ICTR-01-68-T
18-01-2012
(3339-3057)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Florence Rita Arrey, Presiding
Judge Bakhtiyar Tuzmukhamedov
Judge Aydin Sefa Akay

Registrar: Adama Dieng

Date: 30 December 2011

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THE PROSECUTOR

v.

Grégoire NDAHIMANA

Case No. ICTR-01-68-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Holo Makwaia
Althea Alexis Windsor
Segun Jegede
Lansana Dumbuya

Defence Counsel:
Bharat B. Chadha
Wilfred Ngunjiri Nderitu
Tharcisse Gatarama
Marie-Pier Barbeau

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CHAPTER I: INTRODUCTION

1. Introduction

1. The accused in this case is Grégoire Ndahimana ("Ndahimana" or "the *bourgmestre*" or "the accused"). He was a member of the MDR political party and the *bourgmestre* of Kivumu *commune* in April 1994. He was born in 1952 in Rukoko *secteur*, Kivumu *commune*, Kibuye *préfecture*, Rwanda. Ndahimana is married and a father to 11 children. In 1973, he graduated as an agricultural officer from the agricultural technical school in Butare.[1] He was elected, via indirect elections, to the position of *bourgmestre* in June 1993 and assumed the position in October 1993. Ndahimana was *bourgmestre* of Kivumu *commune* throughout the period covered by the Indictment.

2. Ndahimana left Rwanda in July 1994.[2] He was arrested in the Democratic Republic of the Congo on 11 August 2009 and was transferred to the custody of the International Criminal Tribunal for Rwanda ("Tribunal" or "ICTR") on 20 September 2009.[3]

3. The Prosecution has charged him with genocide (Count I), or, in the alternative, complicity in genocide (Count II), as well as extermination as a crime against humanity (Count III). He has denied all the charges.[4]

4. The closing arguments were heard on 21 and 22 September 2011.[5]

2. Summary of the Case

5. The case is based on events that took place over 10 days from 6-16 April 1994. It is not in dispute that following the death of President Habyarimana, 1,000-2,000 Tutsi civilians sought refuge at Nyange parish. Only a very small number of these civilians survived attacks on Nyange church that took place on 15 and 16 April 1994. Nor is it disputed that, following the death of President Habyarimana, a joint criminal enterprise ("JCE") came into existence in Kivumu *commune*. The purpose of this enterprise was to exterminate the Tutsis of the *commune*. However, the Chamber emphasises, that the question under consideration is not whether there was a JCE to commit genocide in Kivumu *commune*; rather, it is whether the Prosecution has proven beyond reasonable doubt based on the evidence in this case that the accused committed the crime of genocide through a JCE.

6. The Indictment alleges that in the days immediately following the death of President Habyarimana, a certain Télesphore Ndungutse ("Ndungutse") led attacks against three civilians, including one Grégoire Ndakubana ("Ndakubana"). The Trial Chamber is satisfied that Ndungutse participated in at least one of these killings. However, it is of the view that the Prosecution has failed to establish that Ndahimana was liable for this killing. Thus, the Chamber concludes that the Prosecution has not proven paragraph 13 of the Indictment beyond reasonable doubt.

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[1] Defence Closing Brief paras. 2-7, 523; Defence Pre-Trial Brief, paras. 10-11, 13; Prosecution Closing Brief paras. 2-3; T. 28 September 2009 p. 1; T. 6 September 2010 p. 2.
[2] T. 21 September 2011 p. 15.
[3] T. 28 September 2009 p. 2.
[4] Amended Indictment, 18 August 2010, para. 1 ("Indictment"); T. 28 September 2009 pp. 4-12; *Exception Préjudicielle*, 10 November 2009 para. 1; T. 6 September 2010 p. 2; T. 17 January 2011 p. 2.
[5] T. 21 September 2011; T. 22 September 2011.

7. The Indictment alleges that following the attacks referred to in paragraph 13 of the Indictment, Ndahimana and others ordered that Tutsi civilians be directed to the Kivumu communal office and Nyange parish in order to exterminate them. The Trial Chamber finds that the Prosecution has failed to prove this allegation beyond reasonable doubt.

8. The Trial Chamber considers that paragraph 15 of the Indictment is an introductory paragraph only and will therefore make no findings on the allegations contained therein.

9. The Indictment alleges that, on 11 April 1994, Ndahimana and members of the JCE met at the communal office to plan the extermination of the Tutsis. At this meeting they made three decisions in furtherance of this plan: (1) to request that the *préfet* assign additional *gendarmes* to the *commune* to participate in the killings; (2) to requisition a vehicle belonging to a Tutsi trader which members of the JCE used to transport assailants to Nyange parish ("the parish"); and (3) to move those Tutsi civilians who had sought refuge at the communal office to Nyange parish. Once there, the Tutsis would be prevented from leaving. The Trial Chamber finds that Ndahimana did chair a meeting at the communal office on 11 April 1994. At this meeting, decisions were taken to request more *gendarmes* from the *préfet*, to move those Tutsis who had sought refuge at the communal office to Nyange parish, and to requisition a vehicle belonging to a local Tutsi trader. However, the Trial Chamber finds that the evidence does not indicate whether the intent behind these decisions was to protect the refugees or to harm them. Thus, the Prosecution has not proven beyond reasonable doubt paragraphs 16, 17 or 18 of the Indictment.

10. The Trial Chamber further concludes that the Prosecution has not proven paragraph 19 of the Indictment beyond reasonable doubt.

11. The Indictment alleges that on or about 10-13 April 1994, Ndahimana held meetings at the communal office and Nyange presbytery ("the presbytery") with members of the JCE. Following these meetings, refugees were disarmed at the parish. The Trial Chamber finds that the evidence does not establish that Ndahimana participated in meetings at the communal office. The Trial Chamber finds, however, that on 13 April 1994, he participated in at least one meeting with members of the JCE at the presbytery. The Majority, Judge Arrey dissenting, concludes that the subject of these discussions is unknown. The Majority, Judge Arrey dissenting, finds that the evidence does not clearly establish when the refugees were disarmed and by whom. The Majority further believes, Judge Arrey dissenting, that the Prosecution has not established that the decision to disarm the refugees was taken during those meetings, nor has the Prosecution established the existence of a causal link between meetings in which Ndahimana participated and the disarmament of the refugees. Thus, the Majority, Judge Arrey dissenting in part, concludes that the Prosecution has not proven paragraph 20 of the Indictment beyond reasonable doubt.

12. The Indictment alleges that on or about 13-16 April 1994, Ndahimana made several vehicles available to his subordinates so that they could transport assailants to Nyange parish and that Ndahimana, as *bourgmestre*, knew or had reason to know of the acts of his subordinates but failed to prevent the acts or punish his subordinates. The Trial Chamber finds that the Prosecution has not proven paragraph 21 of the Indictment beyond reasonable doubt.

13. The Indictment alleges that Ndahimana met with members of the JCE at Nyange presbytery on 13 April 1994 to plan the extermination of the Tutsis. That same day, Hutu assailants launched an attack on the refugees at the instigation of Gaspard Kanyarukiga ("Kanyarukiga"), a member of the JCE. The Trial Chamber concludes that Ndahimana met at least once with members of the JCE at the presbytery that day, but no witnesses were present at this meeting and no compelling

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evidence was adduced that would allow the Chamber to infer that the decision to exterminate the Tutsis was taken during this meeting. In addition, the Majority, Judge Arrey dissenting, is of the view that the evidence does not establish whether the attack took place before or after the meeting. The Trial Chamber further concludes that Hutu assailants attacked Nyange church that day, but cannot conclusively determine that this attack took place at Kanyarukiga's instigation. Thus, the Trial Chamber finds that the Prosecution has not proven paragraph 22 of the Indictment beyond reasonable doubt.

14. The Indictment alleges that on 14 April 1994, Ndahimana met with other members of the JCE at Nyange presbytery. After this meeting, refugees told Ndahimana about the attacks against them. Ndahimana stated that Tutsis were *Inyenzi* who had killed President Habyarimana and refused to assist them. Thereafter, Ndahimana's subordinates launched an attack on the refugees at Nyange church. As *bourgmestre of* Kivumu *commune*, Ndahimana knew or had reason to know of the acts of his subordinates but failed to prevent the attack or punish those responsible for them. The Majority, Judge Arrey dissenting, finds that Ndahimana participated in one meeting during the afternoon with members of the JCE that day at Nyange parish, and that Hutu assailants attacked the parish that day. The Trial Chamber finds that the Prosecution has not proven beyond reasonable doubt that Ndahimana verbally abused the refugees at the parish that day. The Trial Chamber further finds that the Prosecution has not proven beyond reasonable doubt that Ndahimana's subordinates participated in the attack that took place that day and that he failed to prevent or punish their perpetrators. The Majority, Judge Arrey dissenting, believes that Ndahimana's partial alibi for the late afternoon and evening of 14 April 1994 is reasonably possibly true. The Majority further finds that its reasonableness has not been overcome by compelling evidence placing the accused at Nyange church on the evening of 14 April 1994. Thus, the Prosecution has not proven the allegations in paragraph 23 of the Indictment beyond reasonable doubt.

15. The Indictment alleges that on 14 April 1994, Ndahimana presided over a public meeting at Nyange market square that was attended by members of the JCE. At that meeting, Kanyarukiga instigated the crowd to kill the Tutsis at Nyange parish. The Trial Chamber finds that this allegation, in paragraph 24 of the Indictment, has not been proven beyond reasonable doubt.

16. Paragraphs 25, 26 and 27 of the Indictment allege that on 15 April 1994, Ndahimana and his subordinates had meetings at Nyange presbytery, in a building named CODEKOKI, and in front of Kanyarukiga's pharmacy. Following these meetings, Ndahimana ordered his associates and subordinates to "start working." The assailants launched an attack against the Tutsis seriously injuring and killing many of them. One of Ndahimana's subordinates led one of the groups of assailants. The Indictment further alleges that Ndahimana and his associates were present, and were ordering, instigating and supervising the assailants. They provided the assailants with weapons and fuel in an attempt to burn the Tutsi refugees in Nyange church. When these efforts failed, Ndahimana and others met again at the presbytery to plan further attacks. The Indictment further charges Ndahimana with having advised assailants to cover themselves in banana leaves in order to distinguish themselves from the Tutsis. It also alleged that Ndahimana knew or had reason to know of the actions of his subordinates and failed to prevent or punish these actions.

17. The Defence has presented an alibi for this day, specifically that Ndahimana spent the day at a house in Rufungo preparing for, and attending, the funeral of a close friend. He later travelled to see the *préfet* in Kibuye town to ask him to assign more *gendarmes* for the protection of the refugees at Nyange parish. The Trial Chamber unanimously believes that parts of the alibi are reasonably possibly true and, therefore, that the Prosecution has not proven beyond reasonable

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doubt that Ndahimana was present during the attack on the parish that took place on 15 April 1994 or that he advised assailants to dress in banana leaves. The Majority, Judge Arrey dissenting, concludes that the bulk of the alibi is reasonably possibly true; however, the Trial Chamber unanimously believes that Ndahimana returned to the parish during the evening of 15 April 1994 after the day's attack and met with members of the JCE. The Majority, Judge Arrey dissenting, is unable to infer that the only reasonable conclusion is that the attacks of 16 April 1994 were planned at the meeting that evening.

18. Given the circumstantial evidence, however, the Trial Chamber concludes that Ndahimana had reason to know of the crimes perpetrated by the communal police on 15 April 1994 and failed to punish them. The Majority, Judge Arrey dissenting, therefore, concludes that the Prosecution has only established beyond reasonable doubt this element of its allegations in paragraphs 25-27 of the Indictment.

19. Paragraph 28 alleges that members of the JCE ordered that the bodies of Tutsi victims of the attack that day be buried in mass graves. As this paragraph of the Indictment alleges no criminal *actus reus* or *mens rea*, the Chamber considers this indictment paragraph to be superfluous and will make no findings on it.

20. The Defence has presented an alibi for 16 April 1994, specifically that Ndahimana was hiding in a convent from 5 a.m. until 7 p.m. that day. The Trial Chamber concludes that this alibi is not reasonably possibly true.

21. The Indictment alleges that on 16 April 1994, Ndahimana and members of the JCE met at Nyange presbytery. Following this meeting, Ndahimana began shooting at refugees thereby signalling the start of a large scale attack. The Trial Chamber finds that the Prosecution has not proven this allegation in paragraph 29 of the Indictment beyond reasonable doubt.

22. The Indictment further alleges that on 16 April 1994, Ndahimana and members of the JCE met, planned and mutually agreed to kill the Tutsi refugees. The Majority, Judge Arrey dissenting, finds that Ndahimana's mere presence during a meeting does not necessarily mean that he shared the criminal intent of the members of the JCE or that he planned or agreed to kill the Tutsi refugees. Thus, the Majority concludes, Judge Arrey dissenting, that the Prosecution has not proven this allegation in paragraph 30 of the Indictment beyond reasonable doubt.

23. Paragraph 31 of the Indictment alleges that Ndahimana and members of the JCE ordered assailants to destroy Nyange church using a bulldozer and, as a result, 2,000 Tutsi civilians were killed. It also alleges that Ndahimana instigated and supervised the attacks. The Trial Chamber finds that the Prosecution has established that Ndahimana was present during the demolition of the church. The Majority, however, Judge Arrey dissenting, does not believe that the Prosecution has proven that Ndahimana instigated the assailants or supervised the attacks.

24. The Indictment alleges that following the destruction of Nyange church, Ndahimana and members of the JCE went to Nyange presbytery and celebrated by sharing drinks. The Trial Chamber finds that the evidence shows that Ndahimana was present after the attack of 16 April 1994 while members of the JCE were sharing drinks. However, the Majority concludes, Judge Arrey dissenting, that this Indictment paragraph alleges no criminal act and therefore, the Majority will not make a finding on this allegation.

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25. Paragraph 33 of the Indictment alleges that following the destruction of Nyange church, the bodies of Tutsis killed at Nyange parish were buried in mass graves at Nyange parish and the surrounding areas. This Indictment paragraph does not allege a criminal *actus reus* or *mens rea*. Further, this paragraph is constructed in the passive tense and does not name an individual or group who buried the bodies. The Trial Chamber, therefore, concludes that this Indictment paragraph is superfluous and will make no findings on it.

26. Turning to Ndahimana's individual criminal responsibility for the crimes committed at Nyange parish on 15 and 16 April 1994, the Majority, Judge Arrey dissenting, finds that the Prosecution has not proven beyond reasonable doubt that Ndahimana planned, instigated, ordered or committed the massacres of Tutsis. In particular, with respect to commission through a JCE, the Prosecution has not proven that Ndahimana had the specific genocidal intent to incur liability under this mode of participation.

27. However, the Trial Chamber concludes that Ndahimana had effective control over the communal police. The Majority, Judge Arrey dissenting, thus, finds that he is only criminally liable for his failure to punish crimes committed by the communal police at Nyange parish on 15 April 1994 pursuant to Article 6 (3) of the Statute of the International Criminal Tribunal for Rwanda ("Statute").

28. The Majority, Judge Arrey dissenting, further finds that the mere presence of the accused at the scene of the crime on 16 April 1994 had an encouraging effect on the principal perpetrators, particularly because the accused was in a position of authority. Accordingly, Ndahimana aided and abetted genocide under Article 6 (1) of the Statute.

29. The Majority finds Ndahimana guilty of genocide by aiding and abetting as well as by virtue of his command responsibility over the communal police (Count I). In addition, the Majority finds Ndahimana guilty of extermination as a crime against humanity by aiding and abetting as well as by virtue of his command responsibility over the communal police (Count III). Judge Arrey agrees with the Majority that Ndahimana is guilty for Counts I and III but dissents on the appropriate mode of liability. The Trial Chamber unanimously dismisses Count II.

30. Turning now to sentencing issues, the Trial Chamber finds Ndahimana's position as the leading political authority in Kivumu *commune* to be an aggravating factor. However, the Majority of the Trial Chamber, Judge Arrey dissenting, finds that this factor is mitigated by its belief that Ndahimana did not enjoy the same degree of *de facto* authority as that exercised by *bourgmestres* who were members of the MRND and/or had been in office longer than Ndahimana. The Majority also considers as a mitigating factor the fact that the scale of the operation that led to the destruction of Nyange church, and the killings of thousands of Tutsi civilians, reflected broad coordination among various groups, local and religious authorities as well as civilian assailants. Indeed, it would appear that a number of individuals in positions of authority had an interest in these acts of genocide. Such evidence in no way exonerates Ndahimana for his role in the massacre at Nyange church ("the church"). However, it does suggest that his participation through aiding and abetting may have resulted from duress rather than from extremism or ethnic hatred.

31. The Trial Chamber notes that Ndahimana assisted a number of Tutsis during this period but does not hold this selective assistance to constitute a mitigating factor.

32. The Chamber has considered the gravity of each of the crimes for which Ndahimana has been convicted, as well as aggravating and mitigating circumstances. Accordingly, the Majority of

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the Trial Chamber, Judge Arrey dissenting, sentences Ndahimana to a single sentence of 15 years of imprisonment. This sentence supersedes any other sentence imposed on Grégoire Ndahimana by any other State or institution.

33. Grégoire Ndahimana shall receive credit for time served since his arrest on the 11 August 2009, pursuant to Rule 101 (C) of the Rules. The above sentence shall be served in a State designated by the President of the Tribunal, in consultation with the Chamber. The Government of Rwanda and the designated State shall be notified of such designation by the Registrar. Until his transfer to his designated place of imprisonment, Grégoire Ndahimana shall be kept in detention under the present conditions.

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Chapter II: PRELIMINARY ISSUES

1. Notice

1.1 Introduction

34. The Trial Chamber recalls that on 5 March 2010, Grégoire Ndahimana filed a motion alleging a number of defects in the Amended Indictment.[6] On 30 April 2010, the Pre-Trial Chamber issued a decision addressing the issues raised by the Defence.[7] In its Closing Brief and Arguments, the Defence raised new allegations of defective notice.[8] The Chamber has not found it necessary to address specific challenges based on notice where, in the relevant sections of the Judgement, the Prosecution did not prove its case. The Chamber, however, finds it instructive to lay out in this section the legal principles it has applied when considering any notice issues where relevant in this Judgement.

1.2 Law

35. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[9] The Prosecution is expected to know its case before proceeding to trial, and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds. Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of the proceedings, or the exclusion of evidence outside the scope of the indictment.[10] In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.[11]

36. The Appeals Chamber has held that criminal acts that were personally and physically committed by the accused must be set forth in the indictment specifically, including, where feasible, "the identity of the victim, the time and place of the events, and the means by which the acts were committed."[12] Where it is alleged that the accused planned, instigated, ordered or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to

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[6] Defence Motion on Defects in the Amended Indictment Pursuant to Rule 72, 5 March 2010.
[7] Decision on Ndahimana's Motion on Defects in the Amended Indictment, 30 April 2010 ("Decision on Defects in the Indictment").
[8] Defence Closing Brief, paras. 107-110, 531. *See also*, T. 21 September 2011 p. 73 (The Chamber notes that the Defence puts forth that the Prosecution failed to specify the source or scope of the legal duty of the accused in its arguments put forth under Article 6 (3) of the Statute (Defence Closing Brief, para. 444). The Chamber recalls however that this issue has already been addressed in the Decision on Defects in the Indictment. Therefore the Defence's objection is groundless).
[9] *Muvunyi I* (AC) Judgement, para. 18; *Seromba* (AC) Judgement, paras. 27, 100; *Simba* (AC) Judgement, para. 63; *Muhimana* (AC) Judgement, paras. 76, 167, 195; *Gacumbitsi* (AC) Judgement, para. 49, *Ndindabahizi* (AC) Judgement, para. 16.
[10] *Muvunyi I* (AC) Judgement, para. 18; *Ntagerura et al.* (AC) Judgement, para. 27; *Kvočka et al.* (AC) Judgement, paras. 30-31; *Nivitegeka* (AC) Judgement, para. 194; *Kupreškić et al.* (AC) Judgement, para. 92.
[11] *Muvunyi I* (AC) Judgement, para. 18; *Nahimana et al.* (AC) Judgement, para. 326; *Ntagerura et al.* (AC) Judgement, para. 28; *Kvočka et al.* (AC) Judgement, para. 33.
[12] *Muhimana* (AC) Judgement, para. 76; *Gacumbitsi* (AC) Judgement, para. 49; *Ntakirutimana* (AC) Judgement, para. 32 (citing *Kupreškić et al.* (AC) Judgement, para. 89).

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identify the "particular acts" or "the particular course of conduct" on the part of the accused which form the basis for the charges in question.[13]

37. An indictment lacking this precision is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.[14] The principle that a defect in an indictment may be cured is not without limits.[15] The Appeals Chamber has held that a Pre-Trial Brief in certain circumstances can provide such information.[16] In certain circumstances, summaries of witnesses annexed to the Pre-Trial Briefs can also put the accused on sufficient notice that particular events are part of the Prosecution's case.[17]

1.3 Allegations Not Pursued

38. The Chamber considers that the Prosecution withdrew the allegations contained in paragraph 16 of the Indictment because it did not present evidence as to these allegations.[18]

2. Assessment of Evidence

2.1 Preliminary Matters

39. For the sake of consistency, the Chamber relies upon the English translations of all transcripts and exhibits. However, in instances where the French translation is clearer, the Chamber will indicate in the relevant footnote its reliance upon the French version of the document.

40. Numerous witnesses referred to the Tutsis who sought refuge in Nyange church as "refugees." The Trial Chamber notes that they would be more accurately characterised as "internally displaced persons."[19] However, for the sake of consistency with the Indictment, transcripts, evidence and other cases regarding the same incident, the Chamber will continue to use the term "refugee" when referring to those Tutsi civilians who were attacked in Nyange parish.

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[13] *Ntagerura et al.* (AC) Judgement, para. 25.

[14] *Muvunyi I* (AC) Judgement, para. 20; *Seromba* (AC) Judgement, para. 100; *Simba* (AC) Judgement, para. 64; *Muhimana* (AC) Judgement, paras. 76, 195, 217; *Gacumbitsi* (AC) Judgement, para. 49; *Ntagerura et al.* (AC) Judgement, paras. 28, 65.

[15] *Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 30 ("[T]he 'new material facts' should not lead to a 'radical transformation' of the Prosecution's case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.").

[16] *Muhimana* (AC) Judgement, para. 82; *Gacumbitsi* (AC) Judgement, paras. 57-58; *Ntakirutimana* (AC) Judgement, para. 48; *Naletilić & Martinović* (AC) Judgement, para. 45.

[17] *Ndindiliyimana et al.*, Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution from Leading Evidence on Important Material Facts Not Pleaded in the Indictment Through Witness ANF, 15 June 2006, para. 32; *Karemera et al.*, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment, 20 October 2006, paras. 33-34; *Gacumbitsi* (AC) Judgement, para. 58; *Muhimana* (AC) Judgement, para. 201.

[18] Prosecution Closing Brief, para. 29 (The Prosecution outlines the meetings and refers only to meetings on 8, 9, 11-16 of April 1994). The Prosecution did not refer to paragraph 16 of the Indictment in its Closing Brief or in its Closing Arguments; therefore, the Chamber assumes that the allegation is withdrawn.

[19] *See e.g.*, definition of refugees in Convention and Protocol Relating to the Status of Refugees, Article 1 of 1951 Convention and 1967 Protocol, and United Nations Commission on Human Rights, 54th session, item 9 (d) Guiding Principles on Internal Displacement, Scope and Purpose, Article 2, 11 February 1998.

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2.2 Burden of Proof

41. The burden of proving each and every element of the offences charged against the accused beyond reasonable doubt lies solely on the Prosecution, and never shifts to the Defence. It is not sufficient for the Chamber to prefer the Prosecution evidence to Defence evidence. The Chamber must be satisfied beyond all reasonable doubts that the accused is guilty before a verdict may be entered against him or her.[20] If there is any reasonable explanation for the evidence other than his or her guilt, the Prosecution has failed to discharge its burden of proof and the accused must be acquitted.[21]

42. While the Defence does not have to adduce rebuttal evidence to the Prosecution case, the Prosecution will fail to discharge its burden of proof if the Defence presents evidence that raises reasonable doubt regarding the Prosecution case.[22]

2.2.1 Witness Credibility

43. Broad discretion is given to the Trial Chamber in choosing which witness testimony to prefer, and in assessing the impact on witness credibility of inconsistencies within or between witnesses' testimonies and any prior statements. A witness' testimony is not automatically rendered unreliable if minor inconsistencies exist. Minor inconsistencies may include dates and times of meetings.[23] Moreover, it is within the Chamber's discretion to evaluate such inconsistencies and to consider whether the evidence as a whole is credible. It is not unreasonable for the Chamber to accept some, but reject other, parts of a witness' testimony.[24] For these reasons, the Chamber will only address discrepancies that it considers significant.

44. Hearsay evidence is evidence of facts outside the testifying witness' own knowledge. The Chamber has the discretion to cautiously consider hearsay evidence and to rely on it. Since the Chamber may admit any relevant evidence which it deems to have probative value;[25] hearsay evidence is not *per se* inadmissible.[26] However, hearsay evidence may be affected by a compounding of errors of perception, memory, narration, sincerity and recall, and should be subjected to careful scrutiny before being relied on.[27] Thus, the weight and probative value to be afforded to hearsay evidence will usually be less than that accorded to the evidence of a witness who has given it under oath and who has been cross-examined.[28]

2.2.2 Prior Statements

45. Rule 90 (A) of the Rules provides that witnesses shall be heard by the Chamber. Prior out-of-court witness statements are normally relevant only as necessary for the Trial Chamber to assess

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[20] Rule 87 (A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("Rules") (Providing that a majority of the Trial Chamber must be so satisfied). *See also, Nchamihigo* (TC) Judgement, para. 12.
[21] *Kayishema & Ruzindana* (AC) Judgement, para. 117; *Niyitegeka* (AC) Judgement, paras. 60-61; *Delalić et al.* (AC) Judgement, para. 458.
[22] *Kayishema* (TC) Judgement, para. 17; *Musema* (TC) Judgement, para. 113.
[23] *Muvunyi II* (AC) Judgement, paras. 27-28.
[24] *Muvunyi II* (AC) Judgement, para. 44.
[25] Rule 89 (C) of the Rules.
[26] *Akayesu* (AC) Judgement, paras. 284-309.
[27] *Akayesu* (AC) Judgement, paras. 284-309; *Simić et al.* (TC) Judgement, para. 22.
[28] *Kalimanzira* (AC) Judgement, para. 96; *Karera* (AC) Judgement, para. 39.

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credibility. While there is no absolute prohibition on accepting prior statements for the truth of their contents, the Appeals Chamber has held that Tribunal jurisprudence discourages this practice.[29]

46. Prior statements constitute an important tool for assessing the credibility of a witness.[30] In addition, the Chamber recalls that the record of the first interview with a witness is often of the highest value because it is most likely to capture the witness' recollections accurately, being the closest in time to events and less vulnerable to any subsequent influence.[31]

47. In its assessment of the evidence, the Chamber has discretion to determine whether alleged inconsistencies between prior statements and later testimony render the testimony unreliable.[32] On the other hand, the Appeals Chamber is of the view that prior consistent statements cannot be used to bolster a witness' credibility except to rebut a charge of recent fabrication of testimony.[33]

2.2.3 Accomplice Testimony

48. The Chamber recalls that "accomplice witness" testimony must be treated with special caution and thus requires a careful consideration of the totality of the circumstances in which such evidence is tendered when assessing its probative value.[34] The Appeals Chamber has held that the ordinary meaning of the term "accomplice" is "an associate in guilt, a partner in crime."[35] A witness may be deemed an "accomplice" for the purposes of assessing credibility where evidence of that witness' criminal involvement in the events giving rise to the charges faced by the accused is adduced during the trial.[36] The Chamber recalls that a witness may be considered an "accomplice" even if their criminal involvement in the relevant crime is yet to be proven[37] or they have already served the duration of their sentence.[38] However, a designation as an "accomplice witness" is unlikely to be justified where the witness has previously been acquitted of the relevant criminal conduct,[39] or is merely facing criminal charges similar to those of the accused.[40]

49. The Chamber considers that Prosecution Witnesses CNT, CBR, CDL, CNJ, CDK, CBT as well as Defence Witnesses ND6, ND22 and ND24 are accomplice witnesses, as each witness served or is currently serving a sentence for his participation in the events at Nyange parish in mid-April 1994. The Chamber acknowledges that the mere fact that a detained witness may have an incentive to perjure himself to gain leniency from the Rwandan authorities "is not sufficient, by itself, to establish that the suspect did in fact lie."[41]

50. The Chamber will carefully consider whether each accomplice witness had "motive to testify as they did and to lie" when assessing the probative value of such testimony.[42] In the

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[29] *Kalimanzira* (AC) Judgement, para. 180; *Nchamihigo* (AC) Judgement, para. 311.
[30] *Akayesu* (AC) Judgement, para. 169.
[31] *Niyitegeka* (AC) Judgement, para. 33.
[32] *Seromba* (AC) Judgement, para. 116; *Rutaganda* (AC) Judgement, paras. 443-447.
[33] *Ntakirutimana & Ntakirutimana* (AC) Judgement, paras. 147-148.
[34] *Nchamihigo* (AC) Judgement, paras. 47-48; *Muvunyi I* (AC) Judgement, para. 128.
[35] *Niyitegeka* (AC) Judgement, para. 98. *See also*, *Ntagerura* (AC) Judgement, para. 203.
[36] *Niyitegeka* (TC) Judgement, paras. 73, 245.
[37] *Simba* (TC) Judgement, para. 164.
[38] *Muvunyi II* (TC) Judgement, para. 14.
[39] *Ntagerura* (AC) Judgement, paras. 239-240.
[40] *Ntagerura* (AC) Judgement, paras. 239-240.
[41] *Ntakirutimana & Ntakirutimana* (AC) Judgement, para. 181.
[42] *Ntagerura* (AC) Judgement, para. 206 (citing *Čelebići* (TC) Judgement, paras. 759, 762); *Kordić & Čerkez* (TC) Judgement, para. 630.

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Nchamihigo case, the Appeals Chamber listed the following factors as being particularly relevant for the assessment of whether an accomplice witness had motive or incentive to fabricate their testimony:[43] the extent to which discrepancies in the testimony were explained;[44] whether the accomplice witness made a plea agreement with the Prosecution; whether the witness has already been tried; whether the witness has been sentenced or is still awaiting the completion of their trial;[45] whether the witness may have any other reason for holding a grudge against the accused;[46] and whether the evidence of the witness is corroborated.[47] It is important to note that this list is not exhaustive—the Trial Chamber retains full discretion to assess the credibility of a witness' testimony on a "case-by-case" basis.

51. The jurisprudence indicates that the most relevant factor in assessing whether an accomplice witness had motive seems to be whether their testimony will positively affect their own case. In *Kordić & Čerkez*, the Trial Chamber noted that the "prospect of obtaining a discount in sentence" was relevant to motive, as was "the extent his evidence is confirmed by other evidence."[48] Similar considerations were evident in the *Niyitegeka* case, where the Appeals Chamber noted that motive may stem from an accomplice's incentive "to craft his testimony to affect his own case or to ensure a lighter sentence."[49]

52. Therefore, while accomplice witnesses will be considered with caution, a lesser degree of caution will be employed towards witnesses for which no special circumstances or no particular motive to lie can be identified.

2.2.4 Alibi Evidence and Burden of Proof

53. Although the Defence has provided an alibi for 6-9 April 1994, the Chamber will make no findings concerning the adduced evidence relating thereto as it is not relevant to the charges against Ndahimana.[50] The Chamber is reminded that Rule 67 (A) (ii) (a) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("Rules") states that the Defence shall notify the Prosecutor of its intent to raise an alibi "prior to the commencement of the trial," which includes the "names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi." The Defence has also provided an alibi for 14-16 April 1994. The first Notice of Alibi was filed on the 3 September 2010; the names and addresses of some of the relevant witnesses were disclosed on 21 September 2010. In relation to the alibi for 16 April 1994, only the name and address of Witness BX3 was disclosed on 21 September 2010, before the end of the Prosecution case. The names and addresses of Witnesses ND35 and ND17 were disclosed respectively on 7 April 2011 and 13 April 2011, almost at the end of the Defence case.

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[43] *Nchamihigo* (AC) Judgement, para. 47.
[44] *Simba* (AC) Judgement, para. 129.
[45] *See Blagojević & Jokić* (TC) Judgement, para. 24.
[46] *See Kajelijeli* (TC) Judgement, para. 151.
[47] *See Nchamihigo* (AC) Judgement, para. 45 (Although relevant, corroboration is not required).
[48] *Kordić & Čerkez* (TC) Judgement, paras. 628, 630.
[49] *Niyitegeka* (AC) Judgement, para. 98.
[50] Witness KR3: T. 24-25 February 2011; Witness Munsy: T. 28 February 2011 p. 2; Witness BX3: T. 23 February 2011 p. 8; Witness Rucyeribuga: T. 21 February 2011 pp. 45, 49 (All testified concerning Ndahimana's journey from Kigali through Gitarama to Kivumu between 6-9 April 1994). *See also*, Prosecution Closing Brief, paras. 211-227.

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54. The alibi covering 15 April 1994 was filed in a timely manner, at the beginning of the Prosecution case.[51]

55. In relation to the alibi covering 16 April 1994, the Chamber recalls that failure to raise an alibi in a timely manner can impact a Trial Chamber's findings,[52] as it may take such failure into account when weighing the credibility of the alibi.[53] The Chamber will take into account the Defence's late submission of the Notice of Alibi when assessing the credibility of the alibi for 16 April 1994.

56. The Chamber further recalls that in raising an alibi, the accused not only denies that he committed the crimes for which he is charged, but also asserts that he was elsewhere than at the scene of these crimes when they were committed. As discussed above, the onus is on the Prosecution to prove the guilt of the accused beyond reasonable doubt. Thus, in establishing its case, when an alibi defence is introduced, the Prosecution must discredit the alibi defence beyond reasonable doubt. That is, the Prosecution must prove that the accused was present and committed the crimes for which he is charged. As reiterated in the *Zigiranyirazo* Appeals Judgement, an alibi defence does not carry a separate burden of proof. Rather, the finder of fact—that is, the Chamber—must consider whether the Defence presented alibi evidence that is "likely to raise a reasonable doubt in the Prosecution case," and "[i]f the alibi is reasonably possibly true, it must be accepted."[54] To sustain a conviction, the Prosecution must demonstrate that, regardless of the alibi, the facts as alleged are true beyond reasonable doubt, either by demonstrating that the alibi evidence offered does not negate the presence of the accused at the critical place and time, or that the alibi evidence is not credible.[55] In sum, the Chamber may reject an alibi only if the Prosecution establishes "beyond a reasonable doubt that, despite the alibi, the facts alleged are nevertheless true."[56]

2.2.5 *Gacaca* Courts

57. The Chamber is aware that Ndahimana was convicted by *Gacaca* courts prior to his trial before the ICTR.[57] The Chamber notes that the parties did not raise any objection with regard to potential double jeopardy. In any event, the Chamber recalls that the judgement in this case supersedes any other judgement imposed on Grégoire Ndahimana by any other state or institution. (*see* Chapter V, Sentencing).

58. Addressing now the *Gacaca* records, the Chamber acknowledges that Rwandan judicial records are a valuable tool when assessing the credibility of witnesses, particularly when used during witness examinations. In the present case, the Chamber has considered the *Gacaca* court records filed as exhibits in its determination of the individual credibility of the witnesses.

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[51] The Chamber recalls that names and addresses of Witnesses Anicet Tumusenge, Thérese Mukabideri, Beatrice Mukankusi and Clément Kayishema were disclosed on 21 September 2010 (*See* Supplement to the Notice of Alibi filed on 3rd September 2010, 21 September 2010).

[52] *Rutaganda* (AC) Judgement, fn. 392. *See also*, Prosecution Closing Brief, para. 208.

[53] *Kajelijeli* (TC) Judgement, para. 164; *Kamuhanda* (TC) Judgement, para. 82; *Musema* (TC) Judgement, para. 107; *Niyitegeka* (TC) Judgement, para. 50; *Kayishema & Ruzindana* (TC) Judgement, para. 237; *Semanza* (TC) Judgement, para. 82.

[54] *Zigiranyirazo* (AC) Judgement, para. 17.

[55] *Zigiranyirazo* (AC) Judgement, para. 18.

[56] *Musema* (AC) Judgement, para. 202.

[57] *See e.g.*, Defence Exhibit 97.

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59. The Chamber recalls that both the Trial Chamber and the Appeals Chamber have, on different occasions, emphasised that *Gacaca* proceedings remain purely Rwandan in nature and that the *Gacaca* courts constitute a separate and distinct judicial body from the ICTR. For this reason, although *Gacaca* records may be valuable resource, the content of these records is never binding or authoritative before this Tribunal.[58]

60. The Trial Chamber has also considered the testimonies of two *Gacaca* judges involved in the *Gacaca* proceedings relating to the accused, specifically Witnesses ND8 and ND9. The Chamber observes that both witnesses were aware that Ndahimana was tried *in absentia*.[59] Further, both witnesses testified that, in the *Gacaca* trials, Prosecution witnesses CDL, CBR and CBN all falsely alleged that the accused participated in attacks on Nyange church. Their assertions were based on allegations made by members of the public at the time the Prosecution witnesses testified.[60] The Chamber notes that it prefers to rely on the evidence introduced during the current hearing to assess the credibility of these witnesses.[61]

61. The Chamber also has some reservations about Witnesses ND8 and ND9's credibility. Specifically, the Chamber observes that it is unclear exactly how Witness ND8, who was not a judge assigned to hear Ndahimana's case, managed to follow the case so closely from beginning to end.[62] Further, Witness ND9 explained to this court that the judges in the *Gacaca* hearing intended to acquit Ndahimana on the basis that he was innocent of the crimes alleged. When asked to provide further information about this statement in cross examination, Witness ND9 said that the only persons who testified against him were co-perpetrators, but that the public and all defence witnesses believed Ndahimana was innocent.[63] In addition, the Chamber notes that Witness ND9 falsely testified that the law on the *Gacaca* courts stipulated that all persons of authority at the *commune* level had to be found guilty.[64] For these reasons, the Chamber does not find these witnesses credible.

[58] *Renzaho* (AC) Judgement, paras. 460, 469; *Bizimungu et al.* (TC) Judgement, para. 493.
[59] Witness ND8: T. 27 Jan 2011 p. 48 (ICS); Witness ND9: T. 25 Jan 2011 p. 71 (ICS).
[60] Witness ND8: T. 27 Jan 2011 pp. 51-54 (ICS); Witness ND9: T. 26 Jan 2011 pp. 4-7.
[61] *Nahimana et al.* (AC) Judgement, para. 194; *Bikindi* (AC) Judgement, para. 114; *Nchamihigo* (AC) Judgement, paras. 47, 285.
[62] T. 27 January 2011 pp. 47-48 (ICS).
[63] T. 26 January 2011 pp. 19-20 (ICS).
[64] T. 26 January 2011 p. 23 (ICS).

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CHAPTER III: FACTUAL FINDINGS

1. Attacks on Civilian Homes, 6-11 April 1994

1.1 Introduction

62. Paragraph 13 of the Indictment alleges that following the death of the Rwandan President on 6 April 1994, Télesphore Ndungutse led attacks against Tutsi civilians in their homes in Kivumu *commune*, killing Martin Karekezi, Thomas Mwendezi and some members of the family of Grégoire Ndakubana in furtherance of the JCE. The Prosecution did not address this Indictment paragraph in its Closing Brief or Closing Arguments.

63. The Defence submits that no Prosecution witness linked Ndahimana with the attacks alleged in paragraph 13 of the Indictment.[65] In addition, Ndahimana was in Kigali when the attacks took place and therefore had no knowledge about the incidents. When informed about the incidents upon his return to Kivumu *commune*, he immediately arrested those alleged to have participated in these killings. The suspects were later released by the inspector of the judicial police ("IPJ"), Fulgence Kayishema ("Kayishema" or "IPJ Kayishema").[66]

64. Although the Defence has provided an alibi for 6-9 April 1994, the Chamber will make no findings concerning the adduced evidence relating thereto as it is not relevant to the charges against the accused in this case.[67]

1.2 Evidence

1.2.1 Prosecution Witness CDL

65. Prosecution Witness CDL, a Hutu, was a teacher, and lived in Nyange *secteur*, Kivumu *commune* in April 1994. He has been convicted in Rwanda for crimes committed in Kivumu *commune* in April 1994.[68] Witness CDL was working in the communal office when Ndahimana took office in late October or early November 1993 and met him at that time.[69]

66. On 7 April 1994 Hutu attackers began killing Tutsi civilians in an area of Kivumu *commune* know as Murambi. During the night of 7 April 1994, assailants, led by Ndungutse, a Hutu teacher and Vice-Chairman of the MRND, attacked the Ndakubana family killing two children and injuring other family members who were taken to the hospital the next day. Other Tutsis killed during this period included Thomas Mwendezi, who lived in Kigali *secteur*, Martin Karekezi, an agricultural extension worker, and Mr. Muhigirwa, a businessman working by the Statue of the Virgin Mary. Gaspard Gasigwa was arrested in connection with the killing of Mwendezi. A certain Callixte and others suspected of having participated in the killing of Karekezi were also arrested. Other

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[65] Defence Closing Brief, para. 91.
[66] Defence Closing Brief, paras. 93-94.
[67] Witness KR3: T. 24 and 25 February 2011; Witness Munsy: T. 28 February 2011 p. 2; Witness BX3: T. 23 February 2011 p. 8; Witness Rucyeribuga: T. 21 February 2011 pp. 45, 49 (all testified concerning Ndahimana's journey from Kigali through Gitarama to Kivumu between 6-9 April 1994). *See also*, Prosecution Closing Brief, paras. 211-227.
[68] T. 11 November 2010 p. 57 (ICS); Prosecution Exhibit 46.
[69] T. 11 November 2010 p. 57 (ICS).

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perpetrators were not detained. The suspects were released the day after they were arrested,[70] but the witness did not say who released the detainees.

1.2.2 Prosecution Witness CDZ

67. Prosecution Witness CDZ, a Tutsi, was a businessman in Kivumu *commune* in April 1994.[71] He knew Ndahimana well.[72]

68. The Ndakubana family lived in Nyange *secteur*. On 7 April 1994,[73] the family was attacked and two children and a visitor were killed.[74] Witness CDZ's niece was wounded during the attack. The witness then went to see IPJ Kayishema to inform him that the family had been attacked and to request his intervention to stop the killings.[75] Kayishema refused to arrest the perpetrators arguing that others might kill the surviving family members if he arrested the perpetrators.[76]

1.2.3 Prosecution Witness CBN

69. Prosecution Witness CBN, a Tutsi farmer, lived in Kivumu *commune* in April 1994.[77]

70. According to the witness, during the night of 9 April 1994, the Ndakubana family in Nyange *secteur* was attacked. Members of the family were killed by attackers wielding machetes. That same night a certain Thomas was killed. The suspects in Thomas' killing were detained and released the next day.[78] The witness provided no foundation for his knowledge about this incident.

1.2.4 Prosecution Witness CNJ

71. Prosecution Witness CNJ, a Hutu, lived in Gasave *secteur* in Kivumu *commune* in April 1994.[79] He knew that Ndahimana was the *bourgmestre* of Kivumu *commune* during the conflict.[80]

72. The witness would pass in front of Ndakubana's house every day on his way to the market. Ndakubana's family was attacked during the night of 7 April 1994 by assailants led by Ndungutse.[81] The next day, the witness went to Ndakubana's house and observed that two people had been killed.[82] IPJ Kayishema came to the scene but made no arrests. He simply asked that a person who had been injured in the attack be taken to the health centre. Subsequently, Witness CNJ heard that two or three persons had been arrested and that following a meeting held at the communal office on 11 April 1994, the suspects were released.[83]

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[70] T. 11 November 2010 pp. 60-62.
[71] T. 8 September 2010 p. 25; Prosecution Exhibit 4.
[72] T. 8 September 2010 p. 37.
[73] T. 8 September 2010 p. 38.
[74] T. 8 September 2010 pp. 30 (ICS), 38.
[75] T. 8 September 2010 p. 38.
[76] T. 8 September 2010 p. 38.
[77] T. 13 September 2010 p. 15; Prosecution Exhibit 6.
[78] T. 13 September 2010 pp. 13-14.
[79] T. 4 November 2010 p. 42; Prosecution Exhibit 20.
[80] T. 4 November 2010 p. 43.
[81] T. 4 November 2010 p. 63 (ICS).
[82] T. 4 November 2010 p. 63 (ICS).
[83] T. 4 November 2010 p. 64 (ICS).

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1.2.5 Prosecution Witness CBR

73. Witness CBR, a Hutu, lived in Nyange *secteur* in Kivumu *commune* in April 1994.[84] He has been convicted of participating in the genocide.[85] He knew that Ndahimana was the *bourgmestre* of Kivumu *commune*.[86]

74. On 7 April 1994, Ndungutse informed the witness and others that "the head of state had been killed by "*Inyenzi*," and asked them to "avenge [the President's] death."[87] Ndungutse had incited the local population against Tutsis in a similar manner in 1990, but the *bourgmestre* at the time had put a stop to such activities.

75. Ndungutse then said he was going to the communal office.[88] Upon his return to a location known as Karuteyi between 2 and 3 p.m., he addressed a meeting and met with a crowd of people which included the witness. Ndungutse was accompanied by fellow teachers, Innocent Tuyisenge, Bosco Uwayezu, Tharcisse Nyiribuga, and Dominque Hakizimana, as well as by Witness KR3.[89] Ndungutse then "called upon us to go and kill the Tutsis beginning with a certain Ndakubana."[90]

76. At dusk, a group of assailants, including the witness, gathered arms at Ndungutse's house and left for Ndakubana's house. Ndungutse did not accompany them. Ndakubana's sons were at first able to repel the attackers. The attackers reported their failure to Ndungutse who went to Witness KR3's house. Witness KR3 provided Ndungutse with reinforcements from Ndaro and the assailants returned to Ndakubana's home with these reinforcements. Upon their return to the Ndakubana house, the attackers killed two of the five remaining members of Ndakubana's family, and injured the three others.[91] Everyone knew the identities of the attackers, "but the communal authorities incarnated by Ndahimana did not bother us."[92] On the contrary, on the day following the killings, members of the Ndakubana family complained to the "communal administration" about Ndungutse, but when IPJ Kayishema and Joseph Habiyambere ("Habiyambere"), a local judge, arrived at the scene of the crime they only asked the assailants to bury the bodies. One of the surviving victims then told Kayishema and Habiyambere that Ndungutse led the attack and pointed to other assailants who were present at the scene that day. He then asked why the assailants were only being asked to bury the victims. Kayishema and Habiyambere replied "...if you can show us the person who killed the head of state, we will also show you the killers of members of your family." There was no investigation and the perpetrators suffered no repercussions for this crime during the time Ndahimana was the *bourgmestre*.[93]

1.2.6 Defence Witness ND13

77. Witness ND13, a Hutu, was an employee of Kibuye *préfecture* in April 1994.[94]

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[84] T. 1 November 2010 p. 6; Prosecution Exhibit 14.
[85] T. 1 November 2010 pp. 9, 38, 48.
[86] T. 1 November 2010 p. 6.
[87] T. 1 November 2010 p. 7.
[88] T. 1 November 2010 p. 7.
[89] T. 1 November 2010 p. 8.
[90] T. 1 November 2010 p. 7.
[91] T. 1 November 2010 pp. 7-9.
[92] T. 1 November 2010 p. 9.
[93] T. 1 November 2010 pp. 10-11.
[94] T. 17 January 2011 pp. 11-12 (ICS), 39; Defence Exhibit 84.

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78. Witness ND13 testified that Ndungutse was communal Vice-Chairman of the MRND party in April 1994. Ndungutse was one of the masterminds of the massacres committed in Kivumu *commune* in 1994.[95] Ndungutse was not under Ndahimana's authority in April 1994.[96] Ndungutse's superior was the school inspector of the *secteur* Jean Baptise Kagenza, who was also Chairman of the MRND party in the *commune*.[97]

1.2.7 Defence Witness ND3

79. Witness ND3 is a Hutu. His father was a Kivumu *commune conseiller* in April 1994.[98] The witness first met Ndahimana in late 1993 when he came to borrow a vehicle from the witness' father.[99]

80. Members of Ndakubana's family were killed on 7 April 1994. Following this attack, the security situation in the *commune* worsened.[100] The witness could see the Ndakubana home from his own home. The witness was told by his father that Télesphore Ndungutse and Witness CBR led the attack on the Ndakubana family.[101]

81. On 10 April 1994, Ndahimana wrote the witness' father a letter stating:

> "I am hereby writing this letter to request that you ensure security in the *secteur* that is under you or the *secteur* for which you are the *conseiller*. Mr. *Conseiller*, since it appears that security has been deteriorating increasingly in your *secteur*, I am hereby urging you to do the following: To continue to ensure the safety and security of the population; to avoid discord; to ensure in particular, the control of borders with the neighbouring *préfectures*, since those sowing trouble in these *préfectures* may infiltrate this *commune* and disrupt its peace."[102]

82. The original letter was kept by the witness' father among his papers.[103]

1.2.8 Defence Witness ND4

83. Witness ND4, a Hutu, was a 13 year old student in April 1994. His father was a member of the MDR.[104]

84. When Ndahimana learned of problems in the region, he first sent the witness' father "an oral message." On 11 April 1994, Ndahimana wrote the witness' father a letter in which he stated:

> "Some persons have started committing violence -- or have started committing ethnically motivated violence against their neighbours. I hope, without any doubt, that you are going to address the members of the MDR party that you lead and to advise them not to assault anyone on the basis of their ethnicity, like Mr. Ndungutse

[95] T. 17 January 2011 p. 34.
[96] T. 17 January 2011 p. 35.
[97] T. 17 January 2011 p. 35.
[98] T. 15 February 2011 p. 15 (ICS); T. 17 February 2011 p. 11.
[99] T. 15 February 2011 p. 15 (ICS).
[100] T. 15 February 2011 p. 16 (ICS).
[101] T. 17 February 2011 pp. 7-8 (ICS).
[102] T. 17 February 2011 pp. 2-3; Defence Exhibit 108B.
[103] T. 17 February 2011 pp. 22-23.
[104] T. 17 February 2011 pp. 29, 41 (ICS).

is doing in collaboration with his accomplices."[105]

85. On an unspecified date, Ndungutse paid a visit to the witness' father and told him, "We'll end up knowing what you and Ndahimana are doing. If you are not *Inyenzis*, you are the accomplices of the *Inyenzi*, unless you start associating with me in what I am doing." The witness' father replied that he had nothing against Tutsis, and Ndungutse then left.[106]

86. On a Tuesday, which was a market day, "when calm had returned…after things had abated," Ndungutse addressed a crowd at Bambiro market square. Ndungutse read out a list of persons whom he named as "cowards" and announced they would have to buy drinks as "fines." Among those named as cowards were the witness' father and Ndahimana.[107]

1.2.9 Defence Witness ND5

87. Defence Witness ND5, a Hutu, was a farmer in April 1994.[108]

88. Between 8 and 10 p.m. on the night of 9-10 April 1994, attackers in the witness' *cellule* killed an old man named Thomas Mwendezi.[109] On the next day, 10 April 1994, the witness and five others were arrested by policemen named Adrien Niyitegeka[110] ("Niyitegeka") and Télesphore Munyantarama ("Munyantarama") in connection with the killing. During the arrest, the witness tried to explain to the police officers that he had not participated in the crime, but Niyitegeka told him that he had been directed by Ndahimana to arrest the suspects, including the witness. The suspects were taken by the police to the communal office where they met with Ndahimana. When the suspects argued that they had not been involved in Mwendezi's killing, Ndahimana decided that they would spend the night in a communal holding cell while waiting for the inspector of the judicial police to conduct an investigation. The next day, the suspects met with IPJ Kayishema for approximately 40 minutes. He then told them they could go home while he completed his investigation. The witness did not believe Ndahimana had played a role in his release that day.[111]

1.2.10 Defence Witness KR3

89. Witness KR3, a Hutu, worked in Kivumu *commune* in 1994.[112]

90. Ndahimana was in Kigali when President Habyarimana was killed. He returned to Kivumu *commune* on 9 April 1994.[113]

91. The witness was told that two children in the Ndakubana family were killed and that two other members of the family were injured in the days following the death of President Habyarimana. The family lived in Nyange *secteur* not far from the witness' own home.[114] In

[105] T. 17 February 2011 pp. 31-32, 35-36 (ICS).
[106] T. 17 February 2011 pp. 38 (ICS), 44-45 (French transcript: *Huis Clos*).
[107] T. 17 February 2011 pp. 39-41 (ICS), 53-55.
[108] T. 26 January 2011 p. 50; Defence Exhibit 98.
[109] T. 26 January 2011 p. 50.
[110] Niyitegeka was also know as "Maharamu" or "Gichade."
[111] T. 26 January 2011 pp. 50-53.
[112] T. 24 January 2011 p. 52; Defence Exhibit 95.
[113] T. 24 January 2011 pp. 57-58 (ICS).
[114] T. 24 January 2011 pp. 65-66.

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response, "it was decided that *commune* policemen and members of the *cellule* committees should ensure the protection of the population."[115]

92. On or about 8 April 1994, Ndungutse asked the witness to participate in the attack on the Ndakubana family, but the witness refused. Subsequently, Ndungutse sought to have the witness killed "because [the witness] had refused to accompany him in the attack he intended to launch against the home of Ndakubana."[116] The witness then began travelling accompanied by communal police but when he realised this was unsustainable, the witness told Ndahimana about the problem. When Ndahimana learned of Ndungutse's threats, "he acted." Ndahimana asked the communal police brigadier, Jean Bosco Abayisenga ("Abayisenga") to disarm Ndungutse which Abayisenga did together with an army reservist named Boniface Kabalisa ("Kabalisa"), and "this put an end to the problem…because Ndungutse no longer had a firearm."[117]

1.2.11 Defence Witness ND34

93. Witness ND34, a Hutu, lived in Kivumu *commune* in April 1994.[118] Ndahimana was the witness' neighbour.[119] The witness first saw Ndahimana at an MDR meeting held in Nyange *secteur* in 1993.[120]

94. The security situation in Kivumu *commune* deteriorated immediately after the death of President Habyarimana. The family of a certain Thomas was attacked on 8 April 1994. On 9 April 1994, a group led by Callixte Munyaneza, Théoneste, Modeste and Venuste attacked Martin Karekezi.[121] On a Sunday at approximately 8 a.m.,[122] the witness saw Ndahimana arrive at the Karekezi home in the company of two communal policemen, one of whom was named Leonard Kibyutsa. Ndahimana asked persons who had gathered at the scene about the killings, and they provided the names of suspects in the Karekezi killing.[123] On 11 April 1994, the witness saw one of the suspects who told him that he and his associates had been released that day by IPJ Kayishema and that Kayishema had told the suspects that he alone was responsible for conducting investigations.[124]

1.3 Deliberations

95. The Defence asserts that Ndahimana was not in Kivumu *commune* on the days the killings took place.[125] As Ndahimana is not accused of having personally participated in the attacks alleged, his presence in Kivumu *commune* when the attacks took place is not pertinent. What is relevant is whether Ndahimana planned or instigated the attacks, or whether he knew about the attacks and the identities of the suspected perpetrators, and failed to take adequate preventive or punitive measures.

96. The Trial Chamber observes that paragraph 13 of the Indictment refers only to crimes in which Télesphore Ndungutse is alleged to have participated, although it mentions three separate

[115] T. 24 January 2011 p. 67.
[116] T. 25 January 2011 p. 7 (ICS).
[117] T. 25 January 2011 pp. 7-8 (ICS).
[118] T. 17 February 2011 p. 61.
[119] T. 17 February 2011 pp. 60-61.
[120] T. 17 February 2011 p. 30 (ICS).
[121] T. 17 February 2011 p. 63.
[122] The Trial Chamber infers that this was Sunday, 10 April 1994.
[123] T. 17 February 2011 p. 63.
[124] T. 17 February 2011 p. 64.
[125] Defence Closing Brief, paras. 93-94; T. 21 September 2011 p. 68.

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killings. On the basis of the direct and hearsay evidence provided by Witnesses ~~CDL~~, CNJ, CBR, KR3, ND3 and ND4, the Chamber is satisfied that Télesphore Ndungutse participated in the attack on the Ndakubana family, in which two children were killed and others were injured. The evidence does not support the allegation that he also participated in the killings of Martin Karekezi or Thomas Mwendezi. On the evidence of Witnesses CDL and CBN, the Trial Chamber is satisfied that Ndahimana took measures to arrest suspects in the Karekezi murders and the Mwendezi murders. Witness CNJ testified that he heard that two or three unnamed persons had been arrested and later released in connection with the Ndakubana killings.[126] However, the Chamber notes that this vague, hearsay evidence was uncorroborated. In any event, no evidence has been adduced that Ndahimana initiated disciplinary or punitive proceedings against Ndungutse.

97. The Trial Chamber recalls that Defence Exhibit 110C, a letter from Ndahimana to a local representative of the MDR, indicates that on 11 April 1994, Ndahimana was aware that Ndungutse was responsible for "assault[ing]" persons "on the basis of their ethnicity."[127] In addition, Witness ND4 testified that his father, to whom the letter was addressed, knew that Ndungutse was responsible for the attack on the Ndakubana family.[128] In his letter to Witness ND4's father, Ndahimana asked Witness ND4's father to work to reduce inter-ethnic tensions.[129] The Trial Chamber also considers it relevant that at an unspecified time around May 1994, Ndahimana had Ndungutse disarmed by the new brigadier of the communal police when he learned that Ndungutse was threatening Witness KR3.[130]

98. The Majority notes that Ndahimana's letter to Witness ND4's father does not specifically refer to the killings of the Ndakubana family. The *bourgmestre* also had poor relations with Télesphore Ndungutse, who was a member of the MRND. In fact, Ndungutse threatened to kill the witness for refusing to accompany Ndungutse when he launched an attack on Ndakubana on or about 8 April 1994.[131]

99. The Chamber finds that it cannot conclude beyond reasonable doubt that Ndahimana knew about Ndungutse's role in that particular killing, which would have required Ndahimana to take stronger punitive measures against Ndungutse at the time. On this basis, the Trial Chamber cannot hold Ndahimana liable for crimes committed by Télesphore Ndungutse.

2. Meeting at the Communal Office, 11 April 1994

2.1 Introduction

100. Paragraph 16 of the Indictment alleges that: "On or about 10 April 1994, Grégoire Ndahimana, Athanase Seromba ("Father Seromba" or "Seromba"), Fulgence Kayishema, Gaspard Kanyarukiga and other members of the JCE attended a meeting at the Kivumu communal office in order to plan the extermination of the Tutsis and to request *gendarmes* from Kibuye *préfecture* to join in the killings."

101. Paragraph 17 of the Indictment alleges that: "On or about 11 April 1994, Grégoire Ndahimana, Fulgence Kayishema, Télesphore Ndungutse, Védaste Murangwabugabo, also known

[126] T. 4 November 2010 p. 64 (ICS).
[127] T. 17 February 2011 pp. 35-36 (ICS).
[128] T. 17 February 2011 pp. 7-8 (ICS).
[129] T. 17 February 2011 pp. 31-32, 35-36 (ICS).
[130] T. 25 January 2011 pp. 7-8 (ICS).
[131] T. 25 January 2011 p. 7 (ICS).

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as Védaste Mupende, *conseillers* and others whose identities are unknown, held a meeting at the Kivumu communal office at which it was decided to requisition a vehicle belonging to…[Witness CDZ], which Fulgence Kayishema and others used to transport assailants to Nyange parish and to make announcements encouraging the population to attack Tutsis."

102. Paragraph 18 of the Indictment alleges that: "On or about 11-13 April 1994, Grégoire Ndahimana, Fulgence Kayishema, Télesphore Ndungutse, Védaste Murangwabugabo also known as Védaste Mupende and others whose identities are unknown decided to move all the Tutsis at the Kivumu communal office to Nyange parish, and to send *gendarmes* to Nyange parish to confine the Tutsis in furtherance of the JCE."

103. The Prosecution relies on the evidence of Prosecution Witnesses CBR, CDZ, CDL and CNJ.

104. The Defence does not dispute that Ndahimana chaired a security meeting at the communal office on 11 April 1994, but contends that all decisions taken at the meeting were for the purpose of maintaining security and order in the *commune*.[132] The Defence also argues that since several prominent Tutsis in the *commune* participated in the meeting, it is inconceivable that decisions would have been taken at the meeting that were hostile to the interests of Tutsis in the *commune*.[133] The Defence relies on the evidence of Witnesses ND23, KR3, ND1 and Beatrice Mukankusi to rebut the Prosecution's theory that the purpose of the meeting was to begin planning the destruction of the Tutsi population in the *commune*.

2.2 Evidence

2.2.1 Prosecution Witness CDZ

105. Witness CDZ, a Tutsi businessman, resided in Kivumu *commune* in 1994. He knew Ndahimana was the *bourgmestre* of Kivumu *commune* and sometimes met and interacted with him.[134]

106. After President Habyarimana's death on 6 April 1994, "people began to get killed gradually."[135] *Bourgmestre* Ndahimana organised a security meeting on 11 April 1994 at the Kivumu *commune* office attended by the region's *conseillers* and *commune* department heads.[136] The witness did not attend the meeting, but immediately following the meeting, Ndahimana sent him a letter delivered by IPJ Kayishema requisitioning his Toyota Stout pickup vehicle.[137] According to the letter, because of the instability in Kivumu *commune*, the participants of the security meeting held that same day decided that the witness should turn over his vehicle to the communal office at 4:15 p.m.[138] The witness interpreted this letter as an "order…not a mere request

[132] Defence Closing Brief, para. 124.
[133] Defence Closing Brief, para. 122.
[134] T. 8 September 2010 p. 25.
[135] T. 8 September 2010 p. 28 (ICS).
[136] T. 8 September 2010 pp. 27, 28 (ICS) (Witness CDZ testified that he saw several *conseillers* leaving the communal office on his way there: Laurent Sindabyemera, *conseiller* of Sanza *secteur*, Callixte Niyibizi, Télesphore Mahame, Gaspard Gatwaza, *conseiller* of Kivumu *secteur*, and Jean-Marie Vianney Habarugira, *conseiller* of Nyange *secteur*; upon arrival at the communal office he saw Father Baltazar Hitimana, a woman named Thérese Mukabidene and *Conseiller* Munyarukato of Ngobagoba *secteur*). *Cf.*, Defence Exhibit 14, pp. 3-4.
[137] T. 8 September 2010 pp. 27, 30, 31 (ICS); Prosecution Exhibit 5.
[138] T. 8 September 2010 pp. 30-31 (ICS).

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for assistance."[139] He understood the term "security" to mean the complete lack of "security" and "peace" since the death of President Habyarimana on 6 April 1994.[140]

107. Upon receiving the letter from IPJ Kayishema, the witness drove his vehicle to the communal office. Once there, Ndahimana asked the witness to drive him to the border between Kibilira *commune* and Kivumu *commune* in order to inspect the security situation there. The witness refused to follow the directive because he feared he would be killed. However, the witness promised to get a certain Uwimana Jigoma to drive the vehicle for Ndahimana.[141]

108. When the witness arrived at the communal office, he saw three vehicles similar to his own, all belonging to Hutus, and the communal vehicle, a red Toyota Hilux. On this basis, he concluded that Ndahimana specifically wanted the witness, a Tutsi, to drive his vehicle to the border because Ndahimana believed the witness would be killed there.[142]

109. The witness did not know why the 11 April 1994 meeting was held, but noted that it coincided with the beginning of the killings of Tutsis in the *commune*.[143]

2.2.2 Prosecution Witness CBR

110. Witness CBR, a Hutu, resided in Kivumu *commune* in 1994.[144] He was tried and convicted for his participation in the crimes committed at Nyange parish and elsewhere in Kivumu *commune* in April 1994.[145] He was re-arrested a few months before coming to testify in this trial.[146] He knew that Ndahimana was the *bourgmestre* and saw him a number of times prior to the events of April 1994 around Kivumu *commune* either driving the red communal vehicle or passing on foot.[147]

111. On 10 April 1994, an announcement was made in Nyange church that a meeting would take place the next day at the communal office. This meeting, which Ndahimana "convened," included the "service heads…leaders of political parties and the various leaders of the various denominations."[148] The witness did not attend the meeting but was told about it by Télesphore Ndungutse.[149] Immediately after the meeting, the vehicle of a Tutsi businessman, a well-known member of the population, was forcibly seized "under the pretext that the vehicle was going to help the authorities in ensuring the security of refugees."[150] That same vehicle was used to ferry *gendarmes* to the church.[151] On 14 April 1994, the witness saw IPJ Kayishema driving this particular vehicle throughout the witness' cellule. Using a megaphone, Kayishema directed the

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[139] T. 8 September 2010 p. 50 (ICS).
[140] T. 8 September 2010 pp. 28-31 (ICS).
[141] T. 8 September 2010 p. 32 (ICS).
[142] T. 8 September 2010 pp. 31, 32 (ICS).
[143] Defence Exhibit 14.
[144] Prosecution Exhibit 14.
[145] T. 1 November 2010 p. 49.
[146] T. 1 November 2010 pp. 1, 51-53 (ICS).
[147] T. 1 November 2010 p. 6.
[148] T. 1 November 2010 p. 14.
[149] T. 1 November 2010 p. 14.
[150] T. 1 November 2010 p. 14.
[151] T. 1 November 2010 p. 14.

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population to save Nyange parish from the *Inyenzi*,[152] a word which was understood by the local population to refer to the Tutsis.[153]

2.2.3 Prosecution Witness CDL

112. Witness CDL, a Hutu, was a teacher in April 1994.[154] He was a member of the MDR political party,[155] and had held a high-ranking position within the Kivumu communal office from 1988–1993.[156] The witness was convicted for his participation in the crimes committed at Nyange parish in April 1994. He was performing community service as part of his 20 year sentence when he was re-arrested in 2009 and convicted of distributing arms used during the attacks on Nyange church, and of organising and chairing meetings during which the attacks were planned. On 22 October 2009 he was sentenced to life imprisonment.[157] The witness was still holding his position in the communal office when Ndahimana was elected *bourgmestre* of Kivumu in June 1993 and when he took office in late October or early November of that year.[158]

113. On 10 April 1994, during Sunday mass at Nyange church, Father Seromba read out a message at the request of the *bourgmestre*, announcing that a meeting would be held on 11 April 1994 at the communal office.[159] Prior to the meeting, the witness met with Jean Baptiste Kayitare who was the communal head of the MDR party.[160] They decided not to participate in the meeting.[161] However, the witness was told about what took place at the meeting by Witness KR3 and Habiyambere, President of the Cantonal Court.[162] The meeting was chaired by Ndahimana, and those participating in the meeting included *conseillers de secteurs*, representatives of political parties, heads of services and religious leaders as well as other officials concerned with security in the *commune*.[163]

114. Following the death of President Habyarimana, Tutsis had begun seeking refuge at the communal office and other places.[164] According to Witness KR3 and Habiyambere, a decision was made at the 11 April 1994 meeting that Tutsi refugees should be gathered together at Nyange parish, and that they should be encouraged to go to the parish rather than flee. It was also decided that the *préfet* in Kibuye should be asked to provide *gendarmes* and soldiers to Kivumu *commune*, and that communal police officers should be sent to the *secteurs* to ensure security there. Those present also resolved to establish a number of roadblocks, including one near the Statue of the

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[152] The Kinyarwanda word *Inyenzi* means "cockroaches" in English.
[153] T. 1 November 2010 pp. 13-14.
[154] T. 11 November 2010 pp. 57-58 (ICS).
[155] Defence Exhibit 74.
[156] T. 11 November 2010 p. 57 (ICS).
[157] T. 12 November 2010 pp. 33-34 (ICS).
[158] T. 11 November 2010 p. 57 (ICS).
[159] T. 11 November 2010 p. 63.
[160] Defence Exhibit 74.
[161] T. 11 November 2010 pp. 63, 67.
[162] T. 11 November 2010 pp. 63-64.
[163] T. 11 November 2010 p. 64. (Religious leaders at the meeting included Father Seromba and a Protestant pastor from Rufungo whose name the witness could not remember. *Conseillers* present at the meeting included Habarugira, Callixte Niyibizi of Kigali, Onesphore Mahame of Rukoko, Ferdinand Munyamukato of Ngobagoba, Laurent Sindabyemera of Gasanza as well as Gatwaza of Kivumu, Witness KR3, and Joseph Habiyambere, President of the Canton Quarter, Witness ND23, *conseiller* of Gasave *secteur*, Jean-Marie Vianney Habarugira, *conseiller* of Nyange *secteur*, and the assistant *bourgmestre* of Kivumu *commune*, Mr. Kanani).
[164] T. 11 November 2010 pp. 62-63.

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Virgin Mary approximately 20-30 metres from Nyange church.[165] The purpose of the roadblocks was to check the identity papers and luggage of all those passing through.[166]

115. Following the meeting, the witness no longer saw refugees at the communal office, but noticed a great number moving towards Nyange parish and at Nyange parish itself.[167] The witness was also told that immediately following the meeting, at approximately 4 p.m., Ndahimana travelled to Kibuye to meet *Préfet* Clément Kayishema. *Gendarmes* sent by Clément Kayishema arrived in Kivumu that same evening because the witness first saw them the next day.[168]

2.2.4 Prosecution Witness CNJ

116. Witness CNJ, a Hutu, was a student in 1994.[169] He was arrested in 1997 for his participation in the crimes committed at Nyange parish. At an unspecified time he was convicted to eight years imprisonment, but was immediately released on the basis of time already served and is currently free.[170] The witness knew that Grégoire Ndahimana was the *bourgmestre* of Kivumu *commune* during the war.[171]

117. Following the death of President Habyarimana, Hutus, including the witness, began targeting Tutsis in and around Kivumu *commune*. Consequently, Tutsis began seeking sanctuary at the communal office.[172]

118. The witness did not attend the meeting of 11 April 1994 at the Kivumu communal office, but was told about it by a family member who was a *conseiller* at the time and attended the meeting.[173] Those attending the meeting included: *conseillers de secteurs*, the heads of services in the *commune*, *Bourgmestre* Ndahimana, IPJ Kayishema and Ndungutse, the teacher.[174]

119. A decision was taken at the meeting to move those Tutsis who had sought refuge at the communal office to Nyange parish because "those responsible for their security…realised that they could not protect them at the *commune* office."[175] A decision was also taken to ask the *préfet* in Kibuye for *gendarmes* to protect the refugees.[176] However, when the witness first saw *gendarmes* in his *secteur* on 13 April 1994, the *gendarmes* "defined the enemy" as "Tutsis or any other armed person who was opposed to the Government at the time."[177]

2.2.5 Defence Witness ND23

120. Witness ND23, a Hutu, was a *conseiller* in Kivumu *commune* for approximately 20 years prior to the events of 1994, and currently resides in Rwanda. He knew that Ndahimana was the *bourgmestre* in 1994 and recalled that he was inaugurated at the Nyamitanga football field in

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[165] T. 11 November 2010 pp. 64-67.
[166] T. 11 November 2010 pp. 67-68.
[167] T. 11 November 2010 pp. 67-68.
[168] T. 11 November 2010 pp. 66, 68.
[169] Prosecution Exhibit 20.
[170] T. 4 November 2010 p. 64 (ICS).
[171] T. 4 November 2010 p. 43.
[172] T. 4 November 2010 p. 43.
[173] T. 4 November 2010 p. 45 (ICS).
[174] T. 4 November 2010 p. 45 (ICS).
[175] T. 4 November 2010 pp. 44-46 (ICS).
[176] T. 4 November 2010 p. 46 (ICS).
[177] T. 4 November 2010 pp. 46-47 (ICS).

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1993.[178] Moreover, *conseillers* were directly under the authority of the *bourgmestre*.[179] Although the witness was not asked, the Chamber infers that this witness was Witness CNJ's relative and the source about the meeting on 11 April 1994.[180]

121. Immediately following the death of President Habyarimana, the security situation in the witness' *secteur* was stable and therefore Tutsis fleeing the violence in Kibilira sought refuge there. It was not until 10 April 1994, when the witness received a letter from the *bourgmestre* asking all political leaders ensure the security of the population, that he discovered that the security situation was deteriorating in other *secteurs*.[181]

122. The witness attended the meeting convened by the *bourgmestre* on 11 April 1994 at the communal office. Participating in the meeting were the chairpersons of political parties, communal service heads, *conseillers communaux* and religious leaders. Both Hutus and Tutsis attended.[182] Prior to President Habyarimana's death, invitations had been distributed for a development meeting scheduled to take place. That meeting was postponed when the President died and the *bourgmestre* was away. Upon his return, the *bourgmestre* issued a *communiqué* which was read out in church on 10 April 1994 inviting members of the *commune* development council to report to the meeting rescheduled for 11 April 1994.[183]

123. The witness arrived at the communal office at approximately 11 a.m. on 11 April 1994. He noticed that over 30 Tutsis had sought refuge there.[184] Participants at the meeting decided that there should be collaboration between the officials of the *cellules* and officials of political parties to ensure security in their *secteurs*. They also requested that the *bourgmestre* call the *préfet*'s office in Kibuye to requisition *gendarmes*. Ndahimana did so, calling the *préfet* twice by 1 p.m.[185] The *préfet* responded[186] by sending *gendarmes* who worked together with the communal policemen to ensure security in the *commune*.[187] The *commune* was to take charge of the *gendarmes* while they were in Kivumu *commune*.[188] The witness was of the view that since the *bourgmestre* had sent for the *gendarmes*, Ndahimana must have issued instructions to them at some point, but did not elaborate.[189]

124. The participants at the meeting also decided to requisition vehicles belonging to traders, including one belonging to Witness CDZ.[190] The vehicles were to be taken to the *commune* office and guarded by the communal policemen.[191] A further decision was taken to transfer all the Tutsi refugees at the communal office to Nyange parish.[192] The witness did not recall a decision to seek

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[178] T. 19 April 2011 pp. 31-32 (ICS); Defence Exhibit 123.
[179] T. 19 April 2011 p. 41 (ICS).
[180] T. 19 April 2011 pp. 31-32 (ICS); Defence Exhibit 123. *See also*, Witness CNJ: T. 4 November 2010 p. 45 (ICS).
[181] T. 19 April 2011 p. 33 (ICS); Defence Exhibit 124.
[182] T. 19 April 2011 p. 37 (ICS) (Tutsi leaders in attendance included Boniface Gatare, a *commune* youth coordinator, Lambert Gatare, the PL party representative, Charles Mugenzi , the doctor of Nyange health centre, one nun from the convent, Stanislas Kavigi the pastor of Ngungu, and the pastor of Gaseke parish).
[183] T. 19 April 2011 p. 47.
[184] T. 19 April 2011 p. 47.
[185] T. 19 April 2011 p. 49.
[186] T. 19 April 2011 p. 49.
[187] T. 19 April 2011 pp. 38 (ICS), 49.
[188] T. 19 April 2011 p. 49.
[189] T. 19 April 2011 p. 50.
[190] T. 19 April 2011 pp. 48-59.
[191] T. 19 April 2011 p. 59.
[192] T. 19 April 2011 p. 48.

out Tutsis in their *secteurs* and urge them to go to the parish. Rather, a decision was taken to ensure the security of Tutsis and their properties.[193] The witness left the meeting between 1 and 2 p.m.[194]

2.2.6 Defence Witness KR3

125. Witness KR3, a Hutu, was in a position to observe what was taking place in the Kivumu communal office in 1994, and had been in such a position for some time.[195]

126. On 10 April 1994, a *communiqué* was read out in church informing the Christians who had come to mass to spread the news to concerned individuals that they had been invited to attend a meeting chaired by the *bourgmestre* at the communal office on 11 April 1994.[196] The witness did not attend the mass but his son who attended told him about the meeting, and the witness attended the meeting.[197]

127. There were approximately 25 participants at the meeting which started at approximately 10 a.m. and ended at approximately 2 p.m.[198] Both Hutu and Tutsi were present. Tutsis in attendance included: Charles Mugenzi, who was the head of Nyange health centre; Lambert Gatare, the leader of the PL party; Boniface Gatare, who was an officer for youth and cooperative activities; François Kayigi, a pastor from the Ngongwe *(sic)* parish and another pastor from Gaseke.[199] Most of those attending the meeting either held positions of authority or were politicians.[200] Kanyarukiga, a trader in Kigali who owned a pharmacy in Kivumu did not attend the meeting because he did not hold an office. Likewise, Ndungutse was not invited to attend the meeting and was not present.[201]

128. During the meeting, Ndahimana telephoned the *préfet* of Kibuye, and requested that the *préfet* send *gendarmes* to the *commune* to help ensure security.[202] In addition, Ndahimana urged communal *conseillers* to work in conjunction with members of the *cellule* committees to ensure security, and Kivumu residents were banned from bars at night.[203] The participants also decided that the refugees at Nyange parish were to be given food originally destined for students of the Ntambwe secondary school, and that food stored at the nutritional centre and the presbytery was to be distributed to the refugees.[204] In addition, a decision was made that the *bourgmestre* could requisition any vehicle available in the *commune* in order to provide security. This decision was taken because the communal vehicle, an old red Toyota Hilux, was in a garage in Gitarama awaiting repairs.[205] The witness noted that Jean Bizimana, the driver of the communal vehicle died in January or February 1994 and thereafter, Ndahimana drove the vehicle himself. The vehicle was still in the garage in July 1994 when the witness left the country.[206]

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[193] T. 19 April 2011 p. 49.
[194] T. 19 April 2011 p. 51.
[195] T. 24 January 2011 pp. 52, 54 (ICS); Prosecution Exhibit 95.
[196] T. 25 January 2011 pp. 14, 17.
[197] T. 25 January 2011 p. 14.
[198] T. 24 January 2011 p. 61.
[199] T. 24 January 2011 p. 60.
[200] T. 25 January 2011 pp. 16-17.
[201] T. 24 January 2011 p. 60; T. 25 January 2011 pp. 16- 17.
[202] T. 24 January 2011 p. 61.
[203] T. 24 January 2011 pp .61, 71.
[204] T. 24 January 2011 p. 61.
[205] T. 24 January 2011 pp. 61, 64-65.
[206] T. 24 January 2011 pp. 61, 64-65.

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129. The vehicles from Witness CDZ and a certain Antoine Twagirayezu were used to provide security and to transport food to the refugees at Nyange parish. The *bourgmestre* would also use these vehicles to monitor the security situation around the *commune*.[207] Finally, the participants in the 11 April 1994 meeting decided that the Tutsi refugees at the communal office should be transferred to the parish. They believed the *gendarmes* sent by the *préfet* would be better able to protect all the refugees there.[208]

130. At an unspecified time, Ndahimana went to the various *secteurs* and urged *conseillers* and citizens to ensure security.[209]

2.2.7 Defence Witness ND1

131. Witness ND1, a Hutu, worked at Nyange health centre in Kivumu *commune* in 1994.[210] She knew that Ndahimana was the *bourgmestre* of Kivumu *commune* in 1994 but had no other relationship with him.[211]

132. Following the death of President Habyarimana, Kivumu residents were advised to stay home. However, the witness returned to work on 11 April 1994. At approximately 10 a.m. on that day, the head of her service went to a meeting at the communal office. When he returned, he held a staff meeting at which he advised workers to continue working as the *bourgmestre* had reassured the participants of the meeting about the security situation.[212] She was therefore surprised when her office was attacked the next day.[213]

2.2.8 Defence Witness Beatrice Mukankusi

133. Witness Beatrice Mukankusi, a Hutu businesswoman who resided near the Kivumu communal office in 1994, is Antoine Twagirayezu's widow. She knew Ndahimana, who was the *bourgmestre* of Kivumu *commune* effective October 1993.[214]

134. The witness testified that at some unspecified time in April 1994 she received a letter from the communal authorities informing her that she should be prepared to surrender her vehicle if and when the authorities needed it. The document was brought by a communal policeman who was known as Kibyutsa.[215]

2.3 Deliberations

135. A plain reading of paragraphs 16 through 18 of the Indictment suggests that the Prosecution is alleging that Ndahimana and other members of the JCE held a series of meetings at the Kivumu communal office between 10 and 13 April 1994. At these meetings, a number of critical decisions, allegedly relating to the genocide, were taken: (1) "[T]o request *gendarmes* from Kibuye *préfecture* to join in the killings;"[216] (2) To requisition a vehicle belonging to a Tutsi trader, which Fulgence

[207] T. 24 January 2011 p. 64.
[208] T. 25 January 2011 p. 38 (ICS).
[209] T. 24 January 2011 p. 71.
[210] T. 20 January 2011 pp. 2-3 (ICS); Prosecution Exhibit 87.
[211] T. 20 January 2011 pp. 4, 27.
[212] T. 20 January 2011 pp. 7, 27-28.
[213] T. 20 January 2011 p. 28.
[214] T. 7 February 2011 pp. 4-6.
[215] T. 7 February 2011 pp. 32-33.
[216] Indictment, para. 16.

Kayishema and others used to transport assailants to Nyange parish and to make announcements encouraging the population to attack Tutsis;[217] and (3) To move all the Tutsis from Kivumu communal office to Nyange parish, and then to assign *gendarmes* to Nyange parish "to confine the Tutsis in furtherance of the JCE."[218] However, it is clear from the evidence of Prosecution witnesses alone,[219] that all three paragraphs refer to a single meeting chaired by *Bourgmestre* Ndahimana at the communal office on 11 April 1994. The Trial Chamber notes that the Defence raised no objections to the form of the Indictment, and on this basis concludes that it was not prejudiced by the Prosecution's distracting formulation.

136. The parties do not dispute that Ndahimana chaired a security meeting at the Kivumu communal office on 11 April 1994. Further, the Defence accepts that a decision was made at that meeting to requisition a vehicle belonging to Witness CDZ, and that a second decision was made to move the Tutsis who had taken refuge at the communal office to Nyange parish.[220] The parties further agree that the participants decided that Ndahimana would ask the *préfet* to assign a number of *gendarmes* to Kivumu *commune*.[221] What remains in contention is whether the participants took these decisions in order to better protect Kivumu's Tutsi population[222] or in order to further the common plan of the alleged JCE.[223]

137. The Prosecution relies on the hearsay evidence of Witnesses CDZ, CBR, CDL and CNJ about the meeting. The Defence relies on Witnesses ND23 and KR3, who were both present at the meeting, as well as ND1 who was told about the meeting.[224] Defence Witness Beatrice Mukankusi only added that she received a letter from the communal office at an unspecified time alerting her to the possibility that her vehicle might be requisitioned.[225]

138. At the outset, the Trial Chamber notes that it is reluctant to rely on hearsay evidence, and will only do so where such evidence corroborates first-hand evidence. On this basis alone, it could find that the Prosecution has not proven the allegations in paragraphs 16-18 of the Indictment beyond reasonable doubt.

139. However, the Trial Chamber wishes to add that even had one or several of the Prosecution witnesses *actually* attended the meeting of 11 April 1994, their evidence would not support the Prosecution's allegations. The Prosecution does not dispute the Defence contention that a number of Tutsis were invited to, and attended, the meeting. Witness CDZ testified that immediately following the 11 April 1994 meeting, he received a letter from the communal authorities requisitioning his vehicle. He added that Ndahimana asked the witness to drive Ndahimana to the communal border to inspect the security situation there. The witness speculated that Ndahimana made this request to ensure that the witness would be killed at the border, but did not explain his fear of Ndahimana that day, nor did he refer to any threats against him made by Ndahimana at a

[217] Indictment, para. 17.
[218] Indictment, para.18.
[219] Prosecution Witnesses CBR, CDZ, CDL and CNJ.
[220] Defence Closing Brief, paras. 121, 122, 149.
[221] Prosecution Closing Brief, para. 35; Defence Closing Brief, para. 125.
[222] Defence Closing Brief, para. 149.
[223] Prosecution Closing Brief, paras. 29, 31, 33.
[224] Witness ND23: T. 19 April 2011 p. 37 (ICS); Witness KR3: T. 25 January 2011 p. 14; Witness ND1: T. 20 January 2011 pp. 7, 27-28.
[225] T. 7 February 2011 pp. 32-33.

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later date.[226] Thus, while the Chamber is of the view that this witness was generally credible and reliable, it cannot credit his suspicion that Ndahimana intended to have him killed on 11 April 1994.

140. Prosecution Witness CBR confirms that the decision to requisition Witness CDZ's car was made at this meeting. The witness added that the participants of the meeting used "the pretext that the vehicle was going to help the authorities in ensuring the security of refugees,"[227] but noted that the vehicle was used several days later to ferry assailants to Nyange parish, and to call Hutu residents of Kivumu to join the attacks on Nyange church. Despite the Trial Chamber's deep reservations about this witness' credibility and reliability, which will be discussed in more detail below,[228] the Chamber notes that the witness does not allege that the participants of the meeting specifically requisitioned the vehicle for the purpose of transporting Hutu assailants to Nyange parish. Although a number of Prosecution witnesses corroborated Witness CBR's evidence that the requisitioned vehicle was later used to assist the *génocidaires* in their mission,[229] the Chamber is unable to infer on the basis of this evidence alone that the vehicle was requisitioned for this purpose.

141. Witness CDL, another Prosecution witness whose credibility and reliability the Chamber finds wanting,[230] alleged that a decision was taken at the meeting to ask the *préfet* to assign *gendarmes* to Kivumu for security reasons. The witness did not say that it was evident at the time that these *gendarmes* would later participate in the killings of Tutsis. The witness further alleges that the participants of the meeting decided to establish roadblocks just outside Nyange parish.[231] However, this evidence is not corroborated.

142. Finally, Witness CDL also testified that the participants in the meeting decided that Tutsi refugees should be housed together at Nyange parish.[232] This evidence is corroborated by Prosecution Witness CNJ who testified that a decision was made to move the Tutsi refugees at the communal office to Nyange parish.[233] The Chamber notes, however, that Witness CNJ added that this decision was taken because "those responsible for [the] security [of the refugees]…realised that they could not protect them at the *commune* office." Witness CNJ believed that the participants of the meeting decided to ask the *préfet* for *gendarmes* in order to protect the refugees, not kill them.[234] In conclusion, no Prosecution witness intimated that the participants of the 11 April meeting knew, or suspected, that Tutsi refugees would be killed, rather than protected, as a result of their decisions that day.

143. In considering the context of the 11 April 1994 meeting, the Chamber relies heavily on two letters sent by Ndahimana on 10 and 11 April 1994, the authenticity of which was not contested by the Prosecution. The first, dated 10 April 1994, was addressed to the Kivumu political party chairmen of the MRND, MDR, PSD and PL. In it, Ndahimana wrote:

> "Due to the current widespread criminal activities which continue throughout the *secteurs*, especially in Nyange and Ngobagoba *secteur*, where some Tutsis have

[226] T. 8 September 2010 pp. 31, 32 (ICS).
[227] T. 1 November 2010 p. 14.
[228] *See* Chapter III, Section 5.2.5.
[229] T. 1 November 2010 p. 14.
[230] *See* Chapter III, Section 5.2.3.
[231] T. 11 November 2010 p. 64.
[232] T. 11 November 2010 pp. 64-68.
[233] T. 4 November 2010 pp. 45-46 (ICS).
[234] T. 4 November 2010 pp. 44-46 (ICS).

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> been reported killed and others have been sent away from their homes, I am requesting you the following: To request the members of your political party not to involve themselves in these acts of aggression, not to attack anyone due to their political or ethnic leanings, to cooperate with the communal authorities or institutions in order to ensure security for all the inhabitants without any discrimination, to notify the members of your political party that if anyone is caught in the commission of such acts of aggression they shall be punished by way of example."[235]

144. In a letter sent the next day by Ndahimana to a local leader of the MDR,[236] Ndahimana reiterated this theme:

> "I strongly urge you to participate in maintaining security in your area. Indeed, some people started to commit ethnically motivated violence against their neighbours. I hope without any doubt that, contrary to what Mr. Ndungutse may be doing in collaboration with his accomplices, you will recommend to members of MDR party of which you are the leader not to commit violence against anybody on ethnic basis. Mr. [recipient's name], as a member of my party, I absolutely want to warn you."[237]

145. Given these letters indicating Ndahimana's aversion to inter-ethnic strife during this period, the Trial Chamber considers far more plausible the evidence of Defence Witnesses ND23 and KR3, who attended the 11 April 1994 meeting and testified that the decisions taken at the meeting were designed to protect the Tutsi refugees and improve security throughout the *commune*.

146. Thus, the Chamber concludes that the Prosecution has not proven beyond reasonable doubt the allegations contained in paragraphs 16-18 of the Indictment.

3. Decision to Move Refugees into Nyange Church, 11-13 April 1994

3.1 Introduction

147. The Indictment alleges that on or about 11-13 April 1994, Ndahimana and other members of the JCE met at the presbytery or the communal office and took a decision that all Tutsi refugees who were presently at Nyange parish should be moved inside Nyange church. The Indictment further alleges that Father Seromba ordered that all Tutsis be moved to the church so that communal policemen, *gendarmes*, *Interahamwe* and Hutu civilians could more easily prevent the refugees from escaping.[238]

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[235] Defence Exhibit 124; T. 19 April 2011 p. 35 (ICS).
[236] Defence Exhibit 110C; T. 17 February 2011 pp. 30-32 (ICS).
[237] T. 17 February 2011 pp. 35-36 (ICS): At trial, interpreter's booth, interpreting from the original document in Kinyarwanda, preferred the following translation: "11 April 1994. Republic of Rwanda. Kibuye *préfecture*, Kivumu *commune*. Subject: Restoring security.

'Sir, I am strongly urging you to ensure security in your area. Some persons have started committing violence—or have started committing ethnically motivated violence against their neighbours. I hope, without any doubt, that you are going to address the members of the MDR party that you lead and to advise them not to assault anyone on the basis of their ethnicity like Mr. Ndungutse is doing in collaboration with his accomplices. Mr. [...], you belong to the same party as myself. I am, therefore, strongly urging you to be careful'."

[238] Indictment, para. 19; Prosecution Closing Brief, paras. 40-42.

148. The Defence submits that the evidence adduced by the Prosecution is unreliable and incredible. Moreover, it attests that the Prosecution has not proven beyond reasonable doubt who took the decision, and whether it was taken with malicious intent, or because it was believed the refugees would be better protected in the church.[239]

3.2 Evidence

3.2.1 Prosecution Witness CBK

149. Witness CBK, a Hutu, was at Nyange church during the events.[240] The witness stated that the refugees who came in on 7 April 1994 were accommodated at the catechism hall, and refugees continued to come to Nyange parish everyday. Also, a small number of the refugees were accommodated in other rooms of the presbytery.[241] On 12 April 1994, Father Seromba, Ndahimana, Kayishema, Ndungutse, Brigadier Christophe Mbakilirehe ("Mbakilirehe") and other authorities had a meeting and decided to have the refugees move inside the church, where the refugees were told they would be better protected. The authorities could witness the confusion that was created by the refugees who were scattered all over and therefore decided that the refugees had to move inside the church. Subsequently, the Tutsis who were accommodated in those various places were moved into the church. The doors of the church were opened and remained opened to allow other Tutsis who came to settle inside the church.[242] Witness CBK admits that the refugees were relocated partly because Father Seromba wanted some freedom.[243] However, he went on to say in cross examination that "I cannot venture into telling you the reasons which prompted them to open the door."[244]

3.2.2 Prosecution Witness CDJ

150. Witness CDJ, a Hutu, was in a position to observe what was taking place at Nyange parish in April 1994.[245] During the trial, the witness testified that on Tuesday he saw Father Seromba, Kanyarukiga and Ndahimana having a discussion on the upper floor. However, he could not hear what they were saying. The conversation continued for one hour after the witness arrived.[246] When the witness arrived at the church the following day he "noticed that the refugees who were at the presbytery had been moved inside the church. And the other refugees—they went to join other refugees who were in the church, and they were locked in the church." He testified that this move was due to the fact that the refugees "had caused some disorder."[247]

3.2.3 Prosecution Witness CBY

151. Prosecution Witness CBY, a Hutu, was in a position to observe what was taking place inside Nyange parish in April 1994. Although he did not live at the parish in ordinary times, he spent the entire period between 10 and 18 April 1994 there because of security conditions in the region.[248] On 11 April or 12 April 1994, the number of refugees had increased considerably and the halls could not hold them all. It was decided that the doors of the church should be opened so that the refugees

[239] Defence Closing Brief, paras. 153-159.
[240] T. 2 November 2010 p. 64 (ICS); Prosecution Exhibit 16.
[241] T. 3 November 2010 p. 2. The catechism hall was located in the courtyard of Nyange presbytery.
[242] T. 3 November 2010 pp. 2-4, 48-51.
[243] T. 3 November 2010 p. 48 (ICS); T 3 November 2010 pp. 2-3.
[244] T. 3 November 2010 p. 50.
[245] T. 11 November 2010 p. 24 (ICS).
[246] T. 11 November 2010 p. 28. (The Chamber has deduced the date of "Tuesday" as 12 April 1994).
[247] T. 11 November 2010 p. 28.
[248] T. 9 November 2010 p. 40 (ICS); T. 10 November 2010 p. 35 (ICS).

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who could not find space in the hall would be able to go inside the church. Father Seromba gave Witness CBY the keys and asked him to open the church. Witness CBY testified that "The intention was to send the refugees there because there were very many. And the catechism hall was full of refugees." [249]

3.2.4 Prosecution Witness CBI

152. Witness CBI, a Tutsi farmer, was living in Kivumu *commune* in April 1994.[250] He arrived at Nyange parish on 12 April 1994. When he got there, he did not enter the church because it was full, "[a]nd it was only the elderly and the women who were inside the church."[251]

3.2.5 Prosecution Witness CBS

153. Witness CBS, a Tutsi, lived in Kivumu *commune* in April 1994.[252] He arrived at Nyange parish on Tuesday morning, 12 April 1994, and stayed until Friday, 15 April 1994. He was outside the church but on the premises of the parish. As nightfall approached, more refugees entered the church, while others continued to flow into the parish.[253] Nyange church was a very huge building and there were refugees all over the compound. There were about 2,000 refugees.[254] At night when the refugees went within the church, all the refugees could not find space, and so there were some who were left standing along the aisles and around the benches or chairs on which other refugees were seated.[255] When Witness CBS got to the church, he met *gendarmes* there and so it was impossible to leave that location. Regarding the *gendarmes*, he stated that "...I cannot say exactly what their duty was there, but when I got there, I met refugees at the location. I found *gendarmes* there. I did not know exactly what their mission was there. Maybe they had been assigned to supervise us, to watch over us, but what I know is that it was not to protect us."[256]

154. Turning to the Defence evidence, the Chamber recalls that no witnesses testified as to this exact charge.

3.3 Deliberations

155. Of the two witnesses who testified that a meeting occurred on 12 April 1994, neither Witness CBK nor Witness CDJ was privy to the actual content of the conversations they witnessed.[257] Indeed, Witness CDJ could only positively testify that the refugees were moved into the church within a 24-hour time period. However, he was not present when they were moved and his testimony does not provide any evidence showing that the refugees were moved to the church following a decision taken by Ndahimana or other authorities.[258] Witness CBK did not hear the content of the discussion either but "deduced" that Ndahimana and other authorities decided to

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[249] T. 9 November 2010 pp. 49-50 (ICS); T. 10 November p. 10 (ICS).
[250] T. 14 September 2010 p. 24.
[251] T. 14 September 2010 p. 29.
[252] T. 6 September 2010 p. 10; Prosecution Exhibit 1.
[253] T. 6 September 2010 p. 15.
[254] T. 6 September 2010 p. 16.
[255] T. 6 September 2010 pp. 15-16. (The witness explained that he arrived at Nyange parish after killings that occurred on 11 April 1994 and that he stayed from "Tuesday to Friday". The Chamber therefore assumes that he stayed at the church from Tuesday, 12 April 1994, until Friday, 15 April 1994).
[256] T. 6 September 2010 pp. 14-16.
[257] T. 3 November 2010 p. 50 (ICS); T. 11 November 2010 p. 28; T. 21 September 2011 p. 10.
[258] T. 11 November 2010 p. 28.

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move the refugees inside the church.[259] The Chamber notes that in his previous statements the witness explained that when the refugees first began arriving at the church, "Father Seromba prevented them from going inside the church…" and that he opened the doors because "[h]e had realised that there were many refugees, and that those refugees could smash in the doors in order to go in…."[260] Therefore, the Chamber has doubts as to whether Ndahimana was involved in the decision to move the refugees inside the church. Ultimately, it also finds plausible that the refugees were simply granted access to the church because they were many and might have damaged the doors to get in. This version of the facts is corroborated by Prosecution Witness CBY.[261]

156. In addition, the evidence indicates that the refugees had come to the parish and entered the church even before the alleged meeting of 12 April 1994. The Chamber recalls Witness CBK testified that the when refugees started coming to the parish on 7 April 1994, they were put in the catechism hall and in other rooms at the presbytery.[262] Defence Witness ND7, a Tutsi, testified that she went to Nyange parish on 10 April 1994 and found about 40 Tutsi refugees who were already at the parish.[263] Therefore, the Chamber concludes that the refugees could have gone inside the church as early as 7 April 1994 irrespective of any subsequent order to do so.

157. Finally, the evidence does not establish that the refugees were confined inside the church. Rather, they could move around and would go inside the church at night and when attacks were launched because they thought they would be better protected there. Prosecution Witnesses CBI, CBY and CBS testified that the refugees could move around within the compound and were not confined inside the church.[264] The Chamber recalls Witness CBS' claims that because there were *gendarmes* at the parish it was impossible for the refugees to leave, and that these *gendarmes* had been assigned to supervise rather than protect the refugees.[265] However, the Chamber finds that Witness CBS was not certain as to why the *gendarmes* were at the parish, and as he was the only witness that testified on this issue, the Chamber cannot reasonably conclude, solely on this evidence, that the *gendarmes* were there to prevent the refugees from escaping.[266]

158. Several witnesses testified that, during the attack of 15 April 1994, the refugees retreated back into the church and locked themselves inside for their own protection.[267] For example, Witness ND22 testified that during the attacks, many Tutsis attempted to find refuge inside the church, and that those who were unable to enter the church were killed.[268] Witness ND6 testified that there were over 1,000 refugees in the parish, both in and outside of the church.[269] Indeed, in its Closing

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[259] T. 3 November 2010 pp. 4, 50.
[260] Defence Exhibit 41, p. 12; Defence Exhibit 40, p. 3 ("At the beginning, Father Seromba refused to open the church doors to let them in. When the number of Tutsi refugees in the church compound grew too big, Father Seromba noticed that the refugees were trying to force their way into the church which he was refusing to open. He then decided to open the doors and let them in.").
[261] T. 9 November 2010 p. 50 (ICS).
[262] T. 3 November 2010 p. 2.
[263] T. 24 January 2011 p. 3.
[264] T. 14 September 2010 p. 29; T. 6 September 2010 p. 15.
[265] T. 6 September 2010 pp. 14-16.
[266] Indictment, para. 19; Prosecution Closing Brief, paras. 40-42.
[267] Witness ND24: T. 21 February 2011 p. 41; Witness ND22: T. 20 April 2011 pp. 6-7; Witness ND6: T. 27 January 2011 pp. 34-35 (ICS); Witness ND12: T. 19 January 2011 p. 7; Witness ND11: T. 18 January 2011 p. 34.
[268] T. 20 April 2011 pp. 6-7.
[269] T. 27 January 2011 pp. 34-35 (ICS).

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Arguments, the Prosecution even relied upon the fact that Tutsis who could flee barricaded themselves into the church to be protected.[270]

159. In sum, the Prosecution has not proven beyond reasonable doubt that Ndahimana should be held responsible in relation to the charges set forth in paragraph 19 of the Indictment; it also failed to prove beyond reasonable doubt that the refugees were forced to go inside the church and confined there so that the Hutu assailants could more easily attack them.

4. Meetings in Kivumu *Commune*, 10-14 April 1994

4.1 Introduction

160. The Indictment alleges that Ndahimana and other members of the JCE ordered that Tutsi civilians be directed to the Kivumu communal office and Nyange parish in order to exterminate them. The Indictment also alleges that from 13 to 16 April 1994 Ndahimana, Seromba, Kayishema, Kanyarukiga, Ndungutse and others attended several meetings at various locations in the vicinity of Nyange parish in order to plan the extermination of the Tutsis in Kivumu *commune*. It is also alleged that after some of those meetings, the Tutsis were disarmed by members of the JCE and attacks were launched at Nyange church.[271]

161. As a preliminary point, the Majority notes that the Defence submits that paragraph 15 of the Indictment is defective and should be considered as introductory.[272] On this matter the Majority recalls that allegations contained in paragraph 15 are indeed introductory. In addition, the date ranges provided in paragraph 15 must be read in conjunction with paragraphs 16 to 33, which provide further details. The Chamber has previously held that "the Indictment is not impermissibly vague with respect to locations and dates."[273] The Majority also notes that the Prosecution did not adduce any evidence to support paragraph 16 of the Indictment.[274]

162. In response to the Prosecution's allegations, the Defence submits that the Prosecution evidence on the meetings is contradictory and unreliable. It adds that the evidence shows that refugees were not allowed to enter the church with weapons.[275] In addition, the Defence argues that the Prosecution did not establish Ndahimana's involvement in any of the alleged meetings or in the subsequent attacks that occurred at the parish.[276]

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[270] T. 21 September 2011 p. 12 ("Madam President, Your Honours, you will recall the evidence of what took place on the 15th of April 1994. Although the attack was an unprecedented one in terms of brutality and the number of persons who died on this day, it did not kill all the Tutsis. The Tutsis you heard, Madam President, Your Honours, some of the Tutsis were able to flee back and barricaded themselves inside the church.").
[271] Indictment, paras. 14-15, 20, 22-23.
[272] Defence Closing Brief, paras. 107-109.
[273] Decision on Defects in the Indictment, para. 16.
[274] Witness CDZ: T. 8 September 2010 pp. 28-30, 58 (ICS). (The Majority acknowledges that, according to Witness CDZ, Ndahimana attended a meeting in Kibuye on 10 April 1994, organised by *Préfet* Clément Kayishema. Witness CDZ learned of Ndahimana's attendance at that meeting, but did not learn the purpose of the meeting. The Chamber cannot draw any conclusion from this hearsay evidence. In addition the Majority recalls that none of the paragraphs of the Indictment charge the accused in relation to a meeting at the *préfecture* office in Kibuye).
[275] Defence Closing Brief, paras. 164-172.
[276] Defence Closing Brief, paras. 191-269.

