Even though it does not develop any significant legal issues, the Karera Appeal Judgement of 2 February 2009\(^1\) has the merit of clearly strengthening the Appeals Chamber’s jurisprudence in many respects. It also stands out for its approach to site visits and the proprio motu intervention of the Appeals Chamber regarding defects in the indictment.

1. **INTRODUCTION**

After running Nyarugenge Commune (now the city of Kigali) in his capacity as bourgmestre for over fifteen years, François Karera was appointed sous-préfet of Kigali-rural in November 1990. In late 1991, he became President of the ruling political party Mouvement républicain national pour la démocratie et le développement (MRND) in Nyarugenge Commune. On or about 17 April 1994, François Karera was officially appointed by the Interim government as prefect of Kigali Prefecture. As many other officials at that time, he fled to Zaire in early July 1994.\(^2\)

After a swift trial and the Chamber’s visit to the alleged crime sites, François Karera was convicted pursuant to Article 6(1) of the Statute of the Tribunal for genocide and extermination and murder as crimes against humanity for crimes committed in Kigali Prefecture.\(^4\) Specifically, François Karera was found guilty of ordering the murder of four Tutsi in Nyamirambo Sector by policemen and

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\(^3\) See procedural history annexed to the Karera Trial Judgement.

\(^4\) Karera Trial Judgement, para. 569.
Interahamwe,\(^5\) of having instigated and participated in the attack against Tutsi refugees at the Ntarama Church, and of having, by his statements and the distribution of weapons, instigated and aided and abetted the murder of Tutsi in the Rushashi commune.\(^6\)

The Trial Chamber also found that François Karera was responsible as a superior pursuant to Article 6(3) of the Statute for the murders committed in Nyamirambo Sector. However, although it found that François Karera had a significant influence on the Interahamwe from Nyamirambo, Ntarama and Rushashi, the Trial Chamber found that this did not amount to a formal superior-subordinate relationship within the meaning of Article 6(3). In accordance with the jurisprudence of the Appeals Chamber which provides that cumulative convictions under both Article 6(1) and 6(3) based on the same facts are impermissible, the Trial Chamber did not enter a conviction against François Karera pursuant to Article 6(3) for the crimes committed in Nyamirambo, but instead considered his superior responsibility as an aggravating factor in sentencing.\(^7\)

François Karera was sentenced to a single term of life imprisonment.\(^8\)

2. DEVELOPMENTS OF THE APPEALS CHAMBER ON EVIDENTIARY MATTERS

François Karera’s claims before the Appeals Chamber were essentially factual: they mainly concerned the application of the burden of proof, the assessment of evidence by the Trial Chamber, and the extent of the Trial Chamber’s reasoning on particular points.

The Appeals Chamber in the course of its consideration recalled a number of legal standards on the assessment of evidence: the Chamber’s discretion to decide whether corroboration is necessary in order to reach a finding of fact;\(^9\) the possibility for a Chamber to accept some parts of a witness’s testimony while rejecting others;\(^10\) the principle that a Chamber need not articulate every step of its reasoning or to justify its findings in relation to every submission made during trial;\(^11\) the requirement that a conclusion of guilt inferred from circumstantial evidence be the only reasonable conclusion available from the evidence;\(^12\) and the possibility to base a conviction on hearsay evidence.\(^13\)

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\(^5\) Militia group that grew out the MRND Youth movement.

\(^6\) Karera Trial Judgement, paras. 535-561.

\(^7\) Id., paras. 562-568, 577.

\(^8\) Id., para. 585.

\(^9\) Karera Appeal Judgement, paras. 45, 273. See also paras. 192, 173, 174 regarding the meaning of “corroboration”.

\(^10\) Id., paras. 88, 90, 120, 127, 230.

\(^11\) Id., paras. 19,20, 90.

\(^12\) Id., para. 34.

\(^13\) Id., paras. 39, 256.
One of François Karera’s grounds of appeal led the Appeals Chamber to clarify a question relating to the inference a Chamber may draw from the absence of cross-examination.

François Karera submitted that the Trial Chamber had erred in law by failing to conclude that those portions of his testimony that the Prosecution did not cross-examine were established. Referring to the Rule governing cross-examination and to ICTY case-law, the Appeals Chamber recalled that the central purpose of cross-examination is to “promote the fairness of the proceedings by enabling the witness to appreciate the context of the cross-examining party’s questions, and to comment on the contradictory version of the events in question”. The Appeals Chamber further held that, if it is obvious in the circumstances of the case that the witness’s version of the events is being challenged, there is no need for the cross-examining party to waste time putting its case to the witness. For the Appeals Chamber, this was even more relevant where the accused is testifying in order to refute the allegations made against him by the Prosecution. Accordingly, the Appeals Chambers concluded that “a Trial Chamber has the discretion to infer (or not) as true statements unchallenged during cross-examination, and to take into account the absence of cross-examination of a particular witness when assessing his credibility.”

