



ICTR-05-82-T
06-08-2010
(2346 - 2172)

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A

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Khalida Rachid Khan, presiding
Judge Lee Gacuiga Muthoga
Judge Aydin Sefa Akay

Registrar: Adama Dieng

Date: 3 August 2010

THE PROSECUTOR

v.

Dominique NTAWUKULILYAYO

Case No. ICTR-05-82-T

2010.08.03
Adama Dieng

JUDGEMENT AND SENTENCE

Office of the Prosecutor:

Charles Adeogun-Phillips
Ibukunolu Alao Babajide
Thembile Segoete

Counsel for the Defence:

Maroufa Diabira
Dorothee Le Fraper du Hellen

jeff

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CHAPTER I: INTRODUCTION

1. OVERVIEW

(i) Introduction

1. The Accused in this case is Dominique Ntawukulilyayo, born in 1942 in Mubuga commune, Gikongoro prefecture, Rwanda. In 1994, he was the sub-prefect of Gisagara sub-prefecture in Butare prefecture. The Prosecution has charged him with genocide (Count I), and complicity in genocide (Count II), as well as direct and public incitement to commit genocide (Count III). The Defence disputes all charges.

2. The Trial commenced on 6 May 2009 and closed on 17 December 2009. The Prosecution presented 12 witnesses while the Defence called 23, including Ntawukulilyayo. Closing arguments were heard on 14 June 2010.

3. The Chamber is not unanimous with respect to Count I of the Indictment but is unanimous with respect to Counts II and III.¹

(ii) Gisagara Market and Kabuye Hill, 20 to 25 April

4. The Indictment contains a series of allegations concerning events at Gisagara market and Kabuye hill between 20 and 25 April 1994. The evidence clearly establishes that on 20 April, hundreds to thousands of Tutsis and their families fled attacks in their localities and sought refuge at Gisagara market in Ndora commune. Some of these displaced persons tried to leave the market that evening and the following morning, but were stopped by law enforcement personnel and forced to return to Gisagara market.

5. The evidence further establishes that on the morning of 21 April, President Théodore Sindikubwabo arrived in Gisagara and held a brief public meeting near the sub-prefecture office, which was attended by Ntawukulilyayo and others. In his brief address, Sindikubwabo referred to the 1959 revolution, during which ethnic violence erupted between Tutsis and Hutus. From that day and through 23 April, many of the refugees left Gisagara market for Kabuye hill. There, an extensive assault on the refugees was carried out by armed civilians, police and military personnel. Hundreds, and possibly, thousands of men, women, children and the elderly, were killed or seriously injured.

6. The allegations against Ntawukulilyayo with respect to events at Gisagara market and Kabuye hill are considered separately.

(a) Interception of Refugees Fleeing to Burundi

7. The Indictment alleges that between 20 and 21 April, Tutsi refugees who attempted to leave Gisagara market for Burundi were prevented from doing so by soldiers and communal police on the orders of Ntawukulilyayo. The Chamber heard consistent evidence that refugees left Gisagara market early in the morning on 21 April but, were stopped some distance away by law enforcement personnel. They returned to Gisagara market.

¹ The Judgement is rendered pursuant to Rule 88 (C) of the Rules of Procedure and Evidence. An oral summary of it was rendered on 3 August 2010. The written version was filed on 6 August 2010 after the completion of the editorial process.



8. The evidence, however, does not establish beyond reasonable doubt that Ntawukulilyayo had any role in the interception and the forcible return of refugees to Gisagara market. Furthermore, it is not established that when the interception occurred, a plan was in place to gather Tutsis at the market for the express purpose of killing them. Accordingly, this allegation is not proven.

(b) Orders to go to Kabuye Hill

9. The Indictment alleges that around 23 April, in the afternoon, Ntawukulilyayo ordered Tutsis at Gisagara market to move to Kabuye hill to be protected and fed. However, when they arrived, they were attacked by various assailants and killed. The Prosecution presented evidence of Ntawukulilyayo's involvement in instructing refugees at Gisagara market to go to Kabuye hill on 21, 22 and 23 April. The Chamber has considered the evidence of alleged orders on each day.

10. With respect to 21 April, three Prosecution witnesses testified that Ntawukulilyayo gave orders to refugees to move to Kabuye hill. However, two distinct narratives emerge from their evidence. The Chamber considers that their testimonies, when viewed in isolation and as a whole, are insufficiently reliable to support findings beyond reasonable doubt.

11. Turning to orders on 22 April, one Prosecution witness, who was among the refugees at Gisagara market, testified that she saw communal police leaving Ntawukulilyayo's home. They subsequently ordered her and other refugees to move to Kabuye hill. She concluded that the police gave these orders pursuant to instructions from Ntawukulilyayo. The Chamber has doubts about her observations. They also lack specific corroboration. This evidence cannot support findings beyond reasonable doubt.

12. With respect to orders on 23 April, the Chamber, Judge Akay dissenting, finds that two Prosecution witnesses provided compelling and largely corroborated evidence that on the early afternoon of that day, Ntawukulilyayo and Callixte Kalimanzira came to Gisagara market together.² The Majority finds that communal police gathered remaining refugees, mostly Tutsis, for the purposes of directing them to Kabuye hill. The refugees, who were promised by Ntawukulilyayo that they would be fed and protected on the hill, complied with his instructions and were escorted towards Kabuye hill by communal police. The testimonies of Defence witnesses were of limited probative weight and insufficient to raise doubts with respect to the Prosecution evidence. Accordingly, the Majority finds that this allegation is proven.

(c) Orders to Search Tutsi Homes

13. The Indictment alleges that between 21 and 25 April, Ntawukulilyayo ordered civilians to search Tutsi homes for the purposes of assembling them at Kabuye hill where they were ultimately killed.

14. The Prosecution relied on two witnesses. Their accounts referred to separate events and did not offer direct corroboration. The Chamber has reservations about the reliability of both witnesses. Consequently, this allegation has not been proven beyond reasonable doubt.

² The "Majority" of the Trial Chamber is composed of Judge Khalida Rachid Khan, presiding, and Judge Lee Gacuga Muthoga.



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(d) *Attack on Kabuye Hill*

15. The Indictment alleges that between 21 and 25 April, Ntawukulilyayo transported ammunition, soldiers and gendarmes from Butare to Kabuye hill. It further alleges that around 23 April, in the late afternoon, or early evening, Ntawukulilyayo arrived on Kabuye hill with Callixte Kalimanzira in vehicles full of gendarmes. There, soldiers, gendarmes, communal police and armed civilians participated in the killing of as many as 25,000 Tutsi refugees on Kabuye hill.

16. One Prosecution witness testified that Ntawukulilyayo arrived at Kabuye hill on Friday 22 April with soldiers. The Chamber has considered this evidence insufficiently reliable. Three Prosecution witnesses, who had sought refuge at Kabuye hill, testified that, on 23 April, Ntawukulilyayo arrived with armed security personnel, including soldiers. Two observed Ntawukulilyayo with Callixte Kalimanzira. Ntawukulilyayo's presence was brief. The security personnel who had accompanied him to Kabuye hill joined other assailants and attacked the refugees there.

17. The Chamber, Judge Akay dissenting, has found the evidence of these three witnesses consistent and compelling. Having reviewed all relevant Defence evidence, the Majority finds that it carries limited probative weight and does not raise doubt.

18. Accordingly, the Majority finds as follows: Ntawukulilyayo arrived at Kabuye hill, with Callixte Kalimanzira and soldiers in the late afternoon or early evening of 23 April. Ntawukulilyayo stopped at the hill, allowing the soldiers to exit. Shortly thereafter, he and Kalimanzira departed, but the soldiers who had accompanied them, joined others, including communal police, in an extensive assault on the civilian refugees using firearms and other weapons. The record does not establish that Ntawukulilyayo returned to the hill. However, the coordinated attacks continued into the following day. As a result of the attacks, hundreds and possibly thousands of civilians, mainly Tutsis, were killed and injured.

(iii) *Roadblocks*

19. The Indictment alleges that within a few days of President Habyarimana's death on 6 April, several roadblocks were established in Gisagara sub-prefecture and run by armed civilians and other subordinates of Ntawukulilyayo. One was the "Jaguar" roadblock near the Gisagara Catholic Church; another near Ntawukulilyayo's residence; and a third near the trading centre on the road towards Musha. During the period 6 April and 17 July, the roadblocks were used to prevent Tutsis escaping from the area or to kill them. Many Tutsis were killed at these roadblocks. According to the Prosecution, Ntawukulilyayo was aware of and acquiesced to the establishment of roadblocks and in some instances passed through them, congratulating and encouraging killers to continue their work.

20. The Prosecution has conceded that no specific evidence was led in support of the three roadblocks identified in the Indictment. It relies primarily on the testimony of one witness. It has also conceded that his evidence is not clearly pleaded in the Indictment.

21. The Chamber has found that the Defence has not received clear and consistent notice of this evidence. As it is highly prejudicial, the Chamber has excluded it. The Chamber has considered all the other evidence relevant to roadblocks and found it insufficient to support findings beyond reasonable doubt.



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(iv) *Meeting in Gikore, Mudabori, Nyaruhengeri Commune, 24 April*

22. The Indictment alleges that, around 24 April, Ntawukulilyayo addressed a public gathering in Gikore, Mudabori, Nyaruhengeri commune. He promised houses, land and money to those who killed the most Tutsis, thereby inciting them to do so.

23. The Prosecution presented one witness, who testified about a gathering in Gikore on 15 May. The Prosecution conceded that his testimony was inconsistent with amendments made to the Indictment for the purpose of clarifying the date. The Chamber has also considered the evidence but found that it cannot support findings beyond reasonable doubt.

(v) *Meeting in Muyaga Commune, End May*

24. The Indictment alleges that near the end of May, Ntawukulilyayo urged those gathered in Muyaga commune in front of the deputy *bourgmestre*'s house to search for and kill Tutsis before the arrival of the RPF.

25. The Prosecution relied on the evidence of two witnesses. The Chamber has considered that they discussed different events. Having reviewed the merits of their accounts, the Chamber finds their evidence insufficient to support findings beyond reasonable doubt. Accordingly, this allegation has not been proven.

(vi) *Meeting in Kirarambogo, Nyabitare sector, 25 May*

26. The Indictment alleges that around 25 May, Ntawukulilyayo attended a meeting in Kirarambogo in Nyabitare sector, where other officials instructed those present to flush out and kill all surviving Tutsis.

27. The Prosecution relied on the testimony of one witness. The Chamber has considered his uncorroborated evidence insufficiently reliable to support findings beyond reasonable doubt. Accordingly, this allegation is not proven.

(vii) *Verdict*

28. All the evidence in support of the three counts, as well as the various modes of responsibility upon which the Prosecution sought to convict Ntawukulilyayo has been considered. The Majority finds Ntawukulilyayo guilty of genocide (Count I) under Article 6 (1) of the Statute by aiding and abetting and ordering the killing of Tutsis at Kabuye hill. It has not found Ntawukulilyayo guilty of genocide for these killings under Article 6 (3) of the Statute. The Chamber finds Ntawukulilyayo not guilty of complicity in genocide (Count II) and direct and public incitement to commit genocide (Count III).

(viii) *Sentence*

29. The Majority has considered the gravity of the crime for which Ntawukulilyayo has been convicted as well as aggravating and mitigating circumstances. Considering the relevant circumstances discussed in the Judgement, it sentences Ntawukulilyayo to a single sentence of 25 years of imprisonment. Ntawukulilyayo will receive credit for time served since his arrest.



2. PRELIMINARY MATTERS

2.1 Notice

2.1.1 Introduction

30. In its Closing Brief, the Defence raises the issue of insufficient notice with respect to several allegations against Ntawukulilyayo arising from the Prosecution evidence.³ In some instances, the Chamber has considered evidence relevant to a particular allegation in the Indictment, but 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. Several notice challenges have already been addressed in prior decisions.⁴ Before considering specific notice issues in this section, the Chamber makes some general observations with respect to the procedural history in this case.

31. On 20 March 2009, the Defence filed a motion alleging defects in the original indictment of 13 June 2005. On 28 April 2009, the Chamber found a number of defects in the indictment. While the Chamber noted that defects in an indictment can be cured by the provision of timely, clear and consistent information, in view of the pre-trial phase of the proceedings, it considered that where any defects were found, it was more appropriate to order the Prosecution to amend the indictment. The purpose was to “ensure that any ambiguity concerning charges against the Accused be removed from the primary charging instrument before the trial commenced”.⁵ In the Chamber’s view, this was a clear indication to the Prosecution that material facts supporting the charges against Ntawukulilyayo should be included in the operative Indictment and that curing would be an exceptional remedy.

32. Between 1 and 19 May 2009, four amended indictments were filed. The first amended indictment, filed on 1 May 2009, did not fully comply with the Chamber’s decision of 28 April 2009. Consequently, on 4 May 2009, the date scheduled for the commencement of trial, the Chamber held a status conference and ordered the Prosecution to ensure compliance with the Chamber’s decision of 28 April 2009, as well as remove any internal inconsistencies remaining in the first amended indictment. Due to the necessity to file a further amended indictment, the proceedings were adjourned until 6 May 2009.⁶

33. A second amended indictment was filed on 4 May 2009, following the status conference. Due to further errors noticed in the indictment, a third amended indictment was filed on 5 May 2009. However, this indictment also failed to comply with the Chamber’s decision of 28 April 2009 and continued to contain errors.⁷ On 6 May 2009, the Chamber held a further status conference, during which it issued an oral warning to the Prosecution pursuant to Rule 46 (A) of the Rules, and found that the filing of three amended indictments

³ Defence Closing Brief, paras. 310-361.

⁴ See Decision on Defence Preliminary Motion Alleging Defect in the Indictment (TC), 28 April 2009; Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber’s Decision of 28 April 2009 (TC), 18 May 2009; Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber’s Decision of 18 May 2009 (TC), 26 June 2009.

⁵ Decision on Defence Preliminary Motion Alleging Defect in the Indictment (TC), 28 April 2009, para. 13.

⁶ Status Conference, T. 4 May 2009, pp. 16, 19.

⁷ See generally Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber’s Decision of 28 April 2009 (TC), 18 May 2009.

since its decision of 28 April 2009, demonstrated a lack of diligence and “serial carelessness”.⁸

34. The operative Indictment was filed on 19 May 2009, pursuant to the Chamber’s decision of 18 May 2009, which ordered the Prosecution to comply with its decision of 28 April 2009. Aspects of the operative Indictment continued to contain errors and also failed to comply with the Chamber’s orders. However, due to the stage of the proceedings, the Chamber did not order the Prosecution to file a further amended indictment.⁹ While some errors remain in the operative Indictment, the Chamber has considered these where necessary when addressing specific Defence challenges to particular Prosecution evidence.¹⁰

35. The Pre-Trial Brief and annexed summaries of witnesses’ anticipated testimonies, were filed on 20 February 2009. A corrigendum to the annex was filed on 23 February 2009 and a revised witness list with annexed witness summaries was filed on 3 April 2009. As these filings were done prior to the amendment process, they refer to the original indictment of 13 June 2005.

2.1.2 Legal Principles

36. 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.¹¹ 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 proceedings, or the exclusion of evidence outside the scope of the indictment.¹² In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.¹³

37. The Appeals Chamber has held that criminal acts that were physically committed by the accused personally 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

⁸ Status Conference, T. 6 May 2009, pp. 1-2, 8.

⁹ See Decision on Defence Motion Alleging Non-Compliance with the Chamber’s Decision of 18 May 2009 (TC), 26 June 2009, paras. 9-12 (striking paragraph 30 of the Indictment).

¹⁰ For example, paragraph 5 of the Indictment, dealing with individual criminal responsibility under Article 6 (1) of the Statute, cites to paragraphs 6 through 22. Paragraphs 17 through 22, however, set forth facts relevant to superior responsibility under Article 6 (3) of the Statute. The Chamber ordered the Prosecution to rectify this error, but it failed to do so. See Decision on Defence Preliminary Motion Alleging Defects in the Indictment (TC), 28 April 2009, para. 42. Moreover, while chapeau paragraphs 24 and 25 cite to themselves, as well as following paragraphs, for containing particulars in support of the count of direct and public incitement to commit genocide, this is a clear error resulting from the failure to amend internal referencing following the addition of a new paragraph 16 about roadblocks to the operative Indictment. Compare the third amended indictment of 5 May 2009, paras. 23-24 and the operative Indictment of 19 May 2009, paras. 24-25.

¹¹ *Muvunyi* Appeal Judgement, para. 18; *Seromba* Appeal Judgement, paras. 27, 100; *Simba* Appeal Judgement, para. 63; *Muhimana* Appeal Judgement, paras. 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49, *Ndindabahizi* Appeal Judgement, para. 16.

¹² *Muvunyi* Appeal Judgement, para. 18; *Ntagerura et al.* Appeal Judgement, para. 27; *Kvočka et al.* Appeal Judgement, paras. 30-31; *Niyitegeka* Appeal Judgement, para. 194; *Kupreškić et al.* Appeal Judgement, para. 92.

¹³ *Muvunyi* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Judgement, para. 326; *Ntagerura et al.* Appeal Judgement, para. 28; *Kvočka et al.* Appeal Judgement, para. 33.



the acts were committed”.¹⁴ Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the “particular acts” or “the particular course of conduct” on the part of the accused which forms the basis for the charges in question.¹⁵

38. When the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6 (3) of the Statute, the indictment should plead: (i) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (ii) the criminal conduct of those others for whom he is alleged to be responsible; (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (iv) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.¹⁶

39. A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 6 (3) of the Statute.¹⁷ The Appeals Chamber has clarified that physical perpetrators of the crimes can be identified by category in relation to a particular crime site.¹⁸

40. The Appeals Chamber has previously stated that “the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue”.¹⁹ Moreover, in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes.²⁰

41. 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.²¹ The principle that a defect in an indictment may be cured is not without limits.²² The Appeals Chamber has held that a Pre-Trial Brief in certain circumstances can provide such information.²³

¹⁴ *Muhimana* Appeal Judgement, para. 76; *Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, citing *Kupreškić et al.* Appeal Judgement, para. 89.

¹⁵ *Ntagerura et al.* Appeal Judgement, para. 25.

¹⁶ *Muvunyi* Appeal Judgement, para. 19; *Nahimana et al.* Appeal Judgement, para. 323; *Ntagerura et al.* Appeal Judgement, para. 26, 152.

¹⁷ *Muvunyi* Appeal Judgement, para. 55; *Blagojević and Jokić* Appeal Judgement, para. 287.

¹⁸ *Simba* Appeal Judgement, paras. 71-72.

¹⁹ *Ntagerura et al.* Appeal Judgement, para. 26 n. 82. See also *Muvunyi* Appeal Judgement, para. 58.

²⁰ *Muvunyi* Appeal Judgement, para. 58; *Muhimana* Appeal Judgement, para. 79; *Gacumbitsi* Appeal Judgement, para. 50; *Kupreškić et al.* Appeal Judgement, para. 89.

²¹ *Muvunyi* Appeal Judgement, para. 20; *Seromba* Appeal Judgement, para. 100; *Simba* Appeal Judgement, para. 64; *Muhimana* Appeal Judgement, paras. 76, 195, 217; *Gacumbitsi* Appeal Judgement, para. 49; *Ntagerura et al.* Appeal Judgement, paras. 28, 65.

²² *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 (AC), 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

2.1.3 Roadblock between Gisagara and Mukande Sectors

42. In support of the counts of genocide and complicity in genocide, the Prosecution Closing Brief refers to the evidence of Witness BAF, who testified that he manned a roadblock between Gisagara and Mukande sectors, about one kilometre from Kabuye hill, where Tutsis were killed.²⁴ He implicated Ntawukulilyayo in its establishment for the purpose of killing Tutsis and alleged that the sub-prefect passed through it on three occasions.²⁵

43. Paragraphs 15, 16 and 23 of the Indictment relate to Ntawukulilyayo's alleged responsibility for the killing of Tutsis at roadblocks. Paragraph 15 identifies three roadblocks within Gisagara sub-prefecture that were allegedly manned by armed civilians and other subordinates of Ntawukulilyayo at locations where Tutsis were killed. The barriers were the "Jaguar" roadblock near the Catholic Church in Gisagara, one near Ntawukulilyayo's residence and one near the trading centre on the road towards Musha. Paragraph 16 details how Ntawukulilyayo is alleged to have committed and/or aided and abetted killings at roadblocks, and paragraph 23 refers to the same three roadblocks but alleges Ntawukulilyayo's responsibility for killings at them as a superior pursuant to Article 6 (3) of the Statute.

44. During its final submissions, the Prosecution conceded that Witness BAF's roadblock was not one of the three expressly identified in paragraph 15. Indeed, it stated that it led no specific evidence with respect to these three barriers.²⁶ In response to the Chamber's question as to whether Ntawukulilyayo received notice of Witness BAF's barrier, the Prosecution pointed to the witness summary of Witness BAF's anticipated testimony, annexed to the Pre-Trial Brief filed on 23 February 2009.²⁷ However, it subsequently conceded that the Chamber could not convict Ntawukulilyayo on the strength of Witness BAF's evidence pursuant to paragraph 15 of the Indictment.²⁸ Nonetheless, the Prosecution later argued that this evidence

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.").

²³ *Muhimana* Appeal Judgement, para. 82; *Gacumbitsi* Appeal Judgement, paras. 57-58; *Ntakirutimana* Appeal Judgement, para. 48; *Naletilić and Martinović* Appeal Judgement, para. 45.

²⁴ Prosecution Closing Brief, paras. 359-365, 378.

²⁵ See Witness BAF, T. 13 May 2009, pp. 65-66, 68, T. 14 May 2009, pp. 2-8; T. 18 May 2009, pp. 17-20, 46-48.

²⁶ Closing Arguments, T. 14 June 2010, pp. 28, 30-31 ("MADAM PRESIDENT: Madam Prosecutor, would you refer to the evidence which supports the allegation in the indictment, paragraph 15 regarding the three roadblocks? MS. SEGOETE: No, there isn't, My Lord. [] No. There isn't [] any evidence from the record specifically referring to any of the roadblocks named in paragraph 15. I concede that, My Lord.").

²⁷ Closing Arguments, T. 14 June 2010, pp. 28-30.

²⁸ Closing Arguments, T. 14 June 2010, pp. 30 ("JUDGE MUTHOGA: [] Now which of these three [roadblocks] do you say is BAF's roadblock? MS. SEGOETE: I concede My Lord, it is not clear from his evidence."), 75 ("MS. SEGOETE: [] inasmuch as paragraph 15 of the Indictment makes references to specific roadblocks that were named and whose locations were named, our evidence [] didn't come out strong enough to say which particular roadblock that Witness BAF talked about. And in those circumstances, I feel that the Chamber cannot convict the Accused on the strength of Witness BAF, as far as it seeks to support paragraph 15 of the Indictment.").



established that Ntawukulilyayo had “knowledge” of roadblocks “in his jurisdiction” and his failure to dismantle them was a sign that he “acquiesced” to their presence.²⁹

45. The Chamber agrees that Indictment paragraph 15 is defective with respect to Witness BAF’s evidence. It does not set forth Witness BAF’s allegation that Ntawukulilyayo ordered his roadblock’s establishment for the purpose of killing Tutsis or its location. Indictment paragraphs 16 and 23, which are also relevant to Ntawukulilyayo’s alleged criminal responsibility for roadblocks, are similarly silent with respect to these details.

46. A summary of Witness BAF’s anticipated evidence, annexed to the Prosecution Pre-Trial Brief, does provide greater detail. It states that Ntawukulilyayo, Callixte Kalimanzira and Fidèle Uwizeye “instructed the population to establish roadblocks”, and specifies that the barrier manned by Witness BAF was located “about 1km from Kabuye hill”. Moreover, referring to the indictment of 13 June 2005, it states that Witness BAF’s evidence would be relied on in support of paragraph 15.³⁰

47. The Chamber has reservations about whether, as a matter of law, the annexed witness summary can cure the defect in the Indictment in this proceeding. As noted above, the Pre-Trial Brief and annex were filed almost three months prior to the operative Indictment of 19 May 2009. Notably, in the *Karera* case, the Appeals Chamber held that defects in the indictment could not be cured by a Pre-Trial Brief, which was filed prior to the amended indictment and which referred to a prior indictment or the draft amended indictment annexed to a motion to amend.³¹ The Chamber is also mindful that where the Appeals Chamber has conducted a curing analysis with respect to defects in an indictment, it has tended to look to *post*-indictment submissions.³² Under the circumstances, the Chamber has doubts that a Pre-Trial Brief and its annexed witness summaries, which were filed almost three months prior to the Indictment and refers to a prior indictment, could provide clear or consistent notice sufficient to cure defects in the operative Indictment.

48. Notwithstanding, when the Chamber considers the issue of notice in the context of the procedural history in this case, additional doubt is created as to whether the information

²⁹ Closing Arguments, T. 14 June 2010, pp. 27-28, 75 (“But I will still say, Your Honours, that the evidence of BAF, taken together with the evidence of Simon Rumashana and UAO, still supports the Prosecution’s contention that the knowledge by the Accused that roadblocks existed in his jurisdiction and him not saying anything about them, addressing them, whether they should be dismantled, or whatever, is a sign that he acquiesced to the presence of those roadblocks inasmuch as they existed from April to June 1994.”).

³⁰ Corrigendum to Annex A of the Prosecutor’s Pre-Trial Brief, 23 February 2009, p. 8, n. 11.

³¹ *Karera* Appeal Judgement, para. 368.

³² See, for example, *Niyitegeka* Appeal Judgement, para. 198 (setting forth the law on curing defective indictments and phrasing it as such to suggest that a defect in the indictment is normally cured by a “subsequent disclosure”); *Gacumbitsi* Appeal Judgement, para. 175 (looking at the sole “post-Indictment” submission referred to by the Prosecution to determine if a defect had been cured); *Niyitegeka* Appeal Judgement, para. 198 (whether a defect in the indictment had been cured by a “subsequent disclosure”); *Ntagerura et al.* Appeal Judgement, para. 164 (the accused was entitled to infer from “post-Indictment filings” that he was not being charged with crimes at Gashirabwoba pursuant to Article 6 (3) of the Statute). In *Nchamihigo*, the Appeals Chamber looked at a Pre-Trial Brief as well as an opening statement that were submitted prior to the operative Indictment to determine if a defect relating to the accused’s role in the attack on Shangi parish had been cured. See *Nchamihigo* Appeal Judgement, paras. 13, 340, Annex B, p. 156. It determined that the information contained in these submissions failed to cure a defect in the indictment, without reaching the question of whether they *could* be used to cure it. *Nchamihigo* Appeal Judgement, paras. 337-344. Ultimately the Appeals Chamber concluded that the indictment was defective and that it “was not *subsequently* cured by the Prosecution”. *Nchamihigo* Appeal Judgement, para. 343 (emphasis added).

contained in the annexed witness summary provided clear or consistent notice of the Prosecution's intention to rely on this evidence in seeking a conviction. In particular, the Chamber recalls its observation in its first defects decision that given the late stage of the amendment process, it was more appropriate to order the Prosecution to amend the indictment to "ensure that any ambiguity concerning charges against the Accused be removed from the primary charging instrument before the trial commenced".³³ Furthermore, two amendments were made based on the Chamber's findings that defects remained with respect to pleadings about Ntawukulilyayo's role in roadblocks.

49. More specifically, the Chamber's decision of 28 April 2009 found paragraph 15 of the original indictment defective as it failed to plead material facts supporting the allegation that Ntawukulilyayo aided and abetted killings of Tutsis at roadblocks within Gisagara sub-prefecture. It required that the Prosecution, "to the extent it [was] able", provide greater detail in this regard.³⁴ While in possession of Witness BAF's summary of anticipated evidence, the Prosecution did not subsequently include in the following indictments Ntawukulilyayo's alleged orders to establish Witness BAF's roadblock, a material fact relevant to considering his responsibility pursuant to aiding and abetting.³⁵ Nor did it include information about the location's barrier although it possessed it. While the degree of specificity of the roadblocks identified in paragraph 15 was not litigated, the Chamber considers that the amendments to the indictment should have also included this information given the central relevance of Witness BAF's evidence in the Prosecution case against Ntawukulilyayo as it related to roadblocks.

50. On 18 May 2009, the Chamber again found that the Prosecution had failed to plead material facts in support of its allegation that Ntawukulilyayo aided and abetted killings at roadblocks in Gisagara sub-prefecture in its third amended indictment. As an example, the Chamber pointed to particular paragraphs in the Pre-Trial Brief that contained allegations that Ntawukulilyayo passed through roadblocks and congratulated killers, which the Prosecution had not included in the third amended indictment. The Chamber expressly noted that because this indictment had been filed after the Pre-Trial Brief, the material facts contained within it were known and should have been included in the primary charging instrument. The Chamber ordered the Prosecution to amend and "include all material facts contained in the Pre-Trial Brief regarding the manner in which the Accused aided and abetted in the killing of Tutsis at roadblocks."³⁶ However, in the operative Indictment filed the following day, the Prosecution still did not include material facts in its possession, namely, Ntawukulilyayo's alleged order to establish Witness BAF's roadblock and its general location.

51. The Chamber recalls that the Prosecution is expected to know its case before proceeding to trial and cannot mould it against the accused in the course of the trial depending on how the evidence unfolds.³⁷ In this instance, the Prosecution was fully aware of material facts central to its case against Ntawukulilyayo for his criminal responsibility as it

³³ Decision on Defence Preliminary Motion Alleging Defect in the Indictment (TC), 28 April 2009, para. 13.

³⁴ Decision on Defence Preliminary Motion Alleging Defects in the Indictment (TC), 28 April 2009, para. 40.

³⁵ The Chamber further considers that Ntawukulilyayo's ordering the establishment of Witness BAF's roadblock would have been equally relevant to Ntawukulilyayo's responsibility pursuant to Article 6 (3) of the Statute.

³⁶ Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber's Decision of 28 April 2009 (TC), 18 May 2009, para. 18.

³⁷ *Muvunyi* Appeal Judgement, para. 18; *Ntagerura et al.* Appeal Judgement, para. 27; *Kvočka et al.* Appeal Judgement, paras. 30-31; *Niyitegeka* Appeal Judgement, para. 194; *Kupreškić et al.* Appeal Judgement, para. 92.

pertained to roadblocks. While it revealed them through an annexed witness summary, it did not include them in any of its subsequently filed indictments, which were amended, in part, for the express purpose of providing the Defence with clear notice of the Prosecution's case against Ntawukulilyayo as it related to roadblocks. Its decision not to do so raises significant doubt that the Accused would have been provided with clear and consistent notice.

52. Moreover, while the Prosecution initially pointed to the annexed witness summary to demonstrate that Ntawukulilyayo received notice, it subsequently conceded that the Chamber could not convict on the basis of his evidence as far as it relates to paragraph 15. As already noted, paragraph 23 of the Indictment contains the same material facts as those pleaded in paragraph 15. Nonetheless, in its final submissions, the Prosecution stated that it relies on this evidence to establish that Ntawukulilyayo had "knowledge" of roadblocks, and "acquiesced" to their presence.³⁸ It, therefore, appears to rely on paragraph 16 of the Indictment, which alleges that Ntawukulilyayo was "aware" of and "acquiesced" to the establishment of roadblocks. However, these submissions create further confusion when considered in the context of amendments to the Indictment. Paragraph 16 was only added to the Indictment pursuant to the Chamber's decisions of 28 April and 18 May 2009, for the purposes of providing greater specificity with respect to the allegations contained in paragraph 15.³⁹ It was not intended to expand the Prosecution case.⁴⁰

53. In sum, the Chamber finds that Ntawukulilyayo did not receive clear and consistent notice with respect to these allegations.⁴¹ While a Trial Chamber may admit evidence not pleaded in an indictment where its probative value outweighs the prejudicial effect, the Chamber considers that in this instance, Witness BAF's evidence with respect to this roadblock is highly prejudicial, and therefore excludes it.⁴²

³⁸ See Closing Arguments, T. 14 June 2010, pp. 27-28, 75.

³⁹ Decision on Defence Preliminary Motion Alleging Defects in the Indictment (TC), 28 April 2009, para. 40 ("Paragraph 15 of the Indictment refers to the killing of Tutsis at roadblocks in Gisagara *sous préfecture*. The Chamber agrees with the Defence that the Indictment is silent on the issue of how the Accused aided and abetted this killing and finds the Indictment unacceptably vague in this respect. Accordingly, the Chamber requires the Prosecution, to the extent that it is able, to provide greater detail regarding the manner in which the Accused aided and abetted this killing"). See also Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber's Decision of 28 April 2009 (TC), 18 May 2009, paras. 18, 20.

⁴⁰ The Prosecution may seek leave to expand its theory of the Accused's liability after the confirmation of the original indictment, but the risk of prejudice from such expansions is high and must be carefully weighed. On the other hand, amendments that narrow the indictment, and thereby increase the fairness and efficiency of proceedings, should be encouraged and usually accepted. *The Prosecutor v. Bizimungu et. al.*, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment (AC), 12 February 2004, para. 19-20.

⁴¹ The Chamber also considers that it has consistently viewed Witness BAF's evidence with caution (II.1.3.1, II.1.3.2, II.1.3.3). The details of his testimony lack specific corroboration and his evidence of Ntawukulilyayo's direct involvement is limited.

⁴² Rule 89 (C) of the Rules bestows broad discretion on a Trial Chamber to "admit any relevant evidence which it deems to have probative value". A Trial Chamber can exclude evidence where its admission could affect the fairness of the proceedings, such as, where its probative value is outweighed by its prejudicial effect on the accused. See, for example, *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecutor's Interlocutory Appeals Regarding the Exclusion of Evidence (AC), 19 December 2003, para. 13; *Nahimana* Appeal Judgement, para. 319, n. 764.



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2.1.4 Attack on the Gisagara Church

54. Witness BAU testified that he was among persons who sought refuge at the Gisagara Church after fleeing attacks on Kabuye Hill. Some time after arriving, Ntawukulilyayo and Callixte Kalimanzira arrived with police. They spoke to gendarmes who were already at the church. The gendarmes subsequently started shooting at the church and many Tutsi civilians were killed as a result.⁴³ The Defence argues that this evidence falls outside the scope of the Indictment.⁴⁴

55. The Prosecution Closing Brief generally refers to Ntawukulilyayo's "alleged criminal conduct at the Catholic Parish Church" in support of the counts of genocide or complicity to commit genocide.⁴⁵ It, however, includes no further reference to evidence pertaining to events at this church. Similarly, it does not relate this general allegation to any paragraph of the Indictment.

56. The Indictment contains no reference to the attack on the Gisagara Church referred to by Witness BAU or to any attack at a Catholic Parish Church, and is defective in this regard. Rather, this information is contained in a summary of Witness BAU's anticipated testimony, annexed to the Pre-Trial Brief, filed on 20 February 2009.⁴⁶ Moreover, in its opening submissions, the Prosecution referred to a massacre at the "Catholic church" but provided no further details.⁴⁷

57. As noted above, the Chamber has doubts that the Prosecution's Pre-Trial Brief and annexes could cure the subsequently filed Indictment (I.2.1.3). Of greater significance, the Chamber considers that this evidence does not amount to details that provide greater clarity to pleaded charges in the Indictment. Rather, this evidence constitutes an entirely new charge falling outside the Indictment. The Appeals Chamber has warned that a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether. Specifically, "[w]hile it is possible [] to remedy the vagueness of an indictment, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules."⁴⁸ The Prosecution did not seek to do this.

58. In any event, the Prosecution's Closing Brief does not outline the relevance of Witness BAU's evidence to the allegations pleaded in the Indictment, leaving the impression it is not pursuing it.⁴⁹ Given that this testimony is highly prejudicial and that the Prosecution is not pursuing it, the Chamber has not considered this evidence.

⁴³ Witness BAU, T. 12 May 2009, pp. 67-68; T. 13 May 2009, pp. 47-49.

⁴⁴ Defence Closing Brief, paras. 314-315.


⁴⁵ Prosecution Closing Brief, para. 234.

⁴⁶ Pre-Trial Brief, Annex A, number 8. The summary reads that Witness BAU fled to the Gisagara Catholic Church, and that Ntawukulilyayo and Kalimanzira arrived with police and gendarmes to kill refugees at the church. It indicates the evidence is relevant to paragraphs 6-11 of the indictment of 13 June 2005. In a corrigendum filed on 23 February 2009 and then in a revised witness list filed on 3 April 2009, the information was linked to paragraphs 7 and 8 of the 13 June 2005 indictment. The relevant indictment paragraphs do not mention a massacre at a church.

⁴⁷ Opening Statement, T. 6 May 2009, p. 3 (the Accused "ensured the massacres of those who took refuge at the Catholic church").

⁴⁸ *Karera* Appeal Judgement, para. 293.

⁴⁹ *Ntagerura et al.* Appeal Judgement, paras. 148-150.

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2.1.5 Orders to Kill Witness BAU

59. Witness BAU testified that following the attack on Kabuye hill, he was intercepted and taken to the Ndora commune office, where he met Ntawukulilyayo and the Ndora commune *bourgmestre*. Ntawukulilyayo ordered that Witness BAU be taken away and killed.⁵⁰ The Defence submits that the evidence falls outside the scope of the Indictment.⁵¹

60. This event is not pleaded in the Indictment. It is not contained in the Pre-Trial Brief or in the summaries of Witness BAU's anticipated evidence annexed to it. The Prosecution Closing Brief contains no reference to this event nor did it point to it during final submissions. For the same reasons discussed above (I.2.1.4), the Chamber has not considered this evidence.

2.1.6 Meeting at Gisagara Market, 20 May 1994

61. Witness BAC gave evidence that on about 20 May 1994, she saw Ntawukulilyayo at a meeting held at Gisagara market where instructions authorising the killing of a nun named "Odette", were read out. Ntawukulilyayo showed persons gathered at the meeting a letter saying that Odette had been protected. Odette was subsequently arrested.⁵² The Defence argues that this allegation falls outside the scope of the Indictment.⁵³

62. The Chamber notes that in its Closing Brief and final submissions, the Prosecution does not seek to rely on this evidence in support of any count in the Indictment. Indeed, the meeting is not pleaded in the Indictment, nor is it contained in the Pre-Trial Brief and annexed witness summary for Witness BAC. It is an entirely new allegation falling outside the scope of the Indictment. For the reasons discussed above (I.2.1.4), the Chamber has not considered this evidence.

2.1.7 Confirming the Killing of Three Persons at the Gisagara Market

63. Witness BAC testified that she saw Ntawukulilyayo sometime in May 1994 when he came near her home to check the corpses of three persons to ensure that they had been killed.⁵⁴ The Defence argues that this evidence falls outside the scope of the Indictment.⁵⁵

64. This event is not pleaded in the Indictment, nor does it appear in the Pre-Trial Brief or annexed witness summary for Witness BAC. The Prosecution Closing Brief and final submissions do not identify the relevance of this evidence to its case. For the reasons discussed above (I.2.1.4), the Chamber has not considered this evidence.

2.1.8 Distribution of Weapons

65. Witness AXY testified that after fleeing attacks on Kabuye hill, she saw a vehicle transporting machetes. She was informed that the machetes had been supplied by

⁵⁰ Witness BAU, T. 12 May 2009, pp. 68-70.

⁵¹ The Defence objected during the proceedings. See Witness BAU, T. 12 May 2009, pp. 68-70. See also Defence Closing Brief, paras. 316-317.

⁵² Witness BAC, T. 11 May 2009, p. 55.

⁵³ Defence Closing Brief, paras. 312-313.

⁵⁴ Witness BAC, T. 11 May 2009, pp. 51-52; T. 12 May 2009, pp. 13-14.

⁵⁵ Defence Closing Brief, paras. 310-311.

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Ntawukulilyayo for distribution to local residents to kill Tutsis.⁵⁶ The Defence objects to this evidence.⁵⁷

66. This allegation is not pleaded in the Indictment, nor is it referenced in the Pre-Trial Brief or annexed witness summary for Witness AXY. The Prosecution's Closing Brief and final submissions do not demonstrate relevance of this evidence to the events charged in the Indictment. For the reasons expressed above (I.2.1.4), the Chamber has not considered this evidence.

2.1.9 Meeting at Gisagara Centre

67. Witness BAF testified about a meeting at the Gisagara football field in the beginning of June 1994 where the attendants were instructed that Tutsi women should not be spared. Ntawukulilyayo warned the Hutus gathered that if they were caught with Tutsi women that they would be killed as well.⁵⁸

68. This evidence was led in support of paragraph 30 of the Indictment.⁵⁹ However, the Chamber struck this paragraph as the Prosecution had previously failed to comply with the defects decision of 18 May 2009, which required that it provide greater clarity about its timing.⁶⁰ Furthermore, the Prosecution has not referred to this evidence in its Closing Brief or final submissions. For the reasons expressed above (I.2.1.4), this evidence has not been considered.

2.2 Allegations Not Pursued by the Prosecution

69. In its Closing Brief, the Prosecution withdrew the allegations contained in paragraphs 12, 26 and 31 of the Indictment because it did not present evidence on them.⁶¹ A further review of its Closing Brief and the Prosecution's final submissions also reveal that it is not pursuing paragraph 14 of the Indictment.

70. Specifically, paragraph 14 of the Indictment alleges that around 20 April 1994, Ntawukulilyayo participated in a meeting with the new Butare Prefect Sylvain Nsabimana, and *bourgmestres*, at the multipurpose hall in Butare. At the gathering, the Accused was informed by Muganza *Bourgmestre* Chrysologue Bimenyimana, that killings had started in his commune. He asked Ntawukulilyayo for permission to return to Muganza to stop the killings and to assist two Tutsis named Fidèle Kalisa and Jacqueline Utamuliza. Ntawukulilyayo refused and by doing so, aided and abetted in the killing of Tutsis in Muganza commune.

⁵⁶ Witness AXY, T. 19 May 2009, pp. 67-69; T. 20 May 2009, p. 22.

⁵⁷ Defence Closing Brief, paras. 322-323.

⁵⁸ Witness BAF, T. 14 May 2009, pp. 8-11; T. 18 May 2009, p. 13.

⁵⁹ Witness BAF was the only anticipated witness identified in the annexed witness summaries of 20 and 23 February 2009, as well as the revised witness list of 3 April 2009, who was intended to lead evidence in support of paragraph 30 of the indictment of 13 June 2005 (and operative Indictment).

⁶⁰ Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber's Decision of 18 May 2009, 26 June 2009, paras. 9, 12.

⁶¹ Prosecution Closing Brief, paras. 236, 392.

71. The Prosecution indicated in its Pre-Trial Brief that Witness AXV, who had been present during the meeting, would testify with respect to this event.⁶² The Defence denies the allegation and submits that the Prosecution did not present any evidence in support of it.⁶³

72. The Prosecution made no reference to this incident in its Closing Brief. In the Chamber's view, this is significant, as the Prosecution's final written submissions contain a comprehensive listing of the events on which it is seeking conviction for a particular count.⁶⁴ Nor did the Prosecution reference the allegation during its final submissions.⁶⁵

73. Notably, Prosecution Witness AXV, who was a local government official within Gisagara sub-prefecture and who attended the meeting on 20 April 1994 in the multipurpose hall of the Butare prefecture, did not testify that the Muganza commune *bourgmestre* requested permission to leave in order to assist Tutsis in his commune, or that he was prevented from leaving for this purpose. Nor did he make any reference to Fidèle Kalisa, or Jacqueline Utamaliza. There is no other evidence on the record with respect to this incident.⁶⁶

2.3 Alleged Procedural Violations

2.3.1 Alleged Disclosure Violations

74. In its Closing Brief, the Defence submits that the Prosecution violated its disclosure obligations through non-disclosure of *Gacaca* records with respect to detained Prosecution Witnesses AYD and AXV, and late disclosure of *Gacaca* records for detained Prosecution Witness BAF, and formerly detained Witness BAZ. The Defence submits that the Accused

⁶² Indictment, para. 14; Prosecution Pre-Trial Brief and Corrigendum to Annex A, 23 February 2009; Prosecution Closing Brief, paras. 85-86; Defence Closing Brief, paras. 274 and 702.

⁶³ Defence Closing Brief, para. 1205.

⁶⁴ The Prosecution Closing Brief's Table of Contents lists the factual allegations in support of Counts I and II (Genocide and Complicity in Genocide). It includes the "Kabuye Massacres" and "Roadblocks" but makes no reference to the allegation contained in paragraph 14 of the Indictment. Under Chapter IV, which specifically addresses these counts, the Closing Brief states that Ntawukulilyayo is charged with "killing and/or causing of serious bodily and mental harm to members of the population in the five communes of the Gisagara sous-prefecture (Ndora, Muyaga, Kibayi, Muganza, and Nyaruhengeri); the Gisagara market, Kabuye Hill and the several roadblocks throughout Gisagara." See Prosecution Closing Brief, para. 197. The factual allegations in support of Counts I and II also refer only to "criminal conduct in the five communes []; the Gisagara Market; Kabuye Hill; the Catholic Parish Church; and the several roadblocks throughout Gisagara sous prefecture between 19 April and 30 June 1994". See Prosecution Closing Brief, para. 234. There is no reference to the factual allegations in paragraph 14. Rather, the Closing Brief refers to Witness AXV's testimony about the gathering, only by way of background, relevant to Ntawukulilyayo's authority. It does not refer to it as supporting paragraph 14 of the Indictment – namely that Ntawukulilyayo prevented Muganza *Bourgmestre* Chrysologue Bimenyimana from leaving the meeting in order to stop the killing of Tutsis. See Prosecution Closing Brief, paras. 85-86.

⁶⁵ Closing Arguments, T. 14 June 2010.

⁶⁶ Prosecution Exhibit 13 (protected information sheet); Witness AXV, T. 25 May 2009, pp. 9-10, 42-43; T. 26 May 2009, pp. 21-22 (the meeting was convened and chaired by the newly appointed prefect Sylvain Nsabimana in order to issue instructions about the "war situation" and several administrative authorities, including Ntawukulilyayo, attended); T. 26 May 2009, pp. 24, 27-29 (the prefect issued instructions to prevent Tutsis from fleeing. The Witness tried to speak to the prefect and sub-prefect about "the unrest", but Ntawukulilyayo asked him to sit down and listen to proceedings.).

suffered prejudice as a result.⁶⁷ It does not, however, point to any specific provision in the Statute or Rules concerning disclosure, which the Prosecution is alleged to have breached.⁶⁸

75. The Chamber recalls at the outset that there is no general obligation on the Prosecution to obtain *Gacaca* documents in relation to its witnesses for the Defence. Although in some cases the Prosecution has made such inquiries of its own accord, these voluntary efforts do not expand the nature of its disclosure obligations.⁶⁹

76. Disclosure of *Gacaca* records may be required under Rule 68 (A) of the Rules, where such documents “may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence”.⁷⁰ The initial determination of what material is exculpatory, which is primarily a facts-based judgement, rests with the Prosecution.⁷¹ To demonstrate the Prosecution is in breach of its obligation to disclose exculpatory material, the Defence must (i) identify specifically the material sought; (ii) present a *prima facie* showing of its probable exculpatory nature; and (iii) prove that the material requested is in the custody or under the control of the Prosecution.⁷²

77. The Chamber notes that while the Defence has identified the documents, which it submits should have been disclosed, it has not demonstrated their *prima facie* exculpatory nature. Nor has it established that the documents are, or have been, in the custody or control of the Prosecution. Rule 68 does not impose an obligation on the Prosecution to search for material of which it does not have knowledge.⁷³ Indeed, where such records sought by the Defence are not in the custody or control of the Prosecution, Trial Chambers have

⁶⁷ Defence Closing Brief, para. 11. The Defence points to disclosure of *Gacaca* documents on 12 and 26 May 2009 with respect to Witnesses BAF and BAZ.

⁶⁸ The Chamber notes that under Rule 66 (A)(ii) of the Rules, the Prosecution is required to disclose, no later than 60 days before the date set for trial, copies of the statements of all witnesses it intends to call to testify at trial. The Defence has not suggested that the relevant *Gacaca* documents referred to are “statements” for the purposes of Rule 66 (A)(ii). The Chamber further recalls that on 12 March 2009, the Prosecution certified that it had complied with its Rule 66 (A)(ii) disclosure obligations. See Prosecutor’s Certification in respect of Rule 66 Disclosure, 12 March 2009. Moreover, Rule 66 (B) concerns inspection of documents by the Defence, which are within the Prosecution’s custody or control and which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. However, the Defence does not point to any request made pursuant to Rule 66 (B). The Chamber proceeds to consider the Defence submissions in light of Rule 68 (A).

⁶⁹ *Rutaganda*, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006, para. 45, citing *Kajelijeli* Appeal Judgement, para. 263.

⁷⁰ *Karemera et al.*, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion” (AC), 14 May 2008, para. 9; *Karemera et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 9.

⁷¹ *Karemera et al.*, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006, para. 16.

⁷² *Karemera et al.*, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion” (AC), 14 May 2008, para. 9; *Blaškić* Appeal Judgement, para. 268, *Karemera et al.*, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006, para. 13.

⁷³ *Rutaganda*, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006, paras. 45-46; *Bralo*, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material (AC), 30 August 2006, para. 30. However, the Prosecution must actively review the material in its possession for exculpatory material. See *Karemera et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, paras. 9, 10.

consistently held that the primary obligation falls on the Defence to conduct a diligent investigation to locate them.⁷⁴

78. Similarly, with respect to the alleged late disclosure of *Gacaca* records, the Defence has not shown that these materials were exculpatory, nor has it established that once these documents came within the Prosecution's custody or control, they were not disclosed in a timely manner.⁷⁵

79. The Chamber therefore finds that the Defence has not established that the Prosecution was, or continues to be, in breach of its disclosure obligations under Rule 68 (A) of the Rules.

2.3.2 Defence Objections to Prosecution Exhibits

80. The Defence submits that the Prosecution did not act in good faith by relying on exhibits during Trial, which were not in the Prosecution's original list of exhibits filed pursuant to Rule 73bis (B)(v) on 20 February 2009 but appeared in an amended list of 23 April 2009. It further points to exhibits which were removed from the amended list but tendered in evidence. The Defence argues that it did not receive sufficient notice of the Prosecution's intention to tender these documents, causing prejudice to the Accused. It consequently requests the Chamber to exclude these exhibits from the trial record.⁷⁶

81. At the outset, the Chamber notes that the Defence does not demonstrate any special circumstances warranting reconsideration of the decisions to admit the relevant exhibits.⁷⁷ In particular, it does not point to any new material circumstances, nor does it allege that the Chamber's decisions were erroneous or constituted an abuse of authority causing prejudice or injustice to the Accused.⁷⁸ Nonetheless, in the interests of justice, the Chamber considers

⁷⁴ See for example, *Nzabonimana*, Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of *Gacaca* Judicial Material Relating to Prosecution Witnesses (TC), 29 October 2009, paras. 27, 29; *Karemera et al.*, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, 27 November 2006, para. 9 (Rules 66 (A)(ii) and 68 (A) only concern documents within the custody or control of the Prosecution. As a general rule, the Defence must first make its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution); *Bizimungu et al.*, Decision on Motion of Accused Bicomumpaka for Disclosure of Exculpatory Evidence (TC), 23 April 2004, para. 9; *Kajelijeli*, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO (TC), 2 November 2001, para. 2 (the Defence had made "best efforts" to obtain the judicial records of the detained Prosecution witnesses). The Chamber notes that the Defence in this proceeding has not demonstrated any efforts to obtain the *Gacaca* records itself.

⁷⁵ The Chamber notes that the Defence requested a *Gacaca* judgement in relation to Witness BAF. The Prosecution submitted that it only heard of it for first time during the Witness' evidence. See Witness BAF, T. 14 May 2009, pp. 14-15.

⁷⁶ Defence Closing Brief, paras. 285-306.

⁷⁷ The onus is on the moving party to demonstrate special circumstances warranting reconsideration. See *Karemera et al.*, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago (TC), 10 October 2003, para. 6.

⁷⁸ *Bizimungu et al.*, Decision on Mugiraneza's Request for Certification to Appeal and Mugenzi's and Bizimungu's Requests for Reconsideration of the Decision on the Objections of Mugiraneza and Bicomumpaka to the Engagement of Mr. Everard O'Donnell as a Chamber's Consultant dated 28 August 2009 (TC), 23 September 2009, para. 3; *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007, para. 6; *Karemera et al.*, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Witness GAY (TC), 28 September 2007, para. 10; *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence

whether admission of the exhibits was erroneous or an abuse of authority resulting in prejudice to the Accused.

82. The Chamber recalls that pursuant to Rule 73bis (B)(v) a Trial Chamber may order the Prosecution to file a list of the exhibits it intends to offer before the date set for trial. This provision, like others under Rule 73bis, is designed to provide the Defence with advance notice of the evidence to be led against the accused at trial. However, the fact that the Prosecution tenders an exhibit which does not feature on its list submitted in conformity with Rule 73bis (B)(v), does not preclude its admission into evidence. The Tribunal's practice reflects that a party is not exclusively bound by its initial list submitted at the pre-trial stage.⁷⁹

83. When a party objects to the admission of an exhibit based on lack of notice, the principal consideration in assessing whether or not to admit the document is generally whether the Defence had sufficient time to review it given the circumstances.⁸⁰

84. Turning first to the exhibits which only appeared on the Prosecution's amended list of exhibits of 23 April 2009, the Defence refers to Prosecution exhibits 16, 17, 18, and 29. The Defence concedes that the first three exhibits were disclosed on 6 March 2009. Nonetheless, it submits that it did not know until 23 April 2009, that the Prosecution intended to rely on them during Trial, leaving insufficient time for the Defence to organise itself.⁸¹ The Defence, however, has not shown why it did not have sufficient time to consider the documents prior to Trial commencing on 6 May, or prior to admission of the documents on 25 May 2009. Nor has it demonstrated the prejudice caused to the Accused.

85. In the Chamber's view, the Defence had ample time to review Prosecution exhibits 16, 17, and 18 prior to their admission and prior to commencement of Trial. Indeed, it received disclosure of the material on 6 March 2009 – approximately two months prior to commencement of Trial. The documents also appeared on the Prosecution exhibit list of 23 April 2009 - more than two weeks before the Trial started. Thus, the Chamber finds that the Defence received sufficient notice of the Prosecution's intention to rely on these documents. Accordingly, the decision to admit them was not erroneous or an abuse of the Chamber's authority and did not cause prejudice to the Accused.

86. With respect to Prosecution exhibit 29, this document appeared on the amended exhibit list of 23 April 2009, and was tendered by the Prosecution on 17 December 2009 during cross-examination of the Accused. The Defence argues that the document was never disclosed to it. However, the Chamber observes that the Defence received notice of the Prosecution's intention to rely on this document almost eight months prior to it being tendered. Moreover, while the Defence raised a contemporaneous objection to its admission, it did not request any additional time to consider it prior to conducting re-examination of the

Motion for Modification of Protective Order: Timing of Disclosure (TC), 31 October 2005, para. 3; *Karemera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness (TC), 11 October 2005, para. 8 (and authorities cited therein).

⁷⁹ See for example *Simba*, Decision on Admission of Prosecution Exhibits 27 and 28 (TC), 31 January 2005, para. 13.

⁸⁰ See for example *Ndayambaje et al.*, Decision on Prosecutor's Motion to Modify Her List of Exhibits (TC), 14 December 2001, paras. 16-17.

⁸¹ Defence Closing Brief, paras. 296-297.

Accused.⁸² Under the circumstances, the Chamber finds that the Defence received sufficient notice of Prosecution exhibit 29 and the Accused was not prejudiced by its admission.

87. The Defence further points to Prosecution exhibits 19, 20 and 21 which appeared on the list of exhibits filed on 20 February 2009, but not the amended list of 23 April 2009. The documents were disclosed to the Defence on 9 March 2009.⁸³ The Defence was notified of the Prosecution's intention to rely on the material on the morning of 25 May 2009, prior to hearing the evidence of Prosecution Witness AXV, and were admitted during his testimony.⁸⁴ The Defence made a contemporaneous objection to the Prosecution's reliance on the documents and the Chamber noted that the Defence would have an opportunity to consider the material prior to its cross-examination of the Witness.⁸⁵ Notably, the Defence commenced its cross-examination on 26 May 2009 without requesting any additional time for consideration of the exhibits. In view of these circumstances, the Chamber concludes that the Defence did not require additional time to examine the documents prior to its cross-examination of the Witness. Indeed, the Defence has not demonstrated, in its Closing Brief, the prejudice caused to the Accused by the admission of these documents.

88. In sum, the Chamber finds that the Defence has not demonstrated that the decisions to admit Prosecution exhibits 16, 17, 18, 19, 20, 21, and 29 were erroneous or an abuse of the Chamber's authority, causing prejudice to the Accused.

⁸² Ntawukulilyayo, T. 17 December 2009, pp. 16-21. The Chamber further notes that Prosecution Exhibit 29 was admitted during the Prosecution's cross-examination of Ntawukulilyayo and the Defence did not re-examine the Accused with respect to its contents. See T. 17 December 2009, pp. 84-85.

⁸³ Defence Closing Brief, para. 303.

⁸⁴ Witness AXV, T. 25 May 2009, pp. 56, 62-63.

⁸⁵ Witness AXV, T. 25 May 2009, pp. 2-5.

3. DOMINIQUE NTAWUKULILYAYO

89. Dominique Ntawukulilyayo was born in 1942 in Kibeho, Mubuga commune, Gikongoro prefecture. He is married and the father of eight children.⁸⁶

90. Ntawukulilyayo began his career in September 1963 as a teacher. On 1 April 1966, he was appointed school inspector in Mubuga and Rwamiko within the Gikongoro prefecture. At the end of 1967 he was elected *bourgmestre* of Mubuga commune and remained in this position until the end of 1971.⁸⁷ In January 1972, he returned to teaching and during the October 1973 *coup d'état*, was reappointed as the Mubuga commune *bourgmestre*. As a result of the *coup d'état*, *bourgmestres* were appointed by the President of the Republic without any prior elections.⁸⁸

91. Between November 1974 and July 1976, Ntawukulilyayo was sub-prefect for social affairs in the Kigali prefecture.⁸⁹ He was subsequently transferred from Kigali to the sub-prefecture of Munini, within Gikongoro prefecture.⁹⁰ From 1982 to 1988, Ntawukulilyayo became a member of parliament, representing the Gikongoro prefecture.⁹¹ From March 1989 to September 1990, he undertook a civil service appointment in Butare prefecture.⁹²

92. On 21 September 1990, Ntawukulilyayo was appointed sub-prefect of Gisagara sub-prefecture, in Butare prefecture.⁹³ He remained in this position until he left Rwanda in July 1994.⁹⁴ He was arrested in France on 17 October 2007.⁹⁵

⁸⁶ Ntawukulilyayo, T. 8 December 2009, p. 4.

⁸⁷ Ntawukulilyayo, T. 8 December 2009, pp. 7-8, 10-11.

⁸⁸ Ntawukulilyayo, T. 8 December 2009, pp. 12-13.

⁸⁹ Ntawukulilyayo, T. 8 December 2009, pp. 12, 17-18.

⁹⁰ Ntawukulilyayo, T. 8 December 2009, pp. 18-19.

⁹¹ Ntawukulilyayo, T. 8 December 2009, pp. 20-23. At the time, the national development council was the parliament for the national assembly and referred to as the *Conseil National de Développement*.

⁹² Ntawukulilyayo, T. 8 December 2009, pp. 24-27.

⁹³ Ntawukulilyayo, T. 8 December 2009, p. 27.

⁹⁴ Ntawukulilyayo, T. 8 December 2009, p. 45; Defence Closing Brief, paras. 524, 565, 617, 950.

⁹⁵ Ntawukulilyayo, T. 17 December 2009, pp. 84-85; Defence Closing Brief, para. 8.

CHAPTER II: FACTUAL FINDINGS

1. GISAGARA MARKET AND KABUYE HILL, 20-25 APRIL 1994

1.1 Introduction

93. The Indictment alleges that between 20 and 21 April 1994, several thousand Tutsi refugees gathered at Gisagara market. Those who attempted to leave for Burundi were prevented from doing so by soldiers and communal police on the orders of Ntawukulilyayo and Elie Ndayambaje. Around 23 April, in the afternoon, Ntawukulilyayo ordered Tutsis at Gisagara market to move to Kabuye hill to be protected and fed. Upon the refugees' arrival at the hill that day, Ntawukulilyayo came with Callixte Kalimanzira in vehicles full of gendarmes. Between 21 and 25 April, Ntawukulilyayo also ordered civilians to search the houses of Tutsis for the purposes of assembling them at Kabuye hill to be killed, and took soldiers, gendarmes and ammunition there from Butare. The Accused returned to Kabuye hill on 24 April with Kalimanzira and soldiers to kill Tutsis there. Ultimately, soldiers, gendarmes, communal police and civilians killed as many as 25,000 Tutsi refugees gathered there between 21 and 25 April. The Prosecution relies on the evidence of Witnesses AZN, AZV, AZI, AYQ, BAU, BAC, AXY, BAF, BAZ and AXV.⁹⁶

94. The Defence denies that Ntawukulilyayo ordered the interception of Tutsi refugees trying to flee to Burundi or could be held responsible for it. It further disputes that Ntawukulilyayo ordered refugees at the Gisagara market to move to Kabuye hill. Instead, the refugees left for the hill, and other locations, due to directions from Radio Muhabura, an RPF radio station, as well as complaints from Gisagara traders and residents. The Accused did not go there at any time during the relevant period. Rather, he tried to obtain assistance for the refugees. It also points to evidence that Prosecution Witnesses AXY, BAC and AYQ tried to procure false testimony against Ntawukulilyayo. Reference is made to the evidence of Ntawukulilyayo, and Witnesses KAD, Jean-Baptiste Gasana, MAI, MAE, MAD, Emmaunel Niyitegeka, Louis Ahorukomeye, Gérard Ndamage, Agnès Niyonagira, BAA, Simon Rumashana, Innocent Nziyomaze and Claver Habimana.⁹⁷

1.2 Evidence

Prosecution Witness AZN

95. Witness AZN, a Tutsi, was a farmer from Remera sector, Muganza commune in 1994.⁹⁸ On Wednesday, either the 17 or 18 April 1994, he fled attacks in his area with about 30 Tutsi members of his family, many others and livestock. They went to Gisagara market, which was situated on a football field, and arrived around 11.00 a.m. There, they met Ntawukulilyayo and informed him of their situation. The Accused, accompanied by two soldiers or gendarmes, told the Witness' group to remain at the market and that security

⁹⁶ Indictment, paras. 6-11, 13, 18-22. Prosecution Closing Brief, paras. 2, 17, 20-21, 38, 41, 46-47, 91, 93, 101, 105, 107, 146, 160, 178-181, 184, 186, 206, 238, 245-352, 359-362, 365, 369, 394; Closing Arguments, T. 14 June 2010, pp. 5-17, 24-26, 74-75.

⁹⁷ Defence Closing Brief, paras. 277, 390, 403-412, 444-447, 461, 476, 490, 507-512, 600, 626, 750, 919-925, 957-972, 975-978, 984-986, 988-1000, 1013-1199, 1202; Closing Arguments, T. 14 June 2010, pp. 44, 51-58, 68-70, 77, 81.

⁹⁸ Prosecution Exhibit 1 (protected information sheet).

would be provided. Ten thousand to possibly more than twenty thousand refugees from various areas gathered in Gisagara.⁹⁹

96. While at the market, the Witness noticed that “attackers” began to surround it. Between 1.00 and 2.00 a.m. that night, he and other displaced Tutsis fled. They avoided a roadblock across the street blocking the route to Muyaga commune. They travelled in the direction of Mugusa commune, but were stopped around 5.00 a.m. near the Ngirya river by Elie Ndayambaje, soldiers and communal police. They were forced to return and “attackers” accompanied them back to Gisagara market, where they arrived around 11.00 a.m. There, “soldiers” continued to surround the refugees.¹⁰⁰

97. Shortly after their return, the Witness saw President Théodore Sindikubwabo with Ntawukulilyayo and security officers. He believed that Ntawukulilyayo, overwhelmed, had invited Sindikubwabo to assist in solving the present situation in Gisagara. The sub-prefect held a megaphone as the President angrily asked why persons were there and said that they should be taken to Kabuye. Prior to Sindikubwabo’s arrival, the sub-prefect had also said that refugees should be taken from Gisagara as their large number could create insecurity. He asked that they join “others like them” at Kabuye hill.¹⁰¹

98. The President’s instructions were carried out. They left before noon as soldiers and communal police beat refugees while herding them to Kabuye hill. He travelled approximately one kilometre over the course of an hour, arriving with others at Kabuye hill on Friday. There, the Witness found other refugees who had also been sent there or who had gone there on their own volition. Soldiers and police from within the sub-prefecture shot at people while others were killed with clubs. Ntawukulilyayo arrived with soldiers in a vehicle on the Saturday morning as well as another person from the Witness’ region. The sub-prefect showed the soldiers where the people to be killed were, before leaving. The soldiers reinforced those who were already there and fired on the refugees. Between 2,000 and 3,000 unarmed men, women, children and elderly were killed at Kabuye hill, including approximately 30 Tutsi members of his family. It rained on Sunday, and the Witness left that evening.¹⁰²

Prosecution Witness AZV

99. In 1994, Witness AZV, a Hutu, was a farmer living in Muganza commune and was married to a Tutsi.¹⁰³ On a Wednesday, about two weeks after President Habyarimana’s death, war erupted. The Witness, her family and about two thousand others fled to Gisagara. Travelling with children and livestock, the journey took about one-and-a-half hours and they

⁹⁹ Witness AZN, T. 6 May 2009, pp. 8-10, 22, 25-26, 28; T. 7 May 2009, pp. 2-3, 11, 13, 32. Witness AZN arrived at Gisagara market on a Wednesday and estimated that it would have been 17 or 18 April 1994. He denied that Wednesday was 20 April. T. 6 May 2009, pp. 8, 25-26, 28. The Chamber notes that 20 April in 1994 fell on a Wednesday.