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4.2 Evidence

4.2.1 Prosecution Witness CBS

163. Witness CBS, a Tutsi, lived in Kivumu *commune* in April 1994.[277] He arrived at Nyange parish with members of his family on Tuesday, 12 April 1994 at approximately 6 a.m. *Gendarmes* were present at the church when he arrived, as well as about 2,000 Tutsi refugees.[278]

164. On 13 April 1994, pregnant women and a number of children who had sought refuge at the parish died of hunger. Seromba refused to distribute food to the refugees, and asked the *gendarmes* to shoot any refugee taking bananas from the banana plantation.[279]

165. On the morning of Thursday, 14 April 1994, the refugees used stones to repel a group of Hutu assailants who attacked them.[280] That afternoon, Ndahimana, IPJ Kayishema, Mbakilirehe, Kanyarukiga, Ndungutse and Witness CDL came to the parish to meet with Father Seromba. The witness could not hear what was said during the meeting but "[the] officials left without uttering a word to the refugee[s]."[281] That evening, Ndahimana, Kayishema and Mbakilirehe returned to the church in the red communal vehicle. Ndahimana and a police officer remained in the vehicle while Kayishema and Mbakilirehe approached the church. At the entrance of the church, Kayishema called from a list the names of three Hutu women who were married to Tutsis. The women emerged from the church, spoke to Kayishema and Mbakilirehe, and then went to their homes. Kayishema then returned to the vehicle and the vehicle then left.[282]

4.2.2 Prosecution Witness CBN

166. Prosecution Witness CBN, a Tutsi farmer, lived in Kivumu *commune* in April 1994.[283] He and his relatives sought refuge at Nyange parish on 12 April 1994.[284]

167. At approximately 8 a.m. on 13 April 1994, the refugees at the parish were attacked by Hutu assailants bearing traditional weapons who had erected a roadblock opposite Kanyarukiga's pharmacy. Three armed *gendarmes* assisted the assailants by opening the roadblock for them and standing aside. However, at an unspecified time, the *gendarmes* also fired a shot into the air as a warning to the assailants to back off. The refugees managed to repel the assailants by throwing stones at them. The attack lasted the whole day until approximately 4 p.m.[285] Police officers took traditional weapons from the refugees on 13 April 1994, and told them that they would be protected by police officers and *gendarmes*.[286]

168. On 14 April 1994, Hutus launched an attack on the refugees at approximately 8 a.m., but the refugees managed to repel them.[287] According to the witness, "throughout the day we confronted

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[277] T. 6 September 2010 p. 10; Prosecution Exhibit 1.
[278] T. 6 September 2010 pp. 14-16.
[279] T. 6 September 2010 p. 16.
[280] T. 6 September 2010 p. 20.
[281] T. 6 September 2010 pp. 17-19, 62.
[282] T. 6 September 2010 pp. 19-20, 51-52, 58 (One of the women was called Nyirantama. The witness did not know the names of the two others, but knew that they were Hutus married to Tutsis).
[283] T. 13 September 2010 p. 2.
[284] T. 13 September 2010 p. 15.
[285] T. 13 September 2010 pp. 16-17, 55-56; T. 14 September 2010 pp. 7-8.
[286] T. 14 September 2010 p. 8.
[287] T. 13 September 2010 p. 18.

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attackers who were attacking us, and we repelled them."[288] The attackers stopped their assault while the authorities were meeting. No refugee was killed during that day.[289]

169. On 14 April 1994, Ndahimana arrived at the church between noon and 1:30 p.m. He was with Brigadier Mbakilirehe, IPJ Kayishema, Kanyarukiga, and the vice president of a local court, Gaca Butelezi. They went to see Father Seromba at the presbytery.[290] The witness saw them arrive, and then saw the group standing on the balcony of the presbytery and pointing at the refugees, but he could not hear what they were saying. They did not stay long and soon came back downstairs. The refugees asked Ndahimana, "[l]ook, we are being attacked, what are you going to do for us?" Ndahimana responded, "[l]ook, *Inyenzis*, *Inkotanyis* have caused the war, so Hutus have responded." After that Ndahimana left.[291] Following the departure of the authorities, the refugees had to repel a small scale attack.[292]

4.2.3 Prosecution Witness CBI

170. Witness CBI, a Tutsi farmer, lived in Kivumu *commune* in April 1994.[293] The witness knew Ndahimana because he was the *bourgmestre* of his *commune*.[294] On 7 April 1994, the witness sought refuge at a friend's home.[295] He then moved to Nyange parish after hearing from Tutsis in his *secteur* that Ndahimana was encouraging the Tutsis to do so. Indeed, he was told that the *bourgmestre* had already taken Tutsis to Nyange parish in his red Toyota Hilux.[296] He arrived at Nyange parish on 12 April 1994 at approximately 7 p.m.[297]

171. On 13 April 1994, the witness saw Ndahimana, Kayishema, Kanyarukiga, Murangwabugabo and Ndungutse at approximately 10 a.m. They went to meet with Father Seromba at the presbytery.[298] The authorities spent about one hour at the presbytery. The witness could not hear what they were saying, but could see them talking to each other because he was in the courtyard.[299]

172. At an unspecified point that day, Seromba asked the refugees whether there were "any other persons who were still there on the hill."[300] The witness gave him the names of persons from his locality that had not come to the parish, and Seromba handed the list to Ndahimana. Later that day, the witness saw the Tutsis he had mentioned arrive at the parish. Some of them came in a white pickup belonging to Witness CDZ and driven by a man called Yohana Jigoma.[301]

173. On 13 April 1994, towards 10 a.m., Hutu assailants carrying traditional weapons launched an attack against the refugees. As they attacked, they shouted, "[w]e are killing the *Inyenzi*." The

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[288] T. 13 September 2010 p. 62.
[289] T. 13 September 2010 p. 62.
[290] T. 13 September 2010 p. 18.
[291] T. 13 September 2010 p. 20; T. 21 September 2011 pp. 6, 11.
[292] T. 13 September 2010 pp. 20, 56, 62-63.
[293] T. 14 September 2010 p. 24.
[294] T. 14 September 2010 p. 29.
[295] T. 14 September 2010 p. 25.
[296] T. 14 September 2010 p. 27.
[297] T. 14 September 2010 p. 28.
[298] T. 14 September 2010 pp. 29-30; T. 21 September 2011 p. 11; Defence Closing Brief, para. 129.
[299] T. 14 September 2010 pp. 34-35; Defence Closing Brief, para. 129.
[300] T. 14 September 2010 p. 30.
[301] T. 14 September 2010 pp. 30-33 (Among the Tutsis that arrived subsequently at the church, the witness saw Antoine Karake and his family).

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refugees managed to repel the attackers and no refugee was killed in that attack.[302] That night, the refugees tried to pick bananas from trees near the parish. Father Seromba threatened that any refugee found going near the bananas again would be shot.[303]

174. On 14 April 1994, at approximately 11 a.m. or noon, Ndahimana, Kayishema, Kanyarukiga, Ndungutse and Vedaste Murangwabugabo returned to the church and met with Father Seromba at the presbytery. The meeting lasted approximately two hours.[304] At an unspecified time that day, another attack occurred. The assailants were carrying traditional weapons and were greater in number than those who had attacked the previous day, but the refugees managed to repel them once again. The attack lasted approximately one hour, and those authorities who had arrived earlier were present during the attack.[305]

4.2.4 Prosecution Witness YAU

175. Prosecution Witness YAU, a Tutsi housewife, lived in Kivumu *commune* in April 1994.[306] Prior to the events of April 1994, the witness and Ndahimana were neighbours.[307]

176. The witness and her family sought refuge at Nyange parish "some days" after the death of President Habyarimana.[308] She remained there three days.[309] The witness arrived before midday and saw Ndahimana, Father Seromba, Kayishema, Kanyarukiga and a *conseiller* named Vianney Habarugira ("Habarugira") holding a meeting in front of the parish secretariat. The witness was several metres away from the group.[310] Kayishema and Kanyarukiga went looking for Tutsis who had not yet come to the parish. The men made several trips each time returning with Tutsis in Kanyarukiga's vehicle.[311]

177. On the witness' second day at the parish, a sister named Mama Jean attempted to bring food to the refugees. She was stopped by IPJ Kayishema and Kanyarukiga who poured the food on the ground.[312] The same day, the refugees asked Seromba for some water. He refused, telling the refugees they "were condemned to die anyway."[313] At an unspecified time that day, the witness saw Ndahimana, Father Seromba, Kayishema, Kanyarukiga and Habaruriga the *conseiller* of Nyange *secteur*, meeting in front of the secretariat.[314] On the same day, Father Seromba asked the *gendarmes* to confiscate "sticks" that were in the possession of the refugees.[315] She later saw the same persons meeting together with a group of *gendarmes* in front of the secretariat. At an unspecified time, Hutu assailants gathered at Jubilee Square but Father Seromba told the assailants to wait as they were outnumbered by the refugees. This group of assailants obeyed Seromba. However, a second group of assailants coming from the direction of the Statue of the Virgin Mary

[302] T. 14 September 2010 pp. 35-36.
[303] T. 14 September 2010 p. 36.
[304] T. 14 September 2010 p. 36; T. 21 September 2011 p. 11.
[305] T. 14 September 2010 pp. 37-38.
[306] Prosecution Exhibit 13.
[307] T. 15 September 2010 p. 54 (ICS).
[308] T. 15 September 2010 p. 42.
[309] T. 15 September 2010 p. 45.
[310] T. 15 September 2010 pp. 42-43 (The Majority infers that the witness arrived on 13 April 1994).
[311] T. 15 September 2010 pp. 44-45.
[312] T. 15 September 2010 p. 46 (The Majority infers that this was 14 April 1994).
[313] T. 15 September 2010 p. 46 (The Majority infers that the witness is referring here to events that took place on 14 April 1994).
[314] T. 15 September 2010 p. 46.
[315] T. 15 September 2010 pp. 45-46.

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attacked the refugees. According to the witness, "[t]hey attacked us, but we used stones to defend ourselves. We pushed them back, but they would come up again and so on and so forth."[316] Two *gendarmes* were present during the attacks but they did nothing to assist the refugees.[317]

4.2.5 Prosecution Witness CDZ

178. Witness CDZ, a Tutsi, lived in Kivumu *commune* in 1994.[318] Witness CDZ went to Nyange church on 13 April 1994. When he arrived, the "church was packed full of people."[319] He remained at Nyange church from his arrival at 8 p.m. on 13 April 1994 until the following night, 14 April 1994.[320]

179. While hiding in a corner inside Nyange church, the witness overheard noise outside. "[T]here were some Tutsis outside the church...and [he] heard people saying that there were attackers who had attempted to throw stones at the refugees."[321] The witness left Nyange church during the night of 14 April 1994 because he believed that those staying there were risking death. *Gendarmes* had indicated to the witness the high risk of staying at the church.[322]

4.2.6 Prosecution Witness CBK

180. Witness CBK, a Hutu, was at Nyange parish during the events of April 1994.[323] He testified that on 7 April 1994, the first group of Tutsis came to seek refuge at the parish around 2 p.m., and that refugees continued to arrive every day thereafter.[324] On 12 April 1994, the refugees entered Nyange church after Seromba, Ndahimana, Kayishema, Ndungutse, Mbakilirehe and other authorities told them they would be better protected there. The witness was watching while this took place.[325]

181. On the morning of 13 April 1994, the witness saw Seromba, Ndahimana, Witness CDL, Kayishema, Mbakilirehe, Ndungutse, Colonel Nzaphakumunsi, as well as other authorities "from all categories," arrive at the parish. They went in the building housing the priests' living quarters to the room that was usually occupied by the bishop of Nyundo when he came to the parish.[326] The same authorities met twice on 13 April 1994. The first meeting took place before midday and lasted for about one hour; the other started around 2 p.m. In between the two meetings a small attack was launched on the refugees, but the Tutsis managed to repel the Hutus by using stones and small traditional weapons. The witness believed that during the second meeting the authorities decided to bring weapons to the church because "it was after the meeting of the afternoon that arms were brought to the church."[327]

182. On 14 April 1994, the authorities disarmed those refugees who came to the church with traditional weapons such as bows and machetes. They told the refugees "'...give us your weapons

[316] T. 15 September 2010 pp. 47-48.
[317] T. 15 September 2010 p. 48.
[318] Prosecution Exhibit 4.
[319] T. 8 September 2010 p. 35.
[320] T. 8 September 2010 p. 36.
[321] T. 8 September 2010 p. 37.
[322] T. 8 September 2010 p. 37.
[323] T. 2 November 2010 p. 64 (ICS); Prosecution Exhibit 16.
[324] T. 3 November 2010 pp. 2, 39 (ICS).
[325] T. 3 November 2010 pp. 3, 55-56.
[326] T. 3 November 2010 p. 6.
[327] T. 3 November 2010 p. 10; T. 21 September 2011 p. 11.

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because we are here to ensure your safety'."[328] On that day, the authorities met twice in the bishop's room. Following the first meeting, at approximately 11 a.m., they began to disarm the refugees. This process lasted about one hour. Some of the confiscated weapons were loaded onto the communal truck, while bows and arrows were stored at the church. Ndahimana was present at both meetings and while the refugees were being disarmed. Others involved in the meetings and the confiscation of weapons included Father Seromba, Kayishema, Kanyarukiga, Ndungutse and other authorities, including *conseillers*.[329] Immediately after the weapons were taken from the refugees, a group of Hutu assailants again attacked the parish. The witness testified that while Ndahimana, Seromba and Kayishema were meeting for the second time that day "the Hutus retreated and the Tutsis went back into the church." The Tutsis were again able to repel the assailants and "[t]he damage was not significant." The witness believed that during their meetings the authorities were discussing how to overcome the Tutsis.[330]

4.2.7 Prosecution Witness CBY

183. Prosecution Witness CBY, a Hutu, was in a position to observe what was taking place at Nyange parish in April 1994. Although he did not live at the parish in ordinary times, he spent the entire period between 10 and 18 April 1994 there because of security conditions in the region.[331] He saw Ndahimana twice before the events of April 1994; the first time during his inauguration as *bourgmestre*, and the second time as the *bourgmestre* was travelling along a road.[332]

184. During the genocide, he saw Ndahimana on 8, 9, 11, 12, 13, 14, 15 and 16 April 1994.[333] On 12 April 1994, the witness saw a group of about ten "criminals and ruffians" armed with clubs and machetes arrive at Nyange parish. They traded insults with the refugees and left.[334] On 13 April 1994, the authorities, including Ndahimana, arrived at the parish after a group of assailants. The witness heard Ndahimana direct the assailants to go home.[335]

185. At approximately 8 a.m. on 14 April 1994, the witness saw Ndahimana, IPJ Kayishema, Ndungutse, a man named Théodomir (a.k.a. "Kiragi") and Kanyarukiga in the rear courtyard on their way to see "the priest" at the presbytery. The attack on the refugees started an hour or two later. The witness explained that the "authorities" were already gone when the attack started. The attack that day lasted approximately two hours.[336] The witness considered the attack of 14 April 1994 the first real attack against the refugees because a man named Muhigirwa was killed at approximately 2 p.m. at the roadblock by the parish on that day.[337] The leaders of the attack that day were Kanyarukiga, Maharamu and Appolinaire Rangira ("Rangira").[338] The assailants threw stones

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[328] T. 3 November 2010 pp. 10-11.
[329] T. 3 November 2010 pp. 10-12, 56-57.
[330] T. 3 November 2010 pp. 11-12, 56 (The names of the *conseillers* were: Habarugira Kamili and Sindagera. The witness said he overheard the authorities, including Ndahimana, discussing the need to disarm the refugees. It is not clear whether he overheard this following a meeting held on 12 April 1994 or following the first meeting on 14 April 1994).
[331] T. 9 November 2010 p. 40 (ICS); T. 10 November 2010 p. 35 (ICS).
[332] T. 9 November 2010 p. 36.
[333] T. 9 November 2010 p. 46 (ICS).
[334] T. 9 November 2010 p. 52.
[335] T. 10 November 2010 pp. 19-20 (ICS) ("A.: He [Ndahimana] was talking to the Hutus who had attacked the Tutsis. Q.: So, correct me if I am wrong that Mr. Ndahimana asked attackers to go home—to return to their homes? A.: Yes, he told them to go home, but I do not know whether they immediately obeyed, because I did not follow that up.").
[336] T. 10 November 2010 pp. 27-29 (ICS).
[337] T. 9 November 2010 p. 52; T. 10 November 2010 pp. 19, 27 (ICS).
[338] T. 10 November 2010 p. 27 (ICS).

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at the refugees, who responded by throwing stones back at the assailants, but "[t]he Tutus were not very many on that day and so they retreated."[339]

4.2.8 Prosecution Witness CDJ

186. Witness CDJ, a Hutu, was in a position to observe what was taking place at Nyange parish in April 1994.[340]

187. The witness was present on the Sunday that the refugees began to flock to the parish in large numbers, but saw no authorities that day. The next day, upon his arrival at 7 p.m., he saw Ndahimana, Kayishema and Kanyarukiga talking with Father Seromba on the balcony of the priests' living quarters. The witness could not hear what the men were saying but thought the meeting lasted for approximately one hour after he arrived.[341] When the witness arrived on Tuesday at 7 p.m., he saw Ndahimana sitting with Kanyarukiga and Father Seromba on the same balcony. Again, he could not hear what they were saying but thought they stayed for about one hour after the witness' arrival.[342]

188. The witness also went to the parish on Wednesday at 7 p.m. Upon his arrival, the witness noticed that refugees who had been in Nyange presbytery had been moved and locked into Nyange church. The witness understood that the change had taken place because the refugees had caused "disorder" at the presbytery. That day the witness saw Ndahimana with Kanyarukiga and Father Seromba talking on the same balcony. They remained there for approximately an hour and a half after the witness' arrival.[343]

189. Upon his arrival at the parish the next day, a Thursday, the witness learned from persons at the parish that there had been "clashes" at the parish that day and that "people had been throwing stones at one another." He also saw Ndahimana, Kayishema, and Kanyarukiga meeting with Father Seromba on the balcony. Again, he could not hear what they were saying but believed that they remained together for approximately two and a half hours after his arrival on that occasion.[344]

190. In response to a Defence submission that Ndahimana attended a funeral on 14, 15 and 16 April 1994, the witness answered "[Ndahimana] went to Rufungo on the day it was said that Dr. Juvénal Ntawuruhunga ("Dr. Ntawuruhunga") had died in Kigali, but [he] did not spend the night in Rufungo."[345]

4.2.9 Prosecution Witness CDL

191. In April 1994, Witness CDL, a Hutu, was a teacher living in Kivumu *commune*.[346] On 13 April 1994, the witness went to the Mutanoga market centre between 12 and 2 p.m. On the way there, he ran into Kanani, who was with Habiyambere, Kayishema and others who were coming from Nyange church. Kanani said that he had "completed his mission" and it was now "up to the

[339] T. 9 November 2010 pp. 52-53.
[340] T. 11 November 2010 p. 24 (ICS).
[341] T. 11 November 2010 pp. 24 (ICS), 28 (The Trial Chamber infers that this was 11 April 1994).
[342] T. 11 November 2010 pp. 24 (ICS), 28.
[343] T. 11 November 2010 pp. 24 (ICS), 28-29.
[344] T. 11 November 2010 p. 29.
[345] T. 11 November 2010 p. 50.
[346] Prosecution Exhibit 46.

others to do their part."[347] Kanani explained that he had checked the refugees to see whether they were armed and that in doing this he was executing a decision that had been taken at a meeting that day at the Kivumu communal office. Those who attended the meeting included: Ndahimana, IPJ Kayishema, the president of the local court Habiyambere, the brigadier of the communal police, as well as the "leaders of the attacks," Ndungutse, Kanyarukiga, and Father Seromba. The witness was told about the meeting by Kanani and Habiyambere. Kanani found that some of the refugees had traditional weapons but that none had firearms.[348]

192. On 14 April 1994, the witness did not go to the church.[349] At around 3 p.m., he went to the Mutanoga market centre and was sitting at Nganji's pub when he saw a group armed with sticks and machetes coming from the direction of Nyange church. The witness learned that there had been an attack on the church, led by Ndungutse. At the market square, some people manned the roadblock next to the square, and others had come to see the corpse of Dr. Ntawuruhunga. Although the witness said he could not be certain about times, he believed that a certain Felix who was manning the roadblock told the witness that the body had arrived at the roadblock at approximately 2 p.m., before the witness' arrival. At the market square, the witness saw Ndahimana, Kayishema, Habiyambere, Mbakilirehe and Jean-Baptiste Kagenza, who was a teacher and the MRND chairman. Ndahimana had been asked by "some persons...who had come from Kigali" to intervene. The individuals manning the roadblock wanted to open the doctor's coffin. When Ndahimana arrived he ensured that the coffin went through the roadblock without further trouble.[350]

193. At approximately 3:30 p.m., as Ndahimana was speaking with Ndungutse, Kayishema and others, Kanyarukiga arrived in a red vehicle.[351] He asked whether the refugees at the church had been killed, and was told that the attack had been unsuccessful. Kanyarukiga then informed the group that the *Inkotanyi* had arrived across the river and were planning to liberate the refugees, and that they therefore had to be exterminated quickly.[352] Ndahimana added that all "inhabitants" had to come to the parish and that they should be made to understand that the *Inkotanyis* had killed Dr. Ntawuruhunga, Théoneste Mujyanama, and the President of the Republic. He called on all those present to gather their neighbours to take part in the attack.[353] About a half an hour later, the group, including Ndahimana, left together for Ngobagoba *secteur*, as they believed the *Inkotanyi* would be arriving from that direction.[354] Ndahimana could not have spent the night at Dr. Ntawuruhunga's house as the situation was critical and he had urgent matters to take care of.[355]

4.2.10 Prosecution Witness CBR

194. Prosecution Witness CBR, a Hutu farmer, was living in Kivumu *commune* in April 1994.[356] He knew that the accused was the *bourgmestre* of Kivumu *commune*. He often saw Ndahimana

[347] T. 11 November 2010 p. 69.
[348] T. 11 November 2010 pp. 69-70; T. 18 November 2010 pp. 49-50; T. 19 November 2010 p. 20; T. 21 September 2011 p. 11.
[349] T. 18 November 2010 p. 52.
[350] T. 12 November 2010 pp. 2-3; T. 18 November 2010 pp. 10, 49-50.
[351] T. 12 November 2010 pp. 3, 5.
[352] T. 12 November 2010 pp. 3-4; T. 18 November 2010 p. 50.
[353] T. 18 November 2010 p. 51.
[354] T. 12 November 2010 p. 5.
[355] T. 18 November 2010 p. 51.
[356] T. 1 November 2010 p. 6; Prosecution Exhibit 14.

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drive past in the *commune* vehicle, a red truck to which he was entitled after his appointment as *bourgmestre*.[357]

195. The witness went to Nyange parish on 13 April 1994 to bring food to his brother-in-law, a Tutsi who had sought refuge there. Before going to the parish Ndungutse informed the witness that a meeting had taken place at the communal office and had included Ndungutse, the *bourgmestre* Ndahimana, Védaste Muragwabugabo, the assistant *bourgmestre*, Gilbert Kanani Rugwizangoga, Gatsha Buthelezi, Kanyarukiga and Senior Warrant Officer Habarugira. At the meeting, decisions were taken to attack the refugees and to ascertain whether the refugees were armed or not. When the witness arrived at the parish he told his brother-in-law that an attack was imminent. The witness' brother-in-law told him that Rugwizangoga, Father Seromba and Habiyambere had already searched the refugees.[358]

196. On 14 April 1994, Kayishema drove a vehicle belonging to Witness CDZ through the *commune*. Using a megaphone, Kayishema informed the local population that "*Inyenzis*" had attacked the *commune* and that the *commune* had to be saved. The witness understood the word *Inyenzi* to refer to Tutsis. Ndungutse, Kayishema and a group of assailants, including the witness, gathered at the Statue of the Virgin Mary at approximately 11 a.m. Ndungutse and Kayishema met with the *gendarmes*, who told the two men that they would be overwhelmed by the large numbers of refugees. Ndungutse and Kayishema replied "we'll do what we can" and convinced the *gendarmes* to let the assailants carry out the attack. The *gendarmes* then cut a rope which served as a roadblock and retreated. Thereafter, the assailants, including the witness, began throwing stones at the refugees, who responded in kind. There were between 500 and 1,000 assailants that day, but they were outnumbered by the refugees. The assailants soon realised that there were too many refugees and returned home. No one was killed that day. The witness believed that he and other assailants arrived at the church at approximately 11 a.m., that the attack was launched in the afternoon and that it did not last long. Although the witness could not be sure about the time, he believed that the assailants retreated at about 3 p.m.[359]

197. On his way home with the other assailants, the witness saw Ndungutse stop to talk to someone in a vehicle along the road. Ndungutse subsequently told the assailants that he had been talking with Kanyarukiga, who had told him that the *Inyenzi* were close and that they were bringing assistance to the refugees at the parish. Kanyarukiga directed the assailants to return to the church and promised reinforcements.[360]

4.2.11 Prosecution Witness CNJ

198. Witness CNJ, a Hutu student, lived in Gasave *secteur*, Kivumu *commune* in April 1994.[361] He participated in killings in April 1994, including those at Nyange church.[362] The witness knew Ndahimana because he was the *bourgmestre* of Kivumu *commune*.[363]

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[357] T. 1 November 2010 p. 6.
[358] T. 1 November 2010 pp. 11-13; T. 2 November 2010 p. 16; T. 21 September 2011 p. 11.
[359] T. 1 November 2010 pp. 13-16; T. 2 November 2010 pp. 14-15, 17.
[360] T. 1 November 2010 p. 16.
[361] T. 4 November 2010 p. 43; Prosecution Exhibit 20.
[362] T. 4 November 2010 p. 43 ("Q.: Were you one of these Hutus who were targeting Tutsis, Mr. Witness? A.: I was."); T. 5 November 2010 p. 11 (ICS) (The witness declared that "I also played a role in the killing of other persons, but the eleven persons are persons I physically killed.").
[363] T. 4 November 2010 p. 71.

199. He testified that on 14 April 1994, Kayishema came to Karuteyi and asked members of the population to go to Nyange church on 15 April 1994 in order to kill the Tutsis because they were the ones who had killed a Hutu doctor.[364]

4.2.12 Defence Witness Thérese Mukabideri

200. Thérese Mukabideri, a Hutu, was married to Dr. Ntawuruhunga. She worked at the *Banque Continentale Africaine* and was a member of the MRND party in 1994.[365] She was informed on 14 April 1994 that her husband, Dr. Ntawuruhunga, was killed during the night of 13 April 1994 by RPF soldiers. His body was brought to Rufungo around 4 p.m. on 14 April 1994 accompanied by Ndahimana, Ferdinand and others.[366] Ndahimana stayed at Rufungo until past midnight organising the ceremony for the burial to take place the next day, 15 April 1994.[367]

4.2.13 Defence Witness Beatrice Mukankusi

201. Beatrice Mukankusi, a Hutu, lived in Nyange *secteur* about 50 to 100 metres away from the *commune* office in 1994. She sold food and beverages in the local market.[368]

202. On Thursday, 14 April 1994, at approximately 2 or 3 p.m., the witness loaned Ndahimana her vehicle, a blue Daihatsu pickup, to attend the funeral of Dr. Ntawuruhunga of Rufungo in Rukoko *secteur*.[369]

4.2.14 Defence Witness Léonille Murekeyisoni

203. Léonille Murekeyisoni, a Hutu, lived in Ngoma in Butare *préfecture* in 1994. She was married to a Juvénal Rwanzegushira who was the *bourgmestre* of Kivumu *commune* from September 1990 until 1993.[370] The Majority notes that her husband and Ndahimana were friends, which must be considered in evaluating her testimony.[371]

204. On 14 April 1994, the witness learned that Dr. Ntawuruhunga had died. She went to his house. She arrived at approximately 5 p.m. and left and at about 6 p.m. Ndahimana was present at Dr. Ntawuruhunga's house when the witness arrived.[372]

4.2.15 Defence Witness ND24

205. Witness ND24, a Hutu, was a trader living in Kivumu *commune* in April 1994.[373] The witness first became aware of Ndahimana when he became the *bourgmestre* in October 1993.[374] The witness was arrested in 1996 for his participation in the genocide: he confessed to having

[364] T. 4 November 2010 p. 50.
[365] T. 7 February 2011 p. 61.
[366] T. 7 February 2011 p. 67.
[367] T. 7 February 2011 p. 68
[368] T. 7 February 2011 pp. 4-5.
[369] T. 7 February 2011 p. 13.
[370] T. 10 February 2011 p. 5.
[371] T. 10 February 2011 pp. 5-6, 17.
[372] T. 10 February 2011 pp. 8, 15-17.
[373] T. 21 February 2011 pp. 3, 5-6; Defence Exhibit 113.
[374] T. 21 February 2011 p. 6.

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manned a roadblock, participating in killing a Tutsi named Innocent Muhigirwa on 12 April 1994 and participating in attacks on Nyange church on 14-15 April 1994. He was released in 2003.[375]

206. On 13 April 1994, Witness CDL, Kayishema, Ndungutse and the local court president Gacabuterezi ordered the witness and others to erect a roadblock by Nyange parish just across from Kimaranzara's house, and approximately one and a half minutes away on foot from Mutanoga market square, to "prevent the infiltration of the *Inkotanyi*."[376] The roadblock remained there for three days. No Tutsis were killed at the roadblock.[377] The witness testified that he would have heard if the *bourgmestre* had gone through the roadblock even if the witness himself hadn't been there—"A person like [Ndahimana] couldn't have passed through such a place without people knowing."[378]

207. On 14 April 1994, the witness arrived at the roadblock at 8 a.m. At approximately 11 a.m., assailants led by Ndungutse arrived at the roadblock, armed with clubs. The *gendarmes* shot into the air, and the attackers, including those manning the roadblock, ran away. The entire incident lasted about twenty minutes, and the roadblock was re-established around noon.[379] The witness saw Ndahimana pass through the roadblock on his way to the presbytery between 1 and 2 p.m. on 14 April 1994. He was driving a blue Daihatsu belonging to a local trader named Antoine and was accompanied by two local policemen. When Ndahimana arrived at the presbytery, "everyone [including the Tutsis] moved towards him, even the *gendarmes*" but the witness could not hear what they were saying.[380] Ndahimana returned from the presbytery approximately 30 minutes later.[381] The witness saw Ndahimana again later that day. Between 3 and 4 p.m., those manning the roadblock searched the vehicle carrying the "mortal remains" of a man who was killed in Kigali. An individual in the car said that the body was going to the home of the deceased. Kimaranzara, the leader of those manning the roadblock, personally searched the vehicle. Kayishema had instructed those manning the roadblock to search all vehicles going through the roadblock, including the *bourgmestre*'s. Approximately 20 minutes later, Ndahimana "passed by there" in the Daihatsu vehicle and his vehicle too was searched.[382] No Tutsis were killed on 14 April 1994.[383]

4.2.16 Defence Witness ND6

208. Witness ND6, a Hutu, lived in Nyange *secteur*, Kivumu *commune* in 1994.[384] He participated in the attacks on Nyange church, making him an accomplice witness.[385] He testified that he did not see the *bourgmestre* on 14, 15 or 16 April 1994.[386]

209. On 14 April 1994, Ndungutse directed a small group of about 20 persons, including the witness, to go to Nyange parish to kill the refugees there. The witness left home at about noon and joined Ndungutse at a bar in Karuteyi.[387] When the group arrived at Nyange parish, Ndungutse

[375] T. 21 February 2011 pp. 3-4.
[376] T. 21 February 2011 pp. 5, 21.
[377] T. 21 February 2011 pp. 21-22.
[378] T. 21 February 2011 p. 27.
[379] T. 21 February 2011 pp. 7-8.
[380] T. 21 February 2011 p. 8.
[381] T. 21 February 2011 pp. 8-9.
[382] T. 21 February 2011 pp. 9, 22.
[383] T. 21 February 2011 pp. 20-21.
[384] Defence Exhibit 99.
[385] T. 27 January 2011 pp. 1-4.
[386] T. 27 January 2011 pp. 17, 29.
[387] T. 27 January 2011 p. 4.

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spoke to the *gendarmes*. The *gendarmes* told the group to retreat. When the group failed to do so, the *gendarmes* shot in the air. Ndungutse then decided it would be wiser to return to the parish the next day with reinforcements. On the way back from the church, the group ran into Brigadier Mbakilirehe. When he learned of what had taken place, Mbakilirehe said "It is the *bourgmestre* who has complicated matters for us because he brought in those *gendarmes*."[388] He too thought it would be best to seek reinforcements and return the next day. The witness did not hear the conversation between Ndungutse and Mbakilirehe but was told about it later by Ndungutse.[389]

210. The witness saw Witness CDL talking to Ndungutse at a bar at Karuteyi on the way back from the attack. Witness CDL said he would provide reinforcements from Kilibilira in order to "dislodge" the *gendarmes*. Witness ND6 saw neither Kanyarukiga nor Ndahimana on that day.[390]

4.2.17 Defence Witness ND12

211. Witness ND12, a Tutsi farmer, lived in Kivumu *commune* in April 1994.[391] He knew Ndahimana when Ndahimana was an agronomist in Gisenyi.[392] He went to seek refuge at Nyange parish. He arrived there between 10 and 11 p.m. on 13 April 1994.[393]

212. At approximately 10 a.m. on 14 April 1994, Ndungutse arrived at Nyange parish with a group of attackers. There were three *gendarmes* at the parish who were able to chase the attackers away. The attackers did not return that day. The witness saw Ndahimana at the presbytery at approximately 2 p.m. that afternoon. The witness testified that Ndahimana spoke to two Tutsis, one teacher named Gatare and the other a medical assistant named Charles Mugenzi. He asked the refugees who had led the attack. They replied that it was Ndungutse. Ndahimana told them that he "did not have powers" but that he had asked the *gendarmes* to keep protecting the refugees.[394] He also told them that one of his relatives had died in Kigali and that he was going to the funeral. He then asked the *gendarmes* to keep the *Interahamwe* away from the church.[395] The witness also saw Ndahimana at Nyange parish on the evening of 14 April 1994.[396]

4.2.18 Defence Witness ND11

213. Witness ND11, a Tutsi, lived in Kivumu *commune* in April 1994. He knew that Ndahimana was the *bourgmestre* of Kivumu *commune*.[397]

214. On 14 April 1994, the witness went to seek refuge at Nyange church. He arrived at approximately 10 p.m., and had to circumvent road blocks to get to the parish. Some refugees had tried to bring weapons with them into Nyange church, but they had been confiscated by the *gendarmes*.[398] When the witness arrived at the church, some of his relatives informed him that Ndungutse had launched an attack on the refugees that day but that the *gendarmes* had repelled the assailants. They also said that Ndahimana had come to the presbytery at about 2 p.m. after the

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[388] T. 27 January 2011 p. 5.
[389] T. 27 January 2011 pp. 5-6.
[390] T. 27 January 2011 pp. 7-8.
[391] T. 19 January 2011 p. 2; Defence Exhibit 86.
[392] T. 19 January 2011 p. 2.
[393] T. 19 January 2011 p. 3; Defence Closing Brief, para. 148.
[394] T. 19 January 2011 p. 5.
[395] T. 19 January 2011 p. 6.
[396] T. 19 January 2011 p. 7.
[397] Defence Exhibit 85; T. 18 January 2011 p. 30.
[398] T. 18 January 2011 pp. 31-32, 48-49; Defence Closing Brief, para. 146.

assailants left. The refugees told the witness that Ndahimana spoke with Charles Mugenzi and a man named Gatare. Ndahimana then left to attend the funeral of a relative who had been killed in Kigali.[399]

4.2.19 Defence Witness ND7

215. Witness ND7, a Tutsi farmer, lived in Kivumu *commune* in April 1994.[400] She went to seek refuge at Nyange parish on 10 April 1994.[401]

216. On 14 April 1994, Hutu assailants led by Ndungutse, Kayishema and Witness CDL attacked Nyange church, but the *gendarmes* were able to repel the attack. Ndahimana arrived at the parish after the attack at approximately 2 p.m. He spoke with Aniceť Gatare and Charles Mugenzi, but the witness could not hear what they were saying. However, she did hear him talking to the *gendarmes* because she had gone to fetch water and the tap was close to where the *gendarmes* were. Ndahimana told the *gendarmes* that they were to protect the refugees and that they could fire on any attackers if necessary.[402]

4.3 Deliberations

4.3.1 Credibility of Witnesses

4.3.1.1 *Prosecution Witness CBS*

217. The Majority recalls that many of the witness' family members were killed at Nyange church, and therefore his memory may have been impacted by the chaotic and traumatic nature of the events.[403]

218. The Majority has also considered the fact that Witness CBS' statement to Tribunal investigators of February 1996 was recorded at the Kivumu tribunal and that his statement of March 2003 was recorded at the residence of the assistant *bourgmestre*.[404] The Majority has also considered that the witness was distantly related to the *bourgmestre* at the time of the attacks and held an administrative position in the *commune* from at least 1995 to 2003.[405] However, these points do not necessarily render his sworn testimony in this proceeding unreliable.

219. Considering the witness' previous statements, the Majority finds that the witness was evasive in his answers to questions put to him regarding these statements,[406] and that this had a negative impact on the Majority's assessment of his demeanour at trial.[407] The statements dated November 1995 and August 2000 support the witness' evidence that on Thursday afternoon,

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[399] T. 18 January 2011 pp. 32-34, 49.
[400] Defence Exhibit 93.
[401] T. 24 January 2011 p. 3; Defence Closing Brief, para. 145.
[402] T. 24 January 2011 pp. 4-5, 31-33; T. 21 September 2011 p. 51.
[403] T. 6 September 2009 pp. 29-30.
[404] T. 7 September 2010 pp. 15-17; Defence Exhibit 4; Defence Exhibit 6.
[405] T. 7 September 2010 p. 18 (ICS); Prosecution Exhibit 1; Defence Exhibit 3; Defence Exhibit 4; Defence Exhibit 5; Defence Exhibit 6.
[406] *See e.g.*, T. 6 September 2010 pp. 34-37 (The witness tried to avoid answering the questions put to him by alleging that the statement was recorded a long time ago, that he is not the one who wrote it down, that the statement was not properly recorded and that it was only read back to him.); T. 7 September 2010 pp. 6-7. ("I can see that there is a signature on this document which is similar to mine, but it's far-off similarity. I would say it is someone else who signed this document and not myself."); Defence Closing Brief, paras. 75-78.
[407] *Nahimana et al.* (AC) Judgement, para. 194; *Bikindi* (TC) Judgement, para. 31.

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Ndahimana, Kayishema, Mbakilirehe and Kanyarukiga went to Nyange presbytery to meet with Seromba.[408] In the 1995 statement, the witness explained that three Hutu women who were married to Tutsis were taken out of the church but did not provide details on who took out those Hutu women.[409] However, in neither of his previous statements did the witness refer to the fact that Ndahimana came back to Nyange parish a second time and remained in the car while three Tutsi women were called out from the church.

220. The witness provided further explanations in his 1996 statement. The witness said that he saw Ndahimana arrive at the church in a vehicle on "Thursday" together with IPJ Kayishema, Brigadier Mbakilirehe, and a police officer named Aloys Nishirimbere. Specifically, the witness stated that "Kayishema came in the church and took the Hutu women that were married to Tutsi men out of the church…The *bourgmestre* Ndahimana stayed in the car."[410] In this statement the witness did not mention the occurrence of a meeting earlier that day. The Majority notes that this account differs from his trial testimony, in which he stated that Ndahimana came to Nyange parish twice that day.

221. The witness attempted to explain the omissions in his previous statements by stating that he did not write down the statements himself and he only responded to the questions that were put to him.[411] Nonetheless, the Majority finds these omissions concerning.

222. Furthermore, in his 1996 statement, the witness stated that he had not seen Ndahimana on "the day of the attack [15 April 1994],"[412] while at trial he testified that he saw Ndahimana at Nyange parish on that day (Chapter III, Section 5.2.10). The Majority notes that this discrepancy tends to show that the witness might have tried to exaggerate Ndahimana's responsibility in relation to the 1994 events. In those circumstances, the Majority may rely on the witness' testimony only where corroborated.

4.3.1.2 *Prosecution Witness CBN*

223. The Majority has considered the witness' previous statements. In his statement provided to ICTR investigators on 15 November 1995, he did not refer to Ndahimana in relation to the events of 14 April 1994.[413] However, in an addendum to that statement dated 2 February 1996, the witness referred to a meeting held on a "Thursday," attended by the *bourgmestre*. The Majority infers that this meeting took place on 14 April 1994. The witness noted that the refugees asked Ndahimana for help and Ndahimana responded "there is nothing I can do for you." Further in the addendum, the witness stated that "[t]he next day, Friday, the big attack occurred. I'm sure the *bourgmestre* knew about everything. He and the priest didn't do anything to help us. This was the only time I saw the *bourgmestre* around the church."[414] In his 2000 statement, the witness also indicated that

[408] Defence Exhibit 3 (Witness CBS mentioned that he saw the accused from Monday to Thursday arriving in a car from the *commune* and that he talked with policemen and *gendarmes*); Defence Exhibit 5 (The witness also referred to that meeting).
[409] Defence Exhibit 3, pp. 3, 5.
[410] Defence Exhibit 4, p. 4.
[411] T. 7 September 2010 pp. 28-29.
[412] Defence Exhibit 4, p. 4.
[413] Defence Exhibit 16B.
[414] Defence Exhibit 17B, p. 4.

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Ndahimana attended a meeting at Nyange presbytery with Seromba and other authorities on 14 April 1994.[415]

224. The Majority notes a certain evolution in Witness CBN's recounting of Ndahimana's alleged words to the refugees. In his 1996 statement, the witness alleged that Ndahimana said "[t]here is nothing I can do for you."[416] In his 2000 statement the witness stated that Ndahimana said "this war was launched by the *Inyenzi* who killed our President Habyarimana."[417] Finally, in the witness' testimony at bar, he stated: "Look, *Inyenzis*, *Inkotanyis* have caused the war, so Hutus have responded."[418] The Majority notes that Witness CBN's early statements portray Ndahimana as someone rather powerless, whereas his trial testimony reveals the accused as a rather vindictive character.

225. The witness seems to bear a grudge against the accused because he did not provide assistance to the refugees despite the high position he held in the *commune*. Therefore, the Majority may rely on the witness' testimony only where corroborated.

4.3.1.3 *Prosecution Witness CBI*

226. At the outset, the Majority notes that the witness gave his statement dated April 2001 at the communal office of Kivumu and his statement dated February and March 2003 at the residence of the *bourgmestre*, the latter being listed as a contact person in all the witness' previous statements to the ICTR.[419] The witness confirmed in cross examination that he was now a member of the RPF and that he informed the party that he would be absent from Rwanda while testifying in the instant proceedings.[420] For this reason, the Majority considers it possible that the witness might lack impartiality while testifying against 1994 authorities. However, as the Defence did not question the witness further on this matter, the Majority cannot conclude that the witness might have had a motive to testify against the accused. Furthermore, the witness, as well as other persons, serves as a guide for people interested in knowing what happened at Nyange church.[421] Taking this into account, the Majority notes it is possible that the witness' testimony reflects not only what he witnessed himself at the time of the events in April 1994, but also information that he has since gathered for the purposes of his role as a guide at the church's site.

227. The Majority finds the following an example of the witness' attempt to extend Ndahimana's liability in his testimony related to 7 April 1994. Initially, the witness testified that he saw Ndahimana on that that day, when violence started to erupt, in the communal red car. However, when confronted with the evidence that the accused was in Kigali that day, the witness retracted his statement and said that he only saw the red vehicle and that "Tutsis" told him that the *bourgmestre* was there.[422] The Majority has doubts about this allegation, as it is not convinced that the red communal vehicle was functioning in April 1994 (Chapter III, Section 5.3.1.26).

228. Turning to the witness' testimony regarding the attacks on Nyange church, the Majority notes that the Defence pointed to discrepancies in the witness' prior statements regarding the date

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[415] Defence Exhibit 18, p. 3.
[416] Defence Exhibit 17B.
[417] Defence Exhibit 18 (Non-official translation).
[418] T. 13 September 2010 p. 20.
[419] Defence Exhibit 25; Defence Exhibit 26; Defence Exhibit 27.
[420] T. 15 September 2010 pp. 15-16.
[421] T. 15 September 2010 p. 19.
[422] T. 15 September 2010 pp. 1-4, 39.

on which he arrived at Nyange parish and the dates of subsequent events.[423] The witness maintained in his trial testimony that he arrived on 12 April 1994 and that the attack on Nyange church took place on 15 April 1994.[424]

229. The Majority notes that in his first statement to ICTR investigators dated 30 August 2000, the witness provided no dates for the incidents he alleged. Nevertheless, he did detail Seromba's request for the names of Tutsis, his own role in providing the names, Ndahimana's receipt of the list and the arrival at Nyange parish later that day of some of these Tutsis.[425]

230. The Majority also notes that the witness did not report the meetings of 13 and 14 April 1994 in his previous written statements or in his testimony in the *Seromba* case.[426] The Defence questioned the witness regarding his statements dated February and March 2003, in which he did not reference any meetings involving the authorities and Seromba. In response, the witness recanted any assertion of meetings: "Q.: So you have no knowledge of any meetings held on 13th, 14th, 15th. Do you agree with me? A.: No. I'm not aware of meetings which might have been held at that period. I simply saw those authorities pass by there and go to Father Seromba's place. I saw them speak to one another. But I cannot describe that conversation as a 'meeting.' I didn't talk about a meeting."[427]

231. Ultimately, the Majority has reservations about relying on Witness CBI's testimony for the purposes of supporting findings beyond reasonable doubt. In addition to doubts related to the witness' possible interest in charging the accused, it did not find his account sufficiently compelling and detailed with regard to the meetings Ndahimana allegedly attended. Therefore, it may only rely on this testimony if corroborated.

4.3.1.4 *Prosecution Witness YAU*

232. Having considered the totality of her evidence, the Majority concludes that Witness YAU arrived at Nyange parish on 13 April 1994; that she remained there on 14 and 15 April 1994; and that she fled during the night of 15 and 16 April 1994.

233. The Majority observes that the witness did not mention the presence of Ndahimana at Nyange parish in her first statement to ICTR investigators in 2000. When questioned about this, the witness explained that she only answered questions put to her but did not elaborate.[428] The Majority considers this response plausible. Despite the witness' explanation, the Majority notes that the witness, in her statement, did describe the events preceding the attack—that Seromba refused to give water to the refugees, that he came to disarm them and that he came again with Kayishema and Kanyarukiga to take money from the refugees—but she never referred to Ndahimana. The witness stated that she knew Ndahimana, nonetheless, she also specifically stated that "[t]he only official I

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[423] T. 14 September 2010 pp. 46-52, 56-57; T. 15 September 2010 pp. 9-13.
[424] T. 14 September 2010 pp. 46-48.
[425] Defence Exhibit 25A, p. 3.
[426] Defence Exhibit 26 (The Majority notes that, in his statement dated April 2001, the witness referred to Kanyarukiga coming to Nyange parish together with Ndungutse, Kayishema, Ndahimana and a business man called "Anicet" on the afternoon of the day that seems to be 13 April 1994. But the witness also mentioned that the same day an attack occurred and he heard a grenade explosion. It follows from the witness' testimony assessed elsewhere (Chapter III, Section 5.2.11) that the grenade was thrown on 15 April 1994. Given that the statement is vague, and given that the witness reported several meetings, the Majority is unsure whether this event reported in the statement supports the witness' testimony).
[427] T. 14 September 2010 p. 52.
[428] T. 15 September 2010 p. 58.

recognised at the Nyange church was *conseiller* Vianney."[429] Thus, the Majority may only rely on this witness' testimony where it is corroborated.

4.3.1.5 *Prosecution Witness CDZ*

234. As the witness only superficially corroborates the fact that Hutu assailants attacked Tutsi refugees on 14 April 1994, a fact that is not in dispute, the Majority will not dwell on the witness' credibility at this juncture. In any event, the Majority notes that Witness CDZ does not report any meeting or that any authority entered Nyange church to search the refugees while he was hiding there.

4.3.1.6 *Prosecution Witness CBK*

235. The Majority recalls that Witness CBK was only 14 years old during the events.[430] Accordingly, his young age at the time will be taken into consideration. The witness gave three prior statements to the ICTR. Those dated August 2000 and October/ November 2002 seem to focus primarily on Seromba, while the one dated April 2001 was mainly related to Kanyarukiga.[431]

236. The statement dated August 2000 is quite detailed and covers the events that occurred at Nyange parish from the arrival of the first refugees until the days following the destruction of Nyange church. However, the witness did not refer to any particular events on 14 April 1994 and only mentioned Ndahimana in connection with a meeting that took place on the evening of 15 April 1994.[432] In his statement dated October/November 2002, Witness CBK stated that Seromba entered the church with Ndahimana, Kayishema, Kanyarukiga and Mbakilirehe and that the men came out with traditional weapons. Seromba kept "one bow, some arrows and some spears" and the rest of the weapons were taken to the communal office by Ndahimana and IPJ Kayishema.[433] The statement is consistent with the witness' testimony on the point that the authorities, including Ndahimana, disarmed the Tutsis. However, the statement does not refer to any meetings that would have occurred on 14 April 1994. Given that the statement was very detailed (11 pages), yet failed to mention the two meetings included in the witness' testimony in court, the Majority finds this omission troubling.

237. In addition, Witness CBK testified in the *Seromba* case that two meetings took place on 14 April 1994. He further said that the refugees were disarmed "at some point" but that he did not know who made the decision to do so.[434] However, in the *Kanyarukiga* case he said that the Tutsis were disarmed on 13 April 1994 by authorities including Ndahimana, Kayishema, Kanyarukiga, Mbakilirehe and Witness CDL.[435] The Majority considers that all the variances mentioned above are not significant by themselves, but, taken together, raise doubt with respect to Witness CBK's account in relation to whether meetings were held on 14 April 1994 and who disarmed the refugees.

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[429] Defence Exhibit 30, p. 5.
[430] Prosecution Exhibit 16.
[431] Defence Exhibit 40; Defence Exhibit 39, p. 4; Defence Exhibit 42, pp. 6-7.
[432] Defence Exhibit 40, p. 5 (While the witness did not refer to a particular date, he stated that he saw Ndahimana on the day when the assailants tried to set the church on fire. The Majority considers that according to the witness' evidence in court, that day would have been 15 April 1994).
[433] Defence Exhibit 42, pp. 6-7.
[434] Defence Exhibit 41, pp. 15, 17.
[435] Prosecution Exhibit 19, p. 70.

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238. Turning to the assessment of the witness' testimony in court, the Majority recalls that the witness could move freely because he was a Hutu and that he was close to Father Seromba. Therefore, he was well placed to describe who was meeting with Seromba, although it is clear that he did not attend the meetings.[436] According to the witness, two meetings took place on 14 April 1994. The meeting that took place in the morning was allegedly followed by the disarmament of the Tutsi refugees. However the decision to do so was taken during a meeting that occurred the day before, on 13 April 1994.[437] Therefore the purpose of the meeting that took place on the morning of 14 April 1994 is unclear. Thus, the Majority may only rely on this witness' testimony where it is corroborated.

4.3.1.7 *Prosecution Witness CBY*

239. Witness CBY gave statements to ICTR investigators in 1996 and in 2000.[438] The Majority recalls that when assessing the consistency of a witness' accounts of events, it attaches particular importance to those statements provided by witnesses prior to the indictment of the accused by this Tribunal. The Majority has addressed elsewhere certain concerns regarding discrepancies between the evidence given by the witness at trial and his prior statements with respect to the dates on which he saw Ndahimana at Nyange parish. (Chapter III, Section 5.3.1.7). In his 1996 statement the witness only said that he had seen Ndahimana meet with Father Seromba a few days before the main attack.[439] In contrast, in his trial testimony, he said that he saw Ndahimana at the parish meeting with Seromba on several occasions before the attacks. The Majority finds this discrepancy to be of concern. However, the Majority notes that the 1996 statement was generally lacking in detail, and focused primarily on Seromba. The witness' 2000 statement is substantially more detailed than his 1996 statement and is generally consistent with the witness' evidence at trial, except with respect to dates.

240. The Majority is of the view that the information provided through the witness' testimony in relation to meetings prior to the attacks is quite brief and does not address the purpose of the meetings. As the witness said: "I merely see them -- saw them going to see the priest."[440] Nor is his testimony clear on whether or not the authorities were present at some point of the attack on 14 April 1994.[441] Because of the inconsistencies with prior statements, as well as the fact that the witness' testimony is not very compelling on the alleged meetings, the Majority may rely on his evidence when corroborated.

4.3.1.8 *Prosecution Witness CDJ*

241. The Majority notes that the witness' testimony was vague regarding the dates and hours of the events he reported, and he could not provide any information on the purpose of the meetings. The Majority notes that in his April 2001 statement,[442] the witness said that the refugees were at

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[436] T. 3 November 2010 p. 41 (ICS) (The witness knew Seromba); T. 2 November 2010 pp. 64-66 (ICS); T. 3 November 2010 p. 5 (He also described Seromba as being the priest in charge of Nyange parish in 1994); T. 3 November 2010 pp. 3-4, 11 (The witness described Ndahimana as being the *bourgmestre* of Kivumu *commune* in 1994 and further said that Fulgence Kayishema was judicial police inspector, Ndungutse was a teacher and he was also the president of the MRND party in Kivumu *commune*. Mbakilirehe was the brigadier of Kivumu *commune* and Gaspard Kanyarukiga was a trader, a businessman, who had his business at the Nyange market centre).

[437] T. 3 November 2010 p. 56.

[438] T. 9 November 2010 p. 57.

[439] Defence Exhibit 67.

[440] T. 10 November 2010 p. 28 (ICS).

[441] T. 10 November 2010 pp. 27-29 (ICS).

[442] Defence Exhibit 71.

Nyange parish for about three days, but emphasised that he could not be specific about dates. The witness also said in this statement that during this period, Gaspard Kanyarukiga would come in the evenings to have discussions with Father Seromba and that he had never seen the two men together before the arrival of the refugees. He described Kanyarukiga's attire and added that he "would usually be accompanied by a third man, the *bourgmestre*, Ndahimana, Grégoire."[443] The witness added that when he was close to the men they would begin to speak in French, which the witness did not understand.[444]

242. The Majority believes that the witness' first statement is generally consistent with his evidence at trial. The Majority notes that it was his habit to be present at Nyange parish by 7 p.m. each evening, and accepts that he was likewise there by 7 p.m. on 12, 13 and 14 April 1994. Therefore, the Majority finds the witness credible when his testimony corroborates more precise information on the alleged meetings.

4.3.1.9 *Prosecution Witness CDL*

243. As will be discussed in more detail elsewhere (Chapter III, Section 5.3.1.3), Witness CDL is an accomplice witness, and appears to have been among the leaders of the attacks on Nyange church in April 1994. In addition, as early as 1999, he informed the Kibuye Prosecutor's office that he had some personal animosity against Ndahimana (Chapter III, Section 5.3.1.3).

244. At the outset, the Majority observes that the witness' steps to testify against Seromba, Kanyarukiga and Ndahimana were most likely motivated by his desire to establish the truth regarding the events of 1994. That said, the Majority considers that those steps are unlikely to be devoid of any personal interest. As shown by the evidence in this case, the witness may have tried to minimise his own role in events. During cross-examination the witness explained that in relation to the meeting on 14 April 1994, Kanyarukiga had come from his house to inform the authorities that the *Inkotanyi* were already on the other side of the river and that they were coming to release the Tutsis who had sought refuge at Nyange parish.[445] The Majority observes that: firstly, this information regarding the alleged purpose of the meeting is hearsay; and secondly, other evidence was brought before the court through Witness ND11, who testified that on 11 April 1994, Kayishema, Gacabuterezi and Witness CDL sent a letter to an *Interahamwe* requesting that killings of Tutsis start in the area.[446] Therefore, the Majority is not convinced that the witness was not among those participants that bear responsibility for the start of the killings in the area.

245. Also, the testimony of other witnesses raises doubts concerning Witness CDL's statement that he did not go to Nyange parish on 14 April 1994. Witness CBS said that Witness CDL attended the meeting at the parish together with Ndahimana, Kanyarukiga, Seromba and others.[447] In addition, while Witness CDL testified that he was a "spectator" at the meeting at the market square after the attack on 14 April 1994,[448] Defence Witness ND6 explained that Witness CDL not only watched what was happening, but also told Ndungutse, "[y]ou cannot succeed with so few people" and promised that he would bring reinforcements.[449] Thus, the Majority believes that the witness'

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[443] Defence Exhibit 71, p. 3.
[444] Defence Exhibit 71, p. 4.
[445] T. 18 November 2010 p. 50.
[446] T. 18 January 2011 p. 30.
[447] T. 6 September 2010 pp. 17-19, 62.
[448] T. 12 November 2010 pp. 2-3; T. 18 November 2010 pp. 10, 49-51.
[449] T. 27 January 2011 pp. 7-8.

responsibility in the events that occurred at the parish might impact his whole testimony, and therefore commands caution.

246. The Majority has closely considered the witness' previous statements. It finds that his statements, particularly his 16 April 1999 confession, guilty plea, and request for forgiveness taken at the Kibuye Prosecutor's office, is consistent with his testimony in court with regard to the main features of the events that took place on 13 and 14 April 1994.[450] In that document, the witness said that the decision to launch an attack on Nyange church was taken during a meeting held on 13 April 1994 that Ndahimana attended as well as other authorities and *gendarmes*. He also explained that following the meeting, Rugwizangoga and Seromba went into the church to see whether the refugees were armed.[451] The Majority observes however, that while the witness' evidence was hearsay according to his testimony in court, in his statement he indicated that he "was able to recognise" Ndahimana and others, which implies that he attended the meeting.[452] It is also noted that the prior statement does not corroborate the witness' testimony regarding the identity of those who went to check whether the refugees were armed.[453]

247. In his 1999 statement, the witness explained that during the attack of 14 April 1994, attackers were repelled by the refugees, and the *gendarmes* advised the attackers to seek reinforcements. Ndahimana, Kayishema, Habiyambere, Mbakilirehe, Kagenza and the witness were at Mutanoga market centre. Kanyarukiga then arrived and informed the group that the *Inyenzi* were coming.[454] Ndahimana asked those gathered to "spread the word" that "they were going to meet at the church very early the next day to 'kill those Tutsi'."[455] Ndahimana further added, "'Make them understand that it was the *Inkotanyi*...who killed the Head of State...Théoneste Mujyanama...[and] Dr. Juvénal Ntawuruhunga'."[456]

248. The Majority notes Witness CDL's leading role in the attacks on Nyange church, his rivalry with Ndahimana, as well as his tendency to distort the truth in relation to events that involve his responsibility require this witness' testimony to be considered with caution. The Majority may rely on this witness' testimony only if duly corroborated.

4.3.1.10 *Prosecution Witness CBR*

249. The Majority recalls that Witness CBR is an accomplice witness because he actively participated in the killings at Nyange church. He testified that the Kibuye Prosecutor's office asked him to testify at the Tribunal and introduced him to ICTR investigators.[457] In addition, the Majority recalls its observations and serious concerns expressed elsewhere in relation to credible evidence alleging that Witness CBR exerted pressure on other detainees to implicate Ndahimana in their confessions. These circumstances require the Majority to view the witness' testimony with caution (Chapter III, Section 5.3.1.5).

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[450] Defence Exhibit 77.
[451] Defence Exhibit 77, p. 9.
[452] Defence Exhibit 77, p. 9.
[453] Defence Exhibit 77, p. 9 (Witness identified Rugwizangoga and Seromba). *Cf.* T. 11 November 2010 p. 69 (Witness identified Kanani).
[454] Defence Exhibit 77, p. 9.
[455] Defence Exhibit 77, p. 9.
[456] Defence Exhibit 77, p. 9.
[457] T. 2 November 2010 p. 54.

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250. The Majority notes that the witness pleaded guilty and provided a confession to Rwandan authorities in 1999. In that confession, he named Ndahimana, *inter alia*, as a co-perpetrator, and confessed, *inter alia*, to having participated in an attack on Nyange church on 14 April 1994.[458] The witness' testimony regarding the attack on 14 April 1994 is consistent with the account he provided in this confession. He did not, however, mention the meeting at the communal office that Ndungutse told him preceded the attack on the church, nor did he mention the disarming of the refugees on 13 April 1994.[459] In his initial statement to ICTR investigators in August and September 2000,[460] the witness did not mention the meeting of 13 April 1994, but his account of the attack on 14 April 1994 is consistent with his evidence at trial. He did not mention Ndahimana's presence on that day.[461] The Majority notes that the witness' evidence regarding the meeting, as well as the allegation that the assistant *bourgmestre* came to check whether the refugees were armed on the evening of 13 April 1994, is hearsay evidence, which the Majority will therefore assess with caution. Ultimately, the witness did not refer to Ndahimana in connection with the attack of 14 April 1994. Considering these facts together, the Majority views his testimony with caution and may only rely on his testimony where well corroborated.

4.3.1.11 *Prosecution Witness CNJ*

251. Witness CNJ participated in the attack of 15 April 1994 on Nyange church and is, therefore, an accomplice witness. He spent eight years in prison and was released in 2008.[462]

252. During cross examination, the witness made it clear that none of the authorities "came to our *secteur* calling upon us to go to Nyange" but that the information had been transmitted by Kayishema and Ndungutse, which is why the witness and others decided to go.[463]

253. In two statements provided prior to 2001, the witness said that the communal authorities had mobilised the population to attack the refugees at Nyange church, but he did not name Ndahimana.[464] In a guilty plea dated August 2000, the witness specified that the assailants were led by Ndungutse, Witness CDL and the communal policemen, but made no mention of Ndahimana.[465]

254. The Majority is troubled by the fact that the witness did not mention Ndahimana until a statement dated November 2001, after Ndahimana's first indictment was filed.[466] Thus, the Majority may only rely on this witness where corroborated.

4.3.1.12 *Defence Witnesses Thérese Mukabideri, Beatrice Mukankusi and Léonille Murekeyisoni*

255. The Majority found these witnesses to be generally credible despite their families' close relations with the accused. The Majority has addressed Mukabideri's links with other Defence witnesses elsewhere and further recalls that, because of Mukankusi's contradiction during cross examination, it considers her testimony with caution (Chapter III, Section 5.3.1.14).

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[458] Defence Exhibit 34, p. 27 (The document is unclear. Although it appears to be dated 2001, it refers to a confession provided by the witness in September 1999).
[459] Defence Exhibit 34, p. 27.
[460] Defence Exhibit 32.
[461] Defence Exhibit 32, p. 3.
[462] T. 4 November 2010 p. 64 (ICS).
[463] T. 5 November 2010 p. 39.
[464] Defence Exhibit 44, p. 1; Defence Exhibit 50, p. 1. *See also*, T. 5 November 2010 pp. 4-5 (ICS).
[465] Defence Exhibit 44, p. 2.
[466] Defence Exhibit 46.

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256. Addressing in particular the credibility of Léonille Murekeyisoni, the Majority found her account relatively cursory. The Majority however notes that Murekeyisoni was not listed as an alibi witness, which must be considered in evaluating her testimony.

4.3.1.13 *Defence Witness ND24*

257. The witness participated in the attacks on Nyange church on 14 and 15 April 1994 and confessed to having killed one Tutsi civilian on 12 April 1994.[467] The witness was also found guilty of having manned the roadblock erected just outside Nyange parish.[468] The witness is an accomplice; however the Majority considers that he does not seem to have any particular motive to testify in favour of the accused (Chapter III, Section 5.3.1.19).

258. The Majority acknowledges that Witness ND24 saw the accused pass through the roadblock three times on 14 April 1994; first, when the accused went to Nyange presbytery after the attack attempt, next when he left the presbytery and, finally, later in the afternoon following the funeral convoy that had passed the roadblock.[469] The witness' testimony that the accused was driving a blue Daihatsu pickup is corroborated by Witness Beatrice Mukankusi, who said that she loaned Ndahimana her vehicle, a blue Daihatsu pickup, to attend the funeral of Dr. Ntawuruhunga of Rufungo in Rukoko *secteur*.[470]

259. The Majority is not convinced that the witness would have received instructions to search the *bourgmestre*'s car in particular; however, it finds plausible that he would have been asked to search any car and that because the *bourgmestre* was driving a private car, he would have been searched as well. To conclude, the Majority recalls that the witness was manning his roadblock so he was not at Nyange parish itself and could only provide general information on the activities of the *bourgmestre* there.

4.3.1.14 *Defence Witness ND6*

260. The witness acknowledged that he participated in killings at Nyange church in April 1994.[471] He is therefore an accomplice witness. He was tried in 1996 and confessed to the crimes he committed. He served his sentence and was doing community service at the time of his testimony before this Tribunal.[472]

261. The Majority recalls that the main question when assessing the credibility of such witnesses is not whether or not the witness is detained, but rather whether the witness concerned might have a personal interest in implicating the accused[473] (Chapter II, Section 2.2.3). The Majority considers that it does not appear here that the witness might have motive to implicate Ndahimana. Considering that the witness admits his participation in the crime and has already served his sentence, it does not seem that testifying in favour of the accused would exonerate him from his responsibility. The Majority therefore finds the witness' testimony credible. Nonetheless, the Majority notes that the witness did not actually hear the conversations between Ndungutse and the *gendarmes* nor the conversation between Ndungutse and Mbakilirehe; thus, his testimony on this

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[467] T. 21 February 2011 pp. 3-5.
[468] T. 21 February 2011 p. 5.
[469] T. 21 February 2011 pp. 34-35, 40.
[470] T. 7 February 2011 pp. 12-14.
[471] T. 27 January 2011 p. 18.
[472] T. 27 January 2011 p. 20.
[473] *Nahimana et al.* (AC) Judgement, para. 439.

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point amounts to hearsay evidence. In addition, it would appear that Ndungutse himself reported both conversations to the witness. In that instance, the Majority considers this hearsay evidence with caution.

4.3.1.15 *Defence Witness ND12*

262. The Majority finds this witness' evidence credible. Nevertheless, it notes that he stated that he remained in Nyange church during his time at the parish, and that he only went once to Nyange presbytery on 14 April 1994 to hear what Ndahimana had to say. Thus, he may not have been in a position to observe what other witnesses saw. For example, the witness said he did not see Father Seromba at Nyange parish during his stay there because he was in the church and Seromba would stay in the backyard of the presbytery.[474] Finally, as noted elsewhere in the Judgement (Chapter III, Section 5.3.1.24), the Majority is mindful of the risk of collusion with Witness ND11 and will address that issue below.

4.3.1.16 *Defence Witness ND11*

263. The Majority notes that during cross examination, the Prosecution suggested that, had the witness participated in the meeting that took place on 12 April 1994, it is doubtful that Jean Bosco, who knew that the witness was a Tutsi, would have let him leave peacefully. However, the witness explained that Jean Bosco was his neighbour and that they knew each other personally. He added that being an *Interahamwe* did not mean that one could not save or warn some people.[475] The Majority finds this explanation plausible.

264. The Majority recalls that, according to the witness, Ndahimana rescued him on 15 April 1994. Therefore, it is possible that the witness may have had motive to provide an account which cast Ndahimana in a positive light.[476] Further, the witness acknowledged that he arrived at Nyange parish late in the evening of 14 April 1994, and, therefore, his evidence about that day was hearsay. In addition, the Majority notes that the witness' account of the events on 14 April 1994 is similar to that of Witness ND12. The Majority is mindful of the risk of collusion between the two witnesses. In any event, both testimonies are of little probative value.

4.3.1.17 *Defence Witness ND7*

265. The Majority notes that, in its Pre-Trial Brief, the Defence said that the witness saw Ndahimana talking to the refugees on 14 April 1994 but that she could not hear what he was saying. The Defence did not indicate that the witness would testify that she heard Ndahimana speaking with the *gendarmes*. The Prosecution objected that the Defence did not provide this information in a timely manner.[477] In response to this objection, the Chamber ruled that it would not disregard the relevant evidence but that the Defence would not be permitted to ask any further question on this matter. In any event, the Majority is troubled by the witness' late recollection of Ndahimana's discussion with the *gendarmes* at Nyange church on 14 April 1994. The Majority will consider this information with caution; however, notes that it found other parts of the witness' account of her experiences at Nyange church on 14 April 1994 to be credible.

[474] T. 19 January 2011 p. 11.
[475] T. 18 January 2011 pp. 47-48.
[476] T. 18 January 2011 pp. 37-38, 57-59.
[477] T. 24 January 2011 pp. 5-6.

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266. Having found that none of the Prosecution witnesses can be relied upon without corroboration, the Majority will now consider whether the Prosecution's case offers corroborated evidence supporting findings beyond reasonable doubt regarding the accused's guilt.

4.3.2 Preliminary Matters

267. The Defence submits that the allegations of an attack on Nyange church on 12 April 1994, as put forth by Witnesses CBY and CBN, were not properly pleaded, and thus should be excluded from consideration of the charges against the accused.[478] The Majority acknowledges that Witness CBY reported that on 12 April 1994, he saw a group of about ten "criminals and ruffians" armed with clubs and machetes arrive at Nyange parish. They traded insults with the refugees and left.[479] He also said that Ndahimana came to visit Seromba at Nyange parish on 12 April 1994.[480] In addition, Witness CBN reported that a woman called Judith was attacked and wounded by *Interahamwe* on 12 April 1994.[481] As these allegations do not relate to any criminal action of the accused, they cannot be considered to be charges against him. Therefore, the Majority concludes that the Defence objection is baseless and does not need to be addressed.

4.3.3 Meetings at Nyange Presbytery, 13 April 1994 (Paragraph 22)

268. According to paragraph 22 of the Indictment, on or about 13 April 1994, Ndahimana, Seromba, Kayishema, Kanyarukiga and others held a meeting at Nyange presbytery to plan the extermination of the Tutsis. On that same day, assailants launched an attack against the refugees at the instigation of Kanyarukiga.

269. The Majority considered the evidence of Prosecution Witnesses CBN, CBI, YAU, CBK, CBY, CDJ, CDL and CBR and Defence Witnesses ND12 and ND24.

270. First, the Majority notes that, from 13 April 1994, the situation at Nyange parish became increasingly tense and the refugees faced sporadic attacks of limited scale.

271. The Majority now turns to review the evidence based on allegations that Ndahimana was involved in meetings and subsequent attacks on Nyange church.

272. The Majority acknowledges that Witness CBN testified about one attack that day but he did not testify that a meeting occurred, nor did he refer to Ndahimana in relation to 13 April 1994. Witness CBI reported the occurrence of both a meeting between Ndahimana and other authorities and an attack that started simultaneously around 10 a.m. Witness CDJ, who arrived at Nyange parish late in the day, reported that a meeting occurred at around 7 p.m. Witnesses YAU and CBY testified about a meeting that day but did not talk about an attack. Finally, Witness CBK explained that two different meetings occurred that day involving the Kivumu authorities and that the attack occurred in between the two meetings.[482] The evidence on whether one or two meetings happened at the parish on 13 April 1994 and whether one or several attacks were launched that same day is unclear. Given the passage of time since the events, the Majority considers the minor variances, with respect to the precise timings immaterial. That being said, a certain level of consistency remains necessary to enable the Majority to draw conclusions from the evidence.

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[478] Defence Closing Brief, n. 572.
[479] T. 9 November 2010 p. 52.
[480] T. 9 November 2010 p. 49 (ICS); T. 10 November 2010 p. 8 (ICS).
[481] T. 13 September 2010 p. 15.
[482] T. 3 November 2010 p. 10; T. 21 September 2011 p. 11.

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273. At the outset, the Majority notes that Witnesses CDL and CBR both testified that members of the JCE met at the communal office on the morning of 13 April 1994. Paragraph 22 of the Indictment does not refer to such a meeting at the communal office, and thus the Majority will not consider this evidence.

274. Witnesses CBK, CBI and CBN testified that Hutu assailants attacked the refugees that day.[483] Witness CBN reported that the attack started at around 8 a.m. and that it lasted until 4 p.m. Witness CBK referred to a small attack that took place between morning and 2 p.m.[484] Moreover, it falls from Witness CBI's evidence that Tutsis managed to repel the assailants and no one was killed that day,[485] a fact that was confirmed by Witness CBY.[486] In any event, the evidence does not show that any attacks were a result of, or followed, a meeting attended by the Ndahimana.

275. Several witnesses reported that a meeting occurred in the morning with Ndahimana, Seromba, Kayishema, Kanyarukiga and other authorities at Nyange parish. At the outset, the Majority notes a lack of consistency with regard to the location of that meeting.[487] In addition, none of the witnesses were able to report the specific contents of the meeting, nor could they confirm that its purpose was to plan the extermination of the Tutsis.[488]

276. Witness CBK was the only witness to report that two meetings occurred that day. He testified that the second meeting started around 2 p.m. and involved Seromba, Ndahimana, Witness CDL, Kayishema, Mbakilirehe, Ndungutse, Colonel Nzaphakumunsi and other authorities "from all categories."[489] He stated that the authorities decided that the refugees should be disarmed and they were subsequently disarmed on 14 April 1994. The witness did not actually attend the meeting, but, noted that after it ended, the authorities publicly stated that refugees had to be disarmed.[490] Given that the witness' account is not corroborated and that the evidence surrounding the disarmament of the refugees is confusing, the Majority will not rely on Witness CBK's evidence alone.

277. Witness CDJ is the only witness reporting that on 13 April 1994 at around 7:30 p.m., Ndahimana, Kanyarukiga and Seromba had a conversation at Seromba's residence.[491] In any event, no evidence was adduced regarding the purpose or eventual consequences of that meeting.

278. The Majority acknowledges that it is a difficult task for the Prosecution to bring witnesses who are able to report the content of a meeting that was restricted to a selected audience composed of figures of authority. This being the case, the Majority notes that circumstantial evidence may be

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[483] Witness CBN: T. 13 September 2010 pp. 16-17, T. 14 September 2010 p. 7; Witness CBI: T. 14 September 2010 pp. 29-30, 34-36; Witness CBK: T. 3 November 2010 pp. 6-7, 55.
[484] Witness CBN: T. 13 September 2010 p. 17; Witness CBK: T. 3 November 2010 p. 10.
[485] Witness CBI: T. 14 September 2010 p. 35; Witness CBY: T. 10 November 2010 p. 21 (ICS).
[486] T. 10 November 2010 p. 21 (ICS).
[487] Witness YAU: T. 15 September 2010 pp. 42-43 (Witness testified that Ndahimana, Father Seromba, Kayishema, Kanyarukiga and a *conseiller* named Vianney Habarugira held a meeting in front of the parish secretariat); Witness CBI: T. 14 September 2010 pp. 29-30 (Ndahimana, Kayishema, Kanyarukiga, Murangwabugabo and Ndungutse went to meet Seromba at Nyange presbytery); Witness CBK: T. 3 November 2010 pp. 6-7, 55 (Seromba, Ndahimana, Witness CDL, Kayishema, Mbakilirehe, Christophe Ndungutse, Colonel Nzaphakumunsi, as well as other authorities "from all categories" had a meeting in the building where the priests lived and upstairs in the room that was usually occupied by the bishop of Nyundo when he came to visit Nyange parish).
[488] Witness CBY: T. 9 November 2010 p. 49 (ICS) (Testified that he saw "those persons coming and discussing with the priest" but did not see them doing anything else); Witness CBI: T. 14 September 2010 pp. 34-35 (Testified that he could not hear what they were saying, but could see them talking to each other because he was in the courtyard).
[489] T. 3 November 2010 pp. 6-7.
[490] T. 3 November 2010 p. 56.
[491] T. 11 November 2010 pp. 28-29 (The Chamber assumes that the witness must have been referring to 13 April 1994).

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useful to indicate the eventual consequences of the meeting and the state of mind of those persons in attendance.

279. In that regard, Witness CBI testified that at an unspecified time on 13 April 1994, Seromba asked the refugees whether there were "any other persons who were still there on the hill."[492] The witness gave Seromba the names of the persons from his locality that had not come to Nyange parish, and Seromba subsequently handed the list to Ndahimana. Later that day, the witness saw the Tutsis he had mentioned arrive at the parish, noting that some of them arrived in a white pickup belonging to Witness CDZ, driven by a man called Yohana Jigoma.[493]

280. The Majority assumes that the Prosecution relies on this evidence to show that the accused acted in concert with members of the JCE in a shared genocidal intent.[494] The Majority finds that the witness provided a substantial amount of detail about this incident, naming both the refugees who were brought to Nyange parish that day and details of the vehicle in which some arrived.[495] Nonetheless, this evidence does not prove beyond reasonable doubt that the purpose of the list was to gather the Tutsis at the church so that they would be exterminated. When asked what became of Antoine Karake, one of the Tutsis that was transported to the parish, the witness responded "I've never seen him again. And I don't know anything."[496] Furthermore, the Majority has no doubt as to the good faith of the witness when he provided the names to Seromba. Even if Ndahimana had actually been given that list of names, no evidence shows that at that time Ndahimana was spurred on by criminal intentions. In addition, no evidence suggests that the Tutsis were brought to Nyange parish following Ndahimana's instructions.

281. The Majority has also considered Witness YAU's evidence, who testified that IPJ Kayishema and Kanyarukiga brought Tutsis to Nyange parish in Kanyarukiga's car that day following a meeting with Ndahimana.[497] The Majority does not consider it to be beyond the realm of possibility that some Tutsis were brought to the parish by authorities who later participated in the killings. However, other evidence also shows that Tutsis decided to go to the parish voluntarily because they had no other place to go or thought they would be protected there.[498] The Majority notes that while there are various possible explanations regarding the presence of so many refugees at the church, none of these explanations demonstrate that the accused played a central role in the presence of the Tutsis, or that he planned or ordered Tutsis to be moved to Nyange parish, and later, into Nyange church, for the purpose of their extermination. Nor does the evidence of the case support paragraph 18 of the Indictment.[499]

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[492] T. 14 September 2010 p. 30.
[493] T. 14 September 2010 pp. 31-33 (Witness testified that among the Tutsis that subsequently arrived at Nyange church, he saw Antoine Karake and his family).
[494] Prosecution Closing Brief, para. 143; T. 21 September 2011 p. 9.
[495] T. 14 September 2010 pp. 30-33.
[496] T. 14 September 2010 pp. 33-34.
[497] T. 15 September 2010 pp. 44-45.
[498] Witness CBS: T. 6 September 2010 p. 14 (Explained that he fled to Nyange church because he thought they would be safe, because when similar events occurred in 1990 in Kibirara those who fled to the church survived the massacre); Witness CBI: T. 14 September 2010 p. 53 (Went to the church of his own volition, because people had been safe there in 1993); Witness ND12: T. 19 January 2011 pp. 3-4 ("I decided to go to Nyange parish because in 1973 when there was a war in Rwanda, people had sought refuge at Nyange parish. That is why everyone when, once again, the war broke out, went towards Nyange parish…No one forced me to go there. People were used to seeking refuge in churches and they were safe there. So this was a personal decision on my part.").
[499] Paragraphs 18 and 19 of the Indictment are further discussed in Chapter III, Sections 2.3, 3.

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282. Considering the totality of the evidence, the Majority is satisfied that one meeting occurred at Nyange presbytery with Ndahimana, Seromba and others in attendance on 13 April 1994. However, the evidence does not establish that the purpose of that meeting was to plan the extermination of the Tutsis. In fact, other evidence actually suggests that Ndahimana did not harbour negative feelings or intentions towards the refugees. Indeed, Witness CBY reported that on 13 April 1994 he heard Ndahimana direct the assailants to go home.[500] Finally, while several witnesses reported that an attack took place on 13 April 1994, it is not proven that the attack was launched at the instigation of Kanyarukiga.

283. The Defence evidence is of little assistance in the present case; none of the witnesses who participated in the killings reported any attack or meeting on 13 April 1994.[501] Among the witnesses that were at Nyange church, Witness ND12 testified that the first attack on the church happened on 14 April 1994.[502] Witness ND24 did not report that Ndahimana passed through the roadblock that he was manning on 13 April 1994. Other Defence witnesses did not report any particular event on 13 April 1994.

284. Ultimately, the Majority does not find paragraph 22 of the Indictment to be established beyond reasonable doubt.

4.3.4 Meetings at Nyange Presbytery, 14 April 1994 (Paragraph 23)

4.3.4.1 *Preliminary Matters*

285. The Defence advanced a partial alibi for 14 April 1994 stating that from 3 p.m. that day, the accused was with the family of the deceased Dr. Ntawuruhunga.[503] In its Closing Brief, the Defence stated that from approximately 2:30 p.m., 14 April 1994 until approximately 1 p.m., 15 April 1994, Ndahimana was preparing for, and attending, the funeral of Dr. Ntawuruhunga.[504]

286. On 14 April 1994, evidence shows that the corpse of Dr. Ntawuruhunga was transported from Kigali to Rufungo, passing through the roadblock located near the Mutanoga market square in Kivumu *commune* in the afternoon.[505] Beatrice Mukankusi said that on 14 April 1994, at approximately 2 or 3 p.m., she loaned Ndahimana her vehicle to attend the funeral of Dr. Ntawuruhunga in Rukoko.[506] Thérese Mukabideri testified that her husband's body arrived at her home in Rufungo at approximately 4 p.m. on 14 April 1994, accompanied by Ndahimana and others. She reported that Ndahimana stayed at her home until past midnight organising the funeral that was to take place the next day.[507]

287. Witnesses ND24 and ND12 explained that after going to the presbytery, the accused went to the residence of the deceased. Witness ND12 saw Ndahimana at the presbytery at approximately 2 p.m.; Witness ND24 saw him while he was on his way to Rufungo between 3 and 4 p.m.[508] Witness

[500] T. 10 November 2010 pp. 19-20 (ICS) ("A.: He [Ndahimana] was talking to the Hutus who had attacked the Tutsis. Q.: So, correct me if I am wrong that Mr. Ndahimana asked attackers to go home—to return to their homes? A.: Yes, he told them to go home, but I do not know whether they immediately obeyed, because I did not follow that up.").
[501] *See* Witness ND24: T. 21 February 2011; Witness ND6: T. 26 January 2011, T. 27 January 2011.
[502] T. 19 January 2011 p. 3.
[503] Notice of Alibi, 3 September 2010, p. 2.
[504] Defence Closing Brief, para. 23.
[505] Witness CDL: T. 12 November 2010 pp. 2-3; Witness Mukabideri: T. 7 February 2011 pp. 67-68.
[506] T. 7 February 2011 pp. 12-14.
[507] T. 7 February 2011 p. 68.
[508] Witness ND24: T. 21 February 2011 p. 9; Witness ND12: T. 19 January 2011 p. 5.

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CDJ testified that the accused went to Rufungo that day when he left the presbytery, but that he did not sleep there.[509] The evidence varies regarding the time Ndahimana arrived at Rufungo, but the Majority relies on Defence Witnesses Thérese Mukabideri and ND24 to conclude that Ndahimana arrived at the house of Dr. Ntawuruhunga at approximately 4 p.m. on 14 April 1994. This evidence is corroborated by Witness Murekeyisoni, who reported that she saw the accused at Ntawuruhunga's house when she went there, between 5 and 6 p.m.[510] The Majority notes that the fact that the accused went to the funeral does not necessarily exclude the possibility that he was at Nyange presbytery earlier on that same day.

288. Similarly, the Majority acknowledges that the fact that Ndahimana arrived at the house of Dr. Ntawuruhunga at around 4 p.m. and stayed there until late does not exclude the possibility that he stopped by Nyange presbytery on his way back. Indeed, Witness CDJ reported that he saw Ndahimana, Kayishema and Kanyarukiga meeting with Father Seromba on the balcony. Although he could not hear what they were talking about, nor could he provide the time of this event the witness testified elsewhere that he himself stayed at the parish from 7 p.m. until 6 a.m.[511] Witness ND12 also saw Ndahimana at Nyange parish on the evening of 14 April 1994.[512] Witness ND24 did not report that event, but it is possible that Ndahimana came to the parish very late in the evening, after the witness went back home for the night. As the witness himself admitted, he was not at the roadblock all day long.[513]

289. In conclusion, the Majority considers that the accused could have travelled to both the funeral and Nyange parish on the same day, given that it would take a maximum of one hour to travel from Nyange to Rufungo (Chapter III, Section 5.3.3). Therefore, while the partial alibi submitted by the Defence is reasonably possibly true, it is nonetheless compatible with other evidence in relation to the presence of the accused at the parish that day.

290. The Majority recalls, however, that Ndahimana is not charged in relation to a second meeting on 14 April 1994, but only for the one meeting mentioned in paragraph 23 of the Indictment. In any event, the evidence does not shed light on the purpose of the alleged second meeting.

291. The Majority will now assess the evidence brought in support of paragraph 23 of the Indictment.

4.3.4.2 *Discussion*

292. Paragraph 23 of the Indictment alleges that on or about 14 April 1994, Ndahimana, Seromba, Kayishema, Kanyarukiga and others met at Nyange presbytery. After this meeting, some Tutsi refugees told Ndahimana that attacks had been launched against them. Ndahimana stated that the Tutsis were *Inyenzi* who had killed the President, and he refused to help them. Thereafter, Ndahimana's subordinates launched an attack against the Tutsis in Nyange church. Ndahimana knew or had reason to know of the acts of his subordinates, but he failed to prevent or punish them.

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[509] T. 11 November 2010 p. 50.
[510] T. 10 February 2011 pp. 8-9, 15.
[511] T. 11 November 2010 pp. 24 (ICS), 29.
[512] T. 19 January 2011 p. 7.
[513] T. 21 February 2011 pp. 26-27.

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293. The evidence shows that an attack was launched at Nyange parish on the morning of 14 April 1994, but that the attempt failed. The Majority will now address the evidence relating to the purpose of Ndahimana's presence at Nyange parish on this date.

294. In doing so, the Majority will consider the evidence of Prosecution Witnesses CBS, CBN, CBI, CBK, CDJ, YAU and CDL, as well as Defence Witnesses ND7, ND11, ND24, and ND12.

4.3.4.2.1 Purpose of the Alleged Meeting

295. Witnesses CBS, CBN, CBI, CBK, CDJ and YAU testified that Ndahimana, together with other members of the JCE, including Kanyarukiga and Kayishema, had a meeting with Father Seromba at Nyange presbytery on 14 April 1994.[514] Witnesses CBS and CBN could not hear what was being said during the meeting. Witnesses CBK, CBI and YAU did not provide information on this point.[515] Witness CBS testified that when the meeting ended, Ndahimana and the others left without talking to the refugees.[516] This evidence is contradicted by Witness CBN who said that the refugees requested assistance from Ndahimana, who responded before leaving: "[l]ook, *Invenzis, Inkotanyis* have caused the war, so Hutus have responded."[517] However, the Majority considers that this inconsistency could be explained by the different vantage points of the witnesses. The other witnesses do not provide any information on this aspect. The Majority recalls its assessment of Witness CBN's individual credibility and its decision that it may not rely on the witness unless corroborated. The Majority also recalls its caution as to the witness' inconsistencies regarding the words Ndahimana's allegedly said to the refugees (Chapter III, Section 4.3.1.2). Therefore, the Majority will not rely on his testimony alone for its findings on this matter.

296. The Defence evidence supports the fact that Ndahimana went to Nyange presbytery on 14 April 1994. Witness ND24 testified that after the attack, Ndahimana went to the presbytery and was escorted by two policemen. The witness noted that everyone moved toward the *bourgmestre*, including the *gendarmes* and the Tutsis, but that he could not hear what the accused was saying.[518] Witness ND11 was told that the accused came to the presbytery and talked to the refugees.[519] Ndahimana's presence at the parish is corroborated by Witness ND12, who was among the refugees present on that day. She said that "[a]ll refugees could hear" what was being said and that the refugees told Ndahimana that Ndungutse had led an attack against them, to which the accused responded that "he did not have powers," but he had asked the *gendarmes* to continue to protect the refugees.[520] Witness ND7, who was also a refugee at the church, did not hear what Ndahimana was saying to the refugees, but heard him asking the *gendarmes* to ensure the safety of the Tutsis and to open fire if necessary.[521]

297. The Majority finds that it has been established that Ndahimana went to Nyange on 14 April 1994. However, the Prosecution did not prove that Ndahimana left and refused to assist the refugees. In addition, the Prosecution did not prove beyond reasonable doubt that an attack

[514] Witness CBS: T. 6 September 2010 pp. 17, 62; Witness CBN: T. 13 September 2010 pp. 18-20, 62; Witness CBI: T. 14 September 2010 p. 36; Witness CBK: T. 3 November 2010 pp. 10-12, 57; Witness CDJ: T. 11 November 2010 p. 29; Witness YAU: T. 15 September 2010 p. 46.
[515] Witness CBS: T. 6 September 2010 pp. 17-18, 62; Witness CBN: T. 13 September 2010 pp. 18-20; Witness CDJ: T. 11 November 2010 p. 29.
[516] T. 6 September 2010 pp. 19, 62.
[517] T. 13 September 2010 p. 20.
[518] T. 21 February 2011 p. 8.
[519] T. 18 January 2011 p. 34.
[520] T. 19 January 2011 p. 5.
[521] T. 24 January 2011 pp. 5, 32.

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orchestrated by the accused's subordinates occurred after the meeting. On that matter, the Majority notes that although the evidence is vague regarding the identity of the assailants, none of the witnesses involve the communal police in the attack. Rather, it falls from Witness CDL's evidence that communal policemen were *not* among the attackers that day. Indeed, the witness reported that on 14 April 1994, after the attack took place, Kanyarukiga left with others because they wanted to enrol policemen to "take part in the operation."[522]

4.3.4.2.2 Consequences of the Alleged Meeting

298. The Majority finds the Prosecution evidence on the consequences of the alleged meeting to be vague and inconclusive. Witness CBN is the only person to testify that on 14 April 1994, following the meeting at Nyange presbytery and the departure of the authorities, the refugees had to repel a small scale attack. The witness heard whistles and people were asked to prepare for an attack on Nyange church the following day, 15 April 1994.[523]

299. The Majority notes that, in order "to prove Ndahimana's genocidal intent," the Prosecution relies upon evidence alleging that Hutu women who were married to Tutsi men were removed from Nyange church. The Prosecution submits that Ndahimana "was so bent on the extermination of specifically Tutsi that he ensured that no Hutus were accidentally killed."[524] The Defence requests that the Chamber disregard these allegations because of a lack of notice.[525] As clearly stated by the Prosecution, this allegation goes to the *mens rea* of the accused; therefore, because the Indictment pleads as a material fact the specific state of mind alleged, the facts by which his *mens rea* is to be established are matters of evidence and need not be pleaded."[526]

300. Prosecution Witness CBS reported that Ndahimana came back in the evening that same day in the red *commune* vehicle with Kayishema and Mbakilirehe. The witness stated that Ndahimana remained in the car while Kayishema read aloud the names of three Hutu women, who were married to Tutsis, from a list. Subsequently, the women left Nyange church and returned home.[527]

301. At the outset, evidence alleging that Ndahimana stayed back in the car, while three Hutus were being called out from Nyange church by Kayishema could, at most, show that he knew about Kayishema's criminal intent to separate Hutus from Tutsis in anticipation of attacks but does not necessarily mean that he shared it. The Majority is of the view that had he had animus against the Tutsis, he probably would have played a more active role in the removal of the Hutu women than the single description by the Prosecution witness of Ndahimana staying passively in the vehicle, indicates.

302. In addition to its previous finding that it would not rely on Witness CBS' testimony unless corroborated; the Majority is troubled by the fact that, among all the witnesses that were present at Nyange parish on the evening of 14 April 1994, Witness CBS is the only one who recalls that some Hutus were removed from Nyange church. The Majority has also expressed doubts elsewhere on

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[522] T. 12 November 2010 p. 5.
[523] T. 13 September 2010 pp. 20-21, 56, 62-63.
[524] Prosecution Closing Brief, paras. 62-63.
[525] T. 21 September 2010 p. 73.
[526] *See e.g.*, *Kanyarukiga*, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010, paras. 8-10; *Ntahobali & Nyiramasuhuko*, Decision on the Appeals By Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible," 2 July 2004, paras. 14-15.
[527] T. 6 September 2010 pp. 19-20, 51-52, 58.

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whether the red vehicle of the *commune* was functioning during the events (Chapter III, Section 5.3.1.26). Therefore, the Majority is not convinced beyond reasonable doubt by the witness' testimony on that point.

4.3.5 Meeting at Nyange Market Square, 14 April 1994 (Paragraph 24)

303. The Indictment alleges that on or about 14 April 1994, Ndahimana presided over a public meeting held at the Nyange market square that was attended by Rugwizangoga, Kanani, Mbakilirehe, Habiyambere, IPJ Kayishema and others whose identities are unknown. At that meeting, Kanyarukiga instigated the crowd to kill the Tutsis at Nyange church.[528]

304. The Defence argues that no meeting was held on 14 April 1994 at the Mutanoga market, that Ndahimana was on his way to Rufungo to attend a funeral and that the Prosecution did not prove that Kanyarukiga instigated the population at Mutanoga market square.[529]

305. The Majority will now consider the evidence brought by Prosecution Witnesses CBR, CNJ and CDL, and Defence Witness ND24.

4.3.5.1 *Preliminary Matters*

306. The Majority has decided that Ndahimana's alibi was reasonably possibly true, as evidence was adduced to show that he borrowed Beatrice Mukankusi's car on 14 April 1994 at approximately 2 or 3 p.m.; that he arrived at Rufungo at approximately 4 p.m. and stayed there until late before returning to Nyange. (Chapter III, Section 4.2.11). The Majority will now turn to consider whether the reasonableness of the alibi was overcome by convincing evidence.

4.3.5.2 *Discussion*

307. Witness CBR was among the assailants. He testified that on 14 April 1994, IPJ Kayishema drove a vehicle belonging to Witness CDZ around the *commune*. Using a megaphone, Kayishema informed the local population that "*Inyenzis*" had invaded the *commune*. Ndungutse and Kayishema incited the assailants to launch an attack against the refugees. The witness participated in the attack that subsequently occurred. The witness' group did not kill anybody that day.[530] The Majority notes that the witness did not report that Ndahimana presided over a public meeting that day. He reported that Ndungutse and Kayishema incited the population, but did not refer to Kanyarukiga as mentioned in the Indictment. The Majority may rely on Witness CBR's evidence on this point only to support evidence that the population was incited by local leaders to go to Nyange parish.

308. Witness CNJ was among the assailants.[531] He testified that he went to Nyange parish because the communal authorities had asked the population to go there and kill the Tutsi refugees. More precisely, he explained that on 14 April 1994, at around 4 p.m., Kayishema came to Karuteyi and addressed members of the population, asking them to go to the parish and kill the Tutsis.[532] However, the Majority notes that this allegation does not involve the accused.

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[528] Indictment, para. 24; Prosecution Closing Brief, paras. 59-60, 144-145.
[529] Defence Closing Brief, paras. 253-269.
[530] T. 1 November 2010 pp. 13-16; T. 2 November 2010 pp. 14-15, 17.
[531] T. 4 November 2010 p. 43 ("Q. Were you one of these Hutus who were targeting Tutsis, Mr. Witness? A. I was.").
[532] T. 4 November 2010 p. 50 (Kayishema was accusing the Tutsis for the murder of a Hutu doctor in Kigali).

309. The Majority has also considered Witness CDL's evidence that on 14 April 1994, he saw Ndahimana, Kayishema and Kanyarukiga at the Mutanoga market square after the attack, at some point between 2 and 4 p.m.[533] He reported that Ndahimana stated that all inhabitants had to go to Nyange parish; that they had to understand that the *Inkotanyis* had killed Dr. Ntawuruhunga, as well as the President of the Republic.[534] However, Witness CDL is the only witness supporting the allegation that Ndahimana presided over a public meeting held at the Nyange market square as alleged in paragraph 24 of the Indictment. The Majority has expressed before that, for findings beyond reasonable doubt, it would not rely on Witness CDL's testimony alone.

310. In any event, the Majority notes that according to Witness CDL, Ndahimana had come because people manning the roadblock wanted to open Dr. Ntawuruhunga's coffin.[535] Witness ND24 testified that Ndahimana passed through the roadblock about twenty minutes after the convoy carrying Dr. Ntawuruhunga.[536] Given that Witness CDL reported hearsay evidence contrary to the testimony of Witness ND24, who was actually present at the roadblock, the Majority relies on Witness ND24's evidence on this point.

311. Ultimately, other evidence indicates that Witness CDL might have an interest in incriminating Ndahimana in order to minimise his own responsibility in those events. In coming to this conclusion, the Majority acknowledges that according to Defence Witness ND6, Witness CDL was at Karuteyi after the attack and that he promised Ndungutse that he would get reinforcements from Kibilira in order to dislodge the *gendarmes* and attack the refugees.[537] In addition, Witness CDL testified that he did not go to Nyange church on 14 April 1994.[538] This statement is contradicted by Prosecution Witness CBS who said that Witness CDL attended the meeting at the church together with Ndahimana, Kanyarukiga, Seromba and others.[539] Defence Witness ND24 also testified that Witness CDL participated in the attack on Nyange church on 14 April 1994.[540]

312. Given these circumstances, the Majority concludes that the Prosecution has not overcome the reasonableness of Defence evidence showing that at 3 p.m., at the latest, the accused left Nyange in the direction of Rufungo. Accordingly, the Prosecution has not proven paragraph 24 of the Indictment beyond reasonable doubt.

4.3.6 Disarmament of the Tutsi Refugees (Paragraph 20)

313. The Indictment alleges that, in furtherance of the plan to kill the Tutsis, refugees were disarmed by Mbakilirehe, Kanani and others "immediately following" meetings held by Ndahimana, Seromba, Kayishema, Kanyarukiga and others at the communal office and Nyange presbytery.[541]

314. The Majority will now consider the evidence of Prosecution Witnesses CBK, CDL and CBR and Defence Witnesses ND7, ND11 and ND12.

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[533] T. 12 November 2010 pp. 2-3; T. 18 November 2010 pp. 10, 50.
[534] T. 18 November 2010 p. 51.
[535] T. 12 November 2010 p. 3.
[536] T. 21 February 2011 pp. 9, 26.
[537] T. 27 January 2011 pp. 7-8.
[538] T. 18 November 2010 p. 52.
[539] T. 6 September 2010 p. 17.
[540] T. 21 February 2011 p. 5.
[541] Indictment, para. 20.

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315. According to Witness CBK, the authorities, including Ndahimana, Seromba, Kayishema, Kanyarukiga, Ndungutse and others, went into Nyange church on the morning of 14 April 1994 to confiscate weapons.[542] Witness CBK stated that the decision to disarm the refugees was taken on 13 April 1994 during a meeting. The witness did not attend the meeting, but after it ended, the authorities publicly stated that refugees had to be disarmed the next day.[543]

316. While the Defence did not raise any objection on this point, the Majority recalls however that "[t]he specificity of the notice required is proportional to the extent of the [a]ccused's direct involvement."[544] The Majority has considered Witness CBK's evidence in light of the Indictment and concludes that the Prosecution did not charge Ndahimana with having *personally* confiscated the weapons of the Tutsis. The Majority does not consider that the accused received adequate notice of this particular charge. Moreover, this testimony of Witness CBK is not corroborated and his evidence that Ndahimana was involved in the decision to disarm the refugees is contradicted by the witness' testimony in *Seromba* where he said that the refugees were disarmed "at some point," but that he did not know who took the decision to do so.[545]

317. Both Witnesses CDL and CBR reported hearsay evidence that Ndahimana and others attended a meeting on 13 April 1994, where the decision to search the refugees was made. Witness CDL reported that Kanani told him on 13 April 1994 that he had gone to Nyange church to check whether the refugees were armed, following the instructions given at the meeting held at the communal office the same day.[546] Witness CBR reported that his brother-in-law, who was hiding in the church, told him that the assistant *bourgmestre*, as well as Seromba, Joseph Habiyambere and others, had come to search the refugees on the night of 13-14 April 1994.[547]

318. The Majority recalls that it has observed elsewhere (Chapter III, Sections 4.3.1.9, 4.3.1.10, 5.3.1.3, 5.3.1.5) that both Witnesses CDL and CBR are accomplices. In addition, neither of them refer to the fact that the refugees were searched or disarmed following a meeting held by Ndahimana in their previous statements. Given that the evidence they reported is hearsay, the Majority will consider whether other sources corroborate the above mentioned allegations.

319. The Majority finds that evidence on the 13 April 1994 meetings, as well as evidence on the fact that Tutsis were searched and eventually disarmed, is hearsay. While it makes sense that no witness would have attended the meeting on 13 April 1994 if only authorities and leaders were involved, the Majority finds the fact that none of the victim witnesses who were hiding inside Nyange church reported such events troubling. Only Witness YAU reported in a previous statement that on a day that seems to be 14 April 1994, Seromba came to disarm the refugees and that he came again with Kayishema and Kanyarukiga to take money from the refugees.[548] However, the witness was not questioned regarding this part of her statement during her testimony. The Majority recalls that Prosecution Witnesses CBS, CBI and CBN were already refugees at Nyange parish on 13 and 14 April 1994, but did not testify about refugees being searched or disarmed. The Majority notes that this absence of witness testimony regarding refugees being searched or disarmed does not

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[542] T. 3 November 2010 pp. 10-12 (The names of the *conseillers* were Habarugira Kamili and Sindagera).
[543] T. 3 November 2010 p. 56.
[544] *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 2006, para. 5. *See also*, *Karemera et al.*, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment, 19 October 2006, para. 12
[545] Defence Exhibit 41, pp. 15, 17.
[546] T. 11 November 2010 pp. 69-70; T. 19 November 2010 p. 20.
[547] T. 1 November 2010 pp. 11-13.
[548] Defence Exhibit 30, p. 3.

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mean that the event did not occur and finds it credible that the refugees could have been disarmed. Despite this, the Majority notes that the Prosecution did not take advantage of the opportunity it had to present first-hand evidence on this particular charge in order to establish that alleged JCE members disarmed refugees following meetings attended by Ndahimana.

320. The Majority has considered the evidence of Defence Witnesses ND7 and ND12, who were refugees at Nyange parish, and testified that there were no weapons inside Nyange church.[549] Witness ND11 testified that, before entering the church, *gendarmes* were confiscating the weapons.[550] However, the Majority finds this evidence to be of little assistance.

321. Ultimately, the Majority finds that the evidence does not clearly establish when the refugees were disarmed and by whom. The Majority further finds that the Prosecution has not established that the decision to disarm the refugees was taken during the meetings of 13 and 14 April 1994, as discussed above. Therefore, the Majority concludes that the Prosecution has not proven paragraph 20 of the Indictment beyond reasonable doubt.

5. Attack on Nyange Parish, 15 April 1994

5.1 Introduction

322. Paragraph 21 of the Indictment alleges that Ndahimana made several vehicles available to his subordinates, including IPJ Kayishema and Ndungutse, to transport assailants to Nyange parish.

323. Paragraph 25 of the Indictment alleges that, on or about 15 April 1994, Ndahimana and a group of named subordinates met at Nyange presbytery, the CODEKOKI and in front of Gaspard Kanyarukiga's pharmacy. Following these meetings, the accused ordered the communal policemen, *gendarmes*, *Interahamwe*, an army reservist named Théophile Rukara ("Rukara") and other assailants to 'start working.' The assailants launched an attack against the Tutsis that day, seriously injuring and killing many of them. Habarugira led one of the groups that attacked the Tutsis. Ndahimana, as *bourgmestre* of Kivumu *commune* knew or had reason to know of the acts of his subordinates, but failed to prevent or punish their actions.

324. Paragraphs 26-28 of the Indictment allege that during the attacks, Ndahimana, Seromba, IPJ Kayishema, Kanyarukiga and others were present, ordering, instigating and supervising the assailants by providing them with weapons and fuel in an attempt to burn the Tutsi refugees in the church. The attempt was not successful, leading Ndahimana and the other members of the JCE to hold a meeting at Nyange presbytery to plan further attacks on the Tutsis. Ndahimana told the assailants that they should cover themselves in banana leaves to distinguish themselves from the refugees they were about to attack. After the attack, members of the JCE ordered that the bodies of the Tutsi victims killed during the attacks be buried in mass graves at Nyange parish and surrounding areas.

325. The Defence presented an alibi for this date.[551] It submits that Ndahimana attended the funeral of Dr. Ntawuruhunga in Rufungo on 15 April 1994. Ndahimana did not know that Nyange church would be attacked that day, and only learned of the attacks while at the funeral. As soon as

[549] Witness ND7: T. 24 January 2011 p. 4; Witness ND12: T. 19 January 2011 p. 6.
[550] T. 18 January 2011 p. 32.
[551] Notice of Alibi, 3 September 2010; Supplement to the Notice of Alibi filed on 3rd September 2010, 21 September 2010; Defence Closing Brief, paras. 270-331, 333-352; T. 21 September 2011 pp. 47-60, 74-77; T. 22 September 2011 pp. 1-3, 15-16.

