdictions, subject to exceptional admission on the basis of sufficient circumstantial guarantees of reliability when circumstances make its admission necessary for the fairness of the trial.

[86] *Prosecutor v Kunarac*, Appeals Chamber judgment, par 324

assessing identification evidence, it is submitted that the Chamber must take particular care, and in doing so, make an assessment of a variety of factors including, the eye-witnesses distance from the person identified, the light conditions, the weather conditions, the number of people present, the extent to which the view of the eye witness may have been obstructed by people, objects such as cars and houses, whether the eye witness knew the person sighted from before, and how well, the quality of eyesight of the eye-witness, the quality of memory of the eye witness and the credibility and general reliability of account of the eye witness. If the Chamber is deprived of the means of assessing such factors then relying on the identification becomes dangerous, particularly for the purposes of proof beyond all reasonable doubt.

d. Corroboration

101. While the Chamber is mandated to, and should, in our submission, consider the totality of the evidence, it is only reliable and credible evidence that can corroborate other evidence the reliability of which is in question.[87] Where looking at the totality of the evidence bears out weakness in much of the testimony of the witnesses, it is submitted that this has the effect of undermining the value of the evidence as a whole as a basis for being sure of an accused guilt beyond all reasonable doubt. It does not, through the number of witnesses, strengthen the weakness in that evidence through a simple accumulation of bad evidence. It must be remembered that the cases at this Tribunal are highly political cases considering that the authorities and others within Rwanda have made their political bias towards the outcomes known, sometimes with subtlety and sometimes frankly.[88]

[87] *Prosecutor v Kvocka* , judgment of 2 November 2001, 663

[88] Consider the comments of the Rwandan government following the acquittals before these tribunals and the threat made to the Appeals Chamber in the case of *Barayagwisa*, as well as the allegations against and interference with the Defence in this case.