¹⁰⁰ Witness AZN, T. 6 May 2009, p. 9 (quoted), 28 (quoted), 29; T. 7 May 2009, pp. 12, 13 (quoted), 15 (quoted), 32, 33 (quoted).

¹⁰¹ Witness AZN, T. 6 May 2009, pp. 10, 14; T. 7 May 2009, p. 11, 14 (quoted), 15-16. Witness AZN also testified that Ntawukulilyayo said “combatants should be taken from Muhabura to the location where others were”. Muhabura was the RPF radio station and he believed the sub-prefect was referring to the refugees as *Inkotanyi*. T. 6 May 2009, p. 14.

¹⁰² Witness AZN, T. 6 May 2009, pp. 9-16; T. 7 May 2009, pp. 10, 16, 26-27.

¹⁰³ Witness AZV, T. 7 May 2009, p. 49; Prosecution Exhibit 3 (protected information sheet).

arrived there around 7.00 p.m. Ntawukulilyayo stopped them in front of his residence. After hearing that they were from Muganza commune and fleeing the “war”, he directed them to Gisagara market and promised to provide security. More than ten thousand persons, including others from Nyaruhengeri commune, gathered there.¹⁰⁴

100. That night, Ntawukulilyayo returned with Elie Ndayambaje and soldiers. Soldiers surrounded the market, set up barriers and blocked passage to the Akanyaru river, which borders Burundi. She also believed that Ntawukulilyayo transported soldiers to Muyaga commune. He returned later that evening with soldiers and police and told the refugees that they could leave. The Witness and many others left on Thursday morning, arriving at Muyaga commune around 9.30 a.m. She saw Witness AZN there. Soldiers and police forced them to return to Gisagara, where they arrived around 11.00 or 11.30 a.m. They remained there through the night.¹⁰⁵

101. On Friday, at about 8.00 a.m., the Witness saw communal police leave Ntawukulilyayo’s residence. They told the refugees to go to Kabuye, where the Red Cross would provide assistance. She reached Kabuye hill around 9.00 a.m. and observed Hutu assailants come from Gahondo hill, opposite Kabuye hill, attack and kill Tutsi refugees with clubs and machetes in the valley until 6.00 p.m. From about 20 metres away, the Witness observed Ntawukulilyayo come to Kabuye hill after the Hutu attackers left. He arrived in a white pick-up, possibly a Toyota, with soldiers in the back and parked opposite a Mr. Aphrodi’s house. Only Ntawukulilyayo was inside the vehicle. He did not mingle among the refugees there and he and the soldiers left immediately.¹⁰⁶

102. Soldiers returned early Saturday morning, went to Dahwe hill and fired on the refugees at Kabuye hill until 6.00 p.m. The Witness heard gunfire and explosions and saw Ntawukulilyayo’s vehicle parked close by. Many were killed, including the Witness’ daughter. On Sunday morning, survivors began to bury the dead until soldiers returned and fired upon them. They attacked until about 6.00 p.m., when it began to rain. The Witness fled that evening. Ten of her 12 children had been killed. She saw Witness AZN at Kabuye.¹⁰⁷

Prosecution Witness AZI

103. Witness AZI, a Tutsi teacher, lived in Muganza commune in 1994.¹⁰⁸ He fled his home on 19 April 1994 and arrived in Gisagara on Wednesday between 3.00 and 3.30 p.m. There, Ntawukulilyayo, Ndora *Bourgmestre* Célestin Rwankubito and ten communal police officers among others were present near the market. The sub-prefect ordered the Witness and those with him to go to the marketplace where their security would be ensured. Police escorted them there.¹⁰⁹

104. Numerous men, women, children and livestock gathered at the market, which the police surrounded. The Witness heard police officers and *Interahamwe* discussing whether they had enough grenades to kill the crowd. The law enforcement officers, as well as Hutu members of the population, looted the refugees and removed machetes, knives and sticks

¹⁰⁴ Witness AZV, T. 7 May 2009, pp. 36-37, 54-59, 74.

¹⁰⁵ Witness AZV, T. 7 May 2009, pp. 39-40, 59-60, 62, 66-68, 71-74.

¹⁰⁶ Witness AZV, T. 7 May 2009, pp. 40-44, 63-65, 74.

¹⁰⁷ Witness AZV, T. 7 May 2009, pp. 43-47, 71-72.

¹⁰⁸ Prosecution Exhibit 6 (protected information sheet).

¹⁰⁹ Witness AZI, T. 12 May 2009, pp. 16, 19-20, 24, 28, 30-32, 47.



from them. The displaced persons remained the evening and left the next day. They followed the road to Muyaga commune in order to cross the Akanyaru river. However, in the Ngiriyi valley between Ndora, Mugusa and Muyaga communes, police fired shots into the air, forcing the refugees to return to Gisagara.¹¹⁰

105. Witness AZI and others remained at Gisagara market that evening and left on Friday morning for Kabuye hill. Again, Tutsi men, women and children, none of whom were *Inkotanyi*, gathered there. *Interahamwe*, communal police and gendarmes, some using firearms, attacked them, killing many Tutsis. The Witness' older brother and some of his brother's children were among those killed there. He never saw Ntawukulilyayo at Kabuye hill but concluded that the sub-prefect had "orchestrated" the killings there.¹¹¹

Prosecution Witness AYQ

106. In 1994, Witness AYQ, a Hutu, was a farmer living in Ndora commune.¹¹² On a Saturday in April after President Habyarimana died, she sought refuge with her Tutsi husband and six children at Gisagara market following attacks on Tutsis. There, they found many refugees from areas including Kibayi and Muganza communes, occupying a space nearly the size of a football field. Some had arrived as early as Wednesday evening. That day, several communal police gathered the many refugees. The Witness observed Ntawukulilyayo, using a megaphone, direct the police to bring refugees to Kabuye hill and promise that they would be fed and protected. Callixte Kalimanzira was present as well. Police, wearing brown uniforms and hats, beat and shoved them en route to Kabuye hill.¹¹³

107. When they arrived on the hill, they found many refugees there. The Witness heard gunshots. At around 4.00 p.m., Ntawukulilyayo and Callixte Kalimanzira, arrived in a white, possibly "berline [...] saloon" vehicle and parked next to a bar. The Witness, who was on the "lower side of the same road", saw Ntawukulilyayo exit the car with four soldiers, who wore military uniforms distinct from those worn by the police that had escorted them there. She and others approached the vehicle, believing that they would offer protection. Ntawukulilyayo got back in the vehicle and left with Kalimanzira. The soldiers who remained joined the others, including policemen who were there, and shot at the refugees.¹¹⁴

108. The assailants intensified their attack under the lightning and thunder that occurred on Sunday evening. Shooting continued until the following morning. Two of Witness AYQ's children and her Tutsi husband were killed at Kabuye hill.¹¹⁵

¹¹⁰ Witness AZI, T. 12 May 2009, pp. 19-23, 28.

¹¹¹ Witness AZI, T. 12 May 2009, pp. 17, 23, 46. Witness AZI testified that one of his children was killed on Sunday following 19 April 1994, while his five others along with his sister were killed on Monday around 10.00 a.m. He described communal policemen and gendarmes employing firearms in the attack and Hutu assailants wielding machetes, clubs and hoes. It is not clear from his testimony that these killings were part of the attack on Kabuye hill or elsewhere. T. 12 May 2009, pp. 16-19.

¹¹² Witness AYQ, T. 11 May 2009, p. 8; Prosecution Exhibit 4 (protected information sheet).

¹¹³ Witness AYQ, T. 11 May 2009, pp. 7-11, 13-14, 24-32, 39.

¹¹⁴ Witness AYQ, T. 11 May 2009, pp. 11 (quoted), 12, 13 (quoted), 33-39.

¹¹⁵ Witness AYQ, T. 11 May 2009, pp. 11, 14-15.

Prosecution Witness BAU

109. Witness BAU, a Tutsi, operated a bar in the vicinity of the Gisagara market in 1994 and was a member of the PL party.¹¹⁶ While working on Wednesday 20 April, he observed refugees arriving at the Gisagara market starting around 4.30 to 5.00 p.m. They were Tutsis, and explained that they were fleeing Kibayi, Muganza and Nyaruhengeri communes, where Hutus were attacking them. He remained until 7.00 p.m. and returned home.¹¹⁷

110. On 21 April, the Witness opened his bar. Around 10.00 or 11.00 a.m., he saw a motorcade of five vehicles travelling in the direction of the sub-prefecture office. A red saloon car, belonging to a secondary school, was in the lead and carried Ntawukulilyayo. He ran after the group and observed President Théodore Sindikubwabo, Ndora *Bourgmestre* Célestin Rwankubito, Prefect Sylvain Nsabimana and Ntawukulilyayo standing in front of the office. The sub-prefect sent police officers in the red vehicle, driven by Mr. Erasme, to gather members of the public.¹¹⁸

111. The government officials entered the sub-prefecture office and then returned to its front. Sindikubwabo stated to the many persons who had gathered that the inhabitants of Ndora commune had failed to fulfil their duty. The Witness interpreted this to mean that Hutus were not killing Tutsis. The President asked a man called "Mr. Antoine", a Tutsi, if he had had any problems in 1959, to which he responded "No." He then ordered that each person must be his neighbour's keeper. Sindikubwabo also spoke to a person called Mr. Mukezarugamba. He made no mention of the refugees that had come to Gisagara. The meeting lasted about 45 minutes.¹¹⁹

112. Refugees continued to arrive on 21 through 22 April and roadblocks prevented them from leaving Gisagara. On 23 April, the Witness left his bar around 1.30 p.m., when communal police, using whistles, began directing persons to go to the market. He observed three police gathering persons. There, the Witness was among possibly 25,000 to 30,000 others. Ntawukulilyayo, in the presence of Callixte Kalimanzira and police officers Vincent and Munyakindi, told the refugees to go to Kabuye hill where tents would be erected and their security ensured. Kalimanzira also said the refugees should leave. The Witness had seen assailants covered with banana leaves coming to Gisagara and left with the displaced Tutsis for Kabuye hill. Police escorted the refugees until Ntawukulilyayo's home, whereupon they continued for about two kilometres unescorted.¹²⁰

113. At Kabuye hill, other refugees arrived from Gahondo and Dahwe. The Witness went to a flat area on its summit. Between 5.00 and 5.30 p.m. on 23 April, Ntawukulilyayo arrived

¹¹⁶ Witness BAU, T. 13 May 2009, pp. 11-12, 28; Prosecution Exhibit 7 (protected information sheet). Witness BAU explained that his bar was located downhill from the marketplace and separated by a road. T. 13 May 2009, p. 28.

¹¹⁷ Witness BAU, T. 12 May 2009, pp. 60-61; T. 13 May 2009, pp. 20, 22. During cross-examination, Witness BAU testified that on the evening of 20 April 1994, Ntawukulilyayo stopped refugees travelling on the road to Gakoma about 50 metres from the Witness' home. He observed that the sub-prefect in a vehicle with Vincent, the Brigadier, a policeman called Munyakindi and two Tutsi policemen named Laurent and Kavamayanga and directed them back to the market. T. 13 May 2009, pp. 20-22.

¹¹⁸ Witness BAU, T. 12 May 2009, p. 61; T. 13 May 2009, pp. 23-26.

¹¹⁹ Witness BAU, T. 12 May 2009, pp. 61-63; T. 13 May 2009, pp. 25-26, 62 (quoted). Witness BAU testified that Ndora *Bourgmestre* Célestin Rwankubito also arrived at the market after the meeting had commenced. T. 13 May 2009, p. 28.

¹²⁰ Witness BAU, T. 12 May 2009, pp. 63-64; T. 13 May 2009, pp. 26-31, 33-34, 38-39, 53.

at Kabuye in a white, double-cabin pick-up truck. A khaki coloured minibus also came there. Three policemen were on Ntawukulilyayo's vehicle. They did not do anything and left. The sub-prefect returned later that evening with Kalimanzira in double-cabin pick up trucks followed by a "carrier". Policemen and soldiers accompanied them. From about five metres away, the Witness saw Ntawukulilyayo direct them to exit. He and Kalimanzira remained for a few minutes and after they left on the same vehicle, the soldiers, gendarmes and police fired on the refugees. The attack took place at night. Tutsi men, women, children and the elderly were killed. Under the cover of rain, the Witness fled around 1.00 or 2.00 a.m. that evening.¹²¹

Prosecution Witness BAC

114. Witness BAC, a Tutsi farmer, lived in Ndora commune in 1994, not far from the Gisagara market.¹²² On Thursday 21 April 1994, vehicles arrived at the Gisagara sub-prefecture office. She went there around mid-day and found President Théodore Sindikubwabo, Ntawukulilyayo, and Ndora *Bourgmestre* and a small number of other local residents standing outside. Sindikubwabo was addressing the crowd, warning that things should not occur as they did in 1959. He added that he would give instructions to the local authorities to be announced to the public. The President, Ntawukulilyayo and the *bourgmestre* then entered the sub-prefecture office, and the Witness left. She estimated that the meeting lasted less than one half hour.¹²³

115. By that Thursday, refugees from regions including Butare, Kibayi and Muganza streamed into Gisagara, some stopping at its marketplace. Others attempted to go to Burundi. She observed Ntawukulilyayo and communal police "go after refugees" and saw displaced persons passing her home when returning to the market. She heard from Tutsi refugees from Muganza that they had been intercepted by the sub-prefect at Muyaga commune.¹²⁴

116. On the same day, sometime after the morning, but before the evening, the Witness, from in front of her home, saw Ntawukulilyayo gather those at the market and tell them to go to Kabuye in order to assure their safety. Ntawukulilyayo and communal police escorted the refugees in that direction, although she was uncertain if they accompanied them the entire way. She believed that nothing occurred that evening, but heard gunshots the following night starting around 7.00 p.m. and ending between 3.00 or 4.00 a.m. the following morning. She later learned from those who survived attacks on Kabuye hill that soldiers and police fired on the refugees.¹²⁵

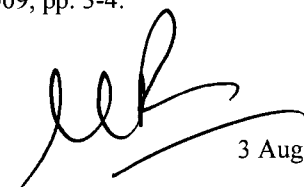
¹²¹ Witness BAU, T. 12 May 2009, pp. 64-66; T. 13 May 2009, pp. 42-47, 54.

¹²² Witness BAC, T. 11 May 2009, pp. 47, 71-72; T. 12 May 2009, p. 9; Prosecution Exhibit 5 (protected information sheet).

¹²³ Witness BAC, T. 11 May 2009, pp. 44-47, 69-72. Witness BAC testified that the meeting occurred on the Thursday of 20 or 21 April. T. 11 May 2009 pp. 46-47. Thursday fell on 21 April in 1994.

¹²⁴ Witness BAC, T. 11 May 2009, pp. 46-48, 55-57.

¹²⁵ Witness BAC, T. 11 May 2009, pp. 47-49, 56, 61, 69; T. 12 May 2009, pp. 3-4.



Prosecution Witness AXY

117. Witness AXY, a Tutsi, was at her parents' home in the vicinity of Kabuye hill in April 1994.¹²⁶ In the evening, sometime between 20 and 21 April 1994, her father and paternal uncle returned home and said that President Sindikubwabo spoke to Hutus and Tutsis at Gisagara market that day. Only Sindikubwabo, who was in the company of Ntawukulilyayo, Ndora *Bourgmestre*, parliamentary member Bernadette Mukarurangwa and an MDR official addressed the crowd. He called the population of Ndora commune "indifferent", suggesting that they needed to attack Tutsis as others were doing elsewhere. The meeting lasted less than 10 minutes and Ntawukulilyayo, the President as well as his delegation continued to the sub-prefecture office.¹²⁷

118. Subsequently, Tutsis who had previously fled attacks elsewhere in the sub-prefecture and gathered at Gisagara market went to Kabuye hill. There, the Witness learned from them that Ntawukulilyayo and the *bourgmestre* had asked that they to go to Kabuye hill where their protection would be provided. On 23 April, Hutus living on Kabuye hill left, leaving only Tutsis there.¹²⁸

119. By 24 April, heavy weapons were installed on hills overlooking Kabuye, where the Witness had remained to seek refuge. Hutu assailants, including *Interahamwe*, a group referred to as "Jaguar" based below the Gisagara church and others led by Rwakimwaga from Muganza commune, attacked the refugees at Kabuye hill. The assaults came from Dahwe and Karama hills, Ruturo and Gisagara and gunshots were fired. Attackers took cover from the heavy rain that evening and the Witness fled. She eventually returned to Kabuye hill where she found numerous dead Tutsis, including women, children and infants, as well as Hutu women who had been married to Tutsi men. The Witness did not see Ntawukulilyayo in April 1994 but considered him responsible for not protecting those within his sub-prefecture.¹²⁹

Prosecution Witness BAF

120. In 1994, Witness BAF, a Hutu farmer and member of the MRND lived near the Gisagara trading centre.¹³⁰ As early as 10.00 a.m. on Wednesday 20 April 1994, refugees fleeing from attacks in Kibayi, Muganza and Nyaruhengeri communes began to gather on the football field at Gisagara market. They were numerous, some travelling with livestock and young children, and their presence prevented the market from opening that day. They remained there that evening.¹³¹

¹²⁶ Witness AXY, T. 19 May 2009, p. 61; T. 20 May 2009, pp. 7-8; Prosecution Exhibit 10 (protected information sheet).

¹²⁷ Witness AXY, T. 19 May 2009, pp. 64-65; T. 20 May 2009, pp. 19-20.

¹²⁸ Witness AXY, T. 19 May 2009, pp. 63, 65; T. 20 May 2009, p. 25.

¹²⁹ Witness AXY, T. 19 May 2009, pp. 62, 66-69; T. 20 May 2009, pp. 11, 20. Witness AXY testified that one of her brothers was clubbed and agonised for three days before dying. She also saw the bodies of her two younger brothers and witnessed Hutu *Interahamwe* kill her father and mother on 25 April 1994. It is not clear if these killings occurred at Kabuye hill. T. 19 May 2009, pp. 62, 64-65.

¹³⁰ Witness BAF, T. 13 May 2009, pp. 60, 62-63, 65; T. 18 May 2009, pp. 23, 32, 49; Prosecution Exhibit 8 (protected information sheet). At the time of his testimony, Witness BAF was detained in Karubanda prison, Butare, with five years remaining on his sentence. He previously confessed to killings, rape, torching homes, looting and slaughtering others' livestock in 1994. The *Gacaca* court for Mukande sector sentenced him to 20 years' imprisonment. T. 14 May 2009 pp. 12-14; T. 18 May 2009, pp. 3, 7-17, 56-61.

¹³¹ Witness BAF, T. 13 May 2009, pp. 61-62, 65; T. 18 May 2009, pp. 28, 34.

121. The following morning, Thursday 21 April, the Witness was at the Gisagara market when he heard that Ntawukulilyayo was holding a public meeting at the sub-prefecture office. Within a big hall, many Hutus and Tutsis gathered. President Théodore Sindikubwabo was present with soldiers as was Ntawukulilyayo, *conseillers* and four communal police officers and residents of various sectors and *cellules*.¹³² Sindikubwabo asked Deo Mukezarugamba, a Hutu, and Antoine Uhagaze, a Tutsi, if they remembered the events of 1959 and said that they would happen again, leaving the impression that persons needed to prepare for war between Hutus and Tutsis. He then gave a letter to Ntawukulilyayo and said authorities will provide instructions. Ntawukulilyayo asked what to do about the refugees, who had started moving towards Burundi that morning. Sindikubwabo told him to send police to stop them. After the meeting, Witness BAF saw Ntawukulilyayo give this order at the sub-prefecture office and four communal police board a vehicle in order to stop fleeing refugees.¹³³

122. Witness BAF returned to his home and transported his wife and children to his father-in-law's home in Bweya sector, Shyanda commune. He returned to Gisagara market around 1.00 p.m. There, he saw Tutsis who had left the market for Burundi but who had been stopped in Muyaga commune, returning. Displaced persons coming from elsewhere also continued to arrive. Ntawukulilyayo came to the market and told those present to go to Kabuye hill where their safety would be assured. They started heading in that direction around 3.00 p.m.¹³⁴

123. The Witness remained in Gisagara and that evening Fidèle Uwizeye directed him and others to establish roadblocks. The following day, groups of refugees continued to arrive at the market. Anyone, whether a civilian, police officer or soldier, would instruct them to go to Kabuye hill, where up until this point, no killings had occurred. On Friday evening, Uwizeye informed the Witness and others that Ntawukulilyayo had ordered that Tutsi houses be torched, their cows killed and the meat shared. The group carried out the orders within the commune. The Tutsi residents fled, gathering at the Gisagara market or going directly to Kabuye hill. Early the following morning, Saturday 23 April, Ntawukulilyayo, Fidèle Uwizeye, Gaëtan Uwihoreye and one Callixte Kalimanzira, who had arrived in Gisagara the previous day, went to the market. The sub-prefect told the displaced Tutsis to go to Kabuye, again promising that protection would be provided there. They complied, leaving from around 8.00 a.m.¹³⁵

124. On Saturday afternoon, Witness BAF saw Ntawukulilyayo and Kalimanzira in the company of numerous soldiers at the "centre". Between 8.00 p.m. and 1.00 a.m. that evening, he heard gunshots coming from the direction of Kabuye hill through heavy rain. At the time, he was about one kilometre from Kabuye, posted at a roadblock between Gisagara and Mukande sectors.¹³⁶ On Sunday morning, refugees fleeing from Kabuye were stopped and killed at the Witness' roadblock. Three days later, he received information that

¹³² Witness BAF did not see if members of parliament, including Bernadette Mukarurangwa, were present at the 21 April 1994 meeting. T. 18 May 2009, p. 24. He did not know the Butare prefect. T. 18 May 2009, p. 47.

¹³³ Witness BAF, T. 13 May 2009, pp. 59-63; T. 18 May 2009, pp. 23-25, 27, 29-30, 34-39, 60.

¹³⁴ Witness BAF, T. 13 May 2009, pp. 62-65; T. 14 May 2009, p. 8; T. 18 May 2009, pp. 27-30, 60.

¹³⁵ Witness BAF, T. 13 May 2009, pp. 65-70; T. 18 May 2009, pp. 46-49, 60.

¹³⁶ Witness BAF further stated that the roadblock was located between Mukande and Gisagara sectors. The transcript initially refers to "Mukambe" sector, but this appears to be an error. The sector is repeatedly referred to as "Mukande" sector. See Witness BAF, T. 14 May 2009, p. 6; T. 18 May 2009, pp. 3, 17; Ntawukulilyayo, T. 15 December 2009, pp. 29, 36.

Ntawukulilyayo had ordered civilians in Gisagara to bury the dead there. He went to Kabuye hill about four or five times for this purpose.¹³⁷

Prosecution Witness BAZ

125. Witness BAZ, a Hutu, was a teacher in Kibayi commune in 1994.¹³⁸ On the morning of Saturday 23 April 1994, a businessman named Gaëtan met him and others at a local market, and told them that Ntawukulilyayo had ordered that Tutsis be taken from shops in Gisagara to Kabuye hill.¹³⁹ The Witness and others went in Gaëtan's vehicle to Ndatemwa – between Muganza and Ndora communes and about three kilometres from Kabuye by road – arriving there between 11.00 a.m. and 1.00 p.m. Hutu killers from Kibayi and Muganza communes were present.¹⁴⁰

126. Once at Ndatemwa, the Hutu assailants were divided into four different groups for the purpose of searching for Tutsis, burning down their homes and taking them to Kabuye hill. Ntawukulilyayo arrived with Fidèle Uwizeye, the chairman of the MDR party in Ndora commune. The Witness had not previously met Ntawukulilyayo, but other persons stated that the sub-prefect had arrived. Leaders among those waiting for Ntawukulilyayo, including the Muganza school inspector Mbarushimana (also known as Kivunja), warrant officer and director of the school centre Narcisse Nshimiyimana and Innocent Mukurarinda, approached the sub-prefect and informed him that they had organised attacks. Ntawukulilyayo ordered them to surround refugees and kill any who tried to escape. He also instructed the search of Tutsi homes and to kill their Tutsi inhabitants. Finally, he prohibited anyone from “entering into the camp” prior to his arrival with soldiers.¹⁴¹

127. The groups dispersed, and the Witness' group searched homes on Dahwe hill. He carried a metallic tube and participated in the killing of two Tutsi females and one child. The group continued until nightfall, stopping at Gahondo. They returned to Ndatemwa, where a meal was prepared for them and they spent the night there.¹⁴²

128. Around 10.00 a.m. on Sunday 24 April, Narcisse Nshimiyimana, accompanied by six soldiers, ordered the Witness and others to attack the Tutsis on Kabuye hill. Civilian attackers

¹³⁷ Witness BAF, T. 13 May 2009, p. 70 (quoted); T. 14 May 2009, pp. 2-4; T. 18 May 2009, pp. 17-18, 52-53, 60. While imprisoned together, Witness BAZ had informed Witness BAF that he had participated in attacks at Kabuye hill. T. 18 May 2009, p. 54.

¹³⁸ Witness, BAZ, T. 21 May 2009, pp. 29-30; Prosecution Exhibit 12 (protected information sheet). Witness BAZ was arrested in August 1996. He confessed to killing two women and a young girl in Kabuye and was convicted by the *Gacaca* court in Dahwe in 2007 and sentenced to 20 years of imprisonment. He was also convicted by a *Gacaca* court in Rwamiko in 2007 for crimes committed in that region. The Rwamiko court, however, also considered the crimes the Witness committed elsewhere and imposed a 20 year sentence as well. He was released after approximately 11.5 years of detention and was participating in communal labour at the time of his testimony. T. 21 May 2009, pp. 10-11, 20-33, 35; T. 21 May 2009, pp. 38-39.

¹³⁹ Witness BAZ testified that this meeting occurred on a Saturday between 19 and 24 April. T. 21 May 2009, pp. 3, 5. This day fell on 23 April in 1994.

¹⁴⁰ Witness BAZ, T. 21 May 2009, pp. 3-5, 9.

¹⁴¹ Witness BAZ, T. 21 May 2009, pp. 5, 7 (quoted) 8-9.

¹⁴² Witness BAZ, T. 21 May 2009, pp. 10, 14, 31-32. Witness BAZ confirmed Defence counsel's assertion that at least five other persons were killed at the same house on Dahwe hill where he had killed three females. T. 21 May 2009 pp. 31-32. It appears, however, that counsel misread his confession, as it indicates that the Witness was responsible for killing one additional person in a house on Kabuye hill the following Monday, and that about six other persons were found there. Defence Exhibit 40 (confession of 2 January 2001).

wore banana leaves and were given passwords such as “rain” and “hailstone”, which would allow them to identify each other during the attack. They threw stones while soldiers fired on the refugees, who, along with their livestock, nearly covered the hill. They resisted by throwing stones and took wounded persons to a gated compound that belonged to a Mr. Aphrodise.¹⁴³

129. The Witness and his group eventually left for Gahondo, while the soldiers returned to Gisagara. Between 3.00 and 4.00 p.m., two soldiers arrived at Gahondo with a gun positioned on a tripod. They fired shots in order to flush out Tutsis. The civilian attackers would go to the bottom of the hill, firing arrows at Tutsis, or in the Witness’ case, wielding an iron bar. The Tutsis continued to resist, throwing stones. A stream separated the refugees from their attackers, and it became dangerous for persons in either group to cross it. At night it started to rain heavily, and the Witness returned to Ndatemwa where a kitchen had been established. He heard heavy gunfire the entire evening.¹⁴⁴

130. On Monday 25 April, the Witness and other attackers returned to Kabuye hill in order to loot. Houses were searched and the Witness observed three Tutsis being killed. Belongings were taken from the homes and abandoned cattle removed from the hillside.¹⁴⁵

Prosecution Witness AXV

131. In 1994, Witness AXV, a Hutu, worked as a local government official in Gisagara sub-prefecture.¹⁴⁶ Tutsis were killed around 23 April at Kabuye hill in Ndora commune by soldiers and communal policemen using firearms as well as civilians wielding traditional weapons. He saw bodies there from a distance, but as this occurred in another commune, the incident was not a primary concern for him.¹⁴⁷ The killings of Tutsis were not discussed at a meeting on 3 May, chaired by Ntawukulilyayo at the Gisagara sub-prefecture office.¹⁴⁸

Ntawukulilyayo

132. Ntawukulilyayo testified that on Wednesday 20 April 1994, he returned to his home in Gisagara town, after having attended a meeting at the Butare prefecture office.¹⁴⁹ From in front of his house between 6.00 and 7.00 p.m., he observed about 50 to 60 persons heading

¹⁴³ Witness BAZ, T. 21 May 2009, pp. 11-12.

¹⁴⁴ Witness BAZ, T. 21 May 2009, pp. 13-14.

¹⁴⁵ Witness BAZ, T. 21 May 2009, pp. 14-15.

¹⁴⁶ Witness AXV, T. 25 May 2009, pp. 9-10; Prosecution Exhibit 13 (protected information sheet). Witness AXV was incarcerated at the time of his testimony but no evidence was elicited from him about the circumstances of his imprisonment. Prosecution Exhibit 13 (protected information sheet). Witness BAF testified that the two were detained together after having pleaded guilty. Witness BAF, T. 18 May 2009, p. 54. Witness MAI also testified that he was detained with Witness AXV who accepted to plead guilty and to accuse some authorities at the time and was moved into the ward known as “Arusha”. Witness MAI, T. 24 September 2009, p. 24.

¹⁴⁷ Witness AXV, T. 25 May 2009, pp. 37-38, 52-53.

¹⁴⁸ Witness AXV, T. 25 May 2009, pp. 52, 54. Witness AXV also stated that the killings of Tutsis at Kabuye hill were not discussed in any telegrams received from the Minister of Interior or Communal Development after 23 April 1994. T. 25 May 2009, p. 38.

¹⁴⁹ For details concerning the 20 April 1994 meeting Ntawukulilyayo attended at the Butare prefecture office, see Ntawukulilyayo, T. 15 December 2009, pp. 49-54, 57, 60-61; T. 17 December 2009, pp. 34-37.

towards the Ndora commune office and the Gisagara market.¹⁵⁰ He greeted them and learned that they had fled from Kibayi and Muganza communes. He gathered the *bourgmestre* and father Thomas Mutabazi, the Gisagara parish priest, to see what could be done. Ntawukulilyayo parked his car near his home and then went with Mutabazi on foot to the Gisagara market square between 7.00 and 8.00 p.m. There, he observed between 300 and 500 persons. Ntawukulilyayo told those who had gathered there that he was saddened that they had been chased from their homes and that he would contact Caritas. He denied that he misled the crowd in order to allow him to subsequently send them to Kabuye hill. Mutabazi told those gathered that he would attempt to provide similar support, and the *bourgmestre*, who arrived with a communal policeman, stated that he would deploy the police to provide security for the area. No gendarmes or soldiers were there. Ntawukulilyayo left on foot and denied that he and Joachim Kurimpuzu left together in a vehicle. He did not see Elie Ndayambaje on 20 April.¹⁵¹

133. At about 8.00 a.m. the following day, Thursday 21 April, Ntawukulilyayo left for Muganza commune. At Dahwe, however, a man on a motorbike in military uniform, with a painted face and carrying a firearm stopped him. Speaking in Kirundi, a Burundian language, the man said that he had heard that Ntawukulilyayo was collaborating with the *Inkotanyi* and that the sub-prefect was not needed in Muganza. Ntawukulilyayo turned around and the man followed him back to Gisagara.¹⁵²

134. Around 9.00 a.m. he was back in Gisagara town near his home when an individual informed him that President Théodore Sindikubwabo was at the sub-prefecture office. He had no prior knowledge of this visit and went to his office. There, he saw the arrival of the Ndora *Bourgmestre* Célestin Rwankubito, Prefect Sylvain Nsabimana, parliamentary member Bernadette Mukaruranga and Sindikubwabo. Ntawukulilyayo greeted the delegation and informed the prefect that persons were fleeing from Muganza and Kibayi communes and taking refuge in Gisagara. He received no response. Sindikubwabo then addressed a crowd that grew from about 30 to 60 persons, requesting the residents to ensure the security of their neighbours and prevent a reoccurrence of what happened during the revolution of 1959. Sindikubwabo spoke for about five minutes and left immediately thereafter. Ntawukulilyayo had no knowledge of the President stopping at Gisagara market, did not discuss the issue of the refugees with him, and did not receive an envelope from him.¹⁵³

135. As Ntawukulilyayo did not have an opportunity to fully explain the situation in Gisagara to Prefect Nsabimana, he left for the prefect's office to see if he could procure further assistance. There, the sub-prefect for administration and politics informed Ntawukulilyayo that the prefect was on tour with the President. He collected mail and left, stopping first at the African Catholic Institute (ICA) in Butare between 3.00 and 3.30 p.m. to see the director of Caritas. A priest there informed him that the director was not present. Ntawukulilyayo then went to his son's home, stopping for about 30 minutes in order to visit

¹⁵⁰ The Gisagara market was approximately 150 to 300 metres from Ntawukulilyayo's home. Ntawukulilyayo, T. 10 December 2009, p. 44; Defence Exhibit 67 (sketch of Gisagara town). See also Chamber's Exhibit 1 (Confidential Report on Site Visit, 5 May 2010), para. 8 (ii) (the Accused's former residence to the Gisagara market – 0.2 km).

¹⁵¹ Ntawukulilyayo, T. 15 December 2009, pp. 49-50, 61-66; T. 16 December 2009, pp. 3, 49; T. 17 December 2009, p. 47.

¹⁵² Ntawukulilyayo, T. 15 December 2009, p. 66.

¹⁵³ Ntawukulilyayo, T. 8 December 2009, p. 51; T. 15 December 2009, pp. 66-68; T. 16 December 2009, p. 2; T. 17 December 2009, pp. 31, 44-47, 71.

orphans who had fled from Kigali, after which he left for Gisagara, arriving at around 5.00 p.m.¹⁵⁴

136. Once in Gisagara town, Ntawukulilyayo first dropped mail at the sub-prefecture office and then went to Gisagara market. There, refugees stated that they were fine despite the conditions. Some said that a group who decided to go to Musha *cellule* in Mugusa commune were stopped by authorities from there and forced to return. Ntawukulilyayo did not go to Musha to assess the situation. Instead, he went home after leaving the market and spent the rest of the evening there. During a 6 May meeting of the extended prefectural security council, Mugusa *Bourgmestre* André Kabayiza said that he, with the assistance of communal police, had intercepted refugees coming through Mukande sector, Ndora commune at Ngiriyi river bridge on 21 April. Mugusa commune did not fall within the Gisagara sub-prefecture. Ntawukulilyayo denied that he prevented refugees from attempting to cross into Burundi.¹⁵⁵

137. On the following day, Friday 22 April, Ntawukulilyayo left Gisagara around 10.00 a.m. and went to the ICA in Butare in search of the director of Caritas. There he spoke to father Denis Sekamana, who informed him that the Caritas director had left for Burundi. He did not receive any aid from Caritas. He next went to the prefect's office. There were several people there and Ntawukulilyayo learned of killings in Butare that had occurred that day and the day before. He informed Nsabimana that he was seeking assistance for those taking refuge in Gisagara town. Nsabimana said there was nothing he could do but assured Ntawukulilyayo that he would inform the director of Caritas of his request for assistance upon the director's return. Ntawukulilyayo left Butare around 1.30 p.m., arriving in Gisagara around 2.00 p.m. Upon arrival, he first went to his office and then the town centre where he told refugees that he was still unable to obtain assistance. He remained there for about 10 minutes and returned home.¹⁵⁶

138. Ntawukulilyayo testified that at around 6.00 p.m. that Friday, three priests Thomas Mutabazi (a Tutsi), Marcelin Twagirayezu (a Hutu) and Tharcisse Rubingiza (a Tutsi) came to Ntawukulilyayo's home. New displaced persons had arrived from Butare and Ngoma commune escaping killings in their regions. Ntawukulilyayo and the priests discussed for about one hour how they could help these persons leave. They decided, however, that all routes had been blocked. Ntawukulilyayo then accompanied the priests back to the commune office and returned home, where he remained that evening.¹⁵⁷

139. The following day, Saturday 23 April, Ntawukulilyayo left Gisagara to go to Nyaruhengeri commune. However, a short distance from his house, he noticed that a group of around seven persons wielding machetes had gathered near the home of the Keletis, a Tutsi family that he knew. Members of the Keleti family as well as those who had fled Kigali were also present. The Keletis had been accused of harbouring *Inkotanyi* and were targeted as a result. Ntawukulilyayo pleaded with the group not to attack, but they responded that he was an *Inkotanyi*. He then offered them 3,000 Rwandan francs and they decided to leave.¹⁵⁸

¹⁵⁴ Ntawukulilyayo, T. 16 December 2009, pp. 2-3, 11; T. 17 December 2009, p. 71.

¹⁵⁵ Ntawukulilyayo, T. 16 December 2009, pp. 3-4, 7-11.

¹⁵⁶ Ntawukulilyayo, T. 16 December 2009, pp. 11-13; T. 17 December 2009, p. 71.

¹⁵⁷ Ntawukulilyayo, T. 16 December 2009, pp. 13-14.

¹⁵⁸ Ntawukulilyayo, T. 16 December 2009, pp. 14-17 (Ntawukulilyayo identified Jérôme (nicknamed Rutwitsi) and Jean (also referred to as Bihehe), Hutus from Nyamigango *cellule*, in the group).

140. Ntawukulilyayo proceeded to Kansi sector in Nyaruhengeri commune, a distance of between 25 to 30 kilometres from Gisagara town, arriving at the Benedictine Sisters around 10.00 a.m. He had previously asked *Bourgmestre* Charles Kabeza to station a communal police officer there to protect the occupants and wanted to check whether this had been done. A communal policeman was stationed there and Witness BAA indicated that assailants had not attacked the location because of the police officer. Ntawukulilyayo then left, returning to Gisagara.¹⁵⁹

141. When he arrived home, he found his wife and father Thomas Mutabazi there. The latter asked Ntawukulilyayo to give him refuge. Ntawukulilyayo feared it was unsafe to keep the Tutsi priest in his home as people were already accusing him of working with the *Inkotanyi*. They decided to take Mutabazi to the home of one Doctor Venant Ntabonvura. Mutabazi left for his parish to prepare for the trip.¹⁶⁰

142. Ntawukulilyayo picked up Mutabazi from the parish around 2.00 p.m. and drove him to Ntabonvura's home. On the way, he was stopped at a roadblock in Ntobo, around eight kilometres from Gisagara. A person working at the roadblock told him that Bernadette Mukarurangwa had instructed them to intercept and kill Tutsis. It was common knowledge that Mutabazi was a Tutsi, and Ntawukulilyayo pleaded with those at the roadblock and the two were eventually allowed to pass. When returning, Ntawukulilyayo was stopped at the same roadblock and accused of helping Tutsis flee as well as being one. They eventually asked for money, which he gave them and then left. He returned to Gisagara, arriving at around 5.00 p.m. and went to the commune office to report the incident at the roadblock. When he arrived, however, the *bourgmestre* informed him that those who had sought refuge at the Gisagara marketplace had left for Kabuye or the Sisters of Abizeramariya convent. Ntawukulilyayo told the *bourgmestre* to ensure the security of those at Kabuye and asked him to dispatch a communal police officer to the convent. He informed the *bourgmestre* that he would go immediately to speak with the prefect.¹⁶¹

143. Before leaving for Butare, Ntawukulilyayo first went home briefly and then proceeded to the Sisters of Abizeramariya convent. He did not stop at the Gisagara market, nor did he visit Kabuye hill.¹⁶² At the convent, he assured the sisters that a communal police officer would protect them. He proceeded to Butare around nightfall. Since it was late, he did not expect to find the prefect at his office but hoped that a sub-prefect could assist in locating him.¹⁶³

144. Ntawukulilyayo testified that while in Butare, he met with Jean-Baptiste Hakizamungu, the sub-prefect in charge of administrative and legal affairs. He told him that the refugees in Gisagara had left, that he was concerned for their security and that members of the population said they intended to arrest and kill Tutsis. Hakizamungu was unable to locate the prefect and told Ntawukulilyayo to return at 10.00 a.m. the next day. Having

¹⁵⁹ Ntawukulilyayo, T. 16 December 2009, pp. 14, 17-19.

¹⁶⁰ In particular, Ntawukulilyayo testified that persons were accusing him of using a radio to inform the *Inkotanyi* of what was occurring. T. 16 December 2009, pp. 20-21.

¹⁶¹ Ntawukulilyayo, T. 16 December 2009, pp. 19-25. T. 17 December 2009, p. 48.

¹⁶² The Chamber notes that while Ntawukulilyayo testified about what he did on 23 April 1994, he was asked if he ever went to the Gisagara market on 24 April, to which he responded no, and continued to detail what he did on 23 April (T. 16 December 2009, p. 25). Given the context in which this testimony arose, it appears that Ntawukulilyayo was in fact denying that he went to Gisagara market on 23 April.

¹⁶³ Ntawukulilyayo, T. 16 December 2009, pp. 25-26.

considered the dangers of returning to Gisagara that late, Ntawukulilyayo decided to stay in Butare at the home of his relative Viateur Nyandwi.¹⁶⁴

145. Early the next morning, Sunday 24 April, he left Butare to return to Gisagara town to see if there were any new developments. He arrived around 8.00 a.m. The *bourgmestre* informed him that persons from Kirarambogo and Muganza had attacked Cyamukuza sector. As the two walked to Ntawukulilyayo's office, he saw people running from assailants carrying spears and machetes. Ntawukulilyayo then went to the Benedictine Sisters convent and found that while it had not been attacked, the communal police officer was no longer there. He again left for Butare at around 9.00 a.m.¹⁶⁵

146. In Butare, Ntawukulilyayo was unable to meet the prefect. Instead he informed the sub-prefect of what he had seen and learned. The sub-prefect, who had spoken to the prefect, told Ntawukulilyayo that all soldiers and gendarmes had been deployed to the war front. Ntawukulilyayo left to return to Gisagara, arriving around noon. There, the *bourgmestre* told him that persons had been attacked and killed in Gisagara and that those at Kabuye hill had been slain. He also said that he was unable to deploy a police officer to the Sisters of Abizeramariya convent because he could not pay him. Ntawukulilyayo responded that he and the sisters would pay the officer and reiterated his request to deploy that person there. Later, Ntawukulilyayo spoke to some "wise elders" of the community who included Joseph Kamanzi, Jean Ntamuhanga, Déogratias Misago, Murihano, Lini and *Bourgmestre* Niyolagona. They had sheltered refugees and Ntawukulilyayo asked them to continue to do so.¹⁶⁶

147. On the morning of 25 April, Ntawukulilyayo again saw armed attackers with traditional weapons and persons carrying property that had been looted. He believed they were Hutus from Kibayi, Kirarambogo and Muganza as well as refugees from Burundi. Fearing that he might be attacked, Ntawukulilyayo went to the commune office, retrieved his vehicle and drove to Butare to speak with the prefect. He only managed to speak with the sub-prefect, who again informed him that soldiers had gone to the war front. He returned to Gisagara, concluding that nothing could be done. Upon his return, he again spoke with the elders and informed them that no help could be obtained but they continued to follow his requests by preventing their own children from taking part in attacks as well as confronting assailants. Ntawukulilyayo spent that evening in his home and noted that no further attacks occurred by the afternoon that day.¹⁶⁷

¹⁶⁴ Ntawukulilyayo, T. 16 December 2009, pp. 25-28, 35.

¹⁶⁵ Ntawukulilyayo, T. 16 December 2009, pp. 28-30.

¹⁶⁶ Ntawukulilyayo, T. 16 December 2009, pp. 30, 33-34, 36-38; T. 17 December 2009, p. 47. The Chamber notes while Ntawukulilyayo initially testified that he went to Butare on 24 April and spoke with the sub-prefect (T. 16 December 2009, pp. 28-30), he later stated that he went there on 25 April (T. 16 December 2009, p. 34: "No. I was saying that I had returned to Butare. We are talking about the 25th. When I arrived I spoke to the sous préfet, who told me he had discussed the matter with the préfet over the phone."). Subsequently, he confirmed that he went to Butare on 24 April (T. 16 December 2009, p. 36) but then again testified that he went there on 25 April and was given nearly the same message (T. 16 December 2009, p. 42: "25th of April, just as the 24th of April, really made an impression on me [] the sous préfet told me that there were no soldiers to intervene. He told me that all the soldiers had gone to the war front.").

¹⁶⁷ Ntawukulilyayo, T. 16 December 2009, pp. 42-43. Ntawukulilyayo specified that the following Tutsis were saved based on efforts within his community: Madam Drosella Mukakabera (a school director), her daughter and son; children from Kibayi who stayed at Gérard Ndamage's home; the daughters of Benoît Ruzindana and his wife, Antoine Uhageze's two sons and a reverend sister called Speciosa had all taken refuge at the

148. Ntawukulilyayo testified that at no point did he order the Tutsis at Gisagara market to leave or to go to Kabuye hill as alleged in paragraph 7 of the Indictment. He denied ordering persons to chase them from there.¹⁶⁸ He did not instruct, as contained in paragraph 9, anyone to search Tutsis on Kabuye hill.¹⁶⁹ He denied going to Gisagara market or Kabuye hill around 23 or 24 April as alleged in Indictment paragraphs 11 and 21.¹⁷⁰ He further rejected the claim in paragraph 10 that he transported ammunition as well as soldiers and gendarmes to Kabuye hill to assist in killings there.¹⁷¹ He testified that he did not have the authority or means to punish those who committed crimes at Kabuye hill but had told the *bourgmestre* to identify and punish the perpetrators.¹⁷²

149. On 2 May, Ntawukulilyayo sent a letter to the prefect, explaining that a tragedy had occurred in Gisagara sub-prefecture between 20 and 25 April where innocent persons were killed. This reference intended to refer to Hutus in Kibayi and Muganza communes who had destroyed Tutsi homes and chased their residents away, and that killings had subsequently occurred in Cyamukuza, Kabuye hill and Gisagara. He explained that the killing of many “innocent people” was a reference to the Tutsi victims of attacks. The letter also read that peace and a “spirit of tolerance” were being restored in the communes, which he explained that after the massacres ordinary relations had resumed in the community. Ntawukulilyayo denied that this text was referring to conflicts between Hutus fighting over looted property and killings among them rather than the murder of Tutsis. The letter also contained a request for a vehicle and a radio, which would allow him to visit the communes and then report to the prefect.¹⁷³

Defence Witness KAD

150. In 1994, Witness KAD, a Tutsi, lived in Muganza commune and was married to a sector *conseiller*.¹⁷⁴ She testified that after 6 April 1994, about 50 family members took refuge in her home. On Wednesday 20 April, she fled with her relatives, except her Hutu husband and child, after her home had been attacked. They went on foot to Gisagara, as security remained at there, and sought refugee at its market. They arrived between 9.00 and 11.00 a.m. along with 200 to 300 others from Muganza, Ndora, Nyaruhengeri and Kibayi communes. The number continued to grow.¹⁷⁵

151. Between 7.00 and 8.00 p.m. that day, Ntawukulilyayo and “Father Thomas” arrived on foot, and the Ndora *bourgmestre* arrived shortly after. Ntawukulilyayo, standing about three and a half metres from the Witness, said that no one should kill based on ethnicity and that he, in coordination with Father Thomas, would contact Caritas to obtain relief for the

Abizeramariya Sisters convent. Ntawukulilyayo also saved three relatives who were orphaned during killings in Cyahinda. T. 16 December 2009, p. 43.

¹⁶⁸ Ntawukulilyayo, T. 16 December 2009, pp. 27-28.

¹⁶⁹ Ntawukulilyayo, T. 16 December 2009, p. 44.

¹⁷⁰ Ntawukulilyayo, T. 16 December 2009, pp. 25, 38-39.

¹⁷¹ Ntawukulilyayo, T. 16 December 2009, pp. 44-46.

¹⁷² Ntawukulilyayo, T. 16 December 2009, p. 39.

¹⁷³ Ntawukulilyayo, T. 16 December 2009, pp. 49-50, 52; T. 17 December 2009, pp. 69-71; Defence Exhibit 69 (letter from Ntawukulilyayo to the prefect of Butare, dated 2 May 1994).

¹⁷⁴ Witness KAD, T. 19 November 2009, pp. 4, 9; Defence Exhibit 64 (protected information sheet).

¹⁷⁵ Witness KAD, T. 19 November 2009, pp. 8-10.



refugees. He asked the *bourgmestre* to provide security. The three remained there for between 15 to 30 minutes.¹⁷⁶

152. The Witness stayed at Gisagara market for three days. During that period, she never saw Ntawukulilyayo return after his 20 April visit, nor did she learn of this occurring. Refugees were free to leave, although it was dangerous to do so. Some with livestock left on Thursday and Friday. Others left for Musha *cellule* while some went towards Burundi. Hygiene deteriorated at the market, as animal and human waste, as well as garbage, accumulated. Traders based at the market also expressed their desire that the refugees leave the market. Others said that messages were broadcast on the radio directing refugees to go to "Kabuye", but there was confusion as to whether they meant Kabuye in Kigali or Kabuye hill.¹⁷⁷

153. The Witness testified that on the morning of Saturday 23 April, between 8.00 and 11.00 a.m., she and her relatives left with other refugees for Kabuye hill. Some had already gone there, particularly persons with livestock. Once out of Gisagara, the adults, children and animals travelled on a narrow path and in chaotic conditions. She estimated that 300 to 500 persons were at Kabuye hill when she arrived there sometime between 9.00 and 11.00 a.m. Once there, persons scattered all over the hill.¹⁷⁸

154. The evening on the hill started without incident but late into the night, the Witness, who was at the top of the hill, observed soldiers and other attackers coming. Some arrived in vehicles that stopped a short distance from Kabuye hill while others came by foot. She was unaware of their numbers. They mounted the hill on foot and attacked the refugees, some shooting firearms, while others wielded machetes, clubs or other weapons. She and others threw stones in their defence for about one half hour until the stones ran out. The attack lasted about two hours, until it began to rain and the assailants left.¹⁷⁹

155. The assailants returned the following evening, Sunday 24 April, around the same time they had started the previous day. The killings continued into Monday morning. During this attack, the Witness was injured, although she could not recall what had happened. She awoke in a pit of corpses and believed she had been left for dead. All of her family that accompanied her there died. At no point, while on the hill, did she see Ntawukulilyayo or hear that he had come.¹⁸⁰ She hid on Kabuye hill until the following Thursday. She then moved to a banana farm. The owner found her there that day and took her to the Burundian border that evening. Her husband and child rejoined her there and they fled to Tanzania.¹⁸¹

¹⁷⁶ Witness KAD, T. 19 November 2009, pp. 11-12, 16, 33.

¹⁷⁷ Witness KAD, T. 19 November 2009, pp. 10-15, 17-18. Notwithstanding that Witness KAD's husband was a Hutu and a local official who had worked closely with Ntawukulilyayo, he did not visit her during her stay at Gisagara market as it was too dangerous. T. 19 November 2009, pp. 9, 28-29, 33.

¹⁷⁸ Witness KAD, T. 19 November 2009, pp. 17, 19-22.

¹⁷⁹ Witness KAD, T. 19 November 2009, pp. 22-23, 30-32.

¹⁸⁰ Witness KAD, T. 19 November 2009, pp. 23-24, 28, 32-33.

¹⁸¹ Witness KAD, T. 19 November 2009, pp. 23-24, 26. Witness KAD lived in exile at the time of her testimony. She had returned to Rwanda with her husband in 1996, whereupon he was imprisoned. After his release, they returned to Tanzania, where her husband died. She continued to feel that it was unsafe to return to Rwanda as it was alleged that she was the wife of a killer. T. 19 November 2009, pp. 26-27.

Defence Witness Jean-Baptiste Gasana

156. In 1994, Jean-Baptiste Gasana, a Hutu, lived and worked opposite the Gisagara dispensary, about 30 metres from the Gisagara market square. He knew Ntawukulilyayo as the Gisagara sub-prefect.¹⁸² On a Wednesday, about two weeks after 6 April 1994, he saw refugees arriving in Gisagara from around 3.00 p.m. They were from Muganza, Mugombwa, Kibayi and other areas. Some came to Gasana's shop and told him that they had fled because Hutus had torched their houses and there was no longer security in their areas. They believed that there would be "good officials" and security in Gisagara.¹⁸³

157. Refugees continued to arrive into the night. At about 7.30 p.m., the Witness saw Ntawukulilyayo come to the market accompanied by "Father Thomas". They passed by the Witness' shop who immediately went to listen to the refugees. *Bourgmestre Célestin Rwankubito* joined them about three minutes later. The refugees told Ntawukulilyayo and Father Thomas that they had fled their homes because people had started torching their houses. The Accused promised to protect and find food for them with the assistance of Caritas and the Red Cross. He also assured them that they would not have any problems in Gisagara and asked Rwankubito to provide safety for them. Ntawukulilyayo and Father Thomas then left together on foot and Rwankubito left in a Toyota Hilux pickup. The encounter lasted approximately ten minutes.¹⁸⁴

158. The refugees remained at Gisagara market for three days. Residents complained that they were creating a sanitation problem and traders wanted them to leave. All this while, there were no policemen or gendarmes at the market. The Witness testified that he did not watch the market continuously and was unaware of Ntawukulilyayo returning to the market at any time while the refugees were there.¹⁸⁵

159. The last of the refugees departed Gisagara market around 10.00 a.m. or 11.00 a.m. on Saturday. There were around 200 of them and they left towards Muganza, on the road leading to Butare and the Burundian border. The Witness did not know who sent refugees to Kabuye hill, or what happened there, but heard gunshots coming from that direction.¹⁸⁶

Defence Witnesses MAI

160. In 1994, Witness MAI, a Hutu, ran a shop in Gisagara, from where he could see the marketplace. He knew Ntawukulilyayo as the former sub-prefect of Gisagara sub-prefecture.¹⁸⁷ On Wednesday 20 April 1994, the Witness was at his shop when refugees started arriving in Gisagara at around 3.00 p.m. More continued to arrive that day and in total,

¹⁸² Gasana, T. 29 September 2009, pp. 40-42, 46.

¹⁸³ Gasana, T. 29 September 2009, pp. 55-58.

¹⁸⁴ Gasana, T. 29 September 2009, pp. 58-63.

¹⁸⁵ Gasana, T. 29 September 2009, pp. 62-64, 71-72.

¹⁸⁶ Gasana, T. 29 September 2009, pp. 63, 71-73.

¹⁸⁷ Witness MAI, T. 24 September 2009, pp. 16-18, 29; Defence Exhibit 47 (protected information sheet). Witness MAI fled Rwanda for Burundi in July 1994 and then to Tanzania. In 1996, he was forced by the Tanzanian authorities to return to Rwanda where he was accused of having looted property in 1994 and imprisoned. He testified that he was badly beaten and coerced into confessing to the crime. In 1998, he was transferred from the commune prison to Karubanda prison, where he remained for four years until he escaped by bribing a prison guard. He fled to Burundi and then to Malawi where he currently resides. T. 24 September 2009, pp. 4-9, 13, 29, 35.

they numbered between 300 and 500. They came with their cattle and belongings. Many settled at the marketplace and remained for three days. Others continued their journey. Those at the market were free to move around.¹⁸⁸ The Witness heard from two traders, Clément and Gaëtan that Ntawukulilyayo came to the market that evening, between 8.00 and 9.00 p.m., with a priest and enquired after the refugees' situation. The Witness did not hear that he ordered them to go to Kabuye hill.¹⁸⁹

161. On Thursday 21 April, the Witness heard a broadcast by Radio Muhabura, an RPF radio station, announcing that refugees should go to Kabuye where they would find security. On Friday 22 April, at around 3.00 p.m., the Witness watched refugees as they started to leave the market for Kabuye hill. He believed that they went there pursuant to the Radio Muhabura announcement. That Friday, he met a friend who was among the refugees who told him that his parents had left for Kabuye hill further to the radio broadcast, and that he was also going to join them. By 8.00 or 9.00 a.m. on Saturday 23 April, all the refugees had left. They were calm as they departed, and no officials, police, soldiers or gendarmes were present. The Witness did not see Ntawukulilyayo at the market on either the Friday or the Saturday, nor was any meeting held at the market during the three days that the refugees were there.¹⁹⁰

162. Over the three days that the refugees were at the market, the Witness opened his shop everyday from around 6.00 a.m. to 8.00 p.m. Due to the number of refugees and their cattle, sanitation became a problem. Clément and Gaëtan were in charge of security there and were the first to ask the Ndora commune *bourgmestre* to move the refugees. He believed that the *bourgmestre* subsequently "advised" the refugees to go to Kabuye.¹⁹¹

163. The Witness heard that Rwandan government forces went to fight at Kabuye hill because the "enemy" had captured it. He subsequently heard the sound of gunshots coming from the direction of the hill. Tutsis who did not go to Kabuye hill, and were hidden by their neighbours in Gisagara, survived the events.¹⁹²

Defence Witness MAE

164. In 1994, Witness MAE, a Hutu, lived in Ndora commune and worked for a trader. His place of work was about a minute's walk from the Gisagara market and the road leading to Musha separated the two. He knew Ntawukulilyayo as the Gisagara sub-prefect.¹⁹³ While at work on Wednesday 20 April 1994 at around 3.00 p.m., he saw refugees arriving at the Gisagara market. At about 7.00 p.m., Ntawukulilyayo came on foot accompanied by "Father Thomas" of the Gisagara parish. Approximately five to ten minutes later, *Bourgmestre* Célestin Rwankubito arrived with a police officer in a communal vehicle. The Accused was at the market for 20 to 25 minutes. The refugees informed the officials and the priest that they had sought refuge at Gisagara market from people who had torched their homes and stolen

¹⁸⁸ Witness MAI, T. 24 September 2009, pp. 18-20.

¹⁸⁹ Witness MAI, T. 24 September 2009, pp. 24-25, 27, 34.

¹⁹⁰ Witness MAI, T. 24 September 2009, pp. 20-25, 27-31, 34. Witness MAI did not know why some refugees had decided to leave prior to the Radio Muhabura announcement. T. 24 September 2009, p. 30. Nor did he know whether all the refugees had radio sets but believed that those who did not, would listen to radios of others. T. 24 September 2009, p. 33.

¹⁹¹ Witness MAI, T. 24 September 2009, pp. 18, 19 (quoted), 20, 28-31, 34.

¹⁹² Witness MAI, T. 24 September 2009, pp. 29, 32-33, 36-37.

¹⁹³ Witness MAE, T. 28 September 2009, pp. 5, 10, 21, 23, 57; T. 28 September 2009, p 23.

their cattle. Ntawukulilyayo told them that he “was not happy with the situation” and asked Rwankubito to provide safety and security for them. The sub-prefect then left with Rwankubito, Father Thomas and the policeman. Following their departure, some refugees left the market while others continued to arrive. The Witness left the marketplace at around 7.30 p.m. to go home¹⁹⁴

165. The Witness went to work each day between Wednesday 20 April and Saturday 23 April and testified that displaced persons continued to arrive at Gisagara market during this period. The Witness could observe them on his way to work from home. On Thursday 21 April or Friday 22 April, between 8.00 and 9.00 a.m., he saw a convoy of three dark military jeeps pass by. The Witness heard that it was for President Sindikubwabo and was headed for the sub-prefecture office.¹⁹⁵

166. After three days of the refugees staying at the marketplace, it became dirty and began to smell and the community wanted them to leave. A delegation representing the traders, consisting of Clément and Gaëtan, asked *Bourgmestre* Célestin Rwankubito to transfer them to another location. When the delegation returned, they told the crowd that Rwankubito had found a place for the refugees.¹⁹⁶

167. On Saturday 23 April, the Witness left for work around 7.00 a.m. and observed that the last of the remaining refugees were leaving. By 10.00 a.m., they had all gone. Some went via the road to Musha, while others went in the direction of Kabuye. One morning after the refugees arrived in Gisagara, the Witness heard a Radio Muhabura announcement that RPF soldiers would provide for refugees at Kabuye hill, and believed this might have prompted their departure. No policemen, gendarmes or soldiers were present as the refugees left. The Witness did not see Ntawukulilyayo at the market after Wednesday, nor did he hear of him returning. He did not see Tutsis killed in Gisagara but had heard that they were killed on Kabuye hill. Witness MAE knew Witness BAC and testified that it was not possible to see the market from her home, as a number of houses and shops blocked her view.¹⁹⁷

168. Witness MAE fled Rwanda in 2005 because of pressures to provide testimony against persons who visited him on more than six occasions between 1999 and 2005. In particular, Benoît Ruzindana first contacted him in 1999. He asked the Witness to provide testimony against his former employee, former Ndora *Bourgmestre* Célestin Rwankubito and Ntawukulilyayo. With respect to the former sub-prefect, he asked that the Witness testify that Ntawukulilyayo instigated the public to kill and that he had driven refugees from Gisagara market. Ruzindana threatened that the Witness would be thrown in jail if he did not cooperate. The last time he met Ruzindana was in 2005.¹⁹⁸

169. The Witness added that, on unspecified occasions, Witness BAC, a member of *Ibuka* came to his mother's home. While there, she would tell him to accuse his former boss, the *bourgmestre*, a sub-prefect and former female parliamentarian of inciting persons to kill.¹⁹⁹ The Witness testified that Witness AYQ was a member of *Avega*, which was a group that asked persons to accuse Hutu authorities. On an unspecified occasion, she informed him that

¹⁹⁴ Witness MAE, T. 28 September 2009, pp. 23-26, 27 (quoted), 54, 56.

¹⁹⁵ Witness MAE, T. 28 September 2009, pp. 27, 33-34, 54-59.

¹⁹⁶ Witness MAE, T. 28 September 2009, pp. 28-29.

¹⁹⁷ Witness MAE, T. 28 September 2009, pp. 27-32, 33-35, 42, 51-53, 57.

¹⁹⁸ Witness MAE, T. 28 September 2009, pp. 36-41.

¹⁹⁹ Witness MAE, T. 28 September 2009, pp. 36, 41-43.



whatever she said was accepted as true because she was a Hutu and a widow and had “seen or experienced what had transpired”.²⁰⁰

Defence Witness MAD

170. Witness MAD, a Hutu, lived in Ndora commune in 1994. Prior to April 1994, she would visit a girl who lived with Ntawukulilyayo.²⁰¹ On a Wednesday, about two weeks after 6 April 1994, the Witness went to Gisagara market to sell goods. At around 3.00 p.m., she saw refugees starting to arrive at the market. They came in small groups from other Gisagara communes and were fleeing massacres in their localities. The homes of some of the refugees had been torched.²⁰²

171. The Witness heard from the traders that Ntawukulilyayo came to the market between 6.00 and 7.00 p.m. that evening with “Father Thomas” of the Gisagara parish. Both asked the refugees about their welfare and Father Thomas said he would try to bring food from Caritas.²⁰³

172. While some displaced persons continued their journey and went directly to Kabuye, others remained at the market for three days. As a result, it became dirty, disorderly and Gisagara inhabitants wanted the refugees to leave. On the following Saturday, those at the market left for “Kabuye” as the *Inkotanyi* had said they would find security there. One refugee told the Witness that Radio Muhabura had announced that refugees would be protected on Kabuye hill and asked for directions there. She heard one such broadcast on a Sunday, a few days after President Habyarimana’s death, and had been told that similar broadcasts were made at other times. During the three days that the refugees were at the market, the Witness did not see Ntawukulilyayo.²⁰⁴

173. Witness MAD testified that she was invited on three occasions to meet with members of *Avega*, whose purpose was to falsely accuse persons. Members also came twice to her house. Describing her first meeting in June 2008, she stated that Witnesses AYQ and AXY were among the *Avega* members present. These persons asked her to testify that Ntawukulilyayo had incited persons to kill Tutsis and had ordered Tutsis to go to Kabuye hill. They explained that they were prepared to make the same “false” allegations. Benoît Ruzindana, who she described as the group’s representative and leader, offered her a job with increased payment for her cooperation. Witness MAD did not initially inform them she was not aware that Ntawukulilyayo had done such things but considered that they were not concerned that what they wanted her to say was not true. Later, however, she refused to sign documents that had been brought to her house. She expressly referred to Ruzindana as well as Witness AXY as having come to her home.²⁰⁵

174. In November 2008, she was called to attend a meeting with *Avega* the following month. She arrived at the intended gathering early and was informed by security personnel that there were plans to arrest her. She returned home. That evening one of her children informed her that security personnel and a police officer arrived at her house. She fled to

²⁰⁰ Witness MAE, T. 28 September 2009, pp. 36 (quoted), 43-44.

²⁰¹ Witness MAD, T. 24 September 2009, pp. 39-41, 44; Defence Exhibit 49 (protected information sheet).

²⁰² Witness MAD, T. 24 September 2009, pp. 47-49, 69.

²⁰³ Witness MAD, T. 24 September 2009, pp. 53-54.

²⁰⁴ Witness MAD, T. 24 September 2009, pp. 49-54, 70-71.

²⁰⁵ Witness MAD, T. 24 September 2009, pp. 57-59, 60 (quoted), 61-67.