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he was told about the attack on the parish, Ndahimana went to seek assistance from the *préfet* of Kibuye, Clément Kayishema.[552] The Defence also challenges the credibility of those Prosecution witnesses who testified that Ndahimana was present at Nyange parish on 15 April 1994.[553]

5.2 Evidence

5.2.1 Prosecution Witness CBT

326. Prosecution Witness CBT, a Hutu, was a farmer living in Kivumu *commune* in April 1994.[554] He participated in the killings at Nyange parish on 15 April 1994.[555] It is not clear from the record how he knew Ndahimana.

327. On 15 April 1994, the witness was looking after his cattle when he heard IPJ Kayishema addressing the population over a megaphone. Kayishema was speaking from a white pickup truck that belonged to Witness CDZ. Kayishema directed members of the public to go to Nyange parish to confront the "*Inyenzi*." The witness understood the word *Inyenzi* to refer to Tutsis.[556] He heeded Kayishema's call because Kayishema threatened to take his cattle if he failed to do so.[557] The witness, together with others, walked to the parish. The witness was armed with a stick that he used when looking after cattle. He was wearing his ordinary clothes, but others were covered in banana or eucalyptus leaves. He arrived at the parish between 11:30 a.m. and noon.[558]

328. Upon his arrival, the witness noticed corpses of Tutsis between the Statue of the Virgin Mary and the church.[559] According to the witness, Rukara had thrown a grenade killing the victims. It is not clear from the evidence how the witness knew this.[560]

329. Among the communal authorities present when the witness arrived at the church were Ndahimana, IPJ Kayishema, assistants to the *bourgmestre* named Anastas and Védaste Murangwabugabo (a.k.a. "Mpenda" or "Mupende"), Habiyambere, a certain Mbakilirehe; a certain Leonard Nibarere; communal policemen named Niyitegeka Appolinaire Rangira; and the communal veterinary officer, a man named Nyiramukira.[561] Also present were other community leaders, some without official posts including: Kanyarukiga, Witness ND23, *conseiller* of the Gasave *secteur*; Habarugira, *conseiller* of Nyange *secteur*; the *conseiller* of Nyange *secteur*; as well as teachers and headmasters of schools.[562] Mpenda asked the assailants to surround the church to ensure that the refugees could not flee. Habiyambere also issued instructions to the assailants.[563]

330. At approximately 1 p.m. on 15 April 1994, the assailants gathered in the courtyard of Nyange church. From that position, the witness could clearly see Ndahimana take a gun from

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[552] Defence Pre-Trial Brief, para. 133; Defence Closing Brief, para. 332.
[553] Defence Closing Brief, paras. 270-331, 333-352; T. 21 September 2011 pp. 47-60, 74-77; T. 22 September 2011 pp. 1-3, 15-16.
[554] Prosecution Exhibit 2; T. 7 September 2010 p. 60.
[555] T. 7 September 2010 pp. 70-71 ("I went there in order to commit killings. And I confessed to that."); T. 8 September 2010 p. 2.
[556] T. 7 September 2010 pp. 37-38, 58, 62.
[557] T. 7 September 2010 pp. 38, 61.
[558] T. 7 September 2010 pp. 39-40, 44, 64, 66.
[559] T. 7 September 2010 p. 40; T. 8 September 2010 p. 6.
[560] T. 7 September 2010 p. 40.
[561] T. 7 September 2010 pp. 41-42.
[562] T. 7 September 2010 pp. 43, 47.
[563] T. 7 September 2010 pp. 41-42.

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Kabalisa, a former soldier, and fire one shot at the clock tower of the church to signal the commencement of the attack.[564] "No one had dared shoot at the church, but as soon as he gave the signal, the attackers set upon the church."[565] Rangira and Niyitegeka continued firing at the tower with a gun.[566] Ndahimana did not stay at the parish long and appeared to be furious. The witness heard him tell the assailants that the *Inyenzi* had killed a relative who was a doctor, and that he was leaving to provide assistance to the family of the deceased.[567] The witness later learned from the local authorities that the deceased was Dr. Ntawuruhunga.[568] Ndahimana then left for Rufungo and the witness did not see him again.[569] During the attack that day, assailants first used traditional weapons and guns. Subsequently, two men named Ahorunaniye and Nibarere sprayed the church with petrol. Assailants then tried to burn down the church. When this failed they used dynamite in an effort to break down the church doors. Many Tutsis were killed in the attack that day.[570] Their bodies were buried later that day in a pit under the Caritas building.[571]

331. The witness left Nyange church that evening. On his way home, he dodged roadblocks that had been erected to keep assailants at Nyange parish and to ensure that the Tutsis did not escape during the night.[572]

5.2.2 Prosecution Witness CDK

332. Prosecution Witness CDK, a Hutu farmer, was living in Kivumu *commune* in April 1994.[573] He participated in the killings at Nyange parish in April 1994.[574] The witness knew that Ndahimana was *bourgmestre* of Kivumu *commune* and had seen him before the 15 April 1994 attack.[575]

333. At approximately 9 or 9:30 a.m. on 15 April 1994, the witness heard IPJ Kayishema arrive in his village aboard a white Toyota Stout which had been confiscated from Witness CDZ. Using a megaphone, Kayishema informed the population that the "*Inyenzi* had attacked the church." Kayishema then directed those in the village to go to Nyange parish.[576] The witness arrived at the parish between 11 and 11:30 a.m. armed with a machete and a stick. A large crowd of Hutus armed with traditional weapons were already gathered in front of the Statue of the Virgin Mary. Some were covered in banana leaves. Upon arrival, the witness saw Ndahimana, Father Seromba, Gaspard Kanyarukiga, and a teacher named Ndungutse on their way to a meeting at the CODEKOKI building.[577]

334. When the men emerged from the meeting, Ndahimana and Father Seromba, together with a group of *gendarmes*, moved towards Nyange church. At the same time, Kanyarukiga directed a group of Hutus standing in front of the statue to gather stones to attack the Tutsis in the church. Soon after, a group of Tutsis emerged from the church and began throwing rocks at the advancing

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[564] T. 7 September 2010 pp. 42, 47; T. 8 September 2010 pp. 6, 11, 14-15, 19.
[565] T. 7 September 2010 p. 42.
[566] T. 7 September 2010 p. 47.
[567] T. 7 September 2010 p. 42; T. 8 September 2010 pp. 5, 9, 13.
[568] T. 8 September 2010 p. 9.
[569] T. 7 September 2010 p. 53.
[570] T. 7 September 2010 pp. 44-45.
[571] T. 7 September 2010 pp. 44-45.
[572] T. 7 September 2010 pp. 48, 67-70; T. 8 September 2010 p. 2.
[573] Prosecution Exhibit 41.
[574] T. 8 November 2010 p. 36.
[575] T. 8 November 2010 p. 32.
[576] T. 8 November 2010 pp. 29-30.
[577] T. 8 November 2010 pp. 31-32.

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Hutus. Following this incident, Kanyarukiga had a conversation with a soldier named Rukara. Rukara then climbed on the roof of Kanyarukiga's house and began lobbing grenades at the Tutsis, killing a number of them. The surviving Tutsis retreated towards the church. The assailants then attacked the church. First, two communal police named Maharamu and Munyancarama, and a former soldier named Kabilisa, shot at the church. Then, two men named Arnold Nibarere and Faustin Uworenaniye tried to burn it down. Finally, employees of the Astaldi Company attempted to bring down the church using dynamite.[578]

335. The witness saw Ndahimana again at Nyange church together with Father Seromba and IPJ Kayishema. In Ndahimana's presence, Kayishema told the attackers "Fight the Tutsis and prove to them that you are strong and powerful young people."[579] The witness was approximately two metres away from Kayishema and Ndahimana when Kayishema said this.[580] Ndahimana remained in the area surrounding Nyange church for approximately two hours before leaving for Rufungo at approximately 1 p.m.[581]

336. At an unspecified time, IPJ Kayishema and others brought a "special machine which began picking up the bodies and dropping them in a grave below the building of Caritas."[582] Witness CDK left Nyange church between 5 and 5:30 p.m.[583]

5.2.3 Prosecution Witness CDL

337. In April 1994, Prosecution Witness CDL, a Hutu, was a teacher living in Kivumu *commune*.[584] He participated in the attacks at Nyange parish in April 1994.[585]

338. On 15 April 1994, the witness went to the school where he worked. The watchman there requested that the witness locate a second watchman to replace him while he took a short break.[586] The first watchman told the witness that he believed the second watchman had spent the night at the Kubyapa road block, and thus the witness went to Nyange parish to search for the second watchman.[587]

339. The witness arrived at Nyange parish between 10 and 11 a.m. At that time, attackers who had surrounded Nyange church were involved in a stone-throwing fight with the Tutsi refugees at the church.[588] Some of the attackers were located on the Nyange-Kibuye road, others in a banana plantation, while still others were in a small forest.[589]

340. The refugees succeeded in repelling the attackers until the attackers started throwing grenades at them. One Abayisenga, a policeman, threw a grenade that failed to explode. Then "Rukara", a former soldier whose real name was Théophile Boneza, climbed on top of one of the shops of the small trading centre and threw a grenade which exploded. The refugees then began

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[578] T. 8 November 2010 pp. 32-35; T. 9 November 2010 pp. 18-19.
[579] T. 8 November 2010 pp. 35-36.
[580] T. 8 November 2010 p. 38.
[581] T. 9 November 2010 p. 19.
[582] T. 8 November 2010 pp. 36-37.
[583] T. 8 November 2010 p. 41.
[584] Prosecution Exhibit 46.
[585] T. 12 November 2010 pp. 33, 34 (ICS).
[586] T. 12 November 2010 pp. 5-6.
[587] T. 12 November 2010 pp. 5-7.
[588] T. 12 November 2010 p. 7.
[589] T. 12 November 2010 p. 7; T. 18 November 2010 p. 14.

retreating. The witness did not personally see Rukara throwing the grenade but heard about it from others.[590] The refugees fleeing the grenades could not all retreat into the church and went into Nyange presbytery or the nearby forest instead.[591]

341. Around noon, after the stone-throwing attack, the witness left the area to return to his school. Upon reaching the vicinity of the communal office, he heard grenades exploding and returned to Nyange parish to see what was happening. He saw dead bodies on the road going up to Nyange church, and at the church itself. He estimated that approximately 30 refugees were killed in the grenade attacks but that there were 200-300 more bodies in the courtyard of the church.[592]

342. The most prominent priest at the parish at the time was Father Seromba.[593] The witness saw Seromba between 2 and 3 p.m. on 15 April 1994 in the presbytery courtyard. Later, Seromba was standing at the secretariat of Nyange parish facing Nyange church. Seromba did nothing to prevent attackers from killing Tutsis, but expressed concern about the number of corpses that were accumulating.[594] He spoke to the attackers and they decided to interrupt the attacks so that the bodies could be buried. They then resumed the attack.[595] There were between 1,500 and 2,000 Tutsis present at the church that day.[596]

343. A group of persons met with Seromba, including Ndungutse, the *gendarmes*, Kayishema, Kanani and other members of the population. After their discussion, Ndungutse asked the witness to contact the person in charge of the Astaldi Company's equipment, to request the use of its machines to bury the dead. The corpses of the refugees killed that day were buried at approximately 2 p.m., behind the Caritas restaurant which belonged to Nyange parish.[597] They were buried using a special machine, called a *poquelin*, provided by the Astaldi Company.[598] The *poquelin* was used to dig a pit and another machine carried the dead bodies and loaded them onto a lorry which in turn dumped them into a pit.[599] The witness participated in the burial.[600]

344. The attacks resumed after the burials. *Gendarmes* were among the assailants.[601] The assailants tried to break open the doors of Nyange church. When this failed, they used dynamite that they had received from the Astaldi Company in an effort to blow up the church. When this too failed, the assailants attempted to use petrol to burn down the church. Fulgence Kayishema brought the petrol in a jerry can. The attackers were unable to kill the Tutsi refugees who were inside the church that day.[602]

345. Those at Nyange church that day included: Ndungutse, a number of *gendarmes*, Habiyambere, Kanani, and Kanyarukiga. The communal policemen who participated in the attacks included: Abayisenga, Télesphore Nyantara, Anasthase Uzabakiriro (a.k.a. "Gicyare"), one Makaberi, Appolinaire Rwamagira and Adrien Niyitegeka. Policemen, including warrant officer

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[590] T. 12 November 2010 pp. 7-8 (In the English transcript this policeman is referred to as "Mabayisenga").
[591] T. 12 November 2010 p. 10.
[592] T. 12 November 2010 p. 8.
[593] T. 12 November 2010 p. 8.
[594] T. 12 November 2010 p. 9.
[595] T. 12 November 2010 pp. 9-10.
[596] T. 12 November 2010 p. 10.
[597] T. 12 November 2010 pp. 10, 12 (ICS).
[598] T. 12 November 2010 p. 12 (ICS).
[599] T. 12 November 2010 p. 11.
[600] T. 12 November 2010 p. 12 (ICS).
[601] T. 12 November 2010 p. 13.
[602] T. 12 November 2010 pp. 13-14.

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Habarugira and one Ephrem, opened gun fire on the Tutsi refugees and the church.[603] A certain Uzabakiriho turned over his gun because he did not know how to use it.[604]

346. The witness did not see Ndahimana at Nyange parish on 15 April 1994 but saw him on 14 April 1994 at Mutanoga. On that occasion, Ndahimana said that he would not join the attackers at the parish the next day because he was scheduled to attend the funeral of Dr. Ntawuruhunga.[605] However, the witness did see Ndahimana by the flag post in front of the communal office on the evening of 15 April 1994 at approximately 6:30 p.m. He was having a discussion with IPJ Kayishema and communal police officers Abayisenga and Kagenza. Kayishema and Abayisenga were telling Ndahimana how the attacks that day had unfolded. They told Ndahimana that the attackers had failed to kill the Tutsi refugees because they had run out of ammunition and Ndahimana was not there to distribute the necessary equipment.[606] Ndahimana promised to provide them with the necessary equipment the next morning.[607]

5.2.4 Prosecution Witness CNJ

347. Prosecution Witness CNJ, a Hutu student, lived in Gasave *secteur*, Kivumu *commune* in April 1994.[608] He participated in killings in April 1994, including those at Nyange parish.[609] He served his sentence and was free at the time of his testimony.[610] The witness knew Ndahimana because he was the *bourgmestre* of Kivumu *commune*.[611]

348. On 14 April 1994, IPJ Kayishema came to Karuteyi and asked members of the population to go to Nyange parish on 15 April 1994.[612] The witness estimated that he arrived at the Statue of the Virgin Mary between 11 a.m. and 1 p.m. on 15 April 1994 aboard a lorry used by the communal office to transport assailants. At this time, fighting was already ongoing.[613] Upon arrival, he saw Ndahimana together with IPJ Kayishema, the pharmacist Kanyarukiga and a certain Ndungutse at the Statue of the Virgin Mary. Ndahimana welcomed the group of assailants, and asked them to dress in banana leaves to distinguish themselves from the Tutsis. He also told them that Kanyarukiga was nearby and ready to provide medical assistance in the event they were injured.[614] Kayishema then took the assailants to the area where they were to attack the Tutsis. At one point, Rukara, a retired soldier, threw three grenades at Tutsis, who then started retreating. Ndahimana was still present when this took place.[615]

349. After Rukara threw the grenades, the assailants pursued the Tutsis as they retreated into Nyange church and locked it. Those who could not get into the church were killed. The witness testified that Ndahimana "ordered the communal policemen to fire on the persons who were trying

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[603] T. 12 November 2010 p. 9.
[604] T. 12 November 2010 pp. 13-14.
[605] T. 18 November 2010 p. 20 (ICS).
[606] T. 12 November 2010 p. 14.
[607] T. 12 November 2010 pp. 14-15.
[608] T. 4 November 2010 pp. 42-43; Prosecution Exhibit 20.
[609] T. 4 November 2010 p. 63 ("Q.: Were you one of these Hutus who were targeting Tutsis, Mr. Witness? A.: I was."); T. 5 November 2010 p. 11 (ICS) (The witness declared, "I also played a role in the killing of other persons, but the eleven persons are persons I physically killed.").
[610] T. 4 November 2010 p. 64 (ICS).
[611] T. 4 November 2010 p. 71.
[612] T. 4 November 2010 p. 50.
[613] T. 4 November 2010 p. 52.
[614] T. 4 November 2010 pp. 47-49; T. 5 November 2010 pp. 22-23 (ICS), 30.
[615] T. 4 November 2010 pp. 49-51; T. 5 November 2010 pp. 60-61.

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to hide in the tower of the church." He then confiscated the guns of two *gendarmes* who refused to comply with his directive. The Brigadier Mbakilirehe and two communal policemen also refused to shoot, and the *bourgmestre* asked them to hand over their guns as well.[616]

350. After killing the Tutsis who were unable to retreat into Nyange church, IPJ Kayishema and others arrived in a Pajero, bringing fuel with them. The assailants started sprinkling fuel on the church tower, but the attempt to burn down the church was unsuccessful.[617] The *bourgmestre* left after 2 p.m., after having given the order to open fire.[618] When the policemen ran out of ammunition they realised that the *bourgmestre* had gone and that they had to wait for his return to get more ammunition. The witness was told that the *bourgmestre* had gone to the burial of a doctor, a native of Rukoko.[619]

351. According to the witness, there were approximately 4,000 attackers at Nyange parish on 15 April 1994, and approximately 300 Tutsis were killed that day.[620] Kayishema and Kanyarukiga directed the individuals from Kibilira to spend the night around Nyange church in order to prevent the refugees who had barricaded themselves inside the church from escaping.[621] The witness left the church at approximately 6 p.m.[622]

352. The bodies of the Tutsis who were killed on 15 April 1994 were buried in Nyange close to the Caritas restaurant. Witness CDL brought a Caterpillar tractor to dig a mass grave.[623]

5.2.5 Prosecution Witness CBR

353. Prosecution Witness CBR, a Hutu farmer, lived in Kivumu *commune* in April 1994.[624] The witness participated in the killings at Nyange parish on 15 April 1994.[625] He knew that Ndahimana was the *bourgmestre* of Kivumu *commune*, and often saw him drive past in the *commune* vehicle, a red truck to which Ndahimana was entitled "after his appointment as *bourgmestre*."[626]

354. On 14, 15 and 16 April 1994, the witness went to Nyange church to participate in attacks led by Ndungutse.[627] On 14 April 1994, IPJ Kayishema drove a vehicle belonging to Witness CDZ around the *commune*. Using a megaphone, Kayishema informed the local population that "*Inyenzis*"

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[616] T. 4 November 2010 pp. 51-53 (The policemen Adrien Niyitegeka (a.k.a. "Maharamu") and Abayisenga, who was a native of Rukoko, fired at the church tower. One of the two policemen that were disarmed was called "Gicadi.").
[617] T. 4 November 2010 p. 52 (Kayishema was with a certain Kiragi, Théodomir, and Arnaud Nibarere when he came and brought fuel in a Pajero car).
[618] T. 4 November 2010 p. 56; T. 5 November 2010 p. 31.
[619] T. 4 November 2010 p. 54 (The witness explained that when the policemen ran out of ammunitions, "they had to wait for the return of the *bourgmestre* because there was no way of going to look for ammunition in the *commune* office.").
[620] T. 4 November 2010 pp. 54-55 (On 15 April 1994, Gatari, a former teacher, was killed at Nyange church. The witness could not remember the names of others killed); T. 4 November 2010 p. 71.
[621] T. 4 November 2010 p. 56 (Ndungutse and Biyambere were also present).
[622] T. 4 November 2010 p. 56.
[623] T. 1 November 2010 p. 6; Prosecution Exhibit 14.
[624] T. 1 November 2010 p. 6; Prosecution Exhibit 14.
[625] T. 1 November 2010 pp. 17-18.
[626] T. 1 November 2010 p. 6.
[627] T. 1 November 2010 pp. 11, 14 ("Actually, it is Ndungutse who led us. He was our chief, our leader. He is the person who gave us all the news and all information in respect of what had happened at the *commune* office. So he is the person who used to tell us what happened at the *commune* office and who also gave us the programme of what was going to take place.").

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had invaded the *commune*. Ndungutse and Kayishema incited the population to launch an attack against the refugees.[628]

355. On 15 April 1994, Kayishema arrived in the same manner in the witness' *commune*, and again incited the population to attack Nyange parish.[629] The witness and other assailants boarded trucks belonging to the Astaldi Company which brought them to the parish. The witness believed that the transportation had been arranged by the local authorities.[630]

356. The trucks dropped the assailants at the Statue of the Virgin Mary at an unspecified time. When the witness arrived, a large crowd of assailants had already gathered there. The witness estimated that there were approximately eight times more assailants than refugees. When he arrived, the witness saw Ndahimana, Ndungutse, Kanyarukiga, Kayishema, Murangwabugabo, Habarugira, and others.[631] The authorities moved away from the statue in the direction of Nyange presbytery. Along the way, they spoke with the *gendarmes*. They then met with the priests at the presbytery before returning to the CODEKOKI building.[632]

357. When the authorities emerged from CODEKOKI, Ndahimana instructed the assailants: "Guys, get yourself to work." The assailants understood that this was an instruction to kill the Tutsis, and launched an attack against the refugees at Nyange church.[633] The witness estimates that the attack began between 11 a.m. and noon.[634] After giving this order, Ndahimana left with communal policemen to attend the funeral of a doctor from Rufungo.[635]

358. In the initial stages of the attack, the assailants threw stones at the refugees.[636] Then a certain Rukara arrived with weapons, including grenades.[637] From the roof of a shop, Rukara threw grenades at the refugees causing many deaths among the Tutsis.[638] The assailants then "hopped over" the corpses to continue the attack.[639] Survivors ran towards Nyange church and locked themselves inside, while others sought refuge in Nyange presbytery and a third group fled to a small patch of woods near Nyange parish.[640]

359. The assailants chased the refugees toward Nyange presbytery but were stopped by Father Seromba and *gendarmes*. Father Seromba told Ndungutse and IPJ Kayishema, who were leading the attack, that the priority was to clear the corpses in the courtyard.[641] Witness CDL went to the Astaldi Company in Witness CDZ's vehicle.[642] Astaldi sent bulldozers and a truck between 2 and 3

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[628] T. 1 November 2010 pp. 13-15.
[629] T. 1 November 2010 pp. 14, 17.
[630] T. 1 November 2010 p. 17.
[631] T. 1 November 2010 p. 17; T. 2 November 2010 p. 18.
[632] T. 1 November 2010 pp. 17, 47.
[633] T. 1 November 2010 p. 23; T. 2 November 2010 p. 23.
[634] T. 2 November 2010 p. 21.
[635] T. 1 November 2010 p. 23; T. 2 November 2010 p. 23.
[636] T. 2 November 2010 p. 21.
[637] T. 1 November 2010 p. 18.
[638] T. 1 November 2010 pp. 18-19; T. 2 November 2010 pp. 58-59.
[639] T. 1 November 2010 p. 18.
[640] T. 1 November 2010 p. 19.
[641] T. 1 November 2010 pp. 19-20.
[642] T. 1 November 2010 p. 20.

p.m. The vehicles were used to collect the corpses, to dig a grave under the Caritas building and to dump the bodies there.[643]

360. After the bodies were buried, former soldiers and communal policemen began firing at Nyange church and the attack on the church began.[644] IPJ Kayishema arrived with fuel and the assailants then tried to burn down the church but were unsuccessful.[645]

361. The attack continued until nightfall.[646] "[T]owards the end of [their] operation" *Interahamwe* from Kibilira arrived on Astaldi trucks carrying traditional weapons. The reinforcements were asked to spend the night at Nyange church to ensure that the refugees did not escape during the night and that the attackers would not arrive late the following day.[647] At dusk, Ndungutse and IPJ Kayishema informed the assailants that they had run out of "equipment" because "the stock of equipment had been locked up by the *bourgmestre* and they were waiting for the return of the *bourgmestre*" to give the assailants more.[648]

362. The witness left Nyange church at approximately 6 p.m. that evening. Ndungutse told him that Ndahimana returned later to provide food to the reinforcements from Kibilira.[649]

5.2.6 Prosecution Witness CBK

363. Prosecution Witness CBK, a Hutu, was 14 years old in April 1994.[650] He was in a position to observe what took place at Nyange parish in 1994.[651] It is not clear from the transcript how he knew Ndahimana, but he was able to recall his full name and position.[652] He believed that Nyange church could hold 2,000-3,000 persons.[653]

364. On 15 April 1994, the attackers arrived at Nyange parish both on foot and in vehicles. "Things were so organised" that vehicles were made available to those responsible for transporting assailants to the parish. Among the vehicles used were a white Stout pickup truck belonging to Witness CDZ; the Kivumu *commune* vehicle, a red Toyota Hilux; and Colonel Nzaphakumunsi's vehicle, a white two cabin pickup truck.[654] The witness saw the red Hilux at the parish on both 15 and 16 April 1994, but on those days Ndahimana travelled in the white Toyota Stout belonging to Witness CDZ.[655]

365. At approximately 9 a.m. on 15 April 1994, the witness saw Seromba, Ndahimana, IPJ Kayishema, Kanyarukiga, Mbakilirehe, Witness CDL as well as the *conseillers* Habarugira,

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[643] T. 1 November 2010 pp. 20-21; T. 2 November 2010 p. 44.
[644] T. 1 November 2010 pp. 20-22 (The attackers were ex-soldiers and communal policemen from Kivumu *commune*, including Adrien Niyitegeka (a.k.a. "Murangwabugabo"), Appolinaire Rangira, Murantayama, and an ex-soldier named Kabalisa. Anasthase Uzabukaliho (a.k.a. "Giyshade") started to tremble when he fired his gun, so Kabalisa confiscated the gun and used it himself).
[645] T. 1 November 2010 p. 21.
[646] T. 2 November 2010 p. 21.
[647] T. 1 November 2010 pp. 21, 23.
[648] T. 1 November 2010 p. 21.
[649] T. 1 November 2010 pp. 30-31; T. 2 November 2010 p. 22.
[650] T. 2 November 2010 p. 64 (ICS); Prosecution Exhibit 16.
[651] T. 2 November 2010 pp. 64-65 (ICS); Prosecution Exhibit 16.
[652] T. 3 November 2010 pp. 3-4.
[653] T. 2 November 2010 pp. 64-66 (ICS).
[654] T. 3 November 2010 pp. 15-16, 26, 53-54 (The Kivumu *commune* had only one vehicle, a red-coloured pickup vehicle).
[655] T. 3 November 2010 p. 54.

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Sindabyemera and Mahame. They went into the bishop's room in the priests' living quarters. The witness did not hear what they said, but after the meeting he saw the group speaking with Hutu assailants, after which a large-scale attack took place. The attackers included communal policemen who fired on Nyange church with guns. The *Interahamwe* were armed with traditional weapons. *Gendarmes* participated in the attack as well. Attackers wore banana leaves and small cypress branches to distinguish themselves from the refugees. The witness put on banana leaves for this purpose. At one point, Théophile Rukara climbed on the roof of the Caritas building and threw grenades at the Tutsis, killing a number of them.[656]

366. When the Tutsis realised that they could not defend themselves, they retreated into Nyange church and locked themselves in.[657] The attackers used fuel to set banana leaves on fire which they then threw into the church in order to kill the refugees inside. They then tried to burn down the church by "sprinkling" fuel around it. More grenades were also thrown that day.[658] When the "authorities" realised that their plan to burn down the church had failed, they held another meeting at approximately 7 p.m., again at the priests' living quarters. The following were present at this second meeting: Seromba, Ndahimana, IPJ Kayishema, Kanyarukiga, Ndungutse, Mbakilirehe and Colonel Nzaphakumunsi, among others.[659] The witness did not see Ndahimana between the first meeting that finished at approximately 10 a.m. and the second meeting that took place that same evening.[660]

5.2.7 Prosecution Witness CBY

367. Prosecution Witness CBY, a Hutu, was in a position to observe what was taking place at Nyange parish in April 1994. Although he did not live at the parish in ordinary times, he spent the entire period between 10 and 18 April 1994 there because of security conditions in the region.[661] He saw Ndahimana twice before the events of April 1994: the first time during his inauguration as *bourgmestre*, and the second time while Ndahimana was travelling along a road.[662]

368. On 15 April 1994, the witness saw Ndahimana, IPJ Kayishema; Ndungutse; Kanyarukiga and Théodomir (a.k.a. "Kiragi") come into the courtyard of Nyange presbytery at approximately 8 a.m. to meet with the priests.[663] After the discussion, the group left the presbytery. Immediately thereafter, Hutu assailants wearing banana leaves began throwing stones at the refugees. Among the attackers were communal policemen, including Maharamu, Appolinaire and Kabalisa. The refugees were able to repel the attackers back to the area around the Statue of the Virgin Mary. As the priests were having lunch at approximately 12:30 p.m., a former soldier called Rukara climbed on the roof of a nearby house and threw grenades at the Tutsi refugees. Many refugees were killed and wounded. The surviving refugees then retreated towards Nyange church. Those who were unable to get into the church moved towards the courtyard of the presbytery where *gendarmes* were stationed.[664] There, the *gendarmes* opened fire on the refugees. The attackers, including

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[656] T. 3 November 2010 pp. 12-15, 58 (Among the policemen, the witness recognized Adrien Marahamu, Mbungira, Kibyutsa and Leonal. He added that the policemen were carrying rifles. As far as he remembered, they had Kalashnikovs and "another type of gun that do not fire many shots at the same time."); T. 4 November 2010 p. 1.
[657] T. 3 November 2010 pp. 13-14.
[658] T. 3 November 2010 pp. 15-16.
[659] T. 3 November 2010 pp. 16-17.
[660] T. 3 November 2010 p. 58.
[661] T. 9 November 2010 p. 40 (ICS); T. 10 November 2010 p. 35 (ICS).
[662] T. 9 November 2010 p. 36.
[663] T. 9 November 2010 pp. 46 (ICS), 53.
[664] T. 9 November 2010 p. 53; T. 10 November 2010 pp. 22, 30-31 (ICS).

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Kanyarukiga, a certain Kiragi, and several communal policemen named Kabalisa, Mabarumu and Jean-Marie, tried to shoot into the church. When they discovered this mode of attack to be unsuccessful, a certain Leonard Nibarere came with a fuel pump and doused the church walls with petrol in an effort to burn down the church. Later, the attackers realised that it was difficult to demolish the church and became very angry. They left and returned with a bulldozer. They started to demolish the church on 15 April 1994.[665] That evening, attackers surrounded the church in order to attack any refugee trying to escape.[666] The witness estimated that 200 refugees were killed that day.[667]

5.2.8 Prosecution Witness CDJ

369. Prosecution Witness CDJ, a Hutu, was in a position to observe what was taking place at Nyange parish in April 1994.[668] It is not clear from the record how he knew Ndahimana, but he was aware that he had been made *bourgmestre*.[669]

370. On an unspecified Friday night after President Habyarimana's death, the witness arrived at Nyange parish at approximately 7 p.m. and found that part of Nyange church had been destroyed and that there were dead bodies in the courtyard.[670] When he arrived, Ndahimana, Father Seromba and Kanyarukiga were seated on the veranda of Nyange presbytery having a discussion which lasted approximately two hours. The witness did not know what the authorities were discussing.[671] When he returned to the church the next day, he noticed that the church had been completely destroyed.[672]

5.2.9 Prosecution Witness YAU

371. Prosecution Witness YAU, a Tutsi housewife, lived in Kivumu *commune* in April 1994.[673] Prior to the events of April 1994, the witness knew Ndahimana even before he became *bourgmestre* of the Kivumu *commune*.[674]

372. The witness and her family sought refuge at Nyange parish "some days" after the death of President Habyarimana.[675] She remained there for three days.[676] On the witness' third day at Nyange parish, there was a widespread attack and many Tutsis were killed.[677] That morning the witness saw a Father Kanyiranga arrive in a bus with a group of soldiers armed with grenades. "Before noon," Kanyiranga met with Ndahimana, Kayishema, Kanyarukiga, and Father Seromba in front of the secretariat. Soon after, Father Seromba met with a group of *Interahamwe* and the killing began. A teacher named Gatare, who was considered to be an intellectual, was among the first killed. The witness then saw grenades being thrown and fled to Nyange presbytery. Ndahimana was

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[665] T. 9 November 2010 pp. 53-54; T. 10 November 2010 pp. 27, 30-32 (ICS).
[666] T. 9 November 2010 p. 54.
[667] T. 10 November 2010 p. 24 (ICS).
[668] T. 11 November 2010 p. 24 (ICS).
[669] T. 11 November 2010 p. 57 (ICS).
[670] T. 11 November 2010 p. 30 (The Majority infers that the witness was referring to Friday, 15 April 1994).
[671] T. 11 November 2010 pp. 29-30.
[672] T. 11 November 2010 pp. 30-31 (The Majority infers that the witness was referring to Saturday, 16 April 1994).
[673] Prosecution Exhibit 13.
[674] T. 15 September 2010 p. 54 (ICS); T. 16 September 2010 p. 15 (ICS).
[675] T. 15 September 2010 p. 42.
[676] T. 15 September 2010 p. 45.
[677] T. 15 September 2010 p. 48 (The Majority infers that the witness' third day at the church was 15 April 1994).

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present "as the killings were taking place."[678] The witness saw IPJ Kayishema and *gendarmes* at Nyange church but did not see any communal policemen.[679]

373. At Nyange presbytery, the witness heard Father Seromba ask an *Interahamwe* named Nyirandayimbushi to kill the refugees who had gone into the presbytery. That evening she heard Seromba tell the *Interahamwe* that he was tired and that they should go home and rest, but that they should return that night to kill Tutsis who had taken refuge in the bell tower of Nyange church.[680] That evening, Father Kanyiranga entered the room in which the witness and other refugees were hiding and advised them to flee. Of the 30 Tutsis who fled the presbytery that night, only two, including the witness, survived.[681]

5.2.10 Prosecution Witness CBS

374. Prosecution Witness CBS, a Tutsi, lived in Kivumu *commune* in April 1994.[682] The witness knew Ndahimana before the events of April 1994 because the witness had visited Ndahimana at the communal office on at least one occasion to discuss a problem with him.[683]

375. Members of the witness' family were killed on 11 April 1994. The following day he went to find refuge at Nyange parish with his mother and some of his siblings.[684] They arrived at the parish on Tuesday 12 April 1994 at approximately 6 a.m. When they arrived, *gendarmes* were present as well as approximately 2,000 Tutsi refugees.[685]

376. Early in the morning of 15 April 1994, the refugees at Nyange parish heard the sound of whistles and drums coming from the hills, which the witness understood to be a signal to Hutus to begin an attack on the Tutsis at the parish.[686] Soon after, *Conseiller* Gatwaza arrived with his "army," and other assailants came from neighbouring localities.[687]

377. The witness was on the church square that morning.[688] Attackers came from everywhere. Vehicles were bringing attackers to the Statue of the Virgin Mary.[689] Communal authorities requisitioned a vehicle belonging to Witness CDZ and used it to transport assailants.[690]

378. Attackers disguised themselves with banana leaves in order to distinguish themselves from the refugees.[691] At approximately 8 a.m., the witness saw Ndahimana, together with Kayishema and armed police officers, in the area where the vehicles were dropping off attackers. According to the witness: "It was obvious that it was Ndahimana's group which was issuing instruction to the attackers. The attackers stopped there and they would discuss with the group made up of

[678] T. 15 September 2010 p. 49.
[679] T. 15 September 2010 p. 65.
[680] T. 15 September 2010 pp. 50-51.
[681] T. 15 September 2010 pp. 52-53.
[682] T. 6 September 2010 p. 10; Prosecution Exhibit 1.
[683] T. 6 September 2010 p. 19.
[684] T. 6 September 2010 pp. 13-14.
[685] T. 6 September 2010 pp. 14-16 (The witness explained that he arrived at Nyange church after killings that occurred on 11 April 1994 and that he stayed from "Tuesday to Friday." The Majority assumes therefore that he stayed at the church from Tuesday, 12 April 1994 until Friday, 15 April 1994).
[686] T. 6 September 2010 p. 21.
[687] T. 6 September 2010 p. 25.
[688] T. 6 September 2010 pp. 15, 19, 22, 26-27.
[689] T. 6 September 2010 pp. 21-22.
[690] T. 6 September 2010 p. 28.
[691] T. 6 September 2010 p. 25.

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Ndahimana and other authorities." The witness thus inferred that the attackers were receiving instructions from Ndahimana. Ndahimana remained in the area until the attackers were ready to begin.[692]

379. The attack on the refugees at Nyange parish started at approximately 9 a.m. The refugees repelled the assailants by throwing stones at them. The assailants then began using grenades that "would kill 30 Tutsis in one go." The refugees began retreating and were soon overwhelmed. The attack lasted until approximately 3 p.m. Communal policemen participated in the attack, shooting at the refugees.[693] The witness saw Kivumu *commune conseillers* Gatwaza and Habarugira at the parish that day.[694] *Conseiller* Gatwaza and other leaders wearing banana leaves surrounded Nyange church in order to kill the refugees.[695] Another *conseiller*, Habarugira, also participated in the massacre, and was armed with a machete and giving instructions to the assailants.[696] *Gendarmes* also participated in the attack.[697]

380. The witness survived because he hid in the kitchen of Nyange presbytery. He then moved to the corridor and then into the poultry shed where he remained until nightfall. That night he fled to Gitarama *préfecture*.[698] Of the more than 2,000 refugees at Nyange parish, only about 20 survived the massacres.[699]

5.2.11 Prosecution Witness CBI

381. Prosecution Witness CBI, a Tutsi farmer, lived in Kivumu *commune* in April 1994.[700] The witness knew Ndahimana because he was the *bourgmestre* of his *commune*.[701] On 7 April 1994, the witness sought refuge at a friend's home.[702] He then moved to Nyange parish after hearing from Tutsis in his *secteur* that Ndahimana was encouraging the Tutsis to do so. He was told that the *bourgmestre* had already taken Tutsis there in his vehicle, a red Toyota Hilux.[703] He arrived at Nyange parish on 12 April 1994 at approximately 7 p.m.[704]

382. The most significant attack on Nyange church took place on 15 April 1994. During this attack he saw the following local authorities, among others: Ndahimana, Kayishema, assistant *bourgmestre* Védaste Murangwabugabo, Kanyarukiga, Ndungutse and a man named Anicet.[705]

383. The witness estimated that the number of attackers on 15 April 1994 was about ten times greater than the number of those who had participated in previous attacks, causing the attackers to outnumber the refugees. The attackers carried traditional weapons, and some wore banana leaves.

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[692] T. 6 September 2010 pp. 21-22.
[693] T. 6 September 2010 pp. 22-23 (A policeman named Nishyirembere left before the end of the attack. The witness recognised other police officers named Nihirembere, Adrian Maharamu Niyitegeka, and Rangira. Ndahimana was ordering those communal policemen to shoot at the refugees).
[694] T. 6 September 2010 pp. 23-24.
[695] T. 6 September 2010 pp. 24-25.
[696] T. 6 September 2010 pp. 26-27 (*Conseiller* Habarugira was in charge of the Nyange church *secteur*).
[697] T. 7 September 2010 pp. 8-10, 32.
[698] T. 6 September 2010 pp. 26-27, 29.
[699] T. 6 September 2010 p. 27; T. 7 September 2010 p. 23.
[700] T. 14 September 2010 pp. 22-24. *See also*, T. 15 September 2010 p. 15.
[701] T. 14 September 2010 p. 27.
[702] T. 14 September 2010 p. 28.
[703] T. 14 September 2010 pp. 26, 27.
[704] T. 14 September 2010 p. 28.
[705] T. 14 September 2010 p. 39.

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The witness saw Ndahimana's red Hilux and was told it had travelled through the witness' *secteur* and neighbouring *communes* with a megaphone calling the local inhabitants to go to the parish.[706]

384. The attack began at about 11 a.m. or noon, and continued until about 2 p.m. when it started to rain. The killings finally stopped at around 6 p.m. when it started to get dark.[707] The attackers surrounding Nyange church were armed with traditional weapons, while the communal policemen were equipped with modern weapons including firearms. Among the police officers were Niyitegeka, Munyantarama and Télesphore Mbakirirehe.[708]

385. During the attack, *gendarmes* and policemen worked in concert with the attackers and shot at the refugees. Those who were not shooting stood with the priest and watched the events unfold. Many Tutsis were killed that day.[709]

386. Together with the refugees, the witness fought against the attackers. When he realised that they were being overpowered, he jumped over the church wall and hid in the kitchen of Nyange presbytery for about 20 minutes until approximately 4 p.m.[710] While he was in hiding, the witness heard grenades exploding. Soon after, *gendarmes* arrived and asked each person to identify himself. The witness scaled the fence of the presbytery and fled to Kabgayi.[711]

5.2.12 Prosecution Witness CBN

387. Prosecution Witness CBN, a Tutsi farmer, lived in Kivumu *commune* in April 1994. He first met Ndahimana in 1991.[712] He and his relatives sought refuge at Nyange parish due to the mounting hostilities in his *commune* following the president's death.[713]

388. On 14 April 1994, the witness heard whistles and people were asked to prepare for an attack on Nyange church the following day.[714] Then, on April 15 1994, Hutu assailants conducted a large-scale attack on the church. It began at about 8 a.m.[715] Attackers coming from the Statue of the Virgin Mary, Lugabano and the direction of Nyamiyugiri surrounded the church.[716] Some bore traditional arms while others lobbed grenades at the refugees resulting in many casualties.[717]

389. The assailants that day included: Balisaba; Grégoire Gatana; *Conseillers* Gatwaza and Habarugira; and Mahame, who led the attackers coming from Lugoko; Kanyarukiga; IPJ Kayishema; Mupenda, assistant *bourgmestre*; and various policemen, soldiers and *gendarmes* who collaborated with the attackers and taught them how to use the grenades.[718] The witness did not see Ndahimana leading any of the attacks.[719]

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[706] T. 14 September 2010 pp. 35-39; T. 15 September 2010 p. 38.
[707] T. 14 September 2010 pp. 39-41.
[708] T. 14 September 2010 p. 40.
[709] T. 14 September 2010 pp. 39-41.
[710] T. 14 September 2010 pp. 41, 43.
[711] T. 14 September 2010 p. 43.
[712] T. 13 September 2010 p. 2.
[713] T. 13 September 2010 p. 15.
[714] T. 13 September 2010 pp. 20, 56, 62-63.
[715] T. 13 September 2010 p. 23.
[716] T. 13 September 2010 pp. 21-22.
[717] T. 13 September 2010 pp. 21-23.
[718] T. 13 September 2010 pp. 22-23.
[719] T. 13 September 2010 p. 58.

390. The attacks were still ongoing when the witness was able to escape from Nyange church between 1 and 2 p.m. by covering himself in banana leaves as the attackers had done. He managed to go to the Kabgayi Junior Seminary. The witness' relatives all perished at the church.[720]

5.2.13 Defence Witness Thérese Mukabideri

391. Thérese Mukabideri, a Hutu, was chief of the administrative and financial department of the *Banque Continentale Africaine* in April 1994.[721] She was married to Dr. Ntawuruhunga and they lived in Kigali. The witness travelled from Kigali to Gitarama on 8 April 1994, and then on to Kivumu on 11 April 1994, while her husband remained in Kigali.[722] Ndahimana was a family friend. The witness first met Ndahimana when she and the doctor were married in 1986. The doctor was the godfather of Ndahimana's sons.[723]

392. On 14 April 1994, the witness was informed that RPF soldiers killed her husband during the night of 13 April 1994. Ndahimana, Ferdinand and others accompanied his body to Rufungo, in Kivumu *commune*, at approximately 4 p.m. on 14 April 1994.[724] Ndahimana stayed in Rufungo until past midnight organising the funeral, which was to take place the next day.[725]

393. Ndahimana returned to Rufungo at approximately 5 or 6 a.m. on 15 April 1994 to complete arrangements for the burial, but left before the body was buried. Before leaving, he informed the witness that he had been told there was unrest in Nyange *secteur* and that he had to travel to Kibuye to see the *préfet*. He left with Anicet Tumusenge who drove him to Kibuye.[726] Anicet and Ndahimana returned to the funeral at approximately 6 or 7 p.m., but did not stay long before leaving again. The accused then left again with Anicet but the witness did not know where they went.[727]

394. The witness estimated the distance between Rufungo and Nyange to be about 10 kilometres.[728] She could not approximate the distance between Rufungo and Kibuye.[729] However, she explained that the roads between the two areas were bad.[730]

5.2.14 Defence Witness Beatrice Mukankusi

395. Beatrice Mukankusi, a Hutu trader, lived in Nyange *secteur*, approximately 50-100 metres away from the communal office in 1994.[731]

396. On Thursday, 14 April 1994 at approximately 2 or 3 p.m.,[732] the witness loaned Ndahimana her vehicle, a blue Daihatsu pickup, to attend the funeral of Dr. Ntawuruhunga of Rufungo in Rukoko *secteur*.[733]

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[720] T. 13 September 2010 p. 23.
[721] Defence Exhibit 102.
[722] T. 7 February 2011 pp. 61, 66; T. 8 February 2011 p. 4.
[723] T. 7 February 2011 p. 67.
[724] T. 7 February 2011 pp. 67-68.
[725] T. 7 February 2011 p. 68; T. 8 February 2011 p. 18.
[726] T. 7 February 2011 p. 68.
[727] T. 7 February 2011 p. 69.
[728] T. 8 February 2011 p. 17.
[729] T. 7 February 2011 p. 68.
[730] T. 8 February 2011 pp. 16, 17.
[731] T. 7 February 2011 pp. 4-5; Defence Exhibit 101.
[732] T. 7 February 2011 p. 13.

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397. The witness did not see Ndahimana again until 15 April 1994 at Dr. Juvenal Ntawuruhunga's funeral.[734] The witness went to the funeral with her brother-in-law, Anicet Tumusenge, in his blue Pajero. She travelled in the vehicle along with Clémence Mujawimana, Anicet's wife; Sekimanzi Jean, Anicet's younger brother, together with his wife; Beatrice's mother in law; and Beatrice's driver Alphonse Mudaheranwa.[735]

398. They left home at approximately 10 a.m.[736] Along the way, they encountered Hutu attackers and Tutsi refugees throwing stones at each other in the area surrounding the Statue of the Virgin Mary,[737] and took a detour to reach the funeral.[738] They arrived at Rufungo just before 11 a.m.[739] The witness could not estimate the distance between Nyange and Rufungo but said that "there was quite a distance between the two localities."[740] When she arrived, Ndahimana was already present and coordinating the event.[741]

399. Although Ndahimana was the "master of ceremonies" at the funeral, when the witness described the situation at Nyange parish to him, Ndahimana left the funeral with Anicet Tumusenge in Anicet's Pajero and went to Kibuye to see the *préfet*.[742] Although she could not say at what time Ndahimana and Anicet left the funeral, it was not immediately after she arrived at 11 a.m., but before she herself left at 5 p.m.[743] She stated, "We did not look at our watches, and it was a funeral. We did not pay attention to the time."[744] On her way home from the funeral, she saw "many dead bodies…[and]…a bulldozer which was collecting the dead bodies."[745]

5.2.15 Defence Witness Léonille Murekeyisoni

400. Léonille Murekeyisoni, a Hutu, lived in Ngoma in Butare *préfecture* in 1994. Her husband was the *bourgmestre of* Kivumu *commune* from September 1990 until 1993.[746] Her husband and Ndahimana were friends.[747]

401. The witness arrived at Dr. Ntawuruhunga's funeral on 15 April 1994 at approximately 11 a.m., but "at any rate...before noon."[748] Ndahimana was at the house when she got there. He was the "master of ceremonies" together with another man named Anicet. Ndahimana left before the end of the funeral ceremony. She believed it was approximately 1 or 2 p.m. when she noticed he was no longer there.[749] A certain Mukeshimana told the witness that Ndahimana had gone to the *préfecture* to see whether the *préfet* could provide him with assistance to solve a security problem in Nyange

[733] T. 7 February 2011 pp. 12-14
[734] T. 7 February 2011 p. 14.
[735] T. 7 February 2011 p. 45.
[736] T. 7 February 2011 p. 14.
[737] T. 7 February 2011 p. 15.
[738] T. 7 February 2011 pp. 15, 41-42.
[739] T. 7 February 2011 pp. 45-46.
[740] T. 7 February 2011 p. 42.
[741] T. 7 February 2011 pp. 43, 46.
[742] T. 7 February 2011 pp. 15-16.
[743] T. 7 February 2011 pp. 16, 47.
[744] T. 7 February 2011 p. 46.
[745] T. 7 February 2011 p. 16.
[746] T. 10 February 2011 p. 5.
[747] T. 10 February 2011 pp. 5-6.
[748] T. 10 February 2011 p. 18 ("At any rate, I came there before noon. Maybe 11 and some minutes; I wouldn't be say—I wouldn't be able to say whether it was 11:05 or 11:10. But, generally speaking, I would say it's around 11. I cannot give you the precise time to the minute. No, I can't do that.").
[749] T. 10 February 2011 pp. 7-11, 18.

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secteur.[750] The burial itself took place at around 2 p.m. and the funeral ceremony came to an end at approximately 3 p.m. No more than 100 people attended the ceremony.[751] The witness left the funeral at about 5 p.m. and never saw Ndahimana return.[752]

5.2.16 Defence Witness Anicet Tumusenge

402. Anicet Tumusenge, a Hutu, was a businessman in Gitarama.[753] On the morning of 7 April 1994, he left Gitarama to go to Nyange *secteur* in Kibuye *préfecture* because of the security situation.[754] He is Defence Witness Beatrice Mukankusi's brother-in-law and the godfather of Defence Witness Thérese Mukabideri's daughter.[755] The deceased, Dr. Ntawuruhunga, was the godfather of the witness' daughter.[756] He did not know Ndahimana prior to the funeral.[757]

403. The witness knew Dr. Ntawuruhunga well and attended his funeral in Rufungo. Although he could not remember the precise date of the funeral, he believed it took place between 14 and 16 April 1994.[758] Ndahimana coordinated the funeral and was already at the house when the witness arrived in the morning.[759] During the funeral, the witness was responsible for welcoming guests and providing supplies to Ndahimana.[760] At a certain point, Ndahimana asked the witness to loan him his vehicle so that he could go to Kibuye because there were security problems in Nyange. The witness feared that Ndahimana was trying to commandeer his vehicle and decided to drive Ndahimana to Kibuye himself.[761] The witness believed he had been at the funeral for one hour when he left with Ndahimana for Kibuye, and that they left at approximately 1 p.m.[762]

404. As they started the trip, Ndahimana told the witness that he was going to the *préfecture* to find soldiers because there were security problems in Nyange.[763] The witness drove Ndahimana to the headquarters of the *préfecture*. Ndahimana spent approximately 40-60 minutes inside the *préfet's* office while the witness waited in the car. When Ndahimana emerged, he was accompanied by the *préfet*. The witness did not know it was the *préfet* until Ndahimana told him.[764] When Ndahimana returned to the car he told the witness that the *préfet* had informed him that there were no soldiers or *gendarmes* available.[765]

405. The witness and Ndahimana then went to the *gendarmerie*. Ndahimana left the witness in the vehicle while he went inside.[766] Ndahimana was at the station for less than 30 minutes. They then passed by the house of an agronomist named Janvier before returning to the funeral. The witness estimated they arrived back at the funeral at about 6 p.m. The funeral had ended, so he and

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[750] T. 10 February 2011 pp. 11-12.
[751] T. 10 February 2011 p. 18.
[752] T. 10 February 2011 pp. 11-12.
[753] T. 12 May 2011 p. 2; Defence Exhibit 128.
[754] T. 12 May 2011 p. 3.
[755] T. 8 February 2011 p. 18.
[756] T. 12 May 2011 p. 5.
[757] T. 12 May 2011 pp. 5-6.
[758] T. 12 May 2011 pp. 5, 12.
[759] T. 12 May 2011 p. 7.
[760] T. 12 May 2011 p. 12.
[761] T. 12 May 2011 p. 7.
[762] T. 12 May 2011 p. 12 ("I think we must have left that place around 1 p.m., because I spent about one hour there.").
[763] T. 12 May 2011 p. 9.
[764] T. 12 May 2011 pp. 8, 11.
[765] T. 12 May 2011 p. 9.
[766] T. 12 May 2011 p. 8.

Ndahimana had a few beers and left at around 7:30 p.m.[767] The witness dropped Ndahimana at his house at approximately 8 p.m. before returning to his own home.[768]

5.2.17 Defence Witness Clément Kayishema

406. Clément Kayishema, a Hutu, was the *préfet* of Kibuye *préfecture* in April 1994.[769] He was tried and convicted by this Tribunal for his participation in the 1994 genocide and is currently serving a sentence of life imprisonment.[770]

407. During the afternoon of 15 April 1994, Ndahimana arrived at the witness' office at approximately 2 p.m. and spent 30-40 minutes meeting with him.[771] He arrived, without an escort, in a blue vehicle with civilian licence plates driven by a person the witness did not know.[772] Ndahimana briefed the witness on the situation in Kivumu as well as the situation at Nyange parish, and informed the witness of rumours circulating around the *commune* that there were plans for a large-scale attack on Nyange church.[773] Ndahimana asked the witness to send *gendarmes* to Kivumu as reinforcements, but the witness could not assist him because the *gendarmes* in Kibuye had left for Kigali.[774] Ndahimana asked for petrol and money to pay salaries to his staff and requested food and medical care for the displaced persons and war survivors.[775] The witness had no fuel or vehicles to give Ndahimana.[776]

408. Kayishema and Ndahimana talked about the punishment of the perpetrators of the attacks in Kivumu *commune* that day. Ndahimana told the witness that individuals had been arrested and they discussed how to transfer the detainees to the Kibuye Prosecutor's office.[777]

5.2.18 Defence Witness ND13

409. Witness ND13, a Hutu, was an employee at the Kibuye *préfecture* in 1994. Ndahimana had been the witness' student and they would meet "once in a while."[778]

410. He heard about the killings at Nyange parish between 12 and 15 April 1994.[779] On 15 April 1994, the witness saw Ndahimana as he was leaving the *préfet*'s office. Ndahimana went to ask the *préfet* for reinforcements in order to protect the refugees at the parish because the three *gendarmes* already assigned to him were overwhelmed. The *préfet* was unable to assist as most of the *gendarmes* had been recalled to Kigali, and those that remained were to protect the property of the *gendarmerie*.[780]

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[767] T. 12 May 2011 pp. 10, 14-17.
[768] T. 12 May 2011 pp. 15, 17.
[769] Defence Exhibit 118.
[770] *Kayishema & Ruzindana* (AC) Judgement, Disposition.
[771] T. 18 April 2011 pp. 31, 61; T. 19 April 2011 p. 8.
[772] T. 18 April 2011 pp. 33-34, 62.
[773] T. 18 April 2011 pp. 31, 63.
[774] T. 18 April 2011 pp. 31-32.
[775] T. 18 April 2011 pp. 44, 50-51, 63.
[776] T. 18 April 2011 pp. 31, 33-34, 44.
[777] T. 19 April 2011 pp. 12-13.
[778] T. 17 January 2011 pp. 11-12; Defence Exhibit 84.
[779] T. 17 January 2011 p. 21.
[780] T. 17 January 2011 pp. 37-38, 40.

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5.2.19 Defence Witness ND24

411. Witness ND24, a Hutu, was a small businessman living in Kivumu *commune* in April 1994.[781] He participated in the genocide.[782] The witness first became aware of Ndahimana when Ndahimana became *bourgmestre* in October 1993.[783]

412. On 14 April 1994, the witness was manning a roadblock at about 3 or 4 p.m. when a vehicle arrived carrying the remains of a person who used to live in Kigali. Approximately 20 minutes later the *bourgmestre* passed through the roadblock. The guards manning the roadblock learned that the occupants of that car were going to the residence of the deceased person.[784] The *bourgmestre* was in a private car, not the communal vehicle.[785]

413. On 15 April 1994, the witness arrived in Nyange *secteur* at around 7 a.m. and went to the roadblock together with other people. They stopped a number of vehicles that day but the witness could not remember any details.[786]

414. That day a large-scale attack began at approximately 10:30 a.m. The assailants were led by Ndungutse, IPJ Kayishema and the vice-chairman of the local court, Gacabuterezi. Kayishema gave orders to the assailants. Some of the attackers came in a car belonging to a certain Mutuyimana. Others came by lorry or on foot. Many of the attackers covered themselves in banana leaves. Hutus and Tutsis were throwing stones at each other. The witness left the roadblock and went to throw stones as well. At some point, Rukara, a reserve officer "who was able to take position on a roof," threw a grenade at the Tutsis who retreated and locked themselves into Nyange church. Later that day, a Caterpillar was brought to destroy the church.[787] No firearms were used that day except for grenades.[788]

415. It began to rain at approximately 4 p.m. and the attackers left the church. That same day, the witness saw Ndahimana at around 8 or 9 p.m. in a private Pajero driven by a trader named Anicet coming from direction of Kibuye. The witness and his group searched the car but found nothing.[789] When they searched the car, those manning the roadblock realised that the *bourgmestre* was inside. The witness and his group opened the roadblock to let the car go through and Ndahimana went to Nyange presbytery. He did not stay at the presbytery long and the witness saw him leave.[790]

416. Anyone going by road to Nyange church would have had to pass through the roadblock.[791] Although he acknowledged that he was not at the roadblock at all times, he asserted that Ndahimana could not have passed through the roadblock between 14 and 16 April 1994 without the witness

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[781] T. 21 February 2011 pp. 2, 14; Defence Exhibit 112.
[782] T. 21 February 2011 pp. 2-3.
[783] T. 21 February 2011 p. 6.
[784] T. 21 February 2011 pp. 8-9.
[785] T. 21 February 2011 pp. 22, 26.
[786] T. 21 February 2011 pp. 9-10.
[787] T. 21 February 2011 pp. 10-12.
[788] T. 21 February 2011 p. 41.
[789] T. 21 February 2011 pp. 12, 24-25.
[790] T. 21 February 2011 pp. 12-13 (quoted), 22, 24.
[791] T. 21 February 2011 p. 23 ("Yes. Anyone coming from the road that came from Kigali could see the roadblock. When you were going to the church, you, of necessity, had to pass through that roadblock. And what—and it was composed of two sticks, you know, from one end of the road to the other.").

knowing about it, adding, "A person like him couldn't have passed through such a place without people knowing."[792]

5.2.20 Defence Witness ND34

417. Witness ND34, a Hutu farmer, lived in Kivumu *commune* in April 1994.[793] He participated in the 1994 genocide but not at Nyange church.[794] The witness first met Ndahimana in 1993 and was later told that he had been elected *bourgmestre* of Kivumu *commune*.[795]

418. The witness went to Nyange church on 15 April 1994 at approximately 5 p.m. There he saw corpses in the courtyard as well as two Caterpillars—one was gathering corpses while the other was digging a pit behind the Caritas building.[796] He left the church at approximately 5:30 p.m. when it started raining. While at the church, he saw two policemen, Appolinaire and Gicadi, talking to "those who were present" and telling them to gather the corpses and bring them to the Caterpillar. He also saw Kayishema, Gacabuterezi, Witness CDL, and Ndungutse.[797]

5.2.21 Defence Witness ND22

419. Witness ND22, a Hutu farmer, lived in Kivumu *commune* in 1994.[798] He knew that Ndahimana was the *bourgmestre* of Kivumu *commune*.[799] The witness participated in the attack of 15 April 1994 on Nyange church and was imprisoned for eight years but was free at the time of his testimony.[800]

420. The witness did not see Ndahimana at Nyange parish on 15 April 1994.[801] That day, the witness arrived at the Statue of the Virgin Mary at 7 a.m. A large number of Hutus were gathered there as well as the following "officials": Kayishema, Ndungutse, Mbakilirehe and Witness CDL. Hutus continued to arrive, some on foot, some on board of lorries. The officials were next to the Statue of the Virgin Mary telling members of the population that they had to confront the Tutsis.[802] "At some point" Hutus, including the witness, and Tutsis began throwing stones at each other. Kayishema, who was furious, asked Ndungutse where the *bourgmestre* was. Ndungutse answered that "he had gone to see his friends, the *Inkotanyi*." Tutsis managed to repel the Hutu attackers back to the Statue of the Virgin Mary, but Rukara then threw three grenades at the Tutsis, and the Tutsis retreated back to Nyange church. Approximately 100 Tutsis who were unable to get into the church were killed by the assailants.[803]

421. Seromba asked that the bodies "be taken away and kept somewhere." Subsequently, two Caterpillars were brought, one to dig a grave and the other one to transport the bodies that were buried below the Caritas building.[804] After the killings and the burials, a Caterpillar began

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[792] T. 21 February 2011 pp. 27 (quoted), 28-29.
[793] T. 17 February 2011 p. 59; Defence Exhibit 111.
[794] T. 17 February 2011 p. 65.
[795] T. 17 February 2011 pp. 59-60.
[796] T. 17 February 2011 p. 64.
[797] T. 17 February 2011 p. 65 (The witness said that Gacabuterezi was the president of the Canton court).
[798] T. 20 April 2011 pp. 2, 19; Defence Exhibit 125.
[799] T. 20 April 2011 p. 3.
[800] T. 20 April 2011 pp. 14-22.
[801] T. 20 April 2011 p. 20.
[802] T. 20 April 2011 pp. 4-6.
[803] T. 20 April 2011 pp. 6-7, 20, 24.
[804] T. 20 April 2011 pp. 8, 31.

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destroying Nyange church, but it started raining and the demolition stopped because the wheels of the Caterpillar kept getting stuck in the mud.[805]

422. The attack started at 10 a.m. and ended between 4 and 5 p.m. When the witness left, some attackers remained at the site.[806]

5.2.22 Defence Witness ND6

423. Witness ND6, a Hutu, was an Astaldi Company employee in April 1994. He was also Télesphore Ndungutse's neighbour at that time.[807] He knew that Ndahimana was the *bourgmestre* of Kivumu *commune*.[808] He participated in the killings at Nyange parish.[809] He served his sentence and was free at the time of his testimony.[810] The witness knew Ndahimana well because he would see him at mass at Nyange church.[811]

424. The witness did not see the *bourgmestre* on 14, 15 or 16 April 1994.[812] At approximately 11 a.m. on 15 April 1994, the witness and other assailants left for Nyange parish aboard a lorry belonging to a certain Mutuyimana. The truck continued to pick up assailants as it moved towards the parish and held more than 30 persons by the time it arrived.[813]

425. The lorry stopped by the Statue of the Virgin Mary, where the assailants met Ndungutse and other attackers. Ndungutse instructed the attackers to wear banana leaves so that they could be distinguished from Tutsis.[814] No meeting was held at CODEKOKI before waging the attack, and no meeting was held on 15 April 1994 by authorities from the *commune* at Nyange church or its vicinity. If a meeting had taken place, Ndungutse would have told the attackers about it.[815]

426. More than 1,000 refugees were at Nyange parish, both inside and outside Nyange church.[816] The assailants were fewer in number but their numbers grew as the attack progressed. Ndungutse gave the signal for the attack to begin. In the meantime, the refugees started throwing stones at the assailants and managed to repel them toward the area of the CODEKOKI building.[817]

427. A soldier named Rukara then devised a plan to lie on the roof of a building in order to throw grenades at the refugees. Ndungutse ordered the assailants to provoke the refugees so that they would emerge from the courtyard. The plan worked, and after Rukara threw a second grenade at the refugees, they stumbled towards Nyange church. Many Tutsis at the entrance of the church were killed while those inside the church locked themselves in. At an unspecified time it started to rain. The attackers sprayed petrol on the church doors in order to order to burn them down but did not

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[805] T. 20 April 2011 pp. 11-12.
[806] T. 20 April 2011 pp. 7, 8.
[807] T. 26 January 2011 p. 61; Defence Exhibit 99.
[808] T. 26 January 2011 p. 64.
[809] T. 27 January 2011 p. 18.
[810] T. 27 January 2011 p. 20.
[811] T. 27 January 2011 pp. 17-18, 25, 29, 34 (ICS).
[812] T. 27 January 2011 pp. 17-18, 25, 29, 34 (ICS).
[813] T. 27 January 2011 pp. 8-9.
[814] T. 27 January 2011 p. 9 (The witness added that a man called Rwarakabije coming from Kibilira was also among the assailants).
[815] T. 27 January 2011 p. 14.
[816] T. 27 January 2011 pp. 10-11, 35-36 (ICS).
[817] T. 27 January 2011 p. 14.

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succeed. Finally the assailants decided to throw stones at the refugees through the window panes.[818] The attacks at the church ended at approximately 4:30 p.m.[819]

428. Among the attackers at Nyange church on 15 April 1994, the witness saw IPJ Kayishema and Witness CDL. He also saw communal police officers named Munyantarama and Niyitegeka later when corpses surrounded the church. The policemen had come from the *commune* office and "were surprised" to see "this horrible scene."[820] The policemen arrived at the church approximately one hour after the start of the attack that began between 10 and 11 a.m. By the time they arrived, a number of Tutsis had already been killed while others had taken refuge in the church.[821] They did not speak to anyone but one of them shot twice in the air. The police did not arrest any perpetrators but could not have done so as Kayishema was present, and was one of the leaders of the attack.[822] *Gendarmes* were in the backyard of Nyange presbytery but "gave up" because there were too many attackers.[823] The witness did not see any *conseillers* at Nyange church nor did he see any assistant *bourgmestres*.[824]

5.2.23 Defence Witness ND12

429. Witness ND12, a Tutsi farmer, lived in Kivumu *commune* in April 1994.[825] He went to seek refuge at Nyange parish on 13 April 1994.[826] Ndahimana came to Nyange presbytery on 14 April 1994 at approximately 2 p.m.[827]

430. On 15 April 1994 an attack was launched between 9 and 11 a.m. The attackers were led by Ndungutse, Kayishema, Gacabuterezi, Witness CDL and many others.[828]

431. The witness did not see did not see anyone arrive at Nyange parish in a vehicle that day.[829] The attackers headed towards Nyange church to kill the refugees and the *gendarmes* repelled them. Subsequently, there was another attack involving many *Interahamwe* who arrived whistling and shouting loudly. The *gendarmes* were no longer present. Some *Interahamwe* were armed with grenades. One, named Rukara, threw grenades at the refugees. Some were killed and others retreated into the church.[830] The witness was among those exchanging stones with the assailants, but then retreated when the assailants began to use grenades.[831] The attackers then tried to burn down the church using fuel but did not succeed. A Caterpillar later arrived to bury the victims in a place called Rubagano. At approximately 4 or 5 p.m., the Caterpillar began attacking the walls of

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[818] T. 27 January 2011 pp. 11-13 (The person who sprayed the petrol on the church's doors was called Arnold and was assisted by one Faustin Uwurinaniye).
[819] T. 27 January 2011 p. 14.
[820] T. 27 January 2011 pp. 13, 29-31, 39-41.
[821] T. 27 January 2011 pp. 31-32.
[822] T. 27 January 2011 pp. 29-31.
[823] T. 27 January 2011 p. 36 (ICS).
[824] T. 27 January 2011 p. 21.
[825] T. 19 January 2011 pp. 1-2; Defence Exhibit 86.
[826] T. 19 January 2011 p. 3.
[827] T. 19 January 2011 pp. 4-6, 14-15.
[828] T. 19 January 2011 p. 6 (The witness explained that Gacabuterezi was a magistrate).
[829] T. 19 January 2011 pp. 11-12 (The witness knew that a vehicle had been seized from Witness CDZ but he did not see it that day). *See* Chapter III, Section 2.3.
[830] T. 19 January 2011 pp. 6-8.
[831] T. 19 January 2011 pp. 6, 16.

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the church but stopped when it began raining. The *Interahamwe* withdrew and the refugees, including the witness, remained inside the church.[832]

432. Ndahimana did not come to Nyange parish on 15 April 1994.[833] The witness left the parish on 15 April 1994 at approximately midnight together with Witness ND11. When they left Nyange church, Witness ND11 told the witness that refugees had told him that Ndahimana had asked a policeman to open fire on the attackers trying to kill the refugees.[834]

5.2.24 Defence Witness ND11

433. Witness ND11 is a Tutsi survivor of the genocide. In 1994 he lived in Kivumu *commune*. He knew that Ndahimana was the *bourgmestre* of Kivumu *commune* and saw him twice before the events at Nyange parish. The third time was when the witness went to seek refuge at Ndahimana's house on the night of 15 April 1994.[835]

434. On 14 April 1994, the witness went to seek refuge at Nyange parish.[836] Between 10 and 11 a.m., on 15 April 1994, a large number of *Interahamwe* arrived at the parish blowing whistles. The witness and other Tutsi men threw stones at the assailants and repelled them back towards the Statue of the Virgin Mary. The assailants then began throwing grenades at the refugees, and the refugees retreated back to Nyange church. Among the attackers were Witness CDL, Ndungutse and IPJ Kayishema. The witness did not see Ndahimana. There were approximately 1,000 refugees and 3,000 assailants at the parish that day.[837]

435. While the witness was inside Nyange church, a man called Leonard arrived with fuel and sprayed the church with petrol. The refugees then saw a "special motor" arrive. It dug a pit in which the dead bodies were buried. This machine was used to attack the north side of the church. Subsequently it began to rain and nightfall came. The special motor remained at the church compound.[838]

436. No meeting was held that day at the Nyange church compound or in the backyard of Nyange parish. The witness and others were in the bell tower and would have been able to see if such a meeting had taken place.[839] That night, the witness was in the bell tower when he heard assailants saying that the Tutsis would be killed the following day. The witness then talked to a *gendarme* who "allowed" him to leave the church at about midnight.[840]

437. The witness fled with Witness ND12. At one point, Witness ND12 decided to take another direction. The witness went alone to seek refuge at the house of the accused because he had heard that the *bourgmestre* had assisted Tutsis from Kigali *secteur*. When he arrived, Ndahimana asked him about the prevailing situation at Nyange church because he had not gone there. Ndahimana told the witness that he had asked for assistance from the *préfet*. Subsequently, he gave the witness food

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[832] T. 19 January 2011 pp. 6-8.
[833] T. 19 January 2011 p. 7.
[834] T. 19 January 2011 p. 8.
[835] Defence Exhibit 85; T. 18 January 2011 p. 30.
[836] T. 18 January 2011 p. 31.
[837] T. 18 January 2011 pp. 34-35, 51-52.
[838] T. 18 January 2011 pp. 35, 40.
[839] T. 18 January 2011 p. 35.
[840] T. 18 January 2011 pp. 35-36, 66.

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and provided a policeman named Munyantarama, who was guarding his house, to escort the witness across the river so that he could continue to Gitarama *préfecture*.[841]

5.2.25 Defence Witness ND7

438. Witness ND7, a Tutsi farmer, lived in Kivumu *commune* in April 1994. She first saw Ndahimana when he campaigned in 1993, and later saw him around the *commune*.[842]

439. The witness sought refuge at Nyange parish on 10 April 1994.[843] On 15 April 1994, a large attack took place beginning at approximately 9 a.m. The attackers assaulted the refugees who tried to defend themselves by throwing stones at the attackers. In the afternoon, many refugees died when the assailants threw grenades at them. The refugees retreated back into Nyange church, and those who were unable to enter were attacked by Hutus outside the church building.[844] The witness was wounded with a machete. She and others refugees then went to hide in a room in Nyange presbytery.[845]

440. Immediately after she and other refugees entered the room between 3 and 4 p.m., *gendarmes* locked the room so that the attackers could not get at the refugees.[846] From that room the witness could see other rooms in Nyange presbytery, and from the window she could see Nyange church and the bell tower.[847] When the witness entered the room she could see the leaders of the attack outside, who were Kayishema, Witness CDL and Ndungutse. She added that "these are the persons who had the bulldozers come and bury the bodies of persons who had been killed." The victims were buried in a place called Rubagano.[848] Among "the authorities" who came to the church that day she also recognized a number of *conseillers* including Jean Rwajekare, and the *conseiller* of Sanza, Sindabyemera. She reported seeing Father Seromba there as well. She did not know Kanyarukiga.[849] She did not see Ndahimana during the attack but saw him between 8 and 9 p.m. in the courtyard of the presbytery.[850]

5.3 Deliberations

5.3.1 Credibility of the Witnesses

5.3.1.1 *Prosecution Witness CBT*

441. Prosecution Witness CBT participated in the attack on Nyange church on 15 April 1994, but testified that he did not participate in the attack the next day.[851] He pled guilty to having participated in the genocide before a *Gacaca* court and was released in 2003 after spending eight years in prison.[852] He is an accomplice witness; however, it does not fall from his testimony that he

[841] T. 18 January 2011 pp. 37-38, 40, 50, 54-55.
[842] T. 24 January 2011 p. 1; Defence Exhibit 93.
[843] T. 24 January 2011 p. 3.
[844] T. 24 January 2011 pp. 8, 35-36.
[845] T. 24 January 2011 pp. 9-11, 35 (The witness identified the location of the room in a picture shown to her); Defence Exhibit 94.
[846] T. 24 January 2011 pp. 14-15, 35, 38.
[847] T. 24 January 2011 pp. 9-11, 15, 37; T. 24 January 2011 pp. 15, 37.
[848] T. 24 January 2011 pp. 14-15, 38.
[849] T. 24 January 2011 p. 38.
[850] T. 24 January 2011 p. 8.
[851] T. 7 September 2010 p. 53; T. 8 September 2010 pp. 4, 5.
[852] T. 7 September 2010 p. 56.

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might have any particular motive to charge the accused. The Majority notes he is the only witness who mentioned the presence of all communal authorities at the church on 15 April 1994; nonetheless, this point does not necessarily render his testimony unreliable.[853]

442. The witness gave several previous statements to ICTR investigators and also testified in the *Seromba* case.[854] Witness CBT discussed the 15 April 1994 killings at Nyange parish in his August 2000 statement. The Majority notes that he did not mention Ndahimana's presence at the parish on 15 April 1994, although he did name a number of other persons present at the time.[855] The Majority also notes that in his October 2001 statement, the witness did not mention Ndahimana's presence at the parish on 15 April 1994, although it appears that Gaspard Kanyarukiga was the focus of this second statement.[856]

443. The witness acknowledged that he did not mention Ndahimana's involvement in either statement, but claimed that he had done so in a guilty plea to the Rwandan authorities dated 18 January 2001.[857] The Majority observes that in this statement the witness said that Ndahimana was among those who used "arrows and guns."[858] Despite the fact that the witness referred to the 18 January 2001 statement as a guilty plea, the Majority notes that he did not confess any of his own actions; rather, he reported to the Kibuye Prosecutor the involvement of more than 15 persons from Kivumu *commune*, most of them holding position of authority. The Majority notes that this statement should be viewed with caution, as the witness was still detained in 2001 and might have had an interest in involving the pre-1994 authorities.

444. The Majority is also troubled by the witness' acknowledgement that he was not sure he would be able to recognise Ndahimana in court due to poor eyesight and the passage of time.[859] While the witness was not asked whether or how he knew the accused in 1994, his evidence suggests that he did in fact know that Ndahimana was the *bourgmestre* of the Kivumu *commune*.[860]

445. The witness' failure to mention Ndahimana's presence at Nyange parish on 15 April 1994 in his first two statements, and his failure to identify Ndahimana in court, does not necessarily render his sworn testimony in these proceedings unreliable; nevertheless, the Majority may rely on his evidence only when corroborated.

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[853] T. 7 September 2010 pp. 40-41, 43 ("For example, there was the inspector of the judicial police. Kayishema, assistant *bourgmestre*. Anastas, then another one called Penda, the Cantonal court presiding judge. Habiyambere, and then there was Mbakilirehe. *Bourgmestre* Grégoire Ndahimana, there was also Mr. Leonard Nibarere, there was Adrien Niyitegeka, who was communal policeman. There was a policeman whose nickname was Gichade *(phonetic)*; there was Mr. Appolinaire Rangira, who was also a communal officer; there was also communal counsellors or *conseillers* and other officers of the *commune*. For example, Nyiramukira who was the communal veterinary officer. There were several officials there.").

[854] Defence Exhibit 9; Defence Exhibit 10; Defence Exhibit 11; Defence Exhibit 12.

[855] T. 7 September 2010 pp. 61, 66; T.8 September 2010 p. 3; Defence Exhibit 9 (The witness detailed the 15 April 1994 killings but did not refer to the accused. However, he mentioned the accused in the following context: "The same day I was at the church, I noticed that Ndungutse was armed with a gun, which according to his militiamen had been issued to him by the *bourgmestre*. The following day, the *bourgmestre* had retrieved the weapon but Ndungutse had used it in the night to fire shots in the air.").

[856] Defence Exhibit 10.

[857] T. 8 September 2010 p. 5. *See also*, Prosecution Exhibit 3.

[858] Prosecution Exhibit 3.

[859] T. 7 September 2010 p. 52.

[860] T. 7 September 2010 p. 52 (The witness knew that Ndahimana was *bourgmestre* for about six months and he came from Rufungo).

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5.3.1.2 *Prosecution Witness CDK*

446. The Majority recalls that Witness CDK participated in the attack on Nyange church on 15 April 1994. The witness pled guilty, was sentenced to 25 years, and remained in prison at the time of his testimony. He is therefore an accomplice.[861]

447. In his 2 October 1994 statement to Rwandan authorities, Witness CDK denied having participated in the killing of a child. However, in a later statement and guilty plea to the Rwandan authorities dated 26 October 1994 and 3 August 2000 respectively, he confessed to having killed this child and named several co-perpetrators in that killing. The Majority notes that the witness made no other reference to the killings at Nyange parish in any of these three declarations.[862] In a fourth statement dated 18 August 2000 the witness denied having participated in any other crime.[863]

448. In his initial statement to ICTR investigators on 11 October 2001, the Witness acknowledged having been at Nyange parish on 15 April 1994. Although the statement appeared to focus primarily on Kanyarukiga, the witness indicated that Kanyarukiga, Ndungutse and Kayishema were the "three main people in charge of what was going on that day." The witness also noted Father Seromba's presence, but did not mention Ndahimana.[864]

449. In his 24 January 2002 statement to the Kivumu Truth Commission, the witness also did not mention Ndahimana's presence. The witness explained the omission by stating that he was specifically asked to discuss the role of Kanyarukiga.[865] Moreover, the witness claimed that a certain Nzabageraeza told him that he was only to discuss those names provided to him and that he was therefore "prohibited" from mentioning Ndahimana, or else he would have been put in prison.[866] The Majority considers these explanations to be unpersuasive.

450. The witness first mentioned Ndahimana's presence at Nyange parish on 15 April 1994 in his 29 January 2003 statement to ICTR investigators. Here, the witness specified that he was adding information to his 2001 statement and provided more detail. The Majority observes that while the witness gave several previous statements, he only charged Ndahimana after he was indicted before this Tribunal. In addition, the witness' prior statements to the Rwandan authorities show that he tried to minimise his own responsibility in the genocide. This as such does not render his sworn testimony unreliable. However, coupled with the fact that he was still detained at the time of his testimony, it is possible that he had a motive to charge the accused in order to share or shift the blame. His approach could also be motivated by real or perceived gains in terms of conditions of incarcerations. In sum, the Majority may rely on his evidence where it is corroborated.

5.3.1.3 *Prosecution Witness CDL*

451. Witness CDL was arrested and convicted on two occasions for crimes connected with the 1994 genocide. The Majority is unable to determine the precise time of his first arrest and conviction. He was arrested a second time whilst completing the community service part of a 20 year sentence and again convicted of crimes committed during the 1994 genocide. He was serving a

[861] T. 8 November 2010 pp. 39-40 (ICS).
[862] Defence Exhibit 57; Defence Exhibit 58; Defence Exhibit 59.
[863] Defence Exhibit 60.
[864] Defence Exhibit 54.
[865] Defence Exhibit 56; T. 8 November 2010 pp. 57-58.
[866] T. 8 November 2010 pp. 58-61 (ICS).

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life sentence for these crimes at the time of his testimony.[867] According to the witness, the findings at his second trial were based on false testimony. The witness claims that he was falsely charged with distributing weapons used during the attack on Nyange church, and organising and chairing meetings during which the attacks were planned.[868]

452. The Majority notes that in a letter written by the witness to the Kibuye Prosecutor in 1999, he said that he was not on good terms with Ndahimana.[869] At trial, he confirmed this statement but clarified that his differences with Ndahimana were ideological and not personal.[870]

453. Despite these issues, the Majority notes that the witness' evidence was consistent and detailed. Nevertheless, Witness CDL is an accomplice witness, and the Majority bears in mind that he may have invented or exaggerated Ndahimana's role in the attacks in order to minimise his own responsibility. For example, in a statement provided to ICTR investigators in 2001, he claimed: "I did not take any active part in the killings…I was only an observer."[871] In 2002, he only admitted to requesting machinery for the burial of corpses, adding that "during the killings...I only tried to reprimand the people who attempted to inflict injury on the innocent victims and loot them of their property."[872] Although the witness is not on trial, a number of witnesses in this case have testified that he was among the principal attackers at Nyange parish. For example, Witness CBK testified that Witness CDL took part in a meeting at the priests' quarters on the morning of 15 April 1994, and Witnesses CNJ, CBT, ND12 and ND7 all noted that he was among the leaders of the attack that took place on 15 April 1994. In addition, Witness ND9, a *Gacaca* judge, testified that Witnesses CDL was accused of being one of Ndahimana's co-perpetrators in the *Gacaca* proceedings against Ndahimana that were held in Rwanda.[873] Given these concerns with regards to the witness' credibility and reliability, the Majority may only rely on this witness' testimony as to the events of 15 April 1994 where it is corroborated.

5.3.1.4 *Prosecution Witness CNJ*

454. Witness CNJ participated in the 15 April 1994 attack on Nyange church. He spent eight years in prison and was released in 2008. He is therefore an accomplice witness, and the Majority bears this in mind while assessing his credibility and reliability.[874] The Majority notes that the witness was detained at the time he gave previous statements to ICTR investigators, as well as when he testified in this case. Therefore, the Majority will consider his evidence with caution, even though the witness asserted that he was under no pressure to implicate authorities and that he did not receive a reduced sentence in return for testifying before this Tribunal.[875]

455. In a guilty plea dated 21 August 2000, the witness did not specifically mention Ndahimana.[876] In a subsequent, undated statement updating a 1998 confession, he also failed to

[867] T. 12 November 2010 pp. 33-34 (ICS).
[868] T. 12 November 2010 pp. 33-34 (ICS).
[869] Specifically, he wrote: "…let me inform you that I was not on good terms with *Bourgmestre* Grégoire Ndahimana since both of us had applied for that same post. Members of the MDR secretariat in Kivumu refused to support my application because I espoused an ideology different from that of the Power wing. Moreover, I could not support the activities of the MRND which had denied me a good position."
[870] T. 18 November 2010 pp. 24-25 (ICS).
[871] Defence Exhibit 74.
[872] Defence Exhibit 78.
[873] T. 26 January p. 16 (ICS).
[874] T. 4 November 2010 p. 64 (ICS).
[875] T. 5 November 2010 pp. 41-42.
[876] Defence Exhibit 44.

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mention Ndahimana.[877] When asked to explain these omissions, the witness said, "I failed to mention the names of all the persons who were involved in the Nyange massacres because I did not want to be cited as a witness[.]"[878] The Majority finds this response unconvincing as the witness implicated other people, such as Seromba and Kayiranga, and subsequently appeared as a witness in the *Seromba* trial. In addition, while the Majority acknowledges that it may not have been possible for the witness to mention the "names of all the persons who were involved," the witness should have, at minimum, mentioned the names of persons to whom he subsequently attributed a key role in the massacre, such as Ndahimana.

456. The witness first mentioned Ndahimana in his statement to the Rwandan authorities in November 2001, indicating that he saw Ndahimana and others speaking with Seromba. Here, the witness provided a significantly more detailed list of the persons who went to speak to Seromba. He also referred to having seen these individuals on "Friday" which the Majority concludes was 15 April 1994.[879]

457. The Majority notes that in this statement, in which the witness said Ndahimana and others were present when the decision to demolish the church was taken, the witness added "The people I have mentioned above did not play any major role, but the population took their presence as a sign of moral support (moral reinforcement)."[880] When questioned about this discrepancy between this statement and his testimony, the witness explained that at the time he wrote this statement he had been promised money by Father Seromba's brother;[881] however, when he learned that he would not receive this money unless he testified in Seromba's defence, the witness wrote a second statement contradicting his November 2001 statement.[882] The witness' explanation of this issue was unclear, but ultimately, the fact that the witness admitted his willingness to provide erroneous information for money requires his testimony to be viewed with caution.

458. The Majority acknowledges other discrepancies between Witness CNJ's testimony and his prior statements. At trial, the witness estimated that he arrived at the Statue of the Virgin Mary between 11 a.m. and 1 p.m. on 15 April 1994.[883] However, in a prior statement he said that he arrived at approximately 2:30 p.m. While it is possible that this discrepancy could be explained by the passage of time, the Majority is troubled by the witness' caution: "Do not consider that date or that hour, that time, as a real time when we arrived at the church. I'm telling you that I did not want to provide additional and correct information, so as not to be called to testify in the trials of the priests. Actually I simply wanted to avoid that trial."[884] The reason why the witness provided false information is doubtful. Taking these various considerations together, the Majority may only rely on this witness' evidence where corroborated.

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[877] Defence Exhibit 50; T. 5 November 2010 pp. 2, 4-5 (ICS).
[878] T. 5 November 2010 p. 6 (ICS). *See also*, T. 5 November 2011 p. 5 ("...you admit that this document does not speak the whole truth. Is that what you are saying? A.: I agree with you. And I give you the reasons for that.").
[879] Defence Exhibit 46.
[880] Defence Exhibit 46; T. 5 November 2011 pp. 12-14 (ICS).
[881] T. 5 November 2010 pp. 20-22 (ICS), 47.
[882] T. 5 November 2010 pp. 53-54 ("That amount of money was not given to me, but a promise was made to hand me this money when I wrote the letter which was the cause of contention for a long time. And after having written that letter, and I demanded the promised sum of money, I was told that the sum of money was going to be given to me after I would have testified in Seromba's Defence. And that was when I decided to write another letter contradicting the previous letter. In other words...I never received that amount of money.").
[883] T. 4 November 2010 p. 52.
[884] T. 5 November 2010 p. 32.

5.3.1.5 *Prosecution Witness CBR*

459. Witness CBR participated in the 15 April 1994 attack on Nyange church. He was arrested in July 1994 and charged with participating in the genocide.[885] He confessed and was sentenced to 20 years in prison.[886] He testified that the Kibuye Prosecutor's office asked him to testify at this Tribunal and introduced him to ICTR investigators.[887] Given these elements, the Majority views his testimony with particular caution.

460. The witness played an important role in the killings, admitting to having participated in numerous attacks on Nyange church between 13 and 16 April 1994. When asked why he failed to disclose the names of two persons he had killed in his guilty plea, he explained: "When I was questioned on the murder of those two victims, I thought there would be no witnesses to testify against me. So before the investigators, I did not confess to the crimes."[888]

461. The Majority also observes that Defence Witnesses ND24, ND34 and ND22 all claimed that while in prison, Witness CBR exerted pressure on other detainees to implicate authorities, including Ndahimana, in their confessions.[889] The Majority found these witnesses credible with respect to their evidence regarding Witness CBR. While the Majority is deeply troubled by these allegations against Witness CBR, it acknowledges that he was not asked about these claims during his testimony, and therefore did not have an opportunity to address them. Considering these facts together, the Majority views his testimony with particular caution, and may only rely on his testimony where well corroborated.

5.3.1.6 *Prosecution Witness CBK*

462. The Majority notes that Witness CBK was 14 years old in April 1994. The age of the witness at the time of the events requires that his testimony be viewed with some caution.[890] Despite his young age, the Majority notes that the witness' evidence was consistent and detailed.

463. However, in his statement dated 15 August 2000, Witness CBK referred to Ndahimana as having been present at only one meeting, at Nyange presbytery at nightfall, on 15 April 1994.[891] The witness did not mention Ndahimana in his statement dated 26 April 2001, but the Majority notes that this statement concentrated on Gaspard Kanyarukiga. In his 2002 statement, the witness identified Ndahimana as having been one of the local leaders present on 15 April 1994 at a 9 a.m. meeting at the presbytery. In that statement, he also said that Ndahimana spoke to the *Interahamwe* prior to the start of the attacks and returned for a second meeting the same evening.[892]

464. In the *Seromba* case, the witness referred to "the *bourgmestre*" as among those who tried to burn down Nyange church.[893] This is inconsistent with the witness' testimony in the instant case in

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[885] T. 1 November 2010 pp. 6, 9, 27 (Acknowledged that in May 2010, he was arrested again and placed in custody).
[886] T. 2 November 2010 pp. 33-35. *See also*, Witness ND9: T. 26 January 2011 p. 16 (ICS) (Testified that Prosecution Witness CBR was accused of being one of Ndahimana's co-perpetrators by a *Gacaca* court).
[887] T. 2 November 2010 p. 54.
[888] T. 2 November 2010 p. 35.
[889] Witness ND24: T. 21 February 2011 p. 32; Witness ND22: T. 20 April 2011 pp. 16, 29; Witness ND34: T. 17 February 2011 pp. 66-68, T. 18 February 2011 pp. 8-9.
[890] The young age of the witness at the time of the events requires that his testimony be viewed with some caution. *See, i.e.*, *Simba* (TC) Judgement, para. 78.
[891] Defence Exhibit 40.
[892] Defence Exhibit 42, p. 7.
[893] Defence Exhibit 41.

which he testified that he did not see the accused during the attack. Due to the inconsistency of his prior statement, the Majority will consider the witness' testimony that he saw Ndahimana at a meeting at Nyange presbytery early in the morning of 15 April 1994 only where corroborated.

5.3.1.7 *Prosecution Witness CBY*

465. Witness CBY was convicted by a first instance *Gacaca* court in 2007 for having participated in the killings at Nyange church but was acquitted on appeal.[894] Thus, this witness is not considered an accomplice witness. The Majority notes that the witness was in a good position to observe what took place at Nyange parish in April 1994.[895]

466. The Majority notes a number of discrepancies between the dates of events provided by the witness at trial and those given in his statements dated 2 February 1996 and 4 October 2000.[896] In his 2000 statement, the witness said that certain events took place on 13 April 1994, while at trial he testified that these same events took place on 15 April 1994. When questioned as to these discrepancies, the witness explained that the investigators taking his statement in 2000 were principally interested in the events that took place and did not focus on the dates.[897] The witness added that he rectified the errors during his testimony in the *Kanyarukiga* trial;[898] a point which the Majority concludes is true. However, the Majority recalls that in 1996, two years after the events, the witness stated that "the main attack began on the 14th. I remember of that date because the church was destroyed on the 15th."[899] The Majority takes note of these contradictions.

467. Of greater concern to the Majority are the discrepancies between the evidence given by the witness at trial and his prior statements with respect to the dates on which he saw Ndahimana at Nyange parish. At trial, the witness testified that he saw Ndahimana at the parish on 8, 9, 11, 12, 13, 14, 15 and 16 April 1994.[900] However, in his 1996 statement, the witness indicated that he only saw Ndahimana a "few days before the destruction of the church. That must have been between the 12th and the 13th."[901] In his 2000 statement, the witness indicated that he saw Ndahimana only on 8, 11 and 12 April 1994.[902] He explained these discrepancies by stating that when providing that statement, he only answered the questions that were put to him.[903]

468. The Majority finds the contradictions between his testimony and his prior statements to be troubling and may only rely on the witness' account in relation to the events that took place on 15 April 1994 when corroborated. It will not rely on his evidence with respect to Ndahimana's presence at Nyange parish on 15 April 1994.

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[894] T. 9 November 2010 pp. 56-57.
[895] Prosecution Exhibit 43.
[896] Defence Exhibit 67; Defence Exhibit 66.
[897] T. 9 November 2010 pp. 58-59; T. 10 November 2010 p. 21 (ICS).
[898] T. 9 November 2010 p. 58 ("The events are correct and accurate. But some events are fixed on the 13th of April, while they, in fact, took place on the 15th."); Defence Exhibit 68; Defence Exhibit 69.
[899] Defence Exhibit 67.
[900] T. 9 November 2010 pp. 46, 49, 51 (ICS).
[901] Defence Exhibit 67; T. 10 November 2010 pp. 7-8, 34 (ICS)
[902] Defence Exhibit 66.
[903] T. 10 November 2010 p. 34 (ICS).

5.3.1.8 *Prosecution Witness CDJ*

469. Witness CDJ was charged with participating in the 1994 genocide and acquitted by a *Gacaca* court in 2007.[904] Thus, he is not an accomplice witness.

470. The witness' testimony was consistent and unshaken on cross-examination. The Majority observes that while the witness' testimony is vague regarding some aspects of the events, most notably the dates, it was the witness's habit to be present at Nyange church by 7 p.m. each evening. The Majority, therefore, accepts that the witness was there by that hour the evening of 15 April 1994.[905]

5.3.1.9 *Prosecution Witness YAU*

471. The Majority notes that although Witness YAU was unable to recall the specific dates of the events she described,[906] the Majority is able to infer from the events she described and the testimony of other witnesses in this case that she arrived at the parish on 13 April 1994 and fled during the evening of 15 April 1994.

472. The Majority observes that during her testimony in the *Seromba* trial, the witness mentioned the presence of Ndahimana at Nyange parish on 15 April 1994, although she was not specifically asked about him.[907] However, the witness did not mention the presence of Ndahimana in her 25 October 2000 statement. Although this statement primarily concentrated on the activities of Father Seromba, the witness did mention a number of other individuals as being present. In addition, the witness related the meeting that took place before the killings and the subsequent attack. She also specifically stated "The only official I recognised at the Nyange church was *conseiller* Vianney."[908]

473. The Majority also notes that, in her prior statement, the witness said several times that she was hiding in the basement of Nyange presbytery and that she "heard" Father Seromba. She did not see events as they unfolded.[909] This contradicts the witness' testimony in this case that she fled to the first floor of the presbytery where she saw the events she described.[910] In any event, the Majority is not satisfied that the witness could actually see all the events she described as having taken place on 15 April 1994. Thus, the Majority may only rely on this witness' testimony on the events of that day where it is corroborated.

5.3.1.10 *Prosecution Witness CBS*

474. The Majority recalls that many of the witness' family members were killed at Nyange church, and therefore his memory may have been impacted by the chaotic and traumatic nature of the events.[911]

475. The witness provided several prior statements to ICTR investigators and testified in the *Kanyarukiga* trial.[912] The Majority finds that the witness was evasive in his answers to questions

[904] T. 11 November 2010 p. 31.
[905] Defence Exhibit 71; T. 11 November 2010 p. 24.
[906] T. 15 September 2010 p. 64; Defence Exhibit 30; Defence Exhibit 31, p.11.
[907] Defence Exhibit 31, pp. 14, 17 (The witness also referred to the presence of Ndahimana at Nyange parish on 13 or 14 April 1994 although she was not specifically asked about him).
[908] Defence Exhibit 30.
[909] Defence Exhibit 30.
[910] T. 15 September 2010 p. 49 ("...and I was an eyewitness of all that happened.").
[911] T. 6 September 2009 pp. 29-30

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put to him regarding his prior statements,[913] and that this had a negative impact on the Majority's assessment of his demeanour at trial.[914] In his 15 November 1995 statement, the witness indicated that he did not see IPJ Kayishema, the *bourgmestre* or others leading and/or giving orders to the population during the war.[915] Further, while the witness provided information about Ndahimana's role in a meeting held on 11 April 1994, he did not mention Ndahimana when asked to name the killers at Nyange parish.[916] In his 2 February 1996 statement, which was given "in addition" to the one dated November 1995, the witness corrected only a small number of details.[917] In this statement, he specifically stated that he had "not seen the *bourgmestre* [Ndahimana] on the day of the attack [15 April 1994]." According to the witness, his earlier statement was not recorded properly.[918] The Majority finds that these omissions raise concerns.

476. The Majority further notes that the witness' testimony was not clear regarding Ndahimana's presence during the attack following the meetings. He made reference to the fact that the authorities present did not intervene,[919] but he never mentioned Ndahimana's role in the attack, where he was, or how long he stayed. Nevertheless, on cross-examination he claimed that Ndahimana was present during the attack.[920] Given the concerns expressed above, the Majority will consider Witness CBS's evidence credible, where corroborated, with respect to the meeting prior to the 15 April 1994 attack, but will not rely on his evidence alleging that Ndahimana was present during the attack.

5.3.1.11 *Prosecution Witness CBI*

477. The Defence pointed to discrepancies in the witness' prior statements regarding the date on which he arrived at Nyange parish and the dates of subsequent events.[921] However, the witness maintained his testimony in court that he arrived on 12 April 1994 and that the attack took place on 15 April 1994.[922] In addition, despite some discrepancies, the witness mentioned Ndahimana's presence during the attack in his statements dated August 2000 and April 2001.[923]

478. However, the Majority recalls its previous observation in relation to this witness' credibility (Chapter III, Section 4.3.1.3).

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[912] Defence Exhibit 3; Defence Exhibit 4; Defence Exhibit 2; Defence Exhibit 5; Defence Exhibit 6; Defence Exhibit 7; Defence Exhibit 8. The Majority has also considered the fact that Witness CBS's statement to ICTR investigators of February 1996 was recorded in the Kivumu tribunal and that his statement of March 2003 was recorded at the residence of the assistant *bourgmestre*. The Majority has also considered that the witness was distantly related to the *bourgmestre* at the time and held an administrative position in the *commune* at least from 1995 to 2003. This point does not necessarily render his sworn testimony in this proceeding unreliable. *See* Chapter III, Section 4.3.1.1.

[913] *See e.g.*, T. 6 September 2010 pp. 34-37 (The witness tried to avoid answering the questions put to him by alleging that the statement was recorded a long time ago, that he is not the one who wrote it down, that the statement was not properly recorded and that it was only read back to him); T. 7 September 2010 pp. 6-7 ("I can see that there is a signature on this document which is similar to mine, but it's far-off similarity. I would say it is someone else who signed this document and not myself."); Defence Closing Brief, paras. 75-78.

[914] *Nahimana, et al.* (AC) Judgement, para. 194; *Bikindi* (TC) Judgement, para. 31.

[915] Defence Exhibit 3; T. 6 September 2010 pp. 38-41.

[916] T. 6 September 2010 pp. 43-45.

[917] Defence Exhibit 4; T. 6 September 2010 pp. 50-51 (The witness corrected his date of birth and confirmed that his father was killed on Monday, 11 April 1994 and that he stayed at Nyange church from Tuesday to Friday, 15 April 1994).

[918] T. 6 September 2010 pp. 46-50.

[919] T. 6 September 2010 pp. 24-25.

[920] T. 6 September 2010 pp. 46-52.

[921] T. 14 September 2010 pp. 44-52, 56-57; T. 15 September 2010 pp. 9-13.

[922] T. 14 September 2010 pp. 46-50.

[923] Defence Exhibit 25; Defence Exhibit 26.

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479. Ultimately, the witness' testimony in relation to Ndahimana's involvement on 15 April 1994 is very succinct. The witness did not report that Ndahimana attended any meeting prior to the attack. He referred to the accused's presence during the attack but did not report anything else in relation to Ndahimana's presence at Nyange parish. Finally, he explained that he did not see Ndahimana himself but he saw the red Hilux leaving and was told that the accused travelled in the area to incite the population to go to the parish.[924] This allegation is contradicted by other Prosecution witnesses, who reported that the accused left to go to a funeral at Rufungo.[925] The Majority also recalls it found Defence Witness Charles Ruvurajabo to be credible, and therefore doubts that the red vehicle of the *commune* was still functioning on 15 April 1994.[926] Consequently, the Majority may only rely on this witness' testimony if corroborated.

5.3.1.12 *Prosecution Witness CBN*

480. In his 15 November 1995 statement, the witness provided only a superficial account of the events that took place at Nyange parish between 12 and 15 April 1994. In that statement, he said that he saw Seromba having a meeting with the *bourgmestre* at the presbytery "on the last day of the attacks."[927] As the witness fled the parish on 15 April 1994, the Majority assumes that when the witness spoke of the "last day of the attacks," he was referring to the attack of 15 April 1994. However, reference to this meeting did not appear in the witness' testimony in court. In fact, the witness' testimony did not report anything related to the accused's presence or actions on 15 April 1994. The Majority concludes that the witness did not see the accused on 15 April 1994, but may rely on his testimony for the purpose of corroborating other evidence in relation to the events of 15 April 1994.

5.3.1.13 *Defence Witness Thérese Mukabideri*

481. The Majority observes that the witness denied ever using a false identity.[928] However, the Prosecution showed that she travelled on a false passport when she went to Belgium to seek asylum.[929] The witness explained that she had forgotten about this incident,[930] and also conceded that her asylum application contained incorrect information about her employment history.[931] The Majority finds that this, as such, does not affect the reliability of the witness' testimony.

482. The Majority further observes that the witness and her family were close friends of the accused and that the witness had known him for close to 25 years when she testified in the present case.[932] Moreover, the witness was grateful to Ndahimana for his assistance in allowing her to phone her husband one last time before he was killed.[933] The Majority further takes into consideration that when asked about the nature of her friendship with Defence Witness Beatrice Mukankusi, the witness stated that the two women were not close friends although she admitted that their families were friends and that they occasionally saw each other because they both now reside

[924] T. 14 September 2010 pp. 35-39; T. 15 September 2010 p. 38.
[925] *See e.g.*, Witness CBT: T. 7 September 2010 p. 53; Witness CNJ: T. 4 November 2010 p. 54; Witness CBR: T. 1 November 2010 p. 23, T. 2 November 2010 p. 23.
[926] *See* Chapter III, Section 5.3.1.26.
[927] Defence Exhibit 16A.
[928] T. 8 February 2011 p. 3.
[929] T. 8 February 2011 p. 7.
[930] T. 8 February 2011 p. 7.
[931] T. 8 February 2011 p. 8.
[932] T. 8 February 2011 pp. 15, 18-19.
[933] T. 8 February 2011 pp. 15-16.

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in Belgium. The witness also said that she and Mukankusi travelled on the same plane to Arusha and were lodged in the same hotel in Arusha while waiting to testify.[934]

483. Beatrice Mukankusi described her relationship with Mukabideri as a close one. She said that they were family friends, and that they would often meet to discuss the events that took place in Kivumu *commune* in a general way. However, she added that although the two women had travelled to Arusha together they had not talked about their anticipated testimonies.[935] While the Majority finds similarities between the testimonies of the two witnesses, it acknowledges that this in and of itself is not determinative evidence that the witnesses colluded. In conclusion, the Majority finds Witness Mukabideri to have been credible and reliable.

5.3.1.14 *Defence Witness Beatrice Mukankusi*

484. During her testimony in the *Seromba* case, Witness Mukankusi testified that Ndahimana, Fulgence Kayishema and Ndungutse were at the church on 14, 15 or 16 April 1994, but that she did not see them. The witness admitted that she provided this answer, but added that she only responded to the questions put to her.[936] The Majority finds the witness' explanation troubling but notes that in any event Mukankusi's evidence in *Seromba* was based on hearsay. In sum, the Majority considers her testimony with caution.

5.3.1.15 *Defence Witness Léonille Murekeyisoni*

485. The witness' testimony was relatively short and she was not asked to provide a great deal of detail about the events of 15 April 1994 or the general situation in Kivumu *commune* at the time. The Majority has identified no particular discrepancies in her testimony; it only notes that her husband and Ndahimana were friends, which must be considered in evaluating her testimony.[937]

5.3.1.16 *Defence Witness Anicet Tumusenge*

486. The witness testified that he did not know Ndahimana prior to the funeral they both attended on 15 April 1994.[938] The witness' testimony was consistent and unshaken on cross-examination; however, he expressed uncertainty about dates and the timing of events. Initially, he said that he arrived at the funeral "in the morning," but later he said he left the funeral around 1 p.m. after being there for an hour. It follows from the latter statement that he arrived at the funeral around noon. Further, although the witness says he returned to the funeral at 6 p.m., it is not clear to the Majority that his travels that afternoon required 5 hours. Thus, it remains possible that he could have returned earlier.