Following the position taken in the Kamuhanda Appeal Judgement, the Appeals Chamber distanced itself again from the Rutaganda Appeal Judgement wherein it had stated that “a party who fails to cross-examine a witness upon a particular statement tacitly accepts the truth of the witness’s evidence on the matter.” As the Appeals Chamber explained in the Karera case, the circumstances are different in each case. Still, the Appeals Chamber proposed an approach significantly different in spirit than the one adopted in the Rutaganda Appeal Judgement: after implicitly recognising a presumption, the Appeals Chamber returned to a casuistic approach affording wide discretion to the Trial Chamber. This approach makes sense in the general context of limitations on the parties’ time to present their case in court (for judicial economy purposes and to

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14 Rule 90(G)(ii) of the Tribunal’s Rules of Procedure and Evidence.
15 Karera Appeal Judgement, para. 25.
16 Id., paras. 25-27.
17 Id., paras. 29, 198.
19 ICTR, Georges Anderson Nderubumwe Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 310. The Appeals Chamber noted in footnote 59 of the Karera Appeal Judgement that the English version of para. 310 of the Rutaganda Appeal Judgement did not accurately reflect the French authoritative version and stated that: “in order to fully reflect the nuances introduced by the Appeals Chamber in its finding, the English translation of the first two sentences of this paragraph should read: ‘The Appeals Chamber considers that, [in general], a party who fails to cross-examine a witness upon a particular statement tacitly accepts the truth of the witness’s evidence on the matter. Therefore the Trial Chamber [would have] not commit[ted] an error of law in the case at bar, in inferring that the Appellant’s failure to cross-examine Witness Q on the weapons distribution meant that he did not challenge the truth of the witness’s evidence on the matter.’”
ensure the right of the accused to be tried without undue delay). Maintaining that the silence of a party should generally be interpreted as tacit approval given that the parties have no other option most of the time than to save their time, would certainly have led to unfortunate misunderstandings. It is interesting to note that this jurisprudence was recently endorsed by the ICTY Appeals Chamber in the Krajišnik case.  

3. NEW JURISPRUDENCE ON SITE VISITS

One of the most interesting points of the Karera Appeal Judgement regards the issue of site visits. François Karera argued that the Trial Chamber erred in law by failing to provide the factual findings arising from the site visit conducted in Rwanda from 1 to 3 November 2006, thus denying him the opportunity to present a full defence. He also argued that the Trial Chamber erred by failing to keep records from the site visit and by making factual findings which were contrary to the observations it made during its site visit.  

While a Trial Chamber organised a site visit to Rwanda as early as 1999, subsequent Trial Chambers declined to visit the sites of the alleged crimes. Considered costly and often inconclusive, requiring extensive logistics, site visits were denied in several cases, the judges preferring to rely solely on the trial record. However, recently, several Trial Chambers organised site visits to Rwanda. The reasons may relate to a change in the strategy of the Tribunal, the desire of Chambers to demonstrate to Rwanda and to Rwandans that the cases before them are dealt with the highest seriousness, or simply the specific needs of the individual cases. However, it is rather difficult to find any significant sign of those visits in the record or in the judgements.Absent a record of the exchanges between the parties during the visit, and, most often, absent the admission of supporting material in the form of pictures taken on the sites, Chambers have no evidence on which they could rely for their findings concerning what they saw in Rwanda. The site visit organised in the Karera case was no exception. Even

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21 Karera Appeal Judgement, para. 48.
22 See ICTR, Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001, para. 10.
24 In particular, site visits were organised in the Seromba, Rwamakuba, Mpambara, Karera, Bikindi, Zigiranyirazo, Nsengimana, and Bizimungu et al. cases.
25 Before the ICTR, the Rwamakuba case where a procès-verbal of the site visit in Rwanda was properly made and admitted as evidence, is an exception. Before the ICTY, a detailed procès-verbal
though it rejected the arguments of François Karera based on the absence of any prejudice, the Appeals Chamber nevertheless reminded Trial Chambers of their obligations:

The purpose of a site visit is to assist a Trial Chamber in its determination of the issues and therefore it is incumbent upon the Trial Chamber to ensure that the parties are able to effectively review any findings made by the Trial Chamber in reliance on observations made during the site visit.\(^{26}\)

For the first time, the Appeals Chamber unequivocally set forth the obligation for Trial Chambers to keep detailed records of their site visits.\(^{27}\) It remains to be seen whether this will bear fruit and whether the reports that will be established will actually prove useful.

4. **Proprio Motu Intervention Regarding the Form of the Indictment**

Although not successful on the question of site visits, François Karera managed to convince the Appeals Chamber that the Trial Chamber erred by convicting him for an incident in Rushashi which was not pleaded in the indictment.