Kigali where her family was, and two weeks later left with them for Malawi where she continues to live in exile.²⁰⁶

Defence Witness Emmanuel Niyitegeka

175. In 1994, Emmanuel Niyitegeka, a Hutu, was a farmer and lived with his Tutsi wife in Ndora commune, about two kilometres from the Gisagara market. He knew Ntawukulilyayo as the Gisagara sub-prefect.²⁰⁷ On a Wednesday, about two weeks after 6 April 1994, the Witness heard that Tutsi refugees had arrived at Gisagara market between 3.00 and 4.00 p.m. He went there around 5.00 p.m. and saw between 2,000 and 3,000 Tutsi refugees gathered on the field at the market. They came with livestock and were fleeing attacks in their localities such as Bugesera, Nyamata, Kibayi, Muganza and Nyaruhengeri. The homes of some had been torched and they appeared distressed. As Wednesday was a market day, it became crowded with the usual inhabitants as well as the refugees. People were saying that the traders complained to *Bourgmestre* Rwankubito about the dirt from the refugees and asked him to find another place for them.²⁰⁸

176. The Witness left the market after 30 minutes, and went to have a drink at a nearby bar with friends while waiting for someone to go home with as he could not see very well due to difficulties with his eyes. At 7.00 p.m., he saw Ntawukulilyayo arrive on foot and went over to him so that he was just two metres away. He was accompanied by a priest. Ntawukulilyayo told the refugees to stay close to the market as their security depended on it. He also told them that he would ask the priest to find them food from Caritas. About five minutes later, Rwankubito arrived in a vehicle with a policeman. The Witness went home at around 8.00 p.m. and did not return to the market. While he was there, he saw that the refugees were free to move around and there were no policemen, gendarmes or soldiers there.²⁰⁹

177. The refugees remained at the market for three days. While at home, he could hear them passing by on the road which was about 50 metres from his house. He could see that they were heading towards Butare, Nyaruhengeri, Muganza and "Kabuye", as the road outside his home led to Muganza and Butare and Kabuye hill was opposite his home. They took different routes and numbered between 1,500 and 1,700. They were not accompanied by any policemen or officials. The Witness did not hear about the conditions in which the refugees left the market but testified that Ntawukulilyayo "may have been there" as they departed. He had heard that the sub-prefect told them that they could seek refuge at the Abizeramariya Sisters convent. Consequently, some refugees went there.²¹⁰

Defence Witness Gérard Ndamage

178. In 1994, Gérard Ndamage, a Hutu, owned a shop at the Gisagara market. He knew Ntawukulilyayo as the Gisagara sub-prefect and lived about 30 to 80 metres from

²⁰⁶ Witness MAD, T. 24 September 2009, pp. 55, 61-63.

²⁰⁷ Niyitegeka, T. 28 September 2009, pp. 62, 64. He fled Rwanda for Uganda in December 1994 and has not returned due to fears. T. 28 September 2009, p. 62; T. 29 September 2009, pp. 5, 18, 22.

²⁰⁸ Niyitegeka, T. 28 September 2009, p. 71; T. 29 September 2009, pp. 2-5, 8-10, 18, 29-30.

²⁰⁹ Niyitegeka, T. 29 September 2009, pp. 10-14, 16, 31-32, 36.

²¹⁰ Niyitegeka, T. 29 September 2009, pp. 17-19, 20 (quoted).

Ntawukulilyayo's home and about 200 to 300 metres from the market.²¹¹ While in his shop on Wednesday 20 April, the Witness received information that refugees started arriving at the market at around 2.00 or 3.00 p.m. and more continued to arrive on Thursday, such that they occupied the entire market square. Their numbers were similar to the number of persons that would normally visit on a market day, which could be as many as 5,000 or 6,000. At around 6.00 p.m., Ndamage closed his shop to go home.²¹²

179. On Thursday 21 April, the Witness did not return to his shop, but he learned that Ntawukulilyayo had visited the refugees at the market with the parish priest. On Friday, Ndamage remained at home but in the evening, saw some refugees starting to leave as they passed by his home towards Muganza commune. Later, he learned that they had gone to Kabuye hill. At around 8.00 a.m. on Saturday 23 April, he went to the market to check that his shop was still locked. He was at the market for about 30 minutes before returning home. He did not see any "figures of authority", policemen or soldiers at the market. He believed that the last of the refugees left the Gisagara market by around 11.00 a.m. or 12.00 p.m. that day, as he did not see any more refugees passing by his home after that time.²¹³

Defence Witness Louis Ahorukomeye

180. In April 1994, the Witness was a night watchman at the Gisagara Health Centre, located about 70 metres from the town market. He lived about 200 steps from Ntawukulilyayo's residence and knew him as the Gisagara sub-prefect.²¹⁴ Between 20 and 25 April, the Witness was working at the Health Centre premises from 5.00 p.m. to 8.00 a.m. He saw that over 200 Tutsi civilians had gathered at the Gisagara market and more continued to arrive. He heard that a policeman named Munyakindi was responsible for security at the market. During this time, Ahorukomeye did not see Ntawukulilyayo or "Father Thomas" at the market. He did, however, see Father Thomas near the sub-prefect's home, which was visible from the Health Centre. He assumed that the priest was visiting Ntawukulilyayo due to the friendship between the two men.²¹⁵

181. The Witness heard that President Théodore Sindukubwabo visited Gisagara on the Thursday and that he went straight to the sub-prefecture office but did not stay for long. People gathered at the sub-prefecture hall. In the course of his address, the President called on a person named Mukezarugamba and asked him whether he understood or knew what it meant to be "indifferent". Sindikubwabo was accompanied by Presidential Guard but the Witness did not know whether Ntawukulilyayo or other authorities were also present.²¹⁶

²¹¹ Ndamage, T. 13 October 2009 pp. 10-14, 21, 32; Defence Exhibit 59 (protected information sheet). At the time of his testimony, Ndamage was living in exile in Malawi. He had heard that he had been accused in *Gacaca* proceedings of having manned a roadblock and looted. He denied the allegations but remained in exile due to fears of being arrested. T. 13 October 2009 pp. 5-10.

²¹² Ndamage, T. 13 October 2009, pp. 19, 21-22, 25, 27.

²¹³ Ndamage, T. 13 October 2009, pp. 22-24, 32.

²¹⁴ Ahorukomeye, T. 6 October 2009, pp. 45, 50; T. 7 October 2009, pp. 8-9, 26. At the time of his testimony, Ahorukomeye had resided in Uganda. He had fled from Rwanda in 2007 after having been pressured by a member of *Duhozanye*, a branch of *Ibuka*, and two others to testify against authorities, including Ntawukulilyayo. T. 6 October 2009, pp. 45, 62-64.

²¹⁵ Ahorukomeye, T. 7 October 2009, pp. 9-11.

²¹⁶ Ahorukomeye, T. 7 October 2009, pp. 12-13. Ahorukomeye initially testified that he was not aware of the President's visit to Butare prefecture between 19 and 20 April 1994. T. 7 October 2009, pp. 3-4.

182. The refugees left Gisagara market on a Saturday between 20 and 25 April. They had gone by the time he arrived at work that evening. On the same day, some time after the refugees had left Gisagara market, Hutu youths, carrying clubs and machetes, tried to loot the house of the Kereti family, who were his neighbours. The Witness went near to the home and a short time after, the sub-prefect, who was coming from the direction of Butare, arrived in a vehicle. He stopped and asked what was happening. The youths told Ntawukulilyayo that they had seen *Inkotanyi* hiding in the house. Ntawukulilyayo asked them to leave the Kereti family alone but they refused. He then gave them money and the family was released. The assailants accused the sub-prefect of being *Inkotanyi* before leaving.²¹⁷ On Sunday, the Witness heard gunshots and believed that the refugees who had gone to Kabuye were killed. He concluded that soldiers must have shot them.²¹⁸

Defence Witness Agnès Niyonagira

183. Agnès Niyonagira, a Tutsi, was a farmer living in Mugusa commune in 1994. On a Thursday, about two weeks after 6 April 1994, at around 12.00 p.m., Hutu and Tutsi refugees from Kibayi, Muganza and Kigembe communes fled attackers and went towards Mugusa commune, gathering at the Ngiriyi bridge.²¹⁹ Those at a roadblock close to the Ngiriyi bridge prevented the displaced persons from crossing. Mugusa *Bourgmestre* André Kabayiza arrived with five police officers and ordered those manning the roadblock to return the refugees' belongings. He advised the refugees to go home. They returned in the direction of Gishya and Mukande. By 4.00 p.m., everyone had left. This was the only time the Witness saw or heard of refugees arriving at the Ngiriyi bridge roadblock. She did not see Ntawukulilyayo there and testified that she would have known had he come.²²⁰

Defence Witness BAA

184. Witness BAA, a Hutu, worked for a school run by the Benedictine Sisters in Kansi sector Nyaruhengeri commune in April 1994.²²¹ After 6 April, she saw Ntawukulilyayo on two occasions, the second occurring between 8.00 and 11.00 a.m. on Saturday 23 April at the Benedictine Sisters community. He came alone, appeared tired but tried to comfort those present and asked that they pray for the situation to return to normal.²²²

²¹⁷ Ahorukomeye, T. 6 October 2009, pp. 56-59, 61; T. 7 October 2009, pp. 14-17. Ahorukomeye named the individuals who tried to loot the Kereti home as Jerome (alias Rututsi), Isidore Uwimana, Jerome Rubayiza and Alexander (nicknamed Kimunga).


²¹⁸ Ahorukomeye, T. 7 October 2009, pp. 11-12, 14.

²¹⁹ Niyonagira, T. 23 September 2009, pp. 57-58, 65-67, 69 (Niyonagira knew it was a Thursday because she had banana wine to sell at the Musha market the next day).

²²⁰ Niyonagira, T. 23 September 2009, pp. 66-72. Roadblocks were set up in Mugusa commune on the orders of *Bourgmestre* Kabayiza, to counter the *Inkotanyi*. One was close to Ngiriyi bridge. Niyonagira could see it from her house and passed it each day on her way to work. It was manned by two men during the day, and five at night. Men of diverse ethnic groups worked on a rotation system under the *bourgmestre*. It would take three to four hours to walk between Ngiriyi Bridge and Gisagara. T. 23 September 2009, pp. 62-65.

²²¹ Witness BAA, T. 1 October 2009, pp. 5-6, 28; Defence Exhibit 53 (protected information sheet).

²²² Witness BAA, T. 1 October 2009, pp. 12, 23-24, 30-31, 36.

 3 August 2010

Defence Witness Simon Rumashana

185. Simon Rumashana, a Hutu, lived in Ndora commune in April 1994 and knew Ntawukulilyayo as the Gisagara sub-prefect.²²³ He manned a roadblock in the Ntobo area, located in Rugara *cellule*, Ndora sector, Ndora commune, about a 45 minute walk from the Gisagara parish. The roadblock was set up about three days after President Habyarimana's death to counter the *Inkotanyi*, pursuant to instructions from *Bourgmestre* Célestin Rwankubito, which were transmitted through *responsable de cellule* Ndayisenga. A member of parliament named Bernadette Mukarurangwa subsequently gave orders to kill Tutsis at the roadblock.²²⁴

186. Around 2.00 and 3.00 p.m. on a Saturday about two weeks after the President's death in April 1994, Ntawukulilyayo passed through the barrier in a red Hilux pickup accompanied by "Father Thomas", a Tutsi priest from Gisagara. Although Father Thomas was known to be a Tutsi, Ntawukulilyayo explained that the priest had to pass though in order to say mass. Ntawukulilyayo was allowed through the barrier with the priest, as any other "official" would be. It was later rumoured that Ntawukulilyayo had helped the priest escape. That evening, parliamentary member Mukarurangwa came to the barrier and said that the sub-prefect was an accomplice and had to be killed. Subsequently, the Witness heard that a group went to search Ntawukulilyayo's house.²²⁵

187. Rumashana further testified that, in the end of 2005, one Benoît Ruzindana, as a representative of *Ibuka*, went to the Witness' home and asked him to testify against Ntawukulilyayo in France. The purpose of *Ibuka*, as well as its affiliate *Avega*, was to represent genocide survivors as well as imprison Hutu officials, businessmen and intellectuals in power before the war. Ruzindana asked Rumashana to testify that Ntawukulilyayo instigated persons to kill Tutsis and order refugees to go to Kabuye hill. He added that Rumashana's status as a Hutu would demonstrate that all Rwandans were prepared to serve as Prosecution witnesses. Rumashana said that he would be lying, but Ruzindana assured him that persons would be available to help him prepare.²²⁶

188. Ruzindana returned to Rumashana's home in May 2007, still as a representative of *Ibuka*, and again requested that Rumashana testify against Ntawukulilyayo. Rumashana responded that he could not and Ruzindana told him that there would be consequences. In June 2007, a person who had attended meetings with Ruzindana told the Witness that there were plans to arrest him. Consequently, he fled to Malawi, where he continues to live in exile.²²⁷

189. Rumashana testified that he had spoken to a woman who had the same first name and came from the same area as Witness AXY. Based on conversations with her and others, he believed that *Ibuka* and *Avega* had "malicious plans against Hutus". He also heard that a

²²³ Rumashana, T. 30 September 2009, pp. 6, 9.

²²⁴ Rumashana, T. 30 September 2009, pp. 9-18.

²²⁵ Rumashana, T. 30 September 2009, pp. 13-21, 37, 43.

²²⁶ Rumashana, T. 30 September 2009, pp. 22-29, 31.

²²⁷ Rumashana, T. 30 September 2009, pp. 18-19, 27-30. Defence Exhibit 52 (name written by Simon Rumashana).

woman with the same first name and who came from the same commune as Witness BAC was a member of *Avega* and had testified against Hutus.²²⁸

Defence Witness Innocent Nziyomaze

190. Innocent Nziyomaze, a Hutu, was a farmer in Tanzania in 1994, returning to live in Gisagara sector, Ndora commune in 1997.²²⁹ Between October 2002 and March 2007, he was a Gisagara *Gacaca* court judge. He participated in the information gathering phase between October 2002 and January 2004 and presided over about 45 cases before leaving. About 22 persons were convicted in relation to the Kabuye killings. While there were no survivors from Kabuye hill and the refugees who left before the attack did not know who participated, Hutus who lived nearby provided evidence. None indicated that Ntawukulilyayo was involved in the attack.²³⁰

Defence Witness Claver Habimana

191. In 1994, Claver Habimana, a Hutu and a shop and restaurant owner, lived with his family in Muganza commune.²³¹ He knew Ntawukulilyayo as the Gisagara sub-prefect and would see him pass along the road on board his white Hilux. Habimana also knew Witness AZI, a Tutsi who lived in Remera sector. They had a business relationship and would sometimes drink together. Around 7.00 p.m. on 13 or 14 April 1994, Witness AZI came to Habimana's home. He told Habimana that there were disturbances and tension between Hutus and Tutsis. He had parted with his family and sought refuge alone as he feared that by hiding together, his whole family could be killed. At that time, killings had not yet started in Muganza commune, but there were unlawful gatherings of Hutus and Tutsis opposing each other and the atmosphere was tense. Habimana accepted Witness AZI into his home for three days.²³²

192. Around 16 or 17 April, Witness AZI requested that Habimana help him cross into Burundi. That day, at about 9.00 a.m., Habimana accompanied him to the border. It took them around two hours to arrive due to roadblocks along the way. These barriers were abandoned and the two could cross at locations that were previously blocked, including Kanage and Mugombwa. The Witness had contacted a canoe owner named Sekiromba, who helped Witness AZI cross the Akanyaru river, running between Rwanda and Burundi.

²²⁸ Rumashana, T. 30 September 2009, pp. 22, 31-35.

²²⁹ Nziyomaze, T. 7 October 2009, pp. 36-37; Defence Exhibit 58 (protected information sheet). Nziyomaze lived in exile at the time of his testimony. He left Rwanda in September 2007 and currently lives in Uganda. T. 7 October 2009, pp. 37, 46.

²³⁰ Nziyomaze, T. 7 October 2009, pp. 38-40, 49-52. Nziyomaze testified that his *Gacaca* court heard evidence that Ntawukulilyayo brought persons from his home to the Abizeramariya convent and a university student named "Janet" attributed the fact that she survived based on his action. Considering all the evidence, the *Gacaca* court concluded that Ntawukulilyayo had provided assistance to Tutsis. T. 7 October 2009 pp. 41-45.

²³¹ Habimana, T. 6 October 2009, pp. 2-6; Defence Exhibit 57 (protected information sheet). Habimana's mother and two brothers were killed by the RPF, and he fled at the end of June 1994, fearing that he might also be killed. At the time of his testimony, he lived in exile in Uganda. T. 6 October 2009, pp. 5-6; Prosecution Exhibit 25 (statement of 9 June 2009).

²³² Habimana, T. 6 October 2009, pp. 9-12, 15, 18-19, 22, 26-31.

Habimana saw and heard Witness AZI from the Rwandan side of the river, despite it being dark. Habimana had not seen Witness AZI since the river crossing but believed he is alive.²³³

1.3 Deliberations

193. The evidence unequivocally demonstrates that starting on Wednesday 20 April 1994, hundreds to thousands of Tutsis and their families fled attacks in various areas including Muganza, Nyaruhengeri and Kibayi communes and sought refuge at Gisagara market in Ndora commune.²³⁴ Ntawukulilyayo greeted incoming refugees and directed them to the Gisagara market, assuring them that they would be safe there.²³⁵ Some of these displaced persons decided to leave the market that evening and the following morning, but were stopped by law enforcement personnel and forced to return to Gisagara market.²³⁶

194. The evidence further establishes that on the morning of Thursday 21 April, President Théodore Sindikubwabo arrived in Gisagara and held a brief public meeting in the vicinity of the sub-prefecture office, which was attended by, amongst others, Ntawukulilyayo and Prefect Nsabimana. In his brief address to those gathered there, Sindikubwabo referred to the 1959 revolution, during which ethnic violence erupted between Tutsis and Hutus.²³⁷ From

²³³ Habimana, T. 6 October 2009, pp. 11-17, 27-29, 33-34, 40.

²³⁴ Witness AZN, T. 6 May 2009, pp. 8, 28 (10,000 to possibly more than 20,000 refugees were at Gisagara market as early as Wednesday); Witness AZV, T. 7 May 2009, pp. 36-37, 54-57 (went to Gisagara market on Wednesday with around 2,000 others and the number of refugees grew to about 10,000); Witness AYQ, T. 11 May 2009, pp. 8-9, 24-25 (on Saturday, Witness AYQ, her Tutsi husband and children joined refugees from Kibayi and Muganza communes, who filled the Gisagara market); Witness AZI, T. 12 May 2009, pp. 19-20 (Tutsi men, women, children and their livestock took refuge at Gisagara market on Wednesday following 19 April); Witness BAF, T. 13 May 2009, pp. 61, 62-65; T. 18 May 2009 pp. 28, 34 (Tutsi refugees fled attacks in Kibayi, Muganza, Nyaruhengeri and other communes and occupied the football field at Gisagara market starting on 20 April); Witness KAD, T. 19 November 2009, pp. 8-10 (on Wednesday 20 April, 200 to 300 refugees arrived in Gisagara and the number continued to grow); Witness MAI, T. 24 September 2009, pp. 18-20 (on Wednesday 20 April, between 300 and 500 refugees arrived at the Gisagara market); Niyitegeka, T. 29 September 2009, pp. 2-3, 8, 11, 29 (on a Wednesday in April, about two weeks after President Habyarimana's death, he found around 2,000 to 3,000 Tutsi refugees at the Gisagara market).

²³⁵ Witness AZV, T. 7 May 2009, pp. 36-39, 54-59, 74; Witness AZI, T. 12 May 2009, pp. 19-20, 28-30; Ntawukulilyayo, T. 15 December 2009, pp. 61-62; T. 16 December 2009, pp. 3, 49; T. 17 December 2009, p. 47.

²³⁶ Witness AZN, T. 6 May 2009, p. 9, 28-29 (Ndayambaje, communal police and soldiers stopped refugees near the Ngiriyi river on Thursday 21 April around 5.00 a.m. and forced them to return to Gisagara market); Witness AZV, T. 7 May 2009, pp. 39-40 (at around 9.30 a.m. on Thursday 21 April, soldiers and police in Muyaga forced refugees to return to Gisagara); Witness BAC, T. 11 May 2009 pp. 46-47, 55-57 (refugees were stopped in Muyaga commune); Witness AZI, T. 12 May 2009, pp. 22-23 (the Witness and other refugees en route to the Akanyaru river were stopped by communal police in Ngiriyi valley on Thursday and returned to Gisagara); Ntawukulilyayo, T. 16 December 2009, pp. 3, 7-11 (the Accused was informed that some refugees had decided to go to Musha *cellule* in Muyaga commune but were stopped by authorities and forced to return to Gisagara market, and during a 6 May meeting, was informed that the Mugusa *bourgmestre* had intercepted refugees at Ngiriyi bridge on 21 April, with the assistance of communal police); Niyonagira, T. 23 September 2009, pp. 65-67 (at about 12.00 p.m. on a Thursday, about two weeks after 6 April, Hutu and Tutsi refugees going to Mugusa commune were stopped at a roadblock at Ngiriyi bridge and the Mugusa *bourgmestre*, accompanied by five police officers, told the refugees to go home).

²³⁷ Witness AZN, T. 7 May 2009, p. 14 (Sindikubwabo delivered a speech, at a "ground" which bordered the Gisagara market, on Thursday 21 April); Witness BAU, T. 12 May 2009, p. 62; T. 13 May 2009, p. 25 (Sindikubwabo delivered the speech outside the sub-prefecture office in the morning on Thursday 21 April); Witness BAC, T. 11 May 2009, pp. 44-47 (on a Thursday on 20 or 21 April, Sindikubwabo addressed a crowd outside the sub-prefecture office); Ntawukulilyayo, T. 15 December 2009, pp. 66-68; Ahorukomeye, T. 7 October 2009, pp. 12-13 (heard about the meeting attended by President Sindikubwabo).

that day and through Saturday 23 April, many of the refugees and their livestock left Gisagara market for Kabuye hill.²³⁸ There, an extensive assault on the refugees was launched, and first-hand accounts identified the various assailants to include armed civilians, policemen and military personnel.²³⁹ Hundreds, and possibly, thousands of men, women, children and the elderly, were killed and others seriously injured during the attacks.²⁴⁰

195. The Chamber turns to review the evidence based on allegations concerning Ntawukulilyayo's involvement in the interception of refugees leaving Gisagara market,

²³⁸ Witness AZN, T. 6 May 2009 pp. 10-11 (left with about 30 Tutsi family members to Kabuye hill on "Friday"); Witness AZV, T. 7 May 2009, pp. 41-42, 55 (went to Kabuye hill on Friday while some refugees had gone directly there on Thursday); Witness AYQ, T. 11 May 2009, pp. 9, 32 (went to Kabuye hill on "Saturday"); Witness BAC, T. 11 May 2009, pp. 47-48, 56 (Sindikubwabo came to Gisagara on Thursday and refugees were sent to Kabuye the same day); Witness BAU, T. 12 May 2009, pp. 64-65 (left for Kabuye hill on Saturday 23 April); Witness BAF, T. 13 May 2009, p. 65; T. 14 May 2009, p. 8; T. 18 May 2009, pp. 29-30 (saw refugees leave for Kabuye hill on Thursday, Friday and Saturday); Witness KAD, T. 19 November 2009, pp. 17, 19-22 (went to Kabuye hill on Saturday, while others had already gone there); Witness MAE, T. 28 September 2009, pp. 29-32, 34, 57 (all the refugees had left by Saturday); Gasana, T. 29 September 2009, pp. 63, 71, 73 (the refugees had all left by Saturday morning); Witness MAI, T. 24 September 2009, pp. 21-25, 34 (the refugees started leaving for Kabuye hill on Friday and, by Saturday morning, all had left); Witness MAD, T. 24 September 2009, pp. 49-54, 70 (some refugees went directly to Kabuye hill while others stopped at Gisagara market but by Saturday, all had left for Kabuye hill).

²³⁹ Witness AZN, T. 6 May 2009, pp. 11-14, T. 7 May 2009, p. 3 (he arrived at Kabuye hill on Friday, where soldiers, or possibly gendarmes, and policemen from the sub-prefecture office shot at refugees; soldiers arrived again on Saturday as reinforcements and continued to attack; he fled on Sunday evening after it rained); Witness AZV, T. 7 May 2009, pp. 42-48 (Hutu attackers with clubs and machetes attacked Tutsi refugees on and around Kabuye hill starting on Friday and soldiers fired on them on Saturday and Sunday); Witness AYQ, T. 11 May 2009, pp. 11-14, 34-39 (on Saturday, soldiers joined police who had surrounded those at Kabuye hill, and shot at refugees through the evening, intensifying under lightening and thunder; attacks continued on Sunday until about 4.00 p.m. when heavy rains fell; he fled the next day); Witness BAU, T. 12 May 2009, pp. 64-66; T. 13 May 2009, pp. 42-47, 53-54 (soldiers, gendarmes, and police fired at the refugees on 23 April at night; he fled Kabuye hill between 1.00 and 2.00 a.m. on 24 April under cover of rain); Witness AXY, T. 19 May 2009, pp. 66-67; T. 20 May 2009, p. 11, 25 (by 23 April, all Hutus on Kabuye hill abandoned their homes to join the attack; on 24 April, there were gunshots and attacks were carried out by Hutus from various communes within Gisagara sub-prefecture; heavy rains fell on the evening of 24 April and the Witness fled Kabuye on 25 April); Witness BAZ, T. 21 May 2009, pp. 10-14, 31-32 (he was one of several Hutu assailants who attacked Tutsis on Dahwe hill on Saturday; on Sunday, he attacked Tutsis at Kabuye hill in coordination with soldiers; heavy rains commenced on Sunday evening and the Witness continued to hear heavy gunfire from Ndatemwa); Witness KAD, T. 19 November 2009, pp. 22-23, 30-33 (soldiers and other assailants carrying machetes commenced attacks on Saturday after sunset and continued until heavy rainfall that evening; they returned on Sunday and continued the assault until Monday morning); Witness AZI, T. 12 May 2009, p. 23 (*Interahamwe*, communal police and gendarmes attacked Tutsi men, women and children on Kabuye hill on an unspecified day).

²⁴⁰ Witness AZN, T. 6 May 2009, p. 13 (2,000 to 3,000 unarmed men and women, children and elderly were killed at Kabuye hill including approximately 30 Tutsi members of his family); Witness AZV, T. 7 May 2009, pp. 46-47 (men, women and children were killed and mutilated, and bodies were everywhere); Witness AYQ, T. 11 May 2009, pp. 11, 14, 35 (Witness AYQ's Tutsi husband and two children were killed at Kabuye hill and she witnessed others falling as shots were fired at many refugees who had gathered there); Witness BAU, T. 12 May 2009, pp. 65-66; T. 13 May 2009, p. 47 (Tutsi men, women and children were killed); Witness BAF, T. 14 May 2009, pp. 2-3; T. 18 May 2009, pp. 52-53 (the death toll at Kabuye hill was so high that burials lasted several days and tractors were employed to dig common graves); Witness AXY, T. 19 May 2009, pp. 68-69 (when she returned to Kabuye hill she saw the dead bodies of many Tutsis, including women, children and infants as well as Hutu women who had been married to Tutsis); Ntawukulilyayo, T. 16 December 2009, p. 49; T. 17 December 2009, p. 49 (the days following 21 April, the Kabuye massacre occurred where Tutsis were killed); Witness KAD, T. 19 November 2009, pp. 22-23 (around 300 to 500 persons were on Kabuye hill when she arrived there and many were killed – the "entire" hill was "littered" with bodies); Witness MAE, T. 28 September 2009, p. 52 (Tutsis were killed on Kabuye hill).

orders for refugees to leave the market for Kabuye hill, the searching of Tutsi houses to gather them on Kabuye hill, and finally, the attack on Kabuye hill.

1.3.1 Interception of Tutsi Refugees Leaving Gisagara Market

196. The Indictment alleges that between 20 and 21 April 1994 refugees had gathered at Gisagara market, but subsequently attempted to flee to Burundi. They were stopped by soldiers and communal police on the orders of Ntawukulilyayo.²⁴¹ In support of this allegation, the Prosecution points to Witnesses AZN, AZV and AZI, who testified about being stopped in Ngiriyi valley on Thursday 21 April. Witness BAF testified about Ntawukulilyayo ordering communal police to stop refugees after President Théodore Sindikubwabo held a meeting in Gisagara town on the morning of 21 April. Witness BAC also testified that Ntawukulilyayo accompanied communal police to go to intercept refugees that same day.²⁴² Through Ntawukulilyayo and Witness Agnès Niyonegira, the Defence concedes that refugees were stopped in Ngiriyi valley. However, it argues that Ntawukulilyayo was not involved and, that the interception was carried out by authorities outside of Gisagara sub-prefecture.²⁴³

197. Witnesses AZN, AZV and AZI, who were among the displaced persons that left Gisagara market but were intercepted, provided generally consistent accounts of being stopped on Thursday 21 April. Witnesses AZN and AZV both testified that they left early that morning, while Witness AZI did not provide a specific time. They were stopped, by law enforcement personnel, in the Ngiriyi valley or more generally, Muyaga commune, in their attempt to flee to Burundi and forced to return to Gisagara.²⁴⁴ Notably, none of these witnesses recalled Ntawukulilyayo being present among the group who intercepted them, nor did they testify to any orders being issued by him while at Gisagara market. Although Witness AZN asserted that Ntawukulilyayo, soldiers and communal police prevented them from leaving, his account of the interception referred only to Elie Ndayambaje, soldiers, and policemen stopping them near the Ngiriyi river. While he added that “someone” must have asked them to intervene, he did not specify whom.²⁴⁵ Similarly, Witness AZV believed that Ntawukulilyayo was behind the interception, but did not testify that he issued orders to stop the refugees, nor that he was present when they were stopped in Muyaga commune.²⁴⁶ Witness AZI made no reference to Ntawukulilyayo with respect to the interception.

²⁴¹ Indictment, paras. 6, 18. Paragraph 18 alleges that the refugees were prevented from fleeing to Burundi by Ntawukulilyayo’s subordinates, pursuant to his orders. The subordinates were “principally, the *bourgmestres* of the five communes under his immediate supervision”.

²⁴² Prosecution Closing Brief, paras. 251-256, 262.

²⁴³ Defence Closing Brief, paras. 1095-1106, 1108-1121, 1125.

²⁴⁴ Witness AZN recalled that they were stopped near the Ngiriyi river some three to four hours after leaving Gisagara. Witness AZN, T. 7 May 2009, p. 13. Witness AZV testified that they were stopped at 9.30 a.m. and arrived back in Gisagara at around 11.00 or 11.30 a.m. Witness AZV, T. 7 May 2009, p. 40. Witness AZI recalled that they were stopped in the Ngiriyi valley between Ndora, Mugusa and Muyaga communes. Witness AZI, T. 12 May 2009, pp. 22-23.

²⁴⁵ Witness AZN, T. 6 May 2009, pp. 7-8 (Ntawukulilyayo stopped the refugees from fleeing), 8-9 (Ntawukulilyayo was with soldiers at the Gisagara market and stopped the refugees and told them to remain there). However, his testimony specifically regarding the interception refers to Elie Ndayambaje with communal policemen arriving near the Ngiriyi stream. He did not know who asked them to intervene. T. 6 May 2009, p. 29; T. 7 May 2009, p. 13.

²⁴⁶ Witness AZV, T. 7 May 2009, p. 59. Witness AZV inferred, from seeing Ntawukulilyayo with soldiers, that he must have brought them to prevent them from fleeing and blocked all outlets at the Akanyaru river.

198. The Chamber also considers the accounts provided by Witnesses BAF and BAC of Ntawukulilyayo's actions in Gisagara on the morning of Thursday 21 April. Witness BAF testified that Ntawukulilyayo ordered four communal policemen to stop refugees after the 21 April meeting attended by President Sindikubwabo.²⁴⁷ The Chamber, however, notes that Witness BAF's evidence about this meeting is significantly different to the testimonies of Witnesses BAU, BAC, and AXY. They testified that the President's public address occurred outside the sub-prefecture office and neither mentioned Ntawukulilyayo speaking after Sindikubwabo. Witness BAF, on the other hand, stated that the public meeting occurred inside a large meeting hall, that Sindikubwabo handed Ntawukulilyayo a letter, that Ntawukulilyayo spoke of fleeing refugees after the President spoke, and that he subsequently ordered police officers to chase after the refugees.

199. Witness BAF's description of the gathering is significantly different to the accounts of Witnesses BAU, BAC, and AXY, raising doubt that Witness BAF actually attended the gathering outside the sub-prefecture office. Accordingly, the Chamber has doubts about his evidence that, immediately after the gathering, he saw the sub-prefect issue orders to communal policemen. The Chamber further notes that Witness BAF was incarcerated at the time of his testimony, convicted for crimes that are at issue in this case and thus, his status warrants that his evidence be viewed with caution.²⁴⁸ The Chamber therefore will not accept his testimony without adequate corroboration and turns to consider whether other evidence in the record supports it.

200. Witness BAC also testified that she attended the 21 April gathering outside the sub-prefecture office. However, she stated that after the President's address, the officials went back to their offices and the local residents returned to their homes. Moreover, following a specific question from the Prosecution, she replied that no one spoke after Sindikubwabo and although she referred to "directives" being given by the President, there was no "follow-up".²⁴⁹ She made no mention of the sub-prefect issuing orders to stop refugees who were fleeing from Gisagara.

201. Witness BAC further testified that she observed Ntawukulilyayo and communal police "go after refugees" but her evidence on this point lacks detail. She also accepted that she was not an eye witness to the interception of refugees who, according to what she was told, were stopped in Muyaga commune. Witnesses AZN, AZV, and AZI, however, did not place Ntawukulilyayo among the group who intercepted them and do not corroborate Witness BAC's evidence that Ntawukulilyayo physically participated in stopping displaced persons who had left Gisagara market that day. The Chamber finds her evidence insufficient to conclude that Ntawukulilyayo issued an order to intercept refugees, or that he was present when they were stopped.

202. The Chamber has also considered the testimonies of Ntawukulilyayo and Defence Witness Agnès Niyonegira. They confirm that refugees were stopped on 21 April in Ngiriyi valley. However, they assert that this had been done by Mugusa *Bourgmestre* André Kabayiza and communal police.²⁵⁰

²⁴⁷ Witness BAF, T. 13 May 2009, pp. 62-64; T. 18 May 2009, pp. 23, 28-30.

²⁴⁸ Witness BAF, T. 14 May 2009, pp. 12-13; T. 18 May 2009, pp. 7-8, 56.

²⁴⁹ Witness BAC, T. 11 May 2009, pp. 45-46.

²⁵⁰ The Accused testified that when in Gisagara town, at around 5.00 p.m. that day, he was informed by refugees that a group had decided to go to Musha *cellule* in Mugusa commune but were stopped by the authorities who

203. The Chamber concludes that the totality of the evidence suggests that refugees left Gisagara market early in the morning on Thursday 21 April and were stopped some distance away in the area of the Ngiriyi valley.²⁵¹ It is also clear that law enforcement personnel stopped the refugees. While the Chamber considers that they would have done so pursuant to the orders of local officials, and indeed, the Defence concedes as much, the Chamber is unable to conclude that Ntawukulilyayo had any role in the interception and the forcible return of refugees to Gisagara market as alleged in the Indictment.

204. Furthermore, the evidence of witnesses who were among those intercepted suggests that the interception occurred on 21 April in the morning, prior to Sindikubwabo's visit to Gisagara. In the Chamber's view, the record does not reflect that when the interception occurred, a plan was already in place to consolidate Tutsis at Gisagara market for the express purpose of killing them.

205. Accordingly, the Chamber concludes that the evidence does not establish beyond reasonable doubt that Ntawukulilyayo issued orders to intercept refugees who were fleeing towards Burundi for the purposes of subsequently sending them to Kabuye hill in order for them to be killed. Given the doubts about the interception's purpose, it is unnecessary to consider Ntawukulilyayo's responsibility as a superior.

1.3.2 Order for Refugees to Leave Gisagara Market for Kabuye Hill

206. The Indictment alleges that around 23 April 1994, Ntawukulilyayo ordered Tutsis gathered at Gisagara market to move to Kabuye hill where they would be fed and protected. Those unwilling to go on their own were chased there.²⁵² Prosecution Witnesses AZN, BAC, BAF, BAU and AYQ provided first-hand accounts of Ntawukulilyayo directing refugees to Kabuye starting as early as Thursday 21 April and continuing to as late as Saturday 23 April. Furthermore, Witness AZV testified that policemen leaving the sub-prefect's house ordered Tutsis at the market to go to Kabuye hill. Witnesses BAZ and AXY testified to having heard that Ntawukulilyayo had instructed refugees to go to Kabuye hill.²⁵³

207. Ntawukulilyayo denies that he ordered refugees gathered at Gisagara market to move to Kabuye hill. He testified that he visited the marketplace on the evening of Wednesday 20 April and the afternoon of Friday 22 April to enquire after their welfare and inform them of his efforts to obtain assistance. Defence Witnesses KAD, MAE, MAI, MAD, Jean-Baptiste Gasana, Emmanuel Niyitegeka, and Gérard Ndamage were either at or near the Gisagara

forced them to return to Gisagara market. He later attended a meeting on 6 May 1994 where the Mugusa *bourgmestre* said that he and communal police had intercepted refugees coming through Mukande sector, Ndora commune, at the Ngiriyi river bridge, on 21 April. See T. 16 December 2009, pp. 3-4, 7-11. Ntawukulilyayo's account is consistent with that of Agnès Niyonegira. She saw refugees being stopped at the Ngiriyi bridge, and told to return home by the Mugusa *bourgmestre* while in the company of communal police. See T. 23 September 2009, pp. 62-72. Notably, Mugusa commune is not one of the five communes within the Gisagara sub-prefecture.

²⁵¹ The Chamber has also considered the evidence of Prosecution Witnesses AZV, AZI and BAU that Ntawukulilyayo stopped those arriving in Gisagara on Wednesday 20 April and directed them to the market. Indeed, Ntawukulilyayo testified that he spoke to refugees upon their arrival in Gisagara on the evening of Wednesday 20 April. This evidence, however, does not establish that these persons were prevented from leaving. Notably, Witness AZV testified that Ntawukulilyayo later told them that they could go, and many refugees departed early the following morning.

²⁵² Indictment, paras. 7, 19.

²⁵³ Prosecution Closing Brief, paras. 238, 243, 257, 264-271. 295-296.

market during the relevant period, and testified that they neither saw, nor heard of Ntawukulilyayo visiting the market after the evening of Wednesday 20 April. Several also recalled that Gisagara traders and residents complained about the refugees' presence and that a radio broadcast also directed refugees to Kabuye hill. By late morning on Saturday 23 April, all the refugees had left the marketplace for Kabuye hill and other locations on their own accord. The Defence further presented evidence that Ntawukulilyayo was not in Gisagara, particularly on Saturday 23 April when purported orders were given.²⁵⁴

208. The Chamber considers the evidence with respect to alleged orders to go to Kabuye hill on 21, 22 and 23 April 1994 below.

(i) *Orders to Leave on Thursday 21 April 1994*

209. Prosecution Witnesses AZN, BAC and BAF provided first-hand accounts of Ntawukulilyayo instructing refugees at Gisagara market to go to Kabuye hill on Thursday 21 April. However, a review of their evidence reveals two distinct narratives. On the one hand, Witness AZN said that prior to President Sindikubwabo's arrival on Thursday 21 April, Ntawukulilyayo had stated that refugees should be taken from Gisagara as their large number could cause insecurity. Ntawukulilyayo returned to the market on 21 April with Sindikubwabo, who asked why the refugees had not been taken to Kabuye. Sindikubwabo's statements led to the removal of Witness AZN and others to Kabuye hill by soldiers and communal police before noon. Witnesses BAC and BAF, on the other hand, observed Ntawukulilyayo direct those gathered at Gisagara market to go to Kabuye hill in the afternoon of Thursday 21 April. While both testified about the President's visit, they make no mention of his presence with the Accused at the marketplace. The Chamber will review the individual merits of each Witness' testimony.

210. Turning first to Witness AZN, the Chamber is satisfied about his ability to identify Ntawukulilyayo in 1994.²⁵⁵ He provided three extra-judicial statements about his experiences in 1994 prior to testifying in this case. The first, a June 1995 *pro justitia* statement to Belgian authorities, does not refer to Ntawukulilyayo ordering refugees to go to Kabuye hill.²⁵⁶ The questions recorded in the June 1995 statement are broad and so were the Witness' responses. He was not specifically asked if he was ordered to go to Kabuye hill and the statement does not provide details about how refugees were transferred there from Gisagara.²⁵⁷ The Witness explained he did not have sufficient time to prepare or testify before the Belgian magistrates and that he only answered questions asked of him.²⁵⁸ The Chamber does not consider the omission material.

211. Witness AZN also provided a statement to Tribunal investigators in November 1995 about Elie Ndayambaje, and a second in October 2008 that concerned Ntawukulilyayo.²⁵⁹ Neither statement mentions Ntawukulilyayo ordering those at Gisagara market to go to Kabuye hill. Instead, the November 1995 statement provides a detailed description of

²⁵⁴ Defence Closing Brief, paras. 507-511, 921-925, 961-973, 984-1001, 1088-1094, 1131.

²⁵⁵ Witness AZN knew that Ntawukulilyayo was the Gisagara sub-prefect and had attended two to three meetings in Muganza commune with him. T. 6 May 2009, pp. 7, 14, 16. Witness AZN also identified the Accused in court. T. 6 May 2009, pp 16-17.

²⁵⁶ Defence Exhibit 1E (statement of June 1995).

²⁵⁷ Defence Exhibit 1E (statement of June 1995) p. 2.

²⁵⁸ Witness AZN, T. 6 May 2009, pp. 20, 25; T. 7 May 2009 pp. 8, 11-12.

²⁵⁹ Witness AZN, T. 6 May 2009, pp. 17-18.

President Théodore Sindikubwabo angrily stating that refugees should be sent to Kabuye hill, after which soldiers and communal police carried out this directive.²⁶⁰ While the statement discusses Ntawukulilyayo's earlier role in telling refugees leaving Gisagara to return to their homes, and lists him as an individual responsible for killings, it makes no mention of him ordering that the displaced Tutsis go to Kabuye hill.²⁶¹ The Chamber notes that the statement is precise and elsewhere does refer to Ntawukulilyayo. However, when it does so, he is also said to be with Ndayambaje. Given that Ndayambaje was not with the sub-prefect at Gisagara market when refugees were directed to Kabuye hill, the omission is not significant.²⁶²

212. Nevertheless, the November 1995 statement suggests that Sindikubwabo and not Ntawukulilyayo gave the order to refugees to move to Kabuye hill on Thursday 21 April. Indeed, when cross-examined about this, Witness AZN stated that Sindikubwabo's statements at the market, rather than Ntawukulilyayo's, were what had led to the refugees' removal.²⁶³ While it is not inconceivable that the President gave the order to refugees at the market, and that Ntawukulilyayo also gave a similar order, Witness AZN is the only person to have testified that Sindikubwabo came to Gisagara market after holding a meeting near the sub-prefecture office on the morning of Thursday 21 April.²⁶⁴

213. Witness AZN's October 2008 statement to Tribunal investigators also makes no reference to an order to send refugees to Kabuye hill. The Witness was not confronted with this specific omission. However, given that the statement concerned the Accused and the significance of the order to go to Kabuye hill, the omission raises questions regarding the Witness' testimony that Ntawukulilyayo ordered the removal of the refugees that day. While it is possible that the Witness did not realise the importance of the order to go to Kabuye hill when providing his statement, the omission nonetheless creates doubt about his testimony that Ntawukulilyayo gave one. Thus, in this instance, the Chamber considers his evidence is insufficient to support a finding beyond reasonable doubt that Ntawukulilyayo directed refugees to Kabuye hill on the morning of Thursday 21 April.

214. With respect to Witnesses BAC and BAF, both indicated that Ntawukulilyayo went to Gisagara market on the afternoon of Thursday 21 April and told refugees that they should go to Kabuye hill where their welfare and safety would be assured. The Chamber has no doubts about the ability of either witness, both residents of Gisagara town in 1994, to identify Ntawukulilyayo.²⁶⁵ Moreover, their evidence that Ntawukulilyayo gathered refugees in

²⁶⁰ Defence Exhibit 2E (statement of 14 November 1995) p. 4.

²⁶¹ Defence Exhibit 2E (statement of 14 November 1995) pp. 4-5.

²⁶² While Judge Akay concurs with the Chamber's conclusions with respect to the orders to leave on Thursday 21 April, he finds that the omission in this instance does raise concern.

²⁶³ Witness AZN, T. 7 May 2009, pp. 14-15, 16 ("Q. So you said that the president was angry. You could tell that from his face. And you added that, and I quote, 'After that, the soldiers and policemen immediately carried out his orders.' In other words, the president's orders. Is that correct? ... Now, speaking about the president's speech, you said – and I quote – 'After that the soldiers and policemen immediately carried out his orders'. Is that correct? A. Well, if that is written in the statement, then it reflects what happened. I don't have a copy of that statement. You have to understand that no one could challenge orders given by the president. No one could challenge orders given by a sub préfet in his sub préfecture.").

²⁶⁴ Witness AXY learned from her father and uncle that Sindikubwabo held a meeting at Gisagara market that day before continuing to the sub-prefecture office. In the Chamber's view, this hearsay evidence is insufficiently reliable and not necessarily consistent with Witness AZN's testimony, and therefore, fails to corroborate it.

²⁶⁵ Witness BAC, T. 11 May 2009, pp. 42, 60-61 (she lived near Ntawukulilyayo and had good relations with him); Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010) para. 8 (iii) (Witness BAC's house was recorded as being 0.4 km from Ntawukulilyayo's former residence); Witness BAF, T. 13 May 2009, pp. 59,

Gisagara market and directed them to Kabuye hill is similar in many respects.²⁶⁶ They each recalled that the orders were issued sometime in the afternoon. Witness BAC testified that the order was given after the morning, but before the evening and Witness BAF's evidence indicates that it would have happened sometime between 1.00 and 3.00 p.m.

215. Reviewing the strengths of each Witness' evidence alone, the Chamber notes that Witness BAC's December 2001 statement to Tribunal investigators does not mention that Ntawukulilyayo ordered refugees at Gisagara market to go to Kabuye. However, the statement does not describe how refugees left for Kabuye hill, and is brief with respect to the events there.²⁶⁷ It also appears focussed on the activities of Callixte Kalimanzira.²⁶⁸ In the circumstances, the omission alone does not cast doubt on her evidence.

216. The Chamber has also considered several points raised by the Defence about the reliability of Witness BAC.²⁶⁹ It argues that she could not have seen the market, nor heard Ntawukulilyayo give orders there from in front of her home. Specifically, the Defence submits that the market was not "opposite" her house and that the angle from her home to the market was too acute to allow her to see what happened there.²⁷⁰ Witness BAC testified that she was "in front of [her] house" when she saw Ntawukulilyayo give the order.²⁷¹ The Chamber notes that while her house was in close proximity to the market, it was not located at the market square.²⁷² While she testified that she could have heard orders from this distance, she later stated – referring to a separate incident – that she "could not exactly hear"

65; T. 18 May 2009, pp. 45-47 (he was a resident in Gisagara town, lived near the trading centre and knew Ntawukulilyayo, who had been a well respected sub-prefect).

²⁶⁶ Compare Witness BAC, T. 11 May 2009, pp. 47 ("A. It is the sous préfet who ordered that the refugees be taken to Kabuye. And to get to Kabuye the refugees were escorted by the policemen and they promised to give them security once in Kabuye."), 56 ("The Witness: I was in front of my house. ... I saw the movement of the refugees and I saw the préfet calling people, asking them to leave their shops and to gather at the open area, at the field, so that they would be taken to Kabuye."), 61 ("A. ... [Ntawukulilyayo] was obeyed. That is why people obeyed him when he said they should go to a place for protection."); T. 12 May 2009, p. 3 ("He asked the refugees who were at the marketplace to go to Kabuye ... The sous préfet sent them to Kabuye.") and Witness BAF, T. 13 May 2009, pp. 63 ("A. ... The sous préfet asked them to go to Kabuye and added that that is where their safety was going to be ensured."), 64 ("A. The sous préfet spoke to the refugees, telling them that they had to go to Kabuye, where their safety was going to be ensured."); T. 14 May 2009, p. 8 ("A. Ntawukulilyayo gave the orders on Thursday, after taking the refugees to the football field. Ntawukulilyayo asked for the refugees to go to Kabuye, where they would be protected.").

²⁶⁷ See Defence Exhibit 10E (statement of 6 December 2001) pp. 3-4.


²⁶⁸ While Witness BAC's December 2001 refers to Ntawukulilyayo's activities in two other instances, they concern events where Kalimanzira was also present. Defence Exhibit 10E (statement of 6 December 2001) pp. 3-4.

²⁶⁹ Defence Closing Brief, paras. 1160-1175.

²⁷⁰ Supplement to Defence Final Brief further to the Site Visit in Rwanda, 25-29 April 2010, 14 May 2010, paras. 13-18.

²⁷¹ Witness BAC, T. 11 May 2009, pp. 47 ("A. I was at the same place in front of my house. We were all there observing what was happening."), 56; T. 12 May 2009, p. 3 ("Q. Were you there at the time the sous préfet was instructing that the refugees be sent to Kabuye? A. We were many, and I was an eye witness. The sous préfet sent them to Kabuye.").

²⁷² During the site visit, it was noted that the furthest end of the market was 0.3 kilometres from her home while the closest was 0.1 kilometres. Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010) para. 8 (iv) n. 6. See also Witness BAC, T. 11 May 2009, pp. 46-47, 71-73; T. 12 May 2009 pp. 8-9 (her home was near the Gisagara trading centre and she could see what occurred there).

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what people said at the trading centre from her house.²⁷³ Though it is possible that she was in an area close to her house, such that she could have had a full view of the market square, the evidentiary record is equivocal in this regard.

217. Moreover, when considered in its entirety, the Chamber has some general reservations about Witness BAC's credibility. Unlike other Tutsi Gisagara residents, she remained in Gisagara and did not go to Kabuye hill. During this time, she avoided showing herself in public, because if she did, "people could actually call on [her] neighbours to kill [her]", as she was known to be Tutsi in her neighbourhood.²⁷⁴ Given these circumstances, the Chamber finds it surprising that she nonetheless moved through roadblocks and attended a number of gatherings led by Hutus – some of which were aimed at inciting attacks against Tutsis and most of which, were attended by the Accused.²⁷⁵ Though it appears her husband, also a Tutsi, carried Hutu identity papers and was not from that area, Witness BAC was a Gisagara resident and her ethnicity was likely known. In view of these concerns, and given her brief testimony regarding the order to go to Kabuye hill, the Chamber finds her evidence insufficient to support a finding beyond reasonable doubt.²⁷⁶

218. Turning to Witness BAF, he provided two prior statements to Tribunal investigators in September 2001 and October 2008. The first statement contains some discrepancies with his in court testimony. For instance, while it includes reference to Ntawukulilyayo's involvement in President Sindikubwabo's meeting on Thursday 21 April, it makes no mention of Ntawukulilyayo ordering refugees at Gisagara market to go to Kabuye hill.²⁷⁷ However, Callixte Kalimanzira was the target of the September 2001 statement. Given that Kalimanzira was not with Ntawukulilyayo on Thursday 21 April, the absence of any reference to the order by the Accused from the statement is understandable. Indeed, the Witness explained that other differences between his September 2001 and October 2008 statement resulted from the different questions posed to him.²⁷⁸ He also noted that the

²⁷³ Witness BAC, T. 12 May 2009, pp. 6-8. Witness BAC was referring to an incident at the "business centre", or "trading centre", when she "peeped out" of her house and "could not exactly hear what people were saying", raising questions about her ability to hear from outside her house.

²⁷⁴ Witness BAC, T. 11 May 2009, p. 73.

²⁷⁵ Witness BAC, T. 11 May 2009, pp. 52, 55 (on 20 May 1994, she attended a meeting where instructions were given that "Odette", a nun, had to be killed and the Accused showed a letter saying that she had been protected, but she was subsequently arrested); T. 11 May 2009, p. 52 (sometime in May 1994, she attended a gathering in Gisagara at which the Accused was present and a soldier addressed the gathering, saying "I have looked around practically everywhere and I have noticed that you have not done anything [] there were still tasks to be done and [] that in their area, Muganza, they had cleansed the area well and that they had cleared the filth"); T. 12 May 2009, pp. 11-12 (she attended a meeting towards the end of May or early June 1994 where a person in military uniform addressed the crowd).

²⁷⁶ The Chamber has also considered testimonies concerning attempted witness tampering by Witness BAC (II.1.3.2.iii). Given that her evidence is not being relied upon, it is unnecessary to determine what impact, if any, the allegations have on her credibility.

²⁷⁷ Defence Exhibit 18 (statement of 19 September 2001) pp. 3-4.

²⁷⁸ Witness BAF, T. 18 May 2009, p. 39 ("Q. Why did you only narrate that version in 2008; whereas, you had the opportunity to talk about it in 2001? A. Even today I cannot claim that I have told you every single thing that happened during the war. One cannot talk about all things. Q. Witness, that is not an insignificant detail. It is an important fact which you did not talk about in 2001. What is your explanation for that? A. I would like to tell you that even now there are so many very important things that you and I have not talked about. [] A. This question was put to me in 2008, and I was only answering questions that had been put to me.").

September 2001 interview could not be seen as a complete record of his observations.²⁷⁹ The October 2008 statement, taken after Ntawukulilyayo's arrest, is generally consistent with the Witness' evidence.²⁸⁰

219. However, the Chamber recalls that Witness BAF was incarcerated at the time of his testimony and had been convicted for crimes related to this case. It is possible that his evidence may be influenced by a desire to deflect responsibility to Ntawukulilyayo or to obtain favourable treatment while imprisoned. In considering his testimony, the Chamber has, therefore, approached it with the necessary caution.²⁸¹ Furthermore, the Chamber has previously discussed how aspects of his evidence lack credibility (II.1.3.1). In view of these circumstances, the Chamber does not find Witness BAF's evidence sufficient to support findings beyond reasonable doubt.

220. As noted above, the Chamber considers that the testimonies of Witnesses BAC and BAF are generally consistent. However, given the concerns about their evidence individually as well as the brevity of their accounts about the order, the record is not sufficiently compelling to support findings beyond reasonable doubt. Consideration has also been given to the testimony of Defence Witness MAE that there was not a direct line of vision from Witness BAC's home to the market. The Chamber has also reviewed Defence evidence, discussed in greater detail below, which generally denied that Ntawukulilyayo ordered refugees at Gisagara market to go to Kabuye hill (II.1.3.2.iii). While the Chamber finds it to be of limited probative value, having carefully considered the testimony provided by the Prosecution and Defence witnesses, it is unable to come to a definitive conclusion that Ntawukulilyayo ordered the removal of refugees from Gisagara market to Kabuye hill on Thursday 21 April. Under the circumstances, it is unnecessary to consider the Defence challenges to sufficiency of notice provided concerning the evidence of orders given on 21 April 1994.²⁸²

(ii) *Orders to Leave on Friday 22 April 1994*

221. Prosecution Witness AZV testified that on Friday 22 April, at around 8.00 a.m., communal police officers left Ntawukulilyayo's home and directed her and other refugees to go to Kabuye hill, where Red Cross would provide assistance. Witness BAF testified that starting on Friday 22 April anyone from a civilian, to a police officer or soldier would instruct refugees arriving in Gisagara to go to Kabuye hill.

²⁷⁹ Witness BAF, T. 18 May 2009, p. 33 ("Q. You had the opportunity to give a full statement in which nothing was held back; is that correct? A. You cannot say that this investigation – this statement is a full statement. There were a lot of events that occurred during the war. [] A. Maybe I did not get sufficient time. Q. And if you did not have sufficient time, you could have asked for more time. A. It was not a trial.").

²⁸⁰ See Defence Exhibit 19E (statement of 28 October 2008) p. 2 ("[On Thursday] Dominique told the President that some people were moving toward Burundi and the President asked him to have them called back. Dominique ordered the police to follow them and bring them back. When they came, he instructed them to go to Kabuye hill.").

²⁸¹ The Chamber has also considered evidence that Witness BAF was forced to testify against authorities, including Ntawukulilyayo, and received favourable treatment for doing so. Witness MAI, T. 24 September 2009, pp. 14-15. This evidence is general and given that Witness BAF's account is not relied upon, it is unnecessary to consider it further.

²⁸² Defence Closing Brief, paras. 236-240. In particular, the Defence cites to the inconsistency between, on the one hand, the pleading in paragraph 7 of the Indictment of "on or about 23 April", and on the other, the Pre-Trial Brief and annexed witness summary with respect to evidence of the order on 21 April.

222. Witness AZV's evidence about being sent to Kabuye hill is generally consistent with her prior statements to Tribunal investigators in December 1996 and October 2008.²⁸³ However, she conceded during her testimony that she did not hear Ntawukulilyayo give instructions to go to Kabuye hill. Rather, as the police had just left the sub-prefect's house, and because of his general authority, she concluded that Ntawukulilyayo had given the order.²⁸⁴

223. The Defence submits that there is no line of sight between Ntawukulilyayo's home and the marketplace, making it impossible for Witness AZV to have seen police officers leave there.²⁸⁵ However, it is unclear from her testimony where she was within Gisagara town when she saw police officers leave Ntawukulilyayo's home.²⁸⁶ Evidence in the record suggests that while they were in the same neighbourhood, one could not see the sub-prefect's home from the market.²⁸⁷ In any event, the Chamber doubts that Witness AZV, a resident from Muganza commune who only knew the sub-prefect from a prior visit he made to her commune, necessarily could have identified Ntawukulilyayo's home.²⁸⁸ In the Chamber's view, these ambiguities raise questions about her assertion that the police came from there. Furthermore, it has elsewhere questioned the reliability of her evidence (II.1.3.4).

224. The Chamber notes that Witness AZI, a refugee, also testified to leaving Gisagara market on the same morning. While not questioned about the details of his departure, he did not state that he left pursuant to orders from Ntawukulilyayo or police.²⁸⁹ While this evidence is not necessarily inconsistent with Witness AZV's testimony that some refugees were directed to Kabuye hill by communal police, it does not offer corroboration for her evidence that the police did so after leaving the Accused's house or pursuant to his instructions.²⁹⁰ Furthermore, the circumstantial evidence of Witnesses AZN, AYQ, BAU and BAC, that police escorted refugees towards Kabuye hill on different days, is insufficient to corroborate the details of Witness AZV's account. Similarly, Witness BAF's statements that anyone from

²⁸³ See Defence Exhibit 5E (statement of 18 December 1996) p. 3; Defence Exhibit 6E (statement of 29 October 2008) p. 3. The 18 December 1996 statement appears to have been focused on Elie Ndayambaje and thus the absence of specific reference to the policemen leaving Ntawukulilyayo's house before giving the order to the refugees to go to Kabuye hill is not material. While the 29 October 2008 statement indicates that Ntawukulilyayo gave the order for the refugees to go to Kabuye hill, which goes further than Witness AZV's testimony in this case, the Chamber observes that the statement is generally consistent with the Witness' testimony that she believed Ntawukulilyayo was behind the order the police officers gave directing refugees to go there.

²⁸⁴ Witness AZV, T. 7 May 2009, pp. 40-42, 63, 65, 74.

²⁸⁵ Defence Closing Brief, para. 1116; Supplement to Defence Final Brief further to the Site Visit in Rwanda, 25-29 April 2010, 14 May 2010, paras. 7-10. During the site visit, the Chamber recorded that the distance from Ntawukulilyayo's residence to the Gisagara market was 0.2 kilometres. Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010) para. 8 (ii).

²⁸⁶ While it is clear that Witness AZV spent Wednesday night at Gisagara market (T. 7 May 2009, p. 39), it is not entirely clear that she stayed there when she returned to Gisagara on Thursday (T. 7 May 2009, p. 40) or that she was at the market when she saw police officers leaving Ntawukulilyayo's home and when they ordered her and others to leave (T. 7 May 2009, pp. 40-42, 63, 65).

²⁸⁷ Defence Exhibit 67 (sketch of Gisagara); Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010), para. 8 (ii).

²⁸⁸ Witness AZV, T. 7 May 2009, p. 37.

²⁸⁹ Witness AZI, T. 12 May 2009, p. 23.

²⁹⁰ The Chamber has also considered Claver Habimana's evidence that Witness AZI had left for Burundi around 16 or 17 April and likely was not at Gisagara market at this time. T. 6 October 2009, pp. 11-17, 27-29.

a civilian to a police officer to a soldier started directing refugees to Kabuye hill after Thursday 21 April, is also insufficiently precise to corroborate Witness AZV's evidence here.

225. The Chamber has also considered Ntawukulilyayo's testimony that he left Gisagara on Friday 22 April at around 10.00 a.m. and proceeded to the ICA in Butare in search of the Caritas director. Other Defence evidence that police were not at the market when refugees departed and that they left on their own for Kabuye hill, has also been reviewed. The Chamber, however, finds this evidence to be of limited probative value when assessing the merits of Witness AZV's testimony that she saw police leave Ntawukulilyayo's residence at about 8.00 a.m. that day.

226. Based on the foregoing, the Chamber finds that the evidentiary record does not establish that communal policemen left Ntawukulilyayo's home on the morning of Friday 22 April 1994 and removed refugees at Gisagara market to Kabuye hill pursuant to his orders.

(iii) Orders to Leave on Saturday 23 April 1994

227. Prosecution Witnesses BAF, BAU and AYQ each provided first-hand accounts of Ntawukulilyayo instructing refugees at Gisagara market to go to Kabuye hill on Saturday 23 April. Witness BAF testified that some time prior to 8.00 a.m., he observed Ntawukulilyayo, in the company of Fidèle Uwizeye, Gaëtan Uwihoreye and Callixte Kalimanzira, at the market. There, the sub-prefect told the displaced Tutsis to go to Kabuye where protection would be provided. Witness BAU said that around 1.30 p.m. he followed instructions from communal police to go to the market where Ntawukulilyayo, in the presence of Callixte Kalimanzira and police officers Vincent and Munyakindi, told refugees to go to Kabuye hill where tents would be erected and their security ensured. Witness AYQ, a refugee who arrived at Gisagara market that day, observed Ntawukulilyayo, using a megaphone, direct police to bring displaced persons to Kabuye hill where they would be fed and protected.²⁹¹ Kalimanzira was also present at the market with the sub-prefect.

228. As noted above, the Chamber has no doubt of Witness BAF's ability to identify Ntawukulilyayo in 1994 (II.1.3.2.i). Witness BAU, who also lived in Gisagara sector, knew Ntawukulilyayo as the Gisagara sub-prefect, observed him at meetings prior to 1994 and knew details about the sub-prefect's family.²⁹² Witness AYQ indicated that she had known Ntawukulilyayo prior to 1994 as having been the well respected sub-prefect of Gisagara sub-prefecture. She also lived in Gisagara sector, in the same commune as the sub-prefect. Accordingly, while she was unsure if she would recognise the Accused at the time of her testimony, not having seen him since 1994, the Chamber has no doubt that she would have been able to do so at that time.²⁹³

²⁹¹ It is noted that Witness AYQ testified that she saw Ntawukulilyayo only once on a Saturday in "early" April 1994. However, she also testified that this was "during the killings of April" and *after* the President's death. Her descriptions of the situation at Gisagara market is consistent with Defence and Prosecution evidence of events around Saturday 23 April. Given the tense circumstances and the significant passage of time, the Majority finds her reference to a Saturday in "early" April 1994 immaterial to the extent it is inconsistent with other evidence. See T. 11 May 2009, pp. 7-8.

²⁹² Witness BAU, T. 12 May 2009, pp. 52-53; T. 13 May 2009, pp. 13, 50; Prosecution Exhibit 7 (protected information sheet). Witness BAU also identified Ntawukulilyayo in court during his testimony. T. 12 May 2009, p. 66.

²⁹³ Witness AYQ, T. 11 May 2009 p. 7; T. 11 May 2009, p. 19.

229. Turning to the merits of the witnesses' testimonies, there are a number of similarities. All identified Kalimanzira as accompanying Ntawukulilyayo at Gisagara market. Witnesses BAU and AYQ suggested that Kalimanzira also spoke while in the company of Ntawukulilyayo at the market.²⁹⁴ Witness BAF's testimony is less clear on whether Kalimanzira spoke.²⁹⁵ The evidence consistently indicates that Ntawukulilyayo was the focal point for instructing the refugees to leave. Notably, aside from Witness BAU, neither Witness AYQ nor BAF was asked pointed questions about what Kalimanzira did at the market that day. Varying vantage points could also account for such differences in their testimonies on this point.

230. Moreover, the fundamental features of what was said to the refugees, is largely consistent. Witness AYQ recalled that Ntawukulilyayo promised the refugees that they would be fed and protected. Witness BAU testified that the Accused told them that tents would be erected and assured them that security would be provided on Kabuye hill. Witness BAF also recalled that Ntawukulilyayo promised that the refugees would be protected there. While there are slight discrepancies, these are understandable given the lapse of time and varying vantage points from which they observed these events. While Witness AYQ is the only person who said that Ntawukulilyayo used a megaphone, neither Witness BAU nor BAF were asked whether the Accused used a megaphone.

231. Notwithstanding the above similarities, Witness BAF's evidence of the event occurring in the early morning prior to 8.00 a.m. stands in sufficient contrast to the testimonies of Witnesses BAU and AYQ to suggest that he is not necessarily referring to the same event. Witness BAU specifically recalled hearing these instructions at the market after closing his shop around 1.30 p.m.²⁹⁶ Although Witness AYQ could not estimate when she and other refugees received instructions to leave Gisagara, her evidence tends to suggest that it was in the afternoon.²⁹⁷ Notably, she did not testify that she settled at the market. She also recalled arriving at Kabuye hill at around 4.00 p.m., and given its relatively short distance from Gisagara market, it is reasonable to conclude that she would have observed the Accused at the market in the early afternoon, consistent with Witness BAU's account.²⁹⁸

²⁹⁴ Witness AYQ, T. 11 May 2009, pp. 30 ("A. By dignitaries, I meant Dominique and Kalimanzira because they were the ones who asked us to leave that area and to go to Kabuye."), 31 ("A. I said that when they came to the market to tell us that we had to leave that area and go to Kabuye, they were with the communal policemen. They asked the communal policemen to gather us and to take us to Kabuye."); Witness BAU, T. 13 May 2009, pp. 34 ("A. It is correct. I said that the sous préfet spoke. If counsel had asked me regarding Kalimanzira's speech, I would have answered that he too, Kalimanzira, spoke."), 38 ("A. Well, I have to say this: The sous préfet spoke. Kalimanzira did not address the refugees. He simply said that they should leave. So we immediately went to Kabuye because attackers had just arrived. The situation was worsening, so we went to Kabuye.").