487. The Majority notes that the witness denied that he was ever arrested or that he ever used a false identity.[939] However, it emerged that the witness had travelled to Belgium using a false passport,[940] and that he was arrested and detained for three weeks in Gitarama in December 1994 and was arrested in Kenya in December 1998.[941] The witness explained that he did not consider the

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[934] T. 8 February 2011 pp. 18, 23.
[935] T. 7 February 2011 pp. 42-43.
[936] T. 7 February 2011 pp. 50-53; Prosecution Exhibit 57.
[937] T. 10 February 2011 pp. 5-6.
[938] T. 12 May 2011 pp. 5-6.
[939] T. 12 May 2011 p. 18.
[940] T. 12 May 2011 p. 20.
[941] T. 12 May 2011 pp. 23-24.

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incident in Kenya to be an arrest as he had paid money and was released prior to trial.[942] The Majority considers that this point does not necessarily render his recollection of the facts that occurred on 15 April 1994 unreliable.

488. The Majority also notes that, in June 1994, the witness began to fear for the safety of his family and turned to Ndahimana for assistance, which Ndahimana provided, although the details of this assistance are unclear.[943] This raises a question regarding his motivation to testify; however, the Majority acknowledges it is possible that he simply sought assistance in return for providing Ndahimana with transportation on 15 April 1994.

489. Finally, the Prosecution drew to the Chamber's attention the fact that although Mukankusi said that she went to the funeral on 15 April 1994 together with her brother-in-law, Anicet Tumusenge, the latter did not mention having travelled with Mukankusi in his own testimony.[944] The Majority notes, however, that the Prosecution did not ask Tumusenge any questions about his arrival at the funeral, and therefore can make no findings on this issue.

490. In conclusion, the Majority finds that Tumusenge's evidence is generally credible. It notes however, that his evidence with respect to the purpose of Ndahimana's visit to the *préfet* is hearsay provided by the accused himself.

5.3.1.17 *Defence Witness Clément Kayishema*

491. Former *Préfet* Clément Kayishema was tried and convicted by this Tribunal for his participation in the 1994 genocide, and is currently serving a sentence of life imprisonment.[945] As a perpetrator and a former *préfet*, the Majority acknowledges that it is possible that he might have an interest in testifying that he did all he could to provide security in his own *préfecture*.

492. Witness Kayishema testified that on 15 April 1994, Ndahimana went to the *préfecture* to request reinforcements and that he was driven by an unknown person in a blue jeep with civilian licence plates.[946] This evidence corroborates Witness Tumusenge's evidence that he drove the accused to the *préfecture*. The Majority also recalls Witness Mukankusi's evidence that Tumusenge drove a blue Pajero.[947]

493. Witness Kayishema also testified in this case that two *bourgmestres* participated in the massacres. However, in the evidence he gave in his own case in September 1998, he said that he did not know any "personality of the *préfecture* of the *communes*," that participated in the Mubuga massacre. The witness claimed that the evidence reached him after the trial and denies that he changed his story to protect Ndahimana.[948] The Majority has doubts about these explanations.

494. Clément Kayishema further testified that Ndahimana came to the *préfecture* on 15 April 1994 after 2 p.m. to ask for reinforcements but that Kayishema could provide no more *gendarmes* because they had all gone to Kigali.[949] However, at Kayishema's own trial, Kayishema testified that

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[942] T. 12 May 2011 p. 24.
[943] T. 12 May 2011 p. 21.
[944] T. 7 February 2011 pp.14, 45; Prosecution Closing Brief, para. 251.
[945] *Kayishema & Ruzindana* (AC) Judgement, Disposition.
[946] T. 18 April 2011 pp. 31, 33-34, 59.
[947] T. 7 February 2011 p. 45.
[948] T. 18 April 2011 pp. 41-42; T. 19 April 2011 pp. 4-8; Prosecution Exhibit 61.
[949] T. 18 April 2011 pp. 31, 33-34, 44; T. 19 April 2011 p. 8.

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the *gendarmes* left Kibuye on the evening of 15 April 1994. In the case at bar, Kayishema maintained his version that they left in the afternoon but before Ndahimana requested assistance.[950] On re-examination, Kayishema noted that the only *gendarmes* remaining in Kibuye when Ndahimana arrived were those guarding the camp, and that these *gendarmes* were not available for requisition.[951] The Majority has serious concerns about this witness' testimony and will consider his evidence with caution.

5.3.1.18 *Defence Witness ND13*

495. The witness held an administrative position within Kibuye *préfecture* in April 1994. He had known the accused since he was a child and would see him from time to time afterwards.[952] While this in and of itself does not indicate that the witness had a motive to testify for the accused, it is the Majority's view that because of his former position, he may have had an incentive to provide testimony favourable to the accused as he did for other figures of authority in Kivumu. Indeed, the witness conceded that he had been convicted and sentenced to three months imprisonment for giving false testimony to a *Gacaca* court in a case involving another *bourgmestre* from Kibuye *préfecture*. The witness denied that he had provided false testimony.[953] Elsewhere he reported that he was told that Seromba had been wrongly convicted because he did not participate in the destruction of Nyange church.[954]

496. The Majority further observes significant discrepancies between the witness' trial testimony and his prior statements. For example, at trial, the witness insisted he was not present at a meeting with *Préfet* Clément Kayishema on 18 April 1994.[955] However, in his 19 October 1995 and 11 April 1996 statements, the witness said that he participated in a meeting with the *préfet* on 18 April 1994.[956] The witness attempted to explain the discrepancy by stating that he considered his discussion with the *préfet* to have constituted a "consultation" rather than a "meeting."[957] The Majority considers this justification unpersuasive.

497. Given these concerns, the Majority will consider his testimony with caution. It also notes that his evidence with respect to the purpose of Ndahimana's visit to the *préfet* is hearsay provided by the accused himself.

5.3.1.19 *Defence Witness ND24*

498. The witness confessed that he participated in the killings at Nyange parish and that he killed one person on 12 April 1994. He is therefore an accomplice. He was among the assailants who attacked the refugees on 14 April 1994, and threw stones at the refugees on 15 April 1994 in order to draw the refugees from Nyange church.[958] The witness was found guilty of having manned a roadblock that was erected just outside the parish on 13 April 1994.[959]

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[950] T. 19 April 2011 pp. 8-9; Prosecution Exhibit 62.
[951] T. 19 April 2011 p. 21.
[952] T. 17 January 2011 pp. 11-12 (ICS); Defence Exhibit 84.
[953] T. 18 January 2011 p. 17 (ICS).
[954] T. 17 January 2011 pp. 42-43.
[955] T. 18 January 2011 p. 5.
[956] Prosecution Exhibit 49; Prosecution Exhibit 50.
[957] T. 18 January 2011 pp. 7-9.
[958] T. 21 February 2011 pp. 3-5, 32 (The name of the person killed by the witness was Innocent Muhigirwa).
[959] T. 21 February 2011 pp. 5, 7.

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499. The Majority recalls the most relevant factor in assessing the witness' credibility is to ascertain whether the witness could gain any benefit or advantage from his testimony before the Tribunal. Here, the Majority notes that Witness ND24 was a free man at the time of his testimony, that he did not deny his participation in the killings and that distancing himself from the accused would have no consequences, positive or negative, regarding the witness' own responsibility. Therefore, the Majority does not believe that his testimony for the Defence displays any motives or incentives from the witness.

500. The Majority notes that the witness acknowledged that he was not always at the roadblock, but declared that the accused could not have passed through the roadblock between 14 and 16 April 1994 without the witness knowing about it.[960] Given the number of persons who would have travelled through the roadblock on 15 April 1994, and the chaotic nature of the events at Nyange parish that day, the Majority cannot credit the witness' claim that he would have known if the accused had passed through the roadblock in his absence. Notably, the witness failed to mention that the accused passed through the roadblock early in the morning on 15 April 1994, despite Defence evidence showing that the accused went to Rufungo early that morning for the funeral.

5.3.1.20 *Defence Witness ND34*

501. Witness ND34 participated in the genocide but his crimes do not seem to be related to the killings at Nyange parish.[961] The Majority finds the witness' evidence to be of limited probative value with respect to the events of 15 April 1994 as the witness did not arrive at the church until approximately 5 p.m.[962] It also found credible Witness ND34's testimony that while he and Witness CBR were in detention, the latter exerted pressure on detainees to provide false evidence against Ndahimana.[963]

5.3.1.21 *Defence Witness ND22*

502. Witness ND22 participated in the attacks against the Tutsi refugees at Nyange church on 15 April 1994 and is therefore an accomplice witness.[964] He was a free man at the time of his testimony and the Majority has no particular reason to believe that he might have had a motive to testify in favour of the accused.[965]

503. The witness testified at trial that he arrived at Nyange parish to join the assailants at 7 a.m. on 15 April 1994.[966] However, in a confession provided to a *Gacaca* court, he stated that he left his home approximately noon to go to the church.[967] He posited that the woman who had recorded his statement might have made a mistake which he could not have detected because he is illiterate.[968] The Majority finds this explanation plausible.

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[960] T. 21 February 2011 pp. 27-29.
[961] T. 17 February 2011 pp. 65-66 (The witness acknowledged that his participation in the genocide was limited to killing an unknown person hiding in a banana field and looting beds, belongings and the property of a Mukamukwaya).
[962] T. 17 February 2011 p. 64.
[963] T. 20 April 2011 pp. 16, 29-30.
[964] T. 20 April 2011 pp. 6-7, 20.
[965] Defence Exhibit 125.
[966] T. 20 April 2011 p. 4.
[967] T. 20 April 2011 pp. 22-23; Prosecution Exhibit 64B.
[968] T. 20 April 2011 pp. 23-26.

504. The witness further testified in examination-in-chief that he heard Father Seromba saying that the dead bodies were to be taken away.[969] On cross-examination, he said that he never saw Seromba during the killings at Nyange church, and could not have seen him, because he did not go to Nyange presbytery. The witness clarified that he heard members of the population saying that Seromba had asked that the bodies be removed.[970] The rest of the witness' evidence was generally consistent, but the Majority bears in mind that he remained at the Statue of the Virgin Mary during the 15 April 1994 attack and may not have been in a position to see everything that took place at the presbytery that day.

505. Witness ND22 further testified that while he and Witness CBR were in detention, the latter exerted pressure on detainees to provide false evidence against Ndahimana.[971] The Prosecution pointed out that the witness did not implicate Ndahimana in his confession. The witness answered that he could not have implicated Ndahimana given that he knew nothing about Ndahimana.[972] The Majority concludes that the fact that the witness did not implicate the accused in his confession does not render his evidence about Witness CBR's coercion unreliable.

5.3.1.22 *Defence Witness ND6*

506. Although Witness ND6 participated in the killings at Nyange church, he had finished serving his sentence prior to his testimony.[973]

507. The witness asserted that no meeting was held at the CODEKOKI building before the attack began on 15 April 1994, and that the communal authorities did not participate in a meeting that day at either Nyange church or in its vicinity. The witness testified specifically that he did not see Ndahimana at Nyange parish on 15 April 1994 and that no meeting took place that day. The witness noted that if such a meeting had taken place, Ndungutse would have told the witness and his associates about it. The Majority notes that the witness did not arrive at the parish until approximately 11 a.m. on 15 April 1994, so a meeting, with or without Ndahimana, could have taken place before his arrival. In addition, given the chaos of the day, it is not clear that the witness was in a position to observe all that was taking place at the parish. Finally, while most other witnesses referred to the presence of Father Seromba at the parish on 15 April 1994, the witness did not. This supports the possibility that the witness was not in a position to observe all that took place at the parish that day.[974] Nevertheless, the Majority notes that the witness gave a detailed account of the events at the church, and considers his evidence to be generally reliable and credible in relation those events.

5.3.1.23 *Defence Witness ND12*

508. The witness asserted that "I saw a lot of things that happened at the church," and that he would have known if the *bourgmestre* had been present at Nyange parish that day. The Majority has substantial doubts about the reliability of this statement given that the witness retreated into Nyange church when the assailants began throwing grenades at the refugees, not to mention the large number of refugees inside the church, the poor visibility from within the church and the chaotic

[969] T. 20 April 2011 p. 8.
[970] T. 20 April 2011 pp. 31-32.
[971] T. 20 April 2011 pp. 16, 29-30.
[972] T. 20 April 2011 p. 30.
[973] T. 27 January 2011 p. 18.
[974] T. 27 January 2011 pp. 9-10 (The witness added that a man called Rwarakabije coming from Kibilira was also among the assailants).

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nature of the events that day.[975] Thus, while the Majority finds the witness' account of his experiences at Nyange parish on 15 April 1994 to be credible and reliable, his testimony does not assist the Majority in determining whether Ndahimana was present that day. The Majority also notes that the witness knows Witness ND13 and is grateful to him for having given him a job. The Majority notes that the two men travelled together to Arusha.[976] However, in light of each individual testimony, the Majority has no reason to suspect possible collusion between the two witnesses. The Majority also notes that Witness ND12 knows Witness ND11 and they were together at the church. The risk of collusion between those two witnesses will be addressed separately below.

5.3.1.24 *Defence Witness ND11*

509. The witness is a Tutsi survivor of the killings that took place at Nyange parish.[977] The witness explained that on 15 April 1994, he was inside Nyange church. When the attackers arrived, he went outside to throw stones at them. He later retreated back into the church. The Majority notes that the witness testified that the refugees could see what was happening outside because they went to the bell tower from which a broad view of the area was possible. However, when asked how long he stayed in the bell tower, the witness answered, "One couldn't go there and stay for a long time. You could go there for two minutes. There was a staircase leading there, and you would return immediately."[978] Given that the witness was inside the church, together with over 1,000 other refugees, the Majority is not convinced that he could have seen much of what was taking place outside the church.

510. The Majority also considers critical the witness' testimony that Ndahimana rescued him on the night of 15 April 1994,[979] noting that this gave the witness a reason to protect Ndahimana at trial.

511. The Majority also notes that Witnesses ND11 and ND12 fled from the church together on 15 April 1994.[980] Witness ND11 explained that they were neighbours during the events and that they remain neighbours today. They see each other almost every day, and during "the mourning period" discussed the events that took place in 1994. They also travelled together to Arusha, although they were not housed together.[981]

512. The Majority observes however, that while Witness ND12 stated that a bulldozer began destroying Nyange church on 15 April 1994, Witness ND11 only said that the Caterpillar remained at the church compound.[982] Further, while Witness ND12 said that the *gendarmes* fought the assailants along side the refugees on 15 April, Witness ND11 did not address the role of the *gendarmes* except to say that a *gendarme* allowed him to flee the church at midnight.[983] Despite these minor discrepancies, both testimonies are quite similar and thus the Majority is mindful of the risk of collusion between the two witnesses. In any event, both testimonies are of a little probative value.

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[975] T. 19 January 2011 pp. 11 (quoted), 16-17.
[976] T. 19 January 2011 p. 18 (ICS).
[977] Defence Exhibit 85; T. 18 January 2011 p. 30.
[978] T. 18 January 2011 pp. 52, 65 (quoted).
[979] T. 18 January 2011 pp. 37-38, 57-59.
[980] Witness ND12: T. 19 January 2011 p. 8; Witness ND11: T. 18 January 2011 pp. 37-38, 40, 50, 54-55.
[981] T. 18 January 2011 p. 56.
[982] Witness ND12: T. 19 January 2011 pp. 6-8; Witness ND11: T. 18 January 2011 pp. 35, 40.
[983] Witness ND12: T. 19 January 2011 pp. 6-8, 17; Witness ND11: T. 18 January 2011 pp. 35-36.

5.3.1.25 *Defence Witness ND7*

513. The witness was a victim of the attacks at Nyange parish on 15 April 1994. She acknowledged that there were thousands of refugees at Nyange church that day. The witness maintained that she was regularly looking out of the window of Nyange presbytery to see what was taking place outside. She also testified that had Ndahimana come to the parish that day she would have been aware of his presence because each time a prominent person arrived, the *Interahamwe* would call the person's name out loud and wave banana leaves, and she did not hear Ndahimana's name called.[984]

514. Having visited the site that was once Nyange parish, the Majority is of the view that the witness could only have seen very little of what was taking place outside Nyange presbytery that day from her position. In addition, given the number of people at the church, the fact that the witness was hiding and the traumatic nature of the events, the Majority concludes that the witness would not necessarily have seen Ndahimana had he been present. Finally, no other witnesses testified that banana leaves were waved or that the names of prominent persons were called out when they arrived at the parish.[985] Thus, while the Majority finds the witness' account of her experiences at Nyange on 15 April 1994 to be credible and reliable, her testimony does not assist the Majority in determining whether Ndahimana was present at Nyange parish that day.

5.3.1.26 *Defence Witness Charles Ruvurajabo*

515. Witness Ruvurajabo testified that the red pickup belonging to the *commune* remained at his garage from late 1993 until the witness fled in mid-April 1994, because it needed major repairs, but the *commune* had not paid the sum required to fix the vehicle.[986] The Majority finds the witness' testimony to be reliable and credible. The Majority is of the view that the witness would have had no motive to testify in favour of Ndahimana. It notes that the witness reported that he "went into hiding in early May," but that he did not know exactly when the "*Interahamwe* started looting our garage."[987] However, in response to a question asked by the Chamber the witness said, "approximately I would say that it was between a week and a week and a half after the 6th of April." Therefore, the witness would have fled around 15 or 16 April 1994.[988]

516. The Majority finds that there is very little chance that the vehicle was stolen before the attacks at Nyange parish; and there is even less chance that after being stolen it would have been fixed prior to the attacks, given that it needed major repairs. In any event, the Majority concludes that Ruvurajabo's testimony raises doubts about the Prosecution witnesses' testimonies alleging that the communal red pickup was used between 12 and 16 April 1994. In addition, the Majority recalls that the letter dated 10 April 1994, written by the Kibuye *préfet,* also mentioned that Kivumu *commune* did not have a vehicle.[989]

5.3.2 The Use of Communal Vehicles to Bring Assailants

517. Paragraph 21 of the Indictment alleges that Ndahimana made several vehicles available to his subordinates such as Kayishema and Ndungutse to transport assailants to Nyange parish. The

[984] T. 24 January 2011 pp. 35, 37.
[985] T. 24 January 2011 pp. 35, 37.
[986] T. 8 February 2011 pp. 31-35.
[987] T. 8 February 2011 p. 36.
[988] T. 10 February 2011 p. 32.
[989] *See* Defence Exhibit 1; T. 14 September 2010 pp. 54-55.

evidence shows that on 15 April 1994, the attackers arrived at the parish both on foot and aboard vehicles. The Prosecution alleges that the accused, along with members of the JCE, assisted in arranging such transportation.[990]

518. Testimonies show that various vehicles were used to transport the Hutu assailants. Witness CBK mentioned the white Stout pickup truck belonging to Witness CDZ and the Kivumu *commune* vehicle—a red Toyota Hilux that was used to bring the attackers to the church.[991] Witness CBS said that communal authorities requisitioned Witness CDZ's vehicle to transport assailants.[992]

519. Witness CNJ said that he arrived at the church aboard a lorry which belonged to the Astaldi Company but was, at that time, being used by the communal office to transport assailants.[993] This testimony is corroborated by Witness CBR, who testified that he and other assailants boarded trucks belonging to the Astaldi Company, which brought them to Nyange parish. The witness believed that the transportation had been arranged by the local authorities.[994] Witness YAU is the only witness who said that Father Kanyiranga arrived in a bus with a group of soldiers armed with grenades.[995]

520. Some of the Defence witnesses who were among the assailants also described how they arrived at Nyange parish. Witness ND22 said that some Hutus arrived aboard lorries.[996] Witness ND6 testified that he went to the parish in Mutuyimana's lorry.[997]

521. In assessing this evidence, the Majority finds that the Prosecution has not proven beyond reasonable doubt the allegations contained in paragraphs 17 and 21 of the Indictment.[998] The Prosecution has not adequately shown that Witness CDZ's car was requisitioned to transport assailants and encourage the local population to attack the Tutsis at Nyange parish. As regards the red Toyota Hilux, the Majority has previously stated that Defence Witness Ruvurajabo's evidence raises doubts as to whether or not this communal car was even functioning at the time (Chapter III, Section 5.3.1.26). Additionally, the Majority has stated elsewhere that it will not rely upon the uncorroborated evidence of Witness YAU (Chapter III, 4.3.1.4).

522. Evidence has shown that trucks and lorries did indeed bring Hutu assailants to Nyange parish. However, apart from some witnesses' belief that Kayishema's involvement equalled involvement by the local authorities, the Prosecution has not put forth any evidence to prove that such authorities—in particular, the accused—*actually* arranged the means of transportation described above. This lack of evidence leads the Majority to conclude that the Prosecution has not proven beyond reasonable doubt that Ndahimana and other communal authorities requisitioned vehicles and arranged for other means of transportation in order to transfer assailants to Nyange parish.

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[990] Indictment, paras. 17, 21.
[991] T. 3 November 2010 pp. 15-16, 53-54 (The Kivumu *commune* had only one vehicle, a red-coloured pickup vehicle).
[992] T. 6 September 2010 p. 27.
[993] T. 4 November 2010 p. 50.
[994] T. 1 November 2010 p. 17.
[995] T. 15 September 2010 p. 49.
[996] T. 20 April 2011 p. 7.
[997] T. 27 January 2011 p. 8.
[998] Indictment, paras. 17, 21.

5.3.3 Alibi

523. The Notice of Alibi filed by the Defence on 3 September 2010 indicated the following in regards to Ndahimana's activities of 15 April 1994: (1) he was at Dr. Ntawuruhunga's house preparing for the doctor's funeral from 7 a.m. until 1 p.m.; (2) at 1 p.m. he left the doctor's house to travel to Kibuye to meet with *Préfet* Clément Kayishema; (3) he arrived at approximately 3 p.m. and concluded his meeting with the *préfet*, as well as a short visit to the *gendarmerie* camp, by approximately 4 p.m.; (4) from 4 to 6 p.m., he travelled back to Kivumu; (5) he returned to the doctor's house at approximately 6 p.m. and remained there for an hour before; (6) he made a short stop at his home and then moved to Nyange parish between 7:30 and 8 p.m.[999]

524. The Defence relied upon several witnesses to support this alibi. Thérese Mukabideri testified that Ndahimana was in Rufungo at approximately 5 or 6 a.m. on 15 April 1994.[1000] Beatrice Mukankusi said that she arrived at 11 a.m. for the funeral and Ndahimana was already there.[1001] However, Anicet Tumusenge, who drove her, said first that they arrived "in the morning," then later provided evidence that they may have arrived closer to noon.[1002] Léonille Murekeyisoni said that she arrived between 11 a.m. and noon for the funeral and that Ndahimana was already there.[1003]

525. Turning to the distance between Nyange and Rufungo, Thérese Mukabideri estimated the distance between Rufungo and Nyange to be about 10 kilometres, but that the roads were very bad.[1004] Beatrice Mukankusi said she left her home in Nyange *secteur* at approximately 10 a.m.[1005] and arrived at Rufungo just before 11 a.m.[1006] The Majority concludes therefore that the distance between Nyange and Rufungo could be covered in about one hour.

526. Thérese Mukabideri is the only person who says that she saw the accused at 5 or 6 a.m. on 15 April 1994 because he had to finalise the organisation of the burial.[1007] She also is the only one who could have known at what time Ndahimana arrived, given that she was the host and the other witnesses arrived later in the morning. The Majority recalls that the witness' testimony was very articulate and detailed and that her testimony was unshaken on cross-examination. The Majority also recalls that the witness did not try to negate the fact that Ndahimana was a family friend, but maintained that her testimony was not led by a desire to assist Ndahimana.[1008] The presence of the accused at Mukabideri's house was confirmed by the other witnesses who testified that the accused was already busy organising the burial when they arrived between 11 a.m. and noon. While weighing the credibility of the Defence evidence, the Majority has considered that the Notice of Alibi has been tendered in a timely manner, before the commencement of the trial. In light of these circumstances, it concludes that the alibi is reasonably possibly true, and therefore must be

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[999] Notice of Alibi, 3 September 2010.
[1000] T. 7 February 2011 p. 68.
[1001] T. 7 February 2011 pp. 45-46.
[1002] T. 12 May 2011 pp. 7, 12.
[1003] T. 10 February 2011 pp. 7-11, 18.
[1004] T. 8 February 2011 p. 17.
[1005] T. 7 February 2011 pp. 4-5, 14. *See also*, Defence Exhibit 101.
[1006] T. 7 February 2011 pp. 45-46.
[1007] T. 7 February 2011 p. 68.
[1008] T. 8 February 2011 p. 19 ("No, Counsel for the Prosecution. I beg to differ with you. What I am saying is what I witnessed. I cannot assert what is not true, just for the purpose of defending him. Ndahimana was a friend, but I would like to tell you, Counsel, that even for his election he came to see me to ask him *(sic)* to vote for him. And I told him, "I'm a member of another party. I am not going to vote for you." And I told -- so I cannot -- I cannot -- I cannot defend him just for the purpose of defending him. What I have testified to is what I witnessed.").

accepted.[1009] The Majority accepts that the accused was at Rufungo on 15 April 1994 from 5 or 6 a.m.

527. In addition, the Majority has considered that at some point during the funeral, Ndahimana left Rufungo to go see the *préfet* at Kibuye. Anicet Tumusenge said that he left with Ndahimana at approximately 1 p.m.[1010] Léonille Murekeyisoni noticed that Ndahimana was no longer at the funeral around 1 or 2 p.m.[1011] *Préfet* Kayishema, confirmed that Ndahimana arrived at his office at approximately 2 p.m. and spent 30-40 minutes meeting with him.[1012] Witness ND13 testified that on 15 April 1994 he saw Ndahimana as he was leaving the *préfet*'s office.[1013] Both Mukabideri and Tumusenge reported that the accused returned to Rufungo between 6 and 7 p.m., but that he did not stay long before he left again.[1014]

528. Turning to the content of the conversation Ndahimana allegedly had with *Préfet* Kayishema, the Majority notes that only *Préfet* Kayishema was able to provide first hand evidence—the evidence provided by other Defence witnesses was entirely hearsay. The Majority has expressed concern with respect to *Préfet* Kayishema's reliability and has found that he might have motives to testify in favour of the accused. In the absence of further reliable evidence, the Majority is not convinced of the content of the conversation between the two men.

529. However, based on corroborated evidence, the Majority finds it reasonably possibly true that the accused was not present at Nyange parish during the commission of the crimes that occurred in the afternoon because he left Rufungo at around 1 p.m., went to see several persons, including the *préfet*, and then returned to Rufungo at approximately 6 or 7 p.m.[1015] Given these circumstances, the Majority does not need to address the Defence's objection that the accused did not received adequate notice in relation to the order to start the attack of 15 April 1994.[1016]

530. Finally, the Defence itself argues that after Ndahimana came back from Rufungo, between 7:30 and 8 p.m., he made a short stop at his home before moving on to Nyange parish.[1017] The Majority has no reason to doubt that this submission is true. Having found that the alibi is

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[1009] *Nahimana et al.* (AC) Judgement, para. 414; *Kamuhanda* (AC) Judgement, para. 38; *Kajelijeli* (AC) Judgement, para. 41; *Musema* (AC) Judgement, paras. 205-206.
[1010] T. 12 May 2011 p. 12.
[1011] T. 10 February 2011 pp. 10-11.
[1012] T. 18 April 2011 pp. 31, 61; T. 19 April 2011 p. 8.
[1013] T. 17 January 2011 pp. 37-38, 40.
[1014] T. 7 February 2011 p. 69; T. 12 May 2011 pp. 10, 15-17.
[1015] The Majority notes that it finds the testimony of Anicet Tumusenge particularly convincing because of its detail and consistency, in addition to the fact that he was the only one with the accused during the times spent travelling (Chapter III, Section 5.3.1.16). Mr. Tumusenge testified that as they started the trip away from Rufungo, Ndahimana told him that he was going to the *préfecture* because there were security problems in Nyange *secteur* (T. 12 May 2011 p. 9). He further stated that he drove Ndahimana to the *préfecture*'s office, where he waited in the car while Ndahimana met with the *préfet* for approximately 40-60 minutes. Ndahimana emerged from the office with the *préfet*, who the witness did not know was the *préfet* until Ndahimana told him (T. 12 May 2011 p. 8). Ndahimana then informed the witness that the *préfet* had informed him that there were no soldiers or *gendarmes* available (T. 12 May 2011 p. 9). After the visit to the *préfet*, the witness drove Ndahimana to the *gendarmerie*, where he waited in the car for 30 minutes while Ndahimana was in the *gendarmerie* office. Following this, the witness took Ndahimana to visit an agronomist named Janvier, and then returned with him to Rufungo (T. 12 May 2011 p. 10). The Majority further recalls that the distance between the house in Rufungo and the Kibuye *préfectoral* office is 37.7 kilometres according to the Report on Site Visit, 13 June 2011, para. 6 (x).
[1016] *See e.g.*, T. 21 September 2011 pp. 72-73; T. 22 September 2011 pp. 16-17.
[1017] Notice of Alibi, 3 September 2010.

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reasonably possibly true; the Majority will now turn to consider whether its reasonableness has been overcome by convincing evidence placing Ndahimana at Nyange parish that day.

5.3.4 Meetings

5.3.4.1 *Place and Purpose of the Morning Meetings*

531. In support of paragraph 25 of the Indictment, the Prosecution alleges that at least two meetings took place before the attack on Nyange church on 15 April 1994, one at the CODEKOKI building or at the Statue of the Virgin Mary and one at Nyange presbytery. It seems that the distance between these locations was very short. Therefore, the accused could have been involved in both meetings by travelling between the locations within a very short frame time. The Majority will address each of these meetings in turn.

5.3.4.2 *Meetings at Nyange Presbytery or Parish Area Before the Attacks*

532. Witness CBY testified that he saw Ndahimana, IPJ Kayishema, Ndungutse, Kanyarukiga and Théodomir come into the courtyard of Nyange presbytery at approximately 8 a.m. and meet with the priests. The witness explained that after their discussion, the authorities "left and went out."[1018]

533. Witness CBK testified that at approximately 9 a.m., Seromba, Ndahimana, Kayishema, Kanyarukiga, Mbakilirehe, Witness CDL and a number of *conseillers* met inside the bishop's room in the priests' living quarters. The witness could not hear what they were saying, but after the meeting he saw the group speaking with Hutu assailants. Following this discussion, a large-scale attack on Nyange church took place.[1019]

534. Witness YAU testified that Father Kanyiranga, IPJ Kayishema, Ndahimana, Kanyarukiga, and Father Seromba participated in a meeting in front of the secretariat sometime "before noon, in the morning." Soon thereafter, Father Seromba met with a group of *Interahamwe* and the killing began.[1020]

535. After assessing the details of the witnesses' credibility, the Majority finds that the Prosecution witnesses do not corroborate each other regarding the precise time,[1021] location[1022] or consequences of the meeting.[1023]

[1018] T. 10 November 2010 p. 30 (ICS).

[1019] T. 3 November 2010 pp. 12-14, 58 (Among the policemen, the witness recognized Adrien Marahamu, Mbungira, Kibyutsa and Leonal); T. 4 November 2010 p. 1 (Witness added that the policemen were carrying rifles. As far as he remembered, they had Kalashnikovs and "another type of gun that do not fire many shots at the same time.").

[1020] T. 15 September 2010 p. 49.

[1021] Witness CBK: T. 3 November 2010 p.12 (Testified that the authorities met at 9 a.m.); Witness YAU: T. 15 September 2010 p. 49 (Testified that the authorities met "in the morning.").

[1022] Witness CBK: T. 3 November 2010 p. 12 (Said that it happened at the bishop's room in the priests' living quarters); Witness YAU: T. 15 September 2010 p. 49 (Said that it happened in front of the secretariat). The Majority notes that while these places might have been close to each other, the witnesses were precise regarding their description of the location of the meeting.

[1023] Witness CBK: T. 3 November 2010 pp. 12, 58 (Said that after the meeting he saw the authorities speaking with Hutu assailants); Witness YAU: T. 15 September 2010 p. 49 (Said that after the meeting, Father Seromba met with a group of *Interahamwe* and the killing began. While she involved Ndahimana in relation to the meeting, according to her testimony, only Seromba talked to the assailants).

5.3.4.3 *Meeting at the CODEKOKI Building/ Statue of the Virgin Mary*

536. Witness CNJ arrived at the Statue of the Virgin Mary between 11 a.m. and 1 p.m. The fighting had already begun.[1024] Upon his arrival, he saw Ndahimana together with IPJ Kayishema, the pharmacist Kanyarukiga and a certain Ndungutse at the Statue of the Virgin Mary. Ndahimana welcomed the group of assailants.[1025] Kayishema then took the assailants to the area where they were to attack the Tutsis. At one point, Rukara, a retired soldier, threw three grenades at Tutsis, who then started retreating.[1026]

537. Witness CDK testified that he arrived at Nyange parish between 11 and 11:30 a.m. and that Ndahimana, Seromba, Kanyarukiga and Ndungutse held a meeting at the CODEKOKI building.[1027] His testimony seems to indicate that an attack occurred shortly after the meeting ended, but he did not specify how long the meeting lasted.[1028]

538. Witness CBS, a refugee, testified that he saw Ndahimana with Kayishema and armed policemen at the Statue of the Virgin Mary at 8 a.m. He testified, "It was obvious that it was Ndahimana's group which was issuing instruction to the attackers"[1029] for the attack that began at approximately 9 a.m.[1030]

539. Witness CBR, who participated in the attacks that day, saw the following authorities at the CODEKOKI building: Ndahimana, Ndungutse, Kanyarukiga, Kayishema, Murangwabugabo, Habarugira and others.[1031] When the authorities emerged from their meeting, Ndahimana instructed the assailants: "Guys, get yourself (*sic*) to work."[1032] The witness could only say that this meeting took place before an attack that began between 11 a.m. and noon.[1033]

540. Even assuming that the CODEKOKI building and the Statue of the Virgin Mary are referring to the same location, the Majority finds that the Prosecution evidence, once again, varies greatly regarding the time of the alleged meeting. Depending on the witness, the time of the meeting varies from 8 a.m. to noon.[1034] While the Majority does not expect each of the witnesses to be able to report the exact time of the events he or she witnessed 17 years ago, the timing of the meeting in relation to the start of the attack is important here.

541. A detailed review of the Prosecution evidence shows the evidence to be inconsistent regarding the two alleged meetings. First, it is not clear which of the two meetings happened first or which one started the attack. More importantly, the timing of the meetings in relation to the start of the attacks is unclear.

[1024] T. 4 November 2010 pp. 48, 52.
[1025] T. 4 November 2010 pp. 47-48; T. 5 November 2010 pp. 22-23 (ICS), 30.
[1026] T. 4 November 2010 pp. 49-51.
[1027] T. 8 November 2010 pp. 31-32.
[1028] T. 8 November 2010 p. 33.
[1029] T. 6 September 2010 pp. 21-22.
[1030] T. 6 September 2010 p. 26.
[1031] T. 1 November 2010 p. 17; T. 2 November 2010 p. 18.
[1032] T. 1 November 2010 pp. 17-18.
[1033] T. 2 November 2010 p. 21.
[1034] Witness CDK: T. 8 November 2010 pp. 31-32 (Testified that the meeting occurred between 11 and 11:30 a.m.); Witness CBS: T. 6 September 2010 pp. 21-22 (Testified it occurred at 8 a.m.); Witness CBR: T. 2 November 2010 p. 21 (Testified that it occurred sometime before the attack, which he estimated began between 11 a.m. and noon).

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542. The Majority will not rely on Witness CNJ who was the only witness to testify that stone-throwing was already ongoing before the authorities met at the Statue of the Virgin Mary.[1035]

543. Witnesses CBT and CDL did not report any meetings; however, this could be explained by the possibility that they arrived after the two meetings alleged in paragraph 25 of the Indictment occurred. Witness CBT arrived between 11:30 a.m. and noon, after Rukara threw a grenade at the refugees and after they were repelled toward Nyange church.[1036] He mentioned that the attack on the church started at approximately 1 p.m.[1037] According to Witness CDL, the stone-throwing fight started around the same time as he arrived at the church between 10 and 11 a.m.[1038] He further explained that he heard a grenade exploding around 12 p.m. and returned to the church.[1039]

544. It follows from this evidence that the meetings would have occurred at least before 11 a.m. This assertion is supported by the testimonies of Witnesses CBK and CBY. Indeed, according to Witness CBK, the attack started right after a meeting that took place at approximately 9 a.m. at the priests' living quarters.[1040] According to CBY, the attack started immediately after the meeting that occurred at approximately 8 a.m. at the presbytery.[1041] Witness YAU did not provide any clear indication of time.[1042]

545. However, other evidence tends to show that the attack started after 11 a.m. Witness CDK arrived at the church between 11 and 11.30 a.m.[1043] He testified that following a meeting at the CODEKOKI building, Hutus started to throw stones at the Tutsis, then Rukara threw the grenade, the Tutsis were repelled to Nyange church and the attack continued.[1044] Witness CBR estimated that the attack started after a meeting at the CODEKOKI building, between 11 a.m. and noon.[1045] He reported that Hutus started to throw stones at the Tutsis then Rukara threw grenades at the Tutsis who started retreating to the church. The attack then continued.[1046]

546. The Majority finds these theories difficult to reconcile. While Witnesses CBK and CBY asserted that the stone throwing attack started right after the meeting that took place at the presbytery at around 8 or 9 a.m.; Witnesses CDK and CBR testified that the stone throwing attack started right after the meeting that took place at the CODEKOKI building or the Statue of the Virgin Mary at around 11 a.m.

547. A third version of how the attack began is brought by Witness CBS who was at Nyange church square the morning of 15 April 1994, but did not report any meeting at Nyange presbytery.[1047] The witness testified that the attack began at 9 a.m.[1048] However, shortly before, at 8 a.m., he saw Ndahimana with Kayishema and armed policemen at the Statue of the Virgin Mary.

[1035] T. 4 November 2010 p. 49.
[1036] T. 7 September 2010 pp. 39-40, 66-67.
[1037] T. 7 September 2010 p. 47.
[1038] T. 12 November 2010 p. 7; T. 18 November 2010 p. 14.
[1039] T. 12 November 2010 p. 8.
[1040] T. 3 November 2010 pp. 12-13, 58.
[1041] T. 10 November 2010 pp. 27-28.
[1042] T. 15 September 2010 p. 49 ("Before noon").
[1043] T. 8 November 2010 p. 31.
[1044] T. 8 November 2010 pp. 33-34.
[1045] T. 2 November 2010 p. 21.
[1046] T. 1 November 2010 pp. 18-19; T. 2 November 2010 p. 22.
[1047] T. 6 September 2010 p. 22.
[1048] T. 6 September 2010 p. 26.

He asserted, "It was obvious that it was Ndahimana's group which was issuing instruction to the attackers."[1049]

548. Considering these circumstances, the Majority finds that the testimonies of the Prosecution witnesses do not sufficiently corroborate each other to prove beyond reasonable doubt that Ndahimana attended a meeting at Nyange presbytery on the morning of 15 April 1994. No evidence was adduced regarding the content of that meeting, and the Prosecution did not prove beyond reasonable doubt that the accused ordered his alleged subordinates to start the killings. Nor did the Prosecution prove that the accused planned or instigated the killings that occurred later that day. Because the Prosecution evidence does not overcome the defence alibi which was found to be reasonably possibly true, the alibi stands.[1050]

5.3.4.4 *Events After the Alleged Meetings*

549. Paragraphs 26 to 28 of the Indictment allege that during the attacks, Ndahimana, Father Seromba, IPJ Kayishema, Kanyarukiga and others were present, ordering, instigating and supervising the assailants by providing them with weapons and fuel in an attempt to burn the Tutsi refugees in Nyange church. The attempt was not successful, leading Ndahimana and the other members of the JCE to hold a meeting at Nyange presbytery to plan further attacks against the Tutsis.[1051]

550. Witnesses CDK, CBS, CBR, CBY, ND22, ND6 and ND12 said that after the meetings they observed the beginning of the attack when Hutus started throwing stones at the refugees. After one or several grenades were thrown at the refugees by a reservist named Rukara, the refugees retreated to Nyange church.[1052] No evidence was adduced to show that Rukara acted upon an order by the accused.

5.3.5 Assailants Wearing Banana Leaves

551. The Indictment alleges that Ndahimana ordered the assailants to cover themselves in banana leaves in order to distinguish themselves from Tutsis.[1053] The Majority notes that some of the Hutu assailants used banana and other types of leaves for this purpose.[1054] However only Witness CNJ testified that the order to the assailants to cover themselves in banana leaves came from Ndahimana.[1055] The Majority has previously held that it would not rely on this accomplice witness

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[1049] T. 6 September 2010 pp. 21-22.
[1050] T. 21 September 2011 pp. 72-73; T. 22 September 2011 pp. 16-17.
[1051] T. 21 September 2011 pp. 4, 16-18, 34-37.
[1052] Witness CDK: T. 8 November 2010 pp. 32-34; Witness CBS: T. 6 September 2010 pp. 21-22; Witness CBR: T. 1 November 2010 p. 19, T. 2 November 2010 p. 22; Witness CBY: T. 9 November 2010 p. 53, T. 10 November 2010 p. 30 (ICS); Witness ND22: T. 20 April 2011 pp. 6-7; Witness ND6: T. 27 January 2011 p. 11; Witness ND12: T. 19 January 2011 pp. 6-7, 16-17; Witness CNJ: T. 4 November 2010 p. 48, T. 5 November 2010 pp. 22-23 (ICS), 30 (He is the only witness who said that fighting was already ongoing before Ndahimana and others "welcomed" the assailants at the Statue of the Virgin Mary).
[1053] Indictment, para. 27.
[1054] Witness CBT: T. 7 September 2010 p. 39 (Some people had banana leaves or eucalyptus tree leaves); Witness CDK: T. 8 November 2010 p. 31 (Some assailants had covered themselves with banana leaves); Witness CBY: T. 10 November 2010 pp. 32 (ICS), 65 (Attackers were wearing banana leaves); Witness CBK: T. 3 November 2010 p. 15, T. 4 November 2010 pp. 48-49 (Attackers were wearing banana leaves and small cypress branches to distinguish themselves from the refugees); Witness CBS: T. 6 September 2010 p. 25 (Attackers disguised themselves with banana leaves to distinguish themselves from refugees); Witness CBI: T. 14 September 2010 p. 35 (Some were dressed in their personal clothing others were wearing banana leaves).
[1055] T. 4 November 2010 p. 48; T. 5 November 2010 p. 22 (ICS).

unless corroborated. (Chapter III, Section 4.3.1.11) Therefore, it finds that the Prosecution has not proven this allegation beyond reasonable doubt.

5.3.6 Attack on Nyange Church, 15 April 1994

552. The Majority recalls that it was unable to determine from the evidence the precise time the 15 April 1994 attacks on Nyange church began. However, the evidence does depict a rather consistent description as to *how* the attack was conducted. Tutsis and Hutus began throwing stones at each other. After a certain Rukara threw one or several grenades, refugees retreated to the church, Nyange presbytery and a nearby forest. Following the grenade attacks and corresponding retreat, the assailants moved towards the church and killed a number of refugees who were still in the courtyard.

5.3.6.1 *Ndahimana's Participation and Presence During the Attack on Nyange Church*

553. Three witnesses testified that Ndahimana ordered the start of the attack. Witness CBT testified Ndahimana was in the courtyard of Nyange church and that he took a gun from Kabalisa, a former soldier, and fired one shot at the clock tower of the church to signal the commencement of the attack.[1056] Witness CNJ said Ndahimana "ordered the communal policemen to fire on the persons who were trying to hide in the tower of the church." He then confiscated the guns of two *gendarmes* and three communal policemen who refused to comply with his directive.[1057] Witness CBR testified that from outside the CODEKOKI building, Ndahimana instructed the assailants: "Guys, get yourself to work," which the assailants understood to mean to attack the Tutsis.[1058] The Majority has expressed concerns about the credibility and reliability of each of these witnesses. In particular, as detailed below, the Majority has doubts about Witness CNJ's allegation that Brigadier Mbakilirehe refused to shoot. In addition, the discrepancies between the three accounts do not allow the Majority to conclude beyond reasonable doubt that Ndahimana instigated the attacks or was physically present to order the assailants to start the killings on 15 April 1994. Moreover, this evidence is contradicted by Witness YAU, who testified that the killings began immediately after Father Seromba spoke to the *Interahamwe*.[1059]

554. A number of Prosecution witnesses testified that Ndahimana was present at some point during the attack. Witnesses CDK, CBR, CBT and CNJ each testified that Ndahimana was present at the start of the attack, but that he then left to go to the funeral at Rufungo, departing at approximately 1 or 2 p.m.[1060] Witness YAU said that Ndahimana was present at Nyange parish "as the killings were taking place" and Witness CBI testified that he saw Ndahimana during the attack.[1061]

555. However, other Prosecution witnesses such as CBY, CDL, CBK, CBS and CBN, all of whom were present during the attack, did not testify that Ndahimana was present. Additionally,

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[1056] T. 7 September 2010 pp. 42, 47; T. 8 September 2010 pp. 6, 11, 14-15, 19.
[1057] T. 4 November 2010 pp. 51-53.
[1058] T. 1 November 2010 pp. 17-18.
[1059] T. 15 September 2010 p. 49.
[1060] Witness CDK: T. 9 November 2010 pp. 19-20; Witness CBR: T. 1 November 2010 p. 23, T. 2 November 2010 p. 23; Witness CBT: T. 7 September 2010 p. 42. T. 8 September 2010 pp. 5, 9, 14; Witness CNJ: T. 4 November 2010 p. 54.
[1061] Witness YAU: T. 15 September 2010 p. 49; Witness CBI: T. 14 September 2010 p. 39.

Defence Witnesses ND24, ND22, ND6, ND12, ND11 and ND7 also all testified that Ndahimana was not present during the attack.[1062]

556. The Majority points particularly to Witness CDL's testimony, who said that he did not see Ndahimana at Nyange parish until the evening of 15 April 1994.[1063] While Witnesses CNJ, CBT, ND12 and ND7 stated that Witness CDL was among the leaders of the attack, it seems that had Ndahimana been there as well, they would have most likely been together.[1064]

557. In conclusion, the Majority finds that the Prosecution did not provide sufficient credible evidence to overcome the reasonableness of the accused's alibi. The Prosecution evidence is insufficient to establish beyond reasonable doubt that, on 15 April 1994, Ndahimana ordered a number of assailants to "start working" and that the attack was launched following this order. Nor did the Prosecution prove beyond reasonable doubt that Ndahimana should be liable for ordering, instigating and supervising the assailants by providing them with weapons and fuel in an attempt to burn the Tutsi refugees in Nyange church. Given these circumstances, the Majority does not need to address the Defence's objection that the allegation that the accused fired the first shot that signalled the start of the attacks on 15 April 1994 was not properly pled in the Indictment.[1065]

5.3.7 After the Attack on Nyange Church

5.3.7.1 *Distribution of Weapons*

558. The Majority has considered Witness CDL's evidence alleging that Ndahimana had a discussion with IPJ Kayishema, and two men named Abayisenga and Kagenza in front of the communal office on 15 April 1994 at approximately 6:30 p.m.[1066] The Majority recalls that it will not rely on Witness CDL's evidence unless it is corroborated.

559. The Defence contends that it had inadequate notice of the allegation made by Witness CDL at trial—that on 15 April 1994 at 6:30 p.m., he saw Ndahimana meeting outside the communal office with two individuals, and that Ndahimana promised these individuals that he would ensure the assailants had enough weapons and ammunition for the next day.[1067]

[1062] Witness CBY: T. 9 November 2010 pp. 19-20 (Ndahimana left right after the meeting, before attack began); Witness CDL: T. 12 November 2010 p. 14 (Saw Ndahimana around 6:30 p.m., after the attacks had stopped); Witness CBK: T. 3 November 2010 pp. 57-58, T. 4 November 2010 p. 1 (Saw Ndahimana at a meeting in the morning, did not see him after 10 a.m. until the evening, around 7 p.m. when he returned to Nyange church for another meeting); Witness CBS: Defence Exhibit 4, p. 4 (Describes a visit by Ndahimana on Thursday, but states he did not see him the day of the attack); Witness CBN: T. 13 September 2010 pp. 21-22 (No mention of Ndahimana in description of 15 April 1994 attack), T. 13 September 2010 p. 58 (Ndahimana was not one of the leaders of the attacks), T. 14 September 2010 p. 9 (Stating he did not see Ndahimana on 15 April 1994); Witness ND24: T. 21 February 2011 p. 12 (Did not see Ndahimana until 8 or 9 p.m.); Witness ND22: T. 20 April 2011 p. 7 (During attack, Kayishema asked Ndungutse where Ndahimana was); Witness ND6: T. 27 January 2011 p. 13 (Did not see Ndahimana at Nyange church on 15 April 1994); Witness ND12: T. 19 January 2011 p. 7 (Did not see Ndahimana at Nyange church on 15 April 1994); Witness ND11: T. 18 January 2011 p. 34 (Did not see Ndahimana at Nyange church that day); Witness ND7: T. 24 January 2011 p. 9 (Did not see Ndahimana at Nyange presbytery until 8 or 9 p.m.).

[1063] T. 18 November 2010 p. 20 (ICS).

[1064] Witness CNJ: T. 5 November 2010 p. 13 (ICS); Witness CBT: Defence Exhibit 9 ("The entire exercise was overseen by Judge Habiyambere and Witness CDL."); Witness ND12: T. 19 January 2011 p. 6; Witness ND7: T. 24 January 2011 p. 34.

[1065] T. 21 September 2011 p. 74.

[1066] T. 12 November 2010 p. 14.

[1067] Defence Closing Brief, n. 572.

560. First, the Majority observes that paragraph 26 of the Indictment alleges that the accused and others provided weapons to the assailants in "an attempt to burn the Tutsi refugees in the church."[1068] This detailed paragraph of the Indictment does not cover allegations according to which weapons were distributed *after* the attack on Nyange church; that is, after the attempt to burn the church failed. In addition, the Majority finds that the Prosecution provided no notice of this incident in its Pre-Trial Brief with regard to the summary of Witness CDL's anticipated evidence; the Prosecution only noted that the witness would testify "that the accused gave the attackers more bullets during this attack of 16th April 1994…."[1069] The Majority concludes that the Prosecution failed to provide adequate notice of Witness CDL's evidence about the discussion outside the communal office, which it considers to be a material fact. Therefore, the Majority will not consider this allegation.

5.3.7.2 *Meeting at Nyange Presbytery*

561. Paragraph 26 of the Indictment alleges that because the attempt to burn down the church was not successful, Ndahimana and other members of the JCE held a meeting at Nyange presbytery to plan further attacks on the Tutsis.

562. Prosecution Witness CBK testified that when the "authorities" realised that their plan to burn down the church had failed, they held a meeting in the priests' living quarters at approximately 7 p.m. Present at this second meeting were: Seromba, Ndahimana, Kayishema, Kanyarukiga, Ndungutse, Mbakilirehe, Colonel Nzaphakumunsi and others.[1070] This evidence is partly corroborated by Witness CDJ, who arrived at the parish at approximately 7 p.m. and saw Ndahimana, Father Seromba and Kanyarukiga sitting on the veranda of Nyange presbytery having a discussion which lasted approximately two hours.[1071] Neither of the two witnesses overheard the content of the conversation.

563. In its Notice of Alibi, the Defence acknowledged that Ndahimana returned to Nyange parish on the evening of 15 April 1994. However, it asserts that he was only there from approximately 8 until 8:30 p.m.[1072] Witness ND24 testified that he saw Ndahimana travel through the roadblock he was manning at approximately 8 or 9 p.m. that day. Ndahimana came from the direction of Kibuye in a Pajero driven by a man named Anicet.[1073] He added that Ndahimana was headed to Nyange presbytery but did not stay long, and the witness saw him leave.[1074] Witness ND7 testified that she did not see Ndahimana during the attack but saw him between 8 and 9 p.m. in the courtyard of the presbytery.[1075] Thérese Mukabideri said that Ndahimana came back to the funeral at approximately 6 or 7 p.m. that evening but did not stay long.[1076] This evidence is corroborated by Anicet Tumusenge, who said that it was about 6 p.m. when they arrived back at the funeral, and that he dropped Ndahimana at his house around 8 p.m.[1077] None of the Defence witnesses provided information on the purpose of the accused's visit to the presbytery nor whether he met with other persons while there.

[1068] Indictment, para. 26.
[1069] Prosecution Pre-Trial Brief, Annex IV, p. 4.
[1070] T. 3 November 2010 p. 16.
[1071] T. 11 November 2010 p. 30.
[1072] Notice of Alibi, 3 September 2010, p. 3.
[1073] T. 21 February 2011 pp. 12, 24-25.
[1074] T. 21 February 2011 p.12.
[1075] T. 24 January 2011 p. 9.
[1076] T. 7 February 2011 p. 69
[1077] T. 12 May 2011 pp. 10, 14-15, 17.

564. Despite the slight inconsistencies regarding the exact time of Ndahimana's visit, the Majority accepts that after going to Kibuye, Ndahimana returned to the funeral and then went to Nyange presbytery. The Majority further accepts that he met with Father Seromba, Kanyarukiga and perhaps other authorities. However, in the absence of further evidence establishing the purpose of that meeting, the Majority cannot conclude that the Prosecution has proven beyond reasonable doubt that the only reasonable explanation is that the meeting was held to plan further attacks on Tutsis. The Majority notes that it has found elsewhere that on the morning of 16 April 1994, a meeting occurred in order to plan the attack against the Tutsis later that day (Chapter III, Section 6.3.3.3).

5.3.7.3 *Involvement of Ndahimana or Members of the JCE in Ordering the Assailants to Bury the Bodies of the Tutsis That Were Killed That Day*

565. Numerous witnesses testified that the bodies of Tutsi victims were buried on 15 April 1994. However, as paragraph 28 of the Indictment alleges neither a criminal *actus reus* nor a criminal *mens rea*, the Trial Chamber will not make a finding on this allegation.

6. Attack and Demolition of Nyange Church, 16 April 1994

6.1 Introduction

566. The Indictment alleges that on or about 16 April 1994, Ndahimana, Seromba and Kayishema, Kanyarukiga and others met at Nyange presbytery. After this meeting, Ndahimana started shooting at the refugees thereby signalling the assailants to launch a large scale attack on the Tutsi refugees. On the same day, Ndahimana, these same individuals and others, met, planned and mutually agreed to kill all of the Tutsi refugees in Nyange church by destroying it.[1078]

567. The Indictment further alleges that the same individuals ordered the assailants to destroy Nyange church using a bulldozer, killing about 2,000 Tutsi refugees inside. Ndahimana was present during the demolition of the church and instigated the assailants to kill the refugees. He also supervised the attack. Following the destruction of the church, these same individuals, including the accused, went to Nyange presbytery to share drinks and celebrate. The bodies of the Tutsis killed at Nyange parish were buried in mass graves at the parish and surrounding areas.[1079]

568. The Defence has provided an alibi for Ndahimana relating to 16 April 1994. The Defence submits that the accused hid at a convent because he feared the Kibilira *Interahamwe*, whom he believed would be present at Nyange parish that same day.[1080] In its Notice of Alibi, the Defence also submitted that the accused was being pursued by "the same people in January 1993 when he was working for Rubaya Gisenyi."[1081] The Defence also challenges the credibility of Prosecution witnesses[1082] and notes that five witnesses who were at Nyange parish on 16 April 1994 testified that they had not seen Ndahimana there.[1083]

[1078] Indictment, paras. 29-30. *See also*, T. 21 September 2011 pp. 7, 18-19.
[1079] Indictment, paras. 31-33. *See also*, T. 21 September 2011 pp. 7, 18.
[1080] Defence Closing Brief, paras. 29-32, 389. *See also* T. 21 September 2011 pp. 67-68.
[1081] Notice of Alibi, 3 September 2010. *See also*, Supplement to Notice of Alibi filed on 3rd September, 21 September 2010.
[1082] Defence Closing Brief, paras. 364-388. *See also*, T. 21 September 2011 pp. 49-50, 58, 73-77; T. 22 September 2011 pp. 1-3.
[1083] Defence Closing Brief, paras. 391, 393, 395-399.

569. The Prosecution called Witnesses CBR, CDL, CBK, CNJ, CNT, CBY, CDJ and CBT to support its case against Ndahimana with respect to the attack at Nyange parish on 16 April 1994. The Defence called Witnesses BX3, ND17 and ND35 to support Ndahimana's alibi that he spent the day of 16 April 1994 hiding in a convent, and Witnesses ND22, KR3, ND6, ND24 and ND7 who testified that they were present at the parish that day and did not see Ndahimana.

6.2 Evidence

6.2.1 Prosecution Witness CBR

570. Witness CBR, a Hutu farmer, lived in Kivumu *commune* in April 1994.[1084] The witness participated in the killings at Nyange parish.[1085] Early in the morning of 16 April 1994, IPJ Kayishema arrived in the witness' *cellule* in a pickup truck.[1086] Using a megaphone, he woke the residents and called upon them to go to the parish.[1087] The witness and other assailants travelled to the parish in trucks provided by the Astaldi Company. They arrived there between 6 and 7 a.m.[1088]

571. On his way to the church, the witness, together with Ntagwabira and Hakuzimana, killed two Tutsis in Gakoma *cellule*.[1089] The witness told himself before leaving "I must kill them," and he did.[1090] Upon arrival at Nyange parish, the witness saw the following authorities conferring in front of the priest's office: Father Seromba, Ndahimana, Kanyarukiga, Habiyambere, IPJ Kayishema, Védaste Murangwabugabo, Ndungutse, Senior Warrant Officer Habarugira and several *gendarmes*. The witness did not hear what the men were saying.[1091]

572. After the discussion, Ndahimana, Kayishema and the other authorities, with the exception of Father Seromba, moved toward Nyange church.[1092] The attack on the church began between 7 and 8 a.m.[1093] From the right hand side of the courtyard near Nyange church, the witness was close enough to witness Ndahimana, standing at the front door of the church,[1094] shooting through the church's doors and windows.[1095]

573. Kayishema trailed after Ndahimana, also shooting into Nyange church. Ndahimana "set the tone" and the other authorities followed, standing near him in the small passage between the church and the presbytery walls. According to the witness, "Ndahimana opened fire on the side at which the women sat in church." Ndahimana was using "a rifle that wasn't very long" and that had "strips (*sic*) around the shoulder." The witness estimated that attackers shot at the church continuously for approximately 30 minutes, while assailants surrounded the church to prevent refugees from escaping.[1096]

[1084] T. 1 November 2010 p. 6.
[1085] T. 1 November 2010 pp. 17-18.
[1086] T. 2 November 2010 p. 30.
[1087] T. 1 November 2010 p. 23; T. 2 November 2010 p. 30.
[1088] T. 1 November 2010 p. 23.
[1089] T. 2 November 2010 pp. 33-34.
[1090] T. 2 November 2010 p. 34.
[1091] T. 1 November 2010 p. 24.
[1092] T. 1 November 2010 p. 24.
[1093] T. 2 November 2010 p. 35.
[1094] T. 2 November 2010 p. 43.
[1095] T. 1 November 2010 p. 24.
[1096] T. 1 November 2010 pp. 24-25.

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574. After the shooting subsided, the authorities returned to their previous spot near Nyange presbytery. The witness overheard Kanyarukiga saying, "This church has to be demolished, for within three days, we will be able to rebuild it." Ndahimana was standing next to Kanyarukiga when Kanyarukiga made this statement. The witness did not hear the rest of the conversation, but soon after Kanyarukiga spoke, Kayishema arrived with "special vehicles" that were used to demolish Nyange church.[1097] The witness did not know who actually gave the order for the demolition to begin.[1098] The drivers of the vehicles were three Zairians, named Robert, Mitima, and Maurice; and a Rwandan named Anasthase Nkinamubanzi[1099] (a.k.a. "2000").[1100]

575. Robert "began piercing holes" in the church basement walls with a bulldozer, eventually causing the church walls to collapse on the refugees inside. After the roof fell in on the refugees, one of the bulldozers dug a pit behind Nyange parish. The bulldozer then began separating the bodies from the bricks and pushing the bodies toward the pit. The witness estimated the demolition of the church started at approximately 11 a.m. and lasted late into the afternoon.[1101] The church tower collapsed at approximately 4 or 5 p.m.[1102]

576. As the demolition of Nyange church progressed, the wall of the church bell tower remained standing. A bulldozer then attacked the bottom of the bell tower, causing it to crumble from the bottom and curve in before collapsing. The witness "saw a few refugees" through the broken glass windows of the bell tower, and "through some holes" where the church joined the bell tower. The witness recalled having seen a number of refugees alive, including Charles Kagenza, and a man who ran a small business near the Statue of the Virgin Mary named Damien. He did not know how they were able to escape.[1103]

577. The witness could not say whether Ndahimana was present throughout the entire day of 16 April 1994[1104] because he was focusing on the events at the church.[1105]

6.2.2 Prosecution Witness CDL

578. Witness CDL, a Hutu, was a teacher in Kivumu *commune* in 1994.[1106] He was among the assailants.[1107] On 16 April 1994, the witness arrived at Nyange church sometime after 7 a.m. "to take part in the events that were unfolding there."[1108] When he arrived, Ndahimana, the communal policemen, IPJ Kayishema, Abayisenga and Kagenza were already in the vicinity of Nyange church.[1109] These authorities were coming from the communal office towards the church, and the

[1097] T. 1 November 2010 p. 25.
[1098] T. 2 November 2010 p. 56.
[1099] T. 2 November 2010 pp. 53-54.
[1100] T. 1 November 2010 pp. 25-26.
[1101] T. 1 November 2010 p. 26.
[1102] T. 2 November 2010 p. 36.
[1103] T. 1 November 2010 p. 27.
[1104] T. 1 November 2010 p. 30.
[1105] T. 2 November 2010 p. 48.
[1106] T. 11 November 2010 pp. 57, 59 (ICS).
[1107] T. 12 November 2010 pp. 33-34 (ICS).
[1108] T. 19 November 2010 p. 10.
[1109] T. 12 November 2010 pp. 14-15.

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witness followed them.[1110] The *bourgmestre* was with some communal policemen, and the witness joined the group and conversed with the policemen.[1111]

579. When the group arrived at Nyange church, Father Seromba was standing in front of the church secretariat and Ndahimana went to speak to him. After their conversation, "the *bourgmestre* came back to his policemen and told them that the work was going to begin." Ndahimana then opened fire on refugees inside the church. Immediately thereafter, policemen began shooting through broken church windows into the church. Because Ndahimana was the highest authority present at Nyange, the witness considered the shot fired by Ndahimana "as the green light to kill the Tutsis who were in the church."[1112] The *bourgmestre* and the policemen kept firing at the refugees until they ran out of ammunition: "[w]hen they realised they had run out of ammunition, those persons decided to destroy the church upon the Tutsis and thus kill them."[1113]

580. Another meeting took place at approximately 10 a.m. at Kanyarukiga's pharmacy. Present at the meeting were: Kanyarukiga, Ndahimana, Kayishema, Habiyambere, Habarugira, Ndungutse, and Kanani. Also present was a man named Sinaruhamagaye, who was in charge of managing the Astaldi Company's equipment pool, and a *gendarme*. The only person who was not there was Father Seromba. After this set of consultations, the group went up the hill. Kayishema, Habiyambere and Emmanuel, who was in charge of the Astaldi Company's equipment, lagged slightly behind, discussing ways of reaching the drivers. The same group then moved towards Nyange church.[1114]

581. When they arrived at Nyange church, Father Seromba was standing in front of the secretariat. Ndahimana spoke to Father Seromba, and Seromba approved the decision to destroy the church. This discussion was held in the open, and the witness was close enough to hear Ndahimana and Seromba talking.[1115]

582. A Caterpillar arrived, and Kayishema and Habiyambere went to look for the Caterpillar drivers, as one of the drivers had spent the night at the communal office. The drivers of the Caterpillars included Mitima and Maurice who were both of Zairian nationality. They were assisted by one Anasthase Nkinamubanzi (a.k.a. "Damien") who was a driver with the Astaldi Company but was suspended at the time.[1116]

583. The Caterpillars began destroying the part of Nyange church that was closest to the bell tower, but the walls were reinforced and difficult to destroy. Thus, Father Seromba advised the drivers to start with the back wall of the church, which was weaker.[1117] Father Seromba and Ndahimana were present and directing the drivers of the bulldozers. At one point, the refugees began throwing stones at the Caterpillar drivers. Ndahimana and Seromba then provided protective gear to the drivers.[1118] Ultimately, the church was "destroyed right down to the last brick." The bell tower was the last part of the church to come down. Refugees were killed as the church structure

[1110] T. 12 November 2010 pp. 15, 17.
[1111] T. 12 November 2010 p. 17.
[1112] T. 12 November 2010 p. 17.
[1113] T. 12 November 2010 p. 19.
[1114] T. 12 November 2010 pp. 19-20; T. 19 November 2010 p. 16.
[1115] T. 12 November 2010 p. 19; T. 19 November 2010 p. 17.
[1116] T. 12 November 2010 p. 20.
[1117] T. 12 November 2010 p. 21.
[1118] T. 12 November 2010 p. 21.

fell down on them. Those who survived were "finished off" by assailants at the scene. The attack was completed by approximately 5 p.m.[1119]

584. Ndahimana neither punished the perpetrators nor compelled them to pay compensation for the damage they had done. On the contrary, the witness heard that Ndahimana demoted a police officer named Mbakilirehe from the position of brigadier to that of ordinary policeman for not having been active enough during the attacks, and in particular for not having provided the attackers with enough ammunition that day. The decision to penalise Mbakilirehe was taken at the first meeting of *conseillers communaux* after the attack.[1120] Ndahimana also rewarded a number of attackers from Kibilira with cows.[1121]

6.2.3 Prosecution Witness CBK

585. Witness CBK, a Hutu, was in a position to know what was taking place at Nyange parish in April 1994.[1122]

586. On the morning of 16 April 1994, the witness had the impression that "all the Hutus of the Kivumu *commune*" had come to Nyange parish.[1123] The witness saw Kayishema, Ndahimana, Ndungutse and Father Seromba having a meeting at Nyange presbytery. As they approached the secretariat, Seromba asked Ndahimana what was to be done "because all attempts had failed." Ndahimana was with IPJ Kayishema at that moment, and they insisted that Tutsi intellectuals would have to be killed or the assailants "would have wasted their time." So the men decided to destroy the church tower in order to kill the refugees hiding there.[1124] Ndahimana and the others were outside when they had this discussion, and the witness was standing at a nearby water tap and could hear what they were saying.[1125]

587. Caterpillars then arrived to destroy Nyange church. The bulldozers began by demolishing the back wall of the church. Once the wall came down, the assailants were able to attack some of the refugees who were in the church, but were unable to reach refugees hiding in the church tower. One of the drivers who was directed to attack the church tower was reluctant to do so. He asked Kayishema, Seromba and Ndahimana whether they really wanted him to destroy the church. Seromba answered: "Yes, you should demolish it. There are many Hutus and they are going to build another one." The driver asked twice more, and Father Seromba answered that the church had to be destroyed because there were demons inside it.[1126]

588. The witness believed that the bell tower of Nyange church collapsed at approximately 2 p.m. Those refugees who survived the destruction of the church were killed by assailants using machetes, clubs and small axes. As the church was being demolished the witness saw Father Seromba, Ndahimana, Kayishema, Brigadier Mbakilirehe, and Witness CDL, among others.[1127] The

[1119] T. 12 November 2010 p. 22.
[1120] T. 12 November 2010 p. 22.
[1121] T. 12 November 2010 p. 23.
[1122] Prosecution Exhibit 16.
[1123] T. 3 November 2010 p. 17.
[1124] T. 3 November 2010 pp. 17, 23; Prosecution Exhibit 8 (1).
[1125] T. 3 November 2010 pp. 17-18.
[1126] T. 3 November 2010 pp. 18-19.
[1127] T. 3 November 2010 pp. 18-19.

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bodies were then buried in three common graves using Caterpillars provided by the Astaldi Company.[1128]

589. Following the destruction of Nyange church, Father Seromba, Ndahimana, Kayishema, Kanyarukiga, Mbakilirehe, the *conseiller*, Nsidabyamere, Dabame, Kanamugire, Colonel Nzaphakumunsi and others met at Nyange presbytery and drank wine and beer. According to the witness, "all we noticed is that they were feasting after the Nyange church had been destroyed." The authorities then threw some bottles to the *Interahamwe* who were downstairs. The witness was in the presbytery courtyard as this was taking place, and concluded that "it could be noticed that those authorities were happy with what had happened."[1129]

6.2.4 Prosecution Witness CNJ

590. Prosecution Witness CNJ, a Hutu, was a student living in Kivumu *commune* in April 1994.[1130] He participated in the killings at Nyange parish.[1131]

591. When the witness arrived at Nyange parish at approximately 9 a.m. on 16 April 1994, he saw assailants surrounding Nyange church. Kayishema, Ndahimana, Védaste Murangwabugabo, Witness CDL, Ndungutse, Habiyambere and Kanyarukiga were all present. One Caterpillar and its driver, Anasthase Nkinamubanzi, were already at the site and the authorities were discussing how best to destroy the church. The deputy *bourgmestre*, Védaste Murangwabugabo, suggested creating a hole in the church so that the assailants could get inside, but the *bourgmestre* countered that if the hole were too small, the refugees would be in a position to attack the assailants. Thus, the authorities began discussing the destruction of the entire church. The witness was standing approximately two metres away from the authorities when he heard them discussing the destruction of the church. The witness explained that he was young and wanted to show the authorities that he was an active participant in the goings on that day.[1132]

592. Father Seromba was not present while this discussion was taking place, and thus Kayishema went to find him. The authorities then met with Father Seromba. Approximately one minute later, the witness heard Ndahimana say "now you can start," after which Kayishema told the Caterpillar driver: "Now you can go ahead." The bulldozer then demolished a wall, and assailants ran into Nyange church to kill the refugees who had survived. The surviving refugees responded by throwing stones at the attackers. The *bourgmestre* would then order the assailants to leave the church while the bulldozer attacked another wall. Each time a wall collapsed the assailants would enter the church to kill the refugees who had survived the falling debris.[1133] The attack finished at approximately 3 to 4 p.m. A small section of a wall of the church remained standing but as it sheltered no refugees there was no reason to bring it down.[1134] The bodies were buried in a mass grave near the road leading to Kibuye.[1135] In response to a prosecution question asking whether Ndahimana had tried to stop the killings, the witness answered: "What you're saying is highly

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[1128] T. 3 November 2010 p. 26.
[1129] T. 3 November 2010 p. 20.
[1130] T. 4 November 2010 p. 42; Prosecution Exhibit 20.
[1131] T. 4 November 2010 p. 63 ("Q.: Were you one of these Hutus who were targeting Tutsis, Mr. Witness? A.: I was."); T. 5 November 2010 p. 11 (ICS) ("I also played a role in the killing of other persons, but the eleven persons are persons I physically killed.").
[1132] T. 4 November 2010 pp. 57-59.
[1133] T. 4 November 2010 p. 59.
[1134] T. 4 November 2010 pp. 59-60.
[1135] T. 4 November 2010 p. 62.

amusing." Ndahimana's only concern was preventing the deaths of Hutu assailants; "he never had any pity on the Tutsis."[1136]

6.2.5 Prosecution Witness CNT

593. Witness CNT, a Hutu, was a local government official in 1994.[1137] Witness CNT participated in the attack at Nyange parish on 16 April 1994.[1138]

594. The witness testified that he went to Nyange church on the day it was destroyed by bulldozers in 1994 but could not remember the exact date.[1139] On that day, IPJ Kayishema arrived in the witness' *cellule* driving a white Pajero. The witness was not wearing a watch but estimated that it was approximately noon when Kayishema arrived. Kayishema informed the witness that Ndahimana had asked members of the population to go to the church because the church had been attacked by the "enemy," which the witness understood to mean "by Tutsis."[1140] As this message came from the *bourgmestre*, the witness immediately went to the church aboard a vehicle belonging to a person from Ruhengeri. Along the way, he also saw a certain Jigoma driving a white Toyota pickup belonging to Witness CDZ. That vehicle was also transporting Hutu assailants to Nyange parish, and the witness believed that Jigoma had been authorised by the *bourgmestre* to drive this vehicle.[1141]

595. The witness was not armed when he left his *cellule*, but picked up stones upon his arrival at Nyange parish.[1142] When he arrived, the witness saw Kayishema holding a rifle and firing at the refugees inside Nyange church. He also saw Ndahimana holding a rifle and moving amongst attackers and instructing them to "[m]ake sure nobody escapes."[1143] Ndahimana was wearing a black coat over black trousers and had no beard.[1144] A bulldozer started destroying the church; some of the attackers continued shooting at the church, while others were throwing stones, and still others were using traditional weapons to kill the Tutsis.[1145] The bulldozers began demolishing the church, and when the refugees opened the door to flee, the assailants would shoot or throw stones at them. According to the witness, "everyone died."[1146]

596. The witness left at approximately 3 p.m., while the bulldozer was digging a pit for the corpses.[1147] The witness believed that Ndahimana was responsible for the killings adding that, "...if Grégoire Ndahimana had wanted to prevent the attackers from killing those people, the attackers wouldn't have killed them." Moreover, a certain Philippe Twahirwa told the witness that he and others had received cows from Ndahimana as a reward for their participation in the attacks.[1148]

[1136] T. 4 November 2010 p. 61.
[1137] Prosecution Exhibit 44; T. 10 November 2010 p. 40 (ICS).
[1138] T. 10 November 2010 p. 51 (ICS).
[1139] T. 11 November 2010 p. 13 (On the basis of the witness' entire testimony, the Majority is able to infer that the witness was testifying about the events that took place on 16 April 1994).
[1140] T. 10 November 2010 pp. 43-44. *See also* Witness CBK: T. 3 November 2010 pp. 18-19.
[1141] T. 10 November 2010 pp. 43-45.
[1142] T. 10 November 2010 p. 44.
[1143] T. 10 November 2010 pp. 45-48; T. 11 November 2010 p.1.
[1144] T. 11 November 2010 pp. 2-3.
[1145] T. 10 November 2010 pp. 47-48.
[1146] T. 10 November 2010 p. 47.
[1147] T. 10 November 2010 p. 48.
[1148] T. 10 November 2010 p. 49.

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6.2.6 Prosecution Witness CBY

597. Witness CBY, a Hutu, was in a position to observe what was taking place at Nyange parish in April 1994.[1149] Early on the morning of 16 April 1994, the witness saw Ndahimana and other authorities at Nyange presbytery. They met with "the priest" and then left the presbytery.[1150]

598. The witness went outside and, before returning to Nyange presbytery, discovered that a second bulldozer had arrived. The bulldozers were used to demolish the church. Father Seromba was in the presbytery during the demolition of Nyange church. The witness himself did not emerge from his position within the presbytery often that day. Later that afternoon, Seromba was drinking beer on the balcony together with two other priests. The witness saw Ndahimana after the church was destroyed. He was drinking beers in front of the priests' living quarters together with "the authorities I mentioned earlier on," a certain Kimaranzara, and a number of police officers. They had crates of beer which they were sharing with the bulldozer drivers.[1151]

6.2.7 Prosecution Witness CDJ

599. Prosecution Witness CDJ, a Hutu, was in a position to know what took place at Nyange parish in April 1994.[1152]

600. He went to Nyange parish on a Saturday in April but could not specify the date.[1153] He arrived there at approximately 7 p.m.[1154] When he arrived, he noticed that Nyange church had been destroyed but saw no visible corpses. He was told by an individual at Nyange presbytery that the church had been demolished by a Caterpillar.[1155]

601. When the witness arrived, he saw Ndahimana, Kanyarukiga and Father Seromba on the balcony of Nyange presbytery in front of Father Seromba's room.[1156] They were drinking beers and in a joyous mood. They remained there for approximately three hours, but the witness was not within earshot and could not hear what they were saying.[1157]

6.2.8 Prosecution Witness CBT

602. In April 1994, Witness CBT, a Hutu farmer, was living in Kivumu *commune*.[1158] On 15 April 1994, the witness was at Nyange church until approximately 4 p.m. and did not return there.[1159] The following day was a Saturday.[1160] The witness went to the trading centre before afternoon to make a purchase, but did not spend the entire day there.[1161] Saturday was market day at Mutanoga and the witness heard other shoppers say that the church had been demolished. *Interahamwe* at the market place also told the witness that they had seen Ndahimana confiscate a

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[1149] T. 9 November 2010 p. 36.
[1150] T. 9 November 2010 pp. 54-55; T. 10 November 2010 pp. 32-33 (ICS).
[1151] T. 9 November 2010 p. 55.
[1152] T. 11 November 2010 p. 24 (ICS).
[1153] T. 11 November 2010 p. 31.
[1154] T. 11 November 2010 pp. 39, 40.
[1155] T. 11 November 2010 p. 31.
[1156] T. 11 November 2010 p. 31.
[1157] T. 11 November 2010 pp. 31, 40.
[1158] T. 7 September 2010 p. 60.
[1159] T. 7 September 2010 p. 48; T. 8 September 2010 p. 3.
[1160] T. 8 September 2010 p. 3.
[1161] T. 8 September 2010 pp. 4-5.

gun from Ndungutse that day. The same individuals told the witness that Ndahimana had first issued the gun to Ndungutse.[1162]

6.2.9 Defence Witness ND17

603. Witness ND17, a Hutu, was in a position to know what took place at the convent in April 1994.[1163] During the events of April 1994, he remained at the convent on a permanent basis.[1164] The witness lived approximately 200 metres away from Ndahimana and knew that Ndahimana was a person of authority, but thought that Ndahimana did not know him.[1165]

604. The witness believed that Ndahimana faced problems in April 1994 because "he refused to collaborate with the persons who were killing people."[1166] The witness believed that Ndahimana was a "targeted person… because he was not involved in the business of killing people," and because he had arrested "some murderers."[1167]

605. Two attacks on the convent by *Interahamwe* on the convent were repelled by police officers assigned by Ndahimana to protect the nuns, four of whom were Tutsi and two of whom were Hutu. The police officers were assigned to the Convent on 16 April 1994, and the attacks on the convent took place after the destruction of Nyange church.[1168]

606. On Saturday 16 April 1994, the accused knocked on the door of the convent at approximately 5 a.m. The witness opened the door and Ndahimana walked inside without saying hello. He appeared to be very sad.[1169] The witness saw Ndahimana leave at approximately 7 p.m. that evening using the south entrance of the convent, and did not see him leave between his arrival and departure.[1170] On Saturday 16 April 1994, the witness could hear the destruction of Nyange church from the "convent where I was at night."[1171]

6.2.10 Defence Witness ND35

607. Witness ND35, a Hutu, was in a position to observe what took place at the convent in April 1994. The witness first saw Ndahimana during Ndahimana's inauguration ceremony as *bourgmestre*.[1172]

608. After the war started, the witness would arrive at the convent at approximately 4 p.m. and leave at about 7 a.m. The witness was aware that Nyange church was under attack but did not go there. At approximately 5 a.m. on Saturday 16 April 1994, the witness saw Ndahimana arrive at the convent. Witness ND17 opened the door and Ndahimana entered quickly. The witness and other persons present stopped Ndahimana to ask him what was going on. One of the other individuals present at the time informed the witness that this person was the *bourgmestre*. The witness then left the convent at approximately 7 a.m. Although he returned to the convent at 4 p.m., he said it was

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[1162] T. 8 September 2010 pp. 3-4.
[1163] T. 3 May 2011 p. 2 (ICS).
[1164] T. 3 May 2011 pp. 6-8 (ICS).
[1165] T. 3 May 2011 pp. 4-5 (ICS), 19-20.
[1166] T. 3 May 2011 pp. 4-5 (ICS).
[1167] T. 3 May 2011 p. 17.
[1168] T. 3 May 2011 pp. 9-10 (ICS), 13.
[1169] T. 3 May 2011 pp. 4, 10 (ICS).
[1170] T. 3 May 2011 p. 10 (ICS).
[1171] T. 3 May 2011 p. 8 (ICS).
[1172] T. 3 May 2011 p. 29 (ICS).

not until approximately 7:30 p.m. that he learned from other persons at the convent that Ndahimana had left approximately a half hour earlier.[1173]

609. The next day, Sister Johanna explained to the witness that Ndahimana was seeking refuge from persons who wanted to kill him named Callixte, Kimana and Kayishema. The witness added that during the war, Ndahimana saved lives, including the lives of the four nuns at "Nyange church" who survived the war.[1174]

6.2.11 Defence Witness BX3

610. Witness BX3, a Hutu, was a small business owner in 1994.[1175] The witness knew Ndahimana because he was a native of her husband's *commune*.[1176] When the President died, Witness BX3 was in Kigali. On 7 April 1994, she left Kigali for Kivumu.[1177]

611. The witness saw Ndahimana on 12 April 1994 when he issued a *laissez-passer* to her. "After [12 April 1994], Ndahimana was in hiding because people wanted to do harm to him…But we knew very well that he wasn't dead. He was still alive, although he was in hiding."[1178]

612. On 16 April 1994, the witness did not see Ndahimana. She heard that he had gone into hiding in the convent of *Les Sœurs de l'Assomption* that day.[1179] She was told this by an acquaintance named Mama Yuwani, who was able to leave the convent because she had not been targeted by the killers.[1180]

6.2.12 Defence Witness Melane Nkiriyehe

613. In April 1994, Melane Nkiriyehe was the budget director in the Ministry of Finance in Kigali. He was also a member of the technical committee of Kivumu *commune* and knew the accused very well.[1181] In early April 1994, the witness lived in Kigali, but then moved with the interim government to Murambi in Gitarama on 13 April 1994. He remained there until the fall of the government, but "did a hop" to Kivumu *commune* in late May 1994. During this trip he saw Ndahimana briefly.[1182]

614. He reported that Ndahimana was suspected of associating himself with the RPF in 1993.[1183] He also added that Ndahimana was not respected by some authorities of Kivumu *commune*, including Witness CDL and Kanyarukiga.[1184]

[1173] T. 3 May 2011 pp. 31 (ICS), 36.
[1174] T. 3 May 2011 p. 38.
[1175] T. 23 February 2011 p. 2; Defence Exhibit 116.
[1176] T. 23 February 2011 pp. 4-5.
[1177] T. 23 February 2011 p. 17 (ICS).
[1178] T. 23 February 2011 pp. 34-35.
[1179] T. 23 February 2011 p. 14.
[1180] T. 23 February 2011 p. 15.
[1181] T. 22 February 2011 pp. 3-4, 17-18.
[1182] T. 22 February 2011 p. 20.
[1183] T. 22 February 2011 pp. 7-8.
[1184] T. 22 February 2011 pp. 13-16, 18-19, 33.

6.2.13 Defence Witness ND6

615. Witness ND6, a Hutu, was living in Kivumu *commune* in 1994.[1185] The witness knew Ndahimana well because he would often see him at mass.[1186] The witness was among the assailants at Nyange parish on 15 and 16 April 1994.[1187]

616. The witness arrived at Nyange parish at approximately noon on 16 April 1994 together with two neighbours. According to the witness, "we knew what had happened on the day before, and we knew what had to happen on that day."[1188] When the witness arrived, the roof of Nyange church was still intact and the bell tower was still standing, and the refugees were being pelted with stones.[1189] Upon his arrival, the witness went to greet Ndungutse. The witness heard Ndungutse telling Witness CDL "Our leader [Ndahimana] has abandoned us. He's forgotten us. Where is he? He asked. And [Ndungutse] said: Well, I'm going to look for five boys--five young boys to accompany me and check whether he's hiding in his house." The witness then went with a group to Ndahimana's house, which was approximately one kilometre away from the church, but they did not find him. When the search team arrived back at the church, Ndungutse said, "Even if we have not been able to find Ndahimana, whatever the case, we will continue our work."[1190]

6.2.14 Defence Witness ND21

617. Witness ND21, a Hutu, was married to Prosecution Witness CBR at the time of her testimony.[1191] She testified that on 15 April 1994, a large number of assailants attacked Nyange church. Witness CBR returned from that attack around 9 p.m. with a wound to his forehead and informed her about what had taken place at the church.[1192] He said he had been hit with a stone when the groups were throwing stones at each other. He was in a bad shape.[1193]

618. Witness CBR was sick for one week and did not participate in the attack on Nyange church on 16 April 1994. The witness cared for her husband's wounds and was by his side throughout that period.[1194]

619. Although Witness ND21 was not physically present during the attacks at Nyange church in April 1994, she was informed about the attacks by a number of other persons as well.[1195] Witness CBR never told his wife that Ndahimana had been present when the attacks took place.[1196]

[1185] Defence Exhibit 99.
[1186] T. 27 January 2011 p. 17.
[1187] T. 27 January 2011 pp. 20-21.
[1188] T. 27 January 2011 p. 14.
[1189] T. 27 January 2011 p. 14.
[1190] T. 27 January 2011 pp. 15, 26 (The witness went to Ndahimana's house together with Didace Habyarimana, Habiyakare and other youngsters from Kibilira, including Rwarakabije); T. 27 January 2011 p. 32 (The distance between Nyange church and the communal office could be covered in 10 minutes of walking).
[1191] T. 14 February 2011 pp. 3, 4 (ICS).
[1192] T. 14 February 2011 p. 19.
[1193] T. 14 February 2011 p. 48.
[1194] T. 14 February 2011 pp. 20, 37.
[1195] T. 14 February 2011 p. 42.
[1196] T. 14 February 2011 p. 21.

6.2.15 Defence Witness ND7

620. Witness ND7, a Tutsi farmer, lived in Kivumu *commune* in 1994.[1197] She knew Ndahimana as the *bourgmestre* of Kivumu *commune*.[1198] At approximately 4 p.m. on 10 April 1994, the witness left her home to seek refuge at Nyange parish.[1199] There were over 1000 refugees at the parish while she was there.[1200]

621. On 16 April 1994, the witness was hiding in a room at Nyange presbytery. From the window in that room she could see the bell tower of Nyange church and the Statue of the Virgin Mary.[1201] The 16 April 1994 attack began at approximately 5 a.m. By 2 p.m. the church had been destroyed. The witness did not see Ndahimana at Nyange parish on 16 April 1994. Indeed, she did not see him until approximately 9 a.m. on 17 April 1994, when he arrived to take survivors of the attack, including the witness, to the hospital.[1202]

6.2.16 Defence Witness ND24

622. Witness ND24, a Hutu, worked at a local company in April 1994.[1203] He manned a roadblock outside Nyange parish between 14 and 16 April 1994, and participated in the attack on Nyange church on 15 April 1994.[1204] The witness first became aware of Ndahimana when Ndahimana became *bourgmestre* in October 1993.[1205]

623. According to the witness, he did not participate in the attack on Nyange parish on 16 April 1994 as he had other commitments.[1206] Nevertheless, he testified that "the attackers who had come from Kibilira came shouting. Some of them were wearing banana leaves, and they went to the church where they found people who had spent the night…And the bulldozer started bringing down the church. And thereafter, the persons who were killed were buried. After that event, I recall that the…IPJ Kayishema awarded the attackers who had accepted to spend the night at the church in order to prevent the Tutsi[s] from fleeing." It would appear that he learned of these details from an associate and from traders he met at the trading centre when he went there at approximately 4 or 5 p.m. that day.[1207]

624. The witness did not man the roadblock outside Nyange parish on 16 April 1994, but believed that if Ndahimana has travelled past Nyange market square that day he would have seen him, despite the large numbers of people at the square.[1208] The witness did not see Ndahimana on 16 April 1994.[1209]

[1197] T. 24 January 2011 p. 2; Defence Exhibit 93.
[1198] T. 24 January 2011 p. 2.
[1199] T. 24 January 2011 p. 3.
[1200] T. 24 January 2011 p. 4.
[1201] T. 24 January 2011 p. 15.
[1202] T. 24 January 2011 pp. 15-16.
[1203] Defence Exhibit 112.
[1204] T. 21 February 2011 pp. 2-3.
[1205] T. 21 February 2011 pp. 6, 16.
[1206] T. 21 February 2011 p. 15.
[1207] T. 21 February 2011 pp. 15-16, 27.
[1208] T. 21 February 2011 p. 28.
[1209] T. 21 February 2011 pp. 16, 28.

6.2.17 Defence Witness KR3

625. Witness KR3, a Hutu, worked for Kivumu *commune* in April 1994.[1210]

626. On 16 April 1994, the witness went to Nyange church to provide food to two refugees he had sent to seek refuge at Nyange parish. He arrived at approximately noon and left by 1:30 p.m. When the witness arrived at the church, he saw a huge crowd gathered there and was afraid. The bulldozers had begun striking at the church, the roof had collapsed, and the bulldozer was attacking a wall. By the time the witness left the area, only the bell tower remained standing.[1211]

627. At Nyange church, the witness saw Ndungutse; Kanyarukiga; Mbakilirehe, Habiyambere, Kayishema, and a communal police officer named Niyitegeka. He did not see Ndahimana, and believed that he would have noticed him had he been there. No one ever told the witness that Ndahimana had been present at the church on 16 April 1994. The witness assumed that Ndahimana had remained at the funeral of Dr. Ntawuruhunga.[1212]

6.2.18 Defence Witness ND22

628. Witness ND22, a Hutu farmer, was living in Kivumu *commune* in 1994.[1213] He knew Ndahimana because he was the *bourgmestre* of Kivumu *commune*.[1214] The witness confessed during *Gacaca* proceedings to having participated in the attack of 15 April 1994 at Nyange parish.[1215]

629. On 16 April 1994, the witness arrived at Nyange parish at approximately 6:30 or 7 a.m.[1216] According to the witness, no refugees were killed by members of the population that day; refugees were killed when Nyange church collapsed on them.[1217] The bulldozers began by destroying the wall by the sacristy at approximately 10 a.m. The bell tower collapsed and the attack ended at approximately 3 p.m.[1218] The witness described his role at the parish on 16 April 1994 as that of a "cynical observer."[1219] The witness did not see Ndahimana that day,[1220] and named the leaders of the attack that day as Kayishema, Witness CDL, Mbakilirehe and Ndungutse.[1221]

6.3 Deliberations

6.3.1 Credibility of the Witnesses

6.3.1.1 *Prosecution Witness CBR*

630. At the outset, the Majority acknowledges that in a guilty plea dated 26 January 2001, the witness confessed to having participated for three days in the crimes committed at Nyange parish,

[1210] T. 24 January 2011 p. 54; Prosecution Exhibit 95.
[1211] T. 24 January 2011 pp. 67-68.
[1212] T. 24 January 2011 p. 69.
[1213] T. 20 April 2011 pp. 2, 19; Defence Exhibit 125.
[1214] T. 20 April 2011 p. 3.
[1215] T. 20 April 2011 p. 22.
[1216] T. 20 April 2011 p. 9.
[1217] T. 20 April 2011 p. 10.
[1218] T. 20 April 2011 pp. 9-10.
[1219] T. 20 April 2011 p. 10.
[1220] T. 20 April 2011 p. 12.
[1221] T. 20 April 2011 p. 9.

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including 16 April 1994.[1222] The Majority finds it unlikely that an individual would consistently and freely confess to having participated in crimes in which he did not actually take part. Thus, the Majority considers that when Witness ND21 testified that her husband was injured on 15 April 1994, she was either mistaken about the date or she was untruthful for some other reason.

631. The Majority recalls its serious concerns with respect to the credibility of Witness CBR (Chapter III, Section 5.3.1.5). Witness CBR is an accomplice witness currently detained, and the Majority will consider his testimony with caution given its previous findings considering the credible and reliable Defence evidence on Witness CBR's behaviour in prison. Indeed, Defence witnesses ND24, ND34 and ND22 claimed that while in prison, Witness CBR exerted pressure on other detainees to implicate authorities, including Ndahimana, in their confessions (Chapter III, Section 5.3.1.5).[1223]

632. Addressing Witness CBR's previous statements, the Majority acknowledges that he had not been sentenced yet at the time of his statement dated 9 October 2001.[1224] The Majority recalls that "a witness who faces criminal charges that have not yet come to trial 'may have real or perceived gains to be made by incriminating accused persons' and may be tempted or encouraged to do so falsely."[1225]

633. That being said, Witness CBR provided statements to ICTR investigators dated August/September 2000 and 9 October 2001 and confessed to the Kibuye Prosecutor's office on 26 January 2001.[1226] Those statements as well as his prior testimony in the *Seromba* case described Ndahimana's participation in a manner consistent with his evidence at trial.[1227]

634. In conclusion, the Majority may rely on Witness CBR's evidence where it is corroborated, despite its reservations about the witness' character and possible motive to charge the accused through his activities in prison.

6.3.1.2 *Prosecution Witness CDL*

635. The Majority notes that other witnesses in the trial named Witness CDL as one of the authorities involved in the attack of 16 April 1994.[1228] The evidence at trial shows that the witness tried to minimize his role in the killings of 15 and 16 April 1994 at Nyange parish. Several witnesses named him in relation to his involvement in the attacks of those two days. However, the witness' admissions and acknowledgement of his participation in the attacks on Nyange church are very limited. Indeed, he admitted that he was the one who went to ask someone to send the bulldozers that were used for the burial of the corpses on 15 April 1994.[1229] In addition, he admitted that he participated in the "consultations" at the Kanyarukiga pharmacy and opposite the office in which the parish secretariat was located on the morning of 16 April 1994 at around 10 a.m.[1230] When asked about the sentence of life imprisonment with criminal restriction that he is currently

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[1222] Defence Exhibit 34, p. 27.
[1223] Witness ND24: T. 21 February 2011 p. 32; Witness ND22: T. 20 April 2011 pp. 16, 29; Witness ND34: T. 17 February 2011 pp. 66-68, T. 18 February 2011 pp. 8-9.
[1224] *See* Defence Exhibit 33, p. 3 ("I have not been sentenced yet.").
[1225] *Ntakirutimana* (AC) Judgement, para. 129.
[1226] Defence Exhibit 32; Defence Exhibit 33; Defence Exhibit 34.
[1227] Defence Exhibit 35.
[1228] Witness CBK: T. 3 November 2010 pp. 18-19; Witness CNJ: T. 4 November 2010 p. 57; Witness ND6 T. 27 January 2011 pp. 15-16, 21; Witness ND22: T. 20 April 2011 p. 9.
[1229] T. 12 November 2010 p. 12 (ICS).
[1230] T. 19 November 2010 p. 16.

serving, he stated that he was convicted "on the basis of false accusations" for distributing weapons that were used during the attack on Nyange church.[1231] Another example of this witness' attempts to downplay his role in the attacks at Nyange parish can be found in the discussions amongst authorities on how best to destroy the church. Witness CNJ testified that Witness CDL was among the authorities discussing the best way to destroy the church, while Witness CDL only testified that he heard those authorities talking.[1232]

636. The Majority takes into consideration that the witness' account of events that day may have been manipulated to minimise his role in the events and to shift the blame to the accused. In addition, the Majority recalls its previous findings that the witness might have held a grudge against the accused because he had also been considered for the position of *bourgmestre* that Ndahimana ultimately won. (Chapter III, Section 4.3.1.9).

637. However, the Majority bears in mind that his leading role in the attacks means he likely would have been in a good position to discern the role of individual participants in the events as they unfolded. In sum, the Majority may rely on Witness CDL's evidence where it is corroborated, despite its reservations about the witness' character and possible motives, discussed above, to charge the accused.

6.3.1.3 *Prosecution Witness CBK*

638. The Majority recalls that Witness CBK was 14 years old at the time of the events at issue.[1233] In his first statement to ICTR investigators, dated 15 August 2000, the witness did not mention Ndahimana with respect to the attack of 16 April 1994 but did refer to him in relation to a prior meeting on that same day. However, the Majority notes that the statement focused almost exclusively on Father Seromba.[1234] A second statement dated 26 April 2001 focused on Gaspard Kanyarukiga, where again the witness referred to no other attackers on 16 April 1994 apart from Seromba.[1235] In his third statement, taken in October and November 2002, the witness stated:

> "On 16 April 1994, in the morning at about 0800 hours, the leaders again gathered at the Presbytery. They first had a meeting in one of the rooms of the Presbytery. Later I saw Seromba, Ndahimana, Kayishema, Kanyarukiga, Colonel Nzaphakumunsi, Ndungutse and [Witness CDL] standing in front of the Secretariat of the Parish discussing....Kayishema told [Witness CDL] to assist them in bringing the Caterpillar to destroy the Church...the group was discussing about the number of Tutsis intellectuals who were hiding in the Tower."[1236]

639. The witness then described the attack and the destruction of Nyange church but did not mention Ndahimana's presence. Nor did he mention Ndahimana's presence when he referred to the fact that Seromba, Kayishema and others shared drinks after the killings. Finally, he also claimed that "[i]n Kivumu people had more confidence in the priests than in the local government officials.

[1231] T. 12 November 2010 p. 34 (ICS).
[1232] T. 4 November 2010 pp. 57, 59 (Witness CNJ arrived at approximately 9 a.m. He saw assailants surrounding Nyange church. Kayishema, Ndahimana, Védaste Murangwabugabo, Witness CDL, Ndungutse, Joseph Habiyambere and Kanyarukiga were all present).
[1233] The young age of the witness at the time of the events requires that his testimony be viewed with some caution. *See Simba* (TC) Judgement, para. 78.
[1234] Defence Exhibit 40.
[1235] Defence Exhibit 39.
[1236] Defence Exhibit 42, pp. 8-9.

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Father Seromba was more powerful than the *bourgmester* (*sic*)".[1237] These observations, taken in conjunction with the absence in each of his previous statements of any mention of Ndahimana's presence or involvement in the attacks of 16 April 1994 causes the Majority to approach this witness' testimony with caution. Therefore the Majority may rely on this witness' evidence where corroborated.

6.3.1.4 *Prosecution Witness CNJ*

640. Witness CNJ participated in attack at Nyange parish on 16 April 1994, and is an accomplice witness. The witness explained that he was arrested in January 1997 and sentenced to eight years imprisonment. Since he had already spent 11 years in custody, after convicting him, the judges released him because he had spent more time in prison awaiting trial.[1238] Following this timeline, the witness probably received his sentence around 2008, meaning that all his prior statements were given while he was detained and awaiting conviction. The Majority notes that in past statements and confessions to the Rwandan authorities, the witness did not detail all the crimes he committed—possibly to minimise his own role in the crimes that took place in April 1994. Furthermore, in discussing the statements he gave in Gisovu prison, the witness admitted that he "did not speak the truth in all these letters" because he did not want to be summoned to testify in some trials.[1239] He also lied in his November 2001 statement regarding Seromba's involvement because he had been promised that he would receive money to do so.[1240] The witness's admission that he would ready to lie for money warrants caution. Additionally, the witness did not implicate the accused until he provided supplementary information to the Rwandan authorities in November 2001, after Ndahimana had been indicted before this Tribunal.[1241]

641. However, the witness was a free man at the time of his testimony.[1242] In addition, during his testimony at trial he provided significant detail about the 16 April 1994 attack on Nyange parish and the participants.[1243] Taking these various considerations together, the Majority may rely on this witness' evidence where corroborated.

6.3.1.5 *Prosecution Witness CNT*

642. Witness CNT participated in the attack at Nyange parish on 16 April 1994 and is therefore an accomplice witness. At the time of his testimony, he had confessed his crimes and was doing community service.[1244]

643. The witness did not remember the date on which the church was destroyed,[1245] but his account is nevertheless consistent with those of other witnesses who testified about the attack on 16 April 1994. Therefore, the Majority concludes that he was describing events that took place that day.

[1237] Defence Exhibit 42, pp. 5, 8-10.
[1238] T. 4 November 2010 p. 64 (ICS).
[1239] T. 5 November 2010 pp. 32, 45.
[1240] T. 5 November 2011 pp. 20-22 (ICS).
[1241] Defence Exhibit 46.
[1242] T. 4 November 2010 p. 64 (ICS).
[1243] Defence Exhibit 52.
[1244] T. 10 November 2010 p. 51 (ICS).
[1245] T. 11 November 2010 p. 13 (This would be 16 April 1994 according to CBK's testimony).

644. The Majority finds that the witness' testimony lacks detail and is not sufficiently compelling to be of particular use when making findings beyond reasonable doubt. Additionally, of all the witnesses that testified regarding Ndahimana's presence during the demolition of Nyange church, he is the one who provided the most incriminatory report. Indeed, while the other Prosecution witnesses do not corroborate each other on the words uttered by Ndahimana during the attack, none of them reported that he "had a rifle and was moving about amongst the attackers…and he told us that 'No one should slip through your fingers'."[1246] In addition, contrary to the corroborated evidence showing that the accused was with other authorities when the church was demolished, Witness CNT testified that "Kayishema was standing close to the entrance which could be used by many persons. As for Seromba, he was at the entrance leading to the inner court. He seemed to be overtaken by the events. And as for Ndahimana, he was standing on the other side of the church."[1247] This contradicts the witness' prior statement of 25 March 2003 where he explained that the three men were standing in front of the main door of Nyange church.[1248] His testimony could be influenced by the desire to see the Kivumu authorities convicted for the killings at Nyange church in order to shift or share the blame falling from his own conviction. In conclusion, the Majority may rely on this witness where he is corroborated.

6.3.1.6 *Prosecution Witness CBY*

645. The Majority recalls that in a statement provided to ICTR investigators on 2 February 1996, it appears that the witness did not see Ndahimana during the attacks, but only a "few days before the destruction of the church. That must have been between the 12th and the 13th."[1249] In his 2000 statement, the witness mentioned having seen Ndahimana only on 8, 9, 11 and 12 April 1994.[1250] When these discrepancies were brought to the attention of the witness, he explained that when providing that statement, he only answered the questions that were put to him.[1251] The Majority finds this explanation unpersuasive.

646. In addition to the concerns discussed above, the witness' evidence was vague. Lastly, his account of events on 16 April 1994 also suffered from inconsistencies in comparison with evidence adduced at trial. For example, it appears that during the demolition of Nyange church, the witness was hiding in Nyange presbytery, which could explain the fact that he did not describe Ndahimana's role during the event. However, the witness reported that Seromba was also in the presbytery during the demolition, sharing beers with two other priests.[1252] In sum, the Majority may rely on this witness only if corroborated.

6.3.1.7 *Prosecution Witness CDJ*

647. The evidence of Witness CDJ is of little support given he arrived at the parish at 7 p.m. However, he consistently reported that he saw Ndahimana, Kanyarukiga and Father Seromba on the balcony of Nyange presbytery in front of Father Seromba's room and that they were drinking beers and in a joyous mood.[1253] On this basis, the Majority is able to infer that the witness was referring to 16 April 1994. The Majority observes that while the witness' testimony is vague regarding some

[1246] T. 10 November 2010 p. 45; T. 11 November 2010 p. 1.
[1247] T. 11 November 2010 p. 4.
[1248] Defence Exhibit 70.
[1249] Defence Exhibit 67; T. 10 November 2010 pp. 8, 34 (ICS).
[1250] Defence Exhibit 66.
[1251] T. 10 November 2010 p. 34 (ICS).
[1252] T. 9 November 2010 p. 55.
[1253] T. 11 November 2010 pp. 31, 39-40.

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aspects of the events, most notably the dates, the amount of detail as to what he could observe while the authorities were allegedly drinking the drinking is suspicious.[1254] The Majority has doubts as to whether the witness could observe the scene so precisely from his location while in complete darkness.[1255] Therefore, the Majority may rely on this witness only if corroborated.

6.3.1.8 *Prosecution Witness CBT*

648. The Majority notes that Witness CBT was not at the church on 16 April 1994, and thus his testimony is of little probative value in this instance.

6.3.1.9 *Defence Witnesses*

649. Defence Witnesses ND6, ND7, ND24, KR3 and ND22 all testified that they were present during the attack on Nyange parish on 16 April 1994, but did not see Ndahimana that day. In addition, Witness ND24 testified that although he was not present at the parish he would have known if Ndahimana had passed by Nyange centre on his way to the parish. The Majority has found elsewhere that the accused might have passed through the roadblock without Witness ND24 knowing it (Chapter III, Section 5.3.1.19).