Before reaching its conclusion, the Appeals Chambers recalled well-established jurisprudence: the indictment shall not only state the charges against the accused, but also the material facts underpinning the charges in question. If the indictment is considered defective because it is too vague or ambiguous, the defect “may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.”\(^ {28}\)

The Appeals Chamber warned against the danger of being too permissive in curing. Probably taken in convictions acquired after hearing the entire evidence, some Trial Chambers seem reluctant to acquit the accused on the basis of a defective indictment when they think that the evidence against the accused is conclusive. While it is understandable for a judicial organ whose mission is to establish the truth (at least from a legal perspective), it is less acceptable in light of the accused’s fundamental right to be informed promptly and in detail of the charges against him. As the primary accusatory instrument, the indictment cannot be replaced by any of the Prosecutor’s post-indictment submissions in the pleading of the charges. While it is possible to remedy the vagueness of an indictment by providing the defendant with timely, clear and consistent

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\(^{26}\) Karera Appeal Judgement, para. 50.

\(^{27}\) *Id.*, para. 50: “The Appeals Chamber emphasizes that detailed records of Trial Chambers’ site visits should normally be kept”.

\(^{28}\) *Id.*, para. 293.
information detailing the factual basis underpinning the charges (the “curing”), the addition of omitted charges (for example, a new incident or a new victim) can be authorised only by a formal amendment of the indictment.\textsuperscript{29} Applying these well-established principles,\textsuperscript{30} the Appeals Chamber reversed the Trial Chamber’s decision to convict François Karera for the distribution of weapons in Rushashi since this incident was not pleaded in the indictment. As a result, it overturned François Karera’s conviction for genocide and extermination as a crime against humanity based on the Rushashi incident.\textsuperscript{31}

But the Appeals Chamber did not limit itself to granting François Karera’s claim on this ground of appeal. Notably, the Appeals Chamber raised another defect in the form of the indictment which was not part of François Karera’s appeal. Indeed, the Appeals Chamber took issue with the fact that François Karera was convicted of genocide and extermination based on the murder of Murekezi although this incident was only explicitly pleaded under the murder count. At the end of its analysis, the Appeals Chamber reversed the convictions entered against François Karera for genocide and extermination based on Murekezi’s murder.\textsuperscript{32}

The Appeals Chamber has already allowed itself to consider legal issues not raised by the parties. However, it is the first time the Appeals Chamber decided to rule \textit{proprio motu} on a matter related to the form of the indictment. This particular decision is notable. The error in question was not manifest\textsuperscript{33} and did not raise any new legal issue. It also did not affect the actual outcome since François Karera’s convictions for genocide and extermination were affirmed on the basis of other facts. The Appeals Chamber also affirmed the life sentence.\textsuperscript{34} Prompted to address the issue at the appeal hearing, François Karera’s Defence declined to make arguments, which \textit{a priori} suggest that there was indeed no prejudice. The reasoning followed by the Appeals Chamber is also interesting: while its conclusion is based on a certainly strict but nonetheless right reading of the law applicable to the form of the indictment, the Appeals Chamber further justified itself in speculating on what might have been the reaction of Defense Counsel if the incident had been correctly pleaded under every count.\textsuperscript{35} The formulation chosen by the Appeals Chamber disconcerts and the use of the conditional tense and the over-cautious wording\textsuperscript{36} undermine the Appeals Chamber’s call for rigour. We are left with the vague impression that the Appeals Chamber questioned the validity of its approach.

The decision of the Appeals Chamber to seize this error \textit{proprio motu} may however draw the Trial Chambers’ attention to the importance of attending to

\begin{footnotesize}
\textsuperscript{29} \textit{Id.}, para. 293.
\textsuperscript{30} See \textit{inter alia}, \textit{Muvunyi, Nahimana et al., Ndindabantizi and Ntagerura et al. Appeal Judgements.}
\textsuperscript{31} \textit{Karera Appeal Judgement}, para. 297.
\textsuperscript{32} \textit{Id.}, paras. 360-370.
\textsuperscript{33} One could argue that the charge was not omitted in the indictment but inadmissibly vague, and that the vagueness had been cured by the Prosecution’s Pre-trial Brief.
\textsuperscript{34} \textit{Karera Appeal Judgement}, paras. 391-393, 398.
\textsuperscript{35} \textit{Id.}, para. 369.
\textsuperscript{36} \textit{Id.}, para. 369: “might have focused more attention on Murekezi’s killing”, “may have given the opposite impression”, “the conclusion it might have generated”.
\end{footnotesize}
the accused’s right to be provided with clear and detailed notice of the charges against him. The Appeals Chamber applied well-established jurisprudence, but in a somewhat unprecedented manner: the message of the Appeals Chamber is not entirely new but the strength with which it was sent is.

5. CONCLUSION

The Appeals Chamber only allowed very few of François Karera’s grounds of appeal. While it reversed the convictions based on specific incidents, it affirmed François Karera’s criminal responsibility and life sentence for genocide and murder and extermination as crimes against humanity.