²⁹⁵ Witness BAF generally testified about Ntawukulilyayo speaking to refugees at Gisagara market. T. 13 May 2009, pp. 67, 69; T. 18 May 2009, p. 60. One statement, however, raises the possibility that Kalimanzira spoke as well. See T. 18 May 2009 p. 46 ("A. [] So there were people who went and sought refuge at the football ground where there were other refugees. *The sous préfet, together with Kalimanzira, asked those refugees to go to Kabuye because that is where they would be protected.* That was a Saturday morning.") (emphasis added).

²⁹⁶ Witness BAU, T. 13 May 2009, p. 27.

²⁹⁷ Witness AYQ, T. 11 May 2009, p. 32. Specifically, Witness AYQ testified that she could not say whether she and others "left Gisagara at one or two in the afternoon []". T. 11 May 2009, p. 32.

²⁹⁸ Witness AYQ, T. 11 May 2009, pp. 11, 32. The Chamber notes that Witness AYQ testified in *Kalimanzira* that she arrived at Gisagara market in the early afternoon. See Defence Exhibit 8F (*Kalimanzira*, T. 9 May 2008, p. 31) (she testified that she arrived in Gisagara in "early afternoon"). With respect to the distance between

232. Other variances between the testimony of Witness BAF, on the one hand, and Witnesses AYQ and BAU, on the other, tend to suggest that they are referring to separate incidents. With respect to who exactly accompanied Ntawukulilyayo that day, Witness BAF testified that Fidèle Uwizeye, Gaëtan Uwihoreye and Callixte Kalimanzira were among those present with Ntawukulilyayo at Gisagara market but did not place communal policemen with them.²⁹⁹ However, Witnesses AYQ and BAU specifically recalled policemen accompanying Ntawukulilyayo. Witness BAU saw Ntawukulilyayo, Kalimanzira as well as communal police, including Munyankindi and Vincent, and indicated that Célestin Rwankubito arrived after they had gathered.³⁰⁰ Witness AYQ also observed Callixte Kalimanzira and communal police with Ntawukulilyayo.³⁰¹ The variances among the testimonies reasonably may have resulted from the passage of time, varying vantage points, as well as differing abilities to identify the other individuals who were with the Accused. This reasonably explains the minor differences between the testimonies of Witnesses BAU and AYQ. However, the Chamber considers that in light of Witness BAF's detailed description of who accompanied Ntawukulilyayo, the absence of any mention of communal police, as well as his recollection of the timing of the event, he referred to a separate incident to that recalled by Witnesses AYQ and BAU. The Chamber proceeds to consider the individual merits of each Witness' evidence.

233. Turning first to Witness BAF, the Chamber recalls that his conviction for crimes at issue in this proceeding requires that his evidence be viewed with caution. As noted above, Witness BAF provided statements to Tribunal investigators in September 2001 and October 2008. The first differs from his testimony as it does not refer to Ntawukulilyayo ordering refugees at Gisagara market to go to Kabuye hill on Saturday 23 April 1994 in Callixte Kalimanzira's presence.³⁰² The October 2008 statement, taken after Ntawukulilyayo's arrest, is generally consistent with the Witness' testimony.³⁰³

234. The omission in the September 2001 statement seems surprising as the statement details Kalimanzira ordering "Tutsi refugees from Muganza, Ndora and Kibayi communes to move to Kabuye hill" on an unspecified date.³⁰⁴ The statement, however, does appear to suggest that Ntawukulilyayo was with Kalimanzira on that occasion.³⁰⁵ Notably, Kalimanzira, not Ntawukulilyayo, was the target of the September 2001 statement and that detail of the sub-prefect's involvement in moving refugees from Gisagara to Kabuye hill may not have been canvassed by the investigator or volunteered by the Witness. As noted earlier, the Witness explained that other differences between his September 2001 and October 2008

Gisagara market and Kabuye hill, this was approximately 2.7 kilometres. See Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010) para. 8 (ii) and (viii).

²⁹⁹ Witness BAF, T. 13 May 2009, p. 69; T. 18 May 2009, p. 46.

³⁰⁰ Witness BAU, T. 12 May 2009, p. 64; T. 13 May 2009, p. 28.

³⁰¹ Witness AYQ, T. 11 May 2009, pp. 30-31.

³⁰² Defence Exhibit 18E (statement of 19 September 2001).

³⁰³ See Defence Exhibit 19E (statement of 28 October 2008) p. 2 ("On Saturday, Tutsis fleeing from Ndora came to Gisagara and gathered at the football field. Dominique, Callixte Kalimanzira and Fidèle Uwizeye asked them to go to Kabuye hill where they would be protected.").

³⁰⁴ Defence Exhibit 18E (statement of 19 September 2001) pp. 3-4.

³⁰⁵ Defence Exhibit 18E (statement of 19 September 2001) p. 4 ("I heard Kalimanzira telling the Tutsi refugees from Muganza, Ndora and Kibayi communes to move to Kabuye hill, where they would be fed. He told them that he was going to Butare to get food. *He left and went away together with the sous-préfet, Dominique, in the latter's vehicle []*") (emphasis added).

statement resulted from the different questions posed to him. He also noted that the September 2001 interview could not be seen as a complete record of his observations.

235. However, these explanations are not as compelling in this instance. The statement details Ntawukulilyayo's involvement in a meeting of Ndora commune Hutu intellectuals and a subsequent meeting at the Gisagara football field that continued in the hall of the IGA development project.³⁰⁶ Kalimanzira is not implicated in either event, suggesting that questions were not limited only to activities in which he participated and that the Witness generally talked about Ntawukulilyayo as well. Thus, it is surprising that the Witness did not discuss, or that the investigator did not record, information about Ntawukulilyayo's role in removing refugees from Gisagara to Kabuye hill. These discrepancies require that his testimony be considered with caution. The Chamber, in exercising appropriate caution, will accept his evidence only where adequately corroborated.

236. Turning to the evidence of Witness AYQ, the Defence confronted her with her 9 May 2008 testimony in *Kalimanzira* and her statement to Tribunal investigators in March 2003. Her prior testimony in *Kalimanzira* indicated that others who were taller than her could see Ntawukulilyayo when he ordered the refugees to go to Kabuye hill, but that she was unable to.³⁰⁷ It further noted that nowhere in her March 2003 statement does it say that she saw Ntawukulilyayo.³⁰⁸ The Witness affirmed her testimony that she observed him at the market.³⁰⁹ Notably, her evidence that she saw Ntawukulilyayo is consistent with excerpts of her testimony in *Kalimanzira* that the Defence did not reference.³¹⁰ Moreover, her March 2003 statement, while taken in relation to Kalimanzira, expressly states that Ntawukulilyayo was at Gisagara market with Kalimanzira. Nothing in it indicates that she was unable to see him.³¹¹ Thus, her prior statement and testimony in *Kalimanzira*, on the one hand, and her testimony in this proceeding, on the other, do not manifest any inconsistencies with respect to

³⁰⁶ Defence Exhibit 18E (statement of 19 September 2001) pp. 3-4.

³⁰⁷ Witness AYQ, T. 11 May 2009, pp. 27-28; Defence Exhibit 8E (*Kalimanzira*, T. 9 May 2008, p. 28) ("Q. How close were you to the sous préfet and Calixte Kalimanzira ... when the sous préfet spoke? A. He was very close to me. Even if I was in the middle of the group of refugees, there were other refugees who were taller who could see them, and he was saying that it was the sous préfet and Kalimanzira and that they were ensuring us that they would make sure that we were safe.").

³⁰⁸ Witness AYQ, T. 11 May 2009, pp. 29-30; Defence Exhibit 7E (statement of 23 March 2007) p. 3 ("While we were gathered near the market, some dignitaries accompanied by soldiers arrived there to speak to us. Among that group, there was the Gisagara sous préfet, Dominique Ntawukulilyayo, who announced to the refugees that we were to move to the Kabuye hill, where we would be protected and fed.").

³⁰⁹ Witness AYQ, T. 11 May 2009 pp. 28-31.

³¹⁰ See Defence Exhibit 8E (*Kalimanzira*, T. 9 May 2008, p. 28) ("Q. What can you say about your ability to see the two of them as the sous préfet spoke? Did you have a clear view or not? A. We could see them quite clearly."); Defence Exhibit 9E (*Kalimanzira*, T. 20 May 2008, p. 26) ("A. ... He told us to go to Kabuye because there were other refugees there. And he pointed out that our safety would be assured on Kabuye hill. I could see him opposite me. Even though there were many people there, I could see him well. And people were saying that since it was the sous-préfet himself who was saying that, and since he was in the company of Kalimanzira, it was sure that – or it was certain that these people would actually want to assure our safety.") (emphasis added).

³¹¹ Defence Exhibit 7E (statement of 27 March 2003) p. 3. The Chamber, Judge Akay dissenting, finds it immaterial that her March 2003 statement referred to seeing dignitaries arrive while she was at the market, while her testimony in this case was that when she arrived she saw Ntawukulilyayo and Kalimanzira. To the extent there is a discrepancy, the Majority considers that this reasonably could have resulted from a recording error and is also insignificant given the passage of time since the events.

the order to go to Kabuye hill. Rather, in the Chamber's view, Judge Akay dissenting, her evidence remained convincing under cross-examination.

237. The Defence challenged Witness BAU's evidence about Ntawukulilyayo's order to send refugees to Kabuye hill with his statement to Tribunal investigators in March 2003 and his testimony in *Kalimanzira*. In particular, Witness BAU initially testified that only Ntawukulilyayo addressed the refugees at the market.³¹² However, his March 2003 statement, taken in relation to *Kalimanzira*, indicates that both he and Ntawukulilyayo spoke to the attendees.³¹³ The Witness explained that he was answering the questions asked of him, and then conceded that *Kalimanzira* spoke after Ntawukulilyayo.³¹⁴ Defence counsel subsequently pointed to his testimony in *Kalimanzira*, wherein he said that *Kalimanzira* had only stood by while the sub-prefect ordered refugees to leave.³¹⁵ The Witness responded that Ntawukulilyayo spoke and that *Kalimanzira* "simply said that [the refugees] should leave."³¹⁶

238. These discrepancies, however, are minor in light of the significant passage of time and varying circumstances under which Witness BAU provided information to investigators, testimony in *Kalimanzira*, and evidence in this case. His explanations tend to suggest that Ntawukulilyayo took the lead in directing refugees to leave, a position that he has consistently held while testifying under oath in two different proceedings before the Tribunal. The Chamber, Judge Akay dissenting, considers his evidence compelling. Indeed, his explanations as to why he went to the market to hear Ntawukulilyayo speak and that he left his family behind when heading to Kabuye are coherent and compelling, particularly in light of the heightened tension at the time.³¹⁷

239. As noted above, the testimonies of Witnesses AYQ and BAU were generally consistent with regard to the timing of the order and persons present. While Witness AYQ

³¹² Witness BAU, T. 12 May 2009, p. 64; T. 13 May 2009, p. 28 ("Q. Did [Ndora Bourgmestre Célestin Rwankubito] address the crowd? A. He did not address the meeting, *only Dominique, the sous préfet, addressed the meeting.*") (emphasis added).

³¹³ Defence Exhibit 15 (statement of 27 March 2003) p. 3 ("... They [Ntawukulilyayo and *Kalimanzira*] came and addressed us, one after the other; first [Ntawukulilyayo], and then *Kalimanzira*. They both advised the crowd to move to the nearby Kabuye hill where we would be sheltered in tents and fed. After their address, police guards accompanying them escorted us to the Kabuye hill.").

³¹⁴ Witness BAU, T. 13 May 2009, pp. 31, 34.

³¹⁵ See Witness BAU, T. 13 May 2009, pp. 37-38; Defence Exhibit 17 (*Kalimanzira*, T. 5 May 2008, p. 12) ("Q. And while the sous préfet was speaking, what did – what was Callixte *Kalimanzira* doing? A. Callixte *Kalimanzira* was standing next to him. Q. Did you hear him speak? A. On the field he did not say anything. He was merely standing next to the sous préfet."). See also Defence Exhibit 17 (*Kalimanzira*, T. 12 May 2008, p. 29) ("Q. ... During your testimony in chief, you indicated that only sous préfet Ntawukulilyayo addressed the crowd. Do you confirm this information? A. Yes, I confirm that only the sous-préfet addressed the crowd. ... Q. ... You testified that only sous préfet Ntawukulilyayo addressed the crowd at the marketplace, and that Mr. *Kalimanzira* did not say anything and was simply standing by his side. Am I correct? A. I agree with you, Counsel."); Defence Exhibit 17 (*Kalimanzira*, T. 12 May 2008, p. 42) ("Q. Let me continue my reading. You say at about 1:30 p.m. you saw *Kalimanzira* and the Gisagara sous préfet, Ntawukuriryayo, Dominique, with their armed police guards approaching you. And let me read it in extenso, what is written. 'They came and addressed us, one after the other; first, Ntawukuriryayo and then *Kalimanzira*.' Before the Trial Chamber, Mr. Witness, on two occasions, you confirmed that *Kalimanzira* had not addressed the crowd. Which version is correct, Mr. Witness? A. I told you that it was the sous préfet who took the floor, and that *Kalimanzira* had not said anything. And here, before the Trial Chamber, I said that I saw them at 2 p.m., not at 1:30 p.m., as you said. I am not the one who gave that testimony.").

³¹⁶ Witness BAU, T. 13 May 2009, p. 38.

³¹⁷ See Witness BAU, T. 13 May 2009, pp. 28-29 (communal police directed persons to go to Gisagara market), 39 (he left his family in Gisagara because he felt threatened).

testified that communal police accompanied the refugees to Kabuye hill, beating and shoving them along the way, Witness BAU said that they were escorted as far as the Accused's residence but covered the remaining two kilometres unaccompanied. However, given the large numbers of refugees being moved, and varying vantage points, this difference is immaterial.³¹⁸

240. In view of the above, the Chamber, Judge Akay dissenting, considers that Witnesses AYQ and BAU provided convincing and consistent accounts of Ntawukulilyayo's order to refugees to go to Kabuye hill. It next considers their evidence in the context of other Prosecution and Defence testimonies in assessing its reliability.

241. Prosecution Witness BAZ testified that Ntawukulilyayo attended a meeting in Ndatemwa on Saturday 23 April. The Witness arrived there between 11.00 a.m. and 1.00 p.m., and Ntawukulilyayo arrived after. At the outset, the Chamber has not accepted Witness BAZ's testimony about Ntawukulilyayo's presence and participation in this meeting (II.1.3.3). Notwithstanding, his evidence is not necessarily inconsistent with the evidence of Witness AYQ and BAU that Ntawukulilyayo was at Gisagara market in the early afternoon that same day. The distance between Ndatemwa and Gisagara market is relatively short and would have allowed Ntawukulilyayo to have been at both locations within a short period.³¹⁹ This does not raise doubt with respect to the testimonies of Witness AYQ and BAU.

242. Turning to the Defence case, it sought to discredit Witness AYQ generally based on her associations with *Avega*, a genocide survivors group for widows, as well as allegations that she sought to procure fabricated testimony against persons, including Ntawukulilyayo. The Chamber does not consider that her *Avega* membership, a branch of a largere genocide survivors group called *Ibuka*, necessarily renders her evidence unreliable.³²⁰

243. Reviewing evidence of Witness AYQ's alleged attempts to procure false testimonies, Witnesses MAD, MAE and Simon Rumashana all live in exile based on their fear of reprisal for refusing to testify falsely against Ntawukulilyayo and other authorities. Their evidence evinces a clear belief that genocide survivors groups such as *Ibuka* and *Avega* in Gisagara have sought to solicit fabricated evidence against the former sub-prefect.³²¹ Furthermore, each provided rather detailed accounts of Benoît Ruzindana either indicating that giving testimony against Ntawukulilyayo would come with benefits or that a failure to cooperate would be punished.

244. Notwithstanding these parallels, Rumashana did not implicate Witness AYQ in attempting to procure false testimony against Ntawukulilyayo. Furthermore, the accounts of Witnesses MAD and MAE are particularly brief and vague as they relate to Witness AYQ's alleged improper conduct. Other than identifying her as being present during a June 2008 meeting where members of *Avega* asked her to testify against Ntawukulilyayo, Witness MAD

³¹⁸ Witness BAU testified that he left for Kabuye hill in part because he saw attackers "covering themselves with banana leaves". T. 13 May 2009, p. 39. No further details were elicited about this. To the extent this evidence is inconsistent with Witness AYQ's testimony, it is immaterial.

³¹⁹ Witness BAZ, T. 21 May 2009, p. 9 (Ndatemwa was approximately 3 kilometres from Kabuye hill by road); Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010) para. 8 (ii) and (viii) (Kabuye hill was approximately 2.7 kilometres from the Gisagara market).

³²⁰ The Defence also concedes that Witness AYQ's membership in genocide survivors group does not necessarily make her evidence unreliable. Defence Closing Brief, para. 1155.

³²¹ See also Ahorukomeye, T. 6 October 2009, pp. 62-64 (fled to Uganda after being pressured by members of Duhozanye, a branch of *Ibuka*, to provide false testimony against the accused).



did not delineate any particular action taken by her. Indeed, the Witness' testimony is ambiguous about whether Witness AYQ participated in later incidents where she was again requested to testify against Ntawukulilyayo or sign documents.³²² Similarly, while Witness MAE stated that *Avega* as a group sought to obtain testimony against Hutu authorities, the only details he gave with respect to Witness AYQ's role was that she told him that she was a member of *Avega* because she was a widow. Although she was Hutu, she was married to a Tutsi. He added that "it was taken" that whatever she said was true and that "she had seen or experienced what had transpired because she was Hutu".³²³

245. The Chamber has carefully considered this evidence, bearing in mind that the Defence carries no independent burden when seeking to raise doubt with elements of the Prosecution case.³²⁴ However, it considers the record as it relates to Witness AYQ's purported improper conduct ambiguous and unsubstantiated. It does not raise doubts about her testimony in this proceeding, which she provided under oath.³²⁵

246. The Defence also presented evidence that Witness BAU had given statements outside of this proceeding that he had sought refuge starting in the middle of April 1994.³²⁶ In the Defence's view, this raises doubt about his testimony that he was at Gisagara market when this order was given. The details about when the statement was provided are general and unsupported. This ambiguity raises questions about the probative value of this hearsay evidence. Accordingly, it does not raise any doubt about Witness BAU's testimony in this proceeding, which also was given under oath, and whose fundamental features are corroborated by Witness AYQ's evidence.³²⁷

247. Moreover, the Defence led evidence that Ntawukulilyayo was not at Gisagara market or even in Gisagara town on Saturday 23 April. It relies on the testimonies of Ntawukulilyayo, Louis Ahorukomeye, Witness BAA and Simon Rumashana.³²⁸ Specifically, Ntawukulilyayo testified that on the morning of 23 April, he departed for Nyaruhengeri commune but stopped a short distance from his home to prevent an attack on the Kereti family. He then continued to the Benedictine Sisters Convent in Kansi sector, Nyaruhengeri commune, arriving there at around 10.00 a.m. and then returned home, where he met with Father Thomas Mutabazi. He left with the priest around 2.00 p.m. for Doctor Venant

³²² In particular, Witness MAD only described Benoît Ruzindana and Witness AXY as coming to her home on two occasions. See T. 24 September 2009, pp. 64-66.

³²³ Witness MAE, T. 28 September 2009, pp. 43-44.

³²⁴ Cf. *Zigiranyirazo* Appeal Judgement, paras. 17-18 (an alibi defence does not carry an independent burden and the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true).

³²⁵ Witness AYQ, T. 11 May 2009, p. 5. With respect to the Defence suggestion of collusion given that Witness AYQ knew Witness BAC and lived in the same sector since 1994, and both were active members of the *Avega* association (Defence Closing Brief, paras. 1157-1159), nothing in the testimonies of either witness suggests collusion. Rather, they both provided very different accounts of Ntawukulilyayo's role in events. See also Witness AXY, T. 20 May 2009, pp. 10-14; Defence Exhibits 29 and 30 (names of Witnesses AYQ and BAC, respectively).

³²⁶ The Chamber has omitted details about this evidence and only cites to the Defence Closing Brief for reasons of witness protection. Defence Closing Brief, para. 1199. It has considered the evidence cited in its entirety.

³²⁷ Witness BAU, T. 12 May 2009, p. 52; T. 13 May 2009, p. 3.

³²⁸ The Defence did not file a Notice of Alibi pursuant to Rule 67 (A)(ii). While this does not preclude it from presenting such evidence, the manner in which the evidence is brought may impact its credibility. See *Setako* Trial Judgement, citing *Rutaganda* Appeal Judgement, para. 242; *Musema* Appeal Judgement, para. 201; *Kayishema and Ruzindana* Appeal Judgement, para. 111.



Ntabonvura's house. Along the way, he and Mutabazi were stopped at the Ntobo roadblock, approximately eight kilometres from Gisagara.

248. Ntawukulilyayo testified after the benefit of having heard the evidence presented by the other Defence witnesses, which is taken into account when weighing his evidence.³²⁹ Aspects of his account are corroborated by the testimonies of Louis Ahorukomeye, Witness BAA and Simon Rumashana. Specifically, Ahorukomeye confirmed seeing Ntawukulilyayo prevent an attack at the Kereti home on a Saturday morning between 20 and 25 April. Witness BAA similarly stated that she saw Ntawukulilyayo at the Benedictine Sisters convent in Kansi sector Nyaruhengeri commune between 8.00 and 11.00 a.m. on Saturday 23 April. Likewise, Simon Rumashana observed Ntawukulilyayo pass the Ntobo roadblock on a Saturday about two weeks after Habyarimana's death around 2.00 or 3.00 p.m.

249. The Chamber has reservations about the date provided by Witness BAA in relation to Ntawukulilyayo's visit to the Benedictine Sisters Convent. She testified that it was one to two weeks after he and the Nyaruhengeri *Bourgmestre*, Charles Kabeza, had responded to a call for help "towards the end of the month of April". At that point, militia were threatening to search the convent for Tutsis hiding there, and the Witness, who no longer had access to banks, had run out of money.³³⁰ On cross-examination, she reaffirmed that the first visit was towards the "end of the month of April" because the visits from militiamen were increasing at that point.³³¹ Nonetheless, she insisted that Ntawukulilyayo's last visit was around 23 April and that she did not see him after that date.³³² The threats described by Witness BAA appear consistent with the violence that began in Butare prefecture starting around 20 April. In the Chamber's view, her evidence suggests that Ntawukulilyayo's first visit to prevent a militia raid would have been after 20 April, and, consequently, his second – if one to two weeks after the first – later than 23 April. Ntawukulilyayo's testimony as to the timing of this visit is viewed with similar suspicion.

250. However, even if the evidence about Ntawukulilyayo's whereabouts on Saturday 23 April is accepted, it is not inconsistent with the testimonies of Witness AYQ and BAU, which placed Ntawukulilyayo at Gisagara market in the early afternoon that day. Indeed, the Accused conceded that he returned to Gisagara after leaving the Benedictine Sisters Convent and was there until he departed with Father Mutabazi before 2.00 p.m. Furthermore, while Rumashana observed the sub-prefect drive to the Ntobo roadblock between 2.00 and 3.00 p.m., it was only eight kilometres from Gisagara town. According to Rumashana, the distance between Gisagara parish and the roadblock could be covered by bicycle in 15 minutes.³³³ Moreover, Defence evidence of Ntawukulilyayo assisting Tutsis does not raise doubt that he also gave orders that same day for the primarily Tutsi refugees at Gisagara market to go to Kabuye hill, where they were subsequently killed.

251. The Defence also relies on the evidence of witnesses who were at the Gisagara market, or nearby, from 20 to 23 April, and who testified that they did not see or hear about Ntawukulilyayo coming to the market other than on the evening of Wednesday 20 April. Specifically, Witnesses KAD (refugee at the market), MAI (trader near the market), MAE

³²⁹ *Ntakirutimana* Appeal Judgement, paras. 392-393.

³³⁰ Witness BAA, T. 1 October 2009, pp. 12, 16, 17 (quoted), 21, 23-25, 29-31.

³³¹ Witness BAA, T. 1 October 2009, p. 30.

³³² Witness BAA, T. 1 October 2009, pp. 24, 30-31, 36.

³³³ Rumashana, T. 30 September 2009, p. 10.

(worked about one minute from the market), MAD (acquaintance of Ntawukulilyayo) Jean-Baptiste Gasana (worked about 30 metres from the market), Emmanuel Niyitegeka (lived approximately two kilometres from the market), and Gérard Ndamage (worked and lived near the market) denied having seen or heard that the sub-prefect had come there after his initial visit on the evening of Wednesday 23 April.³³⁴

252. Several Defence witnesses testified that refugees left Gisagara market for Kabuye hill due to the rapid decline in living conditions at Gisagara market, as well as a Radio Muhabura broadcast directing them to go there.³³⁵ Furthermore, those who had gathered there were free to leave on their own and did so.³³⁶ When the last of the refugees left Gisagara market on Saturday, they departed voluntarily and were not accompanied by security forces when doing so.³³⁷

253. This Defence evidence, however, is not necessarily inconsistent with the testimonies of Prosecution Witnesses AYQ and BAU that Ntawukulilyayo instructed refugees to go to Kabuye hill where security and accommodation would be provided.³³⁸ Furthermore, a close review of the Defence evidence that denied Ntawukulilyayo returned to Gisagara market on 23 April reveals that it is of limited probative value. For example, Witness KAD sought refuge at Gisagara market on Wednesday and left between 8.00 and 11.00 a.m. on Saturday for Kabuye hill. However, the evidence from Witnesses AYQ and BAU indicates that Ntawukulilyayo instructed remaining refugees to leave sometime in the early afternoon. Thus, her evidence is not necessarily inconsistent with the aforementioned Prosecution evidence.³³⁹

³³⁴ Witness KAD, T. 19 November 2009, pp. 9-13, 16; Witness MAI, T. 24 September 2009, pp. 17-18, 24-25, 27; Witness MAE, T. 28 September 2009, pp. 5-6, 10-11, 24-26, 29; Witness MAD, T. 24 September 2009, pp. 47-49, 69; Gasana, T. 29 September 2009, pp. 41-42, 46; Niyitegeka, T. 28 September 2009, pp. 62, 64; Ndamage, T. 13 October 2009, pp. 10-14, 21, 32.

³³⁵ For evidence about the decline in hygiene at the market, see Witness KAD, T. 19 November 2009, pp. 10-11, 16; Witness MAE, T. 28 September 2009, pp. 28-29; Witness MAI, T. 24 September 2009, p. 19; Gasana, T. 29 September 2009, p. 72. See also Witness MAD, T. 24 September 2009, pp. 49-50. For testimonies about Radio Muhabura broadcasts, see Witness MAI, T. 24 September 2009, pp. 19-20, 29-31, 34; Witness MAE, T. 28 September 2009, pp. 30-32; Witness KAD, T. 19 November 2009, pp. 17-18.

³³⁶ Witness KAD, T. 19 November 2009, pp. 10 (not all refugees left Gisagara market at the same time Witness MAI, T. 24 September 2009, pp. 25, 31, 34 (learned from a friend on Friday 22 April that he would be leaving to join his family who had previously sought refuge on Kabuye hill), 30 (some refugees went immediately to Kabuye hill while others remained in Gisagara); Witness MAE, T. 28 September 2009, pp. 27, 29-30, 32-33 (there was an ongoing flow of refugees in and out of the marketplace towards Kabuye and Musha); Witness MAD, T. 24 September 2009, pp. 52-53, 70-71 (some refugees headed to another "Kabuye"); Niyitegeka, T. 29 September 2009, pp. 10-11, 17-19, 30-31 (the refugees were not fenced in the market area and were free to move about).

³³⁷ Witness KAD, T. 19 November 2009, pp. 10-11, 16-19 (Witness KAD and others left due to hygiene problems in the Gisagara market area; they did not encounter soldiers on the way); Witness MAI, T. 24 September 2009, pp. 24, 27 (there were no officials present and the refugees calmly departed on Saturday); Witness MAE, T. 28 September 2009, pp. 29-30 (the refugees left in the direction of Kabuye and Musha); Witness MAD, T. 24 September 2009, p. 49 (the local population wanted the refugees to leave because they were creating hygiene issues in the market area); Gasana, T. 29 September 2009, pp. 63, 71-73; Niyitegeka, T. 29 September 2009, pp. 17-19 (did not see any policemen accompanying the refugees as they left Gisagara).

³³⁸ Indeed, for example, Witness AZN testified that when he arrived at Kabuye hill, he found refugees who had been sent there and others who had come on their own volition. T. 6 May 2009, p. 10.

³³⁹ The Chamber further notes that Witness KAD's husband worked in local government alongside Ntawukulilyayo prior to the genocide and has taken into account her relationship with Ntawukulilyayo when assessing her evidence. See Witness KAD, T. 19 November 2009, pp. 9, 26, 34.

254. Moreover, other witnesses were not necessarily at the market or in a position to monitor persons going to or coming from the market at all times. Ntawukulilyayo himself testified that he went to Gisagara town centre and spoke to the refugees on the afternoon of Friday 22 April. There is no reason to doubt this aspect of his testimony, which suggests that, given the number of refugees at the market, and its size, many persons may not have seen him had he returned at times other than the evening of Wednesday 20 April.

255. Witnesses Jean-Baptiste Gasana, MAE and MAI also denied that Ntawukulilyayo returned to the Gisagara market on Saturday. In contrast to the testimonies of Witnesses AYQ and BAU, they also stated that all the refugees had left before that afternoon. Notably, Gasana testified that he decided to leave his store and go to the market to see what the Accused and the priest had to say, thus suggesting that he would not have been able to see or hear the Accused at the market from his shop.³⁴⁰ He further conceded that although he worked about 30 metres from the market, he was not constantly in a position to monitor persons going or coming from there.³⁴¹

256. Similarly, the evidence of Witness MAE, who worked about one minute away from the market, demonstrates that he could not always account for what occurred there while at work. For example, he specified that when refugees arrived, he went to the market to see what was happening, and he saw refugees at the market while travelling between his work and other locations.³⁴² Indeed, he did not see Ntawukulilyayo come to speak to refugees on Friday afternoon, and it is similarly possible that he did not see him arrive on the Saturday.³⁴³

257. Witness MAI also denied that Ntawukulilyayo returned to the market on Saturday 23 April. He testified that from his shop in Gisagara he could see the market and that from Wednesday 20 April to Saturday 23 April, he worked from 6.00 a.m. to 8.00 p.m. Notably the precise location of his store is not known, and he stated that he did not go to the market to mingle with refugees.³⁴⁴ Moreover, despite his presence that Wednesday 20 April, he did not see Ntawukulilyayo visit refugees there. While he testified that Ntawukulilyayo and Father Thomas Mutabazi had come after he left, the record indicates that he would have been there

³⁴⁰ Gasana, T. 29 September 2009, pp. 58-59 (“... [Ntawukulilyayo] passed in front of my shop [] in the company of father Thomas [] and subsequently, I saw them at the market square and I felt obliged to go and listen [] I was alone on duty in my shop, so I locked it and I went to where the refugees had assembled in order to hear what the sous préfet and Thomas were telling them”). The sketch drawn by Gasana of his shop, in relation to the market, confirms that it was not located at the market but on a road leading to the market. See Defence Exhibit 51 (sketch of Gisagara town).

³⁴¹ Gasana, T. 29 September 2009, p. 71 (“I did not go to that location at all times to find out what was happening [] if he had returned to the market square, although I may not have been watching at all times to see who was going by, I can say that as far as Dominique is concerned, I did not see him.”).

³⁴² Witness MAE, T. 28 September 2009, pp. 10-11 (would pass the market when travelling from the shop to his home), 23-24 (when the refugees arrived “[w]e all came out and went to the market square to see what was happening [] When we got to the market square, we asked what had happened ...”), 24 (passed by where the refugees were on his way home), 27 (“Q. Do you mean to say that whenever you left your home and went to the shop, or from your shop to the home, whenever you moved about, you saw those refugees? A. Yes.”).

³⁴³ Witness MAE further testified that if such “a high level official” as Ntawukulilyayo had come to the market, this would have been discussed. T. 28 September 2009, p. 28. However, Ntawukulilyayo’s house was only 0.2 kilometres from the marketplace. It is thus surprising that his presence at the market, which was essentially the trading centre in Gisagara, would have been discussed as such an unusual occurrence. See Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010), para. 8 (ii).

³⁴⁴ Witness MAI, T. 24 September 2009, pp. 17-18, 21, 33.

during the meeting Ntawukulilyayo led.³⁴⁵ Nor did he see Ntawukulilyayo come to the market on the afternoon of Friday 22 April. This raises questions about his ability to observe what was occurring at the market from his shop, even large events, as well as his testimony about his permanent presence there during 6.00 a.m. and 8.00 p.m. those days, including Saturday.³⁴⁶

258. Accordingly, the testimonies of these witnesses do not raise concerns about the reliability of Witness AYQ and BAU's first-hand accounts that refugees remained in Gisagara market until the early afternoon and were subsequently instructed to leave by Ntawukulilyayo. In so finding, consideration has also been given to the fact that Witness AYQ stated that Ntawukulilyayo used a megaphone and that Witness BAU testified that communal police with whistles gathered persons around the market. Given the market's size, the number of persons in and around it and ambiguities about the vantage points of the Defence witnesses, it is not clear that such actions would have been noticed by them.³⁴⁷

259. Witness MAD also testified that Ntawukulilyayo did not return to Gisagara market on Saturday 23 April. However, she did not reside in the same sector as the Gisagara market in 1994.³⁴⁸ She testified that she went there on Wednesday 20 April.³⁴⁹ While she also stated generally that she would go to the market on every Wednesday and Saturday to sell goods and described deteriorating conditions at it over the following three days, she did not expressly testify that she returned on that following Saturday.³⁵⁰ Indeed, her position when she observed refugees leaving for Kabuye hill on Saturday was unspecified.³⁵¹ In sum, her evidence is of limited probative value.

260. Similarly, Emmanuel Niyitegeka testified that while the refugees were at Gisagara market, Ntawukulilyayo was only seen there on the evening of Wednesday 20 April. However, Niyitegeka did not return to the market again, nor did he testify that he was there

³⁴⁵ Witness MAI, T. 24 September 2009, p. 34 ("A. [traders It was Clément and Gaëtan] [] told me that [Ntawukulilyayo and Father Thomas Mutabazi] came from this area between [] 8 p.m. and 9 p.m. That is at the time I had already left the venue to go back home."); Ntawukulilyayo, T. 15 December 2009, p. 62 (went to the Gisagara market square between 7.00 and 8.00 p.m.); Witness KAD, T. 19 November 2009, p. 11 (saw Ntawukulilyayo and Father Thomas Mutabazi at Gisagara market between 7.00 and 8.00 p.m.), Gasana, T. 29 September 2009, pp. 58-59 (observed Ntawukulilyayo with Father Thomas at Gisagara market around 7.30 p.m.); Witness MAE, T. 28 September 2009, p. 25 (saw Ntawukulilyayo and Father Thomas at Gisagara market around 7.00 p.m.); Niyitegeka, T. 29 September 2009, pp. 11, 14 (at around 7.00 p.m., he saw Ntawukulilyayo and a priest arrive at the Gisagara market).

³⁴⁶ The Chamber further notes that Witness MAI fled from prison by bribing a guard. Notwithstanding his explanations that he was forced to confess to a crime and subjected to torture in prison, his fugitive status raises some concerns about his credibility. T. 24 September 2009, pp. 5-13, 35.

³⁴⁷ Notably, Witness BAU referred to the presence of only three communal policemen. Considering the large crowd at the market, it is understandable that they may not have been visible to everyone that was in or around the market.

³⁴⁸ Defence Exhibit 48 (protected information sheet).

³⁴⁹ Witness MAD, T. 24 September 2009, pp. 47-49.

³⁵⁰ Witness MAD, T. 24 September 2009, pp. 48 ("I was there because every market day, which was either on Wednesday or Saturday, I would go to the market to sell goods."), 49-50 (describing deteriorating conditions during the three days the refugees stayed at the market), 53-54 (she never saw Ntawukulilyayo at the market the days the refugees remained there).

³⁵¹ Witness MAD, T. 24 September 2009, p. 50 ("A. [] *Some refugees passed by where I was* and asked me to show them the way to Kabuye. And I asked them why they wanted to go there, and one of them told me that they had been told that if ever they found their situation untenable, they should go to Kabuye hill where they would be protected.") (emphasis added).

on Saturday 23 April. Although he did not hear about Ntawukulilyayo returning, he accepted that he was unaware of the conditions surrounding the refugees' departure from the market.³⁵²

261. Gérard Ndamage testified that he only returned to the market on Saturday 23 April at 8.00 a.m. for 30 minutes. Accordingly, his evidence is of limited probative value with respect to events at the marketplace later that day. Moreover, he saw refugees passing by his home on Friday evening and up to 12.00 p.m. on Saturday 23 April but did not hear of orders being given to refugees. However, he largely remained at home and was preoccupied with the death of his father-in-law during this time.³⁵³

262. While Defence witnesses who saw refugees leaving did not see them escorted by communal police as described by Witnesses AYQ and BAU, given the large number of refugees and varying vantage points, it is doubtful whether these witnesses would necessarily have been able to see the policemen.³⁵⁴ Notably, however, Louis Ahorukomeye referred to the presence of at least one policeman in charge of security at the market.³⁵⁵

263. Accordingly, based on the consistent and convincing evidence of Witnesses AYQ and BAU, the Chamber, Judge Akay dissenting, finds as follows: on the early afternoon of Saturday 23 April, Ntawukulilyayo and Callixte Kalimanzira came to Gisagara market and together with communal policemen, gathered remaining refugees, mostly Tutsis, for the purposes of directing them to Kabuye hill. The refugees, who were promised by Ntawukulilyayo that they would be fed and protected on the hill, complied with his instructions. They were escorted towards Kabuye hill by communal police and arrived later that same afternoon. The Chamber elsewhere considers the subsequent events on Kabuye hill.

1.3.3 Orders to Search Tutsi Homes

264. The Indictment alleges that between 21 and 25 April 1994, Ntawukulilyayo ordered civilians to search Tutsi homes for the purposes of assembling them at Kabuye hill where they were ultimately killed.³⁵⁶ The Prosecution seeks to prove this allegation through the first-hand account of Witness BAZ and the second-hand evidence of Witness BAF.³⁵⁷ The Defence argues that aspects of the evidence led falls outside the Indictment. It further submits that Witnesses BAZ and BAF are unreliable.³⁵⁸

265. The accounts of Witnesses BAZ and BAF do not directly corroborate each other. They testified about orders received on different dates, from different persons and at different locations. Specifically, Witness BAZ testified that in the late morning or early afternoon of Saturday 23 April in Ndatemwa, Ntawukulilyayo arrived with Fidèle Uwiyeze and instructed Hutu assailants to search Tutsi homes and kill the inhabitants. The Witness and other assailants followed the orders, and he participated in the killing of three Tutsi females in a

³⁵² Niyitegeka, T. 29 September 2009, pp. 16-17, 20, 31.

³⁵³ Ndamage, T. 13 October 2009, pp. 23-24.

³⁵⁴ Witness MAI, T. 24 September 2009, pp. 21, 27; Witness MAE, T. 24 September 2009, pp. 32, 35; Niyitegeka, T. 29 September 2009, pp. 17-19 (in particular, Niyitegeka observed from his home about 1,500 to 1,700 refugees travelling on the road, which was about 50 metres from his house). Notably, Witness BAU only referred to three communal policemen. See T. 13 May 2009, p. 39. While Witness AYQ referred to several policemen, she did not specify a number.

³⁵⁵ Ahorukomeye, T. 7 October 2009, pp. 11-12.

³⁵⁶ Indictment, para. 9.

³⁵⁷ Prosecution Closing Brief, paras. 273-279.

³⁵⁸ Defence Closing Brief, paras. 7, 9, 11, 279-280, 324-327, 342.

house on Dahwe hill that day. Witness BAF, on the other hand, was informed by Fidèle Uwiyeze in the evening of Friday 22 April that Ntawukulilyayo had ordered that Tutsi homes be torched, their cows killed and the meat shared. He received these instructions at a roadblock between Gisagara and Mukande sectors. These orders were carried out by him and others and Tutsi residents fled to Gisagara market. The Chamber considers the individual merits of each Witness' evidence.

266. With respect to Witness BAZ, the Chamber notes that while he knew that Ntawukulilyayo was the sub-prefect of Gisagara, the two had never met. Rather, he appears to have relied on others who said that the sub-prefect had arrived in identifying Ntawukulilyayo at the meeting.³⁵⁹ Thus, doubts exist about his uncorroborated identification of Ntawukulilyayo. Furthermore, Witness BAZ was convicted for his participation in crimes at issue in this proceeding. He was in the community labour phase of his sentence when he testified. Concerns remain that he may have had an interest in deflecting responsibility for his acts to authorities during his own proceedings and while testifying before the Tribunal. His testimony, which must be viewed with caution, lacks direct corroboration and, by itself, cannot support findings beyond reasonable doubt.³⁶⁰

267. Turning to Witness BAF, his evidence that Ntawukulilyayo ordered Tutsi homes to be burned and their livestock slaughtered is hearsay. As noted above, the Witness was convicted for crimes at issue in this proceeding, incarcerated at the time of his testimony and the Chamber has considered aspects of his evidence to lack credibility (II.1.3.1; II.1.3.2.iii). These factors also require the Chamber to view his testimony with caution, and accordingly, it alone cannot sustain a finding beyond reasonable doubt.

268. The Chamber has considered circumstantial consistencies between the accounts.³⁶¹ It has also reviewed Defence evidence concerning Ntawukulilyayo's whereabouts during the relevant periods.³⁶² However, both are of limited probative value. Ultimately, the Chamber does not find the evidence of Witnesses BAZ and BAF sufficiently compelling to establish findings beyond reasonable doubt. Consequently, the Prosecution has not proven that

³⁵⁹ Witness BAZ, T. 21 May 2009, pp. 3, 7. See also Defence Exhibit 41F (statement of 29 October 2008) p. 3 (*"Avant le génocide, je savais que le sous-préfet de Gisagara était un home appelé Dominique Ntawukulilyayo, même si je ne l'avais jamais vu ni rencontré."*).

³⁶⁰ The Chamber also finds it suspect that the Witness BAZ denied knowing Witness BAF. They were both detained in the same prison, were members of *Ukuri* and Witness BAF testified that he knew Witness BAZ. Witness BAZ, T. 21 May 2009, pp. 42-43; Witness BAF, T. 18 May 2009, pp. 54-56.

³⁶¹ For example, Witness BAF and BAZ each received orders around the same time directed at evicting Tutsis who had remained in their homes in Ndora commune, ultimately with the aim of consolidating them at Kabuye hill and killing them. Furthermore, Witness BAF testified that in the early morning of Saturday 23 April, he saw Ntawukulilyayo, Gaëtan Uwihoreye, Fidèle Uwiyeze and Callixte Kalimanzira at the Gisagara market, where the sub-prefect directed Tutsis who had gathered there to go to Kabuye hill. Witness BAZ's evidence appears to commence where Witness BAF's concludes, as the former testified that in the late morning or early afternoon of the same day, a trader named Gaëtan informed him that Ntawukulilyayo had ordered the Tutsis at Gisagara market to go to Kabuye hill. Subsequently, he saw Ntawukulilyayo arrive with Fidèle Uwiyeze at a meeting of Hutu attackers in Ndatemwa and instruct them to search Tutsi homes and kill the inhabitants. However, the Chamber has not relied upon Witness BAF's observations for the morning of Saturday 23 April (II.1.3.2.iii) and continues to have doubts about Witness BAZ's ability to identify Ntawukulilyayo.

³⁶² The Chamber has also considered Ntawukulilyayo's testimony that he remained at his home on the evening of Friday 22 April, as well as the evidence of his activities on Saturday 23 April (II.1.3.2.ii; II.1.3.2.iii). Given the Chamber's findings, it is unnecessary to assess this evidence here.

Ntawukulilyayo ordered that Tutsi homes be searched in order to send them to Kabuye hill.³⁶³ Under the circumstances, it is unnecessary to consider the Defence challenges to sufficiency of notice provided concerning the evidence.³⁶⁴

1.3.4 Attack on Kabuye Hill

269. The Indictment alleges that between 21 and 25 April 1994, Ntawukulilyayo transported ammunition as well as soldiers and gendarmes from Butare to Kabuye hill. Around 23 April, in the late afternoon, or early evening, Ntawukulilyayo arrived on Kabuye hill with Callixte Kalimanzira in vehicles full of gendarmes. Soldiers, gendarmes, communal police and armed civilians, all of whom were subordinates of the sub-prefect, participated in the killing of as many as 25,000 Tutsi refugees on Kabuye hill during that period.³⁶⁵

270. Prosecution Witnesses AZV, AZN, AYQ and BAU each purportedly observed Ntawukulilyayo at Kabuye hill around the time attacks were launched against the primarily Tutsi refugees gathered there. Specifically, Witness AZV reached Kabuye hill at around 9.00 a.m. on Friday 22 April. At about 6.00 p.m. that day, after Hutu assailants completed an attack there, she saw Ntawukulilyayo arrive in a white-pickup with soldiers in the back. Ntawukulilyayo and the soldiers left, but the soldiers returned the following day and continued with the attacks. Witness AZN, on the other hand, appears to have testified that the sub-prefect arrived in a vehicle with soldiers on Saturday morning. The soldiers reinforced other assailants in killings that day. Witnesses AYQ and BAU each said that Ntawukulilyayo came to Kabuye hill accompanied by Callixte Kalimanzira and security personnel on the afternoon of Saturday 23 April. These persons joined other assailants at Kabuye in attacking refugees at the hill.

271. In the Chamber's view, Witness AZV's account is sufficiently different from the evidence of Witnesses AZN, AYQ and BAU to indicate that she is talking about a separate event. The Chamber will consider the individual merits of her testimony, before assessing the strength of the remaining witnesses' evidence.

272. While Witness AZV provided statements to Tribunal investigators in December 1996 and in October 2008, neither contains reference to her seeing him at Kabuye hill. She said that the December 1996 statement concerned Elie Ndayambaje.³⁶⁶ Furthermore, when confronted with the omission in both statements, she merely affirmed her evidence that Ntawukulilyayo had come to Kabuye hill and left immediately.³⁶⁷

³⁶³ The Prosecution only seeks conviction for this allegation pursuant to Article 6 (1) of the Statute. Given the Chamber's conclusion, evidence of killings by alleged subordinates pursuant to the purported orders need not be considered in its legal findings.

³⁶⁴ Defence Closing Brief, paras. 324-327.

³⁶⁵ Indictment, paras. 7, 10-11, 13, 19-22. The Chamber considers that the Prosecution evidence about Ntawukulilyayo having retrieved soldiers from Butare is largely general and speculative. See, for example, Witness AZV, T. 7 May 2009, pp. 38, 45, 59-61 (Witness AZV saw the Accused with soldiers on the night of Wednesday 20 April at the Gisagara market and believed that he must have brought them from Butare); Witness BAF, T. 13 May 2009, p. 70; T. 18 May 2009, pp. 29-30, 60-61 (Witness BAF also referred to seeing Ntawukulilyayo with soldiers on the afternoon of Saturday 23 April). This evidence cannot support findings beyond reasonable doubt. In any event, the Chamber considers Ntawukulilyayo's alleged arrival on Kabuye hill, and his role in the subsequent attacks, to be the critical issue here.

³⁶⁶ Witness AZV, T. 7 May 2009, p. 53.

³⁶⁷ Witness AZV, T. 7 May 2009, pp. 72-73.

273. Witness AZV's explanation and the omission in the December 1996 statement are reasonable. The interview about the events at Kabuye hill was focussed on Ndayambaje's conduct and it is likely that both questions and responses were tailored around him.³⁶⁸ However, the discrepancy within the October 2008 statement, which primarily concerned Ntawukulilyayo, is problematic. It details Ntawukulilyayo's conduct and the killings at Kabuye hill. It seems unlikely that had the Witness seen him there with soldiers who ultimately attacked the refugees, that this would not have been reported by her or recorded by the interviewer.³⁶⁹ Under the circumstances, her evidence alone is insufficient to support findings beyond reasonable doubt.

274. Turning to Witness AZN, the Chamber recalls that it is satisfied with his ability to identify Ntawukulilyayo in 1994 (II.1.3.2.i). However, it notes that his testimony concerning the timing of his arrival at Kabuye hill lacks clarity. For example, his evidence suggests that he and others were ordered to go to Kabuye hill on Thursday 21 April and that they left immediately.³⁷⁰ Elsewhere, however, he testified that he would not have left on Thursday 21 April, but would have remained at the market that day.³⁷¹ Indeed, when questioned about the journey, he said that they left before noon, the journey took only an hour and they arrived at Kabuye on Friday.³⁷² Given the traumatic nature of the events he would have experienced, as well as the significant passage of time between them and his evidence before this Tribunal, this ambiguity in his account is insignificant. His testimony, when considered in its entirety and in the context of other evidence in the record, suggests that he arrived on Kabuye hill on Friday 22 April.³⁷³

³⁶⁸ Defence Exhibit 5E (statement of 18 December 1996) pp. 3-4. The Chamber notes that the statement does mention Ntawukulilyayo in relation to her arrival in Gisagara prior to going to Kabuye hill. Defence Exhibit 5E (statement of 18 December 1996) p. 3. Moreover, it describes Ndayambaje arriving in a green pick-up truck with "Muganza commune" inscribed on it and distributing machetes to civilians after attacks began. Defence Exhibit 5E (statement of 18 December 1996) pp. 3-4. This description appears to provide supplemental – rather than inconsistent – information to her testimony that Ntawukulilyayo arrived in a white pick-up with soldiers prior to attacks at Kabuye hill.

³⁶⁹ Witness AZV's evidence about whether Ntawukulilyayo arrived at Kabuye hill with soldiers also became less clear during her cross-examination. Specifically, when asked if Ntawukulilyayo came with soldiers, she appears to only confirm that he had earlier brought soldiers to Muyaga and not Kabuye hill. T. 7 May 2009, pp. 73-74.

³⁷⁰ While Witness AZN did not identify the day or date he received orders to leave, he appears to have testified that he first arrived in Gisagara on Wednesday, which would have been 20 April. T. 6 May 2009, pp. 8, 25-26, 28. He then fled the evening of his arrival in Gisagara, between 1.00 and 2.00 a.m., was apprehended around 5.00 a.m. and returned to Gisagara around 11.00 a.m., where he found Sindikubwabo making statements that led to the refugees' removal to Kabuye. T. 6 May 2009, pp. 9, 29; T. 7 May 2009, pp. 13-16.

³⁷¹ Witness AZN, T. 6 May 2009, p. 9 (testifying that after trying to flee and being forced to return to Gisagara, Witness AZN and others were forced to return to Gisagara market, where they "spent the entire day at that location.").

³⁷² Witness AZN, T. 6 May 2009, pp. 11-12. Witness AZN's prior statements to Tribunal investigators do not clarify whether he arrived at Kabuye hill on Thursday or Friday. Defence Exhibit 4E (statement of 29 October 2008) p. 3 ("We were at Kabuye on Thursday, surrounded by soldiers and gendarmes."); Defence Exhibit 2E (statement of 14 November 1995) p. 4 ("We were herded to a hill in the sector of Kabuye near Gisagara. I estimate that about fifty thousand people had been gathered on that hill. I believe that it was on Friday 26 of April 1995 [sic].").

³⁷³ For example, Witness AZV, who also arrived on Friday testified that those at Kabuye hill were attacked that day. Any differences in the identity of assailants is explainable based on the traumatic nature of the events the witnesses lived through and varying vantage points. See T. 7 May 2009, pp. 42-45.

275. With respect to Witness AZN's prior statements, as discussed earlier, he provided a *pro justitia* statement to Belgian authorities in June 1995 and statements to Tribunal investigators in November 1995 and October 2008. All discussed his observations at Kabuye hill, but only his October 2008 statement refers to Ntawukulilyayo's presence there.³⁷⁴ When questioned about the omissions in the June and November 1995 statements, the Witness responded that he was only answering questions put to him.³⁷⁵ Concerning the June 1995 statement, the omission appears reasonable. The Witness was only asked five questions, none of which explicitly sought further detail about the events at Kabuye hill. While it contains reference to Ntawukulilyayo's role in other respects, the Witness' closing remarks that Elie Ndayambaje should be prosecuted, leaves the impression that he was the primary subject of this interview.³⁷⁶

276. The November 1995 statement provides significantly greater detail about the events at Kabuye hill, but it also appears to have been taken in relation to Elie Ndayambaje. Indeed, it appears focussed on his specific conduct, particularly as it relates to the attacks there. Although the statement makes reference to Ntawukulilyayo's involvement in a separate event, it does so when he is alleged to have been with Ndayambaje.³⁷⁷ Notably, Ndayambaje was not seen to have arrived on Kabuye hill with Ntawukulilyayo. The Witness also explained that he only responded to questions asked of him.³⁷⁸ Under the circumstances, his failure to give a detailed account of Ntawukulilyayo's conduct at Kabuye hill is not troubling. Accordingly, the Chamber, Judge Akay dissenting, considers Witness AZN's evidence internally consistent and compelling, and will later assess it in light of the testimonies of Witnesses AYQ and BAU.

277. Turning to Witness AYQ's observations of Ntawukulilyayo at Kabuye hill, the Chamber recalls that it is satisfied in her ability to identify Ntawukulilyayo in 1994 (II.1.3.2.iii). The Defence confronted her with her March 2003 statement to Tribunal investigators, which indicated that she saw Ntawukulilyayo come with Kalimanzira to Kabuye hill on Sunday around 2.00 p.m. rather than Saturday at 4.00 p.m.³⁷⁹ She explained that this was a mistake and affirmed her testimony.³⁸⁰ The relatively slight variations between the precise times and day in her statement, on the one hand, and her sworn testimony before this Chamber, on the other, are immaterial.³⁸¹ They reasonably could have resulted from a recording error during her interview in March 2003 or from the significant passage of time between the interview and her testimony in this case and thus, are insufficient to raise doubt about her evidence.

³⁷⁴ Defence Exhibit 4E (statement of 29 October 2008) p. 3.

³⁷⁵ Witness AZN, T. 7 May 2009, p. 27.

³⁷⁶ Defence Exhibit 1E (statement of June 1995) p. 3.

³⁷⁷ Defence Exhibit 2E (statement of 14 November 1995) pp. 4-5.

³⁷⁸ Defence Exhibit 2E (statement of 14 November 1995) pp. 5-6. Although Witness AZN was confronted with his statement of 29 October 2008, which states that he saw "Dominique and Elie at the hill", he explained that they came one after the other. See T. 7 May 2009, pp. 26-27.

³⁷⁹ Defence Exhibit 7E (statement of 27 March 2003) p. 3 ("I also remember that it was about 1400 hours on Sunday that I saw Kalimanzira arrive on the hill in the company of the sous préfet and other soldiers in one vehicle.")

³⁸⁰ Witness AYQ, T. 11 May 2009, pp. 33-34, 38.

³⁸¹ Like her testimony in this proceeding, Witness AYQ testified in *Kalimanzira* that she saw Ntawukulilyayo at Kabuye hill on Saturday. Defence Exhibit 8F (*Kalimanzira*, T. 9 May 2008, pp. 32-34).

278. The Defence further submits that Witness AYQ's March 2003 statement, unlike her testimony in this case, suggests that Kalimanzira and Ntawukulilyayo were present on Kabuye hill when the soldiers started shooting at the refugees.³⁸² However, a close examination of her statement reveals nothing which contradicts her sworn testimony before this Chamber, that Ntawukulilyayo and Kalimanzira left the hill prior to the commencement of the attack.³⁸³

279. The Defence also points to aspects of Witness AYQ's testimony during cross-examination in *Kalimanzira* wherein she stated that the soldiers and policemen who accompanied Ntawukulilyayo and Kalimanzira to Kabuye hill, left with them, rather than remained and participated in the attacks on the refugees.³⁸⁴ During her evidence in this proceeding, she affirmed her testimony that the soldiers had remained, which is also consistent with her evidence-in-chief in *Kalimanzira*.³⁸⁵ Similarly, there is nothing in her March 2003 statement to suggest that the soldiers who came with the officials did not stay behind on the hill and shoot at the refugees.³⁸⁶ Thus, the Chamber, Judge Akay dissenting, finds that her testimony during cross-examination in *Kalimanzira*, of which only a small extract was tendered by the Defence, is insufficient to cast doubt on her compelling evidence in these proceedings.³⁸⁷

280. Reviewing the evidence of Witness BAU, the Chamber recalls that it is satisfied in his ability to identify Ntawukulilyayo in 1994 (II.1.3.2.iii). His testimony, as it emerged, about how many times Ntawukulilyayo came to Kabuye hill as well as who accompanied him was a little confusing. During direct examination, he only testified about Ntawukulilyayo coming to Kabuye hill on one occasion. It occurred at "night", and he came with Kalimanzira in a "double-pick up truck[]" followed by a "carrier". The two arrived with "policemen and

³⁸² Defence Closing Brief, para. 1149. The Defence seeks to establish an inconsistency by referring to a portion of Witness AYQ's March 2003 statement, which states that "it would not surprise" her if Kalimanzira had joined in the shooting. Defence Exhibit 7E (statement of 27 March 2003) p. 3.

³⁸³ Witness AYQ, T. 11 May 2009, pp. 36-37; Defence Exhibit 7E (statement of 27 March 2003) p. 3. The March 2003 statement does not say that Kalimanzira shot at the refugees. Rather, it states that after Kalimanzira, Ntawukulilyayo and soldiers arrived, the "group" joined in the shooting. It appears that the "group" referred to in the statement would have been the soldiers. Furthermore, although it states that "it would not surprise" her if Kalimanzira also shot at the refugees, it does not state that he did in fact join in the attack. During her testimonies in this case and in *Kalimanzira*, she clarified that she did not see Kalimanzira or Ntawukulilyayo shoot at the refugees. T. 11 May 2003, p. 39; Defence Exhibit 8F (*Kalimanzira*, T. 9 May 2008, pp. 26-34); Defence Exhibit 9E (*Kalimanzira*, T. 20 May 2008, pp. 28-29).

³⁸⁴ Defence Closing Brief, para. 1150; Defence Exhibit 9E (*Kalimanzira*, T. 20 May 2008, p. 29) ("Q. During your examination in chief, you indicated that Callixte Kalimanzira and the sous préfet, as well as these persons, had come out of the vehicle. Did the soldiers also unboard the vehicle? A. They opened the doors of the vehicle, and Callixte Kalimanzira and the sous préfet went back into the vehicle. The soldiers were next to the vehicle and that was before they started shooting. Q. Madam Witness, I wish for this to be clear. Earlier on, I asked you whether they had all left in the vehicle, and your answer was yes. Let me put the question back to you. When the sous préfet and Kalimanzira left Kabuye hill, did the soldiers who were with them in the vehicle leave with them or did they remain there? A. The soldiers left at the same time as Callixte and the sous préfet. Q. So the sous préfet, Kalimanzira, the soldiers alighted the vehicle, looked at you, did not say anything, went back into the vehicle and left? Am I correct? A. Yes, they left.")

³⁸⁵ Witness AYQ, T. 11 May 2009, pp. 11, 38; Defence Exhibit 8 (*Kalimanzira*, T. 9 May 2008, pp. 33-34).

³⁸⁶ Witness AYQ's March 2003 statement states that the soldiers who came with Ntawukulilyayo and Kalimanzira shot at the refugees. Defence Exhibit 7E (statement dated 27 March 2003), p. 3.

³⁸⁷ Notably, the excerpt from *Kalimanzira* referenced by the Defence also included the Prosecution counsel objecting to that line of questioning as it misrepresented the record. Defence Exhibit 9E (*Kalimanzira*, T. 20 May 2008, p. 30).

soldiers", who Ntawukulilyayo asked to exit the vehicle. Ntawukulilyayo and "his neighbour" left and the soldiers and police started firing on the refugees.³⁸⁸

281. During cross-examination, however, Witness BAU testified that Ntawukulilyayo came on two occasions. He specified that he first arrived sometime between 5.00 and 5.30 p.m. in a double-cabin pick-up followed by a "mini-bus". He added that "three policemen" were on Ntawukulilyayo's vehicle.³⁸⁹ No further details were solicited about this incident. The Witness then proceeded to testify that Ntawukulilyayo returned on a second occasion "during the night". This time, Ntawukulilyayo was accompanied by "Kalimanzira, policemen and gendarmes". Subsequently he testified that on this occasion Ntawukulilyayo "dropped off the policemen and soldiers". He also referred to Ntawukulilyayo and Kalimanzira having brought "policemen". The two stayed for only a few minutes and left as "police and soldiers" or "police and gendarmes" started firing on persons.³⁹⁰

282. Neither the Witness' March 2003 statement to Tribunal investigators, nor his evidence in the *Kalimanzira* case refer to Ntawukulilyayo coming to Kabuye hill on two occasions. Rather, they each refer only to one occasion, when Kalimanzira and Ntawukulilyayo arrived and left shortly before attacks started.³⁹¹ When confronted with the discrepancy, he responded that he had refused to comment on statements made in the *Kalimanzira* case and that he "made a statement for this Chamber."³⁹² In the Chamber's view, Judge Akay dissenting, the discrepancies pertaining to the number of visits Ntawukulilyayo made to Kabuye hill are minor. The March 2003 statement and his prior testimony before the Tribunal concerned Kalimanzira. Given that he did not appear to accompany Ntawukulilyayo on the first trip and nothing significant occurred, it is reasonable that he omitted mention of this in both contexts. The Witness' evidence in this proceeding also places primary importance on the second visit, when Ntawukulilyayo dropped off armed security personnel who subsequently attacked refugees on Kabuye hill.

283. Furthermore, the variations among the general category of law enforcement personnel who accompanied the officials, is not significant. Indeed, Witness BAU was not questioned specifically about these minor discrepancies during his testimony before the Chamber.³⁹³

³⁸⁸ Witness BAU, T. 12 May 2009, pp. 64-65. When Witness BAU also testified that Ntawukulilyayo left with his "neighbor", it appears that he was referring to Kalimanzira, as this was the person with whom the sub-prefect had arrived. However, no specific questions were asked about the identity of this person. T. 12 May 2009 p. 65 (English) or p. 75 (French). The ambiguity is immaterial.

³⁸⁹ Witness BAU, T. 13 May 2009, p. 46.

³⁹⁰ Witness BAU, T. 13 May 2009, pp. 46-47.

³⁹¹ Defence Exhibit 15E (statement of 27 March 2003) p. 3 ("We arrived at the hill at about 1630 hours. At about 1830 hours, I saw Kalimanzira and Ntawukulilyayo joining us on the hill in 2 pick-up vehicles. Kalimanzira's pick-up was whitish while the sub-prefect's was grayish; both vehicles were full of gendarmes. After the arrival of the two dignitaries with armed troops, Ntawukulilyayo addressed us again and assured us not to be afraid because the troops were there to protect us. After that, I saw the armed gendarmes joining up with some of the policemen and they surrounded us on the hill. At around 1900 hours, when it was quite dark, the gendarmes and policemen started shooting into the refugees, killing many of them."); Defence Exhibit 17 (*Kalimanzira*, T. 5 May 2008, pp. 13-14; T. 12 May 2008, pp. 33-37, 44-45).

³⁹² Witness BAU, T. 13 May 2009, p. 46. The Defence also noted that Witness BAU did not mention this in his October/November statement to Tribunal investigators. However, that statement did not focus on attacks on Kabuye hill but events after he left. See Defence Exhibit 16 (statement of 31 October and 20 November 2007).

³⁹³ In *Kalimanzira*, Witness BAU testified that Ntawukulilyayo and Kalimanzira arrived at Kabuye hill with soldiers. Defence Exhibit 17 (*Kalimanzira*, T. 5 May 2008, pp. 13-14). He was cross-examined with his March 2003 statement, which indicated that Ntawukulilyayo and Kalimanzira arrived with gendarmes. Defence Exhibit 15E (statement of 27 March 2003) p. 3; Defence Exhibit 17 (*Kalimanzira*, T. 12 May 2008, pp. 45-46). He

Given the traumatic nature of events and the significant passage of time between them and his testimony, the differences appear immaterial. Notably, several witnesses testified of various law enforcement agencies participating in attacks on Kabuye hill (II.1.3).