6.3.2 Alibi

650. The Defence, in its Notice of Alibi filed on 3 September 2010, indicated that Ndahimana was hiding in the sisters' convent on the 16 April 1994. In support of its alibi, the Defence called Witnesses BX3, ND17 and ND35.[1256] The Majority recalls that according to Rule 67 (A) (ii) (a), the Defence shall notify the Prosecutor of its intent to raise an alibi "prior to the commencement of the trial," including the "names and addresses of Witnesses and any other evidence upon which the accused intend intends to rely to establish the alibi." In the present case, while the Defence disclosed the name and address of Witness BX3 at the beginning of the Prosecution case, on the 21 September 2010, the names and addresses of Witnesses ND17 and ND35 were not filed by the Defence until April 2011, three months after the start of the Defence case. In these circumstances, the Majority recalls that a late disclosure of alibi witnesses may affect its assessment of the credibility of the alibi.[1257]

651. Witness BX3 provided hearsay evidence about Ndahimana's stay at the convent on 16 April 1994. She testified that Mama Yumani, a nun at the convent, told her that Ndahimana had been there on 16 April 1994.[1258] Witnesses ND17 and ND35 were together at 5 a.m. on 16 April 1994 at the convent of *Les Sœurs de l'Assomption* ("the convent"). Each testified that they saw Ndahimana arrive at that hour. Witness ND17 also testified that he saw Ndahimana leave the Convent that evening at 7 p.m.,[1259] while Witness ND35 only said that he was told that the accused left the

[1254] T. 11 November 2010 p. 40 (The witness could indicate the type of beers the assailants were drinking—"I was able to see that they were using the beer known as Primus.").
[1255] T. 11 November 2010 pp. 24, 30, 51 (The witness explained that when he arrived at the parish that day he saw many corpses, he panicked therefore and "went towards the parish to the place where I was supposed to be." (p. 30). The witness further explained that he was standing close to the gate around 20 metres away from the authorities (p. 51)).
[1256] *See* Notice of Alibi, 3 September 2010; Supplement to the Notice of Alibi filed on 3rd September 2010, 21 September 2010; Additional Notice of Alibi, 7 April 2011; Additional Notice of Alibi, 13 April 2011.
[1257] *Bizimungu et al.*, Decision on Jerome Bicamumpaka's Notice of Alibi, 7 July 2005, para. 5; *Nchamihigo* (AC) Judgement, para. 97; T. 21 September 2011 p. 23.
[1258] T. 23 February 2011 p. 15 (ICS).
[1259] T. 3 May 2011 p. 10 (ICS).

convent at that time.[1260] Witness ND35 added that he was told that Ndahimana was hiding from persons named Callixte, Kimana and Kayishema.[1261]

652. The Majority is of the view that the witnesses' evidence about 16 April 1994 is vague, with the exception of the time at which they saw Ndahimana arrive at the convent and the time of his departure. Indeed, neither of these witnesses reports having seen Ndahimana between 5 a.m. and 7 p.m. on 16 April 1994. In addition, the belated disclosure of Witnesses ND17 and ND35's identities may suggest that the Defence has tailored the alibi evidence in order to corroborate that of Witness BX3. The Majority considers seriously the risk of recent fabrication in this particular case.

653. In addition, the Majority observes that Witness ND17 explained that his house was located only two kilometres away from the convent but that he stayed at the convent and did not come back home from 6 April 1994 until he left in May or June 1994. He explained that he stayed at work because the nuns were threatened and that he "could not abandon them to their fate." He also testified that he was married and father of five children. When asked why he chose to stay with the nuns rather than with his family he responded: "I was preoccupied by the fate of the nuns and also by the fate of my children, but since I could not be in two places at the same time, I continued guarding the nuns. Luckily, my children did not have any problems and the nuns also did not have any problem." The Majority finds the witness' explanation troubling, especially given that the nuns were guarded by policemen from 16 April 1994.[1262]

654. Witness ND35 testified that he saw Ndahimana on 16 April 1994 at 5 a.m., noting that he himself left the convent at 7 a.m. and came back later at 4 p.m. Later, during a discussion with his colleagues around 7:30 p.m., they told him that the accused had just left the convent about half an hour earlier.[1263] The Majority notes that, by his own testimony, the only event he could have actually witnessed first-hand was the arrival of the accused at approximately 5 a.m.

655. The Majority also notes that Witness ND6 testified that on 16 April 1994 he was at Nyange parish and overheard Ndungutse asking Witness CDL about the whereabouts of the *bourgmestre*. The witness then went to look for Ndahimana at his home but did not find him there.[1264] The Majority acknowledges that the witness is an accomplice, however at the time of his testimony he had confessed the crimes he committed, had already been convicted and had served his sentence.[1265] The Majority does not consider that he might have had a motive to testify in favour of the accused. However, the Majority notes that the witness admitted "You see, there were many persons. We couldn't see everyone. And I can only talk about the people I saw and those who were near me or with me." Talking specifically about Ndahimana, the witness testified that he did not see him but did not deny the possibility that he was there.[1266] It is possible that the ability of different witnesses to recognise different individuals, as well as their varying vantage points, may also account for his failure to see the accused.

[1260] T. 3 May 2011 pp. 31 (ICS), 36.
[1261] T. 3 May 2011 p. 33 (ICS).
[1262] T. 3 May 2011 pp. 13, 18-21.
[1263] T. 3 May 2011 pp. 31 (ICS), 36.
[1264] T. 27 January 2011 pp. 15, 26, 32 (The witness went to Ndahimana's house together with Didace Habyarimana, Habiyakare, and other youngsters from Kibilira, including Rwarakabije (p. 26). The Majority also notes that the distance between Nyange church and the communal office could be covered in 10 minutes of walking (p. 32)).
[1265] T. 27 January 2011 pp. 20-21.
[1266] T. 27 January 2011 p. 34 (ICS).

656. In conclusion, the Defence evidence establishes only that the accused arrived at the convent at 5 a.m. and left at 7 p.m. It does not account for his whereabouts at any point between these times on 16 April 1994. Further, the Majority notes two points. Firstly, the evidence would not prevent the accused from going to Nyange church after leaving the convent.[1267] Secondly, the Majority has already expressed doubts on the reliability of the testimonies of Witnesses ND17 and ND35—it has also found that their testimonies present a risk of recent fabrication of evidence which affects the Majority's analysis of their credibility.

657. For the reasons discussed above, the Majority considers the evidence of Witnesses ND17, ND35 and BX3 that Ndahimana came at the convent on the 16 April 1994 early morning and stayed there the whole day in hiding is not reasonably possibly true.

6.3.3 Meetings and Decision to Destroy Nyange Church, 16 April 1994

6.3.3.1 *Introduction*

658. Having found that none of the Prosecution witnesses can be relied upon without corroboration, the Majority will now consider whether the Prosecution's case offers any corroborated evidence that would support a finding beyond reasonable doubt regarding the allegations in paragraphs 29-31 of the Indictment.

659. After reviewing both the evidence and paragraphs 29-31 of the *Indictment*, the Majority notes that at least two meetings are alleged to have taken place on 16 April 1994 to plan the killing of the refugees and the destruction of Nyange church. Members of the JCE are alleged to have met for a first time at Nyange presbytery at an unspecified time on the morning of 16 April 1994. Following that meeting, the assailants shot at the church until they ran out of ammunition. A second meeting between the members of the JCE then took place later that morning near or at the presbytery. Following this meeting, the church was destroyed by a bulldozer. Those refugees who were not killed by the collapsing debris were killed by attackers entering the church after the collapse of the building's facade.

6.3.3.2 *First Meeting and Shooting at Nyange Church, 16 April 1994*

660. Prosecution Witnesses CDL and CBR both testified that in early morning, Ndahimana met with other members of the JCE. After this meeting Ndahimana fired a weapon at the refugees, signalling the start of the attack. According to Witness CBR, when he arrived at Nyange parish, he saw the following authorities conferring in front of the priest's office: Father Seromba, Ndahimana, Kanyarukiga, Habiyambere, Kayishema, Védaste Murangwabugabo, Ndungutse, Senior Warrant Officer Habarugira, and several *gendarmes*. The witness did not hear what the men were saying. After the discussion, Ndahimana shot through the doors and windows of the church to "set the tone" and the other authorities followed.[1268] When Witness CDL arrived at the parish, Ndahimana, the communal policemen, Kayishema and the other authorities were conversing. When this group arrived at the church secretariat, Ndahimana spoke to Father Seromba. After their discussion, "the *bourgmestre* came back to his policemen and told them that the work was going to begin."

[1267] The Majority recalls that the distance between the Nyange church and the convent is only 0.4 kilometres. *See* Report on Site Visit, 13 June 2011, para. 6 (iii).
[1268] T. 1 November 2010 pp. 24-25; T. 2 November 2010 p. 43 (From the right hand side of the courtyard near Nyange church, the witness was close enough to witness Ndahimana, standing at the front door of the church, shooting through the doors and windows of the church. Kayishema trailed after Ndahimana, also shooting into the church. Ndahimana "set the tone" and the other authorities followed).

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Ndahimana then opened fire on refugees inside Nyange church. Immediately thereafter, police officers began firing at the church.[1269]

661. The Majority notes that the witnesses both testified that they saw Ndahimana opening fire at Nyange church.[1270] Witness CBR testified that he saw Ndahimana using "a rifle that wasn't very long" and that had "strips (*sic*) around the shoulder."[1271] Witness CDL did not provide any information on the kind of weapon Ndahimana allegedly used; he only reported that Ndahimana opened fire on refugees inside the church.[1272]

662. However, the Majority notes that parts of their testimonies differ with regard to the participants of the meeting and with regard to how the meeting unfolded. According to Witness CBR, the participants of the meeting were Seromba, Ndahimana, Kanyarukiga, Habiyambere, Kayishema, Murangwabugabo, Ndungutse, Habarugira and *gendarmes*.[1273] According to Witness CDL, the *bourgmestre* spoke first to Kayishema, other authorities and communal policemen.[1274] After that, he apparently went alone to talk to Seromba in front of the church secretariat and came back to tell the policemen to start killing.[1275]

663. According to Witness CBR, after the discussion, Ndahimana, Kayishema and the other authorities, with the exception of Father Seromba, moved toward the church.[1276] It also appears that at least Ndahimana and Kayishema shot at the church.[1277] Witness CDL testified Ndahimana and the policemen accompanying him shot at the church.[1278]

664. The Majority recalls that it has expressed substantial doubts about the credibility of Witnesses CBR and CDL. The Majority recalls that Witnesses CBK, CBY, ND7 and ND22 were also in a position to observe what was happening at the parish early on 16 April 1994, before the start of the attack and the destruction of Nyange church. However, none of these witnesses testified about a first meeting and a first attack which occurred that day. While the different vantage points of the witnesses could explain the variances in their testimonies, the Majority considers that this first attack, if it had occurred, would have involved firearms as well as several people shooting at the church. Other people present at Nyange parish would have heard or would have been aware of its occurrence.

665. Taking into account the circumstances described above, the Majority finds that the Prosecution has not proven beyond reasonable doubt that the accused participated in a meeting at Nyange presbytery, nor have they proven that following this alleged meeting Ndahimana fired at the church, signalling the start of the attack.

[1269] T. 12 November 2010 p. 17 (Ndahimana then opened fire on refugees inside the church. Immediately thereafter, policemen also began shooting through broken church windows into the church. Because Ndahimana was the highest authority present at Nyange church, the witness considered the shot fired by Ndahimana "as the green light to kill the Tutsis who were in the church.").
[1270] Witness CBR: T. 2 November 2010 p. 43, T. 1 November 2010 p. 24; Witness CDL: T. 12 November 2010 p. 17.
[1271] T. 1 November 2010 pp. 24-25.
[1272] T 12 November 2010 p. 17.
[1273] T. 1 November 2010 p. 24.
[1274] T. 12 November 2010 pp. 15, 17.
[1275] T. 12 November 2010 p. 17.
[1276] T. 1 November 2010 p. 24.
[1277] T. 1 November 2010 pp. 24-25.
[1278] T. 12 November 2010 p. 17.

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6.3.3.3 *Second Meeting and Decision to Destroy Nyange Church, 16 April 1994*

666. According to Prosecution Witnesses CDL, CBR, CBK, CNJ and CBY a meeting attended by Ndahimana and other authorities took place on 16 April 1994. Following that meeting, the demolition of Nyange church by bulldozers began.

667. At the outset the Majority is satisfied that a meeting occurred in the morning, between 9 and 10 a.m.[1279] Turning to the location of the meeting, Witnesses CBR, CBK and CBY asserted that the discussion took place near Nyange presbytery.[1280] Witness CDL said that the meeting began at Kanyarukiga's pharmacy and that the authorities, including Ndahimana, then moved to Nyange church to meet with Father Seromba who was standing in front of the secretariat.[1281] These testimonies are not inconsistent. Indeed, it appears that the secretariat and the presbytery were in very close proximity to one another.[1282] Therefore the Majority is satisfied that a meeting occurred between 9 and 10 a.m. near the presbytery on the morning of 16 April 1994, the location and time of the meeting is established beyond reasonable doubt.

668. Witness CBR heard Kanyarukiga saying to other authorities, including Seromba, that Nyange church had to be demolished. According to Witness CBR, Ndahimana was present when Kanyarukiga made this statement. The witness did not know who gave the order to start destroying the church.[1283]

669. Witness CBK saw Kayishema, Ndahimana, Ndungutse and Seromba having a meeting at Nyange presbytery. As they approached the secretariat, Seromba asked Ndahimana what was to be done "because all attempts had failed." Ndahimana was together with IPJ Kayishema at that moment, and they insisted that Tutsi intellectuals would have to be killed, so the men decided to destroy the church tower in order to kill the refugees.[1284] The witness was standing at a nearby water tap and could therefore hear what Ndahimana and the others were saying because they were outside when they had this discussion.[1285]

670. Witness CBY explained that he saw Ndahimana and other authorities having a meeting but did not provide any information regarding Ndahimana's role.[1286]

671. Witness CNJ is the only witness reporting that the authorities including Ndahimana met with Father Seromba and that immediately after, Ndahimana said "now you can start," after which Kayishema told the Caterpillar driver, "Now you can go ahead."[1287] However, the witness' testimony that the accused gave the order to start the demolition of Nyange church is incompatible

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[1279] Witness CBR: T. 1 November 2010 p. 25 (After the shooting subsided, the authorities returned to their previous location near the presbytery); Witness CDL: T. 12 November 2010 pp. 19-20, T. 19 November 2010 p. 16 (The meeting occurred at approximately 10 a.m. at Kanyarukiga's pharmacy); Witness CBK: T. 3 November 2010 p. 17 (The meeting occurred at an unspecified time at Nyange presbytery); Witness CNJ: T. 4 November 2010 pp. 57, 59 (Reported that the meeting occurred around 9 a.m. but did not specify the location); Witness CBY: T. 9 November 2010 pp. 54-55, T. 10 November 2010 pp. 32-33 (ICS) (Testified that the meeting occurred "[i]n the morning" at the presbytery).

[1280] Witness CBR: T. 1 November 2011 p. 25; Witness CBY: T. 9 November 2010 p. 55; Witness CBK: T. 3 November 2010 pp. 17, 23; Prosecution Exhibit 8 (1).

[1281] T. 12 November 2010 pp. 19-20; T. 19 November 2010 pp. 16-17.

[1282] Prosecution Exhibit 35; Prosecution Exhibit 37; Prosecution Exhibit 38.

[1283] T. 1 November 2010 pp. 24-25; T. 2 November 2010 p. 56.

[1284] T. 3 November 2010 pp. 17, 23; Prosecution Exhibit 8 (1).

[1285] T. 3 November 2010 pp. 17-18.

[1286] T. 9 November 2010 pp. 54-55; T. 10 November 2010 pp. 32-33 (ICS).

[1287] T. 4 November 2010 p. 59.

with other testimonies on the same meeting. The Majority recalls that the while the witness mentioned Ndahimana's presence in some of his previous statements, in these statements, he never said that it was Ndahimana who ordered the drivers of the Caterpillar to start destroying Nyange church. The Majority considers this to be a serious omission. In addition, the Majority has previously decided that it would not rely on this accomplice's evidence unless corroborated[1288] (Chapter III, Sections 5.3.1.4, 6.3.1.4).

672. Witness CDL is the only witness testifying that the decision to destroy Nyange church was taken at Kanyarukiga's pharmacy by several persons including Kanyarukiga, Ndahimana and Kayishema. Father Seromba was not there.[1289] He added that subsequently, Ndahimana spoke to Seromba, who approved the decision to destroy the church.[1290] Following this discussion, a Caterpillar came and the destruction of the church began.[1291] The Majority recalls that it would not rely on this accomplice's testimony without corroboration.

673. It falls from the evidence recalled above that Ndahimana attended the meeting along with various other authorities. While his actions or level or contribution to that meeting is less clear, the Majority nonetheless concludes that the presence of the accused at the meeting is proven beyond reasonable doubt.

674. Turning to the purpose of the meeting, Witnesses CBR, CDL, CBK and CNJ all reported that the decision to destroy Nyange church was taken during this meeting.[1292] The Majority notes that Witnesses CDJ, CBY, ND11, ND12 and ND22 reported that the destruction of the church with the bulldozers started on 15 April 1994 and that the demolition stopped that same day because it began to rain and nightfall came.[1293] Further evidence established that the ultimate destruction of the church took place on 16 April 1994. Witness CDL explained, "So there was no destruction as such on the 15th. Only the windows were broken when the grenades were thrown. The windows

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[1288] T. 4 November 2010 pp. 57-59.
[1289] T. 12 November 2010 pp. 19-20; T. 19 November 2010 p. 16.
[1290] T. 12 November 2010 p. 19; T. 19 November 2010 p. 17.
[1291] T. 12 November 2010 pp. 19-20.
[1292] Witness CBR: T. 1 November 2010 p. 25 (After the shooting subsided, the authorities returned to their previous spot near the presbytery. The witness overheard Kanyarukiga saying, "This church has to be demolished, for within three days, we will be able to rebuild it." Ndahimana was standing next to Kanyarukiga when Kanyarukiga made this statement. The witness did not hear the rest of the conversation, but soon after Kanyarukiga spoke, Kayishema arrived with "special vehicles" that were used to demolish the church); Witness CDL: T. 12 November 2010 p. 19, T. 19 November 2010 p. 17 (After the meeting at Kanyarukiga's pharmacy Ndahimana spoke to Father Seromba and Seromba approved the decision to destroy the church. This discussion was held in the open, and the witness was close enough to hear Ndahimana and Seromba talking); Witness CBK: T. 3 November 2010 pp. 17-18, 23 (The men decided to destroy the church tower in order to kill the refugees hiding there); Witness CNJ: T. 4 November 2010 pp. 57-59 (The witness was standing near the authorities and heard them discussing the destruction of the church).
[1293] Witness CDJ: T. 11 November 2010 pp. 30-31 (On Friday night, the witness arrived at the parish at approximately 7 p.m. and found that part of the church had been destroyed and that there were dead bodies in the courtyard); Witness CBY: T. 10 November 2010 pp. 27, 30-32 (ICS) (They started to demolish the church on 15 April 1994 and completed the demolition on 16 April 1994); Witness ND11: T. 18 January 2011 pp. 35, 40 (While the witness was inside the church, a man called Leonard arrived with fuel and sprayed the church with petrol. The refugees saw a "special motor" arrive. It dug a pit in which the dead bodies were buried. This machine was then used to attack the north side of the church. Subsequently it began to rain and nightfall came. The special motor remained at the church compound); Witness ND12: T. 19 January 2011 pp. 6-8 (The attackers then tried to burn down the church using fuel but did not succeed. "Later," a Caterpillar arrived to bury the victims in a place called Rubagano. At approximately 4 or 5 p.m., the Caterpillar began attacking the walls of the church but stopped when it began raining. The *Interahamwe* withdrew and the refugees, including the witness, remained inside the church); Witness ND22: T. 20 April 2011 pp. 11-12 (After the killings and the burials, a Caterpillar began destroying the church, but it started raining and the demolition stopped because the wheels of the Caterpillar kept getting stuck in the mud).

were broken, but destruction *per se* took place on the 16th. The true demolition took place on the 16th of April."[1294] The Majority finds that the destruction of the church may have been attempted on 15 April 1994 but that it was actually destroyed on 16 April 1994.

675. The Majority also concludes that notwithstanding the attempts to destroy Nyange church on 15 April 1994, a decision to destroy the church was taken at the meeting on the morning of 16 April 1994. The evidence establishes that the decision was taken to kill the Tutsi refugees in Nyange church by destroying it. The Majority reaches this conclusion based upon the direct and circumstantial evidence adduced at trial. The attack and the ultimate destruction of the church started just after the meeting on 16 April 1994.

676. However, Ndahimana's mere presence during this meeting does not necessarily mean that he shared the criminal intent of the members of the JCE. As developed below, the Majority finds that the presence of the accused at Nyange church on 16 April 1994 might have been motivated by duress as credible evidence showing that he was under threat was adduced during trial.

677. In conclusion the Prosecution failed to prove beyond a reasonable doubt that the accused should be liable for the charges set in paragraph 30 of the Indictment.

6.3.4 Ndahimana's Participation in the Attack on Nyange Church

678. Paragraph 31 of the Indictment alleges that Ndahimana and other authorities ordered the assailants to use a bulldozer to destroy Nyange church, killing about 2,000 Tutsis refugees inside. The Indictment further alleges that Ndahimana was present during the destruction of the church and that he was instigating and supervising the assailants.

679. As a preliminary matter, the Majority notes that the Defence contends that the Prosecution did not properly plead its charge that on 16 April 1994 the accused "was moving around telling assailants that no refugees should escape."[1295] The Majority recalls that the accused is charged with "instigating the assailants to kill the Tutsi refugees and supervising the attack" on 16 April 1994 at Nyange church. In this context, the Majority recalls that while the Prosecution is obliged to state the material facts in the indictment, there is no such requirement that it must state all the evidence it intends to lead to prove those material facts.[1296] Therefore, the Defence objection is groundless.

680. Witnesses CDL, CNT, CNJ and CBK all testified that Ndahimana was present during the actual demolition of Nyange church on 16 April 1994.[1297] Witness CBT only heard that the church had been demolished.[1298]

681. Addressing now the evidence on Ndahimana's involvement during the attack, Witness CDL reported that the *bourgmestre* and Seromba tried to assist the drivers by showing them how "to

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[1294] Witness CND: T. 19 November p. 6; Witness ND24: T. 21 February 2011 pp. 15, 27; Witness ND7: T. 24 January 2011 p. 15; Witness ND6: T. 27 January 2011 p. 15; Witness CBR: T. 1 November 2010 pp. 23-27; Witness CBK: T. 3 November 2010 pp. 18-19, T. 4 November 2010 p. 4; Witness CNJ: T. 4 November 2010 pp. 57-59.
[1295] T. 21 September 2011 p. 73.
[1296] *Ntagerura et al.* (AC) Judgement, para. 21; *Ntakirutimana et al.* (AC) Judgement para. 470; *Niyitegeka* (AC) Judgement, para. 193.
[1297] Witness CDL: T. 12 November 2010 p. 21; Witness CBK: T. 3 November 2010 pp. 18-19; Witness CNJ: T. 4 November 2010 p. 59; Witness CNT: T. 10 November 2010 pp. 45-48, T. 11 November 2010 pp. 1-3.
[1298] T. 8 September 2010 pp. 3-4.

perform the various duties." He further testified that when refugees began throwing stones at the Caterpillar drivers, Ndahimana and Seromba provided protective gear to the drivers.[1299]

682. Witness CNT testified that Ndahimana directed the assailants to ensure that no refugee escaped from Nyange church while the attackers were destroying it.[1300]

683. Witness CNJ testified that each time the bulldozer demolished a wall, assailants rushed into Nyange church to kill the refugees who had survived the falling debris. Ndahimana would then choose when to order the assailants to leave the church so that the bulldozer could attack another wall without harming the assailants.[1301]

684. Witness CBK testified that Ndahimana was present when Seromba told the drivers of the bulldozers to start demolishing Nyange church and when the church was being demolished.[1302]

685. The Majority recalls that corroboration does not require witnesses' accounts to be identical in all aspects since "[e]very Witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others."[1303] Differences can be reasonably explained by the witnesses' varying vantage points during the attack, their respective knowledge of the involvement of particular attackers, and the passage of time.[1304]

686. The Majority finds that while the Prosecution witnesses corroborate each other as to the presence of the accused during the destruction of Nyange church, they fail to establish beyond reasonable doubt the role he played during the killings. Rather, the Prosecution witnesses each give a different account of Ndahimana's actions during the demolition of the church.

687. Witnesses CNT and CNJ reported that the accused ordered or directed the assailants during the attack.[1305] However, both of them are accomplices. The Majority further recalls that Witness CNT's testimony shows that he may be motivated by the desire to shift or share the blame falling from his own conviction. Turning to Witness CNJ, his willingness to lie in a written statement in exchange of money warrants his testimony to be taken with caution.[1306] The Majority does not find these witnesses credible with regard to their testimony on Ndahimana's actions during the attack on 16 April 1994.

688. Witness CDL reported that the accused assisted the drivers, notably by showing them how "to perform the various duties."[1307] Finally Witness CBK only refers to the accused's presence when Nyange church was being demolished.[1308]

689. Having considered the totality of the evidence, the Majority finds that the Prosecution only established beyond reasonable doubt that the accused was present during the attack on Nyange church. It has not proven that Ndahimana instigated the assailants to kill the Tutsis or supervised the attack at Nyange parish.

[1299] T. 12 November 2010 p. 21.
[1300] T. 10 November 2010 pp. 45-48; T. 11 November 2010 p. 1.
[1301] T. 4 November 2010 p. 59.
[1302] T. 3 November 2010 pp. 19, 26.
[1303] *Nahimana et al.* (AC) Judgement, para. 428.
[1304] *Munyakazi* (AC) Judgement, para. 107.
[1305] T. 4 November p. 59; T. 10 November 2010 pp. 45-48; T. 11 November 2010 p. 1.
[1306] *See* Chapter III, Section 5.3.1.4.
[1307] T. 12 November 2010 p. 21.
[1308] T. 3 November 2010 pp. 19, 26.

6.3.5 Drinks at Nyange Presbytery

690. Paragraph 32 of the Indictment alleges that after the destruction of Nyange church, Ndahimana and other authorities went to Nyange presbytery to celebrate by sharing drinks. The Prosecution relies on Witnesses CBY, CDJ and CBK in support of this allegation.[1309]

691. Witness CBK testified that following the destruction of Nyange church, Ndahimana, Father Seromba, Kayishema, Kanyarukiga, Christophe Mbakilirehe, *Conseiller* Dabama Nsidabyamere, Kanamugire, Colonel Nzaphakumunsi and others met at Nyange presbytery and drank wine and beer. According to the witness, "all we noticed is that they were feasting after the Nyange church had been destroyed." The authorities then threw some drinks to the *Interahamwe* who were downstairs. The witness, who was in the presbytery courtyard while this was taking place, concluded that "it could be noticed that those authorities were happy with what had happened."[1310] The Majority recalls however that Witness CBK did not originally mention Ndahimana's presence when he referred to the fact that Seromba, Kayishema and others shared drinks after the killings in his 2002 statement.[1311] In addition, Defence Exhibit 43 raises doubt as to whether Nzaphakumunsi was present on 16 April 1994 given that Nzaphakumunsi declared in his statement dated 2003 that he did not return to Nyange *secteur* before the end of April or the beginning of May 1994.[1312] Therefore, the Majority has serious doubts regarding the witness' credibility on this point.

692. Witness CBY saw Ndahimana drinking beers in front of the priests' living quarters after Nyange church was destroyed with "the authorities I mentioned earlier on," a certain Kimaranzara and a number of police officers. They had crates of beer which they were sharing with the bulldozer drivers.[1313] However, the Majority recalls that in his previous statements, the witness declared that the last day he saw the accused was 12 or 13 April 1994.[1314]

693. Witness CDJ saw Ndahimana, Kanyarukiga and Father Seromba on the balcony of Father Seromba's room at Nyange presbytery following the destruction of Nyange church. He testified that they were drinking beers and that the group was "in a rather joyous mood."[1315] However, the witness did not provide specific details on how he could witness that event from his location situated at least 20 metres away from the authorities and in complete darkness.[1316]

694. At the outset, the Majority observes that the evidence does not clearly and precisely show where the authorities shared the drinks or with whom, although it is established that Kanyarukiga and Seromba were present, along with Ndahimana.

695. The Majority finds that this particular paragraph of the Indictment does not allege any criminal act and that this allegation was adduced to prove the intent of the accused. The Majority recalls that for the genocidal intent to be proven through circumstantial evidence the finding that the accused had genocidal intent must be the *only* reasonable inference that can be drawn from the

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[1309] Witness CBK: T. 3 November 2010 p. 20; Witness CBY: T. 9 November 2010 p. 55; Witness CDJ: T. 11 November 2010 pp. 31, 40.
[1310] T. 3 November 2010 p. 20.
[1311] Defence Exhibit 40.
[1312] Defence Exhibit 43.
[1313] T. 9 November 2010 p. 55.
[1314] Defence Exhibit 66; Defence Exhibit 77.
[1315] T. 11 November 2010 pp. 31, 40.
[1316] T. 11 November 2010 pp. 24 (ICS), 30, 51 (Witness explained that when he arrived at the parish that day he saw many corpses, he panicked and "went towards the parish to the place where I was supposed to be." The witness further explained that he was standing close to the gate around 20 metres away from the authorities).

totality of the evidence.[1317] In the present case, the Majority finds that none of the three witnesses were among the group of person sharing drinks, the allegation that they were celebrating is therefore an inference made by the witnesses themselves. The Majority is reluctant to rely on the witnesses' interpretation of the event notably because each of their testimonies raises credibility concerns. Ultimately, the Majority finds proven beyond reasonable doubt that the accused shared drinks with Kanyarukiga, Seromba and possibly other persons after the killings on 16 April 1994. However, the evidence has not established beyond reasonable doubt the reasons for their sharing drinks.

6.3.6 Burial of the Bodies After the Killings

696. Paragraph 33 of the Indictment alleges that following the destruction of Nyange church, the bodies of Tutsis killed at Nyange parish were buried in mass graves at Nyange parish and the surrounding areas. The Trial Chamber notes that this paragraph of the Indictment does not allege a criminal *actus reus* or *mens rea*. Further, this paragraph is constructed in the passive tense and does not name an individual or group who buried the bodies. Therefore, the Trial Chamber will not make findings on this allegation.

6.3.7 Defence Case

6.3.7.1 *Defence Witnesses*

697. Defence Witnesses ND6, ND7, ND24, KR3 and ND22 all testified that they were present during the attack on Nyange church on 16 April 1994, but did not see Ndahimana that day. In addition, Witness ND24 testified that although he was not present at the parish he would have known had Ndahimana passed by Nyange market centre on his way to Nyange parish. The Majority has found elsewhere that the accused might have passed through the roadblock without Witness ND24's knowledge (Chapter III, Section 5.3.1.19).

698. The Majority recalls that Witness CBK and Witness KR3 were under the impression that "all the Hutus of the Kivumu *commune*" came to Nyange parish on 16 April 1994,[1318] and that there were more assailants than on previous days.[1319] The Majority estimates that thousands of persons (assailants and refugees alike) were present at the parish on 16 April 1994. Moreover, the Majority considers that the scene at the parish could only have been chaotic that day, given that the attack involved hundreds of assailants trying to kill the refugees and that the whole of Nyange church was destroyed by the use of bulldozers, causing the death of almost all the refugees.

699. In addition, none of the Defence witnesses were in a good position to be able to monitor all events and persons at the parish carefully. For example, Witness ND7 had little visibility from where she was hiding in a room at Nyange presbytery. From the window in that room she could see the bell tower of Nyange church and the Statue of the Virgin Mary.[1320] Witness KR3 remained at the church only from noon to 1:30 p.m.[1321] Further, Witness ND22's testimony was undermined by

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[1317] *Nahimana et al.* (AC) Judgement, para. 524.
[1318] Witness CBK: T. 3 November 2010 p. 17; Witness KR3: T. 25 January 2011 p. 21 (Witness stated that "the crowd of assailants who had attacked the church and which had come from all corners of Kivumu *commune*. There were even some who came from other *communes* apart from Kivumu *commune*....It was a compact crowd of people.").
[1319] T. 3 November 2010 p. 18.
[1320] T. 24 January 2011 p. 15.
[1321] T. 24 January 2011 pp. 67-68.

his assertion that no refugees were killed by members of the population that day; rather, refugees were killed when the church collapsed on them.[1322]

700. Further, the Majority notes that the evidence that Witnesses ND6 and ND22 did not see the accused at Nyange parish could be explained by their different vantage points and the chaotic nature of the events.

701. Taking these circumstances into account, the Majority is of the opinion that the Defence evidence is of limited probative value and fails to raise reasonable doubt as to Ndahimana's presence during the attacks on Nyange church on 16 April 1994.

6.3.7.2 *Threats to the Accused*

702. Witness ND6 testified that around noon on 16 April 1994, shortly after he arrived at Nyange parish, he went with a group to Ndahimana's house, following an order from Ndungutse and in the presence of Witness CDL.[1323] The witness and five other persons obeyed the order but did not find him.[1324] The witness also reported that: "Ndungutse's programme was to kill the Tutsis who had sought refuge at the church. So on the 14th he said this to us: These *gendarmes* have been called by Ndahimana so that they can be positioned there. On the 15th we went to the location. He wasn't there. Ndahimana must be an accomplice of the *Inyenzis*. So we must go and look for *Inyenzis*. We must go and look for Ndahimana to show him that his efforts have all failed."[1325]

703. The above testimony regarding Ndungutse's threats to the accused is only credible if it can be corroborated that Ndahimana was in fact not present at Nyange parish the morning of 16 April 1994 before the meeting took place. At the outset, the Majority acknowledges that Prosecution Witnesses CBR and CDL reported that they saw the accused at around 7 a.m. at the parish, that he had a meeting with other authorities and that he shot at Nyange church to signal the beginning of an attack.[1326] For reasons explained above, the Majority did not find these portions of the witnesses' testimonies to be sufficiently compelling. Rather, the Majority believes that the accused arrived later that morning in order to attend the meeting that took place just before the destruction of the church.

704. The Majority finds that Witness ND6's evidence is not necessarily inconsistent with its finding that the accused was present during the meeting that took place late in the morning before the attack on 16 April 1994. Indeed, the witness said that he arrived at Nyange church around noon.[1327] However, this time was only an approximation. Commenting about the time he gave for another event, the witness explained "You know, it is hard to estimate the time when one doesn't have a watch. We were often mistaken about time. I am explaining myself based on the position of the sun....What matters to me is an account of the events."[1328] The witness also said that while he was gone to look for Ndahimana, "[Witness CDL] and Kayishema prepared an attack against the

[1322] T. 20 April 2011 p. 10.
[1323] T. 27 January 2011 pp. 14-15.
[1324] T. 27 January 2011 pp. 15, 26, 32.
[1325] T. 27 January 2011 p. 27.
[1326] Witness CBR: T. 1 November 2010 pp. 23-24, T. 2 November 2010 p. 35; Witness CDL: T. 12 November 2010 pp. 14-15, T. 19 November 2010 p. 10.
[1327] T. 27 January 2011 p. 14.
[1328] T. 27 January 2011 p. 32.

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Tutsis."[1329] Therefore, it is possible that the meeting occurred during the time when Witness ND6 acknowledges that he was not at Nyange parish.

705. Witness ND6's testimony indicates that Ndungutse was suspicious as to where the accused's allegiances lay. The testimonies of Witnesses ND17 and BX3 corroborate that the accused had reason to be concerned for his safety.

706. That the alibi was not found reasonably possibly true does not mean that the entire testimonies of the alibi witnesses must be disregarded.[1330] Witness ND17 believed that Ndahimana was a "targeted person…because he was not involved in the business of killing people," and because he had arrested suspected murderers.[1331] Witness BX3 saw Ndahimana on 12 April 1994, and explained that "After [12 April 1994], Ndahimana was in hiding because people wanted to do harm to him…But we knew very well that he wasn't dead. He was still alive, although he was in hiding."[1332] The Majority recalls that Ndungutse was one of the leaders of the attacks that took place at Nyange church.[1333] The Majority notes that Ndungutse was seemingly a person of influence, capable of leading assailants such as Witness ND6 and his group.[1334] Indeed, Witness ND6 reported that Ndungutse believed that Ndahimana was supporting the Tutsi population and uttered a threatening statement about him, specifically: "We must go and look for Ndahimana to show him that his efforts have all failed."[1335] Therefore, the Majority concludes that the evidence establishes that Ndungutse challenged the accused's authority and that some members of the population actually thought that the accused was a targeted person. In conclusion, the Majority finds that Ndahimana was under threat during the period in question.[1336]

[1329] T. 27 January 2011 p. 15.

[1330] *Ntagerura* (AC) Judgement, para. 214 (Explaining that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness' testimony. Even if some parts of a witness' testimony are corroborated by other evidence, a Trial Chamber is not bound to accept the whole of the testimony).

[1331] T. 3 May 2011 p. 17.

[1332] T. 23 February 2011 pp. 34-36.

[1333] Witness CBK: T. 3 November 2010 pp. 16-17 (Testified that Ndungutse was present at meeting in evening of 15 April 1994); Witness CBK: 9 November 2010 p. 5 (Testified that Ndungutse was one of the leaders on 15 April 1994); Witness CBI: T. 14 September 2010 p. 39; Witness ND24: T. 21 February 2011 p. 10 ("On the 15th…the big attack that was led by Ndungutse"); Witness ND6: T. 27 January 2011 pp. 10, 13-15 (Testified that it was Ndungutse who "gave the signal for the attack" on 15 April 1994 and that he told the witness to "continue the work" on 16 April 1994); Witness ND22: T. 20 April 2011 p. 9 (Testified that Ndungutse was one of the leaders of the attack on 16 April 1994).

[1334] *See e.g.*, T. 27 January 2011 p. 15.

[1335] T. 27 January 2011 p. 27.

[1336] The Majority also acknowledges that Witness Nkiriyehe testified that Ndahimana told him that he left the tea factory at Rubaya Gisenyi in early 1993 because of security concerns related to his union activities at the factory, and his employers' suspicions that he was working with the RPF. However the Majority finds the evidence of little value given that Nkiriyehe did not link the alleged threats to Ndahimana in Gisenyi *préfecture* in early 1993 with a specific threat to Ndahimana on 16 April 1994 in Kibuye *préfecture*.

CHAPTER IV: LEGAL FINDINGS

1. Introduction

707. The Prosecution has charged Ndahimana with genocide (Count I) or in the alternative, complicity in genocide (Count II), and extermination as a crime against humanity (Count III) pursuant to Article 6 (1) of the Statute.

708. The Majority found the allegations relative to Ndahimana's criminal responsibility for the meetings that took place on 13 and 14 April 1994 not proven (Chapter III, Sections 4.3.3, 4.3.4.2.1).

709. In its factual findings, the Majority found that the alibi presented by the Defence in relation to the events of 15 April 1994 is reasonably possibly true and covers the whole day from the early morning to the end of the afternoon. In addition, the Majority found that its reasonableness was not overcome by convincing evidence placing the accused at Nyange church on 15 April 1994 (Chapter III, Section 5.3.4.3).

710. Further in its factual findings, the Majority found that the alibi presented by the Defence in relation to the events of 16 April 1994 is not reasonably possibly true. The Majority found that Ndahimana participated in a meeting that occurred at Nyange church on 16 April 1994 just before the attacks started. In addition, the Majority found established that during the attacks, Ndahimana was present and that, by his presence, he aided and abetted the crime of genocide. (Chapter I, Section 2).

2. Direct Criminal Responsibility

2.1 Article 6 (1) of the Statute

711. Article 6 (1) of the Statute sets out the forms of individual criminal responsibility applicable to the crimes falling within the Tribunal's jurisdiction, namely planning, instigating, ordering and committing, as well as aiding and abetting.

712. The Indictment charges Ndahimana with all the forms of individual criminal responsibility set out in Article 6 (1) of the Statute. The Prosecution also seeks to establish Ndahimana's criminal liability for the above acts based on the theory of JCE (basic form).[1337] Before setting forth the legal principles applicable to the modes of liability, the Majority first considers whether each form, as relevant to its findings, is sufficiently pleaded.

2.2 Notice

713. The Appeals Chamber has held that, where an individual count of the indictment does not indicate precisely the form of responsibility pleaded, an accused might still have received clear and timely notice of the form of responsibility pleaded, for instance, in other paragraphs of the indictment. Thus, the law requires that the indictment be read as a whole when determining whether there is notice of the relevant modes of liability applicable to the particulars pleaded in it.[1338] Where it is unclear from the indictment which form or forms of responsibility are pleaded, the Prosecution

[1337] Indictment, paras.11, 36; Prosecution Pre-Trial Brief, paras. 9-29.
[1338] *Semanza* (AC) Judgement, paras. 259, 358; *Ntakirutimana* (AC) Judgement, para. 473; *Aleksovski* (AC) Judgement, para. 171, n. 319. *See also*, *Gacumbitsi* (AC) Judgement, paras. 120-124.

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must identify precisely the mode or modes of liability alleged for each count as soon as possible, such as through its pre-trial brief.[1339]

714. In the present case, the Chamber has stated as follows:

> "Grégoire Ndahimana alleges that Articles 6 (1) and 6 (3) cannot be pled together. The Chamber finds that as the material factual allegations contained in paragraphs 13 through 33 are sufficient to support each form of liability and provide Ndahimana with sufficient information to investigate the case against him, they can be pled cumulatively."[1340]

715. Therefore, the Defence submissions that the Indictment is defective because it failed to clearly identify the source of the accused's legal duty to prevent or to punish criminal acts, is unfounded.[1341]

716. The Chamber has also decided that it found "no defects in the pleading of JCE in the Amended Indictment."[1342] Accordingly, the Defence's allegation that the JCE as a form of liability is not pleaded as required by the law is groundless.[1343]

2.3 Law

717. "Planning" requires that one or more persons design the criminal conduct—constituting one or more statutory crimes—that is later perpetrated.[1344] It is sufficient to demonstrate that the planning was a substantially contributing factor to such criminal conduct.[1345] The *mens rea* for this mode of liability requires that the accused possess the intent to plan the commission of a crime or, at a minimum, be aware of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[1346]

718. "Instigating" implies influencing another person to commit an offence.[1347] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a substantially contributing factor to the conduct of the person committing the crime.[1348] The *mens rea* for this mode of liability requires the accused to possess the intent to cause another person to commit a crime, or at a miminum, be aware of the substantial likelihood that a crime will be committed as a result of the act or omission.[1349]

[1339] *Gacumbitsi* (AC) Judgement, paras. 161, 163 (citing *Krnojelac* (AC) Judgement, para. 138); *Ntakirutimana* (AC) Judgement, para. 475.
[1340] Decision on Defects in the Indictment, 30 April 2010, para. 12.
[1341] The Defence puts forth that neither the Indictment nor the Prosecution's Pre-Trial Brief clearly identifies the source or scope of the legal duty of the accused. The Defence also argues that no material facts were presented as "distinctly supportive" of the allegation of a failure to discharge this duty to prevent or punish. *See*, Defence Closing Brief, para. 444.
[1342] Decision on Defects in the Indictment, 30 April 2010, para. 7.
[1343] Defence Closing Brief, para. 444; Decision on Defects in the Indictment, 30 April 2010, para. 7.
[1344] *Nahimana et al.* (AC) Judgement, para 479 (citing *Kordić & Čerkez* (AC) Judgement, para. 26).
[1345] *Nahimana et al.* (AC) Judgement, para. 479 (citing *Kordić & Čerkez* (AC) Judgement, para. 26).
[1346] *Nahimana et al.* (AC) Judgement, para. 479 (citing *Kordić & Čerkez* (AC) Judgement, paras. 29, 31).
[1347] *Nahimana et al.* (AC) Judgement, para. 480 (citing *Ndindabahizi* (AC) Judgement, para. 117; *Kordić & Čerkez* (AC) Judgement, para. 27).
[1348] *Nahimana et al.* (AC) Judgement, para. 480 (citing *Gacumbitsi* (AC) Judgement, para. 129; *Kordić & Čerkez* (AC) Judgement, para. 27).
[1349] *Nahimana et al.* (AC) Judgement, para. 480 (citing *Kordić & Čerkez* (AC) Judgement, paras. 29, 32).

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719. "Ordering" requires that the accused be in a position of authority while he or she instructs another person to commit an offence. A formal superior-subordinate relationship between the accused and the perpetrator is not necessary. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime pursuant to the accused's order. The authority creating the kind of relationship envisaged under Article 6 (1) of the Statute for "ordering" may be informal or of a purely temporary nature.[1350]

720. The Appeals Chamber has held that commission primarily covers the physical perpetration of a crime—coupled with the requisite *mens rea*—or a culpable omission of an act that is mandated by a rule of criminal law.[1351] "Committing" has also been interpreted to contain three forms of JCE: basic, systemic and extended.[1352] The Prosecution has indicated that it is only pursuing the basic form of JCE in the present case.[1353]

721. According to settled jurisprudence, the required *actus reus* for each form of JCE comprises three elements.[1354] First, a plurality of persons is required, though they need not be organised in a military, political or administrative structure. Second, there must be a common purpose which amounts to, or involves, the commission of a crime provided for in the Statute. It is not necessary that this purpose be previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts. Third, the participation of the accused in the common purpose is necessary, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve the commission of a specific crime under one of the provisions (for example, murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose. Although an accused's contribution to a JCE need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is found to be responsible.[1355]

722. The required *mens rea* for each form of JCE varies. In the present case, the Prosecution relies on the basic form of JCE.[1356] This basic form requires an intent, shared by all co-perpetrators, to commit a certain crime.[1357] Where the underlying crime requires a special intent, such as discriminatory intent, the accused, as a member of the JCE, must also share this special intent.[1358]

[1350] *Bagosora et al.* (TC) Judgement, para. 2008 (citing *Semanza* (AC) Judgement, paras. 361, 363).
[1351] *Nahimana et al.* (AC) Judgement, para. 478.
[1352] *Simba* (TC) Judgement, para. 386 (citing *Kvočka et al.* (AC) Judgement, paras. 82-83; *Ntakirutimana* (AC) Judgement, paras. 463-465; *Vasiljević* (AC) Judgement, paras. 96-99; *Krnojelac* (AC) Judgement, para. 30). *See also, Nahimana et al.* (AC) Judgement, para. 478; *Brđanin* (AC) Judgement, para. 364.
[1353] Prosecution Pre-Trial Brief, paras. 21-27.
[1354] *Simba* (TC) Judgement, para. 387 (citing *Kvočka et al.* (AC) Judgement, para. 96; *Ntakirutimana* (AC) Judgement, para. 466; *Vasiljević* (AC) Judgement, para. 100; *Krnojelac* (AC) Judgement, para. 31). *See also, Brđanin* (AC) Judgement, para. 364.
[1355] *Simba* (AC) Judgement, para. 303 (citing *Brđanin* (AC) Judgement, para. 430). *See also, Kvočka et al.* (AC) Judgement, para. 90 ("Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a JCE involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a JCE and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator."). *See also, Vasiljević* (AC) Judgement, para. 102; *Tadić* (AC) Judgement, para. 229.
[1356] Prosecution Pre-Trial Brief, paras. 21-27.
[1357] *Simba* (TC) Judgement, para. 388 (citing *Ntakirutimana* (AC) Judgement, para. 467; *Vasiljević* (AC) Judgement, para. 101; *Krnojelac* (AC) Judgement, para. 32).
[1358] *Simba* (TC) Judgement, para. 388 (citing *Kvočka et al.* (AC) Judgement, paras. 109-110).

Indeed, mere knowledge of the criminal purpose of others is not enough; the accused must intend that his or her acts will lead to the criminal result.[1359]

723. The Appeals Chamber has explained that an aider and abetter carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a specific crime. These actions must have a substantial effect on its commission.[1360] The *actus reus* need not serve as a condition precedent for the crime and may occur before, during or after the principal crime has been perpetrated.[1361] The requisite *mens rea* of aiding and abetting is knowledge that the acts performed assist in the commission of the specific crime by the principal perpetrator.[1362] In cases of specific intent crimes, such as persecution or genocide, the aider and abetter must additionally know of the principal perpetrator's specific intent.[1363]

724. The Majority will assess these forms of criminal responsibility where relevant in its legal findings.

3. Superior Responsibility

3.1 Legal Principles

725. The following three elements must be proven to hold an individual, whether a civilian or a military superior, criminally responsible pursuant to Article 6 (3) of the Statute for crimes committed by subordinates: (1) a superior-subordinate relationship existed; (2) the superior knew or had reason to know that the criminal acts were about to be or had been committed by his subordinates; and (3) the superior failed to take necessary and reasonable measures to prevent such criminal acts or to punish the perpetrators.[1364]

726. A superior-subordinate relationship is established by a showing of a formal or informal hierarchical relationship. The superior must have possessed the power or the authority, *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The superior must have had effective control over the subordinates at the time the offence was committed. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not satisfied by a showing of general influence on the part of the accused.[1365]

727. A superior will be found to have possessed, or will be imputed with the requisite *mens rea* sufficient to incur criminal responsibility, provided that: (1) the superior had actual knowledge,

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[1359] *Mpambara* (TC) Judgement, para. 14.
[1360] *Bagosora et al.* (TC) Judgement, para. 2009 (citing *Blagojević & Jokić* (AC) Judgement, para. 127; *Simić* (AC) Judgement, para. 85; *Blaškić* (AC) Judgement, paras. 45-46; *Vasiljević* (AC) Judgement, para. 102; *Ntagerura et al.* (AC) Judgement, para. 370).
[1361] *Bagosora et al.* (TC) Judgement, para. 2009 (citing *Blagojević & Jokić* (AC) Judgement, para. 127; *Blaškić* (AC) Judgement, para. 48; *Simić* (AC) Judgement, para. 85; *Ntagerura et al.* (AC) Judgement, para. 372).
[1362] *Bagosora et al.* (TC) Judgement, para. 2009 (citing *Blagojević & Jokić* (AC) Judgement, para. 127; *Simić* (AC) Judgement, para. 86; *Vasiljević* (AC) Judgement, para. 102; *Blaškić* (AC) Judgement, para. 46; *Ntagerura et al.* (AC) Judgement, para. 370).
[1363] *Bagosora et al.* (TC) Judgement, para. 2009 (citing *Blagojević & Jokić* (AC) Judgement, para. 127).
[1364] *Orić* (AC) Judgement, para. 18; *Nahimana et al.* (AC) Judgement, para. 484; *Gacumbitsi* (AC) Judgement, para. 143; *Ntagerura et al.* (TC) Judgement, para. 627; *Semanza* (TC) Judgement, para. 400.
[1365] *Halilović* (AC) Judgement, para. 59; *Gacumbitsi* (AC) Judgement, para. 143; *Kajelijeli* (AC) Judgement, para. 85; *Ntagerura et al.* (AC) Judgement, paras. 341-342; *Ntagerura et al.* (TC) Judgement, para. 628; *Semanza* (TC) Judgement, paras. 402, 415.

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established through direct or circumstantial evidence, that his subordinates were about to commit, were committing, or had committed a crime under the Statute; or (2) 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.[1366]

728. With respect to actual knowledge, relevant factors include: the number, type and scope of illegal acts committed by the subordinates; the time during which the illegal acts occurred, the number and types of troops and logistics involved; the geographical location; whether the occurrence of the acts was widespread; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the superior at the time.[1367]

3.2 Preliminary Matters

729. The Defence submits in its Closing Brief that neither the Indictment nor the Pre-Trial Brief clearly identifies "the source of the legal duty on the accused, nor is the scope of the legal duty described in any way...."[1368]

730. The Majority recalls the Decision on Defects in the Indictment where the Pre-Trial Chamber held that:

> "... superior responsibility has been pled sufficiently. The Chamber recalls that the Amended Indictment should be read as a whole. The Amended Indictment alleges that Grégoire Ndahimana was *bourgmestre* of Kivumu and that by virtue of his alleged position had authority over those listed in paragraphs 12 and 37 of the Amended Indictment. Further, a number of paragraphs set out the direct material conduct of the accused by which he is alleged to have known or had reason to know of the acts of his subordinates but failed to prevent or punish them."[1369]

731. Thus, the Majority concludes that this point is unfounded.

3.3 Deliberations

732. The accused is charged with genocide or complicity in genocide pursuant to Article 6 (3) of the Statute under paragraph 12 of the Indictment. He is also charged with extermination as a crime against humanity pursuant to Article 6 (3) of the Statute under paragraph 37 of the Indictment.

733. The Indictment alleges that Ndahimana is responsible for the crimes committed by his *de jure* and *de facto* subordinates during the period of 6 April 1994 to 30 April 1994. The alleged subordinates of Ndahimana include, but are not limited to: Gilbert Rugwizangoga Kanani, an assistant *bourgmestre*, Védaste Murangwabugabo, an assistant *bourgmestre*, Fulgence Kayishema, the Inspector of Judicial Police, Christophe Mbakilirehe, Brigadier of Kivumu *commune*, *conseillers* such as Laurent Sindabyemera, *conseiller* of Sanga *secteur*, Jean Marie Vianney

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[1366] *Čelebići* (AC) Judgement, para. 232; *Hadžihasanović & Kubura* (AC) Judgement, para. 28; *Galić* (AC) Judgement, para. 184; *Bagilishema* (AC) Judgement, paras. 37, 42; *Ntagerura et al.* (TC) Judgement, para. 629; *Semanza* (TC) Judgement, para. 405.
[1367] *Bagosora et al.* (TC) Judgement, para. 2014 (citing *Delić* (TC) Judgement, para. 64; *Strugar* (TC) Judgement, para. 68; *Limaj et al.* (TC) Judgement, para. 524).
[1368] Defence Closing Brief, para. 444.
[1369] Decision on Defects in the Indictment, 30 April 2010, para. 11.

Habarugira, *conseiller* of Nyange *secteur*, other *conseillers*, communal policemen, communal employees, *gendarmes*, *Interahamwe* and other Hutu civilians.[1370]

3.4 General *De Jure* Authority

734. The Prosecution alleges that Ndahimana, as *bourgmestre* of Kivumu *commune* in April 1994, is responsible for the acts of his *de jure* and *de facto* subordinates during that time, as he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.[1371]

735. The Defence submits that Ndahimana had *de jure* authority over only a limited number of persons, namely communal staff and communal policemen. Moreover, any control he had was more akin to that of a "general manager of a public agency focused on social development" than that of a military commander.[1372] With respect to *de facto* authority, Ndahimana had only limited powers to prevent the events that occurred at Nyange parish because he was a member of the MDR political party, and therefore could not command the support of most inhabitants of Kivumu who were MRND loyalists. Further, "[Ndahimana] did not assume duty officially because no ceremony of handover took place. Had there been a real handover, the various organs of the *commune*...would have sought to collaborate with him."[1373]

736. It is not in dispute that in April 1994, the law in force regulating the powers, rights and obligations of *bourgmestres* was entitled *Organisation Communal et Disposition Organique* of 23 November 1963, as amended by the Legislative Decree of 26 September 1974 and Presidential Decree of 4 October 1977 ("Administrative Law").[1374]

737. According to Article 56 of the Administrative Law, the communal administration was under the direct control of the *bourgmestre*.[1375]

738. The *bourgmestre* supervised the *conseillers communaux*[1376] and exercised administrative control over State agents assigned to the *commune*.[1377] All communal agents, including administrative personnel, technical personnel and communal police were under the authority of the *bourgmestre*.[1378] The *bourgmestre*, after consulting with the communal council could hire, suspend or dismiss any communal staff members; however, these decisions had to be approved by the *préfet*.[1379] Chapters VI through VIII of the Administrative Law set out the disciplinary regime available to the *bourgmestre* in case of disciplinary problems involving communal agents. The *bourgmestre* was responsible for imposing such measures.[1380]

739. The legislation detailing the *de jure* powers of the *bourgmestre* is limited in determining the precise authority that was actually exercised by the *bourgmestre* in 1994. Thus, the Majority will consider more specific evidence of Ndahimana's *de jure* and *de facto* authority with respect to each

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[1370] Indictment, paras. 12, 37.
[1371] Indictment, paras. 2, 37.
[1372] Defence Closing Brief, paras. 422-423.
[1373] Defence Closing Brief, paras. 436, 438-440.
[1374] Prosecution Exhibit 47.
[1375] Prosecution Exhibit 47, Article 60.
[1376] Prosecution Exhibit 47, Article 37.
[1377] Prosecution Exhibit 47, Article 58 (11).
[1378] Prosecution Exhibit 47, Article 104 (88); Amendment of 25 November 1975, Article 3.
[1379] Prosecution Exhibit 47, Articles 93 (77) and 94 (78).
[1380] Prosecution Exhibit 47, Amendment of 25 November 1975, Article 33.

category of alleged subordinates who have been found to have participated in the attacks on Nyange church.

3.5 Specific *De Jure* Authority and Effective Control

3.5.1 Communal Police

740. Under Rwandan law, the *bourgmestre* assumed complete responsibility for the organisation, functioning and control of the communal police.[1381] A member of the communal police was an employee of the *commune* and subject to the same basic conditions of employment as other communal staff.[1382] The *bourgmestre*'s power to discipline members of the communal police was the same as for other staff. The law prescribed five categories of sanctions, as set out below. While it was the *bourgmestre* who was exclusively empowered to discipline communal staff, sanctions described in the fourth and fifth categories could be imposed by the *bourgmestre* only on the advice of the *conseil communal* and with the prior approval of the *préfet*.[1383] The five categories were: "(1) warning; (2) withholding of one quarter salary for one month maximum; (3) disciplinary suspension for one month maximum; this sanction involves prohibition from exercising any duties and withholding of salary; (4) extended disciplinary action for an indeterminate period; this sanction involves termination of all salary and of all indemnities; (5) termination of service."[1384]

741. Witness Kayishema explained that the *commune* included five policemen, one brigadier and his assistant.[1385] He further testified that the IPJ of Kivumu *commune* was Fulgence Kayishema, who remained in his position until he fled in July 1994.[1386] In addition, Mbakilirehe was the brigadier of the communal police in Kivumu *commune*.[1387] Other witnesses corroborated this evidence. Relevant testimonies reflect that the *bourgmestre* was the primary authority over the communal police.[1388]

3.5.1.1 *Effective Control Over Policemen*

742. The Majority recalls that effective control is not satisfied by the mere showing of a general influence on the part of the accused.[1389] Therefore, the Majority will first assess whether the accused had the power to give orders or to take disciplinary measures toward the Kivumu policemen in April 1994.

743. Defence Witness ND17 reported that two attacks on the convent by *Interahamwe* were repelled by police officers assigned by Ndahimana to protect the nuns. According to the witness, the

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[1381] Prosecution Exhibit 47, Amendment of 4 October 1977, Article 4, 7 (Further establishes that the brigadier of the communal police is under the authority of the *bourgmestre*).
[1382] Prosecution Exhibit 47, Articles 1-3.
[1383] Prosecution Exhibit 47, Article 33.
[1384] Prosecution Exhibit 47, Article 32 (Non-official translation).
[1385] T. 18 April 2011 pp. 18-21.
[1386] T. 18 April 2011 p. 57.
[1387] T. 18 April 2011 pp. 39-40; T. 19 April 2011 p. 1.
[1388] Witness CDL: T. 12 November 2010 pp. 23-24 (Communal staff supervised by the *bourgmestre* included communal policemen. In addition, the *bourgmestre* was responsible for ensuring security in his *commune*, and he was authorized to seek outside forces to restore security); Witness ND13: T. 18 January 2011 pp. 23-24 (The witness conceded that the *bourgmestre* was responsible for the organisation, functioning and control of the communal police, and that he could punish the brigadier "for minor offences" in "normal times"); Witness Kayishema: T. 18 April 2011 pp. 18-21 (Policemen were responsible before the *bourgmestre* according to the legal provisions on that matter and could only perform their duty within the *commune*).
[1389] *Ntagerura et al.* (TC) Judgement, para. 628; *Karera* (TC) Judgement, para. 564; *Setako* (TC) Judgement, para. 459.

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police officers were assigned to the convent on 16 April 1994, and the attacks on the convent took place after the destruction of Nyange church.[1390] Despite the Defence's assertion that the accused was powerless during the genocide, the fact that, on 16 April 1994—the day Nyange church was destroyed—he assigned policemen to a certain task and was obeyed shows that Ndahimana had effective control over the policemen.

744. The Majority has also considered circumstantial evidence which indicates that Ndahimana took disciplinary measures against Brigadier Mbakilirehe. In particular, the Majority has considered Prosecution Exhibit 51. This letter, dated 29 April 1994, indicates that the accused demoted Mbakilirehe from the position of brigadier to that of an ordinary policeman. The letter also indicated that he would be replaced by Abayisenga and that his deputy would be Niyitegeka. *Préfet* Kayishema confirmed that he received a copy of the letter and that Ndahimana had full power to demote or promote communal staff during the month of April 1994.[1391]

745. The Majority notes that Defence Witness ND22 saw Mbakilirehe among the leaders of the attack on 16 April 1994.[1392] This evidence has to be considered in light of Prosecution Witness CNJ's evidence regarding the attack on 15 April 1994. He said that Brigadier Mbakilirehe, as well as another communal policeman, refused to shoot and the *bourgmestre* asked them to hand over their guns.[1393] Also, while Witness CDL said that he learnt that Mbakilirehe had been demoted because he had not been active enough during the attacks,[1394] Witnesses KR3 and ND13 testified to the contrary.[1395] Witness Kayishema explained that Mbakilirehe had been demoted because of "some dysfunction in the communal police." such as the transfer of policemen to a working duty post and the management of weapons and ammunition.[1396] The Majority notes that whether Mbakilirehe was actively participating in the killings or whether he was reluctant to do so is not clearly established by the evidence, nor are the reasons for his demotion. However, Prosecution Exhibit 51 clearly established that Mbakilirehe was replaced by Abayisenga and that his deputy would be Niyitegeka. Furthermore, Niyitegeka's involvement in the attacks on Nyange church on 15 and 16 April 1994 is not disputed (*See* witness testimony contained in Chapter III, Sections 5.2.1 and 6.2.17).

746. That the accused promoted Niyitegeka to the position of deputy brigadier two weeks after the Nyange church killings is established. In addition, regardless of the reason for Mbakilirehe's demotion, the very fact that he was demoted shows that Ndahimana could demote or promote communal staff during the month of April 1994.[1397]

747. Other evidence also shows that Ndahimana had effective control over the policemen in April 1994. For instance, Witness ND11 testified that he escaped the night of 15 April 1994 and Ndahimana assigned a policeman to escort him to the river so he could cross to safety.[1398] Witness

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[1390] T. 3 May 2011 pp. 9-10, 13.
[1391] T. 19 April 2011 pp. 2-4, 16-18.
[1392] T. 20 April 2011 p. 9.
[1393] T. 4 November 2010 pp. 51-53 (The witness noted that communal policemen Niyitegeka and Abayisenga fired at the church tower. The witness then explained that two *gendarmes* refused to shoot and were consequently disarmed by the *bourgmestre*. One of the two *gendarmes* that were disarmed was named Gicadi, a native of Rukoko and the other was Christopher Mbakilirehe, the brigadier).
[1394] T. 12 November 2011 pp. 22-23.
[1395] Witness ND13: T. 17 January 2011 p. 33; Witness KR3: T. 25 January 2011 p. 1 (The witness explained that Mbakilirehe was demoted because of his participation in the killings).
[1396] T. 18 April 2011 pp. 39-40.
[1397] T. 19 April 2011 pp. 2-4, 16-18.
[1398] T. 18 January 2011 pp. 37-38.

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ND1 testified that she saw Ndahimana arrive at the health centre with Tutsis survivors on 17 April 1994.[1399] The witness also testified the accused stationed policemen around the health centre in an attempt to ensure their safety.[1400] Based upon the totality of the evidence, the Majority concludes that Ndahimana had effective control over the policemen during the month of April 1994.

3.5.1.2 Mens Rea: *"Knew or Had Reason to Know"*

748. The Majority notes that a superior's actual knowledge that his subordinates were committing, were about to commit or had committed crimes cannot be presumed, but may be established through circumstantial evidence.[1401]

3.5.1.2.1 Events of 15 April 1994

749. The Majority has found as follows: on 15 April 1994, a large scale attack occurred at Nyange parish, and as a result, hundreds of Tutsi refugees were killed. The Majority notes that Witnesses CBT, CDK, CBY, CDL, CBI, CBK, CBN and CNJ implicate communal policemen, including Niyitegeka, in the attacks at the parish.[1402]

750. The Majority agrees that at least several policemen were implicated in the attacks that occurred on 15 April 1994 and that the attack was one of a large scale. The Majority recalls that neither the presence of Ndahimana on 15 April 1994 nor his liability under Article 6 (1) of the Statute are not proven beyond reasonable doubt. The Majority has also found unproven that the accused participated in meetings aimed at planning the attacks before 16 April 1994 (Chapter III, Section 5.3.4.3). Rather, the Majority concluded that Ndahimana went to Rufungo on 14 April 1994, where he stayed late into the evening, and that he returned to Rufungo early in the morning on 15 April 1994. The accused was in a different location than Nyange, taking care of his friend Dr. Ntawuruhunga's funeral (Chapter III, Section 5.3.3).

[1399] T. 20 January 2011 p. 13.
[1400] T. 20 January 2011 p. 14.
[1401] *Halilović* (AC) Judgement, para. 66.
[1402] Witness CBT: T. 7 September 2010 p. 47; Witness CDK: T. 8 November 2010 pp. 32-35, T. 9 November 2010 pp. 18-19 (Testified that two policemen, Maharamu and Munyancarama, shot at Nyange church); Witness CBY: T. 9 November 2010 pp. 53-54, T. 10 November 2010 pp. 7, 8, 30-31, 34 (ICS) (Reported that communal policemen named Kabalisa, Maharumu and a student named Jean-Marie, shot into the church. In a statement provided to ICTR investigators on 2 February 1996, he already mentioned the leaders of the attack as follows: Kanyarukiga, Maharamu and Rangira, both were communal policemen); Witness CDL: T. 12 November 2010 p. 9 (According to Witness CDL, the communal policemen who participated in the attacks included Jean-Bosco Mabayisenga, Télesphore Nyantara, Anasthase Uzabakiriro, Makaberi, Appolinaire Rangira and Adrian Niyitegeka. Policemen, including Habarugira and one Ephrem, also opened gun fire on the Tutsi refugees and on the church); Witness CBI: T. 14 September 2010 p. 40 (Testified that communal policemen were equipped with modern weapons including firearms and were shooting at the refugees. Among the police officers were Adrien Niyitegeka (a.k.a. "Maharamu"); Télesphore Munyantarama and Télesphore Mbakilirehe); Witness CBN: T. 13 September 2010 pp. 22-23, 59; T. 21 September 2011 pp. 13-14; Witness CBK: T. 3 November 2010 pp. 12-15, 58 (Attackers included communal policemen who fired into the church with their guns and *Interahamwe* who were armed with traditional weapons. *Gendarmes* participated as well); T. 21 September 2011 p. 14 (The Prosecution also relies upon Prosecution Exhibit 51, showing that Ndahimana promoted Niyitegeka on 1 April 1994. However the Chamber did not find this evidence particularly relevant given that the letter was issued two weeks before the events at Nyange church); Witness CNJ: T. 4 November 2010 pp. 51-53 (The witness noted that communal policemen Adrien Niyitegeka (a.k.a. "Maharamu") and Abayisenga fired at the church tower. The witness then explained that two *gendarmes* refused to shoot and were consequently disarmed by the *bourgmestre*. One of the two *gendarmes* that were disarmed was named Gicadi, a native of Rukoko and the other was Christopher Mbakilirehe, the brigadier).

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751. The Appeals Chamber in *Čelebići* held that even general information in the possession of the commander which would put him on notice of possible unlawful acts by his subordinates is sufficient to incur criminal liability.[1403] The Majority has found it to be reasonably possibly true that the accused was away from Nyange parish as early as 5 or 6 a.m. on 15 April 1994. Therefore, the Majority concludes that the Prosecution has failed to prove beyond reasonable doubt that Ndahimana had reason to know that crimes were about to be committed.

752. The Majority has also considered evidence that a second meeting occurred after the attacks of 15 April 1994, but recalls that none of the witnesses heard the content of that meeting (Chapter III, Section 5.3.7.2). Additionally, with regard to the purpose of the meeting, the Majority does not consider that the planning of the next day's killings is the only reasonable conclusion that can be drawn from the evidence (Chapter III, Section 5.3.7.2).

753. The Majority recalls that the phrase "had reason to know" has been interpreted as "had information enabling him to conclude" by the Appeals Chamber in the *Čelebići* case.[1404] To establish whether the accused "had information enabling him to conclude," the Majority has considered various pieces of circumstantial evidence. In particular, Ndahimana came back to Nyange parish—to the exact same place where the killings occurred—only a few hours after the attack of 15 April 1994 had ceased. Several witnesses testified that some *Interahamwe* spent the night at the parish in order to prevent the Tutsis who had locked themselves into Nyange church from escaping.[1405] The presence of assailants at the parish must have been noticeable enough to draw the attention of anyone coming there. In addition, and most importantly, the Majority notes that numerous refugees had been killed, an attempt to burn the church had been conducted, and a bulldozer remained at the parish after it had been used to bury corpses. The situation at the parish must have been so chaotic that any person coming there would have known that a large scale attack had occurred that day. In addition, while the evidence is unclear regarding the purpose of the meeting, Witnesses CBK and CDJ corroborate each other on the fact that Ndahimana met with Seromba and Kanyarukiga.[1406] Both Kanyarukiga and Seromba were present at the church and involved—in different ways—in the attack that occurred on 15 April 1994.

754. The Majority has also assessed the evidence in relation to the events of 16 April 1994. It notes that both Defence and Prosecution witnesses reported the presence of the policeman Niyitegeka not only on 15 April 1994, but also on 16 April 1994, when Ndahimana was present. Witness CBY reported seeing policemen, together with Ndahimana, sharing drinks after the destruction of Nyange church. This evidence gives further support to the Majority's finding that Ndahimana had reason to know that the communal policemen committed crimes on 15 April 1994. He went to the parish soon after the killings on the evening of 15 April 1994 and met with Seromba and Kanyarukiga, and was present on 16 April 1994, when he again met with Seromba and Kanyarukiga, as well as with policemen, including Niyitegeka, who was identified as being one of the attackers on 15 April 1994.

755. Given these circumstances, while the Majority is not persuaded that Ndahimana actually knew that the communal policemen were implicated in these events, it finds that Ndahimana had

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[1403] *Čelebići* (AC) Judgement, para. 238.
[1404] *Čelebići* (AC) Judgement, para. 232.
[1405] *See e.g.*, Witness CNJ: T. 4 November 2010 p. 56 (IPJ Kayishema and Kanyarukiga directed the individuals from Kibilira to spend the night around Nyange church in order to prevent the refugees, who had barricaded themselves inside the church, from escaping); Witness CBY: T. 9 November 2010 p. 54 (That evening, attackers surrounded the church in order to attack any refugee trying to escape).
[1406] Witness CBK: T. 3 November 2010 pp. 16-17; Witness CDJ: T. 11 November 2010 p. 30.

reason to know. In reaching these findings, and considering the relatively small number of policemen in Kivumu *commune*, the Majority does not accept the submission that the accused had no reason to know of the participation of any of the Kivumu communal policemen in the attack on Nyange church that occurred on 15 April 1994.

3.5.1.2.2 Events of 16 April 1994

756. The Majority has found that a meeting occurred at Nyange parish on 16 April 1994, when the decision to destroy Nyange church was taken by a group of authorities, in the presence of Ndahimana (Chapter III, Section 6.3.3.3). The Majority has also concluded that the Prosecution has proven beyond reasonable doubt that Ndahimana was present during these killings (Chapter III, Section 6.3.4).

757. Regarding the question of whether communal authorities were implicated in the attack on Nyange church on 16 April 1994, Witness CBR referred to the presence of Ndahimana, Kayishema and other authorities.[1407] Further, when Witness CDL arrived at the church on the morning of 16 April 1994, Ndahimana was there with communal policemen.[1408] When asked about which authorities were present "when the church was being demolished," Witness CBK responded that some *conseillers* of Kivumu *commune* were there as well as Ndahimana, Kayishema, Christophe Mbakilirehe and "many others."[1409] Witness CBY reported that after the killings and the demolition of the church, Ndahimana and others, including some policemen, were sharing beers.[1410] This is the only evidence tending to show that the policemen were present after the attack on 16 April 1994. However, the Majority has decided elsewhere that it may not rely on Witness CBY unless corroborated (Chapter III, Section 6.3.1.6).

758. Turning to the Defence evidence, when asked about which communal authorities he saw on 16 April 1994, Witness ND6 responded that he saw Kayishema and two communal policemen.[1411] Witness ND7 saw Adrien Niyitegeka, Mbakilirehe and Kayishema on 16 April 1994, but they were not together and the witness did not see them participating in the killings.[1412] Witness ND22 did not see Ndahimana on 16 April 1994, but did see Kayishema and Mbakilirehe among the leaders of the attack.[1413]

759. Having assessed the evidence in relation to 16 April 1994, the Majority finds that the presence of communal policemen is established, but that their participation in the killings is not. Several witnesses referred to the presence of many "Hutus assailants" without further details. Some also mentioned the presence of many *Interahamwe* coming from various places, including Kibilira *commune*. The Majority has no doubt that such an attack involved various categories of attackers; indeed, it recalls its finding that policemen participated in the attack that occurred on 15 April 1994. However, the exact role of the policemen remains unclear in relation to 16 April 1994. Mere evidence of the presence of communal police is not sufficient to prove beyond reasonable doubt that the police participated in the attack of 16 April 1994. The Majority recalls that command responsibility can only be considered in relation to crimes *committed* or *about to be committed* by the subordinates. Therefore, the proof that crimes *had* been committed or *were about to* be

[1407] T. 1 November 2010 p. 24.
[1408] T. 12 November 2011 pp. 15, 22-23.
[1409] T. 3 November 2011 pp. 18-19.
[1410] T. 9 November 2011 p. 55.
[1411] T. 27 January 2011 p. 16.
[1412] T. 25 January 2011 pp. 20-23.
[1413] T. 20 April 2011 pp. 9, 12.

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committed is fundamental to the Majority's determination of the accused's guilt. Proof of the mere presence of communal policemen cannot be sufficient for the purpose of supporting findings under Article 6 (3) of the Statute.

760. The Majority recalls that it is the Prosecution's responsibility to prove the guilt of the accused beyond reasonable doubt. When the evidence does not clearly establish the charges, the Majority may rely on circumstantial evidence. In the case at bar, the Majority finds that the absence of evidence with regard to the involvement of the policemen in the events that occurred on 16 April 1994 is mainly due to the failure of the Prosecution to take the appropriate steps aimed at establishing the categories of assailants present at Nyange church. In conclusion, the Majority finds that Ndahimana cannot be held responsible under Article 6 (3) of the Statute for the events of 16 April 1994.

3.5.1.3 *Failure to Prevent or Punish*

761. According to established jurisprudence, the duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate's crime if he acquires the knowledge that such crime is being prepared or planned, or has reason to know thereof. The duty to prevent and the duty to punish are two distinct legal obligations.[1414]

762. The Majority has considered the evidence of Witnesses Kayishema, Anicet Tumusenge and Witness ND13 that on 15 April 1994, after 2 p.m., Ndahimana went to request reinforcements from the *préfet* because Nyange church had been attacked several times, but that the *préfet* could not assist him. The *gendarmes* of the Kibuye *gendarmerie* camp had left to go to Kigali and there was no fuel or vehicles.[1415] As expressed elsewhere, the Majority does not believe the evidence allows it to infer what the actual purpose of Ndahimana's travel to the *préfecture* was that day (Chapter III, Section 5.3.3). However, that the accused had knowledge that the church was being attacked and that he requested the help of *gendarmes* does not show that he took any measure to prevent the commission of the crime. The *bourgmestre*'s command responsibility over the *gendarmes* will be addressed below.

763. Turning to the duty to punish, the Majority is of the view that the duty to punish is a separate form of liability from the duty to prevent. As held by the Appeals Chamber in *Blaškić*: "The failure to punish and the failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes while the failure to prevent concern future crimes of subordinates."[1416]

764. When asked about measures taken regarding the prevailing situation in Kivumu *commune* between April and July 1994, Witness Kayishema testified that he "think[s] he [Ndahimana] even wrote reports on the security situation prevailing in his *commune*."[1417] However, no evidence of these reports was adduced at trial. The Majority recalls its findings that on 16 April 1994, Ndahimana was present during the attacks. The Majority has serious doubts that Ndahimana would have reported the killings of 15 April 1994, given that, as the Majority has noted elsewhere, he was present at Nyange parish on 16 April 1994. Furthermore, the Majority notes that Kayishema's testimony regarding the reports is uncorroborated and vague.

[1414] *Halilović* (AC) Judgement, paras. 72, 79.
[1415] Witness Kayishema: T. 18 April 2011 pp. 31, 33-34, 44, T. 19 April 2011 p. 8; Witness Tumusenge: T. 12 May 2011 p. 9; Witness ND13: T. 17 January 2011 pp. 37-38, 40.
[1416] *Blaškić* (AC) Judgement, para. 83.
[1417] T. 18 April 2011 p. 41.

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765. In any event, the Majority recalls the Appeals Chamber's finding that under the legal standard of superior responsibility, a report to the appropriate authorities *may* be sufficient to discharge the obligation to punish offending subordinates, but whether it is indeed sufficient depends on the circumstances of the case.[1418] Necessary and reasonable measures are those that can be taken within the competence of a commander, as evidenced by the degree of effective control he wielded over his subordinates.[1419]

766. The Majority recalls that the *bourgmestre* could use substantial penalties to regulate the conduct of communal policemen (Chapter IV, Section 3.5.1.1). The accused's authority to impose penalties for indiscipline, while not a sufficient indicator of command responsibility in and of itself, is nevertheless a necessary element.

767. In conclusion, the Majority finds that the Prosecution has not established beyond reasonable doubt that Ndahimana had the material ability to prevent crimes committed by communal police at Nyange church. Indeed, there is no direct evidence that any instructions concerning security measures were in fact implemented and resulted in criminal conduct. However, the Majority finds that the accused did have the material ability to punish those crimes through disciplinary measures such as demotion. In light of these circumstances, the Majority finds that Ndahimana is responsible pursuant to Article 6 (3) of the Statute in relation to the crimes committed by the policemen on 15 April 1994 at Nyange church.

3.5.2 Communal Staff

768. For the period covered by the Indictment, the administration of Kivumu *commune* was, according to Rwandan law, under the direct authority of the *bourgmestre*.[1420] The staffing of the communal administration was subject to the following general principles, set out in Articles 92 to 94 of the Law on the Organisation of *Communes* of 23 November 1963 ("Law on the Organisation of *Communes*"):

> "*Communes* may employ personnel to perform communal functions. Furthermore, should there be need, representatives from State Administrative Services may be assigned to Communal Administrative positions, pursuant to statutory provisions.
>
> The *bourgmestre* has the authority to employ, suspend or terminate [after conferring with Communal Council pursuant to instructions from the Minister of the Interior].
>
> All decisions in regard to employment, suspension, or termination of personnel must be approved by the Prefect or his representative."[1421]

769. The communal staff was subdivided into three groupings. There was the "*personnel administrative*" (secretarial and accounting staff), the "*personnel technique*" (technical staff) and the "*police communale*" (communal police force).[1422]

3.5.2.1 Conseillers Communaux

770. Witness CDL explained the hierarchy within the *commune* as follows: the highest ranking administrative official in the *commune* was the *bourgmestre*, followed by the *conseiller communal*

[1418] *Boškovski* (AC) Judgement, para. 234.
[1419] *Blaškić* (AC) Judgement, para. 83.
[1420] Prosecution Exhibit 47.
[1421] Prosecution Exhibit 47, Articles 92-94 (Non-official translation).
[1422] Prosecution Exhibit 47, Articles 3-4.

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which was made up of the *conseillers de secteurs*. After this came the *commune* staff which included secretaries, policemen, census workers and the assistants of the *bourgmestre*.[1423]

771. Witness Kayishema testified that the situation of the *conseillers de secteurs* was to be considered with caution because they were elected by the *commune*'s population. They had the duty to assist the *bourgmestre* in the running of the *commune*, but it was the Ministry of Interior that was in charge of sanctioning and punishing them.[1424] Witness ND13 reported that only one of the *conseillers*, Laurent Sindabyemera of Sanza *secteur*, who was a member of the MDR, had good relations with Ndahimana. All the others were MRND members and did not get along well with Ndahimana.[1425]

772. It appears that members of the *conseil communal*, an elected advisory body of *secteur* representatives, were not *de jure* subordinates of the accused in the sense of Article 6 (3) even though each member's work was supervised by the *bourgmestre*, who was entitled to write a quarterly report on his or her activities.[1426] This follows from the applicable legislation: "The *bourgmestre* is responsible, generally, for executing the decisions of the Communal Council."[1427] Legally, under Article 6 (3), the accused cannot be found to have breached his duty under the doctrine of superior responsibility if the persons in question were not his true subordinates.

773. In any event, the Majority acknowledges that when Witness CBT arrived at the church on 15 April 1994, he saw Witness ND23, *conseiller* of the Gasave *secteur*, Habarugira, *conseiller* of Nyange *secteur* and the *conseiller* of Kivumu *secteur*.[1428] Witness CBK reported that *Conseillers* Habarugira, Sindabyemera and Mahame were together with other authorities on the morning of 15 April 1994 and that they met with Seromba. The witness did not hear what they said, but after the meeting he saw the group speaking with Hutu assailants, after which a large-scale attack took place.[1429] Witnesses CBS and CBN refer to *Conseillers* Gatwaza and Habarugira as being among the leaders of the attack on 15 April 1994.[1430] Witness YAU also testified about the meeting that took place before the killings and the subsequent attack on 15 April 1994. She specifically stated "[t]he only official I recognised at the Nyange church was *conseiller* Vianney."[1431] Witness CBK testified that some *conseillers* of Kivumu *commune* were present "when the church was being demolished."[1432]

774. Therefore, the evidence shows that *Conseiller* Habarugira was implicated in the killings. It appears that other *conseillers* of Kivumu *commune* participated in the killings as well but the evidence is not clear regarding their identities. The Majority has also considered Witness ND13's admission that a meeting took place at the communal office on 20 April 1994, in which he took part, together with *conseillers* of the *commune* and the *bourgmestre*. He also confirmed that five

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[1423] T. 12 November 2010 pp. 23-24.
[1424] T. 19 April 2011 pp. 14-15.
[1425] T. 17 January 2011 p. 35.
[1426] Prosecution Exhibit 47, Article 37. This follows from the applicable legislation: "The *bourgmestre* is responsible, generally, for executing the decisions of the Communal Council." (Article 58) (Non-official translation).
[1427] Prosecution Exhibit 47, Article 58 (Non-official translation).
[1428] T. 7 September 2010 pp. 43, 47.
[1429] T. 3 November 2010 pp. 12-15, 58.
[1430] Witness CBS: T. 6 September 2010 pp. 23-27 (The witness stated that the *conseillers* of Kivumu and Nyange, Gatwaza and Habarugira respectively, were at the parish that day. *Conseiller* Gatwaza and other leaders surrounded the church to kill the refugees. *Conseiller* Habarugira, was armed with a machete and giving instructions. He participated in the massacre); Witness CBN: T. 13 September 2010 pp. 22-23.
[1431] Defence Exhibit 30.
[1432] T. 3 November 2011 pp. 18-19.

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days later, on 25 April 1994, Tutsis refugees at the health centre were killed.[1433] The Majority observes that while the purpose of this meeting is unclear and its outcome not established, the occurrence of the meeting is clear. However, this evidence is too remote and general to support an inference that Ndahimana had the material ability to prevent or punish crimes committed by the *conseillers* at Nyange church. Indeed, there is no direct evidence that the accused gave instructions and that those instructions were implemented and resulted in criminal conduct. The Prosecution did not adduce sufficient evidence to show that Ndahimana knew or had reason to know that the *conseillers* were about to, or had already committed criminal acts at Nyange church. Similarly, the Majority cannot conclude that Ndahimana was informed of these acts at any time. In conclusion, the Majority finds that Ndahimana is not responsible as a superior under Article 6 (3) for the acts of the *conseillers*.

3.5.2.2 *Assistant* Bourgmestres

775. While the Law on the Organisation of *Communes* does not specifically refer to assistant *bourgmestres*, the evidence shows that assistant *bourgmestres* were part of the communal staff. While the inclusion of "assistant" would seem to imply that the *bourgmestre* had some kind of superior position, the Law on the Organisation of *Communes* is not clear as to the responsibility of the *bourgmestre* towards his assistant *bourgmestre*. Therefore the accused's possible breach of his duty according to the law of superior responsibility in relation to the assistant *bourgmestres* does not, in the absence of relevant evidence showing to the contrary, come under the purview of Article 6 (3) of the Statute.

776. Witness CBT testified that on 15 April 1994, he saw the assistant *bourgmestre* Mpenda order the assailants to surround Nyange church.[1434] Witness CBN said that the assistant *bourgmestre* was "collaborating" with the attackers.[1435] When Witness CNJ arrived at the church on 16 April 1994, he allegedly saw Ndahimana, Kayishema and the assistant *bourgmestre*, Murangwabugabo.[1436]

777. Turning to Ndahimana's interactions with the assistant *bourgmestres*, Witness ND13 reported that Ndahimana "was not in good relationships" with them and had no control over them.[1437] He further explained that if assistant *bourgmestres* were guilty of any misconduct, "all the *bourgmestre* could do was to prepare a report for the benefit of the *préfecture* or the Ministry of the Interior because the assistant *bourgmestres* were answerable to the Ministry of the Interior through the Ministry of Public Service."[1438] Witness Kayishema testified that Ndahimana, as *bourgmestre* of Kivumu *commune*, lacked *de jure* authority over the assistant *bourgmestres*.[1439] Witness Kayishema categorised an assistant *bourgmestre* as a civil servant of the central administration intended to help the *bourgmestre*, but not falling under his direct authority.[1440]

778. After having carefully reviewed the evidence adduced at trial, the Majority concludes that the Prosecution did not prove beyond reasonable doubt that Ndahimana knew or had reason to know that the assistant *bourgmestres* were about to, or had already committed criminal acts at

[1433] T. 25 January 2011 pp. 25-26, 30.
[1434] T. 7 September 2010 pp. 41-42 (The witness explained that Mpenda was Védaste Murangwabugabo's nickname).
[1435] T. 13 September 2010 pp. 22-23.
[1436] T. 4 November 2011 pp. 57-58.
[1437] T 17 January 2011 p. 24.
[1438] T. 17 January 2011 pp. 24-25.
[1439] T. 18 April 2011 pp. 22-24, 26.
[1440] T. 18 April 2011 pp. 16-17, 27.

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Nyange church. Nor has the Prosecution proven that Ndahimana had the material ability to prevent or punish such crimes. In conclusion, the Majority finds that Ndahimana is not responsible as a superior under Article 6 (3) of the Statute for the acts of the assistant *bourgmestres*.

3.5.2.3 Inspecteur de Police Judiciaire *(IPJ)*

779. In April 1994, the IPJ of Kivumu *commune* was Fulgence Kayishema. Article 106 (90) of the Law of on the Organisation of *Communes* states that an IPJ, although a member of the communal police, was answerable to the *Ministère Public*. The Prosecution did not tender evidence on Ndahimana's *de jure* authority as *bourgmestre* of Kivumu *commune* over the communal staff.

780. Turning to the evidence adduced at trial, the Majority acknowledges that Defence Witness ND13 testified that according to Articles 58, 61 and 62 of the Law on the Organisation of *Communes*, the IPJ came under the *bourgmestre* who represented the *commune*.[1441] The Majority has assessed the applicable law and finds that these articles refer more to the status of the *bourgmestre* in general terms than to his responsibility over the IPJ in particular. The Majority has also considered Defence Witness Kayishema's evidence that Ndahimana, as *bourgmestre* of Kivumu, lacked *de jure* superior authority over the IPJ.[1442] Moreover, the IPJ was not subordinated to the *bourgmestre* and the *bourgmestre* could only request his assistance.[1443]

781. Witness ND13 reported that IPJ Kayishema abandoned his responsibilities as a criminal investigations officer; rather, he committed genocide—thus abusing his authority.[1444] He also reported that Ndahimana could not take disciplinary action against Kayishema since he did not work under the *bourgmestre*, but was appointed by the Ministry of Justice working under the office of the Public Prosecutor, who was the person to take disciplinary action against the IPJ when necessary.[1445]

782. As regards the question of who carried the primary responsibility for the keeping and the administration of the weapons in the *commune*, the Majority finds that the evidence is inconclusive. Defence Witness ND13 said that even though the law provided that the *bourgmestre* was the chief executive in the *commune*, he did not necessarily deal with the weapons of the *commune*.[1446] He further explained that it was the brigadier of the communal police who supervised police officers, was in charge of weapons and ammunition and kept the key to the weapons store.[1447]

783. After having carefully reviewed the evidence adduced at trial, the Majority concludes that the Prosecution has not proven beyond reasonable doubt that Ndahimana knew or had reason to know that the IPJ was about to, or had already committed criminal acts at Nyange church. Nor did it prove that Ndahimana had the material ability to prevent or punish such crimes. In conclusion, the Majority finds that Ndahimana is not responsible as a superior under Article 6 (3) of the Statute for the acts of IPJ Kayishema.

[1441] T. 18 January 2011 p. 20.
[1442] T. 18 April 2011 pp. 22-24, 26.
[1443] T. 18 April 2011 p. 20.
[1444] T. 17 January 2011 pp. 27, 28.
[1445] T. 17 January 2011 p. 28.
[1446] T. 18 January 2011 p. 21.
[1447] T. 17 January 2011 p. 33; T. 18 January 2011 pp. 3-4.

3.5.3 Gendarmes

784. Article 28 of the 1974 *Law on the Gendarmerie Nationale* states, generally, "Members of the National Police Force (*Gendarmerie Nationale*) are subject to the exclusive authority of their ranking superiors in order to carry out their mission."[1448]

785. In April 1994, a *bourgmestre*, not being part of the *gendarmerie's* hierarchy, could not have had operational command of the allocated unit. The limited nature of the *de jure* relationship between the two sides is evident from the following clause:

> "In the execution of a requisition, the National Police must maintain authority, while liaising with the administrative authority of the petitioner and providing information, not withstanding exigent circumstances, regarding the means that it plans to use. Similarly, the administrative authority must convey to the National Police command all useful information to accomplish the mission."[1449]

786. The Majority concludes that the *bourgmestre* did not have *de jure* control over the *gendarmes*. However, the Appeals Chamber has stated that the possession of *de jure* authority provides only some evidence of effective control.[1450] Thus, the particular facts in this case must be considered to determine whether Ndahimana exercised effective control over the *gendarmes*.

787. In terms of general powers, Defence Witnesses Kayishema and ND13 testified that Ndahimana did not have the legal authority to issue orders to the *gendarmes*; rather, he could only request their assistance on security matters.[1451] In sum, the Prosecution did not show that the Ndahimana had *de jure* authority over the *gendarmes*.

788. The Majority recalls its findings in relation to paragraphs 16-18 of the Indictment (Chapter III, Section 2.3). The parties do not dispute that Ndahimana chaired a security meeting at the Kivumu communal office on 11 April 1994, and that the participants decided that he would ask the *préfet* to assign a number of *gendarmes* to Kivumu *commune*. After having carefully assessed the evidence in relation to that meeting, the Majority has concluded that the evidence does not indicate whether the intent behind these decisions was to protect the refugees or to harm them.

789. The evidence also indicates that the *gendarmes* tried to protect the refugees at the early stages of the attacks on Nyange church, before 14 April 1994.[1452] However, their role as protectors became less pronounced as the number of assailants and the scale of the attacks grew. Once again, the events of 15 and 16 April 1994 are the most relevant in determining the role of the *gendarmes*.

790. In assessing the evidence relating to 15 April 1994, the Majority has considered the testimony of Witnesses CBK, CDL, CBS, CBI and CBN that *gendarmes* participated in the attack on Nyange church.[1453] While the Majority finds that these witnesses corroborate each other on this

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[1448] Defence Exhibit 120 (Non-official translation).
[1449] Defence Exhibit 120, Article 39 (Non-official translation).
[1450] *Orić* (AC) Judgement, paras. 91-92. *See also*, *Renzaho* (AC) Judgement, para. 752.
[1451] Witness Kayishema: T. 18 April 2011 pp. 22-24, 26; Witness ND13: T. 17 January 2011 pp. 23-24.
[1452] *See e.g.*, Witness CDZ: T. 8 September 2010 p. 37; Witness ND24: T. 21 February 2011 pp. 7-8; Witness ND6: T. 27 January 2011 p. 5; Witness ND12: T. 19 January 2011 pp. 5-6.
[1453] Witness CBK: T. 3 November 2010 pp. 12-15, 58; Witness CDL: T. 12 November 2010 p. 13; Witness CNJ: T. 4 November 2010 pp. 51-53; Witness CBY: T. 9 November 2010 pp. 53-54, T. 10 November 2010 pp. 27, 30-32;

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point it has concerns about Witness CBS's testimony.[1454] In his statement dated August 2000 and in *Kanyarukiga*, the witness said that the *gendarmes* alerted the refugees that they were going to be attacked and that they should try to defend themselves. He explained that what he meant was that the *gendarmes* did not assist the refugees and that subsequently "they accomplished the mission order that they had received," meaning that they worked together with the Hutus to kill the Tutsis.[1455] The Majority has serious doubts about this explanation and finds the witness' report that the *gendarmes* were part of the attack incredible. Rather, it believes that his 2000 statement tends to show that the *gendarmes* were in fact not hostile to the refugees.

791. The Defence evidence does not implicate the *gendarmes*; indeed, Witness ND6 testified that when the attack started, the *gendarmes* were in the backyard of Nyange presbytery, but "gave up" because there were too many attackers.[1456] This is partially corroborated by Witness ND12, who said that when the attackers headed towards Nyange church to kill the refugees, the *gendarmes* repelled them. The witness added that subsequently, a larger attack occurred when the *gendarmes* were no longer present.[1457] Furthermore, both Witnesses ND11 and ND7 were among the refugees who testified that the *gendarmes* assisted them.[1458] The Majority recalls that as these two witnesses are Tutsis survivors, they would have no motive to deny the presence of the *gendarmes* had they been there. Considering the evidence as a whole, the Majority finds the Defence witnesses raise reasonable doubt as to the role of the *gendarmes* during the attacks on Nyange church on 15 April 1994. As a result, it must conclude that the Prosecution has not proven beyond reasonable doubt that the *gendarmes* participated in the 15 April 1994 attacks at Nyange parish.

792. The Majority will now address the evidence relating to 16 April 1994. Witnesses CBR and CDL referred to the presence of *gendarmes* at the parish on the morning of 16 April 1994 together with Seromba, Ndahimana, Kanyarukiga, Kayishema, Ndungutse and others.[1459]

793. The Majority finds that the *gendarmes'* participation in the killings has not been established by the Prosecution, and their involvement in the events of 16 April 1994 at the parish is not clear. The Majority is unable to conclude that the only reasonable inference is that the *gendarmes* participated in the killings at Nyange parish and that Ndahimana exercised effective control over them. Therefore, it cannot hold the accused responsible for the actions of the *gendarmes* pursuant to Article 6 (3) of the Statute.

3.5.4 Reservists

794. The Prosecution has not brought evidence showing that a civilian administrator such as the accused could have interposed himself in the Rwandan army structure. Therefore, the Majority is of the view that he could not have had *de jure* authority over the soldiers involved.

Witness CBS: T. 7 September 2010 pp. 8-10, 32; Witness CBI: T. 14 September 2010 pp. 39-41; Witness CBN: T. 13 September 2010 pp. 22-23.

[1454] T. 6 September 2010 p. 63; T. 7 September 2010 p. 27; Defence Exhibit 7; Defence Exhibit 8.

[1455] T. 7 September 2010 pp. 8-10, 32.

[1456] T. 27 January 2011 p. 36.

[1457] T. 19 January 2011 pp. 6-8.

[1458] Witness ND11: T. 18 January 2011 pp. 35-36, 66 (Witness talked to a *gendarme* who "allowed" him to leave Nyange church at about midnight); Witness ND7: T. 24 January 2011 pp. 14-15, 35, 38 (Immediately after she and other refugees entered the room between 3 and 4 p.m., *gendarmes* locked the room so that the attackers could not get at the refugees).

[1459] Witness CBR: T. 1 November 2010 p. 24; Witness CDL: T. 12 November 2010 pp. 19-20, T. 19 November 2010 p. 16.

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795. The Majority recalls that the events of 15 April 1994 address the involvement of the army reservist Théophile Rukara. However, Rukara was not acting under the supervision of the Rwandan army in the present case; his involvement will be therefore considered under the section addressing the control of the accused over the civilian assailants.

3.5.5 Civilian Assailants

796. The Prosecution sought to establish Ndahimana's superior responsibility for crimes committed by the civilian Hutu population in Kivumu *commune*, including the *Interahamwe* militia, through his position as *bourgmestre*.[1460] The Defence denied that the accused exercised authority over civil defence forces, *Interahamwe* or other civilian militia.[1461]

797. The Majority has determined that the case of Rukara falls in the category of the civilian assailants. It recalls that on the morning of 15 April 1994, one, or possibly several, grenades were thrown at the refugees by a reservist named Rukara, forcing them to retreat toward Nyange church (Chapter III, Section 5.3.5).[1462] However, the Prosecution did not establish that Rukara was acting pursuant to orders given by Ndahimana, or that Rukara was under Ndahimana's effective control.

798. The Majority believes that the events of 16 April 1994 are the most relevant to address Ndahimana's superior responsibility for crimes committed by the civilian Hutu population. The evidence shows that the civilians were incited to go and participate in the attacks on Nyange church; however, it has not been established that Ndahimana was involved in the gathering or the supervision of *Interahamwe* forces. During the destruction of the church, Ndahimana's presence, together with the presence of Seromba, Kanyarukiga and Kayishema, gives the strong impression that *several* persons of influence in Kivumu *commune* had an interest and involvement in the massacre. Similarly, the fact that *Interahamwe* also came from other *communes*, including Kibilira, indicates the extensive coordination that must have involved civilian forces outside Ndahimana's territorial jurisdiction.[1463] In the Majority's view, the record reflects that, at the critical moments, Ndahimana's presence and standing as *bourgmestre* facilitated a large-scale attack on Tutsi refugees (Chapter III, Section 6.3.4). While this tends to reflect Ndahimana's general authority, it is insufficient to conclude that he had the material ability to prevent or punish the civilian assailants who participated in the attack.

799. Under the circumstances detailed above, the record does not establish that a superior-subordinate relationship existed between Ndahimana and the civilian assailants, or that he had the

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[1460] Indictment, para. 12.
[1461] Defence Closing Brief, para. 431.
[1462] Witness CBT: T. 7 September 2010 p. 40 (Théophile Rukara had thrown a grenade killing Tutsis); Witness CDK: T. 8 November 2010 pp. 32-35 (Kanyarukiga had a "conversation" with Théophile Rukara and subsequently he threw grenades killing Tutsis); Witness CBY: T. 9 November 2010 p. 53, T. 10 November 2010 pp. 30-31 (ICS) (A former soldier, Rukara, climbed on the roof of a house and threw grenades at the Tutsi. Many were killed and wounded); Witness CDL: T 12 November 2010 p. 8 ("Rukara" a former soldier, climbed on top of a shop and threw grenades. Refugees retreated); Witness CBK: T. 3 November 2010 pp. 12-15, 58 (At one point, Théophile Rukara climbed on the roof of the Caritas building and threw grenades at the Tutsis causing the death of a number among them); Witness CNJ: T. 4 November 2010 pp. 49-51 (At one point, Rukara, a retired soldier, threw three grenades at Tutsis who then started retreating); Witness CBR: T. 1 November 2010 pp. 18-19, T. 2 November 2010 pp. 58-59 (A certain Rukara arrived with weapons, including grenades. From the roof of a shop, Rukara threw grenades at the refugees causing many deaths among the Tutsis)
[1463] *See e.g.*, Witness CBR: T. 1 November 2010 pp. 21, 23; Witness CNJ: T. 4 November 2010 p. 56; Witness ND6: T. 27 January 2011 p. 9.

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material ability to prevent or punish crimes committed by them at Nyange church. Therefore, he cannot be held responsible for their actions pursuant to Article 6 (3) of the Statute.

3.6 Conclusion

800. The Prosecution demonstrated that Ndahimana exercised effective control over the communal policemen who participated in the attacks on Nyange church on 15 April 1994. Therefore, Ndahimana can be held responsible for their crimes committed at Nyange parish, pursuant to Article 6 (3) of the Statute.

801. The Prosecution failed to demonstrate that Ndahimana exercised effective control or bore superior responsibility over any other category of assailants proven to have committed crimes at Nyange parish. Consequently, he cannot be held responsible for their crimes at Nyange parish, pursuant to Article 6 (3) of the Statute.

4. Genocide

4.1 Introduction

802. Count I of the Indictment charges Ndahimana with genocide under Article 2 (3) (a) of the Statute.

4.2 Law

803. To find an accused guilty of the crime of genocide, it must be established that the accused committed any one of the enumerated acts in Article 2 (2) of the Statute, with the specific intent to destroy, in whole or in part, a group, as such, that is defined by one of the protected categories of nationality, race, ethnicity or religion.[1464] Although there is no numeric threshold, the perpetrator must act with the intent to destroy at least a substantial part of the group.[1465] The perpetrator need not be solely motivated by the criminal intent to commit genocide, nor does the existence of personal motive preclude him from having the specific intent to commit genocide.[1466]

804. In the absence of direct evidence, a perpetrator's *mens rea* as to the crime of genocide may be inferred from relevant facts and circumstantial evidence proving the existence of such intent beyond reasonable doubt. Factors that may establish the requisite specific intent include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group or the repetition of destructive and discriminatory acts.[1467]

[1464] *Bagosora et al.* (TC) Judgement, para. 2115 (citing *Nahimana et al.* (AC) Judgement, paras. 492, 496, 522-523; *Niyitegeka* (AC) Judgement, para. 48; *Gacumbitsi* (AC) Judgement, para. 39; *Brđanin* (TC) Judgement, paras. 681, 695).

[1465] *Bagosora et al.* (TC) Judgement, para. 2115 (citing *Seromba* (AC) Judgement, para. 175; *Gacumbitsi* (AC) Judgement, para. 44; *Simba* (TC) Judgement, para. 412; *Semanza* (TC) Judgement, para. 316).

[1466] *Bagosora et al.* (TC) Judgement, para. 2115 (citing *Simba* (AC) Judgement, para. 269, *Ntakirutimana* (AC) Judgement, paras. 302-304; *Niyitegeka* (AC) Judgement, paras. 48-54; *Krnojelac* (AC) Judgement para. 102 (citing *Jelisić* (AC) Judgement, para. 49)).

[1467] *Bagosora et al.* (TC) Judgement, para. 2116 (citing *Seromba* (AC) Judgement, para. 176 (referring to *Seromba* (TC) Judgement, para. 320); *Nahimana et al.* (AC) Judgement, paras. 524-525; *Simba* (AC) Judgement, para. 264; *Gacumbitsi* (AC) Judgement, paras. 40-41; *Rutaganda* (AC) Judgement, para. 525; *Semanza* (AC) Judgement, para. 262 (citing *Jelisić* (AC) Judgement, para. 47); *Kayishema & Ruzindana* (AC) Judgement, paras. 147-148).