284. It is further noted that Witness BAU's March 2003 statement to Tribunal investigators differs from his testimony, in that it described Ntawukulilyayo addressing the refugees once at Kabuye hill.³⁹⁴ He was not confronted with the discrepancy, and it does not raise doubt about his consistent evidence that Ntawukulilyayo arrived on the hill with armed security personnel.³⁹⁵

285. Comparing the testimonies of Witnesses AZN, AYQ and BAU as they relate to Ntawukulilyayo's presence on Kabuye hill, several similarities emerge. The evidence of all three witnesses suggests that Ntawukulilyayo arrived on Kabuye hill on Saturday 23 April. Each testified that he came there accompanied by security personnel. Specifically, Witness AZN stated that Ntawukulilyayo was with soldiers, although he conceded that he had difficulties distinguishing between them and gendarmes because they both wore similar camouflage fatigues.³⁹⁶ Witness AYQ saw Ntawukulilyayo with soldiers, and identified them as such due to their "military uniforms and caps or helmets", which were distinct to the outfits worn by communal police.³⁹⁷ Witness BAU stated that Ntawukulilyayo dropped off soldiers and police officers or gendarmes and police officers.³⁹⁸

286. Given that they were civilians unaffiliated with the military or civilian security forces, the confusion is immaterial. Indeed, While Witness BAU is the only person who testified that Ntawukulilyayo transported communal police, Witness AYQ stated that the soldiers who were left behind by Ntawukulilyayo joined communal police already there in the attack. In view of the traumatic circumstances in which the observations were made, the significant passage of time, as well as varying vantage points and abilities to differentiate between armed security agents, these differences are immaterial. Indeed, the parallels among the security personnel who accompanied Ntawukulilyayo, particularly soldiers, as well as the other attackers, are compelling. Based on the collective testimonies of Witness AYQ, BAU and AZN, the Chamber, Judge Akay dissenting, is satisfied that the Prosecution evidence

testified that this was a recording error and that he could differentiate between soldiers and gendarmes. Defence Exhibit 17 (*Kalimanzira*, T. 12 May 2008, pp. 45-46).

³⁹⁴ Compare Defence Exhibit 15 (statement of 27 March 2003) p. 3 ("At about 1830 hours I saw Kalimanzira and Ntawukulilyayo joining us on the hill in two pickup vehicles. Kalimanzira's pickup was whitish, while the sous préfet's was greyish. Both vehicles were full of gendarmes. After the arrival of the two dignitaries with the armed troops, Ntawukulilyayo addressed us again and assured us not to be afraid because the troops were there to protect us.") and Witness BAU, T. 12 May 2009, p. 65 (Ntawukulilyayo asked soldiers and police to exit the vehicles and then left); T. 13 May 2009, p. 46 (Ntawukulilyayo did not speak to the refugees).

³⁹⁵ The Defence in *Kalimanzira* did confront Witness BAU with his March 2003 statement, noting that it said that Ntawukulilyayo spoke. He replied that he "[could not] confirm that [Ntawukulilyayo] said anything whatsoever." Defence Exhibit 17 (*Kalimanzira*, T. 12 May 2008, p. 45).

³⁹⁶ See Witness AZN, T. 6 May 2009, pp. 12-14, 25; T. 7 May 2009, p. 3 (explaining, in the context of another event, that it was impossible to tell the difference between a soldier and gendarme as they both wore camouflage uniforms).

³⁹⁷ Witness AYQ, T. 11 May 2009, p. 12. Witness AYQ also repeatedly referred to the persons who had accompanied Ntawukulilyayo as "soldiers." T. 11 May 2009, pp. 11-12, 34, 37.

³⁹⁸ Witness BAU, T. 12 May 2009, pp. 64-65 (soldiers and policemen); T. 13 May 2009, pp. 46 (gendarmes and policemen), 47 (soldiers and policemen).

establishes that Ntawukulilyayo transported soldiers to Kabuye hill on Saturday 23 April, who subsequently attacked refugees there in coordination with communal police.³⁹⁹

287. Furthermore, Witnesses AZN, AYQ and BAU similarly testified that Ntawukulilyayo's presence on the hill was relatively brief. While Witness AZN mentioned that Ntawukulilyayo "brought in the soldiers and showed them the location where the persons to be killed were found and then left", he also stated that "all [Ntawukulilyayo] did was bring in the soldiers, whom he left behind, and then he took off".⁴⁰⁰ Witness AYQ observed Ntawukulilyayo exit his vehicle along with soldiers but then return to his car and leave.⁴⁰¹ Witness BAU indicated that Ntawukulilyayo had asked the security personnel to exit the vehicles, and without speaking to anyone, left the hill.⁴⁰²

288. The Chamber, Judge Akay dissenting, finds the above consistencies striking and next turns to consider differences among the accounts. It is recalled that Witness AZN recounted that Ntawukulilyayo arrived in the morning, while Witnesses AYQ and BAU referred to him arriving later in the day. However, the difference, in this instance, is immaterial in light of the traumatic nature of the events, particularly given that Witness AZN had experienced an attack the night before, as well as the passage of time since the attack.

289. Unlike Witnesses AYQ and BAU, Witness AZN did not state that Ntawukulilyayo arrived with Kalimanzira at Kabuye hill. Rather, he appears to have seen Ntawukulilyayo accompanied by a different person.⁴⁰³ However, Witness AZN was not specifically asked about Kalimanzira's presence at Kabuye hill. The Chamber, Judge Akay dissenting, finds that the consistent testimony that Ntawukulilyayo was accompanied by soldiers as the crucial element when evaluating the strength of all the witnesses' testimonies. Indeed, their evidence reflects that the presence of these armed forces was significant in the minds of the refugees who would have wondered what their presence meant.⁴⁰⁴ Under the circumstances, these parallels eliminate any doubt left by the ambiguity about whether Witness AZN saw Kalimanzira. Moreover, varying vantage points, the passage of time and the traumatic nature of the events could reasonably explain his failure to see him.

290. Differences also emerge with respect to the vehicles described by the witnesses. Witness AYQ recalled that the sub-prefect and Kalimanzira arrived in a white vehicle, possibly a "berline ... saloon".⁴⁰⁵ Witness BAU, however, testified that the two came in

³⁹⁹ As discussed below, Defence Witness KAD's description of soldiers attacking on Saturday evening, offers circumstantial corroboration. Other Defence witnesses also referred generally to having heard or believing that the attack would have been carried out by soldiers. For example, Witness MAI referred to Rwandan armed forces, and Ahorukomeye concluded that soldiers must have shot at the refugees on Kabuye hill (II.1.2).

⁴⁰⁰ Witness AZN, T. 6 May 2009, p. 13. See also T. 6 May 2009, p. 12 ("A. Yes. I saw Dominique Ntawukulilyayo early on Saturday morning in the company of soldiers. They came in a vehicle. And he left leaving the soldiers on Kabuye hill.").

⁴⁰¹ See Witness AYQ, T. 11 May 2009, pp. 11, 13, 36-38.

⁴⁰² See Witness BAU, T. 12 May 2009, p. 65; T. 13 May 2009, p. 47.

⁴⁰³ See Witness AZN, T. 6 May 2009, pp. 14-16; Prosecution Exhibit 2 (identification of a person who left with Ntawukulilyayo).

⁴⁰⁴ See, for example, Witness BAU, T. 13 May 2009, p. 47 ("A. [Ntawukulilyayo] did not speak to the people. But we were wondering why he came with soldiers and policemen."); AYQ, T. 11 May 2009, p. 11 ("Dominique was in the vehicle. When we saw Dominique get out of the vehicle, we thought that he would protect us. Then soldiers got out of the same vehicle. So we thought that we would be protected.").

⁴⁰⁵ Witness AYQ, T. 11 May 2009, p. 11.

“double-cabin pickup trucks and they had a carrier behind them”.⁴⁰⁶ Witness AZN did not specify the make of the vehicle that he observed. These differences are also not material. Indeed, Witness AYQ conceded in cross-examination that she could not tell the vehicle’s make.⁴⁰⁷ Again, varying vantage points, the passage of time and the traumatic nature of the events reasonably explain these differences.

291. Having carefully considered the testimonies given by these witnesses and reviewed them in the context of other evidence, the Chamber, Judge Akay dissenting, finds that all three witnesses provided compelling first-hand observations of Ntawukulilyayo arriving with soldiers on Saturday 23 April. They consistently testified that Ntawukulilyayo’s stay was brief, and that the soldiers who had accompanied him there joined with others at Kabuye hill in attacking the displaced persons seeking refuge there.

292. Moreover, circumstantial support can also be found in the testimony of Witness BAF, who saw Ntawukulilyayo and Kalimanzira in Gisagara in the company of soldiers that afternoon. While his evidence has been viewed with caution, in this instance, it shares striking similarities with the reliable testimonies assessed above and offers further support to them. Furthermore, other evidence confirms that attacks occurred at Kabuye hill on Saturday 23 April. Notably, Defence Witness KAD testified that soldiers and other assailants, some of whom arrived on Kabuye hill in vehicles, attacked and shot at the refugees that Saturday evening.⁴⁰⁸ While Witnesses AZI and AXY did not testify to having seen Ntawukulilyayo on Kabuye hill, given the tense circumstances at the time, it is possible that they would not have been in a position to see his arrival on the hill. Furthermore, while Witness BAZ also did not testify to having seen the Accused on Kabuye hill, the Witness participated in the attacks on Dahwe, and not Kabuye, hill that day.⁴⁰⁹ Accordingly, the evidence of Witnesses AZI, AXY, and BAZ is not necessarily inconsistent with the accounts of Witnesses AZN, AYQ and BAU.⁴¹⁰

293. In addition, having considered other evidence in the record concerning activities following the attacks, the Chamber, Judge Akay dissenting, finds that Ntawukulilyayo’s participation in security meetings as well as instructions to local Gisagara officials offer further circumstantial corroboration of his involvement in facilitating the attacks on Tutsis on Kabuye hill. Even after the attack, where it was clear from both Prosecution and Defence evidence that the Rwandan army had been mobilised to eliminate Tutsis generally, Ntawukulilyayo continued to issue instructions about supporting it and organising civilian

⁴⁰⁶ Witness BAU, T. 12 May 2009, pp. 64, 65 (quoted). During cross-examination, Witness BAU was not questioned about the vehicle Ntawukulilyayo and Kalimanzira were using. T. 13 May 2009, pp. 45-47. In *Kalimanzira*, Witness BAU testified that Ntawukulilyayo and Kalimanzira came in the same vehicle. He was cross-examined with his statement from March 2003, which said the two arrived in separate vehicles. He confirmed that the two arrived in the same vehicle, which was in the front. Defence Exhibit 17 (*Kalimanzira*, T. 5 May 2008, p. 13; T. 12 May 2008, p. 45).

⁴⁰⁷ Witness AYQ, T. 11 May 2009, p. 34.

⁴⁰⁸ Witness AXV also testified that Tutsis were killed on Kabuye hill on 23 April 1994.

⁴⁰⁹ See Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010) para. 6 (these were separate hills).

⁴¹⁰ While Witness AXY did not testify to an attack occurring on Saturday 23 April 1994 but only referred to 24 April., the difference of one day is immaterial, given the consistent evidence in the record from both Prosecution and Defence witnesses of attacks on Saturday 23 April, as well as the passage of time since the events. Accordingly, her evidence is not inconsistent with the evidence of Prosecution Witnesses AZN, AYQ, BAU, and BAF, and Defence Witness KAD.

security efforts.⁴¹¹ While the purpose of some of these meetings is disputed and their outcomes unproven, it is not disputed that Ntawukulilyayo had a role in them.⁴¹²

294. This evidence of Ntawukulilyayo's activities after the Kabuye hill attacks, at a minimum, suggests that he was complicit and at times acted as a conduit for issuing instructions and organising security operations within his sub-prefecture. Given his status as the highest administrative official, his familiarity with the refugee problem in Gisagara and his local knowledge of the area, it is logical that those who organised the attack at Kabuye hill would have employed Ntawukulilyayo to facilitate the refugees' removal from Gisagara town and to assist in the coordination of the various assailants that ultimately attacked them. In the Chamber's view, Judge Akay dissenting, the circumstantial evidence discussed above, lends further support to the notion that Ntawukulilyayo would have complied with instructions to remove refugees and assist in the subsequent attack.⁴¹³ Accordingly, this evidence further corroborates the already compelling first-hand accounts that he did.⁴¹⁴

295. The Chamber next considers the Prosecution evidence in the context of Defence testimonies. It recalls that Defence evidence pertaining to Witness AYQ's alleged witness tampering was imprecise and did not raise doubts concerning her testimony about

⁴¹¹ See Prosecution Exhibit 20 (letter of 10 May 1994) (letter to *bourgmestres* on 10 May 1994, which includes requests to identify and solicit material support to the Rwandan army); Prosecution Exhibit 21 (letter of 14 May 1994) (letter to *Bourgmestres* on 14 May 1994 asking that meetings be held within each of the communes between 17 and 20 May 1994 for the purposes of, among other things, discussing security and assistance to the Rwandan army) and Witness AXV, T. 25 May 2009, pp. 63, 65-66; T. 26 May 2009, p. 30 (discussing one meeting in Muganza commune); Prosecution Exhibit 30E (letter dated 28 May 1994) (letter from Ntawukulilyayo to the prefect on 28 May 1994 indicating that he visited the five communes and addressed "the people" concerning security as well as the need to assist the Rwandan army; he requested the assistance of soldiers to aid members of the population "in finding out whether there are no enemies amongst [] refugees" that had gathered in Gisagara).

⁴¹² Concerning the 3 May 1994 meeting at the Ndora commune office, compare Ntawukulilyayo, T. 16 December 2009, pp. 53-55, T. 17 December 2009, pp. 40, 54-59, 66 and Witness AXV, T. 25 May 2009, pp. 47, 50-55; T. 26 May 2009, pp. 25-26, 29-30, 38. Ntawukulilyayo, referring to a 14 May 1994 communiqué to Gisagara sub-prefecture *bourgmestres* to convene meetings within the communes for the purpose of providing security and assistance to the Rwandan army, testified that he went to Muyaga commune on 18 May and attended a meeting there. T. 15 December 2009, p. 29; T. 17 December 2009, pp. 54-55, 73. See also, Ntawukulilyayo, T. 17 December 2009, pp. 73-79 and Prosecution Exhibit 30E (letter dated 28 May 1994) (a letter confirming that he visited the five communes and addressed "the people" concerning security as well as the need to assist the Rwandan army; he requested the assistance of soldiers to aid members of the population "in finding out whether there are no enemies amongst [] refugees" that had gathered in Gisagara).

⁴¹³ In so finding, consideration has also been given to Ntawukulilyayo's letter of 2 May 1994 to Prefect Sylvain Nsabimana. It discusses the "tragedy that has befallen the country after the loss of its President of the republic and the resumption of the war by the *Inkotanyi*, a war that has caused the death of many innocent people". It further indicates that some of the repercussions of "this tragedy in Gisagara" from 20 to 25 April include clashes "among the inhabitants which have caused many deaths, and others have fled". Defence Exhibit 69E (letter of 2 May 1994). Ntawukulilyayo testified that the letter's purpose was to inform the prefect that Tutsi citizens, in particular, were experiencing problems. He did not expressly identify Tutsis as the victims in the letter because it was obvious. Ntawukulilyayo, T. 10 December 2009, p. 13; T. 16 December 2009, pp. 49-50, T. 17 December 2009, pp. 70-71. This explanation is viewed with suspicion. Indeed, other evidence indicates that clashes among inhabitants around that time were Hutus fighting over abandoned Tutsi properties and that the sub-prefect was interested in resolving this issue. Witness AXV, T. 25 May 2009, pp. 50-51; T. 26 May 2009, pp. 25-26, 29-30, 38.

⁴¹⁴ The Chamber considers that this circumstantial evidence is neither dispositive nor essential for establishing beyond reasonable doubt that Ntawukulilyayo instructed refugees at Gisagara market to go to Kabuye hill on Saturday 23 April 1994 or that he brought soldiers there later that day.

Ntawukulilyayo's instructions for refugees to leave Gisagara market for Kabuye hill on Saturday 23 April (II.1.3.2.iii). It does not raise concerns in this context either in light of the Witness' coherent and corroborated testimony. Equally, purported statements made by Witness BAU in proceedings other than those at this Tribunal, that he had sought refuge elsewhere as the attacks at Kabuye hill were ongoing, is insufficient to raise doubts about his sworn testimony before the Tribunal.

296. The Chamber has also assessed Defence evidence about Ntawukulilyayo's whereabouts that day.⁴¹⁵ He testified that after leaving Father Thomas Mutabazi at Doctor Ntabonvura's home, he arrived in Gisagara around 5.00 p.m. He then went to the commune office, to his home, to the Abizeramariya convent and then to Butare where he stayed the night.

297. Again, the Chamber recalls that Ntawukulilyayo testified after having heard all the evidence and considers his evidence in this context. His explanation for going to Butare to seek assistance, while knowing that the Prefect would not be available given his late arrival there, is suspicious. His evidence is also uncorroborated.

298. Of greater significance is Ntawukulilyayo's own concession that he had returned to Gisagara around 5.00 p.m. Given his access to a vehicle, his evidence is thus not inconsistent with Prosecution evidence suggesting that he went to Kabuye hill around that time, as it was only 2.7 kilometres away. Furthermore, the evidence reflects that soldiers, for example, were not stationed in Gisagara and thus, it is reasonable to infer that they, along with Callixte Kalimanzira would have come to Ntawukulilyayo, who subsequently would have led them to Kabuye hill. Thus, Ntawukulilyayo's purported activities earlier in the day would not have inhibited his ability to escort attackers to Kabuye hill.

299. Defence Witness KAD, who was present at Kabuye hill on Saturday 23 April, testified that she did not see Ntawukulilyayo there. This evidence is of limited probative value given the chaotic circumstances that surrounded her departure from Gisagara and arrival at Kabuye hill, the size of the location and her position on the top of the hill when the attacks commenced.⁴¹⁶

300. The Defence also relies on the testimony of Innocent Nziyomaze, who was a *Gacaca* court judge between October 2002 and March 2007. He testified that there were no survivors of the attacks and that Hutus, who lived nearby, did not implicate Ntawukulilyayo in the killings. However, he conceded that some persons did accuse Ntawukulilyayo before *Gacaca* courts, but that "those who accused him simply complained that he would not have been

⁴¹⁵ See II.1.3.2.iii, concerning Ntawukulilyayo's whereabouts in the morning and early afternoon of Saturday 23 April 1994.

⁴¹⁶ Witness KAD, T. 19 November 2009, pp. 19-21, 22 ("Q. So soldiers and assailants attacked you on Saturday night. Did you see them when they were coming? A. Yes. We were at the top of the hill, and we could see them approaching, but we were powerless."), 31 ("Q. So there were 500 of you on the hill, between 3-500 of you on the hill. And roughly how many attackers were on that hill? How many attackers did you witness, roughly? A. I didn't try to count the assailants. We had problems and we were rather looking for a hiding place. And that was not the right time to count the assailants. Q. But that's exactly what I thought, Witness. I rather thought that you and the others were perhaps busy, trying to find somewhere to hide, having seen these attackers coming. Was that not the case? A. Yes. However, we no longer had a hiding place [] we were simply there waiting for our death. We were already at the summit and the assailants had come from the foot of the hill. Where would you have wanted us to look for a hiding place? [] it was difficult for us to find a hiding place.").


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innocent, given that he had served as an authority under the former regime”.⁴¹⁷ Moreover, he testified that during the *Gacaca* proceedings, he only heard from persons who were not on Kabuye hill.

301. Accordingly, Nziyomaze’s evidence is of limited probative value. It is relatively general and unsupported. Furthermore, while parallel proceedings about the same crime as that charged against the accused may, in certain circumstances, provide relevant background or context, such evidence is not dispositive.⁴¹⁸ Moreover, it is highly speculative to suggest that the general absence of information about an accused in other judicial proceedings proves that he was not involved.⁴¹⁹

302. Finally, evidence that the Toyota double cabin pick-up used by the sub-prefect was broken down in April 1994 does not create any doubt about the observations of Witnesses AYQ, BAU and AZN. Witnesses testified about various vehicles used by Ntawukulilyayo during the relevant period.⁴²⁰ Ambiguities concerning the exact vehicle used in this operation are immaterial, and there is a distinct possibility that any vehicles used might have come from elsewhere with the soldiers.

303. Having carefully examined and analysed the Prosecution and Defence evidence, the Chamber, Judge Akay dissenting, finds beyond reasonable doubt as follows: In the late afternoon or evening of Saturday 23 April 1994, Ntawukulilyayo arrived on Kabuye hill in a vehicle along with Callixte Kalimanzira and soldiers. Ntawukulilyayo stopped briefly at the hill, allowing the soldiers to exit. Shortly thereafter, Ntawukulilyayo and Kalimanzira left, after which the soldiers who had accompanied them, along with others, including communal policemen, attacked the civilian refugees using firearms and other weapons.⁴²¹ Although the record does not demonstrate that Ntawukulilyayo returned, the coordinated assault on Kabuye

⁴¹⁷ Nziyomaze, T. 7 October 2009, p. 45. Furthermore, when Nziyomaze left in March 2007, there were 45 cases which were ongoing, and 135 cases pending. T. 7 October 2009, p. 49.

⁴¹⁸ Where courts rely on different records, it is conceivable that their results may vary. Indeed, “two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence”. See *Kayishema and Ruzindana* Appeal Judgement para. 143.

⁴¹⁹ See *Rutaganda*, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006 para. 13, quoting *Kajelijeli* Appeal Judgement, para. 176; *Niyitegeka*, Decision on Request for Review (AC), 30 June 2006 para. 70, citing *Niyitegeka* Appeal Judgement, para. 180.

⁴²⁰ Ntawukulilyayo testified that his predominantly black, multi-coloured pick-up was broken and that he was using a vehicle belonging to the Saint Juvénal school. Ntawukulilyayo, T. 10 December 2009, pp. 10, 14-15, 19; T. 15 December 2009, p. 21. Ntawukulilyayo’s personal vehicle was a white saloon vehicle. Witness AXV, T. 25 May 2009, pp. 21-22. Simon Rumashana observed Ntawukulilyayo in a red pick-up on Saturday 23 April 1994. T. 30 September 2009, p. 43. Witness BAU observed Ntawukulilyayo in a “red saloon car” belonging to the secondary school on Thursday 21 April. Witness BAU, T. 12 May 2009, p. 61; T. 13 May 2009, p. 23-26, 54.

⁴²¹ Although Witnesses BAU and AZI testified that gendarmes participated in attacks at Kabuye hill, the Chamber considers their evidence on this point insufficient. As noted above, Witness BAU appeared to have referred to soldiers and gendarmes interchangeably while testifying and considered in the context of Witness AZN and AYQ’s testimonies, would suggest that he saw soldiers. Witness AZI’s testimony about attacks on Kabuye hill was extremely brief and it did not indicate the basis for his identification. Other evidence in the record, as already noted, also suggests that soldiers would have arrived that day on the hill (for example, Witness KAD).

hill continued into the following day, and by that time included civilian participants.⁴²² As a result, hundreds and possibly thousands of civilians, primarily Tutsis, were killed.

⁴²² See generally, evidence of Witnesses AYQ, AZV, AXY, KAD, BAZ. Witness BAZ also testified that he and others returned to Kabuye hill on Monday in order to loot. While there, he observed three Tutsis, who were hiding, get killed. See Witness BAZ, T. 21 May 2009, pp. 14-15.

2. ROADBLOCKS, APRIL THROUGH JULY 1994

2.1 Introduction

304. The Indictment alleges that within a few days of President Habyarimana's death on 6 April 1994, several roadblocks were established within Gisagara sub-prefecture and run by armed civilians and other subordinates of Ntawukulilyayo. One was the "Jaguar" roadblock near the Gisagara Catholic Church; another near Ntawukulilyayo's residence; and a third near the trading centre on the road towards Musha. Up to 17 July 1994, the roadblocks were used to prevent Tutsis from escaping and many were killed at them. It is alleged that Ntawukulilyayo was aware of, and acquiesced to, the establishment of roadblocks in Gisagara sub-prefecture and in some instances, congratulated and encouraged the killers as he passed through. Reference is made to Prosecution Witnesses AXV AZN, AZV, BAC, BAU, AXY, and BAW.⁴²³

305. The Defence argues that the Indictment is defective and that the Prosecution Pre-Trial Brief fails to cure it. The sub-prefect had no control over the roadblocks' establishment, or over acts that occurred at them, and was even targeted as an accomplice at some. He attempted only to curtail violence at them. Reference is made to Ntawukulilyayo, Simon Rumashana, Witness UAO, Jean-Baptiste Gasana, Gérard Ndamage and Thamar Uwimana Kabayiza.⁴²⁴

2.2 Evidence

Prosecution Witness AXV

306. From April to June 1994, Witness AXV, a Hutu, was an administrative official within Gisagara sub-prefecture.⁴²⁵ He testified that up to 19 April, roadblocks were mounted for the protection of all persons. On 20 April, Witness AXV travelled to the Butare multipurpose hall to attend a meeting convened by prefect Sylvain Nsabimana. On his way, the Witness passed through a barrier at the roundabout close to the gathering point that was manned by soldiers asking for identity cards to check the ethnicity of persons passing through. He observed Tutsis being killed there. He also saw Tutsis being intercepted at a roadblock at the entrance of the National University of Rwanda. He did not see them again and presumed that they were killed and thrown into nearby pits.⁴²⁶

307. The meeting was attended by Ntawukulilyayo, *bourgmestres*, army representatives, gendarmerie commander, the public prosecutor and other chiefs of prefecture services attended. Nsabimana chaired it and ordered that roadblocks be used to prevent fleeing Tutsis. Afterwards, the barriers' purpose was no longer to protect everyone but used to target Tutsis. Most of the barriers within Butare town were manned by soldiers, while those in rural areas

⁴²³ Indictment, paras. 15-16, 23; Prosecution Closing Brief, paras. 20, 46, 234-235, 237, 296, 306, 353-379; Closing Arguments, T. 14 June 2010, pp. 6-7, 15, 17-19, 25-29-31. The Prosecution also points to evidence of Ntawukulilyayo participating in meetings concerning roadblocks. Prosecution Closing Brief, paras. 39-40, 42, 101-103, 108-111, 149, 177, 372-375.

⁴²⁴ Defence Closing Brief, paras. 181-196, 209, 219-231, 244, 261, 483-485, 492-493, 499-504, 521, 565-571, 832, 842, 861-883, 906-910, 988-989, 991, 993, 1002-1012, 1207-1208, 1210-1211, 1216; Closing Arguments, T. 14 June 2010, pp. 57-59, 64, 68-69.

⁴²⁵ Witness AXV, T. 25 May 2009, pp. 9-10, 67-68; Prosecution Exhibit 13 (protected information sheet).

⁴²⁶ Witness AXV, T. 25 May 2009, pp. 42-43, 46; T. 26 May 2009, pp. 20-22.

were largely administered by local residents, wielding traditional weapons, and in some instances, communal police. The Witness estimated that he observed around 1,000 bodies in the area where he was from, including Bishya, Mugombwa and a parish. He did not see any at roadblocks, however, as they were dumped in pits.⁴²⁷

Prosecution Witness AZN

308. In 1994, Witness AZN, a Tutsi, was a farmer in Muganza commune and was among those who sought refuge in Gisagara market on Wednesday 20 April.⁴²⁸ Early the following morning, he and other refugees left Gisagara, avoiding a barrier which had been mounted across the road leading to Muyaga. He testified that that the roadblock had been set up to stop refugees from fleeing and people had been assigned to man it.⁴²⁹

Prosecution Witness AZV

309. Witness AZV, a Hutu, was a farmer living in Muganza commune in 1994 and was married to a Tutsi. The Witness was among those who sought refuge in Gisagara market on Wednesday 20 April.⁴³⁰ Upon arrival in Gisagara, she saw that roadblocks had been mounted. A barrier had been set up in front of the police station, which her group was unable to pass. Consequently, they stopped at the Gisagara market.⁴³¹

Prosecution Witness BAC

310. In 1994, Witness BAC, a Tutsi, was a farmer in Ndora commune. She saw two roadblocks manned by Hutus in Gisagara and supervised by "officials". One was located not far from her house, on the road leading to Muyaga. The other was on the road leading to Musha, downhill from the church. She passed through them, but only after killings had abated. She also heard about a roadblock in front of Ntawukulilyayo's house but did not see it.⁴³²

Prosecution Witness BAU

311. Witness BAU, a Tutsi, was a farmer living in Ndora commune in 1994. He saw refugees arriving at the Gisagara market on Wednesday 20 April. More continued to arrive on 21 and 22 April. During this time, the refugees did not leave the market as "up until" 22 April, roadblocks had been erected and were impassable.⁴³³

⁴²⁷ Witness AXV, T. 25 May 2009, pp. 42-44, 46; T. 26 May 2009, pp. 20-24.

⁴²⁸ Prosecution Exhibit 1 (protected information sheet); Witness AZN, T. 6 May 2009, pp. 8, 25.

⁴²⁹ Witness AZN, T. 6 May 2009, p. 9.

⁴³⁰ Witness AZV, T. 7 May 2009, pp. 35-38, 49, 58-59; Prosecution Exhibit 3 (protected information sheet).

⁴³¹ Witness AZV, T. 7 May 2009, pp. 55-56.

⁴³² Witness BAC, T. 11 May 2009, pp. 42, 50 (quoted), 51; T. 12 May 2009, pp. 2-3; Prosecution Exhibit 5 (protected information sheet).

⁴³³ Witness BAU, T. 13 May 2009, pp. 26, 27 (quoted); Prosecution Exhibit 6 (protected information sheet).

Prosecution Witness AXY

312. In 1994, Witness AXY, a Tutsi, was a healthcare assistant living in Ndora commune and is a survivor of the Kabuye hill attacks.⁴³⁴ She heard from family members that between 20 and 21 April, President Sindikubwabo held a meeting in Gisagara. After his departure, roadblocks, manned by Hutus were established. Some were used to prevent Tutsis from fleeing from Kabuye hill and to facilitate the massacres there.⁴³⁵

Prosecution Witness BAW

313. In 1994, Witness BAW, a Tutsi, was a trader and member of the PSD party in Nyaruhengeri commune.⁴³⁶ He believed that it was “impossible for anything to be done without Ntawukulilyayo’s blessing” in Gisagara sub-prefecture, and if roadblocks were set up in the sub-prefecture, Ntawukulilyayo must have been responsible for them.⁴³⁷

314. Tutsis passing barriers would be stopped and asked to provide identity cards. The Witness was able to move through roadblocks in Nyaruhengeri, for example, because *Bourgmestre* Charles Kabeza had issued him an identity card that stated he was a Hutu. While in Butare town on 17 April, he saw soldiers at roadblocks.⁴³⁸

Ntawukulilyayo

315. Ntawukulilyayo testified that roadblocks were mounted in Gisagara sub-prefecture following the start of the war on 1 October 1990. They were intended to provide security, counter RPF infiltrators, and were manned by Hutus and Tutsis together. After 6 April 1994, the government instructed that the roadblocks be strengthened.⁴³⁹

316. From 24 April, unofficial roadblocks were set up in Gisagara and manned by Hutu and Twa bandits targeting Tutsis and their sympathisers. Ntawukulilyayo knew that killings occurred at these barriers but the bandits were heavily armed. For example, the Ndora commune *bourgmestre* informed Ntawukulilyayo of a killing in Mugenza sector.⁴⁴⁰

317. Ntawukulilyayo also passed through roadblocks but denied congratulating and encouraging those manning them. He did not see any killings or dead bodies at them. On 23 April, Ntawukulilyayo had to plead with those manning a checkpoint in Ntobo to allow him to pass with Father Thomas Mubazi, a Tutsi priest. A person informed him that Bernadette

⁴³⁴ Witness AXY, T. 19 May 2009, pp. 67-68; T. 20 May 2009, pp. 19-21; Prosecution Exhibit 10 (protected information sheet).

⁴³⁵ Witness AXY, T. 19 May 2009, pp. 64 -65; T. 20 May 2009, p. 25. During cross-examination, Witness AXY was confronted with her 24 November 1999 statement to Tribunal investigators that reads she was at a roadblock in Bishya and passed another manned by soldiers at an unspecified location. T. 20 May 2009, p. 23. Witness AXY testified about being taken to Bishya by those who had captured her after escaping Kabuye hill in order to be killed. She was ultimately released. See T. 19 May 2009, pp. 68; T. 20 May 2009, pp. 21-22. It is not clear from her in court testimony whether she was being held in Bishya at a roadblock, and the Chamber finds it unnecessary to consider the hearsay evidence from her statement further.

⁴³⁶ Witness BAW, T. 14 May 2009 pp. 18-19, 25; T. 18 May 2009 pp. 65, 72; Prosecution Exhibit 9 (protected information sheet).

⁴³⁷ Witness BAW, T. 14 May 2009, p. 23; T. 19 May 2009, p. 54.

⁴³⁸ Witness BAW, T. 14 May 2009, p. 23; T. 19 May 2009, pp. 33, 35.

⁴³⁹ Ntawukulilyayo, T. 15 December 2009, pp. 9-11; T. 17 December 2009, p. 7.

⁴⁴⁰ Ntawukulilyayo, T. 15 December 2009, pp. 11-12.

Mukarurangwa, a member of parliament, had given an order to kill Tutsis there. On his return, he was accused of helping a Tutsi and was forced to pay persons at the barrier to pass.⁴⁴¹

318. On 18 May, he went through a roadblock located in Mukande sector, on his way to Muyaga commune. He denied that it was located between Gisagara and Mukande sectors and that he checked to see if orders were being implemented.⁴⁴²

Defence Witness Simon Rumashana

319. Simon Rumashana, a Hutu, lived in Ndora commune in April 1994 and knew Ntawukulilyayo as the Gisagara sub-prefect. He testified that after 6 April, roadblocks were mounted for security purposes. They were initially manned by Hutus and Tutsis together in order to arrest the *Inkotanyi*. The Witness manned a roadblock in the Ntobo area ("Ntobo roadblock"), located in Rugara *cellule*, Ndora sector, Ndora commune. It was set up about three days after President Habyarimana's death to counter the *Inkotanyi*, pursuant to instructions from *bourgmestre* Célestin Rwankubito, which were transmitted through *responsable de cellule* Ndayisenga. After Tutsis were killed in Muzenga sector, Tutsis did not return to man the roadblock. Member of parliament, Bernadette Mukarurangwa subsequently gave orders to kill Tutsis at the Ntobo roadblock.⁴⁴³

320. On a Saturday in late April, between around 2.00 and 3.00 p.m., Ntawukulilyayo passed through the Ntobo roadblock in a red Hilux pickup with father Thomas, a Tutsi priest from Gisagara. They were going towards Muzenga. Although father Thomas was known to be a Tutsi, they were allowed through as Ntawukulilyayo explained that the priest had to say mass. The Witness testified that they "let him pass, as [they] would any other official" and respected him. The Accused was surprised and sad when informed that instructions had been given that no Tutsi should be allowed through but said nothing.⁴⁴⁴ It was rumored that he had helped the priest escape. That evening, Bernadette Mukarurangwa came to the roadblock. She said that the sub-prefect was an accomplice and had to be killed. Subsequently, the Witness heard that a group went to search Ntawukulilyayo's house.⁴⁴⁵

321. Rumashana manned the Ntobo roadblock in shifts between April and June. He could also see it from his home. Although the barrier was on a road leading to Butare and much used, no Tutsi was killed there.⁴⁴⁶

Defence Witness UAO

322. Witness UAO, a Hutu, lived in Ndora commune in 1994 and now resides in Uganda.⁴⁴⁷ He knew Ntawukulilyayo as the Gisagara sub-prefect. Between April and May, he

⁴⁴¹ Ntawukulilyayo, T. 16 December 2009, pp. 21-24, 29-30, 59-61.

⁴⁴² Ntawukulilyayo, T. 15 December 2009, pp. 29-30, 36.

⁴⁴³ Rumashana, T. 30 September 2009, pp. 6, 9-18. On foot, the roadblock was about 45 minutes from the Gisagara parish. See T. 30 September 2009, p. 10.

⁴⁴⁴ Rumashana, T. 30 September 2009, pp. 13-18, 37, 43. Rumashana later said that the Accused passed through the roadblock about two weeks after the President's death. T. 30 September 2009, p. 20.

⁴⁴⁵ Rumashana, T. 30 September 2009, pp. 19-21. Rumashana was not at the roadblock at the time but observed Mukarurangwa from his house. See T. 30 September 2009, pp. 47-48.

⁴⁴⁶ Rumashana, T. 30 September 2009, pp. 18, 39-41.

manned an unnamed roadblock near Bernadette Mukarurangwa's house and about seven to eight kilometres from Ntawukulilyayo's residence. It was mounted about two weeks after 6 April.⁴⁴⁸ Mukarurangwa's husband, Nzamwita, ordered the Witness to man the roadblock. Mukarurangwa had told those positioned there that its purpose was to counter the *Inkotanyi*. Persons without identity cards were to be reported to her or the *responsable de cellule*, arrested and taken to the commune office. While the Witness was at the roadblock, two people without identity cards were arrested and taken to the commune office. He heard of no other persons being arrested at the roadblock. From April, the Witness saw no other barrier within Muzinga sector.⁴⁴⁹

323. Ntawukulilyayo passed through the roadblock about two weeks after 6 April, when travelling towards Butare. He was not stopped and returned on another road past the primary school. Around the end of April, a meeting was held at the primary school in the absence of the sub-prefect where Mukarurangwa called the Accused an *Inkotanyi* accomplice. Ntawukulilyayo came to the roadblock again on 1 June 1994 and was stopped by a huge crowd of people. Nzamwita ordered that the Accused's vehicle be searched but nothing was found. The crowd, including Nzamwita and the Witness, went together in the Accused's vehicle to search his house for weapons and radios which may have been used to communicate with the *Inkotanyi*. They found nothing.⁴⁵⁰

Defence Witness Gérard Ndamage

324. In 1994, Gérard Ndamage, a Hutu, owned a shop near the Gisagara market. He knew Ntawukulilyayo as the Gisagara sub-prefect. Ndamage lived about 30 to 80 metres from Ntawukulilyayo's residence.⁴⁵¹ He knew of two roadblocks in Gisagara sector. One was located "below" the commune office, which he was able to see and where no killings occurred. He was aware of another barrier, known as the "Jaguar" roadblock, situated on the other side of the church, but was unable to get there due to the distance between that roadblock and his house. He believed that it must have been the communal authorities who gave the order for the roadblocks to be set up.⁴⁵²

Defence Witness Jean-Baptiste Gasana

325. In April 1994, Jean-Baptiste Gasana, a Hutu, lived opposite the Gisagara dispensary, which was some 30 metres away from the market square, and worked as a trader from home.⁴⁵³ He testified that at "some point" he started to man the "Jaguar" roadblock. He

⁴⁴⁷ Witness UAO, T. 17 November 2009, pp. 16-17, 46; Defence Exhibit 60 (protected information sheet). Witness UAO heard from his son that he was being prosecuted before the *Gacaca* courts but did not know the charges against him or whether he had been convicted.

⁴⁴⁸ Witness UAO, T. 17 November 2009, pp. 17-18, 39-42. Mukarurangwa was Witness UAO's neighbour. She was a woman of great authority. See T. 17 November 2009, pp. 19-26.

⁴⁴⁹ Witness UAO, T. 17 November 2009, pp. 26-27, 41; T. 17 November 2009, p. 14.

⁴⁵⁰ Witness UAO, T. 17 November 2009, pp. 28-33, 35. Between 20 and 25 people went to search the house.

⁴⁵¹ Ndamage, T. 13 October 2009 pp. 10-14; Defence Exhibit 59 (protected information sheet). At the time of his testimony, Ndamage was living in exile in Malawi. He had heard that he had been accused in *Gacaca* proceedings of having manned a roadblock and looting. He denied the allegations but remained in exile due to fear of arrest. T. 13 October 2009 pp. 5-10.

⁴⁵² Ndamage, T. 13 October 2009, pp. 31 (quoted), 36, 37 (quoted).

⁴⁵³ Gasana, T. 29 September 2009, pp. 39-42.

denied that Tutsis were killed there either while he manned the barrier, or after he stopped working there. Nor did he ever hear of people being killed at the roadblock.⁴⁵⁴

Thamar Uwimana Kabayiza

326. In 1994, Thamar Kabayiza Uwimana, a Tutsi, was a student at the National University of Butare, and lived in Butare Town. She is married to Ntawukulilyayo's son, Benoît Kabayiza.⁴⁵⁵

327. At the end of June to early July 1994, Ntawukulilyayo successfully helped Kabayiza and her family flee to Kibeho.⁴⁵⁶ They were stopped several times at roadblocks en route to Kibeho by "bandits". At each barrier, Ntawukulilyayo would have to negotiate and pay money to those at the checkpoints to ensure the family's safe passage. Kabayiza did not see any dead bodies at the roadblocks as they had been moved.⁴⁵⁷

2.3 Deliberations

328. Paragraphs 15 and 23 of the Indictment identify three roadblocks within Gisagara sub-prefecture that were allegedly manned by armed civilians and other subordinates of Ntawukulilyayo as locations where Tutsis were killed. The barriers were the "Jaguar" roadblock near the Catholic Church in Gisagara, one near Ntawukulilyayo's residence and one near the trading centre on the road towards Musha. However, the Chamber recalls that the Prosecution conceded during its final submissions that no specific evidence was led concerning these three checkpoints.⁴⁵⁸ The Chamber has also reviewed the evidentiary record and similarly finds that it does not specifically implicate Ntawukulilyayo in the killing of Tutsis at any of these three barriers.⁴⁵⁹ While there is general evidence that roadblocks were used to single out and kill Tutsis, none of it demonstrates that killings occurred at any of the roadblocks expressly identified in the Indictment.⁴⁶⁰

329. More specifically, the Chamber's review of the evidence reveals that roadblocks were established in Gisagara sub-prefecture, after President Habyarimana's death on 6 April 1994. They were mounted initially to provide security for all persons and, in some instances, manned by Hutus and Tutsis together.⁴⁶¹ Evidence also indicates that later in April, however,

⁴⁵⁴ Gasana, T. 29 September 2009, p. 72 (quoted).

⁴⁵⁵ Kabayiza, T. 17 November 2009, pp. 51-53, 65.

⁴⁵⁶ Kabayiza, T. 17 November 2009, p. 60. Kabayiza fled with her husband, her child Fiacre Kabayiza, Eric Dushime and Victor Habinshute. T. 17 November 2009, p. 61.

⁴⁵⁷ Kabayiza, T. 17 November 2009, pp. 60, 67-69, 71, 74. See also Witness Dushime, T. 18 November 2009, pp. 13-14.

⁴⁵⁸ Closing Arguments, T. 14 June 2010 pp. 30-31 ("MADAM PRESIDENT: Madam Prosecutor, would you refer to the evidence which supports the allegation in the indictment, paragraph 15 regarding the three roadblocks? MS. SEGOETE: No, there isn't, My Lord. ... No. There isn't ... any evidence from the record specifically referring to any of the roadblocks named in paragraph 15. I concede that, My Lord.").

⁴⁵⁹ The Chamber notes that the existence of the Jaguar roadblock is undisputed. See Gasano, T. 29 September 2009, p. 72; Ndamage, T. 13 October 2009, pp. 31, 37. However, the evidence does not establish that Tutsis were killed at this roadblock, nor does it implicate Ntawukulilyayo in its establishment or administration. The record does not establish the existence of the other two barriers specified in the Indictment.

⁴⁶⁰ Witness BAF, T. 14 May 2009, pp. 2-5; T. 18 May 2009, pp. 17-20; Witness BAW, T. 14 May 2009, pp. 23-24; Witness AXV, T. 26 May 2009, pp. 20-22.

⁴⁶¹ Witness AXV, T. 26 May 2009, pp. 20-22, 32; Ntawukulilyayo, T. 15 December 2009, pp. 9-11; T. 17 December 2009, p. 7; Rumashana, T. 30 September 2009, pp. 9-14, 16; Witness UAO, T. 17 November 2009, pp. 17, 39-42.



roadblocks were used to stop and single out Tutsi civilians. From around 20 April, Prosecution Witnesses AZN, AZV, and BAU saw roadblocks in Gisagara town, which refugees at the market could not pass.⁴⁶²

330. With respect to evidence of killings at roadblocks, Prosecution Witness AXV testified that after 20 April, roadblocks were used to single out and kill Tutsis. He testified that in rural areas, the roadblocks were generally manned by local residents armed with traditional weapons and occasionally communal police. He did not see dead bodies at roadblocks as they were dumped in nearby pits. However, he testified to having observed about 1,000 corpses at locations such as Bishya, Mugombwa and a parish.⁴⁶³

331. Prosecution Witness AXY testified that after Sindikubwabo's visit to Gisagara around 20 or 21 April, roadblocks set up and manned by Hutu civilians, were used to prevent Tutsis from fleeing and, in particular, to facilitate the massacres at Kabuye hill. However, details were not elicited about any particular roadblocks and crimes committed at them, nor about Ntawukulilyayo's role in their establishment or administration.⁴⁶⁴

332. Ntawukulilyayo acknowledged that Tutsis were killed at "unofficial" roadblocks from 24 April. He further conceded to having passed through certain barriers, and in particular, was informed that Parliamentarian Bernadette Mukaruranga had ordered the killing of Tutsis at the Ntobo roadblock.⁴⁶⁵ Defence Witness Simon Rumashana manned the Ntobo barrier and acknowledged that Mukaruranga ordered that Tutsis be killed at it. He, however, denied that any Tutsis were in fact killed there.⁴⁶⁶ Defence Witness UAO worked at a roadblock near Mukaruranga's home. She had stated that its purpose was to counter the *Inkotanyi*. Witness UAO was present for the arrest of two persons who did not have identity cards but did not specify that any persons were killed at the roadblock.⁴⁶⁷

333. In sum, the evidence generally suggests that, after 20 April 1994, roadblocks within Gisagara sub-prefecture were used to single out Tutsi civilians to be killed. However, details about such killings are ambiguous. The Prosecution evidence pertaining to the location of the roadblocks, the category or categories of perpetrators and the nature of the killings that purportedly occurred at them remain obscured and insufficiently precise to make findings beyond reasonable doubt. Beyond the ambiguities as it relates to particular crimes, the evidence does not demonstrate a link between Ntawukulilyayo and any alleged crimes.⁴⁶⁸

⁴⁶² Witness AZN, T. 6 May 2009, pp. 8-9; Witness AZV, T. 7 May 2009, p. 56; Witness BAU, T. 13 May 2009, pp. 26-27.

⁴⁶³ Witness AXV testified about soldiers manning roadblocks near the Butare multi-purpose hall and the National University of Rwanda and killing Tutsis at them on 20 April 1994. These roadblocks, situated outside Gisagara sub-prefecture, fall outside the scope of the Indictment. Indictment, paras. 15-16, 23. Moreover, Witness AXV does not identify any act or omission linking Ntawukulilyayo to the events he witnessed at them. This evidence is only considered for context. See *The Prosecutor v. Arsène Shalom Ntahobali and Pauline 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" (AC), 2 July 2004, para. 15.

⁴⁶⁴ Witness AXY, T. 19 May 2009, pp. 64-65; T. 20 May 2009, p. 25.

⁴⁶⁵ Ntawukulilyayo, T. 15 December 2009, p. 12-13, 14 (quoted); T. 16 December 2009, pp. 21-26.

⁴⁶⁶ Rumashana, T. 30 September 2009, pp. 11-12, 16-18.

⁴⁶⁷ Witness UAO, T. 17 November 2009, pp. 17, 26-27, 39-42.

⁴⁶⁸ In so finding, the Chamber has also reviewed evidence of local government officials' involvement in the administration of roadblocks, and, in particular, that Parliamentarian Bernadette Mukaruranga issued orders to kill Tutsis at them. The Chamber has also considered that Ntawukulilyayo passed through roadblocks and that in some instances his status as an authority facilitated his movement at them. Furthermore, the record demonstrates

Thus, there is no basis for the Chamber to consider whether Ntawukulilyayo was the superior of those manning roadblocks generally within Gisagara sub-prefecture and whether he exercised effective control over them.

that government officials, including Ntawukulilyayo, held meetings to discuss the administration of roadblocks in April and May 1994. See Ntawukulilyayo, T. 16 December 2009, pp. 53-54; T. 17 December 2009, pp. 40, 56-57, 66 (he asked *bourgmestres* to convene communal councils in order to set up roadblocks under their authority and requested that ethnic based killings stop); Witness AXV, T. 25 May 2009, pp. 30, 50-55; T. 26 May 2009, pp. 25, 29-30, 38 (he attended the meeting and it was decided that at least one person at each barrier must be able to read in order to check identity cards and avoid killing Hutus; the Ndora *bourgmestre* was not present but represented by his deputy, Alphonse); See also Prosecution Exhibit 19 (letter of 29 April 1994 from Ntawukulilyayo to *bourgmestres*). See also Ntawukulilyayo, T. 15 December 2009, pp. 50-54, 57, 60; T. 17 December 2009, pp. 35-36 (Sylvain Nsabimana chaired a meeting 20 April 1994 and instructed that roadblocks needed to be brought under control of local administration); Witness AXV, T. 25 May 2009, pp. 30, 42-44; T. 26 May 2009, pp. 21-24 (attended the same 20 April 1994 and testified that Nsabimana stated that the purpose of roadblocks was to stop Tutsis from fleeing). This evidence does not eliminate any ambiguities concerning the underlying crimes for which the Prosecution seeks to hold Ntawukulilyayo responsible nor does it sufficiently link Ntawukulilyayo to them.

3. MEETING IN GIKORE, MUDABORI, NYARUHENGARI COMMUNE, 24 APRIL 1994

3.1 Introduction

334. The Indictment alleges that around 24 April 1994, Ntawukulilyayo promised houses, land and money during a public gathering in “Gikor[e], Mudabori,” Nyaruhengeri commune to those who killed the most Tutsis, thereby inciting them to do so.⁴⁶⁹ The Prosecution relies on the evidence of Witness BAW.⁴⁷⁰

335. The Defence argues that Witness BAW’s evidence falls outside the scope of the Indictment, and that the relevant allegation, as pleaded in paragraph 28 of the Indictment, is confusing and vague. Reference is made to the testimonies of Ntawukulilyayo, Witness KAB and MTA.⁴⁷¹

3.2 Evidence

Prosecution Witness BAW

336. Witness BAW, a Tutsi, was a trader and member of the PSD party in Nyaruhengeri commune in 1994.⁴⁷² He testified that, on 15 May 1994, he was in Mudabori, Nyaruhengeri commune hiding in his grandfather’s home. While in the house’s courtyard, the Witness saw Ntawukulilyayo about 12 metres away in a nearby road, telling about 50 persons to exterminate surviving Tutsis. He promised that those who killed the most Tutsis would receive rewards of land and cattle owned by Tutsis as well as money. He also asked the crowd to gather bodies from Cyamwakizi valley and bring them to the sector office in order to be counted and identified. He warned that there was a satellite that could see corpses there and that they should not be left in the open. At the conclusion of the gathering, the persons went to Cyamwakizi, where the Witness estimated 40,000 to more than 50,000 corpses were.⁴⁷³

⁴⁶⁹ Indictment, para. 28; Prosecution Closing Brief, paras. 393-394, 398, 440-441. Paragraph 28 of the Indictment incorrectly refers to Nyaruhengeri as a sector instead of a commune.

⁴⁷⁰ The Prosecution also points to Witness BAW’s testimony concerning a 17 or 18 April 1994 meeting in “Ruhuha” where Ntawukulilyayo purportedly asked the public to man roadblocks and to prevent Tutsis from fleeing. See Prosecution Closing Brief, paras. 396-397, 413-414. However, the location of the meeting and the statements attributed to Ntawukulilyayo do not appear to support the allegation pleaded in paragraph 28. Nor did, the Prosecution refer to this meeting in support of paragraph 28 during final submissions. See T. 14 June 2009, p. 37. In any event, it appears that Witness BAW did not attend this purported meeting but only heard about it in 1996 while participating in investigations, raising doubts about the reliability of this evidence. See T. 19 May 2009, pp. 53-54. Under the circumstances, the Chamber finds it unnecessary to address the Defence notice objections with respect to Witness BAW’s evidence about the Ruhuha meeting. See Defence Closing Brief, paras. 318-319.

⁴⁷¹ Defence Closing Brief, paras. 119-123, 125-132, 165-172, 318-321, 339-342, 345-360, 461-463, 486-488, 712. Although the Defence also points to Witness Vianney Kabengeri to demonstrate that Ntawukulilyayo did not attend a meeting in Ruhuha between 20 to 25 April, the Chamber has determined that Prosecution Witness BAW’s evidence concerning the Ruhuha meeting falls outside paragraph 28 of the Indictment.

⁴⁷² Witness BAW, T. 14 May 2009, pp. 18-19; T. 18 May 2009, pp. 65, 72; Prosecution Exhibit 9 (protected information sheet).

⁴⁷³ Witness BAW, T. 14 May 2009, pp. 25-26; T. 19 May 2009, pp. 48-49, 53-55.

Ntawukulilyayo

337. Ntawukulilyayo denied that he attended a meeting in Mudabori on 15 May 1994 or that he was present at any rally there from April to July.⁴⁷⁴

Defence Witness KAB

338. Witness KAB, a Hutu, lived in Kibilizi sector, Nyaruhengeri commune in 1994.⁴⁷⁵ In late May 1994, he attended a gathering in the Gikore sector trading centre, approximately two to three kilometres from his home.⁴⁷⁶ The meeting started around noon. *Bourgmestre* Charles Kabeza introduced other authorities present, who stood up and greeted the crowd upon being named. Ntawukulilyayo, who the Witness had first seen in 1991 in his capacity as the sub-prefect, was not among them. Prefect Sylvain Nsabimana spoke second, urging those gathered to support the fight against the RPF. Ruzindaza, the president of the Court of First Instance in Butare, held the Bible and said that those who fought the enemy and succeeded would be rewarded by God. Colonel Tharcisse Muvunyi asked young persons to go to the war front while Alphonse Nteziryayo warned that the RPF could be disguising themselves as women or the poor. Nteziryayo used a proverb indicating that one cannot remain at home and wait for the enemy's arrival to fight but one should confront them far from his or her own home. The Witness was about three to four metres from the authorities during the meeting.⁴⁷⁷

Defence Witness MTA

339. Witness MTA, a Hutu, was a teacher living in Kibayi commune in April 1994.⁴⁷⁸ He knew Ntawukulilyayo as the Gisagara sub-prefect and had seen him on several occasions.⁴⁷⁹ One afternoon around the end of May, the Witness attended an outdoor meeting near the Nyaruhengeri *bourgmestre's* home in Gikore sector in Nyaruhengeri commune. The event commenced prior to his arrival and around 200 persons were present. Alphonse Nteziryayo was speaking about regional security problems and warned that people should "avoid falling into the RPF trap" and "avoid problems between them." Other authorities present were Tharcisse Muvunyi, Prefect Sylvain Nsabimana, *Bourgmestre* Charles Kabeza, various *conseillers* and commune officials. The Witness heard that the president of the Court of First Instance was also present. *Bourgmestre* Kabeza spoke next about matters of authority. The Witness was five metres away from the speakers. He did not ask anyone whether other authorities had spoken. The meeting lasted about 45 minutes and he left when it ended. Ntawukulilyayo was not present, nor did the Witness hear anyone say that he had spoken to

⁴⁷⁴ Ntawukulilyayo, T. 16 December 2009, p. 40 (Mudabori is a *cellule*, but does not contain an area referred to as Gikoro and Gikore is a sector in Nyaruhengeri commune).

⁴⁷⁵ Witness KAB, T. 18 November 2009, pp. 38; Defence Exhibit 61 (protected information sheet).

⁴⁷⁶ According to Witness KAB, Gikore is a sector and Mudabori is a *cellule* found in Ringano sector. Both are situated in Nyaruhengeri commune. Gikoro is a *cellule* in Kigali-Rurale. T. 18 November 2009, pp. 39, 53.

⁴⁷⁷ Witness KAB, T. 18 November 2009, pp. 40-42, 48-53, 60-63. Witness KAB said that he knew Witness BAW. He had heard from at least two persons that this person had testified in Arusha against former members of President Habyarimana's regime. He believed that Witness BAW disliked Hutus and wanted to obtain their property. T. 18 November 2009, pp. 54-58.

⁴⁷⁸ Witness MTA, T. 5 October 2009, pp. 4-5 (Witness MTA confirmed that "Gikore" was a sector in Nyaruhengeri commune).

⁴⁷⁹ Witness MTA, T. 5 October 2009, pp. 9-11.

the inhabitants of Gikore. This was the only occasion that the Witness went to Gikore and he was unaware of any other meetings held there between 6 April and July 1994.⁴⁸⁰

3.3 Deliberations

340. The Prosecution relies on Witness BAW to establish that Ntawukulilyayo incited members of the population in Gikore, Mudabori, Nyaruhengeri to kill Tutsis by offering rewards such as property and money. The Defence, through the testimonies of Witnesses KAB and MTA, concedes that a meeting took place towards the end of May 1994 in Gikore. However, it disputes the evidence of Witness BAW with respect to what was said and who was present, in particular, it denies the presence of Ntawukulilyayo at that meeting. The Defence further submits, in its Closing Brief, that this evidence is outside the scope of the Indictment.⁴⁸¹ The Chamber finds it instructive to first address the issue of notice.

3.3.1 Notice

341. The Chamber recalls that the indictment of 13 June 2005 alleged that the Gikore meeting occurred sometime between 21 April and 31 May 1994. In light of the absence of other details, such as the specific location, time and identity of the participants, on 28 April 2009, the Chamber ordered the Prosecution to narrow the date range or provide other information in order to avoid any prejudice to the Accused.⁴⁸² In response, the Prosecution amended the Indictment, alleging that the event occurred “on or about 24 April 1994” without providing further details.

342. While the new information added in the Indictment filed on 19 May 2009 represented an approximation, it was also relatively specific in time when compared to the original date range of 41 days. In the circumstances, the Chamber considers that by leading evidence of an event that occurred 21 days after 24 April 1994, the modification, even if only an approximation, did not assist the Accused’s ability to focus his Defence but likely misled him.⁴⁸³

343. Moreover, during its final submissions, while the Prosecution relied on this evidence in support of paragraph 28 of the Indictment, it also conceded that the Defence “could not have had reliable and consistent information on what [was] being charged” with respect to this meeting.⁴⁸⁴

⁴⁸⁰ Witness MTA, T. 5 October 2009, pp. 4, 19-21, 23-31, 26-31.

⁴⁸¹ In particular, the Defence argues that Witness BAW’s evidence is not contained in the Indictment or the Prosecution Pre-Trial Brief and that the references in paragraph 28 of the Indictment to Gikore as being in Mudabori, rather than Gikore, creates confusion as to the location of the incident. Defence Closing Brief, paras. 165-172, 320-321.

⁴⁸² See Decision on Defence Preliminary Motion Alleging Defects in the Indictment (TC), 28 April 2009, para. 20.

⁴⁸³ The Pre-Trial Brief and the summary of Witness BAW’s anticipated testimony also provided no greater detail with respect to the meeting. Pre-Trial Brief, paras. 58-60, 62 and Annex A, n. 10; Corrigendum to Annex A of the Prosecutor’s Pre-Trial Brief, 23 February 2009, n. 30; Prosecution’s Compliance with further Orders to the Parties Concerning Commencement of Trial, 3 April 2009, n. 10.

⁴⁸⁴ Closing Arguments, T. 14 June 2010, p. 37. Although the Prosecution added that it “nevertheless brought evidence from Witness BAW to the effect that the meeting actually took place on the 15th of May”, it gave no further explanation. See T. 14 June 2009, p. 76. The Chamber considers this statement does not serve to demonstrate that the Accused received sufficient notice.

344. Under the circumstances, the Chamber has doubts that the Prosecution provided clear, consistent and timely notice about Ntawukulilyayo's alleged presence and role at this meeting. The Chamber nevertheless considers the merits of the evidence, which may be useful for contextual purposes.⁴⁸⁵

3.3.2 Gikore Meeting

345. At the outset, the Chamber has no reservations about Witness BAW's identification of Ntawukulilyayo. His official position in the PSD party in 1994 within the Gisagara sub-prefecture appears to have given him the opportunity to know the sub-prefect as he carried out his work.⁴⁸⁶

346. The Chamber considers several points raised by the Defence in order to cast doubt about Witness BAW's impartiality. He testified that Ntawukulilyayo's MRND party, which occupied most government posts in 1994, was a catalyst for the genocide, by instructing Hutus not to join parties with Tutsis.⁴⁸⁷ The Witness was and remains a member of the PSD party, which was in opposition to the MRND and is complimentary to the current regime in Rwanda.⁴⁸⁸ Moreover, he is a member of a genocide survivor's group.⁴⁸⁹

347. In the Chamber's view, Witness BAW's affiliations do not necessarily render him unreliable or impartial. He testified that the genocide survivor's group worked to fight "against negativism of the genocide" and that it "assists witnesses coming to the Tribunal and teaches them how to speak the truth". When questioned about what this last phrase meant, he explained that they assisted by instructing persons on how to work with *Gacaca* courts and Rwandan judicial authorities, and that they encouraged people to discuss only what they witnessed.⁴⁹⁰

348. Turning to the merits of his evidence, the Defence confronted Witness BAW with the fact that he never mentioned Ntawukulilyayo in an October 1995 *pro justitia* statement to Belgian authorities.⁴⁹¹ The Witness first explained that a complete reading of the statement would reveal that he did refer to Ntawukulilyayo.⁴⁹² However, after reviewing the statement, he later indicated that the interview only concerned Augustin Ndindiliyimana, and for this reason, did not reference the sub-prefect.⁴⁹³ The Chamber considers this explanation to be reasonable. The statement is brief and appears to focus primarily on the conduct of Augustin Ndindiliyimana in 1994.

349. Witness BAW's first two statements from June 2000 and March 2001 to Tribunal investigators also make no reference to the gathering.⁴⁹⁴ In particular, the June 2000

⁴⁸⁵ See *The Prosecutor v. Arsène Shalom Ntahobali and Pauline 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" (AC), 2 July 2004, para. 15.

⁴⁸⁶ Witness BAW, T. 14 May 2009, pp. 18, 21. Witness BAW also identified Ntawukulilyayo in court. T. 14 May 2009, p. 20.

⁴⁸⁷ Witness BAW, T. 18 May 2009, pp. 66, 70.

⁴⁸⁸ Witness BAW, T. 14 May 2009, p. 18; T. 18 May 2009, pp. 65, 70-71.

⁴⁸⁹ Witness BAW, T. 19 May 2009, pp. 24-25, 56.

⁴⁹⁰ Witness BAW, T. 19 May 2009, pp. 24-25, 56.

⁴⁹¹ Defence Exhibit 23E (statement of 9 October 1995).

⁴⁹² Witness BAW, T. 19 May 2009, p. 21.

⁴⁹³ Witness BAW, T. 19 May 2009, p. 22.

⁴⁹⁴ See Defence Exhibits 21E and 22E (statements of 6, 7 and 10 June 2000 and 28 March 2001, respectively).

statement provides a very detailed narrative. It states that the Witness hid in his grandfather's cousin's house on 14 May 1994 - a likely reference to the "grandfather" he recalled during his oral testimony. The following day, 15 May, he was visited by his mother. However, the statement makes no mention of the meeting, which he testified had occurred that day. It also contains no reference to Ntawukulilyayo.⁴⁹⁵ While the Witness appears to testify that this statement primarily concerned Ndindiliyimana, the account also details the role of other Rwandan authorities in killings and thus raises some concern.⁴⁹⁶

350. Witness BAW's March 2001 statement is a follow-up interview aimed at providing details omitted from the June 2000 statement. However, a broad reading of it suggests that it focussed on conduct of accused persons charged in the *Nyiramasuhuko et al.* case.⁴⁹⁷ While it refers to Ntawukulilyayo's involvement in a dispute on 20 May 1994, notably, the dispute also involved accused persons from the *Nyiramasuhuko et al.* proceeding. Thus, the omission in this instance does not raise any significant concern.

351. While Witness BAW's June 2002 statement includes reference to Ntawukulilyayo coming to "Gikoro" between 21 April and end of May 1994, and that he "stopped at Mudabori" and addressed the local population. He could not be "more specific" about when this occurred.⁴⁹⁸ The Chamber considers it surprising that while he could not recall the date of this meeting in that statement, he remembered it with precision seven years later during his testimony.

352. The Chamber further considers these omissions in light of Witness BAW's testimony that he participated in investigations through which he heard about the 17 or 18 April meeting in Ruhuha (II.3.3.1). Given his testimony about this gathering, and his subsequent acceptance that he did not in fact attend it, the Chamber considers it possible that his evidence about the 15 May gathering is also second-hand, particularly when viewed in light of his June 2000 and June 2002 statements.

353. The Chamber considers that the Defence evidence is of limited probative value. It is not clear that the evidence of Witnesses KAB and MTA concern the meeting purportedly observed by Witness BAW. Nonetheless, Witness BAW's uncorroborated evidence is insufficient to support findings beyond reasonable doubt that, on about 24 April 1994, Ntawukulilyayo addressed the local population in Mudabori and promised to reward those persons who would kill the greatest numbers of Tutsis.

⁴⁹⁵ Defence Exhibit 21E (statements of 6, 7 and 10 June 2000) p. 7.

⁴⁹⁶ Witness BAW, T. 19 May 2009, p. 9); Defence Exhibit 21E (statements of 6, 7 and 10 June 2000) pp. 7-8 (identifying, for example, Pauline Nyiramasuhuko, sub-prefect Faustin Rutayisire and Colonel Tharcisse Muvunyi as being responsible for massacres).

⁴⁹⁷ See Defence Exhibit 22E (statement of 28 March 2001).

⁴⁹⁸ See Defence Exhibit 25E (statement of 1 June 2002) p. 3 ("[between 21 April and the end of May 1994] – and I cannot be more specific – one day Dominique Ntawukulilyayo, who happened to be in Gikoro, stopped at Mudabori, Nyarugenergi [sic] sector, very near the home of my grandfather, where I was taking refuge.").

4. MEETING IN MUYAGA COMMUNE, END OF MAY 1994

4.1 Introduction

354. The Indictment alleges that near the end of May 1994, Ntawukulilyayo urged those gathered in Muyaga commune in front of the deputy *bourgmestre*'s house to search and kill Tutsis before the arrival of the RPF. The Prosecution relies on the evidence of Witnesses BAW and AYD.⁴⁹⁹

355. The Defence argues that it did not receive sufficient notice of the allegation and that the evidence is inconsistent with it. Reference is made to the evidence of Louis Ngendahayo.⁵⁰⁰

4.2 Evidence

Prosecution Witness BAW

356. Witness BAW, a Tutsi, was a trader and member of the PSD party in Nyaruhengeri commune in 1994.⁵⁰¹ He arrived in Mamba sector, Muyaga commune around 19 May 1994, where he stayed at the home of Alexis Mutezinshuti, the commune's deputy *bourgmestre*. Between 25 and 28 May, the Witness, from inside Mutezinshuti's house, observed Ntawukulilyayo, who was about eight metres away in a nearby football field. At the gathering, Mutezinshuti welcomed Ntawukulilyayo, and the latter ordered those present to kill Tutsis and to "clear the bush". He did not want there to be any survivors when the *Inkotanyi*, who were winning the war, would arrive. The following day, Hutus who attended the gathering searched the bushes and sorghum fields and took Tutsis to the Mamba sector trading centre.⁵⁰²

Prosecution Witness AYD

357. In 1994, Witness AYD, a Hutu, was a farmer.⁵⁰³ He testified that, around late May or early June 1994, he attended a meeting at the Mamba sector office. There, Colonel Tharcisse Muvunyi first explained to the gathering how three RPF members could capture an entire commune. He then stated that he would introduce the new prefect of Butare, Alphonse Nteziryayo, who identified himself by name. Ruzindaza spoke next, informing the crowd that he was the President of the Butare Circuit Court. He was responsible for sensitising them about the "mop-up operation" and the need to kill Tutsi, using an adage about killing lice.⁵⁰⁴

⁴⁹⁹ Indictment, para. 29; Prosecution Closing Brief, paras. 393-394, 399, 401, 405-406, 410-412, 418-433.

⁵⁰⁰ Defence Closing Brief, paras. 153-164, 278.

⁵⁰¹ Witness BAW, T. 14 May 2009, pp. 18-19; T. 18 May 2009, pp. 65, 72; Prosecution Exhibit 9 (protected information sheet).

⁵⁰² Witness BAW, T. 14 May 2009, pp. 26-27; T. 19 May 2009, pp. 35, 43-49, 55.

⁵⁰³ Witness AYD, T. 20 May 2009, p. 28; Prosecution Exhibit 11 (protected information sheet). Witness AYD was arrested in 1997 and pleaded guilty before the *Gacaca* court in Mamba sector for participating in the murder of two Tutsis in Mashenyi *cellule*. T. 20 May 2009, pp. 28-29, 37, 39-40, 54-55; Defence Exhibit 33E (confession of 30 April 2000). He was sentenced to four years of imprisonment and released in 2004. T. 20 May 2009, pp. 28, 39. The Chamber notes that Witness AYD testified that he pleaded guilty in October 1998 and that his written confession is dated 30 April 2000. The Chamber considers the differences immaterial.

⁵⁰⁴ In particular, Witness AYD heard Ruzindaza say: "You see, when you have lice in your clothes, you can kill the lice, but their eggs will still remain alive. That is why you need to boil water and steep the clothes in hot

Ntawukulilyayo then admonished persons for being passive in killing Tutsis and Fidèle Nzamwita for asking for food for such refugees. Ntawukulilyayo then instructed them to search and kill every Tutsi. Callixte Kalimanzira addressed the crowd next and used a metaphor about crushing coffee to incite the crowd to kill Tutsis. He stated that he was aware of a Tutsi priest from Muganza called Sekunde who was still alive. The Witness then left the meeting with others. They found the daughter and son of André Kanyabutoro and killed them. They also killed Azara Gikoko's wife, who was called Venantie.⁵⁰⁵

Ntawukulilyayo

358. Ntawukulilyayo denied that he was present at a public gathering and incited Hutus to kill Tutsis around 27 or 28 May or early June 1994.⁵⁰⁶ He also noted that Alphonse Nteziryayo was appointed prefect of Butare around 18 June.⁵⁰⁷

Louis Ngendahayo

359. In 1994, Louis Ngendahayo, a Hutu, was the president of the MRND party in Gakoma sector, where he lived, and its vice-president for the Muyaga commune.⁵⁰⁸ In the last days of May 1994, he attended a meeting in a wooded area in front of the Mamba sector office in Muyaga commune. The location was approximately 400 metres from the house of the assistant *bourgmestre* and about 430 metres from the commune office. Approximately a week earlier, he had received a written invitation signed by the Muyaga *bourgmestre* indicating that the gathering would concern security issues.⁵⁰⁹

360. The Witness travelled eight kilometres to the meeting in his capacity as a head of the MRND, where he observed approximately 400 to 500 persons gathered. From about five metres away, he listened as Muyaga *Bourgmestre* Fidèle Nzamwita first thanked the population for attending and asked them to pay close attention. He introduced Prefect Sylvain Nsabimana, who then introduced Ruzindaza, the president of the Butare Court of First Instance, Alphonse Nteziryayo, head of security in Butare, and Colonel Tharcisse Muvunyi, head of security for Butare and Gikongoro. Ruzindaza spoke, followed by Nteziryayo, who warned that the RPF could infiltrate the community disguised as civilians. He also said that

water in order to be able to kill the eggs. That is why you must mop up the area to make sure that there are no surviving Tutsis." T. 20 May 2009, p. 32.

⁵⁰⁵ Witness AYD, T. 20 May 2009, pp. 31-33, 47, 71.

⁵⁰⁶ Ntawukulilyayo, T. 16 December 2009, pp. 57-58, 65. The Chamber notes that, referring to a 14 May 1994 communiqué, Ntawukulilyayo testified that he went to Muyaga commune on 18 May and attended a meeting there. T. 15 December 2009, p. 29; T. 17 December 2009, pp. 54-55, 73; Prosecution Exhibit 21E (letter dated 14 May 1994). Ntawukulilyayo also authenticated a letter he sent to the prefect on 28 May 1994. It reads that he visited the five communes and addressed "the people" concerning security as well as the need to assist the Rwandan army. He requested the assistance of soldiers to aid members of the population "in finding out whether there are no enemies amongst [] refugees" that had gathered in Gisagara. However, Ntawukulilyayo was not specifically asked to discuss this letter in the context of the 18 May meeting at Muyaga commune. See T. 17 December 2009, pp. 73-79; Prosecution Exhibit 30E (letter dated 28 May 1994).

⁵⁰⁷ Ntawukulilyayo, T. 8 December 2009, pp. 36, 40-41; T. 15 December 2009, pp. 20-21.

⁵⁰⁸ Ngendahayo, T. 23 September 2009, pp. 7, 9, 11-12, 52. At the time of his testimony, Ngendayaho was living in exile in Malawi. He had heard from members of his family that he had been convicted in absentia in Rwanda for participation in attacks and sentenced to 19 years of imprisonment. He denied having committed such crimes. T. 23 September 2009, pp. 47-48, 50-51, 53-54.

⁵⁰⁹ Ngendahayo, T. 23 September 2009, pp. 12-13, 15-19, 39, 52-53; Defence Exhibit 46 (sketch).

they could be hiding in bushes and suggested that they be cut down and that civilians conduct patrols. Muvunyi spoke last, instructing the population that they too needed to fight the war. He warned, for example, that three persons could take different positions and shoot and that they must know how to react. Shortly after, three soldiers fired gunshots to simulate the experience, but it caused the crowd, which had grown to about 1,000 persons, to disperse in a panic.⁵¹⁰

361. The Witness, who had met Ntawukulilyayo when the latter was appointed as the sub-prefect in August or September 1990, said that he was not present during the meeting. He was unaware of any other meeting occurring in Muyaga commune and testified that, given his position, he would have been informed of any other had it occurred.⁵¹¹

4.3 Deliberations

362. The Indictment alleges that near the end of May 1994, Ntawukulilyayo urged those gathered in front of the Muyaga commune deputy *bourgmestre*'s house to search and kill Tutsis before the arrival of the RPF. The Prosecution argues that two witnesses provided relevant evidence. Witness BAW testified that, between 25 and 28 May, Ntawukulilyayo addressed a crowd near the deputy *bourgmestre*'s house, inciting them to kill Tutsis and dispose of bodies at the sector office. In the Prosecution's view, Witness AYD's testimony that, in late May or early June, Ntawukulilyayo was one of several prominent officials addressing a crowd at the Mamba sector office corroborates this account. Through Louis Ngendahayo, the Defence concedes that a meeting occurred in front of the Mamba sector office in late May, involving many of the officials identified by Witness AYD. However, Ngendahayo denied that Ntawukulilyayo was present. The Chamber first considers whether the Prosecution witnesses referred to the same event, before evaluating the merits of their evidence.

363. At the outset, the Chamber notes that Witness BAW's description of Ntawukulilyayo addressing a gathering in late May, in front of the deputy *bourgmestre*'s house, in Mamba sector, is in marked contrast to Witness AYD's account that Ntawukulilyayo was the fourth of five officials who spoke. This discrepancy is significant given Witness BAW's active involvement in politics in 1994. Had military and government officials such as Muvunyi, Nteziryayo, Ruzindaza, and Kalimanzira played roles as prominent as those described by Witness AYD, it seems unlikely that Witness BAW would have omitted reference to them in his testimony.⁵¹²

364. Moreover, Witness BAW stated that this meeting occurred in a football field, less than eight metres from the deputy *bourgmestre*'s house, near the Mamba sector trading centre, and was approximately 20 metres from the Muyaga commune office.⁵¹³ Witness AYD, on the other hand, testified that the meeting occurred at the Mamba sector office.⁵¹⁴

⁵¹⁰ Ngendahayo, T. 23 September 2009, pp. 19-29, 32-36.

⁵¹¹ Ngendahayo, T. 23 September 2009, pp. 10-11, 13, 29, 37-41, 52.

⁵¹² The Chamber notes that Witness BAW was not questioned about whether any other officials were present but nonetheless considers that this point raises questions as to whether the two witnesses described the same event.

⁵¹³ See Witness BAW, T. 19 May 2009, pp. 43-45, 47. Witness BAW was specifically asked about the exact location in Mamba sector. See T. 19 May 2009, p. 43.

⁵¹⁴ See Witness AYD, T. 20 May 2009, p. 31. In his prior statements to Tribunal investigators, Witness AYD identified the location as the "Muyaga communal office" and the "*Bureau communal de Mamba*". See Defence

According to Louis Ngendahayo, the distance between these two locations is nearly half a kilometre, and separated by a business centre and houses.⁵¹⁵

365. In the Chamber's view, the accounts provided by Witness BAW and AYD are sufficiently different to suggest that they may have described separate gatherings.⁵¹⁶ In any event, the Chamber must assess the individual strengths of each Witness' evidence.

366. Turning first to Witness BAW, the Chamber observes that there were minor variances in his testimony. Notably, during direct-examination, he testified that he did not arrive in Muyaga commune until around 25 May, and that he observed Ntawukulilyayo address a gathering between 27 and 28 May.⁵¹⁷ During cross-examination, he said that he arrived in the commune around 19 May, and that the gathering occurred on 25 May.⁵¹⁸ Given the significant lapse of time between the events and the Witness' testimony, the differences appear immaterial.

367. Regarding Witness BAW's testimony and prior statements, while this event features in his June 2002 statement, it is not contained in his first two statements from June 2000 and March 2001. Notably, the June 2000 statement refers to the Witness hiding at the home of Alexis Mutezinshuti and describes observing refugees at the prefecture office but makes no reference to observing the 15 May gathering in front of the house. The omission raises some concern, given that the June 2000 statement accounts for Witness BAW's activities up to the end of June 1994 and makes reference to staying with Mutezinshuti. While the June 2000 statement appears to have been taken in relation to Ndindiliyimana, it refers to a number of other persons, such as Muvunyi, Bikindi, and Nteziryayo, among others.

368. Witness BAW's March 2001 statement, while a follow-up to the June 2000 statement, also makes no reference to Ntawukulilyayo with respect to this incident. However, accused persons in the *Nyiramasuhuko et al.* proceedings, and not Ntawukulilyayo, appear to have been the target of that investigation. Although the statement refers to Ntawukulilyayo's involvement in a dispute on 20 May 1994, notably, the dispute also involved accused persons from the *Nyiramasuhuko et al.* case.⁵¹⁹

369. Nonetheless, the Chamber considers that these discrepancies, when viewed in the context of Witness BAW's entire testimony in this proceeding, as well as concerns noted elsewhere, raise doubts about the Witness' account (II.3.3.2). Moreover, Louis Ngendahayo testified that the home of the deputy *bourgmestre* was occupied by a handicapped Tutsi called

Exhibit 34E (statement of 3 November 1999) p. 3 and Defence Exhibit 35F (statement of 31 October and 20 December 2001) p. 4.

⁵¹⁵ Ngendahayo, T. 23 September 2009, pp. 17-18 (the distance from the assistant *bourgmestre*'s home and the Mamba sector office was about 400 metres); Defence Exhibit 46 (sketch), which indicates that the "Centre de Négoce de Gakoma", which is lined with houses, sits between the football field near the assistant *bourgmestre*'s home and the Mamba sector office.

⁵¹⁶ Chambers Exhibit 1 (Confidential Report on Site Visit, 5 May 2010), para. 7, 8 (ix).

⁵¹⁷ Witness BAW, T. 14 May 2009, p. 26.

⁵¹⁸ Witness BAW, T. 19 May 2009, pp. 35-39 (in Muyaga commune on 19 May 1994), 44 (observed Ntawukulilyayo around 25 May 1994).

⁵¹⁹ Defence Exhibit 21E (statement of 6, 7 and 10 June 2000) p. 8; Defence Exhibit 22E (statement of 28 March 2001).

Isadore Karema and not Alexis Mutezinshuti.⁵²⁰ Under the circumstances, the Chamber finds Witness BAW's evidence insufficient to support findings beyond reasonable doubt.

370. Turning to Witness AYD, the Chamber notes that he had no knowledge of the Accused prior to the genocide. He only became aware of his identity during a gathering on about 25 April 1994, which Ntawukulilyayo purportedly attended.⁵²¹ However, when the Chamber considers his evidence with respect to the 25 April gathering in light of his testimony in the *Nyiramasuhuko et al.* case, questions arise as to whether Ntawukulilyayo was present. In that proceeding, the Witness described the meeting and officials in attendance but did not mention Ntawukulilyayo. Moreover, during his testimony in this case, he attributed statements to Ntawukulilyayo that, in his evidence before the *Nyiramasuhuko et al.* Trial Chamber, it appears Muvunyi had made.⁵²² The Chamber thus has doubts with respect to the Witness' testimony that he first saw Ntawukulilyayo at the 25 April gathering. The early May or late June meeting may, therefore, have been the first time that Witness AYD saw the Accused, thus raising significant doubt about the Witness' ability to identify him. Further questions arise when his evidence is considered in light of his prior statements.

371. The Defence confronted Witness AYD with his statement to Tribunal investigators from November 1999, which refers to a meeting at the Muyaga commune office on 4 or 5 June 1994.⁵²³ He explained that this information pertained to a subsequent meeting on 10 June, which he had previously testified about, where Ntawukulilyayo promised to provide weapons.⁵²⁴ However, there are several parallels in the November 1999 statement and the Witness' testimony suggesting that the statement referred to the meeting at issue in the present context. Similar to his testimony, the statement described Muvunyi informing those gathered how three *Inkotanyi* can capture a commune and Nteziryayo introducing himself as the next prefect of Butare.⁵²⁵ It also referred to officials employing metaphors involving killing lice and crushing coffee as a means to emphasise the need to exterminate Tutsis.⁵²⁶

⁵²⁰ Ngendahayo, T. 23 September 2008, pp. 17-18. Ngendayaho also testified that an employee working at the inspectorate named "Murecyeyinshute" lived at the assistant *bourgmestre*'s home. T. 23 September 2009, p. 18. It is unclear to the Chamber whether this person was the Alexis "Mutezinshuti" identified by Witness BAW.

⁵²¹ Witness AYD, T. 20 May 2009, pp. 57, 59, 61.

⁵²² Defence Exhibit 36E (*Nyiramasuhuko et al.*, T. 20 April 2004), pp. 5 (with respect to a meeting on 25 April, Witness AYD described Muvunyi coming to the market square with some 40 soldiers), 6 (the agronomist was also present and Muvunyi, the agronomist and Thomasin Burikanto took the floor), 7 ("[Muvunyi] told us that he came to urge us to kill Tutsis because in other areas they had finished doing so. [] He asked the audience, 'Who was fearless in our mist.' [] He wanted to [] select from our mist someone who [could] trigger the war – the massacre of the Tutsis." The agronomist said "he was a daredevil, fearless" and Thomasin Burikanto also spoke), 8 (Martin Kabarira also spoke. There were no other officials at the meeting, "apart from those I have referred to, and I'm talking about the first meeting." The "second meeting" took place between late May and early June.). In this proceeding, Witness AYD also recounted the first meeting taking place on about 25 April 1994, Muvunyi and the agronomist were present, as well as other officials and soldiers, and the message to the public was essentially that Tutsis had to be killed and the officials asked for courageous persons to accomplish the task. Witness AYD, T. 20 May 2009, pp. 29 (Ntawukulilyayo said "[t]he enemies have been killed in the other *communes*" and "I would like to see some courageous persons of this commune".), 30 (the meeting was held on 25 April 1994).

⁵²³ Defence Exhibit 34 (statement of 3 November 1999).

⁵²⁴ Witness AYD, T. 20 May 2009, pp. 47, 51, 53.

⁵²⁵ Defence Exhibit 34E (statement of 3 November 1999) pp. 3-4.

⁵²⁶ When testifying, Witness AYD stated that Ruzindaza referred to killing lice and that Callixte Kalimanzira discussed crushing coffee. T. 20 May 2009, pp. 32, 34. His statement, however, described Ruzindaza using a coffee metaphor and Nteziryayo referring to lice. Defence Exhibit 34E (statement of 3 November 1999) pp. 3-4.

Notably, however, the statement is different from his testimony in that it makes no mention of Ntawukulilyayo's participation. Witness AYD explained that he had discussed Ntawukulilyayo.⁵²⁷ The Chamber doubts this explanation. It is unlikely that had the Witness described Ntawukulilyayo's involvement in the gathering that it would have been omitted.

372. In a statement to Tribunal investigators from October and December 2001, Witness AYD once again appears to have discussed the same meeting. It is described as having occurred in front of the Mamba sector office on 5 May 1994, rather than later in the month or in early June. However, similar to his testimony, Muvunyi is described as having spoken first and warning those present how three soldiers could capture a commune. Nteziryayo also addressed the gathering by making comparisons between killing lice and killing Tutsis.⁵²⁸ In this instance, the statement refers to Ntawukulilyayo. He purportedly described the coffee refining process as a means to instruct those gathered to kill Tutsis.⁵²⁹ Finally, Witness AYD provided a third statement to Tribunal investigators in October 2008. Notably, it refers to Ntawukulilyayo and Muvunyi addressing a gathering three weeks after President Habyarimana's death, but makes no mention of the meeting at issue.⁵³⁰

373. In this instance, the Chamber considers the significant differences between these statements and Witness AYD's testimony raise doubt about his reliability. Moreover, the fact that he did not mention Ntawukulilyayo in his October and December 2001 statement, and then attributed statements to Ntawukulilyayo that, in his evidence before the Chamber, Kalimanzira had made, creates confusion.⁵³¹ While fundamental themes of what was said at the meeting are relatively constant, the timing and participants shift significantly.⁵³² When these discrepancies are considered in light of concerns regarding the Witness' ability to

⁵²⁷ Witness AYD, T. 20 May 2009, pp. 49, 53.

⁵²⁸ Defence Exhibit 35E (statement of 31 October and 20 December 2001) p. 5.

⁵²⁹ Defence Exhibit 35E (statement of 31 October and 20 December 2001) pp. 5-6.

⁵³⁰ Defence Exhibit 39 (statement of 30 October 2008).

⁵³¹ Compare Witness AYD, T. 20 May 2009, p. 34 ("A. Yes. When Callixte Kalimanzira spoke after Dominique, but we did not know him previously, now he said that coffee was being grown in our area, and that it needed to be crushed and put in water, so that the good coffee could ... settle at the bottom and the rest will rise to the top. And that the good coffee seeds will be dried, not the bad seeds. ... Judge Muthoga: What did you understand about the coffee needing to be sieved? The witness: You see the bad coffee seed would be the Tutsi. So he was referring to Tutsis when he said that the good coffee will be processed properly, whereas the bad seed had to be thrown away because it was floating above the water ...") and Defence Exhibit 35E (statement of 31 October and 20 December 2001) p. 5 ("A person named Dominique also gave a short speech and said: 'You know me, I am a native of your region and I support what the people before me have said. Only, I wish to tell you this: When you grow coffee, first you pick the beans and then you husk them and put them in water, if any of the beans float you throw them away.' He was making a comparison with the Tutsis saying that they had to be killed.").

⁵³² Witness AYD testified that, in late May or early June 1994, Colonel Tharcisse Muvunyi, Alphonse Nteziryayo, Ruzindaza, Ntawukulilyayo, Callixte Kalimanzira addressed those who had gathered. Witness AYD's 3 November 1999 statement identifies Muvunyi, Nteziryayo, Ruzindaza and Vedaste Ntawuhignayo (communal agronomist) speaking at the meeting held on 4 or 5 June 1994. Defence Exhibit 34E (statement of 3 November 1999) pp. 3-4. His subsequent statement from 2001 specifies that Muvunyi, Martin Kabilira, Ntawukulilyayo, and Kalimanzira spoke at a 5 May 1994 gathering. Defence Exhibit 35F (statement of 31 October and 20 December 2001) pp. 5-6.

identify Ntawukulilyayo, as well as his conviction for crimes at issue in this case, the Chamber finds his evidence insufficient to support findings beyond reasonable doubt.⁵³³

374. While Ntawukulilyayo conceded that he attended a meeting in Muyaga commune on 18 May 1994, no details were elicited in relation to this visit.⁵³⁴ He denied being involved in the gatherings described by the Prosecution witnesses.

375. Furthermore, Ngendahayo, who appears to have attended the same meeting as Witness AYD, denied that Ntawukulilyayo was present.⁵³⁵ Unlike Witness AYD, Ngendahayo, who was active in communal politics, had previous knowledge of who the Accused was and would have been able to identify him had he been there. While Ngendahayo's apparent fugitive status raises some concerns about his reliability, his evidence is sufficient to raise further doubt in the current context.

376. Consequently, the Chamber finds that the Prosecution evidence is insufficient to establish beyond reasonable doubt that, in late May 1994, Ntawukulilyayo urged persons, outside the deputy *bourgmestre's* house in Muyaga commune, to search for and kill Tutsis, as charged in the Indictment. Nor is it sufficient to establish that he addressed persons at the Mamba sector office, in Muyaga commune. Under the circumstances, the Chamber does not consider it necessary to address the Defence objections with respect to notice.

⁵³³ The Chamber also considers that Witness AYD is an alleged accomplice of Ntawukulilyayo. His Rwandan proceedings have concluded, and he has completed his prison sentence for genocide related crimes. Nonetheless, external pressures may continue to generate an interest in shifting responsibility to others, such as the Accused.

⁵³⁴ Ntawukulilyayo, T. 15 December 2009, p. 29; T. 17 December 2009, pp. 54-55, 73. The Accused's letter of 14 May 1994, requesting that a meeting be held at the Muyaga commune office on the morning of 18 May to discuss security and assistance to the Rwandan army, indicates that those invited to participate include all communal staff, *conseillers*, political party representatives, and various other members of the general population. Prosecution Exhibit 21 (letter of 14 May 1994). The 28 May communiqué to the Butare prefect confirmed that the Accused visited the communes within the sub-prefecture, and indicates that he generally discussed security issues and the need to provide assistance to the Rwandan army as well as obtain assistance to search for infiltrators among refugees. Prosecution Exhibit 30 (letter of 28 May 1994). Under the circumstances, this is insufficient to corroborate the testimonies of Witness BAW or AYD.

⁵³⁵ The common location of the meeting (in front of Mamba sector office), its participants (Muvunyi, Nteriyayo, Ruzindana) and the themes addressed (Muvunyi's warning involving three soldiers) leave a strong impression that Witnesses AYD and Ngendayaho were referring to the same event. Indeed, a review of Witness AYD's statements from November 1999, as well as October and December 2001, not only indicates that Muvunyi spoke about how three persons could capture a commune, but further describes soldiers firing shots into the air, closely reflecting Ngendahayo's testimony. See Defence Exhibit 34E (statement of 3 November 1999) p. 3; Defence Exhibit 35E (statement of 31 October and 20 December 2001) pp. 4-5.

5. MEETING AT KIRARAMBOGO, NYABITARE SECTOR, MUGANZA COMMUNE, 25 MAY 1994

5.1 Introduction

377. The Indictment alleges that around 25 May 1994, Ntawukulilyayo attended a meeting in Kirarambogo, Nyirkanywero *cellule*, Nyabitare sector, where Alphonse Nteziryayo and Judge Ruzindaza instructed those present to flush out and kill all surviving Tutsis. The Accused's silence showed his support for these speeches. The Prosecution relies on the testimony of Witness BAZ.⁵³⁶

378. The Defence submits that the evidence is inconsistent with the Indictment, disputes the allegation and points to the testimonies of Ntawukulilyayo and Witness KAA.⁵³⁷

5.2 Evidence

Prosecution Witness BAZ

379. Witness BAZ, a Hutu, was a teacher in 1994 and lived in Kibayi commune.⁵³⁸ In the second or third week of May 1994, he heard that instructions were going to be given in light of the imminent arrival of the RPF and followed others to the Nyabitare sector marketplace in Muganza commune, where persons from various areas, including Kirarambogo, gathered.⁵³⁹ There, the Witness saw Ntawukulilyayo, Tharcisse Muvunyi and Alphonse Nteziryayo. The sub-prefect spoke to the crowd first, thanking residents for having killed the enemy. He warned that the job was not complete and that they needed to ensure that all Tutsis had been identified. Nteziryayo also spoke, directing the youth to receive paramilitary training in order to fight the *Inyenzi*. Muvunyi also said that not everyone had been identified and employed a Rwandan proverb that emphasised all Tutsis, including women married to Hutus, should be killed.⁵⁴⁰

380. The Witness left the gathering before it ended but testified that persons returned to their *cellules* to search for Tutsis. Subsequently, attackers killed John Rwezibamba, John Habinshuti and others the Witness did not know. He was not present for these killings.⁵⁴¹

⁵³⁶ Indictment, para. 27; Prosecution Closing Brief, paras. 393-394, 407-408, 434-439. The Prosecution does not refer to Witness AXV in its Closing Brief in relation to this incident, nor in its final submissions. See T. 14 June 2009. However, it is clear from its pre-trial submissions that he was intended to lead evidence in support of it. See Prosecution's Compliance with Further Orders to the Parties Concerning Commencement of Trial, 3 April 2009, Annex A2, para. 5 (which refers to paragraph 26 of the 13 June 2005 indictment – the operative indictment at the time of the filing – which corresponds with paragraph 27 in the Indictment). The Chamber will consider the relevant evidence.

⁵³⁷ Defence Closing Brief, paras. 1231-1252.

⁵³⁸ Witness, BAZ, T. 21 May 2009, pp. 29-30; Prosecution Exhibit 12 (protected information sheet).

⁵³⁹ Witness BAZ testified that Kirarambogo was an area that included more than one *cellule*. T. 21 May 2009, pp. 21, 34.

⁵⁴⁰ The proverb Witness BAZ referred to was: "*Uhora muri cugi cugi bakagucumita umwambi*", which was translated in court as: "When you get engulfed in sexual relations, you ran the risk that the enemy would pierce you with an arrow ...". T. 21 May 2009, p. 18.

⁵⁴¹ Witness, BAZ, T. 21 May 2009, pp. 15-19, 34-36, 41, 45-47, 49. Witness BAZ was arrested in August 1996. He confessed to killing two women and a young girl in Kabuye and was convicted by the *Gacaca* court in Dahwe in 2007 and sentenced to 20 years of imprisonment. He was also convicted by a *Gacaca* court in Rwamiko in 2007 for crimes committed in that region. The Rwamiko court, however, also considered the crimes



Witness AXV

381. Witness AXV testified about attending a meeting with Ntawukulilyayo in Kirarambogo around 25 May 1994. No further details were elicited regarding who was present, where precisely the meeting was held, and what specifically was said.⁵⁴²

Ntawukulilyayo

382. Ntawukulilyayo denied that he attended a public meeting in Kirarambogo in Nyabitaré sector around the end of May, or at any time from April to July 1994.⁵⁴³

Defence Witness KAA

383. Witness KAA, a Hutu, was a student who had returned to his parents' home in Muganza commune for Easter recess in April 1994.⁵⁴⁴ In the end of May, he attended a meeting at a playground area in Kirarambogo *cellule*, Nyabitaré sector, approximately eight to ten kilometres from his home. It started between 10.00 a.m. and noon. Muganza *Bourgmestre* Chrysologue Bimenyimana, spoke first, stating that the meeting's purpose was for pacification. However, he warned that the RPF could attack from neighbouring Burundi and that persons needed to be vigilant. Prefect Sylvain Nsabimana next addressed the crowd, emphasising that the war remained ongoing and expressed his concerns about an RPF advance from Burundi. Alphonse Nteziryayo added that young persons had to enrol in the army and that night rounds should be conducted. He identified the enemy as Tutsis and persons who collaborated with the RPF. Ruzindaza, the president of the Butaré Court of First Instance, said that the population should be prepared to shed blood for their country. Holding the Bible, he said that those who did would be blessed by God. The Witness remained for the entire meeting. While he knew Ntawukulilyayo as the sub-prefect of Gisagara, he did not see him there. Colonel Tharcisse Muvunyi, however, was present.⁵⁴⁵

5.3 Deliberations

384. The Prosecution points to Witness BAZ, who testified about the meeting at the market in Nyabitaré sector in the second or third week of May, to support its allegation in paragraph 27 of the Indictment. It also draws the Chamber's attention to a communiqué dated 14 May 1994 sent from Ntawukulilyayo requesting *bourgmestres* to inform relevant persons that meetings will be held at various commune offices to discuss security issues.⁵⁴⁶ The Chamber considers that Prosecution Witness AXV's testimony is also relevant

385. Turning first to Witness BAZ, the Chamber considers his testimony in light of his prior statements to Tribunal investigators in October 1999, February 2000 and October 2008.

the Witness committed elsewhere and imposed a 20 year sentence as well. He was released after approximately 11.5 years of detention and was participating in communal labour at the time of his testimony. T. 21 May 2009, pp. 10-11, 20-33, 35, 38-39.

⁵⁴² Witness AXV, T. 25 May 2009, p. 31.

⁵⁴³ Ntawukulilyayo, T. 16 December 2009, p. 57.

⁵⁴⁴ Witness KAA, T. 18 November 2009, pp. 66-67; Defence Exhibit 63 (protected information sheet). At the time of his testimony, Witness KAA was living in exile, having left Rwanda in July 1994. He did not believe he was facing any criminal charges there. T. 18 November 2009, pp. 75-76.

⁵⁴⁵ Witness KAA, T. 18 November 2009, pp. 68-74, 78.

⁵⁴⁶ Prosecution Closing Brief, para. 436; Prosecution Exhibit 21 (letter of 14 May 1994). The letter indicates that one such meeting would occur in Muganza commune on 19 May 1994.



While the first statement mentions Ntawukulilyayo with respect to events at Kabuye hill, it contains no reference to this meeting.⁵⁴⁷ However, the second statement, which sought to add information to the first, does refer to the gathering, but does not indicate that Ntawukulilyayo was present or participated in it.⁵⁴⁸ The third statement, taken after Ntawukulilyayo's arrest, describes his role at the meeting but does not refer to any of the other persons who allegedly spoke to the crowd on that occasion.⁵⁴⁹

386. With respect to Witness BAZ's October 1999 statement, the Witness explained that he did not mention the meeting or Ntawukulilyayo's involvement because he was only answering questions concerning Alphonse Nteziryayo.⁵⁵⁰ This explanation is not entirely convincing since he testified before the Chamber that Nteziryayo participated in this meeting. Of greater significance, the statement clearly was not limited to Nteziryayo's conduct given the extensive details provided about the acts of other officials and prominent persons, including Muvunyi, Ruzindaza and Uwizeye. Indeed, it refers to Ntawukulilyayo's order to search Tutsi homes prior to killings at Kabuye hill.⁵⁵¹ In this regard, the absence of any mention about the meeting and Ntawukulilyayo's role in it raises questions about the reliability of the Witness' subsequent testimony.

387. Turning to the February 2000 statement, which refers to the meeting, Witness BAZ explained that he was only asked questions about Tharcisse Muvunyi.⁵⁵² Again, this explanation is not convincing. The statement also describes the conduct of Muvunyi during the meeting and the presence of Nteziryayo and Ruzindaza but makes no mention of Ntawukulilyayo.⁵⁵³ The Chamber finds it surprising that there is no reference to the Accused, given his prominent role at the meeting, as recounted in the Witness' testimony. The Chamber also recalls concerns expressed elsewhere with respect to the reliability of Witness BAZ (II.1.3.3). In sum, the Chamber finds his evidence insufficient to support findings beyond reasonable doubt.

388. The Chamber has also considered the communiqué of 14 May 1994, as well as the testimonies of Witness AXV and Ntawukulilyayo with respect to it. It has also reviewed a 28 May communiqué from Ntawukulilyayo to the Butare prefect and the Accused's testimony about it.⁵⁵⁴ In the Chamber's view, it appears that this evidence, as it relates to a meeting in Muganza, concerns one that would have taken place at the Muganza commune office.⁵⁵⁵ Moreover, evidence led through Witness AXV and Ntawukulilyayo pertaining to this letter, and ultimately the meetings referred to in it, is insufficiently detailed to corroborate the fundamental features of Witness BAZ's account.⁵⁵⁶

⁵⁴⁷ Defence Exhibit 44E (statement of 19 October 1999).

⁵⁴⁸ Defence Exhibit 43E (statement of 2 February 2000) p. 3.

⁵⁴⁹ Defence Exhibit 41F (statement of 29 October 2008) p. 3.

⁵⁵⁰ Witness BAZ, T. 21 May 2009, pp. 48-49.

⁵⁵¹ Defence Exhibit 44F (statement of 19 October 1999) pp. 4-6.

⁵⁵² Witness BAZ, T. 21 May 2009, pp. 46, 48.

⁵⁵³ Defence Exhibit 43E (statement of 2 February 2000) p. 3.

⁵⁵⁴ See Witness, AXV, T. 25 May 2009, pp. 63-66; T. 26 May 2009, p. 30; Ntawukulilyayo, T. 17 December 2009, pp. 54-55, 73-79; Prosecution Exhibit 30 (letter of 28 May 1994).

⁵⁵⁵ See Ntawukulilyayo, T. 8 December 2009, p. 64 (the Muganza commune office is not in Kirarambogo).

⁵⁵⁶ Topics of discussion included establishing security committees at the commune, sector and *cellule* levels, instructing residents to stop "looting" and "killing", collecting money for the Rwandan army and training civilians to fight alongside it. Witness AXV's evidence contains no reference to specific individuals, precise location or the statements that Witness BAZ allegedly heard. Witness AXV, T. 25 May 2009, pp. 63-66; T. 26

389. The Chamber finds the Defence evidence to be of limited probative value. It is not clear that Witness KAA was necessarily referring to the same event as Witness BAZ. Furthermore, Witness KAA lived several kilometres from the location, limiting his physical ability to monitor activities there.

390. However, the Prosecution evidence is insufficient to establish beyond reasonable doubt that Ntawukulilyayo was present at a meeting in Nyabitare sector, Muganza commune around 25 May 1994 where authorities urged attendants to kill remaining Tutsis. In light of this finding, the Chamber considers it unnecessary to address the Defence's notice objections.

May 2009, p. 30; Prosecution Exhibit 21 (letter of 14 May 1994). Ntawukulilyayo affirmed having written the 14 and 28 May 1994 letters to the *bourgmestres* and prefect respectively. The second letter indicates that he visited the five communes, which, in light of the 14 May 1994 letter, would include a 19 May 1994 meeting at the Muganza commune office. The letter reads that at the meetings he addressed "the people" concerning security and the need to assist the Rwandan army. Ntawukulilyayo was not specifically asked to discuss the 19 May 1994 meeting at the Muganza commune office in the context of the 28 May letter. Ntawukulilyayo, T. 17 December 2009, pp. 73-79; Prosecution Exhibit 30 (letter of 28 May 1994).



CHAPTER III: LEGAL FINDINGS

391. The Prosecution has charged Ntawukulilyayo with genocide (Count I) or in the alternative, complicity in genocide (Count II) pursuant to Articles 6 (1) and 6 (3) of the Statute. It further charges Ntawukulilyayo with direct and public incitement to commit genocide (Count III) pursuant to Article 6 (1) of the Statute.

392. In its factual findings, the Chamber determined that hundreds and possibly thousands of refugees, mostly Tutsi, had gathered at Gisagara market between 20 and 23 April 1994, seeking refuge from attacks in their localities. The Chamber, Judge Akay dissenting, further determined that on the afternoon of Saturday 23 April, Ntawukulilyayo, accompanied by Callixte Kalimanzira, gathered refugees with the assistance of communal police, and directed them to Kabuye hill, assuring them that they would be fed and protected there. The refugees complied and were escorted towards Kabuye hill by communal police (II.1.3.2.iii).

393. The Chamber, Judge Akay dissenting, found that in the late afternoon or evening of that day, Ntawukulilyayo arrived on Kabuye hill in a vehicle along with Callixte Kalimanzira and soldiers. Ntawukulilyayo stopped briefly at the hill, allowing the soldiers to exit. Shortly thereafter, Ntawukulilyayo and Kalimanzira departed and the soldiers they transported, along with others, including communal police, attacked the civilian refugees using firearms and other weapons. Although Ntawukulilyayo did not return, the coordinated assault on Kabuye hill continued into the following day, and by that time included civilian participants. As a result, hundreds and possibly thousands of civilians, primarily Tutsis, were killed (II.1.3.4).

394. The Majority will now address Ntawukulilyayo's individual and superior responsibility for the killing of Tutsis on Kabuye hill, charged as genocide (Count I) and, in the alternative, complicity in genocide (Count II). It need not address the charge of direct and public incitement to commit genocide (Count III), as none of the allegations in support of this count were proven.⁵⁵⁷

1. CRIMINAL RESPONSIBILITY

1.1 Article 6 (1) of the Statute

1.1.1 Introduction

395. 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, committing as well as aiding and abetting.

396. Paragraph 5 of the Indictment charges Ntawukulilyayo with individual responsibility under all modes specified in Article 6 (1) of the Statute, with the exception of "planning".⁵⁵⁸

⁵⁵⁷ See II.3, II.4 and II.5.

⁵⁵⁸ During its opening submissions, the Prosecution stated that Ntawukulilyayo "planned with others, ordered, instigated, aided and abetted, failed to prevent, and failed to punish genocide", and that he "planned, organized, and supervised the massacre of children, women, and civilians who trusted in him for refuge at Kabuye hill". See T. 6 May 2009, p. 2. While "planning" was pleaded in the Indictment of 13 June 2005, the Chamber ordered the Prosecution to remove it as it had not pleaded any material facts in support of this mode of liability. See Decision on Defence Preliminary Motion Alleging Defects in the Indictment (TC), 28 April 2009, paras. 28-29; Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber's

Before setting forth legal principles applicable to the modes of liability, the Majority will first determine whether each form is sufficiently pleaded in light of the findings of the Chamber, Judge Akay, dissenting. The Majority will also determine whether the Prosecution continues to pursue them.

1.1.2 Modes of Liability: Pleaded and Pursued

(i) Notice Principles

397. The Appeals Chamber has held that where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the “particular acts” or the “the particular course of conduct” on the part of the accused which forms the basis for the charges in question.⁵⁵⁹ The Prosecution should only plead those modes of responsibility on which it intends to rely.⁵⁶⁰

398. As noted by the Appeals Chamber, it has been the practice of the Prosecution to merely quote the provisions of Article 6 (1) of the Statute in the indictment, leaving it to the Trial Chamber to determine the appropriate form of participation. It has warned that “in order to avoid possible ambiguity, it is advisable to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged”.⁵⁶¹ Nonetheless, if an individual count of the indictment does not indicate precisely the form of responsibility pleaded, an accused might have received clear and timely notice, for instance, in other paragraphs of the indictment. Thus, in considering whether an accused received clear and timely notice, the Indictment must be considered as a whole.⁵⁶²

399. The Chamber considers whether Ntawukulilyayo received adequate notice that he was charged with the modes of liability referred to by the Indictment and whether the Prosecution is pursuing them.

(ii) Ordering

400. Paragraph 5 of the Indictment includes general reference to Ntawukulilyayo’s responsibility for genocide or complicity in genocide pursuant to Article 6 (1) of the Statute through “ordering”. None of the paragraphs pleading the particulars in support of these counts, including the proven paragraphs, expressly refer to this mode of liability. Rather, they identify other modes of liability, such as committing, instigating and or aiding and abetting, which are also generally pleaded in paragraph 5.

401. The Defence argues that it was not put on notice that modes of liability, other than those expressly pleaded in the individual paragraphs of particulars, would be relied on by the Prosecution. Thus, while chapeau paragraph 5 of the Indictment refers to “ordering”, it argues

Decision of 28 April 2009 (TC), 18 May 2009, para. 19. The operative Indictment filed on 19 May 2009 does not plead “planning”. Accordingly, the Chamber does not discuss this mode of liability.

⁵⁵⁹ *Ntagerura et al.* Appeal Judgement, para. 25.

⁵⁶⁰ *Kvočka et al.* Appeal Judgement, para. 41.

⁵⁶¹ *Semanza* Appeal Judgement, para. 259.

⁵⁶² *Semanza* Appeal Judgement, paras. 259, 358; *Ntakirutimana* Appeal Judgement, para. 473; *Aleksovski* Appeal Judgement, para. 171, n. 319. See also *Gacumbitsi* Appeal Judgement, paras. 120-124.

that the Indictment is defective as this mode is not contained in any supporting paragraph pleading material facts.⁵⁶³

402. The issue of whether the Indictment sufficiently pleaded material facts supporting the mode of liability of “ordering” has already been litigated in this proceeding. In its first motion alleging defects in the indictment of 13 June 2005, the Defence argued that the indictment failed to sufficiently link particular allegations with the particular modes of liability pursuant to Article 6 (1) of the Statute.⁵⁶⁴ Subsequently, in its decision of 28 April 2009, the Chamber directed the Prosecution to remove modes of liability listed in paragraph 5 of the original indictment for which no material facts were pleaded.⁵⁶⁵ “Ordering” remained in paragraph 5 of the amended indictments filed on 1, 4 and 5 May.

403. In its decision of 18 May 2009, the Chamber, *proprio motu*, ordered the Prosecution to remove “planning”, as the supporting paragraphs did not plead material facts supporting it.⁵⁶⁶ It did not give similar instructions as it related to “ordering”. “Ordering” again remained in paragraph 5 of the operative Indictment, filed on 19 May 2009. Thus, the Indictment provided a clear indication that “ordering” was still being pursued by the Prosecution. The Chamber’s decisions implicitly acknowledged that the material facts supporting this form of liability were sufficiently pleaded in the Indictment.⁵⁶⁷

404. Indeed, 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.⁵⁶⁸ In *Semanza*, the Appeals Chamber found that the accused was on sufficient notice that he was being charged with “ordering”, although the relevant indictment paragraph pleading the material facts in support of it did not expressly allege “ordering”. The Appeals Chamber noted that the preamble paragraph alleged all forms of responsibility listed in Article 6 (1) of the Statute. Furthermore, the material facts pleaded in the relevant indictment paragraph, as well as other paragraphs showing the accused’s “prominent” role in the attacks and his superior status *vis-à-vis* the attackers, when read together, provided the Defence with sufficient notice that “ordering” was being pursued.⁵⁶⁹

405. Similarly, in *Gacumbitsi*, the Appeals Chamber held that the Trial Chamber erred in not considering aiding and abetting as a relevant mode of liability. It found that the relevant

⁵⁶³ See Defence Closing Brief, paras. 38, 51-52, 58 (“paragraph 5 of the Indictment refers to this mode of participation without, however, mentioning any physical act relating to it”). The Defence’s position is illustrated in part by its arguments that the Prosecution Pre-Trial Brief contains reference to Ntawukulilyayo having “ordered” killings at roadblocks, when the Indictment only specified committing and/or aiding and abetting. Defence Closing Brief, para. 195, citing Prosecution Pre-Trial Brief, para. 41.

⁵⁶⁴ See *Exceptions préjudicielles de la Défense fondées sur les vices de forme de l’acte d’accusation*, 20 March 2009, paras. 39-41 (generally asserting that the indictment is defective because the forms of liability are not sufficiently linked to particular facts).

⁵⁶⁵ Decision on Defence Preliminary Motion Alleging Defects in the Indictment (TC), 28 April 2009, paras. 28-29.

⁵⁶⁶ Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber’s Decision of 28 April 2009 (TC), 18 May 2009, para. 19.

⁵⁶⁷ Notably, the Defence did not again object to “ordering” in its third defects motion nor did the Chamber find it insufficiently pleaded in its final defects decision. See *Requête de la Défense sur la non-conformité à la décision de la Chambre du 18 mai 2009 de l’acte d’accusation amendé déposé par le Procureur le 19 mai 2009*, filed 1 June 2009; Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber’s Decision of 18 May 2009 (TC), 26 June 2009.

⁵⁶⁸ *Gacumbitsi* Appeal Judgement, para. 123.

⁵⁶⁹ *Semanza* Appeal Judgement, paras. 356-358.

paragraph, which expressly pleaded that the accused had “ordered” killings, also pleaded material facts sufficient to sustain an aiding and abetting conviction. The Appeals Chamber highlighted that a preamble paragraph alleged all forms of responsibility listed in Article 6 (1) of the Statute, including aiding and abetting. It further noted that other paragraphs provided context that would have also put the accused on notice that if the facts pleaded in the relevant indictment were proven, he clearly would have aided and abetted killings. When read together, the Appeals Chamber considered that the indictment provided sufficient notice that the Prosecution was also pursuing aiding and abetting.⁵⁷⁰

406. Like *Semanza*, the Indictment only generally pleads “ordering”. Nonetheless, the material facts pleaded generally with respect to Ntawukulilyayo’s role in the attack on Kabuye hill reflect his prominent role in it.⁵⁷¹ For example, paragraphs 7 and 8 indicate that he “arrived in vehicles full of gendarmes” and that they, along with others surrounded the hill and started shooting at refugees there. Paragraph 9 alleges that he gave orders to search Tutsi houses for the purposes of gathering them on Kabuye hill. Paragraphs 10 and 11 refer to him having “collected” and “transport[ed]” soldiers to Kabuye hill, who then participated in killings there. Moreover, the Indictment alleges that Ntawukulilyayo was the superior of these categories of assailants and exercised effective control over them.⁵⁷²

407. Given that the Indictment alleges his central role in the attacks, as well as his immediate proximity to the attackers and his superior status *vis-à-vis* the assailants, it also provided clear notice that “ordering” was being pursued by the Prosecution for the killings at Kabuye hill.⁵⁷³ Indeed, in its Pre-Defence Brief, the Defence denied the charge of “ordering” and did not object to its pleading.⁵⁷⁴

408. Turning to the post-Indictment submissions, the Prosecution in its Closing Brief stated its belief that “aiding and abetting” was the most appropriate form of liability for Ntawukulilyayo’s attacks at Kabuye hill. Nonetheless, it also argued that the facts supported a conviction for “ordering” and referred to paragraphs in its Pre-Trial Brief setting forth the law relevant to this mode of liability.⁵⁷⁵ Moreover, throughout its final submissions, it argued that “ordering” was a central component in assessing Ntawukulilyayo’s responsibility for the killings at Kabuye hill. It also stated that the Indictment paragraphs relevant to Article 6 (1) of the Statute sufficiently pleaded “ordering”, again providing notice that this mode of liability was part of its case.⁵⁷⁶ It further argued that Ntawukulilyayo could be held liable for “instigating and aiding and abetting” the crimes at Kabuye.⁵⁷⁷

⁵⁷⁰ *Gacumbitsi* Appeal Judgement, paras. 122-124.

⁵⁷¹ In *Semanza*, the Appeals Chamber found references in the indictment to Semanza having “organised”, “executed”, “led”, and “directed” massacres gave clear notice of his prominent role in the attack sufficient to support the allegation of “ordering”. *Semanza* Appeal Judgement, para. 355, 358.

⁵⁷² Indictment, paras. 17-22.

⁵⁷³ In considering the Indictment as a whole, the Majority is mindful that “ordering” does not require proof of an express order but can be proven through circumstantial evidence. See *Galić* Appeal Judgement, paras. 177-178, 389.

⁵⁷⁴ Defence Pre-Trial Brief, para. 11.

⁵⁷⁵ Prosecution Closing Brief, paras. 350-351; Prosecution Pre-Trial Brief, paras. 18-19.

⁵⁷⁶ Closing Arguments, T. 14 June 2010, pp. 5 (“This case is about how Dominique Ntawukulilyayo abused his authority as a sous-prefet of Gisagara. He did this by ordering soldiers, gendarmes, communal policemen, and Hutu civilians to massacre Tutsi civilians at Kabuye hill ...”), 7 (“I will now address, Your Honour, the issue of command responsibility as a superior, ...”), 10-11 (“The issue that I will address next, Your Honours, having referred you to the exact evidence where witnesses have said they saw the Accused in the presence of soldiers,



409. Under the circumstances, while the Indictment also pleads specific modes of liability in individual paragraphs, the Majority is satisfied that the Indictment provided Ntawukulilyayo with timely, clear and consistent notice that “ordering” was a mode of liability pursuant to Article 6 (1) of the Statute pursued by the Prosecution with respect to the killings at Kabuye hill. While the Prosecution expressed its opinion of what modes it felt were the most appropriate, it did not indicate that it was no longer pursuing “ordering”. Indeed, it expressly indicated that the facts relevant to the Kabuye hill attack supported this mode of liability. The Defence has not made any specific arguments as to prejudice suffered from any purported ambiguity in the Indictment or the Prosecution’s case as it relates to “ordering”. Consequently, the Majority will consider this mode of liability.

(iii) *Instigating*

410. As noted above, paragraph 5 of the Indictment includes general reference to various forms of individual responsibility pursuant to Article 6 (1) of the Statute, including “instigating”. “Instigating” is also expressly pleaded in a single paragraph setting forth particular acts in support of the counts of genocide (Count I) and complicity in genocide (Count II). The paragraph alleges that Ntawukulilyayo ordered civilians to search Tutsi homes in order to assemble and kill them at Kabuye hill, thereby “instigating” the killings.⁵⁷⁸ This allegation has not been proven (II.1.3.3).

411. In the Majority’s view, the Prosecution’s pleading of “ordering” and “instigating” are materially different. “Ordering” was only pleaded generally in the preamble (paragraph 5) and not in the following paragraphs alleging the particulars in support of Ntawukulilyayo’s alleged liability pursuant to 6 (1) of the Statute. It was therefore clear that this form of liability was intended to apply to all those paragraphs.⁵⁷⁹

412. While “instigating” is also generally alleged in the preamble, the Prosecution limited its applicability by expressly including it in the paragraph pleading particular acts to which it

is to ask Your Honours to find that the Accused gave orders to the soldiers at the hill to kill the refugees and that those [] orders were followed.”), 11 (referring to ordering soldiers and “command” over soldiers), 12 (“And, My Lords, I will also make a submission with regard to command authority []. That should the Chamber [] find that the only inference to draw from the circumstances of the Accused going up Kabuye hill with armed soldiers and leaving them there and immediately thereafter an attack ensuing, if the Chamber will find that the only reasonable inference to draw is that the Accused had ordered those soldiers to kill the refugees at Kabuye hill, then you should also find that the Accused had command responsibility over the soldiers because he gave an order and the order was implemented.”), 13 (referring to “effective control”, relevant to establishing a superior-subordinate relationship, the Prosecution made submissions that the only reasonable inference from “bringing soldiers to reinforce the attacks [] is that [Ntawukulilyayo] gave orders to the soldiers to kill the Tutsi civilians at Kabuye hill”), 13 (when asked by the Chamber to specify the portions of the Indictment where the Accused was charged with “ordering soldiers to kill Tutsis”, the Prosecution pointed to the material facts as pleaded in paragraphs 7, 10 and 11).

⁵⁷⁷ Closing Arguments, T. 14 June 2010, p. 39 (“The Prosecution urges the Chamber to find that the Accused personally instigated and aided and abetted genocide against Tutsis at Kabuye on 23rd and 24th April 1994.”).

⁵⁷⁸ Indictment, para. 9.

⁵⁷⁹ In this regard the Majority recognizes that the pleading in this Indictment is distinguishable from that used in the *Semanza* and *Gacumbitsi* cases, where the Prosecution generally left it to the Trial Chamber to select the appropriate mode of liability. *Gacumbitsi* Appeal Judgement, paras. 123-124; *Semanza* Appeal Judgement, para. 358. Here, the Prosecution expressly indicated the appropriate mode of liability, either by pleading it generally with no subsequent reference in the paragraphs pleading the particular acts (“ordering”), or pleading generally and then specifying the particular facts to which the mode applied (“instigating”, “committing” and “aiding and abetting”).



applied (paragraph 9). The Majority further considers that the applicability of “committing” and “aiding and abetting” have been similarly limited, as the Prosecution expressly set them forth in paragraphs it had determined supported them. This practice can also be found in the paragraphs relating to direct and public incitement to commit genocide (Count III). Thus, reading the Indictment as a whole, by expressly inserting these modes of liability in particular paragraphs, it is clear that the Prosecution intended to limit their applicability only to those paragraphs. That the Defence also understood this to be the case is clear from their post-Indictment submissions.⁵⁸⁰

413. The Majority notes that the Prosecution Closing Brief and its final submissions assert that the proven facts of Ntawukulilyayo’s role at Kabuye hill support a finding that he is responsible for “instigating” killings there.⁵⁸¹ However, such argument cannot modify the modes of criminal responsibility clearly pleaded in the Indictment.⁵⁸² Consequently, the Majority will not consider instigating in relation to the proven allegations.⁵⁸³

(iv) *Committing*

414. The proven paragraphs in this Indictment allege that Ntawukulilyayo “committed” killings on Kabuye hill pursuant to Article 6 (1) of the Statute.⁵⁸⁴ However, the Prosecution’s post-Indictment submissions clearly indicate that it is no longer pursuing this mode of liability. Its Closing Brief expressly omits reference to it when incorporating portions of the Pre-Trial Brief setting forth the legal principles relevant to each mode of liability under Article 6 (1) of the Statute.⁵⁸⁵ Similarly, it did not argue that committing was the proper form of liability for the proven allegations in its final submissions.⁵⁸⁶

415. That the Prosecution is no longer pursuing commission appears to be a logical consequence of its decision not to seek a conviction through the theory of joint criminal enterprise.⁵⁸⁷ The Appeals Chamber has held that it may also be unfair to convict an accused based on allegations that no longer appear to be pursued by the Prosecution.⁵⁸⁸ Consequently, the Chamber will not consider committing.⁵⁸⁹

⁵⁸⁰ See Defence Closing Brief, paras. 39, 53 (“only paragraph 9 of the Indictment refers to this mode of participation”).

⁵⁸¹ Prosecution Closing Brief, paras. 350-351; Closing Arguments, T. 14 June 2010, p. 39.

⁵⁸² See for example *Muhimana* Appeal Judgement, paras. 214-218, 224.

⁵⁸³ Even if the Majority were to consider “instigating” in relation to the proven allegations and found that they supported this form of liability, this would not impact Ntawukulilyayo’s sentence.

⁵⁸⁴ Indictment, paras. 8, 10.

⁵⁸⁵ Prosecution Closing Brief, para. 350, referring to paragraphs 11-19 and 27-28 of the Prosecution Pre-Trial, which outline the legal principles to all other modes of liability pursuant to Article 6 (1) of the Statute, while paragraphs 20 to 26 concern “committing”.

⁵⁸⁶ Closing Arguments, T. 14 June 2010, pp. 5-6, 12, 13, 39.

⁵⁸⁷ The Indictment of 13 June 2005 charged the Accused with commission through a joint criminal enterprise (JCE). It is clear, as confirmed by the Pre-Trial Brief, that the Prosecution originally sought to establish Ntawukulilyayo’s liability for committing pursuant to Article 6 (1) of the Statute through JCE. See Prosecution Pre-Trial Brief, paras. 20-26. However, the pleading of JCE was removed from paragraphs 5 and 23 of the Indictment filed on 4 May 2009. Further amendments were made to the Indictment on 5 May 2009 to make other paragraphs consistent with paragraphs 5 and 23. The operative Indictment was filed on 19 May 2009.

⁵⁸⁸ See *Ntagerura et al.* Appeal Judgement, paras. 146-150, 164.

⁵⁸⁹ Even if the Majority were to consider “committing” in relation to the proven allegations and found that they supported this form of liability, this would not impact Ntawukulilyayo’s sentence.

1.1.3 Legal Principles

416. "Ordering" requires that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order. The 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.⁵⁹⁰

417. The Appeals Chamber has held that an aider and abetter carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime, which have a substantial effect on its commission.⁵⁹¹ The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.⁵⁹² Tacit approval and encouragement, which substantially contributed to the crime, may also amount to aiding and abetting. In such cases, the accused's authority, combined with his presence at, or very near the crime scene, especially if considered together with prior conduct, may amount to an official sanction of the crime, thereby substantially contributing to it.⁵⁹³

418. The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.⁵⁹⁴ In cases of specific intent crimes, such as genocide, the aider and abetter must know of the principal perpetrator's specific intent.⁵⁹⁵

1.2 Article 6 (3) of the Statute

1.2.1 Legal Principles

419. 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: (i) the existence of a superior-subordinate relationship; (ii) the superior's knowledge or reason to know that the criminal acts were about to be or had been committed by his subordinates; and (iii) the superior's failure to take necessary and reasonable measures to prevent such criminal acts or to punish the perpetrator.⁵⁹⁶

420. A superior-subordinate relationship is established by showing a formal or informal hierarchical relationship. The superior must have possessed the power or the authority, *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The superior must have had effective control over the subordinates at the time the offence was committed.

⁵⁹⁰ *Semanza* Appeal Judgement, paras. 361, 363.

⁵⁹¹ *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, paras. 45-46; *Vasiljević* Appeal Judgement, para. 102; *Ntagerura et al.* Appeal Judgement, para. 370.

⁵⁹² *Blagojević and Jokić* Appeal Judgement, para. 127; *Blaškić* Appeal Judgement, para. 48; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 372.

⁵⁹³ *Muvunyi* Appeal Judgement, para. 80, citing *Brđanin* Appeal Judgement, paras. 273, 277.

⁵⁹⁴ *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 86; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 46; *Ntagerura et al.* Appeal Judgement, para. 370.

⁵⁹⁵ *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 86; *Krstić* Appeal Judgement, paras. 140-141. See also *Ntakirutimana* Appeal Judgement, paras. 500-501.

⁵⁹⁶ *Orić* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Judgement, para. 484; *Gacumbitsi* Appeal Judgement, para. 143; *Ntagerura et al.* Trial Judgement, para. 627; *Semanza* Trial Judgement, para. 400.



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.⁵⁹⁷

421. A superior will be found to have possessed or will be imputed with the requisite *mens rea* sufficient to incur criminal responsibility provided that: (i) the superior had actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit, were committing, or had committed, a crime under the Statute; or (ii) the superior possessed information providing notice of the risk of such offences by indicating the need for additional investigations in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by subordinates.⁵⁹⁸

422. 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 is 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.⁵⁹⁹

1.2.2 Deliberations

423. Paragraph 2 of the Indictment alleges that Ntawukulilyayo exercised *de jure* and *de facto* control over *bourgmestres*, *conseillers*, *responsables des cellules*, ten-house leaders, administrative personnel, gendarmes, communal police, *Interahamwe*, militias, and armed civilians in the sub-prefecture. Paragraph 17 further specifies persons or categories of persons, including soldiers, alleged to be subordinates of the Accused.⁶⁰⁰ The particular acts and omissions giving rise to Ntawukulilyayo's alleged responsibility for genocide or complicity in genocide pursuant to Article 6 (3) of the Statute are set forth in paragraphs 18 to 23.

424. The Chamber, Judge Akay dissenting, has found as follows: on the early afternoon of Saturday 23 April 1994, Ntawukulilyayo and Callixte Kalimanzira came to Gisagara market and together with communal police, gathered remaining refugees, mostly Tutsi, for the purposes of directing them to Kabuye hill. The refugees, who were promised by Ntawukulilyayo that they would be fed and protected on the hill, complied with his instructions and were escorted towards Kabuye hill by communal police (II.1.3.2.iii). Later that day, Ntawukulilyayo and Kalimanzira arrived on Kabuye hill with soldiers. They joined other assailants, including communal police in an attack on the civilians who had gathered there. Attacks continued into the following day, and by that time, involved civilian assailants.

⁵⁹⁷ *Halilović* Appeal Judgement, para. 59; *Gacumbitsi* Appeal Judgement, para. 143; *Kajelijeli* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, paras. 341-342; *Ntagerura et al.* Trial Judgement, para. 628; *Semanza* Trial Judgement, paras. 402, 415.

⁵⁹⁸ *Delalić et al.* Appeal Judgement, para. 232; *Hadžihasanović and Kubura* Appeal Judgement, para. 28; *Galić* Appeal Judgement, para. 184; *Bagilishema* Appeal Judgement, paras. 37, 42; *Ntagerura et al.* Trial Judgement, para. 629; *Semanza* Trial Judgement, para. 405.

⁵⁹⁹ *Bagosora et al.* Trial Judgement, para. 2014, citing *Delić* Trial Judgement, para. 64; *Strugar* Trial Judgement, para. 68; *Limaj et al.* Trial Judgement, para. 524.

⁶⁰⁰ Paragraph 17 of the Indictment refers to "Civil Defense Forces", communal police (including Vincent Twiringiyimana), civilian militias, local administrative officials, other soldiers and militiamen (including Lucien Simbayobwebe), Chrysologue Bimenyimana, Elie Ndayambaje, Célestin Rwankubito, Fidèle Uwizeye and other unknown participants.



As a result, hundreds and possibly thousands of civilians, primarily Tutsis, were killed (II.1.3.4). Consequently, the Majority will consider Ntawukulilyayo's authority generally as well as over these various categories of assailants.

(i) *General De Jure Authority*

425. The Prosecution seeks to establish Ntawukulilyayo's *de jure* and *de facto* authority over his alleged subordinates primarily through his position as sub-prefect during the relevant period. It submits that Ntawukulilyayo was the "substantive" prefect within the sub-prefecture. The Prosecution argues that, as the highest ranking civilian authority in Gisagara sub-prefecture and chairman of the MRND party at the communal level, Ntawukulilyayo was in charge of local administration and exercised authority over all law enforcement personnel, armed forces, and members of the civilian Hutu population, including the *Interahamwe*, from 7 April to 14 July 1994.⁶⁰¹

426. The Prosecution cites to Article 3 of the Legislative Decree No. 10/75 of 11 March 1975 to argue that Ntawukulilyayo "exercised the authority of the State in the sub-prefecture and served as the representative of the central Government".⁶⁰² However, that article refers only to the powers of the prefect.⁶⁰³ Rather, Articles 17 and 22 delineate the responsibilities and powers of the sub-prefect. Article 17 indicates that the sub-prefect shall "represent" the prefect in all his functions, while Article 22 states that the powers of the sub-prefect shall be determined by "the fact of his assignment by the Presidential Decree of appointment".⁶⁰⁴

427. This legislation raises questions about the Prosecution's argument that Ntawukulilyayo was vested with the powers of the prefect within his sub-prefecture. Indeed, Article 12 expressly provides that a prefect may, in writing, delegate some powers to an official within the prefecture, raising further doubts that his powers were automatically delegated to the sub-prefect.⁶⁰⁵

428. The Prosecution did not lead expert testimony on Ntawukulilyayo's *de jure* authority as a sub-prefect within Butare prefecture based on these provisions. The Presidential Decree relevant to his appointment was not admitted.⁶⁰⁶ Evidence outlining powers delegated to Ntawukulilyayo from the prefect do not form part of the record.

429. The legislation detailing the *de jure* powers of the sub-prefect is limited in determining the precise authority that was actually exercised by him in 1994. Thus, the Majority will consider more specific evidence of Ntawukulilyayo's *de jure* and *de facto* authority with respect to each category of alleged subordinates who have been found to have participated in the attacks on Kabuye hill.

⁶⁰¹ Prosecution Closing Brief, paras. 34-39, 49-56, 124-125, 131-139; Closing Arguments, T. 14 June 2010, pp. 5, 7, 11-15, 17, 22, 26, 39, 74.

⁶⁰² Prosecution Closing Brief, paras. 37-38.

⁶⁰³ Defence Exhibit 66 (*Décret-loi sur l'organisation et fonctionnement de la préfecture* of 11 March 1975 as modified on 14 August 1978), Article 3.

⁶⁰⁴ Defence Exhibit 66 (*Décret-loi sur l'organisation et fonctionnement de la préfecture* of 11 March 1975 as modified on 14 August 1978), Articles 17 and 22.

⁶⁰⁵ Defence Exhibit 66 (*Décret-loi sur l'organisation et fonctionnement de la préfecture* of 11 March 1975 as modified on 14 August 1978), Article 12.

⁶⁰⁶ Ntawukulilyayo testified that he never received the Presidential Decree installing him. T. 8 December 2009, p. 34.

(ii) *Communal Police*

430. The Prosecution asserts that Ntawukulilyayo had under his command all communal staff, including communal police, by virtue of his role as the “substantive” prefect in the five communes in Gisagara sub-prefecture.⁶⁰⁷ As noted above, the legislation relied upon is ambiguous as to Ntawukulilyayo’s *de jure* authority.