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805. The Prosecution charges Ndahimana with killing and causing serious bodily or mental harm to members of the Tutsi group. The Majority has taken judicial notice of the fact that the Tutsi ethnicity is a protected group.[1468] A conviction for the crime of genocide requires a showing that the principal perpetrator intentionally killed one or more members of the group.[1469] The Appeals Chamber has noted that the term "serious bodily or mental harm" is not defined in the Statute, and that the definition of such harm has not squarely been addressed.[1470] Examples of serious bodily harm are torture, rape and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.[1471] Serious mental harm includes, "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat."[1472] To support a conviction for genocide, the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction, in whole or in part.[1473]

4.3 Deliberations

4.3.1 Killings at Nyange Church, 16 April 1994

806. In its factual findings, the Majority found that, based upon the corroborating evidence of Prosecution Witnesses CBK, CBY, CNJ, CDL and CBR, the Prosecution has proven beyond reasonable doubt that late in the morning on 16 April 1994, before the destruction of Nyange church began, Ndahimana met at Nyange presbytery with Father Seromba, IPJ Kayishema, Kanyarukiga and other members of the JCE. The Majority is further satisfied that Ndahimana was present during this meeting when the other participants planned and agreed to kill all the refugees at the church by destroying it (Chapter III, Section 6.3.3.3).

807. In its factual findings, the Majority further determined that the accused was present during the destruction of Nyange church and the killing of the Tutsi refugees on 16 April 1994 (Chapter III, Section 6.3.4).

808. In light of these circumstances, the Majority turns to consider the most appropriate mode or modes of liability applicable to Ndahimana's conduct. The Majority recalls that the Appeals Chamber has highlighted the importance of unambiguously expressing the scope of a convicted person's criminal responsibility.[1474] It has also affirmed that a Trial Chamber may cumulatively

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[1468] Decision on Prosecution's Motion for Judicial Notice, 7 April 2010.

[1469] *Bagosora et al.* (TC) Judgement, para. 2117 (citing *Simba* (TC) Judgement, para. 414 (referring to *Kayishema & Ruzindana* (AC) Judgement, para. 151)).

[1470] *Seromba* (AC) Judgement, para. 46. *See also*, *Kayishema & Ruzindana* (TC) Judgement, paras. 110, 113 (In which the Trial Chamber stated "that 'causing serious mental harm' should be interpreted on a case-by-case basis in light of the relevant jurisprudence.").

[1471] *Seromba* (AC) Judgement, para. 46 (citing *Semanza* (TC) Judgement, para. 320 (citing *Kayishema & Ruzindana* (TC) Judgement, para. 109); *Ntagerura et al.* (TC) Judgement, para. 664).

[1472] *Seromba* (AC) Judgement, para. 46 (citing *Kajelijeli* (TC) Judgement, para. 815 (citing *Kayishema & Ruzindana* (TC) Judgement, para. 110); *Semanza* (TC) Judgement, para. 321).

[1473] *Seromba* (AC) Judgement, para. 46 (citing *Kajelijeli* (TC) Judgement, para. 184; *Krajišnik* (TC) Judgement, para. 862); Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May-26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 91, UN Doc. A/51/10 (1996).

[1474] *See Ndindabahizi* (AC) Judgement, paras. 122 ("While an accused can be convicted for a single crime on the basis of several modes of liability, alternative convictions for several modes of liability are, in general, incompatible with the principle that a judgement has to express unambiguously the scope of the convicted person's criminal responsibility. This principle requires, *inter alia*, that the sentence corresponds to the totality of guilt incurred by the convicted person. This totality of guilt is determined by the *actus reus* and the *mens rea* of the convicted person. The modes of liability may either augment (*e.g.*, commission of the crime with direct intent) or lessen (*e.g.*, aiding and abetting a crime with

refer to various modes of responsibility where it is necessary to fully characterise an accused's criminal conduct.[1475]

809. In this instance, the Majority has considered that the accused's responsibility stems from his presence at the meeting on 16 April 1994 and during the subsequent killings. Therefore, the Prosecution has not proven that the accused planned, instigated or ordered any of the crimes charged.[1476] However, the Majority will assess whether, by his presence, Ndahimana committed the crime of genocide through a JCE or aided and abetted the crime of genocide.

4.3.2 Does Presence of Accused Constitute an Omission as Evidence of Participation in a JCE?

810. Involvement in a JCE may be proven by evidence characterised as an omission. The objective element of participation is satisfied as long as the accused has "committed an act or an omission which contributes to the common criminal purpose."[1477] However, the omission of the accused that forms the *actus reus* of this mode of liability cannot simply be the failure to prevent or punish.[1478]

811. In convictions under this mode, the act of omission is often combined with previous positive actions. Often, in order to prove the requisite *mens rea* for this mode of liability, it is necessary to combine the accused's inaction with previous positive actions that point toward the accused's shared criminal intent.[1479]

812. In the present case, the Majority is not convinced beyond a reasonable doubt that Ndahimana shared the requisite specific intent of the other members of the JCE. Specifically, the Prosecution failed to prove beyond reasonable doubt that the accused shared the intent to destroy the Tutsi population in whole or in part.[1480]

813. The Majority recalls that the evidence as to whether Ndahimana attended one or two meetings at Nyange church on 13 April 1994 and whether an attack was launched that same day is unclear. It concluded that Ndahimana attended one meeting at Nyange presbytery but it had not been proven beyond reasonable doubt that the authorities planned the extermination of the Tutsis on 13 April 1994 (Chapter III, Section 4.3.2). In addition, while the Majority found that Ndahimana went to the presbytery on 14 April 1994, the Prosecution did not prove that Ndahimana left and

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awareness that a crime will probably be committed) the gravity of the crime. Thus, the criminal liability of a convicted person has to be established unequivocally." (Internal citations omitted)).

[1475] *See Ndindabahizi* (AC) Judgement, para. 122 (An accused can be convicted for a single crime on the basis of several modes of liability), para. 123 (Noting that the Trial Chamber wanted to emphasise that a full characterisation of the accused's conduct had to cumulatively refer to various modes of liability); *Gacumbitsi* (AC) Judgement, para. 204 (Recalling that the accused played a central role in planning, instigating, ordering, committing and aiding and abetting genocide and extermination in his *commune* of Rusumo, where thousands of Tutsis were killed or seriously harmed).

[1476] Indictment, paras. 10, 35.

[1477] *Kvočka et al.* (AC) Judgement, para. 187.

[1478] *Mpambara* (TC) Judgement, para. 39 ("The Chamber emphatically rejects this approach. Failure to prevent or punish a crime *cannot* be characterised as a form of commission of that same crime.") (emphasis added).

[1479] *Mpambara* (TC) Judgement, para. 24; *Kvočka et al.* (AC) Judgement, para. 195 (The Appeals Chamber upheld a conviction of participation in a JCE based on the accused's failure to prevent or punish crimes that were being committed by camp guards. The Appeals Chamber considered also: "[1] that he held a high-ranking position in the camp and had some degree authority over the guards; [2] that he had sufficient influence to prevent or halt some of the abuses but that he made use of that influence only very rarely; [3] that he carried out his tasks diligently, participating actively in the running of the camp; that through his own participation, in the eyes of other participants, he endorsed what was happening in the camp.").

[1480] Statute, Article 2.

refused to assist the refugees. Nor did the Prosecution prove beyond reasonable doubt that an attack, orchestrated by the accused's subordinates, occurred after the meeting on 14 April 1994 (Chapter III, Section 4.3.4.2.1).

814. The Majority found that Ndahimana's alibi for 15 April 1994 was reasonably possibly true and that no inferences can be drawn from his visit to Nyange presbytery that evening (Chapter III, Section 5.3.3). Therefore, the Majority cannot rely on previous positive actions of the accused to conclude that he shared the specific intent of the main perpetrators.

815. Turning to the events of 16 April 1994, the Majority recalls that the Prosecution only proved that Ndahimana was present at the meeting and subsequent attack. Therefore, the Majority found that even if the accused bore responsibility for the events that occurred that day, he did not, however, play a central role in planning the killings at Nyange church. That is, he did not issue orders or express instructions to kill Tutsis (Chapter III, Section 6.3.4).

816. The Majority further recalls that in most cases, genocidal intent will be proven by circumstantial evidence. However, in such cases, the finding that the accused possessed the requisite *mens rea* must be the only reasonable inference from the totality of the evidence.[1481] Here the Majority does not conclude that the only reasonable inference which can be drawn from the evidence is that the accused possessed genocidal intent.

817. Accordingly, the Majority has also addressed the circumstantial evidence presented by the Prosecution, tending to show that Ndahimana had a criminal intent during the period covered by the Indictment.

818. Witness CBI testified that on 13 April 1994, Seromba handed Ndahimana a list containing Tutsis' names, and that those people were brought to Nyange parish.[1482] The Majority, however, found that it would not rely on this witness unless corroborated. In addition, the Majority also concluded that there was no evidence showing that, at that time, the accused was spurred on by criminal intentions, nor was there evidence that the Tutsis were brought to Nyange church on Ndahimana's instructions (Chapter III, Section 3.3). Other evidence, such as Witness CBY's testimony, suggested that Ndahimana in fact did not have criminal intentions towards the refugees; indeed, the witness reported that on 13 April 1994 he heard Ndahimana direct the assailants to go home.[1483]

819. Furthermore, the Majority acknowledges that the Prosecution relies on evidence alleging that Hutu women were removed from Nyange church on 14 April 1994 in order to "prove Ndahimana's genocidal intent."[1484] Nevertheless, in addition to its observation that it would not rely on Witness CBS' testimony unless corroborated, the Majority considered that the evidence alleging that Ndahimana remained in the car while the three Hutu women were being called out from the church by Kayishema could, at most, show that he knew about Kayishema's criminal intent, but not necessarily that he shared it (Chapter III, Section 4.3.4.2.2). Here, the Majority does not conclude

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[1481] *Nahimana et al.* (AC) Judgement, para. 524.
[1482] T. 14 September 2010 pp. 30-33 (Witness noted that among the Tutsis that arrived subsequently at the church, he saw Antoine Karake and his family).
[1483] T. 10 November 2010 pp. 19-20 (ICS) ("A.: He [Ndahimana] was talking to the Hutus who had attacked the Tutsis. Q.: So, correct me if I am wrong that Mr. Ndahimana asked attackers to go home -- to return to their homes? A.: Yes, he told them to go home, but I do not know whether they immediately obeyed, because I did not follow that up.").
[1484] Prosecution Closing Brief, paras. 62-63.

that the only reasonable inference to be drawn from the evidence is that Ndahimana possessed genocidal intent.

820. On the contrary, the Majority finds it plausible that Ndahimana's presence at Nyange parish on the days preceding the destruction of Nyange church could have been motivated by an attempt to protect the refugees rather than to harm them. Indeed, the Prosecution's submission regarding Ndahimana's criminal intent is challenged by other evidence tending to show that the accused came after the attack on 14 April 1994 and asked the *gendarmes* to protect the refugees. Prosecution Witness CDZ left Nyange church the night of 14 April 1994 because he believed that those staying there were risking death, because *gendarmes* had indicated to the witness the high risk of staying at the church.[1485] Defence Witness ND24 explained that on 14 April 1994, the assailants, including the witness, tried to launch an attack on the church but were unable to do so because *gendarmes* shot into the air to disperse the assailants, and that no Tutsis were injured on 14 April 1994.[1486]

821. In relation to the events of 16 April 1994, the Prosecution submits that "Ndahimana celebrated the killings of the Tutsis because it was his intention that they be killed."[1487] In the present instance, the Majority is not satisfied that the only reasonable conclusion that can be drawn from the evidence is that Ndahimana was celebrating the killings and therefore shared the criminal intent of the main perpetrators (Chapter III, Section 6.3.5).

822. That Ndahimana had the requisite *dolus specialis* to incur liability under this mode of participation is not the only reasonable inference that can be drawn from the totality of the evidence.

823. The Majority will not address whether the accused should be liable for aiding and abetting by omission. The Prosecution gave clear and consistent information both to the accused and to the Chamber that its case was framed on the *direct participation* in criminal activities surrounding the attacks that occurred at Nyange parish.[1488] It would therefore be contrary to the fundamental fair trial rights of the accused, including his right to defend himself and to know the charges against him, if the Majority was to find him criminally responsible for aiding and abetting by omission.[1489]

4.3.3 Does Presence of Accused Constitute Tacit Approval as Evidence of Aiding and Abetting?

824. The Majority recalls that an accused may be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to that crime.[1490] Aiding and abetting by tacit approval and encouragement requires the presence of the accused at or near the scene of the crime.[1491]

[1485] T. 8 September 2010 pp. 35, 37.
[1486] T. 21 February 2011 pp. 3, 5, 8, 20-21.
[1487] Prosecution Closing Brief, para. 98.
[1488] *See e.g.*, Indictment, paras. 25-31.
[1489] *Rwamakuba* (TC) Judgement, paras. 26, 28.
[1490] *Aleksovski* (TC) Judgement, para. 87; *Kayishema & Ruzindana* (AC) Judgement, paras. 201-202; *Akayesu* (TC) Judgement, para. 706.
[1491] *See Brđanin* (AC) Judgement, para. 273 (Noting that "[i]n the cases where this category [of conduct amounting to tacit approval and encouragement of the crime] was applied, the accused held a position of authority, he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement."). *See also*, *Seromba* (TC) Judgement, para. 307; *Bagilishema* (TC) Judgement, para. 36 ("liability for aiding and abetting as an 'approving spectator' presupposes actual presence at the scene of the crime, or at least presence in the immediate vicinity of the scene of the crime.").

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825. In cases where this category of Article 6 (1) liability has been applied, the accused held a position of authority, was physically present on the scene of the crime and his non-intervention was seen as tacit approval and encouragement.[1492] The *Kayishema & Ruzindana* Trial Chamber held that "individual responsibility pursuant to Article 6 (1) is based, in this instance, not on a duty to act, but from the encouragement and support that might be afforded to the principals of the crime."[1493] In such cases, the combination of a position of authority and physical presence on the crime scene allows the inference that non-interference by the accused actually amounted to tacit approval and encouragement.[1494]

826. "Encouragement" and "moral support" are two forms of conduct which may lead to criminal responsibility for aiding and abetting a crime. The encouragement or support need not be explicit; under certain circumstances, even the act of being present on the crime scene (or in its vicinity) as a "silent spectator" can be construed as tacitly approving or encouraging the crime. In any case, this encouragement or moral support must always substantially contribute to the commission of the crime.[1495] As put by the *Furundžija* Trial Chamber, "[w]hile any spectator can be said to be encouraging a spectacle—an audience being a necessary element of a spectacle—the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals."[1496]

827. According to the jurisprudence, the authority of the accused, combined with his presence at the crime scene, leads to the conclusion that the accused's conduct substantially contributed to the crime. It thus follows that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of the accused's presence.[1497] In the present case, Ndahimana's presence on 16 April 1994 has been established beyond reasonable doubt (Chapter III, Section 6.3.3.3).

828. The Majority considers that Ndahimana could not ignore the fact that the victims of the attacks at Nyange parish were Tutsis. For example, evidence relating to 14 April 1994 shows that the accused talked to the refugees and they told him that they had been attacked.[1498] The Majority found that Ndahimana came to Nyange parish on the evening of 15 April 1994 and that he had reason to know that a large-scale attack occurred that day. In addition, the Majority found him criminally responsible for the acts committed by the communal police on 15 April 1994 as he had reason to know that they participated in the killings that occurred that day but did not punish them (Chapter IV, Section 3.5.1.3). The *mens rea* of the "approving spectator" may be deduced from the circumstances, and may include prior concomitant behaviour; for instance, allowing crimes to go

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[1492] *Aleksovski* (TC) Judgement, para. 87; *Kayishema & Ruzindana* (AC) Judgement, paras. 201-202; *Akayesu* (TC) Judgement, para. 706. *See also Furundžija* (TC) Judgement, paras. 205-207 (Discussing the *Synagogue* case).

[1493] *Kayishema & Ruzindana* (TC) Judgement, para. 202 (Upheld by *Kayishema & Ruzindana* (AC) Judgement, paras. 201-202).

[1494] *Kayishema & Ruzindana* (TC) Judgement, para. 200 (Referring to the discussion of the *Synagogue* case in *Furundžija* (TC) Judgement, para. 207).

[1495] *Brđanin* (AC) Judgement, para. 277.

[1496] *Furundžija* (TC) Judgement, para. 232.

[1497] *Kayishema & Ruzindana* (AC) Judgement, para. 201; *Akayesu* (TC) Judgement, paras. 706-707; *Furundžija* (TC) Judgement, paras. 207-209; *Aleksovski* (TC) Judgement, para. 88; *Bagilishema* (TC) Judgement, para. 36; *Ndindabahizi* (TC) Judgement, para. 457.

[1498] *See, e.g.*, Witness ND11: T. 18 January 2011 pp. 31-34, 49-50 (He was told that the accused came to the presbytery and talked to the refugees); Witness ND12: T. 19 January 2011 pp. 4-6, 14-15 (She said that "[a]ll refugees could hear" what was being said. The refugees told Ndahimana that Ndungutse had led an attack against them and the accused responded that "he did not have powers", but he had asked the *gendarmes* to continue to protect the refugees).

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unpunished or providing verbal encouragement to commit such crimes.[1499] Additionally, Ndahimana's presence at the meeting prior to and during the attack of 16 April 1994 shows that Ndahimana could not have ignored, nor been ignorant of the fact that the main perpetrators intended to commit genocide.

829. The "approving spectator" must have a significant status if his or her presence is to have the required effect on the perpetrators.[1500] Several witnesses described Ndahimana, the *bourgmestre* of Kivumu *commune*, as a person of authority.[1501] Taking this into consideration, the Majority concludes that Ndahimana exerted a sense of moral authority over the population of his *commune*.

830. However, the Majority acknowledges that Ndahimana's position of authority, in and of itself, would not support a positive finding on criminal responsibility. The requisite *mens rea* in the more specific case of the "approving spectator" is that the accused knows that his presence would be seen by the perpetrator of the crime as encouragement or support.[1502] In this respect, several perpetrators reported the encouraging effect of Ndahimana's presence at Nyange parish.[1503] The Majority found that the accused did not instigate or supervise the attack.[1504] In this context, the accused's presence is circumstantial evidence that can be taken into consideration to establish the *mens rea* of the approving spectator.[1505]

831. Ndahimana must have known that his presence during the attack would have a significant encouraging effect on the assailants as he was a person of influence in the *commune*. In addition, his attendance at meetings held at Nyange parish on the days prior to 16 April 1994, amidst the attacks and other circumstances prevailing at the parish and in his *commune* conveyed the impression of him as an "approving spectator." Ndahimana did not openly object to the killings, and could not have ignored that this would likely be considered by the assailants as tacit approval of their perpetration of the attacks. Ndahimana knew that the destruction of the church would necessarily cause the death of the Tutsi refugees. In these circumstances, his presence on the scene of the crime substantially contributed to the attack that was launched, the destruction of the church and the death of the numerous refugees inside.[1506]

832. Grégoire Ndahimana's conduct as an approving spectator was limited to giving moral support to the principal perpetrators of the crime, which constitutes the *actus reus* of aiding and

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[1499] *Bagilishema* (TC) Judgement, para. 36.
[1500] *Bagilishema* (TC) Judgement, para. 36.
[1501] Witness CBS: T. 6 September 2010 p. 46; Witness CBK: T. 4 November 2010 p. 17; Witness ND24: T. 21 February 2011 p. 30 ("All I know, in general terms, is that the *bourgmestre* was in charge of all of us."); Witness ND3: T. 17 February 2011 p. 18 ("I know that Ndahimana was in a vehicle touring the *commune* and, in fact, he was the authority in the *commune*.").
[1502] *Bagilishema* (TC) Judgement, para. 36.
[1503] *See* discussion of testimonies of Witnesses CBR and CDL (Chapter III, Section 6.3.3.2).
[1504] The Majority recalls the Dissenting Opinion of Judge Liu, para. 4, as appended to the *Seromba* (AC) Judgement, which distinguished practical assistance from supervision as follows: "In the present case, Athanase Seromba played a different role. While he accepted the decision of the communal authorities to destroy the church, spoke with a bulldozer driver and uttered words that encouraged him to destroy the church, even giving advice as to the weak side of the church, Athanase Seromba did not "supervise" or "direct" the massacre and he played no role in any separation of Tutsi refugees so that they could be killed."
[1505] *Bagilishema* (TC) Judgement, para. 36.
[1506] The Majority recalls the dissenting opinion of Judge Liu, para. 16, as appended to the *Seromba* (AC) Judgement, which states as follows: "the mere knowledge that the destruction of the church would necessarily cause the death of approximately 1,500 Tutsi refugees does not exactly correlate with 'an intention to destroy in whole or in part the Tutsis'."

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abetting.[1507] In the Majority's view, Ndahimana's participation through aiding and abetting by tacit approval most aptly sums up his criminal conduct. Accordingly, the Majority finds beyond reasonable doubt that Ndahimana is responsible pursuant to Article 6 (1) of the Statute for aiding and abetting the killing of Tutsi refugees in Nyange church on 16 April 1994.

5. Complicity in Genocide

833. Count II of the Indictment charges Ndahimana with complicity in genocide under Article 2 (3) (e) of the Statute. The Prosecution has indicated that the count of complicity is pleaded in the alternative to the count of genocide (Count I). Accordingly, having found the accused guilty of genocide under Count I, the Majority dismisses Count II of the Indictment.

6. Crimes Against Humanity

6.1 Introduction

834. Count III of the Indictment charges Ndahimana with extermination as a crime against humanity under Article 3 (b) of the Statute.

6.2 Widespread or Systematic Attack

835. For an enumerated crime under Article 3 to qualify as a crime against humanity, the Prosecution must prove that there was a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds.[1508] An attack against a civilian population means the perpetration of a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraphs (a) to (i) of Article 3 against that population.[1509] Intended to be read as disjunctive elements, "widespread" refers to the large scale nature of the attack and the number of targeted persons, while "systematic" describes the organised nature of the acts of violence and the improbability of their random occurrence.[1510]

836. With respect to the requisite *mens rea*, the perpetrator must have acted with knowledge of the broader context and knowledge that his acts formed part of the attack, but need not share the purpose or goals of the broader attack.[1511] The additional requirement that crimes against humanity

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[1507] *Blaškić* (AC) Judgement, para. 46.

[1508] *Bagosora et al.* (TC) Judgement, para. 2156 (citing *Semanza* (AC) Judgement, paras. 326-332 (referring to *Akayesu* (TC) Judgement, para. 578); *Rutaganda* (TC) Judgement, para. 73; *Akayesu* (AC) Judgement, paras. 467, 469; *Ntakirutimana* (AC) Judgement, para. 516; *Ntagerura et al.* (TC) Judgement, paras. 697-698; *Mpambara* (TC) Judgement, para. 11; *Simba* (TC) Judgement, para. 421; *Gacumbitsi* (TC) Judgement, para. 299; *Tadić* (AC) Judgement, paras. 248, 255).

[1509] *Bagosora et al.* (TC) Judgement, para. 2165 (citing *Nahimana et al.* (AC) Judgement, paras. 915-918; *Kordić & Čerkez* (AC) Judgement, para. 666; *Kunarac et al.* (AC) Judgement, para. 89; *Kunarac et al.* (TC) Judgement, para. 415).

[1510] *Bagosora et al.* (TC) Judgement, para. 2165 (citing *Nahimana et al.* (AC) Judgement, para. 920 (quoting *Kordić & Čerkez* (AC) Judgement, para. 94); *Ntakirutimana* (AC) Judgement, para. 516; *Mpambara* (TC) Judgement, para. 11; *Semanza* (TC) Judgement, paras. 328-329; *Kunarac et al.* (TC) Judgement, para. 429; *Kunarac et al.* (AC) Judgement, para. 94; *Gacumbitsi* (AC) Judgement, para. 101 (citing *Gacumbitsi* (TC) Judgement, para. 299); *Stakić* (AC) Judgement, para. 246; *Blaškić* (AC) Judgement, para. 101, *Limaj et al.* (TC) Judgement, para. 180; *Brđanin* (TC) Judgement, para. 133).

[1511] *Bagosora et al.* (TC) Judgement, para. 2166 (citing *Gacumbitsi* (AC) Judgement, paras. 86, 103 (referring to *Tadić* (AC) Judgement, paras. 251-252); *Galić* (AC) Judgement, para. 142; *Semonza* (AC) Judgement, paras. 268-269; *Simba* (TC) Judgement, para. 421; *Kordić & Čerkez* (AC) Judgement, para. 99; *Kunarac et al.* (TC) Judgement, para. 434; *Kunarac et al.* (AC) Judgement, para. 102; *Blaškić* (AC) Judgement, paras. 124-127).

must be committed "on national, political, ethnic, racial or religious grounds" does not mean that a discriminatory *mens rea* must be established.[1512]

837. Having considered the totality of the evidence, the Majority concludes that there were widespread attacks against the Tutsi population in Kivumu *commune* in April 1994. Witnesses recounted attacks against Tutsis in the days immediately following President Habyarimana's death. Hundreds and possibly thousands of Tutsis sought refuge at Nyange parish. The evidence of the attacks at Nyange parish, the scale of the killings and the ethnic composition of the victims, can lead to no other conclusion than, in April 1994, in Kivumu *commune*, there were widespread attacks against the civilian Tutsi population on ethnic grounds.

838. Given Ndahimana's position of authority at the time and his presence at Nyange parish on 16 April 1994, the Majority finds it inconceivable that the perpetrators of the killings, as well as Ndahimana himself, did not know that their actions formed part of a widespread attack.

7. Extermination

7.1 Law

839. The crime of extermination requires proof that an accused participated in a widespread or systematic killing or systematically subjected a widespread number of people to conditions of living that would inevitably lead to death.[1513] Extermination is distinguishable from murder on the basis that it is the act of killing on a large scale.[1514] Although extermination is the act of killing a large number of people, such a designation does not require that a numerical minimum must be reached.[1515] The mental element for extermination is the intent to perpetrate or to participate in a mass killing.[1516]

7.2 Deliberations

840. Ndahimana is charged with extermination as a crime against humanity with respect to the proven allegations related to the events that unfolded at Nyange parish on 15 and 16 April 1994.[1517] The Majority considers whether the established allegations amount to extermination as a crime against humanity.

841. The Majority has found that the killings at Nyange parish on 15 and 16 April 1994 amount to genocide. It is clear from those findings that the killings at the parish were conducted on ethnic grounds. Ndahimana is liable under Article 6 (3) of the Statue for the crimes committed by the communal police on 15 April 1994. In addition, he is liable under Article 6 (1) of the Statute for aiding and abetting the killings on 16 April 1994 (Chapter IV, Section 4.3.3).

842. Moreover, the Majority recalls its findings that hundreds and possibly thousands of Tutsi civilians were killed at Nyange parish. Accordingly, the Majority has no doubt that the killings were

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[1512] *Bagosora et al.* (TC) Judgement, para. 2166 (citing *Akayesu* (TC) Judgement, paras. 464-469, 595; *Bagilishema* (TC) Judgement, para. 81).
[1513] *Ntakirutimana* (AC) Judgement, para. 522; *Ndindabahizi* (TC) Judgement, para. 480.
[1514] *Ntakirutimana* (AC) Judgement, para. 516. *See also*, *Ndindabahizi* (TC) Judgement, para. 479; *Semanza* (TC) Judgement, para. 340.
[1515] *Ntakirutimana* (AC) Judgement, para. 516.
[1516] *Ntagerura et al.* (TC) Judgement, para. 701. *See also*, *Ntakirutimana* (AC) Judgement, para. 522.
[1517] Indictment, paras. 34-38.

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conducted on a massive scale and, thus, amount to extermination. The number of Tutsi refugees who sought refuge at the parish, and Ndahimana's presence, demonstrate his knowledge of the intent of the main perpetrators to kill on a large scale, particularly given the context in which the killings took place.

843. The Majority finds Ndahimana guilty of extermination as a crime against humanity by aiding and abetting as well as by virtue of his command responsibility over the communal police (Count III).

8. Cumulative Convictions

8.1 Introduction

844. The Majority has found that the evidence supports findings under different statutory provisions on the basis of the same conduct. The Appeals Chamber has held that cumulative convictions are permissible where each crime has a materially distinct element not contained in the other.[1518] An element is materially distinct from another if it requires proof of a fact not required by the other element.[1519] Where this test is not met, a conviction will be entered only under the more specific provision. The more specific offence subsumes the less specific one because the commission of the former necessarily entails the commission of the latter.[1520]

845. In light of these legal principles, the Majority turns to consider whether it may enter cumulative convictions based on its findings.

8.2 Genocide and Extermination as a Crime Against Humanity

846. The Majority's findings with respect to the crime of genocide (Count I) and extermination as a crime against humanity (Count III) are based on the same conduct. The two are treated as distinct crimes by Articles 2 (3) (a) and 3 (b) of the Statute, respectively. The jurisprudence of both this Tribunal and the ICTY has consistently established that each crime contains materially distinct elements. The materially distinct element of genocide is the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group. The materially distinct element of extermination as a crime against humanity is the requirement that the crime was committed as part of a widespread or systematic attack against a civilian population.[1521] Convictions for both are permissible based on the same conduct.[1522]

847. Therefore, the Majority proceeds to enter convictions for both genocide (Count I) and extermination as a crime against humanity (Count II) with respect to Grégoire Ndahimana's responsibility for the killings and attacks at Nyange parish in April 1994.

[1518] *Ntakirutimana* (AC) Judgement, para. 542 (citing *Musema* (AC) Judgement paras. 358-370; *Kordić & Čerkez* (AC) Judgement, para. 1033; *Krstić* (AC) Judgement, para. 218; *Čelebići* (AC) Judgement, para. 412).
[1519] *Ntakirutimana* (AC) Judgement, para. 542 (citing *Čelebići* (AC) Judgement, para. 412). The standard was clarified in *Kunarac et al.* (AC) Judgement, para. 168. *See also, Vasiljević* (AC) Judgement, paras. 135, 146; *Krstić* (AC) Judgement, para. 218.
[1520] *Popović et al.* (TC) Judgement, para. 2111 (citing *Galić* (AC) Judgement, para. 163; *Krstić* (AC) Judgement, para. 218).
[1521] *Ntakirutimana* (AC) Judgement, para. 542 (citing *Musema* (AC) Judgement, para. 366). *See also, Nahimana et al.* (AC) Judgement, para. 1029; *Ntagerura et al.* (AC) Judgement, para. 426; *Semanza* (AC), Judgement, para. 318.
[1522] *Ntakirutimana* (AC) Judgement, para. 542 (citing *Musema* (AC) Judgement, para. 370).

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CHAPTER V: SENTENCING

1. Introduction

848. The Majority has found Grégoire Ndahimana guilty of genocide by aiding and abetting as well as by virtue of his command responsibility over the communal police (Count I). In addition, the Majority has found Ndahimana guilty of extermination as a crime against humanity by aiding and abetting as well as by virtue of his command responsibility over the communal police (Count III). Therefore, the Majority must determine an appropriate sentence.

2. Law

849. All crimes under the Tribunal's Statute are serious violations of international humanitarian law.[1523] When determining a sentence, a Trial Chamber has considerable, though not unlimited, discretion on account of its obligation to individualise penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes committed.[1524]

850. Pursuant to Article 23 of the Statute and Rule 101 of the Rules, when determining an appropriate sentence the Chamber shall consider: (1) the general practice regarding prison sentences in Rwanda; (2) the gravity of the offence; (3) the individual circumstances of the accused, including aggravating and mitigating circumstances; and (4) the extent to which any penalty imposed by a court of any State on the accused for the same act has already been served.[1525] As pointed out by the Appeals Chamber, this list of considerations is not exhaustive when determining an appropriate sentence.[1526] In addition, the Trial Chamber shall credit the accused for any time spent in detention pending transfer to the Tribunal and during trial.[1527]

3. Submissions

851. The Prosecution submits that Ndahimana should receive two concurrent life sentences for Count I and Count III, emphasizing the gravity of the crime of genocide, the presence of multiple aggravating factors and the lack of any mitigating factors.[1528] It submits that Ndahimana directly participated in crimes of the most heinous nature, thus placing him in the category of the most serious offenders.[1529] It further submits that aggravating factors include Ndahimana's position of authority as *bourgmestre* of Kivumu *commune* and his abuse of that position, his direct participation as a perpetrator, the violent and humiliating nature of his acts, as well as the vulnerability of his victims and the lengthy temporal duration of his offences.[1530]

852. The Defence submits that Ndahimana's sentence should be mitigated based on the fact that, at the time of the crimes, Ndahimana had only been *bourgmestre* for six months and when he took that position, the *commune* was already in a critical situation which he could not control.[1531] The

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[1523] *Gatete* (TC) Judgement, para. 673 (citing *Kayishema & Ruzindana* (AC) Judgement, para. 367 (quoting Article 1 of the Statute)).
[1524] *Gatete* (TC) Judgement, para. 673 (citing *Kajelijeli* (AC) Judgement, para. 291).
[1525] Statute, Article 23 (1)-(3); Rule 101 (B) (i)-(iv) of the Rules.
[1526] *Kajelijeli* (AC) Judgement, para. 290 (citing *Musema* (AC) Judgement, para. 380).
[1527] Rule 101 (C) of the Rules.
[1528] Prosecution Closing Brief, paras. 284-317. *See also*, T. 21 September 2011 pp. 45-47.
[1529] Prosecution Closing Brief, paras. 284-285.
[1530] Prosecution Closing Brief, paras. 289-309.
[1531] Defence Closing Brief, paras. 519-521.

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Defence also asserts that Ndahimana took all possible measures to protect Tutsis and that he is a man of good character who is married and the father of nine biological children and two adopted children.[1532]

4. Deliberations

4.1 Gravity of the Offence

853. The gravity of the offences committed is the deciding factor in the determination of the sentence.[1533] Gravity entails the particular circumstances of the case, the form and degree of the participation of the accused in the crimes and the number of victims.[1534]

854. The Majority has found Ndahimana responsible, under the law of superior responsibility, for the crimes committed by the communal policemen on 15 April 1994 and for aiding and abetting the crimes of genocide as well as for extermination as a crime against humanity with respect to the events that occurred at Nyange parish on 16 April 1994, resulting in the death of approximately 2,000 Tutsi men, women and children. The serious gravity of these crimes and the loss of human life and dignity caused by them cannot be overemphasised.

855. The Majority notes that, under Rwandan law, similar crimes as those at issue here carry the possible penalty of life imprisonment, depending on the nature of the accused's participation.[1535] The general practice of this Tribunal has been to limit imposing life sentences except for the most senior leaders who planned and ordered that atrocities be committed.[1536]

4.2 Personal, Aggravating and Mitigating Circumstances

856. With regard to the personal circumstances of the accused, the Chamber has broad discretion to consider aggravating or mitigating factors it deems relevant to the determination of an appropriate sentence. To be established for consideration, aggravating circumstances must be

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[1532] Defence Closing Brief, paras. 522-523.

[1533] *Nshogoza* (AC) Judgement, para. 98; *Nahimana et al.* (AC) Judgement, para. 1060.

[1534] *Rukundo* (AC) Judgement, para. 243.

[1535] *Gatete*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008, paras. 22-25 (Assessing Rwanda's penalty structure); *Kanyarukiga*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008, paras. 22-25 (Same). *See also Semanza* (AC) Judgement, para. 377 ("The command for Trial Chambers to 'have recourse to the general practice regarding prison sentences in the courts of Rwanda does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice'." (quoting *Serushago* (AC) Judgement, para. 30)); *Dragan Nikolić* (AC) Judgement, para. 69.

[1536] *See e.g.*, *Renzaho* (TC) Judgement, para. 820, n. 890 (citing *Musema* (AC) Judgement, para. 383 (Noting that the leaders and planners of a particular conflict should bear heavier responsibility, with the qualification that the gravity of the offence is the primary consideration in imposing a sentence)). The Majority notes that life sentences have been imposed against senior government and military authorities in the following cases: *Niyitegeka* (TC) Judgement, paras. 499, 502 (Minister of Information); *Kambanda* (TC) Judgement, paras. 44, 61-62 (Prime Minister); *Kamuhanda* (TC) Judgement, paras. 6, 764, 770 (Minister of Higher Education and Scientific Research). In several other cases, lower level officials, as well as those who did not hold government positions have received life sentences, for instance: *Karera* (TC) Judgement, para. 585 (Prefect of Kigali-Rural); *Kayishema & Ruzindana* (TC) Judgement & Sentence, p. 8 (Kayishema was *préfet* of Kibuye); *Gacumbitsi* (AC) Judgement, para. 206 (*Bourgmestre*); *Musema* (TC) Judgement, paras. 999-1008 (Influential director of a tea factory who exercised control over killers); *Ruraganda* (TC) Judgement, paras. 466-473 (Second Vice-President of *Interahamwe* at national level); *Hategekimana* (TC) Judgement, paras. 736-748 (Commander and influential authority at Ngoma Camp); *Gatete* (TC) Judgement, paras. 675-683 ("Prominent personality in Byumba and Kibungo *prefectures*," former *bourgmestre* of Murambi *commune*, Director of Women and Family Affairs in April 1994).

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proven beyond reasonable doubt.[1537] Mitigating circumstances need only be established by a balance of the probabilities.[1538]

4.2.1 Aggravating Circumstances

857. The Appeals Chamber has listed various factors that may qualify as aggravating circumstances. These include the position of the accused, the length of time during which the crime continued, premeditation, the active participation of a superior in the criminal acts of subordinates, the violent nature of the acts, the vulnerability or status of the victims, a particularly high number of victims and the general circumstances surrounding the offence(s).[1539]

858. The Chamber may consider an individual's position of authority or influence, or their abuse of that authority, as an aggravating circumstance.[1540] However any circumstance that is included as an element of the crime for which an individual is convicted cannot be considered as an aggravating factor.[1541]

859. The Majority notes that, in the present case, Ndahimana's abuse of his role as an influential authority is an element of the crime for which he was convicted under Article 6 (1) and Article 6 (3) of the Statute. Therefore, it cannot be considered as an aggravating factor.

860. The Majority further finds that the number of victims of the attack on Nyange church, for which Ndahimana is individually responsible, is an aggravating factor,[1542] as is the fact that attacks took place at a parish, where people sought refuge because of the universally recognised status of such places as sanctuaries.[1543]

861. The Majority considers that Ndahimana's actions did not evidence any particular zeal or sadism. He did not physically participate in the killings. Accordingly, these are not found to be aggravating factors, as suggested by the Prosecution.[1544]

4.2.2 Mitigating Circumstances

862. Mitigating circumstances include factors such as the accused's cooperation with the Prosecution, voluntary surrender, evidence of good character with no prior criminal convictions, comportment in detention, personal and family circumstances, indirect participation in alleged criminal acts, age and assistance to detainees or victims.[1545]

[1537] *Nyiramasuhuko et al.* (TC) Judgement, para. 6193 (citing *Nahimana et al.* (AC) Judgement, para. 1038; *Kajelijeli* (AC) Judgement, paras. 82, 294).
[1538] *Nyiramasuhuko et al.* (TC) Judgement, para. 6197 (citing *Nahimana et al.* (AC) Judgement, para. 1038; *Kajelijeli* (AC) Judgement, para. 294).
[1539] *Blaškić* (AC) Judgement, para. 686; *Ndindabahizi* (AC) Judgement, para. 135.
[1540] *Semanza* (AC) Judgement, paras. 335-336 ; *Dragomir Milošević* (AC) Judgement, paras. 302-303.
[1541] *Ndindabahizi* (AC) Judgement, para. 137.
[1542] *Semanza* (AC) Judgement, paras. 337-338; *Ndindabahizi* (AC) Judgement, para. 135; *Simba* (TC) Judgement, para. 440; *Bagosora et. al.* (TC) Judgement, para. 2272; *Serugendo* (TC) Judgement, para. 90; *Karera* (TC) Judgement, para. 579; *Rugambarara* (TC) Judgement, para. 24.
[1543] *Kamuhanda* (AC) Judgement, para. 357; *Ntakirutimana et al.* (AC) Judgement, para. 563; *Karera* (TC) Judgement, paras. 579-580; *Muhimana* (TC) Judgement, para. 605.
[1544] T. 21 September 2011 p. 46; Prosecution Closing Brief, para. 302 (b).
[1545] *Blaškić* (AC) Judgement, para. 696.

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863. The Majority notes that the Defence adduced evidence during trial which indicated that, prior to the events alleged in the Indictment, Ndahimana had a history of pleasant and cooperative relationships with Tutsis, both in his professional and personal life.[1546] The Defence also pointed to the fact that Ndahimana is married and is the father of nine biological children and two adopted children.[1547]

864. The Defence submitted evidence that Ndahimana assisted Tutsis during the relevant time of the Indictment.[1548] Several witnesses testified to specific incidents in which Ndahimana personally assisted them to reach a place of safety.[1549] While the Majority is mindful of Ndahimana's humanitarian actions, it also considers the number of Tutsis that the accused assisted in relation to the number of victims of the attack on Nyange church. The disproportionate result of this comparison leads the Majority to view Ndahimana's assistance to Tutsis as relatively selective, and therefore it does not consider it to be a substantial mitigating factor.

865. In respect to the accused's conduct during the events of 1994, the Majority has considered that Ndahimana did not play a leading role in the attacks. He did not personally participate in these killings. In addition, the Majority did not find that the accused planned or instigated the crimes. His responsibility for the crimes committed does not result from a premeditated plan, but rather, from his belated association to the crimes through his presence at Nyange church on 16 April 1994. The Majority further found that the accused did not have the requisite *mens rea* to support findings on other modes of direct liability such as JCE; indeed, the evidence in this case did not show that the only reasonable conclusion to be drawn from the accused's actions is that he shared the genocidal intent of the main perpetrators. Instead, his criminal responsibility is derived from his tacit approval combined with his presence at the crime scene.

866. The Majority also finds it significant that the accused took positive actions to preserve security in the *commune* in the days following the death of President Habyarimana until the height of the attacks. The Majority is satisfied that Ndahimana used the meeting of 11 April 1994 to discuss the security situation in the *commune*. Additionally, on this date, he requested the *préfet* to

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[1546] Witness Munsy: T. 28 February 2011 p. 17 (Testified that Ndahimana "didn't have anything against anyone, not even against Tutsis."); Witness Nkiriyehe: T. 22 February 2011 pp. 7-8 (Testified that Ndahimana had told him he had to leave his job at the Rubaya tea factory because the authorities did not like the fact that he employed persons from all ethnic groups. This witness also testified that at his wedding, members of the bridal and protocol parties were Tutsi); Witness ND2: T. 18 February 2011 p. 25 (ICS) (Testified that when attacks on the Tutsi minorities occurred in Gaseke and Giciye *communes* in 1991, Ndahimana immediately went to the director of his company to request that actions be taken to protect them).

[1547] Defence Closing Brief, para. 523.

[1548] Defence Closing Brief, paras. 522-523.

[1549] Witness ND13: T. 17 January 2011 p. 37 ("At the time of the events during the genocide, even if Ndahimana was unable to save many Tutsi lives, he was, however, able to give counsel or advice to some Tutsis so that they could save their own skins…he assisted people to flee to go and seek refuge elsewhere."); Witness ND11: T. 18 January 2011 pp. 37-38 (Testified that he escaped the night of 15 April 1994 and Ndahimana provided the help of a policeman to assist him to cross the river to safety); Witness ND7: T. 24 January 2011 p. 5 (Testified that on 14 April 1994 she overheard Ndahimana tell the *gendarmes* to open fire on the assailants if necessary. On 17 April 1994, the accused took her and about 26 other survivors to the health centre); Witness ND6: T. 27 January 2011 pp. 5-6 (Testified that when he went with Ndungutse to Nyange parish, the *gendarmes*, which Ndungutse stated were sent by Ndahimana, chased them away and "actually almost shot at us."); Witness Mukankusi: T. 7 February 2011 p. 17 (Testified regarding several incidents where people were saved because the communal policemen or communal authorities stepped in).

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send *gendarmes* to the parish.[1550] The Majority has also considered that Ndahimana took steps to punish some of the perpetrators of the earlier attacks on Tutsis.[1551]

867. The Majority recalls its findings that Ndahimana is liable under Article 6 (3) of the Statute for the crimes committed by the communal police on 15 April 1994 (Chapter IV, Section 3.5.1.3). Also, the Majority recalls its findings that Ndahimana's presence had a substantial contributing effect on the attack on Nyange church on 16 April 1994. However, the Majority also takes into account evidence relating to the fact that the accused was affiliated with a moderate political party. Witness ND13 emphasized the effect that the multiparty system had on the accused's authority, given that he was a member of an opposition party.[1552] Witness CDL, in his record of confession, stated: "In terms of political parties, I was a member of the moderate MDR party and people called us traitors and *Inkotanyi* accomplices."[1553] The Majority acknowledges that Ndahimana also was a member of the minority moderate MDR party and that this could have negatively influenced the way he was perceived by the Hutu society in Kivumu *commune*.

868. In addition, the Defence also submitted evidence to suggest that, compared to other authorities in the *commune*, Ndahimana's power was minimal.[1554] Several witnesses testified regarding occasions in which persons accused of attacking Tutsis were arrested following Ndahimana's order but were released by IPJ Kayishema a day or two later without a full investigation into the events.[1555] Witness CBK stated that, "[i]n Kivumu people had more confidence in the [p]riests than in the local government officials…The local population obeyed him [Father Seromba] more than the local authorities."[1556] The Majority does not accept that Ndahimana's power was minimal during the events in question and emphasises that such evidence in no way exonerates Ndahimana for the role he played in the events at Nyange parish. However, the evidence gives the strong impression that *several* persons of influence in Kivumu *commune* had an interest and were involved in the massacres. Additionally, the Majority has found elsewhere that the presence of the accused at Nyange church was not inconsistent with the assertion that he was under threat on 16 April 1994 (Chapter III, Section 6.3.7.2). It further implies that the accused's

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[1550] T. 24 January 2011 p. 70. *See also* T. 19 April 2011 pp. 35-38 (ICS); Defence Exhibit 124; T. 15 February 2011 p. 37 (ICS); Defence Exhibit 108; T. 17 February 2011 pp. 2-3 (ICS).

[1551] *See e.g.*, T. 25 January 2011 p. 7 (ICS) (Testified that when Ndahimana heard that Ndungutse had threatened the witness because he refused to participate in an attack against Tutsis, he instructed communal officials to confiscate the firearm that was in Ndungutse's possession. This event took place on the 8 April 1994); T. 24 January 2011 p. 70 (Testified that Ndahimana sent letters "to the *commune conseillers* and members of the *cellule* committees to ensure the security of members of the population…[and] disbursed *commune* policemen to *secteurs* to ensure the security of the local inhabitants….").

[1552] T. 17 January 2011 pp. 15-16 (Stating, "the people who elected him would respect and obey him, but the other part of the community which did not elect him did not do so…[H]is powers would have been reduced, and he would not have been as strong as he would have been during the time of the single-party [S]tate."); T. 18 January 2011 p. 24 (Indeed, "during the time of multiparty politics the powers of the *bourgmestres* had been trimmed significantly to such an extent that those who were in a different party than the one to which the *bourgmestre* belonged did not listen to what the *bourgmestre* said."); T. 24 January 2011 p. 73 (ICS) (This evidence was also corroborated by Witness KR3).

[1553] Defence Exhibit 77, p. 14.

[1554] Witness Kayishema: T. 18 April 2011 p. 20 (Testified that IPJ Kayishema "meddled a great deal in the administrative affairs of the *commune*.").

[1555] Witness KR3: T. 24 January 2011 p. 74 (ICS) ("Sometimes when Grégoire Ndahimana arrested some people, Kayishema would release them."); Witness ND5: T. 26 January 2011 p. 53 (Witness arrested in relation to the killing of a Mr. Thomas Mwendezi. He was told that the *bourgmestre* had authorised his arrest. However, shortly thereafter, Kayishema released him and the other five suspects from custody); Witness ND34: T. 17 February 2011 p. 64 (Witnessed the arrest of those suspected of the murder of Martin Karekezi, but was told by one of the suspects who he saw a couple days later that Kayishema had released them from custody).

[1556] T. 4 November 2010 p. 17; Defence Exhibit 42, p. 5.

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participation in the killings may have resulted from a sense of duress rather than from extremism or ethnic hatred.

869. The Majority finds that Ndahimana's good character and family situation mitigates his sentence. The Majority also finds the fact that Ndahimana did not possess the genocidal intent to kill the Tutsis and that he tried to preserve security in Kivumu *commune* in the days following the death of President Habyarimana until the situation became extremely chaotic, to carry significant weight as mitigating factors in sentencing. Finally, the Majority has also considered the influence of other authorities of Kivumu *commune* as being relevant in its determination of Ndahimana's sentence.

5. Conclusion

870. The Majority has the discretion to impose a single sentence and notes that this practice is usually appropriate where the offences may be characterised as belonging to a single criminal transaction.[1557]

871. The Majority has considered the gravity of each of the crimes for which the accused has been convicted, as well as the aggravating and mitigating circumstances mentioned by the parties.

872. Considering the relevant circumstances discussed in the Judgement above, and having ensured that the accused is not being punished twice for the same offence, the Majority, Judge Arrey dissenting, sentences Grégoire Ndahimana to a single sentence of:

15 YEARS OF IMPRISONMENT

CONSEQUENTIAL ORDERS

873. This sentence supersedes any other sentence imposed on Grégoire Ndahimana by any other State or institution. Grégoire Ndahimana shall receive credit for time served since his arrest on 11 August 2009, pursuant to Rule 101 (C) of the Rules.

874. The above sentence shall be served in a State designated by the President of the Tribunal, in consultation with the Chamber. The Government of Rwanda and the designated State shall be notified of such designation by the Registrar.

875. Until his transfer to his designated places of imprisonment, Grégoire Ndahimana shall be kept in detention under the present conditions.

876. Pursuant to Rule 102 (B) of the Rules, on notice of appeal, if any, enforcement of the above sentence shall be stayed until a decision has been rendered on the appeal, with the convicted person nevertheless remaining in detention.

877. Judge Arrey appends a dissenting opinion to this Judgement.

[1557] *Karera* (TC) Judgement, para. 585; *Ndindabahizi* (TC) Judgement, para. 497.

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Arusha, 30 December 2011, done in English.

Florence Rita Arrey	Bakhtiyar Tuzmukhamedov	Aydin Sefa Akay
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

Dissenting Opinion of Judge Florence Rita Arrey

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1. Introduction

1. In my opinion, the instant case is one of joint criminal enterprise *par excellence*. The Accused, Grégoire Ndahimana, may not have been the enterprise's mastermind, if indeed there was one, but he participated as actively in the enterprise as Athanase Seromba, Gaspard Kanyarukiga, Fulgence Kayishema, Télesphore Ndungutse,[1558] and others, albeit in his own manner.

2. In its Pre-Defence Brief, the Defence argued that the killing of Tutsi civilians began in Ndahimana's absence

> and without his knowledge. [Prosecution Witnesses] testified that the killings started on the hills, that Tutsis were killed, their cows eaten and their houses burnt, Grégoire Ndahimana was certainly not responsible for this. There could therefore not have been any established plan, whether designed or decided by Grégoire Ndahimana, with a view to exterminating the Tutsi of the commune.[1559]

3. I am of the view that the planning and preparation of the massacres did not take place on one single day or at one or two isolated meetings. Rather, the plan evolved over time with participants joining the enterprise as the planning developed. Early enthusiasts of the plan to kill the Tutsi civilians of Kivumu *commune* appear to have included Télesphore Ndungutse, Fulgence Kayishema, and Gaspard Kanyarukiga, among others.[1560] There is no evidence that Ndahimana was among this group of early adherents, and indeed, he may have been reluctant to join the enterprise in its initial stages. But as the planning progressed, consensus among Kivumu decision-makers strengthened and the number of participants in the enterprise multiplied. I agree with the Majority that there is no evidence that when Télesphore Ndungutse committed the first crimes against Tutsi civilians in the days immediately following the death of President Habyarimana, Ndahimana supported these crimes or shared Ndungutse's criminal intent.[1561] This case, however, focuses on the genocide committed at Nyange Parish on 15 and 16 April 1994, and, as this opinion will detail, I am satisfied that by 14 April 1994, Grégoire Ndahimana knew of the impending genocide, shared the criminal intent of his co-perpetrators, and made a significant contribution to the enterprise.

[1558] I note that Fulgence Kayishema and Télesphore Ndungutse have not been tried by this Tribunal and that Kanyarukiga's case is not yet complete. I rely exclusively on the evidence adduced in this case in making conclusions about their participation in the events at Nyange parish.

[1559] Pre-Defence Brief, para. 116.

[1560] Defence Witness ND11: T. 18 January 2010 pp. 30-31. "It could be the 11th, Kayishema, Gacabuterezi and Rushema, sent a letter to the *Interahamwe* addressed to a certain Jean Bosco, who was an *Interahamwe* of our area. And in that letter that *Interahamwe* was asked to start the killing of the Tutsis in that area. And he was asked to leave no stone unturned, to make sure that no Tutsis escaped." Witness ND6: T. 27 January 2011 p. 27: Ndungutse's programme was to kill the Tutsis who had sought refuge at the church." Also see evidence discussed below that Ndungutse participated in early killings of Tutsis in Kivumu *commune*; Witness YAU: T. 15 September 2010, pp. 45-46: On one occasion, the witness and other refugees gave money to Kayishema and Kanyarukiga to get food but they never brought any. Moreover, when a sister of Nyange church tried to bring food to the refugees, Kayishema and Kanyarukiga "poured the food . . . on the ground."

[1561] Judgement, para. 99.

2. Attacks on Tutsi civilians, 6-11 April 1994

4. As noted above, I agree with the Majority's conclusion that the Prosecution has not established that Ndahimana was liable for Ndungutse's killing of Grégoire Ndakubana.[1562] There is no evidence that he planned, instigated or organised this killing. Moreover, Ndungutse was a teacher, and the Prosecution has not established that Ndahimana had authority over teachers within the meaning of Article 6 (3) of the Statute. I am also satisfied that Ndahimana had arrested a number of low-level individuals he may have believed were responsible for the first killings.[1563]

5. However, I bear in mind that Kivumu had a population of only just over 50,000 inhabitants;[1564] that Ndungutse was well-known for his longstanding anti-Tutsi sentiments;[1565] that Ndungutse, in addition to his profession as teacher was also the Vice-Chairman of the Kivumu *commune* MRND;[1566] and that Ndahimana wrote a letter on 11 April 1994 indicating that he was aware that Ndungutse was responsible for "assault[ing]" persons "on the basis of their ethnicity."[1567] On this evidence, I am satisfied that by 11 April 1994, Ndahimana knew that Télesphore Ndungutse had participated in the killing of Grégoire Ndakubana, and took no steps to have him detained or disarmed. I consider this failure to take those measures available within his powers as *bourgmestre* to be of particular significance given that Ndahimana later had Ndungutse disarmed, after the killings at Nyange parish, when Ndungutse threatened Defence Witness KR3, one of Ndahimana's associates.[1568]

3. Decision to Move Refugees into Nyange Church, 11-13 April 1994

6. I agree with the Majority's conclusion with respect to paragraph 19 of the Indictment. However, I believe it is important to emphasise that refugees at the Nyange church were not free to wander. The evidence is conclusive that a roadblock was established approximately 20 to 30 metres from Nyange church on 13 April 1994 for the purpose of restricting the movement of Tutsis.[1569] As the Prosecution makes no mention of this roadblock in the Indictment, I will not assess Ndahimana's possible contribution to the confinement of Tutsis.

[1562] Judgement, para. 99.

[1563] T. 26 January 2011 pp. 50-53; the *bourgmestre* asked Adrien Niyitegeka and Télésphore Munyantarama to arrest six persons in connection with the killing of Thomas Mwendezi.

[1564] *Prosecutor v. Ndahimana*, ICTR-2001-PT-68, Decision on the Prosecution's Motion for Judicial Notice, 7 April 2010, Adjudicated Fact x.

[1565] Witness CDL: T. 11 November 2010 p. 60; T. 12 November 2010 p. 3; and Witness CBR: T. 1 November 2010 pp. 7, 9, 14.

[1566] T. 11 November 2010 p. 60; T. 17 January 2011 p. 34.

[1567] Defence Exhibit 110 (C); See also T. 17 February 2011 pp. 35-36 (ICS).

[1568] T. 25 January 2011 pp. 7-8 (ICS).

[1569] See for example, Witness ND24: T. 21 February 2011 pp. 5, 7, 21-22, 23, 26-27; Witness CDL: T. 11 November 2010 p. 67. Also see Witness ND24, T. 21 February 2011 p. 19: When asked whether the Tutsi civilians at Nyange church had freedom of movement, the witness responded: "Of course [not]. If they had left that location they would have been killed, so that they had to stay at that location."

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7. I further note that the catechism hall was not inside the church,[1570] and thus do not agree with the Majority's conclusion that "the refugees could have gone inside the church as early as 7 April 1994…"[1571]

4. 13 April 1994 ("13 April")

8. At the outset, I observe that the Prosecution has not alleged the commission of any crimes on 13 and 14 April 1994, and thus the relevant evidence goes to Ndahimana's knowledge and intent on those critical two days prior to the massacres.

9. I further note that the Defence has adduced no evidence indicating that Ndahimana was not at Nyange parish on 13 April. Nevertheless, the burden remains on the Prosecution to prove that Ndahimana was not only present at the parish that day but that his presence was in some way linked with the killings that took place there on 15 and 16 April 1994.

4.1 Attack on the Parish and Role of the *Gendarmes* Assigned to the Parish

10. I agree with the Majority finding that Hutu assailants attacked the refugees at Nyange parish on 13 April but that the Prosecution has not proven that Gaspard Kanyarukiga instigated the attack that day.[1572]

11. There is no evidence that *gendarmes* were stationed in Kivumu *commune* prior to Ndahimana's requisition of 11 April 1994, and it is not in dispute that on 11 April 1994, Ndahimana, in his capacity as *bourgmestre*, requested that the *préfet* assign *gendarmes* to Nyange parish. Hours later, four *gendarmes* arrived in Kivumu *commune*. Thus, I consider the role of the *gendarmes* in the subsequent events at Nyange parish to be of relevance. On the evidence available, however, I cannot conclude they played a harmful role at Nyange parish on 13 April 1994.

4.2 Providing a List of Tutsis to Father Seromba in Ndahimana's Presence

12. Witness CBI testified that at an unspecified time on 13 April 1994, Seromba asked the refugees whether there were "any other persons who were still there on the hill." Witness CBI gave Seromba a list of Tutsi civilians who had not come to the parish, and Seromba handed the list to Ndahimana. Later that day, Witness CBI saw the Tutsis whose names he had listed arrive at the parish. Some arrived in a vehicle belonging to Witness CDZ. That vehicle was driven by a man named Yohana Jigoma.[1573]

13. This incident was not adequately conveyed by the Prosecution in paragraph 14 of the Indictment. However, the Defence has raised no objections with regards to notice on this issue. More importantly, this evidence goes to the *mens rea* of the Accused, a material fact that was pled in the Indictment.[1574]

[1570] Witness CBK, T. 3 November 2010 p. 2.
[1571] Judgement para. 156.
[1572] Judgement, para. 282.
[1573] T. 14 September 2010 pp. 30-33. Among the Tutsis who arrived subsequently at the church, the witness saw Antoine Karake and his family.
[1574] See for example, *Prosecutor v. Kanyarukiga*, ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010, paras. 8-10.

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14. I respectfully disagree with many of the concerns raised by the Majority with respect to Witness CBI's credibility.[1575] I found his evidence overall to be credible and reliable and in particular his evidence with respect to Father Seromba's request for a list of Tutsis who had not come to the parish, and Ndahimana's role in ensuring that they were brought to the parish. The witness first provided details of this incident in his first statement to investigators dated August 2000, well before Ndahimana was indicted by this Tribunal. As the witness was personally involved in providing names of Tutsis who had not arrived at the parish to Father Seromba who then gave the list to Ndahimana, he would have had a better recollection of the details of this incident than of others that took place during what would have been a traumatic period for the witness, a Tutsi. Moreover, it is clear from the witness' testimony that he blamed himself for providing the names to Seromba,[1576] and this too would have made the incident a memorable one. Finally, I note that the witness provided a substantial amount of detail about this incident, naming both the refugees who were brought to the parish that day and details of the vehicle in which they arrived, as well as the name of the driver.[1577] I also observe Witness YAU testified that Kayishema and Kanyarukiga brought Tutsis to the church in Kanyarukiga's vehicle that day following a meeting with Ndahimana and other alleged members of the JCE.[1578]

15. On Witness CBI's evidence in particular, and the evidence of Witness YAU which supports his account that alleged members of the joint criminal enterprise brought Tutsis to the church on 13 April 1994, I am satisfied that Ndahimana participated in bringing Tutsis who had remained at home or with friends and family to Nyange parish on 13 April 1994.

16. I concur with the Majority that on 11 April 1994, those, including Ndahimana, who decided to move the refugees who were at the communal office to Nyange parish, may have done so because they believed they could better protect and assist the refugees at the parish.[1579] While there is no evidence that on 13 April 1994, members of the joint criminal enterprise forced Tutsi refugees who were in their homes or with friends and family to Nyange parish, I can think of no plausible benign motive for such transfers on that day, particularly as the transfer appears to have been principally engineered by Athanase Seromba, Fulgence Kayishema and Gaspard Kanyarukiga, all of whom appear to have been early supporters of the plan to exterminate Kivumu *commune*'s Tutsi

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[1575] I consider that many of the concerns expressed by the Majority in paragraphs 226 of the Judgement with respect to the credibility of Witness CBI were speculative. While I do agree that the fact that the witness felt the need to "inform [the RPF] that he would be absent from Rwanda while testifying in the instant proceedings" could be problematic, I see no discrepancies suggesting that the witness' ties to the RPF impacted on his evidence. I do not consider the discrepancy noted in paragraph 227 of the Judgement to be a significant one particularly as the witness admitted at trial that he did not see Ndahimana on 7 April 1994. Further, as I will discuss in more detail below, I consider the evidence on the availability of the red communal vehicle to be too inconclusive to make a finding that would impact on witness credibility. I do not agree with the Majority in paragraph 230 of the Judgement that the "witness recanted any assertion of meetings." Rather the witness decided that what he had previously described as "a meeting" was in fact "a conversation." To my mind this is a simple matter of semantics rather than a discrepancy. Finally, with respect to the Majority's conclusion, in paragraph 231 of the Judgement, that it did not find "his account sufficiently compelling and detailed with regard to the meetings Ndahimana allegedly attended", I recall that this witness was a refugee at the time of the events; and on this basis, I find it unlikely that he would have been able to provide more detail. I further disagree with the Majority's finding at paragraph 479 that the fact that "the witness did not report that Ndahimana attended any meeting prior to the attack" of 15 April 1994 is significant. As a refugee, the witness may not have been in a position to observe meetings taking place at the presbytery. On the contrary, I consider the fact that the witness did not mention Ndahimana's participation in meetings on 15 April 1994 suggests that he was not overly determined to implicate Ndahimana in each and every aspect of the day's events.

[1576] Defence Exhibit 25 (A).

[1577] T. 14 September 2010 pp. 30-33.

[1578] T. 15 September 2010 pp. 44-45.

[1579] Judgement, paras. 145-146.

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population. For example, Witness CBS testified that on 13 April 1994, Seromba refused to distribute food to the refugees, and asked the *gendarmes* to shoot any refugee taking bananas from the banana plantation.[1580] Witness CBI also testified that when the refugees tried to pick bananas from trees near the parish that day, Father Seromba threatened to shoot them.[1581] Witness ND11 stated that on 11 April 1994, Kayishema and others sent a letter addressed to a certain Jean Bosco, an *Interahamwe* in the area. In that letter Jean Bosco was directed "to start killing the Tutsis in the area, and "was asked to leave no stone unturned, to make sure that no Tutsis escaped."[1582] Witnesses CBR and CBY both testified that Kanyarukiga was involved in the attack on the refugees that took place on 14 April 1994.[1583]

17. In conclusion, I partially disagree with the Majority's finding that "no evidence shows that at that time Ndahimana was spurred on by criminal intentions..."[1584] While I am unable to conclude beyond reasonable doubt that Ndahimana shared the intent of the earliest members of the joint criminal enterprise on 13 April 1994, I am certain that by this date he was aware of their intent to harm the refugees. There is no evidence that he took any of the measures within his powers as *bourgmestre* to hinder their plans.

4.3 Ndahimana's Presence at Nyange Parish on 13 April 1994

4.3.1 Prosecution Witness Credibility

18. The Majority has raised concerns with respect to the credibility of Prosecution Witnesses CBK,[1585] CBY[1586] and CDJ[1587]. I do not agree entirely with its conclusions. I start by noting that none of these witnesses has been accused of participating in the genocide, no evidence has been adduced suggesting that any of these witnesses had a motive to lie, and all three were in a particularly good position to observe what was taking place at the parish during the period at issue.

19. To my mind, Witness CBK's age at the time of the events is not a factor in assessing his credibility.[1588] While he was objectively young, he was treated as an adult by those around him, and in particular Father Seromba. In his first statement to ICTR investigators in 2000, the witness only referred to Ndahimana as having been present at Nyange parish at one meeting and that meeting took place on 15 April 1994 "at nightfall" in the presbytery.[1589] However, that statement focused almost exclusively on Seromba, which was natural given the witness' position at the time. In addition, the statement concentrated on the events of 15 and 16 April 1994 rather than the lead-up to the genocide.[1590] Similarly, I am not particularly concerned about the witness' failure to mention Ndahimana in his second statement dated 2001 as that statement concentrated almost entirely on Gaspard Kanyarukiga and was extremely short. In this statement, the witness said that he had seen Kanyarukiga at the parish on 14 April 1994, but this is all he had to say about the lead up to the

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[1580] T. 6 September 2010 p. 16.
[1581] T.14 September 2010 p. 36.
[1582] T. 18 January 2010 pp. 30-31.
[1583] Witness CBR: T. 1 November 2010 p. 16; Witness CBY: T. 10 November 2010 p. 27 (ICS).
[1584] Judgement, para. 280.
[1585] Judgement paras. 235-238.
[1586] Judgement paras. 239-240.
[1587] Judgement paras. 241-242, 647.
[1588] See Judgement para. 235.
[1589] Defence Exhibit 40.
[1590] Defence Exhibit 40.

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attacks of 15 and 16 April 1994.[1591] Despite minor discrepancies, his statement dated 2002, and his subsequent testimonies in the *Seromba* and *Kanyarukiga* trials were generally consistent with his evidence in this case.[1592] I also note that contrary to other witnesses, Witness CBK testified that he did not see Ndahimana during the attack on 15 April 1994,[1593] which suggests that he was not overzealous in implicating Ndahimana in the events at Nyange parish. Further, it is evident from his prior statements that although the witness considered Athanase Seromba to be most responsible for the killings at Nyange parish--which is unsurprising given the witness' position at the parish-- he was very careful to say that he never saw Seromba actually take part in a killing. The witness also took care, both in these early statements and at trial, to distinguish between what he saw and what he inferred. More generally, his demeanour at trial, the amount of detail he provided, and the fact that he was not shaken on cross-examination, all conveyed credibility and reliability. Finally, much of the witness' evidence is corroborated in whole or in part by other witnesses.

20. Unlike the Majority, I am not especially concerned by the discrepancies between Witness CBY's evidence at trial and his prior statements with respect to dates.[1594] I am satisfied with the witness' explanation that when he was first interviewed investigators were principally interested in the events that took place and did not focus on the dates.[1595] However, I do share the reservations of the Majority with respect to his evidence about events on 15 and 16 April.[1596] That said, the witness' account of events was consistent with the evidence of other witnesses and I do not doubt that he was at the parish during the period at issue. The witness testified that he saw Ndahimana at the parish on 8 April 1994. The Defence has adduced evidence indicating that Ndahimana was in Kigali that day.[1597] I do not find the evidence on this issue conclusive but observe that even if I did, I would not consider this discrepancy about Ndahimana's presence at Nyange parish on 8 April to be of sufficient significance to render the witness' evidence entirely unreliable. I further note that at trial, the witness only testified to having seen Ndahimana at the parish in the early mornings of 15[1598] and 16 April 1994[1599] and in the late afternoon of 16 April,[1600] but did not say he had participated in the attacks on those days. Thus like Witness CBK, he does not appear to have been overzealous in implicating Ndahimana in the events at Nyange parish. Further, the witness provided substantial detail about the events at issue, his testimony in this case was generally consistent with

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[1591] Defence Exhibit 39.

[1592] Prosecution Exhibit 19; Defence Exhibits 38, 41, 42. At para. 237 of the Judgement, the Majority notes that "Witness CBK testified in the *Seromba* case that two meetings took place on 14 April 1994. He further said that the refugees were disarmed "at some point" but that he did not know who made the decision to do so. However, in the *Kanyarukiga* case he said that the Tutsis were disarmed on 13 April 1994 by authorities including Ndahimana, Kayishema, Kanyarukiga, Mbakilirehe and Witness CDL." I see no discrepancy between those two statements. The second statement does not indicate that the witness "suddenly" knew who took the decision to disarm the refugees.

[1593] T. 3 November 2010 p. 58.

[1594] Judgement, para. 466.

[1595] T. 10 November 2010 p. 21 (ICS).

[1596] Judgement, paras. 466-468. I am concerned that in his 1996 statement (Defence Exhibit 67), he only mentioned having seen Ndahimana once before the events at Nyange parish. In his 2000 statement which was more detailed (Defence Exhibit 66), he noted having seen Ndahimana on several occasions prior to the attacks on 15 and 16 April, but did not mention Ndahimana's presence on those days. However, I observe that that second statement provided only a relatively superficial account of the events on 15 and 16 April and referred to no meetings at all. Moreover, both statements focused primarily on Athanase Seromba. Nevertheless, I will only rely on Witness CBY's evidence with respect to the events of 15 and 16 April where it is corroborated.

[1597] Defence Witnesses Emerita Munsy: T. 28 February 2011 pp. 3-7; Witness BX3: T. 23 February 2011 p. 19; and Witness KR3: T. 24 January 2011 pp. 57- 58 (ICS).

[1598] T. 9 November 2010 pp. 46-47 (ICS).

[1599] T. 9 November 2010, pp. 54-55; T. 10 November 2010 p. 32 (ICS).

[1600] T. 9 November 2010 pp. 46-47 (ICS), p.55.

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his evidence in *Kanyarukiga*,[1601] and he was not shaken on cross-examination. Finally, much of the witness' evidence is corroborated in whole or in part by other witnesses.

21. Witness CDJ was consistent and clear on cross-examination. While he was not specific with respect to the dates of the calendar month, he was clear about the days of the week on which the events at the church took place, and this evidence was consistent with that of other witnesses. It was the witness' habit to arrive at the parish at a specific time each day, and this renders his recollection about times to be particularly reliable 17 years after the events. I have no reservations about the witness' credibility and reliability.

4.3.2 Assessment of Evidence

22. Witness CBK described two meetings at the presbytery on 13 April 1994 attended by members of the alleged JCE including Ndahimana, one in the morning and a second in the early afternoon.[1602] Witness CDJ referred to a meeting with some of the same participants, including Ndahimana, in the early evening.[1603] These testimonies are not mutually exclusive. Witness CDJ would not have been in a position to observe meetings that took place earlier in the day, and Witness CBK might not have seen a meeting that took place in the early evening. Witness CBI corroborated Witness CBK's evidence that members of the alleged JCE met at the presbytery in mid-morning on 13 April 1994.[1604] I accord no weight to the fact that Witness CBI believed that meeting took place at approximately 10:00 a.m. while Witness CBK testified that it took place at 11:00 a.m. Witness CBI also corroborated Witness CBK's evidence that Ndahimana and Seromba were together at the parish later that day. I found Witness CDJ to be credible and reliable and do not feel that his evidence requires corroboration to be relied upon.

23. As noted above, Witness CBK testified that he saw Ndahimana and other members of the joint criminal enterprise, including Seromba, Kayishema and Ndungutse, following the attack at about 2:00 p.m. Witness CBY testified that he saw Ndahimana and other authorities at the parish toward the end of the attack, and that Ndahimana told the assailants to go home.[1605] Witness YAU testified that she arrived at the parish on 13 April 1994 at midday. Upon arrival, she saw Ndahimana and other alleged members of the joint criminal enterprise, including Father Seromba, Fulgence Kayishema, and Kanyarukiga, meeting in front of the parish secretariat.[1606] Because she did not refer to the attack that took place that day, I infer that she arrived and saw these individual together after the attack. Witness CDJ testified that he saw Ndahimana together with Seromba and Kanyarukiga in the early evening.[1607]

24. I am therefore satisfied that the Prosecution has proven beyond reasonable doubt that Ndahimana participated in at least three meetings with other members of the alleged JCE, including Father Seromba, Fulgence Kayishema, and Télesphore Ndungutse, on 13 April 1994, one that took place in the morning before the day's attack, another that took place just after the attack, and a third that evening.

[1601] Defence Exhibits 68 and 69.
[1602] T. 3 November 2010 pp. 6-7, 10, 55.
[1603] T. 11 November 2010 pp. 28-29.
[1604] T. 14 September 2010 pp. 29-30; T. 21 September 2011 p. 11.
[1605] T. 10 November 2010 pp. 19-20 (ICS).
[1606] T. 15 September 2010 pp. 42-43. I infer that the witness arrived on 13 April 1994.
[1607] T. 11 November 2010 pp. 28-29.

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25. While I accept Prosecution Witness CBY's evidence that Ndahimana directed the assailants that day to go home,[1608] I cannot determine whether he did this to protect the refugees or because he had concluded that the attackers would be overwhelmed by the large number of refugees. However, this evidence demonstrates that Ndahimana had some influence over the attackers.

4.4 Conclusion-13 April 1994

26. I am satisfied that Ndahimana participated, together with Athanase Seromba, Gaspard Kanyarukiga and Fulgence Kayishema in the decision to bring Tutsi civilians who had not come to the parish to the church on 13 April 1994. I do not believe the purpose of this operation was to protect the refugees. I am further satisfied that Ndahimana knew about the attack that took place on 13 April 1994. No evidence was adduced that he took any measures within his powers as *bourgmestre* to punish the perpetrators of this attack or deter subsequent attacks. Although the details are unavailable, I do not doubt that the fate of the refugees was discussed by Ndahimana and members of the joint criminal enterprise on 13 April 1994. I am further satisfied that by this date, members of the alleged JCE, including Father Seromba and Télesphore Ndungutse, had no intention of protecting the refugees and that Ndahimana was aware of this. Nevertheless, I cannot conclude beyond reasonable doubt that Ndahimana shared their intent on 13 April 1994.

5. 14 April 1994 ("14 April")

5.1 The Alibi

27. Much of Ndahimana's alibi for this day is not incompatible with the Prosecution's evidence. I am satisfied that Ndahimana may have facilitated the passage of Dr. Ntahuruwunga's corpse through the roadblock by the parish, and that Ndahimana spent some time in the mid to late afternoon at the home of the deceased. The main incompatibility is the evidence of Defence Witness Thérèse Mukabideri that the accused was present at her house from 4:00 p.m. until midnight that day. As I will discuss in more detail below,[1609] I am of the view that Mukabideri's evidence was sufficiently unreliable that it could be overcome by compelling Prosecution evidence.

28. The evidence of Defence Witness ND24 is not entirely incompatible with the Prosecution evidence. The witness was manning the roadblock just outside the parish on 14 April 1994. He saw Ndahimana pass through the roadblock on his way to the presbytery between 1:00 and 2:00 p.m. on 14 April 1994. When Ndahimana arrived at the presbytery, "everyone [including the Tutsis] moved towards him, even the *gendarmes*" but the witness could not hear what they were saying. Ndahimana returned from the presbytery approximately 30 minutes later.[1610] The witness saw Ndahimana again later that day. Between 3:00 and 4:00 p.m., those manning the roadblock searched the vehicle carrying the "mortal remains" of a man who was killed in Kigali. Approximately 20 minutes later, the *bourgmestre* "passed by there", and his vehicle too was searched.[1611]

29. Although Witness ND24's account of the attacks at the church was in some respects unshaken on cross-examination despite the Prosecution's efforts to confuse him, I nevertheless have concerns about the witness' credibility. I recall that he was an accomplice in the attacks at Nyange, and

[1608] T. 10 November 2010 pp. 19-20 (ICS).
[1609] Dissent, para. 55.
[1610] T. 21 February 2011 pp. 8-9.
[1611] T. 21 February 2011 pp. 9, 22.

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confessed to having participated in one of the early killings of Tutsis in the *commune*.[1612] In particular, I have reservations about his repeated insistence that Ndahimana could not have passed through the roadblock manned by the witness without the witness knowing about it.[1613] On re-examination the witness testified that "I could only know about those who passed by the roadblock if I saw them. But I'm telling you that basically we were at the roadblock all the time because, even to get our food, we got this not far from that roadblock. So I can speak to the things that I witnessed. But as to the events or incidents that I did not witness, I can't speak to them."[1614] Yet, by the witness' own account he was not at the roadblock during significant periods. He was not there while he participated in the attacks on 14 and 15 April, nor was he at the roadblock while attending to family business on 16 April.[1615] Moreover, he said "when we were tired, we would go home."[1616] Thus, I do not accept the witness' contention that Ndahimana could not have passed through the roadblock on the way to or from Nyange parish during the period 13-16 April 1994 except at the times indicated by the witness. I further note that the witness appeared to hold Fulgence Kayishema, and to a lesser extent Witness CDL, alone responsible for the genocide at Nyange. This is perhaps because he was closer to those particular participants in the JCE than the others, but he provided little foundation for his general assertions that IPJ Kayishema was more influential in Kivumu *commune* than Ndahimana.[1617]

30. Finally, I note that both Witnesses CDL and ND24 testified about the passage of Dr. Ntawuruhunga's corpse through the Nyange roadblock on the afternoon of 14 April in support of their particular positions about Ndahimana's *de facto* authority that day. Witness CDL testified that when on 14 April, individuals manning the roadblock attempted to open the coffin of Dr. Ntawuruhunga, Ndahimana intervened and ensured safe passage for the vehicle.[1618] Witness ND24 testified that when Ndahimana arrived at the roadblock, after the vehicle bearing Dr. Ntawuruhunga body has passed through the roadblock, his car was searched as thoroughly as a vehicle driven by any other individual.[1619] As I have concerns about the reliability of both witnesses, I can make no conclusive findings on this matter, but as I will discuss below,[1620] Witness CDL's account is more consistent with other reliable evidence regarding Ndahimana's authority at the time.

5.2 Meeting at Mutanoga/Nyange Market on the Afternoon of 14 April

31. I share many of the concerns expressed by the Majority with respect to Witness CDL's credibility and reliability,[1621] and am therefore unwilling to rely on his uncorroborated evidence. I therefore concur with the Majority[1622] that the Prosecution has not proven paragraph 24 of the Indictment beyond reasonable doubt.

[1612] T. 21 February 2011 pp. 3-5, 32.
[1613] T. 21 February 2011 pp. 27-29: If Ndahimana "had passed [through] that roadblock, we would have known about it one way or the other...A person like him couldn't pass through such a place without people knowing." "And if Ndahimana had passed by that place I would have seen him...But if a person, for instance the bourgmestre, had to pass by, I would have seen him." "If he had passed by, we would have known."
[1614] T. 21 February 2011 p. 40.
[1615] T. 21 February 2011 pp. 13-15, 38.
[1616] T. 21 February 2011 p. 7 (quoted), 8, 11, 15.
[1617] T. 21 February 2011 p. 24.
[1618] T. 12 November 2010 pp. 2-3; T. 18 November 2010 pp. 10, 49-50.
[1619] T. 21 February 2011 p.9.
[1620] Dissent, para. 185.
[1621] Judgment, paras. 243-248, 452-453.
[1622] Judgement, para. 312.

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5.3 The Role of the *Gendarmes* on 14 April 1994

32. Ndahimana requisitioned four *gendarmes* from the *préfet* on 11 April 1994, and assigned these men to Nyange parish. As I will discuss in more detail below,[1623] it is therefore my view that Ndahimana bears a degree of responsibility for their conduct at the parish during the events at issue.

33. Witness CBN, a refugee in 1994, testified that on 13 April 1994, police officers confiscated traditional weapons from the refugees, and told the refugees that they would be protected by police officers and *gendarmes*.[1624] Witness YAU, also a refugee at the time of the events in question, testified that on 14 April 1994, Father Seromba asked the *gendarmes* to confiscate "sticks" that were in the possession of the refugees.[1625] She also testified that she saw the *gendarmes* meeting with members of the joint criminal enterprise, including Ndahimana, later that same day.[1626] She further observed that two *gendarmes* were present during the attacks that day and did nothing to assist the refugees.[1627] Witness CDZ, a refugee, testified that he fled the church on Thursday night[1628] because *gendarmes* had indicated to the witness that it would be dangerous to remain at the church.[1629] Witness CBR, an accomplice, testified that on 14 April, Ndungutse, Kayishema and a group of assailants, including the witness, gathered at the Statue of the Virgin Mary at approximately 11:00 a.m. Ndungutse and Kayishema met with the *gendarmes* who told the attackers that they would be overwhelmed by the large numbers of refugees. Ndungutse and Kayishema replied, "we'll do what we can" and convinced the *gendarmes* to let the assailants carry out the attack. The *gendarmes* then cut a rope which served as a roadblock and retreated.[1630]

34. Witness ND24, an accomplice, testified that he arrived at the roadblock he was manning at 8:00 a.m. At approximately 11:00 a.m., assailants led by Ndungutse arrived at the roadblock armed with clubs. The *gendarmes* shot into the air, and the attackers, including those manning the roadblock, ran away. The entire incident lasted about 20 minutes, and the roadblock was re-established by approximately 12:00 noon.[1631] Witness ND6, an accomplice witness, testified that on 14 April 1994, Ndungutse directed a small group of about 20 persons, including the witness, to go to Nyange parish to kill the refugees there. When the group arrived at the church, Ndungutse spoke to the *gendarmes*. The *gendarmes* told the group to retreat. When they failed to do so, the *gendarmes* shot in the air. On the way back from the church, the group ran into Brigadier Mbakilirehe. When he learned of what had taken place, Mbakilirehe said, "It is the *bourgmestre* who has complicated matters for us because he brought in those *gendarmes*." The witness did not hear the conversation between Ndungutse and Mbakilirehe but was told about it later by Ndungutse.[1632] Witness ND12, a refugee, testified that at approximately 10:00 a.m. on 14 April

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[1623] Dissent, paras. 220, 226.

[1624] T. 13 September 2010 p. 56; T. 14 September 2010 p. 8. I agree with the Majority's assessment of Witness CBN's evidence with respect to Ndahimana's abuse of refugees at paragraph 224 of the Judgement. For that reason, I cannot find that that the Prosecution has proven beyond reasonable doubt that Ndahimana verbally abused the Tutsi refugees at Nyange on 14 April. That said I do not agree with the Majority at paragraph 225 that the fact that "[t]he witness seems to bear a grudge against the accused because he did not provide assistance to the refugees despite the high position he held in the *commune*" renders his evidence unreliable. If this were the case, any victim's testimony could be deemed unreliable. My own view is that this witness was generally credible.

[1625] T. 15 September 2010 pp. 45-46.

[1626] T. 15 September 2010 pp. 47-48.

[1627] T. 15 September 2010 pp. 47-48.

[1628] I infer that the witness was referring to Thursday 14 April 1994.

[1629] T. 8 September 2010 pp. 35, 37.

[1630] T. 1 November 2010 pp. 13-16; T. 2 November 2010, pp. 14-15, 17.

[1631] T. 21 February 2011 pp. 7-8, 20.

[1632] T. 27 January 2011 pp. 4-7.

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1994, Ndungutse arrived at the parish with a group of attackers. There were three *gendarmes* at the parish who were able to chase the attackers away. The attackers did not return that day. The witness saw Ndahimana at the presbytery at approximately 2:00 p.m. that afternoon. He spoke to the refugees asking them who led the attack. They replied that it was Ndungutse, to which Ndahimana responded that he "did not have powers" but that he had asked the *gendarmes* to keep protecting the refugees.[1633] Witness ND11 testified that on 14 April 1994, he went to seek refuge at the Nyange church. He arrived at approximately 10:00 p.m. When the witness arrived at the church, some of his relatives informed him that Ndungutse had launched an attack on the refugees that day but that the *gendarmes* had repelled the assailants.[1634] Witness ND7, a refugee, testified that on 14 April 1994, Hutu assailants led by Ndungutse, Kayishema and Witness CDL attacked the parish but the *gendarmes* were able to repel the attack. Later, the witness overheard Ndahimana telling the *gendarmes* that they were to protect the refugees and that they could fire on any attackers if necessary.[1635]

35. Thus, Prosecution witnesses testified that the *gendarmes* posted at Nyange parish did not protect them on 14 April, while Defence witnesses testified that they did. I am of the view that the Prosecution evidence is not necessarily incompatible with that of the Defence, as it would appear that there was more than one attack or skirmish between Hutu assailants and Tutsi refugees on 14 April 1994. Witness CBN, for example, testified that on 14 April, Hutus launched a "significant" attack on the refugees at approximately 8:00 a.m. He added: "we repelled the attackers but once again, they came back and attacked us. And again, we repelled them," and "[t]hroughout the day we confronted attackers who were attacking us," but "the afternoon attack did not last long."[1636] The witness also testified that the assault stopped while Ndahimana and other members of the alleged JCE met at the presbytery.[1637] The evidence of Witness YAU also supports the notion that there were a series of skirmishes or attacks that day, although she did not provide a timeframe for these incidents. She testified that "we would push them back, but they would come up again and so forth and so on."[1638] Witness CBK did not mention an attack in the morning but refers to one that would appear to have taken place in the early afternoon. He also indicated that this attack took place after a meeting of members of the alleged joint criminal enterprise, including Ndahimana, at the presbytery.[1639] Witness CBY indicated that an attack took place in the late morning after a meeting of members of the alleged JCE, including Ndahimana. These individuals were no longer present when the attack started but they returned while it was ongoing.[1640] Witness CDL testified that he saw the assailants returning from the church at approximately 3:00 p.m. on 14 April 1994, thus I infer that he saw them soon after the attack ended.[1641] Witness CBR testified that he participated in an attack that began at approximately 11:00 a.m. on 14 April 1994 and that the assailants left at approximately 2:00 p.m.[1642] All these witnesses, a mix of victims and accomplices, indicate that the attack that took place on 14 April 1994 ended at approximately 2:00 or 3:00 p.m. The Prosecution witnesses also all testified that the attack ended because the assailants were outnumbered by the refugees, and did not indicate that the *gendarmes* assisted in repelling the assailants that day.

[1633] T. 19 January 2011 pp. 4- 6.
[1634] T. 18 January 2011 pp. 31-34, 49-50.
[1635] T. 24 January 2011 pp. 4-5, 31-33.
[1636] T. 13 September 2010 pp. 56, 62.
[1637] T. 13 September 2010 pp. 18-21, 56, 62-63
[1638] T. 15 September 2010 pp. 47-48.
[1639] T. 3 September 2010 pp. 10-12, 56-57 (English). T. 3 November 2010 pp. 12-14, 68-70 (French).
[1640] T. 10 November 2010 pp. 27-28 (ICS)
[1641] T. 12 November 2010 pp. 2-3; T. 18 November 2010 pp. 10, 49-50.
[1642] T. 1 November 2010 pp. 13-16; T. 2 November 2010 pp. 14-15, 17.

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36. Defence Witness ND24 also testified that an attack started in the late morning of 14 April 1994 at approximately 11:00 a.m. The assailants were armed with clubs. The *gendarmes* shot into the air, and the attackers, including those manning the roadblock, ran away. The entire incident lasted about 20 minutes, and the roadblock was re-established by approximately 12:00 noon.[1643] I note that the witness provided a much shorter timeframe for the attack than that provided by other witnesses. While I do not consider this accomplice witness to be credible or reliable, and observe that significant aspects of his testimony are contrary to that of more reliable witnesses, this does not mean that every single detail of his testimony, including his evidence about the timing of the attack, is unreliable. Defence Witness ND6, who also acknowledged having participated in an attack, said the attack began at 10:00 a.m. and was repelled by the *gendarmes* when they shot into the air. This evidence is consistent with Witness ND24's evidence that this incident took place in the morning and did not last long.[1644] Witness ND12 also referred to an attack that took place at approximately 10:00 a.m but testified that the attackers did not return after the *gendarmes* chased them away.[1645] I have doubts regarding Witness ND12's certitude on this matter as he testified that he remained in the church building during all but a few minutes of his stay at the parish.[1646] Witness ND11 only provided hearsay evidence about the *gendarmes'* role in foiling an attack.[1647]

37. On this evidence taken together, I am satisfied that the *gendarmes* assigned by Ndahimana to Nyange parish repelled an attack that took place on the morning of 14 April 1994. However, it is not clear whether they continued to play a protective role throughout the day. The timing is significant because I am of the view that while some members of the alleged JCE already had a nefarious fate in mind for the refugees on 13 April 1994, a concerted and coordinated decision to launch a massive attack on the refugees may not have been taken or concretised until some time on 14 April 1994. With respect to the evidence of Witness CDZ, a refugee, that he fled the church on the night of Thursday 14 April because *gendarmes* had indicated to the witness that it would be dangerous to remain at the church,[1648] I recall that he described himself as the "most eminent Tutsi" in Nyange,"[1649] and as such may have been privy to better information from the *gendarmes* than other less influential Tutsis.

38. In conclusion, I believe that the role of the *gendarmes* assigned by Ndahimana to the parish began to change on 14 April 1994. I am satisfied that they protected the refuges on the morning of 14 April 1994. I can make no conclusions on their role later that day, although they may have offered selective assistance as in the case of Witness CDZ. As I will discuss in further detail below,[1650] I am satisfied that they sided with the attackers on 15 April 1994.

5.4 Participation of the Communal Police in the Attack(s) on 14 April 1994

39. Witness CBY testified that Kanyarukiga, Appolinaire Rangira and Maharamu, led the attackers on 14 April 1994. The latter two men were communal police officers. Although I find Witness CBY's evidence with respect to the events of 14 April 1994 to be generally reliable, there is one significant discrepancy between his testimony at trial and a prior statement with respect to the events of 15 April 1994, and I thus prefer to rely on his evidence where it is corroborated.

[1643] T. 21 February 2011 pp. 7-8, 20.
[1644] T. 27 January 2011 pp. 4-7.
[1645] T. 19 January 2011 pp. 4- 6.
[1646] T. 19 January 2011 p. 11.
[1647] T. 18 January 2011 pp. 31-34, 49-50.
[1648] T. 8 September 2010 pp. 35, 37.
[1649] T. 8 September 2010 pp. 35-36.
[1650] Discent, para. 87.

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Witness CBR testified that IPJ Kayishema participated in the attack that took place on that day.[1651] As I will discuss in more detail below, I believe that Ndahimana was liable for Kayishema's conduct during this period but have significant concerns about Witness CBR's reliability and will not rely on his uncorroborated evidence. No other witness mentioned the role of these police officers in the attack, or attacks, on this day, and thus I conclude that the Prosecution has not proven beyond a reasonable doubt that Ndahimana's subordinates attacked Tutsi refugees at Nyange parish on 14 April 1994.

5.5 Ndahimana's Presence at Nyange Parish on 14 April 1994

40. The Majority has found that Ndahimana participated in one meeting with members of the JCE on 14 April 1994, and that "Ndahimana is not charged in relation to a second meeting on 14 April 1994, but only for the one meeting mentioned in paragraph 23 of the Indictment."[1652] I respectfully disagree. While I agree that had the Prosecution known its case in detail ahead of trial, it would have referred to one or several meetings in paragraph 23 of the Indictment, I do not believe its failure to mention more than one meeting relieves the Chamber of its obligation to review the evidence in its totality. Participation in a meeting is not a crime, but the evidence on the meetings of 14 April 1994 is relevant to the knowledge and intent of the accused. Thus, I conclude that the meetings that day were not material facts that were to be pled with precision in the Indictment.

41. I consider Witness CBY's evidence that Ndahimana participated in a meeting with other members of the JCE at Nyange parish at 8 a.m on 14 April[1653] to be reliable. Nevertheless, I prefer to concentrate on the meetings that took place later that day. On the basis of the evidence adduced, I conclude that Ndahimana participated in at least two meetings with members of the JCE at the parish on 14 April 1994, one that took place between approximately 11:00 a.m and 1:30 p.m, and one that evening. It may be that members of the JCE met twice both before and after the disarmament of the refugees as described by Witness CBK. Witnesses CBN, CBI, CBK and CBY all testified that the attack started while Ndahimana and other members of the JCE were still at the parish or immediately after their departure early that afternoon.

42. I am further satisfied on the evidence of Witness CDJ, whom I find to be reliable,[1654] that Ndahimana participated in another meeting with members of the JCE that evening. With respect to Witness CDJ, the Majority found that the "witness' testimony was vague regarding the dates and hours of the events he reported, and he could not provide any information on the purpose of the meetings" held on 14 April 1994. I respectfully disagree. Witness CDJ's first statement to ICTR in 2001 is not inconsistent with his evidence at trial. It is simply a superficial statement, and the witness failed to provide dates. In his testimony in this case, the witness referred to events that took place on "Monday", "Tuesday", "Wednesday", etc. rather than 11, 12 and 13 April. His evidence about what he observed at Nyange parish on "Friday" and "Saturday" is consistent with the evidence of other witnesses with respect to the events that took place on Friday 15 April and Saturday 16 April 1994. Thus, I cannot agree that the witness was vague with respect to dates. Further, it is my view the witness' acknowledgement that he did not overhear the conversations at the parish does no more than suggest that that the witness was not interested in exaggerating Ndahimana's role in the events at Nyange parish. Finally, Ndahimana's presence at the parish that

[1651] T. 1 November 2010 pp. 13-16; T. 2 November 2010 pp. 14-15, 17.
[1652] Judgement, para. 290.
[1653] T. 10 November 2010 pp. 27-29 (ICS).
[1654] Judgement, para. 241.

evening is further corroborated by the evidence of Witness CBS, and I do not consider Witness Mukabideri's evidence that Ndahimana was at her home all evening to be reliable.

43. I recognize that there are discrepancies between the witnesses' accounts of the meetings and the attack or attacks that day. I attribute this to the passage of time, and the fact that because the attack (or attacks) on 14 April resulted in no fatalities, any attack (s) would not have been as memorable as the attacks the following days. Thus, on the basis of the evidence taken together, I conclude that Ndahimana spent a significant amount of time at the parish on 14 April 1994 in the presence of members of the JCE, and that he would have been aware of the attack(s) that took place that day.

44. Finally, I disagree with the Majority that "the Prosecution evidence on the consequences of the alleged meeting [is] vague and inconclusive."[1655] While it is true that no witness attended the meetings at issue, or overheard the discussions, given the scale of the attacks that took place on 15 and 16 April 1994, and the massive number of participants in those attacks, I believe that the offensive required extensive planning and that the coordinated decision to kill the refugees was taken well before the first attacks on the morning of 15 April 1994. Thus I conclude that the only reasonable inference is that in at least two meetings were held on 14 April 1994, members of the JCE and Ndahimana discussed the fate of the refugees, and that by that date no influential participant in these meetings exerted himself to protect them.

5.6 "Disarming" of the Refugees

45. At the outset I note that Defence Witness ND7 testified that some of the refugees arrived at the church with small sticks that they left at the entrance of the church,[1656] while Witness ND12 testified that the refugees at the parish "did not have anything in the form of arms."[1657] I am of the view that the term "arm or weapon" may be misleading. No evidence has been adduced suggesting that the refugees were equipped with firearms or similar weapons. The evidence does show, however, that the refugees were able to repel attackers both on 13 April and on the morning of 14 April using stones and objects which Witness CBK described as "bows and machetes" and Witness YAU described as "sticks." I further note that certain witnesses testified that the refugees were "disarmed" on 13 April 1994,[1658] while others said this took place on 14 April.[1659] I am satisfied that on 13 or 14 April 1994, members of the alleged JCE decided to search the refugees and remove all objects from them that could be termed a "traditional weapon." There is no evidence of fighting among the refugees, and thus I am further satisfied that the only reasonable inference is that the decision to disarm the refugees was taken to deprive the refugees of their ability to protect themselves in furtherance of the common plan which was to exterminate the Tutsi population of Kivumu *commune* gathered at the parish. What remains to determine is whether the accused either contributed to the "disarmament" or knew about it.

46. Witness CBK testified that following a meeting on 13 April, he overheard members of the JCE discuss the need to disarm the refugees. On 14 April 1994, following a meeting of influential individuals, including Ndahimana, members of the JCE disarmed the refugees. Ndahimana was

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[1655] Judgement, para. 298.
[1656] T. 4 November 2011 p. 4.
[1657] T. 19 January 2011 p. 6.
[1658] Witnesses CBN and CDL.
[1659] Witnesses CBK and YAU.

present while this took place.[1660] I note that the witness' evidence on the times of the meeting, and the subsequent disposal of the arms was relatively detailed. I do not consider the witness' testimony in *Seromba* that he did not know who took the decision to confiscate the weapons to be inconsistent with his evidence in this case, as he merely testified in this case that the decision was taken at a meeting in which a number of named persons were present. In addition, although the witness' reference to this incident in *Seromba* was fleeting, he did say that the confiscated weapons were taken to the communal office. Witness YAU testified that Father Seromba asked the *gendarmes* to confiscate "sticks' in the possession of the refugees and that they did so.[1661] Witness CBN testified that police officers took traditional weapons belonging to the refugees, but believed this took place on 13 April 1994.[1662] I recall that this witness stated, "...understand[ing] the circumstances in which I found myself.... I was panic-stricken. I was very very frightened. And if it was possible for me, I would have committed suicide, but I had no choice and I could not even flee."[1663] Given the circumstances, it is possible that the witness was mistaken about the dates, but I accord little significance to any such error. Witness ND11 testified that when he arrived at the parish on 14 April 1994, he observed that refugees had tried to bring weapons into the church but these arms had been confiscated by the *gendarmes*.[1664] Finally, Witness CDL testified that on 13 April 1994 at some time between noon and 2:00 p.m., he came across Assistant *bourgmestre* Kanani who told him that following a meeting of members of the alleged joint criminal enterprise, including Ndahimana, Kanani and others had checked the refugees to see whether they were armed. Traditional weapons were found in the search but no firearms.[1665] Although Witness CDL's evidence was hearsay and does not corroborate other evidence on the location of the meeting that preceded the search for weapons, it does corroborate the evidence of other witnesses that a search took place and that Ndahimana knew about it.

47. Witness CBK stated that the confiscation of the refugees' objects took place after a meeting among members of the JCE that began at approximately 11:00 a.m on 14 April. Witness CBI partially corroborated this evidence stating that he saw Ndahimana and other members of the alleged JCE meeting with Father Seromba at approximately 11:00 a.m. or noon.[1666] Witness CBN testified that he saw Ndahimana together with other members of the alleged JCE that day between noon and 1:30 p.m. Witness CBS testified that he saw Ndahimana together with other members of the alleged JCE on the afternoon of 14 April.

48. On the evidence adduced, I do not believe that those responsible for "disarming" the refugees did so with the expectation the police and *gendarmes* would protect the refugees. On the contrary, I am satisfied that members of the joint criminal enterprise decided to remove these articles in order to facilitate the subsequent extermination of the refugees. Whether Ndahimana was present when the disarmament took place is not of paramount importance. Of greater significance, is whether Ndahimana knew about the decision to "disarm", and whether he knew that the purpose of the confiscation was to deny the refugees the ability to defend themselves during forthcoming attacks. I am satisfied that the Prosecution has proven beyond reasonable doubt that he had this knowledge. Moreover, Ndahimana took no steps within his powers as *bourgmestre*, to interfere with the plan.

[1660] T. 3 November 2010 pp. 10-12, 56-57.
[1661] T. 15 September 2010 pp. 45-46.
[1662] T. 13 September 2010 p. 56; T. 14 September 2010 p. 8.
[1663] T. 14 September 2010 p. 7.
[1664] T. 18 January 2011 pp. 31-34, 49-50.
[1665] T. 11 November 2010 pp. 69-70; T. 18 November 2010 pp. 49-50.
[1666] T. 14 September 2010 pp. 36, 38; T. 21 September 2011 pp. 6, 11.

5.7 Removal of the Hutu Women from the Church

49. In its closing arguments, the Defence submitted that the allegation that Hutu women married to Tutsi men were removed from the church on 14 April 1994 in Ndahimana's presence was not pleaded in the Indictment. It concluded that the failure to provide Mr. Grégoire Ndahimana with "sufficient notice to meet those allegations renders the information or testimony fatal."[1667] I first note that the Defence did not raise this issue until closing arguments, and that it was able to address the allegation during its cross-examination of Witness CBS.[1668] I also observe that this allegation was contained in the Prosecution's summary of Witness CBS's anticipated testimony in its Pre-Trial Brief. Finally, I consider of relevance a decision of the Appeals Chamber in *Kanyarukiga* addressing an analogous submission from the Defence that the fact that Kanyarukiga threw food destined for the refugees on the ground was not specifically pleaded in the Indictment. The Appeals Chamber held that "[g]iven that the Indictment pleads as a material fact the specific state of mind alleged, the facts by which his *mens rea* is to be established are matters of evidence and need not be pleaded."[1669] I observe that paragraph 9 of the Indictment only refers to the *mens rea* for complicity in genocide, but conclude that paragraph 9 taken together with paragraphs 8 and 28 of the Indictment and paragraph 71 of the Pre-Trial Brief, put the accused on sufficient notice of the *mens rea* alleged with respect to the crimes of genocide and extermination. While I believe that at this advanced stage in the Tribunal's history, the Prosecution should have been able to plead the *mens rea* for the crime of genocide more clearly in the Indictment, I conclude that the Defence has suffered no prejudice as a result of the Prosecution's lack of clarity. With respect to the removal of the Hutu women from the church, I consider that this is a matter of evidence supporting the alleged *mens rea*, and that in any event the Defence has suffered no prejudice with respect to this matter.

50. The only witness to have testified about the removal of Hutu women from Nyange church on 14 April 1994 was Prosecution Witness CBS.[1670] The Majority has expressed concerns with respect to the witness' credibility and reliability, but their most significant concern, with which I concur, relates to his alleged sighting of Ndahimana at Nyange parish on 15 April 1994.[1671] I do not

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[1667] T. 21 September 2010 p. 73.

[1668] T. 6 September 2010 p. 58.

1669 See for example, *Prosecutor v. Kanyarukiga*, ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010, paras. 8-10. See also *Arsène Shalom Ntahobali and Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-97-21-AR73, Decision on the Appeals By Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004, paras. 14-15.

[1670] At paragraph 302 of the Judgement, the Majority states that it "is troubled by the fact that, among all the witnesses that were present at Nyange parish on the evening of 14 April 1994, Witness CBS is the only one who recalls that some Hutus were removed from Nyange church." First, I note that there were approximately 1500 to 2000 refugees at the church that evening, and that the vast majority of those potential witnesses to this incident were exterminated over the following days. The few survivors who testified in this case may not have been in a position to witness this incident. It is clear from the evidence of the three witnesses who were in a good position to observe what was taking place at the parish in general, CBK, CBY and CDJ, that they were often occupied with other tasks and were not permanent observers.