431. Relevant testimonies and legislation reflect that *bourgmestres*, who were primarily in charge of maintaining public order within communes, were the sole authority over communal police.⁶⁰⁸ Thus, in assessing Ntawukulilyayo’s *de jure* and *de facto* authority over communal police, it is instructive to also consider his authority over *bourgmestres*.

432. Ntawukulilyayo testified that his powers as they related to *bourgmestres* were limited to convening meetings with them, forwarding instructions and consulting them with respect to grievances received by his office. *Bourgmestres* reported directly to the prefect, who was their immediate supervisor, and were not obliged to follow instructions from him.⁶⁰⁹ Furthermore, while Ntawukulilyayo could file reports with the prefect concerning improper or illegal conduct of *bourgmestres*, the power to punish them was given to the prefect, Minister of the Interior and the President.⁶¹⁰ He also had no authority over communal employees generally.⁶¹¹

433. Article 8 of the Legislative Decree No. 10/75 of 11 March 1975 expressly gives the prefect *de jure* authority over communal authorities.⁶¹² Furthermore, legislation concerning the organisation of the communes indicates that prefects retain the power to impose sanctions, with the exception of suspension or revocation, upon *bourgmestres*.⁶¹³

434. Prosecution Witness AXV, a local government official within Gisagara sub-prefecture in 1994, testified that the sub-prefect was the administrative head for the sub-prefecture, representing the authority of the prefect. According to him, *bourgmestres* reported directly to the sub-prefect.⁶¹⁴ However, he explained that *bourgmestres* also reported to the prefect, and

⁶⁰⁷ Prosecution Closing Brief, paras. 39, 124, 136, 139.

⁶⁰⁸ See Witness AXV, T. 25 May 2009, pp. 24-25; Witness AXV, T. 26 May 2009 p. 12; Ntawukulilyayo, T. 10 December 2009, pp. 9-10, 31-33; Defence Exhibit 65 (*Loi sur l’organisation communale* of 23 November 1963 as modified on 5 August 1991), Article 104. See also Articles 103, 105-110. While the sub-prefect could requisition communal police, he would be required to cooperate with the officer in charge of the mission rather than to act as a superior. Defence Exhibit 71 (*Instruction Ministérielle n°01/02 sur le maintien et rétablissement de l’ordre* dated 15 September 1978), Articles 10 (the requesting authority would not have had command over the category of armed forces requisitioned), 13 (communal police may be requisitioned to maintain public order), 15 (includes the sub-prefect as an authority that could requisition armed forces).

⁶⁰⁹ Ntawukulilyayo, T. 8 December 2009, pp. 31, 34-35, 43; T. 10 December 2009, pp. 3-4, 15-18, 24, 26; T. 15 December 2009, pp. 15-22; T. 17 December 2009, p. 81.

⁶¹⁰ Ntawukulilyayo, T. 8 December 2009, pp. 32-34, 43-45; T. 10 December 2009, pp. 3-4, 24, 29; T. 15 December 2009, p. 18.

⁶¹¹ Ntawukulilyayo, T. 10 December 2009, pp. 25-26.

⁶¹² Defence Exhibit 66 (*Décret-loi sur l’organisation et fonctionnement de la préfecture* of 11 March 1975 as modified on 14 August 1978), Article 8.

⁶¹³ See Defence Exhibit 65 (*Loi sur l’organisation communale* of 23 November 1963 as modified on 5 August 1991), Article 46.

⁶¹⁴ Witness AXV, T. 25 May 2009, pp. 10, 13; T. 26 May 2009, pp. 8-10.



that the latter was responsible for personnel matters.⁶¹⁵ Notably, he previously testified in *Kalimanzira* that a *bourgmestre's* immediate supervisor was the prefect.⁶¹⁶ In addition, Witness AXV was detained at the time of his testimony and is an alleged accomplice of the Accused.⁶¹⁷ Thus, his evidence is also viewed with caution.

435. Ultimately, the general evidence about the relationship between the sub-prefect, and *bourgmestres* is equivocal. Consequently, whether Ntawukulilyayo exercised *de jure* authority over communal police is similarly ambiguous. However, the critical issue is whether Ntawukulilyayo exercised effective control over his alleged subordinates. While a showing of *de jure* authority may suggest the material ability to prevent or punish an offence, its proof is neither necessary nor sufficient to prove beyond reasonable doubt that an accused exercised effective control over his subordinates.⁶¹⁸ Accordingly, the Majority has not considered such evidence as decisive in its assessment of Ntawukulilyayo's authority. The main question is whether Ntawukulilyayo exercised effective control over the communal police.⁶¹⁹

436. The Majority considers that the events of Saturday 23 April 1994 are the most relevant in determining whether Ntawukulilyayo exercised effective control over communal police in relation to the crimes committed by them. The removal and attack that day demonstrates close coordination between the sub-prefect and communal police. These civilian security forces gathered refugees in and around Gisagara market to hear the sub-prefect's instructions. Moreover, Ntawukulilyayo told the civilians to go to Kabuye where they would be provided for, and communal police subsequently assisted in shepherding them there. Later, communal police attacked refugees at Kabuye hill after Ntawukulilyayo had brought soldiers there. It is likely that many of the communal police that participated in the attack had previously participated in the refugees' removal from Gisagara market earlier that day.

437. Such evidence may suggest that at these critical moments, Ntawukulilyayo was acting as the superior of these communal police and that he had effective control over them. However, this is not the only reasonable inference. The record lacks information with respect to whether Ntawukulilyayo interacted with the communal police who participated in the attacks on the hill. Moreover, the scale of the operation reflected broad coordination among various security forces, local and national civilian authorities and civilian assailants. Indeed, Callixte Kalimanzira's presence with Ntawukulilyayo at Gisagara market and Kabuye hill gives the strong impression that the national government had an interest and involvement in the massacre. Similarly, the presence of soldiers in Gisagara sub-prefecture, which did not have a military base, further indicates extensive coordination that involved authorities outside the jurisdiction for which Ntawukulilyayo was the administrative head.⁶²⁰ In the Majority's view, the record reflects that at the critical moments, Ntawukulilyayo used his influence as

⁶¹⁵ Witness AXV, T. 25 May 2009, p. 10; T. 26 May 2009, p. 9.

⁶¹⁶ Witness AXV, T. 26 May 2009, p. 10; Defence Exhibit 45E (*Kalimanzira*, T. 18 June 2008, p. 44).

⁶¹⁷ Prosecution Exhibit 13 (protected information sheet).

⁶¹⁸ *Renzaho* Trial Judgement, para. 752, citing *Orić* Appeal Judgement, paras. 91-92.

⁶¹⁹ *Orić* Appeal Judgement, para. 91.

⁶²⁰ Witness AXV, T. 25 May 2009, pp. 24-25; T. 26 May 2009, p. 11 (no soldiers or gendarmes based at Gisagara sub-prefecture office); Ntawukulilyayo, T. 10 December 2009, pp. 30 (no gendarmerie camp in Gisagara sub-prefecture); T. 10 December 2009, p. 35 and T. 16 December 2009, p. 48 (no military camp within Gisagara sub-prefecture). See also Witness AZV, T. 7 May 2009, pp. 45, 59 (presumed soldiers were from Butare as none were based in the area).

the sub-prefect to facilitate a wide-scale attack on refugees. However, it cannot conclude that he necessarily had the material ability to prevent or punish the assailants, including communal police, who participated in it.

438. In so finding, the Majority has also considered circumstantial evidence that tends to indicate that Ntawukulilyayo had some role in, at a minimum, passing on instructions regarding general security operations that were to be carried out by local government and its communities after the attack on Kabuye hill. He sent letters to *bourgmestres*, the *de jure* superiors of communal police, which contained instructions concerning security issues within the sub-prefecture.⁶²¹ He also sent letters to them to convene meetings with *bourgmestres*, other local officials and members of the public to discuss specific security measures that required local assistance.⁶²² While the purpose of some of these meetings is disputed and their outcomes not established, that some occurred is not.⁶²³ In sum, however, this evidence is too remote and general to support an inference that Ntawukulilyayo had the material ability to prevent or punish crimes committed by communal police at Kabuye hill. Indeed, there is no direct evidence that any instructions concerning security measures were in fact implemented resulting in criminal conduct. In view of all these circumstances, Ntawukulilyayo cannot be held responsible pursuant to Article 6 (3) of the Statute.

(iii) *Soldiers*

439. The Prosecution concedes that Ntawukulilyayo did not have *de jure* authority over soldiers.⁶²⁴ Like communal police, the sub-prefect had the authority to requisition armed forces, but they would have remained under the operational command of their officers.⁶²⁵


⁶²¹ See Prosecution Exhibit 20 (letter of 10 May 1994) (letter to *bourgmestres* on 10 May 1994, which includes instructions to implement security measures adopted by the Security Council of Butare).

⁶²² Prosecution Exhibit 19 (letter of 29 April 1994) (communication to *bourgmestres* on 29 April 1994, which requested that they come to the sub-prefecture on 3 May 1994 for the explicit purpose of determining the location and supervision of roadblocks); Prosecution Exhibit 21 (letter of 14 May 1994) (letter to *Bourgmestres* on 14 May 1994 asking that meetings be held within each of the communes between 17 and 20 May 1994. It requested the attendance of various categories of persons, including *conseillers*, for the purposes of discussing security and assistance to the Rwanda army).

⁶²³ Concerning the 3 May 1994 meeting at the Ndora commune office, compare Ntawukulilyayo, T. 16 December 2009, pp. 53-55, T. 17 December 2009, pp. 40, 54-59, 66 and Witness AXV, T. 25 May 2009, pp. 47, 50-55; T. 26 May 2009, pp. 31-34, 36, 37-38. Referring to a 14 May 1994 communiqué, Ntawukulilyayo testified that he went to Muyaga commune on 18 May and attended a meeting there. See Ntawukulilyayo, T. 15 December 2009, p. 29; T. 17 December 2009, pp. 54-55, 73. See also Ntawukulilyayo, T. 17 December 2009, pp. 73-79 and Prosecution Exhibit 30E (letter dated 28 May 1994) (letter from Ntawukulilyayo to the prefect on 28 May 1994 indicating that he visited the five communes and addressed “the people” concerning security as well as the need to assist the Rwandan army; he requested the assistance of soldiers to aid members of the population “in finding out whether there are no enemies amongst [] refugees” that had gathered in Gisagara).

⁶²⁴ Closing Arguments, T. 14 June 2010, p. 12 (“Dominique Ntawukulilyayo was just a local authority, he was a sub-prefect. He wasn’t a military person. And in terms of formal structures, he couldn’t have had the *de jure* authority over military people, such as soldiers”). See also Witness AXV, T. 26 May 2009, p. 11.

⁶²⁵ Defence Exhibit 71 (*Instruction Ministérielle n°01/02 sur le maintien et rétablissement de l’ordre* dated 15 September 1978), Articles 10 (the requesting authority would not have had command over the category of armed forces requisitioned), 13 (soldiers are categories of armed forces which may be requested to maintain public order), 15 (includes the sub-prefect as an authority that could requisition armed forces). Ntawukulilyayo testified that they remained under the operational command of their commanders. T. 10 December 2009, pp. 33-35.



440. As noted above, the Appeals Chamber has stated that the possession of *de jure* authority, without more, provides only some evidence of effective control.⁶²⁶ Thus, the particular facts in this case must be considered to see whether Ntawukulilyayo exercised effective control over soldiers. As before, the events of Saturday 23 April 1994 are the most relevant in determining this. Ntawukulilyayo was in Gisagara town with Callixte Kalimanzira and soldiers and was later observed transporting them to Kabuye hill. Following Ntawukulilyayo's brief presence on the hill, the soldiers joined other assailants in an extensive assault on the civilians who had sought refuge there.

441. While no one expressly heard Ntawukulilyayo give instructions to the soldiers, the Majority has concluded that the only reasonable inference is that he ordered those he transported to Kabuye hill to kill Tutsis there (III.2.3), and thus, a kind of superior-subordinate relationship existed temporarily. However, the Majority is unable to conclude that the only reasonable inference is that he exercised effective control over the soldiers.⁶²⁷ Indeed, the scale of the attack on Kabuye hill reflected broad coordination among various security forces, local and national civilian authorities and civilian assailants. Accordingly, while the record reflects that Ntawukulilyayo was a focal point for providing assistance to aspects of this wide scale attack and issued orders during it, the Chamber is not convinced that reasonable measures were available to him to prevent or punish the conduct of the soldiers who participated in the killings at Kabuye hill. Furthermore, evidence of interactions between Ntawukulilyayo and soldiers outside the attacks at Kabuye hill is also insufficient to support an inference of his general *de facto* control over them.⁶²⁸

442. Accordingly, the record does not establish that Ntawukulilyayo had the material ability to prevent or punish crimes committed by soldiers at Kabuye hill. Under the circumstances, he cannot be held responsible pursuant to Article 6 (3) of the Statute.

(iv) *Civilian Assailants*

443. The Prosecution seeks to establish Ntawukulilyayo's superior responsibility for crimes committed by the civilian Hutu population, including *Interahamwe* militia, in Gisagara sub-prefecture through his position as sub-prefect and his chairmanship of the MRND party at the commune level.⁶²⁹ Ntawukulilyayo denied that he exercised authority over civil defence forces, *Interahamwe* or other civilian militia.⁶³⁰

444. The Majority considers, contrary to the Defence submissions, that Ntawukulilyayo maintained respect and exercised some influence within Gisagara sub-prefecture during the events at issue. His instructions for Tutsis to leave Gisagara market were both followed by the refugees and facilitated by communal police (II.1.3.2.iii). Evidence in the record reflects that he was able to move through roadblocks administered by civilians, in part based on his

⁶²⁶ *Orić* Appeal Judgement, paras. 91-92. See also *Renzaho* Trial Judgement, para. 752.

⁶²⁷ *Semanza* Appeal Judgement, paras. 363 (the kind of superior-subordinate relationship envisaged under Article 6(1) of the Statute for ordering may be informal or of a purely temporary nature).

⁶²⁸ That Ntawukulilyayo requested the assistance of soldiers on 28 May 1994 has also been considered. The record is equivocal as to whether he received any. Ntawukulilyayo, T. 10 December 2009, pp. 34-35; T. 17 December 2009, p. 80; Prosecution Exhibit 30 (letter dated 28 May 1994). This evidence, however, is of limited probative value in determining his effective control over soldiers involved in the attack at Kabuye hill. As noted earlier, the right to requisition armed forces is not synonymous with effective control.

⁶²⁹ Prosecution Closing Brief, paras. 124-125, 132-134, 135-139.

⁶³⁰ Ntawukulilyayo, T.10 December 2009, pp. 45-46; T.17 December 2009, pp. 67-68.

position in the government (II.2), as well as prevent attacks by civilian assailants against Tutsis (II.1.2). While these tend to reflect Ntawukulilyayo's general authority, this is insufficient to conclude that he exercised effective control over every person who was present in his sub-prefecture during the time in question.⁶³¹

445. The Majority has also considered correspondence about the recruitment of civilians for the civil defence force. It suggests that commune authorities were responsible for the recruitment and training of youth for the civil defence force and that they reported to the military commander of Butare-Gikongoro prefectures.⁶³² Ntawukulilyayo was at times, but not always, copied into correspondence concerning recruitment for the civil defence force.⁶³³ The extent to which a system of civilian defence was put in place, with local officials supervising it, is unclear. Furthermore, considering the ambiguity as it relates to Ntawukulilyayo's authority over *bourgmestres*, merely being informed of such recruitment is insufficient to establish a superior-subordinate relationship between Ntawukulilyayo and those involved in civil defence or that he exercised effective control over such forces.

446. Turning specifically to the attacks on Kabuye hill, the evidence did not establish that Ntawukulilyayo ordered civilian assailants to attack Tutsi homes for the purposes of consolidating them on Kabuye hill (II.1.3.3). The record is equally inconclusive as to whether Ntawukulilyayo interacted with civilian assailants during or after the attacks there. While there is evidence that civilian assailants participated in attacks there as early as Friday, much of the record indicates that their participation peaked on 24 April, a day after Ntawukulilyayo had gone there. The record does not establish that a superior-subordinate relationship existed between Ntawukulilyayo and civilian assailants or that he had the material ability to prevent or punish crimes committed by them at Kabuye hill. Under the circumstances, he cannot be held responsible pursuant to Article 6 (3) of the Statute.

(v) *Conclusion*

447. The Prosecution has failed to demonstrate that Ntawukulilyayo exercised effective control over any of the category of alleged subordinates proven to have committed crimes at Kabuye hill. Consequently, he cannot be held responsible for their crimes there pursuant to Article 6 (3) of the Statute. Given this finding, it is unnecessary to consider Defence objections to the sufficiency of the pleadings as it relates to this mode of liability.⁶³⁴

⁶³¹ See for example, *Gacumbitsi* Appeal Judgement, para. 144.

⁶³² Prosecution Exhibit 16 (letter of 27 April 1994) (the letter was from Muganza *bourgmestre* to Commander of Butare-Gikongoro reporting on the recruitment of civilians to assist the Rwandan Army); Defence Exhibit 72 (letter of 21 April 1994) (the letter was from Colonel Muvunyi to *bourgmestres* regarding recruitment for the civil defence force).

⁶³³ The Accused received a copy of Defence Exhibit 72 (letter of 21 April 1994) (letter from Colonel Muvunyi to *bourgmestres*). Ntawukulilyayo explained that the area commander was calling on *bourgmestres* to organise the youth in an effort to undergo military training. T. 17 December 2009, pp. 49-50. See also Prosecution Exhibit 16 (letter of 27 April 1994) (letter from Muganza *bourgmestre* to Commander of Butare-Gikongoro). Ntawukulilyayo stated that the letter referred to mobilisation of youth who had undergone training. T. 17 December 2009, pp. 50-51. Ntawukulilyayo did not receive a copy of Defence Exhibit 73 (letter of 15 May 1994) (the letter is copied to the Butare prefect, Gikongoro prefect, Sector Commander of Operations in Butare, Chief of Staff of the Rwandan Army, and Chief of Staff of the Gendarmerie *Nationale*, and informs them of the decision to set up a civil defence organisation). See T. 10 December 2009, pp. 55-61.

⁶³⁴ Defence Closing Brief, paras. 201-231.

2. GENOCIDE

448. Counts I and II of the Indictment charge Ntawukulilyayo with genocide and complicity in genocide under Article 2 (3)(a) and (e) of the Statute. Count III charges him with direct and public incitement to commit genocide pursuant to Article 2 (3)(c) of the Statute.

2.1 Genocide

449. Count I of the Indictment charges Ntawukulilyayo with genocide under Article 2 (3)(a) of the Statute.

2.1.1 Law

450. To find an accused guilty of the crime of genocide, it must be established that the accused committed any 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.⁶³⁵ Although there is no numeric threshold, the perpetrator must act with the intent to destroy at least a substantial part of the group.⁶³⁶ The perpetrator need not be solely motivated by a criminal intent to commit genocide, nor does the existence of personal motive preclude him from having the specific intent to commit genocide.⁶³⁷

451. In the absence of direct evidence, a perpetrator's intent to commit genocide may be inferred from relevant facts and circumstances that can lead beyond any reasonable doubt to the existence of the intent. Factors that may establish the 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.⁶³⁸

452. The Indictment charges Ntawukulilyayo with killing or causing serious bodily or mental harm to members of the Tutsi ethnic group. It is firmly established that the Tutsi ethnicity is a protected group.⁶³⁹ Killing members of the group requires a showing that the principal perpetrator intentionally killed one or more members of the group.⁶⁴⁰ The term "causing serious bodily harm" refers to acts of sexual violence, serious acts of physical violence falling short of killing that seriously injure the health, cause disfigurement, or cause

⁶³⁵ *Nahimana et al.* Appeal Judgement, paras. 492, 496, 522-523; *Niyitegeka* Appeal Judgement, para. 48; *Gacumbitsi* Appeal Judgement, para. 39.

⁶³⁶ *Seromba* Appeal Judgement, para. 175; *Gacumbitsi* Appeal Judgement, para. 44.

⁶³⁷ *Simba* Appeal Judgement, para. 269; *Ntakirutimana* Appeal Judgment, paras. 302-304; *Niyitegeka* Appeal Judgement, paras. 48-54; *Krnjelac* Appeal Judgement, para. 102, citing *Jelisić* Appeal Judgement, para. 49.

⁶³⁸ *Seromba* Appeal Judgement, para. 176 referring to *Seromba* Trial Judgement, para. 320; *Nahimana et al.* Appeal Judgement, paras. 524-525; *Simba* Appeal Judgement, para. 264; *Gacumbitsi* Appeal Judgement, paras. 40-41; *Rutaganda* Appeal Judgement, para. 525; *Semanza* Appeal Judgement, para. 262, citing *Jelisić* Appeal Judgement, para. 47; *Kayishema and Ruzindana* Appeal Judgement, paras. 147-148.

⁶³⁹ See Decision on Prosecutor's Motion for Judicial Notice of Facts of Common Knowledge (TC), 17 March 2009, paras. 7-8, citing *Semanza* Appeal Judgement para. 192.

⁶⁴⁰ *Kayishema and Ruzindana* Appeal Judgement, para. 151.



any serious injury to the external or internal organs or senses.⁶⁴¹ Serious mental harm refers to more than minor or temporary impairment of mental faculties.⁶⁴² The serious bodily or mental harm, however, need not be an injury that is permanent or irremediable.⁶⁴³

2.1.2 Deliberations

453. The Chamber, Judge Akay dissenting, has found as follows: that on the early afternoon of Saturday 23 April 1994, Ntawukulilyayo and Callixte Kalimanzira came to Gisagara market and together with communal police, gathered remaining refugees, mostly Tutsi, for the purposes of directing them to Kabuye hill. The refugees, who were promised by Ntawukulilyayo that they would be fed and protected on the hill, complied with his instructions and were escorted towards Kabuye hill by communal police. Later that day, Ntawukulilyayo and Kalimanzira arrived on Kabuye hill with soldiers. These military personnel joined other assailants, including communal police, in an attack on the civilians who had gathered there. Attacks continued into the following day, and by that time, involved civilian assailants. As a result, hundreds and possibly thousands of civilians, primarily Tutsis, were killed.

454. By instructing the mostly Tutsi refugees at Gisagara market to go to Kabuye hill, Ntawukulilyayo substantially contributed to their subsequent killings. His encouraging words to the displaced persons that they would be accommodated for at Kabuye hill facilitated their movement from the populated centre of Gisagara market to the relatively isolated Kabuye hill. This provided a tactical advantage to the attackers, who subsequently surrounded the refugees, and it removed the assault from the public eye. He provided further sanction and material support to the killings that followed at Kabuye hill by bringing soldiers there. Both his status as the highest administrative official in the sub-prefecture and his act of transporting soldiers to Kabuye hill clearly would, at a minimum, have lent encouragement and moral support to the principal perpetrators he transported there, even though his stay was brief.

455. No one expressly heard Ntawukulilyayo give instructions to the soldiers he brought to Kabuye hill. However, his prominent role in removing Tutsis from Gisagara market to Kabuye hill and his direct involvement in transporting assailants to there leads the Majority to the only reasonable conclusion that he ordered the assailants that he brought there to kill the Tutsi refugees.⁶⁴⁴ This finding accepts the possibility that similar orders may have been given by other civilian or military authorities. Nonetheless, Ntawukulilyayo's position of authority, direct involvement and presence at the hill, even if brief, would have compelled the assailants to whom he had issued orders to kill.

456. Given the systemic and extensive nature of the attack, the Majority has no doubt that its purpose was to eliminate the primarily Tutsi refugees gathered on Kabuye hill and that the assailants possessed genocidal intent. Furthermore, the range of assailants, including soldiers

⁶⁴¹ *Seromba* Appeal Judgement, paras. 46-49; *Ntagerura et al.* Trial Judgement, para. 664; *Semanza* Trial Judgement, para. 320; *Kayishema and Ruzindana* Trial Judgement, para. 110.

⁶⁴² *Seromba* Appeal Judgement, para. 46; *Kajelijeli* Trial Judgement, para. 815; *Ntagerura et al.* Trial Judgement, para. 664; *Semanza* Trial Judgment, paras. 321-322; *Kayishema and Ruzindana* Trial Judgment, para. 110.

⁶⁴³ *Ntagerura et al.* Trial Judgement, para. 664; *Semanza* Trial Judgement, paras. 320, 322.

⁶⁴⁴ Circumstantial evidence can be used to prove a mode of liability such as ordering. See *Galić* Appeal Judgement, paras. 177-178, 389.



and communal police, who participated in the assault just hours after Ntawukulilyayo sent refugees to Kabuye hill evinces considerable coordination. Indeed, Ntawukulilyayo's arrival on Kabuye hill with soldiers would no doubt have required planning, given that they were not normally stationed within the sub-prefecture. Under the circumstances, there is no doubt that Ntawukulilyayo instructed refugees to go to Kabuye hill and transported soldiers there with the knowledge of the genocidal intent of the assailants and that his acts would assist the killings. The evidence firmly establishes that Ntawukulilyayo shared that genocidal intent.⁶⁴⁵

457. In sum, the Majority concludes that Ntawukulilyayo is responsible for aiding and abetting the killing of the primarily Tutsi civilians who had gathered at Kabuye hill under Article 6 (1) of the Statute by instructing refugees at Gisagara market to go to Kabuye hill and by transporting soldiers who participated in the attack there. He is also liable under Article 6 (1) of the Statute for ordering the killings.

2.2 Complicity in Genocide

458. Count II of the Indictment charges Ntawukulilyayo with complicity in genocide under Article 2 (3)(e) of the Statute. The count is pleaded alternatively to Count I, which charges genocide.⁶⁴⁶ As the Majority has already entered a conviction for Count I, it finds Ntawukulilyayo not guilty on this count.

2.3 Direct and Public Incitement to Commit Genocide

459. Count III of the Indictment charges Ntawukulilyayo with direct and public incitement to commit genocide based his role in meetings Nyaruhengeri commune (II.3), Muyaga commune (II.4) and Muganza commune (II.5). The Prosecution did not prove these allegations beyond reasonable doubt. Accordingly, Ntawukulilyayo is not guilty on this count.

2.4 Conclusion

460. The Majority finds Ntawukulilyayo guilty of genocide (Count I) under Article 6 (1) of the Statute by aiding and abetting and ordering the killing of Tutsis at Kabuye hill. It has not found Ntawukulilyayo guilty of genocide for these killings under Article 6 (3) of the Statute. The Chamber finds Ntawukulilyayo not guilty of complicity in genocide (Count II) and direct and public incitement to commit genocide (Count III).

⁶⁴⁵ In finding that Ntawukulilyayo had genocidal intent, consideration has been given to evidence of his efforts to facilitate peaceful coexistence between Hutus and Tutsis prior to April 1994 as well as efforts in preventing attacks on the Kereti family, transporting Father Thomas Mutabazi to safety, transporting Tutsi family members through roadblocks and other evidence of his good character. See II.1, II.2, III.3.2.2. When reviewing Ntawukulilyayo's conduct in relation to the killings at the Kabuye hill, this evidence does not raise doubt that he possessed the genocidal intent at that time. See *Kvočka* Appeal Judgement, paras. 232-233.

⁶⁴⁶ Prosecution Closing Brief, para. 197.

CHAPTER IV: VERDICT

461. For the reasons set out in this judgement, having considered all evidence and arguments, the findings are as follows:

- Count I: the Chamber, Judge Akay dissenting, finds Ntawukulilyayo GUILTY of Genocide
- Count II: the Chamber finds Ntawukulilyayo NOT GUILTY of Complicity in Genocide
- Count III: the Chamber finds Ntawukulilyayo NOT GUILTY of Direct and Public Incitement to Commit Genocide

CHAPTER V: SENTENCING

1. INTRODUCTION

462. Having found Ntawukulilyayo guilty on Count I of the Indictment for genocide, the Majority must determine an appropriate sentence.

463. The penalty imposed should reflect the goals of retribution, deterrence, rehabilitation, and the protection of society. Pursuant to Article 23 of the Statute and Rule 101 of the Rules of Procedure and Evidence, the Majority shall consider the general practice regarding prison sentences in Rwanda, the gravity of the offence or totality of the conduct, the individual circumstances of the accused, including aggravating and mitigating circumstances, and the extent to which any penalty imposed by a court of any State on the accused for the same act has already been served.⁶⁴⁷ As pointed out by the Appeals Chamber, these considerations are not exhaustive when determining the appropriate sentence. In addition, the Trial Chamber shall credit the accused for any time spent in detention pending transfer to the Tribunal and during trial.⁶⁴⁸

2. SUBMISSIONS

464. The Prosecution submits that Ntawukulilyayo should receive a sentence of life imprisonment and emphasises the gravity of the crime of genocide. It argues that his abuse of trust and authority are aggravating factors, and that there are no mitigating circumstances. In support, the Prosecution points to Rwandan law and the Tribunal's case-law.⁶⁴⁹

465. The Defence did not make specific submissions with respect to mitigating factors in the event of a conviction. Nonetheless, in its Closing Brief, and during final submissions, it pointed to Ntawukulilyayo's good character, family situation, age and ill health.⁶⁵⁰

3. DELIBERATIONS

3.1 Gravity of the Offence

466. All crimes under the Tribunal's Statute are serious violations of international humanitarian law.⁶⁵¹ When determining a sentence, a Trial Chamber has considerable, though not unlimited, discretion on account of its obligation to individualise penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes for which the accused has been convicted.⁶⁵²

467. In determining an appropriate sentence, the Appeals Chamber has stated that "sentences of like individuals in like cases should be comparable". However, it has also noted the inherent limits to this approach because "any given case contains a multitude of variables,

⁶⁴⁷ Article 23 (1)-(3) of the Statute and Rule 101 (B)(i)-(iv) of the Rules.

⁶⁴⁸ *Kajelijeli* Appeal Judgement, para. 290. See Rule 101 (C) of the Rules.

⁶⁴⁹ Prosecution Closing Brief, paras. 443-467.

⁶⁵⁰ Defence Closing Brief, paras. 365-427; 428-511; 526-528, 547, 565-569, 582, 617-618. See also Closing Arguments, T. 14 June 2010, pp. 57-58, 69-72.

⁶⁵¹ *Kayishema and Ruzindana* Appeal Judgement, para. 367 (quoting Article 1 of the Statute).

⁶⁵² *Kajelijeli* Appeal Judgement, para. 291.

ranging from the number and type of crimes committed to the personal circumstances of the individual”.⁶⁵³

468. The Majority has found Ntawukulilyayo guilty of genocide through ordering and aiding and abetting in the killing of hundreds and possibly thousands of Tutsi civilians who had sought refuge on Kabuye hill. It is difficult to overemphasise the gravity of this offence, which led to a significant loss of human life and immense suffering.

469. Under Rwandan law, similar crimes carry the possible penalties of life imprisonment, depending on the nature of the accused’s participation.⁶⁵⁴ At this Tribunal, a sentence of life imprisonment is generally reserved for those who planned or ordered atrocities as well as the most senior authorities.⁶⁵⁵ The Majority finds some guidance from cases, where convictions for direct participation in genocide did not result in life sentences.⁶⁵⁶

470. In this case, while Ntawukulilyayo’s crime is grave, the Majority is not satisfied that he is deserving of the most serious sanction available under the Statute. The evidence does not show that he was a main architect of crimes committed in Gisagara sub-prefecture. Indeed, the scale and nature of the attacks on Kabuye hill would have required planning and organisation by various civilian and military officials. It is not clear that Ntawukulilyayo planned the operation, nor did he physically participate in the attack.

3.2 Individual, Aggravating and Mitigating Circumstances

471. The Majority will consider Ntawukulilyayo’s individual circumstances, including aggravating and mitigating factors. Aggravating circumstances need to be proven beyond reasonable doubt, while mitigating circumstances need only be established by the balance of the probabilities.⁶⁵⁷ Any particular circumstance that is included as an element of the crime for which the Accused is convicted will not also be considered as an aggravating factor.⁶⁵⁸

3.2.1 Aggravating Circumstances

472. The Appeals Chamber has held that an accused’s abuse of his superior position or influence may be considered as an aggravating factor.⁶⁵⁹ While the Chamber has not found Ntawukulilyayo responsible as a superior under Article 6 (3) of the Statute, it nonetheless considers that he was in a position of authority and maintained general influence within

⁶⁵³ *Kvočka et al.* Appeal Judgement, para. 681.

⁶⁵⁴ *Kanyarukiga*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (TC), 6 June 2008, paras. 22-25 (assessing Rwanda’s penalty structure); *Gatete*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (TC), 17 November 2008, paras. 22-25. See also *Semanza* Appeal 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* Appeal Judgement, para. 30; *Dragan Nikolić* Appeal Judgement, para. 69.

⁶⁵⁵ See *Renzaho* Trial Judgement, para. 820 n. 890 (citations omitted).

⁶⁵⁶ See *Simba* Appeal Judgement, paras. 279-288, p. 103 (affirming the Trial Chamber’s imposition of 25 years of imprisonment for direct participation in two massacres); *Semanza* Appeal Judgement, paras. 388-389 (finding 25 years’ imprisonment appropriate for direct perpetration at a massacre site); *Ruzindana* Appeal Judgement, paras. 191, 194, 352 (affirming a sentence of 25 years’ imprisonment based on direct participation in attacks).

⁶⁵⁷ *Nahimana et al.* Appeal Judgement, para. 1038; *Kajelijeli* Appeal Judgement, para. 294.

⁶⁵⁸ *Ndindabahizi* Appeal Judgement, para. 137.

⁶⁵⁹ *Simba* Appeal Judgement, paras. 284-285; *Ndindabahizi* Appeal Judgement, para. 136; *Seromba* Appeal Judgement, para. 230.

Gisagara sub-prefecture. Many civilians sought refuge at Gisagara market, an area that had been untouched by violence around 20 April 1994. They followed Ntawukulilyayo's instructions to move to Kabuye hill on 23 April under the pretext that they would be fed and protected there. In the Majority's view, Ntawukulilyayo's abuse of the trust he had previously obtained in connection with moving Tutsi refugees to Kabuye hill for the purpose of killing them amounts to an aggravating factor. Likewise, the abuse of his general authority *vis-à-vis* the assailants he ordered to kill Tutsis, is also aggravating. Moreover, the Majority considers that the number of victims of the attacks on Kabuye hill is an aggravating factor.⁶⁶⁰

473. Ntawukulilyayo's actions did not evidence any particular zeal or sadism. He did not physically participate in killings, and did not remain at the massacre site but for more than a brief period. Accordingly, this is not found to be an aggravating factor, as suggested by the Prosecution.⁶⁶¹

3.2.2 Mitigating Circumstances

474. The Majority has considered Ntawukulilyayo's background and individual circumstances. Much of his life prior to 1994 was committed to public service, as a teacher, as well as service as a member of parliament and in local government (I.3). He devoted part of his professional career to easing ethnic tension prior to April 1994.⁶⁶² Prosecution and Defence witnesses testified that Ntawukulilyayo did not distinguish between the different ethnic groups in Rwanda, was considered by some to be Tutsi, and was accused of being an RPF accomplice.⁶⁶³ Such evidence in no way exonerates or excuses Ntawukulilyayo for his role in the massacre on Kabuye hill. However, it implies that his participation in the killings may have resulted from external pressures to demonstrate his allegiance to the government rather than from extremism or ethnic hatred.

475. Furthermore, the Majority has reviewed Ntawukulilyayo's role in assisting Tutsis between April and June 1994, which was not limited to family members or those close to

⁶⁶⁰ *Semanza* Appeal Judgement, paras. 337-338.

⁶⁶¹ Prosecution Closing Brief, para. 462.

⁶⁶² See, for example, Habimana, T. 6 October 2009, pp. 21-23 (in November 1993, the sub-prefect addressed Burundian Hutu refugees telling them to abandon their ethnic hatred and tribalism); Witness BAA, T. 1 October 2009, pp. 7-9, 28-29 (around the end of 1993, Ntawukulilyayo chaired meetings with officials from secondary schools for the purpose of facilitating harmony among Hutu and Tutsi students).

⁶⁶³ See for example, Witness AYQ, T. 11 May 2009, p. 19 (before the events, Ntawukulilyayo "treated all the ethnic groups in the same manner"); Witness BAC, T. 11 May 2009, p. 61 (Ntawukulilyayo was a "good person" and "well respected"); Witness AXY, T. 19 May 2009, p. 69 (the sub-prefect was known as a "kind man"); Witness AXV, T. 26 May 2009, pp. 3-4 (Ntawukulilyayo was "loved by members of the population" and "worked for the peace of his subjects"); Witness MAD, T. 24 September 2009, p. 41 (the sub-prefect was a man of "good character" and "loved very much"); Witness MAI, T. 24 September 2009, p. 17 (he was "beloved to the entire population"); Rumashana, T. 30 September 2009, pp. 9, 19-21 (the sub-prefect was "beloved" to all, people thought he was Tutsi and he was accused of being an *Inkotanyi* accomplice after helping a Tutsi priest); Witness BAA, T. 1 October 2009, p. 10 (Ntawukulilyayo wanted people to live in peace regardless of whether they were Hutu or Tutsi); Witness KAD, T. 19 November 2009, p. 4 (the Accused was a "humble man", a Tutsi, and worked for unity); Witness MTA, T. 5 October 2009, pp. 10-11 (there was a time when people thought the Accused was Tutsi and he "ran into serious problems"); Witness KAB, T. 18 November 2009, pp. 41-45 (people thought Ntawukulilyayo was Tutsi because he had not "sensitised Hutus to kill Tutsis"); Raffin, T. 12 October 2009, pp. 8-9, 23-24 (Ntawukulilyayo helped the poor and underprivileged without distinction); Niyitegeka, T. 28 September 2009, pp. 64-66 (the sub-prefect was accused of being an RPF accomplice); Witness UAO, T. 17 November 2009, pp. 31-32 (the Accused was stopped at a roadblock and his house was searched as he was suspected of assisting *Inkotanyi*).



him.⁶⁶⁴ Notably, Madeleine Raffin, who during the relevant period was director of Caritas in Gikongoro prefecture, testified that in early June 1994, Ntawukulilyayo visited and offered about 100 mattresses to assist Tutsi survivors who had been brought to Caritas by French soldiers. She further attested to the assistance he continued to provide after leaving Rwanda to underprivileged children in Gikongoro, regardless of their ethnicity.⁶⁶⁵

476. The Majority has considered Ntawukulilyayo's family situation and health condition. He is married with eight children, and thirteen grandchildren. Born in 1942, he is almost 70 years of age and has spent almost three years in detention. The Defence points to Ntawukulilyayo's diabetes, which requires management, as was evident during the trial proceedings. Considered together, these factors require mitigation in Ntawukulilyayo's sentence.⁶⁶⁶

477. The Majority finds that Ntawukulilyayo's prior public service, good character, age, family situation and health condition, as mitigation in sentencing.⁶⁶⁷

4. CONCLUSION

478. The Majority has the discretion to impose a single sentence. This practice is usually appropriate where the offences may be characterised as belonging to a single criminal transaction.⁶⁶⁸

479. Considering all the relevant circumstances discussed above, the Majority **SENTENCES** Dominique Ntawukulilyayo to:

25 YEARS OF IMPRISONMENT

5. CONSEQUENTIAL ORDERS

480. Ntawukulilyayo shall receive credit for time served since his arrest on the 17 October 2007, 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.

481. Until his transfer to his designated place of imprisonment, Dominique Ntawukulilyayo shall be kept in detention under the present conditions.

⁶⁶⁴ Nziyomaze, T. 7 October 2009, pp. 40-42 (Ntawukulilyayo had hidden Tutsis at his home and also at the Abizeramariya Convent); Raffin, T. 12 October 2009, pp. 18-20, 23-25 (Ntawukulilyayo offered a 100 mattresses to Raffin in June 1994 for Tutsi survivors who had been brought to Caritas); Ndamage, T. 13 October 2009, p. 34 (some Tutsis were saved at the Abizeramariya Convent and it was the sub-prefect who had assisted them); With respect to the assistance provided by the Accused to Tutsi members of his family, see Uwimana, T. 17 November 2009, pp. 57-58, 65-66; Dushime, T. 18 November 2009, pp. 18-20, 30-31.

⁶⁶⁵ Raffin, T. 12 October 2009, pp. 18-20, 23-25.

⁶⁶⁶ See for example *Ntakirutimana* Appeal Judgement, para. 569, affirming *Ntakirutimana* Trial Judgement, paras. 895-989.

⁶⁶⁷ See *Seromba* Appeal Judgement, para. 235; *Semanza*, Appeal Judgement, paras. 334, 397, 398; *Gacumbitsi* Appeal Judgement, para. 195; *Ntakirutimana* Appeal Judgement, para. 569. In view of this jurisprudence, it is noted, as noted by the Appeals Chamber, that in most cases the accused's previous good character is accorded little weight in the final determination of the sentence.

⁶⁶⁸ *Nahimana et al.* Appeal Judgement, paras. 1042-1043; *Simba* Trial Judgement, para. 445; *Ndindabahizi* Trial Judgement, para. 497.



482. Pursuant to Rule 102 (B) of the Rules, on notice of appeal, if any, enforcement of the above sentences shall be stayed until a decision has been rendered on the appeal, with the convicted person nevertheless remaining in detention.

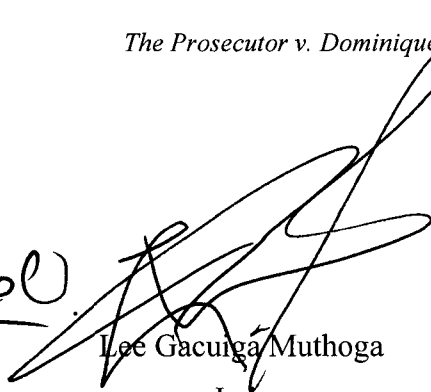


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Arusha, 3 August 2010



Khalida Rachid Khan
Presiding Judge



Lee Gacunga Muthoga
Judge



Aydin Sefa Akay
Judge

(SEAL OF THE TRIBUNAL)

SEPARATE, DISSENTING OPINION OF JUDGE AKAY

1. INTRODUCTION

1. With respect, I am unable to agree with the conclusions of the Majority of the Chamber with regard to the findings that Ntawukulilyayo gave orders to refugees at the Gisagara market to go to Kabuye hill on Saturday 23 April 1994 (II.1.3.2.iii). Similarly, I am unable to agree with the findings that, later that same day, Ntawukulilyayo arrived on Kabuye hill with soldiers, stayed briefly and left, and that the soldiers who accompanied him joined others in an assault on Tutsi refugees who had gathered on Kabuye hill (II.1.3.4).

2. While I agree with the Majority's presentation of the evidence of events at Gisagara market and Kabuye hill, as summarized in the Judgement (II.1.2), I am unable to resolve inconsistencies among the Prosecution witnesses' testimonies, which were relied upon by the Majority. Moreover, I have found that internal inconsistencies within the witnesses' testimonies before the Chamber and their prior statements or evidence in other cases before this Tribunal raise doubts about their individual reliability. In my view, these variances taken together raise doubt with respect to their accounts.

2. ORDERS FOR REFUGEES TO GO TO KABUYE HILL

3. The Majority has relied on the evidence of Witnesses AYQ and BAU with respect to its findings that on Saturday 23 April, Ntawukulilyayo ordered refugees at Gisagara market to go to Kabuye hill (II.1.3.2.iii). While the Majority has been able to resolve variances between their testimonies and their prior statements, these variances raise doubt in my mind.

4. With respect to Witness AYQ, points raised by the Defence which have been addressed by the Majority in the Judgement, nonetheless raise questions in my mind about the reliability of her evidence. At the outset, she testified that she saw Ntawukulilyayo only once in April 1994 and when *specifically* questioned about whether this was at the beginning, middle, or end of April, she replied that it was at the beginning.⁶⁶⁹ Given the significance of the events in Gisagara and Kabuye hill, and bearing in mind that the killings in Rwanda in 1994 largely took place over a period of only approximately three months, I find this discrepancy significant.⁶⁷⁰

5. Moreover, while her testimony in this case as well as in *Kalimanzira*, was that she saw Ntawukulilyayo at the Gisagara market, an extract from her evidence in the *Kalimanzira* proceedings that there were "other refugees who were taller who could see [Ntawukulilyayo and Kalimanzira]" creates confusion and raises doubt that if she was at Gisagara market, that she saw Ntawukulilyayo there with her own eyes.⁶⁷¹ Furthermore, her March 2003 statement

⁶⁶⁹ Witness AYQ, T. 11 May 2009, pp. 7-8 ("Q. What day of the week was it that you saw Dominique in April? A. It was a Saturday. Q. Very well. Now, can you tell me: Was this Saturday at the beginning of the month of April, in the middle of the month of April, or towards the end of the month of April? Are you able to help me with that, Witness? A. I believe it was at the beginning of April, but I do not recall the date").

⁶⁷⁰ Decision on Prosecutor's Motion for Judicial Notice of Facts of Common Knowledge (TC), 17 March 2009, paras. 7-8.

⁶⁷¹ Witness AYQ, T. 11 May 2009, pp. 27-28; Defence Exhibit 8E (*Kalimanzira*, T. 9 May 2008, p. 28) ("Q. How close were you to the sous préfet and Callixte Kalimanzira ... when the sous préfet spoke? A. He was very close to me. Even if I was in the middle of the group of refugees, *there were other refugees who were taller who could see them*, and he was saying that it was the sous préfet and Kalimanzira and that they were ensuring us that they would make sure that we were safe.") (emphasis added).

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to Tribunal investigators referred to her seeing the arrival of dignitaries, including Ntawukulilyayo, while her testimony before this Chamber was that while she saw Ntawukulilyayo, she did not see his actual arrival.⁶⁷²

6. In my view, these discrepancies taken together, and when considered in light of concerns about other aspects of Witness AYQ's evidence, as discussed below, I have reservations about her reliability. Thus, her evidence is insufficient to support findings beyond reasonable doubt.

7. Turning to Witness BAU, while he testified that only Ntawukulilyayo addressed the crowd of refugees at Gisagara market, his prior statements and testimony in this respect suggest otherwise.⁶⁷³ Specifically, his prior statement to Tribunal investigators in March 2003 indicates that both Ntawukulilyayo and Kalimanzira spoke to the refugees.⁶⁷⁴ Under cross-examination, he conceded that Kalimanzira spoke after Ntawukulilyayo.⁶⁷⁵ Defence counsel subsequently pointed to his testimony in *Kalimanzira*, wherein he said that Kalimanzira had only stood by while the sub-prefect ordered refugees to leave.⁶⁷⁶ The Witness responded that Ntawukulilyayo spoke and that Kalimanzira "simply said that [the refugees] should leave."⁶⁷⁷ In my opinion, these inconsistencies are not minor and raise questions with respect to the Witness' reliability.

⁶⁷² Witness AYQ, T. 11 May 2009, p. 11 ("Q. Witness, did you see Dominique arrive at the Gisagara market on that Saturday? When we arrived in Gisagara, we were dispersed in that area. I saw Dominique Ntawukulilyayo in front of the refugees when he was addressing them. But I did not see him when he arrived at that place."); Defence Exhibit 7E (statement of 27 March 2003) p. 3 ("While we were gathered near the market, some dignitaries accompanied by military guards arrived to speak to us. Among the group was the Gisagara sous préfet Ntawuku[l]i[y]ayo Dominic. He announced that we were to move to the Kabuye hill where we would be protected and fed").

⁶⁷³ Witness BAU, T. 12 May 2009, p. 64; T. 13 May 2009, p. 28 ("Q. Did [Ndora Bourgmestre Célestin Rwankubito] address the crowd? A. He did not address the meeting, only Dominique, the sous préfet, addressed the meeting.")

⁶⁷⁴ Defence Exhibit 15 (statement of 27 March 2003) p. 3 ("... They [Ntawukulilyayo and Kalimanzira] came and addressed us, one after the other. First Ntawukulilyayo, and then Kalimanzira. They both advised the crowd to move to the nearby Kabuye hill where we would be sheltered in tents and fed").

⁶⁷⁵ Witness BAU, T. 13 May 2009, pp. 31, 34.

⁶⁷⁶ See Witness BAU, T. 13 May 2009 pp. 37-38; Defence Exhibit 17 (*Kalimanzira*, T. 5 May 2008, p. 12) ("Q. And while the sous préfet was speaking, what did – what was Callixte Kalimanzira doing? A. Callixte Kalimanzira was standing next to him. Q. Did you hear him speak? A. On the field he did not say anything. He was merely standing next to the sous préfet."). See also Defence Exhibit 17 (*Kalimanzira*, T. 12 May 2008, p. 29) ("Q. ... During your testimony in chief, you indicated that only sous préfet Ntawukulilyayo addressed the crowd. Do you confirm this information? A. Yes, I confirm that only the sous-préfet addressed the crowd. ... Q. ... You testified that only sous préfet Ntawukulilyayo addressed the crowd at the marketplace, and that Mr. Kalimanzira did not say anything and was simply standing by his side. Am I correct? A. I agree with you, Counsel."); Defence Exhibit 17 (*Kalimanzira*, T. 12 May 2008, p. 42) ("Q. Let me continue my reading. You say at about 1:30 p.m. you saw Kalimanzira and the Gisagara sous préfet, Ntawukuriryayo, Dominique, with their armed police guards approaching you. And let me read it in extenso, what is written. 'They came and addressed us, one after the other; first, Ntawukuriryayo and then Kalimanzira.' Before the Trial Chamber, Mr. Witness, on two occasions, you confirmed that Kalimanzira had not addressed the crowd. Which version is correct, Mr. Witness? A. I told you that it was the sous préfet who took the floor, and that Kalimanzira had not said anything. And here, before the Trial Chamber, I said that I saw them at 2 p.m., not at 1:30 p.m., as you said. I am not the one who gave that testimony.")

⁶⁷⁷ Witness BAU, T. 13 May 2009, p. 38.

8. In my view, Witness BAU's testimony, when viewed in its entirety, raises questions about his reliability. As noted below, his account of the attacks on Kabuye hill was confusing, raising further doubts about his evidence.

9. Considering the record in its entirety, Prosecution Witness BAF testified that from Friday 22 April, anyone, whether a civilian, police officer or soldier, would instruct arriving refugees to go to Kabuye hill.⁶⁷⁸ Furthermore, the Defence presented consistent evidence of witnesses who were either at or near Gisagara market during the relevant times. They neither saw nor heard Ntawukulilyayo come to the market with communal police and give orders to refugees. This evidence further suggests that the refugees left Gisagara market as a result of pressures from traders and residents, as well as the Ndora commune *bourgmestre*, and due to the deteriorating hygiene conditions at the market resulting from the thousands of refugees present at that location (II.1.2). These testimonies, in my mind, create further doubt that the refugees left Gisagara market pursuant to Ntawukulilyayo's orders.

10. In sum, I find the evidence of Witnesses AYQ and BAU insufficiently clear or consistent. Their accounts, when considered in light of their prior statements and testimonies in other proceedings before the Tribunal, as well as other evidence in the record, leaves doubt in my mind that Ntawukulilyayo instructed refugees at Gisagara market to go to Kabuye hill on Saturday 23 April.

3. ATTACK ON KABUYE HILL

11. The Majority has accepted the evidence of Witnesses AZN, AYQ and BAU about the attack on Kabuye hill (II.1.3.4). I respectfully disagree with their findings.

12. At the outset, I am unable to reconcile the differences, which are noted by the Majority in the Judgement, between their accounts with respect to the timing of Ntawukulilyayo's arrival on the hill, the vehicle he arrived in, and the description of the persons who accompanied him (II.1.3.4). Of particular concern are the differences which emerge with respect to the vehicles described by the witnesses, and who accompanied Ntawukulilyayo. Witness AYQ recalled that the sub-prefect and Kalimanzira arrived in a white vehicle, possibly a "berline ... saloon" containing about four soldiers.⁶⁷⁹ Witness BAU, however, who was the only witness to testify that Ntawukulilyayo came to the hill on two occasions, specified that the Accused first arrived sometime between 5.00 and 5.30 p.m. in a double-cabin pick-up followed by a "mini-bus". He added that "three policemen" were on Ntawukulilyayo's vehicle.⁶⁸⁰ On the second occasion, Witness BAU referred to Ntawukulilyayo and Kalimanzira coming in "double-cabin pickup trucks and they had a carrier behind them" with "policemen and gendarmes".⁶⁸¹

13. The circumstances may have been tense. Nonetheless, given the detailed accounts provided by these witnesses, these variances are significant and I am unable to conclude that their testimonies sufficiently corroborate each other.

14. I also feel that internal frailties between their testimonies in this proceeding, on the one hand, and prior statements and or testimonies in other proceedings, create additional concern.

⁶⁷⁸ Witness BAF, T. 13 May 2009, pp. 62-65; T. 14 May 2009, p. 8; T. 18 May 2009, pp. 27-30, 60.

⁶⁷⁹ Witness AYQ, T. 11 May 2009, p. 11.

⁶⁸⁰ Witness BAU, T. 13 May 2009, p. 46.

⁶⁸¹ Witness BAU, T. 12 May 2009, pp. 64, 65 (quoted).

15. Turning first to Witness AZN, in addition to the lack of clarity with respect to the timing of his arrival on Kabuye hill, which has been noted by the Majority, I am particularly concerned by the Witness' November 1995 statement to Tribunal investigators which provides considerable detail about the events at Kabuye hill. While, as noted by the Majority, it appears focussed on the conduct of Elie Ndayambaje, it does nonetheless make reference to Ntawukulilyayo. Although the Witness explained that he only responded to questions asked of him, the omission in this instance is significant as the statement refers in detail to a number of other authorities, as well as events on Kabuye hill, but does not reference Ntawukulilyayo's arrival on Kabuye hill.⁶⁸² In my view, the omission casts doubt on his testimony in this proceeding.

16. With respect to Witness AYQ, the Defence confronted her with her March 2003 statement to Tribunal investigators, which indicated that she saw Ntawukulilyayo come with Kalimanzira to Kabuye hill on Sunday around 2.00 p.m. rather than Saturday at 4.00 p.m.⁶⁸³ The Witness explained that this was a mistake and affirmed her testimony. However, given the significance of the events, and that she described events over only a three day period, the inconsistency with respect to the day is worrying.⁶⁸⁴

17. Moreover, the Defence points to aspects of Witness AYQ's testimony during cross-examination in *Kalimanzira* wherein she stated that the soldiers and policemen who accompanied Ntawukulilyayo and Kalimanzira to Kabuye hill, left with them, rather than remained and participated in the attacks on the refugees.⁶⁸⁵ While she affirmed her testimony that the soldiers had remained, I am unable to resolve this inconsistency, which in my mind is significant. Moreover, while she referred to soldiers and policemen in *Kalimanzira*, she only referred to soldiers in this proceeding.⁶⁸⁶

18. Considered in light of earlier concerns regarding Witness AYQ's testimony, these discrepancies raise further doubt with respect to her evidence, and I am unable to rely on it for the purposes of making findings beyond reasonable doubt.

19. Witness BAU also testified that he went to Kabuye hill and that Ntawukulilyayo arrived later on Saturday 23 April. He, however, is the only witness to testify that the Accused arrived twice that day. His evidence with respect to Ntawukulilyayo's arrival was confusing. During direct examination, he only testified about Ntawukulilyayo coming to

⁶⁸² Defence Exhibit 2E (statement of 14 November 1995) pp. 4-6.

⁶⁸³ Defence Exhibit 7E (statement of 27 March 2003) p. 3 ("I also remember that it was about 1400 hours on Sunday that I saw Kalimanzira arrive on the hill in the company of the sous préfet and other soldiers in one vehicle.")

⁶⁸⁴ See Witness AYQ's account of events between Saturday 23 and Monday 25 April 1994, as summarised in the Judgement (II.1.2).

⁶⁸⁵ Defence Closing Brief, para. 1150; Defence Exhibit 9E (*Kalimanzira*, T. 20 May 2008, p. 29) ("Q. During your examination in chief, you indicated that Callixte Kalimanzira and the sous préfet, as well as these persons, had come out of the vehicle. Did the soldiers also unboard the vehicle? A. They opened the doors of the vehicle, and Callixte Kalimanzira and the sous préfet went back into the vehicle. The soldiers were next to the vehicle and that was before they started shooting. Q. Madam Witness, I wish for this to be clear. Earlier on, I asked you whether they had all left in the vehicle, and your answer was yes. Let me put the question back to you. When the sous préfet and Kalimanzira left Kabuye hill, did the soldiers who were with them in the vehicle leave with them or did they remain there? A. The soldiers left at the same time as Callixte and the sous préfet. Q. So the sous préfet, Kalimanzira, the soldiers alighted the vehicle, looked at you, did not say anything, went back into the vehicle and left? Am I correct? A. Yes, they left.")

⁶⁸⁶ Witness AYQ, T. 11 May 2009, pp. 11, 38; Defence Exhibit 8 (*Kalimanzira*, T. 9 May 2008, pp. 33-34); Defence Exhibit 9 (*Kalimanzira*, T. 20 May 2008, pp. 28-29).

Kabuye hill on one occasion with Kalimanzira in a “double-pick up truck” followed by a “carrier” and “policemen and soldiers”.⁶⁸⁷ However, during cross-examination, he testified that Ntawukulilyayo came on two occasions. The first was sometime between 5.00 and 5.30 p.m. in a double-cabin pick-up followed by a “mini-bus” and “three policemen” were on Ntawukulilyayo’s vehicle.⁶⁸⁸ On the second occasion, “during the night”, Ntawukulilyayo was accompanied by “Kalimanzira, policemen and gendarmes”. Subsequently he testified that on this occasion Ntawukulilyayo “dropped off the policemen and soldiers”. He also referred to Ntawukulilyayo and Kalimanzira having brought “policemen”. The two stayed for only a few minutes and left as “police and soldiers” or “police and gendarmes” started firing on persons.⁶⁸⁹ In my mind, his evidence was confusing.

20. Furthermore, the Majority has noted that neither the Witness’ March 2003 statement to Tribunal investigators, nor his evidence in the *Kalimanzira* case refer to Ntawukulilyayo coming to Kabuye hill on two occasions. Rather, they each refer only to one occasion, when Kalimanzira and Ntawukulilyayo arrived and left shortly before attacks started.⁶⁹⁰ When confronted with the discrepancy, he responded that he had refused to comment on statements made in the *Kalimanzira* case and that he “made a statement for this Chamber.”⁶⁹¹ In my view, this explanation does not resolve the inconsistency, which I find casts doubt on his testimony in this case. In my mind, his evidence is insufficiently reliable to support findings beyond reasonable doubt.

21. While I have considered other circumstantial evidence in the record, I am unable to conclude that it is sufficient to support the accounts of the witnesses discussed above for the purposes of making findings beyond reasonable doubt. Rather, the evidence of other witnesses who had sought refuge on Kabuye hill, that they did not see Ntawukulilyayo there at any time, creates further doubt that he did in fact go there with soldiers. Accordingly, I am unable to find that Ntawukulilyayo arrived on Kabuye hill in the later afternoon or early evening on Saturday 23 April with soldiers or any other military or law enforcement personnel who subsequently participated in the attacks on the Tutsi civilians who had sought refuge there.

4. CONCLUSION

22. In view of the above, I find that the Prosecution has not established beyond reasonable doubt that on Saturday 23 April 1994, Ntawukulilyayo gave orders to Tutsi refugees at Gisagara market to go to Kabuye hill. Nor do I find it proven that he took soldiers

⁶⁸⁷ Witness BAU, T. 12 May 2009, pp. 64-65.

⁶⁸⁸ Witness BAU, T. 13 May 2009, p. 46.

⁶⁸⁹ Witness BAU, T. 13 May 2009, pp. 46-47.

⁶⁹⁰ Defence Exhibit 15 (statement of 27 March 2003) p. 3 (“We arrived at the hill at about 1630 hours. At about 1830 hours, I saw Kalimanzira and Ntawukulilyayo joining us on the hill in 2 pick-up vehicles. Kalimanzira’s pick-up was whitish while the sub-prefect’s was grayish; both vehicles were full of gendarmes. After the arrival of the two dignitaries with armed troops, Ntawukulilyayo addressed us again and assured us not to be afraid because the troops were there to protect us. After that, I saw the armed gendarmes joining up with some of the policemen and they surrounded us on the hill. At around 1900 hours, when it was quite dark, the gendarmes and policemen started shooting into the refugees, killing many of them.”); Defence Exhibit 17 (*Kalimanzira*, T. 5 May 2008, pp. 13-14; T. 12 May 2008, pp. 33-37, 44-45).

⁶⁹¹ Witness BAU, T. 13 May 2009, p. 46. The Defence also noted that Witness BAU did not mention this in his October/November statement to Tribunal investigators. See Defence Exhibit 16 (statement of 31 October and 20 November 2007).

or other military or law enforcement personnel to Kabuye hill later that day to participate in the subsequent attacks on the Tutsi refugees there.

23. Since I find that the Prosecution has not proven its case based on the factual findings, it is not necessary for me to deliberate further for the purposes of making legal findings. Accordingly, I do not join the Majority in its Legal Findings (III), and do not enter a conviction against Ntawukulilyayo for Count I (Genocide) (III.2).

Arusha, 3 August 2010



Aydin Sefa Akay

Judge

(Seal of the Tribunal)

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ANNEX A: PROCEDURAL HISTORY

1. PRE-TRIAL PROCEEDINGS

1. On 26 May 2005, the Prosecution filed its original Indictment against Dominique Ntawukulilyayo charging him with three counts of genocide, complicity to commit genocide and direct and public incitement to commit genocide. Following a hearing before Judge Jai Ram Reddy on 10 June 2005, the Prosecution filed an amended Indictment on 13 June 2005. On the same date, Judge Reddy confirmed all counts in the Indictment. An arrest warrant against Ntawukulilyayo was issued on 21 September 2006.⁶⁹²

2. Ntawukulilyayo was arrested in France on 17 October 2007 and transferred to the United Nations Detention Facility on 5 June 2008. At his initial appearance before Judge Khalida Rachid Khan on 10 June 2008, Ntawukulilyayo pleaded not guilty to all three counts in the Indictment.⁶⁹³ On 16 December 2008, following transfer of the case to Trial Chamber III, that Chamber held a status conference and confirmed that the Trial was scheduled to commence on 30 March 2009.⁶⁹⁴ On 6 February 2009, the Chamber granted a number of protective measures for Prosecution witnesses.⁶⁹⁵

3. On 27 February 2009, the Chamber found the Prosecution in violation of its disclosure obligations under Rule 66 (A)(ii) of the Rules and ordered it to conduct a thorough and diligent review of materials in its possession with a view to ensuring full compliance with Rule 66 (A)(ii) due to a failure to comply with the Chambers orders.⁶⁹⁶ On 26 March 2009, the Chamber again found the Prosecution in violation of its disclosure obligations and warned it pursuant to Rule 46 (A) of the Rules. The commencement of Trial was postponed to 4 May 2009.⁶⁹⁷

4. On 13 March 2009, following receipt of the Registrar's Submissions on the language proficiency of the Defence team, the Chamber denied a Defence motion requesting an order that any documents disclosed to the Defence be immediately translated into French and that the time for responding to motions run from the date the Defence received French translations.⁶⁹⁸

⁶⁹² Warrant of Arrest and Order for Transfer Addressed to All Members of the United Nations (TC), 21 September 2006.

⁶⁹³ Defence Closing Brief, para. 8; Initial Appearance, T. 10 June 2008, pp. 2, 4-11. During Ntawukulilyayo's initial appearance, the date of his arrest was mistakenly identified as 22 October 2007.

⁶⁹⁴ Status Conference, T. 16 December 2008, pp. 4-5, 10, 14.

⁶⁹⁵ Decision on Prosecution's Motion for Protective Measures (TC), 6 February 2009.

⁶⁹⁶ Decision on 'Requete en Urgence de la Defense Cernant les Manquements du Procureur a ses Obligations de Communiquer les Pieces et ses Effets sur le Calendrier du Proces' (TC), 27 February 2009. As a result of the Prosecution's failure to comply with the aforementioned order, on 9 March 2009, Judge Lee Gacuiga Muthoga ordered the Prosecution to comply with the Chambers orders. See Order for the Prosecution to Comply with the Chamber's Order of 27 February 2009 (TC), 9 March 2009.

⁶⁹⁷ Decision on Defence Motion Alleging Breach of Prosecution's Disclosure Obligations; Chamber's Warning to Prosecution Counsel; and Scheduling Order Concerning Commencement of Trial (TC), 26 March 2009.

⁶⁹⁸ 'Requete en Urgence de la Defense aux Fins de Suspension de delais de la Procédure Jusqu'a Traduction des Documents de L'Accusation et des Actes de Procedure en Français, Langue de L'Accuse et de son Conseil' (TC), 13 March 2009. On 5 March 2009, the Chamber ordered the Registrar to provide written submissions on the composition and proficiency in English of the Defence team. See Order for the Registrar's submissions (TC), 5 March 2009. On 6 March 2009, the Registrar responded, stating that as at 6 March 2009, Mr. François Roux (Lead Counsel) did not have any knowledge of English and Ms. Dorothée Le Fraper du Hellen (Co-

5. On 17 March 2009, the Chamber took judicial notice of facts of common knowledge, including the occurrence of genocide in Rwanda in 1994.⁶⁹⁹ Pursuant to the Chamber's order of 18 March 2009, the Parties filed tables detailing disclosures made by the Prosecution.⁷⁰⁰ On 1 April 2009, the Chamber issued further orders to the Parties in preparation for the commencement of Trial.⁷⁰¹

2. INDICTMENT AMENDMENTS

6. On 20 February 2009, the Prosecution filed a Pre-Trial Brief and annexed summaries of witnesses' anticipated testimonies. On 23 February 2009, it filed a corrigendum to the annex. A revised witness list with revised witness summaries was filed on 3 April 2009.⁷⁰²

7. On 28 April 2009, the Chamber ordered the Prosecution to amend the indictment of 13 June 2005 and provide further information on certain allegations.⁷⁰³ On 1 May 2009, the Prosecution filed an amended indictment. However, due to errors in that indictment, the Prosecution filed a second amended indictment on 4 May 2009.⁷⁰⁴ As a result of further errors, the Prosecution filed a third amended indictment on 5 May 2009. This indictment also failed to comply with the Chamber's orders and it issued an oral warning to the Prosecution.⁷⁰⁵

8. Pursuant to the Chamber's decision of 18 May 2009, the Prosecution filed a further amended indictment on 19 May 2009, which is the operative Indictment.⁷⁰⁶ On 26 June 2009, the Chamber denied a Defence motion, which alleged non-compliance with the Chamber's decision of 18 May 2009, but struck paragraphs 29 and 30 of the Indictment due to the Prosecution's continued failure to comply with the Chamber's orders.⁷⁰⁷

3. PROSECUTION CASE

9. On 27 April 2009, the Chamber ordered the transfer of detained Prosecution witnesses to Arusha.⁷⁰⁸ The Prosecution case commenced on 6 May 2009 and ended on 26

Counsel), Ms. Ms. Chloé Gaden (Legal Assistant), and Mr. Iain Edwards (Legal Assistant) had "good" knowledge of both French and English. See Registrar's Submissions on the Language Proficiency of the Ntawukulilyayo Defence Team, 6 March 2009.

⁶⁹⁹ Decision on Prosecution's Motion for Judicial Notice of Facts of Common Knowledge (TC), 19 March 2009.

⁷⁰⁰ Prosecution's Compliance with the Interim Order from the Parties Regarding Disclosure, 23 March 2009; *Reponse à la demande d'informations émise par la Chambre dans sa décision du 18 mars 2009*, 23 March 2009. See also Interim Order to the Parties Regarding Disclosure (TC), 18 March 2009.

⁷⁰¹ Further Orders to the Parties Concerning Commencement of Trial (TC), 1 April 2009.

⁷⁰² Prosecution Pre-Trial Brief, 20 February 2009; Corrigendum to Annex A of the Prosecution's Pre-Trial Brief, 23 February 2009; Prosecutor's Compliance with Further Orders to the Parties Concerning Commencement of Trial, 3 April 2009 including Annex A1 (Prosecution's Revised Witness List) and Annex A2 (Summaries of Anticipated Evidence of Prosecution Witnesses).

⁷⁰³ Decision on Defence Preliminary Motion Alleging Defects in the Indictment (TC), 28 April 2009.

⁷⁰⁴ Status Conference, T. 6 May 2009, pp. 1-2.

⁷⁰⁵ Status Conference, T. 6 May 2009, 1-2.

⁷⁰⁶ Indictment, 19 May 2009, filed pursuant to Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber's Decision of 28 April 2009 (TC), 18 May 2009.

⁷⁰⁷ See Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber's Decision of 18 May 2009 (TC), 26 June 2009.

⁷⁰⁸ Decision on Prosecution's Request for an Order Transferring Detained Witnesses Pursuant to Rule 90bis (TC), 27 April 2009.

May 2009. Over 12 trial days, the Prosecution called 12 witnesses and tendered 40 exhibits. On 2 July 2009, the Chamber denied a Defence motion for no case to answer.⁷⁰⁹

4. DEFENCE CASE

10. On 11 May 2009, the Chamber granted protective measures to Defence witnesses.⁷¹⁰ On 12 May 2009, the Chamber ordered that the Defence case commence on 14 September 2009.⁷¹¹ The Pre-Defence Brief was filed on 7 August 2009. The Defence witness list, with summaries of proposed testimonies, and an exhibit list were filed on 14 August 2009.⁷¹² On 21 August 2009, the Chamber ordered the Defence to file a revised and reduced witness list.⁷¹³ The Defence subsequently removed four witnesses from its witness list.⁷¹⁴ On 30 September 2009, the Chamber granted the Defence leave to add Witnesses KAD, KAA and KAB to its witness list but ordered that it also review and further reduce its list.⁷¹⁵ On 11 September 2009, the Defence case was rescheduled to commence on 23 September 2009.⁷¹⁶

11. On 29 September 2009, the Chamber denied a Defence request to admit the written statement and report of Mr. Vincent Chauchard.⁷¹⁷ On 23 November 2009, the Chamber postponed the date of Ntawukulilyayo's testimony until 8 December 2009, to allow time for the French translation of certain filings, and the case was adjourned until further notice.⁷¹⁸ On 25 November 2009, the Chamber ordered the Defence to remove Mr. Joseph Ufiteyezu, a proposed expert linguist, from its witness list.⁷¹⁹ Following a *voir dire* hearing on 14 December 2009, the Chamber held that Mr. Charles Ntampaka did not have the academic qualifications or the professional experience in Rwanda to qualify as an expert witness in the field that the Defence had proposed.⁷²⁰

⁷⁰⁹ Decision on Defence Motion for No Case to Answer (TC), 2 July 2009.

⁷¹⁰ Decision on Defence Motion for Protection of Witnesses (TC), 11 May 2009.

⁷¹¹ Decision on Order Regarding Preparation for and Commencement of the Defence Case (TC), 12 May 2009. On 31 July 2009, the Chamber denied a Defence request to postpone various deadlines set during the pre-Defence conference held on 26 May 2009. See Decision on Urgent Defence Motion for Postponement of Deadlines for Filing of Pre-Defence Brief and the Opening of the Defence Case (TC), 31 July 2009. See also Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 31 July 2009 (TC), 14 August 2009.

⁷¹² *Memoire Prelable de la Defense fonde sur l'article 73 ter du Reglement de Procedure et de Preuve*, 7 August 2009; *Annexe A, Tableau Provisoire des Résumés des Dépositions Attendues des Témoins à Décharge*; *Annexe B, Tableau Provisoire des Pièces à Conviction a Décharge Proposées*, 14 August 2009.

⁷¹³ Order for the Defence to Reduce its List of Witnesses (TC), T. 21 August 2009.

⁷¹⁴ Confidential Response to 'Order for the Defence to Reduce its List of Witnesses', 25 August 2009.

⁷¹⁵ Decision on Defence Motion for Leave to Vary its Witnesses and Extend Protective Measures; and the Chamber's Further Order to Reduce the Defence Witness List (TC), 30 September 2009.

⁷¹⁶ Scheduling Order Regarding the Commencement of the Defence Case (TC), 11 September 2009.

⁷¹⁷ Decision on Defence Motion to Admit the Statement and Report of Mr. Vincent Chauchard (TC), 29 September 2009. On 19 November 2009, the Chamber issued an oral decision that Witness EAD's testimony would not be postponed until the following year. It further ordered that Ntawukulilyayo be prepared to testify on 23 November 2009, in the event that Defence expert witnesses could not be heard. See Oral Decision on Defence Submissions Regarding the Accused's Testimony (TC), T. 19 November 2009.

⁷¹⁸ Oral Decision on Defence Request to Postpone the Accused's Testimony (TC), T. 23 November 2009.

⁷¹⁹ Decision on Prosecution Motion to Reject Ufiteyezu as an Expert Witness (TC), 25 November 2009. See also Decision on the Defence Request for Reconsideration of the Chamber's Decision Rejecting Joseph Ufiteyezu as an Expert Witness (TC), 16 December 2009.

⁷²⁰ Oral Ruling on the Qualification of Mr. Charles Ntampaka to Testify as a Defence Expert Witness (TC), T. 14 December 2009. See also Decision on Prosecution Motions Opposing Proposed Defence Expert Witness Charles Ntampaka (TC), 27 November 2009.

12. The Defence conducted its case from 23 September 2009 to 17 December 2009 over 21 trial days. The Defence called 23 witnesses, including Ntawukulilyayo, and tendered 110 exhibits.

5. FURTHER PROCEEDINGS

13. On 18 December 2009, the Chamber ordered that the Parties file their Closing Briefs by 25 February 2010 and that final submissions be heard on 12 and 13 April 2010.⁷²¹ On 3 February 2010, the Chamber notified the Parties that a *proprio motu* site visit would take place during the week commencing 26 April 2010, and should they wish to file submissions regarding the site visit, they should do so by close of business on 19 February 2010. The Parties were also informed that closing arguments would be postponed until after the site visit and a scheduling order would be issued in due course.⁷²²

14. On 11 February 2010, the Chamber granted an extension allowing the Defence to file its Closing Brief on 25 March 2010.⁷²³ On 19 February 2010, the Chamber denied a Prosecution request for an extension of time for the filing of its Closing Brief.⁷²⁴ Accordingly, the Prosecution and Defence filed their closing briefs on 25 February and 25 March 2010 respectively.

15. On 9 March 2010, the Chamber issued a scheduling order for a site visit to Rwanda for 25 to 29 April 2010.⁷²⁵ On 20 April 2010, the Chamber issued modalities with respect to the site visit and, on 25 April 2010, denied a Defence motion requesting the issuance of new modalities.⁷²⁶ The Chamber conducted the site visit from 25 to 29 April 2010. The Registry's report on the site visit was filed on 5 May 2010.⁷²⁷ Final submissions were heard on 14 June 2010.⁷²⁸

16. The Chamber delivered the oral summary of its judgement on 3 August 2010. The Chamber, Judge Akay dissenting, found Ntawukulilyayo guilty of Count I (genocide) and imposed a single sentence of 25 years, giving credit for time served. The Chamber acquitted Ntawukulilyayo of Counts II (complicity in genocide) and III (direct and public incitement to commit genocide). The written version of the judgement was filed on 6 August 2010 after the completion of the editorial process.

⁷²¹ Scheduling Order for Filing of Closing Briefs and Hearing of Closing Arguments (TC), 18 December 2009.

⁷²² Email correspondence dated 3 February 2010 from the Chamber to Prosecution and Defence Counsel.

⁷²³ Decision on Defence Motion for an Extension of Time for the Filing of its Closing Brief (TC), 11 February 2010.

⁷²⁴ Decision on Prosecution Motion for Equality of Arms following the Trial Chamber's Decision on the Defence Motion for an Extension of Time for the Filing of its Closing Brief (TC), 19 February 2010.

⁷²⁵ Scheduling Order for Site Visit to Rwanda and Hearing of Closing Arguments (TC), 9 March 2010.

⁷²⁶ Decision on Extremely Urgent Defence Motion for the Trial Chamber to Reissue New Modalities for the Site Visit to Rwanda (TC), 25 April 2010.

⁷²⁷ Confidential Report on Site Visit, 5 May 2010. See also Defence Supplement to the Defence Final Brief Further to the Site Visit in Rwanda, 25-29 April 2010.

⁷²⁸ Final submissions had been scheduled for 3 June 2010. See Scheduling Order for Site Visit to Rwanda and Hearing of Closing Arguments (TC), 9 March 2010. However, due to unavoidable circumstances, final submissions were re-scheduled for 14 June 2010.

ANNEX B: CITED MATERIALS AND DEFINED TERMS

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1. JURISPRUDENCE

1.1. ICTR

Akayesu

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998 (“*Akayesu* Trial Judgement”)

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

Bagilishema

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement (AC), 3 July 2002 (“*Bagilishema*” Appeal Judgement)

Bagosora et al.

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-AR73, 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 (AC), 18 September 2006

The Prosecutor v. Théoneste Bagosora et al., Case Nos. ICTR-98-41-AR93 and ICTR-98-41-AR93.2, Decision on Prosecutor’s Interlocutory Appeals Regarding the Exclusion of Evidence (AC), 19 December 2003

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR 98-41-T, Judgement (TC), 18 December 2008 (“*Bagosora et al.* Trial Judgement”)

Bizimungu et al.

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-AR50, Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment (AC), 12 February 2004

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence (TC), 23 April 2004

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T, Decision on Mugiraneza’s Request for Certification to Appeal and Mugenzi’s and Bizimungu’s Requests For Reconsideration of the Decision on the Objections of Mugiraneza and Bicamumpaka to the Engagement of Mr. Everard O’Donnell as a Chambers Consultant dated 28 August 2009 (TC), 23 September 2009

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Gacumbitsi

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006 (“*Gacumbitsi* Appeal Judgement”)

Gatete

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (TC), 17 November 2008

Kajelijeli

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005 (“*Kajelijeli* Appeal Judgement”)

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli’s Motion Requesting the Recalling of Prosecution Witness GAO (TC), 2 November 2001

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement (TC), 1 December 2003

Kambanda

The Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgement (TC), 4 September 1998 (“*Kambanda* Trial Judgement”)

Kamuhanda

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Judgement (TC), 22 January 2004 (“*Kamuhanda* Trial Judgement”)

Kanyarukiga

The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (TC), 6 June 2008

Karemera et al.

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-PT, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago (TC), 10 October 2003

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure (TC), 31 October 2005

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-T, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness (TC), 11 October 2005

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-T, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda (TC), 27 November 2006

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-T, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Witness GAY (TC), 28 September 2007

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008

Karera

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement (AC), 2 February 2009 ("Karera Appeal Judgement")

The Prosecutor v. François Karera, Case No. ICTR-01-74-T, Judgement (TC), 7 December 2007 ("Karera Trial Judgement")

Kayishema and Ruzindana

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1, Judgement (TC), 21 May 1999 ("Kayishema and Ruzindana Trial Judgement")

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-I-A, Judgement (AC), 1 June 2001 ("Kayishema and Ruzindana Appeal Judgement")

Muhimana

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement (AC), 21 May 2007 ("Muhimana Appeal Judgement")

Musema

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001 ("Musema Appeal Judgement")

The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement (TC), 27 January 2000 (“*Musema Trial Judgement*”)

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Muvunyi

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008 (“*Muvunyi Appeal Judgement*”)

Nahimana et al.

Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007 (“*Nahimana et al. Appeal Judgement*”)

Nchamihigo

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-2001-63-A, Judgement (AC), 18 March 2010 (“*Nchamihigo Appeal Judgement*”)

Ndayambaje et al.

The Prosecutor v. Elie Ndayambaje, et al., Case No. ICTR-96-8-T, Decision on Prosecutor’s Motion to Modify Her List of Exhibits (TC), 14 December 2001

Ndindabahizi

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

The Prosecutor v. Emmanuel Ndindabahizi, Case No. ICTR-2001-71-T, Judgement and Sentence (TC), 15 July 2004 (“*Ndindabahizi Trial Judgement*”)

Ndindiliyimana

The Prosecutor v. Augustin Ndindiliyimana, Case No. ICTR-2000-56-I, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council (TC), 26 March 2004.

Ngirabatware

The Prosecutor v. Augustin Ngirabatware, Case No. ICTR-99-54-PT, Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial (TC), 17 September 2009

Niyitegeka

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 (“*Niyitegeka Appeal Judgement*”)

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-R, Decision on Request for Review (AC), 30 June 2006

The Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003 (“*Niyitegeka Trial Judgement*”)

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Ntagerura et al.

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006 (“*Ntagerura et al.* Appeal Judgement”)

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004 (“*Ntagerura et al.* Trial Judgement”)

Ntakirutimana

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases No. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004 (“*Ntakirutimana* Appeal Judgement”)

The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgement (TC), 21 February 2003 (“*Ntakirutimana* Trial Judgement”)

Nyiramasuhuko et al.

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” (AC), 2 July 2004

Nzabonimana

The Prosecutor v. Callixte Nzabonimana, Case No. ICTR-98-44D-T, Decision on Callixte Nzabonimana’s Motion for an Order Concerning Disclosure of Gacaca Judicial Material Relating to Prosecution Witnesses (TC), 29 October 2009

Renzaho

The Prosecutor v. Tharcisse Renzaho, Case No. ICTR-97-31-T, Judgement (TC), 14 July 2009 (“*Renzaho* Trial Judgement”)

Rutaganda

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-03-A, Judgement (AC), 26 May 2003 (“*Rutaganda* Appeal Judgement”)

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006

Semanza

The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003 (“*Semanza* Trial Judgement”)

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005 (“*Semanza* Appeal Judgement”)

Seromba

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

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-T, Judgement (TC), 13 December 2006 (“*Seromba* Trial Judgement”)

Serushago

Omar Serushago v. The Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgement (AC), 6 April 2000 (“*Serushago* Appeal Judgement”)

Setako

The Prosecutor v. Ephrem Setako, Case No. ICTR-04-81-T, Judgement (TC), 25 February 2010 (“*Setako* Trial Judgement”)

Simba

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

The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-T, Decision on Admission of Prosecution Exhibits 27 and 28 (TC), 31 January 2005

The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-T, Judgement and Sentence (TC), 13 December 2005 (“*Simba* Trial Judgement”)

Zigiranyirazo

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

1.2. ICTY

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Aleksovski

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement (AC), 24 March 2000 (“*Aleksovski Appeal Judgement*”)

Blagojević and Jokić

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement (AC), 9 May 2007 (“*Blagojević and Jokić Appeal Judgement*”)

Blaškić

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement (AC), 29 July 2004 (“*Blaškić Appeal Judgement*”)

Bralo

Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material (AC), 30 August 2006

Brđanin

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement (AC), 3 April 2007 (“*Brđanin Appeal Judgement*”)

Čelebići/Delalic/Delic

Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka “Pavo”), Hazim Delic and Esad Landžo (aka “Zenga”), Case No. IT-96-21-A, Judgement (AC), 20 February 2001 (“*Delalic, et. al Appeal Judgement*”)

Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka “Pavo”), Hazim Delic and Esad Landžo (aka “Zenga”), Case No. IT-96-21-T, Judgement (TC), 16 November 1998 (“*Delalic Trial Judgement*”)

Galić

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement (AC), 30 November 2006 (“*Galić Appeal Judgement*”)

Hadžihasanović and Kubura

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement (AC), 22 April 2008 (“*Hadžihasanović and Kubura Appeal Judgement*”)

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Halilović

The Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement (AC), 16 October 2007 (*Halilović Appeal Judgement*)

Jelisić

The Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement (AC), 5 July 2001 (*Jelisić Appeal Judgement*)

Kupreškić et al.

Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-A, Judgement (AC), 23 October 2001 (*Kupreškić et al. Appeal Judgement*)

Krnojelac

The Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement (AC), 17 September 2003 (*Krnojelac Appeal Judgement*)

Krstić

The Prosecutor v. Radoslav Krstić, Case No. IT-98-33-A, Judgement (AC), 19 April 2004 (*Krstić Appeal Judgement*)

Kvočka et al.

The Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30-A, Judgement (AC), 28 February 2005 (*Kvočka et al. Appeal Judgement*)

Limaj et al.

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-T, Judgement (TC), 30 November 2005 (*Limaj et al. Trial Judgement*)

Naletilić and Martinović

Prosecutor v. Mladen Naletilić, a.k.a. "TUTA" and Vinko Martinović, a.k.a. "ŠTELA", Case No. IT-98-34-A, Judgement (AC), 3 May 2006 (*Naletilić and Martinović Appeal Judgement*)

Nikolić

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement (AC) 4 February 2005 (*Dragan Nikolić Appeal Judgement*)

Orić

The Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement (AC), 3 July 2008 (*Orić Appeal Judgement*)

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Simić

The Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement (AC), 28 November 2006 (“*Simić* Appeal Judgement”)

Strugar

Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Judgement (TC) 31 January 2005 (“*Strugar* Trial Judgement”)

Tadić

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement (AC), 15 July 1999 (“*Tadić* Appeal Judgement”)

Vasiljević

The Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement (AC), 25 February 2004 (“*Vasiljević* Appeal Judgement”)

2. DEFINED TERMS AND ABBREVIATIONS

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Defence Closing Brief

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, Defence Closing Brief, 25 March 2010

Defence Pre-Trial Brief

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82, Pre-Defence Brief Pursuant to Rule 73 *ter* of the Rules of Procedure and Evidence, 7 August 2009

First Amended Indictment

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, Indictment, 1 May 2009

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

Indictment

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, Indictment, 19 May 2009

Indictment of 26 May 2005

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, Indictment, 26 May 2005

Indictment of 13 June 2005

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, Indictment, 13 June 2005

Majority

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A majority of the Trial Chamber composed of Judge Khalida Rachid Khan, presiding and Judge Lee Gacuiga Muthoga

MDR

Mouvement Démocratique Républicain

MRND

Mouvement Révolutionnaire National pour la Démocratie et le Développement

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Parti Libéral

Prosecution Closing Brief

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, The Prosecutor's Closing Brief, 25 February 2010

Prosecution Pre-Trial Brief

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, The Prosecutor's Pre-Trial Brief, 20 February 2009

PSD

Parti Social-Démocrate

RPA

Rwandan Patriotic Army

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RPF

Rwandan (also Rwandese) Patriotic Front

Rules

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Second Amended Indictment

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, Indictment, 4 May 2009

Statute

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

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Transcript

Third Amended Indictment

The Prosecutor v. Dominique Ntawukulilyayo, Case No. ICTR-05-82-I, Amended Indictment, 5 May 2009

UNAMIR

United Nations Assistance Mission for Rwanda

UNDF

United Nations Detention Facility

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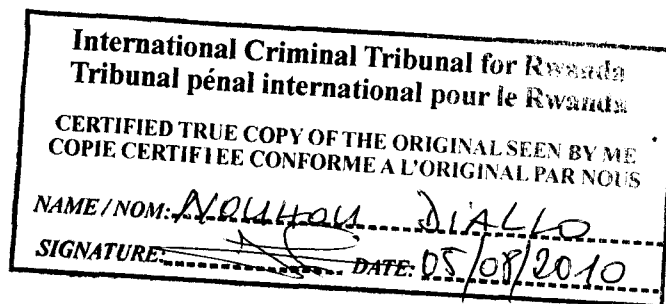
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UNITED NATIONS
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Case No. ICTR-2005-82-I

THE PROSECUTOR
AGAINST
DOMINIQUE NTAWUKULILYAYO

INDICTMENT



JUDICIAL RECORDS/ARCHIVES
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2009 MAY 19 P 6:44

[Signature]

- I. The Prosecutor of the United Nations 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") charges:

Dominique NTAWUKULILYAYO

With:

- Count I - GENOCIDE, pursuant to Articles 2(3)(a), 6(1) and 6(3) of the Statute, or in the alternative,
 Count II - COMPLICITY IN GENOCIDE, pursuant to Articles 2(3)(e), 6(1) and 6(3) of the Statute;
 Count III - DIRECT AND PUBLIC INCITEMENT, pursuant to Articles 2(3)(c), 6(1) of the Statute;

II. THE ACCUSED

1. **Dominique NTAWUKULILYAYO** was born in 1942 in Mubuga *Commune*, Gikongoro *Préfecture*, Republic of Rwanda.
2. **Dominique NTAWUKULILYAYO** was at all times referred to in this indictment:

(A) A senior public official who,

- (i) was *Sous-Préfet* of Gisagara Sous Prefecture in Butare Prefecture;
- (ii) consequently had *de jure* and *de facto* control over *bourgmestres*, *conseillers de secteur*, *responsables de cellule*, *nyumbakumi* (ten-house leaders), administrative personnel, *gendarmes*, communal police, *Interahamwe*, militias, and armed civilians in the sous-prefecture in that he could order such persons to commit or to refrain from committing unlawful acts and could discipline or punish them for unlawful acts or omissions.

III. CHARGES AND CONCISE STATEMENT OF FACTS

3. At all times referred to in this indictment there existed in Rwanda a minority racial or ethnic group known as Tutsis, officially identified as such by the government of Rwanda. The majority of the population of Rwanda was comprised of a racial or ethnic group known as the Hutus, also officially identified as such by the government of Rwanda.

4. Between 6 April 1994 and 17 July 1994, throughout Rwanda, and in Kigali in particular, *Interahamwe* militias, soldiers of the FAR and armed civilians targeted and attacked the civilian population based on ethnic or racial identification as Tutsi, or perceived sympathies to the Tutsi. During the attacks some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of these attacks, large numbers of ethnically or racially identified Tutsi were killed.

Count I: GENOCIDE

The Prosecutor of the International Criminal Tribunal for Rwanda charges **Dominique NTAWUKULILYAYO** with **GENOCIDE**, a crime stipulated in Article 2(3)(a) of the Statute, in that between the dates of 6 April 1994 and 17 July 1994 throughout Rwanda, particularly in Butare *Préfecture*, **Dominique NTAWUKULILYAYO** 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, a racial or ethnic group, as such, as outlined in paragraphs 5 through 15.

Alternatively,

Count II: COMPLICITY IN GENOCIDE

The Prosecutor of the International Criminal Tribunal for Rwanda charges **Dominique NTAWUKULILYAYO** with **COMPLICITY IN GENOCIDE**, a crime stipulated in Article 2(3)(e) of the Statute, in that between the dates of 6 April 1994 and 17 July 1994 throughout Rwanda, particularly in Butare *Préfecture*, **Dominique NTAWUKULILYAYO** 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, a racial or ethnic group, as such, 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 assistance would contribute to the crime of genocide, as outlined in paragraphs 5 through 15.

CONCISE STATEMENT OF FACTS FOR COUNTS I AND II

Individual Criminal Responsibility

5. Pursuant to Section 6(1) of the Statute, the accused, **Dominique NTAWUKULILYAYO**, is individually responsible for the crimes of genocide or complicity in genocide because he instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes. With respect to the commission of those crimes, **Dominique NTAWUKULILYAYO** ordered those over whom he had effective control as a result of his position and authority described in paragraph 2, and he instigated and aided and abetted those over whom he did not have effective control. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 6 through 22.

The massacre at Kabuye hill

6. Between 20 and 21 April 1994, several thousand Tutsi refugees had gathered at Gisagara market in Gisagara Town in Ndora Commune, Butare Prefecture. Many of these refugees attempted to leave to travel towards the Burundi border but were prevented from doing so by soldiers and communal policemen on the orders of **Dominique NTAWUKULILYAYO** and **Elie Ndayambaje**. These refugees returned to Gisagara, and were subsequently sent to Kabuye hill where they were killed. By preventing the Tutsi refugees from leaving to Burundi, **Dominique NTAWUKULILYAYO** aided and abetted in the subsequent killing of the Tutsi.
7. On or about 23 April 1994, in the afternoon, **Dominique NTAWUKULILYAYO** ordered Tutsi who were gathered at Gisagara market place that they were to move to Kabuye hill where they would be protected and fed. Those that were unwilling to go were chased to Kabuye hill. Upon arrival in the late afternoon or early evening, **Dominique NTAWUKULILYAYO** arrived with Callixte Kalimanzira at Kabuye hill in vehicles full of gendarmes. **Dominique NTAWUKULILYAYO** told the refugees that they would be protected by armed soldiers. By ordering the Tutsi to go to Kabuye hill, **Dominique NTAWUKULILYAYO** aided and abetted in the killing of those Tutsi.
8. Within a short time of their arrival at Kabuye hill, on or about 23 April 1994, gendarmes and communal policemen had surrounded the hill and started shooting at the refugees. Many Tutsi were killed. By bringing the gendarmes to Kabuye hill, who, along with others took part in the killing of those Tutsi, **Dominique NTAWUKULILYAYO** committed and aided and abetted in the killing of those Tutsi.
9. Between about 21 and 25 April 1994, **Dominique NTAWUKULILYAYO** ordered civilians to search the houses of Tutsis so that they could be assembled at Kabuye hill. He told the civilians to wait for the arrival of soldiers who he would bring before the killings commenced. Tutsis were sent to Kabuye hill where they were killed. By ordering civilians to search houses for Tutsis to be sent to Kabuye hill where they were killed, **Dominique NTAWUKULILYAYO** instigated and aided and abetted in the killing of the Tutsi.
10. Between about 21 and 25 April 1994, **Dominique NTAWUKULILYAYO** collected soldiers and gendarmes from Butare and transported them to Kabuye hill to kill the Tutsi who were there. During that same period he also collected ammunition from Butare which was used by attackers to kill the Tutsi at Kabuye hill. The killings at Kabuye hill during that period were carried out by soldiers, gendarmes, communal police and civilians. By transporting ammunition to Kabuye hill that was used by attackers to kill Tutsi, **Dominique**

NTAWUKULILYAYO committed and aided and abetted in the killing of the Tutsi.

11. On or about Sunday 24th April 1994, in the afternoon **Dominique NTAWUKULILYAYO** arrived at Kabuye hill with Callixte Kalimanzira and several soldiers. This group took part in the attack on the Tutsis gathered at Kabuye hill. By transporting soldiers and Callixte Kalimanzira, to Kabuye hill, **Dominique NTAWUKULILYAYO** committed and aided and abetted in the killing of the Tutsi.
12. By reason of the large numbers of refugees present at Kabuye hill, it took several days from on or about 21 April to 25 April 1994 to kill those Tutsi who had taken refuge there. On or about 25 April 1994, **Dominique NTAWUKULILYAYO**, Callixte Kalimanzira, Bernadette Mukarurangwa met with Fidele Uwizeye at Uwizeye's house in Gisagara town where they discussed the fact that the attackers had failed to kill all the refugees at Kabuye hill due to their large numbers. They decided to go to Kabuye hill to check on the progress of the killings.
13. As a result of his actions, **Dominique NTAWUKULILYAYO** was responsible for the death of as many as 25000 Tutsi refugees who were killed at Kabuye hill during the period of 21 to 25 April 1994.

Other acts

14. On or about 20th April 1994, the Accused **Dominique NTAWUKULILYAYO** participated in a meeting with the new Prefet of Butare, Sylvain Nsabimana, and the bourgmestres of Butare, at the multipurpose hall in Butare. The Accused **Dominique NTAWUKULILYAYO** was informed at that meeting of killings that had started taking place in the Muganza commune which formed part of the Gisagara sous prefecture by the bourgmestre of Muganza, Chrysologue Bimenyimana. The Bourgmestre asked **Dominique NTAWUKULILYAYO** for permission to return to Muganza to assist stop the killings and to assist two Tutsi named Fidele Kalisa and Jacqueline Utamuliza. **Dominique NTAWUKULILYAYO** refused to allow the bourgmestre of Muganza to leave the meeting to try and stop the killings. By refusing to allow the bourgmestre to return to try and stop the killing of Fidele Kalisa and Jacqueline Utamuliza, **Dominique NTAWUKULILYAYO** aided and abetted in the killing of Tutsi in Muganza commune.

Roadblocks

15. Within a few days of the death of President Habyarimana on 6 April 1994, several roadblocks were established in the Gisagara sous prefecture including including the "Jaguar" roadblock which was near to the Catholic Church in Gisagara, one established near to **Dominique NTAWUKULILYAYO's** residence, and one near the trading centre on the road towards Musha. The roadblocks were run by subordinates of the accused referred to in paragraph 5 of the indictment, including Lucien Simbayobwebe. During the period 6 April 1994 and 17 July 1994, the roadblocks were used to prevent Tutsi from escaping from the area, and so that people could be identified as Tutsi and be killed. Many Tutsi were killed at the roadblocks including Jean Munyagihugu.
16. **Dominique NTAWUKULILYAYO** was aware and acquiesced to the establishment of roadblocks in various areas within Gisagara secteur and in some instances, whilst passing through the said roadblocks, congratulated and encouraged the killers to continue with their work.

In his capacity as sous-prefet of Gisagara sous-préfecture, **Dominique NTAWUKULILYAYO's** mere knowledge of the establishment of and possible presence at any of these roadblocks in around the 5 communes that comprise the said sous prefecture would have had an encouraging effect on the attackers mentioned herein, and conveyed the impression, that the attacks and/or killing of Tutsi civilians at those locations was endorsed by the him, thereby committing and/or aiding and abetting in the killing of the Tutsi at the roadblocks in Gisagara sous-prefecture.

Criminal Responsibility as a Superior

17. Pursuant to Section 6(3) of the Statute, the accused, **Dominique NTAWUKULILYAYO**, is responsible for the crimes of genocide or complicity in genocide because specific criminal acts were committed by subordinates of the accused and the accused knew or 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. These subordinates included the *Interahamwe*; the "Civil Defense Forces"; communal police including Vincent Twiringiyimana; civilian militias; local administrative officials; other soldiers and militiamen including Lucien Simbayobwebe; other known participants, such as Chrysologue Bimenyimana, Elie Ndayambaje, Celestin Rwankubito and Fidele Uwizeye; and other unknown participants.

The massacre at Kabuye hill

18. Between 20 and 21 April 1994, several thousand Tutsi refugees had gathered at Gisagara market in Gisagara Town in Ndora Commune, Butare Prefecture. Many of these refugees attempted to leave to travel towards the Burundi border but were prevented from doing so by subordinates of **Dominique NTAWUKULILYAYO** on the orders of **Dominique NTAWUKULILYAYO** and Elie Ndayambaje. These subordinates are principally, the bourgemestres of the five communes under his immediate supervision. There were: the bourgemestres of Ndora, Muyaga, Kibayi, Muganza and Nyaruhengeri communes. These refugees returned to Gisagara, and were subsequently sent to Kabuye hill where they were killed.
19. On or about 23 April 1994, in the afternoon, **Dominique NTAWUKULILYAYO** ordered Tutsi who were gathered at Gisagara market place that they were to move to Kabuye hill where they would be protected and fed. Those that were unwilling to go were chased to Kabuye hill. Upon arrival in the late afternoon or early evening, **Dominique NTAWUKULILYAYO** arrived with Callixte Kalimanzira at Kabuye hill in vehicles full of gendarmes, **Dominique NTAWUKULILYAYO** told the refugees that they would be protected by armed soldiers. Within a short time of their arrival at Kabuye hill, gendarmes and communal policemen, who were subordinates of the Accused, surrounded the hill and started shooting at the refugees. **Dominique NTAWUKULILYAYO** knew or had reason to know of the killing and failed or refused to take the necessary or reasonable steps to prevent the killing or to punish the perpetrators thereof.
20. Between about 21 and 25 April 1994, **Dominique NTAWUKULILYAYO** collected soldiers and gendarmes, who were his subordinates, from Butare and transported them to Kabuye hill to carry out the killings. During that same period the Accused also collected ammunition from Butare which was used to kill the refugees at Kabuye hill. The killings at Kabuye hill during that period were carried out by soldiers, gendarmes, communal police and armed civilians who were subordinate to the Accused. **Dominique NTAWUKULILYAYO** knew or had reason to know of the killings and failed or refused to take the necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.
21. On or about Sunday 24th April 1994, in the afternoon, **Dominique NTAWUKULILYAYO** arrived at Kabuye hill with Callixte Kalimanzira and several soldiers who were his subordinates. This group took part in the attack on the Tutsis gathered at Kabuye hill. **Dominique NTAWUKULILYAYO** knew or had reason to know of the killings and failed or refused to take the necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.
22. As a result of the actions of **Dominique NTAWUKULILYAYO** and those of his subordinates, as many as 25,000 Tutsi refugees were killed at Kabuye hill during the period of 21 to 25 April 1994.

Roadblocks

23. Within a few days of the death of President Habyarimana on 6 April 1994, several roadblocks were established in the Gisagara sous-prefecture, including the "Jaguar" roadblock which was near to the Catholic church in Gisagara, one established near to **Dominique NTAWUKULILYAYO**'s residence, and one near the trading centre on the road towards Musha. The roadblocks were established and run by armed civilians and other subordinates of the Accused including Lucien Simbayobwebe. During the period 6 April 1994 and 17 July 1994, the roadblocks were used to prevent Tutsi from escaping from the area, and so that could be identified as Tutsi and be killed. Many Tutsi were killed by the subordinates of the accused at the roadblocks, including Jean Munyagihugu, who was killed at the roadblock near to the house of **Dominique NTAWUKULILYAYO**. **Dominique NTAWUKULILYAYO** knew or had reason to know of the killings and failed or refused to take the necessary or reasonable measures to prevent the killings or to punish the perpetrators thereof.

Count III: DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

The Prosecutor of the International Criminal Tribunal for Rwanda charges **Dominique NTAWUKULILYAYO** with **DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE**, a crime stipulated in Article 2(3)(c) of the Statute, in that between the dates of 6 April 1994 and 17 July 1994 throughout Rwanda, particularly in Butare *Préfecture*, **Dominique NTAWUKULILYAYO** was responsible for directly and publicly inciting people to kill or cause serious bodily or mental harm to members of the Tutsi racial or ethnic group, with intent to destroy, in whole or in part, a racial or ethnic group.

CONCISE STATEMENT OF FACTS FOR COUNT III

Individual Criminal Responsibility

24. Pursuant to Section 6(1) of the Statute, the accused, **Dominique NTAWUKULILYAYO**, is individually responsible for the crimes of direct and public incitement to commit genocide because he committed or otherwise aided and abetted in the planning, preparation or execution of this crime. With respect to the commission of this crime, **Dominique NTAWUKULILYAYO** ordered those over whom he had effective control as a result of his position and authority described in paragraph 2, and he instigated and aided and abetted those over whom he did not have effective control. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 24 through 31.
25. Between 6 April 1994 and 31 July 1994, the Accused **Dominique NTAWUKULILYAYO** organized, attended and/or participated in various meetings throughout Butare Prefecture and in particular the Gisagara Sous

Prefecture where various speakers at these meetings called on members of the public and officials to take part in killing Tutsis. The particulars of these meetings that give rise to his individual criminal responsibility are set forth in paragraphs 25 through 31.

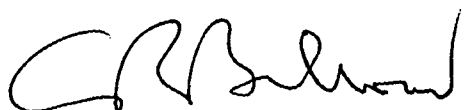
26. On or about 19th April 1994, the Accused **Dominique NTAWUKULILYAYO** participated in a meeting for the swearing in of the new Prefet for Butare Sylvain NSABIMANA at the MRND Palace in Butare. During that meeting, the Interim President Theodore SINDIKUBWABO, addressed the officials present and the object of that speech was to instigate the genocide throughout the Butare Prefecture. The Accused agreed with the speech of President SINDIKUBWABO. By doing so, **Dominique NTAWUKULILYAYO** committed and aided and abetted in the direct and public incitement of the killing of Tutsi.
27. On or about 25 May 1994, **Dominique NTAWUKULILYAYO** attended a meeting at Kirarambogo, Nyirkanywero Cellule, Nyabitaré secteur together with Alphonse Nteziryayo, Colonel Tharcisse Muvunyi, Judge Ruzindaza and others. At this meeting, clear instructions were given by Nteziryayo and Ruzindaza to flush out and kill all remaining Tutsi who were in hiding. The attendance of **Dominique NTAWUKULILYAYO** at this meeting, and his subsequent silence at the meeting, was intended as being seen by the population of his agreement with the content of those speeches and in so doing **Dominique NTAWUKULILYAYO** committed and aided and abetted in the direct and public incitement of the killing of the Tutsi.
28. On or about 24 April 1994, the Accused **Dominique NTAWUKULILYAYO** addressed the local population in Gikoro, Mudabori, Nyaruhengeri Secteur and promised to reward those persons who would kill the greatest numbers of Tutsis with houses, land and money. By doing so, **Dominique NTAWUKULILYAYO** committed direct and public incitement to kill Tutsi.
29. Towards the end of May 1994, in Muyaga Commune, the Accused **Dominique NTAWUKULILYAYO** addressed the local population in front of the deputy bourgmestre's house and urged them to search for and kill all the Tutsi's before the Rwandan Patriotic Front reached Muyaga. By doing so, **Dominique NTAWUKULILYAYO** committed direct and public incitement to kill Tutsis.
30. Between 1 May and 17 July 1994 at a meeting at the Gisagara centre, which was attended by **Dominique NTAWUKULILYAYO**, Callixte Kalimanzira, Celestin Rwankubito, Fidele Uwizeye as well as other ordinary members of the population, people were ordered to kill any young Tutsi women who were still alive. The attendance of **Dominique NTAWUKULILYAYO** at this meeting, and his subsequent silence at the meeting, was intended as being seen by the population of his agreement with the content of those speeches. In so doing

Dominique NTAWUKULILYAYO committed and aided and abetted in direct and public incitement to kill Tutsi.

31. On or about 21 June 1994, **Dominique NTAWUKULILYAYO** attended a meeting for the swearing in of the new bourgmestre of Ndora Commune, Fidele Uwiyeze at the Gisagara market place. This meeting was attended by officials such as Alphonse Nteziryayo, Callixte Kalimanzira, Bernadette Mukarurangwa and others. During the swearing in ceremony, several of these officials made speeches to instigate the local population to search for and kill any remaining Tutsi in the commune. The attendance of **Dominique NTAWUKULILYAYO** at this meeting, and his silence thereafter was intended as being seen by the population of his agreement with the content of those speeches. In doing so, **Dominique NTAWUKULILYAYO** committed and aided and abetted in the direct and public incitement to kill Tutsi.

The acts and omissions of **Dominique NTAWUKULILYAYO** detailed herein are punishable in pursuant to Articles 22 and 23 of the Statute.

Signed at ARUSHA, Tanzania, this 18th day of May 2009.



Hassan Bubacar Jallow
Prosecutor UN-ICTR





19-5-2009
(250bis-241bis)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

2181

Affaire n° ICTR-2005-82-1

FRANÇAIS
Original : ANGLAIS

LE PROCUREUR

c.

DOMINIQUE NTAWUKULILYAYO

JUDICIAL RECORDS/ARCHIVES
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ACTE D'ACCUSATION

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS

NAME / NOM: *NQUHOMA DI ALLO*

SIGNATURE: *[Signature]* DATE: *05/08/2010*

I. Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le « Statut »), accuse :

Dominique NTAWUKULILYAYO

des crimes énumérés ci-après :

- Premier chef d'accusation : GÉNOCIDE, en application des articles 2, paragraphe 3 a), et 6, paragraphes 1 et 3 du Statut, ou à titre subsidiaire,
- Deuxième chef d'accusation : COMPLICITÉ DANS LE GÉNOCIDE, en application des articles 2, paragraphe 3 e), et 6, paragraphes 1 et 3 du Statut,
- Troisième chef d'accusation : INCITATION DIRECTE ET PUBLIQUE À COMMETTRE LE GÉNOCIDE, en application des articles 2, paragraphe 3 c), et 6, paragraphe 1 du Statut.

II. L'ACCUSÉ

1. **Dominique NTAWUKULILYAYO** est né en 1942 en République rwandaise dans la commune de Mubuga (préfecture de Gikongoro).

2. Durant toute la période visée par le présent acte d'accusation, **Dominique NTAWUKULILYAYO** était :

A) Haut fonctionnaire :

- i) Exerçant les fonctions de sous-préfet de Gisagara dans la préfecture de Butare ;
- ii) Exerçant par conséquent un contrôle de droit comme de fait sur les bourgmestres, les conseillers de secteur, les responsables de cellule, les *nyumbakumi* (chefs de chaque ensemble de 10 maisons), le personnel administratif, les gendarmes, les agents de la police communale, les *Interahamwe*, les miliciens et les civils armés de la sous-préfecture, en ce qu'il pouvait ordonner à ces personnes de commettre ou de s'abstenir de commettre des actes illicites et les discipliner ou les punir de leurs actes ou omissions contraires à la loi.

III. ACCUSATIONS ET EXPOSÉ SUCCINCT DES FAITS

3. Durant toute la période visée par le présent acte d'accusation, il existait au Rwanda un groupe racial ou ethnique minoritaire appelé le groupe tutsi et officiellement considéré comme tel par les pouvoirs publics rwandais. La majorité de la population rwandaise appartenait à un autre groupe racial ou ethnique appelé le groupe hutu qui était lui aussi officiellement considéré comme tel par les pouvoirs publics rwandais.

4. Entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais et à Kigali en particulier, des miliciens *interahamwe*, des militaires des FAR et des civils armés ont pris pour cible et attaqué des civils en raison de leur appartenance au groupe ethnique ou racial tutsi ou parce qu'ils étaient considérés comme des personnes sympathisant avec les Tutsis. Au cours de ces attaques, certains citoyens rwandais ont tué des personnes soupçonnées d'appartenir au groupe tutsi ou porté gravement atteinte à leur intégrité physique ou mentale. De nombreuses personnes identifiées comme membres du groupe ethnique ou racial tutsi y ont trouvé la mort.

Premier chef d'accusation : GÉNOCIDE

Le Procureur du Tribunal pénal international pour le Rwanda accuse **Dominique NTAWUKULILYAYO** de **GÉNOCIDE**, crime prévu à l'article 2.3 a) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais et en particulier dans la préfecture de Butare, il s'est rendu responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, ainsi qu'il est exposé aux paragraphes 5 à 15.

Ou à titre subsidiaire,

Deuxième chef d'accusation : COMPLICITÉ DANS LE GÉNOCIDE

Le Procureur du Tribunal pénal international pour le Rwanda accuse **Dominique NTAWUKULILYAYO** de **COMPLICITÉ DANS LE GÉNOCIDE**, crime prévu à l'article 2.3) e) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais et en particulier dans la préfecture de Butare, il s'est rendu responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel ou en sachant que d'autres personnes avaient l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi comme tel et que son aide contribuerait à la perpétration du crime de génocide, ainsi qu'il est exposé aux paragraphes 5 à 15.

EXPOSÉ SUCCINCT DES FAITS RELATIFS AUX PREMIER ET DEUXIÈME CHEFS D'ACCUSATION

Responsabilité pénale individuelle

5. En application du paragraphe 1 de l'article 6 du Statut, l'accusé **Dominique NTAWUKULILYAYO** est individuellement responsable du crime de génocide ou de complicité dans le génocide pour avoir incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, **Dominique NTAWUKULILYAYO** a non seulement utilisé de ses fonctions et de ses pouvoirs indiqués au paragraphe 2 plus haut pour ordonner aux personnes placées sous son contrôle effectif de le commettre, mais encore incité et aidé et encouragé des personnes sur lesquelles il n'exerçait aucun contrôle effectif à le faire. Les faits détaillés qui donnent lieu à sa responsabilité pénale individuelle sont exposés aux paragraphes 6 à 22.

Massacre de la colline de Kabuye

6. Entre le 20 et le 21 avril 1994, plusieurs milliers de réfugiés tutsis se sont regroupés au marché de Gisagara dans la ville de Gisagara, commune de Ndora (préfecture de Butare). Nombre d'entre eux ont essayé de se rendre à la frontière du Burundi, mais ils en ont été empêchés par des militaires et des policiers communaux sur l'ordre de **Dominique NTAWUKULILYAYO** et d'Élie Ndayambaje. Ils sont retournés à Gisagara et ont été envoyés par la suite sur la colline de Kabuye où ils ont été tués. Pour avoir empêché ces réfugiés tutsis de se rendre au Burundi, **Dominique NTAWUKULILYAYO** a aidé et encouragé à commettre leur massacre qui s'est produit ultérieurement.

7. Le 23 avril 1994 ou vers cette date, dans l'après-midi, **Dominique NTAWUKULILYAYO** a ordonné aux Tutsis qui s'étaient regroupés au marché de Gisagara de se rendre sur la colline de Kabuye pour y être protégés et nourris. Ceux qui ne voulaient pas partir ont été pourchassés jusqu'à la colline de Kabuye. À leur arrivée sur la colline vers la fin de l'après-midi ou au début de la soirée, **Dominique NTAWUKULILYAYO** et Callixte Kalimanzira sont venus à bord de véhicules pleins de gendarmes. **Dominique NTAWUKULILYAYO** a dit aux réfugiés qu'ils seraient protégés par des militaires armés. Pour avoir ordonné à ces Tutsis de se rendre sur la colline de Kabuye, **Dominique NTAWUKULILYAYO** a aidé et encouragé à les massacrer.

8. Le 23 avril 1994 ou vers cette date, peu après leur arrivée sur la colline de Kabuye, les gendarmes et les policiers communaux ont encerclé la colline et se sont mis à tirer sur les réfugiés. Beaucoup de Tutsis ont été tués. Pour avoir conduit sur la colline de Kabuye des gendarmes qui, avec d'autres, ont pris part au massacre de ces Tutsis, **Dominique NTAWUKULILYAYO** a commis et a aidé et encouragé à commettre leur meurtre.

9. Entre une date située aux alentours du 21 et le 25 avril 1994, **Dominique NTAWUKULILYAYO** a ordonné à des civils de fouiller les maisons de Tutsis pour faire regrouper ceux-ci sur la colline de Kabuye. Il leur a demandé d'attendre l'arrivée des soldats qu'il

y conduirait avant de déclencher les massacres. Les Tutsis ont été envoyés sur la colline de Kabuye où ils ont été tués. Pour avoir ordonné aux civils de fouiller les maisons afin que les Tutsis soient envoyés sur la colline de Kabuye où ils ont été tués, **Dominique NTAWUKULILYAYO** a incité et a aidé et encouragé à massacrer ces Tutsis.

10. Entre une date située aux alentours du 21 et le 25 avril 1994, **Dominique NTAWUKULILYAYO** est allé chercher des militaires et des gendarmes à Butare et les a transportés jusqu'à la colline de Kabuye pour qu'ils tuent les Tutsis qui y étaient. Pendant la même période, il est aussi allé à Butare chercher des munitions qui ont été utilisées par les assaillants pour tuer les Tutsis sur la colline de Kabuye. Les meurtres qui ont eu lieu sur la colline de Kabuye pendant cette période ont été commis par des militaires, des gendarmes, des policiers communaux et des civils. Pour avoir apporté sur la colline de Kabuye des munitions qui ont été utilisées par les assaillants pour tuer les Tutsis, **Dominique NTAWUKULILYAYO** a commis et a aidé et encouragé à commettre leur meurtre.

11. Le dimanche 24 avril 1994 ou vers cette date, dans l'après-midi, **Dominique NTAWUKULILYAYO** est arrivé sur la colline de Kabuye en compagnie de Callixte Kalimanzira et de plusieurs militaires. Ce groupe a participé à l'attaque perpétrée contre les Tutsis rassemblés sur la colline. Pour avoir transporté des militaires et Callixte Kalimanzira, jusqu'à la colline de Kabuye, **Dominique NTAWUKULILYAYO** a commis et a aidé et encouragé le meurtre des Tutsis.

12. En raison du grand nombre de réfugiés présents sur la colline de Kabuye, il a fallu plusieurs jours, du 21 ou d'une date située aux alentours du 21 au 25 avril 1994, pour tuer les Tutsis qui y avaient trouvé refuge. Le 25 avril 1994 ou vers cette date, **Dominique NTAWUKULILYAYO**, Callixte Kalimanzira, Bernadette Mukarurangwa et Fidèle Uwizeye se sont réunis chez ce dernier dans la ville de Gisagara et ont discuté du fait que les assaillants n'avaient pas tué toutes les personnes réfugiées sur la colline de Kabuye en raison de leur grand nombre. Ils ont décidé de se rendre sur ladite colline pour vérifier l'état d'avancement du massacre.

13. Par ses actes, **Dominique NTAWUKULILYAYO** s'est rendu responsable de la mort d'au moins 25 000 réfugiés tutsis tués sur la colline de Kabuye du 21 au 25 avril 1994.

Autres actes

14. Le 20 avril 1994 ou vers cette date, l'accusé **Dominique NTAWUKULILYAYO** a participé à une réunion avec Sylvain Nsabimana, nouveau préfet de Butare, et les bourgmestres de la préfecture de Butare dans la salle polyvalente de Butare. Lors de cette réunion, il a été informé par Chrysologue Bimenyimana, bourgmestre de Muganza, que des meurtres avaient commencé dans la commune de Muganza qui faisait partie de la sous-préfecture de Gisagara. Le bourgmestre a demandé à **Dominique NTAWUKULILYAYO** l'autorisation de rentrer à Muganza pour aider à faire cesser ces meurtres et porter secours à deux Tutsis dénommés Fidèle Kalisa et Jacqueline Utamuliza. **Dominique NTAWUKULILYAYO** a refusé de laisser le bourgmestre de Muganza quitter la réunion pour tenter d'arrêter les meurtres. Pour avoir refusé

de laisser le bourgmestre rentrer pour essayer d'empêcher les meurtres de Fidèle Kalisa et Jacqueline Utamuliza, **Dominique NTAWUKULILYAYO** a aidé et encouragé à tuer des Tutsis dans la commune de Muganza.

Barrages routiers

15. Quelques jours après la mort du Président Habyarimana survenue le 6 avril 1994, plusieurs barrages routiers ont été mis en place dans la sous-préfecture de Gisagara, notamment près de l'église catholique de Gisagara sous le nom de « Jaguar », près de la résidence de **Dominique NTAWUKULILYAYO** et près du centre commercial sur la route de Musha. Ces barrages routiers étaient tenus par des subordonnés de l'accusé mentionnés au paragraphe 5 plus haut, dont Lucien Simbayobwebe. Du 6 avril au 17 juillet 1994, ils ont servi à empêcher les Tutsis de quitter la région et à les identifier pour les tuer. Beaucoup de Tutsis, dont Jean Munyagihugu, y ont été tués.

16. **Dominique NTAWUKULILYAYO** était au courant de l'établissement de barrages routiers en divers endroits du secteur de Gisagara et y avait donné son agrément. Il avait aussi parfois, alors qu'il passait à ces barrages, félicité les tueurs et les avaient encouragés à continuer leur travail.

Le simple fait pour **Dominique NTAWUKULILYAYO** d'être au courant de l'établissement de l'un ou l'autre de ces barrages routiers dans les cinq communes de la sous-préfecture de Gisagara et sa présence éventuelle à l'un ou l'autre de ces barrages auraient, du fait de sa qualité de sous-préfet de Gisagara, constitué un encouragement pour les agissements des assaillants visés dans le présent paragraphe et donné l'impression qu'il cautionnait les attaques perpétrées contre les civils tutsis et/ou leur meurtre à ces endroits. Par ces actes, **Dominique NTAWUKULILYAYO** a commis et/ou a aidé et encouragé le meurtre des Tutsis aux barrages routiers de la sous-préfecture de Gisagara.

Responsabilité pénale du supérieur hiérarchique

17. En application du paragraphe 3 de l'article 6 du Statut, l'accusé **Dominique NTAWUKULILYAYO** est responsable du crime de génocide ou de complicité dans le génocide en ce que ses subordonnés ont commis certains actes criminels et qu'il savait ou avait des raisons de savoir que les intéressés étaient sur le point de commettre ou avaient commis ces actes, mais n'a pas pris les mesures nécessaires et raisonnables pour les prévenir ou pour en punir les auteurs. Au nombre de ces subordonnés figuraient les *Interahamwe*, les « forces de défense civile », les agents de la police communale comme Vincent Twiringiyimana, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens tels que Lucien Simbayobwebe, d'autres personnes connues comme Chrysologue Bimenyimana, Élie Ndayambaje, Célestin Rwankubito et Fidèle Uwizeye, ainsi que des personnes inconnues.

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Massacre de la colline de Kabuye

18. Entre le 20 et le 21 avril 1994, plusieurs milliers de réfugiés tutsis se sont regroupés au marché de Gisagara dans la ville de Gisagara, commune de Ndora (préfecture de Butare). Nombre d'entre eux ont essayé de se rendre à la frontière du Burundi, mais ils en ont été empêchés par des subordonnés de **Dominique NTAWUKULILYAYO**, sur l'ordre de celui-ci et d'Élie Ndayambaje. Ces subordonnés sont principalement les cinq bourgmestres placés sous sa supervision directe, à savoir ceux des communes de Ndora, de Muyaga, de Kibayi, de Muganza et de Nyaruhengeri. Les réfugiés sont retournés à Gisagara et ont été envoyés par la suite sur la colline de Kabuye où ils ont été tués.

19. Le 23 avril 1994 ou vers cette date, dans l'après-midi, **Dominique NTAWUKULILYAYO** a ordonné aux Tutsis qui s'étaient regroupés au marché de Gisagara de se rendre sur la colline de Kabuye pour y être protégés et nourris. Ceux qui ne voulaient pas partir ont été pourchassés jusqu'à la colline de Kabuye. À leur arrivée sur la colline vers la fin de l'après-midi ou au début de la soirée, **Dominique NTAWUKULILYAYO** et Callixte Kalimanzira sont venus à bord de véhicules pleins de gendarmes. **Dominique NTAWUKULILYAYO** a dit aux réfugiés qu'ils seraient protégés par des militaires armés. Peu après leur arrivée sur la colline de Kabuye, des gendarmes et des policiers communaux, qui étaient des subordonnés de l'accusé, ont encerclé la colline et se sont mis à tirer sur les réfugiés. **Dominique NTAWUKULILYAYO** était ou avait des raisons d'être au courant de ce massacre et il s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour le prévenir ou pour en punir les auteurs.

20. Entre une date située aux alentours du 21 et le 25 avril 1994, **Dominique NTAWUKULILYAYO** est allé à Butare chercher des militaires et des gendarmes, qui étaient ses subordonnés, et les a transportés jusqu'à la colline de Kabuye pour qu'ils commettent des meurtres. Pendant la même période, il est aussi allé à Butare chercher des munitions qui ont été utilisées pour tuer les personnes réfugiées sur la colline de Kabuye. Les meurtres qui ont eu lieu sur la colline de Kabuye pendant cette période ont été commis par des militaires, des gendarmes, des policiers communaux et des civils armés qui étaient des subordonnés de l'accusé. **Dominique NTAWUKULILYAYO** était ou avait des raisons d'être au courant de ces meurtres et il s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour les prévenir ou pour en punir les auteurs.

21. Le dimanche 24 avril 1994 ou vers cette date, dans l'après-midi, **Dominique NTAWUKULILYAYO** est arrivé sur la colline de Kabuye en compagnie de Callixte Kalimanzira et de plusieurs militaires qui étaient ses subordonnés. Ce groupe a participé à l'attaque perpétrée contre les Tutsis rassemblés sur la colline. **Dominique NTAWUKULILYAYO** était ou avait des raisons d'être au courant des meurtres qui y ont été commis et il s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour les prévenir ou pour en punir les auteurs.

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22. En raison des actes de **Dominique NTAWUKULILYAYO** et de ceux de ses subordonnés, au moins 25 000 réfugiés tutsis ont été tués sur la colline de Kabuye du 21 au 25 avril 1994.

Barrages routiers

23. Quelques jours après la mort du Président Habyarimana survenue le 6 avril 1994, plusieurs barrages routiers ont été mis en place dans la sous-préfecture de Gisagara, notamment près de l'église catholique de Gisagara sous le nom de « Jaguar », près de la résidence de **Dominique NTAWUKULILYAYO** et près du centre commercial sur la route de Musha. Ces barrages routiers étaient mis en place et tenus par des civils armés et d'autres subordonnés de l'accusé, dont Lucien Simbayobwebe. Du 6 avril au 17 juillet 1994, ils ont servi à empêcher les Tutsis de quitter la région et à les identifier pour les tuer. De nombreux Tutsis ont été tués par les subordonnés de l'accusé aux barrages routiers, notamment Jean Munyagihugu qui a été tué au barrage établi près de la maison de **Dominique NTAWUKULILYAYO**. **Dominique NTAWUKULILYAYO** était ou avait des raisons d'être au courant de ces meurtres et il s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour les prévenir ou pour en punir les auteurs.

Troisième chef d'accusation : INCITATION DIRECTE ET PUBLIQUE À COMMETTRE LE GÉNOCIDE

Le Procureur du Tribunal pénal international pour le Rwanda accuse **Dominique NTAWUKULILYAYO** d'INCITATION DIRECTE ET PUBLIQUE À COMMETTRE LE GÉNOCIDE, crime prévu à l'article 2.3 c) du Statut, en ce qu'il a, entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais et en particulier dans la préfecture de Butare, incité directement et publiquement des gens à tuer des membres du groupe racial ou ethnique tutsi ou à porter gravement atteinte à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique.

EXPOSÉ SUCCINCT DES FAITS RELATIFS AU TROISIÈME CHEF D'ACCUSATION

Responsabilité pénale individuelle

24. En application du paragraphe 1 de l'article 6 du Statut, l'accusé **Dominique NTAWUKULILYAYO** est individuellement responsable du crime d'incitation directe et publique à commettre le génocide pour avoir commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, **Dominique NTAWUKULILYAYO** a non seulement utilisé de ses fonctions et de ses pouvoirs indiqués au paragraphe 2 pour ordonner aux personnes placées sous son contrôle effectif de le commettre, mais encore incité et aidé et encouragé des personnes sur lesquelles il n'exerçait aucun contrôle effectif à le faire. Les faits détaillés qui donnent lieu à sa responsabilité pénale individuelle sont exposés aux paragraphes 24 à 31.

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25. Entre le 6 avril et le 31 juillet 1994, l'accusé **Dominique NTAWUKULILYAYO** a organisé diverses réunions ou a assisté et/ou participé à diverses réunions partout dans la préfecture de Butare et en particulier dans la sous-préfecture de Gisagara. Lors de ces réunions, plusieurs orateurs ont demandé au public et aux autorités de prendre part au massacre des Tutsis. Les faits détaillés survenus lors desdites réunions qui donnent lieu à la responsabilité pénale individuelle de l'accusé sont exposés aux paragraphes 25 à 31.

26. Le 19 avril 1994 ou vers cette date, l'accusé **Dominique NTAWUKULILYAYO** a participé à une réunion organisée au palais du MRND dans la préfecture de Butare à l'occasion de la prestation de serment de Sylvain Nsabimana, nouveau préfet de Butare. Pendant cette réunion, le Président par intérim Théodore Sindikubwabo a prononcé une allocution devant les autorités présentes à l'effet de les inciter à commettre le génocide dans toute la préfecture de Butare. L'accusé a souscrit au discours du Président Sindikubwabo. Par cet acte, **Dominique NTAWUKULILYAYO** a commis et a aidé et encouragé à commettre le crime d'incitation directe et publique au meurtre de Tutsis.

27. Le 25 mai 1994 ou vers cette date, **Dominique NTAWUKULILYAYO** a assisté à une réunion à Kirarambogo dans la cellule de Nyirkanywero (secteur de Nyabitare), en compagnie d'Alphonse Nteziryayo, du colonel Tharcisse Muvunyi, du juge Ruzindaza et d'autres personnes. Lors de cette réunion, Nteziryayo et Ruzindaza ont clairement ordonné de débuser tous les Tutsis restants qui se cachaient pour les tuer. La présence de **Dominique NTAWUKULILYAYO** à ladite réunion et le silence qu'il a gardé par la suite visaient à montrer à la population qu'il adhérerait à la teneur des discours de ces orateurs. Par ces actes, il a commis et a aidé et encouragé à commettre le crime d'incitation directe et publique au meurtre de Tutsis.

28. Le 24 avril 1994 ou vers cette date, l'accusé **Dominique NTAWUKULILYAYO** a pris la parole devant la population locale de Gikoro dans la cellule de Mudabori (secteur de Nyaruhengeri) et a promis de récompenser les personnes qui tueraient le plus grand nombre de Tutsis possédant des maisons, des terres et de l'argent. Par cet acte, il a commis le crime d'incitation directe et publique au meurtre de Tutsis.

29. Vers la fin de mai 1994, dans la commune de Muyaga, l'accusé **Dominique NTAWUKULILYAYO** a pris la parole devant la maison de l'adjoint au bourgmestre aux fins d'exhorter la population locale qui s'y était rassemblée à rechercher tous les Tutsis pour les tuer avant que le Front patriotique rwandais n'ait atteint Muyaga. Par cet acte, **Dominique NTAWUKULILYAYO** a commis le crime d'incitation directe et publique au meurtre de Tutsis.

30. Entre le 1^{er} mai et le 17 juillet 1994, lors d'une réunion tenue au centre de Gisagara, à laquelle assistaient **Dominique NTAWUKULILYAYO**, Callixte Kalimanzira, Célestin Rwankubito et Fidèle Uwizeye ainsi que d'autres membres ordinaires de la population, les gens se sont vu ordonner de tuer toutes les jeunes femmes tutsies encore en vie. La présence de **Dominique NTAWUKULILYAYO** à ladite réunion et le silence qu'il a gardé par la suite visaient à montrer à la population qu'il adhérerait à la teneur des discours prononcés. Par ces actes, **Dominique NTAWUKULILYAYO** a commis et a aidé et encouragé à commettre le crime d'incitation directe et publique au meurtre de Tutsis.

31. Le 21 juin 1994 ou vers cette date, **Dominique NTAWUKULILYAYO** a assisté à une réunion tenue au marché de Gisagara à l'occasion de la prestation de serment de Fidèle Uwiyeze, nouveau bourgmestre de la commune de Ndora. Ont également assisté à cette réunion des autorités telles qu'Alphonse Nteziryayo, Callixte Kalimanzira, Bernadette Mukarurangwa, etc. Pendant la prestation de serment, plusieurs de ces autorités ont prononcé des discours tendant à inciter la population locale à rechercher tous les Tutsis restants dans la commune pour les tuer. La présence de **Dominique NTAWUKULILYAYO** à ladite réunion et le silence qu'il a gardé par la suite visaient à montrer à la population qu'il adhéraient à la teneur des discours de ces orateurs. Par ces actes, **Dominique NTAWUKULILYAYO** a commis et a aidé et encouragé à commettre le crime d'incitation directe et publique au meurtre de Tutsis.

Les actes et les omissions de **Dominique NTAWUKULILYAYO** exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut.

Fait à Arusha (Tanzanie), le 18 mai 2009

Le Procureur du TPIR,

[Signé]

Hassan Bubacar Jallow





TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

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| To: | <input type="checkbox"/> Trial Chamber I N. M. Diallo | <input type="checkbox"/> Trial Chamber II R. N. Kouambo | <input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu |
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| | | | <input type="checkbox"/> Other: (names) |
| Case Name: | The Prosecutor vs. Dominique Ntawukulilyayo | | Case Number: ICTR-05-82-T |
| Dates: | Transmitted: 6 August 2010 | | Document's date: 3 August 2010 |
| No. of Pages: | 176 (incl. trans sheet) | Original Language: | <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda |
| Title of Document: | JUDGEMENT AND SENTENCE | | |
| Classification Level: | | TRIM Document Type: | |
| <input type="checkbox"/> Ex Parte | | <input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties | |
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