[1671] I concur with the concern expressed by the Majority in paragraph 475 of the Judgement that the witness provided two statements in which he said that he did not see Ndahimana at Nyange parish on 15 April 1994 and that he contradicted these statements at trial, and thus he cannot be relied upon on this point. I do not agree that with the Majority at paragraph 218 of the Judgement that the fact that "Witness CBS' statement to Tribunal investigators of February 1996 was recorded at the Kivumu tribunal and that his statement of March 2003 was recorded at the residence of the assistant *bourgmestre*" is significant. More importantly, I do not agree with the Majority's conclusion at paragraphs 219 and 475 of the Judgement that the witness was evasive on cross-examination. I further disagree with the Majority's finding in paragraphs 219-221 of the Judgement that there were significant discrepancies between the

conclude that his evidence was unreliable in *toto*. In a first statement provided to ICTR investigators in 1995, the witness was asked about the "kind of people who stayed" at the church. The witness replied that "...a small number of Hutu women who were married to Tutsi [were at the church]. The Hutu took those women out of the church on Thursday. The next day the killings started." In this same statement, the witness also said that he saw the *bourgmestre* arrive at the church each day in a vehicle, and "this happened from Monday till Thursday."[1672] In a second statement provided to ICTR investigators in 1996, the witness said that he saw Ndahimana arrive at the church in a vehicle on "Thursday" together with IPJ Kayishema, Brigadier Mbakilirehe, and a police officer named Aloys Nishirimbere. "Kayishema came in the church and took the Hutu women who were married to Tutsi men out of the Church. The *bourgmestre* Ndahimana stayed in the car."[1673] I infer that when the witness spoke of the "Thursday" before the attacks he was referring to 14 April 1994. Thus, I conclude that the witness has been consistent in his account of Ndahimana's presence during the removal of the Hutu wives of Tutsi men from Nyange church by IPJ Kayishema on the evening of 14 April 1994 since 1995-1996, long before Ndahimana was indicted by this Tribunal. I further observe that statements taken by ICTR investigators in this case at this time were generally extremely superficial in nature, focusing primarily on the attacks in which civilians were killed rather than on the lead up to the attacks. Thus, I consider the witness' reference to the removal of Hutu women in such an early statement to be of particular significance. Further, this incident would have been memorable if the witness believed that it was an indication that the fate of the Tutsi refugees had been sealed, as appears to have been the case. Indeed, the only reasonable conclusion is that the women were removed from the church in preparation for the large-scale attack that was to take place the next day.

51. Finally, I note that Witness CBS's testimony is partially corroborated by Witness CDJ, a witness I believe was credible and reliable, and who testified that he saw Ndahimana at the parish on the evening of 14 April 1994. The evidence of Witnesses CBS and CDJ is also consistent with that of other witnesses who testified that Ndahimana spent a significant amount of time at the parish on 13 and 14 April in the company of Kayishema, Mbakilirehe and other members of the alleged joint criminal enterprise. Thus, I conclude that the Prosecution has proven beyond reasonable doubt that Ndahimana was present when Hutu women were removed from the church on the evening of 14 April 1994 by Fulgence Kayishema and Police Brigadier Christophe Mbakilirehe. The Majority has found that "had [Ndahimana] had animus against the Tutsis, he probably would have played a more active role in the removal of the Hutu women than...staying passively in the vehicle."[1674] To my mind this is speculative as many high-level perpetrators prefer to remain behind the scenes,[1675] and may even wish to leave their victims with the impression that they are on their side. I am satisfied that Ndahimana knew that these women were taken out of the church in preparation for the large-scale attack that was to take place the next day. Ndahimana was Mbakilirehe's direct superior. He was also a higher ranking authority than IPJ Kayishema. Once again, Ndahimana took no measures within his authority as *bourgmestre* to interfere with the criminal plan. On the contrary, I

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witness' 1995 and 1996 statements with respect to the removal of Hutu women from the Church on 14 April 1994, as all statements provided by witnesses at the time were superficial in nature.

[1672] Defence Exhibit 3, pp. 3, 5.

[1673] Defence Exhibit 4, p. 4.

[1674] Judgement, para. 301.

[1675] As an example of the type of consideration that may have been in the minds of perpetrators at the time, see Defence Exhibit 42, a witness statement provided by Witness CBK to Prosecution investigators in 2002 in which the witness said that Father Seromba decided to save some Tutsi children "to prove to the advancing RPF forces that he had saved some Tutsis. Father Seromba was convinced of this plan because he was told the RPF have heard what has happened in Nyange and that when they arrive in Nyange, they would kill him because of his participation in the genocide."

am satisfied that his presence during the removal of the Hutu women indicates that he condoned the preparations.

5.8 Conclusions on 13 and 14 April 1994

52. On 13 and 14 April 1994, Ndahimana and members of the joint criminal enterprise held a series of meetings at Nyange parish. I am satisfied that the Prosecution has established that by 14 April 1994 members of the joint criminal enterprise had agreed to exterminate the Tutsis of Kivumu *commune*. To this end, they i) transported Tutsis who had not come to the parish to the church on 13 April 1994; ii) "disarmed" the refugees to weaken their potential resistance; and iii) removed the Hutu wives of Tutsi civilians from harm's way. While no evidence has been adduced suggesting that Ndahimana was among the most forceful advocates of the plan, or that he had a pre-existing antipathy toward the Tutsis of his *commune*-- indeed I recall that he had arrested some of the individuals who may have been involved in the earliest attacks on 9 and 10 April 1994--the Prosecution is not required to prove "personal enthusiasm nor satisfaction, nor personal initiative in performing the relevant contribution to the common plan."[1676] Ndahimana was the highest ranking political official in Kivumu *commune* and at Nyange parish. He spent a great deal of time in the company of members of the JCE and was thus aware of the intent of individuals such as Seromba, Kayishema, Ndungutse and Kanyarukiga. Further, it is my view that had the members of the JCE believed that Ndahimana was opposed to their plan and/or that his contribution to the plan would be insignificant, they would have excluded him from their discussions. Ndahimana participated in the transfer of Tutsis who had not come to the parish to the church on 13 April 1994. He was, at the very least, aware of the disarming of the refugees on 13 or 14 April 1994, and he was present while Hutu women were taken out of the church on the evening of 14 April 1994. He would have known that the four *gendarmes* assigned to Kivumu *commune* would not be in a position to protect the refugees from the coming onslaught. He did not ask the *préfet* or state agencies for more reinforcements on that day. More importantly, he did not assign the armed communal policemen, under his direct control, to protect the refugees. I am therefore satisfied that the only reasonable conclusion on the totality of the evidence is that by 14 April 1994 Ndahimana shared the criminal intent of individuals such as Fulgence Kayishema, Gaspard Kanyarukiga, Télesphore Ndungutse and Athanase Seromba and was therefore himself a member of the joint criminal enterprise. Ndahimana's contribution to that enterprise will be discussed in more detail below.[1677]

6. 15 April 1994 ("15 April")

6.1 General Overview of the Day's Events

53. When taken together, the evidence suggests the following sequence of events on 15 April 1994 at Nyange Parish: i) Between 8:00 a.m and 10:00 a.m, members of the joint criminal enterprise met together at the presbytery; ii) following this meeting Hutu assailants began throwing stones at the Tutsi refugees, but the Tutsi refugees were able to repel them back to the Statue of the Virgin Mary; and indeed it may be that the assailants were deliberately trying to lure the Tutsi men away from the church building[1678] iii) sometime between 11:00 a.m and 12:00 noon, members of the joint criminal enterprise met at the CODEKOKI building located by the Statue of the Virgin Mary; iv) following this meeting, a man named Rukara climbed atop Kanyarukiga's shop, also

[1676] *Kvočka* (AC) Judgement, paras. 105-106.
[1677] Dissent, paras. 208-231.
[1678] T. 27 January 2011 pp. 11-13:Witness ND6 testified that the attackers deliberately lured the refugees away from the church. While I have concerns about this witness' overall credibility, his evidence on this point is plausible.

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located in the area of the Statue, and began throwing grenades at the advancing refugees, killing a significant number. The surviving refugees then retreated into the church. Dozens or more refugees who were unable to get into the Church building were killed by assailants using firearms in the church courtyard. Assailants then tried to attack the refugees inside the church using a panoply of schemes. They shot through the church windows, they tried to burn down the doors of the church or the entire structure of the church, and they attempted to blow up the church using dynamite. When all these efforts failed, Father Seromba called on the assailants to bury the victims. A bulldozer from the Astaldi company was brought to the church for this purpose, and the corpses of those refugees who were killed outside the church were dumped in a pit by the Caritas building. The remainder of the afternoon is not as clear. It would appear, however, that some at the scene already contemplated using the bulldozer to attack the structure of the church, but it began raining and the bulldozer got stuck in the mud. A group of assailants then went home, while another group encircled the church to ensure that refugees could not escape during the night. Members of the JCE then met at the presbytery again that evening.

6.2 Introduction to assessment of evidence

54. I am satisfied that Ndahimana attended the funeral of Dr. Juvenal Ntawuruhunga in the very late morning or early afternoon of 15 April 1994. I also believe that the Defence evidence indicating that Ndahimana traveled to Kibuye to see *préfet* Clément Kayishema that afternoon is reasonably possibly true. However, there are significant elements of the Defence case for this day that I do not accept as true because I have serious reservations about the credibility of Defence witnesses and believe the Defence evidence has been overcome by more compelling Prosecution evidence. *In addition, I observe that the Defence witnesses displayed a remarkable memory for* times given the 17-year lapse between the events at issue and their testimony in this trial, and that the times provided appear to have been neatly tailored to exonerate Ndahimana. Thus, while certain aspects of Ndahimana's alibi are reasonably possibly true, I am satisfied that the Prosecution has proven beyond reasonable doubt that Ndahimana was present at Nyange parish on the morning of 15 April 1994, that he participated in two meetings with other members of the joint criminal enterprise while there and did not leave until after the start of the second attack that day. The Prosecution has further established that Ndahimana returned to the parish on the evening of 15 April 1994 and again met with members of the joint criminal enterprise.

6.3 Defence Witness Credibility

6.3.1 Witness Thérése Mukabideri

55. Witness Thérése Mukabideri provided Ndahimana with an alibi from 5:00 or 6:00 a.m until the early afternoon.[1679] She is the only Defence witness who testified to having seen Ndahimana before 11 a.m. on this day. The Majority has found this witness, among others, to be "generally credible."[1680] *I respectfully disagree and indeed have grave reservations about this* witness' credibility. The witness testified that she first met Ndahimana at her wedding in 1986. Ndahimana was one of her husband's friends and was also the godfather of her late husband's sons. The witness arrived in Kivumu from Kigali on 12 April 1994 and went to visit Ndahimana either the same day or the following day. Ndahimana arrived with the body of the witness' husband at her home on 14 April 1994, and spent many hours with her preparing for, and presiding over, her

[1679] T. 7 February 2011 p. 68.
[1680] Judgement para. 255.

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husband's funeral.[1681] Other witnesses described Ndahimana as the "Master of Ceremonies" at the funeral.[1682] Yet, when asked on cross-examination whether she and Ndahimana were close friends she answered "I would say no."[1683] While I acknowledge that there is no scientific measure for the "closeness" of a friendship, I am of the view that she and Ndahimana were sufficiently close that she had a motive to exculpate him.[1684] Similarly, I believe she may have downplayed the nature of her friendship with Defence Witness Mukankusi in order to minimize the appearance of collusion between the two witnesses.[1685] I further note that while the witness was relatively precise about the times she saw Ndahimana at her house on 14 and 15 April, and said he assisted her in organizing the funeral, she provided no detail on the nature of this assistance. Finally, the witness' husband was killed on the night of 13 to 14 April and thus her memory of the surrounding days may have been shaken by the trauma of this event. For these reasons, I do not find this witness reliable except where corroborated.

6.3.2 Witness Béatrice Mukankusi

56. The Majority also found that Witness Béatrice Mukankusi was "generally credible."[1686] Again, I respectfully disagree. Witness Mukankusi testified that when she arrived at Mukadiberi's house "slightly before 11 o'clock" Ndahimana was already present.[1687] The witness did not explain how she could be so precise about her time of arrival at the house 17 years after the events at issue. Indeed, when asked a question about a particular incident on cross-examination, she stated: "You are complicating my life, really. You are asking me to give you the time for events which happened in 1994? Come on. Do you really think I can remember the times at which all the events took place?"[1688] Further, when asked the time at which she informed Ndahimana that she had seen stone throwing at the church, she answered: "We did not look at our watches, and it was a funeral. We did not pay attention to the time."[1689] The witness was only required to say whether she informed Ndahimana of this incident immediately upon arriving at the funeral or whether she did so later.

57. I also found that this witness was evasive in answering questions on cross-examination, even when addressing relatively minor discrepancies between her testimony in the *Seromba* case and her evidence in this trial. The witness was elusive even when answering the most straightforward questions. For example, when asked whether Tutsis were targeted in April 1994, she responded "when you say that it was the Tutsis who were concerned or targeted, what I would say is that we were all afraid."[1690] When asked to address a more significant discrepancy between her evidence in the *Seromba* trial and her testimony in this trial with respect Ndahimana's presence at Nyange church she was particularly evasive, stating: "[b]ut if I answered in that way that I did, it's because that question was put to me during that trial. Otherwise I didn't have that information. At the time of the events I was not aware of this information."[1691]

[1681] T. 7 February 2011 pp. 67-68.
[1682] See for example, Witness Beatrice Mukankusi: T. 7 February 2011 p. 15; Witness Thérèse Mukabideri: T. 7 February 2011 p. 68; Witness Anicet Tumusenge: T. 12 May 2011 p. 7.
[1683] T. 8 February 2011 p. 16.
[1684] T. 8 February 2011 pp. 18-19.
[1685] T. 8 February 2011, pp. 18, 23.
[1686] Judgement, para. 255.
[1687] T. 7 February 2011 pp. 45-46.
[1688] T. 7 February 2011 p. 33.
[1689] T. 7 February 2011 p. 46.
[1690] T. 7 February 2011 p. 36.
[1691] T. 7 February 2011 p. 51.

58. Finally, I am concerned by the witness' certitude that no meeting to incite the population to attack the refugees at Nyange parish could have taken place on 14 April 1994 at Mutanoga square.[1692] On the evidence of Witnesses CDL[1693] and CNJ,[1694] I am satisfied that such an incident did take place at that location on the afternoon of 14 April 1994, although the Prosecution has not established beyond reasonable doubt that Ndahimana participated in this incident. For these reasons, I have significant concerns about this witness' credibility.

6.3.3 Witness Anicet Tumusenge

59. I respectfully disagree with the Majority's conclusion that Witness Tumusenge was "unshaken on cross-examination."[1695] Indeed, I am concerned by the witness' failure to disclose his prior arrests in Rwanda and Kenya when asked about such arrests by the Prosecution, and did not find his explanation for failing to mention these incidents persuasive.[1696] More importantly, although the details are unclear, it would seem that in June 1994, Ndahimana provided the witness with assistance at a time when he feared for his security and that of his family.[1697] Thus, while some aspects of the witness' testimony were credible, I believe he had a motive for adjusting details, including times, to protect the accused.

6.3.4 Defence Witness Clément Kayishema

60. I share the Majority's concerns about Witness Clément Kayishema.[1698] I wish to stress, however, that Kayishema was tried and convicted by this Tribunal for his participation in the 1994 genocide, and is currently serving a sentence of life imprisonment,[1699] and that he testified that he intended to present "new evidence" to the Tribunal that would exonerate him,[1700] as is his right pursuant to Rules 120-123. I consider it of particular significance that the witness does not consider his case to be closed, and observe that given his position as *préfet* at the time of the events at issue, it is in his legal interest to testify that he and his subordinates, including Ndahimana, did all they could do to provide security in Kibuye *prefecture*. That said, it was the witness' position that he did not "have any subordinates," and that *bourgmestres* in particular were entirely autonomous, a claim about which I am sceptical.[1701]

61. There were also numerous discrepancies, both minor and significant, between the witness' testimony in this trial and that in his own trial. For example, Kayishema testified in this case that two *bourgmestres* participated in the massacres. However, in the evidence he gave in his own case in September 1998, he said that he did not know any "personality of the *communes*", who had participated in the Mubuga massacre. The witness claimed that he learned about the activities

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[1692] T. 7 February 2011 p. 11.
[1693] T 12 November 2010 p. 3
[1694] T. 4 November 2010 p. 50: I am satisfied that Kareteyi and Mutanoga market/square were the same location.
[1695] Judgement, para. 486.
[1696] T. 12 May 2011 pp. 18, 20, 23-24.
[1697] T. 12 May 2011 p. 21.
[1698] Judgement, para. 490.
[1699] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgement, 1 June 2001, Disposition.
[1700] T. 18 April 2011 p. 49.
[1701] T. 18 April 2011 p. 7.

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of the two *bourgmestres* after his own trial, and denied that he altered his account to protect Ndahimana.[1702] I find this explanation unpersuasive.

62. Kayishema further testified that Ndahimana came to the *prefecture* on 15 April after 2:00 p.m. to ask for reinforcements but that Kayishema could provide no more *gendarmes* because they had all left for Kigali.[1703] However, at Kayishema's own trial, Kayishema testified that the *gendarmes* left Kibuye on the evening of 15 April 1994.[1704]

63. Generally, I find this witness to be unreliable and cannot rely on his evidence.

6.3.5 Léonille Murekeyisoni

64. I concur with the Majority's assessment of the credibility of Defence Witness Léonille Murekeyisoni.[1705]

6.4 Conclusion on the Alibi

65. I am satisfied that Ndahimana was not present at Nyange parish during the afternoon of 15 April 1994, and that he participated in the funeral of Dr. Juvenal Ntawuruhunga during his absence from the parish. It is also reasonably possible that he traveled to Kibuye to visit *préfet* Clément Kayishema. Given the passage of time, however, I believe that the Defence witnesses may have been mistaken with respect to the precise times that Ndahimana arrived at the funeral, left for Kibuye, and returned from Kibuye.

66. It is the Defence case that when Witness Mukankusi informed Ndahimana of the fighting at Nyange parish that she had witnessed on her way to the funeral, Ndahimana departed almost immediately for Kibuye[1706] where he asked the *préfet* to provide reinforcements for the protection of the refugees.[1707] First, as discussed above, I am satisfied that Ndahimana was aware on 14 April 1994 of the impending attack of 15 April, and therefore do not believe that Ndahimana learned of the attack from Witness Mukankusi. Second, as Clément Kayishema was the only witness to have testified about the substance of his meeting with Ndahimana that day, and I do not find this witness to be credible, I accord no weight to his evidence that Ndahimana came to seek assistance to protect the refugees. Indeed, circumstantial evidence mitigates against such a discussion. Although the four *gendarmes* assigned to Kivumu *commune* may not have been under the direct *de jure* authority of any single individual in Kivumu *commune*, it would appear that they were involved in discussions about the fate of the refugees and followed the instructions of members of the joint criminal enterprise.[1708] Thus, I am satisfied that Ndahimana did not believe that any number of *gendarmes* would protect the refugees. In addition, had Ndahimana wanted to reinforce the *gendarmes* he could have assigned the communal police to protect the refugees at the

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[1702] T. 18 April 2011 pp. 41-42; T. 19 April 2011 pp. 4-8. Transcripts of Kayishema's testimony in his own case filed as Prosecution Exhibit 61.
[1703] T. 18 April 2011 pp. 31, 33-34, 44; T. 19 April 2011 p. 8.
[1704] T. 19 April 2011 pp. 8-9. Transcripts of Kayishema's testimony filed in his own case as Exhibit Prosecution 62.
[1705] Judgement, para. 484.
[1706] T. 7 February 2011 pp. 15-16.
[1707] See Witness Anicet Tumusenge: T. 12 May 2011 p. 9; Witness Clément Kayishema, T. 18 April 2011 pp. 31-32.
[1708] T. 1 November 2010 pp. 15-16. T. 2 November 2010 p. 16: Witness CBR testified that on 14 April, Ndungutse and Kayishema spoke with the *gendarmes* armed with guns. The gendarmes advised the assailants that because the refugees far outnumbered the attackers, the assailants should postpone their attack. See also Witness YAU: T. 15 September 2010 pp. 46-47.

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parish. As I will discuss in further detail below, I am satisfied that there were at least eleven communal police officers working in Kivumu *commune* at the time of the events.[1709] I will not speculate on the real purpose of Ndahimana's visit to the *préfet* on 15 April 1994, if indeed such a visit took place, but am nevertheless able to conclude that the Defence account is not credible. Finally, while Witness Tumusenge's evidence that he and Ndahimana returned to the funeral after visiting the *préfet* but before going home is reasonably possibly true, I believe that he may have adjusted the timeline of this visit to protect the accused.

6.5 Other Defence Evidence

67. Witness ND24 manned the roadblock just outside Nyange parish and participated in the attacks on Nyange parish that took place on 14 and 15 April 1994.[1710] According to the witness, on 15 April 1994, he only saw Ndahimana arrive at the roadblock on 15 April 1994 at approximately 8:00 to 9:00 p.m and then leave again shortly thereafter.[1711] Ndahimana could not have passed through the roadblock between 14 and 16 April without the witness knowing about it: "A person like him couldn't have passed through such a place without people knowing."[1712] As discussed above, I do not find this witness credible or reliable.[1713] I further note that the witness insisted that the only firearms used at the parish on 15 April were grenades, a point contested by numerous witnesses who testified that other firearms were used.[1714]

68. Witness ND22 testified that he participated in the attack at Nyange parish on 15 April 1994,[1715] but that he did not see Ndahimana there that day.[1716] The witness also testified that at an unspecified point, Kayishema asked about Ndahimana's whereabouts and Ndungutse answered that "he had gone to see his friends, the *Inkotanyi*".[1717] I note that this witness was an accomplice and therefore consider his evidence with caution. In addition, I believe that there were at least 4000 people at Nyange parish, including both refugees and assailants, on 15 April 1994, and therefore that it is possible that Ndahimana was present and that Witness ND22 did not see him. Finally, Ndahimana was not present at the parish during the entire day of 15 April 1994, thus I accept that Kayishema may have asked about his location. However, even if true, this evidence would not signify that Ndahimana was never at the parish on that day.

69. Witness ND6 also participated in the attacks at Nyange Parish on 14, 15 and 16 April 1994,[1718] but did not see the *bourgmestre* on 14, 15 or 16 April 1994.[1719] I respectfully disagree with the Majority's assessment that because the witness completed his sentence for his participation in the events at Nyange church, his evidence does not require cautious review.[1720] Felons have a range of motives for embellishing the truth. Some may hope to curry favor with the current regime, others may harbor such expectations in the event of regime change. Some may owe consideration to powerful individuals in the communities in which they live, whether connected to the regime or not,

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[1709] Dissent, para. 211.
[1710] T. 21 February 2011 pp. 3, 22, 32.
[1711] T. 21February 2011 p. 12.
[1712] T. 21 February 2011 pp. 27 (quoted), 28-29.
[1713] Dissent, para. 29.
[1714] T. 21 February 2011 p. 41.
[1715] T. 20 April 2011 pp. 14- 22.
[1716] T 20 April 2011 p. 20.
[1717] T. 20 April 2011 pp. 6-7, 20, 24.
[1718] T. 27 January 2011 p. 18. On this basis, I also disagree with the Majority's assessment of Defence Witness ND24 at paragraph 499 of the Judgement.
[1719] T. 27 January 2011 pp. 17-18, 25, 29, 34 (ICS).
[1720] Judgement, para. 261.

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while others may expect to receive such consideration in the future.[1721] In addition, a number of accomplice witnesses in this case appeared intent on pointing the finger exclusively at the particular individuals they held responsible for instigating their own criminal acts.[1722] The motives for misrepresentation or embroidery are many, and I am of the view that an individual who has been found guilty of far more grievous crimes than perjury cannot be presumed to be telling the truth. Thus, when a convicted *genocidaire* testifies, whether for the Prosecution or for the Defence, that witness' credibility requires particular scrutiny, and I prefer to rely on such evidence only where corroborated unless there is a compelling reason to rely on it alone.[1723]

70. I further respectfully disagree with the Majority's conclusion that this witness was "generally reliable and credible."[1724] Witness ND6 was a low-level perpetrator associated with Télesphore Ndungutse, and his evidence focused almost exclusively on Ndungutse's role in the attacks and what the witness learned from Ndungutse. He mentioned no other important perpetrators or leaders apart from Witness CDL and Fulgence Kayishema,[1725] but when he referred to the latter two men he did not indicate why he believed that they were responsible for the attacks. I am also troubled by the witness' evidence that he did not see any either *conseillers de secteur* or assistant *bourgmestres* at Nyange parish on either 15 or 16 April 1994. Despite the trial's focus on the activities of Ndahimana, ample evidence was adduced that individuals holding such positions participated in the attacks on Nyange parish.[1726] The witness also testified that communal police officers only arrived at the crime site after the killings on 15 April and that they "were surprised" to see "this horrible scene".[1727] As I will discuss in more detail below,[1728] I am satisfied that at least nine communal police officers were present at the parish during the attacks of 15 April and participated in the attacks, thus I cannot credit the witness' testimony on this issue. I note that *conseillers de secteurs*, assistant *bourgmestres* and communal policemen were all alleged by the Prosecution to have been under the effective control of the *bourgmestre* in April 1994. Thus, this

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[1721] See for example Witness CBR: T. 2 November 2010, pp. 4-6 (ICS). The witness testified that influential members of Gaspard Kanyarukiga's family, to whom his wife, Defence Witness ND21, was related, exerted pressure on the witness and his wife to testify for the Kanyarukiga defence. When this failed members of Kanyarukiga's family bribed members of the community to testify falsely against the witness. Although Witness CBR was an accomplice, this evidence is plausible as he confessed to a significant number of crimes both to the Rwandan authorities and to this Tribunal but appears to argue that after the Kanyarukiga trial he was additionally charged with crimes he did not commit. His evidence also confirms that he was tried more than once for his participation in the crimes at Nyange parish by Rwandan authorities. Witnesses CDL and BX3 also said that they had been tried and convicted more than once for crimes related to the genocide. Thus, I cannot agree with the presumption that once a *genocidaire* has served his sentence he has nothing more to fear or gain from the Rwandan authorities or the community around him.

[1722] For example: Witness ND6 and Ndungutse and Witness ND24 and Fulgence Kayishema.

[1723] T. 12 November 2010 pp. 33-34 (ICS).

[1724] Judgement para. 507.

[1725] T. 27 January 2011 pp. 15-16.

[1726] See for example, Witness CDL: T 12 November 2010, p. 12 (CS, 19-20, T. 19 November 2010 p. 16: discussing the role of assistant *bourgmestres* Gilbert Rugwizangoga Kanani and Védaste Murangwabugabo (aka Mupende). Witness CBI: T. 14 September 2010, p. 39. Witness CBR: T. 1 November 2010 p. 24: testified that Murangwabugabo participated in the planning on 16 April 1994. Witness CNJ: T. 4 November 2010 p. 57, 59: saw Murangwabugabo participate in the attack on 16 April 1994. Witness CBT: T. 7 September 2010, p. 43, 47: testified that *conseiller* Jean Marie Vianney Habarugira participated in the 15 April 1994 attack. Witness CBK: T. 9 November 2010 pp. 53-54: testified that Haburuiga participated in the meeting at the presbytery on the evening of 15 April 1994. Witness CBN: T. 13 September 2010 p. 22-23: testified that Habaruriga participated in the 15 April 1994 attack. Witness YAU: T. 6 September 2010 pp. 26-27, T. 15 September 2010 pp. 42-43 testified that Habaruriga met with other members of the JCE on 15 April 1994 and participated in the killings that day. Witness CBK: T. 3 November 2010 pp. 16-17: testified that he saw *conseiller* Laurent Sindabyemera participate in the meeting of members of the JCE on the evening of 15 April 1994

[1727] T. 27 January 2011 pp. 29-31, 39-41.

[1728] Dissent, para. 211.

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particular testimony appears to have been deliberately tailored to shield the accused from potential Article 6 (3) liability, and this casts doubt on the witness' evidence with regard to Ndahimana's Article 6 (1) liability.

71. It is also significant that the witness insisted that no meeting was held at CODEKOKI before the attacks on 15 April, and that no meeting was held on 15 April involving communal authorities anywhere at Nyange church or in its vicinity. He argued that if any such meetings had taken place, Ndungutse would have told the attackers, including the witness, about it.[1729] I am disturbed by the witness' certitude on this issue and do not find his reasons for this certainty persuasive. The witness also testified that on 15 April he over heard Ndungutse telling Witness CDL: "Our leader [Ndahimana] has abandoned us. He's forgotten us. Where is he?"[1730] but Witness CDL made no mention of any such conversation during his own evidence. Taking all these issues together, I have substantial reservations about the witness' overall credibility.

72. I also observe that given the number of persons at Nyange parish on 15 April, the mere fact that Witness ND6 did not see Ndahimana at the parish does not mean that Ndahimana was not there. This same analysis holds for Witnesses ND7, ND11 and ND12, who were refugees at the parish rather than accomplices, but testified that they did not see Ndahimana at the parish on 15 April.

73. Witness ND7 also testified that she could see the church and bell tower from her position in the presbytery. Having participated in a site visit, I do not believe this was possible.

74. I am concerned by Witness ND11's insistence that no meeting took place at the parish that day, and that if a meeting had taken place he would have seen it.[1731] The witness, a refugee, explained that he began the day of 15 April inside the church and that when the attackers arrived he went outside to throw stones at them. He later retreated back into the church. When asked what he could see from the church that day, Witness ND11 answered that the refugees could see what was happening outside because he went to the bell tower from which a broad view of the area was possible. However, when asked how long he stayed in the bell tower, the witness answered: "One couldn't go there and stay for a long time. You could go there for two minutes..."[1732] I also note that the witness said that he could not say whether Father Seromba had been at the parish on 14 and 15 April,[1733] while the vast majority of witnesses said that Seromba was present and no witness said that he was not. Given that the witness spent much of the day hiding inside the church, together with over 1,000 other refugees, and that he was only able to make short visits to the bell tower, I find his conviction that he would have seen a meeting if it had taken place dubious. I also question his motives for making such an assertion.

75. Witness ND12 testified that Ndahimana saved his life on the night of 15 April 1994, and thus the witness had a motive to exonerate him. Further, Witness ND12 said that when he saw Ndahimana later that night at Ndahimana's home, Ndahimana asked the witness about conditions at the church.[1734] The Defence itself concedes that Ndahimana went to the parish that evening.[1735]

[1729] T. 27 January 2011 p. 14.
[1730] T. 27 January 2011 pp. 15, 26; T. 27 January 2011 p. 32. It was a ten minute walk from Nyange Church to the *communal* office.
[1731] T. 18 January 2011 p. 35.
[1732] T. 18 January 2011 pp. 52, 65.
[1733] T. 18 January 2011 p. 46 (ICS).
[1734] T. 18 January 2011 pp. 37-38, 40, 50, 54-55.
[1735] Defence Notice of Alibi.

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Thus, either Ndahimana misrepresented his knowledge of events at the parish to the witness on the night of 15 April, or the witness was untruthful about their discussion at trial. Finally, I observe that Witnesses ND11 and ND12 fled from the church together on 15 April 1994.[1736] Witness ND11 explained that they were neighbours during the events and that they remain neighbors today. They see each other almost every day, and during "the mourning period" discussed the events that took place in 1994. They also travelled together to Arusha although they were not housed together.[1737] Thus, I take into consideration the possibility that the two witnesses may have discussed issues related to their evidence in advance of their testimonies.

6.6 Conclusion on Defence Evidence for 15 April 1994

76. For the reasons discussed above, I believe the Defence evidence that Ndahimana was not present at all at Nyange parish on 15 April 1994 could be overcome by more compelling Prosecution evidence.

6.7 Prosecution Evidence

77. A number of Prosecution witnesses support the Defence evidence that Ndahimana attended a funeral on 15 April 1994. They, however, alleged that he attended after leaving Nyange parish between about 11:30 a.m and 2:00 p.m on 15 April 1994.[1738]

78. At trial, nine Prosecution witnesses--CBK, CBY, CBS, CBT, CDK, CNJ, CBR, YAU and CBI-- placed Ndahimana at Nyange parish on the morning of 15 April 1994. All nine witnesses provided statements prior to Ndahimana's indictment by this Tribunal. Of those witnesses, only three, CBR, CBI, and CBT, referred to Ndahimana's presence at the parish on the morning of 15 April 1994 in these early statements.[1739] While this is troubling, I do not believe that the failure of those witnesses to mention Ndahimana's presence in their first statements necessarily renders their evidence at trial on his presence unreliable. Many of the witnesses' first statements were vague;[1740] a number appeared to concentrate primarily on the role of Athanase Seromba;[1741] and others focused on the most visible leaders of the attacks.[1742] This latter point is significant because no witness alleged that Ndahimana personally led groups of assailants on this day.

79. The Majority has concluded that a "detailed review of the Prosecution evidence shows the evidence to be inconsistent regarding the two alleged meetings. First, it is not clear which of the two meetings happened first or which one started the attack. More importantly, the timing of the meetings in relation to the start of the attacks is unclear."[1743] I respectfully disagree, as I will now explain.

[1736] Witness ND12: T. 19 January 2011 p. 8; Witness ND11: T. 18 January 2011 pp. 37-38, 40, 50, 54-55.
[1737] T. 18 January 2011 p. 56.
[1738] See for example Witness CBT: T. 7 September 2010 p. 42; T. 8 September 2010 pp. 5, 9, 13; Witness CDK: T. 9 November 2010 p. 19; Witness CNJ: T. 4 November 2010 p. 54; Witness CBR: T. 1 November 2010 p. 23, T. 2 November 2010 p. 23.
[1739] Witness CBR: Defence Exhibit 32; Witness CBI: Defence Exhibit 25 (B); Witness CBT: Prosecution Exhibit 3.
[1740] See for example, Witness CBN: Defence Exhibit 16 (A); Witness CBY: Defence Exhibit 67; Witness CDZ: Defence Exhibit 15.
[1741] See for example, Witness CBI: Defence Exhibit 25 (A); Witness YAU: Defence Exhibit 30 (A); Witness CBK: Defence Exhibit 40; Witness CBY: Defence Exhibit 67.
[1742] See for Example: Witness CDK: Defence Exhibit 56; Witness CNJ: Defence Exhibit 44; Witness CBN: Defence Exhibit 16 A; Witness CBY: Defence Exhibit 67.
[1743] Judgement, para. 541.

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6.7.1 Early Morning Meeting, and the First Attack

80. Witnesses CBK, CBY and CBS all testified that they saw Ndahimana at Nyange parish on 15 April 1994 before the attacks began that day. Both Witnesses CBK and CBY saw Ndahimana at the presbytery in the company of Fulgence Kayishema, and Gaspard Kanyarukiga, among others. Witnesses CBK and CBY were both well placed to observe what was taking place at the presbytery during the events at issue, both gave detailed descriptions of what they saw, and I can find no motive for either to lie or exaggerate. In addition, neither appears to have been zealously determined to implicate the accused as neither testified that he was present at Nyange parish during the attacks that day and neither witness said that he heard the discussions that took place that day between members of the JCE. I have greater reservations about relying on the evidence of Witness CBS with respect to his sighting of Ndahimana during the early morning of 15 April. When interviewed by ICTR investigators in 1995, Witness CBS was asked to discuss the activities of the *bourgmestre* during the attack on the church. He responded that he saw Ndahimana arrive at the church in a communal vehicle each day from Monday through Thursday. On those days he spoke with *gendarmes* and communal officers, but on Friday, the day of the killings "I did not see him."[1744] He repeated that he did not see the *bourgmestre* on the day of the attack in a subsequent statement dated 2 February 1996.[1745] At trial, Witness CBS explained that the investigator had inaccurately recorded his statements.[1746] While it is certainly possible that investigators erred in taking statements, I have difficulty in believing that they would have erred twice on the same significant point. Therefore, I only rely on Witness CBS to the extent that his testimony partially corroborates the more reliable evidence of Witnesses CBK and CBY.

81. The Majority has found "that the Prosecution witnesses do not corroborate each other regarding the precise time, location or consequences of the meeting."[1747] I respectfully disagree. I note that Witness CBK testified that the meeting took place at approximately 9:00 a.m, while Witness CBY spoke of a meeting at 8:00 a.m, and that while both witnesses referred to the presence of Fulgence Kayishema and Gaspard Kanyarukiga at this meeting, they differed on the other participants. To my mind such discrepancies are to be expected given the passage of time and the chaos of the day. With respect to the location of the meeting, Witness CBK offered the most precise account. He testified that the men first met together in the bishop's room in the priests' living quarters and then came down together to the secretariat, which is located in the presbytery, where they spoke to the attackers.[1748] Witness CBY was less precise testifying only that he saw the men come to see "the priest" at the presbytery.[1749] Witness CBS did not say he saw Ndahimana meeting with other members of the JCE, but said that he saw him shortly before at the Statue of the Virgin Mary,[1750] which was less than 200 meters from the church and presbytery.[1751] These accounts are in no way inconsistent.

[1744] Defence Exhibit 3, p. 7. T. 6 September 2010 p. 50. I infer that when the witness spoke of Monday through Thursday he was referring to the dates of 11-14 April 1994, and that when he said he did not see Ndahimana on "Friday" he was referring to 15 April 1994.
[1745] Defence Exhibit 4.
[1746] T. 6 September 2010 p. 50.
[1747] Judgement, para. 535.
[1748] Witness CBK: T. 3 November 2010 p. 12.
[1749] Witness CBY: T. 9 November 2010 p. 53.
[1750] T. 6 September 2010 p. 22.
[1751] Although the Registry failed to take note of it in its Site Visit Report, I observe that my colleagues and I informally agreed during the site visit that the Statue of the Virgin Mary and Kanyarukiga's pharmacy were less than 200 meters away from the Nyange church building.

82. As to the consequences of the meeting, all three Prosecution witnesses testified that Hutu assailants armed with stones and/or traditional weapons attacked the refugees soon after they saw Ndahimana early that morning.[1752] Thus, I further respectfully disagree with the Majority's conclusion that "Witness CNJ... was the only witness to testify that stone-throwing was already ongoing before the authorities met at the Statue of the Virgin Mary" later that morning.[1753] In conclusion, on the evidence of Witnesses CBY and CBK, which is partially corroborated by Witness CBS, I am satisfied that at approximately 8:00 or 9:00 a.m on 15 April 1994, Ndahimana met with Fulgence Kayishema, Gaspard Kanyarukiga, and others at the presbytery. Although no evidence was adduced about the theme of the meeting, I believe the only reasonable inference is that these individuals discussed the attacks that were to take place that day.

6.7.2 Second Meeting and Start of the Second Round of Attacks

83. Witnesses CBT, CBI, CDK, CNJ, CBR and YAU all placed Ndahimana at the parish sometime between 11:00 a.m and 1:00 p.m at the start of the second round of attacks that day in which the assailants used live ammunition, including grenades, against the refugees.

84. In her first statement to ICTR investigators in 2000, Witness YAU said that the only authority she saw at Nyange parish on 15 April 1994 was *Conseiller* Vianney.[1754] While this is troubling, I consider it of significance that in the *Seromba* trial she mentioned Ndahimana's presence at Nyange parish on that day although she was not specifically asked about him.[1755] Finally, given her timeline of events I believe that Witness YAU would have seen Ndahimana before going to hide in the presbytery, and thus I have little reason to doubt her testimony on this issue. Witnesses CBT, CDK, CNJ and CBR are accomplice witnesses. I am of the view that not one of these witnesses was so reliable that his evidence could be relied upon without corroboration. At the same time, I believe that each of these witnesses was sufficiently credible to be relied upon in the event of adequate corroboration, particularly as there was no allegation of collusion among them. I assume that conditions at the parish were chaotic on 15 April and therefore further consider that accomplice witnesses were better placed to observe the attacks as they unfolded from the Statue of the Virgin Mary than other witnesses who were either refugees or observers in the vicinity of the presbytery.[1756] I share many of the concerns raised by the Majority with respect to the credibility of Witness CBR in particular,[1757] but note that from his first statement provided to ICTR investigators in 2000, the witness referred to Ndahimana's presence at the parish during the attacks.[1758] The witness subsequently provided a number of statements both to the Rwandan judiciary and to ICTR investigators, and testified in both the *Kanyarukiga* and *Seromba* trials. His evidence has been detailed from his first statement through his testimony in this case. In addition, his evidence is

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[1752] Witness CBK: T. 3 November 2010 p. 14; Witness CBY: T. 9 November 2010 p. 53, T. 10 November p. 30 (ICS); Witness CBS: T. 6 September 2010 p. 22.
[1753] Judgement, para. 542.
[1754] Defence Exhibit 30.
[1755] Defence Exhibit 31, p. 17. See also Defence Exhibit 31, p. 14: the witness also referred to the presence of Ndahimana at the parish on 13 or 14 April 1994 although she was not specifically asked about him.
[1756] Thus I do not agree with the Majority at para. 555 of the Judgement that the fact that "other Prosecution witnesses such as CBY, CDL, CBK, CBS and CBN, all of whom were present during the attack, did not testify that Ndahimana was present" is significant. Witnesses CBY and CBK did not participate in the attacks and would have remained in or around the Presbytery; Witnesses CBS and CBN were refugees. Witness CDL arrived at the scene later that day. I have discussed my concerns regarding those Defence witnesses who stated that Ndahimana was not present earlier.
[1757] Judgement, paras. 459-460.
[1758] Defence Exhibit 32.

generally consistent with that of Witnesses CDK, CBT, and CNJ, each of whom provided detailed descriptions of the attack that took place on 15 April.

85. Witnesses CNJ, CDK and CBR all testified that Ndahimana, Fulgence Kayishema, Kanyarukiga and Ndungutse met together at approximately 11:00 a.m or soon thereafter at the CODEKOKI building or the Statue of the Virgin Mary, and that an army reservist named Rukara began throwing grenades at the refugees immediately thereafter, thus launching a second and more significant attack on the refugees that day.[1759] The Trial Chamber's Site Visit revealed that the CODEKOKI building was within several meters of the Statue and thus these accounts are not inconsistent. It would appear that Witness CBT arrived in the area just after Rukara began throwing grenades, meaning after the meeting observed by Witnesses CNJ, CDK, and CBR, but he corroborated their evidence that Ndahimana was present at the start of the second attack.[1760] Witness CDL, a high-ranking perpetrator, participated in the attack on 15 April and did not see Ndahimana that day, but by his own account did not arrive until some time after he heard the grenades exploding from a distance.[1761] Thus, it is possible that he arrived after Ndahimana left.

86. Witnesses CBT, CDK, CNJ and CBR all described the attack that followed the meeting in a similar manner, and they all described Ndahimana as having played a role at the start of that attack, although they differed on certain details. For example, Witness CBT testified that he saw Ndahimana shoot at the church.[1762] while Witness CNJ testified that Ndahimana ordered the police to shoot at the church.[1763] While these discrepancies may be attributable to the various vantage points of the witnesses, I am only satisfied on the evidence of Witnesses CBT, CBI, CDK, CNJ, CBR and YAU taken together that the Prosecution has proven beyond reasonable doubt that Ndahimana met with other members of the joint criminal enterprise immediately before the start of the second attack, and that he was present, and not as a mere bystander, at the start of that second attack which began between approximately 11:00 a.m and noon on 15 April. In addition, the evidence indicates that in contrast to the limited numbers of attackers present at Nyange parish on 13 and 14 April, there were several thousand attackers present on 15 April. Thus I conclude that the Prosecution has proven beyond reasonable doubt that Ndahimana participated in planning the attacks, and that he knew that atrocities would be committed that day and that the *gendarmes* assigned to the church would be in no position to repel the assault even if they wished to do so.

6.7.3 The Role of the *Gendarmes* on 15 April

87. The Majority has found that "the Defence witnesses raise reasonable doubt as to the role of the *gendarmes* during the attacks on Nyange church on 15 April 1994."[1764] I respectfully disagree. I did not find Witness ND6 to be a reliable witness. Further, he could not have witnessed each crime committed in the attack. Witness ND12 did not testify that the *gendarmes* repelled the attackers on 15 April, but rather that he did not see them that day.[1765] Further, the Prosecution evidence is not incompatible with the possibility that individual *gendarmes* offered selective

[1759] Witness CNJ: T. 4 November 2010 pp. 47-49, 52; T. 5 November 2010 pp. 22-23 (ICS), 30; Witness CDK: T. 8 November 2010 pp. 31-32; Witness CBR: T. 1 November 2010 pp. 17, 47; T. 2 November 2010 p. 18.
[1760] T. 7 September 2010 pp. 40-42.
[1761] T. 12 November 2010 p. 8.
[1762] T. 7 September 2010 p. 42, 47; T. 8 September 2010 pp. 6, 11, 14-15, 19.
[1763] T. 4 November 2010 p. 56; T. 5 November 2010 p. 31.
[1764] Judgement, para. 791.
[1765] T. 19 January 2011 pp. 6-8.

assistance to the refugees as described by Witnesses ND11 and ND7.[1766] In summary, on the evidence of Witnesses CBK, CDL, CBS, CBI and CBN, I am satisfied that the *gendarmes* assigned to Nyange parish participated in the attack of 15 April.[1767]

6.7.4 Evening Meeting

88. Turning to the meeting that took place on the evening of 15 April 1994, I recall my opinion that Defence Witness Anicet Tumusenge may have been mistaken with respect to timing of the events he described. The same is true for Witness ND24, whom I did not find especially reliable. Witnesses CDJ[1768] and CBK[1769] both testified that Ndahimana met with Gaspard Kanyarukiga and Athanase Seromba that evening at the presbytery. I consider Witness CDJ to be a particularly credible witness, and his evidence is corroborated by Witness CBK. As it was Witness CDJ's habit to arrive at the church every day at a particular time, I consider his recollection of times to be more accurate than those of other witnesses. On this basis, I conclude that Ndahimana met together with Athanase Seromba and Gaspard Kanyarukiga, among others, at the presbytery on the evening of 15 April 1994. The Majority has concluded that the Prosecution has not "proven beyond reasonable doubt that the only reasonable explanation is that the meeting was held to plan further attacks on Tutsis. The Majority notes that it has found elsewhere that on the morning of 16 April 1994, a meeting occurred in order to plan the attack against the Tutsis later that day."[1770] I respectfully disagree. Although I concur that the details of the conversation are unknown, I believe the only reasonable inference is that the men discussed the attacks that took place at the parish that day and the continuation of the offensive that was to take place the next day. I do not believe that an attack of the scale and magnitude of the one that took place on 16 April[1771] could have been planned at one *ad hoc* meeting on the morning of the 16 April.

7. 16 April 1994 ("16 April")

7.1 The Alibi

89. I concur with the Majority that the alibi of the accused for 16 April 1994 is not reasonably possibly true[1772] but wish to make some additional remarks. In support of the alibi, the Defence called Witnesses ND17 and ND35 who were together at 5:00 a.m at the Sisters' convent on 16 April 1994. Each testified that they saw the Accused arrive at that hour. Witness ND 17 also testified that he saw Ndahimana leave the convent that evening at 7:00, while Witness ND35 only said that he was told that the accused left the convent together at that time. Witness ND35 added that he was also told that Ndahimana at the convent hiding from the Kibilira *interahamwe*. Witness

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[1766] Witness ND11: T. 18 January 2011 pp. 35-36, 66 (Witness talked to a *gendarme* who "allowed" him to leave Nyange church at about midnight); Witness ND7: T. 24 January 2011 pp. 14-15, 35, 38 (Immediately after she and other refugees entered the room between 3:00 and 4:00 p.m., *gendarmes* locked the room so that the attackers could not get at the refugees).

[1767] Witness CBK: T. 3 November 2010 pp. 12-15, 58; Witness CDL: T. 12 November 2010 p. 13; Witness CNJ: T. 4 November 2010 pp. 51-53; Witness CBY: T. 9 November 2010 pp. 53-54, T. 10 November 2010 pp. 27, 30-32; Witness CBS: T. 7 September 2010 pp. 8-10, 32; Witness CBI: T. 14 September 2010 pp. 39-41; Witness CBN: T. 13 September 2010 pp. 22-23.

[1768] T. 11 November 2010 pp. 29-30.

[1769] T. 3 November 2010 pp. 16-17.

[1770] Judgement, paras. 564, 756.

[1771] Both Prosecution Witness CBK and Defence Witness KR3 were under the impression that "all the Hutus of the Kivumu *commune*" came to Nyange parish on 16 April 1994. Witness CBK: T. 3 November 2010 p. 17; Witness KR3: T. 25 January 2011 p. 21.

[1772] Judgement, para. 657.

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BX3 provided hearsay evidence about Ndahimana's stay at the convent on 16 April; Mama Yumani, a nun at the convent, told Witness BX3 that Ndahimana had been there that day. The witness did not say when Mama Yumani transmitted this information. Finally, Witness ND6 testified that on 16 April he was at Nyange parish and overheard Ndungutse angrily asking about the whereabouts of the *bourgmestre*. The witness then went to look for Ndahimana at his home but did not find him there.

90. I note that even if the accounts of the two eyewitnesses were to be considered generally credible, their accounts would not constitute a full alibi, as these witnesses actually saw Ndahimana between 5:00 a.m and 7:00 p.m on 16 April 1994. However, the alibi is problematic for other reasons too. It is clear that Witnesses ND17 and ND35 spent considerable amounts of time at the convent at the very least during the period at issue. Although they were not asked about their relationship at trial, the two witnesses testified on the same day in May 2011, raising the possibility that they travelled to Arusha together and discussed their prospective testimony. In addition, their evidence about 16 April 1994 was generally quite vague with the exception of the time at which the witnesses saw Ndahimana arrive at the convent and the time of his departure. Their accounts were hazy in other ways too. For example, Witness ND17 gave a very vague account of attacks on the convent after 16 April 1994 that were repelled by *gendarmes* he believed were assigned to protect the convent by Ndahimana. Although he recalled the date that Ndahimana was at the convent, he did not remember the dates on which the convent was attacked.[1773] Witness ND35 did not mention any threats or attacks on the convent.

91. More importantly, the Defence offered little support for its assertion that Ndahimana was under threat on 16 April 1994. Witness ND6 stated that Ndungutse, a local school teacher, was angry with Ndahimana for his failure to appear at Nyange parish on 16 April 1994, while Witness ND35 stated that he was told that Ndahimana was running from the Kibilira *Interahamwe*. I therefore have very little basis on which to assess who precisely threatened Ndahimana, when exactly he was threatened, or the circumstances leading to the threats against him. The Defence itself allows that Ndahimana went to Nyange parish after his return from the funeral on 15 April 1994 at approximately 8:00 or 9:00 that evening. No evidence has been adduced suggesting that a threat arose between that time and 5:00 a.m the next morning causing Ndahimana to go into hiding. In addition, I am unable to understand why Ndahimana would have believed he was in danger on 16 April but not on 15 April or 17 April 1994. Witness ND17 testified that he remained at the convent from 6 April 1994 until his departure in June 1994, leaving his family alone, because he feared for the security of the nuns at the convent.[1774] Four of the six nuns at the convent were Tutsi, and given the attacks on Nyange parish on 13, 14, and 15 April 1994, it was already clear that assailants did not consider religious establishments to be protected. Thus, I cannot understand why Ndahimana would have chosen to hide at the convent, which was not a particularly protected area, and which was located only one kilometre away from Nyange parish where the Kibilira *Interahamwe* and other assailants gathered on 16 April 1994. Finally, I recall that the Defence does not dispute that Ndahimana returned to his duties as *bourgmestre* on 17 April 1994 and remained in that position until the fall of the Interim Government in late June or early July 1994.

92. Related to the alibi is the evidence of Defence Witness ND6, who testified that on 16 April 1994 he was instructed by Ndungutse to find Ndahimana and bring him to the church. The witness went to Ndahimana's home but did not find him there. I have discussed this witness'

[1773] T. 3 May 2011 p. 10 (ICS).
[1774] T. 3 May 2011 p. 20.

credibility above[1775] and recall that he was an accomplice witness. I wish to add here that I do not entirely discount the possibility that there may have been friction between Ndahimana and Ndungutse,[1776] but as I will discuss in more detail below I am satisfied that Ndahimana had some degree of authority over Ndungutse.[1777] Finally, I as will be discuss below, the witness' account of going to search for Ndahimana is not only uncorroborated, it is entirely at odds with the more substantiated evidence of Prosecution witnesses.

93. In conclusion, on the evidence available, I cannot conclude that Ndahimana may have hidden in the convent on 16 April 1994 because he did not want to participate in the attacks that were to take place that day at Nyange parish, or because he was under threat from individuals unhappy with his alleged opposition to the attacks. I therefore concur with the Majority that Ndahimana's alibi for 16 April 1994 is not reasonably possibly true, and now turn to the Prosecution evidence.

7.2 First Meeting 16 April and Shooting at the Church Building

94. Prosecution Witnesses CDL and CBR both gave detailed accounts of the attack on the parish on 16 April 1994, and Ndahimana's role in the attacks. Both testified that when they arrived at the parish early in the morning, Ndahimana was already present and meeting with other alleged members of the Joint criminal enterprise. After this meeting Ndahimana fired a weapon at the refugees inside the church, signaling the start of the attack.

95. Defence Witness ND21, Prosecution Witness CBR's wife, testified that Witness CBR was wounded on 15 April 1994 and remained home for a week and therefore could not have participated in the attack on Nyange parish on 16 April 1994. According to the witness, when her husband arrived home with a wound on his forehead at approximately 9:00 p.m on 15 April 1994,[1778] "[h]e said he had been stoned. Apparently, there were two camps who were hauling stones at each other."[1779] On the basis of this information, I conclude that Witness ND21 meant that Witness CBR had been wounded in the attacks at Nyange parish of 15 April 1994. I am of the view that the incident in which Hutu assailants and Tutsi refugees threw stones at each other would have finished by approximately 11:00 a.m that morning when "Rukara" began throwing grenades at the refugees and the refugees retreated into the church.[1780] If Witness CBR had been so badly wounded in the exchange of rocks that took place before 11:00 a.m, it is not clear why he did not return home until 9:00 p.m and did not exhibit symptoms until midnight. More importantly, Witness CBR provided a statement to ICTR investigators in January 2000.[1781] In that statement, in which the witness appears to have been asked primarily to address the role of Athanase Seromba, and in a second statement dated 9 October 2001,[1782] which focused more closely on Kanyarukiga, the witness said that he had been present at Nyange parish on 16 April 1994, and described Ndahimana's participation in a manner consistent with his evidence at trial. Finally, in a guilty plea dated 26 January 2001, the witness confessed to having participated in the crimes committed at Nyange parish on three days in 1994 including 16 April 1994.[1783] I find it improbable that an

[1775] Dissent, para. 69.
[1776] Defence Exhibit 110 (C).
[1777] Para. 180.
[1778] T. 14 February 2011 pp. 19-20.
[1779] T. 14 February 2011 p. 48.
[1780] Dissent, para. 85.
[1781] Defence Exhibit 32.
[1782] Defence Exhibit 33.
[1783] Defence Exhibit 34.

individual would consistently and freely confess to having participated in crimes in which he did not actually take part. Therefore I cannot credit Witness ND21's evidence that Witness CBR was not at Nyange parish on 16 April 1994. More generally, Witness CBR's account of Ndahimana's participation in the events of 16 April 1994 has been consistent since 2000, meaning before Ndahimana was indicted by this Tribunal. Thus, despite my deep reservations about Witness' CBR's character, I believe I can rely on his evidence in some circumstances and where corroborated.

96. Witness CDL confessed to having been a perpetrator in the attacks of 16 April 1994. He has also been named by other witnesses as one of the leaders of the attack that day.[1784] I therefore take into consideration the possibility that the witness' account of events may have been arranged to minimise his role in the attacks that day. However, I also bear in mind that because of his leading role in the attack he would have been in a particularly good position to discern the role of individual participants in the events as they unfolded. The witness first identified Ndahimana as a leader of the attacks at Nyange parish in general in an extremely detailed confession he provided to the Public Prosecutor's Office of Kibuye on 16 April 1999.[1785] In that confession, he described Ndahimana's presence and role at Nyange parish in a manner consistent with his evidence at trial in this case.[1786] In that confession, the witness also noted that he was not on good terms with Ndahimana. At trial, he explained that their disagreements were political rather than personal.[1787] While this might still provide him with a motive for exaggerating Ndahimana's culpability, I recall that the witness testified that he did not see Ndahimana at Nyange parish on 15 April 1994, [1788] and therefore does not appear to have been determined to implicate Ndahimana in each and every atrocity committed at Nyange parish. Nevertheless, I will only rely on this witness' evidence where it is corroborated.

97. I am satisfied that the testimonies of Witnesses CBR and CDL tend to corroborate each other on Ndahimana's presence at Nyange church together with other members of the joint criminal enterprise on 16 April 1994. However, Witness CDL testified that Ndahimana only fired one shot to signal the start of the attack after which the communal police continued firing, [1789] and while Witness CBR also said that Ndahimana fired the first shots, his evidence appears to indicate that he continued shooting with the other assailants.[1790] My reservations about the credibility of these two witnesses are such that even when they closely corroborate each other, I prefer that their evidence be further supported. Thus, I am not satisfied that the Prosecution has proven paragraph 29 of the Indictment beyond reasonable doubt.

7.3 Second Meeting 16 April and the Decision to Destroy Nyange Church

98. The Majority has held that "the Prosecution failed to prove beyond a reasonable doubt that the accused should be liable for the charges set in paragraph 30 of the Indictment."[1791] I respectfully disagree. Both Witnesses CDL and CBR testified that after the shooting ceased, the Accused and the other authorities then met again to discuss how to demolish the church. Witness

[1784] Witness CBK: T. 3 November 2010 pp. 18-19; Witness ND6: T. 27 January 2011 pp. 15, 26, 32; Witness ND22: T. 20 April 2011 p. 9.
[1785] Defence Exhibit 77, p. 7.
[1786] Defence Exhibit 77, pp. 11-12.
[1787] T 18 November 2010 pp. 24-25 (ICS); T. 19 November 2010 p. 21.
[1788] Defence Exhibit 77, p. 11.
[1789] T. 12 November 2010 p. 17
[1790] T. 1 November 2010 pp. 24-25.
[1791] Judgement, para. 677.

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CBR asserted that the discussion took place near the presbytery,[1792] while Witness CDL said that the meeting began at Kanyarukiga's pharmacy and that the authorities, including Ndahimana, then moved to the church to meet with Father Seromba who was standing in front of the presbytery secretariat.[1793] As noted above, the Statue of the Virgin Mary, the CODEKOKI building and Kanyarukiga's pharmacy were less than 200 meters away from the Nyange church and presbytery buildings. Thus, I do not consider these accounts to be inconsistent. Witnesses CBK, CBY and CNJ also testified that Ndahimana participated in a meeting at the presbytery with other members of the alleged JCE to discuss the destruction of the church.[1794]

99. Witness CBK saw Ndahimana, Kayishema, Ndungutse, and Seromba having a meeting at the presbytery. He overheard Seromba asking what was to be done about the failed attempts to kill the refugees, and Ndahimana and Kayishema reply that killing Tutsi intellectuals was a priority, after which the group immediately decided to destroy the church.[1795] I note that this witness described a number of meetings from 12 to16 April between members of the JCE, but generally said he did not hear the discussions. Given this factor and his position when the discussion was held, I find his account of this discussion to be credible.

100. Witness CBR overheard Kanyarukiga saying "This church has to be demolished, [...] within three days, we will be able to rebuild it." Ndahimana was standing next to Kanyarukiga when Kanyarukiga made this statement.[1796] Witness CDL testified that Ndahimana spoke to Father Seromba, and Seromba approved the decision to destroy the church.[1797] Thus, the evidence of Prosecution Witnesses CDL and CBR that Ndahimana actively participated in the decision to destroy the church is corroborated by Prosecution Witness CBK. As will be discussed in more detail below, this evidence is consistent with the evidence of other Prosecution witnesses who also saw and heard Ndahimana providing tactical advice, support and comfort to the assailants.

101. In conclusion, I am satisfied that the Prosecution has proven beyond reasonable doubt that on 16 April 1994, Ndahimana met with members of the alleged joint criminal enterprise and mutually agreed to kill all the Tutsi refugees in Nyange church by destroying it.[1798]

7.4 Ndahimana's Participation in the Attack

102. The Majority has held that it "finds that the Prosecution only established beyond reasonable doubt that the accused was present during the attack on Nyange church. It has not proven that Ndahimana instigated the assailants to kill the Tutsis or supervised the attack at Nyange parish."[1799] I respectfully disagree.

103. Witness CBK testified that one of the drivers of the bulldozers was reluctant to attack the church and asked Kayishema, Seromba and Ndahimana twice whether they really wanted him to destroy the church. Seromba answered: "Yes, you should demolish it. There are many Hutus and

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[1792] T. 1 November 2010 p. 25.
[1793] T. 12 November 2010 pp. 19-20; T. 19 November 2010 pp. 16-17.
[1794] Witness CDL: T. 12 November 2010 p. 21; Witness CBK: T. 3 November 2010 pp. 17-18-19, 23; Witness CNJ: T. 4 November 2010 pp. 57-59. Witness CNT: T. 10 November 2010 pp. 45-48; T. 11 November 2010, pp. 1-3; Witness CBY: T. 9 November 2010 pp. 54-55.
[1795] T. 3 November 2010 pp. 17, 23; Prosecution Exhibit 8 (1).
[1796] T. 1 November 2010 p. 25.
[1797] T. 12 November 2010 p. 19; T. 19 November 2010 p. 17.
[1798] Paragraph 30 of the Indictment.
[1799] Judgement, para. 689.

they are going to build another one."[1800] Witness CNJ testified that after the members of the JCE met with Father Seromba, he heard Ndahimana say "now you can start," after which Kayishema told the bulldozer driver: "Now you can go ahead." In addition, each time the bulldozer demolished a wall and assailants rushed into the church to kill the refugees who had survived the falling debris, Ndahimana would choose when to order the assailants to leave the church so that the bulldozer could attack another wall without harming the assailants.[1801] Witness CNT testified that Ndahimana directed the assailants to ensure that no refugee escaped from the church while the attackers were destroying it.[1802] Witness CDL testified that when refugees began throwing stones at the bulldozer drivers, Ndahimana and Seromba provided the drivers with protective gear.[1803] Witness CNJ testified that when Assistant *bourgmestre*, Védaste Murangwabugabo suggested boring a hole into the church façade to allow the assailants to enter the church, Ndahimana opposed the suggestion arguing that if the hole were too small the refugees would be in a position to attack the assailants as they entered the church. Immediately thereafter, the authorities began discussing the destruction of the entire edifice of the church.[1804] Witness CDL also testified that at an unspecified time, a group of persons arrived at the parish to tell Ndahimana that an "attack" had started in the *secteur* of Gasave. Ndahimana ordered those who had arrived with the information to go assist the attackers in Gasave.[1805]

104. Finally Witnesses CDL, CNT, CNJ and CBK all testified that they saw Ndahimana at Nyange parish during the actual demolition of the church,[1806] while Witness CBT was told that Ndahimana had been at the parish on 16 April 1994.[1807] As Witness CBT's evidence was hearsay I will only rely on it because it was adequately corroborated by more direct evidence. Whether Ndahimana was present throughout the day or simply during significant parts of the day is inconsequential.

105. Again I note that while I share many of the Majority's concerns with respect to the individual credibility of the Prosecution accomplice witnesses, with the exception of Witness CNT,[1808] and am of the view that not one of these witnesses was so reliable that his evidence could

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[1800] T. 3 November 2010 p. 26.
[1801] T. 4 November 2010 p. 59.
[1802] T. 10 November 2010 pp. 45-48; T. 11 November 2010 p. 1.
[1803] T. 12 November 2010 p. 21.
[1804] T. 4 November 2010 pp. 57-59.
[1805] T. 12 November 2010 p. 21.
[1806] Witness CDL: T. 12 November 2010 p. 21; Witness CBK: T. 3 November 2010 pp. 18-19; Witness CNJ: T. 4 November 2010 p. 59; Witness CNT: T. 10 November 2010 pp. 45-48, T. 11 November 2010 pp. 1-3.
[1807] T. 8 September 2010 pp. 3-4.
[1808] I respectfully disagree with the Majority's assessment of Witness CNT's credibility at para. 644 of the Judgement. First, I do not agree that the witness' testimony lacked sufficient detail to be relied upon. He provided detail about the drivers and vehicles ferrying attackers to the parish. He described the attack in a manner consistent with his participation as a low-level perpetrator. He was also precise in explaining Ndahimana's physical position in relation to that of Kayishema and Seromba on 16 April, and named Tutsi victims of the attack that day. More importantly, I do not agree that the witness' testimony at trial about the position of the accused is inconsistent with his 2003 statement and the evidence of other witnesses. In Defence Exhibit 70, his 2003 statement, the witness stated that he "saw Kayishema, Seromba, Ndahimana assisting in the demolition of Nyange church. They were standing in front of the main door." At trial (T.11 November 2010 pp. 4-5), the witness testified that he saw all three men within five meters of the main entrance during the demolition of the church. In my view, the witness was more precise at trial than he was in his first statement, but he was not inconsistent. Finally, I consider the Majority's conclusion that "[h]is testimony could be influenced by the desire to see the Kivumu authorities convicted for the killings at Nyange parish in order to shift or share the blame falling from his own conviction" to be speculative. I nonetheless agree that as he was an accomplice witness, his evidence must be treated with caution.

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be relied upon without corroboration, I believe that each of these witnesses was sufficiently credible to be relied upon in the event of adequate corroboration.

106. I observe that the Prosecution witnesses do not corroborate each other on the precise details of Ndahimana's participation in the attack. However, I recall that corroboration does not require witnesses' accounts to be identical in all aspects since "[e]very witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others."[1809] Differences too can be reasonably explained by the witnesses' varying vantage points during the attack, their respective knowledge of the involvement of particular attackers, and the passage of time.[1810] Given the substantial passage of time between the events at issue and the testimony of witnesses in the trial, the large number of assailants and refugees at the church on 16 April 1994, and the chaos that would have surrounded a massacre of the magnitude described by witnesses, I am not troubled by the fact that no two witnesses heard or saw Ndahimana participating in precisely the same manner. Rather, I rely on the fact that all the witnesses described Ndahimana as having taken an active role in the destruction of the Church, and that no witness testified that Ndahimana faced resistance from his co-perpetrators to his approach, instructions or manner of participation. Further, the witnesses' descriptions of the manner in which Ndahimana participated are generally consistent. For instance, no witness said that he saw Ndahimana personally kill a Tutsi civilian or lead a particular group of assailants. Rather he appears to have concentrated on providing tactical support and advice to the assailants. I therefore conclude that the Prosecution has proven beyond reasonable doubt that Ndahimana actively participated in the killings at Nyange parish on 16 April 1994, and in particular that he instigated the assailants and supervised the attacks.

7.5 Drinks at the Presbytery

107. The Majority has found "proven beyond reasonable doubt that the accused shared drinks with Kanyarukiga, Seromba and possibly other persons after the killings on 16 April 1994. However, the evidence has not established beyond reasonable doubt the reasons for their sharing drinks."[1811]

108. Witnesses CBY, CDJ and CBK all testified that Ndahimana and other alleged members of the joint criminal enterprise had drinks at the presbytery following the destruction of the church.[1812]

109. Witness CBK testified that following the destruction of the church, Ndahimana, Father Seromba, Kayishema, Kanyarukiga, Christophe Mbakilirehe, *conseiller* Dabama Nsidabyamere, Kanamugire, Colonel Nzaphakumunsi, and others met at the presbytery and drank wine and beer. According to the witness, "all we noticed is that they were feasting after the Nyange church had been destroyed." The authorities then threw some drinks to the *Interahamwe* who were downstairs. The witness, who was in the presbytery courtyard while this was taking place, concluded that "it could be noticed that those authorities were happy with what had happened."[1813] Witness CDJ also saw Ndahimana, Kanyarukiga and Father Seromba on the balcony of Father Seromba's room at the

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[1809] *Nahimana et al.* (AC) Judgement, para. 428.
[1810] *Munyakazi* (AC) Judgement, para. 107.
[1811] Judgement, para. 694.
[1812] Witness CBK: T. 3 November 2010 p. 20; Witness CBY: T. 9 November 2010 p. 55; Witness CDJ: T. 11 November 2010 pp. 31, 40.
[1813] T. 3 November 2010 p. 20.

presbytery following the destruction of the church. He testified that they were drinking beer and that the group was "in a rather joyous mood."[1814]

110. This evidence is supported by Witness CBY, who saw Ndahimana after the church was destroyed drinking beer in front of the priests' living quarters together with "the authorities I mentioned earlier on," a certain Kimaranzara, and a number of police officers. They had crates of beer which they were sharing with the bulldozer drivers.[1815]

111. The Majority argues that "Witness CBK did not originally mention Ndahimana's presence when he referred to the fact that Seromba, Kayishema and others shared drinks after the killings in his 2002 statement."[1816] I note that in Defence Exhibit 42, the witness' 2002 statement, the witness said that "[A]fter the church was pulled down, Colonel Nzapfakumunsi, Father Seromba and the local authorities went upstairs in the presbytery to drink and celebrate."[1817] Thus I find no inconsistency, and as discussed earlier, find this witness to be generally credible. I find no reason to doubt his evidence on this particular point, particular as it is corroborated by Witnesses CDJ, whom I found to be credible and reliable, and Witness CBY, whom I found to be credible on most points. Further, given Witness CDJ's position at the parish, I do not agree with the Majority that his failure to "provide specific details on how he could witness that event from his location situated at least 20 metres away from the authorities and in complete darkness" is significant.[1818] I assume that the participants in the gathering did not meet in complete darkness. I also respectfully disagree with the Majority's finding that "the evidence does not clearly and precisely show where the authorities shared drinks and with whom."[1819] All three witnesses said the gathering took place at the presbytery. Witness CBK and CDJ both referred to the presence of Ndahimana, Seromba, Kanyarukiga, among others. And when, Witness CDJ referred to "the authorities I mentioned earlier on,"[1820] it is clear that he is referring to this same core group, among others.

112. Thus, on the evidence of Witnesses CBK, CDJ and CBY, all of whom were well-placed to observe what was taking place at the parish in April 1994, I am satisfied that the Prosecution has proven paragraph 32 of the Indictment beyond reasonable doubt. While celebrating genocide is not a crime covered by the Statute, I expect that the Prosecution pled this allegation for the purpose of proving Ndahimana's intent on this date. I am satisfied that the evidence proves that after 1,500 to 2,000 of his *commune's* residents had been massacred on 15 and 16 April 1994 Ndahimana shed no tears.

8. Legal Findings

8.1 Ndahimana's Authority

113. The parties do not dispute that Ndahimana was *bourgmestre* of Kivumu *commune* during the period covered by the Indictment. In its Pre-Trial Brief, the Prosecution argued that "for the average citizen of Kivumu *commune*, the *bourgmestre* would have been considered the final authority on many issues. He would appear to such a citizen as almost a demi-god, an all powerful human being who could impact upon many aspects of life." It went on to conclude that Ndahimana

[1814] T. 11 November 2010 pp. 31, 40.
[1815] T. 9 November 2010 p. 55.
[1816] Judgement, para. 691, and footnote 1311 referring to Defence Exhibit 40.
[1817] Defence exhibit 42, p. 5 (emphasis added).
[1818] Judgement, para. 693.
[1819] Judgement, para. 694.
[1820] T. 9 November 2010 p. 55.

"possessed the material ability to control the actions of a wide segment of the population of Kivumu commune" from the brigadier of the communal police to armed civilians.[1821]

114. It is the Defence position that "the powers and means of Ndahimana was extremely limited and could not allow him to prevent the events that occurred in Nyange."[1822] More concretely, the Defence argued that Ndahimana was a member of the MDR and following the advent of multi-party politics "only those belonging to the same party were obeying to the *bourgmestre's* instructions."[1823]

115. In its Closing Brief, the Prosecution disputed the Defence contention that Ndahimana had no *de facto* authority during the events of April 1994, arguing that "Ndahimana's power and influence in Kivumu commune remained undiminished from April until he fled Rwanda in July."[1824] In its closing argument, the Prosecution referred to Ndahimana as the "supreme authority in Kivumu *commune*" at the time Nyange church was destroyed.[1825]

116. It is my view that in a number of instances, the Prosecution has conflated the *bourgmestre's* liability for failure to control his subordinates pursuant to Article 6 (3) of the Statute, with his liability for failing to perform a legal duty pursuant to Article 6 (1) of the Statute. For example, I cannot find that Ndahimana had effective control over "Hutu civilians", within the meaning of Article 6 (3) of the Statute, as posited by the Prosecution in paragraph 37 of the Indictment.

117. As discussed above, I am satisfied that in the days following the death of President Habyarimana, a number of prominent individuals in Kivumu came together and agreed to exterminate the Tutsi population of the *commune*. I am further satisfied that by some time on 14 April 1994, *bourgmestre* Grégoire Ndahimana shared their criminal intent, thus becoming himself a member of the JCE. I will now turn to the evidence on Ndahimana's *de jure* and *de facto* authority in order to evaluate his contributions to the joint criminal enterprise.

8.2 *De Jure* Authority

118. It is not in dispute that in April 1994, the law in force regulating the powers, rights and obligations of *bourgmestres* was a law entitled *Organisation Communale: Disposition Organique* of 23 November 1963, as amended by the Legislative Decree of 26 September 1974 and Presidential Decree of 4 October 1977 ("Administrative Law").[1826]

119. According to Article 56 of the Administrative Law, a *bourgmestre* was both the representative of the central authority in the *commune* and the personification of authority in the *commune*. The communal administration was under the direct control of the *bourgmestre*.[1827]

120. In addition, the *bourgmestre* was responsible, *inter alia*, for executing laws and regulations;[1828] supervising the *conseillers communaux*;[1829] presiding over the communal

[1821] Prosecution Pre-Trial Brief, para. 35.
[1822] Defence Closing Brief, para. 436.
[1823] Defence Closing Brief, paras. 437-439.
[1824] Prosecution Final Trial Brief, para. 6.
[1825] T. 21 September 2011 p. 3.
[1826] Prosecution Exhibit 47.
[1827] Prosecution Exhibit 47, Article 60
[1828] Prosecution Exhibit 47, Article 57.

council;[1830] representing the *commune* in matters of justice;[1831] and exercising administrative control over state agents assigned to the *commune*.[1832] In emergencies, the *bourgmestre* could, on his own initiative, impose police measures including penalties of not more than seven days in prison and 200 franc fines.[1833] More generally, he could incarcerate any individual causing public disorder for up to 48 hours.[1834] All communal agents, including administrative personnel, technical personnel and the communal police were under the authority of the *bourgmestre*.[1835] The *bougmestre,* after consulting with the communal council, could hire, suspend or dismiss any communal staff member; but, these decisions were to be approved by the *préfét*.[1836] Chapters VI through VIII of the Administrative Law set out the disciplinary regime available to the *bourgmestre* in case of disciplinary problems involving communal agents. The *bourgmestre* was responsible for imposing such measures,[1837] and in cases where the individual was accused of having committed a grave error, the *bourgmestre* could suspend the individual pending investigation.[1838]

121. With respect to the communal police, the law stipulated that the communal police was a force established at the *commune* level. It was under the sole authority of the *bourgmestre* who used it to fulfill his duty to maintain and re-establish public order and execute laws and regulations.[1839] The *bourgmestre* assumed complete responsibility for the organisation, functioning and control of the communal police.[1840] Article 109 (93) of the Administrative Law set out the duties of the communal police, and established that the police must immediately inform the *bourgmestre* of any offence that it was aware of.[1841] Members of the communal police who were named as judicial police officers were answerable to the Public Prosecutor.[1842]

122. Defence Exhibit 120 is a law on the creation of the *Gendarmerie Nationale*, dated 23 January 1974. Article 28 of the law established that "members of the *Gendarmerie Nationale*, in carrying out their work, are under the exclusive authority of their hierarchical superiors."[1843] On this basis, I conclude that *gendarmes* were not under the direct control of a *bourgmestre* in the same manner as the communal police. Nevertheless, the law required communication between the administrative authorities, including the *bourgmestre*, and the *gendarmerie* on issues relating to public order. Article 37 stipulated that the Administrative Authority and the *Gendarmerie Nationale* were required to communicate information to each other on matters of public order that might result in preventive or punitive measures, and that each member of the *Gendarmerie* was to establish regular contacts with the Administrative Authority. Article 38 added that where there was a threat of public disorder these contacts were to be tightened in order to coordinate measures and prepare

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[1829] Prosecution Exhibit 47, Article 37.
[1830] Prosecution Exhibit 47, Article 17.
[1831] Prosecution Exhibit 47, Article 58 (7).
[1832] Prosecution Exhibit 47, Article 58 (11).
[1833] Prosecution Exhibit 47, Article 61.
[1834] Prosecution Exhibit 47, Article 62.
[1835] Prosecution Exhibit 47, Article 104 (88); Amendment of 25 November 1975, Article 3.
[1836] Prosecution Exhibit 47, Articles 93 (77) and 94 (78).
[1837] Prosecution Exhibit 47, Amendment of 25 November 1975, Article 33: « Les peines disciplinaires sont infligées par le bourgmestre…. »
[1838] Prosecution Exhibit 47, Amendment of 25 November 1975, Article 38.
[1839] Prosecution Exhibit 47, Article 104 (88) and 108 (92); and Amendment of 4 October 1977, Article 1.
[1840] Prosecution Exhibit 47, Amendment of 4 October 1977, Article 4. Article 7 further establishes that the Brigadier of the communal police is under the authority of the *bourgmestre*.
[1841] Prosecution Exhibit 47, Article 109 (93) (i),unofficial translation.
[1842] Prosecution Exhibit 47, Article 106 (90).
[1843] "Les members de la Gendarmerie Nationale sont placés pour l'execution de leur mission, sous l'autorité exclusive de leurs supérieures hiérarchiques. »

their implementation. Pursuant to Article 39, except in cases of *force majeure*, the *gendarmerie* was required to liaise with the Administrative Authority, and keep him informed of any measures it intended to implement. At the same time, the *bourgmestre* was required to transmit to the *gendarmerie* any information that could assist the *gendarmerie* in the implementation of its mission. Finally, Article 40 stated that the *gendarmerie* was required to issue special reports to the Administrative Authorities on extraordinary events relating to public order and security.

123. In 1994, Rwanda was a party to the Fourth Geneva Convention and Additional Protocol II of the Geneva Conventions[1844] as well as the Genocide Convention.[1845] Pursuant to Articles 1, 3 and 146 of the Fourth Geneva Convention, part IV of Protocol II of the Convention, and Articles I, V and VI of the Genocide Convention, government officials have a positive obligation to protect the civilian population in times of internal conflict and/or genocide. It is my view that Articles 56 and 57 of the Rwandan Administrative Law, taken together with Article 1 of the 4 October 1977 amendment,[1846] further imposed a legal duty on Rwandan *bourgmestres* to secure law and order in their *communes*. To this end, the law provided the *bourgmestre* with *de jure* effective control over the communal police, the only forces of law and order assigned to a *commune* on a permanent basis.[1847]

124. With respect to Ndahimana's authority over individuals such as the Inspector of the Judicial Police, Assistant *bourgmestres*, and *gendarmes*, I consider it significant that the *bourgmestre* exercised administrative control over state agents assigned to the *commune*.[1848] Thus, while a *bourgmestre* may not have had the same degree of authority over state agents assigned to the *commune* that he did over communal staff and communal police, he did have some degree of authority over them.

125. With respect to *gendarmes*, in particular, I consider it of critical importance that the 1974 law on the *Gendarmerie Nationale* required extensive coordination, and reciprocal reporting, between the *gendarmes* assigned to an area and the relevant administrative authority. I recall that in *Boškoski*, the Appeals Chamber approved Trial Chamber determinations that "civilian superiors, who may lack the disciplinary or sanctioning powers of military commanders may discharge their obligation to punish by reporting to the competent authorities whenever a crime has been committed..."[1849] It went on to note that the elements of degree of effective control over subordinates and the necessary and reasonable measures within the competence of a superior are interrelated, as the former may be evidence of the latter.[1850] Thus, I do not accept the Defence argument that Ndahimana had no authority whatsoever over the IPJ, Assistant *bourgmestres* or the four *gendarmes* requisitioned by Ndahimana and assigned by *préfet* Clément Kayishema to Kivumu *commune* on 11 April 1994.

[1844] *Prosecutor v. Ndahimana*, ICTR-2001-PT-68, Decision on the Prosecution's Motion for Judicial Notice, 7 April 2010, Fact of Common Knowledge vi.
[1845] *Prosecutor v. Ndahimana*, ICTR-2001-PT-68, Decision on the Prosecution's Motion for Judicial Notice, 7 April 2010. Facts of Common Knowledge, v and vi..
[1846] Prosecution Exhibit 47, 4 October 1977 amendment, Article 1: « La police communale...est placé sous l'autorité du bourgmestre qui l'utilise dans sa tâche de maintien de l'ordre public et d'exécution des lois et règlements. » (Unofficial translation : "The communal police is under the authority of the bourgmestre who uses it in his duty to maintain public order and implement laws and regulations.")
[1847] Prosecution Exhibit 47, Title II, Chapter II, Section 4, Article 104 (88); Chapter I Amendment of 4 October 1977, Article 1.
[1848] Prosecution Exhibit 47, Article. 58 (11).
[1849] *Boškoski* (AC) Judgement, para. 231.
[1850] *Boškoski* (AC) Judgement, para. 231.

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126. At this juncture, I recall that while I think it is essential to properly evaluate the authority of a *bourgmestre* during the period at issue, these findings are not for the purpose of assessing Ndahimana's liability for the acts of his subordinates pursuant to Article 6 (3) of the Statute, but for the purpose of assessing Ndahimana's liability both for his acts in support of the JCE and for his failure to prevent and punish the crimes of his associates in the JCE as well as those of his subordinates, in accordance with the law on joint criminal enterprise.

127. Turning to the measures that were available to a *bourgmestre* to prevent crime in 1994, I recall that when a *bourgmestre* was aware that a crime was about to take place, he could requisition *gendarmes* and other state security forces,[1851] enact emergency measures allowing him to incarcerate individuals for up to seven days,[1852] and make use of the communal police. With respect to those measures available to punish crime, I am of the view that it was a *bourgmestre*'s duty as the representative of the central authority in the *commune* to officially inform high ranking members of the *gendarmerie* or other ministries sitting in Kibuye, Murambi or Kigali of crimes committed by their subordinates while assigned to Kivumu *commune*. It was equally his duty to inform regional or state level law enforcement authorities of such crimes. I note that even Defence Witness ND13, whom I did not find credible with respect to Ndahimana's authority, referred to a *bourgmestre*'s ability to write a report to the *préfecture* or state level authorities in case of misconduct by an Assistant *bourgmestre*.[1853] With respect to military reservists and *gendarmes*, Witness Clément Kayishema, another Defence witness whose credibility with respect to Ndahimana's overall authority I found wanting, testified that "the relationship is that since the military or gendarme reservist is dressed in civilian clothing, if he lives in the *commune*, he does not come directly under the orders of the *bourgmestre*, but the *bourgmestre* has the right to ensure that he is disciplined and to see what he does in the *commune*."[1854]

128. Given the *bourgmestre's* overarching responsibility for law and order in his *commune*, I reject the Defence contention that any such duty could only have encompassed misconduct by subordinates or associates in the context of their official duties.[1855] On the contrary, I conclude that the *bourgmestre* had the legal duty to initiate measures leading to criminal or disciplinary proceedings against all government officials working in Kivumu *commune* in April 1994 alleged to have committed crimes there by reporting them to the competent authorities. I will now consider whether Ndahimana had the *de facto* authority to do so.

8.3 *De Facto* Authority

129. The Defence submits that Ndahimana had no *de facto* authority in April 1994, based in large part on his membership in an opposition party,[1856] and the relatively short period between the time he assumed the position of *bourgmestre* and the events of 1994.[1857] The Defence also relies on evidence that Ndahimana took steps to prevent the attacks, and argues that he was overwhelmed by the destructive forces in the *commune*.[1858]

[1851] See Witness T. 12 November 2010 p. 24, and evidence that Ndahimana did effectively requisition *gendarmes* from the *préfecture* on 11 April 1994.
[1852] Prosecution Exhibit 47, Article 61.
[1853] T. 17 January 2011 pp. 24-25.
[1854] T. 18 April 2011 pp. 17-18.
[1855] Defence Final Brief, paras. 423-425.
[1856] Defence Final Brief, paras. 435-441.
[1857] Defence Final Brief, para 440; Witness Melane Nkiriyehe T 22 February 2011 p. 15.
[1858] Clément Kayishema, T. 18 April 2011 p. 13.

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130. The Prosecution disputes this contention, relying primarily on the evidence of Ndahimana's alleged leadership role in the attacks of 15 and 16 April 1994.[1859]

8.3.1 Credibility of Defence Witnesses

8.3.1.1 *Introduction*

131. Three Defence witnesses, ND13,[1860] KR3,[1861] and Melane Nkiriyehe,[1862] whose testimonies centered on Ndahimana's authority in April 1994, testified that although Ndahimana

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[1859] Prosecutor's Final Trial Brief, paras. 4-7.

[1860] T. 17 January 2011 pp. 5, 11-14 (ICS), 20-22, 24-25 (IOS), 30 (ICS), 33, 35-37, 41 (IOS): In April 1994, Defence Witness ND13 was an employee of Kibuye prefecture. He had once been a *bourgmestre* and was therefore in a position to appreciate the authority and responsibilities of *bourgmestres*, particularly in the period preceding the introduction of multi-party politics. During the period of single party rule, *bourgmestres* "wielded large powers" and were the "undisputed masters of the commune."According to the witness, the *de facto* authority of *bourgmestres* representing opposition parties diminished with the advent of multi-party rule. This authority, in part, rested on their role as chairpersons of the ruling political party. Once multi-party rule was introduced, *bourgmestres* and other authorities no longer enjoyed the support or respect of members of other political parties: "...when a *bourgmestre* was elected a leader of the commune, it was...the members of his parties (sic) who would listen and obey his instructions...citizens who belonged to different political parties whose candidate was not elected...did not obey the *bourgmestre*." Ndahimana had little authority because he was a member of the MDR, a minority political party in his commune. On this basis, he "could say nothing" to individuals who were members of the MRND. Moreover, in Kivumu *commune*, the MDR was considered to be in cahoots with the RPF.Although Ndahimana was elected, he was surrounded by individuals who opposed him "because he was an intellectual and had not lived in Kivumu" very long. The witness was told that Ndahimana had won the elections because of the support of religious leaders and "other associations." Ndahimana did not "enjoy the cooperation" of the Kivumu *conseillers*. .

[1861] T. 24 January 2011 pp. 55-56, 67-69, 70-71, 73-76 (all in closed session); T. 25 January 2011 pp. 7 (see also French transcript p. 8, ICS), 11, 13-14, 16-26 (IOS), 28-31, 36-38, 53-43, 58 (ICS): Witness KR3 was in a position to comment on the authority of the *bourgmestre* of Kivumu *commune* in 1994. Approximately 25 persons took part in the election of Ndahimana as *bourgmestre*. Ndahimana "behaved...properly" during the genocide, but because of opposition politics at the time, "a huge part of the population...did not obey his orders." Ndahimana wanted "to spread his authority over... the commune without taking into account the views of any particular party, but the members of the MRND did not want to hear anything about Ndahimana's authority. The witness noted that ten of the eleven communal *conseillers* were members of the MRND, the eleventh was a member of the MDR. In addition, the *bourgmestre* did not enjoy good relations with the communal staff as the majority of the staff were members of the MRND. He also did not have good relations with IPJ Fulgence Kayishema who was a member of the MRND. Further, Ndahimana did not enjoy good relations with the President of the "Cantonal" court, Joseph Habiyambere, because Habiyambere was a member of the MRND, and because he was on the payroll of the Ministry of Justice and the *commune* had no say over judges. Chiefs of service were under the authority of the *bourgmestre*, but he could not give orders to service heads, and most service heads were members of the MRND. The *bourgmestre* also had poor relations with Télésphore Ndungtse, who was a member of the MRND.

[1862] T. 22 February 2011 pp. 3-4, 7-8, 10-20, 22, 26, 33: In April 1994, Witness Melane Nkiriyehe was the budget director in the Ministry of Finance in Kigali. He was also a member of the technical committee of Kivumu commune. Normally, the technical committee would meet once per quarter, but it did not meet during time Ndahimana was *bourgmestre*. Nkiriyehe was also a member of the MDR. Nkiriyehe and Ndahimana were from the same cellule, attended the same schools, and were both members of the "elite." In early April 1994, the witness lived in Kigali, but then moved with the interim government to Murambi in Gitarama on 13 April 1994. He remained there until the fall of the government, but "did a hop" to Kivumu commune in late May 1994. During this trip he saw Ndahimana briefly. Before becoming *bourgmestre* Ndahimana worked at a tea factory in Rubaya. Ndahimana was forced to leave Rubaya for security reasons. Ndahimana joined the MDR sometime after June 1992. Despite the fact that he had only recently joined the party, Ndahimana was elected on the basis of his charisma, popularity and reputation in the commune. Ndahimana received 110 votes while his opponent, CDL, received only two votes.
Those voting in the general election for *bourgmestre* included *conseillers*, members of the technical commission, heads of services, chairmen of political parties, and heads of the religious denominations. In that election, Ndahimana received 19 votes, the MRND candidate Jean Baptiste Kagenza received 15 votes, and a third candidate, who was a

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was *bourgmestre*, he had next to no *de facto* authority as he was consistently sabotaged by associates and subordinates who were members of the MRND. This evidence was supported by *préfet* Clément Kayishema, whose credibility I addressed earlier, and a number of other Defence witnesses. I only address the credibility of Prosecution witnesses where I disagree with the Majority.

8.3.1.2 *Defence Witness KR3*

132. Witness KR3 was in a position to discuss the authority of the *bourgmestre* in Kivumu *commune*, but I observe that he said that he rarely left his house during the critical period of 6-20 April 1994.[1863]

133. According to the witness, he went to Nyange parish on 16 April 1994 to bring food to two young girls who had sought refuge there and remained in the area of the parish for just over an hour as an "observer."[1864] The witness was sentenced to eleven years in prison for his participation in the 1994 genocide.[1865] By June 2010 he was no longer in detention but fled from his home because of rumours that Nyange *secteur Gacaca* judgements were under review, and that the review process was resulting in lengthier prison terms than the original judgments provided for.[1866] The witness testified that he had been told that on review his sentence had been revised to life imprisonment.[1867] The Prosecution did not refer to, or ask to have tendered into evidence, judicial records for this witness. Therefore, I can only rely on the witness' own testimony that "one of the charges against" him was that he had not prevented the massacres.[1868]

134. As the Prosecution has not introduced any of the witness' judicial records into evidence, it is more difficult to assess whether the witness may have tried to minimise his own role in the events of 16 April 1994 at Nyange parish. I bear in mind, however, that Witness CBR testified in detail about the killing of a Tutsi named Ndakubana on the night of 7 April 1994, and Witness KR3's participation in that incident.[1869] In addition, Witness CDL testified that "[Witness KR3] was on the side of the attackers" on 16 April 1994.[1870] As I have significant reservations with respect to

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member of the PSD, received five votes. Ndahimana received votes from members of the MRND as well as members of the PL. When Ndahimana assumed duty in October 1993 and there was no official handover. The fact that there was no handover ceremony made it easier for Ndahimana's opponents to sabotage his work. Because he lost the MDR election, Witness CDL was Ndahimana's enemy from the start. In addition, following the election, the losing MRND candidate, Kagenza, did everything to hamstring the effective functioning of the commune. The same was true for IPJ Kayishema, another member of the MRND, who wanted to obstruct "all the good work of Mr. Ndahimana. Generally, all the MRND service heads tried to impede Ndahimana's work. When the witness visited Ndahimana in late May 1994, Ndahimana told him that he was overwhelmed and that he was being sabotaged by "people who had grudge against him." The MRND supporters who voted for Ndahimana in the election for *bourgmestre* were not the same MRND supporters with whom he had to work within the communal office.

[1863] T. 24 January 2011 pp. 67-68; T. 25 January 2011 pp. 12-14, 22-23: The witness remained at home from 6 to 10 April. On 11 April, he attended the security meeting at the communal office. He was home on 12 April and went to the communal office briefly on13 April. He remained at home on 14 and 15 April, but went to the parish on 16 April for just over an hour. He again remained at home on 17, 18 and 19 April but participated in a meeting at the communal office on 20 April 1994. During this period, the witness only saw Ndahimana at meetings held at the communal office on 11 and 20 April.

[1864] T. 25 January 2011 pp. 13-14.

[1865] T. 25 January 2011 p. 8 (ICS).

[1866] T. 25 January 2011 pp. 9-10 (ICS).

[1867] T. 25 January 2011 pp. 9-10 ICS).

[1868] T. 25 January 2011 p. 10 (ICS)

[1869] T. 1 November 2010 pp. 8-9.

[1870] T. 12 November 2010 pp. 27-28.

the credibility of both Witnesses CBR and CDL, I do not accord inordinate weight to their evidence with respect to Witness KR3's participation in the genocide.

135. More troubling is the witness' testimony that, although he spent approximately an hour and a half at Nyange parish on 16 April 1994 and saw a bulldozer demolishing the church, he did not witness any killings while there. The witness added that he saw IPJ Kayishema, Ndungutse, Kanyarukiga, Mbakilirehe, the brigadier of the communal police, and police officer Adrien Niyitigeka, at the parish that day, but did not know whether they were involved in the attacks.[1871] I have difficulty believing that the witness saw no killings that day. Further, given the witness' position in the *commune*, his failure to assess the roles played by Mbakilirehe, Niyitegeka, Ndungtuse, Kayishema and/or Kanyarukiga, strains credibility.[1872] On this same note, I observe that when asked by the Prosecution to explain why the killings at Nyange parish were not addressed during a meeting chaired by Ndahimana at the communal office on 20 April 1994, Witness KR3 claimed "it was difficult to identify the persons who had launched the attack on the refugees at the church. There were no ringleaders..."[1873] When asked why the communal authorities took no measures to punish the assailants who killed the survivors at the health center, located 500 meters from the communal office on 25 April 1994, the witness explained that "we could not establish the identities of the killers."[1874] Again, given the witness' position, I can only conclude that the witness was deliberately untruthful, and suspect that he may have been trying to minimise his own culpability by pleading ignorance on behalf of all communal officials.

136. The witness stated that Ndahimana did not enjoy good relations with the ten Kivumu *conseillers* who were members of the MRND, those members of the communal staff who were members of the MRND, the chiefs of service who were members of the MRND or the president of the local court, who was also a member of the MRND.[1875] However, the only example he provided related to the relationship between Ndahimana and Fulgence Kayishema. Specifically, he testified that Kayishema had released suspects that Ndahimana had had arrested for the killing of the Ndakubana family.[1876] However, on cross-examination, the witness clarified that on one occasion, Ndahimana and Kayishema had jointly proceeded to arrest a suspected perpetrator in the killing of a Tutsi and that he had never intimated that Ndahimana and Kayishema were completely opposed to each other: "there were points on which they were opposed and points on which they agreed."[1877] In addition, the witness acknowledged that he himself had had good relations with Ndahimana, although he was a member of the MRND,[1878] and did not explain why he alone, among communal staff members belonging to the MRND, had good relations with the *bourgmestre*. I am of the view that the witness was ideally placed to provide specific examples of discord between Ndahimana and other communal authorities. His failure to do so casts serious doubt as to the reliability of his overly generalised evidence on this point.

137. There were several important discrepancies between Witness KR3's testimony in this trial, and his prior statements and testimony in other cases. At trial for example, the witness testified that he returned to work on 20 April 1994 and that he did not see Ndahimana carrying a weapon until June 1994. However, in a statement dated 14 September 2000, the witness stated that when he

[1871] T. 24 January 2011 pp. 68-69; T. 25 January 2011 pp. 20-23.
[1872] T. 24 January 2011 pp. 68-69; T. 25 January 2011 pp. 22-23.
[1873] T. 25 January 2011 p. 29.
[1874] T. 25 January 2011 p. 30.
[1875] T. 24 January 2011 pp. 73-75 (ICS); T. 25 January 2011 pp. 6, 38.
[1876] T. 24 January 2011 (ICS); T. 25 January 2011 p. 38.
[1877] T. 25 January 2011 pp. 40, 61 (ICS); Prosecution Exhibit 53, p. 16 (ICS).
[1878] T. 25 January 2011 p. 19.

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returned to the office after the events at Nyange parish he saw Ndahimana carrying a gun.[1879] The witness also testified at trial that Father Seromba attended the 11 April security meeting at the communal office. This statement is consistent with his statement to a Rwandan Truth Commission in 2002[1880] but inconsistent with his testimony during the *Seromba* case where he testified that Seromba had not attended the meeting. When this discrepancy was pointed out to the witness in this trial, he stated that he had made a mistake when he testified in the *Seromba* trial.[1881] This suggests that the witness may have "mistakenly" provided exculpatory evidence for Seromba during his case. The witness was also inconsistent during his cross-examination in this trial. He testified that on 20 April 1994, *bourgmestre* Ndahimana held a meeting of communal workers to discuss, *inter alia*, the conduct of the brigadier of the communal police. Although the witness first said that it was not a meeting for *conseillers* of *secteurs*, it later emerged that at least six of the eleven *conseillers* attended this meeting.[1882]

138. The witness testified that Ndahimana had had poor relations with Télésphore Ndungutse, who was a member of the MRND. He then went on to explain that Ndungutse threatened to kill the witness for refusing to accompany Ndungutse when he launched an attack on the Ndakubana family on or about 8 April 1994. When the witness told Ndahimana about Ndungutse's threat, Ndahimana asked the new brigadier of the communal police Jean-Bosco Abayisenga to confiscate Ndungutse's gun which Abayisenga was able to do.[1883] First, it was not at all clear why Ndungutse waited until May 1994 to threaten the witness for having failed to participate in an attack that took place on or about 8 April 1994. More importantly, this anecdote only demonstrates that Ndungutse had poor relations with Witness KR3 and not that he had poor relations with Ndahimana.

139. For the reasons above, and because the witness was not able to provide a single example to support his general theory that Ndahimana was not on good terms with the vast majority of Kivumu *commune*'s top officials, I conclude that this witness was not credible in any respect.

8.3.1.3 *Defence Witness ND13*

140. During the period at issue, Witness ND13 lived in Kibuye town. While the witness testified in a detailed and definitive manner on a number of critical issues, the source of his information and certitude was often unclear. In any event, his evidence was entirely based on hearsay. The witness admitted that he did not visit Kivumu *commune* during the period between 6 and 17 April 1994, and said that he only saw Ndahimana one time during that period, on 15 April 1994 when he saw Ndahimana coming out of the *préfet*'s office in Kibuye town. The witness informed the Chamber that his information about events in Kivumu *commune* was based on reports he received from friends and relatives who were living in the *commune* at the time: "I had many people in that *commune* who needed my advice and who would ask me how they could conduct themselves during those events. So it was very easy for me to know what was happening in that *commune* because I would receive information from those individuals."[1884]

141. The witness was told, for example, that Father Seromba had been wrongly convicted because Seromba had not participated in the destruction of Nyange parish.[1885] This is not supported

[1879] T. 25 January 2011 p. 37; Prosecution Exhibit 52 (b).
[1880] T. 25 January 2011 pp. 46, 49-50 (ICS); Prosecution Exhibit 54 (b), p. 2, question 11.
[1881] T. 25 January 2011 pp. 46-48, 50 (ICS); Prosecution Exhibit 53, p. 18-19 (ICS)
[1882] T. 25 January 2011 p. 26, pp. 28-29(ICS).
[1883] T. 25 January 2011 p. 7 (ICS) (French: T. 25 January 2011 p. 8 (HC)).
[1884] T. 17 January 2011 pp. 19 (ICS), 41.
[1885] T. 17 January 2011 pp. 42-43.

by any of the evidence in the instant trial, and thus casts doubt on the reliability of the witness "information" more generally.

142. The witness asserted that Ndahimana had not been able to obtain the cooperation of the Kivumu *conseillers*. When asked by the Prosecution how he knew this, the witness conceded that he was "not an eyewitness of these events. But people would report to me..."[1886] Yet, when asked about events in the *secteur* in which his brother was a *conseiller*, the witness stated: "I am unaware of events that occurred in my absence. If my brother was a *conseiller* in that *secteur*, that is not enough for me to give an account of events that unfolded in that *secteur*."[1887]

143. Although the witness was certain that Witness CDL and Ndahimana had been at loggerheads throughout the relevant period, [1888] he could not say whether Witness CDL had resigned from his position within the *commune* before or after Ndahimana became *bourgmestre* because the incident took place after the witness left the *commune*.[1889] Moreover, he insisted that Witness CDL was a member of the MRND,[1890] a fact disputed by Melane Nkiriyehe, a high ranking member of the MDR,[1891] and Witness CDL himself who said he was a member of the MDR.[1892]

144. The witness insisted that political parties such as the MDR, the PSD and the PL had views that differed significantly from those of the MRND, and therefore that the parties, or individuals within those parties, could not have joined forces in April 1994.[1893] On cross-examination, he conceded that the Interim Prime Minister in April 1994 "must have been a member of the MDR" and that the Kibuye *préfet*, Clément Kayishema, was a member of the PSD.[1894] Both have been found guilty of genocide by this Tribunal.[1895]

145. On examination in chief, Witness ND13 testified that IPJ Kayishema was appointed by the Ministry of Justice, but "in his routine duties" was a subordinate of the office of the prosecutor, meaning that only the prosecutor could discipline him. [1896] However, on cross-examination he conceded that "[t]he *bourgmestre* is the superior of the IPJ."[1897] The witness also testified that the brigadier of the communal police fell under the supervision of the Ministry of Interior, and adamantly asserted that Ndahimana had no say over the communal police,[1898] assertions that are not supported by the Administrative Law or other evidence. He insisted that the *bourgmestre* could not dismiss or in any way punish either an IPJ or the brigadier of the communal police, and that new laws were written after the two institutions were established, [1899] but no such laws were tendered

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[1886] T. 17 January 2011 p. 41.
[1887] T. 18 January 2011 p. 15.
[1888] T. 17 January 2011 p. 25.
[1889] T. 18 January 2011 p. 3.
[1890] T. 18f January 2011 p. 3.
[1891] T. 22 February 2011 pp. 11-12.
[1892] T. 18 November 2010 p .21.
[1893] T. 18 January 2011 p. 2.
[1894] T. 18 January 2011 p. 2.
[1895] *Prosecutor v Kambanda* ICTR-97-23-T, Judgement and Sentence, 4 September 1998 (affirmed by Appeals Chamber on 19 October 2000); *Prosecutor v Clement Kayishema* ICTR-95-1-T, Sentence 21 May 1999 (affirmed by Appeals Chamber on 1 June 2001).
[1896] T. 17 January 2011 pp. 27-28.
[1897] T. 18 January 2011 p. 20.
[1898] T. 17 January 2011 p. 36.
[1899] T. 18 January 2011 pp. 21-22.

into evidence. More importantly, it is not in dispute that Ndahimana did punish the brigadier of the communal police, Christophe Mbakilirehe, after the events at Nyange parish.[1900]

146. The Defence did not 'contest the Prosecution submission that the Administrative Law, entered into evidence as Prosecution Exhibit 47, was in place at the time the witness himself was a *bourgmestre* as well as during Ndahimana's tenure. As discussed above, this law is clear with regards to the relationship between the *bourgmestre* and the communal police. Thus, I can only conclude that the witness was deliberately untruthful, at least on this point. Further, when the Prosecution showed Witness ND13 the letter from Ndahimana, dated 30 April 1994, demoting communal police brigadier Christophe Mbakilirehe, the witness explained: "If I said that *Bourgmestre* Ndahimana was not respected, that doesn't mean he was no longer *bourgmestre*; he was still *bourgmestre*. He would give instructions, but those instructions were not...implemented..."[1901] However, Defence Witness KR3 testified that Mbakilirehe's demotion was implemented, and indeed, his successor Jean-Bosco Abayisenga successfully assumed the position of brigadier.[1902]

147. Finally, the witness testified that "communal law required" that the key to the armoury remain in the control of the brigadier of the communal police: "it was the brigadier of the communal police who statutorily managed the weapons..." However, he could cite no law supporting this position although he had once been a *bourgmestre* himself.[1903]

148. More generally, as was the case with Witness KR3, the witness had a great deal to say about Ndahimana's poor relationship with other officials in Kivumu *commune*, but could not provide a single concrete example of the way in which these sour relationships manifested themselves in the *commune*'s routine business, or during the events of April 1994.

149. There were also significant discrepancies between the witness' testimony at trial and his prior statements and testimonies. For example, in response to a question from the Prosecution about a meeting the witness attended with *Préfet* Clément Kayishema on 18 April 1994, the witness insisted: "I did not even attend that meeting. I was not present. I was not in Kibuye because I had gone to visit my family at Karongi. Therefore, I did not attend any of those meetings. I heard about them. I was told that those meetings had taken place, but I did not attend those meetings."[1904] However, it emerged that in a statement provided to ICTR investigators on 19 October 1995, the witness had said that he had participated in a meeting with the *préfet* on 18 April 1994.[1905] He provided further detail of his visit to the *préfet* on this day in a subsequent statement to ICTR investigators dated 11 April 1996.[1906] Asked to explain this discrepancy, the witness claimed he had misunderstood the question because he considered his discussion with the *préfet* that day to have constituted a "consultation" rather than a "meeting" adding: "...counsel for the prosecution. You need to know the difference between a meeting and a consultation session."[1907] This explanation is unpersuasive as the witness had emphatically testified moments earlier that he was visiting his family in Karongi on 18 April 1994 and was not in Kibuye.[1908] In this same 1995 statement,[1909] the

[1900] Prosecution Exhibit 51.
[1901] T. 18 January 2011 p. 25.
[1902] T. 25 January 2011 p. 7 (ICS).
[1903] T. 18 January 2011 pp. 3-4.
[1904] T. 18 January 2011 p. 5.
[1905] Prosecution Exhibit 49 (A).
[1906] Prosecution Exhibit 50 (A).
[1907] T. 18 January 2011 pp. 7-9.
[1908] T. 18 January 2011 p. 5.

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witness claimed that Clément Kayishema was not responsible for crimes committed in Kibuye, "he is only guilty of not having been able to protect people", while at trial he testified that the *préfet* would meet with the *Interahamwe* each time they returned from killings at "the church" and on this basis "... at the time we thought that *Préfet* Kayishema collaborated with the *interahamwe* even if he was not always with them at the scene of the killings."[1910]

150. Finally, I note that the witness conceded that he had been sentenced to three months imprisonment for giving false testimony to a *Gacaca* court in a case involving another *bourgmestre* from Kibuye *préfecture*. The witness denied that he had provided false testimony arguing that "the judges of that court at that time didn't like hearing the contrary to what they wanted to hear."[1911] I do not accord undue weight to this conviction as I am not familiar with the details of the trial process. Nevertheless, I conclude that I cannot rely on this witness' evidence with respect to Ndahimana's *de facto* authority in April 1994.

8.3.1.4 *Defence Witness Melane Nkiriyehe*

151. Witness Melane Nkiriyehe was the budget director in the Ministry of Finance in Kigali when the conflict erupted in April 1994. He was also a member of the technical committee in Kivumu *commune*.[1912] However, he was not in Kivumu *commune* during the events at issue in this case. The technical committee would normally meet once per quarter but it did not meet during the time Ndahimana was *bourgmestre*.[1913]

152. When asked how he had formed his impression of Ndahimana's authority in 1994, Nkiriyehe replied: "here I must be specific."[1914] He then went on to say that he had seen what was happening in Kigali and Gitarama, and that he spoke with Ndahimana during a brief meeting which lasted less than five minutes at the end of May 1994. [1915] He concluded that both the authorities in Kivumu and the Interim Government in Gitarama were "overwhelmed" by the militias: "[i]t was the militia [sic] that were ruling"[1916] The witness concluded that "[Ndahimana] was making an effort, but he was really overwhelmed because most of those militiamen didn't want to listen to him." Nkiriyehe added that after meeting with Ndahimana in late May 1994, he met with "other officials and other people" who told him that "Ndahimana made an effort...but ...was unable to prevent what had happened."[1917] The witness did not name his sources or detail any of the "efforts" made by Ndahimana.

153. Nkiriyehe conceded that he had not visited Kivumu in April 1994. When asked about meetings chaired by Ndahimana that month, the witness answered: "I didn't even know about those

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[1909] Prosecution Exhibit 49 (A).
[1910] Prosecution Exhibit 49 (A), p. 5.
[1911] T. 18 January 2011 p. 17 (ICS).
[1912] T. 22 February 2011 p. 3.
[1913] T. 22 February 2011 pp. 17-18.
[1914] T. 22 February 2011 p. 23.
[1915] T. 22 February 2011 pp. 23-24; 39-40, 42-43. P. 24: "We didn't even have five minutes. We had just opened the first beer, and we said cheers to one another, and then he had to leave...we did shake hands, but we didn't really discuss."
[1916] T. 22 February 2011 pp. 23-24.
[1917] T. 22 February 2011 p. 25.

meetings."[1918] When asked whether IPJ Kayishema remained IPJ until July 1994, Nkiriyehe answered: "I don't know about that. I don't know because I wasn't there."[1919]

154. The witness was a member of national branch of the MDR,[1920] and counted ballots in the Kivumu *commune* MDR primary elections.[1921] Thus, he was well placed to assess internal MDR politics and I credit the details he provided about the MDR election to choose the MDR candidate for the election of Kivumu *bourgmestre*.[1922] The witness also testified that in the general election Ndahimana won 19 votes, and his MRND opponent got 15 votes,[1923] and that Ndahimana received votes from members of the MRND as well as members of the PL.[1924] He added that the MRND supporters who voted for Ndahimana in the election for *bourgmestre* were not those MRND supporters with whom he had to work in the communal office but provided no detail to support this assertion.[1925] He did not name a single member of the MRND who voted for Ndahimana or any of those who later refused to work with him apart from IPJ Kayishema. If the ballot was secret, it was not clear how he knew that Ndahimana had received any MRND support. Although the witness was originally from Kivumu *commune*, the foundation for his knowledge about the general election in Kivumu and MNRD politics was not clear.

155. Referring to MRND obstruction of Ndahimana's work, Witness Nkiriyehe stated "I can give you an example" and then went on to say that the MRND school inspector ensured that some teachers "did not listen to what the *bourgmestre* had to say at all" and that the same was true for IPJ Kayishema. He added that" I can give you many other examples,"[1926] but went on to provide an abstract example rather than a concrete one.[1927] Although the witness could provide no specific example of the negative relationship he believed existed between Ndahimana and his associates and subordinates who were members of the MRND, the witness could remember that Ndahimana had been elected three times as president during secondary school.[1928] His selective memory for detail is troubling.

156. I further observe that the witness testified that when he visited Ndahimana in late May 1994, Ndahimana told him that he was overwhelmed and that he was being sabotaged by "people who had grudge against him,"[1929] and thus it would appear that Ndahimana himself was at least one source of the witness' information.

157. Finally, I am disturbed by the witness' contention that the Interim Government in Gitarama was overwhelmed by the *Interahamwe*, and can only conclude that Nkiriyehe's political

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[1918] T. 22 February 2011 p. 27.
[1919] T. 22 February 2011 p. 32.
[1920] T. 22 February 2011 p. 4.
[1921] T. 22 February 2011 p. 11.
[1922] T. 22 February 2011 pp. 10-11, 13-14.
[1923] T. 22 February 2011 pp. 10-11.
[1924] T. 22 February 2011 p. 26.
[1925] T. 22 February 2011 p. 26.
[1926] T. 22 February 2011 p. 15.
[1927] T. 22 February 2011 p. 17: "Say the bourgmestre tells the IPJ to handle this file, or to intervene in this matter, or to look into this situation where the population is facing some difficulties, and the IPJ... doesn't want to do this because the IPJ was like a police commissioner [rather than a civilian policeman]...For instance, if there was a motor accident, or if there was a case of people who had fought in this secteur, it was the place of a policeman to go there. And if the bourgmestre has been told, 'There had been some fighting in this secteur', and if he tells the IPJ to go there and look at the matter but he doesn't go, that's already a problem."
[1928] T. 22 February 2011 p. 8.
[1929] T. 22 February 2011 p. 22.

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analysis was designed to minimise the responsibility of all authorities in the 1994 genocide. In this vein, the witness also testified that Ndahimana's authority suffered in part because there had been no formal handover ceremony after his election.[1930] He did not elaborate on this theme, and I cannot accept as true that Ndahimana's authority was significantly diminished due to the lack of an official handover ceremony.

158. On these considerations taken together, I conclude that this witness was neither credible nor reliable.

8.3.1.5 *Defence Witness ND24*

159. Witness ND24 testified that both IPJ Kayishema and a certain Gacabuterezi, the president of the local court, were more respected than Ndahimana in Kivumu *commune*.[1931]

160. The Chamber has heard evidence about the participation in the crimes of a certain Habiyambere who witnesses said was the president of the local court, [1932] but has heard little evidence about Gacabuterezi, an individual the witness claimed was more powerful than the *bourgmestre*. More generally, although the evidence clearly indicates that IPJ Kayishema actively participated in the crimes committed at Nyange parish, the witness appears to have based his conclusion that he and Gacabuterezi were the most powerful individuals in Kivumu, and that they alone were responsible for the crimes committed at Nyange parish, on the fact that Kayishema supervised the roadblock manned by the witness and that he led attackers at Nyange on 15 April 1994.[1933]

161. I have previously expressed reservations about Witness ND24's credibility and reliability.[1934] I further believe that he was not in a position to assess Ndahimana's *de facto* authority, and thus accord little weight to his evidence on this issue.

8.3.1.6 *Defence Witness ND23*

162. Defence Witness ND23 was a *conseiller de secteur* in Kivumu *commune* in April 1994.[1935] The witness was originally a member of the MRND, but at an unspecified time in 1994 resigned from the MRND.[1936] In April 1994, he did not belong to a political party.[1937]

163. The witness remained in his position until July 1994, and although he was elected by members of the population, he remained answerable to, and under the authority of, the *bourgmestre* throughout that period.[1938] "...[T]he bourgmestre...initiated decisions and those decisions were sent to us." The communal council met twice a week and was "briefed on how the commune had to be

[1930] T. 22 February 2011 pp.15, 16-17.
[1931] T. 21 February 2011 pp. 23-24.
[1932] Witness CDL: T. 11 November 2010 pp. 69-70; Witness KR3: T. 24 January 2011 p. 75 (ICS); Witness CBR: T. 1 November 2010, p. 10. The Prosecution refers to Habiyambere as the President of the Cantonal Court in para. 11 of the Indictment. I am not certain this is accurate as there were no Cantons in Rwanda at the time.
[1933] T. 21 February 2011 pp. 23-24, 31-32.
[1934] Dissent, para. 161.
[1935] T. 19 April 2011 pp. 31-32 (ICS), 47; Defence Exhibit 123 (Personal Identification Sheet).
[1936] T. 19 April 2011 p. 59.
[1937] T. 19 April 2011 p. 32 (ICS); T. 19 April 2011 pp. 44, 59.
[1938] T. 19 April 2011 pp. 57, 60.

run."[1939] The administrative machinery of the *commune* was functioning in the period between the death of President Habyarimana and July 1994.[1940]

164. This witness' testimony tends to support the Prosecution's view of Ndahimana's *de facto* authority rather than that of the Defence. Given the witness' position, I believe he was well placed to discuss Ndahimana's *de facto* authority, and conclude that the witness was reliable on this particular evidence.

8.3.1.7 *Defence Witness Clément Kayishema*

165. Witness Clément Kayishema testified that once violence broke out in April 1994 in Kivumu, Ndahimana lacked any effective control over his *commune* because of the overwhelming number of people committing violence in the street.[1941] I recall my finding above that Kayishema was not a credible witness.[1942]

8.3.1.8 *Defence Witness Emerita Munsy*

166. It was Witness Emerita Munsy's evidence that she heard from "people" whose names she could not remember, because "they weren't people that I knew," that on an unspecified date "Ndahimana's mini support team had proposed that they should go and search his house because he was being suspected of hiding Tutsis." The witness concluded that if Ndahimana's associates were seeking to search Ndahimana's house, it was because "[Ndahimana's] behaviour was not consistent with what those people were doing at the time."[1943]

167. The witness further recalled that on an unspecified occasion, she heard Ndahimana complain that the *préfet* of Kibuye had either acted in bad faith or was totally "unconscious," because when Ndahimana had asked the *préfet* to send him *gendarmes* to protect Kivumu, the *préfet* had sent only four *gendarmes*. Ndahimana was annoyed by the *préfet's* reaction and called him names.[1944] Although the witness denied it, [1945] her evidence indicated that she and her husband, Jean-Marie Vianney Nzapfakamunsi, a lieutenant colonel in the *gendarmerie*, were close friends of the accused and a number of alibi witnesses. Indeed, Ndahimana stayed at their house on the night they heard of President Habyarimana's death.[1946] This witness' testimony about Ndahimana's character and authority at the time of the events at issue was vague, and although she could not name the persons who she said had spoken positively about Ndahimana during this period or say when the conversation about the *préfet* had taken place, she did remember that on the night of 6-7 April 1994, Ndahimana slept in her corridor next to her daughter's godfather, although he was one of 40 guests who spent that night at her home.[1947] More generally, I felt at the time that she testified that Witness Munsy's interest in appearing before the court was to exonerate her husband and those

[1939] T. 19 April 2011 p. 61.
[1940] T. 19 April 2011 pp. 46-47.
[1941] T. 18 April 2011 pp. 36-38.
[1942] Dissent, paras. 60-63.
[1943] T. 28 February 2011 pp. 17-18.
[1944] T. 28 February 2011 pp. 23, 29.
[1945] T. 28 February 2011 pp. 46-47.
[1946] T. 28 February 2011 pp. 4-5, 71, 74.
[1947] T. 28 February 2011 p. 74.

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associated with him, including Ndahimana, from any allegations against them.[1948] Thus, I do not attach undue weight to her evidence.

8.3.2 Conclusion on Defence Evidence on Ndahimana's *De Facto* Authority

168. On the basis of the evidence adduced by the Defence, I find its argument that Ndahimana had little or no *de facto* authority as *bourgmestre* to be unpersuasive. That said, Ndahimana can only be held liable for his acts and omissions as *bourgmestre*, if the Prosecution has proven that Ndahimana enjoyed both *de facto* as well as *de jure* authority in this position.

8.3.3 Indicia of Ndahimana's *De Facto* Authority

8.3.3.1 *Introduction*

169. As discussed above, I cannot accept the Defence evidence that due to a failure of political cohabitation in Kivumu *commune*, the *bourgmestre* had no authority or influence over any official who did not belong to the MDR. I note that no Prosecution witness testified explicitly on the relations between Ndahimana and those persons over whom he is alleged to have had authority or influence. I have therefore reviewed circumstantial evidence I consider relevant in assessing Ndahimana's *de facto* authority in the *commune*.

8.3.4 Authority Over the Communal Police

170. I recall that I have found that Ndahimana had direct *de jure* authority over the communal police.[1949]

171. Witness ND34 testified that on 9 April 1994, a group of Hutu assailants attacked a Tutsi named Martin Karekezi.[1950] On a Sunday at approximately 8 a.m.,[1951] the witness saw Ndahimana arrive at the Karekezi home in the company of two communal policemen, one of whom was named Leonard Kibyutsa. Ndahimana asked persons who had gathered at the scene about the killings, and they provided the names of suspects in the Karekezi killing.[1952] This evidence suggests that Ndahimana had authority over the communal police on 9 April 1994.

172. According to Witness ND5, between 8 and 10 p.m. on the night of 9-10 April 1994, attackers in the witness' *cellule* killed an old man named Thomas Mwendezi.[1953] The next day, on 10 April, the witness and five others were arrested by policemen named Adrien Niyitegeka, alias Maharamu, and Télésphore Munyantarama in connection with the killing. During the arrest, Niyitegeka told the witness that he had been directed by Ndahimana to arrest the suspects including the witness.[1954] This evidence indicates that the communal police, including Adrien Niyitegeka who played a prominent role in the attack of 15 April 1994, abided by Ndahimana's directives on 10 April 1994.

[1948] T. 28 February 2011 pp. 36, 41-42.
[1949] Dissent, paras. 121, 127.
[1950] T.17 February 2011 p. 63.
[1951] I infer that this was Sunday 10 April 1994.
[1952] T. 17 February 2011 p. 63.
[1953] T. 26 January 2011 p. 50.
[1954] T. 26 January 2011 pp. 50-53.

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173. Witness KR3 testified that on one occasion Ndahimana and IPJ Kayishema proceeded together to arrest an individual accused of having killed a Tutsi civilian in the days immediately following the death of President Habyarimana.[1955] This was corroborated by Witness ND34.[1956] This evidence undermines Witness KR3's own testimony, and that of other Defence witnesses, that Ndahimana and IPJ Kayishema were working at cross-purposes in April 1994.

174. Witness ND4 testified that on 12 April 1994, a group of Hutu assailants attacked Tutsi civilians at a location named Muryamanihura Hills. Ndahimana sent police officer Niyitegeka, aka Maharamu, to the scene. Niyitegeka dispersed the attackers by shooting one assailant in the leg.[1957] The evidence that the attackers in this incident were dispersed by Niyitegeka was corroborated by Witness ND5.[1958] Again, this evidence indicates that Ndahimana was directing the activities of the communal police, and in particular, Adrien Niyitegeka, on 12 April 1994.

175. The Defence adduced evidence that those suspects Ndahimana had arrested in connection with the killing of Tutsis on 9 and 10 April 1994 were subsequently released by IPJ Kayishema.[1959] Witness ND3 testified that from 15 April "[Fulgence] Kayishema wielded more power than Ndahimana"[1960] but the witness provided no foundation for his conclusion on this issue. As noted above, both Witnesses KR3 and ND34 testified that on at least one occasion, IPJ Kayishema and Ndahimana arrested the suspects together.[1961] And while the evidence in this case indicates that Kayishema was an early supporter of the JCE,[1962] without verification of the applicable criminal procedure at the time, I cannot conclude that Kayishema released suspects in order to further the JCE. It may be that the releases were consistent with the applicable laws in place at the time.[1963] I also note that Ndahimana had at least eleven communal police officers under his control. There is no evidence that the IPJ enjoyed this type of support. Finally, Kayishema and Ndahimana often attended meetings together during the period 13-16 April 1994. Thus, on the basis of this evidence alone, I am not satisfied that IPJ Kayishema had the desire or ability to undermine Ndahimana. I further note that Télesphore Ndungutse, a leader of these early attacks, went unmolested by the communal authorities, and thus I cannot even be certain that Ndahimana had arrested the principal perpetrators of these early crimes.

[1955] T. 24 January 2011 pp. 40, 61 (ICS), Prosecution Exhibit 53, p. 16 (ICS).
[1956] T. 18 February 2011 pp. 2-3.
[1957] T. 17 February 2011 pp. 37-38 (ICS).
[1958] T. 26 January 2011 p. 54.
[1959] Witness Emerita Munsy: T. 28 February 2011 p. 18; Witness KR3: T. 24 January 2011 pp. 74-75.
[1960] T. 17 February 2011 p. 18.
[1961] T. 25 January 2011 pp 40, 61 (ICS), Prosecution Exhibit 53, p. 16 (ICS); T. 18 February 2011 pp. 2-3.
[1962] See for example, Defence Witness ND11: T. 18 January 2010 pp. 30-31. 'It could be the 11th, Kayishema, Gacabuterezi and Rushema, sent a letter to the *Interahamwe* addressed to a certain Jean Bosco, who was an *Interahamwe* of our area. And in that letter that *Interahamwe* was asked to start the killing of the Tutsis in that area. And he was asked to leave no stone unturned, to make sure that no Tutsis escaped." Also see evidence discussed above that Ndungutse participated in early killings of Tutsis in Kivumu *commune*.
[1963] For example, Witness ND5: T. 26 January 2011 pp. 50-53: On 10 April, the witness and five others were arrested by police officers Adrien Niyitegeka, and Télésphore Munyantarama in connection with the killing of an elderly Tutsi named Thomas Mwendezi the previous night. During the arrest, Niyitegeka told the witness that he had been directed by Ndahimana to arrest the suspects including the witness. The next day, the suspects met with the IPJ Kayishema who interviewed them for approximately 40 minutes. After the interview, Kayishema told Witness ND5 and the other suspects that they could go home while he completed his investigation.

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176. Witness ND24 testified that on 14 April 1994, when Ndahimana went through the roadblock manned by the witness on his way to Nyange parish, he was accompanied by two armed police officers.[1964] This suggests Ndahimana could direct the communal police on 14 April 1994.

177. Witness ND7 testified that on 17 April 1994, after consulting with Seromba, Ndahimana and a number of communal police officers took 27 wounded Tutsis from Nyange parish to the communal health center.[1965] Witness ND1 corroborated evidence that Ndahimana brought wounded Tutsis to the health center that day. He also ensured that the centre was protected by communal policemen. However, three days later a group of assailants killed the survivors at the health center.[1966] Witness KR3 confirmed that survivors were taken to the communal health center, and that they were later killed there.[1967] This evidence indicates that Ndahimana was still directing the communal police on 17 April 1994. I will not speculate about Ndahimana reasons for using the communal police to protect Tutsis on 17 April 1994 but not on 15 and 16 April. As the killings at the communal health center were not pleaded in the Indictment, I will make no further determinations on this issue.

178. Witness ND17 testified that on an unspecified date following the attacks on Nyange parish, communal police officers assigned by Ndahimana to protect the sisters' convent were able to repel assailants on the convent.[1968] This evidence too indicates that Ndahimana was still able to direct the activities of the communal police after the killings at Nyange.

179. Prosecution Exhibit 51 is a letter from Ndahimana demoting the brigadier of the communal police, Christophe Mbakilirehe, to the position of an ordinary policeman, and appointing Jean Bosco Abayisenga as brigadier and Adrien Niyitegeka as Abayisenga's deputy. It is not in dispute that this reorganisation of the communal police was implemented, and I conclude that this reorganisation supports the Prosecution position that Ndahimana exercised both *de jure* and *de facto* control over the communal police as *bourgmestre*. What remains in dispute is the reason for Mbakilirehe's demotion. I will discuss this in assessing Ndahimana's intent below.

180. When Ndungutse threatened to kill Witness KR3 for refusing to accompany Ndungutse in an attack on the Ndakubana family on or about 8 April 1994, Witness KR3 told Ndahimana about the threat against him. Ndahimana responded by asking the new brigadier of the communal police, Jean-Bosco Abayisenga, to confiscate Ndungutse's gun--which Abayisenga was able to do.[1969]

8.3.5 Meetings

181. It is not in dispute that Ndahimana chaired a meeting on 11 April 1994 to discuss security in the area, and that *conseillers* and other communal leaders participated in this meeting. Following this meeting, Ndahimana called the *préfet* to ask that he assign *gendarmes* to Kivumu *commune*, and the *préfet* complied sending four to Kivumu that very day.[1970] No evidence has been adduced suggesting that influential members of the community did not attend this meeting convened by the *bourgmestre*, or that the decisions taken at the meeting that day were not

[1964] T. 21 February 2011 pp. 8, 30, 39.
[1965] T. 24 January 2011 pp. 39-41.
[1966] T. 20 January 2011 pp. 10-11.
[1967] T. 25 January 2011 pp. 30-31 (ICS).
[1968] T. 3 May 2011 p. 13.
[1969] T. 25 January 2011, p. 7 (ICS) (English); T. 25 January 2011 p. 8 (HC) (French).
[1970] See for example, Witness ND23: T. 19 April 2011 pp. 49-52.

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implemented. To my mind, this evidence indicates that Ndahimana had *de facto* authority similar to that of any other *bourgmestre* on 11 April 1994.

182. Equally significant, Witness KR3 testified that on 20 April 1994, *bourgmestre* Ndahimana held a meeting of communal workers and *conseillers* to discuss, *inter alia*, the conduct of the brigadier of the communal police.[1971] It would further appear that Ndahimana's decision to demote Mbakilirehe was approved by the communal council at this meeting.[1972] A procedure for dividing properties belonging to the Tutsi victims at Nyange was also discussed and approved.[1973] This evidence establishes that within four days of the genocide at Nyange parish, Ndahimana was able to conduct business as usual at the communal office; he was able to get council assent for his decision to demote Mbakilirehe, and a procedure in place for the division of Tutsi properties.

8.3.6 Other Indicia of *De Facto* Authority

183. As discussed in detail above, the evidence establishes that when Ndahimana gave directives or suggestions to the attackers on 16 April 1994, those directions were implemented.[1974]

184. Witness BX3 testified that on or about 12 April 1994, the witness decided to have her grandchildren, living outside the *commune*, brought to her home in Kivumu. In order to have her grandchildren picked up by a friend, the witness obtained a *laissez-passer* from Ndahimana. It was the witness' understanding that individuals manning roadblocks would allow *laissez-passers* holders to pass through roadblocks unmolested.[1975] This evidence indicates that Ndahimana had a critical role in controlling the movement of Kivumu residents during this period.

185. Witness CDL testified that when on 14 April 1994, individuals manning a roadblock attempted to open the coffin of Dr. Ntawuruhunga, Ndahimana intervened and ensured safe passage for the vehicle.[1976]

186. Witness ND23 was a Kivumu *commune conseiller*. He testified that during the period April to July 1994, he was answerable to and under Ndahimana's authority.[1977] "...[T]he *bourgmestre*...initiated decisions and those decisions were sent to [*conseillers*]." The communal council met twice a week and was "briefed on how the commune had to be run."[1978] In addition, the communal office was functioning throughout that period.[1979]

187. In response to a question about Ndahimana's authority over the communal police, Witness ND24 stated that he did not know the relationship but added: "all I know, in general terms, is that the *bourgmestre* was in charge of all of us."[1980] Witness ND3 also described Ndahimana as

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[1971] T. 25 January 2011 p. 26, pp. 28-29 (ICS).
[1972] Witness KR3: T. 24 January 2011 p. 76 (ICS).
[1973] Witness KR3: T. 25 January 2011 pp. 29-30, 58 (ICS): The matter of Tutsi properties was discussed in detail, and it was decided that any person who wanted to use land belonging to a Tutsi victim would pay rent to their local *conseiller* who would then transfer the money to the *commune*.[1973]
[1974] Dissent, paras. 102-106.
[1975] T. 23 February 2011 pp. 8-9 (ICS), 34-35.
[1976] T. 12 November 2010 pp. 2-3; T. 18 November 2010 pp. 10, 49-50.
[1977] T. 19 April 2011 pp. 57, 60.
[1978] T. 19 April 2011 p. 61.
[1979] T. 19 April 2011 p. 47.
[1980] T. 21 February 2011 p. 30.

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"the authority in the commune,"[1981] as did Witness ND5 who testified that the population of Kivumu respected Ndahimana because he was a person of authority.[1982]

188. It was the view of Witness CBK that Athanase Seromba had spiritual authority over the attackers at Nyange parish and that Ndahimana had administrative authority over them, and that if Seromba and Ndahimana "had put their heads together" to prevent the events from taking place, they would not have occurred; "Ndahimana and Seromba colluded to bring about the destruction of the church."[1983]

189. Witness CBN testified that the Ndahimana "was the supreme leader because he was the *bourmgestre* of Kivumu *commune*... And everything that was taking place in the *commune* fell under the responsibility of the *bourgmestre* because he is the highest or supreme authority at *commune* level."[1984]

190. According to Witness CDL, one or two weeks after the killings at Nyange, Ndahimana summoned Kivumu residents and army reserve soldiers, and had the reservists train the other residents in civil defence.[1985]

191. Finally, I consider it significant that Ndahimana remained in office until threatened by the RPF advance in late June or early July 1994 when he fled to the Democratic Republic of the Congo.

8.3.7 Conclusion on Ndahimana's *De Facto* Authority

192. On this evidence taken together, much of which was provided by Defence witnesses, I find it established that Ndahimana had *de facto* authority in line with his *de jure* authority in April 1994.

8.4 Duress

193. In its Pre-Defence Brief, the Defence alleged that Ndahimana was a "victim of political violence" when he worked in Gisenyi, that MRND militiamen in Gisenyi suspected him of being an RPF agent after he traveled to Abidjan in January 1993, and that he was thereafter threatened by the *Interahamwe* and fled to Kivumu in the middle of the night."[1986] It added that the Defence would adduce evidence that Ndahimana was under threat from the Kibilira *Interahamwe* and thus could not have risked going to Nyange parish on 16 April 1994.[1987] The Majority has found that "Ndahimana was under threat during the period in question"[1988], and that the "accused's participation in the killings may have resulted from a sense of duress rather than from extremism or ethnic hatred."[1989] I respectfully disagree.

[1981] T. 17 February 2011 p. 18.
[1982] T. 26 January 2011 p. 57.
[1983] T. 4 November 2010 p. 17.
[1984] T. 13 September 2010 pp. 58-59.
[1985] T. 12 November 2010 p. 23
[1986] Pre-Defence Brief, para. 18.
[1987] Pre-Defence Brief, para. 116.
[1988] Judgement, para. 706.
[1989] Judgement, para. 868.

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194. First, I observe that Ndahimana's defence has not been that Ndahimana participated in criminal activity under duress but that he was not present at Nyange parish on 15 and 16 April 1994 and did not contribute to the crimes in any way whatsoever.[1990] That said, I do not believe it would be in the interests of justice to overlook evidence of duress simply because Defence Counsel opted to pursue another legal strategy.

195. Witness ND11 testified that when he arrived at Ndahimana's house on the night of 15 April 1994, Ndahimana asked him about the situation at Nyange church because he had not been there. Ndahimana also told the witness that he had asked the *préfet* for assistance "because the *Interahamwe* has spent the whole day pursuing [him] as well."[1991] Witness ND17 testified that Ndahimana had problems in April 1994 because "he refused to collaborate with the persons who were killing people."[1992] The witness believed that Ndahimana was a "targeted person... because he was not involved in the business of killing people," and because he had arrested "some murderers."[1993] Witness ND35 testified that he learned from a Sister Johanna that Ndahimana sought refuge at the Sisters' convent on 16 April 1994 from persons who wanted to kill him named Callixte, Kimana and Kayishema.[1994] Witness Melane Nkiriyehe testified that Ndahimana was suspected of having associated with the RPF in 1993.[1995] Witness Clément Kayishema asserted that when Ndahimana came to visit him on 15 April 1994 the two men discussed a number of issues including Ndahimana's personal "insecurity... even before he became *bourgmestre*, he had faced problems of insecurity. Those problems had led him to leave his posting [at the tea factory] in Rubaya"[1996]

196. As discussed above,[1997] unlike the Majority,[1998] I do not consider Witness ND6 to have been a credible witness. I also have serious concerns regarding the reliability of the remaining evidence that Ndahimana was under duress during the period at issue as that evidence was hearsay and it was excessively vague. Those who testified that Ndahimana was under threat at the tea factory in Gisenyi in early 1993, provided no detail of the problem or link with the alleged threats against him in April 1994. Moreover, within than six months of having returned from Gisenyi to Kivumu, Ndahimana was elected *bourgmestre* of Kivumu *commune*. This suggests that he was generally liked and respected within the *commune*. In addition, it would appear that while at Nyange parish on the morning of 15 April, Ndahimana made no secret of the fact that he planned to attend the funeral of Dr. Juvenal Ntawuruhunga that day. No evidence was adduced suggesting that Ndahimana was harassed while at the funeral. On the contrary, Defence witnesses testified that Ndahimana traveled later that day to Kibuye town in the company of Anicet Tumusenge whom he had only just met that morning, and unescorted by the communal police or any other armed individual.[1999] Finally, Ndahimana spent a great deal of time in the company of members of the joint criminal enterprise from 11 through 16 April, many of whom were influential members of the community, and he continued in his position as *bourgmestre* throughout the relevant period. I also consider it significant that Ndahimana had at least eleven communal police officers at his disposal

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[1990] Defence Notice of Alibi.
[1991] T. 18 January 2011 p. 37.
[1992] T. 3 May 2011 pp. 4-5 (ICS).
[1993] T. 3 May 2011 p. 17.
[1994] T. 3 May 2011 p. 38.
[1995] T. 22 February 2011 pp. 7-8.
[1996] T. 18 April 2011 p. 62.
[1997] Dissent, para. 69.
[1998] Judgement, paras. 702-705.
[1999] Witness Clément Kayishema: T. 18 April 2011 p. 62; Witness Anicet Tumusenge: T. 12 May 2011 pp. 7- 8; Witness ND24: T. 21 February 2011 pp. 24, 36.

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and appears to have had a close working relationship with the *préfet*. Thus, I find the limited evidence suggesting that Ndahimana was under duress to be unpersuasive.

8.5 Joint Criminal Enterprise

8.5.1 Introduction

197. The Prosecution has alleged in paragraphs 11 and 36 of the Indictment that Ndahimana was a member of a joint criminal enterprise, that the purpose of this enterprise was the extermination of Tutsis at Nyange parish, and that Ndahimana is therefore liable for the genocide committed at Nyange parish, pursuant to Article 6 (1) of the Statute.

198. The Prosecution has proven that a joint criminal enterprise existed in Kivumu *commune* in April 1994, and that its purpose was to exterminate the Tutsi population of Kivumu *commune* in whole or in part. I will not make a finding on the precise membership of the JCE, but conclude that its core members included: Athanase Seromba, the Nyange parish priest, Gaspard Kanyarukiga, an influential businessman, Télesphore Ndungutse, a local teacher and Vice-Chairman of the Kivumu *commune* MRND, and Fulgence Kayishema, the Kivumu Inspector of the Judicial Police. There may have been personality clashes or factional disputes within the enterprise but what is relevant is that the members were able to work together to achieve a common goal, which was the genocide of Kivumu's Tutsi population.

8.5.2 Ndahimana's Intent

199. The Majority has held that it cannot "conclude that the only reasonable inference which can be drawn from the evidence is that the accused possessed genocidal intent."[2000] I respectfully disagree. At the outset I observe that had Ndahimana displayed the opposition to the plan, and had as little influence, as suggested by the Defence evidence, the other members of the joint criminal enterprise could have proceeded to implement their plan without him. On the contrary, the evidence establishes that Ndahimana met regularly with the members of the criminal enterprise throughout the relevant period, before, during, and immediately after the killings. To my mind this fact constitutes *prima facie* evidence that he accepted the plan, and that his participation in the enterprise was valuable, and possibly essential.

200. However, I cannot rely on *prima facie* evidence alone and recall that I believe that the Prosecution has established beyond reasonable doubt that by some time on 14 April 1994, if not before, Ndahimana shared the intent of his co-perpetrators.[2001] Here I would simply like to add that the fact that Ndahimana did not assign any of the communal police officers under his authority to reinforce the *gendarmes* at the parish, despite the threats I am certain he was aware of, supports my finding that he did not wish to see the refugees protected.

201. Witness KR3 testified that at the 11 April 1994 meeting chaired by Ndahimana at the communal office, the participants decided that the Tutsi refugees at the church were to be given food which was initially destined for the students of Ntambwe secondary school, and that the food stored at the nutritional center and at the presbytery was also to be distributed to the refugees.[2002] The *commune* would provide transportation for the food, specifically, Witness CDZ's vehicle and a

[2000] Judgement, para. 816.
[2001] Dissent, para. 52.
[2002] T. 24 January 2011 p. 61.

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blue Daihatsu belonging to Antoine Twagirayezu. The two vehicles were to be used by the *bourgmestre* to transport the food and ensure security.[2003] However, Prosecution Witness CBS testified that while at the church, the refugees received no food to eat.[2004] Indeed, pregnant women and children at the church began dying of hunger on 13 April 1994.[2005] This evidence was corroborated by Witnesses CNJ, YAU, CDJ and CBI who all testified that the refugees never received any food from the authorities.[2006] Given, Ndahimana's numerous trips to the parish prior to the attacks he should have known that the refugees were dying of starvation. I consider his failure to implement the decisions taken at the meeting of 11 April 1994 with respect to food for the refugees to be a further indication of his intent during the period after that meeting.

202. On the afternoon of 16 April 1994, Ndahimana and other members of the JCE celebrated the successful implementation of the criminal plan at the presbytery, a point which I believe further illustrates that Ndahimana shared the intent of his co-perpetrators.

203. On 20 April 1994, *bourgmestre* Ndahimana held a meeting of communal workers and *conseillers* to discuss, *inter alia*, the conduct of the brigadier of the communal police.[2007] A second item on the agenda related to the properties belonging to Tutsis. This issue was discussed in detail, and it was decided that any person who wished to use land belonging to a Tutsi victim would pay rent to their local *conseiller* who would then transfer the money to the *commune*.[2008] The fact that Ndahimana and his associates chose to address the division of Tutsi properties rather than punishment of those responsible for the killings at Nyange parish buttresses my conclusion below that Ndahimana shared the intent of his co-perpetrators within the joint criminal enterprise throughout the relevant period.

204. Prosecution Exhibit 51 is a letter from Ndahimana demoting the brigadier of the communal police, Christophe Mbakilirehe, to the position of an ordinary policeman, and appointing Jean Bosco Abayisenga as brigadier and Adrien Niyitegeka as Abayisenga's deputy. The letter itself does not explain the reasons for the demotion, but refers to prior warnings issued to Mbakilirehe dating back to 1988, meaning before Ndahimana became *bourgmestre*. Witness KR3 testified that Mbakilirehe was demoted because "he did not conduct himself properly [during the troubles]. He was the police brigadier. Instead of calling on the police officers to restore order, he did something else, and that led to the deterioration of security."[2009] Witness ND24 provided hearsay evidence suggesting that Mbakilirehe sided with the attackers during the 15 April attack.[2010] Witness Clément Kayishema, who as *préfet* was informed of the changes in the communal police, could only say that Mbakilirehe had been demoted due to "dysfunctioning" in the communal police.[2011] Prosecution Witness CDL, on the other hand, testified that Mbakilirehe was demoted "for not having been very active during the attacks… [and] because he was being accused of having refused to provide the policemen with enough ammunition during the attacks of Friday."[2012]

[2003] T. 24 January 2011 p. 64.
[2004] T. 6 September 2010 p. 16.
[2005] T. 6 September 2010 p. 16.
[2006] Witness YAU: T. 15 September 2010 p. 46; Witness CBI: T. 14 September 2010 p. 3, T. 15 September 2010. p. 46; Witness CDJ: T. 11 November 2010 p. 40; Witness CNJ: T. 4 November 2010 p. 70.
[2007] T. 25 January 2011 p. 26, pp. 28-29 (ICS).
[2008] T. 25 January 2011 pp. 29-30, 58 (ICS).
[2009] T. 24 January 2011 p. 76 (ICS). See also French transcript 24 January 2011 p. 84 (HC) which appears to be more accurate: "Celui-ci s'est mal comporté pendant les troubles. Il était brigadier de la police communale, au lieu d'ordonner à ses policiers d'assurer la sécurité, il a fait autre chose… »
[2010] T. 27 January 2011 pp. 4-7.
[2011] T. 18 April 2011 p. 40; T. 19 April 2011 p. 2.
[2012] T. 12 November 2010 p. 22.

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According to Witness CNJ, on 15 April 1994, Ndahimana ordered the communal police to fire at the church and when Mbakilirehe as well as two *communal* policemen refused this order, Ndahimana asked them to turn over their guns.[2013] I have significant concerns about Witness CDL's reliability and am therefore unwilling to rely on his evidence unless corroborated. As discussed above, I find Witnesses KR3 and ND24 equally, if not more, unreliable. I have fewer concerns about Witness CNJ's reliability but am unwilling to make a finding on Mbakilirehe's role in the attacks on the basis of his evidence coupled with that of Witness CDL alone.

205. It is not in dispute, however, that Ndahimana replaced Mbakilirehe with police officers Jean Bosco Abayisenga and Adrien Niyitegeka. Witnesses CDL and CNJ both testified that Abayisenga actively participated in the killings on 15 April 1994.[2014] Witnesses CBT, CBY, CBS and CBN testified that Niyitegeka played a particularly active role in this attack.[2015] Given that Ndahimana replaced Mbakilirehe with two other police officers who participated in the attack, I am satisfied that whatever his reasons for demoting Mbakilirehe, Ndahimana did not punish him for having participated in the attacks at Nyange parish.

206. I recall that when Télesphore Ndungutse threatened Witness KR3, Ndahimana was able to have Ndungutse disarmed. Thus I conclude that when Ndahimana wanted to take action against high-level perpetrators, such as Ndungutse, he was able to do so. I will discuss Ndahimana's liability for his omissions as *bourgmestre* below, but at this juncture wish to emphasise that the fact that Ndahimana took none of the reasonable and necessary measures within his authority to punish the perpetrators of the killings at Nyange parish, is a critical point which reinforces my conclusion that he shared the intent of his co-perpetrators. Given Ndahimana's participation in numerous meetings with members of the JCE and his active participation in the massacre of 16 April 1994, I find Witness KR3's suggestion that no punitive measures were taken because Ndahimana did not know who the perpetrators were[2016] to be devoid of merit.

207. In conclusion, had Ndahimana only participated in meetings with individuals such as Anasthase Seromba and the *gendarmes* at Nyange parish prior to the genocide that took place on 15 and 16 April 1994, I would agree with the Majority that a reasonable inference could be that Ndahimana's intent and participation were benign.[2017] However, given his participation in numerous meetings with other members of the JCE throughout the period of 13-16 April, together with the other circumstantial evidence relevant to the assessment of Ndahimana's *mens rea*, I find that the Prosecution has proven beyond reasonable doubt that by an unknown time on 14 April 1994 Ndahimana shared the intent of his co-perpetrators to destroy in part or in whole the Tutsi community of Kivumu *commune*.

8.5.3 Ndahimana's Contribution to the JCE

8.5.3.1 *Active Assistance*

208. Turning to Ndahimana's contribution to the JCE, I recall that as *bourgmestre*, Ndahimana was the highest-ranking political authority linked to the killings at Nyange parish. I

[2013] T. 4 November 2010 pp. 51-53: The police officer Adrien Niyitegeka nickname Maharamu, fired at the church tower. One of the two police officers who were disarmed was named Gicadi.
[2014] Witness CDL: T. 12 November 2010 pp. 7-9; Witness CNJ: T. 4 November 2010 pp. 51, 53.
[2015] Witness CBY: T. 9 November 2010 pp. 53-54, T. 10 November 2010, pp. 27, 30-32 (ICS); Witness CBS: T. 14 September 2010 p. 40; Witness CBN: T. 13 September 2010 pp. 22-23.
[2016] T. 25 January 2011 p. 29 (ICS).
[2017] Judgement, para. 820.

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have found that he had substantial *de jure* and *de facto* authority in the *commune*. While I cannot be certain that his participation in the JCE was a *sine qua non* for the genocide committed at Nyange parish, I am nonetheless satisfied that had he used his full authority to impede the work of the JCE, the JCE would have suffered a setback.

8.5.3.1.3 Planning

209. I have found that Ndahimana participated in at least eight meetings with members of the joint criminal enterprise in the period 13-16 April 1994, at least six of which took place before the first round of killings on 15 April 1994, and at least two more before the second round of killings on 16 April 1994. On this evidence, I am satisfied that Ndahimana actively participated in planning the killings at Nyange parish.

8.5.3.1.4 Instigating

210. I have previously found that on 16 April 1994, Ndahimana both instigated and supervised the attackers at Nyange parish.

8.5.3.2 *Participation of Communal Police Officers in the Attacks*

211. Ndahimana's responsibility for the role played by the communal police in the killings can be expressed both as liability for omission and liability for commission; Ndahimana both failed to assign the police under his authority to protect the refugees at the parish after the attacks on 13 or 14 April 1994, and ensured they participated in the attacks on 15 and 16 April 1994. The evidence indicates that there were at least eleven communal police officers in Kivumu commune in April 1994, and that at least nine participated in the 15 April 1994 attack: Jean Bosco Abayisenga;[2018] Adrien Niyitegeka aka Maharamu;[2019] Appolinaire Rangira;[2020] Athanase Uzubukaliho/Uzabakiriho, aka Gicyare or Gicadi;[2021] Télesphore Munyantarama;[2022] Nyantara;[2023] Habaruriga;[2024] Makaberi;[2025] and Ephrem.[2026] Witnesses added that Christophe Mbakilirehe was present at the parish that day but did not describe his participation.[2027] Witnesses ND34 and Beatrice Mukankusi also referred to a police officer named Leonard Kibyutsa but not in connection with the attacks on Nyange parish.[2028] Witness CBS referred to the presence of a communal police officer named Aloys Nishirembere at the parish on 14 April.[2029] Although Witness CBY testified

[2018] Witness CBR: T. 1 November 2010 p. 20; Witness CNJ: T. 4 November 2010 pp. 51, 53.
[2019] Witness CDL: T. 12 November 2010 p. 9; Witness CBR: T. 1 November 2010 p. 20. Witness CBI: T. 14 September 2010 p. 40 (French: T. 14 September 2010 p. 44); Witness CDK: T. 8 November 2010 pp. 32-35, T. 9 November 2010 pp. 18-19; Witness CBT: T. 7 September 2010 pp. 41-42.
[2020] Witness CDL: T. 12 November 2010 p. 9; Witness CBR: T. 1 November 2010 p. 20; Witness CBT: T. 7 September 2010 pp. 41-42; Witness ND34: T. 17 February 2011 p. 65.
[2021] Witness CDL: T. 12 November 2010 p. 9; Witness CBR: T. 1 November 2010 p. 20; Witness ND34: T. 17 February 2011 p. 65.
[2022] Witness CBR: T. 1 November 2010 p. 20; Witness CBI: T. 14 September 2010 p. 40 (French T. 14 September 2010 p. 44); Witness CDK: T. 8 November 2010 pp. 32-35, T. 9 November 2010 pp. 18-19.
[2023] Witness CDL: T. 12 November 2010 p. 9.
[2024] Witness CBR: T. 1 November 2010, p. 20.
[2025] Witness CBR: T. 1 November 2010 p. 20.
[2026] Witness CDL: T. 12 November 2010 p. 9.
[2027] Witness CBI: T. 14 September 2010 p. 40 (French T. 14 September 2010 p. 44); Witness CBT: T. 7 September 2010 pp. 41-42; Witness CBK: T. 03 November 2010 pp. 12-13; Witness CNJ: T. 4 November 2010 pp. 51-53: Mbakilirehe refused Ndahimana's order to shoot at the refugees; Witness ND22: T. 20 April 2011 pp. 4-6.
[2028] T. 17 February 2011 pp. 63-64; T. 7 February 2011 p. 32.
[2029] Defence Exhibit 4, p. 4.

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that another participant named Kabalisa was also a police officer, Witnesses CBR and CDK said he was a former military officer.[2030] As perpetrators in the attacks, I suspect the latter two witnesses were better placed to assess his position.

212. The Majority has held that "the Prosecution has not established beyond reasonable doubt that Ndahimana had the material ability to prevent crimes committed by communal police at Nyange church."[2031] I respectfully disagree. The Majority and I both agree that Ndahimana had *de jure* authority over the communal police, and I consider the evidence that he also had *de facto* authority over the police to be conclusive. No evidence has been adduced suggesting that Ndahimana ever denounced the participation of the communal police in the attack, or that he suspended or dismissed a police officer for having participated in the attacks. Given these elements taken together with the evidence above that Ndahimana did have *de facto* authority over the communal police,[2032] I not only believe that Ndahimana was in a position to prevent the crimes committed by the local police and did not do so, but am additionally of the view that he ensured that the communal police would participate in the attacks that took place on 15 and 16 April 1995. To my mind, this is the only reasonable inference on the evidence.[2033]

8.5.3.3 *Transportation*

213. I agree with the Majority that when Ndahimana and the other participants in the meeting held on 11 April 1994 decided to requisition vehicles belonging to members of the community, they did not necessarily intend that the vehicles would be used to ferry attackers to Nyange parish. However, conclusive evidence has been adduced that at least one vehicle, belonging to Witness CDZ, was requisitioned by Ndahimana following the 11 April 1994 meeting,[2034] and that this vehicle was later used to ferry attackers to Nyange parish.[2035] I am satisfied that this vehicle could not have been used for this purpose without Ndahimana's consent.

214. With respect to the attackers' use of the Communal Office's red Toyota Hilux, I note that Defence Witness Charles Ruvurajabo testified that it did not leave his father's garage during this period.[2036] I respectfully disagree with the Majority's conclusion that Ruvurujabo's evidence was reliable.[2037] I recall that the witness was a Tutsi and that he admitted having gone into hiding "I would say that it was between a week and a week and a half after the 6th of April".[2038] The witness did not provide a foundation for his certainty that the communal vehicle did not leave his father's garage during the period at issue. More generally, I find the evidence on the communal vehicle to

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[2030] Witness CBR: T. 1 November 2010 p. 22: Witness CBR described Kabalisa as an ex-soldier but testified that he worked together with the communal police on this day. Witness CDK also described Kabalisa as a former soldier: T. 9 November 2010 pp. 53-54; T. 10 November 2010 pp. 27, 30-32 (ICS).
[2031] Judgement, para. 767.
[2032] Dissent, paras. 171-180.
[2033] Witness CBR: T. 2 November 2010 pp. 33-34; Witness CDL: T. 12 November 2010 p 14-15, 17, 19; Witness CBK: T. 3 November 2010 pp. 18-19, 20, 26.
[2034] Prosecution Exhibit 5.
[2035] Witness CDZ: T. 8 September 2010 p. 34; Witness CBR: T. 1 November 2010 pp. 14, 20, T. 2 November 2010 p. 53; Witness CBK: T. 3 November 2010 p. 15; Witness CBS: T. 6 September 2010 pp. 27-28; Witness CBT: T. 7 September 2010 pp. 62-64; Witness CNT: T. 10 November 2010 p. 44.
[2036] T. 8 February 2011 pp. 35-36.
[2037] Judgement, para. 515.
[2038] T. 10 February 2011 pp. 28-29, 32.

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be too parenthetical and contradictory to make a clear finding. Thus, unlike the Majority, I have not considered this issue in assessing the credibility of witnesses.[2039]

8.5.3.4 *Ammunition*

215. Witness KR3 asserted that both Ndahimana and brigadier Christophe Mbakilirehe held the key to the communal armoury.[2040] Witness ND13 believed that only the brigadier of the communal police had a key.[2041] Prosecution Witnesses CDL, CBR, and CNJ all testified that Ndahimana had a role in the distribution of weapons held at the communal office for use by the communal police.[2042] Witnesses CBR and CDL were not the most credible of the Prosecution's witnesses, and Witness ND 13 was not a credible Defence witness. I also note that the evidence of Witnesses CBR and CNJ was hearsay. Nevertheless, I find that circumstantial evidence corroborates the evidence of the three Prosecution witnesses. It is not in dispute that assailants used firearms to attack Nyange church in the late morning or early afternoon of 15 April 1994 and later ran out of ammunition. The evidence also establishes that Christophe Mbakilirehe, the brigadier of the communal police was present at the church that day, but no evidence was adduced suggesting that he travelled the short distance from Nyange parish to the communal office to replenish the weapons stock of the assailants.[2043] Ndahimana, on the other hand, was not at the parish when the assailants ran out of ammunition, and did not return to the area until later that evening. The evidence is equally conclusive that the next day, 16 April 1994, the assailants again arrived at Nyange parish equipped with firearms and ammunition. There is no evidence suggesting that anyone but Ndahimana and Mbakilirehe had keys to the communal weapons stock. Thus, I find that the only reasonable inference is that Ndahimana made ammunition available to the attackers either upon returning from Rufungo on the evening of 15 April, or in any event before the attack began the next day.

8.5.4 Participation by Omission

216. In its discussion of Ndahimana's liability for failing to prevent and punish pursuant to Article 6.3 of the Statute, the Majority cites the Appeals Chamber jurisprudence establishing that "[e]ffective control means the material ability to prevent the commission of the offence or to punish the principal offenders,"[2044] and that "[n]ecessary and reasonable measures are those that can be

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[2039] See for example, Judgement para. 479 with respect to Witness CB1.
[2040] T. 25 January 2011 p. 38 (ICS).
[2041] T. 18 January 2011 pp. 3-4.
[2042] Witness CNJ, T. 4 November 2010 p. 54: On 15 April 1994 when the communal police ran out of ammunition, "they had to wait for the return of the *bourgmestre* because there was no way of going to look for ammunition in the *commune* office". Witness CBR, T. 1 November 2010 p. 21: Late in the day on 15 April, Ndungutse and judicial police inspector Kayishema informed the assailants, including the witness, that they had run out of "equipment" because "the stock of equipment had been locked up by the *bourgmestre* and they were waiting for the return of the *bourgmestre*" to give the assailants more. Witness CDL, T. 12 November 2010 pp. 14-15: At approximately 6:30 p.m on 15 April 1994, the witness saw Ndahimana having a discussion with Kayishema and Abayisenga outside the communal office. Kayishema and Abayisenga told Ndahimana that the attackers had failed to kill the Tutsi refugees because they had run out of ammunition and Ndahimana was not there to distribute the necessary equipment. Ndahimana promised to provide them with the necessary equipment the next morning.
[2043] Witness CDL: T. 11 November 2010 p. 67: The distance between the communal office and the church was approximately one kilometer.
[2044] Judgement, para. 726.

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taken within the competence of a commander, as evidenced by the degree of effective control he wielded over his subordinates."[2045]

217. In determining whether an individual is culpable for failing to take necessary and reasonable measures to prevent criminal acts or to punish the perpetrators under Article 6.3 of the Statute, the Appeals Chamber in *Blaškic* held that what constitutes a reasonable and necessary measure "is not a matter of substantive law but of evidence..."[2046] and that "necessary and reasonable measures are such that can be taken within the competence of a [superior] as evidenced by the degree of effective control he wielded over his subordinates. The measure of submitting reports is...applicable 'under some circumstances'"[2047]

218. Once again I would like to stress that I assess the reasonable and necessary measures that were available to Ndahimana to prevent and punish crime in 1994 not for the purpose of establishing whether he was a superior within the meaning of Article 6 (3) of the Statute, but in order to determine whether his omissions, taken together with his acts, resulted in a significant contribution to the JCE pursuant to the jurisprudence and Article 6 (1) of the Statute. It is my view that the existing jurisprudence on Article 6 (3) liability is of value in assessing the significance of omissions under Article 6 (1) of the Statute. For example, I do not believe that any principal perpetrator at Nyange parish apart from Ndahimana and Christophe Mbakilirehe, the Brigadier of the communal police, could be held liable specifically for failing to assign the communal police to protect the refugees at the parish under either Articles 6 (1) or 6 (3) of the Statute.

219. I recall that pursuant to Article 56 of the Administrative Law, a *bourgmestre* was both the representative of the central authority in the *commune* and the personification of authority in the *commune*.[2048] The communal police was under the sole authority of the *bourgmestre* who used it to fulfill his duty to maintain and re-establish public order and execute laws and regulations.[2049] A *bourgmestre* also had certain direct law enforcement powers. For instance, in emergencies he could incarcerate persons for up to seven days.[2050] He could also requisition state level security forces.[2051] On this basis, I have concluded that the *bourgmestre* had a legal duty to ensure law and order in his *commune*. This sets Ndahimana apart from other members of the joint criminal enterprise such as Seromba, a priest, and Kanyarukiga, a businessman, who may have had influence in the community, and in Seromba's case a moral or religious obligation to protect civilians, but did not have a legal duty to do so.

220. The *bourgmestre* was also responsible for exercising administrative control over state agents assigned to the *commune*.[2052] On the evidence in this case, I have concluded that "state agents" include, *inter alia*, *gendarmes*, the Inspector of the Judicial Police, and Assistant *bourgmestres*. Given a *bourgmestre's* responsibility for law and order in the *commune* coupled with his role as representative of the central government in the *commune*,[2053] and his administrative

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[2045] Judgement, para. 765.
[2046] *Blaškic* Appeal Judgement, paras. 69, 72.
[2047] *Blaškic* Appeal Judgement, para. 72. See also *Boškovski* (AC) Judgement, para. 234.
[2048] Prosecution Exhibit 47, Article 60
[2049] Prosecution Exhibit 47, Article 104 (88) and 108 (92); and Amendment of 4 October 1977, Article 1.
[2050] Prosecution Exhibit 47, Article 61.
[2051] See Witness T. 12 November 2010 p. 24, and evidence that he did effectively requisition *gendarmes* from the *préfecture* on 11 April 1994.
[2052] Prosecution Exhibit 47, Article. 58 (11).
[2053] Prosecution Exhibit 47, Article 60.

control over state agents,[2054] it is my view that a *bourgmestre* had an obligation to report both professional misconduct and criminal activity committed by state agents to their hierarchical superiors in Kigali, Kibuye or Murambi. Indeed, I fail to see how a superior in a state institution seated outside the *commune* would learn of misconduct or criminal activity committed by a subordinate assigned to Kivumu *commune* unless it was reported to him by the individual responsible for law and order in the area covering the crime site, in this case the *bourgmestre*.

221. *Conseillers communaux* were elected officials, and thus while on the evidence of Witness ND23[2055] I suspect that the *bourgmestre* had a greater degree of *de facto* authority over them than suggested by the Administrative Law, I agree with the Majority that the Prosecution has not proven this beyond reasonable doubt.[2056] That said, as the *bourgmestre* was responsible for law and order in his *commune*, I believe he had a duty to report *conseillers*, judicial officials, militia, and civilians alleged to have committed crimes to the competent law enforcement authorities upon receiving grounded information that such individuals might have participated in grave criminal activity in his *commune*. I am only satisfied, however, that Ndahimana knew or had reason to know of the participation in the genocide at Nyange parish of those associates within the JCE with whom he planned the attacks at Nyange parish, his subordinates in the communal police, and the state agents assigned to the *commune*, meaning the IPJ, Assistant *bourgmestres* and *gendarmes,* with whom he worked on a regular basis.[2057] I cannot infer that he had the requisite knowledge with respect to individual *conseillers*, judicial officials and individual members of militia groups, and thus will not examine any legal obligations Ndahimana might have had to report crimes committed by these latter groups to the competent authorities.

8.5.4.1 *Specific Omissions*

222. On 10 April 1994, Ndahimana sent a letter to at least one *conseiller* asking him to "preserve security" in the *secteur* under his authority and "avoid divisions,"[2058] and that the next day he sent a letter to a colleague within the MDR party to ensure that MDR members in his area did not stir up ethnic tensions as Ndungutse was doing.[2059] I consider these letters to be part of the minimum necessary and reasonable measures that a *bourgmestre* would take when facing ethnic violence in his *commune*.

223. I further recall that on 9 and/or 10 April, Ndahimana had arrested a number of persons who were accused of having participated in the first killings of Tutsi civilians in Kivumu *commune* following the death of President Habyarimana,[2060] and that in a separate incident on 12 April, he instructed the communal police to repel individuals attacking Tutsis civilians, which they did.[2061] I consider that these acts too demonstrate that Ndahimana took reasonable and necessary measures to address violence in his region in the six days following the death of the president. There is no

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[2054] Prosecution Exhibit 47, Article. 58 (11).
[2055] T. 19 April 2011 p. 61.
[2056] Judgement para. 772.
[2057] Thus, I respectfully disagree with the Majority's findings in paragraphs 778, 783 and 793 of the Judgement. Contrary to the Majority at paragraph 775 of the Judgement, I am not satisfied that Assistant *bourgmestres* were communal staff within the meaning of the Administrative Law. I consider it equally possible that they were state agents assigned to the *commune*.
[2058] Defence Exhibit 108 (B).
[2059] Defence Exhibit 110 (C).
[2060] Witness ND34: T. 17 February 2011 pp 63-64, T. 18 February 2011 pp. 3, 17; Witness ND5: T. 26 January 2011 pp. 50-53, 56, 59; Witness KR3: T. 25 January 2011 p. 38 (ICS).
[2061] Witness ND4: T. 17 February 2011 pp. 37, 38 (ICS).

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evidence, however, that Ndahimana took any necessary or reasonable measures to prevent or punish inter-ethnic crime after 12 April 1994, and as discussed above, I am satisfied that he continued to wield the same authority after 12 April 1994 that he did when he took these constructive measures.

224. According to Witness KR3, following the killings at Nyange parish, Ndahimana sent a note to *commune conseillers* and members of *cellule* committees asking that they ensure the security of their citizens and that they end manhunts against Tutsis.[2062] Witness Clément Kayishema testified that he thought Ndahimana "even wrote reports on the security situation prevailing in his commune."[2063] I cannot credit this evidence, as both these witnesses were particularly unreliable and could not produce even a single copy of the alleged communications or report their content in any detail.

225. As discussed above, I am satisfied that Ndahimana had effective control over the communal police. Yet he did not assign the communal police to protect the parish on 14 April 1994 when I am certain that he was aware of the plans for the onslaught the next day. On the contrary, witnesses both for the Prosecution and the Defence testified that the communal police took a lead role in attacking the church on 15 April.[2064] The evidence that Ndahimana demoted brigadier Mbakilirehe for his participation in the attacks is unpersuasive. There is no other evidence that Ndahimana punished other communal police officers who took part in the attacks. Indeed, two of the officers who took part in the attacks were promoted including one who took a leading role.[2065]

226. On 11 April 1994, Ndahimana requisitioned *gendarmes*. As discussed earlier, I believe it is quite possible that on the day he made the request he expected that the *gendarmes* would protect the Tutsi population. However, when they instead opted to join the attackers on 15 and 16 April 1994 rather than protect the refugees, Ndahimana did not chastise them or report their crimes to their superiors in the *gendarmerie* or the *préfet*. In requesting their assignment to Kivumu *commune*, I believe he acquired a special duty to monitor their performance.

227. As noted above, I am satisfied that Ndahimana had a degree of real authority over IPJ Fulgence Kayishema, a member of the communal police, albeit one answerable to the Public Prosecutor, if only as a state agent assigned to Kivumu *commune*. Based on the evidence adduced in this case, I am satisfied that Kayishema played an active role in the genocide at Nyange parish.[2066] There is no evidence that Ndahimana informed Kayishema's superiors in the Public Prosecutor's office or other competent authorities, of Kayishema's role in the attacks following the killings.

228. I am further satisfied that Védaste Murangwabugabo (alias Védaste Mupende), an Assistant *bourgmestre* participated in the attacks.[2067] Again, there is no evidence that Ndahimana informed Murangwabugabo's superiors or other competent authorities of Murangwabugabo's participation in the crimes at Nyange parish on 15 and 16 April 1994.

[2062] T. 24 January 2011 pp. 70-71; T. 25 January 2011 pp. 11, 25; T. 25 January 2011 pp.33, 36-37 (ICS), Prosecution Exhibit 52 (b).
[2063] T. 18 April 2011 p. 41.
[2064] See for example, Witnesses CBR, CDL, CNJ, and ND6.
[2065] Dissent, paras. 204-205.
[2066] See for example: Witness CBT: T. 7 September 2010 pp. 37-38, 58, 62; Witness CNJ: T. 4 November 2010 pp. 49-53, T. 5 November 2010 pp. 60-61; Witness CBR: T. 1 November 2010 pp. 14, 17.
[2067] See for example, Witness CBT: T. 7 September 2010 p. 42; Witness CBR: T. 1 November 2010 p. 24; Witness CNJ: T. 4 November 2010 p. 57.

229. More generally, no evidence has been adduced indicating that Ndahimana took any measures whatsoever to punish any of the perpetrators after the attacks in his *commune*. On the contrary, on 20 April 1994, when Ndahimana convened a meeting at the communal office with *conseillers* and communal staff, he opted to discuss the division of the properties belonging to the victims of the crimes rather than the punishment of the perpetrators.

230. On this basis, I believe the only reasonable inference is that one of Ndahimana's most significant contributions to the JCE was to assure his associates and subordinates, either explicitly or tacitly, that he would not use those measures within his authority as *bourgmestre* to punish them for committing crimes at Nyange, and that this encouraged their participation in the crimes.

8.5.5 Conclusion on JCE

231. In conclusion, I find that Ndahimana provided the criminal plan with the imprimatur of the highest political authority in the region; that he participated in the planning of the crimes committed at Nyange parish on 15 and 16 April 1994; that he provided tactical advice and support to the attackers on 16 April; and provided transport throughout the period and ammunition to the attackers during the attacks. Equally importantly, I believe he provided his associates and subordinates with blanket immunity for their participation in the genocide that took place at Nyange parish on 15 and 16 April 1994. Taken together, I believe his contribution to the basic form of JCE can only be reasonably evaluated as a significant one.

9. Sentencing

9.1 Aggravating Factors

232. A substantial section of Kivumu *commune*'s Tutsi population, 1,500-2,000 civilians, was exterminated over two days in April 1994 in horrific conditions. The evidence indicates that the victims were starved before they were killed. I consider the gravity of the crime and the authority of the accused at the time to be aggravating factors for purposes of sentencing. I agree with the Majority that the fact that the massacre took place in a parish, a universally recognized place of sanctuary, is a further aggravating factor.[2068]

9.2 Mitigating Factors

233. I concur with the Majority at paragraph 866 of the Judgement that in the days immediately following the death of President Habyarimana, Ndahimana had individuals suspected of crimes against Tutsis arrested, and that he sent at least two letters to local political leaders condemning the inter-ethnic violence.[2069] In addition, on the balance of probabilities, I conclude that on 11 April 1994, he requisitioned *gendarmes* from the *préfet* to better protect the refugees. I further agree that these constructive early steps constitute a mitigating factor.

234. The parties adduced next to no evidence on the politics of the MDR, and thus I am puzzled by the Majority's conclusion that the MDR was a "moderate political party", and that Ndahimana's affiliation with the MDR can constitute a mitigating factor.[2070] The Prime Minister of

[2068] Judgement, para. 860.
[2069] Exhibits D108(B) and Exhibit D110(C): letters from Ndahimana asking officials to ensure security in Kivumu *commune*.
[2070] Judgement, para. 867.

the Interim Government, Jean Kambanda, was a member of the MDR.[2071] Witness CDL claimed to have been a member of the moderate wing of the MDR,[2072] but this affiliation did not prevent the witness from actively participating in the genocide. As discussed above, I find the little evidence suggesting that Ndahimana did not enjoy the authority of other *bourgmestres* to be neither credible nor reliable. More generally, I do not accept that membership in a particular political party can constitute a mitigating factor.

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235. I respectfully disagree with the Majority's conclusion that the "family situation" of the Accused is a mitigating factor.[2073] On the contrary, I am personally of the view that given the fact that the accused had eleven children,[2074] he should have had more consideration for the families of others. Nevertheless, I consider his family situation to constitute neither a mitigating factor nor an aggravating factor for purposes of sentencing.

236. Finally, I strongly disagree with the Majority's consideration of the evidence that "several persons of influence in Kivumu commune had an interest and involvement in the massacres", and its conclusion that "the influence of other authorities in Kivumu *commune*" is relevant to sentencing.[2075] As detailed above, I take it as a given that crimes of this scale and nature are most often committed by a number of persons of influence acting together. While I agree with the Majority that Ndahimana was not a lone lunatic in Kivumu *commune*, I do not consider this to be a mitigating factor in sentencing.

237. As I have concluded that Ndahimana was not a mere accomplice in the genocide at Nyange parish, but a principal perpetrator of that crime, I would have sentenced him to a longer term of imprisonment than did the Majority.[2076]

Done at Arusha, 30 December 2011

Florence Rita Arrey

Judge

[Seal of the Tribunal]

[2071] Witness ND13; T. 18 January 2011 pp. 2-3.
[2072] Defence Exhibit 77, p. 14.
[2073] Judgement, para. 869.
[2074] Defence Closing Brief, paras. 522-523.
[2075] Judgement, para. 868.
[2076] Judgement, para. 872.

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Annex A: Procedural History

THE INDICTMENT

1. Grégoire Ndahimana was initially indicted on 20 June 2011,[2077] on a charge of genocide; or in the alternative, complicity in genocide; conspiracy to commit genocide; and crimes against humanity for extermination which are offences stipulated in Articles 2 and 3 of the Statute of the Tribunal and punishable under Articles 22 and 23 of the Statute of the Tribunal. On 5 July 2001, the Indictment against Ndahimana was corrected and confirmed.[2078]

2. On 4 July 2000, the Prosecution issued a Warrant of Arrest and Order for Transfer against the accused.[2079] The Chamber rendered a Decision on the Prosecutor's *Ex Parte* Request for Search, Seizure Arrest and Transfer on 4 July 2001.[2080]

3. On 21 December 2001, the Chamber rendered a Decision on the Prosecutor's *Ex Parte* Request to Rescind the Non-Disclosure Order of 4 July 2001 relating to the Indictment and Warrant of Arrest.[2081]

4. The accused was arrested on 11 August 2009, in the Democratic Republic of Congo and thereafter transferred to the seat of the Tribunal in Arusha on 20 September 2009. Ndahimana made his initial appearance before the Tribunal on 28 September 2009 and he pleaded not guilty to all charges.[2082]

5. The Chamber and the parties discussed preparations for trial at an informal status conference on 23 October 2009. The Chamber thereafter issued a Scheduling Order instructing the Prosecution to file its Motion For Leave to Amend the Indictment and another Motion for Protection of Potential Witnesses by 16 November 2009, and ordered the Defence to file its reply, if any, within five days after the date the translated copy of the proposed Amended Indictment was served on it.[2083]

6. On 16 November 2009, the Prosecution filed an Amended Indictment charging Ndahimana with genocide (Count I), alternatively, complicity in genocide (Count II), and extermination as a crime against humanity (Count III).[2084] Ndahimana denied all the charges.[2085]

7. On 3 February 2010, based on the 3 July 2001 confirmation of the Indictment against Ndahimana, and the fact that the amendment sought would bring correction and clarity to the confirmed Indictment, the Chamber granted leave for the Prosecutor to file an Amended Indictment.[2086] The Prosecution then filed the Amended Indictment on 5 February 2010.[2087] The

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[2077] Indictment, 20 June 2001.
[2078] Indictment Confirmation Memorandum from ICTR Prosecutor, 3 July 2001.
[2079] Warrant of Arrest and Order for Transfer, 4 July 2000.
[2080] Decision on the Prosecutor's *Ex Parte* Request for Search, Seizure Arrest and Transfer, 4 July 2001.
[2081] Decision on the Prosecutor's *Ex Parte* Request to Rescind the Non-Disclosure Order of 4 July 2001 relating to the Indictment and Warrant of Arrest, 21 December 2001.
[2082] T. 28 September 2009 p. 12.
[2083] Scheduling Order under Rule 54 of the Rules of Procedure and Evidence, 4 November 2009.
[2084] Amended Indictment, 16 November 2009.
[2085] *Ndahimana, Exception Préjudicielle*, 10 November 2009.
[2086] Decision on Prosecutor's Request for Leave to File an Amended Indictment under Rule 50 of the Rules of Procedure and Evidence, 3 February 2010.
[2087] Amended Indictment, 5 February 2010.

Chamber thereafter issued a scheduling order to the effect that a further initial appearance by Ndahimana be made on 9 February 2010.[2088]

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PRE-TRIAL PHASE

8. On 4 March 2010 the Chamber granted, in part, the Prosecution's Motion for Protective Measures for its Witnesses and ordered the Prosecution to file confidentially, the list of its witnesses who were already the beneficiaries of protective measures, the contents of the protective measures, and the cases in which such protective orders were issued.[2089]

9. On 5 March 2010, the Defence filed its Motion Alleging Defects in the Amended Indictment.[2090] In its Decision issued on 30 April 2010, the Pre-Trial Chamber found that there were no defects in the Amended Indictment. The Chamber found that the form and *mens rea* for the alleged JCE, as well as the nature of Ndahimana's participation in the alleged JCE, were properly pleaded in the Indictment. It also held that the identity of the alleged members of the JCE was sufficiently pleaded by stating the names and categories of persons involved in the alleged JCE. However, the Prosecution was ordered to "provide more specificity as to the identity of 'others' in paragraphs 15, 17-26 and 29-32 or add the words 'whose identity is unknown' to 'and others'."[2091] On 18 August 2010 the Prosecution re-filed the Amended indictment in the case of *The Prosecutor vs. Grégoire Ndahimana*.[2092]

10. On 15 March 2010, the Prosecution filed its Motion for Judicial Notice,[2093] which was granted by the Chamber on 7 April 2010. In granting the motion, the Chamber took judicial notice of the genocide that occurred in Rwanda in 1994, information about Nyange church and its location, existing Rwandan law, as well as Rwanda's international status in 1994 as a State Party to the Genocide Convention and the Geneva Conventions and their Additional Protocols.[2094]

11. The Prosecution filed its Pre-Trial Brief on 15 March 2010.[2095]

12. On 14 June 2010, the Registrar issued a Decision on the Withdrawal of the Assignment of Beth Susan Lyons, Co-Counsel for Grégoire Ndahimana,[2096] who was then replaced by Mr Wilfred Ngunjiri Nderitu.[2097]

13. The Defence filed an urgent motion to adjourn the trial temporarily on 24 August 2010.[2098] However, the trial commenced as scheduled on 6 September 2010, and because there was a

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[2088] Scheduling Order under Rule 50 and 54 of the Rules of Procedure and Evidence, 8 February 2010.
[2089] Decision on the Prosecution's Motion for Protective measures for its witnesses - Articles 19, 20 and 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence, 4 March 2010.
[2090] Ndahimana Defence Motion on Defects in the Indictment, 5 March 2010.
[2091] Decision on Ndahimana's Motion on Defects in the Amended Indictment, 30 April 2010, paras 4-7, p. 6.
[2092] Amended Indictment (with the addition of "whose identities are unknown," at paragraphs 15,17-26 and 29-32 as ordered by the Trial Chamber in its Rule 72 Decision of 30 April 2010), 18 August 2010.
[2093] Prosecution's Motion for Judicial Notice Pursuant to Rule 94 of the Rules of Procedure and Evidence, 15 March 2010.
[2094] Decision on the Prosecution's Motion for Judicial Notice, 7 April 2010, pp. 5-6.
[2095] Prosecution Pre-Trial Brief, 15 March 2010.
[2096] Decision on the Withdrawal of the Assignment of Beth Susan Lyons as Co-counsel for Grégoire Ndahimana, 14 June 2010.
[2097] Letter from DCDMS, Ref: ICTR-JUD-11-5-2-09-1290/DN Assigning Mr. Wilfred Ngunjiri Nderitu as Co-counsel to Represent the Accused Grégoire Ndahimana, 23 July 2010.
[2098] Urgent Defence Motion for Adjournment of the Hearing of the Trial Pursuant to Article 20 (2) and (4) of the Statute of the ICTR and Request for Convening a Status Conference, 24 August 2010.

informal meeting on 14 September 2010, where all parties came to a satisfactory agreement regarding the trial schedule, the Chamber ruled the Defence's request for a status conference as moot on 15 September 2010.[2099]

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TRIAL PHASE

14. The Prosecution commenced its case on 6 September 2010 and concluded on 19 November 2010.[2100] It presented its witnesses and tendered 65 exhibits into evidence.

15. The Defence filed its Pre-Defence Brief on 7 December 2010.[2101] It commenced its case on 17 January 2011 and concluded on 12 May 2011.[2102] It presented its witnesses and tendered a total of 128 exhibits into evidence.

16. The Trial Chamber granted interim protective measures to Defence witnesses in September 2010.[2103] On 7 December 2010, the Trial Chamber issued its decisions on two Prosecution motions relating to the Particulars of the Alibi and to the Site Visit in Rwanda.[2104] On 14 December 2010, the Trial Chamber ordered the Defence to reduce its witness list.[2105] In February 2011, the Chamber allowed the Defence to vary its witness list,[2106] but denied the Defence request to hear certain witnesses by video link.[2107] The Chamber further granted the Defence's Motion for Variation of Its Witness List and Protective Measures for Its New Witnesses[2108] and later delivered another decision on a Defence Motion to Vary Its Witness List.[2109]

17. On 3 May 2011 the Chamber denied the Defence's motion to admit a witness' testimony under Rule 92*bis* of the Rules.[2110]

18. The Chamber decided to grant a motion by the Defence of Gaspard Kanyarukiga requesting the disclosure of materials from the Trial of Grégoire Ndahimana on 20 January 2011.[2111]

FURTHER PROCEEDINGS

19. From the commencement of this trial on 6 September 2010 and until its conclusion on 12 May 2011, the Trial Chamber sat for a few sessions under Rule 15*bis* due to the concurrent

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[2099] Decision on Defence Motion for Adjournment of the Start of Trial and Request to Convene a Status Conference, 15 September 2010.
[2100] T. 6 September 2010 p. 2; T. 19 November 2010 p. 31.
[2101] Defence Pre-Trial Brief, 7 December 2010.
[2102] T. 17 January 2011 p. 1; T. 12 May 2011 p. 36.
[2103] Interim Order on Protective Measures for Defence Witnesses, 22 September 2010.
[2104] Decision on the Prosecutor's Motion for Particulars of Alibi, 7 December 2010; Decision on the Prosecution's Motion for Site Visits in the Republic of Rwanda, 7 December 2010.
[2105] Order for the Defence to Reduce Its List Of Witnesses (Rules 54 and 73*ter* (D) of the Rules of Procedure and Evidence), 14 December 2010.
[2106] Decision on Defence Motion For Leave to Vary Its Witness List and Correct The Pseudonym of a Witness, 11 February 2011.
[2107] Decision on Defence Motion to Hear the Testimony of Witnesses BX7 and FB1 via Video Link, 25 February 2011.
[2108] Decision on Defence Motion to Vary Its Witness List and Request for Protective Measures for New Witnesses, 31 March 2011.
[2109] Decision on Defence Motion to Vary Its Witness List, 18 April 2011.
[2110] Decision on Defence's Motion for the Admission of Witness Testimony Pursuant to Rule 92*bis* (With Strictly Confidential Annex 1), 3 May 2011.
[2111] Decision on Motion by Gaspard Kanyarukiga for Disclosure of All Material from the Proceedings of Grégoire Ndahimana, 20 January 2011.

assignment of Judge Bakhtiyar Tuzmukhamedov in *The Prosecutor v. Nzabonimana* trial which is on-going at the Tribunal.

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20. The Chamber issued a decision as to which locations were to be inspected on the site visit on 28 April 2011. The parties proposed the locations in Rwanda where the events relating to the trial occurred.[2112] The site visit was conducted between 7-10 June 2011.[2113]

21. The parties both submitted their Closing Briefs on 25 July 2011.[2114] The Closing Arguments by both parties at Trial were heard by the Chamber on 21 and 22 September 2011.[2115]

22. On 19 October 2011, the Trial Chamber issued a scheduling order to notify the parties that the oral summary of its Judgement would be delivered at 11:00 a.m. on 17 November 2011.[2116] The oral summary of this Judgement was read publicly on that date.

[2112] Scheduling Order for Site Visit to Rwanda, Filing of Closing Briefs and Hearing of Closing Arguments, 28 April 2011.
[2113] Report on Site Visit, Ref: ICTR/11-6-04-11/010, 13 June 2011.
[2114] Scheduling Order for Site Visit to Rwanda, Filing of Closing Briefs and Hearing of Closing Arguments, 28 April 2011, p. 8. *See also*, Prosecution Closing Brief, 25 July 2011; Defence Closing Brief, 25 July 2011.
[2115] Scheduling Order for Site Visit to Rwanda, Filing of Closing Briefs and Hearing of Closing Arguments, 28 April 2011, p. 8. *See also*, T. 21 September 2011; T. 22 September 2011.
[2116] Scheduling Order, 19 October 2011, p. 2.

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Annex B: Defined Terms and Jurisprudence

1. DEFINED TERMS AND ABBREVIATIONS[2117]

Church

Nyange church

Defence Closing Brief

The Prosecutor v. Ndahimana, ICTR-2001-68-T, Defence Closing Brief, 25 July 2011

Defence Pre-Trial Brief

The Prosecutor v. Ndahimana, ICTR-2001-68-T, Pre-Defence Brief, Pursuant to Rule 73*ter* of the Rules of Procedure and Evidence, 7 December 2010

ICTR or Tribunal

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

ICTY

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

First Amended Indictment

The Prosecutor v. Ndahimana, ICTR-2001-68-I, Amended Indictment, 16 November 2009

Original Indictment

The Prosecutor v. Ndahimana, ICTR-2001-68-I, Indictment, 20 June 2001

Indictment

The Prosecutor v. Ndahimana, ICTR-2001-68-I, Amended Indictment, 18 August 2010.

JCE

Joint Criminal Enterprise

[2117] According to Rule 2(B), of the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Majority

A majority of the Trial Chamber composed of Judge Bakhtiyar Tuzmukhamedov and Judge Aydin Sefa Akay

MDR

Mouvement Démocratique Républicain

MRND

Mouvement Révolutionnaire National pour la Démocratie et le Développement

n.

footnote

p. (pp.)

page (pages)

para. (paras.)

paragraph (paragraphs)

Parish

Nyange parish

PL

Parti Libéral

Presbytery

Nyange presbytery

Prosecution Closing Brief

The Prosecutor v. Ndahimana, Case No. ICTR-2001-68-T, Prosecutor's Closing Brief, 25 July 2011

Prosecution Pre-Trial Brief

The Prosecutor v. Ndahimana, Case No. ICTR-2001-68-PT, Prosecutor's Pre-Trial Brief, 15 March 2010

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PSD

Parti Social-Democrate

RPA

Rwandan Patriotic Army

RPF

Rwandan (Rwandese) Patriotic Front

Rules

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Second Amended Indictment

The Prosecutor v. Ndahimana, Case No. ICTR-2001-68-I, 5 February 2010

Third Amended Indictment

The Prosecutor v. Ndahimana, ICTR-2001-68-I, Amended Indictment, 18 August 2010

Statute

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

T.

Transcript

UNAMIR

United Nations Assistance Mission for Rwanda

UNDF

United Nations Detention Facility

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2. JURISPRUDENCE

2.1. ICTR

Akayesu

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

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, Trial Chamber 2 September 1998 ("*Akayesu* (TC) Judgement")

Bagilishema

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, Appeals Chamber, 3 July 2002 ("*Bagilishema* (AC) Judgement")

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, Trial Chamber, 7 June 2001 ("*Bagilishema* (TC) Judgement")

Bagosora et al.

The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva, Case No. ICTR-98-41-T, Judgement, Trial Chamber, 18 December 2008 ("*Bagosora et al.* (TC) Judgement")

The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuz and, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006

Bikindi

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

The Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-T, Judgement, Trial Chamber, 2 December 2008 ("*Bikindi* (TC) Judgement")

Gacumbitsi

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, Appeals Chamber, 7 July 2006 ("*Gacumbitsi* (AC) Judgement")

Gatete

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-T, Judgement, Trial Chamber, 31 March 2011 ("*Gatete* (TC) Judgement")

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The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Trial Chamber, 17 November 2008

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Kajelijeli

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, Appeals Chamber, 23 May 2005 ("*Kajelijeli* (AC) Judgement")

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement, Trial Chamber, 1 December 2003 ("*Kajelijeli* (TC) Judgement")

Kambanda

The Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgement, Trial Chamber, 4 September 1998 ("*Kambanda* (TC) Judgement")

Kamuhanda

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

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Judgement, Trial Chamber, 22 January 2004 ("*Kamuhanda* (TC) Judgement")

Kanyarukiga

Gaspard Kanyarukiga v. The Prosecutor, Case No. ICTR-02-78-AR73-2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010

Karemera et al.

The Prosecutor v. Karemera et al, Case No. ICTR-98-44-T, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment, 19 October 2006

Karera

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, Appeals Chamber, 2 February 2009 ("*Karera* (AC) Judgement")

The Prosecutor v. François Karera, Case No. ICTR-01-74-T, Judgement and Sentence, Trial Chamber, 7 December 2007 ("*Karera* (TC) Judgement")

Kayishema and Ruzindana

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement, Appeals Chamber, 1 June 2001 ("*Kayishema and Ruzindana* Judgement (AC)")

NM

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, Trial Chamber, 21 May 1999 ("*Kayishema and Ruzindana* (TC) Judgement")

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Mpambara

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

Musema

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, Appeals Chamber, 16 November 2001 ("*Musema* (AC) Judgement")

The Prosecutor v Alfred Musema, Case No. ICTR-96-13-T, Judgement, Trial Chamber, 27 January 2000 ("*Musema* (TC) Judgement")

Muvunyi

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-A, Judgement, Appeals Chamber, 29 August 2008 ("*Muvunyi I* (AC) Judgement")

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-A, Judgement, Appeals Chamber, 1 April 2011 ("*Muvunyi II* (AC) Judgement")

Nahimana et al.

Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, Appeals Chamber, 28 November 2007 ("*Nahimana et al.* (AC) Judgement")

The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-T, Judgement and Sentence, Trial Chamber, 3 December 2003 ("*Nahimana et al.* (TC) Judgement")

Nchamihigo

Simeon Nchamihigo v. The Prosecutor, Case No. ICTR-2001-63-A, Judgement, Appeals Chamber, 18 March 2010 ("*Nchamihigo* (AC) Judgement")

The Prosecutor v. Simeon Nchamihigo, Case No. ICTR-2001-63-T, Judgement, Trial Chamber, 12 November 2008 ("*Nchamihigo* (TC) Judgement")

Ndahimana

The Prosecutor v. Grégoire Ndahimana, Case No. ICTR-2001-68, Exception Préjudicielle pour Vices de Form L'acte D'accusation Fondée sur l'Article 72 (A) (ii) du Reglement de Procédure et de Preuve, 9 November 2009 ("*Ndahimana, Exception Préjudicielle*")

VM

The Prosecutor v. Grégoire Ndahimana, Case No. ICTR-2001-68-PT, The Prosecutor's Pre-Trial Brief, 15 March 2010 ("Prosecution Pre-Trial Brief")

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The Prosecutor v. Grégoire Ndahimana, ICTR-2001-68-PT, Defence Motion on Defects in the Amended Indictment pursuant to Rule 72, 5 March 2010

The Prosecutor v. Grégoire Ndahimana, ICTR-2001-68-PT, Decision on Ndahimana's Motion on Defects in the Amended Indictment, 30 April 2010 ("Decision on Defects in the Amended Indictment")

The Prosecutor v. Grégoire Ndahimana, Case No. ICTR-2001-68-I, Amended Indictment, 18 August 2010 ("Indictment")

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ANNEX C: INDICTMENT

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

THE PROSECUTOR

AGAINST

GRÉGOIRE NDAHIMANA

Case No. ICTR-2001-68-I

AMENDED INDICTMENT

I. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute of the Tribunal") charges:

Grégoire NDAHIMANA

With:

Count I	**Genocide**
Count II	**Alternatively to Count I, Complicity in Genocide**
Count III	**Extermination as a Crime against Humanity**

II. THE ACCUSED

1. **Grégoire NDAHIMANA** was born in 1952 in KIVUMU commune.

2. **Grégoire NDAHIMANA** was at all times referred to in this indictment the *bourgmestre* of KIVUMU commune, KIBUYE prefecture, Republic of Rwanda.

3. During the events which are the subject of this indictment, Nyange Parish was located in KIVUMU commune, KIBUYE prefecture, Republic of Rwanda. Nyange Church had a seating capacity of 1500 to 2000 persons.

III. CHARGES AND CONCISE STATEMENT OF FACTS

4. Between 1 January and 31 December 1994, citizens native to Rwanda were classified according to the following ethnic or racial classifications: Tutsi, Hutu and Twa.

5. Between 6 April and 17 July 1994, throughout Rwanda, there were widespread or systematic attacks against the civilian population based on Tutsi ethnic or racial identification, or perceived sympathies with the Tutsi. As a result of these attacks, large numbers of ethnically or racially identified Tutsis and moderate Hutus were killed.

6. Between 6 April and 17 July 1994, genocide against the Tutsi group occurred in Rwanda.

7. The general allegations contained in paragraphs 4 through 6 above are incorporated into each of the allegations set forth below.

Counts I and II: GENOCIDE, or alternatively, COMPLICITY IN GENOCIDE

8. The Prosecutor of the International Criminal Tribunal for Rwanda charges **Grégoire NDAHIMANA** with **GENOCIDE**, a crime stipulated in Article 2(3)(a) of the Statute, in that on or between the dates of 6 April 1994 and 30 April 1994, in KIVUMU commune, KIBUYE prefecture, Republic of Rwanda, **Grégoire NDAHIMANA** was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population with intent to destroy, in whole or in part, a racial or ethnic group, as such, as outlined in paragraphs 13 through 33.

9. The Prosecutor of the International Criminal Tribunal for Rwanda charges **Grégoire NDAHIMANA** with **COMPLICITY IN GENOCIDE**, a crime stipulated in Article 2(3)(e) of the Statute, in that on or between the dates of 6 April 1994 and 30 April 1994 in KIVUMU commune, KIBUYE prefecture, Republic of Rwanda, **Grégoire NDAHIMANA** was responsible for killing or causing serious bodily or mental harm to members of the Tutsi racial or ethnic group with intent to destroy, in whole or in part, the Tutsi racial or ethnic group or with knowledge that other people intended to destroy, in whole or in part, the Tutsi racial or ethnic group, as such, and that his subordinates would contribute to the crime of genocide, as outlined in paragraphs 13 through 33.

Individual Criminal Responsibility under 6(1)

10. Pursuant to Article 6(1) of the Statute, the accused **Grégoire NDAHIMANA** is individually responsible for the crime of genocide or alternatively complicity in genocide because he planned, instigated, ordered, committed or otherwise aided and abetted in the preparation or execution of these crimes. With respect to the commission of these crimes, **Grégoire NDAHIMANA** ordered those over whom he had authority as a result of his position described in paragraph 2 above, and he instigated and aided and abetted those over whom he did not have authority.

11. In addition, the accused **Grégoire NDAHIMANA** willfully and knowingly participated in a joint criminal enterprise whose common purpose was the commission of genocide against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsi in KIVUMU commune, KIBUYE prefecture. To fulfill the joint criminal purpose, the accused acted with others including Athanase SEROMBA, Parish Priest of Nyange, Gaspard KANYARUKIGA, an influential Hutu businessman, Fulgence KAYISHEMA, Judicial Police Inspector of KIVUMU commune, Judge Joseph HABIYAMBERE, President of the Canton Court, Gilbert Rugwizangoga KANANI, an Assistant *bourgmestre*, Védaste MURANGWABUGABO, also known as Védaste MUPENDE, an Assistant *bourgmestre*, Télesphore NDUNGUTSE, a Teacher, Anasthase RUSHEMA, a Teacher, Christophe MBAKILIREHE, Brigadier of KIVUMU commune, Théophile RUKARA, an army reservist, conseillers such as Jean Marie Vianney HABARUGIRA, conseiller of Nyange sector, Laurent SINDABYEMERA, conseiller of Sanga sector, Ferdinand MUNYARUKATO, conseiller of Ngobagoba secteur, other conseillers, gendarmes, the Interahamwe militia, communal policemen, and other Hutu civilians, all such actions being taken either directly or through subordinates, between the period of 6 April 1994 to 30 April 1994.

Individual Criminal Responsibility under 6(3)

12. Pursuant to Article 6(3) of the Statute, the accused **Grégoire NDAHIMANA** is responsible for the crimes of genocide and complicity in genocide because specific criminal acts were committed by subordinates of the accused and the accused had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. **Grégoire NDAHIMANA** is responsible for the acts of his de jure and de facto subordinates in KIVUMU commune, including but not limited to Nyange Parish between the period of 6 April 1994 to 30 April 1994. The subordinates of **Grégoire NDAHIMANA** include but are not limited to: Gilbert Rugwizangoga KANANI, an Assistant *bourgmestre*, Védaste MURANGWABUGABO also known as Védaste MUPENDE, an Assistant *bourgmestre*, Fulgence KAYISHEMA, the Judicial Police Inspector, Christophe MBAKILIREHE, Brigadier of KIVUMU commune, conseillers such as Laurent SINDABYEMERA, conseiller of Sanga sector, Jean Marie Vianney HABARUGIRA, conseiller of Nyange sector, other conseillers, communal policemen, communal employees, gendarmes, interahamwe and other Hutu civilians.

CONCISE STATEMENT OF FACTS FOR COUNTS I AND II

13. Following the death of the Rwandan President on 6 April 1994, Télesphore NDUNGUTSE led attacks against Tutsi civilians in their homes in KIVUMU commune, killing Martin KAREKEZI, Thomas MWENDEZI and some members of the family of Grégoire NDAKUBANA in furtherance of the joint criminal enterprise referred to in paragraph 11 of the indictment.

14. Subsequent to the said attacks, **Grégoire NDAHIMANA** and other members of the joint criminal enterprise ordered that Tutsi civilians be directed to the Kivumu Communal Office and Nyange Parish in order to exterminate them.

15. From 8 April to 16 April 1994 Grégoire NDAHIMANA, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA, Védaste Murangwabugabo also known as Védaste MUPENDE, Laurent SINDABYEMERA, Jean Marie Vianney HABARUGIRA and others whose identities are unknown, attended several meetings at the Kivumu Communal Office, various locations in Nyange Parish such as the Presbytery, and the CODECOKI and areas near to it. The object of these meetings was to plan the extermination of the Tutsis in KIVUMU commune.

16. On or about 10 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA and other members of the joint criminal enterprise attended a meeting at the Kivumu Communal Office in order to plan the extermination of the Tutsis and to request gendarmes from KIBUYE prefecture to join in the killings.

17. On or about 11 April 1994, **Grégoire NDAHIMANA**, Fulgence KAYISHEMA, Télesphore NDUNGUTSE, Védaste MURANGWABUGABO also known as Védaste MUPENDE, *conseillers* and others whose identities are unknown held a meeting at the Kivumu Communal Office at which it was decided to requisition a vehicle belonging to a Tutsi trader named Aloys RWAMASIRABO, which Fulgence KAYISHEMA and others used to transport assailants to Nyange Parish and to make announcements encouraging the population to attack Tutsis.

18. On or about 11-13 April 1994, **Grégoire NDAHIMANA**, Fulgence KAYISHEMA, Télesphore NDUNGUTSE, Védaste MURANGWABUGABO also known as Védaste MUPENDE and others whose identities are unknown decided to move all the Tutsis at the Kivumu Communal Office to Nyange Parish, and to send gendarmes to Nyange Parish to confine the Tutsis in furtherance of the joint criminal enterprise.

19. On or about 11-13 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA and others whose identities are unknown met at the Presbytery and the Kivumu Communal Office and decided that all Tutsi refugees at Nyange Parish should be moved into Nyange Church. In furtherance of the joint criminal enterprise to kill the Tutsis, Athanase SEROMBA ordered that the Tutsis be moved to Nyange Church where communal policemen, gendarmes, Interahamwe and Hutu civilians confined the refugees preventing them from leaving.

20. On or about 10-13 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA, Joseph HABIYAMBERE, Christophe MBAKILIREHE, Télesphore NDUNGUTSE, Gilbert Rugwizangoga KANANI and others whose identities are unknown held meetings at the Kivumu Communal Office and the Presbytery. Immediately following these meetings, Christophe MBAKILIREHE, Gilbert Rugwizangoga KANANI and other members of

the joint criminal enterprise disarmed the refugees in Nyange Church in furtherance of the plan to attack and kill the Tutsi refugees.

21. On or about 13-16 April 1994, **Grégoire NDAHIMANA** made several vehicles available to his subordinates such as Fulgence KAYISHEMA and Télesphore NDUNGUTSE to transport assailants to Nyange Parish. These assailants joined other killers who included interahamwe, communal policemen, gendarmes and others whose identities are unknown in killing Tutsi refugees at Nyange Parish. **Grégoire NDAHIMANA** as *bourgmestre* of KIVUMU commune knew or had reason to know of the acts of his subordinates but he failed to prevent or punish their actions.

22. On or about 13 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA and others whose identities are unknown held a meeting at the Presbytery to plan the extermination of the Tutsis. On that same day, the assailants launched an attack against the Tutsi refugees at the instigation of Gaspard KANYARUKIGA.

23. On or about 14 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA, Joseph HABIYAMBERE, Christophe MBAKILIREHE and others whose identities are unknown met at the Presbytery. After this meeting, some Tutsi refugees told **Grégoire NDAHIMANA** of the attacks that had been launched against them. **Grégoire NDAHIMANA** stated that the Tutsis were *inyenzi* who had killed the President and he refused to assist them. Thereafter, the subordinates of **Grégoire NDAHIMANA** such as the communal policemen, gendarmes, Interahamwe and other assailants surrounding the parish launched an attack against the Tutsi refugees in the church. **Grégoire NDAHIMANA** as *bourgmestre* of KIVUMU commune knew or had reason to know of the acts of his subordinates but he failed to prevent or punish their actions.

24. On or about 14 April 1994, **Grégoire NDAHIMANA** presided over a public meeting held at the Nyange market square that was attended by Gilbert Rugwizangoga KANANI, Christophe MBAKILIREHE, Joseph HABIYAMBERE, Fulgence KAYISHEMA and others whose identities are unknown. At that meeting, Gaspard KANYARUKIGA instigated the crowd to kill the Tutsis at Nyange Church.

25. On or about 15 April 1994, **Grégoire NDAHIMANA** and his subordinates, Fulgence KAYISHEMA, Christophe MBAKILIREHE, Télesphore NDUNGUTSE, Védaste MURANGWABUGABO also known as Védaste MUPENDE and others whose identities are unknown held meetings at the Presbytery, the CODECOKI and in front of Gaspard KANYARUKIGA's pharmacy. Following these meetings, **Grégoire NDAHIMANA** ordered the communal policemen, gendarmes, interahamwe, an army reservist named Théophile RUKARA and other assailants whose identities are unknown, to 'start working'. The assailants launched an attack against the Tutsis seriously injuring and killing many of them. Jean Marie Vianney HABARUGIRA led one of the groups that attacked the Tutsis. **Grégoire NDAHIMANA** knew or had reason to know of the acts of his subordinates and failed to prevent or punish these actions.

26. During the attack on 15 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA and others whose identities are unknown were present, ordering, instigating and supervising the assailants, and aided and abetted the assailants by providing them with weapons and fuel in an attempt to burn the Tutsi refugees in the church. However, the attempt was not successful, leading **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA and others whose identities are unknown to hold a meeting at the Presbytery to plan further attacks on the Tutsis.

27. On or about 15 April 1994, **Grégoire NDAHIMANA** told the assailants that they should cover themselves in banana leaves to be easily distinguishable from the refugees they were about to attack in furtherance of the plan to kill the Tutsi refugees.

28. On or about 15 April 1994, members of the joint criminal enterprise ordered that the bodies of the Tutsi victims killed during the attacks be buried in mass graves at Nyange Parish and surrounding areas.

29. On or about 16 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA and others whose identities are unknown met at the Presbytery. After this meeting, **Grégoire NDAHIMANA** started shooting at the refugees thereby signaling the assailants to launch a large scale attack on the Tutsi refugees.

30. On or about 16 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA, Joseph HABIYAMBERE, Télesphore NDUNGUTSE, Anasthase RUSHEMA, Gilbert Rugwizangoga KANANI, Védaste MURANGWABUGABO also known as Védaste MUPENDE, Jean Marie Vianney HABARUGIRA and others whose identities are unknown met, planned and mutually agreed to kill all of the Tutsi refugees in Nyange Church by destroying it.

31. On 16 April 1994, **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA and others whose identities are unknown ordered the assailants to destroy Nyange Church using a bulldozer, killing about 2000 Tutsi refugees inside. **Grégoire NDAHIMANA** was present during the demolition of the church and was instigating the assailants to kill the Tutsi refugees and supervising the attacks.

32. After the destruction of the Church, the authorities, including **Grégoire NDAHIMANA**, Athanase SEROMBA, Fulgence KAYISHEMA, Gaspard KANYARUKIGA and others whose identities are unknown went to the Presbytery to celebrate by sharing drinks.

33. On or about 16 April 1994, after the destruction of the Church, the bodies of the Tutsis killed at Nyange Parish were buried in mass graves at Nyange Parish and surrounding areas.

Count III: EXTERMINATION AS A CRIME AGAINST HUMANITY

34. The Prosecutor of the International Criminal Tribunal for Rwanda charges **Grégoire NDAHIMANA** with **EXTERMINATION as a CRIME AGAINST HUMANITY**, as stipulated in Article 3(b) of the Statute, in that on or between the dates of 6 April 1994 and 30 April 1994, in KIVUMU commune, KIBUYE prefecture, Rwanda, **Grégoire NDAHIMANA** with intent to participate in the killing of an number of individuals and knowing that his action was part of a vast murderous enterprise, was responsible for planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of the killing of the civilian population as part of a widespread or systematic attack against that civilian population on political ethnic or racial grounds, as follows.

Individual Criminal Responsibility under 6(1)

35. Pursuant to Article 6(1) of the Statute, the accused **Grégoire NDAHIMANA** is individually responsible for the crime of extermination as a crime against humanity because he planned, instigated, ordered, committed or otherwise aided and abetted in the preparation or execution of these crimes. With respect to the commission of these crimes, **Grégoire NDAHIMANA** ordered those over whom he had authority as a result of his position described in paragraph 2 above, and he instigated and aided and abetted those over whom he did not have authority.

36. In addition, the accused Grégoire NDAHIMANA willfully and knowingly participated in a joint criminal enterprise whose common purpose was the commission of extermination as a crime against humanity against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsi in KIVUMU commune, KIBUYE prefecture. To fulfill the joint criminal purpose, the accused acted with authorities of KIVUMU commune such as Athanase SEROMBA, Parish Priest of Nyange, Gaspard KANYARUKIGA, an influential Hutu businessman, Fulgence KAYISHEMA, Judicial Police Inspector of KIVUMU commune, Judge Joseph HABIYAMBERE, President of the Canton Court, Gilbert Rugwizangoga KANANI, an Assistant bourgmestre, Védaste Murangwabugabo also known as Védaste MUPENDE, an Assistant bourgmestre, Télesphore NDUNGUTSE, a Teacher, Anasthase RUSHEMA, a Teacher, Christophe MBAKILIREHE, Brigadier of KIVUMU commune, Théophile RUKARA, an army reservist, conseillers such as Jean Marie Vianney HABARUGIRA, conseiller of Nyange sector, Laurent SINDABYEMERA, conseiller of Sanga sector, Ferdinand MUNYARUKATO, conseiller of Ngobagoba sector, other conseillers, gendarmes, the Interahamwe militia, communal policemen, and other Hutu civilians all such actions being taken either directly or through subordinates, between the period of 6 April 1994 to 30 April 1994.

Individual Criminal Responsibility under 6(3)

37. Pursuant to Article 6(3) of the Statute, the accused Grégoire NDAHIMANA is responsible for the crime of extermination as a crime against humanity because specific criminal acts were committed by subordinates of the accused and the accused

had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. Grégoire NDAHIMANA is responsible for the acts of his de jure and de facto subordinates in KIVUMU commune, including but not limited to Nyange Parish between the periods of 6 April 1994 to 30 April 1994. The subordinates of Grégoire NDAHIMANA include but are not limited to: Gilbert Rugwizangoga KANANI, an Assistant bourgmestre, Védaste Murangwabugabo, also known as Védaste MUPENDE, an Assistant bourgmestre, Fulgence KAYISHEMA, the Judicial Police Inspector, Christophe MBAKILIREHE, Brigadier of KIVUMU commune, conseillers such as Laurent SINDABYEMERA, conseiller of Sanga sector, Jean Marie Vianney HABARUGIRA, conseiller of Nyange sector, other conseillers, communal policemen, communal employees, gendarmes, Interahamwe and other Hutu civilians.

38. The Prosecutor relies upon the allegations in paragraphs 13 through 33 in support of the charge of extermination as a crime against humanity.

The acts and omissions of Grégoire NDAHIMANA detailed herein are punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

Dated in Arusha this 18th day of August 2010

Hassan Bubacar Jallow
The Prosecutor

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Dates:	Transmitted: **18 January 2012**		Document's date: 30 **December 2011**	
No. of Pages:	**274**	**Original Language:**	☒ English	☐ French ☐ Kinyarwanda
Title of Document:	**JUDGEMENT AND SENTENCE**			

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